



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
Videoconference  
July 7, 2020

### Commission Members in Attendance:

Honorable Brett R. Wilson, Chair  
Honorable Shannon E. Avery, Vice-Chair  
Senator Robert G. Cassilly  
Delegate Luke H. Clippinger  
William M. Davis, Esquire, *representing Public Defender Paul DeWolfe*  
Chief Douglas DeLeaver  
Brian L. DeLeonardo  
Richard A. Finci, Esquire  
Secretary Robert L. Green  
Melinda C. Grenier  
Brian D. Johnson, Ph.D.  
Senator Delores G. Kelley  
Honorable Patrice E. Lewis  
Alethea P. Miller  
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

MSCCSP Chair, Judge Wilson, called the meeting to order.

### 2. Roll call and declaration of quorum

The meeting began at 5:32 pm when attendance reached a quorum.

### 3. Introduction of new Commissioners: Chief Douglas DeLeaver and Alethea Miller

Dr. Soulé noted that two new Commissioners, Chief Douglas DeLeaver and Alethea Miller, were appointed since the Maryland State Commission on Criminal Sentencing Policy (MSCCSP) last met in person in December. Dr. Soulé and Judge Wilson welcomed Alethea Miller as the new victim advocacy representative, and Chief Douglas DeLeaver as the new law enforcement representative.



#### **4. Discussion of MSCCSP mission in light of national conversations about race and the criminal justice system**

Judge Wilson started the conversation by noting the difficulties facing the nation surrounding the criminal justice system and race. With these issues in mind, Judge Wilson stated it would be useful for the Commission to begin its meeting with an open discussion. The mission of the MSCCSP is to identify disparities in sentencing and create policies that ensure the fair treatment of individuals of all races. It is important that the public be able to hear the Commission's open dialogue on these matters. Judge Wilson stated that any member who wished to speak could take this time to make a statement regarding the MSCCSP and its role in sentencing policy, the criminal justice system, and the healing of the community.

Senator Kelley noted that she found it interesting that people are now going back in history and reexamining the good versus bad nature of notable figures. Senator Kelley suggested that it is important for people to understand the good and bad roles historical figures played in society. These considerations are something for Commissioners to keep in mind, as there may be a number of upcoming court cases regarding historical artifacts and individuals' concerns with these artifacts. Senator Kelley suggested that certain statues and monuments be placed in a museum for study rather than on public display.

Mr. Finci expressed that he is focused on the role of the Commission in broader society. Mr. Finci suggested that the mission of the MSCCSP can serve to perpetuate longer term issues of overincarceration. Inherent in the MSCCSP's mission are sentencing guidelines that provide recommended sentence lengths. Mr. Finci suggested that these sentence length recommendations perpetuate the issue of overincarceration. Mr. Finci noted that he has tried to bring attention to this issue in the past. Mr. Finci suggested that the Commission's upcoming review of the sentencing guidelines and sentences imposed post-Justice Reinvestment Act is particularly important as it may provide a means for the Commission to address overincarceration.

Mr. Davis stated that he agreed with Mr. Finci and expressed frustration with the situation. Mr. Davis noted that the guidelines can be quite broad. For instance, one cell of the drug matrix provides a suggested range of 12 years to 20 years. Mr. Davis noted that he understood the rationale behind broad ranges but wondered if the broad ranges are used to perpetuate overincarceration, particularly among individuals of color. Mr. Davis questioned, what makes the difference between a 12-year and a 20-year sentence. Is it the defendant's jurisdiction? Is it the individual? If two defendants have the same background and are convicted of the same offense, why is one defendant sentenced to 12 years and the other sentenced to 20 years? Mr. Davis suggested that the Commission evaluate whether the guidelines ranges are being used appropriately.

Dr. Johnson noted that mass incarceration is a broad societal problem. Further, it disproportionately impacts some groups. While African Americans comprise 12-13% of the U.S. population, they are the modal category of race in the prison system. Dr. Johnson noted that one of the MSCCSP's express missions, as documented in the Maryland Sentencing Guidelines Manual (MSGM), is "to increase equity in sentencing by reducing unwarranted



disparity, including any racial disparity.” As such, the Commission has a responsibility to be cognizant of the racial impact of any policy decisions.

Judge Avery expressed that she felt uplifted to see this discussion as an item on the agenda and that it is important, particularly for the MSCCSP, to talk about these issues. Since the Commission’s inception, its mission, by statute, has been to identify, reduce, and eliminate racial disparity. The sentencing guidelines exist to identify and remediate problems of racial disparity. Judge Avery noted that racial disparity has always been a problem and continues to be a problem. Disparity in sentencing is one of the building blocks of structural or systemic racism. As a judge, Judge Avery noted the importance of recognizing and beginning a conversation about disparity. The Commission has grappled with this question since its inception. Judge Avery suggested that data is important when addressing and trying to dismantle structural racism. In the past, the Commission has examined how sentencing practices result in disproportionate impact on people of color (e.g., the Commission’s Juvenile Delinquency Study). Judge Avery suggested that the MSCCSP hold a special meeting to address how the Commission can carry out its mission to identify and remediate racial impact in sentencing. Judge Avery suggested a special meeting because the Commission comprises members of different backgrounds (e.g., judges, prosecutors, defense attorneys, legislators, corrections and law enforcement officials, and advocates). A special meeting would give the group an opportunity to learn how to talk about race in a way that allows all voices to be heard. Judge Avery suggested a facilitator could assist the Commission in developing a protocol to discuss race. Judge Avery noted that members of the Commission are experts on sentencing related issues and could work together to find ways to address racial disparities and sentencing policy.

Judge Wilson noted that the Commission’s next meeting is scheduled for September 15. Judge Wilson stated that, between now and then, the Commission could put Judge Avery’s suggestions into practice.

Mr. Green echoed Judge Avery’s sentiments on data. Mr. Green suggested that a dashboard format for the Commission’s data, perhaps integrated into its website, would be particularly helpful. The Department of Public Safety and Correctional Services is working on a similar tool for their data. Mr. Green noted that a dashboard provides users with the ability to quickly evaluate data, identify challenges, and set goals.

Senator Cassilly asked whether the Commission currently has data that would indicate that individuals who are being scored similarly on the sentencing guidelines are being sentenced differently based on race. Senator Cassilly acknowledged that the Commission previously looked at disparities in the juvenile delinquency score, but questioned whether we had data specific to sentencing in the adult population.

Dr. Soulé responded that the Commission has data relevant to race and sentencing but has not recently presented data in that manner. Dr. Soulé noted that nearly 20 years ago, the Commission prepared a report evaluating the impact of race on sentencing when controlling for other factors. Dr. Soulé further noted that the Commission more recently evaluated racial disparities in the juvenile delinquency score component of the offender score. The



Commission found that African Americans were more likely than white defendants to score a point on the juvenile delinquency score due to juvenile commitments, thus introducing disparity into the measure. By redefining the juvenile delinquency score to include adjudications rather than commitments, the Commission was able to eliminate disparity in the score. Dr. Soulé noted that while the Commission does not currently have the ability to present data in a dashboard format, it does have access to data that would address racial disparities. Senator Cassilly suggested that, regardless of format, any report on this issue would be useful. Senator Cassilly asked Dr. Soulé how long such a report would take to prepare. Dr. Soule noted that staff would want to put thought into the analysis and, perhaps, reach out to the University of Maryland's Department of Criminology and Criminal Justice for assistance. Dr. Soulé, however, noted the limitations inherent in the Commission's data. The Commission collects data from only the sentencing guidelines worksheet. The Commission has access to the defendant's prior record score, but only as an aggregate measure. The Commission does not have access to the specific offenses contained in a defendant's prior record. The Commission also does not have access to the factors involved in prosecutorial decision-making that influence convictions and sentencing.

Senator Kelley noted that there was recently an article in the Baltimore Sun paper regarding an African American business owner who applied for a business loan under the Cares Act. Initially, the business owner was not going to receive the loan because of a criminal record he obtained at a much younger age. Senator Kelley suggested that the effects of one's prior record may be something the Commission wishes to consider.

Judge Wilson noted that Senator Kelley was correct. While there are ways by which the impact of one's prior record on the sentencing guidelines are reduced (e.g., the prior adult criminal record score decay factor), the prior record score is an important area of future study for the Commission. Judge Wilson noted there is a consensus among Commissioners that there is additional work to do on issues surrounding race and sentencing.

## 5. Approval of minutes

### a. December 10, 2019, MSCCSP business meeting

The Commission approved the minutes as submitted.

### b. December 10, 2019, public comments hearing

The Commission approved the minutes as submitted.

### c. January 29, 2020, teleconference

The Commission approved the minutes as submitted.

### d. February 20, 2020, teleconference

The Commission approved the minutes as submitted.

## 6. Guidelines Subcommittee report – Judge Shannon Avery and Dr. David Soulé



Judge Avery noted that, at its June meeting, the Guidelines Subcommittee reviewed the proposed classification of new/revised offenses from the 2020 Legislative Session, as well as the Commission’s current ABA plea policy. Judge Avery deferred to Dr. Soulé for the remainder of the report.

a. Proposed classification of new/revised offenses, 2020 Legislative Session (**Action item**)

Dr. Soulé summarized the process the Commission traditionally follows to classify new and revised offenses. Each year, the Commission reviews new and revised criminal penalties from the most recent legislative session and considers how the new and revised criminal penalties fit within the Maryland sentencing guidelines. He noted that the task of classifying new and revised criminal offenses is designated first to the Guidelines Subcommittee. In preparation for this task, the staff reviews all legislation from the legislative session and identifies any legislation that creates new criminal penalties or alters existing criminal penalties. The staff then prepares a memorandum that identifies any new or revised criminal offenses that carry a maximum penalty of greater than one year of incarceration.

Dr. Soulé explained that MSCCSP staff focuses on penalties greater than one year because, by rule, the MSCCSP does not require classification of offenses that carry a maximum penalty of one year or less. Rather, those offenses are automatically assigned a seriousness category of VII.

Dr. Soulé then referred the Commission to the memorandum labeled “*Proposed Classification of New or Revised Offenses, 2020 Legislative Session*” and noted that it is a 13-page document, divided into three sections: (1) new offenses with a maximum penalty greater than one year of incarceration, (2) existing offenses with an altered maximum penalty greater than one year of incarceration, and (3) additional amended offenses with no recommended action. Dr. Soulé then referred the Commission to an additional supporting document labeled “*Combined file of legislation with new\_revised offenses\_2020*”, which is a PDF that combines all of the legislation that is reviewed in the new or revised offenses memorandum. The bills within the PDF appear in the order they are listed in the “*Proposed Classification of New or Revised Offenses, 2020 Legislative Session*” memorandum.

Dr. Soulé explained that based on previously established protocol, the Guidelines Subcommittee makes seriousness category recommendations by examining currently classified offenses that are comparable based on the type of offense (person, property or drug), statutory maximum, misdemeanor/felony classification, and when possible, the nature of the offense. For each new or amended offense, the memorandum presents staff-identified comparables at the bottom of each page.

- i. Chapters 21 and 22 (HB 5/SB 161) – Hate Crimes – Placing or inscribing an item or a symbol, including an actual or depicted noose or swastika, whether temporary or permanent, on any real or personal property, public or private, without the express permission of the owner, owner’s agent, or lawful occupant of the



property, with the intent to threaten or intimidate any person or group of persons (CR, § 10-305.1); (CR, § 10-306(a)(penalty)).

Chapters 21 and 22 (HB 5/SB 161), create a new offense prohibiting a person from placing or inscribing an item or a symbol, including an actual or depicted noose or swastika, whether temporary or permanent, on any real or personal property, public or private, without the express permission of the owner, owner's agent, or lawful occupant of the property, with the intent to threaten or intimidate any person or group of persons.

The Commission adopted the Guidelines Subcommittee's recommendation to classify the offense as a person offense with a seriousness category of V, without opposition.

ii. Chapter 45 (HB 81) – Sexual Crimes – Sodomy (CR, § 3-321).

Chapter 45 (HB 81) repeals the crime of sodomy.

Mr. Finci questioned whether there is a provision in the MSGM that instructs that a repealed offense shall be excluded from the scoring of the prior criminal record. Dr. Soulé responded that the Commission had adopted that provision a few years ago.

The Commission adopted the Guidelines Subcommittee's recommendation to remove the offense from the Sentencing Guidelines Offense Table.

iii. Chapter 93 (HB 171) – Animals, Crimes Against – Cruelty to Animals – injuring a racehorse (CR, § 10-620).

Chapter 93 (HB 171) alters the penalty for interfering with, injuring, tampering with, or destroying a horse used for a certain purpose to prohibit a person from interfering with, injuring, tampering with or destroying an equine used for a certain purpose or for any other lawful activity. This bill also changes the crime from a felony to a misdemeanor; and alters the maximum penalty to include a fine not exceeding \$1,000 or imprisonment not exceeding one year or both.

Based on the penalty decrease, the re-classification to a misdemeanor, and the provided comparables, the Commission adopted the Guidelines Subcommittee's recommendation to decrease the seriousness category to VII, without opposition.

iv. Chapters 128 and 129 (HB 246/SB 231) – Sexual Crimes – Sexual solicitation of a minor or law enforcement officer posing as a minor, subsequent (CR, § 3-324(d)(2)).

This bill establishes a new penalty for a subsequent violation of sexual solicitation of a minor or law enforcement officer posing as a minor. This bill also expands the definition of sexual solicitation of a minor or law enforcement officer posing



as a minor to include knowingly and with a certain intent soliciting the consent of a parent, guardian, or custodian of a minor, or a law enforcement officer posing as a parent, guardian, or custodian of a minor, to engage in certain prohibited sexual acts with the minor.

The Commission adopted the Guidelines Subcommittee's recommendation to classify the offense as a person offense with a seriousness category of III, without opposition.

- v. Dr. Soulé noted that Chapters 385 and 386 (HB 947/SB 169) increase the maximum incarceration penalty for certain fraud related offenses and reclassify the offenses from a misdemeanor to a felony.

- a. Chapters 385 and 386 (HB 947/SB 169) – Fraud, Miscellaneous – Practicing or attempting to practice dentistry without a license, 1<sup>st</sup> offense (HO, § 4-606(a)(1)(i))

The Commission adopted the Guidelines Subcommittee's recommendation to classify the offense as a person offense with a seriousness category of VII, without opposition.

- b. Chapters 385 and 386 (HB 947/SB 169) – Fraud, Miscellaneous – Practicing or attempting to practice dentistry without a license, subsequent (HO, § 4-606(a)(1)(ii))

The Commission adopted the Guidelines Subcommittee's recommendation to classify the offense as a person offense with a seriousness category of VI, without opposition.

- c. Chapters 385 and 386 (HB 947/SB 169) – Fraud, Miscellaneous – Conducting unauthorized dental laboratory work or advertising a dental appliance without a dental license (HO, § 4-606(c))

The Commission adopted the Guidelines Subcommittee's recommendation to classify the offense as a property offense with a seriousness category of VII, without opposition.

Dr. Soulé noted that the Guidelines Subcommittee debated the offense type classifications for these particular offenses. One Subcommittee member questioned whether *conducting unauthorized dental laboratory work without a license or advertising a dental appliance without a dental license* should be classified as a person offense, as it relates to something being added to a person's biological system, which could potentially result in death. Dr. Soulé reported that ultimately, the Guidelines Subcommittee decided to recommend classifying it as a property offense, as that is most consistent with the other



comparables. It was noted that if there is a problem with the classification, the Commission can review it again at a future date.

- vi. Dr. Soulé noted that Chapter 613 (SB 395) expands the definitions of various offenses related to the unauthorized practice of health and medical professions. He further noted that these offenses are not new offenses, but rather are existing offenses that have not been previously classified.

- a. Chapter 613 (SB 395) – Fraud, Miscellaneous – Practicing respiratory care without a license (HO, §§ 14-5A-20 – 14-5A-22.1); (HO, § 14-5A-23(a)(penalty))

Senator Kelley expressed concern that this offense may be more serious than initially considered. She noted that given the current COVID-19 pandemic, if an individual tested positive for the virus and another individual was acting as a respiratory therapist without having a license, it could result in death. Judge Wilson responded that the legislature can always revisit a measure during the next session as need be.

The Commission adopted the Guidelines Subcommittee’s recommendation to classify the offense as a person offense with a seriousness category of VII, without opposition.

- b. Chapter 613 (SB 395) – Fraud, Miscellaneous – Practicing radiation therapy, nuclear medicine technology, radiography, or radiology assistance without a license (HO, §§ 14-5B-17 – 14-5B-18.1); (HO, § 14-5B-19(a)(penalty))

The Commission adopted the Guidelines Subcommittee’s recommendation to classify the offense as a person offense with a seriousness category of VII, without opposition.

- c. Chapter 613 (SB 395) – Fraud, Miscellaneous – Practicing athletic training without a license (HO, § 14-5D-17); (HO, § 14-5D-18(a)(penalty))

The Commission adopted the Guidelines Subcommittee’s recommendation to classify the offense as a person offense with a seriousness category of VII, without opposition.

- d. Chapter 613 (SB 395) – Fraud, Miscellaneous – Practicing perfusion without a license (HO, §§ 14-5E-20 – 14-5E-22); (HO, § 14-5E-23(a)(penalty))

The Commission adopted the Guidelines Subcommittee’s recommendation to classify the offense as a person offense with a seriousness category of VII, without opposition.



The Commission followed the recommendation of the Guidelines Subcommittee to take no action with respect to the offenses on pages 8 through 13 of the *Proposed Classification* memorandum. These were existing offenses amended in ways that expanded or altered the definition of an offense or increased a fine amount but retained the same statutory maximum penalty. For the existing offenses amended in ways not substantively relevant to the sentencing guidelines, some non-substantive changes to COMAR 14.22.02.02 and the Guidelines Offense Table are nevertheless necessary (e.g., changes to offense title descriptions).

b. Proposed classification of common law forgery (Action item)

Dr. Soulé referred the Commission to the memorandum, “*Proposed Classification of Common Law Forgery*.” He noted that recently, an assistant state’s attorney contacted MSCCSP staff to inquire how to calculate the guidelines for the offense, common law forgery. In this instance, the state’s attorney had charged a defendant under common law for the forgery, or counterfeiting, of a welfare benefits application. Dr. Soulé stated that Maryland’s Criminal Law Article provides penalties for the creation (or forgery) of and use (or uttering) of certain counterfeit documents. In Maryland, forgery and uttering are also prohibited under common law. Dr. Soulé stated that the Court of Appeals in Maryland has held that when a statute is enacted, common law still applies where the statute was not intended to cover the whole field, as is the case in forgery and uttering, or was not intended to repeal the common law (*Reddick v. State*; *Green v. State*).

Dr. Soulé further noted that common law forgery is used in Maryland to charge offenses that involve counterfeiting private or public documents of legal significance other than those listed in CR, § 8-601 and CR, § 8-605, for instance a police report, a welfare benefits application, or other government document. Similarly, common law uttering is used in Maryland to charge offenses that involve the use of counterfeit documents not listed in CR, § 8-601. Dr. Soulé noted that both the creation of and use of a counterfeit document, as provided in the Criminal Law Article, carry a statutory maximum incarceration penalty of 10 years. The maximum penalty for a common law offense is limited only by the constitutional prohibition on cruel and unusual punishment.

In response to this issue, Dr. Soulé stated that the Guidelines Subcommittee recommends classifying common law forgery and uttering as seriousness category V offenses, which is the seriousness category classification for statutory forgery and uttering, and adding the corresponding three offenses specified in the memorandum to the offense table.

Delegate Moon questioned whether a defendant charged with common law forgery is a subject to a life sentence.

Judge Wilson responded that technically speaking, yes, but practically speaking, he does not think that has ever happened. He noted that common law does not put limits on sentences as statutes do, which is one of the main purposes of codification as it brings certainty to both the elements of an offense and its penalty. He further noted that every



sentence is controlled by the Eighth Amendment, which prohibits any cruel and unusual punishment, and that the court has stepped in with regard to creating judiciary sentencing caps.

Dr. Johnson asked if the guidelines classify most common law offenses. Dr. Soulé responded that the Commission has classified the more commonly charged common law offenses. He noted that the staff had originally proposed a rule to create some catchall language about classifying offenses and matching them with their most analogous statutory counterpart. However, the Guidelines Subcommittee ultimately decided that the rule was not as clear-cut as it may seem.

The Commission adopted the Guidelines Subcommittee's recommendation to add these offenses to the offense table and assign a seriousness category of V, without opposition.

c. Proposed classification of previously unclassified offenses (Action item)

Dr. Soulé referred the Commission to the memorandum titled "*Proposed Classification of Unclassified Offenses*." Dr. Soulé noted that staff was recently contacted by practitioners regarding two offenses not contained in the Guidelines Offense Table. Both carry a maximum penalty greater than one year and as such, the Guidelines Subcommittee is recommending classification of the offenses by the Commission.

- i. Stored Wire and Electronic Communications Access, Crimes Involving— Obtaining, altering, or preventing authorized access to a wire or electronic communication while it is in electronic storage in an electronic communications system, 2<sup>nd</sup> or subsequent offense (CJ, §10-4A-02(b)(1)(ii))

Dr. Soulé noted that for a first violation of this offense, the maximum penalty is one year and/or \$250,000. The first violation is also not contained in the Guidelines Offense Table, but by guidelines rule, since the maximum penalty is one year or less, the offense is assigned a seriousness category VII. For clarity purposes, the Guidelines Subcommittee recommends also adding the first violation to the offense table when the second or subsequent violation is added.

The Commission adopted the Guidelines Subcommittee's recommendation to classify the offense as a property offense with a seriousness category of VI, and to also add the first violation to the Guidelines Offense Table, without opposition.

- ii. Estates, Crimes Against— Embezzle, steal, destroy, withdraw, impair, or alter a will, codicil, deed, land patent or assignment of a land patent, or a writ of administration, return, record, or part of any of those documents if as a result of that act the estate or right of any person may be defeated, injured, or altered (CR, §8-701)

The Commission adopted the Guidelines Subcommittee's recommendation to classify the offense as a property offense with a seriousness category of VI, without opposition.



d. Review of ABA pleas (Status report)

Dr. Soulé noted that the last item on the Guidelines Subcommittee report agenda is the review of American Bar Association (ABA) pleas. He noted that this topic originated initially due to the frequency of questions MSCCSP staff receives asking for clarity on what constitutes an “ABA plea.” The staff has also communicated with Judge Wilson that they receive multiple questions about the definition of an ABA plea. Accordingly, the topic was designated for review by the Guidelines Subcommittee.

Dr. Soulé noted that in the MSCCSP 2019 annual report that was released in January 2020, the Commission indicated its plan to review the definition of binding ABA pleas, with the understanding that the review would necessitate a fuller discussion of guidelines compliance and the longstanding ABA plea agreement compliance rule.

For purpose of review, Dr. Soulé explained that the ABA compliance rule indicates that sentences pursuant to an ABA plea agreement are deemed guidelines-compliant regardless of whether the initial sentence (defined as the sum of incarceration, credited time, and home detention) falls within the applicable guidelines range (COMAR 14.22.01.17). He noted that the MSCCSP adopted the ABA plea agreement compliance policy in 2001 to acknowledge that ABA plea agreements reflect the consensus of the local view of an appropriate sentence within each specific community. The rule was adopted after the Commission received feedback from the Judiciary indicating that sentences should be deemed “compliant” or consistent with the guidelines recommendation when both the State and the defense agree that a particular sentence, typically a below-guidelines sentence, is the most appropriate sentence given the particular circumstances of the specified case.

Dr. Soulé indicated that during the 2020 Legislative Session, House Bill 1458 (The Truth in Plea Deals Act of 2020) was introduced. HB 1458 provides that a sentence imposed pursuant to a plea agreement may not be deemed compliant with the sentencing guidelines unless the sentence falls within the actual sentencing guidelines range. Dr. Soulé reminded Commissioners that, as they may recall, in March 2020, the MSCCSP voted to oppose HB 1458. He noted that the MSCCSP submitted written testimony explaining the Commission’s vote to oppose the legislation. The testimony stated that the Commission already indicated its plan to review in 2020 the current definition of binding ABA pleas and the ABA plea agreement compliance rule.

Dr. Soulé stated that the testimony further noted that the Commission appreciates the legislature’s concerns and asked that the legislature defer to allow the Commission to systematically study the issue and report its findings to the legislature by the start of the 2021 General Assembly session. Dr. Soulé reported that HB 1458 did not advance out of the Judiciary Committee.

Accordingly, as promised in the MSCCSP’s testimony on HB 1458, the MSCCSP staff presented this issue for review to the Guidelines Subcommittee at its June meeting. The staff presented two questions for consideration:



1. Should the MSCCSP clarify the definition of an ABA plea agreement and/or provide specific examples of what constitutes an ABA plea?

Dr. Soulé noted that Maryland Rule 4-243 defines a binding plea in Maryland, and MSCCSP staff have engaged in conversations with judges and other criminal justice practitioners that suggest there is a difference in opinion regarding what constitutes an “agreement proposing a *particular* sentence, disposition, or other judicial action” (emphasis added).

2. Should sentencing events resolved by an ABA plea agreement continue to be deemed guidelines compliant, even if the sentence is outside of the recommended sentencing guidelines range?

Dr. Soulé noted that, during its June meeting, the Guidelines Subcommittee completed a robust discussion of this topic, including a thorough review of what constitutes an ABA or “binding plea.” Throughout the course of the meeting, it was noted by the Subcommittee that it would be helpful to research how the federal rule and other jurisdictions define a binding plea agreement and suggested that the federal definition may help inform the Commission’s definition. The Subcommittee asked staff to research how other jurisdictions define binding pleas and also to address the implications for a binding plea. Dr. Soulé noted that the staff will research this issue and that the Guidelines Subcommittee plans to revisit the matter at its next scheduled meeting.

## 7. Executive Director report – Dr. David Soulé

### a. Criminal justice community survey (Status report)

Dr. Soulé reported that on May 18, 2020, the MSCCSP distributed a survey to circuit court judges, prosecutors, public defense attorneys, and private criminal defense attorneys soliciting feedback on the Maryland sentencing guidelines and the activities of the MSCCSP. Two hundred and twenty-three survey invitations were distributed, and a complete survey response was received from 103 respondents equaling a completed survey response rate of 46.2 percent. He noted that according to SurveyMonkey.com, the typical response rate ranges from 20 to 30 percent for a customer service survey. Given that the MSCCSP has a relationship with the targeted audience, Dr. Soulé stated that the MSCCSP hoped for a slightly higher rate of completed surveys and noted that the Commission received a good response. He further noted that the rates were fairly well distributed with at least one response received from each region or judicial circuit in the majority of the recipient categories (judge, prosecutor, and defense attorney). Dr. Soulé noted that, due to the open-ended nature of many of the questions, the staff needs time to organize the responses into a more easily digestible format to share with the Commission. A report on the responses will be provided at a future meeting date.



b. Update on amendments to sentencing guidelines and guidelines offense table (Status report)

Dr. Soulé reported that amendments to the sentencing guidelines and offense table were adopted since the Commission last met in person in December. First, on February 1, 2020, the MSCCSP released Version 12.0 of the MSGM. Dr. Soulé noted that the MSGM 12.0 revises part A of the offender score to allow it to differ across offenses in multiple offense sentencing events; provides updated sample cases; and offers minor edits and formatting changes. An updated version of the Maryland Automated Guidelines System (MAGS, version 9.0) was also deployed on February 1 to coincide with the adoption date for the revision to part A of the offender score.

Next, Dr. Soulé reported that on April 1, 2020, the MSCCSP revised the MSGM and corresponding Guidelines Offense Table. Version 12.1 of the MSGM was amended to add a new offense that was passed during the 2019 Legislative Session. Dr. Soulé noted that the new offense, *committing a crime of violence against another person when the person knows or believes that the other person is pregnant*, was overlooked during the Commission's initial review of new and revised offenses. He further noted that the April 1 offense table also included the addition of CJIS codes for a number of offenses and other minor edits to the table.

Lastly, Dr. Soulé reported that on July 1, 2020, the MSCCSP released Version 12.2 of the MSGM and corresponding updates to the list of offenses in the Maryland Automated Guidelines System (MAGS). MSGM 12.2 clarifies the instructions for scoring the prior adult criminal record component of the offender score to indicate that certain military adjudications shall not be included. Additionally, the MSGM 12.2 classifies *conspiracy to commit a lawful act by unlawful means* by indicating that the seriousness category shall be the same as the most serious unlawful means by which the lawful act was to be accomplished. He also noted that on July 1, MAGS was updated to add a unique entry for *CDS distribution, PWID, manufacture, etc.– Fentanyl* to the list of offenses. Finally, three offenses with a maximum penalty of one year or less were added to the Guidelines Offense Table and the list of offenses in MAGS.

c. Update on guidelines webinar training (Status report)

Dr. Soulé reported that the MSCCSP had planned to conduct a guidelines webinar training on April 17, 2020. However, due to the restrictions surrounding the COVID-19 outbreak, staff were not able to access the necessary equipment to conduct the webinar. Accordingly, the guidelines webinar training was postponed. Dr. Soulé reported that the staff are working on arrangements to complete the webinar from the office and expect to announce a new webinar date soon.

d. Sentencing Snapshot report (Status report)

Dr. Soulé reported that the MSCCSP 2019 Annual Report, released this past January, indicated the Commission's intention to produce a series of topical, mini-reports to highlight statistics on topics of interest. These reports, which the staff has entitled,



*Sentencing Snapshot*, are intended to provide a closer look at figures not captured in the annual report in a shorter, easily digestible format.

Dr. Soulé noted that one of the goals of the MSCCSP is to aid in the public's understanding of sentencing policy and practices. Multiple respondents in the Commission's recent criminal justice community survey indicated a desire for easier access to the Commission's data. Given this feedback, the staff believes the *Sentencing Snapshot* will be well received by the criminal justice community. The staff plans to publish the *Sentencing Snapshot* on a periodic basis, beginning this summer. They will be distributed to all recipients on the MSCCSP listserv, which includes circuit court judges, administrative assistants and law clerks, state's attorneys and assistant state's attorneys, and public and private defense attorneys. Dr. Soulé noted that the *Sentencing Snapshot* will also be posted on the MSCCSP website for the public to access.

Senator Kelley noted that various legislative committees may also be interested in receiving the *Sentencing Snapshot*. Dr. Soulé responded that he would be happy to reach out to the legislature to inquire whether various committee members are interested in being added to the distribution list.

In the first four reports, Dr. Soulé reported that the staff plans to provide a closer look at average sentences for the different categories of crime. The first *Sentencing Snapshot* will focus on crimes of violence and firearms offenses. Subsequent reports will focus on other person offenses, drug offenses, and property offenses. Dr. Soulé stated that the staff are open to suggestions as to topics or statistics that Commissioners would like to see covered in these and future reports.

Dr. Johnson noted that if the Commission does eventually support a new analysis of racial disparity, it would be an interesting topic that could be summarized in one of the *Sentencing Snapshots*.

Dr. Soulé responded that the race topic might be somewhat complex to capture in a brief snapshot analysis, but noted that the staff will further assess the idea.

e. **FY 2021 budget and impact of COVID-19 (Status report)**

As the last agenda item under the Executive Director Report, Dr. Soulé provided an update on the fiscal year (FY) 2021 budget. He noted that due to the COVID-19 pandemic, the MSCCSP and all State agencies were required to submit a budget reduction proposal for FY 2021. Dr. Soulé noted that while reducing operating costs would have been preferable, the Commission's operating costs are already quite low. Consequently, he made the difficult decision to suspend the graduate research assistant position (i.e., policy analyst position) for FY 2021. The policy analyst completes many duties critical to the operation of the Commission.

Senator Kelley proposed alternative methods in hopes of raising funds to put towards a stipend for the policy analyst position. Judge Wilson responded that Dr. Soulé could



certainly reach out to the University of Maryland to explore any potential funding options for the position.

**8. Date, Time, and location for remaining 2020 meetings**

Judge Wilson reminded Commissioners of the dates for the remaining 2020 meetings. The remaining 2020 meetings will be held as follows:

September 15, 2020, 5:30 pm, Maryland Judicial College  
December 8, 2020, 5:00 pm, House of Delegates Office Building

As suggested by Judge Avery, Judge Wilson noted that the Commission will consider holding a special meeting to continue the discussion on race and the work of the MSCCSP.

**9. Old Business**

None.

**10. New business and announcements**

None.

The meeting adjourned at 7:00 pm.