Minutes

Maryland State Commission on Criminal Sentencing Policy
Judiciary Education and Conference Center
Annapolis, MD 21401
July 12, 2016

Commission Members in Attendance:
Honorable Glenn T. Harrell, Jr., Chair
Honorable Shannon E. Avery, Vice-Chair
Senator Robert G. Cassilly
LaMonte E. Cooke
Honorable Brian L. DeLeonardo
Paul B. DeWolfe, Esquire
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.
J. Michael Zeigler, *representing Secretary Stephen T. Moyer*

Staff Members in Attendance:
Justin Bernstein
Sarah Bowles
Katharine Pembroke
David Soulé, Ph.D.

Visitors:
Hon. Philip Caroom, Judiciary Risk Assessment Advisory Group; Linda Forsyth, Community Liaison for Senator Kelley; Claire Rossmark, Department of Legislative Services; Hon. Michael Whalen, Judiciary Risk Assessment Advisory Group; Webster Ye, Assistant to Delegate Vallario.

1. **Call to order**
   Judge Harrell called the meeting to order at 5:30 p.m.

2. **Declaration of quorum**
   Judge Harrell declared a quorum.

3. **Approval of minutes from May 10, 2016 MSCCSP meeting**
   The Commission approved the minutes as submitted.

4. Continued review of risk assessment feasibility study

a. Presentation from Joseph Clocker, Acting Director, and Tia Brunson, Project Manager, Maryland Division of Parole & Probation (Status report)
Judge Harrell noted that Joseph Clocker was unable to attend or send a surrogate.

b. Begin actuarial assessment decision map process (Action item)
Judge Harrell noted that the MSCCSP staff had responded, in a handout distributed in advance of the current meeting, to the questions received following a solicitation at the May 10 meeting for questions that members felt required addressing to make a decision about the next step in the process. Judge Harrell referred the Commission to the decision tree document distributed in advance of the meeting and reviewed the four options presented. He noted that several of the downstream questions under Option 4 (implement an actuarial assessment) might influence which option the Commission adopts.

Senator Kelley moved in favor of Option 2 (wait and see) in light of the various assessments that the Department of Public Safety and Correctional Services (DPSCS) will be implementing pursuant to the Justice Reinvestment Act (JRA). Senator Cassilly seconded the motion.

Judge Avery indicated her support for the motion, asserting that from the point of view of the circuit court, a shift in the Commission's vision to an educational role would be more useful than having two instruments operating at the same time. She believes the judiciary would welcome educational material that might relate to research and data focusing on public safety and risk, to allow for balancing of different sentencing considerations. Trying to reinvent the wheel by developing its own instrument does not make sense to her at this point, she said.

Mr. Finci also supported a wait and see approach based on the changes, both structural and attitudinal, from the JRA. Mr. Finci stated the Commission should wait and see where the Justice Reinvestment process leads before interjecting a risk assessment tool into sentencing.

Mr. Zeigler indicated that the Division of Parole and Probation would share its results and data with the Commission related to the JRA risk instruments.

Dr. Johnson also expressed support for waiting, for efficiency purposes. He stated the Commission should try to learn from other agencies' processes, and at some point in the future, if the Commission is able to work with DPSCS to provide an assessment that would be much more efficient than developing a separate tool.

Judge Caroom agreed that judges need more training, and agreed that it made sense for the Commission not to try to reinvent the wheel while DPSCS is in the process of implementing a family of assessment instruments. He suggested that the Commission affirmatively seek out a partnership with DPSCS. Judge Caroom asserted it could benefit the public and allow all to do their jobs better if a low risk screener can identify those for whom incarceration or intensive treatment will increase the probability of recidivism. If DPSCS could give the Commission or judges a low risk screener as part of a presentencing investigation report, which would use the same data and LSI-R suite of screeners, that screener could be integrated into a standard or shorter presentencing investigation report. The guidelines could

include a provision to the effect of notwithstanding the offender score, if someone screens as low risk to recidivate (and more likely to do so if incarcerated), not incarcerating the person is a guidelines compliant sentence. He further noted that DPSCS does not want someone under its jurisdiction that does not belong there, but DPSCS does not have a chance for input before sentencing unless asked for it.

Mr. Cooke asked Judge Caroom about the effect on local correctional agencies. Judge Caroom stated that if implemented by DPSCS as part of an updated and more systematic presentencing investigation report, he did not think his suggestion would affect county budgets at all. The data needed for a low risk screener may be available entirely online without needing an interview, so DPSCS may be able to do that from headquarters without local involvement. If the Division of Correction (DOC) is going to be screening everyone coming into its system, and is going to identify low risk people, if it were able to identify before sentencing someone who appears headed to the DOC, why not make it a part of the sentencing guidelines process.

Senator Kelley stated that additional infrastructure might not be necessary, but we might need to make greater use of the historical record to find predictors, such as when and how someone first entered the justice system. She asked Mr. Zeigler to keep the Commission informed as it progresses through various decision points.

Judge Harrell indicated that this was what he understood Judge Caroom to be saying, that the Commission engage with DPSCS and DOC as it goes through its process to see how the Commission can help and how the Commission can avoid redundancy. He noted that the seconded motion at this point was Option 2 (wait and see), which did not mean that the matter was resolved, but rather that it would return. He stated that the Commission would engage with DPSCS and the DOC in the meantime and at an appropriate time the Commission will try to have Mr. Clocker or another appropriate person keep the Commission posted on how it evolves. The motion passed without opposition.

5. Guidelines Subcommittee report – Judge Shannon Avery

Judge Avery noted the Commission's charge to review and assign seriousness categories to criminal offenses. She reported that the Guidelines Subcommittee reviewed new and revised offenses at its June 30 teleconference. She referred the Commissioners to memoranda distributed in advance of the meeting and asked Dr. Soulé to review the Subcommittee's recommendations for the Commission.

a. Proposed classification of new/revised offenses with October 1, 2016 enactment dates (Action item)

The Commission reviewed the offenses on the first six pages of the memorandum individually.

i. Chapters 456 & 457 (SB 969 & HB 1236) - Motor Vehicle Offense - Knowingly sell, offer, install, reinstall, import, misrepresent, etc., a counterfeit, nonfunctional, or no airbag (TR, § 22-419). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VI, without opposition.

ii. Chapter 478 (HB 188) - Surveillance and Other Crimes Against Privacy - Unauthorized disclosure of information obtained or generated by examining licensed persons, etc. (FI, § 2-117). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VI, without opposition.

Chapter 478 (HB 188) - Surveillance and Other Crimes Against Privacy - Unauthorized disclosure of information obtained or generated by examining banking institutions and credit unions, etc. (FI, § 2-117.1). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VI, without opposition.

iii. Chapters 517 & 518 (SB 160 & HB 157) - Manslaughter and Related Crimes - Manslaughter—by vehicle or vessel, subsequent (CR, § 2-209(d)(2)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category III, with three votes in opposition.

Chapters 517 & 518 (SB 160 & HB 157) - Manslaughter and Related Crimes - Criminally negligent manslaughter by vehicle or vessel, subsequent (CR, § 2-210(f)(2)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category V, with three votes in opposition.

Chapters 517 & 518 (SB 160 & HB 157) - Manslaughter and Related Crimes - Negligent homicide by vehicle or vessel while under the influence of alcohol, subsequent (CR, § 2-503(c)(2)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category IV, with three votes in opposition.

Chapters 517 & 518 (SB 160 & HB 157) - Manslaughter and Related Crimes - Negligent homicide by vehicle or vessel while impaired by alcohol, drugs, or CDS, subsequent (CR, § 2-504(c)(2); CR, § 2-505(c)(2); CR, § 2-506(c)(2)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category V, with three votes in opposition.

Chapters 517 & 518 (SB 160 & HB 157) - Assault and Other Bodily Woundings - Cause a life threatening injury by motor vehicle or vessel while under the influence of alcohol, subsequent (CR, § 3-211(c)(3)(ii)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category V, with two votes in opposition.

Chapters 517 & 518 (SB 160 & HB 157) - Assault and Other Bodily Woundings - Cause a life threatening injury by motor vehicle or vessel while impaired by alcohol, subsequent (CR, § 3-211(d)(3)(ii)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the

offense as a person offense with seriousness category V, with two votes in opposition.

Chapters 517 & 518 (SB 160 & HB 157) - Assault and Other Bodily Woundings - Cause a life threatening injury by motor vehicle or vessel while impaired by drugs, subsequent (CR, § 3-211(e)(3)(ii)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category V, with two votes in opposition.

Chapters 517 & 518 (SB 160 & HB 157) - Assault and Other Bodily Woundings - Cause a life threatening injury by motor vehicle or vessel while impaired by a controlled dangerous substance, subsequent (CR, § 3-211(f)(4)(ii)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category V, with two votes in opposition.

With respect to Chapters 517 & 518, Dr. Soulé noted that the Guidelines Subcommittee had asked whether the Commission typically provides a separate and more stringent classification for subsequent offender sentencing enhancements, and Dr. Soulé stated that the Commission's usual practice was to provide a "step-up" in classification when the statute provides for increased enhanced sentences.

Delegate Vallario expressed concern that increasing the severity for subsequent offenders will penalize the defendant twice for a prior conviction through both the prior adult criminal record and the enhanced seriousness category.

Mr. Finci asked whether the guidelines require simply that the person has a prior conviction or also a notice that the person is a subsequent offender. Judge Lewis replied that as a matter of law, without a notice a judge cannot sentence a defendant under a subsequent offender provision, which would then trigger the enhanced seriousness category.

Judge Avery stated that the increased seriousness category reflects the statutory scheme. Manslaughter by motor vehicle or vessel as a first offense has a seriousness category IV, and so the Guidelines Subcommittee was recommending that the subsequent offense have a seriousness category III. This is consistent with the Commission's prior practice.

iv. Chapters 199 & 200 (SB 393 & HB 490) – Fraud, Miscellaneous - Violate certain provisions of Health Occupations Article, Title 8 (Nurses), Subtitle 7 (Prohibited Acts; Penalties) (HO, § 8-710). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category VI, without opposition.

The Commission followed the recommendation of the Guidelines Subcommittee to take no action with respect to the offenses on the remaining 16 pages of the memorandum. These were either new offenses that provide for no more than one year of incarceration or existing offenses amended in ways that did not change the penalty structure of the offense. By Commission rule, any offense providing for no more than one year of incarceration automatically receives a seriousness category VII (COMAR 14.22.01.09B(2)(f)) unless the

Commission chooses to adopt a different seriousness category. By taking no action on these new offenses, the Commission allowed the default rule to take effect. For the existing offenses amended in ways not substantively relevant to the sentencing guidelines, some nonsubstantive changes to COMAR 14.22.02.02 and the Guidelines Offense Table will nevertheless be necessary to reflect, e.g., changes to subsection designations. The new and revised offenses on which the Commission took no action are:

v. Chapter 96 (HB 131) - Consumer Protection Laws - Threaten or seek enforcement of nondisparagement provision in a contract or penalize consumer for making a protected statement (CL, § 14-1325; CL, § 13-411 (penalty))).

vi. Chapter 485 (HB 439) - Consumer Protection Laws – Door-to-door sales—unfair or deceptive trade practices (CL, § 14-302; CL, § 14-302.1; CL, § 13-411 (penalty))).

vii. Chapter 513 (HB 409) – Public Health & Safety, Crimes Against – Adult providing alcohol to a person under 21 when adult knew or reasonably should have known the person under 21 would drive, resulting in death or serious injury (Alex & Calvin's Law) (CR, § 10-117(d); CR, § 10-121(c)).

viii. Chapter 546 (SB 283) – Animals, Crimes Against – Possess implement of dogfighting with intent to unlawfully use (CR, § 10-607.1).

ix. Chapter 739 (HB 1420) – Fraud, Miscellaneous – Practicing massage therapy without a license or registration or misrepresentation as a practitioner of massage therapy, subsequent (HO, § 6-504).

x. Chapter 4 (SB 517/15) & CH 514 (HB 565) - CDS and Paraphernalia - Possession—unlawful possession or administering to another, obtaining, etc., substance or paraphernalia by fraud, forgery, misrepresentation, etc.; affixing forged labels; altering etc., label; unlawful possession or distribution of controlled paraphernalia—marijuana (CR, § 5-601(c)(2)(i); CR, § 5-620(d)(2)).

Chapter 4 (SB 517/15) - CDS and Paraphernalia - Paraphernalia—use or possession, with intent to use, subsequent (CR, § 5-619(c)(3)(ii)).

xi. Chapter 6 (HB 980/15) – Election Offenses – Voting by person convicted of a felony and currently serving a court-ordered sentence of imprisonment (EL, § 16-202).

xii. Chapter 41 (SB 724) – Alcoholic Beverages – Intoxicated and endanger safety of person or property; or intoxicated or drink alcoholic beverage in public place and cause public disturbance (AB, § 6-320).

Chapter 41 (SB 724) – Alcoholic Beverages – County-specific provisions concerning giving, serving, dispensing, keeping, or allowing alcoholic beverages without license; bottle clubs; places of public entertainment-Anne

Arundel, Baltimore, Calvert, Caroline, Charles, Dorchester, Frederick, Kent, Prince George's, Queen Anne's, Somerset, Talbot, Wicomico, or Worcester Counties, or Baltimore City (AB, § 11-2502; AB, § 12-2501; AB, § 13-2501; AB, § 14-2501; AB, § 15-2501; AB, § 18-2501; AB, § 19-2501; AB, § 20-2501; AB, § 24-2501; AB, § 26-2501; AB, § 27-2501; AB, § 29-2501; AB, § 30-2501; AB, § 32-2501; AB, § 33-2501).

Chapter 41 (SB 724) – Fraud, Miscellaneous – Out-of-State unlicensed sellers of alcohol (AB, § 6-326).

xiii. Chapter 370 (SB 285) – Fraud Miscellaneous – Act as a contractor without a license, 1st offense (BR, § 8-601).

Chapter 370 (SB 285) – Fraud Miscellaneous – Act as a contractor without a license, subsequent (BR, § 8-601).

xiv. Chapters 532 & 533 (SB 156 & HB 98) – Influencing or Intimidating Judicial Process – Retaliation for testimony, reporting a crime, performance of juror's or officer of the court's duties (CR, § 9-303(c)(1)).

Chapters 532 & 533 (SB 156 & HB 98) – Influencing or Intimidating Judicial Process – Retaliation for testimony, reporting a crime, performance of juror's or officer of the court's duties, related to felony violation of Title 5 offense or crime of violence (CR, § 9-303(c)(2)).

xv. Chapters 536 & 537 (SB 178 & HB 493) – Extortion and Other Threats – Felony Extortion—by anyone, $100,000 or greater (CR, § 3-701(c)(3)).

Chapters 536 & 537 (SB 178 & HB 493) – Extortion and Other Threats – Felony Extortion—by anyone, at least $10,000 but less than $100,000 (CR, § 3-701(c)(2)).

Chapters 536 & 537 (SB 178 & HB 493) – Extortion and Other Threats – Felony Extortion—by anyone, at least $1,000 but less than $10,000 (CR, § 3-701(c)(1)).

Chapters 536 & 537 (SB 178 & HB 493) – Extortion and Other Threats – Misdemeanor Extortion—by anyone, less than $10,000 (CR, § 3-701(d)).

xvi. Chapters 544 & 545 (SB 278 & HB 155) – Stalking and Harassment – Stalking (CR, § 3-802).

xvii. Chapter 612 (HB 121) – False Statements, Other – False Statement—rumor as to bomb (CR, § 9-504(b)).

xviii. Chapter 629 (HB 751) – Sexual Crimes – Sexual contact with inmates in correctional and juvenile facilities or with person ordered to obtain services (CR, § 3-314).

xix. Chapter 633 (HB 822) – Sexual Crimes – Rape, 2nd degree (CR, § 3-304(c)(1)).

xx. Chapter 633 (HB 822) – Sexual Crimes – Sex Offense, 2nd degree (CR, § 3-306(c)(1)).

Chapter 633 (HB 822) – Sexual Crimes – Sex Offense, 3rd degree (a)(1) employ or display a dangerous weapon, etc.; (a)(2) with substantially cognitively impaired, mentally incapacitated, or physically helpless individual(CR, § 3-307(a)(1); CR, § 3-307(a)(2)).

b. Proposed classification of select unclassified existing offenses punishable with more than 1 year of incarceration (Action item)
Dr. Soulé noted that from time to time MSCCSP staff become aware of an offense allowing for more than one year of incarceration that the Commission has not previously categorized. Judge Avery noted the Guidelines Subcommittee had distinguished between offenses based on the culpable mental states involved.

xxi. Election Offenses – Violation of any provision of Subtitle 3 (Absentee Voting) of Title 9 (Voting) of Election Law Article (EL, § 9-312). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VII, without opposition.

xxii. Election Offenses – Voter registration offenses (EL, § 16-101). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VII, without opposition.

xxiii. Election Offenses – Tamper, damage, or prevent correct operation of voting equipment (EL, § 16-802). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VI, without opposition.

Election Offenses – Remove, deface, or destroy equipment or supplies placed in polling place by election officials (EL, § 16-803). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VI, without opposition.

xxiv. Election Offenses – Neglect of official duties by election official or official of political party (EL, § 16-301). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VII, without opposition.

xxv. Election Offenses – Unlawful actions by an election judge (EL, § 16-303). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VII, without opposition.

xxvi. Election Offenses – Falsely or fraudulently making, defacing, or destroying a certificate of candidacy or nomination (EL, § 16-901). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a property offense with seriousness category VI, without opposition.

xxvii. Boating Offenses – Operate a vessel while under the influence of alcohol, 1st offense (NR, § 8-738(e)(1)(i)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category VII, without opposition.

Boating Offenses – Operate a vessel while under the influence of alcohol, 2nd offense (NR, § 8-738(e)(1)(ii)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category VI, without opposition.

Boating Offenses – Operate a vessel while under the influence of alcohol, 3rd or subsequent offense (NR, § 8-738(e)(1)(iii)). The Commission adopted the Guidelines Subcommittee's recommendation to categorize the offense as a person offense with seriousness category V, without opposition.

c. Revisiting prior adult criminal record instructions and expungement (Action item)
Judge Avery noted that at its May 10, 2016, meeting, the Commission voted to make several changes to the scoring instructions for the prior adult criminal record. That discussion tabled certain other changes related to scoring expunged adjudications. After further discussion and in keeping with the spirit of the JRA, the Guidelines Subcommittee was now re-recommending the proposed change, which would exclude from the prior adult criminal record all adjudications that were expunged from the record or proven by the defense to have been eligible for expungement prior to the date of the current offense. Under existing Commission rules, the prior adult criminal record excludes only expunged and expungable probations before judgment or convictions under the Federal Youth Corrections Act.

Senator Cassilly noted that while some adjudications are eligible for expungement as a matter of statutory right, others may require a hearing and judicial determinations that giving due regard to the nature of the crime, the history and character of the person seeking expungement, and the person seeking expungement's success at rehabilitation, that the person is not a risk to public safety; and that an expungement would be in the interest of justice. He asked whether the proposed amended instructions meant to include both categories (i.e., if "eligible for expungement" included adjudications where a state's attorney might have objected and a judge might have denied a petition, if the defendant had filed a petition) and whether they should do so.

Judge Avery stated that they were referring to offenses that are expungable as a matter of statutory right.

Mr. Finci noted that all the amendment is saying is that if, for example, at criminal court sentencing for a new offense, a person had a prior probation before judgment for drug possession, three years had passed by the date of the new offense, but the person had never

gotten around to expunging the adjudication, the sentencing guidelines would not include the old adjudication in the prior adult criminal record for the new case.

Senator Cassilly expressed concern that as worded, the "eligible for expungement" proposed language would include any adjudications where the petitioner could have petitioned for expungement, without requiring a showing from the defense attorney that at the time of the offense the old adjudication was automatically expungable.

Judge Salmon moved to amend the suggested revisions to add "as a matter of right" after the words "proven by the defense to have been eligible for expungement" and before the words "prior to the date of offense" to clarify that the provision only referred to those adjudications already expunged or eligible for expungement as a matter of right.

The Commission approved the following amended language for the instructions in ¶ 7.1C of the Maryland Sentencing Guidelines Manual, and corresponding changes to COMAR 14.22.01.10B(3)(a)(i):

> Except as noted in this paragraph below, the prior adult criminal record includes all adjudications preceding the current sentencing event, whether the offense was committed before, during, or after the instant offense(s). **[**Unless expunged from the record or proven by the defense to have been eligible for expungement prior to the date of offense pursuant to CP, §§10-101 to 10-105,**]** The prior adult criminal record shall not include:
>
> **i.** **[**PBJs and convictions under the Federal Youth Corrections Act (FYCA) shall be included.**]** **adjudications that were expunged from the record or proven by the defense to have been eligible for expungement as a matter of right prior to the date of offense pursuant to CP, §§10-101 to 10-107**.

Note: Text enclosed in **[**bolded square brackets**]** deleted from current text.
Bolded underlined text added to existing text.
~~Struckthrough~~ text deleted from original amendment.

6. Executive Director Report – Dr. David Soulé

a. Proposed 12 month activity schedule for MSCCSP (Status report)

At the May 10, 2016, Commission meeting questions arose regarding the timeline for when the Commission would review the classification of offenses with penalty structures affected by the JRA taking effect October 1, 2017. In light of these questions, and considering the other additional requirements for the Commission in the JRA, Judge Harrell and Dr. Soulé agreed to draft a proposed activity schedule for the Commission for the next 12 months. Dr. Soulé presented this schedule for review by the Commission, referring to a document with the title "Proposed Staff and Board MSCCSP Activity Schedule for the Next 12 Months," distributed in advance of the meeting. Much of the schedule is driven by mandates from the JRA and does not include many of the routine activities that the Commission addresses on a regular basis.

The schedule also notes a funding consideration. In light of the additional responsibilities, Judge Harrell and Dr. Soulé discussed requesting additional funds starting in FY 2018 to

expand the hours for the policy analyst position. The Commission currently has a staff with 4.3 positions. This includes 4 full-time staff and 1 part-time policy analyst who works 20 hours per week for 9.5 months per year (which roughly equals one-third of the hours of a full-time position). The MSCCSP staff would like to expand the policy analyst position to cover all 12 months and provide 40 hours per week during the 2.5 month summer period. This minor staff addition would be helpful particularly for completing the study mandated by the JRA concerning alternatives to incarceration. Dr. Soulé noted that further staff considerations depend on the JRA mandates concerning work with the Justice Reinvestment Oversight Board.

Dr. Soulé asked whether anyone present had any questions or comments concerning the proposed schedule and funding request.

Senator Kelley suggested submitting the request early. She also noted that the MSCCSP staff may need to expand its research capabilities.

Judge Harrell noted that the Commission has a seat at the table and Dr. Soulé would be present when those involved meet to discuss allocation of the JRA responsibilities between agencies and the Justice Reinvestment Oversight Board, and will make sure the Commission's voice is heard. He also stated that expanding the policy analyst position will help the Commission across the board, not limited to addressing the JRA requirements.

b. Presentation of proposal for study on alternatives to incarceration (Action item)
Section 8 of the JRA requires the Commission to "study how more alternatives to incarceration may be included in the sentencing guidelines" and "submit a report of the findings and recommendations" to the Justice Reinvestment Oversight Board, Governor, and General Assembly by January 1, 2018. This requirement derived largely from evidence cited in the Justice Reinvestment Coordinating Council's *Final Report* that indicated lengthy prison sentences have little impact on recidivism and more specifically that the most effective response to drug addiction and drug-related crimes includes, among other things, alternative sentencing to divert nonviolent drug offenders from costly incarceration to evidence-based supervision. The Justice Reinvestment Coordinating Council's *Final Report* went on to note that many sentencing guidelines recommendations call for incarceration sentences even for lower-level, nonviolent offenses and that in order to impose an alternative to incarceration, judges must sentence outside of the guidelines. That last statement was misleading because the sentencing guidelines, by rule, deem sentences to corrections options programs as guidelines compliant sentences (for cases not including a crime of violence, child sexual abuse, or escape) provided that the initial sentence plus any suspended sentence, falls within or above the applicable guidelines range.

Regardless of the potential misconceptions about the sentencing guidelines, the Commission is now required to conduct a study on how more alternatives may be included in the sentencing guidelines. Accordingly, the MSCCSP staff drafted a basic outline for the proposed study that Dr. Soulé presented for the Commission's review. First, the outline proposes that the study will review the history of corrections options in Maryland with respect to the sentencing guidelines. The next step is to address the current state of corrections options in Maryland with respect to the sentencing guidelines. MSCCSP staff would complete an inventory of sentencing alternatives available to circuit court judges. This would briefly recap previous attempts to inventory corrections options, use the gap

analysis required of the GOCCP by December 31, 2016, and rely on a survey of each county's circuit administrative judge to assess what alternative sentencing options are available in each jurisdiction. Lastly, the study would look at information on other states and the federal system to learn if and how alternatives to incarceration are incorporated in their sentencing guidelines in their respective jurisdictions and how that information can inform decisions in Maryland.

Dr. Soulé noted that he would like input from the Commissioners on the best way to proceed with the inventory process. The Commission has completed similar inventories in the past and they have been tedious to complete. Dr. Soulé spoke with Kelley O'Connor in the Judiciary and Gray Barton, the Director of the Office of Problem Solving Courts, to solicit input with respect to surveying the circuit court county administrative judges. Ms. O'Connor indicated that her office would be willing to send out a survey on the Commission's behalf, but also suggested that the Commission run the survey by Judge Rattal, as Chair of the Specialty Courts Committee, for his input before distributing it.

It was also noted that it would be helpful if the Commission could narrow down the field in terms of what types of alternatives the Commission is seeking to identify. The JRA does not define "alternatives to incarceration," so as a first step, Dr. Soulé indicated that he would like Commissioner input on the scope of alternatives to be addressed by the survey of circuit court judges and the larger report, keeping in mind the types of alternatives that could reasonably be included in the guidelines. For example, an alternative to incarceration could seemingly range from something as simple as a fine to more restrictive alternatives, such as residential substance abuse treatment. There are a large variety of programming services available within that continuum and they vary tremendously by jurisdiction in terms of eligibility criteria, supervision, duration, and a whole host of other criteria.

Dr. Soulé noted the sentencing guidelines current definition of corrections options, which refers to home detention; a corrections options program under law which requires the individual to participate in home detention, inpatient treatment, or other similar programs involving terms and conditions that constitute the equivalent of confinement; inpatient drug or alcohol counseling under Health General Article (HG), Title 8, Subtitle 5, Annotated Code of Maryland; or participation in a drug court or HIDTA substance abuse treatment program. Correctional Options includes programs established by the State Division of Correction, provided that the program meets the Commission's criteria, as described. This definition is fairly narrow and primarily pertains to drug court, home detention, and inpatient drug treatment. The definition was adopted by the Commission from the four sections of the Criminal Procedure Article (§§ 6-216, 6-219, 6-220, and 6-225) that define "custodial confinement" to include "a corrections options program established under law which requires the individual to participate in home detention, inpatient treatment, or other similar program involving terms and conditions that constitute the equivalent of confinement."

The Commission adopted its current definition to focus on "intermediate sanctions" or those that fall in a nexus between probation and jail/prison. This evolved from the work of the Study Commission. At the time there was a specific assumption about what corrections options would be, and an assumption that judges would sentence defendants with a guidelines recommendation of 12 to 18 months to a Corrections Options Authority. The

Corrections Options Authority never came into existence. The Commission then borrowed from the definition of what the corrections options program was to mirror the equivalent to confinement, but not within a jail or prison, and the Commission later added other programs such as drug court.

Dr. Soulé asked for input from the Commissioners on the types of alternatives the inventory should seek to identify. As examples, would the Commission include any program that can be included as a condition of probation, community service, intermittent incarceration (or weekend incarceration), and work release?

Senator Kelley noted that the Study Commission had looked at restorative justice, perhaps paired with restitution, and she stated the current study may want to look at those. Judge Harrell noted that the Maryland State Bar is involved in the restorative justice concept. Judge Avery added that in juvenile justice there may also be some restorative justice programming.

Judge Avery asked why community supervision or probation was not considered an alternative to incarceration. Dr. Soulé stated that it is not currently within the Commission's definition of corrections options because the Commission was concerned with intermediate sanctions (sentences in between probation and placement in prison or jail), which were very popular in the late 1990s when the General Assembly established the Commission. The idea was to have sentences for defendants needing more supervision or services than they might get on ordinary probation but for whom incarceration was unnecessary. Judge Avery then stated that for her, there was a disconnect because many of the examples Dr. Soulé had provided require involvement from the Division of Parole and Probation. Dr. Soulé replied that Judge Avery was raising the question he was asking, which was whether the study would look at all of these as potential alternatives to incarceration—any condition of probation. If the Commission is looking to incorporate those into the sentencing guidelines, there is a range of eligibility criteria. Dr. Soulé's question was whether the Commission wanted to narrow down the inventory; what are we looking for in terms of identifying alternatives. Judge Avery suggested that because the point is to keep people out of prison if there is an appropriate alternative, regardless of the label used, the Commission should be looking at programming which is just good programming. She emphasized the need to identify good programming outside of Maryland as well.

Mr. Finci stated his view that the JRA's requirement seemed more related to how to integrate alternatives to incarceration into the guidelines themselves than related to identifying what programs exist or should exist. In Washington, DC, and in the federal system, he noted, guidelines ranges in the grids include instructions to the judge to consider certain options such as home detection, halfway housing, or work release, specific to the particular location on the grid.

Judge Avery responded that the way to do that is to provide alternatives in the grid such as *X* length of incarceration or *Y* length of home detention or *Z* split sentence, or with needs-based programming under the Division of Parole and Probation.

Dr. Soulé noted that within Washington, DC, or the federal system, all the programming is under the auspices of a single agency, whereas Maryland has many local correctional agencies with different programs available in different locations. For the sentencing

guidelines to incorporate alternatives to incarceration into the sentencing guidelines matrices, the Commission would need to confront that the statewide sentencing guidelines would in effect not be uniform throughout the state.

Mr. DeWolfe noted that in his opinion, the JRA indicates that the current sentencing scheme overuses incarceration for nonviolent drug offenders. The JRA mandate to study alternatives is asking the Commission to expand its view of possible sentencing ranges. Perhaps rather than try to pigeonhole options into what is incarceration or custody, the Commission may need to look broader than that. And if reinvestment means taking money saved from not incarcerating and putting it into alternatives, the Commission should be looking into what is possible, not only what currently exists.

Senator Kelley stated she hopes the Commission does not just take something old that in its own right needs a paradigm shift. People inherited the systems we find ourselves in, the Commission must look at everything and as it makes recommendations about new modalities the Commission must look at how best to implement those modalities in light of demonstration projects and research.

Mr. DeLeonardo agreed that the JRA means to create a mechanism for incorporating alternatives to incarceration into the sentencing guidelines matrices, but alternatives to incarceration is not only not jailing people, it also affects people who historically would only get probation. The JRA is intervening more for offenders who would normally just get passed along. But, he added, the scope has to be what is available in every jurisdiction in Maryland. It seemed to him that this would need to be state-provided alternatives, rather than drawing on separate programs in different counties. Or it could be generic, such as a recommendation to drug court or its equivalent of intensive supervision.

Mr. Cooke asked about pretrial release. Many people are incarcerated awaiting trial, and a number of them could be eligible for a program pretrial.

Judge Lewis noted that asking an administrative judge will help determine what exists. But if you send a survey out to trial court judges to ask what they have used successfully in the last three to five years, you may find out something else. Some lawyers or family members, for example, may find amazing programs out of state. Even if only one defendant used a certain program, it may be something that could and should be available more broadly. That is what problem-solving courts are doing. And where problem-solving courts are not available, judges still may be doing creative things. Judge Lewis added that while she supports pretrial release, it may be outside the purview of the Commission.

Mr. DeLeonardo agreed with the sentiment that we need more programs and judges use great creativity, but the Commission's mandate, as he views it, is how to go out and take current alternatives to incarceration that a judge can factor in. Incorporating more alternatives in the guidelines is, to him, very different from what are great ideas for diversion. You cannot include something in the sentencing guidelines that does not exist in that jurisdiction, he said. The JRA has other provisions creating alternatives to incarceration, he did not know that it should be the Commission doing that through the sentencing guidelines. The Commission should be looking at what alternatives exist and look into how the sentencing guidelines can integrate those.

Judge Avery noted that the origin of the Commission concerned disparities in sentencing across the state. Identifying alternatives to incarceration available in one part of the state and not another can highlight such disparities. There may be a great program available in Allegany County which is not available in Baltimore City, but that does not mean the guidelines should not point out that this geographic disparity exists, something the Commission is charged with addressing.

Dr. Johnson asked whether pretrial diversion programs can or should count as alternatives to incarceration. Someone with an adjournment in contemplation of dismissal will never show up in sentencing guidelines data. So is the Commission interested in a broader scope of alternatives that include not only options to judges at sentencing, but also other procedural mechanisms that prevent people from going to jail or prison? He also drew attention to the issue of how and where to substitute alternatives in the sentencing guidelines. Assuming that we have some set of alternatives that everyone agrees is useful and appropriate, at least for some offenders, how do we build those options into the current guidelines and provide some guidance to judges on how and when they should be applied? In other states that have included alternatives to incarceration, a criticism has been that there has been no real guidance to judges on how and when to use particular alternatives to incarceration. Once we answer the how and when the issue is what –is effective, is available, etc. We might be able to learn both from other states and around Maryland. An evaluation of Pennsylvania found, as some Commissioners have suggested, tremendous variation throughout the state, in terms of what is available, which judges use, how often judges use them, and levels of funding. The best predictor of how many people get alternatives to incarceration is how many dollars the jurisdiction invests in alternatives. Which leads to the question of whether it is the Commission's job to try to make things uniform, or just say that in particular cells certain alternatives are within the guidelines.

Mr. Cooke recommended asking not only judges, but also program administrators, wardens, and sheriffs. Dr. Soulé noted that MSCCSP staff may need help from some of the Commissioners to reach out to their constituents to ask them to respond in a timely manner.

Mr. Vallario stated the majority of the alternatives to incarceration will fall on the locals. It will be a burden on the locals. Someone has to come up with the funds to do those programs.

Dr. Soulé noted part of justice reinvestment involves taking money saved from not incarcerating and letting counties create programs using those funds.

7. Next meeting – September 20, 2016, Conference Room 2 (upper level), Judiciary Education and Conference Center

8. Old business
None.

9. New business and announcements

a. Richard Finci – Request to consider whether sex offender registration should be counted as "criminal justice involvement" for purposes of determining application of criminal record decay factor (Request for future review)

Mr. Finci stated he received an inquiry from his constituents as to whether required sex offender registry is a relationship to the criminal justice system for purposes of the offender score or criminal justice system involvement which would eliminate application of the decay factor in a particular case. This was not part of the original guidelines, because there was no sex offender registration at the time. Mr. Finci had never heard of this issue before, and neither had Laura Martin or Judge Avery. Mr. Finci moved to assign the question to the Guidelines Subcommittee to study and make recommendations to the full Commission at a future meeting. This may involve drafting a new definition for criminal justice system involvement or a frequently asked question.

Senator Kelley stated that it is a collateral consequence.

Mr. Finci noted that in 2013 the Court of Appeals held that it was a criminal sanction, and in the case at bar the requirement operated as an ex post facto law. The requirement is also part of a civil statute, so in that sense it is not part of the criminal law.

The motion to assign the matter to the Guidelines Subcommittee passed without opposition.

b. Judge Harrell – Release of white papers from Risk Assessment Feasibility study

Judge Harrell noted that a law professor had asked for the two white papers written by the University of Maryland research team as part of the risk assessment feasibility study. Judge Harrell indicated the researchers had given their approval and the Office of the Attorney General was reviewing the legal issues involved in making the papers publicly available on the Commission website. Judge Harrell asked whether any of the Commissioners had a problem with making the materials available. No one expressed any issue.

The meeting adjourned at 7:30 p.m.