

Minutes of the March 23, 2005 United States Sentencing Commission Public Meeting

Chair Hinojosa called the meeting to order at 9:30 a.m. in the Commissioner's Conference Room.

The following Commissioners and staff participated in the meeting: Judge Ricardo H. Hinojosa, Chair

Judge Ruben Castillo, Vice Chair Judge William K. Sessions, III, Vice Chair

John R. Steer, Vice Chair Beryl Howell, Commissioner Deborah Rhodes, Commissioner Ex Officio Edward F. Reilly, Jr., Commissioner Ex Officio Timothy B. McGrath, Staff Director

Dr. Louis Reedt, Director (Acting), Office of Policy Analysis

Kelley Land, Staff Attorney, Office of General Counsel

Pamela Montgomery, Director and Chief Counsel of Training, Office of Education and Sentencing Practice

Chair Hinojosa began the meeting with the Chair's report. He noted that the previous week he reported on the Commission's activities at the meeting of the Judicial Conference of the United States. During the event, he met with both the Chief Judges of the circuit courts and the representatives of the district courts. Questions were raised about the Statement of Reasons (SOR) form. He advised that the Commission was working closely with the Criminal Law Committee on a revised SOR form which the Criminal Law Committee will present to the Judicial Conference shortly. The Chair then called on the Staff Director, Tim McGrath, for his report.

Mr. McGrath reported on the Commission's upcoming events. On May 25-27, the Commission's 14th Annual National Seminar will be held in San Francisco. On July 11-12, the Commission will participate in the National Sentencing Institute, an event sponsored by the Administrative Office's Federal Judicial Center. The Commission and the D.C. Sentencing Commission will co-host the National Association of Sentencing Commission's Conference on August 7-9 in Washington, D.C.

Mr. McGrath announced that Ken Cohen, Director, Office of Legislative Affairs, will serve a six-month detail with the Senate Judiciary Committee. Lisa Rich is returning to the Commission and will replace Mr. Cohen while he is on detail. Assistant General Counsel Grace Chung Becker is leaving the Commission's Office of General Counsel to join the Department of Defense's Office of General Counsel. Ms. Chung Becker is a long time employee of the Commission who recently completed a detail with the Senate Judiciary Committee.

The Chair asked if there was a motion to adopt the minutes of last month's public meeting. Commissioner Howell made a motion to adopt the minutes with Vice Chair Castillo seconding. The minutes of the February 15, 2005 public meeting were adopted by a unanimous voice vote.

The Chair asked Mr. McGrath to introduce a series of reports on the staff's efforts concerning the *Booker* decision. Mr. McGrath stated that the Commission was focused on three areas in the post-*Booker* era, one of which is data collection. This information will inform Congress and members of the criminal justice community on how the courts are responding to the new advisory guideline system. The second area is case law. The Commissioners have asked that appellate cases and select district court cases concerning *Booker* be collected and analyzed. Finally, the Commission has implemented an outreach program through its training unit.

Dr. Lou Reedt presented the Commission's recently collected and analyzed data. Dr. Reedt called particular attention to the leadership role of Linda Maxfield, Senior Research Associate, Office of Policy Analysis, and briefly explained the Commission's data collection and analysis processes. Typically, the Commission receives between 270-280 cases per day.

Dr. Reedt stated that in the two months since *Booker*, OPA has noticed some differences in the cases received when compared to the data from the '02 fiscal year. Dr. Reedt cautioned the Commissioners that so far the Commission has received only 7.5% of the typical number of cases received in a year. This is a very small number of cases upon which to base any conclusions. Certain high volume districts are currently underreported. The absence of such high volume districts may skew national data.

In comparing the two time periods, the distribution of sentences above, within and below the guideline ranges appears to be similar. Since *Booker* was decided, approximately 62.1% of the cases are within the guideline range, compared to 65.0% in fiscal year 2002. About 1.9% of the sentences are above the guideline range and 36.0% are below the range, as compared to 2002's figures of 0.8% and 34.2%, respectively. Of the total number of cases, 22.3% are government-sponsored, below-the-guideline-range sentences. Almost three-quarters of these are §5K1.1 substantial assistance departures. Early disposition program (or fast-track) departures account for 4.2% of all cases. Plea agreements account for 1.6% of all cases. Additionally, 5.1% of all cases are guideline departures documented by the SOR form; 8.6% of the cases are sentenced below the range but are attributable to other reasons (either there are no reasons documented, there is a reference to *Booker*, or there is a reference to an 18 U.S.C. § 3553 factor).

Ms. Kelley Land reported that she continues to update a post-*Booker* circuit case law memo for the Commission. This memo includes some selected district court opinions but is not intended to be all inclusive of district court cases. She reported that there is a 3-way circuit split regarding the plain error review standard in cases on direct appeal with unpreserved *Booker* objections. The 1st, 5th and 11th Circuits place the burden on the defendant to show he/she suffered specific prejudice and that there is a reasonable probability that a different outcome would have resulted under an advisory sentencing system. The 3rd, 4th, 6th and 9th Circuits use a presumption of prejudice standard where judicial fact finding was used to determine the sentence. The 2nd and the 7th Circuits have decided the sentencing courts should determine whether there was plain error in the sentence imposed. The 2nd Circuit vacates the sentence and remands to the district court

for a plain error review. The 7th Circuit maintains jurisdiction of the case by ordering a limited remand to permit the sentencing judge to indicate whether he/she would have made a different decision under an advisory system, and will only vacate and remand for resentencing upon notice from the district court that a different sentence would have been imposed. On the issue of retroactivity, the 2nd, 6th, 7th, 10th and 11th Circuits have ruled that *Booker* is not applicable on collateral review of sentences.

Ms. Pam Montgomery reported on the Commission's training initiatives. The Commission's training efforts have been greatly expanded in the wake of the *Booker* decision. The program reaches out to judges, probation officers and to circuit staff attorneys. The Commission's training staff has been invited to several district conferences and to several Federal Judicial Center sponsored workshops. The staff has also been out training probation officers in districts with large caseloads, such as the Southern District of New York, New Jersey, the Eastern District of Pennsylvania, Southern, Eastern and Central Districts of California. Training of circuit staff attorneys has been scheduled for the 11th Circuit and the 10th Circuit, with a tentative date scheduled for the 9th Circuit. All the foregoing training is in addition to the training given in collaboration with the Federal Judicial Center, the Administrative Office, the defense bar's Sentencing Guidelines Training Group and the prosecutors' National Advocacy Training Center. In conclusion, Ms. Montgomery highlighted the Commission's 14th Annual National Seminar, which will be held in San Francisco May 25-27 at the Westin St. Francis. There will be over 80 speakers and 26 breakout groups focusing specifically on post-*Booker* topics.

The Chair expressed the Commissioners' appreciation for the staff's hard work needed to collect the post-*Booker* sentencing data and the continuing efforts to keep the data current on a daily basis. The Chair also expressed appreciation for the training efforts made in response to the *Booker* decision. Finally, the Chair thanked fellow Commissioners for their efforts. In addition to their normal duties as judges or practitioners, the Chair noted that the Commissioners have taken on many additional tasks in this very important period in the Commission's history.

In closing, the Chair reminded the public that the Commission has published requests for public comment on proposed guideline amendments and issues for comment and will hold a public hearing in April to hear anyone interested in addressing those proposed amendments. Interested parties may also submit their comments in writing to the Commission. With no new business before the Commission, Vice Chair Steer made a motion to adjourn the meeting. The motion was seconded by Vice Chair Castillo and upon unanimous voice vote, the meeting was adjourned.