



Minutes

Maryland State Commission on Criminal Sentencing Policy
Judiciary Training Center
Annapolis, MD 21042
September 25, 2007

Commission Members in Attendance:

Honorable Howard S. Chasanow, Chair
Delegate Curtis S. Anderson
Chief Marcus L. Brown
Leonard C. Collins, Jr., Esquire
Paul Enzinna, Esquire
Richard A. Finci, Esquire
Major Bernard Foster
Senator Lisa Gladden
Senator Delores G. Kelley
Patrick Kent, Esquire, *representing Nancy S. Forster, Esquire*
Laura Martin, Esquire
Secretary Gary D. Maynard
Honorable John P. Morrissey
Kate O'Donnell, Esquire, *representing Attorney General Douglas Gansler*
Honorable John C. Themelis
Delegate Joseph F. Vallario, Jr.
Charles F. Wellford, Ph.D.

Staff Members in Attendance:

Kira Antell, Esquire
Stacy Skroban Najaka, Ph.D.
David Soulé, Ph.D.

Visitors:

Rick Kern, Ph.D. Virginia Criminal Sentencing Commission
Kristina Loveless, University of Maryland intern
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 5:33 p.m. when quorum was reached.



3. Presentation from Rick Kern, Director, Virginia Criminal Sentencing Commission – Risk Assessment as a Tool for Sentencing

Judge Chasanow welcomed the Commissioners and introduced Rick Kern, Director, Virginia Criminal Sentencing Commission who would be presenting on Virginia's risk assessment tool.

Dr. Kern discussed the make up of the Virginia Criminal Sentencing Commission (VCSC) as being organized under the judiciary branch and described the members' affiliations. Dr. Kern offered that the VCSC was well-funded and Senator Kelley asked if Dr. Kern could share a copy of the VCSC budget to aid in efforts to obtain funding for the MSCCSP.

Dr. Kern next focused on the development of the risk assessment tools for use at sentencing. He noted that it is clear that judges have long performed an informal risk assessment at sentencing. The VCSC tools provide a formalized method based on an actuarial risk model, to suggest how an offender should be sentenced within a voluntary sentencing guidelines framework. Virginia currently uses two risk assessment tools. The first is used for non-violent offenders to identify and divert incarceration bound offenders into alternatives to incarceration and the second is used for sex offenders to identify where calculated guidelines should be adjusted upwards to address a continued public safety risk. The risk assessment tools identify different characteristics of offenders that are common among those likely to recidivate. The goal was to provide judges with tools that were broadly accurate and could assist in sentencing decision making.

a. Non-Violent Offenders Risk Assessment

The non-violent offender risk assessment tool was developed at the request of the Virginia legislature which asked the VCSC to develop a tool that would divert 25% of non-violent prison bound offenders away from incarceration without decreasing public safety. The VCSC conducted a retrospective study of non-violent offenders sentenced to incarceration to identify characteristics common to those who recidivated at a high rate. The VCSC then developed a tool which was pilot tested across the Commonwealth. The tool was refined in a second analysis.

The non-violent risk assessment tool as developed, and currently in use, is an easy to complete, brief analysis that assigns points if the offender at sentencing shares certain characteristics with those who were found likely to recidivate. Characteristics include offense type, age, marital status, recent arrests and convictions, among others. If the score is below a threshold, the otherwise incarceration bound offender is recommended for alternatives to incarceration. If the score is above the threshold, he is not recommended. In either event, sentencing guidelines and incarceration decisions remain strictly voluntary and at the judge's discretion.

An independent evaluation has suggested that annual savings could range from \$3.7 to \$4.5 million annually in monies not used to incarcerate these non-violent low risk offenders.

b. Sex Offender Risk Assessment

The Virginia Legislature asked the VCSC to develop a risk assessment tool for use within the special population of sex offenders that could be used to help identify an appropriate



range of sentences. The VCSC conducted a retrospective study of sex offenders to identify characteristics common among those who recidivate.

Similar to the non-violent offender risk assessment tool, the sex offender tool currently in use is an easy to complete, brief analysis that assigns points if the sex offender at sentencing shares certain characteristics with those sex offenders who were found likely to recidivate. The characteristics include, age, education, victim/offender relationship, and location of the offense, among others. However, unlike the non-violent offender risk assessment tool, if the score is above a certain threshold, the guidelines are adjusted upwards to suggest a longer sentence and the guidelines are never adjusted downwards for shorter sentences.

Dr. Kern touched briefly on legal challenges to the assessment tools which have focused primarily on the sex offender assessment tool. These challenges have been dismissed by Virginia courts which have relied on the fact that the Virginia sentencing guidelines, and indeed all sentencing decisions, continue to be at the judge's discretion.

Judge Chasanow opened the floor for questions.

Dr. Wellford asked why the sex offender risk assessment offered no reduction in recommended sentence for an offender who scored below a specific threshold. Dr. Kern responded that such decision was political in nature. He described the environment during which the sex offender risk assessment was created, explaining that this tool was always anticipated to increase sentences. The sex offender tool was in part, an attempt to prevent adoption of a statute permitting civil commitment for some sex offenders. It was thought that the sex offender tool would permit much longer "within guidelines sentences" for those sex offenders deemed likely to recidivate and be adopted in lieu of civil commitment. Instead, civil commitment and this tool were both authorized.

Mr. Collins asked if there was discussion about whether gender is an appropriate characteristic to use and whether there was any discussion about the use of race as a characteristic. Dr. Kern responded that there was discussion on both topics, but ultimately they felt that while gender was an appropriate characteristic, race was merely a proxy for other measures such as socioeconomic status and was not appropriate.

Delegate Anderson asked if there are mandatory minimums for sex offenders in Virginia. Dr. Kern explained that there are few mandatory minimums in Virginia. This is in part because of the structure of their legislative system which requires the sponsor of any bill to explain how he/she would fund such bill in response to a fiscal note prepared by the VCSC indicating the cost of a bill. The VCSC drafts a fiscal note for any relevant proposed legislation explaining the anticipated costs to the Commonwealth. Ms. Martin also explained that unlike in Maryland, Virginia's truth in sentencing laws require that offenders serve 85% of their sentence. Dr. Kern agreed with this statement.

Senator Kelley asked a follow up regarding fiscal notes. She asked if Dr. Kern could provide copies of some of these fiscal notes to the MSCCSP so they can perhaps be used as a guide for Maryland.



Dr. Soulé noted that the MSCCSP staff has been working with Applied Research Services, Inc. to develop a correctional simulation model which is nearly complete and will assist in making fiscal projections.

Mr. Kent asked if VCSC's risk assessment tools and their development process was subjected to peer review in any published articles. Dr. Kern responded that it had been, and Dr. Soulé noted that he had forwarded copies of two peer reviewed articles to the Commissioners.

Mr. Finci offered that he had seen psychologically based assessment tools used for sex offenders and asked for information on how Virginia's sex offender tool, which is statistically based, compares. Dr. Kern explained that sex offenders are the most difficult group to study, in part because of the secretive nature of their crimes. He suggested that the advantages of the VCSC tool include that it was developed using a broader definition of recidivism and covering a longer period of time than some traditional psychological assessment tools. He questioned whether these psychological tests use a large enough sample for a long enough period of time to get accurate results.

Judge Chasanow thanked Dr. Kern again for his presentation. Judge Chasanow indicated that the Commission would be grateful if Dr. Kern would provide copies of the fiscal notes and the VCSC's budget. Judge Chasanow reminded the Commission that the MSCCSP staff has copies of the VCSC assessment tools should anyone wish to examine them.

4. Approval of minutes, July 24, 2007 meeting

The minutes were approved as submitted.

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

Dr. Soulé began by introducing student intern Kristina Loveless who was observing the meeting.

- a. Dr. Soulé gave a brief update regarding the Guidelines changes and additions adopted at the last meeting. He indicated that the proposed regulations would be published in the September 28, 2007 edition of the Maryland Register and that December 7, 2007 would be the earliest date that the new regulations could go into effect. Dr. Soulé suggested that the Commission may want to choose a more standard start date such as December 15, 2007 or January 1, 2007.
 - The Commission unanimously agreed that January 1, 2007 would be an appropriate start date.
- b. Dr. Soulé also notified the Commissioners that there is an open position on the MSCCSP staff for the dual position of office administrator/training coordinator and encouraged the Commissioners to direct interested applicants to the announcement at www.msccsp.org for more information.

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

a. Proposal to add SID number to guidelines worksheet

Dr. Wellford directed the Commissioners to the corresponding memorandum which suggests that adding the SID number to the guidelines worksheet would assist in the



matching of data for the Correctional Simulation Model which is now in the final stages of development.

The Subcommittee approved this addition and agreed this would be a positive change and generally easily implementable despite the fact that it may create new procedures in at least one jurisdiction.

Senator Gladden asked if every inmate gets an SID number. Dr. Soulé responded that such number is assigned at arrest. Ms. Antell added that there are non-criminal reasons for the assignment of an SID and stated that an SID is created any time an individual has fingerprints sent to the central registry for any reason which can then be matched at arrest.

Ms. Gladden explained that the SID number can vary in digits and asked if there is standardization. Ms. Antell indicated that this number is in common use by the Department of Public Safety and Correctional Services and suggested that the DPSCS likely has a method of standardization. Dr. Wellford stated that in an audit they did approximately seven years ago, the SID was missing in approximately 20% of the cases but that in a second and more recent audit, that there were virtually no Circuit Court case files missing the SID.

Mr. Finci asked where one could find the SID number. Dr. Soulé responded that it is located on the criminal rap sheet. Senator Gladden indicated that it is on the CJIS report.

Discussion being there ended, the motion to add the SID number to the guidelines worksheet passed unanimously.

- b. Proposal to add language to COMAR indicating that the guidelines and offense seriousness category in effect at time of sentencing shall be used to calculate the sentencing guidelines
Dr. Wellford introduced this proposal which would formalize the standing policy of the MSCCSP to use the guidelines in effect at the time of sentencing by promulgating such a rule through COMAR and revising language in the Guidelines Manual. Senator Kelley noted that the MSCCSP had sought the advice of counsel, namely Stuart M. Nathan, Assistant Attorney General, Counsel to the Department of Public Safety & Correctional Services and by extension the MSCCSP. Senator Kelley suggested that such an adoption made sense.

Mr. Finci noted that the federal sentencing guidelines, when they were mandatory, had language that required use of the guidelines in effect at the time of the offense if such guidelines were more favorable to the offender in order to avoid ex post facto concerns. He noted that the federal sentencing guidelines have since changed to advisory and that there have been at least two decisions on this point but no complete agreement as to whether there are ex post facto concerns inherent in an advisory or voluntary guidelines sentencing scheme. He suggested adoption of the proposal accompanied by a warning to attorneys that there may continue to be ex post facto concerns. Mr. Finci suggested that the memorandum prepared by Mr. Nathan seems to rely on case law that is not directly on point.



Ms. O'Donnell, indicated that while not in the same division of the Attorney General's office as Mr. Nathan, that she had reviewed his memorandum and disagreed with Mr. Finci's assessment that the case law was not on point. She referred specifically to United States v. Davenport, 445 F.3d 366 (4th Cir. 2006) and United States v. Demaree, 459 F.3d 791, 793 (7th Cir. 2006) which she felt were relevant. Mr. Finci suggested that Davenport could be distinguished on its facts and that while Demaree did state that the now advisory federal sentencing guidelines no longer implicated ex post facto concerns, that this has not been echoed in other federal circuits.

Ms. O'Donnell stated that the key point of Davenport related to whether the defendant was on notice as to the maximum sentence and that a COMAR regulation explicitly stating the Commission's policy would broadcast the maximum sentences and seem to be in keeping with this holding. Senator Kelley agreed that using the guidelines in effect at the date of sentencing made sense to her given the fact that legislation continues to shift.

Mr. Finci recognized that in practice, not using the guidelines in effect at the date of sentencing poses too great a challenge but he was simply suggesting that the language be accompanied by an ex post facto warning. However, he conceded that perhaps it is simply the responsibility of defense counsel to remind the judge about ex post facto concerns.

Dr. Soulé noted that the despite any guidelines calculation, the upper range of any sentence cannot exceed the statutory maximum in effect at the time of the offense.

The motion was unanimously approved.

c. Proposal to adopt language in COMAR regarding adjustment of guidelines ranges due to mandatory minimum penalties

Dr. Wellford introduced the proposal which developed from comments at a prior Guidelines Subcommittee meeting where a former member of the Commission noted the difference between non-suspendable mandatory minimum sentences and suspendable mandatory minimum sentences. It was recognized that the language in the Guidelines Manual and COMAR did not specifically address this distinction and should be revised for clarity to distinguish between those offenses where there is no minimum, those with suspendable minimums, and those with non-suspendable mandatory minimums. The proposal contains COMAR revisions and revisions to the Manual as to how one should respond to such offenses.

The motion was unanimously approved.

Dr. Soulé thanked Mr. Collins and Mr. Kent for their efforts in reviewing and updating a list of offenses which identified suspendable and non-suspendable mandatory minimum offenses. He added that the Guidelines Offense Table will be revised to clearly distinguish between suspendable and non-suspendable offenses in the next COMAR update.



d. Proposal to adopt new chapter regarding special applications in calculating the guidelines in the Maryland Guidelines Manual

Dr. Wellford introduced the new chapter as one that clarifies some of the more complicated instances of sentencing guidelines calculations. He noted that these are existing guidelines rules but the new chapter makes these instances clearer in the manual, addresses questions often received by the staff, and responds to situations where the staff may receive inaccurately calculated guidelines worksheets.

Senator Kelley added that this addition would likely be helpful in the training of new judges.

The motion was unanimously approved.

7. Update on new Subcommittee on Sentencing Drug Offenders – Delegate Curtis Anderson

Delegate Anderson spoke about two meetings and noted that he hoped he was reaching all members of the Subcommittee on Sentencing Drug Offenders.

The first meeting was held on Monday, September 24, 2007, and was a briefing on the status of drug abuse, sentencing, and treatment in Maryland for “stakeholders.” This meeting was attended by Delegate Anderson as well some of the other members of the Subcommittee. Delegate Vallario sent Claire Rossmark as his representative, and Senator Gladden also attended. Also in attendance were two judges from Baltimore City and Prince Georges County.

There is another meeting scheduled for Tuesday, October 16, 2007, at Cross Keys in Baltimore City. At this meeting, Hirsch Goldberg, Public Affairs Officer from Baltimore Substance Abuse Systems, Inc. will brief the Subcommittee. Mr. Collins noted that he had not been informed of either meeting and asked to be added to the list.

Delegate Anderson noted that he felt that each member of the Subcommittee brings certain degrees of knowledge about the situation and that this is not a two-sided debate but rather a multi-faceted problem that requires input from all interested parties. His goal was to get the Subcommittee briefed on the issue before they begin to tackle the problem. He added that hopefully, after the briefings, they will begin to generate proposals and other meaningful products.

Judge Chasanow mentioned that the Subcommittee may want to look at the Virginia risk assessment tool as they move forward.

Senator Kelley referred to the Drug Policy Institute briefing that the Commission received last year and suggested that the Subcommittee may want to examine that study as well. Delegate Anderson responded that the presenter of that briefing was present at the initial meeting on September 24, 2007 and that he will distribute that briefing to the Subcommittee members.

Judge Morrissey asked if Dr. Soulé could create a universal email list so the Subcommittee members can communicate amongst each other. Dr. Soulé responded that the list had been generated and that he would send it to all Subcommittee Members.



Judge Chasanow thanked Delegate Anderson for his efforts and stated that the Commission looks forward to hearing about the Subcommittee's work as they move forward.

8. Discuss date, time, and location for 2007 Public Comments Hearing

The next meeting was set for Monday, November 26, 2007 at 5:00 p.m. at the House Office Building in Annapolis, MD. The Commission will provide dinner and it will be made available starting at 6:00 p.m. The Public Comments Hearing will begin at 6:30 p.m. immediately following the break for dinner.

9. Old Business

There was no old business to address.

10. New Business and announcements

There was no new business nor announcements.

11. Adjournment

The meeting adjourned at 6:59 p.m.