

COMMISSION MEETING

APRIL 10, 1987

The following persons attended the U.S. Sentencing Commission Meeting on April 10, 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
Alan Chaset
Jerry Gaes
Russell Ghent
Kim Halbig
Peter Hoffman
Debbie Lister
David Lombardero
William Rhodes
Ronnie Scotkin
John Shadegg
Eric Simon
John Steer
Sharon Turner
Camille Williams

Guests

Commissioner Fechtler, U.S. Parole Commission
Professor Schulhofer

Commission Meeting Minutes - April 10, 1987

Chairman Wilkins called the meeting to order at 11:00 a.m., on Friday, April 10, 1987. The meeting was held in the U.S. Sentencing Commission office at 1331 Pennsylvania Avenue, NW, Washington, DC.

The Chairman started the meeting by reviewing and moving the adoption of the revised version of Chapter One. Included were the suggestions of various Commissioners.

Judge Breyer stated that he received from each Commissioner a significant number of comments and that this draft integrates those comments. Commissioner Corrothers commended Judge Breyer for a tremendous amount of effort and for his willingness to respond quickly to concerns and input from other Commissioners. The Chairman agreed.

The Chairman called to the Commission's attention the application instructions on page 11 of Chapter One. The motion was made by Judge Breyer and seconded by Commissioner Block to approve the instructions, subject to any necessary clarification. The motion was adopted by a vote of 6-0. (Commissioner Robinson abstained).

The Chairman proposed a letter of transmittal to be sent with the guidelines to The Honorable George Bush, dated April 13, 1987. Commissioner Nagel proposed the following amendments to paragraph 5 of the first page and paragraph 3 of the second page:

Paragraph 5, Page 1. Prior to and during this period, the Commission proposes to conduct field testing of the guidelines with a variety of groups, a process which the limited time for guideline preparation has not permitted to the degree the Commission would otherwise desire. As part of the field comparison, sentencing judges would be encouraged - in addition to their regular sentencing procedures - to apply the guidelines to cases coming before them.

Paragraph 3, Page 2. Using the feedback and information gathered during the field testing and educational efforts, the Commission will prepare any necessary technical and substantive amendments.

The motion to approve the transmittal letter, made by Judge Breyer and seconded by Judge MacKinnon, was adopted by a vote of 6-0. (Commissioner Robinson abstained).

Judge Wilkins proposed that §B311 - Career Offenders should be sentenced automatically to the statutory maximum. (The proposed language attempts to provide a definition of statutory maximum for the judge). Judge Breyer suggested a change in the wording and a new levels table. The last sentence in §B311, paragraph one, would read as follows: "A career offender shall be sentenced to a term of imprisonment not less than ...". The last sentence in paragraph 2 would read: "If the offense level from the above table is less than the offense level otherwise applicable, apply the greater offense level. The career offender's criminal history category shall in every case be Category VI".

Judge Breyer moved this be adopted with the suggested changes, with a new levels table that cross-references these statutory sections. (18 U.S.C. §§3581 and 3559).

Commissioner Nagel inquired whether the Commission intended to make a policy decision that the judge should be precluded from going to the statutory maximum.

Judge Breyer suggested a compromise by selecting a level of that was approximately 80-85% of the statutory maximum.

Commissioner Nagel accepted Judge Breyer's suggestion, but suggested a career offenders' levels table in which the upper bracket will be the §3581 maximum, with the lower bracket not less than 25% below the upper, to conform with the 25% range limitation.

After discussion, Judge Wilkins presented the recommendation of Commissioner Nagel as a motion, with Judge Breyer's modified changes and Commissioner Block seconded. The motion passed by a vote of 5-2. Judge Breyer, and Commissioner Corrothers voted no. (Commissioner Robinson voted yes to this motion).

A motion was made by Commissioner Block to strike out the words in this paragraph, "and the court shall increase the criminal history category by one category" in §B313 Criminal Livelihood. Judge Breyer seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge Breyer, Judge MacKinnon, and Commissioner Robinson suggested changes to Chapter Two (Offense Conduct). The following changes were made to the Overview paragraph and Section 201 (Applicable Guidelines): The first paragraph should read, "The court shall, within the statutory maximum for the offense of conviction, apply the guideline ...". In the last sentence of the paragraph, a comma(,) should follow the word "conduct". The motion, made by Judge Breyer and seconded by Judge MacKinnon, passed by a vote of 6-0. (Commissioner Robinson abstained).

Professor Schulhofer presented an overview of Part B: Multiple Counts: Concurrent and Consecutive Sentences. After discussion, Judge Breyer moved to approve the proposal. Judge MacKinnon suggested deletion of the word occurrence in §B512 (b)(1), Count Groups. Judge Breyer amended his motion to adopt Judge MacKinnon's suggestion. Commissioner Block seconded this motion with a reservation of returning to the offense level increase as soon as the Commissioners receive the current practice information. The motion passed by a vote of 6-0. (Commissioner Robinson abstained). The Commission agreed that Professor Schulhofer was to be commended for his work on the proposal.

Commissioner Block asked David Lombardero to revise Part C - Offenses Involving Public Officials, §C211 (b) Specific Offense Characteristics, by increasing the levels from 6 to 8. In §C211 (b)(2), an attempt to bribe, or bribery of, a witness in order to get a criminal acquitted should be treated as an accessory after the fact to the crime. Therefore, the sentence for the bribe should be that given to an accessory after the fact, if not more.

Judge Breyer moved to adopt the proposal, and to add to the commentary a statement that with respect to §C211 (b)(2). If the alternative accessory after the fact is applied then the normal 2 adjustment for role in the offense relating to public officials would also apply. Commissioner Block seconded, and the motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Commissioner Block asked William Rhodes to give a presentation on his memorandum dated April 10, 1987, concerning prison impact. After discussion of suggestions from Commissioners Block and Robinson, the matter was deferred for consideration later in the meeting. A summary of Mr. Rhodes presentation is attached to the minutes.

Judge Wilkins suggested that the commentary reflect that specific offense characteristics for use of a gun do not apply if the defendant was also convicted under 18 U.S.C. §924(c).

Judge Wilkins suggested that the base offense levels for §C211 1(b) and §C212(b)(2) be 8 instead of 6. Judge MacKinnon so moved and Commissioner Nagel seconded the motion, which was adopted by a vote of 6-0. (Commissioner Robinson abstained).

Judge Wilkins mentioned there was a conflict between the base offense levels in §C215(a) and §C216(a). Judge MacKinnon moved that the base offense level be increased from 6 to 8. Commissioner Corrothers seconded and the motion was passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge Wilkins called upon Suzanne Conlon for a recommended revision of the commentary for §J217 to conform the commentary with the statute.

Judge Breyer moved to add a new paragraph 5 to §K213(b). Judge Wilkins suggested the provision read: "If a recordkeeping offense reflected an effort to conceal a substantive offense, use the offense level for the substantive offense" and to also parallel the language in Q212(b)(5), taking out the word "environmental". This could also be considered a C-Note: Apply §C215. If the recordkeeping violation was done for the purpose of concealing a substantive offense, then apply the guidelines for the substantive offense, if greater. Also, if this drafting approach was used, in §Q212, paragraph (5) would come out and become (c).

Judge Breyer moved to add the substance of §Q212 (b)(5) in §K213. Commissioner Corrothers seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Commissioner Block proposed to increase the base offense level of §S213 from 12 to 13 and to add under §S213 (b)(1) that if the defendant knew the funds were criminally derived, increase by 5 levels. The motion was seconded by Commissioner Corrothers and passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge Breyer moved to delete "if a knowing violation" from §N221 (a)(1). Commissioner Block seconded and the motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge MacKinnon moved to change the base offense level of §A231 (a) to read no more than 30 instead of 31. Judge Breyer seconded and the motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Commissioner Block moved to increase the base offense level of §A231 (a) from 24 to 27. Commissioner Nagel seconded and the motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge Wilkins moved to revise §B212 (a) as follows: If two or more individuals were involved in organized activity and the offense level determined above is less than 12, increase to level 12. Judge Breyer seconded and the motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge MacKinnon moved to change §B261 to read the same as §B211(b)(6): If two or more people engage in an organized criminal activity and the offense level determined above is less than 14, increase to 14. Judge Breyer seconded and the motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge Breyer moved to revise the second paragraph of Chapter 5 Introduction. "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing." This should be the last sentence of the first paragraph. Then the last two sentences of the second paragraph should be put in the commentary. The remainder of paragraph two should be stricken. Commissioner Nagel seconded and the motion passed, with Commissioners Breyer, Corrothers, MacKinnon, and Nagel voting yes. Judge Wilkins and Commissioner Block were not present at the time. (Commissioner Robinson abstained).

Commissioner Corrothers expressed concerns about proposed §A313(c), "prior adult criminal conduct not resulting in a criminal conviction." She questioned whether this phrase includes an arrest. Judge Breyer responded absolutely not. Commissioner Corrothers stated that in the explanatory remarks following the statement of §A313, subsections (a), (b), (d) and (e) are explained. However, there is no reference describing the meaning of (c). Commissioner Corrothers suggested that arrests not be considered and expressed concern that it appeared that unadjudicated conduct has no ceiling whereas consideration for previous convictions is limited. Making reference to another section not previously discussed by the Commission - expunged records - she stated that she questioned the legality of sentence enhancement, citing 18 U.S.C. §3607, as well as whether it is honest to do so.

Judge Breyer, in support of the concern about arrests, moved: (1) to redesignate subsection "c" as "e" and subsections "d" and "e" as "c" and "d", respectively, and rearrange the subsections accordingly, (2) to insert the word "similar" after the word "prior"; and (3) amend the first paragraph of the text following subsection (e) by adding a new sentence at the end stating that a prior arrest record itself shall not be considered under §A313, and that the examples do not include a prior arrest record. This sentence was added after the end of the second sentence in the paragraph. Commissioner Corrothers seconded and the motion passed by a vote of 5-1 with Judge MacKinnon voting no. (Commissioner Robinson abstained).

Judge Breyer pointed out two important factors raised by Commissioner Corrothers and Judge MacKinnon in §A313. Judge MacKinnon stated that the Criminal Law Committee discussed

the treatment of expunged convictions. Judge Breyer stated that he believed when a conviction is expunged the only proper treatment is not to count it.

Judge Breyer suggested a clarification of this by saying, "which was not a totally expunged conviction." He recommended adding a section under §A312 (c)(2): "Sentences for the following prior offenses and offenses similar to them by whatever name they are known are never counted". Also, under §A312 (c)(2), add (c)(3) expunged convictions shall not count unless the statute expressly so permits in this or an analogous circumstance. Judge Breyer made the motion and Commissioner Corrothers seconded. The motion failed by a vote of 2-4. Judge Breyer and Commissioner Corrothers voted yes. (Commissioner Robinson abstained).

Commissioner Nagel suggested that the expunged convictions provision be treated like (h) Foreign Sentences and (i) Tribal Court Sentences. The revised provision would read as follows: "Sentences resulting from expunged convictions are not counted, but may be considered under §A313, Adequacy of Criminal History Category". It would follow (i) Tribal Court Sentences. Commissioner Nagel moved and Commissioner Block seconded. The motion passed by a vote of 5-1, with Commissioner Corrothers voting no. (Commissioner Robinson abstained).

Judge Breyer moved to strike the last sentence of the paragraph on page 2 of §X211. If a defendant is convicted of conspiracy, the sentence should be imposed only on the basis of the defendant's conduct or the conduct of co-conspirators that was reasonably foreseeable and (specifically aided, encouraged, or contemplated) in furtherance of the conspiracy. He suggested adopting the Chairman's suggestion (specifically aided, encouraged, or contemplated) in furtherance of the conspiracy.

Judge MacKinnon moved to amend by striking the entire paragraph. Judge Wilkins suggested taking out the words "underlying conduct" and replace them with "completed offense", in the first sentence of the paragraph. Judge Breyer moved to revise §X211 with Judge MacKinnon's amendment and Commissioner Corrothers seconded. The motion passed by a vote of 5-0. Commissioner Block was not present at the time. (Commissioner Robinson abstained).

Commissioner Nagel moved that §L211(b)(2) read as follows: "If the defendant participated in bringing illegal aliens into the United States on more than 1 occasion, increase by 2 levels". Commissioner Corrothers moved to revise §L212(b)(1) as follows: "If the defendant has previously unlawfully entered or remained in the United States, increase by 2 levels". The motions were moved by Commissioner Corrothers and seconded by Commissioner Nagel. The motions passed by a vote of 6-0. (Commissioner Robinson abstained).

The Chairman moved and the Commission agreed to revise §B211(b)(6) as follows: If 2 or more people engage in an organized criminal activity and the offense level determined above is less than 14, increase to 14. In §B212, add a subsection (b)(4) with the same wording as §B211(b)(6). In §B261, add a subsection (b)(2) with the same wording as §B211(b)(6). Also, the commentary should state that this language is directed to organized criminal activity, such as auto theft rings and "chop shops". These motions, made by Commissioner Block and seconded by Commissioner Nagel, passed by a vote of 6-0. (Commissioner Robinson abstained).

Commissioner Nagel moved to increase the §D211 provision for marijuana up to levels 34 and 36, proportional to other drugs: 1000-2999 (level 34), 3000-9900 (level 36). Commissioner Block seconded the motion, the motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge Breyer noted that this provision should be on the Commission's agenda for careful reexamination, with the possibility of an amendment perhaps next year.

Judge MacKinnon moved to change §X211 as follows: "Strike out the last sentence of paragraph 3 in §X211 commentary. Where the facts indicate that the defendant actually abandoned the attempt or withdrew from the conspiracy, under circumstances manifesting a voluntary renunciation of the criminal purpose, a complete defense to the charge of conspiracy, attempt, or solicitation will ordinarily be available." Also take out the word "completed" in the 2nd sentence of this paragraph and reword it to read: "Sometimes, however, the arrest occurs well before the defendant or any co-conspirator has committed the necessary acts of the substantive offense."

In the first sentence of paragraph 2, take out "for the object offense, i.e., the offense that the defendant conspired or" etc. Replace this sentence with "for the substantive offense that is the object of the conspiracy which he attempted to commit." Commissioner Corrothers seconded and the motions passed by a vote of 6-0. (Commissioner Robinson abstained).

Commissioner Robinson moved that guidelines not be submitted, but that a letter be sent to Congress explaining the hard work completed and requesting an extension of time for submission. The motion failed for lack of a second.

Commissioner Block inquired whether Chapter 6 is a required part of the submission. Judge Wilkins responded that it is required, but the statutory index is not a part of the required submission. He suggested the Commission not to submit the index until later.

The Commissioners discussed the procedures by which the staff would incorporate the final revisions made by the Commission, make technical and conforming changes and prepare the document for submission to Congress on April 13, 1987. The process of submitting any necessary technical or subsequent amendments, subsequent to the April 13, 1987, submission and prior to May 1, 1987, was also discussed.

The Chairman moved adoption of the proposed guidelines for submission to Congress. Judge MacKinnon seconded and the motion passed by a vote of 6-1, with Commissioner Robinson voting no.

Commissioner Robinson moved that during the six-month debate period, his dissenting views be bound in the back of the guidelines. The motion failed for lack of a second.

Commissioner Robinson made several motions with respect to his dissent: (1) There be a title page reflecting the votes in the bound document, (2) In the letter dated April 13, 1987, to Vice President Bush, a dissenting vote be reflected, and (3) All distribution of the guidelines within the next six-months include a copy of the dissenting views. Commissioner Corrothers seconded and the motion passed unanimously.

Judge Breyer moved that the dissent be circulated to the majority and that they be allowed to respond. Commissioner Nagel amended this motion to provide that the response to the dissent be a part of the package. This motion was withdrawn.

Commissioner Gainer requested that a statement be included that if he were a voting member, he would not vote for the guidelines in their present form. Commissioner Robinson so moved and Commissioner Corrothers seconded. This motion passed unanimously.

The meeting was then adjourned in order that staff, in accordance with Commission directives, could finalize the guidelines for submission to Congress on Monday, April 13.