

**MINUTES**  
**NORTH CAROLINA SENTENCING AND POLICY ADVISORY**  
**COMMISSION MEETING**  
**RALEIGH, NC**  
**September 7, 2012**

The North Carolina Sentencing and Policy Advisory Commission met on Friday, September 7, 2012, at the North Carolina Judicial Center in Raleigh, North Carolina.

**Members Present:** Chairman W. Erwin Spainhour, Honorable Charlie Brown, Honorable Warren Daniel, Louise Davis, Honorable Richard Elmore, Honorable Robert Ervin, Honorable Clark Everett, Honorable John Faircloth, Chris Fialko, Paul Gibson, Bill Hart, Chief Deputy Secretary Jennie Lancaster, Moe McKnight, Dr. Harvey McMurray, Luther Moore, Honorable Fred Morrison, Sandy Pearce, Tony Rand, Honorable June Ray, and Billy Sanders.

**Guests:** Andrew Baird (UNC Law Student, Extern with Office of Administrative Hearings), Susan Sitze (Research Division, North Carolina General Assembly), Kaleb Wingate (NCCU Law Student), and Yolanda Woodhouse (AOC Court Programs).

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

**INTRODUCTION**

Chairman Spainhour called the meeting to order at 10:00 a.m. After reviewing the agenda, introductions of all those in attendance were made.

The Chairman recognized Executive Director Susan Katzenelson for her 15 years of service. The minutes from the June 15, 2012 Commission meeting were presented. Luther Moore made a motion to accept the minutes as written, June Ray seconded the motion, and the motion carried.

**REPORT ON THE 2012 LEGISLATIVE SESSION**

Sara Perdue presented the Criminal and Juvenile Bills ratified during the 2012 Legislative Session (*see attached handout*). She discussed felony bills that create new criminal offenses or change the elements of the existing offenses, felony bills that make changes to the classification of existing offenses, and felony bills that make changes to punishments.

Misdemeanor bills that create new criminal offenses or change the elements of existing offenses were presented, but there were no misdemeanor bills passed that make changes to the classification of existing offenses or changes to punishment. No juvenile justice bills were ratified. Ms. Perdue mentioned bills of interest to the Commission.

Tony Rand said that sex offenders are on post-release supervision for five years but, prior to 2011, only faced nine months in prison for a violation. The General Assembly had

authorized the Post-Release Supervision and Parole Commission to hold sex offender violators in contempt. Mr. Rand asked if the amendment to G.S. 15A-1368.3 in House Bill 1021, Justice Reinvestment Clarifications, repealed that provision. John Madler answered that it did not repeal that provision.

Judge Charlie Brown questioned eligibility under House Bill 1023, Expunction of Nonviolent Offenses. He understood that a previous expunction would make the offender ineligible for expunction under this provision. Susan Sitze said that that was the intent of the sponsors. If an offender has had a previous expunction, with the exception of a few drug offenses, he/she is not eligible for another expunction. Judge Brown asked about an expunction of an offense for which the offender received a prayer for judgment continued (PJC). Ms. Sitze said that was not considered by the committee so she did not know the answer; however, a PJC is not a conviction and, therefore, should not preclude the expunction. Chairman Spainhour said that a PJC is a conviction for prior record level purposes. Bill Hart said that case law says that a PJC is a conviction for certain purposes. Judge Morrison commented that the District Attorney and the victim(s) are allowed a say before the Judge, then the judge will make his/her decision as to whether an expunction will be granted.

Chris Fialko referred to SB 105, Increasing Penalties for DWI Deaths and Murder by Vehicle, and asked if this was the first time the General Assembly had passed a provision that violated the Structured Sentencing Punishment Chart. He expressed concern and wondered if the Commission should let the General Assembly know that the provision violated structured sentencing. Mr. Hart responded that the General Assembly had ignored the Commission's comments on certain bills in the past and he cautioned against appearing to reprimand them.

David Lagos gave a brief overview of the provisions enacted in House Bill 950, Modify 2011 Appropriations Act. Reductions to the budgets of the Judicial Department, the Department of Justice, and the Department of Public Safety (DPS) were accomplished largely through management flexibility reserves. The legislature restored the recurring appropriation for the state's Family Court Program. The bill also authorized DPS to reclassify vacant positions in order to add probation officers and related staff to handle the increased caseloads resulting from the Justice Reinvestment Act of 2011, and directed the Division of Adult Correction to study the feasibility of creating technical violation centers to house probationers serving 90-day confinements for technical violations.

Mr. Lagos summarized the results of the Commission's annual review of proposed legislation pursuant to G.S. 164-43. During the 2012 short session, the General Assembly enacted 28 felony provisions, 16 of which were reviewed by the Commission. For 2 of the 16 provisions, the Commission's Offense Classification Criteria were found to be inapplicable; 10 provisions were found consistent with the Offense Classification Criteria or with Structured Sentencing; and 4 were found to be inconsistent with the Criteria or with structured sentencing. The Commission recommended an alternative offense classification for 3 of these 4 provisions; and the General Assembly adopted 1 of the recommended changes. Of the 12 felony provisions that the Commission did not review, 9 were added to the relevant bills after the Commission's June 15, 2012 review date, 1 was amended after the review date, and 2 were ratified before the review date.

## **UPDATE ON CORRECTIONAL AND DELINQUENT POPULATIONS**

Ginny Hevener presented an update on correctional and delinquent populations. As part of this update, Ms. Hevener summarized the potential impact of the bills ratified during the short session. Sentencing Commission staff prepared 13 impact projections during the session, including projections for 8 of the 18 ratified bills. A total of 15 new felony offenses and 14 new misdemeanor offenses were created, and six felony offenses were reclassified. There were four punishment changes. The majority of the new felony offenses were for Class F-I (non-violent) felonies, with only 3 new offenses for Class A-E (violent) felonies. Individually, most of these new offenses are not expected to have a substantial impact on the prison population. Ms. Hevener noted that the new criminal penalties are also subject to the Justice Reinvestment Act (JRA), and that the limited empirical data available since implementation make it difficult to determine the impact of changes to criminal penalties.

Ms. Hevener continued with an update on the prison population (*see* attached handout). Ms. Hevener reminded Commission members that two prison population projections were prepared as a result of the significant changes to the criminal justice system passed through the JRA. The Pre-JRA Projection provides an estimate of the prison population based on the policies and practices of the criminal justice system as it existed prior to JRA and is based on empirical data from FY 2011. The JRA projection provides an estimate of the prison population based on assumptions about how the criminal justice system will operate under JRA. Under the Pre-JRA Projection, the prison population is projected to increase from 40,392 to 41,342 across the ten-year projection period compared to an increase from 39,142 to 39,976 for the JRA projection. As a result of changes in demographic trends, decreases in crime trends, and the enactment of policy changes prior to the passage of JRA, both projections indicate a decline in the prison population compared to the previous projection, with further declines expected with the implementation of JRA.

Ms. Hevener reviewed a graph depicting prison population trends from July 2003 through July 2012. The prison population began to stabilize in 2009 after years of growth and has been declining since July 2011. Ms. Hevener noted that the declines from July to December 2011 can be attributed primarily to changes to earned time credits that went into effect in June 2011, while the declines from January to July 2012 can be attributed to changes in prison entries as a result of the JRA. Overall, prison entries declined 17% from FY 2011 to FY 2012, with an 11% decline for prison entries resulting from a new crime and a 23% decline for prison entries resulting from revocation of probation. The decline in revocation entries to prison is a result of the legal change under JRA that places limits on revocations of probation and establishes 90-day confinement in response to violation (CRV) for technical violations of probation. Ms. Hevener noted that the data to date do not show a corresponding shift from revocation entries to CRV entries, although the number of CRV entries to prison is gradually increasing. There were 544 CRV entries to prison in FY 2012.

Ms. Hevener provided a comparison of the projections for FY 2012 with the actual prison population for that time period. The average prison population for June 2012 was 38,569 compared to the Pre-JRA Projection of 40,392 (a difference of 4.7%) and the JRA Projection of

39,142 (a difference of 1.5%). The prison population is currently lower than prison capacity, with this trend projected to continue based on current trends.

Ms. Hevener mentioned that staff has started working with the Department of Public Safety's Office of Research and Planning on the next projections and that staff would be using a new simulation model to produce the projections. The Administrative Office of the Courts contracted with SAS Institute to develop a simulation model for the Sentencing Commission to use for projecting the prison population. The new model was developed using SAS's Simulation Studio software. Ms. Hevener provided an overview of flowcharts that staff developed to provide the framework for the new simulation model (*see* attached handout). The flowcharts illustrate the criminal justice system flow (pre- and post-JRA) as it pertains to the prison projections. Susan Katzenelson commented regarding the complexity of producing prison population projections over the next several years. Data from this fiscal and next fiscal year will be a mix of partial JRA implementation, not yet empirically representative of the full implementation of the new law.

Ms. Hevener also presented an update on the youth development center population (*see* attached handout). This population contains all adjudicated juveniles with a level 3 disposition – whether in a youth development center (YDC), awaiting placement in an YDC, or a community-based placement. The projection for the end of FY 2012 remains stable at around 325 over the five-year projection. Ms. Hevener reviewed a graph depicting YDC population trends from July 2003 through July 2012. Like the adult prison population, the YDC population has also been decreasing over the past few years. Ms. Hevener provided a comparison of the YDC projection for FY 2012 with the actual YDC population for that time period. The projected YDC population for June 2012 was 325 compared to the actual average population of 305, a difference of 20 or 6.6%. Staff has started working with the Department of Public Safety's Division of Juvenile Justice on the next projections and will have updated projections in time for the long session.

Mr. Rand suggested that the staff of the Sentencing and Policy Commission help him predict at what level the newly projected post-release supervisees (12,000 – 14,000 due to ratification of JRA) will violate supervision and what level they will be put back in prison. His staff is trying to predict the number of personnel they will need to do this additional work. Ms. Hevener explained that last year the revocation rate for post-release supervision was 21%. Based on the high rate of reoffending by low-level felons, it was projected that this rate would increase to 25% with the addition of Class F-I felons to post-release supervision. Mr. Rand said that would equate to between 1,500 and 2,000 more offenders returning to prison for 90-day periods. He is concerned about the amount of paperwork that will have to be generated to accommodate these numbers. Susan Katzenelson offered for the SPAC Research Staff to meet with the Post-Release Supervision and Parole Commission and with Community Corrections to share the knowledge that they have from the recidivism studies. Mr. Rand expressed his concern that he will not have enough personnel to do this job well.

Jennie Lancaster called attention to one of the columns in the handouts – Expanded Operating Capacity (EOC). Starting with 2013, the number remains the same. There was no money for capital construction for any prison growth. It is the intention of the Division of Adult

Correction that the prison system be run the way it is supposed to be run. The numbers are coming down and beds from day rooms are being eliminated. Also, some of the older prisons will be shut down sometime in the future which will be a cost savings to the Division and to the State. They are following the numbers very closely and re-doing their 10-year capital plan.

Bill Hart asked Chief Deputy Secretary Lancaster what the difference was in Standard Operating Capacity and Expanded Operating Capacity. Ms. Lancaster answered that in *Small v. Martin* the Federal court authorized housing inmates at 50 square feet per inmate. North Carolina subsequently received approval to house its inmates at 130% of the 50 square feet. She pointed out that, for the first time in 30 years, the U.S. Supreme Court stepped in and told California how to house its inmate population that was getting out of control and that the 50 square feet is the accepted standard by the American Correctional Association.

### **STUDIES OF SPECIAL SENTENCING ISSUES**

John Madler presented two issues that had been referred to the Sentencing Commission for study. The first issue dealt with sentencing minors for first degree murder and the study was a mandate from the General Assembly.

On June 25, 2012, the U.S. Supreme Court issued an opinion in the case of *Miller v. Alabama*. The Court held that the Eighth Amendment prohibition of cruel and unusual punishment forbids a sentencing scheme that mandates life in prison without possibility of parole for offenders who are convicted of a homicide offense and are less than 18 years of age at the time of their offense. Mr. Madler told the members that the decision built on previous cases in which the Court had banned certain punishments for defendants under 18 (capital punishment and sentences of life without parole for non-homicide crimes) and had required individualized consideration of the particular defendant before the death penalty may be imposed. In the *Miller* case, the Supreme Court did not ban the punishment of life without parole for minors convicted of a homicide offense, but it did say that the judge must be able to consider the mitigating circumstances of the defendant.

Mr. Madler reminded the members that in North Carolina a juvenile 13 and older, alleged to have committed a Class A felony, must be transferred to adult court, that an offender who is 16 or 17 is already considered an adult, and that the punishment for first degree murder is death or life without parole. He added that since the Supreme Court previously banned the death penalty for minors convicted of first degree murder, the only punishment for minors convicted of first degree murder is life without parole.

Mr. Madler then informed the Commission members that, in response to *Miller v. Alabama*, the General Assembly passed Senate Bill 635, Minors/Sentencing for 1<sup>st</sup> Degree Murder. (It was signed by the Governor on July 12, 2012; S.L. 2012-148.) This bill set up a separate sentencing procedure for a defendant who is convicted of first degree murder and who was under the age of 18 at the time of the offense. If the sole basis for the conviction was the felony murder rule, then the court must sentence the defendant to life imprisonment with parole. If not, then the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole or life imprisonment with parole. "Life

imprisonment with parole” means the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole. The term of parole is five years. If parole is revoked and the offender is returned to prison, he is not eligible for parole for five years from the date of the return to confinement. The bill became effective July 12, 2012, and applies to any sentencing hearings held on or after that date; it does not address the issue of retroactivity. According to the Department of Public Safety, there are 89 offenders in prison who have a sentence of life without parole for first degree murder and who were under 18 at the time of the offense.

Section 2 of the bill requires the North Carolina Sentencing and Policy Advisory Commission, in consultation with the Office of the Juvenile Defender, the Conference of District Attorneys, and other organizations and agencies it deems appropriate, to study the provisions in the act, United States Supreme Court precedent relevant to sentencing a minor for first degree murder, sentencing policies in other jurisdictions, and any other matter relating to the sentencing of minors convicted of first degree murder. The Commission is required to report its findings and recommendations to the General Assembly no later than January 31, 2013.

Mr. Madler told the members that the second issue dealt with felony child abuse offenses and was requested by a member of the General Assembly. On July 24, 2012, Representative Horn of Union County sent a letter to the Sentencing Commission asking it to examine several issues regarding the felony child abuse offenses and to provide him with additional information. (*See Rep. Horn letter*) Specifically, he asked the following:

1. How does North Carolina compare to other states in the definition of felony child abuse either with Serious Bodily Injury or Serious Physical Injury?
2. What is the process for revisiting both the definition of Serious Bodily Injury and Serious Physical Injury? He expressed concern over the use of the term “intentionally” in the current definition.
3. Would the NC Sentencing and Policy Advisory Commission undertake a review of child abuse sentencing guidelines and recommend changes to the General Assembly? Specifically consider reclassifying the offenses.

The letter does not give a due date but the staff recommended responding to Representative Horn before the beginning of the 2013 Session, which is January 30.

Judge Spainhour announced the formation of the Special Sentencing Issues Subcommittee to address the mandated study. He stated that he would serve as chair and he listed the members. He set meeting dates for October 12 and November 9. Luther Moore moved to accept the request to study the felony child abuse offenses and to assign it to the Special Sentencing Issues Subcommittee. The motion was seconded and carried.

### **FY 2012/13 STAFF WORK PLAN**

Susan Katzenelson presented the 2012/2013 Staff Work Plan (*see attached handout*). Luther Moore moved that the plan be accepted with the addition of studying Child Abuse. Louise Davis seconded the motion, and the motion carried.

Chairman Spainhour reminded the Commissioners that the next Commission meeting will be on December 14.

The meeting adjourned at 12:00 p.m. for lunch and the two Subcommittee meetings in the afternoon.

Respectfully submitted,

Vicky Etheridge  
Administrative Assistant