

CHAPTER IV.

ASSESSMENT OF DETERMINATE SENTENCING PRACTICES IN THE DISTRICT OF COUMBIA THROUGH JUNE 30, 2002

Section 6 of the Advisory Commission on Sentencing Establishment Act of 1998, as amended by the Sentencing Reform Amendment Act of 2000 provides, in pertinent part:

“(b) The Court shall collect and provide to the Commission data on the length of and reasons for each sentence imposed for crimes committed on or after August 5, 2000. The reasons should include, but are not limited to, the weight given to such factors as the background and criminal history of the offender, the nature of the offense, and the impact of the offense on the victim or community. The data shall not become a part of the record and shall not be used to challenge the sentence imposed.

“(c) The Commission shall analyze the data provided to it by the Court and shall submit to the Council in the 2002 annual report:

“(1) An interim assessment on the implementation of the determinate sentencing system.

D.C. Official Code § 3-105(b) and (c).

This chapter reports on the Commission’s study of sentencing practices for crimes committed after August 5, 2000. First, the section called “Overview of Determinate Sentences” discusses the number and type of “new law” sentences for all offenses during the period August 5, 2000 through June 30, 2002. Next, in the section headed “Assessment of New Law Sentencing Practices,” the Commission assesses sentencing practices under the new determinate sentencing system, for crimes committed after August 5, 2000.¹ In the section entitled “Interim Assessment of the Implementation of Determinate Sentencing,” the Commission provides its assessment of the implementation of the determinate sentencing system.

¹ Because relatively few cases were sentenced under the new law through June of 2002, a more comprehensive study of this topic will be completed next year as more cases are sentenced. For example, data on serious violent crimes, arguably the most important category to review in depth, are only now beginning to accumulate, and at least one more year of data is needed to provide useful information on those sentences. There are, however, enough new law drug cases to provide an adequate basis for analysis of drug crimes.

Overview of Determinate Sentences

As mandated by Sentencing Reform Amendment Act of 2000, the Superior Court provided detailed automated sentencing information to the Commission through the Court Information System (CIS), for all sentences imposed since August 5, 2000.² The legislation requires the Court to provide the Commission with “data on the length of and reasons for each sentence imposed,” including “background and criminal history of the offender, the nature of the offense, and the impact of the offense on the victim or community.” The Court has been providing this information in two ways: (1) automated data directly from the CIS, which includes the conviction charges, the sentence imposed, criminal history, selected background characteristics of offenders, and other factors, and (2) a special Data Collection Form designed by the Commission and completed by judges in felony cases since January 2002, which includes the nature of the offense, such as victim injury and weapon use, and additional background information on the offender, such as legal status at the time of arrest.³

The Superior Court provided CIS automated information on 4,607 sentencing events from the period August 5, 2000 through June 30, 2002. Among the cases with sentences imposed on or after August 5, 2000, the sentences include both old law and new law sentences. In fact during the period August 5, 2000 through June 30, 2002, only 1,994 cases involved determinate sentences under the new law, while 2,613 cases involved indeterminate or old law sentences. This section presents a statistical description of felony sentencing under the determinate

² As noted in Chapter III, the Superior Court provided data on all sentences since 1980.

³ The Commission determined that it needed more complete data on the length of and reasons for each sentence imposed, in addition to data made available through CIS records. The limitations of existing data are described in Chapter III, Understanding Sentencing Outcomes. The Commission developed the Sentencing Data Collection Form and asked judges to provide information on numerous factors including weapon use, victim characteristics, and offender status. As of October 23, 2002, the Commission has received 1,226 Sentencing Data Collection Forms. The Form itself is included in the Appendix D.

sentencing structure (“new law”) in the Superior Court from August 5, 2000 to June 30, 2002.⁴

These are preliminary results regarding determinate sentences, and at least one more year of data is needed to better assess determinate sentencing in the District of Columbia.

Tables 4-1 and 4-2 describe the type of sentence offenders received by year of the sentencing for the 1,967 felony offenders who were convicted and sentenced in Superior Court under the new law.⁵ It is important to note that only 27 cases were processed under the new law by the end of 2000 and therefore this year is not shown separately. If the figures for the first half of the 2002 were to be extrapolated for the entire year, approximately 1,800 offenders would receive determinate sentences in 2002. Comparing new law sentences to old law sentences for 2001, a year with a substantial number of both old and new law cases, proportions sentenced to a period of incarceration are identical: 58.7% of offenders sentenced under the old law in 2001 were incarcerated (See Table 3-2); an identical 58.7% sentenced under the new law in 2001 were incarcerated (Table 4-2). Split sentences represented a slightly higher percentage of the sentences to incarceration, 16.4% under the new law as compared to 13.8% under the old law.

Table 4-1. Sentences Imposed on Felony Defendants Sentenced Under New Law by Year, by Type of Sentence Imposed (Number)

| Year | Total sentenced | | Incarceration | | | | |
|-------|-----------------|-----------------|---------------------|--------------------|-------|-----------|-------|
| | Number | Percent by Year | Total Incarceration | Incarceration only | Split | Probation | Other |
| 2001 | 1072 | 53.8 | 629 | 453 | 176 | 441 | 2 |
| 2002 | 895 | 44.9 | 527 | 380 | 147 | 361 | 7 |
| Total | 1967 | 100.0 | 1156 | 833 | 323 | 802 | 9 |

⁴ As noted in footnote 1 of Chapter III, the 2002 *indeterminate* sentences are atypical cases, usually complex cases and often far more serious than the average case. Therefore, the 2002 cases are not representative of cases seen in Superior Court under the indeterminate sentencing period and are not reported. It is possible that the 2002 *determinate* sentences are atypical also, in this case because the simplest cases tend to be disposed of most quickly, and *the most serious and complex cases are underrepresented*.

⁵ Defendants who commit crimes on or after August 5, 2000 must be arrested, prosecuted, convicted, and sentenced before they appear in the CIS database. From August 5, 2000 through December 31, 2000, there were 843 old law and 27 new law cases (3% of total sentences during that time period). In calendar year 2001, there were 1,336 old law and 1,072 new law cases (45% of total sentences that year). In the first half of calendar year 2002, there were 434 old law and 895 new law cases (67% of total sentences for that time period).

Table 4-2. Sentences Imposed on Felony Defendants Sentenced Under New Law by Year, by Type of Sentence Imposed (Percent)

| Year | Total sentenced | Incarceration | | | Probation | Other |
|-------|-----------------|---------------------|--------------------|-------|-----------|-------|
| | | Total Incarceration | Incarceration only | Split | | |
| 2001 | 1072 | 58.7 | 42.3 | 16.4 | 41.1 | 0.2 |
| 2002 | 895 | 58.9 | 42.5 | 16.4 | 40.3 | 0.8 |
| Total | 1967 | 58.8 | 42.3 | 16.4 | 40.8 | 0.5 |

Table 4-3 shows the trends by major offense categories.⁶ This table illustrates that the percentage of all offenses that were drug offenses, high from 1999-2002 under the old law, continued to be high through June 30, 2002 under the new law also. Again, new law cases in 2000 were too few to provide a meaningful comparison and are excluded. During the first half of 2002, the percentage of new law sentences that were drug offenses was 38.2% -- a proportion consistent with recent historical figures for old law sentences (See Table 2-5 in Chapter II). During the period January 1, 2000 through June 30, 2002, the percentage of old and new law sentences that were drug offenses ranged between 38% and 40%.

⁶ Due to the small number of cases in a single year, violent crimes are not subdivided by seriousness level here.

Table 4-3. Sentences Imposed on Felony Defendants Sentenced Under New Law, in 2001 and first half of 2002 by Major Offense Category

| Year | Offense Category | Number | Percent by Year |
|------|------------------|-------------|-----------------|
| 2001 | Violent | 170 | 15.9 |
| | Property | 102 | 9.5 |
| | Drug | 432 | 40.3 |
| | Weapon | 60 | 5.6 |
| | Public Order | 278 | 25.9 |
| | Other | 30 | 2.8 |
| | Total | 1072 | 100.0 |
| 2002 | Violent | 153 | 17.1 |
| | Property | 74 | 8.3 |
| | Drug | 342 | 38.2 |
| | Weapon | 57 | 6.4 |
| | Public Order | 203 | 22.7 |
| | Other | 66 | 7.4 |
| | Total | 895 | 100.0 |

For those offenders receiving a sentence to a period of incarceration, the length of sentence under the new law for violent crimes and drug crimes is shown in Tables 4-4 and 4-5, respectively. Only violent and drug crimes are reported here because the number of new law weapon, property, and other crimes is still quite small.⁷ Whereas under the old law, we represented the length of sentence by reference to the minimum term of the sentence imposed, under determinate sentencing, offenders sentenced to incarceration receive a single term, and must serve at least 85% of the sentence.

As demonstrated in Table 4-4, the median sentence length for violent offenses remains consistent for 2001 and 2002. The median sentence for violent crimes is 48 months in 2001 and the first half of 2002. However, because the most serious crimes are more complex and take longer to resolve, serious violent crimes are probably underrepresented in new law cases to date. Under the old law, the median minimum sentence was 60 months in 2001 – the last year with an appreciable number of indeterminate sentences. Given that old law cases during the period are

⁷ Public order crimes have a sufficient number of cases, but little variation in sentence length.

likely to be more complex cases representing more serious crimes, it is not surprising that the median sentence length for new law cases is somewhat lower than old law cases, although the differences do not appear substantial. In general, it is probably fair to say that new law sentences for violent crimes are early returns, and we would expect later new law sentences to approach the minimum sentence for violent crimes under indeterminate sentencing.⁸

Table 4-4. Felony Sentence in Months for New Law Violent Offenses, by Year

| Disposition Year | Offenders sentenced | Mean | Standard Deviation | 25th %tile | Median | 75th %tile | Mode |
|------------------|---------------------|------|--------------------|------------|--------|------------|------|
| 2001 | 138 | 69 | 72 | 18 | 48 | 96 | 60 |
| 2002 | 124 | 79 | 107 | 19 | 48 | 96 | 60 |
| Total | 262 | 74 | 89 | 18 | 48 | 96 | 60 |

⁸ The 25th and 75th sentence length percentiles for new law violent crimes were also comparable to the minimum sentences under the old law.

Table 4-5 describes the sentence length for drug offenses under determinate sentencing. The median sentence for drug offenses remains constant for 2001 and 2002 at 12 months. The median minimum sentence for drug crimes under the old law was 12 months in 2001 (See Table 3-5).⁹ Therefore, it appears that for drug crimes, sentences to a period of incarceration under the new law are equal to the minimum sentence under the old law. As previously noted, the typical drug distribution crime in Superior Court is a small street-level sale often made to support a drug habit, very unlike the extreme case of a large volume sale by a major drug trafficker.

Table 4-5. Felony Sentence in Months for New Law Drug Offenses, by Year

| Disposition Year | Offenders sentenced | Mean | Standard Deviation | 25th %tile | Median | 75th %tile | Mode |
|------------------|---------------------|------|--------------------|------------|--------|------------|------|
| 2001 | 164 | 23 | 60 | 4 | 12 | 24 | 12 |
| 2002 | 154 | 17 | 14 | 6 | 12 | 24 | 12 |
| Total | 318 | 20 | 38 | 5 | 12 | 24 | 12 |

These findings have important implications for offenders sentenced to prison. Under the old law, judges could only control the minimum sentence, and how long an offender served beyond the minimum sentence, up to the maximum sentence less “good time” credits, was a decision made by paroling authorities. If these early results continue, with new law sentences roughly equal to old law minimum sentences, then judges will be replicating that portion of past practice that they have always controlled. Moreover, to the extent that offenders serve more than their minimum term before parole (see Chapter III, footnote 4), it is possible that offenders sentenced for drug crimes may end up serving less time under the new law than their predecessors served under the old law.

⁹ There are relatively few old law drug crimes in 2002, but the median sentence length was 12 months for this period also.

Assessment of New Law Sentencing Practices, August 5, 2000 through June 30, 2002

In Chapter III, old law sentencing outcomes were described, including a description of the data and methods used to understand two sentencing outcomes: the decision to incarcerate; and the length of incarceration sentences. The same statistical approaches were used to evaluate sentences imposed for crimes committed on or after August 5, 2000, as required under the Council's mandate to the Commission. However, it is again important to reiterate that these results are preliminary. Drug cases represent the only offense category with enough new law cases to provide an adequate basis for analysis (780 cases).

Statistical Analysis of the Decision To Incarcerate (New Law Only)

The decision to incarcerate (the in-out decision) under the new law is examined in this section, beginning with Tables 4-6 and 4-7. As we did with the analysis of old law cases, we have again divided the violent crime category into three subcategories. Table 4-6 shows the incarceration rates by major offense category, controlling for prior felony convictions, and Table 4-7 presents the incarceration rates by major offense category controlling for the number of charges for the current case.

Table 4-6 shows that for all offenders, those with at least one prior felony conviction were more likely (70.4%) to receive some term of incarceration than those offenders without any prior record (50%). These findings are similar to the percentages for old law cases (Table 3-8), 72.4% and 55.5% respectively. For every major offense category, offenders with prior felony records had higher incarceration rates than those with no prior felony convictions.

Table 4-6. Incarceration Rate by Offense Category and Prior Felony Convictions for New Law Cases, August 2000- June 2002

| Offense Category | No Priors | | Priors | |
|---------------------|-------------|-------------|------------|-------------|
| | Total | % | Total | % |
| Violent | | | | |
| Seriousness Level 1 | 47 | 95.7 | 13 | 100.0 |
| Seriousness Level 2 | 127 | 81.1 | 59 | 88.1 |
| Seriousness Level 3 | 45 | 64.4 | 34 | 76.5 |
| Property | 91 | 47.3 | 87 | 74.7 |
| Drug | 451 | 34.1 | 329 | 59.9 |
| Weapon | 110 | 46.4 | 9 | 66.7 |
| Public Order | 187 | 62.0 | 306 | 74.8 |
| Other | 69 | 33.3 | 28 | 78.6 |
| Total | 1127 | 50.0 | 865 | 70.4 |

As shown in Table 4-7, offenders sentenced on multiple charges had an incarceration rate of 71.1% compared to 56.3% for those who were sentenced on a single charge. Drug offenders sentenced with multiple charges were more likely to be incarcerated (64.5%) than those who had a single charge for the current offense (42.9%). Based on these early returns, this may represent a slight change from the analysis conducted on the old law sentences, where the number of charges appeared to have little or no impact on the in-out decision (Table 3-9).

Table 4-7. Incarceration Rate by Offense Category and Number of Charges for New Law Cases, August 2000- June 2002

| Offense Category | Single Charge | | Multiple Charge | |
|---------------------|---------------|-------------|-----------------|-------------|
| | Total | % | Total | % |
| Violent | | | | |
| Seriousness Level 1 | 37 | 94.6 | 23 | 100.0 |
| Seriousness Level 2 | 114 | 78.1 | 72 | 91.7 |
| Seriousness Level 3 | 64 | 64.1 | 15 | 93.3 |
| Property | 125 | 59.2 | 53 | 64.2 |
| Drug | 704 | 42.9 | 76 | 64.5 |
| Weapon | 62 | 35.5 | 57 | 61.4 |
| Public Order | 488 | 69.9 | 5 | 80.0 |
| Other | 53 | 45.3 | 44 | 47.7 |
| Total | 1647 | 56.3 | 345 | 71.1 |

The Decision to Incarcerate and Other Factors

The following tables examine other factors that may be related to the in-out decision, controlling for (1) the type of offense and (2) prior felony convictions. However, because there are not sufficient numbers of cases for most crime categories, only the results for drug offenses are presented at this time. The Commission expects to report all other offenses in future annual reports.

Table 4-8 compares drug offense incarceration rates for single and multiple charges, controlling for prior record. Among drug offenders with no prior felonies, the incarceration rate for multiple charge cases is higher than single charge cases (53.8% and 31.6%, respectively). For those with prior felonies, the incarceration rate for multiple charge cases is similarly higher than single charge cases (87.5% and 57.7%, respectively).

Table 4-8. Incarceration Rate for New Law Drug Cases by Prior Felony Convictions and Number of Charges, August 2000- June 2002

| Offense Category | No Priors | | | | | Priors | | | |
|------------------|-----------------|---------------|------|-----------------|------|---------------|------|-----------------|------|
| | Total sentenced | Single Charge | | Multiple Charge | | Single Charge | | Multiple Charge | |
| | | Total | % | Total | % | Total | % | Total | % |
| Drug | 780 | 399 | 31.6 | 52 | 53.8 | 305 | 57.7 | 24 | 87.5 |

Regarding drug offense incarceration rates by race of the offender, there are 769 black offenders but only 21 non-black offenders. There are too few non-black offenders to compare incarceration rates at this time.

Table 4-9 shows the incarceration rates in drug cases by gender of the offender, controlling for prior felony convictions. As with old law sentences (Table 3-12), males are more likely to receive an incarceration sentence than females, whether the offender had no felony record or had at least one prior felony conviction. Among drug offenders with no prior felonies, the incarceration rate for males is higher than females (37.7% and 13.4%, respectively). For those with prior felonies, the incarceration rate for males is similarly higher than for females (62.6% and 37.1%).

Table 4-9. Incarceration Rate for New Law Drug Cases by Prior Felony Convictions and Gender of Offender, August 2000- June 2002

| Offense Category | No Priors | | | | Priors | | | |
|------------------|-----------|------|-------|------|--------|------|-------|------|
| | Female | | Male | | Female | | Male | |
| | Total | % | Total | % | Total | % | Total | % |
| Drug | 67 | 13.4 | 384 | 37.7 | 35 | 37.1 | 294 | 62.6 |

Table 4-10 shows the drug offense incarceration rates by the age of the offender, controlling for prior felony convictions. As with old law cases (Table 3-13), younger drug offenders were more likely to be incarcerated than older offenders. For example, 78.0% of drug offenders who had prior records and were 24 years old and under were incarcerated. Among drug offenders who had prior records and were age 40 and older, 50.8% received a term of incarceration. For offenders with no prior record, the youngest category had an incarceration rate of 41.7%, and the oldest group had an incarceration rate of 26.5%.

Table 4-10. Incarceration Rate for New Law Drug Cases by Prior Felony Convictions, and Age of Offender, August 2000- June 2002

| Offense category | No Priors | | | | | | Priors | | | | | |
|------------------|----------------|------|--------|------|--------------|------|----------------|------|--------|------|--------------|------|
| | 24 and Younger | | 25-39 | | 40 and Older | | 24 and Younger | | 25-39 | | 40 and Older | |
| | Number | % | Number | % | Number | % | Number | % | Number | % | Number | % |
| Drug | 170 | 41.7 | 179 | 31.3 | 102 | 26.5 | 41 | 78.0 | 156 | 62.8 | 132 | 50.8 |

Statistical Analysis of Length of Sentence (New Law Only)

The Commission also examined the length of sentence for offenders sentenced to incarceration. The evidence presented in Tables 4-11 and 4-12 suggests that the presence of multiple charges does appear to be related to length of sentence. In contrast, the presence of a prior felony conviction has less effect on the sentence length decision. These results are similar to the old law results reported in Chapter III.

In Table 4-11, the sentence length decision (sentence in months) for new law cases is examined by offense category and number of charges. Overall, cases with multiple charges receive a 36-month median sentence, while the median sentence for single charge cases is 12 months. In every offense category, the median sentence length for multiple charge cases is either equal to or higher than the median sentence in single charge cases. For Level 1 violent crime, the median sentence is 144 months for both single charge and multiple charge cases, although the number of cases in both categories is still relatively small.

Table 4-11. Median Sentence Length in Months for New Law Cases by Offense Category and Number of Charges, August 2000- June 2002

| Major offense category and seriousness level | Offenders sentenced | Single Charge | | Multiple Charge | |
|--|---------------------|---------------|-----------|-----------------|-----------|
| | | Number | Months | Number | Months |
| Violent | | | | | |
| Serious level 1 | 58 | 35 | 144 | 23 | 144 |
| Serious level 2 | 154 | 88 | 36 | 66 | 60 |
| Serious level 3 | 54 | 40 | 15 | 14 | 18 |
| Property | 98 | 65 | 12 | 33 | 24 |
| Drug | 322 | 278 | 12 | 44 | 18 |
| Weapon | 49 | 22 | 6 | 27 | 12 |
| Public Order | 299 | 295 | 4 | 4 | 7 |
| Other | 41 | 22 | 6 | 19 | 6 |
| Total | 1,075 | 845 | 12 | 230 | 36 |

Table 4-12 shows the sentence length for new law cases by offense category and prior felony convictions. Overall, offenders with no prior felonies received a median sentence of 12 months, and offenders with a prior felony also received a median sentence of 12 months. However, in most crime categories, the median sentence was longer for offenders who had one or more prior felony convictions. As was true of the old law cases, the comparability of the overall median sentence length between offenders with prior felony records and those with no record is best explained by relatively short sentences given to offenders convicted of public order crimes, the vast majority of whom have prior felony convictions. The overall median is also skewed by the relatively long sentences in the most serious violent crime category, where offenders are statistically less likely to have a prior felony conviction.

Table 4-12. Median Sentence Length in Months for New Law Cases by Offense Category and Prior Felony Convictions, August 2000- June 2002

| Major offense category and seriousness level | Offenders sentenced | No Prior Felony | | Prior Felony | |
|--|---------------------|-----------------|-----------|--------------|-----------|
| | | Number | Months | Number | Months |
| Violent | | | | | |
| Serious level 1 | 58 | 45 | 144 | 13 | 168 |
| Serious level 2 | 154 | 103 | 48 | 51 | 48 |
| Serious level 3 | 54 | 28 | 17 | 26 | 17 |
| Property | 98 | 42 | 12 | 56 | 24 |
| Drug | 322 | 143 | 9 | 179 | 12 |
| Weapon | 49 | 44 | 12 | 5 | 4 |
| Public Order | 299 | 98 | 3 | 201 | 6 |
| Other | 41 | 21 | 6 | 20 | 12 |
| Total | 1,075 | 524 | 12 | 551 | 12 |

As we did in Chapter III, the number of charges is used as a control variable in the following tables, along with the major crime category of the offense.

Length of Sentence and Other Factors

Other factors were examined for any relationship to sentence length for drug offenders, controlling for the number of charges. Again, there are not enough new law sentences to

incarceration to examine any offense category except drug crimes. Table 4-13 shows the sentence length for drug offenders by prior felony convictions, controlling for the number of charges in the current case. Among drug offenders with single charges, offenders with prior felony convictions received longer sentences than offenders with no prior felony convictions (12 months and 8 months, respectively). Among drug offenders with multiple charges, prior felony convictions were also associated with longer sentences than those with no priors (27 months and 15 months).

Table 4-13. Median Sentence Length in Months for New Law Drug Offense by Number of Charges and Prior Felony Convictions, August 2000- June 2002

| Offense category | Offenders sentenced | Single Charge | | | | Multiple Charge | | | |
|------------------|---------------------|------------------------|---------------------|------------------------|---------------------|------------------------|---------------------|------------------------|---------------------|
| | | No Prior Felony Number | Prior Felony Months | No Prior Felony Number | Prior Felony Months | No Prior Felony Number | Prior Felony Months | No Prior Felony Number | Prior Felony Months |
| Drug | 322 | 117 | 8 | 161 | 12 | 26 | 15 | 18 | 27 |

There are 311 black drug offenders sentenced to incarceration but only 10 non-black drug offenders. There are too few non-black offenders to compare sentence lengths at this time. Similarly, there are 302 male drug offenders, but only 20 female drug offenders, sentenced to incarceration. There are too few female offenders to compare sentence lengths at this time.

Table 4-14 displays sentence length by age, controlling for number of charges. There are three age categories: 24 years old and younger, 25 to 39 years old, and 40 years old and over. For single charge cases, drug offenders 24 years of age and younger received a median sentence of 10 months and the remaining two age groups receive a median sentence of 12 months. Again, these are preliminary numbers. There are too few multiple charge cases (44) to analyze. Any comparison to old law cases must wait until more new law cases are collected.

Table 4-14. Median Sentence Length in Months for New Law Drug Offense by Number of Charges and Age Category, August 2000- June 2002

| Offense category | Single Charge | | | | | | Multiple Charge | | | | | |
|------------------|----------------|--------|--------|--------|--------------|--------|-----------------|--------|--------|--------|--------------|--------|
| | 24 and Younger | | 25-39 | | 40 and Older | | 24 and Younger | | 25-39 | | 40 and Older | |
| | Number | Months | Number | Months | Number | Months | Number | Months | Number | Months | Number | Months |
| Drug | 76 | 10 | 127 | 12 | 75 | 12 | 20 | 20 | 15 | 18 | 9 | 12 |

Interim Assessment of the Implementation of Determinate Sentencing in Superior Court

Determinate sentencing came to the District of Columbia as a federal mandate, in the form of the criminal justice provisions of the National Capital Revitalization and Self-Government Improvement Act of 1997 (“Revitalization Act”). Through the Revitalization Act, Congress abolished discretionary parole release for the most serious felonies, and required that good time credit be calculated according to federal law. As a result, District offenders convicted of serious felony offenses committed on or after August 5, 2000 would receive determinate sentences, without parole, and serve at least 85% of the sentence imposed. Following the Commission’s recommendation, the Council enacted the Sentencing Reform Amendment Act of 2000, which established a “unitary” sentencing system in the District. As a result, one set of rules was applied to all persons convicted of felony and misdemeanor offenses in the District. In the same legislation, the Council addressed the issues Congress did not preempt in the

Revitalization Act: establishing terms of supervised release, establishing new authorized maximum terms of imprisonment for offenses formerly carrying a life sentence, and amending the Youth Rehabilitation Act.

In formulating its recommendations in response to the Revitalization Act, the Commission made a conscious decision not to propose any change in authorized maximum terms of imprisonment, except for life offenses. The Commission assumed that judges would not impose the maximum sentence in most cases, but should have the discretion to do so in extraordinary cases. However, the Commission was mindful of concerns that sentences imposed (and hence time served) might increase in the determinate sentencing system.

We expected that sentences in the new system would approximate the minimum sentences in the old system for most offenses. With the data we have accumulated so far, that expectation appears to be borne out. Since historical data regarding time-served is of limited value, we cannot compare the two systems on this basis. However, if new law sentences continue to mimic old law minimum sentences, it is likely that offenders may serve less time in the new system than in the old (since there is less discretion on the release date). Nevertheless, if, as time goes on, judges impose determinate sentences which exceed by more than 15% the length of time an offender would have served in the indeterminate parole-based system, then time served would tend to increase. Authorized maximum terms of imprisonment for criminal offenses in the District were enacted in the context of an indeterminate parole-based sentencing system. In such a system, even if the judge imposed the maximum sentence, it was unusual for an offender to serve the maximum sentence without parole. Retaining these maximum terms in the determinate sentencing system, in effect, widened the range within which a judge has discretion to imprison an offender.

The District of Columbia is largely relieved of the fiscal burden of housing its felon population, because the District's sentenced felons are now the responsibility of the Federal Bureau of Prisons. Unlike the 50 states, if the District legislature proposes to establish a new felony offense, or to increase a criminal penalty for an existing offense, the proposal's fiscal impact on the District's budget will be negligible because the federal government bears the entire cost of housing felons for these extended periods. Although there is no reason to believe that judges or prosecuting and defense attorneys make their decisions in individual cases based on the economics of incarceration, it is unclear what impact, if any, determinate sentencing will have on those practices in the Superior Court.

This report represents the first attempt by the Advisory Commission on Sentencing to answer the important question of how the implementation of determinate sentencing is going and what impact it has had. Given the important questions raised in the preceding discussion, this report attempts to provide preliminary answers based on available data and other sources of information. It is still much too early in our experience with determinate sentencing to come to any firm conclusions about whether offenders sentenced to prison under the new law will serve more, less, or about the same amount of time in prison as compared to those sentenced for similar crimes under the old law.

Overview of Determinate Sentencing

To briefly recapitulate the developments to date, discretionary parole release is abolished for all felony offenses. The judge decides the length of any prison term imposed and imposes a period of supervised release to follow any term of imprisonment.¹⁰ This supervised release term insures that offenders are supervised upon re-entry into the community, and that offenders can be

¹⁰ Of course, many offenders receive a suspended sentence rather than a term of imprisonment. In these cases, there is no reason to believe that the implementation of determinate sentences will have any effect.

returned to prison if supervised release is revoked.¹¹ If the maximum term of imprisonment authorized for an offense is a term of years, the court may impose a determinate sentence up to the statutory maximum, minus the maximum term of imprisonment authorized upon revocation of supervised release, except that if the maximum term of imprisonment authorized for the offense is up to life or the offense is specifically designated a Class A felony, the court is not required to deduct the maximum revocation time when imposing the statutory maximum sentence.

When judges impose a term of imprisonment under the old law, the announced sentence includes two numbers, the minimum term of imprisonment and the maximum term of imprisonment. Offenders are eligible for good time credits to reduce the minimum term. The paroling authority and corrections officials determine the actual release date within this range.

When judges impose a prison sentence under the new law, the announced sentence includes a single number for the term of imprisonment, along with a period of supervised release, which, with few exceptions,¹² cannot exceed five years. An offender can earn up to 54 days per year of institutional good time credit (roughly 15% or 365 days), which means that he must serve at least 85% of his or her sentence.

The United States Parole Commission (USPS) decides the specific conditions of supervised release, whether to revoke supervised release, and the length of any prison sentence upon revocation of supervised release. See 28 CFR § 200 et seq. Like the old parole system, there is no credit for "street time" while on supervised release. However, any period of

¹¹ For every term of imprisonment under the new law, the Court must order an adequate period of supervised release as defined by D.C. Code §214.403.1(b).

¹² The exceptions are sex offenses for which the offender is required to register under the Sex Offender Registration Act. D.C. Official Code §22-4002 (2001). With those, the court has discretion to impose a period of supervised release equal to the number of years the offender is required to register.

incarceration is deducted from the available period of supervised release than can be imposed when an offender is released from a revocation sentence.

Because determinate sentencing applies only to offenses committed on or after August 5, 2000 and because most cases take many months to reach the sentencing stage, it was well into 2001 before a significant number of cases with determinate sentences became available for analysis.

Training and Monitoring for New Law Sentences

Because determinate sentences are different in a number of ways from indeterminate sentences, including key differences in the meaning and structure of the announced sentence and the judgment and commitment order that accompanies all sentences, determinate sentences are being closely monitored in at least two ways. First, the Clerk of Court, through the Criminal Division, is currently screening all cases and returning obvious errors to the sentencing judge for correction. Second, the Superior Court is recording all sentences in the Court Information System and making copies of the automated files available to the Sentencing Commission for analysis.

In addition to the monitoring of sentences, the Superior Court took steps to prevent errors from occurring through extensive training. The training began prior to the implementation of the new law, at the annual Judicial Conference on June 23, 2000, using what was then draft legislation. Commission members and staff also made presentations on June 30, 2000 and September 15, 2000 at mandatory training sessions for the Associate Judges of the Superior Court. The Court continues to provide judicial training as needed.

In addition, the Public Defender Service has taken the lead in providing training for PDS attorneys, the private Criminal Justice Act bar, and the Criminal Law Section of the D.C. Bar. The U.S. Attorney's Office provided ongoing training to its own attorneys.

Commission members provided training for all of the CSOSA staff responsible for pre-sentence investigations and reports. Commission staff has twice conducted training for the United States Probation Office.

In summary, the training function provides a mechanism to insure that all parties understand the new laws and procedures. The monitoring provides a mechanism for identifying areas where implementation of new law is in need of improvement. The training and monitoring functions are routine and on-going, and will become even more important if the District moves to some form of structured sentencing.

Results of the Interim Assessment of the Implementation of Determinate Sentencing in Superior Court

In the process of monitoring the transition from indeterminate to determinate sentencing, Commission members, and members of the bar generally, discovered a number of areas of confusion regarding determinate sentencing, particularly in areas where there is little or no guidance in the applicable statutes and legislative history. Because of these recurring problem areas, members of the Commission prepared the following informational report, which was distributed widely to bench and bar in July 2002 and is reproduced here in its entirety.

Calculating maximum prison time for non-Class A felonies

In the new determinate sentencing system ["new system"], there are two classes of felonies: Class A felonies and everything else. With the exception of armed carjacking, all of the Class A felonies carried a maximum penalty of life in the old

indeterminate sentencing system [“old system”].¹³ All other felonies carried a maximum penalty of a term of years in the old system.

The distinction between Class A felonies and all other felonies determines, among other things, the maximum sentence the court can impose. For Class A felonies, the court can impose any sentence up to the statutory maximum sentence. For all other felonies, the court must deduct from the statutory maximum sentence the additional prison time that could be imposed (by the U.S. Parole Commission) if supervised release were to be revoked [“back up time”]. Keep in mind that back up time is not the same as the term of supervised release.

The total amount of time a person could serve in prison following revocation of supervised release is set out in column two of the following chart:

| If the statutory maximum for the offense is | Then the maximum amount of imprisonment following revocation of supervised release [“back up time”] is |
|--|---|
| Life or the offense is specifically designated as a “Class A” felony | 5 years |
| 25 years or more, but less than life | 3 years |
| 5 years or more, but less than 25 years | 2 years |
| Less than 5 years | 1 year |

In order to figure out the maximum prison sentence the court can impose, one should first determine what the statutory maximum for the offense is and then, for non-Class A felonies, deduct the amount of back up time from the statutory maximum. The balance is the maximum prison sentence the court can impose.

Thus, for example, aggravated assault has a statutory maximum penalty of 10 years. The back up time for aggravated assault is 2 years because the statutory maximum is more than 5 years but less than 25 years. Therefore, the maximum amount of prison time that the court can impose on the defendant on the day of sentencing is 8 years (the 10-year statutory maximum minus 2 years of back up time). The worst case scenario for this defendant (from his or her point of view) is that the court imposes the maximum prison sentence of 8 years and then the defendant violates his/her subsequent supervised release and gets revoked by the United States Parole Commission for the entire 2 years. Even in this worst case scenario, the defendant cannot be legally imprisoned even one day more than the 10 year statutory maximum, which was the intent behind requiring the subtraction of the back up time.

Remember that subtracting the back up time from the statutory maximum to arrive at the maximum prison sentence that can be imposed is required for all felonies except Class A felonies. Subtracting the back up time from the statutory maximum is

¹³ [footnote in the original] Class A felonies are: first and second degree murder, first degree sexual abuse, first degree child sexual abuse, kidnapping, armed carjacking, obstruction of justice, armed crimes of violence as defined in D.C. Code § 22-4501(f)(2001), the third conviction for a felony, and the third conviction for a violent felony.

the only way to arrive at the correct maximum prison sentence and the calculation is mandatory. A sentence greater than the statutory maximum minus the back up times is not a legal sentence. Thus, for example, assault on a police officer has a 5-year statutory maximum. The maximum prison sentence is therefore 3 years (the 5 year statutory maximum minus the 2 year back up time). The court cannot legally impose a prison sentence of 4 years or 5 years, even if the court suspends the sentence and places the defendant on probation.

For Class A felonies, the back up time is not subtracted from the statutory maximum. For example, aggravated assault while armed is a Class A felony and its statutory maximum penalty is now 30 years. While the back up term is 5 years, this term is not subtracted from the statutory maximum to arrive at the maximum prison sentence the court can impose. The maximum prison sentence the court can impose is the statutory maximum; thus, the judge can impose a sentence of up to 30 years.

In sum, the court may not impose a prison term greater than the statutory maximum for Class A felonies or the statutory maximum *minus* back-up time for all other felonies. The court is always free to impose less prison time, keeping in mind any applicable mandatory minimums. Once the court imposes its sentence, the defendant will serve at least 85% of it according to “truth-in-sentencing” principles. The defendant can earn good time to reduce his or her sentence, but s/he cannot reduce the sentence by more than 15%. As in the old system, the United States Bureau of Prisons, and not the court, administers the award of good time credits.

Finally, the amount of back up time for any given offense is set by D.C. Official Code § 24.403.1(b)(7). It is not a part of the sentence imposed by the judge. If the U.S. Parole Commission revokes supervised release, it can impose all or part of the back up time. If the Parole Commission imposes only part of the back up time, the balance is still available if the Parole Commission places the defendant on supervised release again in that case and it is again revoked.

Split sentences

Split sentences continue to pose problems in the new regime. A split sentence must have these elements: an imposed prison sentence, an imposed period of supervised release, suspension of some, but not all, of the prison time, suspension of all of the supervised release term, and an imposed period of probation, not to exceed 5 years, to follow release from the unsuspended portion of the prison time.

To impose a legal split sentence, the court should impose the prison sentence it wants the defendant to serve if probation is later revoked and impose the amount of supervised release that it must impose with that prison sentence. Then the court should suspend the amount of prison time it wants to suspend and suspend all the supervised release time. The court should then set an appropriate term of probation. The court must impose a term of supervised release because the law says that every felony sentence must be followed by an adequate period of supervised release. The court must suspend the imposed term of supervised release when it is imposing a split sentence because the felony sentence will not be completely served and the supervised release will not begin unless and until probation is revoked and the defendant serves the unsuspended portion of the original prison sentence (or some lesser sentence, if the judge chooses to reduce it

upon revocation).¹⁴ If the supervised release were not suspended, it would run concurrently with the probation and the court and the United States Parole Commission would both have jurisdiction in the same case at the same time. If the defendant violated, for example by testing positive for drugs, then anomalous results could occur with the judge deciding not to revoke probation but to order the defendant into an inpatient treatment program and the United States Parole Commission deciding to revoke supervised release and to send the defendant to prison.

An example of a legal split sentence in an aggravated assault case is “6 years in prison to be followed by 3 years supervised release, suspend all but 2 years in prison to be followed by 4 years probation.” In this example, the defendant will serve 2 years in prison and then be released to do 4 years of probation. If the defendant is successful on probation, then the defendant will never serve the remainder of the prison sentence (the 4 years s/he did not serve of the 6 year imposed sentence) and s/he will never serve the term of supervised release. If the defendant is unsuccessful and the court revokes probation, then the defendant will serve the remainder of the prison sentence (or less, if the court chooses) and, once s/he is released from prison, the defendant will serve the 3-year term of supervised release.

When calculating a split sentence, the initial prison sentence that the court imposes cannot be greater than the maximum prison sentence allowed for the offense. Splitting a sentence does not change the rules for how the maximum prison sentence must be calculated for non-Class A felonies. In the earlier example, we noted that a sentence of 4 years on a conviction of APO is illegal. It is similarly illegal to impose a sentence of 4 years, followed by a 3-year term of supervised release, suspend all but 1 year, followed by probation for 2 years. In this example, the defendant would initially serve only one year, but if the probation were later revoked, s/he could serve the remainder of the 4-year prison term imposed and then be subject to 2 years of back up time if s/he violates the conditions of his/her 3-year term of supervised release. This means that defendant could be required to serve 6 years in prison -- which is more than the 5-year statutory maximum. As discussed above, a defendant cannot be made to serve more time in prison than the statutory maximum penalty for that offense.

Minimum sentences (robbery)

Robbery is probably the most common offense for which there is a statutory minimum but there are others, including first and second degree burglary (5 years and 2 years, respectively) and second degree murder (20 years). See attached chart. Using robbery as an example, according to D.C. Official Code § 22-2801, the penalty for robbery is “not less than 2 years nor more than 15-years.” This language does not create a mandatory minimum, and probation is a possibility on a robbery conviction. However, if the court imposes a prison sentence, then the court must impose a sentence between 2 years (the statutory minimum) and 13 years (15 year statutory maximum minus 2 years back up time). If the judge wants to impose a prison sentence but does not want the defendant to serve 2 years, there are at least two options. The court could impose a split sentence: impose a sentence of 2 years to be followed by a 3-year term supervised

¹⁴[footnote in the original] Some believe that the court can, when splitting a sentence, suspend imposition of supervised release and impose the term of supervised release if and when probation is revoked. The majority view is that the term of supervised release must be imposed when the initial sentence is imposed, but that it must be suspended when all or part of the prison sentence is suspended and the defendant is placed on probation.

release, suspend all but the amount of prison time the court wants the defendant to serve and impose a period of probation. If the court wants the defendant to serve 1 year or less, then the court can either suspend imposition of sentence (ISS) or impose a sentence and suspend execution of all of it (ESS), place the defendant on probation for any period up to 5 years, and require the defendant, as a condition of probation, to spend up to one year in custody, either at the D.C. Jail or at a halfway house. D.C. Code § 16-710(b-1)(2001, 2002 interim update service). These options are available for any offense that has a minimum that is not a mandatory minimum.

Special Problems of Multiplication and Division

The statutory maximums for some felonies are tied to statutory maximums for other felonies, which can create some complications. The period of supervised release, the back up time, and the prison sentence that can be imposed are tied to the statutory maximum sentence for the offense of conviction and not to a percentage of time for the underlying offense. For example, a person convicted of accessory after the fact faces a maximum sentence up to one-half the maximum imprisonment to which the principal is subject. If the underlying offense is aggravated assault, the defendant would face a 5-year statutory maximum because 5 years is half of the 10-year statutory maximum for aggravated assault. However, even though the maximum prison time the court can impose for aggravated assault is 8 years (10 year statutory maximum minus 2 year back up time), the most prison time the court can impose on the defendant convicted of accessory after the fact (aggravated assault) is not 4 years, but 3 years (5 year statutory maximum minus 2 years of back up time). The period of supervised release is not 1 ½ years (½ of 3 years) but 3 years because the 5-year sentence for accessory after the fact (aggravated assault), like the sentence for aggravated assault, is less than 25 years.

Offenses that enhance a sentence based on a percentage of another offense are calculated similarly. For example, a person convicted of a crime in a case in which repeat papers have been filed pursuant to § 22-1804 faces a maximum sentence of 1 ½ times the underlying offense penalty for a second conviction and 3 times the underlying offense penalty for a third or subsequent conviction. A defendant convicted a second time for aggravated assault with repeat papers is facing a 15-year statutory maximum (10-year statutory maximum times 1 ½) and, for a third or subsequent conviction, the defendant is facing a 30-year statutory maximum (10 years times 3). Again, even though the maximum prison time the court can impose for aggravated assault is 8 years, the most prison time the court can impose for a third conviction of aggravated assault with repeat papers is not 24 years, but 27 years (30 year statutory maximum minus 3 year back up time). The period of supervised release is not 9 years (3 times 3 years) but 5 years because the 30-year statutory maximum for the enhanced offense is more than 25 years.

Conclusion

It is too early to draw any definite conclusions regarding new law sentencing practice.

There will be many more new law cases by June 2003. The Commission will continue efforts to collect additional data from judges and other sources in the next year. With the 2003 Report, the

Commission expects to provide a more comprehensive analysis of new law cases. The Judicial Data Collection Form currently in use appears in the Appendix D.