

Minutes

Maryland State Commission on Criminal Sentencing Policy
House Office Building
Room 180
Annapolis, Maryland 21401

September 18, 2006

Commission Members in Attendance:

Delegate Curtis S. Anderson
James V. Anthenelli, Esquire
Russell P. Butler, Esquire
Leonard C. Collins, Jr., Esquire
Richard A. Finci, Esquire
Robert Gibson, *representing Secretary Mary Ann Saar*
Patrick Kent, Esquire, *representing Nancy S. Forster, Esquire*
Laura L. Martin, Esquire
Kate O'Donnell, *representing Honorable J. Joseph Curran, Jr.*
Barry L. Stanton
Charles F. Wellford, Ph.D.

Staff Members in Attendance:

Stacy Skroban Najaka, Ph.D.
David Soulé, Ph.D.
Haisha Thompson

Intern:

Brad Goldstein

Visitors:

Ellen Mugmen
Jennifer Pollit-Hill, Maryland Coalition Against Sexual Assault

1. Call to order

Dr. Soulé, acting chair, called the meeting to order.

2. Roll call and declaration of quorum

The meeting began at 4:13 p.m. when quorum was reached and roll was taken.

3. Approval of minutes, June 5, 2006 meeting

The minutes were approved as submitted.

4. Report from the Executive Director

- a. Dr. Soulé reviewed the schedule for the day. The general meeting would be followed by a brief break for dinner and then followed by the annual Public Comments Hearing.
- b. Dr. Soulé announced that Judge Tim Doory was appointed to the Circuit Court for Baltimore City. Since Judge Doory serves on the Commission as the representative for the District Court, Chief Judge Bell has been contacted to appoint a replacement for Judge Doory on the Commission. Dr. Soulé noted that Judge Doory has served on the Commission for several years dating back to the original Study Commission and that his contributions and commitment to the Commission will be missed.
- c. Dr. Soulé introduced a student intern from the University of Maryland, Brad Goldstein. Brad is one of the four interns who will work with the Commission during the current semester. Dr. Soulé commented that the Commission staff is very pleased to continue to have a relationship with the University which allows intern participation.
- d. Dr. Soulé announced the Commission's staff conducted a training session on August 31, 2006 with the Baltimore City's State's Attorney's Office (SAO). The training session was attended by approximately 100 prosecutors. The focus of the training was how to accurately complete the guidelines worksheet and also to raise awareness of all of the Commission's resources for assisting in the worksheet completion process. Dr. Soulé noted that Robert Gibson also presented during this training session on diminution credits, mandatory supervision, parole and other related release laws.
- e. Dr. Soulé stated that during the Baltimore City's SAO training, the staff reiterated the Commission's desire to collect worksheets for probation revocations. Since the meeting, Dr. Soulé has had discussions with both Ahmet Hisim, the training director for the Baltimore City SAO, as well as Denise Fili who is the Chief Circuit Court Administration and serves as the liaison between the SAO and the circuit court judges. Dr. Soulé was informed that since the training, the Baltimore City SAO have attempted to initiate the completion of worksheets for all violation of probations.

Denise Fili explained to Dr. Soulé that during her last meeting with the judges, they expressed concern for the court's ability to complete worksheets for VOPs and Judge Glynn, chief judge of the criminal docket, was opposed to the collection of worksheets for VOPs. Dr. Soulé indicated that worksheets for VOPs were being collected by request of the judges in Baltimore City. Ms. Fili explained that while that may be true, the SAO has a difficult time completing VOP worksheets because they are not required to be at probation revocation hearings. Dr. Soulé stated that it was explained to him that the court files were not being pulled and the only information brought to court was the violation of

probation order. Therefore the SAO would not have access to the original guidelines worksheet. Furthermore, in terms of volume, Baltimore City has approximately 15,000 VOP cases per year. Dr. Soulé shared this information to illustrate the staff's difficulties in collecting VOP data.

Dr. Soulé noted that at the January 9, 2006 Commission meeting, the Commission decided to hold off on any change in policy regarding the collection of worksheets for revocations until it was determined how the automated system would simplify the submission process for these types of cases. Dr. Soulé expressed that until the automated process is available and fully functional, he believed the Commission was doing a disservice by continuing to ask for the VOP worksheets. Additionally, the Commission has not provided precise instructions in the Guidelines manual for how to complete a worksheet for VOPs. Dr. Soulé requested the Commission consider a moratorium on the collection of worksheets for VOPs until the automated process is functional.

A question was raised in regards to when the automated system would be available. Dr. Soulé answered the staff plans to have a presentation on the system at the next Commission meeting, at which time he hopes the Commission will be able to approve the adoption of the automated system in volunteer jurisdictions.

Russell Butler noted that the court file and the guidelines worksheet are available during the probation revocation hearing in the judge's court jacket. Mr. Butler also commented that since COMAR is the power of law, he does not think the Commission can suspend the portion which requires the collection of worksheets for VOPs. Dr. Wellford suggested that it may be best to still collect the worksheets for probation revocation cases when they are submitted. However, because of the difficulties noted by those who would complete the worksheets, the Commission probably does not need to emphasize the completion of VOP worksheets until the automated system is available. Dr. Soulé indicated the staff would be comfortable with this suggestion.

- f. Finally, Dr. Soulé announced that the Commission staff is in the process of revising the Frequently Asked Questions (FAQ) posted on the Commission's website. The Commission staff is updating the questions and adding questions that are frequently asked during calls placed to the Commission. Per the Guidelines Subcommittee's suggestion, a draft of the revised FAQs will be emailed to all Commissioners for feedback.

5. Report from the Guidelines Subcommittee – Dr. Charles Wellford

- a. Review of classification for fraudulent statement in application for public assistance (CR, §8-504(b))

The Subcommittee recommended that the Commission revise the seriousness category for this offense from V to IV to maintain consistency with other comparable offenses.

Richard Finci questioned why this offense was classified the same as perjury. A reading of the Criminal Law Article confirmed that a person who makes a false or fraudulent statement with the intent to obtain public assistance is guilty of the misdemeanor of perjury and is subject to the penalty for perjury provided in CR, §9-101.

By a vote of 7-2, the Commission adopted the Guidelines Subcommittee's recommendation to change the seriousness category from V to IV for this offense.

b. Review of classification for DWI and DUI offenses

Dr. Wellford explained the table distributed to the Commission included a series of motor vehicle offenses that were presented to the Commission at the June 5, 2006 meeting. Patrick Kent clarified that most of the proposed changes have already been adopted (in some part) on some of these offenses. Therefore, the Guidelines Subcommittee suggests the highlighted offenses on the chart be added to the Guidelines Offense table in order to provide a comprehensive listing of all DWI and DUI offenses.

Richard Finci questioned if having different classifications for second or third offenses would propose a problem for Parole and Probation agents when completing the prior record portion of the worksheet. In other words, would they be able to tell from the criminal history information if a subsequent offender notification was filed and therefore should the more serious charge be counted when calculating the prior adult criminal record.

Bob Gibson noted that if an offender is found guilty of the statutory requirements necessary to be convicted as a subsequent offender, then the court has already made the determination that the offender has met the standards to be considered a "second or third-time loser". Therefore, the person preparing the worksheet would be able to correctly classify prior subsequent offenses.

By unanimous vote, the Commission adopted the Guidelines Subcommittee's proposed seriousness categories for the various DWI and DUI offenses.

c. Review of classification for offenses/penalties resulting from HB 2 (Special Session 2006)

Dr. Wellford reviewed the table on recommended seriousness categories for the new offenses that were created as a result of the sex offender legislation passed during the Special Session.

I. Rape, 1st degree, adult offender with victim under age 13 (CR, §3-303(c)(4)(i))

- o By unanimous vote, the Commission adopted the proposed seriousness category of I for this offense.

- II. Rape, 2nd degree, adult offender with victim under age 13 (CR, §3-304(c)(2)(i))
 - By unanimous vote, the Commission adopted the proposed seriousness category of II for this offense.
- III. Sex offense, 1st degree, adult offender with victim under age 13 (CR, §3-305(c)(4)(i))
 - By unanimous vote, the Commission adopted the proposed seriousness category of I for this offense.
- IV. Sex offense, 2nd degree, adult offender with victim under age 13 (CR, §3-306(c)(2)(i))
 - By unanimous vote, the Commission adopted the proposed seriousness category of II for this offense.
- V. Sex offender registration, failing to register and/or providing false information, 1st offense (CP, §11-721(b)(1))
 - By unanimous vote, the Commission adopted the proposed seriousness category of VI for this offense.
- VI. Sex offender registration, failing to register and/or providing false information, Subsequent (CP, §11-721(b)(2))
 - By unanimous vote, the Commission adopted the proposed seriousness category of V for this offense.
- VII. Violation of restriction barring sex offender from specified locations where children gather (CP, §11-722(d))

Dr. Wellford noted the Guidelines Subcommittee’ recommendations for this offense were persuaded by the comparability notion, although the Subcommittee’s vote was not unanimous. It was noted that it was difficult to find offenses that were similar in nature to this offense. However, the selected comparables offenses were similar in terms of offense type and maximum sentence length.

Delegate Anderson questioned whether an offender would be told of the circumstances of their sentence if this offense were committed. Delegate Anderson expressed his concern that if an individual accidentally committed this offense, they would receive a significant sentence based on the high seriousness category assigned by the Commission. Mr. Anderson also noted that he believed it was not the intent of the Legislature for this offense to receive a categorization as severe as a level V offense.

Leonard Collins noted that it was not the function of the Commission to judge the intent of the Legislature. The bill was passed and it was the job of the Commission to assign a seriousness category. Based on the

Commission’s policy of assigning seriousness categories based on comparable offenses, this offense should be assigned to level V.

Mr. Collins also added that prosecutors do not prosecute cases if the elements of the crime are not present. Leonard Collins expressed that this offense addresses situations where someone knowingly puts himself in the position where he is going to be around children when he has been ordered not to do so.

Laura Martin indicated she believed stalking was accurately listed as a comparable offense for this crime. She noted that this offense pertains to sex offenders who would potentially stalk children.

Richard Finci stated that an offender charged with this offense would be on probation, would have a conviction for a felony, and would likely have a high offender score. Therefore, with all of these factors, he believed that this offense should be categorized as a VI and not a V.

Russell Butler noted that the guidelines’ offense score would be calculated the same regardless of whether the offense is categorized as a V, VI, or VII.

- By a vote of 8-2, the Commission adopted the proposed seriousness category of V for this offense.

- d. Review of classification for various sex offenses/continuing course of conduct
Dr. Wellford reviewed the proposed seriousness categories for the various sex offenses listed on the chart titled, “Review of Classification for Various Sex Offenses.” Dr. Wellford informed the Commission that the Guidelines Subcommittee’s recommendations were not unanimous for these offenses.

Dr. Soulé indicated that two individuals requested the opportunity to address the Commission regarding the categorization of these offenses. Ellen Mugmen and Jennifer Pollit Hill spoke to the Commission regarding their viewpoints of this issue.

Ellen Mugmen introduced herself and indicated she has testified to the Legislature on child abuse and neglect for over twenty years. She distributed copies of her written testimony given to the Legislature and additional information concerning this issue. She strongly urged the Commission to raise the levels of seriousness categories now assigned to various sex offenses committed especially with regard to children, which includes 3rd degree sex offenses, sodomy, incest, and continuing course of conduct with minor children. In her opinion, the public tends to minimize sexual crimes against children and the amount of harm that is done. In her written testimony, she outlined new research that has been conducted supporting the fact that when children are molested, there is permanent

injury, such as brain changes. Ms. Mugmen also noted that sexual abusive behavior is the violation of your privacy, bodily integrity, and is the climate of invasion, isolation and abandonment. When one reviews the bills in the General Assembly, it states a punishment of thirty years. However, people who commit these offenses do not receive this amount of time in prison, which demonstrates a lack of truth in sentencing. If an offender were to receive some form of incarceration, the children are somewhat protected for the sentenced amount of time. Ms. Mugmen stated that higher seriousness categories may not benefit the offender, but the protection of the children should be the greatest concern. Finally, Ellen Mugmen restated her urging for the Commission to give their support for the increase of the seriousness categories for these sex offenses.

Jennifer Pollit Hill introduced herself as the Executive Director of the Maryland Coalition Against Sexual Assault (MCASA). MCASA is a state-wide advocacy organization that represents rape recovery centers around the state as well as law enforcement, medical personnel, and other professionals that respond to sexual abuse/rape victims. The Coalition concurs with the proposed recommendations to increase the seriousness categories for the sex offenses being reviewed. Particularly, the Coalition strongly supports the seriousness level increase for 3rd degree sex offenses. Ms. Hill expressed that the Coalition believes that these offenses are violent in nature and violent sex offenders should have longer sentences. The Coalition also believes that the current guidelines are routinely overstepped by judges and increased seriousness categories would better reflect the impact these offenses have on their victims. Ms. Pollit Hill concluded her testimony, reiterating her request for the Commission to support the proposed increased seriousness categories.

Patrick Kent expressed that in his experience, despite the current seriousness category classifications, judges are willing to exceed the suggested guidelines if the specific details of a case warrant a greater sentence. Therefore, he believes the judiciary will sentence based on the circumstances of the case even if they need to go above the guidelines.

Leonard Collins stated that this was one of the areas where judges have indicated they believe the guidelines are too low. Mr. Collins also noted that Mr. Kent's suggestion that judges are willing to depart above the guidelines is in itself an indication that the seriousness categories should be increased for these offenses. Mr. Collins noted that the guidelines are supposed to reflect actual sentencing practice.

Russell Butler noted that Commission staff research has shown that judges were most likely to depart above the guidelines specifically for 3rd degree sex offenses. Therefore in order for the Commission to enforce our policy of maintaining consistency and using actual sentencing practice to revise the guidelines, the seriousness levels of 3rd degree sex offense should be increased.

Dr. Soulé confirmed Mr. Butler's statement that the staff is currently working on a report to be distributed as a Guidelines E-News. This report examines those offenses that are most likely to result in a departure from the guidelines. As Mr. Butler stated, the preliminary findings indicate 3rd degree sex offense is the single offense most likely to result in a departure above the guidelines.

Patrick Kent noted that he hoped the Commission would give equal consideration to any future proposed changes to lower the guidelines for drug distribution offenses when and if data indicate sentences are consistently below the prescribed guidelines range.

Dr. Wellford asked if the staff could analyze the data to determine if any sentences that are currently categorized as departures above the guidelines would become compliant sentences with the proposed seriousness category increase for 3rd degree sex offenses categorized under CR, §§3-307(a)(1) and 3-307(a)(2). Dr. Soulé replied that the staff could not currently conduct this type of analysis because the offense is not reported on the worksheet based on the specific element of the offense that was met (i.e. what type of 3rd degree sex offense was committed). Dr. Soulé further added that the proposed change to divide the categorization of 3rd degree sex offenses would require the Commission staff to work with those individuals completing the guidelines worksheets in order to make the proposed change in reporting requirements for this specific offense.

Delegate Andersen asked what sentence the guidelines would prescribe for a first time 3rd degree sex offender. Kate O'Donnell stated that for first time offenders, the victim age and injury is considered. Additionally, for victim injury to apply, a child must be receiving counseling. On the other hand, if the case is dealing with a first time offender and the victim is over the age of eleven and the child is not in counseling, victim injury points would not be awarded. As a category V, the guidelines range for this offense would be probation to probation and as a category IV, it would be probation to two years. Therefore, probation would still be an option for a first time offender.

- I. Sex offense, 3rd degree: CR, §3-307(a)(1)use of dangerous weapon; suffocate, strangle, disfigure, or inflict serious injury; or while aided and abetted by another; CR, §3-307 (a)(2)with mentally defective, mentally incapacitated, or physically hapless individual
 - o By a vote of 9-2, the Commission adopted the suggested seriousness category of IV for this offense.

II. Sodomy (CR, §3-321)

- By a vote of 10-1, the Commission adopted the suggested seriousness category of IV for this offense.

III. Incest (CR, §3-323)

- By a vote of 10-1, the Commission adopted the suggested seriousness category of IV for this offense.

IV. Sexual solicitation of a minor (CR, §3-324)

- By a vote of 10-1, the Commission adopted the suggested seriousness category of IV for this offense.

V. Continuing course of conduct which includes 3 or more acts involving 1st or 2nd degree rape or 1st, 2nd, or 3rd degree sex offense over a period of 90 days or more, with a victim younger than 14 years old (CR, §3-315)

Delegate Anderson inquired as to what the impact of changing the seriousness category from III to II for this offense would be for a first time offender.

Dr. Soulé stated that if the seriousness category is changed from III to II, assuming no other factors are involved and no prior record, the range would be from 3 months to 4 years and from 4 years to 9 years, for seriousness category III and II respectively.

- By a vote of 9-2, the Commission adopted the suggested seriousness category of II for this offense.

VI. Child Abuse, sexual (CR, §3-602)

- By a vote of 9-2, the Commission adopted the suggested seriousness category of II for this offense.

VII. Child Abuse, physical, 1st degree (CR, §3-601(b)(2)(i))

- By a vote of 9-2, the Commission adopted the suggested seriousness category of II for this offense.

d. Calculating adult prior record with multiple victims

Dr. Wellford explained that at the June 5, 2006 meeting, Leonard Collins presented a proposal to change the way in which prior criminal history scores would be calculated. Mr. Collins's proposal would allow for one's prior record score to be adjusted upward if a prior conviction included an offense that involved multiple victims. At the prior meeting, Mr. Collins's proposal was referred to the Guidelines Subcommittee for review. The Guidelines Subcommittee discussed this proposal but was unable to reach a conclusion and will continue to review the proposal before making a formal recommendation to the Commission.

Mr. Collins agreed to consider a revision to his proposal which would focus only on person offenses or more serious person offenses. The Subcommittee will continue reviewing this proposal and will provide suggestions to the Commission at the next scheduled meeting.

f. Listing of Tamar’s Children as correctional options program in Sentencing Guidelines Manual

Dr. Wellford explained that the final Subcommittee topic was related to the Commission’s definition of “corrections options” in both the Guidelines manual and in COMAR. Currently in the manual, the fifth bullet in the definition states, “Correctional options include programs such as Tamar’s Children, etc...” It came to the attention of the staff that the Department of Public Safety and Correctional Services pulled funding for this program because of a decertification of the vendor. The staff looked into this further and discovered that in COMAR, Tamar’s Children is not included under the definition of correctional options. Therefore, the Guidelines Subcommittee recommended the staff should modify the manual. The Subcommittee also recommended the definition of corrections options in COMAR remain unchanged and therefore any program established by the Division of Corrections which also met the Commission’s criteria would then be included under our definition of corrections options. Dr. Wellford noted that that Subcommittee wanted to inform the Commission that the definition of corrections options in COMAR is the one that should be applied and the staff will need to modify the definition in the manual to match the definition in COMAR.

6. Adjournment

The next meeting was set for Monday, January 8, 2007 at 4:00 p.m. at the Judiciary Training Center in Annapolis, MD.

The meeting adjourned at 5:30 p.m. for a brief break to be followed by the start of the Public Comments Hearing at 6:00 p.m.