



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
Judiciary Education and Conference Center  
Annapolis, MD 21401  
September 30, 2014

### Commission Members in Attendance:

Honorable Diane O. Leasure, Chair  
Delegate Curtis S. Anderson  
Colonel Marcus L. Brown  
Honorable Joseph I. Cassilly  
Paul B. DeWolfe  
Richard A. Finci, Esquire  
Senator Delores G. Kelley  
Honorable Patrice E. Lewis  
Megan Limarzi, Esquire, *representing Attorney General Douglas F. Gansler*  
Kevin Loeb, *representing Secretary Gregg L. Hershberger*  
Honorable Laura L. Martin  
Honorable Alfred Nance  
Corporal David Pratt, *representing LaMonte Cooke*  
Honorable James P. Salmon  
Delegate Joseph F. Vallario, Jr.

### Staff Members in Attendance:

Marlene Akas  
Sarah Bowles  
Stacy Najaka, Ph.D.  
David Soulé, Ph.D.

### Visitors:

Hon. Sherrie Bailey; Hon. Donald Beachley; Hon. Philip Caroom; Hon. Michael Whalen; Hon. Barry Williams; Rachel Kesselman, Director of Special Projects, GOCCP; Dr. James Lynch, UMD; Dr. Brian Johnson, UMD; Dr. Thomas Loughran, UMD; Megan Collins, UMD; Claire Rossmark, Department of Legislative Services; Linda Forsyth, Community Liaison for Senator Kelley

### 1. Call to order

Judge Leasure called the meeting to order and introduced the two newest Commissioners. First, she introduced the Chief Judge's designee for the Appellate Courts, Judge James Salmon. The Honorable James Salmon is a retired judge from the Court of Special Appeals and previously sat on the Circuit Court for Prince George's County. Judge Leasure next introduced the Chief Judge's designee for the District Court, Judge Patrice Lewis. The Honorable Patrice Lewis is the Presiding Judge of the Mental Health Court in Prince George's County.

Next, Judge Leasure introduced the members of the Judiciary Risk Assessment Advisory Group, including Judge Sherrie Bailey, Circuit Court for Baltimore County; Judge Donald Beachley, Circuit Court for Washington County; Judge Philip Caroom, Circuit Court for Anne



Arundel County; Judge Michael Whalen, Circuit Court for Prince George’s County; and Judge Barry Williams, Circuit Court for Baltimore City. Judge Leasure noted that the Judiciary Risk Assessment Advisory Group was invited to attend this meeting in order to participate in the discussion on the Risk Assessment Feasibility Study. Judge Leasure thanked the Advisory Group for their willingness to participate in the risk assessment discussions and indicated that the Commission looked forward to their input.

**2. Roll call and declaration of quorum**

The meeting began at 5:30 p.m. when quorum was reached.

**3. Approval of minutes, July 15, 2014 meeting**

The minutes were approved as submitted.

**4. Risk Assessment Feasibility Study – Dr. James Lynch, Chair, Department of Criminology and Criminal Justice, University of Maryland**

Dr. James Lynch delivered a presentation to the MSCCSP and the Judiciary Risk Assessment Advisory Group based on the white paper titled “Decision Points for Risk Assessment Implementation,” included in the materials provided in advance of the meeting. Dr. Lynch presented the findings from the white paper. He offered the paper as the first of a series intended to identify design decisions that the Commission would need to make in trying to identify and implement a risk assessment tool. The paper poses a series of questions, each followed by the research team’s recommendation and rationale. Dr. Lynch requested feedback throughout the presentation. He emphasized the need for MSCCSP determinations regarding the direction of any continued study and risk assessment instrument development or implementation. Dr. Lynch specifically asked the Commission and the Advisory Group to note whether the white paper had omitted any relevant design decisions, and also asked the group to identify any additional information the MSCCSP would need to reach its decisions.

The Commissioners and Advisory Group members offered several comments over the course of the presentation. For organizational purposes, these comments were organized into three broad areas: 1) comments related to what the instrument should accomplish; 2) comments with respect to whether to pursue a risk (only) assessment or a risk-needs assessment; and 3) comments related to how to define recidivism in the assessment tool.

Comments Related to What the Instrument Should Accomplish:

Mr. Cassilly suggested that because judges often do not incarcerate a person until a second or later offense, a better approach would be to divert people into empirically validated corrections options programs that reduce recidivism, rather than seeking to lower incarceration. He added that reducing incarceration should not be the reason for using risk assessments. He preferred identifying and using the best proven sentencing alternatives, and if those happen to reduce incarceration, that is an added benefit.

Judge Caroom responded that research shows that not all offenders are alike. Incarcerating low risk offenders with high risk offenders, for example, triples the formers’ rate of recidivism. But imprisonment can obtain a much better result for a sex offender in denial. Risk and needs



assessments help judges to be more accurate when trying to predict what sentence will be best for a particular defendant.

Judge Bailey asked whether prior analyses focused on risk of recidivism or to public safety.

Judge Caroom responded that research had focused on risk of reoffending, rather than the risk to public safety, but that limiting the risk assessment to nonviolent offenders addresses risk to public safety.

Senator Kelley stated that reducing incarceration, where appropriate, is an important positive goal, and society as a whole is better off when someone can remain in the community, if not a danger to the community. She also expressed concerns over collateral consequences arising from unnecessary incarceration and of jails and prisons being the new mental hospitals.

Comments With Respect to Whether to Pursue a Risk (Only) Assessment or a Risk-Needs Assessment:

Senator Kelley stated that both risks and needs are necessary. She was not opposed to working incrementally, starting with risk, but needing to move on to needs because of the disadvantages affected populations already face, which an exclusive focus on risks could exacerbate.

Judge Caroom asked about the possibility of acquiring an off-the-shelf risk tool which Maryland could calibrate and to which it could incrementally add material, such as needs assessment or mental health status.

Judge Lewis expressed concern over non-maintenance of mental health as a risk factor. A risk (only) assessment might predict someone to be at high risk of reoffending, when his or her criminal activity is really the expression of an unmet mental health need.

Judge Nance offered that pulling away needs and only focusing on offender risk is unworkable from the beginning. The assessment must have an understanding of the needs to make a risk assessment of the person's ability to function and whether recidivism is probable. Judge Nance indicated his belief that the viewpoint of risk has to be connected to needs.

Dr. Lynch responded to Judge Caroom's question and Judge Lewis' and Judge Nance's concerns, stating that if mental health data exist and are available, a risk assessment tool can incorporate that data into its risk predictions for a defendant coming in with evidence of mental health issues. That would be more limited than a formal diagnosis. It would not help to diagnose a person and determine what kind of mental health assistance the person needs, which is related but a very different and much more involved procedure, requiring more information.

Delegate Anderson responded, asking why anyone would not want a judge to have as much information as possible when making his or her decision, so judges have a tool on which they can really rely with confidence.

Dr. Lynch replied that the point of these assessment tools is to leverage information and make it manageable, to establish relationships between known and unknown factors. In building the tool with a test population, one would look at these relationships.



Senator Kelley expressed concern that Dr. Lynch was treating the issue too abstractly. She reminded everyone of the human and fiscal interests involved, and of the potential for justice reinvestment.

Judge Williams asked what judges can do with the information from a risk assessment, lacking resources, when judges already know that people have needs.

Dr. Lynch responded to these concerns, indicating his support for justice reinvestment. Risk assessment can be a small step toward justice reinvestment, by getting information to judges to leverage for decisions. Judges can get the resources required to provide people the services they need by demonstrating that the judges are keeping people safe while shepherding resources through transparent, systematic, data driven decisions that avoid more costly sentences where those are unnecessary. The intent of risk assessment is to increase decision making ability, which judges could use as suggested by Senator Kelley. If judges, as the people responsible for sentencing, are to lead in that effort they must give politicians a plan and resources, much of which starts with getting information into the hands of judges so they can use resources more efficiently and advocate for more resources.

Dr. Johnson added that the research team agreed about the importance of a needs element of a prediction tool, but the information required for that would fundamentally change presentencing processes. Someone would also need to collect the additional information. Responding to Senator Kelley, who mentioned that drug courts already collect data that courts do not generally collect, Dr. Johnson noted that specialty courts involve particular subpopulations. Applying an instrument more broadly would be more difficult. While the researchers' charge had begun with the question of whether we would not be risking public safety if we did not place particular people in prison who we currently are, the discussion was now getting into the more complicated realities of sentencing.

Senator Kelley replied that the decision as to whether to release an offender into the community is not a simple yes or no decision. It involves the conditions in one's community where they will be released and also the services available to the individual in their community. Senator Kelley noted that a needs assessment would be necessary to understand these conditions and to target the right services. Even if someone is very low risk, very often he or she will need services to be successful in the community, the two have to go together to make sense.

Judge Bailey questioned how an assessment can be effective without a needs component suggesting the appropriate alternative to prison. At the point at which a nonviolent offender is incarceration-bound, he or she has likely already had probation, diversion, and/or a non-prosecuted case. She expressed uncertainty concerning where the assessment fits into the continuum of people already receiving diversions, probation, presentence investigation reports.

Mr. DeWolfe asked how a risk assessment model, premised on evidence-based practices, integrates into a sentencing guidelines model, based on consistency for similar offenses and fairness rather than risk, particularly given that most of the sentencing guidelines matrix cells recommend incarceration. Delegate Vallario echoed this question, asking what the effect is if the guidelines recommend two to five years, but a risk assessment says low risk. Senator Kelley noted in this regard that the Commission has defined ABA pleas as within the guidelines. Judge Caroom stated that if he were the judge receiving a risk assessment stating that all the research



indicates that incarcerating this low risk defendant will make him more likely to reoffend, he would be happy to place him in a corrections options program based on evidence rather than shooting from the hip. Dr. Soulé added that the Commission had previously reached a consensus that a risk assessment instrument would complement the guidelines. It was his understanding that the intent was to utilize the risk instrument to look at offenders for whom the guidelines recommend incarceration and determine if the additional factors identified in the risk assessment instrument indicate the individual is actually a low-risk offender. If the instrument identified a low-risk offender, who would otherwise receive an incarceration sentence based on the guidelines recommendation, then the MSCCSP may choose to inform judges that they can use the low-risk assessment as a reason to divert the offender and depart from the guidelines.

#### Comments Related to How to Define Recidivism in the Assessment Tool:

Senator Kelley stated that time to first arrest has a lot to do with the kind of community in which someone lives and the supports in the community and family. She expressed concern that this would be a surrogate for the defendant's ZIP code, which might reflect police activity in an area more than anything else and may lack a logical or real relationship with recidivism.

Judge Nance noted that the mere fact of arrest does not equal risk. If one lives in a less dense population (as opposed to a metropolitan area), that in and of itself reduces the probability of arrest.

Judge Bailey responded that time to first conviction, another potential measure, would vary depending on court dockets.

Dr. Lynch suggested the possibility of using date of arrest, but only for those cases resulting in conviction. Conviction would then become a validation of an arrest, though this would omit cases which leave the court for reasons other than innocence.

With respect to what information to use to predict recidivism, in addition to presenting the information in the white paper, Dr. Lynch suggested building in a component looking into cumulative prejudicial effects from including variables about which disagreement exists as to their inclusion's propriety. This would avoid including variables that become a proxy for proscribed characteristics.

After reviewing the white paper's contents, Dr. Lynch referred to the next steps once the research team has received feedback and the Commission makes threshold decisions. Cost issues will partially determine the decision of whether to use an off the shelf instrument. What data are available and other logistical issues will also influence decision making.

Delegate Vallario brought up costs to the state. Drug courts have a complete assessment by an independent person, which is important. Cases under the Health General Article § 8-505 involve a complete evaluation and recommendation as to needs. Expanding these types of assessments to nonviolent offenders more generally would be costly. Judge Caroom stated that because the risk assessment tool would only come into play when someone was otherwise incarceration bound, using a risk assessment tool would not necessarily open the floodgates. He also mentioned that the Governor's Commission to Reform Maryland's Pretrial System is



looking into pretrial risk, so by the time of sentencing, much of the necessary information may already exist.

Dr. Soulé identified some additional logistical issues that the Commission would likely need to revisit if refocusing the project's scope regarding what the Commission wants from an assessment and how it would use it to complement the guidelines. These include when and how to score the instrument, who would score it, and whether it would apply to all felonies, all guidelines offenses, or some other group of offenses. The Commission had considered the assessment as a quick screening instrument that might be scored automatically, rather than by Parole and Probation agents. Parole and Probation only conducts presentence investigations in about 20% of guidelines cases and Dr. Soulé indicated that Parole and Probation may not have the resources to allow for investigators to conduct a full LSI-R assessment, since that instrument includes 54 items and a 45 minute interview.

Judge Whalen asked about coordinating with the Department of Public Safety and Correctional Services, which already uses risk assessment tools, to avoid inefficiency. Mr. Loeb stated that DPSCS is exploring use of the LSI-R, after using a risk only tool for several years. Mr. Loeb further noted that while switching to the LSI-R is generally a good idea, it would entail many associated costs from using the instrument and reallocating treatment resources. Also on efficiency and coordination, Judge Caroom encouraged the Commission and Advisory Group to collaborate with the Governor's Commission to Reform Maryland's Pretrial System, which is preparing to adopt a risk instrument, to see if cost savings would be possible by adopting the same instrument. He also noted that cost free instruments exist, such as the Ohio Risk Assessment System (ORAS) developed by Professor Edward Latessa.

In closing Judge Leasure noted that this was the beginning of the discussion and that the Commission needed to come to agreement on many things about where it sees the project going and what it wants the mission to be. She thanked Dr. Lynch and the research team for the presentation.

##### **5. Report from the Executive Director – Dr. David Soulé**

Dr. Soulé referred the Commissioners to the memorandum with the subject "Proposed language to be added to the MSGM and COMAR regarding the Prior Adult Criminal Record." He reviewed the background and contents and presented the MSCCSP staff's recommended amendments to the Commissioners for their review. Following a seconded motion to accept the memorandum's proposed language the Commission adopted the motion.

Next Dr. Soulé referred the Commissioners to the memorandum with the subject "Proposed language to be added to the MSGM and COMAR regarding the guidelines effective date." He reviewed the background and contents, and presented the Commission's previously adopted language along with MSCCSP staff's recommendations for locations for that language in three sections of the MSGM and in one section of COMAR.

Mr. Finci requested a report on a disagreement concerning the language which arose during the Commission's July 15, 2014, meeting. Ms. Martin noted that the disagreement which arose at the July meeting involved the same issues and concerns originally discussed when the Commission voted to adopt the language in May, and that the current vote concerned only placement in the MSGM and COMAR.



Pursuant to Robert's Rules of Order, Mr. Finci moved to amend the language that the Commission adopted at the May 6, 2014, meeting, citing ex post facto implications in light of the Supreme Court of the United States' *Peugh* decision (569 U.S. \_\_\_, 133 S. Ct. 2072, 186 L. Ed. 2d 84). The amended language would replace the word "different" with the words "more harsh," the word "may" with "shall" and would strike all words after "judge" from the previously adopted text. The Commissioners thoroughly discussed the proposed amendments, as well as which party, if either, should have the obligation to inform the court in relevant situations. Paul DeWolfe seconded the motion to amend. The motion failed (with six votes in favor).

Following a seconded motion to add the previously adopted language in the MSGM and COMAR locations recommended by MSCCSP staff, the Commission adopted the motion.

## 6. Report from the Guidelines Subcommittee – Dr. David Soulé

Dr. Soulé presented the report of the Guidelines Subcommittee on behalf of Judge Sonner, who was not in attendance.

### A. Indication of subsequent offender status on presentence investigation orders

Dr. Soulé referenced the memorandum titled, "Indication of Subsequent Offender Status on Presentence Investigation Orders," and reported that it had been brought to the attention of staff that probation and parole (P&P) agents sometimes have difficulty calculating guideline ranges accurately when a notice of subsequent offender status has been filed. Dr. Soulé noted that when a defendant is convicted as a subsequent offender, for instance under CR §5-905, the statutory maximum for the offense is doubled. Per guidelines rule, the applicable guidelines range for that defendant should also be doubled. Dr. Soulé reported that P&P agents have notified MSCCSP staff that they are unlikely to be aware of the subsequent offender status unless it has been noted on the presentence investigation (PSI) order. In many jurisdictions, it is common practice for the judge to note the defendant's subsequent offender status on the PSI order. However, this practice is not always followed in all jurisdictions. The Guidelines Subcommittee discussed this issue at their September 10, 2014 meeting and recommended that language be inserted in the Maryland Sentencing Guidelines Manual (MSGM) encouraging judges to indicate, on the PSI order, when a defendant has been convicted as a subsequent offender. The Guidelines Subcommittee recommended inserting the following language in sections 3.5 and 8.6:

In MSGM 3.5, in the second paragraph, after the first sentence:

In order for the agent to be able to calculate the guidelines accurately, the judge should indicate on the PSI order when the State's Attorney has filed a notice of subsequent offender.

In MSGM 8.6, in the first paragraph, after the first sentence:

If the judge orders a PSI for a defendant who is subject to enhanced punishment legislation for subsequent offenders, the judge should indicate on the PSI order when the State's Attorney has filed a notice of subsequent offender, in order for the Community Supervision agent to be able to calculate the guidelines accurately.



By unanimous vote, the Commission adopted the language to be inserted in the MSGM.

### **B. Review of Sentencing Guidelines Compliance, by Matrix and Cell**

Dr. Soulé stated that one of the primary responsibilities of the Commission is to regularly review sentencing guidelines compliance. In accordance with this responsibility, the Commission has periodically conducted detailed reviews of compliance by examining compliance rates for each of the individual cells in the person, drug, and property sentencing matrices. Dr. Soulé noted that the last review of sentencing guidelines compliance for individual matrix cells was completed at the December 8, 2009 Commission meeting. At that time, data from fiscal years 2004 through 2008 were analyzed, and the Commission reviewed guidelines compliance by individual cell and among ABA plea cases and all other cases. At that time, it was determined that there was not substantial noncompliance by cell or by case type, as many of the cells that qualified as noncompliant had compliance rates that were close to the 65% benchmark and ABA pleas did not have dramatically different compliance rates when compared to all other cases. At that time, there were no changes made to the guidelines.

Dr. Soulé noted that at the May 6, 2014 Commission meeting, the MSCCSP authorized staff to conduct an updated analysis of guidelines compliance for individual matrix cells using data from the most recent five-year period (fiscal years 2009 through 2013). Dr. Soulé reported that the MSCCSP staff had prepared three documents detailing the results of the review of sentencing guidelines compliance, by matrix and cell. Each of the three documents was reviewed by the Guidelines Subcommittee and was presented to the Commission, as a whole, to review. The first document, a memorandum titled, "Update on Review of Guidelines Compliance for Individual Matrix Cells," provided a summary of the review. The second document, a set of tables titled "Sentencing Guidelines Compliance, By Matrix and Cell," displayed the guidelines range, the number of offenders sentenced, and the guidelines compliance rate for each cell in the person, drug, and property offender matrices. The third document, a set of tables titled "Average Sentence, By Matrix and Cell," displayed the guidelines range, the number of offenders, the percentage of offenders sentenced to incarceration, and the average sentence length for each cell in the person, drug, and property offender matrices. Dr. Soulé noted that the cells in each set of tables highlighted in yellow were those cells in which the guidelines compliance rate was below 65% and in which there were at least 50 offenders sentenced; the cells in each set of tables highlighted in blue were those cells in which the guidelines compliance rate was below 65% and in which there were less than 50 offenders sentenced. Dr. Soulé noted that the cells highlighted in blue should be interpreted with some caution as they were based on very small sample sizes.

Dr. Soulé reported that the Guidelines Subcommittee recommended that the next step in the review would be to take a closer look at those cells in which there is a guidelines compliance rate of less than 65% and at least 50 offenders sentenced. The MSCCSP staff will prepare documents for the Guidelines Subcommittee to review at their next meeting to inform this next step of analysis. Dr. Soulé reported that the Subcommittee does not request further action from the Commission at this time and anticipates that the review of compliance rates for individual cells will continue over the next few Commission meetings.



Member of the Commission were given the opportunity to provide feedback on the guidelines compliance documents. Mr. Cassilly noted that the cells with low compliance rates were most often below sentencing guidelines and suggested that the Commission may wish to inquire with the judiciary as to whether there are factors that lead them to depart below guidelines in these cases. Ms. Martin noted that the low compliance cells were seen mostly in the drug and property offense matrices, rather than the person offense matrix. Ms. Martin suggested that the low compliance rates and high percentages of departures below guidelines for drug and property offenders in these cells may be due to the use of Health General (HG) §8-505 and §8-507 commitment orders or to the use of substance abuse treatment commitments in lieu of incarceration. Judge Leasure agreed with Ms. Martin that this may be the case. Mr. Finci suggested that, in his experience, judges often find the recommended ranges in these cells too harsh and no longer descriptive of their sentencing practices. Ms. Martin expressed concern that if the guidelines ranges for these cells were reduced to probation, it would not provide defendants with the incentive to enter treatment in lieu of incarceration. Judge Leasure inquired as to whether MSCCSP staff has access to data regarding HG §8-507 orders. Dr. Soulé replied that there is a section on the guidelines worksheet to indicate whether drug court or other corrections options programs were imposed as a part of the defendant's sentence, however this information is rarely recorded on the worksheet. Dr. Soulé noted that sentences that involve approved Correction Options, including HG §8-507 orders, are classified as guidelines compliant. Dr. Soulé further noted that, per his communication with judges, HG §8-507 orders are most often imposed at sentencing reconsiderations, rather than at original sentencing proceedings, and worksheets are not required for sentencing reconsiderations unless the sentencing included a conviction for a crime of violence.

#### **7. Date, time, and location for the annual Public Comments Hearing**

The next Commission meeting and the annual Public Comments Hearing will take place on Tuesday, December 9, 2014 at the Miller Senate Office Building in Annapolis, MD. The Commission meeting will commence at 4:30pm followed by the Public Comments Hearing at 6:15pm. Senator Kelley noted that she would be unable to attend.

#### **8. Old business**

Mr. Finci questioned whether the Commission has a plan of action regarding the next steps with Risk Assessment in light of the infrequency and brevity of the Commission meetings. Judge Leasure commented that upon receiving feedback from the UMD presenters, the Commission can then determine how to proceed. Senator Kelley suggested that staff investigate some of the "off the shelf" risk tools from other states and provide the Commission with a best practices assessment of the major predictors, independent and dependent variables of tools that look at both needs and risk. Dr. Soulé commented that the Feasibility Study conducted by the UMD Research Team was intended to provide an independent analysis of best practices on risk (only) assessment because that was a recommendation reached by the Commission three years prior. He noted that it may be necessary for the MSCCSP to revisit some of its prior decisions regarding risk assessment, but he felt the UMD Research Team was well-suited to help guide the Commission in any decisions regarding risk and needs assessment. Judge Nance noted the need for both political commitment and funding in order to make the tool successful in reducing recidivism. Judge Lewis noted the possibility that district commissioners may be using a risk assessment tool on the front end prior to the next Commission meeting. Judge Lewis added that the state should have a building model for risk tools.



**9. New business and announcements**

There was no new business or announcements.

**10. Adjournment**

The meeting adjourned at 8:00 p.m.