

CHAPTER IV.

UNFINISHED BUSINESS

While the Commission has worked diligently to develop a structured sentencing system that will work best in the District of Columbia, several short-term and longer-term tasks remain to be completed. These tasks fall into three major areas: 1) implementation issues; 2) remaining design issues; and 3) on-going tasks for a sentencing commission after a structured sentencing system becomes fully operational.

The pilot structured-sentencing system should be implemented by May 2004, if the Council accepts the Commission's recommendation. The details of this implementation process are discussed in the first section of this chapter.

There are a few remaining rules of operation and design issues that need to be completed before implementation can begin, even on a pilot basis. These remaining issues are discussed in the next section.

Finally, there are ongoing tasks that a well-functioning Sentencing Commission is required to perform. The American Bar Association (ABA) has termed the role of Sentencing Commissions as an intermediate function, serving as a link between

practitioners and policy makers.¹ In this role, the Commission's function is to provide structure for the development of public policy by the collection, analysis, and dissemination of information on the nature and effects of sentences imposed by judges and served by offenders. Every state with a structured sentencing system has retained a sentencing commission to collect and analyze data on sentencing and to make recommendations for future improvements. These ongoing tasks are the subject of the final section of this chapter.

Implementation and Fine Tuning of Structured Sentencing

In addition to legislative review of the Commission's recommendations, practitioners and the public also need an opportunity to review and comment on the Commission's work. While this review is taking place, the Commission will need to conduct extensive training with judges, prosecutors, defense lawyers and CSOSA staff to familiarize them with the operation of this entirely new system. Assuming everything is then on track, the structured sentencing system will be ready for implementation on a pilot basis starting as early as May 2004 and extending into fiscal year 2006. During this period, as actual cases come before the Court, the Commission expects another period of revision, at least along the margins, to accommodate unanticipated circumstances. Finally, if the pilot program of structured sentencing is successful, the Council may wish to entertain legislative language, as it deems necessary, to cement the proposed system in place. At this point, the Commission could settle into the routine tasks that accompany maintenance of any

¹ See Standard 18-1.3, American Bar Association Standards for Criminal Justice Sentencing (3rd Ed., 1994).

structured sentencing system.

Review by Public and Practitioners

The Commission is a pluralistic body consisting of judges, a Council member, prosecutors and defense lawyers, non-lawyer citizen members, a criminal justice scholar, offender supervision agencies and correctional experts. The Commission or its subcommittees have met virtually every week for the past two years, including several all day sessions, and members have spent additional time studying data, literature and other states' systems, all of which has contributed to the recommendations for the structured sentencing system contained in this Report. However, as this Report is submitted, the recommended guidelines have not been subjected to scrutiny by judges and lawyers and have not been shared widely with members of the public. Before the recommendations are implemented, even as a pilot project, the Commission must have an opportunity to hear the views of other judges, practitioners and members of the community and to refine the proposed system if necessary. This period of review can coincide with the period of the Council's consideration, and it is very important that it be done. Notwithstanding the diversity of the Commission and the care taken in preparing these recommendations, other legitimate factors involved in the sentencing process may still need to be considered and input and feedback from the community must still be obtained.

Practice Guidance and Training

The primary role for the Sentencing Commission in the coming months is to help implement the sentencing guidelines. In addition to promulgating the guidelines

themselves, new procedures will be required to ensure that all of the appropriate information is timely presented to the sentencing judge and that all of the parties and the judge are prepared to go forward without delay.

Four institutions/agencies play a significant role in the sentencing process: the Court, the defense bar, the U.S. Attorney's Office and victim advocates, and the Court Services and Offender Supervision Agency. Therefore, judges, defense attorneys, prosecutors, pre-sentence report writers, and victim advocates all must be trained in the new system in order to facilitate a smooth transition and to achieve the desired compliance, without adding significantly to the complexity of the sentencing process.

Because the guidelines were designed as descriptive of historical practice, and are based on the middle ground of sentencing outcomes for typical cases, the resulting recommendation in most cases should comport with the experience of most practitioners.

However, virtually every person in the criminal sentencing process will conduct business a little differently than before, and a practice manual and training are needed to communicate these changes and standardize procedures. In addition, the plea bargaining process will undoubtedly be altered once structured sentencing is implemented. Accurate and timely sentencing guidelines recommendations must be prepared based on the conviction offense(s) and the criminal history. While CSOSA staff already prepare pre-sentence reports ("PSRs"), they will now have to provide additional information on the appropriate guideline range(s) for the offense(s) being sentenced. It will also be more important for the PSR to match out-of-state convictions correctly with the equivalent

D.C. offenses, so that criminal history scores are accurately calculated. It is likely that the PSRs will have to be made available to the judge, defense and prosecution more than two days in advance of sentencing, which now is the common practice, so that the parties have a chance to review them and to supplement or correct information that affects the guideline range. The parties must also have the opportunity, in advance of sentencing, to respond if the judge is considering a departure from the guideline sentence. Finally, if a departure is granted, the judge must be prepared to state on the record which departure principle(s) the judge relied on or, if the judge relied on one of the catchall departure factors, the reasons for that departure. Obviously, consistent implementation of these new practices will require a practice manual and training. Drafting the manual and preparing and conducting training for several hundred people in the criminal justice system are expected to take at least two to three months.

Public Outreach

While the training of criminal justice personnel is probably the most crucial step in the implementation process, the Commission believes that public outreach is also an important function. To this end, the Commission plans to survey citizens on their attitudes toward this proposal. In addition, if the Council deems it appropriate, the Commission is prepared to present the guidelines to community groups upon request.

The Pilot Test

The proposed system of structured sentencing represents the culmination of more than four years of study and analysis of sentencing practices in the District of Columbia Superior Court, which has led the Commission to see the value of trying this approach. It is not a finished product. Development of sentencing guidelines is an exceedingly complex undertaking. Experience with these recommendations over time will undoubtedly highlight factors the Commission may have overlooked or weighted improperly and suggest the need for revision. As previously noted, the Commission therefore strongly recommends that the Council not enact these recommendations into law at this time, but instead allow them to be tested in the crucible of actual practice in the criminal justice system for at least 18 months, beginning perhaps as early as May 2004, to ensure that there are a sufficient number of complex and serious crimes for analysis. This will provide a further opportunity for practitioners and citizens to comment on the guidelines, and for the Commission to make any necessary adjustments before proposing them to the Council for implementation on a more permanent basis.

The Commission intends to develop a monitoring system to collect compliance information, and where appropriate, departure information. This information will provide a basis for evaluating the guideline recommendations in practice and making any necessary adjustments to the recommendations before submission to the Council.

Legislative Drafting

Following the pilot period, the Council may wish to consider legislation. As a general

rule, systems of voluntary sentencing guidelines have not been explicitly enacted into law. For example, in Delaware and Pennsylvania (both voluntary guidelines states), the statute simply recognizes the guideline recommendations, provides provisions for legislative review of changes in guideline recommendations, and requires judges to state for the record their reasons for departure if they depart from the recommended sentence in a given case.²

Remaining Design Issues for Structured Sentencing

Even before the implementation of the new sentencing system, the Commission needs to complete a number of tasks that were initially envisioned to be part of its final proposal. Some of these issues, most importantly intermediate sanctions, are a statutory requirement. Others, such as subdivision of certain crimes that can be committed in very different ways, are finer points that the Commission still intends to address and perhaps build into the existing grids.

Intermediate Sanctions

The Advisory Commission on Sentencing Establishment Act of 1998 directs the Commission to report on “recommendations for rules or principles to guide a judge’s imposition of intermediate sanctions as part of a criminal sentence.” Other than to provide for probation and split sentences in designated cells of the grids, the Commission has not developed specific program rules governing judicial application of intermediate

² The presumptive structured sentencing system in North Carolina, on the other hand, is written into statute

sanctions. However, as the Commission continues its design of structured sentencing, a framework for rules to guide imposition of intermediate sanctions should emerge.

Intermediate sanctions are an important element of proportionality, providing a middle ground between standard probation and imprisonment for offenders whose crimes deserve a higher sanction and whose risk requires more surveillance than that offered by standard probation. Intermediate sanctions, if well designed and well operated, also offer the prospect of increased crime prevention by addressing offender behavior before it degenerates into new crimes. Often, offenders are repeatedly recycled through the criminal justice system because they are unable to maintain steady employment or positive social ties within the community due to substance abuse, illiteracy, mental illness, or other factors. It is believed that addressing some of the underlying issues that may cause criminality will lead to a lower recidivism rate.

The District of Columbia drug court (a pretrial release program), for example, has achieved substantial success utilizing a framework that holds offenders accountable while offering access to services, including substance abuse treatment, that are associated with a law-abiding lifestyle. The model provides surveillance (including drug testing), sanctions (swift and certain modest, but graduated, sanctions for violations of court orders and offender agreements), and treatment (to address offender problems so as to reduce the likelihood of future crime). The Commission seeks to promote the use of

in great detail.

intermediate sanctions for a wider group of offenders than currently experience drug court.

The grids proposed by the Commission provide zones of discretion that allow intermediate sanctions as punishments within certain boxes. It is important to note, however, that intermediate sanctions in the District of Columbia are a condition of probation, and a judge cannot couple an intermediate sanction with a prison sentence. The Bureau of Prisons cannot use intermediate sanctions on the front-end of a sentence.³ As a result, the grids tie intermediate sanctions to the probation and split sentence eligible shaded cells. In any cell for which probation is permitted, either alone or as part of a split sentence, the judge could use an intermediate sanction to supplement or as an alternative to regular probation.

CSOSA, the agency that supervises all offenders on probation, parole and supervised release, uses a contract-based graduated sanctions program for offenders with substance abuse problems, although they are looking to expand this program to other groups. Offenders, when placed in this program, first sign Individual Accountability Contracts that spell out how they will be sanctioned for each subsequent violation. As the term graduated sanctions suggests, these sanctions become more and more severe with each

³ A US Department of Justice, Office of Legal Counsel (OLC) opinion found unlawful the BOP's long-standing practice of accommodating judicial recommendations for direct community corrections centers (CCC) designation of low-risk, non-violent offenders serving short prison sentences. The OLC opinion concluded that BOP's only authority to place inmates in CCCs is found in section 3624(c) of Title 18, United States Code. This statute allows BOP to place inmates in CCCs to facilitate reentry, and such placements are limited to the last 10 percent of the prison time being served, not to exceed six months.

violation. Because research suggests that in order for graduated sanctions to work effectively, they must be “certain, incremental and swift,” CSOSA has designed a range of administrative punishments that can be administered without requiring that an offender return to court. For this population, waiting two or three weeks for a court date to have a sanction imposed is not effective. In addition, making sanctions proportional to the violation and based on a predetermined contract help to add validity to the process and cut down on offender perceptions of unfairness.

It should also be noted that, as a part of the Sentencing Reform Act of 2000, the Council has recently enacted an intermediate sanction alternative that is just now being commonly utilized. DC Official Code §16-710(b-1) enables a judge to order, as a condition of probation in felony cases, brief periods of custody or placement in a community correctional center, for a total period not to exceed one year. This allows the judge to address probation violations or other deviant behavior before it reaches the point of revocation of probation and a prison term is the only reasonable response.

This provision was initially underutilized because resources to house individuals were not available. With help from the Bureau of Prisons, CSOSA has obtained additional resources and more judges are taking advantage of this option. This new sentencing option has the potential for diverting a significant number of non-violent offenders who are not quite making it, because of substance abuse or other reasons, into community-based alternatives until their negative behavior can be interrupted and addressed, and they can successfully complete the remainder of their sentences in the community. In

addition, it appears that more and more judges are using this option on the front end of probationary sentences to provide an initial period of punishment to “shock” some offenders into conforming their behavior to the requirements of law without having to send them to prison, causing job loss and disruption of important family and community ties. The Commission intends to monitor the use of this sentencing alternative with a view toward further recommendations.

One specific intermediate sanctions program that has been studied extensively and found to have no effect on recidivism is boot camp. Although the 2000 Report discussed the use of boot camps in the District, CSOSA has phased out boot camps due to negative evaluations. Not only do boot camps not reduce recidivism for offenders, they are also often just as expensive as traditional incarceration and more expensive than many other intermediate sanctions programs. The demise of boot camp programs in the District of Columbia is one example of how CSOSA and corrections officials are constantly revamping available resources and programs based on evaluations of their effectiveness. In future reports, the Commission may be able to report on other programs that have or have not proven their effectiveness after being evaluated in the District and around the country.

Subdivision of Offenses and Heartland Definitions

As explained in the 2002 Annual Report, the Commission ranked offenses in order of seriousness by considering the “typical” case rather than the “worst” or most “benign” example of each crime. In the initial phase, during which members were asked to rank

crimes without reference to historical sentences, only a few crimes were ranked unanimously, and members put some crimes in three or four different ranking groups. It soon became clear that part of the difference in rankings stemmed from differences in perception as to the typical criminal behavior for that offense. Due to these differences in perception, many of the offenses had to be debated and discussed in detail (based on both the experience of Commission members and historical data) until the Commission could reach a consensus as to where they should be ranked. For some crimes, however, ranking remained problematic due to the wide range of behaviors that the offense can encompass. As a result, the Commission has begun to develop heartland case definitions, which describe the typical circumstances the Commission had in mind when it ranked some of the more problematic offenses. Two such definitions, for Obstruction of Justice and Assault on a Police Officer, were included in the 2002 Report. At this time, the Commission has not created other heartland definitions, although it is very likely that it will. In addition, the Commission is also considering subdividing certain offenses that are commonly committed in more than one way, with one version significantly more serious than the other. Using robbery as an example, crimes can range from stealthy pick-pocketing, to “snatch and grab” robberies that startle the victim, to violent confrontations that result not only in the loss of property but serious or potentially serious injury to the victim. Eventually, the Commission may decide to rank robbery at more than one level, depending on the type of robbery committed. The same approach also may be used for other offenses.

In deciding which offenses need to be more clearly defined, or perhaps subdivided, the Commission will be looking at offenses that appear to receive a wide range of sentences, or a large number of departures, either upwards or downwards. While the availability of aggravating and mitigating factors will help judges deal with cases that are more or less serious than the typical case, feedback from judges and other practitioners should help the Commission identify areas for further guidance. Such feedback and a careful review of the guidelines during the pilot program will allow the Commission to fine-tune its proposal to accommodate what is occurring in practice before making final recommendations to the Council.

Improved Criminal History

Unlike the information available to judges at sentencing through the pre-sentence report, the current data the Commission are using do not accurately portray an offender's full criminal history. The Commission's data do not include an offender's misdemeanor record or juvenile record or crimes committed outside of the District of Columbia. This results in an undercounting of an offender's criminal record. The Commission plans to continue to look for ways to improve the accuracy and completeness of our criminal history data, including close monitoring of the criminal history scores reported on the sentencing guideline worksheets once the pilot program is implemented.

On-Going Tasks for a Permanent Sentencing Commission

In general, sentencing commissions serve a unique function in the 22 states where they exist or are under study.⁴ The American Bar Association, in its Standards for Criminal Justice Sentencing, describes the role of a sentencing commission as that of serving an “intermediate function” between the legislative branch and the court system, providing information on the nature and effects of sentences imposed by judges and served by offenders. Pursuant to this intermediate function, below are powers common to sentencing commissions (adapted from the Pennsylvania Commission on Sentencing):

- 1) Establish general policies and promulgate such rules and regulations for the commission as are necessary to carry out their purposes.
- 2) Issue invitations requesting the attendance and testimony of witnesses and the production of any evidence that relates directly to a matter with respect to which the commission or any member thereof is empowered to make a determination.
- 3) Establish a research and development program within the commission for the purpose of:
 - i) Serving as a clearinghouse and information center for the collection, preparation and dissemination of information on sentencing practices.
 - ii) Assisting and serving in a consulting capacity to courts,

⁴ See the Commission’s 2002 Annual Report.

departments and agencies in the development, maintenance and coordination of sound sentencing practices.

- 4) Collect systematically the data obtained from studies, research and the empirical experience of public and private agencies concerning the sentencing processes.
- 5) Publish data concerning the sentencing processes.
- 6) Collect systematically and disseminate information concerning sentences actually imposed.
- 7) Collect systematically and disseminate information regarding effectiveness of sentences imposed.
- 8) Make recommendations concerning modification or enactment of sentencing and correctional statutes that the commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy.
- 9) Establish a plan and timetable to collect and disseminate information relating to incapacitation, recidivism, deterrence and overall effectiveness of sentences imposed.
- 10) Establish a program to systematically monitor compliance with the guidelines and with mandatory sentencing laws by:
 - i) Promulgating forms which document the application of the guidelines or mandatory sentencing laws, or both.

ii) Requiring the timely completion and submission
of such forms to the commission.

11) Annual reports--The commission shall report annually on
the activities of the commission.

Proposed Adjustment to Guidelines

One of the most important tasks for a Sentencing Commission is to monitor sentencing practice and make changes to sentence recommendations as needed. Routine monitoring is crucial to make sure the guidelines system is working as designed, and to follow up on missing, erroneous and incomplete departure forms. Subject to the direction of the Council, the Commission plans to report regularly on compliance. As a result of this routine monitoring of compliance and analysis of departures, the Commission is likely to identify areas in need of improvement and propose revisions to the guideline recommendations. Analysis of compliance and departures may reveal that certain crimes receive an extraordinary number of departures. A large number of departures or non-compliant sentences for a given crime may indicate that the Commission needs to rethink the recommendation for that crime, and conduct an analysis of the reasons for the high degree of departure or non-compliance. In most structured sentencing systems, proposed modifications to the sentencing recommendations are subject to legislative veto, and go into effect after the period for legislative review has expired.

Sentencing commissions also routinely revise guidelines based on criminal code changes, such as the enactment of new crimes or new sentences for existing crimes. Typically, legislation establishes the maximum penalty, but a sentencing commission needs to place new crimes into the guideline framework to maintain the proportionality of the overall structure. In most states, the commissions advise their legislatures on the impact of proposed changes in sentences, so the legislature can identify in advance what resources will be necessary to accommodate the changes.

Technical Assistance to Practitioners and Citizens

The Guidelines represent a major shift in sentencing practice in the District of Columbia.

Although every effort has been made to ensure that they are as simple and easy to follow as possible, there are nevertheless a number of complexities, beyond the grid itself, that may not be readily apparent to those who are not familiar with the system. Moreover, any transition is difficult, at best.

In order to ensure that sentencing hearings are not continued because one party or another does not fully understand the guidelines or how they apply to the case before the court, the Commission must be in a position to offer technical assistance whenever court is in session. The Commission, therefore, plans to develop a system to handle inquiries and provide technical assistance concerning the application of the guidelines.

In addition to inquiries in relationship to a specific sentencing hearing, the Commission also plans to field inquiries from policy makers and the public, and to accept suggestions, comments, and criticisms that may assist it in modifying the guidelines as necessary.

Resource Utilization, Impact Assessment, and Forecasting Correctional Populations

The Advisory Commission on Sentencing Establishment Act directs the Commission to “project the impact, if any, on the size of the District’s population of incarcerated

offenders and offenders on supervised release if any Commission recommendation is implemented.”

Because its recommendations are deliberately grounded in current practice, the Commission concludes that implementation of the new sentencing system is unlikely to produce significant changes in the number of D.C. offenders in prison or on probation. *However, as previously noted, there will be no conclusive evidence regarding the net effect of the shift from indeterminate to determinate sentences until determinate sentences are given in more cases than are currently available.*⁵

One important aspect of informing policymakers involves the use of historical sentencing information to make credible projections about the impact(s) of proposed changes and adjustments in sentencing provisions. The quality and reliability of these projections depend on credibility of the data available on past sentencing decisions and historical trends, which explains the time and attention the Commission has devoted to an understanding of time served on terms of imprisonment under the old law. The projections typically use simulation models in an effort to provide defensible answers to critical “what-if” policy questions.

⁵ Unfortunately, a precise impact analysis may never be possible. We are unable to compare new law sentences to old law sentences with a high degree of accuracy. Given the nature of determinate sentencing, we are able to calculate precisely how long offenders will serve under new law sentences to prison. As noted elsewhere in this report, however, our data do not permit us to calculate with any degree of confidence how long offenders served under indeterminate sentences before first release on parole, particularly in the case of longer sentences imposed for violent crimes.

Conclusion

The Commission has proposed that the new sentencing guidelines be introduced as a pilot program. If the Council agrees that a pilot program is warranted, the Commission proposes to begin operation in May 2004.

Every state with a fully-functional structured sentencing system has retained a Sentencing Commission to collect and analyze data on sentencing and to make recommendations for future improvements. Subject to the direction of the Council, the Commission intends to monitor sentences to determine compliance with the guidelines and with the rules for departure. The compliance information will be an important means of evaluating the guideline recommendations and making adjustments to recommendations as needed. In addition to monitoring, the Commission would expect to provide technical assistance for practitioners and the public, providing fast and accurate information to judges, lawyers, and CSOSA staff who are using the guidelines every day. Having devoted a tremendous amount of energy and resources to the development of a system that should promote more fairness and uniformity in sentencing without sacrificing individual justice, the Commission stands ready to see this project through to the goal of providing the best possible structured sentencing system for the citizens of the District of Columbia.