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COURT MANAGEMENT PROJECT

SENTENCING GUIDELINES WORKSHOP

April 17-18, 1980

MEETING SUMMARY

NCJRS

AUG 7 1980

ACQUISITIONS

Prepared by
Courts Technical Assistance Project Staff

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SUMMARY OF MEETING DISCUSSIONS

Thursday, April 17

I. INTRODUCTION OF ATTENDEES

Following a welcome and introduction by Joe Trotter, Caroline Cooper gave a brief overview of current state and local sentencing research and guidelines activities and a comparison of the present level of state and local involvement with that noted a year ago when the first sentencing guidelines workshop was held. A representative from each of the sentencing projects was then asked to summarize the project's mandate, current stage of activity, source and level of funding, and topics of specific interest for discussion at the session.

Description of Each Project Represented

ALASKA:

Nick Maroules, Legal Analyst at the Alaska Judicial Council, explained that the Alaska Sentencing Guidelines Committee was created by the Alaska Supreme Court in response to a Judicial Council study on the impact of abolishing plea bargaining which found sentencing disparity among different racial groups. Another consequence of the plea bargaining study was the adoption of a new criminal code with a presumptive sentencing structure. The Committee recently implemented its first set of guideline grids for use in felony drug offenses. Given the relatively small caseload in Alaska, impact analysis of this first set of guidelines must be deferred until late summer at which time a sufficient quantity of data should be assembled. The results of this analysis will be reported to the courts and the Legislature. Reaction to these findings will influence policy concerning the use of sentencing guidelines in other crime areas. The plea bargaining study was funded by LEAA (\$400,000.) with funding for subsequent efforts provided by the legislature (\$120,000).

DELAWARE:

Mike Rabasca, Director of the Delaware SPA's Statistical Analysis Center (SAC), reported that Delaware is not presently involved in sentencing guidelines research or implementation. The Statistical Analysis Center is conducting a study under contract with the National Institute of Corrections (NIC) to measure the impact of recent changes in Delaware's legislation on the state's prison population. Rabasca noted that the study was prompted by the peculiar circumstance of having a state legislature seeking longer incarceration periods for criminal offenders at the same time as state officials are attempting to implement a federal court order to remedy the overcrowded conditions of the state's prison. The data for the study has been collected and a report on the findings should be available by June 30th. The project has been funded by

a NIC grant (\$12,000), SAC (federal) funding (\$4,800), and state funds for hardware (\$4,000).

FLORIDA:

Kenneth Plante, Director of the Florida Sentencing Guidelines Project, explained that the project is sponsored by a grant from LEAA's NIJ under the multi-jurisdictional test design program. Data will be collected in four judicial circuits which include thirteen counties. Staff are presently completing the codebook and data collection questionnaire, selecting a study sample, and seeking an effective method for extracting data from pre-sentence reports. Plante noted the following specific topics of interest to the project: (1) techniques for explaining to an advisory board the relationship between statistical findings regarding sentencing practices and guideline implementation; (2) sample selection; (3) the application of sentencing guidelines to misdemeanors; and (4) the impact of sentencing guidelines on plea bargaining. Florida's project has been funded by NIJ (\$270,000), with prior LEAA and state funds provided at a level of \$160,000.

ILLINOIS:

Terry Lyons, Legal Consultant to the Illinois Criminal Sentencing Commission, explained that the Commission was created by the Legislature when it adopted a determinate sentencing structure. The Commission is charged with the task of studying sentencing disparity and proposing legislation to remedy disparities noted. Several factors, Lyons felt, could contribute to sentencing disparity in the state, including the size of Cook County alone which results in disparity both within the county and between Cook County and other counties in the state; the concentration of racial and economic groups in certain areas of the county; and the diversity of county populations sizes in the state. Although sentencing guidelines projects have existed in two Illinois counties (Cook and DuPage), Lyons stated that the Commission had no mandate to expand guidelines statewide. However, Commission staff plan to discuss the feasibility of guidelines with the state court administrator. The Commission's purpose in attending the workshop was to gain insight into the sentencing guidelines area from on going projects. The Commission has been funded by the Legislature (\$137,000).

LOUISIANA (Orleans Parish, New Orleans):

Rivers Trussell, Assistant Administrator of the Orleans Parish Criminal District Court stated that his office has recently completed a descriptive sentencing practices study and developed a set of sentencing guidelines for major offenses brought before the court in high frequency. The guidelines are presently being reviewed by the judges and are slated to be implemented on July 1 on a pilot basis. Their project has been funded by the state Criminal Justice Council (SPA) (\$14,000) with additional research support provided by local college students. Funds for monitoring the project will be provided from the court's budget.

MARYLAND:

Pat Nelson, Director of the Maryland Sentencing Guidelines Project noted that Maryland's project was, like Florida's, funded under LEAA's NIJ Multi-Jurisdictional Test Design Program. The project mandate is to develop and implement sentencing guidelines within four jurisdictions over a two-year period. Jurisdictions from which data will be gathered produce 80% of the sentences handed down in the state. Staff are presently testing a data collection instrument and plan to begin data collection on June 1. Among the topics of interest at the workshop which she noted were: (1) relationships with advisory boards; (2) sampling techniques; (3) using data collection instruments; and (4) the impact of plea bargaining on the prosecution and parole practices. The project has been funded by the NIJ at a level of \$270,000.

MICHIGAN:

Marvin Zalman, Director of the Michigan Felony Sentencing Project, reported that Michigan's project has no legislative mandate but is supported by the state Supreme Court. Basic research has been completed and published and the task of working with the Supreme Court to develop the final set of guidelines is near completion. The guidelines being developed are based on the findings of the research study and reflect weights assigned to certain offense and offender variables. Michigan's governor and legislature are concerned about prison overcrowding and appear interested in exploring the potential of sentencing guidelines to remedy this problem. Zalman mentioned that the project hopes to test the guidelines and develop monitoring procedures and would be interested in hearing discussion on the mechanics of implementing these efforts. Their project has been funded by federal block funds (\$200,000).

MINNESOTA:

I. Minnesota Sentencing Guidelines Commission

Kay Knapp, Research Director of the Minnesota Sentencing Guidelines Commission, explained that the project was created by the state legislature in 1978 with the mandate to develop presumptive sentencing guidelines. Data collection on judicial sentencing and parole releasing practices was completed in June 1979. Data analysis was performed until September and guideline development was completed in the fall. The project subsequently received a NIC grant to develop a prison population projection for use in constructing the sentencing guidelines which are effective May 1st, 1980. Project staff are presently conducting training sessions on the use of the guidelines for judges, defense attorneys, prosecutors, parole officials, and others. Additional staff efforts include: development of evaluation and monitoring procedures; design of an evaluation scheme regarding disparity reduction; and planning of a study of the effect of sentencing guidelines on plea negotiations, and conversely, the effect of plea negotiations on the use of sentencing guidelines. The guidelines project has been funded at

an annual rate of \$200,000 by the state legislature with subsequent support provided by NIC (\$7,500) for the prison population study, and the court system's SJIS for future monitoring.

II. Juvenile Project

Elinor Zimmerman, Research Project Coordinator for Correctional Service of Minnesota, explained that she represents a private organization which has no public mandate. Her project's objective is to develop sentencing guidelines for juvenile offenses. This project may be one of the first juvenile sentencing guideline projects in the country. Although the project is undertaken by a private organization with no public mandate, it is served by an advisory committee from the Minnesota Family and Juvenile Court Judges Association. The project is presently developing its research design and hopes to have guidelines developed by January 1981. Staff plan to study disposition decisions and various types of offender behavior in juvenile cases in a sample of counties from the state. Zimmerman noted that, because of the unique study constraints upon juvenile information, she would like to hear of the experiences of any other project which has dealt with similar issues. Their project has been funded by the Northwest area Foundation (\$130,000).

MISSOURI:

Terry Brummer, Director of Planning, Research, and Training at the Office of the State Court Administrator, stated that the Judicial Planning Committee has become quite interested in the problem of sentencing disparity, although not necessarily in the study or use of sentencing guidelines. However, action along these lines has been indefinitely postponed because of funding cuts and the implementation of a new criminal code. Brummer stated his purpose in attending the workshop was to gather information on sentencing guidelines which might assist planners in the future.

PENNSYLVANIA:

I. Statewide Project

John Kramer, Executive Director of the Sentencing Guidelines Commission, stated that Pennsylvania is the only state other than Minnesota whose legislature has mandated the creation of sentencing guidelines. The Commission is charged with the tasks of: (1) specifying a range of sentences applicable to crimes of a given degree of severity; (2) specifying the 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; and (3) prescribing variations from the sentences on account of aggravating or mitigating circumstances beyond those specified in task number two. The Commission is comprised of eleven members from across the state. This has caused difficulty in arranging meeting times. Two phases of the project have been completed to date: a survey of judges attitudes and a survey of past sentencing practices. Data collection began in January and guidelines are scheduled for completion by June.

Hearings will be scheduled during the summer and a final set of guidelines will be submitted to the legislature in the fall. Kramer noted that the impetus for development of sentencing guidelines, he felt, has come more as a response to the threat of mandatory sentences than from concern about disparity. The project has been funded by the state legislature (\$100,000 for fy 1979; \$200,000 for fy 1980, \$200,000 for fy 1981).

II. Philadelphia Project

Saundra DiIlio, Program Analyst at the Court Administration Planning Unit of the Philadelphia Court of Common Pleas, reported that the Court's 38 judges in the Criminal Program began using sentencing guidelines on March 5, 1979. The project has been advised by a ten judge committee. The Planning Unit is now monitoring the use of the guidelines as they are used in disposing approximately 5,500 convictions a year. The Planning Unit plans to develop sentencing guidelines for white collar crimes. DiIlio noted that she would be particularly interested in workshop discussions of monitoring and validation techniques.

RHODE ISLAND:

Susan McCalmont, Judicial Planner at the Office of the State Court Administrator, described her project as an effort to develop benchmarks or aggravating and mitigating factors that judges could use in formulating sentences. The project was begun as a response to growing support for a mandatory sentencing scheme and has been supervised by the Chief Justice. Two main problems faced the project initially. First, presentence reports are not used in approximately 80% of the cases and therefore an important source of data was missing. Second, there was little support for this project by the judges. In order to remedy this second problem, the project made a survey of how judges sentenced fourteen hypothetical cases. The survey results showed enough disparity to convince most judges of the need for tools to assist them in making equitable sentencing decisions. The project has produced a set of recommended benchmarks which are now under consideration by a judicial panel. The project plans to develop a system for monitoring the use of the benchmarks and hopes to expand the use of presentence reports in order to gather data which might be useful in future sentencing studies. The project has been funded by an LEAA block grant (\$16,000) and support from the Judicial Planning Council.

SOUTH CAROLINA:

Andrew Surles, Assistant Director of the South Carolina Office of Court Administration, reported that interest in the development of sentencing guidelines came from the state judiciary rather than from the governor or legislature. The Supreme Court had requested development of guidelines as a tool for the state's general jurisdiction court judges, who rotate throughout the state, to help them formulate sentences within the wide range of discretion provided by South Carolina statute. The project is sponsored by the Office of

Court Administration with no specific funding provided. The project is using data from the Attorney General's Office, the LEAA-funded statistical Analysis Center, and court records.

UTAH:

Richard Oldroyd, Program Specialist at the Utah Division of Corrections, reported that Utah's indeterminate sentencing structure provides that judges make decisions as to whether or not to imprison and the Board of Pardons sets release dates. A joint seven month effort by the judiciary and Board of Pardons has produced a sentencing guidelines matrix for use in felony and misdemeanor cases. The guidelines were developed using data from the Department of Corrections but are based primarily on convention rather than sophisticated data analysis. The guidelines were pretested in the parole office and are now being given a one year trial run statewide. A formal evaluation of their effectiveness will be completed by July or August. Preliminary results show that felony guidelines are working well, although misdemeanor guidelines may need modification. This project has been made possible by a joint effort by Utah's Division of Corrections, State Judicial Council, and Board of Pardons with no special funding provided.

VERMONT:

Robert Squires, Director of the Sentencing Guidelines Project at the Office of the State Court Administrator, announced that his project was only two days old and that it was starting from scratch with no data. He said that he was at the workshop to learn how to begin. This project has been funded by the state criminal justice council (SPA) at a level of \$40,000.

VIRGINIA:

Kenneth Montero, Director of Planning and Research at the Virginia Supreme Court, explained that a presumptive sentencing structure has been introduced and defeated in the Legislature for the last two years. The Legislature has directed the Attorney General's Office to conduct a feasibility study on sentencing guidelines. Montero reported that he was at the workshop to learn more about sentencing research from on going projects. This project will be conducted by the Supreme Court with no special funding.

WASHINGTON:

Bruce Freeland, Manager for Research at the Office of the Administrator for the Courts, stated that sentencing guidelines which were developed by a private consulting firm were implemented on a voluntary basis last year. Judges have not fully accepted the guidelines and are using them in only 60% of felony cases and 30% of misdemeanors. 6% of these sentences are above the guidelines; 26% are below. Pending legislation would create a sentencing commission and a mandatory sentencing scheme; however, the legislation, Freeland felt, had been given low priority. Funding to develop guidelines was provided by the SPA (\$80,000).

WISCONSIN:

Sandra Shane-Dubow, Director of Criminal Justice Research at the Wisconsin Center for Public Policy, stated that there is no mandate to develop sentencing guidelines in Wisconsin. In fact, there seems to be growing support for a mandatory sentencing structure. The Center produced a sentencing study in June 1979 which is based on data gathered in five Wisconsin counties. The study addresses the issues of sentencing disparity (or variability) and possible sentencing reforms. Shane-Dubow noted the need for some method to rectify sentencing disparity but is not committed to the idea of using sentencing guidelines in Wisconsin. The sentencing study was funded by the Wisconsin Council on Criminal Justice (SPA) and the Judicial Planning Council (\$143,000).

FEDERAL SENTENCING PROJECT:

Arthur Gelman, Senior Research Associate at the Institute for Law and Social Research, reported that pending federal legislation would mandate the development of sentencing guidelines for Federal District Courts. INSLAW is presently assembling a data base for use in the project should the enabling legislation be passed. This data collection effort, which is being funded by the Department of Justice, includes surveys of federal judges, prosecutors, and others. The project which includes a number of other components, has been funded by the U.S. Department of Justice (\$900,000).

OTHER ATTENDEES:

Joe Calpin of the Mitre Corporation reported that he was attending the workshop as a resource person. Calpin has been involved in sentencing guidelines work since his participation in the first major guidelines project, the U.S. Parole Commission study.

Chris Zimmerman of Carnegie-Melon University explained that he has recently been involved in examining methodologies in sentencing guidelines development and in evaluation of sentencing guidelines impact. Funding for these efforts has been provided by NIMH.

Richard Sparks reported that his project was evaluating statewide guidelines efforts and preparing an intensive case study on one jurisdiction.

Cooper then explained that four individuals had expressed regrets that they were not able to attend the session. Mike Hutner was presenting the Massachusetts guidelines to the judges the following day; Dale Parent was involved in a training session in preparation for guidelines implementation in Minnesota; Paul Sutton of the National Center for State Courts was in the midst of preparing his final report for LEAA. Jack McCarthy, although unable to attend Thursday's session, was planning to come on Friday.*

*Due to scheduling problems, McCarthy was unable to come on Friday.

II. GUIDELINES RESEARCH AND DEVELOPMENT: ALTERNATIVE MODELS AND METHODOLOGIES

A. Past Guidelines Methodologies and New Approaches: Richard Oldroyd and Rivers Trussell, moderators

Oldroyd began this session with a brief history of methodologies used in the development of predictive studies and parole guidelines. He noted the increasing use of sophisticated statistical approaches of these and later sentencing guidelines efforts. He cited the recent New Jersey, Michigan and INSLAW efforts as examples of such methodologies. He also noted that the older, more simple designs that use a small number of variables (e.g., the 1928 Burgess study) still appear quite adequate. The discussion which followed Oldroyd's opening remarks centered on the relative merits of the more and less sophisticated methodologies used in sentencing guidelines projects.

Trussell began the interchange by asking Sparks which methodology he felt worked best and whether a "good" approach required substantial funds. Sparks commented that the U.S. Parole Commission and Oregon studies, while less extensive statistically, were excellent efforts. He also noted that the ultimate policy issues relating to sentencing practices would not be answered by expensive statistical studies but, rather, by dealing with the policy issues themselves. Calpin and C. Zimmerman agreed with Oldroyd's assessment that earlier sentencing guidelines projects were statistically less complex and placed less emphasis on data collection efforts. Gelman described the use of empirical data in the Albany study as "to inform" rather than "to form" guidelines. He cited a recent study by Gottfredson and others which supports the position that less sophisticated methodologies (e.g., the Burgess system) seem to be as effective as the newer types. He also noted that, regardless of the methodology used, it was important that it be useable by the judiciary and not overly complex. Maroules commented that the Alaska Commission rank ordered the variables deemed essential in making sentencing decisions and found that these variables correlated well with the guidelines which were empirically derived. Calpin, citing the experience of the U.S. Parole Commission study, described the difference between normative and empirical studies as a fine line. Sparks commented that no matter how statistically sophisticated a study may be, final products are derived from basic policy decisions. Knapp agreed and stated that every policy decision made during a sentencing guidelines study is subjective regardless of whether empirical data exist; nevertheless extensive data collection efforts are important. While expensive, they are essential to understanding the systemwide policy impact of sentencing guidelines in such areas as prison population and caseflow projections, and are an important tool for subsequent monitoring and evaluation efforts.

In further support of empirical data collection, McCalmont explained that, while surveys like the hypothetical cases given to Rhode Island judges were helpful in establishing the need for structuring discretion, such surveys will not produce the kind of information needed to construct guidelines.

Gelman warned workshop participants, however, not to dismiss the importance of empirical data too quickly. He noted that judges, the users of the guidelines, can appreciate guidelines developed by sound social scientific methods. He proposed the continued use of empirical data but without an overly extensive data collection effort. Gelman made the final observation that data collection is most important in feedback and evaluation efforts.

Moving away from the discussion on the data collection effort, Trussell sought judicial input on the use of sentencing guidelines by asking Judge Ballif what judges want from the guidelines. Ballif replied that judges are highly individualistic and may have their own subjective guidelines already. He noted that this new effort [sentencing guidelines] might threaten some judges but that this threat can be overcome if they have sufficient awareness of the discretionary element inherent in a sentencing guidelines program.

Oldroyd closed the session by observing that sentencing guidelines can be a valuable method to join together the efforts of the various agencies in the criminal justice system. He believes this has worked well in Utah.

B. Selected Research Issues: Sandra Shane-Dubow, moderator

Shane-Dubow began the session by explaining that she is not convinced that sentencing guidelines are the best approach in attempting to reduce sentencing disparity. She then briefly described her experiences in sample selection and dealing with regional differences in sentencing patterns as Director of the Wisconsin Sentencing Study. In particular, Shane-DuBow noted problems in maintaining representativeness in the sample and deciding which offenses to study. She then asked Zalman to recount his experiences in the Michigan study. Zalman explained that his project was forced to make a sudden radical change in research methodology in order to carry out the study under existing constraints. This change became necessary after the project had begun and Zalman suggested that new projects be prepared to do the same. Gelman noted that the process of selecting a sample methodology and the type of stratification to use is a policy/political decision and cautioned project representatives not to lose sight of this fact.

The second half of the session was devoted to measurement of legitimate vs. illegitimate disparity and internal and external validation of research findings. Knapp made known her belief that the difference between legitimate and illegitimate disparity is a policy question and that she would welcome advice on this subject. DiIlio asked for discussion of what sentencing factors are illegitimate. Knapp responded by saying that one answer includes certain social status characteristics such as sex, race, lifestyle, and age. To that Kern asked whether any project had found a correlation between social status characteristics and sentencing disparity and, if so, whether that evidence was presented to the judges. Knapp and DiIlio said they had. DiIlio then asked if any project had used variables such as time intervals from arrest to disposition in developing guidelines. Knapp replied that they had not because they did not have the time, money, or the assurance that this type of variable would be relevant. Zalman, however explained that Michigan's project had used such variables and through them discovered evidence of racial disparity. This evidence was presented by the project to the judges and the news media but little controversy resulted.

After hearing this discussion, Calpin asked whether any other large sentencing guidelines study had encountered legal/ethical problems in the discovery of disparity. Tony Pasciuto from NIJ announced that he knew of no definitive results supporting the existence of large scale racial bias. Sparks noted New Jersey's finding that no sentencing disparity based on race was evidenced by statistical study. (Sparks, however, questioned New Jersey's methodology.) He also noted that Massachusetts had been quite concerned with the possible existence of racial disparity. Montero said he didn't believe race can be singled out as a causal factor in sentencing disparity and suggested that factors such as education and income are the true correlates. At this point, Judge Ballif warned that he could see the eventuality of sentencing guidelines approaching a mandatory sentencing structure as the guidelines development process becomes more sophisticated, and urged that some room for judicial discretion be retained in guidelines programs.

Discussion on measurement of legitimate vs. illegitimate disparity was concluded by Knapp and Smaby who explained two reasons why the Minnesota Commission chose to establish the use of mitigating and aggravating factors to allow deviation from guidelines when appropriate: first, to discourage departure from guidelines and second, to offer guidance to the state Supreme Court in its reviews. Knapp and Smaby noted that the subjective development of these factors was a very difficult task for the reasons stated earlier by Judge Ballif, i.e., that judges are individualistic and may have their own subjective guidelines.

The subject of internal and external validation of research findings was discussed only briefly. C. Zimmerman, who had previously noted his lack of faith in validation studies, explained that, once sentencing guidelines are implemented, they no longer are descriptive. Sparks mentioned that any validation study must incorporate prosecution policy regarding plea negotiation recommendations. Zalman remarked that the Philadelphia project was a good example of what Sparks was talking about; Philadelphia had first conducted a plea negotiation study and then developed sentencing guidelines.

C. Communicating with Advisory Board: Sandra DiIlio, Moderator

DiIlio began this session by stating that sentencing guidelines project staff must perform five tasks for their advisory boards if the project is to succeed: (1) offer basic statistical information; (2) explain the complexity of the problem; (3) explain the large amount of work expected from the advisory board; (4) persuade the board to trust staff judgment; and (5) prod the board to make decisions themselves.

Smaby, speaking as an advisory board member of the Minnesota Sentencing Guidelines Commission, concurred with and expanded upon DiIlio's comments by saying that Knapp and Parent helped to ensure the project's success by effectively explaining to the board study "concepts" and secondarily "research methods". Kramer explained that his experiences in communicating with an advisory board have been somewhat different. His advisory board was familiar with the concept of sentencing guidelines yet wanted the project to offer a new approach to guidelines development. Kramer stated his belief that guidelines projects nationwide are going overboard with intricate statistics; nevertheless, he still supports the need for using some data collection and analysis. He mentioned some difficulty in convincing his board of the need for some data collection. Kramer described several communication problems in dealing with his board, including his task of becoming familiar with the personalities on the board, assembling Commission members from across the state for meetings, and having to assume leadership in the Commission meetings in order to expedite the work of the Commission and to comply with the statutorily mandated deadline. Smaby agreed with Kramer's decision to assume the leadership role in Commission meetings if the work is not being completed on schedule. She added that elected officials who serve on the Commission can cause special communication problems because of the limited amount of time and attention they typically have to offer.

Montero then asked the judges present what issues they would be interested in if they served on an Advisory Board. Judge Scholz replied with several specific questions of current interest to him. First, he asked whether illegitimate disparity had been discovered. Kramer replied no, while Knapp and Zalman reported yes. Scholz then stated that he wanted to be convinced that sentencing guidelines reform is needed. Dillio replied that sentencing guidelines can be the mechanism to prevent legislatures from eliminating judges' discretion through the imposition of a mandatory sentencing scheme. Scholz responded by saying that he likes the idea of sentencing guidelines, but wondered why the provision for appellate review was not an adequate safeguard against disparity. Scholz asked for examples of empirical studies which demonstrated that appellate review does not remedy the problem of sentencing disparity. Zalman said he knew of studies which have shown that appellate review does not greatly decrease sentencing disparity.

D. Guidelines Development: Marvin Zalman, Moderator

Zalman began this session by saying there is no clear cut way to move from data findings to sentencing guidelines. He did offer four issues which must be addressed in this process: (1) selection of variables to be used; (2) assignment of weights and subcategories to the variables; (3) selection of guidelines format; and (4) composition of the factors. He then addressed the role of mitigating and aggravating factors (regarding offender and offense characteristics) in the development of sentencing guidelines. He explained that in the Michigan Project, the goal is to use these factors to establish benchmarks. Sparks commented that he felt that the extent of departure from the guidelines is more important than the frequency of departures. Gelman remarked that he is personally against allowing sentencing "just outside" the guidelines, as opposed to a substantial deviation, because this practice can greatly undermine the effectiveness of the guidelines. Sparks strongly disagreed with Gelman's viewpoint.

Friday, April 18

III. IMPLEMENTATION, EVALUATION AND MONITORING

A. Public Relations: Jan Smaby, Moderator

Smaby, Chairperson of the Minnesota Sentencing Guidelines Commission, began this session by describing her experiences with public relations for the state's guidelines effort. These experiences centered upon a campaign to influence the broad range of individuals who would be impacted by the adoption of sentencing guidelines. She prefaced her remarks about Minnesota's public relations effort by noting that she felt Minnesota was a progressive state and therefore its citizens initially more receptive to proposed changes in the state's sentencing structure than other states' citizens might be. The Minnesota Commission operated under an open meeting law and, expanding upon the law's intent, the Commissioners traveled across the state to publicize their effort through public hearings and meetings with local criminal justice officials. The Commission asked for input at these meetings but received very little.

Another phase of the Commission's public relations effort focused on identifying key legislators and other "powerful" individuals, getting them to commission meetings, and trying to incorporate their concerns into the guidelines development process. The Commission sought the advice of these individuals on sensitive issues relating to the guidelines development, thereby attempting to alleviate problems which might occur later when it came time for legislative approval. This phase of public relations also helped to obviate criticism that the Commission operated in a vacuum. Smaby noted that the Commission also lobbied newspaper editorial boards. The favorable response made by these boards was important in developing broad support for the guidelines package.

The Commission completed a draft of the sentencing guidelines thirty days prior to the due date in order to circulate the draft among judges, district attorneys, public defenders, and others. This move was acknowledged to be risky in that it could have become the vehicle to help consolidate an opposition. The draft was met with hearty debate. In retrospect, the Commission felt this move was one of the most important steps taken in securing guidelines approval. Two formal legislative hearings on the guidelines were then held.

Sparks complimented the Minnesota Commission's public relations campaign noting in particular its impressive presentations to the three groups whose daily functions would be most affected by the implementation of guidelines, i.e., judges, prosecutors, and public defenders. Sparks warned that a project's overall effort could be undermined by ineffective public presentations which leave the public with a negative impression of the guidelines project. He pointed to particular problems which can occur with such presentations, including the use of poor quality printed materials to explain the guidelines, ineffective speakers making the presentations, and too complex an explanation of the guidelines matrix which can end

up confusing the audience. At this point, Montero asked Sparks if the degree of acceptance by judges in particular was a function of how much discretion the judges stand to lose. Sparks replied that he did not believe so.

Smaby facilitated discussion on a second type of public relations experience in sentencing guidelines development by soliciting comments from projects that did not have to mount a large scale campaign in order to sell the idea of sentencing guidelines. Freeland responded that in Washington the judges developed their own guidelines in an effort to appease legislative criticism of disparity. This form of public relations was more reactive than proactive. Freeland noted that the guidelines developed by this process demonstrate the little commitment, preparation, and support for guidelines among the judiciary. The judges, he felt, want to keep the existence of the guidelines as quiet as possible and some have been reluctant to respond to requests for information on the guidelines. Freeland predicted that the lack of public relations associated with the development of these guidelines might cause the Governor and Legislature to act on sentencing reform from outside the judiciary.

Following Freeland's remarks, Mosley asked when public relations efforts should begin for those states whose judiciaries initiate an internal guidelines development effort. Surles added that the South Carolina project has not yet gone to the news media with information on its project because nothing official has been agreed to or acted upon by those directly involved. Surles added that presently the project is conducting a public relations campaign among judges, prosecutors, and others.

A third type of public relations experience was described by Rubenstein who explained that, in Alaska, the impetus for the development of sentencing guidelines i.e., the active promotional effort, came from the public. This popular mandate came as a consequence to a study that documented sentencing disparity among different groups. Surles felt a somewhat similar situation existed in South Carolina where a certain newspaper journalist is seeking to use the work of the guidelines project to document his perceived disparate sentencing practices of a particular judge. Surles reported that the project is trying to prevent any adverse publicity which might jeopardize the positive approach taken by the state's judges in ordering the development of guidelines.

The session concluded with discussion of projects' public relations among judges, prosecutors, and defense attorneys during guidelines implementation. Smaby asked whether judicial council guidelines projects which have excluded prosecutors and defense attorneys in the development and implementation process had received negative reaction from the prosecutors and defense attorneys. Freeland responded by saying Washington prosecutors and defense attorneys did not question the value of guidelines but objected to their cloaked existence. Zalman reported that the Michigan Attorney General has been won over to the use of guidelines but that lack of support by defense attorneys has caused some concern among guidelines supporters. C. Zimmerman noted the Denver experience in which one excluded party, the District Attorney, later helped to

eliminate the use of the guidelines. DiIlio described her experience in Philadelphia in which the prosecutors and defense attorneys were presented the new guidelines one week prior to their implementation. She said the public defenders were outraged that they had not been consulted while the prosecutors showed little concern about the change. Rubenstein warned other projects not to expect across the board support by prosecutors or defense attorneys even if a representative from either group states his or her support. He said individual judges are the key to successful implementation of sentencing guidelines.

B. Monitoring Methodologies: Richard Sparks, Moderator

Sparks began this session by proposing several issues that he believed guidelines projects should consider when developing a monitoring methodology: (1) What effects do guidelines have on sentencing patterns?; (2) what difference do they make in sentencing distribution?; (3) what is the extent of compliance by those using the guidelines?; (4) how do guidelines effect the rest of the criminal justice system?; (5) how does the system effect the guidelines (for example in prosecution policy)?; and very importantly, (6) what is the mandate concerning monitoring and possible modification (for example, if guidelines are developed in response to the threat of legislatively imposed mandatory sentencing, the mandate for evaluation and/or modification would most likely be quite weak)? He then asked Knapp to comment on the Minnesota Commission's plans for monitoring. Knapp explained that Minnesota probation officers will use the guidelines in determining sentencing recommendations. The guidelines project will receive a copy of the recommendation. The project will also collect information from the new statewide court information system. Knapp has been working with the developers of the information system for the purpose of coordinating their efforts with the needs of the Commission. Oldroyd commented that few criminal justice systems employ a coordinated or "systems" approach in the development of information systems. Montero agreed, commenting that he felt Virginia was "too far down the line" to make the necessary adaptations to facilitate guidelines monitoring. Knapp characterized the Minnesota project's monitoring effort as small but consistent. It will collect basic demographic and sentencing information. Staff had originally planned to extract factors used by judges in sentencing by examining the transcript of each case; however, plans now call for the judges or their clerks to use forms to indicate why a sentence was given. Knapp expressed concern that the task of convincing judges to comply with this forms procedure could be the most difficult aspect of the monitoring effort. McCalmont remarked that Rhode Island clerks are required to produce a short report on each disposition and felt that this report could, perhaps, be adapted for their data collection effort. Sparks asked Knapp whether the sentencing recommendations formulated by Minnesota probation officers will include input from the prosecution and defense. Knapp said they would and added that the probation officers appear to be accepting the new forms well.

Discussion on monitoring methodologies moved from the experience of the Minnesota project to the experiences of other state projects. Oldroyd noted that Utah's probation department uses a uniform list of variables when offering recommendations to judges and that this process is conducive to monitoring. Kramer said that the Pennsylvania project plans to use the state's court information system to help it monitor the effect of the guidelines. He noted that it will take considerable effort to clean up the system's data and adapt it to the Commission's use. Kramer also noted that the project is working with the probation office to explain the work that will be required from them. The probation officers are greeting these new procedures with some anxiety.

Zalman then suggested that the group focus on two questions: (1) what data and what methods should be used in monitoring?; and (2) what are the policy issues in evaluation? McCalmont remarked that in Rhode Island pre-sentence reports are rarely required and therefore her project lacked a major source of data. Rubenstein noted that, in Alaska, earlier attempts to ask judges or clerks to complete monitoring data forms had failed. He has since asked the Chief Justice to lend special support to this request but the impact of this support is not yet clear. Calpin reported that the Chicago guidelines project also asked the chief judge for added support. Dillio noted that Philadelphia judges complete the guidelines forms in 80% of the cases. Montero asked the attendees whether they felt prosecutors and/or defense attorneys should be allowed to challenge the facts contained in a pre-sentence review. Knapp answered Montero by explaining the Minnesota procedure which allows prosecutors and defense attorneys to review pre-sentence investigations with judges ruling on the admissibility of disputed facts.

Ostrom ended the discussion by expressing his belief that there are two types of guidelines monitoring: (1) monitoring the mechanics of the process; and (2) monitoring the real or social impact of the guidelines. He thinks the second type of monitoring does not receive much attention.

C. Impact Analysis and Projection: Kay Knapp, Moderator

Knapp began the session by suggesting several stages for impact analysis including the impact of guidelines before implementation and assessing the impact of guidelines after implementation. Oldroyd commented that the Utah project had built a monitoring procedure into its guidelines project which was working well. He noted the particular interest in Utah and elsewhere concerning prison population statistics and added that the Utah guidelines monitoring process is a valuable tool for making decisions for regarding new prison construction. Montero questioned the use of prison population statistics for guidelines projects and asked whether attendees felt that guidelines sentence lengths should be adjusted downward when legislatures will not authorize money to build facilities to house the prison population. Oldroyd suggested that greater emphasis might be placed on community based corrections. Freeland commented that judges are already reducing sentences because of large prison populations. Knapp continued the discussion on prison populations by saying that Minnesota has the only guidelines project

that has assumed a full prison population in a statutorily sanctioned sentence guidelines formula. She acknowledged the problem with this formula but felt that the positive aspects of the guidelines reform outweigh this deficiency. She went on to say that most guidelines affect only one half of the sentencing decision, i.e. the length of the sentence, and not the decision of whether or not to incarcerate. Kramer noted that California is presently considering a guidelines structure that would assist judges when making decisions on whether or not to incarcerate.

Blumstein warned those making prison population projections to adjust their figures to account for shifts in overall population demographics. He predicted that the post war baby boom that has inflated prison population statistics should peak around 1990. He noted two key variables bearing on prison population projections: (1) the percent of convicted people who go to prison; and (2) the length of sentence a convicted person will serve. Rubenstein redirected the discussion on prison populations by explaining that the Alaska project had discovered a correlation between longer prison sentences and less probation and active support for mandatory or determinate sentencing. He said he was suspicious of determinate sentencing proposals because they might be an excuse to justify prison population increases. Oldroyd and Smaby also noted that wars and economic depressions usually reduce prison populations while recessions increase them.

Knapp then asked the group to comment on the effect of plea bargaining on prison populations. Oldroyd cited an INSLAW study that concluded that plea bargaining causes a greater amount of time served by the prison population as a whole. This finding was explained by evidence that showed that aggravating circumstances can negate concessions made to the offender during plea bargaining and result in an increase in sentence length. Knapp said she did not fully agree with these findings.

Sparks asked for discussion on how multiple charges are handled by guidelines projects. Knapp observed that prosecutors don't like to drop charges because they want to build up the defendant's criminal record for use against that defendant in future cases. Oldroyd asked the group for discussion on the use of consecutive sentencing. Knapp replied that this was an important issue with the Minnesota project and staff decided to set strict guideline conditions concerning the use of consecutive sentencing. Knapp also cited the problem of dealing with probation and parole revocations due to technical violations. She said the Minnesota project had no mandate to deal with this problem and therefore it is not covered by the guidelines. However, the project has "strongly suggested" procedures that judges should follow in these instances. McCalmont asked Knapp how this process will be monitored. Knapp replied that, unfortunately, a new form had to be created to capture this information.

IV. SPECIAL ISSUES BEARING ON SENTENCING GUIDELINES PROGRAMS:
John Kramer and Susan McCalmont, Moderators

Although this session was scheduled to allow for discussion on various aspects of sentencing guidelines, the group's interest quickly centered on the role of mitigating and aggravating factors used in calculating a sentence. Rubenstein said that this was a big issue with the Alaska project. The project decided not to formalize these factors because they were seen as detrimental to the effort to persuade judges to use guidelines. He said he feels strongly that these factors should not be formally included in the process. Nelson agreed with Rubenstein and added her belief that judges might pick out factors of specific interest and use them indiscriminately. Smaby related that the Minnesota Commission felt it necessary to make special provision for white collar criminals in that they rarely had a past criminal record. She said the Commission wanted to offer guidance in decisions to depart from guidelines such as in the case of white collar criminals. Zalman noted that white collar or "major economic" crime is a special case in the Michigan guidelines. Rubenstein reiterated his belief that guidelines should not specify special conditions for departure. To this line of discussion, Calpin commented that he sees a dichotomy of philosophies; one in which judges' discretion is trusted (Alaska) and one in which judges' discretion is not trusted (Minnesota). Knapp said that the Minnesota legislature, through its mandate, demonstrated that it does not trust the judges' discretion. Rubenstein clarified his definition of mitigating and aggravating factors as those that place the sentence not only outside of the grid box or cell but outside of the grid entirely. Judge Scholz expressed his concern over how these factors would be applied under a determinate sentencing structure such as that of Illinois. Smaby offered a warning to the group about blindly accepting ABA standards on these factors. She said she feels the ABA standards are too vague and could be used to justify departure from guidelines in most cases. Smaby remarked that judges can use the established mitigating and aggravating factors and also use their own subjective factors. She also noted that the set of these factors used in Minnesota was subjectively established by the Commission. Kramer explained that, in Pennsylvania, these factors are loosely established by law and that guidelines could be overridden under existing law. He noted that present appellate review courts are asking for written explanations of why a sentence was given and that this practice may lead to the development of common law standards regarding mitigating and aggravating factors. Smaby described the Minnesota criminal code as very thorough in detailing these factors but that the Commission's mandate empowers it to set new factors.

Judge Ballif offered an explanation of how he formulates a sentence under the Utah guidelines. First, he independently arrives at a sentence. He then compares this sentence with that shown on the guidelines grid. If these sentences differ, he reexamines his original sentence. He said he believes that Utah's "general" mitigating and aggravating factors are adequate.

Discussion on mitigating and aggravating circumstances became more focused when Kramer asked the group for ways to address racism in sentencing practices. Rubenstein said that the Alaska project incorporated minority viewpoints when it decided to use socio-economic factors to adjust sentences within a box or cell on the guidelines grid. Montero questioned this procedure by suggesting that racial and socio-economic factors are inextricably linked and that sentencing disparity might not really be tied to racism. Rubenstein stated that Alaska's study had clearly found sentencing disparity according to race and not just socio-economic factors. Oldroyd noted that Utah also uses socio-economic factors as mitigating and aggravating factors. Smaby said that the Minnesota Commission did not want women to receive special consideration in sentencing based on whether the women had dependent children. Sparks, Martorana, and Kramer engaged in a discussion on interpreting the social impact of using mitigating factors. They left unanswered the question of whether a mitigating factor gives a "break" to one person or deals with a whole class of offenders in a disparate way.

Judge Scholz stated his belief that Illinois law mandates disparity in sentencing but not disparity in punishment. He cited Illinois statute that instructs judges to sentence with the intent to help "restore a person to useful citizenship." The statute's intent is that a sentence serve the interests of the offender and the community. He felt that sentencing guidelines might push out some good judges who are fulfilling the Illinois mandate. He observed, finally, that perhaps guidelines projects are trying to make an exact science out of an inexact one. He implored guideline developers to be realistic in their work and to look at the big picture.

APPENDICES

CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT

SENTENCING GUIDELINES WORKSHOP ATTENDEES

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April 17-18, 1980

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SENTENCING GUIDELINES WORKSHOP
AGENDA
PAGE TWO

- 6:00 - 7:30 P.M. AMERICAN UNIVERSITY RECEPTION
Patio Room
- 7:30 - 9:00 P.M. AMERICAN UNIVERSITY DINNER
Patio Room
- 9:00 - 10:00 P.M. SMALL GROUP DISCUSSIONS ON TOPICS OF SPECIAL INTEREST
TO ATTENDEES
Terrace Room

Friday, April 18th

- 8:00 - 8:30 A.M. COFFEE AND PASTRY
Terrace Room
- 8:30 - 12:00 A.M. IMPLEMENTATION, EVALUATION AND MONITORING
- 8:30 - 10:00 *Public Relations; Strategies for working effectively
with the:*
- *judiciary*
 - *legislature*
 - *media*
 - *court*
 - *prison officials*
 - *probation officials*
 - *public*
- Training those who use guidelines*
*Criticisms of guidelines programs which jurisdictions
have encountered*
- 10:00 - 11:00 *Monitoring Methodologies*
- *evaluating guidelines programs*
 - *determining the need for modification*
- 11:00 - 12:00 *Impact Analysis and Projection*
*Methodologies and statistical approaches for projecting
impact of guidelines on:*
- *prison populations*
 - *probation populations*
 - *plea bargaining*
 - *internal court system adjustments in caseload
and other processes*
- Experiences of jurisdictions with accuracy of projections*
- 12:00 - 12:30 P.M. CHECKOUT
- 12:30 - 1:30 P.M. LUNCHEON
Patio Room

CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT
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SENTENCING GUIDELINES WORKSHOP
April 17-18, 1980

*Terrace Room
Linden Hill Hotel
Bethesda, Maryland*

WORKSHOP AGENDA

Thursday, April 17th

1:00 - 2:00 P.M.

INTRODUCTION OF ATTENDEES

Description of each project represented

- *project mandate*
- *current stage of activity*
- *summary of research approach*
- *topics of particular interest for discussion at workshop*

2:00 - 6:00 P.M.

GUIDELINE RESEARCH AND DEVELOPMENT: ALTERNATIVE MODELS AND METHODOLOGIES

2:00 - 3:00

Past Guideline Methodologies and New Approaches

3:00 - 4:00

Selected Research Issues

- *sample selection*
- *dealing with regional differences in sentencing patterns*
- *measurement of legitimate vs. illegitimate disparity*
- *internal and external validation of research findings*

4:00 - 5:00

Communicating with Advisory Board

- *educating advisory board to understand statistical findings and to understand questions raised by the research*
- *stimulating advisory board to act on study recommendations*

5:00 - 6:00

Guideline Development

- *role of staff in structuring guideline development*
- *making the transition from imperial sentencing research to the development of working guidelines*
- *policy factors that should be considered in guideline development*

SENTENCING GUIDELINES WORKSHOP

AGENDA

PAGE THREE

1:30 - 2:30 P.M.

SPECIAL ISSUES BEARING ON SENTENCING GUIDELINES
PROGRAMS

- *Legal issues relating to data collection and analysis*
- *Appeals or other litigation which have occurred at the state or local level*
- *State or federal decisions or legislation which may affect guideline development*

2:30 - 4:00 P.M.

OPEN DISCUSSION OF ISSUES OF SPECIAL CONCERN TO ATTENDEES

4:00

ADJOURNMENT

END