Maryland State Commission on Criminal Sentencing Policy
June 19, 1997

Commission Members in Attendance:
The Honorable John F. McAuliffe, Chairperson
Judith R. Catterton, Esq.
Ms. Roberta Roper
Walter E. Chase, Sr.
Dr. Charles Wellford
William Kelley for LaMonte E. Cooke
Senator Delores G. Kelley
Delegate Joseph F. Vallario, Jr.
Delegate James M. Harkins
Delegate Kenneth C. Montague, Jr.
The Honorable Howard S. Chasanow
The Honorable Joseph H.H. Kaplan
The Honorable Alexander Wright, Jr.
Carolyn Quattrocki, Esq.
Stephen E. Harris, Esq.
John Lang for Secretary Bishop L. Robinson
Marna McLendon, Esq.
Adam Gelb
The Honorable Andrew L. Sonner, Consultant

Staff Members in Attendance:
Linda M. Schuett

Announcements

The Honorable John F. McAuliffe, Chairman, called the meeting to order. He asked for any additions or corrections to the minutes of the meeting held on May 13, 1997. Hearing none, the minutes were approved.

The Chairman announced that the National Association of Sentencing Commissions will be holding a conference relating to sentencing guidelines at the Breakers Hotel in Palm Beach, Florida, on July 20 - 22, 1997. Three Commission members have committed to attending the conference. If any additional members are interested, they should speak to the Chairman today so that appropriate arrangements can be made.

During the months of July and August, 1997, the various subcommittees will continue their work. Judge McAuliffe noted that, in his capacity as chair of the subcommittee on guidelines, he has requested all states to forward copies of their guidelines to him. Senator McCabe has been in touch with George Keiser at the National Institute of Corrections, and that subcommittee is moving forward.

The Chairman discussed potential meeting dates for September, October, and November, noting that one will probably be a public hearing. After discussion, the dates of September 26, October 24, and November 25, 1997 were chosen.

Judge McAuliffe stated that Judge Raisin was unable to attend today's meeting, but that she had renewed her

invitation for any member to attend a judicial ride along with a judge of the District Court.

The Chairman stated that the letter from Ms. Roper distributed at the last meeting will be addressed later in the day, time permitting.

Judge McAuliffe asked Mr. Gelb to comment on the report issued by the Task Force on Drug Addicted Offenders. A copy of the report was distributed to all members. Mr. Gelb noted that the report is based on two major premises: 1) 60% of all cocaine and heroin is consumed by those on parole or probation, such that a reduction of that consumption would significantly reduce crime; and 2) the length of a drug offender's stay in treatment is critically important to success. The report calls for the statewide adoption of an approach called the Coerced Abstinence Seamless System. No county would be permitted to use public funds unless the system were in place. The system calls for swift, certain sanctions for every violation, as well as a treatment response for every violation. The sanctions would be standardized. The treatment would be individualized.

Mr. Gelb stated that the Task Force requested input from federal agencies. Twenty one federal officials attended a recent meeting, and they are very excited about the program. There will be a conference in October or November relating to the guidelines and how to implement the system in local jurisdictions.

Judge McAuliffe stated that Faye S. Taxman, the Task Force Chair, is willing to work with this Commission in connection with any guidelines formulated. Senator Kelley expressed her approval of the system, but her concern that it not supplant funds now used for such programs as early education. She also questioned whether a legislative package may be required to implement the system, so that, for example, drug offenders are not committed to jail for a violation of probation relating to drug use. Mr. Gelb stated that a legislative package may be necessary. He also noted that the system will be supported by $1.5 million in new state funding for the pilot program in Baltimore City.

The Chairman asked Judge Sonner to introduce the first speaker, Prof. Michael Tonry. Judge Sonner noted that Prof. Tonry is a prolific writer, in areas very germane to the work of this Commission. Prof. Tonry used to teach at the University of Maryland School of Law. He now teaches at the University of Minnesota, and elsewhere. If some of Prof. Tonry's theories could be put into practice, the world would be a better place.

Professor Michael Tonry

Prof. Tonry thanked Judge Sonner for his introduction. Prof. Tonry stated that his presentation would be informal, and he encouraged questions at any time. He planned to address the history of how sentencing guidelines developed in the 1970's and 1980's and what the original guidelines were like, current guidelines, an overview of different sentencing systems in this country and elsewhere, and the type of guidelines that he would develop if granted the power to do so.

Prof. Tonry noted that he spoke to the District of Columbia Superior Court Guidelines Commission about ten years ago. About 15 years ago, he worked with Judge Marshall Levin and an ad hoc committee on Maryland guidelines. There is no literature or institutional history for sentencing commissions, so it is important to network with other commissions so as not to repeat what has already been done.

The earliest guidelines, in the 1970's, were about fairness to defendants and reducing disparity, including racial biases or patterns and gender disparity. They were not about crime victims, the reduction of crime, or being tough on crime. From those guidelines, we learned some lessons. For example, non-voluntary guidelines do in fact reduce disparity in sentencing, including disparity based on racial grounds, for those defendants who are sentenced pursuant to the sentencing guideline grid. On the other hand, numerous conditions that may be relevant to an appropriate sentence are excluded from consideration, such as drug

addiction, childhood history, parental status, and employment status. For some of these considerations, particularly stable employment status and stable family status, the thinking was that only the middle class would receive reduced sentences if these considerations were taken into account. However, the middle class comprises but a small percentage of those in the criminal justice system. If minorities make up the bulk of those in the system, arguably the judge should consider, for example, whether the female defendant is the sole support for her children. Excluding considerations such as these backfired in some ways.

After putting sentencing guidelines into use, disparity in sentencing remained, but in less obvious ways. For example, minorities continued to be sentenced at the high end of ranges set forth in the guidelines and whites were typically sentenced at the low end. Minorities were less often placed into diversionary programs. And, since it has long been true that minorities make up approximately 42-45% of those arrested for serious crimes, minorities were five to six times more burdened by the so-called three strike rules, whereby penalties were increased based on the number of prior strikes.

Gender disparity was a sleeping issue. It had been documented by the 1970's that female defendants were punished less severely than male defendants. There was discussion about having separate grids for males and females or using the female standards for males. The ultimate decision was to use one grid for both males and females and to use the male sentencing standards for both males and females. The result was to systematically increase penalties for females. However, sentences for women tend to be at the bottom of the range set forth in the grid and women are more likely to be placed into diversionary programs. The reason for this is that judges want to take into account the female's status as the nurturer and provider for children. Judges likewise want to consider functioning family issues for men.

With respect to current guidelines, fairness to defendants, while still a factor, is no longer the motivating force. Now, money issues and the ability to predict the need for prison beds is at the forefront.

Senator Kelley asked the speaker to address the issue of geographical disparity. Prof. Tonry responded that crime is demographically motivated. Rural counties tend to be tougher on crime than urban counties. The philosophy of the guidelines is that a defendant is a citizen of the state and should therefore be sentenced similarly regardless of the nature of the county where he or she is sentenced. Nonetheless, geographical differences must be considered, for if the guidelines differ significantly from what judges and lawyers in the system believe is fair, then ways to subvert the guidelines will be found.

Judge Wright questioned how the guidelines take geographical disparity into account. Prof. Tonry stated that presumptive guidelines have the force of law. No jurisdiction has created different guidelines for different parts of the state. All are statewide. Most have a way for the judge to depart from the guidelines for reasons stated. If a court in a particular county departed from the guidelines for the stated reason that in that particular county higher sentences are given for the particular offense, an appellate court would need to decide whether that stated reason is valid or appropriate. However, subversion of the guidelines is generally less obvious. Charging patterns change - i.e. more charges are brought for the purpose of increasing the potential sentence. The number of guilty pleas increases.

Prof. Tonry noted that the federal guidelines are the only guidelines that have the relevant conduct or real offense standard. No state guidelines include this notion. There are one or two federal district court judges who overtly subvert the federal guidelines by, for example, telling the probation officer what to say in the pre-sentencing investigation report so that the report matches the sentence to be imposed.

Senator Kelley questioned how charging practices and the like are affected in jurisdictions with descriptive guidelines. Prof. Tonry stated that, for example, Florida and the former Pennsylvania guidelines were weak and allowed substantial latitude in sentencing. When this is true, there is no reason to fiddle with the number of counts brought or plea bargaining.

Ms. McLendon questioned the intellectual dishonesty involved. The speaker responded that most judges and lawyers believe they should enforce the law. Although sentencing and various practices nudge in one direction or the other in certain counties with respect to certain crimes, outright disobedience to the mandates of sentencing guidelines is rare. Over time, as new judges enter the system, the guidelines become the only system known and less nudging occurs.

Ms. McLendon questioned why it is healthy not to take geographical differences into account. Prof. Tonry responded that the principal of equal treatment under the law is a powerful and basic belief in this country. On the other hand, we also believe that communities are important and that they should be autonomous. The guidelines place these two principals squarely in conflict.

Prof. Tonry stated the opinion that the federal guidelines will eventually need to change. The federal guidelines are based entirely on the concept of fairness, without sufficient recognition of other relevant factors.

Mr. Harris questioned the effect of the guidelines on the defendant who wishes to go to trial when, where that occurs, there is no room for manipulation or adjustment of the sentence. Prof. Tonry stated that this presents a difficult problem. Our sentencing guideline systems do encourage guilty pleas. Various European methods are more overt about giving credit for cooperation or pleading guilty. Despite the problem raised, all sentencing commissions have determined that indeterminate sentencing has lost its legitimacy.

Minorities are more likely to be held in jail pre-trial in some states. The reason for this is that the standard is whether the defendant is likely to appear for trial, and minorities are more likely to be unable to meet the conditions that make an appearance likely. Studies show when a defendant is held in jail pre-trial, the likelihood of post-trial jail time is greater, even accounting for time served.

Prof. Tonry stated that the concerns that motivate current guidelines include the need to control growth in prisons, the need to make the number of required prison beds predictable, and the need to reduce and prevent crime. None of the current guidelines has been in effect long enough to evaluate their success. However, it does appear that North Carolina has cut in half the number of non-violent offenders who are sentenced to prison and increased by 1/4 to 1/3 the number of violent offenders sentenced to jail. The system appears to be working.

The speaker then turned to the issue of the types of systems that now exist. He noted that although the federal system was supposed to be presumptive, it is routinely referred to as mandatory. Biographical data is rarely relevant and, thus, does not justify a departure from the guidelines. It is very difficult for a federal judge to depart from the guidelines in any legal fashion. Again, it is the only system with the relevant conduct/real offense standard. Plea bargains fall outside the guidelines since there is no appeal.

North Carolina has mandatory minimum penalties for violent crimes. In truly exceptional cases, the judge can make special findings in order to sentence the defendant below the mandatory minimum. The practice thus far is that the judges are within the guidelines far more often than not and departures are rare. Sentences for violent crimes are now two to three times higher. Significant funds have been allocated to community programs, and those programs are built into the guidelines.

Minnesota, Oregon, and Washington are in the middle. The guidelines are moderately strong, but departures from them are easier. The Minnesota guidelines do not address those offenses for which the sentence is less than one year. The judges from those states appear to be relatively happy with the guidelines.

Delaware has legally voluntary guidelines, from which there is no appeal. There is no grid - it is more like a phone book. There are five levels of types of restriction, ranging from prison down to house arrest and

probation. Any one sentence may include various amounts of time within the various levels. There is no literature about the success of the guidelines. However, guidelines of this nature are unlikely to work elsewhere. Delaware had 18 judges when the guidelines were created, and the guidelines were created by five of them. Most of the remaining judges are now new to the bench, and they accept the guidelines.

In Michigan, the guidelines are voluntary, without legal force. They were created by judges.

Delegate Montague stated that some research reveals that a release from prison that corresponds to the optimal prison time level for that individual defendant may reduce recidivism. The speaker noted that 2/3 of those in prison for the first time do not return. It is small property offenders, such as shoplifters, who are most likely to be recidivists.

Senator Kelley stated that Maryland has moved in the direction of taking victims' rights into consideration. She questioned how this is treated in the various guidelines. Prof. Tonry stated that there are no guidelines that incorporate victim issues into the guidelines.

Prof. Tonry stated that our criminal justice system is enormously wasteful - so wasteful as to be bewildering. It is also cruel. This country has a history of imposing long penalties. Other countries are not the same. In Germany, for example, any sentence over 15 years is presumptively violative of human rights. In Europe generally, about one to two percent of the prison population is serving a sentence of five to ten years. In this country, 50% of the prison population is serving a sentence of ten years or longer. On the other hand, this country is fairly lenient in terms of sending the defendant to prison in first place. Countries like Finland, Norway, Holland, and Sweden use prison far more than it is used here, but for far shorter time frames. There, it is not at all unusual to have sentences of one week or two months.

Public opinion polls often show that the public believes that judges are too lenient in sentencing, that the public wants serious crimes to have consequences, and that more funds should be spent on treatment programs. Some of the responses, however, are knee-jerk reactions to out-of-context questions. More textured questions often lead to different results.

Prof. Tonry believes that today's guidelines should be very confining in terms of the upper limits of sentences allowed for particular crimes. Guidelines that provide for a strong maximum sentence allow for predictability of the need for prison space, control disparity, and assure proportionality. He would allow for departures upward from the maximum, but only in the rare case. He believes that most judges wish to depart downward, in any event. He would then provide for a wide range below the maximum, with loose minimums. The standard for departing downward from the minimum should be far easier to meet than a departure from the maximum. He would allow judges to take family and other such considerations into account during the sentencing process. He would abolish all mandatory sentences, as was done in Massachusetts.

Judge Sonner questioned what Prof. Tonry would do with parole. Prof. Tonry responded that he would keep it. In days gone by, the thinking about parole seemed to be that it could not be trusted or that parole was somehow a dishonest process. Judge McAuliffe questioned how the retention of parole squares with the notion of truth in sentencing. The speaker responded that judges have complained in some states about their sentences being altered by parole practices. But judges have no ownership interest in the sentences they impose. Our system was created to allow for decisions concerning probation after imposition of a sentence by the judge.

Mr. Harris said that some judges now impose a sentence of 20 years, rather than ten, because they take in account the effect of parole. If under a new system the maximum sentence were ten years, how would the public react? Prof. Tonry stated that in Australia, truth in sentencing meant the elimination of good time,

and the prison population increased by 25%. In Canada, when they saw what happened in Australia, they attempted to educate the judges so this would not happen. After several years, however, there were problems.

Ms. McLendon questioned whether any courts impose a wide range of sentence and allow parole to determine the appropriate timing of the release. Prof. Tonry stated that the states of Washington and California have allowed sentences like one to 25 years, with parole deciding the time for release within that long range.

Ms. Roper stated her belief that victim impact statements should be addressed in the guidelines. Prof. Tonry stated that he knows of no guidelines that have done this, but the guidelines could easily state that the statements shall be allowed and the judge shall give them appropriate weight.

The Chairman thanked Prof. Tonry for his marvelous and informative presentation. The Commission then took a break for lunch.

Dr. Charles Wellford - Recent Studies, Public Opinion Poll

Dr. Wellford stated that his subcommittee will report to the Commission in three areas: (1) the public opinion survey; (2) the effects of discretion and racial considerations on past sentencing; and (3) time-served estimates.

Dr. Wellford reported that the public opinion survey has been completed. He handed out the questions that were asked during the survey, noting that the questions were based on the questions used in North Carolina. He told Commission members that the only significance of the terms reverse and normal within the questions is to make the particular word bold, thereby signaling to the interviewer to put special emphasis on that word when asking the question. The survey was completed by the Survey Research Center at College Park. They interviewed 800 adults by telephone, using random digit dialing and ensuring that the persons reached were geographically diverse. Calls were made at various times during the day and early evening. If the participants asked questions, the interviewers were told to simply repeat the question. There was a high level of cooperation from participants. The data was received and processed just days ago, so there has not yet been time to analyze it. The subcommittee will produce a report analyzing the data by the fall. There is a 3-5% margin of error.

Senator Kelley stated her expectation that the public opinion survey can be used to focus on issues and to narrow the breadth of the issues to be considered by the Commission. Dr. Wellford agreed that the survey may be useful in this regard.

Dr. Wellford then addressed a 32-page handout, the first page of which is entitled "Individuals Sentenced Between January 1, 1987 and September 30, 1996 Using Single Count and Multiple Count Data." Pages two through twelve are charts reflecting the decision about whether or not to incarcerate analyzed on the basis of various factors, such as single/multiple counts, gender, race, etc. Pages thirteen through twenty eight are charts reflecting the length of incarceration based on similar factors. Table One at page 29 summarizes estimates predicting the incarceration decision between January 1987 and September 1996 using single count data only. Table Two at page 30 summarizes estimates predicting sentence length for the same months based on the same data. Page 31 is a chart that predicts the probability of incarceration for a hypothetical individual with mean values on all variables except race. It reflects that an African American defendant has a 78% probability of being incarcerated, that a Hispanic defendant has an 86% probability of being incarcerated, that all other defendants of various races and ethnic origins have a 73% probability of being incarcerated, and that a white defendant has a 68% probability of being incarcerated. The last page of the handout shows the probability of incarceration for whites versus non-whites, with whites having a 68%

probability of being incarcerated and non-whites having a 78% probability of being incarcerated.

Dr. Wellford stated that his subcommittee is waiting to receive documentation from the Department of Public Safety relating to time served estimates. The subcommittee expects to have a report ready by September.

Judge McAuliffe thanked Dr. Wellford and the subcommittee for the presentation and the fine work done. The Chairman then introduced Judge Jamie Weitzman, the next speaker.

Judge Jamie Weitzman - Drug Court

Judge Weitzman stated that her passion is the drug court. Prior to becoming a judge, she served as a prosecutor and as Chief of the Drug Unit. In both positions, she has seen the devastating impact that drugs have on our communities.

In Baltimore City, 85% of the cases are drug cases or, at a minimum, drug driven. However, drugs are not just a city problem. They are everywhere and they are everyone's problem.

In District Court, the judges rarely have the benefit of presentence information reports. Thus, in sentencing, little is known about the defendant's family, employment history, or drug history. A drug court helps to remedy this situation.

Ideally, a defendant needs to come before the Court within days of his or her arrest. In Baltimore City, the first step is to screen out violent offenders. Then, an assessment of the defendant is made concerning such issues as prior treatment, family history, and the like. A treatment plan is then devised - and it must be immediate, intensive, and sustained. Once in the program, the defendant returns to the Court approximately every two weeks so the judge can assess progress.

The program includes both sanctions and incentives. Without a drug court, violations of probation come to the attention of the Court months after the violation. In drug court, the judge sees the defendant often, so violations of probation are dealt with swiftly. The sanctions range from a simple admonishment by the court to shock incarceration. On the other hand, when defendants do well, they need to be rewarded. Rewards include verbal encouragement, clapping, pens or other tangible presents, and decreased supervision. Although clapping by the judge may seem unusual, it has a very positive effect on defendants. When defendants complete the program, there is a graduation event.

The drug court program builds in structural accountability by requiring that the defendant see the assigned probation officer often, be in court about twice monthly, and attend daily treatment. Still, the program would be doomed to failure if it only addressed drug abuse and addiction issues. The program also includes GED, parenting training, life skills training, job training, and job placement. As a drug court judge, she gets to know the defendants assigned to her better than do some of their lawyers. There is significant and prolonged interaction between her and the drug offender.

Senator Kelley questioned the cost of the program. Judge Weitzman responded that it costs about $3-4,000 per year per defendant. When contrasted with a $22,000 cost to incarcerate, the cost is amazingly low. In addition, almost all of the defendants are now employed taxpayers. There are numerous other cost savings as well. For example, the program has saved many babies from being born addicted to drugs. Many defendants give birth during the program, and these births are drug free. Judge Weitzman pointed out that the philosophy of the program could apply equally as well to other types of cases, such as juvenile, domestic violence, and alcohol cases.

Judge McAuliffe asked what happens to the charges when the defendant enters the program. Judge

Weitzman responded that the defendant must plead guilty and sign an agreement in order to enter the program. A sentence is then imposed and suspended pending successful completion of the program.

Judge Weitzman pointed out that, in addition to the drug court in the District Court for Baltimore City, there is a drug court in the Circuit Court for Baltimore City and a new drug court in the District Court for Anne Arundel County. The District Court program in Baltimore City has a 4% recidivism rate. Judge Kaplan noted that of the 140 in the program in the circuit court, 14 were later arrested for another offense, of which three were convicted.

Mr. Harris questioned how many of the defendants in the drug court program are destined for jail time. Judge Weitzman responded that the majority would go to jail in the absence of the program.

Chief Chase questioned how long it takes to complete the program. Judge Weitzman responded that successful completion of the program takes approximately one year. Chief Chase noted that it takes about 30 days to get into the program in his jurisdiction and then treatment lasts for only 30 days. Judge Weitzman pointed out that treatment is provided through outside providers. Treatment is usually not on an in-patient basis, although that is also now becoming an option.

Judge McAuliffe questioned how many judges participate in the drug court program. Judge Weitzman responded that there is one main judge in the District Court and four in the circuit court. It is important to the program that the same judge deal with the defendant throughout the program so that a relationship is built and maintained between the judge and drug offender.

The Chairman thanked Judge Weitzman for her presentation and expressed the Commission's appreciation for her coming to the meeting.

The Chairman noted that Ms. Roper had to leave and that the issues addressed in her letter would therefore be deferred. There being no further questions or comments, the meeting was adjourned.