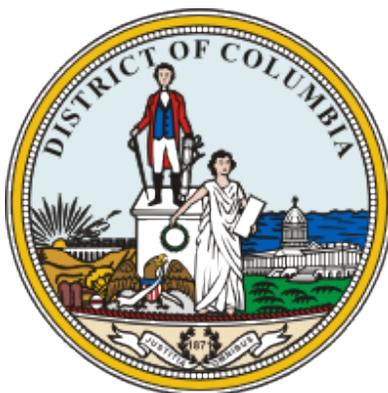




The Importance of Departures Under the D.C. Voluntary Sentencing Guidelines



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DISTRICT OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION
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Four individual defendants were sentenced in D.C. Superior Court for one count of robbery on the same day¹. Each separate, unrelated case was sentenced by a different judge. Defendant Andrew received a sentence of 40 months incarceration, defendant Carl received a sentence of 24 months incarceration, defendant Bob received a sentence of 84 months incarceration, and defendant Don received a sentence of 30 months, execution of sentence suspended.²

In each case, the defendant and an accomplice followed the victim to a secluded area, threatened or restrained the victim and took items of value (wallet, cellular phone, MP3 player and jewelry). Each defendant was a male with an identical criminal history consisting of prior property and drug convictions. The defendants were between 26 and 28 years of age, with the exception of defendant Don who was 42 years old.

While similar in many respects, the four defendants each received substantially different sentences for essentially the same criminal conduct. Were their sentences fair and just? One fundamental purpose of a sentencing guideline system is to promote consistency and fairness while reducing disparity in sentencing. Guideline systems achieve this goal by encouraging similar sentences for analogous offenses and offenders, thus reducing the risk of unwarranted discrepancies in sentencing.³ However, a rigid sentencing system does not always produce just results. This issues paper will explore how and why defendants sentenced under the D.C. Voluntary Sentencing Guidelines (the Guidelines) can receive significantly different sentences and why monitoring these sentences is an essential part of maintaining an effective guideline system.

The Guidelines, like similar guideline systems found in other states and in federal court, promote consistency by using two factors - a defendant's criminal history and the severity of the offense of conviction - to provide judges a range of sentencing options, including a prison sentence.⁴

¹ The four examples used in this paper are not based on specific cases or events.

² Execution of Sentence Suspended means that the sentencing judge imposed a prison sentence but suspends the entire sentence and placed the defendant on probation. If the court later revokes the defendant's probation, it may resentence the defendant to some or all of the time suspended.

³ Unwarranted disparity can take various forms. A particularly troubling example of unwarranted disparity is differences in sentences imposed based on race, gender, religious affiliation or ethnic origin, for instance.

⁴ An offender's criminal history score and the offense severity of the crime committed represent the axes of the Guidelines' two grids - the Drug Grid that governs drug felonies and the Master Grid that governs all other felonies.

Typical cases are sentenced within the recommended sentencing range, ensuring that similar cases are sentenced in a similar manner.

For example, consider defendant Andrew's case. The victim is a 30-year-old male on his way to visit a friend at approximately 11:00 pm. The defendant and an accomplice approached the victim from behind and held his arms before robbing him and running away. While the crime occurred very quickly, the victim was noticeably shaken and reported a bruise on his upper arm from the incident.

The Guidelines indicate that a 30 to 72 month prison sentence is appropriate for a defendant convicted of robbery with a criminal history matching Andrew's, Bob's, Carl's, and Don's.⁵ Therefore, the 40-month sentence defendant Andrew received is within the Guidelines prison range. Similar to defendant Andrew's sentence, a strong majority of felony sentences imposed by D.C. Superior Court judges falls within a defendant's applicable Guidelines range. The Commission refers to these sentences as "in-the-box" sentences. In 2011, 95.6% of the 3,321 counts for which the Commission had complete data to calculate judicial compliance with the Guidelines, were compliant in-the-box sentences. Violent offenses, such as robbery, had a compliance rate of 96.1%.⁶ Therefore, for typical cases, compliance with the Guidelines creates uniform results.

These two axes intersect at one "box" on the grid that displays a recommended sentencing range and sentencing options (prison, probation or a short split suspended sentence). The Guidelines also incorporate statutory enhancements (which increase the maximum sentence if certain factors are present), mandatory minimum provisions (where a minimum term of imprisonment must be imposed) and approved departures for sentencing outside of the recommended range. Following the rules set forth in the Guidelines result in what is referred to as a "compliant sentence."

⁵ Under the Guidelines, robbery falls in offense severity group six. The defendants' criminal history score is 2 ½ points and, therefore, puts them in category C. The intersection of offense severity group 6 and criminal history category C reveals a Guidelines compliant range of 30 to 72 months, prison only. This means that to be compliant with the Guidelines, the judge must sentence the defendants' to at least 30 months in prison but not more than 72 months.

⁶ For data analysis purposes, the Commission has divided all offenses into five categories – Drug, Violent, Sex, Property, Weapon and Other; and robbery is considered a violent offense.

I. Why Analyze Departures?

The in-the-box sentencing options recommended by the Guidelines cannot always account for the unique individual or the unique circumstances of a particular criminal case. Taking into consideration the atypical cases, the Guidelines contain a list of departure principles that provide judges discretion to “depart” from the sentencing options in-the-box while still imposing a Guidelines-compliant sentence.

In the District, the Commission routinely analyzes judicial compliance in accordance with the Guidelines’ rules. The Commission also closely monitors sentences that fall outside of the in-the-box sentencing range. These sentences are tracked because understanding when and why judges depart from the Guidelines can offer invaluable insight into sentencing trends and areas of the Guidelines that may need to be revised or modified.

Of the four robbery examples presented, defendants Bob, Carl, and Don represent atypical cases where departure principles help maintain the integrity of a system meant to guide uniform sentencing options. At first glance, the sentences for Carl, Bob and Don suggest that a disparity exists. However, closer examination of the details of each case and each defendant reveals that the disparity is not unexplained or unwarranted, but that there is an identifiable reason for the deviation from the Guidelines.

Departures represent extraordinary and individual sentencing factors where the Guidelines’ recommendation cannot adequately reflect a just punishment for a particular offender or take into consideration the specific manner in which a crime was committed. Nevertheless, departures can reveal interesting and sometimes telling information about sentencing practices. Analyzing departure patterns can help detect shifts in sentencing trends, reveal novel departure reasons, assess the effectiveness of new legislation, and indicate if the recommended Guidelines sentences are appropriate. If a jurisdiction observes larger numbers of departures above or below the Guidelines recommendation for a particular type of crime, examining these departures, along with compliant sentences, may indicate that the Guidelines recommend a punishment that is too

severe or too lenient. At its core, analyzing reasons for departures may identify areas where the Guidelines need to evolve.⁷

When a judge departs from the Guidelines and cites a valid departure principle, the sentence imposed is still considered compliant. Partly because of its inclusive treatment of departures, the District has reported consistently high rates of compliance since the inception of the Guidelines in 2004.⁸ Nevertheless, compliant departures can still be identified and analyzed on their own. Monitoring compliant departures also encourages judges to state their reasons for departure on the record.⁹

II. What is a Compliant Departure?

Almost all sentencing guidelines systems allow a judge to depart from the recommended sentence when certain special circumstances are present. Departures give judges flexibility to take into consideration unusual sentencing factors.¹⁰ Although the Guidelines already provide for a fair amount of discretion due to the broad in-the-box ranges and the voluntary nature of the Guidelines, judges are also provided with another option for use in unique cases. The Guidelines identify a non-exclusive list of ten mitigatingⁱ and eleven aggravatingⁱⁱ circumstances when a sentence that does not fall in-the-box can be imposed and still be considered compliant with the Guidelines. This list includes two “catch-all” provisions that can be used for any unforeseen or

⁷ The evolution of a guidelines system as a result of analyzing departures is sometimes referred to as the “common law of sentencing.” The use of departure power and the development of departure principles will continuously balance discretion for guidelines. *Id.* at 34-35, 39-40. Both Maryland and Pennsylvania have specifically reported on the use of departure power under their guidelines. See John H. Kramer, Jeffery T. Ulmer, “Report to the Pennsylvania Commission on Sentencing: Departures from the Sentencing Guidelines for Serious, Violent Offenses.” (October 2000); Claire Souryal and Charles Welford, “An examination of Unwarranted Sentencing Discretion Under Maryland’s Voluntary Sentencing Guidelines.” (November 1997).

⁸ Four types of sentences are considered compliant sentences under the Guidelines. They are in-the-box sentences, sentences involving a statutory enhancement, compliant departures, and 11(e) (1) (C) sentences. See District of Columbia Sentencing and Criminal Code Revision Commission, Voluntary Sentencing Guidelines Manual Sec. pii §7.3.

⁹ When the Commission encounters a sentence that appears to be non-compliant with the Guidelines and the sentencing judge did not already indicate that a departure principle was used, the judge is sent a departure letter and asked to indicate whether the judge followed the Guidelines when imposing the sentence. If the judge states that they followed the Guidelines when imposing the sentence, they are asked to specify which departure principle they used and why.

¹⁰ For more on the different methods used in other guidelines systems and the balance between uniformity and judicial discretion, see Kevin R. Reitz, “The Enforceability of Sentencing Guidelines.” *Stanford Law Review* 58:1 (Oct 2005): 155, 158.

unidentified substantial and compelling reason.¹¹ The Commission classifies sentences imposed under this non-exclusive list as “compliant departures.”

Departures can be either dispositional or durational. A dispositional departure is where the judge imposes a sentencing option not authorized under the guideline rules, such as sentencing the defendant to probation when the recommended option only allows for incarceration. Defendant Don received a dispositional departure because his sentence (30 months, execution of sentence suspended), while meeting the minimum length (30 months), is a probation-only sentence. Therefore, it is not a compliant sentence for a defendant convicted of robbery with his criminal history score. A durational departure occurs where the judge imposes a sentence that is either longer or shorter than the prison range recommended under the Guidelines. Defendants Carl and Bob received durational departures because their sentences fell outside of the prison range in-the-box.

Effective guideline systems are developed to provide sentencing options for the “typical” criminal offense not the “atypical” offense. Departure principles assist with extraordinary circumstances that warrant deviations from the recommended guideline sentence and guide this extra use of discretion to ensure that the principles of fair sentencing are not compromised. Based on the length of sentence imposed, departures can be mitigating or aggravating.

A. Mitigating Departures

Defendant Carl: The victim was a 31-year-old male on his way to a convenience store at approximately 10:45 pm. The accomplice pushed the victim against a wall and restrained him. The accomplice ordered Carl several times to remove any items of value from the victim. When Carl did not respond, the accomplice berated him. Carl then took the items and handed them to his accomplice. The accomplice ran away, however Carl remained at the scene of the incident. The arresting officer reported that Carl did not know where he was at the time of arrest or why he was arrested. A psychiatrist testified that Carl has an IQ of 74 and has been diagnosed with

¹¹ The two catch-all departure reasons are M10 for mitigating departures and A11 for aggravating departures. Endnotes i and ii provide a complete description of all departure reasons.

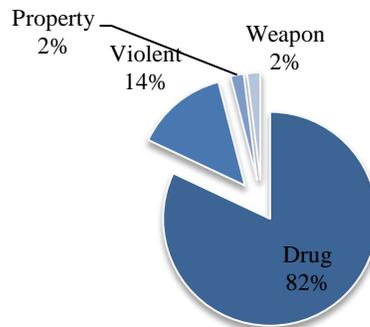
schizophrenia for several years and that the actions of the accomplice may have triggered a schizophrenic episode.

In such extraordinary instances the judge can depart downwards imposing a less severe (or more lenient) sentence on the defendant. A downward departure is permissible under the Guidelines if the judge decides the in-the-box sentence does not adequately reflect the culpability of the defendant. At Carl’s sentencing hearing, the judge noted that she was departing from the in-the-box sentencing range and cited several reasons for imposing a 24-month sentence. Not only did she comment on Carl’s initial unwillingness to participate in the offense, especially in light of his mental health and intellectual capacity, but also noted the possibility of coercion by the accomplice. Under such circumstances the Guidelines permit judges to impose a sentence below the recommended range, resulting in a mitigating departure

The judge specifically indicated that she imposed a sentence outside of the in-the-box range based on Mitigating Factor #6 (M6). This departure applies when the defendant lacks the capacity to appreciate the wrongfulness of his conduct or cannot conform his conduct to the requirements of the law. Mitigating Factor #3 (M3), which addresses cases where the defendant acted under coercion, threat, or duress in such a way that reduces his culpability, could also explain the departure but was not cited by the judge.

In 2011, there were 53 compliant departures. Of that total, 50 were mitigating departures and the average number of months by which the mitigating sentences departed was less than 14 months. Although departures are rare in the District, mitigating departures are most common among drug offenses. Approximately 82% of all mitigating departures involved drugs. Figure 1 shows the percentage of mitigating departures by offense types.

Figure 1: Percentage of Mitigating Departures by Offense Type



N = 50

B. Aggravating Departures

Defendant Bob: The victim is a 38-year-old male on his way home from work at approximately 9:30 pm. Bob and an accomplice pushed into an elevator behind the victim and slammed his head to the ground repeatedly before robbing him and getting out on another floor. The victim sustained a severe concussion and ultimately lost the hearing in one of his ears.

Similar to mitigating departures, in extraordinary circumstances a judge can depart above the Guidelines prison range in-the-box and impose a more severe sentence than would otherwise be permissible under the Guidelines. In this example, Bob's sentence to 84 months is above the range in-the-box. Since the sentence exceeds the prison range of 30 to 72 months in-the-box by 12 months, the sentence is considered to be compliant based on an upward departure. At Bob's sentencing, the judge indicated that an upward departure was warranted and cited Aggravating Factor #1 (A1). A1 signifies departures where there was deliberate cruelty or gratuitous violence inflicted upon the victim substantially beyond what is normally associated with the offense. As the victim suffered partial, permanent loss of hearing, Aggravating Factor #3 (A3) can also be invoked since A3 permits a departure where the victim sustained a devastating injury. In 2011, there were only three aggravating departures: one each for Murder II while Armed, Child Sex Abuse – 1st degree, and Conspiracy.

C. Catch-all Departures

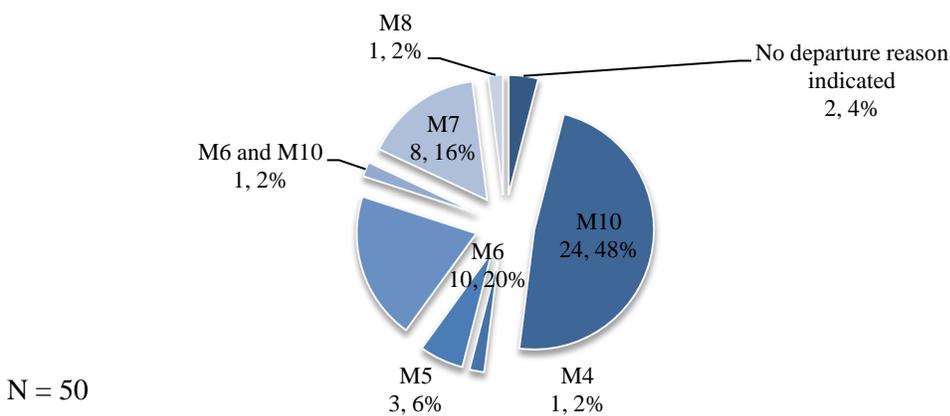
Defendant Don: The victim was a 32-year-old male on his way to the grocery store at approximately 9:00 pm. Don and the accomplice approached the victim from behind and yelled, "give me your money mister or you will get it." The victim dropped his wallet to the ground and ran away. Shortly after the robbery, Don turned himself into the police and returned the wallet with everything intact. He apologized for what he had done, explaining that he was desperate for money because his child needed medication that he could not afford and was not covered by insurance. He immediately realized that he was wrong and expressed sincere remorse for his conduct. After his arrest, the defense provided the government with documents related to the

child’s illness and medication. After hearing Don’s reasons, the victim asked the court for leniency.

The catch-all departure principles, M10 and A11, permit judges to depart from the Guidelines for relevant reasons not captured by the specified departure principles that aggravate or mitigate significantly the seriousness of the offense or the defendant’s culpability. Don’s sentence of 30 months, execution of sentence suspended, departs downwards from the recommended sentencing options. The judge sentenced Don under the catch-all downward departure after finding that the defendant’s actions were the result of his attempt to help his child. Importantly, the judge also noted the victim’s desire for Don to receive a lenient sentence. The catch-all departure reason (M10) is appropriate in this case because the reason given by the judge for departing is not specifically accounted for in any of the other departure principles. However, the judge’s articulated reasons for departing are comparable to other departure reasons.

While departing downward, it is common for judges to cite M10 as the departure reason. As seen in Figure 2, in 2011, out of the 50 downward departures, 25 were M10¹². As this does not provide a specific reason for departure, it limits the Commission’s capability to conduct in-depth analysis on departures in the District. However, just like the recommended guideline ranges are unable to take into consideration all possibilities, neither are the departure principles.

Figure 2: Mitigating Departure Reasons in 2011



¹² In 2011, there was one instance where the sentencing judge cited both M10 and M6 as the departure reason.

Conclusion

Departures are a valuable tool for maintaining uniform sentencing practices in the District's sentencing system. Fundamentally, they take into account special circumstances where the sentencing options on the Master Grid or the Drug Grid do not capture the true nature or unique circumstances of an offense. As the examples illustrate, there will always be cases that do not represent typical criminal behavior. Departures assist in guiding a judge's discretion while sentencing atypical offenses or offenders like Carl, Bob and Don.

Although compliant departures account for only a very small percentage of all sentences (1.6% in 2011), they are important to monitor since they offer insight into the kinds of offenses which call for a departure, as well as the types of sentences imposed. These findings may identify the need for changes in sentencing policy that result in more just and effective sentencing practices.

The Commission reports on both compliance with the Guidelines and the use of departures in the District. Examining departure patterns continues to be a valuable method for evaluating the effectiveness of the Guidelines and areas that may require further analysis. Ultimately, it provides an important means to improve on the framework used to guide sentencing decisions. As the Commission moves forward, analyzing departures, especially catch-all departures, will be vital to recommending future modifications and policy suggestions that will further support a uniform and effective guidelines system for the District of Columbia.

ⁱ Mitigating Departure 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 the 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.

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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 were 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.

ⁱⁱAggravating Departure 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 that results in one or more of the following:
 - a. Permanent and substantial impairment of the person's employment opportunity and/or lifestyle;
 - b. Permanent, gross disfigurement; or
 - 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 Disfigurement; Aggravated Assault; Assault with intent to commit any of the foregoing; Assault with intent to kill; Assault with a Deadly Weapon; or 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.

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11. There is any other substantial and compelling basis, as articulated by the sentencing judge, comparable in gravity to those listed in 1 to 10 above, which aggravates substantially the seriousness of the offense or the defendant's culpability.

Note: Going to trial is not an aggravating factor and should not be used to go outside of the box.

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