



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
Videoconference  
February 22, 2022

### Commission Members in Attendance:

Honorable Shannon E. Avery, Vice-Chair

Honorable J. Sandy Bartlett

Richard A. Finci, Esq.

Secretary Robert L. Green

Melinda C. Grenier

Brian D. Johnson, Ph.D.

Alethea P. Miller

Honorable David Moon

Kathleen C. Murphy, Esq., *representing Attorney General Brian E. Frosh*

Honorable James P. Salmon

Kyle E. Scherer, Esq.

Lisa M. Spicknall-Horner

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 Vice-Chair, Judge Shannon E. Avery, called the meeting to order. Judge Avery indicated that MSCCSP Chair, Judge Brett R. Wilson, was unable to attend the meeting and that she would be serving as acting chair in his absence.

#### 2. Declaration of quorum

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

#### 3. Approval of minutes from February 7, 2022, MSCCSP meeting

The minutes were approved as submitted.

#### 4. Review of Senate Bill (SB) 763 – Dr. David Soulé

*Introduction.* Dr. Soulé stated that the purpose of the videoconference meeting is to discuss Senate Bill (SB) 763. 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 SB 763 and then discuss the impact on the MSCCSP.

If enacted, SB 763 would require the Administrative Office of the Courts (AOC), with the cooperation of each State's Attorney, to collect and provide to the MSCCSP approximately 75 data points for each case prosecuted. For example, the data points include, but are not limited to the following:

- case number;
- the defendant's race, gender, and disability status, if any;
- the incident date;
- the arrest date;
- the district or neighborhood of arrest;
- the primary arresting agency;
- the charges listed on the arresting agency's paperwork;
- if applicable, the reason the State's Attorney declined to prosecute the arrest;
- the charges brought by the State's Attorney;
- the prosecutor who brought the charge;
- whether the defendant was determined eligible for court-appointed counsel, and the proceeding where the determination was made;
- the arraignment date;
- the charge modification date;
- whether diversion was offered;
- whether the charge carries a mandatory minimum sentence;
- the prosecutor's recommendation on bail or bond, including release conditions;
- whether bail or bond was imposed on the defendant;
- release conditions;
- information on whether a risk assessment or other algorithm-based or quantitative tool was used in determining whether pretrial detention was ordered or the amount of bail or bond;
- whether a plea was offered;
- whether a time limit was provided with a plea offer;
- all terms of all pleas offered;
- whether the plea was accepted or rejected;
- whether discovery was offered to the defendant before the plea;
- the date discovery was disclosed to the defense or defendant;
- the presiding judge at the pretrial stage;
- the case disposition;
- the presiding judge at the disposition;
- the disposition date;
- the sentence type;
- the sentence length;
- the presiding judge at sentencing;
- supervision terms;



- services required or provided, if any; and
- forfeiture of property required, if any.

Dr. Soulé noted that the proposed legislation would also require the AOC to record and maintain the information for at least 10 years. The proposed legislation would require each State's Attorney to cooperate with the AOC to provide any data necessary to meet the requirements of the proposed legislation. SB 763 would also require each State's Attorney to make publicly available certain information regarding the State's Attorney's policies and practices by (1) publishing the information on the State's Attorney's website and (2) providing the information to any person who requests the information directly from the State's Attorney.

Dr. Soulé directed Commissioners' attention to the MSCCSP's role in the legislation beginning on page 15, line 15 of the bill. Specifically, SB 763 would require the MSCCSP to determine the way the AOC provides certain information to the Commission. The proposed legislation would also require the Commission, in coordination with the AOC, to ensure that disclosure of information under the proposed legislation is performed in a uniform and consistent manner. The proposed legislation would also require the Commission to determine an implementation schedule and plan by which the AOC will disclose the collected information. The implementation schedule and plan may include implementation on a rolling basis that starts by prioritizing a subset of the data collected or that prioritizes disclosure from larger State's Attorney offices.

Dr. Soulé went on to explain that SB 763 would require the AOC, on or before October 1, 2023, to begin disclosing data, stripped of any individualized or identifying personal information about any person arrested or prosecuted, to the Commission for the immediately preceding calendar year. By May 1, 2024, and annually thereafter, MSCCSP must begin publishing online the data collected relating to prosecutions in a modern, open, electronic format that is machine-readable, machine-searchable, and readily accessible to the public on the Commission's website. By September 1, 2024, the MSCCSP must report on the data received from the State's Attorneys, comparing and contrasting the practices and trends among jurisdictions, although it is not specified what practices and trends are expected to be analyzed. Additionally, at least twice per year, the MSCCSP must publish issue-specific reports that provide in-depth analysis of one or more areas of prosecutorial decision making, and at least one report must focus on racial disparities. The proposed legislation would also require the Commission to determine an implementation schedule and plan by which the AOC will disclose the collected information on or before October 1, 2025.

Dr. Soulé pointed out that staff believes the dates in the bill may be off. The implementation plan and schedule by which the AOC will disclose the data collected are due October 1, 2025, yet the MSCCSP is to begin receiving data from the AOC by October 1, 2023, and publishing it and producing reports in 2024. It seems that the implementation plan and schedule should be in place prior to when the MSCCSP needs to start receiving and publishing the data. If the bill proceeds, the corresponding dates may need to be revised.

*Operational and Fiscal Impact.* Dr. Soulé next reviewed the operational and fiscal impact of the legislation on the MSCCSP. For several reasons, the proposed legislation would have a significant fiscal impact on the Commission. To comply with SB 763, the Commission would need to create and host a database capable of storing extensive information for an



estimated 750,000 prosecutions per year. This is the first major impact on the work of the Commission, as SB 763 would expand substantially the number of cases tracked by the MSCCSP and would expand the scope of the Commission's work beyond criminal sentencing to include all prosecution charging decisions, practices, etc. Dr. Soulé explained that the estimated 750,000 prosecutions per year is based on the number of circuit court criminal filings, District Court criminal filings, and motor vehicle filings from FY 2019, which was the last full fiscal year before COVID. The Commission's data are currently limited to guidelines-eligible sentencing, which generally include original convictions and sentencing in the State's circuit courts. SB 763 would expand the universe of data to all prosecutions, which is substantially larger. For comparison, in FY 2019, the MSCCSP received data for just over 11,000 guidelines-eligible sentencing events (in comparison to 750,000 prosecutions per year).

The second major impact is that the MSCCSP would need to create a data tool for the Commission's website and would need to develop a website application/program to publish data in a modern, open, electronic format that is machine-readable, machine-searchable, and readily accessible on the Commission's website. The estimated cost for the development of the website application, SQL server acquisition costs, data hosting services, purchase of dedicated servers for storing the data, and the hiring of a database administrator/IT system programmer is approximately \$265,000 in year one and \$155,000 per subsequent year, plus incremental increases for service cost increases and salary adjustments. The MSCCSP current fiscal year budget is \$573,117, so the year-one estimate would represent approximately a 46% increase.

Dr. Soulé stated that a final point to note about the legislation is that it will require the Commission to publish data that identifies individual judges and individual prosecutors. As outlined on page 11, line 8, the AOC is to disclose data stripped of any individual or identifying personal information about any person arrested or prosecuted. However, the legislation does not indicate that judge information (pretrial bail judge, disposition judge, and sentencing judge) shall be de-identified. Accordingly, the legislation would necessitate a change in the MSCCSP policy regarding publishing of data by individual judge.

Dr. Soulé concluded by noting that the hearing for SB 763 in the Senate Judicial Proceedings Committee is scheduled for Tuesday, March 1, 2022, at 1:00 pm. Further, the bill is cross-filed in the House (House Bill 1429), but because it was filed late in the session, the bill is not assigned to the House Judiciary Committee and instead will go directly to the Rules & Executive Nominations Committee. As such, Dr. Soulé was not sure that there would be a hearing in the House. Dr. Soulé reminded Commissioners that the MSCCSP may choose to approve, oppose, or take no position. Another option is that the MSCCSP could submit written testimony for informational purposes only. This is an approach that is often taken by agencies with respect to legislation that affects their operations. At a minimum, it may be helpful if the Commission simply notes that this legislation cannot be implemented by the Commission unless appropriate funding is included.

With the conclusion of his report, Dr. Soulé opened the meeting to questions and discussion.



**5. Discussion and vote whether to support, oppose, or take no position – Judge Shannon E. Avery (Action item)**

Judge Avery called for questions and discussion. Delegate Moon indicated that once again he would abstain from the vote since the bill may come before him in the legislature. He confirmed that Dr. Soulé was correct in noting that the bill was cross-filed in the House late, and thus it is unclear if there will be a hearing. It will be up to the leadership to pull the bill out for a hearing. Otherwise, the bill will only be heard in the House if the Senate chooses to advance it. Delegate Moon expressed that he was curious about the genesis of the bill. He surmised that it may be related to the Judicial Transparency Act, which he noted he had previously described as a targeted or weaponized transparency bill. Delegate Moon wondered if perhaps the current bill was intended to be the opposite by doing a deeper dive and analysis of a large number of data points in order to gain a better understanding. He noted there are positives to the approach, and he would be interested in some of the mentioned data points. He questioned if funding were aplenty, whether folks would be opposed to what the bill proposes, setting aside the concerns about attaching identifying information to specific judges.

Dr. Soulé responded that it was unfortunate that Senator Sydnor (the bill's sponsor) was currently tied up in a hearing and unable to participate in the meeting, as he would be best able to speak to the genesis of the bill.

Judge Avery noted that while the Judiciary is opposed to the bill, it is not opposed to all the data points in the bill. The Judiciary sees the value in collecting data and recognizes that it provides important information. A primary concern is that the Judiciary's data system is incapable of producing much of the required data. Judge Avery explained the overriding issue with regard to the Sentencing Commission is that the amount of data to be collected and analyzed is enormous and far exceeds the mission and the enabling legislation that created the Commission. She noted it is an example of the adage "no good deed goes unpunished" and in some ways is a tribute to the sound, non-partisan approach to data collection and analysis conducted by the Commission staff. Because the staff do a good job, there are those who would like them to do all of the jobs, even if outside of the scope of the MSCCSP.

Commissioner Zaremba asked what additional staffing would be needed to accommodate the requirements of the bill. Dr. Soulé responded that in the fiscal note, the MSCCSP asked for one full-time database administrator/IT system programmer. He added that the other requests in the fiscal note pertain to the costs associated with hosting the data, as the MSCCSP currently does not have the infrastructure in place to host such a large amount of data. Commissioner Zaremba noted the required reports would necessitate personnel resources as well.

Commissioner Finci stated that what jumped out to him about the bill is the day-to-day, incalculable impact it would have on practitioners. He noted for example that when negotiating a plea agreement, there may be numerous back and forth conversations between the prosecutor and the defense, and the burden placed on prosecutors to record that information would be great; and that is just one data point of many. Commissioner Finci echoed Judge Avery's comment regarding the value of data, but he believes the impact of the bill the way it is currently written is beyond reasonable or rational.

Dr. Soulé explained that the same legislation was introduced last year. However, it did not come to the Commission's attention, because it did not specify any involvement by the



Commission. Instead, last year's legislation specified that the Governor's Office of Crime Prevention, Youth, and Victim Services would collect and analyze the data. Dr. Soulé noted also that the statements from State's Attorney Offices responding to the bill last year indicated it would require a substantial lift to provide the requested information.

Commissioner Miller commented that she works in a State's Attorney's Office and confirmed that her colleagues have expressed the bill would be a very heavy lift for prosecutors and would require a lot fiscally that the office just does not have. Further, she wondered how all the data would be used and what changes were expected to come as a result.

Delegate Bartlett shared that generally when the legislature puts forth a data collection bill, it is for the purpose of making evidence-based decisions. Sometimes the resulting data and reports indicate a need for change, and the legislature uses those resources to decide on proposed bills for change. Delegate Bartlett questioned the impetus for the current bill and why the Sentencing Commission is included. She also wondered if perhaps there could be an amendment to the bill to create a pilot program with a more manageable number of requirements.

Dr. Johnson expressed that as a social scientist, he is all for data collection and analysis, noting that many policy questions can be informed by better data. He further noted that among the members of the Commission, he is probably one who would be most in favor of data collection. But he is not in favor of this bill, because as Judge Avery noted, it fundamentally changes the scope of the Commission's mission and work. Dr. Johnson explained that it does not seem that the Commission is the right entity to be charged with collecting data and producing reports on issues that do not fall under the purview of the Commission (such as prosecution and bail). He concluded that from his perspective, data collection is great; but this bill, and what it is asking the Commission to do, does not make a lot of sense.

Dr. Soulé responded that it would be helpful to hear from Senator Sydnor why the Sentencing Commission was included in the bill in place of the Governor's Office of Crime Prevention, Youth, and Victim Services. He wondered if, as Judge Avery had surmised, Senator Sydnor thought it would be better to have an independent agency involved in collecting and analyzing the data. Dr. Soulé noted however, that whether that is consistent with the Commission's enabling legislation is a fair question.

Judge Avery noted that while Judge Wilson was unavailable to participate in the meeting, he had shared his position on the bill in advance of the meeting. Specifically, Judge Wilson expressed that consistency would require taking a position on the bill as with the Judicial Transparency Act. Further, that position should be opposition since monitoring State's Attorneys is not consistent with the MSCCSP intent. Judge Avery expressed agreement with Judge Wilson's comments.

Hearing no additional discussion from the members present, Judge Avery asked if anyone wished to make a motion.

**Commissioner Finci responded that he would so move to oppose the legislation and to adopt the position Judge Avery just described. Commissioner Miller seconded the motion. By unanimous vote with 5 abstentions, the Commission voted to oppose SB 763.**

Dr. Soulé explained that the staff would draft the statement in opposition and would circulate it to the Chair and Guidelines Subcommittee to finalize.



Judge Avery and Dr. Soulé thanked the Commissioners for their time and participation in the meeting. The meeting adjourned at 6:39 p.m.