

Approved Minutes

Maryland State Commission on Criminal Sentencing Policy
Judiciary Training Center
Annapolis, Maryland

May 2, 2005

Commission Members in Attendance:

Honorable Raymond G. Thieme
Russell P. Butler, Esquire
Honorable Arrie W. Davis
Honorable Timothy J. Doory
Richard A. Finci, Esquire
Senator John Giannetti
Robert Gibson
Senator Delores G. Kelley
Patrick Kent, Esquire
Kate O'Donnell
Secretary Mary Ann Saar
Barry L. Stanton
Honorable John C. Themelis, via conference call
Delegate Joseph F. Vallario, Jr.

Staff Members in Attendance:

Shawn Flower
Gary Locust
David Soulé, Ph.D.
Haisha Thompson
Josh Gordon (University of Maryland intern)

Visitors:

Tara Andrews, MD Justice Coalition
Kevin Pranis, MD Justice Coalition
Jason Ziedenisberg, MD Justice Coalition
Sally Rankin, Court of Appeals, Court Information Office
Bob Bruchalski, Deputy Director, Department of Judicial Information Systems

1. Call to order

Judge Thieme called the meeting to order.

2. Roll call and declaration of quorum

The meeting began at 4:04 p.m. when quorum was reached and roll was taken.

3. Approval of minutes, January 3, 2005 meeting

The minutes were approved as submitted.

Judge Thieme announced that Commissioner Russell Butler has decided not to seek reappointment when his Commission term expires on June 30, 2005. Judge Thieme spoke on behalf of the entire Commission when he expressed his thanks for Commissioner Butler's hard work and he noted that the Commission benefited greatly from Mr. Butler's membership.

It was incorrectly announced that Commissioner Robert Riddle had resigned from the Commission. Commissioner Riddle did not resign. His term expires on June 30th and he fully intends to serve the Commission for the duration of his term.

4. Report from the Executive Director

Dr. Soulé introduced Assistant Attorney General Kate O'Donnell, who will serve as the representative for Attorney General Curran. Shawn Flower, a Ph.D. candidate in the Department of Criminology and Criminal Justice at the University of Maryland was also introduced. Shawn will join the Commission staff in mid-August as a research/policy analyst. Finally, Josh Gordon, a student intern from the University of Maryland, was introduced. Josh worked with the Commission during the spring semester and will continue to work with the Commission staff through the summer.

- a. Update on COMAR submissions
Dr. Soulé reported that the latest COMAR revisions were approved as submitted and took effect March 28, 2005.
- b. Update on worksheet automation project
There is little new information to report on the automation project. Dr. Soulé continues to work with the University of Maryland's Office of Academic Computer Services (OACS) to update and revise the system. Once this step is completed, the Commission staff will start utilizing the web-based system to enter the hard-copy worksheets which are currently received via mail delivery. After providing feedback to OACS regarding the effectiveness of the system and allowing time for revisions, Commission staff will ask for volunteers from the field to come into the staff office, field test the process and provide feedback.
- c. New trial judges orientation presentation (May 15-20, 2005)
Dr. Soulé contacted Fred Williams at the Judicial Institute to ask if the Commission staff could make a presentation on completing the guidelines worksheets at the new trial judges' orientation presentation. Fred Williams point us in touch with Judge Martin Welch, who is organizing the training. Judge Welch graciously agreed to make a presentation regarding the Commission and the guidelines worksheets on behalf of the Commission.

The Commission staff put together a Power Point presentation for Judge Welch and also supplied a packet of useful materials to be distributed to each new judge.

d. Revised Guidelines Manual completed and mailed

The Commission staff completed the revisions to the guidelines manual, which include an update of the offense table, revised definitions, and a general reorganization designed to make the manual more user friendly. In addition to Commission members, the completed manual was mailed to all circuit judges, each State's Attorney's office, each Public Defender's office, Divisions of Parole and Probation and each county's law library. Dr. Soulé asked all the Commissioners to please contact the staff if they had not yet received the revised manual.

e. Website updates/revisions

It was announced that the Commission's website (www.msccsp.org) has been updated extensively since the last meeting. All of the tools for assisting with the completion of the guidelines worksheets have been updated. Dr. Soulé invited Commissioners to review the website and provide feedback to the staff.

f. Hypothetical scenarios exercise

Dr. Soulé called for an extension of the deadline for the submission of the hypothetical sentencing scenarios exercise since only two were submitted. The Commission members agreed and the deadline was extended to a week prior to the next scheduled meeting.

5. Presentation from the Judiciary regarding the Judicial Data Warehouse and the Judiciary's plan for online access

Dr. Soulé explained that this presentation came at the suggestion of Commissioner Butler who believed it would be useful for the Commission to learn about the Judiciary's plans to provide on-line access to certain court information. Commissioner Butler suggested there might be an overlap in the Commission's electronic submission project and the Judiciary's automated court records project and that a partnership might be beneficial to both parties.

Sally Rankin, from the Court of Appeals, Court Information Office, presented on behalf of the Judiciary's Access Rules Implementation Committee. The Judicial Information Systems department is developing a web-based public access system to improve access to court records and reduce the number of large commercial requests. According to Ms. Rankin's research, many state courts and the federal courts differentiate between access to paper and electronic records. While the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) have created model guidelines that suggest as a basic

premise that paper and electronic records should be treated the same, many state courts did not adopt this principle. However, Maryland has decided to apply this principle and therefore has opened records to the public to a greater extent than most states.

The main objective of this JIS project is to take all data that is permissibly accessible to the public and put it into a public data warehouse. This process would permit a record-by-record search, various data compilations, and allow bulk transfers as requested by data miners who sell the information to other parties. The data warehouse would use various web services to accommodate all interface requirements including the State Commission on Criminal Sentencing Policy.

The final steps in the implementation of this data warehouse would be to continue documenting requirements, consider the Rules on Public Access, and create a policy and fee model for use.

After hearing the presentation from JIS, Senator Kelley expressed her concern regarding the release of judge specific data. She stated this might provide disincentives for judges to complete guidelines worksheets because this system would provide judge specific information and could allow data miners to impose a negative impact on the JIS system. Senator Kelley suggested the data should be summary oriented, excluding judge specification.

Senator Giannetti also expressed his concern for making court data so readily available. He suggested he did not believe it was wise for JIS to make decisions based on requests and did not like the idea of data miners creating a huge enterprise at the cost of the public. Additionally, he was concerned about the power the data warehouse would create and how it could be given to the public. Bob Bruchalski, the Deputy Director from JIS, replied to Giannetti's concerns, stating that the intention of this system is to place the data collection burden back on the public. Some form of a fee could be attached to these requests, which would allow the public to financially gain from this system. JIS currently maintains multiple disparate systems and the intent of the public access system is to replace the current method of accessing these systems with a modern, web-based system which would lower system maintenance and provide easier access. Bulk access would be provided in later phases, after further consideration of the Access Rule, and quite possibly a fee would be included. The burden would be placed on the requestor to retrieve data using JIS technology standards.

Senator Kelley raised a question about the timeliness of requests for compiled and bulk data and when they were fulfilled. Sally Rankin answered that even though no criteria has been established, priority is given based on who is requesting the data and the size of the request. Ms. Rankin further pointed out that other states (e.g. Washington) have already implemented a similar system to the one proposed in Maryland.

Judge Davis questioned whether there was something in place to prevent commercial enterprises from requesting bulk data. The reply was no. However, Ms. Rankin stated that even though any request can be made, it does not have to be filled. Judge Themelis echoed Senator Kelley's sentiment that he was fearful that this automated system would cause a chilling effect among judges. Judge Themelis then suggested that the Commission should hold its own discussion regarding the collection of the judge's name in its database while Sally Rankin and Bob Bruchalski were present.

***Note: Since the response to the presentation from JIS was leading to the Subcommittee's report on the judge's signature and identification in the Automated Worksheet submission process, Judge Thieme agreed with Judge Themelis and decided it was appropriate to skip to that item on the agenda.**

6. Report from the Guidelines Subcommittee

- a. Judge's signature and identification in Automated Worksheet submission process

Dr. Soulé explained that currently the Commission does not data enter the judge's names from the worksheets. However, the automated worksheet submission process is currently set-up so that each judge would be given an electronic signature and therefore a judge's name would be attached to each worksheet and available in the dataset. In response, the Guidelines Subcommittee suggested an alternative solution. The on-line database would include a check-off box for each judge. Each judge would check-off a statement such as "I have reviewed this worksheet for accuracy and completeness and agree to officially submit this guidelines worksheet". By checking this box, a judge would "sign-off" on the worksheet without actually providing a signature of their name. The worksheet would then be printed and this hard copy would then have a space where the judge would sign the document so that a hard copy (with signature) would be available for the court's records. Only the electronically submitted version (without signature) would be sent to the Commission database.

Senator Kelley reiterated that the state of Maryland has a voluntary guidelines system with limited resources which she feels should not be used to set up an electronic system for commercial use or political gain. Additionally, she does not want this system to cause a chilling factor by creating disincentives for judges to participate.

Judge Themelis affirmed Senator Kelley's concerns, adding that as a judge he was not aware the judge's sentencing information was so easily attainable. Specifically, Judge Themelis stated:

"To electronically store the judge's name would decrease the number of judges participating for fear that the information that is not now easily accessible would in the future be retrievable easily from the system and conceivably inexpensively,

and that the information could be used and distorted by anyone who may wish to file against or criticize a sitting judge knowing that statistics can be skewed. At the present time, we track only by Circuit even though manually, but at considerable expense, the stats for individual compliance records could be obtained. I recommended that electronically the judge verify that he/she reviewed the form and that the forms not include the judge's name, and that the name of the judge and his/her signature appear on the hard copy mailed into the Commission as we now do. I stressed to do otherwise would create a chilling effect and decrease participation of our judges with regard the use and filing of sentencing guideline forms and even worse change the guidelines defacto into mandatory guideline contrary to the stated intent of the General Assembly because of the fear that if the guidelines were not complied with, the information could be used against them at little cost electronically.”

Commissioner Butler agreed with the idea that attaching names to the electronic system would have wide ranging effects that have not yet been discussed. He stated that practical obscurity would become nonexistent and that anybody could get the sentencing trends of judges if they knew what they were doing. However, once JIS makes the information publicly accessible, this would allow it to be compiled commercially and sold to the public. In response to these concerns expressed by the Commission, Sally Rankin shared that JIS currently manually creates a monthly report attaching the sentencing judge to the sentence.

Patrick Kent thought it would be pragmatic to have a check-off box instead of electronic signature. As a whole, the Commission agreed that the JIS system needed further discussion and requested more information from Sally Rankin regarding what information data miners were typically looking for and what other states were doing with their court records. Sally Rankin agreed to remain in contact with the Commission staff and to provide any additional information the Judiciary has collected on public access to court records.

b. Discussion and vote for proposed Seriousness Category changes

Commissioner Finci requested a review of the seriousness categories for the offense of unlawful wearing, carrying, etc., 2nd weapon offense (CR, §4-203c). More specifically, he asked the Guidelines Subcommittee to consider changing these offenses from Category III offenses to Category V offenses. The Subcommittee reviewed similar misdemeanor offenses with 10 year maximum penalties and instead proposed a change in seriousness category from a III to a IV. Commissioner Finci pointed out that since the guidelines rules assigned two additional points for weapon usage under the offense score, the current category III was “doubly” severe. Delegate Vallario stated that the offenses may have been overlooked because they use to be dealt with in district courts, but were later bumped up to circuit courts. Assistant Attorney General O’Donnell stated that she opposed the proposed reductions in seriousness category for these unlawful carrying wearing, carrying a weapon subsequent offenses.

Ms. O'Donnell further added that she supported the proposed increase in Seriousness Category for straw purchases (PS, §5-136; PS, §5-140; PS, §5-141). She suggested that a category IV was more appropriate than a category V for this offense since it often involves persons barred from owning handguns because of domestic violence or past convictions for crimes of violence. Judge Doory agreed with her and strongly advised against minimizing the proposed offense categories for all of the reviewed weapon offenses. He believes that weapon offenders have not been punished hard enough and further stated that research indicates these offenders often become repeat offenders. He also added that New York has taken the opposite approach and punishes weapon offenders severely and they have seen a decrease in the number of repeat offenders.

Since there was no clear consensus on the categorization of these offenses, Judge Thieme proposed to table this discussion until the next scheduled meeting when the Subcommittee chair, Dr. Wellford, would be present and could articulate the Subcommittee's rationale for the proposed Seriousness Category changes.

c. Presentation of Drug Distribution cell ranges and 35/65 Compliance Rates

Patrick Kent presented to the Commission regarding the current compliance rates for Category III B drug offenses. Mr. Kent believed it was useful to present this information to the full Commission since some of the new members may have never seen these numbers. Mr. Kent reiterated that the Commission is expected to regularly review compliance rates within individual cells and consider adjustments when the compliance rates fall below the benchmark 65 percent compliance rate.

Mr. Kent expressed his belief that societal views of drug offenses have evolved and the guidelines no longer reflect a consensus view. Based on the "strict" interpretation of compliance, approximately 30 percent of judges are complying with guidelines for these drug distribution offenses and as the seriousness category of the drug offense rises, the compliance rate lowers. Mr. Kent suggested the guidelines ranges for these offenses should be changed to reflect actual practice and the Commission should devise a plan to achieve the benchmark 65 percent compliance rate.

Robert Gibson stated that the problem with compliance rates is that probation is viewed as a lesser sentence, but when probation is violated, the initial sentence can be given, which is usually within the guidelines ranges. Additionally, suspended sentences are not taken into consideration in the guidelines matrix, which may be misleading.

Judge Doory commented that this issue has come up in the past and as a result of public uproar, we have stayed away from revising ranges. Russell Butler

believed that when actual practices of judges are used as the sole variable for guidelines ranges, there will be a downward spiral.

Senator Giannetti explained that Baltimore City and Prince George's county offer the most data for these cells which would drive the compliance rates down and that these sentencing trends may not be statewide. Additionally, he questioned whether it was the Commission's duty to make sure sentencing patterns in Maryland were consistent geographically (from county to county). Patrick Kent replied that there should not be any sentencing disparity within the state and maybe the Commission is not clear as to what that means.

Judge Themelis stated that the data is skewed based on problems faced in individual jurisdictions. Senator Kelley added that many government personnel told the initial Study Commission to have more tolerance for geographic issues and less for disparity due to offender characteristics. Judge Doory agreed with Mr. Kent's argument that it was foolish to have guidelines that did not reflect sentencing trends. However, instead of changing the entire range, the Commission could consider reducing the lower end of the cells to include probation. The Commission agreed that this idea was worth considering and the Guidelines Subcommittee should review this proposal and continue working on the cell range changes.

d. Guidelines worksheet submission process review and proposal changes

Dr. Soulé explained to the Commission that cases involving reconsiderations, reviews, and probation revocations continue to be under-reported (in terms of guidelines worksheets submitted). The Guidelines Subcommittee proposed introducing a new, separate worksheet for only these offenses. The worksheet would be simplified and geared specifically toward these offenses. A draft copy of this alternative worksheet was shared with the Commission. Commissioner Finci agreed that a separate worksheet was a good idea. However, he suggested it might be easier to wait until the automated system was up-and-running because it would be easier to capture these types of cases when all of the original case information would not have to be re-entered. Judge Themelis agreed that the separate worksheet was useful. However, it should include a field addressing whether the sentence was modified within the original guidelines range.

As a whole, the Commission decided that this worksheet was a sound idea and might prove useful with some revisions. As suggested by Commissioner Finci, others wondered whether it made sense to create an alternate paper worksheet since we are already planning to move to the automated system. Senator Kelley suggested that once the automated process was implemented, the Commission would find out which jurisdictions were not participating electronically and we could then consider utilizing an alternate paper worksheet in these jurisdictions.

7. Finalize date and discussion topics for annual Public Comments Hearing

The Commission members agreed to hold a joint Public Comments Hearing and Commission meeting on Monday, September 12, 2005. The time and discussion topics for this hearing will be finalized at the next full Commission meeting.

8. New Business and announcements

Dr. Soulé announced that the National Association of Sentencing Commissions (NASC) 2005 Conference will be held in Washington, DC this year at the Thurgood Marshall Federal Judiciary Building from August 7th through August 9th. Dr. Soulé added that last year's meeting in Santa Fe was very informative and anyone who is interested in attending should contact the Commission staff for further information.

9. Adjournment

The next meeting was set for Monday, June 27, 2005 at 4:00 p.m. in Annapolis at the Judiciary Training Center. **Note: After the conclusion of the meeting, it was learned that the Judiciary Training Center is not available for this date and time.**

Accordingly, the June 27th meeting has been relocated to the Miller Senate Office Building, President's Conference Center, East I, in Annapolis.

The meeting adjourned at 6:08 p.m.