

COMMENTS OF
THE LITIGATION SECTION OF
THE DISTRICT OF COLUMBIA BAR ON THE
D.C. SUPERIOR COURT SENTENCING GUIDELINES COMMISSION REPORT*

June, 1987

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*The views expressed herein represent only those of the Litigation Section of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors.

INTRODUCTION

The Litigation Section of the District of Columbia Bar is pleased to submit comments on the Report of the D.C. Superior Court Sentencing Guidelines Commission. The Litigation Section is comprised of more than 2,000 members of the D.C. Bar, who are involved in all phases of litigation before District of Columbia courts. The practice of many of the Section members encompasses criminal law, and the Section includes practitioners who regularly litigate sentencing proceedings. Therefore, Section members are particularly interested in sentencing policy and procedure in D.C. Superior Court.

Obviously, the Commission's recommendations reflect years of study and hard work, as well as hard choices, in recommending changes in sentencing practice. Since sentencing is such an important stage in a criminal proceeding, the Commission's review of actual sentencing practices in Superior Court is to be applauded. Furthermore, study and debate of appropriate sentencing ranges for convictions of particular offenses is invaluable in providing guidance to judges, defendants, and practitioners.

Our review of the report reveals four general concerns which are left unresolved by the report, and which we believe need further study before guidelines can be endorsed:

1. There is insufficient public data to determine whether, or to what extent, there is actual evidence of disparity in sentencing for similarly situated defendants in the District of Columbia.
2. The Guidelines are too rigid and fail to allow judges to adequately apply the full range of historically important sentencing considerations in deciding individual sentences.
3. The proposed system does not decrease sentencing discretion, but merely shifts discretion from judges to prosecutors.
4. More analysis is needed concerning the impact of Guidelines enactment on the entire criminal justice system.

Each of these concerns is addressed in detail below.

In the Conclusion to our comments we recommend an alternative sentencing plan. The alternative plan would alleviate the problems of the proposed Guidelines while eliminating unfair disparity in sentencing.

1. There is insufficient public data to determine whether, or to what extent, there is actual evidence of disparity in sentencing for similarly situated defendants in the District of Columbia.

The Commission is, as are we all, concerned regarding sentencing disparity among similarly situated defendants. The Commission states that prior studies - apparently in other jurisdictions - have shown that a problem exists,¹ and recommends a solution that would radically change existing sentencing practices. However, the Commission has not indicated in its report whether or to what extent its research actually revealed any problem of sentencing disparity among similarly situated defendants in the District of Columbia. At present, there is no data available to the public to determine this information. Before endorsing this major change we believe the public and the Bar must be informed to what extent a problem exists at Superior Court, so that we can subsequently determine whether the problem merits such a drastic change in sentencing practices.

The limited information the Commission provided from the results of its study of current sentencing practices tends to suggest that there may not be the kind of sentencing disparity that would justify the drastic changes proposed. For example, the Commission notes that 67% of all defendants convicted of robbery were incarcerated.² The grid-determined sentences for a person convicted of robbery would permit a community sentence for all first offenders and some second offenders and would require incarceration for those with more serious prior records. Thus an incarceration rate of 67% may well represent an appropriate level of incarceration. Of course, it is impossible to discern from the information provided whether among the 67% are similarly situated defendants who received significantly disparate periods of incarceration.

Actual sentences imposed in D.C. Superior Court are in the public domain. Release of the data that the Commission has collected, even without including judges' or defendants' names, would greatly aid the public in assessing any need for sentencing reform. Sentencing data should be regularly compiled and released to the public regardless of whether the proposed Guidelines are enacted.

1 Guidelines Report, page 1.

2 Guidelines Report, page 7.

There is no indication whether the Commission considered other, less drastic solutions to meet sentencing disparity problems, and if so, why they were rejected. If less drastic reforms could eliminate unfair sentencing disparity, they should be considered. It is possible that mere publication of sentencing data would lead to any necessary sentencing revision by judges. Other solutions to unfair sentencing disparity might include sentencing forums for judges, or a listing of suggested sentences which judges are free to refer to, and follow or reject based on the particular facts before them.

2. The Guidelines are too rigid and fail to allow judges to apply the full range of historically important sentencing considerations in deciding individual sentences.

The proposed Guidelines limit the factors to be employed in determining the sentencing range to two factors:

- 1) convicted offense; and
- 2) prior convictions of the defendant.

According to the Commission, these factors have historically been given important consideration in sentencing.³

The Guidelines allow two additional considerations to override the sentencing range required by the above factors:

- 1) victim injury (which automatically increases the sentence for some offenses); or
- 2) circumstances of the offense itself which affect defendant culpability or victim injury (which, as mitigating or aggravating factors, could increase or decrease the sentence).

Special hearings and strict proof would be required to allow the court to apply these additional factors to increase or decrease the sentence required for the offense and the defendant's prior record. According to the Commission, circumstances of the offense itself have historically been given important consideration in sentencing, although victim injury was not separately listed as a major factor in sentencing.⁴

³ Guidelines Report, page 7.

⁴ Guidelines Report, page 7.

But the Commission's research also revealed that the following four additional factors have historically been given important consideration in sentencing:⁵

- 1) defendant's employment status at time of offense;
- 2) age of the defendant (specifically, whether eligible for sentencing under a youth corrections act);
- 3) first offender status of the defendant (no prior criminal record);
- 4) the recommendation of the presentence report.

Yet the proposed Guidelines would prohibit judges from using any of these four factors to override the sentencing ranges determined solely by offense committed and prior convictions.

By so limiting the factors to be used in determining sentencing range, the Commission is making fundamental policy changes regarding sentencing policy for offenses. The four prohibited factors above relate to the social history of the individual defendant, which is considered reflective of his or her likely recidivism and rehabilitation. Although the Commission specifically stated that it decided not to allow these factors any consideration in sentencing outside the grid, it did not give the reason for its decision.⁶

We can discern no good reason for eliminating social factors as a basis for a decision to sentence outside the grid-determined sentence. While convicted offense and criminal history have always played the largest role in determining the sentence to be imposed, there have always been cases where social factors have militated in favor of a harsher or more lenient sentence than the two primary factors would dictate. The Commission contrasts the guidelines established in Minnesota, which rule out consideration of anything other than current offense and prior criminal record, and where the policy decision was made that the primary purpose of sentencing was retribution, and those guidelines systems where social information is thought to bear on rehabilitation and recidivism.⁷ The Commission, by adopting a system that so narrowly limits the trial judge's consideration of social factors, has adopted a view of the purpose of sentencing too much like Minnesota's and not enough like those systems where rehabilitation and recidivism are also deemed worthy of

⁵ Guidelines Report, page 7.

⁶ Guidelines Report, pages 15-16.

⁷ Guidelines Report, pages 16-17.

consideration. We believe that rehabilitation and recidivism are factors which judges should be allowed to consider and that the judges in this jurisdiction can be relied upon to properly weigh all relevant factors in reaching a fair sentence. Moreover, such a radical departure from accepted sentencing policy in this jurisdiction should not be adopted without legislative approval.

Any guidelines should specifically allow the judge to consider any circumstances of an individual case which would affect the fairness of the sentence required by the grid system. For example, first offender status of the defendant is given inadequate consideration in the Guidelines. First offenders include a great variety of defendants and fact patterns within each technical statutory violation. These factors typically affect the appropriate sentence for the defendant. For instance, the first offender may give a full confession to the police, giving the government a very strong case and subsequently a harsher plea offer than a more experienced defendant, who does not talk to police, would receive. Judges can presently temper the more serious offense conviction with an appropriate sentence. Under the Guidelines, that would not be possible. Also, first offenders sometimes include the older offender who has no realistic likelihood of committing a second crime. This consideration would receive inadequate consideration under the Guidelines.

Social factors of the defendant are not the only circumstances which the proposed Guidelines do not adequately consider. Special sentencing plans, such as residential drug treatment programs, halfway house placement or split sentences, which are presently important components of sentencing, would be effectively disallowed because the plan does not consider these sentencing alternatives.

Furthermore, it appears that the reduction of importance of these factors may contradict the legislative intent of some statutes. For example, by prohibiting probation for first offenders convicted of all armed offenses and some unarmed offenses, the Guidelines would effectively eliminate probation allowed by statute. Also, the D.C. Youth Rehabilitation Act, 24 D.C. Code (801 et seq., provides for special sentencing consideration for youthful offenders, yet the Guidelines, in apparent contradiction, require youthful offenders to be sentenced using the same considerations as their adult counterparts. And the Guidelines make no allowance for split sentences, which were recently authorized by the legislature.

The grid system, by focusing on convicted offense and prior convictions of the defendant, offers a useful starting point when

considering a defendant for sentencing.⁸ But by so severely limiting the factors in determining sentencing ranges, the Guidelines would require judges to discount considerations which could affect the fundamental fairness of sentencing. And by requiring a special hearing to bring even the limited allowed additional factors to the court's attention, sentencing would also unfairly and unnecessarily burden parties who wish to bring important sentencing factors to the court's attention.

The grid format provides a constructive basis for sentencing, but judges should be allowed to depart from the recommended grid sentence for any substantial reason, including, for example, social factors of the defendant, circumstances of the offense, or an alternative available sentencing plan for the defendant. Furthermore, parties should be permitted at the time of sentencing to bring any factors which they consider important in sentencing to the court's attention, as is presently allowed.⁹

3. The proposed system does not decrease sentencing discretion, but merely shifts discretion from judges to prosecutors.

The sentencing system developed by the Commission attempts to limit the discretion of the sentencing judge in order to eliminate to the extent practicable the perceived disparity in sentences meted out to similarly situated defendants. We suggest that the actual result of this system may be to shift the discretion from sentencing judges to the prosecutor's office.

Under the proposed guidelines the convicted offense will play a major role in determining what sentence will be imposed; indeed, it is the only one of the two grid factors over which defense and government counsel have any control. Through the plea bargaining process the specific offense and the number of offenses to which the defendant will plead can be determined.

As a result, the process of plea bargaining will gain far greater importance as the decisions of prosecutors regarding the

⁸ This comment does not address the individual sentencing ranges within the grid system. Although the actual sentencing ranges can fundamentally affect the fairness of sentences, this comment focuses on policy issues presented by the proposed sentencing system.

⁹ The Section recommends an alternate sentencing plan to the proposed Guidelines which is detailed in the Conclusion of these comments.

acceptable offer will in many cases virtually determine within a narrow range the ultimate sentence. Such a process will vest in prosecutors far greater ability to make determinations about punishment than they now have. For example, under the present system a defendant charged with armed robbery might agree to plead guilty to robbery. By accepting such a plea the prosecutor has in effect agreed to reduce the defendant's exposure from life to 15 years, but has left with the sentencing judge the decision to sentence in the range from probation to 15 years. Under the proposed guidelines the same plea bargain would result in a guarantee of a sentence between 6 and 15 months unless the government presented evidence in aggravation, something we presume the government could agree not to do as part of the plea bargain. The discretion thus has not been eliminated - it has simply been moved.

Moreover, the process of appealing to the decision-maker on the basis of social factors will naturally shift to the plea bargaining process as defense counsel make their case to the prosecutor for a particular plea offer based not just on the strength of the government's case, but on the offense that will achieve the right sentencing result given the defendant's particular situation. Thus, for example, the attorney for a 60 year old man charged with armed robbery, with no prior record, with steady employment for 35 years, who owns his own home and has six children he supports will have to take his case for leniency to the prosecutor instead of to the judge. As long as there exist institutional pressures to close out cases with guilty pleas prosecutors will have incentives to consider such pleas for leniency in making plea offers. Moreover, a prosecutor might well believe that a particular defendant deserves leniency that he would not receive otherwise. Under the present system the judge decides whether the defendant deserves leniency. Under the Guidelines, that decision can be made in the prosecutor's office.

In our opinion, as long as there is discretion to make sentencing decisions, that discretion should reside with judges, not with prosecutors. Judges are better equipped by virtue of maturity and experience to make correct decisions and are better able to implement procedures to guard against disparate sentences than are prosecutors. Moreover, judges are more accountable for their decisions since their decisions are a matter of public record and by virtue of their 15-year appointments they are less subject to political pressures to reach particular decisions.

4. More analysis is needed concerning the impact of Guidelines enactment on the entire criminal justice system.

The proposed Guidelines state that the plan would initially be voluntary. It is unclear what the Commission means by voluntary. For example, would judges be able to choose among individual defendants when deciding whether to follow the Guidelines? The actual operation of the plan by judges will affect its usefulness and impact on the court system.

The Guidelines could be expected to have some impact on three major sectors of government: Superior Court, the Court of Appeals, and the Department of Corrections. It is necessary to evaluate the impact that the plan would have on these agencies, including financial impact, to determine whether the Commission's proposed solution is the most appropriate one.

The judiciary may expect a greatly increased workload at both the trial and appellate level if the proposed sentencing scheme is enacted. Naturally, this will also entail greatly increased expenses.

Defense attorneys will be obligated to request a "due process" hearing for every defendant so that the court will consider a sentence less severe than the recommended Guidelines sentence. These hearings will require extensive case investigation and presentation of witnesses because judges are required to consider all factual allegations concerning the case, regardless of the defendant's admissions at a plea. Judges will be required to preside over these hearings, with attending court personnel present. Judges will also be required to render decisions based on information provided at the hearings.

The required enhancement of sentence for victim injury will also require substantial investigation regarding the exact nature of a victim's injury, regardless of whether a defendant is convicted as a result of trial or plea. Again, hearings will be required where the defense and prosecution disagree on whether and/or to what extent a victim is injured.

The required enhancement of sentence for prior convictions will also entail increased litigation in Superior Court because the exact nature of prior convictions may have a great effect on a defendant's sentence. Defense attorneys will be required to conduct extensive investigations of their clients' prior cases, especially if the convictions are from another state, to show whether or to what extent each prior conviction should increase the severity of the sentence within the grid system.

The Guidelines do not fully address the issue of appellate review of the many new sentencing rules that are encompassed within the Guidelines. All of the rules would be subject to appellate review for proper enforcement, greatly increasing the caseload of the Court of Appeals. These rules include sentence enhancement for victim injury, use of prior convictions to enhance sentences, and use of mitigating and aggravating factors to affect sentence.

The Court of Appeals would also be called on to rule upon whether judicial enactment of the Guidelines violates the separation of powers doctrine or due process clause.

The Guidelines would obviously have a great impact on the Department of Corrections. Under the Guidelines, the average sentence would increase 2.1 months per prisoner.¹⁰ This projected increase does not take into consideration the increased sentences required by the Commission's consecutive sentencing policy. Therefore, incarceration might increase by substantially more time than presently projected. The expense of increased incarceration should be determined so that the public can in turn decide whether the expense has adequate justification.¹¹

The Commission suggests that its proposed prison rehabilitation program will ultimately lower the prison population. The Litigation Section strongly supports additional prison rehabilitation programs and prisoner incentives. But unfortunately, prison litigation has revealed in a painfully clear manner that the Department of Corrections cannot handle either its present incarceration levels or its rehabilitation obligations. Knowledge of the cost of the prison rehabilitation program and increased parole surveillance as recommended by the plan (including the cost of bringing the prison system up to presently required standards) is essential to determine whether prison rehabilitation programs are a realistic possibility.

¹⁰ Guidelines Report, page A-4.

¹¹ The Commission's decision to increase levels of incarceration for defendants clearly reflects a policy decision that more incarceration is better. Yet the Commission did not give a rationale for that policy decision.

CONCLUSION

The grid format provides a constructive basis for sentencing, but the proposed sentencing system is too rigid and fails to allow for the full application of sentencing considerations. The Section recommends an alternative sentencing plan. Although the grid system is a good starting point for sentencing, a judge should be allowed to depart from the recommended grid sentence for any reason that the judge feels is substantial, including, for example, social factors of the defendant, circumstances of the offense, or an alternative available sentencing plan for the defendant. Sentencing should be conducted at one hearing, as it is now, and parties should be permitted at that hearing to bring to the Court's attention any factors which they feel should have an impact on the sentencing decision¹². The judge should decide at the sentencing hearing whether to depart from the recommended Guidelines sentencing range. To avoid arbitrary and unfair sentences, judges should be required at the time of sentencing to state their reasons for any departure from the recommended Guidelines sentencing range.

This alternative sentencing plan would allow for consideration of special circumstances of individual cases and defendants, would maintain sentencing discretion with judges instead of prosecutors, would eliminate the unfair restrictions of the proposed guidelines, and would prevent unjust sentences.

¹² Parties should only be limited in their presentations to judges by the plea agreement between the parties, as is the present practice.