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Sentencing Discretion in Pennsylvania: Has the Pendulum Returned to the Trial Judge?

John C. Dowling

SENTENCING DISCRETION IN PENNSYLVANIA: HAS THE PENDULUM RETURNED TO THE TRIAL JUDGE?

*The Honorable John C. Dowling**

When one thinks of the criminal justice system as a responsive mechanism, one is immediately confronted with at least four, sometimes competing goals—retribution, deterrence, rehabilitation and incapacitation.[1] These four goals of criminal justice have been so well-established and so often cited as reasons for imposing criminal sanctions that it seems, at this late date, beyond cavil to quarrel with their philosophical underpinnings. But when one considers that each of these objectives weighs more or less heavily in the minds of a vast body of trial judges, in a sentencing scheme that permits—and in fact requires[2]—consideration of numerous factors relating to these ends in arriving at a single sentence, it is not surprising that sharp differences in sentencing practices emerge.[3] It was for this reason, i.e., disparity in sentencing, that proponents of sentencing reform advocated limits on discretionary sentencing power.[4]

In the Keystone State, those efforts culminated in the creation in 1976 of the Pennsylvania Commission On Sentencing which was charged with the responsibility, generally stated, "of collecting data regarding sentencing practices throughout the Commonwealth and assimilating a wide range of information and opinions from indivi-

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* Judge of the Court of Common Pleas Twelfth Judicial District, 1970. B.S., 1948, University of Pittsburgh; J.D., 1950, Dickinson School of Law. The author wishes to acknowledge the services of Shawn P. Kenny, his law clerk, for his research and assistance in preparing this article.

1. Gottfredson, *Criminal Sentencing in Transition*, 68 JUDICATURE 125 (1984); Carey, *Foreward: Sentencing Provisions and Considerations in the Federal System*, 13 LOY. U. CHI. L.J. 609-619 (1982).

2. 42 PA. CONS. STAT. ANN. §§ 9721-9726 (Purdon 1982); 204 PA. ADMIN. CODE § 303 (Shepard's 1988).

3. *See* Knapp, *What Sentencing Reform in Minnesota has and has not Accomplished*, 68 JUDICATURE 181, 185 (1984) ("The simultaneous pursuit of multiple goals in a single sentence . . . results in maximum discretion for decision-makers.")

4. Martin, *Interests and Politics In Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania*, 29 VILL. L. REV. 21, 22-23 (1983-84).

duals and groups interested in the sentencing process either personally, professionally or otherwise."[5] The objective "was to enable the Commission to promulgate guidelines to be considered by courts in imposing sentences and, if appropriate, to propose to the legislature changes in the sentencing statutes."[6] Sentencing guidelines eventually were enacted into law and became effective July 22, 1982. These so-called guidelines[7] came to be a permanent fixture on the landscape of Pennsylvania criminal law until the State Supreme Court's decision in *Commonwealth v. Sessoms*.[8] In *Sessoms*, the court held that the guidelines were invalid because the legislature acted unconstitutionally when it failed to present to the governor a concurrent resolution of the respective Houses of the General Assembly which had rejected the first set of guidelines submitted to it in 1981. In other words, the first set and all subsequent amendments thereto, were invalid because of a failure to meet constitutionally mandated *procedural* requirements. As a matter of *substantive* constitutional law, however, the concept of commission-established guidelines was deemed constitutional provided the guidelines "do not exceed the constitutional limitations applicable to the legislature generally.[9]

The respite from the constraints of the guidelines was brief.[10] For whatever one's views, the legislature acted quickly in re-enacting and

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5. Commonwealth v. Sessoms, 516 Pa. 365, , 532 A.2d 775, 776 (1987).

6. *Id.* For a detailed discussion of the political process leading to the final enactment of the Sentencing Guidelines, 204 PA. ADMIN. CODE § 303 (Shepard's 1988), *see Martin, supra* note 4.

7. *See and compare* Commonwealth v. Smith, 340 Pa. Super. 62, 85, 489 A.2d 845, 852 (1985) (Cirillo, J., dissenting: "It is my opinion that the Code Guidelines are guidelines, and nothing more.") with Commonwealth v. Hutchinson, 343 Pa. Super. 596, 598, 495 A.2d 956, 958 (1985) ("In sum, only in exceptional cases and for sufficient reasons may a court deviate from the guidelines.")

8. *Sessoms*, 516 Pa. 365, 532 A.2d 775.

9. *Id.* at ____, 532 A.2d at 782. The court explained, "We recognize that guidelines adopted under this scheme have significantly less force than is commonly attributed to them, but this result is necessary and unavoidable if the Commission as structured under present legislation is to pass constitutional muster." *Id.* at ____, 532 A.2d at 782. The concern over structure was borne out by the observation that "inclusion of legislators and/or judges [four each] on an agency administering the laws is itself likely violative of the separation of powers doctrine." *Id.* at ____, 532 A.2d at 780. In order to avoid this constitutional pitfall, the court, in accordance with 1 PA. CONS. STAT. ANN. § 1922(3) (presumption that the legislature acts constitutionally) interpreted the Commission as having the power to investigate, classify and evaluate, but whose product—the guidelines—lacked the force and effect of law. *Id.* Employing the same reasoning and general due process principles, the new federal sentencing guidelines have been recently declared unconstitutional in United States v. Frank, F. Supp. (W.D. Pa., Mar. 30, 1988).

10. Indeed, even during the period of the guidelines' invalidity, the appellate

revising them.[11] Thus, it is apparent that guidelines are here to stay. On April 25, 1988 the trial judges of Pennsylvania are once again shackled by the constraints that the guidelines purport to place on sentencing discretion. This article will seek to demonstrate that, at least pre-*Sessoms*,[12] and despite the compelling euphemism and the soothing language of some appellate decisions, the guidelines have acquired the force of mandates which the sentencing judge deviates from at his peril and where in explaining his non-compliance he needs the elegance of Holmes, the wit of Musmanno, and the profundity of Blackstone, if he is to satisfy his appellate brethren. As a result, the joy of some,[13] and the fear of others,[14] was fulfilled—a "common law" of punishment has grown out of successive appellate decisions which have "come to govern sentencing more than the guidelines."[15] Secondly, it will be argued that recent Pennsylvania Supreme Court decisions have sounded, and wisely so, the death knell to intense appellate review of trial court sentencing discretion. Finally, as a member of the bench for eighteen years, I will add my own observations on sentencing and will attempt to counter some of the arguments in favor of increased appellate review of sentencing decisions.

A brief historical review of sentencing practice is in order. As a trial judge, I agree with the statement of Chief Justice (then Justice) Nix who said that sentencing is the "most complex and difficult function a jurist is called upon to perform."[16] For centuries, however,

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courts were still using them to evaluate the reasonableness of a sentence. *See* Commonwealth v. Douglass, ___ Pa. Super. ___, ___, 535 A.2d 1172, 1173 (1988); Commonwealth v. Pickering, ___ Pa. Super. ___, ___, 533 A.2d 735, 739 n.1 (1987).

11. Some of the revisions include increased offense gravity scores for aggravated assault and statutory rape, which were made to correspond with increases in the statutory grades of these offenses pursuant to Act 164 of 1986. A new guidelines chart was devised and applies exclusively to all violations of the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-101 *et seq.* Further, the court is directed that it "should consider" an explicit list of circumstances when determining whether a disposition will be imposed in the aggravated or mitigated range for drug offenses under Title 35.204 PA. ADMIN. CODE § 303.3 (Shepard's 1988).

12. *See supra* note 5.

13. *See* Levin, *Maryland's Sentencing Guidelines—A System By and For Judges*, 68 JUDICATURE 172, 179 (1984).

14. Schwartz, *Options In Constructing A Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637, 665 (May 1981).

15. *Id.*

16. Commonwealth v. Martin, 466 Pa. 118, 136, 351 A.2d 650, 659 (1976) (Nix, J., dissenting). *See also* Robinson, *A Sentencing System For the 21st Century?*, 66 TEX. L. REV. 1 (1987).

the decision had been relatively simple because there was only one punishment for all crimes.[17] The sentence of death was mandatory; judicial discretion was not an issue.[18] Clearly, the basic purpose of sentencing under such a scheme was retribution.[19]

Not surprisingly, the payment of human life for the theft of a horse was deemed too austere.[20] As early as 1790, the use of incarceration as punishment was accepted[21] and gradually became the primary modality by the nineteenth century.[22] Though death was not used as punishment save for the most serious offenses, the dominant purpose of sentencing was still retributive.[23]

During the late 1800's and early 1900's, legislatures began to re-evaluate their sentencing philosophy in light of the more humane and scientific theory of rehabilitation. The counterpart to this philosophy is the indeterminate sentence law, which was enacted in Pennsylvania in 1911.[24] Within the statutory limits prescribed for the offense, the court had discretion to impose a sentence that it deemed appropriate. In determining what sentence was appropriate, the court was thereby empowered to consider and weigh not only the crime at hand, but also the defendant's character and background. Thus, the concept of "individual sentencing"[25] was introduced and has remained a part of Pennsylvania criminal law.

Individualized sentencing necessitates the granting of broad discretion in those of us trusted with the awesome power to decide.[26] For

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17. *Martin*, 466 Pa. at 128, 351 A.2d at 655.

18. Comment, *Procedural and Substantive Fairness in Sentencing: An Unnecessarily Unappealing Subject to Pennsylvania Higher Courts*, 82 DICK. L. REV. 379, 380 n.14 (1978).

19. Dowd, *The Pit and The Pendulum: Correctional Law Reform From the Sixties Into The Eighties*, 29 VILL. L. REV. 1, 3 (1983-84).

20. Comment, *supra* note 18.

21. Dowd, *supra* note 19, at 3 n.7.

22. *Martin*, 466 Pa. at 128, 351 A.2d at 655.

23. Forst, *Selective Incapacitation: A Sheep in Wolf's Clothing?*, 68 JUDICATURE 153 (1984). The retributive theory, i.e., that "punishment should be directly proportional to the crime committed" became a popular theory since it was first posited by Cesare di Beccaria in the eighteenth century. Dowd, *supra* note 19, at 3 n.6.

24. The Act of June 19, 1911, P.L. 1055 § 6, as amended, 19 P.S. § 1057 (1964), provided in pertinent part: " . . . the court, instead of pronouncing upon such convict a definite or fixed term of imprisonment, shall pronounce . . . a sentence of imprisonment for an indefinite term: Stating in such sentence the minimum and maximum limits thereof; and the maximum limit shall never exceed the maximum time now or hereafter prescribed as a penalty for such offense. . . ."

25. *Martin*, 466 Pa. at 130, 351 A.2d at 656.

26. *Id.*

years, appellate courts "have long recognized the wisdom in vesting this responsibility within the discretion of the trial judge and [they] have been loathe to interfere except where there has been a clearly demonstrated abuse of that discretion."[27] A consequence of the broad discretion is that two individuals who commit similar or identical crimes may legally receive different sentences. Because of this perceived inequity, reform efforts focused on ways to limit trial court discretion.

The first, and perhaps easiest, route taken to promote uniformity was to assure that the process by which the judge arrived at his or her decision was a fair one.[28] The reception by the court of adequate and accurate information was deemed crucial to fashioning a sentence consistent with the Commonwealth's sentencing philosophy.[29] A logical corollary to the requirement that the court consider information bearing on the defendant's character and background, in addition to pre-sentence reports,[30] is the requirement that judges state on the record their reasons for the sentence imposed.[31] This requirement, though landmark[32] at the time, is now so deep-rooted in the minds of trial judges that when imposing a sentence, it is often reduced to a mere mechanical incantation of statutory principles.[33]

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27. *Id.* at 136, 351 A.2d at 659.

28. The notion of "procedural fairness" in arriving at a sentence reflects the concern that the decision be based upon an informed exercise of discretion and is derived principally from the due process clause of the fourteenth amendment. Comment, *supra* note 18, at 384-385.

29. *Martin*, 466 Pa. at 131-33, 351 A.2d at 657. A sentencing policy was formally enacted on December 30, 1974 and provided in pertinent part: ". . .the court shall follow the general principle that the sentence imposed shall call 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." 18 PA. CONS. STAT. ANN. § 1321(b).

This section was repealed and has been incorporated, with what I believe are significant changes, in Title 42 PA. CONS. STAT. ANN. § 9721(b), as follows: " . . . the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing. . . ."

30. PA. R. CRIM. P., Rule 1403, 42 PA. CONS. STAT. ANN. authorizes the use of pre-sentence reports as well as psychiatric or diagnostic examinations.

31. Commonwealth v. Riggins, 474 Pa. 115, 377 A.2d 140 (1977).

32. Though *Riggins* was the first decision which explicitly required a statement of reasons in all cases, as early as 1932, the court in Commonwealth v. Garramone, 307 Pa. 507, 514, 161 A. 733, 735 (1932), required "a brief memorandum which will reveal the reasons for the sentence imposed" in cases where the death penalty is imposed following a plea to murder.

33. *See, e.g.*, Commonwealth v. Bryner, 385 Pa. Super. 305, 308, 427 A.2d

The procedural safeguards which were designed to insure individualized treatment of offenders obviously did little to promote uniformity. Indeed, individualization is the antithesis of uniformity. This brings us to the guidelines, which are an attempt to bring about substantive fairness in the penalties imposed. Prior to the guidelines, however, the issue of substantive fairness was limited to the question of whether the sentence "exceeds the statutorily prescribed limits or is so manifestly excessive as to constitute too severe a punishment."[34] Thus, the guidelines can be seen not only as an attempt to promote uniformity, but also to expand a previously and "deliberately curtailed scope of appellate review in this area."[35] Unfortunately, sentencing appeals under the guidelines have become an area wrought with difficulty and have been the subject of much tension between the trial and appellate courts. The problem was prophetically forewarned by Chief Justice, then Justice, Nix in *Commonwealth v. Martin*,[36] who feared that "the majority opinion introduces a concept of appellate review that would permit an appellate tribunal to superimpose its sentencing philosophy upon the sentencing court. I believe this intrusion upon the trial court's sentencing discretion is unwarranted and therefore register my dissent."[37] Though *Martin* was decided six years before the guidelines came into effect, this decision, along with the Pennsylvania Supreme Court's decision in *Commonwealth v. Riggins*[38] marked a clear shift in the degree of discretionary power once accorded trial courts.[39]

This change in attitude has been seized upon to the extent that the guidelines became the all-important overriding factor in sentencing. The result has been that the appellate courts have often reversed the trial court under the guise of a "fail[ure] to articulate properly the reasons for its sentence"[40] which in reality is often a disagreement

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236, 237 (1981) and Commonwealth v. Wicks, 265 Pa. Super. 305, 401 A.2d 1223 (1979).

34. *Martin*, 466 Pa. at 137, 351 A.2d at 660 (Nix, J., dissenting, quoting Commonwealth v. Wrona, 442 Pa. 201, 206, 275 A.2d 78, 80-81 (1971)).

35. *Martin*, 466 Pa. at 136, 351 A.2d at 660.

36. *Id.* at 118, 351 A.2d 650.

37. *Id.* at 138, 351 A.2d at 660.

38. *Riggins, supra* note 31 and accompanying text.

39. *See* Commonwealth v. Williams, 456 Pa. 550, 551, 317 A.2d 250, 251 (1974) (*per curiam*: "The sentence imposed upon a convicted person is within the sole discretion of the sentencing judge, and will be reviewed by an appellate court only within narrow confines.")

40. Commonwealth v. McDonald, 322 Pa. Super. 110, 112, 469 A.2d 206, 207 (1983).

as to the "weight to be attached to the germane variables in the sentencing decision,"[41] and ultimately, disagreement with the sentence imposed.

Consider *Commonwealth v. McDonald*,[42] in which a jury convicted the defendant of rape, involuntary deviate sexual intercourse, burglary and simple assault and was sentenced to serve three concurrent terms of imprisonment of three to six years and a concurrent one-to two-year term for the assault. The total sentence of three-to six-years was obviously well below the statutory maximum of thirty-one to sixty-two years for all four offenses if imposed consecutively.[43] The court heard arguments of counsel and had this to say before imposing the sentence:

> THE COURT: Mr. McDonald, I have considered your past arrest history. I have considered your good behavior at the . . . Prison. These are points in your favor, but I have also considered the seriousness of these offenses, and the fact that you were found guilty by a jury after a full trial. I have also considered the need of the protection of the public from this type of offenses [sic] and in addition I have considered the circumstances involved such as the use of violent force in this case and the trauma or effect it has on the victim. In determining your rehabilitative needs I have considered the alternatives in sentencing. . . . The Court finds that any lesser sentence than that could be imposed would depreciate the seriousness of the crimes involved and that you are definitely in need of correctional treatment that can best be provided in a state institution.[44]

The Superior Court, in a two to one decision, held that the statement of reasons "fall[s] short of complying with the dictates of *Commonwealth v. Riggins*, ..."[45] The references made by the trial court to defendant's good behavior and past arrest record "were not sufficiently detailed."[46] Further, defense counsel's arguments were deemed not a substitute for a statement of reasons.[47]

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41. *Martin*, 466 Pa. at 138, 351 A.2d at 660 (Nix, J., dissenting).
42. *McDonald, supra* note 40.
43. 18 PA. CONS. STAT. ANN. §§ 2701, 3121, 3123, and 3502 (Purdon 1983).
44. *McDonald*, 322 Pa. Super. at 114, 469 A.2d at 207-08.
45. *McDonald*, 322 Pa. Super. at 114-115, 469 A.2d at 208.
46. *Id.*
47. *But see* Commonwealth v. Johnson, 319 Pa. Super. 635, 466 A.2d 728 (1983). In the unpublished memorandum opinion Commonwealth v. Johnson, No. 110, slip op. at 6 (Harrisburg 1983), in which a sentence of five to twelve years imprisonment for violations of the Drug, Device and Cosmetic Act, 35 PA. CONS. STAT. ANN. § 780-113(f)(1) (Purdon 1987), was upheld on the ground that the sentence was within the statutory maximums and because I "was afforded the benefit of the extensive remarks of counsel for appellant and the Commonwealth."

Another example is *Commonwealth v. Smith*[48] in which the defendant plead guilty to robbery, aggravated assault and disorderly conduct and received five to ten years imprisonment for the robbery; six to twelve months consecutive on the assault, and a concurrent term of probation of ten years. The trial court refused to change the sentence after defense counsel made an oral motion to modify on the basis that the guidelines recommended for the robbery an aggravated minimum sentence range of twelve to eighteen months. The victim of the robbery, a cashier at a convenience store, was struck on the face and neck and as a result sustained serious injuries which required extensive medical attention. Although the majority opinion does not indicate the full extent of the trial court's reasons, the dissent reveals that "the judge took note of the defendant's violent tendencies as evidenced by his juvenile record, military record, and the way he wantonly inflicted harm after he had already completed a robbery."[49] Nevertheless, the majority remanded for re-sentencing because the "court [itself] did not advise the defendant what the sentencing guidelines provided as far as the range of sentence and did not state why he deviated from the sentencing guidelines. . . ."[50] The statement of reasons must demonstrate "at least in a summary form, the factual basis and specific reasons which compelled the court to deviate from the sentencing range."[51]

More examples, which demonstrate that the guidelines have acquired the force of mandates through appellate enforcement, could be cited. Fortunately, however, two recent Pennsylvania Superior Court cases buttress the argument most effectively without the need to belabor the point further. In *Commonwealth v. Bullicki*,[52] the defendant was convicted of attempted burglary and was sentenced to serve eight to twenty-three and one-half months imprisonment followed by eight years probation, a sentence seventeen months below the guideline range.[53] As in *McDonald*,[54] the dissent in *Bullicki* offers a more fair-minded and complete statement of the trial court's reasons:

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48. 340 Pa. Super. 72, 489 A.2d 845 (1985).

49. *Id.* at 86, 489 A.2d at 852-853 (Cirillo, J., dissenting).

50. *Id.* at 84, 489 A.2d at 851-852 (quoting Commonwealth v. Royer, 328 Pa. Super. 60, 71, 476 A.2d 453, 458 (1984)).

51. *Id.* at 83, 489 A.2d at 851 (quoting Commonwealth v. Royer, *supra* note 50.

52. 355 Pa. Super. 416, 513 A.2d 990 (1986).

53. *Id.* at 417, 513 A.2d at 990.

54. *See supra* note 44 and accompanying text.

> The sentencing court noted that although the record was sufficient to support an attempted burglary conviction, the facts could also have led to the conclusion that appellant was being a "peeping tom" on the occasion in question. [The court was aware that the defendant had a history of being a peeping tom.] The court felt that the facts and circumstances of the offense "were not of such a serious nature as to warrant further incarceration." The court obviously imposed a sentence which it believed was consistent with the protection of the public and the gravity of the offense as related to the impact on the victim and the community, after taking into account the guidelines.[55]

In a rare display of candor, the Pennsylvania Superior Court remanded for sentencing specifically to be imposed "within the range of the guidelines."[56] The majority's decision to remand was premised primarily on a statement by the sentencing judge to the effect that the defendant was facing additional incarceration because of parole violations and because the sentencing judge commented after imposing sentence that he "would take a dim view to any further criminal activity for any reason whatsoever."[57] It appears that the majority seized upon these comments to the exclusion of all other reasons in an attempt to justify its result. What is most troubling is that the trial court was directed to specifically impose a sentence within the guidelines.

In the second case, *Commonwealth v. Radabaugh*,[58] the trial judge had twice sentenced the defendant to serve a term of two and one-half to five years for Possession and Possession with Intent to Deliver Methamphetamines. The trial court's reasons were that it felt the guidelines were too lenient for drug offenses, that the defendant had been manufacturing the drug, that incarceration was needed to illustrate the seriousness of the crime, to deter others in the community and to meet the defendant's rehabilitative needs.[59] On the second appeal, the superior court remanded for sentencing "specifically to be imposed within the minimum or mitigated minimum range of the sentencing guidelines,"[60] despite the potential statutory maximum of fifteen years[61] and a recognition by the Sentencing Commission itself

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55. *Bullicki*, 355 Pa. Super. at 421, 513 A.2d at 992 (Brosky, J., dissenting).
56. *Id.* at 420, 513 A.2d at 992.
57. *Id.*
58. Unpublished memorandum opinion. No. 88, slip op. at 5 n.5 (Harrisburg, 1987).
59. *Id.* at 2-3.
60. *Id.* at 5.
61. 35 PA. CONS. STAT. ANN., § 780-113(f)(1). Reference to statutory maximums is not an uncommon way to gloss over the apparent severity of an otherwise

that "major drug trafficking" may warrant a more severe sentence than suggested under the guidelines.[62]

In short, Pennsylvania appellate courts, particularly the Pennsylvania Superior Court, have developed a "common-law"[63] of sentencing which was best summed-up in *Commonwealth v. Hutchinson*,[64] wherein the court wrote "only in exceptional cases and for sufficient reasons may a court deviate from the guidelines,"[65] despite the absence of this language in the sentencing code. As a result, the burden was placed on the trial court to justify a sentence outside of the guidelines. Fortunately, two recent Pennsylvania Supreme Court cases have signaled an end to this practice and hopefully a return to the "abuse of discretion" standard of review.[66]

One case, *Commonwealth v. Tuladziecki*,[67] dealt with the procedures which must be followed by a party seeking review of the discretionary aspects of a sentence. Ordinarily, a criminal defendant had a right to appeal the judgment of sentence to the superior court; however, under the new sentencing code, either party may challenge the discretionary aspect of the sentence, but must first invoke the jurisdiction[68] of the appellate court by demonstrating "that there is a substantial question that the sentence imposed is not appropriate under this chapter."[69] In order to implement this law, the Pennsylvania Supreme Court, pursuant to its rule making power, promulgated specific rules regarding the manner in which a party is to

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harsh sentence under the guidelines. *See, e.g.*, Commonwealth v. Johnson, 319 Pa. Super. 635, 466 A.2d 728 (1983), unpublished memorandum opinion, No. 110, slip. op. at 5 n.2. (Harrisburg, 1982); Commonwealth v. Muller, 364 Pa. Super. 346, 352, 528 A.2d 191, 194 (1987) ("In the instant case, the sentence imposed was rigorous but well within the statutory limits and guidelines."); and *see* Commonwealth v. Williams, 456 Pa. 550, 552, 317 A.2d 250, 251-252 (1974).

62. 204 PA. ADMIN. CODE § 303.1(e) (Shepard's 1988).

63. Levin, *supra* note 13 and accompanying text.

64. 343 Pa. Super. 596, 495 A.2d 956 (1985).

65. *Id.* at 599, 495 A.2d at 958.

66. *See* Commonwealth v. Douglass, ____, Pa. Super. ____, ____, 535 A.2d 1172, 1173 (1988) and Commonwealth v. Tuladziecki, 513 Pa. 508, 522 A.2d 17 (1987).

67. 513 Pa. 508, 522 A.2d 17 (1987).

68. Commonwealth v. Cummings, ____ Pa. Super. ____, 534 A.2d 114 (1987). The reader is cautioned that the use of the word "jurisdiction" may not be accurate. In Commonwealth v. Krum, ____ Pa. Super. ____, 533 A.2d 134 (1987), the superior court ruled 5-4 that the requirements of PA. R. APP. P. 2119 (f) and *Tuladziecki* (see accompanying text) are *procedural*, rather than jurisdictional, and thus a failure to object to an appellant's failure to include a "concise statement" in his or her brief results in a waiver of that issue.

69. 42 PA. CONS. STAT. ANN. § 9781(b) (Purdon 1983).

demonstrate a substantial question.[70] Specifically, PA. R. APP. P. 2116(b) requires a party to include:

> any questions relating to the discretionary aspects of the sentence imposed (but not the issue whether the appellate court should exercise its discretion to reach such question) in the statement [of questions involved] required by Subdivision (a). Failure to comply with this subdivision shall constitute a waiver of all issues relating to the discretionary aspects of sentence.

PA. R. APP. P. 2119(f) further requires an appellant challenging the discretionary aspects to "set forth in his brief a concise statement of the reasons relied upon for allowance of appeal. . . . The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence."

In *Tuladziecki*, the Commonwealth appealed the discretionary aspects of a sentence to the superior court, which reversed and remanded for resentencing. The Pennsylvania Supreme Court vacated the superior court's order because the Commonwealth's brief did not have the required "concise statement." Prior to this ruling, superior court had routinely reviewed the briefs and argument on the merits in order to determine if there was a substantial question.[71] This, the court wrote, was error:

> 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.[72]

Though *Tuladziecki* and its progeny may seem far afield from the instant topic, given that it concerns very technical procedural requirements for obtaining review of a sentence, the following passage reveals the import of the court's decision:

> Our insistence on separate presentation of these issues is more than mere formalism; important concerns of substance guide this decision. In addition to preserving the respective rights of both parties according to the jurisdictional scheme provided by the legislature, *it furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors*

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70. See PA. R. APP. P. 902, 2116(b) and 2119(f).
71. Commonwealth v. Zeitlen, 366 Pa. Super. 78, 530 A.2d 900, 901 (1987).
72. *Tuladziecki*, 513 Pa. at 513, 522 A.2d at 19.

impinging on the sentencing decision to exceptional cases.[73] (emphasis added).

The court went on to note some of the *general* principles found in the Sentencing Code[74] which must be *considered* by the trial court before pronouncing sentence and concluded:

> It is apparent that the legislature has vested broad discretion in the trial court to impose a sentence appropriate to each case which comes before it. . . . It is only where a party can articulate reasons why a particular sentence raises doubts that this scheme as a whole has been compromised that the appellate court should review the manner in which the trial court exercised its discretion.[75]

A fair reading of *Tuladziecki* buttresses the conclusion that the supreme court went out of its way to restore sentencing discretion in the trial court and to reject cases such as *Commonwealth v. Hutchinson*[76] which essentially say that a sentencing judge deviates from the guidelines at his or her peril. Continuing this restoration of sentencing power is *Commonwealth v. Sessoms*,[77] which, as discussed above, declared the Pennsylvania Sentencing Guidelines unconstitutional for reasons unrelated to their substantive effect. However, a concern over their effect, i.e., the weight to be accorded them, was indeed expressed due to the inclusion of legislators and judges on the Sentencing Commission.[78] In order to avoid a violation of the separation of powers doctrine, the court held that the "guidelines cannot, without more, be given the effect of law, either as legislation or regulation, so as to by themselves alter the legal rights and duties" of the parties or the court.[79] The decision further states that the trial court "has no 'duty' to impose a sentence considered appropriate by the Commission"[80] and that the court need only "take notice of the Commission's work."[81] That the guidelines are truly "guidelines, and nothing more"[82] is derived not only by the express language used, but also by constitutional limitations inherent in the composition of the commission.

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73. *Id.* at 513, 522 A.2d at 19-20.
74. 42 PA. CONS. STAT. ANN. § 9701 *et seq.* (Purdon 1983).
75. *Tuladziecki*, 513 Pa. at 515, 522 A.2d at 20.
76. *See supra* note 64 and accompanying text.
77. *See supra* note 5 and accompanying text.
78. *Id.*
79. *Sessoms*, 516 Pa. at ____, 532 A.2d at 780.
80. *Id.* at ____, 532 A.2d at 781.
81. *Id.*
82. *Smith*, 340 Pa. Super. 72, 85, 489 A.2d 845, 852 (1985) (Cirillo, J., dissenting).

It should be noted that a criminal defendant previously had nothing to lose and everything to gain by appealing the terms of a sentence. In fact, it was not uncommon for defendants to appeal sentences within the guidelines. To stem this flow of appeals and to preserve judicial resources for cases involving genuine abuses of discretion, the court has stated unequivocally that challenges shall be limited to "exceptional cases."[83] If *Tuladziecki* and *Sessoms* mean what they say, sentencing discretion has returned to the trial judge, who will not be reversed absent an abuse of discretion. The question remaining is whether an abuse of discretion standard is sound as a jurisprudential matter, and whether we trial judges, as trustees of sentencing power, are worthy of our charge, in a system that demands fairness above all else, but whose participants disagree as to what is fair.

It is important to point out that the disparity between the guideline ranges and the potential statutory maximums has allowed for and even promoted the differences that have sometimes occurred. Since they were enacted, the statutory penalties have remained relatively unchanged and represent the philosophical basis for punishment that prevailed at their inception, i.e, retribution.[84] However, with the advent of the guidelines, the trial judge was confronted with a markedly lower suggested sentence than was permitted by statute. For instance, burglary is punishable by up to twenty years imprisonment,[85] yet under the most recent guidelines, the recommended aggravated range is only twelve to eighteen months for a person with a prior record score of zero.[86] As a consequence, the trial judge is often torn between these two extremes *and* the philosophies they represent.

A second point to be made is that it is important to distinguish between a complete failure to exercise discretion and a so-called abuse of discretion. In the former case, the judge imposes an unreasonable sentence *and* fails to state why. In the latter, the judge imposes a harsh, or lenient, sentence and states his or her reasons, but which fail to satisfy the appellate court. With respect to the former, no man should be required to pay for a judge's arbitrary or prejudicial sentencing philosophy.[87] For example, a jurist who sen-

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83. *Tuladziecki*, 513 Pa. 508, 522 A.2d 17.

84. *See supra* notes 17-23 and accompanying text.

85. 18 PA. CONS. STAT. ANN. §§ 3502, 1103 (Purdon 1973).

86. 204 PA. ADMIN. CODE §§ 303.8, 303.9 (Shepard's 1988).

87. "As far as I am concerned, I would not want any human being, no matter how sorry he might be, to pay for my mistakes with his life or liberty." *Symposium,* Appellate Review of Sentences, 40 F.R.D. 79 (1976) (remarks of Brewster, J.).

tences all tax evaders to extensive prison time without even considering lesser alternatives, but who is relatively lenient to burglars or robbers has clearly abused his power. I am confident that these types of abuse are rare and are nonetheless corrected on appeal.

My quarrel is not with the concept of appellate review, but rather with the frequency that appellate tribunals send cases back because of a perception that the trial court "abused its discretion." The entire record as a whole should be taken into consideration in reviewing a sentence, not just the remarks of the trial judge. If the judge says little or nothing with regard to rehabilitation, can he or she be faulted if the lawyers, probation personnel or the defendants themselves say little to show any promise. By the same token, if the facts of the crime cry out for retribution and the record shows that this concern was foremost in the mind of the judge such that notions of leniency or rehabilitation were out of the picture, should the judge still be required to say, "I have considered the defendant's prospects for rehabilitation, but they must fall to the heinous nature of the crime"? For that matter, requiring the trial judge to tick off the numerous factors impinging on a sentence is often reduced to a ritualistic litany like prayers before meals.

Appellate courts looking down on a cold record at a time and in a place far removed from the trial court and the community within which the crime was committed are ill-suited to determine the substantive fairness of a sentence for the same reason the law grants broad discretion to the trial judge in ruling on the grant or denial of additur or remittitur in a civil case.[88] A cold record does not show the tears on a victim's cheeks nor the fear in their eyes, much as it fails to show the apathy and rebellion in the expression of the offender.

Surely, unwarranted disparity in sentencing is an anomaly to be condemned in a society that so often exalts "equal protection of the law" over the will of the majority. But to say that uniformity in sentencing is the be-all and end-all is to say something different. In our energetic response to sentence disparity, have we gone overboard in our quest for uniformity, have we taken away too much discretion from those who must decide what is fair, and as a result forgotten that "[n]ot all rapes or all robberies are equal in damage or in

88. Sulecki v. Southeast Nat. Bank, 358 Pa. Super. 132, 516 A.2d 1217 (1986).

viciousness"?[89] Our sentencing guidelines include only two variables in the equation: (1) prior criminal history; and (2) offense gravity score.[90] Yet there are an almost infinite number of variables which enter into the formula for determining a "fair" sentence. Thus, the guidelines can be seen as a reference point or bench mark on which we begin our computation in a given case, but nothing more. The trial judge, who lives and works in the community, is more sensitive to these variables and the competing demands placed on his discretion.*

89. SYMPOSIUM, DISPARITY AND EQUALITY OF SENTENCES—A CONSTITUTIONAL CHALLENGE, 40 F.R.D. 55, 73 (1965) (Remarks of Rubin).

90. 204 PA. ADMIN. CODE §§ 303.2, 303.7, 303.8 (Shepard's 1988).

* The author wishes to include mention of a very recent case which supports the position of this article. This is a landmark case in Pennsylvania and one which originated in Judge Dowling's courtroom.

Commonwealth v. Joseph Devers, ___Pa. ___, ___A.2d ___(July 27, 1988) 21 M.D. Appeal Docket 1987, is a truly landmark case which deals with the precise issue of trial court sentencing discretion and the requirement of a "statement of reasons." This case thoroughly rejects a long-standing line of superior court decisions which had required an explicitly detailed statement by the trial judge of the reasons for the sentence imposed. As the title of the article implies, it is the author's position that discretion in sentencing has returned to the trial judge. *Devers* emphatically makes this return full circle. One of the assertions made in this article is that the entire record should speak for itself at sentencing and that this entire record should be considered when analyzing the substantive fairness of any sentence. *See* p. 938. *Dever* holds that as long as the sentencer has a presentence report, the sentencer is presumed to have weighed the various factors and is not only held to his/her remarks made at the time of sentencing. Further, the article attacks the requirement that the judge tick off the statutorily mandated factors as a "ritualistic litany like prayers before meals." *See* p. 938. *Devers* rejects this requirement stating, "re checklists or any extended or systematic definitions of their punishment procedure." slip op. at 18.