



Minutes

Maryland State Commission on Criminal Sentencing Policy
House Office Building
Annapolis, MD 21041
November 26, 2007

Commission Members in Attendance:

Honorable Howard S. Chasanow, Chair
James V. Anthenelli, Esquire
Shannon E. Avery, *representing Secretary Gary D. Maynard*
Chief Marcus L. Brown
Leonard C. Collins, Jr., Esquire
Paul Enzina, Esquire
Richard A. Finci, Esquire
Major Bernard Foster
Senator Lisa Gladden
Senator Delores G. Kelley
Patrick Kent, Esquire, *representing Nancy S. Forster, Esquire*
Laura Martin, Esquire
Honorable John P. Morrissey
Kate O'Donnell, Esquire, *representing Attorney General Douglas Gansler*

Staff Members in Attendance:

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

Visitors:

William Lipsky, University of Maryland intern

1. Call to order

Judge Chasanow called the meeting to order.

2. Roll call and declaration of quorum

The meeting began at 5:00 p.m. when quorum was reached.

3. Approval of minutes, September 25, 2007 meeting

The minutes were approved as submitted.

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

Dr. Soulé began by reviewing the schedule for the evening and stated that the public comments hearing would begin at 6:30 p.m. following a brief adjournment. Dr. Soulé noted that additional individuals had given notice that they planned to give public comments and referred the Commissioners to the updated list of speakers. Dr. Soulé stated that the Commission staff is



in the process of drafting the 2007 Commission Report and he would send the draft report out for comment. Finally, Dr. Soulé introduced undergraduate student intern William Lipsky who was observing the meeting.

5. Report from the Guidelines Subcommittee – Leonard C. Collins

Mr. Collins presented the report of the Guidelines Subcommittee and began by briefly describing the process by which new offenses are categorized.

a. Suggested Revisions for COMAR 14.22.01.10

Mr. Collins directed the Commissioners to the corresponding memorandum which suggests two changes.

First, the Subcommittee recommended that language regarding the calculation of the offender's prior criminal history be changed in COMAR and the Sentencing Guidelines Manual to state that any prior adjudications shall be included in the calculation, rather than any admitted offenses.

- The proposed language reads “**Any prior criminal adjudications (as defined in COMAR 14.22.01.02.B.(1)) shall be included.**”

The motion was unanimously approved.

Second, the Subcommittee recommended that COMAR be updated to reflect the previous vote of the Commission that offender points shall not be assigned for an offender on unsupervised probation where the offense for which the term of probation was imposed was not punishable by imprisonment.

- The proposed language reads “**An offender is not considered to be in the criminal justice system if the offender was on unsupervised probation for an underlying offense not punishable by imprisonment.**”

Mr. Finci asked for clarification regarding the use of the term “underlying” in the proposed language and Mr. Collins remarked that “underlying” related to the offense for which the term of probation was originally imposed. Senator Kelley moved that the wording in the proposed language be changed to remove the word “underlying.”

The amended motion was unanimously approved.

b. Proposal to categorize new offense resulting from HB 1409

Mr. Collins introduced the new offenses as being felony offenses which are comparable to currently existing felony theft provisions. He noted that monetary loss must exceed \$300, the maximum sentence for each is 15 years, and the maximum fine is \$10,000. The Subcommittee recommended a seriousness category V based on the comparable offenses.

Judge Chasanow questioned why improper disclosure of an accident report by a law enforcement agent would be assigned the equivalent seriousness category assigned to the creation of a fraudulent accident report. Dr. Soulé noted that the proposed seriousness category of V seemed appropriate based on the maximum penalty provisions within the



statute. He noted that the staff generally suggests seriousness categories based on comparable offenses given maximum penalty provisions with less focus on the substantive nature of the offense.

Major Foster asked whether there was a misdemeanor provision that was overlooked. After brief review by Commissioners, it was agreed that there would be Circuit Court jurisdiction of this lesser offense and that it would be a Guidelines Offense. Judge Chasanow suggested the Subcommittee recommendation as to theft over \$300 be approved and that the lesser offense for which there was no Subcommittee Recommendation be treated as comparable to theft under \$500 and be classified as a seriousness category VII.

The motion was unanimously approved.

c. Proposal to categorize Murder, 1st degree, conspiracy*

Murder, 1st degree, conspiracy is not listed in the Guidelines Offense Table and has not been otherwise categorized. Mr. Collins noted that the default rule in sentencing guidelines calculation instructs one completing the sentencing guidelines to place a conspiracy in the same seriousness category as the substantive offense, which makes Murder, 1st degree, conspiracy a seriousness category I. Mr. Collins reported that in order to prevent continued confusion, the Subcommittee recommended categorizing Murder, 1st degree, conspiracy separately in the Guidelines Offense Table as a seriousness category I.

Mr. Collins noted that Murder, 1st degree, solicitation is a seriousness category II but added the Subcommittee thought that it would be difficult to have a Murder, 1st degree, solicitation without also properly charging for Murder, 1st degree, conspiracy. A discussion about various ways in which a Murder, 1st degree, solicitation charge could occur without being accompanied by a Murder, 1st degree, conspiracy charge followed. Mr. Collins also mentioned that the Subcommittee had discussed Murder, 1st degree, accessory before the fact. Mr. Collins noted that the Subcommittee is not coming forward with a recommendation as to Murder, 1st degree, accessory before the fact.

Judge Chasanow noted that the proposed classification would result in the following scenarios: (1) a person who conspires to commit a murder that does not occur would be a category I; (2) a person who attempts to hire a person to commit a murder would be a category II; and (3) any person who attempts to commit a murder but fails in the attempt would be a category II. He asked if this belied a lack of symmetry in the categorization of these offenses and asked that the Commission may want to consider whether it is more serious to simply be part of a group that decides to commit a murder versus being a person who actually hires another to commit a murder.

Mr. Collins noted that the Subcommittee did discuss whether there should be a distinction in categorization for a “successful” conspiracy (i.e. one that results in a death) as opposed to an unsuccessful conspiracy. He noted that conspiracy categorization at this point does not

* Please note, unless otherwise referenced, “murder” refers exclusively to Murder, 1st degree and not Murder, 2nd degree.



hinge on the success of the offense. In terms of being consistent however, there may be a reason for a distinction.

Senator Kelley noted that it seemed illogical to distinguish between successful and unsuccessful attempts. She noted that if an individual shot another person and the only reason the attempt was unsuccessful was because the victim was wearing a bullet proof vest, the offense should be categorized just as seriously as a “successful” attempt.

Mr. Collins reiterated that the guidelines for Murder, 1st degree are unaffected by injury to the victim as guidelines for Murder, 1st degree are Life to Life. Therefore, based on the current guidelines rules, the guidelines for Conspiracy to commit 1st degree murder are also Life to Life. Mr. Collins again stated that the Subcommittee recommends that Murder, 1st degree, conspiracy be categorized as a category I offense.

Judge Chasanow asked whether it is relevant that there is an actual death or whether conspiracy is a more or less serious charge than a solicitation or attempt. Judge Morrissey replied that it will depend on the facts of the particular case and some conspiracies will be worse than solicitations or attempts. Mr. Kent noted that the struggle in the conversation seems to point to a lack of consistency and the fact-intensive nature of murder related charges. He suggested that perhaps seriousness category II is the more appropriate category for Murder, 1st degree, conspiracy as the judge can always sentence above the guidelines range based on the particular facts of the case. On the other hand, he suggested that a seriousness category I for Murder, 1st degree, conspiracy would likely not result in judges going below the suggested range in cases where no death resulted.

Mr. Collins stated that changing the seriousness category of Murder, 1st degree, conspiracy from I to a II would result in the only situation in our guidelines where a conspiracy is categorized as a lesser offense than the underlying offense. He suggested that Murder, 1st degree, conspiracy be left as a default seriousness category I in order to prevent additional confusion. Mr. Finci noted that he thinks it would be a mistake to make Murder, 1st degree, conspiracy a category I and that it would adversely affect the resolution and prosecution of Murder, 1st degree, conspiracy cases.

Laura Martin stated that as a prosecutor she has never had any problems prosecuting Murder, 1st degree, conspiracy as a seriousness category I. Senator Kelley noted that one charge of the Commission is to reduce unwarranted disparity and she believes the offense of conspiracy reflects such a wide range of behavior that making Murder, 1st degree, conspiracy a seriousness category II would be more appropriate and permit the judge to consider any specific aggravating facts.

Judge Chasanow noted that Murder, 1st degree, conspiracy had never been categorized as a separate offense before and that it was simply a category I under the default COMAR rule. Judge Chasanow proposed, and the Commission agreed, that a vote be called but that if the vote were close that this issue would be sent back to the Subcommittee for further discussion.



Shannon Avery disagreed with Mr. Kent's assertion that it would be easier for a judge to go above the guidelines and instead suggested that it would become the state's burden to prove why the judge should go above the guidelines in that case. Ms. Avery stated that for this reason Murder, 1st degree, conspiracy should be a category I.

Judge Chasanow stated that death of the victim is not an element of the offense of Murder, 1st degree, conspiracy and for that reason it would be harder for a judge to depart below the guidelines as a mitigating factor than it would be to depart above where there is a death as an aggravating factor.

Given that the guidelines are purely voluntary, Senator Kelley asked for clarification as to why Ms. Avery had stated that it would be harder for a judge to depart above the suggested range. Ms. Avery replied that it becomes a justification argument that must be made by the state subject to appellate review, and that this is qualitatively more difficult than going below the guidelines. Mr. Kent disagreed with this assessment.

Mr. Collins suggested that the abandonment of a conspiracy would be a factor in sentencing and that a Murder, 1st degree, conspiracy would require a true meeting of the minds and agreement as to the intention of the conspiracy. He further noted that a resulting death would be something that judges are likely to take into account in sentencing.

At the taking of the vote, there were 6 votes in favor of Murder, 1st degree, conspiracy being categorized as a category I. There were 6 votes against Murder, 1st degree, conspiracy being categorized as a category I and in favor of it being categorized as a category II. Senator Gladden abstained from the vote since she was absent for the bulk of the discussion. After noting that the vote was tied, Senator Gladden offered a few thoughts.

Senator Gladden stated that she is very familiar with the issue and suggested that Murder, 1st degree, conspiracy would be better categorized as a category II. Since the vote was already taken, no new vote was called, and no clear favorite was determined during the vote, Judge Chasanow asked that the Subcommittee reexamine the issue and bring it forward again at the next meeting.

d. Discussion regarding the use of probation before judgment (PBJ) in calculation of prior adult record.

In a previous meeting of the Subcommittee, the issue of whether PBJs can be used as adjudications in the calculation of prior adult record was discussed. The staff obtained guidance from the Attorney General's Office. Stuart Nathan, Assistant Attorney General, provided a written memorandum advising that PBJs could be considered adjudications for the purpose of the calculation of prior adult criminal record. Judge Themelis felt that Mr. Nathan's guidance was very useful but did not address his core question as to whether it is appropriate to count those PBJs that were eligible to be expunged but had not been expunged. The staff is bringing this question to Mr. Nathan for review.



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

The next meeting was set for Tuesday, January 22, 2008 at 6:00 p.m., location to be announced. The Commission will provide dinner and it will be made available starting at 6:00 p.m.

*Note: The January 22, 2008 meeting was later postponed until the conclusion of the 2008 Session of the Maryland General Assembly. The next meet was rescheduled for Monday, May 5, 2008 at 5:30 p.m. at the Judiciary Training Center in Annapolis.

7. Old Business

There was no old business to address.

8. New Business and announcements

There was neither new business nor announcements.

9. Adjournment

The meeting adjourned at 5:55 p.m.