

THE SENTENCING GUIDELINE

A PUBLICATION OF THE NATIONAL ASSOCIATION OF SENTENCING COMMISSIONS

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2005 NASC Conference The Continuing Evolution of Sentencing August 7 - 9, 2005 Washington, DC

The United States Sentencing Commission and the District of Columbia Sentencing Commission invite you to the 2005 NASC Conference. The conference will be held at the Thurgood Marshall Federal Judiciary Building in Washington, DC. The theme of this year's conference is "The Continuing Evolution of Sentencing." We hope that you make the trip to the nation's capital to enjoy the conference as well as the sights of the greater Washington area. The conference hotel is the Phoenix Park Hotel, which is located across the street from Union Station and within a block of the Thurgood Marshall Building. Because of security concerns, there will be no "day of conference" registration. Identification is required to enter the Thurgood Marshall Judicial Building. Badges should also be worn for conference activities.

One of the conference panel tracks will focus on the continuing impact of the U.S. Supreme Court's *Blakely* decision by examining recent rulings in the *Booker* and *Fanfan* cases. During the closing plenary session of the conference, a state-by-state roll call will provide each member state the opportunity to share the impact of, and state responses to, these landmark decisions on criminal sentencing. States should designate a representative to participate in this roll call discussion.

Elections for the NASC Executive Committee will be held during the conference. Two members of the Committee will be serving out their terms this year, leaving the Committee with two vacancies. Any one interested in running for the Executive Committee should submit his or her name and a short biography to the Committee's Vice-President, Kevin Blackwell, at kblack@ussc.gov by July 20.

THIS CONFERENCE IS HOSTED BY

Co-Hosts

United States Sentencing Commission
District of Columbia Sentencing Commission

CONFERENCE PANEL TRACKS

Impact of the *Blakely*, *Booker/Fanfan* decisions
Sentencing/corrections research
Current/special issues
Criminal justice industry vendors

REGISTRATION FEES

The conference registration fee of \$225.00 includes reception on Sunday evening, continental breakfast and luncheon on Monday and Tuesday. Complete the registration, enclose the appropriate fee, and return it to DC Sentencing Commission. Payment must be in the form of a check made payable to NASC. You may also register on-line at www.scdc.dc.gov.

HOTEL INFORMATION

The conference hotel is the Phoenix Park. Reserve your room directly through the hotel. When making reservations online, please use Internet group code 18051 to receive conference rate of \$139 + tax. Parking is \$25 a day at the hotel. Long term parking is available at Union Station for \$16. Union Station is convenient to the Phoenix Park and the conference site.

TRANSPORTATION

Washington, DC is serviced by three airports and a train station.
Dulles Airport (IAD) (approx. 28 miles to hotel)
Reagan National Airport (DCA) (approx. 5 miles to hotel)
Baltimore-Washington Airport (BWI) (approx. 35 miles)
Union Station is served by Amtrak. (approx. 1 block from the hotel)



Message from the President

As I began to write this message, I realized it would be my last one as President of NASC. I was elected to the Executive Board of NASC in 1999 and have served as President since 2000. According to the organization's by-laws, I have reached my sixth consecutive year as a Board member and it is now time for me to pass on this opportunity and role to another NASC member. I reach this point with very mixed emotions, surprised that the time has passed so quickly; grateful for the experience and knowledge I have learned during this period; impressed with the dedication and resourcefulness of sentencing commissions across the country and thankful for the many wonderful friendships I have had the opportunity to develop during my presidency. There were also those moments of frustration, uncertainty and disappointment over the years. However, I can truthfully say that the good memories clearly outweigh those of the difficult times. Watching this organization continue to grow and demonstrate the level of expertise it has with regard to the development and implementation of sound rational sentencing policy has been very rewarding.

When you think about the membership of NASC, they represent a very diverse group of individuals from vastly different backgrounds and states. There are states represented with guidelines and without guidelines; states with commissions and without commissions; states with determinate sentencing and with indeterminate sentencing. Each state has a different criminal code, a different legislative process and a different judicial structure. Some states have had guidelines for years, in some states they are fairly new and some states have even implemented guidelines, abolished guidelines and then reinstated guidelines a second time. State representation changes over time with new states coming on board and other states leaving. The inclusion of the United States Sentencing Commission and the federal guideline issues adds even another dimension to that of the states. Given the multiplicity of interests in this group, one would wonder what in the world could they ever share as a common goal.

What I have experienced is that each member of NASC has something unique to contribute and also has the opportunity to learn something new, no matter how long you have worked in the area of sentencing policy. I can remember attending my first NASC conference as a Director many years ago and feeling so intimidated and overwhelmed. I was the new kid on the block and figured I would never have the knowledge or the expertise of the other directors or members of NASC. But the sharing of information and, maybe more importantly, experiences among states and members proved to be the best education possible for me. Regardless of varying backgrounds of the members or states, there are common issues faced by everyone. There are sentencing disparity issues, sentence proportionality issues, resource issues, recidivism issues

and political pressures and influences to name a few. In addition, there are the unexpected external influences such as state and federal court decisions – who would have envisioned the chaos and the impact the *Blakely v. Washington* decision would have on sentencing policy across this country? What NASC has contributed to the field of sentencing policy development and reform is a forum for the exchange of information, an opportunity for healthy debate and the benefit of experience, both positive and negative.

It is with the sincerest appreciation that I express my thanks to the membership of NASC who gave me the opportunity to serve as president all these years. I would also like to recognize and commend the hard work and dedication of the Executive Board. Most of you are not aware of the countless details, the never ending conference calls and the amount of planning that the Executive Board must complete in preparation for the annual conference. They have been a spectacular group to work with and have always gone above and beyond what anyone could expect – my special thanks to each and every one of you.

My best wishes to the next president of NASC. I hope your experiences will be as rewarding as mine have been.

Sincerely,
Barb Tombs
NASC President

NASC Executive Board

Barbara Tombs, President

Executive Director, Minnesota Sentencing Guidelines Commission

Kevin Blackwell, Vice President

Senior Research Associate, U.S. Sentencing Commission

Michael Traft, Treasurer

Member, Massachusetts Sentencing Commission

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Deputy Director, Pennsylvania Commission on Sentencing

Meredith Farrar-Owens

Deputy Director, Virginia Criminal Sentencing Commission

Paul O'Connell

Director, Administrative Services, Arizona Superior Court in Pinal County

Ida Rudolph Leggett

Executive Director, Washington Sentencing Guidelines Commission

Alabama



On the Verge of Obtaining Approval for Sentencing Standards

As the Alabama Sentencing Commission prepares to begin its fifth year on the path to sentencing reform, we are on the brink of passage and approval of voluntary sentencing standards based on historic time-imposed data, modified to achieve our legislative mandates. In addition, we have grown to a staff of 6, adding a statistician to assist our research analyst and a staff attorney/community corrections coordinator. With the help of Chief Assistant Attorney General and commission/staff member Rosa Davis, we have also been able to secure the services of legal interns through most of the fiscal year, who have been of invaluable assistance.

This year, the Sentencing Commission's legislative package contained 12 bills; the most important of which was the bill proposing the implementation of our initial voluntary sentencing standards. The primary focus of ASC's legislative package for 2005 was gaining approval of the sentencing standards and delaying implementation of truth-in-sentencing standards for three years to gage the effectiveness of the original standards. To effectively implement the standards, we also proposed amendments to Alabama's Youthful Offender and Juvenile statutes to authorize statewide access to these records for judges, prosecutors, defense attorneys, probation and parole officers, community correction employees and others who will be completing sentencing worksheets.

Other legislation included the amendment of Alabama's Burglary 1st and Burglary 2nd statutes to incorporate a "loot rule." With this amendment an offender would be required to be either armed with a deadly weapon or dangerous instrument upon entry into a dwelling or building or use or threaten the immediate use of the weapon in the commission of these crimes. Upon approval of this bill, defendants would no longer be charged with Burglary 1st or 2nd when a deadly weapon or dangerous instrument is simply acquired as a part of the theft.

The Sentencing Commission also pursued bills to provide a procedure for discretionary medical and geriatric release of terminally ill, permanently incapacitated, and geriatric inmates. The legislative package also included a bill to amend Alabama's split sentencing statute to specifically authorize judges to incarcerate an offender for any portion of his or her suspended sentence upon revocation of the probation portion of the sentence. Other bills introduced were revenue bills to obtain additional funds for community correction programs, pardon and parole facilities and the state general fund.

Although none of our bills passed during the general session, we are encouraged that there was very little opposition to the standards or other ASC legislative proposals. Most of the bills made it through the House of Representatives and through Senate committees before the process bogged down on the Senate floor with filibusters over the General Fund budget. During three months in session, the Alabama Legislature managed to pass (other than budgets) only 7 bills of statewide application. In summary, the Commission's legislative package, along with other much needed proposals, died because the clock ran out.

Because the Legislature failed to pass a General Fund budget, the Governor will call a special session some time this summer. The Governor has stated the Sentencing Commission's package (or the most important bills) will be included in the Special Session call. The ASC staff is already working to ensure passage of these bills by the Legislature. It is also noteworthy that Commission members and staff and members of the Commission's Advisory Board have been appointed to the Governor's Prisoner Reentry Task Force and the Governor's Prison Overcrowding Task Force. The Commission staff will assist these groups by providing current data, legal research and administrative assistance.

In addition to our proposed sentencing standards and other reform bills and the Governor's support in our efforts to reform Alabama's criminal justice system, there are a number of exciting things happening in Alabama. Many criminal justice departments and agencies are changing the way they do business, at least in part, because of the emphasis given to certain areas by the Alabama Sentencing Commission. Pardons & Paroles has instituted a transition center for female inmates leaving prison with promising results. The Sentencing Commission has recommended additional funding and is seeking support to establish transition centers for male inmates.

Pardons and Paroles is also changing from a "contact" supervision method to an evidence-based or results-based supervision of offenders. This means probation and parole officers will no longer consider just the number of contacts between a supervisor and an offender, but will look at needs assessments and attempt to meet those needs. This is a significant change for Alabama and was made possible by additional funding provided as recommended and supported by the ASC.

Another exciting development is the growth of community punishment programs. While state funding for these programs is still insufficient, new programs are continuing to develop. The proposed General Fund appropriations did contain a substantial

The Sentencing Guideline

Alabama CONT.



increase for community corrections programs, which we are hopeful will be approved during this summer's Special Session. Community corrections programs are expanding in Alabama but are only established in 34 of our 67 counties. Since 2000, there have been eight new programs started and many county commissions and judges have expressed an interest in having programs established. The Sentencing Commission continues to work with local entities that are trying to establish programs. The Commission assists new programs in getting established and applying for funding through the Department of Corrections. The Administrative Office of Courts is also working with community corrections programs to implement a statewide automated case management and records system that will benefit all aspects of the criminal justice system when implemented.

Overall it has been a good year and we are hopeful that it will be a landmark year for sentencing reform in our state with the passage, approval and implementation of the proposed sentencing standards. We have made it this far only with the assistance, support, and guidance of many of you and the Vera Institute of Justice, for which we are profoundly grateful.

available to adjust the sentences. The new law sets a range of permissible sentences for each offense, including all of the first felony B and C offenders, thus expanding the scope of presumptive sentencing to all felony convictions. Typically, the new ranges start at the previous presumptive sentence (if there was one) and go up to several years above that. Mitigators can still be argued to reduce the sentence. Aggravators that would take the sentence above the presumptive range must meet *Blakely* restrictions.

Alaskans had varied responses to the new *Blakely*-inspired sentencing legislation. The bill was introduced in the Alaska Senate on January 14, passed by the Senate, transmitted to the House on January 26, and thence to the governor on March 14; it was effective immediately after the governor signed it (March 23, 2005). Governor Frank Murkowski characterized the bill as creating more discretion for judges. The Department of Law, chief drafters of the new bill, said that the sentencing ranges adopted by legislators were "in keeping with the spirit of the [U.S.] Supreme Court decision." Defense attorneys said that defendants would be more reluctant to plead guilty because negotiated sentences would be less certain.

Alaska



Blakely Update

Six months after the *Blakely* decision, in early January 2005, much of the Alaska response to the decision centered on negotiations in specific cases, and a few early superior court opinions questioning the constitutionality of Alaska's presumptive sentencing scheme in light of the U.S. Supreme Court decision. A year after *Blakely*, the landscape showed signs of marked change. Sentencing appeals and related actions were up substantially, and Alaska had passed legislation to revise its sentencing laws.

Alaska's former sentencing system set a single presumptive sentence for repeat Class B and C (lesser) offenders, and for Class A and most Unclassified felons (the more serious offenders). Presumptive sentences for subsequent felony offenders in all categories also were set by law, with aggravators and mitigators

The Senate's letter of intent, which was incorporated into the legislation, noted that the legislature intended to preserve "the basic structure of Alaska's presumptive sentencing system, subject to judicial adjustment for statutory aggravating or mitigating factors." The Senate also noted that it did not intend to increase the overall amount of active imprisonment. The Department of Corrections noted that its research suggested that the average unsuspended incarceration for first felony Class B and C offenders fell within the middle of the new ranges. As a result, it did not expect increasing sentence lengths or added burdens for its work. Some agencies commenting on the bill noted concerns about the possibility of increasing sentence lengths, increasing overall incarceration, increasing the numbers of defendants on probation (and therefore probation revocations), and increasing appellate work.

Alaska will continue to track and report on changes in its criminal justice system related to *Blakely* issues.

Arkansas

Legislative Update



The Arkansas Legislature just finished its 2005 legislative session with a number of new bills being passed that focused on reducing the size of the prison population here in the state and one bill that dealt specifically with the Arkansas Sentencing Guidelines. In response to the *Booker/Fanfan* decision handed down by the U.S. Supreme Court earlier this year, the legislature adopted a bill that restated that the Arkansas Sentencing Guidelines are entirely voluntary. It also removed a provision that stated the following: if a sentence is imposed that is outside of the presumptive range and it is not accompanied by written reasons for the departure, then the offender would be considered for any discretionary release applicable under the law as if he had received the presumptive sentence, and the transfer or releasing authority may review, grant, or deny transfer or release based on any eligibility established by the presumptive sentence term. Some legislators felt that this provision was a type of penalty if a judge did not file a departure report and this would be a violation of the majority opinion in *Booker/Fanfan*.

The legislature also passed a series of bills that dealt with the overcrowding of the state's prisons. Act 678 provides for the establishment of transitional housing facilities as a way of both reducing the prison population and of reducing the recidivism rate of offenders. Act 681 provides inmates the opportunity to obtain additional days of meritorious good time if they successfully complete various programs available to them while they are incarcerated with the Department of Correction or Department of Community Correction. The legislature also passed Act 1034 that allows two offenses that were subject to the state's seventy-percent rule to earn meritorious good time and therefore reduce the original sentence to no less than fifty-percent. The two offenses are the manufacture or methamphetamine and the possession of drug paraphernalia with the intent to manufacture methamphetamine.

Massachusetts

Guidelines and Offender Reentry considered by Legislature



The Commission continues to work with the legislature to formally adopt sentencing guidelines. Currently, the legislature is considering four sentencing guidelines bills: Senate 1064 and House Nos. 682, 683, 813 and 938. There is also substantial interest in addressing issues of prisoner re-entry in Massachusetts. The Legislature is considering a number of proposals to create mandatory post-release supervision for incarcerated offenders. It is hoped that policymakers will tap into the growing momentum for increased post-release supervision and promote a comprehensive criminal justice reform package with sentencing guidelines at the center. Sentencing guidelines address many of the prisoner re-entry issues by encouraging the use of intermediate sanctions, by establishing uniformity in sentence structure, and by encouraging the use of discretionary release by the Parole Board.

The Commission published a new edition of the *Felony and Misdemeanor Crime List*. This reference document contains citations for over 2,000 criminal offenses punishable by incarceration in Massachusetts. Some of the new offense provisions established in Massachusetts include expanded elder abuse provisions and dangerous conditions in buildings used for assemblies. The commission also recently published the annual *Survey of Sentencing Practices, FY2004*. This report contains the first sentencing data for some of the recently established offenses in Massachusetts including criminal harassment, identity fraud, and aggravated Assault & Battery. Copies of these and other publications are available by request or at the commission's website.

Honorable Robert A. Mulligan, Chief Justice for Administration and Management and Chairman of the Massachusetts Sentencing Commission recently reconstituted the Race and Ethnic Advisory Board (REAB). The reconstituted Advisory Board will focus attention on two issues of critical importance to racial and ethnic minorities involved in the judicial system: interpreter services and disparities in sentencing.

The Sentencing Guideline

Minnesota

Crime Bill Adopted



Although the Minnesota Legislature is currently in a “special session,” one of the few bills to pass during the regular legislative session was HF 1, the Omnibus Crime Bill, which was signed into law by Governor Pawlenty on June 2, 2005. HF 1 contained three major sentencing provisions: a new sex offender sentencing policy; enhanced sentencing provisions for methamphetamine; and modifications to the Minnesota Sentencing Guidelines in response to the U.S. Supreme Court decision *Blakely v. Washington*.

Given the growing legislative interest in sex offender sentencing policy, the impact and public attention generated from a recent high profile sex offense case in the state, and issues surrounding the limitations of civil commitment for sex offenders, previous determinate sex offender sentencing under the guidelines was modified to include a combination of determinate and indeterminate sentencing provisions. HF 1 contained mandatory life sentences without possibility of release for a limited number of repeat and violent sex offenders whom the Legislature defined as the “worst of the worst.” This portion of the bill targets sex offenders who commit the most serious Criminal Sexual Conduct offenses with two or more aggravating factors from a specified list of aggravating factors and those who have two or more prior convictions for sex offenses. This target population of sex offenders poses the greatest threat to public safety and also represented a significant percentage of the current upward departures under the guidelines.

In addition to the mandatory life sentence, an indeterminate life sentence was designated for a separate group of sex offenders who represent the second tier of what the legislature designated as the “worst of the worst”. These cases include those with one aggravating factor or limited prior sex offense convictions. Here, the guideline grid time serves as the minimum sentence and a Release Board determines the actual release date of the offender. A new crime entitled Criminal Sexual Predatory Conduct was also created and significant changes were made to the supervised release of sex offenders.

The Sentencing Guidelines Commission proposed a separate sex offender sentencing grid in its January Report to the Legislature. The Legislature rejected that specific grid but instructed the Commission to develop and resubmit a specific sex offender grid given the statutory changes enacted this session for sex offender sentences.

The Legislature also addressed the growing problem of methamphetamine in the state by redefining methamphetamines as a narcotic; creating a new offense “entitled possession with

intent to manufacture meth”; and enhancing penalties for manufacture of meth in the presence of children and vulnerable adults. Finally, restrictions were placed on the over-the-counter sale of precursor drugs and monitoring requirements were placed on retailers. Methamphetamine represented the largest category of drug offenses in the state during the past year.

Given the recent *Blakely v. Washington* ruling and the structural similarity of the Minnesota Sentencing Guidelines to Washington State, the Commission acknowledged shortly after the Supreme Court decision that, although the guidelines themselves remained constitutional, the current procedure for imposing aggravated/upward departures was not. Over the past year, Minnesota Court of Appeals decisions supported that finding and have ruled that only upward durational departures, not upward dispositional departures are subject to *Blakely*. Since aggravated upward departures accounted for very limited number of cases sentenced under the guidelines, the Commission strongly believed that limited modifications to the current sentencing guidelines could be made to address the constitutional issues identified in *Blakely* while maintaining the integrity or the underlying goals of the guidelines. The Commission brought forth a proposal that recommended increasing the sentencing range within each grid cell to the statutorily permitted 15 % up and 15% down from the presumptive sentence.

The Commission also proposed that for specific statutorily enhanced sentencing provisions (such as the Dangerous Offender Sentencing Provision or the Career Offender Sentencing Provision) some form of a bifurcated proceeding be utilized when necessary, replacing the current requirement of the court’s findings with findings by the trier of the facts. In addition, the Sentencing Guidelines Commission recommended that appropriate modifications to the current plea proceeding be made to include a “willingly and knowingly” waiver of the right to a jury determination of aggravating factors.

A competing proposal was introduced during the legislative session that allowed for a 100% increase upward in the sentencing range, but only a 15% decrease in the range. This proposal did not favor bifurcated proceedings. After debate, the Legislature passed the Commission’s recommendations with the only modification being a 20% upward increase in the sentencing range and 15% downward decrease in the sentencing range.

Although it appears that minimal guidelines modifications were necessary to comply with the constitutional issues in *Blakely*, the Minnesota Supreme Court has just heard its first *Blakely*-related case. That ruling could directly impact future modifications and application of the Minnesota Sentencing Guidelines.

Ohio



Ohio Legislature Ponders Commission's Forfeiture Proposals

The Ohio General Assembly has begun hearing a lengthy bill to reform the state's myriad asset forfeiture laws. H.B. 241 was introduced in early May and immediately scheduled for extensive hearings before the House Criminal Justice Committee.

The bill grew out of proposals made last year by the Ohio Sentencing Commission. The Commission suggested streamlining the laws governing property forfeitures relating to criminal misconduct and clearly identifying the respective rights of property owners and the government. The proposals called for new standards for linking crimes and property subject to forfeiture and for a review to assure that forfeitures are proportionate to the underlying wrongdoing. In Ohio, assets are most frequently forfeited in drug and racketeering cases today.

In other Sentencing Commission news, the Ohio Supreme Court agreed to hear several appeals relating to the *Apprendi-Blakely-Booker* line of cases. At issue are several provisions in Ohio's sentencing guidelines. These include a statute that favors minimum prison terms for offenders who have not been to prison before and one that authorizes maximum prison terms only when certain findings are made about offense severity and the offender's prospects for future crime. The statutes were enacted in 1996 at the behest of the Ohio Sentencing Commission.

To date, most Ohio courts have upheld the state's sentencing guidelines in the face of *Blakely* challenges. However, there are a handful of decisions that question the constitutionality of certain statutes. The Ohio Supreme Court will address the conflicts.

While briefing has begun, the cases have not yet been set for argument. It is likely they will be heard in the fall and decided late in the year. The General Assembly has not moved to amend the guidelines to date. It awaits instruction from the Court and the Sentencing Commission on whether changes are needed. The Commission has steadfastly defended Ohio's guidelines against *Blakely* challenges.

2004 Sponsor

BI Incorporated is the nation's leader in providing state-of-the-art technology, treatment and reentry services for offenders released to community supervision. For more than 20 years, BI has worked closely with public corrections officials to reduce the cost of corrections without sacrificing public safety. For more information, visit www.bi.com or call 800.701.5171.



Oklahoma



Legislature Adopts Key Recommendations of Oklahoma Sentencing Commission

The 2005 Oklahoma Legislature has increased funding for Drug Courts by \$8 million next year – triple the current amount – and enacted a new Intermediate Sanctions Program designed to provide more swift and certain punishment for probation violators. The funding boost is expected to make Oklahoma the No. 1 state in the nation in base funding for drug courts. The state will spend \$3.26 per capita for drug courts in FY'06, more than any of the other 28 states that provide state funding for the programs, according to the Oklahoma Criminal Justice Resource Center (OCJRC).

The two alternative sanctions programs were recommended by the Oklahoma Sentencing Commission as lawmakers struggled to find alternatives to buying more prison beds. OCJRC, which provides staff support to the commission, had predicted the state's use of prisons – already the fourth highest rate in the nation – would grow by more than 600 beds during FY'06.

The increased appropriation brings Oklahoma's annual adult Drug Court budget to \$11.5 million, and will allow for an increase in treatment capacity from 1,152 persons to 4,381. Quadrupling the capacity of drug courts is expected to have a significant impact on prison receptions, which totaled 8,900 in 2005, said Ben Brown, Director of Substance Abuse Services for the Oklahoma Department of Mental Health and Substance Abuse Services (DMHSAS), which administers the program. The prison system received a \$25 million appropriation increase during the 2005 session to house more offenders, and is seeking \$23 million more during a special session that convened shortly after the regular session ended in May.

Besides the drug court funding initiative, the Legislature sought to address prison crowding by passing HB 1267, sponsored by commission co-chairs Sen. Richard LerBlance (D-Hartshorne) and Rep. Terry Ingmire (R-Stillwater). The bill creates a statutory Intermediate Sanctions Program that courts can begin using to address probationers who commit minor rule infractions while under supervision; it does not apply to probationers charged with new crimes.

Previously, revocation was the only formal tool available to courts to address so-called "technical violators" of probation rules. Last year, the state's prisons received about 1,500 technical violators, accounting for nearly 20% of annual receptions. Justin Jones, Deputy Director of Community Sentencing at DOC, says the new program may result in \$5 million in annual prison savings if 400 violators avoid revocation.

The Sentencing Guideline

Oklahoma CONT.



The 15-member Sentencing Commission in February made eight specific recommendations to the 2005 Legislature. Top among them was recognition that Oklahoma does not provide enough funding to supervise probationers. "Central to the success of the proposed changes to the use of probation sentences is a substantial increase in the funding level and an increase in the number of probation and parole officers to supervise offenders given all types of probation sentences," the report stated. Oklahoma's criminal justice system uses probation at a rate that is 40% below the national average, according to a 2002 report by the Bureau of Justice Statistics. Oklahoma spends \$2.04/day per offender on standard probation supervision, which is provided statewide by the Department of Corrections. That amount is half the U.S. average rate of \$4.37/day.

The state's drug court programs provide more intensive supervision and treatment, with an average daily cost per participant of \$6.37 per day. "When we asked prosecutors and judges why they incarcerate (Oklahoma) offenders more than the national average, they say probation doesn't provide enough offender accountability and public protection," said K.C. Moon, OCJRC director. "The 2005 Legislature made a wise investment by making our probation system better." 2005 marks the first year that legislators put more new money into prison diversion slots than into prison beds, Moon said. "The old saying, 'build it and they will come,' is as applicable to the criminal justice system as it is anywhere," he said. "Oklahoma lawmakers are choosing to build systems that treat the core problems of offenders, rather than chasing our tails trying to build enough prison space."

Other key 2005 Legislature actions related to criminal sentencing:

- HB 1405, co-authored by Rep. Ingmire, creates statutes for administration of juvenile drug courts. The state is using Tobacco Settlement Funds to help open new courts for juvenile offenders and expand existing ones. The courts had operated under the adult Drug Court Act.
- SB 631, titled "Jessica Lunsford's Law," requires habitual and aggravated sex offenders to wear electronic monitors for the remainder of their lives. Under current law, such offenders are subject to lifetime registration only. Commission co-chair Rep. Ingmire, author of the bill, said the state's justice system should take full advantage of high-tech supervision tools to hold habitual offenders accountable and save lives.

The complete report of Commission's 2005 recommendations is available at: http://www.ocjrc.net/pubFiles/LegisRecom/Sentcomm3_08_05.pdf. The Commission's 2003 Report of Felony Sentencing is available at: <http://www.ocjrc.net/pubFiles/FelSentRpt/2003SntRpt.pdf>. For the state's Drug Court report, see: <http://www.odmhsas.org/eda/drugcourtreport2004.pdf>

Pennsylvania



Pennsylvania Adopts 6th Edition Sentencing Guidelines

Pennsylvania's initial sentencing guidelines were implemented on June 22, 1982, and on June 3, 2005, the 6th edition of Pennsylvania's guidelines became effective. The latest version of the guidelines included revisions in response to several issues such as: 1) the 120 enacted, amended, or repealed statutes that have impacted the sentencing guidelines since the 5th edition of the guidelines in 1997, 2) requests for changes in the sentence recommendations for a number of offenses, including violations of the Uniform Firearms Act, crimes of violence, weapons of mass destruction, controlled substances, and driving under the influence of alcohol or controlled substance, 3) legislation mandating the Commission to provide a sentencing enhancement for the offense of homicide by vehicle, when the violation occurs in an active work zone, 4) streamlining certain aspects of the Commission's previous Prior Record Score policies; 5) clarification of several issues raised by Pennsylvania's appellate courts, such as the definition of school zone used in the youth/school enhancement for drug delivery cases, and the use of court martial in the Prior Record Score calculation, and 6) the incorporation of a new sentencing alternative, State Intermediate Punishment, into the guidelines. The guidelines now also require all criminal courts to use the Commission's JNET-based Sentencing Guidelines Software Web application (*SGS Web*) to prepare and submit all guideline-required sentencing information to the Commission electronically, approximately 120,000 sentences per year. The Commission held statewide public hearings on the proposed guideline changes prior to submitting a final version to the Legislature for approval, and has been conducting training sessions across the state on these new guidelines.

New Sentencing Option of State Intermediate Punishment [SIP] Becomes Effective

In December 2004 Pennsylvania's Governor signed Act 112 providing for a new sentencing option of State Intermediate Punishment [SIP], which provides another alternative for offenders traditionally sentenced to state prison. SIP combines an initial short period of confinement in an institutional therapeutic treatment community (TCU) with an individualized comprehensive treatment and supervision program administered through community-based programs and services. This initiative builds upon the 1990 legislation that created County IP programs that diverted persons recommended for county jail and/or state prison to comprehensive treatment programs in lieu of incarceration. The SIP sentencing alternative became effective on May 18, 2005. The statute also requires the Commission to make guideline recommendations for SIP eligibility, and to conduct regular evaluations of the program.

Virginia



Probation Violator Risk Assessmen to be Phased In

SIP Procedure. The procedure for participation in the SIP Program involves a motion of the District Attorney, and agreement of the defendant, that the offender be considered by the judge for referral to the Department of Corrections [DOC] for program evaluation. The court provides the DOC with information on the defendant, including the summary of the current offense, prior criminal history, substance abuse history, and a Pre Sentence Investigation if available. The DOC conducts an assessment and provides a report to the court, the district attorney, the defendant, and Sentencing Commission within 60 days. Included in the report is a proposed treatment plan, if SIP is deemed appropriate for the offender. Upon agreement with the district attorney and defense, the court may sentence the offender to 24 months of SIP. The SIP Program is individually tailored to meet the substance abuse needs of the offender, along with educational and employment concerns.

Phases to SIP. There are four phases to the SIP Program, allowing for a gradual step-down of treatment: 1) a minimum of 7 months incarceration in a state correctional institution that includes a minimum of 4 months in an institutional therapeutic community, 2) a minimum of 2 months in a community based therapeutic community, 3) a minimum of 6 months in an outpatient addiction treatment facility, and 4) supervised reintegration into the community for the balance of the 24 months. Upon successful completion of the program, the DOC notifies the judge, district attorney, and Sentencing Commission. If the offender is expelled from the program, the court may sentence the offender to the sentencing options available at the initial sentencing.

SIP Reports. The Sentencing Commission is required to submit a Legislative Report on the SIP Program in even numbered years, and the DOC will provide the reports in odd numbered years. Statute requires that the report include the number of offenders: 1) eligible for SIP, 2) sentenced to SIP, 3) evaluated for SIP, and 3) who successfully completed the program. Additionally, 6-month, 1-year, 3-year, and 5-year recidivism rates of offenders who completed the program and a comparison group of offenders who were not placed in the program are to be provided, as well as recommendations for improving the program.

The Sentencing Commission has continued its work on a legislative mandate to develop discretionary sentencing guidelines and a risk assessment instrument for felony offenders who violate conditions of probation supervision but are not convicted of a new crime (i.e., "technical" violators). The first part of this directive specified that these guidelines were to be based on an examination of historical judicial sanctioning patterns in probation revocation hearings. The goal of the probation violation guidelines is to ensure that equally-situated offenders are more likely to receive comparable sanctions for their technical breaches.

Following implementation on July 1, 2004, the Commission closely monitored the early response to the probation violation guidelines and noted a much lower compliance rate than that found for sentencing guidelines in felony conviction cases. After analyzing the departure patterns and the cited reasons for departures, the Commission developed recommendations for revising the violation guidelines. The legislature accepted the Commission's recommendations and the revised sentencing guidelines took effect on July 1, 2005.

To address the second component of the General Assembly's directive, implementation of a risk assessment instrument, the Commission conducted a large recidivism study of probation violation cases to identify factors that were statistically significant in predicting the likelihood of a new arrest. The goal was to identify otherwise incarceration-bound probation violators who pose a low risk to public safety and who would be excellent candidates for an alternative sanction to traditional incarceration. The Commission was successful in developing a risk assessment instrument to supplement the probation violation guidelines and recommended its adoption to the 2005 General Assembly.

In making its recommendation, the Commission stressed the importance of ensuring that judges had new intermediate sanction options available to them to sanction this class of offender. The 2005 General Assembly approved the Commission's recommendation to implement the risk assessment instrument but provided only modest funding for the creation of new intermediate sanctions. Accordingly, the Commission will be moving forward with a gradual implementation of this new guidelines component, with first priority being placed on circuits that are geographically proximate to a newly-established regional return-to-custody center for technical probation violators.

Among other new initiatives, the Sentencing Commission will be working with the legislative Crime Commission on a comprehensive study of the sex offender registry and the civil commitment process for violent sexual predators.

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The Sentencing Guideline

Washington



Legislative Update

During the 2005 legislative session, the Washington Sentencing Guidelines Commission (SGC) worked with legislators and criminal justice professionals around the state to draft legislation in response to the *Blakely* decision. After reviewing several options, including one that would have amended the Sentencing Reform Act (SRA) to make the sentencing grid advisory instead of presumptive, the Commission recommended passage of Senate Bill 5477.¹ The Bill primarily provides procedural changes to the SRA to bring the Act into compliance with *Blakely*.

In SB 5477, the legislature did not alter existing procedures for the imposition of exceptional sentences below the grid. The court, prosecutors and defense counsel still may seek mitigated exceptional sentences. The sentencing court retains the authority to find the facts supporting a mitigated sentence by a preponderance of the evidence. Like *Blakely*, however, SB 5477 requires that facts supporting exceptional sentences above the standard range, aggravated exceptional sentences, be found and decided by a unanimous jury beyond a reasonable doubt.

This new law empowers the state, prosecutors, and not the court, to give notice at any time prior to trial or the entry of a guilty plea that it will seek a sentence above the standard sentencing range. Evidence supporting an exceptional sentence generally must be presented to the jury at trial. Should it determine that the introduction of aggravating circumstances would either prejudice the offender's right or violate existing rules of evidence, SB 5477 authorizes the court to bifurcate the trial.

The bill also limits permissible aggravating factors to those contained in an exclusive list set forth in the SRA. Under the bill, the court retains the authority to determine whether those facts are sufficient, substantial and compelling, to justify imposition of an exceptional sentence.

Several groups and individuals expressed concern that the bill impermissibly shifted the seat of discretion in criminal sentencing from the court to prosecutors. While acknowledging that several issues required further study, the Legislature passed SB 5477 and it became effective law in the state on April 15, 2005.

In response to the concerns expressed during hearings on the bill, however, the Legislature issued the following mandate:

- (1) The sentencing guidelines commission shall review the sentencing reform act as it relates to the sentencing grid, all provisions providing for exceptional sentences both above and below the standard sentencing ranges, and judicial discretion in sentencing. As part of its review, the commission shall:
 - (a) Study the relevant provisions of the sentencing reform act, including the provisions in this act;
 - (b) Consider how to restore the judicial discretion which has been limited as a result of the *Blakely* decision;
 - (c) Consider the use of advisory sentencing guidelines for all or any group of crimes;
 - (d) Draft proposed legislation that seeks to address the limitations placed on judicial discretion in sentencing as a result of the *Blakely* decision; and
 - (e) Determine the fiscal impact of any proposed legislation.
- (2) The commission shall submit its findings and proposed legislation to the legislature no later than December 1, 2005.

Joined by several former members and staff who served the Commission since the enactment of the SRA in 1981, the present members initiated a review of judicial discretion and advisory guidelines at the April public meeting. We look forward to the August NASC conference for the chance to exchange views with representatives of other jurisdictions on these very important issues.

(Footnotes)

¹ The full text of SB 5477 can be found at the following links:
<http://www.leg.wa.gov/pub/billinfo/2005-06/Htm/Bills/Session%20Law%202005/5477.SL.htm>

<http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/Session%20Law%202005/5477.SL.pdf>

Wisconsin

Wisconsin Awarded NIJ Grant



In the wake of the *Blakely and Booker* decisions, more interest has arisen in judicial discretion and the factors that judges consider when making sentencing decisions. Wisconsin, with its long-term emphasis on judicial discretion at sentencing, has a guidelines system that stresses such factors. Unlike more traditional and quantitative guidelines systems, Wisconsin's system requires no calculations and relies on purely subjective assessments by judges of offense severity and the offender's future risk of reoffending. (For details and history of Wisconsin sentencing guidelines, see its Sentencing Commission's website, <http://wsc.wi.gov>.)

For eleven major felonies, the state's guideline system asks that judges complete a worksheet at sentencing which details the major factors that the judge usually consider regarding severity and risk. After determining the type of severity and risk, the judge then locates the appropriate sentencing range on a 3X3 grid marking low to high levels of each. After that, the judge is asked to indicate other factors, such as degree of remorse, prosecutor or defense recommendation, payment of restitution, that might aggravate or mitigate the sentence. Judges are **not** asked to record the actual sentence. That information is obtained by matching the worksheet cases to data from the state courts and department of corrections.

The worksheet factors include but go beyond the usual data collected by sentencing commissions, such as role in the offense, type of harm, social factors, and offender attitude. The wealth of data provided allows Wisconsin analysts to look in far more depth at the multiplicity of influences on sentencing decisions. Given the potential for results of statistical modeling of these data at this crucial time in American sentencing, the National Institute of Justice awarded the Wisconsin Sentencing Commission a two-year grant to study and report on the impact of these variables on judicial decision-making.

Some of the questions to be examined are: (1) does an offender's perceived role in an offense have a consistent aggravating or mitigating effect?, (2) does association with a gang have the same sentencing impact in rural areas as in suburban as in urban?, (3) does abuse of a position of trust or authority have different impacts

depending on whether the offense is violent, non-violent, sex, or drug?, and (4) does acceptance of responsibility have a bigger impact on sentencing than cooperation with authorities, having multiple counts, or paying restitution at great sacrifice prior to sentencing? Moreover, what is the effect of the traditional variables used in sentencing studies, such as age, gender, race, or geography, on each of these questions and the others to be explored? And do the usual findings about these traditional variables change given the nature of the other factors indicated?

Finally, much of the debate about sentencing guidelines has historically been premised on the assumption of arbitrariness of judicial decision-making. This has usually been based on the use and results of simple models and limited numbers of variables. This study may allow the sentencing community to answer much more definitively whether or not judges' decisions are in fact so predictably based on one or a few variables that they can be appropriately routinized into guidelines systems. It may also point the community toward new factors that should be considered in the (re)construction of future systems.

The final report is due in June 2007. Any questions should be directed to Michael Connelly, executive director of the Wisconsin Sentencing Commission, at 608-261-5049 Michael.Connelly@wsc.state.wi.us.

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2005 NASC Conference

The Continuing Evolution of Sentencing

August 7 - 9, 2005

Washington, DC

Tentative Agenda and Speakers

DAY ONE: AUGUST 7, 2005

5:00-7:00pm **Conference Registration**
Phoenix Hotel Ballroom

6:00-8:30pm **Conference Reception**
Phoenix Hotel Ballroom

DAY TWO: AUGUST 8, 2005

8:00-9:00am **Continental Breakfast**

9:00-10:30am **Opening Plenary Session**
Barbara Tombs, NASC President
The Honorable Ricardo H. Hinojosa,
United States Sentencing Commission (USSC)

10:30-10:45am **Break**

10:45-12:00pm **Mandatory Sentencing: The National Perspective**
Julie Stewart, President, FMM
Jay Apperson, Counsel, House of Representatives
Doug Berman, Ohio State University School of Law
Lisa Rich, Legislative Director, USSC

Blakely and Booker/Fanfan 101
Scott R. Staab, Counsel for Blakely
Lenell Nusbaum, WA Sentencing Commission
Chris Kelly, Counsel for Booker

Sentencing Reform and Intermediate Punishment
Jonathan Wroblewski, US Department of Justice
Patricia Biggs, Kansas Sentencing Commission
Faye Taxman, Ph.D., Virginia Commonwealth Univ.

12:00-1:30pm **Lunch**

1:30-2:45pm **Blakely's Impact**
David Boerner, Seattle Univ. School of Law,
Chair, WA Sentencing Commission
Kevin Reitz, University of Colorado School of Law
Steve Chanenson, Villanova Univ. School of Law

Sentencing Evaluations I
Don Stemen, Vera Institute
Judge Richard S. Gebelein, DE Superior Court

Vendor Session - Metatomix
Darren Raybourn, SVP, Public Sector

Re-entry
Nancy LaVigne, Ph.D., Urban Institute
Calvin Johnson, Ph.D., and David Huffer,
Court Services and Offender Supervision, DC
Becky Ebron, NC Sentencing and Policy Comm.

2:45-3:00pm **Break**

3:00-4:15pm **The Effect of Booker/Fanfan on the Federal Guidelines**
Judge Ricardo H. Hinojosa, Chair, USSC
Judge Ruben Castillo, Vice Chair, USSC
Judge William K. Sessions III, Vice Chair, USSC
John R. Steer, Vice Chair, USSC
Michael E. Horowitz, Commissioner, USSC
Beryl A. Howell, Commissioner, USSC
Edward F. Reilly Jr., Ex Officio Commissioner, USSC
Deborah J. Rhodes, Ex Officio Commissioner, USSC
Lou Reedt, Acting Director, USSC

Drug Courts
Doug Marlowe, Ph.D., J.D., University of Pennsylvania
C. West Huddleston, III, Drug Court Institute

Vendor Session - Cross Current
Mark Bergstrom, Director, PA Sentencing Comm.
Kim Hunt, Ph.D., Director, DC Sentencing Comm.
John Kramer, Ph.D., Pennsylvania State University
Richard Freeman, Cross Current, Technical Architect

Experiences with Civil Commitment of Sex Offenders
Judge Richard Walker, KS District Court
Karol Lucken, Ph.D., Univ. of Central Florida
Kristi Waits, WI Sentencing Commission

DAY THREE: AUGUST 9, 2005

8:00-9:00 am **Continental Breakfast**

9:00-10:30am **Plenary Session**
Kim Hunt, Ph.D., DC Sentencing Comm.
Judge Frederick H. Weisberg, DC Sentencing Comm.

10:30-10:45am **Break**

10:45-12:00pm **State Legislative Responses to Blakely**
Judge W. Erwin Spainhour, Chair,
NC Sentencing and Policy Comm.
Teri Carns, Alaska Judicial Council
Russ Hauge, WA Assoc. of Prosecuting Attorneys

Specialty Courts
John Roman, Urban Institute
Judge William J. O'Neil, AZ Superior Court

Vendor Session - Pro Tech
Justin Jones, OK Department of Corrections

Probation Violator Policies
Jim Austin, Ph.D., JFA Associates
Susan Katzenelson, NC Sentencing and Policy Comm.
Thomas J. Charron, Nat'l District Attorneys Assoc.

12:00-1:30pm **Business Lunch**

1:30-2:45pm **Blakely's Impact**
David Boerner, Seattle Univ. School of Law,
Chair, WA Sentencing Commission
Kevin Reitz, University of Colorado School of Law
Steve Chanenson, Villanova Univ. School of Law

Sentencing Evaluations II
Paul J. Hofer, USSC
Brian Johnson, Ph.D., University of Maryland
Mike Connelly, Ph.D., WI Sentencing Comm.

Vendor Session - Internet Probation and Parole Control, Inc. (IPPC)
Judy Hogaboom, President, IPPC
Marci Meller, Information Coordinator, IPPC

Offender Risk Assessment
Meredith Farrar-Owens, VA Sentencing Comm.
Dennis Wagner, Nat'l Council on Crime and Delinquency, Midwest

2:45-3:00pm **Break**

3:00-4:30pm

Closing Plenary Session
State Roll Call - States should designate a representative to participate in this roll call discussion on the impact of *Booker/Fanfan*.
Closing by Kevin Blackwell, USSC

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* Source for case examples and quote: Center for Society, Law & Justice, University of New Orleans. Consequences of Inadequately Integrated Justice Information Systems: A Project Report, 302

DAY TWO: AUGUST 9 Pro Tech 10:45 - 12:00 noon

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DAY TWO: AUGUST 9 IPPC 1:30 - 2:45 pm



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DAY ONE: AUGUST 8 Cross Current 3:00 - 4:15 pm



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