District of Columbia
Sentencing Commission
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DISTRICT OF COLUMBIA SENTENCING COMMISSION
IMPLEMENTATION SUBCOMMITTEE MEETING MINUTES
December 14, 2004
DC Superior Court
Washington, DC

Attending	F. Weisberg	P. Riley	B. Weinsheimer
	L. Hankins	K. Hunt	R. Buske
	S. Vance		

Call to order at 5:00 p.m.

K. Hunt introduced the first item on the agenda, which was to rank newly created offenses. These offenses involved terrorism and fleeing law enforcement. P. Riley, L. Hankins, and B. Weinheimer indicated they would rank these items in the near future and respond to Commission staff.

Rankings

K. Hunt then introduced the next item on the agenda, which was to determine where to rank attempted crimes of violence while armed.

Background:
According to Appendix C, all attempted crimes of violence not otherwise specified default to Group 8. While preparing data for Cross Current, Commission staff noticed that a number of these attempts could be charged while armed, and that while armed offenses were generally ranked higher than unarmed offenses. Additionally, although attempt crime of violence offenses generally have a five-year statutory maximum, armed offenses have a 30 year statutory maximum, as well as mandatory minimums based on weapon type. As a result, Commission members decided to revisit the issue of ranking armed attempts. It was decided that all unarmed attempts would remain in Group 8.

After reviewing the list of offenses, B. Weinheimer suggested putting each such armed attempt in the same group as the completed unarmed offense. F. Weisberg asked staff to put together a list of offenses that need to have their armed attempts ranked, side by side with the grouping for the unarmed completed offense. Below is the list of attempts that need to be ranked, with the current ranking of the completed unarmed and armed offense.

Offenses for which armed attempts need to be ranked:

Offense	Unarmed Completed	Armed Completed
Aggravated Assault w/a	M-6	M-4
Arson w/a	M-6	M-5*
Arson-own property with intent to defraud w/a	M-6	M-5*
Assault with a dangerous weapon	M-6	M-5*
Assault with intent to kill w/a	M-5	M-3
Assault with intent to rob/poison/ 1st or 2nd degree sex abuse/ child sex abuse w/a	M-6	M-5
Assault with any intent to commit any other offense w/a	M-6**	M-5
Blackmail with threats of violence w/a	M-9	M-8
Burglary I while armed	M-5	M-3
Burglary II w/a	M-7	M-6
Child Prostitution-Abducting	M-5	M-5*
Extortion with threats of violence w/a	M-8	M-8
Kidnapping w/a	M-5	M-3
Mayhem w/a	M-6	M-5
Malicious disfigurement w/a	M-6	M-5
Voluntary manslaughter w/a	M-4	M-3
Involuntary manslaughter w/a	M-5	M-5

* These offenses were never officially ranked by the Commission, and therefore default to Master group 5 (See Armed Crimes of Violence not otherwise specified, in Appendix C, page C-2).

** This offense is ranked in Master group 6 in Appendix C (page C-3) but is ranked in Master Group 8 in the 2003 Annual Report. Assault with intent to commit Mayhem is ranked in Master 7 in the 2003 Annual Report but is not specified in Appendix C.

Attempted murder is not on this list because it is never charged in DC according to Commission members.

ACTION: Commission members will review the list above and determine whether all of these attempts do in fact need to be ranked, and if so, which groups they should be ranked in. When finalized, Commission staff will update its spreadsheet and notify Cross Current of the changes.

F. Weisberg also noted that the sentencing guideline rule for accessory after the fact (reducing the bottom of the box) should not apply to accessory after first degree murder. The current statute makes the penalty for accessory after first degree murder twenty years (not ½ the maximum of 60 years) even though first degree murder is no longer punishable by death. If the City Council thought about it, it would probably amend the statute to repeal the anachronistic reference to the death penalty and make the penalty for accessory after first degree murder ½ of 60 years (like all other crimes) rather than just 20 years. But meanwhile, for the purpose of the sentencing guidelines, the accessory after the fact rule of reducing the bottom of the box should not apply to accessory after first degree murder. Other Commissioners agreed with this.

Out of State Prior Record Scoring

K. Hunt turned to the third agenda item, which was to discuss whether new rules for comparing out-of-state convictions are necessary. S. Vance explained how he has had difficulties determining the most comparable DC offense for out-of-state convictions under the current rules of the Sentencing Guidelines. For instance, the current rules do not accurately or fairly account for situations where conduct would not be illegal in DC or for conduct that would not be regulated by DC (ex: some Federal offenses). Additionally, the "elements test" is rarely sufficient to determine an out of state "match," as the out-of-state convictions almost never mirror the DC offenses. Generally, there are a group of DC offenses that could possibly match up to the out-of-state offense. Under the current rules (created by the implementation subcommittee since the Practice Manual was drafted), S. Vance has gathered all possible DC matches for each out-of-state offense and informed others (CSO's and defense attorneys) that they should select the lowest (least severe) possible statute unless the underlying conduct of the prior offense (burden would be on US Attorney and/or CSOSA) demonstrates that a more serious statute would apply. F. Weisberg expressed serious concern about relying on such underlying conduct, and other Commissioners agreed.

The Commissioners therefore agreed on the following new rules for comparing out-of-state convictions:

1. Look at the name of the offense;

2. Examine the statutory elements of the offense;

3. If there are more than one possible DC statutes that "match" the out-of-state offense, select the least severe statute, whether that statute is a misdemeanor or a lesser felony. (In some cases, the least severe DC statute might actually be a felony even if the out-of-state offense is a misdemeanor. What is most important is how DC classifies the statute.) Importantly, the user should not look to underlying conduct of the prior offense to select a higher (more severe) statute within the group of possible comparable offenses. If the U.S. Attorney would like to cite underlying conduct of the prior offense at the sentencing hearing, he or she is free to argue for a higher sentence within the applicable sentencing guideline range. The purpose of this rule is to increase simplicity and consistent calculations among CSO's and other criminal justice practitioners.

4. If no comparable DC statue can be found based on the above rules, then the following default rules apply:

    a. Apply one point for all convictions that are classified as felonies by the other jurisdiction;

    b. Apply ½ point for all adjudications that are classified as felonies by the other jurisdiction;

    c. Apply ¼ point for all convictions that are classified as misdemeanors by the other jurisdiction.

    d. Exception: If defense counsel can demonstrate to the sentencing Court that the conduct criminalized by the other jurisdiction would not be classified as criminal conduct in DC, then the Court may delete or remove any criminal history points applied by CSOSA for such an offense.

The Commissioners determined it was not necessary at this point to create a rule governing prior convictions that are not regulated by DC such as Federal immigration offenses. The Commissioners stressed that the Court is always free to sentence within the higher end of the guideline range to account for any serious prior conviction, the severity of which may not be fully captured by the one-point default rule. The Commissioners also discussed the possibility of ranking a subset of Federal offenses in the future if such inquiries become more common.

F. Weisberg requested that S. Vance prepare a list of past and present rules concerning out-of-state convictions. B. Weinheimer further asked that S. Vance review his notes of prior sentencing guidelines inquiries to provide concrete examples of how the new out-of-state calculation rules would apply to certain Maryland and Virginia statutes. S. Vance will send this information to the subcommittee in the near future.

Guideline Departure

K. Hunt provided details on the 12 cases identified as departures from the staff research to date. He illustrated the departures using two cases. The first involves a Drug-3C case with a ten month sentence that is a downward departure from the 14-30 month prison recommendation, but close to a short split that is permissible. The judge provided no departure reason in the case and it may be an inadvertent departure. The second case is a Master-8C in which a 25 month prison sentence was imposed, ESS all. While 25 month is within the prison range, it is not a probation permissible box, a clear downward departure without a reason.

The subcommittee members discussed strategies for communicating with judges regarding departures. It was noted that the DCSC QA section should receive a guideline form with the departure reason provided on the top of the case jacket. The proposal is for the Commission staff to email the judge in all cases of departures without reasons as follows:

> Case Number__, Count __, Charge(s) _____, Defendant name____, PDID #__
>
> According to Guideline Sentence Form prepared in conjunction with the PSI Report, the above listed case was Master/Drug box __. The guideline recommendation is: Prison Range, Probation is/is not permissible, a Short split is/is not permissible
>
> Actual sentence reported to the Commission: _____, Sentence date: ___ Based on the Guideline Sentence Form, this is a non-conforming sentence. The sentence imposed does not conform to any of the sentence options recommended by the box for this charge/count because _____ (*Staff will clearly state how this sentence fails to comply*).
>
> The Sentencing Commission follows up on each case that appears to contain a sentence that does not conform to the guidelines. Please take a moment to review this case and tell us which of the following applies:
>
> 1. The case **does** conform to the applicable guideline for the following reason(s): _____. The Commission may have flagged this case as non-conforming based on incomplete or erroneous information. Examples include: the sentence is the result of a plea or verdict prior to June 14, 2004 (not a guideline case) or a probation revocation on such a case; the sentence results from a Rule 11(e)(1)(C) plea (always guideline compliant); or the original guideline sentence form was revised, resulting in a different guideline recommendation (Please remember: the courtroom clerk should place the **corrected** guideline form in the case jacket so that the Criminal Division Quality Assurance staff can review and record the change before reporting the sentence to the Commission). In

other words, there are several scenarios that may cause our staff to flag a guideline-compliant case erroneously as non-conforming.

2. This sentence was intended as a departure in compliance with the guidelines. The reason for the departure was _____. If you used one of the departure factors enumerated in Chapter 5 of the Practice Manual, please tell us which factor. If you had in mind a substantial and compelling reason to depart, but it was not one of the factors enumerated in Chapter 5, please provide a very brief statement of your reason.

3. The guidelines were not used in this sentence. The guidelines are voluntary and there are no sanctions for failing to follow them. Nonetheless, the Commission would like to know about cases where the judge does not have a substantial and compelling reason to depart but does not agree that the applicable guideline provides the appropriate sentence for a particular offender or offense.

4. This sentence was an **inadvertent** non-conforming sentence. Especially in the early going, there may be occasions when the judge intended to comply with the guidelines and did not recognize that the sentence given was non-conforming. Over time, we would expect these situations to be eliminated.

Adjourn at 6:40 p.m.

Adjourned