February 2007

The Sentencing Guideline

A publication of the National Association of Sentencing Commissions

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2007 NASC Conference
New Frontiers in Sentencing
August 5-7, 2007 Oklahoma City, OK

Photo credit: The Oklahoma City Convention and Visitors Bureau

The Oklahoma Sentencing Commission will be sponsoring the 2007 NASC Conference on August 5-7, 2007. The conference will be held at the historic Skirvin Hilton Hotel, the oldest existing hotel in Oklahoma. If you haven't heard already, Oklahoma is celebrating its centennial this year.

With the same spirit of the pioneers who settled this city and created one of the most dynamic young towns of the early century, today's Oklahoma City has been reinvented to offer visitors a fun-filled combination of attractions, events, restaurants and amenities.

Nowhere will you find a greater concentration of Oklahoma City's modern-day urban vitality than in Bricktown, an early-day warehouse district transformed in the last decade to become the fastest growing entertainment district in the Southwest. Bricktown is just blocks from the host hotel.

The city's western, pioneer spirit can most easily be seen in some of Oklahoma City's top attractions, like the National Cowboy and Western Heritage Museum, Remington Park Race Track, Stockyards City, Oklahoma City Bombing Memorial, and the Red Earth Indian Center. Each reflects the strong ties this area has with its western heritage. If you want to experience a little of the real West of today, mosey on down to Stockyards City, home to the world's largest stocker/feeder livestock market. When the trading is over, have a hearty meal of steak, eggs, and biscuits at Cattlemen's Steakhouse, the oldest restaurant in Oklahoma City.

Golfers may want to stick around after the conference. The historic Southern Hills Country Club in Tulsa, Oklahoma, is scheduled to host its fourth PGA Championship on August 6-12. For ticket information, call 1-800-PGA-GOLF, or access the tournament website at www.PGA2007.com.

President's Message

The 2007 theme for our annual National Association of Sentencing Commission (NASC) conference is *New Frontiers in Sentencing.* The pioneer spirit of our host state, Oklahoma, is truly apropos for our theme. Think of the National Cowboy and Western Heritage Museum, the Red Earth Indian Center and the real-life-working stockyard. Oklahoma City is a family-friendly location, and for you golfers in the crowd, following our meeting in Oklahoma City, taking place just up the road in Tulsa, is the 89th PGA Championship. Oklahoma is preparing to celebrate their centennial and they are planning a real Western welcome for us at the historic, but just renovated, Skirvin Hilton Hotel.

In the past year there has been a resurgence of interest in sentencing guidelines. Many guideline commissions in their original authorizations highlighted the reduction of sentencing disparity, more balanced classification of offenders associated with crime severity, an emphasis for community corrections for the non-violent offenders, and more accurate projections. Yet there has always been a frontier of change that we have had to address if we are to remain relevant. The purposes of sentencing have evolved and guideline commissions have stayed abreast by intently studying and implementing changes incorporating addiction treatment, drug courts, mental health courts, boot camp, refined risk assessments and revisiting the role and viability of probation and postprison supervision.

In addition to staying abreast of these evolutions of sentencing philosophy, the guideline commissions have become the "go-to-source" for sentencing and systemic criminal justice information as they are often the only sustainable multi-agency deliberative bodies that can readily and quickly respond to assessment of proposed criminal justice legislation and critical criminal justice system issues.

Within this context, the NASC Executive Board and the conference planning committee are working diligently to bring state, U.S. Sentencing Commission, legal, and academic perspectives forward for our consideration and discussion. NASC committee members live daily with the emerging hot issues and we will do all we can to bring you the most insightful plenary sessions and panels possible. As always, we are open to your input for this and future conferences.

Photo credit: The Oklahoma City Convention and Visitors Bureau

I am particularly thankful to K.C. Moon, Director of the Oklahoma Criminal Justice Resource Center, and Michael Connelly of the Oklahoma Department of Corrections, who are the co-hosts of the conference. The Virginia Sentencing Commission, especially Rick Kern, Meredith Farrar-Owens and Carolyn Williamson, are to be thanked for volunteering to produce this newsletter for another year. Please consider contributing information about your state in the forthcoming June issue of *The Sentencing Guideline* newsletter. All you have to do is provide a short update on your progress or issues to the Virginia Sentencing Commission by May 2, 2007.

The cost of this year's conference is $275 for those that register through July 10, 2007, and $300 for those registering later. We have an excellent room-rate at the Skirvin of $119 per night that extends a couple of days before and after the conference to make your stay more convenient and relaxing. I look forward to seeing all of you in Oklahoma City on August 5 –7 at the Skirvin.

John P. "Jack" O'Connell, President NASC
Director of Delaware Statistical Analysis Center,
Office of Management and Budget

2007 NASC Conference
New Frontiers in Sentencing

Hosts
Oklahoma Sentencing Commission
Oklahoma Department of Corrections

Tentative Panel Topics
Economic Impact of Sentencing
Getting Guidelines Off the Ground
Juvenile Sentencing and Amenability Issues
Risk Assessment
Post-Prison Sanctioning
State Implementation of Rehabilitation and Re-entry Programs
Sentencing and Recidivism Research
Fallout from Blakley, Booker and Cunningham
Internet Blogs and Sentencing Issues
Latest Developments in the Model Penal Code
Exploring Comparative Sentencing Structures
Revisiting Theories of Sentencing
Rebuilding Sentencing and Criminal Justice Systems in New Orleans, Bosnia and Afghanistan

This year, the NASC conference will devote one session to round-table discussions. Participants will be able to engage in in-depth discussions on a variety of topics with colleagues from around the country.

Interested in participating on a panel or have a suggestion for panel topic? Contact NASC President Jack O'Connell at 302.739.4626 or via e-mail at John.O'Connell@state.de.us

Registration Fees
The conference registration fee is $275.00 through July 10, 2007. After July 10, the conference rate will be $300.

Hotel Information
The conference hotel is the historic Skirvin Hilton Hotel in downtown Oklahoma City. Reservations may be made directly with the Hotel by calling 1-888-490-6546 and referring to the National Association of Sentencing Commissions. When making reservations online (www.hilton.com), please use promotion code NAS to receive the conference rate of $119 + tax. You must make your reservations by July 10th to take advantage of this special rate.

Area Airport
Will Rogers World Airport (OKC) The average fare from the airport to downtown is $17.00.


Oklahoma State Capitol

Photo credit: The Oklahoma City Convention and Visitors Bureau


Skirvin Hilton Hotel

The Skirvin Hilton
Oklahoma City

Alabama

What can you do with a staff of three and a little help from your friends? The Alabama Sentencing Commission has set a high standard of accomplishment with few resources. The year 2006 proved to be an exceptionally busy one for the Alabama Sentencing Commission. Accomplishments included Legislative approval of the Initial Voluntary Sentencing Standards, which became effective on October 1, 2006; providing training for court personnel in how to use the standards and worksheets; and implementing on-line worksheets with immediate access to statewide criminal histories for work sheet preparers.

When the Legislature approved Alabama's Initial Voluntary Sentencing Standards (guidelines) in April 2006, the Commission immediately began to plan its summer campaign for taking training to court personnel throughout Alabama. Choosing twelve strategically selected locations, the sentencing commission planned and conducted one day workshops, blanketing the State. Lawyers, prosecutors, probation officers, court clerks, judges, judicial assistants, and any other interest parties were invited to attend free of charge. Lawyers were enticed to attend with the lure of free continuing education credit hours (almost half of the annual requirement). The Commission began the workshops in May and the last one was conducted the last week in September, just prior to the implementation date. Over 1050 participants received the training. Not surprising, these efforts were not enough. As the implementation date approached, lawyers, judges and probation officers began to request additional seminars. The Commission complied, holding an additional two days of seminars in the state capital and additional seminars in the state's largest counties. When the dust finally settled, the Commission counted 31 workshops in its training efforts. This work is still, however, not complete. Weekly, the Commission receives requests for additional training. So far we are able to comply with all of these requests in our effort to maximize the use of the new criminal sentencing procedures.

As of this writing, the Commission has received worksheets from 53 of Alabama's 67 counties. In spot checking those counties that have not sent in worksheets, the judges and prosecutors in those counties appear to be using the worksheets, and the completed worksheets simply have not been forwarded to the Commission. We are working to correct this problem.

In an effort to make the transition to this new system of informed sentencing easier, the Commission, with the help of the state administrative office of courts, designed and implemented an on-line worksheet application. This web application offers almost instant criminal history information for work sheet preparers to use in filling out worksheets and computing sentence recommendations. The application provides a link to all prior automated criminal convictions, all prior or present electronic pre-sentence investigation reports (now required for all criminal convictions), and state wide access to juvenile delinquency adjudications, and youthful offender convictions. This information has not previously been available in such a user friendly format and has served as an incentive for using the online worksheet application.

The Alabama Sentencing Commission is also pleased that the Pew Foundation Charitable Trusts have selected Alabama as one of the States to participate in the Foundations' Public Safety Performance Initiative. Through this program, Alabama will continue to partner with the Vera Institute of Justice in New York to evaluate the implementation of the State's new sentencing system, to expand and evaluate the effect of community corrections punishment programs in Alabama, and possibly to evaluate various risk assessment instruments now in use. Selection for this program provides Alabama with some of the needed technical assistance to accomplish our criminal justice reform goals and the opportunity to evaluate the effect of our new state policies.

So, with a little help from our friends, the Vera Institute of Justice, all of you with sentencing commissions around the country, Applied Research Services of Atlanta, (Drs. Tammy Meredith and John Spier) and now the Pew Foundation Trusts, Alabama is achieving our initial goals of elimination of unwarranted sentencing disparity, utilization of a continuum of sanctions, and a reduction of the prison population, all without jeopardizing public safety. Never underestimate the contribution of a few friends.

As for the future, along with the continued evaluation of our criminal justice reform efforts, Alabama will begin this year to collect additional data for recommending a system of truth-in-sentencing for this state. Friends, beware! We are not finished.

Alaska

Blakely Effect in Alaska

In 2005, the Alaska Judicial Council reported that the *Blakely* decision had a substantial effect on Alaska sentencing statutes and appellate caseloads. Two and a half years post-*Blakely*, its effects continue to ripple through the state's jurisprudence. Sentencing appeals and related actions continued at high rates, according to defense attorneys, prosecutors, and the clerk of the appellate courts.

Interviewed in November 2006, attorneys perceived an undiminished rate of new appeals, and a rapidly accumulating backlog. Despite thirty-three separate appellate decisions on *Blakely* issues by November of 2006, attorneys expected the number of new appeals to continue. They cited several reasons. Both sides appeared unwilling to abandon *Blakely* arguments that were unsuccessful in the court of appeals until the Alaska Supreme Court has decided them. If federal issues were raised, attorneys were continuing to file state appeals until the federal courts resolved the issues. Appellate decisions based on federal law have not diminished the number of similar appeals based on state law.

Perhaps the most significant of the cases decided by the Alaska Court of Appeals was *Smart v. State*,[1] issued on October 27, 2006. The court held that *Blakely*'s requirement of proof beyond a reasonable doubt was essential "to a fair and lawful determination of a defendant's sentence under Alaska's presumptive sentencing law,"[2] and had to be applied retroactively.[3] The court also decided that Alaska's retroactivity law applied, rather than federal law, and that the defendant was entitled to a jury decision on aggravators.[4]

The court estimated that its decision would affect "several dozen defendants."[5] The Council calculated the number of offenders who might still be incarcerated in June 2007, based on the data in its report on 1999 felony charges.[6] Extrapolating from the 1999 offenders and using the court system's annual reports to estimate increases in felony filings, the Council suggested that about 120 offenders were likely to still be incarcerated, who might qualify for relief of some sort under *Smart.* Some of those offenders would not qualify because their aggravating factors were prior convictions or other factors that would not qualify for *Blakely* relief.[7]

The Department of Law asked the court of appeals to stay the retroactive application of *Blakely* while it petitioned the Alaska Supreme Court to reverse the *Smart* decision. The Public Defender Agency did not oppose the request for the stay, but did oppose the state's petition. It also was preparing its own petition to the Supreme Court for review of portions of *Smart*. The appellate court clerk reported that the court of appeals had stayed 256 appeals, another indication of its current *Blakely* related caseload. Attorneys suggested that if the Alaska Supreme Court upholds *Smart*, the trial courts will see substantial new work. Remands of the currently-stayed cases to the trial court for relief under *Smart* would add to the courts' and attorneys' already substantial *Blakely* workloads.

[1] *Smart v. State,* Alaska Court of Appeals Opinion No. 2070, October 27, 2006, available at http://www.state.ak.uscourts/ops/ap-2070.pdf.

[2] *Id.*, page 3, slip opinion.

[3] *Id.* A sizable portion of the court's opinion in *Smart* was devoted to discussing the *Teague (Teague v. Lane,* 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989)) test used in federal habeas corpus litigation, and the court's opinion about why it did not apply in this situation.

[4] *Id.*

[5] *Id.*, page 44, slip opinion.

[6] Carns, Cohn and Dosik, *Alaska Felony Process: 1999*, published by the Alaska Judicial Council, February 2004. Available from the Council's website, www.ajc.state.ak.us, under "Publications."

[7] The Council did not estimate how many more offenders charged before 1999 might still be incarcerated and might qualify for relief under *Smart*. Nor did it estimate how many offenders on probation or parole would qualify for reductions in suspended sentences and probation periods.

District of Columbia

VOLUNTARY SENTENCING GUIDELINES IN THE DISTRICT OF COLUMBIA: RESULTS OF THE PILOT PROGRAM

On June 14, 2004, the District of Columbia Sentencing Commission began the nation's most recent full-scale sentencing guidelines system as a pilot program, following major restructuring of criminal justice operations in the District of Columbia. After over two years of experience, the Commission is pleased to report on the progress of these guidelines in restructuring sentencing practice in the District of Columbia.

The D.C. Commission made the policy decision to reject mandatory or presumptive sentencing guidelines in favor of developing a system of voluntary sentencing guidelines. Coincidentally, at almost the same time, the Supreme Court was faced with constitutional challenges to a state presumptive guideline system and to the federal sentencing guidelines (first in Blakely, then Booker). It seems likely that many states now considering guidelines for the first time will want to consider following the example of the District of Columbia and others and steer future guidelines toward a voluntary approach, although many others will opt for presumptive guidelines with expanded jury fact finding. It is reasonable, then, to ask how well voluntary guidelines perform. We are just one jurisdiction, unique in many ways, but our experience may be instructive.[1]

Developing the Pilot Guidelines

The Commission proposed that the system be voluntary, for two principle reasons. First, it assumed that voluntary guidelines could achieve high compliance while avoiding time-consuming appellate litigation, which would be a particular problem in a high volume urban court system with heavy caseload pressures. Second, voluntary guidelines would be far less rigid than mandatory systems that could prevent judges from imposing the appropriate sentence in atypical circumstances. The Commission expected, given a single courthouse and substantial judicial support, that a high degree of compliance would be achieved. The proposal called for the judge to comply with the recommended guideline sentence options or to explain that he or she departed using one of the prescribed departure rules or chose not to follow the guideline for some other reason.

The Commission built off of sentencing grids that had been constructed in the earlier guidelines effort, in part because a good deal of thought went into the earlier proposal and in part because, even though it was not finally adopted, it was familiar and likely to garner greater support from the voting members. The Commission ranked felony crimes in severity relative to each other, and then grouped comparable crimes to form nine groups for crimes other than drug offenses and three groups for drug offenses. Drug crimes were separated from non-drug crimes because drug crimes were not easily ranked alongside non-drug crimes using historical sentencing patterns, and because the Commission believed that many drug offenders would benefit from a combination of sanctions and treatment.

The Commission decided that the guidelines should be descriptive, not designed to incarcerate more or fewer offenders or to increase or decrease prison sentence length, but rather to reduce the unexplained variation in sentences. Thus, the goals were relatively modest. Unlike virtually every state, the District does not pay for its prisons, and this cost is shifted to the federal government. Thus, while many state guidelines movements were driven, at least in part, by a desire to control escalating corrections budgets, this was not a constraint the directly informed the Commission's policy choices.

The Commission sought to bring in outlying sentences toward the middle of prevailing practice, so that similarly situated offenders would receive more comparable treatment. Drawing on historical sentences from the period January 1996 through June 2003 gave us a substantial baseline of historical sentencing practice. The guidelines authorize a suspended prison sentence with probation if at least twenty-five percent of offenders who fall within a given cell were sentenced to probation in the past.

Evaluating the Pilot Guidelines

In an effort to evaluate the pilot guidelines, the Commission asked two questions: (1) to what extent would judges and criminal justice practitioners accept voluntary guidelines and agree to follow them; and (2) to what extent would the guidelines alter sentencing patterns.

Compliance Results

The analyses in this article are based on data collected since the inception of the guideline system. During the period from June 2004 through June 2006, the Commission collected 5,454 Sentencing Guideline Forms (SGF) representing guideline recommendations and actual sentences in felony cases. Sentencing Guideline Forms representing counts that fell in probation-eligible boxes on both grids accounted for 65.1% (3,552 SGF) of the total number, and short-split-eligible SGF accounted for an additional 12.7% percent (695 SGF). The remaining 22.1% (1,207 SGF) of the total fell in prison-only boxes, which typically represent more serious crimes and/or offenders with more serious prior criminal records. Because of the relatively small number of cases in the database falling in the prison-only boxes of the Master Grid, more time is needed before we will be in a position to draw reliable conclusions about compliance with the guidelines in these cases.

Of the 5,454 SGF collected since the inception of the guidelines, 87.9% (4,794 SGF) of all sentences are sentenced "within the box." The remaining 12.1% (660 SGF) are "outside the box."

Prison sentences were imposed in 65% of all cases (3,544 out of 5,454). Of these, 89.7% (3,180 SGF) are sentenced within the box. The remaining 10.3% (364 SGF) are outside the box (3.7% above the range; and 6.6% below the range). The dispersion of prison sentences within each range indicates that judges are using all parts of the range in most boxes. It remains to be seen whether this pattern will hold true when the Commission has data on more cases in the top third of the Master Grid, representing more serious crimes and more complex cases.

There were 1,346 SGF with probation sentences, 24.7% of the total, and 564 SGF with short split sentences, 10.3% of the total. Ninety one percent (1,225 SGF) of all probation sentences are in boxes that authorized a probation sentence. 98.6% (556 SGF) of short split sentences are in boxes that permitted short splits.

Of the 3,552 SGF in the sentencing guidelines database representing probation-eligible boxes, 1,222 (34.4%) received a probation sentence, 496 (14%) received a short split sentence, and 1,834 (51.6%) received a sentence to prison. Thus, where both probation and prison are available options, the sentences are about evenly split between prison sentences and sentences that are either entirely or partially suspended with probation.

The analysis of probation sentences indicates that judges are taking advantage of this option primarily when the offense is less serious and/or the offender has a relatively minor criminal record. For example, the rate of probation in probation-eligible boxes decreases as criminal history score increases across both grids. Of the 1,688 SGF in criminal history category A on the Drug and Master Grids, 841 (49.8%) received a probation sentence in a probation-eligible box. In criminal history category B, 254 of 1,074 (23.6%) received a sentence to probation.

In criminal history category C, 127 of 775 (16.4%) received a sentence to probation. Criminal history categories D and E have no probation-eligible boxes. In summary, while probation was an option in many cases involving repeat offenders, as one would expect, judges were far more likely to use probation when the defendant fell in a probation-eligible box and had little or no prior record. The analysis also shows, again not surprisingly, that the rate of probation in probation-eligible boxes generally decreases as offense severity increases.

When the analysis focused on the incidence of probation in non-probation-eligible boxes, the finding was that judges occasionally take advantage of the fact that the guidelines are voluntary and impose suspended sentences with probation. However, probation sentences are imposed in less than 2% (36 of 1,902 SGF) of the cases falling in prison-only boxes. This proportion stands in sharp contrast to the 34.4 % (1,222 of 3,552 SGF) of cases in probation-eligible boxes that receive probation.

It is apparent from these compliance data that judges are consistently applying the guidelines in the vast majority of cases. The Commission's 2006 focus groups also revealed that defense attorneys and prosecutors overwhelmingly approve of the guidelines. Lawyers on both sides praised the sentencing guidelines for reducing inter-judge disparity. Focus group participants specifically noted that the sentencing guidelines have done a good job of capturing the midrange of historical sentences for most crimes, effectively eliminating the pre-guidelines extremes between judges sentencing in similar cases. The defense attorneys and prosecutors also noted that the sentencing guidelines have facilitated plea negotiations by increasing the predictability of sentences and have made the plea bargaining and sentencing process more transparent and accessible to defendants, victims, and the general public.

Impact on Sentencing Patterns

The Commission examined the extent to which the guidelines appear to have been successful in achieving their primary goal of reducing unwarranted variation in sentencing without altering case processing or other sentencing practices in unintended ways. The early evidence is positive. First, the guidelines do not appear to be altering the rate at which cases are resolved by guilty plea and by trial. Second, there is strong evidence that the guidelines are reducing unexplained variation in sentences for similar crimes. Third, the guidelines do not appear to have changed the overall rates of probation and prison as sentencing options, but they may be redistributing the use of these options in ways that were intended. Finally, although it is too early to tell for most serious crimes, for which not enough data exist, it does not appear that guidelines are causing any changes in the length of prison sentences imposed on average.

The Commission examined the impact of sentencing guidelines on case processing by looking at the annual rate at which convictions in all offense severity groups resulted from the entry of a guilty plea compared to the annual rate at which convictions were the product of a guilty verdict at trial. If the rate of guilty pleas has not changed in the guidelines period, then the guidelines system can be said to be neutral with respect to this important aspect of criminal case processing.

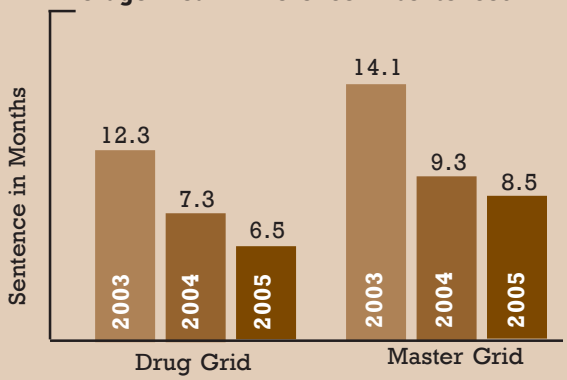
In general, year after year close to 90% of all felony cases in Superior Court are resolved with the entry of a guilty plea. The sentencing guidelines went into effect in June of 2004. Thus, 2003 was a pre-guideline year and 2005 was a guideline year, while 2004 was a mixed year with some pre-guideline pleas and trials and some guideline pleas and trials. The plea rate remained largely unchanged between 2003 and 2005. The guilty plea rate in drug cases was almost unchanged, from 94.1 % in 2003 to 93.5 % in 2005, while the guilty plea rate for non-drug offenses rose very slightly from 87.3 % in 2003 to 87.9% in 2005.

One way to measure whether the guidelines have reduced disparity is to compare the distance between actual sentences that were imposed in a given group and the mean sentence for the whole group. If the average distance between the actual sentences and the group mean has declined in the guidelines period, then it can be presumed that the guidelines system reduced unexplained sentence variation.

District of Columbia *continued*

The average distance from the mean has decreased between 2003 (pre-guidelines) and 2005 (post-guidelines) for both Drug Grid sentences and Master Grid sentences. Average distance from the mean for Drug Grid sentences dropped from 12.3 months in 2003 to 7.3 months in 2004 and to 6.5 months in 2005, while average distance from the mean for Master Grid sentences dropped from 14.1 months in 2003 to 9.3 months in 2004 and to 8.5 months in 2005.

Average Mean Difference in Sentences



Further, as descriptive guidelines not intended to change overall incarceration rates or sentence lengths, the Commission did not expect to see significant changes in the pattern after guidelines were introduced. The preliminary evidence, while not definitive, suggests that the guidelines appear to be meeting this goal.

The rates of probation and incarceration fluctuated within a relatively narrow range with no apparent trend between 2001 and 2005, and there is no evidence that the introduction of guidelines in June of 2004 had any influence on the variations in the pattern from year to year. Therefore, at this point in time, there is no reason to believe that the introduction of sentencing guidelines has either increased or decreased the use of incarceration or probation, although more time is needed to be certain.

The extremely high rate of judicial compliance with the guidelines appears to have channeled the probation sentences to the cases where we would expect to find them - the probation-eligible boxes on both Grids and, even where they are "outside the box," predominately in cases involving less serious crimes and offenders with little or no prior record. To date, the guidelines appear to have succeeded in not incarcerating either more or fewer offenders than in the past, while at the same time distributing the prison sentences to the most violent offenders convicted of the most serious crimes and the probation sentences to offenders most deserving of alternatives to incarceration, which is the goal of any fair and rational structured sentencing system.

In summary, the voluntary sentencing guidelines have been a success. They have received widespread acceptance in the criminal justice community and the sentencing process is more transparent and accessible to defendants, victims, and the general public. The rate of judicial compliance is close to 90%. Apart from the high rate of compliance, the guidelines appear to be accomplishing the primary goal of reducing unwarranted disparity in sentencing, which was the Commission's stated goal when it introduced the guidelines. While all of these issues will continue to require close attention in future years as we accumulate more experience under the guidelines and the Commission is able to identify any unintended consequences or areas in need of improvement, the pilot program has served its purpose of demonstrating that voluntary guidelines can and do work in the District of Columbia.

For more details, go to http://sentencing.dc.gov for the 2006 Annual Report.

[1] The Superior Court for the District of Columbia is unique in that is comprised of a single courthouse with judges all housed under one roof, and it shares a common court culture instead of a series of different courts with different cultures that may be found in large and diverse state systems. The District is also a relatively small, entirely urban jurisdiction, a central city that is part of a much larger urban area. As such, there is little geographic diversity. The mix of offenders is less diverse, and the vast majority of felony defendants (95 %) are African American, most of whom are poor. The District of Columbia is also unique in that the executive and judicial branches answer to two legislatures: the Congress, which has plenary power over the District under Article I of the Constitution; and the District of Columbia Council, which has enumerated legislative powers pursuant to Home Rule.

[2] The average distance methodology used here is also known as "absolute mean difference," the absolute value of the difference between each offender's prison sentence and the average prison sentence imposed in that year for the associated offense severity group. It is a measure of statistical dispersion (also called statistical variability), similar to, and simpler to explain than, standard deviation. The standard deviation results were comparable.

Massachusetts

The proposed Massachusetts sentencing guidelines remain pending in the legislature. Several bills have been filed for the 2007-2008 legislative session. Newly elected Governor Deval Patrick noted the need for "sensible sentencing reform" in his inaugural address. The Massachusetts Sentencing Commission is hopeful that Governor Patrick and the legislature will consider sentencing guidelines as the cornerstone of any sensible and comprehensive sentencing reform effort.

The Massachusetts Sentencing Commission recently published the annual Survey of Sentencing Practices for FY 2006. This report presents detailed statistical information on all adult defendants convicted in Massachusetts. The Massachusetts Sentencing Commission also recently published an updated version of the Felony and Misdemeanor Master Crime List. This reference document contains statutory penalty information on over 2,000 criminal offenses in Massachusetts. The updated version of the document contains citations for new offenses including those created under "An Act Relative to HIV and Hepatitis C Prevention" which decriminalized possession of hypodermic syringes in Massachusetts and created new offenses for Assault or A&B with a hypodermic syringe and "An Act Protecting Children from Persons Who Offer to Pay for Sexual Contact." Copies of both publications are available on the Massachusetts Sentencing Commission's web-site or by request to the commission.

Information from the Massachusetts Sentencing Commission's annual survey of sentencing practices was included at the Massachusetts GIS day event at the State House. The primary focus of the event was to demonstrate the diversity of GIS use throughout the State, including the analysis of sentencing information.

Minnesota

Topics of Interest

After a period during which it seemed that the public discussion of Minnesota's sentencing policy consisted of a series of contests as to who could propose the longest sentences in the loudest voice, the state is returning to rational exploration of, and debate about, crime reduction. Here in the sentencing endgame, topics of interest include: expanding and improving CD treatment (drug court); collateral consequences of conviction and incarceration; re-entry from prison; evidence-based approaches in sentencing and corrections; re-examining Minnesota's response to drug crimes; having MSGC gather and analyze local jail data; and rumblings of interest in indeterminate sentences.

Legislature

The Guidelines Commission is, of course, firmly opposing any move toward indeterminate sentencing. A bill proposing the creation of a parole board – and the consequent evisceration of the sentencing guidelines – has a Senate sponsor, but none thus far in the House. Even at this early stage, it has strong opposition from state and local corrections officials, crime victims and their advocates, and prosecutors. We hope the bill will turn out to be a "straw man," occasioning a lot of testimony about the value of Minnesota's guidelines.In 2006, the legislature accepted the Commission's new sex offender grid, which went into effect on August 1. The grid is designed to provide more appropriate sentences for sex offenders, while maintaining proportionality and avoiding a wholesale ratcheting

upward of all sentences for sex crimes. The grid should result in more effective incapacitation of the most problematical offenders by earlier imprisonment of repeat offenders, based on heavier weights assigned to prior sex offenses and an accelerated progress to the maximum sentence. No sentences were reduced in the new structure, and it will cost more prison beds.

The Commission is about to deliver to legislators and criminal justice professionals an updated and condensed version of its 2004 report on drug sentencing in Minnesota. We hope the study will contribute to a reduction in incarceration of drug offenders. It contrasts our state's sanctions with those of other jurisdictions, demonstrating the unusual severity of our drug laws. It sets out the steady expansion in the number of drug felonies, the increasing length of sentences, and a startling rise in prison commitments, despite a very high rate of downward departures. The Commission has considered drug policy in the light of comity, believing it best that publicly-elected legislators decide whether to reduce sentences for controlled substance offenses. However, the report will include clear scenarios for change, with the estimated fiscal impact of each proposal.

Jail Sentences

The Commission has initiated discussion about whether Minnesota should fund the gathering and analysis of jail data, so that we can begin to document and project local costs of felony sentences, in addition to state costs. At present, jail data do not show whether the time individuals spend in jail is pre-conviction or post-conviction; we cannot tell whether jail sentences are actually served in cells, on home-monitoring programs, on furloughs to treatment, etc. Our impact projections cover prison beds, but not jail beds. Since Minnesota jails a much higher percentage of its felons than other states, this gap is particularly significant. We raised this issue at our first-ever forum for legislators after the last session, and to county commissioners and local corrections officials in September. Since the new session convened, legislators attending several overview presentations they requested from the Commission have expressed interest in this subject.

Racial Disparity Research

In the spring of 2006, the Commission authorized the director to explore the possibility of doing research designed to explain as fully as possible the long-standing disparities between the number of racial minorities in Minnesota and the number convicted and incarcerated. Our state has often had the dubious distinction of having the highest radial disparity rates in the nation, while maintaining the lowest incarceration rate per capita.

We have been able to convene a truly stellar collaboration to design the research. Commission staff has worked with Richard Frase and Kevin Reitz (University of Minnesota College of Law), Myron Orfield (University of Minnesota College of Law's Center on Race and Poverty), Deb Dailey (now State Courts Research Director), researchers from Hennepin County District Court and Hennepin County Corrections, and the indispensable Kay Knapp.

In November, Commissioners approved a preliminary research design and budget and authorized the director to seek private funding for the work. The collaborative will continue to advise the research, which will be done by MSGC and the University's Center on Race and Poverty. Kay Knapp has agreed to serve as the study's initial director. We are all hopeful about what we may be able to achieve. Wish us well and send suggestions about money!

Oklahoma

Prison Crunch in Oklahoma Gets Tighter As Private Prison Drops State's Contract

A private prison is booting 800 Oklahoma inmates, adding to a prison crowding problem that has the Department of Corrections scrambling for space. Before the Cornell Corrections Corporation's announcement to cancel its contract to keep the Great Plains Correctional Facility, in Hinton, Oklahoma, filled with DOC inmates, the agency's incarceration count was projected to grow by 1,200 prisoners during FY'07, and the Legislature had provided no funding for projected growth.

All told, the system needs about 2,000 new beds, about $50 million to finish FY'07 and $150 million more for FY'08. "We just have myriad problems confronting this Legislature," said Sen. Richard Lerblance, Chairman of the Oklahoma Sentencing Commission. "The public wants us not to be soft on crime but I think we need to be smart on crime." Cornell announced that it would replace its Oklahoma prisoners, effective March 1, with those from the U.S. Immigration and Customs Enforcement or from California – jurisdictions that pay at least 60% more than the $45/inmate/day Oklahoma DOC pays. "Oklahoma was having enough problems with its own prison growth, and now we're having to deal with other jurisdictions' prison-crowding problems," said K.C. Moon, Director of the Oklahoma Criminal Justice Resource Center (OCJRC). "California problems are having a domino effect here. "Against this backdrop, the Oklahoma Sentencing Commission has proposed sentencing reforms that would provide some relief to the state's rate of imprisonment, which ranks 4th highest nationally overall and No. 1 in women.

Reform proposals include:

- Ending the mandatory minimum of life-without-parole for drug traffickers who have two prior convictions. Oklahoma's trafficking law is triggered by possession of as few as 5 grams of drugs.
- Capping at two years the length of a prison sentence for a probationer whose sentence is revoked for technical violations.
- Revising recent clamp-downs on sex-offenders that probation officers and police say are doing more harm than good. Enhanced distance restrictions, which ban registered sex offenders from living within 2,000 feet of certain children facilities, have been blamed for reducing compliance with registry laws. The proximity restrictions are so restrictive that sex offenders may legally live in less than 10% of the state's two metropolitan areas.
- Removing the constitutional requirement that the Governor sign all paroles. The commission suggested that the five-member parole board should be the decider of most paroles, leaving the Governor in the loop only for paroles that are protested by victims or prosecutors.
- Identifying legal and administrative barriers that complicate the successful re-entry of prisoners into society.

The commission has also directed OCJRC staff to devise a plan for overhauling laws punishing drug and alcohol felons, who account for more than half of Oklahoma's 23,000 felony convictions each year. The commission voted down a proposal to ask the Legislature itself to rewrite drug laws. "Last time the Legislature rewrote the laws, we doubled our prison population again," said commissioner Bob Ravitz, chief public defender for Oklahoma County. "It's a particularly ripe time for the Legislature to consider options other than just spending more money," Moon said. "It's a time when the straw might break the camel's back as far as somebody deciding if there's an option to building another prison."

The commission also approved its annual Report on Felony Sentencing, which is a detailed analysis of all felony sentences handed down in 2004. The report is available on the OCJRC website at www.ocjrc.net/publications.asp. The report includes the first-ever assessment of the prevalence of felons among Oklahoma's population. As a perennially high-incarceration state, researchers hypothesized that Oklahoma's prevalence of felony convictions – measuring the cumulative effect of sentencing policies that are otherwise documented incidentally – would be very high. Previous research by federal researchers has documented the lifetime risk of imprisonment for U.S. citizens. The OCJRC project, "Estimated Prevalence of Felons Among the Oklahoma Adult Population," written by Bill Chown, adds felony probationers to the mix, and concludes that 8% of Oklahoma's adult population has been convicted of a felony. The rate for black males is 38%. The report also includes "The 1054 Project," an attempt to explain why 1,054 "first-time, non-violent" felons were sent to prison in Oklahoma during 2003.

Pennsylvania

The Impact of a 30-day Aftercare Provision on Offender Recidivism: 2007 Legislative Report on the Boot Camp Program

The Commission recently released its latest Legislative Report on Pennsylvania's Motivational Boot Camp Program, which is in accordance with the Commission's legislative mandate to provide legislative reports on the Boot Camp Program in odd-numbered year. In even numbered years, the Commission provides a report on the State Intermediate Punishment program that was established in 2005.

The focus of our last two Legislative Reports on the Boot Camp Program has been to study the impact of aftercare on offender recidivism. Our previous study examined the impact of a policy requiring a mandatory minimum of 90 days of residential aftercare for Boot Camp graduates, which we found to have a positive impact on lowering recidivism. The current study examined a change to the aftercare policy that reduced the mandatory minimum to 30 days of residential aftercare. In this study we first replicated our analysis for our 90-day aftercare study, and found that while the direction of the findings were the same, they were no longer significant. Upon further examination, we found that there were two reasons for this change: 1) we started receiving information on offenders who had died [previously defined as successes] and 2) additional arrest information for people in the aftercare group which was not available in our previous study.

In our current study, we found that there was no significant difference in the recidivism of offenders in our three groups: no mandatory aftercare, 90 days of aftercare, and 30 days of aftercare. However, consistent with our previous research, those offenders with the best record of employment were less likely to be re-arrested. Additionally, those offenders who indicated that they had the most problems with substance abuse were more likely to have a technical violation, while those who indicated the most problems with anger management were more likely to be arrested for a new crime. We concluded that the finding that aftercare did not impact recidivism does not necessarily negate the need for aftercare programs. Rather, our findings do support the importance of targeting the specific needs of offenders upon return to the community, and recognizing that addressing these needs may not bring about quick or permanent results, but may require reinforcing over time.

Since the inception of the Motivational Boot Camp Program in 1992, another alternative prison program, State Intermediate Punishment, was established in 2005. Both of these programs were created to enhance public safely by offering offenders treatment programs oriented toward reducing their criminal behavior, while helping to ease the prison overcrowding problem. As the Commission is mandated to evaluate both of these programs, it is anticipated that future studies will address the issue of what type of program works best for what type of offender

New Research Project: Effectiveness of Sentencing.

Last year, the Commission decided to undertake a new multi-year, multiphase research project that would examine the effectiveness of sentencing, particularly with respect to recidivism. The goal of the research project is to examine various types of sentences imposed to determine their effectiveness in lowering recidivism. Phase I of this project is focusing on sex offenders due to the heightened concern for these types of offenders. Thus far, the Commission has had several meetings with the Chair of the Board of Probation and parole, and some of her staff, to discuss issues of mutual concern to be addressed in the study. The recidivism study will consist of persons released from prison during 2000, as well as people sentenced to county jail and probation during that time, to allow for a five year tracking period. This winter, we will be starting to collect detailed information on persons sentenced to state prison from records maintained by the Parole Board.

As part of this project, the Commission began some preliminary analysis on a subset of sex offenders: the sexually violent predator. In merging data obtained from the Sex Offender Assessment Board with the Commission's sentencing data, we found that about 25% of the offenders convicted of a Megan's Law offense were determined to be sexually violent predators. Offenders found to be sexually violent predators are also more likely to go to prison and to receive longer minimum sentences than those who were convicted of the same crime, but not determined to be a sexually violent predator.

United States

The United States Sentencing Commission has been very active over the last few months in the "Post-*Booker*" world in which it finds itself. The Commission submitted an *Amicus* brief on January 22, 2007 to the Supreme Court of the United States in the *Clairborne v United States* and *Rita v United States* cases. The Commission hosted a public hearing on "Cocaine and Federal Sentencing Policy" on November 14, 2006 with the hope of updating information since the last report to Congress on the issue. The Commission also hosted a pair of roundtable discussions on the topics of "Simplification of the Federal Guidelines" and "Criminal History" in November, assembling a host of outside interested parties in a day long discussions on these topics. In addition, the Commission is continuing updating and refining its guidelines, with priorities for the 2007 cycle on implementation of the Adam Walsh Child Protection and Safety Act of 2006, immigration offense, the impact of "minor offenses" on an offender's criminal history score, and other important federal sentencing issues. Finally, the Commission will be hosting its 16 Annual National Seminar on the Federal Sentencing Guidelines from May 23 - 25, 2007 in Salt Lake City, Utah.

Virginia

Child Pornography and Online Solicitation Offenses in Virginia

In April 2006, the Virginia Criminal Sentencing Commission received a letter from Virginia's Attorney General asking the Commission to consider establishing sentencing guidelines for child pornography and child exploitation offenses committed via the Internet. These offenses are currently among the small number of felony crimes not covered by Virginia's sentencing guidelines. The Attorney General expressed his desire for consistent and appropriate punishment for offenders committing these crimes and his concern that sentences in these cases have become increasingly disparate in Virginia. The Commission approved a special study of these offenses to determine if guidelines for these crimes indeed were feasible.

Online solicitation offenses have gained considerable attention in recent years with the widespread use of the Internet by both adults and children and heightened concern over exploitation of minors by adults that may take place through chat rooms and web sites designed for children and teenagers. Technology has also had a significant impact on child pornography offenses, transforming how pornography is produced, distributed, and viewed. According to the Federal Bureau of Investigation (FBI), one study showed that 88% of child pornography discovered by law enforcement was stored on computer drives and disks as opposed to hard copies (www.roanoke.com/news/roanoke/wb/92338, November 20, 2006). In Virginia, significant resources are now being devoted to the identification and apprehension of online offenders.

To gain insight into the nature of these cases, Commission contacted law enforcement and criminal justice officials involved in the investigation and prosecution of offenders for illicit online activity involving minors. These cases

are frequently complex and information gleaned from investigators guided the Commission's data collection efforts. For example, officials from Operation Blue Ridge Thunder with the Bedford County Sheriff's Office suggested that a defendant chatting with a minor or police officer posing as a minor over the Internet may be charged with a separate count for each day the chat includes a prohibited solicitation. If the defendant attempts to meet with a minor he solicited over the Internet, he may be charged with attempted indecent liberties under § 18.2-370. Based on the officer's chat log with the defendant, there may be probable cause to seize the defendant's computer to search for related chat logs and child pornography. If a warrant is subsequently issued, the Virginia State Police forensic unit will conduct the search of the defendant's computer; however, this investigation may take from 12 to 18 months. During this period, the defendant may be convicted of the attempted indecent liberties charge or other charges, serve his sentence and be released before child pornography charges are brought. Because of the way the investigation progresses (separate charges, lag time between the initial arrest and the forensic investigation, multiple jurisdictions involved), the data may appear to show that a defendant has a prior record when in reality all charges stemmed from the same scenario. Finally, Operation Blue Ridge Thunder officials suggested that offenders convicted of online solicitation of a minor tend to receive a lower sentence when the victim is actually a police officer posing as a minor on the Internet rather than an actual child. These and other observations provided useful insight for the Commission as it studied these crimes.

To examine cases associated with child pornography, sexually explicit material involving minors, and online solicitation of minors, the Commission collected data from traditional sources such as Virginia's Pre/Post-Sentencing Investigation (PSI) database. The study did not include cases in which a conviction for one of the specified crimes accompanied a more serious offense such as a rape, forcible sodomy or aggravated sexual battery. In nearly all cases, these more serious offenses are already covered by the sentencing guidelines.

The collection of detailed offense information, however, posed major challenges. Traditional criminal justice databases were not designed to maintain detailed information for Internet-related crimes. To fill this void, supplemental data was requested from the files of Commonwealth's Attorneys. The Commission was specifically interested in details related to the commission of the offense, the offender and the victim. These included offense elements such as whether or not the offender arranged to meet a minor with whom he was communicating online, whether or not the charges were the result of an online police operation (or "sting"), the number of minors the offender had contacted and their ages, and if the offender was a convicted sex offender.

Of the cases studied by the Commission, 42% involved solicitation of a minor over the Internet while 58% were associated with the production, distribution, or possession of child pornography. Punishment varied considerably depending on the conviction offense. For example, nearly two-thirds of offenders convicted for a second or subsequent possession of child pornography were committed to prison; however, less than one-third of offenders convicted for using the Internet to procure or promote the use of a minor for sexually-explicit material received a prison sentence. For offenders given a prison term, the median sentence ranged

from four years for the second possession of child pornography to approximately two years for online solicitation offenses.

The Commission's examination revealed that the vast majority (more than 80%) of Virginia's Internet solicitation cases during the last five years have resulted from an online police operation. During these operations, a law enforcement officer poses as a minor while communicating through Internet chat rooms and websites designed for children and teenagers. In the majority of online solicitation cases studied, offenders targeted 13 and 14-year-old girls. The Commission found that well over half of the offenders traveled to meet the "minor" with whom they had been communicating, although most were met instead by law enforcement. Exchanges between the offender and a minor in some cases progressed beyond text exchanges. For example, one in five Internet solicitation cases involved exposure either by the offender or the minor. This was achieved through Internet-ready cameras ("web cams"), digital cameras and camera phones.

Of the child pornography cases examined, the Commission found that roughly half of the cases involved the production or distribution of sexually explicit materials depicting minors (the remaining offenders were convicted for possessing this type of material). For many child pornography offenders, this was not their first conviction. Over half of the offenders studied had a prior adult record of some kind and more than 20% had been convicted previously for a sex offense or obscenity charge as an adult. By collecting information from prosecutors' files, the Commission determined that more than half of the cases involving sexually explicit materials with minors appeared to depict teenagers; however, one in five depicted school-age children roughly 6 to 12 years of age. Nearly one in four of the cases included sexually explicit images depicting children under the age of six. While two-thirds of the cases studied portrayed females only, one in five cases portrayed both male and female children. When the number of images possessed by the offenders could be determined from case files, the Commission's examination revealed that the largest share of pornography cases (37%) involved 6 to 25 images. Nonetheless, 1 in 5 child pornography offenders studied by the Commission had over 100 images in his possession at the time of his arrest.

The Commission's objective was to examine offenses related to child pornography, sexually explicit materials involving minors, and online solicitation of minors and to determine if historically-based sentencing guidelines for these crimes could be developed. The Commission concluded that guidelines were feasible and would be a useful tool for judges when sentencing offenders convicted of these crimes. The Commission developed a proposal for integrating these crimes into the guidelines system. The proposed guidelines are anchored to historical practices of Virginia's circuit court judges for the period studied.

All of the Commission's findings, and the proposal to integrate these crimes into the sentencing guidelines, are presented in the Commission's *2006 Annual Report*. This report is now available on the Commission's website (www.vcsc.virginia.gov).

Per the *Code of Virginia*, any modifications to the sentencing guidelines adopted by the Commission and contained in its annual report shall, without action from the legislature, become effective on the following July 1.

Washington

The 2007 Washington State legislative session was convened the first week in January. The Sentencing Guidelines Commission (SGC) does not anticipate any major changes to state sentencing laws during this session. Legislators, however, are examining evidenced based policy options that have been shown to reduce recidivism.

The primary focus of criminal justice policymakers will be on programs offered in institutions and resources accessible to offenders upon reentry into the community. As preparation for the legislative session, during the summer the SGC participated in a Joint Task Force on Offender Programs, Sentencing and Supervision. The work of that taskforce has been translated into several legislative proposals that are aimed at providing opportunities for education, developing transportable employment skills, and better social and psychological functioning. Advances in these areas have been shown to reduce recidivism.

The Commission is again working this session to resolve some remaining issues affecting judicial discretion post *Blakely.* Senator Adam Kline, a state legislator and member of the Commission, has introduced two bills aimed at giving judges more discretion in sentencing while still retaining our present determinate sentencing system. If passed, one bill would expand the standard sentencing ranges throughout the sentencing grid. The other bill contains provisions permitting and requiring the court to give notice of its belief that an exceptional sentence may be appropriate in a particular case and on its own motion to empanel a jury to decide the issue.

Finally, the Commission has embarked on a technical review of the Sentencing Reform Act of 1981(SRA), Washington's sentencing law. During the 26 years since its enactment, the SRA has been amended approximately 195 times. Amendments have been made to scoring rules, eligibility requirements for exceptions, sentencing ranges, conditions of release and definitions of sentencing terms. As a result, the SRA has become more complex each year. So much so that each year the Commission staff now publishes a practice manual more than 700 pages long. During the coming spring and summer the Commission will work to eliminate or at least reduce some of this complexity.

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