

COMMISSION MEETING

APRIL 7, 1987

The following persons attended the U.S. Sentencing Commission Meeting on April 7, 1987.

Commissioners

William W. Wilkins, Chairman  
Michael K. 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  
Kimberly Halbig  
Susan Hayes  
Peter Hoffman  
Debbie Lister  
David Lombardero  
Paul Martin  
John Shadegg  
John Steer  
Sharon Turner  
Camille Williams

Guests

Ivan Abrams, Department of Justice  
John Dubois, Department of Justice  
Peter George, Department of Justice

Commission Meeting Minutes - April 7, 1987

Chairman Wilkins called the meeting to order at 9:00 a.m., on Tuesday, April 7, 1987.

The Chairman stated that the staff revised the vulnerable victim and abduction provisions in Part A. The staff is now reviewing data and revising areas that the Commission previously discussed.

Commissioner Nagel moved to add Part Y, General Provisions or Victim Related Adjustments, to the guidelines. Three new sections would be added. The first, §Y211: vulnerable victim, would read, "If the defendant selected or targeted the victim of the offense because of the victims vulnerability due to age, physical or mental condition, increase by 2 levels." The second section, §Y212: official victim, would read, "If the victim was any law enforcement or corrections officer or any other official as defined in 18 U.S.C. § 1114, or a member of the immediate family thereof, and the crime was motivated by such status, increase by 3 levels." These first two provisions would apply throughout the guidelines. The third section, §Y213: abduction of victim, would read, "If the victim of a homicide or assault was abducted during the commission of the offense, increase by 2 levels." She also suggested that the remainder of the part be for departures. Judge Breyer amended the motion to read that there shall be no other general adjustments in Part Y that apply throughout the guidelines. Judge MacKinnon seconded. The motion passed by a vote of 5-0. Commissioner Corrothers was not present at the time. (Commissioner Robinson abstained). Commissioner Nagel stated that she would have these sections in final written form as soon as possible and suggestions would be welcome.

Commissioner Block moved to adopt the structure of Parts B through T as described by David Lombardero in the guidelines revision, dated April 5, 1987. He noted that Part A and Part X still needed more work. Commissioner Block noted that Mr. Lombardero's revision included changes voted on by the Commission since the last revision, but not any made since April 5.

Commissioner Block stated that some substantive changes needing approval were included in the revision. He stated that the specific offense characteristic in §E221(b), for robbery, had been added to make it parallel the extortion guideline in §B232. He also noted that §G231(b)(1) would parallel §G222(b)(2) to place a minimum increase of 5 levels for pecuniary gain. He stated that a cross-reference to accessory after the fact had been added as (b)(2) to §J218, bribery of a witness. This change would parallel §J212, obstruction of justice, and the guideline for perjury, §J213. Commissioner Block proposed that the Commission accept these changes and the structure as described in

Parts B through T. Commissioner Nagel seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Commissioner Block suggested that the adjustment for a stolen firearm in §B211 be consistent with a similar adjustment in §K221(b)(1) and §K222(b)(1). He moved that the increase for this specific offense characteristic in all of these sections be 1 level. Commissioner Nagel seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained). Judge MacKinnon encouraged the Commissioners to be vigilant in eliminating similar inconsistencies.

The Commission discussed the manner in which guidelines were to be reviewed. Commissioner Robinson moved to work through the draft guidelines in conjunction with a summary of the revisions made for each section. The motion failed for lack of a second.

The Commission discussed the due date for the guidelines. John Steer described the statutory timetable.

### Part C: Public Officials

Commissioner Gainer introduced Peter George, Deputy Chief of the Public Integrity Section of the Department of Justice. Mr. George explained proposed changes in the guidelines for bribery and corruption offenses.

Commissioner Corrothers introduced proposed changes in §§C211 and C212. She stated that §C211(b)(1) remains unchanged and §C211(b)(2) is a substitute paragraph that shows more clarity and specificity. She stated that paragraphs three and four had disposed of the words "significant" and "substantial". Commissioner Block suggested making a structural change so that the guideline would require that the greater of the first two specific offense characteristics be applied.

Mr. George and Commissioner Gainer encouraged increasing the base offense level for bribery due to public outcry over current practice, especially in the lesser offenses. Commissioner Gainer stated that the public must be assured of the integrity of the criminal justice system.

Judge Breyer suggested that offense levels not be mandated by public opinion. He proposed adding commentary that would substitute for the itemized increases in the draft guideline.

Commissioner Corrothers moved to adopt the proposed guideline, §C212, with Commissioner Block's amendment concerning use of the greater of the two specific offense characteristics. Judge MacKinnon seconded. The motion failed by a vote of 1-5. Commissioner Corrothers voted yes. Judges Wilkins, MacKinnon and Breyer, and Commissioners Block and Nagel voted no.

(Commissioner Robinson abstained). Judge Wilkins stated that he supported the proposal in principle, but suggested the Commission revisit this section.

#### Part G: Sexual Offenses

Commissioner Corrothers offered a proposal containing the changes made in §G231 since the previous draft. She stated that under this proposal the base offense level had increased from 6 to 10. The term "production" had been inserted in §G231(b)(1) and §G231(b)(2) had been changed to include all violent and some non-violent offenses. Also added was a specific offense characteristic for organized crime. Commissioner Corrothers called upon Mr. Abrams and Mr. Dubois, special attorneys from the Obscenity Task Force of the Criminal Division of the Department of Justice, to discuss this area with the Commission.

Mr. Abrams encouraged the Commission to adopt guidelines that would effectively offset the pecuniary gain that is the basis of pornography offenses. He suggested that the guidelines specifically target organized crime, the most common instigators of these offenses.

Commissioner Block suggested keeping the base offense level of 6 and adding a specific offense characteristic for pecuniary gain similar to the one added in §G222 earlier. Judge Breyer suggested adding commentary to insure the section pertains to all aspects of production and distribution. He also recommended adding a cross-reference to criminal enterprise in place of a specific offense characteristic.

Judge Wilkins summarized an alternative revision to §G231 to: keep the base offense level at 6; change (b)(1) to read, "if the offense involves acts of distribution for pecuniary gain, increase according to the fraud table, but in no event by less than 5 levels"; for the purposes of §G231(b)(1), 'distribution' will be defined in the commentary to include production, transportation and sales; §G231(b)(2) would be changed to read, "if the offense involves material that portrays sadomasochistic conduct or other depictions of violence, increase by 4 levels; and §G231(b)(3) would cross-reference Part E, organized crime, to be used if the resulting offense level is greater."

Mr. Abrams encouraged the base offense level be set at 10, with a decrease for offenses not involving distribution for pecuniary gain. Judge Breyer stated that this was inconsistent with the current guidelines structure. Judge Wilkins suggested adding commentary to the section to read, "because most federal prosecution is directed to acts related to distribution, the base offense level usually should be 11."

Commissioner Nagel moved that these changes summarized by Judge Wilkins be adopted. Commissioner Block seconded. The motion passed by a vote of 5-1. Judges Wilkins, MacKinnon, Breyer and Commissioners Nagel and Block voted yes. Commissioner Corrothers voted no. (Commissioner Robinson abstained.)

Judge Breyer moved to adopt Judge Wilkins' suggestion that the base offense level be kept at 6 with commentary added concerning the usual base offense level. Commissioner Nagel seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

#### Part H: Civil Rights

Commissioner Corrothers discussed changes made to Part H concerning civil rights. She recommended that the specific offense characteristic concerning public officials be increased from 2 to 5 because of the nature of their status in the community. She recommended increasing the base offense level for §H214 from 10 to 12.

Commissioner Corrothers moved to change the title of §H213 to read, "Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination." Commissioner Nagel seconded the motion. The motion passed by a vote of 6-0. (Commissioner Robinson abstained.)

Judge Breyer recommended adding commentary to the section to clarify application in order to be consistent with a similar change in the peonage guideline made earlier.

The Commission discussed the structure and level of increase in the specific offense characteristic for public officials. Commissioner Corrothers moved to increase the offense level for public officials in §§H211, H212, H213, and H215 from 2 to 4. Commissioner Nagel seconded. The motion passed by a vote of 5-0. Judges Wilkins, MacKinnon, Breyer and Commissioners Corrothers and Nagel voted yes. (Commissioners Block and Robinson abstained.)

Commissioner Corrothers suggested amending the commentary to §§H211 and H212 to include informally organized groups and others who engaged in intimidating activities, as well as commentary concerning activity intended to deprive a victim of his civil rights.

Commissioner Corrothers moved that the base offense level for §H213 be increased from 10 to 12. Judge Breyer stated that an offense level of 12 would be beyond the statutory maximum. Judge Breyer moved that the base offense level for §H213 remain

at 10. The Commission should then recommend to Congress that the statutory maximum be increased. Commissioner Nagel seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

#### Chapter 4: Sentencing Procedures and Plea Agreements

The Chairman suggested that the Commission clear up the few remaining points in Chapter 4 so that the staff could complete its work. Judge MacKinnon moved that the word "shall" be changed to "may" on page 5 of the draft concerning the policy statement for stipulations. Judge Breyer seconded the motion, which passed by a vote of 4-2. Judges MacKinnon, Breyer and Commissioners Nagel and Block voted yes. Judge Wilkins and Commissioner Corrothers voted no. (Commissioner Robinson abstained).

Judge MacKinnon moved that §A413, resolution of disputed factors (currently §6A1.3), be altered to switch (a) and (b), and have (b) read, "The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence." He noted that this change would eliminate the need for §A414. Judge Breyer seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Judge MacKinnon recommended deleting §A414 and adding a citation to 18 U.S.C. §3661 in the commentary. The line of commentary for §A413 would read, "If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the party of its tentative finding and afford an opportunity to point out any oversight or error before sentence is imposed." Judge Wilkins agreed.

#### Chapter 6

Judge MacKinnon proposed several grammatical and stylistic changes to Chapter 6 and the commentary. Judge Wilkins supported these changes.

Judge MacKinnon moved that Chapter 6 be adopted as written with his proposed amendments. Commissioner Block seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

The meeting was adjourned until 1:30 p.m.

Judge Breyer recommended deleting "stated on the record" from §B412(b)(2) and §B412(c)(2) so that they read, "departs from the applicable guideline range for justifiable reasons." He stated that requiring a recorded statement may possibly cause problems. Judge Wilkins suggested making some commentary changes.

Commissioner Robinson submitted his list of omitted special offense characteristics. (See attached).

#### Part D: Drugs

Commissioner Nagel moved that a reference to weapons be included in Part D on drugs. Commissioner Corrothers seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Commissioner Nagel stated that a pharmaceutical expert at the National Institute of Drug Research informed her that there are errors in the drug equivalency tables in Part D. These errors are consistent with errors in the statute. She suggested that the Commission may want to address these errors in the future.

Commissioner Robinson moved that an adjustment for physical injury be included in the guideline for continuing criminal enterprise in Part D. He recommended using the language of the general provision for physical injury included in the January draft. Commissioner Corrothers seconded the motion. The motion failed by a vote of 2-5. Commissioners Robinson and Corrothers voted yes. Judges Wilkins, MacKinnon, and Breyer, and Commissioners Nagel and Block voted no.

#### Part E: Criminal Enterprises and Racketeering

Commissioner Robinson moved that adjustments be included for weapons and abduction to cover all of Part E. The language for these adjustments would be the same as the general adjustments in Part Y of the January draft. The motion failed for lack of a second.

Commissioner Gainer suggested that the cross-reference in §E215 to §B232, forcible extortion, be changed to prevent non-forcible extortion from being overlooked. The Commission discussed the best way to meet this problem stylistically.

Judge Breyer suggested that the cross-reference be omitted and add commentary that would read, "This section makes two distinctions to cover a wide range of possible behavior in terms of threat. It may be, for example, in certain instances, particularly where organized crime is involved, that a threat to



destroy property, even though not by force, is equivalent in seriousness to a threat to destroy by force. In such a case the judge should apply the higher level." The Commission agreed that this language was acceptable for the commentary.

Commissioner Gainer suggested reinstating §E255, "prohibited service by convicted persons in connection with an employee benefit plan," and §E258, "prohibited service by convicted persons in labor organizations, employee associations and as labor relations consultants," from the January draft. The Commission discussed the need for more information concerning these crimes in order to provide a narrower range. The Commission agreed to revisit Part E in order to reinstate §§E255 and E258 and adopt appropriate base offense levels.

Commissioner Robinson questioned the timetable imposed on the Commission. Commissioner Nagel stated her desire to complete the work of the Commission, such as the omitted guidelines in Part E, by May 1.

Commissioner Robinson stated that, because he viewed the guidelines as an integrated package, he preferred to submit them to Congress all at one time. He moved that in the absence of any possibility of delay, that the Commission commit itself to the April 13 deadline. The motion failed for lack of a second.

#### Part F: Fraud or Deceit

Commissioner Block noted that since the general adjustments would take precedence over the specific offense characteristics, the Commission needs to take out the adjustment for vulnerable victim everywhere it appears.

Commissioner Block compared fraud under §F211 (b)(2) and insider trading under §F212. He noted that comparative sentences imposed using the fraud guideline for insider trading were four times the actual sentence imposed in 1985. Commissioner Nagel stated that the difference would not have been as great if more recent cases had been used.

Commissioner Gainer discussed the specific offense characteristics under §F211(b)(2) and recommended that they be cumulative. He also recommended that use of a foreign bank account be allowed as an adjustment even if the amount involved more than \$100,000.

Judge MacKinnon discussed common offenses prosecuted under the fraud statute and recommended making the aggravating factors listed in §F211 (b)(2) cumulative with a limit of a 4 level increase. The Commission discussed the manner in which the guideline would be applied.

Judge Breyer stated his concern for consistency between the fraud and property guidelines.

Commissioner Corrothers moved that the maximum increase for specific offense characteristics outlined in §F211 (b)(2) be changed from 9 to 10. Commissioner Block seconded the motion. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

Part G: Offenses Involving Prostitution, etc.

Commissioner Robinson recommended including various aggravating factors, such as abduction, weapons and physical injury, in the guidelines for Part G. Judge Breyer stated that he believed that the adjustment for use of physical force or coercion, in §G212(b)(1), took these into account. Commissioner Robinson moved to include adjustments for abduction, physical injury or weapons in the guidelines within the section on sexual exploitation of a minor. Commissioner Corrothers seconded. Commissioner Block noted that the data indicated that these were rarely occurring factors in the sentencing for these offenses. The motion failed by a vote of 2-5. Commissioners Robinson and Corrothers voted yes. Judges Wilkins, MacKinnon and Breyer, and Commissioners Nagel and Block voted no.

Part H: Civil Rights

Commissioner Robinson moved that Part H include adjustments for weapons, abduction and physical injury. Commissioner Corrothers seconded. The motion failed by a vote of 2-5. Commissioners Robinson and Corrothers voted yes. Judges Wilkins, MacKinnon and Breyer, and Commissioners Nagel and Block voted no.

Part J: The Administration of Justice

Commissioner Robinson moved that Part J include adjustments for weapons, physical injury and abduction.

Judge Breyer noted that the data for obstruction of justice did not show a distinction in the length of sentences where these factors existed and where they did not. He recommended that such adjustments only be included in the guidelines where they play an important role in a large number of cases. Commissioner Robinson stated that this placed too much reliance on data. Commissioner Corrothers suggested that the base offense level, which presumably included the weapons, be lowered and include an adjustment for weapons.

Judge MacKinnon moved that the base offense level for §J212, obstruction of justice, be increased from 10 to 12. Commissioner Block seconded. The motion passed by a vote of 4-2. Judges Wilkins, MacKinnon and Commissioners Nagel and Block voted yes. Judge Breyer and Commissioner Corrothers voted no. (Commissioner Robinson abstained).

Commissioner Corrothers seconded Commissioner Robinson's earlier motion concerning adjustments to Part J. The motion failed by a vote of 2-5. Commissioners Corrothers and Robinson voted yes. Judges Wilkins, MacKinnon and Breyer, and Commissioners Nagel and Block voted no.

Commissioner Gainer recommended alterations to §J215, failure to appear by a material witness. He suggested a base offense level of 6 for a felony, 4 for a misdemeanor, and the inclusion of a 3 level increase if the underlying case is adversely affected by the offense.

Commissioner Nagel agreed with this proposal, but noted that distinctions between felonies and misdemeanors had not been made elsewhere. She recommended that Commissioners discuss this guideline informally and draft a proposal to be submitted for a vote in a later meeting.

Commissioner Block recommended changing the commentary for §J212 to reference the departure section. Other stylistic changes were made to Part J.

#### Part K: Offenses Involving Public Safety

Commissioner Robinson stated his concern that there were no adjustments for §§K211 and K212. He stated that regulatory offenses resulting in physical injury deserve a greater penalty. The Commission discussed the manner of distinguishing regulatory and more serious offenses in Part K.

Commissioner Robinson moved that an adjustment be added to Part K for physical injury patterned after the general adjustment included in the previous draft. Judge Breyer recommended including this distinction in the commentary because physical injury was only involved in 9 out of 162 cases in the data. Peter Hoffman explained the evolution of this guideline. Commissioner Robinson's motion failed for lack of a second.

Commissioner Gainer stated that the Lands Division was concerned over the omission of §K232, unlawfully transporting hazardous material in commerce, in the latest draft. Judge Breyer noted the lack of data to serve as guidance for an appropriate base offense level. John Shadegg explained the reasoning behind the base offense level in the earlier draft of §K232. He noted that midnight dumping was better covered under

§Q212.

Judge Breyer moved to add §K232 and include a cross-reference to §Q212. Judge MacKinnon seconded. The motion passed by a vote of 5-0. Commissioner Block was not present at the time. (Commissioner Robinson abstained).

Part L: Immigration

Commissioner Robinson moved that Part L include adjustments for abduction, physical injury, and weapons. Judge Breyer suggested cross-referencing Part A, offenses against the person. Commissioner Robinson stated that he saw a problem with using one guideline or the other, but not both. Commissioner Corrothers seconded Commissioner Robinson's motion. The motion failed by a vote of 2-5. Commissioners Robinson and Corrothers voted yes. Judges Wilkins, MacKinnon and Breyer, and Commissioners Nagel and Block voted no.

Commissioner Block requested that the commentary for Part L reference the section for departures with respect to the proposed adjustments.

Part M: National Defense

Commissioner Gainer asked for clarification on the deletion of distinctions in the guidelines for espionage and treason where national security information had been compromised. He stated that the base offense levels for these offenses, by themselves, may be too high to be prosecuted.

Judge Breyer stated that distinctions were made in the guidelines in accordance with statutory distinctions.

Commissioner Gainer noted that the guidelines for sabotage were missing from the current draft.

Judge MacKinnon recommended reinstating the four guidelines on sabotage and their commentary as they appeared in the January draft. Judge Breyer recommended that the Commission not create base offense levels without serious consideration. Judge Wilkins noted that it might be unwise to include guidelines for treason and espionage, but not for sabotage.

Commissioner Gainer stated that he would request a draft guideline for sabotage from the Internal Security Section of the Department of Justice. The Commission could decide the issue after reviewing this proposal.

Judge MacKinnon asked for clarification on the distinction in base offense levels for §M222, gathering national defense information, and §M223, transmitting national defense

information. Judge Breyer recommended asking the general counsel for the CIA to propose a draft of these guidelines. He discussed the statutory distinctions and the matching guidelines.

Commissioner Gainer stated that the Justice Department would prefer that the lesser included offenses be reinstated because there is no need to disclose classified information in the prosecution of such offenses. He stated that he would ask the Internal Security Division to draft a proposal on sabotage in conjunction with the staff members who worked on this section.

#### Part N: Food, Drugs, Agricultural Products and Odometer Laws

Commissioner Robinson recommended that Part N include adjustments for abduction, physical injury, and weapons.

Commissioner Gainer noted that §N232 in the January draft, unsafe consumer products, had been omitted from the current draft. The staff stated that this guideline had been omitted for lack of data.

Judge Breyer recommended that the Commission only adopt guidelines where there is present data available and include guidelines as soon as data become available. Commissioner Gainer stated that the Justice Department's view was that guidelines would aid in the prosecution of these offenses and, therefore, would increase the amount of data available.

#### Part P: Prisons

Commissioner Robinson recommended that physical injury, and weapons be included as adjustments in §P211.

Commissioner Gainer recommended the Commission reinstate §P213 from the January draft, an officer permitting escape, as a useful lesser included offense. Commissioner Corrothers suggested revisiting this guideline when Alan Chaset could brief the Commission on the rationale for omission of this guideline.

#### Part Q: The Environment

Commissioner Nagel noted that the Justice Department began aggressive prosecution of environmental crimes in the last three or four years with the creation of a new division. She stated that the data are lacking because of this, but that the Commission could justify including guidelines based on the current approach.

Commissioner Gainer stated that he would ask staff from the Lands Division to attend the next meeting to brief the Commission on Part Q.

## Part R: Antitrust

Commissioner Block suggested adding commentary in Part R to state that bid-rigging normally receives a higher sentence under current practice than price-fixing. He also stated that David Lombardero received more recent data indicating that the average fine imposed in these offenses was \$20,000. The Commission agreed to these commentary changes.

## Part S: Money Laundering

Commissioner Gainer requested that the Commission revisit this part after he has a chance to consult Justice Department staff on the subject.

## Part T: Taxation

David Lombardero discussed the guidelines in Part T and some of the concerns expressed by the Department of Justice. Commissioner Nagel stated that the Commission needed to address the departure for criminal purpose with respect to tax evasion.

Judge MacKinnon stated that he did not believe a 2 level increase was adequate for the specific offense characteristic of criminal activity.

Commissioner Block moved that the increase for §T211(b)(1) remain at 2 levels, but if the resulting offense level is less than 12, increase to 12. Commissioner Nagel seconded. The motion passed by a vote of 5-0. Judge Breyer was not present at the time. (Commissioner Robinson abstained).

David Lombardero discussed the commentary for tax evasion concerning criminal tax deficiency. Commissioner Nagel moved that the commentary to Part T include "deficiencies resulting from more than one year are to be added regardless of whether the defendant is convicted of multiple counts." Commissioner Block seconded. The motion passed by a vote of 5-0. Judge Breyer was not present at the time. (Commissioner Robinson abstained).

## Part J

Peter Hoffman discussed alternatives to §J215, failure to appear as a material witness, that Commissioner Gainer had expressed concerns about, and submitted a proposed draft. He stated that a felony/misdemeanor distinction had been made in §§J216 and J217 as well as the statutes for those offenses. The Commission discussed the best way to approach this problem stylistically.

Commissioner Corrothers moved to include a distinction for felonies and misdemeanors in §J215 as proposed by Mr. Hoffman. Judge MacKinnon seconded. The motion passed by a vote of 4-1. Judges Wilkins, MacKinnon and Commissioners Corrothers and Block voted yes. Commissioner Nagel voted no because she wished to wait for Judge Breyer to return before voting. Judge Breyer was not present at the time. (Commissioner Robinson abstained).

The Chairman distributed Parts A, B and C for Commission review at the next meeting on Wednesday, April 8, at 9:00 a.m. The meeting was adjourned.