



Minutes

Maryland State Commission on Criminal Sentencing Policy
House of Delegates Office Building
Annapolis, MD 21401
December 10, 2019

Commission Members in Attendance:

Honorable Brett R. Wilson, Chair
Honorable Shannon E. Avery, Vice-Chair
Delegate Luke H. Clippinger
Honorable Brian L. DeLeonardo
Richard A. Finci, Esquire
Secretary Robert L. Green
Melinda C. Grenier
Brian D. Johnson, PhD
Senator Delores G. Kelley
Molly Knipe
Honorable Patrice E. Lewis
Kathleen C. Murphy, *representing Attorney General Brian E. Frosh*
Honorable James P. Salmon
Lisa M. Spicknall-Horner
Delegate Charles E. Sydnor III

Staff Members in Attendance:

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

Visitors: Patrick Burke, Law Clerk, Prince George’s County, District Court; Claire Rossmark, Department of Legislative Services

1. Call to order

Judge Wilson called the meeting to order.

2. Roll call and declaration of quorum

The meeting began at 6:00 pm when attendance reached a quorum.

3. Welcome of new commissioners

Judge Wilson welcomed two new Commissioners, Molly Knipe and Lisa Spicknall-Horner, and thanked them for joining the Commission.



4. Approval of minutes from September 17, 2019, MSCCSP meeting

The Commission approved the minutes as submitted.

5. Guidelines Subcommittee Report – Judge Shannon Avery

Judge Avery noted that the Guidelines Subcommittee met via teleconference on November 25, 2019 and indicated that Dr. Soulé would present the Guidelines Subcommittee Report. Dr. Soulé noted that all four Subcommittee members participated in the teleconference. The Commission's Chair, Judge Wilson, and special invited guests Senator Cassilly, KC Murphy, and Ms. Murphy's colleague also participated in the teleconference. The Subcommittee reviewed two issues.

a. Proposed revisions to the instructions for the *Prior Adult Criminal Record Score* to provide guidance regarding military adjudications (Action Item)

Dr. Soulé noted that staff learned of this issue upon receiving inquiries as to whether military adjudications should be included in the prior adult criminal record score. This issue was first discussed by the Guidelines Subcommittee during its September 3, 2019, teleconference. The issue was on the agenda for the full Commission's September 25, 2019, meeting. Senator Cassilly, a former Judge Advocate General (JAG) officer for the U.S. Army, was unable to attend the September 25 meeting and asked that a vote on the issue be postponed until the December meeting. Specifically, Senator Cassilly was concerned about the inclusion of military-specific offenses in an offender's prior record score. Accordingly, the Guidelines Subcommittee recommended to postpone discussion of the issue to allow for Senator Cassilly's input. The Subcommittee then reconsidered the issue during its November 25 teleconference. Senator Cassilly participated in that discussion.

Dr. Soulé referred Commissioners to the corresponding memorandum, *Military Adjudications in the Prior Adult Criminal Record Score*, and noted that the memo is an updated version of the one distributed prior to the September 25 meeting. The updated version adds *Appendix B* to provide a reference list of military-specific offenses and amends the recommended proposal to exclude all military-specific adjudications from the prior adult criminal record score.

Dr. Soulé noted that the current Maryland Sentencing Guidelines Manual (MSGM) does not explicitly reference military adjudications. The MSGM provides a definition of adjudication that includes a finding of guilt by a judge or jury. Those completing the guidelines might interpret differently whether that definition of "finding of guilt by a judge or jury" applies to military adjudications. To help inform the Commission's decision on this issue, the staff researched how other guidelines jurisdictions address military adjudications. As summarized in *Appendix A* of memo, 10 of the 17 jurisdictions that have sentencing guidelines provide specific guidance as to when and how to account for military adjudications in the prior record. Based on a review of other states' guidelines and prior to the input from Senator Cassilly, the staff recommended that a finding of guilt by a general or special court-martial be included in the MSGM's



definition of an adjudication. However, during the November 25 call, Senator Cassilly noted that individuals who decide to enter the military subject themselves to higher standards than civilians. In some instances, military members are unable to meet those standards, leading to formal military sanctions. While those standards are entirely appropriate in a military setting, they would not be used as a basis to penalize civilians. The Guidelines Subcommittee unanimously agreed with Senator Cassilly's position and recommended explicit reference to military adjudications in the definition of adjudication and the instructions for the prior adult criminal record score. Given that Article 15 proceedings and summary courts-martial are not considered criminal forums, the Subcommittee recommended that language similar to that of the United States Sentencing Commission and the District of Columbia Sentencing Commission be adopted, specifically including general and special courts-martial adjudications if the elements of the offense constitute an offense under Maryland law and do not require the defendant's service in a military force. Given the unique nature of and circumstances surrounding military-specific offenses, the Guidelines Subcommittee recommended exclusion of military-specific offenses from the prior adult criminal record score.

Senator Kelley made a motion to accept the recommendations of the Guidelines Subcommittee. Delegate Sydnor seconded the motion. **The Commission unanimously voted to adopt the proposed language regarding military adjudications in the prior criminal record score.**

Dr. Soulé noted that there would be a longer timeframe than usual before changes voted on at the current meeting could go into effect. The Commission must promulgate any revisions to the guidelines as regulations through the Code of Maryland Regulations (COMAR). Promulgation is a multi-step process. This process occurs over several months, and regulations do not become effective until the end of the process. The promulgation process begins with submitting proposed regulations to the Office of the Attorney General (OAG). An Assistant Attorney General reviews proposed regulations to make sure 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). The AELR Committee ensures that proposed regulations are consistent with legislative intent and due process. The Commission can submit the proposed regulations to the Division of State Documents 15 days after they are on file with the AELR Committee. The Division of State Documents makes sure that everything is in order and in the proper form, then publishes the proposed regulations in the Maryland Register. A 45-day comment and review period follows publication. Following the comment and review period, the Commission formally adopts 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. This process takes approximately 3-4 months to complete. The process will take longer this time because the AELR Committee issues annually a moratorium asking agencies to refrain from submitting proposed regulation revisions during the beginning of the General Assembly session to due to the press of other business accompanying the start of the General Assembly's legislative session in early



January. This year, the moratorium is from December 9, 2019 to February 9, 2020. The MSCCSP staff will prepare proposed revisions for submission shortly after February 9, but this delay will push back the process two months meaning that the revisions will be adopted effective on or about July 1, 2020.

Senator Kelley noted that she chaired the AELR Committee twenty years ago. The Committee sometimes receives as many as 500 submissions in a month.

b. Proposed classification of *conspiracy to commit a lawful act by unlawful means* (Action item)

Dr. Soulé referred Commissioners to the memorandum entitled, *Proposed Classification of Conspiracy to Commit a Lawful Act by Unlawful Means*. Dr. Soulé noted that, recently, the OAG contacted staff to inquire as to how to calculate the guidelines for the offense, *Conspiracy to establish and entrench a gang by unlawful means*. To establish and entrench a gang is not a criminal offense in Maryland. In this case, though, the conspiracy was committed by unlawful means, including participation as member of a criminal gang in the commission of crime, murder, and attempted murder.

Criminal conspiracies in Maryland fall into one of two categories: (1) conspiracy to commit an unlawful act, or (2) conspiracy to commit a lawful act by unlawful means. Criminal Law Article (CR), § 1-202, provides that the punishment for a person convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit. Similarly, the MSGM instructs that conspiracy to commit an unlawful act shall be classified in the same seriousness category as the substantive offense (MSGM, Chapter 5.2). Neither the MSGM nor the laws of Maryland explicitly address conspiracy to commit a lawful act by unlawful means. Absent statutory law providing otherwise, common law dictates that the maximum punishment for a conspiracy to commit a lawful act by unlawful means is limited only by the constitutional prohibitions on cruel and unusual punishment.

Because conspiracy to commit a lawful act by unlawful means (or “common law” conspiracy) has not previously been classified by the Commission, staff instructed the practitioner at the OAG to calculate the guidelines for the conspiracy charge based on the seriousness category for the closest analogous offense (as instructed in MSGM 5.2). The court, however, was unable to submit this case via the Maryland Automated Guidelines System (MAGS) as the sentence for the offense exceeded the statutory maximum penalty for the closest analogous offense (which in this case was CR, § 9-804, participating as a member of a criminal gang in the commission of a crime).

Given that future indictments for *Conspiracy to commit a lawful act by unlawful means* are likely, the staff recommends that the offense be classified and included in the MSCCSP’s Guidelines Offense Table. The staff identified three offenses that may provide guidance for the classification of *Conspiracy to commit a lawful act by unlawful means*: (1) Participate as member of criminal gang in commission of a crime, (2) Participate as member of criminal gang in commission of a crime resulting in death of the



victim, and (3) Accessory after the fact to a felony. For each of these three offenses, the Commission adopted a rule tying the seriousness category for these offenses to that of the underlying crime. In other words, unlike the majority of offenses that are classified into one seriousness category, the seriousness category for these offenses is allowed to vary based on the underlying crime. The MSCCSP staff recommends utilizing this same principle for *Conspiracy to commit a lawful act by unlawful means* in that the seriousness category and offense type will be the same as that of the most serious unlawful means by which the lawful act was to be accomplished.

Dr. Soulé provided the following example: The defendant is charged with conspiracy to establish and entrench a gang via the illegal means of robbery, armed carjacking, and theft. The most serious of these means is armed carjacking, a seriousness category II person offense. Therefore, conspiracy to establish and entrench a gang would be classified as a seriousness category II person offense, with a statutory maximum of life.

Dr. Soulé noted that the Guidelines Subcommittee and invited guests, KC Murphy and her colleague from the OAG, thoroughly debated this issue. Concerns were raised about cases in which the State and the defense disagreed regarding what qualified as the most serious unlawful means. Accordingly, the Subcommittee approved a recommendation to include language similar to the instructions provided for out-of-jurisdiction convictions. Specifically, the corresponding language at MSGM 5.2 and COMAR 14.22.01.08 would add the following: “For conspiracy to commit a lawful act by unlawful means, the seriousness category and offense type classification shall be the same as that of the most serious unlawful means by which the lawful act was to be accomplished. If there is question as to the most serious unlawful means, that question should be brought to the attention of the judge at sentencing.” The MSCCSP agreed to add the last sentence to articulate that the defense does have the ability to argue for a different classification.

Dr. Soulé presented the proposed recommendations to the MSGM and COMAR, starting at page 4 of the memorandum, as the unanimous recommendations of the Guidelines Subcommittee.

Senator Kelley made a motion to adopt the recommendations of the Guidelines Subcommittee. Mr. DeLeonardo seconded the motion. **The Commission unanimously voted to adopt the classification of *Conspiracy to commit a lawful act by unlawful means*.**

6. Executive Director Report – Dr. David Soulé

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

a. Release of Maryland Sentencing Guidelines Manual, 11.1 (Status report)

Dr. Soulé noted that on November 4, 2019, the MSCCSP released Version 11.1 of the MSGM. MSGM 11.1 includes: (1) clarified instructions for computation of the juvenile delinquency scoring component of the offender score; and (2) an updated Guidelines Offense Table that reflects classification of new and amended offenses passed during the



2019 Legislative Session, classification of one previously unclassified offense (*Environment (EN), § 9-228(f)(2); Penalty (EN, § 9-268.1(a)(2)) -- Disposing of scrap tires for monetary or financial gain by any means other than through a licensed scrap tire hauler or by delivering the tires to an approved facility*), the addition of four previously unlisted offenses with a maximum penalty of one year or less, and other minor edits.

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

Dr. Soulé reminded Commissioners that at the July 9, 2019, meeting, the MSCCSP adopted a protocol for responding to legislative proposals. Given that the General Assembly session starts next month and since the Commission has acquired several new members since adoption of the protocol in July, Dr. Soulé stated that he thought it would be helpful to review the protocol.

Dr. Soulé noted that during the most recent legislative session, Senate Bill (SB) 176/House Bill (HB) 229 was introduced with the potential to directly affect the operations of the MSCCSP. He noted that the Commission first became aware of this bill just nine days before its hearing in the Senate Judicial Proceedings Committee, giving the Commission a relatively short period to determine its position on the bill and prepare testimony. Given that the Commission does not meet typically during the legislative session, the position of Commission members had to be determined via an email poll. Accordingly, at the conclusion of this year's legislative session, the prior MSCCSP Chair, Judge Glenn Harrell requested that the Commission adopt a formal policy to guide future responses to legislation that directly affects the sentencing guidelines and/or the operations of the Sentencing Commission.

Dr. Soulé then referred Commissioners to the document titled *Policy for the MSCCSP Response to Legislative Proposals* to review the following protocol:

1. The MSCCSP staff shall identify and review, as soon as possible, legislative proposals that will affect the sentencing guidelines and/or the MSCCSP's operations.
2. The staff shall notify promptly 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 purpose of soliciting feedback and to request a vote whether to support (with or without amendments), 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 shall include a notice that the Commission may need to meet on short notice when the General Assembly is in session.
4. The MSCCSP will adopt the majority position of the voting Commission members, provided that a quorum of Commission members participates in the conference call.
5. The MSCCSP Chair and the Sentencing Guidelines Subcommittee shall convene timely (via teleconference, email, or in-person) to consider relevant bills after receiving feedback from the full Commission.



6. The MSCCSP Chair and Sentencing Guidelines Subcommittee will decide whether it is necessary, and if so, present to the legislative committees, legislative leadership, and/or Governor, as relevant, the position of the Commission.
7. 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.

Senator Kelley suggested that the Commission might want to consider holding any future conference calls in the evening, in order to accommodate the busy schedules of various Commissioners, particularly during the legislative session.

c. Update on the Maryland Automated Guidelines System (Status Report)

Dr. Soulé reported that on October 1, 2019, the Maryland Automated Guidelines System (MAGS) was updated to include a "SUBMITTED" stamp along with the corresponding date to indicate the completed submission of a guidelines worksheet. He further noted that MAGS was also deployed for use in the Circuit Court for Baltimore City, effective October 1, 2019. At that time, Baltimore City became the 24th and final jurisdiction to deploy MAGS, and achieved a commendable 100% submission rate for the first month.

Judge Avery commended Judge Melissa Phinn, who oversees the criminal docket for the Circuit Court for Baltimore City, for her continued diligence with regard to MAGS related efforts.

Dr. Soulé recognized and thanked the MSCCSP staff for all of their efforts in ensuring successful MAGS deployments statewide.

d. Update on recent trainings/meetings (Status Report)

Dr. Soulé reported that since the last MSCCSP meeting in September, he met with three of the newest Commissioners, namely Judge Wilson, Molly Knipe, and Lisa Spicknall-Horner. Additionally, he met with the Circuit Court for Calvert County on October 22, 2019, in a continuing effort to get out to each jurisdiction at least once every two to three years.

Dr. Soulé reported that the MSCCSP's training coordinator, Katharine Pembroke, provided sentencing guidelines training for the Prince George's County State's Attorneys' Office on November 6, 2019 and also provided training for the law clerks in Baltimore County on September 27, 2019.

e. Update on Task Force to Study Crime Classification and Penalties (Status Report)

Dr. Soulé noted that Chapter 372 of the 2019 legislative session established the Task Force to Study Crime Classification and Penalties and as an appointed member, it is his intention to regularly update the MSCCSP on the activities of the Task Force. He further noted that the Task Force held its first meeting on October 29, 2019, during which the Task Force membership elected Senator Mary Washington as the Chair.

Dr. Soulé stated that the Task Force worked to prioritize its objectives moving forward and identified the following objectives and issues as having initial priority in its work: examining the current classification and penalties for criminal laws in Maryland; reviewing the work and findings of past task forces and commissions established by the



General Assembly that are relevant to the work of the Task Force; gathering information and resources from other states that have revised their criminal classification systems; comparing Maryland's crime classification scheme to crime classification schemes in other states; examining the role that administrative boards, agencies, local governments, appointed commissioners, or other persons or entities play in enacting rules, regulations, ordinances or laws providing for criminal penalties; and examining whether the State would benefit from a default mental state as an element of criminal liability and whether to make statutory changes to provisions of criminal law that currently lack an explicit *mens rea* requirement.

Dr. Soulé reported that the Task Force met again on December 3, 2019, and that he presented to the group regarding an offense database that the MSCCSP staff created that merged the Maryland criminal charge code database with the guidelines offense table to create a more comprehensive listing of criminal offenses in Maryland. He noted that the database was created to hopefully serve as a useful reference for the Task Force. Dr. Soulé also mentioned that Professor David Jaros from the University of Baltimore School of Law presented 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. He noted that the proposed revisions never came to fruition, but that this prior work may help guide the current task force that is looking at many of the same issues.

Lastly, Dr. Soulé asked for input from Commissioners and encouraged them to communicate with him if there are areas of the Code that they feel need to be addressed. He concluded by noting that members of the Commission can feel free to share input in their individual respective roles or if the Sentencing Commission feels it is warranted, input can be shared as an agency.

Dr. Johnson asked if the offense database created by the MSCCSP staff could be shared with the Commission. Dr. Soulé stated that he would be happy to share the database with the Commission.

f. Update on MSCCSP annual report (Status report)

Dr. Soulé reminded Commissioners that the MSCCSP 2019 annual report is due on January 31, 2020. Dr. Soulé reported that the staff began preparations for this report and will distribute a draft for Commissioner review by January 21, 2020. Dr. Soulé asked Commissioners to send feedback, questions, or concerns relative to the annual report directly to him.

7. Proposed MSCCSP meeting dates for 2020 (Action Item)

Judge Wilson presented the proposed meeting dates for 2020.

Tuesday, May 12, 2020

Tuesday, July 7, 2020

Tuesday, September 15, 2020

Tuesday, December 8, 2020

No objection was made concerning the proposed meeting dates for 2020.



8. Old business

None.

9. New business and announcements

None.

The meeting adjourned at 6:40 pm.