



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
Judiciary Training Center  
Annapolis, MD 21041  
September 14, 2009

### **Commission Members in Attendance:**

Honorable Howard S. Chasanow, Chair  
Delegate Curt S. Anderson  
James V. Anthenelli, Esquire  
Shannon E. Avery, Esquire, *representing Secretary Gary D. Maynard*  
Paul F. Enzinna, Esquire  
Richard A. Finci, Esquire  
Major Bernard B. Foster, Sr.  
Senator Delores G. Kelley  
Honorable John P. Morrissey  
Delegate Joseph F. Vallario, Jr.  
Charles F. Wellford, Ph.D.

### **Staff Members in Attendance:**

Eric Dunton  
Jessica A. Rider  
Stacy Skroban Najaka, Ph.D.  
David Soulé, Ph.D.

### **Visitors:**

Diane Hutchins, Baltimore City Mayor's Office of Government Relations  
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 5:30 p.m. when quorum was reached.

#### **3. Approval of minutes, June 30, 2009 meeting**

The minutes were approved as submitted.

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

Dr. Soulé reminded the Commission that it voted to revise and clarify the policy regarding the submission of guidelines worksheets for probation revocations at the May 5, 2009 meeting. At that time, the Commission determined that it was no longer necessary to submit a worksheet for probation revocations. Further, the Commission clarified that worksheets should still be submitted for sentence reconsiderations, but only for sentences adjusted for those convicted of a crime of violence. These revisions were submitted to the AELR committee and were adopted



in COMAR effective September 1, 2009. The staff sent out a notice of these policy changes via a Guidelines E-News on September 1, 2009.

Dr. Soulé noted that the Commission hosted the 15<sup>th</sup> annual National Association of Sentencing Commissions (NASC) conference in Baltimore on August 2-4. Dr. Soulé indicated that copies of presentations and a sample of photos from the conference are available on the conference website. The conference website can be accessed through a link on the homepage of the Commission's website.

Dr. Soulé thanked all of the Commissioners, many of whom were in attendance, for their support in hosting this event. He acknowledged Judge Howard Chasanow and Dr. Charles Wellford, who graciously agreed to participate as speakers at the conference. Dr. Soulé also thanked Secretary Gary Maynard, who served as a moderator for one of the panels, and Shannon Avery, noting that both were outstanding contributors on the conference planning committee. Dr. Soulé indicated that Commission staff has received extremely positive feedback from conference attendees.

Dr. Soulé introduced Eric Dunton. Eric is a third year student at the University of Baltimore School of Law and began working part-time as a staff policy analyst at the end of August.

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

Dr. Wellford presented the report of the Guidelines Subcommittee.

### A. 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 reminded the Commission that they had previously taken a vote at the June 30, 2009 meeting to not count prior adjudications of “not criminally responsible” (NCR) when calculating the offender score. However, there was no vote on whether specific clarifying language should be added to COMAR and/or the Guidelines Manual. Dr. Wellford noted that there had been some 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.

Dr. Wellford indicated that the Guidelines Subcommittee voted to recommend the clarifying language noted below be added to COMAR and the Maryland Sentencing Guidelines Manual.

### **Proposed Revisions to COMAR 14.22.01.10 – Computation of the Offender Score**

A. Computation of the Offender Score. The individual completing the worksheet shall derive the offender score by totaling the points represented by the offender's prior criminal history. Any prior criminal adjudications, as defined in COMAR 14.22.01.02B(1), shall be included. With the exception of the juvenile delinquency component of the offender score, the offender score refers only to the defendant's adult involvement with the criminal justice system. **A prior adjudication of not criminally responsible (NCR) shall not be included when calculating the offender score.**



## **Proposed Revisions to the Maryland Sentencing Guidelines Manual (MSGM), p.22**

### **7.1 Computation of the Offender Score**

The offender score is derived by totaling the points represented by the offender's prior criminal history. The factors comprising this history are shown in Table 7-1 below. Any prior criminal adjudication (as defined in COMAR 14.22.01.02.B(1)) shall be included. With the exception of the juvenile delinquency component of the offender score, the components of the offender score refer only to the defendant's adult involvement with the criminal justice system ("CJS"). **A prior adjudication of not criminally responsible (NCR) shall not be included when calculating the offender score.**

Judge Chasanow proposed modified language that would include findings of not guilty by reason of insanity. Mr. Finci seconded the motion.

## **Proposed Revisions to COMAR #2 - COMAR 14.22.01.10 – Computation of the Offender Score**

A. Computation of the Offender Score. The individual completing the worksheet shall derive the offender score by totaling the points represented by the offender's prior criminal history. Any prior criminal adjudications, as defined in COMAR 14.22.01.02B(1), shall be included. With the exception of the juvenile delinquency component of the offender score, the offender score refers only to the defendant's adult involvement with the criminal justice system. **A prior adjudication of not criminally responsible (NCR) or not guilty by reason of insanity shall not be included when calculating the offender score.**

## **Proposed Revisions to the Maryland Sentencing Guidelines Manual (MSGM) #2, p.22**

### **7.1 Computation of the Offender Score**

The offender score is derived by totaling the points represented by the offender's prior criminal history. The factors comprising this history are shown in Table 7-1 below. Any prior criminal adjudication (as defined in COMAR 14.22.01.02.B(1)) shall be included. With the exception of the juvenile delinquency component of the offender score, the components of the offender score refer only to the defendant's adult involvement with the criminal justice system ("CJS"). **A prior adjudication of not criminally responsible (NCR) or not guilty by reason of insanity shall not be included when calculating the offender score.**

The Commission unanimously voted to adopt the modified language.

Dr. Wellford noted that the Guidelines Subcommittee did not feel it was necessary to list a prior NCR finding as a possible aggravating reason to depart from the guidelines because judges are already free to depart from the guidelines for any reason.

**B. Interim report of data on guidelines compliance for individual matrix cells**

Dr. Wellford noted that the Guidelines Subcommittee at its August 31, 2009 meeting had discussed compliance rates within each cell of the sentencing matrices. He referred the Commission to three documents prepared by staff and presented at the August 31 meeting regarding compliance by individual cell. Dr. Wellford explained that the first document details the percent of sentences below, within, and above the guidelines for each of the three matrices (drug, property, and person). Compliance figures are based on single count offenses for fiscal years 2004-2008. Cells with a compliance rate less than 65% are highlighted. Cells with less than 50 cases are highlighted in blue, while those with 50 cases or more are highlighted in yellow. The second document, entitled "Cells with Compliance Less than 65%," takes a closer look at the cells highlighted in yellow. For each cell, the document details the actual sentence range for the middle 65% of sentences in the cell. Also listed are the jurisdictions with the largest number of departures, and the most common offense(s) in each cell. The third document, "Disposition Type by Jurisdiction," provides a crosstab of disposition type by jurisdiction for each of the three matrices.

Dr. Wellford informed the Commission that ABA pleas and sentences to correctional options are defined as compliant, regardless of whether the length of a sentence falls within or outside of the guidelines range. Therefore, jurisdictions that use a large number of ABA pleas may have a higher compliance rate than those that do not.

Dr. Wellford outlined three possible options the Commission may take in response to the data:

- (1) The Commission can find that the compliance rates are high enough to not warrant adjusting the cells and direct staff to continue to encourage jurisdictions to comply with the guidelines. Dr. Wellford explained that this option is based on the realization that compliance rates by cell are very high. Generally, the cells that fall below compliance are off by only a few percentage points, particularly in the cells with a high volume of cases.
- (2) The Commission can alter the guidelines ranges for noncompliant cells to better reflect the sentences given by judges. Changing these ranges would require the matrices as a whole to be adjusted to insure proportionality among the individual cells.
- (3) A detailed analysis of the data reveals that two jurisdictions, Anne Arundel and Baltimore Counties, largely account for statewide noncompliance. Rather than changing the matrices, the Commission can explore why these two jurisdictions fall outside of compliance.

In response to options two and three, Senator Kelley reminded the Commission that its purpose is to effect proportionality in sentencing but not at the risk of creating presumptive or mandatory sentences. Instead, the Commission should base the guidelines on a sound rationale that allows for variations in sentencing. Senator Kelley echoed her statement at the Subcommittee meeting that because noncompliance is fairly limited and may in part be due to temporary trends, she would be hesitant to tamper with the cell ranges. Instead, the senator suggested that the Commission inform and educate the less compliant jurisdictions.



Judge Chasanow agreed with Senator Kelley's statement and cautioned that changing the cell ranges involved both a domino effect, in that surrounding cells would need to be altered to ensure proportionality in sentencing, and a public relations effect. Judge Chasanow then gave examples of specific cells that could justifiably be changed. Specifically, the cell for Seriousness Category VII, Offender Score 2 on the drug matrix could easily be brought into compliance by extending the sentencing range to probation to one month incarceration. The sentencing ranges in Category V of the drug matrix, covering simple possession of cocaine, could be lowered to reflect how judges tend to treat simple possession as warranting a shorter sentence than possession with intent to distribute. Similarly, the ranges in Category V of the property matrix may be lowered to reflect the legislature's recent creation of the crime of theft over \$100,000.00.

No matter the option the Commission chooses, Judge Chasanow set forth that the Commission must have a rational reason for acting. He reminded the Commission of the extensive justification required for previous changes to the cells.

Delegate Anderson asked the Commission about the significance of Anne Arundel and Baltimore Counties' compliance rates. Dr. Soulé noted that these two counties have a high volume of cases, which lower the state's overall compliance rate. Dr. Wellford stated the importance of engaging in a discussion with the judiciary in these higher volume counties to make them aware of their lower compliance levels. Judge Chasanow responded that the lower compliance in Anne and Baltimore Counties is to a large degree a result of their state's attorneys not using ABA pleas. The compliance levels are not a result of judges' sentencing decisions, but rather decisions by state's attorneys in those counties.

Judge Morrissey offered that another option would be to target the cells that are the furthest from meeting the 65% benchmark standard for compliance.

Mr. Finci expressed his concerns that the guidelines may lose their relevance if they do not reflect the actual sentences given by judges. Delegate Vallario similarly stressed that the guidelines should be an extension of current judicial sentencing practices.

In response, Dr. Wellford stated that a cell by cell analysis of the guidelines may require the Commission to explore the issue of real sentences versus compliant sentences for the drug matrix, but not for the other matrices. The drug matrix data are unique because they contain a larger number of ABA pleas than the other matrices. Dr. Wellford noted that an in depth evaluation of the drug matrix cells may necessitate looking at the actual sentences given by judges within each cell to ensure that the guidelines reflect these sentences. Judge Chasanow remarked on the difficulties that may arise from such an analysis. Judge Chasanow commented on the dichotomy between compliance in jurisdictions that use ABA pleas and those that do not. He offered the example of an offender charged with simple possession of cocaine whose guidelines range is one to two years. In Baltimore City, if the offender is given a sentence below the guidelines range, the sentence would still be compliant if it was the result of an ABA plea. However, if an Anne Arundel or Baltimore County judge gave the offender the same sentence it would be noncompliant because the two counties infrequently use ABA pleas.



Concluding the discussion, Dr. Wellford asked the Commission members to review the three documents prepared by staff and share their questions and concerns with Dr. Soulé or him.

**6. Date, time, and location for the next Commission Meeting**

The last meeting of the year is scheduled for Tuesday, December 8<sup>th</sup> at 5:00 p.m. at the House Office Building, Judiciary Committee Hearing Room in Annapolis, MD. The Commission 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 6:00 p.m.

Dr. Soulé informed the Commission that there were draft copies of the Public Comments Hearing invitation and recipient list available for their review. Dr. Soulé noted that the recipient list included groups that were targeted last year and asked Commissioners for any additions to the list. Major Foster suggested that the Maryland Chiefs of Police Association and the Maryland Sheriffs' Association be added to the recipient list. Commissioners additionally suggested contacting community papers, soliciting judges, and inviting national institutions based in Washington, D.C. The Commission decided that Dr. Soulé would send an electronic copy of the invitation to all Commissioners so that they may invite their constituents and any other groups or organizations they deem appropriate.

**7. Old Business**

Delegate Anderson noted that the Subcommittee on Sentencing Drug Offenders did not meet during the summer as staff was not available to work on the correctional options inventory. The Subcommittee will resume their work on the correctional options inventory this fall.

**8. New Business and announcements**

There was neither new business nor announcements.

**9. Adjournment**

The meeting adjourned at 6:50 p.m.