INTRODUCTION AND EXECUTIVE SUMMARY

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

> *"(a) The Commission shall submit to the Council in the 2002 annual report a survey of the various types of structured sentencing systems in use in the United States and the Commission's recommendations as to which system would best serve the District of Columbia. The Commission shall also submit recommendations for the classification or ranking of criminal offenses in the District of Columbia.*
> *"(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; and*
> *"(2) An assessment of sentencing practices within the District of Columbia for August 5, 1996 to August 5, 2000.*

D.C. Official Code § 3-105 (2001).

This is the 2002 Annual Report of the Advisory Commission on Sentencing. In Chapter I, pursuant to section 3-105(a) above, we survey various forms of structured sentencing and present the Commission's recommendation on the system that would best serve the District of Columbia. In formulating its recommendation, the Commission studied many different sentencing systems and reflected on the sentencing goals for the District of Columbia. After

much deliberation, the Commission recommends development of a system of voluntary sentencing guidelines for further consideration by the Commission and the Council.

In Chapters II, III and IV, the Commission reports on sentencing practice in the District of Columbia during the period January 1996 through June 2002, highlighting what appear to be discernable trends over the period. In Chapters II and III, the Commission discusses sentencing practices over the entire study period and sentencing practice under the former indeterminate sentencing system in effect for crimes committed before August 5, 2000. Chapter IV represents the Commission's first opportunity to comment on the implementation of determinate sentencing. However, much of the information regarding determinate sentencing must be regarded as preliminary, because there are still too few sentenced cases to provide an adequate basis for analysis. Finally, in Chapter V, pursuant to section 3-105(a) above, the Commission presents its recommendation for the classification or ranking of felony offenses in the District of Columbia.

Background

Determinate sentencing came to the District of Columbia as a federal mandate, as detailed in the criminal justice provisions of the National Capital Revitalization and Self-Government Improvement Act of 1997 ("Revitalization Act"). The Revitalization Act abolished discretionary parole release for the most serious felonies and required offenders convicted of crimes committed on or after August 5, 2000 to serve at least 85% of the sentence imposed. The Council subsequently abolished parole for all offenses and established a unitary system of sentencing in the Sentencing Reform Amendment Act of 2000.

Since August 5, 2000, the District has been sentencing offenders under two systems: indeterminate sentences for crimes committed prior to August 5, 2000 ("old law") and determinate sentences for crimes committed on or after August 5, 2000 ("new law"). 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. 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, and offenders are required to serve at least 85% of this term. The judge must also impose a term of supervised release to follow any prison term.

Survey of Sentencing Systems

In Chapter I the Commission reports on "various types of structured sentencing systems in use in the United States and the Commission's recommendations as to which system would best serve the District of Columbia." D.C. Official Code § 3-105(a)(2001). In the past, most sentencing systems in use in the states and in federal practice were indeterminate, with broad authorized sentencing ranges, parole release and case-by-case decision making with substantial judicial discretion. However, there has been substantial change in sentencing practice over the past thirty years. By 2000, at least 16 states and the District had moved to determinate sentencing, in which discretionary parole release is eliminated. Another recent development is the adoption of sentencing guidelines, which seek to channel judicial discretion in individual cases by providing a recommended disposition for each offense (e.g., prison, probation or intermediate sanction) and a proposed sentence length or range when a prison term is the recommended sentence. Sentencing guidelines are generally thought to promote uniformity and

fairness and may reduce any unwarranted disparity due to factors such as race, class or gender -- factors that should not influence an offender's sentence. According to the Commission's survey, by 2000 eighteen states and the federal government had adopted some form of sentencing guidelines and another four states had guidelines under development.

To determine which system may make the most sense for the District of Columbia, the Commission began with its own mission statement, developed to highlight the various goals for sentencing. This mission statement was separated into nine discrete goals that were then used to rank different jurisdictions on values important to the District. In looking at other jurisdictions, the Commission sought to look beyond the unique norms and values reflected in each jurisdiction's system, and to reflect on the contribution various aspects of each system might make to the District. The Commission selected four states for in depth study and invited representatives from these states to discuss their systems in detail at a conference sponsored by the Commission. The states chosen were: North Carolina (presumptive guidelines), Delaware (voluntary guidelines), Pennsylvania (hybrid guidelines) and Illinois (presumptive sentencing without guidelines).

A consensus emerged from this meeting that the District may be best served by a flexible system of voluntary sentencing guidelines. In the proposed system, judges would be free to depart from the recommendations, and would be expected to state reasons on the record for departure. After much deliberation and debate, the Commission arrived at the following recommendation.

Recommendation 1: The Commission will develop by November 2003 a system of voluntary sentencing guidelines based primarily on the severity of the offense of conviction and the criminal history of the offender. The guidelines will include recommended sentencing dispositions and, where prison is the disposition, recommended ranges for terms of imprisonment. The ranges would be relatively wide to preserve judicial discretion, but not

so wide as to defeat the goals of uniformity and proportionality. The guidelines would be based on two principles of proportionality: the more serious the offense of conviction, the more severe the recommended sentence; and the more serious the offender's criminal record, the more severe the recommended sentence. Judges would be encouraged to follow the recommended sentences and to sentence within the recommended ranges. The Commission will consider aggravated and mitigated ranges for prison sentences, which would still be considered "within the guidelines" as long as the judge relied on one of the listed aggravating or mitigating factors. Since the guidelines would be voluntary, judges would be free to depart in both directions in "extraordinary" cases, but would be expected to state reasons in writing or on the record using the aggravating or mitigating factors provided, including "other, please specify." Consistent with current law, there will be no appellate review of sentences.

Criminal Sentencing Practice, January 1996 To June 2002

The Superior Court provided to the Commission automated data on all felony sentences for the period January 1996 through June 2002. These data provide information about the current conviction charges, the sentence imposed, the local criminal history of the offender, and the demographic characteristics of the offender. The Superior Court automated files were supplemented by criminal history information from the Pretrial Services Agency (PSA), which includes information on offenders' out-of-state criminal record.

During the period January 1996 through June 2002, 13,524 felony offenders were convicted and sentenced in Superior Court. Of those, 8,430 offenders (62.4%) received some term of incarceration. During the same time period, 4,966 felony offenders (36.7%) received probation without incarceration, and small number of offenders received other sentences such as fines or could not be categorized. The sentencing disposition varied by the type of offense – incarceration sentences are frequently given for violent offenses (85.0% received some form of incarceration) while probation is used for a greater proportion of non-violent offenses (45.5% of felony drug offenders, mostly repeat offenders, received incarceration while 54.0% were sentenced to probation).

With respect to trends, the incarceration rate for all crimes fell from a high of 72.2% in 1996 to a low of 53.4% in 2000, and then increased to 56.1% by the first half of 2002 (See Table 2-4). One explanation, though not the only one, for the overall increase in probation sentences during the period involves a changing mix of crimes – the proportion of non-violent crimes increased during the period. The mix of crimes is important because, all other things being equal, violent offenses tend to receive prison sentences, while non-violent offenses often do not. The proportion of all felonies that were drug felonies grew during the period. In 1996, drug offenses made up 29.9% of all sentenced felonies. By the first half of 2002, however, the percentage of all sentences that involved drug offenses was 39.3%. At the same time, the most serious violent crimes (such as murder and armed crimes of violence) declined as a proportion of all felonies. In summary, as the proportion of sentences for non-violent crimes grew over the period, the proportion of sentences to probation also grew.

Additionally, looking more closely at drug offenses, not only is the proportion of drug sentences increasing year to year, but the percentage of drug cases that receive probation sentences is also increasing. For example, Figure 2-1 shows that for drug offenses alone, there was an increased use of probation and a decrease of incarceration – probation sentences climbed from 44% of all drug cases in 1996 to 56% by 2001 and the first half of 2002, with a high of 65% in 2000. As discussed in more detail in Chapter V, the typical drug distribution crime sentenced in Superior Court involves a small street-level sale, and does not involve high-level traffickers. Conversely, incarceration rates for serious violent crime remained high throughout the period (See Figures 2-2 and 2-3).

Turning briefly to the background of offenders sentenced in Superior Court during the study period, the average age for the 13,524 offenders was approximately 33 years old. Most

offenders (90%) were men. Sentenced offenders were predominantly black (94.1%), while offenders classified as white made up almost 6% of the total.

Regarding the prior criminal records of offenders in the study, 53.1% of the 13,524 offenders had no prior felony convictions, 37.2% had one or two prior felony convictions, and 9.7% had three or more prior felony convictions. Furthermore, 66% of these offenders had no prior prison commitments, 29.4% had one or two prior prison commitments, and 4.5% had three or more prior prison commitments.

Assessment of Indeterminate Sentencing Practice

Chapter III reports on the Commission's study of sentencing practices for crimes committed prior to August 5, 2000 and receiving indeterminate sentences. In general, sentence lengths for non-violent crime (reported as the minimum term of the indeterminate sentence imposed) declined during the period. For example, the median sentence length for drug offenses, the point at which 50% of sentences are above and below and a statistic not skewed by unusually long and short values, steadily declines from 1996 (28 months) to 2000 (12 months) and remains steady in 2001 (See Table 3-5). This appears to be the result of a shift in emphasis toward treatment of drug offenders during the period and may also be attributable to the success of the Superior Court's highly acclaimed Drug Court.

However, sentence lengths for violent crime did not experience the same clear decline, and sentences for the most serious violent crimes (crimes such as murder and armed crimes of violence) remained relatively constant. The median sentence ranged from 120 months to 216 months, but exhibited no trend in one direction or the other during the period (See Table 3-3a).

The Commission also reports in Chapter III on the factors that appear related to the sentencing outcome. Sentencing has at least two distinct, and somewhat independent, components. The first involves the judge deciding whether to incarcerate the offender or not -- the "in-out decision." If the decision is made to incarcerate the offender, the judge must then determine the length of the incarceration.

Looking at sentencing outcomes, differences emerge based on the type of crime committed, the prior record of the offender, the number of charges (sentence length only), and whether the crime was committed while armed or not. As would be expected, the type of crime being sentenced is a strong factor in both the in-out decision and the length of sentence decision. The prior record of the offender appears to be a particularly strong factor in the in-out decision. The number of charges appears to be a strong factor in the length of sentence decision.

There are differences in sentencing outcome by demographic characteristics such as age and gender, with males and younger offenders more likely to go to prison and receive longer sentences. There is little or no difference in sentencing decision by the race of the offender. Black offenders are convicted in Superior Court in 94% of all felony cases. The evidence presented here simply suggests that after controlling for the type of crime and number of charges, the sentences that blacks receive are relatively close to similarly situated non-black offenders, who make up a small proportion of all cases.

Important caveats are required. A number of potentially important factors could not be studied at this time – for example, the extent of victim injury, weapon use, criminal justice status of the offender, and plea agreements. As a result, a complete multivariate analysis, one that controls for all or most of the relevant factors when examining the sentencing decision, is not presented here.

Assessment Of Determinate Sentencing Practices

During the period August 5, 2000 through June 30, 2002, only 1,994 cases were determinate sentences under the new law. Because of the relatively small number of new law cases reported (15% of all cases during the period covered by this Report are new law cases), the statistical descriptions of determinate sentencing that can be offered at this point are necessarily preliminary and incomplete. More extensive analysis must await additional data that will become available in future years.

Comparing new law sentences to old law sentences for 2001, a year with an acceptable number of both old and new law cases, proportions sentenced to a period of incarceration are identical: 58.7% of offenders received incarceration under the old law and under the new law in 2001. During the period January 2000 through June 2002, the percentage of old and new law sentences that were drug offenses varied between 38% and 40%.

Focusing on new law sentences to some period of incarceration, the median sentence for violent crimes is 48 months in 2001 and the first half of 2002. 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 new law cases included in this comparison were adjudicated over a short period of time – by definition, crimes committed after August 5, 2000 and already sentenced at some point in 2001 – they are likely to be less complex cases representing less serious crimes. Consequently, 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 great. 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.

When examining incarceration rates and sentence lengths for new law cases by different factors, only drug cases were examined because they represented the only offense category with a substantial number of new law cases. Consistent with prior patterns under the old law, drug offenders with prior felony criminal records and multiple charges are more likely to be incarcerated and receive longer median sentences.

Turning to the implementation of the new law, because determinate sentences are different in a number of ways from indeterminate sentences, the Superior Court has carefully monitored sentences imposed under the new system. In addition to the monitoring of sentences, the Superior Court took steps to prevent errors from occurring through extensive training. 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 Commission member representing the United States Attorney have had primary responsibility for ongoing training of Assistant U.S. Attorneys, and Commission members provided training for all of the CSOSA staff responsible for pre-sentence investigations and reports. Commission staff also conducts on-going training for the United States Probation Office.[1]

Classification or Ranking of Offenses

The current scheme of statutory maximum sentences represents past legislative judgments about the relative seriousness of criminal offenses. The Commission has assumed that the Council wants more than a classification or ranking based solely on the current statutory

[1] Federal probation officers must understand the new law in order to present sentencing options to United States District Court judges with respect to D.C. Code offenses falling within their jurisdiction.

maximum sentence in the Code, and undertook to rank more than 150 felony offenses by severity of the crime. There are nine groups, with Group I containing the most serious crimes and Group IX containing the least serious crimes, and the offenses within each group are considered to be at least roughly comparable to each other in terms of seriousness.

The Commission formulated its rankings based on a hypothetical "ordinary" offender who has committed the offense in an "ordinary" way, where "ordinary" refers to factual scenarios that come before courts often and would be recognized by court actors as typical rather than extreme examples of the crime being ranked. Commission members made a conscious choice to consider statutory maximum sentences in each case, but to rank the offenses based on the typical offense behavior for such crimes. For example, drug distribution cases sentenced in Superior Court usually involve low-level dealers, often selling to support a drug habit, rather than predatory drug kingpins.

The Commission, along with others in the District, supports intermediate sanctions for some drug offenders (e.g., drug treatment), and considered at one point a separate listing for drug crimes to emphasize that focus. However, the majority view was that drug offenses should remain ranked with all other offenses, and Group 8 well reflects the Commission's general view of the severity of the typical drug case seen in Superior Court.

If these classifications become the basis for sentencing guidelines, the Commission may propose that some of the crimes with an especially broad range of offense conduct be subcategorized into separate groups. Also, the Commission has begun developing heartland case definitions that describe the typical circumstances the Commission had in mind when it ranked some of the more problematic offenses. However, the current mandate is for the Commission to rank or classify offenses by November 30, 2002, not to provide a comprehensive structured sentencing system that

could incorporate these additional elements. Such a system will be considered and fleshed out in the next year.