

COMMISSION MEETING

AGENDA

APRIL 8, 1987

The following persons attended the U.S. Sentencing Commission Meeting on April 8, 1987.

COMMISSIONERS

William W. Wilkins, Jr., Chairman  
Michael 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  
Russell Burress  
Susan Hayes  
Peter Hoffman  
Debbie Lister  
David Lombardero  
Paul Martin  
John Shadegg  
Sharon Turner  
Camille Williams

Guests

Mr. David Beier  
Committee on the Judiciary  
U.S. House of Representatives

Mr. Thomas Hutchinson  
Committee on the Judiciary  
U.S. House of Representatives

Mr. Judd Starr, Lands Division, DOJ  
Mr. Ray Mushal, Lands Division, DOJ

Mr. Michael P. Walls, Staff Attorney  
Office of General Counsel  
Chemical Manufacturers Association

Richard M. Cooper,  
Chemical Manufacturers Association

Williams Connolly  
Chemical Manufacturers Association

Commission Meeting Minutes - April 8, 1987

Chairman Wilkins called the meeting to order at 9:00 a.m., on Wednesday, April 8, 1987.

§§A221-A222: The Assault Guideline

The Chairman stated that the murder guideline has been moved from the homicide section to the assault section. The Chairman also noted the change in the assault section where a weapon is used and bodily injury occurs, the cumulative adjustment will not exceed 8 levels. Commissioner Block stated that David Lombardero's review of data on the subject warranted this change.

The Commission discussed the cumulative adjustments and maximum offense levels for the assault section. Commissioner Nagel stated her opposition to any maximum level in §§A221 & A222. David Lombardero explained the data which supported the decision to place the maximum at an 8 level increase. Commissioner Nagel moved that §A221(3) and §A222(3) Specific Offense Characteristics be changed to read, "shall not exceed 9 levels." Commissioner Block seconded. The motion passed by a vote of 5-1. Commissioner Corrothers voted no. (Commissioner Robinson abstained).

§§A241-A242: The Kidnapping Guideline

Judge Wilkins discussed specific offense characteristic (4) in the kidnapping guideline for release of the victim. On a motion by the Commission, the staff had included an increase of 2 levels if the victim was not released before thirty days, an increase of 1 level if the victim was not released before seven days and a decrease of 1 level if the victim was released within 24 hours. Commissioner Gainer suggested changing the provision to increase the offense level on a "per day" basis. Commissioner Nagel recommended replacing the specific offense characteristic with commentary recommending sentencing at the top of the range when the victim is held for a longer duration. Judge Wilkins stated that a decision on this specific offense characteristic should be delayed until the tables could be reviewed the next day.

Part O: Environmental Offenses

Commissioner Gainer introduced Mr. Starr, and Mr. Mushal from the Lands Division of the Department of Justice. Judge Wilkins called upon Mr. Starr and Mr. Mushal to discuss environmental offenses.

Commissioner Nagel asked to have a vote of appreciation for Mr. Starr and Mr. Mushal. They have met with the Commission many times throughout the year upon immediate request in order to

assist the Commission.

Mr. Starr discussed the guideline for recordkeeping violations and encouraged the Commission to adopt a base offense level of 8 for §Q213. Commissioner Block suggested that the fine tables be increased to effect the same purpose.

Mr. Starr recommended that a specific offense characteristic be included in §Q211 for situations where serious bodily injury or death occurs. Judge Breyer stated that the commentary for the section included that characteristic as a reason for departure.

Mr. Walls, Mr. Cooper and Mr. Connolly from the Chemical Manufacturers Association were called in to provide an alternative viewpoint on Part Q. Judge Breyer discussed the provisions that had been recommended by the representatives from the Lands Division. Mr. Cooper discussed reasons for keeping the base offense level at 6. As a possible compromise, Judge Breyer suggested splitting the base offense level. The base offense level would be 6 if "simple" recordkeeping violations were involved and a base offense level of 8 otherwise. Commentary on this section would state that "simple" refers to a reporting violation that the violator did not know and did not have good reason to believe would cause significant harm to the environment.

Summarizing the discussion on Part Q, Judge Wilkins stated that §Q215 would be absorbed into §§Q212 & Q213 with commentary changes. He stated that the compromise on §Q212 referring to "simple" recordkeeping violations was appropriate. For consistency, the base offense would remain an 8, but would include a final specific offense characteristic for "simple" recordkeeping violations with a decrease of 2. The word "public" would also be omitted from the specific offense characteristic dealing with disruption, evacuation or cleanup to read "substantial expenditures".

Judge Wilkins suggested that specific offense characteristic (3) of §Q212 be changed to provide an increase of 4 levels for disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, and a separate offense characteristic be provided for ongoing, continuous, or repetitive discharge with a 2 level increase.

Judge Breyer stated that in order to remain consistent with other guidelines, the base offense level for §Q213 should be 6. He recommended including commentary to explain why there is no decrease for simple recordkeeping violations.

Judge Wilkins stated that specific offense characteristic (b)(2) in §Q213 should be raised to 11, with explanatory commentary, if the base offense level is to be changed to 6.

Specific offense characteristic (b) (3) should be changed to parallel the change made in §Q212. Judge Wilkins also asked that the commentary for §§Q212 & Q213 be changed to eliminate guided departure when mere negligence is the cause of harm. A concluding paragraph in the commentary should reference the adequacy of the criminal history category when the defendant has engaged in similar misconduct as established by a civil adjudication or failure to comply with an administrative order.

Commissioner Block moved to have the recommendations of Judges Wilkins and Breyer made to Part Q. Commissioner Nagel seconded. The motion passed by a vote of 6-0. (Commissioner Robinson was not present at the time).

#### Part P: Offenses Involving Prisons

Alan Chaset pointed out several stylistic corrections that should be made to the commentary of Part P.

Commissioner Gainer asked to have §P213, the guideline for a correctional officer allowing a prisoner to escape, reinstated. Judge Wilkins suggested that correctional officers be singled out as a specific offense characteristic under §P211. Commissioner Block stated that the reason it had been omitted was due to the 2 level increase in Chapter 3 for abuse of position of trust. Commissioner Corrothers asked to have any decision delayed until she could speak with Mr. Chaset about the reason the Bureau of Prisons had recommended the offense level for such an offense be placed at 23.

#### Part B: Offenses Involving Property

David Lombardero discussed the changes made in the latest version of Part B. Mr. Lombardero stated that specific offense characteristic (b) (5) of §B211 involving mail had been changed from a 1 level aggravator to a minimum offense level of 6. A minimal planning characteristic was added to §B212 (b) (2) to make it parallel with other property offense guidelines. A specific offense characteristic for firearm possession was added, per Commission request, in §§B221 through B223 (burglary and trespass). An 8 level cumulative increase maximum was placed on the specific offense characteristics of firearm possession and resulting injury for robbery and extortion, §§B232 & B233. Mr. Lombardero pointed out other stylistic changes made.

Judge MacKinnon pointed out a potential conflict between the robbery guideline and 18 U.S.C. §2113(e) dealing with robberies which result in a death. Mr. Lombardero read §2113(e) and agreed that the minimum sentence for such an offense is ten years. A suggestion was made to cross-reference the homicide guideline in order to make such offenses consistent with other felony murders charged under 18 U.S.C. §1111.

Judge Breyer suggested eliminating the specific offense characteristic of death, §B231(b)(6), in the robbery guideline and including commentary to instruct the judge that if there is a violation of 2113(e) involving the death of a person that the judge should refer to the first degree murder provision. The Commission and the staff discussed the reasons behind the wording of §B231 and several proposals to correct perceived problems.

Judge Wilkins suggested including commentary to §B231 to cross-reference the guideline for homicide when the robbery conviction is based on 18 U.S.C. §2113(e). When a death occurs in robberies not covered under §2113 the commentary should recommend departure.

Judge MacKinnon moved to place specific offense characteristic (b)(6), concerning convictions under 18 U.S.C. §2113(e), in the commentary and add that death in convictions under other statutes is a reason to depart. The statutory index would reference this. Commissioner Block seconded the motion. The motion was passed by a vote of 5-2. Judge Wilkins and Commissioner Robinson voted no.

Judge Wilkins moved that §B221, for burglary of a residence, include a minimal planning characteristic increasing the offense level by 2 to be consistent with §B222. Judge Breyer stated that he considered such specific characteristics inconsistent with the overall structure of the guidelines. Commissioner Corrothers seconded the motion. The motion passed with a vote of 4-3. Judge Breyer and Commissioners Nagel and Block voted no.

Commissioner Gainer, at the request of the Organized Crime Section of the Department of Justice, recommended a modification of the forcible extortion guideline, §B232, or the commentary to capture the seriousness of a threat to put an organization out of business. He stated that he would have someone involved with labor racketeering prosecutions talk to David Lombardero about a possible modification.

Commissioner Block moved that the maximum cumulative increase for possession of a firearm and bodily injury in the guidelines for robbery and extortion, §§B231 & B232, be changed from 8 to 9 to be consistent with a similar change made in the assault guideline. Commissioner Nagel seconded. The motion passed by a vote of 6-0. (Commissioner Robinson abstained).

#### Part D: Offenses Involving Drugs

Judge Wilkins discussed changes made in Part D. He pointed out an increase in the base offense level of §D215 (a)(1) to 32 to meet with statutory requirements. He also asked for future discussion of §D218, the guideline for managing a drug establishment, suggesting the base offense level of 16 may be too

low. Judge Wilkins also pointed out a change to the last sentence of the first paragraph of the commentary on the guideline for §D214, attempts and conspiracies, omitting the requirement that the defendant be the leader of the conspirators.

Commissioner Nagel suggested that the Commission make a note in the report to Congress that the Commission discovered anomalies in the drug tables due to statutes which mandate the treatment of less serious offenses with higher severity.

#### Part X: Other Offenses

The Commission discussed the structure and offense characteristics of the general conspiracy guideline, §X211. Judge Breyer reviewed the drafting history of the guideline and discussed the convictions which are expected to fall within this guideline. He suggested a reduction of 3 levels for not completing the offense which is the subject of the conspiracy.

Commissioner Nagel recommended different reductions for voluntary and involuntary withdrawal of completion of the offense. The Commission discussed how the guideline would apply to various hypothetical offenses and how best to modify it. Judge Breyer moved that the reduction for voluntary withdrawal under the role in the offense section be moved to the attempted conduct guideline and include language to insure that withdrawal due to factors beyond the defendant's control would be treated the same as if the conspiracy had been completed. The amount of the level reduction would be decided at a later time. Commissioner Robinson recommended that some reduction be given in the offense level even when the withdrawal from the attempted offense is fortuitous. Commissioner Block seconded Judge Breyer's motion. The motion passed by a vote 5-1. Commissioner Nagel voted no. (Commissioner Robinson abstained).

Commissioner Robinson moved for a 2 level decrease in §X211 for withdrawal for any reason from an unsuccessful attempt or conspiracy in order to reflect almost unanimous state practice. Commissioner Corrothers seconded the motion. The motion failed by a vote of 2-5. Commissioner Robinson and Corrothers voted yes.

#### Chapter 5: Determining the Sentence

Judge Wilkins called upon Peter Hoffman to discuss a proposal for revising split sentencing, supervised release, and intermittent and community confinement in Chapter 5. Mr. Hoffman stated that his proposal allowed straight probation for offenses with a minimum sentence of zero months. When the minimum sentence for the offense is 1-6 months, his proposal would allow probation in conjunction with prison alternatives (community confinement, intermittent confinement and home detention) or

imprisonment with a split sentence.

The commission discussed when a judge could apply alternatives to imprisonment. Commissioner Nagel stated her desire to have home detention removed as an alternative when the offense level was 7 or 8. Commissioner Corrothers pointed out the amount of comment adverse to restrictions on alternatives to incarceration and suggested addressing those concerns. Commissioner Nagel stated that mandating incarceration for such offense levels met certain policy objectives. Judge Breyer suggested a possible alternative for offenses up to level 12 to decrease the sentence by half and substituting supervised relief.

Judge MacKinnon noted that the criminal statute provides that any person may be given probation unless the offense to which he has been convicted of is a class A or class B felony. He suggested allowing probation in sentences up to 12 years to place 28 U.S.C. §994(j) in conformity with 18 U.S.C §3561.

Judge Wilkins stated that he had just received an unsolicited letter from the U.S. Department of Justice on the issue of probation and the application of 18 U.S.C. §3561. Commissioner Gainer stated that the letter was drafted by the Appellate Legislative Section of the Criminal Division to explain the statutory provisions for probation in light of their intent and history.

Judge Breyer stated that if the proposal is adopted the Commission should be prepared to state that offenses at or above level 9 which are denied probation are "serious" as required by 28 U.S.C. §994(j). He gave examples of such offenses.

Commissioner Nagel suggested that the Commission adopt all of Mr. Hoffman's proposal with the exclusion of the home detention provision.

Commissioner Gainer asked for clarification on the schedule of substitute punishment provision in Chapter 5.

Judge Wilkins moved that Mr. Hoffman's entire proposal be adopted by the Commission. Judge Breyer seconded the motion. The motion passed by a vote of 5-1. Commissioner Nagel noted that she reluctantly voted yes due to the home detention provision. Commissioner Robinson voted no. Commissioner Corrothers abstained.

Judge Wilkins stated that the next meeting would be on April 9, 1987 at 9:30 a.m. The meeting was then adjourned.