



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
Videoconference  
September 14, 2021

### **Commission Members in Attendance:**

Honorable Shannon E. Avery, Vice-Chair  
Delegate J. Sandy Bartlett  
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  
Delegate David Moon  
Honorable James P. Salmon  
Kyle E. Scherer, Esq.  
Lisa M. Spicknall-Horner  
Senator Christopher R. West  
Donald Zaremba, Esq., *representing Public Defender Paul DeWolfe*

### **Staff Members in Attendance:**

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

### **1. Call to order**

MSCCSP Chair, Judge Brett R. Wilson, was unable to attend the meeting. Honorable Shannon E. Avery, MSCCSP Vice-Chair, filling in for Judge Wilson, called the meeting to order.

### **2. Roll call and declaration of quorum**

The meeting began at 5:32 pm when attendance reached a quorum.

### **3. Recognition of departing Commissioners: Senator Robert Cassilly**

Judge Avery confirmed that Senator Cassilly was not present at the meeting and requested that she be informed if Senator Cassilly joined the meeting because she wanted to recognize him and say a few words about his service.



#### **4. Welcome new Commissioners: Delegate Bartlett, Robert Harvey, Kyle Scherer, Senator Sydnor, and Senator West**

Judge Avery welcomed Delegate Bartlett to the Commission and stated that she has been a member of the House of Delegates since January 2019. Delegate Bartlett represents District 32 in Anne Arundel County.

Judge Avery welcomed Senator Sydnor to the Commission. Senator Sydnor previously served on the Commission in 2019 as a representative of the House of Delegates. Senator Sydnor has now been appointed to the Commission as a representative of the State Senate. Senator Sydnor is also serving on the Commission's Guidelines Subcommittee.

Judge Avery welcomed Senator West to the Commission. Senator West has been a member of the Maryland Senate since January 2019 and represents District 42 in Baltimore County. Senator West is also a member of the Senate Judicial Proceedings Committee.

Judge Avery welcomed Mr. Kyle Scherer to the Commission. Mr. Scherer was appointed by Governor Hogan to the Commission in August and serves as one of two public representatives.

Judge Avery welcomed Mr. Robert Harvey to the Commission. Mr. Harvey is serving on the Commission as the representative from the Maryland State's Attorneys Association. Mr. Harvey is also serving on the Commission's Guidelines Subcommittee.

Judge Avery noted that Dr. Johnson and Alethea Miller were recently reappointed to the Commission. Judge Avery thanked them for their service on the Commission.

#### **5. Approval of minutes from July 6, 2021, MSCCSP meeting**

Secretary Green made a motion to approve the minutes from the July 6, 2021, meeting. Judge Salmon seconded the motion. The Commission approved the minutes as submitted.

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

Judge Avery reported that the Guidelines Subcommittee met on September 2, 2021, and had a robust discussion relating to the classification of offenses. Judge Avery then turned the Subcommittee Report over to Dr. Soulé to present. Dr. Soulé noted that there are two new Guidelines Subcommittee members. First, Robert Harvey is the Commission's newly appointed representative of the Maryland States' Attorneys Association. Mr. Harvey takes the place of Mr. DeLeonardo, who was appointed to the bench of the Circuit Court for Carroll County. Second, Senator Sydnor takes the place of longtime Commissioner and Subcommittee member Senator Kelley. Dr. Soulé stated that the Committee reviewed three items, which are presented as items 6a through 6c on the meeting agenda.



a. Proposed classification of previously unclassified offense (Action item)

Dr. Soulé reported that Ms. Bowles would present the memorandum labeled, *Proposed Classification of Previously Unclassified Offenses*.

Ms. Bowles stated that staff was recently contacted by a criminal justice practitioner regarding an offense not contained in the Guidelines Offense Table. This offense carries a maximum penalty greater than one year. The Commission's policy is to classify any offense with a penalty of greater than one year. The memo presents the previously unclassified offense, along with the Guidelines Subcommittee's recommendation as to its classification.

Ms. Bowles stated that the offense listed on page 1 of the memo is a second or subsequent violation of Environmental Law Article (EN), § 9-204, with the penalty provision contained in EN, § 9-343(a)(1)(ii), which prohibits the installation, alteration, or extension of water supply systems, sewerage systems, or refuse disposal systems without a permit, etc. A second or subsequent violation of this section is a misdemeanor punishable by up to two years imprisonment and/or a fine of \$50,000 per day of violation.

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.

Ms. Bowles noted that comparable offenses are listed on page 2 of the memo. Based on these comparables, the Guidelines Subcommittee recommends classifying this offense as a property offense with a seriousness category of VII.

Ms. Bowles additionally noted that EN, § 9-343 contains a penalty for a first-time violation of this act, which carries a maximum penalty of 1 year imprisonment and/or a fine of up to \$25,000. This offense is also not contained in the Guidelines Offense Table, but by guidelines rule, since the maximum penalty is one year or less, the offense is assigned a seriousness category VII.

Judge Avery stated that this agenda item is an action item and that the Guidelines Subcommittee's recommendation was unanimous. Judge Avery asked if there were any questions or concerns. Judge Avery asked if there was any opposition to the recommendation. Hearing none, the Commission unanimously voted to adopt the Guidelines Subcommittee's recommendation and classify the offense as a seriousness category VII property offense.

b. Continued review of the guidelines ranges for the drug and property offense sentencing matrices (Status report)

Dr. Soulé noted that Dr. Najaka would present agenda item 6b. Dr. Najaka stated that the materials provided for the present discussion of guidelines compliance by cell include (1)



staff proposed revisions to the guidelines ranges in the drug and property matrices, (2) strict compliance rates for those proposed ranges, and (3) a corresponding memo. Dr. Najaka noted that these materials were provided for informational purposes only, as the Guidelines Subcommittee is not requesting any action by the Commission at this time. The Subcommittee is still considering the provided revisions to the drug and property matrices and is not yet prepared to make a recommendation to the full Commission. Given that the compliance review has spanned multiple meetings and that there are new Subcommittee and Commission members, the Subcommittee thought it would be helpful to summarize the compliance review to date.

Dr. Najaka noted that review of compliance with the sentencing guidelines is one of the Commission's primary responsibilities. Accordingly, the MSCCSP periodically conducts detailed reviews by examining compliance within each cell of the three sentencing matrices (drug, property, and person). The last review concluded in December 2015 with the Commission's vote to approve revisions to the sentencing matrix for seriousness categories IV and V drug offenses, effective July 1, 2016.

The Commission initiated the current review of guidelines compliance by matrix cells in the spring of 2021. This timing allowed for the collection of three full calendar years of sentencing guidelines data following the Justice Reinvestment Act and corresponding October 2017 revisions to the seriousness categories for many common property offenses and drug possession offenses. The review is based on data for single count, guidelines-eligible sentencing events during calendar years 2018-2020.

Central to the review is a consideration of (1) regular compliance and (2) strict compliance within each matrix cell. A number of factors determine regular compliance. First, a sentence is guidelines-compliant if the initial sentence (defined as the sum of incarceration, credited time, and home detention) falls within the applicable guidelines range. Second, sentences that involve no post-sentence incarceration but fall above the upper guidelines limit due to credit for time served are guidelines-compliant. Third, sentences to corrections options programs are guidelines-compliant provided that the initial sentence plus any suspended sentence falls within or above the applicable guidelines range and the sentencing event does not include a crime of violence, child sexual abuse, or escape. Finally, sentences pursuant to an ABA plea agreement are guidelines-compliant. The data utilized for the current review are based on sentences prior to the recent name and definition changes for a guidelines-compliant plea. As such, the terms "ABA plea agreement" here indicate a guidelines-compliant plea.

In comparison, strict compliance considers a sentence guidelines-compliant only if the initial sentence (defined as the sum of incarceration, credited time, and home detention) falls within the applicable guidelines range.

As a first step in the review, the Subcommittee examined both regular compliance and strict compliance rates for each cell of the current matrices, with particular attention paid to cells with rates below the 65% benchmark standard and a sufficient sample size of at least 50 total cases. The Commission adopted the goal of 65% as the benchmark standard for sentencing guidelines compliance, with the understanding that guidelines revisions



should be considered when sentences depart from the guidelines in more than a third of cases.

Results of the first step of the current review showed that while nearly all cells currently meet the 65% benchmark for regular compliance, more than one-quarter of cells have a strict compliance rate below 65%. Further, in the majority of cells where the strict compliance rate is less than 65%, departures below the guidelines exceed departures above the guidelines.

The second step of the review considered the impact of the COVID pandemic on sentences and guidelines compliance. Approximately 13% of the single-count sentencing events in calendar years 2018-2020 occurred during-COVID. To the extent that defendants sentenced during-COVID were diverted from incarceration or were incarcerated for shorter periods of time due to the pandemic, one would expect to observe differences in strict compliance by matrix and cell when these sentences are excluded.

Results of the second step of the review showed little evidence of a so-called COVID discount, with few differences in strict compliance rates when COVID sentences are removed. Further, any observed differences are small, with rates generally varying by no more than a few percentage points.

The third step of the review, undertaken by the Subcommittee at its recent September 2 meeting, considered staff proposed amendments to the drug and property matrices and examined how compliance rates would change with those revisions.

Dr. Najaka referenced the summary document containing the current and proposed ranges for the drug and property matrices. Dr. Najaka noted that supplementing this summary document are the detailed tables listing the strict compliance rates for the current and proposed ranges. Dr. Najaka briefly reviewed the contents of these documents.

Within the summary document, three rows of information are listed for each cell:

- Row 1: Middle 65% of sentences (i.e., what the range would need to be to capture the middle 65% of sentences)  
Total number of cases for the cell
- Row 2: Current guidelines range  
Number of months between lower and upper ranges
- Row 3: Proposed guidelines range  
Number of months between lower and upper ranges

Cells highlighted in yellow have a strict compliance rate less than 65% and at least 50 cases, while cells highlighted in blue have a strict compliance rate less than 65% and fewer than 50 cases.

To illustrate the cell contents, Dr. Najaka provided an example. Consider the drug matrix cell corresponding to a category IV offense and an offender score of 2. The first row of the cell indicates that there are 106 sentences for a category IV drug offense where the



defendant has an offender score of 2, and the middle 65% of those sentences is probation to 7.8 months. The second row indicates that current guidelines range is 1M to 1Y (with 11 months between the lower and upper ranges) and the yellow highlighting indicates that fewer than 65% of sentences are within that range. The third row indicates that the staff proposed range is probation to 6M, and the absence of yellow highlighting indicates that at least 65% of sentences are within that range.

Dr. Najaka noted that the specific strict compliance rates are provided in the separate detailed compliance tables. Those tables indicate that 47.2% of the sentences are within the current guidelines range whereas 80.2% of the sentences are within the proposed guidelines range.

Dr. Najaka stated that the proposed revisions strike a balance between a strictly descriptive middle 65% of current sentences, the number of months in each range, and the proportionality of ranges across cells. The proposed revisions move the guidelines substantially closer to the middle 65%. However, they do not correspond strictly to the middle 65%, as they also offer proportional incremental increases going across the matrices (as the offender criminal history score increases) and down the matrices (as the offense severity increases).

Dr. Najaka noted that the the yellow highlighting in the summary document provides an indication of how the proposed ranges compare with current ranges in terms of strict compliance. Looking first at the proposed ranges in the drug matrix, the yellow highlighting indicates that there are nine cells with at least 50 cases where strict compliance is less than 65%. This is compared with (or down from) 15 cells in the current matrix. Looking next at the proposed ranges in the property matrix, the yellow highlighting indicates that there are six cells with at least 50 cases where strict compliance is less than 65%. This is compared with (or down from) 14 cells in the current matrix. Dr. Najaka summarized that the proposed ranges improve on the current ranges, moving the guidelines closer to actual sentences with proportional recommendations that are not so wide as to lack guidance.

Dr. Najaka noted that the Guidelines Subcommittee discussed the staff proposed revisions to the drug and property offense matrices at its recent meeting and decided to postpone the vote on the revisions to allow additional time for review. Given the importance of the revisions and the recent turnover of Subcommittee and Commission members, the Subcommittee recommends holding a special meeting prior to the scheduled December 7, 2021, Commission meeting to permit further consideration of the proposed revisions.

Dr. Najaka turned the discussion over to the Commission. Dr. Soulé thanked Dr. Najaka for her presentation.

Judge Avery asked Dr. Soulé to elaborate on the special meeting and the special considerations that are driving the meeting. Dr. Soulé noted that two of the four Guidelines Subcommittee members are new to the process. Additionally, the Commission has five new members in total, so the Subcommittee thought it would be fair to give





members further time to consider the proposed revisions. Dr. Soulé noted that the Subcommittee could have pushed the discussion to the December 7 meeting, but instead decided to schedule a special meeting in November to discuss revisions to the guidelines. The goal is to have proposed revisions for the full Commission to vote on at the November meeting. Dr. Soulé noted that the December 7 meeting is also a public comments hearing. Holding a special meeting in November would allow time for the Commission to vote on the proposed revisions, tentatively adopt them, and call for comment at the December 7 public comments hearing. Dr. Soulé stated that November 10 is the target date for the special meeting. This date will give sufficient time to call for comment at the December 7 public comments hearing. Judge Avery asked if there were any objections to the November 10 meeting date. Hearing none, the special meeting was scheduled for November 10.

Judge Avery stated that while new members do not have formal orientation to the Commission, they have access to materials posted on the MSCCSP's website. Those materials include the Commission's enabling legislation, the intent and purpose of the Commission, and a history of how the Commission came into existence. Judge Avery suggested that the history and purpose of the Commission is important and relevant to the decisions the Commission will make moving forward as they pertain to revising the guidelines. Judge Avery expressed her hope that each Commissioner would take the opportunity to look at the materials so that members are voting, commenting, and making decisions based on an understanding of the purpose of the guidelines and how the guidelines work. Judge Avery noted that the guidelines are voluntary and are based on statewide data. Their purpose is to provide sentencing judges with information that relates to what sentences are being imposed for similar offenses under similar circumstances by offenders with similar criminal history.

c. Proposed reclassification of sex offense, 3rd degree, involving age-based elements  
**(Action item)**

Dr. Soulé referred Commissioners to the memorandum entitled, *Proposed Reclassification of Sex Offense, 3rd Degree, Involving Age-Based Elements*. Dr. Soulé noted that the staff completed this analysis as a complement to the cell-by-cell compliance review and in response to feedback received from members of the criminal justice community. When asked for feedback regarding the guidelines, judges and other members of the criminal justice community cited *Sex offense, 3rd degree*, as an offense in which the guidelines are too low. In response, the staff analyzed the sentencing guidelines data to determine if sentences for *Sex offense, 3<sup>rd</sup> degree*, were frequently outside the guidelines.

Given that the Commission is considering revisions to decrease the guidelines for drug and property offenses, the staff thought it would be appropriate to examine guidelines compliance for *Sex offense, 3<sup>rd</sup> degree* and to determine if there are other offenses in which departures above the guidelines are more common than departures below the guidelines. The analysis identified six person offenses, one property offense, and two drug offenses where sentences were more likely to be above versus below the guidelines. Of these offenses, *Sex offense, 3rd degree, involving age-based elements*, stood out.



First, this offense has the highest percentage of sentences that are departures above the guidelines. Second, it is the only offense that staff identified from this analysis in which it may be appropriate to amend the offense's seriousness category based on its statutory maximum penalty. Dr. Soulé noted that revisions to the seriousness categories for the other offenses would not be consistent with the Commission's policy to make the seriousness categories comparable with other offenses that have similar statutory maximum penalties and similar felony/misdemeanor classifications. While the other offenses that staff identified did not call for revised seriousness categories based on their statutory maximum, the information on above departure rates was included in the memo as it may be useful to legislative members of the Commission who contemplate and revise statutory maximum penalties.

Dr. Soulé provided a brief historical background regarding the Commission's classification of *Sex offense, 3<sup>rd</sup> degree*. In 2006, the Commission conducted an analysis and found similarly that judges were more likely to depart above versus below the guidelines for *Sex offense, 3<sup>rd</sup> degree*. Accordingly, the Commission voted to separate the two acts covered by the statute prohibiting *Sex offense, 3<sup>rd</sup> degree*. A violation of CR, § 3-307(a)(1) or (a)(2), which involves the employment or display of a dangerous weapon or an individual who is substantially cognitively impaired or mentally incapacitated, was reclassified as a seriousness category IV offense, while a violation of CR, §§ 3-307(a)(3), (a)(4), or (a)(5), which involves age-based elements, remained a seriousness category V offense.

Despite this reclassification, the staff's most recent analysis found that judges are still more likely to depart above versus below the guidelines for *Sex offense, 3<sup>rd</sup> degree*, involving age-based elements. Additionally, in the MSCCSP's 2020 survey of criminal justice practitioners, one judge noted that when calculating Part A of the offense score, all seriousness category V through VII offenses receive 1 point. This means that *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, which is a seriousness category V offense and carries a 10-year statutory maximum, receives the same number of points as *Sex offense, 4<sup>th</sup> degree*, which is a seriousness category VII offense and carries a 1-year statutory maximum.

Dr. Soulé stated that the memo provides data as to how guidelines compliance rates would change if this offense were reclassified, specifically that above departure rates would decrease and compliance rates would increase. Additionally, the memo illustrates the most common guidelines ranges for this offense when classified as a seriousness category IV versus V offense.

Dr. Soulé noted that the Guidelines Subcommittee reviewed this issue and that there was discussion regarding the wide range of variability in the facts related to convictions for *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*. For example, it was noted that sometimes the perpetrator is a 19-year-old adult, while other times it is a 45-year old adult. Sometimes the adult is also subject to charges of sex abuse of a minor.

The Subcommittee noted that if the seriousness category for the offense is changed from a category V to a category IV, the most common guidelines range for the typical third-





degree sex offender (i.e., one with no prior record) would still include a recommendation as to probation. As a seriousness category V offense, the most common guidelines range for a defendant with no prior record is probation to probation. Were the offense classified as a seriousness category IV offense, the most common guidelines range for a defendant with no prior record would be probation to 3 years. In either scenario, the lower range is still probation. Only the upper range increases. Accordingly, the revised range would give judges flexibility to adjust the sentence based on the particular facts of the case.

Dr. Soulé reported that based on the review of feedback from judges and survey respondents, as well as the review of the sentencing guidelines data, the Guidelines Subcommittee voted in favor of the proposed revision, by a margin of 3 to 1, to reclassify *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, from a seriousness category V offense to a category IV offense. Dr. Soulé presented this proposed revision as the recommendation of the Guidelines Subcommittee and opened it up for discussion.

Mr. Zaremba stated his belief that *Sex offense, 3<sup>rd</sup> degree, with age-based elements*, is sufficiently different from *Sex offense, 3<sup>rd</sup> degree, employ or display a dangerous weapon, etc., or with mentally defective, mentally incapacitated, or physically helpless individual*, to warrant leaving the offense as a seriousness category V. Mr. Zaremba noted that unlike subsections (1) and (2), which were made a category IV offense in 2006, *Sex offense, 3<sup>rd</sup> degree, with age-based elements*, is different because the offense involves strict liability, in that the defendant may not claim in defense that there was a reasonable belief in mistaken age. In contrast, someone charged with *Sex offense, 3<sup>rd</sup> degree, employ or display a dangerous weapon, etc., or with mentally defective, mentally incapacitated, or physically helpless individual*, can present a defense based on a reasonable belief that the person did know the victim had a disability.

Mr. Zaremba stated that this memo reminded him of a case in which he was the defense attorney. The defendant lost the case, and it became a reported opinion from the Court of Appeals (*Walker v State*, 363 MD 253 (2001)). Mr. Zaremba noted that, though this case is 20 years old, it remains law in Maryland. This case was the Court of Appeals' last word on this statute as it relates to age-based elements. In the Walker case, the Court held that *Sex offense, 3<sup>rd</sup> degree, with age-based elements*, is a strict liability offense. There is no defense as to the defendant's reasonable belief in the victim's age, no matter how reasonable the belief may be, either subjectively or objectively.

Mr. Zaremba noted that the defendant in the case, Mr. Walker, met his girlfriend at his place of employment, Weis Market. At the time, Weis had an employment policy that required all employees to be 17 years old. In filling out the employment application, the victim falsified her age. The victim told the defendant, during the course of their relationship, that she was 19. The facts of the case were undisputed by the prosecution. Despite this, the defendant could present no defense and was convicted. The only difference between then and now is that, instead of having just a felony record, the defendant would now have to register as a tier II sex offender for 25 years. Mr. Zaremba emphasized that *Sex offense, 3<sup>rd</sup> degree, with age-based elements*, involves a wide range of conduct. There are instances in which the defendant is much older and knows that the victim is minor, and then there are cases like MR. Walker's. Because there is no



reasonable defense to this offense, it is different from *Sex offense, 3<sup>rd</sup> degree, employ or display a dangerous weapon, etc., or with mentally defective, mentally incapacitated, or physically helpless individual*.

Mr. Finci stated that he was the one member of the Guidelines Subcommittee who voted against increasing the seriousness category for this offense. Mr. Finci stated that the main reason for his objection was that, in 2006, the bifurcation of the offense was a voted on and negotiated decision by the Commission. For some of the reasons that Mr. Zaremba described and for other reasons, the Commission, at the time, concluded that the characteristics of the two categories of *Sex offense, 3<sup>rd</sup> degree* were very different. Therefore, the seriousness category for *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, was not increased, while the seriousness category for *Sex offense, 3<sup>rd</sup> degree, employ or display a dangerous weapon, etc., or with mentally defective, mentally incapacitated, or physically helpless individual*, was increased.

Mr. Finci noted his appreciation for the staff's analysis but observed that it did not include an analysis of how *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, is sentenced across criminal history categories. Mr. Finci noted that, for instance, in proposing revisions to the drug offense matrix, the Commission examined the average sentences across criminal history categories. Mr. Finci further noted that the Commission will be addressing the person matrix for review, just as it is now addressing the drug and property matrices. The Guidelines Subcommittee agreed to bifurcate this process because the drug and property matrices are easier than the person matrix to revise. While the Guidelines Subcommittee was provided with statistics to support the modification of *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, to a seriousness category IV, Mr. Finci objects to the recommendation based on the lack of information regarding sentences for the offense across criminal history scores. With that information, Mr. Finci suggested that his vote may change.

Dr. Soulé noted that while the staff's analysis did not look at sentences across offender scores, it did look at guidelines compliance, which accounts for the offender score. With regards to *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, less than 46% of sentences were within guidelines, 2.8% of sentences were below the guidelines, and 51.5% of sentences were above the guidelines. Dr. Soulé noted that these findings indicate that judges are consistently going above guidelines when sentencing this offense.

Judge Avery noted that the purpose of the Commission is to examine and make decisions based on data and feedback from judges and the criminal justice community. Judge Avery reiterated that Part A of the offense score allots to *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, an offense with a maximum penalty of 10 years, the same point value as *Sex offense, 4<sup>th</sup> degree*, an offense with a maximum penalty of one year. Judge Avery cautioned that Commissioners should not get lost in the details. Judge Avery stated that there is a reason as to why the Commission is reviewing this offense, and that is because there is an inconsistency in how offense is treated. Judge Avery additionally noted that even with the seriousness category change, the low end of the guidelines for most defendants convicted of this offense will still be probation. Judge Avery suggested that this reclassification does not affect injustice on people like Mr. Walker or the



defendant who mistakenly has a relationship with a minor. The Commission knows that judges are going above the guidelines when sentencing *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, that these offenses involve serious actions, and that there is a reason why the legislature established specific age cutoffs and maximum penalties for this offense, that reason being it is a serious offense. Judge Avery emphasized that *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, should not be treated the same as an offense with a one-year maximum (i.e., *Sex offense, 4<sup>th</sup> degree*). Even if the judge believes there was mistake as to the victim's age, the judge can go below guidelines with an explanation, though the guidelines for most of these defendants will include probation.

Delegate Barrett asked why *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, was initially classified as a seriousness category V offense. Dr. Soulé replied that prior to 2006, there was no separation between the two categories of *Sex offense, 3<sup>rd</sup> degree*— all were classified as category V offenses. When the Commission classifies offenses, it typically looks at comparable offenses, which are other offenses with similar maximum penalties, felony/misdemeanor classification, and type of offense. Prior to 2006, *Sex offense, 3<sup>rd</sup> degree*, was a seriousness category V offense. This offense could have been classified as a category V or IV offense based on the comparables. Dr. Soulé noted that there are more seriousness category IV versus V offenses with a statutory maximum of 10 years. At the time, the Commission was not willing to increase the seriousness category for all *Sex offense, 3<sup>rd</sup> degree*. The Commission looked at data, which at the time was not separated out by category and found that judges were departing above guidelines in cases involving *Sex offense, 3<sup>rd</sup> degree*. At the time, the Commission theorized that the departures were due to offenses involving force or against those with a disability, so the Commission assigned a seriousness category IV to *Sex offense, 3<sup>rd</sup> degree, employ or display a dangerous weapon, etc., or with mentally defective, mentally incapacitated, or physically helpless individual*. The Commission, then, started collecting data on the two categories of offenses. Now, in 2021, the Commission has more data, and has found that what was theorized in 2006 was not accurate because judges are giving higher sentences for both categories of *Sex offense, 3<sup>rd</sup> degree*.

Dr. Soulé noted that page 7 of the memo provides a list of comparable offenses, all of which are seriousness category IV felonies with a statutory maximum of 10 years. Dr. Soulé concluded that the reclassification of *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, is consistent based on its comparable offenses and the Commission's process for setting seriousness categories.

Secretary Green motioned for the Commission to reclassify the offense. Dr. Johnson seconded the motion. The Commission voted 12 to 1 to reclassify *Sex offense, 3<sup>rd</sup> degree, involving age-based elements*, as seriousness category IV offense.



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

### a. Introduction of new staff policy analyst/graduate research assistant, Mark Mills (Status report)

Dr. Soulé announced that Mark Mills has joined the MSCCSP staff as a policy analyst. Dr. Soulé was unable to introduce Mr. Mills because Mr. Mills was attending a class that evening. Mr. Mills 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. For the past 10 years, Mr. Mills served as a Deputy District Attorney in Elko County, Nevada. Dr. Soulé stated that the Commission was excited to welcome Mr. Mills' legal experience to the staff, particularly because lost funding resulted in the position not being filled last year due to COVID-related budget cutbacks. Dr. Soulé stated that he hoped to have the opportunity to introduce Mr. Mills to the Commission at another time when he is not in class.

### b. Sentencing guidelines webinar training (Status report)

Dr. Soulé reported on the staff's continued sentencing guidelines training via online webinars. Most recently, the staff conducted two webinar sessions, one on July 28, 2021, and another on September 8, 2021. These two sessions were intended primarily for law clerks and for court staff. The trainings provided information on the background and goals of the sentencing guidelines, provided an overview of the sentencing guidelines calculation process, and offered a demonstration of how to use the Maryland Automated Guidelines System (MAGS). The trainings also described recent amendments to the guidelines with an emphasis on the April 1, 2021, update regarding guidelines-compliant binding pleas.

Dr. Soulé additionally noted that the MSCCSP website provides access to a webinar titled, *Maryland Sentencing Guidelines 101*. This webinar is available to view on-demand.

Finally, Dr. Soulé shared that the website offers two MAGS instructional videos.

### c. Review of protocol for December 7, 2021, public comments hearing (Status report with request for input)

Dr. Soulé noted that the MSCCSP enabling legislation requires that the Commission hold an annual public comments hearing, and that the hearing is important as it provides a forum for the public to discuss sentencing-related issues. The MSCCSP's 2021 public comments hearing is scheduled for December 7th at 5:00pm, to be followed by a regular business meeting. Dr. Soulé then noted that, in October, a hearing invitation will be distributed to approximately 35 key criminal justice stakeholders throughout the State, and that, further, the invitation will be distributed to the roughly 1,000 criminal justice practitioners currently receiving the MSCCSP's electronic newsletter, *Guidelines E-News*.



The hearing will be announced on the Commission's website, the Maryland Register, the Maryland General Assembly's hearing schedule, and anywhere else that they could think to post it, commenting that the Commission usually calls on Secretary Green's press office for help with posting notice of the hearing, and that the Department of Public Safety and Correctional Services has always been kind about helping the Commission post notice of the hearing. The hearing announcement will indicate that the event will be live-streamed and provide a link to access the live stream.

Dr. Soulé then stated that there were a few other administrative items he wanted to discuss and get feedback on regarding the protocol for the public hearing. First, the staff is still hoping that the meeting will be conducted as a hybrid in-person/virtual meeting. If in-person meetings are possible in December, the meeting will be held at the Maryland Judicial Center, and the plan is to utilize a room that includes video cameras so that the Commission can record those in-person and also allow for virtual participation. If something changes and an in-person meeting is not available at the Judicial Center, the Commission may switch to a virtual-only Zoom meeting. The Commission would need to make a decision as to the meeting status in the beginning of November, so that there is enough time to publish an update regarding the meeting details.

Dr. Soulé then asked whether the Commissioners had any thoughts on the proposed plan to proceed with planning for a hybrid in-person/virtual meeting with the option to switch to strictly virtual if needed. None of the Commission members expressed any objections to the proposed course of action.

Next, Dr. Soulé requested input on whether the staff should begin the public hearing with a presentation on the history, purpose, and goals of the sentencing guidelines and MSCCSP. Dr. Soulé mentioned that he did this last year and asked the Commission whether they thought this was helpful and if the Commission staff should plan on giving this presentation again. Dr. Brian Johnson opined that he thought it was useful, noting that many people do not know what the Commission is and that, to the extent the presentation can be done briefly, it would be a useful and good way to start the meeting. Ms. Spicknall agreed with Dr. Johnson and opined that she found the presentation very helpful. Based on this feedback, Dr. Soulé stated that staff would plan on giving the presentation again this year.

Dr. Soulé stated that the last item to discuss was not a question, but rather a request. 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 encouraged the Commissioners to reach out to possible speakers and tell them to contact Dr. Soulé and he can walk them through the process of providing testimony, let them know what to expect, and arrange for them to speak.

Before concluding the Executive Director Report, Dr. Soulé announced that the staff training coordinator, Katharine Pembroke, was on maternity leave, and that she and her husband just welcomed a new baby girl a few weeks ago. Ms. Pembroke will be on leave for the next few months. Judge Avery and Mr. Finci offered their congratulations.



## **8. Remaining 2021 meetings**

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

- a. November 10, 2021, 5:30 pm
- b. December 7, 2021, 5:00 pm

## **9. Old business**

Judge Lewis noted that, at the last meeting, Senator Kelley had stated that it would be wise for the Commission to include input from scholars from Historically Black Colleges and Universities (HBCUs). Judge Lewis mentioned that she teaches at Bowie State University (BSU), an HBCU, and that the University has a wonderful criminal justice department. Judge Lewis stated that she would recommend that Dr. Charles Adams from BSU work with the Commission. Judge Lewis opined that it would be kind, appropriate, and thoughtful to expand the scholars to include professors from HCBUs.

Dr. Soulé thanked Judge Lewis and commented that she made an excellent point. Dr. Soulé further stated that he would reach out to Judge Lewis to discuss the possibilities.

Judge Avery thanked Judge Lewis for her comments.

## **10. New business and announcements**

There was no new business or announcements.

Judge Avery concluded the meeting.

The meeting adjourned at 6:43 pm.