

## CHAPTER V LEGISLATIVE RECOMMENDATION

By every measure the voluntary sentencing guidelines, introduced as a pilot program on June 14, 2004, have been a success. They have received widespread acceptance in the criminal justice community. Prosecutors and defense attorneys alike report that the guidelines have made the plea bargaining and sentencing process more transparent and accessible to defendants, victims, and the general public. The rate of judicial compliance is close to 90%, measured conservatively, and may even be higher if, as is likely, a portion of the sentences reported as non-compliant actually conformed to the guidelines for reasons that were not provided to the Commission.

Apart from the high rate of compliance, the guidelines appear to be accomplishing the primary goal of reducing unwarranted disparity in sentencing, while evidencing no other discernable impact on the use of prison or alternatives to prison or on the length of prison terms imposed, which was the Commission's stated intent when it introduced the guidelines. While all of these issues will continue to require close attention in future years as we accumulate more experience under the guidelines and

the Commission is able to identify any unintended consequences or areas in need of improvement, the pilot program has served its purpose of demonstrating that voluntary guidelines can and do work in the District of Columbia Superior Court.

During the pilot project, the Commission has been able to respond promptly to inquiries about the application of the guidelines in specific cases. In most instances, Commission members or staff members are able to point the inquirer to appropriate rules in the Sentencing Guidelines Practice Manual. In a few instances, where an inquiry raises an issue that has not been previously considered or where an existing rule has caused confusion, the Commission has made necessary clarifications or modifications. Like the development of the guidelines themselves, virtually all of the Commission's decisions with respect to these questions have been arrived at by consensus.<sup>1</sup> The results can be seen in the 2005 and 2006 Amendments to the Practice Manual, Appendix J (The Practice Manual Appendix J is reproduced as Appendix II to this Report.).

<sup>1</sup>The difficulty of matching out-of-state convictions to D.C. offenses and of obtaining accurate information on out-of-state convictions are examples of the kinds of issues that have prompted considerable discussion and compromise. The Commission adopted a rule of lenity under which we would match an out-of-state conviction to the least severe D.C. offense. If there is no equivalent D.C. offense, a defendant is given one point for an offense the other jurisdiction classifies as a felony and ¼ point for an offense the other jurisdictions classifies as a misdemeanor. If, in the prosecutor's view, this results in significant understatement of the defendant's true criminal history score, the prosecutor can argue for a criminal history departure.

The combination of the success of the guidelines and the flexibility afforded by the current structure augers in favor of permanent legislation authorizing the Commission to continue to do what it has done so well:

- Promulgating and implementing voluntary guidelines;
- Collecting data on sentences and monitoring the guidelines for judicial compliance and the extent to which they achieve the goals of fair and effective sentencing and promoting public safety;
- Updating or amending the guidelines as new crimes or new penalties for existing crimes are enacted, or other changed circumstances are presented;
- Providing technical assistance to the Court, CSOSA, and practitioners;
- Periodically conducting focus groups, community outreach, and training;
- Meeting and collaborating with sentencing commissions in other states;
- Conducting research on the guidelines themselves and other sentencing issues; and
- Keeping the Council, the Executive Branch, the Court and the community informed of the Commission's work.

The Commission has the expertise, experience, and balance necessary to fulfill the mandate of the Council and has demonstrated that it has both the will and the capacity to manage the sentencing guidelines responsibly. It should be entrusted with this task.

There is another compelling reason for the Council to allocate the responsibility for managing the sentencing guidelines to the Commission rather than enacting them into law. In compliance with D.C. Code § 3-105(b) and (d), before recommending voluntary guidelines, the Commission surveyed the various sentencing guideline systems and carefully considered what form of system would best serve the District of Columbia. When it ultimately recommended to the Council that the District adopt voluntary sentencing guidelines, the Commission cited 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.*

*2003 Annual Report at p.15-16 (November 30, 2003).*

At about the same time the Commission made the policy decision to reject the more rigid mandatory or presumptive sentencing guidelines used in many other states and in the federal system in favor of developing a system of voluntary sentencing guidelines, the Supreme Court was faced with constitutional challenges to a state

presumptive guideline system and to the federal sentencing guidelines. First in *Blakely v. Washington*, 542 U.S. 296 (2004),<sup>2</sup> and the following year in *United States v. Booker*, 543 U.S. 220 (2005), the Court held that in a presumptive or legislatively mandated sentencing guideline system, the maximum sentence for purposes of the Sixth Amendment is the maximum sentence provided in the applicable guidelines, rather than the statutory maximum otherwise provided, and a sentence that exceeds the guidelines maximum in such a system violates the Sixth Amendment if the judge bases the enhanced sentence on facts that were not admitted by the defendant as part of a guilty plea or submitted to the jury and proven beyond a reasonable doubt. In reaching that conclusion, the Court was careful to exempt traditional sentencing systems like ours, in which the judge can impose any lawful sentence up to the statutory maximum.

Following *Blakely*, states with legislative guideline systems have been forced to go back to the drawing board to redesign their systems in a way that would pass muster under the Sixth Amendment. Some have looked enviously at the District of Columbia, where our voluntary guidelines, even in their infancy, have become a model for reform efforts in other states. Others have simply engrafted a jury trial requirement onto their guidelines whenever the judge declares an intention to impose an enhanced

sentence based on facts that are not included in the elements of the offenses charged in the indictment.<sup>3</sup> In the federal system, *Booker* invalidated the mandatory nature of the guidelines and, as a remedy, allowed them to continue to operate, for the time being, as an advisory system, in which judges are required to consult the guidelines in all cases but have discretion to impose a sentence outside them, subject to a reasonableness standard of review on appeal.

Although the law in this area is still somewhat unsettled, certain propositions are clear. First, in a purely voluntary guideline system such as ours, in which the judges are free not to follow the applicable guideline and can impose any lawful sentence up to the statutory maximum, there are no Sixth Amendment constraints. Second, guidelines promulgated and revised by the Commission subject to Council oversight, as long as they remain voluntary, are unlikely to present serious constitutional or appellate issues for any sentence that is within the statutory maximum. For that reason, such guidelines are unlikely to require the addition of significant resources at either the trial or appellate level to withstand a constitutional challenge. Third, if the Council were to enact the guidelines into law, including the minimum and maximum prison ranges set forth in the guidelines, and require the judges to follow them, serious constitutional issues would be

<sup>2</sup>*Blakely* was decided only ten days after the D.C. voluntary sentencing guidelines went into effect.

<sup>3</sup>This solution appears to be manageable in states with a predominately rural population and courts with relatively low caseloads, but it would be problematic in a high volume urban court system such as ours.

presented, and such a system could withstand a constitutional challenge only if it also included the right to a sentencing jury trial and the other constitutional protections identified by the Supreme Court in *Blakely* and *Booker*.<sup>4</sup>

For these reasons, among others, the Commission strongly recommends that the District of Columbia sentencing guidelines remain voluntary. Specifically, the Commission recommends that any legislation enacted by the Council in this area establish a system of voluntary sentencing guidelines for use in Superior Court and provide that the guidelines be designed to achieve the goals of certainty, consistency, and adequacy of punishment, with due regard for the seriousness of the offense, the dangerousness of the offender, the need to protect the safety of the community, the offender's potential for rehabilitation, and the use of alternatives to prison, where appropriate. The legislation should provide explicitly that the guidelines neither confer new rights on any party nor diminish any rights that currently exist. Finally, the legislation should also ensure that the guidelines be subject to constant monitoring and periodic revision, as may be necessary, based on recommendations of the Commission in its annual reports to the Council. We recommend that that

date that the annual report is due be changed from November 30 to April 30 and cover the preceding calendar year. Because the majority of the data in the criminal justice system is reported on a calendar year basis, it would be preferable to report the sentencing guidelines data on the same basis.

The enabling legislation also should integrate the new duties enacted in the Criminal Code Revision Amendment Act of 2006, establish that the ex-officio members of the Commission serve without terms at the pleasure of their appointing authorities, and repeal provisions of the former statute that are obsolete because they include statutory mandates to the Commission that have already been fulfilled. Without meaning to appear presumptuous and motivated purely by our desire to assist the Council, we have included proposed legislation along the lines recommended herein. Particularly because of the constitutional minefield that lies between the existing state of affairs and any legislation that may be written in this area, the Commission respectfully requests the Council to enact the legislation as proposed and to consult with the Commission if it is considering any substantive changes. The proposed legislation appears as *Appendix I* to this Report.

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<sup>4</sup>As we saw in Chapter IV, ninety percent of all felony cases in the Superior Court are resolved by guilty plea. In all of these cases, if the elements of the offense to which the defendant pleads guilty do not include the enhancing facts and the defendant does not admit to them, a jury trial would be required whenever the judge found it appropriate to impose a sentence that exceeded the guidelines maximum.