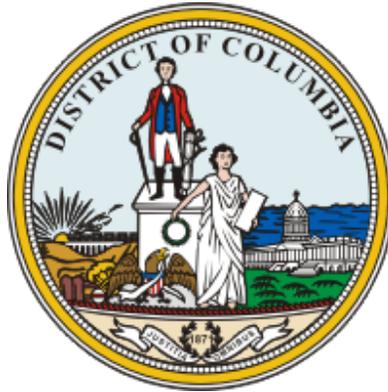




Probation under the D.C. Voluntary Sentencing Guidelines



2012 Issues Paper Number 2

DISTRICT OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION COMMISSION
441 FOURTH STREET, NW, SUITE 430 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 727-8822 FACSIMILE: (202) 727-7929
WEBSITE: <http://sentencing.dc.gov>

MEMBERSHIP OF THE DISTRICT OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION COMMISSION

The Honorable Frederick H. Weisberg
Chairman, Associate Judge
Superior Court of the District of Columbia

The Honorable Harold L. Cushenberry
Superior Court of the District of Columbia

The Honorable J. Ramsey Johnson
Superior Court of the District of Columbia

Donald Braman, Ph.D.
George Washington University School of Law

Ronald Gainer, Esq.
Attorney, Private Practice

Laura E. Hankins, Esq.
Public Defender Service for the District of Columbia

Renata Kendrick Cooper, Esq.
U.S. Attorney's Office

Cedric Hendricks, Esq.
Court Services & Offender Supervision Agency

David Rosenthal, Esq.
Office of Attorney General, District of Columbia

Michele Roberts, Esq.
Attorney, Private Practice

Vacant
Citizen Member

Julie E. Samuels
Urban Institute, Justice Policy Center

Earl J. Silbert, Esq.
Attorney, Private Practice

Anne Seymour
Citizen Member

Vacant
Academic Member

Michael Anzallo**
D.C. Metropolitan Police Department

Stephen J. Husk**
United States Parole Commission

Maria Amato**
D.C. Department of Corrections

Thomas R. Kane, Ph.D.**
Federal Bureau of Prisons

The Honorable Phil Mendelson**
Council of the District of Columbia

** Non-voting Member

COMMISSION STAFF

Barbara Tombs-Souvey
Executive Director

Thurman Sanders IV
Data Management Specialist

Anu Shrestha
Research Analyst

Linden A. Fry
Staff Attorney

Mia Hebb
Staff Assistant

Probation is a sentencing option used throughout the United States that entails a period of community supervision in lieu of or in addition to a period of incarceration. In 1878, Massachusetts was the first state to implement a probation program; however, it was limited to juvenile offenders. By 1938, 37 states had adopted either juvenile or adult probation programs. Probation focuses on holding an offender accountable for their criminal behavior while simultaneously working with them to eliminate future criminal behavior. Probation sentences require an offender to comply with specific conditions of supervision determined by the court, which, if violated, may result in more restrictive conditions or a period of incarceration.¹ The consequences of a defendant's failure to comply with the conditions of probation serve to motivate the defendant to successfully complete probation.² Probation sentences also often include rehabilitative efforts for offenders through involvement in programs identified by either the court or the probation department that address the specific needs that contributed to the offender's criminal behavior. Probation sentences are often imposed in cases involving a limited threat to public safety and for offenders with minimal prior criminal histories.

The D.C. Sentencing and Criminal Code Revision Commission (the Commission) developed, implemented and the D.C. Council adopted, the Voluntary Sentencing Guidelines (the Guidelines) for the District. The Guidelines recommend appropriate sentences for felony offenses, based upon the severity of the underlying offense and an offender's prior criminal history. The Guidelines are voluntary and do not mandate that the court impose the recommended sentence. Rather, the court may use its discretion in determining the appropriate sentence to impose for each individual case. While voluntary, the court imposed a Guidelines compliant sentence in over 97% of all felony convictions in 2011.

The Guidelines set forth in a grid format both the type and the length of the recommended sentence for individual felony offenses. Two separate grids are used for this purpose, a Master Grid and a Drug Grid, to determine the recommended sentence, as noted in Tables 1a and 1b below.³ Under the Guidelines, there are three permissible types of sentences: incarceration, split⁴, and probation⁵. While the Guidelines recommend the type of sentence and sentencing ranges to be imposed, they do not address the length of the term of probation. The only restriction governing the length of the term of probation is a statutory maximum of 60 months for any probation sentence imposed.⁶ This issues paper examines whether the average

¹ Following a violation of the conditions of probation, the court may re-sentence the defendant to serve all or part of any time initially suspended.

² Joan Petersilla, "Probation in the United States," *Perspectives* (1998) 30-41.

³ The severity level of offenses, as shown on the grids, decrease in ascending order, from M1 to M9 in the Master Grid and from D1 to D4 in the Drug Grid.

⁴ A split sentence is a period of incarceration followed by a period of probation, requiring the offender to serve some portion of the sentence either in jail or prison.

⁵ A probation sentence represents a suspended term of incarceration.

⁶ D.C. Code § 16-710.

length of probation only sentences⁷ shared the same consistency and certainty that was present with incarceration sentences during 2011. This paper will also analyze whether offense type and offender demographics impact the length of probation imposed.

Table 1a: Master Grid						
	Severity Level	Criminal History Score				
		0 to 0.5	0.75 to 1.75	2 to 3.75	4 to 5.75	6+
		A	B	C	D	E
3 Points*	M1	360 - 720	360 - 720	360 - 720	360 - 720	360+
	M2	144 - 288	156 - 300	168 - 312	180 - 324	192+
	M3	90 - 180	102 - 192	114 - 204	126 - 216	138+
	M4	48 - 120	60 - 132	72 - 144	84 - 156	96+
	M5	36 - 84	48 - 96	60 - 108	72 - 120	84+
2 Points*	M6	18 - 60	24 - 66	30 - 72	36 - 78	42+
	M7	12 - 36	18 - 42	24 - 48	30 - 54	36+
1 Point*	M8	6 - 24	10 - 28	14 - 32	18 - 36	22+
	M9	1 - 12	3 - 16	5 - 20	7 - 24	9+
* Criminal history points for prior convictions in these groups						
White/unshaded boxes - prison only						
Dark shaded boxes- prison or short split permissible						
Light shaded boxes - prison, short split, or probation permissible						

Table 1b: Drug Grid						
	Severity Level	Criminal History Score				
		0 to 0.5	0.75 to 1.75	2 to 3.75	4 to 5.75	6+
		A	B	C	D	E
2 Points *	D1	30 - 72	36 - 78	42 - 84	48 - 90	54+
	D2	12 - 30	16 - 36	20 - 42	24 - 48	28+
1 Point*	D3	6 - 18	10 - 24	14 - 30	18 - 36	22+
	D4	3 - 12	5 - 16	7 - 20	9 - 24	11+
* Criminal history points for prior convictions in these groups						
White/unshaded boxes - prison only						
Dark shaded boxes- prison or short split permissible						
Light shaded boxes - prison, short split, or probation permissible						

I. Application of the Guidelines to Probation Only Sentences

There are basically two types of probation sentences that can be imposed under the District’s sentencing guideline structure. The first is a probation only sentence, where the entire length of the prison sentence imposed is suspended and the offender is then placed on a term of probation. The offender may be required to serve all or a portion of the prison term identified in the suspended sentence if the court later revokes the probation sentence. Probation may also be imposed as part of a split sentence. In addition, there are instances where the sentence imposed in multiple count cases may result in the imposition of more than one type of sentence. For example, one count may be sentenced to a term of probation, while another count is sentenced to a period of incarceration, with the sentences to run either concurrent⁸ or consecutive⁹ to each another. For purposes of this issues paper, “probation only” cases are analyzed. Split sentences are not included in the analysis.

In 2011, the Commission reported that 3,959 felony counts were sentenced in the Superior Court of the District of Columbia. Of that total number of sentences imposed, 22% resulted in

⁷ This paper examines sentences where an offender received only probation without a term of incarceration, i.e. it does not include split sentences.

⁸ When an offender is sentenced for two or more offenses and the judge rules for these sentences to be served at the same time, the sentences are said to run “concurrent” to each other.

⁹ When an offender is sentenced for two or more offenses and the judge rules for these sentences to be served one after the other, the sentences are said to run “consecutive” to each other.

probation only sentences compared to 14% split sentences and 64% incarceration sentences. The percentage difference between probation and other types of sentences imposed is partially explained by the structure of the Guidelines. An incarceration sentence is an eligible sentence in all 65 grid boxes (45 in the Master Grid and 20 in the Drug Grid), while probation is only eligible in six boxes in the Master Grid and ten boxes in the Drug Grid.

In both the Master Grid and the Drug Grid, as offense severity levels increased, the number of probation only sentences in each grid box decreased.¹⁰ For example, there were only 67 (10%) probation sentences imposed in D2A¹¹ (a more severe offense group), whereas there were 155 (23%) probation sentences in D3A (a less severe offense group).¹² Probation is mainly reserved for offenses ranked on the lower offense severity levels. Thus, there were no probation sentences for offenses in rows M1 through M4 and in row D1, which reflect the highest offense severity levels. The number of probation sentences in each grid box also decreased with increase in criminal history scores. For example, 67 (10%) probation sentences were imposed in grid box D2A (representing a lower criminal history score) and only 36 (5.3%) in D2B (representing a higher criminal history score). Overall, offenders with lower criminal history scores and sentenced for less severe offenses were more likely to receive a term of probation.

A. Compliance with the Guidelines

Based on the offense severity level and criminal history score, the grids present both a recommended sentence type and a recommended sentence range for incarceration sentences. If the sentence imposed by a judge falls within the recommended options, it is considered a compliant sentence. If the sentence falls outside the recommended options it is considered a “departure.” Departures may also be considered a compliant sentence if they satisfy a set of conditions defined by the Guidelines, which enables a judge to use his/her discretion to impose a sentence different from the recommended options. Departures are classified as either dispositional or durational. In the former, the judge imposes a different sentence type from what is recommended by the Guidelines (e.g. a probation sentence instead of incarceration); while the latter takes into account the length of sentence imposed and the sentence range recommended by the Guidelines.

In 2011, the compliance rate for incarceration sentences was 98% compared to 96% for probation sentences. Among the 673 probation only sentences analyzed by the Commission,

¹⁰ D4 was only added after June 14, 2011; hence it has very few offenses that fell in this severity level.

¹¹ Grid boxes represent the intersection of a severity group and a range of criminal history scores. Thus, they are referred to by the same severity level and criminal history category. For instance, M1A refers to the intersection of severity level M1 and criminal history score 0 to 0.5, which is column A in both grids.

¹² In 2011 the Commission had complete data for 92% of all felony counts. Compliance rates and criminal history information are based on these data only. There were 673 probation only sentences for which complete data was available.

there were 12 compliant departures and 31 non-compliant departures. The compliant departures were imposed solely for drug offenses, with the exception of a single property offense. Similarly, among non-compliant probation sentences, Possession with Intent to Distribute/Distribution of a Controlled Substance (PWID+Dist) and attempted drug offenses were the two most common offenses.

Probation only sentences in general were more prevalent on the Drug Grid than on the Master Grid. This finding is at least partially a result of the structure of the grids because probation only sentences are eligible in ten out the 20 grid boxes in the Drug Grid whereas only six of the 45 grid boxes in the Master Grid provide for probation only sentences under the Guidelines. Additionally, offenders who commit drug offenses often have very lengthy substance abuse histories and are in need of treatment to overcome their dependency on drugs. A probation sentence that includes multiple treatment modalities may be more effective at addressing the chronic substance abuse issues of some older offenders and reducing their recidivism rate.

B. Length of Probation Sentences

Under the structure of the Guidelines, the average length of incarceration in each grid box increases with the corresponding increase in offense severity level and criminal history scores. A similar trend can be seen with the term of probation imposed following a suspended sentence with respect to severity level, in spite of the absence of any guidelines recommending the term of probation imposed. Tables 2a and 2b show the number of probation only sentences in each grid box, and the mean and median term of probation for these sentences. The shaded areas represent grid boxes where probation sentences are eligible under the Guidelines.

Severity Level		Criminal History Score				
		0 to 0.5	0.75 to 1.75	2 to 3.75	4 to 5.75	6+
		A	B	C	D	E
M5	N	2	2	1		
	Mean	60.00	48.00	60.00		
	Median	60.00	48.00	60.00		
M6	N	2				
	Mean	21.00				
	Median	21.00				
M7	N	6				
	Mean	22.00				
	Median	18.00				
M8	N	187	31	3	1	
	Mean	19.75	18.00	18.00	24.00	
	Median	18.00	18.00	18.00	24.00	
M9	N	38	38	38		
	Mean	27.00	14.67	40.29		
	Median	18.00	12.00	24.00		

Severity Level		Criminal History Score				
		0 to 0.5	0.75 to 1.75	2 to 3.75	4 to 5.75	6+
		A	B	C	D	E
D2	N	67	36	4	5	2
	Mean	17.33	20.67	18.00	13.20	60.00
	Median	18.00	18.00	18.00	12.00	60.00
D3	N	156	62	38	8	2
	Mean	16.74	17.18	20.26	21.38	12.00
	Median	12.00	18.00	18.00	19.50	12.00
D4	N	1	2	1		
	Mean	24.00	12.00	18.00		
	Median	24.00	12.00	18.00		

Generally, as the severity level of offenses decreased, the mean term of probation also decreased. However, when taking criminal history into account, probation only sentences fail to demonstrate the same trend as incarceration sentences. Offenders with higher criminal history score would be expected to receive longer terms of probation, but this only holds true in severity level D3 in table 2b. There was no consistent increase or decrease in mean terms of probation as criminal history scores increased, which varies from incarceration sentences.

II. Demographics of Offenders Sentenced to Probation in 2011

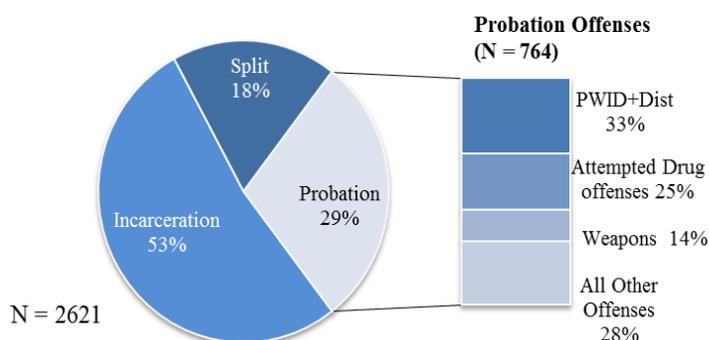
Of the 764 offenders sentenced for 838 probation only sentences in 2011, 95% were Black, 80% were males, and most offenders (34%) were between 18 to 24 years of age. This mirrors the total population of 2,621 offenders sentenced in 2011, which also consisted of an overwhelming majority of Blacks (95%), males (88%) and offenders between 18 to 24 years of age (35%).

When comparing the percentages of offenders that received probation by race, the differences were insignificant. The rate of probation among all races was approximately the same, varying between 26 to 30%. Incarceration was a more frequent sentence type across all races; however, the rate of incarceration among races did not differ by more than one percentage point at approximately 52% for all races. The data indicate that there were no substantial racial disparities between offenders who received probation or those who were incarcerated.

Unlike race, there were noticeable differences when comparing probation sentences by gender. A higher percentage of females (49%) were sentenced to probation than males (26%), although the average probation term for both genders was the same (19 months). This finding may be due to the fact that females were more likely to be sentenced for low-level drug offenses than males. Since attempted Possession with Intent to Distribute or the Distribution of Drugs usually do not involve acts of violence, they are ranked lower on the sentencing grid for which a sentence of probation is considered appropriate. Males, on the other hand, had a significantly higher rate of incarceration (55%), which can be partially explained by the higher average criminal history score of males (2.08) when compared to females (1.23). Since an offender's criminal history is also a factor when determining the recommended sentence under the Guidelines, males were sentenced to a period of incarceration more often than females.

As with gender, there were significant differences between age groups as well. Offenders aged 53 and older were more likely to receive probation than other sentence types since 65% of offenders in this age group were also sentenced for low-level drug offenses. In 2011, the average age of all drug offenders was 37 years whereas that of non-drug offenders was 28 years. Younger offenders tended to commit more serious and violent offenses, with incarceration being more prevalent in offenders from the age group 25-31.

Figure 1: Percentage of Sentence Type by Offenders and Most Common Probation Offenses



Although there is a wide spectrum of offenses for which a judge can impose a compliant probation sentence under the Guidelines, the majority of probationers (72%) were sentenced for one of three offenses: Possession with Intent to Distribute or Distribution of a Controlled Substance (PWID+Dist) (33%), Attempted drug offenses (25%) and Weapons offenses (14%). The majority (86%) of Weapons offenses

sentenced to probation were for Carrying a Pistol Without a License. Since all three offenses are ranked lower on the sentencing grids, they have a higher likelihood of receiving a probation sentence. The average criminal history scores of offenders sentenced to probation for these offenses were also relatively low (1.1 for PWID+Dist and Attempted drug offenses, and 0.3 for Weapons offenses), making the offenses appropriate for a term of probation.

Of the three offenses, women were more likely to be sentenced for either PWID+Dist or Attempted drug offenses, with only five female probationers sentenced for a Weapons offense. Similarly, there were differences between age groups as well. As mentioned earlier, older offenders aged 53 or more were more likely to be sentenced to probation for either PWID+Dist or Attempted drug offenses; whereas offenders sentenced to probation for a Weapons offense were most likely to be between 18 to 24 years of age.

III. Conclusion

There are two ways in which the Guidelines direct sentencing practices in the District given the offense severity level and criminal history score. First, the Guidelines recommend the type of sentence to be imposed; and second, it provides a recommended sentence length for offenders receiving a period of incarceration. However, for probation sentences, the Guidelines only recommend when a probation sentence is appropriate but not the length of the probation term to be imposed. Also there is no guidance on when to use probation versus incarceration in a light shaded grid box. This issues paper examined whether, in the absence of such Guidelines for probation sentences, the length of probation sentences also followed the same trend as incarceration sentences which have more stringent guidelines.

Similar to incarceration sentences, the imposition of probation sentences followed the Guidelines fairly consistently with a significant compliance rate of 96% in 2011. Offenders with low criminal history scores who committed relatively less severe offenses were more likely to receive a probation sentence. Probation sentences followed the same trend as incarceration

sentences when examining the severity level of offenses. The average term of probation as well as length of incarceration increased with the increase in severity levels. However, when considering criminal history, the length of incarceration increased along with an increase in criminal history scores, but there was no consistency when examining the term of probation with respect to criminal history scores.

When studying the demographics of probationers, offenders of all races were equally likely to receive probation. However, females and older offenders were more likely than males and younger offenders to be sentenced to probation, probably because they were sentenced more frequently for low level drug offenses than for non-drug offenses. PWID+Dist, Attempted drug offenses and Simple Weapon Possession offenses were the three offenses that received probation most frequently, since they were all offenses from low severity levels.

On the whole, probation sentences did not entirely follow the same trends as incarceration sentences. The variation could be due to the fact that probation needs to be more flexible to address the individual needs of offenders in order to reduce recidivism. Since drug offenses comprise the majority of probation sentences it reinforces the need for variation in the type and length of sanctions imposed by the court and reflect the ongoing struggle the criminal justice system has with addressing chronic substance abuse. Given that the Guidelines do not purport to address the length of probation to be imposed, there are nonetheless some observable parallels between the length of prison terms and the lengths of probation terms for offenses of comparable severity. The exception is criminal history where prison terms generally increase as criminal history increases but the length of probation terms does not follow the same pattern.

Contact Information:

District of Columbia Sentencing and Criminal Code Revision Commission

441 4th Street, N.W.

Suite 430 South

Washington, D.C. 20001

Office: (202) 727-8822

Fax: (202) 727-7929

Email: sccrc@dc.gov

Website: <http://sentencing.dc.gov>