

**MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY
COMMISSION MEETING
March 7, 2014**

The North Carolina Sentencing and Policy Advisory Commission met on Friday, March 7, 2014, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Art Beeler, Daryl Black (representing Honorable Harry Brown), Sheriff James Clemmons, Louise Davis, Honorable Richard Elmore, Elliott Abrams (representing Chris Fialko), David Guice, Honorable Darren Jackson, Honorable Maureen Krueger, Ilona Kusa, Honorable Floyd McKissick, Dr. Harvey McMurray, Honorable Fred Morrison, Billy Sanders, and Keith Shannon.

Guests: Rory Flemming (Extern for North Carolina Office for Administrative Hearings), Lisa Fox (Fiscal Research, General Assembly), Bill Hart (former Commissioner), Jamie Markham (University of North Carolina School of Government), John Poteat (Fiscal Research, General Assembly), Anne Precythe (North Carolina Department of Public Safety), Lao Rubert (Carolina Justice Policy Center), Cassandra Skinner (North Carolina Association of County Commissioners), Gregg Stahl (North Carolina Sheriffs' Association), and Yolanda Woodhouse (AOC Court Programs).

Staff: Susan Katzenelson, Ginny Hevener, John Madler, Vicky Etheridge, Tamara Flinchum, Michelle Hall, Sara Perdue, Jennifer Wesoloski, and Rebecca Wood.

INTRODUCTION

Chairman Spainhour called the meeting to order at 10:00 a.m. He recognized departing Commissioner Christopher Clifton and introduced new Commissioner Keith Shannon. Members and visitors introduced themselves. After Chairman Spainhour reviewed the agenda for the meeting, Judge Fred Morrison moved to adopt the minutes from the December 6, 2013, meeting; the motion was seconded and carried.

STRUCTURED SENTENCING STATISTICAL REPORT FY 2013

Chairman Spainhour recognized Michelle Hall to present court statistics for Fiscal Year 2012/13 (*see handout*). Ms. Hall informed Commissioners that the information presented would be included in the annual Structured Sentencing Statistical Report for Felonies and Misdemeanors. Trend data included in the presentation come from previously published Statistical Reports. Ms. Hall noted that 64% of the felony convictions and 82% of misdemeanor convictions in FY 2012/13 were for sentences imposed for offenses committed on or after December 1, 2011 (the effective date of the Justice Reinvestment Act or JRA).

Ms. Hall defined a sentencing episode as the sentence imposed for the most serious conviction for a given day of court. In FY 2012/13, there were 28,358 felony convictions (excluding drug trafficking and violent habitual felon convictions) and 130,361 misdemeanor convictions (excluding DWI convictions, cases disposed by magistrates, Class 2 and 3 criminal traffic offenses, and local ordinance offenses) under Structured Sentencing. Felony convictions have increased by less than 1% in the last fiscal year and misdemeanor convictions have decreased by 7.5% in the last fiscal year. Ms. Hall noted the five-year trends: felony convictions have decreased almost 12% and misdemeanor convictions by nearly 18%. Ms. Hall then presented information on the number of convictions by offense class (felons and misdemeanants), prior record level (felons), crime type (felons and misdemeanants), punishments imposed for the current fiscal year and ten-year punishment trends (felons and misdemeanants), distribution by prior conviction level (misdemeanants), active sentences by offense class and sentence location (felons), types of intermediate sanctions imposed (felons and misdemeanants), and types of community punishments imposed (misdemeanants).

Ms. Hall also presented information on several special issues including life and death sentences, habitual felon convictions, habitual breaking and entering felon convictions, and drug trafficking convictions. Ms. Hall concluded that the data reflect Structured Sentencing at work in the North Carolina court system; she noted that FY 2012/13 felony convictions could be summarized by the information included in Table 4 (*see handout*). The table includes the number and percentages of convictions, type of punishments imposed, and the average minimum and maximum sentences by offense class and prior record level for each cell on the sentencing grid. The data for FY 2012/13 showed some discrepancies that staff were trying to resolve, particularly related to the sentencing of offenders in cells on the felony punishment chart where certain dispositions were not authorized.

Commissioner Guice asked if the report excluded DWLR (Driving with License Revoked). Ginny Hevener answered that the report excludes Class 2 and 3 misdemeanors; DWLR is a Class 1 misdemeanor.

Commissioner Guice asked if there was a way to tell if a prior offense of a convicted felon is more serious than the subsequent offense(s) committed. Ms. Hevener explained that only prior record points appeared in the AOC database, and not the associated offenses. Previously, staff had examined the criminal history of habitual felons using OPUS data and found that most have prior convictions for Class H and I offenses.

Chairman Spainhour commented that he saw a lot of frowns when Ms. Hall reported that drug trafficking convictions had again decreased during the last fiscal year. He suggested the decrease was probably due to plea bargaining practices.

Mr. Beeler asked if substance abuse was captured anywhere prior to incarceration. If sentenced to Community or Intermediate punishment, Ms. Hall noted that substance abuse history would be captured in the RNA (Risk Needs Assessment) performed by probation – but would not be included in any sentencing data. As an aside, Mr. Beeler said that if caught on the

front end, an offender might admit to substance abuse, but usually not after conviction. During the site visits made by the staff, Ms. Katzenelson said that defense attorneys told them that they might tell a judge about a client's substance abuse if they thought it might help in the sentencing phase.

Mr. Beeler asked about Ms. Hall's comment that certain sentences are outside the parameters of the sentencing grids. Ms. Hevener explained that this could be due to database limitations or data-entry issues, but staff has a responsibility to report the information. When looking at the data, Ms. Katzenelson suggested that the discrepancies may not necessarily be sentences deviating from the grid, but technology that has not caught up with the changes under JRA.

Chairman Spainhour asked Ms. Hall if the staff had the number of DWI convictions. Ms. Hall and Ms. Hevener responded that they do not get any data on DWIs.

Mr. Abrams asked if the number of first-time felons sentenced every year could be tracked. Ms. Hall responded no.

Mr. Beeler commented that the number of misdemeanants sentenced to active sentences was trending up. He wanted to know a possible explanation for that trend. Ms. Hevener responded that the trend was probably due to the common practice of sentencing misdemeanants to time served.

CURRENT POPULATION PROJECTIONS – FY 2014 TO FY 2023

Ginny Hevener presented the Current Population Projections for Fiscal Year 2014 to Fiscal Year 2023 (*see handout*). The projections were prepared in conjunction with the Rehabilitative Programs and Services Section of the Department of Public Safety, and are produced on an annual basis as part of the Commission's original mandate to develop a projection tool for accurate long-term planning of correctional resources.

Ms. Hevener described the data from the Administrative Office of the Courts and from the Department of Public Safety that are used to project the prison population. The projections are based on the most recent empirical data available – FY 2013 – and were prepared using the simulation model that was developed in collaboration with SAS Institute.

Ms. Hevener noted that FY 2013 represents the first full fiscal year of data since the implementation of the JRA, offering a first look at changes to the criminal justice system under the new law. Ms. Hevener cautioned that data from the early stages of implementation are not necessarily representative of future practices. The annual update of the projections will adjust the projections accordingly as practices evolve.

The prison population is projected to increase from 37,679 to 38,812 across the ten-year projection period – an increase of 3%. Comparing the projected prison population with the

capacity estimates provided by the Adult and Juvenile Facilities Section of the DACJJ, the projected prison population will be below prison capacity across the projection period, with a wider gap between the projected population and Expanded Operating Capacity for FY 2015 through FY 2022. Ms. Hevener noted that the current projections represent an increase compared to last year's projections due to the limited applicability of the FY 2012 data for changes under the JRA.

Ms. Hevener described demographic trends, criminal justice trends, and policy changes that factor into the decline of the prison population prior to the passage of the Justice Reinvestment Act. With the implementation of the JRA, the population declined further – primarily as a result of the shift of most misdemeanants from prison to local jails through the establishment of the Statewide Misdemeanant Confinement Program and the legal change that places limits on revocations and confinement for technical violations of probation. The prison population decreased 11% from October 2009 (with the highest average monthly prison population to date) to January 2014.

Ms. Hevener summarized the assumptions that were used to develop the projections. The assumptions reflect criminal justice practices from FY 2013. The projections take into account projected growth in felony convictions for the ten-year projection period, changes under the JRA, and, when possible, changes from the past legislative session.

Dr. McMurray stated that he had expected a larger decline with the Justice Reinvestment Act. He asked if population trends were taken into account. Ms. Hevener stated that North Carolina population trends as well as national trends are taken into account through growth rates. Commissioner Guice said that people had to look at where the population was before JRA. According to Ms. Katzenelson, there were immediate reductions built in when JRA was passed through the Statewide Misdemeanant Confinement Program administered through the NC Sheriffs' Association. Over time, there will be more reductions. It was never meant to have a smooth slope.

Mr. Black asked if socio-economic factors due to recession played a part in Figure 2 for 2008. Ms. Hevener said that was a factor that was considered for that time period.

Mr. Beeler asked if information about the increases in offenders on post-release supervision had been included in this report. Ms. Hevener answered that these changes are taken into account in the projections, but that the Justice Reinvestment report would provide specific data about the increases in this population since the implementation of JRA.

Commissioner Guice said that 665 misdemeanants were housed in the county jails as part of the SMCP, but that they had projected there would be 1,400. He said that the population had dropped. They have capacity for 1,600. Mr. Sanders asked for an explanation of why the misdemeanor convictions dropped from 170,000 to 130,000. Commissioner Guice told him that one cannot look at this number alone, but also have to consider the number of filings, which were down in the state.

Ms. Krueger said that the reclassification of misdemeanors to a Class 3 or an infraction will have an effect on the misdemeanant population as well as Driving with License Revoked (DWLR). Ms. Hevener stated that she could look at historical data on 1-180 days sentences for changes in misdemeanors.

Senator McKissick stated that it is interesting to see the impact of JRA so soon. Ms. Katzenelson said that North Carolina had a structured system in place already, it has excellent data, and that JRA fits into the structure. Commissioner Guice stated that the difference would be in what they do with the CRV population. Timing is also key. If the legislature had enacted some of the changes recommended by the Sentencing Commission, the State might not have been in the position of having to make so many changes so quickly.

Senator McKissick asked how the quick dips were working out. Commissioner Guice asked Anne Precythe to speak to this. She explained that the quick dips are intended as attention getters. Probation has identified the non-compliances for which it is appropriate.

Representative Jackson asked if 90 days was long enough for a CRV. He wanted to know if the Department was ready on day one for these offenders. Ms. Precythe said that if the Department had the full 90 days, it was enough time for their program to work. Representative Jackson asked if it would be beneficial to order them to report later, when everything is set up. Commissioner Guice said they were ready to take them in immediately. Ms. Davis asked if the offenders in the confinement center were all of the same sort. Commissioner Guice answered that they are not the same right now because CRV inmates are spread out among several units. DACJJ is developing a model at Johnston Correctional Institute where the inmates serving time for CRVs could be confined together but separated from the general prison population. Ms. Davis asked if there were programs set up for aftercare purposes. Commissioner Guice said that the probation officers on site will work with probation officers in the field to ensure a smooth transition.

Ms. Krueger asked if there would be Intensive Outpatient Programming (IOP) for these offenders completing the 90 days. Ms. Precythe answered that this was the missing piece at this time, but they would be candidates for the TECS program. Currently, DACJJ is working across the state to build programming through TECS to provide services to this group. Commissioner Guice said that they would be asking for more legislative money for this purpose.

JUSTICE REINVESTMENT IMPLEMENTATION REPORT SUBCOMMITTEE – STATUS REPORT

Chairman Spainhour recognized Michelle Hall for an update from the Justice Reinvestment Implementation Report Subcommittee. Ms. Hall provided information about the Justice Reinvestment Initiative, which is a data-driven approach to improving public safety, reducing corrections spending, and reinvesting savings in strategies that decrease crime. She explained that the JRA, which was passed in 2011, made substantial changes to sentencing and correction laws in North Carolina. Included in the JRA legislation was a mandate to the

Commission and the DACJJ to conduct ongoing evaluations regarding the implementation of the JRA. In response to the mandate, the Commission had formed the Justice Reinvestment Implementation Report Subcommittee with the purpose of gathering information, reviewing data where available, and reporting to the Commission any recommendations regarding the JRA.

Since the passage of the JRA and the formation of the Subcommittee, two annual reports had been submitted to the Legislature in compliance with the mandate. Ms. Hall explained that the first report, submitted April 15, 2012, included information about the preparation phase of implementation. There were no data yet to analyze the impact of any JRA provisions. As a result, the report focused on agency training efforts, policy and programmatic changes made in anticipation of the new law, and data collection or data system changes. The second JRA Evaluation report, submitted April 15, 2013, included information regarding the fine tuning of JRA policies and procedures. The main finding included in the second report was the staggered nature of the implementation of the new legislation – the staggered implementation was in part by design (the JRA had multiple and varied effective dates), and in part due to some delays agencies needed to develop policies to implement JRA provisions.

Ms. Hall noted that the next report, due April 15, 2014, will detail how the JRA is currently being interpreted in the field. The report will include revised policies and procedures agencies made in CY 2013, data on JRA provisions and practices, and information obtained through site visits conducted by staff across the state in September and October 2013. She concluded by providing a summary of the most recent meeting of the Subcommittee which included presentations from agencies, and update on data for the report, and a summary of some of the information staff learned during site visit interviews.

CREDIT FOR TIME SERVED SUBCOMMITTEE REPORT

Chairman Spainhour recognized John Madler to present the Credit for Time Served Subcommittee Interim Report (see Report). Mr. Madler told the members that the Sentencing Commission established the Credit for Time Served Subcommittee at its December 6, 2013, meeting in response to Commissioner Guice's request that the Commission study the statutory provisions related to the awarding of time credits against sentences of imprisonment and confinement. Specifically, he asked the Commission to focus on three areas of study:

1. Jail Credit statutes are not clear regarding the awarding of credits.
2. Jail credit statutes do not address new changes in the laws.
3. There is confusion regarding the collecting and calculating of jail credit.

The Subcommittee met twice and studied the issues that had been submitted for consideration. For some of the issues, the Subcommittee developed recommendations, while for others it decided that the law was clear and that the policy should not be changed. Several issues involved the period of confinement in response to violation (CRV) instituted as part of the Justice Reinvestment Act. The members recognized that the CRV is relatively new and that there is very little data on its use. The Department of Public Safety representative informed the

Subcommittee that they were revisiting the structure and approach to CRVS in general. For those reasons, the Subcommittee decided not to recommend any amendments to the CRV statutes at that time.

Members also heard from representatives of the Sheriffs' Association, the Conference of Clerks of Superior Court, and the Department of Public Safety's Combined Records Section about the record keeping process for jail credit from their perspectives. The speakers gave examples, identified problems they encountered, and answered members' questions about the process.

After studying the issues, the Subcommittee submitted the following three recommendations to the Commission:

1. The Subcommittee recommends that time spent in custody should count for credit against a defendant's sentence if the defendant's original charge and ultimate conviction arose out of the same incident.
2. The Subcommittee recommends that a defendant should be given credit for time spent in custody unless another sentence was imposed prior to the accrual of credit on the case currently being sentenced.
3. The Subcommittee recommends that the Sentencing Commission refer Commissioner Guice's questions regarding the imposition of terminal CRVs to the Justice Reinvestment Implementation Evaluation Report Subcommittee for further study.

Mr. Madler informed the Commissioners that the Subcommittee will continue to meet and study ways to improve the collection and calculation of jail credit.

Mr. Beeler commented that CRVs are a critical part of the JRA. He supported the idea of having the offender serve the entire 90 day period. The literature says that a program has to provide at least 500 hours of treatment in order for it to take and that it must also provide aftercare. A shorter period of treatment is more deleterious than no treatment at all.

Chairman Spainhour said that CRVs were discussed at length by the Credit for Time Served Subcommittee. It seemed to them that CRVs are only going to work for felonies because most misdemeanor sentences are less than 90 days in length. Perhaps the effort should be spent on trying to figure out what to do with felonies and misdemeanors should be addressed separately. Commissioner Guice said that this was a piece that had to be studied.

The members discussed the mechanics of awarding confinement credit. Mr. Sanders stated that he thought no one on the Subcommittee was disagreeing with the 90 days needed for a CRV, but that pre-trial credit complicated things. He said that there needed to be a legislative mechanism other than sentencing the offender to a set period of confinement to keep them for the full 90 days. Mr. Sanders also questioned what impact removing the credits from the CRV period would have on the projected savings under JRA.

Judge Morrison moved to adopt the Credit for Time Served Subcommittee's Interim Report. Sheriff Clemmons seconded the motion, and the motion carried.

Chairman Spainhour informed the members that the next full Commission meeting is June 13 and that the Justice Reinvestment Subcommittee will meet on March 28.

The meeting adjourned at 1:35 p.m.

Respectfully submitted,

Vicky Etheridge
Administrative Assistant