



Minutes

Maryland State Commission on Criminal Sentencing Policy
Teleconference
January 29, 2020

Commission Members in Attendance:

Honorable Brett R. Wilson, Chair
Honorable Shannon E. Avery, Vice-Chair
Senator Robert G. Cassilly
William M. Davis, Esquire, *representing Public Defender Paul B. DeWolfe*
Chief Douglas DeLeaver
Honorable Brian L. DeLeonardo
Richard A. Finci, Esquire
Melinda C. Grenier
Brian D. Johnson, Ph.D.
Senator Delores G. Kelley
Molly Knipe
Honorable Patrice E. Lewis
Delegate David Moon
Kathleen C. Murphy, Esquire, *representing Attorney General Brian E. Frosh*
Honorable James P. Salmon
Lisa M. Spicknall-Horner

Staff Members in Attendance:

Sarah Bowles
Sean Houlihan
Stacy Najaka, Ph.D.
Katharine Pembroke
David Soulé, Ph.D.

1. Call to order

Judge Wilson called the meeting to order. Dr. Soulé conducted a roll call to confirm the teleconference participants.

2. Declaration of quorum

The meeting began at 6:05 pm when attendance reached a quorum. Judge Wilson noted that the teleconference meeting, like all Commission meetings, was open to the public. Directions to listen to the teleconference were published on the MSCCSP website.

3. Review of HB 355/SB 272 – Dr. David Soulé

Dr. Soulé provided a brief summary of HB 355 and the cross-filed SB 272, followed by a discussion of their anticipated impact on the MSCCSP.



a. Introduction

Dr. Soulé explained that pursuant to the policy for responding to legislative proposals adopted by the MSCCSP in July 2019, the conference call was arranged for the purpose of soliciting feedback and to request a vote whether the Commission will support, oppose, or take no position on the proposed legislation. The legislation will affect the operations of the MSCCSP. If enacted, HB 355/SB 272 would require the MSCCSP to review each case or sentencing event involving a crime of violence as defined in § 14–101 of the Criminal Law Article, and provide in the MSCCSP annual report the following information on each conviction:

- Crime of which the defendant was convicted,
- Sentence imposed,
- Applicable guidelines range,
- Disposition of the case (i.e., plea agreement, court trial, jury trial),
- Amount of time suspended and the percentage of the sentence suspended for convictions in which a portion of the sentence is suspended,
- Departure reason when applicable,
- Court and judicial circuit with jurisdiction over the case, and
- Sentencing judge.

Dr. Soulé stated that the MSCCSP currently collects data on each of these reporting requirements with the exception of the sentencing judge. The Maryland sentencing guidelines worksheet has an entry location for the judge's name, but the judge's name is not reported in the Maryland Automated Guidelines System (MAGS). Rather, a space is provided in the bottom right hand corner of the guidelines worksheet PDF for the judge to provide his/her name/signature on a final printed copy of the worksheet PDF if the court chooses to maintain a signed copy for their records. However, the printed copy is never submitted to the MSCCSP. Therefore, the MSCCSP does not maintain the judge's name. The proposed legislation would necessitate a change in the MSCCSP policy regarding the collection and reporting of data by individual judge.

b. Policy and fiscal impact

Dr. Soulé explained that the MSCCSP will need to amend the Maryland Automated Guidelines System (MAGS) to report the sentencing judge. The MAGS programmers at the Department of Public Safety and Correctional Services provided an estimate of \$10,000 for programming development, testing, and documentation in order to implement the necessary changes.

A review of the Maryland Sentencing Guidelines Database indicates that, for fiscal year 2019, the MSCCSP received information for 2,760 convictions under Section 14-101 of the Criminal Law Article. Further, the MSCCSP data indicate there were 1,788 sentencing events involving a crime of violence in the Maryland Circuit Courts in FY 2019. Given the volume of cases, the proposed legislation will also require additional staff resources to comply with the new reporting requirements.



The additional responsibilities include but are not limited to the following:

- Assistance with data collection, data management, and data analyses for the more than 2,700 annual crime of violence convictions;
- Communicating with the Judiciary and prosecuting agencies to verify reported information as needed;
- Testing and implementing MAGS application updates;
- Assistance with updating all training manuals and materials to implement new data reporting and data collection protocols; and
- Assistance with providing training to criminal justice practitioners on new data reporting requirements.

The MSCCSP staff also expects the proposed legislation may increase the volume of data requests the MSCCSP receives from the public. To handle these extra responsibilities, the staff requested funding to support 10 overload hours per week for the MSCCSP part-time graduate research assistant (GRA) position during the academic year. The GRA position currently works 20 hours per week. The requested overload would allow the GRA to work an additional 10 hours per week during the academic year (42 weeks).

Finally, Dr. Soulé called attention to Section 2 of the legislation, noting that it is not highlighted in bold or underlined font so it may not be immediately clear that this section calls for new action. Section 2 specifies that the Governor’s Office of Crime Control and Prevention (GOCCP), in consultation with the MSCCSP, will report by December 31, 2020, to the Governor and the General Assembly, an analysis on the use of ABA pleas by judicial circuit in calendar year 2019. The report is also to include data showing the percentage of sentences under the ABA pleas that would have been guidelines compliant if the sentence had been imposed under another type of disposition. The MSCCSP will need to assist the GOCCP to complete this report.

4. Discussion – Judge Brett R. Wilson

Senator Kelley requested to initiate the discussion, given her long history with the Commission. She noted that the purpose of the Commission has never been to grade or evaluate individual judges. The guidelines serve to provide judges with sentencing trends. The Commission has always wanted judges to have guidelines while at the same time maintaining their discretion, as there are cases that will have anomalies that won’t fit into a neat box. Senator Kelley noted that while the legislation may be well intended, it would be a grave mistake for the Commission to move in the direction of reporting by individual judge.

Judge Wilson thanked Senator Kelley for starting the discussion. He indicated that he did not believe it would be appropriate for the Commission to take a position on its own enacting statute. Regardless of the merits of the bill, the Commission is a creature of statute and whatever the statute says is what the Commission has to provide. Judge Wilson recommended that the Commission take no position on the bill, but recognized that individual Commission members may wish to testify as to what their personal beliefs are in regard to the legislation. Additionally, staff could testify as to what it would take for the Commission to comply with the legislation.



Judge Avery stated that she believed the Commission should oppose the legislation, consistent with the Commission's opposition to similar legislation last year. She indicated that the legislation contravenes the Commission's enabling legislation and its mission. The purpose of the Commission and its promulgation of guidelines is to provide a description of the average range of sentences imposed for similar offenses on similar offenders throughout the State. Further, the purpose of the guidelines is to remedy racial and regional disparity in sentencing. Judge Avery encouraged Commissioners to review page 4 of the recently distributed annual report for the six goals of the Commission established by the enabling legislation (*included below for reference purposes*):

1. sentencing should be fair and proportional and that sentencing policies should reduce unwarranted disparity, including any racial disparity, in sentences for criminals who have committed similar crimes and have similar criminal histories;
2. sentencing policies should help citizens to understand how long a criminal will be confined;
3. sentencing policies should preserve meaningful judicial discretion and sufficient flexibility to allow individualized sentences;
4. sentencing guidelines be voluntary;
5. the priority for the capacity and use of correctional facilities should be the confinement of violent and career criminals;
6. sentencing judges in the State should be able to impose the most appropriate criminal penalties, including corrections options programs for appropriate criminals.

Judge Avery noted that the goals make it very clear that the purpose of the guidelines is to remedy disparity in sentencing, not to provide a report card on the relative severity of sentences. With regard to Judge Wilson's recommendation that the Commission not take a position, Judge Avery emphasized that the MSCCSP is not an executive State agency created by the Governor. As such, obeying the edict of the legislature and Governor is not consistent with the Commission's responsibility.

Judge Wilson responded that the MSCCSP is a creature of the legislature, and if the legislature decides to change the mission, so be it.

Judge Avery noted that Commissioners are appointed as experts in the field, representing constitutionally separate stakeholders. For that reason, the MSCCSP is distinguishable from executive State agencies. While the MSCCSP would accept legislation that is passed, that does not mean that the Commission does not have a responsibility to speak when there is legislation that undermines the six stated purposes of the MSCCSP.

Judge Wilson reiterated that all Commissioners should be free to testify on their own as to any legislation. The question is whether the Commission as an official body should be taking positions for or against the legislative process that created the Commission in the first place.

Senator Kelley responded that the legislative process that created the Commission had a totally different concept of its role, and it was not to evaluate the sentences handed down judge by judge. It was to see that there is not unnecessary variability circuit by circuit. Further, who better to comment on the role of the Commission than the Commission itself.



Senator Cassilly asked how the proposed change to the statute would be in contradiction to the existing statute.

Senator Kelley responded that the statute would not simply change the Commission's duties but it would change the fundamental mission of the Commission. Judge Avery added that requiring the Commission to provide a report card on individual judges would affect due process and the separation of powers, in that it will impact the discretion that judges exercise in sentencing. Further, the one thing that judges are not supposed to consider in sentencing is whether a sentence will win you or cost you votes in the next election. It is a violation of the independence of the Judiciary to have the public, other agencies, and the Governor weighing in on sentencing patterns of a judge.

Senator Cassilly responded that he does not believe that the legislation is in conflict with the Commission's current mission. Judge Avery recommended again that Commissioners reference the enabling statute and the six purposes of the Commission, highlighting the third purpose which states "sentencing policies should preserve meaningful judicial discretion and sufficient flexibility to allow individualized sentences."

Judge Wilson indicated that part of the problem is the decision by the Commission to include ABA pleas as compliant regardless of whether the sentence falls within the guidelines range. As such, he believes the Commission is not currently fulfilling its mission. He reiterated that his recommendation is for the Commission to take a neutral position and to allow individuals to testify or submit testimony as they wish, because he believes the Commission has gotten away from its original purpose of providing an accurate portrayal of the sentences for various crimes.

Judge Lewis indicated that it is important that all approach the issue with an open mind as some Commissioners support the decision to count ABA pleas as guidelines-compliant.

Richard Finci noted that the difference between last year's bill and this year's bill is that the current bill does not include the State's Attorney's position on a particular sentence and does not include an analysis of ABA pleas. He stated that his position on the current bill is consistent with that of Judge Avery, and that the apolitical nature of the Commission would be compromised by the bill. He indicated that Commission data should not be used for political purposes. Further, the data would only be used to indicate that a judge's sentences were too soft, never to indicate that a judge was sentencing too harshly.

Richard Finci asked, if the Commission agreed to take no position and if individual Commissioners were permitted to testify, would they be permitted to testify as Commissioners or as general citizens or practitioners. Judge Wilson responded that his opinion was that Commissioners could certainly identify themselves as such, but they would not be speaking for the whole Commission.

Chief DeLeaver stated that there should be a report card for judges, because that has been the request of the public. The Governor is evaluated, and the judges should be evaluated also; consistency is paramount.

Delegate Moon noted that if you believe the bill is going to have a difficult time getting through, then whether a position is taken or not is really about what posture and precedent is being set for the Commission. Seeing as how the Commission has taken a position in the past, at a minimum there would need to be an explanation for a divergence from that.



Brian DeLeonardo stated that when the bill came up last year, he took the position that the Commission should take no position. He is of the opinion that by taking a position, it transforms all of the Commissioners' individual roles into a political organization. He believes that engaging in the political process undermines the Commission and fractures the group. Further, Commission members should not be put in the position of opposing a decision of their own Commission. Commissioners should follow their own organization's (Judiciary, State's Attorneys, etc.) dictates.

Judge Avery expressed concern should the Commission decide to never take a position on legislation. She reminded Commissioners of an instance in which a past Commission member, who was also a member of the House of Delegates, proposed legislation that was counter to a decision by the Commission that the delegate did not support concerning the juvenile delinquency score. Judge Avery asked Brian DeLeonardo if he thought the Commission should not have taken a position in that instance.

Brian DeLeonardo responded that he was very much in support of taking a position in that instance. He noted that instance differed in that it was a situation where years had been spent studying and discussing the issue, and the legislation undercut the integrity of the Commission's decision-making process. He views the current legislation as an external decision-making process directed as what the Commission's overall function should be, and he does believe that to be a legislative decision.

Delegate Moon asked if the delegate had passed the bill concept on to a different House member not on the Commission to put forward, would the Commission have weighed in. Brian DeLeonardo responded that his main issue with the bill was that the delegate was a member of the Commission and was attempting to undercut the Commission's decision. Delegate Moon suspected that the Commission's involvement in the debate is what killed the bill, for the reasons cited.

Senator Kelley expressed that most in the General Assembly have no firsthand knowledge of what the Sentencing Commission does and why it exists. As much knowledge as possible should be shared among those making decisions in the General Assembly. Brian DeLeonardo agreed and stated that he believes the Commission should share information and data with the legislature to help inform decisions but not engage in the political back and forth.

Senator Kelley stated that the issue is whether the bill changes the essential mission of the Commission, noting that never in the history of the State has an entity of the State evaluated individual judges.

Judge Lewis noted that the guidelines are an educational tool that show judges how similarly situated defendants with similarly described crimes have been sentenced in the past. She questioned what educational purpose is served and how the criminal justice community benefits by collecting judge name. It would pivot the purpose of the Commission's information and data gathering.

Judge Wilson reiterated that he is not advocating taking a positive position on the legislation. Instead his point is that it is not appropriate for the Commission to take a position on bills that seek to change the mission of the guidelines and or Commission. Additionally, he questioned if the Commission vote is split, is it then appropriate to say the Commission's



position is that of the majority, even if it is not the position of all members. Judge Wilson again noted that it is the right of any Commissioner to testify on their own.

Judge Lewis commented that the Commission should speak to the intent of the legislation. There are all kinds of entities within our government that could collect the information, but for the Commission to do so would undermine its credibility and the educational purpose of the Commission.

Brian DeLeonardo stated that he believed it would be informative to know if a judge's sentences are unlike those of his/her colleagues. Further, Commissioners are all coming from different perspectives, and thus it is hard for the Commission to speak as one voice.

Judge Avery commented that the Commission members are appointed because they represent different agencies or are considered experts in the field. The Commission is well respected in terms of being non-political, non-partisan, and a resource for objective information on sentencing policy and sentencing data. The proposed legislation will undermine that credibility, and more specifically may undermine the Commission's ability to collect the data it is charged with collecting, as judges will no longer view the Commission as a helpful organization. Instead the Commission will be viewed as a policing agency. If the Commission's credibility is to be compromised by legislation, the Commission should weigh in.

Brian DeLeonardo asked if the Commission would be compelled to take a position if legislation was proposed that sought to make the guidelines mandatory. Judge Avery replied that it would depend on whether the legislation directly affected the Commission and the Commission's mission.

Observing that all sides of the issue appeared to have been vetted out thoroughly, Judge Wilson asked if anyone was interested in making a motion.

5. Vote whether to support, oppose, or take no position (Action item) – Judge Brett R. Wilson

Senator Cassilly made a motion for the Commission to take no position on the proposed legislation. Molly Knipe seconded the motion. **The motion to take no position on HB 355 / SB 272 did not carry, with a roll call vote of 5 yea votes, 7 nay votes, and 3 abstentions.**

Judge Avery inquired as to whether there was a motion to oppose the legislation. Judge Salmon made a motion for the Commission to oppose the proposed legislation. Richard Finci seconded the motion. **The motion to oppose HB 355 / SB 272 carried, with a roll call vote of 8 yea votes, 5 nay votes, and 2 abstentions.**

Dr. Johnson recommended that the Commission report out the exact vote count, rather than simply noting that the majority voted to oppose the legislation. The Commissioners agreed.

Brian DeLeonardo noted that bills evolve and wondered if there are amendments, would the Commission discuss the legislation again. Senator Kelley suggested specifying "the bill as introduced."

Dr. Soulé inquired as to the next steps. Senator Kelley recommended that a letter be submitted to the legislature stating that the Commission deliberated and voted, and noting the results of the vote. The Commissioners agreed. Dr. Soulé indicated that the Commission staff



would draft the letter and run it by the Chair and Subcommittee. The letter would then be submitted as written testimony to both the House and Senate.

Judge Wilson asked if anyone objected to Dr. Soulé testifying as to the factual background of the Commission, how its process works, and the operational day-to-day business of the Commission. There were no objections.

6. Adjourn

Judge Wilson asked if there was any further discussion or other business. Hearing none, he adjourned the meeting at 7:36 pm.