

COMMISSION MEETING

APRIL 3, 1987

The following persons attended the U.S. Sentencing Commission Meeting on April 3, 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  
Kimberly Halbig  
Peter Hoffman  
Debbie Lister  
David Lombardero  
Paul Martin  
John Steer  
Sharon Turner  
Camille Williams

Guests

Charles Sullivan, Citizens United for the  
Reform of Errants  
Vickie Portney, Department of Justice  
Roger Pauley, Department of Justice

Commission Meeting Minutes - April 3, 1987

Chairman Wilkins called the meeting to order at 8:25 a.m., on Friday, April 3, 1987.

The Chairman started the meeting by discussing Chapter 2 and the levels table. The Commission thanked Kimberly Halbig, Debbie Lister, Sharon Turner, Camille Williams and Marla Wilson for working throughout the night to finish the levels table project for the Commission. The Chairman also thanked Bill Rhodes and the research staff for their support.

Commissioner Block discussed the progress of the prison impact statement and Chapter 5. He stated that Professor Barnett from MIT would be at the meeting on April 9 to answer any questions. Commissioner Block asked for a tentative agreement on the structure of the chapter. He noted that the Commission still needed to discuss general provisions and the consecutive-concurrent problem. He stated that he hoped to have the entire chapter completed by Monday, April 6.

Judge Wilkins asked Paul Martin to coordinate the format of the chapters.

Commissioner Block discussed the levels table. (See attached). He stated that a second levels listing had been prepared in parts. This listing started with Part A and was arranged by sections.

The Commission discussed the specific offense characteristics included in Part A of Chapter 2. Commissioner Robinson stated his concern about the lack of many specific offense characteristics in Part A that he believed were relevant, particularly since general provisions had been deleted. The Commission discussed the manner in which aggravating and mitigating factors were to be applied in the guidelines.

Commissioner Block discussed specific offense characteristics for homicide. He recommended adding a characteristic for torture.

Commissioner Gainer suggested that all aggravating and mitigating factors be specified in each guideline if the general provisions section was to remain deleted so that judges can distinguish between levels of seriousness. Commissioner Corrothers recommended that Commissioner Gainer's suggestion be adopted.

Judge Breyer recommended that specific offense characteristics be included in guidelines only where there are data available to support the characteristic's inclusion as a relevant sentencing factor.

The Commission discussed vulnerable victim as an aggravating factor. David Lombardero explained why vulnerable victim had not been included as a specific offense characteristic in the guideline for homicide.

Commissioner Nagel stated her understanding that the general provisions were to be deleted and adjustments placed in guidelines only when there was either supporting data, statutory distinctions, or compelling reasons for such inclusion. She proposed that the Commission review the draft guidelines and create a three part list of specific offense characteristics for each guideline. If there are data, compelling reasons or statutory distinctions to support their inclusion, add them and state the reason. Other characteristics could be included in the commentary. The third list would be for those characteristics the Commission should revisit in order to determine whether they should be included within a guideline or allowed as a basis for departure outside the guidelines.

The Commission discussed the manner in which aggravating and mitigating factors are included into the guidelines. Judge Wilkins stated that general provisions had been deleted by Commission vote in an earlier meeting and replaced by specific offense characteristics in some instances and as means for departure in others.

Judge Breyer stated that he believed adjustments were to have been included as specific offense characteristics only when the data indicated it was a factor in sentencing in 3 or 4 percent of the cases.

Judge Wilkins proposed that all factors be included in the guidelines as specific offense characteristics. The level of adjustment would be based on analogous offenses where the adjustment is a commonly occurring factor.

Commissioner Robinson recommended placing all of the adjustments into a chapter of general adjustments, use of which would be discretionary. Commissioner Gainer suggested that all relevant specific offense characteristics be included in each guideline. He stated that the level of adjustment could be approximated for each and the judge allowed more discretion as to the adjustments application. In the alternative, he suggested placing a maximum amount of increase on all adjustments within each guideline.

Commissioner Corrothers moved that general provisions and adjustments be returned to the guidelines. Commissioner Robinson seconded. The Commission did not vote.

Commissioner Corrothers, using unfairness as the rationale, strongly disagreed with including aggravating factors in the base offense levels because there would be instances or cases where the factor is not present or relevant. She recommended adoption of language that would result in the consideration of the adjustment or specific offense characteristic only in instances when such adjustments are relevant.

Commissioner Corrothers moved to reinstate Part Y, general provisions. Commissioner Robinson seconded the motion.

Judge Breyer disagreed with such an approach.

Judge Wilkins and Commissioner Nagel agreed with Commissioner Corrothers' motion in general, but did not believe it could be accomplished under the current time table.

Commissioner Robinson stated that he prepared a list of 100 relevant offense characteristics which had been omitted from the current draft. He distributed this list to the commissioners. (See attached list). Commissioner Corrothers' motion failed by a vote of 2-5. Commissioners Corrothers and Robinson voted yes. Judges Wilkins, MacKinnon and Breyer, and Commissioners Nagel and Block voted no.

The Commission began the process of reviewing each guideline, beginning in Part A, to determine if adjustments should be included. Judge Wilkins recommended that the guideline for second degree murder include commentary stating that the aggravating factors such as extreme cruelty and vulnerable victim had been taken into account. This would aid the court in determining where within the range the defendant should be sentenced in accordance with the relevant factors.

Judge Wilkins asked if factors other than vulnerable victim, extreme conduct and abduction should be included in the guideline for second degree murder. The Commission discussed various aggravating factors for second degree murder in concert with a list of data, prepared by Commissioner Block, showing how often certain characteristics show up as a significant sentencing factor. Judge MacKinnon stated that he believed all data to be inconsistent. Commissioner Nagel disagreed with Judge MacKinnon on this point.

Commissioner Block noted that there were four cases of second degree murder with abduction in 1985. Peter Hoffman explained the manner in which the data was collected. He recommended that the Commission follow the data cautiously.

Commissioner Gainer stated that, although abduction showed up in only four second degree murder cases, it was such an important factor that it should be included in the guideline.

Commissioner Robinson asked what the standard for departure should be. He stated that if the standard was the rarity of the aggravating or mitigating factor, rarity should be measured in relation to the number of offenses covered by the specific guideline. He noted that the four second-degree murder cases involving abduction constituted 11% of the 37 second-degree murders covered by the data, and he did not consider 11% to be rare. Commissioner Robinson suggested that even if rarity was to be measured in relation to all offenses, factors such as abduction should be included in the guidelines to provide the sentencing judge with the guidance needed to avoid disparity.

Commissioner Nagel stated this was essentially a Commission policy decision.

Commissioner Block stated that he was in favor of making abduction, which shows up in 11% of the 37 second degree murder cases, a basis for departure.

Judge Breyer stated his desire to make decisions based on data. He acknowledged the data's imperfections, but stated that it was easier to defend the guidelines based on imperfect data than on subjective choice.

Judge MacKinnon moved to include abduction throughout the homicide section. Commissioner Nagel seconded. The motion passed by a vote of 4-2. Judges Wilkins, MacKinnon and Commissioners Nagel and Corrothers voted yes. Judge Breyer and Commissioner Block voted no. (Commissioner Robinson abstained).

Commissioner Corrothers moved to include vulnerable victim in the homicide section. Commissioner Nagel seconded. The motion passed by a vote of 4-2. Judges Wilkins, MacKinnon and Commissioners Nagel and Corrothers voted yes. Judge Breyer and Commissioner Block voted no. (Commissioner Robinson abstained).

The Commission discussed extreme conduct as an aggravating factor in homicide. Judge Breyer noted that all state guidelines had extreme conduct listed as a basis for departure in homicide. Judge MacKinnon recommended that extreme conduct remain as a basis for departure. The Commission agreed.

Judge MacKinnon recommended that official victim be included as a specific offense characteristic in homicide. Commissioner Nagel suggested that official victim be included in homicide and assault, but not in fraud or theft. She recommended that as a

stylistic convention, official victim be placed as a specific offense characteristic for all of Part A.

Commissioner Block noted that, as a practical matter, it would be easier for the computer to place specific offense characteristics under each guideline than it would be to place them in each section.

The Commission discussed the manner in which adjustments were to be included in the guidelines. Judge MacKinnon suggested that abduction, vulnerable victim and official victim be included as specific offense characteristics in all the guidelines from homicide through air piracy. Commissioner Nagel supported this suggestion.

Judge MacKinnon moved that official victim be included as an adjustment under Part A and given a three level increase. Commissioner Corrothers seconded.

Judge Breyer moved to amend the motion to place victim official at a one-level increase. The motion failed by a tie vote of 3-3. Judge Breyer and Commissioners Block and Corrothers voted yes. Judges Wilkins and MacKinnon, and Commissioner Robinson voted no. Commissioner Nagel was not present.

The Commission voted on Judge MacKinnon's initial motion. The vote was 3-2. Judges Wilkins and MacKinnon and Commissioner Corrothers voted yes. Judge Breyer and Commissioner Block voted no. Commissioner Nagel was not present. Commissioner Robinson abstained.

Judge Breyer asked for a second vote when Commissioner Nagel returned.

Upon Commissioner Nagel's return, the Commission voted 1-5 for Judge Breyer's motion to include victim official as a one level adjustment. Judge Breyer voted yes. Judges Wilkins, MacKinnon and Commissioners Corrothers, Nagel and Block voted no. Commissioner Robinson abstained. The Commission voted 4-2 for Judge MacKinnon's motion to place victim official as an adjustment for all of part A with a three-level increase. Judges Wilkins, MacKinnon and Commissioners Corrothers and Nagel voted yes. Judge Breyer and Commissioner Block voted no. Commissioner Robinson abstained.

Commissioner Robinson recommended including physical injury and extreme psychological injury as adjustments or general provisions in Part A. Judge Wilkins agreed that these were important factors, but questioned whether the Commission should place a numerical value on them.

Commissioner Gainer noted that an earlier draft included a general provision, §Y222, for extreme psychological injury with a one-level increase. He recommended including examples in the commentary to clarify when this provision applies.

Commissioner Robinson moved to include extreme psychological injury as an adjustment under Part A along the lines of the former §Y222. This adjustment would be mandatory when the judge found such extreme psychological injury. Commissioner Corrothers seconded the motion. The motion failed by a vote of 3-4. Judge Wilkins and Commissioners Robinson and Corrothers voted yes. Judges MacKinnon, Breyer and Commissioners Nagel and Block voted no.

Judge MacKinnon encouraged the Commission to include this factor as a basis for departure.

Commissioner Robinson moved to include an adjustment in Part A for physical injury beyond what normally occurs in the offense. The Commission discussed the manner in which physical injury is currently taken into account in offenses against the person. Judge MacKinnon recommended that this characteristic always be a basis for departure. Commissioner Corrothers seconded Commissioner Robinson's motion. The motion failed by a vote of 3-4. Judge MacKinnon and Commissioners Robinson and Corrothers voted yes. Judges Wilkins, Breyer and Commissioners Nagel and Block voted no.

Commissioner Robinson recommended that extreme psychological injury be included as a specific offense characteristic in assault. He stated that it is a common sentencing factor. Judge Wilkins asked for the data on extreme psychological injury in assault cases.

Judge MacKinnon stated that the problem was not that it was rare, but that extreme psychological injury was too vague a term to place a value on. Commissioner Robinson suggested commentary be drafted to help define extreme psychological injury. He moved that the assault guideline include an aggravation for psychological injury where the person has some significant articulated dysfunctions in their family relationship, business, or school as a result of the offense. Commissioner Corrothers seconded. The motion failed by a vote of 2-3. Commissioners Robinson and Corrothers voted yes. Judges Wilkins and MacKinnon, and Commissioner Block voted no. Judge Breyer and Commissioner Nagel were not present at the time.

Judge Wilkins reviewed the adjustments for sexual abuse and the remainder of Part A. Commissioner Gainer recommended an adjustment be included under the guideline for kidnapping to account for the length of the abduction. He suggested that if the kidnapping lasted longer than 12 hours, add one level, and



for each additional 12-hour period add 1 level up to a maximum of 8 levels. Commissioner Corrothers moved to adopt Commissioner Gainer's suggestion in principle and proposed that language be drafted to include this in the guideline for kidnapping. Commissioner Nagel seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge Wilkins discussed the guideline for air piracy. He noted that physical injury was the only current aggravating factor included. Commissioner Robinson suggested that the same specific offense characteristics included for interference with a flight crew, §A252, be included in the guideline for aircraft piracy, §A251. Judge Wilkins noted that the base offense level for air piracy was already 38.

Commissioner Robinson moved to restore §Y225, the adjustment for physical injury, to apply to air piracy, §A251. This would include an increase of four levels for permanent injury, an increase of two levels for serious injury, and a one-level increase for other bodily injury. He noted that this adjustment would be consistent with §A241(b)(2). Commissioner Corrothers seconded. The motion failed by a vote of 3-4. Judge Wilkins and Commissioners Robinson and Corrothers voted yes. Judges MacKinnon and Breyer, and Commissioners Nagel and Block voted no.

The Commission discussed the specific offense characteristics for burglary and other offenses in Part B, offenses against property. Commissioner Robinson moved to include a two-level increase for use or possession of a weapon in §§B221 - B223. Commissioner Corrothers seconded. The motion passed unanimously.

Judge MacKinnon questioned whether any data suggested that bank robberies did not normally involve use of a weapon.

Judge Wilkins suggested that vulnerable victim be included in the guideline for burglary because it is included under assault. The Commission discussed other adjustments in Part B.

Judge Wilkins asked for discussion on vulnerable victim as an adjustment. Judge Breyer noted that vulnerable victim did not show up in the data as a sentencing factor in burglaries. Commissioners Gainer and Robinson recommended its inclusion on the basis of common sense.

Commissioner Robinson moved that vulnerable victim be included as a specific offense characteristic in Part B similarly to the way it is included in the guideline for fraud. Judge MacKinnon seconded. The motion passed by a vote of 5-2. Judges Wilkins, MacKinnon and Commissioners Robinson, Corrothers, and Nagel voted yes. Judge Breyer and Commissioner Block voted no. Commissioner Robinson recommended that this adjustment apply to §§B211, B213, B222 and B233.

Judge MacKinnon recommended that a specific offense characteristic be included in the robbery guideline for death, to take into account offenses convicted under 18 U.S.C. §2113(e). Commissioner Robinson supported this recommendation.

Judge Breyer moved to cross-reference the homicide guideline in the robbery guideline when death occurred. Commissioner Block seconded. The motion passed by a vote of 5-0. Judges Wilkins, MacKinnon, and Breyer and Commissioners Corrothers and Block voted yes. Commissioner Nagel was not present at the time. (Commissioner Robinson abstained).

Judge Wilkins distributed a staff proposal for reorganization of the guidelines for Commission review.

Judge Wilkins noted that the guideline for threatening communications had been omitted in the current draft. He asked the Commission to add this at the end of Part A. Judge MacKinnon so moved. Commissioner Corrothers seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge MacKinnon stated that the Commission needs to look at federal sentencing for crimes prosecuted under the District of Columbia statutes.

Commissioner Gainer noted that the Organized Crime Section of the Department of Justice was concerned that the Hobbs Act violation of threatening economic injury to a business had been inadvertently dropped to the same level as blackmail in the new draft of extortion. David Lombardero stated that it was an oversight and proposed changes for Commission approval.

Judge Breyer moved for adoption of at least as comprehensive a list as the Parole Commission for offenses that are excluded from consideration under prior criminal history. Those offenses that the Sentencing Commission has not included are: driving while intoxicated, contempt of court, resisting arrest, failure to obey a police officer, prostitution, gambling and non-support. Judge Breyer stated that these should not be included as part of a person's past record if they did not lead to a sentence of 30 days or more and were not similar to the instant offense. Judge MacKinnon amended the list to exclude driving

while intoxicated. Commissioner Block seconded the motion, but was not in favor of the amendment. The motion passed, with the amendment, by a vote of 5-0. Commissioner Nagel and Robinson were not present.

Judge Wilkins stated that the Commission will meet on Tuesday, April 7, at 9:00 a.m., to discuss Chapters 3, 4, 5 and 6. The meeting was adjourned.