

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY
COMMISSION MEETING
RALEIGH, NC
December 2, 2011

The North Carolina Sentencing and Policy Advisory Commission met on Friday, December 2, 2011, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Tom Bennett, Honorable Charlie Brown, Christopher Clifton, Chief Scott Cunningham, Louise Davis, Honorable Richard Elmore, Honorable Clark Everett, Honorable John Faircloth, Chris Fialko, Paul Gibson, Honorable David Guice, Bill Hart, Secretary Linda Hayes, Honorable Eleanor Kinnaird, Honorable Floyd McKissick, Jr., Moe McKnight, Dr. Harvey McMurray, Luther Moore, Honorable Fred Morrison, Sandy Pearce, Tony Rand, Rhonda Raney, June Ray, and Honorable Tim Spear.

Guests: Honorable Alice Bordsen (Former Commissioner), Joe Cheshire (Former Commissioner), Locke Clifford (Former Commissioner), Virginia Niehaus (UNC Law Student and Office of Administrative Hearings Ex-tern), James Klopovic (Governor's Crime Commission), Yolanda Woodhouse (AOC Court Programs), David Kaplan (Duke University), Melissa Radcliff (Our Children's Place), and Joel Rosch (Duke University).

Staff: Susan Katzenelson, Ginny Hevener, John Madler, Amy Craddock, Vicky Etheridge, Tamara Flinchum, Ashleigh Gallagher, Michelle Hall, David Lagos, and Sara Perdue.

INTRODUCTION

Chairman Spainhour called the meeting to order at 10:04 a.m. He began by recognizing three departing Commissioners: Representative Alice Bordsen, Locke Clifford, and Joe Cheshire. Judge Spainhour read a resolution recognizing Representative Bordsen's service to the Commission. Luther Moore moved to adopt the resolution; Bill Hart seconded the motion and the motion carried. Judge Spainhour read a resolution recognizing Locke Clifford's service to the Commission. Luther Moore moved to adopt the resolution; Bill Hart seconded the motion and the motion carried. Judge Spainhour read a resolution recognizing Joe Cheshire's service to the Commission. Luther Moore moved to adopt the resolution; Judge Morrison seconded the motion and the motion carried.

After reviewing the day's agenda, Judge Spainhour introduced the new member of the Sentencing and Policy Advisory Commission: Representative John Faircloth, representing the North Carolina House of Representatives. Chairman Spainhour then informed the Commissioners that the Commission meeting dates for 2012 will be February 24th, June 15th, September 7th, and December 14th. The Chairman presented the minutes from the September 16th Commission meeting. Luther Moore made a motion to accept the minutes as written, Tom Bennett seconded the motion, and the motion carried.

CHILDREN OF INCARCERATED PARENTS

Michelle Hall presented an update on staff research on the topic of children of incarcerated parents. She reminded the Commission of its vote at the June meeting to accept a legislative request to study issues surrounding children of incarcerated parents including the short and long-term effects of parental incarceration on children; what North Carolina is currently doing to assist children of incarcerated parents, and what else North Carolina could do to assist these children. She then reviewed the process since June; staff had conducted a literature review, met with officials from the Department of Correction (DOC), contacted other North Carolina agencies that might have contact with children of incarcerated parents, and finally reviewed programs and policies in other states.

Ms. Hall summarized the relevant literature. She noted there have been many attempts to measure the effects of parental incarceration on children; however, most studies note significant challenges in studying and intervening with the population. Due to the lack of empirical findings, it is difficult to establish a causal relationship between parental incarceration and negative life outcomes for children. Ms. Hall noted that associations between parental incarceration and negative life outcomes for children do exist, including poor academic performance, economic instability, mental health and behavioral problems, drug use, and unemployment. At the same time, research also points to pre-existing risk factors that may influence negative outcomes for children (*e.g.* parental mental illness or substance abuse, family poverty, poor parenting, criminality, social disadvantage, etc.), making it difficult to determine the effect of one single factor (parental incarceration) on outcomes for children.

Ms. Hall then reviewed current data collection practices, policies and programs at the DOC. No data exists on the children of probationers, and limited data is available on children of inmates. Both male and female inmates tend to underreport information on their children. The Division of Prisons (DOP) offers a variety of parenting programs at men's and women's facilities; inmates may be assigned to parenting programs based on their diagnostic assessment at intake or they can opt in. DOC currently does not have a definition or evaluation of program effectiveness; however, the DOP indicated they are working to move all parenting programs to evidence-based cognitive behavioral programs. Ms. Hall noted either the court or the DOC can grant maternity leave to pregnant inmates. Regarding visitation, inmates are allowed one collect call per week and one visit per week. Proximity to children and families is rarely a factor for inmate placement.

Following the summary of research and DOC policies and programs, Ms. Hall asked for the consent of the Commission to incorporate the information into a draft report for consideration at the Commission's next meeting. She then requested feedback regarding possible recommendations for the report, bearing in mind the recommendations would potentially be undertaken by the state in the form of legislative or agency policies, and should focus on measureable outcomes for children and/or parents. There were several approaches for recommendations (*see* Handout) including recommending specific policies and programs; recommending a legislative directive for interagency collaboration/coordination; or recommending a legislative resolution. The Commission discussed each option. Chief Cunningham asked if it was known how many children are in this group by incarcerated parents

and what are the sentence lengths for these inmates? Nationally, the Bureau of Justice Statistics has identified 1.7 million children in this category. The North Carolina Department of Correction reported in August of 2011 that 12,404 inmates out of about 40,000 have reported 27,193 children. About 15,000 children were under the age of 18. There is no information about sentence lengths.

Rhonda Raney asked how these children of incarcerated parents compared to other children who have lost parents for other reasons such as death, divorce, or desertion. Ms. Hall answered that a state had not been found yet that supplied this kind of data collection. Data collection problems seem to exist in every state. None of the data was measurable. Mr. Lagos added that their research focused on incarcerated caregiver parents, rather than absentee parents. Ms. Davis said that the social workers in the women's prisons are the ones who are in contact with the children. These children are the most needy. The counties call the prison social workers to report children who need help. She wondered about the caseloads of the social workers in the prisons. Ms. Hall reported that they did not know the caseload of the social workers at DOP. Sandy Pearce stated that many of these children are with relatives and under the Department of Social Services and are involved with lots of agencies. She recommended getting the Collaborative for Children involved in identifying these children. They are best suited to do this as they are advocates for children and many state agencies are involved. Representative Guice voiced his concern that data was not being collected and analyzed. Collection of that data would be the only way for legislators to develop legislation that would affect change.

Senator Kinnaird reiterated the gap in data collection. She pointed out that three important resources have been shut down that were used to protect these children: Summit House, Harriet's House and Our Children's Place. Pre-trial is the place where they could effect change. Representative Bordsen was recognized by the Chairman. Since she requested this study, she wanted to add some context to the group. When a woman gives birth in prison, the baby is immediately taken away. There is no bonding process, and that child is put into the Department of Social Services hands. Things need to be changed in DOC to help these children. Children do not usually stay with the first relative they are given to; they tend to move around a lot. What is the obligation of the State to take care of these children? They have taken their parent(s) in as inmates, but take no obligation to take care of their children. This is the largest at-risk group of children. The State needs to track the children of the parent(s) who were doing well to see how they are doing it. It also has to look at re-entry of the parent back into the household.

Mr. Bennett said that sometimes the best thing that can happen to an abused or neglected child is that the parent be taken away and placed in jail. Senator McKissick agreed with Mr. Bennett. The incarcerated parent may be terrorizing the family – it's not a one size fits all. He questioned whether they knew enough to articulate recommendations. Dr. McMurray praised the staff and said that they have done all they can do as there is no data out there. He did think that the scope of inquiry needed to be expanded to jails, federal prison, etc., but the data needed is nowhere near that now. The Chairman asked Joel Rosch if he had any comments to make. Mr. Rosch discussed the Child and Family Team models. He said that North Carolina is just

beginning to use it. He thinks they can bring together and coordinate the agencies. He thinks this is an opportunity for the State to work with these children in targeted prevention.

The Commission asked the Chairman to write a letter to the Secretary of the new Department of Public Safety, and copy the co-chairs of the Legislative Justice and Public Safety Oversight Committee, requesting better and more complete data be collected on the children of incarcerated parents. Staff would review potential data elements to be collected, and invite Commissioner feedback at the next meeting. Dr. McMurray asked if there was a subcommittee for this report. Ms. Katzenelson clarified that the staff would do a draft report to bring to the Commission in February. At that time, the Commission can determine what other issues should be addressed. Representative Bordsen said that there needs to be a discussion with the Department of Correction to make more child-friendly policies. She asked where the appropriate place was to hold such a meeting. Representative Guice suggested that Rep. Bordsen contact Jennie Lancaster to make that decision. Mr. Hart suggested that without data, the Commission has no power to do this; therefore, it should just prepare the report.

OFFENSE CLASSIFICATION ISSUES

David Lagos presented an issue that had been raised during the Commission's annual review of proposed legislation as mandated by G.S. 164-43: whether the Commission wished to develop a method to evaluate the classification of proposed homicide and drug offenses. He noted that this issue was highlighted by the bills filed during the General Assembly's 2011 Session, which featured a variety of homicide and drug offense provisions. Under its current policy, when the Commission reviews a homicide or drug offense classification, it finds that its Offense Classification Criteria do not apply to these offenses. Although this finding is correct as an historical matter, Mr. Lagos noted that neither homicide nor drug offenses are excluded from the Commission's original mandate to classify offenses by severity under G.S. 164-41, or its ongoing mandate to review proposed criminal legislation for consistency with Structured Sentencing under G.S. 164-43. Moreover, as a result of its current policy, the Commission foregoes the opportunity to advise the General Assembly on the appropriate classification for these offenses.

To assist members in their discussion, Mr. Lagos explained that the Sentencing Commission formed the Offense Structures Subcommittee in January of 1991, for the purpose of fulfilling the primary mandate of classifying all extant offenses based on severity. In assembling a set of harm-based offense classification criteria, the Subcommittee elected to exclude homicide and drug offenses in the interests of clarity and ease of application. Only after the criteria were developed and the most common offenses classified did the Offense Structures Subcommittee address homicide and drug offenses. Placing first degree murder at the top of the nine felony offense classifications (i.e., Class A), the Subcommittee ranked the remaining homicide offenses against each other, as well as against other common offenses within each felony class. In contrast to this process, the Commission referred the classification of drug offenses to its Durational Subcommittee, which was crafting the punishment structure. The Durational Subcommittee and the full Commission agreed to retain the Fair Sentencing Act classification and punishment structures for drug trafficking offenses. Likewise, the Commission preserved

the Fair Sentencing Act offense classifications for non-trafficking drug offenses, but increased by one felony class the offenses of sale of a Schedule I or II controlled substance (from Class H to Class G) and sale of a Schedule III through VI controlled substance (from Class H to Class I).

Mr. Lagos presented examples of the types of homicide and drug offense provisions that have been filed in the General Assembly over the past several years. He also presented a chart showing the number of homicide and drug offense provisions enacted into law during each of the four most recent long sessions for which the Commission found its classification criteria inapplicable.

The Commission then discussed whether it wished to take up the issue of developing a method of reviewing homicide offense classifications, drug offense classifications, or both. Mr. Hart said that if the Commission changes what it currently does, a subcommittee would have to write new criteria for homicide and drug offenses; the current criteria do not fit those kinds of offenses. Ms. Pearce stated that she felt that the Commission should do this in order to be consistent. Chief Cunningham agreed and stated that the Commission should provide guidance on all criminal offenses. He made the motion that a subcommittee be formed to look at developing a means to classify homicide and drug offenses. Sandy Pearce seconded the motion. The motion carried.

John Madler presented several other issues that had been raised during the Commission's review of proposed legislation. He explained that staff had collected these issues based on comments from Commission members during previous meetings and from people who use the Commission's reports. After reviewing the issues, the members may decide to continue a current policy, change that policy, or wait to see if a change becomes necessary.

Mr. Madler reviewed the statutory mandate that requires the Commission to review all proposed legislation which creates a new criminal offense, changes the classification of an offense, or changes the range of punishment or dispositional level for a particular classification, and to make recommendations to the General Assembly. He pointed out that this mandate was enacted in 1990 and that Structured Sentencing was not enacted until 1993. As a result, the Commission has had to interpret the mandate in the context of the actual elements of Structured Sentencing in order to determine how to perform its duties. He added that the mandate was amended in 1998 to require the Commission to review juvenile dispositions and that the Commission decided in 2007 to review proposed misdemeanor offenses based on criteria it had developed in response to a legislative mandate.

The first question was whether the Commission should point out when a proposed felony offense would be better suited as a misdemeanor offense and vice versa and, if so, on what basis. Mr. Madler explained that the current policy is that the General Assembly decides whether a proposal should be a felony or a misdemeanor, the Commission reviews the proposed class. The Commission has generally not answered the felony/misdemeanor question because there is no guidance in Structured Sentencing; the felony offense classification criteria and the misdemeanor offense classification criteria are separate structures, not one continuous system. He gave two examples, however, where the Commission had reviewed felony offenses in their proposed classes but had also noted that each offense would also be consistent as a misdemeanor offense

for different reasons. Senator Kinnaird voiced her concern about the disconnect between the Sentencing Commission and the General Assembly. She asked who receives the reports at the General Assembly. Mr. Madler explained that the report goes to all members and to relevant staff; the staff informs the authors of individual bills. Representative Guice said that, due to the different backgrounds of the members in the General Assembly, they need help from the Sentencing Commission in determining whether an offense should be a felony or misdemeanor. Chief Cunningham said that the Sentencing Commission should provide as much information as possible. Mr. Moore explained that the Commission has been reluctant to get into the felony/misdemeanor question because it is usually a political issue. Mr. Hart added that this has been the policy but that there were proposals where the Commission noted that they could also fit into the other category. The issue has become more prominent with the development of misdemeanor offense classification criteria. The members discussed whether to always address the felony/misdemeanor question or to just do so in its discretion. The Commission decided by consensus to continue the current policy of making it discretionary.

The second question was whether the Commission should always recommend one or more classifications where a proposed offense is found to be inconsistent. The current policy is that the Commission is not required to make a recommendation but that it occasionally recommends one or more classifications that would make a proposal consistent. Mr. Hart commented that notes are only submitted if the offense is inconsistent, but it is not done all the time. Moe McKnight observed that the clock is a factor. Sometimes there is not enough time for the Legislative Review Subcommittee to comment on every bill. Senator Kinnaird asked how many people in the General Assembly actually knew the Sentencing Commission exists. Mr. Moore pointed out that the staff offered training to the members of the General Assembly. Ms. Katzenelson said that some members take advantage of it. Mr. Bennett made a motion to give a classification when the subcommittee finds a proposal inconsistent. Representative Spear seconded the motion. Mr. Fialko asked if any legislator approached the Sentencing Commission before drafting a bill. Mr. Madler answered that some members do ask for guidance. Mr. McKnight asked if any paperwork accompanied a bill and whether the Commission could offer comments that way. The legislative members responded that there was no additional paperwork with a draft bill. The motion carried.

The third question was whether the Commission should continue to review the classification of proposed misdemeanor offenses. Mr. Madler explained that the current policy was that the Commission reviews proposed misdemeanor offenses based on the proposed misdemeanor offense classification criteria. However, he pointed out that, unlike felony offenses, the current misdemeanor offenses are not classified according to the criteria; many proposed misdemeanor offenses are regulatory in nature and punished as a violation of an article or chapter of the General Statutes; and, when the Commission has found a proposal to be inconsistent and has recommended an alternative class, the General Assembly has not made any changes. Mr. Rand made a motion to discontinue the review of proposed misdemeanor offenses. Mr. Hart seconded the motion. The motion carried.

The fourth question was whether the Commission should review a bill that adds a person to an existing group of offenders or victims or adds a weapon to an existing criminal act as creating a new offense. Mr. Madler explained that, currently, the Commission reviews proposals

that amend existing offenses as creating new offenses and he gave two examples. Mr. Moore moved that the Commission no longer review the addition to existing offenses. Mr. Rand seconded the motion. The motion carried by a vote of 14-6.

The fifth question was whether the Commission should review second or subsequent offenses as offenses that are more serious than the first offense. The current policy is to find classifying second and subsequent violations of an offense higher than the first violation inconsistent with the concept of the Prior Record Level. In each case, the Commission points out the following: The Structured Sentencing punishment chart takes a defendant's prior record into account through the Prior Record Level. Increasing the offense class based on prior convictions is inconsistent with structured sentencing. Senator Kinnaird moved to continue the current policy. Mr. Moore seconded the motion. The motion carried.

The sixth and final question was how the Commission should review proposed punishment changes. The current policy is to review proposed punishment changes for consistency with the elements of the punishment chart and the principles of structured sentencing. Senator Kinnaird moved to continue to review offenses with punishment changes in the same way. Mr. Moore seconded the motion. The motion carried.

FY 2011/12 COMMISSION SUBCOMMITTEES

Mr. Moore moved that a subcommittee be formed to prepare the first annual report on implementation of the Justice Reinvestment Project due April 15, 2012. Mr. Gibson seconded the motion, and the motion carried.

Chairman Spainhour reminded the Commissioners that the meeting dates for the Commission in 2012 were February 24th, June 15th, September 7th, and December 14th. The meeting was adjourned at 2:00 p.m.

Respectfully submitted,

Vicky Etheridge
Administrative Assistant