

COMMISSION MEETING

AGENDA

MARCH 25, 1987

The following persons attended the U.S. Sentencing Commission Meeting on Wednesday, March 25, 1987.

Commissioners

William W. Wilkins, Chairman
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
Lester Joseph
David Lombardero
Paul Martin
William Rhodes
John Steer
John Shadegg
Sharon Turner
Camille Williams

Commission Meeting Minutes -- Wednesday, March 25, 1987

The Chairman called the meeting to order at 9:39 a.m.

The Chairman called on Commissioner Gainer to discuss a proposal for application of the guidelines. Commissioner Gainer recommended that the criminal history category not be the first item computed in the guidelines. Judge MacKinnon moved to adopt this suggestion. Commissioner Nagel seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

Chapter 3

The Chairman proposed that the policy statement concerning cooperation be retitled "Substantial Assistance." He recommended that the policy statement apply to defendants who provide usable information and then only upon a motion by the government. Commissioner Nagel supported the proposal to allow the reduction only upon motion of the government, but suggested that the policy statement apply to defendants who make a good faith effort to provide usable information. Judge Breyer stated that making the reduction available only on the government's motion took too much discretion away from judges.

Judge MacKinnon stated that the term "good faith" was too subjective. Commissioner Corrothers stated that she had witnessed an abuse of this mitigating factor among convicted criminals.

The Commission approved restricting the use of the provision upon government's motion without objection. Commissioner Nagel moved to include defendants who assisted in good faith. Judge Breyer seconded. The motion passed by a vote of 4-2. Judges Wilkins and Breyer and Commissioners Block and Nagel voted yes. Judge MacKinnon and Commissioner Corrothers voted no. Commissioner Robinson abstained.

Judge MacKinnon moved to change the commentary of §C331 from "willingness to assist" to "assistance to". Commissioner Corrothers seconded. The motion passed by a vote of 5-1. Judges Wilkins and MacKinnon and Commissioners Block, Corrothers and Nagel voted yes. Judge Breyer voted no. Commissioner Robinson abstained.

Russell Ghent suggested that the commentary mention that the recent anti-drug statute recognizes a defendant's assistance to authorities as a basis to depart from mandatory minimum sentences. Judge MacKinnon moved to include this commentary. Commissioner Corrothers seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

Commissioner Corrothers discussed her proposed revision of offender characteristics. She suggested making age a neutral

factor in sentencing and changing the mitigation for "elderly or infirm" to read, "elderly and infirm."

The Commission discussed age as a relevant sentencing factor. Commissioner Nagel stated that statistical research consistently indicates that youthful offenders are more likely to commit more crimes than older offenders. Commissioner Robinson proposed including age as an aggravating factor with a fixed level increase. Commissioner Gainer and Judge Breyer agreed that it was difficult to conclusively determine the relevancy of age as a factor in sentencing.

Commissioner Corrothers moved to make age a neutral factor in sentencing under §D311. Judge Breyer seconded. The motion passed by a vote of 4-2. Judges Wilkins, Breyer and MacKinnon and Commissioner Corrothers voted yes. Commissioners Block and Nagel voted no. Commissioner Robinson abstained.

Commissioner Corrothers moved to allow a mitigation in the offense level if the defendant was "elderly and infirm." Judge Breyer seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

The Chairman suggested adding commentary to §D311, stating that the Commission would consider age as a relevant factor in sentencing in the future.

Judge MacKinnon stated that the title for §D312, Education and Vocational Skills, was overly broad. He recommended adding the word "licensing" to line 4 of the characteristic.

Judge Breyer suggested that the phrase "or where within the guidelines" be deleted from every section in Part D. He stated that these factors should be directed at avoiding departures from the guidelines.

Commissioner Nagel moved to change §D313 to state that mental and emotional conditions are relevant where provided in the general provisions. Commissioner Corrothers seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

Judges Wilkins and MacKinnon made several suggestions for word changes in §D314 that were approved without objection.

Judge Breyer moved to change the title of §D314 to Drug and Alcohol Abuse. The motion failed by a vote of 3-3. Judges Breyer and MacKinnon and Commissioner Corrothers voted yes. Judge Wilkins and Commissioners Block and Nagel voted no. Commissioner Robinson was absent.

Judge MacKinnon and Commissioner Nagel made several language changes in Part D.

Chapter 4

The Chairman noted that sentencing procedures were grouped separately in Part A of Chapter 4. Judges MacKinnon and Breyer each made several recommendations for minor language and format changes that were adopted without objection.

Commissioner Block recommended deleting phrases (2) and (4) in the introduction to plea agreements because they had been adequately covered elsewhere in the guidelines. This and a clarification of §B411(c) were approved without objection.

Commissioner Nagel discussed the language for §B412, Standards for Acceptance of Plea Agreements. Judge Wilkins recommended changing §B412(a) to read, "the court need not accept it in the event that the remaining charges do not adequately reflect the seriousness of the offense." Commissioner Block and Judge Breyer supported this language and the Commission adopted it without objection.

The Commission discussed wording changes for §§B413 and B414. Judge MacKinnon suggested changing the commentary to conform to changes in the guidelines. Judge Wilkins recommended that the Commission return to these sections after allowing the staff to redraft them.

Part Y: Departures and General Provisions

Commissioner Gainer recommended that death be an adjustment that cross-references homicide rather than a cause for departure. The Commission discussed §Y211, the departure for death.

Judge MacKinnon recommended that the introduction to departures explicitly state that factors which frequently recur in a particular offense are not suitable for departure. Commissioner Nagel recommended compiling a list of factors which state their frequency of occurrence and the effect they currently have on the sentence.

Judge Breyer recommended changing §Y217, De Minimus Violation, to incorporate more of the previous version. He stated that he would redraft his proposal and submit it for approval at the next meeting.

The Commission discussed the remainder of Part Y. Commissioner Gainer distributed suggestions drafted by the Department of Justice for Part Y. The Commission approved the Justice Department's suggestion for §Y212. Commissioner Gainer suggested that ranges be included for the factors included in Part Y. Commissioner Block agreed that ranges would be appropriate for factors that are found to be statistically significant, but stated that those factors that are rarely considered to be relevant should be kept as departures.

Judge Breyer discussed the problems relating to giving a factor a uniform increase in levels, regardless of the nature of the offense involved.

Commissioner Nagel recommended analyzing current sentencing practice statistics to determine which factors could be given ranges. Commissioner Gainer stated that the use of current sentences would continue the practices of judges who are currently without guidance. He stated that the opinions of seven commissioners were better guidance than current practice.

The Commission discussed the manner in which relevant factors are included in the guidelines.

The Commission adjourned for lunch at 12:45 p.m. and resumed at 1:07 p.m.

General Provisions

The Commission discussed the manner of providing levels of increase for general provisions. The Commission discussed the application of several of the provisions. The Chairman recommended that the Commission review each general provision and apply them to guidelines where they are appropriate. Judge Breyer stated that he thought the Commission had sufficiently reviewed the general provisions.

Judge Breyer moved to provisionally consider all adjustments as departures; place the general provisions in the guidelines as specific offense characteristics where applicable; and if questions remain, to revisit the need for general provisions. Commissioner Nagel seconded. Judge Wilkins amended the motion to include commentary on the departures suggesting the amount of the departure. The motion was passed by a vote of 4-3. Judges Wilkins and Breyer and Commissioners Block and Nagel voted yes. Judge MacKinnon and Commissioners Corrothers and Robinson voted no. The Chairman stated that he was philosophically opposed to the motion, but supported it to move through the problem with general provisions.

Part B: Special Offenders

The Chairman discussed the statutory mandate for sentencing special offenders. He stated that originally the Commission believed that statute required special offenders to be sentenced "at or near the [statutory] maximum", but now are aware that some argue that statute requires that they be sentenced "at or near the [guidelines] maximum." The Chairman asked John Steer to prepare an opinion on statutory construction for Commission review.

Judge MacKinnon distributed a proposed revision of §A511, concerning the availability of probation, for consideration and review.

Part Z: Role in the Offense

Commissioner Block distributed a proposal for Part Z concerning role in the offense. The Commission discussed the proposal included in the meeting's packet and Commissioner Block's proposal.

A motion to adopt §§Z211 and Z212 of the original proposal failed to pass with a vote of 3-3. Judges Wilkins and MacKinnon and Commissioner Corrothers voted yes. Judge Breyer and Commissioners Block and Nagel voted no. Commissioner Robinson abstained.

A motion to reconsider §§Z211 and Z212 after the staff has had time to restrict the language passed by a vote of 6-0. Commissioner Robinson abstained.

The Chairman reviewed the issues to be discussed at the next meeting on Friday, March 27 at 9:30 a.m. He stated that concurrent/consecutive sentences would be the first topic discussed, followed by role in the offense, special offender and criminal history.

The meeting was adjourned at 3:10 p.m.