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Appellate Review in a Sentencing Guidelines Jurisdiction: The Pennsylvania Experience*

Joseph A. Del Sole**

INTRODUCTION

Society has long sought to determine appropriate compensation for anti-social behavior. From the time of Moses,¹ through the Middle Ages,² to the present,³ human-kind has sought ways to punish crime.

Pennsylvania, at the time of its founding in 1682, had the most lenient criminal code, with murder being the only crime punishable by death. Property crimes were punishable by restitution, and crimes against the person resulted in whippings or imprisonment for a second offense.⁴ Initially, prisons were designed to provide work which it was believed would lead to rehabilitation. The

* This article is adapted from a thesis submitted by the author in partial fulfillment of the requirements for the degree of Masters of Law in the Judicial Process at the University of Virginia.

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1. *The Holy Bible*, Book of Exodus, ch 21-22 (New International Version 1984).
2. Harold J. Berman, *Law and Revolution: The Formation Of The Western Legal Tradition* at 52-54 (Harvard University Press 1983) details the development of 7th century codes in Western Europe as a means for providing economic compensation to victims of crime to be paid by the accused. Their purpose was to eliminate retaliation and maintain order. Berman, *Law and Revolution* at 55.
3. Recently Congress considered the Crime Control Act of 1991, HR 3371. It was passed by the House but not the Senate. It would have created 51 additional Federal death penalty crimes.
4. Kathleen Preyer, *Penal Measures In The American Colonies: An Overview*, 26 Am J of Legal Hist 333, 336 (1982). "The Quakers arrived in America with new conceptions of society and penal sanctions. William Penn's initial criminal code for Pennsylvania was grounded in Quaker religious belief which minimized the traditional Christian doctrine of original sin, saw causes of crime in poverty, and believed that under proper treatment the worst criminals could be reformed." Preyer, *Penal Measures*, 26 Am J of Legal Hist at 336.

Quakers distrusted courts and attempted to have disputes resolved among the parties.⁵ By 1700, however, the political and social climate had changed and more severe penalties were introduced. Ultimately, by 1718, Pennsylvania's laws included many of the capital crimes of England.⁶

Another turnabout occurred later in the century and by 1786 certain capital crimes had been eliminated.⁷ In 1794 the death penalty was abolished in Pennsylvania for all crimes but murder.⁸

In addition to restricting use of the death penalty to murder, the 1794 Act further classified murder as first or second degree.⁹ First degree murder was either premeditated or felony murder, and was punishable by either death or life in prison. All other murder was second degree, and punishable by imprisonment for up to 20 years for a first offense and life for a second.¹⁰ The Act's preamble was interesting. It defined the purpose of punishment as a means to prevent crime and repair the damage to society. It stated that these goals were best served by "moderate but certain penalties" and asserted that a function of government was to reform offenders.¹¹

5. *Id.* at 337 (cited in note 4). "Within the Quaker meeting such communal procedures [reconciliations] were exercised in minor criminal matters as well as civil disputes [footnote omitted] . . . us[e] of the peace bond, before a person had been criminally accused, was an effort to render criminal court action unnecessary." *Id.*

6. In her article Professor Preyer seemed to attribute this move toward stricter punishment to social conditions within the colony. *Id.* at 337, 343 (cited in note 4). However, a different analysis of the reasons for this change was offered by Professor Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 Pa L Rev 759 (1949). He attributed the changes to political forces of the time. In 1692 King William and Queen Mary removed Penn as governor and appointed Benjamin Fletcher, then Governor of New York, to be Governor of Pennsylvania. By 1718, because of the refusal of the Queen to approve acts of the Provincial Assembly, "Quakers were not permitted to qualify for judicial office or to testify in criminal cases by making affirmation instead of taking an oath. [footnote omitted]. . . In order to secure the privilege of affirmation the Assembly. . . passed an act in 1718 which after providing that judicial officers and witnesses might qualify by affirmation, repealed the 'humane' laws instituted by William Penn, and proscribed the death penalty for [sixteen additional crimes]." Professor Keedy stated that Pennsylvania continued to expand the number of crimes for which the death penalty would apply. Keedy, *History of PA Statute*, 97 Pa L Rev at 762-64.

7. *Id.* at 767. See also Lawrence M. Friedman, *History of American Law* at 281 (Simon and Schuster, 2d ed 1985).

8. Keedy, *History of PA Statute*, 97 Pa L Rev at 772 (cited in note 6).

9. *Id.* at 772 citing 4 Journal Of The Senate 80 (1794).

10. *Id.* at 772 (cited in note 6).

11. *Id.* citing 4 Journal Of The Senate 80 (1794). "Whereas the design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society or the individual, and it hath been found by experience, that these objects are better obtained by moderate but certain penalties, than by severe and excessive punish-

The same year which brought changes in the law also brought the remodeling of the Walnut Street prison in Philadelphia. Prisoners were either to work or to be kept in solitary confinement where they could meditate and reform their lives. It was ultimately conceded that isolation was cruel punishment and was discarded.¹²

As focus on the rehabilitative possibilities of the defendant began to emerge, indeterminate and suspended sentencing practices developed.¹³ By the turn of the century, Pennsylvania was well immersed in this process. By the 1970's there was a growing national concern over sentencing disparity and Pennsylvania was not immune from those forces.

The General Assembly passed a comprehensive sentencing code in 1974 which detailed a decisional process that trial judges were required to exercise in determining sentences.¹⁴ The code defined the type of sentences available,¹⁵ the conditions under which probation was appropriate,¹⁶ and the circumstances under which confinement was to be invoked.¹⁷

At the same time, the Supreme Court of Pennsylvania began the process of appellate review of sentencing decisions. This was a major departure from past practice and illustrative of a more aggressive appellate role. The state high court's actions were tentative, and limited to a procedural examination of the sentencing process.

In 1978 the Pennsylvania Commission on Sentencing ("Commission") was created and charged with the responsibility of establishing sentencing guidelines.¹⁸ This system, which has remained substantially in place, clearly functioned to eliminate sentencing disparity and promoted a greater consistency in sentencing decisions. The enactment of the guidelines and recent supreme court decisions that have limited appellate review have, however, raised the question whether guideline compliance has been at the expense

ments: And whereas it is the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety." Id (cited in note 6).

12. Freidman, *History of American Law* at 296 (cited in note 7). See also Arthur W. Campbell, *Law of Sentencing* §1.2 at 7 (Clark Boardman Callaghan, 2d ed 1991) referred to this as the first penitentiary in America.

13. Freudnabm *History of American Law* at 597 (cited in note 7).

14. 42 Pa Cons Stat Ann § 9701, et seq (Purdon 1981).

15. 42 Pa Cons Stat Ann § 9721 (Purdon 1981) provides for the range of sentencing alternatives from guilt without further penalty to total confinement.

16. 42 Pa Cons Stat Ann § 9722 (Purdon 1981).

17. 42 Pa Cons Stat Ann § 9725 (Purdon 1981).

18. Act 319 of Nov 26, 1978, Pub L No 1316, codified at 42 Pa Cons Stat Ann §§ 2151-2155 and §§ 9721-9781 (Purdon 1981).

of individualized sentencing.

The same legislation which created the Commission also included a provision codifying appellate review.¹⁹ By the terms of this provision, the legislature intended appellate review to be part of the sentencing process. This review insures that the trial courts have considered and applied the guidelines and insures that departures from the guidelines will be permitted where necessary. Despite this clear legislative intent, the supreme court has recently acted to limit appellate review of the discretionary aspects of sentencing.

It is the purpose of this article to suggest that appellate review is a necessary component of an effective guideline system and that parties should have an opportunity to seek such review. Further, this article will show that recent supreme and superior court deci-

19. 42 Pa Cons Stat Ann § 9781 (Purdon 1981).

Appellate review of sentence

(a) right to appeal—The defendant or the Commonwealth may appeal as of right the legality of the sentence.

(b) allowance of appeal—The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

(c) determination on appeal—The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

- (1) the sentencing court purported to sentence within the guidelines but applied the guidelines erroneously;
- (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
- (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

(d) review of record—In reviewing the record the appellate court shall have regard for:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
- (3) The findings upon which the sentence was based.
- (4) The guidelines promulgated by the commission.

(e) right to bail not enlarged—Nothing in this chapter shall be construed to enlarge the defendant's right to bail pending appeal.

(f) limitation on additional appellate review—No appeal of the discretionary aspects of the sentence shall be permitted beyond the appellate court that has original jurisdiction for such appeals.

sions limiting review are inconsistent with legislative intent and the development of a coherent guideline system.²⁰

APPELLATE REVIEW OF SENTENCING BEFORE THE GUIDELINES

Pennsylvania's appellate courts have a long history of limited review of sentencing matters.²¹ Until the 1974 sentencing code was enacted, they held that sentencing was within the discretion of the trial courts and review was only possible if the sentence exceeded the statutorily prescribed punishment (legal limit) or was manifestly excessive.²² In fact, the Pennsylvania Supreme Court stated in 1973 that it was not aware of any non-capital case where it had reduced an appellant's sentence.²³

Pennsylvania's appellate courts have always retained the ability to correct an illegal sentence. Multiple sentences for the same offense have been voided²⁴ and sentences that exceeded the statutory maximum have been corrected.²⁵ These actions were based on the premise that an illegal sentence was beyond the power of the sentencing court and could be reviewed at any time. In fact, illegality

20. The National Center for State Courts, in its final report, *Understanding Reversible Error in Criminal Appeals*, which was submitted to the State Justice Institute, identified sentencing error as an emerging issue facing state appellate courts. It reported that in Rhode Island, an indeterminate sentencing state, there was a sentencing error rate of 38.5 percent. Other courts studied had error rates ranging from 15 to 30 percent. The National Center for State Courts, *Understanding Reversible Error in Criminal Appeals* 1, 19 (National Center for State Courts 1989).

21. Since 1911 Pennsylvania has embraced the concept of indeterminate sentencing. Act of June 19, 1911, § 6. A sentencing court is required to set a minimum and maximum period of incarceration with the minimum not to exceed one-half the maximum. The prisoner's release date is determined by the Parole Board but cannot occur before the minimum sentence is served.

22. *Commonwealth v Wrona*, 442 Pa 201, 275 A2d 78 (1971). While this case dealt with an appeal by the Commonwealth and ultimately held that the Commonwealth's right to appeal in criminal matters was limited to "a pure question of law" the Court also stated "that the sentence imposed on a person convicted of a crime lies . . . within the sole discretion of the trial court, and the sentence imposed will not be reviewed by an appellate court, unless it exceeds the statutory prescribed limits or is so manifestly excessive as to constitute too severe a punishment." *Wrona*, 275 A2d at 80-81. See also *Commonwealth v Bilinski*, 190 Pa Super 401, 154 A2d 322 (1959). I suggest that limiting review to a manifestly excessive sentence is incorrect. Rather, review should be permitted and reversal be limited.

23. *Commonwealth v Lee*, 450 Pa 152, 156-57 n 4, 299 A2d 640, 642-43 n 4 (1973) "We are unaware of any cases where this Court has reduced an appellant's sentence except in those . . . capital cases where the death penalty was imposed." *Lee*, 299 A2d at 642-43 n 4. See also *Commonwealth v Person*, 450 Pa 1, 247 A2d 460 (1973).

24. *Commonwealth ex rel Shaddock v Ashe*, 340 Pa 286, 17 A2d 190 (1941); *Commonwealth v Zaengle*, 332 Pa Super 137, 480 A2d 1224 (1984).

25. *Commonwealth v Britton*, 334 Pa Super 203, 482 A2d 1294 (1984); *Commonwealth v Albertson*, 269 Pa Super 505, 410 A2d 815 (1979).

can be raised *sua sponte* by the appellate court.²⁶ However, for many years it was evident that appellate review of the discretionary aspects of sentencing was nonexistent in Pennsylvania.

The door to appellate review was opened by the supreme court in *Commonwealth v Martin*.²⁷ The crimes involved in this series of six separate appeals occurred before the 1974 sentencing code was enacted. The appellants were each charged with illegal sales of heroin and each received a sentence of three to ten years' imprisonment per sale which were to run consecutively. On appeal it was established that the local judges had previously agreed on a uniform policy involving convictions for the sale of heroin which gave no consideration to the individual characteristics of any defendant. The court concluded that the sentences imposed were in conformity with that predetermined policy and that the individual circumstances of each case were not considered at sentencing. No presentence report was ordered, nor had any effort been made to determine the rehabilitative needs of the individual defendants.

The majority held that the trial court's actions were an abuse of discretion and stated:

The procedures employed by the sentencing court in the appeals before us today ignore the basic premises of Pennsylvania's individualized sentencing. Here . . . the nature of the criminal act was used as the sole basis for the determination of the length of sentence, and all sentences of imprisonment were to run consecutively. Thus the court failed to exercise its broad discretion in accordance with the applicable statutory requirements.

The sentence must be imposed for the minimum amount of confinement that is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. . . . At least two factors are crucial to such determination—the particular circumstances of the offense and the character of the defendant. . . . We hold . . . the sentencing court must at least consider these two factors in its sentencing determination. Failure to give such individualized consideration requires that these sentences be vacated.²⁸

While this decision opened the door to appellate review of trial court action in sentencing, it was a procedurally based rather than a substantively based opening.²⁹ That is, the trial court's proce-

26. *Commonwealth v Boerner*, 281 Pa Super 505, 422 A2d 583 (1980).

27. 466 Pa 118, 351 A2d 650 (1976).

28. *Martin*, 351 A2d at 657-58 (citations and footnotes omitted).

29. The Court also directed that its Criminal Rules Committee prepare a recommendation to require a sentencing court to state on the record why it failed to order a presentence report "1) where incarceration for one year or more is a possible disposition; 2) where the defendant is less than twenty-one years old; and 3) where the defendant is a first offender." *Id* at 659. See also PaRCrP 1403, 42 Pa Cons Stat Ann (Purdon 1981).

dures in arriving at the sentence would be scrutinized by the reviewing court, but the appropriateness of the sentence itself, for a particular defendant would not be reviewed if all of the procedures had been followed. The dissent opined that the decision would allow appellate courts to impose their sentencing philosophies on sentencing courts which deviated from prior practice.³⁰

In *Commonwealth v Riggins*,³¹ decided the following year, the supreme court further broadened the scope of appellate review based on procedural grounds. A twenty-one year old, married, father of three, recently unemployed with no prior record, had been convicted of possession with intent to deliver 1.9 ounces of marijuana and sentenced to two to five years imprisonment. The Court reaffirmed its commitment, first enunciated in *Martin*, and required a pre-sentence report. Furthermore, it required trial courts to state the reasons for the sentence on the record.³² After discussing its rationale for this requirement, the court stated:

Critics of the requirement that a trial court articulate the reasons for its sentence assert that sentencing is not amenable to structured decision making and that requiring a statement of reasons will be an unwarranted burden upon the trial court. We are convinced that these arguments are without merit . . .

. . . we are persuaded that the sentencing process will be improved by requiring a trial court to state, on the record, the reasons for the sentence imposed.³³

The court also required that a person seeking to challenge the trial court's reasoning for its sentence must first raise the issue with that court. It directed its Rules Committee to prepare a rule to accomplish this goal.³⁴

30. *Martin*, 351 A2d at 660. The author of the dissenting opinion, Justice Nix, now Chief Justice, stated in a later dissenting opinion in *Commonwealth v Goldhammer*, 512 Pa 587, 597, 517 A2d 1280, 1285 (1986) "Under settled Pennsylvania law, the sentence imposed lies within the sole discretion of the sentencing court and will not be reviewed by an appellate court unless it exceeds statutory prescribed limits or is so manifestly excessive as to constitute too severe a punishment for the offense committed." *Goldhammer*, 517 A2d at 1285. No mention was made of the individual characteristics of the defendant.

31. 474 Pa 115, 377 A2d 140 (1977). The offense and conviction both pre-dated the 1974 sentencing code.

32. *Riggins*, 377 A2d at 143.

33. *Id* at 148-49.

34. *Id*. This call was answered by PaRCrP 1410, 42 Pa Cons Stat Ann (Purdon 1981) which states "[a] motion to modify sentence shall be in writing and shall be filed with the sentencing court within ten (10) days after imposition of sentence."

Two points should be made. First, Pennsylvania has an extensive post-trial practice philosophy premised on the view that trial courts should be given the first opportunity to cor-

Although the 1974 sentencing code was not in effect when the crimes were committed in both *Martin* and *Riggins*, the supreme court referred to it as illustrative of the individualized nature of Pennsylvania sentencing practices and as policy support for its action in reviewing those sentences.³⁵ Within that framework, the appellate courts became more active in examining the sentencing actions of trial judges. In *Commonwealth v Cottle*,³⁶ the supreme court applied a section of the 1974 code dealing with probation revocation³⁷ to vacate the imposition of total confinement for a probation violation. It determined that the sentencing court did not give sufficient consideration to the fact that the defendant had succeeded in effectively rehabilitating himself even though he had not reported to the probation department between 1972-1976. In its decision the court stated:

Traditionally, appellate courts in this jurisdiction have been reluctant to intrude upon the sentencing discretion of trial courts. We have long maintained that the appellate scope of review of the sentencing decision should be limited to sentences that exceed the statutorily prescribed limits or sentences which were so manifestly excessive as to constitute a constitutionally impermissible sentence [citations omitted]. This perception evolved from our adherence to the concept of individualized sentencing and the belief that the effectuation of that objective was best served by granting broad discretion to the sentencing courts. [citation omitted] More recently, [the] question has been raised as to the wisdom of conferring upon the sentencing court almost unlimited, unstructured and unreviewable discretion. Both the legislature and this Court have been gravitating to a curtailment of the unlimited discretion originally entrusted to the sentencing court [footnotes omitted].³⁸

The superior court in *Commonwealth v Franklin*,³⁹ a post-sentencing code but pre-guideline case, discussed at length the factors that a sentencing judge must consider when sentencing. The court and counsel must have access to a pre-sentence report or state on the record why none was available.⁴⁰ The defendant has the right

rect errors. See PaRCrP 1123, 42 Pa Cons Stat Ann (Purdon 1981) and PaRCP 227.1, 42 Pa Cons Stat Ann (Purdon 1981).

Second, the filing of the 1410 motion does not stop the running of the thirty day time for taking an appeal following imposition of sentence unless the trial court grants reconsideration within those same thirty days. See Comment to PaRCrP 1410, 42 Pa Cons Stat Ann.

35. *Riggins*, 377 A2d at 149-50; and *Martin*, 351 A2d at 656 n 20.

36. 493 Pa 377, 426 A2d 598 (1981).

37. 42 Pa Cons Stat Ann § 9771 (Purdon 1981).

38. *Cottle*, 426 A2d at 600. The opinion was authored by Justice Nix who also authored the *Goldhammer* dissent cited in note 30.

39. 301 Pa Super 17, 446 A2d 1313 (1982).

40. *Franklin*, 446 A2d at 1318. See also PaRCrP 1403, 42 Pa Cons Stat Ann (Purdon

to present information and conduct argument.⁴¹ The court must consider the circumstances of the crime and the character and background of the defendant.⁴² There can be no predetermined sentencing policy or a sentence that exceeds that which was statutorily prescribed.⁴³ The court must state why it rejected probation or partial confinement.⁴⁴ The court can only impose total confinement if the provisions of section 9725⁴⁵ are met and the court must set forth its reasons for the sentence imposed.⁴⁶

Between 1976 and 1982, Pennsylvania appellate courts began reviewing sentences imposed by trial judges. This review recognized the concept of individualized sentencing. However, it was a procedurally based review. A "common law" of sentencing dealing with substantive questions did not develop.⁴⁷ The appellate courts, even when finding fault with the sentence, would not impose sentence but would remand to the trial court for resentencing using the correct procedure which required consideration of a number of factors. Since reversals were procedurally based, the trial courts were free to reimpose the original sentence as long as the identified er-

1981).

41. *Franklin*, 446 A2d at 1318.

42. *Id.* 42 Pa Cons Stat Ann § 9731 details the need for pre-sentence reports in sentencing matters.

43. *Franklin*, 446 A2d at 1318.

44. *Id.* This requirement was established in *Commonwealth v Kostka*, 475 Pa 85, 379 A2d 884 (1977).

45. 42 Pa Cons Stat Ann § 9725 provides:

Total confinement:

The court shall impose a sentence of total confinement if, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that the total confinement of the defendant is necessary because:

- (1) there is undue risk that during a period of probation or partial confinement the defendant will commit another crime;
- (2) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
- (3) a lesser sentence will depreciate the seriousness of the crime of the defendant.

42 Pa Cons Stat Ann § 9725

46. *Franklin*, 446 A2d at 1318. PaRCrP 1405, 42 Pa Cons Stat Ann (Purdon 1981) requires that the court state the reasons for the sentence. That section of the rule was adopted in 1973, prior to the sentencing code.

47. For an interesting discussion of the procedural nature of Pennsylvania appellate review of sentencing, see the unpublished paper prepared by John P. McCloskey, *The Effectiveness of Independent Sentencing Commission Guidelines: An Analysis of Appellate Court Decisions in Two Jurisdictions*, delivered at the 1985 Annual Meeting of the American Society of Criminology, San Diego, California. Mr. McCloskey was a research associate for the Pennsylvania Commission on Sentencing.

rant procedure had been corrected.

*Commonwealth v Jones*⁴⁸ typified this process. In 1985, the defendant pleaded guilty to numerous offenses involving sexual abuse of children. He received consecutive sentences totalling fifty to one hundred years. On appeal, a panel of the superior court in an unpublished memorandum⁴⁹ found the length of the sentence to be manifestly excessive.⁵⁰ It further determined that "the lower court did not take adequate consideration of the appellant's background, his crime-free adult record, the relatively short time span during which the crimes occurred, his undisputed mental illness and expression of remorse, and the prospects of treatment of appellant's illness."⁵¹ Pointing out that a sentence half as severe would keep the defendant in prison until age sixty-three, the court remanded "to the lower court for correction of its manifestly excessive sentence."⁵²

The Commonwealth's request for review was granted by the supreme court which concluded that it was statutorily precluded from reviewing actions of the intermediate appellate court involving discretionary sentencing questions.⁵³ However, the supreme court stated that it did not view the panel decision of the intermediate court as precluding the trial judge from imposing the same sentence once it took into considerations the factors enumerated by the panel.⁵⁴

Following remand, the trial court imposed the same sentence.⁵⁵ On appeal, the superior court affirmed and concluded that once the trial court considered all of the necessary factors in sentencing, and the weight to be given those factors, the final sentence imposed was within the sentencing judge's discretion and would not

48. Pa Super , 613 A2d 587 (1991).

49. *Commonwealth v Jones*, No 01433PHL86 (Pa Super May 18, 1987). In 1979 the superior court adopted a policy of not publishing certain panel decisions labeled memorandum. The decision whether to publish is left to the panel, guided by the court's internal operating rules which call for publication only if new areas of the law are involved or if the issue is believed to be of sufficient importance to the bench and bar to warrant publication. Generally, only 18 percent of the court's panel decisions are published. Superior Court of Pennsylvania Annual Report 1990.

50. *Jones*, slip op at 2.

51. *Id* at 3.

52. *Id* at 4.

53. *Commonwealth v Jones*, 523 Pa 138, 565 A2d 732 (1989). § 9781(f) of the sentencing code limits sentencing review to the intermediate appellate court. See note 19 and accompanying text.

54. *Jones*, 565 A2d at 735.

55. *Commonwealth v Jones*, Pa Super , 613 A2d 587 (1991).

be disturbed on appeal.⁵⁶ Having found that on remand the trial judge considered the defendant's mental illness, the majority rejected the prior panel's and dissent's concern that the sentence was effectively a life sentence requiring incarceration of this thirty-eight year old until age eighty-eight.⁵⁷ This case clearly demonstrated that the reviewing court's failure to impose a reduced sentence made review on procedural grounds meaningless.⁵⁸

In *Commonwealth v Parrish*,⁵⁹ the court vacated a sentence and stated what, in its judgment, would be an appropriate sentence. However, it concluded by remanding to the trial court for resentencing, "rely[ing] on the good judgment of the trial court to amend a manifestly excessive sentence."⁶⁰

THE GUIDELINE SYSTEM

The legislation creating the Pennsylvania Commission on Sentencing charged the Commission with the responsibility of developing guidelines to be used by judges when sentencing. The guidelines were to:

- (1) Specify the range of sentences applicable to crimes of a given degree of gravity.
- (2) Specify a range of sentences of increased severity for defendants previously convicted of a felony or felonies or convicted of a crime involving the use of a deadly weapon.
- (3) Prescribe variations from the range of sentences applicable on account of aggravating or mitigating circumstances.⁶¹

Within this framework, the Commission began its work and on January 24, 1981, submitted its recommendations to the General

56. *Jones*, 613 A2d at 591.

57. *Id.* Pennsylvania does not presently employ any type of "good time" sentencing reduction. Before being eligible for release, a prisoner must serve at least the minimum.

58. This type of resentencing problem can also arise where the sentence is too lenient. In *Commonwealth v Brown*, 402 Pa Super 369, 587 A2d 6 (1991), the defendant was originally sentenced to an aggregate 20 to 40 month term for aggravated assault. On appeal, the superior court vacated and remanded for resentencing and commented that the sentence appeared unreasonably lenient. Following remand, the trial court reimposed the same sentence. On appeal, the superior court again reversed the trial court and remanded for resentencing, concluding that the trial court erred in finding that the conviction for possession of an instrument of crime merged into the aggravated assault conviction. *Commonwealth v Brown*, No 1767PHL91 (Pa Super May 22, 1992).

59. 340 Pa Super 528, 490 A2d 905 (1985), appeal quashed 515 Pa 297, 528 A2d 151 (1987).

60. *Parrish*, 490 A2d at 910. There was no appeal to the superior court following remand.

61. 42 Pa Cons Stat Ann § 2154 (Purdon 1981).

Assembly. They were rejected on March 31, 1981.⁶² The rejection resolution directed the Commission to increase the upper limits of sentences in its various sections, give judges greater latitude in considering aggravating and mitigating circumstances, clarify those circumstances, change its proposal on concurrent and consecutive sentences and increase penalties where actual or threatened serious bodily harm is involved. The Commission submitted revised guidelines to the General Assembly on January 23, 1982. They were approved and became effective July 22, 1982.⁶³

Also, the sentencing code was amended to add the following:

(b) . . . The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines . . . the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines.⁶⁴ Failure to comply shall be grounds for vacating the sentence and resentencing the defendant⁶⁵

This language made consideration of the guidelines mandatory, but not their application.⁶⁶

The guidelines were the culmination of extensive efforts by the commission. They were designed to permit sentencing discretion yet eliminate sentence disparity. This was to be accomplished by focusing consideration on the nature of the offense and the defendant's prior criminal activity.

The Pennsylvania Supreme Court, on October 7, 1987, decided *Commonwealth v Sessoms*⁶⁷ and invalidated the guidelines. In re-

62. House Resolution No 24, Session of 1981, (March 31, 1981).

63. These can be found in the 12 Pa Bull No 4 (Saturday, January 23, 1982).

64. This requirement of a "contemporaneous written statement" is satisfied by stating on the record at the time of sentencing the reasons for the departure. *Commonwealth v Royer*, 328 Pa Super 60, 476 A2d 453 (1984); and *Commonwealth v Catanch*, 398 Pa Super 466, 581 A2d 226 (1990). However, failure to state sufficient reasons on the record at the time of sentencing cannot be corrected by submitting a Commission Sentencing Form. *Commonwealth v Vinson*, 361 Pa Super 526, 522 A2d 1155 (1987). It should be noted that at least one superior court panel has reviewed such a form to determine whether there were sufficient reasons for the sentence. *Commonwealth v Terrizzi*, 348 Pa Super 607, 502 A2d 711 (1985).

65. 42 Pa Cons Stat Ann § 9721(b) (Purdon 1981).

66. *Commonwealth v Sheridan*, 348 Pa Super 574, 502 A2d 694 (1985); and *Commonwealth v Fraizer*, 347 Pa Super 64, 500 A2d 158 (1985).

67. 516 Pa 365, 532 A2d 775 (1987). The court determined that the joint resolution of the General Assembly rejecting the original Commission recommendation of January 24,

sponse to this decision, the Legislature and Commission acted quickly⁶⁸ and new guidelines were adopted effective April 25, 1988.⁶⁹ The present guidelines:

- (A) assign offense gravity scores to applicable crimes.⁷⁰
- (B) assign a prior record score to the defendant.⁷¹
- (C) deal only with minimum term of confinement
- (D) establish a sentence range chart that suggests standard, mitigated and aggravated ranges of punishment;⁷²
- (E) list factors to be considered as aggravating or mitigating circumstances,⁷³ and
- (F) require the addition of 12 to 24 months to the guideline range if a deadly weapon is used.⁷⁴

In applying these guidelines, the sentencing judge is given a wide range of options. For example, a defendant with an offense gravity score of 1, and a prior record score of 6, would be eligible for a mitigated range sentence of non-confinement, a standard range sentence between 0-6 months, and an aggravated range sentence of the statutory limit. A defendant with a prior record score of 6 and an offense gravity score of 10, would be eligible for a mitigated range sentence between 76-102 months, a standard range sentence between 102-120 months, and an aggravated sentence of the statutory limit.⁷⁵ In addition, the court is permitted to depart above or below guideline ranges; it only is required to state its reasons for departure.

In 1990, 86 percent of all sentences conformed to the guidelines. Of that number, 74.6 percent were in the standard range, 9.2 percent in the mitigated range, 2.2 percent in the aggravated range. Of the remaining 14 percent, 12.6 percent departed below and 1.4 per-

1981 was invalid since it had not been presented to the Governor for approval. Consequently, the subsequently adopted guidelines were also invalid. *Sessoms*, 532 A2d at 778-79.

68. During this hiatus, the legislature passed mandatory sentencing for certain drug crimes. 18 Pa Cons Stat Ann § 7508 (Purdon 1981). While the guidelines have been in effect, the legislature has not passed any mandatory sentencing legislation.

69. Section 2 of Act March 22, 1988, Pub Law 240 No 26. See historical note, 42 Pa Cons Stat Ann § 2151 (Purdon 1981). They apply to crimes committed after April 25, 1988.

70. 204 Pa Code § 303.8. These scores range from 1 for misdemeanors III to 10 for third degree murder. In addition, a separate list exists for drug offenses. This list includes scores from A to M, depending on factors such as type and quantity of the drug involved.

71. 204 Pa Code § 303.7. This section lists the types of prior convictions and the points attributable to each. The maximum score that can be given is 6.

72. 204 Pa Code § 303.9 (b) for non-drug related crimes and § 303.9 (c)(3) for drug crimes.

73. 204 Pa Code § 303.3.

74. 204 Pa Code § 303.4(a).

75. 204 Pa Code § 303.9 (b). This chart does not include drug related offenses.

cent were above the guideline ranges.⁷⁶ Multiple current convictions and plea-agreements were the two reasons most cited for departing above.⁷⁷ Multiple sentences and plea agreements were the two reasons most cited for departing below the guideline ranges.⁷⁸ Also, departure rates varied based on the nature of the crime.⁷⁹ Of the 14 percent departure rate, about 6 percent were dispositional (i.e. no incarceration imposed where guidelines recommend incarceration), and 8 percent were durational.

There has been an overall conformity rate to the guidelines that has generally ranged between 85 and 90 percent from 1984 to 1990.⁸⁰ However, that rate declined from late 1987 until the first quarter of 1989. This is directly attributed to the decision in *Sessoms* which invalidated the guidelines.⁸¹ During the period between invalidation and repassage, the average minimum sentence in Pennsylvania increased.⁸²

The conformity rate demonstrates the effect of the guidelines on sentencing decisions. It further suggests overcompliance with the guidelines in sentencing decisions. During the period in which the guidelines were suspended, the conformity rate declined, evidencing a more particularized sentencing approach by trial judges. Appellate review of sentencing decisions would limit overcompliance with the guidelines and allow for individualized sentencing.⁸³

76. 1990-1991 Annual Report of the Pennsylvania Commission on Sentencing, figure F at 20 (on file at Duquesne Law Review).

77. *Id.*, Table 10 at 29 (cited in note 76).

78. *Id.*, Table 11 at 30 (cited in note 76).

79. *Id.*, Table 9 at 28 (cited in note 76).

80. *Id.* at 44 (cited in note 76). Michael Tonry in his article, *The Politics and Processes of Sentencing Commissions*, 37 No 3 Crime and Delinquency, 307, 314 (July 1991) posits "[w]hether [Pennsylvania's guidelines] have significantly reduced sentencing disparities within individual courts, between counties, or between regions, remains unclear. . . . it is difficult to know to what extent sentencing in Pennsylvania is different today from what it would have been had the guidelines not been established." Tonry, *Politics*, 37 No 3 Crime and Delinquency at 314. However, in any individualized sentencing scheme, where one of the objectives is to rehabilitate the offender to allow for return to the community, there will appear to be disparity. It is suggested that this appearance disappears when individual factors are considered.

81. 1990-1991 Annual Report of the Pennsylvania Commission on Sentencing at 43 (cited in note 76). (See note 67 and accompanying text for a discussion of *Sessoms*.)

82. *Id.*, Figure O at 45 (cited in note 76).

83. Roger A. Hanson and Joy Chapper, *What Does Sentencing Reform Do To Criminal Appeals?*, 72 No 1 Judicature 50 (June-July 1988) compared the appeal rate of sentencing among three jurisdictions: Sacramento, California and Springfield, Illinois, determinate sentencing jurisdictions and Rhode Island, an indeterminate sentencing jurisdiction. The number of sentencing appeals were 42 percent in California, 53 percent in Illinois, and 9 percent in Rhode Island. Hanson and Chapper, *Sentencing Reform*, 72 No 1 Judicature at

APPELLATE REVIEW OF GUIDELINES CASES

Included in the legislation establishing the Sentencing Commission was the section on appellate review.⁸⁴ It provides both parties a right of appeal on questions of sentence legality. It permits either party to seek review of the discretionary aspects of sentencing but limits that review to the discretion of the appellate court. The section further sets forth the standard by which the appellate court shall vacate a sentence and the nature of the review, giving due deference to the ability of the trial court to observe the defendant and the defendant's past criminal behavior.⁸⁵

Initially, implementation of the guidelines led to the development of appellate case law defining its terms⁸⁶ and application.⁸⁷ At the same time, the superior court began to examine the decisional process of sentencing judges in line with *Martin* and *Riggins*.⁸⁸ When faced with a challenge to the discretionary actions of a trial judge in imposing a sentence, the court would review the decisional process of the judge as reflected in the sentencing hearing transcript.⁸⁹ Any reliance upon what the appellate court con-

50.

84. See note 19 for text of statute.

85. 42 Pa Cons Stat Ann § 9781 (Purdon 1981). See note 19 and accompanying text.

86. Illustrative are cases dealing with 204 Pa Code § 303.4, Deadly weapon enhancement. The superior court was called upon to define the term "possession," in *Commonwealth v Taylor*, 346 Pa Super 599, 500 A2d 110 (1985); and "weapon" in *Commonwealth v Burns*, 390 Pa Super 426, 568 A2d 974 (1990); *Commonwealth v Batterson*, 409 Pa Super 335, 601 A2d 335 (1992) (motor vehicle not a weapon); and *Commonwealth v Scullin*, 411 Pa Super 252, 601 A2d 335 (1992) (tire iron considered weapon). The standard of proof required for application was considered in *Commonwealth v McKeithan*, 350 Pa Super 160, 504 A2d 294 (1986). The relationship between guideline sentence enhancement and mandatory firearms sentencing requirements was examined in *Commonwealth v Grimmitt*, 354 Pa Super 463, 512 A2d 43 (1986). Application following a guilty plea where the plea contained no reference to the use of a weapon was at issue in *Taylor*, 500 A2d at 110; and mandatory application in *Commonwealth v Johnakin*, 348 Pa Super 432, 502 A2d 620 (1985) was the subject of review.

87. *Johnakin*, 502 A2d at 620 (effect of merger on offense gravity score); *Commonwealth v Maleno*, 348 Pa Super 426, 502 A2d 617 (1985) (value to be assigned convictions under prior statutes); *Commonwealth v Dickison*, 334 Pa Super 549, 483 A2d 874 (1984) (application of correct gravity score to facts of crime); *Commonwealth v Woodard*, 368 Pa Super 363, 534 A2d 478 (1987) (effect of juvenile adjudication on prior record score); *Commonwealth v Bolden*, 367 Pa Super 333, 532 A2d 1172 (1987) (determination of prior record score based on convictions in foreign jurisdictions); *Commonwealth v Kozarian*, 388 Pa Super 627, 566 A2d 304 (1989) (application of prior record score to criminal transaction as a whole where three separately charged crimes are committed at the same time).

88. For discussion, see notes 27-33 and accompanying text.

89. The following cases deal with the sufficiency of the reasons given for the sentence as stated by the judge. *Commonwealth v Hainsey*, 379 Pa Super 376, 550 A2d 207 (1988); *Commonwealth v Chilquist*, 378 Pa Super 55, 548 A2d 272 (1988); *Commonwealth v*

sidered an impermissible factor in sentencing could result in the vacation of the sentence and remand for resentencing.⁹⁰ It is impossible to determine if the appellate court, when faced with a sentence it viewed as either too lenient or too severe, searched for an error in the sentencing process to permit remand.⁹¹

For example, in *Commonwealth v Hutchinson*,⁹² the defendant received a five year probationary sentence following a conviction of involuntary deviate sexual intercourse with a three year old child. This sentence departed from the guidelines and the Commonwealth appealed. In vacating and remanding for resentencing, the superior court held;

The guidelines channel sentencing discretion and focus appellate review which is available to both parties, on the reasonableness of deviations from the presumptively appropriate range of sentences. In sum, only in exceptional cases and for sufficient reasons may a court deviate from the guidelines.⁹³

Trial courts apparently got the message. Following this July 5, 1985 decision, there was an increase in the conformity rate of sentences to the guidelines. Compliance rose to and exceeded 90 percent until the October, 1987 decision by the state supreme court in *Sessoms*.⁹⁴

Beginning with *Commonwealth v Tuladziecki*,⁹⁵ the Pennsylvania Supreme Court, changed the procedural method by which the superior court could review appeals from the discretionary aspects of sentencing. Mr. Tuladziecki was sentenced to pay a fine and to serve five years' probation for his conviction on drug related offenses. This sentence was below the guidelines and the Commonwealth appealed. The superior court concluded that the appellant had complied with the requirement of section 9781(b) of the sen-

Fetznar, 372 Pa Super 469, 539 A2d 890 (1988); *Commonwealth v Thomas*, 370 Pa Super 544, 537 A2d 9 (1988); *Commonwealth v Cherpes*, 360 Pa Super 246, 520 A2d 439 (1987); *Commonwealth v Stafford*, 313 Pa Super 231, 459 A2d 824 (1983). In addition, the court reviewed to determine if the trial judge focused solely on the nature of the criminal act. *Commonwealth v Plasterer*, 365 Pa Super 190, 529 A2d 37 (1987).

90. *Commonwealth v Sypin*, 341 Pa Super 506, 491 A2d 1371 (1985); *Commonwealth v Gaskin*, 325 Pa Super 349, 472 A2d 1154 (1984); *Commonwealth v Knepp*, 307 Pa Super 535, 453 A2d 1016 (1982).

91. This view was alluded to by Judge John C. Dowling, *Sentencing Discretion In Pennsylvania: Has The Pendulum Returned To The Trial Judge?* 26 Duquesne L Rev 925 (1988).

92. 343 Pa Super 596, 495 A2d 956 (1985).

93. *Hutchinson*, 495 A2d at 958.

94. See note 67 and accompanying text for a discussion of *Sessoms*.

95. 513 Pa 508, 522 A2d 17 (1987).

tencing code by raising, in its argument, a substantial question that the sentence was inappropriate since it was below the guidelines.⁹⁶ It then vacated the sentence and remanded for resentencing.⁹⁷

The supreme court granted review and found that the Commonwealth had failed to comply with the appellate rules requiring that, in sentencing appeals where the discretionary aspects of the sentence were challenged, the appellant must set forth, in a separate section of the brief, "a concise statement of the reasons relied upon for allowance of appeal."⁹⁸ The court concluded that the argument section of the Commonwealth's brief could not substitute for the requirement that the question be separately set forth and concluded that the superior court had erred when it undertook to review the matter.⁹⁹ It never discussed, as the superior court had found, whether the trial court abused its discretion in sentencing.¹⁰⁰ Rather, it held that the intermediate court's finding, after full review of the record and briefs, that the appellant had presented a substantial question about the appropriateness of the sentence would not overcome the procedural default.¹⁰¹ This effectively overturned prior superior court decisions.¹⁰²

96. *Commonwealth v Tuladziecki*, 346 Pa Super 636, 499 A2d 402 (1985) (unpublished decision).

97. *Tuladziecki*, 499 A2d at 402.

98. *Tuladziecki*, 522 A2d at 19. PaRAppP 2119 (f), 42 Pa Cons Stat Ann (Purdon 1981) reads:

(f) Discretionary Aspects of Sentence.

An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the arguments on the merits with respect to the discretionary aspects of sentence.

PaRAppP § 2119(f). This language was adopted to implement 42 Pa Cons Stat Ann § 9781 (b) (Purdon 1981).

99. *Tuladziecki*, 522 A2d at 19.

100. To do so may have involved the court in a jurisdictional issue. See *Jones*, 613 A2d at 587 (cited in note 48).

101. The court stated:

Superior Court may not, however, be permitted to rely on its assessment of the argument on the merits of the issue to justify *post hoc* a determination that a substantial question exists. If this determination is not made prior to examination of and ruling on the merits of the issue of the appropriateness of the sentence, the Commonwealth has in effect obtained an appeal as of right from the discretionary aspects of a sentence.

Tuladziecki, 522 A2d at 19.

102. *Commonwealth v Easterling*, 353 Pa Super 84, 509 A2d 345 (1986). Where a review of the record convinced the court that there was a question about the appropriateness of the sentence, review would be allowed. See also *Commonwealth v Dixon*, 344 Pa Super

This decision added another procedural step to the sentencing review process.¹⁰³ Struggling to balance the requirements of *Tuladziecki* with the fact that many pending appeals did not comply with appellate rule 2119(f) or that appellees were filing motions to quash those appeals, the superior court confronted *Commonwealth v Krum*.¹⁰⁴ It concluded that the *Tuladziecki* requirements were procedural rather than jurisdictional. Thus if the appellee did not raise appellant's failure to set forth a substantial question, the objection was waived and the court would proceed to determine if a substantial question was presented. If a substantial question was presented then the court would consider the appeal on the merits.¹⁰⁵

The effect of *Tuladziecki* has been the development of hypertechnical requirements and inconsistent rulings.¹⁰⁶ Failure to include the crime for which the appellant was convicted in the statement, even if it is listed elsewhere in the brief, made the statement insufficient.¹⁰⁷ The statement must also include the crime and length of sentence to warrant review.¹⁰⁸ The inconsistencies are evident in the courts rulings, some which have held that a claim that the sentence exceeded the aggravated range of the guidelines did not raise a substantial question,¹⁰⁹ and others which have ruled that a claim that the aggravated range was considerably exceeded, did.¹¹⁰ A statement that the sentencing judge "unduly focused" on the crimes has been held to be insufficient,¹¹¹ as has a

293, 496 A2d 802 (1985); and *Commonwealth v Drumgoole*, 341 Pa Super 468, 491 A2d 1352 (1985).

103. *Commonwealth v Chilcote*, 396 Pa Super, 106, 578 A2d 429 (1990). Popovich, J. in a concurring opinion concluded that this process only imposed an additional tier that wasted judicial resources. *Chilcote*, 578 A2d at 441 (concurring opinion).

104. 367 Pa Super 511, 533 A2d 134 (1987).

105. *Krum*, 533 A2d at 138. In *Commonwealth v Gambal*, 522 Pa 280, 561 A2d 710 (1989), the supreme court dealt with this issue but raised in a different posture. The superior court had quashed the appeal for failure to include the required statement. Appellant petitioned for permission to amend the brief which was denied. The supreme court concluded that the quash was correct, but that the court should have permitted the amendment to the brief, accepting the *Krum* court's procedural analysis. See also *Commonwealth v Fusco*, 406 Pa Super 351, 594 A2d 373 (1991).

106. There had been a state constitutional challenge to § 9781(b) of the sentencing code which is the underlying source of this matter. The constitutionality of the section was upheld in a 5-4 decision, *Commonwealth v McFarlin*, 402 Pa Super 502, 587 A2d 732 (1991) *aff'd* Pa , 607 A2d 730 (1992).

107. *Commonwealth v Ziegler*, 379 Pa Super 515, 550 A2d 567 (1988).

108. *Commonwealth v Cummings*, 368 Pa Super 341, 534 A2d 114 (1987).

109. *Commonwealth v Ousley*, 392 Pa Super 549, 573 A2d 599 (1990).

110. *Commonwealth v Burdge*, 386 Pa Super 194, 562 A2d 864 (1989).

111. *Commonwealth v Minott*, 395 Pa Super 552, 577 A2d 928 (1990).

statement that the trial judge ignored certain sentencing factors.¹¹² In the later instance the appellate court ruled that it would conclude that the sentencing factors were considered, and deny review.¹¹³ In another case, however, a claim by a defendant, who received a standard guideline range sentence, that the sentencing judge ignored factors which would have justified a mitigated range sentence, was considered sufficient to warrant review.¹¹⁴

In instances where an appellant can define a specific error by the sentencing judge, review has been allowed. Also, failing to impose weapons enhancement will allow review.¹¹⁵ Certain early cases indicated that claims of improper computation of prior record or offense gravity scores raised a substantial question permitting discretionary review.¹¹⁶ However, the superior court has recently held that incorrect computation of these scores is a basis for direct appeal, since their calculation was not discretionary with the trial judge.¹¹⁷ A review of any error in these calculations is not at the appellate court's discretion.¹¹⁸ The sentencing code requires that a sentencing judge first determine the applicable guideline ranges before exercising the discretion inherent in ultimately determining the sentence.

While *Tuladziecki*¹¹⁹ was a procedural ruling, it had a substantial effect in limiting review. Denying review where the claim was that the weight the trial judge gave to various sentencing factors was improper, when that denial is based on the rationale that those factors were considered, is disingenuous. It makes meaningful examination of the court's decisional process non-existent. More fundamentally, the inconsistencies occasioned by this decision lead to unequal application of appellate discretion in granting review. An examination of Commonwealth sentencing appeals revealed forty-seven cases where review was allowed on the claim that the trial court erred by sentencing below the guidelines. However, in two

112. *Minott*, 577 A2d at 930.

113. *Commonwealth v Williams*, 386 Pa Super 322, 562 A2d 1385 (1989) (en banc).

114. *Commonwealth v Wright*, 411 Pa Super 111, 600 A2d 1289 (1991). The panel ultimately concluded that the trial court did not err in sentencing the appellant, and that, when faced with mitigating circumstances, a court does not abuse its discretion by not sentencing in the mitigated range. It did not state how the statement of question had differed from that in *Williams*. *Wright*, 600 A2d at 1290.

115. *Commonwealth v Dotzman*, 403 Pa Super 325, 588 A2d 1312 (1991).

116. *Commonwealth v Tilghman*, 366 Pa Super 328, 531 A2d 441 (1987).

117. *Commonwealth v Johnson*, No 3140PHL91 (Pa Super November 16, 1992).

118. *Johnson*, No 3140PHL91 (Pa Super November 16, 1992).

119. See note 95 and accompanying text.

cases,¹²⁰ it was held that the sentence would not be reviewed, even though the sentence fell below the guideline minimum, because the appeal was based on the weight that the court gave to the various factors affecting the sentence.

Recognizing Pennsylvania's commitment to indeterminate sentencing and the trial court's discretionary power to balance various factors, including rehabilitation, in formulating a sentence, the appellate courts have given deference to the trial courts' sentencing scheme. In cases where the appellate court found it necessary to vacate the sentence on one of multiple convictions, it nevertheless vacated the entire sentence to allow the trial court on remand to devise a new sentence which would accomplish the same goals as the original sentencing scheme. Illustrative was *Commonwealth v Sutton*,¹²¹ where defendant appealed an illegal sentence, but did not appeal his conviction on other charges, and neither did the Commonwealth.¹²² The Commonwealth conceded that the sentence was illegal, but requested that sentence be vacated on the other charges and the case remanded to allow resentencing on all charges. The superior court agreed, concluding that to do otherwise would frustrate the trial court's ability to effectuate its original sentencing scheme.¹²³

Commonwealth v Devers,¹²⁴ imposed another limitation on review of a sentencing court's decisional process. Mr. Devers pleaded guilty to third degree murder and robbery. He received a ten to twenty year sentence on the murder charge and five to ten years on the robbery. On appeal, the superior court vacated the sentence and remanded for resentencing.¹²⁵ Although the trial judge had a pre-sentence report and other information about the defendant, the court concluded that the trial judge had not stated what facts were considered important and what weight was given to those facts in arriving at the sentence.¹²⁶

Without discussing how it had jurisdiction,¹²⁷ the supreme court,

120. *Commonwealth v Thomas*, 366 Pa Super 435, 531 A2d 497 (1987) and *Commonwealth v Scott*, 389 Pa Super 653, 560 A2d 830 (1989).

121. 400 Pa Super 291, 583 A2d 500 (1990).

122. *Sutton*, 583 A2d at 502.

123. *Id.* See also *Commonwealth v Goldhammer*, 512 Pa 587, 517 A2d 1280 (1986), cert denied, 480 US 950 (1987).

124. 519 Pa 88, 546 A2d 12 (1988).

125. 352 Pa Super 611, 505 A2d 1030 (1986). This decision is not reported except in a table of unpublished decisions.

126. *Devers*, 546 A2d at 14.

127. 42 Pa Cons Stat Ann § 9781 (f) (cited in note 19), prohibits the supreme court

on a commonwealth appeal, reversed.¹²⁸ Following a lengthy discussion of the development of appellate review of sentencing actions, the court reaffirmed the commitment to individualized sentences, and the use of pre-sentence reports to achieve that goal.¹²⁹ However, the court gave presumptive significance to those reports by stating:

Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. In order to dispel any lingering doubt as to our intention of engaging in an effort of legal purification, we state clearly that sentencers are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true, we repeat, in those circumstances where it can be demonstrated that the judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion.¹³⁰

Devers has dramatically limited the extent of review that appellate courts can undertake in sentencing matters. Where a trial court has before it a pre-sentence report and the judge indicates that it was considered in arriving at a sentence, the sentencing process has presumptive validity.

*Commonwealth v Kerstetter*¹³¹ dealt with a challenge to a pre-sentence report. At sentencing, the defendant's counsel disputed the accuracy of statements contained in the report. Without discussing those challenges, the trial court imposed sentence. On appeal, the superior court concluded that since *Devers* placed great reliance on pre-sentence reports, their presumed accuracy disappeared when specifically challenged.¹³² It then becomes necessary for the trial court to state for the record what facts it found true, and on what facts it based the sentence.¹³³

Devers, clearly made the exercise of trial court sentencing discretion virtually unreviewable. The appellate courts are not able to determine if the trial judge properly considered all relevant sen-

from reviewing discretionary sentencing matters. This was clearly such a case.

128. *Devers*, 546 A2d at 12.

129. *Id* at 13.

130. *Id* at 18.

131. 398 Pa Super 202, 580 A2d 1134 (1990).

132. *Kerstetter*, 580 A2d at 1136.

133. *Id*.

tencing factors since judges are presumed to have considered and properly weighed what was contained in the pre-sentence report. This is a dramatic retreat from the supreme court's early actions in *Martin and Riggins*.¹³⁴ There can be no effective review of sentencing actions unless the trial court is required to explain its sentencing rationale.

THE ARGUMENT FOR APPELLATE REVIEW OF THE DISCRETIONARY ASPECTS OF SENTENCING

One writer has said that the sentencing decision by a trial judge "is the most complex and difficult function a jurist is called upon to perform."¹³⁵ Pennsylvania's indeterminate sentencing policy and its non-mandatory guidelines continue to require that judges perform this function.¹³⁶ With proper individual background information, and, having participated in the trial and learning of the crime first hand, they are best suited to perform this task.¹³⁷

Pre-sentence reports contain a wealth of information about the defendant. The guidelines focus the jurist's attention on specific factors considered important in developing a sentence. This, coupled with the Sentencing Code requirements defining when confinement or probation should be considered, helps to structure the judge's decision making function.

Clearly, in passing the Sentencing Commission legislation, the legislature contemplated an appellate review process, otherwise it would not have included section 9781 (b) permitting examination of discretionary sentencing.

To permit review is not tantamount to concluding that review will always lead to reversal. It might be argued that the *Tuladziecki* requirement is a method of obtaining review. In theory, if a party cannot sufficiently articulate the reasons why a sentence is inappropriate, then it should be affirmed. In reviewing the statement of reasons it can be said that there has been a form of review. This argument could have merit if the court was consistent in determining what is a substantial question. Instead, the court has been consistent only in its inconsistency on that subject. Since it has been decided that a claim which maintains that the trial court

134. See footnotes 27-33 and accompanying text.

135. *Martin*, 351 A2d at 659 (Nix, J. dissenting).

136. Cirillo, *Windows for Discretion in the Pennsylvania Sentencing Guidelines*, 31 Vill L Rev 1309 (1986).

137. Cirillo, 31 Vill L Rev at 1312 (cited in note 136).

did not properly consider the factors before it does not raise a question for review,¹³⁸ there is effectively no substantive review of the trial court's discretion in most cases.

We will never be able to reach the question of whether a sentence is manifestly excessive or lenient, as long as we are prevented by our post-*Tuladziecki* decisions from evaluating the weight the trial court gave to the sentencing factors presented to it. Permitting review recognizes that an improper sentence can have dire consequences on the individual if too severe, and on the public, if too lenient.

As the guidelines help focus the sentencing judge's attention, so too should they aid in the review process which the appellate judge undertakes. Where a sentence departs from the guidelines, the reviewing court can easily determine its appropriateness since the Code requires the trial court to explain its reasons for deviation. Rather than frustrate review, I suggest that the guidelines aid in this function. Also, I suggest that appellate review was contemplated and expanded, not restricted when the guideline legislation was passed.

Admittedly, the trial judge's sentencing function is difficult. No less difficult are decisions involving custody of minor children, yet these are made everyday and regularly reviewed by appellate courts. In both cases, the long term effects on people's lives and their relation to society are involved. Selecting the wrong custodial parent can adversely affect both the child and society. Here too, trial judges are given great deference but the decisions do not escape appellate scrutiny. In this jurisdiction, that review is broad based and trial courts are required to set forth the reasons for the decision.¹³⁹ A trial court must file a comprehensive opinion specifying the reasons for its decision.¹⁴⁰ Yet, these requirements have not hampered the court's decision-making responsibilities or resulted in the appellate court substituting its judgment for the trial court. So too, can it be in sentencing matters.

To argue that review will overburden the court is no answer to the question.¹⁴¹ Justice is not achieved by closing the courthouse door, particularly where a liberty interest is at risk. By setting the standard of reversal as either an abuse of discretion or an error of law, few sentences would be reversed, but review would be ob-

138. *Commonwealth v Williams*, 386 Pa Super 322, 562 A2d 1385, 1386 (1989).

139. *Commonwealth ex rel Robinson v Robinson*, 505 Pa 226, 478 A2d 800, 806 (1984).

140. *Artzt v Artzt*, 383 Pa Super 23, 556 A2d 409, 410 (1989).

141. *Commonwealth v McFarlin*, 402 Pa Super 509, 587 A2d 732.

tained. Most of these claims could easily be considered while reviewing the record on the other issues presented.

Appellate review of sentencing decisions will not overwhelm the appellate courts. An examination of appeals from judgments of sentence between January 1, 1985 and August 13, 1991 revealed 9335 appeals by defendants, and 151 by the Commonwealth.¹⁴² Since defendants' appeals include all claims of error, review for sentencing error would be part of the overall review process. Further, since the largest percentage of sentences are in the standard guideline range and the most frequent reason given for departure is plea-agreements, one can anticipate that these cases will not present a basis for review.

To accomplish meaningful review, both the Commonwealth and the defendant should be granted a right to appeal from discretionary sentencing decisions. This would require amendment of section 9781, and would eliminate the appellate procedural morass created by *Tuladziecki*.

Trial courts would still be required to comply with sentencing procedures. Review of a pre-sentence report, presence of the defendant with a right to be heard, familiarity with the applicable guideline ranges, absence of a predetermined local sentencing policy, and a statement of reasons for the sentence must be evident in the record.¹⁴³

In addition to examining the procedural process used in imposing the sentence, review must also be substantive. Trial judges in Pennsylvania are now required by rule to set forth their reasons in support of their decisions when an appeal has been taken. Therefore, to state reasons in support of the chosen sentence presents no additional burden.¹⁴⁴ Further, the sentencing code requires a court to set forth its reasons for a particular sentence.¹⁴⁵ There can be no purpose for this requirement if the appropriateness of the decision cannot be examined.

In order to accomplish meaningful substantive review of the rea-

142. Under Pennsylvania practice, a Commonwealth appeal from a judgment of sentence will only contain a sentencing question, while a defendant's appeal is not limited to sentencing issues but will include all claims of trial court error.

143. PaRCrP 1405, 42 Pa Cons Stat Ann (Purdon 1981) details many of the procedural requirements of a sentencing hearing.

144. PaRAppP 1925, 42 Pa Cons Stat Ann (Purdon 1981).

145. 42 Pa Cons Stat Ann § 9721 (b) requires ". . . In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." *Id.*

sons for a particular sentence, two steps must be taken. First, the *Devers* presumption that the trial court properly considered the pre-sentence report must be eliminated. Second, until now pre-sentence reports did not always accompany the record to the appellate court. A January 17, 1992 amendment to the rules now permits the sealing of these reports and their inclusion in the record for review. This process must be enforced.¹⁴⁶

Although review should be substantive in guideline cases, it should be limited to examining the selection of the proper guideline range, and departures above or below the guidelines. Once it is determined that the trial court selected the correct range, the selection of punishment within that range should not be questioned. The selection of the correct sentencing range is the major sentencing decision. Therefore the trial court's reasons for selecting a given range presents the most appropriate question for review. To permit examination of sentences within a given range is tinkering with the sentence; merely substituting the appellate court's discretion for the trial courts. Accepting that sentencing decisions are difficult and that trial judges must be given great latitude, it is suggested that review of the articulated reasons for selecting a particular sentencing range would not diminish their role. If the sentence imposed cannot be supported by reasons, one must wonder if it is just.

This same standard should apply to departures from the guidelines. If departure is justified, the extent of that departure would not be subject to challenge, as long as it is within the legal limit.

It is in examining reasons for selections among the guideline ranges or departures, above or below the guidelines, that a body of case law would develop; a "common law" of sentencing. Appellate review will have the ability to enhance standardization of sentencing, but permit the trial judge to deviate when supported by the record. There will not be a loss of individualized sentencing.¹⁴⁷

In matters where the appellate court determines an inappropriate guideline range or an unjustified departure from the guidelines has occurred, the appellate court should set forth in its decision the correct range. This specific instruction to the trial court would reduce the possibility that the same sentence would be imposed following remand. It would eliminate wastefulness in the review

146. PaRCrP 1404, 42 Pa Cons Stat Ann (Purdon 1981), as amended January 17, 1992, deals with disclosure of reports.

147. Charles B. Burr, II, *Appellate Review as a Means of Controlling Criminal Sentencing Discretion—Workable Alternative?* 33 Pitt L Rev 1 (1971).

process and insure that the trial court formulates a correct sentence on remand.

Also, since concurrent sentences are presumed unless the trial court orders consecutive sentences,¹⁴⁸ there should be review of trial court decisions to impose consecutive sentences.¹⁴⁹ Here again, the trial court must state its reasons for such a sentence. However, in those cases where the individual sentences are appropriate but their cumulative effect is excessive, the appellate court should impose the correct sentence. This would eliminate the possibility that the trial court would reach the same result in a different way, and would shift the sentencing function to the appellate court by making it responsible for the sentence. This responsibility should deter appellate courts from overreaching, yet allow for correction of excessive sentences.

CONCLUSIONS

The 1974 Sentencing Code attempted to structure sentencing decisions. Adding to this process were the decisions in *Martin* and *Riggins*,¹⁵⁰ followed by the creation of the Sentencing Commission for the purpose of establishing guidelines for sentencing. Accompanying the creation of the commission was the legislative expression establishing appellate review of sentencing decisions. Unfortunately, Pennsylvania's appellate courts have frustrated this review and the legislative intent of a structured and reviewable sentencing process.

To return to a meaningfully structured decisional process, appellate review of sentencing decisions must exist. Review must look to more than the application of correct procedures. It must examine the underlying reasons for particular sentencing decisions. This can be done without limiting trial court discretion. It is to accomplish this goal that this paper is offered, to suggest ways to achieve correct sentences in an individualized sentencing jurisdiction with nonmandatory guidelines.

148. PaRCrP 1406(a), 42 Pa Cons Stat Ann (Purdon 1981) provides for concurrent sentences when a defendant is being sentenced on more than one conviction, or where a defendant is incarcerated on other charges unless the judges states otherwise.

149. Recently, the superior court has become active in reviewing consecutive sentences. *Commonwealth v Simpson*, 353 Pa Super 474, 510 A2d 760 (1986) involved a remand because of excessive consecutive sentences. At resentencing, the trial court imposed consecutive sentences totaling 25 years instead of the original 30 years minimum. On appeal the court affirmed. *Commonwealth v Simpson*, 384 Pa Super 18, 557 A2d 751 (1989); see also *Commonwealth v Rizzi*, 402 Pa Super 335, 586 A2d 1380 (1991).

150. See notes 27-33 and accompanying text.