

INTRODUCTION AND EXECUTIVE SUMMARY

This Report presents the recommendation of the Advisory Commission on Sentencing (“the Commission”) for a system of voluntary sentencing guidelines for use in the local courts of the District of Columbia, pursuant to D.C. Official Code § 3-105(d). This recommendation represents the culmination of more than four years of study and analysis of sentencing practices in the District of Columbia Superior Court. It is not a finished product. As this Report is submitted, the recommended guidelines have not yet been subjected to scrutiny of judges and lawyers outside of the Commission, and have not yet been shared widely with the general public.

Development of sentencing guidelines is an exceedingly complex undertaking. Experience with these recommendations over time will undoubtedly identify factors the Commission may have overlooked or weighted improperly and suggest the need for revision. The Commission therefore recommends that the proposed guidelines be implemented initially as a pilot program in order to test them in actual practice. This would allow a sufficient opportunity for practitioners and citizens to comment, and for the Commission to make necessary adjustments before proposing guidelines for formal action by the Council.

The recommended guidelines are a product of compromise. The Commission is, as it should be, a pluralistic body, consisting of judges, a Council member, prosecutors and defense lawyers, non-lawyer citizen members, a criminal justice scholar, offender

supervision agencies and correctional experts. It is an understatement to observe that members representing this diversity of interests did not agree on everything. With much hard work and in the spirit of compromise, however, the resulting recommendations represent a consensus position. No one constituent group got everything it wanted, but all agree that the current proposal comes as close as the Commission can to a workable model that will reduce unwarranted disparity in sentencing while preserving, to the maximum extent possible, discretion of judges to fashion fair and just sentences in individual cases.

When the Commission started its work more than four years ago, there was a division of opinion among the members on the question of whether sentencing guidelines were a good idea for the District of Columbia. In the wake of the truth-in-sentencing reforms initially mandated by the National Capital Revitalization and Self-Government Improvement Act of 1997 and later enacted by the Council in the Sentencing Reform Amendment Act of 2000, some expressed concern that judges would have too much discretion under the new system and that some sentences might increase dramatically unless that discretion was somehow constrained. On the subject of guidelines as a way of constraining discretion, there were strong differences of opinion. Some members were skeptical that any system of guidelines would be desirable for the District of Columbia. Others favored a system of presumptive guidelines which, while less rigid than the Federal guidelines, would nonetheless be binding on the judges, as the best method of constraining discretion and reducing unwarranted disparity. After surveying all 50 states, focusing on the eighteen states with structured sentencing systems, and studying closely

the systems in four states that had taken different approaches, the Commission ultimately settled on voluntary guidelines with relatively wide ranges in recommended prison sentence lengths and the ability to depart, upward and downward, for extraordinary cases. The Commission then began the task of constructing such a system – looking at each combination of crime and criminal history to determine the appropriate range for prison sentences and the availability, or not, of probation or a short split sentence.

In Chapter I, the Commission reports on practices under determinate sentencing from August 2000 through June 2003, completing the work begun in the Commission’s 2002 Annual Report. Chapter II discusses the Commission’s rationale for proposing a system of voluntary sentencing guidelines for the District of Columbia. In Chapter III, the Commission presents an explanation of the guidelines and the principles that were used to construct the system. Finally, Chapter IV discusses the unfinished business of the Commission, including short-term implementation activities and our long-term plans.

Determinate Sentencing Practice

Chapter I reports on the Commission’s study of sentencing practices for 4,418 “new law sentences” for crimes committed after August 5, 2000 through June 30, 2003.¹ This includes a discussion of the number and type of new law sentences for all offenses, an assessment of the trends in sentencing under the new determinate sentencing system, and comparisons of old law versus new law sentences. The chapter updates the

¹ Throughout this Report, “new law sentences” refer to sentences imposed under the new law, which provided for determinate sentences for crimes committed on or after August 5, 2000. “Old law sentences” refer to indeterminate sentences for crimes committed before August 5, 2000.

Commission's 2002 Annual Report, which reported on old law sentences and a relatively small number of early new law sentences.

Examination of prison and probation sentences by year shows that the number of sentences under the new law that included some period of incarceration (including split sentences) increased steadily from 58 percent in 2001 to 64 percent in 2002 to 66 percent during the first half of 2003. This increase is likely due, at least in part, to the fact that prison sentences tended to be most common for crimes of violence and other complex cases, which took longer to be adjudicated following the switch to determinate sentencing in 2000.

As discussed in the 2002 Report, the use of probation sentences grew in the late 1990s. However, it is now apparent that sentences to probation peaked in 2000 at 46 percent of all sentence dispositions. For the first half of 2003, sentences to probation had fallen back to 33 percent of all sentences, close to the 1998 level of 31 percent.

Looking at the assortment of crimes sentenced each year under the new law, the percentage of drug sentences was 40.2 percent in 2001, increased slightly to 43.5 percent in 2002, and increased again to 45.1 percent in the first half of 2003. The percentage of violent crime cases sentenced under the new law also increased steadily during this time period, from 15.8 percent in 2001 to 16.6 percent in 2002 to 20.1 percent in the first half of 2003.²

² The increase in the proportion of violent crime sentences probably reflects the time it has taken for violent crimes committed after August 5, 2000 to reach disposition by trial or guilty plea.

Chapter I also compares the length of new law prison sentences with old law minimum prison sentences by major offense type (violent, property, drug, weapon, public order, and other). New law sentences are approximately equal to old law minimum sentences for nonviolent crimes. For violent crimes, new law sentences are longer than old law minimum sentences. However, one should not conclude that violent offenders are therefore serving longer sentences under the new law. A new law sentence fixes the maximum time an offender will serve, whereas under the old law, many offenders served more than their minimum term before they were released on parole.

The Case for Structured Sentencing

Chapter II discusses the Commission's reasons for recommending voluntary guidelines. The Commission's primary rationale for proposing structured sentencing rests on a concern for basic fairness in sentencing. Substantial unexplained variability in sentencing exists. The judges and practitioners on the Commission all report variability in sentencing, some of which could be explained by legitimate sentencing factors relating to the crime or the background of the offender. The Commission's analysis of sentencing data from 1996-2003 also showed variability in sentencing across all crime categories. To the extent that variability may be attributable solely to differences in judicial philosophy, it is a cause for concern. Basic fairness requires that similarly situated offenders should receive similar sentences for similar crimes.

The proposed sentencing guidelines set sentence length ranges for each combination of crime and criminal history and establish standards for departing from those ranges in extraordinary cases. The proposal attempts to move more sentences toward the historical center, without creating a guidelines system that results in more – or less – time served for the average offender in the average case. Although the ranges are relatively broad, they nevertheless cabin discretion for the imposition of prison sentences to capture approximately the middle 50 percent of historical sentences. The guidelines permit a sentence to probation if at least 25 percent of offenders who fall within a given cell were sentenced to probation in the past. With these parameters, the proposed guidelines should serve to give the judges, practitioners, defendants, crime victims and the community at large a better understanding of the likely consequences of criminal behavior and confidence that sentences will be more predictable and consistent.

The Commission recommends a system of voluntary guidelines, and makes this recommendation for three primary reasons. First, experience in other states shows that voluntary guidelines can achieve high compliance while avoiding undesirable litigation, which can strain resources and affect the court's ability to manage its workload. Second, voluntary guidelines are less rigid than mandatory systems and allow judges more room to structure a sentence to fit the varying circumstances of each individual case. Third, voluntary guidelines will make it easier for the Commission to adjust sentencing ranges in the future and, if necessary, account for important sentencing factors that may have been missed, and address any unanticipated consequences of such a major shift in sentencing practice. Given a single courthouse and substantial judicial support, the

Commission expects the Superior Court to achieve a high degree of compliance. Procedures will be developed that will require judges to acknowledge that they have considered the guideline recommendation and have complied with it, or to explain why they departed, using prescribed departure principles. For this endeavor to be successful, it is important that the Commission continues to receive the resources necessary to monitor and evaluate how the system is working and to recommend changes as indicated.

The Architecture Of The Structured Sentencing System

Chapter III explains the architecture of the structured sentencing system the Commission recommends. To create this structured sentencing system, the Commission developed two separate sentencing grids: the Master Grid for all offenses except drug offenses, and the Drug Grid. For each grid, two axes are used -- one to plot the offenses by seriousness (vertical axis) and one to plot levels of criminal history (horizontal axis). The Master Grid has nine offense seriousness levels and the Drug Grid has three seriousness levels. Both grids have five criminal history categories, from first offenders to those with multiple prior convictions. Consequently, the Master Grid has 45 cells and the Drug Grid has 15 cells. The guideline grids appear at the end of this Chapter and again in Appendix A.

Each sentencing decision has two components: the so-called in/out decision, in which the judge decides whether prison or probation is appropriate; and the length-of-sentence decision in those cases where a prison term is imposed. In developing guideline recommendations, the Commission operated from the principle that the guidelines should

generally follow prevailing practice with respect to both of these decisions, so that guidance would be provided for the in/out decision and, separately, for the length of the sentence if a prison term is imposed. For the former decision, some cells are light shaded to indicate that offenders in that cell are eligible for probation as an alternative to prison. Other cells are dark shaded to indicate that the offender is eligible for a short split sentence.³ A short split sentence means a period of incarceration, typically not more than six months, followed by a period of probation. All cells, including the probation and split sentence eligible cells, contain a minimum and maximum prison sentence (the guideline range). The low number is the shortest prison sentence in months that the judge can impose and still be compliant with the sentencing guidelines. Conversely, the high number is the longest prison sentence in months the judge can impose and still be compliant with the guidelines. In cells where probation sentences and/or split sentences are permitted, these sentencing ranges determine the sentence to be suspended if the judge decides to impose probation or a short split sentence.

The Commission developed the sentencing ranges in each cell after it ranked offenses according to seriousness, collected data on past sentencing practices, and weighted the relative importance of prior criminal convictions. The Master Grid and the Drug Grid were developed based on the following principles:

- 1) Sentences and sentence length ranges are based on the offense of conviction,⁴
- 2) All cells are prison eligible,

³ Light shaded cells appear yellow on the original printed copies of the Report. Dark shaded cells appear green on the original printed copies of the Report.

⁴ Offense of conviction, as distinguished from other related or unrelated conduct, means the offense or offenses to which the defendant pled guilty or of which the defendant was convicted at trial.

- 3) Cell ranges reflect historical sentencing practices and attempt to capture approximately the middle 50 percent of historical prison sentences,
- 4) Each cell has a higher range than the cell adjacent to it both vertically (from bottom to top) and horizontally (from left to right) -- although ranges can overlap,
- 5) Both the minimum and the maximum prison sentence in each cell increase as the cells progress vertically and horizontally,
- 6) Statutory sentencing enhancements can increase the maximum sentence in the cell, but do not affect the minimum,
- 7) Cells in which probation was traditionally granted in 25 percent or more of the cases are probation-eligible cells and cells in which the combination of probation and short split sentences add up to at least 25 percent of historical sentences are short split sentence eligible cells,
- 8) There is a non-exclusive list of aggravating and mitigating factors that might justify a departure in extraordinary cases,
- 9) Minimum or mandatory minimum sentences required by statute trump the guidelines, and
- 10) The judge is bound by the sentence or sentencing range agreed to by the parties under Rule 11(e)(1)(C) of Superior Court Rules of Criminal Procedure if the judge accepts the plea, regardless of the otherwise applicable guideline range.

Unfinished Business

Chapter IV presents an overview of the work still to be accomplished. Although the Commission represents many different viewpoints, practitioners and the public have not had the opportunity to scrutinize the proposed sentencing guidelines system. Before the recommendations are implemented, even as a pilot project, the Commission should have an opportunity to hear the views of other judges, practitioners and members of the community and to refine the proposed system if necessary. Notwithstanding the diversity of the Commission and the care taken in preparing these recommendations, the Commission may not have adequately considered all of the legitimate factors involved in the sentencing process or appropriately reflected the views of the community on the important issues relevant to its recommendations.

In addition, the Commission will have to conduct extensive training and produce a guidelines practice manual for judges, prosecutors, defense lawyers and presentence report writers to familiarize them with the operation of this entirely new system. Drafting the manual and preparing and conducting training for several hundred people in the criminal justice system will take several months.

The Commission is recommending that the new sentencing guidelines be introduced as a pilot program. If the Council agrees a pilot program is warranted, the Commission proposes to begin operation in May 2004.

Every state with a fully-functional structured sentencing system has retained a sentencing commission to collect and analyze data on sentencing and to make recommendations for future improvements. Subject to the direction of the Council, the Commission intends to monitor sentencing practice to determine compliance with the guidelines and with the rules for departure. The compliance information will be an important means of evaluating the guideline recommendations and making adjustments to recommendations as needed. In addition to monitoring, the Commission would expect to offer technical assistance for practitioners and the public, providing fast and accurate information to judges, lawyers, and presentence report writers who are using the guidelines every day. Having devoted a tremendous amount of energy and resources to the development of a system that should promote more fairness and uniformity in sentencing without sacrificing individual justice, the Commission stands ready to see this project through to the goal of providing the best possible structured sentencing system for the citizens of the District of Columbia.

Master Sentencing Grid For Felony Crimes, 11/30/03

Ranking group and Most Common Offenses	Criminal History									
	0 to .5 A	.75 to 1.75 B	2 to 3.75 C	4 to 5.75 D	6+ E					
Group 1 1st degree murder w/armed 1st degree murder	360	720	360	720	360	720	360	720	+	
Group 2 2nd degree murder w/ armed 2nd degree murder 1st degree sex abuse 1st degree sex abuse w/ armed	144	288	156	300	168	312	180	324	192	+
Group 3 Voluntary manslaughter w/ armed 1st degree child sex abuse Carjacking while armed Assault with intent to kill w/armed Armed burglary I	90	180	102	192	114	204	126	216	138	+
Group 4 Aggravated assault w/ armed Voluntary manslaughter	48	120	60	132	72	144	84	156	96	+
Group 5 Possession of firearm /CV Armed robbery Burglary I Obstruction of justice Assault with intent to kill	36	84	48	96	60	108	72	120	84	+
Group 6 ADW Robbery Aggravated assault 2nd degree child sex abuse Assault with intent to rob	18	60	24	66	30	72	36	78	42	+
Group 7 Burglary II 3rd degree sex abuse Negligent homicide Assault w/I to commit mayhem	12	36	18	42	24	48	30	54	36	+
Group 8 (Old Group 7) CPWOL UUV Attempt robbery Attempt burglary 1st degree theft	6	24	10	28	14	32	18	36	22	+
New Group 9 Escape/prison breach BRA Receiving stolen goods Uttering Forgery	1	12	3	16	5	20	7	24	9	+

Yellow/Light shaded cells are probation optional.
Green/Dark shaded cells are splits and probation optional.

Drug Sentencing Guidelines, 11/30/2003					
	A 0 to .5	B .75 to 1.75	C 2 to 3.75	D 4 to 5.75	E 6+
PWID & Distribution while armed	30-72	36-78	42-84	48-90	54+
PWID & Distribution cocaine, heroin, marijuana	12-30	16-36	20-42	24-48	28+
Attempt PWID & Distribution cocaine, heroin, marijuana	6-18	10-24	14-30	18-36	22+

Yellow/Light shaded boxes are probation permissible
Green/Darker shaded boxes are split sentence permissible