

Minutes of the April 10 and 11, 1990 United States Sentencing Commission Business Meetings

The April 10 meeting was called to order at 10:06 A.M. by Chairman William W. Wilkins, Jr.

The meeting was held in the library of the U.S. Sentencing Commission. The following Commissioners, staff, and guests participated:

William W. Wilkins, Jr., Chairman
Helen G. Corrothers, Commissioner
George E. MacKinnon, Commissioner
Ilene H. Nagel, Commissioner
Paul Maloney, Deputy Assistant Attorney General
Phyllis Newton, Staff Director
John R. Steer, General Counsel
David Anderson, Deputy General Counsel
Rusty Burress, Special Consultant
Sharon Henegan, Director of Training and Technical Assistance
Peter Hoffman, Principal Technical Advisor
Jeff Lawrence, Special Counsel
Andy Purdy, Chief Deputy General Counsel
Ronnie M. Scotkin, Guideline Development Analyst
Dean Stowers, Staff Attorney
Fred Bennett, Practitioners' Advisory Group
Paul Borman, Representative, Federal Public Defenders
Mike Keenan, Representative, Probation Division, AO
Roger Pauley, Criminal Division, DOJ
Vicki Portney, Criminal Division, DOJ
Toby Slawsky, Representative, General Counsel's Office, AO

Chairman Wilkins moved to approve the minutes of the April 3 and 4, 1990, Commission meetings; seconded by Commissioner Corrothers. Passed unanimously.

Chairman Wilkins introduced the new Research Director, Joel Garner.

April 10, 1990 Amendments

Chairman Wilkins commented that the amendment process implemented by the Staff Director was working well. He commended the Staff Director and staff for the work accomplished during this amendment cycle.

Chairman Wilkins announced that Commission meetings will be held April 16, 17, 18, and May 3, 1990, and asked Commissioners to hold April 24 open as a possible meeting date.

Commissioner MacKinnon stated that he would not vote to adopt organizational sanctions guidelines during this amendment cycle due to the continued vacancies on the Commission, the importance of such guidelines, as well as the fact that we are not under a statutory deadline to complete them this year. (For Judge

MacKinnon's exact statement, see attached statement.) Chairman Wilkins expressed respect for Commissioner MacKinnon's position and pointed out that the new guidelines for organizations need not be tied to the cycle for issuing general amendments. Commissioner Nagel expressed sympathy for Commissioner's MacKinnon's views but urged the Commission to continue discussion on the issues. Commissioner Corrothers expressed agreement with the continued discussions but stressed the importance of educating the new Commissioners on the underlying principles for the corporate sanctions proposals.

Chairman Wilkins stated that he would move each proposed amendment, request a second to the motion, and then proceed with discussion and a vote.

Item #8: §2B3.1 Robbery; §2B2.1 Burglary of a Residence;
§2B2.2 Burglary of Other Structures

Commissioners Corrothers and MacKinnon seconded the motion to promulgate with the deletion in §2B3.1 Application Note 5 of "actually" and conforming change in amendment #9. Passed unanimously.

General Counsel is to address the issue of "participant" as used in the amendment.

Item #10: §2B3.1 Robbery

Deferred for consideration at some future date, not part of this amendment cycle.

Commissioner Nagel requested data on defendants charged with multiple bank robberies to determine if plea negotiation allowing reduction of sound bank robbery counts is resulting in a lower sentence than would have been the case under past practice.

Item #12: §2B1.1 Larceny, Embezzlement, and Other Forms of Theft;
§2B4.1 Bribery in Procurement of Bank Loan and Other
Commercial Bribery; §2F1.1 Fraud and Deceit

Deferred for further discussion during this amendment cycle.

Item #14 Chapter Two, Part D (Offenses Involving Drugs)
Application Note 10

Deferred for consideration at some future date, not during this amendment cycle.

Commissioner Nagel requested a presentation by DEA and DOJ.

Item #15: §2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals

General Counsel reported that the amendment complied with statutory directive.

Item #16: §2D1.6 Use of a Communication Facility in Committing Drug Offenses

Deferred for further discussion during this amendment cycle.

Item #17: §2D1.11 Unlawfully Importing, Exporting, Possessing, or Distributing Listed Chemicals and Certain Equipment

Deferred for consideration at some future date, not during this amendment cycle.

Commissioner Nagel requested that this issue be included for discussion with DEA and DOJ.

Item #22: §2G2.1 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material. Custodian Permitting Minor to Engage in Sexually Explicit Conduct. Advertisement for Minors to Engage in Production.

Motion made by Commissioner MacKinnon to promulgate with the deletion in §2G2.1(b)(1) of "or who appears to be prepubescent"; seconded by Commissioner Nagel. Passed unanimously.

Item #23: §2G2.2 Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor

Deferred for further discussion during this amendment cycle. Staff is to prepare Commissioner Nagel's suggestion to decrease the base and increase the enhancement for sadistic or masochistic conduct.

Item #24: §2G3.1 Importing, Mailing, or Transporting Obscene Materials

Deferred for further discussion during this amendment cycle.

Item #27: §2J1.6 Failure to Appear by Defendant

This amendment was considered with item #44.

Item #44: §2P1.1 Escape, Instigating or Assisting Escape

Deferred for further consideration during this amendment cycle.

Item #28: §2K1.4 Arson: Property Damage by Use of Explosives

General Counsel reported that there were no potential problems with double counting.

Item #31: §2K2.6

Deferred for further discussion during this amendment cycle.

Commissioner Nagel requested calculations of twenty random cases under Option 1 and the substitute option.

Item #50: Chapter Three, Part B

Deferred for further discussion during this amendment cycle.

Item #51: §3B1.3 Abuse of Trust

Deferred for further discussion during this amendment cycle.

Item #52:

To be included solely within consideration of Item #53.

Item #53: §3C1.1 Willfully Obstructing or Impeding Proceedings

Deferred for further discussion during this amendment cycle.

Item #58: §3E1.1 Acceptance of Responsibility

Commissioner Corrothers seconded the motion to promulgate with the reinstatement of Application Note 5 and the deletion within Note 5 of "review and should not...foundation" and insertion of "appeal." Passed unanimously.

Item #59: Chapter Four, Part A (Criminal History)

Chairman Wilkins moved to promulgate with editorial changes; seconded by Commissioner Nagel. Passed unanimously.

Item #63: §4A1.2 Definitions and Instructions for Computing Criminal History

Deferred for consideration at some future date, with the option for DOJ to request reconsideration during this amendment cycle.

Item #66: §5E1.2 Fines for Individual Defendants

Commissioner Corrothers seconded the motion to promulgate with language changes. Passed unanimously.

Item #72: §2A1.1 First Degree Murder

Deferred for further discussion during this amendment cycle.

Chairman Wilkins recessed the meeting at 4:00 P.M. until April 11, at 9:30 A.M.

April 11, 1990 Amendments

Chairman Wilkins reconvened the meeting at 9:40 A.M., April 11.

Peter Hoffman and Sharon Henegan presented to the Commission the two available options on revocation amendment #69. Discussion ensued. Chairman Wilkins invited comment from the defense bar, the Probation Division and General Counsel's Office of the Administrative Office, and the Department of Justice. Deferred for further discussion during this amendment cycle. Judge Becker will be invited to present his views on the revocation issue during further consideration next week.

Item #12: §2B1.1 Larceny, Embezzlement, and Other Forms of Theft; §2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery; §2F1.1 Fraud and Deceit

Deferred for further discussion of option #3 during this amendment cycle. Peter Hoffman will work with Commissioner MacKinnon to develop definitional language.

Item #23: §2G2.2 Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor

Motion made by Commissioner MacKinnon to promulgate option #2; seconded by Commissioner Nagel. Passed unanimously.

Item #24: §2G3.1 Importing, Mailing, or Transporting Obscene Materials

Commissioner MacKinnon seconded the motion to promulgate only the revision to the cross reference. Passed unanimously.

Item #44: §2P1.1 Escape, Instigating or Assisting Escape

Deferred for further discussion during this amendment cycle. Staff will incorporate language suggested by the defense bar.

Item #50: Chapter Three, Part B

Commissioner Corrothers seconded the motion to promulgate with technical changes. Passed unanimously.

Item #51: §3B1.3 Abuse of Trust

Commissioner Nagel seconded the motion. Passed unanimously.

Item #53: §3C1.1 Willfully Obstructing or Impeding Proceedings

Commissioner Corrothers seconded the motion to promulgate with language changes and a reference in Application Note 3 to 18 U.S.C. §§ 1501-1516. Passed unanimously. This amendment incorporates the modifications earlier proposed in Item #52.

Item #63: §4A1.2 Definitions and Instructions for Computing Criminal History

Deferred for consideration at some time in the future, not during this amendment cycle.

Item #72: §2A1.1 First Degree Murder

Commissioner Corrothers seconded the motion to promulgate with editorial changes. Passed unanimously.

Item #73: §2N2.1 Violations of Statutes and Regulations Dealing with any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

Commissioner Corrothers seconded the motion. Passed unanimously.

Commissioners Nagel and Wilkins requested that the staff redraft Item #66. The amendment as approved contains linguistic inconsistencies.

Revocation Working Group was asked to begin consideration of modifications to the proposed revocation options.

Chairman Wilkins adjourned the meeting into Executive Session at 12:33 P.M..

4/6/90

The issuance of Organizational Sanctions is our most difficult task. It requires the Commission with no precedent to write guidelines on a completely new slate for every corporation in the nation. In my opinion such sentencing guidelines are much too important and far reaching to be adopted while there are three vacancies on our seven member Commission. I expressed this concern some weeks ago to representatives of the Justice Department and had hoped that the vacancies would be filled by now. However, this has not occurred.

Accordingly, because of the extraordinary nationwide importance of the matter, and the three vacancies in the Commission, I will not vote to adopt any proposal for corporate sentences during this current amendment period.

4/10/90

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