



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
House Office Building  
Annapolis, MD 21041  
December 11, 2012

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

Honorable Diane O. Leasure, Chair  
Delegate Curtis S. Anderson  
James V. Anthenelli, Esquire  
Colonel Marcus L. Brown  
Honorable Joseph I. Cassilly  
LaMonte E. Cooke  
Honorable Arrie W. Davis  
William Davis, Esquire, *representing Public Defender Paul B. DeWolfe*  
Paul F. Enzina, Esquire  
Richard A. Finci, Esquire  
Senator Lisa A. Gladden  
Rhea Harris, *representing Secretary Gary D. Maynard*  
Senator Delores G. Kelley  
Megan Limarzi, Esquire, *representing Attorney General Douglas F. Gansler*  
Honorable Laura L. Martin  
Honorable John P. Morrissey  
Honorable Alfred Nance  
Delegate Joseph F. Vallario, Jr.  
Charles F. Wellford, Ph.D.

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

Marlene Akas  
Stacy Skroban Najaka, Ph.D.  
David Soulé, Ph.D.  
Christina Stewart

### **Visitors:**

Linda Forsyth, Legislative and Community Liaison for Senator Kelley  
Claire Rossmark, Department of Legislative Services

#### **1. Call to order**

Judge Leasure called the meeting to order.

#### **2. Roll call and declaration of quorum**

The meeting began at 5:06 p.m. when quorum was reached.

#### **3. Approval of minutes, September 18, 2012 meeting**

The minutes were approved as submitted.



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

Dr. Soulé began the Executive Director's report by discussing how MSCCSP staff followed up on the Commission's motion at the September 18, 2012 meeting to request that the Court's new electronic case management system, Maryland Electronic Courts (MDEC), include a process for verification that a sentencing guidelines worksheet has been completed for all eligible circuit court cases prior to closing out a case at sentencing. Dr. Soulé reported that Judge Leasure and he had sent a letter dated September 19, 2012 to Judge Ben Clyburn, Chair of the Maryland Electronic Courts Advisory Committee, regarding the sentencing guidelines worksheet completion issue. Judge Clyburn agreed to place the issue on the agenda for discussion at the Committee's meeting on September 20, 2012. Dr. Soulé received a response from the Committee on October 16, 2012 via Joan Nairn, MDEC Project Director. Ms. Nairn confirmed that the MSCCSP's request had been received and indicated that the Judiciary was in the process of reviewing all types of similar requests from outside agencies to determine what will be required development for the initial release of MDEC and what may be developed in future releases. Ms. Nairn further indicated that she provided a copy of the MSCCSP's letter to the review committee and that they would consider the MSCCSP's request as they prioritize and finalize the development of MDEC. On October 18, 2012, the Court of Appeals held a public meeting regarding MDEC. Dr. Soulé reported that he requested and was granted permission to address the Court at this meeting. During the meeting, Dr. Soulé noted to the Court that given the statutory mandate for the Court to consider the guidelines at sentencing, it may be mutually beneficial for the Judiciary and the MSCCSP if the MDEC system would include a check to indicate that a guidelines worksheet has been completed for all eligible circuit court cases prior to closing out a case at sentencing. Dr. Soulé shared that the MSCCSP respectfully requests that the Judiciary make this request a priority by including this data check in the initial release of MDEC. Dr. Soulé reported that the Court acknowledged receipt of the MSCCSP's request and encouraged the MSCCSP to continue to work with Judge Clyburn's committee. Finally, Dr. Soulé reported that he is awaiting a response from Ms. Nairn regarding an expected timeframe for further review of the MSCCSP's request.

The second item Dr. Soulé addressed was the MSCCSP's plan to seek permission to implement the Maryland Automated Guidelines System (MAGS) statewide. Dr. Soulé recounted that at its September 18, 2012 meeting, the MSCCSP unanimously approved a plan to seek permission from the Judiciary to continue the use of the MAGS application in Montgomery County after the pilot period and to begin a gradual rollout to the remaining jurisdictions. Judge Leasure and Dr. Soulé were scheduled to meet with the Conference of Circuit Judges (CCJ) in November; however, that meeting was postponed until January 28, 2013 to allow time for Montgomery County Court researchers to fully evaluate the six-month pilot project that concluded on November 7, 2012 (Note: After the December 11, 2012 Commission meeting, the CCJ meeting was postponed until March 18, 2013). Dr. Soulé noted that in the interim, the Administrative Office of the Courts has granted permission for Montgomery County to continue utilizing MAGS beyond the pilot project end date. Dr. Soulé commented that based on internal reviews, MSCCSP staff is fairly confident that MAGS has achieved its stated goals of increased accuracy in calculating the guidelines, enhanced services to the courts, prosecutors, Parole and Probation agents and defense attorneys, and more timely assessment of sentencing practices. Dr. Soulé noted that he hopes that statewide use of the MAGS application will be approved by the CCJ at the next meeting.



Next, Dr. Soulé reported on the MSCCSP staff's meeting with the Information Technology and Communications Division (ITCD) of the Department of Public Safety and Correctional Services (DPSCS) on October 24, 2012 to share feedback from the pilot project and discuss updates to MAGS. At this meeting, Dr. Soulé presented a list of 24 requested enhancements to MAGS that were identified based on feedback from users in the Montgomery County pilot project. Dr. Soulé reported that DPSCS agreed to perform all but one of the requested enhancements. The exception was the request for the ability to use MAGS with web browsers other than *Internet Explorer*, specifically *Safari*, so that MAGS could be used on an *iPad*. DPSCS advised that they were not able to institute compatibility with other web browsers at this time, as this particular enhancement would cost approximately \$14,000 to implement and ITCD cannot support this added expense. It was agreed, however, that this enhancement may be pursued at a later date. Dr. Soulé reported that DPSCS had begun implementing the other requested enhancements and the expected release date for the next version of MAGS is March 2013. Dr. Soulé noted that he also inquired about whether a separate MAGS test environment could be set up for Commissioners. Dr. Soulé was advised by DPSCS that it was possible, however, DPSCS would need to make changes to their infrastructure to implement this request. Dr. Soulé indicated that MSCCSP staff has this ability because DPSCS set up a dedicated computer in the Commission's College Park office, which provides secure access to the test server through a VPN connection to a DPSCS active directory. This process is not replicable for each individual Commissioner and also is not possible if other VPNs are on one's computer. In the meantime, Dr. Soulé suggested that Commissioners could utilize the Guidelines Calculator Tool, which is available on the MSCCSP website, to get a feel for the application.

Lastly, Dr. Soulé noted that 2013 will mark the 30-year anniversary of the utilization of sentencing guidelines in Maryland. Dr. Soulé stated that it may be appropriate to hold a half-day conference to celebrate the establishment and history of the guidelines and to review the activities of the various boards and commissions that developed and maintained the guidelines system in Maryland. The conference could provide an opportunity to look back on the work and accomplishments throughout the years, while also serving as an impetus to look forward and establish future goals. Dr. Soulé reported that either September or October 2013 is being considered as a potential date for this conference. Dr. Soulé noted that all former members of the guidelines-related committees in the Judiciary, former members of the Commission, and judges throughout the state would be invited. Dr. Soulé added that various state dignitaries such as the Governor and Chief Judge would also be invited to highlight the significance of the work done by the Commission and its preceding committees, as well as to relay the importance of current and future projects such as automation, the simulation model, and risk assessment at sentencing. MSCCSP staff has started preliminary discussions to find a willing partner or partners to help fund the costs affiliated with hosting the conference. Dr. Soulé requested that the Commission support the staff in moving forward with taking steps to seek funding for the conference.

Senator Kelley moved that the Commission support the MSCCSP staff in its efforts to secure funding for the conference. The motion was approved unanimously.

Dr. Soulé noted that Judge Leasure appointed a conference planning committee that would start working to identify a date and location for the conference. Judge Leasure commented that Dr. Wellford and Senator Kelley graciously agreed to serve on this committee.



**5. Report from the Guidelines Subcommittee – Honorable John P. Morrissey**  
Judge Morrissey presented the report of the Guidelines Subcommittee.

**A. Proposed classification of the common law offense *affray***

Judge Morrissey indicated that the first item on the Guidelines Subcommittee's agenda was the proposed classification of the common law offense *affray*, which had not been previously classified by the MSCCSP. The MSCCSP staff had asked the Subcommittee to classify the offense, as the staff has received questions about how the offense should be classified. Judge Morrissey indicated that the Subcommittee looked at comparable offenses and also reviewed a recent Court of Special Appeals case, *Hickman v. State*, 996 A.2d 974 (2010), which provided a thorough discussion of the history of the common law offense of *affray*. Judge Morrissey noted that Judge Davis wrote the opinion for *Hickman*. Judge Morrissey noted that after reviewing comparable offenses and the relevant case law, the Subcommittee recommended a classification of seriousness category VI. Judge Morrissey commented that the common law definition of *affray* used in *Hickman* is a voluntary fight in a public place and the offense has an element of disturbing the public peace, which is how it distinguishes itself from an assault. He further noted that an *affray*, unlike an assault, is a consensual touching. The Subcommittee split the difference between using the nonconsensual touching analysis of an assault (category V) and disturbing the peace (category VII) to arrive at its recommendation. Judge Morrissey also noted that the Subcommittee recommended that *affray* should be classified as a person offense.

In regards to *Hickman*, Judge Davis explained that he, along with the former Chief Judge of the Maryland Court of Special Appeals, Judge Alan Wilner, concluded that the victim in an *affray* is the public due to the disturbance of the public peace. Judge Davis noted that in *Hickman*, a case involving a riot was cited and distinguished from an *affray*. Unlike a riot, an *affray* has an assault plus the public policy concern of whether there will be an incitement of the people present. Judge Davis noted that in some respects, an *affray* is more serious than a riot because a riot does not require the occurrence of an assault. The commonality between riot and *affray* is that they are both geared toward the public peace. Judge Davis commented that he believes at the very least an *affray* should be equal to, if not more serious than, a riot because it has all the components of a riot coupled with the components of an assault.

Senator Kelley commented that the offense *affray* seemed arcane and limited and did not rise to the level of a riot. Judge Davis commented that the analysis of *Hickman* was not about two people fighting. Instead, the focus was on the disturbance to the public peace in addition to the potential that people around may be incited. Judge Leasure asked how often an *affray* is charged. Dr. Soulé answered that it does not appear to be a frequent charge, but there are a minimum of four entries for *affray* in the MSCCSP sentencing guidelines database. Dr. Soulé noted that because *affray* is not currently listed on the Guidelines Offense Table, it can only be identified in the MSCCSP database if the data entry specialist took the extra step of indicating in the notes section of the database that the offense that is entered as "miscellaneous" is actually an *affray*. Judge Davis reiterated that from a legal standpoint, an *affray* is not about the two combatants. Rather, it is about it being in the public and that it is a disturbance or disruption of the public peace, and technically it is the public that is the victim, not the combatants.



Senator Kelley questioned whether an *affray* could occur where there is no member of the public or a camera present, which would present evidence as to whether the fight was consensual or one combatant was a victim protecting him or herself from the other. Judge Davis responded that the consensual issue arose to distinguish an *affray* from an assault. In light of Judge Davis' prior remark that an *affray* is consistent with disturbing the peace, Mr. Davis questioned why the seriousness category for an *affray* should be more stringent than that for disturbing the peace. Mr. Davis commented that because an *affray* is a consensual touching, the analogy to an assault is inapplicable. Mr. Davis noted that mutual *affray* is a defense to assault, and therefore to indicate that *affray* has the element of assault is improper. Accordingly, Mr. Davis indicated that he believes that an *affray* should be classified as a seriousness category VII. Judge Morrissey commented that the Subcommittee reached its recommendation based on the fact that an *affray* is disturbing the peace, but with an extra element of violence in the presence of others. Judge Morrissey noted that the Subcommittee acknowledged that the consensual element of *affray* causes it not to rise to the level of assault. Judge Nance commented that it is important to note that *affray* is a common law offense that carries a potential life sentence. He noted that the present day use of the charge of *affray* and what it means were considered by the Subcommittee. Judge Nance noted that the majority of the Subcommittee felt that *affray* was more equivalent to a disturbance of the peace than to an assault or battery.

Mr. Cassilly moved that the Subcommittee's recommendation of seriousness category VI be adopted. The motion was approved with Mr. Davis opposing and restating his belief that *affray* should be classified as a seriousness category VII.

#### **B. MAGS user protocol to be implemented after conclusion of pilot project**

Judge Morrissey referenced the memorandum entitled *MAGS User Protocol*. Judge Morrissey reported that at its September 18, 2012 meeting, the Commission voted to adopt the Subcommittee's recommendation to proceed with obtaining all necessary permissions for the statewide implementation of MAGS and to request that Montgomery County continue utilization of MAGS after the expiration of the six-month pilot period in November. The MSCCSP staff drafted a protocol for MAGS use to be distributed to each jurisdiction as it begins to implement the automated system. The draft MAGS User Protocol was provided for information purposes and as a tool to help guide further discussions regarding the use of MAGS beyond the pilot project.

Judge Morrissey indicated that the Subcommittee also reviewed a proposal by the MSCCSP staff regarding limitations on access to open cases in MAGS based on users' county affiliation. Judge Morrissey noted that the Subcommittee agreed to table the discussion on this proposal to allow Judge Nance an opportunity to review the previously distributed MAGS Pilot Feedback Tracking Log and the forthcoming MAGS evaluation to be completed by Montgomery County.

Judge Leasure commented that in order to move forward with MAGS, the CCJ would need to be provided with information about the Montgomery County pilot project and the corresponding evaluation report. She noted that the CCJ would then presumably make a recommendation to the Judicial Council and ultimately the Judicial Cabinet for a proposed roll-out of MAGS to other counties based upon the degree of success reported in Montgomery County. Judge Leasure indicated that an immediate roll-out to all jurisdictions



would not be possible; instead, a schedule for a gradual roll-out to other counties would probably be suggested by the CCJ if it is in agreement that MAGS should be used in other jurisdictions beyond Montgomery County. Judge Leasure further noted that Judiciary pilot projects are typically deployed in smaller jurisdictions first with a gradual progression to the larger counties. Judge Morrissey commented that he thought a similar approach would be employed with the MDEC implementation.

No action was required of the Commission at this time with respect to this particular issue.

### **C. Review of victim questions data from MAGS**

Judge Morrissey noted that the final item reviewed by the Guidelines Subcommittee was a continued discussion of the victim-related questions included on the guidelines worksheet. Judge Morrissey recapped that the Commission had previously agreed at its June 25, 2012 meeting to table the broader question of whether the victim-related questions should remain on the guidelines worksheet. The Commission agreed to table this issue to allow the MSCCSP staff time to analyze data collected during the MAGS pilot project to determine whether MAGS had any impact on compliance with completing the victim-related information. Judge Morrissey noted that the staff had completed this requested analysis and referenced the memorandum entitled *Review of victim data collected during the MAGS pilot project* for the results of this analysis. Judge Morrissey noted that the report indicates that there was a significant increase both in the percentage of users inputting some victim information on the guidelines worksheet, as well as in how often the victim information was completed in its entirety. Judge Morrissey reported that the compliance rate for Montgomery County worksheets with all victim-related information completed increased from 7.1% during the pre-MAGS period to 66.4% during the MAGS pilot period.

Judge Morrissey further noted that at the December 13, 2011 meeting, the Commission agreed to adopt revisions to the wording of the victim information questions on the guidelines worksheet. The revisions were adopted with the caveat that the Commission would still need to return to the broader issue regarding whether the victim questions should remain on the worksheet. The MSCCSP felt it was still important to adopt the proposed revisions, as they would likely help improve the Commission's ability to capture the intended data should the questions remain. Judge Morrissey noted that MSCCSP staff postponed implementing the revisions due to the tabled discussion of whether the questions should remain on the worksheet. He reported that the Subcommittee recommended that the issue regarding retention of the victim-related questions be tabled again to allow for a longer period of data collection and to see if compliance improves in other jurisdictions when they start utilizing MAGS. Given the suggestion to delay a decision on the broader issue of whether the questions should remain on the guidelines worksheet, the Subcommittee recommended that the staff implement the adopted revisions to the victim information language both on the paper guidelines worksheet and in the MAGS system.

Judge Morrissey moved that the Subcommittee's recommendation be adopted. The motion was approved unanimously.

Judge Nance asked to revisit the decision made at the September 18, 2012 Commission meeting to ask the Judiciary for permission to expand the use of MAGS outside of Montgomery County. Judge Nance commented that he believed the Commission voted to



take the steps to move forward with MAGS prior to receiving sufficient feedback on the pilot project. He recounted an issue raised at the December 2012 Guidelines Subcommittee meeting concerning a judge needing to stop while on the bench to complete a worksheet in MAGS. Judge Nance noted that in Montgomery County, the State's Attorneys were providing a hard copy of the guidelines worksheet created in MAGS for review to defense counsel and the judge in court, to later be completed inclusive of the judge's comments by the judge or judge's designee. Judge Nance commented that during the Montgomery County pilot project, no hard copy of the sentencing guidelines worksheet was going to the court file. He stated that either Montgomery County staff or MSCCSP staff would need to be asked to print a hard copy of the worksheet for inclusion in the court file. Judge Leasure commented that the *MAGS User Manual* specifically states that the judge or judge's designee must print or save a PDF copy of the completed worksheet prior to submission. It further instructs that this PDF hard copy or digital file should be provided to the Court Clerk for distribution. Judge Nance indicated that he was glad to hear that this procedure was documented in the user manual.

Judge Nance next referenced an issue highlighted in the *MAGS Pilot Feedback Tracking Log*. Specifically, he noted a comment that described an instance where a defendant with multiple cases was sentenced on the same day. Judge Nance stated that MAGS should not assume that a defendant only has one case sentenced per day and that users should be able to enter multiple cases with multiple events. Dr. Soulé commented that the issue Judge Nance is referencing was raised by a Montgomery County law clerk who attempted to enter two cases for one defendant sentenced on the same day with two distinct dispositions – a plea and a jury trial. Dr. Soulé reported that the law clerk was instructed to make a notation in the "Additional Comments" field regarding the specific dispositions for each offense, which is the same as how it would be noted on a paper guidelines worksheet. Judge Nance noted that the MAGS system must also be able to handle occasions when a defendant has multiple cases all brought for sentencing on the same day. Dr. Najaka commented that the system has no trouble handling multiple event, multiple offense cases. Judge Nance inquired whether the MAGS system can handle an instance where a defendant is sent to sentencing hearings in front of three different judges on the same day. [Note: The MSCCSP may need to review whether there is an expectation that separate sets of guidelines will be created in instances where a defendant is sentenced by multiple judges on the same day.]

Judge Nance requested that a copy of the report that will be shared with the CCJ be distributed in advance. Judge Leasure stated that the report would be distributed to the MSCCSP and requested that any comments or concerns be relayed in advance of the meeting with the CCJ.

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

The next meeting was set for Tuesday, May 14, 2013 at the Judiciary Education and Conference Center.

**7. Old business**

There was no old business to address.

**8. Adjournment**

The meeting adjourned at 5:59 p.m.