

COMMISSION MEETING

SEPTEMBER 15, 1987

The following persons attended the U.S. Sentencing Commission Meeting on Tuesday, September 15, 1987.

Commissioners

William W. Wilkins, Chairman  
Michael K. Block  
Stephen G. Breyer  
Helen G. Corrothers  
George E. MacKinnon  
Ilene H. Nagel  
Paul H. Robinson

Staff

Alan Chaset  
Kim Halbig  
Peter Hoffman  
David Lombardero  
Sharon Turner  
Camille Williams

Commission Meeting Minutes - September 15, 1987

Chairman Wilkins called the meeting to order at 2:30 p.m.

David Lombardero explained that since the Guidelines had undergone further field testing by probation officers and further review by Commission staff, there were areas in the commentary that needed changes and clarification. He and Peter Hoffman prepared a redraft of the commentary. Most of the suggested changes involved restructuring the existing commentary, but there were also some terms which needed further explanation.

Commissioner Block suggested including a transmittal letter in the revised draft explaining the new revisions and stating the Commission's intent not to alter the Guidelines. Judge Breyer agreed, suggesting that the transmittal letter state that the intention was to reorganize and clarify, particularly areas where testing has identified ambiguities. There was no intent to make any significant substantive change contrary to the Commission's intent in the initial draft."

The Chairman emphasized that the Commission should not write commentary that changes the substance of the Guidelines. The Commission proceeded to consider certain changes individually:

Chapter 1

The Commission first discussed the fact that as written the Guidelines apparently did allow for acceptance of responsibility to apply in situations involving career offenders and criminal livelihood. The decision was made not to make any change at this time, but rather to revisit the issue as a possible amendment to the Guidelines.

Chapter 2, Part A

The Commission discussed whether the words "reckless" and "criminal negligence" should be defined in the Guidelines, but decided not to do so at this time.

David Lombardero recommended adding a sentence in the commentary to Chapter 1, Part B that states, "List of statutory provisions are not exclusive." Chairman Wilkins suggested highlighting this in bold print.

## Chapter 2, Part B

There was a suggestion to add commentary to §2B1.1 stating that the Commission notes that its data shows that when a credit card is stolen with intent to use, the average loss of a stolen credit card is \$1,000. David Lombardero was asked to draft this language.

## Chapter 2, Part F

David Lombardero and Peter Hoffman discussed proposed application notes 14 and 15. Lombardero noted that the commentary for the existing fraud guideline appeared inconsistent with the application instructions of Chapter 1. Judge Wilkins and Commissioner Block stated that the two were not inconsistent, but merely a clarification of which guidelines are to be applied.

Judge Breyer suggested adding language to the commentary for insider trading to insure that the Chapter 3 adjustment for use of special skill or trust would not be double-counted except in special cases. Commissioner Nagel suggested adding examples to show that the Chapter 3 adjustment would be warranted where a corporate president or attorney misused information, but would typically not apply to an ordinary "tippee." The Commission agreed.

## Chapter 3, Part B

The Commission agreed to insert a sentence in the commentary stating that the upward adjustment for leadership role in a crime does not apply to someone who merely suggests or suggested committing the offense.

The Commission decided to add language to the commentary of §3B1.3 to read that "e.g., the adjustment would not apply to an embezzlement by an ordinary bank teller."

## Chapter 4, Part B

Chairman Wilkins and Judge MacKinnon suggested omitting language such as, "it is the Commission's intent that," and replace it throughout the guidelines with the statement, "this provision is to be considered." The Commission agreed to this language and decided to delete proposed application notes 1, 3, 4, and 5 of §4B1.3.

## Chapter 5

Peter Hoffman stated that probation officers had requested that language be added to the commentary for community treatment to expressly allow for evening and weekend passes. The Commission discussed this issue and decided that express language was unnecessary.

David Lombardero discussed the commentary at the end of §5G1.3 suggesting departure. He stated that such commentary was needed where independent prosecutions of two offenses in separate districts resulted in the defendant being given consecutive sentences.

Chairman Wilkins and Judge MacKinnon suggested language to read, "departure may be warranted when independent prosecutions produce anomalous results that circumvent or defeat the intent of the guidelines."

## Chapter 3

Commissioner Block stated that the commentary on multiple counts was well written, but more detailed instructions should be provided for probation officers.

Chairman Wilkins suggested that Rusty Burress, David Lombardero, and Peter Hoffman work with case illustrations to provide probation officers with the guidance needed to calculate multiple counts. The Commission agreed.

## Chapter 2, Part H

Commissioner Corrothers recommended deletion of Application Note #2 on page 2 because of the limitation represented by the definition of public officials. She also recommended deletion of the last sentence of Application Note #3 noting the lack of necessity and inappropriateness of inviting the courts to depart below. Both recommendations were approved.

## Chapter 1

Judge MacKinnon suggested clarifying the application for abduction in §1B1.1 so that it would not apply where a teller is only moved from one room to another within the bank. Commissioner Nagel suggested rewording the sentence to read, "abducted means that a victim was forced to accompany an offender to a different location. For example, a bank robber forcing a bank teller from a bank into a getaway car would constitute an abduction." The Commission agreed to this suggestion.

Chapter 2, Part C

Judges MacKinnon and Breyer suggested including judges in the list of officials holding a high level decision-making or sensitive position in the commentary for §2C1.2. The Commission agreed.

Judge MacKinnon suggested deleting the commentary of §2C1.1 that states, "Corrupt activities prosecuted under the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, may involve either federal or local officials in schemes to defraud the public of its right to honest government." He stated that the recent Supreme Court Decision of McNally v. United States (reported at 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987)) held that the mail and wire fraud statutes do not protect the intangible right to have public officials perform their duties honestly. The Commission agreed.

Chairman Wilkins received approval from the Commission for the staff to make technical and conforming changes to the commentary in order to get the draft to the printer by the end of the week.

The meeting was adjourned.