



Minutes

Maryland State Commission on Criminal Sentencing Policy
Judiciary Education and Conference Center
Annapolis, MD 21401
September 22, 2015

Commission Members in Attendance:

Honorable Glenn T. Harrell, Jr., Chair
Delegate Curtis S. Anderson
Honorable Shannon E. Avery
LaMonte E. Cooke
William Davis, Esquire, *representing Public Defender Paul B. DeWolfe*
Barbara Dorsey Domer
Paul F. Enzina, Esquire
Richard A. Finci, Esquire
Honorable Patrice E. Lewis
Megan Limarzi, Esquire, *representing Attorney General Brian E. Frosh*
Honorable Laura L. Martin
Rachel Sessa, *representing Secretary Stephen T. Moyer*
Colonel William M. Palozzi
Honorable James P. Salmon

Staff Members in Attendance:

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

Visitors:

Claire Rossmark, Department of Legislative Services
Jinney Smith, Maryland Data Analysis Center

1. Call to order

Judge Harrell called the meeting to order.

2. Roll call and declaration of quorum

The meeting began at 5:30 p.m. when attendance reached a quorum. All present introduced themselves. Dr. Soulé noted that James V. Anthenelli (Public Representative) passed away shortly after the May meeting. Judge Harrell added that Joseph I. Cassilly (State's Attorney) had sent a letter to the Governor indicating his intention to resign from the Commission.

3. Approval of minutes, May 19, 2015 meeting

The Commission approved the minutes as submitted.



4. Guidelines Subcommittee report – Judge Shannon Avery

Judge Avery reported on the Subcommittee's September 2, 2015 teleconference to the Commission.

a. Review of *Committing a Crime of Violence in the Presence of a Minor*

At the September 2 teleconference the Subcommittee discussed how the sentencing guidelines ought to consider committing a crime of violence in the presence of a minor—whether as a separate offense from the underlying crime of violence or as a sentencing enhancement. The Commission had initially treated committing a crime of violence in the presence of a minor as a separate offense for purposes of the sentencing guidelines; the Subcommittee decided to recommend not changing the status quo.

Mr. Enzinna asked whether treating committing a crime of violence in the presence of a minor as a separate offense would make it unavailable as an enhancement unless charged in the indictment. Judge Avery responded that she did not believe so, as long as the state meets the statute's required notice and evidentiary standard. Mr. Finci added that he believed that because of the required additional element the State's Attorney would separately need to charge and prove the presence of a minor beyond a reasonable doubt. Ms. Martin agreed with Mr. Finci. For these reasons and given the benefits to the defense and the public of being on notice about the increased penalty, the *Subcommittee recommended taking no action*.

Judge Harrell asked whether the Commission has ever reached out to the General Assembly to note what appears to be an inconsistency or lack of clarity in a law and asked the General Assembly to clarify its intent. Dr. Soulé responded that while nothing precludes the Commission from doing so, he was unaware of it ever occurring. Judge Harrell noted that the Commission might want to do so in the future to avoid the risk of misconstruing the statutory intent.

By consensus **the Commission agreed to take no action**. The sentencing guidelines will therefore continue to treat commit a crime of violence in the presence of a minor as a separate offense.

b. Update #4 on review of guidelines compliance analysis for individual cells

At the May 2014 meeting, the Commission authorized MSCCSP staff to conduct an updated analysis of guidelines compliance for individual matrix cells using data from fiscal years 2009 through 2013. The Guidelines Subcommittee reports at the September 2014, December 2014, and May 2015 Commission meetings included updates from this analysis.

Concerning the current update, Judge Avery noted that at the May 2015 meeting the Commission decided to allow MSCCSP staff time to run the proposed changes to the drug offense matrix through the sentencing simulation model. MSCCSP staff did so, and the Guidelines Subcommittee reviewed the results from the simulation model at its September 2, 2015, teleconference. For the sake of transparency and credibility, the Guidelines Subcommittee now recommended that the Commission allow criminal justice stakeholders the opportunity to comment at the Public Comments Hearing on the proposed changes to the drug offense matrix before definitively going forward with changes to the matrix. The Guidelines Subcommittee determined that when the Commission sends out its yearly announcement concerning the Public Comments Hearing to key criminal justice stakeholders the materials



should explicitly state that the Commission was considering the proposed changes and invite comment from interested persons. Judge Avery asked MSCCSP staff to review the results of the simulation model.

Before presenting the results of simulation model analysis, Dr. Soulé briefly recapped the work that was previously completed. He stated that the first step on the review was to identify matrix cells with a guidelines compliance rate of less than 65% (with at least 50 observations). The second step was to closely examine the sentences within these specific cells. During this review process, it was observed that 27 (12%) of the total 224 cells across three matrices met the criteria of less than 65% compliance and a sample size of at least 50 offenders during the 5-year review period. For the most part, the 27 cells that met this criteria were scattered throughout the matrices with one general exception. Specifically, it was observed that 8 of these cells were grouped together among the seriousness category IV and V drug offenses. The Guidelines Subcommittee felt it was reasonable to consider a revision to these two rows of the drug matrix and directed the MSCCSP staff to develop revised cell ranges to reflect sentencing practices more accurately, while maintaining proportionality across rows and columns of the matrix to be consistent with the principles of the guidelines.

Ms. Bowles directed the Commission to the memorandum with the subject line “Update #4 on Review of Guidelines Compliance for Individual Matrix Cells.” The memorandum shows that offenders in rows IV and V of the drug offense matrix comprise approximately 12% of guidelines offenders in FY09 to FY13. Approximately 11% of those offenders received sentences to state prison. These offenders likely therefore represent approximately 1% of the Division of Correction (DOC) annual intakes. Hence any changes to the drug offense matrix will likely only affect a small number of offenders.

The simulation model shows that the proposed changes to the matrix could slightly reduce the DOC’s population, but the extent of any decrease depends on compliance with the proposed revisions and other factors. As an important caveat, Ms. Bowles noted, because the intent of the proposed changes is to reflect better what judges are already doing, the proposed changes might not have any effect on the DOC’s population at all. The changes might, however, induce some judges to sentence defendants to lower terms of incarceration. The simulation model also cannot speak to any effects on local jails.

Mr. Cooke asked whether the proposed revisions could potentially have an effect on local correctional agencies. Dr. Soulé replied that the proposed revisions could potentially impact the local population. However, the Commission does not have data on local jails. The model is therefore unable to address effects on local correctional populations. One might reasonably expect some of the state prison sentences to become local commitments under the proposed revisions. Delegate Anderson noted that in all likelihood, the proposed changes to the guidelines only reflect what judges already do, so the local facilities should not experience much displacement from the state prisons. Dr. Soulé agreed that there is a chance that the revisions would have no effect, and only reflect what judges are already doing. Whether some judges will change their practices is unknown. Mr. Cooke stated this will probably depend on political conditions in different jurisdictions. Mr. Cooke indicated that the local agencies have not raised this as an issue; he was noting only that it could raise budgetary and programmatic concerns.



At Mr. Finci's request, Dr. Soulé elaborated upon the proposed changes to the drug offense matrix originally presented at the May 2015 Commission meeting. For each cell in the matrix MSCCSP staff calculated what the range would need to be to capture the middle 65% of cases. MSCCSP staff then proposed changes to the existing cell ranges, attempting to balance capturing the middle 65% of cases and proportionality across offender scores and offense seriousness categories. Incorporating appropriate increases and decreases across rows and columns involved comparing cells to those above (less serious), below (more serious), to the left (lower offender score), and right (higher offender score), and required changing cell ranges for cells that already had at least 65% compliance for consistency and proportionality. Under the proposed revised ranges all cells in rows IV and V of the drug offense matrix would have had more than 65% compliance. Some of the cells already above 65% compliance would now have lower compliance rates, though still above 65%, as detailed in the document presented at the May 2015 Commission meeting titled *Sentencing Guidelines Compliance by Cell for V and IV Drug Offenses Based on Current and Proposed Ranges – Fiscal Years 2009-2013 – Single Count Cases*.

Mr. Finci expressed concern that the lower bounds in the proposed new cell ranges were still too high, based on sentencing trends. The lower bound to capture the middle 65% for offenders with an offender score 5, offense seriousness category IV, for example, would need to be .02 months (i.e., less than one day but greater than zero days). The proposed lower bound of 9 months might therefore send the wrong message about an appropriate sentence. To capture the middle 65% of cases, the lower bound of cell 2-IV would need to be probation, as compared to the current lower bound of 6 months and a proposed revised lower bound of 3 months. Mr. Finci suggested decreasing the lower bound for cell 2-IV to probation, then increasing by 2 month increments as the offender score increases might be more appropriate. The currently proposed new lower bounds, Mr. Finci opined, would still be too high. He did not take issue with the proposed upper bounds.

Mr. Davis expressed similar concerns with respect to cell 4-V, where the lower bound for the middle 65% would be .23 months (1 week), but the proposed new lower bound is 3 months (decreased from the current lower bound of 1 year).

Ms. Martin noted that decreasing the lower bounds still further would undermine proportionality, as the lower bounds for several additional cells would need to be probation. The proposed new ranges, she stated, reflect what judges are doing as they capture at least 65% of cases, she stated.

Judge Avery stated that for the structure and credibility of the process, if the Commission wanted to explore other cell range boundaries, she would want to run those changes through the simulation model to give the public the opportunity to comment. Judge Harrell noted that the Commission could still tentatively approve the Subcommittee and MSCCSP staff's recommendation for purposes of receiving public comment. Putting a target out for people to shoot at should be the outcome of the instant meeting, so that people who disagree could come to the Public Comments Hearing in December prepared to offer alternate suggestions, and to explain why the alternate proposal would be better.

Delegate Anderson suggested that the proposal(s) be available at least a month in advance to give the public an opportunity to review. Judge Harrell agreed, noting that there ought to be



specific counterproposals to focus the debate. Mr. Finci asked whether the simulation model could address the effects of specific counterproposals. Dr. Soulé indicated that was possible.

Judge Avery moved to tentatively approve the Subcommittee/MSCCSP staff-recommended changes to the drug offense matrix subject to input received at the December 8 Public Comments Hearing and Commission business meeting. Judge Salmon seconded.

Mr. Davis expressed concern that previous Public Comment Hearings have not produced much meaningful public comment. In the absence of meaningful public comment he would not want the Commission to just automatically move ahead without further discussion. Judge Harrell indicated that use of the word tentative referred to its use in the Commission bylaws, which state “[t]he Commission may tentatively but not officially approve actions pending dissemination and reporting of the preliminary vote and receipt of feedback from relevant practitioners and related parties.” He indicated that he wanted a focused concrete counterproposal with an explanation of why it would be better and more consistent with the Commission’s mandate than the current proposal.

The motion passed by consensus.

c. Review of new and/or revised criminal penalties, 2015 Legislative Session

Judge Avery noted that the 2015 legislative session did not produce any new offenses with a maximum carceral penalty greater than 1 year, increase any existing maximum carceral penalties of 1 year or less to be greater than 1 year, or substantively revise any existing offenses with maximum carceral penalties greater than one year. The *Guidelines Subcommittee recommended no action* concerning the new and revised criminal penalties from the 2015 legislative session. (By MSCCSP rule, any offense with a maximum carceral penalty of 1 year or less automatically receives a seriousness category VII (COMAR 14.22.01.09B(2)(f)) unless the Commission chooses to adopt a different seriousness category.) Based on the Guidelines Subcommittee’s recommendation the **Commission took no action**, allowing the default category VII rule and existing seriousness category classifications to cover the new and revised offenses. Some nonsubstantive changes to COMAR 14.22.02.02 and the Guidelines Offense Table will nevertheless be necessary to reflect, e.g., changes to subsection designations. The 2015 laws considered are:

- i. Chapter 393 (HB 9) – Maryland Licensure of Direct-Entry Midwives Act – Violation of any provision of Health Occupations Article, Title 8, Subtitle 6c (Licensed Direct-Entry Midwives) (HO, § 8-6C-24);
- ii. Chapter 419 (HB 431) – Public Health & Safety, Crimes Against – Burying or disposing of a dead human body other than as permitted by law (HG, § 5-514);
- iii. Chapter 444 (HB 630) – Motor Vehicle Offenses – Offer, sell, negotiate a mechanical repair contract if not a licensed vehicle dealer or registered obligor (TR, § 15-311.2(c)(5), TR, § 27-101(ff) (penalty));
- iv. Chapter 453 (HB 744) – Consumer Protection Laws – Failure to remove mug shot photo within 30 days without charge (CL, § 14-1324, CL§ 13-411 (penalty));



- v. Chapter 462 (HB 871) – Tax Preparer Prohibited Acts – Violating any provision of Business Occupations and Professions Article, Title 21 (Individual Tax Preparers), subsequent (BO, § 21-405(b));
- vi. Chapter 5 (SB 69 / CF HB 181) – Pharmacists and Pharmacies Prohibited Acts – Violations of certain provisions of Health Occupations Article, Title 12 (HO, § 12-701, HO § 12-702, HO, § 12-703, HO, § 12-704, HO, § 12-6B-12, HO, § 12-6D-15, HO, § 12-707(b) (penalty));
- vii. Chapter 69 (HB 106) – Public Health and Safety, Crimes Against – Unlawfully cause or unlawfully dump, deposit, throw, etc., litter, no more than 100 lbs. in weight or 27 cubic feet in volume (CR, § 10-110(f)(2)(i)) – Unlawfully cause or unlawfully dump, deposit, throw, etc., litter, greater than 100 lbs. in weight or 27 cubic feet in volume (CR, § 10-110(f)(2)(ii)) – Unlawfully cause or unlawfully dump, deposit, throw, etc., litter greater than 500 lbs. in weight or 216 cubic feet in volume or for commercial purposes (CR, § 10-110(f)(2)(iii));
- viii. Chapter 140 (HB 942 / CF SB 772) – Apprenticeship and Job Training Standards – Knowingly offer, establish, maintain, or operate an apprenticeship or on-the-job training program other than as permitted (LE, § 11-405(b)(6));
- ix. Chapter 198 (SB 767) – Election Offenses – Knowing and willful violation of Election Law Article, Title 14 (Disclosure by Persons Doing Public Business) (EL, § 14-107(d)) – Knowing and willful violation of Title 14 Disclosure by Persons Doing Public Business (GP, § 5-716(l));
- x. Chapter 261 (HB 566) – Fraud, Miscellaneous – Knowing and willful false statement in connection with an application under Health—General Article, Title 7, Subtitle 9 (HG, § 7-910(b));
- xi. Chapter 293 (HB 1032) – Weapons Crimes—In General – Carrying or possessing firearm, knife, or deadly weapon on school property, other than handgun (CR, § 4-102);
- xii. Chapter 312 (HB 485 / CF SB 593) – Election Offenses – Knowing and willful violation of General Provisions Article, Title 5, Subtitle 7 (GP, § 5-903(a), (b));
- xiii. Chapter 321 (SB 67) – Burglary and Related Crimes – Home Invasion (CR, § 6-202(d));
- xiv. Chapter 351 (SB 456) – CDS and Paraphernalia – Possession—unlawful possession or administering to another, obtaining, etc., substance or paraphernalia by fraud, forgery, misrepresentation, etc.; affixing forged labels; altering etc., label; unlawful possession or distribution of controlled paraphernalia—marijuana because of medical necessity (CR, 5-601(c)(3)) – Paraphernalia —use or possession, with intent to use, subsequent—marijuana because of medical necessity (CR, § 5-619(c));
- xv. Chapter 357 (SB 520) – Prostitution and Related Crimes – Prostitution, etc.—General assignment and solicitation (CR, § 11-306(a))



- xvi. Chapter 361 (SB 549 / CF HB 52) – Identity Fraud – Possess, obtain personally identifying information or willfully assume the identity of another, benefit \$100,000 or greater (CR, § 8-301(b), (c), CR, § 8-301(g)(1)(iii) (penalty)) – Possess, obtain personally identifying information or willfully assume the identity of another, benefit at least \$10,000 but less than \$100,000 (CR, § 8-301(b), (c), CR, § 8-301(g)(1)(ii) (penalty)) – Possess, obtain personally identifying information or willfully assume the identity of another, benefit at least \$1,000 but less than \$10,000 (CR, § 8-301(b), (c), CR, § 8-301(g)(1)(i) (penalty)) – Possess, obtain personally identifying information or willfully assume the identity of another, benefit less than \$1,000 (CR, § 8-301(b), (c), CR, § 8-301(g)(2) (penalty));
- xvii. Chapter 396 (HB 73) – Election Offenses – Violate election laws as defined in Election Law Article, § 16-201, Annotated Code of Maryland (EL § 16-201);
- xviii. Chapter 402 (HB 120) – Influence of Intimidating Judicial Process – Failure to appear in connection with a felony (CP, § 5-211(c)(1)) – Failure to appear in connection with a misdemeanor or for appearance as witness (CP, § 5-211(c)(2));
- xix. Chapter 410 (HB 236 / CF SB 705) – Assault and Other Bodily Woundings – Assault on law enforcement officer or parole or probation agent or first responder, 2nd degree (CR, § 3-203(c));
- xx. Chapter 454 (HB 769) – Election Offenses – Knowing and willful violation of Election law Article, Title 20 (EL, § 14-107(d), (e));
- xxi. Chapter 470 (HB 1172) – Fraud, Miscellaneous – Knowing and willful false statement in connection with an application under Health—General Article, Title 7, Subtitle 9 (HG, § 7-910(c)); and
- xxii. Chapter 490 (HB 121) – CDS and Paraphernalia – Unlawful distribution, manufacture, counterfeiting, possession, etc., of certain equipment for illegal use; keeping common nuisance, narcotics and hallucinogenics (e.g., heroin, cocaine, oxycodone, and methadone), subsequent (CR, § 5-608(b), CR, § 5-609(b), CR, § 5-608(c), CR, § 5-609(c), CR, § 5-608(d), CR, § 5-609(d)) – Unlawful distribution, manufacture, counterfeiting, manufacture, possession, etc., of certain equipment for illegal use; keeping common nuisance, MDMA, 750 grams or more, subsequent (CR, § 5-609(b), CR, § 5-609(c), CR, § 5-609(d)) – Unlawful distribution, manufacture, counterfeiting, manufacture, possession, etc., of certain equipment for illegal use; keeping common nuisance, Schedules I through V non-narcotics (e.g., amphetamines, marijuana, MDMA under 750g), and buprenorphine, subsequent (CR, § 5 607(b))

d. Proposed Classification of Select Unclassified Existing Offenses Punishable with More Than 1 Year of Incarceration

Judge Avery indicated that MSCCSP staff had identified two existing offenses with maximum carceral penalties greater than 1 year that the Commission had not previously classified.

- xxiii. Alcoholic Beverages – County-specific provisions concerning giving, serving, dispensing, keeping, or allowing alcoholic beverages without license; bottle clubs;



places of public entertainment – Anne Arundel, Baltimore, Calvert, Caroline, Charles, Dorchester, Frederick, Kent, Prince George’s, Queen Anne’s, Somerset, Talbot, Wicomico, or Worcester Counties, or Baltimore City (2B, § 20-101, 2B, § 20-103, 2B, § 20-103.1, 2B, § 20-103.2, 2B, § 20-105, 2B, § 20-105.1, 2B, § 20-106, 2B, § 20-107.1, 2B, § 20-108.1, 2B, § 20-108.2, 2B, § 20-110, 2B, § 20-111, 2B, § 20-112, 2B, § 20-113, 2B, § 20-102). By consensus vote, the **Commission adopted the Subcommittee’s recommendation** to add this offense to the Guidelines Offense Table as a property offense with a seriousness category of VII.

- xxiv. CDS & Paraphernalia – Distribute, possess, manufacture, or use cannabis diverted from a qualifying patient, caregiver, licensed grower, or licensed dispensary (HG, § 13-3313(b)). By consensus vote, the **Commission adopted the Subcommittee’s recommendation** to add this offense to the Guidelines Offense Table as a drug offense with a seriousness category of IV.

5. Executive Director report – Dr. David Soulé

MSCSSP staff has continued to work on deployment of the Maryland Automated Guidelines System (MAGS). On June 1, an updated version (MAGS 4.0) became operational in the counties then-currently using MAGS (Calvert, Frederick, and Montgomery). On July 1 Charles started using MAGS. Between the current (September) meeting and the next (December) meeting Prince George’s County will deploy on October 1 and St. Mary’s County should deploy on either November 1 or December 1, at which point the entire sixth and seventh circuits will be using MAGS, together covering approximately 30% of guidelines cases in Maryland. The Office of the Attorney General (OAGS) now also has the ability to log in to MAGS, allowing its attorneys to use MAGS when prosecuting cases in MAGS jurisdictions. The OAGS will likely begin using MAGS after a scheduled training session in October.

Dr. Soulé also discussed progress in the juvenile delinquency score study. The Commission has partnered with the Maryland Data Analysis Center (MDAC) at the University of Maryland due to the complexities involved in working with juvenile data and to allow the Commission to benefit from the research expertise MDAC can provide. The University’s Institutional Review Board approved the project in May, MDAC submitted a research application to the Department of Juvenile Services (DJS), and MDAC is awaiting the results of the research approval committee DJS. MDAC also requested adult recidivism data from the Department of Public Safety and Correctional Services (DPSCS), which DPSCS approved pending completion of a memorandum of understanding.

The third item in the Executive Director report concerned the risk assessment feasibility study. Dr. Soulé noted that the research team from the University of Maryland was planning to provide, at the December 2015 meeting, a follow-up to the initial white paper seeking to address the main issues raised at the September 2014 meeting. Those issues are (1) the desire for a risk-only versus a risk-and-needs instrument; (2) the informational demands of risk-and-needs instruments, and the availability of such information in Maryland; (3) more specific information on the feasibility of adapting existing tools; and (4) information on the advantages and disadvantages of different measures of recidivism. The research team will provide additional information and research, to help guide the Commission through each decision point in the risk assessment instrument implementation process.



6. Date, time, and location of annual Public Comments Hearing

The annual Public Comments Hearing will take place on Tuesday, December 8, 2015, at 5:30 pm in the House Office Building. The Commission's business meeting will follow at 7:00 pm.

7. Old business

None.

8. News business and announcements

None.

The meeting adjourned at 6:59 p.m.