

COMMISSION MEETING

AGENDA

APRIL 9, 1987

The following persons attended the U.S. Sentencing Commission Meeting on April 9, 1987.

COMMISSIONERS

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

Staff

Suzanne Conlon, Executive Director
Charles Betsey
Alan Chaset
Kim Halbig
Susan Hayes
Peter Hoffman
Debbie Lister
David Lombardero
Paul Martin
Sharon Turner
Camille Williams

Guest

Mr. Roger Pauley, Department of Justice

Commission Meeting Minutes - April 9, 1987

Chairman Wilkins called the meeting to order at 9:45 a.m., on Thursday, April 9, 1987.

Chapter 5: Determining the Sentence

The Chairman started the meeting by reviewing Chapter 5. The Commission discussed the introduction to the chapter. Commissioner Nagel moved that paragraph one of the introduction be deleted and amend paragraph two to read, "In general, the sentencing judge should impose the least restrictive alternative compatible with the guidelines that fulfills the statutory purposes of sentencing. However, imprisonment should not be rejected simply because other, non-incarcerative sentences are within the guidelines." Commissioner Block seconded. The motion passed by a vote of 5-0. (Judge MacKinnon was not present at the time. Commissioner Robinson abstained).

Commissioner Gainer asked for commentary stating that probation awarded be roughly equivalent in punitive value to the amount of imprisonment the guidelines call for. Commissioner Nagel stated that she did not believe probation was punitive. The Commission discussed the issue and Judge Wilkins called on Commissioners Corrothers, Gainer and Nagel to cooperate in drafting a proposal for such language to be included in the commentary for Chapter 5.

Commissioner Nagel moved that the words "three months" be changed to "two months" in §A521, because the only range in the sentencing table with a minimum sentence of three months appears in Criminal History Category VI. Commissioner Block seconded. The motion passed by a vote of 5-0. (Judge MacKinnon was not present at the time. Commissioner Robinson abstained).

At the request of Alan Chaset, the Commission discussed the provision for substituting intermittent confinement for imprisonment. Commissioner Nagel moved to change §A521 (e), (currently §5C2.1 (e)(1)) to read: "Confinement for a period of twenty-four hours shall be credited as a day of intermittent confinement." Commissioner Block seconded. The motion passed by a vote of 5-0. (Judge MacKinnon was not present at the time. Commissioner Robinson abstained).

Judge Breyer discussed the conflict between 18 U.S.C. § 3561 and 28 U.S.C. § 994(j) that Judge MacKinnon had commented on the day before. The conflict in the statutes dealt with permitting probation for offenses which are not Class A or Class B felonies (§3561), but denying probation for "serious offenses" (§994(j)). Judge Breyer proposed allowing a sentence of straight probation in offense levels 1-6, and probation in addition to intermittent or community confinement for at least the minimum sentence in

offense levels 7-10. Home detention could not be used as an alternative for levels 7-10. The alternative for imprisonment in levels 11-12 would be at least the minimum prison term or thirty days, whichever is greater, followed by supervised release. The Commission discussed the application of this proposal. Judge Breyer moved that this proposal be adopted. Commissioner Block seconded and the motion was adopted by a vote of 5-0. (Judge MacKinnon was not present at the time. Commissioner Robinson abstained).

Judge Wilkins proposed amending section §A542 (currently §5E4.2(i)) to include a fine to pay the cost of imprisonment or any supervised release ordered. Commissioner Block moved to: (1) move the last sentence, concerning calculation of the fine to the commentary, (2) include the cost of supervised release in the provision, and (3) add appropriate language to insure that the same factors considered for other fines are considered when imposing a fine under this section. Commissioner Nagel seconded. The motion passed by a vote of 5-0. (Judge MacKinnon was not present at the time. Commissioner Robinson abstained).

The Commission discussed the commentary and implementation of prisoner reimbursement for the cost of imprisonment. Judge Wilkins suggested adding commentary to read, "The cost of imprisonment should vary with the level of the institution. The cost of probation and supervised release should vary with the level of supervision." Commissioner Robinson suggested that a list detailing the cost of incarceration by facility, created by the Bureau of Prisons, be distributed each month to aid judges in this cost determination.

Commissioner Nagel asked for clarification in the commentary for application of the home detention provision.

Part X: Other Offenses

The Commission discussed the guideline for attempts and conspiracies. Judge Breyer moved to add language to §X211 (b)(1) to read, "If the attempt failed at completion for reasons beyond the defendant's control, there is no reduction in the defense levels. In all other instances, decrease by 3 levels." Commissioner Nagel seconded. The motion passed by a vote of 5-0. (Judge MacKinnon was not present at the time. Commissioner Robinson abstained).

The Commission discussed the distinction between attempts, solicitations and conspiracies, and the manner in which §X211 will apply to these.

David Lombardero stated that commentary had been added to §X211, proposed by Professor Schulhofer, concerning extremely rare cases of conspiracies or attempts. The commentary cited

Model Penal Code §505(2). Commissioner Nagel moved that this language be deleted from the guidelines. Commissioner Block seconded. The motion passed by a vote of 5-0. (Judge MacKinnon was not present at the time. Commissioner Robinson abstained).

The Commission discussed the amount of decrease for uncompleted attempts, conspiracies and solicitations. Judge Breyer suggested providing a reduction of 3 levels for uncompleted attempts, 4 levels for uncompleted conspiracies and 5 levels for uncompleted solicitations. He stated that this was consistent with the degree of danger likely. Commissioner Robinson stated that he thought allowing a reduction for solicitation under any condition was inconsistent with the rest of the section. Judge Wilkins and Commissioner Block suggested that the decrease for solicitation be the same as for attempt.

Commissioner Block moved to adopt the language of §X211 (a), the base offense level calculations, plus any adjustments from the guidelines, into §X212. The reduction for uncompleted solicitations would be set at 4. Commissioner Nagel seconded. The motion did not carry because of a tie vote of 2-2. Commissioners Block and Nagel voted yes. Judge Breyer and Commissioner Corrothers voted no. Judge Wilkins and Commissioner Robinson abstained.

Commissioner Block moved to treat solicitations like attempts under §X211. The motion did not carry for lack of a second.

Commissioner Block moved that §X211 remain at a 3 level reduction and §X212 have a 4 level reduction. Commissioner Nagel seconded. The motion passed by a vote of 3-2. Judge Wilkins and Commissioner Corrothers voted no. (Judge MacKinnon was not present at the time. Commissioner Robinson abstained).

Commissioner Robinson asked to have the commentary of §X251 changed in order to clarify what a sufficiently "analogous guideline" is.

Commissioner Block moved that the Commission approve Part X as written and amended. Commissioner Nagel seconded. The motion passed by a vote of 3-0. Judges Breyer and MacKinnon and Commissioner Corrothers did not vote. (Commissioner Robinson abstained.)

Part M: Offenses Involving National Defense

The Commission discussed the proposed changes in Part M outlined by Charles Betsey. Judge Breyer stated that the base offense levels appeared to have all been increased by 5 levels for top secret information.

Commissioner Robinson proposed a stylistic change to §M231 (a)(2) and clarifying language to the commentary of §M211.

The Commission agreed that the base offense level for §M234, concerning losing national defense information, be changed to 18 if top secret information is lost and 13 otherwise.

Commissioner Block proposed substituting "attempt to overthrow or seriously injure the United States" for "waging war against the United States" in §M211, the guideline for treason. Commissioner Gainer suggested that the language in the current proposal more closely resembled the language in the statute for treason.

Commissioner Nagel moved to delete §M239 (a)(3) and add a statement in the commentary to allow for departure in cases of defendants who did not have access to classified information. Judge Wilkins agreed and suggested the commentary read: "§M239 (a)(3) does not apply to people that do not have authorized access, such as newspaper reporters." Commissioner Corrothers seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Commissioner Block moved to adopt Part M with amendments and instruct the staff to make the changes. Commissioner Nagel seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Commissioner Block stated for the record that the Commission appreciated the hard work of the research staff who worked through the night on the prison impact study.

Chapter 5

Commissioner Nagel read to the Commission a draft of the proposed commentary for Chapter 5 on the subject of probation. The commentary had been suggested by Commissioner Gainer and written by Commissioners Corrothers and Nagel. The commentary read, "The Comprehensive Crime Control Act makes probation a sanction in and of itself. The purpose of this provision was to provide a viable alternative to incarceration if the terms of probation could be fashioned so as to still meet the statutory purposes of sentencing, including to promote respect for law, to provide just punishment for the offense, to achieve general deterrence, and to protect the public from future crimes by the defendant."

§A211: Homicide

Judge Breyer stated that the base offense level for first degree murder was 11 levels higher than the current average time served. He suggested that commentary be added to §A211 to state

that the guideline not be applied to defendants convicted of felony murder. As an alternative, Judge Breyer proposed changing the base offense level of §A211 from 43 to 42 and applying it in all cases.

The meeting was adjourned until 4:00 p.m.

Part M: Offenses Involving National Defense

Judge Wilkins suggested that §M252 (currently §2M5.1) be amended to include embargo items. He stated that a distinction should be made between offenses involving evasion of national security and nuclear non-proliferation export controls and offenses involving evasion of other export controls. Commissioner Block moved to adopt this suggestion. Commissioner Nagel seconded. The motion passed by a vote of 5-0. Commissioner Corrothers was not present at the time. (Commissioner Robinson abstained).

Commissioner Block presented a copy of Bill Rhodes' memorandum dated April 9, 1987, titled, "Quality of the FPSSIS Data." Mr. Rhodes prepared a cross-reference tabulation for Commissioner Block discussed in this memorandum.

Chapter 5

Judge MacKinnon stated that the letter to the Commission from the Department of Justice concerning probation, dated April 3, 1987, did not address the issue of first offenders. He suggested that more comprehensive consideration be given to probation in cases of first offenders along the lines of 18 U.S.C. § 3561. Judge MacKinnon proposed adding commentary to read, "In compliance with 28 U.S.C. § 994(j), after giving due consideration to 18 U.S.C. § 3553, a court may impose a sentence other than imprisonment in cases where the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. Drug offenders and income tax violators, where the unpaid tax exceeds \$25,000 or involves more than one year, should be considered as serious offenses."

As an alternative to Judge MacKinnon's proposal, Judge Breyer suggested adding a section to Chapter 1 on probation and split sentences. The section would read, "The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.' At the same time, the Commission has found that under present sentencing practice, courts sentence to probation too high of a percentage of offenders guilty of certain economic crimes, such as antitrust offenses, insider trading, fraud, and embezzlement. If the guidelines were to permit courts to impose probation instead of

prison in many or all such cases, present unwarrantedly favorable treatment of this group of offenders will continue. On the other hand, if the guidelines too readily impose significant prison terms in all such cases the result will prove unfair to many of the individual first offenders." Judge Breyer reviewed the position on probation that the Commission had voted on earlier when Judge MacKinnon was not present.

The Commission discussed these proposals and the application of the guidelines on various types of first offenders.

Part A: Offenses Against the Person

The Commission reviewed proposed commentary for the homicide guideline in Part A that would deal with felony murder situations. Judge Breyer moved that the word "ever" be replaced with "ordinarily" in the commentary for §A211. Commissioner Corrothers seconded. The motion passed by a vote of 4-0. Commissioner Block did not vote. (Commissioners Nagel and Robinson abstained).

Judge Wilkins suggested placing victim related adjustments in Chapter 2 when the staff reorganizes the guidelines over the weekend.

Part Y: Departures

Judge Breyer suggested that §Y217, altruistic purpose, be reinstated into the guidelines to read, "If the defendant committed the offense for an altruistic or innocuous purpose that either makes the defendant's conduct less harmful or that significantly diminishes society's interest in punishing or preventing that conduct, the court may reduce the offense level to reflect the nature and circumstances of the offense." The commentary for the section would read as it had previously.

The Commission reviewed various aspects of Part Y. Commissioner Nagel moved that "of a good faith mistake about material facts or applicable law relevant to the elements of the offense or to the availability of a justification or excuse, under circumstances not amounting to a complete defense, or because" be deleted from §Y232, dealing with reduced culpability. Commissioner Corrothers amended this motion to rename the section, "Coercion and Duress." Commissioner Corrothers seconded the motion with the amendment. The motion passed with a vote of 5-0. Judge Breyer was not present at the time. (Commissioner Robinson abstained).

Commissioner Nagel stated that §Y233 had been changed by omitting the non-violent distinction in the first paragraph. She proposed reinstating the distinction to insure the departure was not awarded for violent offenses.

The Commission reviewed the departure provision for lesser harms proposed by Judge Breyer earlier. Commissioner Nagel moved that a lesser harms provision be drafted by Judge Breyer to include the sentiment of the commentary of §Y217 previously drafted. Judge Breyer seconded the motion which passed by a vote of 6-0. (Commissioner Robinson abstained.)

Commissioner Nagel moved to add the words, "if the defendant committed a non-violent offense" to the §Y233. Commissioner Nagel amended her motion to state that §Y233 would become §Y218 with the change. Commissioner Block seconded. The motion passed by a vote of 4-0. Judge MacKinnon and Judge Breyer were not present at the time. (Commissioner Robinson abstained).

Commissioner Robinson raised the need for further clarification of §Y213, restraint of victim. Judge Wilkins stated that the provision would apply to offenses in Parts A and B and Part H (Civil Rights). The other departure provisions would be rewritten to conform, using the words "restrained, abducted, or taken hostage." David Lombardero stated that the adjustment should apply only to offenses in Parts A and H because Part B offenses are mostly property offenses, or else already have abduction as an element of the offense.

Commissioner Robinson suggested that the Commission add a statement that the general adjustment provisions not apply if the specific adjustment has already been taken into account. He suggested that the applicable language should read, "If a victim of an offense described in Parts A and H is physically restrained, increase by 2 levels." Judge Wilkins suggested amending the commentary to include an example of an offense where the adjustment is already included as a specific offense characteristic, such as kidnapping. After discussion, Commissioner Block moved that §Y213 be adopted with the new changes. Judge Breyer seconded. The motion passed with a vote of 4-0. (Judge MacKinnon did not participate in the vote. Commissioner Nagel was not present at the time. Commissioner Robinson abstained).

Commissioner Block moved to amend §B313, career offender and criminal livelihood (currently §4B1.3), by changing the minimum of level 12 to level 13 due to the amendment concerning split sentences made earlier. Commissioner Nagel seconded. The motion passed with a vote of 6-0. (Commissioner Robinson abstained).

Judge Breyer moved that Part B be adopted as amended. Commissioner Block seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge Wilkins suggested making stylistic changes throughout the guidelines so that cross-references would be moved from

specific offense characteristics and placed in a separate subsection in each guideline titled "cross-references." Judge Wilkins asked the Commissioners individually if they had any objections to this change. The Commission agreed to this proposal. Judge Breyer was not present at the time. (Commissioner Robinson abstained).

The Commission discussed the purpose and structure of Chapter 1. No action was taken because Judge Breyer, the author of the chapter, was not present.

The meeting was adjourned.