

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION MEETING
December 4, 2020

The North Carolina Sentencing and Policy Advisory Commission met remotely by Webex on **Friday, December 4, 2020.**

Members Present: Chairman Charlie Brown, Art Beeler, Sheriff James Clemmons, Senator Warren Daniel, Louise Davis, Danielle Elder, Judge Sherri Elliot, Senator Toby Fitch, Willis Fowler, Judge R. Greg Horne, Susan Katzenelson, Chief Henry King, Honorable Tammy Lee, Dr. Harvey McMurray, Representative Allen McNeill, Honorable Jim Mixson, Luther Moore, Tim Moose, Judge Fred Morrison, Representative Billy Richardson, Patrick Weede, and Judge Valerie Zachary.

Guests: Chris Fialko (former Commissioner) and Mrs. Jane Spainhour (wife of Judge Spainhour).

Note: Pursuant to G.S. 166A-19.24, the meeting was simultaneously streamed live online on a private Judicial Branch YouTube channel and the public was notified of the means by which it could access the meeting.

Staff: Michelle Hall, John Madler, Ginny Hevener, Tamara Flinchum, Meghan Boyd Ward, John King, Jennifer Lutz, Becky Whitaker, and Shelley Kirk.

INTRODUCTION AND RECOGNITION OF OUTGOING COMMISSIONER

Chairman Brown called the meeting to order at 10:00 a.m. He welcomed the Commission members and thanked them for their virtual attendance. He reviewed the meeting process and how questions, motions, and votes would be handled, and stated that members of the public were able to view the meeting online but could not ask questions. If they had questions, they could contact staff and staff would follow-up with them.

He announced the 2021 Commission meeting dates: March 5, June 4, September 10, and December 3. He recognized Michelle Hall, staff, to provide an overview of the WebEx functions. Chairman Brown presented the minutes from the September 11, 2020 Sentencing Commission meeting. Luther Moore moved to adopt the minutes as presented; Tammy Lee seconded the motion. Ms. Hall called the roll for attendance and for each member's vote on the motion. The motion carried.

Chairman Brown then recognized a long-serving and very valued commissioner, Chris Fialko. After reading the resolution in recognition of Mr. Fialko's service, Mr. Moore moved to adopt the resolution, seconded by Dr. Harvey McMurray. The motion unanimously passed. Mr. Fialko was then recognized. He noted he was always struck by how nonpartisan the Commission has been. He remarked at how much he learned at every meeting, whether it was the full Commission or a subcommittee meeting. He then he shared a story about Judge Spainhour.

Chairman Brown thanked Mr. Fialko and then informed the Commission about a scholarship at Martin Community College that had been set up in honor of Gwen Norville, a long-time friend of the Commission who passed away three years ago. He thanked DPS Secretary Tim Moose for sharing the information with the Commission.

REMEMBRANCE OF JUDGE W. ERWIN SPAINHOUR

Chairman Brown stated that it was his honor to read a resolution in honor of the life and memory of Judge W. Erwin Spainhour, Chairman of the Sentencing Commission for 18 years. After reading the resolution, Mr. Moore made a motion to adopt it, seconded by Art Beeler, which was unanimously passed. Ms. Hall shared plans to honor Judge Spainhour's memory and Commission legacy by hanging a clock, alongside a framed copy of the resolution and a photo of Judge Spainhour in the Sentencing Commission Board Room. Judge Brown added the timepiece was in recognition of the importance of time to Judge Spainhour, symbolic to the "Army way" he referenced in the punctuality of meeting start times, the work of the Commission, and to Judge Spainhour's professionalism. For all those reasons, Judge Brown stated, the clock is an appropriate symbol to honor him.

Chairman Brown then recognized Mrs. Jane Spainhour, who was joined by phone. Judge Brown told Mrs. Spainhour she would receive a copy of the original resolution, plus copies for the children in the mail, and then expressed his deepest sympathy for her loss. Due to technical difficulties, Mrs. Spainhour's comments were unable to be heard at the meeting, however, she asked the following message be shared with the Commission [sent via email]:

*"I am here; I think technical difficulties prevented your hearing me. I was on the call from the beginning. I appreciated Chris Fialko's words about Asheville. Erwin valued the Sentencing Commission with every facet of his life. The words of your resolution were magnificent. Our family is deeply grateful to you for this recognition. I look forward to seeing the framed picture, resolution, and clock in your board room. Thank you; you have made this a much brighter holiday season by your actions today. To each of you and your families, may this be the SEASON OF HOPE.
Jane Spainhour"*

SPAC STUDY ON SENTENCING PRACTICES: UPDATE STUDIES FROM OTHER STATES

After reviewing the agenda, Chairman Brown recognized Becky Whitaker and Meghan Boyd Ward, staff, to provide an overview of disparity studies in other states (see Presentation).

Ms. Whitaker stated that, to prepare for the Commission's sentencing practices project, staff looked at what other states have done in studying the issue of disparity in the criminal justice system. The purpose was to understand the landscape of disparity projects and to provide context for the Commission's project. Staff searched for government reports on disparity, both adult and juvenile, in all 50 states and the federal government. They excluded reports from academia and research entities unless they had been enlisted by a governmental agency to research disparity.

Staff found a total of 107 reports from 42 states and the federal government, with nearly 75% (76) of the reports on disparity in the adult system. Ms. Whitaker explained that most of the juvenile reports were published pursuant to the Juvenile Justice and Delinquency Prevention Act, which requires states to report on disproportionate minority contact in their juvenile justice systems in order to receive federal grant funding. For that reason, the rest of the presentation would focus on adult disparity reports (reports). For comparison purposes, Ms. Whitaker noted that there were 6 adult disparity reports and 2 juvenile disparity reports published in North Carolina, then turning the presentation over to Ms. Boyd Ward to discuss the characteristics examined in the reports.

Ms. Boyd Ward listed the adult disparity report characteristics examined: geography; guideline status; date of publication; government mandate; publishing entity; research design; and topic. Beginning with geography, she noted that 35 states were responsible for publishing the 76 reports staff collected. Of these, Washington state and the Federal Government, published the most reports overall. Guideline states tended to publish more of the reports, accounting for a total of 42 of the 76 reports.

Ms. Boyd Ward explained that, other than one report published in 1979, the reports were published between 1993-2020, with almost 60% of the reports being published since 2010. Starting in 2016, there was a marked increase in the number of publications by year, with the years 2018 and 2019 having the largest numbers of reports published. Staff identified five reports published in 2020, despite COVID-19 and only collecting reports through September. This may indicate an increased interest in disparity studies.

Staff found that 42 of the 76 reports were mandated and the entity that most often mandated the reports was the legislature, accounting for 60% of the reports. Regarding publishers, the judicial branch represented the largest number of publications with 33% of the reports. The next largest categories were independent commissions and the executive branch with 21% and 20% respectively.

Ms. Boyd Ward then discussed the reports' research designs. In assessing the 76 reports, staff recorded 158 unique instances of methodology usage, with each report using a combination of methodologies. The most frequently used methodologies were descriptive statistics, with 54 instances, followed by regression analysis with 32 instances. Only 6 of the 35 states did not use some form of descriptive statistics in their analysis.

Staff identified six topics the reports addressed: stops; pre-sentence; sentencing; capital punishment; multiple points in the criminal justice process (several topics simultaneously); and other. The most common topic was sentencing reports, representing 37% of the 76 reports. The next largest categories were multiple points in the criminal justice process and stop reports.

Ms. Boyd Ward then shared some key takeaways from these report characteristics. Geographically, states in the south published fewer reports than other regions. However, she noted that when looking to the number of reports published by North Carolina, the state is on par with the states (i.e., Alaska, Washington, and the Federal Government) that published the most reports. Guideline states published more reports than non-guideline states and she noted that North Carolina tracks with the other guideline state publications. Reports have increased (especially in the last decade) and certain topics are emerging areas for study (e.g., stops), while others have been more consistently studied overtime (e.g., sentencing and multiple point). Ms. Boyd Ward noted that sentencing reports led in the 1990s and 2000s as the most common topic, but multiple point and stop reports began to catch up in the 2010s. Descriptive statistics and regression analysis were the most common methodologies used. She noted that the Commission's 2002 report, *Sentencing Practices Under North Carolina's Structured Sentencing Laws*, used both methodology types and plans to use them again in the upcoming 2020 report. Ms. Boyd Ward concluded the takeaways by saying that sentencing was the most frequent topic type and pre-sentence was the most infrequent topic, and then returned the remaining presentation back to Ms. Whitaker.

Ms. Whitaker provided an overview of the reports that specifically addressed sentencing. Sentencing was the most common topic among the reports, followed by reports which analyzed multiple points in the criminal justice system. Between the two, sentencing was discussed in more than two-thirds of the adult reports staff assessed. Regarding sentencing report characteristics, 13 states and the federal

government published reports on sentencing disparity, and the Midwest and West regions published the most reports. Additionally, states with sentencing guidelines published more reports than those without sentencing guidelines. Half of the reports were published in the last decade. More than half of the reports were government mandated, mostly by state legislatures or the federal government, and the three most common publishing entities were state judicial branches, independent commissions, and the federal government. Descriptive statistics and regression analysis were the most common methodologies.

Turning to sentencing report findings, Ms. Whitaker stated that, although the studies differ based on different legal systems, most used race as the primary focus of study, although some analyzed ethnicity, age, and gender as well. Most reports studied statewide level data, although some used municipal or county level data. Most looked at felonies, though some focused on more specific types of offenses, such as drug offenses. Most included legal factors (e.g., prior record level) as control variables, but some also included extralegal factors (e.g., urban versus rural). Most reports looked at sentence type and length, but some also looked at sentencing enhancements or the use of aggravating/mitigating factors. Most reports used “disparity” or “disproportionality” as their terminology; however, no two reports made the exact same type of analysis based on these terms. In conclusion, Ms. Whitaker stated that most of the reports found some level of disparity based on race, either in the sentence type or in the sentence length/severity, but staff is continuing to examine the reports and their findings.

SPAC STUDY ON SENTENCING PRACTICES: UPDATE KEY FINDINGS FROM ACADEMIC LITERATURE

Chairman Brown then introduced Dr. Jennifer Lutz, staff, to present some key findings from the literature on sentencing practice disparity (*see* Presentation). Dr. Lutz noted that she would provide information on statistical techniques, point out some of the key variables (independent and dependent) worth considering in the Sentencing Commission’s study, and provide the groundwork for understanding the Commission’s results. She noted there is not an agreed upon definition of sentencing disparity within the academic community. Some have defined sentencing disparities as the proportion of a group within the criminal justice system being greater than the proportion of that group in the general population. For example, black individuals make up about 12% of the U.S. adult population but make up 33% of the U.S. prison population. Similarly, Hispanics make about 16% of the U.S. adult population but make up 23% of the U.S. prison population. On the other hand, she said, others define sentencing disparities as a departure from the normative standards that been set by the court. So, while similarly situated crimes, and offenders with similar criminal histories should receive similar sentences, courts departing from these standards based on a non-legal factor, would be defined as a sentencing disparity.

In considering the Commission’s study, Dr. Lutz stated, it will be important to be very clear how disparity is defined. Importantly, she noted that there are several discrete decision points prior to an offender ever reaching the sentencing stage. These decision points also present the potential for disparity to occur. These can include policing practices, policing decisions, the jury selection process, the school-to-prison pipeline, and pre-trial detention. All will influence who ends up and what happens at the sentencing stage.

In the academic literature, there are four typical decision points studied: charge reductions, discretionary sentencing decisions, in/out decisions, and sentencing lengths. Both legal and extralegal factors must be included when examining these sentencing outcomes. As some define it, sentencing disparities exist when all the legal factors are the same, but some type of sentencing difference can be

attributed to one of the extra-legal factors. Therefore, in the Commission's study, it will be important to consider both the legal factors and the extra-legal factors.

Legally relevant variables tend to have a strong and significant effect on sentencing outcome, but research has also found that race and ethnicity contribute to sentencing decisions. Specifically, black offenders receive more punitive sanctions compared to white offenders with similarly situated crimes and criminal histories. Also, black offenders are more likely to receive a prison sentence and are more likely than white offenders to receive a discretionary sentencing enhancement (i.e., a habitual offender enhancement). A less consistent racial disadvantage is found when looking at sentencing length decisions. Dr. Lutz added that there is also a growing body of research on Hispanic offenders, which has drawn similar conclusions that Hispanic offenders are more likely to be sent to prison compared to white offenders, but differences in sentencing lengths are often small or non-significant. These racial and ethnic differences are most pronounced when looking at drug cases with black and Hispanic offenders receiving more punitive sentences compared to white offenders.

Sentencing research also looks at disparities based on sex. Overwhelmingly, this literature suggests that female offenders receive more lenient sentences in the criminal justice system compared to male offenders. Specifically, male offenders are more likely to receive a prison sentence, receive longer sentences, and are less likely to receive a downward departure. Dr. Lutz stated that research has also shown a curvilinear relationship between age and sentencing outcomes. Older offenders and younger offenders (under 21), usually have more lenient sentences and are less likely to be sent to prison and have shorter sentences. A peak in sentencing severity occurs for those between the ages of 21 and 27.

Academic studies not only shed light on the disparities that exist in the criminal justice system, but also provide a context for understanding those findings through theoretical explanations. One of the leading theoretical frameworks in the sentencing literature is the "focal concerns" framework. This theory suggests that court actors make sentencing decisions based on: blameworthiness (the culpability and the degree of responsibility attributed to the offender); protection of the community (the need to incapacitate dangerous offenders and deter potential offenders in order to protect the community); and practical constraints and consequences (organization and individual concerns). According to this theoretical perspective, when court actors are facing uncertainty, they must rely on stereotypes about social groups to predict future offending; they are making rational decisions. However, those decisions are bounded by the available information. Therefore, disparities in the sentencing process and the reliance on extra-legal variables occurs when court actors must rely on the stereotypes about race, and gender to predict whether a defendant will participate in future criminal behavior.

Dr. Lutz then summarized that as expected, legal factors such as the offense severity and the criminal history, are strong predictors of sentencing outcomes. However, research also suggests that disparities do exist in sentencing as extra-legal factors, such as race, sex, and age often influence sentencing decision for similarly situated cases. Importantly, she added that the Commission's study will not focus on theoretical explanations of disparities but will focus on empirical findings to inform policy.

SPAC STUDY ON SENTENCING PRACTICES: UPDATE STATEWIDE SENTENCING DATA

Chairman Brown thanked Dr. Lutz and opened the floor for discussion. Representative McNeill was recognized.

Representative McNeill asked how many of the states that found disparity were guideline states. Ms. Boyd Ward responded that staff would get an answer to the question to share at a later point.

Chairman Brown then recognized Susan Katzenelson. She asked if there had been consideration in setting up a subcommittee for the study to allow for more dialogue. Chairman Brown thanked Ms. Katzenelson and then clarified that the current study is not intended to be a product for the Governor's Task Force. He apologized for any confusion created related to the survey soliciting Commissioner feedback on the Task Force recommendations. He noted the process is a work in progress and acknowledged that the learning on this topic needed to be fast but noted there would be additional opportunities for input that have not been decided on yet. Chairman Brown asked Ms. Hall for further comments. Ms. Hall added that virtual meetings are a challenge for exchanging dialogue; she stated her appreciation for the comments. She noted the importance of the topic and the need for feedback and added she and the Chairman were in conversation about the best approach.

Chairman Brown then recognized Dr. Harvey McMurray for comment. Dr. McMurray echoed Ms. Katzenelson's comments about the importance of the work. He referenced Dr. Lutz's presentation on the focal lens perspective and noted the lack of information about whether and to what extent do local municipalities or county make use of this kind of data and reports to inform policy. He specifically cited a previous study on traffic stops that North Carolina Central University conducted in collaboration with North Carolina State University. He commented that the academic community could do a more effective job of disseminating data to be translated into policy. Chairman Brown thanked Dr. McMurray and noted he had heard an update on a traffic stop report at the Governor's Crime Commission and there seemed to be several reports on that topic. Chairman Brown acknowledged that there may be an element to consider within the study related to "staying in the Commission's lane" of sentencing. The research could always be expanded. Chairman Brown added that he wanted to achieve a balance of accessing and utilizing the expertise and wealth of knowledge within the Commission of various stakeholders, while having a study that is not unbridled, but not too narrow either.

Representative McNeill concurred the Commission should focus on the sentencing aspect and not get too far afield. Chairman Brown thanked him for his comments and then recognized Ms. Hall for her presentation on statewide conviction data.

Ms. Hall began by reminding everyone about the preliminary information provided to the Commission at the September meeting to aid in the discussion of proceeding or not with the sentencing practices study. She began with a brief review of the study design and findings from the Commission's 2002 study on sentencing practices. This was the only study, until now, examining whether sentencing disparities existed at the conviction and sentencing phases, while acknowledging that disparity may have existed at earlier points in the process. She reviewed key findings from the 2002 study on extralegal variables found to influence outcomes (age, sex, judicial division, and racial composition of the prosecutorial district). She added that the legal variables were also found to have very strong effect on the outcomes, as would be expected. Importantly for the 2002 study, the race of the offender was not found to be a statistically significant predictor of sentencing outcomes in any of the discretionary points that were examined.

Ms. Hall then reviewed the FY19 felony conviction data (*see Presentation*) by race and then further by sex and age. She noted most convictions in Classes A through D were for non-white offenders and the majority in Classes H and I were for white offenders. There is a similar phenomenon for prior record level (PRL); generally, as PRL increased the percentage of nonwhite offenders increased. Consequently, Ms. Hall stated, there is a difference in the percentage of those that received an active punishment with non-white offenders having a greater percentage. However, when examining

discretionary cells on the felony punishment chart, there is not a lot of variation by type of punishment. Overall sentence lengths imposed by class are very similar between white and non-white offenders, with variation likely due to differences in PRL.

Moving to the findings related to sex, Ms. Hall noted differences in distribution by offense class and criminal history with more females in the less serious offense classes and lower prior record levels. Given that, it is unsurprising that fewer females received nonactive sentences. However, in discretionary cells, a higher percentage of males received an active sentence compared to females. Sentence lengths imposed for females were shorter in every offense class compared to males, except for Class I where the average sentence imposed was the same for both sexes.

Ms. Hall then shared new analysis examining the relationship between the most serious charge associated with the conviction imposed. Overall, charges for the most serious offense classes (Classes A through D) were more likely to be reduced than those in the lower offense classes. When examining these data by race, a higher percentage of white offenders had a most serious charge and a most serious conviction in the same offense class. By sex, females were more frequently convicted in a less serious offense class than the original charge when compared to males.

Ms. Hall concluded by reviewing some of the next steps for the study. Staff will continue to dig deeper into the data, perhaps including an examination of district level data, individual grid cells, and misdemeanor convictions. Lastly, Ms. Hall noted, they will go into the all-important multivariate analysis, which is the next level of sophistication. This type of analysis will allow for the control of multiple variables at the same time offering insight as to the strength, or the relationship between some of these variables that may be influencing the outcome. Ms. Hall then turned it back over to Chairman Brown.

Chairman Brown thanked Ms. Hall and noted he is looking forward to understanding the more advanced details of the multivariate analysis. He then opened the floor for discussion and or reactions from the presentations as well as any questions for staff. He recognized Ms. Katzenelson.

Ms. Katzenelson commented on the great work and thanked the staff. She suggested bail decisions be included if it were possible. She stated that people who are not getting released pre-trial for whatever charge felony/misdemeanor, and cannot make bail, are more likely to plea and more likely to get a less favorable bargain if they plea. She supported the inclusion of examining plea in the study. She noted that the federal system uses a decay factor for PRL, which might be something to consider. She agreed the study should stick close to sentencing; stops by police are relevant, but the Commission does not have the time and the expertise to include that stage of the process in the study.

Chairman Brown thanked Ms. Katzenelson and called on Art Beeler. Mr. Beeler reiterated what Ms. Katzenelson said in that it was a great initial review of work. His overall recommendation is to continue the work then then after the work is done to have a subcommittee look at the information. He highlighted two features he found important about the Commission's approach to the study – practical considerations and academic literature. He supported Ms. Katzenelson's suggested to include bail information and decisions in the study.

Chairman Brown recognized Patrick Weede. Mr. Weede inquired as to whether certain components of the plea agreement (e.g., whether the agreement was open or closed on sentence length) would be included in the study. He also inquired about whether Advanced Supervised Release (ASR) would be examined. Ms. Hall responded that staff would like to include that level of specificity about the plea arrangements, but unfortunately within the empirical data in ACIS (the data source for the conviction data), that level of detail isn't recorded. She added that it is something staff has talked about with AOC as they transition to their new data system. Regarding ASR, so few ASR sentences have been imposed since

the inception of the sentencing option, they would have to consider what could be learned, but made a note to follow up. She added the list of independent variables shown on the slide was not exhaustive and staff planned to take everything available into account. Currently, staff are investigating what data might be able to speak to the bail issues that have been raised.

Representative McNeill asked about the examination of expungements. Ms. Hall responded that staff has talked about that issue but was not sure what could be done considering the confidential nature of the records and a possible control group, but they would certainly investigate the topic more to see what might be possible.

Chairman Brown then noted the time and explained his decision to skip over the agenda item on the Governor's Task Force presentation was not done lightly. He thanked Sheriff Clemmons for standing by to present and apologized for the time constraints. He provided an update on the recent survey asking for Commission member feedback on the Governor's Task Force recommendations. An emerging theme from the responses was Commissioners wanted more time to consider some of the ideas that were presented. He suggested it might be prudent to wait until the Task Force finalizes its recommendations before giving feedback, noting there would be other opportunities for the Commission to weigh in as those recommendations move forward. He asked if there was any objection to his approach. Hearing none, he turned to the final segment of the meeting which was an update from Tamara Flinchum.

Ms. Flinchum shared an update on her most recent Guide Dog puppy, Quay. Quay came to the Commission's offices as a puppy in August 2019 and shortly after, attended her first Commission meeting. Ms. Flinchum shared she returned Quay in November, and received word that she has been selected, which is quite an honor, to become a breeder, and is currently being evaluated for the role. She thanked the Commissioners for the help in raising Quay; it takes a Commission staff and Commission members to raise a Guide Dog Puppy and hopefully Quay will be a breeding mom to future guide dogs.

Chairman Brown thanked Ms. Flinchum and added that it was a great, positive way to conclude the meeting. He thanked Commissioners for participating and sharing their invaluable insights. He wished everyone a happy holiday season.

ADJOURNMENT

Chairman Brown reminded the members of the next meeting date (Friday, March 5th), which would most likely be held virtually. He adjourned the meeting at 12:04 p.m.

Respectfully submitted,

Shelley Kirk
Administrative Secretary