

DISTRICT OF COLUMBIA

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SENTENCING COMMISSION

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY,  
FEBRUARY 27, 2007

The Public Meeting was convened at One Judiciary Square, 441 4<sup>th</sup> Street, NW, Washington, D.C. 20001, Old Council Chambers, at 5:15 p.m., Frederick Weisberg, Chair, presiding.

PRESENT:

FREDERICK WEISBERG Chair  
HAROLD CUSHENBERRY  
LAURA HANKINS  
RAMSEY JOHNSON  
PAUL QUANDER, JR.  
PATRICIA RILEY  
MICHELE ROBERTS  
NOLA JOYCE (Non-Voting Member)  
THOMAS KANE (Non-Voting Member)

STAFF PRESENT:

CHAN CHANHATASILPA  
KIM HUNT  
SYNDA JOHN  
STEVE VANCE

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## I-N-D-E-X

<u>Item</u>		<u>Page</u>
I	Approval of the minutes	5
II	Ranking New crimes per 2006 Omnibus Act	5
III	Enhancements	13
IV	New Business (Criminal Code Revision-Report of the Subcommittee)	42

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P-R-O-C-E-E-D-I-N-G-S

(5:15 p.m.)

JUDGE WEISBERG: Good evening.

I'd like to call to order this public meeting of the District of Columbia Sentencing Commission. It's February 27, 2007, and we're meeting at One Judiciary Square.

This public meeting is required by Title 1, Section 207.42, of the District of Columbia Code, which is the Open Meetings Act, which requires the Commission to hold a public meeting when it takes official action of any kind.

As you will recall, we've determined that a number of things that we've been doing on a less formal basis by, for example, making rule changes in the Practice Manual, are probably properly considered official actions. And therefore, it should be done at public meetings.

So our proposal is that we have public meetings several times a year, which

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1 are different from our normal meetings, which  
2 are also open to the public because they have  
3 to be announced in advance in the D.C.  
4 Register, and there are certain other  
5 formalities.

6 This is the first of those  
7 meetings. It's not a public hearing. There  
8 will be no opportunity for public comment. I  
9 note the presence of a quorum, which under  
10 D.C. Code, Title 3, Section 103, consists of  
11 eight of the Commission's 15 voting members.

12 As you'll recall, the recent  
13 amendments to the Code increased our  
14 membership by three new members and reduced  
15 it by one taking the council member off as a  
16 voting member. The three new members have  
17 not yet been appointed.

18 And we also have one vacancy  
19 created by the resignation of Julie Stewart.

20 So it's not easy to establish a quorum, but  
21 we do have eight of the voting members  
22 present and therefore we can proceed.

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1           A notice of the meeting appeared  
2           in the D.C. Register in February of 2007. If  
3           you all have your agenda, the first order on  
4           the agenda is the approval of the minutes.  
5           Those are the minutes of the last Commission  
6           meeting on January 18, 2007.

7           You all were given those shortly  
8           after the meeting. And as I understand it, a  
9           couple people had corrections, which were  
10          submitted to Dr. Hunt and have been made.

11          Are there any other amendments or  
12          changes to the minutes?

13          (No response.)

14          Hearing none, those will be  
15          approved. The next order of business is the  
16          ranking of new offenses that were created by  
17          the Omnibus Public Safety Amendment Act of  
18          2006.

19          This came at us fairly quickly.  
20          Although it was passed some time ago as  
21          emergency legislation, we didn't really feel  
22          the brunt of it until recently when Steve

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1 Vance received phone calls, several phone  
2 calls, from presentence report writers and  
3 lawyers and others asking how we had ranked  
4 these various new offenses.

5 So the subcommittee on offense  
6 ranking met several times recently to try to  
7 reach consensus. And on a number of them, we  
8 did reach consensus.

9 So if you will look at your  
10 package for tonight. On page one, and going  
11 over the back of page one, on page two, our  
12 number of offenses, which the subcommittee  
13 reached agreement on, and we can discuss  
14 those further as any member wishes.

15 I don't know -- I don't know if  
16 you've all had a chance to -- to digest it,  
17 but they are listed there and the proposed  
18 ranking is listed. How do you wish to  
19 proceed?

20 MS. RILEY: I think we should vote  
21 on those we agree on and get that out of the  
22 way. And then have a discussion on the ones

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1 that, where we have a disagreement on.

2 JUDGE WEISBERG: That's what I  
3 thought, I mean, some of them -- some of  
4 them, the people who are not members of the  
5 ranking committee may have some, even on the  
6 ones we agree on, may have some questions or  
7 disagreements.

8 If not, the statutes are not --  
9 appear on page five and on the back on page  
10 six. The new, by statutes, I mean the new  
11 offenses that are created by the Omnibus Act.

12 But the Committee unanimously  
13 recommends that the -- the new enticing --  
14 actually, Pat and Laura will speak more  
15 coherently than I on these, if anybody wants  
16 to know what the elements of these offenders  
17 are.

18 But the -- the new enticing  
19 offense we propose ranking in Group 8, first  
20 degree sexual abuse of a minor, which is a  
21 15-year felony. We propose ranking in Group  
22 6, attempted first degree sexual abuse of a

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1 minor, which is a half -- half as large a  
2 penalty of seven and a half years.

3 We propose ranking in Group 7,  
4 second degree sexual abuse of a minor, the  
5 same penalty. We propose ranking in Group 7,  
6 an attempt at second degree sexual -- sexual  
7 abuse of a minor, we propose ranking.

8 Actually, when this says -- when it  
9 says, "No group assigned," what do we mean by  
10 that?

11 MS. RILEY: We didn't agree yet.

12 JUDGE WEISBERG: That's one that's  
13 still open?

14 MS. RILEY: Yes, I think, that  
15 probably should be Group 9.

16 MS. HANKINS: I didn't -- there  
17 must have been an email I missed. I guess, I  
18 actually assumed we had already.

19 JUDGE WEISBERG: I thought we had  
20 too. All right. So we can agree on nine as  
21 a committee?

22 MS. RILEY: I wanted to -- I

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1 wanted to trade something for it, Judge. But  
2 I guess I'm --

3 MS. HANKINS: Maybe we should  
4 trade.

5 JUDGE WEISBERG: All right. Well,  
6 we don't have to vote on that one yet if  
7 there's any disagreement about it. But --  
8 but it's one quarter of the penalty of the  
9 Group 6 offense, one half the penalty of the  
10 Group 7 offenses.

11 And the proposal then therefore is  
12 to rank it in Group 9. Why don't we stop  
13 there? Is there any disagreement by the  
14 voting members? If not, we'll call for a  
15 vote on those and we'll move on.

16 Judge Cushenberry. A "yes" vote  
17 means you agree with the rankings.

18 JUDGE CUSHENBERRY: Yes.

19 JUDGE WEISBERG: Ms. Hankins.

20 MS. HANKINS: Court's indulgence.

21 JUDGE WEISBERG: This will teach  
22 us we have to get our act together for these

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1 public meetings. Do you want me to pass?

2 MS. HANKINS: Yes, please.

3 JUDGE WEISBERG: All right, we'll  
4 pass Ms. Hankins' judgement.

5 MS. HANKINS: Okay. I'm sorry,  
6 what's the verdict? I think I can vote,  
7 yes/no.

8 JUDGE WEISBERG: A "Yes" vote  
9 means you agree on the proposed rankings.

10 MS. HANKINS: Yes, yes, yes.

11 JUDGE WEISBERG: Judge Johnson.

12 JUDGE JOHNSON: Yes.

13 JUDGE WEISBERG: Mr. Quander.

14 MR. QUANDER: Yes.

15 JUDGE WEISBERG: Ms. Riley.

16 MS. RILEY: Yes.

17 JUDGE WEISBERG: Ms. Roberts.

18 MS. ROBERTS: Yes.

19 JUDGE WEISBERG: And Mr. Kokesch  
20 for Mr. Rosenthal.

21 MR. KOKESCH: Yes.

22 JUDGE WEISBERG: All right. And

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1 Judge Weisberg votes, yes. So those are  
2 approved unanimously.

3 The same legislation also  
4 recommended new prostitution offenses or  
5 prostitution-related offenses. They really  
6 are more related to the person who is in  
7 charge of the prostitute's pandering and --  
8 and other similar offenses.

9 The proposal is that we rank all  
10 of the 20 years -- all of the -- the new  
11 offenses that have a maximum penalty of 20  
12 years in Group 5. That includes a new crime  
13 of pandering, procuring, compelling, and  
14 abducting a minor.

15 The crimes of compelling an adult  
16 to engage in prostitution, which carry a  
17 maximum penalty of 15 years, we propose  
18 ranking in Group 6. And all the other felony  
19 offenses, which are less serious and have a  
20 maximum sentence of five years, we propose  
21 ranking in Group 9. We, that is the  
22 committee.

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1                   Is there any discussion of those  
2 proposals?

3                   (No response.)

4                   If not, we'll call for a vote.  
5 Judge Cushenberry. A "Yes" vote means you  
6 agree with the rankings as proposed.

7                   JUDGE CUSHENBERRY: Yes.

8                   JUDGE WEISBERG: Ms. Hankins.

9                   MS. HANKINS: Yes.

10                  JUDGE WEISBERG: Judge Johnson.

11                  JUDGE JOHNSON: Yes.

12                  JUDGE WEISBERG: Mr. Quander.

13                  MR. QUANDER: Yes.

14                  JUDGE WEISBERG: Ms. Riley.

15                  MS. RILEY: Yes.

16                  JUDGE WEISBERG: Ms. Roberts.

17                  MS. ROBERTS: No.

18                  JUDGE WEISBERG: All right. Do  
19 you want to -- you want to comment on it and  
20 tell us why you're voting no, or do you just  
21 want to leave it at that?

22                  MS. ROBERTS: I'll leave it at

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1 that.

2 JUDGE WEISBERG: All right. And  
3 Mr. Kokesch for Mr. Rosenthal.

4 MR. KOKESCH: Yes.

5 JUDGE WEISBERG: And Judge  
6 Weisberg votes, yes. So the vote is seven  
7 yes, one no.

8 And the last of the ones that the  
9 committee agreed on, actually, those are the  
10 ones that the committee -- those are the only  
11 ones that the committee agreed on. Am I  
12 right about that?

13 PARTICIPANT: Right.

14 JUDGE WEISBERG: The rest are  
15 still up for grabs. I'd like to skip those  
16 for just a minute and get to the third item  
17 on the agenda, which I think is also one that  
18 there's likely to be little disagreement.

19 The committee agreed some time ago  
20 on a rule for dealing with statutory  
21 enhancements. Most of which are expressed in  
22 multiples of two times or three times what

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1 the offense would be without the enhancement.

2 But some of which are expressed in  
3 terms of years, so that if the maximum is  
4 five years, the enhancement makes the  
5 enhanced version of that offense ten years.

6 And our rule has been that where  
7 the enhancement is expressed in a multiple  
8 than we have agreed, that we would raise the  
9 top of that guideline's box by that multiple.

10 So if it's one and half times as serious as  
11 the offense without the enhancer, then the  
12 top of the box, but not the bottom, would be  
13 raised one and half times, or multiplied one  
14 and half times.

15 That was never apparently adopted  
16 as an official action. And we didn't deal  
17 with, at that time, but are prepared to deal  
18 with, those enhancers that are expressed in  
19 terms of years rather than multiples.

20 And the proposal, which appears  
21 on, it looks like an unnumbered page. It  
22 looks like the page after ten, would be 11.

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1 The proposal is that where the enhancement is  
2 expressed in the code as a term of years, the  
3 ratio of that term to the term of the same  
4 offense unenhanced would become the  
5 multiplier for the top of the box.

6 So that if, for example, the first  
7 offense had a maximum of five years and the  
8 second offense had a maximum of ten years,  
9 then the top of the box would be multiplied  
10 by two.

11 And for other offenses where it  
12 would be three times, where the enhancer is  
13 three times as -- the enhanced version of the  
14 offense maximum sentence is three times as  
15 long as the maximum sentence for the  
16 unenhanced version, then the top of the box  
17 would be multiplied by three.

18 And I don't believe there's any  
19 disagreement on our committee about that.  
20 But if I didn't explain that clearly enough,  
21 I invite you to do it. All right. Does  
22 anybody wish to discuss that proposal, or --

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1 well, I'll leave it at that.

2 Anybody confused by my explanation  
3 or wish to discuss it?

4 (No response.)

5 Hearing none, a "Yes" vote means  
6 that that will become the rule of the  
7 Commission. And if it -- does all of this  
8 appear already in the Practice Manual or only  
9 the first part?

10 MS. RILEY: The multiplier does,  
11 but not the -- not the conversion to the  
12 ratio.

13 JUDGE WEISBERG: All right. So  
14 the second half of what we're doing tonight  
15 will now have to be put in the next version  
16 of the Practice Manual.

17 MS. RILEY: Actually, to be clear,  
18 you could breed on a multiplier in that --  
19 that has been adopted by the Commission only  
20 the ratios that have not.

21 JUDGE WEISBERG: Right. A "Yes"  
22 vote means you agree with the -- with the

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1 proposal as expressed.

2 I'm sorry, I misstated --  
3 mispronounced your name. How do you  
4 pronounce it?

5 MR. KOKESCH: Kokesch.

6 JUDGE WEISBERG: Kokesch, I  
7 apologize.

8 MR. KOKESCH: That's fine.

9 JUDGE WEISBERG: Judge  
10 Cushenberry.

11 JUDGE CUSHENBERRY: Yes.

12 JUDGE WEISBERG: Ms. Hankins.

13 MS. HANKINS: Yes.

14 JUDGE WEISBERG: Judge Johnson.

15 JUDGE JOHNSON: Yes.

16 JUDGE WEISBERG: Mr. Quander.

17 MR. QUANDER: Yes.

18 JUDGE WEISBERG: Ms. Riley.

19 MS. RILEY: Yes.

20 JUDGE WEISBERG: Ms. Roberts.

21 MS. ROBERTS: Yes.

22 JUDGE WEISBERG: Mr. Kokesch.

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1 MR. KOKESCH: Yes.

2 JUDGE WEISBERG: And Judge  
3 Weisberg votes, yes. So we are zero  
4 unanimous on that one.

5 And that gets us back to the --  
6 the one and possibly two -- there are two of  
7 which the Committee did not completely agree.

8 And we decided to defer those to the full  
9 Commission.

10 I would say that the felon in  
11 possession of a firearm is one that was  
12 thoroughly discussed in the Committee. And  
13 you now have Position Papers in your material  
14 from the Public Defenders' Service and the  
15 United States Attorney's Office, which began  
16 on page seven and go through, there's a  
17 number, slightly unusually, but beginning on  
18 page seven.

19 This is a new offense created by  
20 the council in the Omnibus Act. It raised  
21 the penalty for the first offense felon in  
22 possession of a firearm to ten years with a

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1 mandatory minimum sentence of 12 months,  
2 which cannot be suspended.

3           Within the Committee, there was  
4 sentiment for ranking it -- ranking it in  
5 Group 8, which is reflected in the Position  
6 Paper you have authored by the Public  
7 Defenders' Office. And there's sentiment for  
8 ranking in it in Group 7, which is reflected  
9 in the Position Paper you have authored by  
10 the United States Attorney's Office.

11           I think their positions here are  
12 well articulated on both sides in the papers,  
13 but I think it -- it deserves some further  
14 discussion. I would say Ms. Joyce can speak  
15 for herself, of course, but she wrote an  
16 email that I got during the week that I put  
17 somewhere else that I don't have in front of  
18 me expressing disagreement with the position  
19 of the Public Defenders' Service, which had  
20 been circulated earlier than the one that  
21 came later from the United States Attorney's  
22 Office.

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1           And her view was that the recent  
2           action of the council made it clear that they  
3           view this as a more serious offense than  
4           those we have ranked in Group 8. And we  
5           should act accordingly since we have no  
6           sentencing history to go on for this offense  
7           under this new statutory law.

8           Comments?

9           MS. HANKINS: I'd like to sort of  
10          add something to our Position Paper. And  
11          that is that -- that we previously ranked as  
12          -- as the U.S. Attorney's Office pointed out  
13          in their paper, previously ranked felon in  
14          possession as Group 8.

15          That particular offense was,  
16          actually, it doesn't sort of exist anymore  
17          the way the law got changed. But it was a  
18          ten-year maximum penalty for second felon in  
19          possession, for a second felon in possession  
20          conviction.

21          So if -- if a person had  
22          previously been convicted of a violation of

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1 this section, had previously been convicted  
2 of being a felon in possession, then they  
3 were looking at ten years. And we ranked  
4 that as an eight, which I think is a strong  
5 indication that that's what this should be.

6 That we made a determination of an  
7 offense that quite frankly I think would be  
8 more serious, which is a second felon in  
9 possession conviction and we made that an  
10 eight.

11 So I don't know why we would now  
12 make the less serious offense of a first  
13 time, potentially first time felon in  
14 possession, why we would make that -- why  
15 that would be given a higher ranking.

16 So that's -- that was sort of the  
17 -- the first addendum to the Position Paper.

18 And then -- and then I guess my sort of  
19 general response to -- to what Pat  
20 distributed earlier is, I -- is I think, that  
21 she doesn't really address that CPWL second,  
22 CPWL quite frankly, is a more serious offense

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1 than felon and possession.

2 That the operability and the  
3 carrying requirements make the offense a more  
4 serious offense. And -- and quite frankly,  
5 well, I'll leave it at that. I have other  
6 sort of particular responses to points she  
7 made.

8 But -- but I think the strongest  
9 addendum that I wanted to make was we  
10 previously ranked as eight a related offense  
11 that is more serious and we should be guided  
12 by that, as well as the points that we raised  
13 in our Position Paper.

14 JUDGE WEISBERG: Isn't the logic  
15 of that though that the action of the council  
16 should be interpreted as making the first  
17 offense more serious than the first previous  
18 second offense because not only do they make  
19 the first offense a maximum of ten, where it  
20 had been five, but they also made a mandatory  
21 minimum of one, which hadn't previously  
22 existed for either the first or second

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1 offense?

2 I took that to be Ms. Joyce's  
3 point. That when the council goes out of  
4 their way to create a new law and tells you  
5 by its penalty the seriousness with which  
6 they take it, we ought to have a good reason  
7 to rank it in way that doesn't reflect that  
8 level of seriousness.

9 MS. HANKINS: Right, I understand  
10 that. I guess I -- I guess we have a  
11 different, and I hope to persuade you of my  
12 perspective, a different take on -- on what  
13 is the indication of the seriousness.

14 I think that the council, the  
15 argument could be made that the council did  
16 say, you know, first time out, this is  
17 serious. They took it from -- from a  
18 misdemeanor up to ten years the first time  
19 somebody is -- is found guilty of -- of a  
20 felon in possession.

21 And -- and so I think made it as  
22 serious as the way the law used to be, which

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1 is maximum of ten years. And we want to make  
2 sure that the person does do some time, which  
3 is the one year, which I think then leads  
4 into our point that -- that a person, that we  
5 ought not override their intension of a  
6 person getting at least 12 -- 12 months, as  
7 opposed to -- to more often getting a minimum  
8 sentence if you're going to be compliant of  
9 18 months.

10 We -- we acknowledge the point  
11 made by Pat, that there will be some  
12 occasions where people are in Box A. We  
13 don't actually think that's going to be the  
14 majority of cases. That people stay on  
15 papers for a long time.

16 And that most people will at least  
17 be in B. There will be occasions when  
18 they're in A. As to the point that we  
19 haven't normally taken into account criminal  
20 history when -- when we do ranking, there  
21 isn't any other offense where the element is,  
22 any other substantive offense where it is an

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1 element, where criminal history is an  
2 element.

3           There's certainly enhancements,  
4 but we don't -- we didn't rank any of those.  
5       We deal with that differently. So -- so --  
6 so I think the fact that we haven't taken  
7 criminal history into account previously  
8 doesn't mean anything, we never were called  
9 onto.

10           But I think this -- this offense  
11 does. I think we should, and I think in most  
12 cases people are going to be in B. And --  
13 well, again, I'll stop there.

14           JUDGE WEISBERG: All right. Other  
15 comments?

16           MS. ROBERTS: Well, it was the  
17 later piece that -- and we all know I was not  
18 needing a lot of persuasion. But frankly it  
19 was, in two things. One, it struck me when I  
20 looked at the grid, my thought was -- in a  
21 minute -- my thought was that most people --  
22 my thought was that most people charged and

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1 certainly convicted would end up in under the  
2 government's proposal 7B.

3 And, again, that's based on my  
4 recollection of my practice and what I think  
5 is probably what still goes on, on a day-to-  
6 day basis. And what did strike me was,  
7 again, a compliance sentence would exceed  
8 what the -- what the council has already  
9 indicated was a mandatory.

10 So for me, that does it. I mean,  
11 I think a judge who wants to be guidelines'  
12 compliant, would ultimately end up believing  
13 inappropriate to impose a sentence that  
14 exceeds what the council required troubles me  
15 quite a bit.

16 And two, without being repetitive,  
17 I do think that the council did speak and I  
18 heard it. And the court is going to have to  
19 comply with what the council said by imposing  
20 a mandatory 12 month sentence.

21 I don't know that there is much  
22 more than that that we had to do as a

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1 Commission. We certainly can't do anything  
2 to, well, we couldn't if we wanted to, but my  
3 own view is, I don't see anything about  
4 placing it in a Group A given that my primary  
5 concern, though I am persuaded by other  
6 arguments that PDS had, I don't see anything  
7 that hurts or belies with the, or disturbs  
8 what the -- that the council sought to  
9 achieve by keeping this a Group A offense, or  
10 allowing it to be a Group A offense, as  
11 opposed to a Group 7.

12           Though I do see because of the  
13 1842, where again, I think most of these  
14 cases will end up, I do see that as something  
15 that is inconsistent with what we can fairly  
16 conclude that the council sought to achieve.

17           So for that reason, I support PDS  
18 proposal.

19           JUDGE WEISBERG: Any other  
20 comments?

21           MS. RILEY: I think we can put  
22 forth our position as well as I could put it

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1       forth in our writings. Part of the problem I  
2       think that we encounter repeatedly is, you  
3       know, that our real ranking process was  
4       really a two-step process. And we had that  
5       session over at Galludet the first time kind  
6       of where we kind of ranked stuff. And then  
7       we did a kind it historically too.

8                   And, you know, a lot of our  
9       offenses didn't have enough historical data  
10      to really provide us with a lot of guidance  
11      in terms of where they ought to fall out.

12                   I do think that the increase, you  
13      know, for pushing the box up from what it had  
14      been before. And, you know, I did a quick  
15      search today on, you know, the federal  
16      circuit where these -- these cases have been  
17      primarily prosecuted in recent years.

18                   And 98% in 2005 and 76% in 2006  
19      were above -- were sentenced to more than a  
20      year. And of those, at least half were more  
21      than five years. But that's -- that's where  
22      these -- and those were stand-alone felon and

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1 possession cases. I could not get any  
2 statistics when they were combined with  
3 something else, but I just put that on the  
4 table.

5 JUDGE WEISBERG: Did your -- did  
6 your study look at federal court around the  
7 country or just in our own?

8 MS. RILEY: No, just here, just  
9 here.

10 JUDGE WEISBERG: And the elements  
11 of that offense are the same as the elements  
12 as ours?

13 MS. RILEY: I think there has been  
14 interstate component when it's in federal  
15 court. Well, there always would be an  
16 interstate component because all guns are  
17 brought into the --

18 JUDGE WEISBERG: Well, that raises  
19 constitutional questions. But I want to make  
20 it clear if wasn't clear already that the  
21 non-voting members don't have a vote, but  
22 they do have a voice. So if you want to add

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1 something to your, what you circulated  
2 briefly, I'll be glad to --

3 MS. JOYCE: Thank you. I think  
4 you summarized it fairly well. And my  
5 concern is that this is a new law. It  
6 represents continuing, what I saw anyway, as  
7 continuing concern on the part of the council  
8 around firearm violence and possession of  
9 firearms.

10 And that without the historical  
11 data and the normative data by which we've  
12 used in the past, in most cases in the  
13 setting -- setting our decisions that we, the  
14 Commission, should consider the guidance I  
15 believe that was given by the council in  
16 passing this law.

17 JUDGE WEISBERG: Tell me when  
18 you're ready to call for a vote. But I do  
19 want to make sure everybody has a fair  
20 opportunity to be heard on this if they want  
21 to be.

22 MS. RILEY: Well, I don't want to

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1 vote unless I've persuaded everybody yet.

2 (Laughter.)

3 MR. QUANDER: Let me just make  
4 this observation. I remember seeing a  
5 majority of the -- the hearing before the  
6 council when it was debated. And I also  
7 remember having conversations with the  
8 chairperson for Public Safety and Justice,  
9 Council Member Mendelson.

10 And it was quite contentious as to  
11 this mandatory minimum, and it was -- it was  
12 hard for it. And the compromise was a year,  
13 12 months at the bottom. My concern is that  
14 if we place it in Group 7, and given the fact  
15 that the majority of the individuals that  
16 will be facing this offense, will come in at  
17 18 months.

18 It's going to not send a clear  
19 signal as to what the intent of the council  
20 was. I think it was 12 months. Whether or  
21 not I agree with that, is something  
22 different.

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1           But I think their -- their efforts  
2 were to set the bottom at -- at 12 months.  
3 So I am more comfortable for our purposes in  
4 placing it in Group 8.

5           JUDGE WEISBERG: So that the  
6 mandatory requirements met the guideline, but  
7 at least the guideline wouldn't be higher  
8 than the mandatory.

9           MR. QUANDER: Yes, yes.

10          JUDGE WEISBERG: Anybody else?

11          (No response.)

12          JUDGE WEISBERG: All right. Let's  
13 see, how should we phrase the vote? Why  
14 don't we say that the question is, should it  
15 be ranked in Group 7 or Group 8? So when  
16 your name is called, tell us which ranking  
17 you think is correct.

18          Judge Cushenberry.

19          JUDGE CUSHENBERRY: In Group 7.

20          JUDGE WEISBERG: Ms. Hankins.

21          MS. HANKINS: Eight.

22          JUDGE WEISBERG: Judge Johnson.

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1 JUDGE JOHNSON: Seven.

2 JUDGE WEISBERG: Mr. Quander.

3 MR. QUANDER: Eight.

4 JUDGE WEISBERG: Ms. Riley.

5 MS. RILEY: Seven.

6 JUDGE WEISBERG: Is somebody  
7 counting these?

8 PARTICIPANT: We are.

9 JUDGE WEISBERG: Okay. Ms.  
10 Roberts.

11 MS. ROBERTS: Eight.

12 JUDGE WEISBERG: Mr. Kokesch.

13 MR. KOKESCH: Seven.

14 JUDGE WEISBERG: And Judge  
15 Weisberg votes, seven. What's the --

16 PARTICIPANT: Five/three.

17 JUDGE WEISBERG: Five/three for  
18 seven?

19 PARTICIPANT: Yes.

20 JUDGE WEISBERG: All right.

21 That's the action of the Commission. Now,  
22 the other one is a little bit different that

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1 we didn't agree on in the Committee. And  
2 that's the -- I don't think you have  
3 materials on that one. Oh, yes you do. On  
4 the very last page you have materials from  
5 the United States Attorney's Office.

6 And this came up in an unusual  
7 way, which is why you don't have, I think,  
8 Laura can speak for herself, but I think  
9 that's why you don't have a full paper from  
10 the Public Defenders' side.

11 Steve circulated one of his  
12 emails, which is kind of the way we tended to  
13 decide these things in the past before we  
14 realized we should really do it at a public  
15 meeting.

16 Saying he had a query from either  
17 a presentence report writer or a lawyer  
18 saying "How do we rank this because it hasn't  
19 been ranked yet?"

20 And Laura and Vita Johnson sent  
21 back an email, which said, "It seems pretty  
22 clear to us that this is very like the same

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1 offense as involving children, first degree  
2 and second degree cruelty to children, so we  
3 should rank them accordingly."

4 And that was the statement of  
5 their position. At the subcommittee meeting,  
6 which we had last week, which was really  
7 intended to, actually two weeks ago I guess  
8 it was, which was really intended to get  
9 moving on the question of criminal code  
10 reform.

11 Since the matter was timely, we  
12 used the occasion to talk, very briefly,  
13 about this offense, which we also had not  
14 ranked. And Pat responded recently today or  
15 yesterday with this paper that appears on  
16 page nine.

17 But in fairness, the Public  
18 Defenders' Service wasn't asked to and didn't  
19 submit a paper articulating their reasons for  
20 believing it should be ranked differently.  
21 So I don't know whether you feel as a  
22 Commission, or as members of the subcommittee

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1 that we should debate this now and decide it,  
2 which is fine with me.

3 Or whether you think the way it  
4 came up is so last minute that we should  
5 reserve this one for a -- for a later meeting  
6 of the Commission and talk in the committee  
7 further?

8 MS. HANKINS: I think we should  
9 reserve it. The Position Paper, which I  
10 wasn't expecting a Position Paper, came at  
11 11:30 today. So I'm not prepared to respond  
12 to all the points that Pat raises in -- in  
13 her paper. She didn't respond to the email  
14 and so, so I have no way of anticipating the  
15 arguments she was making.

16 MS. ROBERTS: I agree.

17 JUDGE WEISBERT: I think I agree  
18 too, although I wouldn't impose it on other  
19 people if they didn't agree. But I just  
20 think --

21 MS. RILEY: These -- these cases  
22 are rarely prosecuted. I don't think it's

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1 going to be a big deal at all to delay.

2 JUDGE WEISBERG: It probably does  
3 affect the one that was the source of the  
4 original inquiry, but there's nothing much we  
5 can do about that. And so you don't have any  
6 objection to waiting too?

7 MS. RILEY: No.

8 JUDGE WEISBERG: All right.  
9 Anybody disagree with that?

10 (No response.)

11 All right. We'll take that up at  
12 a later then and after the Committee has a  
13 chance to ventilate it. And maybe we'll  
14 agree, which will make the Commission's job  
15 easier.

16 That gets us to item four on the  
17 agenda.

18 MS. RILEY: But Judge, I think we  
19 didn't vote on "Any Other Felony."

20 JUDGE WEISBERG: Which one?

21 MS. RILEY: The last one on --

22 JUDGE WEISBERG: Oh, yes, yes. I

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1 beg your pardon. I didn't flip my page over.

2 There are a number of -- well, maybe, I  
3 don't even know what these are. You have to  
4 tell me.

5 MS. RILEY: "Any Other Felony,"  
6 and I don't know why the court calls them  
7 that because every offense has a name. But I  
8 think these are generally, you know,  
9 distribution of drugs, or, you know, fairly -  
10 - all low-level felonies. I think we  
11 received an email. There were only about six  
12 or eight of them in recent times.

13 But, you know, there's no reason  
14 not to score them at one point. If somebody  
15 wants to go search out the jacket and find  
16 out what it really was. There is no offense  
17 which is called, "Any Other Felony."

18 MS. HANKINS: That should be we're  
19 not -- we're not ranking in a group. We're  
20 just -- this is -- this is a court reporting  
21 that gets picked-up in presentence reports as  
22 "Any Other Felony," so there's no obvious

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1 information about what the -- what the felony  
2 was, so it's always criminal history. We're  
3 not talking about ranking for purposes of  
4 current sentences.

5 JUDGE WEISBERG: Some of these may  
6 in fact may be ranked somewhere.

7 MS. RILEY: Well, I'm sure they  
8 are.

9 MS. HANKINS: They may actually  
10 be.

11 MS. RILEY: I see them in court  
12 view, and it says, "Any Other Felony." And  
13 we have no idea what "Any Other Felony" is.  
14 And why they were inputted that way into the  
15 court's computer, I don't know. But they  
16 would be something else, you know,

17 And I think it's generally going  
18 to be a drug distribution or something like  
19 that, so. Unless somebody wants to go to the  
20 jacket and find out what the charge really  
21 was, our position is just why don't we just  
22 give them one point.

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1                   JUDGE WEISBERG: But it's only --  
2                   it's not ranking, it's a -- to say we're  
3                   ranking it when all we're doing is scoring  
4                   them for criminal history purposes when they  
5                   appear in the data and we don't otherwise  
6                   know what they are.

7                   MS. RILEY: Right.

8                   PARTICIPANT: I think it should  
9                   just be a default score.

10                  JUDGE WEISBERG: That's what I  
11                  think is a better way of looking at it.

12                  MS. ROBERTS: Just so I'm clear,  
13                  these are felonies?

14                  MS. RILEY: Yes, they are  
15                  felonies.

16                  JUDGE WEISBERG: I think it's a  
17                  data input anomaly when instead of putting in  
18                  the name of the felony, which for all we  
19                  know, might have been a two-point felony. I  
20                  doubt it, but it could have been. It gets  
21                  put in as any other felony.

22                  And when the presentence report

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1 writer sees that they have to score it, so  
2 the default score would be one point because  
3 otherwise you'd have to do the research to  
4 find out what felony it was. And chances are  
5 most of them are one point felonies anyway.  
6 That's the theory of the recommendation, I  
7 guess.

8 Anybody wish to discuss it  
9 further?

10 (No response.)

11 JUDGE WEISBERG: All right. We  
12 got to call for a vote on that too.

13 Judge Cushenberry.

14 JUDGE CUSHENBERRY: Yes.

15 JUDGE WEISBERG: Ms. Hankins.

16 MS. HANKINS: Yes.

17 JUDGE WEISBERG: Judge Johnson.

18 JUDGE JOHNSON: Yes.

19 JUDGE WEISBERG: Mr. Quander.

20 MR. QUANDER: Yes.

21 JUDGE WEISBERG: Ms. Riley.

22 MS. RILEY: Yes.

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1 JUDGE WEISBERG: Ms. Roberts.

2 MS. ROBERTS: Yes.

3 JUDGE WEISBERG: Mr. Kokesch.

4 MR. KOKESCH: Yes.

5 JUDGE WEISBERG: And Judge

6 Weisberg votes, yes also.

7 That then gets us to new business.

8 And -- and this is open for anybody's  
9 discussion, but I will report that -- that,  
10 two things. A subcommittee met about two  
11 weeks ago to discuss this.

12 And we were -- we have been, are  
13 and have been quite concerned about the  
14 burden that this assignment is going to place  
15 on the Commission as it's presently  
16 constituted and funded.

17 We have had two teleconferences  
18 that is Steve Vance and Kim Hunt and I with  
19 somebody who was on a commission of this type  
20 in Arizona, a judge, in Arizona, and another  
21 guy who was the Director of the Commission  
22 that did this in Illinois.

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1                   And both of them were quite  
2                   emphatic that it's a major undertaking. It  
3                   requires a great amount of resources. The  
4                   Illinois Commission, for example, had a three  
5                   full-time lawyers in addition to the director  
6                   and deputy director, who were also lawyers  
7                   and working full-time.

8                   Now, Illinois may have a bigger  
9                   code than we do, I don't know. And they may  
10                  have had a larger mandate. So we've been  
11                  concerned about whether, you know, what --  
12                  what we really can -- hope to accomplish in  
13                  the time frame available to us as we are  
14                  presently constituted.

15                  When the subcommittee met, we  
16                  actually had a good discussion of this. And  
17                  I should add that we owe the council a work  
18                  plan on March 31<sup>st</sup>, which will set out some  
19                  sort of a time line in which the Commission  
20                  expects to do the code reform part of our  
21                  work.

22                  And we -- we developed a concept,

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1 which is not yet been reduced to writing,  
2 which would be to start out with the  
3 misdemeanors that are all over the code.

4           The U.S. misdemeanors are all, if  
5 most, if not all, in Title 22 of the Code,  
6 but the Attorney General misdemeanors, that  
7 is those that are prosecuted either by the  
8 U.S. Attorney or the Attorney General or  
9 exclusively by the Attorney General tend to  
10 be found in various sections of the Code.

11           Some of them are regulatory. Some  
12 of them are penal, but they're widespread.  
13 And the thought is that if we started with  
14 misdemeanors, they might be less  
15 controversial in terms of coming to an  
16 agreement.

17           It might actually be a more  
18 important part of the work to make -- to  
19 modernize the code and to make the penalties  
20 more consistent with each other and the  
21 language used less -- less inconsistent.

22           That would also give us some, for

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1 lack of a better word, practice as a  
2 Commission in doing this part of our  
3 function, which we haven't yet undertaken.  
4 And would lead us, would give us a better  
5 foundation to start the work on the felony  
6 sections of the Code, which are likely to be  
7 for all the opposite of all those same  
8 reasons more difficult and possibly more time  
9 consuming.

10           Whether all that can be done in  
11 the time frame currently allowed by the  
12 statute, which is the year 2010 for a final  
13 report remains to be seen. It could depend on  
14 budget issues. It could depend on the time  
15 available to those members of the Commission  
16 that are going to be doing the heavy labor.

17           That's the first part of the  
18 report. And the second part is that Kim and  
19 I met yesterday with Councilman Mendelson.  
20 And I had been asked by members of the  
21 committee to ask him a couple of things.

22           One, whether there's any

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1 flexibility in the March 31<sup>st</sup> deadline. Two,  
2 whether there's any -- whether he and  
3 possibly other council members had any  
4 thoughts about looking again at this part of  
5 our mandate and the membership of the  
6 Commission because the same legislation that  
7 gave us this function also changed the  
8 membership of the Commission by adding three  
9 new research/academic members who have not  
10 yet been appointed.

11 And we didn't want to get too far  
12 ahead of those new members on our work if  
13 they were in fact going to be added to the  
14 Commission. So I included that in my  
15 conversation with Mr. Mendelson.

16 And I think he was pretty emphatic  
17 that whatever compromise he reached with Ms.  
18 Patterson that went into the legislation that  
19 emerged, he was not inclined to go back on.

20 And that his view is that the  
21 membership -- membership of the Commission  
22 should be expanded as it -- as it is

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1 reflected in the -- in the new statute. And  
2 I didn't -- I didn't really push him on the  
3 March 31<sup>st</sup> deadline because we had already in  
4 the subcommittee fairly well agreed that we  
5 could -- we could draft a credible  
6 responsible work plan if they accepted our  
7 proposal that we start with misdemeanors and  
8 use as much time as it took to get that job  
9 done.

10 But he didn't give the impression  
11 that he was particularly interested in  
12 delaying the project to catch up with the new  
13 members.

14 He did ask for our recommendations  
15 for the names of some people who would be  
16 good candidates for those positions. They're  
17 appointments of the council. They have to be  
18 made by Chairman Gray.

19 But he -- he indicated that if we  
20 made recommendations to him he would pass  
21 them along to Chairman Gray and he would hope  
22 for a fairly quick action. And that also

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1 includes their member, Julie Stewart, who has  
2 to -- whose vacancy has to be filled.

3           So that's -- that's what came of  
4 it. I also reported, of course, on the  
5 legislation that has to be, that should be  
6 enacted, I should say, based on our 2006  
7 annual report on the guidelines, he -- he  
8 then focused on that and said, he didn't see  
9 any reason why he wouldn't offer this statute  
10 that we drafted.

11           But said that, because looking at  
12 it, he didn't see any problem with it, but  
13 said that we probably should not expect a  
14 vote on that or a hearing on that actually  
15 until May, which would be after the budget,  
16 which is their major item of business between  
17 now and then.

18           He asked me whether that was a  
19 problem. And I hope I didn't speak out of  
20 turn by saying I didn't think time was of the  
21 essence since the guidelines are running and  
22 running well and probably could continue to

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1 run without legislation.

2 So I said, "Whenever the hearing  
3 would be, it would be." So that's my report  
4 on that. Does anybody want to comment or  
5 talk about it or talk about the code revision  
6 work generally?

7 (No response.)

8 Well, that's good, I suppose. Kim  
9 is going to be contacting you maybe globally,  
10 maybe individually, for suggestions to pass  
11 on to Mr. Mendelson and through him to  
12 Chairman Gray, of people who would fit the  
13 description. I think I brought it with me.  
14 I'm not sure I did. I didn't.

15 The persons devoted to criminal  
16 justice research academic or otherwise. When  
17 -- when Kim circulated an email to a few  
18 members not too long, Laura responded with  
19 some names. All of them I knew, all of them  
20 I respect highly who are academics at Howard  
21 and AU respectively.

22 She was quick to point out that

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1 they had all been former members of the  
2 Public Defenders' Service, which I knew. I  
3 have no idea what their academic leanings may  
4 be at the moment.

5 But I think it would be important  
6 for these members, which is not to exclude  
7 the ones that -- that she suggested by any  
8 means, that we pick members that don't  
9 approach the task with -- with a strong bias  
10 or leaning in one direction or another.

11 We have enough advocacy I think,  
12 an effective advocacy, on the Commission as  
13 it stands. If we're going to have academic  
14 members, I think it would be, I personally,  
15 and this speaking only for myself, think it  
16 would be a good idea if we find people who --  
17 who would approach us -- approach it as  
18 researchers in academics without any  
19 expectation of what the outcome ought to be  
20 or any leaning toward what it ought to be.

21 So, but -- but that being said, I  
22 think, we should -- we should accept the

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1 invitation and make some recommendations  
2 because the more proactive we be on that  
3 subject, the more likely it is we'll get  
4 members that we will all enjoy working with  
5 and we will -- and will help us be more  
6 productive. Okay.

7 MS. HANKINS: If I can just sort  
8 of say about what I recall about the content  
9 of my email. I didn't necessarily suggest  
10 all of those people as potential Commission  
11 members. And in fact, some of the ones I  
12 named aren't D.C. residence, which I don't  
13 know whether that's a requirement or not.

14 But I think what I, I know, one of  
15 the -- one of the primary things I offered  
16 was to speak with those people to see if they  
17 had connections within their universities of  
18 other sort of more academics than necessarily  
19 law school folks. So just to sort of correct  
20 the impression that I was trying to pack the  
21 court. Although, I certainly would try  
22 something like that.

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1                   JUDGE WEISBERG: That wasn't my  
2 impression. I was choosing my words as  
3 carefully as I knew how to do it, but  
4 obviously it failed in that regard.

5                   Anyway, it's a serious matter. If  
6 we can get members that will help us with  
7 this task, it would be very beneficial to us  
8 if there are people who divert us in various  
9 directions that make it harder to do what we  
10 need to do in the time frame allowed it will  
11 be less beneficial.

12                   So if you have ideas of the right  
13 kind of people that you think would be good,  
14 please pass them onto to Kim. And I think  
15 he'll affirmatively solicit all of you. And  
16 I don't want too much time to pass before we  
17 do that because I emphasized to Mr. Mendelson  
18 that was a major impediment, not having those  
19 members, was a major impediment in our work.

20                   Because putting aside the  
21 difficulty of establishing a quorum with them  
22 being unfilled memberships. Again, I don't

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1 think we don't want to get too far down the  
2 road of code reform without them being in the  
3 process, less they approach it, come on the  
4 Commission and disagree with the approach,  
5 and we have to do things over again. At a  
6 minimum we would require them to be brought  
7 up to speed. So we ought to try and do it as  
8 quickly as we can.

9 I have nothing else. If anybody  
10 has anything else, the floor is open.

11 (No response.)

12 All right, then we're adjourned.  
13 Thank you very much.

14 (Whereupon, the above-entitled  
15 matter concluded at 6:04 p.m. on February 27,  
16 2007.)

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