



Minutes

Maryland State Commission on Criminal Sentencing Policy
Judiciary Training Center
Annapolis, MD 21041
June 30, 2009

Commission Members in Attendance:

Honorable Howard S. Chasanow, Chair
Delegate Curt S. Anderson
Shannon E. Avery, Esquire, *representing Secretary Gary D. Maynard*
Chief Marcus L. Brown
Leonard C. Collins, Jr., Esquire
Richard A. Finci, Esquire
Senator Delores G. Kelley
Laura L. Martin, Esquire
Kate O'Donnell, Esquire, *representing Attorney General Douglas F. Gansler*
Delegate Joseph F. Vallario, Jr.
Charles F. Wellford, Ph.D.

Staff Members in Attendance:

Jessica A. Rider
Stacy Skroban Najaka, Ph.D.
Nicola Smith-Kea
David Soulé, Ph.D.

Visitors:

Claire Rossmark, Department of Legislative Services

1. Call to order

Judge Chasanow called the meeting to order.

2. Roll call and declaration of quorum

The meeting began at 5:35 p.m. when quorum was reached.

3. Approval of minutes, May 5, 2009 meeting

The minutes were approved as submitted.

4. Report from the Executive Director – Dr. David Soulé

Dr. Soulé reminded the Commission of the procedure for adoption of the new policies regarding the collection of sentencing guidelines worksheets for reconsiderations and probation revocations. The proposed changes have been submitted to the AELR Committee and the Division of State Documents. The new regulations will be adopted effective September 1, 2009.



Dr. Soulé asked that any Commissioners interested in attending the National Association of Sentencing Commissions 2009 annual conference to please let him know at the end of today's meeting.

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

Dr. Wellford presented the report of the Guidelines Subcommittee.

A. Review and classification of new and/or revised offenses from 2009 Legislative Session

Dr. Wellford explained that the Subcommittee makes a recommendation on the classification of seriousness category by examining offenses that are comparable with regard to the nature of offense, the type of offense (person, drug, property), and the statutory maximum penalty.

Dr. Wellford reviewed the table prepared by staff on recommended seriousness categories for new and/or revised offenses passed during the 2009 Legislative session.

- i. HB 539/SB 850 – Weapons Crimes – In General. Illegal possession of electronic control device (e.g., stun gun, taser) while committing a separate crime of violence (CR, §4-109(e)(2))
 - By unanimous vote, the Commission adopted the proposed seriousness category of VI for this offense.

Theft, Crimes Involving.

The Legislature increased the maximum property value for misdemeanor theft from \$500 to \$1,000. It also created three tiers of felony theft:

- When the value of the item stolen is between \$1,000 and \$10,000, maximum penalty is 10Y/\$10,000
 - When the value of the item stolen is between \$10,000 and \$100,000, maximum penalty is 15Y/\$15,000
 - When the value of the item stolen is \$100,000 or more, maximum penalty is 25Y/\$25,000.
- ii. HB 66 – Theft, Crimes Involving. Misdemeanor theft or theft scheme, less than \$1,000 (CR, §7-104(g)(2))
 - By unanimous vote, the Commission decided that the seriousness category should remain a VII.
 - iii. HB 66 – Theft, Crimes Involving. Misdemeanor theft or theft scheme, less than \$1,000, third and subsequent (CR, §7-104(g)(4))
 - By unanimous vote, the Commission decided that the seriousness category should remain a VI.
 - iv. HB 66 - Theft, Crimes Involving. Misdemeanor theft or theft scheme, at least \$1,000 but less than \$10,000 (CR, §7-104(g)(1)(i))
 - By unanimous vote, the Commission decided that the seriousness category should remain a V.



- v. HB 66 - Theft, Crimes Involving. Misdemeanor theft or theft scheme, at least \$10,000 but less than \$100,000 (CR, §7-104(g)(1)(ii))
- By unanimous vote, the Commission adopted the proposed seriousness category of IV for this offense.

- vi. HB 66 - Theft, Crimes Involving. Misdemeanor theft or theft scheme, \$100,000 or greater (CR, §7-104(g)(1)(iii))
Dr. Wellford noted that the Subcommittee discussed this particular offense in more detail as the recommended guidelines for someone who commits this type of offense with no prior record would be probation to two years. The Subcommittee decided to stick with the principle of comparability, and ultimately recommended that this offense be a seriousness category III.

Mr. Finci inquired as to whether the Commission currently has any useful data in regards to monetary amounts involved in theft cases. Dr. Soulé indicated that the data is so infrequently reported that it is not fully representative of the total number of cases that involve large amounts. Dr. Soulé pointed out that with automation, the amount of monetary loss can be a forced field and that the increased data will provide the Commission with more information from around the state.

Ms. O'Donnell indicated that she felt that the guidelines of probation to two years are too low for this particular offense, based on cases that she has seen. She pointed out that individuals who have stolen in the vicinity of two million dollars are receiving five to ten years.

Delegate Anderson inquired if the Subcommittee considered recommending a seriousness category II.

Dr. Wellford again stressed the principle of comparability and that in searching for comparable offenses, the offenses that most closely resemble this offense are a seriousness category III. Dr. Wellford indicated that a seriousness category II could be reasonable, but he cautioned that if the Commission voted to make this offense a seriousness category II to avoid probation as the lower range of the guidelines, it would not be consistent with the principles used in making the recommendations. Dr. Soulé pointed out that currently there are no seriousness category II property offenses.

Delegate Anderson provided more information regarding the legislative intent behind HB 66. He indicated that HB 66 dictated a change in the felony threshold from \$500 to \$1,000, a step that would seem to favor defendants. However, this change was welcomed by State's Attorneys who wanted to keep these smaller theft cases in district court. In return for what looked like a move toward the defendants, stiffer penalties were assigned for the more serious theft offenses. The expectation was that a person convicted of theft over \$100,000 should go to jail and it seems inconsistent with the intent of the Legislature for there not to be a way to include that in the guidelines. Accordingly, Delegate Anderson proposed that theft over \$100,000 should be assigned a seriousness category of II.



Mr. Finci asked for it to be noted that the Commission should revisit these categorizations after sufficient data becomes available. Judge Chasanow agreed and indicated it would be a good idea to review compliance for all cases and to complete a detailed look on a cell-by-cell basis. Judge Chasanow asked the Guidelines Subcommittee to consider this task.

A motion was made to amend the seriousness category for this offense from a III to a II.

- By a 6-2 vote, the Commission adopted the seriousness category of II for this offense.

- vii. HB 9/SB 99 – Obscene Matter. Possession of visual representations of persons younger than 16 years old engaged in certain sexual acts, 1st offense (CR, §11-208(b)(1))
The Legislature increased the maximum sentence for possession of child pornography, 1st offense from 2 years to 5 years.
- By unanimous vote, the Commission adopted the proposed seriousness category of V for this offense.
- viii. HB 9/SB 99 – Obscene Matter. Possession of visual representations of persons younger than 16 years old engaged in certain sexual acts, subsequent (CR, §11-208(b)(2))
The Legislature changed child pornography, subsequent offense from a misdemeanor to a felony and increased the maximum sentence from 5 years to 10 years.
- By unanimous vote, the Commission adopted the proposed seriousness category of IV for this offense.
- ix. HB 267 – Kidnapping and Related Crimes. Abduction—child younger than 16 years old by relative outside State 30 days or less (FL, §§9-305(a), 9-307(b))
The Legislature increased the statutory maximum for this offense from 30 days to 1 year.
- By unanimous vote, the Commission decided that the seriousness category should remain a VII.
- x. HB 267 – Kidnapping and Related Crimes. Abduction—child younger than 16 years old by relative outside State more than 30 days (FL, §§9-305(a), 9-307(c))
The Legislature increased the statutory maximum for this offense from 1 to 3 years.
- By unanimous vote, the Commission adopted the proposed seriousness category of VI for this offense.
- xi. HB 267 – Kidnapping and Related Crimes. Abduction—International parental kidnapping (FL, §§9-305(b), 9-307(d))
The Legislature increased the statutory maximum for this offense from 3 to 5 years.
- By unanimous vote, the Commission decided that the seriousness category should remain a V.



- xii. HB 583/SB 304 - Fraud, Financial Crimes Against Vulnerable Adults. Obtain property of vulnerable adult by deception, intimidation, or undue influence, less than \$500 (CR, §8-801(c)(2))
The Legislature expanded the protected individuals to include individuals at least 68 years old.
- By unanimous vote, the Commission decided that the seriousness category should remain a VII.
- xiii. HB 583/SB 304 - Fraud, Financial Crimes Against Vulnerable Adults. Obtain property of vulnerable adult by deception, intimidation, or undue influence, \$500 or greater (CR, §8-801(c)(1))
The Legislature expanded the protected individuals to include individuals at least 68 years old.
- By unanimous vote, the Commission decided that the seriousness category should remain a V.
- xiv. SB 151 and HB 560 – Hate Crimes. Crimes against religious property, institutions, or personal property because of race, religious belief, sexual orientation – involving misdemeanor (CR, §10-306(a))
The Legislature expanded the protected classes under the State’s hate crimes law to include homeless persons and a person’s gender (SB 151), as well as disability (HB 560).
-By unanimous vote, the Commission decided that the seriousness category should remain a V.
- xv. SB 151 and HB 560 – Hate Crimes. Crimes against religious property, institutions, or personal property because of race, religious belief, sexual orientation – involving separate felony generally (CR, §10-306(b)(1))
The Legislature expanded the protected classes under the State’s hate crimes law to include homeless persons and a person’s gender (SB 151), as well as disability (HB 560).
-By unanimous vote, the Commission decided that the seriousness category should remain a IV.
- xvi. SB 151 and HB 560 – Hate Crimes. Crimes against religious property, institutions, or personal property because of race, religious belief, sexual orientation – involving separate felony resulting in death (CR, §10-306(b)(2))
The Legislature expanded the protected classes under the State’s hate crimes law to include homeless persons and a person’s gender (SB 151), as well as disability (HB 560).
-By unanimous vote, the Commission decided that the seriousness category should remain a III.

B. Review of calculation of prior adult criminal record – Should a Not Criminally Responsible (NCR) plea be counted as a prior adjudication of guilt?

Dr. Wellford referred the Commissioners to the memorandum on whether prior adjudications of “not criminally responsible” (NCR) should be considered in calculating the offender score. This issue was raised by one of the Commissioners at the May 5, 2009



meeting. During that meeting, the Commission concluded that the Guidelines Subcommittee should examine the issue more thoroughly in order to determine what, if any, clarifying language should be added to COMAR and/or the Guidelines Manual. Dr. Wellford noted that the Guidelines Subcommittee held a lengthy discussion on this issue. Since there was no data available to review on this particular subject, the Subcommittee referenced a summary of legal holdings regarding the use of NCRs to guide its debate. Ultimately, the Subcommittee was guided by the notion that no punishment should be attached to a prior NCR finding. Accordingly, the Subcommittee voted 3-0-1 (1 abstention) to recommend that prior adjudications of *not criminally responsible* (NCR) not be counted when calculating prior criminal history.

The Commission reviewed this recommendation. Some Commissioners felt that because the defendant was found not criminally responsible, there was no circumstance under which that prior finding should be held against the defendant. Other Commissioners noted that from a public safety perspective, the guidelines should reflect the defendant's prior guilty finding, especially if the NCR finding was related to a crime of violence or other person offense. Ultimately, the Commission did vote on the Subcommittee's original recommendation and the motion passed. However, there was no vote on whether specific clarifying language should be added to COMAR and/or the Guidelines Manual. There was discussion about adding language to the Guidelines Manual to note that a prior NCR finding may be considered as an aggravating reason to depart above the recommended guidelines range. However, Dr. Soulé noted that the Guidelines Manual does not currently provide a list of reasons for why a judge may depart from the guidelines. Rather, it simply provides a list of the most commonly cited reasons for departure. After further discussion, the Commission voted to send the issue back to the Subcommittee for further review. The Subcommittee was asked to examine how this issue is addressed in the federal system as well as in our neighboring jurisdictions. Additionally, the Subcommittee was asked to consider whether any specific clarifying language should be added to COMAR and/or the Guidelines Manual.

7. Date, time, and location for the next Commission Meeting

The next meeting was set for Monday, September 14, 2009 at the Judiciary Education and Conference Center in Annapolis, MD. The Commission will provide dinner and it will be made available starting at 5:00 p.m. The last meeting of the year was set for Tuesday, December 8th at 5:00 p.m. at the House Office Building, Judiciary Committee Hearing Room in Annapolis, MD. The regular meeting will be followed by the annual Public Comments Hearing. The Public Comments Hearing will begin at 6:30 p.m. immediately following a break for dinner at 5:45 p.m.

8. Old Business

There was no old business to address.

9. New Business and announcements

Dr. Soulé introduced Nicola Smith-Kea, a graduate student in the Department of Criminology & Criminal Justice at the University of Maryland. Nicola is the National Association of Sentencing Commissions (NASC) 2009 annual conference coordinator.



10. Adjournment

The meeting adjourned at 7:05 p.m.