



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
House of Delegates Office Building  
Annapolis, MD 21401  
December 8, 2015

### **Commission Members in Attendance:**

Honorable Glenn T. Harrell, Jr., Chair  
Honorable Shannon E. Avery, Vice-Chair  
Delegate Curtis S. Anderson  
LaMonte E. Cooke  
William M. Davis, Esquire, *representing Public Defender Paul B. DeWolfe*  
Barbara Dorsey Domer  
Paul F. Enzina, Esquire  
Richard A. Finci, Esquire  
Brian D. Johnson, Ph.D.  
Senator Delores G. Kelley  
Honorable Patrice E. Lewis  
Megan D. Limarzi, Esquire, *representing Attorney General Brian E. Frosh*  
Honorable Laura L. Martin  
Secretary Stephen T. Moyer  
Colonel William M. Palozzi  
Honorable James P. Salmon  
Delegate Joseph F. Vallario, Jr.

### **Staff Members in Attendance:**

Justin Bernstein  
Sarah Bowles  
Stacy Najaka, Ph.D.  
Katharine Pembroke  
David Soulé, Ph.D.  
Hayley Ansell, MSCCSP Intern  
Rosy Shrestha, MSCCSP Intern

### **Visitors:**

Hon. Sherrie Bailey; Hon. Donald Beachley; Hon. Philip Caroom; Hon. Michael Whalen; Linda Forsyth, Community Liaison for Senator Kelley; Joe Clocker, Acting Director, Division of Parole and Probation; Don Hogan, Governor's Office of Crime Control & Prevention; Jinney Smith, Maryland Data Analysis Center; Brian Witte, Associated Press.

### **1. Call to order and introduction of new Commissioner**

Judge Harrell called the meeting to order at 6:35 p.m. Judge Harrell introduced Dr. Brian Johnson, who was appointed to the MSCCSP by Governor Hogan as the criminal justice/corrections policy expert representative.

**2. Declaration of quorum**

Judge Harrell declared a quorum.

**3. Approval of minutes from September 22, 2015 meeting**

The MSCCSP approved the minutes as submitted.

**4. Executive Director Report – Dr. David Soulé****a. Introduction and recognition of interns (*Status report*)**

Dr. Soulé introduced two undergraduate interns, Hayley Ansell and Rosy Shrestha, who worked with the Commission staff during the fall semester. He acknowledged their contributions and thanked them.

**b. MAGS update (*Status report*)**

The Commission staff continues to work on the deployment of the Maryland Automated Guidelines System (MAGS). Dr. Soulé noted several key accomplishments since the September 2015 MSCCSP meeting. On October 1, 2015, Prince George's County became the fifth jurisdiction to start using MAGS for initiation and submission of sentencing guidelines worksheets. That deployment was followed shortly thereafter by St. Mary's County, which became the sixth jurisdiction to start using the application on December 1, 2015. All jurisdictions in the 6th and 7th judicial circuits now use MAGS. These jurisdictions generate approximately 30% of all guidelines worksheets received by the MSCCSP statewide. It was also noted that Cecil County was scheduled to become the seventh jurisdiction to adopt use of MAGS on January 1, 2016. Finally, Dr. Soulé noted that the Office of the Attorney General began using MAGS on October 22, 2015 for cases prosecuted by their office in MAGS jurisdictions.

**c. Juvenile Delinquency Score Study Update (*Status report*)**

In light of concerns raised at the 2012 public comments hearing regarding the purported inconsistent application of the term "commitment" with respect to scoring the juvenile component of the Offender Score, the MSCCSP agreed to further examine the issue and is now collaborating with the Maryland Data Analysis Center (MDAC) at the University of Maryland to examine empirically how juvenile records affect the sentencing guidelines and which aspects of a juvenile record in Maryland predict later adult offending. The MDAC submitted applications to Maryland's Department of Juvenile Services (DJS) and to the Department of Public Safety and Correctional Services (DPSCS) for access to juvenile data and adult recidivism data, respectively. The MDAC and DPSCS completed a memorandum of understanding in November to allow for the eventual receipt of the adult recidivism data. Due to heightened sensitivity of, and privacy protections afforded to, juvenile records, the MDAC's application for the data from the DJS required multiple rounds of revisions. The MDAC and DJS reached a compromise solution in December 2015 which will allow the project to proceed. The MDAC researchers anticipate being able to provide at least preliminary analyses of the data in mid-2016 after it receives, cleans, and links all of the data.

Senator Kelley noted that she expected to have several juvenile justice bills in the 2016 legislative session. She noted that in large jurisdictions, juveniles are often committed to probation with many conditions. Senator Kelley further noted that the increased amount of probation conditions can lead to more violations that ultimately result in increased commitments.

**d. Justice Reinvestment Coordinating Council (*Status report*)**

Dr. Soulé updated the MSCCSP on the work of the Justice Reinvestment Coordinating Council. He noted that he or one other member of the MSCCSP staff attended all of the Justice Reinvestment Coordinating Council's meetings during 2015, and Judge Harrell asked him to summarize the work of the Council.

Chapter 42 of the 2015 Laws of Maryland (Senate Bill 602) created the Justice Reinvestment Coordinating Council. The Council consisted of an inter-branch and bipartisan group of criminal justice stakeholders from across Maryland, including representatives from the General Assembly, judiciary, prosecutorial and defense bars, local and state corrections, law enforcement, and reentry services. The Council worked with the Public Safety Performance Project of the Pew Charitable Trusts to craft a framework of sentencing and corrections policies with the goals of safely reducing the number of inmates in Maryland prisons, controlling state spending on prisons, and reinvesting those savings into more effective strategies to increase public safety and at the same time help nonviolent offenders from returning to prison. As required by its governing legislation, the Council would be submitting its final report and recommendations in December 2015.

Although not a member of the Council, the MSCCSP contributed to the Council's Justice Reinvestment Initiative work in several ways. The MSCCSP provided circuit court sentencing data and analyses critical to the Council's review of existing practices. Dr. Soulé attended several meetings of the Council and its Sentencing Subcommittee. The MSCCSP kept abreast of developments with the Council and offered feedback, as requested, throughout its proceedings.

Delegate Anderson asked Don Hogan, Governor's Office on Crime Control Prevention (GOCCP), whether the intent was for all of the Council's recommendations to be included in one bill. Mr. Hogan stated the intent was to have one omnibus bill.

Delegate Anderson asked about several of the details of the Council's recommendations. With regards to technical violations, such as those involving conditions of probation, Mr. Hogan noted the Council recommends that sanctions be swift and certain, though not necessarily lengthy. As an example, Mr. Hogan suggested that the Parole and Probation agent would immediately take the person off the street for a first offense for fifteen days.

Ms. Martin asked whether Mr. Hogan was saying that the Parole and Probation agent would be taking the person off the street without a hearing. Mr. Hogan stated that it was an issue that would have to be considered.

Senator Kelley expressed concerns over people receiving mutually incompatible conditions (e.g., meet with agent and be at work), and noted that it would be a shame to take people off the street with no hearing in such a situation.

Secretary Moyer noted there was a lot of discussion about the requirements of the Violence Prevention Initiative, and this matter will roll up into that discussion as well.

Judge Caroom stated that the discussions in the Council's sentencing subgroup about the Parole and Probation agent imposing sanctions without a hearing did not relate to detention, but to



other kinds of sanctions. Mr. Hogan stated that Judge Caroom was correct that agents would not be able to incarcerate violators without a hearing.

Delegate Anderson asked how Pew had calculated the cost savings estimated. Mr. Hogan indicated his belief that it was based on the marginal cost of incarceration (not including capital costs).

Judge Avery asked whether the data forming the basis for the projections were from the new Offender Case Management System (OCMS) or if they were from old mainframes. Secretary Moyer replied that it was not from OCMS.

Mr. Davis asked what the Council's rationale was for increasing the maximum penalty for second-degree murder from 30 to 40 years. Mr. Hogan replied that it was based on data showing that approximately 40% of those convicted of second degree murder received the maximum sentence of 30 years, and therefore the Council believed that in a certain number of cases the judges are finding that a 30 year maximum is insufficient.

#### **5. Risk Assessment Feasibility Study Presentation – Dr. Jinney Smith, Department of Criminology and Criminal Justice, University of Maryland**

Dr. Smith gave a presentation based on the white paper, *Follow-Up Report to the MSCCSP: Using Assessment Instruments During Criminal Sentencing*, distributed prior to the meeting. She noted that the major issue that arose during the previous discussion of risk assessment tools (in September 2014) had been whether the Commission would select a risk-only or a risk-needs tool for use at sentencing, assuming that the MSCCSP will adopt a tool for sentencing. The presentation in September 2014 focused predominantly on risk tools, whereas based on feedback from the September 2014 meeting, the most recent paper exclusively addressed risk-needs tools in terms of options for well-validated, viable, off-the-shelf tool availability.

Dr. Smith noted that the risk assessment field is broken down into first, second, and now third and fourth generation risk assessment tools. Third generation tools, such as the LSI-R, include both static and dynamic factors covering both risks and needs. Fourth generation tools, such as the LS/CMI, build on third generation tools by attempting to factor in an offender's rehabilitative and learning style. The goal of fourth generation tools is to improve use of the tools in case management for correctional purposes. While risk assessments have been used on a limited basis at sentencing for some time, risk-needs assessments are becoming more prevalent, though at present they are still uncommon. While designed for case management, a few jurisdictions have begun to modify risk-needs tools for use at sentencing.

Concerning the information routinely collected in Maryland that is relevant to a tool for sentencing, a risk-needs assessment tool would present a significant new information demand. For instance, the MSCCSP previously decided that if it were to implement a risk or risk-needs assessment at sentencing, it would target low risk nonviolent offenders for diversion from incarceration. It was noted that Parole and Probation agents are likely best positioned to administer a risk-needs instrument in conjunction with a Pre-Sentence Investigation (PSI) report. However, in 2014, only 16% of guidelines cases involved PSI reports, and those 16% of cases were overwhelmingly more serious cases and therefore might not be helpful for diverting lower risk offenders.



Dr. Smith indicated that she had recently learned that the Supervision Subcommittee of the Justice Reinvestment Coordinating Council was making a consensus recommendation to adopt a risk-needs tool to provide to the sentencing court and Parole Commission.<sup>1</sup> The Division of Parole and Probation has adopted the LSI-R for use in case management, and training of all agents is underway. Comprehensive statewide implementation is anticipated in 2017. Legislative adoption through the bill stemming from the Council's recommendations may address several financial and logistical issues involved in the tool's implementation.

Judge Avery asked about the time and labor involved in the LSI-R and inquired as to whether reducing the time and labor from the PSIs (which take six weeks) would allow for expanding the scope of application of the risk assessment tool. Dr. Smith noted that the LSI-R is an approximately forty-five minute to an hour-long structured interview with the defendant, though she does not know how that would map onto the time commitment of a PSI. The person conducting the LSI-R can verify in administrative records information related to criminal history and the present offense, though the training emphasizes motivational questioning to encourage thoughtful and reflective responses.

Senator Kelley asked whether the vocabulary used in the LSI-R is comprehensible for people with little education or other deficits. Dr. Smith indicated that the comprehension level of the questions is not very complicated, and the training emphasizes avoiding leading questions.

Dr. Smith then directed attention to a table comparing different assessment tools. Dr. Smith noted that the tools are all comparable in terms of predictive validity for a general offender population. The LSI-R is the most widely used and validated tool, though no state has adopted it statewide for sentencing.

Senator Kelley asked what the strongest predictor of recidivism is among these tools with comparable predictive validity. Dr. Smith noted that criminal history is the strongest predictor of recidivism. Senator Kelley remarked that criminal history is very multifaceted. Dr. Smith stated that the most effective tools utilize a wider and more comprehensive gauge of criminal history.

Delegate Anderson expressed concern that many of the domains in the risk assessment tools will simply replicate, or even increase, existing racial disparities in the criminal justice system, as well as larger society, in terms of who gets sentenced to incarceration. He asked how a tool would affect the composition of who gets incarcerated in jurisdictions using the risk assessment tool at sentencing. Dr. Smith noted that empirically it is too soon to know, as jurisdictions have only recently started using the LSI-R at sentencing.

Judge Lewis noted that by quantifying and requantifying the same information everyone already has, the tool would just provide users with another way to measure disparity in order to justify an outcome and what people are already doing. Judge Lewis further noted that people without an economic base are going to score higher on the tools. Responding to Judge Lewis, Dr. Johnson noted that race and socioeconomic status are closely tied. Part of the argument for a risk-needs assessment tool, Dr. Johnson noted, is to identify needs that would help identify

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<sup>1</sup> It should be noted that this consensus recommendation did not carry over to the final enrolled legislation, SB 1005, the Justice Reinvestment Act, that was adopted by the General Assembly in April 2016.



candidates for alternative programs (e.g., candidates for drug treatment programs.) Though not discounting Judge Lewis's criticism, as socioeconomic status is strongly correlated with race and criminal justice outcomes, if implemented correctly, risk-needs tools can bring real benefits.

Senator Kelley also expressed concerns about using data that will reflect environmental disadvantages and policing practices. Senator Kelley worried that an assessment tool would not provide any new information other than to inform that many individuals had a poor beginning to life.

Dr. Smith emphasized that the risk-needs tool was developed for correctional management and programmatic placement. Variables relating to education and employment are there to indicate whether those are priorities for placing a person into a particular supervision class. The MSCCSP is talking about adopting the tool for sentencing only for diverting low risk offenders away from incarceration, towards probation or intermediate sanctions. The point is not to add time for anyone, it is to find low risk offenders for whom the guidelines would otherwise recommend incarceration.

Senator Kelley noted that the tools do not seem to capture information related to having experienced mental health issues, treatment, or trauma. These factors matter, and could tell a lot about how likely certain interventions are to make a difference in the life of a person. Dr. Smith noted that the table reflects the selection of available tools. Dr. Johnson noted that some items do have mental health history under factors such as emotion. Senator Kelley replied that emotions might be based on a person's life experiences, so the assessment would require subjective judgments from the agent administering the assessment.

Judge Caroom noted that the LSI-R has been validated or calibrated for Maryland. A study compared Maryland inmates to those in other jurisdictions using the LSI-R. The people calibrating the LSI-R adjusted the score to reflect local conditions and avoid discrimination. And while many states currently use the LSI-R, what often happens is that after a few years of use and experience a state will decide to customize a modified or revised tool for its situation, which also saves money. Judge Caroom also reiterated that the purpose for which the judiciary has asked the MSCCSP to research a tool is to identify low risk defendants and to try to persuade judges not to incarcerate them, which can make them worse. The main takeaway for the MSCCSP would be, if there is validated risk assessment available, to find out who is low risk and to incorporate into the sentencing guidelines recommendations for corrections options for low risk offenders that would avoid incarcerating them and increasing their risk of recidivism. The LSI-R is one option, however there may be other options that are simpler, easier, shorter, cheaper, and make no reference to objectionable characteristics.

Mr. Davis stated that some of the concern is that someone growing up in West Baltimore is always going to have higher risk based on the tool than someone growing up in Severna Park, for example. Mr. Davis asked whether by using the tool we would be missing some of the low risk people from West Baltimore. The person from Severna Park may be inherently higher risk for various reasons, but has a good education and goes to a better school. Mr. Davis questioned whether using the tool could potentially lead to missing low risk people who grow up in less fortunate neighborhoods.



Dr. Smith noted the potential to norm a tool to a particular population, but to be able to norm it you would have to use the tool first. Part of the LSI package, after approximately 1,000 events, is that the LSI-R developers work with the local jurisdiction to make sure the tool works under the local conditions. The LSI-R has been validated for Maryland, but only for correction management and program placement, not for sentencing. So if adopted, the MSCCSP would need to allow time to pass for enough people to receive assessments, serve their terms (or not), and recidivate (or not). Logistically, if the Division of Parole and Probation fully deploys the tool in 2017, the MSCCSP would need to wait until roughly 2019 to perform a sound validation study to confirm whether the tool is appropriate for identifying low risk defendants in Maryland for diversions for whom the guidelines would otherwise recommend incarceration.

Judge Harrell closed the discussion on this topic by noting that this had been an informational report and item. He and Dr. Soulé would talk, prior to the next meeting, about trying to organize a decisional hierarchy of how to go about discussing and vetting all of the noted issues with the goal of reaching whatever conclusion the MSCCSP may reach. The goal will be to vet these issues through everyone before the next meeting.

## **6. Guidelines Subcommittee report – Judge Shannon Avery**

### **a. Review of MAGS access levels (*Action item*)**

Judge Avery reported that during the Subcommittee's November 9, 2015 teleconference, the Subcommittee voted to recommend that the MSCCSP provide view-only access to completed and submitted MAGS worksheets for circuit court judges and their designees. The Subcommittee tabled access for non-judicial MAGS users pending additional data and discussion.

Ms. Limarzi noted that the Office of the Attorney General routinely does not receive a copy of worksheets, unless the attorney receives it in the courtroom, so there is often no way for the office to get access to MAGS worksheets without view-only access to submitted worksheets. Judge Avery responded that the Guidelines Subcommittee would continue to review the issue of access to submitted worksheets for non-judicial MAGS users.

The MSCCSP adopted the Subcommittee's recommendation without opposition to provide view-only access to completed and submitted MAGS worksheets for circuit court judges and their designees.

### **b. Continued review of proposed revisions to the sentencing matrix for drug offenses with consideration of alternate proposal from Rick Finci (*Action item*)**

Dr. Soulé recounted the process leading up to the Commission staff's development of the tentatively approved revisions to the sentencing matrix for drug offenses. At its May 2014 meeting, the MSCCSP authorized the Commission staff to conduct updated analyses of guidelines compliance for individual sentencing guidelines matrix cells using data from fiscal years 2009 through 2013. (The Guidelines Subcommittee reports at the September 2014, December 2014, May 2015, and September 2015 MSCCSP meetings included updates from these analyses.) The first step in the review was to identify sentencing guidelines matrix cells with a guidelines compliance rate of less than 65% and a sample of at least 50 offenders. The second step involved examining the sentences within these specific cells closely. The review process showed that 27 (12%) of the 224 cells across the three matrices met the criteria of less than 65% compliance and a sample size of at least 50 offenders during the 5-year review



period. The 27 cells meeting these criteria were largely scattered throughout the matrices. But eight of these cells clustered together among the rows corresponding to seriousness categories IV and V drug offenses.

At the direction of the Guidelines Subcommittee, the MSCCSP staff developed proposed revised cell ranges attempting to reflect sentencing practices more accurately, while maintaining proportionality across rows and columns of the matrix to be consistent with the principles of the guidelines. For each cell in the matrix, the MSCCSP staff calculated what the range would need to be to capture the sentences for the middle 65% of cases. The Commission staff then proposed changes to the existing cell ranges, attempting to balance capturing sentences for the middle 65% of cases and proportionality across offender scores and offense seriousness categories. Incorporating appropriate increases and decreases across rows and columns involved comparing adjacent cells and required changing cell ranges for cells that already had at least 65% compliance to maintain consistency and proportionality.

Concerned that the lower limits proposed by the MSCCSP staff were not low enough, Mr. Finci developed an alternate proposal. Dr. Soulé stated that Judge Avery had asked him for his opinion on Mr. Finci's proposal. Dr. Soulé was concerned that by widening the ranges, the guidelines would not provide sufficient and helpful guidance for judges.

Mr. Finci described how he developed his proposal. He noted that neither proposal captures the middle 65% of cases; both capture "the high 65%." Under both proposals, for most cells recommending an incarceration sentence (i.e., the lower guidelines bound is not zero (probation)), more cases outside the recommended range would be below the range, rather than above, whereas the numbers above and below would be the same if the guidelines were truly capturing the middle 65%. He drafted proposed ranges lowering the upper guidelines bound to narrow the ranges, but this left cells below 65% compliance. So his proposal maintains the high end but lowers the low end, which widens the range and includes more of the lower end cases that were below compliance in the last five years. Mr. Finci noted that, for example, in the cell for seriousness category IV, Offender Score 5, to capture the true middle 65% the lower guidelines bound would need to be one day. In the tentatively approved revision (prepared by MSCCSP staff), however, the lower guidelines bound is nine months, and that simply did not make sense to Mr. Finci, so he decided to make the alternative proposal.

Mr. Finci stated that while the MSCCSP creates the guidelines for judges, the primary beneficiaries are practitioners when negotiating plea agreements. On a day-to-day basis, the guidelines offer the ability to know what a case is worth and to inform discussions between parties on negotiations. Mr. Finci worried that if the MSCCSP adopts changes that do not go far enough to reduce the guidelines in light of changing practices, they will have the reverse effect of causing negotiations to "go in the wrong direction." Practitioners will hear the argument that the MSCCSP reduced the guidelines and yet the defense is still asking for a sentence below the recently reduced guidelines. Mr. Finci further noted that not changing the upper limit of the ranges also addresses Mr. Shellenberger's concerns (from the Public Comments Hearing) regarding non-marijuana and large quantity cases. Mr. Finci stated his belief that it is incumbent upon the MSCCSP to get the proposed revision right since the guidelines ranges have not been amended in many years. He respectfully suggested that there is support among stakeholders in the criminal justice system to lower the guidelines in these categories a little bit further than in the tentatively approved version.



Judge Harrell referred to the letter from former Commissioner Russell Butler submitted prior to the Public Comments Hearing. Mr. Butler's letter asserted that the guidelines were prescriptive rather than descriptive. Judge Harrell had asked Dr. Soulé to investigate Mr. Butler's assertion, and asked Dr. Soulé to report on what he had found, in case people thought that would tip any of the Commissioners' votes one way or another depending on his or her view of descriptive, prescriptive, or presumptive guidelines.

Following Judge Harrell's request, Dr. Soulé had reviewed the report from the Maryland Commission on Criminal Justice Policy (also known as the Study Commission) and minutes from MSCCSP meetings dating back to its inception. Minutes from the May 8, 2000 meeting reflect a discussion concerning this issue. They indicate that while the guidelines are primarily descriptive they allow for prescriptive influence, such as the General Assembly's requirement that the MSCCSP take into consideration that the priority for the capacity and use of correctional facilities should be the confinement of violent and career criminals. Since that meeting, however, the discussions of the MSCCSP and the minutes continuously describe the guidelines as descriptive. Aside from one indistinct reference in the MSCCSP's regulations perhaps suggesting the guidelines are prescriptive<sup>2</sup> (and the corresponding text in the Maryland Sentencing Guidelines Manual), nothing in the regulations, Manual, or any of the other minutes refers to the guidelines as anything other than descriptive.

Senator Kelley noted that she was on the Study Commission, and that the guidelines were always intended to be descriptive, to reflect to judges throughout the state the average sentences of their peers.

Mr. Davis noted that at the Public Comments Hearing, Mr. Shellenberger seemed to be advancing a prescriptive position for the sentencing guidelines. Mr. Davis indicated that Mr. Shellenberger's position seemed to be that the MSCCSP should be telling the judges what to do by coming up with the guidelines. But, Mr. Davis asserted, we trust the judges to do the right thing, which is why we have an adversarial system. The sentencing guidelines should be reflective of what is happening because the judges are supposed to be the ones with an understanding of what society wants them to do. If that is what the judges are doing, that would be descriptive, and we would be bound to that. Mr. Davis indicated his belief that Mr. Finci's proposal captures a wider range and is more akin to what is actually happening in the courtroom. Mr. Davis concluded that if the purpose of the guidelines is to make sure that what happens in Anne Arundel County is similar to what happens in Garrett County, then the guidelines should be descriptive rather than prescriptive, and he believes Mr. Finci's proposal advances that better.

Judge Avery stated her understanding is that the purpose of the guidelines is so that a judge can look at the guidelines and see what the range of normal is if you aggregate across all jurisdictions. The problem is that if the ranges in the cells are too broad, then they are not helpful to the judges and the MSCCSP would potentially make the guidelines less relevant and not helpful to the court.

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<sup>2</sup> "Under Criminal Procedure Article, §6-211(b), Annotated Code of Maryland, the sentencing guidelines are voluntary and may not be construed to require a court to sentence a defendant *as prescribed by this chapter*." COMAR 14.22.01.01B (emphasis added).



Senator Kelley noted that the MSCCSP has made it very easy to have great variability so that people would not feel they were being pulled to any particular center by saying that ABA pleas are always guidelines compliant. There is more variability across circuits than across judges within circuits.

Judge Avery responded that if we are just asking about the state of the system, we are just looking at the potential sentences under the statute. If that is the case, what is the point of having the guidelines? Senator Kelley reiterated that the guidelines are descriptive of the state of the system; they are not there to tell a judge what to do in any particular case.

Mr. Enzinna noted that the MSCCSP is not trying to tell judges what the range of all sentences is, but rather what the norm is, and if they want to go outside that, an explanation should be provided. Mr. Enzinna inquired, if the guidelines are descriptive, why is the MSCCSP not also lowering the upper ends?

Mr. Finci responded to Mr. Enzinna that the reason is the MSCCSP is not capturing enough of the lower end, and the reason the range is so broad is to capture the higher end, as in the tentatively approved version. He had hoped to narrow it, but that would have increased the cells with compliance below 65%.

Responding to Judge Avery's comment, Mr. Finci stated that at some point the MSCCSP will need to address further that if the guidelines really are to be descriptive, and the MSCCSP chooses a 65% compliance target, then why does the MSCCSP not just identify the middle 65% of sentences and change the guidelines every five years?

Judge Avery responded that Mr. Finci's question revealed that there is a prescriptive nature to the guidelines and the MSCCSP. If there were not, then the MSCCSP would just identify the middle 65% of sentences and change the guidelines every five years. But that has not happened.

Dr. Soulé responded that simply identifying the middle 65% of sentences within each cell would result in guidelines that do not always result in proportional increases or decreases as one's offender score varies. This gets at Judge Avery's point that there is a prescriptive element to the guidelines, because the MSCCSP is saying there is a greater level of culpability with an offender with a more serious prior record. The MSCCSP governing legislation states that the priority for the capacity and use of correctional facilities should be the confinement of violent and career criminals, and therefore that priority should be reflected in ranges that proportionally increase as one's offense seriousness and offender score increase.

Judge Lewis noted that the guidelines started in Maryland because the federal system was developing sentencing guidelines that were mandatory and judges in the state thought that was a bad idea. Accordingly, the judiciary in Maryland got out in front of the issue and started discussions about voluntary guidelines. Then in 1993, at the Maryland Judicial Conference, the biggest concern was why, since the guidelines are descriptive, the cells had not been changed to reflect judicial practice. Judge Lewis noted, as someone responsible for judicial training for over 20 years, the judges looking to the guidelines are not judges who have been practicing criminal law all of their practice years. Judges sometimes come to the bench from large civil practices, and do not know what generally happens in terms of sentencing. In all those scenarios, when a colleague asks what he or she should do, the first thing Judge Lewis says is to



ask whether the person has looked to the sentencing guidelines to get a thumbnail sketch. Judge Lewis also asserted that District Court judges look to the sentencing guidelines because the District Court has jurisdiction over theft and the nonviolent misdemeanor cases. Judges who primarily have a civil background have asked Judge Lewis what a case is worth. The MSCCSP should be honest in that answer because the community standard is not to sentence nonviolent offenders to lengthy jail sentences. If a two month sentence is fair and reasonable, that is all the judge wants to know.

Judge Lewis asked that the MSCCSP respect the Maryland State Bar Association’s Criminal Law and Practice Section Council, which includes the defense bar, prosecutors, judges, and law school professors. They said Mr. Finci’s proposal is fair, equitable, and an accurate representation. Judge Lewis recommended that the MSCCSP adopt Mr. Finci’s alternate proposal.

By a vote of 8-7, the MSCCSP adopted Mr. Finci’s revisions to the cells corresponding to offense seriousness categories IV and V of the Sentencing Matrix for Drug Offenses. The adopted revisions are as follows:

**Cell Contents:**            **Row 1 – Current range**            **Row 2 – Approved revised range**

  Compliance less than 65% for cases sentenced FY2009–FY2013 and total N at least 50

<i>Offender Score</i>								
<i>Offense Seriousness Category</i>	0	1	2	3	4	5	6	7 or more
<b>V</b>	P-6M	P-12M	3M-12M	6M-18M	1Y-2Y	1.5Y-2.5Y	2Y-3Y	3Y-4Y
	<u>P-1M</u>	<u>P-6M</u>	<u>P-1Y</u>	<u>1M-1Y</u>	<u>2M-18M</u>	<u>3M-2Y</u>	<u>4M-3Y</u>	<u>6M-4Y</u>
<b>IV</b>	P-12M	P-18M	6M-18M	1Y-2Y	1.5Y-2.5Y	2Y-3Y	3Y-4Y	3.5Y-10Y
	<u>P-3M</u>	<u>P-9M</u>	<u>1M-1Y</u>	<u>2M-18M</u>	<u>3M-2Y</u>	<u>4M-2.5Y</u>	<u>6M-3Y</u>	<u>8M-5Y</u>

*P=Probation, M=Months, Y=Years*

**7. Date, time, and location of next meeting**

The MSCCSP will next meet on Tuesday, May 10, 2016.

**8. Old business**

None.

**9. News business and announcements**

None.

The meeting adjourned at 8:55 p.m.