



Minutes

Maryland State Commission on Criminal Sentencing Policy
Videoconference
May 11, 2021

Commission Members in Attendance:

Honorable Brett R. Wilson, Chair
Honorable Shannon E. Avery, Vice-Chair
Senator Robert G. Cassilly
Delegate Luke H. Clippinger
Chief Douglas DeLeaver
Honorable Brian L. DeLeonardo
Richard A. Finci, Esquire
Secretary Robert L. Green
Melinda C. Grenier
Brian D. Johnson, Ph.D.
Senator Delores G. Kelley
Honorable Patrice E. Lewis
Lisa Marts, Esquire, *representing Attorney General Brian E. Frosh*
Alethea P. Miller
Honorable James P. Salmon
Donald Zaremba, Esquire, *representing Public Defender Paul DeWolfe*

Staff Members in Attendance:

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

1. Call to order

MSCCSP Chair, Judge Wilson, called the meeting to order. He welcomed Lisa Marts, who is representing the Office of the Attorney General at the meeting. Judge Wilson noted that Ms. Marts is the current Deputy Director of Medicaid Fraud and is a former prosecutor for Harford County and Baltimore City, specializing in victims' rights crimes.

2. Roll call and declaration of quorum

The meeting began at 5:35 pm when attendance reached a quorum.

3. Approval of minutes

- a. December 8, 2020, MSCCSP business meeting
The Commission approved the minutes as submitted.
- b. December 8, 2020, public comments hearing
The Commission approved the minutes as submitted.



4. Guidelines Subcommittee Report – Judge Shannon Avery, Dr. David Soulé, Dr. Stacy Najaka and Sarah Bowles

Judge Avery noted that the Guidelines Subcommittee met on April 27 and initiated a review of cell-by cell compliance analysis conducted by the MSSCSP staff and reviewed the sentencing guidelines related to online child pornography and sexual solicitation of a minor. Judge Avery indicated that staff would present these two discussions. Dr. Soulé noted that Dr. Najaka would present the preliminary review *of compliance by cell*, and Ms. Bowles would present the *review of offenses involving child pornography or sexual solicitation of a minor*.

a. Preliminary review of cell-by-cell compliance analysis (Status item)

Dr. Najaka stated that the Guidelines Subcommittee initiated the Commission's planned review of guidelines compliance for individual matrix cells at its April meeting. The primary purpose of the review is to examine whether the 65% compliance benchmark is being met within the cells of the three matrices and to consider whether any changes to the guidelines ranges are warranted. Dr. Najaka noted that the materials provided for the Commission meeting include a memo summarizing the analysis undertaken thus far and three corresponding sets of tables. Dr. Najaka noted that the review is ongoing and is expected to span multiple Guidelines Subcommittee and Commission meetings. The Subcommittee is not requesting any action by the Commission at this time but would like to briefly inform the Commission of the progress of the review and the next steps to be taken.

Dr. Najaka noted that the Maryland State Commission on Criminal Sentencing Policy (MSCCSP or Commission) typically undertakes a review of compliance by cells every three to five years. The last review examined data from fiscal years 2009 through 2013 and concluded in December 2015 with the Commission's decision to revise the drug matrix for seriousness categories IV and V offenses. The revisions were adopted in COMAR effective July 1, 2016.

Dr. Najaka noted that the Commission considered, at its May 2019 meeting, the timing of its next review and ultimately decided to postpone the review until early 2021. This decision was made to allow for the collection of sufficient data following two events of note: (1) the July 2016 revisions to the drug matrix and (2) the October 2017 revisions to the seriousness categories for a number of common offenses in response to the Justice Reinvestment Act (JRA). Waiting until 2021 to initiate the review permitted the collection of three full calendar years of post-JRA sentencing guidelines data. Dr. Najaka stated that one important point to note is that the sample size for the current review is smaller than usual because the period examined is only three years instead of the typical five years. In addition, several months during the three-year period examined were marked by fewer than normal cases due to the impact of COVID on the court's processing of cases.

Dr. Najaka noted that three sets of tables were prepared to initiate the review. The first table details guidelines compliance by cell for the three matrices (drug, property, and person). The second table details strict guidelines compliance by cell for the three matrices. The third table details sentences by cell separately for three groups: (1) all



sentencing events, (2) ABA plea sentencing events, and (3) sentencing events with other dispositions. Dr. Najaka noted that separating ABA plea cases from those with other dispositions permits consideration of whether sentences differ for these two groups.

Dr. Najaka noted that before briefly summarizing the results, she would like to provide a quick reminder of the difference between the definition of standard compliance and that of strict compliance. Several factors determine standard compliance. First, a sentence is guidelines-compliant if the initial sentence (defined as the sum of incarceration, credited time, and home detention) falls within the applicable guidelines range. Second, sentences that involve no post-sentence incarceration but fall above the upper guidelines limit due to credit for time served are guidelines-compliant. Third, sentences to corrections options programs are guidelines-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, sentences pursuant to an ABA plea agreement are guidelines-compliant. The data utilized for the current review are based on sentences prior to the recent name and definition changes for a guidelines-compliant plea. As such, the terms “ABA plea agreement” here indicate a guidelines-compliant plea. In comparison, strict compliance considers a sentence guidelines-compliant only if the initial sentence falls within the applicable guidelines range.

Dr. Najaka noted that some cells in the provided tables are highlighted in yellow, while others are highlighted in blue. All highlighted cells have a compliance rate less than the Commission’s 65% benchmark. The yellow cells have at least 50 cases, while the blue cells have fewer than 50 cases. Statistics in the blue cells should be interpreted with caution since they are based on a small sample size. As such, the findings highlighted in the memo focus on those cells with 50 or more total cases.

Dr. Najaka stated that, when looking first at the set of tables detailing standard compliance by cell, the compliance benchmark is being met in the overwhelming majority of cells. Only five of 224 cells (2.2%) have a compliance rate less than 65% and at least 50 total cases. Further, compliance rates for these five cells are not far below 65%.

Dr. Najaka stated that the set of tables detailing strict compliance by cell paints a different picture, with more than one-quarter of cells failing to reach 65% compliance. Specifically, 59 of 224 cells (26.3%) have a strict compliance rate less than 65% and at least 50 total cases, including most of the seriousness category IV drug matrix cells that were revised in 2016. In the vast majority of cells where the strict compliance rate is less than 65%, departures below the guidelines well exceed departures above the guidelines.

Finally, Dr. Najaka noted that the set of tables summarizing sentences by cell indicates there is no singular sentence pattern in cells with strict compliance below 65%. In some instances, sentences are lower for ABA plea cases; in some cells, they are lower for cases with other dispositions; and in some cells, there is little difference in sentences.

Dr. Najaka stated that the Guidelines Subcommittee discussed these findings at its April 27 meeting and agreed that the next step in the review should be to examine where the middle 65% of sentences fall for each cell. The Subcommittee also agreed that the impact of the COVID pandemic on sentences and guidelines compliance should be assessed. In



advance of the next Guidelines Subcommittee meeting, staff will prepare materials to help inform this next step of the review.

Judge Wilson asked if any Commissioners had questions regarding the compliance by cell review. Hearing no questions, Judge Avery thanked Dr. Najaka for her presentation and stated that the Guidelines Subcommittee looks forward to the next report.

b. Review of online child sex abuse offenses (Action Item)

Judge Avery noted that Ms. Bowles would present this agenda item.

Ms. Bowles stated that, Joyce King, an assistant state's attorney in the Frederick County State's Attorney's Office, provided testimony at the Commission's December 2020, Public Comments Hearing, on behalf of the Frederick County Cyber Crimes Task Force and the Maryland State's Attorney's Association, to request an increase in the guidelines for online child sex abuse and exploitation offenses in Maryland, specifically the possession and distribution of child pornography and sexual solicitation of a minor.

In her testimony, Ms. King noted that the Maryland General Assembly, in recent years, has expanded Maryland statutes related to the online sexual abuse and exploitation of children to bring them in line with Federal standards, thereby recognizing the severity of these crimes, and suggested that the expansion of crimes covered by Maryland laws warrants an increase in the sentencing guidelines.

Ms. King offered two suggestions. First, Ms. King suggested that the seriousness categories for these offenses may be increased. Second, Ms. King suggested that, given the permanent nature of the internet, these offenses should be awarded permanent victim injury points. With respect to this second suggestion, Ms. King noted that images placed on the Internet and disseminated online exist in perpetuity. The victims of these crimes suffer lasting psychological consequences and are revictimized every time an image is viewed, possessed, or distributed. Therefore, permanent victim injury points may be appropriate in cases involving child pornography.

In response to Ms. King's testimony, the Commission agreed to review the possession and distribution of child pornography and sexual solicitation of a minor. Ms. Bowles noted that the Guidelines Subcommittee reviewed the issue at its April 27 meeting. Specifically, the Guidelines Subcommittee reviewed two proposed revisions to the sentencing guidelines. One, the Guidelines Subcommittee reviewed increases to the seriousness categories for these offenses. Two, the Subcommittee reviewed revised language for the Maryland Sentencing Guidelines Manual (MSGM) and COMAR that would award permanent victim injury points to offenses involving evidence of child pornography.

The Subcommittee ultimately decided against increasing the seriousness categories for offenses involving child pornography or sexual solicitation of a minor, as seriousness category reviews are driven primarily by an assessment of comparable offenses based on offense type and statutory maximum penalty. The Commission sets seriousness categories following the lead of the penalty prescribed by the Legislature. In this instance, more stringent seriousness categories would not be proportional to similar offenses with similar statutory maximum penalties.



The Subcommittee unanimously agreed to recommend to the Commission revisions to the MSGM and COMAR to instruct that permanent victim injury points shall be assigned in cases involving photographic or video evidence of child pornography.

Ms. Bowles noted that the corresponding memorandum provides a review of how offenses involving child pornography and sexual solicitation of a minor are treated in other jurisdictions with sentencing guidelines and provides an analysis of sentencing trends for these offenses prosecuted in Maryland circuit courts. Additionally, the memo provides revised language for instructions pertaining to the scoring of permanent victim injury that the Guidelines Subcommittee recommends the Commission adopt. Finally, the memo provides several sample scenarios illustrating how the recommended guidelines ranges for these offenses would vary if the instructions for scoring victim injury points for these offenses is revised.

Ms. Bowles provided a summary of the sentencing trends staff identified when looking at the sentencing guidelines worksheet data. Specifically, staff looked at offenses involving the possession of child pornography, the manufacture or distribution of child pornography, or the sexual solicitation of a minor that were sentenced from 2016 through 2020. During this period, the MSCCSP received a sentencing guidelines worksheet for 605 sentencing events involving 1,039 of these offenses. The most common of these offenses was possession of child pornography, followed by manufacture, distribution, etc. child pornography, and sexual solicitation of a minor. Ms. Bowles noted that, while each of these offenses has an increased subsequent offender penalty, the MSCCSP received few worksheets for defendants sentenced pursuant to subsequent offender statutes during this period.

Ms. Bowles stated that, on average, defendants convicted of these offenses were more likely than other defendants to be older, male, and white. Additionally, nearly 80% of these defendants had no prior adult criminal record, which is notable compared to the average of all defendants in which approximately 34% have no prior adult criminal record.

Just over 60% of defendants convicted of these offenses received a sentence that included incarceration. Just over half of defendants received a period of post-sentence incarceration, or incarceration beyond credit for time served.

The majority of sentences for offenses involving child pornography or sexual solicitation of a minor were guidelines-compliant. When a departure from the guidelines occurred, it was more likely to be above versus below the guidelines. This is notable, because when looking at all offenses or just person offenses, when departures occur, they are typically more likely to be below versus above the guidelines.

Victim injury points were rarely assigned to offenses involving child pornography or sexual solicitation of a minor. Special victim vulnerability points were assigned in about half of these offenses, though the percentage varies by offense. More than half of offenses involving the manufacture, distribution, etc. of child pornography or the possession of child pornography were assigned points for special victim vulnerability, whereas the majority of offenses involving the sexual solicitation of a minor were not assigned points for special victim vulnerability, suggesting that most victims of sexual solicitation of a minor are over the age of 11 years.



Ms. Bowles noted that a more detailed analysis of these trends and a breakdown by offense is provided in the Appendix at the end of the memo.

Ms. Bowles stated that the Guidelines Subcommittee recommends that Chapter 6.1 of the MSGM and the corresponding COMAR section (both pertaining to the scoring of Part B of the offense score or victim injury points) be revised to read that, “Offenses involving photographic or video evidence of child pornography shall be scored as permanent victim injury.”

Ms. Bowles noted that this language is intended to apply permanent victim injury points to all offenses involving photographic or video evidence of child pornography, including but not limited to the possession, manufacture, or distribution of child pornography. For instance, permanent victim injury points would be awarded in a case involving sexual solicitation of a minor or electronic harassment if that offense involved photographic or video evidence of child pornography.

Finally, Ms. Bowles noted, the memo provides a series of tables that illustrate how revising the instructions for scoring permanent injury points would impact the recommended guidelines ranges. For illustrative purposes, the guidelines were calculated for a defendant with no prior record (as the majority of these defendants have no prior record). Ms. Bowles noted that applying permanent victim injury points increases the guidelines for these offenses, and in some cases, removes probation from the low end of the guidelines. Ms. King had indicated this is significant because the overwhelming majority of sex offenders have no prior adult criminal record and therefore the current guidelines often do not reflect the seriousness of these criminal events.

Judge Avery noted that Guidelines Subcommittee discussed this issue at length. Judge Avery asked that Commissioners take this time to discuss any questions or concerns about the proposed revision to the guidelines.

Mr. Zaremba expressed concerns with the proposed revisions. Mr. Zaremba suggested that the proposed revisions would change the way the concept of victim injury is used in the guidelines by presuming injury in certain types of cases. Mr. Zaremba noted that the revised language would not be consistent with how other offenses are treated within the guidelines or with how other jurisdictions provide enhancements for these types of cases. In other jurisdictions, enhancements for offenses involving child pornography are based on the number of images possessed or the age of the child. The proposed revisions to the Maryland sentencing guidelines provide that permanent injury occurs in every case, regardless of the facts of the case.

Mr. Zaremba stated that he would like to briefly address the three reasons Ms. King put forth in her argument as to why these changes to the guidelines are necessary. Ms. King’s first reason is that the General Assembly recently expanded Maryland statutes to bring them in line with federal standards. Mr. Zaremba stated that the primary change to Maryland law was to add computer-generated images to the list of materials covered by laws prohibiting the possession and distribution of child pornography. Mr. Zaremba asserted that expanding the types of offenses covered by the statute was not an argument for increasing the guidelines. Mr. Zaremba further noted that comparing Maryland laws to federal statutes, particularly those related to the possession of child pornography, would be like comparing apples to oranges. Mr. Zaremba cited *Payne v. State*, 243



Md.App. 465 (2019), and noted that the federal statute prohibiting the possession of child pornography makes the unit of prosecution the medium on which pornographic images are contained (e.g., a hard drive). For instance, if someone has a hard drive containing 100 images of child pornography, that is considered one offense under the Federal statute. Mr. Zaremba noted that Maryland law is different, in that the unit of prosecution is the image. If someone possessed 100 different images of child pornography, that could result in 100 charges of possession of child pornography in Maryland. Mr. Zaremba suggested that the difference in the unit of prosecution may be why the federal system provides for enhancements based on the number of images. For those reasons, Mr. Zaremba does not think Ms. King's first argument is applicable to increasing Maryland's sentencing guidelines in cases involving child pornography.

Ms. King's second reason as to why the guidelines need to be revised is that they do not consider the permanent nature of internet. Mr. Zaremba suggested that may be true with distribution charges but expressed uncertainty that victim injury could be presumed in every case of possession. Mr. Zaremba noted that, under the current COMAR definition of victim injury, "Victim injury, whether physical or psychological, shall be based on reasonable proof." The revisions proposed by the Guidelines Subcommittee would require changing that definition because the injury would be presumed, whether or not reasonable proof exists. Mr. Zaremba cited the instance of a computer-generated image that is possessed by an individual, but not distributed, and suggested that the proposed revisions are counter to the concept of victim injury contained elsewhere in the guidelines. Current victim injury contemplates some kind of physical or mental distress to a real person, though Maryland law provides that a person may be convicted of possession of child pornography for an image that does not involve a real person. Mr. Zaremba additionally noted an instance in which a minor sends a pornographic text message to an 18-year-old who does not immediately delete the image off of his or her phone. Mr. Zaremba suggested that the sentencing guidelines cannot presume that the image is going to be disseminated on the internet forever. Mr. Zaremba noted that, by law, at the conclusion of such a case, the pornographic image is supposed to be destroyed. Absent proof that the image was further disseminated, Mr. Zaremba suggested that permanent victim injury cannot be presumed in each and every case. Mr. Zaremba noted that there certainly exist cases in which you can presume injury but based on the breadth of Maryland's child pornography statute, there are also cases where you cannot presume permanent injury. Mr. Zaremba stated that adding points in every case involving child pornography would presume injury where it does not exist.

Ms. King's third reason as to why the guidelines need to be revised is that research shows the progressive nature of online sex offenses and a high recidivism rate among those convicted. Mr. Zaremba noted that, under Maryland's system of jurisprudence, people are not penalized or given enhanced punishment for who they are, but rather for what they do. Further, Criminal Law Article (CR), § 11-208 already provides an enhancement for subsequent offenders. A first offense for possession of child pornography is a misdemeanor with a maximum penalty of five years incarceration, while a subsequent offense is a felony with the maximum penalty of 10 years incarceration. Therefore, Mr. Zaremba suggested, the statute itself provides remedy if there is a progressive nature to online sex offenses. Mr. Zaremba suggested that, if there is going to be a uniform



enhancement of the sentencing guidelines for each and every child pornography case, it is the province of the General Assembly to increase the punishment. Mr. Zaremba expressed concern that the guidelines would be revised to presume injury which, currently, is defined as “physical or psychological injury to the crime victim, the cause of which is directly linked to the conduct of the defendant in the commission of the convicted offense.” Mr. Zaremba noted that injury may occur in many cases involving child pornography, but not all. For those reasons, Mr. Zaremba expressed concern with the Guidelines Subcommittee’s recommendation.

Senator Kelley noted that, as a lay person and not a lawyer, it was her opinion that as long as image is out there, the person portrayed in the image is going to be revictimized every time that image is viewed, possessed, or shared, regardless of the number of times. Senator Kelley stated that, from her perspective, the Guidelines Subcommittee made a lot of sense in presenting its recommendation.

Mr. Zaremba noted that, in many instances involving child pornography, injury occurs. Mr. Zaremba wanted to note, though, that an individual can be charged and convicted for possession of pornography when there is no person involved (i.e., the offense involves a computer-generated image created by the defendant). Mr. Zaremba suggested that concerns about revictimization and distribution of the image do not apply in instances of computer-generated images. Mr. Zaremba suggested that it would be a stretch to have a sentence enhancement based on permanent victim injury when the victim is a computer-generated image.

Senator Kelley noted that real people often appear identical to computer-generated images. In such a case, when a member of the public sees the image and assumes it is an actual person, that person is just as humiliated.

Judge Avery noted that she had never heard of someone being charged with child pornography based solely on a computer-generated image. Judge Avery assumed that such an act would be charged as obscene material, which is a misdemeanor and would originate in the District Court (where the guidelines do not apply) as opposed to a circuit court. Judge Avery asked Mr. Zaremba if he had experience with prosecutions that involved charges based solely on non-human depictions. Mr. Zaremba replied that he had not seen any such cases yet but noted that Maryland law was not revised to include computer-generated images until 2019. Mr. Zaremba noted that the addition of computer-generated images to the child pornography statute were part of the revisions made by the General Assembly, purportedly, to bring Maryland law more in line with what is criminalized federally.

Judge Avery noted that the Guidelines Subcommittee’s recommendation is a policy change that reflects current thinking and is consistent with Maryland law and the unit of prosecution. Judge Avery noted that the unit of prosecution tracks the unit of harm. The Subcommittee is suggesting that every image that depicts child sexual abuse has its own independent and discreet harm. Judge Avery stated that it is known from research and victim testimonials that children are harmed by sexual abuse and child pornography, and its depiction continues to harm the child forever. Judge Avery stated that the Guidelines Subcommittee believes the proposed policy change reflects that reality in the same way Maryland law reflects the harm that is caused by the reproduction, dissemination, and



possession of images of child sexual abuse. Judge Avery noted that the Subcommittee had an extensive discussion regarding these concerns. Judge Avery suggested that she does not see prosecutors pushing child pornography charges or permanent victim injury points in cases involving completely virtual, non-human images or in cases in which teenagers were sexting and there may be an argument that the image was consensual. Judge Avery noted that the Legislature has addressed these concerns in terms of developing Maryland's obscene materials statute and educating State's Attorneys. Judge Avery further noted that the guidelines provide for judicial discretion. Judge Avery stated that the Guidelines Subcommittee did not see this small subset of unique cases being a bar to a good policy change that addresses and reflects current thinking regarding images of child abuse.

Judge Wilson noted that the language from Criminal Law Article (CR), § 11-208 provides that, for a computer-generated image to qualify as child pornography, it must be "indistinguishable from an actual and identifiable child," which means that "an ordinary person would conclude that the image is of an actual and identifiable minor." Judge Wilson noted that the law does not refer to cartoon depictions.

Mr. Zaremba stated that he agreed with Judge Avery's observations, in that many child pornography cases involve long-lasting mental anguish and distress. Mr. Zaremba noted that his concern is that because of the breadth of the child pornography statute, permanent injury may not be true in every case. Mr. Zaremba stated that it is unfair to have a sentence enhanced in a case where injury is not permanent. Mr. Zaremba noted that prosecutors may exercise their discretion and not bring certain types of cases, but there is a reported opinion (*In re: SK* (2019)) in which a prosecutor sought conviction of a minor for sexting her own image. Mr. Zaremba expressed that he does not share the same confidence that prosecutors would exercise discretion in the absence of any kind of demonstrable victim injury. Mr. Zaremba suggested that the sentence enhancement apply to the distribution of child pornography but noted that one cannot presume permanent victim injury in each and every possession case. Mr. Zaremba noted that this is especially true in a case where the image is sent by a minor to an individual's phone. By law, if an image is just on an individual's phone, that image must be destroyed at the conclusion of the case. Mr. Zaremba suggested that there are enough instances in which injury is not present in possession cases that should an enhancement be applied in every possession case, it should be mandated by the Legislature.

Senator Kelley suggested that psychological distress may lead a minor to send a pornographic image of themselves and noted that it would not be a good argument against adopting the recommendation of the Guidelines Subcommittee.

Judge Avery noted that the defendant in *In re: SK* was charged as a juvenile. As such, the guidelines did not apply to the case. Mr. Zaremba noted that he provided the case as an example and was generally referring to a case where an image is sent by a minor to a person 18 years or older and that person does not immediately delete the image from their phone. In that instance, the adult may be charged with possession of child pornography. Mr. Zaremba stated that he does not have faith in all prosecutors not to bring charges in such a scenario. Judge Avery noted that judges, as well as prosecutors, can exercise discretion.



Mr. DeLeonardo stated that he is fully supportive of the Guidelines Subcommittee's recommendation. Mr. DeLeonardo noted that one issue he has observed is that of an adult coaxing or soliciting a child to send pornographic images of themselves. Mr. DeLeonardo suggested that just because the minor sends the image themselves, it does not change the victim status of the child any more than it would for sexual abuse. The reality is that the victimization is in the image. Mr. DeLeonardo agreed with Judge Avery in that, in an exceptional case where the defense believes there is prosecutorial overreach, it may be addressed in court. Similar to how the Commission recently revised the definition of special victim vulnerability, ultimately the matter of assigning victim injury points will be a decision for the judge. Just because a child sends a sexual image themselves, Mr. DeLeonardo suggested that the Commission should not take the position that it is anything other than permanent abuse. Mr. DeLeonardo noted that presuming that a minor sending an image is a voluntary act is the same as saying a child having sexual relations with a 23-year-old is voluntary, and it is not. Mr. Zaremba stated that he is in no way arguing that a child being solicited or pressured into sending an image is not child abuse and stated that was not his example. Mr. DeLeonardo noted that you could have a 23-year-old who receives the image and does not delete it. Such scenarios often lead to redistribution of the image. Even though the initial image was not solicited, that image is now public. If the individual does not take action to immediately delete that image off of their phone, that is something the judge should consider.

Judge Wilson stated that the proposed revision to scoring victim injury points is an action item. Judge Wilson asked Judge Avery if the Guidelines Subcommittee wished to move on the issue. Judge Avery stated that, yes, the Guidelines Subcommittee would like to move on its recommendation to add language under Chapter 6.1B of the MSGM to instruct that permanent victim injury points shall be applied in cases involving photographic or video evidence of child pornography. Judge Avery asked for a motion. Judge Lewis made a motion to adopt the language. Senator Kelley seconded the motion. Judge Wilson asked if any Commissioner was in opposition to the motion. Mr. Zaremba opposed the motion. Judge Wilson asked Dr. Soulé to take a roll call vote. The motion passed, 9 to 1 with 2 abstentions, and the recommended language was adopted.

5. Executive Director Report – Dr. David Soulé

Dr. Soulé reported that he had eight items to review.

a. Recent sentencing guidelines and guidelines offense table amendments (Status report)

Dr. Soulé noted that several amendments to the sentencing guidelines and offense table were adopted since the Commission last met in December 2020. First, on February 1, 2021, the MSCCSP revised the MSGM. Version 12.4 of the MSGM clarifies the instructions for scoring the special victim vulnerability component of the offense score. The MSGM now provides examples of temporary physical or mental limitations including, but not limited to, instances when the offender knew or should have known the victim was pregnant, unconscious, asleep, or intoxicated.

Next, Dr. Soulé reported that on April 1, 2021, the MSCCSP released version 13.0 of the MSGM. MSGM 13.0 provides updated instructions regarding guidelines-compliant



binding pleas by replacing the term “ABA plea agreement” with “MSCCSP binding plea agreement.” Further, Dr. Soulé noted that the definition for an MSCCSP binding plea agreement clarifies that a binding plea involves agreement from all three parties and confirmed that the court maintains the discretion to accept or reject the plea. Finally, the updated language specifies 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.

c. MAGS Updates (Status report)

Dr. Soulé reported that on April 1, 2021, an updated version of the Maryland Automated Guidelines System (MAGS, version 10.0) was deployed to coincide with the adoption date for the previously noted changes regarding guidelines-compliant binding pleas. A *What’s New in MAGS 10.0* document was distributed to highlight that the former “ABA plea agreement” disposition type was replaced with “MSCCSP binding plea agreement,” and the former “Non-ABA plea agreement” has been replaced with “Other plea agreement.” Dr. Soulé further noted that the *What’s New in MAGS 10.0* highlighted several additional updates, including the following:

- The ethnicity and race fields are now mandatory on the *Offender Information* tab. Users will receive an alert if the race and/or ethnicity fields are left blank. These fields were converted to mandatory fields because of an observed high missing rate in the most recent years of data.
- Additionally, MAGS was revised to allow users to enter sentences that fall below the non-suspendable mandatory minimum if the offense involves an “attempt” or “conspiracy.” Pursuant to *DeLeon v. State*, 102 Md. App. 58 (1994), and *Wyatt v. State*, 169 Md. App. 394 (2006), Dr. Soulé advised that both conspiracies and attempts are subject to only the maximum punishment for the crime that the person conspired to or attempted to commit. Unless otherwise outlined in statute, conspiracies and attempts are not subject to the non-suspendable mandatory minimum associated with a given offense. Therefore, unless otherwise outlined in statute, Dr. Soulé noted that when a user selects an offense containing a non-suspendable mandatory minimum, and the offense involves an attempt or conspiracy, the mandatory minimum will no longer display on the *Offense/Offender Score* screen. Further, users are also able to input a total sentence that falls below the non-suspendable mandatory minimum, given that it does not apply in this scenario.
- Next, Dr. Soulé reported that language was added to the *Alternatives to Incarceration* tab to clarify that a defendant’s pre-sentence participation in drug court or other problem-solving court constitutes a “Corrections Options Program” and should be marked accordingly in MAGS.
- Finally, Dr. Soulé advised that the Days Calculator on the *Individual Offense Sentence* screen has been revised to mirror how credit for time served is calculated in Maryland Electronic Courts (MDEC), in that the start date and end date are included when calculating the number of days served.



c. Sentencing Guidelines Webinar Training (Status report)

Dr. Soulé reported that the MSCCSP staff conducted seven webinar trainings since the start of the year. The trainings provided information on the background and goals of the sentencing guidelines, offered an overview of the sentencing guidelines calculation process, provided advice for avoiding common mistakes/omissions, offered examples of more complicated sentencing guidelines scenarios, and described recent amendments to the guidelines with an emphasis on the April 1, 2021, update regarding guidelines-compliant binding pleas.

Dr. Soulé noted that the MSCCSP staff targeted all the various criminal practitioner groups, starting with the Maryland Office of the Public Defender on February 23, 2021. On February 25, 2021, the staff completed a webinar for the Maryland State Bar Association's Criminal Law & Practice Section. Dr. Soulé noted that this session helped to target private criminal defense attorneys along with other members of the Bar Association. On February 26, 2021, the staff presented to the Maryland State's Attorneys' Association. Additionally, on March 3, 2021, and March 10, 2021, Dr. Soulé noted that the staff provided trainings for all general practitioners with a webinar titled, *Maryland Sentencing Guidelines 101*. Finally, on March 5, 2021, and March 23, 2021, the staff presented to judges and court staff a webinar titled, *Making Informed Sentencing Decisions: Enhancing Sentencing Guidelines and Policy Knowledge*.

d. Judiciary feedback meetings/trainings (Status report)

Since the start of the year, Dr. Soulé reported that he has met with judges in multiple jurisdictions to conduct a feedback meeting and review sentencing guidelines data. Since January 1 2021, he has met with the circuit court judges in the following jurisdictions: Anne Arundel, Baltimore City, Baltimore County, Carroll, Charles, Frederick, Howard, Montgomery, Prince George's, and Washington counties.

Dr. Soulé advised that the feedback meetings are an excellent opportunity to review recent guidelines amendments and the activities of the Commission, while also allowing the judges to share their input regarding the sentencing guidelines.

e. Other conference presentations (Status report)

In addition to the previously mentioned training webinars and judiciary feedback meetings, Dr. Soulé reported that he had an opportunity to speak at three additional conferences since the beginning of this year. First, on January 12, 2021, Dr. Soulé noted that he was joined by the MSCCSP Chair, Judge Brett Wilson and Vice-Chair, Judge Shannon Avery, to speak to the Judiciary's Equal Justice Committee Sentencing Subcommittee about how the guidelines work, to describe the data that is collected by the Sentencing Commission, and, finally, to offer recommendations to address equity in criminal sentencing. On February 11, 2021, Dr. Soulé also presented for a graduate seminar at the University of Maryland's School of Public Health. This group asked interesting questions from an outside perspective about the guidelines and the role of the Commission. Finally, on April 29, 2021, Dr. Soulé presented at the 2021 Judicial Conference on utilizing sentencing guidelines to support fair and just criminal sentencing.



Judge Lewis commented that she attended the Judicial Conference session on the sentencing guidelines and, as a member of the Commission, she was very pleased and proud, not only of the presentation, but of how Dr. Soulé addressed questions and challenges. She stated that she also appreciated how Dr. Soulé relayed the generally deliberative process of the Commission and the length of time that goes into the Commission's various discussions. Dr. Soulé thanked Judge Lewis for her remarks.

f. Update on redesigned website (Status report)

Dr. Soulé reported that in April 2021, the MSCCSP launched a redesigned website. The URL for the website remains the same (msccsp.org), but the website has been reformatted and reorganized with an emphasis on making the website more mobile-friendly, so that it renders properly whether it is viewed on a PC, Mac, tablet, or phone. Dr. Soulé noted that the MSCCSP staff hopes that practitioners will find the new website to be an improved, user-friendly resource.

Additionally, Dr. Soulé stated that he was also pleased to report that the MSCCSP staff are currently working with programmers at the Department of Public Safety and Correctional Services to implement similar updates to MAGS so that it is more mobile friendly. This will make it easier to view and edit worksheets on mobile devices and will improve the ability to make changes to guidelines worksheets while in the courtroom if necessary. Dr. Soulé encouraged Commissioners to share any feedback they may have regarding the new website.

g. Sentencing Snapshot report (Status Report)

Dr. Soulé reported that in April 2021, the MSCCSP released the most recent issue of the *Sentencing Snapshot*. The April issue of the *Sentencing Snapshot* examines the characteristics and sentences for felony property offenses in Maryland circuit courts. Dr. Soulé encouraged Commissioners to review these Snapshots and to offer feedback if interested. Additionally, he advised Commissioners to feel free to suggest topics for future editions of the *Snapshot*.

h. FY 2022 budget and impact of COVID-19 (Status Report)

Lastly, Dr. Soulé stated that he would like to provide a brief update on the FY 2022 budget. Due the COVID-19 pandemic, the MSCCSP and all State agencies were required to submit a budget reduction proposal for fiscal year 2021. He noted that, preferably, operating costs would be reduced, but the Commission's operating costs are already quite low. Consequently, Dr. Soulé reported that he had to make the difficult decision to temporarily suspend the part-time graduate research assistant position for FY 2021. The absence of the policy analyst position required the staff to absorb these responsibilities and Dr. Soulé commended the staff for their extra efforts to fill these responsibilities. Finally, Dr. Soulé stated that he was pleased to report that the funding for the graduate research position was restored in the last supplemental budget for FY 2022 and that the staff looks forward to recruiting a graduate research assistant for FY 2022.

Judge Wilson emphasized the importance of having young academics learn the guidelines and the importance of criminal sentencing in the State.



Senator Kelley commented that she would work to look for funding in the community, particularly with one of the State's Historically Black Colleges and Universities (HBCUs), in hopes of finding someone to complete the same tasks as an intern.

Dr. Soulé stated that he would be happy to work with Senator Kelley regarding possible funding for a position. Judge Wilson thanked Senator Kelley and also thanked Judge Lewis for her comments regarding Dr. Soulé's presentation. Mr. DeLeonardo commented that, on behalf of the Maryland State's Attorneys' Association, he would like to note the presentation was also very well received.

7. Remaining 2021 meetings

Judge Wilson reminded Commissioners of the remaining meeting dates for 2021.

- a. July 6, 2021, 5:30 pm
- b. September 14, 2021, 5:30 pm
- c. December 7, 2021, 5:00 pm

Judge Wilson noted that the July meeting will most likely be a virtual videoconference meeting.

8. Old business

None.

9. New business and announcements

None.

The meeting adjourned at 6:42 pm.