

**Maryland State Commission on Criminal Sentencing Policy**  
**House Judiciary Committee Room**  
**Low Office Building, Room 121**  
**Annapolis, Maryland**  
**October 2, 2000**

**Commission Members in Attendance:**

Charles F. Wellford, Ph.D., Acting Chair  
Honorable Marna McLendon  
Honorable John C. Themelis  
Domenic R. Iamele, Esquire  
Russell P. Butler, Esquire  
Major Tom Bowers, for Colonel David B. Mitchell  
Arthur A. Marshall, Jr., Esquire  
Honorable Timothy J. Doory  
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  
Claire Souryal-Shriver  
Kate Wagner

**Visitors:**

Al Cohen, *Prince George's County Correctional Center*  
Michelle Hughs, *Student*  
Kurt Stolzenbul, *Maryland Department of Budget and Management*

1. **Call to order**
2. **Roll call and declaration of quorum**
3. **Approval of minutes, August 21, 2000 meeting**

Dr. Wellford called for the reading and approval of the minutes. No additions or changes were made, and the minutes were approved.

4. **Report from Executive Director**

Dr. Connelly announced that the Commission staff had recently completed a state inventory of all the equipment and furniture in the office. Connelly also stated that the staff was planning for the next Annual Report. He said that the Annual Report would include a history of the Commission, what the Commission has done this year, the legislatively mandated data on judicial compliance rates and the Commission's goals for 2001. Connelly announced that the staff had completed meetings with all of the circuit court administrative judges throughout the state. He said that the meetings were informative and useful in order to open lines of communication. Dr. Connelly also stated that the Annual Public

Meeting was slated for early November. He stated that he is teaching a graduate level class at the University of Maryland in the Department of Criminology and Criminal Justice. His students have been assigned topics related to sentencing including: the aging prison population, sentencing disparity, the effects of alternative sanctions, compliance rates, and the Maryland State Criminal Code and efforts of recodification. These students will present their findings to the Commission at the next Annual Public Meeting.

Commissioner Iamele suggested that the students should research the comparison or the disparity between rural and urban counties in the state, focusing on how the philosophies of the entire criminal court system differ. Judge Doory asked Dr. Connelly if he had experienced in Oklahoma this high concentration of cases in one or two counties, such as there is in Maryland, specifically Baltimore City. Dr. Connelly answered that yes, there were certain counties in Oklahoma that had a high concentration of the state's overall crime.

## **5. Discussion and recommendations on Commission bylaws**

The Commission then discussed the proposed Commission by-laws. Commissioner Butler raised a question about the section under Commission Decisions that read, "The Commission Chair shall have the power to make emergency decisions on behalf of the Commission. These decisions shall be subject to review at the next Commission meeting." He questioned whether it was necessary and asked what types of emergencies would arise where the Commissioners could not be reached by fax or by phone. Butler also suggested that the Commission might want to duplicate language from the Code of Maryland regarding modifying guidelines.

Commissioner Iamele stated that there was a recent case in the Court of Special Appeals regarding the Governor's right to privacy. He said that this raised the questions of the public's right to information and the release of data as they related to the Commission. Dr. Wellford stated that this issue would be discussed later in the meeting under the topic of the Outreach subcommittee and the plan for Dissemination of Materials to Public and Media.

Judge Themelis moved to delete the section quoted by Commissioner Butler regarding the emergency decision-making power of the chair from the Commission bylaws. The motion was seconded and approved.

Judge Doory raised a concern with the section on Amendments. He stated that as it read, amendments to the bylaws could be passed by a majority of Commission members present at a meeting, which could be as few as 6 members. Judge Doory said that the bylaws should read, "Proposed changes to the by-laws may be presented at any regular Commission meeting and must be approved by majority vote of the Commission." Dr. Wellford added that that wording should be followed by the phrase, "at a subsequent meeting." Judge Themelis moved that the section on amendments be changed as discussed. The motion passed. Judge Doory stated, in reference to Commissioner Butler's statement about adding a section to the bylaws regarding modifying the guidelines, that there was no need for information in the bylaws that was already covered in the statutes. Discussion clarified that ex-officio members of the Commission are voting members of the Commission and do count toward reaching quorum. Commissioner Marshall moved to adopt the bylaws with the discussed changes in the Commission Decisions and Amendments sections. Commissioner McLendon seconded the motion and it passed.

## **6. Discussion and recommendations on Commission goals for 2001**

Dr. Connelly stated that he issued a call to the Commission members requesting subject areas for

action and research to the Commission members and received mostly oral responses. He said that Commissioners recommended focusing on areas that come up in the subcommittees. These goals include getting the Commission's data system running and integrated and researching topics as discussed in the Executive Director's Report. Dr. Connelly asked that any other responses be communicated to him soon, so the issues could be addressed in the Annual Report.

## 7. Subcommittee Reports

### A. Sentencing Guidelines

Dr. Connelly reported that the Attorney General's office stated that a departure factor checklist that would accompany the sentencing guideline worksheet would have to be put into COMAR. Connelly stated that a conference call of the subcommittee decided the original departure list was too complex and seemed regulatory. He explained that the list that was handed out at the meeting had not gone through the Sentencing Guidelines Subcommittee, but was given out to show the simplified format that the revised list would take. Dr. Connelly asked if the Commission, in order to get the checklist approved and then into COMAR in an expedient manner, would be willing to let the Sentencing Guidelines Subcommittee act on the sheet, as long as the substance was not changed? Judge Doory answered that he was reluctant to turn this matter of approving a departure checklist over to the subcommittee. He stated that this might be one of the most dramatic changes that the Commission would be responsible for this year and should be voted on by the entire Commission.

Dr. Wellford said that the checklist was distributed for review to criminal justice practitioners statewide and the reviewer comments generally fell into three categories:

1. the first group said there should not be a checklist because it took discretion away from the judge; the subcommittee thought that the need for information regarding reasons for departure from the guidelines overrode that concern;
2. the second group said that the checklist would extend sentencing hearings, proving to be a source for argument from defense attorneys that would raise the mitigating factors, but the subcommittee thought that the departure reasons were common arguments made by defense attorneys already; and
3. the third group thought that the checklist was a good idea, but that it raised so many questions that the subcommittee decided to simplify the checklist to just flash points which could be explained in more detail in the manual.

Dr. Wellford stated that the Commission should go over the draft checklist at the meeting with the assurance that revisions could be made at a later date. Commissioner Butler agreed that the Commission should discuss the checklist at the meeting. He said that the word "Common" was added to the title to read "Common Departure Factors" in order to make it clear that reasons for departure from the guidelines were not limited to the ones listed. Another change was to use the terms Reasons for Downward and Upward Departure instead of Aggravating and Mitigating Factors in order to tone down the form.

Mr. Gibson asked if these reasons for upward and downward departure were going to be used as a research tool to eventually modify the guidelines. Dr. Wellford answered that there were two primary reasons for a checklist that were established by the study commission and by the current sentencing guidelines subcommittee. He explained that on the current form judges have an open box in which to explain reasons for departure. This new checklist would encourage judges to document their reasons for departure from the guidelines because of the ease of use of

the format. Wellford stated that another purpose of the checklist was to gather data on why there were departures from the guidelines in order to summarize the information for the public.

Commissioner McLendon asked if Common Reason for Upward Departure number 12 should parallel the language in Maryland Code 27 § 470A(b)(3)(i), regarding the state "hate crimes" statute. Judge Themelis stated that the term "color" in the reason for upward departure should be removed. Commissioner McLendon stated that if there is a state law that includes classifications of discrimination, then the checklist should be consistent with that law. Commissioner Iamele stated that because of the existing hate crime law, prosecutors can charge suitable crimes as such and the guidelines range would increase to reflect a heightened penalty. Iamele asked if a crime was not charged as a hate crime, then, was it leaving too much up to the sentencing judge to sentence it as such? Commissioner Vallario stated that he did not believe that a judge should have to explain his or her decision to depart from the sentencing guidelines. Vallario stated his opposition to having any sort of departure checklist. Dr. Wellford stated that the Commission was mandated by statute to create a departure checklist. Commissioner McLendon stated that since the sentencing guidelines are voluntary, a departure checklist would be very useful. Judge Doory stated that the Commission must come up with a departure checklist.

Judge Themelis stated that because of the "hate crimes" law, it was the prosecutor's role to charge a specific crime as a hate crime. Judge Doory added that sometimes facts come up in a case that show a crime was indeed a hate crime that were not known at the time the offense was charged. Doory said that the Common Reasons for Departure checklist was not a tool to dictate to judges that they must depart from the guidelines if any of the reasons listed were present, but a tool to record why the judge departed from the guidelines after the sentencing decision had been made. He stated that this was not an encouragement to reduce or raise sentences. Commissioner McLendon stated that the departure checklist should reflect the most routinely given reasons for departure from the guidelines.

Commissioner Vallario suggested that one category be added to the departure list that would be more general. Dr. Wellford suggested "In the Interest of Justice." He stated that the list should go back to the Sentencing Guidelines Subcommittee for work, but he asked the Commission if the concept of a list written in simplified language would be satisfactory. It was unanimous that a simplified list should be created. Dr. Wellford encouraged suggestions and comments from all the Commissioners regarding the departure list. Judge Doory raised a concern about Reason for Downward Departure number 4, regarding providing assistance to law enforcement. He stated that the way the departure reason currently reads might be dangerous for defendants who assist law enforcement because they would be vulnerable to retaliation. Ms. Brennan stated that if a judge selected departure reason 4, it could mean that the person confessed, thereby providing assistance to law enforcement. Brennan stated that the subcommittee tried to make the wording general to avoid exposing the defendant to danger. Judge Themelis assured the Commission that offenders would figure out what the departure reason meant, no matter how vague the language was. Judge Doory suggested that reasons for downward departure could be grouped together to include plea agreements and law enforcement assistance.

Ms. Brennan stated that the Commission should not make it seem that pleas are rewarded with a lesser sentence and that exercising a person's right to trial is penalized with a more severe sentence. Commissioner McLendon stated that the phrase "state's recommendation" be added to a plea agreement. Commissioner Vallario stated that there should be a general reason for departure such as, "Circumstances of the crime do not warrant a sentence within the guidelines." Dr. Wellford stated that the word "Other" could be added to that statement on the departure list as well as keeping the open-ended departure reason, "Other reasons for upward or

downward departure." Dr. Wellford stated that in the interest of time, the discussion on the departure checklist should be stopped and be resumed after the Sentencing Guidelines Subcommittee worked through the list.

## **B. Outreach-Discussion and recommendations**

Dr. Connelly announced that a draft of a proposed information dissemination policy for the Commission was handed out to all Commissioners for their review. Connelly stated that at the last Commission meeting he asked for Commissioners willing to volunteer for the Outreach Subcommittee to get in touch with him, but he had had no response. The proposal dealt with issues of information dissemination and measuring public sentiment through the web site, news media articles, distribution of information to the media, and public surveys and focus groups. Commissioner Marshall stated that staff should take a leading role in public outreach. Commissioner McLendon suggested that instead of a subcommittee, a few Commissioners could volunteer to "brainstorm" with staff on these issues and serve on an as needed basis. Judge Doory and Commissioner McLendon volunteered for this role, and Senator Kelley's name was suggested, also, because of her expressed interest in this area in past meetings.

Dr. Wellford asked about a section of the proposal that stated that Commission staff would prepare reports upon request. He asked who would decide what reports to write, and who would get them? Judge Themelis stated that the statute allows the Commission to charge for information or reports. He also called attention to the Freedom of Information Act and suggested that Commission staff contact the Attorney General's office for instructions on compliance with the Freedom of Information Act, including how to handle information requests, costs, retention schedules, storage of records, and report back to the Commissioners. Commissioner Butler suggested that a staff member from the Attorney General's Office could be invited to a Commission meeting to field questions.

## **8. Old Business**

Judge Themelis stated that in the interest of time he would hold his discussion on both ABA binding plea records and violation of probation records. He stated that he would defer discussion until after the Sentencing Guidelines Subcommittee meeting to see if any other judges had raised concerns about these issues. Judge Themelis stated that if Violation of Probation offenses were treated as sentencing guidelines offenses, the compliance statistics would change significantly. He said that many judges may not give an original sentence within the guidelines, but if the offender violated probation and came back before the court, that sentence would often be within the range of the guidelines. The discussion on this point was deferred as no other judges had brought up any concerns about the matter.

Dr. Connelly expressed concern about deferring action on this subject. Connelly stated that the proposed changes to COMAR would not be done until the first of the year because of the changes to the departure list, and the new worksheet was slated for the first of the year to give consistent data throughout the year. He said that in light of previously expressed concerns about delay, he was concerned that action was taking a slow pace and asked for feedback from the Commission. Dr. Wellford stated that he did not think the changes to the departure checklist would slow anything down, given that they could be put into COMAR at anytime. He stated that the Commission should not issue a new sentencing guidelines worksheet until the new revisions to COMAR are in place. Commissioner Butler suggested that because the Commission is not sure whether to make Violation of Probation a worksheet offense, there could be an optional box on the new worksheet. Amy Brennan stated that the data regarding Violations of Probation would be useful to show that many judges are tougher on offenders who violate the terms of their probation, especially to show the public.

Dr. Wellford asked if the Commission wanted to require that all judges in the state use the new worksheet, without the corresponding new regulations in COMAR. He said that it seemed to him that that would be too premature. Commissioner McLendon asked when the new regulations in COMAR would be approved. Dr. Connelly stated that they are being put into the COMAR style at the present. After stylistic changes were made, they would be submitted for review, with the best possible scenario being that they would be done in 3 months, but it could take up to a year. Commissioner McLendon stated that the goal would be to get the new worksheets out on January 1st, but if there were changes to be made, the Commission should not put out multiple new worksheets in one year.

## 9. **New Business**

As the first Monday is November 6, the day before Election Day, the Annual Public meeting was set for Wednesday, November 8 in the Judiciary Committee Meeting in the Lowe House Office Building. Dr. Connelly stated that the Sentencing Guidelines Subcommittee would meet to discuss the departure checklist before the next Commission meeting. The General Meeting would start at 4:00, with the Public Meeting to follow later in the evening so that the public would have the opportunity to address the Commission with their concerns. It was announced that those who wanted to address the Commission should contact the Commission staff.

Dr. Connelly also noted that the current guidelines manual had been put on the Commission's website through the diligent work of Kate Wagner and of Lynne MacAdam of The State Archives.