



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
Judiciary Education and Conference Center  
Annapolis, MD 21401  
May 10, 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  
Richard A. Finci, Esquire  
Brian D. Johnson, Ph.D.  
Senator Delores G. Kelley  
Honorable Patrice E. Lewis  
Honorable Laura L. Martin  
Honorable James P. Salmon  
Rachel Sessa, *representing Secretary Stephen T. Moyer*  
Delegate Joseph F. Vallario, Jr.

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

Sarah Bowles  
Stacy Najaka, Ph.D.  
Katharine Pembroke  
David Soulé, Ph.D.  
Kwame Apea, MSCCSP Intern

### **Visitors:**

Elizabeth Bayly, Department of Legislative Services; Hon. Philip Caroom, Judiciary Risk Assessment Advisory Group; 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.

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

Judge Harrell called the meeting to order at 5:30 p.m. Judge Harrell introduced Brian L. DeLeonardo, State's Attorney for Carroll County, who was appointed to the Commission by Governor Hogan as the state's attorney representative. Judge Harrell also introduced Senator Robert G. Cassilly, who was appointed to the Commission by the President of the Senate.

### **2. Declaration of quorum**

Judge Harrell declared a quorum.

**3. Approval of minutes from December 8, 2015 MSCCSP meeting.**

The Commission approved the minutes as submitted.

**4. Approval of minutes from December 8, 2015 MSCCSP public comments hearing.**

The Commission approved the minutes as submitted.

**5. Update on Risk Assessment Feasibility Study (Status report) – David Soulé, Ph.D.**

Dr. Soulé gave a presentation to update the Commission on the status of the risk assessment feasibility study. Dr. Soulé noted that the purpose of the report was to set the course for helping the Commission to make an initial decision regarding whether to recommend use of an actuarial assessment instrument to be deployed prior to sentencing, and if so, to map a series of decisions to be made regarding the development and deployment of an instrument. The intent was to identify the appropriate questions to be addressed and to ask for feedback regarding what additional information would be needed in order to make these decisions in the next meetings.

Dr. Soulé began with a brief recap of the activities related to this project since some of the Commissioners were not members of the Commission for the entirety of the review period. The process started in May 2010 when the Judiciary's Ad Hoc Committee on Sentencing Alternatives, Re-Entry & Best Practices (or AHSC) invited the Commission's former Vice-Chair, Dr. Wellford and Dr. Soulé to speak with the AHSC about the potential use of assessment at sentencing. Later in that year the Commission agreed to study the potential use of risk assessment at sentencing and began with an introductory review via a series of presentations to learn the basics of how risk assessment works, to learn how other agencies in Maryland were already using risk assessment at other points in the criminal justice process, and to review examples from other states that use risk assessment as part of their sentencing guideline systems.

In 2011 the Commission determined that there was enough evidence of successful use of risk assessment as a diversion tool to support further exploration of using risk assessment in this manner in Maryland. At that point, it was also determined that the Commission would benefit from exploring funding options to help determine how to incorporate risk assessment into the sentencing guidelines. Eventually a grant was obtained through the Governor's Office of Crime Control & Prevention to conduct the Risk Assessment Feasibility Study. In September 2014, the research team at the University of Maryland presented their first white paper *Decisions Points in Risk Assessment Implementation* and then provided a second *Follow-Up Report to the MSCCSP: Using Assessment Instruments During Criminal Sentencing* at the Commission's December 2015 meeting. During the first UMD presentation, considerable discussion took place regarding the pros and cons of a risk-only approach versus the more comprehensive risk-needs assessment. Accordingly, the *Follow-Up Report* provided a comprehensive review of various risk-needs instruments and their potential for use at sentencing, a review of the additional information-demands of the risk-needs assessment instruments, and a series of recommendations regarding the likely policy-related decisions that would need to be made at various steps along the way.

During the course of the lengthy review period, the Commission has been presented with an abundance of information on actuarial assessment instruments. At the conclusion of the December 2015 meeting, Judge Harrell asked the MSCCSP staff to synthesize and organize all of this information into one decision map. Dr. Soulé reviewed the decision map, distributed in advance of the meeting.



The decision map hinges on revisiting the initial decision regarding whether to support the use of a formal actuarial assessment at sentencing or to consider one of three alternate options. If the Commission decides to move forward with supporting the use of an actuarial assessment instrument at sentencing, then there are a series of next-level decisions to make including: whether the instrument should target a specific population; whether it should focus on risk (only) or risk and needs; whether to develop a new tool or adopt an existing tool; what risk factors and measures of recidivism should be used; what data source should or could be used to develop, validate, and/or implement the instrument; how should the project be funded, and; who would have the authority to administer the instrument and at what point in the sentencing process. Dr. Soulé noted that the decision map is not necessarily set in stone in terms of the order of or specific decisions to make.

Dr. Soulé did not review the next-level decisions in detail, as prior reports thoroughly covered them and the Decision Map Supporting Information document, distributed in advance of the meeting, provided a summary. He noted, however, one cannot make an informed decision about the initial consideration of the use of actuarial assessments unless he or she first considers the full litany of issues surrounding each subsequent decision point.

Given all the information provided, the MSCCSP staff identified four initial options for Commission to consider and potentially choose at the next meeting:

Option 1-Maintain the current system:

The Commission may opt to maintain the present sentencing guidelines system and not implement a pre-sentencing assessment tool. The Commission is not legislatively mandated to implement a risk assessment tool, so it could be decided that the costs to implement a tool outweigh the benefits.

Option 2-Wait:

The Commission may postpone a decision regarding the pre-sentencing risk assessment until after the post-sentencing screener instrument and risk assessment instruments outlined in the Justice Reinvestment Act have been implemented by the Department of Public Safety and Correctional Services (DPSCS) and evaluated. In particular, the screener instrument, which will presumably be shorter and scored based on available official records, may present a more realistic option to model for use at sentencing.

Option 3-Seek funding to conduct an offender score validation study:

As an alternative to deployment of a separate risk assessment instrument, the MSCCSP may wish to consider a validation study of the offender score component of the guidelines to determine how well the offender score predicts re-offending and how much weight should be given to each particular dimension. Given that prior criminal history is by far the strongest predictor of future risk, re-validating the offender score using recent recidivism data, would be another way to efficiently identify offender risk level.

Option 4-Make a decision about whether an instrument should target a specific population and if it would be risk assessment or risk-needs assessment and seek funding to proceed with next steps:

If the Commission is committed to finding a way to incorporate an actuarial assessment tool into the sentencing guidelines, then the Commission needs to first make a decision whether



the instrument should target a specific population and whether to implement a risk assessment or risk-needs assessment instrument and then seek funding.

Dr. Soulé asked each Commissioner and member of the JRAAG to identify, by the end of May, any questions he or she felt needed to be addressed in order to make a decision about the next step in this process. MSCCSP staff would research the questions and provide responses before the next Commission meeting, with the hope that the Commissioners feel they are prepared to make an informed decision and are ready to potentially take action on one of the four initial options at the next meeting.

Senator Kelley asked about research on which particular qualities of an individual's past are most predictive of future reoffending. Dr. Soulé responded that this was something the MSCCSP staff could synthesize for the Commission in advance of the next meeting.

Delegate Anderson asked what the time frame would be for implementation of the tools contemplated by the Justice Reinvestment Act and if there is a budget for them, as there would be no point in duplicating costs if they are similar. It seems to Delegate Anderson that the tools that DPSCS will be using would be apropos to look at. Ms. Sessa noted that the implementation date is October 1, 2017. The DPSCS goal for the Division of Parole and Probation (DPP) is to start with a screener and for those screened as moderate or high risk a more robust LSI-R assessment. She indicated that she could provide more information on the instrument and the tentative rollout deadline. The DPP is moving quickly and may implement it before the deadline.

Delegate Anderson asked why a sentencing assessment would be any different from the Division of Correction's (DOC's) or DPP's assessments. Ms. Sessa indicated that she was not in a position to answer that, but noted that the DOC assessment is required under the Justice Reinvestment Act.

Dr. Soulé noted that a problem which has come up repeatedly is who would administer a sentencing risk assessment and at what point in the process prior to sentencing. The PSI report seems a logical place, but only a minority of guidelines cases involve PSIs. Dr. Soulé further noted that if the risk assessment were incorporated into the PSI, the assessment would only be available for a minority of cases, as judges generally only order PSIs for more serious offenses.

Judge Avery noted that the DOC assessment is more targeted towards classification of the inmate for determining security level on the inside. For sentencing purposes the assessment would be looking at a different outcome. With respect to the PSI, Judge Avery noted that if PSIs were more relevant to judges, more judges would order them. Having a more valid and credible risk assessment would make them a lot more valuable, so judges would likely order them more often. Dr. Soulé noted that this might create resource problems for the parole and probation agents who complete the PSIs.

Mr. Finci noted that the Guidelines Subcommittee and Commission originally recommended exploring a very narrow assessment option, only to opt out nonviolent (or low risk) offenders from incarceration in the first place. They felt this would have support from the judiciary and other stakeholders, but a broader tool would start impeding on judicial discretion and overgeneralizing people in ways that would be a much larger change. If people are now thinking of some broader tool, that is not what the Subcommittee considered and recommended.



Ms. Martin agreed, further noting that the original thought was that either the state or defense could score the tool, as with the guidelines. It would not be as comprehensive as a full risk and needs assessment, but, based on resource constraints, is a more realistic option.

Senator Kelley asked whether the risk tool used for security classification, referred to by Judge Avery, could also identify services needed. Judge Avery responded that her understanding was that the LSI-R does identify needs. Judge Avery noted that sound public policy requires providing good information to judges, and in her opinion, tools like the LSI-R do not always take the idiosyncrasies of local communities into account. So if you want to look at someone at risk for violence, you might not look at the nonviolent drug offense for which he is currently facing conviction, but you might look at social characteristics of the person that are not necessarily quantifiable but that we know from localized research are part of the transactional violence around drug dealing. So all of it comes back to a PSI analysis rather than a risk assessment number that might be attractive in some ways, but might not be conveying the information to the judge that the judge needs to know.

Senator Kelley suggested that given the paradigmatic changes of the Justice Reinvestment Act, waiting a couple of years for new data might make sense.

Judge Harrell noted that this was not on the schedule as an action item for the current meeting, and that the new members should have a chance to review the materials and weigh in. But given how long the study has been ongoing, the Commission should move towards a decision sooner rather than later, i.e., over the course of the next meeting or meetings.

#### **6. Juvenile Delinquency Score Project (Status report) – Jinney Smith, Ph.D., Maryland Data Analysis Center**

Dr. Smith presented an update on and preliminary results from the juvenile delinquency score project. She began with an overview of the project (further detailed in the December 2015 meeting minutes). The project will require linking data from the Commission, from the Department of Juveniles Services (DJS), and DPSCS. In 2015 the Maryland Data Analysis Center (MDAC) applied for data from the DJS and the DPSCS. MDAC requested data from DJS in June 2015, completed a memorandum of understanding in February 2016, and DJS is now matching its data to Commission data. MDAC and DPSCS completed a memorandum of understanding in November 2015 and MDAC received the DPSCS data in May 2016. MDAC analyzed data from the Commission while working on obtaining data from DJS and DPSCS, and Dr. Smith presented preliminary results from those data, cautioning against drawing any firm conclusions in the absence of more detailed juvenile record data (from DJS) or recidivism data (from DPSCS).

Dr. Smith was asked a question about how the data are matched. She explained that because of the highly sensitive nature of juvenile records, DJS is linking the data and will then return the combined data to MDAC for analysis after stripping out identifying information. Once they return the de-identified data, MDAC will be unable to confirm accuracy, but the DJS staff, Dr. Smith noted, seem to know what they are doing. The key person doing the linking is a UMD Criminology Ph.D. and former research director for the Commission.

Because tens of thousands of records are involved, matching will take some time. Dr. Smith expressed her hope to be able to proceed to the next stage of the study by the end of 2016 and expects that MDAC will conclude the study during 2017.



The next stage of the study will be to deconstruct the juvenile delinquency score as recorded on the guidelines worksheet with the DJS data to analyze the juvenile delinquency score for its predictive validity and any problems. Depending on those findings, if the Commission decides that an alternate juvenile delinquency scoring system would improve the reliability and validity of the juvenile delinquency score, MDAC will be able to model and test new designs to construct and validate a new juvenile delinquency scoring system.

Senator Kelley asked whether the data would contain status offenses. Judge Caroom noted that as a matter of statutory and case law, someone should never be committed for a status offense and so they should not show up in the juvenile record that would then contribute to the offender score and sentencing guidelines (unless a status offense and an ordinary offense happened to be sentenced at the same time).

In response to questions from Delegate Anderson, Dr. Soulé noted that part of the project is to see whether people are scoring the juvenile delinquency correctly based on DJS data. Dr. Smith added that the third part of the study would address what kind of juvenile history to consider if the Commission decides to retain a juvenile delinquency record component. Other jurisdictions handle juvenile records in a variety of ways, e.g., only including commitments to a secure facility or of at least 30 days.

Senator Kelley also suggested considering the level of poverty in cases. Juveniles with private counsel get private social workers and forensic investigators, for example, which children with public defenders do not receive. Delegate Anderson, however, noted that a public defender will often be far better versed in the juvenile justice system than a private attorney. Senator Kelley clarified that she was referring to resources available, not knowledge. Mr. Davis disagreed, asserting that the resources available to the Public Defender are greater than those for the private bar. He did agree, however, that poverty is an issue because kids may not have families to go back to, whereas a magistrate may be more inclined to send a child home if there is more support and resources available at the child's home. Senator Kelley responded that resources available to public defenders vary greatly from county to county.

Judge Lewis noted that when looking at someone with prior commitments, she is more concerned with what the commitment is for, rather than the fact of the commitment. At sentencing she is interested in whether there is some indication of progression because that is what the public safety issue is for her.

Dr. Soulé stated that the Commission will likely find that commitment is a poor measure to use. When the guidelines were created and then thoroughly revised by the Study Commission, detailed data on findings of delinquency were limited, so the guidelines used commitment as a proxy measure for seriousness of the record. Dr. Soulé indicated that he hopes this study will determine whether commitment is still a good measure, and if not, offer options for how to refine measurement.

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

Judge Avery reported on two proposals from the Guidelines Subcommittee.

- a. Review of *criminal non-support* and *criminal contempt* as guidelines offenses (Action item)  
Judge Avery referred to the memorandum with the subject line "Whether to retain *criminal*



*nonsupport* and *contempt* as guidelines offenses,” distributed prior to the meeting. These are atypical offenses and different counties handle them very differently. After discussion the Guidelines Subcommittee decided to recommend to exclude these offenses from the definition of guidelines offenses. **The Commission unanimously approved a motion** to exclude criminal non-support and criminal contempt from the guidelines offense definition.

b. Review of Prior Adult Criminal Record Scoring Instructions (Action item)

The Guidelines Subcommittee recommended excluding adjudications based on acts that were no longer criminal offenses and expunged or expungable adjudications from the prior adult criminal record. Delegate Anderson asked how the person preparing the guidelines would know that an adjudication was expunged or expungable. Ms. Martin indicated that the Subcommittee envisioned that the parties would take up with the judge whether a conviction was expungable. Mr. Finci noted that many people have expungable adjudications but have not expunged them, so the defense bar has the obligation to point out to the judge that they were expungable and should not go into the offender score. Judge Lewis noted that if someone has an open case and is facing sentencing, prior convictions are not expungable. Judge Avery indicated that the Guidelines Subcommittee would revisit that aspect of the proposal, but wanted to move forward with the aspect of the proposal concerning acts that are no longer crimes.

(NB: The current language refers to convictions that were expunged or eligible for expungement at the time of the instant offense, not at the current sentencing event.)

**The Commission unanimously approved a motion** to exclude adjudications based on acts that are no longer crimes from the prior adult criminal record and additional minor clarifying stylistic changes to the Maryland Sentencing Guidelines Manual and corresponding COMAR provisions.

8. **Executive Director Report – David Soulé, Ph.D. and Stacy Najaka, Ph.D.**

a. Update on SB 1005 (Justice Reinvestment Act) and impact on MSCCSP (Status report)

Dr. Soulé gave a presentation to update the Commission on the Justice Reinvestment Act (JRA) as it relates to the Commission. In preparation for the presentation, each Commissioner was sent a memorandum titled *Justice Reinvestment Act Summary and Impact on the MSCCSP*. The JRA is one of the most substantial and wide-ranging criminal justice-related legislations to ever pass in Maryland. The JRA mandates change across multiple areas in the criminal justice system, ranging from pre-trial detention through re-entry and completion of supervision.

SB 602 of 2015 created the Justice Reinvestment Coordinating Council (JRCC). The JRCC consisted of an inter-branch and bipartisan group of criminal justice stakeholders including representatives from the General Assembly, the Judiciary, prosecutorial and defense bars, local and state corrections, law enforcement, and reentry services. The Pew Charitable Trusts provided technical services in analyzing the data with respect to Maryland’s correctional populations. Pew also helped guide the framework for recommendations to reduce the number of inmates in Maryland prisons, control state spending on prisons, and to reinvest those savings into more effective strategies to increase public safety, and at the same time help offenders avoid returning to prison. The JRCC submitted a final report in December 2015 with 19 recommendations and those recommendations helped form the basis for the JRA of 2016.



The JRA includes three mandates for the Commission. In Section 3, the JRA creates the Justice Reinvestment Oversight Board within the GOCCP. The Board is charged with, among other things, monitoring progress and compliance with the implementation of the recommendations from the JRA. In an effort to inform the Board's charge to monitor compliance with the Act, the first mandate on the MSCCSP is, in collaboration with DPSCS, the Parole Commission, and the Judiciary, to create performance measures to track and assess the outcomes of the laws related to the recommendations of JRCC. The second mandate requires each county, DPSCS, the Parole Commission, the Administrative Office of the Courts, and the Commission to semiannually: collect and report data to the Board that is disaggregated by race and ethnicity in order for the Board to perform its duties under State Government Article, Section 9-3207. The data reporting required in this second mandate includes seven data elements (noted on pages 2-3 of the memorandum). Among the seven data reporting elements outlined in the statute, the Commission, through data collected via the sentencing guidelines worksheet, only has access to a limited sample of cases for two out of the seven data elements. Specifically, the Commission maintains data for sentence length for guidelines offenders and amount of restitution ordered, when reported for guidelines offenders. Accordingly, it seems likely the majority of the data required by this mandate will need to be provided by agencies other than the Commission. The third mandate requires the Commission to study how more alternatives to incarceration may be included in the sentencing guidelines and submit a report on these findings and recommendations to the Board, Governor, and General Assembly by January 1, 2018. No further specifics about the required study were included in the legislation.

A second group of JRA provisions affecting the Commission are those that explicitly or implicitly impact the Commission. While not a mandate within the legislation, these provisions will require substantial attention from the Commission. Numerous penalty revisions will require the MSCCSP to review these changes and determine if and how the seriousness categories for these various offenses should be revised.

There are also provisions of the JRA that do not directly affect the Commission, but may provide opportunities for the Commission. The JRA requires the DOC and the DPP to implement a risk screener and full risk-needs assessment for those sentenced to the DOC, as well as for each person assigned to probation, parole, or mandatory supervision. Although the risk screener and the more comprehensive risk-needs assessment will occur after sentencing, it is quite possible that the post-sentence implementation of these instruments will help inform the Commission's ongoing Risk Assessment Feasibility Study. Similarly, the Commission may be able to benefit from the Section 5 mandate requiring the GOCCP to complete a gap analysis between offender treatment needs and available services. This GOCCP report is due on December 31, 2016, and therefore should help inform the Commission's mandate to complete a study on alternatives to incarceration (due on January 1, 2018) as there will seemingly be overlap in these two reports.

In summary, there are four primary activities required of the Commission due to the JRA. To assist with organizing the various required actions, MSCCSP staff drafted a rough and tentative timetable for Commission activity. The first action required will be those relating to collaborating with the Justice Reinvestment Oversight Board and other agencies to develop performance measures to track and assess the outcomes of the laws related to the recommendations. The Commission start date for these activities is to be determined at this



point as the JRA does not provide a specific deadline for creating these measures. However, the requirement for the Board to meet quarterly and submit a status report by January 1, 2017, suggests that Board will likely be established relatively quickly. The second action required of the Commission is to begin reporting data to the Board in order for the Board to perform its duties under SG, § 9-3207. Since the Commission has limited access to only a few of the data listed in SG, § 9-3208, other agencies will likely need to take the lead on providing most of the data to the Board.

Judge Harrell asked if anyone had any insight into when the Justice Reinvestment Oversight Board would be operational. Judge Caroom noted that the JRCC would expire, but while it still exists, the members will meet in May to discuss the time frame for the new Justice Reinvestment Oversight Board.

Judge Harrell noted that he and Dr. Soulé would be meeting in the next few weeks to discuss the Commission's role, particularly in the collaborative tasks.

Senator Kelley suggested asking Governor Hogan to increase Commission resources to fulfill the JRA's requirements.

Judge Caroom asked whether the Commission would have any involvement with respect to the new limits for parole or probation violations. Dr. Soulé responded that the Commission does not currently have a role in that. Collecting worksheets for violations would more than double the guidelines worksheets the Commission receives, and the current guidelines would not inform decisions concerning violations. Senator Kelley added that the Commission is not part of the operational corrections system; the Commission's records concern the voluntary sentencing guidelines.

Mr. Finci expressed concern about the delay in the penalty changes, which do not go into effect until October 2017. He would like to prioritize publicizing what the changes will be to the guidelines. Others expressed disagreement. Judge Harrell noted that once he and Dr. Soulé meet and develop a proposed work schedule, if people believe certain tasks should take priority, within resources, the Commission can consider reprioritizing then.

b. Implementation of revisions to sentencing matrix for certain drug offenses (Status report)

Dr. Najaka noted that the previously approved changes to the intersecting cells corresponding to seriousness category IV and V drug offenses would go into effect July 1, 2016. On June 1 the Commission will release a new version of the Maryland Sentencing Guidelines Manual with the revised matrix and updated sample cases. A Guidelines E-News with the changes and a link to the new manual will also be distributed. Also on June 1 a new version of MAGS will ask users whether sentences in cases in affected categories will occur on or after July 1. Responses will dictate which version of the drug offense matrix MAGS uses.

c. Update on MAGS (Status report)

Dr. Najaka noted that in addition to incorporating the drug offense changes (*see* item 8(b) above), the June 1 MAGS release will include new information icons and will allow judges and their designees to view, print, and save .pdf versions of submitted worksheets.



Since the Commission's last meeting Cecil and Harford Counties have deployed MAGS (on January 1 and April 1, 2016, respectively), bringing the total to eight jurisdictions. Baltimore County is scheduled to be the next jurisdiction to implement MAGS on October 1.

d. Introduction of undergraduate intern

Dr. Soulé introduced Kwame Apea, a University of Maryland student who has interned with the Commission during the spring 2016 semester, and expressed the Commission's appreciation for Mr. Apea's contributions and hard work.

**9. Date, time, and location for next three 2016 meetings**

The Commission reviewed options for the remaining 2016 meeting dates and selected the following options:

- a. Tuesday, July 12, 2016;
- b. Tuesday, September 20, 2016; and
- c. Tuesday December 13, 2016.

**10. Old business**

None.

**11. New business and announcements**

None.

The meeting adjourned at 7:50 p.m.