



# District of Columbia Sentencing Commission

441 Fourth Street, NW, Suite 830 South, Washington, D.C. 20001  
(202) 727-8822 – Fax (202) 727-7929

November 30, 2004

*Hon. Frederick H. Weisberg,  
Chairman*

*Hon. Harold L. Cushenberry  
Laura E. Hankins, Esq.  
Hon. Ramsey Johnson  
Hon. Kathleen Patterson  
Paul Quander, Esq.  
Patricia Riley, Esq.  
Michele Roberts, Esq.  
David Rosenthal, Esq.  
Earl J. Silbert, Esq.  
Anne Seymour  
Julie Stewart*

*Non-voting members:  
Brenda Baldwin-White, Esq.  
Nola Joyce  
Thomas R. Kane, Ph.D.  
Cranston J. Mitchell*

*Kim Hunt, Ph.D., Executive Director*

The Honorable Linda W. Cropp  
Chairman  
Council of the District of Columbia  
1350 Pennsylvania Ave., N.W.  
Washington, DC 20004

Re: Annual Report to the Council of the District of Columbia

Dear Chairman Cropp:

Pursuant to section 5(c) of the Advisory Commission on Sentencing Establishment Act of 1998, the Commission submits its 2004 Annual Report to the Council. This report discusses the Commission's activities during fiscal year 2004.

## **PILOT SENTENCING GUIDELINES**

### *Legislation*

In June of 2004, the Council issued the following mandate to the Commission:

“(e) The Commission shall assist the Superior Court of the District of Columbia in implementing, as a pilot program, the comprehensive structured sentencing system that was recommended by the Commission pursuant to subsection (d) of this section. No later than December 1, 2006, the Commission shall submit to the Council its final recommendation on the comprehensive structured sentencing system.”  
(Advisory Commission On Sentencing Structured Sentencing System Pilot Program Amendment Act Of 2004, effective June 23, 2004 L15-190; D.C. Official Code § 3-101 et seq.)

## *Implementation of Sentencing Guidelines*

The pilot sentencing guidelines went into effect on June 14, 2004, and apply to all felony guilty pleas and verdicts entered on or after that date. The pilot guidelines are voluntary. This means that judges are encouraged, but are not required, to follow them. In order to eliminate unwarranted disparities in sentencing, the Commission hopes for and expects a high degree of compliance. We will closely monitor compliance during the next two years. In a later section of this Report, we discuss our monitoring system.

The first guideline cases were sentenced in August 2004, and the Superior Court now has converted its operations to include a consideration of sentencing guidelines in all felony cases. At the present time, it is still too early to report on compliance with the guidelines and their effectiveness, but the Commission is closely monitoring felony sentences and believes that the guidelines have been widely accepted and are operating relatively smoothly. The Commission staff will continue to devote substantial time and effort to implementation and monitoring of the new sentencing system, thereby giving the new system the best chance for success.

One key to successful implementation is training. The Commission oversees an active training program in conjunction with the Superior Court, the Court Services and Offender Supervision Agency (CSOSA), the Office of the U.S. Attorney, and the Public Defender Service. Multiple training sessions were held for judges, attorneys, and court services officers (CSOs) prior to implementation. Training will continue to be an ongoing feature of the Commission's work. The next judicial training, for example, is scheduled for December 2, 2004, for judges rotating into the felony calendar assignments in January of 2005.

To assist guideline users to determine a guideline-compliant sentence, the Commission has developed a practice manual. The practice manual is designed to be a comprehensive compilation of rules and procedures governing the voluntary sentencing guidelines system. The manual includes numerous examples as well as detailed appendices. The manual is available on-line at <http://sentencing.dc.gov/>, or by request.

As the pilot period progresses, the Commission will undoubtedly need to address new issues that arise during implementation and will update the practice manual as new policies and rules are added. The Commission expects that the operating rules and procedures will need to be amended throughout the pilot period and into the future. Any effective system to structure the exercise of judicial discretion in sentencing must be able to

adapt over time to changing and unforeseen circumstances in order to achieve the goals of increased uniformity and fairness.

### *Technical Assistance and Public Information*

In order to promote the principle that defendants convicted of similar crimes with similar backgrounds receive similar sentences, it is critical that the sentencing guidelines be interpreted and applied correctly and uniformly by judges, prosecutors, defense attorneys, and CSOs. The goals of sentencing parity and equity would be disserved if different participants in the criminal justice system impose or recommend different sentences for similar offenders based on divergent understandings of the sentencing guidelines. Though our guidelines are, by design, less complex than many other guideline systems, it is impossible to create a system free of all complexity, given the realities of sentencing practice and the nuances of criminal behavior.

In the first five months following implementation, the Commission's Director and staff attorney have answered more than 160 inquiries from CSOs, defense attorneys and others concerning the operation and correct application of the guidelines. It is anticipated that the Commission staff will continue to respond to inquiries from criminal justice practitioners, particularly because the sentencing guidelines practice manual is an organic document. The Commission – with the assistance and advice of its staff – will work to improve the operation of the guidelines during the pilot period and will continue to provide information and technical assistance to criminal justice practitioners and the general public on an ongoing basis.

### **MONITORING GUIDELINE COMPLIANCE**

The sentencing guidelines are being implemented initially as a pilot project. The purpose for introducing the guidelines as a pilot project is to give the Commission the opportunity to assess implementation, discover where the problems lie, and make such adjustments as may be necessary based on experience rather than prediction. While all sentencing guideline systems must be continuously updated and refined, there should be greater flexibility during this pilot project to revise our basic design as necessary. The Commission will be monitoring the implementation of the guidelines, collecting data and making recommendations on adjustments that should be made both during the pilot project and thereafter. For example, two of the many issues that the Commission will be examining are whether the options and ranges need to be adjusted and whether the offenses are ranked properly,

especially generic offenses that can be committed in a variety of different ways.

The Sentencing Commission is coordinating its work closely with its partners, CSOSA and the District of Columbia Superior Court, to establish a relatively seamless system that will produce timely guideline recommendations to parties and sentencing judges and will report back the actual sentence imposed and data on guideline compliance. This coordination is crucial to preventing court delays and errors. To accomplish this, particularly in the earliest stage of implementation, the CSOs are required to conduct extensive criminal history checks and work closely with the Commission staff to score out-of-state convictions, which under the Commission's rules are to be matched to the closest District of Columbia code offense. As of November 16, 2004, CSOs completed guideline forms and guideline sentence recommendations for 411 defendants awaiting sentence. During the same period, the Superior Court's Quality Assurance branch, which is responsible for reporting the actual sentences imposed and any departures from the guidelines, forwarded to the Commission information, including guideline compliance, on 111 completed sentences. Many more sentences are currently in the pipeline, and the number is increasing as more post-June 14 cases reach the conviction stage. In drug cases alone, there are 53 completed forms representing 51 defendants sentenced under the new voluntary sentencing guidelines. By the 2005 Annual Report, the Commission expects to be able to draw some preliminary conclusions about compliance, at least for the most common offenses.

### *Automating the Monitoring Process*

The Commission has spent much of the past year developing, through an outside vendor, a Sentencing Guideline Web (SGW) that soon will automate all sentencing reports in a secure, interactive web-based computer environment. The SGW provides judges and attorneys with the applicable guideline recommendation for each case, and it allows users to fill out guideline forms online in a secure environment. It facilitates compliance with guidelines and other business rules involved in sentencing and sentencing reporting in the District of Columbia. The SGW also improves efficiency and interagency cooperation by enabling users to submit guideline sentence forms electronically, while providing error checks on the data.<sup>1</sup> Once the SGW has captured all information, users can electronically submit this information to

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<sup>1</sup> One major advantage of the SGW is that it averts many common errors. First, the SGW assures that the case is assigned to the correct offense severity group based on the conviction offense, which is an essential first step to formulating the applicable guideline recommendation. Second,

the Sentencing Commission, which can then download the information for immediate analysis. At this time, the Commission is pleased to report that this system is nearing completion and will be in use by early 2005.

The Commission has developed the SGW because it will significantly enhance the ability to share critical information at key decision points, which is essential to rational and effective sentencing and corrections policy. The Commission is promoting secure sharing of information with its partners, the Superior Court and CSOSA, using the JUSTIS platform developed by the Office of the Deputy Mayor for Public Safety and the Criminal Justice Coordinating Council. As a result, the Commission and its partners are quickly moving to interfaces with the primary databases. For example, the Superior Court's sentencing decisions, currently stored in the Court's database, will be made available to CSOSA through the SGW. Sharing the Court's decisions through the SGW will allow CSOSA timely access to dispositions, reducing and eventually eliminating the delay associated with the delivery of hard copies. Integrating information systems to share critical data not only saves time, but also improves the quality of data, and subsequent decisions, by eliminating error-prone redundant data entry. The first step will be completed in 2005, when the CSOSA SMART system will share its offender information with the guidelines database in a secure, automated format that promotes efficiency as well as accuracy. Thus, often complex criminal history calculations will be made in a reliable manner and shared with the Court through automated messaging. In return, CSOSA will gain electronic access to the judge's sentencing order. We are pleased to report that the electronic interface between the Superior Court and CSOSA through the SGW is being funded entirely from the CSOSA budget, without imposing any added burden on local funds.

Working with the Superior Court, the Commission is also developing, through the same outside vendor, a stand alone module to the SGW that will enable permitted users to calculate guideline recommendations based on hypothetical queries. For example, a prosecutor or defense attorney who is negotiating a guilty plea in a case with multiple charges could query the system using hypothetical scenarios based on the defendant's criminal history and each charge or combination of charges that might be used to structure a plea agreement. The system would churn out what the guideline

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the SGW calculates the criminal history score for the offender, once the prior record is added, and computes the guideline recommendation. Third, the SGW prevents the user from inadvertently ignoring mandatory minimum statutory penalties or applicable statutory enhancements. In addition, the SGW prompts court personnel to solicit a "departure" reason when a judge imposes a sentence that is outside of the guidelines, ensuring that the Commission receives and analyzes this critical information as we report on judicial response to the guideline recommendations.

recommendation would be under each scenario. This relatively simple enhancement of the SGW should be online within a few months after the SGW itself is completed, and, once available, should help demystify the guidelines and improve sentencing practice substantially by making the guidelines accessible and understandable to a much broader segment of the criminal justice community. Once again, we are pleased to report that this enhancement of the SGW was initiated at the suggestion of the Superior Court and is being paid for entirely from the Court's budget, without any additional expenditure of Commission funds.

Over time, the Commission is committed to finding new ways to expand the Sentencing Guideline Web to enhance the accuracy and transparency of the guideline system for other practitioners and the public. While a functional, working system will be in place by early 2005, making the District of Columbia the first jurisdiction to have a fully automated guideline web during its first year of guidelines, the Commission recognizes that new features may be desirable once the SGW is being used in practice. Although the Commission has involved key players in the development process, there will undoubtedly be areas for improvement and innovation. Eventually, the Commission expects that the SGW will allow stakeholders and citizens to gain a better understanding of sentencing practice in the District of Columbia.

## **THE FUTURE OF SENTENCING GUIDELINES IN LIGHT OF BLAKELY**

The Supreme Court's decision in Blakely v. Washington, No. 02-1632 (June 24, 2004), left many jurisdictions with sentencing guidelines perplexed about whether their guidelines can withstand a similar constitutional challenge. In Blakely, based on its prior ruling in Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court invalidated part of Washington State's sentencing guidelines. In Apprendi, the Court had held that under the Sixth Amendment guarantee of the right to trial by jury, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. In Blakely, the Court held that a sentence imposed under the Washington sentencing guidelines violated the defendant's Sixth Amendment right to trial by jury. Under the Washington guidelines, Blakely's guilty plea called for a sentence within the range of 49-53 months, unless the judge found certain aggravating facts, which would enable the judge to go above 53 months, up to the statutory maximum sentence of ten years. The trial judge found by a preponderance of evidence that Blakely had acted with "deliberate cruelty" and sentenced him to 90 months. In declaring

that sentence unconstitutional under the Sixth Amendment, the Supreme Court explained:

Our precedents make clear...that the “statutory maximum” for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant...In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. (emphasis in original).

The Court went on to hold that any facts used by the judge to exceed the newly-defined “statutory maximum” must be submitted to a jury (unless waived by the defendant) and proved beyond a reasonable doubt.

Following Blakely, many observers and scholars have opined that the sentencing guidelines of other states, and perhaps the federal sentencing guidelines, are vulnerable to constitutional challenge. The Supreme Court will soon decide the fate of the federal sentencing guidelines in two cases that were argued on the first day of the current term. It is virtually certain, however, that the D.C. guidelines are immune from such a challenge because of their voluntary features. Unlike the guidelines in the State of Washington and many other states, the District of Columbia sentencing guidelines, because they are not mandatory or presumptive by statute, simply carve out suggested ranges for the exercise of discretion that are well within, and in all cases below, the statutory maximum sentence, which the judge remains free to impose. Because the sentencing guideline ranges recommended by the District of Columbia sentencing guidelines are not binding on the judge, a defendant convicted of an offense in the District of Columbia knows only that he will not receive a sentence higher than the statutory maximum sentence for that offense in the D.C. Code. Accordingly, we are confident that the District of Columbia sentencing guidelines do not violate the constitutional principles set forth in Apprendi and Blakely.

### **ADDITIONAL PROJECTS UNDERWAY**

The Advisory Commission on Sentencing Establishment Act, D.C. Code § 3-106 (2001), directs the Commission to project the impact, if any, on the District’s populations of incarcerated offenders and offenders under supervision if the Commission recommends changes to sentencing practice, including revisions to its guidelines. The Commission previously concluded that implementation of the pilot guidelines is not likely to cause significant

changes in prison or probation populations because the guideline recommendations are based primarily on recent history in terms of sentencing outcomes. However, there can be no conclusive evidence regarding the net effect of the shift to guidelines until more data are available.

The Commission has developed a discrete event simulation model, the District of Columbia Sentencing Simulation, to assess the impact of sentencing changes on correctional populations. Similar computer models have successfully forecast prison populations at the state and federal level. The District of Columbia Sentencing Simulation will allow the Commission to forecast how policy decisions will impact criminal justice resources. The projection is expected to provide reliable answers to critical “what-if” policy questions. At present, the model is designed to forecast prison populations and other correctional resources utilized in felony cases, but the Commission is in the early stages of exploring with the Criminal Justice Coordinating Council the adaptation of the model to the local jail population as well.

This report summarizes our major activities and accomplishments in the past year. We are making do with the resources the Council has allotted to us, with the help of grant funds and significant contributions from our partner agencies. We remain committed to providing the District of Columbia with the best system of structured sentencing yet devised, and we look forward to the Council’s continuing support of our efforts in the years ahead.

Respectfully submitted,

Frederick H. Weisberg, Chair

cc: The Hon. Sandy Allen  
The Hon. Sharon Ambrose  
The Hon. Harold Brazil  
The Hon. David A. Catania  
The Hon. Kevin P. Chavous  
The Hon. Jack Evans  
The Hon. Adrian Fenty  
The Hon. Jim Graham  
The Hon. Phil Mendelson



The Hon. Vincent B. Orange, Sr.  
The Hon. Kathy Patterson  
The Hon. Carol Schwartz  
Secretary of the Council  
The Hon. Anthony Williams  
Robert Bobb  
The Hon. Rufus King