

**United States Sentencing Commission Public Meeting Minutes
September 16, 2010**

Chair William K Sessions III called the meeting to order at 12:03 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge William K. Sessions III, Chair
- William B. Carr, Jr., Vice Chair
- Judge Ruben Castillo, Vice Chair
- Ketanji B. Jackson, Vice Chair
- Dabney L. Friedrich, Commissioner
- Judge Ricardo H. Hinojosa, Commissioner
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Kenneth Cohen, General Counsel

The Chair called for a motion to adopt the September 1, 2010, public meeting minutes. Vice Chair Castillo made a motion to adopt the minutes, with Commissioner Howell seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Ms. Sheon reported the passing of Ms. Margaret Glessner. Ms. Glessner served with the Commission for the majority of her 30-year career in the Federal Government. Ms. Sheon recounted Ms. Glessner's loyal and dedicated service to the Commission.

The Chair called on Mr. Cohen to inform the Commission on a possible vote to amend the sentencing guidelines.

Mr. Cohen stated that the proposed amendment, attached hereto as Exhibit A, would expand the listing in §1B1.10(c) (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to include Amendment 742 (relating to the elimination of "recency" points) as an amendment that may be applied retroactively pursuant to 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2). Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2010 effective date, and with staff

being authorized to make technical and conforming changes if needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Hearing none, the Chair stated that the proposed amendment fails for lack of a motion. Chair Sessions called for discussion. Commissioner Howell stated three reasons why she believes it is not appropriate to make the recency amendment retroactive based on the Commission's criteria for considering retroactivity at §1B1.10. First, while approximately 8,000 offenders may be eligible to benefit from retroactivity of the recency amendment, the purpose of the recency amendment was to simplify guideline application, not to correct a perceived fundamental unfairness with the application of recency points. Second, the potential burden on the courts would be substantial if the approximately 43,000 offenders who received recency points petitioned for review of their sentences when only a comparatively small number may be eligible to benefit. Commissioner Howell noted that the Criminal Law Committee of the Judicial Conference of the United States also shares this concern. Third, the majority of the 8,000 offenders who may be eligible to benefit are in Criminal History Categories IV, V, and VI, which raises public safety concerns.

Vice Chair Jackson stated her belief that the Commission correctly amended the recency provision because Commission data indicates the provision has limited utility as a predictor of recidivism. In her view, however, the data also indicates that the recency amendment should not be applied retroactively. Specifically, more than 43,000 currently incarcerated defendants received recency points, but only 8,000 offenders actually would be eligible for a reduction as a result of the amendment. Thus, if the recency amendment were made retroactive, the courts could be overwhelmed with unsuccessful sentence reduction motions. Additionally, Vice Chair Jackson noted that the data for the 2007 crack cocaine retroactivity amendment correctly predicted that the amendment would yield substantial sentencing results, while the data for the recency retroactivity amendment indicates the amendment will yield less significant sentencing results. Finally, Vice Chair Jackson observed that the recency amendment was not intended to address the same types of fairness issues involved in the circumstances where retroactivity typically has been adopted in the past.

Vice Chair Castillo agreed with Vice Chair Jackson and Commissioner Howell's statements. Recalling the Commission's extensive deliberations about making the recency amendment retroactive, he concluded that the limited potential benefits are outweighed by the potential negative consequences on the criminal justice system. Vice Chair Castillo stated that while he supported the recency amendment to avoid criminal history points in certain cases, primarily in immigration offenses, the data analysis for retroactive application of the amendment will lead to a different result. He reported that the data indicates retroactive application would primarily have an impact on defendants in the higher criminal history categories and on drug offenders, which raises public safety concerns. Vice Chair Castillo agreed with Vice Chair Jackson that the recency amendment is not intended to address a fundamental fairness issue like the crack cocaine amendment, and that potentially 43,000 sentence reductions motions could overburden the criminal justice system. Vice Chair Castillo also believes that, because judges in cases involving recency points had departure authority to downwardly adjust each sentence when originally

imposed, it is far from clear that 8,000 offenders would actually receive a reduction if the recency amendment were made retroactive, especially after individual public safety factors are appropriately evaluated.

Chair Sessions asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Vice Chair Castillo made a motion to adjourn, with Vice Chair Carr seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 12:13 p.m.

APPENDIX A

PROPOSED AMENDMENT: RETROACTIVITY

Synopsis of Proposed Amendment: *This proposed amendment expands the listing in §1B1.10(c) (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to include Amendment 742 (relating to the elimination of "recency" points) as an amendment that may be applied retroactively pursuant to 28 U.S.C. § 994(u).*

§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

* * *

- (c) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, ~~and~~ 715, ~~and~~ 742.

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