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DECEMBER 1989

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME LIII DECEMBER 1989 NUMBER 4

This Issue in Brief

A Proposal for Considering Intoxication at Sentencing Hearings: Part I.—What sentence should a judge impose on a convicted offender who was intoxicated at the time he committed the crime? The U.S. Sentencing Commission decided that an offender's intoxication is "not ordinarily relevant" to his sentence. Author Charles Felker proposes, instead, that intoxication is a relevant and important factor in determining an appropriate sentence. In Part I of this article, the author surveys current theories about the connection between alcohol and crime, the responsibility of alcohol abusers for their acts, and the way offender intoxication affects the purposes of sentencing. In Part II, the author will develop a specific proposal based on a survey of state laws and cases.

Alcohol and Crime on the Reservation: A 10-Year Perspective.— Author Darrell K. Mills examines the relationship between alcohol abuse and crime on the part of Indian felony defendants in the Federal District Court in Wyoming from 1978-88. The author characterizes the types of crime and typical defendant from the reservation and focuses on the history of alcoholism, treatment, and prior arrest of these defendants. The article also discusses the issue of alcoholic denial.

Practitioners' Views on AIDS in Probation and Detention.—The question of how to provide humane and effective supervision for HIV-positive offenders or offenders with AIDS is an important issue facing policy-makers in corrections. Author Arthur J. Lurigio reports on a survey of probation and detention personnel in Illinois conducted to examine views regarding AIDS and its impact on policies, procedures, and work behavior. Comparisons were made between probation and detention personnel. Survey results indicated that probation and detention respondents anticipate that the AIDS health crisis invariably will affect their management of cases. Detention participants were more concerned about occupational risk and precautionary measures. Both groups recommended policy and procedural guidelines governing legal liability, confidentiality, mandatory testing, case contacts, and the education of offenders and staff.

CONTENTS

Florida's Sentencing Guidelines: Six Years Later

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FLORIDA INSTITUTED sentencing guidelines some 6 years ago in October 1983. Although these guidelines have been examined previously (Griswold, 1985, 1987; Holton, 1987; Sundberg, 1983), the purpose of this article is to analyze changes in Florida's sentencing guidelines as well as accompanying changes in gain-time laws in Florida. (Gain-time refers to reduction in the sentence imposed and is provided by correctional officials. The amount of gain-time determines the actual time served in prison.) It is necessary to scrutinize both changes in the sentencing guidelines and gain-time laws to gain insight into the potential impact on patterns of actual punishment.

The principal purpose of enacting Florida's sentencing guidelines was to reduce unwarranted sentencing disparity, although it is questionable that this goal has been achieved (Griswold, 1987). A largely independent issue is the direction of changes in the guidelines since Florida law allows for annual modification of the guidelines. Have Florida's sentencing guidelines become potentially more lenient or punitive? Rather than examine these changes in a vacuum, it is also useful to analyze changes in gain-time provisions since both sentences imposed and gain-time influence time actually served in prison. Further, changes in the sentencing guidelines (particularly if they are more punitive) may influence gain-time provisions because Florida is under Federal court order to reduce prison overcrowding. In other words, to the degree that Florida's guidelines have become more punitive, it might also be necessary to increase gain-time to negate the effect of more lengthy imposed sentences. Although, in part, the guidelines were based upon historical patterns of sentencing, the Sentencing Commission was under no compulsion to develop guidelines which followed this rationale (Griswold, 1985). Unfortunately, there was no consideration of the impact of Florida's sentencing guidelines on the prison population when the guidelines were enacted (and the same caveat applies to any modifications which have been made in the guidelines), and that is the reason why gain-time provisions should be studied as well. In contrast, Minnesota not only developed guidelines which would not increase the prison population, but modifications have been made to keep the prison population in check. (von Hirsch and Harahan, 1981).

Changes in Florida's Sentencing Guidelines and Gain-Time Provisions

Major changes in Florida's sentencing guidelines and gain-time provisions are summarized in Tables 1 and 2. Although these are not the only changes, they are the most important ones; minor changes such as clarification of wording have been ignored.

TABLE 1. CHANGES IN FLORIDA'S SENTENCING GUIDELINES SINCE 1983

Revisions Effective July 1, 1984

1. Multiple Offenses - A separate guidelines scoresheet is to be prepared if there are multiple offenses with each offense at conviction scored as the primary offense and other offenses to be scored as additional offenses. The scoresheet which recommends the most severe sanction shall be used by the sentencing judge. This may result in recommending a more severe sanction than would have occurred prior to July 1, 1984.
2. Juvenile Priors - The definition of juvenile priors was changed so that the 3-year time period beyond which juvenile convictions cannot be scored was altered from the date of conviction to the date of the commission of the new offense. Since it is possible to count more juvenile priors, this change has the potential to increase the severity of the recommended sentence.
3. Probation or Community Control Violation - Sentences imposed after revocation of probation or community control may be in the original cell (which is the way the guidelines were prior to July 1, 1984) or may be increased to the next higher cell. This modification in the sentencing guidelines has the potential to increase the severity of the recommended sentence.
4. Sexual Offenses - Points for the primary offense are increased by 20 percent which has the potential to increase the severity of the recommended sentence.
5. Split Sentence - If the split sentence is a combination of prison and probation, the prison sentence shall not be less than the guideline minimum or exceed the guideline maximum. The total sentence shall not exceed that provided by general law. Previously, split sentences (probation plus prison) were limited to the maximum prison sentence. This change has the potential to increase the recommended prison sentence.
6. Priors - In 1983, four or more priors were scored the same, but now the fifth and succeeding priors are given

The author wishes to thank Dr. Lynette Feder, assistant professor of criminal justice, Florida Atlantic University, Mr. Leonard Holton, director, Florida Sentencing Commission, and Dr. Robert Bales, Florida Department of Corrections, for their comments on earlier versions of this article.

additional points. This change has the potential to increase the recommended sentence.

Revisions Effective October 1, 1986

1. Certain Category 9 offenses (all other offenses) were changed to Category 1 offenses (murder and manslaughter) which may have the effect of increasing the severity of the recommended sentence.
2. Prior Offenses - Scoring of prior, same category offenses is limited to felonies, although, in some cases, misdemeanors were being scored before this revision. This has the potential to reduce the severity of recommended sentences.
3. Alcohol-Related Offenses - This change will result in an additional 32 points per prior alcohol-related or drug-related traffic offense on a Category 1 offense involving the operation of a motor vehicle while intoxicated. This has the potential to increase the severity of the recommended sentence.
4. Probation Violation - Previously, probation violations were scored as additional offenses, but, under the revision, they are scored as priors. This has the potential to increase the severity of the recommended sentence.
5. Split Sentence of Probation and Community Control - This would allow a sentence of probation to follow a sentence of community control. This revision has the potential to increase the severity of the recommended sentence.

Revisions Effective October 1 1988

1. Any person who falls in the first cell (any non-state prison sanction) may be sentenced to community control or prison for up to 22 months. This change has the potential to increase the severity of the recommended sentence.
2. Habitual Offenders - For any offender who has been convicted of two or more felonies within 5 years of the date of the last prior felony, the court may impose an extended sentence up to the statutory maximum. In the case of habitual violent felony offenders there may be minimum mandatory sentences - 15 years for first degree felonies, 10 years for second degree felonies, and 5 years for third degree felonies. These revisions have the potential to increase the severity of recommended sentences.
3. Any offender who falls in the second cell or above may automatically be moved up or down one cell.

Table 1 indicates that the sentencing guidelines have become more punitive since, with the exception of one modification, all of the changes have the potential to increase sentences imposed (Holton, 1987a). Ascertaining the impact of any particular change would be very difficult to determine, but the overall effect is likely to be more harsh sentences. Two changes made in 1988 may have the most dramatic effects on sentences imposed, however. First, statutory changes provide for minimum mandatory sentences for offenders defined as habitual offenders. For first degree felons, the minimum mandatory sentence is 15 years, and the corresponding minimum mandatory sentences are 10 years for second degree felons and 5 years for third degree felons. Since these are minimum mandatory sentences, gain-time provisions do not come into play until the minimum mandatory time is served, although inmates sentenced under habitual offender statutes may receive incentive gain-time. However, Leonard Holton, director of Florida's Sentencing Commission, has indicated that one consequence of previously more restrictive habitual offender statutes in Florida has been to provide prosecutors with an additional plea bargaining tool because labeling a criminal as an habitual offender is discretionary. Whether the broader definition of habitual offenders will have this effect is moot.

Equally important, offenders who fall in the first cells of the sentencing grids do not necessarily receive any non-prison sanction. Instead, judges may sentence such offenders to up to 22 months in prison. Since at least half of the offenders (in 1987 it was 64 percent) fall in the first cell, this change obviously has the potential for sentencing a much greater proportion of offenders to prison. (However, it should be noted that probation violations could be moved from the first to the second cell as of 1984, but it is unknown what proportion of probation violators have been moved from the first to second cell.)

Clearly then, modifications of Florida's sentencing guidelines have been in the direction of greater punitiveness. Further, changes in the sentencing of habitual offenders and those offenders falling in the first cells may potentially have the greatest implications for Florida's prison population. In the future, a larger and larger proportion of Florida's prison population may be comprised of habitual offenders while other offenders may receive shorter and shorter sentences to accommodate habitual offenders.

Limited findings have a bearing on some of the issues already discussed. There is, in fact, some evidence that inmates are serving less time in prison. In 1982, 8 percent of the inmates released served less than 6 months while in 1987 the proportion was 44 percent (Office of the Auditor General, 1988). Although there were no controls for offense or offender characteristics, this difference is substantial. Likewise, the percentage of time served in prison has been on the decline in Florida (Criminal Justice Estimating Conference, 1988). Although the proportion of time served has been considered for a relatively short period of time, it has declined consistently from 40.6 percent in January 1988 to 36.5 percent in September 1988. At the same time, there has been a trend to incarcerate a larger and larger proportion of convicted felons (Criminal Justice Estimating Conference, 1988). In addition, while prison commitments have increased by 178 percent from 1980 to 1987, the incarceration rate has remained nearly constant; probably the greatest reason for the increase in commitments is the greater number of drug offenders incarcerated (Justice Research Associates, Inc. and Evaluation

Systems Designs, Inc., 1988). Implications of these findings will be discussed later.

From the beginning, Florida's sentencing guidelines have allowed relatively minor offenders to receive more severe sanctions than more serious offenders because of the disproportionate weight which can be placed on priors. (Priors refer to the offender's criminal history; in the case of Florida, priors represent prior convictions.) For this reason, it can be argued that the guidelines are most consistent with an incapacitative approach (Griswold, 1985). Further, with the exception of one modification, changes in the scoring of priors have consistently been in the direction of greater and greater weight placed on priors as compared to the instant offense. For example, an offender convicted of a third degree felony who has an extensive criminal history can receive a much harsher sentence than a first degree felon with no priors.

There are several reasons why the disproportionate weight placed on priors may be problematic. For one, there are numerous philosophical reasons for questioning the use of priors in meting out sentences (Durham, 1987). Likewise, the use of priors may create a self-fulfilling prophecy because those with priors may be most likely to be arrested, convicted, and receive a harsh sanction (Farrell and Swigert, 1978).

Besides the disproportionate weighting of priors, other concerns are the decay of priors and whether their weightings should be open or closed. In the case of juvenile priors, they are counted for 3 years while adult priors are counted for 10 years. With adult priors, it is questionable that such remote behavior should be considered (Griswold, 1985).

Initially, Florida had a cap of four priors. In other words, offenders who had four or more priors received the same scores, but since 1984 there has been no cap, so that all priors in excess of four are also counted. Although probably only a small proportion of offenders have five or more priors (in 1987 it was 3.4 percent), this is consistent with other changes in the guidelines which have given criminal history increasing weight. Again, this most closely corresponds to an incapacitative approach rather than a just deserts model, for example, which would place a cap on priors (von Hirsch, 1981).

Another consideration is the measurement of priors. A number of problems have been raised concerning the measurement of criminal history which call into question the reliability and validity of such measurement (Search Group, 1985). In addition, there are measurement problems which are unique to Florida (Griswold, 1985). Because of the influx of people into Florida, priors are not measured in the same manner for all offenders which may put long-term residents at a disadvantage because priors can probably be measured most accurately for them.

There are numerous problems, then, associated with priors which have been largely ignored in Florida. Perhaps most important is whether priors should receive the tremendous weight which they have been assigned.

Equally dramatic are some of the changes in the gain-time provisions. Beginning in 1983 when the sentencing guidelines went into effect, changes in gain-time provisions have consistently been in the direction of reducing the proportion of time actually served (see table 2). For example, if inmates received the maximum gain-time for 1- and 5-year sentences in 1981 (assuming that the inmates were involved in institutional labor), the actual sentences would be slightly more than five months and almost 27 months (excluding meritorious gain-time). However, if inmates received the maximum gain-time for the same sentences in 1988, then the sentences would be only about 2 months and 11 months respectively. There would also be potential increases in gain-time for other sentence lengths.

TABLE 2. CHANGES IN FLORIDA'S GAIN-TIME SINCE 1981

1981 Revisions

1. Gain-time for good conduct (Basic gain-time)
   - 3 days per month for the first and second years of sentence
   - 6 days per month for the third and fourth years of sentence
   - 9 days per month for the fifth and succeeding years of sentence
2. Extra gain-time (Essentially incentive gain-time) - An inmate who performs his assigned duties in a conscientious manner and against whom no disciplinary report has been filed in the past 6 months may receive 1 to 6 days of extra gain-time per month.
3. Work gain-time - An inmate may receive on a monthly basis up to 1 day for each day of productive labor depending on diligence, quality and quantity of work, and skill required.
4. Meritorious gain-time - An inmate who does some outstanding deed may receive 1 to 60 days of additional gain-time.

1983 Revisions

1. Basic gain-time - 10 days per month
2. Incentive gain-time - For each month an inmate engages in positive activities, 20 days of incentive gain-time may be granted.
3. Meritorious gain-time - An inmate who performs an outstanding deed may be granted 1 to 60 days meritorious gain-time.
4. Emergency release - If the correctional system exceeds 98 percent of capacity, the sentences of all inmates who are eligible to earn gain-time shall be reduced up to 30 days

of gain-time in 5 day increments until the inmate population population is 97 percent of lawful capacity.
- If there is still a state of emergency after applying the above provision, inmates serving sentences of 3 years or less who are within 6 months of release shall be given up to 60 days of additional gain-time in 5 day increments.

1987 Revisions

1. Emergency release - Emergency release would go into effect if the prison population exceeded 99 percent of capacity until the population is 98 percent of lawful capacity.
2. Other provisions are essentially the same.

1988 Revisions

1. Provisional credits (similar to emergency release) - When the prison population reaches 97.5 percent of lawful capacity up to 90 days of provisional credits can be granted to inmates who are receiving incentive gain-time. This also entails supervision which is similar to parole supervision which was not the case with the 1987 law.
2. Other provisions are essentially the same.

Implications from Changes in Florida's Sentencing Guidelines and Gain-Time Provisions

At least two changes are evident, then, since Florida's sentencing guidelines have gone into effect. First, while the guidelines have potentially become more punitive, coterminously changes in gain-time can have the effect of reducing actual prison sentences. To what extent changes in the sentencing guidelines and gain-time provisions simply offset each other is uncertain, but the changes in the sentencing guidelines and gain-time provisions as well as limited evidence clearly support this conclusion. Therefore, more punitive sentences called for by the guidelines may be largely superfluous if changes in gain-time have had the consequence of reducing the proportion of time actually served.

A second implication is that sentencing guidelines may have not necessarily curtailed sentencing discretion in Florida. Even though the discretion for sentences imposed may be more structured than it has been in the past, discretionary powers may have been increased among correctional officials. Although basic gain-time is automatically applied to nearly all sentences (an exception would be criminals defined as habitual offenders, for example), incentive gain-time is discretionary; while basic gain-time is 10 days per month, incentive gain-time is up to 20 days per month. The ramification is that discretion may have simply shifted from judges to correctional officials, but further research would be necessary to address this issue.

Obviously, this was not the intent in adopting sentencing guidelines in Florida, but, given Florida's prison overcrowding, this may be the only alternative short of undertaking a massive prison construction program. In the 1989 Florida legislative session, a proposal for the construction of nearly 8,000 new prison beds was passed. Thus, while the Florida Sentencing Guidelines Commission may have satiated legislators and citizens by increasing the sentences imposed, the proportions of sentences served as well as time served in prison appear to have been reduced because of prison capacity constraints and the necessity of early release credits.

Equally problematic is that discretionary power in sentencing may have simply been shifted from judges to correctional officials, undermining the central purpose of Florida's sentencing guidelines. In other words, discretion which may affect actual sentences may have simply been pushed forward to the corrections stage by the legislature.

Conclusion

As changes in Florida's sentencing guidelines have called for more punitive sentences, correspondingly inmates may actually serve shorter and shorter sentences and also serve smaller proportions of their sentences than they did prior to the implementation of the guidelines. As already noted, discretion may have simply been shifted from the judiciary to correctional officials. To remedy this situation it might be necessary to modify the sentencing guidelines so that the sentences imposed are closer to actual time served in prison. However, this might be politically unpopular because the mood of the public as well as legislators in Florida is towards more harsh sanctions.

Limited evidence supports the view that increasingly punitive sentences are being imposed while the proportion of time served and actual sentences are declining. This conclusion is based upon the following findings:

- Compared to 1982 when 8 percent of the inmates released served less than 6 months, the proportion in 1987 was 44 percent.
- Likewise, the percentage of time served has been on the decline from January to September 1988.
- Commitments to prison have increased by 161 percent from 1980 to 1987, while the incarceration rate in Florida has remained nearly constant.
- Also, a larger and larger proportion of convicted offenders have been sentenced to prison since Florida's guidelines were enacted.

A drawback to these findings is the absence of controls for either offender or offense characteristics and sentence lengths, but, nonetheless, all of the evidence is in the predicted direction.

That Florida has also chosen to place greater and greater weight on criminal history and mandatory sentences for criminals defined as habitual offenders is the most recent and dramatic indication of this trend. A possible ramification is that in the future Florida's prisons will be comprised of a greater and greater proportion of habitual offenders while other offenders (even serious ones) will serve less and less time in prison. Several issues have been raised

with regard to priors previously; it is paramount that Florida consider the implications of placing such great weight on criminal history.

Another problem is that Florida has little truth in sentencing. The United States Sentencing Commission, for example, purposely devised sentencing guidelines so that actual sentences are close to imposed sentences because potential gain-time is minimized. Perhaps Florida should follow a similar path, although the public and legislators might view sentences imposed as being too lenient.

Still, at least this could have the effect of structuring discretion to a greater extent because correctional officials would have less discretion in determining actual time served. What is being suggested is that the original intent of reducing unwarranted discretion in sentencing may have been subverted by giving correctional officials tremendous discretionary power in applying gain-time provisions.

The guidelines have become more and more discretionary as well. This is particularly evidenced by two changes in the 1988 sentencing guidelines. First, offenders falling in the first cells who previously could have received any non-prison sanction may now be sentenced to up to 22 months in prison. Secondly, any offenders falling in the second cells or above may be raised or lowered by one cell without aggravating or mitigating the sentence. What effect these changes will have on actual patterns of sentencing is uncertain, but both of these modifications increase the discretionary power of judges.

BIBLIOGRAPHY

Criminal Justice Estimating Conference. "Final Report of the Florida Consensus Criminal Justice Estimating Conference," State of Florida, unpublished manuscript, 1988.

Durham, A. "Justice in Sentencing: The Role of Prior Record of Criminal Involvement." *Journal of Criminal Law and Criminology, 78*, 1987, pp. 614-643.

Farrell, J. and H. Jacob. "Prior Offense as a Self-fulfilling Prophecy." *Law and Society Review, 12*, 1978, pp. 437-454.

Griswold, D. "Deviation from Sentencing Guidelines: The Issue of Unwarranted Disparity." *Journal of Criminal Justice, 15*, 1987, pp. 317-331.

_____. "Florida's Sentencing Guidelines: Progression or Regression?" *Federal Probation, 49*, 1985, pp. 25-32.

Holton, L. "Memorandum Regarding *Miller* v. *Florida*," State of Florida, unpublished manuscript, 1987.

_____. "What is to be Done with Sentencing Guidelines?" *Florida Bar Journal*, 1987a, pp. 19-23.

Justice Research Associates, Inc. and Evaluation Systems Design, Inc. "Quantitative Assessment of Factors Impacting Prison Populations," unpublished manuscript, 1988.

Office of the Auditor General. "An Overview of Release Policies and Programs," State of Florida, unpublished manuscript, 1988.

Search Group. "Data Quality of Criminal Justice Records," Washington, DC: U.S. Government Printing Office, 1985.

Sundberg, A. "Florida's Initial Experience with Sentencing Guidelines," *Florida State University Law Review, 11*, 1983, pp.125-137.

von Hirsch, A. "Desert and Previous Convictions in Sentencing." *Minnesota Law Review, 65*, 1981, pp. 591-634.

von Hirsch, A. and K. Hanrahan. "Determinate Penalty Systems in America: An Overview." *Crime and Delinquency*, July 1981, pp. 289-316.