

Minutes of the January 24, 1988 U.S. Sentencing Commission Business Meeting

The meeting was called to order at 9:41 A.M. by Chairman William W. Wilkins, Jr.

The meeting was held in the library at the U.S. Sentencing Commission. The following Commissioners, staff members and guests participated:

William W. Wilkins, Jr., Chairman
Benjamin F. Baer, Commissioner
Michael K. Block, Commissioner
Stephen G. Breyer, Commissioner
Helen G. Corrothers, Commissioner
Ilene H. Nagel, Commissioner
Winston S. Moore, Staff Director
John R. Steer, General Counsel
Charles Betsey, Senior Research/Economist Associate
Peter B. Hoffman, Principal Technical Advisor
Candace Johnson, Training Specialist
David Lombardero, Consultant - Guideline Drafting
Phyllis Newton, Director of Training
David Scheffman, Economist
Ronnie M. Scotkin, Guideline Development Analyst
Ronald Weich, Special Counsel
James L. Beck, Research Director, Parole Commission
Vicki Portney, Representative from DOJ

Chairman Wilkins recognized Sonia Maynard-Liburd, Data Preparation Supervisor, and Rosemary Barberet, Research Assistant. Also recognized were Jim Beck and Linda Marble from the Parole Commission and Jane McPhillips, probation officer on temporary detail to the Commission.

Chairman Wilkins, on behalf of the Commission, congratulated the staff for their professionalism, hard work and dedication in contributing to a positive decision from the U.S. Supreme Court re: Mistretta v. United States.

John Steer announced that Commission staff would be present at the Department of Justice's January 25, 1989, meeting on resentencing and related issues. Steer also reported that although the principal constitutionality issues had been decided, the due process issue was still subject to litigation.

Chairman Wilkins stated that, for the most part, the press accounts of Mistretta were fair and objective. Discussion, however, ensued concerning the U.S. News and World Report article. It was decided that the Commission might want to write a joint letter to the editor to correct factual inaccuracies.

The Commission considered the proposed guideline amendments for later publication in the Federal Register related to the following provisions of the Omnibus Anti-Drug Abuse Act of 1988.

§ 6481 - Motion made by Commissioner Block to publish a general question regarding the Commission's interpretation of mandatory minimum penalty statutes and to publish the staff proposal with alternative Base Offense Levels (37) and (38); seconded by Commissioner Corrothers. Passed.

§ 6482 - Motion made by Commissioner Block to publish three alternative proposals: (1) the staff proposal with Base Offense Level (26); (2) the staff proposal with Base Offense Level (26) and reference to Chapter Three, Part D, - Multiple Counts; and (3) the staff proposal with Base Offense Level (28); seconded by Commissioner Corrothers. Passed.

§ 6453 - Motion made by Commissioner Block to publish staff proposal; seconded by Commissioner Corrothers. Passed.

§ 6371 - Motion made by Commissioner Breyer to publish staff proposal with option #2 (attached); seconded by Commissioner Block. Passed.

§ 6487 - Motion made by Commissioner Breyer to publish technical changes only; seconded by Commissioner Nagel. Passed.

§ 6301 - Motion made to publish staff proposal modified by changing Base Offense Level "no less than 14" to "no less than 20" by Commissioner Breyer; seconded by Commissioner Corrothers. Passed. Commissioner Nagel was not present for this vote.

§ 7512 - Motion made by Commissioner Breyer to publish staff proposal modified by changing Base Offense Level (37) to alternative Base Offense Levels (37) and (38) with rationale; seconded by Commissioner Corrothers. Passed.

§ 7523 and § 7524 - Motion made by Commissioner Block to publish the proposal modified by changing all 2-level enhancements for the display of sadomasochistic conduct to 4-level enhancements; seconded by Commissioner Corrothers. Passed.

§ 7521 and § 7526 - Motion made by Commissioner Corrothers to publish staff proposal with same modification as §7523; seconded by Commissioner Breyer. Passed. Commissioner Block was not present for this vote.

§ 5301 - Motion made by Commissioner Nagel to publish staff proposal to take no action; seconded by Commissioner Corrothers. Passed. Commissioner Breyer was not present for this vote.

§ 7090, § 7304, § 2403 - The staff proposal to take no action at this time was approved. Commissioners Block and Nagel requested that the staff keep the Commission informed of the status of the demonstration program for mandatory drug testing of defendants on probation or supervised release.

§ 7086 - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioner Corrothers. Passed.

§ 7078 - Motion made by Commissioner Nagel to publish staff proposal; seconded by Commissioner Block. Passed.

§ 7053 - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioner Corrothers. Passed.

§ 7601 - Motion made by Commissioner Block to publish staff proposal option #1; seconded by Commissioner Breyer. Passed.

§ 6471 - Motion made by Commissioner Corrothers to publish two options: (1) staff proposal option #1 and (2) Commissioner Breyer's suggestion of cross referencing to the tax guideline; seconded by Commissioner Breyer. Passed.

§ 6474(b) - Motion made by Commissioner Block to publish staff proposal; seconded by Commissioner Corrothers. Passed.

§ 6470 - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioner Nagel. Passed.

A discussion ensued on Commissioner Baer's report on the comparison of cases under the parole guidelines with cases under the sentencing guidelines. Commissioner Block stated that he studied the first fifty bank robbery guideline cases and the most recent bank robbery guideline cases and both groups of cases had higher actual sentences than pre-guideline cases. A suggestion was made that the Parole Commission research staff and the Sentencing Commission research staff cooperate on developing a methodological procedure for these types of reviews and analyses. The Parole Commission was also commended for doing early analysis in this area. Also stated were other issues that needed to be addressed in a report - stipulated facts, the use of firearms, and acting in concert.

The Commission proceeded to consider a series of proposed technical guideline amendments for later publication.

ITEM: 1 §1B1.3 - Relevant Conduct - Motion made by Commissioner Nagel to publish staff proposal; seconded by Commissioner Breyer. Passed.

ITEM: 2 §1B1.3 - Relevant Conduct - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioner Corrothers. Passed.

ITEM: 3 §2D1.1 - Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offenses) - Motion made by Commissioner Breyer to publish option #2 with the staff directed to obtain more empirical data and conduct a study of its findings for the next meeting; seconded by Commissioner Corrothers. Passed. Commissioner Breyer was not present for this vote.

ITEM: 4 §2D1.6 - (Use of a Communications Facility in Committing Drug Offense) - Motion made by Commissioner Block to publish two options: (1) the staff proposal; and (2) Commissioner Block's suggestion of "applying the Drug Table less (3) levels or (12), whichever is greater." Seconded by Commissioner Breyer. Passed.

ITEM: 5 §2F1.1 - Fraud and Deceit (p. 2.69) - Motion made by Commissioner Corrothers to publish staff proposal; seconded by Commissioner Nagel. Passed. Commissioner Block was not present for this vote.

ITEM: 6 §2G1.1 - Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct - Motion made by Commissioner Block to publish*~~p598Xspecin~~struction - "If more than one person was unlawfully transported, treat as if each person unlawfully transported was contained in a separate count of conviction." Seconded by Commissioner Nagel. Passed. Commissioner Breyer was not present for this vote.

ITEM: 7 §2J1.7 - Commission of Offense While on Release - Motion made by Commissioner Breyer to publish the staff proposal, with the option of the enhancement under 18 U.S.C. §3147 at levels (2), (3) or (4); seconded by Commissioner Block. Passed.

ITEM: 8 §2K2.4 - Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes - Motion made by Commissioner Corrothers to publish technical changes only; seconded by Commissioner Breyer. Passed.

ITEM: 9 §2P1.1 - Escape, Instigating or Assisting Escape - Tabled for further staff consideration.

ITEM: 10 §2Q1.5 - Threatened Tampering with Public Water System - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioner Block; Passed.

ITEM: 11 §2Q2.1 - Specially Protected Fish, Wildlife, and Plants - §2Q2.2 - Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish Wildlife, and Plants - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioner Block. Passed.

Commissioner Nagel dissented.

ITEM: 12 §2S1.3 - Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioner Block. Passed.

ITEM: 13 §2X3.1 - Accessory After the Fact / §2X4.1 - Misprison of Felony - Motion made by Commissioner Corrothers to publish the technical amendments; seconded by Commissioner Block. Passed.

ITEM: 14 §5F5.4 - Order of Notice to Victims - motion made by Commissioner Corrothers to publish the technical amendment; seconded by Commissioner Block. Passed.

ITEM: 15 §5F5.5 - Occupational Restrictions - motion made by Commissioner Corrothers to publish the technical amendment; seconded by Commissioner Block. Passed.

ITEM: 16 §2F1.1 - Fraud and Deceit (p. 2.67) - motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioners Block and Corrothers. Passed.

ITEM: 17 Revision of Loss Values for Theft, Fraud, and Tax Loss Tables; Conforming Revision for Robbery and Burglary Loss Tables - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioners Block and Corrothers. Passed.

ITEM: 18 §2T1.1 - Tax Evasion (p. 2.139, 2.145) - motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioners Block and Corrothers. Passed.

ITEM: 19 §2T1.1 - Tax Evasion (pp. 2.139) - motion made by Commissioner Corrothers to publish staff proposal; seconded by Commissioner Breyer. Passed.

ITEM: 20 §2J1.4 - Impersonation - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioner Block. Passed.

ITEM: 21 Miscellaneous Minor Corrections/Clarifications - Motion made by Commissioner Breyer to publish staff proposal; seconded by Commissioner Block. Passed.

-- Motion made by Commissioner Block to direct the research staff to prepare prison impact statements for all amendments as required by statute; seconded by Commissioner Corrothers. Passed.

Phyllis Newton reported that the training workshop program was moving ahead with the first training date scheduled on March 13, 1989, in Washington, D.C. A memo will be circulated listing all dates and location sites. Each training session will include

approximately one-hundred participants with two probation officers, two AUSAs, and two federal defenders from each district. The Commission will pay for the training of the P.O.s; DOJ will pay for the training of the AUSA's; and the AO will pay for the training of the Federal Defenders. FJC has asked the Commission to pay for in-district training.

Charles Betsey reported on monitoring. He stated that approximately 91 percent of the guidelines cases which match those cases found in the AO's FPSSIS data file actually received a guideline sentence. In response to questions about the numbers of departures and instances of substantial assistance to the government, Phyllis Newton reported that approximately 37 percent of the cases contained a statement of reasons. It was suggested that staff might want to contribute to the Administrative Office's post-Mistretta letter to the judges and raise the issues of (1) dissatisfaction with the return rate on these statements of reasons and (2) the determination of the distinction between the P.O.'s recommendation of sentence and the actual sentence imposed by the judge.

David Scheffman gave an interim report on robbery. He announced that the final report would be completed by the February 14, 1989, Commission meeting.

-- Motion made by Commissioner Breyer to approve the October 25, 1988, minutes with option #2 and the December 13, 1988 minutes; seconded by Commissioner Corrothers. Passed. Commissioner Nagel abstained.

Chairman Wilkins announced that the next Commission meeting would be held on February 14 and 15, 1989.

Chairman Wilkins adjourned the meeting at 3:54 P.M.

Section 6371

Option Two

Section 2D2.1 is amended:

(1) by inserting the following new subsection (b):

"(b) Cross Reference

(1) If the defendant is subject to the penalties pertaining to possession of cocaine base set forth in the third sentence of 18 U.S.C. § 844(a), apply §2D1.1 as though the defendant had been convicted of possession with intent to distribute the cocaine base.";

(2) by deleting the commentary labeled "Background" and inserting in lieu thereof the following:

"Background: 21 U.S.C. § 844(a) sets forth mandatory minimum penalties for several categories of simple possession cases. When a mandatory minimum penalty is higher than the guideline sentence, the statutory minimum becomes the guideline sentence. §5G1.1(b). The cross-reference to §2D1.1 accommodates the mandatory minimum penalty for possession of cocaine base.".

(1)