CHAPTER II.

THE CASE FOR COMPREHENSIVE STRUCTURED SENTENCING

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: "(d) The Commission shall submit to the Council in its 2003 annual report a recommendation for a comprehensive structured sentencing system in the District of Columbia or, in the alternative, a detailed explanation as to why the District of Columbia does not need a structured sentencing system..."
D.C. Official Code § 3-105(d)(2001).

The Commission has concluded that the District of Columbia should move toward a comprehensive structured sentencing system. The Commission recommends that the system be implemented initially as a pilot program operating by administrative order of the Chief Judge, to allow for a period of evaluation, comment from the public as well as from the bench and bar, and any necessary adjustment. Following this period, if the structured sentencing system is achieving its goal, it can be implemented on a more permanent basis with appropriate enabling legislation.

Substantial unexplained variability in sentencing exists. The judges and practitioners on the Commission all report variability in sentencing. The Commission found variability in sentencing in every crime category studied, including drug crimes, which involve fact patterns that are not complex and relatively constant from case to case. The variability

that was observed was seen in both the in/out decision and the length of prison sentence imposed. It is not possible to determine with certainty whether the variability could be explained by factors within the cases that are not readily apparent from available data or simply by differences in judicial philosophy, i.e., different judges looking differently at the "same" case. Undoubtedly, even with drug cases, some of the variability could be explained by legitimate sentencing factors relating to the crime or the background of the offender. However, to the extent that variability is attributable solely to differences in judicial philosophy, it is a cause for concern if it results in similarly situated offenders receiving sentences that are widely disparate.

Quite apart from variability in sentencing, in a determinate sentencing system where the sentencing judge must determine at the front end, without the benefit of hindsight available to a paroling authority, the length of time the defendant will serve, the wide sentencing ranges for most felonies in the District of Columbia Code are reason enough to call for some guidance to sentencing judges as to how to exercise their considerable discretion within those wide ranges. The move from indeterminate to determinate sentencing, with no corresponding adjustment in the statutory maximum sentences, opened up the possibility that offenders in the District would serve longer sentences if judges used more of the available sentencing range than the parole board had used in the former system. Although the Commission to date has seen no evidence to suggest that this has in fact occurred, a structured sentencing system that helps define where within the range the typical sentence would ordinarily fall and identify the kinds of

extraordinary factors that might move a case out of the heartland in one direction or the other is a useful way to ensure that the new system functions as it was intended.

The proposed sentencing guidelines seek to accomplish both of these purposes by setting sentence length ranges for each offense and standards for departing from those ranges. In addition, the proposal attempts to move more sentences toward the historical center without creating a guidelines system that results in more – or less – time served for the average offender in the average case. Although the ranges are relatively broad, they nevertheless cabin discretion for the imposition of prison sentences to capture approximately the middle 50% of historical sentences. The guidelines permit a sentence to probation if at least 25% of offenders who fall within that cell were sentenced to probation in the past. With these parameters, the proposed guidelines should serve to give the judges, practitioners, defendants, crime victims and the community at large a better understanding of the likely consequences of criminal behavior and confidence that sentences will be more predictable and consistent.

The Commission recommends a system of voluntary guidelines. It makes this recommendation for three primary reasons. First, experience in other states shows that voluntary guidelines can achieve high compliance while avoiding undesirable litigation, which can strain resources and affect the court's ability to manage its workload. Second, voluntary guidelines are less rigid than mandatory systems and allow judges to structure a sentence to fit the varying circumstances of each individual case. Third, voluntary guidelines will make it easier for the Commission to adjust sentencing ranges in the

future if necessary, account for important sentencing factors that may have been missed, and address any unanticipated consequences of such a major shift in sentencing practice. Given a single courthouse and substantial judicial support, the Commission expects the Superior Court to achieve a high degree of compliance. Procedures will be developed that will require judges to acknowledge that they have considered the guideline recommendation and have complied with it, or to explain why they departed, using prescribed departure principles. For this endeavor to be successful, it is important that the Commission continue to receive the resources necessary to monitor and evaluate how the system is working and to recommend changes as indicated.

Lessons From National Experience Under Structured Sentencing

Structured sentencing can promote the rule of law and enhance the fairness of the sentencing decision. Thirty years ago, Judge Marvin Frankel of the United States District Court for the Southern District of New York argued that unchecked sentencing discretion, limited only by statutory maximum limits, left the sentencing power of judges "effectively subject to no law at all."[1] By setting recommended sentences to guide judicial discretion, structured sentencing promotes uniformity and predictability in sentencing in most cases, leaving room for departure in exceptional cases.

Those states that have adopted sentencing guidelines have done so primarily out of a desire to reduce unwarranted disparity in sentencing.[2] Nationally, research indicates that sentencing guidelines reduce sentencing disparity, although they have not eliminated it.

[1] Frankel, M., Criminal Sentences: Law Without Order, New York: Hill & Wang, p. 8 (1972).
[2] Eighteen states have some form of structured sentencing, and four are considering it (based on the Commission's survey for 2002 Annual Report).

Sentencing guidelines typically recommend sentencing ranges based on two sentencing factors: the severity of the crime and the defendant's prior criminal record. These factors are considered in virtually every case and have a dominant impact on the sentencing decision. As such, they have become the basis around which recommended sentencing ranges are developed: first by ranking groups of crimes in order of severity, according to the harm to the crime victim and society, then by ranking criminal histories on a graduated scale from first offenders to those with the most extensive prior records. For each combination of crime and criminal history, a sentencing range is established. The use of ranges, rather than a set number, preserves the court's discretion to consider other factors that may legitimately influence the sentence, beyond offense severity and criminal history. Moreover, when these other legitimate factors outweigh the normal offense severity/criminal history factors, departure principles permit the court to sentence above or below the range.[3]

Guidelines also provide a framework within which policy makers and members of the general public can assess the fairness of a sentence in a particular case. By sentencing within the range or by articulating a reason for sentencing outside the guideline range, judges' sentencing practices become more transparent. Similarly, the sentences of judges who simply decline to follow the guidelines can be assessed against a known standard. All of these elements lead to greater accountability in our criminal justice system.

[3] Of course, a high percentage of departures, especially in unexceptional cases, works against the principles of proportionality and uniformity and indicates either that the sentencing range is incorrect or that judges are applying departure principles incorrectly.

Why Voluntary Guidelines?

As will be seen in Chapter III, the guideline system the Commission is proposing is voluntary in the sense that judges will not be sanctioned for noncompliance, and there will be no more appellate review of sentences than there is now.[4] In a voluntary system, even if a judge does not sentence within the guideline range, uses a non-conforming departure factor, or fails to explain his or her rationale for sentencing outside the guideline range or does not apply the correct concurrent/consecutive sentence rule, the sentence will not be appealable as long as the resulting sentence is legally permissible.

The system the Commission has designed gives the judge a great deal of flexibility to decide whether a prison or probation sentence is appropriate, to select an appropriate prison term for ordinary cases within relatively wide ranges, and to depart upward or downward in extraordinary cases. As such, judges should find it relatively easy to comply and to find a sentencing alternative that comports with the facts of the case and fundamental sentencing fairness. If a high degree of compliance is achieved by a voluntary system, there is little reason to consider presumptive or mandatory guidelines in the future, which carry with them certain features the Commission considers undesirable and unnecessary at this time.

The Commission has asked itself at every stage of its deliberations, with relatively wide ranges and relatively flexible departure principles, "why have guidelines at all?" or, put

[4] See, e.g., Handon v. United States, 651 A.2d 814, (D.C. 1994); Poole v. United States, 630 A.2d 1109 (D.C. 1993).

another way, "how will a system with this much discretion promote uniformity and reduce disparity by eliminating true outliers?"

First, the fact that the proposed guidelines are voluntary rather than mandatory does not mean that judges will choose to ignore them. The Commission believes that in a jurisdiction like the District of Columbia, with a single courthouse and judges in frequent contact with each other, most judges will want to operate within the mainstream of Superior Court practice, and will disdain unwarranted disparity. This would be consistent with the experience in several jurisdictions, more widespread than the District, where voluntary guidelines have consistently yielded high rates of compliance. Conversely, some states with presumptive guidelines have experienced compliance problems. The Commission anticipates that Superior Court judges, understanding that the recommendations are derived from an analysis of historical sentencing practice in Superior Court, will generally tend to accept the recommendations for the typical case. No system can eliminate all disparity in sentencing that at least some observers would perceive as unwarranted, but the proposed system of voluntary guidelines will undoubtedly improve the present system and should reduce perceived disparity to a significant degree.

Second, even though ranges are relatively wide, *they nevertheless exclude 25% of the highest historical prison sentences and 25% of the lowest historical prison sentences.* Even if the sentences that will be imposed in typical cases span the entire width of the resulting middle 50% range**,** disparity in prison sentences will be reduced.

Probation is still an option in the proposed system in those cells where probation was historically given in 25% or more of the cases. To be true to the principles that guided formulation of the guidelines, this was the only option, even though it could promote unwarranted disparity at the low end of the scale. The commentary on the imposition of probation is especially important because, based on historical practice, a large number of cells on the grid permit, but do not require, probation as an option. There is no reason to assume that judges will sentence to probation in probation eligible cells at a higher rate than in the past, though theoretically this could happen. However, if judges do impose probationary sentences in these cells at the same rate as before -- at least 25% -- then the guidelines will be ineffective in moving some of these probation sentences into the middle 50 percent of all sentences. In other words, the Commission assumes that some percentage of sentences to probation in the past should still receive probation under the guidelines, but that some percentage of past probation sentences were in fact outliers, which should be brought into the mainstream of prison sentences. If those outlying cases can continue to be given probation whenever probation is an option, the disparity represented by outlying probation cases will not have been eliminated.

The alternative to creating cells where probation is an option would have been to designate some cells in which probation is the only option, despite a significant percentage of historical sentences to prison, and to prohibit probation in other cells even though sentences to probation were imposed in a significant percentage of cases in that cell in the past. In the Commission's view, such an approach is unwise, as it would

divorce the guidelines from the heartland of prevailing practice in these probation eligible cells.

If, following the guidance on probation, some judges select probation and others select prison in what appear to be similar cases, this degree of disparity will either have to be tolerated or reduced in some other fashion. The guidelines have been designed to reduce as much unwarranted disparity as possible, given historical practices. They will have to be continually monitored and assessed to see if that is what occurs in practice.

Finally, fairness in sentencing must go beyond reducing or eliminating unwarranted disparity, that is, treating similar offenses and offenders similarly. Another aspect of fairness is promoting warranted disparity, that is, treating different offenses and offenders differently. Relatively wide ranges permit the court to take into account factors other than offense severity and criminal history in fashioning an appropriate sentence. Common mitigating circumstances can move the sentence to the low end of the range and common aggravating circumstances can move the sentence to the high end of the range. Judges need discretion to account for this kind of variation, and the Commission concludes that relatively wide ranges, including the option of probation for low-end crimes, will promote fairness and make it more likely that judges will elect to depart only in a relatively small percentage of truly extraordinary cases.