

CHAPTER III.

THE ARCHITECTURE OF STRUCTURED SENTENCING

Section 6 of the Advisory Commission on Sentencing Establishment Act of 1998, as amended by the Sentencing Reform Amendment Act of 2000, directs the Commission to recommend a comprehensive structured sentencing system or offer a detailed explanation for why one is not needed. Chapter II of this Report provided the rationale for the Commission's conclusion that a comprehensive structured sentencing system is appropriate. This chapter outlines the architecture of the system the Commission recommends. To supplement this report, a practice manual for judges and lawyers will be prepared to explain in detail how the new system will work in practice.

After careful study of structured guidelines systems in other jurisdictions, the Commission settled on a framework that will promote fairness and uniformity in sentencing and, at the same time, preserve enough flexibility and discretion to achieve justice in individual cases. The two most important factors in any sentencing decision are the severity of the offense and the prior criminal record of the offender. Accordingly, the Commission recommends a structured sentencing system that provides ranges of available sentences based primarily on these two factors, but one that also permits judges to apply other sentencing factors in arriving at the appropriate sentence within the applicable range.

To create this structured sentencing system, the Commission developed two separate sentencing grids: the Master Grid for all offenses except drug offenses, and the Drug Grid. These grids are displayed in Appendix A. Two axes are used -- one to plot the offenses by seriousness and one to plot degrees of criminal history. This approach encourages proportionality in sentencing because it places a given crime and criminal history in relation to the other combinations of crimes and criminal histories. It also satisfies the mandate to the Commission to ensure that all felony sentences should “[r]eflect the seriousness of the offense and the criminal history of the offender.” (D.C. Official Code § 3-101(b)(2)(A); *accord* D.C. Official Code § 24-112.) Other factors can be taken into account in determining where a particular offender should be sentenced within a given range; and unusual factors can be taken into account in determining whether a particular offender should be sentenced entirely outside the range. The Commission developed the ranges for each sentence on the grid after it ranked offenses according to seriousness, collected data on past sentencing practices, and weighted the relative importance of prior criminal convictions.

Overall, there are 45 cells in the Master Grid and 15 cells in the Drug Grid. In recognition of the separate decisions that a judge must make at sentencing – the decision of whether or not to incarcerate the offender and, where the decision is to incarcerate, how long a prison term to impose – each cell contains information (through the “shading” of each cell) regarding the offender’s eligibility for a suspended sentence and probation, as well as information regarding the appropriate length of any prison sentence imposed. Each cell contains two numbers that represent the recommended sentencing range for a

prison sentence [hereinafter referred to as the “guideline range”]. For example, the guideline range for unarmed aggravated assault with little or no prior criminal history, cell 6A on the Master Grid, would be 18-60 months incarceration. For the most serious offenses and those offenders with the most significant criminal histories, prison is the only option and, unless the judge finds sufficient reason to apply one of the departure principles, the prison sentence must fall within the guideline range.

Seven cells on the two grids are shaded dark.¹ In these cells, the judge may impose any prison sentence within the range. However, the judge may also impose a prison sentence within the designated range and suspend part of that sentence, requiring the defendant to serve a brief period of incarceration followed by probation for up to five years, hereinafter referred to as a “short split.”² If probation is later revoked, the defendant serves the remaining portion of the prison sentence that was suspended. In the dark shaded cells, a straight probation sentence, where a prison term is suspended in its entirety, would represent a departure. Thirteen cells are light shaded.³ In these cells, the judge may impose a prison sentence within the designated range, or may impose a prison sentence and suspend all or part of that sentence and place the defendant on probation.

The Commission recommends that the guidelines be initially implemented on a pilot basis by order of the Chief Judge to give judges and lawyers an opportunity to test

¹Dark shaded cells appear green on the original printed copies of the Report. Light shaded cells appear yellow.

² Historically, 10.8 percent of the cases fell in a dark shaded cell and about 7.4 percent were sentenced to a “short split,” that is a split where the initial prison term was 6 months or less.

³ Historically, approximately 71.7 percent of the cases fell in a light shaded cell and about half of these (35 percent) were actually sentenced to probation.

whether offenses were ranked correctly according to severity; whether the guideline ranges and alternatives to prison sentences, where permitted, are consistent with the principles of fairness and community safety; and whether the other rules the Commission has proposed are fair and adequate. The Commission expects to be in a position to begin a pilot program in May of 2004 and estimates that it will take between 18 and 24 months, maybe a little longer, to have sufficient experience with the guidelines, particularly for less common offenses, in order to effectively advise the Council on the final contours of a comprehensive structured sentencing system for the District of Columbia. Thereafter, as in all other jurisdictions with structured sentencing systems, the Commission would continue to meet on a regular, albeit less frequent basis, to monitor the operation of the system and to recommend modifications, if necessary, as circumstances change over time.

Overview of Grid Development

The Commission sought to establish a sentencing system that would be relatively simple to operate, yet responsive to individual factors in particular cases. The Commission was interested in simplicity to achieve uniform application of the guidelines, to avoid excessive, time-consuming, and expensive litigation over the guidelines both in the trial and appellate courts, and to ensure that users and the public could understand them.

Because the sentencing system will have very serious and far-reaching consequences for individuals as well as the community, the Commission believes that the guidelines must also be sensitive to differences among offenders, and responsive to the need for public safety.

The most widely used format for guidelines in other jurisdictions, which seemed to strike the proper balance between simplicity and sensitivity, is the sentencing matrix, or grid, with horizontal and vertical axes. The cells of the grid, where points along the horizontal and vertical axes intersect, specify the length of prison sentences and the availability, or not, of a suspended sentence with probation.⁴ When a prison sentence is indicated, most systems express the guideline sentence by a range of months or years within which the sentence must fall to be within the guidelines.

The Commission decided that the sentencing grid format appropriately takes account of both the seriousness of the conviction offense and the offender's criminal history. The grid format encourages proportionality in sentences, as it places each combination of crime and criminal history in relation to the other combinations of crimes and criminal histories. Finally, the grid format is relatively simple to understand and to operate.

Throughout the development of the grid, the Commission operated from the principle that as the level of seriousness of an offense increased, the sentencing range should increase,

⁴ In the District of Columbia, pursuant to D.C. Official Code § 16-710(b-1), enacted as part of the Sentencing Reform Act of 2000, the court may order as a condition of probation that the defendant remain in custody for an aggregate period of not more than one year. This would be a non-prison sentence, but it would include significant constraints on one's liberty.

and as the extent of criminal history increased, the sentencing range should likewise increase. This meant that the guideline range in the cells would increase from bottom to top (i.e., as offense seriousness increases) and from left to right (i.e., as criminal history increases). However, because the ranges are fairly wide so as to capture approximately the middle 50 percent of historical sentences, there is considerable overlap from one cell to the next. Thus, while the midpoint of each range is always higher than the midpoint of the range in the cell immediately below or to the left, the sentence imposed may not be higher depending on where the judge chooses to place the sentence within the range.

Historical Practice as the Basis for Structured Sentencing

Jurisdictions that have established guidelines in the past several years have generally followed one of two approaches: "descriptive" or "prescriptive."

The "descriptive" approach involves the empirical identification of current sentencing practices and the replication of these practices into guidelines policies. Underlying this approach is the premise that, with some exceptions, current sentencing practices provide an appropriate model for developing guidelines.

The alternative is the "prescriptive" approach, which involves the deliberate development of sentencing policy based on an examination of policy issues and sentencing philosophies. Current sentencing practices are examined in the prescriptive approach, but on an equal basis with other sentencing considerations, without presuming the continuation of current sentencing practices. Underlying this approach is policy analysis,

which involves an examination of substantive issues, political realities, monitoring factors, and impact analysis, including an exploration of the consequences that various sentencing options would have for the courts, corrections, offenders, and the public.

The Commission started from the premise that the amount of time-served under a sentence in the new system should approximate the amount of time-served in the old system. In other words, the Commission did not consider it part of its mandate to design a system that would either increase or decrease the rate of imprisonment or the length of prison sentences offenders served in the indeterminate sentencing system. This meant, a fortiori, that we were choosing a descriptive, rather than prescriptive approach.

Initially, the Commission tried to develop accurate time-served data to guide this process. However, records from Superior Court, the Department of Corrections, and the D.C. Board of Parole were not necessarily computerized, sometimes missing, inaccurate, and, in many instances, impossible to compare or integrate. After spending a considerable amount of resources on this effort, the Commission abandoned it as being unreliable. It relied instead primarily on sentencing data from the Superior Court for setting baseline ranges.

The Commission also determined that bringing future sentences into the middle ground of historical sentencing practice would reduce disparity without substantially altering current and historical sentencing practice. Accordingly, the Commission's recommendations represent a conscious attempt to replicate current sentencing practices

while at the same time reducing disparity by eliminating sentences at the low end and the high end. While the Commission recognizes that some outlying sentences are justified by unusual circumstances, it assumes that these are the exception rather than the rule. If a significant percentage of the low end and high end sentences are in fact historical outliers, not justified by any unusual or extraordinary factors, then the sentencing guidelines should be effective in reducing them. Following implementation of pilot guidelines with a monitoring system to track sentences and departures, the Commission will be in a better position to examine this assumption.

Sentencing Grid Principles

The Commission based its design of the sentencing system on the following principles:

- Sentences will be based on the offense of conviction, not on the real offense behavior. However, real offense behavior can be taken into account in determining where someone fits within the range for the offense of conviction.
- All cells are prison-eligible cells. The sentencing range within the cell is based on the middle 50 percent of both the minimum of the old law sentences and new law sentences for most offenses in the group. The upper 25 percent of sentences are considered a combination of *atypical cases*, in which the sentence was probably appropriately high, and *atypical sentences for typical cases*, which are extreme given the prevailing practice. The same reasoning would apply to the lower 25 percent of sentences.
- The ranges should reflect historical sentencing practices as closely as possible. Adjustments can be made to historical practices to achieve necessary progression of sentences from cell to cell as criminal history increases.
- Each cell must have a higher range than the cell before it, both vertically (from bottom to top) and horizontally (from left to right), although ranges can overlap.
- Both the minimum and the maximum prison sentence in each cell (and therefore the midpoint of the range) must increase as the cells progress vertically and horizontally.

- In any case where a statutory sentencing enhancement applies and the government has filed appropriate notice, the upper (but not the lower) number of months in the appropriate cell(s) will be increased by the statutory multiplier or the amount of additional time set forth in the statute, or to life without release (where applicable).
- Any cell in which probation was granted in 25 percent or more of the cases is a probation-eligible cell. Similarly, any cell in which the combination of probation and short split sentences (i.e., those sentences in which the incarceration portion of the “split” amounted to six months or less) add up to at least 25 percent of historical sentences in that cell is a short split sentence-eligible cell.
- There should be a limited number of departure principles that permit the judge to impose the appropriate sentence in atypical cases.
- The court cannot impose a sentence that is less than a minimum or mandatory minimum sentence required by statute, regardless of the otherwise applicable guideline range.
- The court is bound by the sentence or sentencing range agreed to by the parties under Rule 11(e)(1)(C) of Superior Court Rules of Criminal Procedure if the court accepts the plea, regardless of the otherwise applicable guideline range. Such a sentence is not a departure from the guidelines.

Three points require further elaboration. First, the proposed incarceration range is based on historical practices for recent old law and new law sentences. With respect to the old law sentences, the recommendations are based on the minimum term of the indeterminate sentences imposed, on the theory that the minimum term was the only part of the sentence over which the sentencing judge had control in determining the amount of time the defendant would serve. No adjustment for estimated time served under the old system is made for two reasons: (1) it is unclear what, if any, adjustment judges would have made, as they could not control the exercise of discretion by the parole board beyond the minimum term; and (2) valid time-served data are not available by crime, and estimates of time served for crimes as diverse as unauthorized use of an automobile and first-degree sexual assault would be subject to high levels of error. These considerations led

the Commission to conclude that a time-served conversion factor would be subject to substantial unknown error, and would not reflect the care with which other aspects of the system were developed. Of course, no adjustment is necessary for new law sentences because in those cases the judge imposed the sentence that the defendant would in fact serve, less good-time credit of not more than 15 percent.

Second, sentencing ranges increase by increments as criminal history of the offender increases. The progressiveness of sentences on the grids from cell to cell was followed in developing these increments, despite the fact that available historical data were not consistent in demonstrating that principle as part of historical practice. Additionally, it should be noted that there is substantial overlap between the horizontal cells. This overlap is justified given the wide ranges and relatively gradual increase horizontally as one moves from the less serious to more serious prior record scores.

Third, in the past, judges used split sentences - that is, a prison sentence, part of which was suspended, followed by probation - in three circumstances: (1) where the judge wanted the defendant to serve a specific prison term but did not want to yield the release decision to the parole board; (2) where the judge wanted probation officers rather than parole officers to supervise the defendant following release from prison; and (3) where the judge thought a brief period of incarceration was important, but wanted to give the defendant a chance at rehabilitation in the community, with the prospect of additional prison time if he or she did not succeed. With the advent of determinate sentencing and the establishment of CSOSA as the single agency supervising persons on probation,

parole, and supervised release, the first two reasons for imposing a split sentence are no longer relevant. Although it is still possible for a judge to impose a split sentence in any cell, in prison only cells the time that the offender must serve initially cannot be less than the minimum prison sentence in the range for that cell. On the balance of the grid (the light and dark shaded cells), a split of any duration can be imposed, but the Commission relied on short splits, that is, a split where the time to be served initially was six months or less, in deciding which cells would be split-eligible. Hence, the references above to “short split sentences” mean a sentence where the amount of prison time to be served before probation is six months or less.

With the foregoing principles as a starting point, the Commission examined available historical sentencing data with respect to the two major decisions a judge makes in sentencing: (1) whether or not a person will be sentenced to prison, the so called “in/out” decision; and (2) if so, for how long. In developing guideline recommendations, the Commission operated from the principle that the guidelines should generally follow prevailing practice with respect to both of these decisions, so that a judge would initially make the in/out decision and then, if the decision is in, determine the length of the prison stay. In order to have as much information as possible, the Commission relied on both old and new law sentencing data from January 1996 through June 2003.⁵

⁵ The sentencing system changed on August 5, 2000. For many offenses -- either those that are rarely charged or those that are the most serious and complex -- there are still relatively few new law sentences. Where there were sufficient new law cases to be a reliable indicator of current practice, and reason to believe that the minimum sentence under old law practice was substantially constrained by statute, they were weighted more heavily than old law cases.

Following prevailing practice across the board, however, would necessarily build into the guidelines the very disparity that structured sentencing is attempting to eliminate.

Therefore, with few exceptions, the Commission consciously attempted to capture the middle 50 percent of prison sentences in each category, based on the assumption that some percentage of sentences in the top and bottom 25 percent were outliers that should be brought into the middle range and some smaller percentage in each category were truly extraordinary cases that had – and would still have – valid reasons to depart from the norm. Similarly, with respect to the in/out decision, the Commission has recommended that probation be an available alternative to a prison sentence where at least 25 percent of the cases in the past received probation, and that a short split sentence, but not probation, be an available alternative to a straight prison sentence where at least 25 percent of the cases in the past received either probation or a short split sentence.

The recommended ranges are generally consistent with the middle 50 percent of historical sentences, bringing some future sentences into the middle that would otherwise likely have fallen outside it, although adjustments have been made to achieve symmetry and to follow the principle that sentencing ranges should increase as the severity of the offense and the extent of criminal history increases.

The overall goal of this design is to “cabin discretion” and draw a good number of outlying sentences into the “corral” or mainstream of sentencing practice in the District of Columbia. The metaphor of a “corral” indicates that the goal of reducing unwarranted disparity by drawing in the mavericks is balanced against the goal of maximizing judicial

discretion to achieve a just result in a particular typical case. In other words, the goal is to move all typical offenses and offenders into the “sentencing corral,” which still would be large enough to accommodate a wide range of sentencing discretion. There are no data to guide the Commission on how many atypical offenses and offenders should legitimately remain “outside the corral.” The Commission’s preliminary estimate is that a relatively small percent of cases will fall above the range due to aggravating case factors that take these cases out of the heartland (see aggravating factors below for examples of these circumstances), and a similar relatively small percent of cases will fall below the range due to mitigating case factors that take these cases out of the heartland (see mitigating factors below for examples of these circumstances). After guidelines are implemented on a pilot basis, the Commission intends to monitor departures closely to determine whether judges are departing more or less frequently than would be expected. A higher than expected rate of departure might suggest the need to adjust some of the ranges to capture a higher percentage of typical cases within certain cells.

Probation

In creating the Advisory Commission on Sentencing, the Council of the District of Columbia sought the establishment of a ‘fair and rational sentencing system’ that would, among other things:

- Reflect the seriousness of the offense and the criminal history of the offender;
- Provide for just punishment;
- Afford adequate deterrence; and
- Provide the offender with needed educational or vocational training, medical care and other correctional treatment.

D.C. Official Code § 3-101(b)(2).

In the past, there has been no constraint on the imposition of probation sentences except for the very few crimes that have a mandatory minimum sentence (first degree murder; carjacking; and crimes of violence committed with a firearm or repeat armed crimes of violence). The new guidelines system does not allow probation for very serious offenses and for offenders with extensive criminal histories unless the judge finds a substantial and compelling reason to depart based on an articulated mitigating factor in the case. However, probation is an acceptable sentence under the guidelines in cells into which 94 percent of the drug cases and 60 percent of the other cases have fallen historically.

Two principles that the Commission adopted are to some extent in conflict in cells where probation is a permissible sentence: the principle that the guidelines should try to eliminate the top and bottom 25 percent of sentences (except where a departure principle applies), and the principle that probation should be a permissible sentence in any cell where 25 percent or more of the sentences were to probation historically. The Commission recognizes that a portion of historic sentences to probation – like a portion of most severe sentences imposed historically – were outliers, that is, they were inappropriate given the offense and the criminal history of the defendant. However, unlike exceptionally harsh sentences, which were more easily identified when compared against other sentences, exceptionally lenient sentences were statistically indistinguishable from sentences where probation was indeed appropriate. For this reason, while the Commission was able to exclude from its recommended sentence ranges anomalously “high” sentences, it was not able to impose a comparable bright-line limitation on anomalously “low” probation sentences in every cell. It is therefore

incumbent on individual judges to consider the historical percentage of probation sentences in a given cell when determining whether probation is appropriate in a given case. In making this determination, judges should be guided by the principle that it was the intent of the Commission to eliminate both the top 25 percent and the bottom 25 percent of sentences. It is accordingly the intention and the expectation of the Commission that, just as the guidelines should eliminate a portion of anomalously harsh sentences, so too should the guidelines eliminate a portion of anomalously lenient sentences.

Ranking of Offenses

The Commission devoted considerable time and effort to the ranking of felony offenses, first reported in the Commission's 2002 Annual Report. The Commission followed the principle of proportionality, which requires that more serious crimes receive more serious punishment. To that end, the Commission ranked felony crimes in severity relative to each other, and then grouped comparable crimes to form nine severity levels for crimes other than drug offenses and three severity levels for drug offenses.

In ranking offenses, the Commission was guided by available historical data on sentences imposed, the practitioner's view of the heartland case for each crime,⁶ the harm to crime victims and the community commonly associated with the commission of the crime, the legislative "ranking" of felony offenses as reflected by the statutory penalties prescribed, and by each member's intuitive sense of the relative severity of the offense. As the

⁶ For selected crimes, the heartland (a fact pattern that would describe the typical offense), was formally defined, but for most, it was simply understood.

Commission developed additional data, particularly on new law sentences, a number of offenses were moved from one group to another to reflect more accurately the current historical practice. The severity rankings in the final Master Grid differ somewhat from the original ranking presented to the Council in the 2002 Report, where the offenses were ranked in the abstract and not for guideline purposes.

There is still work to be done in re-ranking certain offenses that may be committed in vastly different ways (for example, sexual abuse, obstruction of justice, second-degree burglary, and robbery).⁷ Our historical data do not distinguish the differences in a way that provides us with adequate guidance. Now that the major components of the system are in place, the Commission can focus its attention on fine-tuning the ranking.

The Drug Grid

Drug cases charged as felonies in Superior Court generally involve small quantities of drugs sold on the street. Superior Court rarely sees drug dealers who are high up in a criminal organization. Many sellers themselves use drugs, and some participate in the sale solely as an aider and abettor to the primary dealer to obtain a “tip” in the form of drugs or money they can use to purchase their own drugs. Historical sentencing patterns demonstrate that these offenders often receive a short split sentence or probation with

⁷ Using historical sentencing practice as a guide to ranking the crime of escape/absconding, it is placed in Group 9. Although it may appear that the offense of “escape” is ranked too low, it is placed in Group 9 where the historical data says it belongs. It is important in assessing the placement of this offense to understand that it rarely involves breaking out of a secure facility, such as D.C. Jail. Instead, the charge almost always results from leaving a halfway house without permission or failing to return to a halfway house when required. Moreover, a sentence for escape must be served consecutively to any sentence from which the person escaped, D.C. Official Code § 22-2601, which means that offenders generally spend longer in prison than the sentence they receive for the escape alone. The Commission recognizes that escape from a secure facility is a different crime than failure to return to a halfway house, and it merits a higher sentence than would be available in Group 9.

drug treatment, even when their criminal history might suggest otherwise.

Philosophically, many believe that treatment and rehabilitation are important sentencing goals for low-level drug dealers selling to support their own substance abuse. This is not to suggest that there is unanimity of views on how to sentence repeat low level drug dealers. All things considered, however, the Commission decided that placing drug felonies on a separate grid was the best way to address both the “just deserts” and “rehabilitation” issues posed by these crimes and this mixed population of offenders.⁸

Criminal History

Every sentencing guidelines effort has developed sentencing standards that are based on the offender's current offense and the extent of his/her prior criminal record. However, recognizing the importance of criminal history does not end the inquiry. Still to be decided were what should be counted, for how long, and for how much. Should all prior convictions be counted, or should some be disregarded after the passage of time? Should misdemeanors be counted as well as felonies? Should all felonies count the same, or should some weigh more heavily than others? How should prior juvenile adjudications be considered? After considerable discussion and debate of these and other questions, the Commission agreed that an offender's Criminal History should be taken into account in the manner described below.

⁸ The Commission also recognizes the goal of rehabilitation and treatment on the Master Grid by providing for probation and short split sentences, including drug treatment, for offenders convicted of other non-violent felonies in cells where probation and short split sentences have been imposed frequently by sentencing judges in the past.

For purposes of computing criminal history score, a “prior conviction” or “prior juvenile adjudication” is any conviction or juvenile adjudication in which the sentence or disposition was imposed prior to the day on which a person is currently being sentenced, regardless of the order in which the offenses were committed. Sentences or dispositions imposed on the same day as the current sentence will not be considered in computing a criminal history score.

1. Scoring Adult Felony Convictions. An offender is assigned three points for each prior felony conviction (or the most serious conviction if multiple convictions arise from a single event) in Master Grid Groups 1-5, two points for each conviction in Master Grid Groups 6-7 and Drug Grid Group 1, and one point for each conviction in Master Grid Groups 8-9 and Drug Grid Groups 2-3.

2. Adult Misdemeanor Convictions. An offender is assigned one-quarter point for each prior adult misdemeanor conviction with a cap of 1.5 points. Therefore, a maximum of six adult misdemeanors will count toward an offender’s criminal history score. All misdemeanors can be considered by the judge in determining the appropriate sentence from within the applicable guideline range.

3. Adult decay period. Adult convictions decay and no longer count toward the criminal history score after the passage of ten years, measured from the completion of the prior sentence to the commission of the instant offense. Completion of the sentence is the later of the date of conviction, release from incarceration, or termination of probation, parole, or supervised release. A decayed felony conviction is revived by any non-decayed felony conviction. A revived felony conviction in Master Grid Groups 1-5 will be scored at three points, one point for Master Grid

Groups 6-7 and Drug Grid Group 1, and .5 points for Master Grid Groups 8-9 and Drug Grid Groups 2-3. Decayed misdemeanor convictions never are revived, nor can a misdemeanor conviction revive a decayed felony conviction. A decayed conviction that is not revived is not included in the criminal history score, although it can be considered by the judge in determining the appropriate sentence from within the applicable guideline range.

4. Convictions Occurring Outside the District of Columbia. Prior convictions from other jurisdictions shall be matched as closely as possible to corresponding crimes in the District of Columbia based on the elements of the crime in each jurisdiction. Consequently, for scoring purposes, these convictions shall be governed by the number of points assigned to the equivalent D.C. offense.⁹

5. Juvenile record. Juvenile adjudications are scored at half the value of comparable adult convictions.¹⁰ Accordingly, an offender is assigned 1.5 points for each prior juvenile adjudication in Master Grid Groups 1-5; one point for each adjudication in Master Grid Groups 6-7 and Drug Grid Group 1, and ½ point for each adjudication in Master Grid Groups 8-9 and Drug Grid Groups 2-3. No points are assessed for juvenile misdemeanor adjudications. In addition, the number of points for juvenile adjudications is capped at 1.5 as long as the offender does not have more than one juvenile adjudication for an offense in Master Grid Groups 1-5. Where an offender has more than one juvenile adjudication for an offense in Master Grid Groups 1-5,

⁹ If there is a difference of opinion as to whether a foreign offense is closer to one D.C. offense than another, it is not necessary for the court to decide which it more closely resembles if they would receive the same number of criminal history points either way.

¹⁰ As with the scoring of adult convictions, where multiple adjudications arise from a single event, only the most serious adjudication is scored, but separate events resulting in multiple adjudications in a single case are scored separately.

the second (and subsequent) Master Grid Group 1-5 adjudication(s) shall each count for an additional 1.5 points.

6. Juvenile decay period. The juvenile decay factor is five years from the date of disposition or release from secure detention, whichever is later. Additionally, juvenile adjudications cannot be revived by any conviction or adjudication after the expiration of this five-year period.

7. Criminal History Ranges. There are five criminal history categories on each grid: Column A= 0-.5, Column B= .75-1.75, Column C= 2-3.75, Column D= 4-5.75, and Column E= 6+.

Sentence Departures

Every system of guidelines presupposes the existence of "ordinary" cases that should be sentenced according to the guidelines. Inevitably, however, there are "extraordinary" cases for which the guideline sentence is too lenient or too severe. The purpose of departure principles is to identify accurately those cases that do not fit within the guidelines, to confine the exercise of discretion to depart from the guidelines to cases that are truly extraordinary, and to standardize departures so that judges can sentence as circumstances dictate in extraordinary cases without undermining the central goal of promoting uniformity and eliminating unwarranted disparity. The Commission attempted to strike a balance between making departures too difficult, which we feared would lead some judges to reject the guidelines entirely or impose a guideline sentence when a departure was really called for, and making departures too easy, which we feared would lead some judges to depart in cases that are not extraordinary, simply because they

disagree with the guidelines or for other reasons. In either event, the guidelines would have failed to reduce unwarranted disparity.

Rules for Departure

1. Any sentence that falls within the permissible sentence options in that cell is not considered a “departure” from the guidelines. Accordingly, apart from the factors that the guidelines expressly prohibit, a judge is free to impose any prison sentence within the guideline range or, where permitted, probation or short split sentence, for any reason.
2. If the sentence is within the guidelines, no reasons need to be given.
3. A “departure” occurs whenever a judge imposes a prison sentence that is outside the applicable guideline range or when a non-prison sentence is imposed where the guideline calls for a prison sentence.¹¹ In addition, a “departure” occurs whenever, in sentencing more than one offense, the judge imposes a consecutive sentence where the guidelines require a concurrent sentence or imposes a concurrent sentence where the guidelines require a consecutive sentence.
4. There must be substantial and compelling reasons for a sentence outside the guideline range. A judge must state on the record which of the enumerated departure principles he or she is relying on in that case and, if he or she is using the “catchall” provision, why the reason for departure is substantial and compelling, and comparable in gravity to the enumerated aggravating or mitigating factors. The guideline sentences for each offender and offense were carefully formulated so as to

¹¹ As noted above, statutorily enhanced sentences, statutory minimums and mandatory-minimums, and Criminal Rule 11(e)(1)(C) pleas are not considered to be departures.

take into account a broad range of “average” cases. Accordingly, the departure rules are to provide guidance to the sentencing judge in the extraordinary cases.

5. The non-exclusive list of mitigating and aggravating factors describes the circumstances under which a departure from the guidelines is appropriate.

Additionally, the list of prohibited reasons defines factors that may not be used as a reason for departing from the guideline sentence. The fact that the defendant pled guilty, as opposed to exercising his or her right to trial, is not, by itself, a reason for a downward departure, although acceptance of responsibility is a factor a judge may use in deciding where to sentence within the guideline range. Similarly, the fact that the defendant elected to go to trial and presented what the judge considered a non-meritorious defense is not a reason for an upward departure. Some of the mitigating and aggravating factors may be present to one degree or another in many cases, but departures are to be restricted to those cases where the factors are present in the extreme (i.e., where a particular factor is manifested to such an extreme degree that there is a substantial and compelling reason to depart) or where the aggravating factors so outweigh the mitigating factors (or vice versa) that there is a substantial and compelling reason to depart.

6. Once the judge decides that a departure from the guideline is warranted, he or she may impose any sentence not prohibited by the applicable statute for the offense. Consequently, there are no limits on the extent of departure from the guidelines. In making decisions about limits on their own departures, judges should give substantial consideration to the purposes of the guidelines and should incorporate into their sentence, to the extent possible, normative principles of proportionality – reserving

the maximum sentence for the worst offense/offender in the category or the minimum sentence for the most deserving offense/offender – and should depart from the guideline only to the extent necessary to account for the aggravating or mitigating factor that necessitated the departure.

Aggravating and Mitigating Factors

There are different ways to define the circumstances under which a departure from the guideline sentence is appropriate. One would allow the judge to depart whenever he or she finds a substantial and compelling reason to do so, without providing guidance on the types of reasons for the departure. Another way would be to list the certain reasons that could not be used, thereby allowing the judge to depart for any other substantial or compelling reason. Another way would be to provide an exclusive list of approved reasons for departure, with departures expressly prohibited for any other reason. The last method, the one ultimately chosen by the Commission, provides a list of prohibited reasons and a non-exclusive list of permitted reasons in the form of aggravating and mitigating factors. By making the list non-exclusive, a judge would be permitted to depart in a case where none of the enumerated factors could be found, but where he or she found another substantial and compelling reason to depart from the guideline sentence. Under this approach, the judge must state on the record the reasons for the departure.

The Commission recommends that the following non-exclusive aggravating and mitigating factors be utilized as a basis for departure from the sentencing guidelines.

Aggravating factors

- 1) There was deliberate cruelty to a victim or there was gratuitous violence inflicted upon a victim in a manner substantially beyond that normally associated with this offense.
- 2) A victim was particularly vulnerable due to age or reduced physical or mental capacity, which was known or should have been known to the defendant, unless that vulnerability constituted an element of the offense of conviction.
- 3) A victim sustained a “devastating injury.” Devastating injury is defined as a physical or mental injury which results in one or more of the following:
 - a. Permanent and substantial impairment of the person’s employment opportunity and/or lifestyle;
 - b. Permanent grotesqueness;
 - c. Medical confinement and/or immobilization for a period of more than three months.
- 4) The crime committed or attempted was substantially premeditated, as evidenced by a high degree of planning or sophistication or planning over an extended period of time.
- 5) The defendant committed for hire or hired another to commit any one of the following offenses: murder; manslaughter; first degree sexual abuse; kidnapping; mayhem/malicious disfiguring; aggravated assault; assault with intent to commit any of the foregoing; assault with intent to kill; assault with a deadly weapon; and arson.
- 6) The offense was part of an enterprise significantly related to organized crime or

high-level drug trafficking. This aggravating factor does not apply in cases charging only distribution or possession with intent to distribute a controlled substance where the defendant's only connection to organized crime or high-level drug trafficking is street level drug trafficking.

- 7) The defendant threatened, bribed, attempted to bribe, induced, or attempted to induce a victim, a member of the victim's family, or a potential witness, or any other person to withhold truthful testimony or provide false testimony, or otherwise attempted to obstruct justice, unless the defendant is separately convicted of an offense that arises out of the same conduct.
- 8) The offense is a violation of Chapter 32 of Title 22 of the D.C. Official Code, which involves an intended or actual monetary loss substantially greater than what would normally be associated with the offense or any one or more of the following:
 - a. The offense(s) involved multiple victims or multiple incidents per victim;
 - b. The defendant has been involved in other conduct similar to the current offense(s) as evidenced by the findings of criminal, civil or administrative law proceedings or the imposition of professional sanctions; and/or
 - c. The defendant used his or her position of confidence or fiduciary responsibility to facilitate the commission of the offense(s).
- 9) The offender, in attempting to gain or while holding public office by appointment or election, betrayed the public trust by his or her unlawful conduct.
- 10) The consecutive/concurrent sentencing policy results in a guideline sentence so lenient in relation to the seriousness of the offense and the history of the

- defendant that imposition of the guideline sentence would result in manifest injustice. A departure based solely on this factor shall not result in a sentence that exceeds the sentence that would result if all guideline sentences were consecutive.
- 11) There is any other substantial and compelling basis, as articulated by the sentencing judge, comparable in gravity to those listed in 1-10 above, which aggravates substantially the seriousness of the offense or the defendant's culpability.

Mitigating factors

- 1) A victim was an aggressor, initiator, willing participant in, or provoker of the incident to such a degree that the defendant's culpability is substantially less than that typically associated with the offense.
- 2) Before detection in a crime other than a crime of violence, the defendant compensated or made a good faith effort to compensate victim(s) for any damage or injury sustained.
- 3) The defendant participated under duress, coercion, threat or compulsion insufficient to constitute a complete defense, but which significantly reduces the defendant's culpability.
- 4) The offense was principally accomplished by another, and the defendant manifested extreme caution or sincere concern for the safety and well-being of a victim.
- 5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

- 6) The defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired significantly, though not sufficiently to constitute a complete defense. Voluntary use of alcohol or other drugs should not be considered in relation to this mitigating factor.
- 7) The defendant has provided substantial assistance to law enforcement in the detection or prosecution of other offenders, and departure for this reason does not demean the seriousness of the defendant's crime or create an unacceptable risk to the safety of the community.
- 8) The guideline sentence calls for incarceration but, after consultation with corrections authorities, the court determines that the defendant, by reason of obvious and substantial mental or physical impairment or infirmity, cannot be adequately protected or treated in any available prison facility.
- 9) The consecutive/concurrent sentencing policy results in a guideline sentence that is so excessive in relation to the seriousness of the offense and history of the defendant that imposition of the guideline sentence would result in manifest injustice. A departure based solely on this factor shall not result in a sentence that is less than the sentence that would result if all guideline sentences are concurrent.
- 10) There is any other substantial and compelling basis, as articulated by the sentencing judge, comparable in gravity to those listed in 1 to 9 above, which does not amount to a defense but which substantially mitigates the seriousness of the offense or the defendant's culpability.

The Commission considered and narrowly rejected a proposed mitigating factor¹² that would permit the court to sentence a person to treatment instead of incarceration under certain extreme circumstances in the prison-only cells.¹³ The proponents of this mitigating factor argued, inter alia, that as worded, it would apply in only rare circumstances, and the court should have discretion to sentence someone to probation with a condition of a treatment program instead of sending him or her to prison if the needs of the offender and the community would be substantially better served by such a disposition. Specifically, the proponents maintained that this mitigating factor would permit judges to use rehabilitation programs to address the unusual rehabilitative needs of a small class of violent or repeat offenders, as long as the needs of the entire community were “substantially better served” by placements in such a program. The opponents of this mitigating factor argued, inter alia, that treatment can be provided in prison and, for violent and repeat offenders, should be provided in prison; that the parties may agree to such a sentence, with the agreement of the court, under Criminal Rule 11(e)(1)(C); and that, regardless of the number of times it is actually used, such a departure will be advanced in many cases where there is arguably a treatment need, and it will require considerable resources to litigate such requests. The Commission intends to examine this point further in the coming months and to collect and assess data, information, and opinions that would inform further judgment on this matter.

¹²The proposed mitigating factor read as follows: “Given the facts of the case, the history and circumstances of the offender, and/or the offender’s capacity to succeed in treatment, the needs of the offender and of the community would be substantially better served by placement in an available treatment program than by incarceration.”

¹³ This additional mitigating factor is not necessary where probation or a short split sentence is permissible, or where another mitigating circumstance applies.

Prohibited Factors

Some guidelines systems base sentences solely on the current offense and the offender's prior criminal record and explicitly prohibit the use of other factors. In some jurisdictions, there was concern that the use of other "social" information such as education, marital status, gender, employment status and the like would build class and racial discrimination into the system. Other guidelines systems incorporate social information, primarily because it is thought to be related to rehabilitation and recidivism. Among the issues considered by the Commission was the extent to which the guidelines should include social information, health factors, alcohol or other drug addiction and ascribed traits such as race, gender and age. After considerable deliberation, including careful consideration of a proposal adopted by the 1987 D.C. Sentencing Commission, the Commission established the following principle:

A judge shall not consider any of the following factors in selecting a sentence:

- a) Race;
- b) Gender;
- c) Marital status;
- d) Ethnic origin;
- e) Religious affiliation; and/or
- f) Sexual orientation.

No Limit on Departure

The Commission understood that without limits on departures, there would likely be some disparity between departure sentences for comparable cases. For example, for two similar crimes of burglary in the first degree, both with similar aggravating factors, committed by offenders with no criminal history, where the guideline sentence for a first offender is 36 to 84 months [three to seven years] and the statutory maximum sentence is

30 years, even if both judges viewed the case as appropriate for an upward departure, one judge might decide to sentence the defendant to 12 years and another judge might sentence the other defendant to 27 years.

The same kind of example can be constructed, of course, in a mitigated case. These disparities might represent nothing more than philosophical differences between the two judges, or different ways of reading the same facts, or both. In any case, if reduction of unwarranted disparity is the primary goal of the guidelines, that goal may not be served by a system of departures without limits. The problem becomes even more serious if departures are not successfully confined to truly extraordinary cases.

Despite these risks, and after much discussion, the Commission decided to recommend no limits on departures. One reason for this recommendation was the expectation that with the adoption of a strict standard for departure, a list of approved reasons for departure and a policy stating that they are to be utilized only in extraordinary cases, the number of departures would be reduced to an acceptable minimum. In addition, the Commission could easily envision cases where departure to one extreme or the other might well be appropriate. In the final analysis, it was felt that imposition of strict durational limits to serve the interest of uniformity would unreasonably constrain judicial discretion in truly extraordinary cases and would inevitably produce a system of unauthorized "departures from departures." Accordingly, the Commission decided to place no limits on departures, but to include in the departure principles a statement of

policy favoring "proportionality" in sentencing.¹⁴

Consecutive and Concurrent Sentences

The Commission recognized that if guidelines were intended to reduce disparity and produce overall consistency in sentencing, principles or rules for consecutive and concurrent sentences would need to be developed. Without such rules, drastically different sentences could be imposed on similarly situated offenders convicted of multiple offenses, where one judge chose to sentence concurrently and another chose to sentence consecutively. If the primary purpose of structured sentencing is to reduce unwarranted disparity, it cannot fulfill that purpose in multiple offense cases unless the structure also includes guidance on when to impose concurrent or consecutive sentences in such cases.

The concurrent/consecutive issue is especially troubling in a guidelines system because, under guidelines, judges have less flexibility to design an appropriate composite sentence to cover all the defendant's convictions on which the sentence is to be imposed. The problem is particularly acute in cases that go to trial, where the parties have less control over the number of charges that result in conviction, as opposed to a plea disposition, where the parties can negotiate the number of convictions with knowledge of the

¹² "Proportionality" means that offenders receive sentences that vary in direct relation to differences in the seriousness of their offenses and their blameworthiness. The guidelines themselves, particularly the ranking of offenses, are to a great extent premised on a principle of proportionality. The idea would be for judges to impose limits on their own departures by reference to goals of the guidelines and the principle of proportionality. For example, after deciding that a case was sufficiently aggravated to justify a departure, the judge would ask: Is it among the worst cases of its kind, requiring the imposition of the maximum sentence allowed by law or, if not, where does the offender fall in the range between the guideline sentence and the statutory maximum? The same analysis would apply to departures based on mitigating circumstances.

expected guideline sentence.

In devising a policy, the Commission considered the approaches adopted in other jurisdictions with guidelines, current sentencing practices, and existing judicial decisions and statutes. It was known that in other jurisdictions there was not unanimity on this question and a variety of approaches had been taken. The two major approaches have been to: (1) establish a maximum guideline sentence regardless of the number of separate offenses; and (2) forbid consecutive sentences for multiple "same transaction" offenses, but require them for certain multiple "different transaction" offenses. The following is a list of rules established by the Commission for sentencing offenders convicted of multiple offenses:

For Crimes of Violence:

- One Victim, Multiple Offenses, One Transaction—Judicial Discretion
- One Victim, Multiple Transactions—Consecutive Sentences
- Multiple Victims, One Transaction—Consecutive Sentences
- Multiple Victims, Multiple Transactions—Consecutive Sentences

For Nonviolent Crimes:

- Multiple Offenses, One Transaction—Concurrent Sentences
- Multiple Offenses, Multiple Transactions—Judicial Discretion

Offense committed while on probation, parole, or supervised release, or under sentence:

- Consecutive to any term imposed as a result of revocation or to a sentence that was being served when the offense was committed.

Offense committed while not on probation, parole, or supervised release, or under sentence, but at the time of sentence the defendant is serving a sentence for an unrelated crime:

- Judicial Discretion

Offense for which a statute requires a consecutive sentence:

- Consecutive

In sentencing cases with multiple counts, it has been the practice of many judges to decide what the overall sentence should be and then to allocate the sentence among the offenses.¹⁵ The guidelines do not affect this practice except to the extent that, absent a permitted departure, the guidelines require each sentence to be within the range specified for that offense and criminal history and require application of the pertinent consecutive-concurrent sentence rule. The guidelines also include both a mitigating factor for a downward departure and an aggravating factor for an upward departure if application of the concurrent/consecutive sentence rule produces an aggregate sentence that is manifestly unjust.

¹⁵Indeed, the Court of Appeals recognizes this practice by permitting resentencing in cases where one or more counts are vacated. See e.g., *Parker v. United States*, 757 A.2d 1280, 1290 (D.C. 2000) (“The court, in its discretion, may also vacate the sentence on any other count or counts and resentence Parker in order to effectuate its original sentencing scheme.”).

