



Minutes

Maryland State Commission on Criminal Sentencing Policy
Judiciary Education and Conference Center
Annapolis, MD 21401
September 19, 2017

Commission Members in Attendance:

Honorable Glenn T. Harrell, Jr., Chair
Honorable Shannon E. Avery, Vice-Chair
Delegate Curtis A. Anderson
LaMonte E. Cooke
William M. Davis, Esquire, *representing Public Defender Paul B. DeWolfe*
Honorable Brian L. DeLeonardo
Barbara Dorsey Domer
Elizabeth Embry, Esquire, *representing Attorney General Brian E. Frosh*
Richard A. Finci, Esquire
Brian D. Johnson, Ph.D.
Senator Delores G. Kelley
Honorable Patrice E. Lewis
Honorable Laura L. Martin

Staff Members in Attendance:

Sarah Bowles
Jennifer Lafferty
Stacy Najaka, Ph.D.
Katharine Pembroke
David Soulé, Ph.D.
Shantel Frederick, MSCCSP Intern

Visitors:

Elizabeth Bayly, Department of Legislative Services; Linda Forsyth, Chief of Staff for Senator Kelley; Jameson Lancaster, Department of Legislative Services

1. Call to order

Judge Harrell called the meeting to order.

2. Roll call and declaration of quorum

The meeting began at 5:34 pm when attendance reached a quorum.

3. Approval of minutes from the July 11, 2017, MSCCSP meeting

The Commission approved the minutes as submitted.



4. Guidelines Subcommittee Report – Judge Shannon Avery

This section is broken into five parts. The Commission first briefly reviewed the juvenile delinquency score project's progress to date, and Commissioners provided their overall perspectives on the juvenile delinquency score. The Commission then addressed and voted on each of the four questions (originally proposed in the memorandum distributed prior to the July meeting, *Brief Summary of the Juvenile Delinquency Score Project and the Corresponding MDAC Analyses*). Each portion of the discussion is elaborated upon below.

Overview

Judge Avery referred the Commission to the memo distributed in advance of the meeting, *Recommendations for the Juvenile Delinquency Score Component of the Maryland Sentencing Guidelines*. Judge Avery reported that the Guidelines Subcommittee discussed the issues related to the juvenile delinquency score at its August 31 meeting. Judge Avery asked Dr. Soulé to provide a brief history of the juvenile delinquency score project. Dr. Soulé summarized that the project was motivated by testimony made at a Public Comments Hearing regarding the inconsistent application of the term commitment in the scoring of the juvenile component of the offender score. There was particular concern that community commitments were being counted as commitments in the calculation of the juvenile delinquency score. Following the hearing, the Commission agreed to further study the issue and collaborated with the Maryland Data Analysis Center (MDAC) to empirically examine how juvenile records affect the sentencing guidelines and which aspects of the juvenile record affect later adult offending. The study had three main goals: (1) to identify any variations in the scoring of the juvenile delinquency record, (2) to evaluate the predictive ability of the current scoring method, and (3) to develop and evaluate potential alternatives to scoring the juvenile delinquency record.

The study evolved over the course of four Commission meetings in 2016 and 2017. At the May 2016 Commission meeting, Dr. Jinney Smith, Associate Director of MDAC, presented the results of analyses of the MSCCSP's data. The results of these analyses showed that jurisdictional and racial variations existed in the scoring of the juvenile record. At the December 2016 Commission meeting, the MDAC team presented the second phase of the study which used juvenile records obtained from the Department of Juvenile Services (DJS) to validate the current juvenile delinquency score. The MDAC team also presented the results of a field survey of State's Attorneys' Offices (SAO) and Parole & Probation agents across Maryland regarding the scoring of the juvenile delinquency record. At the May 2017 meeting, the MDAC team presented several alternative scoring options, focusing on tripartite (3-point) measures of juvenile delinquency. After the May meeting, the MDAC team additionally developed and analyzed several binary (2-point) measures of juvenile delinquency. At the July 2017 meeting, a summary of the project and the nine potential alternative scoring systems was presented. Seven of the nine alternative models failed on one or more measures, including whether they accurately predicted adult recidivism, equally affected different racial groups, and distributed offenders appropriately across the 3-point/2-point categories. Two scores, Adjudication Only #2 and Binary Score B, performed as well or better than the current juvenile delinquency score. Most notably, the two alternative



models do not include commitments in the calculation of juvenile delinquency score, which addresses the primary issue from which the study evolved.

At the July 11, 2017, meeting, the Commission agreed to use four questions to guide the decision to revise the juvenile delinquency score:

- (1) Should the Maryland sentencing guidelines continue to account for a juvenile record when calculating the offender score?
- (2) If the MSCCSP chooses to maintain a juvenile component in the sentencing guidelines, should the instructions for the juvenile delinquency score (referenced in the Maryland Sentencing Guidelines Manual (MSGM) and COMAR) be revised?
- (3) Should the five-year decay method be officially adopted?
- (4) Should an alternative scoring system be adopted?

The Guidelines Subcommittee met in person on August 31, 2017, and reviewed the issues surrounding the juvenile delinquency score, including a summary document prepared by the MDAC team, a letter from the Public Defender's Office in support of excluding the juvenile delinquency component from the sentencing guidelines, and Criminal Procedures (CP) Article, § 6-208(b)(2), which states that "the sentencing guidelines...shall set forth:...a range of increased severity for defendants previously convicted of or adjudicated delinquent for a previous crime." After the Subcommittee meeting, staff prepared a summary memorandum of the four questions and the Guidelines Subcommittee's recommendations. Judge Avery noted that the Guidelines Subcommittee had a robust discussion of the issues surrounding the juvenile delinquency score. Judge Avery reviewed the Subcommittee's recommendations for each of the four questions.

Judge Avery began with Question #1, which asked whether the guidelines should continue to account for a juvenile record. She noted that the Guidelines Subcommittee voted 3 to 1 in favor of maintaining the juvenile delinquency score. Judge Avery noted that one consideration in their vote was CP, § 6-208(b)(2). Judge Avery noted that the Subcommittee also considered the concern that excluding the juvenile delinquency score from the sentencing guidelines would mean that judges would be left without guidance as to how to treat the juvenile record.

Judge Avery noted that the Guidelines Subcommittee unanimously voted yes to Question #2, which asked whether the instructions for the juvenile delinquency score should be revised. Judge Avery noted that the Guidelines Subcommittee unanimously agreed that the instructions should be revised to provide greater clarity to users and to incorporate any adopted revisions to the juvenile delinquency score calculation.

Judge Avery noted that the Guidelines Subcommittee unanimously voted yes to Question #3, which asked whether the five-year decay factor should be officially adopted. Judge Avery noted that Guidelines Subcommittee also agreed to refer to the rule as the five-year "lookback window," so as to avoid confusion with the adult criminal record decay factor. Under this rule, guidelines users would be instructed to examine the juvenile record dating back only five years prior to the date of the instant offense.



With respect to Question #4, Judge Avery noted that the Guidelines Subcommittee voted 3 to 1 in favor of adopting the alternative juvenile delinquency scoring method referred to as Adjudications Only #2. Judge Avery noted that Adjudications Only #2 reduces racial disparities, simplifies the juvenile delinquency scoring system such that it could be automated in the future, and effectively differentiates between offenders with different levels of recidivism. Judge Avery noted that only adjudications would be counted under this scoring system, not commitments.

Delegate Anderson asked whether “adjudication” meant any adjudication, regardless of the offense. Judge Avery responded that it does. Judge Avery noted that while the use of commitment in the current scoring system was intended to denote offense severity, its inconsistent application outweighs its appeal as a measure of offense severity. Judge Avery noted that the Guidelines Subcommittee agreed that there should be consideration of the severity of the defendant’s juvenile record and that the relevant parties (i.e., judge, SAO, and defense) will have access to that information.

Judge Avery noted that Adjudications Only #2 has the potential to increase the number of defendants who receive 1 point on the juvenile delinquency score because Adjudications Only #2 scores defendants with one adjudication with 1 point, rather than zero points as is under the current system. Judge Avery noted that this increase may be countered by the recent decrease in juvenile adjudications in Maryland. Dr. Soulé noted that the imposition of the five-year lookback window may also counter the increase in the number of defendants who score 1 point under Adjudications Only #2.

Judge Harrell asked how long juvenile adjudications have been declining in Maryland. Delegate Anderson stated that it had been at least five years since the decline began, citing 2010 or 2011. Delegate Anderson noted that the DJS had reported that while overall juvenile complaints have dramatically decreased, juvenile complaints for violent offenses have remained stable.

Senator Kelley noted that she was the outlier on the Guidelines Subcommittee. Senator Kelley noted that the MDAC study identified significant geographic and racial disparities in the calculation of the juvenile delinquency score and its effects on sentencing. Senator Kelley noted that these disparities may be related to access to community resources, a jurisdiction’s access to funding, and a defendant’s income level and access to private defense. Mr. Davis agreed with Senator Kelley and noted that whether a juvenile case is prosecuted is often related to where the defendant lives, with youth living in wealthier communities often avoiding prosecution.

Mr. Finci expressed his view that the true effect of the Commission’s vote to revise the juvenile delinquency score was missing from the discussion. Mr. Finci noted that a vote for Adjudications Only #2 would result in lengthier sentences for some juveniles. Mr. Finci further noted that the adoption of Adjudications Only #2 would go against current public policy, current research concerning the juvenile mind, and recent United States Supreme Court cases concerning juvenile justice. Mr. Finci expressed his view that “delinquent act” is defined too broadly under the current system. Mr. Finci stated that he would like to see delinquent act defined as a violent crime, per Criminal Law (CR) Article, § 14-101.



Ms. Martin responded to clarify that the new system does not result in a lengthier sentence for juveniles, but rather, it may result in a higher recommended guidelines range for an adult defendant who has a prior history of juvenile delinquency, which statistics have shown is associated with a higher risk of recidivism. Ms. Martin disagreed with Mr. Finci's suggestion that delinquent act be defined as a violent crime because the MDAC study analyses indicated that an adjudication for any juvenile offense increases one's risk of adult recidivism. Ms. Martin also noted that juvenile court is handled differently than adult court. Ms. Martin noted that juvenile defendants are often offered pleas to misdemeanor charges, rather than felonies, as felonies will disqualify juvenile defendants from certain rehabilitative programs. If the Commission were to define delinquent acts as violent crimes, that may discourage juvenile prosecutors from offering such pleas.

Mr. DeLeonardo noted that presently, juvenile prosecutors are not concerned with the particular offense that is convicted, but rather with what is in the best interest of the juvenile. Mr. DeLeonardo agreed with Ms. Martin that defining a delinquent act as a violent crime may alter policies in SAOs, such that pleas to lesser offenses are no longer offered.

Ms. Martin noted that another issue with restricting the definition of a delinquent act to a violent crime is that a judge would not have a complete picture of the defendant's record. Ms. Martin noted that at the July 11, 2017, Commission meeting, Judge Salmon remarked to her that if judges were given an incomplete picture of the defendant's record, either by not counting the juvenile record at all or by including only a portion of it, judges would deviate from the guidelines.

Senator Kelley noted that the proposed juvenile delinquency score does not address mental illness, trauma, or status offenses that result in a violation of a valid court order. Senator Kelley expressed that she would like to see footnotes in the final report which note some of the factors and variations that are not being captured in the juvenile delinquency score and note that the Commission at least considered these issues.

Judge Avery noted that the guidelines do not reflect many of the issues Senator Kelley cited. She noted that it would be necessary to look to the legislature, the executive branch, or the constitutional agencies that create policy to address some of these concerns.

Mr. Davis expressed concern with the use of recidivism data to support Adjudications Only #2. Mr. Davis referenced the letter Mr. DeWolfe sent (distributed prior to the meeting), which referenced two studies interpreted by Mr. DeWolfe as debunking the idea that juvenile offending is a predictor of recidivism. Mr. Davis noted that the majority of juvenile offenders do not go on to offend as adults. Mr. Davis further noted that juveniles with more than one finding of a delinquent act are the youth living in the most dysfunctional and traumatizing households. Mr. Davis argued that the juvenile delinquency score is further traumatizing youth who cannot extract themselves from dysfunctional living conditions.

Mr. Davis inquired as to what is meant by the term "delinquent act," referenced in the juvenile delinquency score. Mr. Davis noted that there are two levels of findings in juvenile court: (1) "did you commit the act," and (2) "are you delinquent." Mr. DeLeonardo replied that "delinquent act" would refer to the second level. Mr. Davis noted that the current



definition is not clear, and it needs to be clear that “delinquent act” means that the magistrate makes a finding that the “child is in need of assistance.” Ms. Martin agreed that there has to be a “finding of involvement.” Mr. Davis clarified that there has to be the second step too, not just the involvement. Mr. Davis further clarified that the magistrate would have to make the finding that the child is “in need of assistance.” Ms. Martin agreed that the child would have to found “in need of services.”

Ms. Martin noted that guidelines offenders are adults when their delinquency score is being calculated. Ms. Martin noted that these defendants receive a higher guidelines range because they are at a higher risk of recidivism, as Dr. Smith and her team verified using data from Maryland. Ms. Martin noted that victims and the potential for harm to future victims must also be considered when contemplating the juvenile delinquency score.

Judge Avery noted that Mr. DeWolfe’s letter was discussed at the Guidelines Subcommittee meeting and addressed by Dr. Smith and Dr. Soulé. Dr. Soulé noted that the staff reviewed the studies cited in Mr. DeWolfe’s letter and he has a different interpretation of the primary findings from these studies. Dr. Soulé stated that while one study found that the majority of juvenile offenders do not go on to commit crimes as adults (a well-known finding that has been confirmed by other studies), neither study reported anything to debunk the finding that juvenile offenders are at a higher risk of recidivism as adults. Dr. Soulé noted that juvenile offending is one of the strongest predictors of adult recidivism. Judge Avery agreed that overwhelming research has found that juvenile offending is a predictor of later offending.

Mr. Davis asked how Adjudications Only #2 would reduce racial disparity. Judge Avery responded that the MDAC analyses found that there was less racial disparity when applying an adjudications only method to calculating the juvenile delinquency score versus a combined commitments/adjudications method, such as the current system. Judge Avery noted that the disparity present under the current system was due to jurisdictional disparities in commitment practices. Dr. Soulé noted that the current system overscores African American youth who score 2 points. Dr. Soulé noted that African American defendants who scored 2 points on the juvenile delinquency score were found to have the same, or sometimes lower, rates of recidivism when compared to African American defendants who scored 1 point. Dr. Soulé noted that Adjudication Only #2 eliminates these disparities and creates clear demarcations in recidivism rates between defendants who score 0, 1, and 2 points.

Question #1: Should the Maryland sentencing guidelines continue to account for the juvenile delinquency score as a component of the offender score?

Delegate Anderson stated that continuing to account for the juvenile record in the sentencing guidelines would be antithetical to the Commission’s charge. Delegate Anderson stated that the Commission’s charge was not to make sure judges get information regarding recidivism, but rather to make sure that there are consistent guidelines across the state and to ensure that similar defendants are sentenced similarly, regardless of their location. Delegate Anderson expressed his view that nothing in the juvenile record could grant the assurance that defendants would be treated similarly or consistently across the state. Delegate Anderson noted that in the juvenile courts he has visited in Maryland during the course of his practice, the prosecutor in every jurisdiction has stated that their duty is to protect the interests of the



child. Delegate Anderson questioned if children are to be treated as children, why should they be held accountable (in adult court) for actions committed as children. Delegate Anderson noted that the treatment of juveniles across the state is so different that there is no one way to account for the juvenile record in the guidelines. Delegate Anderson stated that the juvenile record should be examined by the judge on a case-by-case basis.

Judge Avery asked Delegate Anderson if he was stating that there should be no guidelines at all pertaining to the juvenile record. Delegate Anderson confirmed that was his position. Judge Avery noted that the legislature has never acted to prevent the judge from considering the juvenile record. Delegate Anderson stated that regardless of how the Commission decides to calculate the juvenile delinquency score, the judge is going to fully examine the defendant's juvenile record and sentence as he or she wants. Delegate Anderson further expressed his opinion that an adjudications only score is worse than a juvenile delinquency score that includes commitments, as a commitment at least denotes offense severity. Judge Lewis agreed with Delegate Anderson's point concerning commitments.

Judge Avery noted that prior to the guidelines, there were jurisdictional, racial, and other disparities in sentencing across the state. The guidelines were created to provide consistency and reduce disparities in sentencing. Judge Avery argued that the inclusion of the juvenile delinquency score as a component of the guidelines should serve the same purpose.

Delegate Anderson noted that the sentencing guidelines and sentencing matrices were structured in such a way that guidelines are recommended based on the defendant's offense severity and prior record, however no such system was created to measure the juvenile record. Delegate Anderson stated that, therefore, defendants who commit juvenile offenses of different severities will be treated the same. Delegate Anderson stated that the juvenile record is not contemplated by the guidelines in a detailed enough manner to warrant its continued inclusion.

Dr. Soulé noted that the Commission has always described the guidelines as descriptive in nature, in that they reflect back to judges their actual sentencing practices. Dr. Soulé further noted that the data showed that judges in Maryland consider the juvenile record at sentencing. Judge Avery stated that a judge would be remiss not to consider the juvenile record. Senator Kelley stated that judges should be able to consider all aggravating and mitigating circumstances at sentencing, rather than "fitting defendants into a box." Dr. Soulé noted that, although the proposed juvenile delinquency score is simplistic, it has done a good job of differentiating recidivism among defendants with different scores.

Judge Lewis noted that the data showed that, although the guidelines were created to ensure consistency, the juvenile score was not calculated consistently across jurisdictions. Judge Lewis also emphasized the difference in seriousness between a finding of a delinquent act and a juvenile commitment. Judge Lewis expressed that a commitment sends a strong signal as to the severity of the offense.

Mr. DeLeonardo noted that the data showed that the use of commitments in the calculation of the juvenile delinquency score was among the biggest issues causing its disparate application. Mr. DeLeonardo noted that Adjudications Only #2 reduced this disparity and



was also the most accurate and best predictor of recidivism. Mr. DeLeonardo expressed concern that the data were now being ignored. Mr. DeLeonardo further noted that the data showed it is not the number of commitments that affect recidivism, it is the number of contacts with the criminal justice system (i.e., adjudications). If the Commission wishes to reflect back to judges their actual practices, Adjudications Only #2 best achieves this goal. Mr. DeLeonardo additionally noted that the guidelines are voluntary.

Senator Kelley asked that the judges be able to consider whether the delinquent child was a child in need of assistance (CINA) when examining the juvenile record. Judge Avery stated that the legislature could put forth that policy.

Dr. Soulé noted that the MDAC team evaluated several alternative methods to score the juvenile delinquency record, including models that used commitments. Dr. Soulé noted that the models that included commitment were the worst performing models in terms of racial disparities and differentiating offenders with different risks of recidivism.

Judge Lewis suggested that the 1-point category under Adjudications Only #2 be expanded to include defendants with no more than 3 (rather than 2) adjudications. Dr. Soulé noted that the data indicated that 2 adjudications was the best cutoff point in terms of differentiating the risk of recidivism between defendants who scored 0, 1, or 2 points.

Judge Lewis stated that the Commission is not trying to increase the number of defendants who score 1 point on the juvenile delinquency score.

Mr. DeLeonardo stated that the goal was not to increase the number of defendants in any one category, but to redefine the categories to provide greater consistency in scoring.

Dr. Soulé noted that while Adjudications Only #2 will increase the number of defendants who score 1 point, that increase may be offset by the official adoption of the five-year lookback window.

Senator Kelley suggested that the Commission provide to judges a list of qualitative factors to look at when considering the juvenile record, for instance the defendant's CINA status and history of mental illness and trauma.

Judge Avery noted that Dr. Smith and her team spent months analyzing the data and developing alternative models of the juvenile delinquency score. The Guidelines Subcommittee then balanced the increase in the number of defendants who score 1 point that may result from the adoption of Adjudications Only #2 with the need to reduce the current disparities in the juvenile delinquency score and to provide more guidance to judges.

Judge Avery suggested that the purpose of the guidelines is to restrict the unfettered discretion of circuit court judges. Senator Kelley disagreed with Judge Avery and stated that the purpose of the guidelines is to reflect back to judges their own practices. Judge Avery noted that judges must say why they are departing from the sentencing guidelines. Judge Avery further stated that it does not make sense to take away restrictions on discretion (for



instance, by eliminating the juvenile delinquency score) if the goal is to have more consistent, non-disparate treatment of defendants.

Dr. Johnson stated that he agreed with Judge Lewis and is concerned about increasing the number of defendants who score 1 point under Adjudications Only #2. Dr. Johnson also stated that the Guidelines Subcommittee had done good work in reviewing the issues. Dr. Johnson stated that moving from commitment to adjudications is an improvement because it will reduce geographic disparities. Dr. Johnson expressed that the Commission could agree on that point. Delegate Anderson disagreed with notion that moving from commitment to adjudications is an improvement.

Dr. Johnson further stated that the imposition of the five-year rule is good. Responding to Judge Lewis's suggestion that a score of 2 points on the juvenile delinquency score be defined as four or more findings of a delinquent act, Dr. Johnson stated that scoring system would not be feasible because so few defendants have four or more findings of a delinquent act.

Dr. Johnson suggested that Adjudications Only #3 may be a good compromise. Adjudications Only #3 maintains the zero point category as either zero or one finding of a delinquent act and does not increase the number of defendants who score 1 point on the juvenile delinquency score. Dr. Johnson noted that Dr. Smith did not recommend Adjudications Only #3 because the method did not distinguish the risk of recidivism among defendants who score 1 point versus 2 points. Dr. Johnson stated that risk of recidivism was one factor judges consider, but they also consider culpability and just desserts. Dr. Johnson suggested that these factors could justify the additional point for defendants with three or more juvenile adjudications, even though their risk of recidivism is not necessarily higher than those who score 1 point.

Ms. Martin made a motion that the Commission take a vote on Question #1. Mr. DeLeonardo seconded the motion.

The Commission voted 8 to 5 in favor of continuing to account for a juvenile record when calculating the offender score.

Question #2: If the MSCCSP chooses to maintain a juvenile component in the sentencing guidelines, should the instructions for the juvenile delinquency score (referenced in the Maryland Sentencing Guidelines Manual (MSGM) and COMAR) be revised?

Senator Kelley recommended that judges be advised to consider all relevant variables (i.e., aggravating and mitigating factors) and to make a qualitative decision regarding the defendant's juvenile record. Judge Harrell asked Senator Kelley if that would be a more appropriate recommendation for Question #4 (should an alternative method be adopted). Senator Kelley agreed that it would be an appropriate recommendation for Question #4. Judge Harrell asked to clarify whether Senator Kelley was suggesting that the Commission provide judges with a non-exhaustive list of factors to consider. Senator Kelley confirmed that was her recommendation. Judge Harrell questioned whether that would be possible.



At the conclusion of the discussion, Judge Harrell called for a vote on Question #2.

The Commission unanimously voted to revise the instructions for the juvenile delinquency score.

Question #3: Should the five-year lookback window be officially adopted?

Mr. DeLeonardo questioned whether Question #4 (should an alternative scoring system be adopted) should be addressed prior to Question #3. Judge Harrell clarified that even if an alternative score is not adopted, the Commission may wish to adopt the five-year lookback window as a means to provide consistency among users calculating the score, therefore Question #3 could be addressed first.

Mr. Cooke asked for clarification as to what the five-year lookback window meant. Mr. DeLeonardo responded that the five-year look back window was designed to reduce ambiguity in the juvenile delinquency score instructions and inconsistencies among users in their calculations of the score. Mr. DeLeonardo noted that some users were looking back at the entire juvenile record to calculate the juvenile delinquency score, while others were looking at only the five years prior to the date of offense.

Mr. DeLeonardo also noted that the imposition of the five-year lookback window may mitigate the increase in defendants who score 1 point under Adjudications Only #2. Mr. DeLeonardo further noted that the five-year lookback window strikes a balance between the desire to look at the entire juvenile record and the desire to increase consistency in scoring.

Senator Kelley noted that to go back to a defendant's juvenile record at age 13 would be counter to where the Supreme Court currently stands with respect to juvenile justice.

Mr. DeLeonardo noted that judges give different weights to juvenile adjudications based on the age at which they were committed.

At the conclusion of the discussion, Judge Harrell called for a vote on Question #3.

The Commission unanimously voted to officially adopt the five-year lookback window.

Mr. Finci asked to clarify whether the five-year lookback window begins on the date of the offense or on the date of sentencing. Dr. Soulé responded that it begins on the date of the instant offense.

Dr. Soulé clarified that the term "lookback window" was decided upon by the Guidelines Subcommittee so as not to confuse the rule with the decay factor that can currently be applied to the adult criminal record.

Question #4: Should an alternative scoring system be adopted?

Ms. Martin suggested that a vote be taken to see where everyone stands with respect to adopting an alternative scoring system.



Delegate Anderson suggested that, before a vote is taken, an ad hoc committee be set up to consider what alternative systems could be adopted. Ms. Martin noted that the Guidelines Subcommittee had already considered what alternative systems could be adopted, prior to making their recommendation. Delegate Anderson asked how many alternative systems were reviewed. Dr. Soulé noted that nine alternative systems were considered and then narrowed down to the two measures that the Guidelines Subcommittee reviewed (Adjudications Only #2 and Binary Score B).

Senator Kelley noted that the qualitative system she suggested (i.e., the list of mitigating and aggravating factors to provide to judges) was not considered at the Guidelines Subcommittee meeting.

Mr. Davis asked if there was discussion concerning the binary score. Dr. Soulé replied that the Guidelines Subcommittee discussed the binary scoring system but preferred the tripartite model because it created three distinct categories of offenders, each with different recidivism rates, provided more information to judges, and created a true zero category of offenders in that defendants would score 0 points only if they had no findings of a delinquent act in the five years prior to the date of offense. Dr. Soulé stated that Binary Score B does not contain a true zero category and, instead, scores a defendant with 0 points if they have either zero or one finding of a delinquent act, and 1 point if they have two or more findings of a delinquent act.

Mr. Davis commented that Binary Score B would address Judge Lewis' concerns (i.e., the increase in defendants who score 1 point under Adjudications Only #2). Mr. Davis expressed support for the binary measure.

Mr. DeLeonardo noted that the binary score created more disparity and was less accurate than Adjudications Only #2. Mr. DeLeonardo noted that the point of the juvenile delinquency study was to figure out if there was disparity and inaccuracy in the current juvenile delinquency score. The analyses showed that there were disparities and inaccuracies and also showed that Adjudications Only #2 did the best in reducing these issues. Mr. DeLeonardo stated that for these reasons, the Commission should vote on Adjudications Only #2 first, then, if the motion fails, address other methods.

Mr. Davis expressed concern with the true zero category created by Adjudications Only #2 and noted that a true zero category does not allow juveniles to make a mistake. Mr. Davis noted the disparity in juvenile prosecution based on the neighborhood in which the youth live. Mr. DeLeonardo and Judge Avery asked how the guidelines could correct those sorts of disparities in juvenile prosecution. Mr. Davis suggested that a category that allows for up to one juvenile adjudication without the accumulation of any points would reduce the disparity in points that youth may later accrue on the juvenile delinquency score component of the sentencing guidelines.

Mr. Finci made a motion to take a straw vote regarding the adoption of Adjudications Only #2. Delegate Anderson seconded Mr. Finci's motion.

The Commission (straw) voted 7 to 6 in favor of adopting Adjudications Only #2.



Judge Avery suggested that if the Commission wanted to consider other models, the official vote should be tabled until Dr. Smith could attend a Commission meeting, as she completed the analyses for the juvenile delinquency study. Additionally, Mr. Davis suggested that the advertisement for the Public Comments Hearing should note that the juvenile delinquency score is an issue being debated by the Commission, and the advertisement should solicit testimony on the matter. Mr. Davis suggested the Commission could then take the public's comments into consideration. The MSCCSP agreed that the December 11 Public Comments Hearing notice would solicit comments pertaining to the juvenile delinquency score.

Mr. Finci moved that the Guidelines Subcommittee be asked to look at whether a clearer definition of "adjudication" or "commitment" could be developed, such as defining juvenile adjudication as a crime of violence, per CR, § 14-101, or defining commitment as a commitment to a secure juvenile facility. Delegate Anderson agreed with Mr. Finci. Dr. Soulé noted that the Commission considered these suggestions; however, the survey of Maryland SAOs and Parole & Probation agents found that those calculating the juvenile delinquency score often do not know whether a commitment was to a secure facility. The survey also found that many users cannot determine the severity of the offense included on the juvenile record, thus making it difficult to define adjudication as a crime of violence. Dr. Soulé further noted that those calculating the guidelines obtain information concerning the juvenile record from different sources of data, depending on their position (SAO or Parole & Probation agent) and jurisdiction.

Dr. Soulé noted that another benefit of going to an adjudications only system is that there is the realistic possibility that the scoring of the juvenile record could be automated in the future, which would further reduce inconsistencies in scoring. Delegate Anderson suggested that the Commission support legislation to automate the process.

Ms. Domer noted that the Commission's main concern with Adjudications Only #2 is the increase in defendants who score 1 point. Ms. Domer wondered if the defense and state's attorney could work together before court so that the juvenile does not even get an adjudication, thereby eliminating the likelihood that the defendant will later score 1 point on the juvenile delinquency score. Ms. Domer expressed that out of all the alternative methods identified, Adjudications Only #2 is the least discriminatory.

Judge Lewis stated that it would not be complicated to adjust the parameters for scoring 1 point, such that it would not lead to an increase in defendants who score 1 point.

Dr. Johnson asked whether the Commissioners who (straw) voted against Adjudications Only #2 did so primarily because of the increase it would cause in defendants who score 1 point. Dr. Johnson noted that he (straw) voted in favor of Adjudications Only #2 with reservation. Dr. Johnson stated that his preference is not to increase defendants who score 1 point. Dr. Johnson suggested that if the Commission's concern was the increase in defendants who score 1 point and not the elimination of the true zero category, moving to Adjudications Only #3 (where 0 points= 0-1 finding of a delinquent act, and 1 point= 2 or more findings of a delinquent act) would be a good compromise.



Dr. Soulé noted that Adjudications Only #3 was dismissed because analyses showed no difference in recidivism between defendants who scored 1 point or 2 points on the juvenile delinquency score.

Judge Lewis wondered how many more defendants would score 1 point on the juvenile delinquency score if 1 point was defined as no more than three adjudications. Dr. Johnson noted that Adjudications Only #2 would increase the percentage of defendants who score 1 point from 13% to 26%.

Dr. Najaka noted that Adjudications Only #3 would decrease the percentage of defendants who score 1 point from 13% to 8%.

Dr. Soulé noted that Adjudications Only #3 would overall reduce the number of defendants who score 1 or 2 points.

Ms. Embry asked how Adjudications Only #3 was different from the binary model. Dr. Soulé stated that Binary Score B is Adjudications Only #3 with the 1- and 2-point categories collapsed.

Judge Avery noted her opposition to having someone who committed a juvenile offense receive zero points on the juvenile delinquency score, as is contemplated by Adjudications Only #3.

Delegate Anderson asked whether there were recent statistics concerning juvenile adjudications versus juvenile commitments. Delegate Anderson expressed concern that Adjudications Only #2 is a worse scoring system because DJS processes so many more juvenile adjudications than commitments, therefore more defendants will be receiving 1 or 2 points under Adjudications Only #2. Dr. Soulé noted that Adjudications Only #2 is not predicted to increase the number of defendants who score 2 points. Dr. Soulé further noted that Adjudications Only #2 increases the number of adjudications necessary to score 2 points, from two adjudications (under the current system) to three adjudications.

Mr. Davis noted that one issue with the use of commitments was the difference between active and suspended commitments. Mr. Davis noted that the public defender who initially brought the issue to the Commission's attention at the Public Comments Hearing stated suspended commitments are being counted as commitments when users are calculating the juvenile delinquency score, particularly in Baltimore City.

Judge Lewis obtained DJS statistics from staff and stated that in 2016, there were 5,932 adjudicated delinquents, 789 of whom were committed.

Judge Lewis stated that she would like to see 1 point defined as no more than three adjudications and two points defined as four or more adjudications. Mr. DeLeonardo noted that so few defendants have four or more juvenile adjudications that such a tripartite classification system would be rendered useless.



Judge Lewis made a motion to define 1 point as younger than 23 years and one to three findings of a delinquent act within five years prior to the date of offense, and 2 points as younger than 23 years and four or more findings of a delinquent act within five years prior to the date of offense. Delegate Anderson seconded the motion. Judge Avery stated that this motion would effectively remove the guidelines and undermine the credibility of the juvenile scoring system as well as the entire guidelines.

The motion to define 1 point as younger than 23 years and one to three findings of a delinquent act within five years prior to the date of offense, and 2 points as younger than 23 years and four or more findings of a delinquent act within five years prior to the date of offense failed (7 to 6).

Dr. Johnson noted that he voted against Judge Lewis's motion because it would render the 2-point classification useless (as so few defendants have four or more findings of a delinquent act). Dr. Johnson suggested that Adjudications Only #3 would be a better option. Although there is little difference in recidivism between defendants who score 1 and 2 points under Adjudications Only #3, Dr. Johnson noted that qualitative differences, such as culpability, may exist between defendants who score 1 versus 2 points, thereby justifying the additional point.

Ms. Domer asked how the model would differentiate between an offender with one juvenile adjudication for shoplifting versus an offender with one adjudication for carjacking. Dr. Johnson noted that none of the alternative models proposed could make that distinction, including Adjudications Only #3. Ms. Domer suggested that the specifics of the offense could be discussed between the judge and attorneys.

Judge Avery stated that the guidelines would not be providing the judge with the information necessary to decide upon an appropriate sentence if they allow a defendant with one juvenile adjudication to score zero on the juvenile delinquency score. A juvenile scoring system, such as Adjudications Only #3, would undermine the guidelines system. Dr. Johnson noted that the current system gives an offender with up to one juvenile adjudication zero points. Judge Avery noted that the point of the juvenile delinquency study was to improve upon these aspects of the scoring system. Judge Avery noted that the Guidelines Subcommittee liked Adjudications Only #2 because it provides a true zero category.

Mr. DeLeonardo noted that the data showed grouping defendants with zero and one offense produced inaccurate results in terms of differentiating recidivism.

Dr. Johnson made a motion to adopt Adjudications Only #3. Senator Kelley seconded the motion. Dr. Johnson noted that he was hesitant to make the motion because Adjudications Only #3 is not the best model, however it is a good compromise.

The motion to adopt Adjudications Only #3 failed (6 to 4).

Ms. Martin made a motion to accept the recommendation of the Subcommittee and adopt Adjudications Only #2. Ms. Domer seconded the motion.



The motion to accept the recommendation of the Subcommittee and adopt Adjudications Only #2 passed (8 to 5).

Judge Harrell noted that the adoption of Adjudications Only #2 does not necessarily mean that the Commission cannot, as Senator Kelley suggested, include language in the guidelines that provides a non-exhaustive list of factors that the judge may wish to consider at sentencing. Judge Harrell asked if any Commissioners would like to draft this language. Senator Kelley said that she would work on the language, but would like to work with someone else.

Mr. DeLeonardo asked if this list of factors would apply to the entire guidelines, not just the juvenile record. Senator Kelley stated that it would apply to the entire guidelines.

Dr. Soulé noted that this exercise was attempted in the past. The Commission debated listing aggravating and mitigating factors in the guidelines. The Commission came up with a list that included hundreds of factors; however, the Commission could not come to an agreement as to which factors to include. Dr. Soulé noted that, instead, the Commission looked at the data and identified the reasons for guidelines departure most commonly cited by judges. A list of the most commonly identified reasons for departing both above and below the guidelines is now provided in the MSGM. Each reason is associated with a numerical code. When a judge departs from the guidelines he or she may easily provide the reason for departure on the sentencing guidelines worksheet.

Senator Kelley suggested that a drafting of the language be tabled for the time being.

Dr. Johnson asked whether there would be any opportunity to reassess the Commission's decision regarding the juvenile delinquency score. Dr. Johnson asked whether, at some point in the next several years, the Commission could examine the data to determine how many people were affected by the new scoring system. Judge Avery and Ms. Martin noted that this would be a good idea.

Dr. Soulé noted that there is precedence to revisit debated issues in the future following the collection of data. There was considerable debate as to the seriousness category classification of criminally negligent manslaughter by vehicle or vessel in 2011. Due to the debate, the Commission classified the offense as a seriousness category VII and agreed to reexamine the issue in three years after accumulating sufficient sentencing data for the offense, which it did in 2015 (three years after it was added to the Offense Table in 2012).

Mr. Finci asked what the Commission would look at if it were to reexamine the juvenile delinquency score in the future. Dr. Johnson suggested that the Commission could prepare a report detailing how the juvenile delinquency score distribution and sentences changed as result of the revisions. Senator Kelley noted that the Commission would also want to explain in this report structural problems with the status quo. Dr. Johnson agreed that the report may be a place to do that. Mr. Finci asked if two years would be an appropriate amount of time to elapse before examining the data. Dr. Soulé agreed and suggested that the annual report would be an appropriate place to make such a report.



Dr. Soulé provided the timeline for implementation. Dr. Soulé stated that the Commission would present the plan for the revised juvenile delinquency score at the Public Comments Hearing in December. The revisions would then be submitted to COMAR following the December meeting and could be adopted as early as April 2018. However, the staff suggests postponing the effective date to July 1, 2018, to provide time to make the necessary programmatic changes to the Maryland Automated Guidelines System (MAGS) and provide training to guidelines users.

5. Executive Director Report – Dr. David Soulé

a. Introduction of staff policy analyst and undergraduate intern

Dr. Soulé reported that he had four items to review. He first introduced Jennifer Lafferty, who has been the policy analyst/graduate research assistant for the Commission for the past year. Dr. Soulé then introduced Shantel Frederick, a University of Maryland undergraduate student who is interning with the Commission for the fall semester.

b. Update on implementation of JRA-related amendments

Dr. Soulé reminded the Commission that the new and revised penalties pursuant to the Justice Reinvestment Act (JRA) will go into effect on October 1, 2017. He further noted that the Commission reviewed the new and revised penalties last year, during which the Commission voted to adopt new seriousness categories for many drug and theft related offenses. The revisions have since been promulgated through COMAR, and will go into effect on October 1, 2017, coinciding with the JRA's effective date.

Dr. Soulé advised that on September 1, 2017, a Guidelines E-News was distributed to criminal justice practitioners notifying them of the impending changes relative to the sentencing guidelines and, in particular, to advise them on how to calculate the guidelines for offenses with decreased penalties pursuant to the JRA, that were committed prior to, but sentenced on or after, October 1, 2017. On Monday, October 2, 2017, MSCCSP Staff will be distributing another Guidelines E-News notifying practitioners that there is new version of the guidelines manual, as well as an updated offense table. The Guidelines E-News will also have relevant instructions pertaining to the JRA.

Dr. Soulé further reported that with regards to the Commission's involvement in data collection and reporting to the Justice Reinvestment Oversight Board (JROB), both he and Dr. Najaka met with staff from the Governor's Office of Crime Control and Prevention (GOCCP) on August 17, 2017, to discuss performance measures that the GOCCP would like the MSCCSP to provide. These performance measures include select guidelines compliance variables and sentence length data, all of which are variables included in the Commission's current data collection activities.

c. Update on study on alternatives to incarceration

Dr. Soulé reported that the study on alternatives to incarceration will be the main focus of the December business meeting. He reminded the Commission that during its May 2017 meeting, the Commission agreed upon certain recommendations to include in the final report on alternatives to incarceration, and further stated that MSCCSP staff is currently



working to refine those recommendations, which will be reported upon at the December meeting.

With regards to alternatives to incarceration, Delegate Anderson questioned whether the study was referring to alternatives to incarceration at only the post-conviction level or also post-arrest. Dr. Soulé responded that the Commission had decided not to limit the discussion or recommendations of alternatives to incarceration to those solely at the post-conviction level.

d. Update on MAGS deployment

Dr. Soulé noted that MAGS will be deployed in Kent and Queen Anne's counties on October 1, 2017, completing deployment in the 2nd Judicial Circuit. At that time, MAGS will have been deployed in two-thirds of the circuit courts and five of eight judicial circuits. Dr. Soulé further noted that the training coordinator for the Commission, Katharine Pembroke, provided a MAGS orientation in both Kent and Queen Anne's counties on September 15, 2017, in addition to providing trainings at the new law clerk orientation on September 8, 2017, and for the Baltimore City Office of the Public Defender on September 13, 2017.

Lastly, Dr. Soulé advised that he was invited to speak about MAGS at the annual National Association of Sentencing Commissions (NASC) conference last month, participating in a session on data innovations that help support better decision making in sentencing policy. He stated that he shared the experiences of the development of MAGS and noted that he received positive feedback and questions from other jurisdictions who are looking to implement a similar automated guidelines system.

6. Date, time, and location for the December 11, 2017, public comments hearing and MSCCSP business meeting

The annual Public Comments Hearing will take place on Monday December 11, 2017, at 5:00 pm in the House of Delegates Office Building, Judiciary Committee Room. The Commission's business meeting will follow at 6:30 pm.

7. Old business

None.

8. New business and announcements

None.

The meeting adjourned at 8:12 pm.