Report of the Advisory Committee on Minority Judicial Sentencing Practices

Ch. 42 SLA 1979

February 1980

ACKNOWLEDGMENT

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Introduction

The Advisory Committee on Minority Judicial Sentencing Practices was established pursuant to Ch. 42 SLA 1979 in response to findings reported by the Judicial Council in July, 1978. Even after adjusting for a number of important factors, such as prior record, probation status, and the like, the Council's findings showed large, statistically significant racial disparities in the sentencing of Alaskan Native and Black persons in comparison with others. The Judicial Council study included all sentences rendered in the Anchorage, Fairbanks and Juneau superior courts between 1974 and 1976.

Contemporaneous with the legislation establishing this Committee, House Concurrent Resolution No. 5 am S was passed. This resolution requested the Judicial Council to expand its statistical sentencing research to cover the period 1976-1979, in all superior court locations throughout the state, and to work with this Committee to formulate "positive remedies to correct inequities which may be suffered by Alaska Natives, Blacks and minority members in the administration of criminal justice."

* * *

This Committee finds that the 1974-1976 sentencing disparities reported by the Judicial Council were not caused by judges alone, but were substantially brought about by a

number of discrete elements in the criminal justice process exerting a cumulative impact upon the sentencing decision. In this report we have described these factors and how we believe they influence sentences. We have also made concrete recommendations for change. Commencing with arrest, followed by the setting of bail, communication with counsel, and in all intermediate stages of the process terminating with the preparation of the pre-sentence report and the imposition of sentence, this Committee finds that minority defendants were likely to suffer disadvantages ultimately reflected in longer sentences and a reduced likelihood of probation.

Although Ch. 42 SLA 1979 became law in March, appointments to the Committee were not completed until August of 1979. Consequently, this report is the product of only seven months of volunteer efforts by nine individuals, with part-time assistance from the Director of the Judicial Council and staff. It should be understood, therefore, that while this report does identify a number of elements in the justice process that significantly contributed to sentencing inequities, these findings are not exhaustive: seven months with limited resources simply did not permit complete inquiry.

Nevertheless, it is our firm belief that if these findings become widely understood, and if the essentials of these recommendations are acted upon positively, the quality of justice in this state will be much improved. Moreover, these improvements are worthwhile for their own sake, even

if there were no sentencing disparities. They will benefit all Alaskans, and not only minorities.

Because we do believe these recommendations serve the common good, and because their implementation will increase public confidence in Alaska's institutions of justice, this Committee urges you, our elected representatives, to carry them out with vigor and dispatch. Too many studies commissioned by the Legislature are filed and forgotten once completed; they are put on the shelf until another "crisis" comes to light. We therefore recommend the creation of a board, commission, or other instrumentality whose full-time and exclusive mandate would be to assure that concrete actions follow from these general recommendations. Experience has shown that implementation cannot be be left the exclusive province of the operating justice agencies themselves. Each agency has its own limited resources, its own list of priorities and problems, and its own strategies. Many of the solutions to the problem of assuring equality of treatment require the coordinated efforts of more than one agency for their resolution. An implementing and coordinating commission could lend assistance to the agencies, supply extra energy where needed, and act as a liason between the agencies and the Legislature with regard to specific issues involving racial equity--issues which are the proper concern of Alaskans of all ethnic backgrounds and cultures.

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I. The Bail Process

A. Findings

1. Minority defendants tend to spend more time in pretrial detention than others. They are also more frequently denied release on their own recognizance pending disposition of their cases. In both felonies and misdemeanors, lengthier and more frequent pretrial detention significantly contributes to sentencing disparities.

B. Recommendations

1. The bail status of every misdemeanant incarcerated pending the disposition of his or her case should be reviewed after 48 hours of detention have elapsed. This review should be mandatory, and should take place with or without request of counsel. In felony cases a similar mandatory review of bail status should follow after 14 days in detention have elapsed, and every 30 days thereafter.

2. As an alternative to costly pretrial incarceration of defendants who pose no danger to the community but who lack roots in the urban center where the courthouse is located, local "attention centers" should be established. These may be low cost open-door facilities providing a place to sleep and a telephone contact as a means of assuring some connection between the court and the person awaiting the disposition of his case.

3. Court rules and procedures should be flexible enough to allow for pretrial release and return to the

community of residence for those defendants awaiting disposition of their cases who have established roots within the state of Alaska, but who do not reside in the city or town where the court is located. In effect, the definition of ties or roots to the "community" should be broadened to include ties or roots anywhere in the state. This expanded definition recognizes the statewide jurisdiction of the Alaska Court System and the Department of Law, and is better suited to the realities of prosecution in Alaska.

C. Discussion

This Committee has reviewed statistical evidence in Judicial Council reports showing that Alaskan Native and Black misdemeanor defendants were sentenced to substantially longer periods of incarceration than others. The Council's report, dated November 7, 1979, shows that of a sample of 1,795 misdemeanor sentences randomly selected in Anchorage and Fairbanks, the mean jail sentence received by Alaskan Natives was 83% longer than that received by Caucasians. The mean jail term for Blacks was 68% longer than the average Caucasian jail sentence. (See Appendix B).

In an attempt to understand the underlying reasons for these disparate sentences, members of this Committee met with District Court judges in Anchorage and Fairbanks. It was suggested by the judges that the operation of the bail system substantially contributed to the reported disparities, especially for Alaskan Native defendants. Significant

numbers of Native defendants included in the study sample resided in rural communities outside of Anchorage and Fairbanks, but were sentenced for offenses allegedly committed in the two cities. Many of these out-of-town defendants had no local jobs, relatives, or other tangible connections or roots within the urban centers. Pursuant to the customary interpretation and application of the bail reform act [AS 12.30.010 - 12.30.080] persons lacking in "community ties" were often denied pretrial release on their own recognizance and required to post cash bail or provide a secured bail bond. When these financial requirements proved impossible for many rural Native defendants, they were required to remain in pretrial confinement. After conviction, sentences reflected the additional time spent in detention waiting for their cases to come up. Sometimes pretrial detention time was actually lengthier than the sentence itself. In many other cases it increased sentence length by a significant proportion.

Although the foregoing discussion pertains specifically to misdemeanors, recent evidence in the form of a study undertaken by the Alaska Court System and informally presented to this Committee by Judicial Council staff strongly indicates that minorities spend more time in pretrial detention for felonies, as well as misdemeanors. Therefore, these recommendations should apply at both levels.

A mandatory review of the bail status of pretrial detainees is an administrative remedy which could be effectuated at little additional cost. The proposed 48-hour delay would allow an arrested person who was intoxicated or under the influence of drugs to become thoroughly sober and better able to communicate the facts to his attorney and the court. It would also insure that the defendant is competent to understand the conditions under which he may be released.

The recommendation for "attention centers" is intended to address the same problem in another way. Many rural defendants with no ties to an urban center, but who pose no threat to society, now spend needless and costly periods awaiting the outcomes of their cases in urban jails. Pretrial detention in jail is very expensive. For example, in Anchorage the cost has been estimated at anywhere from $58 to $88 daily, according to the staff of the Criminal Justice Planning Agency. The proposed attention centers would be relatively inexpensive. They could be established in existing structures in the urban and regional centers, without need for major capital outlays. They could consist of simple dormitory-type bedroom and sanitary facilities in open-door settings, with minimal staff. Cases involving defendants temporarily referred to attention centers could be heard on an expedited basis. The attention center would provide an address and a telephone number, so that court personnel or attorneys might locate defendants to assure their

appearance at future proceedings. The routine utilization of attention centers in appropriate cases would also make more spaces available in the existing correctional facilities. This space could be used for prisoners actually serving their sentences, and not awaiting trial.

AS 12.30.020, governing release pending trial, provides that any person charged with an offense "shall . . . be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond . . . unless the [judicial] officer determines that the release of the person will not reasonably assure the appearance of the person as required, or will pose a danger to other persons and the community." It is only when the defendant either poses a danger to other persons or, because of lack of ties within the "community," his release will not "reasonably assure" his appearance in court, that monetary bail or other conditions are lawfully imposed. A narrow customary definition of "community," usually limited to the city or town in which the courthouse is situated, is responsible for the pretrial detention of many residents of rural Alaska. It must be stressed that it is by no means clear that a narrow definition of "community" is required by law. Lacking the requisite "community ties," out-of-town defendants are often required to post bail or go to jail. Therefore, we suggest a redefinition of the notion of "community" to include the entire state of Alaska. This makes sense:

there are no city or county tribunals in this state, and the jurisdiction of the District and Superior Courts extends throughout Alaska. For residents of small town and village Alaska, of whatever ethnic background, a statewide concept of "community" is more reasonable than the restricted definition customarily employed--a definition that ignores the urban-rural duality of Alaskan life.

In practical terms, this means that a resident of a remote village who is charged with a crime in one of the cities, could be returned home pending the disposition of his case. In many instances this solution is clearly superior to requiring him to spend pretrial detention time in an urban jail at taxpayers' expense, simply because he or she is unable to raise bail. Under the Committee proposal, once the judicial officer at the first court appearance determined that the defendant had sufficient ties to the statewide community, and that he did not "pose a danger to other persons," the defendant's file would be forwarded to the court location nearest his place of residence. All further proceedings except trial, but including imposition of sentence, would take place in the court nearest defendant's home.

If the defendant maintained his plea of not guilty and demanded a trial of the charges, he would have to return to the place where the crime was alleged to have occurred, mainly for the convenience of witnesses. However, trials

have been very much the exception rather than the rule. For example, Judicial Council statistics show that between August of 1975 and August of 1976, of all felony cases filed in the Superior Courts of Anchorage, Fairbanks, and Juneau, only 9.6% actually went to trial. In the preceding one-year period (1975-76) only 6.7% of felony filings were tried. The rest of the cases were either dismissed or terminated by pleas of guilty. Accordingly, the chances would probably be small that our hypothetical rural defendant would have to be returned to the city. In his case, as in many others, a statewide definition of "community" for bail purposes, and a transfer of the court file for further proceedings at the defendant's place of residence, would produce substantial savings and improve the quality of justice.

II. Magistrates

A. Findings

1. The magistrate program has historically played a substantial part in the criminal justice system. Traditionally magistrates have not been lawyers. Currently there is a nationwide movement to phase out nonlawyer magistrates and substitute lawyers. This is particularly true in urban areas. There is also a movement to transfer functions appropriately handled by magistrates to judges who must be lawyers.

B. Recommendations

1. That the Legislature and Supreme Court resist the pressure to make a law degree a requirement for appointment as a magistrate.

2. That the Legislature broaden the magistrates' role in the criminal justice system to include functions currently performed by judges which magistrates could perform as well.

C. Discussion

Anglo-American criminal justice historically assigned misdemeanor trials and sentencing to nonlawyer magistrates living in and a part of the community in which the defendant and his victim resided. This system continues to the present day in England and in most commonwealth countries. In the United States, however, there has been a trend towards elimination of law magistrates and the substitution of lawyers. Recently the Supreme Court of California held that a lay magistrate could not constitutionally preside over criminal proceedings in which a sentence to prison was possible, Gordon v. Justice Court of Yuba City, 12 Cal. 3rd 323, 525 P.2d 72 (1974). Thereafter, the United States Supreme Court reached a contrary conclusion, North v. Russell, 427 U.S. 328 (1976).

The reasoning of the California court has nevertheless had a favorable reception in the Alaskan legal community to which all judges belong, including the members of the Supreme Court who administer the court system. We believe

that reasoning is flawed. With the central assumption that those entrusted with the lives and liberty of their fellow citizens must be trained in the law, we agree. But we disagree that that training must be obtained in a law school (there are none in Alaska) or that a law degree is necessary or even helpful in making the kind of discretionary decisions which magistrates customarily make. The decision to release or detain and the choice of sentence to impose upon one convicted require maturity, compassion and an understanding of and sympathy with the community in which the defendant and his victim and potential victims reside. Maturity, compassion and understanding cannot be taught[1/] they must be gained through living in the company of those whose lives their decisions will affect. Intelligent mature Alaskans can be taught the necessary information about criminal law and procedure in an intensive orientation course similar to that required for English magistrates before they are permitted to decide cases. This training could profitably be supplemented by requiring magistrates to sit with but not participate with experienced

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1/ Until very recently even the most prestigious law schools offered only a single one semester required course in criminal law. While most lawyers have taken courses in constitutional law, until recently these courses have stressed the regulation of business rather than the Bill of Rights. While experience as a criminal lawyer should not be discounted, few judges have extensive criminal law experience and few lawyers appointed magistrates have any legal experience at all. In the real world judges learn criminal law (including constitutional law) and procedure on the job or at the kind of judicial training institutes which we recommend for magistrates.

magistrates in trying cases. Currently committees of the court are preparing form criminal and civil jury instructions which will simplify "legal" decision making. Greater availability of check lists informally developed by judges for their own use would also cut down on the need for extensive legal training.

Limiting magistrates to lawyers has two obvious adverse affects. First, only young inexperienced lawyers fresh from law school, a judicial clerkship or a tour of duty with the state or a federal agency, e.g., Vista, are motivated to apply. Rarely do these individuals have the kind of experience of life necessary to weigh the defendant's freedom against the community's protection (or for that matter to understand or let alone decide the husband/wife disputes so often surfacing in the misdemeanor court). More important, from the standpoint of the Committee, is the virtual absence of minority members in the ranks of the Bar. To limit magistrates to lawyers is to exclude minorities. We therefore strongly recommend increased utilization of lay magistrates in both rural and urban areas.

It is not enough to retain lay magistrates if their authority is continuously eroded in favor of district or superior court judges. While theoretically any criminal case, felony or misdemeanor, could give rise to the most complicated of substantive and procedural issues of criminal law, issues about which the Justices of our Supreme Court and

the U.S. Supreme Court cannot among themselves agree, in practice, the crucial questions in the overwhelming majority of cases are factual and not legal.[2/] Court statistics show that almost all criminal defendants plead guilty, foregoing any kind of trial. Our investigation shows that with felonies as well as misdemeanors, bail and sentencing decisions constitute the bulk of the judicial administration of criminal justice. Our investigation leaves us with the firm conviction that cultural, social and experiential factors, far more than legal knowledge, determine bail and sentencing decisions. The absence of minorities from judicial positions inevitably leads to sentencing disparity.

Consequently we recommend that Alaska borrow two English practices which we believe would work well here. First: We suggest that the Magistrates Jurisdictional Act be amended to permit the prosecutor and the defendant jointly to waive jury trial in the superior court and consent to trial or plea, in the magistrate court with the stipulation that if the defendant is convicted, his sentence cannot exceed one year's imprisonment. It is contemplated that the district attorney would only so stipulate where the defendant, in light of his background, would be virtually certain to receive less than a

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2/ Curiously, most fact questions are left to lay-jury determination in our system without apparent complaint, an exception is sentencing which in most states is done by a judge. Fear of lay jury prejudice should not affect magistrates who except for the lack of a law degree could be as carefully chosen and scrutinized as lawyer-judges.

year to serve if convicted. This would exclude almost all violent felonies, but would include most property crimes committed by first offenders and those with misdemeanor priors. Such a proposal would ensure that such sentencing be done locally at substantial cost saving to the state by someone culturally attuned to the defendant, his victim and the community to be protected.

Second, we recommend increased recruitment of magistrates to ensure more minority involvement. Enabling panels of magistrates, rather than a single magistrate to preside over cases would ensure collective decisions limiting idiosyncratic bias. Such panels could, as in England, be assisted by young lawyers as advisors who would bring the legal knowledge, and it is hoped, enthusiasm for civil rights, while ensuring that the decision itself comes from the community affected.

In summary, if one case in 500 presents complicated legal issues requiring a lawyer's skill to resolve, why require that all 500 be decided by a lawyer if in so doing we sacrifice qualities more relevant to the decision of the 499? Why not establish a mechanism for lay resolution of the 499 and lawyer resolution of the one. Erroneous legal questions, including those involving constitutional law, are precisely the ones the system has evolved a thorough procedure of appellate review to uncover and correct.

III. Post-Conviction Relief

A. Finding

1. Under past Alaskan decisional and statutory law, disparity in sentencing per se has not been established as an express ground for post-conviction relief. However, under the new sentencing code effective January 1, 1980, "the elimination of unjustified disparity, and the attainment of reasonable uniformity in sentences," are advanced as primary legislative purposes (AS 12.55.005). This is a fundamental shift in emphasis which may constitute a basis for post-conviction relief in appropriate cases.

B. Recommendation

1. Any person, whether or not a member of a racial or cultural minority, should be able to urge as a ground for the reduction of his or her sentence that the punishment imposed was substantially more severe than that imposed on the majority of other defendants similarly situated. Upon a prima facie showing of unexplained sentencing disparity, the Supreme Court of Alaska should allow relaxation of Criminal Rules 35(a) and (b) to accept applications from defendants at any time during a term of imprisonment.

C. Discussion

The Judicial Council's findings of apparent racial disparity in sentencing (October 12, 1979) showed that in felony cases Alaskan Natives and Blacks received longer sentences than others and were more often denied probation.

(These findings did not apply to all cases, but to certain broad groups of offenses, such as drug felonies, burglaries and larcenies, and check and fraud prosecutions.) In each of these offense classes the mean sentences of Blacks or Natives was substantially longer than the mean sentences of others. For example, the mean drug sentence for Blacks was 51.2 months, as compared with a mean of 8.8 months for others. For burglaries, larcenies, and offenses involving receiving and concealing stolen property, the Native mean sentence was 6.4 months as compared to a Caucasian mean of 4.4 months. The Black mean for these crimes was 9.4 months. Mean sentences do not "prove" anything by themselves, since they do not take into account such important factors as differences in the number of prior convictions, dollar values of property, type of drug, use of weapons, etc. The Judicial Council's analysis considered all of these variables and many more. Large and statistically significant differentials associated with race continued to show up clearly, even after these variables were controlled for. Nor was race the only invidious factor linked to disparity: income, attorney-type (public vs. private), education, and other irrelevant factors seemed also to be connected with sentencing disparities.

The Committee's recommendation is therefore, that <u>any</u> defendant, whether or not a member of a racial minority, should be heard to present credible statistical evidence that the sentence he received was substantially at variance

from the average of sentences imposed on persons whose cases and circumstances were comparable to his. Of course, to some extent each case must be judged on its individual facts; no defendant is entitled to "automatic" relief simply because his own sentence is longer than the average. Nevertheless, some departures from the norm may be so clearly lacking in relevant legal justification as to offend against the declared legislative policy. The Committee recommends that Criminal Rule 35 be interpreted by the Supreme Court, perhaps by the promulgation of a Supreme Court Order, to make clear that applications for correction or reduction of sentences based on a colorable claim of unjustified disparity would be heard, even beyond the 120-day period specified in Rule 35(a).

The Committee suggests that grounds for relief may already exist within the framework of Criminal Rule 35(b). Criminal Rule 35(b)(7) provides as follows:

> (b) Post Conviction Procedure--Scope any person who has been convicted of, or sentenced for, a crime and who claims:
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> * * *
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> (7) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, when sufficient reasons exist to allow retroactive application of the changed legal standards; may institute a proceeding under this rule to secure release.

The enactment of the new sentencing code, effective January 1, 1980, has certainly been a "significant change in law . . . applied in the process leading to . . . sentence." By citing the elimination of unjustified disparity and the attainment of reasonable uniformity as its primary purposes, the Alaska Legislature has underscored the importance of achieving equity in sentencing. This Committee suggests that this new and clearly stated legislative intention also constitutes a "sufficient reason to allow retroactive application." We urge the Superior Courts and the Supreme Court to hear applications for relief upon a prima facie showing of sentencing disparity.

IV. Criminal Justice Agency Employment Practices

A. Findings

1. Poor communications between minority defendants and police officers, public defenders, probation officers and judges, results in placing racial and cultural minorities at a comparative disadvantage in virtually every stage at which they come into contact with the law. This cumulative disadvantage is often reflected in the final sentence, and in a reduced likelihood of early release.

2. There is a general scarcity of minority employees and officials in virtually every criminal justice agency in the state; minority representation in the agencies is disproportionate to their numbers in the general population, and even more disporportionate considering the numbers

of minority defendants subject to the justice process. This deficiency is especially acute at the policy-making or higher level positions.

3. The Alaska State Troopers' constable program, staffed almost exclusively by Alaskan Natives, has effectively resulted in the creation of a second class trooper, severely limited in salary, opportunity for advancement and prestige.

4. To the knowledge of this Committee there has never been a Native, Black or other minority person appointed to the Alaska Judicial Council. Only one minority, a Native man, has served on the Commission on Judicial Qualifications. The Commission on Judicial Qualifications is also rendered less effective by its constitutionally-mandated composition of five judges to four non-judges.

B. Recommendations

1. In the interest of fairness, and in improving communication between the criminal justice agencies and the many minority citizens who are subject to their attentions, this Committee recommends the vigorous prosecution of a conscious policy of minority recruitment and hire, particularly at the policy-making levels.

2. The Alaska Legislature should join with this Committee in urging the Governor to appoint minority-group members to the Judicial Council and Commission on Judicial Qualifications. The Legislature should initiate a constitutional amendment to alter the composition of the Commission

on Judicial Qualifications to 5-4, in favor of non-judges.

3. The criminal justice agencies should hire more minority persons in paralegal and other paraprofessional positions to help minorities understand the legal process, and to communicate their positions to the courts and other justice personnel. This recommendation should not be interpreted to encourage the use of minorities in non-professional jobs where qualified minority members are available to fill professional positions within the justice agencies.

4. When each criminal justice agency presents its budget request to the Legislature, the agency head should be required to report his agency's progress in carrying out this Committee's recommendations regarding minority recruitment and hire.

5. Where appropriate to the requirements of the job, the Division of Personnel and Labor Relations in the Department of Administration should revise classifications and job descriptions to permit knowledge of and sensitivity to cultural conditions to be substituted in the place of certain educational prerequisites. In addition, previous volunteer or other unpaid services should be given weight equal to paid work experience of a substantially similar nature.

C. Discussion

The Committee heard much testimony concerning difficulties in communication often encountered when minorities

attempt to deal face-to-face with criminal justice agency personnel. This difficulty in communication arises at all stages: the first contact with a policeman on the street; the initial interview of a client by his public defender or court-appointed attorney; in open court; in interviews with probation officers who prepare reports and recommendations on sentencing; when the minority person faces an institutional classification committee; and finally, before the parole board. The criminal justice process is intimidating and confusing to almost everyone on the receiving end of its ministrations. It is even more intimidating and difficult to understand across linguistic or cultural barriers.

The scarcity of minorities within the criminal justice agencies is astonishing. The Alaska State Troopers, apparently alone among the criminal justice agencies, have a special program of minority recruitment and hire, styled the "constable program." However, the Committee's inquiries into the administration of this program have led to the conclusion that present policies of the Department of Public Safety have created, in effect, a second class of trooper, largely limited to Natives. The Committee heard testimony that constables, regardless of the extent of their experience, remain permanently limited in potential for advancement within the trooper hierarchy in terms of rank, salary and prestige. This inequality persists even when a constable and a state trooper have virtually identical duties and responsibilities, run the same

risks and hazards, and even when the constable has equal or greater seniority. The Department's justification for this discrimination, according to the officials who testified before this Committee, was that constables served in one location only, usually the village or town of their residence, whereas a "regular" member of the Alaska State Troopers must be prepared to accept frequent departmental transfers during his or her career. This Committee finds the Department's rationale an insufficient justification for present policy, which, regardless of good intentions, is discriminatory in its effect. Although the Department of Public Safety deserves praise for instituting the constable program in the first instance, this should not blind us to defects in the administration of the program which foster racial inequality.

The Committee also finds that existing recruitment policies and practices of the Department of Law are clearly inadequate to the attainment of minority hire in proportion to minority representation in the population of Alaska. For example, the Criminal Division of the Department of Law, which is responsible for all state prosecutions, and therefore exerts an enormous influence on the administration of justice, does not have a single minority attorney on its staff. This Committee heard explanation for this undisputed fact from the Attorney General and his deputy in charge of the division. In essence, they testified that despite good faith efforts to recruit minorities from law school graduating

classes throughout the country, no "qualified" minority lawyers could be found. However, the Department of Law apparently made no efforts to contact local or national minority organizations or legal programs, nor did they make recuitment trips to law schools with high minority enrollments or special programs in Native American law. In view of these circumstances, among others, this Committee concludes that the Department of Law's efforts at minority recruitment have so far left much to be desired.

The Chairman of this Committee, Mr. Bert Campbell, now serves as a lay member of the Commission on Judicial Qualifications. Under the Alaska Constitution the Commission is the only organ of state government specifically empowered to inquire into complaints against judges and justices, and to report to the Supreme Court of Alaska concerning recommended disciplinary action, if any. (Alaska Const. art. IV, sec. 10) Mr. Campbell has informed this Committee that there is support on the Qualifications Commission itself for increasing the ratio of non-judges to judges. It is also significant that Mr. Campbell is the only member of a racial minority ever to be appointed to the Commission on Judicial Qualifications.

The Alaska Judicial Council, which is the constitutionally created judicial nominating commission for this state, has never had a minority member. This fact has long been a concern of the Judicial Council itself, as evidenced by its Sixth Report to the Legislature (1969-1970), which specifically

urged the appointment of an Alaskan Native to its membership. So far the Judicial Council's recommendation has not been heeded.

State job classifications, descriptions and prerequisites can in some instances be arbitrary. A job requirement may have no clear relationship to the ability of an applicant to perform the work actually required of him or her. When prerequisites which do not really affect job performance, such as those requiring formal education in certain cases, also serve as a barrier to minorities, this is especially unfortunate. If formal education is not, as a practical matter, clearly related to getting the job done, then this requirement should be subjected to careful review. This is especially appropriate where the job itself, as in the justice system, may bring the applicant into close working contact with cultural or racial minorities. In such jobs, sensitivity to and experience working with minority cultures may be greater assets than a diploma.

V. Pre-Sentence Reports

A. Findings

1. The pre-sentence report is the judge's single most important source of information concerning the offense and the background of the defendant. These reports contribute to disparate treatment because they are loosely-structured in form, and they frequently vary in style and content from location to location, or from officer to officer.

Further, the pre-sentence investigation report in present form is not well suited for use in connection with the revised criminal code and presumptive sentencing laws effective January 1, 1980.

B. Recommendations

1. The form and content of the pre-sentence investigation report should be substantially revised and given a uniform structure to reduce sentencing disparities that may be attributable to differences in the information presented to the sentencing court.

2. The Legislature should encourage and support the efforts of the Judicial Council, which has already undertaken the task of pre-sentence report revision, and the retraining of probation officers in the use of the new reports.

3. Regardless of the eventual form and content of the revised pre-sentence report, a preliminary draft of each report should be provided to the defendant and his attorney before it assumes its final form and is filed with the court. This would enable a meaningful inquiry into the accuracy and sufficiency of the document before it is reviewed by the judge.

C. Discussion

Judicial Council staff undertook a systematic review of a sample of pre-sentence reports involving Caucasian, Black and Alaskan Native defendants. This comparative analysis revealed inconsistencies in the inclusion or ex-

clusion of certain items of information: in general, more favorable or positive information was presented concerning Caucasian defendants in comparison with minorities. For example, pre-sentence reports on minority defendants were less likely to include statements about defendants' future plans, such as educational opportunities or job training programs. In general, compared with Caucasians, there was a reduced likelihood that a minority defendant's pre-sentence report would contain information supportive of imposing a mitigated sentence. Sometimes facts which were true of defendants of more than one race were reported in a less favorable light when a minority person was the subject. For example, a Black defendant with no prior convictions "reported" or "claimed" to have had no previous problems with the law, according to the writer. On the other hand, a Caucasian defendant with no priors was said to have had "a clean record," or "no previous convictions." Similar examples of differential use of language were found with respect to reported past employment history, absence of drug use, and in other areas. The use of different descriptive terminology when applied to similar facts may influence the sentencing judge and encourage disparity. In any event, such differences have no legitimate justification. They are merely products of a lack of a standardized format and the need for more training.

The contribution of the pre-sentence report to unjustified sentencing disparity has been observed and discussed by at least one eminent jurist. One of the strongest criticisms was advanced by Judge Marvin E. Frankel of the United States District Court for the Southern District of New York.

> Under the philosophy and practice of individualized sentencing which still prevails, it is necessary to study and somehow characterize or classify each defendant before he may be sentenced. This is the most rational and least debatable tenet of contemporary sentencing doctrine. Accordingly, the defendant who has pled, or been found guilty, is assigned to a probation officer for pre-sentence investigation. The report embodying the results of this investigation will give an account of the offense, the defendant, defendant's prior record, family, work, strengths, and weaknesses. The purposes of such an account are clear enough. Problems arise in the implementation and detailed elaboration of those purposes. The problems spring from the specific nature of the information sought, the personnel and techniques for seeking it, and the standard attitudes reflected in the use of the data.
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> [T]here is a troublesome quality of class bias both in the subjects treated in fore sentence reports and the standard modes of treatment. For example, defendant's religion, or lack of it, is a regular topic. The typical entry on religion is terse, unsubtle, and heavily weighted towards swift orthodoxy in judgment, viz.:
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> > The defendant was reared as a Roman Catholic, but claims only occasional church attendance since his high school graduation.

> The implication of such reported "facts" seems clear enough on the face of the reports. It tends to be re-enforced when the subject is . . . discussed with the probation officer. Most such officers, whether from conventional biases or from ostensibly social-scientific premises, deem church attendance a favorable fact and non-attendance unfavorable. The hypothesis may have some vague and slender merits. But is treated with hasty superficiality.
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> The tendency toward a rather simplistic conventionality, and some fundamental hostility toward defendants, reveals itself in other ways. The standard jargon is one. Defendants intimate with, but not married to, members of the other sex have "paramours." If the initmacy extends to living together, they have "meritricious relationships." If they are asked whether they use narcotics and say no, they "deny" the use of narcotics. Other forms of common misbehavior are similarly "denied," whereas (presumably) the questions about such misbehavior simply do not arise with respect to Senator X or Father Y or Judge Z. M. Frankel, Criminal Sentences (1972).

Some of Judge Frankel's comments would certainly apply to the Alaska pre-sentence report.

Revision of the criminal code and sentencing laws has provided impetus to reformation of the pre-sentence process as well. The new laws are much more specific and focused; they require in positive terms that certain information be emphasized in each sentencing. The laws also require that certain findings of fact and conclusions from those facts be noted by the sentencing judge and included in writing on his sentencing report in any case where the sentence exceeds 180

days. Because of the requirements of specificity and explicit reporting by the judge, he is more in need of a structured and focused pre-sentence report to help insure against reversible judicial error committed through the inadvertent omission of a finding of fact or conclusion required by the new codes.

The Judicial Council has already undertaken a commitment to assist the Division of Corrections in the design and preparation of a new format for the pre-sentence report. The Judicial Council's staff have already conducted several training sessions with probation officers throughout the state, and are in the process of assisting in the design of the new form and procedures. The Judicial Council will appoint a committee of judges, probation officers, public defenders, prosecutors and members of affected minority groups to contribute their suggestions to the revision effort.

VI. Sentencing Guidelines

A. Finding

1. One of the primary reasons for sentencing disparity is that each individual judge is usually unaware of the sentencing practices of other judges. There has been little consistency in sentencing simply because no judge has been provided with the relevant sentencing facts concerning other judges' practices. This makes the formulation

of any conscious sentencing policy very difficult, and the correction of undersirable practices even harder.

B. Recommendations

1. The Judicial Council should continue to compile and analyze statistical data on sentencing practices throughout the state; its research capacity should be expanded to permit the analysis of statewide data for misdemeanor cases, as well as felonies.

2. The Judicial Council should implement a system of periodic reporting on sentencing information to all courts, as well as to the Department of Law, the Alaska Public Defender Agency, and other interested institutions or persons. These periodic reports should contain at least the following information on each sentence rendered in Alaska: (1) the name of the sentencing judge; (2) the length and terms of the sentence; (3) the ethnic background of the defendant; (4) the specific offense of conviction; (5) the defendant's previous criminal history; (6) the extent of personal injury or property damage or loss; (7) the type and quantity of drug, where relevant; (8) whether or not a firearm or other weapon was employed in the offense; (9) whether the defendant was on probation or parole at the time of the commission of the offense; and (10) whether the defendant was intoxicated or under the influence of drugs at the time the offense was committed.

3. The Sentencing Guidelines Committee appointed by the Supreme Court of Alaska should receive the encouragement and budgetary support of the Legislature in its effort to develop a system of racially neutral and empirically-based guidelines for sentencing.

C. Discussion

Until the Judicial Council published its statistical reports, first in 1977, and then in 1978, there had been no systematic analysis of Alaskan felony or misdemeanor sentencing practices. An individual judge who was diligent in keeping records could, at most, record each of his own sentencing decisions and perhaps note the reasons behind them. But no judge had systematic information on the practices of any other judge. This absence of sentencing information is not unique to the Alaskan criminal justice system; it is the general rule throughout the United States.

Lack of attention to developing a systematic statistical picture of sentencing practices and policies is a direct result of the prevailing theory favoring "individualized sentences." The individualized sentencing philosophy maintains that in order to do justice, each individual case must be considered as if it were unique, totally unrelated to any other case. Any systematic statistical approach to sentencing was viewed with disapproval, as irrelevant, as well as "mechanical" or "inhuman." Judge Marvin Frankel of the United States District Court for the Southern District of New York is one of the many critics of this philosophy.

> Like all good ideas allowed to bloom without pruning or other attention, the notion of individualized sentencing has gotten quite out of hand. Reverting to elementary principals for a bit, we ought to recall that individualized justice is prima facie at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law. It is not self-evident that the flesh-and-blood judge coming (say) from among the white middle classes will inevitably achieve admirable results when he individualizes the narcotics sentences of the suburban college youth and the streetwise young ghetto hustler. . . . In most matters of the civil law, . . . the quest is steadily for certainty, predictability, objectivity. The businessman wants to know what the tax will be on the deal, or his possible "exposure" . . . from one risk or another. . . . But what no businessman wants (if he is honest) is a system of "individualized taxes" and exposures, depending on who the judge or other official may turn out to be and how that decision-maker may assess the case and the individual before him. M. Frankel, Criminal Sentences (1972).

Under the sentencing code now in effect, with its stated legislative purpose of "achieving reasonable uniformity in sentencing," the philosophy of individualized sentences has been substantially eroded, at least in its more extreme forms. While the new code does in fact make very ample provision for judicial adjustment of the sentence in individual cases, it also requires that the judge, in order to effectuate the statutory goal of "reasonable uniformity," specifically consider "the seriousness of the defendant's present offense in relation to other offenses." [AS 12.55.005]. Whenever a sentence of imprisonment is imposed, the code requires

the judge to ask whether "imprisonment is equitable considering sentences imposed for other offenses and other defendants under similar circumstances."

Explicit references in the new law to the "present offense in relation to other offenses" and to "sentences imposed for other offenses and other defendants under similar circumstances," require that the sentencing judge and the attorneys have up-to-date and accurate information on other sentences and other offenses. Only by referring to this information can he determine how this proposed sentence fits into the general pattern. It would be impossible for any judge properly to carry out the legislative mandate of the new criminal code in an informational vacuum.

Existing Judicial Council statistics cover sentences for all felonies in Anchorage, Fairbanks and Juneau, between August of 1974 and August of 1976. They also cover a sample of 1,795 misdemeanor sentences imposed in Anchorage and Fairbanks during the same period. An additional Judicial Council report on felony sentences in all ten superior court locations between July of 1976 and July of 1979 will become available in March. However, with the passage of an entirely revised set of statutes governing the definitions of crimes and their punishments, the Council's data collection methods will have to be re-designed, and coders re-trained. For example, data will have to be collected on each of the fourteen aggravating and twelve mitigating circumstances speci-

fically enumerated in the code. Previously, in Alaska there was no such concept as a "presumptive sentence," and the data collection will have to change to embrace this new idea.

The Committee on Sentencing Guidelines, chaired by Ketchikan Superior Court Judge Thomas E. Schulz, was appointed by Chief Justice Boochever even before there were positive indications of racial disparity in sentencing. After the Judicial Council issued its July 1978 report, the supreme court appointed minority representatives to this committee. Judge Schulz's committee has been active for the past year and has already promulgated drug felony guidelines. These are now in use statewide.

The guidelines committee works with the staff of the Judicial Council which supplies statistical information on sentencing practices in each area of interest. Past sentencing practices which prove acceptable can be adopted in the form of guidelines for future action; those which are unacceptable can be excluded from the guidelines. If in a specific case the sentencing judge believes he cannot follow the guidelines without violating his sense of justice, the judge is instructed to make written notation concerning the reasons for his departure from the guidelines sentence. Written justifications for departure from the guidelines can later be reviewed and taken into consideration by the committee when the guidelines are revised from time to time.

Up until this time, the Guidelines Committee has operated with no budget of its own. Nor have any funds been provided for the Judicial Council's technical assistance to the committee. In these recommendations we urge the Legislature to support the guidelines effort and the Judicial Council in its role of providing necessary technical assistance.

VII. Amendments to Criminal Code

A. Finding

1. By providing affirmative guidance for judicial discretion, the new sentencing law, effective January 1, 1980, may be a vehicle for the reduction of unjustified sentencing disparity. However, some provisions of Title 12 may tend disporportionately to increase the severity of sentences imposed on minority defendants; these provisions should be amended.

B. Recommendations

1. The Committee recommends that the Code of Criminal Procedure be amended in the following respects:

> (a) AS 12.55.015(b)(3). The court in exercising sentencing discretion as provided in this Chapter, shall impose a sentence involving imprisonment when. . . .
>
> * * *
>
> (3) sentences [A SENTENCE] of lesser severity <u>have been repeatedly</u> [HAS BEEN] imposed <u>for substantially similar offenses</u> in the past and <u>have</u> proven ineffective in deterring the defendant <u>from further criminal conduct</u>.

2. The Committee recommends the addition of one more Factor in Mitigation to the twelve factors now contained in AS 12.55.155. The following factor is suggested:

> (13) the facts surrounding the commission of the offense and any previous offenses establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment.

3. The Committee recommends that Factor in Aggravation (8) be amended. As presently written, this factor provides as follows:

> (8) The defendant has a criminal history consisting of one or more convictions for misdemeanors having assault as a necessary element.

The Committee's suggested amendment is as follows:

> (8) the defendant has a criminal history consisting of prior convictions for offenses, including misdemeanors, that involved aggravated or repeated instances of assaultive behavior [ONE OR MORE CONVICTIONS FOR MISDEMEANORS HAVING ASSAULT AS A NECESSARY ELEMENT];

C. Discussion

The Committee, in general, favors the new sentencing code and believes that its emphasis on achieving reasonable uniformity in sentencing and eliminating unjustified disparity have the potential for correcting some of the conditions which impelled the Alaska Legislature toward the

creation of this Committee. However, a number of specific provisions are potentially productive of harsher treatment of minorities.

The Committee's first proposed change in the sentencing code is the amendment of subsection (3) of AS 12.55.015 (b), providing that the court "shall impose a sentence involving imprisonment" under certain circumstances. The plain meaning of (3) suggests that whenever a defendant has been previously convicted of any offense, upon the second conviction imprisonment would be mandatory. The Judicial Council's statistical studies demonstrate that defendants belonging to minority groups are more likely than others to have had a record of previous convictions. A literal reading of the above subsection would therefore result in an even more disproportionate incarceration rate for minority citizens, perpetruating the existing situation.

In fact, the objectionable language in AS 12.55.015 is in clear conflict with another, and more specific, provision of the new sentencing code. AS 12.55.155 (Factors in Aggravation and Mitigation) provides that whenever the presumptive sentence is four years or less, if a factor in mitigation is found the court may reduce the presumptive sentence by an amount equal to the presumptive sentence. In other words, the court may reduce the term of imprisonment to zero, placing the defendant on probation. In order for any defendant to be eligible to receive a presumptive term of any length he must have had a previous felony conviction.

Therefore, under AS 12.55.155, many defendants upon whom sentences of lesser severity were imposed in the past may nevertheless become eligible for probation if mitigating factors are present. This is in conflict with a plain meaning interpretation of AS 12.55.015(b)(3) discussed above, under which imprisonment would be mandatory whenever there was a previous conviction, whether for a felony or a misdemeanor.

The Committee recommends the addition of a thirteenth mitigating factor to the list in AS 12.55.155. At present there are fourteen aggravating factors and only twelve mitigating ones; more of a balance between aggravation and mitigation should be struck. One of the clear findings of this Committee is that many persons have received long jail sentences for relatively insubstantial property crimes. Members of this Committee have interviewed prisoners serving sentences in excess of one year whose property crimes resulted in cumulative financial losses of well under $2,000. This Committee was especially disturbed by the circumstance that most of these defendants belonged to minority groups.

The phenomenon of jails filled with minorities--Blacks, Hispanics, and Native Americans--is not unique to Alaska. In the February 18, 1980 edition of Newsweek, the following was reported in connection with the recent atrocities at New Mexico State Penitentiary:

> The cauldron of prison life also boils with racial tension. While blacks and Hispanics account for only 17 per cent

> of the U.S. population, they make up about 55 per cent of the state prison count. . . . A 1979 national study showed that blacks are sentenced to state prison at a rate eight times higher than that of whites, and a Minnesota survey disclosed that a black or American Indian who committed a felony had twice as great a chance of going to jail as a white person. (p.75)

Moreover, when non-violent offenders serving sentences for minor property and drug crimes are forced into close contact with violent and dangerous prisoners, especially under overcrowded and substandard jail conditions, the less dangerous inmates may suffer terribly. This is apparently what took place in New Mexico.

This Committee has personally inspected many of Alaska's overcrowded and occasionally decrepit jails; its members can personally attest to the poor conditions and racially imbalanced populations. By supporting an amendment to the sentencing code seeking to restrict the incarceration of minor offenders, the Legislature will have taken one step toward preventing the occurrence in Alaska of the kind of tragedy that recently took place in New Mexico.

From a purely common-sense economic standpoint it hardly serves the Alaskan taxpayer to maintain prisoners in jail for months, or even years, at the minimum cost of $50 a day, when the social harm caused by the past actions of these persons would not total to a fraction of the expenses of their incarceration. Of course, economics does not tell

the whole story: lengthy incarceration for minor crimes is unjust, whether or not a minority person is the recipient. It is, however, even more unjust when this punishment is disproportionately imposed upon minority groups. Therefore, to help correct this injustice the Committee proposes the addition of one more Factor in Mitigation to those listed under section 12.55.155.

Factor in Aggravation (8) as included in the present law would authorize the judge to increase the presumptive sentence up to the maximum if there is a criminal history consisting of "one or more convictions for misdemeanors having assault as a necessary element." This Committee was informed of no misdemeanor having assault "as a necessary element," other than common assault and battery. A single previous misdemeanor conviction for assault and battery seems a questionable basis for substantially increasing the presumptive sentence, especially when the prior misdemeanor may have occurred many years in the past. The intent of this aggravating factor is apparently to identify and single out for increased punishment those whose records suggest a likelihood of greater than average danger to the community. However, a literal application of the law as presently written is likely to have the impact of increasing the disparity in sentences between Alaska Natives and others, Natives do tend to have more prior misdemeanor convictions. (This has not been found true of Blacks in the Judicial

Council's 1974-1976 data.) The amendment suggested by this Committee would accomplish substantially the same goal as existing law, but without racially invidious side effects.

VIII. Alcohol and Drug Abuse and Crime

A. Findings

1. There is a clear connection between the abuse of alcohol and drugs and the commission of criminal offenses in Alaska. This alcohol connection is particularly strong in rural areas, and among Alaskan Native defendants, wherever situated. Drug-related crime is a phenomenon that crosses racial and cultural lines; but it appears to be less prevalent among Native Alaskans than among Blacks and Caucasians.

2. The criminal justice agencies, and particularly the correctional institutions, have not provided adequate facilities and programs for the treatment of sentenced persons afflicted with alcoholism and drug addiction.

B. Recommendations

1. The Division of Corrections should be required to develop a comprehensive alcohol and drug treatment plan for each correctional facility in the state. The treatment program should be intensive, culturally sensitive, and adequate to treat every prisoner with an alcohol or drug problem. Comprehensive, culturally-sensitive treatment programs should also be established for persons sentenced to non-incarcerative alternative dispositions, as well as for those on deferred sentences. The Legislature is encouraged to provide the funds necessary for such treatment programs.

C. Discussion

The link between alcohol, drugs and crime in Alaska is so obvious as to be virtually undeniable. The statistical evidence is clear, although there is ample reason to believe that the scope of the problem far outstrips descriptive capabilities of the data. For example, wherever this Committee visited, whether in the urban centers of Anchorage, Fairbanks and Juneau, or in the rural regional centers such as Bethel, Nome and Kotzebue, the apparent causal link between excessive alcohol consumption and Alaskan Native crime was constantly reiterated. Law enforcement officials, district attorneys, public defenders, probation officers, and private citizens who attended our hearings estimated that at least 90% of all the crime in their areas was linked with alcohol intoxication.

The statistical picture, which is surely incomplete, (since police statistics do not always mention alcohol intoxication unless it is an element of the offense), also shows this connection. For example, between 1976 and 1979, of 586 sentences imposed for violent crimes in Anchorage, Fairbanks and Juneau, 330 of these sentences, or 56.3%, involved defendants who were known to be under the influence of alcohol at the time they committed their crimes, according to police reports. The percentages are similar, although not quite so dramatic, for property crimes (39.2%), and for sex offenses, (46.2%). Further, statistical evidence also clearly shows that defendants with drug or alcohol problems

are more frequently found among the population of repeat offenders. Among the 1,669 felony sentences rendered in Anchorage, Fairbanks and Juneau between 1976-1979, only 14% of the people in the drug/alcohol group had no prior criminal records. On the other hand, among those with no reported alcohol and/or drug problems, 49.6% were first offenders. Correctional policy should take more serious note of the link between alcohol, drugs and crime by placing emphasis on drug and alcohol treatment. The Legislature should follow suit by making sure that alcohol and drug treatment is a high priority for funding.

IX. Public Defender Agency

A. Findings

1. Because of economics, minority defendants utilize the services of the Alaska Public Defender Agency proportionately more than others. Inadequate funding of the Public Defender Agency deprives these minority clients of substantial equality in the legal services they receive. The inevitable result of too few attorneys, investigators and support personnel to handle the caseload takes an especially heavy toll on minority defendants who, because of difficulties in communication, may need greater attention from their legal counsel than other defendants.

B. Recommendations

1. The Public Defender Agency should receive sufficient funding to meet the minimum standards promulgated by

the National Conference on Criminal Justice (LEAA) with respect to the proper ratio of clients to attorneys.

2. Adequate support staff, including investigators, paralegals, and counselors in vocational rehabilitation and placement are essential to the proper management of the public defender caseload. Support staff is especially important in the representation of persons from minority backgrounds who may need extra help in understanding and dealing with the legal system, and in gaining equal access to rehabilitative alternatives.

3. With respect to both assistant public defenders, (attorneys) and support personnel, a special effort should be made to recruit from minority groups in proportion to the representation of minorities within the agency caseload.

C. Discussion

In virtually all the correctional institutions visited by the Committee, complaints were heard from prisoners concerning their legal representation by the Public Defender Agency. The most frequent allegations were that a single defendant would be assigned a number of different assistant public defenders during the pendency of his case. This serial representation was said to preclude the establishment of a full attorney-client relationship with one lawyer. When an accused person believes that there is no specific individual he or she can count on for legal representation, no matter how competently the case may in fact be handled, this adds to the feeling of distrust and resentment experienced by many minority

prisoners. Unjustified or exaggerated complaints are not entirely unanticipated from prisoners. The Committee is aware that not every allegation should be taken at face value. Nevertheless, the Public Defender himself has recognized the legitimacy of many complaints and attributes their cause to the chronic shortage of funds which the Public Defender Agency has faced ever since its establishment by legislation in 1969.

In 1974 the Judicial Council published a thorough study entitled The Alaska Public Defender Agency in Perspective: An Analysis of the Law, Finances & Administration, 1969-74. This study showed that the Public Defender Agency suffered from inadequate financing from its inception:

> The Alaska Public Defender program faced a financial crisis even before it was operational. The studies of the Alaska Court System . . . concluded that minimum starting costs of the program as enacted would be $409,106. The Legislature appropriated $206,000.
>
> * * *
>
> For the first nine months of the fiscal year there were no investigators anywhere in the state program. By March 1970, the need was critical and one investigator was hired for Anchorage. This severe shortage plagued the agency from the beginning, despite the fact that one of the original problems of the court-appointed counsel system which led the Alaska Bar Association to support public defender legislation was that, when matched against the resources of the prosecutor, defense attorneys lacked the investigatory resources to adequately represent their clients.
>
> * * *

> Finally, the funding shortage required that the public defender and his staff attorneys be paid lower salaries than their peers in the district attorney offices. Carlson [Victor D. Carlson, now a superior court judge in Anchorage] later commented that this pay difference had a noticeable effect on his ability to effectively work with district attorneys as an equal. (pp.40-42).

When a large part of the public defender's caseload consists of minorities who may experience difficulties in communicating with criminal justice personnel, or even with their own attorneys, the need for paralegal and investigatory staff drawn from the same backgrounds as the clientele should be obvious. If a client cannot clearly communicate the facts of his case to his own lawyer, then the attorney is severely limited in his usefulness. This limitation becomes more acute when witnesses are also of the minority subculture. Investigators and paralegals should be actively recruited from minority communities in order to bridge the gap between the attorney, the client, and the witnesses.

X. Pretrial Diversion

A. Finding

1. Pretrial diversion, as exemplified by the program now being operated by the Department of Law in Anchorage, appears to be successful, cost-effective and a fair alternative to prosecution in appropriate cases.

B. Recommendation

1. Pretrial diversion as an alternative to prosecution and incarceration of non-dangerous first offenders should

be continued and expanded to other areas of the state.

C. Discussion

The Department of Law has begun to recognize that not all offenses are so serious as to warrant prosecution to the fullest extent of the law. Some offenders break the law based on a series of circumstances which are either unlikely to reoccur or would be dealt with best by a community program.

When all offenders are treated as serious offenders the public is done a disservice. If the first offender identifies his/herself as a criminal because of this type of classification, or because he is forced into association with real criminals in jail, the likelihood of continuing criminal acts is increased. Diverting certain first offenders is also cheaper than building a jail to hold them.

The Pretrial Diversion program, established by an LEAA grant in February 1978, and located within the Department of Law in Anchorage, affords the possibility of an economically viable alternative to prosecution and subsequent incarceration for first offenders.

By diverting individuals who appear to be unlikely repeaters, the public will be benefitted in two ways. First, the prosecution may concentrate its efforts on more serious crimes. Secondly, first offenders who are diverted will be afforded the opportunity to dispose of their cases in a way that eliminates a criminal record, thus improving their prospects of future useful employment.

Each client accepted into this project is specifically obligated by contract to perform community work service, make restitution, develop employment skills, get a GED diploma, etc. Failure to meet these contractual obligations results in termination from the project and the reinstitution of criminal proceedings.

As of the Spring of 1979, 152 defendants had completed the program. Nearly three-quarters of these clients (107) had been apprehended on shoplifting charges. Eighteen of these defendants were required to make restitution in the amount of $8,950 as a condition of diversion. Sixteen persons paid a total of $7,938. Eight clients were asked to obtain a GED; seven complied. One person was required to seek outside counseling and this was done. One hundred twenty-three clients were asked to perform some form of community work. One hundred fourteen persons provided a total of 3,699 hours to the community of Anchorage. Clients paid back the community or individual victims. If a figure of $5.00 per hour was attached to each hour of community service work done, the value would be $18,495.

Recidivism data collected nearly two years after the start of the project showed that of the 152 clients, 13 were terminated because of a subsequent arrest or failure to meet a condition of diversion. Out of the 140 clients who successfully completed the project, 132 were run through the Anchorage Police Department's Alpin System. Ninety-five per cent of the group remained arrest free. Of the 5% who failed,

over 70% were rearrested on misdemeanor charges.

This clearly shows that pretrial diversion has a substantial impact on reducing future criminal behavior.

Judicial Council staff examined the program's statistics with regard to the racial admixture of the clientele. The program appears to be even-handed and fair in this regard. The racial mix of diversion clients was very close to that of prosecuted defendants: it would thus seem that diversion criteria are utilized without regard to the race of the defendant. Thus, it would appear that the utilization of the diversion option encourages racially neutral prosecutorial decisionmaking at an early stage in the criminal justice process. Expanding the program of diversion as an alternative to prosecution/incarceration will, therefore, increase the rehabilitation potential for minorities in a greater proportion than were there no such option.

XI. Sentencing Alternatives

A. Finding

1. A substantial factor contributing to higher rates of incarceration for minority defendants is the scarcity of alternatives to incarceration. A variety of alternative programs offering different levels of supervision and restraint, treatment, counseling, work service, vocational training, etc. would promote greater equity in sentencing and help relieve dangerously overcrowded prison conditions.

B. Recommendations

1. A central clearinghouse should be established to administer the specific provision for Community Work created by the new sentencing code. [Sec. 12.55.055(a)(b)].

2. Alcohol and drug awareness clinics should be established for defendants, particularly youthful individuals, who may need help in recognizing their problems and in learning how to cope with them.

3. Facilities should be established for the partial confinement of persons who require closer supervision than can be provided through ordinary probation, but who do not need to be incarcerated.

C. Discussion

The Committee has found that the absence of workable alternatives to incarceration frequently leads to jail sentences which are unnecessary. Many judges would prefer to impose non-incarcerative penalties if effective options were available. Judges told the Committee that often persons were imprisoned "by default," so to speak, for the lack of any acceptable alternative. The burden of unnecessary incarceration fell more heavily upon minority groups, in part because they tended more often to appear in court without support, (e.g., business persons in the community willing to offer employment, credible individuals able to provide a place to stay, and the like). Courts, like lending institutions, are more likely to extend "credit" to those who have resources. The kinds of programs and alternatives this

Committee supports are those willing to accept defendants who are relatively lacking in support, and consequently most in need of help. Programs should be carefully monitored to insure that they are accepting hard cases, as well as easy ones whose "success" makes for impressive statistics.

The new sentencing code provides a legislative structure for this Committee's recommendation. Community work under the new code is defined as work on "projects designed to reduce or eliminate environmental damage, protect the public health, or improve public lands, forests, parks, roads, highways, facilities, or education." The code provides that the court may order a defendant convicted of any crime to perform such work either "as a condition of a suspended sentence or suspended imposition of sentence, or in addition to any fines or restitution ordered." [AS 12.55.055]. Community work may also be recommended by the court to the Department of Health and Social Services for defendants serving periods of incarceration.

Although establishing community work as a legislatively sanctioned sentencing alternative is a step in the right direction, unfortunately, at this time there is no statewide agency prepared to help implement the statutory mandate. The law is not self-executing. Community work alternatives will not be well utilized unless judges are kept constantly informed of what kinds of projects or employers are available and how much supervision they are able to provide, and unless some agency or group undertakes the job of match-

ing defendants to programs. For this reason we have suggested that the Legislature establish and fund a central clearinghouse agency to see that community work becomes a reality, and not just a theoretical sentencing alternative. A clearinghouse could reach out into the communities throughout Alaska and actively solicit prospective employers to volunteer to accept persons sentenced to community work. It could then help these prospective employers overcome administrative and bureaucratic hurdles such as the need for insurance, negotiation with labor groups, etc. Having established an inventory of prospective employers, up-to-date information on each alternative employment situation could be supplied statewide to judges, district attorneys and public defenders. Clearinghouse personnel could actively match the characteristics and backgrounds of defendants with suitable employment plans and present them to counsel or the court. Clearinghouse personnel might also periodically report to the court on the defendant's progress under the work program.

Community service programs are not new. For example, in Sitka an alternative sentencing program has been in operation since December of 1978. Robert Wilde of the Sitka Probation Office reported to Judge Duane Craske on October 9, 1979, that from the inception of the program to that date the option to perform community service work was granted by the court in 37 cases. As of October 9, 1979, 13 defendants had performed 357.9 hours of community service

work. Employers using the program in Sitka included the National Park Service, State Park Service, the City and Borough of Sitka, the Pioneers Home, the Sitka Community Association and the Double O Senior Citizens Club. An article appeared in the Sitka Daily Sentinel on Friday, December 1, 1979, describing the Sitka work service option.

> Wilde said that he had compiled a list of sixty organizations in Sitka, including churches, that would be eligible to participate in the community work program as employers.
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> * * *
>
> Although most of the jobs done this last year were manual labor, one person reviewed films on alcohol abuse for the Sitka Community Association and one ran the scoring clock at City League games. (p.4)

Community service alternatives are well established in other states. For example, there is a California League of Alternative Service Programs run by the Volunteer Action Center of Santa Clara County, Inc. This organization is developing a statewide community service network. Alameda County, California, also runs a Volunteer Bureau, which, according to its 1979 annual report, placed some 4,020 defendants in work service to the community between July 1, 1978 and June 30, 1979. Approximately 600 different agencies used the services of court-referred volunteers during that period. These agencies included, among others, hospitals, convalescent homes, rest homes, free clinics, health associations, schools, colleges, adult education programs,

youth organizations, senior citizens' centers, child care organizations, libraries, radio stations, t.v. stations, the Red Cross, volunteer bureaus, and others. The types of community work performed by Alameda County volunteers included skilled and unskilled maintenance, repairs and janitorial, skilled and unskilled clerical work, assisting professional and medical staff, including interviews and counseling, etc., hospital aide and visitor work in convalescent and rest homes, working as a teacher's aide, and aide to handicapped and blind persons.

The judicial member of this Committee suggested there was a need for a correctional alternative to provide closer supervision and control than probation, but still be less restrictive than imprisonment. He styled this alternative a "half-way" house; the Committee has adopted his suggestion. This alternative might be appropriate for defendants who do not constitute a danger to the community, but who have not done well on probation.

* * *

A Note Regarding the Future

The Committee's functions will officially terminate this month. Nevertheless, there still remain major areas for further inquiry. For example, Professor John Angell, Director of the University of Alaska's Justice Center, has testified regarding the enormous disparities he found between the urban criminal processes and those

which apply in the many rural areas of this state. The problems discussed in Professor Angell's report would require a major effort to do them justice. If this document does not deal separately with the issue of bush justice, this is not because the problems were thought insignificant. On the contrary, they were too overwhelming for the time allowed.

The rural-urban dichotomy is not the only large area left untouched, although it is probably the most difficult one. The juvenile justice system has not been mentioned either. Although the Committee heard complaints about alleged inequities in the administration of juvenile justice, we simply lacked the time to investigate. Judges and other witnesses also alerted the Committee to the relationship between the function of the police and the ultimate outcome of a criminal case. Whether proceedings are initiated by a summons--a written command to appear in court--or by an arrest followed by a compulsory trip to jail and an overnight stay, may well affect the outcome of the case. Is the summons/arrest decision neutral with regard to race of ethnic background? What influence does this police decision exert over subsequent decisions, such as whether the judge or magistrate grants an O.R. release to the defendant prior to trial? Other police-related issues include allegations of misconduct, or excessive force in arresting minority persons, and the existence, or lack thereof, of an outside instrumentality such as a civilian review board to consider such charges.

Another subject left almost unexamined was the relationship between prosecutorial discretion in filing criminal charges and the ultimate sentence imposed by the court. In the Judicial Council 1974-76 felony data it was clear that charges against Alaskan Natives frequently were reduced after filing. On the other hand, similar charges against Black defendants usually remained high and unreduced. Subsequently, Blacks tended to go to trial on their charges much more often than Natives similarly charged. How do these charging practices affect the sentences of Blacks, Caucasians and Natives?

Conclusion

We have raised the issue of large but unexamined areas of inquiry discussed above to reemphasize the point made in the Introduction: this report represents an early step in the quest for a truly equitable and culturally-aware system of justice. It is our profound hope that it does not become in fact the last step in this quest. Unless these findings and recommendations are acted upon positively, then our hopes and efforts will have been for nothing. Worse than nothing: they will have been a sop, a temporary appeasement of Alaska's minority citizens until attentions are diverted elsewhere. For a legislative body to ignore these findings and recommendations is to ignore Alaska's constitutional commitment to equal justice under law, and to ignore the proven and stated needs of almost one-fourth of the citizens of this state.