



Minutes

Maryland State Commission on Criminal Sentencing Policy
House Office Building
Annapolis, MD 21041
September 21, 2010

Commission Members in Attendance:

Honorable Howard S. Chasanow, Chair
James V. Anthenelli, Esquire
Chief Marcus L. Brown
Honorable Arrie W. Davis
William Davis, Esquire, *representing Public Defender Paul B. DeWolfe*
Richard A. Finci, Esquire
Major Bernard B. Foster, Sr.
Rebecca Gowen, *representing Secretary Gary D. Maynard*
Senator Delores G. Kelley
Laura L. Martin, Esquire
Honorable Alfred Nance
Charles F. Wellford, Ph.D.

Staff Members in Attendance:

Jessica A. Rider
Stacy Skroban Najaka, Ph.D.
David Soulé, Ph.D.

Visitors:

Claire Rossmark, Department of Legislative Services

1. Call to order

Judge Chasanow called the meeting to order.

2. Roll call and declaration of quorum

The meeting began at 5:35 p.m. when quorum was reached. Judge Chasanow introduced Rebecca Gowen Acting Director of Planning & Statistics at the Department of Public Safety and Correctional Services. Ms. Gowen has been appointed as Secretary Maynard's proxy representative to the Commission. Ms. Gowen will replace Shannon Avery who was sworn in as a district court judge in Baltimore City in August.

3. Approval of minutes, June 29, 2010 meeting

The minutes were approved as submitted.

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

Dr. Soulé reviewed three items. First, Dr. Soulé noted that the Commission voted at the June 29, 2010 meeting to update the guidelines compliance calculation when there is pre-sentence incarceration time. At the same meeting, the Commission adopted seriousness categories for



new and/or revised offenses adopted during the 2010 Legislative Sessions. These revisions were submitted to the AELR committee after the June 29th meeting and are expected to be adopted in COMAR effective November 1, 2010. Commission staff will send a Guidelines E-News on November 1st announcing these updates.

Second, Dr. Soulé indicated that he has continued meeting with county administrative judges to review information specific to their jurisdictions and to get feedback on plans for implementing the automated guidelines system. Since the last MSCCSP meeting in June, Dr. Soulé has met with judges in the following jurisdictions: Anne Arundel County, Baltimore City, Baltimore County, Charles County, Howard County, Prince George's County, and St. Mary's County.

Finally, Dr. Soulé informed the Commission of his meeting with the Honorable Diane Leasure, the administrative judge for Howard County and the 5th Judicial Circuit. Judge Leasure is also the Chair of the Conference of Circuit Judges. Dr. Soulé and Judge Leasure discussed the progress of the development of the automated sentencing guidelines model. Dr. Soulé expressed that the Commission would like to identify one or two volunteer jurisdictions to serve as pilot sites for the automated system once the Commission feels it is ready to deploy. Judge Leasure volunteered Howard County to participate as pilot site. She also suggested that the Commission work with Frank Broccolina, the State Court Administrator to identify a second jurisdiction to serve as a pilot. Senator Kelley inquired if there were certain criteria that the Commission was using to identify a second jurisdiction to serve as a pilot site. Dr. Soulé indicated that jurisdictions with more than one judge are being considered.

5. Review of proposed restructuring of MSCCSP budget – Mr. Robert Platky

Mr. Platky, Director of the Governor's Office of Administration reviewed a proposal to restructure the Commission's budget as a local law enforcement grant provided by the Governor's Office of Crime Control and Prevention (GOCCP). Mr. Platky provided the Commission with a brief overview of the Commission's budget from the Study Commission to present day. From 1996 to 1999, the Study Commission was funded with the federal Bryne Grant through the GOCCP. The Maryland State Commission on Criminal Sentencing Policy was created on July 1, 1999. The first time the MSCCSP appears in the budget was a mid-year budget amendment for a fairly modest start-up effort. In FY 2000, the MSCCSP appears as a separate appropriation unit in the budget. From FY 2000 to FY 2003, the MSCCSP appears in the budget in a similar capacity and funding structure, a combination of federal and state funds. However, over the course of those years, the percentage of funding from federal and state funds reversed with state funds providing the primary source of funding by end of FY 2003. In FY 2004, the MSCCSP was funded 100% through state general funds.

Mr. Platky noted that the MSCCSP operates in a different manner than other state agencies as it is operated entirely through the University of Maryland. Mr. Platky further noted that because of this, MSCCSP employees are identified as University employees rather than state employees. Fiscal year 2005 to fiscal year 2010, the MSCCSP's budget was consistently around \$340,000. However, in FY 2011, the MSCCSP's budget was decreased to \$301,000 due to broad "across the board" budget cuts. In the executive budgetary process, \$20,000 was cut from the MSCCSP's budget. Further cuts were taken in the legislative process through a back of the bill provision that cut salaries and contract employee salaries, resulting in a budget cut of \$19,000 for the MSCCSP. Mr. Platky noted that GOCCP grants were not affected by either of these cuts but rather the GOCCP grants were subject to a more modest budget cut of 1%. However, he also noted that the local law enforcement grants have an increased level of accountability in that a quarterly report is submitted indicating the status of the budget and a spending plan for



the balance of the budget. Mr. Platky further indicated that recipient organizations are not administered at a line item level or subject to the Department of Budget and Management (DBM) hiring freezes. Mr. Platky informed the Commission that restructuring of the budget in this fashion would hopefully make it less susceptible to future budget cuts.

Several Commissioners expressed concern with the proposed restructuring. Senator Kelley raised her concerns about the Commission being able to remain independent and autonomous with the oversight of the GOCCP. Judge Chasanow further inquired whether there were any other entities that were created by statute contained within this classification. Mr. Platky answered that to his knowledge, there is no requirement within the statute that created the MSCCSP or any other indicating what form of funding shall be used.

Ms. Martin also inquired about reporting requirements and wanted to know if it would be possible for the Commission to ask for increased funding. Mr. Platky indicated that the process would be similar to the process that is currently in place. Mr. Platky did indicate that the MSCCSP could ask for increased funding. Mr. Platky further indicated that a request for increased funding would not be treated differently if the MSCCSP falls under GOCCP or the current budget structure.

Dr. Wellford also expressed his concerns about the reporting requirements.

Dr. Soulé asked Mr. Platky about the flexibility allowed in moving funds from object to object within the submitted budget. Mr. Platky answered that the amount of flexibility would be the same as the current budget structure.

A motion was proposed to oppose the restructuring of the MSCCSP's budget as a grant under the GOCCP. The motion was unanimously approved. The Commissioners felt it would be appropriate to send a letter to Governor O'Malley, Mr. Platky, and Ms. Mahoney of the GOCCP outlining their concerns.

6. Report from the Guidelines Subcommittee – Dr. Charles Wellford

Dr. Wellford presented the report of the Guidelines Subcommittee.

A. Review of seriousness categories for *distribution of buprenorphine, distribution of methadone, and distribution of oxycodone*

The MSCCSP staff has observed an increase in the number of sentencing guidelines worksheets for *distribution of buprenorphine*, a drug approved for treating opiate addiction. This increase is not surprising, given recent reports that illegal use and distribution of the drug is on the rise. Staff reviewed a number of recently submitted sentencing guidelines worksheets for *distribution of buprenorphine* and found that there is confusion over the classification of this offense. In some instances it is recorded as a seriousness category IIIB offense (distribution narcotic) with a 20 year maximum penalty. In other instances, the offense is recorded as a seriousness category IV offense (distribution non-narcotic) with a 5 year maximum penalty.

Commissioner Laura Martin contacted Dr. Ross Lowe, the Chemistry Section Manager for the Maryland State Police lab, to inquire about the classification of *buprenorphine*, as well as *methadone*, since both drugs are commonly associated with treatment of heroin



addiction. Dr. Lowe sent a response via email on September 10, 2010, noting the following:

Buprenorphine is a derivative of *thebaine* and as such is a narcotic under the Controlled Substances Act due to its chemical derivation from *thebaine*. *Buprenorphine* is currently federally classified as Schedule III because: a) the drug has a potential for abuse less than drugs in schedules I and II; b) it has an accepted medical use; and c) abuse may lead to moderate or low physical dependence or high psychological dependence.

Methadone is classified as a Schedule II substance; the difference being based on “high” potential for abuse and abuse may lead to “severe” physical and psychological dependence.

Buprenorphine is a relatively new substance that has not yet been separately listed in any of the schedules noted in CR, §5-402 et seq. However, it is separately listed as a Schedule III under the federal schedule, and pursuant to CR, §5-404(a)(3), anything designated as Schedule III by the federal government is included under Schedule III in Maryland law. Furthermore, CR, §5-202 states that a new substance that is designated as a controlled substance under federal law is a similarly controlled substance under title 5 unless the Department of Health & Mental Hygiene (DHMH) objects to its inclusion. The staff contacted Dr. Thomas Cargiulo, Director of the Maryland Alcohol and Drug Abuse Administration (ADAA), a division within DHMH, and confirmed via an e-mail dated September 17, 2010 that DHMH has not challenged the Schedule III classification for *buprenorphine*.

In order to minimize errors on worksheets for *distribution of buprenorphine*, staff recommended adding *buprenorphine* to the list of drugs provided as examples under distribution of Schedule I through V non-narcotics (rows 59 and 60 of the Guidelines Offense Table). Additionally, staff recommended adding *methadone* to the list of drug provided as examples under distribution of Schedule I or II narcotics and hallucinogenics (rows 52 and 53 of the Guidelines Offense Table). Since both *buprenorphine* and *methadone* are primarily associated with treatment for heroin addiction, the staff recommended the addition of *methadone* to clarify that it is classified differently than *buprenorphine*. Finally, the staff also recommended adding *oxycodone* to the list. While errors appear to occur with less frequency for *distribution of oxycodone* as compared to *distribution of buprenorphine*, the number of worksheets submitted for *distribution of oxycodone* has also recently increased.

Dr. Wellford noted that the staff memo did not propose that the Commission re-score these drug offenses. Rather, the proposal offers guidance in the Guidelines Offense Table as to their seriousness categories and penalties. A motion was made and seconded to amend rows 52, 53, 59 and 60 of the Guidelines Offense Table as described in the paragraph above. The motion was unanimously approved.

**B. Proposed modification to the sentencing guidelines worksheet regarding 50% of sentence announced field**

In August 2001, the Maryland State Commission on Criminal Sentencing Policy (MSCCSP) added a box to the sentencing guidelines worksheet to record whether the judge announced in open court that that a violent offender must serve at least 50% of his/her sentence before becoming eligible for parole or mandatory release. Pursuant to CP, §6-217, when a sentence of incarceration is given for a violent crime as defined in CS, §7-101 for which a defendant will be eligible for parole under CS, §7-301(c) or (d), the judge shall state in open court the minimum time the defendant must serve before becoming eligible for parole and before becoming eligible for conditional release under mandatory supervision.

A review of sentencing guidelines data from fiscal year 2009 indicates that the *50% of Sentence Announced* field is left blank in approximately 90% of eligible cases.

Communications with several judges throughout the state confirm that many do not understand the intended nature of this question. Additionally, some do not realize the requirement only applies to those convicted of crimes of violence. Consequently, the staff feels that continued education regarding this requirement will be beneficial. Additionally, based on the recommendation of one judge, the staff believes it would be beneficial to add the phrase “for COVs” under the *50% of Sentence Announced* text in order to clarify that this data field only applies to violent offenders. Accordingly, the staff recommended this minor addition to the guidelines worksheets. The Guidelines Subcommittee supported this recommendation and offered it to the full Commission for review.

Dr. Wellford noted that during the Subcommittee’s discussion of this issue, there was some talk concerning why this item (as well as others, such as victim information) is included on the guidelines worksheet. The Subcommittee decided to move past those questions and focus for the time being on how to enhance completion of the item *50% of sentence announced*. Dr. Wellford also noted that automation will improve reporting by making the item a required field for violent crimes. However, automation is not yet in place and the proposed change would provide an interim procedure.

Judge Chasanow suggested further clarification of the item by changing it to read *50% of minimum sentence announced*. Senator Kelley noted that her concern with the item is that it is not pertinent to the sentencing guidelines -- instead it deals with other behaviors that represent protocols that judges should go through. She recommended that the Subcommittee study what items may be superfluous on the sentencing guidelines worksheet. Dr. Soulé agreed that it might be a good idea to reconsider the items included on the worksheet, but the item *50% of sentence announced* does get at one of our statutory requirements which is to aid public understanding of sentencing and how long criminals will be confined.

A motion was made and seconded for the Subcommittee to study the item *50% of sentence announced* and others on the sentencing guidelines worksheet that may be superfluous. The motion was unanimously approved.

C. Status report on risk assessment at sentencing

The Subcommittee held a meeting with Dr. James Austin, who is a consultant working with Department of Public Safety and Correctional Services (DPSCS) to help develop risk assessment instruments for parole, probation, corrections, and pre-trial services. Dr.



Wellford suggested that the next step for the Subcommittee is to meet to discuss what was learned from the educational seminar with Dr. Austin, and to discuss what, if anything, the Subcommittee wants to recommend to the full Commission.

D. Judge Andrew Sonner to receive award

Dr. Wellford noted that he spoke with the former chair of the MSCCSP, Judge Andrew Sonner and learned that Judge Sonner will receive the President's Justice Award at the meeting of the American Society of Criminology in November 2010. The award is in part due to Judge Sonner's work with the Sentencing Commission in Maryland.

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

The next meeting was set for Tuesday, December 14, 2010 at 5:00 pm at the House Office Building, Judiciary Committee Hearing Room in Annapolis, MD. The Commission meeting will be followed by the annual Public Comments Hearing. The Public Comments Hearing will begin at 6:15 p.m. immediately following a break for dinner at 5:45 p.m.

8. Old Business

There was no old business to address.

9. New Business and announcements

There was neither new business nor announcements.

10. Adjournment

The meeting adjourned at 6:57 p.m.