

January 29, 1987

Commission Meeting Minutes

The following Commissioners were in attendance:

William W. Wilkins, Jr., Chairman
Commissioner Michael Block
Commissioner Stephen G. Breyer
Commissioner Helen G. Corrothers
Commissioner Ronald Gainer
Commissioner George E. MacKinnon
Commissioner Paul H. Robinson

The following staff were in attendance:

Suzanne Conlon, Executive Director
Alan Chaset, Parole Commission ...
John Steer, Chief Deputy General Counsel
Mary Ellen Abrecht, Deputy General Counsel
Peter Hoffman, Senior Research Associate
Rusty Burress, Probation Officer
Deborah Lister, Law Clerk
Janet Fitzpatrick, Librarian

Commission Meeting - January 29, 1987

The Chairman called the meeting to order at 10 a.m. He suggested meeting the morning of January 30 to vote for approval of the draft guidelines for publication.

The Commission discussed section A311(e) of the guidelines, and considered the Commission's previous revision to add the words "after custody or escape status." It was noted that this clause was not duplicative of A311(d) because (d) includes those defendants under criminal justice control, whereas (e) involves the recency of the commission of the offense. Two possible compromises were proposed: 1) assign a lesser point value to the section, or 2) look at the sentence that could have been imposed rather than what actually had been imposed. Judge MacKinnon moved to adopt the section as drafted. Commissioner Block seconded. The motion was carried with Commissioner Corrothers and Judge Breyer voting no. Commissioner Robinson abstained.

The Commission addressed the topic of dissenting views and whether such views were published in the Federal Register. Commissioner Robinson moved that the Commission acknowledge that the dissent of any Commissioner will be published in the Federal Register. Commissioner Block amended the proposal to say that the dissent be published with the draft guidelines, not independent of them. Commissioner Robinson concurred with this view. Judge MacKinnon seconded the motion only with respect to Commissioner Robinson. The motion was carried with all Commissioners voting yes except Commissioner Corrothers, who

abstained due to the qualifier added by Judge MacKinnon.

Commissioner Robinson stated for the record his objections to Commissioner Nagel's memorandum concerning sentencing principles since, in his opinion, the memorandum, had not been adequately considered by the Commission, grossly distorted the principles of just punishment, introduced the topic of retribution, which is not within the Commission's charter and as a matter of policy, the memorandum did not adequately cover the subject. Commissioner Robinson indicated his opposition to having the memorandum distributed in the event that the Commission would vote to have this document published as an appendix to the guidelines. [Commissioner Nagel later requested that the record of this meeting reflect the fact that the Commission discussed the principles of sentencing at an earlier meeting on December 16.]

The subject of ranges of levels within the guidelines was discussed. The Commission revisited the General Provisions section of the guidelines with this issue in mind. A revised proposal, divided into two parts called Departures and Adjustments, was discussed. Judge MacKinnon objected to the Departures section because it did not include any matters of mitigation. Under the Departures Section, the only change was that "Disruption of Governmental Function" had been made a separate category from "Victim Official." A separate section dealing with mitigation was said to be forthcoming.

In Section Y221, the proposed change from the previous draft

was to eliminate the range of levels and consult the property table directly to account for property loss or damage. Commissioner Block proposed not to use the property table directly but rather create three categories. If the property loss was small in relation to the other harm, use a small adjustment; if the harms were roughly equivalent, adjust to a moderate degree; and if the property loss was large relative to the other harm, use a large adjustment. The commentary would direct that the base offense level be compared with the offense level from the property table. Using Commissioner Block's proposal, the punishment would increase by amount of property damage, but increase at a decreasing rate. Commissioner Block moved to adopt the section as modified. Commissioner Corrothers seconded. The motion was carried with all Commissioners voting yes. Commissioner Robinson abstained.

Section Y222, Extreme Psychological Injury, was discussed. Judge Breyer moved to attempt to rewrite this section in accordance with Commissioner Block's ideas stated above. Commissioner Corrothers seconded the motion. The motion was carried with all Commissioners voting yes, except Commissioner Robinson who abstained.

In Section Y223, Vulnerable Victims, Commissioner Block moved to change the first offense level adjustment from 2 to 1. Judge Breyer seconded. The motion carried with Judge Wilkins and Commissioner Corrothers voting no, Commissioner Robinson abstaining.

In the revised version of the Victim Official Section, Y224, the offense level number was changed to three. Commissioner Corrothers made a motion to adopt the section as amended. Commissioner Block seconded that motion. The motion was carried with Commissioner Robinson abstaining.

In the Physical Injury section, Y225, the phrase "from a foreseeable or intentional act" was deleted. Judge Breyer moved that the section be approved with changes in the Commentary reflecting the fact that the judges could decide to interpolate between the offense levels (i.e., adjust the sentence by 5, although "5" is not expressly listed on the table in Physical Injury). Commissioner Block and Judge MacKinnon seconded. The motion carried with Commissioner Robinson abstaining.

The General Provision for use of Weapons was discussed. Commissioner Block moved to change the offense level adjustments to 2, 3, and 4, recognizing that it is a serious element but an adjustment of 6 was too large. Judge Breyer seconded. Commissioner Corrothers said a discharged weapon warranted more of an adjustment. Commissioner Block amended his proposal to a five level adjustment if the weapon was discharged, and a four level adjustment if otherwise used. Judge MacKinnon included changing "involved in the conduct of the defendant" to "used in the commission of the offense." Commissioner Corrothers seconded the combined motion. The motion carried with Judge Wilkins voting no, Commissioner Robinson abstaining.

In Abduction or Unlawful Restraint, Y227, Commissioner

Robinson noted that the restrictive language of "facilitates the commission of the offense" is not present in any other general provision. A motion was made to approve the section as it stands. Commissioner Block seconded. The motion carried unanimously, with Commissioner Robinson abstaining.

Commissioner Block moved to delete Section Y228, since the Criminal History section of the guidelines covers this area. Judge Breyer seconded. The motion carried unanimously, with Commissioner Robinson abstaining.

There was some discussion about the principle of using failed defenses, such as motive and duress, as a reason for departure. Commissioner Block moved to shift Section Y229 to the Departure section of Part Y, General Provisions. Judge Breyer seconded. The motion passed with Judge Wilkins voting no and Commissioner Robinson abstaining.

Coercion and Duress, Y230, was discussed at length. The possibility of limited or guided departures was discussed, in connection with whether particular provisions would be placed in the Adjustments or Departures section. Judge MacKinnon moved to have five levels of downward adjustment in the Coercion/Duress section. Commissioner Corrothers seconded. The motion carried with Judge Breyer voting no and Commissioners Block and Robinson abstaining.

Diminished Capacity, Y231, was addressed. Dave Lombardero noted that the words "decrease the offense level by 6" could be inserted for "take half of the offense level," which was much

more confusing. Judge MacKinnon moved to follow the current wording except change "from 1 to 6" to "not more than 4." Commissioner Block seconded. Judge Breyer moved to change the language to "not more than 6." Judge MacKinnon's motion was seconded by Commissioner Block. The motion carried unanimously. Judge Breyer's motion was not acted upon.

The Chairman asked Judge Breyer to revise Chapter 1 to reflect the Commission's decisions of this meeting.

The proposed changes in Chapter 4 were minor language suggestions. Judge MacKinnon moved to adopt the chapter as amended. Commissioner Corrothers seconded. The motion was carried unanimously, Commissioner Robinson abstaining.

There were no changes in Chapters 5 and 6.

Chapter 3 was addressed. A discussion of cooperation and U.S. Attorneys' certification ensued. After examining possible modifications and the implications thereof, no motion was made to amend the section. The meeting was adjourned at 1:15.

The meeting reconvened at 2:15 to discuss Chapter 2. Part B of that chapter was addressed. The Chairman pointed out that the wording of B211(2) and B212(2) were not consistent and should be amended to conform to the subjects each section was discussing.

Commissioner Block suggested amendments to B231. He distributed a handout containing the current property table and his proposed table (Table #3) to include in the robbery section. The table begins with \$10,000, and differentiates the large robbery from the small robbery, as well as not adding

exceptionally large punishment that would result from using the property table from the theft section. Commissioner Block also suggested that the commentary reflect that this table is used to differentiate between theft and robbery, since a higher base is associated with robbery. Commissioner Block made a motion to accept such changes as discussed. Commissioner Corrothers seconded. The motion carried unanimously, with Commissioner Robinson abstaining.

No changes were needed in Part C. Part D stated that to avoid double counting, the Criminal History section could not count previous drug convictions. The Chairman suggested that in any place in the guidelines where there was a possibility of double counting similar language should be incorporated. No changes were made in Part D or Part E.

Part F had been revised to incorporate the Commission's previous decision to use the property table and alternative for sophisticated conduct. Commissioner Block suggested that the table begin at \$5,000, with the first category from \$5,000-\$10,000 one level, the next category adding two levels, etc. His reasoning was that if a fraud only involved one victim with relatively little loss, it is more serious than simple theft. Larger frauds should be handled with additional sanctions. He also proposed changing the levels in F211(2) and (3). Commissioner Block made a motion to have the property table used only for losses of \$5,000 or more. His second motion was to change the levels. Commissioner Corrothers seconded the first

motion, which was carried unanimously, with Commissioner Robinson abstaining. Commissioner Corrothers seconded the second motion, which was carried with Judge Wilkins voting no and Commissioner Robinson abstaining.

Commissioner Block said the calculation of property in the insider trading section should be gain to the offender, not loss to the victim, which is difficult to determine. Commissioner Block proposed writing section F212 giving instructions to use the F211 table and how to calculate the gain to the offender. Commissioner Block made such motion, which was passed unanimously. Commissioner Robinson abstaining.

No changes were proposed in Part G. In Part H, the last paragraph, there was a reference to "adequate" punishment. The Chairman suggested changing the wording to match other sections by changing the word to "just".

In Section J217, double counting would occur if both J217 and A311(d) were used. The Chairman suggested adding language to the commentary which states that if this section is used, do not use A311(d). Suzanne Conlon suggested adding the same statement in the Criminal History section. This only applies when 18 U.S.C. 3147 is the charge of conviction. Otherwise, the Criminal History section provision applies.

Part K was modified to include a provision inadvertently deleted. K223 had been split into two sections, K223 and K224. It became a separate section so the Commission could discuss it separately. This section included some technical regulations

which may not warrant additional punishment. Judge Breyer moved to adopt the sections as drafted. The motion was seconded and passed unanimously with Commissioner Robinson abstaining.

The second reference to "defendant" was meant to say "person".

K223(a)(1) and (a)(2) were discussed. Commissioner Corrothers suggested the commentary be changed to reflect the exclusive nature of each provision. Judge MacKinnon moved to adopt that. The motion was seconded and carried unanimously, Commissioner Robinson abstaining.

Part L, Section 213, was amended to include the language "pattern of unlawful employment". Commissioner Block made the motion to amend the language. Commissioner Corrothers seconded. The motion carried unanimously, with Commissioner Robinson abstaining.

Part M was revised in accordance with previous Commission decisions. In Part N, Food and Drugs, the prior conviction included in the statute was also counted in the Criminal History section. After some discussion, Commissioner Corrothers made a motion to treat this offense the same as all the others. Judge Breyer seconded the motion. The motion carried with Judge MacKinnon, Judge Breyer and Commissioner Corrothers voting yes, Commissioner Block and Judge Wilkins voting no, and Commissioner Robinson abstaining.

In Section P, the underlined, proposed language was accepted. It was acknowledged that the Commission did consider

that one of the statutes included in the section has a distinction if the offender was convicted of a similar offense more than once. Upon further discussion, it was decided to set the section aside.

Judge Breyer made a motion to delete the underlined portion of part R. The motion was seconded and carried unanimously.

Part S contained additional commentary to make the distinction between a regulatory violation vs. money laundering. Judge Breyer moved to accept the proposed language. Commissioner Block seconded. The motion was carried unanimously. Commissioner Robinson was not present for this vote.

Part Q was reconsidered. After discussion, Judge Breyer made a motion to delete offense characteristic #5 and the last paragraph of commentary, the result being to treat the statute and accompanying criminal history the same as other instances in the guidelines. Commissioner Block seconded. The motion carried with Commissioner Corrothers voting yes, Judge MacKinnon and Judge Wilkins voting no, and Commissioner Robinson abstaining. Commissioner Corrothers then changed her vote to no, at which point the motion failed. Upon further discussion, the Chairman changed his vote to yes to preserve consistency, and the motion carried.

There were no changes in Parts T, X, and Z.

The Chairman discussed the upcoming hearing dates, February 17, March 11, and March 12. The Chairman suggested the Commission meet at 10 a.m. on January 30 to vote on publishing

the guidelines. Commissioner Corrothers said that if the extreme weather did not permit her to attend the meeting, she voted yes to publication, although she did not agree with everything in the guidelines.

The meeting was adjourned.