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February 2006

# The Sentencing Guideline

A publication of the National Association of Sentencing Commissions

## Pennsylvania Sentencing Commission and the Virginia Sentencing Commission Host Summer Conference

The Pennsylvania Commission on Sentencing and the Virginia Criminal Sentencing Commission will be jointly sponsoring the 2006 NASC Conference on August 6-8, 2006. The conference will be held at the Four Seasons Hotel, located adjacent to the Ben Franklin Parkway in the heart of the Center City district. [You too can re-create Rocky on the steps of the Art Museum!].

The theme for this year's conference is *Keystone of Sentencing: Balancing Fairness and Costs*. The Conference will consist of three tracks, with each track including a plenary session, followed by three related concurrent breakout sessions. Below is the tentative agenda showing the three tracks and the breakout sessions: Policy Shaping, Research, and Policy Shaping, Research and the Purposes of Sentencing. The program committee invites sentencing commission members and staff, academics, and other criminal justice professionals to volunteer as presenters. If you would like to provide suggestions for speakers, please contact Mark Bergstrom [mhb105@psu.edu]. As a general rule, NASC cannot reimburse travel or lodging fees.

The conference is also planning on providing the opportunity to participate in two additional, optional events. On Monday night a dinner is tentatively being planned at the National Constitution Center, which is an interactive facility that will allow you to gain a better appreciation for the Constitution. On Tuesday afternoon, a tour of Eastern Penitentiary is being planned, where you can see the Quaker inspired system of rehabilitation through isolation and penitence. Transportation is being arranged for both events.

### TENTATIVE AGENDA FOR NASC 2006 CONFERENCE

#### PLENARY SESSION 1: POLICY SHAPING

Panel Session A: Work Session on Sentencing Information Exchange

Panel Session B: Sentencing of Juveniles

Panel Session C: Federalism and Sentencing

#### PLENARY SESSION 2: RESEARCH

Panel Session A: Sex Offender Research

Panel Session B: Problem-solving Courts

Panel Session C: Drug Treatment/Re-Entry

#### PLENARY SESSION 3: POLICY SHAPING, RESEARCH AND PURPOSES OF SENTENCING

Panel Session A: Economic Impact

Panel Session B: Toolbox: Sentencing-related Instruments

Panel Session C: Probation Reform Act

2006 ANNUAL NASC CONFERENCE  
KEYSTONE OF SENTENCING: BALANCING FAIRNESS AND COSTS

August 6 - 8

NASC CONFERENCE

2006

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NATIONAL ASSOCIATION OF SENTENCING COMMISSIONS

# President's Message

Here in the northeast, the air is nippy, the wind is brisk and it gets dark before 6pm, therefore it helps to dream of when the air turns warm, multiple layers are needed, and one can leave work and actually see the sun. In an effort to aid in those dreams, let's turn our attention to the 2006 NASC conference. This year's conference will be held in "The City of Brotherly Love," Philadelphia, Pennsylvania. The Pennsylvania Commission on Sentencing and the Virginia Criminal Sentencing Commission are serving as co-hosts for the festivities which are being held at the Four Seasons Hotel from August 6-8. The theme for this year's conference is "Keystone of Sentencing: Balancing Fairness and Costs."

The NASC Executive Board and conference committee are working diligently to broaden the conference and to aid in this, the agenda has been restructured. The past two years of the NASC conference has been focused on recent Supreme Court decisions which have affected most of us, but now it's time to move forward. The plenary sessions and panel sessions are presented on the cover page of this newsletter. Hopefully, you will find this program to your liking. The cost of this year's conference is \$275 for those who are registered and paid by July 7, 2006, \$300 for those who register after this date. The NASC Executive Board has initiated a slight increase in the fee, but it is felt that it is still a bargain when compared to other conferences.

If we have learned one thing over the last few years, the sentencing world is a period of uncertainty. The NASC Board and conference committee will certainly keep abreast of any "hot button" topics that may crop up over the next seven months, and will adjust the program to accommodate any changes.

I would like to thank the Virginia Sentencing Commission and especially Carolyn Williamson and Rick Kern for producing this newsletter. This newsletter is a forum for you, the "sentencing community" to communicate with one another twice a year. I hope you take the time to read this and if you would like to contribute to the next newsletter (approximate publication in June 2006), please send the information to the Virginia Sentencing Commission.

I look forward to seeing all of you in Philadelphia. Hopefully you will decide to arrive early and stay late, as Philadelphia is a great city for sightseeing, especially for historical sites. This year, Philadelphia is celebrating Ben Franklin's 300<sup>th</sup> birthday, so there will be lots of exhibits that you may want to take in. Philadelphia has a vibrant water front district with great restaurants and hopefully, the Phillies will be in town for our visit. So, keep August 6-8 open and see you at the Four Seasons.

Kevin Blackwell, President NASC  
Senior Research Associate, United States Sentencing Commission



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## Delaware 2005: Dealing with Minimum Mandatory Drug Sentencing Issues

In the last year, the Sentencing Accountability Commission (SENTAC) in conjunction with the Sentencing Research and Evaluation Committee (SREC) undertook the review of important criminal justice legislation, House Bill 210 and House Bill 181. These bills significantly overlap in regards to sentencing policies for drug trafficking and repeat illicit drug sales. Both bills seek to reduce the penalties for felony drug selling activity, yet the means by which this might be accomplished significantly diverge.

House Bill 210 became law on June 30, 2003 and its implementation was being evaluated by the Statistical Analysis Center for SENTAC and SREC. The development of House Bill 210 was an extensive effort that involved all interested parties in two years of debates, analysis and negotiations. It resulted in a new law that strikes a balance between shorter terms for drug trafficking and repeat drug sellers and tougher penalties for selected violent offenders including crimes such as manslaughter, robbery, assault, firearm possession and burglary. Under HB 210 the minimum mandatory term for drug selling was reduced by one-half — from 3 years to 18 months actual time served. Moreover, fewer offenders are indicted for drug offenses under HB 210 because the per se cocaine possession threshold for the new “minimum sentencing” was increased from 5 to 10 grams. On the other hand, under HB 210, the minimum term for Robbery 1<sup>st</sup> Degree was increased from 2 to 3 years, and new minimum terms were established for Assault 1<sup>st</sup> Degree and Burglary 1<sup>st</sup> and 2<sup>nd</sup> Degree.

HB 181 endeavors to remove all semblances of even the newly reduced HB 210 minimum drug terms. A key sentiment of House Bill 181 is that in reconfiguring drug sales statutes as purely Sentencing Guideline laws full judicial discretion would be returned to sentencing judges.

During the last legislative session, the Sentencing Accountability Commission, while cognizant of both the pro and con arguments regarding HB 181, chose to recommend to the Legislature and the Governor to await the full results from the Statistical Analysis Center’s analysis before making a recommendation on HB 181. These results are now published and have significantly enriched our understanding of the balance between public safety and costs when it comes to drug sellers and the justice we provide.

We learned from our studies that HB 210 has for the most part achieved the balance that was sought between a measured reduction in penalties for illicit drug sellers and penalty enhancements for targeted violent crimes. The results are encouraging in that we are well into the process of reducing our Department of Correction bed need by over 300 beds.

Our review of HB 181 has given us our first-ever comprehensive view of the people selling illicit drugs and their punishments. Given conventional wisdom advanced by some in newspaper editorials, these findings are surprising. The assertion that the pre-HB 210 minimum mandatory laws routinely required judges to put first time drug possessors of small amounts of cocaine in prison for at least three mandatory years is unfounded. The typical “drug trafficker” serving time in prison for a three year minimum mandatory term under the pre-HB 210 laws or a two year term minus good time under HB 210, has been arrested 20 times, of which almost 7 have been for a felony. Remarkably, 54 percent of this group has used deadly weapons, usually firearms, in their criminal careers.

The HB 181 study also identified the court’s effort to actually rehabilitate offenders that are involved in serious crime. On average the Superior Court suspends minimum mandatory drug sentences for 50 offenders a year to serve 6 months at the Department of Correction’s bootcamp where drug treatment is a major activity. Calling this group “first time offenders” is really a misnomer because they have been arrested an average of 13 times, which includes being arrested at least twice for a felony.

In addition to boot camp diversion, another way that judges actively seek rehabilitation for drug sellers is the implementation of “addiction sentences” that circumvent SENTAC Truth-in-Sentencing guidelines by allowing offenders to enter the Department of Correction’s “Key” treatment program and to leave prison on successful completion of the program. The addiction sentence offender often stays for a shorter period of time than could have occurred under a sentencing guideline term. Annually, about 40 additional felony drug-selling cases receive a diversionary treatment sentence.

The overall use of minimum mandatory sentences falls far below popular expectation. For instance, there is less than one in five chance of the persons arrested for drug trafficking being convicted of drug trafficking. Over 80 percent of persons arrested for drug trafficking are either sentenced to reduced charges or not convicted. Even more striking is the findings that out of all arrested drug sellers less than 5 percent receive a minimum drug term.

Instead of a short jail or prison sentence, it is far more likely for an illicit drug seller to be convicted of a lesser charge resulting in a non-incarceration sentence to Level IV quasi-incarceration or probation Levels I, II and III. Sixty-eight percent of the drug selling arrestees that are convicted of at least one crime in their case are not incarcerated. These less serious punishments may seem incongruent when it is revealed that the typical drug seller has been arrested an average of 11 times – of which four times were for a felony.

Offenders that are actually serving time in prison on a minimum or minimum mandatory term are a class separate from the average drug seller. This group of offenders has on average 20 prior arrests, of which about 7 were felony crimes. Furthermore, 54 percent of these offenders have firearm or deadly weapon charges in their history. If it were not for the 18 month drug trafficking term under HB 210, many of these offenders could be candidates for a habitual sentencing term, which can be as long as life, and if not that, then possibly candidates for the deadly weapon and firearm minimum mandatory that have two and three year terms.

It is anticipated that the debates regarding drug sellers and potential bills will continue into the 2006 Legislative session. The one difference is, we now have a detailed profile of arrests, convictions and sentencing to discuss the different proposals.

## DISTRICT OF COLUMBIA



### Superior Court Compliance with the DC Pilot Sentencing Guidelines through September 30, 2005

Now that pilot sentencing guidelines have been in effect since June 2004, the DC Sentencing Commission is able to report some initial data on compliance. It should be noted that this analysis is subject to change, and that a detailed review of most crime categories cannot be undertaken for at least another year, after more felony convictions and sentences occur under the guidelines. At this stage, however, it is fair to say that early returns indicate reason for optimism. Compliance rates are high, with 90 percent of the effective sentences (the prison portion of the sentence) within the applicable sentencing options and guideline range. Furthermore, the preliminary evidence suggests that guidelines are having their intended effect of reducing unexplained sentencing variability, at least for drug crime sentences.

#### Overall Compliance with the Guidelines

During the period June 2004 through September 2005, the Commission collected 2,574 Sentencing Guideline Forms (SGFs), representing guideline recommendations and actual sentences on 2,574 felony counts in approximately 2,100 felony cases. Similar to many other states, DC uses a separate grid for drug cases as opposed to other offenses.

Of the 2,574 SGFs collected, 90 percent of the effective sentences (the prison portion of the sentence, which, in the case of split sentences, is shorter than the imposed prison sentence before some of the prison term is suspended) are compliant with the sentencing options and within the guideline range (“within the box”) for that crime. More than 92 percent of effective sentences on the Drug Grid are within the guideline range, and 87 percent of effective sentences are within the guideline range on the Master Grid.

Overall, ten percent (252 SGFs) of effective sentences are outside the guideline range. Departures below the guidelines account for 7.8 percent (196) of total SGFs, and departures above the guidelines account for 2.2 percent (56). Based on the information available to date, it appears likely that most of the non-compliant sentences are attributable to split sentences where the portion to be served is longer than six months (the ceiling for a “short split” sentence) but shorter than the minimum prison sentence for that box (the floor for a “long split” sentence). Thus, these sentences are within the spirit of the guidelines even if they are technically departures. Other apparent departures may in fact be compliant with the guidelines, but aggravating or mitigating factors considered by the judge or statutory sentencing enhancements have not been reported properly. The Commission will work in the upcoming months to examine departure reporting and departure sentences. Given the relatively low number of departures to date, further generalizations are probably unwarranted at this time.

#### Taking a Closer Look at Drug Compliance

As the Commission explained to the DC Council in 2003, prior to the introduction of the pilot sentencing guidelines, “[s]ubstantial unexplained variability in sentencing exist[ed].” Since guidelines are an attempt to reduce unexplained variability, one measure of the success of the District of Columbia pilot sentencing guidelines should be evidence that variability is reduced after introduction of sentencing guidelines. Because detailed out-of-state criminal history data was unavailable to the Commission before the implementation of guidelines, a comparison of sentences before and after guidelines is only reliable across offense severity groups, without regard to criminal history. Focusing on drug offenses, the Commission compared sentences for 2003 (the last complete year pre-guidelines) to post-guideline sentences (June 2004 through September 2005).

Felony drug convictions in DC generally come in two forms: (1) distribution of or possession with intent to distribute a controlled substance, and (2) attempted distribution of or attempted possession with intent to distribute a controlled substance (Simple possession in DC is a misdemeanor). The “attempt” convictions carry the same statutory penalties as the completed crimes, but they are usually the result of plea bargains and they carry lower guideline recommendations. For purposes of comparison, the Commission separated the “attempts” (Drug Grid Group 3) from the completed crimes (Drug Grid Group 2). The typical drug distribution crime in Superior Court is a small street-level sale, often committed by a person who uses drugs, not someone high up in a drug organization responsible for distribution of large quantities of drugs (higher level drug cases are usually prosecuted in federal court).

In drug cases, two preliminary findings are notable: the median effective sentence went up (indicating that some of the lowest sentences pre-guidelines are being replaced by higher sentences post-guidelines), while the longest sentences found in 2003 are no longer found post-guidelines (indicating a replacement of some of the highest sentences pre-guidelines by lower sentences post-guidelines). Specifically, the *median* sentence for completed drug crimes increased from 8 months to 15 months, while the *average* sentence decreased from 20 to 15 months. Similarly, the median sentence for attempt drug crimes increased from 4 months to 6 months, while the average sentence decreased from 14 to 9 months. Looking at the sentences in the highest range, in 2003 five percent of all sentences for completed drug offenses were 72 months or longer; after guidelines, the top five percent fell to 40 months or longer. Similarly, for attempted drug offenses, before guidelines, the top five percent of all sentences were 42 months or longer; after guidelines, the top five percent were 27 months or longer, again indicating reduced variability. Finally, there are no drug crime sentences beyond 80 months post-guidelines, while there were several sentences in that range sentences pre-guidelines. As a result, on both ends of the continuum, variability appears to have been reduced post-guidelines through the reduction of some of the more extreme sentences. This preliminary evidence suggests that guidelines are having their intended effect, the reduction in unexplained variability, at least for the sentencing of drug crimes during the first year of the pilot phase. *cont.*

## DISTRICT OF COLUMBIA CONT.

Over the past year, the DC Sentencing Commission has successfully transitioned from an advisory group mainly researching policy alternatives to an agency actively implementing and monitoring a voluntary guidelines system. After a full year of guidelines, early returns indicate that compliance (and thus acceptance) of the new guidelines is high, and that some of the more extreme drug sentences appear to be disappearing. With only one year remaining in its pilot program, the Commission is gearing up for a big year of research in order to paint a more complete picture of sentencing within the District. The Commission hopes to report more fully on compliance and sentencing disparity and will make recommendations regarding permanent guidelines at the end of 2006.

## MARYLAND



### Maryland Makes Technological and Research Advancements

During the past year, the Maryland State Commission on Criminal Sentencing Policy (MSCCSP) worked on two technological and research advancements which will allow the Commission to provide more detailed information on sentencing policy and practice in the State. In February 2005, the MSCCSP finalized a contract with Applied Research Services, Inc. (ARS) to develop a sentencing/correctional simulation model for the State of Maryland. The model will include a discrete-event simulation software application to mimic the flow of offenders into, through, and out of the Maryland judicial and correctional system. The simulation model will provide the ability to assess recommendations for legislation or amendments to the sentencing guidelines. The initial phase of the model is expected to be completed by January 2006.

Additionally, the SCCSP collaborated with the University of Maryland's Office of International and Executive Programs (OIEP) to continue the development of an automated (web-based) sentencing guidelines system. The web-based system will automatically calculate the appropriate guidelines range and allow for electronic submission of guidelines data. The automated sentencing guidelines system, which will become operational in 2006, is expected to increase the percentage of cases for which a guidelines worksheet is submitted while also substantially reducing errors and omissions that are common in the current paper system. Together, these two developments are expected to enhance the Commission's ability to make informed decisions regarding Maryland's sentencing guidelines.

## MASSACHUSETTS



### Massachusetts Held Hearings on Proposed Sentencing Guidelines

The Massachusetts legislature held hearings on proposed sentencing guidelines on November 21, 2005. The hearings were held before the Joint Committee on the Judiciary. Issues before the committee included a wide range of sentencing related topics: sentencing guidelines, post-release supervision of prisoners, mandatory drug sentencing, and access to criminal offender record information (CORI). There was a lot of interest in the issue of post-release supervision of prisoners. The Massachusetts Sentencing Commission is hopeful that the legislature will consider sentencing guidelines as the cornerstone of comprehensive sentencing reform.

The Massachusetts Sentencing Commission is in the process of implementing a geographic information system as part of its annual survey of sentencing practices. In the forthcoming FY2005 Survey of Sentencing Practices, geographic information will be available for convicted adult defendants. This work was supported by a Byrne grant from the Massachusetts Executive Office of Public Safety and uses geographic data provided by the Massachusetts Highway Department. We look forward to comments from other sentencing commissions about the application of geographic information to effectively present statistical information on sentencing.

The Massachusetts Sentencing Commission received a Byrne Grant to provide specialized training for research staff Massachusetts criminal justice agencies. It is expected that this project will enhance the skills of criminal justice agency researchers in applying innovative research technologies, enabling researchers to better utilize the wealth of criminal justice information to develop effective criminal justice policy. Training will be conducted in four priority areas in research application technology: statistical analysis software, data extraction technologies, spreadsheet applications, and GIS/mapping. The first step in this project is a needs assessment survey of criminal justice research professionals.



### Minnesota Sentencing Guidelines Commission Update

Minnesota, like numerous states, continues to address *Blakely*-related issues at the state level. Shortly after the *Blakely v. Washington* was released by the U. S. Supreme Court, the Sentencing Guidelines Commission assessed its potential impact on sentencing in Minnesota and released its findings in a report to the Governor. However, Minnesota Courts had not ruled on many of the issues related to *Blakely* at that time. In the past few months several significant decisions have been released clarifying that impact.

On August 18, 2005, the Minnesota Supreme Court ruled in *State v. Shattuck* 704 N.W. 2d 131 (Minn. 2005) stating that the Minnesota Sentencing Guidelines are not advisory and the imposition of the presumptive guideline sentence is mandatory absent additional findings, rejecting the U. S. Supreme Court's remedy in *United States v. Booker* for resolving the conflict between the Federal Sentencing Guidelines and the Sixth Amendment right of a defendant. The court affirmed the ruling in *Blakely* by stating that any factor that results in a sentence above the presumptive guideline sentence, other than a prior conviction, must be presented for jury determination or admitted by the defendant in a knowing and intelligent manner. The Supreme Court did rule that Section 11.D. of the guidelines pertaining to aggravated departures, "facially unconstitutional" and must be severed from the remainder of the guidelines which remain in affect and mandatory. It is important to note that the Court only invalidated the section of the guidelines that permits aggravated durational departures. In the opinion, the majority stated that to invalidate the guidelines in total would be contrary to the expressed sentencing policy of the state in maintaining uniformity, proportionality and predictability in sentencing.

In a second significant opinion, the Minnesota Supreme Court overturned an earlier Appellate Court decision by ruling that aggravated dispositional departures, as well as aggravated durational departures, are subject to the *Blakely* ruling. *State v. Allen*, —N.W.2d—, (Minn. 2005), released on November 23, 2005, involved the imposition of an executed sentence for a defendant whose presumptive guideline sentence was a stayed (probation) sentence. The district court found the aggravating factor, defendant was unamenable to probation, as the basis for the aggravated dispositional departure. The MN Supreme Court stated in its ruling that a stayed sentence is not merely an alternative mode of serving a prison sentence, in that the additional loss of liberty encountered with a prison sentence exceeds the maximum penalty allowed by a plea of guilty or jury verdict, and thus violating a defendant's Sixth Amendment right. The Court felt that a sentence disposition was as much an element of the presumptive sentence as the sentence duration and although the finding by the district court that defendant is unamenable to probation can be used as the basis for an aggravated dispositional departure, it must be submitted to a jury or admitted by the defendant in a manner required by *Blakely*.

In addition to these ruling, numerous ruling on retroactivity, custody status points and consecutive sentences under *Blakely* have been addressed by the courts. Even prior to these recent MN Supreme Court rulings, the 2005 Legislature passed several legislative amendments to address *Blakely* issues both procedurally and statutorily. However, in light of the recent rulings, further legislative action will be necessary. Sentencing Guidelines remain constitutional in Minnesota and procedures have been implemented to address those specific sentencing situations where aggravated sentences are both necessary and appropriate. Minnesota appears to have weathered the *Blakely* aftermath maintaining its determinate sentencing structure that promotes uniformity, proportionality and predictability.

During the 2005 Legislative session, Minnesota enacted mandatory and indeterminate life sentencing provisions for certain sex offenders intended to represent the "worse of the worse." In HF I, the Sentencing Guidelines Commission was directed to develop a separate determinate sentencing grid for the remaining sex offenses. The Commission constructed a sentencing grid included enhanced sentences that primarily focused on the seriousness of recidivism among sex offenders and the threat to public safety they posed. The new grid, which will be presented to the 2006 Legislature, was design to be reflective of mandatory minimum sentences for sex offenders, increased criminal history scores for prior sex offense convictions and elevated custody status points for offenders who commit sex offenses while on community supervision for a prior sex offense conviction. The proposed grid also incorporated the underlying guideline principles of proportionality, uniformity and certainty in sentencing. The new proposed sex offender sentencing grid will become effective on August 1, 2006 unless the legislature otherwise takes action to reject it.



## Recommendations of the New Jersey Commission to Review Criminal Sentencing

What follows is a concise summary of the key findings and recommendations of the New Jersey Commission to Review Criminal Sentencing primarily concerning N.J.S.A. 2C:35-7, commonly known as the drug free school zone law and N.J.S.A. 2C:35-7.1, commonly referred to as the park zone law.

- New Jersey's school zone law mandates enhanced punishment for those that distribute, or possess with intent to distribute, illicit narcotics within 1,000 feet of school property.
- Ten years after the enactment of the school zone law, the Legislature enacted N.J.S.A. 2C:35-7.1 which mandates enhanced punishment for those that distribute, or possess with intent to distribute, illicit narcotics within 500 feet of public parks, public housing and other public buildings.
- New Jersey's cities are among the most densely populated in the nation. Given the large concentration of schools in these areas, the protective zones which surround them have overlapped and coalesced to such an extent that the three cities studied by the Commission – Jersey City, Camden, and Newark – have themselves become all-encompassing drug free zones.
- The foregoing “urban effect” of the drug free zone laws significantly increases the likelihood that a drug distribution offense will occur within a drug free school zone in urban areas; minorities, who currently comprise a greater proportion of urban populations than rural and suburban populations, are therefore far more likely to be charged with a drug free zone offense and subjected to harsher punishment upon conviction.
- The unintended, but profoundly discriminatory, impact of the laws is the direct result of the size of the zones defined by the school zone and park zone laws, and is, moreover, significantly amplified by New Jersey's unique demographic characteristics.
- The end result of this cumulative “urban effect” of the drug free zone laws is that nearly every offender (96%) convicted and incarcerated for a drug free zone offense in New Jersey is either Black or Hispanic.
- The “urban effect” greatly undermines the school zone law's effectiveness in protecting school children: the enormous, unbroken swaths created by the overlapping zones have in fact diluted the special protection of schools that the law was specifically intended to facilitate.
- A review of geocoded arrest data for illicit drug activity in Newark yields no evidence that drug dealers are aware of school zones, much less that they deliberately undertake their criminal activity to evade exposure to the school zone law.
- Based on its review of the pertinent data, the Commission concludes that a substantial reduction of the zones will at once significantly enhance the effectiveness of the law while considerably diminishing the disproportionate number of minority drug dealers subject to enhanced punishment avoided by their white suburban and rural counterparts.
- The Commission's proposal to amend the school zone and drug free park laws by substantially reducing the zone size to 200 feet remedies both aforementioned deficiencies.
- The Commission's proposal would eliminate the mandatory minimum sentence for the school zone offense but would upgrade the crime within the reduced zone to second degree which carries a presumption of imprisonment. Discretionary extended terms of imprisonment for repeat offenders and parole ineligibility terms could still be imposed by judges with respect to drug offenses both inside and outside the zones. This change will ensure that those who sell drugs within close proximity to schools and other protected property will be subject to significant punishment, including the presumption of imprisonment, while also conferring a greater degree of discretion on courts in fashioning fair and appropriate sentences.
- The Commission recognizes that the financial cost of incarcerating large numbers of drug offenders places a tremendous burden on the State budget and might not constitute the most efficient use of public funds to promote public safety by preventing future drug crimes. Further study is urgently required.
- The Commission's findings and recommendations with regard to the drug free zone laws are unanimous.
- The Commission will continue to collect data and carefully monitor application of the current drug free zone provisions, as well as subsequently enacted provisions. These findings will be presented to the Legislature and the public on a periodic basis.
- This report and recommendations is the first of many anticipated studies the Commission will undertake in the coming years regarding sentencing law and policy in New Jersey.

# NORTH CAROLINA



## Update from North Carolina

In response to a legislative request, the NC Sentencing Commission is currently undertaking a yearlong examination of the issues related to Youthful Offenders (aged 16 to 21). North Carolina is one of only three states in the nation where the age limit for juvenile jurisdiction is 16. As they turn 16, juveniles charged with a crime are prosecuted, tried and sentenced as adults. The focus of the study is to assess whether the way North Carolina processes its Youthful Offenders is appropriate and effective in rehabilitating this age group before they become a serious and persistent threat to public safety. Work on this topic is in line with the Commission's broad dual mandate to study and recommend policy for both the juvenile and criminal justice systems of the state.

Following a legislative effort in 2004/05 to strengthen domestic violence laws, the Sentencing Commission was asked to review whether the presence of a domestic restraining order should be added to the list of aggravating factors for capital murder. The Sentencing Commission is also in the process of developing classification criteria and reclassifying all misdemeanors. The Commission's report and recommendations on both the capital murder aggravation and the classification of misdemeanors is due to the NC General Assembly at the start of its Short Session in May 2006.

The Commission's correctional population projections, released in January 2006, show for the first time in years a slow-down in the gradual increase of prison populations over the next ten years. This projected change can be attributed primarily to a decrease in convictions in the most serious felonies, with a corresponding decrease in the rate of prison sentences and average estimated time served. With the prison population currently close to 37,000 inmates, even a decrease in this year's projections compared to previous years, and the opening of six new prisons in the state between 2003 and 2007, indicate that by 2015 North Carolina's need for prison beds will exceed its prison capacity by 6,000 beds.

# OHIO



## OHIO TACKLES SEX OFFENDERS, GRABBING ASSETS, AND TRAFFIC

Mindful of the need for public protection from sex offenders, while recognizing the undue complexity of Ohio's sex offender notice and registration (SORN) statutes, legislators have encouraged the Ohio Criminal Sentencing to review these laws in 2006.

Separately, the Commission's proposed reforms to the state's asset forfeiture statutes cleared the Ohio House in 2005, but await action in the Senate. The Commission tried to balance the governmental need for extraordinary sentencing tools to disrupt criminal organizations with a sense of proportionate punishment for individual offenders. We are guardedly pessimistic about quick action in the Senate, but hope to have a bill to the Governor by fall.

Also in 2006, the Commission will work with the General Assembly to move proposed refinements to the Traffic Code into the passing lane.

2006 ANNUAL NASC CONFERENCE		
KEYSTONE OF SENTENCING: BALANCING FAIRNESS AND COSTS		
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## OKLAHOMA

### Oklahoma Commission Gets New Leadership

State Rep. Fred Morgan, R-Oklahoma City, has been appointed to chair the Oklahoma Sentencing Commission by the House Speaker. Republicans won control of the House of Representatives in Oklahoma for the first time since 1922. "Throughout my legislative career I've fought to ensure that violent-and-habitual criminals are locked up for their crimes and do not get out until they've served their sentence so that our citizens remain safe," Morgan said in a press release announcing his appointment in September. "As a member of the Oklahoma Sentencing Commission, I will be able to continue that effort."

The Oklahoma Sentencing Commission is a 15-member body composed of representatives from the Legislature, criminal justice system and the public. According to the group's Web site, the duties of the commission include:

- Making recommendations to the Legislature to modify sentencing laws and policies, including the addition, deletion or expansion of sentencing options.
- Monitoring and reviewing criminal justice and correctional systems in to ensure that sentencing remains uniform and consistent.
- Ensuring the goals and policies established by the state are being implemented by sentencing practices.
- Reviewing all proposed legislation that creates a new offense, changes the classification of the offense, or changes the range of punishment for a particular classification and make recommendations.

Morgan is an attorney who has led the charge on many sentencing reform issues in the Oklahoma Legislature. During the 2005 session, he authored a new law requiring that all felons submit DNA samples to the state to help solve many cold cases. He also worked to strengthen Oklahoma's "truth in sentencing" law in the 1990s, ensuring that violent criminals serve at least 85 percent of their sentences. Previously, those criminals were eligible for parole years ahead of schedule. Morgan has also opposed proposals that would require the early release of convicts if state prisons become "full" in the eyes of liberal politicians.

"The people of Oklahoma believe the punishment should fit the crime and I've always tried to ensure that their expectations are met in Oklahoma's criminal justice system," Morgan said.

## PENNSYLVANIA

### Legislative Report on State Intermediate Punishment Released

The Commission recently completed its first *Report to the Legislature* on the newly established State Intermediate Program [SIP], which became effective May 18, 2005. This program is a two-year substance abuse treatment program for eligible offenders 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 Sentencing Commission was mandated to identify offenders eligible for the program and to provide a Legislative Report in even numbered years, with the Department of Corrections providing a report in odd numbered years.

**Sentencing Guidelines for SIP.** In accordance with its legislative mandate, Pennsylvania's Sentencing Commission incorporated sentencing recommendations for the SIP program in its latest revision of the sentencing guidelines, which became effective June 3, 2005. The guidelines target drug dependent offenders who otherwise would be serving a minimum sentence of confinement in a state facility for 30 months or more. Under Pennsylvania's indeterminate sentencing structure [in which the maximum is at least double the minimum sentence], the PA Board of Probation and Parole determines when an offender sentenced to state prison is released, once the minimum sentence is served. As the SIP alternative is a flat 24-month sentence, there is potential for offenders to have a reduction not only in the amount of time served in prison, but in their parole supervision time as well.

**SIP Procedure.** Participation in the program requires 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 DOC conducts an assessment

## PENNSYLVANIA *CONT.*



and provides a proposed treatment plan to the court. Upon agreement with the district attorney and defense, the court may then 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.

**SIP Offenders.** During 2005 there were 60 offenders assessed for SIP by the Department of Corrections, with 57 offenders determined to be appropriate, and 24 sentenced by the judge. It is anticipated that the other 33 eligible offenders will be sentenced to the program, but sentencing dates were being scheduled at the time of the report. Thus far, judges in 20 of Pennsylvania's 67 counties have referred offenders to this program. The vast majority of these offenders are male, with a mean age of 38, and have a current conviction for drug delivery offense or driving under the influence. Most offenders report having successfully completed at least one type of treatment program in the past, with outpatient treatment being the most prevalent treatment modality. The Department of Corrections utilized several assessment tools to determine the offender's risk for future criminal activity, the seriousness of the substance abuse problem, and the need for treatment. Overall, the offenders' assessment results indicated that most had a medium or high risk of re-offending, and a severe substance abuse problem, with alcohol being the most common substance used.

**What is next?** While the number of offenders referred to the SIP program is lower than originally anticipated, it is not unusual for a new program to take some time to become fully operational as judges, prosecutors, and defense attorneys become better acquainted with this treatment alternative to traditional prison. Toward that end, the Sentencing Commission, along with the Department of Corrections, has been making a concerted effort to conduct statewide trainings and presentations to provide information on the legislation, the procedure, and benefits of the SIP program. Thus far, the Sentencing Commission has made presentations at 42 sites statewide that have provided information on the SIP program. It is expected that the number of referrals to the program will increase over time, and it is anticipated that within the next few years the program will accommodate several hundred offenders per year.

## VIRGINIA



### Sex Offenders in Virginia: New Research

Prompted by a few well-publicized crimes against children committed by sex offenders in other states, the Virginia State Crime Commission, a legislative agency, formed the Sex Offender Task Force in March 2005. Legislators, law enforcement and corrections' officials, prosecutors, mental health professionals, victim representatives and other public figures were appointed to serve on the Task Force. The Task Force was charged with reviewing the effectiveness of current provisions and making recommendations to improve policies related to the punishment, management, supervision, and treatment of sex offenders in the Commonwealth. Much of the Task Force's work focused on Virginia's Sex Offender and Crimes against Minors Registry and the civil commitment program for offenders determined to be sexually violent predators. At the request of the Crime Commission's chairman, the Sentencing Commission agreed to provide technical assistance to the newly-formed Task Force. This technical assistance included data analysis, recidivism research, and assessment of the potential fiscal impact of Task Force recommendations.

#### Sex Offender Recidivism

Identifying recidivism using official records seriously underestimates the actual rate at which sex offenders commit new crimes. Reconviction, or worse, re-incarceration are highly diluted measures of sexual offense recidivism. Despite the limitations of official crime statistics, these data are the best available sources of information for criminologists to conduct large-scale studies of offender recidivism. For this study, the Commission studied all fiscal year 1998, 1999, and 2000 sex offender releases from prison, jail, or those placed on probation. The sex offenders were tracked for a minimum of five years up to a maximum of eight years (average follow-up period was 6.5 years).

The rates of recidivism for sex offenders varied depending on the particular measure of recidivism used. The rates ranged from a low of approximately 22% when recidivism is measured as any new felony conviction to a high of approximately 52% when recidivism is defined as any new arrest. Although reconviction rates substantially underestimate sex offender recidivism, a measure based on any new arrest may also be undesirable since it includes non-offense behavior such as probation violations, failure to appear and contempt of court violations. For its previous sex offender recidivism study, the Sentencing Commission elected to measure recidivism as any new arrest for a sex offense or other crime against the person. Using this more precise measure, the recidivism rate for sex offenders released in FY1998, FY1999 and FY2000 was approximately 26%. When analyzing recidivism patterns, the Sentencing Commission also recorded arrests for violations of laws governing Virginia's Sex Offender and Crimes against Minors Registry. About one in four released sex offenders were arrested during the follow-up period for failing to register or reregister as required.

The recidivism measures noted above are not mutually exclusive. That is, an offender could be captured in more than one category. For example, some offenders were arrested for a new sex offense or other crime against a person while others



were arrested for violating Registry requirements; some of the released offenders were arrested for both types of offenses following their return to the community. Combining these two measures reveals that nearly 42% of sex offenders were arrested for a new sex offense/ person crime or for Registry violation. Almost half (42%) of the offenders arrested for Registry violations also had at least one arrest for a sex or person crime during the follow-up period. This suggests that, for many released sex offenders, failure to register or re-register is not their only offense behavior.

The Sentencing Commission's recidivism study revealed that patterns of recidivism vary depending on the sex crime for which the offender was originally convicted. Measuring recidivism as the rate at which offenders were arrested for a new sex offense or other crime against a person, those initially convicted of rape and carnal knowledge exhibited the highest recidivism, with rates exceeding one-third (35% and 34%, respectively). Those initially convicted of aggravated sexual battery, object sexual penetration, forcible sodomy, and kidnapping to defile or for an immoral purpose demonstrated lower rates of recidivism, between 20% and 23%. Incest offenders recorded the lowest recidivism rates (8%); however, only 12 offenders in the study had been convicted of this type of crime. Nonetheless, this finding is consistent with that of other researchers, who have found lower recidivism rates among incest offenders, based on official law enforcement statistics, compared to other types of sex offenders.

The most common type of crime for which recidivists were arrested during the follow-up period was assault. Assault offenses (ranging from malicious or unlawful wounding to domestic assault and assault and battery) accounted for nearly two-thirds of the recorded recidivism (62%). Following assaults, arrests for sex offenses other than rape were the most frequent (18%). One in ten recidivists was arrested for a new rape. Other types of person crimes (including kidnapping, robbery, traffic offenses resulting in victim injury, public order crimes involving threats to another, and murder) represented less of the recidivism activity.

Of all offenders studied, rapists demonstrated the greatest propensity to be arrested for Registry violations. Approximately one-third of those initially convicted of rape were arrested for failing to register or re-register as required. Felons originally convicted of aggravated sexual battery, object sexual penetration, and carnal knowledge had relatively high arrest rates for Registry violations as well, over 25% in each group.

When arrests for a new sex/person crime and Registry violations are combined, the recidivism pattern among prison releases is revealing. Almost half of sex offenders released from prison were arrested for a new sex, person crime, or Registry violation after leaving prison. Nearly 36% of jail releases were subsequently arrested for a sex/person crime or a Registry violation. At 32%, those who received probation in lieu of prison or jail were the least likely to be arrested, based on this combined measure. Criminologists often have found that age is highly correlated with repeat offending. For most crimes, particularly violent crimes, offenders tend to age out of their criminal careers by their mid to late 20s, when recidivism rates drop off markedly. Sex offenders, however, differ from offenders who commit other types of crimes. The study revealed that sex offenders remain criminally active until much later in life compared to other offenders.

The recidivism study conducted by the Sentencing Commission for the Sex Offender Task Force found further evidence that sex offenders are at risk for re-offending even into middle age. The youngest sex offenders (under 25) recorded the highest recidivism rates (nearly 37%); however, released sex offenders who were between the ages of 25 and 34 recidivated nearly as often (nearly 32%). The recidivism rate remained fairly high (at 23%) for offenders released between the ages of 35 to 45. Only for offenders who were age 46 or older when released were recidivism rates markedly lower. For this oldest age group, the recidivism rate was 13%.

The Sentencing Commission's analysis also reveals that the younger the sex offender when released, the more likely he or she is to be arrested for violating Registry requirements when in the community. Offenders age 34 and under had higher arrest rates associated with Registry violations than older offenders. For example, nearly 33% of offenders who were 25 to 34 years of age at release were arrested for a Registry violation compared to 26% for offenders who were 35 to 45 when released. As with the recidivism rates for sex offenses and other person crimes, released sex offenders who were 46 or more were by far the least likely to be arrested for failing to register or re-register as required (rate of 15%).

When examining arrests for Registry violations, the Sentencing Commission found that it was not unusual for offenders to incur more than one arrest for failing to register or reregister. Of the 556 offenders with Registry violations, 238 (almost 43%) were arrested more than once for such a violation following release into the community. A few sex offenders in the study have been arrested 10 or more times for Registry violations.

The full report of the Virginia State Crime Commission's Task Force on Sex Offenders can be obtained by contacting the Virginia Criminal Sentencing Commission. Also, a fuller accounting of all of the sex offender recidivism research can be found in the 2005 Annual Report of the Criminal Sentencing Commission.

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