District of Columbia
Advisory Commission on Sentencing
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FULL COMMISSION MEETING MINUTES
Wednesday, April 23, 2003
500 Indiana Ave., N.W.
Washington, DC

Attending	L. Hankins	F. Weisberg	N. Joyce
	T. Kane	P. Riley	A. Teal
	C. Wellford	R. Johnson	T. Edelman
	R. McPhatter	E. Silbert	A. Seymour
	A. Chaturvedi	R. Buske	
	C. Chanhatasilpa	K. Hunt	

I. Call to order at 5:20 p.m.

II. F. Weisberg called the meeting to order. Members reviewed the minutes. Minutes were approved pending any last minute revisions that are sent to K. Hunt by the end of this week.

III. F. Weisberg updated the full Commission on the activities of the Research Subcommittee. He began with a review of what had been presented at the March meeting of the Commission. There is an In-Out line, without regard to sentence length, that should be clear due to the shading of the cells. In the lightly shaded boxes, probation (although it will not be written in the box) will constitute a compliant sentence. In the darkly shaded boxes, a split sentence (which again will not be written in the box) with a sentence of less than 6 months and some period of probation would be a compliant sentence. Judge Weisberg next reviewed the proposed midpoints for the "A" category on the grid, explaining that this was as much as the subcommittee was prepared to present at the last meeting. Since then, the subcommittee had made more decisions at an all-day meeting on Saturday April 12th. He also pointed out that the midpoints are deceiving because they will not appear on the grid, rather they are replaced with an actual range. Tonight, members will see a more developed grid with tentative suggestions and with many important questions left to answer.

He explained that very early in their decision-making process, the subcommittee had to decide between two options for a sentencing grid:

- Three ranges—a Presumptive Range, an Aggravated Range and a Mitigated Range (similar to North Carolina); or

- One range, that represents the sentences for the Heartland cases that are most common for each offense (roughly the middle 50% of historical data), with an approved list of aggravating and mitigating factors. This list, which would not be exclusive, would include a factor at the end that would allow the judge to rely on other compelling reasons for the departure, providing a statement of the reason.

The subcommittee decided on the second option -- one range with a list of aggravating and mitigating factors. Looking at the draft grid, F. Weisberg explained that many of the ranges are very wide because the data suggests that they should be this wide. For example, Box 3A ranges from 5 years to 15 years based on historical data. The concern is that compressing the ranges further could lose judges to departures in cases that were not objectively outside the heartland. F. Weisberg explained two hypothetical problems. First, judges could be herded into the guidelines even when a departure is warranted by an extraordinary case. Second, since sentencing is a difficult process and there is so much discretion necessary even within a guidelines framework, disparity could occur when judges see fit to depart in cases where most would say a sentence within the guideline range was warranted.

F. Weisberg then concluded that, with ranges as wide as those in the proposed draft, he would expect to see more than 50% of sentences fit within the guidelines under structured sentencing.

F. Weisberg then moved on to the topic of drug offenses, explaining to the Commission that the subcommittee decided to remove drug offenses from the grid and that now Group 8 consists of minor nonviolent felonies. For drug offenses, they propose a separate grid or a separate sentencing format that has yet to be determined. F. Weisberg stated that when the Commission was originally ranking offenses, there was some discussion of taking them out, but that they had decided at that time to leave drugs in the grid for purposes of meeting the Council's mandate for the 2002 annual report.

At that time, when attempting to rank drug offenses, it was decided that based on seriousness, they belonged in Group 8. However, as F. Weisberg explained, drug cases are different, and the court's handling supports this view. While the median sentence to incarceration for drug offenses was 12 months, approximately 62% of first-time drug offenders were sentenced to probation, the highest percentage for any group. Secondly, since Group 8 would have a median of 12 months, Group 7 had to have a higher median. Although the data supports a median of 12 months for Group 7, the subcommittee originally artificially created a 16-month median.

As a result of these considerations, the subcommittee decided to take out drug offenses. After reviewing median sentences for the Group 9 offenses, they moved some offenses up to Group 7, created a new Group 8, and then left the remaining offenses in Group 9. Although the data themselves were not presented at the meeting, F. Weisberg stated that Group 9 did break down nicely into three distinct groups. In the end, this process allowed the subcommittee to split up Group 9, which had previously been over inclusive, with dissimilar crimes thrown together in a single group.

Returning to the draft grid, F. Weisberg explained that there are two major principles of proportionality that drive the grid:

- As the seriousness of the offense increases, the sentence increases (as you move up the grid)

- As the criminal history of the offender increases, the sentence increases (as you move from left to right across the grid)

However, looking closely at the grid, F. Weisberg pointed out that these principles are neither perfect nor pure. Looking at Group 6 and Group 5, as an example, there is some overlap. For 6A, the range is 12-36, whereas for 5A the range is 18-48. A sentence of 24 months would be well within both ranges, even though Group 5 offenses are, by definition, more serious than Group 6 offenses. Inevitably, there is a choice: how much overlap to allow? In addition, the same overlap occurs when moving from left to right, and the data does not in many categories justify an increase from left to right. F. Weisberg stated that this is counterintuitive to his experience. He then accounted for this disparity by explaining that the criminal history data being used does not capture misdemeanors, nor does it capture all of the out-of-state convictions. The data being used comes from Superior Court automated files and Pre-trial Services automated records, and staff are attempting to collect Pre-sentence Reports to get a better idea of how these missing factors are affecting sentences.

While on the topic of criminal history, L. Hankins pointed out that it is possible for an offender to move along the horizontal axis without necessarily having a significant criminal record. She pointed out that the Criminal History subcommittee is discussing adding a point to the C.H. score for an offender on some form of supervision at the time of the offense, and for an offender who has committed a crime within the last two years. She concluded that these additional factors should be kept in mind for the Commission's discussions. K. Hunt added that these factors are definitely not included in the data being used. F. Weisberg stated that these were good points and should be high on the list of things to decide on for the Criminal History subcommittee (he also noted that these had been borrowed from the 1987 Guidelines). E. Silbert then pointed out that judges, while still sentencing within the ranges, could use this information. P. Riley noted that while the sentencing range moved up with increases in prior record scores, the low end of the category "E" range is still within the "A" range.

Getting back to the draft grid, F. Weisberg explained that as you move from left to right in Groups 7, 8, and 9, the ranges increase (top and bottom) by 4 months from cell to cell. Likewise, for Groups 5 and 6, the top and bottom of the ranges increase by 6 months from cell to cell. Finally, for Groups 1-4, the ranges increase by 1 year from cell to cell as criminal history increases.. The reasoning behind this is that at the lower levels, an increase of 4 months in significant, whereas, as you go up the grid, a higher difference is necessary. He then moved the Commission's attention to Box E. The central question for the subcommittee was whether or not this box should follow the same pattern, or whether it should be an escalated range. The subcommittee tentatively decided that for those offenders with serious records and for the most serious offenses, it is hard to argue that

judges shouldn't be allowed to sentence at the statutory maximum. If they did not allow judges to do so, many constituent groups would object and question this decision. For example, with a straight line progression Cell 5E would have been "42-72 months" rather than "42+" for crimes which in many cases carry a maximum sentence of 15 years or 180 months (13 years of which may be imposed by the sentencing judge). Therefore, the subcommittee decided to designate each range in Box E with a "+" rather than an absolute number. F. Weisberg cautioned that the problem with this approach is that there could be a lot of disparity if the Criminal History data is wrong and the number of offenders who end up in row E is greater than now shown; if this occurs, the Commission's attempts to reign in disparity might fail.

E. Silbert then raised a practical point. In his opinion, sentencing offenders with more prior convictions was not always the best policy. Taking into account the danger that an offender poses to the community, plus the likelihood of recidivism, he argued that a 22 year old with 2 prior convictions is often a more serious risk to public safety than a 32 year old with 6 prior convictions. This philosophy is based on statistical data, which shows that people age 16-23 are most likely to offend, and that older persons, are less likely to offend. J. Weisberg and N. Joyce agreed that the sentencing judge must take into account not just the age of offender alone, but the criminal history at what age. C. Wellford pointed out that wide ranges and overlapping of these ranges allows the judge to have discretion to consider age and other factors. P. Riley noted that the median age in the District, as found in the Commission reports, was 31 years of age, which appears to be older than offenders being sentenced in other jurisdictions.

R. Johnson suggested having the current broad ranges broken down into 3 ranges that reflected high, average, and low sentences so the guidelines appeared more "structured." The judge would then decide the appropriate range based on sentencing factors. He also noted that this would allow for structuring of plea-bargains. A. Chaturvedi and P. Riley asked how these specific shorter ranges would add structure to the guidelines. L. Hankins added that since in current practice plea offers are not binding for the judge, attempts at structuring plea-bargains would not accomplish certainty in sentencing.

F. Weisberg noted that the 180-month median (15 years) established by the data for Group 2 offenses may not be entirely accurate and reflective of what sentence practice in the District has been. He pointed out that judges might have sentenced higher than 15 years if they were not restrained by the 15-year statutory limit on the bottom number. Also, an offender sentence to 15 to life in the old system would undoubtedly serve longer than 15 years in most cases. He added that we are not sure how much time is being served for Group 2 offenses, but it is almost certainly more than 15 years and less than 30 years. The research subcommittee looked at a 120 to 240 month range initially, but now agrees that this is probably too low, and recommends a 144-288 month range. Commission members agreed that they would ask their respective constituencies about the recommended ranges in all categories.

F. Weisberg also noted that earlier concerns by some Commission members focused on truth-in-sentencing changes, and the possibility that judges would feel pressure to move sentences progressively higher, especially for violent crimes. This had been one argument

for guidelines. Now, judges and others would be asked to provide feedback before and during implementation, with the idea that ranges that seem unreasonable can be adjusted.

The discussion then turned to the role of alternative sanctions. R. Johnson views intermediate sanctions not as enhancements to probation but alternatives to prison. He also noted that if programs are run properly they could save the District money. P. Quander added that the options and possibilities exist for well-run programs. For example, 24-hour monitoring by global positioning system is possible, and six offenders are currently on this system.

L. Hankins reported she and T. Edelman met with a small group of PDS attorneys. She noted that this group, at least, was not comfortable with the concept of structured sentencing, and was not ready to discuss specifics. They want to know more about the system first.

L. Hankins noted that a troubling issue for her was that it seems "easier" for judges to sentence on the high end using aggravating factors but it is more politically difficult for them to depart downward. F. Weisberg pointed out that a goal of the Commission is not to make it hard to depart in either direction. Instead, it must be made clear that the guidelines and the resulting sentences are a learning experience. Judges can initially sentence outside the range, explain their reasoning, and the Commission can revise the guidelines as necessary. P. Riley suggested asking for more time to examine new law sentences. F. Weisberg noted that more time would not necessarily affect what the Commission is doing anyway. P. Quander noted that having guidelines, with a clear departure rationale is useful for community members, offenders, etc. "When a particular crime is committed, this is the sentence to expect." Further, judges in Superior Court have, in effect, 15-year no-cut contracts and have a lot of latitude to use discretion even under a structured sentencing system. A. Teal noted that the potential for sentence creeping upwards already exists, without structured sentencing. F. Weisberg and R. Johnson added that they think that judges who sentence above the range will come down once they realize where they fall relative to others, and will be quite interested to gauge their sentences relative to their colleagues. C. Wellford noted that in other states and the federal system, most departures are downward.

R. McPhatter asked whether discrepancy in sentencing was high in the District currently. She questioned if guidelines in the District were justified in comparison to other jurisdictions (prison space/costs; rural/urban differences). F. Weisberg noted that the discrepancies in sentencing in Superior Court are probably pretty high, and sample cases in past sentencing institutes bears this out. There are differences in philosophies between judges that lead to these disparities. R. Johnson noted that one instance of this occurs between December and January as judges rotate to new calendars. There is evidence of a rush to plead guilty in December if the judge in January is perceived to have a tougher sentencing philosophy than the December judge.

It was agreed that articulating the rationale was very important in the next stage. R. Johnson reminded the group that the principle rationale previously articulated was that

determinate sentencing was implemented without a change in the penalty structure, leading to greater exposure for many defendants.

L. Hankins also noted that the educational effort must start right away. A. Seymour noted that she forwarded an outreach plan to staff several months ago, and now may be the time to pick it up.

The assignment for the research subcommittee meeting is to examine offenders to see if they need to be re-ranked and to develop proposals for drug offenses. Intermediate sanctions also need to be studied. Another pressing agenda item is formulation of departure principles and lists of aggravating and mitigating factors. This will most likely be done during another all day research subcommittee meeting, yet to be scheduled.

Adjourn at 7 p.m.

NEXT FULL COMMISSION MEETING:

Wednesday, May 21, 2003 at 5:00 p.m. at 500 Indiana Avenue, N.W.

NEXT RESEARCH SUBCOMMITTEE MEETING:

To Be Announced

NEXT CRIMINAL HISTORY SUBCOMMITTEE MEETING:

To Be Announced