



MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION MEETING
June 3, 2022

The North Carolina Sentencing and Policy Advisory Commission met on Friday, June 3, 2022, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman Charlie Brown, Art Beeler, Louise Davis, Danielle Marquis Elder, Judge Sherri Elliott, Representative John Faircloth, Willis Fowler, Lindsey Granados, Judge R. Greg Horne, Joe Houchin, Sheriff Garry McFadden, Dr. Harvey McMurray, Representative Allen McNeill, Honorable James Mixson, Tim Moose, Judge Fred Morrison, Calvin Suber, Honorable Michael Waters, Patrick Weede, and Judge Valerie Zachary.

Guests: Melissa Earp (DPS), Nicole Sullivan (DPS), Sean Callan (AOC), Julianna Kirschner (AOC), Emily Mehta (AOC), and Jay Schulte (OAH Intern).

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

INTRODUCTIONS

Chairman Brown called the meeting to order at 10:02 a.m. He welcomed members to the first in-person meeting in over two years and asked them to introduce themselves. Tamara Flinchum, staff, introduced Georgie, her puppy in-training for Guiding Eyes for the Blind. Chairman Brown presented a resolution recognizing former Commissioner Susan Katzenelson for her service. Without objection, the resolution was adopted.

Chairman Brown presented the minutes from the March 3, 2022 meeting and called for a motion. Judge Fred Morrison moved to adopt the minutes as written; Patrick Weede seconded the motion and the motion carried. Chairman Brown reviewed the agenda and reminded the Commission of the remaining quarterly meetings: September 9 and December 2, 2022.

LEGISLATIVE REVIEW AND SESSION UPDATE

Chairman Brown recognized Becky Whitaker, staff, to facilitate the legislative review process and to provide an update on the 2022 Session (*see Handout*). Ms. Whitaker began by stating that the 2022 legislative session convened on May 18, and that the last bill filing deadline was May 26. She reminded the Commissioners that the General Assembly passed a state budget during the 2021 Session, so although there are some budget provisions under consideration this session, there is already a budget in effect. Ms. Whitaker then reviewed the legislative review mandate and process and presented the bills for consideration (*see Handouts*).

HB 1005 [Ed. 3]/SB 766 [Ed. 2] – Organized Retail Theft.

(G.S. 14-86.6(a)(1)) Art Beeler moved to find the proposed Class F felony consistent with the Offense Classification Criteria, with a note stating that conspiracy offenses are generally classified as one class lower than the offense the person conspired to commit, pursuant to G.S. 14-2.4. Danielle Elder seconded the motion and it carried.

Mike Waters moved to find the proposed Class C felony consistent with the Offense Classification Criteria, with a note stating that conspiracy offenses are generally classified as one class lower than the offense the person conspired to commit, pursuant to G.S. 14-2.4. Mr. Beeler seconded the motion and it carried.

(G.S. 14-86.6(a)(2)) Mr. Beeler moved to find the proposed Class G felony consistent with the Offense Classification Criteria. Jim Mixson seconded the motion and it carried.

Mr. Waters moved to find the proposed Class F felony consistent with the Offense Classification Criteria. Ms. Elder seconded the motion and it carried.

Mr. Waters moved to find the proposed Class C felony consistent with the Offense Classification Criteria. Mr. Beeler seconded the motion and it carried.

(G.S. 14-86.6(a)(3)) Mr. Waters asked whether conspiracy offenses under Structured Sentencing are generally treated as one class lower. John Madler, staff, responded that they are. Chairman Brown noted that other inchoate offenses are also treated as one class lower than the primary offense. Lindsey Granados moved to find the proposed Class H felony inconsistent with the Offense Classification Criteria. Mr. Beeler seconded the motion and the motion failed. Mr. Waters moved to find the proposed Class H felony consistent with the Offense Classification Criteria, with a note stating that conspiracy offenses are generally classified as one class lower than the offense the person conspired to commit, pursuant to G.S. 14-2.4. Mr. Weede seconded the motion and it carried.

Mr. Weede moved to find the proposed Class F felony consistent with the Offense Classification Criteria, with a note stating that conspiracy offenses are generally classified as one class lower than the offense the person conspired to commit, pursuant to G.S. 14-2.4. Mr. Waters seconded the motion and it carried.

Mr. Waters moved to find the proposed Class C felony consistent with the Offense Classification Criteria, with a note stating that conspiracy offenses are generally classified as one class lower than the offense the person conspired to commit, pursuant to G.S. 14-2.4. Mr. Weede seconded the motion and it carried.

SB 201 – Various Motor Vehicle/Dealer Changes [Ed. 4].

(G.S. 14-164.1) Mr. Beeler moved to find the proposed Class I felony consistent with the Offense Classification Criteria. Mr. Waters seconded the motion and it carried.

SB 765 – Marijuana Legalization and Regulation [Ed. 1].

(G.S. 18D-700(c)) Ms. Granados asked about the proposed offense's relationship to the existing offense of possession with intent to sell. Ms. Whitaker responded that the bill would remove marijuana entirely from the Controlled Substances Act and that that offense would no longer exist as it pertains to marijuana. Judge Morrison asked why this conduct would be criminalized if the bill would legalize marijuana. Ms. Whitaker responded that the criminal offense is based on an amount of marijuana that exceeds what would be allowed under the bill. Ms. Elder asked if there is a similar offense dealing with the regulation of alcohol. Representative Allen McNeill responded that there are no comparable quantity limitations on

possessing alcohol. For context, Ms. Whitaker provided information regarding existing penalties for trafficking marijuana. Joe Houchin asked if conditional discharge would apply to this offense if marijuana is removed from the Controlled Substances Act. Ms. Whitaker responded that the conditional discharge pursuant to G.S. 90-95 would not apply. Representative McNeill asked how marijuana can be criminalized if it is no longer a controlled substance. Chairman Brown responded that it would be more about drawing a line regarding how much is too much. Mr. Madler stated that it would be a regulatory offense, similar to offenses involving alcohol. Ms. Granados noted that under the current scheme, this conduct would be a Class H felony, and that this provision would be a significant change from that. Mr. Beeler asked if marijuana would be taxed under this bill, and Ms. Whitaker responded that the bill contains taxation provisions. Judge Morrison asked what kind of injury is caused by the conduct covered in this provision. Mr. Houchin responded that the harm is the financial interest protected by the regulations. Judge Sherri Elliott moved to find the proposed Class F felony inconsistent with the Offense Classification Criteria. Mr. Houchin seconded the motion and it carried.

(G.S. 18D-701(d)(3)) Mr. Waters stated that this provision seemed inconsistent with the Offense Classification Criteria and that it may be more appropriate as a Class H felony. Judge Valerie Zachary stated that there is no analogous provision for possession of alcohol based on quantity. Mr. Waters stated that the crux of this provision deals with not allowing private individuals to go into business against the state regulatory scheme, and noted that Colorado experienced a similar issue when it first legalized marijuana. Representative McNeill noted that existing marijuana provisions are based on weight rather than quantity of plants. Mr. Waters moved to find the proposed Class I felony inconsistent with the Offense Classification Criteria. Ms. Granados seconded the motion and it carried.

(G.S. 18D-701(d)(4)) Mr. Waters moved to find the proposed Class F felony inconsistent with the Offense Classification Criteria. Sheriff Garry McFadden seconded the motion and it carried.

(G.S. 18D-702(a)) Commissioners discussed potential analogous offenses. Ms. Elder mentioned unlawful manufacture of alcohol; Mr. Houchin mentioned unlicensed growth of hemp and stated that it is a Class I felony. Judge Morrison asked if the ABC Commission would regulate marijuana under this bill. Ms. Whitaker responded that the bill would create a separate regulatory entity, the NC Cannabis Control Commission. Mr. Weede moved to find the proposed Class I felony consistent with the Offense Classification Criteria. Ms. Granados seconded the motion it carried.

(G.S. 18D-702(c)) Ms. Granados noted that, as with some of the previous provisions, this provision deals with an inchoate offense. Mr. Beeler moved to find the proposed Class I felony consistent with the Offense Classification Criteria, with a note stating that conspiracy offenses are generally classified as one class lower than the offense the person conspired to commit, pursuant to G.S. 14-2.4, and that conspiracy to commit a Class I felony is generally punishable as a Class 1 misdemeanor. Ms. Elder seconded the motion and it carried.

(G.S. 18D-714) Mr. Weede moved to find the proposed Class H felony inconsistent with the Offense Classification Criteria, with a note that it would be consistent with the Offense Classification Criteria for a Class I felony. Ms. Granados seconded the motion and it carried.

SB 828 – Child Abuse – Positive Drug Test [Ed. 1].

(G.S. 14-318.4(a7)(1)) Mr. Beeler asked whether the proposed offense applied to any controlled substance present in a child's body. Ms. Whitaker replied that the proposed offense specifies only controlled substances in Schedules I and II. Ms. Elder asked if the provision includes an intent element;

Ms. Whitaker said that it did not. Ms. Granados pointed out that the current felony child abuse statute contains an intent provision. Judge Elliott asked why the proposed offense deals with children under 10 years of age when the existing child abuse offenses cover children under age 16. Ms. Whitaker responded that she did not know the reasoning for the age provision in the bill. Judge Zachary commented that she had concerns regarding a Class C felony that did not require criminal intent. Judge Zachary moved to find the proposed Class C felony inconsistent with the Offense Classification Criteria. Ms. Granados seconded the motion and it carried.

(G.S. 14-318.4(a7)(2)) Mr. Beeler commented that he was still concerned about the discrepancy between the age of 10 in this bill and the age of 16 in the existing child abuse offenses. Ms. Elder moved to find the proposed Class E felony inconsistent with the Offense Classification Criteria, with a note that it would be consistent with the Offense Classification Criteria for a Class G felony. Mr. Waters seconded the motion and it carried.

(G.S. 14-318.4(a7)(3)) Ms. Granados moved to find the proposed Class G felony inconsistent with the Offense Classification Criteria, with a note that it would be consistent with the Offense Classification Criteria for a Class H felony. Ms. Elder seconded the motion and it carried.

Chairman Brown reminded the members that the Commission authorized a Legislative Review Subcommittee at its March meeting; no meeting was currently scheduled but one would be called if necessary. He then stated that the next agenda item was to be a review of the Adult Recidivism Report but that it would be moved to the September meeting due to time constraints.

PRISONS UPDATE AND ESTABLISHMENT OF A SEPARATE DEPARTMENT OF ADULT CORRECTION

Chairman Brown recognized Tim Moose, Commission member and Chief Deputy Secretary for the Division of Adult Correction, to provide an update on the transition of adult correction from a division within the Department of Public Safety (DPS) to a stand-alone Department of Adult Correction (DAC) (see Presentation). Mr. Moose informed the Commission that in the 2021 budget bill (S.L. 2021-180) the General Assembly directed that the Division become a department effective January 1, 2023. DPS formed a transition task force to work through the logistics. Mr. Moose pointed out that it was obvious that correctional staff would go to the new department but that it was hard to figure out how to allocate the administrative positions. When the General Assembly consolidated the Department of Crime Control and Public Safety and the Department of Correction in 2012, the duplicate administrative positions were eliminated, so there were not enough existing positions to adequately support two departments. The task force has finalized a process for separating the administrative areas and hopes that it put both departments in a better position.

Chairman Brown asked what the theory was behind the consolidation of the two departments. Mr. Moose replied that the consolidation was supposed to produce some efficiencies by eliminating duplication (e.g., administration) and thereby provide savings. They realized some benefits, such as the sharing of intelligence and the development of partnerships with other entities in DPS, but adequate resources for administration was always a problem. DPS has not realized all of the anticipated savings from the consolidation.

Mr. Moose shared a draft organization chart for DAC (*see* Presentation). He pointed out that the Operations Division would have five sections: Community Supervision, Prisons, Reentry and Programming, Health Care Services, and Compliance. Elevating the last three to sections on the same level as Community Supervision and Prisons represents a change from the way Adult Corrections has been structured in the past. Mr. Moose stated that the goal is to have the new structure in place by October 1, 2022, in order to hit the ground running by January 1, 2023.

Mr. Moose explained that the leadership team undertook a significant communication campaign with Adult Correction staff as part of the process. This campaign includes virtual as well as in-person town halls. During this campaign, the leadership shared four foundational tenets with staff to facilitate discussion and to provide the guiding vision for establishing the new department.

Representative Faircloth asked if there was one or more agencies in the nation that are doing everything right and could be copied. Mr. Moose replied that they looked at all 50 states and the federal system, they found strengths and weaknesses in each but not one state doing it all right. They tried to emulate the strengths that they found in the different systems. Nicole Sullivan gave examples of how the new Department would have sections for reentry, inmate healthcare, and compliance with national standards and best practices. The Department would also focus on employee wellness. Mr. Beeler pointed out that none of it could happen without adequate staffing, and that every correctional department in the country was dealing with staffing issues.

Representative McNeill explained to the Commission that the General Assembly did not order the separation of the Division of Adult Correction because there were major problems in the Division, it was done in response to the deaths of the correctional officers at Pasquotank Correctional Institution and the need to focus more attention on those issues. Being a part of a larger department may not be the best way to do that. Mr. Moose added that Adult Correction in North Carolina was recently ranked eighth nationally.

Mr. Mixson asked how the DAC would retain some of the benefits it had from being part of the DPS. Mr. Moose responded that the DAC would have a Division for Special Operations which would include some of the partnerships and task forces Adult Correction had formed with other entities in DPS.

Mr. Moose introduced Melissa Earp, Deputy Secretary for Administration, to provide an update on staffing the DAC (*see* Presentation). Ms. Earp informed the Commission that staffing has been significantly impacted by several factors and that the Department is competing with other corrections and law enforcement agencies for the same applicants. As a result, the Department has had to explore additional measures like salary increases, bonuses, and new marketing to attract applicants. Ms. Earp stated that current entry-level position vacancy rates are at 36% for Correctional Officers and 13% for Probation Officers. The vacancy rates have increased primarily in the last year.

Beginning with Correctional Officers, Ms. Earp explained that prison leaders have been able to mitigate some of the staffing issues due to the decrease in prison entries but that they have still had to make adjustments. Leadership has had to modify some prison operations (e.g., temporarily closing smaller facilities) to compress staff, as well as enter into a contractual agreement with a private security vendor

to staff external security posts at some prisons. She noted that the vendor is facing some of the same staffing issues.

Ms. Granados asked at what point the staffing shortage becomes critical and the prisons become unmanageable. Mr. Moose replied that they are concerned about it but that it is hard to pinpoint because they continue to make adjustments. Ms. Sullivan added that they try to use tools to control the population, such as awarding sentence credits and regulating who goes to prison.

Ms. Elder asked if the Division did exit interviews with staff that are leaving to identify the reasons. Mr. Moose responded that they did and found that it is often due to competition. He gave an example of how North Carolina raised its salaries and then Tennessee raised its salaries and offered bonuses and relocation reimbursements. Mr. Beeler added that staff is overworked and burned out as well.

Dr. Harvey McMurray asked about the staff turnover rate. Ms. Earp replied that they have studied the issue and while she did not have the exact number, it was significant, especially within the first five years of employment.

Ms. Earp concluded her presentation by discussing the staffing issues among Probation Officers. During 2009-10 the Department of Correction made an effort to reduce the vacancy rate for probation officers to 4% or less and it stayed there until 2021. As the vacancy rate has increased, they have had to shift caseloads in order to remain within the goals set by statute. This shifting places additional pressure on officers to maintain coverage, affects the services the offenders receive, and impacts officers' ability to assist local law enforcement.

Mr. Moose introduced Nicole Sullivan, Deputy Secretary for Analysis, Programming and Policy, to provide an update on correction populations (*see Presentation*). Ms. Sullivan began by informing the Commission that the Council for State Governments has been looking at criminal justice metrics across all 50 states as part of its Justice Counts initiative and that North Carolina was the only state to receive an "A" grade for the amount of data that is currently available. Ms. Sullivan presented data on prison admissions, populations, and releases as well as mental health and substance abuse issues. She pointed out that the percentage of felony crime conviction admissions have steadily increased over the last ten years, most of those admissions are direct or as a result of probation revocations, and that the largest crime category group for prison admissions is public order (the category that includes drug offenses) followed by property and then person. Although crimes against the person ranked third, these offenders receive the longest sentences and therefore remain in the population longer. They are seeing a slight increase in the average age of the prison population. She added that a challenge they are facing is getting programs restarted as the impact of the COVID-19 pandemic lessens.

Turning to community corrections, Ms. Sullivan presented data on probation, post-release supervision, and parole admissions, populations, and releases, as well as mental health and substance abuse issues. She pointed out that the that probation admissions have steadily decreased during the last ten years despite the COVID-19 pandemic, largely due to a decline in revocations for technical violations. Public order crimes comprise over one-half of probation admissions but were second to crimes against the person for post-release supervision admissions. Revocations have continued to decline in large part due

to changes made under the Justice Reinvestment Act. Ms. Sullivan stated that DPS has done a large amount of training around mental health issues. She added that the challenge is similar to that in prisons, lack of tools and resources in the community.

UPDATE ON SENTENCING PRACTICES STUDY

Chairman Brown recognized Michelle Hall, staff, to provide an update on the Sentencing Practices Study (see Presentation). Ms. Hall reminded the Commission that the Sentencing Practices Study was started during the fall of 2020. Its purpose is to examine sentencing practices to determine if and to what extent legal and extralegal variables are a factor in determining sentencing outcomes, essentially asking if there are disparities in sentencing outcomes based on extralegal factors. Ms. Hall reviewed the components of the study and their status, as well as the data source (FY 2019 conviction data from the annual Statistical Report) and the unit of analysis (convictions disposed of in a sentencing episode). She pointed out that there is no agreed upon definition of disparity among researchers and in the literature; for the purpose of this study, disparity is defined as decisions made where extralegal factors are used to arrive at the decision.

Ms. Hall presented data showing the differences between the North Carolina population composition and the felony conviction distribution by race, ethnicity, age, and sex, pointing out that blacks and males are overrepresented when compared to the population. Focusing on the felony conviction data, she stated that differences were found when examining outcomes and certain extralegal variables (e.g., race, sex, and age). However, bivariate analysis only allowed examination of two variables together, when multiple variables could have an effect on outcomes. Ms. Hall explained that multivariate analysis takes into account the effect of multiple variables, while also quantifying the singular contribution of each variable in the model to predict an outcome or dependent variable. She described how multivariate analysis worked and listed the independent and dependent variables used in the Sentencing Practices Study.

Ms. Hall then presented preliminary information from the multivariate analysis, focused on two discretionary decision points: when a felony charge results in a misdemeanor conviction and when a felony charge results in a less serious felony conviction. For each decision point, she provided data on how frequently it occurs, a statistical profile of offenders for whom it occurs, and the results of the multivariate analysis (see Presentation). In summary, staff found the following: sex, age, and method of disposition (i.e., jury trial) had the same effect in both models; district characteristics were significant in the misdemeanor model, non-significant in the felony model; removal of district characteristics changed the significance of race from non-significant to significant for misdemeanor model; as the most serious charge class increased, there was a decreased probability of misdemeanor conviction (misdemeanor model) but an increased probability of a less serious felony conviction (felony model); and, with the exception of PRL VI, PRL was not significant in the felony model. This is preliminary information and Ms. Hall outlined next steps staff will take as part of the study: make improvements to the existing models; add other models; and add more data.

Mr. Beeler asked what the level of significance was; Ms. Hall replied that it was 0.05. Representative McNeill asked what year the data was from. Ms. Hall replied that it was FY 2019. Judge Brown suggested that the break given to offenders in Prior Record Level VI may be an alternative to an habitual felon charge. Judge Horne suggested that it could also be an incentive to plead because there is a mandatory active sentence in Prior Record Level VI. Ms. Hall stated that they will examine these points more specifically and thanked the Commissioners for their feedback and insights.

2022 JUSTICE REINVESTMENT ACT (JRA) IMPLEMENTATION EVALUATION REPORT: KEY FINDINGS

Chairman Brown recognized Dr. Jennifer Lutz, staff, to review key findings of the JRA Report. Dr. Lutz began by discussing the reasons for monitoring JRA, which included fidelity, outcomes, and enhancements. In CY 2021, convictions and correctional populations continued to be affected by the COVID-19 pandemic, which altered court operations and correctional policies. Turning to sentencing practices, across the past five years, the lowest percentage of habitual felons were sentenced to Class D and in CY 2021, most habitual felons were sentenced in Class E. Habitual felons accounted for the largest proportion of inmates (14%) of the December 31, 2021, prison population. There were 101 entries for habitual felon breaking and entering and 164 Advanced Supervised Release (ASR) prison entries. The number of inmates receiving ASR sentences increased from 122 (CY 2020) to 164 (CY 2021) with the majority sentenced in Class G and Class H.

Dr. Lutz noted that most of the community corrections population was in Supervision Level 2 (37%), while the smallest proportion of the population was in Supervision Level 5 (2%). The supervision level composition of all offenders on probation was also compared to offenders on PRS. When comparing the two populations, the PRS population was more likely to be supervised in the more restrictive supervision levels (i.e., Levels 1 and 2) than the probation population. Next, she stated that the Treatment for Effective Community Supervision (TECS) completion rates remained the same from 2018 through 2020 (29%). In CY 2021, the overall completion rate increased to 32% for all TECS participants. The number of entries increased from 2020 to 2021 (9,088 to 9,812). Continuing to probation revocation rates, Dr. Lutz stated that PRS entries and population had decreased for the third year in a row likely because of the COVID-19 pandemic.

In concluding, Dr. Lutz remarked that in this year's report, population trends were examined in the context of the COVID-19 pandemic. The overall community corrections population declined 29% since JRA implementation and continued to decrease last year because of court changes due to the COVID-19 pandemic. Additionally, the continued effects of the pandemic resulted in an overall decrease of 3% over the past year. Notably, the lowest monthly average (29,033) occurred in July 2021, but the population has since increased in the second half of the calendar year.

SPAC WEBSITE AND DATA VISUALIZATION PLATFORM UPDATES

Chairman Brown recognized Meghan Boyd Ward, staff, to present the Commission's redesigned website and the new data portal. She explained that the Commission's website was redesigned to streamline content and would be live before the end of the month. Turning to the newly created data portal, Ms. Boyd Ward stated that this platform would add even more possibilities to North Carolina's existing data capabilities. The project began prior to the pandemic and it was rejuvenated in the last year, with a plan to fully launch the in the coming months. The portal is housed in conjunction with the Administrative Office of the Court's data using the program Open Data Soft (ODS).

Ms. Boyd Ward went on to the data portal and conducted a live demonstration of its functionalities. She read the portal's mission statement: "This interactive portal connects stakeholders, practitioners, and members of the public with the data that the North Carolina Sentencing and Policy Advisory Commission publishes. Exploring data through visualizations can inform decision making and public discourse on criminal justice issues." She went on to explain that the homepage offers some quick information on the Commission, the Commission's data, and how to interact with the data portal. The in-depth information

on the homepage includes curated data stories on felony convictions, trends, and comparisons. She noted that the felony convictions and trends are akin to information found in the Statistical Report Quick Facts, while offering more interactivity with the data. She went on to say that in contrast, the felony comparison data story provides entirely new information not seen in Commission publications or presentations because it analyzes the data at a county level basis.

Ms. Boyd Ward covered the next steps of the project, primarily that before the official launch Commission Staff plan to add more data sets (e.g., misdemeanor content and additional years), visualizations, and stories. Users will also be able to access a dashboard and download individual data sets.

INSTRUCTIONS TO STAFF AND OTHER BUSINESS

Chairman Brown thanked the staff for their presentations and reminded the members that the next full Commission meeting was Friday, September 9, 2022.

ADJOURNMENT

Chairman Brown adjourned the meeting at 1:02 p.m.

Respectfully submitted,

Shelley Kirk
Administrative Secretary