District of Columbia
Advisory Commission on Sentencing
441 4th Street, N.W., Suite 830 South, Washington, DC 20001
Telephone (202) 727-8822 Fax (202) 727-7929

FULL COMMISSION MEETING MINUTES
Wednesday, July 16, 2003
500 Indiana Ave., N.W.
Washington, DC

Attending	L. Hankins	F. Weisberg	P. Riley
	N. Joyce	T. Edelman	M. Roberts
	E. Silbert	R. Johnson	A. Chaturvedi
	C. Mitchell	P. Quander	T. Hutchinson
	C. Wellford	A. Flaum	B. Baldwin-White
	J. Stewart	K. Hunt	J. Cronin
	R. Buske	C. Chanhatasilpa	

I. Call to order at 3:40 p.m.

II. F. Weisberg called the meeting to order.

III. F. Weisberg approved the minutes baring any last minute revisions that should be sent to K. Hunt.

IV. F. Weisberg began by introducing C. Mitchell, the new representative from the US Sentencing Commission, and T. Hudson, from the US Parole Commission.

V. F. Weisberg began by introducing the "pluralistic Commission" and summarizing some of the deliberations to date. He stated that the Research Subcommittee has been meeting on a regular basis to try and reach consensus on a number of important issues. He explained that the underlying concept is that judges who prefer to give harsher sentences have to be persuaded in some cases to give more lenient sentences and judges who prefer to give more lenient sentences have to be persuaded in some cases to give harsher sentences. The original effort to introduce sentencing guidelines died in 1992, after dissention developed and some Council members sided with the minority. At this point, after years of hard work, the current Commission has reached a place where it is now on "sacred turf" for several of the constituencies. He explained that the Research Subcommittee members have all come to the table in good faith and have worked hard, but on certain issues, the prosecutors and defense attorneys cannot seem to agree. In the end, they may have to bring their proposals to the Full Commission for a vote.

Despite some of the issues outstanding, F. Weisberg stated that he is hopeful that solutions can be found. If they are not, he sees three possible scenarios: 1) Council will disband the Commission and set up a sentencing system on its own, 2) the efforts of the Commission will die on the vine, and 3) a third group will come into the picture and do the exercise itself. He believes that none of these options are good for the people of the District.

VI. P. Riley stated that the USAO's has some concerns about the current system being crafted. Their primary concern is that there are grave problems with the data being used to determine what sentences have and are being given. Essentially, for most of the more serious offenses, there are not enough new law data to analyze. As a result, much of the rankings are being based on old law data. As a result, she proposed that the Commission go to the Council and explain these concerns and ask for an extension. She argued that she does not think that the Commission can be accused of putting everything off; they have worked very hard and it has been a noble effort.

Responding to these concerns, F. Weisberg argued that this data environment (one with sufficient new law cases) may not exist until 2005 or 2006. He explained that K. Hunt (who has worked in both Maryland and Virginia) and C. Wellford (who has worked in Maryland and is familiar with many other state systems) believe that the data available in DC far surpasses the data other Commissions have used to create their systems. He also remarked that he thinks the sentences for new law violent cases will be lower.

A. Chaturvedi argued that the Commission is using "apples to construct oranges." Under the old law, an offender might get a sentence of 7 to 21 years and it is hard to determine what they actually served. Although the Commission has done their best to estimate time served, there have been a number of different estimates, including 110% and 128%. She stated that she simply does not have confidence in these numbers.

F. Weisberg noted that these were good points but said that he has more confidence in the numbers.

J. Stewart stated that it should not make much of a difference, a decade should yield enough information about current sentencing practices.

P. Riley reiterated that the USAO's has a problem with the time served calculations.

N. Joyce asserted that it has been her experience that systems are amazingly stable. The underpinning factor is human behavior, and that tends to not change. She argued that it is important that they "don't let the perfect be the enemy of the good." Over time, the Commission can monitor and make adjustments to any system they create. They can also introduce a system by wait a few years to codify it.

F. Weisberg noted that the concerns with time served were valid. If an offender got a sentence of 10 to 30 years, and they used the minimum, offenders often served greater than ten years and rarely served less than ten years. In reality, if an offender served 16 years, our calculations have missed six years of that sentence. Similarly, calculating a

actual sentence for an offender sentenced to 15 years to life will often be much lower than the reality.

F. Weisberg further noted that a pilot project might not work because a system that is not a rule might not be followed. He also noted, however, that if they introduce a system and then want to raise sentences, it will be very difficult to do in this community.

B. Baldwin-White agreed with the USAO and stated that they have to shape a system based on the right foundation. Her inclination was to wait for the right data.

J. Stewart argued that if no one is criticizing the systems in Maryland or Virginia and they had worse data, the Commission should be careful not to overreact to data flaws.

T. Edelman stated that the actual sentence received is based on a number of other factors. For drug sentences, there is a mandatory five years of supervised release, whereas under the old law there is less supervised release.

C. Wellford proposed that the Commission study the sentences for new law drug cases, a category for which they have enough data. If the sentencing information seems to be the same, then the concern of there not being enough new law data should not drive the Commission.

F. Weisberg pointed out that there is much less disparity among judges when sentencing drug cases than there is for higher level crimes. As a result, this comparison might not work well.

P. Riley reiterated that the data is flawed. She has reread the mandate for the Commission and it is to "suggest legislation or otherwise." Therefore, the Commission can make sentencing recommendations that do not entail legislation.

L. Hankins raised the concern that the Council will not go for it. They want to see a product. She does want to run the risk of having the Council say no to more time, she would rather have a system in place that they can tinker with over time.

T. Kane stated that his first blush reaction would be to ask for more time; however, while he is uncomfortable with the upper level data, he does not believe that they will gain much knowledge by waiting 18 months…two years…five years.

M. Roberts noted that judges will depart upwards if they believe that the range is not high enough. In terms of time served concerns, time served will always be a function of the parole authority (federal) unless the feds decide to give the responsibility back to DC.

F. Weisberg asked what the reaction would be if 30% of cases are upward departures and the Commission has to revisit the guideline sentences.

L. Hankins responded that she has always believed that the Commission will revisit the numbers and continue to collect information, rather than simply pack up and go home once a proposal has been submitted to Council.

C. Wellford remarked that departures in other jurisdictions tend to mostly be downward departures.

R. Johnson stated that he has been working on the assumption that these guidelines will be based as much as possible on historical data, but that there will also be a normative value attached, meaning serious crimes will receive longer sentences than less serious crimes. He has never felt it would be possible to "hit the nail on the head" exactly in the first version of the guidelines, but that they would be modified over time. Also, the system would be voluntary with wide ranges, thus minimizing problems resulting from a lack of historical data on some categories of sentencing practices.

VII. Departure standards. The 1987 draft guidelines included the phrase "Substantial and Compelling reasons based on clear and compelling evidence." F. Weisberg noted that his personal preference was a strong enough standard to bring all but the most atypical cases, perhaps 5-10% aggravating and mitigating, into the guideline range.

T. Edelman said PDS will yield their preference for "substantial," believing that judges will likely find reasons to support their views regardless. He noted that the subcommittee preferred a standard of proof based on a simple judicial finding rather than clear and compelling standards.

E. Silbert said he was uncomfortable with that, at least in questions of fact, which needs a factual standard. He noted that the presence of a factual standard does not require a hearing, but allows it.

M. Roberts supports the position articulated by Mr. Silbert. She notes that sentencing hearings in the federal system are often fact finding, and either side should have the right to present facts through live testimony rather than solely based on proffers. F. Weisberg noted that this standard would discourage departures, which was consistent with bringing most cases into the middle. A. Chaturvedi said that this could lead an already crowded system into trouble, if many minor crimes result in evidentiary hearings. M. Roberts said it is likely to happen only in very serious cases. E. Silbert added that contentious issues are often addressed by pre-sentence reports and sentencing memoranda rather than hearings, keeping those hearing that do result relatively short. L. Hankins added that the legislative history of this issue needs to suggest that the standard may be met by proffer, but that sometimes a hearing is appropriate.

P. Riley reminded members that this system does not add a right to appeal the guideline sentence. F. Weisberg suggested that existing appeal rights may be invoked and gave an example regarding a judge discussing a case with a neighbor. **Action Item. P. Riley will check with appellate staff regarding current appeals.** R. Johnson noted that the legislative history could include the Commission's view that we do not contemplate changes, beyond the requirement that the judge state a reason for departures.

P. Quander added that CSOSA recognizes that PSR's and guideline worksheets will add to the staff workload, as staff will need to become experts in grid scoring and departures reasons. M. Roberts added that PSR's will be elevated to a higher standard, and that is one of the advantages of the proposed system. F. Weisberg noted that ACS staff will be an available resource for CSOSA staff in this area.

VIII. Aggravating Departures.

Current proposal for #7. The defendant threatened, bribed, attempted to bribe, induced, or attempted to induce a victim, a member of the victim's family, or a potential witness, or any other person to withhold truthful testimony or provide false testimony, or otherwise attempted to evade or obstruct justice, unless the defendant is separately convicted of an offense that arises out of the same conduct.

T. Edelman asked what "evade" means. After a brief discussion, the Commission decided unanimously that "evade" could and should be removed, yielding the final language as follows:

Aggravating Reason 7. The defendant threatened, bribed, attempted to bribe, induced, or attempted to induce a victim, a member of the victim's family, or a potential witness, or any other person to withhold truthful testimony or provide false testimony, or otherwise attempted to obstruct justice, unless the defendant is separately convicted of an offense that arises out of the same conduct.

IX. Mitigating factor.

Proposed #9A. Given the facts of the case, the history and circumstances of the offender, and/or the offender's capacity to succeed in treatment, the needs of the offender and of the community would be substantially better served by placement in an available treatment program than by incarceration.

T. Edelman described the PDS modifications to their earlier proposal, which is needed because no other mitigating departure factor covers rehabilitation and instead focuses on mitigating offense factors or culpability. It includes several limitations including the requirement of a finding that the defendant has a capacity for treatment, that the community as well as the individual will benefit from treatment, and that program availability is established. The goal is a safety valve for offenders recommended for prison, and not as an escape hatch for "typical cases."

R. Johnson said his previous concerns about the vague philosophical nature of the factor have been addressed and he is comfortable with the new language. N. Joyce asked if the And/Or can be changed to And. T. Edelman concurred with that change.

T. Kane noted that he could not envision a situation in which BOP cannot provide treatment that could be found in the community. Rather, BOP treatment serves court orders from U.S. District courts throughout the country through its own

facilities and staff, and includes extensive outside contracts, including the Mayo Clinic. He did not see how a judge could in good faith find this departure reason.

L. Hankins said that typically, when this departure is argued by the defense, the judge could not find it. However, the need for the factor is to cover unforeseen situations that may arise in the future, and she envisions that it will be much more difficult to change the reasons after the system is in effect. She mentioned a possible example, of a juvenile tried as an adult who has established special education needs and established relationships that could be served locally, while in secure confinement at Oak Hill rather than BOP.

T. Kane suggested the mitigation reason be refined to only focus on juveniles. M. Roberts agreed with Ms. Hankins that unforeseen circumstances may arise, such as a funding drop for BOP, that at some point makes adult treatment availability more scarce.

P. Quander said that for offenders with very serious crimes or priors, this factor if adopted would become an escape hatch. He said it was well documented that substance abuse treatment was a documented need for at least 70% of local offenders. He said that the Sullivan letter regarding reduced prison time for successful completion of treatment was a better alternative. It was noted that drug treatment, while the most common, is not the only treatment need.

L. Hankins noted that this argument suggests that offenders will not receive this departure for substance abuse, given treatment availability in BOP. J. Stewart noted that there are limits to BOP treatment. T. Kane noted that this limit involves the policy of reserving the most extensive forms of treatment for later in the prison term, prior to release and as part of a release plan.

M. Roberts reiterated that the defense that marshals a credible argument in favor of this departure will be extremely rare and is in fact hard to envision with all the qualifiers. P. Riley noted that this is the only factor that requires a prognosis. She said Rule 11 departures were made for this sort of potential problem. T. Edelman noted that no other departure principle fits this case, and further that the Council does not impose mandatory minimums on most crimes because one can envision rare cases in which probation should be an option.

P. Riley noted that this factor is also unusual in that the departure is by definition to probation. T. Edelman said that a longer split sentence may be justified in some cases. F. Weisberg said that if guideline requires prison, some may indeed use this as an escape hatch, although he does not necessarily oppose the language. P. Quander noted the system is voluntary and judges could opt to depart without stating this reason. E. Silbert noted that we should construct a system with the assumption that there is 100% compliance with its rules.

A brief discussion of intermediate sanctions followed. T. Kane raised the point that incarceration is a BOP responsibility, while CSOSA handles all probation cases. An intermediate sanction that includes a period of incarceration may be impossible given the USDOJ decision that BOP cannot use halfway houses as a front-end sanction. It was noted that intermediate sanctions need to be discussed at greater depth later, as different people hold different definitions.

The letter from Pauline Sullivan of DC Cure, which requests that D.C. offenders receive the same incentive for treatment participation as federal offenders, was discussed. **Action Item: P. Quander and T. Kane will coordinate their response.**

X. Drug Grid. F. Weisberg summarized the subcommittee discussion to date. The grid would have three ranked groups of armed, distribution/PWID, and attempts. The development has largely followed the historical data, but has incorporated reviews of plea v. trial differences. The completed v. attempt tiers are done to encourage pleas, and the upper reaches of the completed box are intended to accommodate the prison sentences that trial cases currently receive. As criminal history scores increase, so do the ranges, more than the historical data does. The subcommittee is still attempting to resolve a few differences in the ranges.

He noted that one of the sticking points is that USAO feels that all probations will be allowed in many of the cells of this grid, although some of the probation sentences are aberrant. In the present scheme then, mavericks in a probation eligible box are only brought in if they are high-end mavericks, and are not brought in for being low end mavericks. The subcommittee is trying to find ways to equalize the pain.

A. Chaturvedi agreed, saying that the principle of "equalizing the pain" is not working in probation eligible boxes. There is accommodation of higher trial numbers though, and commentary will explain why the ranges were kept wide – so the upper end was available for trials. T. Edelman noted another accommodation is the higher values for criminal history scores, higher than the data suggests.

A discussion of the fiction of "attempts" ensued, which is probably unique to the District. F. Weisberg also noted that supervised release may add substantially to the ultimate time served for many drug offenders, as a three year revocation period is higher than most of the initial sentences. C. Mitchell noted that USPC guidelines would often result in a 4-8 month hit, and rarely three years.

F. Weisberg concluded the meeting by thanking members for the very thoughtful discussion.

Adjourn at 6:45 p.m.

NEXT FULL COMMISSION MEETING:

Wednesday, September 17, 2003 at 5:00 p.m. at 500 Indiana Avenue, N.W.