



Minutes

Maryland State Commission on Criminal Sentencing Policy
Videoconference
September 12, 2023

Commission Members in Attendance:

Honorable Brian L. DeLeonardo, Chair
Honorable Shannon E. Avery, Vice-Chair
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.
Brian D. Johnson, Ph.D.
Alethea P. Miller
Honorable David Moon
Honorable Michelle R. Saunders
Kyle E. Scherer, Esq.
Lisa M. Spicknall-Horner
Honorable Christopher R. West
Donald Zaremba, Esq., *representing Public Defender Natasha Dartigue*

Staff Members in Attendance:

Lydia Becker
Sarah Bowles
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 July 11, 2023, MSCCSP business meeting were approved as submitted.



4. Guidelines Subcommittee Report – Judge Shannon Avery

Judge Avery stated that the Guidelines Subcommittee met on August 30, 2023, and reviewed three items. Judge Avery turned the discussion over to Commission staff to summarize each of the three items.

a. Proposed amendments to the instructions for calculating the offense score to address feigned weapons (Action Item)

Kathy Sanchez referred the Commission to the memo, *Feigned Weapons Definition*. She explained that the Guidelines Subcommittee requests a vote on the definition of a feigned weapon and presents two options for this definition.

First, she explained how the issue arose. In late 2022, an Assistant State’s Attorney shared with the staff their confusion about potentially contradictory language contained in the Maryland Sentencing Guidelines Manual’s (MSGM) instructions for scoring weapon presence in part C of the offense score. Weapon presence is scored on a scale from zero to two points, with one point scored for a weapon other than a firearm or explosive and two points scored for a firearm or explosive. Currently, weapon presence is defined 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 confuse practitioners. While feigned weapons are not real weapons, they can still reasonably appear capable of causing injury.

Next, Ms. Sanchez reminded the Commission of their and the Guidelines Subcommittee’s progress on the issue at the past three meetings. At the Subcommittee’s June 21, 2023, meeting, the staff presented this issue, and the Subcommittee voted 2 to 1 (with one member absent) to instruct users to score 1 point for the presence of a feigned weapon. Then at the full Commission’s July 11 business meeting, it voted 12 to 1 to send the issue back to the Subcommittee for further review to consider adding a definition of feigned weapon to the recommended revisions of the MSGM and Code of Maryland Regulations (COMAR). Accordingly, the Subcommittee discussed possible definitions at its August 30 meeting. Three members of the Guidelines Subcommittee (with one member absent) agreed to present to the full Commission for their consideration two possible definitions of a feigned weapon.

Ms. Sanchez discussed the definitions and example scenarios. She reiterated that the Guidelines Subcommittee requests a vote on the definition of a feigned weapon and presents to the Commission two potential definitions. The two options are summarized on page 2, and the specific language for each set of proposed revisions to the MSGM and COMAR are on pages 3 through 8. She explained that the staff requests the Commission specify in the guidelines manual and COMAR whether the three following scenarios constitute a feigned weapon, as practitioners will likely be unsure about them: (1) a finger used to simulate a gun; (2) a written note stating that there is a dangerous weapon present; and (3) a verbal statement that there is a dangerous weapon present. Option 1 is from Mr. Finci and includes just the second scenario—a written note stating that there



is a dangerous weapon present. Option 2 is based on Virginia’s sentencing guidelines with edits from Judge Avery and includes all three scenarios. Ms. Sanchez concluded her presentation.

Judge Avery confirmed that the Commission should score 1 point for a feigned weapon. Judges, she opined, will consider the additional harm that is created when there is an objective perception that a weapon is present in a crime situation. There is risk to everyone, including the person who feigns the weapon and bystanders. For example, when someone enters a convenience store and creates the impression that he has a weapon and the convenience store clerk objectively thinks there is a weapon and pulls out a gun, the situation has now been raised to deadly force. She does not think that there is any judge who would not consider the feigning of a weapon to be neutral.

Judge Avery advocated for the second proposed definition for a feigned weapon because she does not think that there should be a requirement that there is a physical object present. In fact, she does not think that there must be any written note or other specific requirements to create the objective impression that there is a weapon present. Rather, the objective standard is whether a reasonable person in that circumstance would believe that the offender had a weapon or a gun, and she thinks that the second definition covers that standard.

Mr. Finci explained how his understanding of the feigned weapons issue evolved. During the recent discussions, Judge Avery convinced him that a feigned weapon should be scored 1 point for weapon presence, but he believes that a feigned weapon should continue to be an object.

Mr. Finci argued that definition 1 is the better option because it is more offender oriented, in line with the offense score being offender oriented. In contrast, definition 2 is more victim oriented.

Mr. Finci also noted that the staff worked with him on definition 1. He took their suggestion to change the word “brandish” in a prior iteration of definition 1 to “displayed.”

Mr. Finci then explained why he included the written note example in his definition and excluded the other two examples. Although a threatening note is not a dangerous object, it is an object nonetheless and reflects premeditation. A verbal threat or finger in a jacket in contrast does not raise the incident to a feigned weapon.

Senator Sydnor recognized the merit of both arguments. On one hand, he sees Judge Avery’s point about how a person may react to someone feigning a weapon. On the other hand, he sees Mr. Finci’s point about the importance of requiring an object.

Delegate Moon agreed that a feigned weapon should be considered at sentencing and then described a personal experience with a feigned weapon. Several years ago, outside of Maryland, someone attempted to rob him and a colleague with a finger-in-jacket. He himself did not find the finger convincing, but his colleague did. He understands the victim impact and favors the broader definition, option 2.



Mr. Harvey said that option 2 recognizes the increased level of fear placed on a crime victim when a weapon is feigned. The difference between whether the article is a finger, written note, or verbal statement does not matter because regardless, the level of fear increases. Option 2 therefore recognizes the level of harm, potential harm, and level of risk to first responders also increases. He thinks that requiring the article to be a written note or object or some kind of object is splitting hairs. Intentionally representing a weapon merits 1 point.

Mr. Zaremba opined that option 1 is more in line with legislative intent. Whether words are intended to create the impression that a weapon is present can be ambiguous and depends on the facts and the circumstances of the case. The deadly weapon statutes and *Handy* case (*Handy v. State*, 357 Md. 685, 2000) chose an objective rather than a subjective test. The case embodies the legislature's intent that the trier of fact must objectively determine that the object was inherently itself a dangerous and deadly weapon.

Ms. Guarino agreed with the Subcommittee's recommendation that feigned weapons be scored in the guidelines. In her view, the primary difference between the two options seems to be creating a clear distinction between one method of communication over another. She is concerned that if that communication distinction does not exist elsewhere in the law, then option 1 would create more confusion rather than resolve confusion. She asked whether option 1 could create dissidence to the kind of charging logic present in a case. In other words, could there be instances where an individual would be charged differently, or their offense would be tried differently, depending on the feigned weapon definition? For example, a person may tweet a threat, which may fall under option 2 but not 1.

Judge Avery clarified that option 2 is, in fact, objective. She explained that it does not matter what the actual victim in any given case believed insofar as a reasonable person would believe that an actual weapon was present and the individual intentionally created that impression. She believes that option 2 is a high bar because it requires a finding that the person intentionally feigned a weapon and that any reasonable person would believe that a weapon was present.

Further, she does not think that the definition should stipulate what the Commissioners believe to be reasonable. Requiring a note, object, etc., would undermine the standard of objectivity whereas using the reasonable person standard is grounded. In the real world, someone may touch their side or their back and threaten with street terminology, which could, again, lead to the use of deadly force.

Mr. Finci responded to Ms. Guarino's earlier question. If a person robs someone with a finger, that would be a robbery and not an armed robbery. If a person has an object strong enough to be used as a bludgeon, that would be an armed robbery.

Mr. Harvey responded to Mr. Finci that the action would not necessarily make a difference in terms of charging—a pointed finger, strong object, written note, or verbal



threat, would all be charged as armed robbery. He clarified that the action might make a difference in terms of the verdict.

Ms. Guarino clarified her concern. She does not believe that the written note standard is written anywhere else in law. So, by option 1 limiting a feigned weapon to a written note, she is concerned that option 1 leaves ambiguity that option 2 does not have.

Judge DeLeonardo opined that the effect on a person can be the same regardless of the method—finger in pocket, written note, verbal threat, etc. So, he does not understand why the feigned weapon definition should differentiate between the different methods. Therefore, option 2 makes more sense to him. He invited other members to speak or make a motion.

Mr. Finci called the question, requesting that someone make a motion for one of the two options. He noted that the Commission voted at its last meeting to score feigned weapons with 1 point.

Judge DeLeonardo asked for a motion on one of the two options.

Alethea Miller made a motion to adopt option 2. Mr. Harvey seconded. Dr. Soulé counted 11 votes in the affirmative, 2 votes in the negative and 1 abstention. The motion to adopt option 2 carried.

b. Proposed COMAR and guidelines manual clarification to address SB 211 (2023) and the corresponding new PBJ, CP, § 6-220(c) (Action Item)

Dr. Soulé referred the Commission to the memo, *Proposed COMAR and MSGM Clarifications to Address SB 211 (2023) and the Corresponding New PBJ, CP, § 6-220(c)*. Dr. Soulé stated that, effective October 1, defendants in Maryland will be eligible for a new type of PBJ—one that entails a plea of not guilty. Under current Maryland law, to receive a PBJ, a defendant must plead guilty, no contest, or be found guilty at trial. If the defendant successfully completes the PBJ, the disposition, pursuant to Maryland law, “shall be without judgment of conviction and is not a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime.” Criminal Procedure Article (CP), 6-220(i)(3). Under the new PBJ statute, the defendant will be allowed to plead not guilty, as opposed to guilty, and still receive all the benefits of the traditional PBJ. Given that this new PBJ involves a not guilty plea, certain language in the MSGM and COMAR will need to be revised. Dr. Soulé noted that the Guidelines Subcommittee discussed this issue at its August 30 meeting. The Subcommittee agreed that a new PBJ, like the traditional PBJ, would be considered an adjudication for the purposes of calculating the sentencing guidelines, specifically the offender score. To provide clarity to practitioners, the Subcommittee recommended that the Commission adopt three sets of revisions to the MSGM and COMAR, included on pages 2 through 5 of the memo. These revisions include the following: (1) adding an explicit reference to the new PBJ in the definition of an adjudication; (2) replacing all references to “adjudication of guilt” with simply “adjudication”; and (3) replacing references to “conviction” with “adjudication” in instances where the intended meaning of “conviction” includes both types of PBJs.



Judge DeLeonardo asked if the Subcommittee unanimously recommended the proposed revisions. Dr. Soulé confirmed that the Subcommittee's vote was unanimous.

Mr. Finci asked why the legislature did not just make one form of PBJ instead of allowing two forms to continue. Mr. Finci expressed concern that, from a defense standpoint, creating a different class of PBJ for the purposes of the guidelines, one that is not included in the criminal history score, would deter prosecutors from allowing a new PBJ to go forward since it requires prosecutorial consent.

Senator West responded to Mr. Finci, noting that he sponsored Senate Bill 211, the bill creating the new PBJ. Senator West stated that the bill was the result of lengthy negotiations with the Maryland Judiciary. The Judiciary expressed concerns with early drafts of the bill and vetted carefully the final language included in the bill, resulting in two forms of PBJ.

Delegate Moon stated that he cross-filed the PBJ bill and seconded everything Senator West said. Delegate Moon stated that the Sentencing Commission was headed down the correct path in its treatment of the new PBJ. He explained that the new PBJ provides a mechanism for noncitizens to receive a PBJ without having it count as a federal conviction, thereby avoiding the negative impact of a federal conviction on residency. Delegate Moon emphasized that the bill was never intended to enable recipients to avoid the sentencing consequences associated with a traditional PBJ, but rather to avoid its collateral consequences on residency.

Dr. Soulé noted that the Subcommittee discussed exactly the points Delegate Moon raised.

Ms. Spicknall-Horner made a motion to adopt the Subcommittee's recommendations. Senator West seconded the motion. The Commission adopted the recommended revisions to the MSGM and COMAR, with no opposition.

c. Review of sentencing guidelines departure reasons (Status Report)

Katharine Pembroke introduced the last item of the Subcommittee report, referring Commissioners to the corresponding memorandum titled, *Review of Sentencing Guidelines Departure Reasons*. Ms. Pembroke reminded the Commissioners that during its May meeting, the Commission debated whether animals should be considered victims for the purpose of applying the multiple victims stacking rule. The Commission ultimately voted to exclude animals as victims. However, during the discussion, it was suggested that the Subcommittee consider adding "multiple animal offenses" to the list of identified departure reasons and consider more generally whether the list should be revised.

The issue was directed to the Subcommittee to review, and the Subcommittee initiated its review on August 30th. At that time the Subcommittee considered the instructions for recording departure reasons, the evolution of those instructions, current data, and several questions from staff. Ms. Pembroke stated that she would briefly review that information and the next steps being taken to refine the departure reasons provided to



judges. She noted that the meeting memo was provided for informational purposes only, and the Subcommittee expects to come forward with a recommendation for the Commission at its December meeting.

Ms. Pembroke then summarized the current instructions for recording departure reasons. She explained that the guidelines manual and COMAR instruct that when departures occur, “the judge shall document on the guidelines worksheet the reason or reasons for imposing a sentence outside of the recommended guidelines range.” To facilitate this, judges are provided with a list of some of the common reasons for departure. There are eight identified mitigating reasons and eight identified aggravating reasons (these reasons are listed on p2 of the memo). This list is not intended to cover all circumstances. The guidelines do not limit the reasons for departure, and judges may write in any “other” reason.

Describing the evolution of the instructions, Ms. Pembroke noted that the list of common departure reasons first appeared in the June 2001 version of the guidelines manual, and the list has not changed since that time. Prior to June 2001, no list of reasons was provided, and judges were simply instructed to give their reasons in writing on the guidelines worksheet. Commission materials indicate three reasons for the introduction of the list: (1) to encourage judges to document their reasons for departure by providing an easier recording format, (2) to collect data that could be used to inform the public on why judges depart, and (3) to fulfill the Commission’s mandate to create a list of mitigating and aggravating circumstances.

Ms. Pembroke explained that the list was developed with input from various criminal justice partners in the State. To ease judicial concerns over the guidelines becoming mandatory, the Commission was intentional in noting that the list provides *some* of the common reasons for departure and is not intended to be exhaustive. Further, the option to write-in “other” reasons was done to assure judges that they are not limited to a finite list of reasons. Finally, Ms. Pembroke pointed out that the instructions provided from June 2001 forward indicate that “common reasons for departure should be read broadly so that they might encompass other, more specific reasons. For example, reason (1) regarding a plea agreement could include reasons why the agreement was reached, such as weak evidence, minimal harm, or a victim who did not want to prosecute.” Minutes suggest that this was done not only from a simplicity standpoint but also to shield information from the public that could potentially compromise the safety of certain individuals.

Next, Ms. Pembroke directed Commissioners’ attention to the recent data on departure reasons summarized in Tables 1 and 2 of the memo. The tables contain a rank order of the mitigating and aggravating reasons that judges provided in fiscal year 2022. The tables include the 16 identified common reasons (shaded in the tables), as well as the more frequently occurring “other” reasons. Ms. Pembroke highlighted two points of note regarding the tables: (1) some of the “other” written-in reasons appear more frequently than some of the identified common reasons, and (2) some of the “other” written-in



reasons include the specific examples cited in the instructions as falling under the broader identified common reasons.

Ms. Pembroke then summarized the Subcommittee's recent discussion of whether the list of common departure reasons should be revised. Three of the four Subcommittee members were present at the August meeting, and all three agreed that the list of identified departure reasons should be updated to align more closely with current guidelines data while remaining broad in scope. Additionally, the Subcommittee members present agreed that the corresponding instructions should be revised to more clearly explain why data on departure reasons are collected. Ms. Pembroke indicated that staff would prepare proposed revisions to the list of departure reasons and the corresponding instructions for the Subcommittee to consider at its next meeting, and it is expected that the Subcommittee will come forward with a recommendation for the Commission at its December meeting.

Having completed her summary, Ms. Pembroke turned the issue over to the Commission for any questions or discussion.

Judge Avery thanked Ms. Pembroke for updating the Commission and reiterated that the Subcommittee will continue their discussion of the issue. She shared her position that she is in favor of general departure reasons (e.g., "reasons stated on the record"). Judge Avery invited other comments. Hearing none, the Subcommittee report was concluded.

5. Executive Director Report – Dr. David Soulé

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

a. Introduction of new policy analyst/graduate research assistant (Status report)

Dr. Soulé stated that he was pleased to introduce Lydia Becker who joined the MSCCSP staff as a policy analyst on August 28, 2023. He noted that she works 20 hours per week as a graduate research assistant and is a doctoral student in the Department of Criminology & Criminal Justice at the University of Maryland. He further noted that for the past year, Lydia worked as a project assistant with the Governor's Behavioral Health and Public Safety Commission. Dr. Soulé expressed his excitement that Lydia joined the staff and asked Commissioners to join him in welcoming her to the Commission. Ms. Becker thanked the Commission for the warm welcome.

b. Forthcoming November 13, 2023, offense table updates (Status report)

Next, Dr. Soulé informed Commissioners that a revised Guidelines Offense Table will be published on November 13, 2023. The modifications to the Guidelines Offense Table include (1) new and revised offenses from the 2023 Legislative Session and (2) multiple previously unclassified offenses. He reminded Commissioners that the Commission voted on seriousness categories for these offenses at its July 11, 2023, meeting.

He further noted that the forthcoming modifications will also reflect three revised seriousness categories for subsequent drug offenses with a 40-year maximum penalty.



Dr. Soulé reminded Commissioners that the Commission voted at its May 9, 2023, meeting to increase by one level the seriousness categories for these offenses.

Lastly, he noted the revised offense table replaces all instances of “inmate” with “incarcerated individual,” to be consistent with Senate Bill 293 (2023).

c. Sentencing guidelines training and judiciary feedback sessions (Status report)

Following the MSCCSP meeting in May, Dr. Soulé noted that he reached out to Judge Carrion as the Chair of the Conference of Circuit Judges (CCJ) to inquire whether the CCJ would consider recommending to the Judicial Education Subcommittee that the sentencing guidelines online training be mandatory for law clerks working with judges on the criminal docket. In response, Judge Carrion invited him to speak at the next Conference of Circuit Judges meeting which is scheduled for September 18, 2023. He noted that he looks forward to the opportunity to speak with the CCJ to relay the MSCCSP request.

In the meantime, Dr. Soulé stated that he would like to update the Commission on the training and feedback sessions that have been completed and scheduled since the last Commission meeting on July 11, 2023. First, on July 20, 2023, the MSCCSP training coordinator, Katharine Pembroke, provided a training webinar for the Prince George’s County State’s Attorney’s Office. He further noted that the MSCCSP scheduled four webinar training sessions in September.

On September 6th, 2023, Katharine provided an orientation and training for judicial law clerks and other judicial staff. This same session will also be repeated on September 15th, 2023. On September 20th and 29th, 2023, the MSCCSP will offer a MAGS 101 webinar for all justice partners, including prosecutors, defense attorneys, and P&P agents who initiate sentencing guidelines worksheets.

Judge Deleonardo commented that regarding the most recent training, he had heard positive feedback from several law clerks and commended the staff’s training efforts. Dr. Soulé and Ms. Pembroke thanked Judge Deleonardo for his feedback.

Dr. Soulé continued by noting that he met with judges and court staff in two jurisdictions since the last meeting of the MSCCSP. He explained that his goal is to meet with each jurisdiction every two to three years. Meetings were completed with the judges in Carroll County on July 12, 2023, and Howard County on August 29, 2023. Additional meetings are scheduled for Anne Arundel County and Calvert County in the coming months. Related to Mr. Harvey’s past recommendation, Dr. Soulé noted that both prosecutors and the defense bar have been present in these recent judicial meetings.

d. Review of protocol for the December 5, 2023, public comments hearing (Status report)

Dr. Soulé explained that the MSCCSP enabling legislation requires that the Commission hold an annual public comments hearing. He noted that the hearing is important as it provides a forum for the public to discuss sentencing-related issues. The MSCCSP’s 2023



public comments hearing is scheduled for December 5, 2023, at 5:00pm, and will be followed by the regular business meeting at the Maryland Judicial Center.

Dr. Soulé noted that next month, a hearing invitation will be distributed to approximately 35 key criminal justice stakeholders throughout the State. Further, the invitation will be distributed to the roughly 1,000 criminal justice practitioners currently receiving the MSCCSP's electronic newsletter, *Guidelines E-News*. He noted that the Commission's intention is to allow an option for those who are interested in speaking to do so virtually.

Finally, Dr. Soulé encouraged Commissioners to identify thoughtful speakers who can directly speak to the sentencing issues that are within the scope of the Commission. He asked that any interested speakers contact him if they have questions about the public comments hearing.

6. Remaining 2023 MSCCSP meeting dates

Judge DeLeonardo reminded Commissioners that the public comments hearing and next business meeting will take place on December 5, 2023, at the Maryland Judicial Center. The public comments hearing will begin at 5:00pm and the business meeting will follow.

Judge DeLeonardo asked Dr. Soulé to confirm how potential individuals can participate in the public comments hearing. Dr. Soulé stated that the announcement, both to be posted on the MSCCSP website and distributed to the Commission's listserv, will provide information regarding how individuals can express their intention to speak. To do so, individuals need to contact him directly and he will then place them on the agenda for the public hearing.

7. Old Business

None.

8. New Business and Announcements

Dr. Soulé stated that he has one announcement and one new business item to address. Starting with the announcement, he noted that he was pleased to share that he received preliminary notice from Governor Moore's Appointments Office that three Commissioners have been reappointed to the Sentencing Commission. First, Dr. Soulé announced that Judge DeLeonardo has been re-appointed as the Chair of the Sentencing Commission for a 4-year term through June 30, 2027. He reminded Commissioners that Judge DeLeonardo took over at the end of Judge Wilson's (former MSCCSP Chair) term, so he has only served for about a year as Chair of the MSCCSP. Dr. Soulé stated that he is pleased the Governor's Office is giving Judge DeLeonardo another opportunity to continue to serve as Chair.

Judge DeLeonardo stated that he is very honored and appreciative that the Governor's Office has reappointed him, as he believes the work of the MSCCSP is very important.

Dr. Soulé continued by announcing that Rick Finci has also been reappointed to another 4-year term as the Commission's criminal defense attorney representative. He noted that this will be Rick's 6th term and next year will start his 21st year with the Sentencing Commission.



He further noted that Mr. Finci is currently the longest serving member of the Sentencing Commission.

Finally, Dr. Soulé stated that he was happy to share that Lisa Spicknall-Horner was reappointed to another 4-year term through June 30, 2027. Ms. Spicknall-Horner will continue to serve as one of the two public representatives on the Commission.

Dr. Soulé stated that he expects to receive the formal appointment letters by next week and stated that the Commission is very fortunate to have all three Commissioners back for another term.

Dr. Soulé then stated that he has one new business item to address. He noted that the distributed materials for this meeting included a letter from the Maryland Office of the State Prosecutor (OSP). The letter asks the Commission to consider creating a sentencing guidelines enhancement for instances in which an individual is convicted of an offense that involves an abuse of a public position of trust. Dr. Soulé stated that the staff is asking for the Commission to assign this request to the Subcommittee for further review.

Judge DeLeonardo noted that “Offender exploited a position of trust” is currently listed as an aggravating reason for departure. If this request from the OSP were to be assigned to the Subcommittee, he asked if the staff would be able to run some relevant analyses to help guide the discussion.

Dr. Soulé responded that the staff will examine the data as a starting point, though he noted that the staff does anticipate there will be many of these types of cases.

Judge DeLeonardo noted that this request will be assigned to the Subcommittee and the staff for further action.

The meeting was adjourned at 6:35 p.m.