



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
2020 Public Comments Hearing  
Videoconference  
December 8, 2020, 5:00 p.m.

### Commission Members in Attendance:

Honorable Brett R. Wilson, Chair  
Honorable Shannon E. Avery, Vice-Chair  
Senator Robert G. Cassilly  
Delegate Luke H. Clippinger  
Honorable Brian L. DeLeonardo  
Richard A. Finci, Esquire  
Secretary Robert L. Green  
Melinda C. Grenier  
Brian D. Johnson, Ph.D.  
Senator Delores G. Kelley  
Honorable Patrice E. Lewis  
Alethea P. Miller  
Delegate David Moon  
Kathleen Murphy, *representing Attorney General Brian E. Frosh*  
Honorable James P. Salmon (Present but unable to comment/vote due to technical issue)  
Lisa M. Spicknall-Horner  
Donald E. Zaremba, *representing Public Defender Paul B. DeWolfe*

### Staff Members in Attendance:

Sarah Bowles  
Stacy Najaka, Ph.D.  
Katharine Pembroke  
David Soulé, Ph.D.

### Speakers:

Judge Phillip Caroom, Maryland Alliance for Justice Reform  
Joyce King, Frederick County State's Attorney's Office  
One Maryland Resident

**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.**

The Public Comments Hearing began at 5:03 pm when Judge Wilson called the meeting to order.



Judge Wilson asked the Commissioners to introduce themselves and Judge Wilson started by introducing the Commission's newest member, Donald Zaremba. Mr. Zaremba now serves on the Commission as the representative for Maryland's Public Defender, Paul DeWolfe. Mr. Zaremba is currently Chief for Strategic Operations for the Office of the Public Defender. Mr. Zaremba graduated from the University of Maryland Law School and began work in the Office of the Public Defender in 1989. Mr. Zaremba has been named twice the Office's outstanding advocate.

Next, Judge Wilson introduced Judge Avery, the MSCCSP's Vice Chair. Judge Avery noted that she began her career in the Office of the Public Defender and welcomed Mr. Zaremba to the Commission. Judge Avery stated that she has served on the Commission as a judge for approximately six years and, previously, served on the Commission as a representative of the Department of Public Safety and Correctional Services.

Judge Wilson then introduced each of the other Commissioner members in attendance. Each member briefly described their role on the Commission.

Judge Wilson noted that he would like to recognize Mr. Bill Davis. Mr. Davis served as Mr. DeWolfe's representative from the Office of the Public Defender for more than 10 years. Mr. Davis passed away in 2020. Judge Wilson expressed that the headline to an article published in a local newspaper — "A titan in the courtroom" — was perhaps the most telling statement of who Mr. Davis was in life. Judge Wilson recognized the contributions Mr. Davis made to both the MSCCSP and the legal community. Judge Wilson expressed the Commission's condolences to Mr. Davis' family and praised his memory.

Judge Wilson introduced Dr. David Soulé as the Executive Director of the MSCCSP and indicated that Dr. Soulé would provide a brief overview of the MSCCSP.

Dr. Soulé thanked Judge Wilson for his tribute to Mr. Davis. Dr. Soulé noted that the Commission recognized that the history, purpose, and activities of the MSCCSP may not be well known to the public. Therefore, the Commission decided to begin the meeting with background on the sentencing guidelines and work of the MSCCSP.

Dr. Soulé noted that Maryland was one of the first states to initiate a sentencing guidelines system. In April 1979, the Guidelines Advisory Board, formed by the Judiciary, approved a system of voluntary guidelines to be piloted in four jurisdictions. These sentencing guidelines were then approved for statewide use in the circuit courts starting in 1983. The guidelines in Maryland were in effect statewide for about 15 years with oversight by the Judiciary. Then in 1999, the Legislature decided that a permanent, independent sentencing commission should be created to oversee the guidelines.

Dr. Soulé stated that the Sentencing Commission is an independent, objective agency comprised of a balanced board of 19 members from all three branches of government as well as two public representatives.



Dr. Soulé stated that the enabling legislation that created the Sentencing Commission is provided in Criminal Procedure Article (CP), §§ 6-201 through 6-214 of the Annotated Code of Maryland. CP § 6-202 outlines a statement of intent for the MSCCSP that includes the following six goals:

- (1) Sentencing should be fair and proportional and 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 should be voluntary;
- (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.

Dr. Soulé stated that the Commission has a few primary responsibilities to help address these goals. The first responsibility is to implement and maintain the State's voluntary sentencing guidelines. This is accomplished through the collection and maintenance of an extensive database assembled via data submitted on the sentencing guidelines worksheets. The Commission uses the guidelines data to monitor circuit courts' sentencing practices. The Commission also examines sentencing patterns and reasons for departure for specific offense categories and within individual cell ranges to consider changes to the guidelines when necessary. Finally, the Commission is responsible for providing training to criminal justice practitioners, including judges, to promote the consistent application of the guidelines and the accurate completion of the guidelines worksheet.

Dr. Soulé noted that the sentencing guidelines are a mechanism to encourage proportional sentences. The primary goal of the guidelines is to promote fair, consistent, and equitable sentencing practice, whereby offenders who commit similar offenses and who have similar criminal histories are sentenced alike. The guidelines provide a recommended sentence range. Options can include probation and/or a period of incarceration.

Dr. Soulé noted that the sentencing guidelines in Maryland have a few basic principles. First, they are voluntary. Judges may, at their discretion, depart from the guidelines. The guidelines are also intended to be primarily descriptive. That is, the guidelines should reflect actual sentences and may be amended when the data indicate that sentences are not consistent with the recommended ranges. Finally, the guidelines are generally limited to cases that originate in circuit courts. The guidelines are not required for District Court cases. Jury trial prayers (JTPs) and appeals from the District Court are guidelines-eligible cases only if a pre-sentence investigation (PSI) is ordered, which is a very small percentage of JTPs and appeals.

Dr. Soulé highlighted a few of the Commission's resources, starting with the MSCCSP website. The website provides access to annual reports that are a great source to learn about the most recent sentencing trends and the work of the MSCCSP and the *Guidelines E-News that is*



*intended* to inform practitioners about changes to the guidelines. The website also offers access to the Maryland Automated Guidelines System (MAGS) and the Guidelines Calculator Tool (GLCT), instructional training videos for these applications, and a general training webinar on calculating the guidelines. Dr. Soulé also noted that the Commission staff provide a helpdesk, and Commission staff are available to answer questions regarding the guidelines.

Lastly, Dr. Soulé noted that the MSCCSP recently started producing a series of topical, mini-reports, entitled *Sentencing Snapshot*, intended to provide a quick review of sentencing trends and other topics of interest. The most recent issue of the *Sentencing Snapshot* was published in October 2020. It provides a closer look at the characteristics and sentences for second degree assaults in Maryland circuit courts. Dr. Soulé encouraged Commissioners and the public to review these snapshots and offer feedback if interested.

Dr. Soulé stated that since its inception, the MSCCSP has made it a goal to incorporate feedback from the criminal justice community into its policy decisions. To that end, there are several ways in which the MSCCSP solicits and incorporates feedback from the criminal justice community. First, the Commission holds a public comments hearing every year in December and encourages feedback/comments on the guidelines at this time. Second, the Commission staff meets with the circuit court administrative judge and/or the entire bench in each jurisdiction every two to three years. Additionally, Dr. Soulé noted that, in May 2020, the Commission distributed a survey to circuit court judges, prosecutors, public defense attorneys, and private criminal defense attorneys soliciting feedback on the Maryland sentencing guidelines and the activities of the MSCCSP. The Commission received incredibly useful responses and plans to utilize this information to guide future activities and to inform Commission decisions. Finally, the Commission receives important feedback during training sessions that are conducted throughout the year. The Commission recognizes the importance of hosting an annual public comments hearing as it provides a forum for the public to discuss sentencing-related issues.

Dr. Soulé noted that four speakers registered to participate in the 2020 public hearing. Dr. Soulé thanked the public for taking the time to share its feedback.

Judge Wilson thanked Dr. Soulé for his presentation. Judge Wilson noted that Dr. Soulé heads a very small staff that assembles the statistics and information available to the public, to practitioners, and to Commissioners. Judge Wilson stated that the staff does a phenomenal job collating information from across the State. Judge Wilson thanked the staff for their contributions and hard work.

### ***Judge Phillip Caroom, Maryland Alliance for Justice Reform***

Judge Wilson introduced Judge Caroom and noted that he was testifying as an individual and as a member the Maryland Alliance for Justice Reform (MAJR), not as a member of the Judiciary. Judge Caroom thanked Judge Wilson for the introduction. Judge Caroom noted that MAJR is a bipartisan, non-profit, volunteer organization. Judge Caroom stated that former Chief Judge Robert Bell and former Governor Robert Ehrlich were recently appointed as honorary co-chairs of the group. MAJR has many members, including professionals, attorneys, judges, those who work in the corrections system, and returning citizens.



Judge Caroom stated that one of the biggest issues MAJR discussed during 2020 was motivated by a study from the Justice Policy Institute (JPI). JPI is a national organization, based in Maryland. In November 2019, JPI published a study which found that Maryland courts incarcerate African Americans disproportionately to the population and at a higher rate than any other state. Approximately 31% of the population in Maryland is African American, while 71% of the incarcerated population in Maryland is African American. The rate is even more disparate among offenders incarcerated for 10 or more years, 84% of whom are black. MAJR has been discussing the reasons behind this disparity. To that end, MAJR has held several panel discussions. Judge Caroom reported that both the Baltimore County State's Attorney and the Prince George's County State's Attorney indicated that their respective offices would be willing to participate in a survey of their practices to investigate how charging and plea decisions may contribute to racial disparities in sentencing. Judge Caroom noted, though, that Mr. Scott Shellenberger, State's Attorney for Baltimore County, stated that his office may need additional funding to complete such a study. Judge Caroom noted that MAJR thinks that the MSCCSP may be uniquely positioned to conduct such a study. The MSCCSP already collects data on defendant race and ethnicity. The Commission, however, does not collect information regarding charges that were dropped as part of a plea agreement or whether a plea agreement included as one of its terms a recommendation to a corrections option or alternative sentence. Judge Caroom noted that 90% to 95% of criminal cases are disposed of via plea agreements, but there is little knowledge as to the impact of plea agreements on racial disparities in sentencing. Judge Caroom emphasized that the enabling legislation for the MSCCSP states that the Commission shall ensure that sentencing is fair and proportional and reduce unwarranted disparities, including racial disparities.

Judge Caroom stated that he had one final issue to discuss— violations of probation (VOPs). Judge Caroom noted that the MSCCSP, at one time, collected information on VOPs. The MSCCSP opted to stop collecting this information several years ago.<sup>1</sup> Judge Caroom stated that MAJR encourages the Commission to revisit this decision for several reasons. First, there is more data now suggesting that VOPs are important. Prior to the passage of the Justice Reinvestment Act (JRA), the Justice Reinvestment Coordinating Council completed a study which found that 40% of offenders who were incarcerated on a VOP were sentenced based on a technical violation (i.e., the offender missed a probation appointment or payment). The JRA created a presumption that the sentence imposed for a VOP should not be an imposition of the entire suspended sentence. The JRA set 15-, 30-, and 45-day caps for first, second, and subsequent technical VOPs. Judge Caroom reported that a subsequent study conducted by MAJR, the Office of the Public Defender, and others in the Administrative Office of the Courts (AOC) suggests that some sentences for technical violations may exceed the caps and the reasons why the caps are exceeded needs to be further explored. Pretrial detention may be an issue for

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<sup>1</sup> In 2009, the MSCCSP made an informed decision to stop collecting guidelines worksheets for VOPs after receiving input from the judiciary and multiple criminal justice practitioners about the difficulty in completing guidelines worksheets for VOPs. It was noted that the MSCCSP received a very limited number of guidelines worksheets for these cases since designating VOPs as guidelines offenses in 2001. The Commission further noted that there was no expectation that a VOP sentence should be sentenced consistent with the sentencing guidelines that were intended for original sentencings and therefore it made little sense to require a guidelines worksheet for VOP sentencings.





offenders who lose their jobs or suffer other negative consequences while detained. Pretrial detention also involves costs to the State. Judge Caroom noted that the findings from a national study, cited in his written testimony, suggest that if a person spends more than three days in pretrial detention, their risk of recidivism goes up substantially. Therefore, Judge Caroom suggested that the Commission should be concerned with VOP sentences that exceed the caps, even if it is just pre-trial detention causing judges to exceed the caps. Judge Caroom also noted that there have been studies in other states (e.g., Wisconsin) showing racial disparities in VOPs, though it is unknown whether there are racial disparities in VOPs in Maryland. Judge Caroom suggested that the Commission track VOPs on an abbreviated form of the sentencing guidelines worksheet.

In conclusion, Judge Caroom summarized that MAJR would like to encourage the Commission to examine the impact of plea agreements on racial disparities in sentencing and reexamine the Commission's decision to collect VOP sentencing information via the sentencing guidelines worksheet.

Mr. Zaremba asked Judge Caroom if the JRA allows the judge to depart from VOP sentence caps for reasons of public safety or the safety of the victim or the witness. Further, Mr. Zaremba asked Judge Caroom if there is any data collected as to when these caps are exceeded.

Judge Caroom noted that a group from the Office of the Public Defender and Professor Colbert from the University of Maryland Law School brought this issue to the Rules Committee and the Court of Appeals and asked them to work on the pretrial detention issue in 2019. To aid in their efforts, these groups received data from the AOC that included VOP sentences that occurred from October 2017 to October 2018. Judge Caroom stated that it appeared that the VOP data was pulled from hearing sheets. Judge Caroom offered to share with Mr. Zaremba the spreadsheet provided to him by the AOC. Judge Caroom suggested that it would be easy for the Commission to capture VOP data on the sentencing guidelines worksheet.

Senator Kelley asked Judge Caroom if he could provide any reports or publications related to how these issues (e.g., pretrial detention for VOPs) are handled in states with less racial disparity than Maryland. Judge Caroom noted that there are links to such studies provided in his written testimony. Judge Caroom specifically cited a study conducted by Harvard on racial disparities in the Massachusetts criminal justice system. Judge Caroom also cited a Wisconsin study that suggests racial disparity may result from police overcharging, which then follows defendants through the system. Judge Caroom noted that even if the State revises the defendant's initial charges, dropping the most serious charges, the initial bail decision is determined by the initial charges.

Senator Kelley noted that the MSCCSP staff is small. Therefore, additional funding may be necessary to capture data on VOPs. Senator Kelley suggested that she speak with Judge Caroom offline about other resources that could aid in his efforts. Judge Caroom thanked Senator Kelley for her offer and stated that he has full confidence in Dr. Soulé and the staff.

Judge Wilson thanked Judge Caroom and his group for their continued efforts and testimony. Judge Caroom noted that he would send the VOP data spreadsheet, obtained from the AOC, to Dr. Soulé.



***Joyce King, Frederick County State's Attorney's Office***

Judge Wilson introduced the next speaker, Joyce King. Joyce King stated that she is a prosecutor with the Frederick County State's Attorney's Office and has been prosecuting internet crimes against children for approximately seven years. Ms. King stated that she was testifying to address the online sexual exploitation of children. Ms. King noted that her written testimony cited specific sources and provided statistics as to the issue.

Ms. King stated that, on behalf of the Frederick County Cyber Crimes Task Force as well as the Maryland State's Attorneys' Association (MSAA), she would like to ask that the Commission consider raising the guidelines for internet crimes against children, especially during the global pandemic. Ms. King noted that online sexual abuse and exploitation are on the rise given the isolation and number of children on internet. Ms. King reported that the National Center for Missing and Exploited Children reported a 106% increase in the number of cyber tips received during this period of time. Ms. King asked for an increase in the guidelines for Maryland offenses related to child pornography and sexual solicitation of a minor. Ms. King stated that there are three reasons for the request.

First, in recent years the Maryland Legislature has expanded Maryland statutes to bring them in line with Federal standards, thereby recognizing the severity of these crimes. While the State's statutes have been expanded, Ms. King stated that sentencing has been left behind. Though penalties for internet crimes against children were not increased, Ms. King suggested that the expansion of laws warrants an increase in the guidelines. Ms. King noted that, presently, the guidelines allow for a probation before judgment (PBJ) for many of these defendants, which allows a defendant to avoid the sex offender registry and expunge the offense from his or her record. Ms. King stated that given the nature of these offenses, the possibility of a PBJ is unconscionable and in contrast to efforts made in the Legislature.

Second, Ms. King noted that the guidelines do not currently consider the evolving and permanent nature of the internet. Ms. King stated that it is time to reconsider and update the guidelines to reflect the appropriate seriousness of these offenses. One way to update the guidelines would be to increase the seriousness categories for these offenses. Presently, the possession of child pornography is a seriousness category V offense. Ms. King requests that the Commission increase the seriousness category for possession of child pornography to a category IV. Ms. King noted that the distribution of child pornography and sexual solicitation of a minor are currently seriousness category IV offenses. Ms. King requests that the Commission increase their seriousness categories to category III. Ms. King noted that seriousness category V through VII offenses receive the same number of points when calculating the offense score. Ms. King stated that this combination, essentially, lumps together child pornography with much less serious offenses, such as disturbing the peace and disorderly conduct.

Ms. King stated that a second way to update the guidelines would be to address victim injury points. Presently, she assigns to these cases temporary victim injury points. Given the permanent nature of the internet, Ms. King stated that she would like to see an exception made for internet crimes against children whereby they would be awarded permanent victim injury points. Ms. King stated that every time an image is viewed, possessed, or distributed, it revictimizes the child



victim. Ms. King noted that the Federal guidelines take into consideration additional aggravating factors, such as the number of images possessed or distributed, the number of victims, and the age of victims. Ms. King suggested that, under the current Maryland guidelines, someone viewing child pornography involving a 15-year-old would receive the same offense score as someone viewing the rape of an infant.

Ms. King stated that the third and final reason for her request is so that offenders who commit internet crimes against children may be distinguished from other offenders. Ms. King noted that research has found a correlation between online sex offenses and hands-on sex offenses. Research has also noted the progressive nature of online sex offenses and high rates of recidivism among its offenders.

Ms. King stated that the number of online sex offenses committed against children during the COVID pandemic is astonishing. Ms. King expressed her appreciation that the Commission took the time to hear about this issue. Ms. King acknowledged that this is an uncomfortable topic that no one wants to discuss. Its victims are often marginalized and minimized. Ms. King noted that she has heard judges say that these are victimless crimes, which is untrue. Ms. King stated that some victims of internet crimes will never be rescued and will continue to be abused. Ms. King noted that she would be happy to respond to questions.

Judge Wilson thanked Ms. King for her testimony.

Senator Kelley thanked Ms. King for bringing the issue to the Commission's attention. Senator Kelley noted that the Commission may not be right entity to do the work that needs to be done to address the issue. Senator Kelley stated that the Commission's job is not to determine sentences, but rather to reflect back to practitioners and the public the policies and actions of those in the criminal justice system. Senator Kelley suggested that Ms. King speak with the Legislature.

Judge Avery thanked Ms. King for her testimony. Judge Avery stated that Ms. King's testimony is on the record and, to the extent that the Commission has the policy control and ability to respond to the request that she presented, the Commission will examine and consider it. Judge Avery thanked Ms. King for her service. Judge Avery noted that even being involved in Ms. King's line of work is hard and creates a lot of trauma.

Mr. DeLeonardo noted that the Commission controls the classification of offenses into seriousness categories. Mr. DeLeonardo asked Dr. Soulé what the process would be to have staff re-examine the classification for these offenses to determine whether they are still appropriate. Dr. Soulé stated that the Commission could ask the Guidelines Subcommittee to take up this review. Mr. DeLeonardo asked Dr. Soulé how long this review would take. Dr. Soulé stated that it would be a relatively easy task to re-examine an offense's classification. One aspect of this review would be to examine comparable offenses.

Mr. DeLeonardo asked Senator Kelley if such a review would be okay with her. Senator Kelley stated that she supports what Ms. King is suggesting, however it is not the Commission's job to determine appropriate penalties. Senator Kelley noted that Ms. King made a strong case that





many of these sentences are inappropriate. Senator Kelley suggested that the Legislature examine the issue.

Mr. DeLeonardo stated that it is appropriate for the Commission to examine whether an offense's classification is appropriate. Dr. Soulé noted that while penalties are driven by the Legislature, the Commission has the purview to classify offenses based on available data.

Mr. Finci stated that he was impressed with Ms. King's testimony. Mr. Finci noted that he handles these types of cases frequently. Mr. Finci has found that the collateral consequences of convictions, namely sex offender registration, have motivated members of bench to look at the judge's lack of discretion in assigning someone to the sex offender registry and use it to motivate the court to grant a probation before judgement disposition in cases that, maybe, did not deserve it. Mr. Finci noted that many of the consequences related to sex offenses have become so draconian that the court has gone in other direction.

Ms. King asked, if Dr. Soulé and staff were to do the analysis, would that be a formal motion made by the Commission as whole or would it need to be submitted by the Guidelines Subcommittee. Dr. Soulé replied that the Commission decides as a whole whether the issue should be researched and then assigns it to Subcommittee. Dr. Soulé noted that it is not a formal action but may be proposed during the new business portion of the Commission's business meeting. Mr. DeLeonardo confirmed that it was his intent to propose the review during new business.

Ms. Miller thanked Ms. King for her participation in the public comments hearing. Ms. Miller stated that she, too, works in this area and appreciates that the issue has been brought to the Commission's attention.

### ***One Maryland Resident***

Judge Wilson introduced the final speaker, a Maryland resident. The Maryland resident stated that her testimony would address quasi life sentences and children confined as adults. The Maryland resident stated that Maryland's sentencing practices can create quasi-life sentences for former prisoners or anyone who is criminally adjudicated. Due to restrictions imposed on their constitutionally guaranteed liberty by criminal sentences, for years people face challenges rebuilding their lives, which can consume all the life they have left. Releasing a person from a prison or sentencing them to live in community does not equate to freedom. Some of the challenges involve employment, housing, education, expungements, debts, or electronic monitoring. With these challenges, "released people" essentially face life sentences because their criminal history negatively affects their liberty.

The Maryland resident additionally suggested that Maryland should immediately end the practice of sentencing children as adults and placing children in adult prisons. The Maryland resident stated that the State should also end electronic monitoring for children and limit community supervision to no more than one year. The Maryland resident suggested that to achieve these ends, the State needs to act now. Maryland does not need to study how sentencing laws cause quasi life sentences, nor does it need another commission or white paper regarding sentencing



children. The State simply needs to make the changes (in the immediate future) that are necessary to secure more just and prudent sentencing practices and policies for both adults and children. For example, debts could be forgiven upon release or when sentencing requirements were met. Also ending the practice of charging the person under court supervision for electronic monitoring would eliminate an expense for them.

The Maryland resident concluded that, whether policies and laws are applied as intended, quasi life sentences are a reality and feed a system of mass incarceration. The Maryland resident stated that this reality must be changed.

Senator Kelley noted that many of the issues addressed by the Maryland resident will be in front of the Legislature during the upcoming session. Senator Kelley suggested that the Maryland resident may wish to testify at that time.

The Maryland resident noted that Maryland may be one of the last states that sentences children in adult prisons.

Judge Wilson echoed Senator Kelley's comments. Judge Wilson noted that these issues are frequently raised, debated, and researched in the Legislature. Judge Wilson thanked the resident for her testimony.

Judge Wilson noted that testimony for the public comments hearing had concluded. Dr. Soulé noted that a fourth participant, a Maryland resident, had registered to speak but could not participate. His written testimony was distributed to Commissioners prior to the meeting.

Judge Wilson thanked the public for their participation in the hearing. Judge Wilson noted that the Commission was created so that the public has confidence in the criminal justice sentencing system as well as to ensure that practitioners in the criminal justice system understand what is going on in other parts of the State.

Judge Wilson declared the Hearing concluded at 6:10 pm.