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FLORIDA'S INITIAL EXPERIENCE WITH SENTENCING GUIDELINES

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The 1976 publication of the final report on the sentencing guidelines feasibility study sponsored by the National Institute of Law Enforcement and Criminal Justice¹ provided a fresh approach to the examination of sentencing practices within felony courts throughout the United States. During the decade preceding publication of this monograph, considerable attention had focused on the apparent failure of the nation's criminal justice system to exercise some control over the spiraling crime rate.² In response to this criticism, state legislators throughout the country began to reevaluate the efficacy of existing criminal justice legislation. Given the visibility of the courts in the overall criminal justice process, much of the reform has been directed at the sentencing process and the penalties associated with criminal offenses.

Prior to the publication of the feasibility study, the trend in sentence reform had been toward some form of determinate sentencing,³ wherein punishments are based more on the crime than on

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1. L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, FINAL REPORT OF THE FEASIBILITY STUDY, (1976).

This report was revised in 1978 and published by the National Institute of Law Enforcement and Criminal Justice (now the National Institute of Justice) and the Law Enforcement Assistance Administration. L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION REPORT ON THE FEASIBILITY STUDY (1978) [hereinafter cited as FEASIBILITY STUDY (1978)].

2. For a general discussion of the background underlying the sentence reform movement, see, THE AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971); COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES (1976); D. FOGEL, ". . . WE ARE THE LIVING PROOF. . ." THE JUSTICE MODEL FOR CORRECTIONS (1975); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1975); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT (1975).

3. The various determinate sentencing schemes are a response to traditional "indeterminate" sentencing laws wherein the legislature establishes the range of appropriate sentences (e.g., one to five years incarceration for a 3rd degree felony) and the trial judge has the discretion to assess a specific sentence (e.g., three years) or an indeterminate sentence (e.g., one to three years) within these parameters.

the offender and in which prison terms are predictable and relatively inflexible.⁴

Determinate sentencing proposals can generally be classified into three categories: mandatory, flat-time and presumptive. Mandatory or minimum-mandatory sentences specify sentences or sentence "ranges" bounded by the mandatory minimum and statutory maximum and are legislatively prescribed for either individual crimes⁵ or groups of offenses.⁶ In addition, there are flat-time sentences under which the offender serves exactly the sentence imposed without benefit of gain-time or consideration for parole and presumptive sentences which are based upon the proposition that an offender, upon conviction for a certain offense, should be assessed a legislatively specified sentence. The latter two schemes generally include provisions for departing from the prescribed sentences given the existence of certain mitigating or aggravating circumstances specified within the statutes.⁷

4. The scope of sentencing laws varies considerably from state to state, and the use of a generic term such as "determinate sentencing" is somewhat misleading. Inherent in the concept of determinate sentencing is the notion of a fixed or definite length of sentence. However, because of the varying provisions governing implementation (e.g., the function of the parole board and the application of gain-time, good-time, etc.), determinate sentencing schemes do not necessarily guarantee that the offender will serve all of the sentence imposed.

5. *E.g.*, FLA. STAT. § 775.087 (1981) which prescribes a minimum-mandatory sentence of three calendar years for any person convicted of certain specified felonies while in possession of a firearm.

6. *E.g.*, FLA. STAT. § 893.135 (1980 Supp.) which establishes minimum-mandatory sentences for any individual who "knowingly sells, manufactures, delivers or brings into this state, or who is knowingly in actual or constructive possession of . . ." certain amounts of specified drugs. Sentence minimums range from three to fifteen calendar years.

7. A comprehensive presumptive sentencing scheme was tendered during the 1978 Florida legislative session in the form of Fla. HB 150 (1978) (The Sentencing Reform Act of 1979). The bill provided for "specified and determinate sentences for criminal offenses . . . [with] specified factors in aggravation and mitigation to be used by the court in its determination of whether to increase or decrease a sentence." The supreme court was given the authority to add to the list.

Under the proposed scheme, the penalty for a second degree felony was "a definite term of imprisonment of 9 years or if there were mitigating factors by a definite term of imprisonment of 7 years." Aggravating factors could increase the term of imprisonment to "not less than 11 years nor more than 15 years. . . ." Factors available for use in aggravation included: 1) whether an individual suffered great bodily harm during the commission of the felony; 2) whether the defendant presented a continuing risk of physical harm to the public; 3) whether the crime was committed in a particularly heinous manner; and 4) defendant's prior record. Ten factors were proffered in mitigation, including: 1) whether the offender was provoked; 2) whether the offender had voluntarily compensated the victim for damages and/or personal injury; 3) lack of prior record; and 4) the defendant's age.

Although such a comprehensive piece of legislation deserves a far more in-depth review than can be presented here, one of the primary arguments against this and similar legisla-

Like the generic term "determinate," each of these sentencing schemes has fostered a number of variations, each tailored to the sentencing procedures being considered for reform. Indeed, over the years the distinction between the three schemes has become somewhat clouded. No sentencing proposal can be classified as "pure" mandatory, flat-time or presumptive since those schemes currently in effect embody some of the basic tenets of each. They can best be described as hybrid models. However, nine states term their sentencing schemes as "determinate."⁸

Sentencing guidelines offer a different approach to sentencing reform.⁹ The underlying concept is not altogether different from the basic presumptive sentencing model. Under both sentencing schemes the trial judge is presented with the limited range of sentences at his disposal and deviation from the prescribed sentence must be based on mitigating or aggravating circumstances present in the case. The difference between the two approaches lies in the flexibility given the trial judge in deviating from the recommended sentence¹⁰ under guidelines and, perhaps more impor-

tive packages is the lack of guidance provided the courts in the application of the aggravating and mitigating factors. For example, is it the responsibility of the prosecuting attorney and defense counsel to identify these factors in the record and bring them to the trial court's attention, thereby raising the possibility that they may be bargained away in the plea negotiation process? How does the importance of each factor relate to the other factors enumerated? And, given the uniqueness of each case, could what is defined as a mitigating factor be construed and used as an aggravating factor in another case? For instance, there are no provisions for the interpretation of "defendant's age."

8. "Determinate" sentencing schemes are currently in effect in California, Colorado, Delaware, Idaho, Illinois, Indiana, Maine, New Mexico and North Carolina. CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, OVERVIEW OF STATE AND LOCAL SENTENCING GUIDELINES AND SENTENCING RESEARCH ACTIVITY, (AMERICAN UNIVERSITY LAW INSTITUTE May 1980) [hereinafter cited as OVERVIEW].

9. As with the term "determinate sentencing", "sentencing guidelines" is more properly associated with a general concept rather than a specific schema or application. In the present context, the term sentencing guidelines is used to describe a system of empirically-based decision-making guidelines based on the work of Gottfredson and Wilkins for the United States Parole Commission and adapted for use in trial courts as an aid in the sentence decision-making process. See *supra* note 1.

The basic Gottfredson-Wilkins guideline model consists of a two-dimensional grid or matrix relating specific offense and offender characteristics to length of sentence. The offense and offender-related factors and their associated weight or importance in the sentencing decision are initially derived from statistical analysis of historic sentencing practices in the jurisdiction and modified by an advisory board to comport with current standards and philosophies of sentencing.

10. Under most presumptive sentencing schemes, the presence of any aggravating or mitigating circumstances would only serve to establish another presumptive sentence. See *supra* note 7. Such constraints are absent in sentencing guidelines. Once the decision has been made that the circumstances surrounding the offense are sufficient to warrant a sentence outside the guidelines, the trial judge has complete discretion to impose and sentence

tantly, the fact that guidelines are both offender and offense oriented rather than strictly offense oriented.¹¹

Florida's interest in sentencing guidelines dates from the winter of 1977 with the chief justice's appointment of a committee "to examine the extent and causes of sentence disparity and to explore the variety of sentencing alternatives available—judicial, legislative, and administrative—to reduce unreasonable sentence variation."¹² After an extensive review of felony sentencing practices within the state and an examination of the various sentencing proposals currently in vogue throughout the country,¹³ the Sentencing Study Committee endorsed,

[I]n principle, the exercise of judicial discretion in the sentencing process. However, in order to achieve a greater degree of consistency and fairness in the sentencing process throughout the state, the Committee recommend[ed] the development and implementation of structured sentencing guidelines in combination with a sentence review panel that would operate within the sentence parameters prescribed by the Legislature.¹⁴

THE MULTIJURISDICTIONAL SENTENCING GUIDELINES PROJECT

In September 1979 the Office of the State Courts Administrator

within the legislatively prescribed parameters for that offense.

11. Sentencing guidelines are currently in effect on a statewide basis in Minnesota and, in addition to Florida, are in the development or implementation stages in Michigan, New York, Pennsylvania, Maryland and Massachusetts. See OVERVIEW, *supra* note 8.

12. Sundberg, Plante & Palmer, *A Proposal For Sentence Reform in Florida*, 8 FLA. ST. U.L. REV. 1, 1-2 (1980) [hereinafter cited as *Proposal*].

13. In addition to examining various determinate sentencing alternatives, the Sentencing Study Committee addressed the use of sentence review panels and sentencing councils, appellate review of sentences and various combinations of these proposals. In its deliberations the committee was not predisposed to the assumption that the state's existing sentencing pattern was necessarily inadequate. Although the question of sentence disparity had received considerable attention in the years immediately preceding the appointment of the committee, little empirical data existed on the extent of sentence disparity in Florida courts. The committee recognized the fact that the negative connotation associated with the term "disparity" should not apply to all sentence variation. Although it was readily conceded that a certain amount of unwarranted sentence variation did exist within the Florida criminal justice system, a considerable amount of the "observed variation properly reflects the societal mores and attitudes toward crime within individual jurisdictions and the varying degrees of seriousness of a particular offense." Sentencing Study Committee to the Florida Supreme Court, Interim Report (1978) [hereinafter cited as Interim Report]. The work of the committee, therefore, lay not in the development of recommendations for eliminating disparity altogether, but in the development of a proposal to identify and reduce the amount of unwarranted sentence variation.

14. Interim Report at 7.

was awarded a grant by the National Institute of Law Enforcement and Criminal Justice¹⁵ and the Law Enforcement Assistance Administration (LEAA) to test the feasibility of developing and implementing sentencing guidelines in a multijurisdictional setting and "to evaluate the effectiveness of sentencing guidelines as a mechanism for enhancing sentencing consistency across different jurisdictions within [the] state."¹⁶

Four circuits were selected to participate in the study: the fourth judicial circuit (consisting of Duval, Clay and Nassau counties); the tenth judicial circuit (consisting of Polk, Hardee and Highlands counties); the fourteenth judicial circuit (consisting of Holmes, Jackson, Washington, Bay, Calhoun and Gulf counties); and the fifteenth judicial circuit consisting of Palm Beach County). Selection of the four jurisdictions was based on a number of factors, including: 1) the availability of sentencing-related data from court records, pre- and post-sentence investigation reports and prison admission summaries; 2) the ratio of pre-sentence investigation reports to sentencing decisions; 3) the test design requirement to have a mixture of urban, suburban and rural felony cases; 4) the desire to have a geographic distribution reflective of the varying social and political attitudes within the state; and, perhaps most importantly, 5) a commitment from the trial judges in each circuit to consult the guidelines in their sentencing decisions during the year-long implementation period.¹⁷

Responsibility for overseeing the development and implementation of the guidelines was assigned to an advisory board consisting of the chief judge, or his designated representative, in each of the four jurisdictions and eight *ex officio* members who served in an advisory capacity but had no formal vote in the proceedings.¹⁸ Se-

15. Now the National Institute of Justice (NIJ).

16. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, MULTIJURISDICTIONAL SENTENCING GUIDELINES PROGRAM TEST DESIGN 6, December 1978.

17. *Id.* at 51-52.

18. The advisory board was chaired by Justice Parker Lee McDonald and consisted of the Honorable Oliver L. Green, Jr., Circuit Judge, 10th judicial circuit; the Honorable Robert L. McCrary, Jr., Chief Judge, 14th judicial circuit; the Honorable Marvin U. Mounts, Jr., Circuit Judge, 15th judicial circuit; and the Honorable Everett R. Richardson, Circuit Judge, 4th judicial circuit. The *ex officio* members included: the Honorable Edgar M. Dunn, State Senator, 10th District; the Honorable Harry Fogle, Chief Judge, 6th judicial circuit; Robert Josefsberg, Esq.; the Honorable Virgil Q. Mayo, Public Defender, 14th judicial circuit; the Honorable James T. Russell, State Attorney, 6th judicial circuit; Kenneth Simmons, Commissioner, Florida Parole and Probation Commission; and Dr. Gordon P. Waldo, Professor of Criminology, Florida State University.

lection of the ex officio members was based on the advisory board's desire to complement the judicial experience within the four circuits (i.e., the experience provided by the board members as well as the collective experience of the other trial judges reflected in the sentencing decisions gathered from a data sample) with a statewide perspective offered by the expertise of representatives of the various criminal justice agencies and organizations involved in the sentencing process.

DEVELOPMENT OF GUIDELINES

Sentencing guidelines represent a synthesis of the collective experience of the judges and historic sentencing practices within the circuits. They provide the trial judge with a "basic minimum of information necessary to indicate the 'usual' penalty which has been awarded in similar cases."¹⁹ The basic assumption underlying the entire guideline concept is that while judges in individual jurisdictions "are making sentencing decisions on a case-by-case. . . [basis], they are simultaneously and as a by-product making decisions on the policy level."²⁰

In order to provide the advisory board with a general description of the historic sentencing practices operating within the four participating circuits, a sample of felony cases disposed of²¹ over a three year period (July 1, 1976—June 30, 1979) was selected and analyzed.²²

Although the Florida Statutes enumerate hundreds of unique criminal offenses, the variety of offenses which routinely appear before the circuit courts is rather limited. In order to determine

19. L. WILKINS, *THE PRINCIPLES OF GUIDELINES FOR SENTENCING: METHODOLOGICAL AND PHILOSOPHICAL ISSUES IN THEIR DEVELOPMENT* 3 (NATIONAL INSTITUTE OF JUSTICE 1981).

20. L. WILKINS, *supra* note 1, at 10.

21. This sample consisted of all incarcerative, non-incarcerative (fine, restitution, etc.) and probation sentences assessed during this period including cases in which adjudication was withheld. The latter cases were considered by the advisory board for the purposes of the project to be equivalent to a conviction because a definite sanction or penalty was imposed. Since the purpose of the project was to develop guidelines to aid the trial judge in the sentence decision-making process, all cases for which no information was filed, charges dropped or nolle prossed were excluded from the sample.

22. A three-year frame was selected in order to ensure that the sentencing practices of the maximum number of trial judges could be included in mapping the sentencing procedures in the four circuits. The policy of rotating circuit judges onto the criminal bench varies from circuit to circuit. Therefore, a three-year period was considered the minimum amount of time necessary to ensure rotation and input from a maximum number of judges, and a representative sample caseload for each judge. Such a lengthy period also reduced the potential influence of seasonal caseload variation in overall sentencing patterns.

which offenses should be considered for inclusion in the guidelines, a survey of all felony offenses adjudicated in the four circuits during the three-year sample period was taken. The 15,613 cases surveyed consisted of 194 distinct criminal offenses.²³ Of these, only sixty-five constituted approximately 85% of the criminal felony caseload. Based on the advisory board's assumption that the various offense and offender characteristics influencing the sentence decision-making process are different for different types of offenses, these sixty-five offenses were classified into six offense categories (Table 1). The remaining 129 were eliminated from further analysis.²⁴ A final sample was then drawn from the sixty-five offenses based upon the jurisdiction (urban, suburban, rural) and type of sentence (incarcerative/non-incarcerative).²⁵

23. In defining the universe from which to select the sample upon which to develop guidelines, the advisory board excluded; 1) all capital offenses since they are controlled by FLA. STAT §921.141 (1981); 2) all escapes, since their resentencing is, to a large extent, dependent upon the offense for which they were initially incarcerated; and 3) probation violations other than those for which the offender was convicted of a new crime (*i.e.*, all technical violations were excluded from the study).

24. Given the infrequent occurrence of these offenses, the advisory board felt that sentencing an offender convicted of any of these offenses should be left entirely to the discretion of the trial judge.

25. Since the incarceration rate for each offense category may differ from the overall rate of incarceration, this criteria was included in order to ensure that the sample would accurately reflect incarceration rates for each crime group. Additionally, the sample indicated that probation, restitution, etc., had been imposed in a large number of cases. Since the purpose of the project was to aid the trial judge in assessing the IN/OUT (*i.e.*, incarceration/non-incarcerative decision) and the length of incarceration, a pure random sample would have resulted in a sufficient number of cases upon which to examine the initial question, but possibly could have been lacking the requisite number of cases for analysis of the length of incarceration. The sample, therefore, was drawn with an eye toward ensuring that a sufficient number of incarcerative sentences would be collected to make the findings statistically meaningful.

TABLE 1

FREQUENCY DISTRIBUTION OF CONVICTIONS RESULTING IN
SENTENCES FOR EACH CIRCUIT

CATEGORY OF OFFENSE	PERCENT OF TOTAL NUMBER OF SENTENCES			
	4th	10th	14th	15th
CATEGORY 1 (Murder, Manslaughter, Kidnapping, Lewd and Lascivious Assault)	4.0	4.9	4.0	4.8
CATEGORY 2 (Aggravated Assault, Aggravated Battery, Battery of Law Enforcement Officer)	9.3	8.9	5.1	9.7
CATEGORY 3 Burglary with Assault, Burglary of an Occupied Dwelling, Structure or Conveyance; Robbery)	7.6	6.9	7.9	6.3
CATEGORY 4 (Armed Burglary, Burglary of an Unoccupied Dwelling, Structure or Conveyance)	18.1	24.0	20.9	22.3
CATEGORY 5 (Grand Larceny and Theft, Dealing in and Receiving Stolen Property, Forgery, Worthless Checks)	30.7	24.1	30.9	22.7
CATEGORY 6 (Possession, Sale, Delivery, Importation of a Controlled Substance)	16.7	13.4	13.0	22.7
ALL OTHER CRIMES	13.6	17.8	18.2	11.5

NOTE: The numerical sequence of the categories was arbitrary and was not intended to reflect the relative seriousness of the categories.

Given the limited number of cases in the rural areas, the tenth and fourteenth judicial circuits were combined into a single "rural" jurisdiction. This enabled an approximately equal number of cases to be drawn from the three geographic areas.

A total of 220 information variables was collected for each of the 5,100 felony cases sampled.²⁶ The source documents for the data base were court docket records, pre- and post-sentence investigation reports, prison admission summaries and criminal history records or "rap sheets."²⁷

The case information was then analyzed in order to develop a model of past sentencing practices which would identify those offense and offender characteristics which have historically exerted the greatest influence on the sentencing decision and the relative weight or importance assigned to these variables.

The task of identifying those factors contributing to the overall sentence decision-making process began with a detailed analysis of Category 2 offenses (aggravated battery and aggravated assault). Before analyzing the data by offense category, the frequencies of selected offense and offender characteristics were tabulated in order to obtain a general picture of the overall data sample. The frequencies of several characteristics are presented in the following table.

26. An initial sample of 6,826 cases was identified for coding from the four circuits. Of these, a total of 5,100 cases were located, coded and analyzed. The approximately 1,700 case difference between the projected and actual sample sizes was due, in part, to such factors as the reduction of cases from felonies to misdemeanors; the number for which pre- and post-sentence investigations were not completed (this group primarily consisted of offenders sentenced to short periods of unsupervised probation by the court without formally being processed through Probation and Parole Services and individuals sentenced to county facilities who were never transferred into the custody of the Department of Corrections); and to the inability to locate files. A considerable number of active probation files were included in the sample involving a large number of probation offices and officers. It was therefore virtually impossible to locate all of the files in the time frame allocated for data collection.

A certain amount of case attrition was anticipated during the data collection and coding phases of the project and the sample size was calculated accordingly. The cases lost through coding were due to the large number of data elements for which there was no information, thereby, rendering them unacceptable for all but the most superficial analysis. The figures for these cases are included in the 5,100 cases since their use was selective.

27. Although it was recognized that a considerable amount of information is provided the judge in the courtroom or chambers via oral arguments by prosecution and defense counsel, much of these proceedings go unrecorded, save for lengthy transcripts which severely restrict accessibility to the information. Acknowledging the problems in attempting to totally reconstruct every case, the advisory board decided to limit the data collection effort to the documents readily available since it was agreed that those documents do, in fact, represent the entire written record available to the trial judge at the time of sentencing.

TABLE 2
FREQUENCIES OF SELECTED OFFENSE AND OFFENDER
CHARACTERISTICS

		SUB-			OVERALL
		URBAN	URBAN	RURAL	SAMPLE
RACE:	White	58.7*	56.7	70.0	61.4
	Non-white	41.3	43.3	30.0	38.6
SEX:	Male	90.1	88.7	92.3	90.3
	Female	9.9	11.3	7.7	9.7
AGE:	16-25	61.1	57.1	62.1	59.9
	26-35	25.4	28.4	22.6	25.1
	35 and over	13.5	14.5	15.3	15.0
EDUCATION:	less than 12 years	61.6	60.5	69.0	63.5
	high school graduate	26.4	24.1	21.7	24.2
	beyond high school	12.0	15.4	9.3	12.3
BASIS OF ADJUDICATION:	Plea	93.6	90.6	90.5	91.7
	Trial	6.4	9.4	9.5	8.3
PERCENT ADJUDICATION WITHHELD:		31.8	24.9	29.9	28.9
PERCENT FIRST OFFENDERS:		31.2	30.9	35.3	32.3
RATE OF INCARCERATION:		65.8	55.7	65.5	62.2

*Figures given as percentages

Later, separate analyses were conducted on the urban, suburban and rural cases in order to determine whether different importance was attached to individual factors in the sentencing process. A series of factors was identified for each area (Table 3).

TABLE 3
FACTORS INFLUENCING THE SENTENCING DECISION FOR
CATEGORY 2 OFFENSES (AGGRAVATED BATTERY, AGGRAVATED
ASSAULT)

FACTORS*	URBAN	SUBURBAN	RURAL
Primary Offense at Arraignment**		x	x
Number of Counts of Primary Offense		x	x
Second Offense at Arraignment	x	x	x
Third Offense at Arraignment	x		
Legal Status of Offender at Time of Offense***	x	x	x
Lack of Remorse		x	
Extent of Victim Injury	x		
Extent of Victim Scarring or Disfigurement		x	
Victim Precipitation	x	x	
Sex of Victim	x		
Weapon Use		x	
Prior Felony Convictions****		x	
Prior Felony Convictions Against Persons		x	
Prior Felony Convictions Against Property		x	
Pending Offenses			x
Unverified Prior Offense Behavior			x
Degree of Education			x
Employment Status at Time of Sentencing			x
Method of Adjudication (plea v. trial)			x

*The factors are not listed by order of significance since their impact in the sentence decision-making process varied from circuit to circuit.

**Measured by the statutory seriousness of the offense (i.e. 1st, 2nd, 3rd degree).

***Whether the defendant was under some form of legal restrictions, such as parole, probation or work release.

****Represented by a figure based on both the number and statutory seriousness of prior convictions.

The members of the advisory board then evaluated the data and modified the statistical model to reflect their judicial experience. Those variables deemed inappropriate for use in sentencing were eliminated from the sentencing calculus and variables were added which, although not statistically identified as being significant, were considered to be an integral part of the sentence decision-making process.

The advisory board's immediate task was to reconcile the diverse factors identified for each geographic area. Ten of the original nineteen variables identified in Table 3 were changed or eliminated

altogether. The primary, second and third offenses at arraignment were changed to reflect the offenses at conviction. The advisory board determined that the offenses at conviction (after all charge reduction or plea negotiations had been completed) should be used as the basis for assigning points. Given the myriad of reasons for reducing the degree of seriousness during the period between arraignment and conviction, the advisory board felt that the offense for which the defendant is ultimately found guilty should be the basis for any sanction. The following additional factors were eliminated:

- 1) *Lack of Remorse*. The members of the advisory board were unanimous in their conviction that the extent of remorse demonstrated by the defendant was a critical factor in determining the appropriate sentence. However, because of its subjective nature, it would be impossible to objectively quantify and should not be included in the guideline matrix.
- 2) *Extent of Victim Scarring or Disfigurement*. Since the extent of injury to the victim was already a factor, evidence of scarring or disfigurement would more appropriately be used as a reason for departing from the guidelines on a case-by-case basis.
- 3) *Victim's Sex*. No distinction should be made in the sex of the victim. Perhaps a more appropriate consideration would be an evaluation of the sexes of the offender and victim and their relative size/physical appearances. This too, however, is highly subjective and unique to each case and therefore should not be formally defined and scored.
- 4 & 5) *Pending and Unverified Prior Offense Behavior*. The advisory board was unanimously opposed to aggravating an individual's sentence on the basis of unverified criminal activity.
- 6) *Degree of Education*. This variable was eliminated with little debate.
- 7) *Method of Adjudication*. The fact that an individual elected to go to trial rather than plead guilty should not influence the sentence imposed.

In addition to eliminating the above variables, the advisory board adopted the policy that the race of the offender was an inappropriate consideration in the sentencing process and should not be given any consideration if identified as significant in any subsequent analysis.

One of the key purposes of the project was to test the feasibility of developing a uniform set of sentencing guidelines for diverse jurisdictions. Inherent in this goal was the assumption that sentenc-

ing practices between the four circuits were sufficiently different so as to challenge the advisory board into agreeing upon a uniform set of procedures. Therefore, in an attempt to identify any disparate sentencing practice, an urban/suburban/rural trichotomy was adopted in the preliminary data analysis. The great diversity anticipated between jurisdictions did not surface. Although there was some individuality between the circuits, when presented with the material, the advisory board had little difficulty in arriving at a consensus regarding the appropriateness of individual factors in the sentencing process. Therefore, once policy decisions were made on the basis of Category 2 offenses, there was no need to continue with an urban/suburban/rural analysis. Although such an analysis would have offered additional insight into the sentencing procedures within each jurisdiction, time and monetary constraints precluded such an extended analysis.

Using the advisory board's decisions regarding Category 2 offense variables, the remaining five offense categories were analyzed. Category 2 was also re-analyzed in order to determine the relative importance of the individual factors when examined in the aggregate (*i.e.*, combined urban/suburban/rural jurisdiction). Table 4 lists the offense and offender variables for each of the six offense categories. Several other factors were identified as statistically significant but were eliminated from consideration for inclusion in the final model based on earlier decisions made by the advisory board in association with the preliminary analysis made on Category 2 offenses. These factors included: judge, type of attorney, offender's sex and race.

TABLE 4
DISTRIBUTION OF SENTENCE-RELATED FACTORS BY OFFENSE
CATEGORY

FACTOR	CATEGORY					
	1	2	3	4	5	6
Primary offense at conviction	x	x	x	x	x	x
Second offense at conviction	x	x	x	x	x	x
Third offense at conviction	x	x	x	x	x	x
Number of counts of primary offense		x		x	x	x
Prior adult convictions	x	x	x	x	x	x
Prior juvenile felony convictions		x		x	x	
Extent of personal injury	x		x			
Victim precipitation	x	x				
Type of weapon	x	x			x	
Use of weapon				x		
Crime committed in a heinous manner	x					
Legal status at time of offense		x			x	x
Employment status						x
Type of victim (person or business)				x		
Number of offenders					x	x
Number of dependents		x				
Offender's drug use		x		x	x	
Offender's alcohol use					x	
Offender's psychological health					x	
Role of the offender					x	
Prior criminal traffic record					x	
Evidence of sale or distribution						x
Type of drug						x

Examining the variables listed in Table 4, the advisory board eliminated the following factors:

1) *Offender's Psychological Health*. Although a definite consideration in determining the sentence, the offender's psychological health could serve as either an aggravating or mitigating factor depending upon the circumstances of the offense. It was therefore deemed too subjective to include in a sentencing matrix, especially since most comments contained within the pre-sentence investigation reports (PSI's) are made without the benefit of a formal psychological report in the record.

2) *Offender's Drug or Alcohol Use*. The advisory board agreed that both factors were extremely important but, as with the offender's psychological health, too subjective and difficult to quantify. However, in order to underscore their importance a note was to be included in the user's manual stating that they were legitimate factors to consider in aggravation or mitigation of the

sentence.²⁸

3) *Number of Dependents*.²⁹ Eliminated as having no place in the sentencing process.

4) *Type of Victim*. Eliminated on the basis that whether the victim was an individual, business or government should not make a difference.

5) *Number of Offenders*. This factor could be relevant, but can best be addressed on a case-by-case basis.

6) *Crime Committed in a Particularly Heinous Manner*. This factor was considered extremely important, especially for Category 1 offenses, but too difficult to objectively quantify for purposes of the pilot guidelines effort. The advisory board acknowledged that this should still be considered an aggravating factor in sentencing.³⁰

Four variables, the number of counts of primary offense, prior juvenile felony convictions, legal status at time of the offense and the role of the offender, were deemed to be sufficiently informative so as to warrant their consideration in all categories. The final list of factors determined for use in the sentencing guidelines is presented in Table 5.

28. OFFICE OF STATE COURTS ADMINISTRATOR, MULTIJURISDICTIONAL SENTENCING GUIDELINES PROJECT, GUIDELINES MANUAL, 13, (1981) [hereinafter cited as GUIDELINES MANUAL].

29. Unlike the other factors presented in Tables 3 and 4, this was the one variable for which no reason could be adduced for its statistical significance. However, because a correlation exists between a particular factor and the length and type of sentence does not mean that it is a significant factor in the sentence decision-making process. The entire analysis of historic sentencing practices can best be viewed as a heuristic device to give the advisory board baseline data from which to develop a common understanding of the sentencing process. The key to guideline construction is how the advisory board interprets the sentencing model and modifies it through their normative decisions.

30. For the purposes of the study, this variable was defined as "[a]ny crime which is especially cruel, wicked or atrocious in the manner in which it was carried out . . . [Such offenses] involve: 1) execution style murders, 2) gang rapes, 3) sexual assaults or murders of young children or elderly victims, and 4) torture and mutilation of victims." OFFICE OF STATE COURTS ADMINISTRATOR, MULTIJURISDICTIONAL SENTENCING GUIDELINES PROJECT, CODE BOOK, 40 (1980).

Since the list of examples was not exhaustive, it was found that the data coders, when interpreting the real offense behavior, were allowing their personal sensitivities to influence their objectivity. Although such behaviour may parallel judicial practice, it was felt that the coders' minimal experience with the criminal justice system and exposure to the details of rather violent offenses clouded their objectivity to such an extent that the number of truly heinous offenses was inflated.

TABLE 5
DISTRIBUTION OF FACTORS BY OFFENSE CATEGORY

FACTOR	CATEGORY					
	1	2	3	4	5	6
Primary offense at conviction	x	x	x	x	x	x
Second offense at conviction	x	x	x	x	x	x
Third offense at conviction	x	x	x	x	x	x
Number of counts of primary offense	x	x	x	x	x	x
Prior adult convictions	x	x	x	x	x	x
Prior juvenile felony convictions	x	x	x	x	x	x
Legal status at time of offense*	x	x	x	x	x	x
Role of the offender	x	x	x	x	x	x
Type of weapon**	x	x	x	x	x	
Extent of victim injury***	x		x			
Victim precipitation	x	x				
Prior criminal traffic record					x	
Employment status						x
Evidence of sale or distribution						x
Type of drug						x

*Whether the offender was on probation, parole, work release or some other form of restriction.

**Type and use of weapon were combined into one variable.

***This variable was not included under Category 2 because it was agreed that the degree of the offense (third degree for second aggravated assault and second degree for aggravated battery) takes this factor into account. (However, the variable was later added to Category 2 following the discussions at the October 1981 meeting of the advisory board.)

The advisory board agreed that the defendant's employment history, apart from employment status, was an integral factor in determining the proper sentence. However, because of its subjective nature, it was difficult to quantify and apply equally to all cases. It was therefore determined that employment history

should only be used as an aid in determining the 'in/out' decision, and not the length of incarceration. If the offender was within one point on either side of the probation/incarceration guideline cells, the employment factor could be used to mitigate an incarcerative sentence to probation or aggravate a probation sentence to the lowest incarcerative sentence.³¹

The actual weight or point score assigned to each variable was based on a combination of the statistical data and the normative decisions made by the advisory board.

31. GUIDELINES MANUAL, *supra* note 28, at 13. Such cases only required the trial judge to check the appropriate box provided on the score sheets and did not have to be supported by a written statement.

The goal of the statistical analysis was development of a mathematical model that would help explain the sentencing practices operating within the four test jurisdictions. The initial analysis identified certain offense and offender characteristics and their relative weight in the sentencing decision. The result was an equation in the form:

$$W_1x + W_2y + W_3z + C = \text{sentence}$$

where x , y and z represent individual variables and W_1 , W_2 and W_3 their relative weights. C is a "constant," representing the myriad of factors which, although important in the aggregate, did not individually make a significant contribution to the sentencing decision.

In examining the statistical model, the advisory board was hesitant to add variables to certain offense categories which did not appear in at least one other offense category (see Table 5 and accompanying discussion). A number of factors were identified (*e.g.*, third time that the same offense was committed) which the advisory board thought should be included in the guidelines calculus, but decided to refrain from including them in an effort to keep the guidelines as simple as possible. The committee decided instead to update the guidelines based on factors cited by the trial judges as reasons for deviating from the guidelines and to calculate their weights accordingly. The resulting guidelines, therefore, represent a prescriptive model of what factors "should" be considered in the sentencing process.

A set of six distinct guidelines were developed. Unlike the guidelines developed in Denver³² and Minnesota,³³ wherein the point scores for the offense and offender characteristics are totalled separately and used to enter a two-dimensional matrix, the pilot study points were assigned to each of the variables and a total score was calculated. This score was then used to enter a one-dimensional matrix with score ranges correlated to sentences. A median sentence figure was recommended and accompanied by a minimum and maximum range which may be imposed at the discretion of the court. Departures from the guidelines were to be accompanied by a written explanation.

The guidelines were implemented in the four participating circuits on April 15, 1981. Subsequent to this date, any individual

32. FEASIBILITY STUDY, *supra* note 1, at xv.

33. MINNESOTA SENTENCING GUIDELINES COMMISSION, DEVELOPMENT OF STATEWIDE SENTENCING GUIDELINES IN MINNESOTA TRAINING MANUAL. (n.d.)

found guilty by a bench or jury trial, or whose guilty plea was accepted by the court, was sentenced under the guidelines. The project continued through April 14, 1982.

Although the Sentencing Study Committee³⁴ recommended the implementation of sentencing guidelines in conjunction with a sentence review panel,³⁵ the current project was limited to only the use of guidelines. Since the direct review of sentences is not a part of Florida's current appeal process, such procedures could not be implemented in only four circuits. The sentences, therefore, were not subject to any formal review. However, all of the scoresheets with the accompanying reasons for departing from the guidelines were forwarded to the State Courts Administrator's Office for review and analysis. The advisory board periodically reviewed the reasons and established policy as to which of the reasons were considered sufficiently pervasive to warrant inclusion in the guidelines. This review process is a key element in the entire concept of sentencing guidelines, for it is through the comments of the practicing trial judges that deficiencies in the matrices, both with respect to the actual factors considered and their relative weights, can be modified to meet changing sentencing patterns.

Although the purpose of sentencing guidelines was the reduction of unwarranted sentence variation, the need for some variation was recognized and indeed promoted. It was anticipated that from 15-20% of the sentencing decisions routinely would fall outside of the recommended range. The trial judges were cautioned that at no time should sentencing guidelines be viewed as the final word in the sentencing process. The factors delineated were selected to ensure that similarly situated offenders convicted of similar crimes receive similar sentences. Because a factor was not expressly delineated on the score sheet did not mean that it could not be used in the sentence decision-making process. The specific circumstances of the offense could be used to either aggravate or mitigate the sentence within the guideline range or, if the offense and offender characteristics were sufficiently compelling, used as a basis for imposing a sentence outside of the guidelines. The only requirement was that the judge indicate the additional factors considered.

34. This committee was created in January, 1978, and consisted of two justices of the Florida Supreme Court, one appellate court judge, six circuit court judges, two county court judges, five members of the Florida Legislature (two senators and three representatives), the attorney general, one public defender, one state attorney, one private attorney and a law school professor.

35. *Proposal, supra* note 12, at 20.

In implementing the guidelines, the judges were instructed to consider the recommended sentences as actual sentences to be served, minus the deduction of gain-time. This decision was intended to eliminate the consideration of an assumed presumptive parole release date from the sentencing calculus.

During the course of the project, two modifications were made to the sentencing guidelines scoresheet. Based on the recommendations of trial judges, state attorneys, public defenders and probation officers within the four participating jurisdictions, the first two cells (*i.e.*, recommended sentence ranges) of the guidelines for each offense category were incorporated into a single guideline range, thereby eliminating the confusion surrounding the "out" sentence.

Under the original guideline rules, an "out" sentence was defined as any non-incarcerative sentence such as a fine, probation or restitution. During implementation this led to some confusion as to whether this included jail as a condition of probation. The new rule clarifies this question by having the first cell prescribe a sentence ranging from probation (with all of the conditions associated with it, including up to one year incarceration)³⁶ to a period of incarceration.

The change also allayed some of the concerns of judges and state attorneys that the "out" cell would be interpreted by some would-be offenders as a signal that incarceration was an inappropriate sentence for first-offenders and therefore a license to commit one offense. By changing the composition of the cell it was felt that probation would no longer be considered a "right," but only a possibility.

The second modification added "extent of victim injury" to Category 2 offenses (aggravated assault, aggravated battery) and for all offense categories points would no longer be restricted to the primary, second and third offense nor to a limited number of counts of the primary offense. Points were to be assessed for *all* offenses and *all* counts of the primary offense at conviction. For scoring purposes, separate and distinct statutes were still required for an offense to be classified as an "offense" rather than a "count." An example of the final sentencing guideline for Category 2 offenses is set out below.

36. *Villery v. Florida Parole and Probation Commission*, 396 So. 2d 1107 (Fla. 1981).

CATEGORY 2

Docket No.	Circuit: <input type="checkbox"/> 4th <input type="checkbox"/> 14th <input type="checkbox"/> 10th <input type="checkbox"/> 19th	Judge	Date of Sentence
Name	Date of Birth	Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Race: <input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Other
Primary Offense	Statute	ID Code	Degree Counts Date of Conv/Plen
Second Offense	Statute	ID Code	Degree Offense Modifier: <input type="checkbox"/> Attempt <input type="checkbox"/> Conspiracy <input type="checkbox"/> Consecutive <input type="checkbox"/> Concurrent
Third Offense	Statute	ID Code	Degree Offense Modifier: <input type="checkbox"/> Attempt <input type="checkbox"/> Conspiracy <input type="checkbox"/> Consecutive <input type="checkbox"/> Concurrent
Assistant State Attorney	Defense Counsel	PSI Investigator	

*List additional offenses on back of page.

	SCORE
1. Primary offense at conviction	
2nd degree felony	45 points
3rd degree felony	15 points
2. Number of counts of primary offense	
One	0 points
Two	21 points
Each additional count	21 points
3. Each additional offense at conviction is scored according to the following schedule:	
2nd degree felony	
45 points x _____ (number of offenses)	= _____
3rd degree felony	
15 points x _____ (number of offenses)	= _____
1st degree misdemeanor	
3 points x _____ (number of offenses)	= _____
2nd degree misdemeanor	
1 point x _____ (number of offenses)	= _____
	TOTAL = _____
4. Prior adult convictions	
Each prior capital felony	100 points
Each prior life felony	100 points
Each prior 1st degree felony	60 points
Each prior 2nd degree felony	30 points
Each prior 3rd degree felony	10 points
Each prior 1st degree misdemeanor	2 points
Every five 2nd degree misdemeanors	2 points
5. Prior juvenile felony convictions	
Each prior life felony	50 points
Each prior 1st degree felony	30 points
Each prior 2nd degree felony	15 points
Each prior 3rd degree felony	5 points
6. Extent of physical injury	
No injury, no contact	0 points
No injury, contact made	12 points
Injury, no treatment required	24 points
Injury, minor treatment required	36 points
Injury, hospitalization required	48 points
Death	60 points
7. Type of weapon used	
None	0 points
Weapon other than firearm	6 points
Firearm	12 points
8. Victim precipitation	
Precipitation verified	0 points
None	16 points
9. Legal status at time of offense	
Free, no restrictions	0 points
Under some form of restriction	34 points
10. Role of the offender	
Accessory	-24 points
Alone or equal involvement	0 points
Leader	24 points
Work habits: stable unstable	
	TOTAL: _____

CATEGORY 2	
COMPOSITE SCORE	SENTENCE
0-95	Probation - 18 mos incarceration
96-110	2 years (1 1/2-2 1/2 yrs)
111-125	3 (2 1/2-3 1/2)
126-140	4 (3 1/2-4 1/2)
141-155	5 (4 1/2-5 1/2)
156-175	6 (5 1/2-7)
176-200	8 (7-9)
201-225	10 (9-11)
226-250	12 (11-13)
251-300	15 (13-17)
301-350	20 (17-22)
351-400	25 (22-27)
226-250	30 (11-13)
251-300	15 (13-17)
301-350	20 (17-22)
351-400	25 (22-27)
401-450	30 (27-30)
451+	Life

TOTAL POINTS _____

Recommended guideline sentence _____

Sentence imposed _____

Reasons for deviating from guideline sentence _____

ADDITIONAL OFFENSES:

Fourth Offense	Statute	I.D. Code	Degree
Fifth Offense	Statute	I.D. Code	Degree
Sixth Offense	Statute	I.D. Code	Degree
Seventh Offense	Statute	I.D. Code	Degree

In promulgating the guidelines, the advisory board elected not to identify a list of aggravating and mitigating circumstances that would support deviating from the guidelines. It was felt that such a "shopping list" would give the impression of structuring the sentence decision-making process to a greater extent than designed. If a judge disagreed with the recommended sentence based upon the ten to fifteen factors listed on the scoresheet, then it was incumbent upon the judge to select the factor or factors distinguishing that case from similar cases. Given the adversary process, it was assumed that the prosecuting attorney and defense counsel would have already identified the relevant circumstances supporting an argument for a sentence greater or less than the guideline sentence and would argue such factors during the sentencing hearing.

To specifically identify certain factors without providing a fairly detailed explanation as to how they should be interpreted would negate much of the purpose of the project—the reduction of unwarranted sentence disparity. Many of the possible factors could be used either in aggravation or mitigation depending upon their context in the overall circumstances of the case. Therefore, it would be inappropriate to restrict them to one category or the other. Furthermore, it would be virtually impossible to assign an appropriate weight for their interpretation. Were this possible, the variable would have been included in the guidelines.

ANALYSIS OF PROJECT DATA

A total of 2,489 individuals were sentenced under the guidelines in the four participating circuits between April 15, 1981, and April 15, 1982.

The cumulative project data is presented in Table 6 and Table 7. The data in Table 6 identifies the total number of sentences by circuit and offense category (total number of cases). In addition to the cumulative totals, a percentage breakdown is presented of the number of sentences that fell within the recommended guideline range. From the analysis of 2,847 sentences imposed, 81.1% fell within the recommended guideline range.

Table 7 displays the data analysis of sentences imposed that fell outside the recommended guideline range by circuit and offense category. A further breakdown indicates the number of cases that were above and below the recommended guidelines range.

TABLE 6
CASES WITHIN GUIDELINES

CIRCUIT	CATEGORY 1		CATEGORY 2		CATEGORY 3		CATEGORY 4		CATEGORY 5		CATEGORY 6		TOTAL	
	Total # of Cases	%	Total # of Cases	%	Total # of Cases	%	Total # of Cases	%	Total # of Cases	%	Total # of Cases	%	Total	%
4	29	37.9 (11)	42	78.6 (33)	67	38.8 (26)	173	64.2 (111)	430	93.5 (402)	176	91.5 (161)	917	81.1 (744)
10	41	63.4 (26)	63	84.1 (53)	55	49.2 (32)	112	75.9 (85)	262	88.2 (231)	122	91.8 (112)	665	81.1 (539)
14	15	53.3 (8)	17	70.6 (12)	12	58.3 (7)	50	92.0 (46)	91	87.1 (80)	51	92.2 (47)	236	84.7 (200)
15	57	68.4 (39)	122	73.8 (90)	95	40.0 (38)	246	82.5 (203)	354	89.0 (315)	155	91.6 (142)	1029	80.4 (827)
TOTAL	142	59.2 (84)	244	77.0 (188)	239	43.1 (103)	581	76.6 (445)	1137	90.4 (1028)	504	91.7 (462)	2847	81.1 (2310)

NOTE: Actual number of cases is shown in parentheses.

TABLE 7
CASES OUTSIDE GUIDELINES

CIRCUIT	CATEGORY 1		CATEGORY 2		CATEGORY 3		CATEGORY 4		CATEGORY 5		CATEGORY 6		Total		
	%	% Above % Below	%	% Above % Below	%	% Above % Below	%	% Above % Below	%	% Above % Below	%	% Above % Below	%	% Above % Below	
4	62.1 (18)	67.7 (12) 33.3 (6)	21.4 (9)	100 (9) 0	61.2 (41)	58.5 (24) 41.5 (17)	35.8 (61)	93.4 (57) 6.6 (4)	6.5 (28)	82.1 (23) 17.9 (5)	8.5 (15)	93.3 (14) 6.7 (1)	18.9 (172)	80.8 (139)	19.2 (33)
	36.6 (15)	33.3 (5) 66.7 (10)	15.9 (10)	80 (8) 20 (2)	50.8 (33)	12.1 (4) 87.9 (29)	24.1 (26)	34.6 (9) 65.4 (17)	11.8 (31)	58.1 (18) 41.9 (13)	8.2 (10)	50.0 (5) 50.0 (5)	18.9 (125)	39.2 (49)	60.8 (76)
14	46.7 (7)	42.9 (3) 57.1 (4)	29.4 (5)	100 (5) 0	41.7 (5)	0 (5) 100 (5)	8.0 (4)	25.0 (1) 75.0 (3)	12.1 (11)	72.7 (8) 27.3 (3)	7.8 (4)	75.0 (3) 25.0 (1)	15.3 (36)	55.6 (20)	44.4 (16)
	31.6 (18)	16.7 (3) 83.3 (15)	25.4 (31)	19.4 (6) 80.6 (25)	60.0 (57)	5.3 (3) 94.7 (54)	17.1 (42)	28.6 (12) 71.4 (30)	10.7 (38)	57.9 (22) 42.1 (16)	8.4 (13)	7.7 (1) 92.3 (12)	19.6 (199)	23.6 (47)	76.4 (152)
TOTAL	40.8 (58)	39.7 (23) 60.3 (35)	22.5 (55)	50.9 (28) 49.1 (27)	56.9 (136)	22.8 (31) 77.2 (105)	22.9 (133)	59.4 (79) 40.6 (54)	9.5 (108)	65.8 (71) 34.2 (37)	8.3 (42)	54.8 (23) 45.2 (19)	18.9 (532)	47.9 (255)	52.1 (277)

NOTE: Total number of cases is shown in parentheses.

When interpreting the charts depicting the individual category analysis, several factors need to be considered. Where categories show what appears to be a high percentage of sentences above or below the recommended guideline sentence, the data is usually based on a smaller number of sentences. Because of the small sample size, the data should therefore be interpreted with care when attempting to make any sort of inferential statement concerning guideline utilization or sentencing practices. It also is noted that Category 1 offenses involved crimes of violence against persons and were more likely to have aggravating or mitigating circumstances which enhanced the probability that the sentences might fall outside the recommended sentence guideline range.

The figures for Category 3 indicate a rather low compliance rate. Users indicated that this was attributable, in part, to an increase in the incidence of burglaries in several counties and the trial judges felt that harsher sentences were in order to serve as a deterrent. The deviation was too large to be completely attributable to this factor and additional research is being conducted to determine the weakness in the guideline.³⁷

THE SENTENCING GUIDELINES COMMISSION

The 1982 Florida Legislature created a Sentencing Guidelines Commission³⁸ charged with the development and implementation

37. Much of the criticism directed at the sentencing guidelines by state attorneys and defense counsel was that the guidelines were too lenient or too harsh, respectively, and failed to take into account all factors relevant to the sentence decision-making process. The data presented herein disputes the first allegation since, if either group were correct, one would expect the majority of sentences imposed outside of the guidelines to be either above or below the recommended sentence. With the exception of Category 4 offenses, this was not the case. There was a fairly even distribution of sentences above and below the guidelines.

With respect to the second comment, the factors included in the sentencing guidelines were never intended to be dispositive. They represented the minimum amount of information the advisory board deemed necessary to formulate a sentence. The weights were assigned to ensure consistency among the four participating circuits. All other circumstances surrounding the case were open for consideration to aggravate or mitigate the sentence and it was assumed that, in the best traditions of the adversary process, prosecution and defense counsel would scour the record for factors upon which to base an argument for aggravation or mitigation.

38. The commission is composed of 15 members consisting of two members of the Senate appointed by the President of the Senate; two members of the House of Representatives appointed by the Speaker of the House; the Chief Justice of the Supreme Court or his designees; three circuit court judges and one county court judge appointed by the Chief Justice; and the Attorney General or his designee. The Governor has five appointees: a state attorney recommended by the Prosecutors Association; a public defender recommended by the Public Defenders Association; a private attorney recommended by the Florida Bar; and two individuals of his choice.

of a system of uniform sentencing guidelines for Florida's courts.³⁹

The guidelines are to be representative of current sentencing decisions within the state and shall identify the offense and offender characteristics exerting the greatest influence in the sentence decision-making process, as well as the relative weight or importance accorded each factor by the trial judge.⁴⁰ Upon development by the commission, the guidelines are to be implemented by court rule.

The Sentencing Commission also is charged with examining the interrelationship between sentencing guidelines and the discretion exercised by the Parole and Probation Commission in establishing presumptive parole release dates. Prior to implementation of statewide guidelines, the Sentencing Commission must make a recommendation to the governor and the legislature on the need for legislation regarding the proper relationship between sentences set by judges under a guidelines system and time actually served in light of presumptive parole release dates established by the Parole and Probation Commission.⁴¹

Although the decision to go statewide with sentencing guidelines was, to a large extent, based upon the experience of the Multijurisdictional Sentencing Guidelines Study,⁴² the current commission is not bound by either the methodology used to develop the earlier guidelines or their content and format. The pilot study is viewed as an invaluable training device upon which to develop new standards. Given the different composition of the guidelines commission and the increased scope of the project, it is anticipated that a number of new issues will confront the commission and influence

39. FLA. STAT. § 921.001 (1982 Supp.).

40. *Id.*

41. *Id.*

42. Although the Multijurisdictional Sentencing Guidelines Project was considered a success in that it achieved the goals established in the program test design, *i.e.*, the feasibility of developing and implementing sentencing guidelines in a multijurisdictional setting, the program was not without its problems. Throughout the course of the project there continued to be considerable debate on the merits of a sentencing policy based on guidelines. Indeed, the debate has not diminished since the passage of the bill.

Perhaps the greatest impediment to implementation was the difficulty in scoring offenses for which a pre-sentence investigation was not required by statute or was waived by the defendant. Since the program was based on the assumption that the guideline sentence would be scored by probation officers as objective (nonadversary) members of the criminal justice process, the failure to order a PSI created a void. This problem was especially acute in the fourth and fifteenth judicial circuits wherein pre-sentence investigation reports are completed on less than the majority of cases. The solution proposed involved using the prosecution and defense attorneys to score the cases independently and present a single scoresheet to the trial judge. This recommendation received varying degrees of success and does not appear to be the ideal solution for all circuits.

the final product. For example, in the pilot project, the participants were asked to assume that the sentence imposed would be the actual time served. The continued existence of the Parole and Probation Commission in its present form precludes such an assumption for the present project. Hence, the necessity for a recommendation regarding interaction between the Parole and Probation Commission and implementation of sentencing guidelines. In addition, statewide implementation of sentencing guidelines requires a careful look at its impact on an already overcrowded prison population. Whether the overcrowding issue comes under the purview of the guidelines commission and is considered in the sentencing calculus⁴³ has yet to be formally addressed by the commission, but it promises to receive considerable attention.

The Guidelines Commission held its organizational meeting on July 21, 1982, and anticipates having the guidelines ready for statewide implementation in the fall of 1983.

43. In its decision to develop statewide guidelines, the Minnesota legislature directed the Sentencing Guidelines Commission to base guideline sanctions on appropriate combinations of reasonable offense and offender characteristics. In addition, the commission was directed to take into substantial consideration current sentencing and releasing practices, and, most importantly, available correctional resources including, but not limited to, the capacities of state and local correctional facilities. Knapp, *Estimating the Impact of Sentencing Policies on Prison Populations*, paper presented at the American Society of Criminology 32nd Annual Meeting in San Francisco, CA (November 5-8, 1980).

