Maryland State Commission on Criminal Sentencing Policy
May 28, 1998

Commission Members in Attendance:
The Honorable John F. McAuliffe, Chairperson
Judith R. Catterton, Esq.
Ms. Roberta Roper
Sen. Jennie Forehand
Dr. Charles Wellford
LaMonte E. Cooke
Senator Delores G. Kelley
Delegate Joseph F. Vallario, Jr.
Delegate James M. Harkins
Senator Christopher McCabe
The Honorable Howard S. Chasanow
The Honorable Joseph H.H. Kaplan
The Honorable Alexander Wright, Jr.
Del. Kenneth C. Montague, Jr.
George Lipman, Esq. for Stephen E. Harris, Esq.
Secretary Stuart Simms
Marna McLendon, Esq.
Adam Gelb
The Honorable Andrew L. Sonner, Consultant

Staff Members in Attendance:
Kim Hunt, Executive Director
Claire Souryal, Research Director
Pam Quirk Harris

Announcements

The Chairman announced a membership change. Senator Jennie Forehand from Montgomery County replaces Senator Vernon Boozer on the Commission. Judge McAuliffe welcomed Sen. Forehand. Sen. Kelley also welcomed Sen. Forehand and noted Senator Forehand's record of legislative service.

The Chairman called for a vote approving the minutes from the February and March meetings. The minutes were approved without amendment.

The Chairman thanked Sen. McCabe, Sen. Kelley, and Del. Vallario for sponsoring the bills extending the life of the Commission until July 1, 1999. The Chairman explained that the timetable for the Commission report would not be affected by this request. The purpose of the request was to allow the Commission to maintain a presence during the 1999 General Assembly session when its proposals would be considered. The bills passed and the Commission is extended.

The Chairman noted that the Corrections Options and Guidelines committees have been busy with several meetings each in March, April, and May.

The Chairman also briefly described his informal meeting with Judges of the Court of Appeals. The Chairman noted that members of the Court expressed some concern about the prospect of introducing the concept of appeals from sentences, and it seemed clear that if any appeals were to be permitted the Court wanted them to be initially to the Court of Special Appeals. It was noted that The Court of Appeals could exercise certiorari powers to review a case before the Court of Special Appeals if the need arose.

The Chairman related a conversation with representatives of the U.S. Department of Justice regarding Truth-in-Sentencing and the medical or geriatric exception that often accompanies truth-in-sentencing legislation. If Maryland chooses to adopt truth-in-sentencing for violent offenders, a geriatric exception to allow parole consideration for older offenders having served a significant portion of their sentence could receive favorable review from the U.S. Department of Justice.

The National Association of Sentencing Commissions will hold its annual meeting July 19-21 in Minnesota. Members were invited to volunteer if interested in attending.

The Chairman and the Executive Director conducted telephone interviews with public defenders in North Carolina in May. The attorneys expressed generally favorable reactions to North Carolina's guidelines. The Chairman and the Executive Director also met with Baltimore City prosecutors regarding court backlog in drug cases in Baltimore. The Chairman, Judge Chasanow, and the Executive Director spoke to the Prince George's Criminal Justice Coordinating Council regarding the Commission's activities to date.

The Chairman reminded members that the two-day Commission retreat is scheduled for the Wye River Conference Center, June 25 and 26. Rooms at Wye Woods will be available for Thursday night. Topics to be discussed include all the issues discussed at this meeting plus truth-in-sentencing, guidelines presumptiveness, and creation of a permanent sentencing commission.

Correctional Options Subcommittee Report

The Chairman of the Correctional Options Subcommittee, Sen. McCabe noted that the Subcommittee had been quite busy, meeting four times over the past two months. He explained that whatever came out of this committee, it required broad public acceptance in localities throughout the state, including among judges and corrections officials. Further, it required broad public acceptance. Finally, it must address the problems of drug addicted offenders.

Sen. McCabe asked Dr. Hunt to summarize the Subcommittee's work to date. Dr. Hunt presented a review of the committee's work on Maryland's current programs, current eligible offenders, and matching offenders to programs, as well as possible future changes and obstacles to change.

The Corrections Options Subcommittee heard testimony reviewing the state's COP (Correctional Options Program). Key features included: (1) Crime control through close surveillance and substance abuse treatment participation, (2) careful selection of offenders considering both risk and need, and (3) holding offenders accountable through progressive and regressive sanctions. There are two principal means of entry into COP, Baltimore Drug Treatment Court and Parole.

The Subcommittee also heard testimony and reviewed a survey of local correctional options programs. For both state and local programs, the numbers of participants were reviewed.

Sen. Kelley asked if Maryland's COP uses objective risk assessment criteria. Dr. Hunt said that it did, the Psychopathy Checklist-Revised and the Addiction Severity Index.

Sen. Kelley noted that gender disparity in access to alternative punishment programs is an important issue, in particular the limited number of beds available to women offenders. She also noted that the state needs to

look at a broader array of options that may not be so space-dependent. Sec. Simms noted that problems with access to female boot camp spaces have been addressed, and now space is going unfilled. Nonetheless, Sen. Kelley noted that the issue persists. Judge McAuliffe noted that private-public partnerships in N.C. provide women and children with housing while they receive treatment and counseling and learn job skills.

Dr. Hunt noted that based on research provided by the Research and Statistics Section of the Office of Public Safety, almost 40 percent of prison admissions involve offenders who are classified as non-violent and potentially eligible for state COP. However, not all offenders that are eligible are good candidates. Sec. Simms re-emphasized this point, and reminded the Commission that COP provides an important gate-keeping function.

Dr. Hunt proceeded to discuss means of identifying good candidates, most of which are used in Maryland. Among more serious offenders, a crime control focus requires risk and needs assessment. This assessment identifies offenders who are acceptable risks and have needs that, if addressed, reduce crime. Addressing risk and criminogenic needs (for example, substance abuse that leads to crime) is a crime control issue, not a social services issue.

Mr. Lipman asked if there was not a correlation between risk assessment results and the guidelines scores. Dr. Hunt noted that there is a positive correlation, the greater the risk the higher the offender score. However, most risk scales incorporate other items, such as attitudes, that are not legal factors and do not appear in the score.

The Committee has discussed procedures for direct sentencing to corrections options authority, extending options to judges in partnership with state and local corrections.

Possible obstacles to the further expansion of COP through direct sentencing include:

- Developing State-local standards of operation;
- Local acceptance of options programs;
- Trained officers to handle assessments and placements; and
- Available placements with sufficient surveillance as well as treatment.

Future topics include:

- Restorative Justice and Restitution , including Day fines and other means of community and victim restoration;
- Sanctions and Treatment, Not Sanctions or Treatment;
- Review evaluations of existing programs; and
- Program Costs and Partnership with Localities.

Guidelines Committee Report

Dr. Wellford, Chairman of the Sentencing Guidelines Subcommittee, provided a summary of the Subcommittee's work. Dr. Wellford stated that the Subcommittee had examined the existing Sentencing Guidelines system and concluded that the system was fundamentally sound. While the Subcommittee supported the general structure of the current guidelines system, it recommended several revisions to components of the Offender and Offense score. The proposed revisions were distributed to Commission members for review. Dr. Wellford then described the suggested revisions.

The first proposed revision related to the Juvenile Delinquency component of the Offender score. The Juvenile Delinquency component of the Offender score is currently scored as follows:

0 = Not More Than One Finding of Delinquency or over age 25
1 = Two or More Findings, No or One Commitment
2 = Two or More Commitments.

The Guidelines subcommittee suggested the following revision:

0 = Offender is 23 years or older **or**
Crime free for five years since release from last adjudication **or**
No more than one finding of delinquency, seriousness category III-V.

1 = Offender is younger than 23 years old **and**
One finding of delinquency seriousness category I-II **or**
Two or more findings of delinquency, seriousness category III-V

2=Offender is younger than 23 years old **and**
Two or more findings of delinquency, seriousness category I-II.

Judge McAuliffe solicited questions or comments relating to the first recommendation.

Questions arose as to the use of juvenile commitments as a measure of the seriousness of prior juvenile delinquency. Dr. Wellford explained that the subcommittee chose to remove juvenile commitments from the Juvenile Delinquency component. Members were concerned that the decision to commit a juvenile may be influenced by more than the seriousness of the instant offense and prior record of delinquency (e.g., race, social class/income, or family composition).

Mr. Lipman questioned whether there was a difference between the number of juveniles convicted of serious offenses and the number of juveniles who were committed.

Ms. Catterton suggested that it used to be presumed that commitment meant that juveniles had worked their way through the system, but currently that is no longer necessarily true.

Judge Chasanow questioned whether it would even be possible to use seriousness category as a measure of offense seriousness because juvenile court findings do not state what the particular offense was. Technically, the only finding is whether the juvenile crossed the line to delinquency.

Judge McAuliffe similarly questioned whether juvenile judges make offense-specific determinations -- that is, whether they make a general determination of delinquency or whether they make an offense-specific determination.

Dr. Hunt stated that he had spoken with probation officers in Baltimore City and Montgomery County and that they confirmed that sufficient data on the specific juvenile offense was available.

Judge McAuliffe wondered whether this information was subjective -- in the sense that it is gleaned from the facts of the case -- or an objective finding. He stated that it would be necessary to speak with juvenile court judges.

Delegate Vallario also asserted that the seriousness category may be too specific and suggested a simple dichotomy of whether a juvenile had been committed or not would be more useful in addition to the number of delinquent findings.

Judge McAuliffe reiterated that the use of juvenile commitment may be influenced by station of life and may therefore be unfair.

Delegate Montague suggested that the appropriate question is not whether the court keeps adequate records, but whether record-keeping practices could be changed.

Ms. Catterton stated that in her experience findings were petitioned by count because of the issue of restitution that has become much more prevalent in juvenile court.

Dr. Wellford stated that the Guidelines Subcommittee will have to assess the situation and gather more information.

Delegate Harkins expressed concern about county variability. He stated the Department of Juvenile Justice may need to verify that all counties can provide offense-specific detail.

Ms. Catterton raised a broader issue relating to the overall structure of the sentencing guidelines. She stated that the Guidelines Subcommittee has decided that the current structure is fundamentally sound. However, she is concerned that if the current system is made presumptive, it would not take into account mitigating factors. She asserted that mitigating factors are presently taken into account by the judge -- if, for example, a defendant is mentally retarded. Therefore, a move toward a more presumptive system may necessitate a change in the structure in order to take mitigating factors into account.

Senator Kelley noted that other states with presumptive sentencing guidelines have lists of mitigating factors. She asserted that it would be better to use a list of mitigating factors, rather than to use a point system and further complicate the scoring system.

Judge McAuliffe stated that the revisions are intended to achieve a greater degree of fairness, not to change the number of points allocated.

Ms. Catterton suggested that if mitigating factors are taken into account only within the range of the punishment, rather than in determining the range itself, the mitigating factors would be given less weight.

Judge McAuliffe suggested that it might be more expeditious to vote on the question of presumptive guidelines first, and only then take up mitigating factors if needed.

Dr. Wellford concluded that the Subcommittee would have to collect more information on the availability of specific findings of delinquency.

The discussion then moved to the calculation of the Offense Score. There were two proposed changes to the Offense Score -- a change to the scoring of Victim Injury and Special Vulnerability of Victim. The discussion began with the victim injury component.

Victim Injury currently is scored as follows:

0 = No Injury
1 = Injury, Non-Permanent
2 = Permanent Injury or Death

Victim Injury may be physical or mental. The latter must be based on confirmed medical diagnosis or psychological treatment. For guidelines purposes, mental injury is always to be considered non-permanent. In a multiple offense case, injury points are given only for the offense or offenses where a victim was injured.

The suggested revisions to Victim Injury are shown below:

0 = No Injury
1 = Injury, Not Permanent or Incapacitating**
2 = Permanent or Incapacitating Injury***

** Cause of physical or mental injury is directly linked to conduct of defendant in the commission of the conviction offense. The injury, whether mental or physical, must be based on demonstrable proof. For example, in the case of mental or emotional trauma the injury must be based on confirmed medical diagnosis or psychological treatment. Physical injury must be more than de minimus. Bruises or contusions accompanied by demonstrable pain and discomfort are included, whether or not continuing medical treatment is sought or provided.

*** Cause of permanent or incapacitating physical or mental injury is directly linked to conduct of defendant in the commission of the conviction offense. The injury, whether mental or physical, must be based on demonstrable proof. Such injuries as lasting muscle damage or amputation are permanent. Mental or emotional injury is presumed not permanent or incapacitating unless otherwise demonstrated.

Judge Chasanow strongly questioned the use of the word "incapacitating". He asserted that precise language is critical. For example, would an individual who was knocked unconscious for 5 minutes be considered incapacitated? Judge Chasanow additionally advised against granting the possibility that psychological injury could be permanent. He stated that while psychological injury may be extremely severe and warrant additional points, physicians will very rarely state that psychological injury is permanent or that an individual will NEVER get better.

Senator Kelley raised the manner in which insurance companies reimburse injured individuals. They take into account an individual's ability to function in normal life (e.g., to bathe, dress) -- in other words, injury shown to be a demonstrable, functional loss.

Ms. McClendon asserted that the Sentencing Guidelines are used up front to negotiate pleas and are computed quickly without the opportunity for lengthy investigation or review.

Ms. Roper stated that it is necessary to have a way to document whether Victim Impact Statements are accepted and the frequency with which they are used.

Addressing Mrs. Roper's concern, Dr. Wellford noted that the Guidelines subcommittee will draft a list of items for consideration by the Commission such as the inclusion of a box on the Guidelines worksheet to collect data on victim impact statements, victim presence, etc.

Senator Kelley suggested that a mechanism should be adopted for the court to include in the record the extent of victim injury since some victims are better able than others to express the extent of their injury.

The discussion then shifted to consideration of the special vulnerability of victim component of the offense score.

Dr. Wellford presented the current and proposed method of scoring Special Vulnerability of Victim. The primary changes were three: (1) Change ages of special vulnerability to 12 year of age or less or older than 62 years of age. (2) Change the terminology from handicapped to disabled. (3) Add If victim is exploited out of fear of authority or deference to authority (e.g., parent, teacher, minister, doctor, etc.).. He noted that the point was non-cumulative, the most that this item can score is one point.

The current Special Vulnerability of Victim* reads as follows:

0 = No
1 = Yes

* This item is designed to cover cases in which the relative helplessness of the victim tends to render the actions of the perpetrator all the more brutal or sadistic. An especially vulnerable victim is anyone 10 years of age or less, 60 years of age or more, or physically or mentally handicapped. The handicap may be temporary or permanent.

The Guidelines subcommittee suggested the following changes to Special Vulnerability of Victim**:

0 = No
1 = Yes

** a vulnerable victim is under age 12 or older than 62. Furthermore, a victim can be considered vulnerable if physically or mentally disabled (temporary or permanent). Also, victim is vulnerable if victim is exploited out of fear of authority or deference to authority (e.g., parent, teacher, minister, doctor, etc.). If victim is vulnerable, score one point.

Discussion about the age of vulnerability ensued.

Senator Kelley noted that today's average 60 year old is not particularly vulnerable. Judge Wright recalled that the Committee arrived at 62 years old as a midpoint between 60 years old and 65.

Judge Chasanow questioned changing the lower age bound for a vulnerable victim from 12 to 10. He suggested that the age of 10 had been selected for many reasons. He noted that 10 years old has a statutory history in sex offenses, and would prefer to keep it.

Dr. Wellford explained that the Subcommittee had simply wanted to raise the issue of an age change to the Commission.

Judge McAuliffe suggested a vote on the following age boundaries: 10 years as lower bound and 65 years as upper bound. The Commission voted and conditionally accepted the age 10 as the lower bound and 65 years of age as the upper bound.

Discussion then turned to the language in the proposed revision stating a victim is vulnerable if victim is exploited out of fear of authority or deference to authority (e.g., parent, teacher, minister, doctor, etc).

Mr. Lipman noted that inclusion of authority in vulnerability had two problems: first, it may be double-counted for offenders committing crimes that single out for prosecution someone who violates an position of authority or trust, and second, the wording is ambiguous.

Del. Vallario noted that age is relevant in authority relationships. For example, an adult who is victimized by a parent or priest is not the same situation as a child in the same position.

Several members expressed concern about the breadth of the new language. Ms. Catterton recommended dropping the addition of authority relationships entirely.

Judge Chasanow also questioned why the word "handicapped" had been replaced with "disabled". Dr. Wellford stated that it was changed because the word "disabled" is more acceptable to the disabled population.

Delegate Montague raised the issue that the federal government has defined the word "disabled" as part of

the American with Disabilities Act to include persons who are HIV positive, persons who are drug abusers, and alcoholics. Such disabilities may not have been intended by the term handicapped.

Judge McAuliffe called for a separate vote on each of the three changes. Regarding inclusion of the authority addition that the victim is vulnerable if exploited out of fear of authority or deference to authority (e.g., parent, teacher, minister, doctor, etc.), the vote was 11-1 against the proposed change. Regarding replacing "handicapped" with "disabled" and drop the "temporary or permanent" qualification of "disabled". The vote was 8 in favor of the change and 5 against.

Ms. Catterton suggested checking with an ADA attorney regarding "disabled".

Dr. Wellford noted that these changes concluded the Subcommittee's changes on offense and offender scoring on the work sheets. He noted that Subcommittee members had also made proposals to move some offenses to different seriousness levels, which would have implications for offense scoring. The proposals, affecting 21 offenses in all, were distributed. Dr. Wellford asked the Commission to review them and respond if they identified other proposed changes. Delegate Vallario noted that first degree assault, now a seriousness category 2 crime, should be consistent with assault with intent to murder and therefore a seriousness category 3 offense.

Grant Solicitation

The National Institute of Justice announced a grant solicitation for research on sentencing and corrections, Dr. Hunt announced. The goal is the development of partnerships composed of practitioners and researchers. The Commission staff, Dr. Hunt and Dr. Souryal, attended a grant workshop and are preparing a grant proposal in partnership with the Urban Institute. They will also be speaking to the Maryland Correctional Administrators regarding their interest in the project.

Judge Chasanow suggested that the Commission's role and limitations regarding time frames be very explicit. He noted that the Commission is due to expire next July and NIJ needs to be aware of this fact up front, with any Commission deliverables scheduled prior to this date.

The meeting was then adjourned.