



Minutes

Maryland State Commission on Criminal Sentencing Policy
2015 Public Comments Hearing
House of Delegates Office Building
Annapolis, MD 21041
December 8, 2015, 5:30 p.m.

Commission Members in Attendance:

Honorable Glenn T. Harrell, Jr., Chair
Honorable Shannon E. Avery, Vice-Chair
Delegate Curtis S. Anderson
LaMonte E. Cooke
William Davis, Esquire, *representing Public Defender Paul B. DeWolfe*
Barbara Dorsey Domer
Paul F. Enzina, Esquire
Richard A. Finci, Esquire
Brian D. Johnson, Ph.D.
Honorable Delores G. Kelley
Honorable Patrice E. Lewis
Megan D. Limarzi, Esquire, *representing Attorney General Brian E. Frosh*
Honorable Laura L. Martin
Secretary Stephen T. Moyer
Colonel William M. Pallozzi
Honorable James P. Salmon
Honorable Joseph F. Vallario, Jr.

Staff Members in Attendance:

Justin Bernstein
Sarah Bowles
Stacy Najaka, Ph.D.
Katharine Pembroke
David Soulé, Ph.D.
Hayley Ansell, MSCCSP Intern
Rosy Shrestha, MSCCSP Intern

Speakers:

Margaret Teahan, Maryland State Bar Association
Christine Dufour, Maryland Criminal Defense Attorneys' Association
Scott Shellenberger, Maryland State's Attorneys Association
William Davis, representing Public Defender Paul B. DeWolfe

Judge Harrell called the Public Comments Hearing to order at 5:30 p.m. He explained that in addition to the Commission's governing legislation requiring a public comments hearing at least annually, the Commission specifically sought comment this year in light of potential changes to one of the sentencing guidelines matrices, and may hold additional hearings if and when it considers additional matrix changes. He then requested the first speaker to begin.

***Note:***

The views expressed in the Public Hearing testimony are those of the speaker(s) and do not reflect the official policy, position, or opinions of the Maryland State Commission on Criminal Sentencing Policy (MSCCSP). The MSCCSP does not endorse the content of the testimony, nor does it guarantee the accuracy, reliability, or completeness of the information.

Margaret Teahan, Chair, Legislative Subcommittee of the Criminal Law and Practice Section Council, Maryland State Bar Association

Ms. Teahan introduced herself as an attorney in the Office of the Public Defender, appearing in her capacity as a member of the Maryland State Bar Association's Criminal Law and Practice Section Council. The Criminal Law and Practice Section Council was asking the MSCCSP to adopt Mr. Finci's alternate proposed changes to Rows V and IV of the Sentencing Matrix for Drug Offenses. The Criminal Law and Practice Section Council reviewed the two proposals, had a conference call and contacted members of the Criminal Law and Practice Section Council. The Criminal Law and Practice Section Council is an experienced group of judges, prosecutors, and criminal defense attorneys elected by their peers, and when discussing any issues they consider the perspectives of these three groups. Ms. Teahan stated that trying to determine what a case "is worth" is one of the most difficult things for those in trial courts to do on a daily basis, particularly for inexperienced circuit court practitioners. The guidelines are a starting point for the dialog about what a case is worth. For nonviolent drug offenders, the Maryland State Bar Association believes public sentiment has changed towards perceiving a public health issue in addition to a legal issue. They believe Mr. Finci's alternate proposal more accurately reflects the downward trend in nonviolent drug sentences in Maryland's circuit courts.

Christine Dufour, Assistant Public Defender, representing the Maryland Criminal Defense Attorneys' Association

Ms. Dufour introduced herself as an attorney in the Office of the Public Defender, appearing in her capacity as a member of the Maryland Criminal Defense Attorneys' Association. She stated that she would echo Ms. Teahan's comments, noting that much of her current practice has less to do with whether a client is going to jail as much as whether she can get them a bed in a treatment facility. She has had many clients overdose and stated that "we" continue to look for alternatives to the prison system because people often use drugs in prison as well. She thanked the Commission for assessing what the cells should look like for nonviolent offenders and expressed the Maryland Criminal Defense Attorneys' Association's support for Mr. Finci's proposal based on current sentencing practices and trends. Oftentimes people in court for a criminal act truly need medical attention.

In response to a question from Senator Kelley, Ms. Dufour noted that Mr. Finci's proposal would capture more sentences at the lower end of the guidelines range while remaining consistent with the tentatively approved ranges at the upper end.

***Scott Shellenberger, President, Maryland State’s Attorneys’ Association***

Mr. Shellenberger introduced himself as the State’s Attorney for Baltimore County and President of the Maryland State’s Attorneys’ Association. Mr. Shellenberger indicated that he would rather not see any changes to the matrices, but in recognition of changing views on drug use, he supported the tentatively approved changes as opposed to Mr. Finci’s alternate proposal. He expressed concern that making the changes proposed in the alternate proposal would make the guidelines descriptive rather than prescriptive, which he believes was the initial intent when the Commission began. Because defendants and their attorneys will always seek sentences below the guidelines, Mr. Shellenberger noted that changes will start a process of continuous movement downward in the guidelines. He indicated that Mr. Finci’s proposal would reduce the lower bounds of the matrix cells without increasing the upper bound. Mr. Shellenberger indicated that while the current discussion concerned only the drug matrix, his position and his organization’s position would become even stronger with respect to violent crime. Nonetheless, he recognized that “this is the way the system is supposed to work,” whereby the MSCCSP staff identified sentences outside the guidelines ranges and made recommendations for adjustments that should be made. Mr. Shellenberger indicated actual sentences around the state should be driving the sentences, not the desires of what some people would like the sentences to be. Mr. Shellenberger indicated his belief that the desire to lower the guidelines is a result of changing beliefs, particularly regarding marijuana. However, he noted that the changes will capture drugs other than marijuana, some of which are very dangerous, and also more serious marijuana cases. Drug offenses that altering rows IV and V will affect include importing 5 to 45 kilograms of marijuana, distributing non-CDS as CDS, and distributing or manufacturing any Schedule I through V nonnarcotic, including amphetamines, synthetic marijuana, Diazepam, valium, and MDMA under 750 grams. Mr. Shellenberger indicated that he believed the ranges in the alternative proposal are too large. Mr. Shellenberger stated he would concede to support the tentatively approved amendments as going far enough, and expressed hope that the Commission would not propose similar changes concerning violent crime.

Senator Kelley commented that the sentencing guidelines are descriptive and voluntary already. She further noted that they are not mandatory, presumptive, or prescriptive. The guidelines are intended to capture what judges are doing with regards to particular offenses. Given that the Commission considers all ABA pleas compliant, the matrices will change from time to time as the sensitivity of the public changes.

Mr. Shellenberger indicated that he understood that, and noted that Baltimore County leads the state in below-guidelines sentences for drug offenses. His concern is that adoption of the alternate proposal would start a slippery slope of continuously readjusting the guidelines as a result of judges going lower and lower. He further noted that he does not believe the public’s perception has changed as much with respect to some of the other drugs in rows IV and V, as it has with marijuana.

Mr. Finci asked whether Mr. Shellenberger was aware that this was the first time the Commission was adjusting a sentencing matrix based on data and statistics. Mr. Shellenberger stated that he was, and this was his concern, that we would now be coming back time and time again. He stated that his “people, every day, 95% of their pleas are consistent with the guidelines, maybe even



higher than 95%.” They believe in the guidelines system and use it all the time, and so he is concerned because the guidelines are going down.

Mr. Finci asked whether the Maryland State’s Attorneys’ Association believed the guidelines should ever be reviewed for changes. Mr. Shellenberger stated that it is always good to look at things, which is why he reluctantly supported tentatively approved recommendations drafted by MSCCSP staff, “because that is what their job is,” so he would go along with that, albeit reluctantly.

Mr. Finci asked whether there was some period that Maryland State’s Attorneys’ Association would consider an appropriate passage of time before reviewing statistics to consider changing the guidelines in some way. Mr. Shellenberger stated that, off the top of his head, instead of focusing on year-to-year, he views his life in five year clumps, though he does not know whether that would be possible for a project such as the guidelines review.

Mr. Finci noted that the proposed changes to the guidelines (both versions) were based on five years of data. He called to Mr. Shellenberger’s attention that the Commission has a 65% target guidelines compliance rate. The higher end of seriousness categories IV and V in either proposal do not capture the middle 65%, they capture a higher 65%. They leave out some lower end sentences. Both proposals are capturing more, rather than less.

Mr. Shellenberger expressed that the tentatively approved changes accomplished that. He asked that the Commission keep an open mind when it comes to violent crime. Mr. Finci noted that the current discussion was not concerned with violent crime.

Mr. Davis stated that Mr. Shellenberger seemed opposed to both proposals, though he would support the tentatively approved proposal reluctantly. Both proposals are based on what the judges are doing, and Mr. Shellenberger seemed to want the guidelines to be based on what they are not doing.

Mr. Shellenberger stated that what he was trying to make clear was that while he was not a big fan of changing the guidelines on a regular basis, sixteen years is a reasonable time to look at how we are really doing this. So he would reluctantly support the tentatively approved recommendations because he believes they are data driven. But the difference between the proposals was substantial in some cells, and the tentatively approved version is a far way to go to begin with. Much is driven by changing perceptions towards marijuana, and Mr. Shellenberger wants people to understand that these rows capture much more than just marijuana and sometimes pretty large amounts. Nothing should be set in stone, and he applauds the Commission for looking into this and trying to capture more of what the judges are doing, he just would not want to be back in another year to discuss another guideline change, because that would be too much.

Senator Kelley asked Mr. Shellenberger about corrections options; would he want to look at what it might take to save a person and make him or her into a legitimate taxpayer?

Mr. Shellenberger stated yes, he agrees. He is one of the people saying that we have been doing the same thing for years and it is not working. He serves on the Justice Reinvestment Coordinating Council and believes many of the recommendations of the Coordinating Council will be consistent



with letting certain low level drug dealers out earlier with mandated treatment, increasing treatment inside, and increasing bed spaces on the outside.

William Davis, District Public Defender for Anne Arundel County, representing Public Defender Paul B. DeWolfe

Mr. Davis read the following statement from Public Defender Paul B. DeWolfe, who was unable to attend the hearing.

The “Finci” alternative is a step in the right direction and I would be happy to support it. However, let me share with you some of my thoughts about the Sentencing Guidelines and its impact on mass incarceration of non-violent drug offenders. I am on the Justice Reinvestment Commission and I am hopeful that the Commission will recommend reforms in sentencing policy for this category of offenders. I believe, in the spirit of reducing Maryland’s dependence on jails and prisons as a solution to its citizens’ drug problems, the Sentencing Commission should take the bold and progressive step of amending its guidelines to lessen the reliance on jail and prison. This would empower our judges to take a different approach when sentencing drug-involved offenders.

I believe the following facts about the guidelines contribute to overuse of incarceration and inhibit the use of alternatives to incarceration (including treatment):

1. Under the guidelines, the “default” sentence is incarceration measured in months and years;
2. Treatment alternatives (except for the lowest end of the grid) are necessarily considered a downward departure.
3. The “data” used to compute the guidelines is not based on risk or recidivism predictors but rather is composed of statewide sentencing practices. In other words its purpose is to have an “equalizing effect” on sentencing. This is perhaps appropriate for violent offenses but for drug offenders it perpetuates incarceration and limits the use of alternatives including treatment.

I would ask the Commission to consider revamping the guidelines. Again, I fully support the “Finci” alternative. However I would also propose the Commission go a step further and consider:

- a. Building into the grid, credit for residential and/or outpatient treatment as a substitute or alternative to months/years incarceration (e.g. 6 months residential treatment may be substituted for 6-12 month incarceration). The statutory 8-507 scheme is an inefficient and ineffective way of offering the sentencing judge a treatment alternative for drug involved defendants.
- b. As an addition to the guideline recommendation, the Commission should consider using a validated risk assessment to identify those offenders who are good candidates for community-based treatment regardless of where they would fall on the sentencing guideline grid. The Commission is considering ways to factor-in evidence-based practices as an addition to (not a replacement for) the current formula. Other states are going this route as a way of reducing their overcrowded prisons.

The Hearing concluded at 6:05 pm.



Appendix

Written Testimony Submitted in Advance at the 2015 MSCCSP Public Comments Hearing

The views expressed in the Public Hearing testimony are those of the speaker(s) and do not reflect the official policy, position, or opinions of the Maryland State Commission on Criminal Sentencing Policy (MSCCSP). The MSCCSP does not endorse the content of the testimony, nor does it guarantee the accuracy, reliability or completeness of the information. Only testimony that was provided electronically to the MSCCSP is included.



Criminal Law and Practice Section

The Maryland State Bar Association (MSBA) Criminal Law and Practice Section Council supports the Maryland State Commission on Criminal Sentencing Policy (MSCCSP) officially amending the *Sentencing Matrix for Drug Offenses* to accurately reflect the statewide sentencing trend of lessening periods of incarceration for non-violent drug offenders. The MSBA Criminal Law and Practice Section Council believes that the best way to accomplish this is for the MSCCSP to officially adopt the "Finci Alternate Proposal." The "Finci Alternate Proposal" appears to most closely comport to the actual sentences that are currently being imposed in Maryland's Circuit Courts.

The MSBA Criminal Law and Practice Section Council is a cross section of experienced judges, prosecutors and criminal defense attorneys. Most of us work in trial courts on a daily basis. We utilize the Maryland guidelines as a tool for one of the most nuanced aspects of criminal litigation: deciding what a crime is worth. In the world of criminal law, the currency utilized to determine what a crime is worth is sentence length.

Public sentiment over the last several decades has evolved regarding the treatment of non-violent drug offenders. Drug abuse is now viewed as not only a criminal justice issue, but one of public health as well. Courts are recognizing this change in sentiment. Sentences in this area are indicative of that acknowledgement. It is timely and appropriate that the guidelines comport as well.

For these reasons, the MSBA Criminal Law and Practice Section Council supports the MSCCSP officially adopting the "Finci Alternate Proposal."



Maryland Crime Victims' Resource Center, Inc.



Continuing the Missions of the Stephanie Roper Committee and Foundation, Inc.

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[Redacted]

[Redacted]

[Redacted]

November 30, 2015

The Honorable Glenn T. Harrell, Jr., Chair
Maryland State Commission on Criminal Sentencing Policy
University of Maryland
4511 Knox Road, Suite 309
College Park, MD 20742-8660

Dear Judge Harrell and members of the Commission:

Please accept this letter as public comments from the Crime Victims' Resource Center, Inc. (MCVRC) regarding the proposed amendments to Sentencing Matrix for Drug Offenses. While MCVRC takes no position on the proposed amendments, we write to discuss an important policy perspective that we hope the Commission will follow for this and future potential changes to the sentencing matrixes.

Our Chair, Roberta Roper, served on the study commission that made the recommendation that lead to the statutory change creating the Commission. I subsequently served two terms on the Commission when it was first created. The perspectives provided in this letter relate to the historical perspective of when and how the current Commission should modify the cells in the sentencing matrixes.

While the legislature was clear that the guidelines would remain voluntary, there was disagreement on the Commission whether those guidelines would be presumptive, prescriptive, or descriptive.

- Those Commissioners who wanted the guidelines to be presumptive believed that presumptive guidelines would provide better compliance with the guidelines and therefore eliminate disparities in sentences.



- Those Commissioners who wanted the guidelines to be descriptive advocated for the maintenance of the purported status quo.
- Those Commissioners who opposed descriptive guideline indicated a practical policy concern of “guidelines creep” if the policy of modifying the guidelines to conform to actual sentencing policy. Since a good deal for a defendant is a sentence at the low end of the guidelines or below the guidelines, modifying the guidelines will cause the guidelines to be reduced. Once the guidelines cells are reduced in a descriptive sentencing system, defendants will still want a sentence at the low end or below the guidelines. Thus, in turn, the cells would again have to be reduced to reflect descriptive sentences. Under this iterate loop, the sentences reflected in the cells would continuously creep downward.

Ultimately, in the adoption of the scope of COMAR regulations, the Commission determined that the guidelines would neither be presumptive nor descriptive in scope.¹ Rather, the Guidelines would prescribe what the sentences should be. However since following the guidelines would be voluntary and since they were not presumptive, judges were free to depart without having to overcome a presumption that the guidelines indicated the appropriate sentence should be.

From a policy perspective, prescriptive guidelines eliminated the possibility that there would be sentencing creep that would require iterative decreases in the sentencing cells. This determination did not mean that the Commission would ignore judicial sentencing practices. In fact, the Commission used sentencing practices as well as proportionality to adjust the levels of various offenses. From a statutory perspective, the Commission determined that prescriptive sentences were consistent with the intent of the General Assembly and that descriptive sentences could lead to sentences that were inconsistent with the applicable statutory requirements and intent.²

¹ See, COMAR 14.22.01.01 B (Under Criminal Procedure Article, §6-211(b), Annotated Code of Maryland, the sentencing guidelines are voluntary and may not be construed to require a court to sentence a defendant as **prescribed by this chapter.**) (Emphasis added)

² Md. CRIMINAL PROCEDURE Code Ann. § 6-202 provides “The General Assembly intends that:

- (1) sentencing should be fair and proportional and that sentencing policies should reduce unwarranted disparity, including any racial disparity, in sentences for criminals who have committed similar crimes and have similar criminal histories;
- (2) sentencing policies should help citizens to understand how long a criminal will be confined;
- (3) sentencing policies should preserve meaningful judicial discretion and sufficient flexibility to allow individualized sentences;
- (4) sentencing guidelines be voluntary;



If the sentencing matrixes are to change, MCVRC believes that the changes should conform to the legislative intent and the COMAR scope provision – i.e. the cells should reflect the sentences that should be imposed.³ The Commission's changes to the matrix cells, if any, should emphasize fair and proportional sentences with a priority for the capacity and use of correctional facilities should be the confinement of violent and career criminals.⁴ Even if it were reasonable to make cell changes based upon a descriptive guidelines system, Maryland's guidelines are no longer descriptive and they should not be treated as being descriptive.

In conclusion, MCVRC does not have a position on the proposed changes. However, MCVRC believes that if changes are to occur, those changes should be supported for the right reasons. The right reason to make the changes in the cells are whether the sentences reflected by the cells would proportionally reflect a sentence that should be imposed considering the statutory intent vis-à-vis all of the cells in all of the matrixes.

Sincerely,

A handwritten signature in blue ink that reads "Russell P. Butler".

Russell P. Butler
Executive Director

(5) the priority for the capacity and use of correctional facilities should be the confinement of violent and career criminals; and

(6) sentencing judges in the State should be able to impose the most appropriate criminal penalties, including corrections options programs for appropriate criminals.”; *See also*. Md. CRIMINAL PROCEDURE Code Ann. § 6-208(b).

³ Compare Commission's Synopsis of Proposed Amendment, P. 4, “Given that the Maryland Sentencing Guidelines are descriptive (rather than prescriptive), the MSCCSP determines that considering a revision to these two rows of the Sentencing Matrix for Drug Offenses would be reasonable.”

⁴ When serving on the Commission, I had drafted a proposed modification of the cells that would have decreased some cells and increased other cells that was in accord with the recommendations of the study commission and with the legislative intent in creating the Commission.