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The Model Federal Sentencing Guidelines Project: A Simplified Sentencing Grid, Model Sentencing Guidelines §1.1

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A Simplified Sentencing Grid: Model Sentencing Guidelines §1.1

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Model Sentencing Guidelines §1.1—Sentencing Table (For Criminal History Category I only)

Offense Level	Criminal History Category I	II	III, etc.
1	0-6 mos.		
2	6 mos. – 1 year		
3	1-2 years		
4	2-5 years		
5	5-8 years		
6	8-11 years		
7	11-15 years		
8	15-20 years		
9	20-25 years		
10	25-30 years		
11	LIFE		

APPLICATION NOTES:

1. *A sentencing range with a maximum term of no more than six months is the equivalent of a sentence in Zone A of the 2005 Federal Sentencing Guidelines. That is, a sentence within such a range need not include any term of imprisonment and the sentencing court may impose a sentence consisting wholly of probation or non-incarcerative penalties without resort to any departure and without providing any extraordinary justification.*
2. *A sentencing range with a maximum term of more than six months, but no more than one year, is the equivalent of a sentence in Zone B of the 2005 Federal Sentencing Guidelines. That is, a sentence within such a range must include:*
   a. *A term of imprisonment:*
   b. *A sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention for imprisonment, provided that at least one month is satisfied by imprisonment; or*
   c. *A sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment.*
3. *A sentencing range with a maximum term of more than one year, but no more than two years, is the equivalent of a sentence in Zone C of the 2005 Federal Sentencing Guidelines. That is, a sentence within such a range must include:*
   a. *A sentence of imprisonment; or*
   b. *A sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention for imprisonment, provided that at least one-half of the minimum term (or six months) is satisfied by imprisonment.*
4. *A sentencing range with a maximum term of more than two years is the equivalent of a sentence in Zone D of the 2005 Federal Sentencing Guidelines. That is, a sentence within such a range must include a term of imprisonment of at least the length of the minimum of the range.*
5. *By stating that a sentence within a particular type of range "must include" certain conditions or types of punishment, this Commentary places no necessary constraint on the power of a sentencing judge to impose a sentence in some other range (to "depart"). The rules regarding the power of judges to impose a sentence outside of the applicable guideline range are set forth elsewhere. This Commentary merely clarifies the point that a judge who, for example, imposes a sentence of straight probation on a defendant whose applicable sentencing range on this Table is 6-12 months is not imposing a sentence within the applicable range because, pursuant to Note 2 above, a sentence within the 6-12 month range must include at least some period of confinement, either in a prison or in community or home confinement.*

Drafter's Commentary

The Constitution Project Sentencing Initiative (CPSI), in concord with many other observers during the life of the Federal Sentencing Guidelines, concluded that a central defect in the Guidelines system has been its complexity and that a desirably simplified guidelines system requires a markedly simplified sentencing table or grid.[1] The CPSI recommended that a simplified grid should continue to be based on the same factors currently used – the seriousness of the present offense and the defendant's prior criminal history.[2] The CPSI also suggested that "the number of offense seriousness levels should be in the neighborhood of ten and ... the number of criminal history categories should not exceed the number in the current guidelines and might be reduced."[3] The model

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guidelines proposed here are based on such a simplified grid. The model simplified grid that appears above contains only the sentencing ranges for the lowest criminal history category. The problem of whether, and if so how, to revise the current Guidelines' approach to criminal history is addressed elsewhere in this Issue, and a fully articulated sentencing grid with all sentencing ranges filled in for all criminal history categories is proposed in that section.[4]

A nearly infinite number of grids could be constructed depending on the design parameters with which one begins. The model suggested here is based on the following premises:

1. The number of offense seriousness categories should be reduced to the extent feasible.

2. This model guidelines system will not address capital sentences.

3. The sentencing grid should cover the complete range of non-capital sentences statutorily authorized by federal felony statutes, from probation to life imprisonment. It is, of course, possible to construct a sentencing table that calls for the imposition of a particular sentence, rather than a range of punishments, for each grade of offense. For example, the California sentencing regime now under review by the U.S. Supreme Court[5] prescribes three specific terms of imprisonment for each class of offense: a middle term, a mitigated term, and an upper term.[6] For example, the middle term for Mr. Cunningham, the appellant in the case now under review, was twelve years, while the upper term was sixteen years.[7] Under California law, the judge could impose a sentence of twelve years, or, given the presence of certain aggravating factors, sixteen years, but he could not impose a sentence of fourteen years.

Likewise, one could construct a sentencing table consisting of non-contiguous ranges. In such a system, the range for the least serious category of offense might be 0-1 year, while the next highest range would be 2-4 years. Thus, no defendant could receive a sentence of more than one year, but less than two years. Single-point or non-contiguous-range systems have points to commend them. However, the model proposed here is based on a table of contiguous ranges, primarily because this approach seems more consistent with the objective of promoting increased sentencing flexibility. Moreover, a single-point or non-contiguous-range table would effectively prohibit the imposition of sentences that federal statutory law now authorize. For example, a non-contiguous-range table with 0-1 year and 2-4 year ranges would preclude an eighteen-month sentence for any defendant regardless of circumstances, even if the statute of conviction authorized imposition of a sentence from 0-5 years for each count of conviction. This result seems inconsistent with congressional intent.

4. In contrast to the existing Sentencing Table, U.S.S.G. §5A, which is composed of overlapping ranges, this Model Sentencing Table is constructed of contiguous, nonoverlapping ranges. As the CPSI observed:

> The original Sentencing Commission created overlapping ranges largely to provide a disincentive for appeals; their theory was that litigants would be less apt to appeal a sentence within the overlapping portion of two contiguous ranges because reversal of a judicial decision producing a one-level difference would be deemed harmless error. Given the extraordinary volume of sentencing appeals that has characterized the Guidelines era, the Committee is doubtful that overlapping ranges achieved the effect hoped for by the Commission. Nonetheless, some members of the Committee believe that overlapping ranges can serve other beneficial purposes, such as reducing the impact of close calls on sentence-determinative facts and providing judges a modest additional increment of sentencing flexibility. Adopting overlapping, rather than contiguous, sentencing ranges requires that one either expand the width or increase the number of sentencing ranges on the sentencing table.[8]

The group involved in this drafting project exhibited a similar divergence of views on the desirability of overlapping ranges. The grid displayed above does not employ overlapping ranges, but could be readily modified to do so should that be thought desirable.

5. As suggested by the CPSI, the model grid contains sentencing ranges at the low end of the seriousness scale that permit the imposition of non-incarcerative penalties. Levels 1 and 2 of the model grid correspond to Zones A and B of the current Guidelines Sentencing Table,[9] inasmuch as incarceration of a defendant with a Level 1 range of 0-6 months is not required and a Level 2 defendant with a 6-12 month range is eligible for a variety of sentences including community or home confinement. Level 3 sentences of 1-2 years correspond to Zone C of the current Guidelines Sentencing Table,[10] and would permit so-called "split sentences" in which half of the required term would be satisfied by imprisonment, while the other half could be satisfied by a term of community or home confinement. Any sentencing range with a maximum exceeding two years would correspond to Zone D of the current Guidelines Sentencing Table in that a sentence within range—must include a period of imprisonment equal to the minimum of the range."

6. The model grid is composed of ranges of differing width, with the two ranges at the low end of the seriousness scale being only six months wide, the next range spanning one year, and ranges above that point scaling upwards gradually from 36 months (three years) to 60 months (five years). There is no pretension that the particular figures employed in the model grid were chosen based on any scientifically exact basis. Other numbers might rationally be chosen. However, the basic structure of the model is based on several compelling considerations.

If one were concerned purely with simplicity, one might construct a sentencing grid that consisted solely of ranges of uniform width, say five years. The portion of such a grid governing first-time offenders might look like this:

Offense Level	Criminal History Category I
1	0-5 years
2	5-10 years
3	10-15 years
4	15-20 years
5	20-25 Years
6	25-30 years
7	30 years to life
8	LIFE

A grid constructed in this way would suffer from two related defects. First, there is some tendency in the current criminal justice environment to focus solely on the length of the term of incarceration imposed on those defendants who will be imprisoned. However, the first choice a sentencing judge must make is whether the defendant and his offense merit incarceration at all – the "in-out choice." Even in the post-Guidelines era, roughly 9% of all federal defendants receive sentences with no incarcerative component.[11] Regardless of whether one thinks non-incarcerative penalties should be used more or less than they now are, it is indisputable that some fraction of federal defendants should not be imprisoned, or if imprisoned, should receive only short sentences. A grid with wide, uniform ranges at the low end of the seriousness scale would provide no guidance to the sentencing judge regarding the in-out choice. Defendants in Offense Level 1 would be an undifferentiated mass, some of whom should properly receive every day of five years, and some of whom should not go to prison at all. With a grid like this one, either the in-out choice would have to be left up to the unguided discretion of judges, or a separate body of rules based on facts found by judges rather than juries would have to be created to guide judicial discretion on the critical in-out choice.

Second, even as to those defendants for whom some term of imprisonment would plainly be appropriate, a grid with wide, uniform ranges at the bottom probably provides insufficient guidance. More than 60% of all convicted federal defendants receive sentences of five years of imprisonment or less, and roughly 80% receive sentences of less than ten years imprisonment.[12] If a sentencing grid based on jury-found facts is to place meaningful limits on, or provide meaningful guidance to, sentencing judges in the majority of cases which involve sentences of less than five years (not to speak of the supermajority that involve less than ten years), then the low-to-medium segment of the sentencing grid must have relatively small subdivisions. Of course, just as with the in-out choice, one could adopt a grid in which jury-found facts placed the defendant in a broad range and then create an ancillary body of rules based on judge-found facts to guide placement within that broad range. The objection to this approach is that, while some rules or guidance for how judges should sentence within jury-created ranges may be helpful (a point addressed elsewhere in this issue[13]), such rules risk offending the constitutional limitations imposed by *Blakely* and *Booker*,[14] and perhaps more importantly, if too numerous and too complex, risk recreating the operational defects of the existing Federal Sentencing Guidelines.

In short, a grid with wide, uniform ranges at the bottom would be unsatisfactory because it would provide no meaningful guidance to sentencing judges in the majority of cases that confront them. Conversely, if the twin imperatives of a simple grid and increased judicial flexibility are to be accommodated, the middle and higher ranges into which those who merit some prison will fall should be fewer and wider than is the case under the present system. The structure of this model sentencing grid attempts to balance three considerations that are inevitably in some tension – guidance to judges, simplicity, and flexibility — by providing guidance to judges within a simpler, more flexible framework.

6. Finally, it bears reemphasis that this model grid is illustrative only. It could be reconfigured many different ways and still remain consistent with the premises and objectives of this project so long as the final form maintains simplicity in terms of a small number of boxes and flexibility in terms of ranges of reasonable width within which judges can exercise informed discretion.

Notes

1 The Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post*-Booker *World*, 18 FED. SENT. REP. 310, 314 (2006) (hereinafter "CPSI, Recommendations").

2 *Id.*

3 *Id.*

4 *See* Beverly Dyer, *Revising Criminal History*, 18 FED. SENT. REP. 373 (2006).

5 *Cunningham v. California*, 126 S.Ct. 1329, No. 05-6551 (2006) (granting writ of certiorari).

6 Cal. Penal Code § 1170.

7 Cal. Penal Code § 288.5(a); *People v. Cunningham*, No. A103501, 2005 WL 880983, at *7 (Cal. Ct. App. Apr. 18, 2005).

8 CPSI, Recommendations, *supra* note 1, at ** n. 27.

9 U.S.S.G. §§ 5A, 5C1.1(b), (c) (2006).

10 U.S.S.G. §§ 5A, 5C1.1(d) (2006).

11 In the portion of FY 2004 prior to the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004), 8.7% of all sentenced federal defendants received probation-only sentences. U.S. Sentencing Commission, 2004 Sourcebook of Federal Sentencing Statistics 46 tbl. 12 (2006). In the post-*Blakely* portion of the year, 9% of convicted federal defendants received such sentences. *Id.* at 252 tbl. 12.

12 *Id.* at 66 tbl. 23, 272 tbl. 23.

13 *See* Frank O. Bowman, III, *Determining the Sentencing Range and the Sentence Within Range*, 18 FED. SENT. REP. 323 (2006).

14 At the simplest level, any rule pursuant to which a fact found by a judge after conviction generates a sentencing range with an enforceable maximum lower than the maximum sentence authorized by the fact of conviction alone would probably offend the rule of *Blakely* and *Booker*. Even a rule under which judge-found facts generated a presumptive maximum sentence lower than the statutory maximum would at the least raise constitutional questions.