

COMMISSION MEETING

JANUARY 20, 1987

The following persons attended the U.S. Sentencing Commission Meeting on January 20, 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  
Russell Burress  
Alan Chaset  
Russell Ghent  
Di Horvath  
Debbie Lister  
Paul Martin  
Phyllis Newton  
William Rhodes  
John Steer  
Dave Lombardero  
Elizabeth Williams

Commission Meeting Minutes - January 20, 1987

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

The Chairman stated that the minutes of the previous meeting had not yet been prepared for the Commission's review and approval.

Capital Punishment

The Chairman stated that John Steer had begun studying the legal authority of the Commission to promulgate guidelines concerning capital punishment. He also noted that the Commission had received a position paper from the Department of Justice on this issue. Judge Wilkins stated that a number of individuals and groups, including the NAACP, ACLU and the AO, had expressed an interest in participating in the Commission's decision on capital punishment. He recommended that the Commission hold a public hearing on February 17th to solicit oral and written testimony concerning capital punishment.

Commissioners Block, Corrothers and Nagel expressed their support for a public hearing. Commissioner Corrothers stated that the Commission had held hearings regarding every area of concern within the guidelines and added that it would not appear rational to change procedures when considering the death penalty. Commissioners Block and Nagel suggested that the controversial nature of the death penalty mandated the same open-comment policy that the Commission has followed in the past with other issues. Commissioner Nagel recommended that the Commission narrow the scope of questions that witnesses consider in order to facilitate an orderly hearing.

Judge Breyer stated his concern that the controversial nature of the death penalty may dwarf the work accomplished by the Commission. He agreed, however, that if the Commission was to become involved with the issue, it would be best to do so after a public hearing. Commissioner Corrothers expressed concern over whether Congress intended the Commission to consider the death penalty. Judge Breyer stated the Justice Department's argument was that the Commission could supply the procedural standards needed to make the death penalty provisions in eleven statutes constitutional under the Supreme Court's 1972 decision in the Furman case. Judge Breyer recommended that the Commission not address capital punishment.

Judge MacKinnon stated his desire to gain more information on the manner in which the federal government has applied the death penalty, especially from groups like the NAACP.

Commissioner Block moved to hold a public hearing on the death penalty on Tuesday, February 17, which would address a constrained set of issues. He moved that the first issue be the Commission's authority to include the death penalty in the guidelines and the second being the statutes that would be relevant if the Commission decides to promulgate such guidelines. Commissioner Nagel seconded. The motion passed by a unanimous vote.

The Chairman asked John Steer to draft a list of issues to be considered at the hearing, including the Commission's statutory authority and the procedural safeguards that would be required in such guidelines. He also called upon Paul Martin to draft a press release to inform the public of the Commission's position on capital punishment at this time.

## Chapter 2

Judge Wilkins recommended that the Commission review Chapter 2 in the same fashion as previously adopted with Chapters 3, 4, 5, and 6. He called for limiting discussion to the guidelines and leaving the commentary for the staff to implement.

## Part Y: General Provisions

The Chairman reviewed Part Y, General Provisions. He recommended the provisions be made mandatory by using the word "shall" rather than "may", and asked for discussion concerning the range of levels to be applied to these provisions.

Commissioner Block stated his understanding that the general provisions were to be used only when specific adjustments were not included in the guidelines.

Judge Breyer recommended that the general provisions be used as possible reasons for departure. He stated that this would be consistent with the evolutionary process of creating sentencing guidelines. If the provisions were included as mandatory factors in all crimes, he stated, the guidelines would have many of the same problems as the September draft.

Commissioner Gainer stated that the Commission was bound by law to promulgate guidelines that encompass those serious forms of criminality commonly found in federal offenses.

Judge Breyer stated that the legislative history of the statute creating the Commission relied on the Minnesota guidelines as a model. He noted that departures from the state sentencing guidelines are as common in Minnesota as are sentences within the state guidelines.

As a compromise position, Commissioner Nagel suggested that the Commission review each general provision and label those that are common as adjustments and those that are genuinely rare as departures. She suggested this distinction be made on the basis of whether a range was included in the provision, indicating that more data was available.

Commissioner Corrothers suggested that commentary be drafted to include that the Commission's work is an ongoing process.

Commissioner Gainer favored adjustments rather than means for departure because sentences outside the guidelines would be appealable.

Commissioners Block and Gainer discussed the manner in which adjustments are dealt with throughout the guidelines.

Judge MacKinnon suggested a progressive schedule for each adjustment that could be added after public comment on the guidelines.

The Chairman called upon the Commission to discuss each general provision individually.

Commissioner Corrothers moved that §Y211, concerning death involved in the offense, be made a mandatory factor in sentencing where it occurs. Commissioner Nagel seconded. The motion passed by a vote of 5-0. Judge Breyer and Commissioner Robinson abstained.

Commissioner Robinson discussed the application of the general provisions to the guidelines.

Judge Wilkins stated that the Commission had decided to construct guidelines along the theory of modified real offense sentencing.

Judge Breyer suggested that each guideline be located by the user through a statutory index. If the judge did not believe all relevant factors had been considered after calculating the guideline punishment, the judge would be free to depart.

Commissioner Gainer disagreed with the reliance on departures to take into account many relevant factors due to the number of appeals departures would create.

Judge Breyer stated his difficulty in devising a systematic way of accounting for everything that is relevant to the case, but is not in the guideline for the particular charge of conviction. He discussed the due process problems with requiring a judge to increase a defendant's punishment at the sentencing stage.

The Chairman moved that the word "shall" remain in §Y211, the general provision for death. The motion passed by a vote of 5-0. Judge Breyer and Commissioner Robinson abstained. Judge Breyer restated his opposition to required increases without procedural safeguards.

The Chairman discussed §Y212, property loss or damage. Commissioner Block proposed including a minimum limit of loss in order for this provision to apply.

Commissioner Block moved that "shall" be included in the provision for property loss and include a range of 1 to 6 levels with commentary to follow. Commissioner Nagel 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.

Commissioner Block made a similar motion concerning §Y213, psychological injury. Commissioner Nagel 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.

The Commission discussed §Y214, victim officials. Judge MacKinnon stated that the provision should be applied only in cases where the victim was injured because of his or her position. Commissioner Corrothers moved to include "shall" in §Y214, but not include a range. Commissioner Nagel seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained. Judge Breyer stated his continued opposition to making these factors mandatory, but noted that if some were made mandatory, all of them should be.

The Chairman discussed §Y215, vulnerable victims. Commissioner Block requested that clarifying language be included to avoid the provisions use in minor cases. He also suggested omitting the example. Judge Wilkins moved that "shall" be included in §Y215 and include the present range. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

Commissioner Block moved to include "shall" in §Y216, the departure for extreme conduct, and not include a range. Commissioner Nagel seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

The Commission discussed §Y217, the general adjustment for public welfare. Judge MacKinnon moved to change "affected" to "endangered" and include the word "shall", while retaining the 1-6 level adjustment. Commissioner Nagel seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

The Commission discussed §Y218, the adjustment for physical injury. Commissioner Block recommended adding language to insure that the adjustment would be used in cases of significant injury.

In order to expedite voting, the Chairman noted Judge Breyer's standing objection to including the word "shall" in each adjustment and a range of 1-6 levels. §Y218 was approved in this manner. §Y219, the adjustment for weapons and dangerous instrumentalities, was approved with a minor word change recommended by Commissioner Nagel. §Y220, the kidnapping adjustment and §Y221, the adjustment for defendant in custody were also approved.

The Commission discussed §Y222, the departure for victim conduct in homicide or assault cases. Judge Breyer suggested that the provision not be limited to only homicide and assault. Judge MacKinnon moved to include the word "may" in the mitigating adjustment for victim conduct. Commissioner Nagel seconded.

Judge Breyer noted that this was inconsistent with the previous provisions. He moved that all of the provisions that are to be labeled as departures include the word "may" rather than "shall". This motion failed by a vote of 1-6. Judge Breyer voted yes. Judges Wilkins and MacKinnon, and Commissioners Block, Corrothers, Nagel and Robinson voted no. Judge Wilkins and Commissioner Nagel noted that, although they voted no, they would be willing to revisit this issue again.

The Commission discussed the application of §Y222. Commissioner Gainer stated his concern with the lack of a limit on the amount of mitigation.

Judge MacKinnon's earlier motion passed with a vote of 4-2. Judges Wilkins and MacKinnon and Commissioners Block and Nagel voted yes. Judge Breyer and Commissioner Corrothers voted no. Commissioner Robinson abstained.

Judge Breyer recommended commentary stating that the judge may depart in unusual cases of victim conduct in cases other than homicide and assault. The Commission agreed to this addition.

The Commission discussed the provisions for motive, state of mind and diminished capacity, and the manner by which these will be applied. Commissioner Nagel moved to include the word "shall" in §Y223 and a 1-6 level adjustment for the provision's application as a mitigating and aggravating factor. Upon a suggestion by Commissioner Gainer, she amended her motion to change the maximum level of increase to be the base offense level of the offense facilitated or concealed.

The Commission discussed §Y224, the provision for mental capacity and §Y225, the provision for coercion and duress. David

Lombardero explained the reasons behind the current drafts. Commissioner Nagel moved to approve these provisions as amended. The motion to include "shall" in §§Y223 and Y224 was passed by a vote of 6-0. Commissioner Robinson abstained.

Judge MacKinnon moved to eliminate the provision for coercion. Commissioner Nagel seconded. The motion failed on a vote of 3-3. Judge MacKinnon and Commissioners Block and Nagel voted yes. Judges Wilkins and Breyer and Commissioner Corrothers voted no. Commissioner Robinson abstained.

Commissioner Corrothers moved to have the general provision for coercion read, "if the defendant committed the offense because of a threat he reasonably believed that he or a member of his family would suffer unusually serious harm if he did not commit the offense, the court shall reduce the offense level by 1-6 levels to reflect the degree of coercion relative to the seriousness of the offense." The commentary would state the distinction in the relationship between coercion and minor participant. Judge Breyer seconded the motion. The Commission discussed the application of this provision. Commissioner Corrothers amended her motion to include the word "violent" at an appropriate place to avoid the provision's application in cases of economic duress. The motion passed by a vote of 5-0. Judge Breyer and Commissioner Robinson abstained.

The Commission discussed a proposed provision for necessity and decided to strike it from Part Y at this time.

Commissioner Corrothers moved to specifically reject §Y227, special solicitude for the victim, as a basis for departure, but allow it as a reason for sentencing at the lower end of the range. Commissioner Block 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.

The Commission reviewed, discussed and approved a news release concerning the upcoming public hearing on the death penalty drafted by Paul Martin.

#### Part Z: Role in the Offense

The Chairman reviewed the guidelines for role in the offense and suggested several stylistic changes. Judge Breyer commented on the guideline for minor participant. The Commission discussed the application of these provisions.

Commissioner Nagel moved to approve all of Part Z as amended. Commissioner Corrothers seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.



Judge MacKinnon made several recommendations for changes in the commentary.

## Chapter 2: Offense Conduct

The Commission discussed the two page overview for Chapter 2 and recommended various wording changes. Judge Breyer noted that the chapter does not explain how the guidelines work and suggested that instructions be addressed in another chapter. Commissioner Block moved to adopt the overview to Chapter 2 with the amended word changes. Commissioner Corrothers seconded. The motion passed by a vote of 5-0. Commissioner Robinson abstained. Commissioner Nagel was not present at the time.

### Part A: Offenses to the Person

#### --Homicide

The Commission discussed the guideline for homicide. Judges MacKinnon and Breyer discussed the base offense levels for §§A211 to A214. Judge MacKinnon stated his opposition to the base offense level for attempted murder being greater than second degree murder.

Commissioner Robinson stated his opposition to the manner by which the Commission created base offense levels. He encouraged a move away from the use of current practice statistics.

Phyllis Newton explained the method used for determining base offense levels. She stated that the staff used statutory limits in conjunction with parole commission guidelines and current practice to establish a range of levels.

Judge MacKinnon suggested changing the base offense level for conspiracy to 25-28 which would be less than the base offense level for attempted murder.

Commissioner Nagel moved to adopt the proposed guideline, as written, for homicide. Commissioner Block seconded. The vote passed by a vote of 5-0. Commissioner Robinson abstained. Judge MacKinnon was not present at the time.

The Commission discussed the commentary for homicide. Judge Breyer recommended that the commentary not try to define offenses. Judge MacKinnon suggested that the commentary deal more explicitly with statutory minimum sentences.

Commissioner Robinson stated his confusion with the manner in which the guidelines are to be used. He expressed concern that the judge may be foreclosed from applying relevant factors in the sentencing decision.

Commissioner Corrothers supported the commentary language for sentencing at the high end of the range for involuntary manslaughter when the offense occurred as the result of drunk driving. Judge Breyer requested that it be reworded to meet more closely the Commission's objective.

--Assault

Phyllis Newton explained the base offense and specific characteristics for assault. Judge Breyer asked for clarification on the application of this guideline. Commissioner Robinson reviewed his understanding of how the guideline would work in a case of simple assault with a weapon.

Commissioner Nagel moved to adopt the guideline for assault with the various wording changes suggested. Commissioner Block seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

--Criminal Sexual Conduct

Phyllis Newton noted that all definitions had been deleted from the guidelines for criminal sexual assault and replaced with commentary referencing 18 U.S.C §2245.

The Chairman recommended replacing one level ranges with a specific level, so that an increase of 4 to 5 will be changed to a 5 level increase, but a 3 to 5 level increase will remain.

Commissioner Block recommended moving §A232(3) to the commentary because it states a reason for departure.

Judge MacKinnon suggested adding a specific offense characteristic for acts of perversion in §§A231 & A232. Commissioner Block recommended that a 3 to 5 level adjustment be applied only to §A231. Judge MacKinnon moved to place this adjustment in the guideline. Commissioner Block seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

Judge Breyer questioned the reason for treating attempted rape the same as rape under §A231. He noted that attempts were normally treated half as seriously as the completed offense. He recommended that if attempted rape is to be treated the same as rape, the commentary should state the reason for this. The Chairman noted that a defendant convicted of attempted rape could be awarded a reduction for voluntary abandonment of the offense.

Commissioner Block moved to adopt the guidelines for criminal sexual conduct as amended with attempted rape flagged for comment at a later time. Commissioner Nagel seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

### --Kidnapping

Judge MacKinnon stated that the base level for receiving ransom money should not be less than the base level for attempted kidnapping. He moved that the lower limit for the base offense for attempted kidnapping be reduced to 24. Commissioner Block seconded and recommended appropriate wording changes to the guideline. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

Judge Breyer recommended that solicitation to kidnap not be penalized as severely as a completed kidnapping. Commissioner Robinson noted that states have almost uniformly dealt with attempts, conspiracies and solicitations as less severe than completed acts.

Judge Breyer moved to change the base offense level of §A243 to 20-24. Commissioner Nagel seconded the motion with the amendment that the guideline read as drafted, except for the base offense level. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

### --Air Piracy

Judge MacKinnon moved to adopt the guideline as drafted. Commissioner Corrothers seconded the motion. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

Commissioner Robinson asked for commentary to note that the general provision for use of a weapon cannot apply as it is already included in the base offense level.

### Part C: Public Officials

Judge Breyer suggested that a clearer distinction be made between gratuities and bribes. He also recommended that bribery of a witness be covered under obstruction of justice. Judge Breyer also recommended that §C214, the guideline for attempts, conspiracies and solicitations, be deleted and language included in §§C211 & C212 to allow for these offenses.

Commissioner Nagel moved to adopt Part C with the stated amendments. Commissioner Corrothers seconded. Judge MacKinnon asked for clarification on several points in the commentary concerning where dollar loss cannot be determined. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

### Part D: Drugs

Judge Wilkins explained the drug table on page 3 of the draft. He encouraged the staff to draft a table for greater drug quantities than are covered by the current table. Judge Breyer

recommended increasing the number of levels in the table to the point where each row is one level different from the next in order to provide overlapping of sentencing ranges and avoid the number of litigable issues.

Judge MacKinnon made several changes to the commentary. Judge Breyer and Commissioner Block both recommended several stylistic and wording changes.

Commissioner Nagel moved to adopt Part D, subject to the new drug tables. Commissioner Corrothers seconded. The motion passed by a vote of 6-0. Commissioner Robinson abstained.

#### Part E: Criminal Enterprise

Judge Breyer requested commentary explaining the reason for the base offense level of 19 for the guideline covering violations of the Hobbs Act. He also recommended that involvement by a labor union not be used as a specific offense characteristic.

Judge Breyer reviewed the data for gambling. He recommended that any offense level chosen be based on an identifiable reason.

Commissioner Nagel moved to change the base offense level of §§E231-E234 to 10 and add a specific offense characteristic to capture the size of the operation. Commissioner Block seconded.

Judge Breyer expressed concern about the guideline for extortion-picketing. He noted that the offense was very controversial.

The Chairman suggested that the Commission work straight through the weekend in order to get the draft to the printer by the following week. The next meeting was scheduled for January 21, at 9:30 a.m. Judge Wilkins stated that the Commission would begin the next meeting by reviewing Part G.

The meeting was adjourned.