



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
Videoconference  
July 11, 2023

### Commission Members in Attendance:

Honorable Brian L. DeLeonardo, Chair  
Honorable Shannon E. Avery, Vice-Chair  
Honorable J. Sandy Bartlett  
Katie Dorian, Esq., *representing Attorney General Anthony G. Brown*  
Richard A. Finci, Esq.  
Angelina Guarino, *representing Secretary Carolyn J. Scruggs*  
Robert H. Harvey, Jr., Esq.  
Alethea P. Miller  
Honorable David Moon  
Honorable Michelle R. Saunders  
Kyle E. Scherer, Esq.  
Honorable Melanie M. Shaw  
Lisa M. Spicknall-Horner  
Donald Zaremba, Esq., *representing Public Defender Natasha Dartigue*

### Staff Members in Attendance:

Sarah Bowles  
Mark Mills  
Stacy Najaka, Ph.D.  
Katharine Pembroke  
Kathy Sanchez  
David Soulé, Ph.D.

**Visitors:** None

### 1. Call to order

MSCCSP Chair, Judge Brian L. DeLeonardo, called the meeting to order.

### 2. Declaration of quorum

The meeting began at 5:31 p.m. after a quorum had been established.

### 3. Approval of minutes

The minutes from the May 9, 2023, MSCCSP business meeting were approved as submitted.



#### 4. Guidelines Subcommittee Report – Judge Shannon Avery

Judge Avery stated that the Guidelines Subcommittee met on June 21, 2023, and reviewed three items. Judge Avery turned the discussion over to Commission staff to summarize each of the three items.

a. Proposed classification of new and revised offenses, 2023 Legislative Session (Action Item)

Dr. Soulé began by presenting agenda item 4a, the proposed classification of new and revised offenses from the 2023 legislative session. He stated that before doing so, he would, as he had done in previous years, provide some background about the process of classifying new and revised offenses.

Dr. Soulé then reviewed how the Commission has traditionally classified new and revised offenses. Each year, the MSCCSP reviews new and revised criminal penalties and considers how the new and revised criminal penalties will fit within the Maryland sentencing guidelines. The task of classifying new and revised criminal offenses is designated to the Guidelines Subcommittee, and those classifications are then presented to the full Commission for review. In preparation for this task, the staff reviews all legislation from the most recent legislative session and prepares a memorandum that identifies any new or revised criminal offenses that carry a maximum penalty of greater than one year of incarceration. The memorandum focuses on penalties of one year or greater because, by rule, the Commission does not require classification of offenses that carry a maximum penalty of one year or less. Rather, these offenses are automatically assigned a seriousness category of VII.

Dr. Soulé then referred Commissioners to the memorandum titled, *Proposed Classification of New or Revised Offenses*. This is a 23-page document, divided into four sections: (1) new offenses with action recommended, (2) changes to existing offenses with action recommended, (3) new offenses with no recommended action, and (4) changes to existing offenses with no recommended action. Also provided was a supporting document titled, *Combined file of legislation with new/revised offenses*. This PDF combines all the legislation that is reviewed in the new or revised offenses memo. The bills appear in the order they are listed in the *Proposed Classification of New/Revised Offenses* memo.

Dr. Soulé noted that based on previously established protocol, the Guidelines Subcommittee offers seriousness category recommendations by examining currently classified offenses that are comparable based on the following: type of offense (person, drug, property); statutory maximum; misdemeanor/felony classification; and nature of the offense (when possible). For each new or amended offense, the memorandum presents the staff-identified comparable offenses at the bottom of each page or on the next page.

Dr. Soulé stated that he would begin with the new offenses for 2023 starting on page one of the memorandum.



- i. The first bill, titled the “Anti-Swatting Act of 2023,” creates a new offense prohibiting a person from making a report of an emergency that the person knows to be false to a governmental emergency report recipient with reckless disregard of causing bodily harm to an individual as a direct result of a response to the report. A person who violates this prohibition is guilty of a misdemeanor, punishable by imprisonment for up to three years and/or a fine of up to \$2,000. The bill also prohibits a person from making a false report of an emergency or alleging the commission of a crime resulting in a response from law enforcement and serious physical injury to a person or the death of a person as a proximate result of lawful conduct arising out of the response. Under these circumstances, a violator is guilty of a felony, punishable by imprisonment for up to 10 years and/or a \$20,000 maximum fine.

- a. Chapter 698 and 699 (HB 745/SB 340)— False Statements, Other—False statement—of an emergency or crime with reckless disregard of causing bodily harm to an individual (CR, §9-501(c)(1))

Based on the comparable offenses identified on page 2, the Guidelines Subcommittee recommends classifying the 3-year misdemeanor as a person offense with a seriousness category of VII.

- b. Chapter 698 and 699 (HB 745/SB 340)— False Statements, Other—False statement—of an emergency or crime resulting in serious physical injury or death to a person (CR, §9-501(c)(2))

Further, the Guidelines Subcommittee recommends classifying the 10-year felony as a person offense with a seriousness category of V.

Dr. Soulé asked whether there was any discussion. Judge Avery noted, and Dr. Soulé confirmed, that the Subcommittee’s vote on the recommendations was unanimous.

Judge DeLeonardo clarified whether the Commission would consider the pieces of legislation individually or collectively, and Dr. Soulé stated that only the first items, which required specific action by the Commission, would be considered individually.

The Commission voted unanimously to adopt the recommendations.

- ii. Chapter 546 (SB 470)— False Statements, Other— False statement in loan application under the Local Land Trust Revolving Loan Program (NR, §3-215)

Dr. Soulé explained that Senate Bill 470 creates a Local Land Trust Revolving Loan program and prohibits a person from knowingly making or causing to be made any false statement or report, including any understatement or overstatement of financial condition for a new loan or affecting a loan already made, under certain circumstances.



A person who violates this prohibition is guilty of a misdemeanor, punishable by imprisonment not exceeding 5 years, a fine not exceeding \$50,000, or both.

Based on the comparable offenses listed on page 4, the Guidelines Subcommittee recommends classifying this offense as a property offense with a seriousness category of VII.

The Commission voted unanimously to accept the Subcommittee's recommendation.

- iii. House Bill 824 alters CR, §4-203(c)(2)(i) and CR, §4-203(c)(2)(ii) to increase from three years to five years the maximum incarceration penalty that may be imposed for a violation of the prohibition against wearing, carrying, or transporting a handgun when the person has no prior convictions under §§ 4-203 (wearing, carrying, or transporting a handgun), 4-204 (use of a firearm in the commission of a felony or crime of violence), 4-101 (wearing or carrying dangerous weapons), or 4-102 (carrying or possessing deadly weapons on school property) of the Criminal Law Article.

- a. Chapters 651 (HB 824)—Handguns, In General—Handgun—unlawful wearing, carrying, etc., 1<sup>st</sup> weapon offense, generally (CR, §4-203(c)(2)(i))

Based on the comparable offenses identified on page 6, the Guidelines Subcommittee recommends classifying this offense as a person offense and changing the seriousness category from category VII to VI to reflect the increased penalty.

- b. Chapters 651 (HB 824)—Handguns, In General—Handgun—unlawful wearing, carrying, etc., on school property, 1<sup>st</sup> weapon offense, generally (CR, §4-203(c)(2)(ii))

Based on the comparable offenses identified on page 6, the Guidelines Subcommittee recommends classifying this offense as a person offense and changing the seriousness category from category VII to VI to reflect the increased penalty.

- c. Chapters 651 (HB 824)—Handguns, In General—Handgun—unlawful wearing, carrying, etc., a loaded handgun, 1<sup>st</sup> weapon offense, generally (CR, §4-203(c)(2)(i))

Based on the comparable offenses identified on page 6, the Guidelines Subcommittee recommends classifying this offense as a person offense and changing the seriousness category from category VII to VI to reflect the increased penalty.

Delegate Bartlett asked how an offense's fine is considered when an offense is classified. In response, Judge Avery stated that the Subcommittee had not discussed the fines with respect to these offenses, and Dr. Soulé added that



traditionally the focus has always been on the statutory maximum penalty, rather than the fine, when classifying an offense.

The Commission members voted unanimously to accept the Subcommittee's recommendation.

iv. Chapters 797 (SB 54)—Sexual Crimes—perverted sexual practices (CR, §3-322)

Dr. Soulé explained that Senate Bill 54 repealed the crime of unnatural or perverted sexual practice, and that the Guidelines Subcommittee recommended removal of this offense from the Sentencing Guidelines Offense Table. The Commission voted unanimously to accept the Subcommittee's recommendation.

- v. Dr. Soulé explained that for the remainder of the memorandum, from pages 8-23, there is no recommended action by the Guidelines Subcommittee. The Guidelines Subcommittee recommends no action on the remaining offenses for a few reasons. First, for the legislation listed on pages 8-12, these new offenses have a maximum penalty of 1-year or less. The Commission has a long-standing policy regarding offenses with penalties of 1-year or less whereby these offenses are automatically assigned a seriousness category of VII unless the Commission chooses to adopt a different seriousness category. The legislation noted on pages 13-23 includes all other changes to existing offenses. However, the legislation makes no change to criminal penalty structures and therefore the staff recommends no action concerning those offenses. Dr. Soulé stated that he is happy to review any specific offenses with no designated action, but he will defer to the Subcommittee to decide if any offense-specific review is necessary.

Seeing no call for further review, Dr. Soulé turned it over to Mr. Mills to present the next item for discussion, which was the proposed classification of previously unclassified offenses.

b. Proposed classification for miscellaneous previously unclassified offenses (Action Item)

Mr. Mills directed the Commissioners' attention to the memo entitled *Proposed Classification for Miscellaneous Previously Unclassified Offenses*. He stated that Commission staff were recently contacted by criminal justice partners regarding three offenses that have a penalty greater than 1 year but are not currently included in the Guidelines Offense Table. The Commission's policy is to classify any offense with a penalty of greater than 1 year. He explained that the memorandum presents these three previously unclassified guidelines-eligible offenses along with recommended classifications.

Mr. Mills referred Commissioners to page 2 of the proposed classification memorandum, containing the first of the three offenses, which is a violation of Criminal Law Article (CR), §3-601(c)(1). This statute prohibits subsequent violations of 1st and 2nd degree child abuse not resulting in the death of the victim. Under the statute, a person convicted of 1st or 2nd degree child abuse (not resulting in the death of a victim), who has previously been convicted of 1st or 2nd degree child abuse, is subject to imprisonment not



exceeding 25 years. Mr. Mills noted that comparable offenses are listed on page 2. Based on the comparable offenses, Commission staff recommended to the Guidelines Subcommittee that this offense be classified as a person offense with a seriousness category of II. Mr. Mills stated that at the June 21, 2023, Guidelines Subcommittee meeting, the three Subcommittee members who were present at the meeting voted unanimously to adopt the Commission staff's recommendation. Accordingly, the Guidelines Subcommittee recommends classifying this offense as a person offense with a seriousness category of II. Mr. Mills then turned it over to the Commission for discussion. Seeing none, Judge DeLeonardo invited a motion to accept the recommendation. Judge Saunders made such a motion, which Ms. Spicknall seconded. Judge DeLeonardo then conducted a vote, and the motion passed unanimously.

Mr. Mills then moved on to the next offense, on page 3, which was the offense of willfully, maliciously, or with intent, setting on fire, or causing to be set on fire, any woods, brush, grass, grain, or stubble. Mr. Mills explained that the penalty for this offense is contained in Natural Resources Article (NR), §5-704(a) and provides that a person convicted of this offense is guilty of a misdemeanor and is subject to imprisonment not exceeding 5 years and/or a fine of between \$250-\$2,000. Comparable offenses for this offense are listed on page 3. Based on the comparable offenses, Commission staff recommended to the Guidelines Subcommittee that this offense be classified as a property offense with a seriousness category of VI. Mr. Mills noted that at the June 21 Guidelines Subcommittee meeting the Subcommittee members voted unanimously to adopt the Commission staff's recommendation. Accordingly, the Guidelines Subcommittee recommends classifying the offense as a property offense with a seriousness category of VI. Mr. Mills then turned it over to the Subcommittee for any discussion.

The Commission voted unanimously to accept the Subcommittee recommendation.

Mr. Mills then moved on to the third and final offense, on page 4, which was a violation of any provision of or failure to perform any duty imposed by a rule, regulation, order, or permit adopted or issued under Environment Article, Title 9, Subtitle 2, subsequent (the penalty for which is contained in the Environment Article (EN), §9-343(a)(1)(ii)). This offense is a misdemeanor punishable by imprisonment not exceeding 2 years and/or a fine of \$50,000 per day. Comparable offenses are listed on page 4. Based on these comparable offenses, Commission staff recommended to the Guidelines Subcommittee that this offense be classified as a property offense with a seriousness category of VII. Mr. Mills stated that at the June 21 Guidelines Subcommittee meeting, the Subcommittee members in attendance voted unanimously to adopt the Commission staff's recommendation. Accordingly, the Guidelines Subcommittee recommends classifying this offense as a property offense with a seriousness category of VII.

Mr. Mills then turned it over to the Subcommittee for any discussion.

The Commission voted unanimously to accept the Subcommittee motion.



c. Review of how feigned weapons impact the weapons presence portion of the Offense Score (Action Item)

Sarah Bowles presented the next issue, a review of how feigned weapons impact the weapon presence portion of the offense score and referred Commissioners to the corresponding memorandum titled, *Feigned Weapons and Part C of the Offense Score*. Ms. Bowles stated that this issue was brought to the attention of Commission staff by an Assistant State's Attorney (ASA) who was prosecuting a case in which the defendant planted a very realistic-looking phony destructive device at a jewelry store in an attempt to rob the store. The ASA was attempting to calculate weapon presence points for the robbery but noted that the Maryland Sentencing Guidelines Manual's (MSGM) current instructions for calculating weapon presence points provide conflicting advice. Chapter 6.1.C of the MSGM defines weapon presence as "the presence of an article or device which reasonably appears capable of causing injury." The same instructions go on to state that the score shall be zero points if "a weapon was feigned but no weapon was actually present." Taken together, these instructions may cause confusion. While feigned weapons are not real weapons, they can still reasonably appear capable of causing injury, as illustrated in the ASA's case.

Ms. Bowles stated that, given the inconsistency in these instructions, the staff asked the Guidelines Subcommittee to review this issue at its June Subcommittee meeting. With one member absent, the Subcommittee reviewed the issue and voted, 2 to 1, to recommend to the full Commission revisions to the MSGM and the Code of Maryland Regulations (COMAR) to clarify the treatment of feigned weapons. Ms. Bowles noted that the current memo provides a review of the guidelines and law related to feigned weapons in Maryland and other jurisdictions and concludes with the Subcommittee's proposed revisions to the MSGM and COMAR.

Ms. Bowles explained that the instructions for scoring weapon presence points currently include three provisions relevant to feigned weapons. First, as noted, the instructions state that "Weapon presence means the presence of an article or device which reasonably appears capable of causing injury." Second, the instructions state, "Except if used as a bludgeon, a toy gun is not a weapon and shall receive a weapon presence score of zero." Finally, the instructions state, "If a weapon was feigned but no weapon was actually present, the score shall be 0 (no weapon present)." These instructions have evolved since the first version of the MSGM was published in 1981. The instructions providing that "if a weapon was feigned but no weapon was actually present, the score shall be 0" have been in the MSGM since its first iteration, while the "reasonably appears capable of causing injury" language was added in the second iteration of the MSGM.

Ms. Bowles stated that it is not clear why this language was added to the manual. It is possible that it was meant to refer to feigned weapons or to unloaded firearms; non-functioning, but real, weapons; or some other object. The second version of the MSGM also clarified that "CO2 guns, toy pistols and starter pistols are scored as weapons other than firearms." Notably, this language was revised in 1989 following the ruling in *Brooks v. State*.



In *Brooks v. State*, Maryland’s Court of Appeals (now the Supreme Court of Maryland) found that a “lightweight toy plastic automatic pistol” was neither a dangerous nor a deadly weapon in the context of the State’s *robbery with a dangerous weapon* statute. Directly in response to this ruling, the MSGM was revised to state “except if used as a bludgeon, a toy gun is not a weapon and shall receive a weapon presence score of zero,” an instruction that remains in the manual today. Since the *Brooks* decision, the General Assembly has enacted legislation providing that, in a certain scenario, *robbery with a dangerous weapon* includes something other than the physical presence of an objectively dangerous weapon. Specifically, in 2005, the General Assembly passed House Bill 663, which amended the State’s *robbery with a dangerous weapon* statute (CR, § 3-403) to include “displaying a written instrument claiming that the person has possession of a dangerous weapon.” Passage of this law suggests that there is at least one scenario in which the Legislature considered an offense involving something other than the physical presence of a real weapon serious enough to place it in the same statutory subsection and penalize it in the same manner as a real weapon.

Ms. Bowles stated that, to provide some context for the current discussion of feigned weapons, staff examined the sentencing guidelines data, specifically looking at weapon presence points scored for convictions for *robbery by display of a written instrument claiming possession of a dangerous weapon*.

Ms. Bowles stated that staff identified five sentencing events, involving five convictions for *robbery by display of a written instrument* sentenced from 2013 through 2022, and that no weapon presence points were scored for these offenses.

However, staff identified one sentencing event involving convictions for both *robbery with a dangerous weapon* and *manufacture, possess, transport, or place a phony destructive device*. Similar to the earlier scenario, the individual in this case brought a phony destructive device into a store and claimed that it was an actual bomb in an attempt to rob the store. In this case, one point was scored for weapon presence for the *robbery with a dangerous weapon* charge.

Finally, staff reviewed how other sentencing commissions treat feigned weapons in the context of their guidelines. Of the 17 jurisdictions that maintain sentencing guidelines, five jurisdictions include in the calculation of their guidelines a measure of weapon presence or use that makes an implicit or explicit reference to feigned weapons. Of these five jurisdictions, three jurisdictions (Virginia, Michigan, and the federal system) provide for an increase in the guidelines when a feigned weapon is present or used in at least some circumstances, while two jurisdictions (Pennsylvania and Alabama) suggest that feigned weapons would not be defined as weapons for the purposes of calculating the guidelines.

Ms. Bowles noted that, after discussion at the June Guidelines Subcommittee meeting, the Subcommittee members voted 2 to 1 to recommend revisions to the MSGM and COMAR that would instruct users that one point shall be scored for part C of the offense score if a weapon is feigned but not actually present. Those in favor of scoring feigned





weapons with one point emphasized the heightened sense of fear and potential for harm that a feigned weapon produces relative to a scenario where no weapon, feigned or real, is present. For instance, regardless of whether a real or phony destructive device is used in the commission of a crime, the law enforcement response is the same as is the victim's sense of fear. The Subcommittee member who voted against the proposed revisions expressed concern that the instructions may lead to potentially less serious feigned weapon cases being scored 1 point for weapon presence. For instance, a scenario where an individual places his finger in a jacket and pretends it is a gun would score one point under the proposed revisions.

Ms. Bowles noted that the language for the proposed revisions starts on page 5 of the memo, and that there are three main changes proposed to the instructions for scoring weapon presence. The first clarifies that an unloaded firearm is considered the same as a loaded firearm. This was done to make clear that an unloaded firearm would not be considered a feigned weapon. The second revision removes the instruction stating that, "except if deliberately used as a bludgeon, a toy gun is not a weapon and shall receive a weapon presence score of zero." The final revision modifies part g of the instructions to state that, "if a weapon was feigned but no weapon was actually present, the score shall be 1."

Ms. Bowles concluded her summary and turned it over to the Commission for further discussion.

Dr. Soulé thanked Ms. Bowles for her presentation of the issue and thanked the Commission staff for their work on the memorandum. He then turned it over to the Commission for discussion.

Judge Avery noted that they had discussed the issue at length during the Subcommittee meeting, and that she and Mr. Harvey had voted to accept the recommendation to assign one point for a feigned weapon. She felt that scoring one point for feigned weapons was a good compromise, and opined that using a feigned weapon creates a dangerous situation because often force is met with force, i.e., if a victim perceives that the perpetrator is using a weapon (even if it's just a feigned weapon), then the victim or someone else might respond with a weapon of their own, thereby creating a "zone of harm." She explained that this was the majority viewpoint at the Subcommittee meeting, but that she was happy to hear from anyone else on the matter.

Mr. Finci stated that this was an important issue, and he expressed concern that the proposed changes to the guidelines create ambiguity regarding what constitutes a feigned weapon. When the issue was first presented to him at the Subcommittee meeting, the example of a fake bomb used to rob a jewelry store was given, and he had no problem with that being scored as a feigned weapon. However, he explained that there were other scenarios where there is not an object present. If an objective definition of "feigned weapon" were included in the recommended changes to the guidelines, then the proposed compromise would make sense. He emphasized that his concern was not with establishing a policy of scoring points for feigned weapons, but rather the



uncertainty of what constitutes a feigned weapon. He stated that if they were going to score feigned weapons, they needed to also come up with an objective definition for judges to apply. Drawing on the federal guidelines, he suggested that a definition should require the presence of an object coupled with the intent to create the impression that the object was a deadly weapon.

Delegate Bartlett questioned whether item “d.” under MSGM, Chapter 6.1 (“Except if used as a bludgeon, a toy gun is not a weapon and shall receive a weapon presence score of zero”) would be removed. Ms. Bowles confirmed that item “d.” would be removed and that under the recommended revision to the guidelines a toy gun would be considered a feigned weapon and scored one point.

Judge Avery stated that regarding the definition of a feigned weapon, she does not think there should have to be an object that looks like a gun. She gave the example of someone putting a piece of PVC pipe against a person’s back and pretending it was a gun; in that situation, the victim would think it was a gun and be scared, even though a PVC pipe does not look like a weapon, and the victim might use a weapon in response. As another example, she pointed out the scenario where a person walks into a bank with a note that says “give me your money or I’m gonna shoot this place up.” There may be someone who reads or observes that and responds with deadly force.

Mr. Finci stated that it was much more common where someone has their hand in a position where it looks like they are reaching for a weapon when they are just reaching for a phone. He pointed out that Judge Avery’s example of sticking a pipe into someone’s back and intentionally creating the impression of a weapon would fall within the definition of a feigned weapon that he proposed. He concluded by stating that he believed the Subcommittee’s recommendation was too broad and would encompass too many scenarios where a deadly weapon should not be scored.

Judge Shaw confirmed that Mr. Finci would like a definition for feigned weapon in the guidelines and asked whether there would be a substantive definition for the offense itself.

Mr. Finci responded that he was proposing that there be a definition added to the guidelines defining what a feigned weapon is and stating if it is going to be scored as one point.

Mr. Harvey stated that he believed it would be almost impossible to define what a feigned weapon is because there are too many types of feigned weapons. He would focus on the effect that the feigned weapon had on the victim and on the actions of the offender, i.e., if the offender affirmatively represented, either verbally or in writing, that they are in possession of a weapon, then the weapon score would be one, regardless of whether a weapon is actually displayed or observed. If the offender creates that dangerous situation for the victim, the police, and for the offender himself, then that scenario should be scored one point for weapon presence.

Ms. Shaw confirmed with Mr. Harvey that he was focused on the effect on the victim.



Mr. Zaremba cited a case, *Handy v. State*, 357 Md. 685, in which the Maryland Supreme Court examined the legislative intent of dangerous/deadly weapons statutes, and held that an objective test rather than a subjective test should be applied in these situations, i.e., the trier of fact should determine whether an object actually existed and was used as a dangerous or deadly weapon, not whether the person believed there to be a dangerous or deadly weapon. He expressed concern that the proposal would recommend an increased punishment for a feigned weapon based on a subjective belief that the weapon is real, and that this would run counter to the legislative intent of dangerous/deadly weapon statutes as discussed in the *Handy* case. He stated that where the legislature has determined that a feigned weapon merits increased punishment it has done so, as in the situation where a person uses a note claiming the person has a weapon to rob a bank.

Judge Avery inquired whether there was a statute dealing with the bank robbery note, and Mr. Zaremba confirmed that there was, Criminal Law Article (CR), §3-403.

Mr. Finci clarified and confirmed with Ms. Bowles that the Commission staff had identified five cases of *robbery with a written note* and that none of them scored weapon presence points.

Judge DeLeonardo asked whether there were any other comments, and if not, whether someone would make a motion regarding the recommendation.

Ms. Spicknall made a motion to adopt the recommendation, and Mr. Finci made an alternative motion to send the recommendation back to the Subcommittee to propose a definition of feigned weapon to include along with the recommendation.

Judge DeLeonardo asked Ms. Spicknall if she accepted Mr. Finci's amendment to her motion, and she stated that she did.

Judge DeLeonardo confirmed that this was the current motion and asked if anyone would second the motion. Mr. Harvey seconded the motion.

Ms. Shaw inquired whether the Subcommittee considered the definition of feigned weapon at its last meeting, and Judge Avery responded that she thought they did address the definition of feigned weapon but that she was willing to revisit it.

Dr. Soulé stated that they did discuss it at the meeting and specifically discussed whether the feigned weapon had to be an object or not to be scored a weapon presence point.

Mr. Finci questioned whether an appendix was included in the memorandum containing definitions from other jurisdictions. Ms. Bowles and Dr. Soulé confirmed that the appendix was included, and Dr. Soulé referred Mr. Finci to Appendix A on page 10 and read the federal definition of a feigned weapon. Mr. Finci stated that he was proposing something to that effect.

Mr. Finci made a motion to send the issue back to the Subcommittee to discuss including a definition of feigned weapon. The motion passed with just one vote in opposition from Mr. Harvey.



Delegate Bartlett asked what the Commission members should do if they had any thoughts or comments. Judge DeLeonardo stated that anyone could send their input to Judge Avery, Dr. Soulé, or any of the Subcommittee members.

Delegate Bartlett confirmed with Dr. Soulé that the next Subcommittee meeting would be in late August.

Dr. Soulé then concluded the Subcommittee report.

## **5. Report on Assessment of Racial Differences in Guidelines-Eligible Sentencing Events (Status Report)**

Dr. Soulé introduced agenda item 5, *An Assessment of Racial Differences in Maryland Guidelines-Eligible Sentencing Events*. He thanked the staff, in particular Sarah Bowles and Stacy Najaka, for their hard work on the report. He also thanked the Commissioners who had reviewed and provided feedback on the report. Finally, he asked Ms. Bowles to present an overview of the report to the Commission.

Ms. Bowles screenshared a PowerPoint presentation and began her discussion with background on impetus for the report. She explained that the Commission started reviewing racial differences in guidelines-eligible sentencing events in 2020 by examining the components of the sentencing guidelines. In 2022, the Department of Legislative Services (DLS) also raised the issue of race during the Commission's fiscal year 2023 budget review. DLS recommended, and the Legislative Budget Committees agreed, that the Commission study the extent to which racial bias is present at sentencing.

Ms. Bowles explained that the present report is the culmination of the MSCCSP's analysis of race and sentencing which began in 2020 and its response to the DLS recommendation. The report, she stated, presents a descriptive analysis of racial and ethnic differences in Maryland guidelines-eligible sentencing events. Ms. Bowles then reviewed the study methodology and limitations and explained that the rest of her presentation would cover three key findings from the report.

For the first finding, she discussed the general racial demographics of guidelines-sentenced individuals. She explained that the majority of guidelines-sentenced individuals were Black, followed by White, then Hispanic, and last Other race. Then she elaborated on and discussed two limitations to these findings. First, the racial differences among guidelines-individuals are present before sentencing. Various factors that occur before sentencing, including arrest practices and charging decisions, impact the demographics of those individuals who ultimately come before a court for sentencing. Second, caution should be used interpreting results from small populations (e.g., the study's results for Hispanic and Other race guidelines-sentenced individuals), particularly when they are broken down into even smaller subgroups (e.g., by offense type and jurisdiction).

Second, Ms. Bowles discussed criminal history, offense, and disposition characteristics by guidelines-sentenced individuals' race. Black guidelines-sentenced individuals were



more likely than other races to have serious prior criminal records and higher offender scores and less likely to have no prior criminal involvement.

Third, Ms. Bowles discussed sentencing trends and sentencing guidelines compliance by race. She explained how some differences in sentencing can be attributed to the differences in criminal history and offense severity, and some of the differences may be attributed to the mandatory minimum penalties that apply to certain firearms and weapons offenses.

Ms. Bowles concluded that the racial differences in guidelines-applicable sentences were largely explained by the offense seriousness and prior record, and the guidelines generally appear to be achieving their purpose. She turned the presentation over to Dr. Soulé to discuss the report's recommendations.

a. Vote to approve report recommendations (Action Item)

Dr. Soulé thanked Ms. Bowles and proceeded with the recommendations. He explained that the report divides the recommendations into two sets. The first set of recommendations is for the MSCCSP to potentially address. The second set of recommendations is for other decision makers to potentially address as they would be outside the current MSCCSP scope or resources.

He discussed the following items under the first set of recommendations.

- In 2026, assess the impact of the July 1, 2022, revisions to the sentencing guidelines drug and property matrices.
- Educate criminal justice practitioners about scoring prior records that involve adjudications based on acts that are no longer crimes.
- Study whether the offender score calculation should be amended.
- Review the feasibility, advantages, and disadvantages of amending the Maryland Automated Guidelines System (MAGS) to help practitioners calculate the adult prior criminal record.
- Examine whether disparities exist in the utilization of corrections options and other alternatives to incarceration.

He discussed the following items under the second set of recommendations.

- Fund a comprehensive study and statistical analysis to examine the impact of race at multiple points in the criminal justice system.
- Analyze the racial impact of mandatory minimum penalties.
- Analyze usage of pre-sentence detention by race.
- Further explore whether there are unique factors that influence sentencing decisions for Hispanic individuals.



Dr. Soulé concluded, saying that he would be happy to answer any questions from the Commission.

Judge DeLeonardo thanked the staff for the volume of data, analysis, and education they provided in the report. He invited the Commissioners to comment on the report.

Angelina Guarino congratulated the Commission staff on behalf of the Department of Public Safety and Correctional Service (DPSCS) and noted that she had many key takeaways to share with DPSCS staff. Turning her attention to the recommendations, she agreed with the intent to continue training criminal justice practitioners. Specifically, she emphasized the DPSCS's shared commitment to training agents in their Parole and Probation Division and the immediate impact that would have on retaining standards in scoring prior records, especially considering the disproportionate impact prior records have on certain groups. She elaborated that the DPSCS not only agrees with the recommendation but wants to partner with the MSCCSP for the training.

Ms. Guarino then raised a question about the recommendation to review the feasibility, advantages, and disadvantages of amending MAGS to help practitioners calculate the adult prior criminal record. She liked the idea of improving standardization and consistency and wanted to know more about the scope of the recommendation, such as what the data source and level of information would be.

Dr. Soulé explained that the reason for the recommendation is that prosecutors must currently go through a complex process to score the prior record. Pursuing the recommendation would allow the MSCCSP to investigate whether there is a way to automate the process. For example, an automated system might be able to pull the information from Criminal Justice Information Services (CJIS) necessary to calculate the prior record. Or, for example, the user might be able to type in the individual's prior offenses and the system would automatically calculate the individual's prior record score. Dr. Soulé noted the MAGS developers had previously tried piloting such a tool, but it did not work well at that time.

Dr. Soulé summarized that the main goal of such a tool would be to help prosecutors in calculating the prior record, and it would be further helpful if the MSCCSP could directly access the data that goes into calculating the prior record. Directly accessing the data would allow Commission staff to more efficiently obtain prior record data to analyze it for racial differences.

Ms. Guarino thanked Dr. Soulé for the background.

Judge DeLeonardo asked the staff for more detail on how it might examine whether disparities exist in the utilization of corrections options and other alternatives to incarceration. He noted that he understood the rationale behind the recommendation—Dr. Soulé had mentioned during the presentation that pretrial incarceration may account for some of the report's observed racial differences. In particular, Judge DeLeonardo wanted to know details of the recommended study in light of the MSCCSP's 2018 study on alternatives to incarceration. He recounted that in that study, the staff



found wide variation in the availability of pretrial services, citing an example that his county has strong pretrial services that other counties may not offer.

Dr. Soulé confirmed that the MSCCSP produced a 2018 report on the use of corrections options and other alternatives to incarceration. That study focused on alternatives to incarceration employed at sentencing, though he agreed that there are more programs available pretrial. For example, he stated, current guidelines data severely undercount the use of drug courts because individuals are often ordered to complete these programs prior to sentencing. Dr. Soulé suggested that this recommendation could be expanded. Specifically, the Commission could look into alternatives to incarceration, while other State entities could look into pretrial services. Further, both alternatives to incarceration and pretrial services could be examined for any racial differences, and the study may also consider what to do about any observed disparities.

Judge DeLeonardo asked whether his understanding is correct—whether the plan would be to identify the availability of pretrial services and then analyze how they are used by race. He wanted to know how the MSCCSP would complete the study considering that there is so much variation across counties in pretrial services.

Dr. Soulé agreed and invited Judge Avery to speak considering her longstanding interest in the issue and involvement in drafting recommendations for the 2018 study.

Judge Avery summarized the previous study on alternatives to incarceration. She stated that the study released in 2018 showed variation in the use of alternatives to incarceration across the State. Even in jurisdictions with effective alternatives to incarceration, the justice partners in those jurisdictions were not necessarily aware of those alternatives. She explained that it would be ideal if justice partners could be made aware of resources already available to them in their own jurisdictions and to examine disparities in service availability between jurisdictions. Therefore, she would like to add a companion recommendation to the current report suggesting that other justice partners work toward a unified, searchable, electronic system that would provide information about the specific services available in each jurisdiction.

Dr. Soulé confirmed that the staff would be comfortable with making that addition to the race report recommendations and asked for the Commission's thoughts on the change.

Ms. Guarino emphasized that phrasing the issue as one of utilization is important because there is a wide gulf between availability and accessibility. She explained that, for example, Baltimore City is the only jurisdiction to facilitate both pretrial release supervision and home detention at no economic penalty to the defendants. She elaborated that costs affect different groups differently and that statutory eligibility criteria also affect access. So, for example, when assessing how many jurisdictions have pretrial release options, the report should also consider how many of those jurisdictions with pretrial release have it at no additional cost to the defendant.

Judge Avery thanked Ms. Guarino for thoughtfully considering the structural ways that people may be limited from the services.



Judge DeLeonardo asked whether there were any other comments.

Judge Shaw moved to accept the report and paused to ask how Judge Avery's suggestions would impact the report's timeframe for release. Judge Avery and Dr. Soulé confirmed that the staff could still distribute the report by their Saturday, July 15 deadline if Judge Avery assisted in drafting the additional recommendation.

Judge Shaw reiterated her motion and requested a second.

Judge Avery seconded the motion.

Judge DeLeonardo asked for those in favor and opposed. Seeing none opposed, Judge DeLeonardo acknowledged the motion to accept the report with the additional recommendation from Judge Avery for justice partners to develop a unified system that identifies alternatives to incarceration.

Dr. Soulé noted that to comply with the MSCCSP's deadline, the staff would distribute the report consistent with official legislative reporting requirements. He asked whether there were objections to either posting the report to the Commission website or distributing it via the Commission's email list so that the relevant practitioners and justice partners are aware of the report. There were no objections.

## 6. Executive Director Report – Dr. David Soulé

Dr. Soulé stated that he had two items to discuss as part of the Executive Director Report.

### a. July 1, 2023, offense table updates (Status report)

Dr. Soulé announced that effective July 1, 2023, the MSCCSP adopted a revised Guidelines Offense Table to reflect the classification of a new cannabis cultivation offense enacted by Ch. 26 (H.B. 837), Acts of 2022. To account for this new offense, the MSCCSP issued new versions of the MSGM and the Guidelines Offense Table, and the corresponding updates were adopted in COMAR, effective July 1, 2023. The staff distributed a Guidelines E-News on Friday, June 30, 2023, to inform practitioners about this update.

Dr. Soulé noted that the E-News also provided another reminder that pursuant to guidelines rule, adjudications based on acts that are no longer crimes should be excluded from both the juvenile delinquency and the prior adult criminal record components of the offender score. He emphasized that this reminder is relevant because of the recent decriminalization of cannabis possession.

### b. Sentencing guidelines trainings/feedback meetings (Status report)

Dr. Soulé reported that on June 16, 2023, he and the MSCCSP training coordinator, Katharine Pembroke, provided a judicial education webinar titled "Utilizing Guidelines to Support Fair and Just Criminal Sentencing."

Additionally, Dr. Soulé stated that since the last MSCCSP meeting, he has met with judges and court staff from multiple jurisdictions. Judicial meetings were completed with the judges in Frederick County on May 31, 2023; Prince George's County on June





15, 2023; and in Montgomery County on July 10, 2023. Additional meetings are scheduled for Carroll County and Howard County in the coming months. Dr. Soulé noted these judicial sentencing guidelines feedback meetings will continue, as the goal is to meet with each jurisdiction every two to three years. The meetings are a great opportunity to share sentencing guidelines, discuss recent guidelines updates, review the work of the Commission, and finally, to solicit feedback from the Judiciary regarding the sentencing guidelines and the work of the MSCCSP.

Mr. Harvey suggested that the State's Attorney and Public Defender in the various jurisdictions be included in the judicial feedback meetings. Dr. Soulé responded that he has been including these individuals, but ultimately, with regards to meeting participation, he leaves the decision to the discretion of the judge(s) in their respective jurisdiction.

#### **7. Remaining 2023 MSCCSP meeting dates**

Judge DeLeonardo reminded Commissioners of the remaining meeting dates for the year and noted that the next meeting will be virtual. The remaining dates are as follows:

- Tuesday, September 12, 2023 (virtual)
- Tuesday, December 5, 2023

Judge DeLeonardo reminded Commissioners that the public comments hearing will also be held on December 5, 2023, and noted that the public will be invited to make comments regarding any matters affecting the Commission.

#### **8. Old Business**

None.

#### **9. New Business and Announcements**

None.

The meeting was adjourned at 7:26 p.m.