

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION MEETING
March 5, 2021

The North Carolina Sentencing and Policy Advisory Commission met by Webex on Friday, March 5, 2021.

Members Present: Chairman Charlie Brown, Frances Battle, Art Beeler, Sheriff James Clemmons, Louise Davis, Danielle Elder, Judge Sherri Elliot, Senator Toby Fitch, Willis Fowler, Lindsey Granados, 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, Senator Bob Steinburg, Calvin Suber, Michael Waters, Patrick Weede, and Judge Valerie Zachary.

Guests: Lindsey Davis (for Commissioner Representative John Faircloth), Billy Lassiter (DPS, DACJJ), Megan Perrault (DPS, DACJJ), Nicole Sullivan (DPS, DACJJ), and Jesse Sholar (NCSA).

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, John King, Meghan Boyd Ward, Jennifer Lutz, Becky Whitaker, and Shelley Kirk.

INTRODUCTIONS

Chairman Brown called the meeting to order at 10:03 a.m. He welcomed 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 remaining 2021 Commission meeting dates: June 4, September 10, and December 3.

Chairman Brown introduced a new Commission member, Michael Waters, the District Attorney for Granville, Franklin, Vance, and Warren Counties (11th District) representing the Conference of District Attorneys.

Chairman Brown presented the minutes from the December 4, 2020, Sentencing Commission meeting and recognized Michelle Hall, staff. Ms. Hall noted some typographical errors in the draft minutes previously distributed and indicated they will be corrected in the final version. Luther Moore moved to adopt the minutes as amended and Calvin Suber seconded the motion. Ms. Hall called the roll for attendance and for each member's vote on the motion. The motion carried.

PRISON POPULATION SETTLEMENT OVERVIEW AND DISCUSSION

Chairman Brown recognized Tim Moose, Chief Deputy Secretary of the Division of Adult Correction and Juvenile Justice (DACJJ), Department of Public Safety (DPS), and Nicole Sullivan, Deputy Secretary of DACJJ, DPS, to provide an overview of the recent settlement agreement in the case of *NC NAACP; ACLU v. Cooper*. Mr. Moose referred to the previously distributed handout that provided an

operational overview of how DPS is responding to the settlement (*see Handout*). Under the terms of the settlement, DPS, with the Post-Release Supervision and Parole (PRSP) Commission, will complete an early reentry or transition of 3,500 offenders out of prison facilities over the next six months; this is in addition to normal releases. In CY 2020, 21,126 inmates were released back into the community; approximately 90% of all inmates eventually go back into the community, so the process of releasing inmates is something DPS deals with frequently. DPS will use three existing tools: Extended Limits of Confinement (ELC), discretionary sentence credits for good behavior, and special reviews by the PRSP Commission. DPS has been using those tools since April 2020 to reduce the prison population in response to the pandemic. Mr. Moose added that only inmates with 2021 release dates would be eligible for consideration under the settlement.

Mr. Moose stated that DPS has used ELC for years to transition inmates into work release and other situations. During the COVID-19 pandemic, DPS had already released 1,033 inmates to ELC prior to the settlement. Offenders on ELC are placed in residential settings until they finish their active sentence when they are placed on post-release supervision. There are a set of rules offenders must follow and if they fail to comply, they are returned to prison. Ms. Sullivan explained the criteria for offenders to be eligible for ELC, emphasizing the fact that offenders convicted of crimes against person are automatically excluded from consideration. This removes a large part of the prison population from consideration. She added that few of the remaining offenders in this group have a 2021 release date. Inmates transferred to ELC will be a small portion of the releases.

Mr. Moose explained that there is a discretionary sentence credit system in place that allows inmates to earn time off of their maximum sentence for participation in programs. With many programs being suspended due to COVID-19, it has changed. DPS developed credits that are awarded for good behavior. The majority of releases will be inmates who received sentence credits to get down to their minimum sentence. He stated that awarding sentence credits is a process the Division of Prisons would use with or without the pandemic as a behavior management tool.

Chairman Brown asked if it was possible to achieve the 3,500 releases within six months, especially given the restrictions on ELC. Mr. Moose responded that most of the releases will be a result of the awarding of discretionary sentence credits. He also explained the special reviews the PRSP Commission would be doing of post-release supervisees with technical violations and the use of the Mutual Agreement Parole Program (MAPP) for parole-eligible offenders. Ms. Sullivan agreed that ELC is a narrow group and would not make up a major portion of the releases.

Representative McNeill asked if the point of the lawsuit was prison conditions during COVID-19; Mr. Moose responded that it was. Representative McNeill asked what the positivity rate was in prison; Mr. Moose stated that it was approximately 1% active cases in prison. Representative McNeill asked what the positivity rate was in the general public, if it was over 6%; Mr. Moose replied that he did not know but thought that was possibly it. Representative McNeill asked if the parties to the lawsuit considered that they were sending inmates into a worse environment. Mr. Moose responded that it was part of the discussion but that one of the other concerns was prison facilities are not set up to isolate infected individuals, particularly in the dorm environments. Representative McNeill asked what the highest positivity rate was in prison. Mr. Moose responded that he did not have that number but could get it, he believed it was above 15%. Representative McNeill commented that it seemed like the wrong time to implement the conditions of this settlement when things are improving in the prison system.

Tammy Lee asked if DPS would look at each eligible offender's infraction record, how recent and how severe they were. Mr. Moose replied that certain infractions cause the offender to be removed from consideration for a period of time. As a result, that will reduce the eligible population. Ms. Sullivan added that DPS just sent notices out to all prison facilities informing inmates of the impact infractions would have on possible release under the settlement.

Patrick Weede asked (1) if there was a mechanism for inmates to request consideration for release and if they would be notified if they were rejected, and (2) what percentage of prison staff are vaccinated and will vaccination be mandated. Ms. Sullivan explained that all eligible inmates will automatically be considered and DPS will communicate with them whether they are accepted or rejected. Mr. Moose stated that 44% of staff have been fully or partially vaccinated and the vaccine allocation will be increasing in the next week. Vaccination is still voluntary, but DPS is providing education to encourage it and more staff are volunteering.

Lindsey Granados asked if there was a timeline for vaccinating inmates. Mr. Moose said that inmates in Groups 1 and 2 are being vaccinated and then more inmates will be vaccinated in the next 30 days. Vaccination is voluntary so it will expand as long as they have vaccines and willing inmates.

Representative Richardson reminded the Commissioners about Representative Faircloth's question a few meetings ago about letting out non-violent offenders who are serving long sentences. This is something to keep in mind as the state deals with these issues.

Frances Battle asked whether victims would be notified of releases. Mr. Moose explained that notification is part of the process and DPS will follow all requirements of the Victims Rights Act. Ms. Sullivan added that the steps for release will be the same, the process will just be faster.

Dr. Harvey McMurray referred to positivity numbers, cases, and deaths reported in a recent News & Observer article and pointed out that they conflicted with the response to Representative McNeill's earlier question. Mr. Moose explained that a large number of inmates have tested positive but that the positivity rate is active cases. He referred Commissioners to the COVID-19 dashboard on the DPS website.

Chairman Brown encouraged Commissioners to contact Mr. Moose offline with additional questions, then thanked Mr. Moose and Ms. Sullivan for their presentation.

FY 2020 FELONY CONVICTIONS AND FY 2021–FY 2030 PRISON POPULATION PROJECTIONS (GH)

Judge Brown introduced Ginny Hevener, staff, to review the current prison population projections (see Handouts). She stated that, pursuant to statute, the projections are prepared annually in conjunction with the Department of Public Safety (DPS). She noted that examining the projected population within the context of prison capacity allows DPS and the General Assembly to proactively consider policy options or resource needs. Ms. Hevener stated that the projections do not account for any reductions to the prison population that would occur as part of the settlement since the terms just became public last week. She shared that staff would be working with DPS to determine whether revisions to the projections would be needed and potential approaches for consideration.

Ms. Hevener began by describing how key data used for the projections (primarily convictions and prison entries) have been impacted by actions taken by the court and correctional systems in response to the pandemic. Prior to the pandemic, felony convictions and felony prison entries were somewhat stable.

Convictions decreased 16% and felony prison entries decreased 13% from FY 2019 to FY 2020. While the pandemic affected only the last quarter of FY 2020, it continues to affect court and correctional systems. An examination of felony prison entries through CY 2020 revealed that felony prison entries have not returned to pre-pandemic levels. The prison population was stable at FY 2005 levels for several years prior to the pandemic. The prison population declined 7% from March to June 2020 and an additional 6% from June to December. Ms. Hevener noted that the current prison population is around 29,500 including a population of about 300 on jail backlog.

In reviewing these trends, Ms. Hevener also pointed out the Felony and Misdemeanor Quick Facts documents that were sent to Commissioners. She noted a methodological change that was made to misdemeanor convictions this cycle, adding Class 2 and Class 3 traffic offenses to the convictions examined.

Ms. Hevener explained that the prison population projections, even without accounting for 3,500 inmates to be released under the settlement in FY 2021 and FY 2022, are substantially lower than last year's projections as a result of the system-wide impact of the pandemic. Ms. Hevener noted that a COVID adjustment was applied to the first two years of the projection. The projections (30,568 for end of FY 2021 and 32,062 for end of FY 2030) are below Expanded Operating Capacity (36,433) for the entire 10-year projection period and below Standard Operating Capacity (31,690) for all but three years.

The projections were developed using data on convictions and sentences imposed from FY 2020 and on the resident prison population on June 30, 2020. Ms. Hevener recognized that data from FY 2020 are limited in their applicability due to the ongoing pandemic. To address these limitations, assumptions for the projections were made by making estimates based upon actions taken by the court and correctional systems in response to the pandemic. Additionally, quarterly data for the remainder of CY 202 were considered where possible. Ms. Hevener noted that data on court and correctional practices during the pandemic would be taken into account as it becomes available.

Ms. Hevener concluded with a discussion of how offense seriousness factors into the prison population. While Class A – D convictions account for the smallest proportion of convictions (7%), they comprise over half of the prison population as a result of their mandatory active sentences and long sentence lengths. Class H – I convictions impact the prison population through their high volume (representing 65% of felony convictions) but have a limited impact on the prison population (accounting for 27% of the population) due to their lower rate of active sentences and shorter sentence lengths.

YOUTH DEVELOPMENT CENTER (YDC) RESOURCE PROJECTIONS AND FY 2020 JUVENILE DISPOSITIONS

Chairman Brown recognized Tamara Flinchum, staff, to present the YDC Population Projections for the Fiscal Year 2021 to the Fiscal Year 2025 (*see Handouts*). Ms. Flinchum commented that it was a challenging year for the projections for two reasons. First, the implementation of the Juvenile Justice Reinvestment Act went into effect on December 1, 2019 that increased the age of juvenile jurisdiction to include most 16- and 17-year-olds, an anticipated impact that would increase the number of juveniles in the Juvenile Justice System (JJS). Secondly, the COVID-19 pandemic resulted in school closures and adjusted courthouse operations beginning in March 2020, an unanticipated impact that slowed the growth of juveniles due to the increase in juvenile age.

The projections were developed using 2,535 delinquent dispositions in FY 2020, a 21% decrease from FY 2019, and 151 juveniles in a YDC on June 30, 2020, also decreased from 204 in a YDC on June 30,

2019. Ms. Flinchum shared past and current trends in delinquent dispositions and YDC population to illustrate the impact of the two factors on the JJS. The projections involved using a combination of FY 2020 juvenile justice disposition data and adult conviction data to project 16- to 17-year-olds since the Raise the Age (RtA) initiative began halfway through the fiscal year.

Ms. Flinchum shared the YDC population projections for FY 2021 through FY 2025 and explained that a COVID adjustment was applied to the first two years of the projection based on the decrease in delinquent dispositions (*see* Presentation). She noted that projected YDC population will be within available YDC capacity for each year of the projection. The DACJJ plans to open flexible space in the future with 35 renovated beds at CA Dillon in December 2022, and a new, 60-bed facility in March 2023. Ms. Flinchum stated that the projections for this year are lower than last year because of the pandemic and fewer juveniles were committed to a YDC. She then reviewed the assumptions used to develop the projections. Ms. Flinchum concluded her presentation by sharing CY 2020 data comparing the RtA youth (n=718) to non-RtA juveniles (n=1,795).

Chairman Brown invited Deputy Commissioner Billy Lassiter to speak to the Commission. Mr. Lassiter thanked the staff for all their hard work on the projections and acknowledged that they were complicated this year due to COVID-19 pandemic. He emphasized that the key takeaway was that the RtA kids were higher risk kids according to their risk assessments and had more delinquency history because of being in the system longer. The result is that more of these kids are receiving commitments. Mr. Lassiter added that law enforcement appears to be focusing on direct diversions in the community before juveniles are even brought to the court counselor. As a result, only the more serious cases are coming to the JJS.

STATEWIDE MISDEMEANANT CONFINEMENT PROGRAM (SMCP) CAPACITY PROJECTION

Chairman Brown recognized Meghan Boyd Ward, staff, to present on the SMCP Capacity Projections (*see* Handout). Ms. Boyd Ward explained that the SMCP projection informs future capacity to assist with resource planning, given that any shortfall in misdemeanor confinement beds would impact the state prison system as it is required to house the additional inmates. In creating the projections, staff consider factors that affect the program, including the mandatorily vs. voluntarily housed populations within jails, the counties that participate as sending or receiving within the SMCP, and external factors.

Ms. Boyd Ward explained that the external factors were especially impactful in the past year due to the effects from the COVID-19 pandemic. Specifically, she referenced the Chief Justice's emergency directives postponing court proceedings, DPS suspending prisoner transfers from county jails contributing to jail backlog, and receiving counties temporarily suspending their participation in the SMCP have affected convictions, jail populations, and beds committed to the SMCP. These changes impact the accuracy of the SMCP capacity projections, and she emphasized that COVID-19 continues to affect the court and correctional systems in FY 2021, and it is unclear how long these effects will continue.

Ms. Boyd Ward provided some context data regarding the overall jail population during 2020. She noted that in the past five years, the highest reported average daily population (ADP) was in July 2019 (20,863). In comparing July 2019 to July 2020, there was a 28% decrease in the ADP. Overall, the July 2020 statewide jail capacity was 27,215, which is reflective of all available capacity in that month. Narrowing in on the SMCP population, Ms. Boyd Ward explained that since March 2020, a total of 27 receiving counties went to an offline status, which reduced the overall capacity of the SMCP. Of these counties, 12 counties went offline for a period and have returned to receiving inmates at similar rates as before going offline.

In February, the Sheriffs' Association surveyed the still offline counties and 56% responded saying they will resume participating as receiving counties at pre-COVID bed allocation levels. As of the publication of the report, 15 counties remain in an offline status due to the pandemic. Additionally, 40 receiving counties remained online throughout the pandemic.

The historical capacity of the SMCP has remained relatively consistent through the first years of the program but began to decline in FY 2017. Beginning in March 2020, with the onset of the pandemic, the program experienced unprecedented decreases in capacity and population. In February 2020, the SMCP capacity was 1,355 and the average monthly population was 1,118. By the end of the fiscal year in July 2020, capacity dropped to 923 and the average monthly population to 625.

Key long-term and short-term assumptions that were used to develop the projections were reviewed next. Ms. Boyd Ward referred Commission members to the projections document (*see Handout*) for complete details. She explained that to account for changes in capacity related to the COVID-19 pandemic, the behavior of offline receiving counties (both those that returned online and those that remain offline) during this period was examined historically. Based on this examination, it was assumed that those that returned online would remain at their current capacity levels and for those counties that remain offline, two scenarios were developed assuming a full and partial recovery of the beds lost during the pandemic.

For counties that remained online during the pandemic, the projections assume throughout the five-year period that the counties that remained online during the pandemic would continue to do so at a decreasing growth rate. The jail backlog was considered, as it can limit available beds (the jail backlog on December 31, 2020 was 657). The last long-term assumption Ms. Boyd Ward noted was that no new beds were added to the projection because jail administrators for counties currently building new jail facilities said they have no plans at this time to add beds to the SMCP.

Ms. Boyd Ward then presented the two scenarios for the five-year projections. First, Scenario 1 assumes that the offline counties will recover the full amount of beds taken offline due to the COVID-19 pandemic by FY 2023. The SMCP capacity is projected to recover from 976 currently to 1,240 in June 2025 – an increase of 264 beds, or 27%. Second, Scenario 2 assumes that the offline counties will only recover a portion of beds taken offline due to the COVID-19 pandemic by FY 2023, based on the historical consistency of offline county participation. The SMCP capacity is projected to recover from 976 currently to 1,106 in June 2025 – an increase of 130 beds, or 13%.

Lastly, Ms. Boyd Ward shared some projections considerations. She emphasized that both scenarios indicate an increase in SMCP capacity through FY 2023 as offline beds return online, but then will decline in capacity in FY 2024 and FY 2025 (*see Handout*). She went on to say that projected capacity could be further altered by factors relating to COVID-19 pandemic and, as has always been the case in the SMCP, bed participation is voluntary, creating further uncertainty for future planning. Lastly, she reminded the Commission that issues related to funding are not addressed by these projections.

SENTENCING PRACTICES STUDY UPDATE

Chairman Brown recognized Ms. Hall for an update on the sentencing practices study. Ms. Hall stated that staff has been trying to engage an expert consultant in criminology to assist with some of the more sophisticated data analysis but that it was taking longer than expected. She asked the Commissioners to tentatively reserve Friday, May 7, for a special Commission meeting dedicated to the

sentencing practices study. If there is enough information at that time from staff working with the potential consultant, the Commission could meet in order to receive that information and discuss it. Chairman Brown added that, as Representative McNeill suggested, this study is not something the Commission should rush through but be deliberate about, so it is no surprise that it is taking a little more time than may have been forecasted.

INSTRUCTIONS TO STAFF AND OTHER BUSINESS

Chairman Brown reminded the Commission of its statutory duty to review proposed legislation for consistency with Structured Sentencing. Due to the bill filing deadlines, he asked the Commission to authorize the formation of a legislative review subcommittee to meet between Commission meetings. There being no objection, the Subcommittee was authorized. Chairman Brown announced Friday, March 19, as the date for the first meeting. He added that in order to keep the virtual meetings short, it may be necessary to have more than one meeting.

ADJOURNMENT

Chairman Brown reminded the members that in addition to the meetings just mentioned, the next full Commission meeting is Friday, June 4, which would most likely be held virtually. Ms. Hall reminded the Commission that membership appointments end on June 30, 2021, so staff will be sending out notices to appointing authorities in May. If a member would like to continue to serve, she encouraged them to talk to their appointing authority. Chairman Brown adjourned the meeting at 12:01 p.m.

Respectfully submitted,

Shelley Kirk
Administrative Secretary