

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION MEETING
MAY 7, 2021

The North Carolina Sentencing and Policy Advisory Commission met by Webex on Friday, May 7, 2021.

Members Present: Chairman Charlie Brown, Art Beeler, Danielle Elder, Senator Toby Fitch, Willis Fowler, Lindsey Granados, Judge R. Greg Horne, Susan Katzenelson, Chief Henry King, Honorable Tammy Lee, Representative Allen McNeill, Honorable Jim Mixson, Luther Moore, Judge Fred Morrison, Senator Bob Steinburg, Calvin Suber, and Patrick Weede.

Guests/Presenters: Dr. Rodney Engen, Criminologist, University of Arkansas (virtual presenter); Lindsey Davis (for Commissioner Representative John Faircloth); Nicole Sullivan (for Commissioner Tim Moose).

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, Melissa Lugo, 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 recognized National Correctional Officer's Week and thanked Art Beeler for bringing it to his attention. He then reviewed the remaining 2021 Commission meeting dates: June 4, September 10, and December 3.

The Chairman then introduced a new staff member, Melissa "Mel" Lugo, who was previously introduced at the Legislative Review Subcommittee. Chairman Brown then recognized Luther Moore for his 30 years of service on the Commission.

Chairman Brown presented the minutes from the March 5, 2021, Sentencing Commission meeting and called for a motion. Mr. Moore moved to adopt the minutes and Calvin Suber seconded the motion. Chairman Brown introduced Michelle Hall, staff, to call the roll for attendance and for each member's vote on the motion. The motion carried.

Next, Chairman Brown introduced Dr. Rodney Engen, a Criminologist at the University of Arkansas. He noted that Dr. Engen had previously assisted the Sentencing Commission in 2002 with its sentencing practices study; Dr. Engen will contribute to the current study that has been underway over the past several months by the Commission.

SENTENCING PRACTICES STUDY - UPDATE AND DISCUSSION
BACKGROUND AND REVIEW OF CURRENT STUDY (MICHELLE HALL, STAFF)

Chairman Brown recognized Michelle Hall, staff, to present an update regarding the Sentencing Practices Study. Ms. Hall noted the timeline of the study to date: the Commission had decided in September to go forward with an update to its study from 2002; the Commission reviewed relevant data on felony convictions, key findings from academic literature, and studies from other states at its meeting in

December. Also in December, the Conference of District Attorneys and the Governor’s Task Force on Racial Equity in Criminal Justice both recommended the Commission complete a study on potential disparity in sentencing.

Ms. Hall reviewed the specific decision points examined in 2002 including reduction of felony charges to misdemeanor convictions, reduction in charges by one or more felony offense classes, and the imposition of non-active versus active punishment. She discussed the variables found to have a significant effect on sentencing outcomes. She then noted what has been completed for the current study including a literature review, a review of disparity studies from other states, and the statistical profile of FY 2019 felony convictions.

Lindsey Granados presented a question in the chat concerning what the variable “defense attorney type” included, as it was referenced in the 2002 study. Ms. Hall clarified the defense attorney measure: whether someone was represented by a public defender, private assigned counsel, or a privately retained attorney.

Chairman Brown asked Ms. Hall to describe in more detail the judicial versus prosecutorial district distinction discussed during the presentation. Ms. Hall responded that both prosecutorial district and judicial district were being considered for the current study. Consideration of the fact that districts have changed since the previous study is also being discussed.

Representative McNeill asked how much of the data includes juvenile adjudications, in light of a recent executive order from the Governor related to the review of juvenile sentences. Ms. Hall noted that the data for the present study include felony conviction data in the criminal justice system, however, if a juvenile was convicted as an adult then they would be included in the sample. Chairman Brown followed this point by asking about the impact of Raise the Age (RtA). Ms. Hall emphasized that specific dates were selected for the current study to avoid the implementation of RtA, therefore comparisons between the results of this study and the previous study could be drawn. Mr. Beeler presented a methodological question, asking whether the variables in the 2021 study were going to be the same as the 2002 studies. Ms. Hall responded that most of the variables would be the same but for any new variables, staff was considering how those might limit or affect comparisons to the 2002 findings.

**UNDERSTANDING DISPARITY AND DISPARITY RESEARCH
(DR. RODNEY ENGEN, UNIVERSITY OF ARKANSAS)**

Chairman Brown recognized Dr. Engen to present on Understanding Disparity and Disparity Research. Dr. Engen thanked the Commission and commended the research staff and noted their credentials. He also highlighted how senior staff have worked with SPAC for 20 years or more and featured what an asset that was in terms of institutional memory, which is especially relevant to the research being undertaken in the present study.

Dr. Engen mentioned the question asked earlier regarding whether the current study will use the same variables, which he affirmed that he plans on using the same variables. Dr. Engen reviewed his credentials, background, and prior research. While the analysis was still underway, it was not yet complete. He noted that the main objective of his presentation was to get feedback from the Commission on what they hope to learn from the study along with any interests and goals.

Dr. Engen then focused on understanding disparity, emphasizing the possibility for miscommunication and misunderstanding regarding disparity research because the dialogue is not clear (e.g., different

terminology, how disparity is studied). He noted that the parameters for the study are narrow, however, the context is *not* narrow. The impact of the study is important given that it not only involves the Commission, but also the general public and those involved in the criminal justice system.

Chairman Brown inquired about the timetable of Dr. Engen's work. Dr. Engen replied by stating it depends on how big the Commission would like the study to be and mentioned his contract ends in June. Dr. Engen also noted that he submitted final grades for the semester, so he is fully committed to working on the project. He discussed a general timetable for the study, which included no more than six weeks to replicate the original 2002 study resulting in findings in early June. After discussing the potential timeline of the study, Dr. Engen underscored the goal of today's presentation which is to discuss the concepts surrounding disparity research that relate to the bigger picture.

Chairman Brown commented on Dr. Engen's point concerning how sentencing disparity is not equivalent to imprisonment disparity. Chairman Brown further noted that, as a judge, he hears about "systemic racism," and asked how that related to the research. Dr. Engen responded that topic is a difficult issue to examine; he would explain further in the presentation.

Dr. Engen featured the different topics he has researched, including mass incarceration, racial inequality/disparity, and sentencing/criminal justice reform. He also noted the importance of understanding how discretion impacts policy. Dr. Engen then discussed his history conducting disparity research at the University of Washington and with the Washington State Sentencing Guidelines Commission. Generally, he noted that the research he conducted while in the state of Washington focused on sentencing departures, prosecutorial discretion, and interviewing judges and prosecutors with large drug offender caseloads to assess sentencing practices. Dr. Engen noted that these experiences have shaped how he approaches sentencing disparity research and the importance of understanding how sentencing policies are implemented.

Dr. Engen reviewed the "Three Types of Racial Disparity," and underscored that the term "disparity" has taken on a new meaning in society that is different from the sentencing literature. He commented that the term "disparity" has become synonymous with "disproportionality" and "overrepresentation." He also noted that disparity studies vary in methodological approaches, which can impact the results. Dr. Engen provided examples of how studies measure disparity, some measure disparity relative to offending rates (i.e., adjusting for differences in arrest rates) and examine differences in sentencing after controlling for legally relevant differences (i.e., individual-level data).

Next, Dr. Engen discussed some general findings related to sentencing (or case processing) disparity. Studies show that African Americans are less likely to be sentenced to alternative or intermediate punishments relative to prison. He also emphasized there is a limited amount of research examining mandatory minimums or enhancements in the literature. Dr. Engen noted that the 2002 study was unique given that it included charge reductions as a key measure. Ms. Hall asked Dr. Engen to discuss his approach to the multivariate analysis for the current study.

Dr. Engen described developments since 2002, noting what has changed since the original study. He discussed looking at the interaction of race with sex and age, given that the effects of race may not uniform, but instead conditioned by how young an individual is or whether they are male. Dr. Engen also suggested this may reveal why the original study did not find race was significant in sentencing outcomes; perhaps race was conditional on sex and potentially age (conditional effects were not measured in the original study). The present study may want to consider race being conditional on race, age, *and* offense

type. Dr. Engen discussed generally, the differences in disparity findings for violent offenses compared to drug offenses and differences in the amount of discretion available in those instances. Dr. Engen then highlighted the importance of jurisdictions; some counties may be tougher than other counties; studies show that the tougher counties tend to be rural. Dr. Engen also described cumulative disadvantage, which is small disparities that add up to sizeable disparities, another consideration for the present study.

Art Beeler was recognized. He pointed out that urban populations drive the majority of policy changes because of their population size; rural areas may have more disparity but do not have as many policy changes. He asked how Dr. Engen planned to account for this. Dr. Engen discussed that there are methodological techniques that could be examined each county separately; however, he noted the sensitivity of identifying singular counties.

QUESTION & ANSWER AND DISCUSSION

Chairman Brown opened the meeting for questions. Susan Katzenelson commented that she has been working and teaching policy for six years. She noted that it seemed clear that the Commission needs to look at policy. She suggested identifying the causes of disparity academically, but then finding targets for change.

Dr. Engen responded that considering policy is another key area that may address some of the bigger picture issues he brought up during his presentation. Dr. Engen also stated that examining the policies themselves, which impact the number of people coming into the system, is a consideration. He provided an example of criminal history in guideline states, which appear to disadvantage African Americans and could be a source of systemic racism. He continued by saying these policies inadvertently have a disparate impact and this will not be evident in a study where two people convicted of the same crime get the same punishment. He also mentioned that his review of the descriptive data provided by staff shows that the criminal history score has increased dramatically over the past couple of years.

Chairman Brown brought up the point of the criminal history discussion provided by Dr. Engen. Chairman Brown underscored that the inclusion of criminal history is one of the aspects of structured sentencing he celebrates, as a practitioner of the law, but he also recognizes it is not a completely finite net that captures everything. Chairman Brown continued by noting that criminal history accounts for severity of offense and discounts lesser crimes, however, there is some nuance with criminal history, and it is very complicated.

Mr. Beeler noted that from the practitioner standpoint, he would like to know what he can do and how can he do it. He stated the Commission needs to have the baseline information from 2002, but cannot reach a salient conclusion on policy recommendations unless and until the Commission can assess the differences between the two studies – where are we today? Mr. Beeler shared his hope that the Commission does not get so bogged down by the nuances that it is unable to reach conclusions.

The Chairman reaffirmed to Mr. Beeler and Commissioners that it is both his job and Ms. Hall's job to keep the Commission from getting too "bogged down." Dr. Engen added that the 2002 study was done narrowly within considerations of the law.

Chairman Brown noted there is a consideration of the big picture with the study – the Commission wants the research expertise of Dr. Engen and staff to lead the Commission to come up with solid

recommendations. He then stated the Commission has no agenda and is apolitical; he noted to Dr. Engen that the Commission is a diverse body. Dr. Engen replied that he was delighted to hear that.

Representative McNeill mentioned he appreciated the discussion bringing back the big picture. He asked if the goal was to prove or disprove systemic racism, and then inquired as to the larger goal for the project.

Chairman Brown responded, asking if Representative McNeill's question was directed to Dr. Engen. Representative McNeill responded by asking, if systemic racism exists, what does the Commission do about it? Dr. Engen replied that his goal was to bring an understanding as to why differences exist in the system, not necessarily figure out exactly where racism exists.

Chairman Brown noted that it is time to update the results from the 2002 study with more recent data. The Commission is not trying to prove anything but is following up on previously conducted research and hoping to expand the previous methodology employed. He asked Ms. Hall to comment.

Ms. Hall returned to Representative McNeill's question about the goal for the study and referenced Dr. Engen's definitions of disparity. The purpose of the original 2002 study was to understand if disparity existed under Structured Sentencing; specifically, whether extralegal variables (e.g., race, sex, age, etc.) accounted for differences in sentencing outcomes for similarly situated offenders. Ms. Hall emphasized that the 2002 study was not trying to answer whether systemic racism exists, but if there was disparity at discretion points of the sentencing phases.

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. Chairman Brown also announced that due to the receipt of additional bills for review, another Legislative Review Subcommittee Meeting will be held on Friday, May 14th.

Ms. Hall reminded the Commission that membership appointments end on June 30, 2021; staff will be sending out notices to appointing authorities in May. Chairman Brown adjourned the meeting at 12:01 p.m.

Respectfully submitted,

Shelley Kirk
Administrative Secretary