

**Maryland State Commission on Criminal Sentencing Policy**  
**February 9, 1998**

**Commission Members in Attendance:**

The Honorable John F. McAuliffe, Chairperson  
Judith R. Catterton, Esq.  
Ms. Roberta Roper  
Walter E. Chase, Sr.  
Dr. Charles Wellford  
LaMonte E. Cooke  
Senator Delores G. Kelley  
Delegate Joseph F. Vallario, Jr.  
Delegate James M. Harkins  
Senator Christopher McCabe  
The Honorable Howard S. Chasanow  
The Honorable Joseph H.H. Kaplan  
The Honorable Alexander Wright, Jr.  
Carolyn Quattrocki, Esq.  
Stephen E. Harris, Esq.  
Secretary Stuart Simms  
Marna McLendon, Esq.  
Adam Gelb  
The Honorable Andrew L. Sonner, Consultant

**Staff Members in Attendance:**

Kim Hunt, Executive Director  
Claire Souryal, Research Director  
Pamela Harris

**Announcements**

The Chairperson reminded the Commission members that the Commission was due to expire on Dec. 31, 1998. He alerted the members to his request to extend the life of the Commission through July 1, 1999, a request that had been discussed with subcommittee chairperson but not with the full Commission. Judge McAuliffe explained that the timetable for the Commission report would not be affected by this request. The purpose of the request was to allow the Commission to maintain a presence during the 1999 General Assembly session when its proposals would be considered.

The Chairperson noted that a new list of committee assignments was forthcoming. Carolyn Quattrocki agrees to be vice chairperson of the Corrections Options Committee, while Dr. Charles Wellford will be chairperson of Guidelines Development Committee.

The National Association of Sentencing Commissions will hold its annual meeting July 19-21 in Minnesota. More information will be available later, but some members will likely attend.

Judge McAuliffe introduced Patricia Cushwa, Chair of the Maryland Parole Commission, who was in

attendance. A brief summary of pending parole legislation followed.

## **Break the Cycle**

Adam Gelb, reported on progress of the Break the Cycle initiative, and provided a handout. Break the Cycle may be the nation's first attempt at full integration of public safety and public health operations to create a seamless system of drug testing, sanctions, and treatment.

Mr. Gelb reviewed the development of the initiative. He noted that Break the Cycle is the product of work by the Cabinet Council's Task Force on Drug Addicted Offenders, appointed by the Lt. Governor. The task force found problems in Maryland's drug treatment delivery including:

Unnecessary treatment

Incorrect or inadequate testing and treatment

Offenders inappropriately absent from scheduled treatment programs

Inadequate coordination and communication between state and local agencies

General lack of capacity to deliver needed services including especially drug testing

In response, the Task Force recommended 1) frequent testing of offenders, 2) escalating and swift sanctions for substance abusing offenders, and 3) treatment with swift response to absences from treatment.

Beginning April 1, 1998, Maryland's 24 local jurisdictions will be required to file Memorandums of Understanding (MOU) as part of the drug testing and treatment grant process. Included in the MOU's are local planning requirements regarding testing, treatment, sanctions and a behavioral contract to be attached to the Standard Probation Order, laying out the graduated sanctions following violations.

Mr. Gelb noted that one important role for the Commission was helping to conserve resources. By setting up standards for the front-end use of alternative programs such as drug treatment, the Commission can help ensure their viability and success.

Mr. Gelb noted that the Governor's proposed budget includes \$5 million in Break the Cycle funding, about one-half for testing and the rest for treatment and sanctions. Included in the testing funds are four regional drug labs. Treatment and sanctions include funding for day reporting, technology and treatment services.

Senator Kelley asked about risk assessment. Ms. Cushwa of the Parole Commission stated that they were looking at a couple of models, one using the LSI instrument developed in Canada. The Parole Commission is looking into New Jersey's practice, utilizing a risk instrument for both release and supervision. Also, work is presently being done at the Maryland Department of Probation on a combined addiction severity and public safety risk instrument.

The Chairperson mentioned to Ms. Cushwa that the Sentencing Commission was very interested in her work, and would follow their progress with interest.

Delegate Harkins asked if the Break the Cycle probation funds were "new" money or just shifted from another source. Mr. Gelb responded that it was new money for paraprofessionals, freeing probation officers to monitor and evaluate probationers.

Senator Kelley asked if the money follows the offenders to new programs if they are "graduated" up to

tougher sanctions. Mr. Gelb said not necessarily, but local savings would result on the front end, such as jail stays, as detention center visits were expedited. Mr. Harris mentioned the issue of probation officer discretion and due process, especially if loss of liberty results.

## **Truth in Sentencing**

Judge McAuliffe presented material from the U.S. Department of Justice Truth in Sentencing workshop, also attended by Adam Gelb. The Violent Offender Incarceration and Truth-in-Sentencing Incentive Grant Program, created under Title II, Subtitle A of the Violent Crime Control and Law Enforcement Act of 1994, assists the states in their efforts to remove violent offenders from the community and encourages states to implement truth-in-sentencing. This program, administered by the Corrections Program Office (CPO), Office of Justice Programs (OJP), U.S. Department of Justice, provides funding to states as formula grants to build or expand correctional facilities and jails to increase secure confinement space for violent offenders. Judge McAuliffe also mentioned that building facilities that would not house violent offenders (medium security facilities for example), but frees space in maximum-security facilities, is allowed.

Judge McAuliffe reported in FY 1997, all states, the District of Columbia, and the Territories qualified for Violent Offender Incarceration funding and 27 states qualified for Truth-in-Sentencing funds. He indicated that Maryland received almost \$5 million in Violent Offender Incarceration funding since April, 1997. This funding is given under the provisions of Tier I and Tier II. Maryland presently does not appear to qualify for Tier III funding, and could expect approximately one million dollars in additional funds if qualified.

The Chairperson explained that qualifying for Truth in Sentencing incentive funding requires that, for the four categories of Part I violent crime, states with determinant sentencing have offenders serve 85 percent of sentence imposed, average 85 percent, or enact legislation now that will achieve this result within three years. States with indeterminate sentencing must have offenders serve 85 percent of the maximum prison term allowed by law, or 85 percent of the state's sentencing and release guidelines (the "Utah exception"). Judge McAuliffe estimated that approximately 9 million dollars in federal funds could be available to Maryland if we qualify under the truth in sentencing requirements.

The Chairperson said that to receive additional funding through the year 2000, Maryland would need to enact legislation by July, 1999.

Senator Kelley pointed out that this decision is not just economic, but also philosophical. The dollar savings are relatively small considering that funds are only available for capital construction, not operating expenses. Further, potential savings may result from community options including risk assessment and graduated sanctions.

## **Review of Current Guidelines**

Dr. Kim Hunt, Executive Director of the Commission, reviewed the previous testimony given before the Commission concerning the current Maryland Sentencing Guidelines. The objective of his presentation, was to clarify current conditions as a means of identifying the next steps.

The goal of Maryland Guidelines includes reducing unwarranted variation and articulating explicit sentencing policy. Previous research has demonstrated that the current guidelines have made progress in reducing unwarranted disparity. Dr. Hunt cited a study from the University of Maryland (Griffin, 1994) which documented this progress. The study involved almost 2,000 pre-guidelines and 80,000 post-guidelines cases. The conclusion reported that unwarranted disparity was reduced by guidelines, though some disparity remains.

Next, Dr. Hunt reviewed judicial compliance with the current Maryland Guidelines, which were designed to

be descriptive of current sentencing philosophy and practice. Using previous testimony and reanalysis of guideline's cases, Dr. Hunt noted that the overall compliance rate of 55 percent from 1987 through 1996. However, the compliance for property crime averaged 65 percent, while compliance for recommendations on the person offense and drug offense matrixes were much lower, 57 percent and 49 percent respectively. Most departures represented sentences below the guidelines.

Dr. Hunt noted that even within a single matrix, compliance varied greatly. For example, compliance for cocaine possession was 69 percent, while compliance for cocaine distribution was 42 percent. In part, it appeared that the departures were greatest where the guideline's minimum recommendation required some period of incarceration.

Judge Kaplan observed that compliance is affected when offenders are charged with more serious crimes than the facts of the case support. This occurs, he explained, in cases involving possession with intent to sell drugs when the amount really supports possession for personal use rather than possession with intent to sell.

Dr. Hunt stated that compliance varied substantially by circuit. Compliance was highest in Circuit 1 (Eastern Shore) at 69 percent and lowest in Circuit 8 (Baltimore City) at 43 percent. Compliance in Circuit 7, which includes Prince George's, Calvert, Charles, and St. Mary's counties, also had higher than average compliance with 65 percent. Compliance rates for the remaining circuits were between 55 and 58 percent. For sentences not in compliance with the guideline's recommendation, mitigated sentences outweighed aggravated sentences, except in Circuits 1, 2, and 4, representing Maryland's eastern-most and western-most counties.

Dr. Hunt explained that compliance rates just above 50 percent are surprising given the guideline system's stated goal of being descriptive of actual practice.

Returning to the testimony regarding disparity, the current definition of unwarranted disparity is the differences in sentences attributed to the race, gender, ethnicity, religion, marital status and/or beliefs of the offender.

Dr. Wellford explained that race and ethnicity may be standing in as proxies for factors that differentially affect Blacks and Hispanics but are not available to the researcher, factors such as income and employment, for example.

Judge Chasanow pointed out that it is important to look at these cases more carefully if possible, including the bail decision. Offenders that cannot make bail and are held awaiting trial, if eventually convicted, may be sentenced to time served. Another offender that does make bail, may be sentenced to probation. Both offenders are placed on probation after sentencing in this example, but one has been incarcerated before sentencing.

Judge Wright also explained that differential treatment of Hispanics may be related to language barriers. The problem may have more to do with lack of court interpreters than with the sentencing decision itself.

Dr. Hunt then reviewed the Citizen Opinion Survey conducted by the University of Maryland. 800 Maryland adults were interviewed by phone following state-of-the-art survey methodology. Margin of error was 3-5 %. About one in four survey respondents report crime victimization of themselves or family in past 5 years, and one-fourth of those were violent crime (Table 3).

Concerning the criminal justice system, two-thirds of respondents rate the Maryland court system as fair or good (show Table 8). However, one in five rates it poor. Only about one-half of the respondents rate the prison system as fair or good. By contrast, over three-quarters of respondents rate police as fair or good. Notably a large percentage of citizens reveal that they do not know how well either the courts or prisons are doing (12 and 22 percent respectively).

Concerning what citizens see as causes of crime, Marylanders believe the main causes of crime are related to moral issues or illegal drug use (Show Table 5). Substantially further down the list is police under-capacity (eighth place) and judicial leniency (ninth place).

Citizens are not always accurate in their beliefs about criminal sentencing. For example, an overwhelming majority think violent offenders should be sent to prison almost all the time (Table 10, 77.4%) but most think violent offenders are actually sent to prison one-half the time or less (Table 10, 59.1%). Actually, for most serious violent crimes, the percentage of offenders receiving incarceration is 85 percent or more (Table 10b).

## **Guidelines Committee**

Dr. Wellford assessed the findings to date from the Guidelines Development Committee. Dr. Wellford said the Committee has examined classification of offenses, the calculation of an offenders score, and the structure and number of sentencing matrixes currently utilized. In Dr. Wellford's view, the review has concluded that Maryland's approach is sound and provides a firm foundation for the development of the Commission's work. The basic offense classification is reasonable and consistent with existing legislation. The basic offender score is sound. Further, the structure of matrixes is appropriate.

Committee members mentioned some areas requiring further consideration. These include: (1) the location of certain offenses in the offense scoring hierarchy, including for example the offense of child sexual abuse; (2) more attention should be given to aggravating and mitigating circumstances; and (3) scoring multiple count events. These more technical aspects appear to be handled within the current structure of guidelines. The staff will work with the Guidelines Committee to address current recommended sentences in the matrixes, estimates of the correctional impact of any changes in recommended sentences, and to assess the impact of the adoption of structured sentencing as opposed to our current voluntary system.

## **Time Served on Sentence**

After reviewing the progress of the Guidelines Development Committee, Dr. Wellford stated that the Research Committee had initially been asked to complete several tasks, one of which was a study of time-to-serve. The time-to-serve estimates generated by the study would then be used in the simulation model to predict prison populations.

Dr. Wellford distributed copies of the presentation materials. He thanked the Department of Public Safety and Correctional Services for their invaluable assistance in collecting the data. The presentation began with a description of the study methodology. Dr. Wellford described the criteria for selecting the sample. He noted that the sample had been selected prior to modifications in parole eligibility legislation that mandated 50% time-to-serve for violent offenses. In addition, he pointed out that data were unavailable for 16% of the samples combined because they had been incarcerated in a local facility and 12% of the samples combined because had still been incarcerated at the time of data collections.

Dr. Wellford then summarized the study findings. The first overhead presented the average and median time-served for three samples of offenders (person, property, and drug offenders). On average, both person and property offenders served 55% of the total imposed sentenced. Drug offenders served 50% of the total imposed sentenced on average. The average and median time-served values were quite similar.

Dr. Wellford then described how time-served varied by the type of release (mandatory, parole, and court release). As expected, individuals released via mandatory release served the greatest percentage of the total imposed sentence (ranging from 64% for person offenders to 71% for drug offenders). Individuals released on parole served between 40% (drug offenders) and 48% (person offenders) of the total sentence. Lastly,

individuals released by the court served between 19% (drug offenders) and 26% (both person and property offenders).

Dr. Wellford pointed out that time-served for the sentence of interest (target sentence) could be confounded with time-served stemming from prior parole/probation revocations or subsequent convictions. A comparison of time-to-serve among individuals who served time for the target sentence only and individuals who served time for the target sentence plus additional time did not reveal substantial differences. Individuals who served time for the target sentence only generally served a slightly smaller percentage of the total sentence.

Next, Dr. Wellford examined whether time-served varied by the seriousness of the offense (Offense score) or the severity of the prior record of the offender (Offender score). Individuals in each sample were categorized into the following groups: (1) "low" or "high" Offense score; and (2) "low" or "high" Offender score. Dr. Wellford noted that due to sample size constraints only two groups (low and high) could be constructed. By and large, the analysis revealed that individuals with "high" Offense or Offender scores served a slightly greater percentage of their total sentence than persons with "low" Offense or Offender scores, with one exception. Drug offenders with "low" and "high" Offense scores served approximately the same percentage of the total imposed sentence.

Dr. Wellford concluded the presentation with a comparison of time-to-serve among several groups: (1) inmates held in local facilities; (2) person, property, and drug offenders sentenced to between 1 and 10 years; and (3) 643B violent offenders. The comparison revealed that offenders who served time in local facilities appeared to serve the greatest proportion of the total sentence (70%-75% according to Department of Public Safety and Correctional Services estimates). Results from the present study revealed that time-to-serve among individuals sentenced to between 1 and 10 years were similar, ranging from 50% for drug offenders to 55% for property and person offenders. Lastly, the Department of Public Safety of Correctional Services calculated that individuals convicted of 643B violent offenses (murder, kidnapping, rape/sex offenses, robbery, assault with intent to rape, rob, or murder, and arson) served 60% of the sentence on average.

Senator McCabe questioned whether the time served estimates applied to persons convicted of murder. [Individuals convicted of Murder were not included in the present study because sample membership was restricted to persons sentenced to between 1 and 10 years. The best estimate of time-served for murder was generated by the Department of Public Safety and Correctional Services (DPSCS) as part of their report on prison population growth under a hypothetical system of 85% truth-in-sentencing. The DPSCS estimate of time-served for murder convictions was 57.5%.]

At the conclusion of the presentation, Judge Sonner questioned whether persons who were still incarcerated at the time of data collection and were therefore not included in the present study were more likely to have been convicted of more serious person offenses. Dr. Wellford answered that persons who were incarcerated at the time of data collection were equally distributed among person, property, and drug offenses.

Judith Catterton, Esq. asked whether individuals who served time Patuxent were included in the study since they would be subject to different release practices. Dr. Wellford responded that they would have been included.

### **Robert C. Bonsib, Esq.**

Mr. Bonsib wished to relay lessons learned from his experience, both as a prosecutor and a defense attorney, with both the State and Federal Guidelines. He said that sentencing should be conducted by independent, objective arbiters, as is the case today with Maryland sentencing under judges with voluntary

guidelines.

Under the Federal guidelines, sentencing by impartial arbiter has been replaced by control over sentencing by advocates representing one side in the adversarial system of justice. Mr. Bonsib explained that prosecutors and police control sentencing in the federal system, since discretion that used to be held by Federal judges simply devolved to the prosecution. The power to select the charge and the method of investigation are now the important aspects of federal sentencing. He gave an example concerning undercover drug cases.

Regarding truth-in-sentencing policies, Mr. Bonsib said he does not object to simplifying the connection between the announced sentence and the actual time served on incarcerative sentences. However, a major educational campaign is required to alert everyone to the change.

Mr. Bonsib stated that regarding presumptive or structured sentencing, his concern is that adjustments to sentences always have the effect of increasing sentences, never decreasing them.

Judge Sonner asked how to restrict prosecutorial discretion under presumptive sentencing. Mr. Bonsib responded that he had no knowledge of an effective method to restrict prosecutorial discretion.

Dr. Wellford asked if Mr. Bonsib was aware of prosecutorial discretion in states with presumptive sentencing. He responded that he was not. Ms. McClendon mentioned the right to appeal the sentence as important to structured sentencing. Ms. Catterton noted the problem of mandatory minimum sentencing.

### **Timothy F. Maloney, Esq.**

Mr. Maloney explained that he wished to devote most of his time to discussing correctional alternatives. He explained that the criminal justice outcomes are affected by the availability of programs and levels of funding.

One of the sources of disparity involves pretrial services. The state has not had a substantial role, except in Baltimore City. As a result, some localities offer substantial pretrial programming, and others little at all. Mr. Maloney advocates a more substantial role for the state in encouraging pretrial programming. State leadership is justified given the very large capital construction outlay for local jails.

An effective statewide capital planning process for jail construction requires analysis pre-trial. Urinalysis and screening of offenders would improve the use of jail resources.

Regarding parole release, Mr. Maloney said that he was not bothered by discretionary parole release but by cases of mandatory release. These releases represent people who could not effectively present themselves by behavior, participation in prison programs, or otherwise as fit for release. Mr. Maloney suggested more emphasis be devoted to these offenders, and to their post-release plans. Regarding correctional alternatives, Mr. Maloney stated that fear of risk leads the actors in the criminal justice system to hold many inmates in traditional incarceration when some form of transition to the community is needed prior to release.

Mr. Maloney reminded the Commission that many task forces fail to provide specific budgetary recommendations and cost analysis to their recommendations. He urged the Commission to attach dollar amounts to its recommendations.

Regarding restitution and restorative justice, Mr. Maloney said the criminal justice system could learn from child support enforcement. For example, child support enforcement reduces the high level of uncollected fees through wage withholding and license revocation.

Mr. Maloney reiterated earlier criticism of the Federal Guidelines.

Mr. Maloney spoke in favor of retaining geographical disparity in sentencing, as this reflects the sentiments of different communities regarding crime and punishment.

Sec. Simms asked the speaker if he had suggestions for funding alternative sanctions in light of the difficulties faced by alternatives in light of current capital budget process rules. Mr. Maloney suggested two capital budgets, one for hard cells and one for operating budget changes that reduce capital budgets. This might address the imbalance between the capital budget and the operating budget.

Mr. Gelb asked the speaker how "net widening", the practice of filling alternative programs with lower level offenders, thereby increasing costs and doing nothing to relieve prison crowding, would be addressed without presumptive guidelines. The speaker said that there is no way around the fact that if you build the beds, those beds will be filled, and no advanced reservation system is likely to be effective.

The meeting was then adjourned.