Maryland State Commission on Criminal Sentencing Policy
December 12, 1996

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

Staff Members in Attendance:
Sandra Shane-DuBow
Linda M. Schuett

Announcements

Dr. Wellford stated that he would be the acting Chairperson for this meeting. Judge McAuliffe has the flu.

Dr. Wellford welcomed a new member to the Commission, Marna McLendon, the State's Attorney for Howard County, and Senator McCabe made some introductory remarks about her. He noted that she came through the police department before she obtained her law degree and that she will be a valuable member of the Commission. Ms. Roper agreed, stating that she had served on another committee with Ms. McLendon. Ms. McLendon replaces Judge Sonner as the representative for the State's Attorneys' Association.

The Acting Chair prompted the Commission's attention to the Committee assignments reflected on a handout.

Dr. Wellford then presented the minutes of the meetings held on September 12, October 3 and 4, October 17, and November 7, 1996 for the comments and approval of the Commission. With respect to the September 12 minutes, Ms. Roper noted that the reference at page seven to the 44 pieces of legislation should relate to legislation proposed by the Stephanie Roper Committee only. Ms. Roper also noted that the sentence in the first paragraph on page eight which states that "it has not been successful" in reference to the Victims of Crime Fund's collection of fines from offenders should be deleted. With respect to the October

17 minutes, the name "William Thelp" as the representative for LaMonte Cooke on the list of members attending the meeting should be changed to "William Kelley." With respect to the November 7 minutes, Mr. Cooke's name should be added to the list of those present. With those revisions, the minutes were approved.

Dr. Wellford stated that Commission members had several handouts relating to the federal sentencing guidelines. The handouts include five articles from the Washington Post during the October, 1996 time frame.

Federal Sentencing Guidelines

Dr. Wellford introduced the first speaker, the Honorable J. Frederick Motz, Chief Judge of the United States District Court for the District of Maryland, whose presentation would focus on the federal sentencing guidelines.

Judge Motz stated that he is a critic of the federal sentencing guidelines. He believes that there should be guidelines, but not mandates. The federal guidelines are more detailed than they need to be, but he could accept the detail if they were not mandatory in nature. Judge Motz believes that judges should be able to depart from the guidelines under appropriate circumstances, stating reasons for the departure and then having that departure reviewed by an appellate court for abuse of discretion. Human judgment is needed in the sentencing process, and it is impossible and unfair to micro-manage sentencing. The guidelines are an intellectual masterpiece, but it is wrong to eliminate discretion on the part of the sentencing judge. "Discretion cannot be destroyed. It can only be disbursed."

Some criticize the guidelines for being too harsh. In Judge Motz's view, that is a policy matter. It is not the role of judges to decide the appropriate lengths of sentences for particular crimes.

The federal system has abolished parole, but the abolition of parole will not be included in Judge Motz's presentation. Judge Motz is not opposed to the abolition of parole, but he recognizes that it can have a major effect on prison management.

Judge Motz believes in truth in sentencing. However, the federal guidelines do not promote that goal. Once a defendant is convicted, the sentencing is uniform. But an examination of how the conviction is reached reveals that there is no uniformity.

Judge Motz pointed out that sentences can be disparate based on which judge does the sentencing. However, sentences under this system can be disparate based on which prosecutor has responsibility for the case. The discretion is still there, but it rests with the prosecutor. First of all, the prosecutor has the discretion to decide whether to bring charges at all and, if brought, which charges to bring. The prosecutor also decides whether to seek statutory mandatory sentences/enhancements and, if so, which ones.

Judge Motz stated that a prosecutor can include "924 c counts." These relate to a federal statute requiring a five-year consecutive sentence for the first offense of a firearm being involved in the underlying offense. The mandatory sentence for a second offense is 20 years. So, if the prosecutor brings three of these counts, the defendant faces a 45-year minimum sentence even before consideration is given to the sentence for the underlying offense. Thus, the prosecutor's choice in terms of charging the defendant determines the sentence because the sentence is dependent on the charges initially filed and the ones to which the defendant pleads guilty. Once the offense level is determined, together with the defendant's criminal history, the grid tells the judge what the sentence is. Although the guidelines were premised on the notion that the prosecutor is duty bound to bring the harshest charge and then accept a plea to that charge only, that premise was never going to happen in reality.

Investigative agents also have discretion to affect the sentence. For example, an important issue may be how

many drugs were distributed. The investigator can keep an investigation going over a longer period of time to affect the determination of that issue and, therefore, the sentence.

Judge Motz examined why it is inappropriate for prosecutors to have this type of discretion under the federal sentencing guidelines. He said that judges are neutral - they are not angry with a particular defendant or part of the process of charging them. Also, judges are selected through a public process which, presumably, chooses people who carry characteristics of fairness. Judges, unlike prosecutors, would need to state their reasons on the record and in a public hearing for any departure from the guidelines. Finally, the decision of a judge would be subject to an established review process.

Despite his opposition to the federal sentencing guidelines, Judge Motz believes that the overall sentencing process is better since adoption of the guidelines than it was before. Prior to the adoption, Judge Motz recalls how frightening it was to consider that his sentences might be dramatically different from those of other judges.

Judge Motz believes that the guidelines represent rationality over reason. They are "smart," but they lack "wisdom" - they are alien to the common law tradition. The guidelines can make a judge "pound the wall" because they force the judge to do something unfair.

The guidelines are too expensive. They can be a wasteful use of resources. At times, they cause extended and detailed evidentiary hearings, which may affect a year or two of the total sentence. These hearings take up too much court time.

The guidelines have the appellate courts "tied up in knots." The appellate courts spend endless time on opinions relating to the federal sentencing guidelines because of the precedential value of those opinions. Different Courts of Appeal interpret the guidelines differently. The Supreme Court is taking about three cases a year relating to them.

Post conviction review is also time consuming. When a §2255 motion to challenge sentence is filed, the motion takes up a lot of court time. Also, when new decisions concerning the guidelines are filed, questions arise as to their retroactivity. If determined to be retroactive, prisoners must be re-sentenced.

Judge Motz gave another example of how the guidelines can result in unfairness. For example, if a murder occurs, and the charge brought by the prosecutor is one of second degree, and the defendant is convicted, the prosecutor may rely on evidence of pre-meditation in the sentencing phase. This turns sentencing into a first degree murder trial - but there is no right to trial by jury and a standard of preponderance of the evidence, rather than beyond a reasonable doubt, applies.

Senator Kelley questioned how trial judges can be given sufficient discretion under proposed guidelines. Judge Motz stated that the guidelines should not be overly detailed, that reasons should be required for a departure from the guidelines, and that appellate review should be available for abuse of discretion. In addition, the federal guidelines provide that if the guidelines already take a particular factor into account, as for example age, then the judge may not consider that particular factor. Proposed guidelines should not include a provision along these lines.

Mr. Gelb pointed out that there is a distinction between discretion and leverage. He stated the view that a prosecutor should have leverage regarding the nature of the charges, and he questioned how proposed guidelines could take away discretion on the part of a prosecutor. Judge Motz agreed that the prosecutor always has leverage - and should have discretion. If the prosecutor wishes to charge a defendant with first degree murder, then the prosecutor is put to the burden of proving that charge. But under the guidelines, the prosecutor can charge one defendant one way and another similarly-situated defendant another way and the

judge is powerless to correct the disparate treatment. If a judge sees this happening, the judge should be able to depart from the guidelines, state that the reason for the departure is the prosecutor's inability to explain the disparity, and let the appellate court decide whether the departure is an abuse of discretion.

Judge Chasanow questioned whether there are any statistics on deviations from the guidelines. The Executive Director stated that the percentage is 17% (with a 10% deviation for other reasons).

Judge Motz stated that sometimes the prosecution will cooperate with the "big-guy" offender, rather than someone in the chain. Then, the worst offender may get a better sentence, even though more culpable. Judge Motz tries to gauge the value of a particular defendant's cooperation.

Ms. Catterton stated the opinion that everyone in the process has discretion, including counsel for the defense. The issue is one of power. Judges cannot be disempowered to act.

Judge Wright stated that District Court judges may do 10-20 sentencings per day. He questioned whether sentencing can be done quickly under the guidelines. Judge Motz responded that sentencing cannot be done quickly under the federal sentencing guidelines. The size of the federal probation department has increased significantly to do what is needed under the guidelines.

The Acting Chairperson and Commission members thanked Judge Motz for his presentation, which was useful and informative.

Comparative Analysis - Federal And Selected State Sentencing Guidelines

The Acting Chairperson introduced the next speaker, the Commission's Executive Director, Sandra Shane-DuBow. Ms. Shane-DuBow's presentation focused on a comparative analysis of the federal guidelines and selected state sentencing guidelines: Maryland, Wisconsin, Minnesota, North Carolina, and Massachusetts.

Ms. Shane-DuBow stated that in the 1800's, sentences were determinate sentences set by the legislature. In the 1900's, sentences became indeterminate. Sentencing under guided discretion guidelines is in the middle of those two positions.

Under the federal guidelines and the concept of "real offense sentencing," judges can review all relevant conduct of the defendant, including behavior for which the defendant was acquitted. Thus, even acquitted behavior can result in points under this system. Probation officers have great discretion because they are the ones who inform the judge of the behavior to be considered.

Structured sentences are fair and even, result in proportionality of sanctions, reduce the impact of extraneous factors such as gender or race on the sentence given, produce statistical information, and allow for intelligent planning and use of resources. The best guided discretion guidelines should be simple to use, systemic in scope, reviewable under a limited test, empirically informed, monitored, and inclusive in development.

The Executive Director focused the members' attention on the last page of the interim report, which is the chart that compares the guideline systems of five states and the federal system. Using the criteria of that chart, she compared the federal sentencing guidelines to the guidelines of those five states. The federal sentencing guidelines are mandatory, based on policy directives using information from past practice. The cell ranges in the federal guidelines are narrow. The question on appeal in the ordinary case is whether the guidelines were correctly applied. However, since the sentencing judge can consider such factors as age or employment under extraordinary circumstances, the appellate court can be asked to examine whether extraordinary circumstances were present. The federal system produces extensive information and there is systemic monitoring. There is no inclusion of community sanctions. There is ongoing extended research.

The major purpose of the federal sentencing guidelines is to establish truth in sentencing and proportionality. Parole, under the federal system, is eliminated.

The Executive Director turned to the sample sentence for armed robbery listed on the chart. She noted that, putting the federal mandatory sentence increase for weapon use to the side, there is a near unanimity of range of sentence across the states. That range is around 63 to 78 months; Maryland is the exception with a range of 84 to 156 months. With the federal mandatory sentence added, the federal range is 97 to 106 months.

Guideline sheets produce useful information for redevelopment and revision of the guidelines. The Executive Director noted that Maryland has no annual reports and no analysis of departures relating to its guidelines. Judges Chasanow and Kaplan disagreed with that statement.. They indicated that analysis of departure information was considered, and was provided to sentencing courts.

Senator Kelley pointed out that the District Court is not included within Maryland's guideline system at the present time. This is a significant omission since the District Court sentences a significant number of the people currently serving time in prisons. Senator Kelley also noted that Maryland currently has three matrices relating to crimes against persons, crimes against property, and drug-related crimes. The Executive Director stated that the Wisconsin system included many matrices, and there are arguments to be made for and against this approach.

Delegate Vallario stated the belief that the current guidelines are "right on the money." The changes that were proposed last year were excellent. Judge Kaplan stated that the proposed changes would have raised the sentences in 14 cells and reduced sentences in about eight cells. Two thirds of the time, judges sentence within those cells. The current guidelines serve to inform judges of what their colleagues are doing. Senator Kelley stated that she is very pleased to have the guidelines. However, in her view, they are too descriptive. They can mirror back particular practices at particular times. Thus, they can produce excellent results at times and terrible results at times. Maryland's guidelines need to be more prescriptive.

Senator McCabe stated that the current guidelines were developed by one group - the judiciary. In his view, input from more groups is needed. Judge Chasanow noted that various groups participated in the development of the current guidelines, including representatives from the State's Attorneys Office, the Public Defender's Office, and the legislature.

The Executive Director discussed the Wisconsin system and its cells, noting that the Wisconsin system was in use for over 10 years, but is no longer. She said the Minnesota system has been in place for 20 years and is very successful. In Maryland, sentences are within the guidelines only 57% of the time, even with the wide breadth or range within each cell. Massachusetts is the "newest kid on the block" in terms of guidelines. Indeed, those guidelines have not yet been implemented. The Massachusetts system will maintain parole, but with built-in eligibility dates.

The Acting Chairperson and Commission members thanked the Executive Director for her presentation.

Interim Report Discussion

Dr. Wellford presented the Commission's Interim Report, noting that the report had to be finalized at this meeting. He welcomed comments from the members.

Ms. Catterton said the report is descriptive up to a certain point and then shifts to conclusory language. For example, the second full paragraph on page ten seems to conclude that Maryland in fact has dissimilarity in sentences. However, it is possible, after further investigation, that the Commission will see more similarity that this paragraph conveys. The report also implies that when the range of sentences is narrowed, fairness is

increased. While that may or may not be true, the point is that the Commission is still in the process of study. It was agreed, with respect to the second full paragraph on page 10, that the phrase "this means that" in the third sentence should be deleted. Also, a sentence should be added to the effect that further research and investigation is needed. With respect to the second paragraph on that page, the notion that the Commission has heard testimony on the subjects set forth in the paragraph should be added. Changes of this nature should be made throughout the report.

Judge Chasanow stated that it is difficult to believe that the public believes in treatment, not additional sentences, as is set forth under the first paragraph of the heading "Public Perception of Sentencing and Sentencing Disparity" at page six. The Executive Director stated that the information in this interim report comes from the minutes. Ms. Catterton suggested that the report include references to the particular studies from which information was taken and that it cite the findings and the source of those findings, rather than provide a summary. Delegate Harkins questioned whether a citation to the study should be included in an appendix.

Ms. Roper noted that the first full paragraph on page seven is inaccurate. For example, the victim's rights amendment was supported by 92% of the public, not 92% of the legislature. With respect to the last two sentences of that paragraph, she noted that the purpose of the Victim of Crimes organization is to provide services, not restitution. Ms. Roper agreed to submit specific language to correct these errors. Delegate Vallario noted that the phrase "to restore justice" in that same paragraph gives an incorrect connotation. He suggested, and the Commission agreed, that the phrase should be "to provide restorative justice." Ms. Catterton suggested that this phrase needs to be defined, perhaps in a footnote. Secretary Robinson noted that in the first incomplete paragraph on page seven the word "convicted" should be added to the reference to "first time drug user offenders."

Senator McCabe questioned whether someone from the Commission will make a presentation to the legislature, in addition to providing the interim report. He believes that a letter should go out soon requesting time to do that. Delegate Vallario suggested that a good time for a presentation would be the first or second week of January. Perhaps the presentation could be made at a joint hearing.

Senator Kelley stated that the phrase "correctional options" should be used consistently throughout the report and that references to "alternatives" or "intermediate sanctions" should be deleted. Mr. Gelb questioned whether a glossary of terms should be included.

Secretary Robinson said that the reference to $18,000 in the first paragraph under the heading "Prison Capacity Utilization" at page four is incorrect. It should read "$13,500." Mr. Gelb suggested that the report include a chart to show the full range of costs. In the third sentence of that same paragraph, Secretary Robinson suggested that the phrase "and time served" should be added in after the phrase "length of sentence."

With respect to page five, Secretary Robinson noted that certain projections turned out to be overstated. For example, there has not been an increase in the prison population, as predicted. Secretary Robinson will make the necessary changes.

On page six, Secretary Robinson stated that the word "rehabilitative" in the first sentence of the first full paragraph should be changed to "remediation."

On page eight, the Commission decided to delete the paragraph directly under Table 4. Senator Kelley suggested that the report include a reference to the potential geographical/jurisdictional disparity that has been discussed.

Mr. Harris suggested that the second paragraph under the heading "Maryland's Existing Sentencing Guidelines" at page nine should make it clear that the opposition to attempts to revise the current guidelines did not come from the Commission.

Judge Chasanow stated the view that Table 5 is inaccurate in some respects regarding Maryland. In particular, there is appellate review by a three judge panel and there is monitoring.

With these changes, the interim report was approved.

Lunch break

Correctional Options

Dr. Wellford introduced the next speaker, Judy Greene. The topic of Ms. Greene's presentation was correctional options.

Ms. Greene stated that there were three principal areas she wished to discuss, if time permitted: (1) the degree of public support for correctional options, relying in part on a North Carolina study; (2) what has been determined to work or not work within various programs; and (3) what a whole system looks like, using Oregon as an example, and the funding that might be required for it. She questioned whether Commission members would like to focus on any particular area first.

Secretary Robinson said that he would like to hear discussion on whether judges should have the authority to sentence offenders to particular correctional options or whether the Department of Corrections should be the entity with that authority. He also questioned whether judges are best able to determine whether particular defendants meet the criteria for particular programs. Ms. McLendon stated that she would like to focus on how correctional options are made palatable to the public.

Ms. Greene stated that research in nine states shows that the public is uncomfortable with the criminal sentencing process because they do not understand it. The public is also concerned about the long-term effectiveness of sentencing and whether particular sentences imposed will change the behavior of offenders. Judges are the ones responsible for sentencing, so judges need to be informed about available resources. It is also important, however, for the Department of Corrections to have flexibility to move offenders up and down within the available correctional options.

Senator Kelley stated the opinion that correctional options in Maryland may need to be phased in over a decade, awaiting, for example, the time when computers "talk" to each other within the circuit court and District Court systems. Ms. Greene noted that effective mechanisms are needed to predict the caseloads for probation and for correctional options programs.

Ms. Greene stated that, in her opinion, probation is a necessary tool to have in place, even though the public does not appear to respect the probation process. There is no research of any kind to indicate that parole is ineffective or "bad." To the contrary, research shows that about 80% of offenders on parole do well and do not recidivate.

Ms. Greene turned to Oregon as an example of what an entire system might look like. Oregon instituted its program in 1977, one of the first in the nation. Its budget for the two-year period from 1997 through 1999 is $169,000,000. This includes probation, parole, post-prison supervision, and the community corrections grant system. In Oregon, the larger counties tend to administer the programs on their own with grants from the State, while the State itself often runs and pays for the programs in smaller counties.

Structured sentencing was introduced into Oregon at a time when there was concern about prison

overcrowding. The Oregon grid has "units" plus jail time, with a cap placed on the length of potential jail time. Jail time is often reserved for use as a back-up. In other words, offenders are rarely given the maximum amount of jail time allowed, thereby reserving time if needed for a violation of probation. Under this system, as examples, one day of house arrest equals one day of jail time, whereas thirty-eight hours of community service equals one day of jail time. Other forms of options are available for unlimited use - as, for example, training in anger management and cognitive skills development.

In Oregon, about 18% of convicted offenders were sentenced to jail time before structured sentencing, and that percentage did not change after the adoption of structured sentencing. However, the type of person spending time in jail changed, and the actual average time served increased. The number of trials decreased. The rate of appellate review has been negligible. Senator Kelley questioned what kind of range exists within the cells in Oregon. Ms. Greene stated that the range is quite narrow, often about five months.

Ms. Catterton asked how the various states go about designing their systems. In particular, she questioned whether they set up a budget first and then design the system, or whether it is done the other way around. Mr. Gelb stated the view that the legislature wants this Commission to look at what currently exists, and the cost, while looking at possible changes and the cost of those changes. Ms. Catterton asked how the Commission could decide that, for example, 25 spots at Shephard Pratt should be included within a system if there is no money for those spots.

Judge Wright asked who it is that decides in Oregon whether a defendant should be assigned to a particular spot or program. Ms. Greene responded that the judge decides initially, but ample discretion is given to the Department of Corrections, particularly in the area of ordering such treatment as anger management. Probation carries out the program. The Executive Director noted that the Wisconsin model blended authority in this area so as not to set judges up against the Department of Corrections.

Ms. Greene said that Oregon decided in the 1991-1992 time frame that it needed to deal with revocations of probation. Oregon was experiencing an increase in revocations and, as a result, an increase in the size of its prison population. A large percentage of the revocations were for failure to comply with community service correctional programs. Counties began to realize that it did not cost the community anything to "dump" these offenders back into prison. Oregon streamlined its revocation proceedings and gave additional powers to the Department of Corrections. This revision caused Oregon's first significant rise in the budget.

By ballot initiative, Oregon recently enacted mandatory sentences for certain offenses. Now, once again, there is a problem with the size of the prison population and the need for more prison space. The State moved sentences of 12 months and under down to the local level and budgeted $103,000,000 of State funds to assist counties in the construction of additional prisons. Oregon has a population of 3,000,000, with about 8,800 people in the prison system, not including local jail populations. A prisoner can earn a reduction of up to 20% off his or her sentence. The average time served is 83%.

Ms. Greene then gave an example of the cost to fund a structured sentencing program. In North Carolina, the cost, over and above the cost of what was already in place, was as follows:

Total cost of community
Correctional program $35,232,542
Probation enhancement (513 additional officers) $18,000,000
State and local boards (77 counties) - ongoing basis $10,000,000
State and local boards (77 counties) - start-up cost $12,000,000
Community penalty programs (to, e.g., assess sanctions) $ 1,900,000
Human Resources - case management $ 2,500,000
Community service $ 224,000

Administrative costs $ 1,800,000

Mr. Gelb questioned whether the Department of Corrections in North Carolina is executive or judicial and, if executive, whether the system has been tested by a lawsuit. Ms. Greene responded that it is part of the executive department. North Carolina started its structured sentencing program in 1993 and, to her knowledge, it has not been tested, probably because the defendant must consent to the recommendation made by the Department of Corrections. In the absence of consent, the defendant has the right to a court hearing.

Ms. McLendon asked whether the local boards include citizen input. Ms. Greene responded that they do.

The Commission thanked Ms. Greene for her presentation, which was well received.

The next meeting of the Commission will be a public hearing on Thursday, January 23, 1996 in the Joint Committee Hearing Room.

The meeting was adjourned.