

The following persons attended the U.S. Sentencing Commission Meeting on March 20, 1987.

COMMISSIONERS

William W. Wilkins, Chairman
Benjamin F. Baer
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
Ronald L. Gainer
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson

Staff

Suzanne Conlon, Executive Director
Alan Chaset
Russell Ghent
Peter Hoffman
Debbie Lister
David Lombardero
John Steer
Camille Williams

Commission Meeting Minutes - March 20, 1987

Chairman Wilkins called the meeting to order at 10:00 a.m., on Friday, March 20, 1987.

The Chairman raised the issue of whether the Commission desired to address corporate sanctions in the initial submission of guidelines. After discussion, it was generally agreed upon to request assistance from attorneys at the Justice Department with knowledge and experience in the area. In the event a guidelines proposal could not be drafted to the satisfaction of the Commission, an effort would be made to prepare some general policy statements, with John Steer to work with the Justice Department attorneys toward that objective.

The Commission turned to the consideration of revisions of the criminal history section of Chapter Three of the guidelines:

The need for an additional, separate column in the Sentencing Table for offenders with no (zero) criminal history score was discussed. It was generally agreed that the staff would conduct clinical testing to determine whether there was any significant difference between having the initial column I include scores of zero and one, or the alternative of a separate column I for scores of only zero.

Section A311. Subsection (a) was discussed. Without objection, the provision was amended by substituting the language "exceeding 13 months" in lieu of "for more than one year and one day."

Subsection (b) was discussed. Commissioner Corrothers opposed counting uncounseled convictions. A majority of the Commission agreed on the language "60 days or more."

Subsection (c) was discussed and approved as proposed. Commissioner Corrothers dissented for reasons similar to her position on (b); i.e., opposition to counting uncounseled convictions.

Subsections (d) and (e) were discussed together. Judge MacKinnon moved to amend (d) by striking "current," inserting in lieu thereof "instant," and add at the end "or within 3 years after release from custody or from the termination of criminal justice control." The motion would also delete (e). Commissioner Corrothers seconded. After extensive discussion of alternative formulations, the Chairman suggested a modification of Judge MacKinnon's motion which would substitute "2" for "3" and delete the second sentence.

Judge Breyer moved to amend Subsection A311(c) by substituting "8" for "6" (as the maximum points to be counted for prior

sentences not counted in (a) or (b)). Commissioner Corrothers seconded. Judge Breyer then modified his motion by changing "3" to "4". The motion failed on a vote of 3 in support (Judge Breyer, Commissioner Corrothers, and Commissioner Robinson) to 4 opposed (Judge Wilkins, Judge MacKinnon, Commissioner Nagel, and Commissioner Block).

Judge MacKinnon's prior motion, incorporating the Chairman's suggestion of changing "3" to "2" and deleting the second sentence in §A311(e), was renewed. The motion carried by vote of 5-1, Commissioner Corrothers voting against and Commissioner Robinson abstaining. [Note: At this point, the audio tape becomes inaudible. Minutes are based on staff notes].

Judge Breyer initiated a discussion of the need for upper limits on the number of points which could be accumulated in §A311 (a), (b) and (c). After several reformulations, the Commission considered a modified motion that the maximum criminal history category would not apply except in the case of a recent conviction. Commissioner Nagel seconded, and the motion carried without objection (Commissioner Robinson abstained). [Note: At this point, the tape recording is again audible.]

Section A312. Judge MacKinnon suggested a reformulation of §A312(a)(1) which was unanimously adopted. (Commissioner Robinson abstained).

Judge Breyer suggested a reformulation of §A312(a)(2). Commissioner Nagel seconded, and the motion was adopted (Commissioner Robinson abstained).

With reference to the commentary on related cases, Judge MacKinnon suggested that the word "joined" be used in lieu of "consolidated" whenever applicable.

The definition of related cases in the commentary was discussed. Without objection, the Commission adopted Commissioner Nagel's suggestion that an effort be made to redraft the applicable commentary.

Section A312(b) was approval without objection. §A312(c) was extensively debated.

Judge Breyer moved that the list of exclusions should at a minimum contain all misdemeanors excluded by the Parole Commission. The motion failed for lack of a second.

Judge MacKinnon suggested that changes in the list of exclusions be considered separately.

Judge Breyer moved to exclude "contempt of court" misdemeanors. The motion failed, Commissioner Block and Judge

Breyer voting in favor.

Judge Breyer moved to add "Furnishing False Information to a Police Officer." The motion failed on a vote of 3 in favor, (Judge Breyer, Commissioner Block, and Commissioner Nagel); 4 against (Judge Wilkins, Judge MacKinnon, Commissioner Corrothers, and Commissioner Robinson).

Judge Breyer moved to add "Criminal Non-Support." Commissioner Block seconded. The motion failed on a 3-3 vote. (in favor: Judge Breyer, Commissioner Block, and Commissioner Nagel); (Against: Judge Wilkins, Judge MacKinnon, and Commissioner Corrothers). (Commissioner Robinson abstained).

Judge Breyer moved to add "Prostitution." Commissioner Block seconded. The motion failed on a vote of 2 in favor, (Judge Breyer and Commissioner Block); 4 against (Judge Wilkins, Judge MacKinnon, Commissioner Corrothers, and Commissioner Nagel).

Judge Breyer moved to add "Resisting Arrest, Evade and Elude." The motion failed on a vote of 2 in favor, (Judge Breyer and Commissioner Block); 3 against (Judge Wilkins, Judge MacKinnon, and Commissioner Corrothers). (Commissioner Robinson and Commissioner Nagel abstained).

Judge Breyer then renewed his motion that the list be at least as inclusive as the Parole Guidelines. The motion was not acted upon, after further discussion. Commissioner Nagel asked for reconsideration of the votes previously taken on Judge Breyer's motions to amend the list in §A312(c)(1). The votes on reconsideration were as follows:

<u>Offense to be added to exclusions</u>	<u>Yes (show of hands)</u>
Contempt of Court	2 (Breyer, Block)
False Information to Police Officer [Motion carried]	4 (Breyer, Block, Nagel and Corrothers)
Non-Support	3 (Breyer, Block, and Nagel)
Prostitution	2 (Breyer, and Block)
Elude Resisting Arrest, Evade & Elude	2 (Breyer, and Block)
Failure to Obey Officer	3 (Breyer, Block, and Nagel)
Driving Under the Influence	3 (Breyer, Block, and Nagel)

[Note: All of the above, except for False Information to Police Officer, did not carry; i.e., are not added to the list and not to be excluded except under the terms of the guideline provisions].

Judge Breyer received clarification that the list in §A312(c)(2) is as inclusive as the parole guidelines list.

The Commission agreed that the commentary should be clarified to indicate the Commission's intent that "hit-and-run with physical injury" is to be counted.

Judge MacKinnon recommended that the commentary make clear that the Commission does not intend that public intoxication include intoxication as a result of the use of illegal drugs or narcotics. Upon second by Judge Breyer, the recommendation was unanimously adopted.

Commissioner Robinson suggested that the introductory sentence in §A312(c)(1) and (2) be amended to read "...the following offenses, whether given these names or others" in lieu of the phrase "and offenses similar to them." Without objection, the suggestion was adopted.

Commissioner Corrothers stressed the importance of adhering strictly to the guarantee of due process rights contained in the Constitution. Judge Breyer made a motion, seconded by Commissioner Corrothers, to exclude all offenses for which the Constitution does not require an attorney.

Judge MacKinnon moved to strike the phrase in the commentary pertaining to uncounseled convictions which stated: "It is the Commission's interpretation of the law that." The provision would then read as follows: "Any sentence resulting in a valid conviction may generally be counted in the criminal history score, as may factors unrelated to convictions. However, a conviction in violation of Baldesar vs. Illinois shall not provide the break point..."

The Commission returned to the Breyer motion, which Commissioner Corrothers seconded. The motion failed on a vote of 2 in favor (Judge Breyer and Commissioner Corrothers); 4 against (Judge Wilkins, Judge MacKinnon, Commissioner Block, and Commissioner Nagel).

Judge MacKinnon then renewed his motion clarifying, at the suggestion of staff and Commissioner Robinson, that "the use of an uncounseled conviction in violation of Baldesar," etc., "shall not provide the break point..." etc. Commissioner Nagel seconded. The motion carried by a vote of 5-1. Commissioner Corrothers who had recommended deletion of §A311(e) in its entirety voted against the motion. (Commissioner Robinson abstained). Commissioner Corrothers asked that the record state that her opposition was based solely on her view that this was an inadequate substitute for her proposal that all uncounseled convictions be excluded.

No further business being brought before the Commission, the Chairman declared the meeting adjourned.