

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY
COMMISSION MEETING
RALEIGH, NC
December 14, 2012

The North Carolina Sentencing and Policy Advisory Commission met on Friday, December 14, 2012, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Honorable Charlie Brown, Christopher Clifton, Honorable Warren Daniel, Louise Davis, Honorable Richard Elmore, Honorable Robert Ervin, Honorable John Faircloth, Chris Fialko, Ilona Kusa, Chief Deputy Secretary Jennie Lancaster, Honorable Floyd McKissick, Moe McKnight, Dr. Harvey McMurray, Luther Moore, Honorable Fred Morrison, Sandy Pearce, Tony Rand, and Honorable Tim Spear.

Guests: Nancy Britt, Cullen Browder (Reporter, WRAL-TV), Jim Coleman (Duke Law School), Heather Cox (SAS), Cammie Dunnagan (SAS), Shannon Hanes (DJJ), Honorable Craig Horn (North Carolina House of Representatives), Megan Howell (DJJ), Eric Hunley (SAS), Robin Jenkins (DJJ), Anne Maness (Extern with Office of Administrative Hearings), Becky Parnell, Stephanie Parnell, Mary Pollard (North Carolina Prison Legal Services), Lao Rupert (?), Nicole Sullivan (DPS), George Tkach (DJJ), and Eric Zogry (Juvenile Defender).

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. He introduced new Commissioner Ilona Kusa, representing the Victim Assistance Network. After reviewing the agenda, introductions of all those in attendance were made.

The minutes from the September 7, 2012 Commission meeting were presented. Luther Moore made a motion to accept the minutes as written, Moe McKnight seconded the motion, and the motion carried.

Chairman Spainhour announced the dates for the 2013 Commission meetings: March 8, June 14, September 6, and December 6.

REPORT OF THE SPECIAL SENTENCING ISSUES SUBCOMMITTEE

Mr. Lagos summarized the subcommittee's report and recommendations regarding the Commission's mandate in Senate Bill 635 (S.L. 2012-148) to review the provisions of the bill and report back to the General Assembly by January 31, 2012. (*See handout*). Senate Bill 635 enacted special sentencing provisions for minors convicted of first degree murder, in order to comply with the U.S. Supreme Court's holding in *Miller v. Alabama*. Pursuant to the mandate in Section 2 of the bill, the Subcommittee consulted with the Juvenile Defender, the Conference of District Attorneys, the North Carolina Bar Association, and the Post-Release Supervision and

Parole Commission, studied the relevant Supreme Court precedent on the sentencing of juvenile offenders for first-degree murder, and examined the sentencing provisions in other states affected by the *Miller* decision. After reviewing each provision of SB 635, the Subcommittee submitted the following four recommendations to the Commission:

1. The Commission should recommend repeal of the provision of SB 635 that distinguishes felony murder from other forms of first-degree murder;
2. The Commission should recommend expansion of the new sentencing provisions enacted by SB 635 to include all Class A felony homicide offenses, including the Class A form of murder of an unborn child in G.S. 14-23.2;
3. The Commission should alert the General Assembly to existing non-homicide offenses that carry a mandatory sentence of life without parole for offenders under the age of 18, in violation of Supreme Court precedent; and
4. The Commission should request a memorandum opinion from the Attorney General's Office on the retroactive effect, if any, of the *Miller v. Alabama* decision.

After reiterating the Commission's mandate in SB 635, Judge Spainhour read the portions of the subcommittee's meeting minutes related to the felony murder issue. He distributed to commissioners a letter from Representative Glazier, dated December 13, 2012, explaining the bi-partisan consensus that led to the treatment of felony murder in SB 635.

Luther Moore moved to adopt the Subcommittee's report and recommendations. Judge Richard Elmore seconded the motion.

Chairman Spainhour recognized Mary Pollard, Executive Director of North Carolina Prisoner Legal Services, Inc., who urged the Commission not to recommend any change related to felony murder. As enacted, SB 635 prescribes a sentence of life with parole for minors convicted of first-degree felony murder, while authorizing a sentence of life with parole or life without parole for minors convicted of any other form of first-degree murder. Based on the Supreme Court's recent decisions, Ms. Pollard predicted the Court would eventually bar life without parole sentences for minors convicted of felony murder.

Chairman Spainhour next recognized Professor James E. Coleman, Jr., from Duke University School of Law. Professor Coleman asked the Commission to recommend to the General Assembly that SB 635 be made to apply retroactively. He noted that the Supreme Court provided retroactive relief to the petitioner in *Miller's* companion case, *Jackson v. Hobbs*. Professor Coleman further noted that of the 89 offenders in North Carolina currently serving mandatory life without parole for juvenile offenses, 91% are people of color. The existence of this disproportionate impact under a mandatory sentencing statute raised a question of whether race was a factor in these cases.

Senator McKissick expressed support for providing retroactive relief under *Miller*. Moreover, in light of the history of SB 635 recounted in Representative Glazier's letter, Senator McKissick favored leaving in place SB 635's provision on felony murder. Jenny Lancaster described her own experience in working with youthful offenders convicted of murder and

agreed that the General Assembly properly excluded felony murder from eligibility for life without parole in SB 635. Judge Ervin noted the possibility that the Subcommittee's recommendation to treat felony murder the same as other forms of first-degree murder under SB 635 may expose North Carolina to future litigation, given the apparent trend in the Supreme Court's juvenile sentencing jurisprudence.

Chairman Spainhour reviewed the four recommendations of the Subcommittee which were the subject of Mr. Moore's motion. Senator McKissick made a substitute motion to delete recommendation (1), and to amend recommendation (4) to note the information received by the Commission regarding the possibility of retroactive relief under *Miller*. At Judge Ervin's suggestion, Senator McKissick proposed amending recommendation (4) to provide that the General Assembly should receive memoranda on retroactivity from both the Attorney General and an appropriate alternative perspective such as the Juvenile Defender. Judge Elmore seconded the substitute motion.

Representative Spear supported leaving the Subcommittee's recommendations intact. Chris Fialko referred to the Commission's Homicide Classification Criteria and suggested that, for juvenile offenders, committing a homicide in the course of a felony may not reach the level of a legally recognized substitute for premeditation and deliberation so as to qualify as a Class A felony.

The Commission adopted the substitute motion.

John Madler presented the Subcommittee report on the study of certain felony child abuse offenses. (*See handout*) He stated that Representative D. Craig Horn (House District 68) requested the study. The Commission, at its September 7 meeting, accepted the request and assigned the study to the Special Sentencing Issues Subcommittee. The Subcommittee met on Friday, October 12, and reviewed the development of the offenses, the current offenses, and recent sentencing data. The Subcommittee also looked at child abuse offenses in other states. After discussing the issues raised by Representative Horn, the Subcommittee developed its response.

1. How does North Carolina compare to other US states in the definition of felony child abuse either with serious bodily injury or serious physical injury?

The Subcommittee found that, while other states vary in the specifics of their felony child abuse offenses, North Carolina is generally consistent with other states in its approach to such offenses.

2. What is the process for revisiting both the definition of serious bodily injury and serious physical injury (specifically, the use of the term "intentionally" in the elements of the offense)?

The Subcommittee found that the current language of G.S. 14-318.4 appears to address Representative Horn's concern.

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, would the Commission comment on changing Class E, Child Abuse Inflicting Serious Physical Injury, to Class D, and changing Class C, Child Abuse Inflicting Serious Bodily Injury, to Class B2?

The Subcommittee found that reclassifying the offense of child abuse inflicting serious physical injury (G.S. 14-318.4(a)) from Class E to Class D would be inconsistent with the Commission's Offense Classification Criteria for Class D. Class E felony offenses are those that reasonably tend to result in or do result in serious personal injury. Class D felony offenses are those that reasonably tend to result in or do result in serious infringements on property interest which also implicate physical safety concerns by use of a deadly weapon or an offense involving an occupied dwelling. Child abuse inflicting serious physical injury addresses personal injury and not a property interest.

The Subcommittee found that reclassifying the offense of child abuse inflicting serious bodily injury (G.S. 14-318.4(a3)) from Class C to Class B2 would be consistent with the Commission's Offense Classification Criteria for Class B2. Class C felony offenses are those that reasonably tend to result or do result in serious long-term personal injury. Class B felony offenses are those that reasonably tend to result or do result in serious debilitating long-term personal injury. The definition of "serious bodily injury" is broad but can include serious long-term personal injury that is debilitating.

However, the Subcommittee also found that the current classifications of the offenses are proportional to similar assaultive offenses in terms of exposure to prison time. The Class E felony of child abuse inflicting serious physical injury (G.S. 14-318.4(a)) exposes the offender to approximately five times the punishment for the Class A1 misdemeanor of assault inflicting serious injury (G.S. 14-33(c)(1)); the Class C felony of child abuse inflicting serious bodily injury (G.S. 14-318.4(a3)) exposes the offender to approximately five times the punishment for the Class F felony of assault inflicting serious bodily injury (G.S. 14-32.4(a)). Raising an offense from Class C to Class B2 more than doubles the potential sentence length.

Representative Horn stated that one of his concerns was that the current assault offenses do not differentiate between a child victim and an adult victim. Judge Ervin explained that there are aggravating factors that would allow the court to increase the punishment for a child victim. Chairman Spainhour added that, if the perpetrator is the parent or person providing care to or supervision of the child, that person would be charged with child abuse and the punishment is five times greater than for the similar assault offense.

Luther Moore moved to adopt the report as presented; the motion was seconded and carried.

COURT STATISTICS – FY 2011/12

Judge Spainhour recognized Michelle Hall to present court statistics for Fiscal Year 2011/2012 (*see Handout*). Ms. Hall informed Commissioners that the information presented

would eventually be included in the annual Structured Sentencing Statistical Report for Felony and Misdemeanors. She emphasized the 2011/2012 data are preliminary. Trend data included in the presentation come from previously published Statistical Reports. Ms. Hall noted that the FY 2011/2012 felony and misdemeanor convictions represent the last pure Structured Sentencing sample; the vast majority of convictions (91% of felonies) were imposed prior to the effective date of the Justice Reinvestment Act (JRA). The data will serve as a useful point of comparison in understanding how sentencing practices change under the JRA.

Ms. Hall defined a sentencing episode as the sentence imposed for the most serious conviction for a given day of court. In FY 2011/12, there were 28,169 felony convictions (excluding drug trafficking and violent habitual felon convictions) and 140,833 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 decreased by 4% in the last fiscal year and misdemeanor convictions have decreased by 7% in the last fiscal year. Ms. Hall noted the ten-year trends; felony convictions have been declining since FY 2008/2009 and misdemeanor convictions have been declining since FY 2004/2005. 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, and drug trafficking convictions. Ms. Hall concluded that the data reflect Structured Sentencing at work in the North Carolina court system; she noted FY 2011/2012 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.

Judge Brown offered a possible explanation regarding why there were fewer drug trafficking convictions for FY 2011/2012. Drug trafficking convictions have been declining since 2009. He suggested that although there the same number of drug trafficking charges as in previous years, the threshold for reaching drug trafficking status has been raised to four pills; this results in dropped charges. Chris Clifton asked if the number of drug trafficking convictions included attempts to traffic. Ms. Hall and Ms. Hevener did not think this number was included, but would check the data for an answer.

Mr. Rand asked if driving while impaired convictions were included in the misdemeanor data, and Ms. Hall answered that they were not. Ms. Hall then listed all exclusions from this data for felony and misdemeanor convictions. Mr. Rand asked if data was available for the number of DWI convictions that were given active sentences. Ms. Hevener explained that the Sentencing Commission does not keep any data on DWI convictions, but that AOC and DAC would be able to supply that information.

Senator Daniel asked about population growth over the past ten years. Ms. Hevener

answered that population growth had remained steady at 1% each year. She noted the 50 and older group is growing at the most rapid rate; the younger group (the group most likely to be arrested) is growing at a declining rate. Luther Moore asked if charges and arrests had gone down in the same manner as convictions. Ms. Hall answered arrests had also been declining; she was not sure about trends for charges. Ms. Lancaster said that North Carolina was blessed with this downward trend because there is no capital money for construction for more prisons. She stated the add-ons for existing prisons will not come online until next year. Mr. Fialko asked if there were any death sentences this year. There were none in 2012; there were two in 2011.

Mr. Rand asked about the current prison population; Ms. Lancaster answered that it was around 37,600. She noted the number has decreased from over 41,000. She emphasized, however, that the number will start increasing again, especially since more prisoners will be on post-release supervision and more will be revoked and return to prison. Discussion ensued about downward trends in crime indicators and possible explanations. Ms. Hall noted the Technical Forecasting Advisory Group, which met in November, also discussed crime trends. The group could only speculate when the bottoming out of the decreases in the trends will occur; there was a general feeling that at some point, trends will start to increase again. Representative Faircloth asked if the public perception regarding the crime rate is accurate. Ms. Hall and Ms. Katzenelson thought the public perception regarding crime is accurate, but Mr. Rand stated that he did not believe that was the case. He noted the 24-hour news cycle; people see more and more crime reported on television, which leads them to believe that crime rates are higher than the numbers show. Ms. Hall concluded that the Statistical Report would be sent to Commissioners as soon as it is published.

JUVENILE DELINQUENT POPULATION PROJECTIONS

Tamara Flinchum presented the Juvenile Resource Projections. In the Juvenile Dispositional Chart, there are three offense classifications: violent, serious, and minor; three delinquency history levels: low, medium and high; and three types of dispositions imposed: Level I (community punishment), Level II (intermediate punishment), and Level III (Youth Development Center (YDC) commitment). In 2011/12, there were 6,384 juveniles adjudicated delinquent. The majority of juveniles (73%) committed a minor offense, and 73% had a low delinquency history. These numbers have remained stable for the last five years. Of those adjudicated, 64% received community punishment, 34% received an intermediate punishment, and 2% were committed to a YDC. The average stay in a YDC was 13 months, which has remained fairly stable over the last five years. Ms. Flinchum pointed out that juvenile projections are not quite as accurate as adult projections because the juvenile disposition chart is more flexible, the YDC population is much smaller, and the juvenile system is more sensitive to changes in policy and/or practices. Looking at YDC population trends, the YDC population has generally declined since January 2003. The YDC resource needs are projected to remain stable over the projection period from 276 YDC beds by June 2013 to 279 YDC beds by June 2017.

Ms. Pearce asked what the capacity was of YDC beds. Ms. Flinchum deferred to Robin Jenkins of the Division of Juvenile Justice, and he responded that the maximum capacity is 293 beds with current staff. Mr. Fialko wanted to know how many juveniles under the age of 16 were bound over for adult court. Megan Howell from DJJ answered that it averaged to be

around 28 juveniles per year. Ms. Lancaster stated that the population under 17 now serving in the adult system is the lowest it has ever been and has remained at that level for the last several years. Ms. Davis asked how 13-year old juveniles would be housed in the adult system. Ms. Lancaster answered that all male juveniles are housed at Western Correctional Institution, and that if a 13-year old came in, he would be carefully watched although Western is single-bed cells. Female juveniles are housed at the Women's prison in Raleigh and would be carefully watched as well.

SUBCOMMITTEE STATUS REPORTS

Judge Spainhour recognized Judge Robert Ervin, Chair of the Classification of Homicide and Drug Offenses Subcommittee. Judge Ervin reminded the Commission that this Subcommittee had presented its proposed Homicide Offense Classification Criteria to the full Commission on June 15, 2012. The Commission adopted the criteria as recommended. On September 7, the Subcommittee reconvened to take up the issue of drug offense classification. Presentations were made by David Lagos and John Rubin of the UNC School of Government. On November 9, 2012, the members of the Subcommittee heard additional presentations on the nature and effect of controlled substances and the process undertaken when scheduling a controlled substance under G.S. 90-88. Staff also provided information on the drug offense structures of other states and under federal law.

The Subcommittee members felt that since the Commission is not mandated to reclassify existing drug offenses, and that drug trafficking offenses are not punished under Structured Sentencing, Drug Offense Classification Criteria would offer very little help to the General Assembly. The Subcommittee made the recommendation that the Commission review proposed drug offense classifications on an ad hoc basis, by comparison to existing offenses. Judge Ervin made a motion to accept the recommendation; the motion was seconded and carried. This finishes the work of this subcommittee.

Ms. Hall informed the Commission that "attempt to traffick" drug convictions were not included in the drug trafficking convictions presented earlier in the meeting.

Judge Brown began by informing the Commission members that Professor Jamie Markham of the School of Government had written a book about the Justice Reinvestment Act. Through grant funds, the Division of Adult Correction was making copies available to members of the criminal justice system, including members of the Sentencing Commission. One copy was available for each member.

Judge Brown then presented an update on the Justice Reinvestment Implementation Report Subcommittee. He reminded the members that the Commission created the Subcommittee at its meeting on December 2, 2011, to assist with the preparation of the statutorily-required annual report on the implementation of the Justice Reinvestment Act and to make any recommendations regarding implementation. The Commission submitted the first report on April 16, 2012. Since then, the Subcommittee met once to receive updates from the agencies involved in implementing the Act. It heard from the Administrative Office of the Courts, the Department of Public Safety, and the N.C. Sheriffs' Association. Judge Brown noted

that, overall, elements of the Justice Reinvestment Act will continue to be implemented over time and that limited data will be available for the 2013 report.

Judge Brown concluded by telling members about the Justice Reinvestment Administrative Responses Conference he attended in New Orleans earlier in the week. A delegation from North Carolina met with other states and discussed aspects of delegated authority.

Judge Spainhour asked if any other southern states were represented at the Conference in New Orleans. Judge Brown answered that Arkansas and Georgia delegations were both there. Ms. Lancaster noted that Georgia's system is much more similar to North Carolina's than Arkansas's system is. Judge Ervin wanted to know if there was any data on how often the quick dip option is used. Judge Brown answered that it was rarely being used so far, only seven or eight times in North Carolina. Senator McKissick wanted to know why they weren't using it more. Judge Brown and Ms. Lancaster both agreed that it was imperative that those responsible for quick dips were properly trained, jail space was available, and that this power not be abused.

Mr. Clifton wanted to know if any of these quick dips had been litigated. Judge Brown reported that, due to the short duration, none of them had been appealed. Ms. Pearce asked if any consideration had been given to skipping the next Recidivism Report since JRA data would not be available. Ms. Katzenelson said that the biannual reporting requirement was the law. Ms. Pearce said that maybe some amendment could be made as she felt that it would be a lot of work to prepare the report on the old system's data instead of waiting a year for the JRA data. Representative Faircloth stated that he was sure they would be re-visiting several items in the JRA legislation.

Ms. Sullivan added that since North Carolina is on the front end of quick dips, they can apply for federal grants to study the use of quick dips in North Carolina. This would provide information to determine whether or not this is working in North Carolina.

Mr. Rand said that he should have about 12,000 more cases with JRA, and that approximately 60% of them would probably be revoked. That would mean six or seven-thousand additional prisoners. The question is what to do with them, and what would it do to the prison population. Ms. Lancaster stated that centers could be established dedicated to CRVs and run by Community Corrections, not by the Division of Prisons. Right now, DAC has an area set aside for the CRVs so that they are not housed with the other prisoners. She said that there are several closed minimum security prisons that could be turned into these centers. They would not be operated like a prison. Mr. Rand expressed concern about the proper resources being there.

Judge Brown said that one of the things that was highlighted at the Conference was that probation officers are not revocation officers; they are much more than that. He also wanted to reiterate that delegated authority is not new to North Carolina. Probation officers have had this for twenty years. JRA just expanded that authority. The sanction of jail time has gotten a lot of attention. One of the other concerns that the Subcommittee has is programs. Ms. Sullivan of DPS noted that they are trying to identify programs that will work for intervention. They are identifying service providers and they do have TECS programs in 76 counties. One of the areas

that no providers have bid on is a program for sex offenders. This really needs attention in North Carolina.

PROJECTING PRISON POPULATIONS WITH SAS SIMULATION STUDIO

Ginny Hevener provided an overview of the Sentencing Commission's new simulation model that will be used to project the prison population. The Administrative Office of the Courts contracted with SAS Institute to develop the simulation model using their Simulation Studio software. Ms. Hevener noted that it was necessary to develop a new model to take into account the changes in criminal justice processes under the Justice Reinvestment Act (JRA).

Ms. Hevener described the system flow pre- and post-JRA as it pertains to the development of prison population projections. She then reviewed the simulation model, which combines elements of both the pre- and post-JRA models to handle the mix of offenders that will exist. While all probation violations will be subject to the changes under JRA, the post-release supervision population will include pre-JRA prisoners for years to come.

The new simulation model will be used to produce the ten-year prison population projections and to prepare impact analyses for proposed changes to criminal penalties. In addition, the prison projections are used as the starting point for the Division of Adult Correction's custody projections. Ms. Hevener noted that staff currently are working on the prison projections and hope to have them finalized in January.

Ms. Lancaster wanted to clarify whether the model accounted for jail time an offender serves awaiting a CRV hearing. Ms. Hevener answered that the model did account for this. Mr. Moore asked how Ms. Hevener and Ms. Flinchum tested the model – how did they know it works? Ms. Hevener answered that the pre-JRA model was tested using multiple years of historical data. The new model's accuracy was tested against the actual prison population and against the results of the previous simulation model, with similar results found. Mr. Moore asked how long SAS would continue to support this model. Ms. Hevener stated that staff has the capability to make changes to the model in-house, but that SAS would provide support for the product similar to that provided for their other products. Simulation Studio is also used in many other fields.

Ms. Pearce asked if any JRA data was ready to run through this model. Ms. Hevener answered that there would be very little data available this year. Ms. Lancaster stated that the DAC was told it would not have data for three years. Ms. Pearce asked how long it takes to run the model once the data is input. Ms. Hevener said that the model takes about 30-45 minutes to run, but it is the data preparation that takes the time. When running impact projections, different scenarios are run, so each one takes 30-45 minutes once the data preparation is done. Mr. Moore asked how much the model cost. The cost of the model was just over \$100,000.

Chairman Spainhour informed the Commissioners that the Commission meeting dates for 2013 are March 8, June 4, September 6, and December 6.

The meeting adjourned at 2:10 p.m.

Respectfully submitted,

Vicky Etheridge
Administrative Assistant