



Minutes

Maryland State Commission on Criminal Sentencing Policy
Teleconference
February 20, 2020

Commission Members in Attendance:

Honorable Shannon E. Avery, Vice-Chair
Honorable Brian L. DeLeonardo
Richard A. Finci, Esquire
Brian D. Johnson, Ph.D.
Senator Delores G. Kelley
Molly Knipe
Honorable Patrice E. Lewis
Delegate David Moon
Kathleen C. Murphy, Esquire, *representing Attorney General Brian E. Frosh*
Honorable James P. Salmon
Lisa M. Spicknall-Horner

Staff Members in Attendance:

Sarah Bowles
Stacy Najaka, Ph.D.
Katharine Pembroke
David Soulé, Ph.D.

1. Call to order

Judge Avery, serving as Chair in Judge Wilson's absence, called the meeting to order. Dr. Soulé conducted a roll call to confirm the teleconference participants.

2. Declaration of quorum

The meeting began at 7:03 pm when attendance reached a quorum. Dr. Soulé thanked Commissioners for arranging their schedules to participate in the call. He noted that the teleconference meeting, like all Commission meetings, was open to the public. Directions to listen to the teleconference were published on the MSCCSP website.

3. Review of HB 1458 – Dr. David Soulé

Dr. Soulé provided a brief summary of HB 1458, followed by a discussion of its anticipated impact on the MSCCSP.

a. Introduction

Dr. Soulé explained that HB 1458 will affect the operations of the MSCCSP, in that it alters the Commission's definition of a guidelines-compliant sentence. Pursuant to the policy for responding to legislative proposals adopted by the MSCCSP in July 2019, the conference call was arranged for the purpose of soliciting feedback and to request a vote



whether the Commission will support, oppose, or take no position on the proposed legislation.

Dr. Soulé noted that Criminal Procedure (CP) Article, § 6-209, requires that the MSCCSP annual report shall, among other things, review judicial compliance with the sentencing guidelines, including compliance by crime and by judicial circuit. If enacted, HB 1458 would provide that a sentence imposed pursuant to a plea agreement may not be deemed to be compliant with the sentencing guidelines unless the sentence falls within the actual sentencing guidelines range.

Dr. Soulé explained how guidelines compliance is calculated by the Commission. The MSCCSP deems a sentence compliant with the guidelines if the guidelines applicable sentence (defined as the sum of incarceration, credited time, and home detention) falls within the applicable guidelines range. In addition, the MSCCSP deems a sentence compliant if the judge sentenced an offender to a period of pre-sentence incarceration time with no additional post-sentence incarceration time and the length of credited pre-sentence incarceration exceeds the upper guidelines range for the sentencing event. The MSCCSP deems sentences to corrections options programs (e.g., participation in a problem solving court; Health General Article, § 8-507 commitments; home detention; work release) compliant provided that the initial sentence plus any suspended sentence falls within or above the applicable guidelines range and the sentencing event does not include a crime of violence, child sexual abuse, or escape. Finally, sentences pursuant to an American Bar Association (ABA) plea agreement are guidelines-compliant (COMAR 14.22.01.17). An ABA plea is a disposition resulting from a guilty plea agreement in which the defendant and the State present to the court, on the record, a specific sentence that the court approves and the agreement is binding on the court under Maryland Rule 4-243(c).

Dr. Soulé noted that in fiscal year 2019, 95% of sentencing guidelines events were adjudicated via a plea agreement; 48.5% were resolved by an ABA plea; 35.4% were resolved by a non-ABA plea agreement (those in which a plea agreement was reached by the State and defense, but the agreement was not approved by, and thus not binding on, the court); and 11.2% were resolved by a plea with no agreement (that is, the defendant pleaded guilty without any agreement from the prosecutor or judge).

Dr. Soulé then summarized how the Commission reports compliance. First, the Commission reports compliance by circuit and crime type every year via the annual report. Additionally, every three to five years, the MSCCSP conducts detailed reviews of the guidelines by examining compliance, as well as average sentence, within the individual cells of each sentencing matrix. The last detailed review concluded in a vote to revise the sentencing matrix for seriousness categories IV and V drug offenses, effective July 1, 2016. At its May 7, 2019, meeting the MSCCSP discussed a plan to complete the next analysis of guidelines compliance by individual matrix cells. Noting the recent revisions to the sentencing matrix for seriousness categories IV and V drug offenses, and the significant revisions to the seriousness categories for many common property offenses and CDS possession offenses in response to the Justice Reinvestment Act (JRA) effective October 1, 2017, the Commission agreed to start the next review of guidelines



compliance for individual cells in early 2021, at which time there would be three full calendar years of post-JRA sentencing guidelines data (i.e., calendar years 2018–2020).

Dr. Soulé stated that in response to this proposed legislation, the staff researched the history of the sentencing guidelines compliance, and specifically the adoption of the ABA-plea policy and corrections option policy. The staff did this by reviewing minutes from Commission meetings dating back to the inception of the MSCCSP in 1999. Dr. Soulé noted that Judge Wilson asked that he briefly summarize this history for the Commissioners on the call. The MSCCSP adopted the ABA plea agreement compliance policy in 2001 to acknowledge that ABA pleas reflect a disposition agreed to by all three parties (i.e., the defense, the State, and the court) and they indicate a consensus local view of an appropriate sentence within each specific community. The corrections options and ABA plea agreement compliance policies allow the court to set a guidelines compliant sentence that considers the individual needs of the offender, such as substance abuse or mental health treatment. These policies were driven in part as a response to the governing legislation that created the Sentencing Commission, particularly CP, § 6-202(6) which states that “Sentencing judges in the State should be able to impose the most appropriate criminal penalties, including corrections options programs for appropriate criminals.”

Dr. Soulé explained that the governing legislation’s reference to corrections options programs was written under the assumption that a “Corrections Options Authority” would be established, a statewide system of corrections options (i.e., alternatives that fall between traditional probation and incarceration) would be created, and then the MSCCSP would develop eligibility criteria and identify specific cells on the drug and property matrices that would include these “corrections options.” However, for reasons that are too numerous to discuss in the call, the creation of a statewide system of correction options never came to fruition.

Dr. Soulé noted that in the interest of time, and to keep the call focused on HB 1458, which pertains only to the ABA plea rule, he would refrain from further discussion of the long history of corrections options and the guidelines. He stated that he would be happy to provide that history at another time. In addition, he noted that a written summary of the history is provided in Appendix B of the 2018 MSCCSP Study on Alternatives to Incarceration, which is posted in the reports section of the MSCCSP website.

b. Policy and fiscal impact

Dr. Soulé explained that in terms of fiscal and operational impact on the MSCCSP, HB 1458 would eliminate the ABA plea agreement compliance policy adopted in 2001 and would therefore require the MSCCSP to amend the Maryland Automated Guidelines System (MAGS) to revise the calculation of sentencing guidelines compliance. Guidelines compliance is automatically calculated by MAGS and clearly displayed on the last screen. The MAGS revisions will require an estimated 50 hours of development time at a cost of \$8,750. This programming cost is reflected in the fiscal estimate provided by the MSCCSP to the Department of Legislative Services.

Dr. Soulé noted that the proposed legislation would also require the MSCCSP staff to test and implement the MAGS application revisions, update all training manuals and materials to reflect the change in the definition of sentencing guidelines compliance, and



communicate the revised compliance definition to criminal justice practitioners. The staff would also need to amend the format of guidelines compliance reports. The legislation is to be enacted effective October 1, 2020, so it would take effect three months into FY 2021. Accordingly, the MSCCSP 2021 annual report published in January of 2022 would need to reflect revised guidelines compliance rates. These activities are consistent with the routine work of the Commission staff and would have minimal operational impact.

4. Discussion – Judge Shannon E. Avery

Judge Avery commended Dr. Soulé and staff for their quick and thorough work preparing a summary of the issue. To structure the discussion Judge Avery recommended that each Commissioner be called on in alphabetical order, and those wishing to speak could do so in turn. Judge Avery deferred her comments to the end of the discussion.

Brian DeLeonardo stated that the proposed legislation highlights a real issue. He questioned whether some pleas labeled ABA pleas are truly ABA pleas. He would like to see if there are ABA pleas that are consistently below guidelines, and he expressed that the guidelines should reflect actual sentences. However, his preference would be to ask that this be a matter that the Commission be able to take up and look at over the next year. The Commission has done a good job in the past of looking at the pros and cons of various issues, examining the data, and coming back with a recommendation.

Dr. Soulé noted that Delegate Moon would need to leave the call early and asked if Delegate Moon had any comments before jumping off. Delegate Moon observed that the proposed legislation is one of a number of bills this session that are aimed at increasing sentences. He stated that he did not intend to take a position in his capacity as a Commissioner but would be taking one in his capacity as a legislator.

Richard Finci stated that he agreed with Brian DeLeonardo. He explained that he understands why ABA pleas are deemed compliant and why the rule was implemented years ago, but he is not sure that the reason is still relevant today. He thinks the Commission should probably take no position on the bill and let the politics play out, but when the Commission says it takes no position, it should also indicate that the Commission recognizes that the issue is one it should look at.

Dr. Soulé pointed out that the Commission noted in its recently released 2019 annual report that the Commission indicated plans to review the definition of ABA plea in 2020, and Judge Wilson and Dr. Soulé had discussed that such a review would necessitate a fuller discussion of guidelines compliance and the ABA plea compliance rule.

Richard Finci noted that the Commission could readily add ABA plea as a departure code (i.e., reason for departure from the recommended range).

[Kathleen Murphy was called on for comment, and she indicated she had no additional comment.]

Dr. Johnson stated that he agreed with what had been said by Commissioners DeLeonardo and Finci. He noted that he would like to know what percentage of ABA pleas result in a sentence within the recommended guidelines range. It is the Commission's responsibility to look into these issues. He would like the Commission to be able to discuss the ABA plea issue and to consider the consequences of changing the ABA plea compliance rule. This



should not be a political issue; it should be an issue that the Commission takes up and says we recognize the importance of the issue and will take time to investigate the issue and consider the consequences.

Senator Kelley recommended that the Commission be careful in how it responds to the proposed legislation. If the Commission simply takes no position, that may be interpreted as the Commission does not care and the legislature should do as it wants. The legislature, especially the newer legislators, should know that the Commission's decisions are based on research. The Commission should thank the legislature for highlighting their interest in the issue, that it is an area of research that the Commission is committed to take on, and that the Commission will report back before the next legislative session regarding its findings.

[Molly Knipe was called on for comment, and she indicated she had no additional comment.]

[Judge Lewis was called on for comment, but she had inadvertently disconnected from the call.]

Judge Salmon expressed that he agreed with the comments made by Senator Kelley.

[Lisa Spicknall-Horner was called on for comment, and she indicated she had no additional comment.]

Judge Avery indicated that she is strongly opposed to the legislation, though she is not opposed to examining the multitude of issues around pleas. But even if the Commission agrees to examine the issue, it should still oppose the bill, because the bill should not be passed without the requisite research. Judge Avery noted that it would be inconsistent to take no position and at the same time say that the Commission wants time to investigate the issue. If the Commission is going to request time to investigate the issue, it should oppose the passing of the bill this year.

Senator Kelley indicated that was her intention when she suggested that the issue needs study and the Commission should be afforded the opportunity to study the issue and report back its findings.

Judge Avery asked if Senator Kelley would reframe her comment in terms of a motion. Senator Kelley made a motion for the Commission to take a position opposing HB1458 at this time because it is untimely, and the issue is important enough to require systematic study and a report back from the Commission before this time next year. Dr. Johnson seconded the motion.

Having heard Judge Lewis rejoin the call, Dr. Johnson asked if she had any comment. Judge Lewis stated that she agreed with what had been said. The Commission should let the legislature know that it appreciates the legislature's concerns, an examination of ABA pleas is on the Commission's agenda, and the Commission would ask that the legislature defer to let the Commission do what is on its agenda to do. The Commission has the issue on its agenda, the Commission will look at the issue, and the Commission will present the findings to the legislature.

Brian DeLeonardo indicated that he would be fine with the Commission opposing the bill as untimely. He stated that the Commission should be clear that it is not opposing the concept of the bill but rather opposing the passage of the bill without the Commission's having had an



opportunity to discuss the issue. Judge Lewis agreed and noted that was the intent of Senator Kelley's motion.

5. **Vote whether to support, oppose, or take no position (Action item)**

Dr. Soulé summarized the motion from Senator Kelley which was seconded by Dr. Johnson, noting that the motion was to oppose HB1458 but to make it clear that the Commission is not opposing the concept of the bill but rather is opposing not giving the Commission the opportunity to first review and study the issue on its own and report back.

Brian DeLeonardo suggested providing a specific timeframe for completing the Commission's study of the issue, such as prior to the public comments hearing in December 2020. There was agreement to indicate such a timeframe.

The motion to oppose HB 1458 carried, with a roll call vote of 9 yea votes, 0 nay votes, and 1 abstention. Judge Avery, serving as chair, refrained from voting.

Dr. Soulé stated that the staff would draft written testimony reflecting what was agreed to on the call and would share that testimony with the Chair and Guidelines Subcommittee for their review. He noted that the hearing in the House Judiciary Committee for the bill is on 3/10/2020, and the bill has not been cross-filed in the Senate.

6. **Adjourn**

The meeting adjourned at 7:42 pm.