



GuideLines

News from the U.S. Sentencing Commission

Winter 2010

Judge William K. Sessions III Confirmed as Sentencing Commission Chair

On October 21, 2009, the United States Senate confirmed Chief United States District Judge William K. Sessions III of Cornwall, Vermont, as chair of the United States Sentencing Commission.

Chief Judge Sessions said, "I am honored to have been nominated by President Obama and confirmed by the Senate to serve as chair of the Sentencing Commission. This is a particularly exciting time because of the commitment to review sentencing policy that everyone in the criminal justice community has demonstrated, and we are taking the lead — through our data, reports, amendments, and listening — on shaping a policy that remains fair and certain, protects and promotes public safety, and ensures equal justice for everyone involved in the process."

Chief Judge Sessions served as a vice chair of the Commission for ten years before taking over as chair. He has served as chief judge of the District of Vermont since July 2002 and has been a district judge since 1995. He served on the Judicial Branch Committee of the Judicial Conference of the United States from 2002–2007 and currently is a



Chief Judge William K. Sessions III

©Twin Lens Photo



Chief Justice John G. Roberts Jr. administered oaths of office (left to right) to William B. Carr Jr., Judge Ruben Castillo, Chief Judge William K. Sessions III, Chief Judge Ricardo H. Hinojosa, Beryl A. Howell, and Dabney L. Friedrich. (Photo credit: Steve Petteway, Collection of the Supreme Court of the United States)

member of the Judicial Conference of the United States and the Second Circuit Judicial Council. From 1978–1995, he was a partner with the Middlebury firm of Sessions, Keiner, Dumont & Barnes. Chief Judge Sessions previously served in the Office of the Public Defender for Addison County, as a professor at the Vermont Law School, and as an officer in the United States Army. Chief Judge Sessions received a B.A. degree from Middlebury College and a J.D. degree from the George Washington School of Law.

On November 30, 2009, Chief Justice John G. Roberts Jr. presided over an investiture ceremony held at the Supreme Court and administered the oath of office to Chief Judge Sessions and to all current members of the Sentencing Commission.

Commission Holds Regional Public Hearings

In February 2009, the Commission launched a series of regional public hearings on federal sentencing policy to mark the 25th anniversary of the Sentencing Reform Act of 1984 (the "SRA"). The Commission visited seven cities during the series of regional public hearings: Atlanta, Georgia; Stanford, California; New York, New York; Chicago, Illinois; Denver, Colorado; Austin, Texas; and Phoenix, Arizona. The Commission held these public hearings across the country to engage federal sentencing experts in discussion about issues related to federal sentencing policy and the implementation of the SRA over the past 25 years. Witnesses included federal circuit and district judges, representatives from the U.S. Department of Justice, defense attorneys, probation officers, law enforcement, and members of the academic community and community interest groups.

Commission chair, Chief Judge William K. Sessions III, said, "These regional hearings are about listening. Federal sentencing policy is extraordinarily complicated. It involves all three branches of government — the judicial branch, the legislative branch and the executive branch — all of which have a vested interest in protecting the public and ensuring that sentences are fair and just. The Sentencing Commission is right at the intersection of all three branches of government, and it's our responsibility to set sentencing policy in light of the input of all of the branches of government. These hearings help us meet that responsibility."

Commission to Hold Public Hearing in March on Proposed Amendments

The Commission will hold a public hearing to discuss its recent package of proposed amendments on Thursday, March 18, 2010, in Washington, D.C. The hearing will supplement the written public comment the Commission expects to receive on proposed amendments and will assist the Commission in making its final determinations on proposed amendments to the federal sentencing guidelines. The Commission is required by statute to submit proposed amendments to Congress by May 1 of each year. More information about the hearing will be forthcoming on the Commission's website at www.ussc.gov.



At the public hearing in New York City, (left to right) Judge D. Michael Fisher, Judge Jeffrey R. Howard, Judge Brett M. Kavanaugh, and Judge Jon O. Newman provided the Commission with a perspective from the circuit courts. (Photo by Daniel Tvedt)

From the Fifth Circuit Court of Appeals, Chief Judge Edith Jones (left) and Judge Fortunato P. Benavides (right) shared their insights and experiences in federal sentencing at the public hearing in Austin, Texas. (Photo by Matt Osterrieder)



Commission Seeks Comment on Alternatives to Incarceration, Specific Offender Characteristics Relevant to Sentencing, and Hate Crimes

Public Hearing on Proposed Amendments Scheduled March 18 in Washington, D.C.

At its January 12 public meeting, the United States Sentencing Commission voted to publish for public comment proposed guideline amendments and issues for comment on a wide range of topics that include alternatives to incarceration, the relevance of specific offender characteristics to sentencing, and penalties for hate crimes. The 60-day public comment period runs through mid-March 2010.

Commission chair, Chief Judge William K. Sessions III, said, "The series of seven regional public hearings that concluded in Phoenix this month gave us the benefit of the knowledge and experience of all parts of the criminal justice system: judges, prosecutors, defense counsel, law enforcement officials, representatives of public interest groups, and academics. We have listened to them and incorporated what we have learned into the proposed amendments."

The Commission voted to issue for comment a proposed amendment expanding the court's authority to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and who meet certain criteria. The proposed amendment creates a new guideline that gives the court the authority to impose a sentence of probation with a requirement that the offender participate in a substance abuse treatment program. The defendant receiving such a sentence must be a willing participant in the program and must have committed the offense while addicted to a controlled substance. In addition, the offender must have committed a lower-level offense, and the offender must meet the "safety valve" criteria as specified in the sentencing guidelines.

The proposed amendment also would expand by one offense level Zones B and C in the guidelines' sentencing table, making additional defendants eligible for sentencing alternatives. Currently, the sentencing guidelines give the court the authority to sentence eligible defendants to community confinement, intermittent confinement, or home detention. The Commission also provided a number of issues for comment regarding alternative

sentencing that include a request for comment on defendants suffering from other conditions (e.g., mental conditions) and whether they, too, should be eligible for a treatment program as an alternative to incarceration.

The Commission issued for comment a proposed amendment responding to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. The proposed amendment would broaden the sentencing guideline for offenses involving individual rights to now specifically include the new hate crime offense, which makes it unlawful to willfully cause bodily injury to a person because of the person's race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. The Act also created a second new offense, relating to attacking a United States serviceman on account of his or her service, and the Commission proposed an amendment incorporating into the guidelines this new offense. The Commission also proposed an expansion of the definition of a hate crime in its penalty enhancement for hate crimes to now include victims who were targeted because of their "gender identity."

The Commission also is seeking public comment on the extent to which specific offender characteristics should be relevant at sentencing. In particular, the Commission asks for comment on five particular offender characteristics: age; mental and emotional condition; physical condition, including drug dependence; lack of guidance as a youth; and military, civic, charitable, or public service, employment-related contributions, and prior good works.

Other proposed guideline amendments refer to guideline issues that include the calculation of criminal history points; the procedure to follow when arriving at a sentence, a departure, or a variance; and defacing a paleontological resource on federal land.

The full text of the proposed changes to the sentencing guidelines and issues for comment is available on the Commission's website at www.ussc.gov.

Preliminary Commission Data on Retroactive Application of Crack Cocaine Amendment and 4th Quarter FY09 National Trends Now Available

Now available on the Commission’s website, www.ussc.gov, is an updated set of tables presenting preliminary data on cases in which a motion for a reduced sentence was considered under 18 U.S.C. § 3582(c)(2) as a result of the retroactive application of the crack cocaine amendment to the sentencing guidelines (Amendment 706, as amended by Amendment 711), which became effective on November 1, 2007, and which took retroactive effect on March 3, 2008. This January 2010 report includes motions decided on by the courts and processed by the Commission through January 20, 2010.

Continuing with its real-time data reporting effort, the Commission released on its website preliminary quarterly data for the fourth quarter of fiscal year 2009. This report provides an extensive set of tables and charts presenting data about the 78,832 cases sentenced on or after October 1, 2008, and processed by the Commission through November 16, 2009. In addition to providing important information about sentencing trends and practices throughout fiscal year 2009, this report also provides an analysis of five-year sentencing trends in several key areas.

SELECTED SENTENCING FACTORS FOR OFFENDERS WHO WERE CONSIDERED FOR SENTENCE REDUCTION DUE TO APPLICATION OF RETROACTIVE CRACK COCAINE AMENDMENT			
	All Cases	Granted	Denied ¹
	%	%	%
Weapon			
Weapon Specific Offense Characteristic	24.2	23.8	27.9
Firearms Mandatory Minimum Applied	10.2	9.8	13.5
Safety Valve	9.2	9.8	4.5
Guideline Role Adjustments			
Aggravating Role (USSG §3B1.1)	10.0	9.1	17.9
Mitigating Role (USSG §3B1.2)	3.0	2.8	4.6
Obstruction Adjustment (USSG §3C1.1)	6.1	5.9	7.1
Sentence Relative to the Guideline Range			
Within Range	69.2	70.9	55.5
Above Range	0.4	0.3	1.2
Below Range	30.3	28.8	43.3
Criminal History Category			
I	22.2	22.9	15.9
II	12.9	12.9	12.8
III	23.0	23.2	21.8
IV	16.8	17.2	13.8
V	10.3	10.2	11.4
VI	14.7	13.6	24.3

¹ The 1,812 offenders represented in this column are those whom the Commission previously identified as eligible to seek a sentence reduction but whose petition for a reduction was denied by the court. Of the remaining 6,158 cases in which the court denied the request for a sentence reduction, 4,064 were excluded from this analysis because the offender was not previously identified as eligible to seek a sentence reduction for one or more reasons (see *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* (October 3, 2007) available at www.ussc.gov). Of the remaining 2,094 cases, 447 were excluded from this analysis because the offender had been identified as released or projected to be released prior to November 1, 2007, and so was excluded from the Commission's prior analysis of eligible offenders, 566 were excluded from this analysis because the offender was not sentenced for a drug offense, 875 were excluded from this analysis because crack cocaine was not involved in the offense, and 206 were excluded from this analysis because the reason for the court's decision cannot yet be determined.

SOURCE: U.S. Sentencing Commission, Preliminary 2008-2010 Datafiles, USSCFY08-USSCFY10.

Temporary Assignment Programs Continue to Serve as Successful Link

In 2009, the Commission continued its temporary assignment program for probation officers, assistant U.S. attorneys, and assistant federal public defenders. Approximately 200 attorneys and probation officers have been on temporary detail to the Commission since the program began in 1988.

The Commission's temporary assignment program has been successful in providing a link between the Commission and those practicing in the criminal justice community. This close interaction with officers and attorneys who take part in sentencings and apply the guidelines on a regular basis provides the Commission with additional information about the practical concerns facing users of the guidelines. The officers and attorneys who serve on temporary assignment gain increased exposure to and proficiency in the federal

NATIONAL COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO THE GUIDELINE RANGE ¹		
4th Quarter 2009 Preliminary Cumulative Data (October 1, 2008, through September 30, 2009)		
	N	%
TOTAL CASES	77,139	100.0
CASES SENTENCED WITHIN GUIDELINE RANGE	43,945	57.0
CASES SENTENCED ABOVE GUIDELINE RANGE	1,414	1.8
DEPARTURE ABOVE GUIDELINE RANGE	508	0.7
Upward Departure from Guideline Range ²	360	0.5
Upward Departure with <i>Booker</i> /18 U.S.C. § 3553 ³	148	0.2
OTHERWISE ABOVE GUIDELINE RANGE	906	1.1
Above Guideline Range with <i>Booker</i> /18 U.S.C. § 3553 ⁴	798	1.0
All Remaining Cases Above Guideline Range ⁵	108	0.1
GOVERNMENT SPONSORED BELOW RANGE⁶	19,518	25.3
§5K1.1 Substantial Assistance Departure	9,599	12.4
§5K3.1 Early Disposition Program Departure	7,087	9.2
Other Government Sponsored Below Range	2,832	3.7
NON-GOVERNMENT SPONSORED BELOW RANGE	12,262	15.9
DEPARTURE BELOW GUIDELINE RANGE	2,316	3.0
Downward Departure from Guideline Range ²	1,501	1.9
Downward Departure with <i>Booker</i> /18 U.S.C. § 3553 ³	815	1.1
OTHERWISE BELOW GUIDELINE RANGE	9,946	12.9
Below Guideline Range with <i>Booker</i> /18 U.S.C. § 3553 ⁴	9,038	11.7
All Remaining Cases Below Guideline Range ⁵	908	1.2

¹ This table reflects the 78,832 cases sentenced on or after October 1, 2008, with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by November 16, 2009. Of these, 1,693 cases were excluded because information was missing from the submitted documents that prevented the comparison of the sentence and the guideline range. Descriptions of variables used in this table are provided in Appendix A.

² All cases with departures in which the court did not indicate a reason either *United States v. Booker*, 18 U.S.C. § 3553, or a factor or reason specifically prohibited in the provisions, policy statements, or commentary of the *Guidelines Manual*.

³ All cases sentenced outside of the guideline range in which the court indicated both a departure (see footnote 2) and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system.

⁴ All cases sentenced outside of the guideline range in which no departure was indicated and in which the court cited either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system.

⁵ All cases sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. This category includes cases in which no reason was provided for a sentence outside of the guideline range.

⁶ Cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

SOURCE: U.S. Sentencing Commission, Preliminary 2009 Datafile, USSCFY09 (October 1, 2008, through September 30, 2009).

sentencing guidelines, as well as familiarity with national sentencing trends and practices. The officers and attorneys return to their respective districts as valuable resources to their colleagues and the courts.

The following individuals and districts participated throughout 2009:

United States Attorney Representatives

- Harriett Galvin
Southern District of Florida
- Daniel Tvedt
Northern District of Iowa

Federal Public Defender Representatives

- Molly Roth
Western District of Texas
- Leo Latella
Middle District of Pennsylvania

United States Probation Representatives

- Anthony Merolla
Eastern District of Michigan
- Lisa Pence
District of Colorado
- Carlos Cancio Lugo
District of Puerto Rico

Commission Announces New Members of Its Victims Advisory Group

In December 2009, the Commission announced the appointment of a new chair and three new members to its Victims Advisory Group (VAG). The VAG is a standing advisory group that provides the Commission insight and advice on the operation of the federal sentencing guidelines from the perspective of victims of federal crime.

Susan Smith Howley, public policy director for the National Center for Victims of Crime, will serve as chair of the VAG. The other new members are –

- **Jennifer Bishop-Jenkins**
Victims' Rights Advocate
- **Paul G. Cassell**
Professor of Law
S.J. Quinney College of Law
University of Utah
- **Charles C. Song, Esq.**
Howrey LLP

These new members join the following incumbent VAG members –

- **Douglas E. Beloof**
Director, National Crime Victim Law Institute
Lewis & Clark Law School
- **Russell P. Butler**
Executive Director
Maryland Crime Victims' Resource Center
- **Montie R. Deer**
Chief Justice of Iowa of Kansas & Nebraska
- **Pat Sekaquaptewa**
Executive Director
The Nakwatsvewat Institute
- **Howard Zehr**
Professor of Restorative Justice
Center for Justice and Peacebuilding

Commission Releases Several New Research Publications

New Releases are Part of Special Series of Sentencing Research Reports

The Sentencing Reform Act of 1984 created the Commission to serve as a clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices. In 2009, as a leader in federal sentencing research, the Commission continued to produce its special series of sentencing-related research reports — augmenting its regularly published reports and information on federal sentencing.

Throughout the year, the Commission published —

- *Changing Face of Federal Criminal Sentencing: Seventeen Years of Growth in the Federal Sentencing Caseload;*
- *Alternative Sentencing in the Federal Criminal Justice System;*
- *Impact of Prior Minor Offenses on Eligibility for Safety Valve;* and
- *Introduction to the Collection of Individual Offender Data by the United States Sentencing Commission.*

These reports are available in hard copy while supplies last and may be downloaded from the Commission's web site at <http://www.ussc.gov/research.htm>.

Plans Underway for 2010 National Training Seminar

The Sentencing Commission will be returning to New Orleans, Louisiana, on June 16–18, 2010, for its Annual National Seminar on the Federal Sentencing Guidelines. More than 1,100 attendees participated in the June 2009 seminar, the largest number of participants in the event's 18-year history. Last year's participants in the three-day event included judges, prosecutors, defenders, probation officers, academicians, and consultants. Watch the Commission website for information about registering for this very popular program.

Sentencing Commission Announces Membership of Practitioners Advisory Group

Commission Seeks to Benefit from Broad Range of Defense Bar Practitioners

In October 2009, the Commission announced the new membership of its standing advisory group that provides insight and advice to the Commission on the operation of the federal sentencing guidelines from the private defense bar perspective. The Practitioners Advisory Group (PAG) was initially formed in 1989 and provides input to the Commission on policies, sentencing procedures, and proposed guideline amendments. The advisory group also disseminates information regarding sentencing issues to the criminal defense community through its membership.

The Commission solicited applications for membership in the PAG by (1) publishing a notice in the *Federal Register* soliciting applications and (2) obtaining recommendations from all chief circuit and district judges in the federal judiciary. The reconstituted PAG consists of 17 voting members (12 circuit representatives, three at-large members, one chair, and one vice chair).

David Debold of Washington, D.C., will serve as the initial chair under the new charter and **Todd A. Bussert** of New Haven, Connecticut, as the initial vice chair. The initial chair will serve a full three-year term, and the initial vice chair will serve a term reduced to two years because of an initial staggering of terms.

The other members of the PAG, who will serve staggered terms are —

William C. Brennan, Jr.

Brennan Sullivan & McKenna LLP, Greenbelt, MD

Riley H. Ross III

Drinker, Biddle & Reath LLP, Philadelphia, PA

James M. Cole

Bryan Cave LLP, Washington, DC

Robert L. Sheketoff

Sheketoff & Horman, Boston, MA

Thomas W. Cranmer

Miller, Canfield, Paddock and Stone, P.L.C., Troy, MI

Jeffrey B. Steinback

Chicago, IL

Lawrence D. Finder

Haynes and Boone, LLP, Houston, TX

Eric Tirschwell

Kramer Levin Naftalis & Frankel LLP, New York, NY

Stephen J. Knorr

Tulsa, OK

Miguel A. Torres

El Paso, TX

Michael R. Mazzoli

Cox & Mazzoli PLLC, Louisville, KY

JoAnn Trog

Menees, Whitney, Burnet & Trog, St. Louis, MO

Carl J. Oreskovich

Etter, McMahon, Lamberson, Clary & Oreskovich, P.C.
Spokane, WA

Michael J. Trost

Atlanta, GA

Jacquelyn Robins

Albuquerque, NM

The newly constituted PAG will operate under a new charter that, among other things, allows its chair and vice chair to appoint non-voting attorney members to ensure that the Commission benefits from a wide range of experts in the criminal defense community.

Commission To Review Mandatory Minimums, Receives Directive From Congress

In June 2009, the Commission listed "a comprehensive review of statutory mandatory minimum penalties, including a review of the operation of the 'safety valve' provision at 18 U.S.C. § 3553(e)" as part of its final priorities. In October 2009, Congress directed the Commission to undertake an even broader review of statutory mandatory minimum penalties and their interaction with existing national sentencing policy. The Matthew Shepard and James Byrd Hate Crimes Prevention Act (part of Pub. L. No. 111–84) directs the Commission to issue a report on mandatory minimum sentencing provisions under federal law. Components of that report, due in October 2010, include —

- a compilation of all mandatory minimum sentencing provisions under Federal law;
- an assessment of the effect of mandatory minimum sentencing provisions under Federal law on the goal of eliminating unwarranted sentencing disparity and other goals of sentencing;
- an assessment of the impact of mandatory minimum sentencing provisions on the Federal prison population;
- an assessment of the compatibility of mandatory minimum sentencing provisions under Federal law and the sentencing guidelines system established under the Sentencing Reform Act of 1984 (Pub. L. No. 98–473; 98 Stat. 1987) and the sentencing guidelines system in place after *Booker v. United States*, 543 U.S. 220 (2005);
- a description of the interaction between mandatory minimum sentencing provisions under Federal law and plea agreements;
- a detailed empirical research study of the effect of mandatory minimum penalties under Federal law; and
- a discussion of mechanisms other than mandatory minimum sentencing laws by which Congress can take action with respect to sentencing policy.

The report also may include any other information that the Commission determines would contribute to a thorough assessment of mandatory minimum sentencing provisions under federal law.

GuideLines

is published periodically by the
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002
www.ussc.gov
(202) 502-4500
Fax: (202) 502-4699

William K. Sessions III — Chair
Ruben Castillo — Vice Chair
William B. Carr Jr. — Vice Chair
Ricardo H. Hinojosa — Commissioner
Beryl A. Howell — Commissioner
Dabney Friedrich — Commissioner
Jonathan J. Wroblewski — *ex officio*
Isaac Fulwood Jr. — *ex officio*

HelpLine 8:30 a.m. – 5:00 p.m. (E.S.T.)
(202) 502-4545

Office of Legislative & Public Affairs
(202) 502-4590

Editors — Lisa Rich and Michael Courlander
Production — Jeanne Doherty

Commission Undertakes Comprehensive Examination of Child Pornography Offenses

In October 2009, as the first step in the Commission's ongoing examination of the child pornography guidelines, the Commission published a comprehensive review of the legislation and guideline development pertinent to child pornography offenses. This broad, historical examination of child pornography offenses is entitled *The History of the Child Pornography Guidelines* and is available both in hard copy while supplies last and on the Commission's web site at http://www.ussc.gov/general/20091030_History_Child_Pornography_Guidelines.pdf.

As noted in its priorities, the Commission is undertaking a thorough examination of child pornography offenses and the guidelines, including, among other things, a review of the incidence of, and reasons for, departures and variances from the guideline sentence; and a compilation of studies on, and analysis of, recidivism by child pornography offenders. The Commission anticipates that it will issue a report on its findings, including possible recommendations to Congress on any statutory changes that may be appropriate, at the conclusion of its analysis.