



# District of Columbia Advisory Commission on Sentencing

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## FULL COMMISSION MEETING MINUTES

Wednesday, June 18, 2003  
500 Indiana Ave., N.W.  
Washington, DC

Attending	L. Hankins	F. Weisberg	P. Riley
	N. Joyce	T. Edelman	M. Roberts
	E. Silbert	R. Johnson	H. Cushenberry
	A. Chaturvedi	R. Spagnoletti	A. Seymour
	R. Scotkin	P. Quander	R. Buske
	J. Cronin	K. Hunt	C. Chanhataasilpa

I. Call to order at 5:15 p.m.

F. Weisberg called the meeting to order. F. Weisberg then asked that members review the minutes from the last meeting and give any edits or corrections to K. Hunt by the end of the week.

II. F. Weisberg explained that his presentation would attempt to synthesize and summarize what has been a very complex task for the Research Subcommittee. He added that he hoped the Full Commission would be able to reach as much consensus as possible on as many issues as possible as they prepare to report to Council.

F. Weisberg reviewed with members the preliminary decision to remove drug offenses and place them on their own grid. As a result of this proposal, the subcommittee was able to refine Group 9 and break it out into a new Group 8 (containing the more serious charges from the original Group 9) and a new, smaller Group 9. One additional change from the last meeting is that Escape has been moved from Group 9 to Group 8. The subcommittee felt that this offense is closely related to Bail Reform Act, which is also in Group 8.

F. Weisberg then directed members to the proposed grid in their package of materials. There are new ranges for Groups 8 and 9, due to the concern raised by the US Attorney's Office that the previous ranges were too narrow. Their concern was that the narrow ranges would make it difficult for attorneys to reach plea agreements. The ranges were widened mostly at the lower end, rather than at the top. Reading from left to right, the new Group 8 ranges are: 2-10, 4-14, 8-18, 12-22, and 16+. From left to right, the new Group 9 ranges are: 1-6, 3-10, 5-14, 7-18, and 9+.

F. Weisberg then added that in his opinion, the ranges were too wide. His goal is to bring outliers into a tighter range. He pointed out that the wide ranges above Group 6 were wider than most other state systems. He asked that the Commission think about this fact and consider whether or not it should be addressed. **Action Item: Staff and members to consider ideas for narrowing ranges.**

P. Riley added two comments this discussion: First, the process of creating ranges was heavily guided by historical data. Second, the light gray boxes (probation and split sentences eligible) represent 74% of cases, and the dark grid (split sentences permissible, but not probation) represent an additional 12% of cases. Thus, only 14% of total cases are not eligible for probation or split sentences.

R. Johnson pointed out that the Commission's goal is to reduce disparity without substantially increasing complexity. While the ranges are wide, the system does reduce the most extreme sentences, and therefore reduces disparity. Further, disparity reduction can be reassessed after some experience under structured sentencing.

F. Weisberg stated that the process was very faithful to the data, and that the middle 50% of sentences result in very wide ranges, removing the upper and lower 25%.

III. F. Weisberg then moved the discussion to the issue of Departures. He reaffirmed his hope that structured sentencing will capture almost all cases, unless there is something extraordinary about a particular case. His goal is to have only about 10% of cases on either side (aggravating or mitigating) as departures. Based on the data, 25% of cases on either end are outside of the range, and this is something he considers unfair and undesirable. Fairness requires that differences in judicial philosophies should not lead to widely disparate sentences, and should ordinarily fit within the guideline range.

The key question is: How easy or hard should it be for judges to depart? The lowest standard of departure would be: The sentencing guideline is inappropriate. The highest standard would be: The sentencing guideline is manifestly unjust. Other standards that are more in the middle would be: Substantial and compelling, or simply Substantial.

L. Hankins and T. Edelman are more comfortable with a lower standard of Substantial for departure.

F. Weisberg explained that some of the questions the subcommittee had to answer were whether or not they should have approved reasons to depart; whether these reasons, if drafted, should be exhaustive; and whether or not there should be prohibited factors. After much debate, the subcommittee agreed to 1) have approved reasons to depart, which 2) would not be exhaustive. These reasons, called aggravating and mitigating factors, include a catch-all at the end that allows a judge to depart for a reason not listed that is equal in gravity to the other listed factors.

T. Edelman explained that he and L. Hankins had proposed an additional mitigating factor: The need for treatment exceeds the need for punishment. He also mentioned that

the subcommittee had not agreed to include #8 on the aggravating factors list, which concerns the use of “flagrant perjury.”

F. Weisberg stated that the concern about #8 was that it would be abused by judges, and would hamper a defendant’s right to testify. He proposed that perhaps the “idea” of #8 could be added to #7.

F. Weisberg explained a few other changes that were not controversial. On the list of mitigating factors, for number 7, “major assistance to law enforcement” has been changed to “**substantial** assistance to law enforcement.” And, for number 8, “cannot be adequately protected” has been amended to “cannot be adequately protected **or treated.**” This last one has been changed because the subcommittee recognized that they couldn’t anticipate every need of an offender.

A. Chaturvedi mentioned that number 8 could be included in the catch-all.

E. Silbert asked about the anticipated implementation of sentencing guidelines. How will departures be handled? Will there be hearings? And, what is the standard of proof that will be used?

F. Weisberg stated that there would be notice given. The defense needs to know if the judge will consider an aggravating factor. The government needs to know if the judge will consider an mitigating factor. His concern is that it should not become too cumbersome and he does not want it to become a mini-trial, but that there should be due process. He is not sure that the Commission needs to develop a standard, but rules need to be written. **Action Item.** In addition, there may be Apprendi issues. **Action Item.**

R. Spagnoletti stated that not having clarity at the beginning will be a problem later on; he explained that often attorneys plea bargain so that the victim will not have to testify. If there is a hearing, the purpose of the plea is compromised because now we are asking the victim to testify at the sentencing hearing as to the aggravating factor. He gave the example of a defendant who claims the victim was the aggressor, a possible mitigating factor. The victim could be forced to testify at the hearing to justify a sentence within the guideline range. He suggests a standard be developed to guide hearings.

R. Johnson stated that he could not imagine creating a system where new evidence often has to be put on at a sentencing hearing. One approach would be to continue the sentencing hearing to a later date if either side objects to proceeding because they are not prepared to address a proposed aggravating or mitigating factor which has appeared in the pre-sentence report.

M. Roberts explained that in the federal system, notice is provided, lawyers come into court prepared to argue certain factors that they want the judge to consider and this is hard to avoid. There will be longer hearings, at least for serious cases, than there is today in Superior Court.

F. Weisberg urged members to read the 1987 Proposed Guidelines, pages 33-34, for an explanation of how the old Commission proposed to handle these issues. P. Riley told members that her office was scanning the 1987 Guidelines and that they would be available electronically, hopefully by the end of the week.

E. Silbert stated that he would be hesitant to include perjury as an aggravating factor. While he understands why some might want to include it, his perspective is that if a defendant wants to get on the stand and try their story, he/she should be allowed to do so, because often that story will fall apart on cross-examination. If the perjury is substantial, it should be handled with the filing of additional charges against the defendant.

A. Chaturvedi argued that if the mitigating factor proposed by T. Edelman and L. Hankins (The defendant's need for treatment substantially exceeds the need for punishment.) is included, it will be raised in every case by any good defense attorney.

T. Edelman argued that this factor is necessary and gave the following examples: 1.) a long-time drug addict who has a long record of nonviolent offenses but has never gotten adequate treatment, will most likely be in a box where treatment is not an option, and 2) someone with charges in both juvenile and adult court could serve five years in a juvenile facility with probation in an adult case, even if the adult case is an offense where probation is not an option. T. Edelman further argued that the catch-all does not address these issues, and pointed out that this factor was taken from the Delaware departures list. He also mentioned that it would be possible to restrict judges from using this factor on certain sections of the grid.

R. Scotkin explained that in the federal system, most offenders who fit the profile described above and are amenable to treatment have gotten treatment. She argued that making rules for rare cases is a bad idea. H. Cushenberry agreed, stating that if it is in writing it will become a rule rather than an exception. P. Quander also agrees.

L. Hankins urged not limiting the ability to argue a departure based on treatment needs. The judge would likely reject for serious violent crimes, so that should not be a reason to reject the notion (M. Roberts seconded this point). She mentioned that they need to address how sentencing hearings will change under the new system. She for one does not foresee a system in which sentencing hearings go for days. A. Chaturvedi said treatment needs are a reason to select the lower end of the range, not to depart from the range. P. Quander noted that the first example, the long time offender with a persistent drug habit, is exactly the offender the community is very concerned about.

L. Hankins notes that lawyers will need notice on criminal history scores, because right now there are problems with determining out of state convictions. F. Weisberg would be comfortable adding a rule that if it is hard to determine whether or not an out of state conviction is accurate, then it should not be included. He explained that judges in DC deal with a high volume of cases and that discrepancies in offenders' records are a major problem and that figuring out a solution is difficult and time-consuming.

P. Riley argued that the proposed treatment factor is "the exception that swallowed the rule." Since 86% of cases are at the bottom of the grid, she does not agree with using alternative sanctions for violent or repeat offenders. If they are not going to improve the system, why have guidelines?

A. Seymour reminded the Commission that their proposals have to pass public scrutiny. Much of the public is fed up with the status quo. In terms of the proposed treatment mitigating factor, she stated that most members seem to be assuming it means drug

treatment. She argued that the defense attorney for a rapist could just as easily use it as a rationale for some sort of sex offender treatment program.

T. Edelman stated that perhaps writing an effective commentary for several of the factors could solve some of these issues. He also pointed out that many of the aggravating factors could be raised in every single case as well.

R. Johnson explained that his problem with the proposed 9A is that it sounds like it is more based on a particular philosophical approach to sentencing than a fact based factor.

M. Roberts stated that she did not believe that 9A would work very often, so why would it matter how often defense attorneys argued for it.

**Action Item: F. Weisberg proposed that T. Edelman and his coworkers should draft new language for 9A and then present it to the Commission for consideration. He hopes that commentary will help with some of these issues.**

P. Riley reiterated that she believes it should be hard for judges to depart. L. Hankins commented that mitigated departures will not necessarily mean that a judge is sentencing someone to probation, only that they are going below the range.

F. Weisberg stated that the Commission must decide if there will be rules governing departures or whether, once a judge departs, “all bets are off.” An alternative would be to cap departures above the guidelines at, for example, twice the upper range (and ½ the lower range for mitigations). P. Riley and N. Joyce both stated that it should be difficult to depart, and if it is, then they should ask themselves why sentencing guidelines are necessary.

E. Silbert commented that it is impossible to create a perfect system, but disparity can be reduced. If it is more rigid, then there will be less discretion. He argued that if the Commission is able to eliminate the extremes, 25% of cases on either side, it is a major accomplishment. If this occurs, the Commission will have eliminated a lot of disparity. He also added that the standard for departure should be strong, but is uncomfortable with “compelling.”

M. Roberts stated that she would be comfortable with a lower standard for departures. L. Hankins argued that she does not believe that a standard of “substantial” will lead to a free for all.

R. Johnson suggested: “clear and convincing.” E. Silbert stated that in historical case law, the term “substantial” often amounts to not very much evidence. He argued that the Commission should use something like clear and convincing, which is known in law. He referenced a paper written in response to the federal sentencing guidelines that is relevant, and agree to find and share it.

P. Riley stated that “clear and convincing” is an evidentiary standard and that this is not a reason, not the same as a catch-all departure factor. Something can be clear but fall short of a legitimate reason. F. Weisberg explained that the standard would apply to all

of the factors, not just the catch-all. R. Johnson concurred, explaining that the judge may find that a factor applies to a certain degree, and yet still not depart. One case would be when a judge finds one aggravating factor and one mitigating factor in the same case, which would then cancel each other out. He added that reasons 1-9 are substantial on their face, but more is needed to justify a departure.

L. Hankins noted that clear and convincing evidence would be appropriate for “gratuitous violence” departures, for example.

P. Quander raised the concern that in the community, departures need to be understood and accepted. He stated that the Commission should continue to develop the language.

F. Weisberg mentioned that pp. 29-31 of the 1987 draft guidelines manual discusses “substantial and compelling” reasons must be found be “clear and compelling evidence.”

IV. F. Weisberg moved the discussion to Consecutive/Concurrent sentencing. He explained that the aggravating and mitigating factors will include departure principles if concurrent/consecutive sentencing policy would result in a sentence that is either too harsh or too lenient.

F. Weisberg explained that in the current system, judges can aggregate sentences for multiple charges in any number of ways. If a judge does not clarify, sentences are presumed to be concurrent. Using both the 1987 draft guidelines and other state systems as a guide, the subcommittee can up with the following rules:

**The subcommittee recommends:**

- 1. Multiple victims (crime of violence) during the same transaction - consecutive sentence.**
- 2. One victim (crime of violence) during separate transactions - consecutive sentence.**
- 3. Multiple offenses during one transaction (non-violent) - concurrent sentence.**
- 4. Convictions for offenses committed while on probation, parole, or supervised release should be sentenced consecutively to any period of incarceration imposed as a result of the revocation.**
- 5. Everything else, judicial discretion.**

F. Weisberg explained that the subcommittee dropped the term habitation that is included with person offenses in the 1987 guidelines. They felt that habitation was a reasonable consideration but not a necessary consideration.

R. Scotkin asked what the thinking was on number 4. F. Weisberg explained that the subcommittee agreed that an offender on parole should receive a consecutive sentence for any new charges in addition to his/her revocation. R. Scotkin explained that the US Parole Commission currently changes the criminal history score for offenders if they get sentenced for new crimes before their revocation. There is the possibility of double-counting, as offenders are penalized for the crime both by the judge and the Parole Commission. F. Weisberg, in light of this information, suggested that maybe the subcommittee needed to rethink number 4, and that perhaps a probation revocation is different from a parole revocation, as judges routinely discuss and consider the probation revocation in light of the new sentence.

N. Joyce argued that she does not see number 4 as a double-hit. P. Quander noted that the philosophy behind the revocation time is that someone abused the system. L. Hankins wondered if #4 should be a matter for judicial discretion.

A. Chaturvedi stated that it would be a public policy problem if different standards were applied to different offenders based solely on whether they were sentenced on new charges before or after their revocation – judges can use a departure principle if an injustice results. N. Joyce then stated that if this issue could not be resolved adequately with a consecutive/concurrent sentencing policy, then the Criminal History subcommittee should deal with it. She also noted that the public should see that an abuse of parole/probation is dealt with seriously in the guidelines. L. Hankins noted that, in total, the new offense would currently be a hit in three ways: 1) as a consecutive sentence, 2) as additional revocation time by the USPC (the length depends on the offense), and 3) as a criminal history point.

V. F. Weisberg then explained enhancements. For all of the enhancements, the existing range would be adjusted as needed for each offender. E. Silbert cautioned that they must be careful not to double-count aggravating factor number 2, dealing with a vulnerable victim, with the enhancement Robbery of a Senior Citizen.

For attempts, F. Weisberg explained that the rest of the attempt offenses relating to violence will be ranked.

Finally, F. Weisberg explained that drug ranking was a more complicated issue that would be discussed at the next meeting.

A. Seymour briefly raised the issue of community outreach.

Adjourn at 7:40 p.m.

NEXT FULL COMMISSION MEETING:

Wednesday, July 16, 2003 at **3:00 p.m.** at 500 Indiana Avenue, N.W.

**Note: Given the amount of work to be done, the Commission agreed to meet early next time, at 3:00 p.m. rather than the usual starting time of 5:00.**