The Sentencing Guideline

A publication of the National Association of Sentencing Commissions

February 2005

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United States Sentencing Commission and the District of Columbia Sentencing Commission Host Summer Conference

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ANNOUNCING

THE NATIONAL ASSOCIATION OF SENTENCING COMMISSIONS

2005 Annual Conference
Washington, DC
August 7 -9, 2005


Thurgood Marshall Federal Judiciary Building

Block out August 7th through the 9th on your calendar as this year's co-hosts, the United States Sentencing Commission and the District of Columbia Sentencing Commission, invite you to the 2005 NASC Conference. The conference will be held at the Thurgood Marshall Federal Judiciary Building in Washington, DC. The theme of this year's conference is "The Continuing Evolution of Sentencing." We hope that you make the trip to the nation's capital to enjoy the conference as well as the sights of the greater Washington area. The conference hotel is the Phoenix Park Hotel, which is located across the street from Union Station and within a block of the Thurgood Marshall Building. Because of security concerns, there will be no "day of conference" registration, so make your plans early.

For the 2005 conference, the Program Committee has selected four tracks for breakout sessions (see below). The Program Committee invites sentencing commission members and staff, academics with expertise in sentencing policy, and other criminal justice professionals to volunteer as presenters and is encouraging all to suggest panel or presentation topics. Please contact one of the Committee members by March 25 with your suggestions. As a general rule, NASC cannot reimburse travel or lodging fees for speakers.

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2005 Conference Tracks	Contact
Impact of the *Blakely* decision.....	Ida Rudolph Leggett.....360.407.1050
Sentencing/corrections research.....	Cynthia Kempinen.....814.863.2543
Current/special issues.....	Meredith Farrar-Owens....804.371.7626
Criminal justice industry vendors.....	Paul O'Connell.....520.866.5426

Message from the President

Since June 24, 2004, the topic of criminal sentencing has surfaced in more conversations, news articles, academic publications and legal debates than in any previous period of time since the inception of the modern criminal justice system. *Blakely v. Washington* received very little attention when it was accepted by the Supreme Court and viewed by many as a Washington State issue. However, when the Supreme Court handed down its ruling, the complexity and magnitude of this one decision on sentencing nationwide was profound. Each state and the federal system was initially faced with the task of attempting to interpret what the decision really meant and then what, if any, portion of their current sentencing system was impacted. That was easy part! Then a course of action had to be developed to address the constitutional issues raised in *Blakely* since sentencing continued daily in courts across the country. Confusion, disagreement, debate and denial were emotions shared by many involved in the sentencing arena.

NASC was fortunate to be able to provide one of the first public forums to discuss the impact of *Blakely v. Washington* through its National Conference held last August in New Mexico. The conference agenda was adjusted shortly after the decision was released and several panels were dedicated to *Blakely*. It provided an excellent opportunity for representatives from both state and federal systems to share information, experiences and interpretations regarding the recent decision. I know personally that the information I gathered at the conference was extremely useful in formulating my state's response to *Blakely* and I hope it was equally as useful to other participants.

It has now been seven months since the *Blakely* decision and even with the recent Supreme Court ruling in *U.S. v. Booker*, there is still much confusion and uncertainty as to the long-term impact of these decisions. State courts are working their way through many of the issues and sentencing commissions will continue to incorporate those ruling in their sentencing procedures. I encourage sentencing commissions to share information among themselves as each state continues to address the multiple issues surrounding these decisions. Although each state has a distinct sentencing system, the lessons learned can serve as a valuable resource.

The NASC Newsletter is produced through the volunteer efforts and time of one of our membership states. It is a big and often thankless task to develop, edit and distribute the two NASC Newsletters each year. Last year the Arkansas Sentencing Commission, headed by Sandy Moll, was responsible for producing the newletter. I would like to express my appreciation and thanks, on behalf of the NASC Executive Board, to the Arkansas Sentencing Commission and their great staff for all the hard work that went into the newsletter. I would also like to recognize the state of Virginia, particularly Rick Kern and Meredith Farrar-Owens, for assuming responsibility for the publication of the newsletter this year. The cooperative efforts of the NASC membership is what has enabled this organization to grow and develop as a resource for sentencing issues nationwide.

Best Wishes,
Barb Tombs
NASC President

Alaska

Blakely in Alaska

Cited in the *Blakely* dissent as one of the states potentially facing fundamental changes to its sentencing system, Alaska has spent the last six months reviewing its options. Alaska's Department of Law and public defense agencies have both developed temporary procedures to respond to the immediate needs, and have cooperated in drafting legislation to be introduced when the legislature convenes in January 2005. To assist in these steps, Alaska sent a team to the VERA conference on *Blakely* in Denver in September.

Among the steps Alaskan prosecutors and defense attorneys have taken as temporary responses are:

- Prosecutors are presenting potential aggravators to the grand jury for indictment when they have identified them early in a case;
- If aggravators are approved in the indictment, or are added later, prosecutors are asking for jury trial on them, and have gone to trial in several cases;
- Prosecutors are asking for *Blakely* waivers in plea agreements.

The state has drafted legislation to create a more permanent response to the issues raised in *Blakely.* The preliminary bill, drafted by the Department of Law, Department of Corrections and the Governor's office, with review by the public defense agencies, set presumptive "ranges" rather than a single presumptive sentence for qualifying offenses. Judges may sentence anywhere in the range. To go beyond the range, the state must prove aggravators to a jury beyond a reasonable doubt (the state, in the proposed legislation, does not need to take the aggravators to grand jury, but must give notice of them before the trial). The procedure for arguing mitigators remains the same.

Meanwhile, at least one judge has issued an order finding Alaska's presumptive sentencing system unconstitutional as a result of the *Blakely* decision. Judge Wolverton in Anchorage said in his opinion (*State v. Herrmann,* 3AN-S02-11320-CR, Alaska Superior Court, October 6, 2004) that "the most appropriate resolution of the issues at this juncture, and until the Alaska Legislature has had the opportunity to remedy the myriad concerns raised by *Blakely v. Washington* (cite omitted), is to declare that Alaska's presumptive sentencing scheme as set forth in Title 12 is unconstitutional." Judge Wolverton based his decision in part on a Utah federal case, *United States v. Croxford*, 2004 WL 146211 (June 29, 2004, D. Utah), in which the court said that its only viable option was to treat the [U.S.] guidelines "as unconstitutional in their entirety . . . and sentence Croxford between the statutory minimum and maximum (*Croxford* at 20)."

In a subsequent order (*State v. LaPage*, 3AN-S02-3227, Alaska Superior Court, December 20, 2004), Judge Wolverton granted the defendant's motion to apply his ruling in *Hermann* to LaPage when dismissing a supplemental indictment by a separate grand jury regarding an aggravator to the original charge. As of January 14, 2005, the Department of Law had about seven petitions for review on similar issues pending. The Court of Appeals had ruled on two petitions involving *Blakely* issues, both times in the state's favor (details available from the Alaska Judicial Council).

A final step being taken in Alaska to respond to *Blakely* issues is to use the Criminal Justice Working Group as a forum to coordinate information about sentencing and other justice system issues. The Working Group formed in summer 2004 to begin responding to findings in the Judicial Council's report, *Alaska Felony Process: 1999.* At its meetings in the fall of 2004, the CJWG reviewed *Blakely* issues and discussed possible legislation.

Arkansas

Arkansas Sentencing Commission Update

The beginning of the New Year heralds the beginning of a new legislative session in Arkansas. As with most states, Arkansas legislators face an uphill battle funding growing programs in corrections, as well as, health and human services, education, and growing needs for infrastructure development. The Sentencing Commission will be kept busy preparing impact statements for proposed criminal legislation.

Alternatives to traditional prison sentences take on a new importance during these times of fiscal constraints. Prison overcrowding is an ever-increasing problem that most states face. Arkansas is certainly no stranger to this problem. The Sentencing Commission, the Department of Correction, and the Department of Community Correction are mandated by statute to work together to make the best use of the State's correctional resources. Two programs currently being developed are an increase in drug courts throughout the state and the building of a Technical Violator Facility.

During the 2003 legislative session, funding was provided to increase the number of drug courts throughout the state. These courts offer a program of graduated sanctions with intensive drug treatment and supervision as an alternative to incarceration in prison. The graduated sanctions include probation with intensive supervision, incarceration in a Department of Community Correction Treatment Center (probation-plus), and revocation with a sentence to the Department of Correction. The Sentencing Commission sponsored a bill to allow incarceration time for probation-plus sentences to be increased from 120 days to 365 days to allow offenders to complete the Therapeutic Community program at the DCC centers.

Funding was also provided for the construction of a 300-bed Technical Violator Facility to be operated by the Department of Community Correction. The facility will house technical parole violators for a term of sixty days. These violators are those offenders on post prison supervision who have violated some condition of their parole other than the commission of a new crime, such as failure to pay their supervision fee, dirty drug test, not working, etc. Offenders must complete such programs as anger management, drug treatment, GED, etc. It is estimated that this program will divert approximately 1,200 offenders a year from the prison system.

The Sentencing Commission lost one of its long-term employees this year. Sally Allen, one of the Commission's four original staff members, retired July 16, 2003. Sally's official title was "Administrative Assistant" but she was much more. She served as the Commission's legislative liaison and spent many hours at the State Capitol during legislative sessions. For the past year she was also the editor of *The Sentencing Guideline*. Her plans are to travel and spend more time with her many grandchildren. In spite of our best efforts, we couldn't convince her that another legislative session would be much more fun than traveling and playing with grandchildren.

District of Columbia

Commission Implements Guidelines

The District of Columbia pilot sentencing guidelines went into effect on June 14, 2004. The pilot guidelines are voluntary. In order to eliminate unwarranted disparities in sentencing, the Commission hopes for and expects a high degree of compliance.

The first guideline cases were sentenced in August 2004, and the Superior Court now has converted its operations to include a consideration of sentencing guidelines in all felony cases. The Commission is closely monitoring felony sentences and believes that the guidelines have been widely accepted and are operating relatively smoothly. The Commission staff will continue to devote substantial time and effort to implementation and monitoring of the new sentencing system, thereby giving the new system the best chance for success. By the 2005 Annual Report, the Commission expects to be able to draw some preliminary conclusions about compliance, at least for the most common offenses.

The purpose for introducing the guidelines as a pilot project is to give the Commission the opportunity to assess implementation, discover where the problems lie, and make such adjustments as may be necessary to achieve our goals of increased sentencing uniformity and fairness. While all sentencing guideline systems must be continuously updated and refined, there should be greater flexibility during this pilot project to revise our basic design as necessary. For example, two of the many issues that the Commission will be examining are whether the options and ranges need to be adjusted and whether the offenses are ranked properly, especially generic offenses that can be committed in a variety of different ways.

The Sentencing Commission is coordinating its work closely with its partners, CSOSA and the District of Columbia Superior Court, to establish a relatively seamless system that will produce timely guideline recommendations to parties and sentencing judges and will report back the actual sentence imposed and data on guideline compliance. This coordination is crucial to preventing court delays and errors. To accomplish this, particularly in the earliest stage of implementation, the CSOs are required to conduct extensive criminal history checks and work closely with the Commission staff to score out-of-state convictions, which under the Commission's rules are to be matched to the closest District of Columbia code offense.

In order to promote the principle that defendants convicted of similar crimes with similar backgrounds receive similar sentences, it is critical that the sentencing guidelines be interpreted and applied correctly and uniformly by judges, prosecutors, defense attorneys, and CSOs. Though our guidelines are, by design, less complex than many other guideline systems, it is impossible to create a system free of all complexity, given the realities of sentencing practice and the nuances of criminal behavior. In the first several months following implementation, the Commission's Director and staff attorney have answered almost 300 inquiries from CSOs, defense attorneys and others concerning the operation and correct application of the guidelines. The Commission – with the assistance and advice of its staff – will work to improve the operation of the guidelines during the pilot period and will continue to provide information and technical assistance to criminal justice practitioners and the general public on an ongoing basis.

The Commission has spent much of the past year developing, through an outside vendor, a Sentencing Guideline Web (SGW) that soon will automate all sentencing reports in a secure, interactive web-based computer environment. The SGW provides judges and attorneys with the applicable guideline recommendation for each case, and it allows users to fill out guideline forms online in a secure environment. It facilitates compliance with guidelines and other business rules involved in sentencing and sentencing reporting in the District of Columbia, and reduces errors. The SGW also improves efficiency and interagency cooperation by enabling users to submit guideline sentence forms electronically, while providing error checks on the data. Once the SGW has captured all information, users can electronically submit this information to the Sentencing Commission, which can then download the information for immediate analysis. At this time, the Commission is pleased to report that this system is nearing completion and will be in use by early 2005.

The Commission has developed the SGW because it will significantly enhance the ability to share critical information at key decision points, which is essential to rational and effective sentencing and corrections policy. The Commission is promoting secure sharing of information with its partners, the Superior Court and CSOSA, using the JUSTIS platform developed by the Office of the Deputy Mayor for Public Safety and the Criminal Justice Coordinating Council. As a result, the Commission and its partners are quickly moving to interfaces with the primary databases. For example, the Superior Court's sentencing decisions, currently stored in the Court's database, will be made available to CSOSA through the SGW. Sharing the Court's decisions through the SGW will allow CSOSA timely access to dispositions, reducing and eventually eliminating the delay associated with the delivery of hard copies. Integrating information systems to share critical data not only saves time, but also improves the quality of data, and subsequent decisions, by eliminating error-prone redundant data entry. The first step will be completed in 2005, when the CSOSA SMART system will share its offender information with the guidelines database in a secure, automated format that promotes efficiency as well as accuracy. Thus, often complex criminal history calculations will be made in a reliable manner and shared with the Court through automated messaging. In return, CSOSA will gain electronic access to the judge's sentencing order.

District of Columbia *cont.*

Working with the Superior Court, the Commission is also developing, through the same outside vendor, a stand alone module to the SGW that will enable permitted users to calculate guideline recommendations based on hypothetical queries. For example, a prosecutor or defense attorney who is negotiating a guilty plea in a case with multiple charges could query the system using hypothetical scenarios based on the defendant's criminal history and each charge or combination of charges that might be used to structure a plea agreement. The system would churn out what the guideline recommendation would be under each scenario. This relatively simple enhancement of the SGW should be online within a few months after the SGW itself is completed, and, once available, should help demystify the guidelines and improve sentencing practice substantially by making the guidelines accessible and understandable to a much broader segment of the criminal justice community.

Over time, the Commission is committed to finding new ways to expand the Sentencing Guideline Web to enhance the accuracy and transparency of the guideline system for other practitioners and the public. While a functional, working system will be in place by early 2005, making the District of Columbia the first jurisdiction to have a fully automated guideline web during its first year of guidelines, the Commission recognizes that new features may be desirable once the SGW is being used in practice. The Commission expects that the SGW will allow stakeholders and citizens to gain a better understanding of sentencing practice in the District of Columbia.

Massachusetts

Guidelines to be Considered by Legislature

There is great optimism in Massachusetts about the future of sentencing guidelines. Despite an 86 year wait, the Red Sox prevailed in their quest for a World Series championship and we are hopeful that the legislature's adoption of sentencing guidelines will not be far behind. Three versions of sentencing guidelines legislation were filed for consideration in the 2005-2006 legislative session. Hearings on this legislation are expected in the spring of 2005.

In Massachusetts there is concern about the impact of the Blakely decision on the proposed sentencing guidelines. As currently drafted, the proposed sentencing guidelines would need to be modified in order to meet the requirements of Blakely. Commission staff continue to monitor the work of other sentencing commissions to develop some options for consideration by the Massachusetts legislature.

Three research groups within the Massachusetts Trial Court were recently awarded a Byrne grant – the Massachusetts Sentencing Commission, the Office of Community Corrections, and the Office of the Commissioner of Probation. Through the strategic deployment of a standard complement of basic technologies, criminal justice researchers within these three agencies will be better positioned to exchange data, methods and models.

Minnesota

Response to Blakely Defined

The Minnesota Sentencing Guidelines Commission, like numerous other sentencing commissions, has spent the vast majority of its time over the past six months trying to identify and examine the implications of the recent *Blakely* decision on sentencing in Minnesota. Shortly after the U.S. Supreme Court handed down its ruling in *Blakely v. Washington,* Minnesota's Governor Pawlenty directed the Sentencing Guidelines Commission to analyze the impact of the ruling on the state's sentencing guidelines and to prepare both short and long term recommendations for his review.

From the beginning, it was fairly evident that even though B*lakely* did not rule the Minnesota's guidelines unconstitutional, there would be a direct impact on the state's sentencing system. The Commission identified several guideline sentencing provisions that would be impacted including: aggravated departures, statutorily enhanced sentencing provisions, permissive consecutive sentencing provisions and a dangerous weapons mandatory sentencing provision. In addition, the Commission noted several other areas in which there

may be a potential impact, however, future actions by the courts would be necessary for that determination.
The Minnesota Court of Appeals has ruled on several Blakely related cases since the Commission's initial analysis and recommendations. The court has stated that aggravated durational departures are subject to Blakely but aggravated dispositional departures are not. Several statutorily enhanced sentencing provisions are impacted and pleas procedures must include both a waiver of a trial as well as waiver of specific Blakely rights. The Court of Appeals has also ruled that retroactive application of Blakely is limited to all cases sentenced, or with direct appeals pending, on or after June 24, 2004. At this time, there have been no State Supreme Court rulings on Blakely related issues.

Although Blakely does impact the guidelines, the impact is limited to about two percent of the total felony sentences per year; however, they often represent very serious cases for which enhanced sentences are appropriate or necessary. The Commission has forwarded to the legislature proposed modifications to the guidelines that include: expanding the sentencing range within the grid cells to 15%, replacing the term of "person offenses" with a list of felony offenses for which consecutive sentencing is permissible; modifying statutory sentencing enhancement statutes, and recommending modifications to plea and trial proceedings that address the constitutional issues raised in *Blakely*. The legislature will take action on the Commission's proposal during the 2005 session.

The Commission has also revisited Sex Offender sentencing policy as a combined result of *Blakely,* a high profile sex offense committed in Minnesota and proposed sex offender legislation that was debated during the previous session but not enacted into law. The Commission has submitted to the legislature a proposed new sex offender sentencing grid and revised criminal history calculations that weigh prior sex offenses more heavily. In addition, a narrowly defined "Off-Grid" sentencing option was developed in an attempt to deal with the most serious and violent sex offenders and to address numerous concerns surrounding civil commitment of sex offenders. Sentencing of sex offenders has been an ongoing and very controversial legislative topic and this year will prove to be no different.

Missouri

New Sentencing Recommendations Aim for Fully Informed Decisions

The Missouri Sentencing Advisory Commission has published a new set of Sentencing Recommendations designed to help judges and lawyers be fully informed in making sentencing decisions.
The new system of recommended sentences is designed to provide timely and useful information that will assist the courts and lawyers in fashioning sentences that are just, proportionate, and protective of victims and society. The recommendations are based upon actual sentence data of Missouri judges and the requirements of various sentencing laws. The new system uses a risk-of-re-offending scale similar to that used by the parole board.

"Judicial discretion is the cornerstone in sentencing in Missouri courts," the sentencing commission's recommendation notes. "Sentencing in Missouri is at its best when the decision makers have accurate and timely information about the offender, the offenses, and the options available for sentencing." Report on Recommended Sentencing, Missouri Sentencing Advisory Commission, June, 2004, p. 4. Available on the Missouri Judiciary Homepage, www.courts.mo.gov.

In describing the new system of recommended sentences, the commission abandons the phrase "sentencing guidelines" – in use in Missouri since 1998 – because the same phrase as used in the federal courts describes a mandatory scheme. Unlike the federal system, Missouri Sentencing Recommendations are voluntary. Senate Bill 5 (2003) required appointment of a renewed sentencing advisory commission to produce a new system of recommended sentences, and studies of sentencing disparities, by June 30, 2004. The current commission released its Report containing the new system of recommended sentencing in June after several months of preparation, including meetings with groups of judges and lawyers around the state in May. The statute provides a one-year period for implementation, and for periodic revisions thereafter. The commission has received funding for implementing its recommendations.

Missouri *(cont.)*

The new system of Sentencing Recommendations is intended to address four simple questions that may arise in any sentencing decision:

1. What do judges do in similar cases?

2. What is the risk that this offender will re-offend?

3. What resources are available – in prison or in the community – to construct and impose a sentence that is right for this offender and for this crime?

4. What does a sentence really mean? If an offender is sentenced to a certain number of years in prison, how long can we expect that the offender will serve before being paroled?

Judicial Practice

To address the first question – what judges do in similar cases – the commission arranged Missouri crimes into five groups that have similar sentencing practices: violent crimes; sex crimes and child abuse; drugs; driving while intoxicated (DWI) felonies; and other nonviolent offenses.

In each of these five groups, some crimes are more severe than others. Within each group, offenses are in three levels — Level I, most severe, to Level III, least severe within that group. The severity level for each crime is determined by the average prison sentence actually imposed for each offense or by the percent of offenders who receive prison terms. For example, second-degree murder is ranked as more severe than first-degree robbery simply on the basis that sentences are lengthier for one than the other.

As to each offense, the Recommended Sentences set forth three recommendations to choose from: a presumptive sentence, which applies where there are no aggravating or mitigating circumstances, and sentence recommendations where aggravating or mitigating circumstances are present.

Risk of Re-offending

Offenders are listed in five categories, depending on their risk of re-offending – Excellent (least risk) to Poor. This risk assessment is based upon the same risk-assessment system used by the Board of Probation and Parole in making decisions on paroling prisoners. The offender is assigned a numerical score based on 12 factors that include

- prior criminal history – prior convictions; incarcerations; total incarceration time; years free of convictions; probation or parole revocations; and whether the offense is highly correlated to recidivism (burglary, auto theft, and tampering);
- Other risk variables – age; prior escape from custody; drug history; educational level; vocational readiness; and employment status.

These risk factors are statistically correlated with the likelihood that an offender will re-offend.

Available Resources

The third question that may arise in a sentencing decision is what resources are available. Missouri corrections officials over the years have developed a variety of programs in prisons and in the community. The non-prison sentences are available in various forms of probation, including community-based alcohol and drug treatment. More common are sentences under the 120-day sentencing provisions that may include drug or alcohol treatment, evaluation for sex offenders, and short-stay shock incarceration.

The sentencing commission adopted some new terminology to describe more accurately and coherently the various nonprison and 120-day sentences. Separation of the "probation" sentences into separate categories is driven by the fact that, in the past 10 years, probation in its various forms has increased 50 percent, and use of the 120-day or long term drug treatment programs is up 180 per cent.

The Sentencing Recommendations use the word "probation" to describe only the sentences that require an offender to check in periodically with the probation officer. "Community Structured Sentence" (CSS), a new label, is used to indicate community-based sentences that may include intensive supervision, electronic

monitoring, community-based drug or alcohol treatment, or other strategies that place fairly onerous requirements or restrictions on an offender serving a sentence in the community. Use of the term "Community Structured Sentence" is intended to convey the message that the sentence involves substantial restrictions on one's freedom though the sentence is served in the community. The next level of sentence is the "shock or treatment" sentences under the 120-day statutes. These include shock incarceration under section 559.115, and drug treatment provisions – including long-term drug treatment —under Sections 217.362, 217.364, and 217.378, RSMo.

Recommendation Sentence Grids

The commission's Recommended Sentences are in the form of grids. Following the grids, the commission's publication has the list of offenses ranked in order of severity. Each grid is also accompanied by a list of aggravating and mitigating factors that the judge can consider in determining what sentence to give for a particular offense. These factors take into account the particular circumstances of the crime and the effect on the victims.

The New PSI: The Sentencing Assessment Report

The Recommended Sentences will be included in a newly formatted pre-sentence investigation (PSI) provided to the sentencing court. The new PSI will be called a Sentencing Assessment Report; it will be much shorter than the current PSI format but will contain all the statutorily required information of a PSI. The Sentencing Assessment Report will include information on the offender, the offense, the risk factors, prior criminal history, and the circumstances of the crime, including aggravating and mitigating factors. The Report also will include the options for sentencing, including programs available in and out of the prison system, as appropriate, for the sentence.

The re-design and simplification of the PSI into the Sentencing Assessment Report is being done with cooperation of the Board of Probation and Parole and the probation staff that prepares PSIs. The new Sentencing Assessment Report is a critical component of implementing the new system of Recommended Sentences. When the commission examined studies of Missouri's previous system of voluntary sentencing guidelines, we found that adherence to the guidelines was spotty. Information on the commission's sentences was included in a generic way on the front sheet of a PSI but there was no attempt to integrate the recommended sentence into the probation officer's report. The Report's sentencing recommendation will be the probation officer's interpretation of the Sentencing Advisory Commission Recommended Sentence.

The new format – short and focused on the essential information needed for sentencing — will be produced more quickly than the traditional PSI. While the new Sentence Assessment Report format has started to appear in place of the PSI, the probation staff is piloting a project in a few circuits to determine the feasibility of presenting a Sentencing Assessment Report in every case within two weeks of a finding or plea of guilt in which a PSI is ordered.

What Does the Sentence Mean?

The final question we identified: if a person is sent to prison for a period of years, what does the sentence mean? The Sentencing Advisory Commission Report on Recommended Sentencing contains the Parole Board's guidelines for consideration for release on parole. These guidelines follow the risk categories that the Sentencing Advisory Commission has adopted in its sentencing recommendations. For example, if a class C violent offender, who is an average risk, is sentenced to four years (the presumptive sentence), the Parole Board's guidelines tell us that the offender can be expected to serve in the range of 19 to 24 months before being paroled. If the sentencing judge determines that there were aggravating circumstances, and gives a five-year term, the offender can be expected to serve 24 to 30 months before parole.
This feature of the sentencing commission's system of recommended sentences is intended to address the question that judges frequently ask about the length of time in prison. A note of caution: The parole board uses these as guidelines; in an individual case, there might be exceptions. The parole board also uses a few additional risk assessment factors than the 12 used for sentencing purposes; these added factors are related to an inmate's conduct and progress in prison. It is possible that an inmate's behavior may put

Missouri *(cont.)*

him in a better or worse category of risk than the rating the inmate had at the time of sentencing. Neither the offender, the judge, nor the victims can take these parole board guidelines as a promise in an individual case. The effort we are making in the system of recommended sentencing is to provide information to those making sentencing decisions as to the probable consequences of their decisions. We would emphasize that a sentence should never be calculated based only on the average or expected parole date; the parole board's decisions are acts of discretion that deserve the same respect as the judges' acts of discretion in sentencing.
The Sentencing Assessment Report, where a prison term is recommended, will contain the parole board information. The report also will contain information where the sentence is subject to a mandatory minimum for time served (e.g., section 558.019).

Comments Are Welcome

The Sentencing Advisory Commission's full report, including the new sentencing recommendations, is available on the Missouri judiciary homepage, www.courts.mo.gov. The commission hopes, during this implementation period, to establish a website that lawyers and judges can use, with relevant information about a particular offender, to determine the appropriate sentence and the available corrections resources.

The Sentencing Advisory Commission premised its efforts on the belief that Missouri judges and lawyers are smart and well motivated and that, given as much information as possible, will fashion and impose sentences that do justice. The commission's efforts, we hope, will be viewed positively because they focus directly on providing information rather than dictating a standardized result for each case. No two cases are alike because no two offenders – and the circumstances of their crimes – are alike. Justice is individual. Justice is achievable, particularly where the decision-makers are as fully informed as possible. We hope these efforts are helpful and we welcome comments from the bar, the judiciary, and the public.

E-mail comments can be directed to the commission executive director, Kim.Green@courts.mo.gov or the commission chair, Michael.Wolff@courts.mo.gov. or addressed to Missouri Sentencing Advisory Commission, P.O. 104480 Jefferson City, MO 65110.

New Jersey

New Comission Begins Work

When the Commission to Review Criminal Sentencing (hereinafter "the Commission") was created in January 2004, New Jersey's Legislature made certain that a deliberative body composed of key constituents of the criminal justice system would promote sound sentencing policy predicated on the basic precepts of public safety, proportionality and fairness. The Commission's establishment is a timely one, as New Jersey prepares to address numerous current and prospective challenges to its sentencing scheme and penal system.

One conspicuous example is a decision,*Blakely v. Washington,* issued by the United States Supreme Court this past summer. This opinion may well unsettle the foundational components of sentencing practice in New Jersey that have stood largely unchanged since the advent of the Code of Criminal Justice (hereinafter "the Code") in 1979. Indeed, one panel of the New Jersey's Appellate Division has recently concluded that a key sentencing provision of the Code is constitutionally infirm under the *Blakely* decision. It is anticipated that the Supreme Court of New Jersey will address *Blakely's* impact on New Jersey's sentencing scheme this term.

Notably, entities in other states with mandates similar or identical to New Jersey's Commission are now actively assisting their respective jurisdictions in fashioning appropriate responses to the *Blakely* decision. These commissions have also been steering efforts to address the consequences of burgeoning prison populations in their states. Despite declines in the last five years, New Jersey's prison population has grown significantly. According to the U.S. Justice Department's Bureau of Justice Statistics, for example, New Jersey's prison population increased 375 percent between 1980 and 2003. According to statistics generated in 2002, less than half of New Jersey's prison inmates – 46 percent – were serving sentences imposed for the commission of violent crimes.

Against this backdrop, during the first year of its existence, the Commission has been engaged in the task of organizing itself into an entity capable of fulfilling its mandate. At the outset, this

entailed the appointment of the fifteen members designated by Legislature to serve on the Commission. These members are: Senator Anthony R. Bucco, Burlington County Prosecutor Robert D. Bernardi, New Jersey Commissioner of Corrections Devon Brown, Assemblyman Michael P. Carroll, Parole Board Chairman John D' Amico, Zulima Farber, Esq., New Jersey Attorney General Peter C. Harvey, retired judge Barnett E. Hoffman, Assemblyman Gordon M. Johnson, Senator Bernard F. Kenny, Jr., Richard S. Lehrich, Esq., Alberto Rivas, Esq., New Jersey Public Defender Yvonne Smith Segars, Judge Edwin H. Stern, P.J.A.D., and Bruce D. Stout, Ph.D.

Because of the time it took to organize the Commission and designate representatives, the first meeting was not held until July 2004. At that meeting, Judge Hoffman and Public Defender Segars were selected to serve as, respectively, the Commission's chair and vice-chair. In October 2004, the Commission selected an experienced attorney, Deputy Attorney General Ben Barlyn, to serve as its full-time executive director. Shortly thereafter, the Commission acquired much-needed office space and other necessary resources to facilitate its work. Hence, the Commission was not able to commence substantive deliberations until the fall of 2004.

By December 2004, however, the Commission had laid the necessary groundwork that would allow it to focus exclusively on its assigned task of "reviewing fairness and proportionality of new criminal offenses and enhanced penalties" added to the Code. In furtherance of its mission, the Commission established five committees to address key areas of interest: 1) Data Collection and Analysis; 2) Drug Policy; 3) Alternatives to Incarceration and Community Corrections; 4) Reentry: Corrections and Parole, and 5) Sentencing Policy. To avoid duplicative efforts, the Commission determined that where there is subject overlap, the committees will address complementary aspects of the same focus area. The committees plan to convene on a regular basis to conduct their work.

The Commission is also committed to basing its policy recommendations upon scrupulous and comprehensive data collection and analysis. To accomplish this objective, the Data Collection and Analysis committee is presently developing the capacity to provide the Commission with accurate descriptive information about current sentencing practice and to develop the capacity to empirically model the impact of alternative sentencing policies that the Commission might entertain. It was concluded that the best strategy for developing this capacity was to conduct two separate mergers of selected information from two databases – Promis/Gavel and Computerized Criminal History (CCH). All components of the criminal justice system represented on the Commission are cooperating in this endeavor.

The first merger of information will be for a recent twelve-month period and will provide timely descriptive information about offender instant and prior conviction offense(s) and complete instant sentencing information. The second merger will employ the same processing technology, but will be based on imprisoned offenders released from custody and will include actual length-of-time served data, in addition to data on the sentence imposed derived from the Department of Corrections' OBCIS database.

In addition, the Commission convened a one-day retreat on December 7, 2004, for all members sponsored in conjunction with the Vera Institute's State Sentencing and Corrections Program. The purpose of the retreat was to provide a forum in which the members could reach consensus on the direction of its upcoming work, particularly the prioritization of policy areas that will be the focus of the Commission's efforts.

The retreat commenced with a presentation on national sentencing trends, including state policy responses to budget constraints and prison overcrowding. Thereafter, three Vera associates – two state sentencing commission directors and one career prosecutor assigned to her state's sentencing commission — provided valuable historical overviews of their commissions, emphasizing in particular the processes relied upon for formulating and implementing successful policy change. In addition, the three Vera associates offered cogent perspective and commentary in response to discussion among the Commission members regarding the delineation and prioritization

New Jersey *(cont.)*

of issues to be addressed. Most importantly, the retreat afforded the Commission an occasion to collectively give substantive content to the terms "fair and proportionate" employed by Legislature in the enabling legislation. It is against these criteria, the foremost being the preservation of public safety and order, that all sentencing legislation will be assessed by the Commission.

The Commission has progressed much since its inception to provide the Legislature and other "stakeholders" with the guidance necessary to promote a sentencing system that simultaneously protects public safety, fosters a greater degree of fairness, and provides meaningful and cost-effective responses to crime. The Commission is wholly committed to these efforts and plans to provide the blue print that will reshape and improve the State's sentencing scheme and penal system.

Ohio

Ohio Tackles Criminal Forfeitures and Withstands Blakely

Fresh off the training judges and other practitioners in the Commission-generated reforms to Ohio's misdemeanor sentencing and traffic laws, the Ohio Criminal Sentencing Commission turns its attention to working with the General Assembly in 2005 to enact proposals to reform Ohio's approach to forfeiting property involved in offenses. Separately, the Commission continues to monitor the fallout from last summer's *Blakely* ruling. The consensus remains that, with minor tinkering, Ohio's felony sentencing plan (enacted in 1996) withstands meaningful challenge under *Blakely.*

Forfeiture

The Commission's forfeiture plan would reorganize and streamline the law governing criminal and civil forfeitures for drug offenses, racketeering, gang-related activities, Medicaid fraud, and other misconduct. It would also rewrite the State's contraband laws. The Commission earlier worked to eliminate "innocent party" forfeitures in the traffic law (eff. 1.1.04).

The proposed forfeiture chapter would:

1. Replace the jumble of current forfeiture laws with clear terms: "contraband" - property that is unlawful to possess; "proceeds" - property derived from crime; and "instrumentality" - property otherwise lawful to possess that is connected to an offense;

2. Provide greater guidance for courts in forfeiting instrumentalities used in misconduct;

3. Protect individual interests by giving a person whose property was seized a chance at pretrial "hardship" release by:
   - *Setting out a quicker process to clarify the status of certain property, including vehicles and personal, business, and government records;
   - *Making instrumentality forfeitures proportionate to the crime;
   - *Providing a pre-seizure probable cause review in civil cases when the target is real estate;
   - *Raising the government's burden for criminal forfeiture from a "preponderance of the evidence" to "beyond a reasonable doubt";
   - *Better safeguarding the rights of innocent parties such as true owners, lien and security holders, law-abiding spouses, and business associates.

4. Protect the public interest by:
   - *Clarifying that the State has "provisional title" to the subject property, allowing a broader range of tools to protect forfeitable property;
   - *Creating a new crime of transferring, hiding, or diminishing the value of property subject to forfeiture;
   - *Clearly giving the State the right to a jury trial in civil forfeiture cases;
   - *Authorizing criminal forfeitures in Medicaid fraud cases.
   - *Continuing to steer forfeited monies largely to law enforcement agencies.

5. Protect the victim's interest by prioritizing the victim's right to receive restitution or a civil recovery from forfeited assets;

The plan is available online at www.sconet.state.oh.us. Simply scroll past the dull stuff until you see a prompt for the Criminal Sentencing Commission.

Blakely

The Commission and most Ohio courts read *Blakely* in the context of the body of case law from Apprendi to Blakely. This differs from the strict reading of *Blakely*—the one given by most commentators—that says that any sentencing enhancement not contemplated by a jury's verdict (or admitted by the defendant) denies the defendant's right to a jury trial. There is little question that racial motivation (as in *Apprendi*) and deliberate cruelty (as in *Blakely*) are element-like sentencing factors that should go to the jury or be waived. Clearly, deciding whether a person is bigoted or inhumane is within the ken of a jury.

However, Ohio's gridless guidelines instruct judges in all cases to weigh whether the offender's conduct is more or less serious than conduct typical of the offense. They also ask the court to weigh whether recidivism is more or less likely for this offender. In addition, Ohio law steers judges to impose the shortest available prison term on an offender's first commitment to prison unless community sanctions "demean the seriousness of the offense" or would not "adequately protect the public". Ohio reserves the maximum term for the "worst form of the offense." And all sentencing is to be consistent with sentences imposed on similar offenders in similar cases.

Does *Blakely* require that these questions go to juries? We think not, primarily because in the run-up to *Blakely*, the Supreme Court kept historical judicial discretion intact (e.g., in the *Jones* and *Harris* cases, cited favorably in *Blakely*). We argue that it is unfair (to the jury, defendant, and the system) to ask the jury to decide whether an act is the worst form of an offense, or is dissimilar to comparable cases, et cetera. After all, a jury's experience is one case old. In short, *Blakely* does not eradicate judicial fact-finding, especially when the court's experience, rather than human nature, is needed for a fair sentence.

Then again, we could be wrong.

Pennsylvania

Revisions to the Sentencing Guidelines

In December 2004 the Commission held statewide public hearings on proposed changes to the sentencing guidelines. Pennsylvania's initial sentencing guidelines became effective June 22, 1982 and were subsequently amended on eight occasions, most recently in 1997. There were four primary reasons for the proposed changes. First, during the past seven years, the General Assembly has enacted, amended or repealed more than 120 statutes that impact the sentencing guidelines. In addition, the Commission has received requests from practitioners to change the sentence recommendations for a number of offenses, including violations of the Uniform Firearms Act, crimes of violence, weapons of mass destruction, controlled substances, and driving under the influence of alcohol or controlled substance. As a result, the Commission undertook a comprehensive review of all Offense Gravity Score and Prior Record Score point assignments for offenses covered under the sentencing guidelines. A second, and related, reason for the proposed revisions is that the Commission has received feedback that the 'totally concurrent' Prior Record Score policy adopted in 1997, has been difficult to implement due to the complexity of the policy, and missing or incomplete prior conviction and sentencing information. A third reason for the revisions is that the Commission is required by legislation passed in 2002 to provide a sentencing enhancement for the offense of homicide by vehicle, when the violation occurs in an active work zone. A fourth, and final, reason for the proposed revisions is that the Commission seeks to clarify several issues raised by Pennsylvania's appellate courts, such as the definition of school zone used in the youth/school enhancement for drug delivery cases, and the use of court martial in the Prior Record Score calculation. As a result of the testimony received at the public hearings, the Commission adopted several changes to the initial proposal and will be holding a public hearing in February on these revisions. It is anticipated that the Commission will adopt a final package of revisions at its February meeting, and submit them to the legislature shortly thereafter. If not rejected by the legislature, it is expected the new set of guidelines will become effective in late spring.

Pennsylvania *(cont.)*

State Intermediate Punishment Legislation

In December 2004 Pennsylvania's Governor signed Act 112 providing for State Intermediate Punishment [State IP], which provides the opportunity for offenders traditionally sentenced to state prison to receive treatment in lieu of incarceration. This initiative builds upon the 1990 legislation that created County IP programs that diverted persons recommended for county jail sentences into treatment programs. The State IP program requires that an offender receiving a judicial recommendation for the program be evaluated by the state Department of Corrections to determine whether the offender would benefit from the 24-month program. If accepted into the program, the offender participates in a multi-phase step down substance abuse program involving treatment within the prison system, as well as in the community. The statute also requires the Commission to make guideline recommendations for State IP eligibility, and to conduct regular evaluations of the program.

Research Activities

The Commission recently completed a study of a mandatory aftercare program for Pennsylvania's Boot Camp graduates, which found that offenders participating in aftercare were significantly less likely than those who did not to be rearrested for a new crime during a two-year tracking period. The report containing the study's findings can be found on the Commission's website *http://pcs.la.psu.edu/*. The Commission is also completing a study on the impact and effectiveness of mandatory sentencing in Pennsylvania, in response to House Resolution 613. It is anticipated that this study will be completed in April 2005.

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NASC Mission Statement

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

Utah

Focuses on Drug Offense Guidelines

Over a two-year period, the Utah Sentencing Commission evaluated sentencing practices for drug offenses and considered whether those practices warranted the development of a separate guideline for drug offenses. The Commission studied lengths of stay for drug offenders compared with other offenders, rates of commitment to prison for drug offenders, and the availability of treatment for drug possessors. The current guidelines in Utah group all types of drug offenses in the same offense category and much of the Commission's study and discussion focused on whether distinctions should be made in our guidelines for drug possession offenses, drug manufacturing offenses, and drug distribution offenses.

Though painstaking at times, the lengthy study yielded valuable research and forced important policy discussions regarding lengths of stay for drug possession offenders and treatment in lieu of incarceration for certain drug offenders, among other things. With much-appreciated assistance from the Vera Institute of Justice, the Pennsylvania Commission on Sentencing and the Kansas Sentencing Commission, the Utah Sentencing Commission crafted an approach that satisfies the most pressing needs while preserving the nature of the Utah guidelines.

Ultimately, the Commission concluded that while some changes to the sentencing guidelines are necessary to distinguish between drug possession offenses on the one hand and drug manufacturing and distribution offenses on the other hand, a separate sentencing guideline for drug offenses is not needed. In furtherance of this conclusion, the Commission amended the current Adult Sentencing and Release Guidelines by adding two new offense category columns for drug possession offenses. The new columns will recommend prison for drug possession offenses at a lower rate than any other offense type and will recommend shorter prison sentences for drug possession offenders who are sentenced to prison compared with all other offense types. These amendments become effective this spring.

To further distinguish between possession offenses and manufacturing and distribution offenses, the Commission is considering revisions to the criminal history assessment which would score prior drug offense convictions at one-third the rate other prior convictions are scored. The intent is to prevent the true drug possession offenders from rapidly climbing the criminal history ladder and thus maintain opportunities for treatment in less restrictive settings than prison.

The amendments to the matrix and the on-going discussions to amend the criminal history are consistent with efforts by the Utah Sentencing Commission and its sister agency, the Utah Commission on Criminal and Juvenile Justice, to pass the Drug Offender Reform Act (DORA). If passed and funded, DORA will mandate substance abuse screening and assessment for all felony offenders prior to sentencing and will close the substance abuse treatment gap for criminal offenders by providing on-going funds over a three-year implementation period ($6 million in year 1, $12 million in year 2, and $17 million in year 3). This new infusion of treatment dollars will bolster all areas of substance abuse treatment in drug courts, probation, prison and jails, and parole by providing additional treatment opportunities for nearly 5,000 felony offenders. The Governor has included the first year of funding in his budget and the Legislature appears poised to adopt that recommendation.

Virginia

Risk Assessment for Probation Violators

Since 1991, Virginia's circuit judges have been provided with historically-based sentencing guidelines grounded in actual judicial sanctioning practices in the Commonwealth. Judges, however, have not had the benefit of guidelines when sentencing probation violators. With the abolition of parole in 1995, circuit judges in Virginia now handle the large majority of supervision violation cases, including violations following release from incarceration that formerly were handled by Virginia's Parole Board as parole violations. In 2003, the General Assembly directed the Commission to develop, with due regard for public safety, discretionary sentencing guidelines for felony offenders who are determined by the court to be in violation of probation supervision but not convicted of a new crime (Chapter 1042 of the 2003 Acts of Assembly). These offenders are often referred to as "technical violators." The directive specified that the guidelines be based on an examination of historical judicial sanctioning patterns in revocation hearings. The mandate also charged the Commission with analyzing recidivism among probation violators not convicted of a new crime and evaluating the feasibility of integrating a risk assessment instrument into the guidelines for these offenders.

Although crime rates have declined over the last decade in Virginia, the number of offenders committed to the state's prison system has increased in recent years. Offenders who are revoked from community supervision, but not convicted of a new crime, are not counted in crime and arrest statistics. Since 2000, approximately 1,300 to 1,700 of these offenders have entered Virginia's prisons annually. In 2003, these violators accounted for more than 1 in every 10 prison commitments.

Following exhaustive data collection, the Commission developed sentencing guidelines for probation violators, returned to court for reasons other than a new criminal conviction, that reflect historical practices in the punishment of these offenders. In its *2003 Annual Report*, the Commission recommended to the General Assembly that the probation violation guidelines be implemented statewide. The 2004 General Assembly accepted the Commission's recommendation and statewide use began July 1, 2004.

The second phase of this study, analyzing recidivism and evaluating the feasibility of developing a risk assessment tool for violators was completed in 2004. Effectively, risk assessment means developing profiles or composites based on overall group outcomes. Groups are defined by having a number of factors in common that are statistically relevant to predicting the likelihood of repeat offending. Those groups exhibiting a high degree of re-offending are labeled high risk. This methodological approach to studying criminal behavior is an outgrowth from life-table analysis used by demographers and actuaries and in other scientific disciplines.

Virginia *(cont.)*

In practice, risk assessment is typically an informal process in the criminal justice system (e.g., prosecutors when charging, judges at sentencing, probation officers in developing supervision plans). Empirically-based risk assessment, however, is a formal process using knowledge gained through observation of actual behavior within groups of individuals. In Virginia, risk assessment has become an increasingly formal process. At sentencing, for example, judges are provided with a risk assessment for offenders convicted of sexual assault, rape, drug offenses, larceny, or fraud. These risk assessment instruments were developed by the Commission and implemented as part of the statewide guidelines system in 2001 (rape and sexual assault) and 2002 (drug, fraud and larceny). Other forms of risk assessment instruments are also used by Virginia's Department of Juvenile Justice. No risk assessment tool can ever predict a given outcome with 100% accuracy. The goal is to produce an instrument that is broadly accurate and provides useful additional information to decision makers.

In the current study, the goal is to identify low-risk probation violators who can be safely punished via a sanction other than traditional incarceration in jail or prison. The analytical approach laid out by the Commission is much like that used for developing Virginia's risk assessment tool for nonviolent offenders. The Commission utilized the newly-developed probation violation sentencing guidelines to determine which violators would be recommended for active incarceration in prison or jail. Only cases recommended for incarceration by the guidelines were analyzed for risk assessment.

Analysis revealed eight factors to be useful in predicting recidivism among probation violators not convicted of a new crime: the type of felony crime for which the offender was on probation, the number of codefendants involved in that offense, the offender's age at the time of the probation revocation, the existence of mental health problems that have resulted in treatment or commitment, new arrests during the supervision period for crimes against a person, the number of capias/revocation hearing requests previously submitted by the probation officer to the judge, whether or not the offender had absconded from supervision or moved without permission, and the offender's substance abuse while under supervision.

The factors proven statistically significant in predicting recidivism were assembled on a risk assessment worksheet, with scores determined by the relative importance of the factors in the statistical model. In combination, these factors are used to calculate a score that is associated with risk of recidivism. Offenders with low scores share characteristics with offenders from the study sample who, proportionately, recidivated less often than those with higher scores. Behavior of the individual is not predicted. Rather, this type of statistical risk tool predicts an individual's membership in a subgroup that is correlated with future offending. Violators scoring below the designated point threshold on the new risk assessment scale will be recommended for an alternative sanction instead of the prison or jail confinement recommended by the probation violation sentencing guidelines. As with other components of Virginia's guidelines system, judicial compliance with the risk assessment recommendation will be discretionary.

While recommending use of this new risk assessment tool, the Commission has expressed concern to Virginia's legislature that judges in the Commonwealth do not presently have an adequate range of alternative sanctions available address this particular offender population. The efficient utilization of limited correctional resources is part of the puzzle that contributes to Virginia's ongoing successes with the truth-in-sentencing reforms adopted back in 1994. In order to continue to prioritize limited prison resources for incapacitating Virginia's most dangerous offenders, the Commission believes it is critically important to make available other sanctioning options for punishing the lower risk probation violators identified through risk assessment.

Washington

Response to *Blakely*

As this legislative session begins, the Washington Sentencing Guidelines Commission (SGC) is working with the legislature and criminal justice professionals around the state to draft legislation in response to the *Blakely* decision. A special taskforce, with representatives from the SGC, superior court judges, defense counsel, county prosecutors, the Department of Corrections and the state legislature, was formed in late June to examine issues relating to the overall operation of the state's Sentencing Reform Act (SRA), as well as *Blakely*.

The Commission at its December 2004 meeting reviewed two proposals for responding to the *Blakely* decision. The first proposal, drafted by the special taskforce, involved procedural changes to sentencing rules. Under this proposal, based upon the Kansas model, facts relating to aggravating factors would be decided by a jury at trial. Unlike Kansas, under this proposal, the applicable aggravating factors would be contained in an exclusive rather than an illustrative list. The court would continue to have the authority to determine whether those facts are sufficient, substantial and compelling, to justify imposition of an exceptional sentence.

A second proposal, drafted by a subcommittee of the Superior Court Judges Association, could be adopted in conjunction with the proposed procedural amendments to the SRA. This proposal involves an amendment to the SRA making the sentencing grid advisory for offenses falling within the higher seriousness levels of the grid and for offenders with certain higher numbers of prior convictions. This proposal was presented as a low impact interim process to satisfy B*lakely* that would also provide for more time for the Commission to examine the advisability of revising other provisions of the SRA.

The Commission voted to recommend passage of a procedure fix, but will continue to work with its partners in reviewing all options. The Commission anticipates that the legislature will pass *Blakely* legislation early this session.

Wisconsin

Commission Examining Race and Sentencing

The Wisconsin Sentencing Commission (WSC) recently completed the first in a series of monographs on disproportionate minority representation in Wisconsin sentencing. As part of its enabling legislation, the WSC must "[s]tudy whether race is a basis for imposing sentences in criminal cases and submit a report and recommendations on this issue to the governor, to each house of the legislature . . . , and to the supreme court." This report reviews existing practice and academic research to show the current state of knowledge about the issue and to highlight potential concerns and problems which the studies might face. Future reports will examine the topic regarding the most frequent offenses within the state's major offense categories—violent, drug, sex, and property or other non-violent offenses, providing recommendations for policy and practice. The series will conclude with a report compiling all Commission recommendations to address race and sentencing in Wisconsin overall and by particular offenses.

Among the findings:

- African-Americans and other minorities constitute a disproportionate percentage of incarcerated populations both nationally and in Wisconsin, compared to their percentages of the general population. Wisconsin's ratio of African-Americans incarcerated to whites incarcerated is the sixth largest in the nation.
- Imprecision in collecting racial data on offenders can lead to mistakes in measuring disparity. The two commonly used methods—self-identification and face-to-face recording by officials—each can produce inaccurate results. The problem is particularly common for Hispanic/Latino offenders and has been exacerbated by the many racial and ethnic categories required for the US census.
- Conclusions about the impact of race on sentencing are affected by decisions made at all prior points in the criminal justice process and must address both decisions to incarcerate or not and decisions about the length of incarceration, if chosen.

Wisconsin *(cont.)*

Among the WSC recommendations:

- Development and adoption of a uniform protocol for data collection and reporting on race and ethnicity for all jurisdictions in Wisconsin.
- Continued integration of justice information across state systems through the Wisconsin Integrated Justice Information System.
- Funding and staffing of a multi-year project to collect data from selected jurisdictions regarding all aspects of the criminal justice process prior to sentencing, from calls for service to failures to prosecute.
- Development of statistical models of the determinants of sentencing decisions, based on data from Wisconsin's unique guidelines worksheet process.

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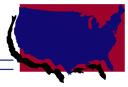

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