



## Minutes

Maryland State Commission on Criminal Sentencing Policy  
Videoconference  
December 7, 2021

### Commission Members in Attendance:

Honorable Brett R. Wilson, Chair  
Honorable Shannon E. Avery, Vice-Chair  
Honorable 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  
Alethea P. Miller  
Honorable David Moon  
Kathleen C. Murphy, Esq., *representing Attorney General Brian E. Frosh*  
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 Paul B. DeWolfe*

### Staff Members in Attendance:

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

### Visitors:

#### 1. Call to order

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

#### 2. Declaration of quorum

The meeting began at 5:58 p.m., immediately following the public comments hearing. A quorum had already been established.

#### 3. Approval of minutes from November 10, 2021, MSCCSP meeting

The minutes were approved as submitted.



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

a. Proposed amendments to the sentencing matrices for drug and property offenses (Action item)

Judge Avery stated that the only issue on the agenda for the Guidelines Subcommittee Report is the proposed amendments to the sentencing matrices for drug and property offenses.

Judge Avery noted that the Guidelines Subcommittee met on October 19 and reviewed all of the issues and questions regarding the proposed amendments to the sentencing matrices for drug and property offenses. At that time, the Subcommittee voted 3 to 1 in favor of adopting the proposed amendments. At its November 10 meeting, the full Commission voted 11 to 1 in favor of tentatively adopting the proposed amendments, subject to the then-upcoming public comments hearing.

Judge Salmon made a motion to adopt the proposed amendments to the sentencing matrices for drug and property offenses. Mr. Finci seconded the motion. Judge Avery asked if there was any further discussion.

Mr. Harvey requested the opportunity to state his position for the record. Mr. Harvey echoed the sentiments expressed during the public comments hearing by the Harford County State's Attorney, Albert Peisinger. Mr. Harvey noted that he is currently the State's Attorney for Calvert County, though he started as an assistant state's attorney in Prince George's County. In the interim, Mr. Harvey worked as a defense attorney. During his 30-plus years as a private attorney, he had the opportunity to practice in most jurisdictions in the State. Mr. Harvey noted that, in his experience, judges sentence based upon the sentencing guidelines. Although the proposed revisions are not intended to reduce sentences, the practical effect of the revisions will be to reduce sentences. Mr. Harvey expressed particular concern with the revisions to categories III-A and III-B drug offenses. Mr. Harvey noted that these are serious offenses and that judges tend to sentence within the guidelines. In order to deviate from the guidelines, a judge has to provide a reason for departure publicly and on the sentencing guidelines worksheet. Mr. Harvey suggested that judges should not be required to provide a reason for departure from the amended guidelines. Mr. Harvey urged the Commission to table the revisions for categories III-A and III-B and revisit them in a year or two after the Commission knows how COVID and other factors have affected recent sentencing trends.

Judge Avery thanked Mr. Harvey for his comments.

Mr. Finci stated that he would like to respond to Mr. Harvey's comments and those of the Harford County State's Attorney (made at the public comments hearing). Mr. Finci stated that he has been a defense attorney for 30-plus years as well and has worked cases with Mr. Harvey. Mr. Finci noted that he has practiced in every county in the State. With respect to drug and property offenses, Mr. Finci stated that the downward trend in



sentence lengths started before the COVID-19 pandemic and even before the passage of the Justice Reinvestment Act. The Commission is only now getting the opportunity to review sentencing data and act accordingly.

Mr. Finci suggested that the guidelines are most important for plea negotiations. Referencing Judge Caroom's earlier comments on plea negotiations and racial disparity (made during the public comments hearing), Mr. Finci suggested that the proposed amendments to the guidelines are one step towards addressing racial disparities in plea negotiations. Mr. Finci reiterated that because the guidelines are so important in the plea negotiation process, and because sentences are trending downward, and because the guidelines are intended to be descriptive, it is imperative that the Commission change them now and approve the amendments.

Dr. Soulé clarified, as reference to comments made by Mr. Peisinger at the public comments hearing regarding the effect of the COVID-19 pandemic on the sentencing data informing the proposed amendments to the guidelines, that the analyses did indicate a COVID discount on sentences. However, when looking at the three-year period covered by the data, 2018-2020, the last 10 months of which occurred during the pandemic, the biggest difference post-COVID was that the number of sentences declined, particularly in circuit courts. Because there were so few cases sentenced in those first 10 months of the pandemic, the COVID-19 pandemic did not affect the data analyzed to develop the proposed amendments to the guidelines.

Judge Wilson confirmed that, in his experience, very few cases were disposed of during the first 10 months of the pandemic.

The proposed amendments to the sentencing matrices for drug and property offenses passed 13 to 1, with 2 abstentions.

Judge Avery stated that she sincerely appreciates all points of view that were expressed from the beginning to the end of the guidelines revision process. Judge Avery noted that the questions raised by Mr. Harvey were vetted and analyzed by the staff. Judge Avery stated that this is why the Commission deliberates on these issues—to ensure that the sentencing guidelines reflect sentencing patterns throughout the State.

#### **5. Preliminary review of guidelines compliance and offender/offense scores by race, ethnicity, and gender – MSCCSP Staff**

Dr. Soulé stated that Ms. Bowles would present the memo, *Preliminary Review of Guidelines Compliance and Offender and Offense Scores by Race, Ethnicity, and Gender*.

Ms. Bowles stated that one of the primary goals of the Commission, as articulated in its enabling legislation in the Criminal Procedures Article, is that sentencing should be fair and proportional and that sentencing policies should reduce unwarranted disparity, including any



racial disparity, in sentences for defendants who have committed similar crimes and have similar criminal histories. In accordance with this statute, the MSCCSP indicated in its 2020 Annual Report its intent to review, by race, offender and offense score characteristics for guidelines defendants sentenced in Maryland circuit courts. In 2021, the staff began its process of review.

Ms. Bowles noted that additionally, in 2021, the MSCCSP provided data to the Maryland Judiciary's Equal Justice Committee Sentencing Subcommittee to aid in their review of race and gender in sentencing. With their work in mind, the staff expanded the review of offender and offense score characteristics to include both race and gender.

Ms. Bowles stated that the memo presents the results of preliminary analyses looking at sentencing guidelines compliance and offender and offense score characteristics by race and gender. Ms. Bowles briefly discussed the steps taken to clean the sentencing guidelines data and to obtain missing race, gender, and ethnicity data. Ms. Bowles then highlighted the main findings from the preliminary analyses and concluded with next steps.

In terms of next steps, Ms. Bowles stated that the Commission has already received approval from the Department of Public Safety and Correctional Services (DPSCS) to use adult criminal record data, previously obtained as part of the MSCCSP's Juvenile Delinquency Score and Recidivism Analysis (conducted in 2015 through 2017), to examine the offenses that compose guidelines defendants' prior adult criminal records. The staff will analyze the data specifically to determine how often the accumulation of multiple minor offenses results in a major criminal record classification for part C of the offender score. This is an issue that multiple practitioners expressed concern over in the 2020 Criminal Justice Community Survey conducted by the Commission.

Additional areas of analysis include incarceration rates by race/ethnicity and gender, average sentences by type of crime and race/ethnicity and gender, sentencing for offenses that carry mandatory minimums by race/ethnicity and gender, and the sentence as a percentage of the guidelines' midpoint by crime type and race/ethnicity and gender.

Ms. Bowles concluded her summary and turned the discussion over to Dr. Soulé and the Commission.

Dr. Soulé reiterated that there are additional analyses that staff suggest for future consideration. One, staff wants to look closer at the application of weapons points by race, ethnicity, and gender. Two, staff plans to look more closely at the calculation of the prior adult criminal record by race, ethnicity, and gender. Dr. Soulé noted that a judge pointed out that a defendant could be scored as a major prior record based solely on the accumulation of minor misdemeanor offenses, such as trespassing. Dr. Soulé recalled the Commission's previous juvenile delinquency score project. Dr. Soulé noted that Dr. Jinney Smith, the lead researcher from the Maryland Data Analysis Center (MDAC) who worked on the project, had the foresight to make sure that the memorandum of understanding (MOU) between the



MSCCSP, the Department of Juvenile Services (DJS), and DPSCS allowed for all data collected as part of the study to be reused in future projects. In contrast, a typical MOU states that data obtained for a study can be used only for the specified study and must be destroyed at end of the study. Because this MOU permits reuse of the data, staff can now use the Criminal Justice Information System (CJIS) data obtained as part of the juvenile delinquency score project to determine what offenses makeup the calculation of each guidelines defendant's prior adult criminal record.

Dr. Soulé requested input from Commissioners regarding additional analyses and stated that Commissioners could also email him with ideas.

Judge Wilson asked if staff would break down, in terms of above versus below departure rates, the sentencing guidelines compliance rates by race and gender. Dr. Soulé confirmed that Figures 1 through 4 of the memo contain departure rated percentages.

Dr. Johnson reiterated Judge Caroom's points (made at the public comments hearing), noting that one of the concerns when looking at disparities in sentencing is whether or not the guidelines and judicial discretion are responsible for disparities, or is it something earlier in the process that leads to disparities, such as plea negotiations. Dr. Johnson acknowledged that the Commission does not have data on factors that occur prior to sentencing but given the prevalence of pleas and the importance of plea negotiations, it is important to collect this information.

Dr. Soulé acknowledged that Dr. Johnson raised a fair point. Dr. Soulé noted that just looking at the sentencing guidelines demographic data by race, one can see that a disparity exists even before sentencing. He acknowledged that it is well known that charging decisions play a significant role in sentencing. Dr. Soulé suggested that Judge Caroom's proposal for the Commission is substantial from a resource perspective. He stated that he would have to put more thought into the proposal, but knows that, at a minimum, it would require more staff.

Mr. Harvey stated that he would like to see the Commission address Judge Caroom's concerns.

Senator Sydnor stated that he believes a number of legislators would be supportive of additional resources for the Commission.

Dr. Johnson suggested that, in the meantime, staff look at racial and gender disparities by disposition type.

Ms. Miller asked if the data used for these analyses accounted for juveniles sentenced as adults. Dr. Soulé confirmed that the data include everyone sentenced in adult circuit courts, including juveniles who are waived to adult courts.



Judge Wilson reiterated that Commissioners could email additional ideas to Dr. Soulé at any time.

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

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

a. Sentencing guidelines training, judiciary feedback meetings, and community outreach. (Status report)

As previously discussed, Dr. Soulé reported that the staff produced a video explaining the purpose of the sentencing guidelines and the process of how the Commission reviewed the guidelines and ultimately adopted revisions to the sentencing matrices for drug and property offenses. Dr. Soulé noted that the video is available to view on-demand on the Commission's website and was distributed to all of the contacts in the Commission's Guidelines E-News distribution list. The Administrative Office of the Courts also distributed the video to all circuit court judges. Additionally, Dr. Soulé reported that on November 18, 2021, he participated in the Maryland Judiciary's Equal Justice Committee's Anne Arundel County Community Forum on Sentencing. The Maryland Judiciary's Equal Justice Committee is hosting community forums across the state to increase understanding of the courts and their services while learning the community's needs and the ways in which the courts can provide better service. Dr. Soulé participated as a panelist in this community forum along with Judges Morris, Klavans, and Butcher from Anne Arundel County, the State's Attorney, the District Public Defender, the Court Clerk, and Dr. Kareem Jordan who is the Director of Diversity and Inclusion at American University. He noted that it was a good educational opportunity to talk about the guidelines and the role that they have in the sentencing process.

b. Update on opportunity to visit State correctional facility. (Status report)

Dr. Soulé reported that there was limited interest in the correctional facility visit that was originally scheduled for Tuesday, November 23, 2021. It was noted that the week of the Thanksgiving holiday was not the best time to schedule a visit. Accordingly, for anyone who is interested, the Commission will try to reschedule the visit for after the holidays in January or February.

Senator West noted that that the legislative members of the Commission will be busy in January and February but stated that they will not be meeting until the evenings on Mondays. Senator West suggested scheduling the visit on a Monday. Dr. Soulé agreed and stated that he appreciated the feedback.

c. Implementation of proposed revisions to the sentencing matrices for drug and property offenses. (Status report)

Next, Dr. Soulé stated that he will review the implementation process for revisions to the sentencing matrices for drug and property offenses. As with any changes to the





sentencing guidelines, the Commission must promulgate the revisions to the sentencing matrices for drug and property offenses as regulations through the Code of Maryland Regulations (COMAR). Promulgation is a multi-step process. He noted that this process occurs over several months, and regulations do not become effective until the end of the process. Dr. Soulé stated that the promulgation process begins with submitting proposed regulations to the Office of the Attorney General. An Assistant Attorney General reviews proposed regulations to make sure that they are legal. After the Attorney General approves proposed regulations for legality, the next step is to submit the proposal to the General Assembly's Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee).

Next, Dr. Soulé stated that the AELR Committee ensures that proposed regulations are consistent with legislative intent and due process. The Commission can then submit the proposed regulations to the Division of State Documents for a publication in the Maryland Register. A 45-day comment and review period follows publication. Following the comment and review period, the Commission may formally adopt the regulations by submitting a Notice of Final Action to the Division of State Documents for publication in the Maryland Register. Regulations may not become legally effective until at least 10 days after publication of the Notice of Final Action.

In addition to the COMAR promulgation process, Dr. Soulé reported that the Maryland Automated Guidelines System (MAGS) will require programming changes to reflect the revisions to the sentencing matrices for drug and property offenses. After programmers change the underlying sentencing recommendations, MSCCSP staff will then need to test the system to make sure everything is functioning properly. Finally, Dr. Soulé noted that the MSCCSP staff will also need to update all of the various sentencing guidelines instructional materials, including the Maryland Sentencing Guidelines Manual, the MAGS User Manual, and the MSCCSP website, to reflect the guidelines revisions.

Given all of the necessary steps, reviews, waiting and comment periods, time for programming and testing MAGS, and updates to the instructional materials, Dr. Soulé stated that July 1, 2022, was identified as the earliest feasible effective date for final adoption of the revisions to the sentencing matrices for drug and property offenses. This timeline would mirror that of the July 2016 revisions to the sentencing matrix for seriousness categories IV and V drug offenses. He further noted that a Guidelines E-News will be distributed to criminal justice stakeholders in advance of this date as a notification of the pending guidelines revisions for all circuit court cases sentenced on or after July 1, 2022.

Mr. Finci noted that when the Commission went through this process in 2015, MSCCSP staff sent out notice shortly after the Commission's vote to practitioners and criminal justice stakeholders explaining that changes were forthcoming. Mr. Finci asked if this protocol could be repeated.

Dr. Soulé confirmed that an email was sent in January 2016, shortly after adoption of the revisions to the sentencing matrix for seriousness categories IV and V drug



offenses. The email noted what the proposed amendments were and when they would go into effect. Assuming there was no objection, Dr. Soulé stated that the staff could proceed with a similar protocol regarding the new amendments.

Mr. Harvey stated that he did not have an objection but emphasized that the official effective date should be made clear. Dr. Soulé agreed and reiterated that the amendments would not be deployed in MAGS until their effective date.

d. Review of protocol for MSCCSP response to legislative proposals. (Status report)

Dr. Soulé reminded Commissioners that in 2019, the MSCCSP adopted a protocol for when there is legislation introduced that specifically affects the Commission. Given that the General Assembly is in special session now, and regular session starts next month, and considering that the Commission has five new Commissioners appointed since this time last year, he thought it would be helpful to review the protocol.

Given that the Commission does not meet typically during the legislative session, Dr. Soulé stated that the Commission adopted a policy to guide future responses to legislation that directly affects the sentencing guidelines and/or the operations of the Sentencing Commission.

Dr. Soulé referred Commissioners to the distributed document titled, *Policy for the MSCCSP Response to Legislative Proposals*.

The Commission adopted the following proposal:

1. The MSCCSP staff shall identify legislative proposals that will affect the sentencing guidelines and/or the MSCCSP's operations.
2. The staff shall promptly notify the MSCCSP Chair of such proposals and the bills' hearing dates before the relevant legislative committees, when known.
3. The MSCCSP Chair and/or MSCCSP staff will schedule a conference call for the full Commission with the purpose of soliciting feedback and to request a vote whether to support, oppose, or take no position on the proposed legislation. The MSCCSP will provide prompt notice of the scheduled date and time for the conference call and will offer public access to the teleconference by publishing a call-in number on the MSCCSP website. Furthermore, the MSCCSP website now includes an announcement that the Commission may need to meet on short notice when the General Assembly is in session.

The MSCCSP will adopt the majority position of the voting Commission members, provided that a quorum of Commission members participates in the conference call.





4. The MSCCSP Chair and the Sentencing Guidelines Subcommittee shall convene in a timely manner to consider relevant bills after receiving feedback from the full Commission.
5. The MSCCSP Chair and Sentencing Guidelines Subcommittee will decide whether it is necessary, and if so, present the position of the Commission to the legislative committees, legislative leadership, and/or Governor.
6. The MSCCSP staff, in conjunction with the MSCCSP Chair and the Sentencing Guidelines Subcommittee, will prepare formal testimony for relevant Senate and House bill hearings.

Dr. Soulé asked if there were any questions regarding the proposal. There were none.

e. Update on the MSCCSP annual report. (Status report)

Dr. Soulé reported that the MSCCSP 2021 annual report is due on January 31, 2022. The staff has begun preparations for the annual report and will distribute a draft for Commissioners to review on or about January 14, 2022. He asked Commissioners to send him any feedback, questions, or concerns relative to the annual report. MSCCSP staff will then review the feedback, incorporate changes that are needed, and submit the report by the required due date of January 31st.

## 6. Proposed MSCCSP Meetings for 2022 (Action Item)

Judge Wilson presented the proposed meeting dates for 2022.

Tuesday, May 10, 2022  
Tuesday, July 12, 2022  
Tuesday, September 13, 2022  
Tuesday, December 6, 2022

No objection was made concerning the proposed meeting dates.

## 7. Old Business

None.

## 8. New Business and Announcements

Judge Wilson thanked everyone for their participation and noted that it has been a good year for the Commission, in spite of the difficulties everyone has faced with the seemingly never-ending pandemic. He wished everyone a happy holiday and looks forward to what can be accomplished next year, particularly in response to some of the comments received during this year's public comments hearing.

The meeting adjourned at 6:52 p.m.