



Minutes

Maryland State Commission on Criminal Sentencing Policy
2023 Public Comments Hearing
Maryland Judicial Center
Annapolis, MD 21401
December 5, 2023, 5:00 p.m.

Commission Members in Attendance:

Honorable Brian L. DeLeonardo, Chair
Honorable Shannon E. Avery, Vice-Chair
Delegate J. Sandy Bartlett
Richard A. Finci, Esq.
Robert H. Harvey, Jr., Esq.
Brian D. Johnson, Ph.D.
Larry L. Johnson
Alethea P. Miller
Honorable Michelle R. Saunders
Kyle E. Scherer, Esq.
Honorable Melanie M. Shaw
Senator Charles E. Sydnor, III
Senator Christopher R. West
Donald Zaremba, Esq., *representing Public Defender Natasha Dartigue*

Staff Members in Attendance:

Lydia Becker
Sarah Bowles
Stacy Najaka, Ph.D.
Katharine Pembroke
Kathy Sanchez
David Soulé, Ph.D.

Visitors: Judge Dana M. Middleton, Circuit Court for Baltimore City; Matthew D'Ambrosi, Chief of Staff, Delegate J. Sandy Bartlett

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 5:02 p.m. when Commission Chair Judge Brian DeLeonardo welcomed everyone and called the meeting to order.



Judge DeLeonardo then asked the Commissioners and staff to introduce themselves and briefly describe their role on the Commission. Following the introductions, Judge DeLeonardo asked Dr. Soulé to provide an introductory presentation for the hearing.

Before beginning the presentation, Dr. Soulé welcomed everyone to the annual public comments hearing and reminded Commissioners that the meeting was being livestreamed. Dr. Soulé indicated that the presentation would provide background information about the Commission including the purpose, goals, and objectives of the MSCCSP and the sentencing guidelines. Dr. Soulé stated that the registered speakers will be called to give their comments after the brief presentation.

Dr. Soulé noted that Maryland was one of the first states to initiate a sentencing guidelines system. The Maryland Judiciary instituted the concept of sentencing guidelines in the late 1970s. In April 1979, the Sentencing Guidelines Advisory Board approved a system of voluntary guidelines to be piloted in four jurisdictions. These sentencing guidelines were then approved by the Judiciary 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 created a permanent, independent sentencing commission to have oversight over the sentencing guidelines.

Dr. Soulé stated that the enabling legislation that created the MSCCSP outlines a statement of intent in Criminal Procedure Article (CP), § 6-202 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. The second includes the collection and maintenance of a 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 to promote the consistent application of the guidelines and the accurate completion of the guidelines worksheet.

Dr. Soulé then described the sentencing guidelines, explaining that the guidelines are a mechanism to encourage proportional sentences. The guidelines are a framework that systematically accounts for common factors a judge considers in a typical case by identifying and assigning weights to core, objective factors for consideration by judges in making sentencing decisions. This allows judges to consistently assign the same value or weight as their colleagues around the State to each of these factors. 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 treated alike.

Dr. Soulé stated that a few basic principles underlie the Maryland voluntary guidelines. First, they are voluntary. Judges may, at their discretion, depart from the guidelines. The guidelines are primarily descriptive. They reflect to judges the typical sentence for an average case. They are not intended to tell judges how to sentence, but rather are informed by data and tell judges how their colleagues typically sentence. The descriptive nature of the guidelines means that they are not static; rather they are dynamic and may be amended when the data indicate that sentences fall outside of the recommended ranges. Dr. Soulé stated that the July 2022 changes to the drug and property sentencing matrices reflect this dynamic nature.

Dr. Soulé explained that, since its conception, the Sentencing Commission has incorporated feedback from both the public and the criminal justice community into its policy decisions. The Sentencing Commission values this input and wants the guidelines to remain a relevant and useful tool for practitioners and for the public. The annual public comments hearing is just one way that the Sentencing Commission solicits and incorporates feedback. Dr. Soulé encouraged anyone who has questions about the guidelines or about the work of the MSCCSP to contact the Commission. Dr. Soulé also encouraged anyone with questions to visit the Sentencing Commission's website at www.msccsp.org. Dr. Soulé thanked everyone for their attendance at the public comments hearing and noted that the Commission values their feedback.

Dr. Soulé then called registered members of the public to speak in the order that they had registered. He encouraged the speakers to limit their testimony to 3-5 minutes. He informed the speakers that if they submitted written testimony, the Commissioners had received a copy. Dr. Soulé stated that he could provide additional contact information if there were any follow-up questions.

Dr. Soulé called the first registered speaker, Dr. Stanley Andrisse, representing the non-profit Prisons-to-Professionals (P2P) program to the stand. Dr. Andrisse thanked Commissioners for the opportunity to speak and stated that he is the Executive Director of the P2P Program, based in Baltimore City. Dr. Andrisse demanded a seat at the table for individuals who have been sentenced. He asked the Sentencing Commission how many of them had personally been



sentenced to prison. Dr. Andrisse recounted his personal experiences from justice involvement to his professional career as an endocrinologist and professor at Howard University College of Medicine. Dr. Andrisse also informed Commissioners of his numerous additional professional accomplishments. He stated that formerly incarcerated individuals bring unique insight into the sentencing and parole process, specifically regarding reintegration, rehabilitation, and the challenges faced by people who experience incarceration, to inform fairer justice system outcomes. Dr. Andrisse stated that allowing formerly incarcerated individuals to serve on the MSCCSP would bring valuable perspective and lived experience to contribute to fairer and more compassionate outcomes. Dr. Andrisse concluded by encouraging Commissioners to consider allowing formerly incarcerated individuals to serve and sit alongside them at the table.

Dr. Soulé then opened the floor to questions. Mr. Harvey asked Dr. Andrisse if he had taken his position to the Governor. Dr. Andrisse replied that he has not, however, he was invited to the public comments hearing by Secretary Scruggs, who has a committee of directly impacted individuals and is setting up a meeting with Governor Moore. Mr. Harvey noted that the Commissioners have no control over who is appointed to the Sentencing Commission. The Governor and Legislature make those decisions. Dr. Andrisse noted that the meeting was being recorded and could be provided to those entities. Judge DeLeonardo noted that he had met Dr. Andrisse through a judicial training and that Dr. Andrisse had been very helpful during this training.

Judge Avery asked if Dr. Andrisse would be amenable to Dr. Soulé sharing his contact information with the Commissioners via email and not publicly. Dr. Andrisse approved and stated that, in addition to MSCCSP matters, he would also be interested in partnering with Commissioners on the work he does with his non-profit.

Dr. Soulé called three registered speakers who were not present.

Dr. Soulé then called Sarah David from the Office of the Maryland State Prosecutor (OMSP) to provide her comments. Ms. David thanked Commissioners for the opportunity to discuss the OMSP proposal for a sentencing enhancement for individuals who abuse a position of trust. Ms. David noted that she would be reading from the written remarks that she provided to Commissioners prior to the public comments hearing, but that she and her colleagues are also able to answer any questions.

Ms. David listed several examples of violations of positions of trust that her office has prosecuted. She noted that there are many ways in which people can abuse positions of trust, and that the fact that these individuals hold a position of trust should be considered in the sentences that they face. Ms. David stated that the OMSP's request is related to the Commission's goal of reducing unnecessary disparities in sentencing and that the lack of guidance for judges regarding the abuse of a position of trust can create such disparities. Ms. David referenced several other considerations included in the guidelines, such as criminal history and relationship to the criminal justice system at the time of the crime, stating that the



Commission knows that judges will consider these factors. Therefore, the Commission should give guidance to judges so that they may consistently consider these factors. Ms. David said that the request is not prescriptive, as the OMSP is not directly asking for sentences to increase. Their suggestion would still allow for the lower end of the guidelines ranges in these cases to be probation.

Ms. David stated that the OMSP's proposal allows judges to consider how a person's position may make their crime more egregious. She informed Commissioners that judges have reported exploitation of a position of trust as a reason for a departure above the guidelines in some of these cases, so we know that judges consider this factor. Ms. David drew a parallel between judges' consideration of criminal history and their consideration of a position of trust. She stated that individuals who hold a position of public trust are granted special access to the public's trust, and breaking this trust should be considered in their sentencing. Ms. David reiterated that these cases are unpredictable and difficult to prosecute because of the unique nature of these offenses. She stated that this enhancement cannot be attached to legislation because the specific crimes to which it applies cannot be fully enumerated.

Ms. David presented two examples of falsified documentation, one committed by a person in a position of trust and the other by a person not in a position of public trust. She explained how the example involving an individual in a position of trust was much more serious than the example involving an individual not in a position of trust. Yet, the guidelines do not differentiate between the two scenarios. Ms. David noted that individuals in a position of trust may benefit from biases in sentencing due to the nature and resources of their position, often including the ability to draw sympathy from judges. This gives the public the impression that these individuals do not face real consequences for their actions. Ms. David acknowledged that the OMSP is asking Commissioners to do something different: look at the offender not just for their criminal act, but to look at the way the justice system views offenders who are given opportunity and then abuse it. She stated that this is an opportunity to address unwarranted disparities and give judges guidance, not necessarily to sentence more harshly.

Judge DeLeonardo opened the floor for questions. Delegate Bartlett asked Ms. David to elaborate on what she meant by "disparities" in sentencing offenders who abuse a position of trust. Ms. David replied that the OMSP concludes most cases involving the abuse of a position of trust via pre-indictment plea agreements, making the guidelines an issue on the front end. Therefore, it is difficult to take into account a judges' consideration of this position of trust in their sentencing decisions because that would become apparent only during post-trial sentencing. Ms. David stated that, in 75% of misconduct cases involving an upward departure, judges report exploitation of a position of trust as a reason for departure, but judges receive no guidance for these departures. Ms. David noted that part of the problem is the lack of information and statistics on these offenses. Delegate Bartlett stated that she does not disagree with Ms. David, and her questions are meant to provide guidance. She asked if the problems Ms. David is discussing would be corrected by the enhancement, even though the guidelines are not mandatory. Ms. David responded that the enhancement would at least help to trace



whether a crime involves the violation of a position of trust. She stated that at this point, the goal is to track these occurrences to gain a better understanding of these cases.

Mr. Zaremba asked whether an offender exploiting a position of trust was already listed in the guidelines as a departure reason, and whether this addresses the issue of tracking these cases. Ms. David noted that departure reasons are only reported if there is a departure from the guidelines, but that most of these cases are resolved via pre-indictment plea agreements. Pre-indictment, it is difficult for prosecutors to negotiate an above-guidelines sentence, especially when the offender has no criminal background. Therefore, an above guidelines departure reason does not fully capture offenses involving an abuse of a position of trust. Mr. Zaremba asked if Ms. David was looking to use this enhancement as leverage in these negotiations. Ms. David responded that the enhancement would be utilized to create consistency in judges' approach to the guidelines in these cases. Without the enhancement, they must assume that a judge is going to offer the standard guidelines and cannot speculate how this element of an abuse of a position of trust is going to influence the judge's decision.

Senator West stated that most of the considerations listed in the guidelines are objective, such as criminal history, but he suspects that a breach of trust varies widely from seemingly innocent breaches to extremely egregious breaches. He asked Ms. David how the Commission would categorize such breaches. Ms. David deferred to her colleague, who would be speaking to the federal guidelines' classification for an abuse of a position of trust.

Dr. Soulé then called Abigail Ticse from the OMSP to give comments. Ms. Ticse introduced herself as a senior prosecutor for police misconduct at the OMSP. She noted that the statistics provided to Commissioners regarding their request relate to the crime of misconduct in office. However, misconduct in office is reserved for public officials acting in their official capacity. Ms. Ticse noted that the abuse of a position of trust encompasses a much wider range of offenses, emphasizing that the OMSP's request is not limited to a specific crime or specific occupation. Ms. Ticse provided a few examples of cases involving the violation of a position of trust that would not be classified as misconduct in office. Ms. Ticse noted that she was previously a federal prosecutor and was not requesting that the Commission adopt the complicated federal guidelines, but rather they use the federal guidelines as a starting point for defining abuse of a position of trust. Ms. Ticse then invited questions from the Commissioners.

Mr. Harvey asked Ms. Ticse to explain how this enhancement would work procedurally. Ms. Ticse stated that there will likely be an argument between the defense and the prosecution as to whether someone abused a position of trust, and the guidelines would be determined based on the judge's decision as to whether there was an abuse of a position of trust. Mr. Harvey expressed concern that this process would lengthen sentencing proceedings, but noted that he supported her proposal. Ms. Ticse noted that in her experience, it is clear whether most cases involve an abuse of a position of trust, but there will likely still be arguments between the state and defense. A judge will resolve those disputes.



Mr. Finci noted that the federal guidelines include numerous enhancements, but also numerous reductions. He asked Ms. Ticse why the Commission might consider adopting an enhancement for a position of trust, but not consider reducing the guidelines for something like the acceptance of responsibility. Ms. Ticse stated that they are not trying to adopt guidelines that are as complicated as the federal guidelines, but rather referencing the federal guidelines as a starting point.

Judge DeLeonardo asked if the enhancement would include any position of trust. Ms. Ticse replied that the enhancement would be to any position of trust, not just public officials. Mr. Finci asked Ms. Ticse if this was the official position of the OMSP. Ms. Ticse replied that, yes, it was their official position. Dr. Soulé asked if Ms. Ticse could provide the federal guidelines' definition of a position of trust. Ms. Ticse stated that the federal guidelines define public or private trust as "characterized by professional or managerial discretion, i.e. substantial discretionary judgement that is ordinarily giving considerable deference. Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense." Ms. Ticse noted that this enhancement also describes a special skill, not possessed by members of the general public, which typically requires substantial training. There were no further questions. Ms. Ticse thanked the Commission for their time.

Dr. Soulé then invited Mary Setzer from the OMSP to give comments. Ms. Setzer introduced herself and stated that she would like to respond to an earlier question regarding the potential for this enhancement to lengthen sentencing proceedings. Ms. Setzer said that they anticipate that this enhancement would be negotiated in a pre-indictment agreement and included in the statement of facts. Otherwise, it would be proven at trial. Therefore, it is not anticipated that this enhancement would lengthen sentencing proceedings. Ms. Setzer noted that, by the nature of the position of trust, the discussion of this enhancement would not likely be a surprise or minor detail, but rather it would be at the forefront of conversations in these cases.

Ms. Setzer referred the Commissioners to the comments she submitted, reiterating that she specializes in special victims matters for the OMSP. She stated that the OMSP is asking for this enhancement to be applied broadly and not restricted to particular crimes. Ms. Setzer noted that in cases of sexual assault, many victims do not report the crime immediately and this passage of time can generate statute of limitations complications. She highlighted that the crime of misconduct in office has a longer statute of limitations than other offenses.

Ms. Setzer reiterated that the enhancement proposed by the OMSP would apply not only to misconduct in office, but also to other crimes. Ms. Setzer provided personal experiences with such cases during her time as a federal prosecutor to reiterate that abuse of positions of trust can occur in many ways. She stated that it seems uncontroversial that the circumstances of these crimes be considered egregious, thus meriting an enhancement. In these cases, victims



may be hesitant to participate in prosecution. Ms. Setzer said that enhancing the top of the guidelines for these offenses would be an important tool for gaining clarity in pre-indictment plea agreements, ensuring that sexual abusers in positions of trust are brought to justice. Ms. Setzer encouraged Commissioners to keep these comments in mind and to remember that a judge still makes the final determination as to sentencing. However, increasing the guidelines would impact these cases.

Judge Avery asked Ms. Setzer to clarify whether the impact on the guidelines would be because of the leverage in the pre-indictment negotiations. Ms. Setzer stated that this is not the sole reason, and that avoiding a trial is important for victims and that an enhancement would also account for the egregious conduct of people in these positions of trust. Judge Avery asked again if this was because prosecutors would be able to negotiate for more jail time. Ms. Setzer stated that while this does sometimes occur in their cases, it is ultimately up to the judge.

Judge Avery stated that the sentencing guidelines are descriptive in nature. Prior guidelines revisions, such as those to the sentencing matrices for drug and property crimes, were based on actual sentencing trends. Judge Avery noted that the OMSP's position was honorable and that most Commissioners would not disagree with the overall objective of the enhancement. However, the enhancement clearly goes against the structure and integrity of the process that the Commission goes through to define the guidelines. Ms. Setzer expressed her understanding and appreciation for the Commission's time. She clarified that the Commission's current data does not capture all the situations in which a person is abusing a position of trust. Therefore, the Commission cannot identify how often offenses involve the abuse of a position of trust or how judges currently sentence in these cases. Ms. Setzer said that if the data was available, the Commission may see that judges are imposing enhanced sentences due to the violation of a position of trust. Judge Avery noted that the guidelines include a departure code for violating a position of trust, but judges may not always note this as a departure reason. Judge Avery said that she understood the difficulty in gaining clarity on the cases that Ms. Setzer was describing. Judge Avery thanked Ms. Setzer for her comments.

Mr. Harvey noted that 9.1% of cases involving misconduct in office involve a departure above the guidelines, whereas only 1% of cases involve a departure below the guidelines. Mr. Harvey stated that, in this respect, the Commission has some data.

Judge DeLeonardo thanked Ms. Setzer for her comments.

Dr. Soulé asked if there were any other people interested in speaking at the public hearing. Judge DeLeonardo noted that the OMSP enhancement would be discussed further during the business meeting later that evening. Judge DeLeonardo then motioned to adjourn the public comments hearing for Commissioners to take a dinner break before the business meeting.

The public comments hearing concluded at 5:59 pm.