THE SENTENCING PROJECT

BRIEFING SHEET

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Funding Opportunities for Defenders and Defense-based Sentencing Programs under Current Federal Law; Prospects for Change by the 104th Congress

This Briefing Paper will discuss the six key funding opportunities available for state and local indigent defender programs under federal law as of 1 May, 1995. These opportunities encompass possibilities of funding for sentencing-related services including defense-based sentencing programs as correctional options. As will be noted below in more detail, with the change in congressional leadership in the 104th Congress, the future of all of these programs is highly uncertain. Legislation already passed by the House would repeal one of them (drug courts) and fold another (corrections grant) into broad law-enforcement block grants to the states. Budget pressures may result in substantial cuts in funding even where the legislation authorizing the program remains intact. In recognition of the uncertain future for most programs described here, The Sentencing Project will update this Briefing Paper at a future date.

Of the six key federal-source funding opportunities for defenders and defense-based sentencing programs described below, the first is an existing program with good prospects for continued funding. The remaining programs discussed in this Briefing Paper are new, having been enacted in the Violent Crime Control Act of 1994, P.L. 103-322. All of these new programs are to be administered by various arms of the Justice Department, which has set up a toll-free national "Response Center" to field inquiries from state and local groups about how to qualify and apply for the bill's grant programs.

For quick reference, key information including agency contacts is summarized in a table appended to this paper.

1. Byrne Grants

Under the federal **Drug Control and System Improvement Formula Grant Program,** commonly referred to as "Byrne grants," programs providing legal representation services to indigents in criminal cases are expressly eligible for funding. Byrne formula grants are funded by an arm of the U.S. Justice Department, the Bureau of Justice Assistance (BJA), and made available to the criminal justice agency designated by the governor in each state, using a formula allocation based on the state's population, and it is that state agency to whom indigent defense programs can make their application.

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In the current fiscal year, the formula grant program is funded at $450 million.[1] Of this amount, based on annual surveys of public defender offices conducted by the National Legal Aid and Defender Association (NLADA), it may be expected that upwards of $10 million may be awarded to indigent defense programs. Although the Byrne program remains politically popular with a wide range of criminal justice system participants, federal budget constraints may be expected to produce some reductions in FY 1996 appropriations.

There are signals from both Congress and the executive branch suggesting that now would be a propitious time for indigent defense programs to be aggressive in seeking Byrne funding from their state criminal justice agencies. In 1990, to resolve a controversy generated by the Bush administration over the funding eligibility of defender programs, Congress amended the statute establishing the Byrne program to resolve ambiguity about the eligibility of defender programs for program funds. Section 601 of the Comprehensive Crime Control Act of 1990, P.L. 101-647, added a specific reference to expanding resources for defender services within the 10th of the 21 purpose areas enumerated in the statute governing both formula and discretionary grants. The accompanying report of the House Judiciary Committee stressed that "a balance of support for all components of the court process," including indigent defense, is essential "to advance the overriding purpose of overcoming congestion in the courts, the most dominant problem in the criminal justice system." Congress' goal, the report stated, was "to ensure that funding for indigent defense is recognized as of no less significance" than any other item listed in the 21 statutory purpose areas.

The Clinton administration has moved strongly to place emphasis on defender funding. Attorney General Janet Reno, in a 1993 speech to NLADA, said that it is "important to make sure that public defenders throughout the country are properly funded." A few months later, Assistant Attorney General Laurie Robinson, who heads the Office of Justice Programs of which BJA is a part, announced the creation of "a new program to provide assistance to state and local indigent defense programs to help ensure that all defendants -- regardless of economic status -- have adequate representation." Subsequently, President Clinton appointed a career public defender, Nancy Gist, to be director of BJA.

The number of defender programs receiving Byrne grant funding has been increasing steadily since 1990, in amounts ranging from $10,000 to over $1 million in a single year. According to NLADA surveys, most defender grants are under purpose area #10 (specifying defender services), for a wide range of purposes including attorney salaries and support staff; supporting law school clinical programs for indigent defense; expediting movement of drug cases or appeals; attorney/social worker teams for drug cases; establishing a defender

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[1] An additional $50 million is available for discretionary grants -- that is, paid directly by the Justice Department to innovative local programs, bypassing the state agency -- but none have yet been awarded to individual defender programs.

information clearinghouse, briefbank or training manual; supporting alternative sentencing; or simply buying equipment such as fax machines for every public defender office in a state.

To a lesser extent, funding is also obtained through other Byrne program areas, such as #2 ("multi-jurisdictional task force programs...") to support defender training programs; #11 ("improve the corrections system...") for alternative sentencing; #15 ("improve drug control technology ... and case management...") for automated information management systems; #16 ("innovative programs [for the] adjudication of drug offenses and other serious crimes") for salaries for appellate law drug issue specialists; #18 ("improved response to domestic violence...") to represent child victims of abuse and domestic violence defendants; and #20 (nonincarcerative alternatives) for alternative sentencing, including programs targeted to women or disabled offenders, and for victim/offender mediation services.

At the same time, it appears that many defender offices are not pursuing Byrne funding opportunities. Indeed, in 14 states which have affirmatively announced that defender programs are eligible for funding through the state agency, no defender programs have applied at all. These states are Alabama, Colorado, Idaho, Kansas, Massachusetts, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas and Wyoming.

2. Federal Assistance to ease the Increased Burdens on State Court Systems

Section 210602 of the Violent Crime Control Act of 1994, P.L. 103-322, sets up a new grant program entitled "Federal Assistance to Ease the Increased Burdens on State Court Systems Resulting From Enactment of This Act." The program is authorized to be funded at $150 million over 5 years, starting with $23 million in fiscal 1996.

Grants are for the purpose of supporting public defenders, prosecutors, courts and other criminal justice participants "to meet the increased demands for judicial activities resulting from the provisions of this Act," i.e., the additional police and prisons. The Justice Department can do this either through grants to states and units of local government, or by direct contracts and payments to any institution or organization providing the services.

This program was designed around the concept of balance in the criminal justice system, in light of the 1994 Act's plan to infuse vast amounts of federal money to support

state prisons and police. In proposing this provision as an amendment to the Senate crime bill, Senator Howell Heflin (D-Ala.) spoke of the crime bill being--

> structured like an hour glass. It is very large at the top with the addition of 100,000 new police officers. The measure is also well rounded at the bottom with the creation of many new prisons and boot camps. Yet there is a dire need to expand the middle.... It is a matter of fact that 100,000 new police officers and new prisons will result in more arrests. Consequently, more prosecutors, public defenders, State and local court systems, along with every other facet of the due process afforded those charged with a crime, should have adequate resources to properly dispose of these new cases.... If my amendment is not agreed to, the Senate will be passing a huge unfunded Federal mandate with devastating consequences for State and local judicial systems. (Cong. Rec., Nov. 16, 1994, at S15760).

Under the Senate bill, the authorization level was $100 million per year over five years, for a total of $500 million. House/Senate conferees cut this back to $150 million total over 5 years, starting one year later ($23 million in fiscal 1996, $30 million in each of 1997 and 1998, $32 million in 1999, and $35 million in 2000).

There are several differences from the Byrne formula grant program:

1) under this new program, the balance between formula and discretionary grants is entirely up to the Justice Department;

2) instead of two dozen qualifying uses to which the money can be put, the new program focuses on funding the three arms of the adjudication process; and

3) the program is designed to respond to the added cases generated by the 100,000 new police, so that funding preference may be expected to be given to defender programs in areas receiving the largest share of the added police.

Grants will be distributed by the Bureau of Justice Assistance, the new director of which, as noted above, is Nancy Gist, the first career indigent defense professional to hold the job. At this time, however, no money has been appropriated for fiscal year 1996, and no regulations have been promulgated or application materials developed. The new crime legislation passed by the House and under consideration in the Senate does not propose to repeal or modify this program, but there is a substantial likelihood that it will simply not be funded, on the theory that states' adjudication costs are adequately covered under the proposed new crime-control block grants to the states. The bill passed by the House on February 13, the Local Government Law Enforcement Block Grants Act of 1995, H.R. 728, would authorize $2 billion per year in grants to states for "reducing crime and improving

public safety." The bill highlights six types of programs on which states could spend the money, including "enhancing the adjudication process of cases involving violent offenders" (with specific legislative history from the amendment's sponsor and others emphasizing the inclusion of indigent defense), but states would have complete discretion to allocate the money among these and any other programs relating to crime or public safety. Other areas among the enumerated six include policing, crime prevention and drug courts, since the block grants are intended to replace the 1994 Act's earmarked authorizations for each. Under H.R. 728, grants would be allocated by BJA among the states on the basis of crime rates, and suballocated among units of local government by population. To be eligible, units of local government must hold at least one public hearing soliciting input on how to use the money.

3. Funds Available through the Violence Against Women Act

The Violence Against Women Act was enacted as one title in the 1994 Act, encompassing six major grant programs. One of these, called Grants to Combat Violent Crimes Against Women (§40121 of the 1994 Act), is one of the few new programs to have received funding ($26 million) for the current fiscal year. Though the seven enumerated purpose areas stress prosecution, law enforcement and victim services, the overall purpose of the grants expressly includes promoting "adjudication" of cases involving violence against women. Proposed regulations issued by the Justice Department (Fed. Reg., Dec. 28, 1994, at 66831) emphasize the goal of encouraging states to develop "innovative and effective approaches" through collaboration among police, prosecutors, victim service providers and the courts. Listed examples of innovative programs include "comprehensive training programs to change attitudes that have traditionally prevented the criminal justice system from adequately responding to the problem," and "better coordination in the handling of cases involving violence against women between civil and criminal courts."

This suggests that indigent defense providers may have an opportunity to obtain funding through their local court systems under this program to help support specialized programs dealing with domestic violence. These could include training relating to battered women's defense syndrome, victim/offender reconciliation or other alternative sentencing initiatives, and coordination efforts between providers of civil and criminal indigent legal services.

Grants will be made to states on a formula basis. States are required to divide the money up at least 25 percent each for law enforcement, prosecution and victim services,

leaving no more than 25 percent for courts. Under the proposed regulations, recipients can include not just state agencies, but public or private nonprofit organizations, units of local government, and "legal services programs." Funding for this grant program is authorized to increase dramatically in future years, from the $26 million level this year to $130 million in FY 1996, $145 million in 1997, $160 million in 1998, $165 million in 1999, and $174 million in 2000.

There is one other grant program under the Violence Against Women Act with funding potential for indigent defense providers. Chapter 3 of the Act, establishing "Grants to Encourage Arrest Policies," includes among its six purpose areas: "to improve judicial handling" of domestic violence cases. It also includes "to strengthen legal advocacy service programs for victims of domestic violence," which would appear to apply where a victim is also a criminal defendant, as in battered women's defense cases. Grants are to be made to states and units of local government, toward the overarching goal of encouraging government "to treat domestic violence as a serious violation of criminal law." No funding has yet been appropriated and no regulations issued under this program. Funding is authorized at $28 million in FY 1986, $33 million in 1987 and $59 million in 1998.

The administration of all Violence Against Women grant programs has been assigned to a newly created Violence Against Women program office in the Justice Department, headed by former Iowa Attorney General Bonnie Campbell. The contact person on regulations is Kathy Schwartz, Administrator, at (202) 307-6026.

4. Opportunities under Prison Construction Grant Provisions

The 1994 Act contains two significant programs of grants to states to help fund general corrections costs: Violent Offender Incarceration grants (§§ 20101, 20103 of the 1994 Act), and Truth in Sentencing Incentive Grants (§§ 20101, 20102). The total funding authorized for both programs is $7.9 billion over 6 years, split equally between them. Of the $175 million authorized in FY 1995, only $24.5 million was appropriated, and that amount was earmarked only to fund boot camps.

The goal of both programs is to ensure that adequate prison space is available to impose lengthy prison terms on violent offenders; the difference lies in how much flexibility states are afforded in reaching this goal.

A) Truth in Sentencing Incentive Grants : There are two ways for states to qualify for their formula share of this fund: 1) establish laws requiring violent offenders to serve 85 percent of the sentence imposed (i.e., by eliminating parole as in the federal system), or 2) enact an 85 percent requirement for a second violent offense plus increase the percentage of all violent offenders sent to prison and the percentage of, and average, time they serve. Each state's formula allocation is fixed, based on its violent crime rate relative to other states, and does not increase if other states do not participate.

B) Violent Offender Incarceration Grants The emphasis here is simply on "free[ing] conventional prison space for the confinement of violent offenders." Although grants may be used for straight prison construction or expansion, they may also be used to develop, operate or improve boot camps and "other alternative correctional facilities." States need only provide "assurances" that they will do nine things--none of them rigid mandates--including developing a "comprehensive correctional plan" reflecting an "integrated approach" to corrections, including diversion programs, community corrections, rehabilitation and treatment, prisoner work activities, job skills and educational programs, post-release assistance, and an assessment of recidivism rates. They must also provide assurances that they are implementing "truth in sentencing"--defined simply as requiring that violent offenders serve a "substantial" and "sufficiently severe" portion of their sentences. Of the $4 billion for this program, 85 percent goes to states on a formula basis, and 15 percent is for discretionary grants in states with the worst crime problems and the best plans.

No state is required to participate in the Truth-in-Sentencing grants with the 85-percent mandate attached. All unclaimed Truth-in-Sentencing grant money automatically reverts to the Violent Offender grant program (under §20102(b)(2)). Thus, if all states decide to opt out of the Truth-in-Sentencing grant program so as to preserve their own autonomy to make corrections choices, they will lose nothing; the $4 billion Violent Offender grant program will automatically double into an $8 billion program with no mandates attached.

Proposed regulations were published in the Federal Register on December 7, 1994, at p.63015. Funds will be distributed to the states by the Office of Justice Programs at the Justice Department (contact: Marlene Beckman). Combined funding for both programs under the 1994 Act provisions rises from $175 million in FY 1995 to $750 million in 1996, $1 billion in 1997, and about $2 billion for each of the three subsequent years. In the states, these grants will be administered by the same criminal justice agencies designated by the governor to disburse the Byrne grants and other federal justice-assistance aid.

These programs in their current form present an opportunity for indigent defense programs to secure funding from their state agencies for alternative sentencing programs.

However, the current Republican crime bills propose significant changes in these programs which would eliminate any potential for the federal funds to be used for alternative sentencing. The bill passed by the House on February 22, H.R. 667, the Violent Criminal Incarceration Act, proposes to retain the same basic structure of the two grant programs, but would prohibit states from spending the money on anything other than building or operating conventional prisons, and would flatly mandate that states achieve the 85-percent "truth in sentencing" requirement in order to gain access to that half of the grant funds. Unused money would not automatically transfer to the less restrictive program. Similar legislation is pending in the Senate (title I of an omnibus bill, S.3, the proposed Violent Crime Control and Law Enforcement Improvements Act of 1995), with action expected on the Senate floor as early as mid-May.

The success of the Republican bill is not assured, in light of increasing lobbying efforts by interested state and local government organizations and corrections departments. Concerns focus on the prohibition against using the money for anything other than conventional prisons, and the cost of the 85-percent truth-in-sentencing mandate. Initial analyses indicate that the average state, by very conservative estimates, will have to spend at least $3 to $5 of its own money on increased prison capacity in order to get each $1 of federal money.[2]

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[2] The Campaign for an Effective Crime Policy has conducted the following analysis: According to the Justice Department, 47 percent of all state prison inmates are serving time for a violent offense, and violent offenders nationwide serve less than 40 percent of the sentence imposed (based on 1991 prison releases). The actual percentage of sentence served may be somewhat higher, due to post-1991 toughening of parole and sentencing policies and the fact that the Justice Department figures do not account for time served by state inmates in local jails (which may add as much as a third to the actual time served, according to the National Council on Crime and Delinquency). With these adjustments, the current percentage of sentence served is probably between 55 and 65 percent. Thus, of the current 860,000 state inmates, about 404,000 are violent and can be expected to have their sentences lengthened by 20-30 percent to reach the 85 percent target, effectively creating a need for some 80,000-120,000 new state prison spaces, or an additional 1600-2400 inmates for the average state over time. Assuming (very conservatively) $50,000 per bed construction costs and $20,000 per year operating costs, these extra prisoners will cost each state between $270 million and $400 million just for the six-year life of the crime bill, while maximum potential federal benefits for acceding to the 85-percent mandate will be only $80 million. Thus, to get one federal dollar, the average state will have to spend $3 to $5 of its own. This is a conservative estimate, since states are also required to put up $1 for every $3 received, and since state costs for prisons will continue after the 6-year federal grant period.

5. Corrections Grant Program: Alternative Punishment for Young Offenders

This is a relatively smaller corrections grant program, targeted to "developing alternative methods of punishment for young offenders to traditional forms of incarceration and probation." There is as of yet no legislative proposal to repeal or scale back this program. This may simply be an oversight, given the prevailing antipathy to nonincarcerative alternatives displayed in the leading bills reshaping the 1994 Act's other correctional grant programs. Even if the program survives legislative review, it could be effectively repealed simply by not funding it when the relevant appropriations bills are considered.

Under the program, entitled "Certain Punishment for Young Offenders" (§20201 of the 1994 Act), states and localities can spend the money on "projects" for "alternative methods" in areas such as restitution, education, job training, community corrections, weekend incarceration, electronic monitoring, community service, intervention with substance abuse or gang involvement, and aftercare.

The program is authorized for total funding of $150 million over 5 years: $20 million in fiscal 1996, $25 million in 1997, $30 million in 1998, $35 million in 1999, and $40 million in 2000. Grants are to be made to states; local units of government will apply to the state criminal justice agency, which must pay money out to them within 45 days of their application. The state share received from Washington is computed by a formula based on the rate of young offenders relative to other states. The local government's share is based on the ratio of its correctional spending to total state correctional spending in the previous year.

No regulations have yet been issued by the Justice Department. The likely official responsible for them is Tom Albrecht at the Bureau of Justice Assistance, at (202) 514-6236. Defender sponsored or cooperative applications for diversionary programs for youthful offenders are a possibility under this grant provision.

6. Alternative Programs and Court Procedures Funded through Drug Courts

The 1994 Crime Bill authorized a total of $1 billion for state drug courts, a favorite program of Attorney General Janet Reno as well as first lady Hillary Rodham Clinton's brother, Dade County public defender Hugh Rodham. On the basis of the pioneering Dade County model, the drug courts which are being experimented with around the country commonly are cooperative efforts between judges, prosecutors, public defenders and probation or corrections personnel. However, the program has come under sustained attack by the new congressional leadership, again because of its focus on nonincarcerative alternatives, and its future is now in doubt.

Section 50001 of the 1994 Act authorizes the Attorney General to make grants to state or local governments or court systems or Indian tribal governments, who will, either acting directly or "through agreements with other public or private entities," conduct programs for the "diversion, probation or other supervised release" of nonviolent, substance-abusing offenders, including the "integrated administration of other sanctions and services." Services include health, housing, education, job placement, drug treatment and aftercare. The sanctions part includes drug testing and the threat of prosecution and incarceration.

Full funding of $29 million was appropriated for fiscal 1995, and regulations were proposed by the Office of Justice Programs (Fed.Reg., Jan. 26, at 5152). The regulations are vague as to what constitutes a drug court. Aside from announcing overall goals such as diversion of first-time, nonviolent drug dependent offenders into treatment, with graduated sanctions for noncompliance, the regulations simply stress DOJ's commitment to "a flexible approach that allows jurisdictions to tailor local initiatives to best suit their needs and local conditions." **The involvement of indigent defense providers is encompassed within the requirement that qualifying drug court programs must "consult with all affected agencies and ensure that there will be appropriate coordination with all affected agencies in the implementation of the program."** Funding is available to drug court programs either for planning, initial implementation, or expansion or development of a program already under way.

Shortly after the issuance of the regulations, however, all unobligated FY 1995 money was rescinded (i.e., withdrawn by Congress), effectively killing the program for the current fiscal year. Both House and Senate Republican crime bills propose de-authorizing it, although a lobbying effort by a national association of state drug courts resulted in House approval of a provision authorizing, but not earmarking, money for state drug courts. This

came in the form of an amendment to the Local Government Law Enforcement Block Grants Act of 1995, H.R. 728, (referred to at p. 4, above), with the result that drug courts will face an uphill struggle for funding in competition with other programs encompassed within the block grants, including police and crime prevention programs. Nevertheless, drug courts resist easy categorization as too "soft" or insufficiently punitive, and may yet survive, due to the breadth of support from courts and prosecutors.

Indigent defense providers should be a central component of every drug court program. Whatever stage a jurisdiction's drug court program is in, defenders should be claiming an appropriate share of the federal funds from the primary grantee (usually the court itself). The contact person at the Office of Justice Programs is Deputy Assistant Attorney General Reginald L. Robinson, 633 Indiana Ave., N.W., Washington, D.C. 20531.

H. Scott Wallace
June 20, 1995

APPENDIX

Summary: Federal Funding Opportunities as of 1 May 1995

Program - Summary	Status	Contact/Agency*
Drug Control and System Improvement Formula Grant Program ("Byrne grants") - for which defender services are expressly eligible.	Funded and politically popular; under-utilized by defenders.	State Criminal Justice Planning Agency - if not known, call The Sentencing Project for reference.
Federal Assistance to Ease Burden on State Court Systems - to respond to new criminal cases resulting from 100,000 new police.	Likely to pass but less likely to be funded.	Bureau of Justice Assistance - no regulations or application process approved as of 1 May.
Violence Against Women Act - training and alternative sentencing initiatives to help address domestic violence.	Has received funding, with future funding likely. Proposed Regulations issued for some provisions of Act.	Kathy Schwartz, Administrator Violence Against Women Program Office U.S. Dept. of Justice (202) 307-6026
Opportunities under the prison construction grant provisions of the new Crime Bill for alternatives to incarceration.	Regulations issued; however new proposals would eliminate use of funds for alternatives.	Larry Meachum, Director Corrections Programs Office of Justice Programs U.S. Dept. of Justice (202) 307-3914; also: State Criminal Justice Planning Agency - if not known, call The Sentencing Project for reference.
Corrections Grant Program: Alternative Punishment for Young Offenders.	No regulations issued; no proposals yet to repeal or scale back.	Tom Albrecht, Chief Corrections Branch Bureau of Justice Assistance U.S. Dept. of Justice (202) 514-6236
Alternative Programs and Court Procedures Funded through Drug Courts.	Originally funds fully appropriated and regulations issued; the new congress rescinded all unobligated FY1995 funds.	Tim Murray, Acting Director Corrections Programs Office of Justice Programs U.S. Dept. of Justice (202) 616-5001

* For additional information, call the Department of Justice Response Center at 800-421-6770.