



Minutes

Maryland State Commission on Criminal Sentencing Policy
Videoconference
February 7, 2022

Commission Members in Attendance:

Honorable Brett R. Wilson, Chair
Honorable Shannon E. Avery, Vice-Chair
Honorable J. Sandy Bartlett
Richard A. Finci, Esq.
Melinda C. Grenier
Robert H. Harvey, Jr., Esq.
Honorable Patrice E. Lewis
Alethea P. Miller
Honorable David Moon
Honorable James P. Salmon
Kyle E. Scherer, Esq.
Lisa M. Spicknall-Horner
Honorable Charles E. Sydnor, III
Donald Zaremba, Esq., *representing Public Defender Paul B. DeWolfe*

Staff Members in Attendance:

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

Visitors:

[none]

1. Call to order

MSCCSP Chair, Judge Brett R. Wilson, called the meeting to order.

2. Declaration of quorum

The meeting began at 6:03 p.m. when attendance reached a quorum.

3. Review of House Bill (HB) 412 / Senate Bill (SB) 392 – Dr. David Soulé

Introduction. Dr. Soulé stated that the purpose of the videoconference meeting is to discuss House Bill (HB) 412 and the cross-filed Senate Bill (SB) 392. If enacted, the legislation would affect the operations of the MSCCSP. As such, pursuant to the policy adopted by the MSCCSP in July 2019 with respect to responding to legislative proposals that directly affect the operations of the MSCCSP or the sentencing guidelines, the meeting 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. Dr. Soulé noted he would start with a brief review of HB 412/SB 392 and then discuss the impact on the MSCCSP.

HB 412/SB 392 combines separate legislation previously introduced during the 2020 Session, specifically, HB 355 (The Judicial Transparency Act of 2020) and HB 1458 (The Truth in Plea Deals Act of 2020). The current proposed legislation includes two distinct requirements: (1) require the MSCCSP to provide in its annual report case-specific information for sentences for crimes of violence, including information identifying the sentencing judge; and (2) revise the definition of a guidelines-compliant sentence, such that a sentence imposed under a binding plea agreement that is above or below the recommended guidelines range would no longer be considered compliant. Dr. Soulé indicated he would summarize the impact of each separately, as they are unique and distinct requirements.

New Reporting Requirements. Dr. Soulé directed Commissioners' attention to the new reporting requirements beginning on page 4, line 26 of the proposed legislation. Specifically, HB 412/SB 392 requires 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 the following information on each conviction in the MSCCSP annual report: crime of which the defendant was convicted, sentence imposed, applicable guidelines range, disposition of the case, 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 explained that the MSCCSP currently collects data on each of these reporting requirements, or some version of these requirements, except for the sentencing judge. The Maryland sentencing guidelines worksheet has an entry location for the judge's name, but the judge's name is not collected or 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 a signature on the final printed copy maintained for the court record. However, the printed copy is never submitted to the MSCCSP. Therefore, the MSCCSP does not maintain a record of the judge's name.

Dr. Soulé stated that the proposed legislation would necessitate a change in the MSCCSP policy regarding collection and reporting of data by individual judge. As such, the MSCCSP will need to amend MAGS to report the sentencing judge. The MAGS programmers at the Department of Public Safety & Correctional Services (DPSCS) estimated in 2020 a cost of \$10,000 for programming development, testing, and documentation to implement the necessary changes. MSCCSP staff reviewed the Maryland Sentencing Guidelines Database and determined that the MSCCSP received information for 2,756 counts and 1,788 individuals sentenced in Fiscal Year 2019 for a crime of violence as defined under Section 14-101 of the Criminal Law Article in Maryland circuit courts. Dr. Soulé explained that the staff selected 2019 for this analysis because it was the last full year of data before the COVID-19 pandemic. Given the volume of cases, the proposed legislation will require additional staff resources to comply with the new reporting requirements.

Change in Rule Regarding Plea Agreements. Dr. Soulé next reviewed how HB 412/SB 392, starting at line 14 of page 4, revises the definition of a guidelines-compliant sentence by indicating that a sentence imposed pursuant to a plea agreement may not be deemed to be compliant with the sentencing guidelines unless the sentence falls within the actual sentencing



guidelines range. To put the impact of the legislation in perspective, Dr. Soulé briefly summarized how guidelines compliance is calculated by the Commission. He explained that for each offense category, a separate matrix contains individual grid cells that provide a recommended sentence range for the defendant based on their criminal history and the seriousness of the offense. The MSCCSP deems a sentence compliant with the guidelines if the guidelines applicable sentence (defined as the sum of incarceration, credited time, and home detention) falls within the applicable guidelines range. In addition, the MSCCSP deems a sentence compliant if the judge sentenced an offender to a period of pre-sentence incarceration time with no additional post-sentence incarceration time and the length of credited pre-sentence incarceration exceeds the upper guidelines range for the sentencing event. The MSCCSP deems sentences to corrections options programs (e.g., participation in a problem-solving court; Health General Article, § 8-507 commitments; home detention; work release) compliant provided that the initial sentence plus any suspended sentence falls within or above the applicable guidelines range and the sentencing event does not include a crime of violence, child sexual abuse, or escape. Finally, in 2001, the MSCCSP adopted a policy designating American Bar Association (ABA) binding plea agreements as guidelines-complaint to acknowledge that ABA plea agreements reflect the consensus of the local view of an appropriate sentence within each specific community.

Dr. Soulé noted that the MSCCSP had observed variation from court to court regarding the level of specificity required for a plea agreement to be considered an ABA plea. For example, it was noted that in some courts, a binding plea agreement may involve an agreement to cap the sentence at the upper guidelines or an agreement to a broad range. Accordingly, in 2020, the MSCCSP completed a comprehensive study of binding pleas that included a review of definitions of binding plea agreements from other jurisdictions, an examination of relevant Maryland case law, and an analysis of data on sentences for guidelines-eligible cases sentenced from 2017 through 2019. Informed by this review, the Commission, at its December 8, 2020, meeting, replaced the term “ABA binding plea agreement” with “MSCCSP binding plea agreement,” and defined the term “MSCCSP binding plea agreement” to clarify this concept for Maryland criminal justice practitioners. Specifically, an MSCCSP binding plea agreement is defined as “A plea agreement presented to the court in agreement by an attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, that a court has approved relating to a particular sentence and disposition.” Further, the MSCCSP tightened the definition to indicate that an MSCCSP binding plea agreement means an agreement to a specific amount of active time (if any), not merely a sentence cap or range. The court has the discretion to accept or reject the plea, and the agreement is binding on the court under Maryland Rule 4- 243(c) if the court accepts the plea. The binding plea agreement and corrections options compliance policies allow the court to set a guidelines-compliant sentence that considers the individual needs of the offender, such as substance abuse or mental health treatment. Dr. Soulé reminded Commissioners that the revisions were adopted effective April 1, 2021.

Dr. Soulé went on to explain that in January 2021, prior to the start of the General Assembly Session, the MSCCSP sent a letter to the Legislature outlining the steps the MSCCSP took in 2020 and in the letter noted how these steps addressed concerns that inspired HB 1458 from the 2020 session. The letter stated that one of the main goals of the sentencing guidelines is to help ensure consistency in sentencing. The letter further noted that the MSCCSP believes the



revised definition and term for guidelines-compliant pleas will reduce the number and percentage of pleas that are considered guidelines-compliant because judges may choose to accept the binding plea terms only if he/she agrees with a specified active time that was presented in agreement by both the State and the defense. Dr. Soulé stated that a review of the Maryland Sentencing Guidelines Database indicates that, for Fiscal Year 2021, 42.2% of sentencing events in Maryland circuit courts were resolved by a binding plea agreement. Among the 42.2% of sentencing events resolved by a binding plea agreement, 55% of sentences were within the recommended guidelines range, 37.9% of sentences were below the recommended guidelines range, and 7.2% of sentences were above the recommended guidelines range. In the prior fiscal year, FY 2020, 48.9% of sentencing events were resolved by a binding plea agreement. So, the percentage of binding pleas was reduced in FY 2021, even though the new rule was only in effect for the last three months of FY 2021.

Dr. Soulé advised caution in interpreting data from FY 2021 because the number of sentencings were substantially reduced across the State due to the COVID-19 pandemic, and the biggest decline was observed in the 8th Circuit where binding plea agreements are most common. However, he indicated it was worth noting that given the Commission's recent decision to adjust the sentencing guidelines for drug and property offenses to better reflect current sentencing practices, many sentences adjudicated via an MSCCSP binding plea agreement that are currently outside the guidelines range, should become guidelines compliant.

Regarding fiscal impact, Dr. Soulé explained that if HB 412/SB 392 were enacted, it would eliminate the MSCCSP binding plea agreement compliance policy, as well as the pre-sentence incarceration compliance policy and the corrections options policy in cases involving a plea agreement. The proposed legislation would therefore require the MSCCSP to amend MAGS to revise the calculation of sentencing guidelines compliance. These MAGS revisions will require an estimated \$8,750 to support 50 hours of development. Thus, the total fiscal cost of amending MAGS would be \$18,750 (\$10,000 for amending MAGS to allow for the reporting of judicial information and \$8,500 to revise the calculation of sentencing guidelines compliance). Furthermore, the proposed legislation would require additional staff resources to comply with the new reporting requirements and the change in the definition of sentencing guidelines compliance. To handle these extra responsibilities resulting in the new data reporting requirements and the change in the rule for plea agreements, the staff requested funding to hire one full-time research analyst position.

MSCCSP Prior Positions. Noting that the Commission has seven new members since versions of the legislation was last introduced in 2020, Dr. Soulé stated that for informational purposes he would summarize the previous position of the MSCCSP. In 2020, the MSCCSP convened to review HB 355/SB 272 (The Judicial Transparency Act of 2020) and separately to review HB 1458 (The Truth in Plea Deals Act of 2020). With respect to the judicial transparency legislation, the majority opinion held that the Commission should oppose HB 355/SB 272 for two primary reasons. First, the majority believed the requirement to report sentencing information by individual judge conflicted with the enabling legislation of the MSCCSP. Specifically, Criminal Procedure Article, § 6-202 instructs that the sentencing guidelines should be voluntary, and it further states "sentencing policies should preserve meaningful judicial discretion and sufficient flexibility to allow individualized sentences." In 2020, the majority expressed opposition to HB 355 because they believed that publishing judge-specific



sentencing data would potentially change the nature of the sentencing guidelines from recommendations to edicts. The second primary opposition noted in 2020 was that by requiring the MSCCSP to publish judge-specific reports, the perception of the MSCCSP would shift from its current role as an objective manager of the sentencing guidelines to a role as monitor of individual judicial performance. At that time, it was noted that the role of the MSCCSP was never intended to be that of enabling the grading of the performance of any trial court judge. Rather, it was noted that the guidelines and the corresponding data collected via the guidelines worksheet were designed for general policy development, rather than for monitoring individual judge behavior.

Regarding the second portion of the bill pertaining to binding plea agreements, Dr. Soulé explained that the MSCCSP in 2020 asked the Legislature to defer on taking action to give the MSCCSP time to study the issue. As previously noted, the MSCCSP completed that study at the end of 2020 and enacted a revised definition for binding plea agreements, effective April 1, 2021. The MSCCSP's most recent annual report included data for FY 2021, which covers July 1, 2020, through June 30, 2021. Accordingly, the reporting period had only three months of data since the adopted revisions for binding pleas on April 1, 2021.

Dr. Soulé once again noted that pursuant to the policy adopted by the MSCCSP, the Commission is meeting to review legislation that directly affects the operations of the MSCCSP or the sentencing guidelines, and to request a vote whether the Commission will support, oppose, or take no position on the proposed legislation. He explained that the MSCCSP is not obligated to assume the same position as taken in 2020. The Commission membership has shifted some, and support for publishing judge-specific data has also somewhat shifted. The MSCCSP may choose to take no-position on the bill, or it could choose to support or oppose the separate portions of the legislation. For example, the MSCCSP may choose to propose an amendment whereby the MSCCSP collects the judge-specific data, does not proactively publish a report with judge-specific identifiers, but instead makes the data available upon request. Another consideration is that it may be appropriate for the Commission to respectfully request that the legislature defer on the plea agreement portion of the legislation to allow the Commission time to assess the impact of the April 1, 2021, revised definition of guidelines-compliant binding pleas.

Emergency Legislation. Before concluding his remarks, Dr. Soulé highlighted one final issue. Specifically, this legislation is marked as an "Emergency Bill." As emergency legislation, if passed, it would take effect shortly after the conclusion of the General Assembly Session in April. However, the requirements of the legislation are not things that the MSCCSP staff can immediately implement. Dr. Soulé pointed out that the practical reality is that it would take a minimum of several months before we could reprogram MAGS to capture the new information, and then the revised data collection would only start at that point. First, MAGS would need to be amended to capture additional reporting details and to change guidelines compliance calculations. But the MSCCSP already has major updates for MAGS planned for release on July 1, 2022, including but not limited to: revised matrices for drug and property offenses; a new streamlined sentence screen to make it easier to enter sentence information; and an update to the whole application to make it more mobile-friendly. These are significant updates that are currently being worked on by DPSCS programmers and MSCCSP staff, which must be meticulously reviewed and tested prior to deployment. As such, it would be difficult to implement the necessary MAGS updates prior to July 1, 2022. Dr. Soulé indicated



it is more realistic to expect any updates to be implemented closer to October 1, 2022. As mentioned, the MSCCSP would also need to hire new staff. The MSCCSP would need time to get the position approved by the University of Maryland, advertise the position, interview, and hire. The absolute quickest that may happen is 2-3 months. Additionally, the MSCCSP would need funding for the position before hiring.

Prior to turning the discussion over to the Commission, Dr. Soulé concluded by noting that the hearing for HB 412 before the House Judiciary Committee is scheduled for tomorrow, February 8, at 1:00 p.m. The hearing for SB 392 before the Senate Judicial Proceedings Committee is scheduled for Thursday, February 10, at 1:00 p.m. Any written testimony therefore needs to be submitted by tomorrow morning. Technically, the deadline for written testimony for the hearing in the House Judiciary Committee has passed, but Chairman Clippinger graciously granted the MSCCSP a one-time exception to submit testimony following this meeting.

4. Discussion and vote whether to support, oppose, or take no position – Judge Brett R. Wilson (Action item)

Judge Wilson called for questions and discussion. Commissioner Finci noted that there are both administrative/practical issues and policy issues, and he wondered if the two needed to be addressed in the meeting or if staff has a handle on the practical issues. Dr. Soulé responded that staff submitted a fiscal note response that addresses the practical issues. He wanted the Commission to be aware that there is a fiscal number attached to the required MAGS programming and full-time research analyst position, but he acknowledged that the policy issues should be the primary focus for Commissioners.

Judge Wilson stated that as far as policy is concerned, the most poignant part of the legislation is the personal identification of judges, and the Commission had a robust debate a couple of years ago on that topic. Because Commission membership has changed a good bit since that time, Judge Wilson asked if any of the newer members would like to weigh in with thoughts or questions about that specific part of the bill. Delegate Moon responded with apologies that he needed to leave the meeting shortly. He noted that the last time the Commission discussed a similar bill, he abstained due to his position on the House Judiciary Committee. That being said, he has always had grave reservations about the legislation given the stated goals of what identification of individual judges is supposed to achieve (e.g., encouraging judges to give longer sentences). However, judicial transparency is among the priorities of the chamber leaders, whether in the form of this bill or another. He renewed his abstention, and he also renewed his reservations about what the bill is trying to do.

Judge Avery weighed in that she has testified on behalf of the Maryland Judiciary in opposition to the legislation over the course of the years that it has been introduced. She noted that she agrees with the previous position of the Commission that this legislation encroaches on judicial discretion in a significant way. It sets up the Sentencing Commission to create a report card on individual judges, and that report card is misleading to the public, as it is based on one fact – the relative length of the sentence. It does not provide transparency to the myriad of factors that exist in a criminal sentencing procedure. Judges are required to consider all the factors that relate to a sentence, including victim, defendant, and circumstances of the crime.



Judge Avery further noted that in addition to creating a due process problem by encroaching on judicial discretion, the legislation would also eliminate the Commission's guidelines compliance rule with regard to binding pleas. That creates a public safety problem, as well as a separation of powers and due process problem, because plea agreements are brought before a judge as a result of negotiations between the State and defense, and there are a number of reasons that the State would negotiate a plea below the sentencing guidelines. They include problematic legal issues concerning policing or the investigation and reluctant witnesses who are afraid to come forward for safety reasons. These are issues of prosecutorial discretion, and the judge is not permitted to get involved in negotiations. The judge simply does or does not accept the plea as negotiated by the parties. By holding the judge accountable for a below guidelines sentence, you are going to see a discouragement of pleas being accepted. That will create a backlog of cases, as well as a public safety problem.

Judge Avery explained that proponents of this bill believe the crime problem is the result of judicial sentencing, and that is statistically not the case. She has examined the Justice Department's violent crime numbers in Baltimore City, and judges sentence defendants in less than .5% of all violent crimes perpetrated in the city. There are many levels of intervention when it comes to violent crime before you get to the top of the pyramid of the criminal justice system where the trial and sentencing event occurs.

Judge Avery concluded by noting one of her primary concerns is that the Legislature is coming to an independent commission to get data about the judges. That is a problem existentially for the Commission because it goes against its mission, and it also is going to harm its relationship with judges.

Judge Wilson noted that there had not been many questions or much discussion during the meeting and asked whether further debate was necessary or if there was a motion to adopt the prior position of opposition.

Judge Avery responded that she would so move to adopt the prior position. Commissioner Grenier seconded the motion.

Judge Wilson asked if there was any further discussion or concern about adopting the prior position. In response, Senator Sydnor suggested that the Commission submit a letter of information rather than taking one position or the other. He noted that this is something agencies often do. Judge Wilson commented that he had shared a similar suggestion two years ago when discussing the legislation, but that his read of the room is that the majority are comfortable taking a position in opposition based on the reasons stated in the current meeting and the position stated two years ago. Senator Sydnor indicated that like Delegate Moon, he would abstain. Delegate Bartlett concurred that she should do the same. Judge Wilson said he understood and that they would not want to lock themselves in a position before hearing the bill on the floor or in committee.

Judge Wilson asked for any additional comments or questions before calling for a vote. Dr. Soulé noted that the testimony would need to be submitted the following morning and that the Commission could simply reiterate the opposition from 2020. Dr. Soulé further noted that staff had drafted a similar, updated opposition statement and explained that the statement *opposes* the new reporting requirements and requests that the Legislature *defer* on the rule change regarding guidelines-compliant plea agreements, given the Commission's recent changes to the definition of such pleas. Judge Wilson expressed agreement with that approach.



He then called for a vote, in the negative, asking if any Commissioners were opposed to the motion to adopt the position of opposition that was stated in prior submittals of the legislation. Seeing and hearing none, Judge Wilson noted that other than the abstentions, there was unanimity.

By unanimous vote with 3 abstentions, the Commission voted to oppose HB 412 and its cross-filed SB 392.

Following the vote, Dr. Soulé read the drafted statement in order to get verbal approval from the Commission prior to submitting the testimony. Judge Wilson expressed his support for the statement as worded and asked if there were any concerns or comments from Commissioners regarding the statement. There were none. Dr. Soulé indicated he would submit the written testimony in advance of the hearings on February 8 and February 10. He asked if the Commission wished to have any Commissioners testify. Judge Wilson responded that he would be available to present the position virtually at both hearings and that he would coordinate with Dr. Soulé.

5. Approval of minutes

a. December 7, 2021, MSCCSP public comments hearing

The Commission approved the minutes as submitted.

b. December 7, 2021, MSCCSP business meeting

The Commission approved the minutes as submitted.

Dr. Soulé thanked the Commissioners for their time and participation in the meeting. The meeting adjourned at 6:51 p.m.