

The Sentencing Guideline

A publication of the National Association of Sentencing Commissions



NASC Breaks Attendance Record at Kansas Conference

The 2001 NASC Conference held in Kansas City last August turned out to be one of the best attended annual NASC conferences held to date, with 113 participants in attendance. There were no tornados, there was a sufficient amount of barbecue to satisfy everyone, and there were cows everywhere (you had to be there!).



Keynote Speaker Robert Stephan, former Kansas Attorney General, and Kansas Sentencing Commission Executive Director Barbara Tombs mug for the camera

The 2001 Conference opened with welcoming remarks from Senator John Vratil, Chairman of the Kansas Senate Judiciary Committee, as well as from the Chair and Vice-Chair of the Kansas Sentencing Commission. The first Plenary Session on Monday included a panel discussion on challenges in the development and retention of rational sentencing policy from a variety of perspectives, including the judiciary, prosecution, media, sentencing commissions and the legislature. This discussion served as the back drop to the conference theme, "Rational Sentencing in an Ill-Rational World of Crime." The conference involved three topic tracks, nine breakout sessions, two plenary sessions and two panel discussions.

Monday's Luncheon Address was provided by Robert T. Stephan, former Kansas Attorney General and the first Chairman of the Kansas Sentencing Commission. His presentation, "Stopping Russian Roulette," focused on how sentencing policies can result in disparity, both intentional and unintentional. Often disparity is not

the result of bias or prejudice but rather a consequence of socioeconomic factors that prevent equitable and determinate sentencing practices. He raised the issue that no system is perfect and that dealing with an appropriate punishment for criminal conduct will always be challenging. However, when a state bases policy on accurate data, clearly defined goals and the pursuit of fairness and equality, then rational sentencing policy is achievable. Mr. Stephan's straight-forward approach in dealing with difficult topics, combined with an unmistakable sense of humor, enabled his presentation to be both informative and entertaining.

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"Sentencing in the 21st Century" Virginia Sentencing Commission to Host Summer Conference

ANNOUNCING
The National Association of Sentencing Commissions 2002 Annual Conference Williamsburg, Virginia August 4-6, 2002

The NASC 2002 Annual Conference will be held August 4-6, 2002 at the Williamsburg Lodge, located in the heart of Colonial Williamsburg.

The Ninth Annual NASC Conference will feature workshops on sentencing fundamentals, emerging issues, information technologies and research, as well as provide the opportunity to share ideas, concerns and experiences related to sentencing policies with people from around the country. Conference materials will be mailed in April of 2002.



Colonial Williamsburg and the adjoining area is one of the nation's premiere tourist destinations. Visitors can step back in time to experience the ideas and dreams of both great and everyday people on the eve of the American Revolution. In the 173 acres and more than 500 restored and reconstructed buildings of Colonial Williamsburg, you'll discover hundreds of people representing actual citizens from 18th Century Williamsburg.

For conference attendees who can extend their stay a few more days, Colonial Williamsburg is the perfect base camp for a vacation that's fun for visitors of all ages. Nearby attractions include:

Busch Gardens Williamsburg, Jamestown Settlement, Yorktown National Battlefield, Yorktown Victory Center, Water Country USA, Virginia Beach and the Chesapeake Bay.

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NASC Mission Statement

"To facilitate the exchange of ideas, data and expertise among sentencing commissions and to educate and inform policymakers and the public on issues related to sentencing policies and sentencing commissions."

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The Keynote Address on Tuesday was delivered by Washburn University Law School Professor William Rich, legal counsel appointed in 1985 to represent inmates who challenged prison conditions in Kansas, which ultimately led to a Federal Conditions of Confinement lawsuit and the development of Sentencing Guidelines in the state. Professor Rich discussed that prerequisites to sentencing reform often involve litigation and education, either forced or voluntary. He also challenged the audience to remember that implementing sentencing reform is only half the battle. Maintaining rationality is an ongoing and difficult charge for everyone involved in developing systems that are fair, proportionate and humane.

The conference breakout sessions were designed around three topic areas: Changing Correctional Populations, Sentencing and the Media, and The Impact of Sentencing Policy. Breakout sessions provided an opportunity for states to learn how their counterparts are dealing with various issues and provided an excellent forum for exchanging ideas and experiences, as well as networking. The U.S. Sentencing Commission presented on sentencing and the impact of evolving drug policies, which served to inform states of trends in new drug growths, impact of mandatory sentencing and issues surrounding state versus federal prosecution of drug offenses.

The conference location at the Fairmont Hotel gave participants easy access to the Country Club Plaza part of Kansas City, which provided many opportunities for great food, great shopping, and even a baseball game. For many participants, this conference served as their first trip to Kansas City and a chance to get an insider's view of the Midwest.

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Message from the Chair

On behalf of the Board and the membership of the National Association of Sentencing Commissions, I want to thank all of you who attended the 7th annual NASC conference last summer in Kansas City. Thanks in large measure to the Program Chair, Barb Tombs, and members of the Kansas Sentencing Commission and its staff, as well as the NASC program committee, we had the largest conference to date. The conference, run by volunteers, continues to attract a diverse audience including members of the judiciary, legislators, noted sentencing researchers, attorneys, citizens interested in sentencing policy, U.S. Department of Justice representatives, and federal and state sentencing commission members and staff.

The Executive Board of NASC encourages readers of this newsletter to attend the association's 8th annual conference in historic Williamsburg Virginia, August 4-6, 2002. The Program Committee, chaired by Rick Kern, director of the Virginia Criminal Sentencing Commission, has secured one of the area's best hotels adjacent to Colonial Williamsburg – a leading tourist destination with many nearby attractions for NASC members, other conference attendees, and their families. The Committee is developing a program to attract a diverse audience interested in federal and state sentencing policy.

This year's Executive Committee includes one new addition, Paul O'Connell of Arizona and formerly director of the Oklahoma Sentencing Commission. Ed McConkie (Utah) and Michael Traft (Massachusetts) were elected to their second and final terms. NASC members will elect four Executive Committee members at the upcoming Williamsburg conference. There will be at least two open seats on next year's NASC Executive Committee, and the seats are open to current or former staff or members of a sentencing commission or similar governmental body. Please send us a brief bio if you wish to stand for election.

We are seeking your advice and input on this year's conference. We expect the annual conference to continue to grow and evolve, and believe that attracting policy makers and Commission members is of foremost importance. As a volunteer and member-run organization, we rely on you, the members, to share program ideas with the NASC Program Committee. If you have suggestions, please call the Program Chair, Rick Kern, (Phone: 804-225-4565), myself (Phone: (202) 353-7794) or another member of the Board. We will make sure your suggestions are considered for this annual conference.

I look forward to seeing you in Williamsburg this summer.

Kim S. Hunt
Chair, NASC Executive Board

Newsletter Staff

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Alabama: Initial Report Filed with the Legislature

Joining the ranks of other states that acknowledge sentencing reform deserves priority status on the agenda of state government. Alabama has a permanent sentencing commission operating as a separate state agency under the Alabama Supreme Court. The Alabama Sentencing Commission has now completed its first year of work toward developing a comprehensive sentencing plan for felony offenders that will:

- Secure the public safety of the state by providing a swift and sure response to the commission of crime.
- Establish an effective, fair and efficient sentencing system for Alabama adult and juvenile criminal offenders that provides certainty in sentencing, maintains judicial discretion, and avoids unwarranted sentencing disparities among defendants with like criminal records who have been found guilty of similar criminal conduct.
- Promote truth in sentencing to ensure that parties involved in a criminal case and the criminal justice process are aware of the nature and length of the sentence and its basis.
- Prevent prison overcrowding and the premature release of prisoners.
- Provide judges with flexibility in sentencing options and meaningful discretion in the imposition of sentences.
- Enhance the availability and use of a wider array of sentencing options in appropriate cases; and
- Limit the discretion of district attorneys in determining the charge or crime. § 12-25-2, Code of Alabama 1975.

As the first step toward achieving these goals, the Alabama Sentencing Commission devoted the first year of operation to reviewing sentencing laws and reform efforts in other states, examining the state's existing criminal laws and procedures and compiling a comprehensive database for an accurate analysis of Alabama's current sentencing practices. Due to time constraints, lack of accurate data and inadequate resources, the initial report to the Legislature submitted January 7, 2002, did not include a comprehensive reform package. The report explained the progress that had been made thus far and requested assistance from the Legislature to enable the Commission to continue its work.

WANTED

SENIOR RESEARCH ANALYST ALABAMA SENTENCING COMMISSION

Salary Range \$48,466 – \$73,881
Location: Montgomery, Alabama

For further details, see job announcement
on at www.alacourt.org or contact the
Sentencing Commission directly: (800)
392-8077 ext. 34830

e-mail Lynda.flynt@alacourt.state.al.us

Alabama Sentencing Commission
300 Dexter Avenue
Montgomery, AL 36104-3741

The Sentencing Commission has identified the methodology that must be applied to overcome the obstacles it is facing and to build and maintain a sure foundation for sentencing reform in Alabama:

- The First Step – Gathering Information for a Reliable Picture of Current Policies and Practices
- The Second Step – Analyzing the Picture to Evaluate Current Policies and Practices and Develop Recommendations for Necessary Changes
- The Third Step – Projecting the Impact of Proposed Changes in Policies and Practices –Building a Simulation Model

Alabama's new Sentencing Commission has experienced the same problems encountered by other states during their first year of operation - struggling with such basic issues as lack of funding and lack of data. These obstacles, while frustrating and a hindrance, will be overcome because in an unusual demonstration of nonpartisan support the Legislature, the Governor, the Attorney General, and Alabama's Chief Justice have united to improve Alabama's Criminal Justice System.

Arkansas: Data Integration Initiative Seeks More Timely, Accurate Information

In 1999, the Arkansas General Assembly created the Integrated Justice Information Systems Coordinating Council and Local Government Advisory Board. The Act was passed in response to the need which criminal justice agencies in Arkansas recognized as critical to their work both individually and as a whole. The Council is charged with establishing the process for integrating the information systems of all of the state's criminal justice agencies in order that crucial data can be electronically shared. Such a system would eliminate error-prone and redundant data, thus dramatically improving timely access to information. The Arkansas Sentencing Commission was selected to staff the Council. As its work progressed, it became apparent that the Sentencing Commission should pay a more vital decision-making role with the Council and, in 2001, the General Assembly passed an Act moving ASC from staff to Council member.

After presenting a report on the integration of the information systems of the state's justice agencies in September of 2000, the Council began working to establish a pilot project for Faulkner County in central Arkansas. The Council submitted a grant application seeking funds for the project. In July of 2001, it was announced that the Arkansas Integrated Justice Information System Coordinating Council had been awarded \$910,563 from the Justice Department. Arkansas was one of 26 states which received grants totaling more than \$16 million to help share information across jurisdictional and criminal justice system component lines. The grants were made under a program authorized by the Crime Identification Technology Act of 1998. The program is administered by the Bureau of Justice, a component of the Office of Justice programs, in cooperation with the National Governors' Association's Center for Best Practices. The projects will last between 12 and 24 months and must contribute directly to improving information sharing among all or some of the law enforcement and criminal justice agencies at the state and local levels.

Arkansas' pilot project will link criminal justice agencies in the city of Conway and throughout Faulkner County. One purpose of the project is to illustrate what obstacles must be overcome when such an effort is made statewide. Success in this pilot project will encourage other jurisdictions to sign on to the project and to be persuasive when state funding is sought. The Arkansas Sentencing Commission is continuing in its role as a member of the Council to consult and supervise the program. The Commission's Executive Director, Sandy Moll is actively serving on the Executive Committee.

Join NASC!!!

District of Columbia: Commission Surveys State Sentencing Practices

During 2001, the District of Columbia Sentencing Commission surveyed 22 states and the federal government regarding sentencing practices with particular emphasis on investigating sentencing guidelines or other forms of structured sentencing. The following states were surveyed: Alabama, Alaska, Arkansas, Delaware, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, and Washington. The surveys were sent out in April 2001 and responses were received, from 21 of the 23 jurisdictions. We were unable to verify sentencing practices in two states, Louisiana and Oregon.

The information gathered consisted of the following: 1) type of sentencing structure—determinate or indeterminate; 2) type of sentencing guidelines—voluntary or presumptive, 3) descriptive or prescriptive guidelines; 4) type of mandatory minimum offenses; 5) presence of a sentencing commission; 6) presence of truth-in-sentencing; 7) presence of discretionary parole; 8) if parole was abolished, presence of post-release supervision; 9) presence of good time; 10) presence of appellate review; 11) incorporation of intermediate sanctions in guidelines; and 12) sentencing commission authority to change the guidelines.

Among the jurisdictions surveyed, currently 17 states and the federal government have some form of sentencing guidelines and another four are considering establishing guidelines. Of the 18 jurisdictions that currently have sentencing guidelines, eight are voluntary and 10 are presumptive. Voluntary guidelines are recommended sentences, from which judges are free to depart. In a presumptive guidelines system, judges are expected to impose the recommended sentence or a sentence within the recommended range. Departures are permitted in some presumptive systems, but they can be closely scrutinized and are often subject to appellate review. Of the 18 guidelines jurisdictions, five have descriptive guidelines, seven have prescriptive guidelines, and six did not specify. Descriptive guidelines are designed to mirror current sentencing practices within the jurisdiction; prescriptive guidelines may or may not reflect current sentencing practices, but are designed based on normative principles of sentencing as viewed by the commission.

Of the 18 jurisdictions with sentencing guidelines, nine contain a provision for appellate review of sentences that fall outside the guidelines and one additional jurisdiction is in the process of implementing an appellate review process. Fifteen jurisdictions currently incorporate intermediate sanctions and another two are proposing the use of intermediate sanctions.

In eight jurisdictions with functioning Sentencing Commissions, the Commission has the authority to revise the sentencing guidelines without any action by the legislature or the judiciary. However, even in these jurisdictions, the legislature (and the judiciary in one state) retains the power to reject any revisions the Commission proposes. In general, the proposed revisions take effect if the legislature does not act within a specified time.

Georgia: Governor Reactivates Commission to Establish Certainty

With Georgia's prison growth leading the nation and the Department of Corrections' budget surpassing \$1 billion for the first time, Gov. Roy Barnes has re-established a Commission on Certainty in Sentencing to implement statewide sentencing guidelines. The 19-member body succeeds a study commission the governor appointed in 1999, which recommended the adoption of structured sentencing in Georgia.

The Commission's goals, as set out in the governor's Executive Order, are:

- To establish certainty in sentencing by ensuring that sentences imposed by the courts will determine the sentences offenders actually serve;
- To maintain meaningful judicial discretion in the imposition of sen-

tences and sufficient flexibility to permit individualized sentenced based on the circumstances of each case;

- To concentrate current and planned prison capacity on the incarceration of violent, sex, and career offenders;
- To establish a comprehensive range of correctional options in each region of the state that ensures offenders receive the most appropriate penalties; and
- To ensure that there exist no unwarranted differences in sentences between offenders who have committed similar offenses and have similar criminal histories.

Commission membership includes 7 judges, 3 prosecutors, 2 defense attorneys, the chairs of the Senate and House Judiciary committees, 1 sheriff, 1 police chief, 1 victims representative, the Commissioner of the Department of Corrections, and a member of the State Board of Pardons and Paroles.

The Commission has plunged directly into the task of building the guidelines. Members are ranking felony offenses into severity levels, as the first step in creating a guidelines grid, and are beginning to design a system of intermediate sanctions for targeted offenders. Chief among the Commission's challenges is to expand Georgia's network of probation detention and diversion centers and other alternatives, without diverting inappropriate offenders from prison and without overcrowding the alternatives with offenders who otherwise would have been sentenced to street probation. The Commission is using a set of statistical indicators, organized by its official goals, to establish a baseline and track the progress of its efforts.

Georgia is fortunate to have a wealth of sentencing and corrections data from which to work. But several high-volume offenses, such as aggravated assault and burglary, have broad statutory penalty ranges (such as 1-20 years in prison) without distinguishing degrees and current data does not capture sentences for the different varieties of crimes within these broad ranges. The Commission has embarked on a supplemental data collection effort in order to determine historical sentencing practices with respect to the different varieties of offenses.

The Commission's work plan, which was adopted as its first meeting on December 6, 2001, calls for completion of the guidelines in a year. The governor and leading judges have said they want the guidelines implemented through court rules, rather than legislation.

Kansas: Apprendi Fallout; Consolidating Community Supervision

The Kansas Sentencing Commission continues to deal with the ongoing affects of the *Apprendi v. New Jersey* decision and its application to Kansas in the *State v. Gould* decision relating to the constitutionality of upward departure sentences. In May of 2001, the Kansas Supreme Court ruled in the *Gould* case that the Kansas scheme for imposing upward departures under the Kansas Sentencing Guidelines Act is unconstitutional on its face, violating a defendant's Sixth Amendment and Fourteenth Amendment Due Process Rights. Citing issues raised in *Apprendi*, the Court stated that any fact, other than prior criminal history, used to enhance an offender's sentence must be presented to a jury and found applicable beyond a reasonable doubt. Under the state's current Sentencing Guidelines aggravating factors considered for upward departures are determined by the judge using the preponderance of the evidence standard.

Since the *Gould* decision, there have been numerous cases brought before our Appellate Courts relating to various aspects of upward departures. Cases relating to the retroactive application of the ruling, upward departures involving plea agreements and upward durational departures have been filed. It would appear that this is an evolving area of law, as the courts attempt to decipher what specific issues are impacted by the U.S. Supreme Court decision in the *Apprendi* case.

The Sentencing Commission has drafted and introduced legislation in the 2002 Legislative Session to address the constitutionality issue raised in where by a jury is instructed first to determine the guilt or innocence of an offender. If the offender is found guilty, that same jury would then determine in a separate proceeding, based upon proof beyond a reason-

able doubt, if aggravating factors were present to enhance the sentence. A unanimous verdict is required and also the use of a special jury verdict form. However, at the time of sentencing, it would still be the sentencing court which would determine whether or not an upward departure is warranted based upon the jury's finding regarding any aggravating circumstances.

The proposed legislation has met with mixed responses. Concerns have been raised relating to the additional workload this solution may place on the courts and the costs associated with the bifurcated proceeding. On the other hand, many counties have already been informally utilizing this bifurcated proceeding to deal with issues related to upward departures. The Commission feels this is the most appropriate approach to address the situation, but legislative debate is anticipated to be strong on this topic.

The second issue being recommended by the Commission, which raises even more controversy and debate, relates to the consolidation of field services in Kansas under a new independent state agency. The topic of consolidation is not new in Kansas, having been studied, reviewed and recommended numerous times over the past ten years. Currently community supervision of offenders is provided under three separate entities, including court services, community corrections and parole. The three entities are under three different controlling authorities (the courts, the counties and the department of corrections) resulting in a variety of supervision related issues. In past efforts to consolidate, the consolidation was recommended to occur under one of the controlling authorities which resulted in a litany of obstacles to be overcome. The Commission's proposal for consolidation under a new agency will address many of the prior issues surrounding consolidation but also presents new concerns. The legislative discussions and hearings on this topic are guaranteed to be lively and opinionated.

Maryland: Focus Group Deliberates Correctional Options

In response to the need to develop mechanisms to educate and receive feedback from the public regarding sentencing issues, the Maryland State Commission on Criminal Sentencing Policy (SCCSP) allowed its staff to organize and hold a pilot "Deliberative Focus Group" (DFG) in August 2001, sponsored by State's Attorney Marna McLendon and Howard County. Based on ideas on participatory democracy from the academic community and the experience of a few practitioners, the DFG focused on correctional options, a topic of long concern among the state's criminal justice policymakers. Fourteen participants completed a survey and reviewed information about correctional options prior to the meeting. They then came to the meeting to discuss and deliberate among themselves before completing the survey again. Their responses gave SCCSP staff a wide range of views on the important policy topic.

Overall, the participants favored correctional options for appropriate non-violent, non-habitual offenders; some even indicated, after group discussion, willingness to extend the sanctions to minor violent offenders. They believed that the best system of options provision would feature county delivery, funded and overseen by the state. They did not prefer major new revenue sources or increases to pay for the programs; their preferences were for a mix of current sources, including fines, offender charges, and the state lottery. The participants expressed willingness, especially after group discussion, to give the offenders' supervising agents significant powers over their movement "up" or "down" a "ladder of graduated sanctions." They did not enthusiastically embrace a complete divorce of the sentencing judge from oversight of the agents or offenders, however.

The participants also indicated that they would hold correctional options programs to higher standards in terms of recidivism rates than they currently hold probation or prison. Their reasoning was that, as a new approach, correctional options would have to do better in order to justify going beyond the current status quo. Finally, when asked about the inevitable failures of some offenders in correctional options programs, the participants urged officials to be proactive in building support for the programs before trouble arose and to be honest and forthcoming in their reaction to offenders whose failures drew public attention and media coverage.

Initial interpretation of the results of the DFG finds promise for the technique in the future on correctional options or other selected topics. The approach appears to offer state or local agencies pressed for resources a viable alternative to the more extravagantly sponsored models offered by academics or public interest organizations. The major problems for SCCSP staff were finding an interested host and deriving an adequate pool of potential participants. With the success of this DFG, it is possible that other jurisdictions will be willing to host them and to assist in finding similar pools of available citizens.

The DFG also showed promise for building greater public confidence in the policy process and for developing useful information and suggestions for particular policies. Participants expressed personal benefit from their involvement, changed their views to some degree after discussion and deliberation with their colleagues, and contributed several valuable ideas and viewpoints for consideration by policymakers and practitioners. While not statistically representative, findings include:

- Support for correctional options generally,
- Support and opposition to various means of structuring and financing them,
- Interest in a "ladder of graduated sanctions" and concern about the authority of those who invoke it,
- Conditions under which violent offenders might be considered for the programs, and
- Advocacy of a proactive and honest approach from responsible officials if/when offenders publicly fail in the programs.

In addition, the participants offered suggestions for serious consideration if/when statewide correctional options programs are debated, including:

- Development of special magistrates with legal authority to "operate" the "ladder,"
- Provision of correctional options to violent offenders with mental or chemical problems, and
- Holding the programs to a higher standard of success in reducing recidivism than probation or prison historically have been held to.

In conclusion, the piloting of the DFG in Howard County appears to have generated enough positive contribution in terms of both citizen input and public education to justify holding more in other communities around the state. With enough events and enough diversity among the groups, the problem of lacking statistical representativeness can be substantially overcome, and data from those different types of groups should well inform any policy deliberations on the future of statewide correctional options in Maryland.

Mass.: House Passes Guidelines, Increases Penalties

The proposed Massachusetts sentencing guidelines legislation reached an historic milestone in the fall of 2001. After considering sentencing guidelines legislation for the past two legislative sessions, the Massachusetts House of Representatives voted in favor of a sentencing guidelines bill, H. 4642, AN ACT TO ESTABLISH NEW SENTENCING GUIDELINES, and sent the bill to the Massachusetts Senate. The Commission is optimistic that the Senate will take up the legislation in the spring of 2002.

The bill passed by the House builds on the provisions of the Massachusetts Sentencing Commission's original proposal and introduced some important differences:

- Increased in the sentencing ranges in seven of the 45 cells on the sentencing guidelines grid;
- Raised the proposed offense seriousness level for 48 different offenses;
- Changed the definition of criminal history groups such that more defendants will fall into the more serious criminal history groups;
- Placed more constraints on departures from the guidelines;
- Limited departures from the mandatory minimums for drug offenses; and,

- Added a period of mandatory post-incarceration supervision for many defendants in addition to discretionary parole release.

Previously, the Massachusetts Sentencing Commission estimated that the Commission's original proposal for sentencing guidelines would be "population neutral" in terms of correctional system. The Commission is working on an analysis of the correctional impact of the provisions of the House Bill and expects that the impact will be substantial, given the differences between the two proposals.

The Commission has completed its annual survey of sentencing practices for FY 2000. Due to budget constraints, the Commission will have a very limited number of printed copies available but will make the report available via the internet. Please check for the report on the Internet at:

<http://www.state.ma.us/courts/formsandguidelines/sentencing/intro.html>

In the budget for FY 2002, the Massachusetts legislature directed the Sentencing Commission to conduct a comprehensive recidivism study to include offenders in drug courts, community corrections centers, houses of correction, Department of Correction, and the Parole Board. The commission has received a great deal of cooperation from the other criminal justice agencies named by the legislature and expects to complete this research by June 2002.

Minnesota: Commission Incorporates Legislative Changes

The Commission is struggling to integrate a variety of legislative changes made in Minnesota sentencing law in the past few years into the Sentencing Guidelines.

Additional Release Periods for some offenders. Traditionally, Minnesota has required offenders to serve 2/3 of the pronounced executed sentence in prison, with the remaining 1/3 to be served on supervised release (parole). A 36-month sentence meant 24 in prison, 12 on supervised release. The legislature has mandated longer release periods for sex offenders (60 months for first time offenders, 120 months for second time offenders) and for our New Felony DWI Offenders (60 months for all of them).

The challenge is to incorporate these changes into the guidelines so that practitioners are not misled by the numbers in the boxes, which do still accurately inform parties of the term of imprisonment, but no longer accurately inform of the term of supervised release.

Felony DWI. Effective August 1, 2002, a fourth DWI (or combination of DWI's and civil license revocations) in 10 years will become a felony. The legislature has mandated a 36-month sentence for these offenders, but did not clarify whether that sentence was to be executed or not. Additionally, the 36-month minimum sentence does not fit on the current grid, so integrating that change into the Guidelines will also be a challenge.

Sex Offender Sentencing. The legislature recently passed a new 144-month presumptive sentence for the most serious class of sex offenders. This created a number of proportionality issues: with respect to treatment of some offenders within that class, with respect to comparisons with other classes of sex offenders, and with respect to other classes of offenses.

Drug Sentencing. For our most serious class of drug offenders, possession with intent to sell 10 or more grams of cocaine, the presumptive sentence is 86 months in prison. Seventy-five percent of offenders do not receive this sentence duration, calling into question the integrity of this particular piece of the Sentencing Guidelines. The general departure rate is less than 30%.

Ohio: Commission Active on Forfeiture, ReEntry, Misdemeanors

The Ohio Criminal Sentencing Commission continues to review forfeiture laws, focusing on the various ways one can lose property as a consequence of criminal activity. Separately, the Commission created a Reentry Committee which will build on the reentry concepts anticipated by the Commission's 1996 felony sentencing package.

Blended juvenile/adult sentencing for serious young offenders took effect January 1. The reforms grew out of a plan submitted to the legislature by the Commission in 1999. The Commission is training judges and other practitioners in the new laws. We also suggested some tinkering that will be considered by the legislature early in 2002.

The Commission's felony sentencing plan continues to work well. And our semi-annual package of refinements is working its way through the General Assembly.

Stalled in 2000, the Commission's 1,000 page package of traffic law revisions was jump-started in 2001. After numerous hearings, it emerged from the Senate Judiciary Committee, only to sputter again before receiving a Senate floor vote. This year's problem: a tight budget makes the bill's training funding unlikely. Unfortunately, it's not under warranty.

Our general misdemeanor package will be reintroduced shortly. We are cautiously optimistic that we can get it through the legislature this year. However, our proposals for reforming Ohio's arcane fine and cost distribution rules, which pit some municipalities against some counties, have not found a legislative home.

The Commission's budget is very tight. We've lost about 25% since the last biennium. Related discussions have not been as much fun as one might think.

In addition, we are working with the University of Cincinnati on an NII-funded study that compares sentencing under our new criminal code versus the pre-Sentencing Commission code. No abstract yet.

Oklahoma: Data Integration Progress, Or Else

The legislative membership of the Commission is sponsoring SB 1583, which designates the Sentencing Commission as the lead authority on coordination and integration of the various management information systems operated by eight separate agencies: the District Courts, Department of Public Safety, Oklahoma State Bureau of Investigations, District Attorneys, and others. Senator Dick Wilkerson, D-Atwood, vice-chair of the Commission, said the legislature is frustrated that multi-million dollar investments in systems operated by the courts, prosecutors and other agencies has produced MIS systems that don't talk to each other very well. He said he is not willing to appropriate one more dollar to any of these systems until he has assurances that integration of the data is a key consideration. Sen. Wilkerson said that finding someone responsible for statewide MIS integration "is like trying to capture smoke." "There has got to be a management information systems czar for the criminal justice system," he said. "If not us (the Sentencing Commission), then who? If not now, when?"

The Oklahoma Criminal Justice Resource Center, which provides the staff support for the Sentencing Commission, began installing an integrated MIS for local law enforcement agencies in 1999. Known as the Oklahoma Defendant Information System or ODIS, the system provides warrant searches, jail-management programs, and other police agency coordination features to 30 of the 77 Oklahoma county sheriffs and 16 municipal police departments. OCJRC is requesting \$300,000 in new appropriations for FY'03 to continue providing state match for the \$1.1 million federal Byrne grant that supports the ODIS project. The center is also requesting \$200,000

and 3 new employees to take on the statewide integration role.

Penn.: Web-based Guidelines Application Launched

During the last quarter of 2001, Commission staff and representatives from five pilot counties tested the Sentencing Guidelines Software web application (SGS Web) by entering test data on a server hosted by the application's developer, Cross Current Corporation (CCC). During an October meeting with the pilot counties and CCC, a detailed list of modifications, enhancements and new features was compiled. Some of the new features requested include weight conversions for drug amounts, greater detail on credit for time served, logical checks against mandatory sentences and improvement of the sanction summary screen. More general issues, such as easier navigation from screen to screen and user roles/groups, were also discussed. Commission staff members have been working with CCC and the state Justice Network (JNET) Office to define user roles/groups and refine the statewide and local protocols for SGS Web.

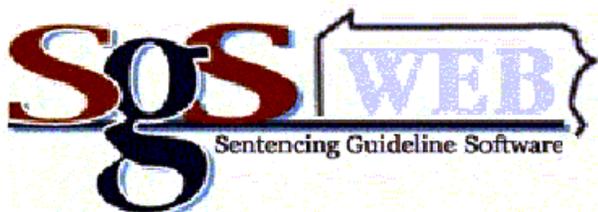
SGS Web was launched in early January as a JNET 'agency-hosted' application. Commission staff is using SGS Web to enter both 2001 and 2002 sentencing forms received from the courts. In addition, authorized JNET counties are now able to use the secure JNET infrastructure to enter all information required for sentencing guidelines, to review conformity and total sentence imposed, and to submit the information electronically to the Commission. In addition to removing the requirement for submitting paper forms to the Commission, SGS Web permits multiple authorized county users to work on the same case, and provides counties with access to sentencing information submitted by the county.

Three steps are required in order for JNET counties and users to receive access:

- Schedule an on-site SGS Web demonstration in the county for the court and all potential users;
- Complete and submit to the Commission a county protocol, describing the local process for using SGS Web and designating user roles;
- Attend an SGS Web training session and/or use the test site or Tutorial CD.

SGS Web presentations have been given to the JNET Steering Committee and County Integration Committee, the Department of Corrections (DOC) and the Administrative Office of the Courts (AOPC), and several counties. Efforts are underway to add Philadelphia Courts as a pilot county, the first of a new tier of counties to be involved during 2002. Staff members continue to work with representatives of the DOC and the AOPC to discuss the exchange of information (via JNET) in order to eliminate redundancy and improve the quality and completeness of offender information, and funding is provided in the grant to begin this work.

For more information, visit the *Information Technology & Software* tab on the Commission's web site (<http://pcs.la.psu.edu>) or contact Carol Zeiss ((814) 863-0731 or caz3@psu.edu).



NASC Q&A: Fallout from Apprendi

In early February, Randall Duncan, Legal Director for the Georgia Sentencing Commission, interviewed Johnson County District Attorney Paul Morrison, Vice Chair of the Kansas Sentencing Commission, on the implications of the U.S. Supreme Court's decision in *Apprendi v. New Jersey*.

(Note: Under the Kansas Sentencing Act, a specific crime Severity Level is statutorily annexed to felony offenses. Burglary of a dwelling, for example, is a Severity Level 7 felony offense. An offender's criminal history determines the presumptive range of punishment for that offense for that particular offender. Before *Apprendi* and *Gould* (see *Kansas update*), departures from that range were permitted under "substantial and compelling" circumstances. Also, departures could "double" the presumptive range, and consecutively imposed sentences could again "double" that departure sentence.)



District Attorney Paul Morrison

What gave rise to the *Apprendi* issue in Kansas? "I think the reason why *Gould* came down the way that it did came to this: if an offender didn't know anything about the statutes and pulled out the grid, he would find that he was looking at a certain number of months for an offense. He wouldn't know that if the judge found for an upward departure he could get "doubled up" or twice the presumptive sentence, or potentially "double-doubled" for consecutive sentences. I think that's why the Kansas Supreme Court found that there was a problem. It's in the statutes, and the rules are very basic about how you can get "doubled up," but it wasn't on the grid."

What "solutions" were considered inresponse? "We considered putting the permitted upward departures ranges right on the Sentencing Range grid, so that the maximum possible sentence would be clearly evident. There was also discussion about "widening" the ranges on the grid and doing away with departures. The problem with that, though, is that the guidelines lose all their predictability; and, predictability is an important feature of our guidelines. We're trying to manage a controlled growth of our prison population."

"In the Fall of 2000 we formed an *Apprendi* Committee within the Commission to draft proposed legislation to bring our guidelines into compliance. But *Gould* wasn't reported until after the 2001 legislature adjourned, so we had to wait until the 2002 session to introduce a bill that would provide for a bi-furcated trial. After rendering its verdict the jury would then consider aggravating factors under a "beyond a reasonable doubt" standard. It sounds a lot more ominous than it is, but what it means is that you'll have the guilt phase and for the departure phase the same jury will be just be submitted another special verdict form to decide aggravating factors. In fact, it's probably going to be easier than it is right now, because sentencing hearings can sometimes become "mini-trials."

What aspects of your office operations have been most affected by the *Apprendi*-related cases? "Basically, as of 6-9 months ago we are totally out of the departure business; durational departures are off the table. As a practical matter, any kind of aggravating durational departures aren't happening."

Has that changed the way you negotiate pleas? "We're still working on the *Cody* problem (Note: In *State v. Cody*, the Kansas Supreme Court ruled that *Apprendi* was implicated when judges departed upward after guilty pleas), and expect that another appellate case is going to address this issue further. It's been almost two years since *Apprendi* came down, and with durational departures effectively off the table, plea bargaining has definitely been affected. Since we can't depart upward, I'm sure that current pleas reflect a tougher stance by my prosecutors. But remember, under the sentencing guidelines, departures are for the exceptions, not the rule."

What has been the impact on completed prosecutions? "Right after *Apprendi*, we tried to project how many appeals might be filed, but we quickly realized that out of 5,500-6,000 annual adult criminal actions, maybe only two dozen resulted in contested upward departures. The vast majority of departures, both upward and downward, are stipulated. Contested upward departures come on the heels of jury trials, and not guilty pleas where the defendant stipulates to the aggravating factors. Contested departures really comprise only a very small percentage of the cases."

Do you expect other *Apprendi*-related caselaw? "A Court of Appeals case about six months ago held that *Apprendi* and *Gould* apply only to upward durational departures, not dispositional departures. Now our bi-furcated trial bill is just sitting while the Senate Judiciary waits to see if the Kansas Supreme Court will disagree and broaden *Gould* to dispositions. My sense, though, is that it probably will not, because the reason the court found originally that dispositional departures weren't affected was that it was the same sentence length, just served a different way."

Utah: Commission Addresses Race & Ethnic Fairness Issues

The Utah Sentencing Commission is responding to specific recommendations from a Task Force on Race & Ethnic Fairness in the Legal System. This Task Force worked for a couple years within the judicial branch and reviewed both the juvenile and adult justice systems from the front end with law enforcement all the way to the back end with parole board practices. As a result, several of the many Task Force recommendations were specifically aimed at sentencing and guidelines.

One of the Utah Sentencing Commission's statutory duties is to increase equity in sentencing. Various Commission subcommittees are reviewing the Task Force recommendations for potential implementation. The Task Force had some concern that race and ethnic bias may be creeping into case processing and actual sentencing under the guidelines with such factors.

In order to increase its research capabilities, the Commission's Research Division is partnering with a research consortium involving institutes of higher education. This new partnership, among other things, will be conducting a blind study on the potential impact and interaction that race may play with aggravating and mitigating factors. Ultimately, this approach will examine bias in sentencing of juvenile and adult offenders.

Training recommendations included heightening awareness of judges to potential unintentional bias that may cloud judgment. An example of an administrative recommendation is assuring that pre-sentence investigations do not contain the race/ethnicity of the offender or victim unless absolutely necessary. A copy of the entire Task Force Report is available at the following web cite:

<http://courtlink.utcourts.gov/specproj/retaskforce/Reportfinal.pdf>

In another research area, the Utah Sentencing Commission is evaluating current law that has lifetime maximum sentences for certain serious sex offenders. In 1996, as a result of an extensive Commission study, the legislature enacted SB 26 - Criminal Penalty Adjustments. This law repealed mandatory minimums but preserved indeterminate ranges within lifetime tops in prison for a number of sex offenses. In essence, it restored some flexibility and discretion to sentencing authorities, particularly the Board of Pardons and Parole.

Virginia: Meth Guidelines Studied, Risk Assessment Tool To Be Implemented

Concern over the potential impact of methamphetamine-related crime in the Commonwealth prompted the 2001 Virginia General Assembly to adopt legislation directing the Virginia Criminal Sentencing Commission to examine the state's felony sentencing guidelines for methamphetamine offenses and to conduct an assessment of the quantity of methamphetamine seized by law enforcement in such cases.

While available statistics indicate methamphetamine crimes increased during the 1990s, both nationally and in Virginia, the Commission found that methamphetamine crimes represent only a very small share of criminal drug activity in the Commonwealth. Although the numbers of seizures and convictions involving methamphetamine have increased in Virginia, particularly in the Western area of the state, methamphetamine remains much less prevalent than other Schedule I or II drugs. Cocaine continues to be much more pervasive a drug in Virginia than methamphetamine. Statewide, convictions for heroin offenses also greatly outnumber those for methamphetamine. In 1999, the Arrestee Drug Abuse Monitoring (ADAM) program continued to show no sign of methamphetamine's spread to arrestees in the Eastern United States. Methamphetamine-positive rates for Eastern cities participating in the ADAM program have remained at less than one percent.

Overall, the Commission found that Virginia's circuit court judges do not weigh the quantity of methamphetamine as a significant factor when sen-

tencing offenders. Prior record, most notably violent prior record, appears to be the most important factor in determining the sentencing outcome. The sentencing guidelines currently in place in Virginia explicitly account for the offender's criminal history through built-in midpoint enhancements, which increase the guidelines recommendation for offenders with prior violent convictions, and factors on the guidelines worksheets that increase the sentencing recommendation based on the number and types of prior convictions in the offender's record.

The Commission reviewed the numerous mandatory minimum penalties for offenses involving a Schedule I or II drug, including methamphetamine, specified in the Code of Virginia. Many of these mandatory penalty laws became effective as recently as July 1, 2000. These mandatory sentences take precedence over the discretionary guidelines system.

Critics of Virginia's sentencing guidelines have argued that the state's guidelines do not provide as stringent penalty recommendations as the federal guidelines system. The Commission's analysis suggests, however, that the two guidelines systems yield roughly comparable recommendations for seven out of 10 offenders who sell methamphetamine and are convicted in circuit courts in the Commonwealth.

While concluding there is not compelling evidence to recommend revisions to the sentencing guidelines at this time, the Commission will continue to monitor emerging patterns and trends in methamphetamine-related crime in Virginia.

In 1994, as part of the reform legislation that instituted truth-in-sentencing, the state legislature required the Virginia Criminal Sentencing Commission to study the feasibility of using an empirically-based risk assessment instrument to select 25% of the lowest risk, incarceration-bound, drug and property offenders for placement in alternative sanctions. This mandate was made in conjunction with other changes in the Commonwealth's sentencing structure that were designed to substantially increase the amount of time to serve in prison for selected violent offenses and for those offenders with a record of prior violent offenses. The goal was to reserve expensive prison beds for violent and relatively high-risk offenders without jeopardizing public safety. The Commission's objective was to develop a reliable and valid predictive scale based on independent empirical research and to determine if the resulting instrument could be a useful tool for judges in sentencing larceny, fraud and drug offenders who come before the circuit court. After careful consideration of the findings of the Commission's original analysis, its validation study, as well as an independent evaluation by the National Center for State Courts (NCSC), the Commission has recommended expanding the risk assessment program to all circuits in the Commonwealth.

Evidence from the pilot sites indicates that the risk assessment program has encouraged the use of alternative sanctions for selected offenders. Between FY1996 and FY2001, the rate at which eligible offenders were diverted from incarceration to alternative sanctions increased by nearly 30% in the risk assessment pilot sites, compared to only 4% in non-pilot circuits. The NCSC evaluation confirmed the fiscal benefits of the program. It is estimated that had the risk assessment instrument been instituted statewide during 2000, the net benefit would have ranged from \$3.7 to \$4.5 million. The Commission's validation study, conducted in 2001, resulted in a refined risk assessment instrument that improves the accuracy of the risk tool in predicting recidivism among drug, larceny and fraud offenders.

Risk assessment will become a component of Virginia's discretionary guidelines system beginning July 1, 2002.

Is Reentry Part of the Mission of a Sentencing Commission?

by Faye S. Taxman, Ph.D.
University of Maryland, College Park

Sentencing Commissions, by their very nature, have historically focused on front-end practices regarding the purpose and intent of the sentence and the mechanics of the sentencing process. The emphasis on the front-end is designed to develop a sentence that integrates the values of the stakeholders, including the use of sentencing options as appropriate sentences for different types of offenders (e.g. multiple, habitual, drug offenders, etc.). Sentencing options are premised on providing the most appropriate punishment in the least restrictive environment that meets the goals of the sentence. A similar need exists for Sentencing Commissions to begin to tackle issues related to reentry, or the process for reintegrating back into the community as part of the sentencing process.

The Failure of Current Reentry Practices

In most correctional systems, the burden for making arrangements for returning to the community is on the offender. The offender is expected to find a place to live, find a job, and reunite for family and/or support systems from the confines of the prison cell. Few correctional systems have transitional staff to assist offenders in the meeting their basic survival needs of shelter and food in the community. Recent changes in federal (and some state) housing laws may prevent offenders from returning to family members living in subsidized housing. The initial 60 days of returning to the community in large part influences the offender's ability to stabilize into a crime-free lifestyle; the inability to obtain stable housing contributes to the need to obtain "quick" money for shelter and food. Without the correctional system assisting in these efforts, the offender must fend for him/herself (Taxman, Young, Byrne, 2002a). This contributes to early failures and technical violations from release.

Psychosocial characteristics complicate the survival needs of offenders. With nearly 60 percent of the offender population in prison not having a GED or high school diploma (Bernstein & Houston, 2000), many offenders enter the low wage market in the community. Substance abuse prevails in the offender population, with nearly 35 percent of all offenders reported to be in need of treatment services (Taylor, Fitzgerald, Hunt, Reardon, & Brownstein, 2001). Nearly 20 percent of prison inmates have some need for mental health services; many receive psychotropic medication in prison but do not have the ability to do so in the community (Beck, & Maruschak, 2001). At both the front and back end, these characteristics are needed to identify high-risk offenders where the risk factors affect public safety in the community. Sentencing Commissions need to have in place appropriate tools to make these decisions since many returning offenders are low-risk and would benefit from less involvement of justice agencies in the community after release (Austin, 2001). With these tools, the focus of the justice agencies would be on the high-risk offenders where services in prison and the community could serve to reduce their reincarceration rates, which drive many state correctional systems.

A Reentry Model

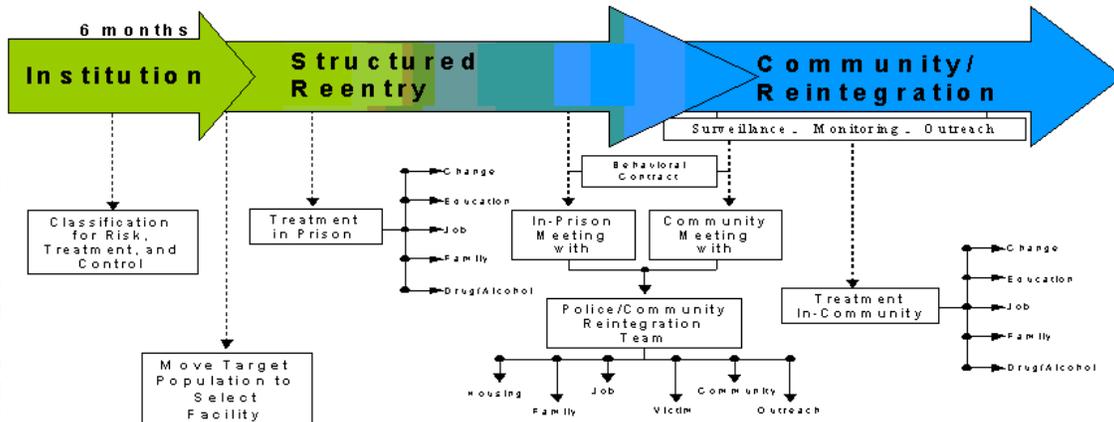
Through two different initiatives — the Reentry Partnership Initiative and Juvenile Aftercare — the U.S. Department of Justice has fostered the notion that reentry is similar to a continuum of care whereby the focus is on the offender moving from incarceration to reintegration. The underlying premise is that there are three main components to the reentry process, and that services should be targeted to the risk factors of individual offenders. See Taxman, Young, and Byrne (2002b) for detailed description of the model.

Prison/Incarceration: During the last six months of incarceration, if not from the beginning of the sentence, the emphasis should be focused on reducing the risk factors in the community. Services (educational, vocational, treatment, etc.) should be targeted. Offenders should be located as close to the family/support system as possible to allow for reunification. The emphasis is on preparation of offenders for release.

Structured Reentry: One month before and two months after release, specialized attention should be paid to developing and implementing a realistic plan focused on shelter, employment, and targeted services. More importantly the linkage with the community is important since this provides a forum for the offender to see that he/she is welcome to return as long as the norms of the community are maintained. The emphasis is on stabilization of offenders.

Reintegration: Services oriented to the offender to address risk factors that prevail. More attention needs to be given to the informal social controls and building the offender's relationship with and commitment to the community. The use of non-justice agencies is critical in this arena to address maintenance of the reentry efforts.

Reentry Partnership Continuum



The Need for Sentencing Options

With over 600,000 offenders expected to return to the community each year, reentry is a vital issue for justice and community agencies. Sentencing Commissions have not been actively involved in the reentry issue. Yet the need to develop strategies for targeting different offenders to different appropriate sentencing options and procedures clearly is within the realm of such commissions. The historical plight of establishing transition processes should be a wake-up call that our ability to handle the returning offender is limited, unless justice and community agencies embrace the need for new reentry practices. Failed attempts to put in place structured reentry protocols are evident in the past 50 years, including limits on the availability of transitional housing in the community, the inclusion of the family and community agencies in the structured reentry and reintegration processes, and the expansion of services focused on reducing the risk of recidivism (and technical violations). Sentencing Commissions can build these processes into the mix of correctional options to ensure that the system is focused on maximizing public safety through its policies, instead of merely managing the prison population.

References are available upon request.

For more information about reentry, refer to the University of Maryland's Bureau of Governmental Research at www.bgr.umd.edu, the U.S. Department of Justice, www.ojp.gov/reentry, and the Urban Institute at www.ui.org.

NASC Survey: State Sentencing and Re-Entry Practices

State	Does Commission Consider Release / Re-Entry Issues?	What is the min/max % of sentence required to serve?	Who Determines Credit for Good/Earned Time”?	Who Decides Actual Release Date?	Provision for Release of Elderly Inmates?	Is the length of post-prison supervision standardized?	Are “split” sentences permitted?
Alabama	Time served	No limits other than mandatory minimums	Corrections	Parole	No	No	Yes, for sentences of 20 yrs or less
Arkansas	No	70%, 50% or 33% depending on offense severity	Corrections	Parole	No	No	Yes via remainder of suspended sentence
D.C.	Time served, supervision issues	85% (all offenses)	Corrections	Corrections	No	3 or 5 yrs depending on offense severity	Yes
Kansas	Supervision issues	85% (all except “offgrid” offenses)	Corrections	Corrections	No	36, 24, or 12 months depending on offense severity	No
Mass. (legislation pending)	Time served, supervision issues	100% of minimum (State prison) 50% for House of Correction	Corrections	Parole	No	No	No (State prison sentences) Yes (House of Correction sentences)
Maryland	Time served, supervision issues	50% (violent) 25% (others)	Corrections; Parole if parole supervision is revoked	Parole; Courts under “reconsidered” sentences	65 and older may seek parole if 15 yrs served	No	Yes
Minnesota	No	67%	Corrections	Corrections	No	33% of sentence, or longer for certain sex, felony DWI	No
North Carolina	Supervision issues	100%-120% (all offenders)	Corrections	Corrections	No	9 months (violent offenders)	Yes, up to 6 months in certain grid cells
Ohio	Time served, supervision issues	100% less up to 1 day per month earned time	Corrections (limited to 1 day per month)	Corrections	No	5 yrs (violent, sex) 3 yrs (others)	No
Oklahoma	Time served, supervision issues	85% (17 designated offenses) 33% (others)	Parole	Parole	No	No	Yes
Pennsylvania	No	100% of min. (State offenders) 0% (County offenders/up to 2 yrs)	No earned time (State offenders) Corrections (County offenders)	Parole (State prisoners) Court (County offenders)	No	No	Yes
Utah	Time served, supervision issues	85% (federal VOITIS crimes only)	Parole	Parole	No	No	No
Virginia	No	85% (all offenses)	Corrections	Corrections	Inmates may seek parole if 60 yrs and served 10 or 65 yrs and served 5	No	Yes
Washington	Time served	85% (sex) 66% (others)	Corrections	Corrections	No	9-48 months depending on offense severity	No

NOTES

- For the sake of simplicity, this table does not include many details. Please contact individual states with questions about the specific provisions of their sentencing systems. States surveyed were active members of NASC. Not all member states responded to the survey.
- A “No” answer to the elderly release question means there is no age-specific or time-served trigger for release. Parole Boards in most states traditionally consider age and medical condition in release decisions. In addition, in many parole states, when inmates are not paroled, their actual release dates are a function of good/earned time credits which are determined by Corrections.
- Responses reflect current laws; in some states, offenders whose offenses were committed under old laws are handled differently.

Membership Form

National Association of Sentencing Commissions (NASC)

The mission of the Association is to facilitate the exchange and sharing of information ideas, data, expertise, and experiences and to educate on issues related to sentencing policies, sentencing guidelines, and sentencing commissions.

Membership is open to any individual who works or serves on a sentencing commission or similar governmental body charged with sentencing policy responsibilities, or works for any other government agency directly involved in the development of state or federal policy, and any other academic, public or private employee, student, or other individual interested in sentencing.

(Articles II & III of NASC By-Laws)

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