



District of Columbia Sentencing Commission

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FULL COMMISSION MEETING MINUTES

Tuesday, May 16, 2006

500 Indiana Ave., N.W., Room 1500
Washington, DC

Attending	F. Weisberg	B. Forst	R. Johnson
	H. Cushenberry	J. King	V. Johnson
	L. Hankins	D. Rosenthal	P. Riley
	B. Weinsheimer	T. Kane	P. Quander
	K. Hunt	C. Chanhatisilpa	R. Buske
	S. Vance		

- I. Call to order at 5:10 p.m. The Commission approved the April 18, 2006 meeting minutes pending any changes.

J. King announced that he was leaving PDS and the Commission in order to relocate away from the District. L. Hankins then introduced Vita Johnson, an attorney from the Public Defender Service, who will be replacing J. King.

II. Focus Group Report

F. Weisberg asked whether the Commission would like to address any of the issues raised in the focus groups prior to November 2006. L. Hankins suggested that the Commission first identify issues that might be negotiable based on experience with the guidelines thus far. Asked by F. Weisberg whether this process should be data driven rather than based on experience, L. Hankins noted that there may not be sufficient data for many of the issues. F. Weisberg agreed that some issues, such as the re-ranking of offenses, are dependent on data that could be insufficient at this moment. Other issues involve policy and procedures questions that can be decided without data. R. Johnson suggested that the Commission look for "low hanging fruit" -- fairly obvious issues to address -- for the upcoming report.

L. Hankins also gave an example of a procedural issue that might be worth discussing: Specifically, should there be a mechanism for the defendant to withdraw the plea if the criminal history score in the pre-sentence report is calculated incorrectly? D. Rosenthal added that the Commission may want to identify procedural issues such as these, which, contrary to substantive issues, do not require significant data.

B. Weinsheimer noted in the Felony 1 cases, judges anticipate problems and currently are giving the parties more time to sentencing. As a result, the PSR arrives at least a week before the sentencing date. Accordingly, making any process changes in more serious cases is less helpful because there is not currently a significant time lag. Regarding time to review the PSI, L. Hankins argued that the criminal history can matter less in the more serious cases because of mandatory minimums. Murder I is getting at least 30 years no matter what. So even with detailed sentencing memos, there might be less quibbling in terms of points and scoring of the criminal history. At the lower offenses though, every point matters because the criminal history moves people out of shaded boxes, so those attorneys need at least as much time between receiving the PSI and the hearing as felony I lawyers do.

With regard to substantive issues such as re-ranking of offenses, B. Weinsheimer agreed that there still may not be sufficient data to address this issue before November. He also noted that it may be roughly two more years before there is sufficient data, and that this may be a duty well-suited to the criminal code revision committee, which will soon be part of the Commission.

L. Hankins agreed with D. Rosenthal that the Commission should begin by identifying and discussing process issues. She also noted that she did believe that the accuracy and timeliness of criminal history scores is especially important in “low level” cases.

F. Weisberg asked whether the Commission should consider amending the criminal history scoring rules, since he has heard that many of the disputes arise in this area. L. Hankins and B. Weinsheimer said they have not heard substantial complaints, and were not inclined to revisit the issue. H. Cushenberry and R. Johnson discussed what judges tell defendants at a plea hearing, and responded that current procedures are probably sufficient without rescoring criminal history.

F. Weisberg then began addressing some of the major issues from the focus groups. The first issue was the timeliness of the pre-sentence report. R. Johnson noted that a fairly frequent problem is to have incorrect offenses of conviction in the report, particularly when lesser included offenses are involved. There are also often incorrect criminal history scores, though this is less common.

A brief discussion of the timeliness issue followed. L. Hankins noted that Section 2.4 of the Practice Manual says that the Pre-Sentence Report will be furnished at least two weeks prior to sentencing. P. Quander noted that CSOSA is hampered by no new resources to accompany the additional workload for officers, but that officers try to contact attorneys well before the PSI’s are due.

D. Rosenthal asked how defense counsel receives a copy of the pre-sentence report, to which J. King responded that defense counsel generally has to pick it up from the Judge, and begins requesting from the judge’s law clerk roughly one week prior to

sentencing. He also noted that some judges will send the report by email, though R. Johnson and others expressed concern that this may present confidentiality concerns. P. Quander noted that CSOSA may be able to work with defense counsel to see that they get the report earlier.

J. King noted that correcting errors in the report is also often a source of delay. Asked what the procedure for correcting the report is, R. Johnson responded the process is different for each judge and that it generally takes him one to two days to correct the report. P. Quander added that corrections are made more quickly when the parties agree, but that there may be delays when there is a dispute that requires the Court's resolution. The Commission resolved to continue discussing this issue in the future, and H. Cushenberry noted that a consistent process for reporting and correcting errors is needed. F. Weisberg stressed the importance of having procedural uniformity among courtrooms. R. Johnson also stressed the importance of correctly amending pre-sentence reports, since they may be used for future purposes (BOP placement, new pre-sentence reports for new offenses). P. Quander added that courtroom decisions that change the guidelines scoring never get communicated back to the originator of the report, so corrective action is insured in the future. L. Hankins noted that maybe this issue can be discussed at a later meeting with the relevant parties involved. In summary, the three issues to be addressed are: (1) the dissemination of the pre-sentence reports; (2) the timing of the hearing; and (3) correcting the pre-sentence reports. **[Future Action Item:** Can the web-based guidelines reporting system be modified to notify parties of errors and corrections?]

F. Weisberg turned to the next issue addressed in the focus groups, which is whether to have a ceiling for those in criminal history category E. F. Weisberg recalled that the Commission initially decided not to have a top of the guidelines range in order to avoid artificially limiting judicial discretion. J. King agreed with many focus groups participants that it is harder to convince defendants to plead guilty when they fall under this topless category. L. Hankins added that the possibility of additional punishment for those on parole also plays a role, though this factor should play less of a role in the future. R. Johnson asked why Rule 11(e)(1)(c) pleas cannot be used in these cases. J. King responded that these pleas are not often offered, though he believed they would be helpful. V. Johnson added that sentence caps do not work in box E cases. B. Forst noted that the Commission should look at offender age for Box E, as younger offenders already in Box E may represent a very different problem than older ones. V. Johnson agreed that there are two profiles, with some older people in Box E for old convictions, while others are younger with much more recent crimes.

L. Hankins expressed concern that the lack of a ceiling for this category may lead to less predictability for defendants and more disparity. She suggested that, if the Commission would not add a ceiling, perhaps it could provide some guidance in the manual about factors to consider for category E offenders (for instance, what if a defendant has 6 criminal history points rather than 12 criminal history points?).

She added that she felt that the Commission cannot just keep adding categories beyond E.

P. Riley and R. Johnson asked whether the Commission has data that can inform its decisions about offenders in category E, specifically the distribution of sentences in this category. B. Weinsheimer responded that there still is not significant data. Additionally, many of the defendants in this category will also be affected by life papers enhancements and other statutory penalties, which would make data driven conclusions more difficult. K. Hunt noted that there are about 150 sentences that fall under category E. He also added that CSOs do not always list how many criminal history points there are when the amount exceeds six. F. Weisberg summarized the two issues that need to be addressed: (1) should anything be done about the lack of a cap for this category?; (2) should any specific guidance be given, for example with respect to the actual number of criminal history points within category E?

It was decided that the staff should examine these 150 sentences, specifically looking at the number of criminal history points for these cases. B. Forst also suggested examining these sentences by age of the defendant. [**Action Item:** Staff will look more closely at age by Box.]

B. Weinsheimer noted that this analysis could provide support for capping drug offense sentences.

F. Weisberg then moved on to the next issue, which was whether to re-rank certain offenses that were addressed in the focus groups. The Commission resolved to return to this issue at the June meeting after it has had a chance to look at these more closely. However, the Commission does not expect that it will be able to make significant changes prior to November given the lack of data for many of the offenses. F. Weisberg asked whether the Commission could begin to collect certain offense specific details so that the Commission can make informed decisions in the future (e.g., type of weapon). L. Hankins responded that she had serious concerns about the accuracy of much of this information without judicial involvement. R. Johnson reminded the Commission of the importance of keeping the guidelines simple and to avoid unwarranted complexity, which can lead to inconsistent application. [**Action Item:** Staff will follow up on existing sources of data on type of weapon.]

F. Weisberg asked whether the focus group comments on acceptance of responsibility should lead the Commission to revisit it in 2006. B. Weinsheimer noted that the Commission created wide ranges in order to give judges wide discretion for sentencing various scenarios.

F. Weisberg briefly recapped the criminal history scoring rules, and the Commission agreed that they were working properly. Moreover, given that they are a result of significant negotiation, the Commission did not believe it could make any changes prior to November.

F. Weisberg concluded that he would like the annual report to state that the Commission has conducted numerous focus groups, which have raised various issues, deliberated and decided that some issues will be addressed in the future. F. Weisberg also added that the Commission should consider when it will begin its public outreach program.

III. December 1, 2006 report update

K. Hunt provided a brief update on the Commission staff's status in developing the annual report. He noted that the staff is currently working with CSOSA and BOP (and possibly DOC in the future) to collect the data containing probation and short split sentences. He added that staff is also working on obtaining case processing data/analysis from Superior Court. He noted that he would provide the Commission with a draft outline of the report by mid-July 2006.

With regard to the section of the report on the type of legislation that will be recommended to the Council, D. Rosenthal noted how important it is that this report be carefully drafted and asked that a draft be provided to the Commission as soon as possible. L. Hankins agreed that this issue is pressing and should be discussed at the June 2006 meeting, also noting that legislative language could be pulled from the 2003 Report that discussed guideline structure and rationales without detailing the ranges in statute. R. Johnson suggested that the Council be given specific language to include in statute, though he did not think that the guidelines themselves should be included. Other members agreed that the guidelines themselves should not be included, as this would make future amendments very difficult to implement.

F. Weisberg suggested that this section of the annual report describe that the Commission was planning on initially recommending that that guidelines could be codified but recent Supreme Court precedents (*Blakely*, *Booker*, etc.), insufficient data for some offenses, and the fact that the voluntary guidelines seem to be working well have changed the Commission's recommendation. He also suggested that the report discuss some lessons learned from the pilot program, which have informed the Commission's recommendation. F. Weisberg agreed that this topic should be discussed at the June 2006 meeting. P. Riley asked that the Commission staff provide the Commission with a sampling of approaches taken by other states in the very near future so that the Commission members may begin thinking about how to draft this section of the report.

Adjourned at 6:30 p.m.

NEXT FULL COMMISSION MEETING:

Tuesday June 20, 2006

