



Minutes

Maryland State Commission on Criminal Sentencing Policy
House Office Building
Annapolis, MD 21401
December 13, 2016

Commission Members in Attendance:

Honorable Glenn T. Harrell, Jr., Chair
Honorable Shannon E. Avery, Vice-Chair
Delegate Curtis S. Anderson
Senator Robert G. Cassilly
William M. Davis, Esquire, *representing Public Defender Paul B. DeWolfe*
Honorable Brian L. DeLeonardo
Barbara Dorsey Domer
Elizabeth Embry, Esquire, *representing Attorney General Brian E. Frosh*
Richard A. Finci, Esquire
Brian D. Johnson, Ph.D.
Senator Delores G. Kelley
Honorable Patrice E. Lewis
Colonel William M. Pallozzi
Honorable James P. Salmon
Delegate Joseph F. Vallario, Jr.

Staff Members in Attendance:

Sarah Bowles
Stacy Najaka, Ph.D.
Katharine Pembroke
David Soulé, Ph.D.
Tessa Guiton, MSCCSP Intern

Visitors:

Linda Forsyth, Community Liaison for Senator Kelley; Claire Rossmark, Department of Legislative Services; Mateus Rennó Santos, Maryland Data Analysis Center; Jinney Smith, Maryland Data Analysis Center; Webster Ye, Assistant to Delegate Vallario

1. Call to order

The meeting began immediately following the Public Comments Hearing at 5:30 pm.

2. Approval of minutes, September 20, 2016 meeting

The Commission approved the minutes as submitted.



3. Update on the Study Examining the Impact of the Juvenile Delinquency Score on the Sentencing Guidelines – Dr. Jinney Smith, Associate Director, Maryland Data Analysis Center (Status report)

Dr. Jinney Smith, Associate Director, Maryland Data Analysis Center (MDAC) and Mateus Santos, PhD Candidate, University of Maryland, presented the second of a three-part series of presentations on the impact of the juvenile delinquency score on the sentencing guidelines. Recapping her presentation from the May 2016 meeting, Dr. Smith noted that preliminary results of the MSCCSP's data were not conclusive, but they showed, in terms of sentencing outcomes, potential variations across subgroups. Dr. Smith received additional data from the Department of Juveniles Services (DJS), and criminal history background records from the Department of Public Safety and Correctional Services (DPSCS).

Dr. Smith drew the Committee's attention to the current Juvenile History Scoring Instructions. Dr. Smith reminded the Commission of the current rules and noted that as the current rule reads, the juvenile score is used within the overall offender score (up to two of nine points).

Dr. Smith and her colleagues created an estimated DJS score by scoring the DJS records using the sentencing guidelines scoring rules. They layered these scores on the MSCCSP's data and this analysis revealed an issue. Using the full juvenile history records, Dr. Smith noted that it was difficult to recreate the scores on the actual sentencing guidelines worksheets. Comparing the estimated scores to the actual worksheet scores, Dr. Smith found that of the 16,470 cases reviewed, the scores matched in only 13,506. Applying the five-year decay, this number rose to 13,706 or 83.2%. In this analysis, Dr. Smith applied the five-year decay rule as follows: to do a retrospective five-year decay; if the offender was crime free for five years retrospectively, they received a score of zero. Dr. Smith noted that this language is ambiguous on the one-page guidelines worksheet and suggested that this language may need clarification.

Additionally, Dr. Smith and the MSCCSP staff conducted a survey asking individuals what data they had available when they completed the guidelines worksheet, what types of data they used, hypothetical scoring situations and what additional information they had available. This survey was sent to one State's Attorney and one Parole and Probation Field Supervisor in each jurisdiction. Dr. Smith stated that the survey revealed that individuals in different jurisdictions are recording juvenile scores in different ways.

During Dr. Smith's presentation, Senator Kelley noted that the current juvenile delinquency score policy may be re-punishing children who were born into bad circumstance or whose families could not afford to get them into community services. She noted different counties are interpreting the current policies differently and that maybe these policies should be reconsidered.

As an example, Dr. Smith presented the Commission with the following hypothetical: *According to the MSCCSP's Guidelines Manual, an individual who is under 23 years old should be assigned a juvenile score of "0" if he or she has been crime free for 5 years since the last finding of a delinquent act or last adjudication. Suppose an individual is aged 22, had one adult conviction at age 19, and had 2 adjudications and 2 commitments when 13 years old. Does this individual meet the "crime free" criterion specified above?* Dr. Smith noted that States' Attorneys and Probation and Parole Agents scored this differently. She



noted that there is ambiguity in terms of how the five-year rule is applied. Interestingly, the MSCCSP staff and Dr. Smith's team also disagreed on the scoring of this hypothetical.

Mr. DeLeonardo noted that there may be a difference in individuals' views of what constitutes a commitment. Dr. Smith indicated that the DJS maintains adjudication and commitment data in two separate data files. She further noted that the files do not indicate which adjudications lead to commitments. While one can attempt to create a time-line and link the cases, individuals frequently have more than one adjudication. Dr. Smith noted that because of the file structure, one always has to separate the commitments from the adjudications. She also noted that there may be a situation in which an individual is committed but still reporting for status reports to a judge, and because this commitment would appear to be reordered at each status hearing, the individual would appear to have multiple commitments when, in actuality, this was the same commitment. Dr. Smith indicated that she removed these situations from the analysis by referring to the recurring petition IDs. If the underlying petition ID remained the same, they determined that this was just one commitment. However, they were not able to differentiate between a more serious commitment or a commitment to a secure facility.

Mr. Finci noted that this review began when it came to light that different jurisdictions view the term "commitment" differently. For example, in one jurisdiction, a juvenile is "committed" to a community diversion program, and this could be counted as a commitment for the purposes of scoring the juvenile record.

Judge Lewis stated that the National Association of Women Judges is concerned about this process in regards to young girls as sometimes "commitments" are made on the basis of safety issues and family issues, even when the juvenile has not been adjudicated a delinquent. Sometimes these girls are detained as a protective matter and this may increase their juvenile delinquency scores.

Dr. Smith noted that she did not specifically look at gender as the sample sizes were so small. Judge Lewis stated that she would still like to see the information separated by gender. Senator Kelley noted that, due a lack of funding, girls are not getting what they need from juvenile facilities. Additionally, girls typically have higher levels of mental health needs and patterns of abuse but that the resources are not meeting their needs.

Dr. Smith noted several difficulties in working with the data from DJS and some missing information. Judge Harrell asked about the impediments to obtaining the missing information from DJS. Dr. Smith noted that while some files have references to the offenses, the delinquency code associated with the offense does not correspond to the adult criminal code. She indicated that there was no easy way to create a hierarchical ranking in coding the offenses and that while this may be done manually, there are currently not enough resources to complete this task.

Senator Kelley stated that Dr. Smith previously indicated that there is a great deal of variability in the definitions of commitment among the jurisdictions. Dr. Smith noted that they cannot see that in the data, but it is what they have been told. The DJS data is operational agency case-management data and it takes a great deal of effort to manipulate these data for research purposes.



Senator Kelley asked if anyone was looking at the data in terms of economics or income levels. Dr. Johnson indicated that that type of information was not collected. Senator Kelley stated that because low income juveniles make use of some services, they are adjudicated in a way that middle class juveniles are not. Dr. Smith indicated that DJS does not collect that information.

Judge Lewis indicated that we need a better definition for both a commitment and a delinquent act. Judge Lewis further indicated that until there is a more complete dataset indicating the underlying causes of adjudication or commitment, it is impossible to make accurate comparisons. Judge Harrell noted that at the end of Phase III of this project, a recommendation should be made concerning the need for these data.

Dr. Smith's last analysis was a preliminary recidivism analysis using only the MSCCSP data. Dr. Smith looked at individuals whose sentences did not include additional incarceration. The three-year re-arrest and reconviction rates by juvenile delinquency score showed the following: individuals with a juvenile delinquency score of zero had a 60% rearrest rate and a 39% reconviction rate; individuals with a juvenile delinquency score of one had a 80% rearrest rate and a 59% reconviction rate; and individuals with a juvenile delinquency score of two had a 87% rearrest rate and a 73% reconviction rate.

Dr. Smith noted that putting aside the conflicting definitions, just looking at these data, the scores appear to work. These numbers are not broken down by type of reconviction, this is the group in its entirety. However, as these rates reflect adult rearrest and reconviction, these data can later be broken down into crime types. Judge Avery noted that the difference in offense would inform policy considerations differently and this should be taken into account. Dr. Smith noted that broad distinctions can be made, such as the difference between felonies and misdemeanors, but beyond that, differentiating by crime type would lead to very small variables. Judge Avery noted that the categories could be broader, such as drug crimes, property crimes and crimes of violence.

Dr. Smith stated that she eventually hopes to look to re-incarceration rates, in addition to re-arrest and re-conviction rates. Dr. Smith also stated that the juvenile delinquency score was never pre-validated. This study is being done now because it had never been done for Maryland. Judge Avery noted that she personally prefers to have substantive information to guide both herself and policy in general. To that note, focusing on only recidivism and re-arrest does not provide enough information. Better information would include information on the seriousness of the offenses committed, especially when compared to the seriousness of past offenses.

Senator Kelley indicated that juveniles can be on probation for the duration of their teenage years. She questioned whether minor violations are considered recidivism, such as not paying fines or status offenses. She stated that she believed the state of Maryland needs to define these terms.

Judge Harrell indicated that he believed it would be important to have a searchable database by gender and by types of crimes. While this may not be created by the end of Phase III, he would like to see an indication of how this database could be created and who could create it.



Returning to the survey, Dr. Smith indicated that when asked if only commitments over 30 days should be counted, respondents indicated that it would be very difficult to calculate the score if commitments had to be a certain length. When asked if commitments were redefined to only include commitments to DJS secure facilities, respondents answered that it would be very difficult to isolate only certain commitments. When asked if adjudications could be redefined to only include acts that were equivalent to those of a certain seriousness category, more respondents answered that this would be feasible when calculating the overall score. Dr. Smith indicated that the MDAC team would look at this more fully for the next phase.

Dr. Smith discussed the goals for the Phase III of the project and asked for information of interest to the Commission. Senator Kelley indicated that she would like to see a qualitative study focusing on the various definitions between jurisdictions.

Judge Lewis reiterated that there is a concern about judicial bias over economics. Someone who has greater needs should not necessarily have greater sentences and our resources should be directed to appropriate places. Judge Lewis noted that studies show over and over again that the earlier an offender is a part of the criminal justice system, the longer they are a part of the criminal justice system.

Mr. Davis stated that under the Roper case, children are constitutionally different than adults. He suggested that the Commission adopt a plan to take age into account. He further suggested that Dr. Smith look at the data to see if children in the adult courts are receiving downward departures based upon their age.

Dr. Smith indicated that the data excludes juveniles sentenced in an adult court and noted that her current study is only focusing on adults aged 18 to 22 who are sentenced in an adult court. Mr. Davis stated that the case law in Maryland is clear that children should be treated differently and that the current sentencing guidelines do not reflect this difference. He noted that there are at least twenty people or so who may be eligible for re-hearings on their sentences because they were sentenced to life without parole as a juvenile. He clarified that he does not believe the Maryland Court of Appeals has ruled on all of these cases, but that these cases are in different states of review.

Mr. DeLeonardo noted that age is considered in the reverse waiver hearing. He questioned the purpose of the juvenile delinquency score study and whether this study went beyond validating the use of the juvenile scoring system. Senator Kelley suggested that having unclear definitions in any study makes the study unclear. Dr. Smith indicated that this study is retroactively studying whether individuals with differing juvenile delinquency scores reoffend at differing rates.

Dr. Smith indicated that she hopes to complete the draft of Phase III by the May meeting but there may be delays that push this draft to July. Judge Harrell indicated that the Commission would like to have an advance look at any information by the May meeting.

4. Guidelines Subcommittee report – Dr. David Soulé

Judge Avery indicated that the Guidelines Subcommittee met on November 30, 2016 via teleconference to review one issue but as she could not make this meeting, Dr. Soulé gave the update.



Dr. Soulé indicated that this issue concerned how to handle scenarios where a defendant is convicted for one of the drug or property offenses with *decreased* penalties pursuant to the Justice Reinvestment Act that was committed *prior to*, but sentenced *on or after*, October 1, 2017. Referring to the memorandum with this title, Dr. Soulé noted that pursuant to *Waker v. Maryland*, Maryland case law indicates that a defendant in the aforementioned scenario is subject to the statutorily-defined penalty in effect at the time of sentencing, unless, pursuant to ex post facto laws, doing so would result in a punishment harsher than that in effect at the time the offense was committed. The Guidelines Subcommittee agreed that *Waker* does control in these scenarios.

As noted in the second document titled “*Proposed Revisions to the Maryland Sentencing Guidelines Corresponding to the Justice Reinvestment Act*” there are multiple drug and theft/fraud related offenses with reduced penalties effective October 1. The second issue addressed by the Guidelines Subcommittee was given that *Waker* controls in these scenarios, and that the Maryland Sentencing Guideline Manual instructs to use the sentencing guidelines in effect at the time of sentencing, how should the guidelines should be calculated to specifically accommodate offenses committed prior to, but sentenced on or after, October 1, 2017?

Previously when offense penalties were revised and/or the Sentencing Commission revised the seriousness category for an offense, the Commission simply removed the old version of the offense from the Offense Table and inserted the revised version. The Guidelines Subcommittee recommended this protocol for drug offenses revised pursuant to the JRA.

Dr. Soulé indicated that the Maryland Automated Guidelines System (MAGS) would display two rows for each of the revised drug offenses. The first row displays the statutory maximum penalty and seriousness category in effect prior to October 1, 2017. The second row displays the new statutory maximum penalty and seriousness category in effect on and after October 1, 2017.

For the property offenses revised by the JRA (and those are essentially the theft- and fraud-related offenses), Dr. Soulé noted that not only were the respective penalties revised, but the elements of the offenses themselves are also changing as the monetary threshold categories will be shifted. The Guidelines Subcommittee decided to recommend adoption of the same basic approach that was used for the drug offenses. If a defendant commits a theft- or fraud-related offense prior to, but is sentenced on or after, Oct 1, 2017, the individual scoring the guidelines will select the closest analogous “new” offense and its corresponding seriousness category and statutory maximum. To select the closest analogous offense, the user will select the new offense with the dollar amount threshold closest to the old offense, unless the dollar amount involved places the offense into a lower dollar amount threshold, in which case the user will select the new offense corresponding to the lower dollar amount threshold. Dr. Soulé gave an example of how this process works.

Dr. Soulé noted that this is important because, by rule, the guidelines cannot exceed the statutory max for an offense, so it is necessary for MAGS to apply the correct statutory



maximum and cap the guidelines at that appropriate maximum. The negative of this approach is that it requires a user to select an offense title that differs from the convicted offense title. Dr. Soulé noted that this approach is justified in order to get the guidelines correct, and the judge or judge's designee can always note the original convicted offense title in the *Additional Information* section of the worksheet/MAGS.

During the Subcommittee teleconference, Mr. Finci asked if it would be possible to program MAGS such that anytime a user selects a revised theft- or fraud-related offense, a pop-up window would appear asking the user whether the dollar amount of the theft or fraud falls between the old and new dollar amount thresholds for the offense. Dr. Soulé indicated that while this is an option, this would require substantial programming and there is no current funding for this type of programming enhancement.

Dr. Soulé stated that a Guidelines E-News would be distributed with an example. Additionally, the rules regarding the use of an offense's current seriousness category when calculating the prior record score will be reiterated.

Dr. Johnson questioned how the revised theft- and fraud-related offenses will be treated in analyses of guidelines compliance. Dr. Soulé said that from a data standpoint, these will have to be considered new offenses as they have different statutory maximums and guidelines.

Mr. Finci recommended that the MSCCSP encourage individuals using MAGS to determine the dollar amount involved in theft offenses. Dr. Soulé noted that the guidelines worksheets requests the amount of economic loss to the victim but that this amount can be higher or lower than the plea suggests. Judge Lewis suggested that the guidelines worksheet also include the actual amount of theft that the defendant agreed to under the terms of the plea.

Dr. Soulé noted that there was a unanimous decision by the Guidelines Subcommittee to make these recommendations and Judge Avery indicated that while she did not participate in the subcommittee teleconference, she does agree with the recommendation. There was a motion to proceed accordingly, and the Committee voted unanimously to accept the proposed recommendations.

5. Executive Director Report – Dr. David Soulé

a. Recognition of interns

Dr. Soulé acknowledged two undergraduate interns, Tessa Guiton and Elizabeth Mullin, who worked with the Commission staff during the fall semester, and thanked them for their contributions.

b. Update on study on alternatives to incarceration

The Justice Reinvestment Act directed the MSCCSP to study how alternatives to incarceration may be included in the sentencing guidelines and to submit a report of their findings with recommendations to the Justice Reinvestment Oversight Board, Governor, and General Assembly by January 1, 2018. Dr. Soulé discussed the steps MSCCSP staff has taken to address this mandate. First, the staff is reviewing and summarizing background



information on the work previously completed by the Study Sentencing Commission relative to corrections options. Dr. Soulé noted that while this work took place in the late 1990s, it is still relevant and should shed some light on why specific guidelines were not developed for corrections options, as mandated in the Sentencing Commission enabling legislation.

Secondly, the staff is also reviewing how alternatives to incarceration are utilized in other states and jurisdictions with a particular emphasis on how they are incorporated into sentencing guidelines.

Lastly, Dr. Soulé reported that MSCCSP staff created an online survey or inventory of alternatives to incarceration that incorporated feedback provided by Commission members at the last meeting. The survey was distributed in November to Circuit Court Administrative Judges, Parole & Probation field supervisors, and local correctional administrators in each jurisdiction. Dr. Soulé noted several preliminary findings from the survey.

Dr. Soulé then directed the Commission's attention to a report released last Friday from the Brennan Center for Justice at New York University School of Law. The study is entitled "How Many Americans are Unnecessarily Incarcerated" and argues for greater use of alternatives to incarceration, particularly for low level, non-violent offenders. He indicated that the staff will thoroughly review the Brennan Center report and may incorporate aspects of it into the Commission's final report on alternatives to incarceration.

c. Request to assign task of developing recommendations to include in study on alternatives to the Guidelines Subcommittee

As the staff works to identify what recommendations the study on alternatives to incarceration might include, Dr. Soulé indicated that it might be helpful if this task was assigned to the Guidelines Subcommittee, so that staff could first work with a smaller group of Commissioners and then bring forward recommendations for the full Commission to consider. He then asked the Commission to consider inviting Commission members LaMonte Cooke and Secretary Moyer's representative, Rachel Sessa, to be involved in this task as special guest Subcommittee members. Given Mr. Cooke's experience with local programming as a corrections administrator, and Ms. Sessa's affiliation with the DPSCS, their input would be a beneficial during these deliberations among the Subcommittee. The MSCCSP agreed with Dr. Soulé's recommendation unanimously.

d. Update on the MSCCSP FY 2018 budget submission

Dr. Soulé reported that at the end of September, the staff submitted a fiscal year 2018 budget in accordance with the \$500,000 target given to the Commission. In the course of preparing for this budget submission, and in conjunction with a careful assessment of budgetary needs with respect to the mandated duties of the MSCCSP, two over-the-target requests for FY 2018 were submitted totaling \$63,714. The first priority over-the-target request equaled \$54,000 to create a dedicated source for contractual services to provide information technology support for updating and maintaining MAGS. In the request to the Governor, it was noted that the Department of Public Safety and Correctional Services (DPSCS) has been a tremendous partner for the MSCCSP by hosting MAGS within its secure server environment. It was further noted that MAGS has been maintained and updated at little to no cost to the MSCCSP, as the DPSCS has covered these costs within its budget.



Since the MSCCSP has relied on DPSCS to fund the contractual programming support for the MAGS application, Dr. Soulé noted that there are often times when programming bugs cannot be addressed in a timely manner, as the funding is not available immediately to support the necessary contractual services. The lack of a dedicated funding source means that MAGS is less efficient than it could be for both the end users and the MSCCSP.

Dr. Soulé further explained that the cost for creating the MAGS application was done almost exclusively with funds received from a federal Bureau of Justice Assistance grant. MAGS has operated for more than four years without any requested additional funds. However, as the use of MAGS expands statewide and the number of agencies and individuals accessing MAGS continues to grow, the MSCCSP will need its own funding to support continued maintenance of the system.

Dr. Soulé continued by reporting that the second priority over-the-target request is for a budget adjustment of \$9,714 to increase the summer hours for the MSCCSP's part-time policy analyst position (staffed by a graduate research assistant) to allow this individual to work 40 hours per week during the 10-week summer period. Currently, the MSCCSP is staffed with 4 full-time equivalent positions and one part-time GRA who fills the policy analyst position. The GRA works 20 hours per week for 9.5 months of the academic calendar year. This equates to roughly one-third of the hours of a full-time position. Thus, in sum, the MSCCSP staff represents 4.3 positions. The submitted over-the-target request would allow for the expansion of the policy analyst position to provide 40 hours per week during the 10-week summer period (400 total hours) when the graduate research student is not taking classes.

Mr. DeLeonardo asked if Commissioners are typically notified of budget submissions in hopes that they may be able to offer either verbal or written support of the request. Judge Harrell suggested that the FY 2018 budget submission letter previously sent to the Governor's office be forwarded to all Commissioners and asked for any possible support regarding this request.

6. Date, time, and location of the next Commission meeting.

The next meeting was scheduled for Tuesday, May 9, 2017 at the Judiciary Education and Conference Center. The remaining meetings for 2017 were scheduled for July 11, September 19, and December 12.

7. Old business

None.

8. New business and announcements

None.

The meeting adjourned at 7:51 p.m.