

Minutes of the April 18 and April 19, 1989 U.S. Sentencing Commission Business Meeting

The meeting was called to order at 9:40 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
Steve Saltzburg, Ex Officio Member
Winston S. Moore, Staff Director
John R. Steer, General Counsel
David Anderson, Deputy General Counsel
Charles Betsey, Associate Research Director
Julie Carnes, Special Counsel
Nolan Clark, Deputy Chief Counsel
Peter Hoffman, Principal Technical Advisor
David Lombardero, Consultant - Guideline Drafting
Candy Johnson, Acting Director of Monitoring
Phyllis Newton, Associate Research Director
Andy Purdy, Deputy General Counsel
Ronnie M. Scotkin, Guideline Development Analyst
Jeff Standen, Deputy General Counsel
Michael Karam, Tax Division, DOJ
Jim Knapp, Tax Division, DOJ
Roger Pauley, Criminal Division, DOJ
Vicki Portney, Criminal Division, DOJ
Paul Borman, Federal Public Defender Representative

Chairman Wilkins suggested that discussion of the amendments for Robbery, Fraud and Career Offender be deferred until disposition of all other items. Also deferred were two pornography amendments on which Senator Helms and others had raised concern.

-- Motion made by Chairman Wilkins to add items #1, #69, #71, #98, #168, #170, and #273 to those already tentatively approved for promulgation and submission as amended to Congress; seconded by Commissioners Block and Breyer. Passed unanimously.

-- Item 12: (Commentary to §1B1.3 Relevant Conduct - Factors that Determine the Guideline Range) - deferred.

-- Item 28: (§2A3.4 Abusive Sexual Contact) - Motion made by Commissioner Block to adopt the amendment on page 16 as amended with the language "if the base offense level is determined under

(a)(1) or (a)(2)" and to raise the base level from (8) to (10); seconded by Commissioner Corrothers. Passed unanimously.

-- Item 34: (§2B1.1(b)(6) Larceny, Embezzlement, and Other Forms of Theft) - Motion made by Commissioner Corrothers to adopt staff proposal; seconded by Chairman Wilkins. Passed, 4-1. Commissioner Block voted "no."

-- Item 36: (§2B1.2 Receiving Stolen Property) - Motion made By Commissioner Block to adopt Commissioner MacKinnon's change to the guideline title; seconded by Commissioner Corrothers. Passed. Commissioner Breyer abstained.

- Motion made by Commissioner Breyer to adopt staff proposal on page 45; seconded by Commissioner Corrothers. Passed unanimously.

- Motion made by Commissioner Breyer to rescind action taken on a previous motion to adopt the title change; seconded by Commissioner Corrothers. Passed unanimously.

- Motion made by Commissioner Breyer to adopt staff proposal as first stated on page 45. Seconded by Commissioner Corrothers. Passed. Commissioner Nagel abstained.

-- Item 56: (§2B5.1 Offenses Involving Counterfeit Obligations of the United States) - Motion made by Chairman Wilkins to adopt the title change on page 57 and application notes 2 and 3 of the staff proposal; seconded by Commissioner Corrothers. Passed unanimously.

- Motion made by Commissioner Block to revisit the background commentary on counterfeiting; seconded by Commissioner Corrothers. Passed unanimously.

-- Item 66: (§2C1.1 /2C1.2 Offering, Giving, Soliciting, or Receiving a Bribe /Gratuity) - Motion by Commissioner Breyer to adopt the amendment and the additional explanation in commentary; seconded by Commissioners Block and Corrothers. Passed unanimously.

-- Item 69: (§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking) - Motion made by Commissioner Nagel to reconsider item #69; seconded by Chairman Wilkins. Motion did not carry, 2-3. Commissioners Block, Breyer and Corrothers voted "no".

-- Item 77: (Commentary to §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking) - Motion made by Chairman Wilkins to adopt proposal #2 to extend upward the drug table; seconded by Commissioners Breyer, Corrothers, and Nagel. Passed. Commissioner Block abstained.

-- Item 82: (Calculation of the Weight of LSD for Guideline Purposes) - Motion made by Commissioner Corrothers to include the issue of whether the weight of the carrier should be counted in determining the quantity of D-lysergic acid diethylamide (LSD) on the priority list of legislative issues to be presented to Congress; seconded by Commissioner Nagel. Passed unanimously.

- Motion made by Commissioner Breyer to add a statement to the commentary stating that the term "mixture" in the guidelines was the same meaning as under the Controlled Substances Act; seconded by Commissioners Block and Corrothers. Passed unanimously.

-- Chairman Wilkins added for the record that he had spoken with Commissioner MacKinnon that morning and that Commissioner MacKinnon strongly opposed any guideline amendment on this issue inasmuch as he thought the statute was controlling.

-- Item 83: (Relationship of Marihuana Plants to Marihuana - §6479 of the Anti-Drug Abuse Act of 1988) - Motion made by Chairman Wilkins to amend the guidelines to follow the requirements of the statute for all quantities above the statutory threshold while leaving the existing guideline equivalencies below that threshold; seconded by Commissioner Nagel. Passed unanimously.

-- Item 92: (§6454, §6458 and §6459 of the Anti-Drug Abuse Act of 1988) - Motion made by Commissioner Corrothers to adopt amendment #92 except (1) is made a (2) in paragraph two; seconded by Commissioner Block. Passed. Commissioner Nagel abstained.

-- Item 96: (§2D1.5 Continuing Criminal Enterprise)- Motion made by Chairman Wilkins to adopt base offense level (38); seconded by Commissioner Corrothers. Passed unanimously.

-- Item 97: (§2D1.6 Use of a Communications Facility in Committing Drug Offense) - Motion made by Commissioner Nagel to direct the monitoring staff to study telephone-counts and postpone adopting this amendment; seconded by Commissioner Breyer. Passed unanimously.

Chairman Wilkins recessed the meeting for lunch at 1:20 P.M. Chairman Wilkins reconvened the meeting at 2:25 P.M.

-- Item 101: (§2D2.1 Unlawful Possession) - deferred for later discussion.

-- Item 102: (§2D2.3 Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs) - Motion made by Chairman Wilkins to adopt levels (28), (21), and (13), with a special note on departure for more than 5 deaths; seconded by Commissioner Nagel. Motion did not carry, 3-2. Commissioners Block and Breyer voted "no."

- Motion made by Commissioner Breyer to adopt levels (26), (21), and (13), with a special note on departure for more than 5 people, and keeping the multiple counts reference in the guideline; seconded by Commissioner Block. Passed unanimously.

-- Item 117: (\$2F1.1(b)(2) Fraud and Deceit) - deferred to consider with fraud.

-- Item 119: (Issues Related to Specific Forms of Fraud) - deferred to consider with fraud.

-- Item 125: (\$2G2.3 Selling or Buying of Children for use in the Production of Pornography) - Motion made by Chairman Wilkins to adopt staff proposal of base offense level (38); seconded by Commissioners Block and Nagel. Passed unanimously.

-- Item 142: (\$2J1.7 Commission of Offense While on Release) - Motion made by Commissioner Breyer to adopt staff proposal with a (2) level increase; seconded by Commissioner Block. Motion did not carry, 2-3. Chairman Wilkins and Commissioners Corrothers and Nagel voted "no."

- Motion made by Commissioner Block to adopt staff proposal with a (3) level increase and add language to commentary noting that this is a "consecutive sentence"; seconded by Commissioner Corrothers. Passed. Commissioner Breyer abstained.

-- Item 154: (Revision of Chapter Two, Part K, Subpart 2) - deferred until later.

-- Item 160: (\$2L1.2 Unlawfully Entering or Remaining in the United States) - Motion made by Commissioner Breyer to adopt staff proposal of (4) level increase, amended to include departure for violent felony; seconded by Commissioner Nagel. Passed unanimously.

-- Item 205: (Issues Relating to Definition of Tax Loss)

-- Commissioner Corrothers recognized Nolan Clark for comprehensively presenting analyses with the guideline amendments on which he worked; Chairman Wilkins and Commissioner Nagel joined in recognizing these efforts.

- Motion made by Commissioner Corrothers to defer for further staff consideration; seconded by Commissioner Breyer. Passed unanimously.

-- Item 189: (\$2T1.1(a) Tax Evasion) - Motion made by Chairman Wilkins that tax evasion is to read (1) level plus the amount in the tax table and the commentary will read that a level was added since interest was deleted; seconded by Commissioner Nagel. Motion did not carry, 3-2. Commissioners Block and Breyer voted "no."

After further discussion, this item was tabled for further staff work.

-- Item 270: (\$5K1.2 Refusal to Assist) - Motion made by Commissioner Corrothers to strike commentary as amended for \$5K1.2; seconded by Commissioners Block and Breyer. Passed. Commissioner Nagel was not present for this vote.

-- Item 169: (Offense Levels for Certain Escapes) - tabled for further staff consideration.

-- Item 171: (\$2P1.2 Providing or Possessing Contraband in Prison) - Motion made by Commissioner Breyer to adopt staff proposal; seconded by Commissioner Corrothers. Passed, 4-1. Commissioner Nagel voted "no."

-- Item 176: (\$2Q1.6 Hazardous or Injurious Devices on Federal Lands) - Motion made by Chairman Wilkins to adopt as proposed, and under (a) (3) choose the language option that stated the "offense level"; seconded by Commissioner Corrothers. Passed unanimously.

-- Item 182: (\$2S1.1 Laundering of Monetary Instruments) - Motion made by Commissioner Corrothers to adopt staff proposal option #1; seconded by Commissioners Block and Nagel. Passed. Commissioner Breyer was not present for this vote.

-- Item 187: (Commentary to \$2S1.3 Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements) - Motion made by Chairman Wilkins to state in commentary that if b(1) applies then a(1)(c) also applies; seconded by Commissioner Breyer. Passed unanimously.

- Motion made by Commissioner Breyer to amend \$2S1.3(a)(1)(B) by striking "activity" and inserting "evasion of reporting requirements"; seconded by Commissioner Block. Passed unanimously.

- Motion made by Commissioner Breyer to adopt staff proposal with the two adopted changes; seconded by Commissioner Nagel. Passed unanimously.

-- Item 242: Proposal deleted.

-- Item 258: (Fines and Costs of Imprisonment) - no amendment adopted.

-- Item 260: (\$5F5.2 Home Detention) - Motion made by Chairman Wilkins to adopt amendment and insert "and such other times as may be specifically authorized" in place of "necessary errands" and also to review the use of home detention in three years to make sure it is working as intended; seconded by Commissioner Corrothers. Passed unanimously.

- Motion made by Commissioner Corrothers to pass the proposal on curfew; seconded by Commissioner Breyer. Passed unanimously.

-- Item 267: (\$5G1.3 Convictions on Counts Related to Unexpired Sentences) - Motion made by Commissioner Corrothers to adopt staff proposal; seconded by Commissioner Breyer. Passed unanimously.

-- Item 291: (\$1B1.3 Relavant Conduct - Factors that Determine the Guideline Range) - Motion made by Commissioner Breyer to discuss this item now; seconded by Commissioner Corrothers. Motion did not carry, 3-2. Commissioners Block and Nagel voted "no."

-- Item 292: (\$7001 of the Anti-Drug Abuse Act of 1988) - Motion made by Commissioner Corrothers to reference the Anti-Drug Abuse Act concerning first degree murder in connection with a drug trafficking offense; seconded by Commissioner Block. Passed unanimously.

-- Motion made by Commissioner Breyer to adopt the fentanyl analog amendments to conform with statute; seconded by Commissioners Block and Nagel. Passed unanimously.

-- Chairman Wilkins distributed Senator Helms' letter and all associated materials relating to items #126-128.

-- An alternative proposal for item #101 was distributed.

-- Chairman Wilkins distributed his proposal for robbery.

Chairman Wilkins adjourned the meeting at 7:06 P.M. to be reconvened on April 19, 1989, at 9:00 A.M.

April 19, 1989

Chairman Wilkins called the meeting to order at 9:15 A.M.

-- Item 243 (\$4B1.1 Career Offender) - Motion made by Commissioner Block to permit a Career Offender to receive an Acceptance of Responsibility reduction and to commit Commission resources to study Career Offender; seconded by Commissioner Breyer. Passed unanimously.

-- A discussion ensued concerning the kinds of considerations which should be made in conducting a career offender study.

-- Item 117 (\$2F1.1(b)(2) Fraud and Deceit) - Motion made by Chairman Wilkins that on page 2.67 of the Guidelines Manuel, combine (A) & (B) of paragraph (2) with a (2) level increase and combine (C) & (D) with a (2) level increase, with a minimum level of (10); seconded by Commissioner Nagel. Passed unanimously.

-- Item 33: (\$2B1.1(b)(1) Larceny, Embezzlement, and Other Forms of Theft) - Motion made by Chairman Wilkins to approve staff proposal; seconded by Commissioner Nagel. Motion did not carry, 3-2. Commissioners Block and Breyer voted "no."

-- Item 119 A: (\$2F1.1 Fraud and Deceit) - Motion made by Commissioner Corrothers to adopt the Conforming Amendments; seconded by Commissioner Block. Passed. Commissioner Nagel abstained.

-- Item 119 L: (\$2F1.2 Insider Trading) - Motion made by Chairman Wilkins to adopt recommended amendment #1; seconded by Commissioner Nagel. Motion did not carry, 3-2. Commissioners Block and Breyer voted "no."

-- Item 154: (Revision of Chapter Two, Part K, Subpart 2) - Motion made by Chairman Wilkins to adopt staff proposal on page 149, except that a machine gun with a silencer and destructive devices would be (16) instead of (12); seconded by Commissioner Corrothers. Passed unanimously.

- Motion made by Chairman Wilkins to adopt staff proposal on page 151, except that a machine gun with a silencer and destructive devices would be (16) instead of (12); seconded by Commissioner Corrothers. Passed unanimously.

- Motion made by Chairman Wilkins to narrow the table in §2K2.2(b)(1), by beginning at level (1) = 3-4 firearms and ending at level (6) = 50 or more firearms; seconded by Commissioner Corrothers. Passed unanimously.

- Motion made by Commissioner Breyer to change the (2) to (6) in §2k2.3(A); seconded by Chairman Wilkins. Passed. Commissioner Block was not present for this vote.

- Motion made by Chairman Wilkins to add to §2K2.3(a)(3) "otherwise 12"; seconded by Commissioner Nagel. Passed. Commissioner Breyer was not present for this vote, but Chairman Wilkins indicated that Commissioner Breyer said he would vote in favor of this motion.

- Motion made by Chairman Wilkins to delete on page 153, paragraph 2, the word "substantially"; seconded by Commissioner Corrothers. Passed. Commissioner Breyer was not present for this vote.

-- A discussion ensued concerning the issue of defining "relevant conduct".

-- Chairman Wilkins announced that in order to obtain Commissioner MacKinnon's vote on critical issues, the meeting might have to be

reconvened at George Washington University Hospital. Commissioner Breyer expressed his willingness to cast his own vote on Commissioner MacKinnon's behalf regarding the fraud table and robbery, after consulting with Commissioner MacKinnon by telephone.

-- **Item 126: (§2G3.2 Obscene or Indecent Telephone Communications)**

Commissioner Corrothers expressed concern about the seriousness of the offense when very small children are being influenced by such telephone or broadcast communications which have been set up for substantial commercial profit and suggested a 4-level increase rather than 2. Commissioner Breyer made a motion to raise the base offense level of §2G3.2 to (12), with a (4) level increase if it involved a minor, and with reference to the fraud table for pecuniary gain, but in no event less than (12); seconded by Commissioner Corrothers. Passed. Commissioner Block abstained.

- Motion made by Commissioner Nagel to adopt the revised staff proposal on §2G3.1 circulated the previous day; seconded by Commissioner Corrothers. Motion did not carry, 3-0. Commissioner Block was not present for this vote. Commissioner Breyer abstained.

-- **Item 101: (§2D2.1 Unlawful Possession)**

Commissioner Nagel registered an objection to the guideline development staff's pattern of presenting a single policy option in the form of an altered proposal, rather than presenting to the Commission for their consideration a range of policy options. She maintained that this effectively puts the staff in the position of deciding policy, especially when the option is often presented at the last minute, so there is little or no time for Commissioners to develop or explore their own alternatives.

- Motion made by Commissioner Breyer to allow more work to be done on this and to promulgate an amendment on cocaine base as an emergency guideline at a later date; seconded by Commissioner Block. Passed unanimously.

-- **Prison Impact and Robbery Studies:** Commissioner Block submitted the April 17, 1989, memo from Bruce Kobayashi and Eric Simon on Prison Impact Studies and David Scheffman's summary reports and data on robbery for the record.

-- Commissioner Nagel also submitted documents with the understanding that everyone who previously received these materials or will in the future be given her comments, too. Chairman Wilkins asked Commissioner Breyer to consult with Commissioner MacKinnon by telephone on issues related to robbery, the fraud table, and pornography during the break.

-- **Bank Robbery Working Group:** David Scheffman reported on the methods used in the bank robbery study, what it looked at, and why. The group used FY 1985 augmented FPSSIS data to derive time served

and compared that to estimates of time served under the guidelines.

-- Commissioner Nagel expressed her belief that the appropriate research question on bank robbery was what could be determined about past practice and that the group's use of the guideline structure as a framework precluded answering the question of whether previous attempts to define past practice provided results that were too low, as suggested by some in the field. She pointed out that she had previously requested that staff provide an analysis showing whether the guideline structure works appropriately with regard to bank robbery cases; that analysis was not done. David Rauma asked that the record reflect that Phyllis Newton, Joe Lowery, and he dissented from the bank robbery working group's report because they felt the methodology was inadequate to address the question of whether or not the guidelines are reflective of past practice. Commissioners Breyer and Block expressed their belief that the study adequately addressed the question of guideline sentencing on bank robbery in relation to past practice. David Scheffman stated that he was aware of Commissioner Nagel's request for analysis and that he had not attempted to comply because of a shortage of time and resources. Commissioner Nagel responded that the Commission should frame the policy questions to which the resources are devoted, not have the staff make those decisions.

-- §2B3.1 (Robbery) - Motion made by Commissioner Breyer to amend bank robbery with an increase in the base level from (18) to (21); seconded by Commissioner Block. Motion did not carry, 2-3. Chairman Wilkins and Commissioners Corrothers and Nagel voted "no."

- Motion made by Chairman Wilkins to adopt his proposal as circulated the previous day; seconded by Commissioner Nagel. Commissioners Block and Breyer voted "no."

-- Commissioner Breyer reported that he had spoken by telephone with Commissioner MacKinnon about the proposed amendment, found him fully informed on the information available and the issues involved, and ascertained his firm conviction that the amendment should be passed. Therefore, and in order to avoid moving the Commission meeting to the hospital, Commissioner Breyer changed his previous vote to vote in favor of the amendment on Commissioner MacKinnon's behalf.

Accordingly, the motion passed, 4-1.

-- Item 33: (§2B1.1 Larceny, Embezzlement, and Other Forms of Theft) Chairman Wilkins asked Commissioner Breyer to report on his conversation with Commissioner MacKinnon. Commissioner Breyer reported that he was convinced Commissioner MacKinnon would have voted in favor of this amendment had he been in attendance. Commissioner Breyer moved to reconsider amendment #33 and change

his vote on Commissioner MacKinnon's behalf. Passed, 4-1.

-- Item 189: (\$2T1.1 Tax Evasion) - Motion made by Commissioner Corrothers to drop interest from the tax tables; seconded by Commissioner Nagel. Passed unanimously.

-- Item 119: (Issues Related to Specific Forms of Fraud) - Motion made by Commissioner Breyer to expand the fraud tables to conform with previous motion, item #189; seconded by Commissioner Corrothers. Passed. Commissioner Block abstained.

-- Item 188: (Commentary to \$2T1.1 Tax Evasion) - Motion made by Commissioner Corrothers to include Tax Division's illustrations in the commentary; seconded by Commissioner Breyer. Passed unanimously.

-- Item 291 (B): (\$1B1.3 Relevant Conduct - Factors that Determine the Guideline Range) - Motion made by Chairman Wilkins to adopt staff proposal; seconded by Commissioners Breyer and Corrothers. Passed unanimously.

- Motion made by Commissioner Corrothers to place supplementary examples 1, 3, 4, and 5 in the commentary; seconded by Commissioner Block. Passed. Commissioner Breyer was not present for this vote.

-- Item 12: (Commentary to \$1B1.3 Relevant Conduct - Factors that Determine the Guideline Range) - Motion made by Chairman Wilkins to adopt staff proposal with DOJ language changes; seconded by Commissioners Block and Breyer. Passed unanimously.

-- Chairman Wilkins moved to give Peter and his staff, subject to Chairman Wilkins' final approval, editorial license to make any corrections and conforming changes that do not change the substance of any guidelines.

-- Motion made by Chairman Wilkins to make these guideline amendments effective, if approved by the Congress, November 1, 1989; seconded by Commissioner Corrothers. Passed. Commissioner Breyer was not present for this vote.

The Guidelines are to be submitted to Congress on May 1, 1989.

Chairman Wilkins adjourned the meeting at 4:45 P.M.