



Minutes

Maryland State Commission on Criminal Sentencing Policy
Judiciary Education and Conference Center
Annapolis, MD 21401
May 6, 2014

Commission Members in Attendance:

Delegate Curtis S. Anderson
Honorable Mary Ellen Barbera
Colonel Marcus L. Brown
Honorable Joseph I. Cassilly
LaMonte E. Cooke
William Davis, Esquire, *representing Public Defender Paul B. DeWolfe*
Kieran Dowdy, *representing Secretary Gregg L. Hershberger*
Richard A. Finci, Esquire
Senator Delores G. Kelley
Honorable Laura L. Martin
Ilene Nathan, *attending on behalf of Megan Limarzi, Esquire, representative for Attorney General Douglas F. Gansler*
Honorable John P. Morrissey
Honorable Andrew L. Sonner
Delegate Joseph F. Vallario, Jr.

Staff Members in Attendance:

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

Visitors:

Josline Ali-Napo, MSCCSP Intern
Jessica Miller, MSCCSP Intern

1. Call to order

Judge Morrissey, acting Chair, called the meeting to order.

2. Roll call and declaration of quorum

The meeting began at 5:40 p.m. when quorum was reached.

3. Welcome of special guest, the Honorable Mary Ellen Barbera, Chief Judge, Court of Appeals

Judge Morrissey welcomed Chief Judge Mary Ellen Barbera and noted that Judge Barbera has a voting right and was included in the quorum. Judge Morrissey also welcomed the return of Judge Sonner, who was a former Chair of the Commission, as the Commission's new Criminal



Justice Policy Expert. Judge Morrissey announced the re-appointments of Ms. Martin, Mr. Cassilly and Mr. Enzinna to the Commission.

4. Approval of minutes, June 25, 2013 meeting

The minutes were approved as submitted.

5. Report from the Executive Director – Dr. David Soulé

Dr. Soulé stated that he had seven items to report to the Commission. First, he introduced a new member of the MSCCSP staff, Sarah Bowles. Ms. Bowles was hired as a program analyst in September 2013 and has taken the lead on the simulation model project. Dr. Soulé noted that the Commission is fortunate to have Sarah join the staff as she has a master's degree from Pennsylvania State University, worked as a graduate research assistant at the Pennsylvania Commission on Sentencing for three years, and has extensive data management and analysis experience and skills.

Dr. Soulé also introduced current MSCCSP undergraduate student interns Josline Ali-Napo and Jessica Miller. Dr. Soulé thanked the Commissioners who met with the MSCCSP interns over the last year.

Next, Dr. Soulé reported on meetings and trainings coordinated by the MSCCSP staff. Since the last Commission meeting, Dr. Soulé met with the administrative judges in 18 jurisdictions. Additionally, the staff, led by Administrative and Training Coordinator Marlene Akas, conducted 21 guidelines training sessions with various State's Attorneys' Offices, Public Defense Offices, Community Supervision Investigators, and law clerks in many of these same jurisdictions. Finally, Dr. Soulé conducted a presentation with 18 new circuit court judicial appointees at the New Trial Judges Orientation Session in April 2014.

Dr. Soulé then provided an update on the status of the risk assessment project. He noted that the MSCCSP previously approved the recommendation of the Guidelines Subcommittee to proceed to the second stage of the project, and directed the MSCCSP staff to review options for funding further efforts in this area. Dr. Soulé reported that the MSCCSP has coordinated with the Department of Criminology and Criminal Justice (CCJS Department) at the University of Maryland, and that the CCJS Department was recently awarded a grant through the Governor's Office of Crime Control and Prevention to conduct a feasibility study on the potential implementation of a sentencing risk assessment instrument in Maryland. The feasibility study will start within the next month or so and will be conducted by a team of researchers within the CCJS Department. The goal of the feasibility study is to provide information that can assist the Commission in making informed decisions about the development of a risk assessment tool. These decisions include: (1) the information that should be included in the tool; (2) the definition of recidivism that should be used; and (3) the method(s) that should be used in analyzing the available data to assess risk. The results of research on these three areas will be presented in three sections of a white paper by the CCJS Department research team to the Commission and to members of the Judiciary. Since any risk assessment tool that is developed would ultimately be used by judges in Maryland, the study will seek feedback from the Judiciary throughout the decision-making process. To this end, Dr. Soulé asked Chief Judge Barbera to identify an appropriate group within the Judiciary to provide feedback on the results from the risk assessment feasibility study. Dr. Soulé thanked Chief Judge Barbera for her swift response to this request and noted that she promptly identified a group of five circuit court



judges to serve as the feedback group for the study. Dr. Soulé indicated that he looks forward to providing additional updates to the Commission as the study gets underway.

Delegate Anderson noted that during the General Assembly session, the Legislature debated the issues related to the *Richmond* case, and that there was a good deal of attention devoted to developing a risk assessment tool for pre-trial intervention. Additionally, there were discussions about the potential benefits of utilizing one tool or a set of similar tools throughout the criminal justice process and making those results available for judges at sentencing. Accordingly, Delegate Anderson asked whether it would be practical for the Commission to examine the possibility of developing one tool that starts earlier in the process with the pre-trial detention decision. Mr. Fini indicated that during the Guidelines Subcommittee's review of risk assessment, it was noted that the variables included in a risk assessment instrument will vary depending on the outcome one is trying to predict. For example, the factors included in the Violence Prevention Initiative (VPI) instrument, which predicts the likelihood of committing or being the victim of a homicide, are likely quite different than those that would be used to predict recidivism at sentencing or the likelihood of returning to court if released pre-trial. Senator Kelley noted that judges should be aware of the components utilized in any risk assessment instrument. Dr. Soulé agreed with Senator Kelley and noted that he believes the risk assessment feasibility study addresses this issue because it will seek feedback from the Judiciary. Chief Judge Barbera confirmed that the five circuit court judges she recruited for the advisory group would serve in a consulting role and would be available to provide feedback on the recommendations made by the CCJS Department research team. Delegate Anderson asked if the CCJS Department research team would present its recommendations directly to the Commission. Dr. Soulé replied that the preliminary plan is for the CCJS Department research team to present its recommendations from the first section of the white paper at either the July or September Commission meeting. The Judiciary advisory group would be invited to attend the meeting in order to provide feedback.

Dr. Soulé next reported on the progress of the juvenile delinquency study undertaken by MSCCSP staff. He noted that at its previous meeting, the Commission had asked staff to explore the possibility of empirically examining which aspects, if any, of a juvenile record in Maryland are predictive of later adult criminality. The purpose of this study would be to help inform the Commission in assessing the most appropriate way to capture juvenile offending in the calculation of the Offender Score. Dr. Soulé reported that MSCCSP staff met with the staff at the Department of Juvenile Services (DJS) to discuss the availability of juvenile delinquency data. MSCCSP staff subsequently drafted and submitted a study proposal to DJS in order to obtain the data. Recently, an opportunity arose for the MSCCSP to collaborate with the CCJS Department at the University of Maryland to conduct this study. Dr. Soulé explained that given the potential complexity of the analysis, this collaboration will allow the MSCCSP to benefit from the resources and expertise of the CCJS Department while also ensuring that the study is overseen by independent researchers. The CCJS Department has identified potential funding sources for the study, and once funding has been secured, the CCJS Department expects that the study can be completed in a relatively quick timeframe. Senator Kelley urged the Commission to consider, while reviewing this issue, the emerging neuroscience research about the juvenile brain and juveniles' emotional and psychological development. Mr. Davis asked for clarification on the type of data that is being sought for this study. Dr. Soulé indicated that the MSCCSP staff has been working with DJS to obtain information on all relevant factors related to the juvenile record. He noted that when the Study Commission examined this issue many



years ago, offense-specific information about juvenile findings was not available, and therefore commitment was used as a proxy for the seriousness of the juvenile record. The hope is that the current data will allow the Commission to explore what factors regarding the juvenile record are related to adult criminal behavior. Given that what constitutes a commitment may vary tremendously from jurisdiction to jurisdiction (e.g., in home placement versus custodial institution), it is likely that other, more equitable factors can be used to determine the extent of one's juvenile delinquency. Chief Judge Barbera offered her support for Senator Kelley's comments about the psychological and neurological differences between juveniles and adults and urged the Commission to consider these factors in conjunction with the results from the analysis. Senator Kelley further suggested that the Commission may need to examine variability in the treatment that is offered to juveniles.

The next item Dr. Soulé reported on was the status of the Maryland Automated Guidelines System (MAGS). In January 2014, the MSCCSP released the latest version of MAGS, MAGS 3.0. The updates contained in MAGS 3.0 were based largely on feedback from Montgomery County Circuit Court (MCCC) judges and staff. These updates included new features such as compatibility with Safari, Google Chrome, and Firefox web browsers, as well as many additional updates aimed at improving the automatic worksheet implementation process. On January 27, 2014, Dr. Soulé met with the Conference of Circuit Judges (CCJ), and the CCJ approved the following: (1) the adoption of the permanent utilization of MAGS in the MCCC; (2) the gradual rollout of MAGS to the remaining jurisdictions in Maryland; and (3) the initiation of the rollout in the Calvert County Circuit Court (CCCC). Over the past few months, MSCCSP staff have been working with the Administrative Office of the Courts, Judicial Information Systems (JIS), the CCCC, the Calvert County State's Attorney's Office, the District 4 Public Defender's Office, and the Department of Public Safety and Correctional Services to prepare for the launch of MAGS in Calvert County. Dr. Soulé was pleased to report that MAGS is ready to go live in the CCCC effective June 2, 2014. Once MAGS has been launched in Calvert County, the MSCCSP will work with the Administrative Office of the Courts to develop a deployment schedule for the remaining circuit courts.

Lastly, Dr. Soulé discussed the MSCCSP staff's efforts to identify cases in the circuit courts that require a sentencing guidelines worksheet. Dr. Soulé noted that JIS, using guidelines eligibility criteria provided by MSCCSP staff, recently developed programming code to flag guidelines-eligible cases on the criminal docket. This flag will allow judges and their staff to easily identify the cases on the docket that should have a guidelines worksheet. The flag will be initiated in the CCCC with the rollout of MAGS and is expected to be implemented in other jurisdictions soon after. Dr. Soulé expressed his gratitude to Chief Judge Barbera, Pam Harris, and JIS for their assistance with this project.

6. Report from the Guidelines Subcommittee – Honorable John P. Morrissey

Judge Morrissey presented the report of the Guidelines Subcommittee.

A. Review of *Peugh v. United States*

Judge Morrissey began by giving a brief summary of the *Peugh* case. He explained that the Guidelines Subcommittee considered three possible courses of action in response to the *Peugh* decision: (1) to take no action; (2) to adopt language similar to that used by the Federal Sentencing Guidelines, which state that "if the court determines that use of the guidelines in effect on the date of sentencing would violate the *ex post facto* clause, then the



court shall use the guidelines in effect on the date the offense of conviction was committed”; or (3) to use the date of offense as the effective date of the guidelines. Judge Morrissey noted that the second and third options constituted a considerable amount of work for the Commission for several reasons. He explained that the Guidelines Subcommittee did agree, however, that in principle it was necessary to follow the rationale of *Peugh* and therefore base the effective date of the guidelines on the date the offense of conviction was committed.

Judge Morrissey then invited Dr. Soulé to discuss in more detail the practical considerations of implementing a change to the current policy regarding the guidelines effective date. Dr. Soulé explained that it would necessitate extensive research into all statutory maximum penalty and seriousness category changes, including those occurring prior to creation of the Commission, as well as require programming changes to the MSCCSP’s databases and MAGS. Ms. Martin inquired whether MAGS already had the capability to automatically determine the seriousness category and statutory maximum penalty in effect on the date of the offense, to which Dr. Soulé replied that it did not. He noted that for MAGS, a plausible option would be to instruct users to complete a paper sentencing guidelines worksheet in instances when the statutory maximum penalty and/or seriousness category for an offense had changed in between the date of offense and sentencing.

Mr. Cassilly stated that such a change in policy would make the guidelines extremely difficult to calculate and would have the effect of discouraging use of the guidelines. Mr. Cassilly asked what would happen in cases in which the seriousness category for an offense was later reduced. He also noted the problems that would arise for an offender being sentenced for several offenses that occurred on different dates, in that a different set of guidelines would have to be calculated for each offense. Mr. Cassilly proposed a fourth option in which the guidelines would be calculated based on the date of sentencing, but if the defense wants to present what the guidelines would have been on the date of offense, the court may consider this in reaching its sentence.

Senator Kelley said she wondered about the frequency with which this would be an issue, and whether all of the work involved in implementing such a change would actually be utilized. Judge Morrissey noted that the Guidelines Subcommittee had asked MSCCSP staff if they would be able to figure this out, and Dr. Soulé explained that MSCCSP staff had determined that it would involve a small number of cases, as 94% of guidelines cases in fiscal year 2013 were sentenced within two years of the date of offense. Dr. Soulé stated that the bigger problem, however, concerns the calculation of the Prior Adult Criminal Record and whether the change would affect this as well, since many offenders have a prior record that may extend far into the past. Mr. Cassilly noted that this brings up a related issue of how convictions occurring since the date of the offense would be factored into the Prior Adult Criminal Record.

Judge Sonner stated that when he is sentencing, the defense presents reasons why he should depart from the guidelines. He said it seems like the simplest thing to do would be to leave it up to the attorneys to argue if there is an earlier date they want the court to use for the guidelines. He added that he believes having the parties figure out what the guidelines were on the date of offense would be counterproductive, and that he’d rather know what the



current guidelines are and have the defense tell him why the current guidelines should not apply as a reason for departure.

Mr. Finci said that there are two issues for the Commission to address, the first being whether the Commission feels that it needs to follow the decision in the *Peugh* case. He stated that the heart of *Peugh* is that there is an *ex post facto* violation when defendants are not put on an equal setting at sentencing, so by the sentencing guidelines putting a defendant in a worse setting than if he had been charged ten years earlier when the offense occurred, there is an *ex post facto* violation. He explained that the second issue is how to implement a change to the guidelines effective date, but it needs to say in the guidelines which date applies. Mr. Finci also stated that he does not believe that *Peugh* has any implications for the calculation of the Prior Adult Criminal Record.

Senator Kelley suggested that in the preface to the Maryland Sentencing Guidelines Manual (MSGM), the Commission cite the *Peugh* decision and encourage the prosecutor and defense to determine whether there is a reason to seek a departure from the guidelines.

Judge Morrissey noted Judge Nance's comments at the meeting of the Guidelines Subcommittee, in which Judge Nance said that there is a two-year period between the date of offense and sentencing for most major crimes, which presents an issue for guidelines calculation. Judge Morrissey also noted that Judge Nance said he believes every judge will want to know what the guidelines were on the date of the offense. Ms. Martin said she agrees with Judge Sonner and Senator Kelley that the Commission should move forward recognizing that *Peugh* is a plurality and not a mandate, and that it should wait to see how the courts react to the case before revising the entire guidelines system.

Judge Morrissey added that the argument has also been made that Maryland's sentencing guidelines are substantially different than the Federal Sentencing Guidelines, although he noted some similarities. Mr. Finci reminded the Commission that one of its responsibilities is to promote consistency among jurisdictions in sentencing, and he believes that the proposed course of action goes against this charge.

Mr. Davis asked Dr. Soulé whether moving forward, MAGS would be able to account for changes to statutory maximum penalties and/or seriousness categories. Dr. Soulé responded that in order to do this, MAGS would have to be reprogrammed. Ms. Martin asked whether, if the Commission proceeds as proposed by Judge Sonner and Senator Kelley, MSCCSP staff could track how many cases are affected by *Peugh*. Dr. Soulé replied that MSCCSP staff would be able to look at which cases had a seriousness category and/or statutory maximum penalty change occur after the date of offense, but before the case was sentenced. Mr. Finci asked about the difficulty of incorporating a warning message on the date of offense screen in MAGS that would alert users to complete a paper guidelines worksheet if the date of offense occurred prior to a change in the sentencing guidelines. Dr. Soulé responded that if this were to be a generic message, then it would be simple to program.

Mr. Cassilly reiterated that the problem is not just about determining the statutory maximum penalty and seriousness category for the offense, but about calculating an offender's Prior Adult Criminal Record. Delegate Anderson stated that he agreed with Mr. Cassilly. Mr. Davis repeated Mr. Finci's earlier point about the proposed solution introducing



jurisdictional disparity, in that the guidelines format would no longer be consistent. Ms. Nathan replied that the guidelines format would still be consistent. She stated that this would just be another factor that the judge could consider in deciding whether to deviate from the guidelines, which is what the situation is now.

Senator Kelley moved that the recommendation of the Guidelines Subcommittee to change the effective date of the guidelines to the date of offense be rejected, and Mr. Cassilly seconded the motion. The motion passed with three (3) votes in opposition.

Mr. Finci then made a motion to adopt language to the MSGM and COMAR stating that the date of offense shall be used as the effective date of the guidelines if it is determined that use of the guidelines in effect on the date of sentencing would constitute an *ex post facto* violation. Mr. Cassilly stated that using this language would effectively build in an appellate argument on the judge's sentence. Mr. Davis replied that it seems like the burden is being placed on the defense to convince the judge to depart downward, when the burden should really be on the prosecution to convince the judge to depart upward. Mr. Cassilly responded that presently, both the defense and the prosecution have the responsibility to persuade the judge to depart downward or upward, respectively. Mr. Davis seconded Mr. Finci's motion, which failed to pass.

Ms. Martin made a motion to maintain the date of sentencing as the guidelines effective date, but to allow either party to make known to the judge, as a consideration for departure, if the sentencing guidelines have changed since the date of the offense. The motion was seconded by Mr. Cassilly.

Mr. Finci then moved to table the motion made by Ms. Martin in order to allow the Guidelines Subcommittee to draft language that would cover Ms. Martin's motion for subsequent consideration by the Commission. Mr. Finci's motion was seconded by Mr. Davis, however, the motion failed to pass.

Delegate Anderson asked for clarification on the specific wording that would be added to the MSGM and COMAR by Ms. Martin's motion. Ms. Martin clarified that the language should state: (1) that the date of sentencing is the effective date of the guidelines; and (2) that if there is an argument to be made that the sentencing guidelines are different than what they would have been if calculated as of the date of the offense, then either party is permitted to bring this fact to the attention of the judge as a consideration for departure from the guidelines. Mr. Finci asked if this wording could reference *Peugh v. United States*. Senator Kelley replied that doing so could possibly necessitate changing the language again in the future, since the opinion in *Peugh* was a plurality and other appellate cases may arise that influence its application. She suggested that the language stay as Ms. Martin proposed it.

Dr. Soulé asked where this language should appear in the MSGM. Senator Kelley suggested adding the language to the preface of the MSGM. Delegate Anderson added that it should also be included anywhere there is a reference to the effective date of the guidelines.



Ms. Martin's motion passed unanimously. It was agreed that MSCCSP staff would present the language given by Ms. Martin at the next Commission meeting, along with a recommendation regarding the location(s) of the language in the MSGM.

B. Proposed revision of guidelines instructions for *accessory*

Ms. Stewart summarized the memorandum on the proposed revisions to the guidelines instructions for accessoryship. Judge Morrissey explained that no substantive changes were being made to the accessoryship instructions. He stated that the recommendation of the Guidelines Subcommittee was to approve the revisions proposed by MSCCSP staff. Judge Sonner moved to adopt the recommendation of the Guidelines Subcommittee, and Senator Kelley seconded the motion.

Mr. Davis questioned why accessory after the fact is assigned the same seriousness category as the underlying offense in certain instances. He stated that he believes the seriousness category for accessory after the fact should be one seriousness category less than the underlying offense, since the offender has not committed the principle crime. Senator Kelley noted that Mr. Davis's disagreement is with the statute. Dr. Soulé reiterated that MSCCSP staff is not recommending a policy change, and that Mr. Davis is proposing that the Commission reconsider whether a lesser seriousness category than the underlying offense should be assigned for accessory.

Judge Morrissey called a vote on the pending motion, and it passed unanimously.

C. Proposal to review guidelines compliance for individual matrix cells

Judge Morrissey introduced the proposal to review guidelines compliance for individual matrix cells. He noted that one of the primary responsibilities of the MSCCSP is to review judicial compliance with the sentencing guidelines and to adopt changes to the sentencing guidelines matrices when appropriate. In accordance with this responsibility, the MSCCSP has periodically conducted detailed reviews by examining compliance within individual cells of each sentencing matrix. The last review was conducted in 2009 and examined five years of data covering fiscal years 2004 through 2008. At that time, the Commission determined that no adjustments to the matrices were warranted. Dr. Soulé noted that the current recommendation from the Guidelines Subcommittee is to authorize staff to conduct an updated analysis of guidelines compliance for individual matrix cells using data from the most recent five-year period, and to present that analysis to the Guidelines Subcommittee for review.

Delegate Anderson asked if the sentence range within a given cell would be adjusted if it is determined that judges are sentencing outside the recommended range. Judge Morrissey stated that the Commission could decide to change the range of the cell if it agreed the change was warranted. Delegate Anderson questioned why the proposed analysis would focus on whether the sentencing matrices are compliant with the judges' decisions, rather than focusing on whether the judges are compliant with the sentencing matrices. Senator Kelley responded that the guidelines are designed to reflect back to judges their own behavior.



Senator Kelley moved to authorize the MSCCSP staff to conduct the compliance analysis and to present the analysis to the Guidelines Subcommittee for review. The motion passed unanimously.

7. Date, time, and location for the next Commission meeting

The next meeting was set for Tuesday, July 15, 2014 at the Judiciary Education and Conference Center in Annapolis, MD at 5:30 p.m.

8. Old business

There was no old business to address.

9. New business and announcements

There were five items of new business. Mr. Finci raised the issue of the impact that the decriminalization of possession of less than ten grams of marijuana (effective October 1, 2014) will have on the sentencing guidelines. He specifically noted its effect on the classification of new offenses and the calculation of an offender's criminal history. Senator Kelley noted the disconnect between the marijuana possession charge, which will now be a civil offense, and the paraphernalia charge, which will continue to be a criminal offense. She recommended that the Commission table this issue to allow time for the Legislature to address whether the paraphernalia offense will remain a criminal offense. Delegate Anderson commented that data on the possession of marijuana of less than ten grams would be limited, as the offense has only been in existence for two years. Dr. Soulé suggested that the offense be removed from the current Guidelines Offense Table since it will no longer be a criminal offense effective October 1, 2014.

Mr. Finci moved that the issue of the effect of the decriminalization of possession of marijuana of less than ten grams on the sentencing guidelines be assigned to the Guidelines Subcommittee. The motion passed unanimously.

Mr. Cooke then presented two items to the Commission. The first was the desire of local detention centers to be included in discussions of the impact of the *Richmond* decision and potential solutions. Next, Mr. Cooke brought up the issue of 18-month sentences as it relates to local detention centers. He noted that local facilities are designed to house offenders with sentences of a maximum of 18 months, however, offenders with consecutive 18-month sentences are being placed in these facilities. Judge Morrissey advised Mr. Cooke to follow up directly with him on these issues as well as to contact Thomas Ross, Chair of the CCJ. Judge Morrissey noted the need to remind judges of this rule, since violating it can cause counties to incur substantial costs.

Next, Judge Morrissey commented that in his new role as Chief Judge for the District Court of Maryland, he has been tasked with implementing *Richmond*. He requested that the Commissioners refer to him any attorneys seeking employment and criminal experience.

Finally, Judge Morrissey announced that this would be his final meeting with the MSCCSP due to his new role. He thanked the Commissioners for their service and stated that it was a privilege and honor to have worked with them.



10. Adjournment

The meeting adjourned at 7:23 p.m.