

Maryland State Commission on Criminal Sentencing Policy
October 24, 1997

Commission Members in Attendance:

The Honorable John F. McAuliffe, Chairperson
Ms. Roberta Roper
Dr. Charles Wellford
Senator Delores G. Kelley
Sen. Christopher J. McCabe
Delegate James M. Harkins
Del. Kenneth C. Montague, Jr.
The Honorable Alexander Wright, Jr.
Carolyn Quattrocki, Esq.
Stephen E. Harris, Esq.
John Lang for Secretary Bishop L. Robinson
Marna McLendon, Esq.
Mr. Adam Gelb
Del. Joseph Vallario
The Honorable Howard S. Chasanow

Staff Members in Attendance:

Linda M. Schuett

Announcements

The Honorable John F. McAuliffe, Chairman, called the meeting to order. He announced that Secretary Robinson will retire, effective November 1, 1997. Secretary Stuart Simms, or his designee, will fill the vacancy.

The Chairman called the members' attention to several handouts. First, copies of an article entitled "Jail Officials Seek More Prison Beds" from the October 22, 1997 issue of the Daily Record has been distributed. Second, each member has been given copies of a letter dated October 8, 1997 from Alexander J. Palenscar and a letter dated October 1, 1996 from Karen A. Elliott. The Chairman noted that the minutes of the last meeting will be distributed shortly.

The Chairman stated that the next meeting will be a public hearing in Rockville. The hearing will commence at 4:00 p.m. on November 25. Specific information concerning the address, directions, and parking will be mailed to all members.

The Guidelines Subcommittee met very recently and it has another meeting planned for November 21, 1997. The Subcommittee is reviewing packages of materials gathered from various States, and summaries of the sentencing approaches taken by those States will be distributed in the near future.

To give subcommittees additional time to meet, there will be no meeting in December. After discussion, the Commission decided that meetings for the first half of 1998 would occur on January 8, February 9, March 9, April 27, May 27, and June 25, all beginning at 1:30 p.m.

The Chairman then introduced the one speaker for the day: Richard B. Rosenblatt, Assistant Attorney General and Deputy Counsel for the Department of Public Safety and Correctional Services. Mr. Rosenblatt was formerly in the appellate division of the Attorney General's office and, while in that position, did an excellent job of handling various appeals to the Court of Appeals, particularly in capital punishment cases. Mr. Rosenblatt will address the issue of good time credits.

Richard Rosenblatt - Good Time Credits

Mr. Rosenblatt stated that the term "good time credits" is a misnomer. The term encompasses far more than credits given solely for good behavior. Mr. Rosenblatt distributed portions of Article 27, §700, all relating to "diminution credits," known as "dime." These credits are awarded by operation of law. They are awarded when a prisoner is received, subsequent revocation.

Prior to 1970, when inmates were released early as a result of diminution credits, they were released without supervision. Since 1970, those inmates who are released early as a result of diminution credits are treated as if on parole. For a violation, there is a parole-like hearing. In 1989, the Parole Commission was given the authority to take diminution credits away.

Mr. Rosenblatt commented that many prisoners have more than one sentence, often imposed and ending on different dates. Thus, the first step is to determine the "term of confinement." That determination is made pursuant to Article 27, §700(a). For multiple sentences, the term of confinement begins on the first day of the sentence beginning first and ends on the last day of the sentence ending last.

On the day of arrival, a prisoner receives a bulk award of credits for the term of confinement. Prior to 1992, all prisoners received five days per month. After 1992, those convicted of a crime of violence or drug distribution receive five days per month and all others receive ten days per month. So, for example, upon arrival, a prisoner with a sentence of ten years for a violent crime immediately receives five days per month, for a total of 600 days to be credited against the total length of the sentence.

Prisoners also receive five days of credit per month for participating in work programs or five days of credit per month for participating in educational programs. Approximately 2/3 of the total prison population currently participates in one of the programs. These credits are posted on a monthly basis if the prisoner participates in the program as agreed.

Prisoners may receive up to ten additional days of credit for participating in special projects that are designated by the Commissioner and approved by the Secretary of Public Safety and Correctional Services. Credits are also awarded to those prisoners housed in overcrowded space. There is a cap of 20 days of total credits that may be allowed per month.

Mr. Rosenblatt pointed to the examples given on the sixth, seventh, and eighth pages of the handout. These examples demonstrate that a prisoner sentenced on October 1, 1997 to a term of ten years could theoretically be released on May 8, 2002, thereby serving just under five years on a ten-year sentence. Mr. Rosenblatt emphasized, however, that the example is not to be taken as the norm. He noted that nonviolent offenders are most likely the ones to receive housing credits. They are also the most likely to obtain jobs. The likelihood of obtaining a credit of five plus five for tutoring, as an example, is not high. Dr. Wellford questioned whether statistics are kept on issues relating to good time credits. Mr. Rosenblatt stated that he does not believe they are.

Senator Kelley questioned whether the assignment of special projects creates disparity. Mr. Rosenblatt stated that disparity can occur with respect to who receives special projects, for there is subjectivity involved in choosing the inmates who participate. Disparity could also occur with respect to who obtains housing

credits.

Judge Wright questioned whether there is a grievance procedure. The speaker responded that there is, but that if "all hoops have been jumped through," any issues relating to good time credits are essentially non-appealable.

Mr. Harris questioned why we have the credits - where did they come from. Mr. Rosenblatt responded that the credits have a dual rationale: 1) to deter bad conduct; and 2) to encourage rehabilitation through participation in the programs. It is both a carrot and a stick approach.

Senator Kelley questioned the level of choice that inmates have with respect to participation in the programs. Mr. Rosenblatt responded that all of the programs are voluntary. Prisoners may choose to remain idle, if they wish. For those who wish to participate, however, availability can be a problem. If a job is not available, the prisoner who wishes to have a job is "job banked" - i.e., he or she is placed on a waiting list for the next available job. Approximately 35% of the prison population is currently job banked. Some of those, however, choose not to take particular jobs as they become available.

Judge McAuliffe questioned whether inmates are deprived of educational credits as a result of the unavailability of programs. Mr. Rosenblatt responded in the negative, although there may be some delay. College educational programs are not available at all. Programs to obtain GED's are plentiful. Younger offenders are required to participate in GED programs. When asked whether the institutions are "equal opportunity" providers, the speaker stated that not all institutions are the same. For example, a maximum security facility does not have as many programs simply because maximum security inmates are not eligible for participation in as many programs. There is parity, however, amongst the medium security institutions.

Mr. Harris asked how housing credits originated. Mr. Rosenblatt stated that housing credits came about to turn the prison population over more quickly in order to comply with law. Ms. Roper asked about the recidivism rate with respect to those who participate in the programs. Mr. Rosenblatt responded that he is unaware of the answer to the question, primarily because those who "max out" on program credits tend to be released through parole, rather than as a result of the credits.

Senator Kelley raised some issues relating to Patuxent. Mr. Rosenblatt stated that Patuxent currently houses five or six different types of populations. It is, for example, the re-entry facility for technical violations of parole, the home of the youth program, and the place for all with mental health issues. Its focus today is on remediation through education and training, as well as psychological treatment. It has a nine-member Board of Review that includes the warden. The Board decides who gets in, who gets leave, who gets work release, etc. If the inmate is a "lifer," the Governor decides parole issues.

Judge McAuliffe asked about the appellate process relating to good time credits. Mr. Rosenblatt stated a notice of infraction is issued for such things as fighting, escape, stealing food, or stealing property. A hearing is held no sooner than 24 hours and no later than 96 hours after the event. The alleged violator can be represented by another inmate and can call and cross examine witnesses. If "convicted," there is a matrix relating to punishment. There is the availability of an appeal to the warden, who can do nothing more than issue a more favorable result to the violator. After that, the issue may be taken before an administrative law judge, with a right of appeal to the circuit court and the ability to file an application for leave to appeal to the Court of Special Appeals. Judge McAuliffe questioned how many good time credits can be taken away. Mr. Rosenblatt responded that, as a practical matter, the limit is 180 days, though there is the authority to take more.

Mr. Gelb asked about the inter-relationship between good time credits and parole. Mr. Rosenblatt stated that a hearing on parole occurs after a prisoner has served 25% of his or her sentence for a non-violent crime or

50% of the sentence for a violent crime. Theoretically, a "non-violent" prisoner could be paroled on his or her first day in prison. As a practical matter, however, parole does not occur until the hearing is held, at the earliest. Participation in boot camp, however, does sometimes result in earlier parole. Inmates believe that both parole and good time credits are important, but they know that parole is discretionary and that good time credits are certain.

Dr. Wellford asked what the speaker's view is concerning what to do with good time credits if the Commission were to recommend a narrower range of sentences with the requirement that a substantial amount of that time be served. Mr. Rosenblatt stated the opinion that the federal requirement that 85% of the sentence be served is too tight because it decreases management tools. A certain number of, for example, sanitation workers are required within the system and there must be a way to pay them for the work. Furthermore, he questions the wisdom of a policy that might discourage the number of inmates willing to take programs to help them learn to read or write.

A discussion ensued about how meaningful these credits are to prisoners. Mr. Gelb questioned how we know what percentage is meaningful to the prisoner - maybe 15% is. Mr. Gelb further questioned what the results have been in the federal system since adoption of the 85% rule. Senator McCabe likewise questioned the importance of the credits to prisoners. Mr. Rosenblatt stated that there is no singular psyche for an inmate. They are as diverse as the public at large is diverse.

Senator Kelley asked about gender disparity and whether, for example, boot camp is equally available to women. The speaker stated that boot camp is available to women. However, for whatever reasons, fewer women choose to participate. This is true even though the program has been revised to make it less physical and more educational.

The Chairman asked what differences exist, if any, in terms of supervision after mandatory release versus parole. Mr. Rosenblatt responded that parole may impose special conditions. A discussion then ensued as to how good time credits can become captured into a new offense after a mandatory release. The issue was addressed legislatively in 1996. At times, an offender can be punished more harshly by not revoking parole.

Senator Kelley asked the speaker for his view on using options in lieu of prison for technical violations of probation. With legislative approval, Mr. Rosenblatt believed that options would be a good idea. He cautioned, however, that current practices concerning technical violations should be examined. If the agent is "reprimanding" only at the present, the availability of options could increase costs.

The Reporter questioned what the matrix is like that is used in connection with hearings concerning possible revocation of good time credits, whether the ranges are large or small, whether discretion is allowed, and whether deviation from the matrix is allowed. Mr. Rosenblatt responded that there are two sanctions: (1) segregation and loss of privileges; and (2) loss of good time credits. Both have ranges in each category. Only the Commissioner may go outside the ranges set forth in the matrix.

The Commission took a lunch break.

General Discussion

The Chairman stated that subcommittees can and should enlist the assistance of consultants. The Criminal Law Section of the State Bar Association, the Young Lawyers Section, and law schools are a few good sources for locating consultants. Votes on issues in the subcommittees, however, should be limited to Commission members. The discussion today is intended to reach a general consensus on certain issues, through straw votes, if necessary, to assist the subcommittees in their work. The Chairman called Commission members' attention to the handout that sets forth a list of questions presented for discussion.

The Chairman stated that the Commission's recommendations could range from recommending no guidelines at all, to keeping the current system of guidelines as they are, to going with the federal guidelines, or to all of the unlimited options that fall between our current system and the federal system. Mr. Gelb distributed a chart that delineates various options available for various categories of issues. He explained that the chart is not intended to be all inclusive. It presumes a more prescriptive system but provides for great flexibility within that system.

Judge Chasanow stated that there is universal dissatisfaction with sentencing. On the other hand, prosecutors and public defenders alike are satisfied with the current guidelines. There has been no adverse publicity concerning the guidelines themselves. The guidelines are currently in the process of revision, and Judge Chasanow questioned whether the Commission should wait to see what that process produces. The development of guidelines is a huge undertaking that will be criticized no matter what the content. Perhaps the Commission would best spend its time focusing on the District Court.

Dr. Wellford agreed, in part, with Judge Chasanow's comments. He stated that Mr. Gelb's chart shows the existence of 40,000 possibilities and that it would therefore be easy to get lost in the process. We have a system in place right now that provides a good starting point. We should examine our current guidelines and recommend any revisions that the Commission believes are appropriate.

Judge Wright suggested that the Commission examine what percentage of District Court defendants end up in the Department of Corrections and then include those crimes only within the matrix. Judge McAuliffe stated that the Commission needs to know how many District Court defendants are going to jail and the term of their sentences. He noted that the Courts Article provides for up to 15 years for a number of offenses. A study of these issues is currently underway. The study should be helpful in determining whether there is a need for guidelines in the District Court.

Mr. Harris stated that he has heard no evidence thus far that the current guidelines are not working. He therefore questions what the Commission is attempting to fix. In Mr. Harris' view, the Commission should begin with the current system, although tinkering with it may be appropriate. Mr. Harris agrees that the public has a right to know about and better understand how sentences are imposed, how agreements are reached, and how good time credits are calculated.

Senator Kelley stated that we lack a systemic database that reflects who is being incarcerated and the cost. She is concerned about the disparity produced by the current guidelines. Under the current system, we are unable to predict the resources that will be needed for the future.

Ms. McLendon expressed agreement with some of the views expressed by Judge Chasanow and Mr. Harris. In her view, most plea agreements include participation by the victims and, so, that part of the system is working well. The problem, however, is that the public does not understand good time credits. She believes that the Commission should focus on truth in sentencing.

Dr. Wellford stated that 50-60% of the sentences imposed fall outside the guidelines. So, one problem clearly identified by the evidence presented is that the current guidelines are not being used at all in a majority of cases.

Ms. Roper stated that the current guidelines also fail to satisfy the public's need for truth. A life sentence, for example, does not mean life. The Commission needs to bring truth into the system. Furthermore, Ms. Roper stated that victims are not uniformly included in plea agreements throughout the State, as perhaps they are within Ms. McLendon's County.

Mr. Gelb stated that it is important to ask the right questions. The issue is not whether the current guidelines

are working. Rather, the Commission has been provided with legislative goals that are not currently being met. The Commission needs to identify measures to accomplish the goals.

Judge McAuliffe stated that Maryland was in the forefront of developing guidelines and that the current guidelines are not "broken." However, guidelines are but a part of a global criminal sentencing policy. Is there a way to identify people currently going to jail who do not need to be in jail in order to ensure public safety and who could safely be in community options in order to preserve bed space for those who really need it and reduce the amount of prison construction needed in the future? If the answer to that question is in the affirmative, do we need a system that guarantees that only those who need options get them? In other words, a recommended system should not send people into options if they would, under the current system, be on probation. Judge McAuliffe stated that a recommended system may need to be more presumptive in order to increase predictability, while at the same time preserving discretion to go outside the presumptive guidelines, perhaps with an appeal. Prosecutors and defense counsel alike would appreciate the increased predictability. Judge McAuliffe stated that there is perhaps unintentional, but nonetheless statistically significant, racial disparity under the current system.

Judge Chasanow stated the view that the current guidelines have eliminated racial disparity. He further stated the view that the current guidelines are followed far more than 50% of the time. Even if followed only 50% of the time, however, that is healthy. There are cases where the defendants deserve far more, or far less, less than the range of sentence recommended by the guidelines. Dr. Wellford stated the view that making the existing guidelines presumptive would, in and of itself, make the current system far better than what we have now.

Delegate Montague stated that he believes the current system needs adjustment. A presumptive system would make the system more understandable to the public. Senator McCabe stated the view that the public is most concerned about the violent offender. In order to institute a system of correctional options, we must be able to tell the public that the people who present a real danger to them are being put away. Delegate Montague noted that Maryland is already tough on crime and good about putting dangerous people into prison, but the public does not perceive it that way. One question is how to improve the public's awareness of the true facts. Delegate Harkins stated that if good reasons exist for good time credits, then the public needs to be made aware of those reasons.

Judge McAuliffe stated that we do need to inform the public about what works with the system we have now. However, we also need to see whether the current system can be made simpler. Mr. Gelb stated that we need to deal with the percentage of time served before we do any kind of public education campaign. That percentage must shrink before the public will understand. Senator Kelley stated that the range within the cells needs to be narrowed. Dr. Wellford stated that the public is confused about the enormous differences between the sentence imposed and the time served.

The Chairman pointed to Item C on the handout, which deals with truth in sentencing. He stated that it would upgrade the public's confidence in the system if the public knew that "what you see is what you get." If we were to go with the federal standard of 85% time served for the enumerated five crimes of violence, Maryland would then be eligible for federal funds. The federal funds, however, relate only to the bricks and mortar. Maryland would still need to pay \$20,000 per year per bed for maintenance. Furthermore, we would be unable to build prisons fast enough if we went to the 85% standard across the board. Another alternative is for the judge to impose, for example, a 12-year sentence if the judge would currently say 20 when, as a policy matter, all agree that the defendant should in fact serve ten. This may be a difficult alternative to sell to the public, but it could be done. Judge McAuliffe noted that there is a seminar soon in the District of Columbia that addresses how the system is working in those jurisdictions that have gone to the 85% standard. Senator Kelley expressed the view that we should not adopt any particular view solely to obtain federal funding.

Judge McAuliffe noted that two ways to affect truth in sentencing revolve around diminution credits and parole. We know that the Parole Board is in the process of creating new risk assessment procedures, and possibly new hearing procedures. The Chairman asked whether there is sentiment to abolish altogether either parole or good time credits?

Dr. Wellford noted that the Commission has no evidence to show that the elimination of good time credits would in fact alter prison management. Ms. McLendon stated that she believes in parole and the "after care" that parole provides. Transition into the community is important. Without it, she believes that the failure rate would be higher. She further believes in the importance of conditions of release. Dr. Wellford noted that a Parole Commission may not be needed if structured sentencing is adopted because, then, the guidelines to be used in connection with parole would mirror the guidelines used by judges.

Judge McAuliffe questioned whether parole is important for the youthful offender who receives a long sentence. Dr. Wellford stated that parole might be important for the youthful offender who receives a 40-year sentence under the current guidelines. With a sentence of five or six years under a new system, however, parole may not be as important.

Delegate Vallario recited examples of sentences that, in his view, point to the need to retain parole. Dr. Wellford suggested that the problems identified by Delegate Vallario could be better dealt with at the front end. Delegate Vallario noted that some states have given up to 75 days per month in good time credits. He stated the view that the system should be changed so that the judge says, for example, that the sentence is five to ten years, with that being the truth. Delegate Vallario also believes that guidelines for the District Court are unworkable. The District Court judges do not want them, and they are unable to handle all the paper that goes along with guidelines because their caseloads are so heavy. Guidelines should always remain voluntary.

The Chairman stated that a consensus has been reached that issues relating to parole should form part of the Commission's recommendations, but that parole should not be abolished. All members also appear to agree that truth in sentencing is needed. Judge Chasanow stated that members also appear to agree that the Commission's work should begin with the existing guidelines.

Mr. Gelb stated that, no matter what, the Commission should recommend required supervision for those who serve less than their entire sentence. A consensus was reached in that regard, with the additional requirement that conditions could be imposed. Mr. Rosenblatt noted that mandated supervision in cases where the time remaining is very short may not be a good use of resources.

Mr. Kelley, on behalf of Secretary Robinson, stated that a judge should be able to allow options as part of the sentence, but should not be permitted to mandate particular options. The Department of Corrections is in the best position to determine the particular options program that is appropriate for a particular person. Senator Kelley stated that she would like to see a system where the judge is able to mandate options, with the Department deciding which of the options is appropriate. Judge McAuliffe noted that judges formerly sentenced defendants to particular prisons, but that did not work because judges lacked information about which prisons had available prison space. That system was legislatively changed so as to require that judges sentence defendants to the Department of Corrections.

Senator Kelley questioned whether the Commission believes that a permanent sentencing commission is advisable. Judge McAuliffe stated that if the Commission recommends prescriptive sentencing, a permanent commission may be needed to follow through. Mr. Gelb stated the view that various agencies currently predict significantly different numbers. It may therefore be a good idea to have a neutral body to evaluate data.

Dr. Wellford asked for a straw vote on the following question: Without specifying any particular form, should the guidelines subcommittee begin with the current guidelines and move towards a greater degree of presumptiveness? Nine voted in favor; four voted against.

Mr. Gelb asked for a straw vote on the following question: Should the cells include a cell that allow judges to mandate or permit an alternative sanction? Nine voted in favor; two voted against.

There being no further discussion or comments, the meeting was adjourned.