



Minutes

Maryland State Commission on Criminal Sentencing Policy
Videoconference
December 8, 2020

Commission Members in Attendance:

Honorable Brett R. Wilson, Chair
Honorable Shannon E. Avery, Vice-Chair
Senator Robert G. Cassilly
Delegate Luke H. Clippinger
Honorable Brian L. DeLeonardo
Richard A. Finci, Esquire
Secretary Robert L. Green
Melinda C. Grenier
Brian D. Johnson, Ph.D.
Senator Delores G. Kelley
Honorable Patrice E. Lewis
Alethea P. Miller
Delegate David Moon
Kathleen C. Murphy, Esquire, *representing Attorney General Brian E. Frosh*
Honorable James P. Salmon (Present but unable to comment/vote due to technical issue)
Lisa M. Spicknall-Horner
Donald Zaremba, Esquire, *representing Public Defender Paul DeWolfe*

Staff Members in Attendance:

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

Visitors: Joyce King, Esquire, Frederick County State's Attorney's Office

1. Call to order

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

2. Roll call and declaration of quorum

The meeting began at 6:10 pm, immediately following the public comments hearing. A quorum had already been established.

3. Approval of minutes from September 15, 2020 MSCCSP meeting

The Commission approved the minutes as submitted.



4. Guidelines Subcommittee Report – Judge Shannon Avery and Dr. David Soulé

Judge Avery stated that the Guidelines Subcommittee met via videoconference on November 30, 2020. The Subcommittee reviewed one issue regarding ABA pleas, specifically what term the Maryland State Commission on Criminal Sentencing Policy (MSCCSP) should use to refer to these pleas and how they should be defined. Judge Avery deferred to Dr. Soulé for a summary of the Subcommittee’s discussion and subsequent recommendations.

a. Proposed Revisions to the MSCCSP Definition of an ABA Plea Agreement and Update on the Guidelines Compliance Rule (Action item)

Dr. Soulé referred Commissioners to the memorandum entitled, *Proposed Revisions to the MSCCSP Definition of an ABA Plea Agreement and Update on the Guidelines Compliance Rule* and the corresponding *Supplemental Information on ABA pleas*.

Dr. Soulé noted that the Guidelines Subcommittee considered the following two questions:

1. Should the MSCCSP clarify the definition of an ABA plea agreement and/or provide specific examples of what constitutes an ABA plea?
2. Should sentencing events resolved by an ABA plea agreement continue to be deemed compliant, even if the sentence is outside of the recommended sentencing guidelines range?

The Guidelines Subcommittee considered these questions at its June 18, 2020, August 31, 2020, and November 30, 2020, meetings. Dr. Soulé noted that the Guidelines Subcommittee discussions included a review of definitions of binding plea agreements from other jurisdictions, as well as relevant Maryland case law. The Guidelines Subcommittee also reviewed data on how sentences for sentencing events resolved by an ABA plea agreement compare with sentences for sentencing events not resolved by an ABA plea agreement in calendar years 2017 through 2019. As a reference for today’s meeting, Dr. Soulé noted that the document titled, *Supplemental Information on ABA Pleas*, has been distributed again. This document, which was previously provided in the September Commission meeting materials, summarizes how other jurisdictions define ABA pleas, and it also summarizes the data analyses reviewed by the Subcommittee. He further noted that the memorandum presented today adds to previously distributed materials on this issue, as it presents recommendations from the Guidelines Subcommittee for proposed revisions to the Maryland Sentencing Guidelines Manual (MSGM) and COMAR.

Dr. Soulé reported that the first question considered by the Guidelines Subcommittee was whether the MSCCSP should clarify the definition of what constitutes an ABA plea agreement. Before addressing that question, he indicated that the Subcommittee agreed that the term “ABA plea agreement” is not universally known by court staff and other criminal justice practitioners and therefore it should be replaced with a more intuitive



term. Dr. Soulé further reported that the Guidelines Subcommittee first considered the term “three-party binding plea agreement.” However, the Guidelines Subcommittee also decided to recommend that the definition for this type of plea describe a plea that requires a greater level of specificity in terms of the sentence. Dr. Soulé then stated that the proposed definition revisions would be described shortly. Because the Subcommittee decided to recommend a revision to the definition for the type of sentence that is guidelines-compliant and that definition may be going beyond the Maryland Rule to specify what terms must be present for a guidelines-compliant plea, Dr. Soulé noted that the Subcommittee questioned whether the term “three-party binding plea” is clearly distinguishable from simply a “binding plea” that is already staked out in MD Rule 4-243.

Dr. Soulé stated that while the Subcommittee believes it is appropriate and relevant for the Commission to speak to the conditions of what constitutes a “guidelines-compliant” plea, the Commission must be careful to distinguish between what is a binding plea per MD Rule 4-243 and what is a guidelines-compliant binding plea. To that point, the Subcommittee considered use of the term “guidelines-compliant binding plea.” However, Dr. Soulé reported that there is concern that the term “guidelines-compliant binding plea” may be confusing and some law clerks or administrative assistants, inevitably, may not read the corresponding instructions and may select the disposition labeled “guidelines-compliant binding plea” only if the sentence is shown to be strictly within the guidelines range. The staff emphasized that court staff must be able to easily identify the disposition type. Presently, the staff knows that the incorrect disposition type is sometimes selected. As such, Dr. Soulé stated that the goal is to offer greater clarity and eliminate confusion.

Dr. Soulé reported that the Subcommittee agreed to the term “Maryland binding plea agreement.” However, after the conclusion of the Subcommittee meeting, the staff discussed that the term “Maryland binding plea” may imply that the Legislature, court, and/or Maryland Bar Association had a hand in crafting the definition. Accordingly, the staff suggests a variation on the term, specifically “MSCCSP binding plea agreement.” Dr. Soulé stated that the staff rationale is that the term “MSCCSP binding plea” is a specific nod to the guidelines and the Sentencing Commission without implying a sentence within the guidelines range.

Next, Dr. Soulé reported that the Guidelines Subcommittee reviewed definitions of binding plea agreements from other jurisdictions, as well as relevant Maryland case law and recommends proposed revisions based on this information. Beginning on page 3 of the memorandum, there are three notable suggested revisions to the definition. First, the proposed revisions offer clarifying language to confirm that a binding plea involves agreement from all three parties. He noted that this point is now emphasized by including new language as illustrated by the underlined text in the first sentence of the definition provided in Chapter 2 of the MSGM and mirrored in COMAR at 14.22.01.02.B.(2).



Specifically, it reads:

ABA plea agreement Maryland (or MSCCSP) binding plea agreement

A plea agreement presented to the court in agreement by an attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, that a court has approved relating to a particular sentence, and disposition, or other judicial action.

Dr. Soulé noted that the proposed language strikes “or judicial action” from the end of the first sentence and instead inserts “and” between “particular sentence” and “disposition.” He further noted that the Subcommittee recommends this particular change because the inclusion of the term “or other judicial action” in the original definition leaves open the possibility that a particular sentence could technically qualify as an ABA plea agreement and therefore be deemed a guidelines-compliant sentence based solely on the fact that the court approved some particular “judicial action” but not necessarily the corresponding sentence or disposition. As an example, Dr. Soulé discussed a scenario in which the court agrees to consider a sentence reduction at a later date if the defendant successfully completes substance abuse treatment while confined, but the court does not agree to the specific length of incarceration or suspended time as presented by the State and defense. In this scenario, the court approved a judicial action (i.e., the agreement to reconsider the sentence upon completion of substance abuse treatment) but the court did not approve the sentence length. Based on the original definition, Dr. Soulé stated that this hypothetical could still be considered a guidelines-compliant plea. The Subcommittee believes that for the purpose of the guidelines, the Commission definition of what constitutes a guidelines-compliant plea should be concerned only with the particular sentence and the disposition.

Dr. Soulé reported that the second component of the revisions is the addition of language in the last two sentences to emphasize that the court maintains the discretion to accept or reject the plea agreement and it is not binding until the court accepts the plea. Specifically, the revision reads:

The court has the discretion to accept or reject the plea. The agreement is binding on the court under Maryland Rule 4-243(c) if the court accepts the plea.

Dr. Soulé reported that the third and final proposed revision to the definition reflects the Guidelines Subcommittee agreement that the definition of what constitutes a guidelines-compliant plea agreement should be “tightened,” specifying agreement as to the specific active time (if any), not merely a sentence cap or range. Specifically, the proposed revision adds a new second sentence to read:

A Maryland (or MSCCSP) binding plea agreement means an agreement to a specific amount of active time (if any), not merely a sentence cap or range.



Dr. Soulé stated that he is presenting these revisions as the first portion of recommendations of the Guidelines Subcommittee. Judge Wilson inquired as to whether Judge Avery was asking for a motion based on Dr. Soulé's report. Judge Avery stated that she was putting forth a motion to seek the approval of the Guidelines Subcommittee's recommendations. Mr. DeLeonardo seconded the motion. Dr. Soulé asked for clarification as to whether the motion includes adopting the amended term as proposed by staff which is to replace "Maryland Binding Plea Agreement" with "MSCCSP Binding Plea Agreement." Judge Avery confirmed that the motion is to adopt the amended recommendation and that she believes this change, both legally and factually, solves a problem that has existed.

Mr. Zaremba expressed his agreement and stated that he believes the amended language provides greater clarity if the intent is to define this binding plea as only that which contains a particular sentence and not a range of sentences. He believes it would be confusing to call it a "Maryland Binding Plea" because under Maryland Rule 4-243(c) a judge can bind to a range of sentences.

Senator Kelley indicated that she seconds the motion. Judge Wilson stated that the vote would be done in the negative and asked there was any opposition as to the motion that was presented. **The motion passed unanimously without opposition.**

Dr. Soulé reported that the next recommendation does not require any action, but he noted that the Guidelines Subcommittee also discussed the binding plea agreement guidelines compliance rule. The Subcommittee reviewed whether sentencing events resolved by a MSCCSP binding plea agreement should continue to be deemed guidelines-compliant, even if the sentence is outside of the recommended sentencing guidelines range. Dr. Soulé reported that the Subcommittee recommends retaining the binding plea compliance rule as long as the disposition type meets the Commission's revised definition of an MSCCSP binding plea agreement.

The Subcommittee also noted that the Commission will conduct its next cell-by-cell compliance analysis in 2021. Dr. Soulé reminded Commissioners that this analysis was postponed due to passage of the Justice Reinvestment Act that resulted in changes to maximum penalties and corresponding seriousness categories, effective October 1, 2017. In 2021, the Commission will have three years of data to conduct the analysis. As a result, he noted that there is a possibility that the Commission may amend guidelines ranges based on the data. In that scenario, it is possible that many sentences adjudicated via a binding plea that are currently outside of the guidelines, may become guidelines compliant.

Lastly, Dr. Soulé reported that the Subcommittee made recommendations for how to report to the Legislature the Commission's deliberations regarding this topic. Dr. Soulé reminded Commissioners that the Commission's response to HB 1458, a bill which proposed eliminating the ABA plea compliance rule, asked the Legislature to defer on any action to allow the Commission to study the issue and report its findings to the Legislature before the 2021 General Assembly session. The Guidelines Subcommittee



recommends that the MSCCSP update the Legislature on the actions taken by the Commission to address pleas and guidelines compliance by sending a letter to the respective Chairs of the Senate Judicial Proceedings Committee and the House Judiciary Committee, as well as the two presiding officers for both chambers.

Judge Avery added that while the Commission is not revisiting the compliance rule at this point in time, she believes that the work the Commission has done has, in an objective and non-partisan way, tightened up some of the issues around this policy in such a way that it answers some of the legitimate criticism as to why the Commission deems these pleas guidelines compliant. Judge Avery noted that she hopes the Legislature appreciates that the Commission has heard the criticism and has addressed some of the issues presented, while still preserving the underlying purpose of this rule, which is to promote good sentencing policy by allowing binding pleas to be accepted by a court.

Mr. DeLeonardo asked about the timeline regarding the adoption of the proposed revisions. Dr. Soulé indicated there is typically a three to four-month timeline and that he anticipates these revisions being adopted in COMAR on or around March 1 or April 1, 2021. Mr. DeLeonardo expressed the importance of educating various criminal justice stakeholders about this revision. He noted that he expects that more judges will request specific numbers from prosecutors as opposed to a sentence range, especially when a given sentence falls outside of the recommended guidelines range. Dr. Soulé agreed that the educational component of this change is critical. Dr. Soulé noted that he would touch base with Mr. DeLeonardo to figure out the best way to disseminate this information to the state's attorneys, as well as to judges and private defense attorneys. Judge Avery added that she and Judge Wilson may be able to assist with judicial education as well.

5. Report on Criminal Justice Community Survey – Dr. Stacy Najaka

Dr. Stacy Najaka reported that she would provide a brief update on the criminal justice community survey and analysis. As previously reported, the MSCCSP, with assistance from the Administrative Office of the Courts, developed an online survey earlier this year to solicit feedback on the sentencing guidelines and the activities of the Commission from various members of the Maryland criminal justice community. The survey consisted of a combination of multiple choice and open-ended questions, taking approximately 5 minutes to complete. Dr. Najaka reported that this past May, a link to the online survey was emailed to all circuit court judges, each Office of the State's Attorney, the Office of the Attorney General, each Office of the Public Defender, and a sample of private criminal defense attorneys. A total of 223 survey invitations were sent and 103 completed surveys were received, which amounts to a 46.2% response rate.

She further noted that a report from staff on the survey results was included in the meeting materials. The survey questions are provided in the Appendix of the report. The report also provides details on the response rate by position and circuit and summarizes the responses to each survey question. Dr. Najaka reported that responses to the open-ended questions were reviewed for common themes, and similar responses to those items were categorized together. She stated that the staff requests that Commissioners review the report following



the meeting and respond with any comments, questions, or potential action items based on the survey feedback.

Lastly, as is noted in the last section of the report, Dr. Najaka reported that the staff identified multiple action items that could be addressed immediately to improve Commission resources and to better inform practitioners regarding the application of Maryland’s sentencing guidelines. She noted that staff has already completed or initiated the following:

- Amending the website homepage menu to include a flyout menu and a direct link to training materials
- Initiating work on the website and the MAGS application to make both mobile friendly
- Increasing training availability by providing multiple online webinars and posting a webinar recording to the MSCCSP YouTube channel
- Updating the guidelines training webinar to provide instruction and clarification regarding some of the issues raised by the survey respondents
- Responding to requests for more reports on sentencing trends by publishing periodic *Sentencing Snapshot* reports
- Following up with respondents who provided their contact information and had specific questions or concerns for staff.

Dr. Najaka noted that additional steps are expected to be taken once Commissioners have had an opportunity to review the survey report and provide recommended action areas. Judge Wilson thanked Dr. Najaka and stated that Commissioners will look at the report and respond with any questions and/or comments.

6. Executive Director Report – Dr. David Soulé

Dr. Soulé reported that he had six items to review.

a. Update on sentencing guidelines trainings and judiciary feedback meetings (Status report)

Dr. Soulé reported that the staff continues to work to provide training on the sentencing guidelines. Since the start of the COVID-19 pandemic, these trainings have all been conducted via online videoconference or webinar. Dr. Soulé reported that on September 22, 2020, he conducted a webinar for the Judicial College titled, “Making Informed Sentencing Decisions: Enhancing Sentencing Guidelines and Policy Knowledge.” On September 29, 2020, the MSCCSP training coordinator, Katharine Pembroke, provided a sentencing guidelines and MAGS orientation training for the Baltimore City State’s Attorneys’ Office. Ms. Pembroke also recently recorded a webinar to be included in the new law clerk orientation.



Dr. Soulé reported that in November, he met with judges and court staff in Allegany, Garrett, Harford, and St. Mary's counties to conduct feedback meetings and review sentencing guidelines data. He noted that the feedback meetings are an excellent opportunity to review recent guidelines amendments and the activities of the Commission, while also allowing the judges to share their input regarding the sentencing guidelines. An additional feedback meeting is scheduled for December in Washington County.

Finally, Dr. Soulé reported that staff met with the Chair of the Maryland State Bar Association (MSBA), Criminal Law & Practice Section to plan a guidelines training webinar that would be offered in coordination with the MSBA. The staff reached out to the MSBA to offer this training and is hoping the MSBA will agree to offer continuing learning education (CLE) credits associated with the training as an added incentive for participation.

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

Dr. Soulé reminded Commissioners that in 2019, the MSCCSP adopted a protocol for responding to legislative proposals. Given that the General Assembly session starts next month, he stated that he thought it would be helpful to review the protocol. During the past few legislative sessions, multiple bills with the potential to affect the MSCCSP were introduced. Given that the Commission does not meet typically during the legislative session, the Commission adopted a policy to guide future responses to legislation that directly affects the sentencing guidelines and/or the operation of the Sentencing Commission.

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

c. Update on Task Force to Study Crime Classification and Penalties (Status report)

Chapter 372 of 2019 established the Task Force to Study Crime Classification and Penalties. As the Executive Director of the MSCCSP, Dr. Soulé noted that he is an appointed member of the Task Force and that it is his intention to regularly update the MSCCSP on the activities of the Task Force. He stated that the Task Force held two meetings in 2019. At the first meeting, the Task Force membership elected Senator Mary Washington as the Chair. He further noted that the Task Force most recently met on November 12, 2020. At that meeting, Professor David Jaros from the University of Baltimore School of Law, provided a follow-up presentation on the work of a previous committee, the Commission on Criminal Law, that completed work in the 1970s to draft a comprehensive revision to the Maryland Criminal Code. The proposed revisions never came to fruition, but this prior work may help guide the current task force that is looking at many of the same issues.

Dr. Soulé reported that the November 12 meeting also included presentations from Judge Daniel Long, Chair of the Justice Reinvestment Oversight Board; the Peoples Commission to Decriminalize Maryland; and the National Conference of State Legislatures. Dr. Soulé stated that the Task Force worked to prioritize its objectives moving forward and agreed to examine the current classification and penalties for criminal laws in Maryland with a focus on trying to establish a clear demarcation between misdemeanor and felony penalties. Finally, Dr. Soulé stated that the Task Force agreed to reach out to the Legislature to ask for an extension for its work through December 2021, as work was delayed this year in large part due to the COVID-19 pandemic. Dr. Soulé stated that he would welcome input from the members of the Sentencing Commission and asked that they communicate with him if there are areas of the Code that they feel need to be addressed.

d. Update regarding the application of non-suspendable mandatory minimums (Status report)

Dr. Soulé reported that recently, the MSCCSP received an inquiry from a law clerk who was completing a guidelines worksheet in the Maryland Automated Guidelines System (MAGS). The law clerk was attempting to input a sentence of "5 years, suspend all but credit for time served" for "conspiracy to unlawful use of a firearm in commission of a



felony or crime of violence,” pursuant to CR, § 4-204(c). Dr. Soulé reminded Commissioners that MAGS is programmed to include several data checks to prevent users from accidentally entering an incorrect or invalid sentence. For example, a user cannot enter a sentence that exceeds the statutory maximum penalty for a particular offense. He noted that this is one of the benefits of MAGS that was not explicitly anticipated. Specifically, the data checks built into MAGS have helped to prevent the imposition of an illegal sentence on more than one occasion. Returning back to the specifics of this recent case, Dr. Soulé stated that MAGS would not allow the law clerk to enter the sentence, as it falls below the mandatory minimum of 5 years associated with the offense. The law clerk contacted staff and indicated that she believed the mandatory minimum would not apply in this case, as the offense involves a conspiracy.

Dr. Soulé reported that the staff confirmed with the Office of the Attorney General that there is case law that indicates that both conspiracies and attempts are subject to only the maximum punishment for the crime that the person conspired to or attempted to commit. Unless otherwise outlined in statute, conspiracies and attempts are not subject to non-suspendable mandatory minimums associated with a given offense. Accordingly, Dr. Soulé reported that the staff has documented this issue and has sent a request to the MAGS programmers at the Department of Public Safety and Correctional Services so that MAGS can be revised to allow users to enter sentences that fall below non-suspendable mandatory minimums, if the offense involves an attempt or conspiracy.

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

Dr. Soulé reported that the MSCCSP 2020 annual report is due on January 31, 2021. He noted that the staff has begun preparations for this report and expects to send a draft for Commissioners to review by January 22, 2021. He asked Commissioners to send any feedback, questions, or concerns relative to the annual report directly to him. The staff will review the feedback, incorporate needed changes, and submit the report by the required due date of January 31st.

f. Update on Sentencing Snapshot report (Status report)

Dr. Soulé reminded Commissioners that in July of this year, the MSCCSP started publishing a series of topical, mini-reports, entitled *Sentencing Snapshot* intended to provide a quick review of sentencing trends and other topics of interest. He noted that the most recent issue of the *Sentencing Snapshot* examined the characteristics and sentences for second degree assault in Maryland Circuit Courts and was published in October 2020. He encouraged Commissioners to review the Snapshots and offer feedback if they are interested. Additionally, Dr. Soulé encouraged Commissioners to suggest topics for future editions of the Snapshot.

Mr. DeLeonardo stated that he would like to commend the staff’s work on the *Sentencing Snapshot*. He noted that they are very well done and that he received a lot of positive feedback in response to the reports. Dr. Soulé thanked Mr. DeLeonardo and specifically commended the staff’s Program Analyst, Sarah Bowles, as she takes the lead on



producing the *Sentencing Snapshot*. Judge Wilson agreed that the *Sentencing Snapshot* reports are very well done.

7. Proposed MSCCSP meeting dates for 2021 (Action item)

Judge Wilson presented the proposed meeting dates for 2021.

Tuesday, May 11, 2021

Tuesday, July 6, 2021

Tuesday, September 14, 2021

Tuesday, December 7, 2021

No objection was made concerning the proposed meeting dates.

8. Old business

None.

9. New business and announcements

Senator Kelley commended Judge Wilson for his orchestration of the public comments hearing. She noted that by providing some background information about the Commission and the Commissioners themselves, it helped the public to gain a better sense of the work of the MSCCSP and its composition. Judge Wilson thanked Senator Kelley for her comments and noted that he found all of the public hearing speakers to be thoroughly interesting.

Mr. DeLeonardo stated that he would like to make a motion to ask the staff to look at the classification of possession and distribution of child pornography in light of recent statutory changes and the issues raised in the 2020 public comments hearing by Joyce King of the Frederick County State's Attorney's Office. He stated that it was his understanding that the issue would then be brought to the Subcommittee where it would be further discussed. If it is a legislative issue, then the discussion can stop there. If staff finds that a reclassification discussion is appropriate, the Subcommittee can have a discussion and bring forth any recommendations to the Commission.

Judge Avery seconded the motion. Judge Wilson asked if there was any objection to the motion. **The motion passed unanimously without opposition.**

Senator Kelley wished to acknowledge the death of Senator Paul Sarbanes. She noted that he was a great public servant and that she hoped his family could take comfort in the life that he lived and the contributions that he made. Judge Wilson reiterated Senator Kelley's sentiments with regard to both Senator Sarbanes and Bill Davis who was recognized earlier in the evening during the 2020 public comments hearing.

The meeting adjourned at 6:55 pm.