

Maryland State Commission on Criminal Sentencing Policy
House Judiciary Committee Room
Low Office Building, Room 121
Annapolis, Maryland
August 21, 2000

Commission Members in Attendance:

Honorable Andrew L. Sonner
Honorable Marna McLendon
Domenic R. Iamele, Esquire
Russell P. Butler, Esquire
Colonel David B. Mitchell
Charles F. Wellford, Ph.D.
Director Barry L. Stanton
Arthur A. Marshall, Jr., Esquire
Honorable Arrie W. Davis
Honorable Timothy J. Doory
Honorable Delores G. Kelley
Honorable Clarence M. Mitchell IV
Honorable Joseph F. Vallario, Jr.
Amy Brennan, Esquire, for Stephen E. Harris, Esquire
Robert Gibson for Stuart O. Simms

Staff Members in Attendance:

Michael Connelly, Ph.D.
Claire Souryal-Shriver, Ph.D.
Douglas J. McDonald, J.D.
Kate Wagner
Jennifer Cox

Visitors:

Dennis J. Hoyle, Lt. Governor's Office
Al Cohen, Prince George's County Correctional Center
Guy Cherry, Office of Policy Analysis, Department of Legislative Services
Victoria Barron, Office of Policy Analysis, Department of Legislative Services
Brian M. Schleiter, *The Capital*

1. **Call to order**
2. **Roll call and declaration of quorum**
3. **Approval of minutes, June 2000 meeting**

Dr. Connelly announced the additions that had been made to the minutes. The minutes were approved.

4. **Report from Executive Director**

Dr. Connelly introduced the information in each Commissioner's packet. It included a new directory

of Commissioners and other participants, research on criminal justice and sentencing issues, a Weed and Seed program evaluation done by the Oklahoma Criminal Justice Research Consortium, Dr. Blumstein's web site address for recent sentencing data, the monthly research and reports compilations, and an OJJDP publication offering case studies of individuals in the juvenile justice systems who have now been successful. Dr. Connelly announced that the staff office has moved into the third floor office and has a new address and a toll-free number.

Dr. Connelly announced that the budget had been submitted for Fiscal Year 2002 as well as the Managing for Results document. The total budget is \$388,000, with \$150,000 from the recently approved Byrne grant, and the other \$238,000 from state funding. The 2002 budget reflects a proposed increase of \$4,000.

Senator Kelley noted a report by the Pennsylvania Sentencing Commission dealing with the struggles of this organization and the way that problems were handled. The report laid out the final protocol regarding the scope of their tracking, compliance of judges, data dissemination, and public access to information. Kelley stated that the Pennsylvania report might prove useful in helping the Commission to decide the scope of the Commission, how the Commission will interact with the public, and how the Commission will answer public questions. Dr. Connelly stated that the Outreach subcommittee would start to answer these questions. The plan for the subcommittee includes information on general education, training, and media relations. Connelly stated that he used the Pennsylvania report to form the documents that are ready for use. Kelley stated that it is important for the Commission to formalize the scope of data that will be tracked. Connelly agreed and stated that the Outreach subcommittee should be formed so the Commission can address these important issues. Judge Sonner stated that staff would circulate the Pennsylvania report to the entire Commission.

Dr. Connelly stated that the Commission's web site has been updated. The membership listing has been revised, minutes from the previous Commission meetings have been posted, and, within the next few weeks, more information will be available for public viewing. Connelly announced that he, Claire Souryal-Shriver, and Doug McDonald attended the National Association of Sentencing Commissions conference in Pittsburgh in early August. A great concern at the meeting was the issue of making sentencing data available to the public. The next annual NASC conference will be held in Kansas City. Connelly encouraged all interested Commission members to attend.

Dr. Connelly informed the Commission that he, Mr. McDonald, and Dr. Souryal-Shriver had met with several Chief Administrative Judges since the last commission meeting. The goal was to establish relationships with judges in all the circuits in order to open communication lines. Connelly also stated that staff has met with Patricia Cushwa and others at the Parole Commission, Families Against Mandatory Minimums, the Black Legislative Caucus, and staff from the Lt. Governor's office. Connelly announced that Dr. Wellford would be chairing an NIJ Discussion on sentencing research including the directors of the Maryland, DC, and Virginia sentencing commissions.

Dr. Connelly asked if the staff should come up with by-laws and bring them to the Commission to approve them or if a small number of Commissioners would rather produce them. Senator Kelley stated that staff should do this. Judge Sonner added that it should be worked on under the direction of a Commissioner, then brought to the entire Commission to be voted on. Dr. Connelly announced that the Ethics Commission requested that those Commissioners who have not already filled out a financial disclosure statement do so as soon as possible.

5. Subcommittee Reports

A. Corrections Options

Dr. Connelly thanked all the Commission members on both the Corrections Options Subcommittee and the Sentencing Guidelines Subcommittee for their hard work and participation. Connelly informed the Commission that a draft of the Corrections Options Authority proposal was included in the packet. He said that at the last Commission meeting, the concept of "immediate parole" was discussed in order to answer the question of the constitutionality of due process protections in the corrections options approach. Since then, the Subcommittee, its working group, and the Lt. Governor's office have worked together to come up with a plan that is more in line with what the Commission had discussed before the "immediate parole" idea. The Attorney General's office was sent the draft proposal, Judge Themelis' memo, a paper by the Lt. Governor's Office, and a paper by Doug McDonald dealing with liberty sanctions and due process. Stuart Nathan and Susan Howe Baron of the Attorney General's Office felt that any corrections options legislation must be carefully structured so that warrants could be dropped and lifted as done by the Parole Commission and that case managers could not put the offender in an incarcerative state. The latter must be done by a third party to address due process concerns. As long as these concerns are addressed, the proposal should be constitutional. Connelly noted that the proposal referred to non-violent offenders, who are eligible for the program, but the proposal also stated that domestic violence offenders would be candidates. The language of the proposal must be changed to "non-643B offenders" instead of "non-violent offenders" to correct this error. Also, the proposal may be changed to include one pilot program that is managed locally by a selected county and one that is managed by the state. If this happens, references to the "local department of correction" will be added to references to "DOC." Dr. Connelly asked the Commission to decide what to do with this proposal so that further action could be taken. The budget for the program will come from the Governor's Office of Crime Control and Prevention. If legislation is to be written, it must be done no later than next month. Judge Sonner asked if the Commission understood the proposal. Dr. Connelly then began to explain the organization of the Corrections Options Authority (COA). Connelly first made it clear that the proposal is for pilot programs in 1 or 2 counties, but no county has signed off yet. Senator Kelley again expressed concern that the Commission's bylaws should have a formalized protocol so that communication occurs with all stakeholders. Connelly stated that the working group of system practitioners had been working on this for 3 months, but it had not yet been presented to any county executives. He went on to explain the COA proposal. Offenders who fell into a sentence of 18 to 36 months on the sentencing guidelines would be eligible for the program. An assessment would be done for DOC at the local level. The Case Placement and Movement Board would act as a small parole commission, but local participation ensured that the conditions of the offender's release would be consistent with local values. This would be the due process body of the COA and would apply treatment and supervision plans to offenders. Each offender could move up and down between graduated sanctions.

Senator Kelley asked if the sentencing judge would send the offender directly to the COA. Kelley also was concerned that the subcommittee had gotten away from the original idea of graduated sanctions. Mr. Hoyle answered that this Case Placement and Movement Board is in fact the COA. Delegate Vallario stated that this is unclear. Vallario was under the impression that DOC would decide who would go to COA, and all offenders that were sentenced from 18-36 months would be eligible. Director Stanton repeated the offender progression through the COA. He explained that an offender traditionally sentenced from 18 to 36 months to DOC could now, under judicial discretion, be sentenced to COA. An assessment would be done at the local facility by a DOC caseworker. The planning councils would form guidelines and criteria for local participation. Delegate Vallario asked, if an offender came back for incarceration, would the offender come back to the county of residence or the county where the crime was committed? Director Stanton noted that this was a question the Commission needs to address,

keeping the fact in mind that every county might not want to participate in the COA program. Some counties/cities have more programs than others. Senator Kelley agreed that there is not symmetry across the state. She added that she thought the subcommittee was going to outline a statewide system of boilerplate contracts between the state and local service providers and compile model examples of possible menus of options at various locations and recommendations for regional service of correctional options. Director Stanton addressed the issue of proposing a pilot program. He said that every correctional administrator that he has talked to in the state does not want to participate in this kind of program. Stanton noted the distrust between state and local government that many correctional administrators feel. He said that in order to work out the "bugs" of the program, one or two counties should pilot the program. Then issues of memorandums of agreement, case management, supervision, and understanding could be discussed. Senator Kelley asked if the Commission wanted to enter this pilot program without some sort of model. Director Stanton answered that at this point, there were no models. Senator Kelley thought that there should be some infrastructure in place first. She added that she was surprised and disappointed that Prince George's County was selected because they have not historically shown a commitment to community corrections. She said that this program should not be done informally or on an ad hoc basis. Director Stanton noted that correction options in Prince George's county have changed substantially, and that the county was not guaranteed the pilot program. Kelley again addressed the point of systematic communications so that all counties in the state are aware of the program. Director Stanton stated that it had not been an informal process. The subcommittee and working group, comprised of corrections, parole and probation, state and local government, and state's attorneys, had been working together for 3 months. Stanton added that this idea was presented to correctional administrators in Ocean City and no one there was favorably receptive. Judge Sonner raised the fundamental question: is the Commission going to propose programs and approve them or are people going to bring programs to the Commission for approval? He took the position that the Commission is here to modify, add to, or approve programs that have already been developed by the executive or by the courts.

Dr. Wellford noted that this targeted population is extremely small. It was agreed that the numbers are indeed small. Dr. Connelly and Director Stanton stated that local governments do not want a program forced upon them by the state. Senator Kelley answered that this was never the intention of the state. She said that the state's intention was to enter contractual agreements with local facilities that are willing to participate.

Judge Doory stated that his concern regarding a pilot program versus a statewide program is that it would be violating the equal protection clause of the U.S. Constitution. He stated that every offender before a court must be treated equally, regardless of what services are available in their county of residence. Mr. Hoyle said that the offender would be sentenced to DOC, so the state refers them to the location of service. Judge Sonner referred to the Commission's enabling legislation, which he interpreted to mean that the Commission would simply develop sentencing guidelines for a corrections options program, not to develop an entire program. Mr. Hoyle stated that he would like to see the Commission take the next step, that is, not to create and run a pilot program, but to lay out models. He would like the Commission to examine how linkages will be put in place. Hoyle would like to use this as a vehicle to see how this program could work. Senator Mitchell stated that he sees this as enabling legislation. He sees that as the mission that the Commission was called to do. Judge Sonner stated that he would like the Commission to give advice to someone that would create this corrections options program, and then, once it was developed, the Commission could develop guidelines for who participates in the program. Senator Kelley said that the initial step was to inventory what services currently exist in each county, then see what it would cost to contract with them. Kelley stated again that

the Commission should not create a corrections options structure.

Robert Gibson stated that the Department of Public Safety and Correctional Services thought that the COA would function like the Patuxent Institution, as a separate institution with parole authority. He stated that from his perspective, all of the key players had a different idea of what the proposal entailed. He said that those he spoke with in the Parole Commission thought they had nothing to do with COA, while those he spoke to in DOC thought that the Parole Commission still had releasing authority in the proposal. Gibson said that he believed there was confusion among the participants. Dr. Connelly stated that in order to move forward with a more detailed plan, the current proposal needed to be approved by the Commission. Mr. Hoyle said that the Commission needed to move forward in order to know how to get to the end product. He said it was necessary for the subcommittee to go almost too far in order to conceptualize the program before legislation could be written. If there was a new body with releasing authority, then legislation was necessary. Hoyle stated that now the proposal needed to be pulled tighter to work through the details.

Dr. Wellford said that the primary function of the Commission is to work with the guidelines, including where the corrections options program would fit into the guidelines. Wellford stressed the importance of solving the problem of participation first. He said that if the wrong population is identified, then the program would have no impact. Wellford stated that the Commission must move forward on development with the guidelines and corrections options simultaneously. Commissioner Iamele added that the discussion of this program was becoming Orwellian. He stated that less is not more and the process needed to be streamlined. Iamele said that if there is a community paroling system, it should be in the hands of the judge. It could be incorporated in the guidelines with an asterisk as well as a list of offenses that the Commission deems community paroleable. Iamele suggested that part of the Parole Commission could have a separate section that deals solely with community parole and issues such as restitution, work release programs, drug and alcohol treatment, and other programs. He agreed with Dr. Wellford that this program should originate from the sentencing guidelines and should be in the hands of the sentencing judge. Delegate Vallario disagreed with Iamele that it should be in the hands of the judge. Vallario believed, that if an offender is sentenced from 18-36 months then it is in the hands of DOC to recommend corrections options to the Parole Commission. Iamele added that in order to eliminate multiple layers of bureaucracy, there should be a special parole agent for these types of offenses and, if the offenders admitted to the program are not successful, they are sent back to the sentencing judge. Delegate Vallario suggested that the offender should already have an incarcerative sentence that would be fulfilled if the offender did not successfully complete corrections options program.

Mr. Gibson suggested that the DPSCS should present what is already being done across the state in regard to corrections options. The Commission could then examine what is being done at the present time, and possibly expand upon what the state has. Mr. Gibson stated his concern that this program would simply be taking offenders that are currently on probation and putting them into custody. Mr. Hoyle stated that this program was designed for those offenders. Hoyle said that judges wanted a level of supervision for these offenders and are asking for additional options. He stated that the two main tenets of this program were graduated sanctions and sanctions "with teeth." Hoyle said that he felt the state was lacking both. He stated that being able to get an offender who had violated the terms of his or her sentence back into custody quickly and effectively, as seen with home detention violators, was extremely important.

Senator Kelley stated that she hoped this was not a net-widening program simply bringing in offenders who would have in the past just been on probation. Mr. Hoyle said that offenders that

are on traditional probation were under supervision anyway, so this program would not be net-widening. Kelley then stated that the Commission must seek out model states with this program. Judge Sonner stated that the Commission was in favor of corrections options in the abstract, but there was no consensus on how to do it. Sonner suggested that staff and parties that were willing to help, such as the Lt. Governor's Office or DOC, collaborate to design a program to speak to the needs of the state. Sonner said that then the Commission would comment on the developed program and eventually decide where the program fits in the guidelines. He stated that the Commission could not design a program from scratch. Judge Doory stated that in order to fulfill its directives the Commission must develop the theory upon which this program will develop. He said that the Commission--not another organization--must hammer out hard decisions, such as eligibility for the program. Delegate Vallario stated that primary responsibility of the Commission was to put a corrections options program in the appropriate place in the guidelines. Mr. Hoyle said that an appropriate question for the Commission to answer in regard to COA would be the type of offender who is suited for corrections options. He said that then staff should grind out the details of the plan and bring it back before the Commission to work through the more difficult concepts. Dr. Connelly said that his concern would be that the Commission is approaching the deadline for the coming session. Judge Doory stated that if the Commission makes it, it makes it; if it does not, it does not. He said that the Commission should not turn something in just to turn it in. Dr. Wellford said that the Commission needed to keep in mind that the guidelines are voluntary and that any proposal for a program must remain voluntary as well.

State's Attorney McLendon stated that the difficulty the Commission was having with corrections options stems from the vagueness of the mandate. She said the enabling legislation read that the Commission should develop guidelines for a corrections options program, but the legislation did not say the guidelines should be developed without a plan for the program. McLendon stated that constructs needed to be decided upon by the Commission and outside help could work out the details. She said that the Commission should pick blocks of cells in the guidelines that made sense for a corrections options program so that judges would have options. Some net-widening was to be expected because in the past judges put offenders on probation that they were not fully comfortable with because the only alternative was incarceration. McLendon stated that those offenders now could be successful in a corrections options program that would have constructs similar to Break the Cycle.

Judge Sonner suggested that the Commission leave it to staff to work with DOC or the Lt. Governor's office to develop the structure of a corrections options program to bring to the Commission. Mr. Hoyle stated that legislation was needed to support a corrections options program and conversely a corrections options program needs legislation. Senator Kelley reminded the Commission that it was important to be careful of what the Commission takes ownership of.

B. Sentencing Guidelines

Dr. Wellford introduced materials that were given to each Commissioner. He explained that one sheet was a chart of proposed changes to the sentencing guidelines by the Sentencing Guidelines Subcommittee including comments, entitled "Recommended Subcommittee Revisions in Response to Reviewer Feedback." The Commission then went through the chart of recommendations by the subcommittee one by one. The revisions were:

- capturing probation revocations in the database, changing the victim's injury definition from "demonstrative proof" to "reasonable proof,"

- making a change in seriousness category to 1st degree assault on detention center or jail employee (seriousness category 3) and 2nd degree assault on a detention center or jail employee (seriousness category 5),
- clarifying the definition of "commitment to a secure residential facility for juveniles," to "commitments refer to a court transferring legal custody to the Maryland Department of Juvenile Justice or comparable commitment to another federal or state authority," and
- adding various securities fraud violations to table as a seriousness category 6. The Commission approved all of the recommendations.

Dr. Wellford then introduced proposed technical changes to the draft COMAR regulations. The Commission also approved each of these recommendations. The next issue that Dr. Wellford addressed was a proposed revised sentencing guidelines worksheet. Most of the changes to the worksheet were pending approval of the draft COMAR regulations. Dr. Wellford called attention to a new section on victim's rights. There was discussion regarding the availability of information to those who would be filling out the worksheet. It was noted that an Assistant State's Attorney would know whether there was victim notification, while someone in the Probation office would not. Senator Kelley stated that an updated manual would need to accompany the new worksheet. Commissioner Iamele said that he thought the new worksheet was asking for too much information. Ms. Brennan agreed. The new worksheet was voted on and approved.

The next subject that Dr. Wellford addressed was the departure list of aggravating and mitigating factors. Wellford explained that the proposed list would accompany the guidelines worksheet to make it easier for judges to explain reasons for departure from the guidelines. Commissioner Butler stated that in lines 641-643 of the COMAR draft, white collar offenses are listed as an aggravating factor but white collar offenses are not listed on the departure sheet. Butler said that the Commission should be consistent. Dr. Wellford noted that number 7 of the aggravating factors includes "economic harm." Mr. Hoyle suggested that an agreement to participate in a program should be included in the mitigating factors, specifically add to number 6 "has agreed to." Commissioner Butler suggested that "psychological harm" be added to number 7 of the aggravating factors. The departure list of aggravating and mitigating factors was voted on and approved by the Commission. The final matter to be brought before the Commission from the Sentencing Guidelines Subcommittee was proposed changes in traffic offenses. Ms. Brennan announced prior to these recommended changes, all traffic offenses were seriousness category 7. She stated then if the offense had a seriousness category 7, there was no change. Brennan said that most of the changes in the serious categories of offenses that were recommended dealt with subsequent offenders. Delegate Vallario stated that in the offense score, a seriousness category of 5,6, or 7 all meant the same thing. He asked then, why aren't they all a category 7? Dr. Wellford answered that the Commission would show the public that they are serious about subsequent offenders. Ms. Brennan added that it did affect the status of an offender's criminal history by the fact that it changed whether the previous criminal acts were considered minor, moderate, or major. Delegate Vallario made a motion to make all traffic offenses seriousness category 7, seconded by Ms. Brennan. The motion failed. Colonel Mitchell stated that automobile theft is very serious now because of the heightened threat of pursuit. Dr. Wellford added that the subcommittee felt that there should be a distinction on subsequent offenses. The Commission voted on the recommendations of the Sentencing Guidelines Subcommittee for traffic offenses and approved all of them.

C. Outreach

Dr. Connelly stated that there are documents drawn up regarding an Outreach Plan dealing with dissemination of materials to the public and to the media. Because of the lack of time, the Commission decided to review the materials at a later date as a "committee of the whole."

6. **New Business**

A. **Annual Public Meeting**

Dr. Connelly asked the Commission members for suggestions on the agenda for the next public meeting. Senator Kelley stated that the agenda should include what the Commission's charge has been, the route the Commission is taking, what the Commission's job is and what it is not, the public's role, and what access the public has to information. Judge Sonner stated that the Commission needs well thought out ideas so the meeting is productive. The Commission decided the annual public meeting would be held in November and the next Commission meeting would be on October 2 in the House Judiciary Committee Room.

B. **Review of *Apprendi v. New Jersey***

Dr. Connelly announced that Doug McDonald put together a brief of the *Apprendi v. New Jersey* case that was recently featured in the Washington Post. This case may affect the Sentencing Commission. It deals with sentences that go beyond the statutory maximum under the law. Dr. Connelly stated that because Maryland's sentencing guidelines are voluntary, it might not affect the state. He said that the Commission would have to wait for other cases to come up. Connelly stated that if there are any questions about the case, they should be directed to Doug McDonald.

7. **Announcements**

Judge Sonner announced that he had received a letter from Delegate Vallario stating that under the Health General Article a judge can allow an offender to participate in a drug treatment program, even if he/she is serving a mandatory minimum sentence. Vallario said that he discovered recently, that one could not do that unless there was a motion for reconsideration. Vallario stated that he was surprised at this. He said that his letter to the Chair explained his desire to propose legislation to permit the defendant to apply for drug rehabilitation at any time during the defendant's sentence. Judge Sonner stated that the Commission should be in favor of drug treatment at any time. Sonner asked if there were any objections to Delegate Vallario bringing draft legislation before the Commission at the next meeting for the Commission's approval. State's Attorney McLendon stated that she did not see this as part of the Commission's mandate. Judge Sonner stated that that brought up a fundamental question that asked, should the Commission comment on legislation? Dr. Wellford asked if the Commission was required to comment on anything that had to do with sentencing. Dr. Connelly said that the Commission was required to do an impact analysis. Dr. Wellford stated that the Commission should take a broad view of this and not make the statement that they would not look at something.