

COMMISSION MEETING
APRIL 11, 1988

The Commission met at 11:05 a.m., Judge Wilkins in the Chair. Present were Commissioners Breyer, Block, Corrothers, MacKinnon, and Nagel.

The Commission expressed its appreciation to Mr. Gerry Gaes, who has been on loan to the Commission from the Bureau of Prisons, who is returning there to become Research Director.

John Steer, General Counsel, reported to the Commission on the status of pending litigation. Mr. Steer presented a memorandum summarizing the decisions to date and the status of other cases pending across the country. He also reported that the Solicitor General has granted permission for the government to appeal a case in the Ninth Circuit, while defendants have filed notices of Appeal in the Fifth and Sixth Circuits. The Department of Justice has finished a draft of a petition for certiorari to the Supreme Court, which is being reviewed by the Solicitor General. Commissioner Corrothers expressed praise for John Steer's argument before District Court in Baltimore and for the work of the other Commission attorneys in various courts across the country. The other Commissioners concurred.

The Commission stood in brief recess from 11:20 to 11:45 a.m. When the Commission reconvened, Commissioner Block suggested dividing the agenda and acting upon the less controversial matters first. Judge Wilkins remarked that the Commission was moving forward on two tracks as it considered guideline amendments: 1) the regular guideline amendment process requiring submission to Congress and passage of the 180 day waiting period; and 2) other amendments which the Commission would pass under its emergency authority with an effective date set by the Commission. He stressed that it was important for the Commission to coordinate both tracks.

Procedure for Sentencing

Motion by Commissioner Nagel to change §6A1.1 and §6A1.2 to conform to the more general policy statement in the Model Local Rule issued by the Judicial Conference. Seconded by Commissioner Corrothers and passed unanimously as an emergency amendment.

Emergency Amendments

Motion by Judge Breyer to submit to Congress as part of the regular guideline amendment process, those emergency guidelines and revised commentary promulgated as of January 15, 1988. Seconded by Commissioner MacKinnon and passed unanimously.

Determination of Loss

There were two motions involving this proposal to modify the following sections: 2B1.1, 2B1.3, 2B2.1, 2B2.2, 2B3.1, 2E5.2 and 2E5.4.

Motion by Judge Breyer to modify Application Note 2 of §2B1.1 (defining loss) by deleting the words "whichever is greater" and substitute the words "as appropriate to make the victim whole." Seconded by Commissioner Corrothers. Unanimously passed.

Motion by Commissioner Corrothers, seconded by Commissioners Block and Nagel, to substitute the revised term "loss" in the guidelines listed above. Unanimously adopted as an emergency amendment.

Obscene Matter

Motion by Commissioner Corrothers, seconded by Commissioners Block and Nagel, to amend §2G2.2 to apply to "a prepubescent minor." Unanimously passed as an emergency amendment.

Information Provided In Cooperation Agreement

The Commission considered a proposal to insert new section §5K1.3 to permit agreements between defendants and the government which would enable the defendant to reveal additional information without such information necessarily being used to calculate his sentence. After considerable discussion, the Commission directed the staff to revise the proposed amendment and present the revision to the Commission later in the meeting.

New Offense Guidelines

The Commission then turned to the proposal to give approval to three new guidelines: §2A2.4 (Obstructing or Impeding Officers); §2A5.3 (Committing Certain Crimes Aboard Aircraft); and §2A6.2 (False Information Regarding Attempts to Wreck Aircraft). Motion by Commissioner Block to adopt the §2A2.4 and §2A5.3. Seconded by Commissioner Breyer. Unanimously passed as regular guidelines. Consideration of §2A6.2 was deferred.

Multiple RICO Offenses

Motion by Judge Breyer to adopt as an emergency amendment a clarification to Application Note 1 of §2E1.1 and §2E1.2. Seconded by Judge MacKinnon, it was unanimously adopted.

The Commission stood in recess from 1:00 p.m. until 2:00 p.m. for lunch.

Information Provided In Cooperation Agreement (Resumed)

When the Commissioners reconvened they returned to the earlier discussion of cooperation agreements. They considered the revision proposed, and after some additional discussion Judge Breyer moved for adoption of new §5K1.3 and accompanying Commentary. Seconded by Commissioner Block, the motion was voted unanimously as an emergency guideline amendment.

Continuing Criminal Enterprise

Motion by the Chairman to change §2D1.5 (Continuing Criminal Enterprise) to a base offense level of 36 with no further adjustments. Seconded by Commissioner Nagel, this change was adopted unanimously as a regular amendment.

Interest in Tax Cases

Motion by Commissioner Nagel to defer the proposed amendment to §2T1.1 (Tax Cases) for further consideration and possibly for public comment. Seconded by Commissioner Breyer, the motion was adopted unanimously.

Petty Offenses

Motion by Judge Breyer, seconded by Commissioner Corrothers, to delete from guideline coverage all petty offenses, by adding §1B1.8 and accompanying Commentary. Unanimously passed as an emergency guideline.

Criminal Livelihood

The Commission then considered several proposed revisions to §4B1.3 (Criminal Livelihood). Two motions were made.

Motion #1

Judge MacKinnon moved to modify one of the proposals to have it address a defendant who derived "substantial income" from criminal conduct rather than a "substantial portion of his income." Seconded by Commissioner Corrothers.

Voting For: Commissioners Corrothers and MacKinnon.

Voting Against: Commissioners Wilkins, Block, Breyer, and Nagel.

The motion failed.

Motion #2

Commissioner Block then moved, seconded by Judge Breyer, to adopt the proposed amendment to §4B1.3 (Criminal Livelihood), leaving the language to read "substantial portion of his income" but deleting the reference to probation and all examples in Application Note 1.

Voted For: Commissioners Wilkins, Block, Breyer, Corrothers and Nagel.

Voted Against: Commissioner MacKinnon.

Motion Passes.

Judge MacKinnon and Commissioner Corrothers noted for the record their belief that §4B1.3 is not applicable to impoverished persons who derive a significant portion of their subsistence by illegal activity, such as the welfare mother abusing food stamps, or the widow who cashes her deceased husband's social security checks, but rather to those who engage in "major criminal activity." NOTE: After the meeting, Judge MacKinnon circulated to all Commissioners a memorandum restating his position that the Criminal Livelihood provision should not apply to welfare mothers or social security widows. In his memorandum, he suggested the following alternative language for the Criminal Livelihood provision, requesting that the text be included in the minutes:

Proposal: To convert §4B1.3 from a guideline to a policy statement. Delete §4B1.3 and the commentary accompanying it. Revise §5H1.9 to read as follows:

The degree to which a defendant depends upon major criminal activity for a livelihood is relevant in determining the appropriate sentence. A term of imprisonment is warranted for individuals who earn substantial income from ongoing, organized criminal activity, including participation in racketeer influenced and corrupt organizations (Title 18, Chaps. 95 and 96); labor racketeering (Title 29, Chap. 7); robbery and burglary (Title 18, Chap. 103); mail and wire fraud (Title 18, Chap. 63); and major drug offenses (Title 21, Chap. 13D).

The guidelines generally specify a sentence of imprisonment for major offenders. See, e.g., §2D1.5 (Continuing Criminal Enterprise); §2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations). If the applicable guideline range does not reflect the extent to which the defendant profited from the offense, an upward departure may be appropriate.

Abuse of Position of Trust or Special Skill

There were two motions concerning the proposal to change the commentary to this guideline.

Motion #1

Commissioner Nagel moved to defer consideration of the proposed amendment to Commentary to §3B1.3 (Abuse of Position of Trust) until the Commission has collected enough data to evaluate how the field is treating this provision.

Failed for want of a second.

Motion #2

Motion by Commissioner Corrothers to consider the amendment immediately. Commissioner Corrothers' motion was amended by Commissioner Block, to defer consideration of this proposal for one week. This latter proposal was agreed to by the Commission without a formal vote.

Multiple Counts

By Commissioner Corrothers, seconded by Judge Breyer, to amend §3D2.1(d) in order to clarify the grouping of multiple counts. The proposal was unanimously adopted as an emergency amendment.

At the request of Commissioner Corrothers, Gary Peters discussed the report of the working group on the Career Offender provision. Several Commissioners praised the report, suggesting that the Commission ought to look at the rationale for the provision, literature and empirical research on the subject and invite public comment. Commissioner Corrothers urged the Commission to proceed very carefully in attempting to apply a selective incapacitation theory.

Transmittal to Congress

Motion by Judge Breyer that all emergency amendments adopted as of January 15, 1988, and all permanent amendments acted upon today, and all revisions in the Commentary and other changes to the Guidelines promulgated by this Commission, be transmitted to the Congress prior to the Commission's meeting next week.

Seconded by Commissioner Block, this motion was adopted unanimously.

The Commission also agreed that they would vote again next week formally to adopt the emergency amendments which they had tentatively adopted today.

Judge Wilkins announced that there will be a delegation from the British Parole Commission visiting here on Monday, April 18, 1988 at 2:00 p.m. Commissioners are encouraged to attend.

The Commission then adjourned.