

COMMISSION MEETING
JANUARY 5, 1988

The Commission met at 3:35 p.m., Commissioner Wilkins in the chair. Present were Commissioners Block, Corrothers, Gainer, MacKinnon, Nagel, and Robinson. Commissioner Breyer participated by telephone because he was unable to arrive from Boston due to inclement weather. By prior agreement of the Commissioners, absent members' votes are not counted.

During the meeting, there was difficulty with the telephone system, and several times the connection to Judge Breyer was lost.

Judge Breyer asked later that the minutes reflect that if he had been present he would have voted for the amendments to the guidelines adopted by the Commission.

The Commission set its next meeting for Tuesday, February 9, 1988, to begin at 10 a.m. Corporate sanctions will be the primary topic.

February 15 was set as a target date for publication in the Federal Register of changes to the guidelines approved by the Commission.

The Commission set March 21 and 22 for public hearings on organizational sanctions, which will be held at Washington. Testimony should be submitted before March 15.

The Commission generally agreed that the staff should collect data and report on areas of difficulty; however, no proposals for change should be presented until an adequate amount of information has been collected. Such reports should include public comment, actual cases, and background law.

The Commission approved the following additional amendments to the guidelines under its emergency guidelines promulgation authority:

Motion #1, by Commissioner MacKinnon

In §1B1.3, to strike out "is" and substitute "includes that" on line 1.

Seconded by Commissioners Corrothers and Nagel. Unanimously approved.

Motion #2, by Commissioner Corrothers

In §1B1.3(a)(1) retain "aided and abetted" and include a change in commentary to correspond.

Seconded by Commissioner Nagel. Unanimously approved.

Motion #3, by Commissioner Corrothers

To strike out "may be" in §1B1.3(a)(1).

Seconded by Commissioner MacKinnon.

Voting yea, 3: Block, Corrothers, MacKinnon

Voting nay, 4: Wilkins, Nagel, Robinson

Motion failed.

Motion #4, by Commissioner Corrothers

To strike out "may be" and "is" in §1B1.3(a)(1) and substitute "would be" in lieu thereof, and change the commentary accordingly.

Seconded by Commissioner MacKinnon.

Voting yea, 5: Wilkins, Block, Corrothers, MacKinnon, and Nagel

Voting nay, 1: Robinson

Motion passed.

Motion #5, by Commissioner Corrothers

To strike out, in §1B1.3(a)(3), "and all harm that . . ." through the end of the sentence.

Failed for want of a second.

Motion #6, by Commissioner Robinson

1B1.3(a) amended to read:

"All harm or risk of harm that resulted from the acts or omissions in subsections (a)(1) and (a)(2) above, if the harm or risk of harm was caused intentionally or recklessly or by criminal negligence."

Failed for want of a second.

Motion #7, by Commissioner Robinson

To amend §1B1.3(a)(3) to read,

"All harm or risk of harm that resulted from the acts or omissions specified in subsection (a)(1) and (a)(2) above, if the harm or risk of harm was caused intentionally, recklessly, or by criminal negligence, and all harm or risk of harm that was the object of such acts or omissions;"

Seconded by Commissioner Nagel. Unanimously adopted.

Motion #8, by Commissioner Block

To conform theft and fraud offenses in §§2B1.1; 2B1.2; 2B1.3.

Seconded by Commissioner Nagel.

Voting yea, 2: Block, Nagel

Voting nay, 4: Wilkins, Corrothers, MacKinnon, Robinson

Motion failed.

Motion #9, by Commissioner MacKinnon

To add "(4) All harm that is the object of such act of omission may be included." and renumber accordingly.

Failed for want of a second.

Motion #10, by Commissioner MacKinnon

In the commentary to §1B1.3, delete "other" in application note 3.

Seconded by Commissioner Corrothers.

Voting yea, 3: Wilkins, Corrothers, MacKinnon, Robinson

Voting nay, 0

Motion passed.

Commissioners Block and Nagel were absent from the room.

Motion #11, by Commissioner MacKinnon

To delete comments 4 and 5 and insert new comments to §1B1.3.

Seconded by Commissioner Robinson. Unanimously adopted.

Motion #12, by Commissioner MacKinnon

To add the following "Background" to §1B1.3.

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging a sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable guideline sentencing range is determined."

Seconded by Commissioner Wilkins. Unanimously adopted.

Motion #13, by Commissioner MacKinnon

To delete "when" and substitute "in" in lieu thereof, in the third sentence of the third paragraph of the background to §1B1.3.

Seconded by Commissioner Nagel. Unanimously adopted.

Motion #14, by Commissioner MacKinnon

To delete "yet" on the second page of the proposed background to §1B1.3.

Seconded by Commissioner Robinson. Unanimously adopted.

Motion #15, by Commissioner MacKinnon

To delete "feasible" from the background to §1B1.3 and substitute "reasonable" in lieu thereof.

Seconded by Commissioner Block.

Voting yea, 5: Wilkins, Block, Corrothers, MacKinnon, Nagel
Voting nay, 0
Abstaining, 1: Robinson

Motion Passed.

Motion #16, by Commissioner MacKinnon

To delete "or ongoing" from background of §1B1.3.

Seconded by Commissioner Corrothers.

Voting yea, 5: Wilkins, Block, Corrothers, MacKinnon, Nagel
Voting nay, 0
Abstaining, 1: Robinson

Motion Passed.

Motion #17, by Commissioner MacKinnon

To delete the parenthetical "(the classical "mens rea")" in the background to §1B1.3.

Seconded by Commissioner Nagel.

Voting yea, 5: Wilkins, Block, Corrothers, MacKinnon, Nagel
Voting nay, 0
Abstaining, 1: Robinson

Motion Passed.

Motion #18, by Commissioner MacKinnon

To amend background to §1B1.3 to read:

"Another consideration is that in a pattern of small thefts, for example, to consider the guideline range of related conduct."

Seconded by Block.

Voting yea, 5: Wilkins, Block, Corrothers, MacKinnon, Nagel
Voting nay, 1: Robinson

Motion Passed.

Motion #19 (as amended by Motion #20)

To add "commentary" below to §1B1.4.

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing a sentence within that range. The section is based on 18 U.S.C. § 3661, which recodified 18 U.S.C. § 3577. The recodification of this statute in 1987 makes it clear that, despite the guideline sentencing system, Congress did not intend to limit the information that a court may consider in imposing sentence. A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that is not taken into account by the guidelines might provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See e.g., Chapter Five, Part H (Specific Offender Characteristics).

Seconded by Commissioner Nagel--upon amendment by her.

Voting yea, 5: Wilkins, Block, Corrothers, MacKinnon, Nagel
Voting nay, 0

Abstaining, 1: Robinson

Motion as amended passed.

Motion #20, by Commissioner Nagel

To amend Motion #19, by changing the heading.

Seconded by Commissioner Block.

Voting yea, 4: Wilkins, Block, MacKinnon, Nagel

Voting nay, 1: Corrothers

Abstaining, 1: Robinson

Motion passed.

Motion #21, by Commissioner Block

Add to §1B1.1(b) "in the order listed."

Seconded by Commissioner Nagel. Unanimously adopted.

(Commissioner Robinson having left the room)

Motion #22, by Commissioner Block

To move §1B1.4 application note 1 to §1B1.1, as application note 4.

Seconded by Commissioner Nagel. Unanimously adopted.

Motion #23, by Commissioner Nagel

At the end of §1B1.2(a), add "Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses."

Seconded by Commissioner Block. Unanimously adopted.

Motion #24, by Commissioner Nagel

§1B1.2 is amended to read:

"After determining the appropriate offense section pursuant to subsection (a) of this section, determine the appropriate

guideline range in accordance with the principles in §1B1.3 (relevant conduct)."

Seconded by Commissioner Block. Unanimously adopted.

Motion #25, by Commissioner MacKinnon

To grant the staff authority to renumber sections appropriately.

Seconded by Commissioners Wilkins and Block. Unanimously adopted.

Motion #26, by Commissioner MacKinnon

To change commentary in §4B1.2.

2. "Controlled substance offense" includes any federal or state offense that is substantially equivalent to any of those listed in subsection 2 of this section. These offenses include manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed.

Seconded by Commissioner Nagel. Unanimously adopted.

Motion #27, by Commissioner MacKinnon

To distribute initial training surveys to probation offices with a cover letter.

Seconded by Commissioner Wilkins. Unanimously adopted.

There being no other business to come before the regular meeting of the Commission, the Commission went into executive session.