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District of Columbia Sentencing Commission

Before the United States Sentencing Commission

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Mr. Chairman and Members of the Sentencing Commission,

Thank you for inviting me to testify today on the present and possible future impact of the *Booker* decision on federal sentencing.

I direct the nation's newest sentencing guideline system, a pilot program[1] begun in June 2004 featuring advisory (voluntary) guidelines for felony crimes under the jurisdiction of the District of Columbia Superior Court. I am here to share some of my Commission's reasons for embarking on a system of advisory guidelines. Because our system is so new, it is too early to make an assessment regarding our success in increasing the uniformity and fairness of sentences. However, early results appear encouraging and cooperation is quite high.

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. 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. By the November 30, 2005 annual report, the Commission expects to release some preliminary conclusions about compliance, at least for the most common offenses. Until that time, it may be useful for you to hear some of our observations after studying several sentencing systems in depth.

## I. The Selection of Advisory Guidelines for D.C.

The Commission, as required by our statute,[2] spent many months considering the various types of structured sentencing systems in use in the United States, before recommending a pilot advisory sentencing system. Our findings and conclusions are contained in our 2002 Annual Report and available on our website (http://sentencing.dc.gov). Our Commission recommended advisory guidelines for four principal reasons. First, experience in other states shows that advisory guidelines can achieve high compliance. Second, advisory guidelines are less rigid than mandatory systems and allow a judge more room to structure a sentence to fit the varying circumstances of an individual case. Third, advisory guidelines will make it easier for the Commission to adjust sentencing ranges in the future, account for important sentencing factors as needed, and address any unanticipated consequences of such a major shift in

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[1] 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.

[2] D.C. Official Code § 3-105(a)(2001).

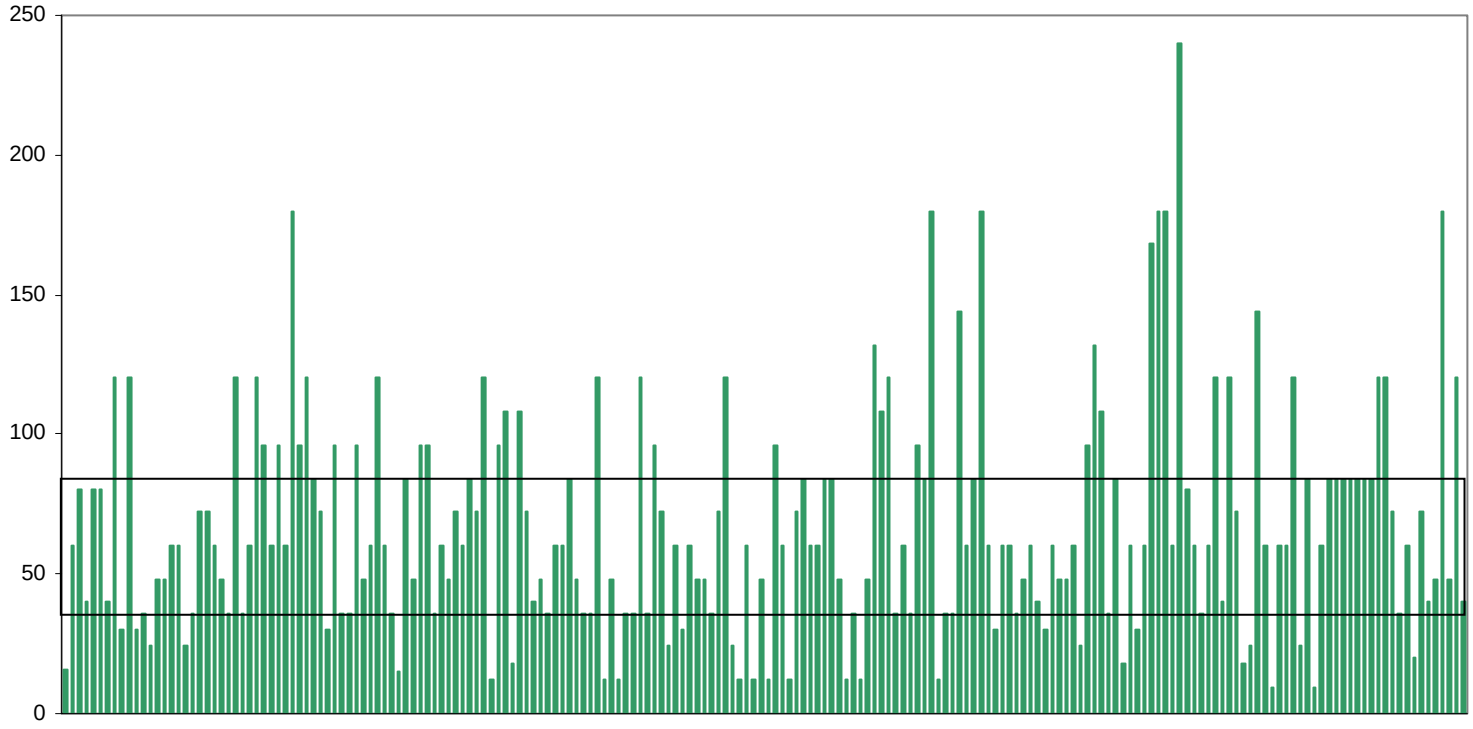
sentencing practice. Last, but not least, the Commission believed that unanimity within the Commission was necessary to insure acceptance, and concluded that selection of advisory guidelines was the only way to achieve unanimity.

I will not spend time here detailing the particular features of our guidelines, except to say it is a grid-based system with 12 offense severity groups and five criminal history categories. The Commission's primary rationale for proposing structured sentencing rested on a concern for basic fairness in sentencing, threatened by the substantial unexplained variation in sentencing that existed during the study period, 1996 through 2003. The Commission recognized that some variability was legitimate, and likely could be explained by factors within the cases that are not readily apparent from available data. However, the Commission concluded that at least some of this variability could reasonably be attributed solely to differences in judicial philosophy.

The guideline structure we developed was designed to reduce unwarranted disparity without creating a guidelines system that results in either more –- or less – time served for the average offender in the average case. Instead, the guidelines attempt to move more sentences toward the historical center by setting sentencing length ranges for each offense, while providing standards for departing from these ranges in exceptional cases.

Although the ranges are relatively broad, they nevertheless cabin discretion for the imposition of prison sentences to capture approximately the middle 50 percent of historical sentences. As illustrated in the graphic below, the guidelines were constructed by assembling all sentences for a particular grid cell during the study period (each sentence is represented by a vertical bar), and constructing a sentencing range by dropping the bottom 25% and the top 25% of sentences, leaving the middle 50% represented by the shaded region running across the center of the distribution. High compliance with these ranges will necessarily result in reduced disparity.

**Sentence Length in Months for Group 5A Offenders**



Historical data also drove the rationale for making offenses probation or split sentence eligible. The pilot guidelines permit a sentence to probation if at least 25 percent of offenders who fall within a given cell were sentenced to probation in the past.

Regarding departures, the Commission consciously selected a limited number of departure reasons, which were believed to represent truly exceptional circumstances. In so doing, the Commission recognized that a limited number of cases are unique, and do not and should not conform to the guidelines that were constructed around the middle of the distribution, where the Commission assumed most typical cases reside. The purpose of the departure principles is to identify accurately those cases that do not fit with the guidelines, to confine departures to truly extraordinary cases, and to standardize departures so that judges can sentence in extraordinary cases as circumstances dictate without undermining the general goal of increased fairness.

Putting aside the expected departures due to extraordinary cases, the D.C. pilot guidelines are truly voluntary in the sense that judges are encouraged, but not required, to follow them. The judge may impose any sentence not prohibited by the applicable statute, with no provision for appellate review of sentences that do not follow the applicable guideline.

While it is still too early to report definitively on compliance, it is our hope and expectation that the pilot guidelines will serve to give the judges, practitioners, defendants, crime victims and the community at large a better understanding of the likely consequences of criminal behavior and confidence that sentences will be more predictable and consistent.

## II. Advisory Guidelines and the Prospects for Success

I noted earlier that our review of state sentencing structures revealed that advisory guidelines frequently succeed. In a recent article,[3] co-authored with Michael Connelly of the Wisconsin Sentencing Commission, I detail some of the evidence that points to successes and conditions we believe have accompanied successful advisory structured sentencing systems. We readily admit that, in general, advisory guidelines systems need further study.

The conclusion that advisory guidelines can succeed will surprise some observers. Advisory guidelines lack a formal enforcement mechanism that many believe is necessary to insure compliance. However, a spot check of compliance rates in several state advisory guideline systems (Utah, Virginia, and Maryland) is at or near the 80% compliance rates that is usually taken as a measure of success and achieved in many of the state presumptive systems. Of course, the devil is in the details, and the differences between the various state systems (even elements adapted from one another) are as numerous as the similarities. Factors such as the operational definition used to calculate compliance and the width of the ranges are only two of many factors one can name that likely affect the compliance rate. However, the essential point should not be lost when debating these fine points. Given the rules of the system in that

[3] Kim Hunt and Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENTENCING REP. (Forthcoming).

particular place at that particular time, the parties in advisory guidelines systems chose frequently to comply with those rules (in similar numbers to presumptive systems), despite the fact that there was no formal enforcement mechanism to compel them. They elected to comply with voluntary rules.

Several factors appear to be associated with successful advisory guideline systems. These factors include transparency, superior information gathering and analysis, effective dialogue, and clear goals and feedback.

Dr. Connelly and I note that higher transparency in sentencing is likely to lead to higher levels of compliance. For example, Pennsylvania has achieved a level of transparency that likely exceeds that of all presumptive guidelines systems, as they report compliance for each judge. It stands to reason that a judge will be more inclined to follow the guideline recommendation, or take care to have a strong rationale for a departure, when he or she knows that departure information is publicly available. There is no reason to believe that the federal system cannot promote this same degree of transparency.

We assert that advisory guidelines are best able to succeed where careful monitoring and evaluation of sentencing practice occurs. This point may appear obvious, as the United States Sentencing Commission has extensive experience in this area. Careful monitoring can provide early indications of trouble spots and areas in need of improvement.

Careful monitoring promotes opportunities for dialogue. For example, compliance with advisory guidelines is usually higher for some offenses than for others. Careful analysis, as well as dialogue with practitioners, can provide insights that may cause a re-examination of policies in areas with higher departure levels. Since advisory systems rely to a greater extent than presumptive systems on informal controls, this sort of feedback can foster effective relationships with key parties. An active dialogue with judges and others promotes "buy-in" and reduced resistance. In contrast, formal controls generate their own forms of resistance and back-door remedies.

In at least one area, appellate review of sentences, the federal system may be in a unique position. An effective practice of appellate sentence review has not been established to date in any state advisory guidelines system.[4] One limitation of advisory guidelines systems to date is that despite high compliance rates, without appellate review there is no remedy for the outlier, a judge who gives a highly atypical sentence for a typical case. In the wake of *Booker*, there may be much the states can learn from the federal experience with appellate review based on the new reasonableness standard.

In summary, there is much reason to believe that advisory guidelines can meet your goals.

[4] See Kevin Reitz, *The New Sentencing Conundrum*, __COL. L. REV.__ (2005).