



Minutes

Maryland State Commission on Criminal Sentencing Policy
Serafino's Restaurant
Ellicott City, MD 21042
July 24, 2007

Commission Members in Attendance:

Honorable Howard S. Chasanow, Chair
Delegate Curtis S. Anderson
Chief Marcus L. Brown
Leonard C. Collins, Jr., Esquire
Honorable Arrie W. Davis
Richard A. Finci, Esquire
Major Bernard Foster
Senator Delores G. Kelley
Patrick Kent, Esquire, *representing Nancy S. Forster, Esquire*
Secretary Gary D. Maynard
Honorable John P. Morrissey
Kate O'Donnell, Esquire, *representing Attorney General Douglas Gansler*
Honorable John C. Themelis
Delegate Joseph F. Vallario, Jr.
Charles F. Wellford, Ph.D.

Staff Members in Attendance:

Kira Antell, Esquire
Stacy Skroban Najaka, Ph.D.
David Soulé, Ph.D.
Haisha Thompson

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 5:42 p.m. when quorum was reached and roll was taken.

3. Welcome and introduction of new commissioners

Judge Chasanow welcomed the new commissioners and introduced himself as the newly appointed chair. Judge Chasanow gave a brief review of the origin of the sentencing guidelines in Maryland and discussed how he had the opportunity to serve on the committee originally established by Judge Murphy 30 years ago. Judge Chasanow noted that it was an honor for him to serve with the current group of Commissioners and that he looked forward to this



opportunity. Given the appointment of several new members to the Commission, Judge Chasanow suggested that each of the Commissioners introduce themselves. At the conclusion of the introductions, Judge Chasanow announced the appointment of Dr. Wellford as vice chair of the Commission.

4. Approval of minutes, September 18, 2006 meeting

The minutes were approved as submitted.

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

a. Review and categorization of new and/or revised offenses from 2007 Legislative Session

Dr. Wellford explained that the Guidelines Subcommittee is a group of six Commission members who classify new offenses passed annually by the General Assembly and reclassify existing offenses when necessary. The Subcommittee makes recommendations to the Commission for review and acceptance.

Dr. Wellford noted that the Guidelines Subcommittee attempts to maintain consistency with previous decisions when classifying offenses. The Subcommittee does this by identifying the type, misdemeanor/felony status, and the statutory maximum. The Subcommittee then identifies currently classified comparable offenses with similar characteristics.

Dr. Wellford reviewed the table prepared by staff on recommended seriousness categories for new and/or revised offenses passed during the 2007 Legislative session.

- I. HB 1036 – Identity Theft >\$500. Representing another person without knowledge in order to solicit personal information from another (CR, §8-301(d))
 - By unanimous vote, the Commission adopted the proposed seriousness category of V for this offense.
- II. HB 1036 – Identity Theft <\$500. Representing another person without knowledge in order to solicit personal information from another (CR, §8-301(d))
 - By unanimous vote, the Commission adopted the proposed seriousness category of VII for this offense.
- III. SB 214/HB 1194 – Possess, possess with intent to deliver, or receive, telecommunication device in place of confinement (CR, §9-417)
 - By unanimous vote, the Commission adopted the proposed seriousness category of VI for this offense.
- IV. HB 1270 – Request or obtain info on HIV and AIDS under false pretenses or deception (HG, §18-215(F)(1)(i))
 - By unanimous vote, the Commission adopted the proposed seriousness category of V for this offense.



- V. HB 1270 – Request or obtain info on HIV and AIDS under false pretenses or deception....with intent to sell (HG, §18-215(F)(1)(ii))
- By unanimous vote, the Commission adopted the proposed seriousness category of IV for this offense.
- VI. HB 285 – Possess Child Pornography, 1st offense (CR, §11-208(b))
- By unanimous vote, the Commission adopted the proposed seriousness category of VI for this offense.
- VII. HB 285 – Possess Child Pornography, subsequent (CR, §11-208(b))
Major Foster asked how much public opinion is factored into categorizing offenses. Dr. Soulé replied that though testimony was given at Commission meeting last year regarding the categorization of various sex offenses, public testimony on the assignment of seriousness categories is rare. Dr. Soulé further explained that the Guidelines Subcommittee generally makes recommendations based on the principle of comparability with previously categorized offenses.
- Judge Themelis explained that the maximum penalty assigned to offenses by the General Assembly more or less controls the seriousness category of the comparable offenses suggested by the Guidelines Subcommittee. Judge Themelis further explained that one of the goals of the Commission is to maintain consistency throughout the state.
- Dr. Wellford noted that the Commission and staff have listened to public comments in the past and in one instance, accepted a suggestion to add a particular program type to the list of recognized corrections options. However, Dr. Wellford also supported Judge Themelis' explanation of the Commission's practice to use the opinion of the General Assembly as representative of public opinion.
- By unanimous vote, the Commission adopted the proposed seriousness category of V for this offense.
- VIII. SB 754 – Eluding a police officer attempting to elude apprehension for investigation of crime of violence (TR, §21-904(e); TR, §27-101)
- By unanimous vote, the Commission adopted the proposed seriousness category of V for this offense.
- IX. SB 606 – Human trafficking, taking, harboring, or unlawfully detaining another for prostitution (CR, §11-303(a))
Dr. Wellford explained that the General Assembly redefined this offense as "human trafficking". Dr. Wellford noted the Guidelines Subcommittee had some difficulty in proposing a classification for this offense. However the majority of the Subcommittee recommended the seriousness category should



be increased from its current category (IV) to a category III offense to reflect the General Assembly changes.

Richard Finci asked why human trafficking (i.e. unlawful detention of another for prostitution, CR, §11-303(a)), a misdemeanor with a 10 year statutory maximum would be assigned a more stringent seriousness category than sexual solicitation of a minor (CR, §3-324), which is a felony with a 10 year statutory max. Mr. Finci noted that he did not believe the original seriousness category for CR, §11-303(a) needed to be increased to be consistent the seriousness category for sexual solicitation of a minor (CR, §3-324). Dr. Wellford explained that the Subcommittee believed the General Assembly intended for the misdemeanor offense (CR, §11-303(a)) to be more serious since it entails a form of kidnapping, and the felony (CR, §3-324) only consists of solicitation.

Richard Finci motioned to decrease the suggested seriousness category for “human trafficking” from III to IV. Mr. Finci did not believe the Commission had to lower the seriousness category for the misdemeanor in order to accommodate the felony.

- By a vote of 9 to 3, the Commission declined the motion to decrease the proposed seriousness category from III to IV for the offense.
 - By a vote of 9 to 3, the Commission adopted the proposed seriousness category of III for this offense.
- X. SB 606 – Sexual solicitation of a minor or a law enforcement officer posing as a minor for prostitution (CR, §3-324(b))
- By unanimous vote, the Commission agreed to keep the current seriousness category (IV) for this offense.
- XI. SB 606 – Human trafficking, taking, harboring, or unlawfully detaining a MINOR for prostitution (CR, §11-303(b))
- By unanimous vote, the Commission adopted the proposed seriousness category of II for this offense.
- XII. SB 606 – Extortion of Labor or Services >\$500 with intent to harm the immigration status of another (CR, §3-701)
- By unanimous vote, the Commission adopted the proposed seriousness category of V for this offense.
- XIII. SB 606 – Extortion of Labor or Services <\$500 with intent to harm the immigration status of another (CR, §3-701)
- By unanimous vote, the Commission adopted the proposed seriousness category of VII for this offense.



- XIV. SB 606 – Extortion of Labor or Services by False Accusation (CR, §3-704)
- By unanimous vote, the Commission adopted the proposed seriousness category of V for this offense.
- XV. SB 606 – Extortion of Labor or Services by Threatening Verbally (CR, §3-705(a))
- By unanimous vote, the Commission adopted the proposed seriousness category of V for this offense.
- XVI. SB 170/HB 213 – Child Sex Abuse (CR, §14-101(a)(16); CR, §3-601) and Continuing course of conduct (CR, §14-101(a)(18); CR, §3-315)
- Dr. Wellford explained that no change was made to the maximum penalties for these offenses. However, the Legislature did add these two offenses to the list of Crimes of Violence as defined in Criminal Law Article, §14-101.
- The Commission agreed no change to the existing seriousness categories of these offenses was warranted.
- XVII. SB 413/HB 930 – Jessica’s Law: Rape 1st degree, adult with victim under 13 (CR, §3-303(d)(4)(i); Rape 2nd degree, adult with victim under 13 (CR, §3-304I(2)(i); Sex Offense, 1st degree, adult with victim under 13 (CR, §3-305I(4)(i)); and Sex Offense 2nd degree, adult with victim under 13 (CR, §3-306I(2)(i))
- Dr. Wellford noted that no change was made to the maximum penalties for these offenses. However, the new legislation mandates that the preexisting mandatory minimums for these offenses must be served without parole.
- The Commission agreed no change to the existing seriousness categories of these offenses was warranted.
- XVIII. HB 1207 – Sexual Contact, with inmates in correctional and juvenile facilities
- Dr. Wellford explained that the only change to this existing offense is that it now explicitly prohibits any person (it used to read “a correctional employee”) from having sexual contact with an inmate at a correctional or juvenile facility.
- The Commission agreed no change to the existing seriousness categories of these offenses was warranted.
- b. Review and guidelines application for new gang participation offenses-HB 713 (no specific Guidelines Subcommittee recommendation)
- Dr. Wellford noted that the Guidelines Subcommittee could not agree on how to formulate possible options to consider for these offenses. Dr. Wellford explained that HB 713 created a penalty that applies when certain offenses are committed by a member of a gang or for the pursuit of a gang purpose or interest. The Guidelines Subcommittee believed these types of offenses are comparable to hate crimes because they are applied in conjunction with a conviction for an underlying offense. Dr. Wellford further explained the Subcommittee’s difficulty in formulating how these offenses should be categorized within the context of the



guidelines. The Guidelines Subcommittee asked staff to draft a memo which would outline various options for the guidelines application of gang participation offenses.

Dr. Soulé presented the options identified by the staff as outlined in the memo distributed to the Commissioners. The first option described in the memo would categorize the gang participation offenses similarly to how hate crimes are currently categorized. Participation in gang crimes with a 10 year maximum penalty would have a seriousness category of IV. Participation in gang crimes resulting in death with a maximum penalty of 20 years would have a seriousness category of III.

The second option is similar to the first except the seriousness category would be increased to III for gang crimes and II for gang crimes with death. This option would result in a greater impact on the guidelines range when the underlying offense has a seriousness category of I or II.

In the third option, the seriousness category for the gang participation offense would be dependent on the underlying offense. Specifically, the Guidelines Offense Table would instruct that the seriousness category for the gang participation offenses would always be one category higher (i.e. more stringent) than the underlying offense. For example, in the first example illustrated in the memo for the third option, the seriousness category for the gang crime is IV because the category for the underlying offense (theft over \$500) is a V.

Dr. Soulé further noted that the least stringent category for any of the underlying offenses identified in this statute is a V. Therefore, if the third option were adopted, the least stringent category that could be assigned for a gang offense would be a IV.

The fourth option is to treat gang offenses and the underlying offense as two separate events. As a result, the guidelines ranges would always be added together, ensuring a higher range to reflect the seriousness of the gang offense.

Richard Finci asked that if the Commission chose the fourth option, what would happen if the offender were only charged with the gang offense. Dr. Soulé replied that this was an issue that came up during the Subcommittee meeting and it was not clear from the legislation if an individual could be convicted of the gang crime but not for the underlying offense.

Leonard Collins noted that it was possible that a jury could find an offender guilty of the gang offense and not guilty of the underlying offense. In that type of case, without the conviction of both crimes, the gang participation offense would not exist. Therefore, the Commission would have to make the gang offense and underlying offense binding regardless of guilt. Judge Themelis stated that there are multiple ways an offender can be convicted of participation in a gang and not be guilty as the principle in the underlying offense. Judge Davis expressed that an offender cannot be charged with gang participation without evidence of the connection between the offender and the gang. As a result, Judge Davis believed the third option to be the best approach.



Patrick Kent stated that he believed the Commission should not go down a road not previously traveled. He believed that the first option is the best choice because it works for hate crimes and could be used to test the waters. Patrick Kent also questioned why gang offenses would be applied to the guidelines differently than other offenses. Judge Davis explained that for hate crimes, the element of hate is the element of the crime itself. Judge Davis further stated that it is harder to prove the element of association for gang membership. Judge Themelis agreed with Judge Davis that the third option was the best choice. He also believed that option three reflects the intentions of the General Assembly with regards to creating enhanced penalties for participation in gang related activity.

A fifth option was to make participation in a gang a factor that would be considered when calculating the guidelines offense score. The fifth option would be a dramatic change to the guidelines calculation process. The gang offense would be added as an aggravator and impact the offense score.

Leonard Collins stated that the problem with the first option is that category III and IV offenses run concurrently with other occurring offenses. For example, if an offender committed second degree murder, which has a seriousness category of II, the gang offense, if categorized as a III, would have no effect on the guidelines range if both offenses were considered to have originated from one single event. Leonard Collins further explained that the other options increase some part of the range.

Judge Chasanow suggested scaling the options down to help ease the decision process. Judge Themelis suggested that the Commission may want to consider the first option and then observe compliance rates for the gang offenses and adjust accordingly if necessary. Dr. Wellford replied that it would take a while before significant data could be collected.

Dr. Wellford pointed out that the Commission appears to favor the first and third options and suggested the staff could further research the implication of these two options. Judge Chasanow stated that if this issue were to be tabled for further research, the Commission would not be able to categorize the offenses in time for the October 1st effective date considering the time that must be allotted to allow for adoption of regulations in COMAR.

Judge Chasanow noted that if the Commission approved option three, it seemed likely that the Commission would need to adopt a default seriousness category for the gang participation offense in a case where the individual was not convicted for the underlying offense. Dr. Wellford agreed that a default seriousness category would have to apply.

Judge Chasanow motioned to amend option three to include a default seriousness category for gang offenses when the individual is not convicted of the underlying offense. The default seriousness categories would be IV for gang participation and III for gang participation resulting in death.

- By a vote of 10 to 3, the Commission approved the motion to amend option three.



Delegate Vallario motioned for the Commission to approve option one.

- By a vote of 8 to 4, the Commission denied the motion to adopt option one.

Richard Finci motioned to table further votes on any of the options until further research could be conducted to determine the best approach for applying the guidelines to these gang offenses.

- By a vote of 9 to 3, the Commission denied the motion to table the vote on option three.

Judge Chasanow suggested inserting language in option three that would instruct to use the seriousness category for the most serious underlying offense (if there were multiple underlying offenses) when determining the gang offense category. He also stated that staff should research the probability of a gang offense conviction without an underlying offense conviction.

- By a vote of 10 to 4, the Commission adopted the amended option three.

6. Old Business

Delegate Anderson noted that at a prior meeting, the Commission briefly discussed the issue of sentencing for felony drug offenders and noted that there is great variation around the state in how these offenders are treated. Delegate Anderson suggested the Commission should address whether the guidelines adequately distinguish between the two levels of drug offenders (i.e. those who sell to support a drug habit versus that who distribute drugs for profit) and the Commission should consider specific recommendations for which offenders should receive treatment.

Judge Chasanow noted that the issue of treatment for low-level drug offenders is a major priority for the Governor and something that should be addressed by the Commission. Judge Chasanow suggested creating a subcommittee to further address the issue.

Senator Kelley noted that the Commission is mandated to endorse a system of correctional options and during previous years the Commission had numerous discussions on this topic. The Commission previously had a Corrections Options subcommittee that drafted specific proposals for incorporating corrections options into the guidelines. However, there were concerns about the availability of back end and front end resources within each jurisdiction and there was a lack of consensus regarding who would be responsible for oversight of the corrections options programs (i.e. the state or individual counties).

Dr. Wellford confirmed that one of the issues which held up specific action on corrections options was the concern over the availability of corrections options within each jurisdiction. Dr. Soulé noted that the staff completed a report in 2006 which inventoried the availability of front end correctional options and he believed this report could be used as a starting point for future review on this topic.

Senator Kelley stated that the Commission is also statutorily required to develop a computer model to predict the impact of certain sentences on departmental resources. Senator Kelley further noted that the Commission would be able to use the model to determine the impact of



proposed legislation on resources. She suggested that the Commission may need to create a committee to decide how to implement the computer model in conjunction with available correctional options research. Judge Chasanow suggested the first step may be to address the sentencing of drug offenders, availability of treatment programs, and options available to the judiciary for the sentencing of these offenders. Judge Chasanow asked Delegate Anderson to serve as chair of a new subcommittee to address this topic. Delegate Anderson accepted the appointment. Judge Chasanow asked for additional volunteers for the new subcommittee. Secretary Maynard, Major Foster, Leonard Collins, and Judge Morrissey agreed to participate in the new subcommittee.

Delegate Vallario noted that he would like to renew the discussion regarding the scoring of additional points in the offense score for weapon usage. Judge Themelis noted that at a prior meeting, he and Richard Finci presented three proposed amendments regarding the definition of “weapon use” for the calculation of offense scores. Judge Themelis added that though the proposal was denied, the full Commission was not present, and therefore he believed the discussion should be heard by all members.

Leonard Collins noted that in his opinion, the “weapon use” definition issue has been thoroughly discussed by the Commission and should not be further reviewed. Mr. Collins suggested that the new chair may want to take the opportunity to review the minutes from prior meetings which illustrate the thoroughness and conclusions of these prior debates.

Judge Themelis mentioned that the weapons use proposal originated from his discovery that the current definition was not in the body of the guidelines and was contrary to law. Judge Chasanow decided to table this issue until the next meeting and will review the minutes from previous meetings.

Judge Chasanow asked that if a Commissioner has any issues or topics that he or she would like addressed by the Commission to please contact Dr. Soulé prior to the meeting so that the item can be added to the agenda and any preparations of discussion for that topic can be made.

7. New Business and announcements

The next meeting was set for Tuesday, September 25, 2007 at 5:30 p.m. at the Judiciary Training Center in Annapolis, MD. The Commission will provide dinner and it will be made available starting at 5:00 p.m.

8. Adjournment

The meeting adjourned at 7:37 p.m.