



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
Judiciary Education and Conference Center  
Annapolis, MD 21401  
September 17, 2019

### Commission Members in Attendance:

Honorable Brett R. Wilson, Chair  
Honorable Shannon E. Avery, Vice-Chair  
Delegate Luke H. Clippinger  
Brian L. DeLeonardo  
Mr. Paul B. DeWolfe  
Richard A. Finci, Esq.  
Kathleen C. Murphy, *representing Attorney General Brian E. Frosh*  
Melinda C. Grenier  
Brian D. Johnson, PhD  
Senator Delores G. Kelley  
Honorable Patrice E. Lewis  
Honorable James P. Salmon  
Delegate Charles E. Sydnor III  
J. Michael Zeigler, *representing Secretary Robert L. Green*

### Staff Members in Attendance:

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

**Visitors:** Claire Rossmark, Department of Legislative Services

### 1. Call to order

MSCCSP Chair, Judge Wilson, called the meeting to order.

### 2. Roll call, declaration of quorum, and introduction of new Chair and Commissioners:

The meeting began at 5:30pm when attendance reached a quorum.

Judge Wilson introduced himself as the newly appointed Chair of the MSCCSP. Judge Wilson provided a brief background of his career prior to his appointment to the Commission. Judge Wilson stated that he served as an assistant state's attorney in Washington County from 2002 until his appointment to the Circuit Court for Washington County in 2017. Judge Wilson also served as a representative for District 2B, Washington



County, in the House of Delegates from 2015 to 2017. Judge Wilson stated that he served as a member of the House Judiciary Committee from 2015 to 2017.

Dr. Soulé then introduced three new Commission members. Governor Hogan appointed Melinda C. Grenier as the local correctional facility representative. Ms. Grenier is the Assistant Director of the Community Services Division for the Frederick County Sheriff's Office. Dr. Soulé noted that the day prior, Governor Hogan appointed both Margaret Knipe and Lisa M. Spicknall-Horner to the Commission. Ms. Knipe was appointed as the victim's advocacy group representative. Ms. Spicknall-Horner was appointed as one of the two public representatives. Dr. Soulé noted that Ms. Knipe and Ms. Spicknall-Horner were informed of their appointments one day prior to the current meeting and could not attend due to prior commitments.

Dr. Soulé noted that Governor Hogan reappointed Commissioner Richard Finci as the criminal defense attorney representative. Dr. Soulé stated that the Commission is fortunate to have Mr. Finci back for another term.

### 3. **Approval of minutes from the July 9, 2019 MSCCSP business meeting**

The Commission approved the minutes as submitted.

### 4. **Guidelines Subcommittee Report – Dr. David Soulé**

Judge Avery explained to new Commissioners that the Guidelines Subcommittee is a balanced group of four Commissioners who meet prior to the full Commission meetings to review legislation and policy questions relevant to the sentencing guidelines and prepare recommendations for the full Commission. The subcommittee consists of herself, Mr. DeLeonardo, Mr. Finci, and Senator Kelley. Judge Avery noted that the Guidelines Subcommittee met via teleconference on September 3, 2019. All four Subcommittee members participated in the teleconference. The Subcommittee reviewed three issues.

#### a. Proposed classification of *crime of violence against a pregnant person* (Action item)

Judge Avery referred Commissioners to the corresponding memorandum, *Proposed Classification of Committing a Crime of Violence Against Another Person When the Person Knows or Believes that the Other Person is Pregnant*. Judge Avery noted that this was a new offense from the 2019 Legislative Session, authorized by Senate Bill 561. This offense was inadvertently omitted from the July memorandum that outlined the proposed classification of new penalties from the most recent legislative session. Judge Avery stated that the Guidelines Subcommittee recommended the offense be classified as a seriousness category IV based on the comparable offenses, provided on page 2 of the memorandum.

Mr. DeLeonardo made a motion to adopt the Guidelines Subcommittee's recommendation. Senator Kelley seconded the motion.

**The Commission voted unanimously to adopt the Guidelines Subcommittee's recommendation to classify the offense as a seriousness category IV.**



b. Should the instructions for the prior adult criminal record score provide specific guidance regarding military adjudications? (Action item)

Judge Avery noted that the Guidelines Subcommittee discussed at its September meeting whether and how military adjudications should be included in the defendant's prior adult criminal record score. The Guidelines Subcommittee had a robust discussion and agreed, in a unanimous vote, to make a specific recommendation to the full Commission. Since that time, though, Dr. Soulé received input on the issue from Senator Cassilly, who was unable to attend the present meeting. Senator Cassilly is a former Judge Advocate General (JAG) Officer in the U.S. Army. Senator Cassilly expressed concern that including military offenses not contained in Maryland law in the defendant's prior record score amounts to a penalty against veterans. Senator Cassilly noted that even serious military offenses, such as desertion, are the result of the extreme stresses of military involvement, stresses that are not present in the civilian world. In light of Senator Cassilly's concerns, the Guidelines Subcommittee agreed that the issue should be tabled until the next meeting. Judge Avery noted that the Guidelines Subcommittee would invite Senator Cassilly to participate in its next meeting to discuss these concerns.

c. Revisiting sex offender registration as it pertains to the definition of criminal justice system involvement (Action item)

Dr. Soulé presented this portion of the report and referred Commissioners to the memorandum entitled, *Revising Sex Offender Registration as it Pertains to the Definition of Criminal Justice System Involvement Used to Calculate the Offender Score*. Dr. Soulé noted that the Commission previously addressed this issue in 2016 when Mr. Finci relayed to the Commission a question from a colleague who inquired as to whether sex offender registration would preclude the application of the decay factor to the prior adult criminal record score. In the course of that discussion, the Commission also considered whether sex offender registration should be defined as criminal justice system (CJS) involvement for part A of the offender score.

Dr. Soulé noted that part A of the offender score provides that, "The offender was in the criminal justice system if the offender was on parole, on probation, incarcerated, on work release, on mandatory supervision, was an escapee, or had a comparable status at the time the offense was committed." The instructions go on to say that, "The defendant is not considered to be in the criminal justice system if the offender was on unsupervised probation for an offense not punishable by imprisonment."

Part C of the offender score includes instructions for application of the decay factor to the prior adult criminal record score. Similar to part A, the decay factor provides that, "An offender was in the criminal justice system if the offender was on parole, on probation, incarcerated, on work release, on mandatory supervision, was an escapee, or had a comparable status."



Dr. Soulé noted that in 2016, the Guidelines Subcommittee recommended to the full Commission that the issue be tabled since it was not a frequent question from practitioners. Since that time, staff has received additional inquiries and, therefore, asked that the Subcommittee reconsider the issue.

As noted in the memorandum, Dr. Soulé suggested that this issue may be informed by whether sex offender registration is considered a civil requirement or criminal penalty. While the Supreme Court ruled that sex offender registration is primarily a civil requirement, more recently, Maryland's Court of Appeals ruled that it is akin to a criminal sanction. In *Doe v. Department of Public Safety and Correctional Services* (DPSCS) (2013), the Court of Appeals ruled that the retroactive application of sex offender registry laws to defendants convicted prior to the law's enactment would violate ex post facto laws due to the registry's punitive and restrictive effects. The Court of Appeals stated that the registration, with its resulting restrictions and reporting requirements, "has essentially the same effect on his life as placing him on probation. It is well-settled in this State that probation is a form of criminal sanction." The opinion went further to state that, "Because the sex offender registration has a highly similar effect on Petitioner's life as being on probation, applying the statute to Petitioner effectively imposes on him an additional criminal sanction."

Dr. Soulé noted that the Guidelines Subcommittee had a lengthy discussion of this issue at its September 3 meeting. Dr. Soulé provided the following summary of the Subcommittee's discussion.

First, Judge Avery stated that, as a circuit court judge, she would consider the requirements of sex offender registration when making a sentencing decision. Judge Avery noted that a defendant's status on the registry at the time of the offense would speak to their amenability to supervision in the community. Accordingly, Judge Avery indicated that she believes that sex offender registration should be included in the definition of CJS involvement. Judge Avery further noted that any factor that is considered by judges at sentencing should be included in the guidelines, as to exclude a relevant factor would undermine the guidelines' credibility.

Mr. Finci suggested that sex offender registration should be taken into account when a person commits a new sex offense, though noted that this is not the way the guidelines currently take into account CJS involvement. Mr. Finci suggested that sex offender registration would not be relevant in cases where the subsequent offense was a property or drug offense.

Judge Avery stated that excluding sex offender registration from the guidelines would undermine the guidelines' credibility, even if the nature of the instant offense makes the defendant's sex offender registration status seemingly irrelevant. Further, Judge Avery noted that the offender's registration might be particularly relevant in domestic-related offenses that are not sex offenses, including property offenses such as malicious destruction of property.



Mr. DeLeonardo indicated that in his opinion, the Maryland Court of Appeals definitively addressed this issue when it ruled that registration is a criminal sanction. Further, the supervision provided to sex offender registrants is, in some cases, more intensive than that provided to an individual on regular probation. Therefore, a defendant who commits a subsequent offense while on the registry should have their supervisory status included in the calculation of their guidelines.

Mr. Finci asserted that the Commission would make a prescriptive (versus descriptive) decision if it decided to indicate that sex offender registration should be considered CJS involvement. He noted that the Court of Appeals ruling simply indicated that sex offender registration is a sanction like probation and, therefore, violates *ex post facto* laws when applied retroactively. In his opinion, Mr. Finci believes the *Doe v. DPSCS* ruling does not apply to the Commission's definition of CJS involvement after an offense is committed.

Mr. DeLeonardo noted that if the instructions are not clear, many practitioners will include sex offender registration in the definition of CJS involvement (i.e., as a "comparable status") for the decay factor, as well as part A, and exclude its application among registrants. Dr. Soulé noted that the MSCCSP data cannot identify how often this may happen, but inquiries to staff indicate that at least some practitioners consider sex offender registration as CJS involvement. Mr. DeLeonardo stated that the Carroll County State's Attorney's Office defines registration as CJS involvement.

Mr. Finci asked whether sex offender registration was defined as CJS involvement in the Federal system. The staff researched this question after the Guidelines Subcommittee meeting. As noted in the memorandum prepared for the full Commission, the staff communicated with the Education and Sentencing Practice staff at the U.S. Sentencing Commission who relayed that sex offender registration is not defined as CJS involvement in their guidelines system.

Senator Kelley questioned what would happen if the defendant were on the sex offender registry, but committed a completely unrelated offense, such as college admissions fraud. Judge Avery stated that sex offender registration should still factor into the guidelines, though it would be at the judge's discretion as to how much weight is placed on it at sentencing. Judge Avery noted that a prosecutor may also weigh registration appropriately, in light of the instant offense, and adjust plea negotiations accordingly.

Mr. Finci asserted that registration status should be considered as an aggravating or mitigating factor at sentencing rather than weighing into the guidelines calculation. Judge Avery stated that it is considered in the guidelines because the guidelines specifically include a measure of CJS involvement. Judge Avery indicated that how registration is weighed at sentencing is ultimately at the



judge's discretion. Mr. Finci stated that sex offender registration is legislatively mandated for certain offenses and not at the discretion of the judge.

Mr. DeLeonardo reiterated that he was in favor of including sex offender registration in the definition of CJS involvement for part A but excluding it from the decay factor. Mr. DeLeonardo explained that this proposal is a compromise. Given the intense level of supervision provided to sex offender registrants, an argument could be made that registration should be counted as CJS involvement for the decay factor as well. Mr. DeLeonardo reasoned that the decay factor, however, examines recently committed offenses and their frequency; therefore, it would be fair to exclude registration from its definition.

In the end, three of the four subcommittee members agreed that sex offender registration should be defined as CJS involvement for part A of the offender score, while all four subcommittee members agreed that sex offender registration should not preclude the application of the decay factor to part C.

Dr. Soulé noted that the proposed revisions to the MSGM and COMAR, starting at page 6 of the memorandum, reflect the Subcommittee's deliberations and are presented to the Commission as its recommendation.

Judge Wilson asked the Commission if there were any comments or questions regarding the proposal. Mr. DeWolfe spoke first. Mr. DeWolfe noted that his proxy, Bill Davis, generally attends meetings on his behalf. Mr. Davis was unavailable for the present meeting and had called Mr. DeWolfe prior to the meeting to express his concerns regarding this issue. Mr. DeWolfe relayed those concerns to the Commission. Mr. DeWolfe stated that he would vote against including sex offender registration in the definition of CJS involvement for any part of the offender score. Mr. DeWolfe noted that the Supreme Court ruled that the registration was a civil requirement, rather than a criminal sanction. Mr. DeWolfe further noted that the opinion in *Doe v. DPSCS* held that registration is akin to a criminal sanction and, therefore, retroactive registration would violate ex post facto laws. Mr. DeWolfe stated that this ruling would not apply to the use of sex offender registration as a future "sentence enhancement." Additionally, the U.S. Sentencing Commission does not include sex offender registration in their measure of CJS involvement at the time of the instant offense. For these reasons, Mr. DeWolfe stated that registration should not be included in Maryland's guidelines definition of CJS involvement.

Judge Avery disputed Mr. DeWolfe's reference to the issue as a "sentence enhancement." Judge Avery noted that the term "sentence enhancement" generally refers to a legislative mandate, outlined in statute, not the provisions of voluntary sentencing guidelines. Judge Avery emphasized that the guidelines are designed to take into account factors that judges consider at sentencing. Registration is one such factor. To exclude sex offender registration from the guidelines would undermine their credibility.



Mr. Finci agreed with Mr. DeWolfe's points. Mr. Finci noted that it was ironic that the State argued sex offender registration was a civil requirement in *Doe v. DPSCS*, while representatives of the State on the Commission are now arguing that it is a criminal sanction. Mr. Finci noted that sex offender registration can last anywhere from 15 years to a lifetime. It would be unfair to penalize a defendant for that length of time after he or she has successfully finished his or her term of parole, probation, or incarceration.

Judge Lewis also questioned whether it would be appropriate to apply one point for the entire term of a defendant's sex offender registration when that individual has successfully completed his or her term of supervision.

Mr. DeLeonardo expressed concern that to not score one point for someone on the sex offender registry would be to treat that individual similarly to someone who is not on the registry. Mr. DeLeonardo stated that the Guidelines Subcommittee brought forth this proposal as a compromise. Mr. DeLeonardo noted that it could be argued that sex offender registration should be defined as CJS involvement for the purposes of part A of the offender score as well as the decay factor. Given that part A contemplates CJS involvement at the time of the offense, while the decay factor contemplates a crime-free period in the defendant's future, it would be a fair compromise to exclude registration from the definition of CJS involvement for the purposes of the decay factor.

Dr. Johnson expressed his concern with applying a point to offenders who are required to register as sex offenders in other jurisdictions. Dr. Johnson noted that, in comparison to Maryland, some states have a much more liberal definition of sex offense.

Senator Kelley also expressed concern with the variability in sex offense definitions by state. Senator Kelley noted that she came into the meeting supporting the Guidelines Subcommittee's recommendation. The present discussion and concerns over variability in states' sex offender laws, however, led her to change her mind. Senator Kelley stated that she would now support excluding registration from the definition of CJS involvement for both part A of the offender score and the decay factor.

Judge Wilson stated that he previously prosecuted child abuse, sex abuse, and molestation cases in Washington County. Judge Wilson noted that the legislature authorized the sex offender registry because sex offenders were seen in the mind of the public as a different type of offender. Judge Wilson suggested that it would be important to include registration in the definition of CJS involvement so that it is considered consistently across jurisdictions.

Delegate Sydnor referenced the recent *In Re: S.K.* (2019) Court of Appeals case and his work as a law clerk on a sex offense docket and noted that many of these cases involve consensual sex between two individuals in which one partner is a minor and the other partner is not aware of his or her age. Delegate Sydnor expressed concerns about penalizing individuals who are required to register because of age-based offenses.



Judge Avery noted that when judges consider the terms of sex offender registration, they are not contemplating the offense that placed the defendant on the registry. Rather, they are contemplating the defendant's amenability to supervision in the community and propensity for risk-taking behavior. It is of concern to a judge that a defendant already under the supervision requirements of the registry would commit another criminal act.

Mr. DeWolfe stated that this matter is a legal issue and inquired as to whether the Commission should seek the opinion of the Attorney General's Office.

Ms. Murphy agreed with Judge Avery's previously stated position.

Mr. Finci asked when the instructions for part A of the offender score were added to the guidelines. Dr. Soulé replied that the instructions date back to the original sentencing guidelines.

Mr. Finci made a motion to bifurcate the vote (i.e., to vote separately for part A and the decay factor). Senator Kelley seconded the motion. Mr. DeLeonardo expressed his opposition to bifurcation. In a majority vote, the Commission voted to bifurcate the vote.

Mr. DeLeonardo made a motion to accept the Guidelines Subcommittee's recommendation to include sex offender registration in part A's definition of CJS involvement. Judge Avery seconded the motion. **The Commission voted 5 to 7 against Mr. DeLeonardo's motion.**

Commissioners then inquired as to whether a vote would be taken regarding sex offender registration as it applies to the decay factor. Judge Wilson stated that a vote would not be necessary as the Guidelines Subcommittee's recommendation for part A of the offender score (i.e., to include registration in the definition of CJS involvement for part A) was defeated. The Guidelines Subcommittee's recommendation for the decay factor (i.e., to exclude sex offender registration from its definition of CJS involvement) is consistent with this vote.

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

### a. Introduction of policy analyst (Status Report)

Dr. Soulé introduced the MSCCSP's policy analyst from the University of Maryland, Sean Houlihan. Dr. Soulé noted that Mr. Houlihan will work 20 hours per week as a graduate research assistant for the MSCCSP for the Fall 2019 through Spring 2020 academic school year. Dr. Soulé stated that Mr. Houlihan is a doctoral student in the Department of Criminology & Criminal Justice at the University of Maryland.

### b. Update on the Maryland Automated Guidelines System (Status report)

Dr. Soulé reported on the status of the Maryland Automated Guidelines System (MAGS), and its implementation in Baltimore City. Dr. Soulé stated that MAGS will be deployed



for use in the Circuit Court for Baltimore City, effective October 1, 2019, at which time all 24 jurisdictions will be using MAGS. Dr. Soulé further noted that the staff has been working with the court, the Baltimore City State's Attorney's Office, the Office of the Public Defender, Parole & Probation agents who prepare pre-sentence investigations, and the private defense bar to prepare for this final deployment cycle. Mr. Finci commented that he recently utilized the Guidelines Calculator Tool and he shared that he thought the tool was an effective, easy-to-use resource for practitioners.

c. Update on recent/upcoming trainings and conferences (Status report)

Dr. Soulé stated that since the last MSCCSP meeting on July 9, the staff has been busy with multiple meetings and trainings. Dr. Soulé noted that the training coordinator for the MSCCSP, Katharine Pembroke, provided a presentation on the sentencing guidelines and utilization of MAGS at the law clerk orientation session on August 23, 2019. Dr. Soulé further noted that Ms. Pembroke has conducted multiple MAGS orientation sessions for Baltimore City and has more scheduled later in the month, in anticipation of the October 1, 2019, deployment. Judge Avery commended Ms. Pembroke for the outstanding job she has done in regards to the MAGS trainings in Baltimore City. Judge Avery continued on to recognize the MSCCSP staff for the work they put into the presentations and trainings in anticipation of the deployment of MAGS in Baltimore city.

d. Review of protocol for annual 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. The hearing is important as it provides a forum for the public to discuss sentencing-related issues. Dr. Soulé noted that the MSCCSP's 2019 public comments hearing is scheduled for December 10, 2019, at 5:00pm. Dr. Soulé stated that a hearing invitation will be distributed to approximately 35 key criminal justice stakeholders throughout the state. In addition, the invitation will be distributed to the approximately 1,000 criminal justice practitioners currently receiving the MSCCSP's electronic newsletter, *Guidelines E-News*. Finally, the hearing will also be announced on the Commission's website, the Maryland Register, the Maryland General Assembly's hearing schedule, and through a press release by the DPSCS.

Dr. Soulé noted that the Commission occasionally invites testimony on proposed or tentatively approved revisions to the sentencing guidelines. Dr. Soulé provided two examples of instances when the MSCCSP invited testimony on approved revisions. In 2015, the MSCCSP requested comment on an amendment to revise the guidelines-recommended sentencing ranges for select cells in the Sentencing Matrix for Drug Offenses. In 2017, the MSCCSP invited testimony on an amendment to adopt a new juvenile delinquency scoring system, adopt a five-year lookback window, and clarify the instructions for the juvenile delinquency score. Dr. Soulé stated that the staff does not anticipate that the MSCCSP will request comment on any proposed or tentatively approved revisions to the sentencing guidelines this year.



Dr. Soulé encouraged Commissioners to identify thoughtful speakers who can directly speak to the sentencing issues that are within the scope of the Commission. Dr. Soulé added that in order to maximize the utility of the hearing, he asks that Commissioners share their input on whether the current protocol for the annual public comments hearing should be revised to increase participation. Dr. Soulé asked that recommendations and feedback be provided to him by October 10, 2019.

Judge Avery suggested that a presentation summarizing the history and goals of the sentencing guidelines would be useful to inform the public as to the purpose of the MSCCSP.

## **6. Old Business**

None.

## **7. New business and announcements**

None.

The meeting adjourned at 6:53 pm.