District of Columbia
Sentencing Commission

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FULL COMMISSION MEETING MINUTES
Tuesday, September 19, 2006
441 4th Street, Room 1114
Washington, DC

Attending	F. Weisberg	P. Riley	H. Cushenberry
	R. Johnson	P. Quander	
	D. Rosenthal	T. Kane	
	S. Vance	S. John	
	C. Chanhatasilpa	K. Hunt	R. Buske

I. F. Weisberg called the meeting to order at 5:00 p.m., and the minutes from the July 2006 meeting were approved.

II. Meetings Schedule Change

F. Weisberg noted that several members of the Commission were unable to attend meetings on Tuesday evenings. The Commission agreed to change the monthly meeting from Tuesday evening to **Thursday evening (3rd Thursday each month)**.

III. Report of the Implementation Subcommittee

S. Vance reviewed the list of proposed amendments to the 2006 Manual, which the Commission hopes to make effective on September 30, 2006. The proposed amendments resulted from discussions and negotiation within the implementation subcommittee meeting.

The first proposed amendment related to section 1.4, "Use of Sentencing Guidelines Manual in Effect on the Date of Sentencing." The current section states: "The sentencing court shall use the Sentencing Guidelines Manual in effect on the date that the defendant is sentenced. The 2005 Manual is effective on June 14, 2005. The amendments to the 2004 Manual, which are included in the 2005 Manual, are listed in Appendix J."

Some members of the Commission have suggested that the date of *conviction* should govern rather than the date of sentence since plea negotiations may be based on the version of the manual in effect at the time of conviction. The subcommittee therefore suggested that "plea or verdict" be used rather than "conviction." Additionally, the subcommittee suggested that the 2006 amendments be added to

the top of Appendix J and that the word "amendment" be removed from the front of each paragraph. Instead, the section number being amended should be bolded.

The full Commission agreed on the following proposed language for amended section 1.4:

> The sentencing court shall use the Sentencing Guidelines Manual in effect on the date of plea or verdict, unless both parties otherwise agree to use the version in effect at the time of sentencing. The 2006 Manual is effective on September 30, 2006. The amendments to the 2005 Manual, which are included in the 2006 Manual, are listed in Appendix J.

The second proposed amendment was for section 2.2.1, "What is a Prior Conviction or Adjudication? The current section states in part: "A prior conviction or adjudication is any conviction or adjudication for which judgment (sentence or disposition) was entered before the day of sentencing in the instant case…" This section has caused some confusion because the use of the word "judgment" corresponds in the eyes of some with a conviction, verdict, or finding more than with a sentence/disposition. One possible clarification is to simply use the words "sentence/disposition" and to delete the reference to "judgment."

The subcommittee suggested using the term "sentence or juvenile disposition," and removing the parentheses. Also, it recommended inserting the word "juvenile" before "disposition" in the second paragraph of section 2.2.1. The Commission agreed on the following proposed language for amended section 2.2.1:

> A prior conviction or adjudication is any adult conviction or juvenile adjudication for which judgment (an adult sentence or a juvenile disposition) was entered before the day of sentencing in the instant case. The order in which the offenses occurred is not controlling.

The third proposed amendment also related to section 2.2.1. This section does not have any language about specific types of dispositions that do not count. Some dispositions that Commission members have stated do not count include:

- Consent decrees;
- Probation Before Judgment;
- Stet Dockets.

The subcommittee agreed to make this clarification. (The subcommittee also suggested that all the new amendments be sent to CSOSA so that they can train the CSO's about changes to the manual.) The Commission agreed on the following proposed language for amended section 2.2.1:

> Cases that are dismissed before a sentence is imposed are not scored. This includes cases that are disposed of by diversion, deferred sentencing, probation before judgment, the stet docket, or juvenile

consent decrees. If the defendant (or juvenile) is not successful in one of these programs and the case proceeds to sentencing, it is then scored.

The fourth proposed amendment related to section 2.2.6, "scoring out-of-state convictions/adjudications." An issue has arisen where certain D.C. offenses become felonies (rather than misdemeanors) only when there are specified prior convictions. For instance, possession of implements of crime becomes a felony only when the defendant has a prior felony conviction. If a defendant has a 1999 conviction for possession of burglary tools from Virginia, one interpretation of rule 2.2.6 is that the most comparable D.C. offense is *felony* possession of implements of crime *if* the defendant had a prior felony conviction prior to the 1999 conviction. Otherwise, the most comparable D.C. offense is misdemeanor possession of implements of crime. An alternative interpretation is that the rule of lenity applies and that such prior convictions are treated as misdemeanors. The subcommittee and the Commission agreed that the following language be added to the chapter on Frequently Asked Questions:

How do you score an out-of-state offense for possession of implements of crime or possession of a prohibited weapon when the defendant has a prior felony conviction that, if charged here, would raise the offense from a misdemeanor to a felony?

Following the basic elements test articulated in Rule 2.2.6(4), PIC (D.C. Code § 22-2501) and PPW (D.C. Code § 22-3515) should be scored as misdemeanors unless the statute in the other jurisdiction, like ours, makes the offense a felony if the person previously has been convicted of that offense or of a felony.

The next proposed amendment related to section 6.1, consecutive sentences. This section currently states in part: "The following sentence must be imposed consecutively: For crimes of violence: multiple victims in multiple events; multiple victims in one event, and one victim in multiple events for offenses sentenced on the same day." The Commission staff proposed that this section be amended to state: "The following sentence must be imposed consecutively: *For multiple crimes of violence*: multiple victims in multiple events; multiple victims in one event, and one victim in multiple events for offenses sentenced on the same day." The rationale for this suggestion was that there has been confusion about whether this consecutive rule applies when there is only one crime of violence and multiple non-violent crimes. The subcommittee and commission agreed to these changes.

The sixth proposed amendment was in regard to section 7.10, Event, which currently states in part that "the phrase 'a single event' means offenses that occur at the same time and place or have the same nucleus of facts. The phrase 'multiple events' means offenses that occur at different times or places or have a different nucleus of facts." There have been numerous instances where the definition of an

"event" has generated confusion for presentence report writers. Many assume multiple counts are one "event" merely because they share the same disposition date.

Moreover, similar to calculation of prior out-of-state convictions, most presentence report writers do not have information about the underlying offense conduct of prior convictions to determine whether there was more than one event. When discussing out-of-state convictions, the Commission determined it did not want CSOs to look into underlying conduct. Rather, it created a rule that the presentence report give the benefit of the doubt to the defendant and that the prosecution may argue for a more serious out-of-state offense at sentencing based on underlying conduct.

The subcommittee agreed to change the language in the definition of an event to "committed" from "occurred." With regard to the second issue, the subcommittee agreed on a rule that essentially states that, if the presentence report writer can not determine that there were two events, then the writer should list one event and alert the parties and the court that he or she was not able to determine there were two events. The subcommittee agreed to include this under Frequently Asked Questions section of the manual.

The Commission agreed to the following proposed language for amended section 7.10:

> For purposes of determining which offenses count for criminal history scoring purposes, see § 2.2.5, and which offenses must be sentenced consecutively/concurrently, see Chapter 6, the phrase "a single event" means offenses that were committed at the same time and place or have the same nucleus of facts. The phrase "multiple events" means offenses that were committed at different times and places or have a different nucleus of facts.

The Commission further agreed on the following language for the Frequently Asked Questions Chapter:

> **What should a presentence report writer do if he or she cannot determine whether multiple out-of-state convictions arose out of a single event or multiple events (See § 2.2.5 and Chapter 6).**
>
> It is sometimes difficult to ascertain whether offenses that were sentenced on the same day arose out of a single or multiple events. If the pre-sentence report writer cannot make this determination, he or she should apply the rules as if it were a single event, score the most serious offense, *and* note in the presentence report that s/he has done so because s/he did not have sufficient information to determine whether there was more than one event.

P. Riley, however, suggested that the government be permitted to argue at sentencing that the sentence be increased based on underlying conduct regarding whether there is more than one event. P. Riley will develop proposed language.

ISS Sentences in Youth Act Cases

K. Hunt explained that Section 3.4 (Probation (ESS All) states that probation is a compliant sentence only in the light gray boxes and that the execution of sentence must be suspended. Footnote 12 explains that the D.C. Code does not authorize probation following suspension of *imposition* of sentence [ISS], though the Youth Rehabilitation Act does allow the court to suspend imposition or execution of sentence. This footnote does not make it clear that ISS sentences in Youth Act cases are considered compliant. The commission agreed on the following proposed language for the end of footnote 12:

> Thus, in a Youth Act case, a sentence of ISS with probation complies with the Guidelines in any box in which a suspended prison term [ESS] with probation would be a compliant adult sentence.

Application of the Sentencing Guidelines to Indeterminate Sentences

P. Riley explained that the Practice Manual does not currently address whether and how the sentencing guidelines apply to indeterminate sentences. The committee and the Commission agreed on the following proposed language for the Frequently Asked Questions chapter:

> **Do the Guidelines apply to indeterminate sentences? If yes, how does it work?**
>
> Yes and no. The Guidelines apply to *all* pleas and verdicts entered into on or after June 14, 2004. While the Guidelines were designed primarily for the new determinate system, a small number of pleas or verdicts entered after June 14, 2004, are cases in which an indeterminate sentence must be imposed because the offense was committed before August 5, 2000.[1]
>
> If the plea or verdict was entered on or after June 14, 2004, the Guidelines apply regardless of when the offense was committed – ie., whether the offense was committed before or after August 5, 2000. Conversely, if the plea or verdict was entered before June 14, 2004, the Guidelines do not apply even if the offense was committed after August 5, 2000. In such cases, the sentencing judge may nonetheless take the Guideline recommendations into consideration.

[1] The District of Columbia changed from an indeterminate to a determinate system of sentencing on August 5, 2000. See § 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000 [Formerly § 24-203.1].

Questions have arisen regarding how to apply the Guidelines to offenses that were committed before August 5, 2000, where the plea or verdict was entered after June 14, 2004. An example of such a case might be a defendant who was convicted in 1999 the conviction was overturned on appeal, and the defendant was convicted again by plea or verdict on or after June 14, 2004. Another example would be a defendant who committed an offense in 1997, but whose case was not disposed of by plea or verdict before June 14, 2004. In both of these examples, the Guidelines would apply.

To apply the Guidelines to an offense that was committed before August 5, 2000, the court should follow the same procedures as it would for an offense that occurred on or after August 5, 2000, to determine the appropriate box and whether any enhancements or departure principles apply. In designing the Guidelines, the sentencing ranges were determined in part by reference to the **minimum** term of a hypothetical indeterminate sentence, where the minimum was one-third of the maximum term. Therefore, if a sentence for theft in the old system was 2-6 years, the Commission used 2 years to determine what the sentencing range should be in Group 8; or if a sentence for aggravated assault while armed in the old system was 8 to 24 years, the Commission used 8 years to determine what the sentencing range should be in Group 4.

In applying the Guidelines to an indeterminate sentence, the judge should locate the box on the grid in which the offense/offender falls, and then use any sentence within the prescribed range to set the **minimum** term of the indeterminate sentence. To set the maximum term, the judge would then multiply the minimum term by three (or more). See D.C. Code § 24-403 ("the court imposing such sentence shall sentence the person for a maximum period not exceeding the maximum fixed by law, and for a minimum period not exceeding one-third of the maximum sentence imposed"). Assuming no enhancements or departure principles, a sentence for first degree burglary while armed in Box 3A could be as low as 90 to 270 months or as high 180 months to life. Prison is the only option. Similarly, a sentence for a second CPWL conviction in Box 8C could be as low as 14 to 42 months or as high as 40 to 120 months. The reason for the latter sentence is that a second conviction for CPWL is an enhancement that doubles the top of the box. This means that the minimum number of an indeterminate sentence could theoretically go as high as 64 months. However, the maximum statutory sentence for a second CPWL conviction is 120 months and the minimum sentence cannot be more than 1/3 of the maximum. So

the maximum indeterminate sentence a person can receive for a second CPWL is 40-120 months, even though box 8C would otherwise permit a longer indeterminate sentence for a second conviction of CPWL. A short split sentence would be permissible for a second CPWL conviction in Box 8C as long as the minimum term of the imposed sentence (before the split) was between 14 and 40 months and the maximum term of the imposed sentence was at least three times the minimum.

P. Riley noted that she will develop language of an example for section 9.17 regarding how to score an offense from before August 5, 2000 with a plea or verdict after June 14, 2004.

Newly Ranked Offenses

S. Vance explained that the committee ranked D.C. Official Code §26-1023 as Group 9. D. Rosenthal noted that there are numerous other offenses prosecuted by the District that the Commission will examine in the future. Specifically, it must determine whether to count certain misdemeanors prosecuted by the District. F. Weisberg also noted that the Commission will examine numerous other offenses as part of its new criminal code revision responsibilities.

IV. Review of Preliminary Data for 2006 Annual Report

Impact of Guidelines on Sentence Variability

K. Hunt presented charts and tables that will be included in the annual report. The first series of slides showed the results of the calculation of the average absolute difference of each sentence from the average group sentence by severity group, year, and by grid. They show that there is a general downward trend in differences for most severity groups and for the two grids since 2003. He explained that the average or mean was used in this case because it would demonstrate the reduction in outlying sentences after sentencing guidelines were implemented. This provides the best evidence to date that sentence variability is declining as a result of guidelines, assuming that all other things are equal from 2003 to 2005.

Compliance Rates

The next series of slides showed the updated conformity with the guidelines for all sentences and by severity group and criminal history categories. These rates have remained stable over the past year. F. Weisberg suggested that compliance rates be examined by type of sentence (broken out by probation and split sentences in addition to prison sentences). P. Riley recommended that the report data distinguish between the different types of cases that are being displayed (i.e. prison only cases, probation eligible cases, etc.). P. Riley agreed that compliance should be calculated by type of sentence. K. Hunt then asked whether Commission should focus on imposed or

effective sentence compliance. F. Weisberg replied that both should be reported. He also noted that Master 2 and Master 3 compliance rates need to be looked at when there is sufficient number of sentences. Currently, the compliance rates for these two groups are lower than found in other groups, but the number of cases is still low.

Sentencing "Within the Box" – Conformity with the Guidelines

K. Hunt showed graphs that examined the clustering of sentences at the minimum and maximum of the sentencing ranges of each severity group for prison sentences that remain "within the box." P. Riley asked if this analysis could be done by offense. K. Hunt responded that there are not enough cases yet for most offenses. P. Riley recommended that the report data distinguish between the different types of cases that are being displayed (i.e. prison only cases, probation eligible cases, etc.). P. Riley expressed concern about the low number of sentences in certain severity groups. T. Kane suggested that charts should include the number of cases (N sizes) for each sample that is analyzed. Also, there should be a discussion that explains the low N sizes for certain groups. P. Riley agreed that N sizes should be included in any graph or table reported. **[Note: The Report will clearly delineate prison only charts from other charts, etc. and N sizes will be displayed]**

Probation Eligible boxes demonstrate some important trends. While prison sentences are more common than probation overall in these boxes, probation is most common for criminal history category A and drug attempts, as one would expect. The more serious the criminal history category and the offense, the less likely is probation. Members present want to these trends to be a theme of the Report.

Sentencing "Outside the Box"

K. Hunt noted that for the majority of these sentences, the judge never gave a reason. K. Hunt added that a major reason why judges have not replied is that due to staffing issues at Quality Assurance, Commission staff will sometimes not be able to submit a request until six months or more after the sentencing date, as Commission staff attempt to catch up with backlog and find missing cases. F. Weisberg stated that there needs to be a decision made about whether this should be included in the report. P. Riley added that there should only be a discussion in the narrative. P. Quander agreed and noted that there needs to be efforts to improve these numbers, with explicit steps the Commission will take to improve this situation. P. Riley suggested that the difference from means analysis be conducted on these "no reason given" cases to see the amount that the judges' sentences differed. If there were small differences, it would suggest that they inadvertently sentenced "outside the box." [**Note: Difference from means analysis will be conducted on these pending cases.**]

The Commission will not discuss in depth the cases with reasons, and instead highlight the steps to improve reporting.

Sentencing Trends

K. Hunt presented updated numbers on sentencing trends. P. Riley noted that incarceration rates remained stable during guidelines years. She also questioned what types of sentences were included in the "other" category. Commission staff will examine these sentences to determine the nature of the disposition, and include footnotes from previous reports addressing this issue. **Note:** F. Weisberg noted that an important theme of the Report must be that dispositions to prison remain stable after the guidelines, but the types of people getting probation is shifting to low end offenders with minimal criminal history scores and less serious crimes.

In/Out Demographics

The next series of slides showed gender and age breakdown for guideline sentences. Women are more likely to receive a probation sentence in a probation eligible box than are men, and there are no age effects. F. Weisberg asked other Commission members if they had any problems with including gender findings in the report. He noted that these findings should be accompanied a discussion of the potential social reasons (child care) that women are less likely to be sentenced to a prison term. The Commission agreed to include this in the report. **Note:** P. Riley suggested that non-probation box sentences should also be studied by gender and age groups.

Adjourn: 6:45 pm

NEXT FULL COMMISSION MEETING:

Thursday, October 19, 2006 at 5:00 p.m.