

January 13, 1987

Commission Meeting Minutes

The Commissioners in attendance were:

Benjamin Baer
Michael Block
Stephen Breyer
Michael Block
Ronald Gainer
George MacKinnon
Ilene Nagel
Paul Robinson
William W. Wilkins, Jr., Chairman

The Staff in attendance were:

Rusty Burress
Alan Chaset
Suzanne Conlon, Executive Director
Matthew Greenberg
Peter Hoffman
Di Horvath
Bill Rhodes
John Steer
Dave Tevelin
Elizabeth Williams

* Commissioner Helen G. Corrothers was attending the American Correctional Association's 1987 Winter Conference in Atlanta, Georgia, at this time. Prior to her departure, she indicated to Chairman William W. Wilkins, Jr. her assent/dissent regarding the various issues to be discussed, which is reflected in the appropriate areas in the minutes.

The Chairman called the meeting to order at 10:00 a.m. on Tuesday, January 13, 1987. The meeting was held in the U.S. Sentencing Commission offices at 1331 Pennsylvania Avenue, NW, Washington, D.C..

The Chairman proposed holding a Public Hearing in Washington, D.C. on February 26 concerning the Proposed Guidelines. He noted it may be determined later that an additional hearing may need to be scheduled.

The Chairman noted that the minutes of July 15, 28-29, August 4, 6, 12, September 9 & 23, and October 1 had been distributed to the Commission for review and approval. Upon a motion by Commissioner Block, seconded by Commissioner Nagel, the minutes were approved by a vote of 6 to 1, Commissioner Robinson opposed.

The Commission discussed legislative amendments which had been distributed earlier by John Steer. The Chairman called on John Steer to summarize each proposal, with the Commission to consider each in turn.

The first proposal dealt with:

1. 18 U.S.C. § 3553(c)(1). Reasons for Imposing Sentence at Particular Point within the 25 Percent Range. -- delete this requirement.

A minor modification in the justification language was proposed by Commissioner Gainer. Judge Breyer moved the Commission accept the proposal with the modified explanation for it. Commissioner Block seconded. The motion passed 7-0.

The second proposal dealt with:

2. 18 U.S.C. § 3561(a)(1). Probation for Serious Offenses by an Organization. -- permit an organization which commits a Class A or B felony to be put on probation as well as fined.

Commissioner Gainer suggested a minor modification in phrasing the amendment. Judge MacKinnon moved to adopt the modified proposal. Commissioner Nagel seconded. The motion carried 7-0.

The third proposal dealt with:

3. 18 U.S.C. § 3583(b). Maximum Term of Supervised Release -- conform the maximums to those for probation.

Commissioner Block moved to accept the proposal. Commissioner Nagel seconded the motion. The motion passed 7-0.

The fourth proposal dealt with:

18 U.S.C. § 3583(c). Purpose of Supervised Release-- clarify that protecting the public is a permissible purpose.

Commissioner Block moved to amend the proposal to include the purpose of public protection in addition to the currently listed purposes of deterrence and rehabilitation. Commissioner Nagel seconded. The motion passed 7-0.

The fifth proposal dealt with:

5. 18 U.S.C. § 3663(g). Failure to Pay Restitution-- permit revocation of supervised release for failure to pay restitution and modification of probation conditions as a remedy short of probation revocation.

Judge MacKinnon moved to adopt the proposal. Judge Breyer seconded. The motion passed 7-0. Commission Block suggested a clarification in the explanation.

The sixth proposal dealt with:

6. 18 U.S.C. § 3742. Appellate Review of Sentences-- substitute a "clearly inapplicable" standard for the present "incorrect" standard of review.

Judge Breyer moved for adoption. Commission Block seconded. The motion passed 7-0.

The seventh proposal dealt with:

7. Section 235(a)(1) of the Act. Guidelines Effective Date -- clarify that the guidelines apply to offenses committed after the guidelines take effect.

A minor modification in the justification was proposed by Commissioner Gainer. Judge MacKinnon moved to accept the proposal as modified. Judge Breyer seconded. The motion passed 7-0.

The eighth and final proposal dealt with:

8. 28 U.S.C. § 994(s). Defendant Petitions for Guidelines Modification -- delete this section.

A modification to the justification for the amendment was proposed by Judge Breyer and Commissioner Block. Commissioner Nagel moved to adopt the proposal with the proposed clarification of the explanation. Commissioner Block seconded. The motion passed 7-0.

Commissioner Baer discussed briefly some additional legislative amendments that he wanted the Commission to support at some point.

John Steer suggested the Commission coordinate its submission of the adopted legislative amendments with the legislative sections of the Administrative Office and the Justice Department. All Commissioners agreed.

(Commissioner Robinson left the meeting briefly during the consideration of the legislative proposals number 7 & 8. Upon his return he asked that the record show his agreement with those two proposals. The record has been so amended above.)

Commissioner Robinson briefly presented for review a proposed legislative amendment to delay by two years the deadline for submission of the guidelines to Congress. Commissioner Robinson did not ask for Commission action on the amendment at the time but indicated his desire that the Commission consider it if the opportunity arose to ask Congress for additional time.

The Chairman asked for Commission review of Chapters 4, 5 & 6. He suggested the Commission vote on each section of each Chapter and then vote on each Chapter as a whole and finally on the Proposed Guidelines package. The procedure would permit the staff to make the appropriate changes as were agreed upon by each Commission vote and would give the Commission the opportunity to review again any sections as necessary. The Commission began with analysis of Chapter Four.

(Commissioner Robinson requested that the record show he was abstaining from all votes on Chapters 4, 5, & 6.)

Commissioner Nagel moved to delete "findings or" from the phrase "and convictions based upon guilty findings or verdicts after trial" in the first part of the introduction of page 1 of Chapter 4. Commissioner Block seconded. The motion passed 6-0.

Commissioner Block moved to delete "independently" from "the court shall independently determine" in §A412(a). Commissioner Nagel seconded. The motion passed 6-0.

Judge Breyer moved to strike all of §A412(b), and replace it with the following language including Commissioner Block's amendment to his proposal in (2):

"(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that it is not bound by the sentencing recommendation. The court need not accept the recommendation, but, if it does, it shall determine that either

(1) the recommended sentence is within the applicable guideline range; or

(2) if the agreed sentence departs from the applicable guideline range, that reason exists for departure from the guidelines.

Rule 11(e)(2) requires the court to advise the defendant that he has no right to withdraw his guilty plea if the court does not accept the sentencing recommendation set forth in the plea agreement."

The Chairman seconded. The motion passed 6 to 1 with Commissioner Robinson opposed.

Commissioner Block moved to adopt Judge MacKinnon's amendment to §A412(c) by substituting "the court before agreeing to impose this sentence shall deter that either" for the "the court shall independently determine that either". In the same motion Commissioner Block suggested amending §A412(c)(2) to read "if the agreed sentence departs from the applicable guideline range, that reason exists for departure from the guidelines and the agreed sentence does not undermine any of the legislatively mandated purposes of sentencing," deleting "the court shall independently determine that justifiable." and "or the letter and spirit of the Guidelines" from the section. Commissioner Nagel seconded. All Commissioners voted yes except Commissioner Robinson, who abstained.

Judge MacKinnon moved to adopt Chapter 4 as amended. Commissioner Nagel seconded. The motion passed 6 to 1 with Commission Robinson voting no.

The Chairman presented Chapter Five for review.

Commissioner Block proposed submitting the word "statutory" before "minimum, mandatory" in the last paragraph of the introduction on page 1. Commissioner Nagel seconded. The motion carried 6-0.

Judge MacKinnon moved to insert "at any time" in the phrase

"to visit him at any time at home or elsewhere" in Commentary (10) on page 3. Commissioner Nagel seconded. The motion passed 6-0.

Commissioner Nagel moved to delete Commentary (14) on page 4 and replace it with the statement, "The court may impose any other conditions it deems appropriate." Commissioner Block seconded. The motion passed 6-0.

Judge MacKinnon moved to amend Commentary (13) to close with the phrase "with such notification requirements." C. Block seconded. The motion passed 6-0.

Judge Breyer moved to amend Commentary (16) page 4, so the body of the statement would read "The court may impose a condition prohibiting the defendant, should he fail to make the scheduled payments under the installment schedule from incurring new credit charges..." (The Commission requested that Dave Tevelin confer with Judge Breyer and Suzanne Conlon on the correct wording of the sentence submitted here.) Commissioner Nagel seconded. The motion passed 6-0.

Commissioner Nagel moved that the following sentence be inserted after §A521(c) "provided, however that this section is generally inapplicable for defendants who have a criminal history category greater than Category 2." Commissioner Block seconded. The motion passed 5-1. Judge Breyer opposed.

Commissioner Nagel moved that in §A521(c)(1) "12 hours" replace "six hours." Commissioner Block seconded. The motion passed 6-0.

Commissioner Block moved that in §A521(c)(3) "2 months of home detention" replace "1 month of home detention." Commissioner Nagel seconded. The motion failed 2-4, Commissioners Block and Nagel voting in favor of the amendment; The Chairman, Judge MacKinnon, Commissioner Corrothers and Judge Breyer opposed.

The meeting was adjourned at 1:00 p.m. to reconvene at 2:00 p.m..

The Chairman reconvened the meeting at 2:00 p.m..

Commissioner Block moved that on page 6 of Chapter 5, the following paragraph be inserted after the second paragraph:

"In a case where §A521(c)(2) permits confinement for reasons of addiction, in a community treatment center in lieu of imprisonment, such confinement should be used as a substitute for imprisonment in cases where the defendant's dependence on an addictive substance contributed to the commission of the offense,

and there is a reasonable likelihood that completion of a treatment program will eliminate that dependence."

Commissioner Nagel seconded. The motion passed 5-1 with Judge Breyer opposed.

Judge Breyer moved to adopt the Chairman's suggestion of replacing the last paragraph in the Commentary section of page 6 with the following:

"In general, the maximum of the guideline range exceeds the minimum by the greater of 25% or six months, the limit allowed by 28 U.S.C. § 994(b) as amended by Public Law 99-363. An exception is made in the case of guidelines ranges for extremely short terms of imprisonment. In such cases, the guideline range is generally narrower than the maximum range authorized by statute."

Commissioner Block seconded. The motion passed 6-0.

Judge MacKinnon moved that the Commission adopt the Chairman's language suggestion that §A541(c) be amended to read "If a defendant was ordered to make restitution and to pay a fine, the court shall order that restitution be paid first." Commissioner Nagel seconded. The motion passed 6-0.

Commissioner Block moved to amend §A521(e) to read, "The amount of the fine should always be sufficient to ensure that the total sanction is punitive," deleting the remainder of (e). Additionally, he moved to amend §A542(d)(6) to read "the defendant previously has been fined a lesser amount for a similar offense." Commissioner Nagel seconded and the motion passed 6-0.

Commissioner Block made a motion incorporating the Chairman's suggestions to amend §A551(b) to read, "community confinement may be used in lieu of imprisonment as provided in §A521." His motion also proposed to amend §A551(b) to read, "Home detention may be used in lieu of imprisonment as provided in §A521; provided however, that the circumstances of home confinement are sufficient to ensure compliance including the detection of any violations." Commissioner Nagel seconded. The motion passed 6-0.

Judge MacKinnon moved to add the words "or permanently" to the phrase in the Commentary on page 14 that reads "during specified hours or permanently." Judge Breyer seconded. The motion passed 6-0.

Judge MacKinnon moved to amend the last lines of §A554 to read "of both sanctions would be excessive considering the amount of harm to the victims resulting from the offense or unduly severe in relation to the financial resources of the defendant."

Commissioner Nagel seconded. The motion passed 6-0.

Judge MacKinnon left the meeting for a brief time.

The Chairman adjourned the meeting for the day and noted the following day's meeting, to be called to order at 9:30 a.m.