



Minutes

Maryland State Commission on Criminal Sentencing Policy
Maryland Judicial Center
Annapolis, MD 21401
September 13, 2022

Commission Members in Attendance:

Honorable Brian L. DeLeonardo, Chair
Honorable Shannon E. Avery, Vice-Chair
Honorable J. Sandy Bartlett
Warren Davis, Esq., *representing Attorney General Brian E. Frosh*
Richard A. Finci, Esq.
Secretary Robert L. Green
Melinda C. Grenier
Robert H. Harvey, Jr., Esq.
Brian D. Johnson, Ph.D.
Honorable Patrice E. Lewis
Alethea P. Miller
Honorable David Moon
Honorable James P. Salmon
Kyle E. Scherer, Esq.
Lisa M. Spicknall-Horner
Honorable Charles E. Sydnor, III
Honorable Christopher R. West
Donald Zaremba, Esq., *representing Public Defender Natasha Dartigue*

Staff Members in Attendance:

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

Visitors: Claire Rossmark, Department of Legislative Services

1. Call to order

Dr. Soulé called the meeting to order.

2. Declaration of quorum

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



3. Recognition of expiring terms for Commissioners: Judge Patrice Lewis and Judge James Salmon

Judge DeLeonardo began by recognizing Judges Patrice Lewis and James Salmon, whose appointments will be coming to an end on September 25, 2022. Since 2014, Judge Salmon has served as the Appellate Court's representative, while Judge Lewis has served as the District Court representative. Judge DeLeonardo continued by acknowledging the active and substantive nature of the Commission itself and stated that he was grateful for the thoughtful input that both Commissioners have continually contributed during their 8-year terms. Both Commissioners were presented plaques in recognition of their contribution and service to the citizens of Maryland as members of the Maryland State Commission on Criminal Sentencing Policy (MSCCSP).

Judge Lewis expressed her gratitude. Judge Avery then commended both Commissioners for their work on the Commission and noted that they will be greatly missed.

Dr. Soulé stated that he also wanted to acknowledge the recent judicial appointment of Kathleen C. Murphy to the District Court of Baltimore County. He noted that Ms. Murphy has been the long-time representative for Attorney General Brian Frosh and has been a tremendous asset to the Commission during her tenure. In her stead, Warren Davis will be representing the Office of the Attorney General for tonight's meeting.

4. Approval of minutes from July 12, 2022, MSCCSP Meeting

The minutes were approved as submitted.

5. Guidelines Subcommittee Report – Judge Shannon Avery

Judge Avery stated that the Guidelines Subcommittee met on August 30, 2022, and reviewed four items, three of which were on the agenda as action items. Judge Avery turned the discussion over to Dr. Soulé to review the first action item.

Dr. Soulé thanked Judge Avery and then, before presenting the first action item, noted that Mr. Harvey had joined the meeting via Zoom..

Dr. Soule commented that he would address the first agenda item, which was a review of the response to the Maryland Alliance for Justice Reform request.

a. Review of response to Maryland Alliance for Justice Reform (MAJR) request (Action Item)

Dr. Soulé reminded commissioners that retired Circuit Court Judge Philip Caroom, representing the Maryland Alliance for Justice Reform (MAJR) presented testimony at the MSCCSP public comment hearings in December 2021 and December 2020. Dr. Soulé noted that a copy of the MAJR testimony from the 2021 public comments hearing was re-distributed with the materials for the current meeting as a reference, and that the December 2020 testimony was similar and thus was not re-distributed.



Dr. Soulé noted that the testimony that Judge Caroom presented on behalf of the MAJR included the following three recommendations for the MSCCSP to address:

- (1) The MSCCSP should add new data fields to the Maryland sentencing guidelines worksheet to collect information regarding charges that were reduced and/or dismissed and include data fields to allow the prosecutor's office to provide an explanation for reduced and/or dismissed charges.
- (2) The MSCCSP should add a new data field to the Maryland sentencing guidelines worksheet to identify whether participation in a corrections option program or other alternative to incarceration was a condition of a plea agreement.
- (3) The MSCCSP should create a new, additional database to collect data regarding probation violations.

Dr. Soulé explained that the MSCCSP did not take specific action after MAJR's testimony in 2020 or 2021. However, the Commission did note that the recommendation should be reviewed and that the Commission should provide a response. Accordingly, at its August 30 meeting, the Guidelines Subcommittee reviewed the recommendations and a draft response prepared by the staff. The Subcommittee offered feedback on the staff draft and a revised draft response was distributed to the full Commission for its review.

The response expresses appreciation for the input of MAJR but also notes that the MSCCSP does not expect to act on the specific recommendations. Dr. Soulé noted that the draft response further states that while each of the recommendations warrants consideration for its ability to help identify potential causes for disparate incarceration rates, the MSCCSP believes the individual recommendations are either more appropriately addressed by another State agency or workgroup and/or the recommendations exceed the scope and resources of the MSCCSP.

With respect to the first recommendation, the Maryland General Assembly passed Senate Bill 763 during the 2022 Legislative Session. Among other provisions, SB 763 created a Task Force to study transparency standards for State's Attorneys. Accordingly, the draft response notes that the Task Force is the more appropriate entity to study prosecutors' decisions on whether charges are reduced or dismissed. The response also notes that the sentencing guidelines are calculated based strictly on convictions. The guidelines are not influenced by charges that may have been reduced and/or dismissed, and therefore the sentencing guidelines worksheet may not be an appropriate mechanism to collect data on charges that do not result in a conviction.

Dr. Soulé stated that with respect to the second recommendation, the draft response noted that the Maryland Automated Guidelines System (MAGS) and the corresponding guidelines worksheet already collects information about participation in these alternatives



to incarceration. Additionally, the guidelines worksheet identifies if a case was adjudicated pursuant to a plea agreement.

With respect to the final recommendation, the response notes that the MSCCSP believes the request is duplicative as this data is already being collected by the Maryland Administrative Office of the Courts (AOC). The number of statewide sentencings that result in probation violations is substantial. The MSCCSP does not have sufficient resources to create a database and then collect, maintain, analyze, and report data on probation violations. Substantial additional funding would be required.

Finally, the draft response notes that the MSCCSP is not statutorily charged with collecting these additional data and the Commission believes these additional requested responsibilities exceed the Commission's role and scope. In conclusion, the Guidelines Subcommittee recommends that the Commission adopt the draft response and distribute this response to the MAJR in a timely manner.

Dr. Soulé then turned it over to the Commission for discussion.

Mr. Zaremba asked a question about the third request addressed by the draft response (the item requesting that the MSCCSP collect data on probation violations). He noted that one of the reasons given for not adopting the recommendation is that it would require substantial resources to create a database. He pointed out that Judge Caroom had proposed adding questions to the existing sentencing guidelines worksheet. Mr. Zaremba asked Dr. Soulé why that option would not be feasible, noting that it appeared to be just a simple software modification to collect that information.

Dr. Soulé responded that a guidelines worksheet is not created for probation violations. He stated that there are a significant number of probation violations each year—he estimated around 20,000 or 30,000 violations—for which they would need to collect worksheets and create a new database. He noted that it would not be a minor task. He further noted that the Commission did investigate this issue years ago and decided guidelines worksheets should not be completed for probation violations because the guidelines are not intended to be utilized for probation violations. Additionally, Dr. Soulé noted that the AOC is already collecting the information that is being requested.

Mr. Zaremba confirmed that one of the issues they would be discussing later that night was the inability to get information on technical violations. He stated that, if that information were collected at the time of sentencing, that would be the way to collect that data.

Dr. Soulé clarified that the meeting agenda called for the Commission to discuss access to information about probation violations when scoring the prior record, i.e., when a person is filling out a guidelines worksheet, how easy it is for them to determine whether a prior probation violation was technical in nature. Dr. Soulé further stated that what Judge



Caroom was suggesting was that the Commission create a new database for tracking information on current probation violations. Dr. Soulé stated that those were two separate issues.

Mr. Zaremba acknowledged that they were separate issues but stated that one of the purposes of the Commission is to ensure that sentences are fair and proportional and reduce unwanted disparities. He noted that although the enabling legislation does not state whether the Commission should look at probation hearings, a probation violation sentence is still a sentence. Furthermore, given that many individuals are incarcerated because of probation violations, it would be impossible for the Commission to make informed choices without this information.

Judge Avery asked what Mr. Zaremba meant by “choices,” inquiring what choices the Commission is making about probation.

Mr. Zaremba responded that the enabling legislation states that the purpose of the guidelines is that sentencing should be fair and proportional, and that the Commission is not getting the full picture if it does not look at the people who are incarcerated due to probation violations.

Judge Avery noted that the Guidelines Subcommittee addressed this issue. She noted that the MSCCSP staff, which is small, does very good work, and that as a result there are organizations and advocates who want to task the Commission with more work that does not fall within the Commission’s responsibilities. She encouraged the Commission to keep its purpose very focused, because the more tasks that get piled on the Commission, the more diffuse its work becomes, and it cannot focus on its core responsibilities. And if that happens, it ends up having a regressive effect. She stated that she believes these requests exceed the scope of the Commission, and that if any advocacy groups want the Commission to monitor probation or post-conviction matters, the Legislature should consider authorizing that action.

Judge Lewis stated that she was confused by Mr. Zaremba’s comments. She stated that she only sentences a defendant once; she may suspend the sentence on certain conditions, but only one sentencing occurs. The original sentence is the original sentence, and when a violation occurs, the sentence has not changed. What Mr. Zaremba was referring to was the execution of the time that was imposed in the original sentence, not a new sentencing. She stated that this was an important difference.

Mr. Zaremba stated that he understood and respected Judge Lewis’s view on the issue but countered that when someone violates probation and is sent to jail, that is a sentence too. Although it is not the original sentencing, it is still a sentencing event. He opined that until the Commission gets a handle on policies, trends, and data regarding probation violations, they are not getting the full picture of what is happening in Maryland courts.



Judge DeLeonardo stated that it was his understanding that the AOC had the data regarding probation violations. Second, the guidelines reflect what judges are doing, so if the Commission asks judges to complete guidelines worksheets for probation violations, the Commission does not have guidelines or guidance for the court, and the Commission would not have any guidance until eventually they had enough data to create guidelines. He opined that it appeared the probation violation data was being collected, but that the issue was who was doing something with the data. Collecting this data would be a huge drain on the resources of the Commission due to the difficulty of marshalling the data to make it actionable. He agreed that a probation hearing resulting in incarceration was a sentence but did not know how the Commission could provide guidelines or guidance to judges. He concluded by reiterating his points that the data is there, but that it would be difficult to do anything with it, and that doing so would require a serious discussion of funding and resources. It might be a good thing to do down the road.

Judge Avery commented that the Commission does not have to be the one that collects and analyzes probation violation data. For example, the Executive branch can collect and analyze data. Additionally, interested advocacy groups can request data from the Judiciary. The Commission should not take on this task unless and until the Legislature tells the Commission to do so.

There being no further discussion, a motion was made and seconded to accept the letter as written. By majority vote, the motion passed.

b. Review of the scoring of prior technical violations under Part D of the Offender Score
(Action Item)

Sarah Bowles from the Commission staff presented the second issue on the Guidelines Subcommittee report.

Ms. Bowles referred the Commissioners to the memo titled, *Scoring Technical Violations of Parole, Probation, or Equivalent Supervisory Status Under Part D of the Offender Score*.

At the Guidelines Subcommittee meeting held on April 25 of this year, Mr. Finci raised the question of whether, following the enactment of the Justice Reinvestment Act (JRA) in 2016, practitioners calculating the guidelines should treat technical violations of probation, parole, or mandatory supervision (VOPs) the same as non-technical violations when scoring part D of the offender score. Part D of the offender score requires the person calculating the guidelines to score one point if the offender has had a prior violation of probation, parole, or equivalent supervisory status.

Mr. Finci noted that scoring an extra point on the offender score could result in a significant increase in the recommended guidelines range and proposed that technical VOPs not be scored one point under part D of the offender score.



The Guidelines Subcommittee agreed that the issue should be reviewed. This memo presents the findings from their review.

The question presented to the Subcommittee was whether the guidelines should account for the technical versus non-technical nature of VOPs. As noted, part D of the offender score assigns one point if the defendant has had a prior violation. Presently, the instructions make no distinction between technical and non-technical violations. Prior to the enactment of the JRA, there was no such distinction.

The JRA provided a definition of and placed limits on the amount of incarceration that judges can impose for relatively minor violations, referred to in the law as “technical violations.” Per Correctional Services Article (CS), § 6-101, technical violations are defined as those that do “not involve: (1) an arrest or a summons issued by a commissioner on a statement of charges filed by a law enforcement officer; (2) a violation of a criminal prohibition other than a minor traffic offense; (3) a violation of a no-contact or stay-away order; or (4) absconding.” All other violations would be considered non-technical.

The Correctional Services Article goes on to provide limits as to the maximum incarceration time that may be imposed for technical violations. A court may not impose more than 15 days of incarceration for a first technical violation, more than 30 days for a second technical violation, or more than 45 days for a third technical violation. For a fourth or subsequent violation, or a non-technical violation, the court may impose any sentence that could have legally been imposed for the crime of which the person was convicted. There is also a provision in the law providing that a court may exceed these limits if it finds that adhering to these limits “would create a risk to public safety, a victim, or a witness.”

Distinguishing between the technical versus non-technical nature of a violation may be relevant to the guidelines. The intent of the JRA was to reduce the incarcerated population. Including technical violations in the scoring of Part D of the offender score means that defendants with only a technical violation in their past receive one point, thereby increasing their guidelines. Whereas, excluding technical violations from the scoring of Part D of the offender score would mean that these same defendants receive zero points for part D, thereby lowering their guidelines and reflecting the JRA’s emphasis on reduced incarceration.

If the Commission is inclined to distinguish between technical and non-technical violations in the scoring of Part D of the offender score, there is one note of caution- that is the technical versus non-technical nature of prior violations may be difficult to determine by the assistant state’s attorneys and parole and probation agents who compute the offender score.



In preparing the memo, staff reached out to several sources to determine the feasibility of accessing this information. Typically, practitioners initiating the guidelines worksheets rely primarily on defendant's RAP sheets when computing the offender score. Staff spoke with a representative from the Department of Public Safety and Correctional Services, which maintains the RAP sheets. They advised that the RAP sheet contains arrest information only and no information to distinguish the technical versus non-technical nature of violations. Staff confirmed that the technical nature of VOPs also cannot be determined via Maryland Judiciary's Case Search. Finally, staff communicated with Mr. Harvey and a representative from the Calvert County State's Attorney's Office who advised that MDEC, the case management system used by the courts, typically does not contain information to distinguish between technical and non-technical VOPs.

Given this information, staff presented at the August 30 Guidelines Subcommittee meeting two possible courses of action. One was to take no action, meaning that both technical and non-technical violations would be scored under part D of the offender score. Alternatively, the Commission could treat technical VOPs in the same manner as it treats offenses eligible for expungement.

Presently, Chapter 7.1.C of the manual provides that adjudications proven by the defendant to have been eligible for expungement are excluded from an offender's prior criminal history, which is part C of the offender score. Similarly, the Commission could decide to score zero points under part D of the offender score if the defendant is able to demonstrate that the only VOPS included in their prior record were technical in nature. Given the laborious task of tracking down detailed information about offenders' prior violations, it may make sense to shift the burden of demonstrating their technical nature to defendants, who are in the best position to know whether their prior violations were technical or non-technical.

These options were discussed at the August 30 Subcommittee meeting. At that time, two members of the Subcommittee voted to take no action, arguing that all violations, even those that are technical in nature, should be reflected in the offender score when calculating the recommended guidelines. Two members voted to adopt language that would treat technical violations the same as offenses eligible for expungement in that they would not be included in part D of the offender score if the defense could prove the violations were technical in nature. Due to the split vote, the Guidelines Subcommittee has no recommendation for the Commission, but presented this information for its consideration. Ms. Bowles noted that if the Commission decides to make any revisions, included in the memo, beginning on page 4, is proposed language to address the revisions to part D of the offender score in the guidelines manual and COMAR. Ms. Bowles concluded her introduction of the topic and turned it over to the Commission for discussion.

Mr. Finci inquired what the JRA required the Commission to do with respect to the guidelines. Dr. Soulé responded that the Commission was asked to study alternatives to



incarceration and corrections options, and that the Commission prepared a report on alternatives to incarceration, but that there were no specific statutory requirements in the JRA for scoring the guidelines or anything of that nature.

Mr. Finci recalled that when the JRA was passed, the Commission was looking at adjustments that needed to be made, but the Commission deferred doing so to see the effects of the JRA, and then went forward with the recent reductions in the guidelines related to drug and property offenses.

Dr. Soule stated that Mr. Finci's statements were correct and noted that the JRA reduced the penalty for a substantial number of offenses, particularly drug and low-level property offenses. He further noted that the Commission had just revised the drug matrix, and then the JRA came along and overrode some of those revisions, decreasing the penalties for drug possession offenses. As a result, the Commission did recategorize many drug and property offenses to reflect decreased penalties. Thus, although the JRA did not explicitly require the Commission to take those actions, the Commission did so in response to the statutory revisions.

Mr. Finci noted that another issue was that the Commission had done some research and located a form that the District Court and some circuit courts were using that included a box for practitioners to check to indicate whether a probation violation was technical or non-technical. Judge DeLeonardo confirmed that he communicated with his circuit court clerk's office and asked about the form. The clerk's office was not even aware of the form. The clerk's office informed him that while they report technical violations, they were not actually using that form. It sounded like the District Court used the form with a lot more uniformity.

Dr. Soulé stated that the Guidelines Subcommittee's research found there is not uniformity among the courts in using the form.

Judge DeLeonardo stated that it was required to be reported whether the violation was technical or not, that not everybody is using that form, and so they are reporting it a different way in a lot of the circuit courts.

Dr. Soulé noted that information pertaining to the technical versus non-technical nature of the violation is not necessarily getting into the Maryland Electronic Courts system (MDEC), so that information is being collected but there is not a universally utilized mechanism for it to be found.

Dr. Soulé stated that the issue could be broken down and considered two ways. First, there is a policy issue—i.e., whether technical violations should be scored differently than non-technical violations when scoring the part D of the offender score. That is the policy question. And then, depending on what the answer to that question is, the Commission would need to decide how that difference should be accounted for in the guidelines. Dr.



Soulé stated that the Commission staff's recommendation was to treat technical violations the way expungements are treated.

Judge DeLeonardo suggested that because the vote was split, it might be better to start by discussing the policy issue first. Judge DeLeonardo stated that he was not present for the Guidelines Subcommittee discussion of the issue, and that there were obviously were differences of opinion.

Judge Avery stated that she could speak to some of the issues that were discussed in the Guidelines Subcommittee meeting. First, she said, the proposal is asking the person filling out the guidelines worksheet to find out more information that is difficult to track down. She stated that, in her opinion, it was adding layers of work to the guidelines, which she opposes. In her opinion, the more difficult and complicated the Commission makes it to complete the forms, the less likely it is that people are going to complete them properly.

Second, Judge Avery stated that a technical violation of probation is not the same as an expungement; it is still a violation of probation. A person who violates probation has not been compliant with the judge's order and has done something that merits being called back into court, which entails a lot of administrative work and expense. Typically, when a probation officer submits a probation violation, the defendant has gotten past the initial discretion of the officer (where they often do not file a violation of probation), and the court must find a violation of probation and determine whether it is technical. It is still a violation, even if the defendant only gets 45 days for it. The defendant has proven that they are unable to comply with the terms of probation. She stated that probation is a privilege and getting violated for probation is the price a defendant pays for being on probation rather than in jail. She stated that she is not against the JRA, but that the value of the JRA is provided at the point of the violation of probation when it is determined that the violation is technical. To compound the value of the JRA by telling judges that they cannot consider technical violations goes against policy, because the Commission would be saying to treat technical violations the same as expungements. But the idea of expungement is that it is as if the defendant were never convicted. That is the legislative policy for expungement, and there is no such legislative policy for technical violations, i.e., that technical violations should be considered as if they never existed. Thus, for the Commission to impose that policy is outrageous.

Delegate Moon stated that he was on the House Judiciary Committee when they worked through the JRA, and the issue of technical violations was something that generated lengthy discussions about the merits of when and how much time someone could do for a technical violation. He expressed that there was concern about ongoing possible negative consequences for technical probation violations. He acknowledged that it was not the same as expungements, but that given the purpose of the JRA, the proposed change to the guidelines seemed consistent with the JRA. Accordingly, he was in favor the proposal to treat technical violations differently than non-technical violations.



Mr. Harvey stated that he did not agree with the idea of treating technical violations as if they did not occur. Conditions of probation are orders of the court, and if a probationer does not comply with them, the court should be made aware of the non-compliance. Defense counsel is present at sentencing hearings and can inform the court that the prior probation violation was technical in nature. Mr. Harvey opined that the sentencing judge needs to know the defendant did not comply with the terms of probation in a prior case, and there should be a point awarded for that fact. Technical violations should be scored one point, and defense counsel can bring any information in mitigation to the attention of the court. Mr. Harvey stated that he did not agree with any changes of the scoring of probation violations, whether technical or non-technical.

Mr. Finci raised a few points. First, he pointed out that just as the defense attorney can inform the court about the nature of the probation violation, the prosecutor can inform the court of prior technical probation violations. Mr. Finci stated that he had represented many clients who had struggled with drug addiction, who had been hauled into drug court or mental health court because they had not followed through correctly with their treatment and were found to have committed a technical violation. Mr. Finci stated that they were pushed to recover. That to him that was the whole point of the JRA, and to invest so much in rehabilitation and then to treat technical violations like regular violations does not make a lot of sense. He stated that he was not saying that they should be treated like expungements, but he does not think that is what the proposal suggests. The expungement rule was simply one of basic fairness, i.e., that if the defense could show that the defendant's prior offense was eligible for expungement, then the prior conviction should not be scored under the guidelines. He stated that the current proposal would, likewise, address basic fairness and equity as it relates to the JRA and technical violations, and that it is the right thing to do. As a policy matter, the Commission should pass a rule that technical violations should not be scored. The issue of how to implement this change can be addressed in the next phase of the discussion.

Judge Avery stated that scoring a violation of probation is not an additional punishment. Mr. Finci responded that in the trenches, it is an additional punishment. Judge Avery replied that a sentencing event is more than the score; it involves defense attorneys, prosecutors and judges, and there is much more information that comes out that cannot be captured in a score. She stated that this is another example of parsing things too much so that the Commission loses sight of its purpose.

Senator Sydnor stated that, like Delegate Moon, he remembers long discussions about technical violations under the JRA, and the Legislature specifically made a distinction between technical and non-technical violations. He stated that he thinks it flies in the face of the legislative intent to not treat technical violations differently. He stated that he is unsure whether the Commission should treat them differently in the way proposed in the memo (i.e., by treating them the way expungements are treated), but they should be treated differently. Senator Sydnor suggested that scoring the sentencing guidelines without



differentiating between technical and non-technical violations is inconsistent with the JRA's intent.

Senator West stated that he also was on the Conference Committee that hammered out the compromise on the JRA, and that he does not remember any conversation about the defendant being charged with another crime later on and then a technical violation coming into play. That was never discussed. He also stated that he had a question about the practicalities of this proposal. He brought up the point that implementing the proposed change to the guidelines would result in a mini trial at the time of sentencing where the defendant would have to prove the technical nature of the prior violation, an assertion that may be disputed by the prosecutor. He stated that he is not sure anyone contemplated that and that he was not sure it was a good idea. He asked if one of the judges present could explain how that would work.

Judge Lewis stated that ideally the judge is the one who filled out the probation violation form. That conversation and decision is made at the time of sentencing. The argument about whether the violation was technical or non-technical takes place before the judge at sentencing because that is when the judge would have the clearest vision of it. She further stated that the irony of this is that the District Court judges who use the form are not subject to the guidelines.

Mr. Harvey stated that the concern about having mini trials to determine whether a prior violation was technical describes the way sentencing hearings work in the federal sentencing system. Mr. Harvey stated that in the federal system they regularly have long sentencing hearings arguing at length about a point or two on the guidelines. He stated Mr. Finci could correct him if he was wrong in that characterization.

Mr. Finci stated that he thought that was an extreme characterization. He further stated that there are already matters in the guidelines, including the one involving a single criminal event that would be addressed next, that also may be disputed and require a finding by the sentencing judge. He gave the example of proving the nature of a victim injury, which could entail a very short mini-trial, and which would not be much of a hassle to deal with. He gave a further example of a probationer who fails a drug test, has a technical violation, and then successfully completes probation. The probationer then comes into court five years later in another case, and the issue is whether that prior positive drug test should be scored as a violation of probation. Mr. Finci granted that there were scenarios more serious than this one, but that this example is the kind of thing that the proposed change is trying to address.

Judge Avery stated that sentencing events are mini trials; that is what sentencing hearings are for is to parse these things out. She stated that her problem was that the form should provide clear binary choices and that the sentencing hearing is to address the nuances. If there is a prior probation violation, whether technical or non-technical, that should be scored on the form. To the extent that there are more nuanced arguments to made, that can



happen at the sentencing hearing. Sentencing hearings are not always about the length of a sentence, but sometimes about the terms of probation or whether someone should be on probation. Sometimes there are qualitative decisions that have to be made based on the person's life and needs rather than just a number on the guidelines worksheet.

Delegate Bartlett asked whether multiple prior probation violations would be scored one point for each violation, or whether it would just be one point regardless of the number of prior violations. It was confirmed that it would be scored just one point whether it was one prior violation or more than one. She stated that this information helped and stated that another concern she had was with respect to the defense being able to demonstrate that a prior violation was technical in nature. She stated that, initially, she had concerns about this because it seemed to depend on whether a person had good legal representation or not, but she did not have as much of a problem with it now. She stated that something needs to be in place to reap the benefit that was intended by the JRA, and it seemed like technical and non-technical violations are distinguished for a purpose. She acknowledged that she not around to create the policy of the JRA, but that it was helpful that they had people on the Commission who were involved in that legislation and can provide insight into the legislative intent. She concluded that maybe scoring zero points is not the answer, but for right now it seems like the best answer available.

Judge DeLeonardo stated that, having heard everyone's comments, he would like to share a few thoughts. First, unlike the federal sentencing guidelines, the State sentencing guidelines are discretionary. He viewed this issue as dealing with a prior record. When a probationer has technical violations such testing positive, the courts typically try to find ways to help them and give them chances. But it is still a prior record. He thought it was important to note that.

Additionally, Judge DeLeonardo noted that when he was on the Sentencing Commission previously, the Commission addressed juvenile scoring. He stated that to him, this issue was similar in that it did not seem fair to score zero points for a person who had ten prior technical violations and also score zero points for a person who had been fully compliant and had no violations. He stated that when judges are considering whether to place someone on probation, they are looking at amenability to supervision, and that probation violations, whether technical or nontechnical, are a factor in making that determination.

Judge DeLeonardo further stated that he did not think all technical violations were created equal—some are more serious than others. For instance, failing to report is not as serious as a person on probation for child pornography using someone else's I-Pad to view pornography. Judge DeLeonardo stated that he views those as different even though they are both technical violations. Mr. Finci pointed out that the judge could find a public safety violation, and Mr. DeLeonardo stated that that could be true of any of the technical violations. Judge DeLeonardo stated that another issue was the difficulty of looking at someone's history and going back to determine whether a violation was technical. He stated the situation reminded him of the juvenile scoring issue, pointing out the inequity in



scoring a person who is complaint the same way (zero points) as a person who is not compliant. Judge DeLeonardo also noted that it would only be scored one point regardless of the number of technical violations, and that historically judges would exercise discretion in accounting for the technical nature of a violation.

Delegate Bartlett questioned whether judges now have the discretion to score zero points, or must they score one point for a prior violation.

Judge DeLeonardo responded that the guidelines require that one point be scored if there is a prior probation violation, but that the judge still has discretion to impose the sentence they feel is appropriate.

Mr. Finci commented that if the sentence were below the guidelines, it would just be marked as a non-compliant sentence.

Delegate Moon pointed out that just as it would be unfair to treat a technical violation the same as no violation, it likewise would be unfair to treat a technical violation the same as a violation involving a conviction for a new crime. He pointed out that you must choose unfairness one way or the other. When the Legislature enacted the JRA, they did not anticipate they would be having these kinds of conversations. He stated that it occurred to him that this is what must have happened with the previous legislators on the Commission who argued for a change with respect to juvenile scoring, were outvoted, and then tried to pass legislation to address the issue. He wondered if they were about to go down that road again and suggested that, before they did, they should define the boundary between what the Legislature mandates with respect to how the Commission operates versus how legislative intent guides what the Commission should do.

Judge Avery stated that the Legislature could create an expungement process for technical violations if it really wanted to, e.g., by proposing a statute that says for all future purposes any technical violation will not be reported as a violation of probation. Judge Avery pointed out that if a judge is filling out a worksheet after the technical violation, the person has likely violated probation again. Judge Avery invited everyone to keep the big picture in mind and remember that they were talking about a subsequent criminal event.

Judge DeLeonardo stated that this is where there was an analogy to expungement because really what is being suggested is that the violation should not be considered in a new offense, and that is a policy decision to be made by the Legislature, but it would be hard for the Commission to not “look behind the door” at the probation violation.

Senator Sydnor wondered if quarter- or half-points could be allocated.

Judge Avery again opined that the Commission should not parse these issues too much, that there are multiple people filling out these forms, and that it should just be a simple binary choice. What the Commission really wants is to get all the information to the judge,



so the judge can make an informed, discretionary decision based on the information that is presented.

Judge DeLeonardo inquired whether anyone else had any comments.

Mr. Finci suggested that they vote on the policy question first. Judge DeLeonardo agreed, stating that they would need a motion, a second, and then the roll call.

Delegate Moon asked for an additional point of information. He again referred to the previous situation where legislators on the Commission were outvoted on the juvenile scoring issue and then turned around and tried to pass legislation which the Commission ended up opposing. He wanted clarification on whether that would happen again in this situation and if the Commission would again oppose the legislation.

Dr. Soulé stated that there was more to that story, and that the Commission spent multiple meetings debating the juvenile score, and what it came down to was coming up with a fairer way to measure a person's prior juvenile record. There were certain Commissioners who thought that the juvenile record should not be considered in the guidelines at all. The Commission had good reasons for why that was not the proper way to go. Dr. Soulé stated that the Commission is the right body to make determinations about which aspects of prior juvenile records should be scored as part of the sentencing guidelines. Dr. Soulé stated that the pushback from the Commission stemmed from the fact that the Commission had debated the issue over multiple meetings, deliberated and voted, and ultimately determined that the juvenile record should be scored as part of the guidelines.

Judge DeLeonardo added that research had been done, that they spent a long time discussing and analyzing the issue, that the vote was split, and that they were able to debate it. Another thing to look at is what the judges are going to do with the information. Whether the point is scored or not, the reality is that judges are going to look at amenability to supervision. Consequently, he was not sure if ultimately the one point would sway what happens.

Judge Avery stated that this goes to the fundamental value of the guidelines scoring system, which is designed to reflect the actual sentencing practices of judges. She stated that, going back to the fundamentals, the guidelines are supposed to be descriptive, not prescriptive. If a judge is customarily considering a juvenile record or amenability to supervision, then it has to be counted because it goes to the legitimacy of the guidelines. If the legitimacy of the guidelines is undermined in the eyes of the judges who use the guidelines, then they will ignore the guidelines. Because if you tell judges not to consider a juvenile record or violations of probation because they are technical, then they will stop believing in the legitimacy of the guidelines. That is an existential problem for the guidelines. She stated that she is emphasizing this point because the legitimacy of the guidelines is important to their existence. If the Commission keeps chopping up the guidelines and making them more prescriptive, then judges will ignore them. The



existence of the guidelines really does reign in the outliers in the sentencing world, regionally and across race and other demographics.

Judge DeLeonardo commented that it was similar with juvenile scores, in that an adult offender who has never had a juvenile offense is different from a 19-year-old with a juvenile history. He stated that a judge is going to see those two situations differently, and if we deny the reality of that then at some point, we are serving the purpose of harmony of sentences regardless of where you are in the state. He stated that this was the concern with respect to the juvenile scoring issue, and that it is similar here. He opined that he thought judges would look at prior probation violations, commenting that judges look at how defendants do on pre-trial supervision.

Mr. Harvey made a motion that the Commission should make no change in the current scoring of violations of probation, regardless of whether the violation is technical or non-technical. Judge Avery seconded the motion.

It was clarified that a vote of “yes” would mean no change to the guidelines, whereas a vote of “no” would mean there would be a change.

By a majority vote of 10-6, the Commission voted in favor of no change to Part D of the offender score.

c. Proposed clarification for the definition of a single criminal event (**Action Item**)

Dr. Soulé stated that the definition of a single criminal event is an issue the Commission has previously discussed, and it is an important one because when there are multiple criminal events in a case, the overall guidelines for each criminal event are summed to calculate the overall guidelines range for the sentencing event. The Maryland Sentencing Guidelines Manual (MSGM) provides limited guidance about how to define a single criminal event. Commission staff recently identified a Supreme Court case (*Wooden v. United States*, 142 S. Ct. 1063), that provides guidance on what constitutes a single criminal event. The case involved ten burglaries, and the Court addressed what constituted a single criminal “occasion,” which is the same concept as a single criminal event. Drawing on guidance provided by that case, the Commission staff proposed a clarifying definition for single criminal event, and the Guidelines Subcommittee unanimously approved the language. The new language would read, “In determining whether multiple crimes are committed in the course of the same transaction, the person filling out the guidelines worksheet shall consider: (1) whether the crimes are committed close in time, in an uninterrupted course of conduct; (2) whether the crimes occur in the same location; and (3) whether the crimes are similar in nature or intertwined (e.g., whether they share a common scheme or purpose).”

Dr. Soulé stated that this proposed language would not alter the current guidelines rules in any way, but rather would provide more clarity to the people completing the sentencing



guidelines worksheets. The Subcommittee agreed that incorporating language from the Wooden case would be helpful and recommends the Commission adopt that language.

A motion was made, seconded, and the Commission unanimously voted unanimously in favor of the proposed language.

6. Executive Director Report – Dr. David Soulé

Dr. Soulé stated that he had four items and one announcement to report as part of the Executive Director Report.

a. Forthcoming October 1, 2022, sentencing guidelines revisions (Status report)

Dr. Soulé stated that there were upcoming revisions to the sentencing guidelines. He stated that at the MSCCSP May 10, 2022, meeting, the Commission voted to adopt changes to the scoring for the juvenile delinquency score and to revise the offense classification for *Arson, 1st degree*.

Specifically, the MSCCPS voted to (1) clarify the instructions for scoring the juvenile delinquency component of the offender score to indicate that adjudications based on acts that are no longer crimes shall not be included and (2) revise the offense type classification for *Arson, 1st degree*, from a property offense to person offense.

These revisions were promulgated through the COMAR review process and will be adopted effective October 1, 2022.

b. Update on sentencing guidelines trainings/feedback meetings (Status report)

Dr. Soulé stated that the second item he wanted to report on was an update on sentencing guidelines trainings and feedback meetings since the last Commission meeting.

Since the last Commission meeting in July, the staff completed one webinar training. Katharine Pembroke, the Training Coordinator, conducted an online judicial training webinar on July 22, 2022. This webinar was an overview of the sentencing guidelines, and Ms. Pembroke also reviewed recent sentencing guidelines updates, including the revisions to the drug and property matrices. This online training is available in the Judicial archives.

Additionally, Dr. Soulé announced that he was pleased to share that the MSCCSP has scheduled three upcoming webinars in September and October. On September 16, 2022, the MSCCSP staff will provide an orientation and training for judicial law clerks and other judicial staff. On September 30, the MSCCSP staff will provide a MAGS 101 webinar for prosecutors and Probation & Parole Agents who initiate sentencing guidelines worksheets. Finally, on October 6, 2022, the staff will provide a sentencing guidelines orientation and guidelines calculator tool training for public and private defense attorneys.



Further information about these trainings is available on the Commission website.

c. Update on search for new staff position (Status report)

Dr. Soulé stated that the third item pertains to the new staff position. As reported at the July 12, 2022, MSCCSP meeting, the Commission is fortunate to be able to add one full time member to its staff resulting from the adoption of SB 763, requiring new actions from the Commission, primarily a new report that the Commission will have to complete on crimes of violence, and putting a data dashboard together.

Dr. Soulé stated that the Commission is currently accepting applications for this position with a best consideration date of September 30, 2022.

Dr. Soulé noted that he distributed a position announcement to all of the Commissioners and that there is also a link on the MSCCSP website that provides a position description and provides a further link to the University of Maryland application site.

Dr. Soulé stated that if anyone knew someone who may be interested in the position, to please direct them to the website.

d. Review of protocol for December 6, 2022, public comments hearing & business meeting (Status report)

Finally, Dr. Soulé stated that he wanted to discuss the public comments hearing, which will be held on December 6, 2022. The MSCCSP enabling legislation requires that the Commission hold an annual public comments hearing. The public comments hearing will take place first and will be followed by a regular business meeting.

Dr. Soulé stated that a hearing invitation would be distributed to key criminal justice stakeholders throughout the State.

Dr. Soulé further stated that the intention is to hold the meeting in person but to allow an option for those who are interested in speaking to do so virtually through Zoom. He suggested that the present meeting would be a good test run to see if this method will work relatively well.

The final item that Dr. Soulé wanted to discuss was a request for help. He encouraged Commissioners to identify thoughtful speakers who can directly speak to the sentencing issues that are within the scope of the Commission. Dr. Soulé mentioned that he would send out an invitation that they could pass on.

Announcement: Mark Mills back for a 2nd year as Graduate Research Assistant/Policy Analyst

Dr. Soulé shared that Mark Mills will remain with the MSCCSP staff for a second year as the Commission's policy analyst. Mark works 20-hours per week as a graduate research assistant. He is a doctoral student in the Department of



Criminology & Criminal Justice at the University of Maryland and staff is very pleased to have him back for a second year.

Dr. Soulé concluded his report and stated that he would be happy to address any questions.

Judge DeLeonardo asked if there were any questions, and there were none.

6. Remaining 2022 Meetings

Dr. Soulé reminded Commissioners of the upcoming public comments hearing and business meeting, scheduled for December 6, 2022. The public comments hearing will begin at 5:00 pm and the business meeting will follow a brief dinner break.

7. Old Business

None.

8. New Business and Announcements

Secretary Green announced that the Department of Public Safety and Correctional Services (DPSCS) has been actively working on a dashboard encompassing much of the data that has been discussed this evening. He noted that the dashboard is being finalized and should be deployed in the coming weeks.

Judge DeLeonardo asked if it would be possible for the DPSCS to provide a presentation of the dashboard to the Commission. Secretary Green responded that DPSCS would be happy to present to the Commission once it has been finalized.

The meeting adjourned at 7:20 p.m.