

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY
COMMISSION MEETING
June 14, 2013

The North Carolina Sentencing and Policy Advisory Commission met on Friday, June 14, 2013, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Sheriff James Clemmons, Louise Davis, Honorable Richard Elmore, Chris Fialko, Bill Hart, Honorable Darren Jackson, Ilona Kusa, Honorable Floyd McKissick, Dr. Harvey McMurray, Honorable Fred Morrison, Sandy Pearce, and Tommy Thompson.

Guests: Keenon James (NC Sheriffs' Association), Tracy Little (Office of State Budget and Management), Jamie Markham (UNC School of Government), George Pettigrew (Division of Adult Corrections, Department of Public Safety), Shaunis Mercer (Office of the Juvenile Defender), Thomas Maher (Office of Indigent Defense Services), Jean Steinberg (Division of Juvenile Justice, Department of Public Safety), Kimberly Williams (NC Governor's Crime Commission), Yolanda Woodhouse (AOC Court Programs) and Eric Zogry (Office of the Juvenile Defender).

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

INTRODUCTION

Chairman Spainhour called the meeting to order at 10:00 a.m. He introduced new staff member Jennifer Wesoloski and new Commissioner Representative Darren Jackson. After Judge Spainhour reviewed the agenda for the meeting, Judge Elmore moved to adopt the minutes from the March 8, 2013, meeting and the motion carried.

JUVENILE RECIDIVISM IN NORTH CAROLINA

Tamara Flinchum presented the Juvenile Recidivism Study: FY 2008/09 Juvenile Sample. (*See* attached handout.) This is the fourth of the Commission's legislatively mandated biennial reports on juvenile recidivism in North Carolina. The report being presented was submitted to the General Assembly on May 1, 2013. Ms. Flinchum described the four groups of juveniles in the sample: closed, diverted, dismissed, and adjudicated. Their inclusion in the study was based on their first encounter with the juvenile justice system during FY 2008/09. Information was presented on the juvenile sample's profile – including the demographic profile, the delinquency history profile, the sample complaint/offense, and overall results for the risk and needs assessments completed during the Intake process for delinquent complaints. Chris Fialko asked if this included cases bound over for Superior Court when she was talking about how few violent juvenile offenders there were, and Ms. Flinchum answered that it did not. There were no transfers in this population as they were not served by the juvenile system.

Ms. Flinchum then provided the recidivism rates for the juvenile sample. Regarding the recidivism rates by the risk levels, Susan Katzenelson explained that a side effect of statistical analysis is that when you get such a close outcome between juveniles with a medium risk level and juveniles with a high risk level, you need to reassess the cut off points for the risk scores that establish the risk levels for the assessment tool used by Division of Juvenile Justice. Jean Steinberg from the Division of Juvenile Justice agreed with Ms. Katzenelson.

Judge Spainhour asked how the FY 2009 delinquent population of 17,660 compared to North Carolina's total juvenile population in 2009. Ms. Flinchum said that she did not know. Ginny Hevener said that the figure was made available at the Forecasting meeting held each fall and that she would retrieve that information at the lunch break and report back. She reminded the Commission that this 17,660 sample was only the delinquent recidivists and did not account for juveniles that might enter the juvenile justice system some other way. Ms. Hevener reported back that the 10 to 15-year-old population in 2011 was 769,000. The 17,660 juvenile delinquent population equated to eight percent of the total juvenile population.

Sandy Pearce asked Ms. Flinchum if she had the recidivism rate for the population that was on probation. Ms. Flinchum answered that the information could be found in Appendix D of the Juvenile Recidivism Report. She further explained that she did not have the number of juveniles that had been diverted, but that this number included those adjudicated and disposed. Ms. Pearce was specifically wondering if those committed to a Youth Development Center (YDC) had a higher recidivism rate than those on probation as compared to the adult system. Ms. Flinchum explained that the recidivism rates for those on probation were actually slightly higher than those committed to a YDC. Ms. Hevener explained that the sample in the adult system is not comparable to the sample chosen for the juvenile report. The adult recidivism report is based on all offenders released from prison, while the juvenile report is not based solely on those juveniles released from YDCs. The results in the two reports cannot be compared since the samples are chosen differently. Ms. Katzenelson also explained that the adult recidivism report was post prison, while the juvenile report is based on follow-up while some are still in the YDC. The time at risk for the juveniles is very different from the time at risk for the adults in their respective reports.

Dr. Harvey McMurray asked if the data was ever reported by county. Ms. Hevener said that the variables would be hard to study and Ms. Flinchum added that some counties were so small that they had only five delinquent juveniles. She explained that the recidivism results on five juveniles would be meaningless. Ms. Katzenelson said that the Sentencing Commission staff does have the data by county if he wanted to see it. Eric Zogry pointed out to the Commission that children as young as six years old could be charged with a complaint.

Ms. Flinchum gave a brief summary of the second submission to the General Assembly on May 1, 2013, the mandated juvenile report titled the Effectiveness of Programs Funded by Juvenile Crime Prevention Councils (JCPC). (*See attached handout.*) Ms. Flinchum provided a general description of the FY 2009 sample and overall recidivism rates and compared the court-involved youth to the juveniles in the Juvenile Recidivism Study just discussed. Sandy Pearce asked for examples of JCPC programs. Ms. Hevener said that they ranged from evaluation assessment (*e.g.*, psychological assessment) to structured activities (*e.g.*, teen court, residential

programs). Ms. Pearce asked if recidivism was broken down by program, and Ms. Hevener said that it was covered in Table B.1 of the Appendix in the JCPC report. Ms. Pearce asked if policy decisions could be made from these results. Ms. Katzenelson explained that very little is known about these 600 programs. The data is based on admissions. The closer you get to the individual programs located in the specific counties, the less accurate the data. Ms. Flinchum said they hope to have more data in the future with the implementation of NC ALLIES. Ms. Davis said that there is no link between JCPC and recidivism. Ms. Hevener reported that there is no common identifier between the two automated data systems, NC-JOIN and the Client Tracking System. A discussion arose on the effectiveness of the JCPC programs involving Ms. Pearce, Ms. Kusa, Ms. Davis, Sheriff Clemmons and Mr. Thompson. The conclusion was that there is data out there, but the data is not housed in compatible systems and until there is more conclusive data, a concrete conclusion cannot be stated. It is believed that those juveniles who are diverted from court do better than those involved in the court system. It was concluded that more needs to be done with the 12-13 age group if headway is to be made with these juveniles.

LEGISLATIVE REVIEW

Sara Perdue presented an update on the 2013 Legislative Session. She presented ratified bills with criminal provisions, ratified bills of interest, and bills of interest that have not been ratified. Mrs. Perdue presented twelve ratified bills with criminal provisions, a number of which the Commission had reviewed at previous meetings. There were five ratified bills of interest, including the Justice Reinvestment Technical Corrections Bill and an act repealing the Racial Justice Act. Finally, she highlighted six bills of interest which were at various other stages in the approval process.

Of particular interest to the Sentencing Commission, the Justice Reinvestment Technical Corrections Bill (House Bill 361) includes a provision repealing the Commission's report on recidivism rates for offenders participating in TECS (Treatment for Effective Community Supervision) funded programs. Mrs. Perdue reminded members that those offenders will be included in the Commission's regular Report on Recidivism. Ms. Pearce asked if she understood that the Division of Community Corrections was going to prepare the recidivism report. Mr. Madler answered that it was for TECS. Ms. Pearce asked if the Sentencing Commission would be involved in that and the answer was no, but it could come under the general recidivism study.

John Madler presented an overview of the justice and public safety portion of the budget proposals from the 2013 Session. (*See* handout, Summary of Justice and Public Safety Budget Proposals.) He explained that the budget had not been adopted yet but that the Governor, the Senate, and the House had each presented their version. It was now up to the House and the Senate to work out a compromise in a conference committee. Mr. Madler then reviewed the proposed appropriations and relevant special provisions for the Judicial Branch, Indigent Defense Services, the Department of Justice, and the Department of Public Safety.

Judge Spainhour questioned the Senate budget recommendation that would eliminate the contract with Prisoner Legal Services and install legal terminals in prisons instead. Senator McKissick spoke up and said that he was not in favor of this budget proposal. He was under the impression that the prisoners would only have access to legal software. He asked if Mr. Maher

of Indigent Defense Services could speak about this proposal. Mr. Maher said that his office was not consulted about this item. To his knowledge, legal software is no longer available, it is all internet based. It is also his understanding that money would be taken away from Indigent Defense Services but that comparable money was not given to the Division of Adult Corrections for this expenditure. Staff would be needed to teach inmates how to use these computers as well as to oversee the usage to insure that internet service is not abused.

John Madler highlighted a provision from the House and the Senate budget proposals that would change the sentencing structure for some Class 3 misdemeanors. This proposal would reclassify certain Class 1 and 2 misdemeanors as Class 3 misdemeanors and then limit the punishment for offenders convicted of Class 3 misdemeanors who have three or less prior convictions to a fine only unless otherwise specified. By eliminating the possibility of an active sentence, the court would not have to appoint defense counsel for these offenders. The General Assembly estimated that this would save two million dollars. Judge Spainhour commented that he was not sure there would be any savings. Judges do not know how many prior convictions a defendant has at first appearance and they are bound by law to assign lawyers to indigent defendants if a prison sentence is possible. Lawyers would have to be paid even if the conviction only resulted in a fine. Sandy Pearce asked how a person in jail already would get credit for time served if he ended up only being issued a fine. Mr. Maher responded that Indigent Defense Services was not consulted on this, but that he had to take some responsibility for this recommendation as Indigent Defense Services has pushed for the reclassification of some misdemeanors as infractions. His opinion was that the judges should not appoint lawyers until they know that jail time is possible. Laws have changed for Driving While Impaired which will impact this recommendation. Because this law would not go into effect until December of 2013, he said the actual savings would be far less than the General Assembly projects. Ms. Pearce asked what would happen if an indigent person was given a fine and could not pay it. Mr. Madler explained that there is a statutory provision that allows the court to require an offender to appear and show cause why he should not be imprisoned for failure to pay the fine. If the defendant was able to pay the fine but did not do so, the court may impose a jail sentence of up to 30 days. Judge Spainhour added that the judge could not make the person pay a fine if he/she is not able to do so. Ms. Pearce asked if this bill was discussed in the Judiciary Committees, and Senator McKissick answered that it was not. He explained that it was introduced as a special provision in the budget bill. He added that he thought it would be appropriate if the Sentencing Commission sent a letter to legislators expressing these concerns. Judge Spainhour said that the Commission could certainly do that if it was the consensus of the Commission. Senator McKissick moved that Judge Spainhour send a letter to the appropriate people at the General Assembly regarding this matter; Ms. Pearce seconded the motion and also suggested that the 2010 report of the Misdemeanor Reclassification Subcommittee be mentioned. The motion carried. Judge Spainhour asked Mr. Madler to draft the letter.

Ms. Pearce said that she heard that there was a provision in the budget to add money to TECS to fund Drug Treatment Courts. Representative Jackson said that the Governor's budget recommended funding for Drug Treatment Courts but the House decided to provide funding through the Governor's Crime Commission. He said that there is grant money in the budget, but he is not sure where it falls. Mr. Madler said that that provision had been changed and money had been given to the Broaden Access to Community Treatment program in the Department of

Public Safety. Tracy Little of the Office of State Budget and Management said that it was shifted at the last minute to the Broaden Access to Community Treatment program to provide additional funds in the community to serve the population formerly served by Drug Treatment Courts. Ms. Pearce asked if this was just for treatment and not case coordinators. Mr. Little said there would be no positions funded but there would be a statewide commitment on the part of judges, court officials, probation officers, etc., to provide the treatment that these individuals needed without funding other full-time state employees to do so. This would fall under Community Corrections in the Division of Adult Corrections.

Mr. Madler reviewed an issue that the Legislative Review Subcommittee had raised for the Commission to consider. (See handout, Legislative Review Issue.) As part of its legislative review, the Sentencing Commission has reviewed proposed aggravating and mitigating factors for consistency with structured sentencing. In some cases, the Commission found them to be inconsistent while in other cases the Commission found that structured sentencing was not applicable. The issue was whether the Commission should continue to review these factors or not and, if so, how. The Commission members discussed the benefits of being able to weigh in on certain factors that may be inconsistent versus the time it takes to review other factors that fit the grid. Bill Hart moved that the Commission adopt a policy that the Sentencing Commission will not review bills dealing with aggravating and mitigating factors. Judge Elmore seconded the motion. Ms. Pearce countered that she thought the Commission should continue reviewing aggravating and mitigating factors. Mr. Fialko agreed. Mr. Hart clarified what the legislative review does and does not cover. The motion carried.

Sara Perdue presented for review a revised portion of HB 589. (See handout.) She pointed out that the other provisions in the bill had not changed since the previous review.

HB 589 – VIVA [ed.5]. (G.S 20-37.7, Subdivision (d)(6)). Mr. Hart moved to find the provision consistent with the Offense Classification Criteria. Judge Elmore seconded the motion, and the motion carried.

John Madler presented for review a revised portion of SB 683. He pointed out that the other provisions in the bill had not changed since the previous review.

SB 683 – Safe Harbor/Victims of Human Trafficking [Ed.3].

(G.S. 14-203.3). Mr. Hart moved to find the provision inconsistent with Offense Classification Criteria as it makes it a felony only upon second offense. Senator McKissick seconded the motion, and the motion carried. Senator McKissick moved to provide a note stating that the provision would be consistent with a Class 1 misdemeanor. Judge Elmore second the motion, and the motion carried.

(G.S. 14-203.3). Mr. Hart moved that the Commission vote as they did in April that the provision is inconsistent with the Offense Classification Criteria. The offense would be consistent with a Class F felony. Senator McKissick seconded the motion, and the motion carried.

OVERVIEW OF SEX OFFENDER REGISTRATION PROGRAM

Judge Spainhour recognized Jamie Markham, Assistant Professor, UNC School of Government, to present an overview of the Sex Offender Registration Program. Mr. Markham began his presentation by defining the offenses for which a person is required to register on the Sex Offender Register. Although some of the offenses do not actually deal with a sex, they are offenses in which the victim is a minor and the offense is not committed by a parent and the minor child could possibly be in a situation in which a sex offense could occur.

Mr. Markham then described the two kinds of registration – a 30-year registration in which the offender can petition the court to be taken off the registry after ten years, and a life-time registration. Federal law sets the minimum time at 15 years. Judge Spainhour asked if this was for federal offenses and Mr. Markham said no, it was for State offenses as well. The Court of Appeals has found that this federal law applies to state offenses. Only those offenders in what the federal law calls the “Tier 1” category can petition after ten years.

Finally, Mr. Markham discussed the crimes related to registration. Failure to register, failure to notify the last registering sheriff of a change of address, and failure to return a verification notice can lead to more prison time. Restrictions are placed on where the sex offender can live or go including not being able to reside within 1,000 feet of a school or childcare center, not being able to go on certain premises that are intended for use, care, or supervision of minors, not being able to go within 300 feet of a place intended for use, care, or supervision of minors within a place not intended for such use, and not being able to go to any place where minors gather for regularly scheduled education, recreational or social programs. Sex offenders are often kept from living with their own children as a result.

Sheriff Clemmons asked if a church providing a day care center or a nursery constituted a place where sex offenders could not go. Mr. Markham said that this was an issue that had not yet been tested in the Supreme Court, but he believes that it could be resolved by having the pastor escort the sex offender or having the pastor’s permission. He thinks there would be ways around this one.

Work restrictions include working or volunteering in child-involved activities, caring for a minor when a sex offender resides in the same location, babysitting service, obtaining a commercial driver’s license except with a “P” or “S” endorsement, and obtaining EMS credentials. Sex offenders may not access social networking web sites. Judge Elmore said that social networking cases were coming before the Court of Appeals now. Decisions should be handed down in about 30 days.

Regarding satellite-based monitoring systems, Mr. Fialko asked Mr. Markham if there was a problem getting through TSA at the airport as one of his clients had that problem. Mr. Markham deferred to George Pettigrew, Division of Adult Corrections, Department of Public Safety, who informed Mr. Fialko that the person could obtain a letter stating why they were wearing the monitor, or if travelling out of state, could have it removed for a period of time. Mr. Fialko wanted to know if there was any recidivism information on those registered. Ms. Hevener stated that, out of 1,048 offenders, about 27% of that population recidivated.

JUSTICE REINVESTMENT IMPLEMENTATION SUBCOMMITTEE – 2013 REPORT

Michelle Hall, Commission staff, presented the 2013 Justice Reinvestment Implementation Evaluation Report. Ms. Hall reminded Commissioners that the Commission has a mandate to conduct annual evaluations of the implementation of the Justice Reinvestment Act (JRA) and submit reports to the Legislature each year. The 2013 evaluation report is the second report in compliance with the mandate. In response to the mandate, the Commission created the Justice Reinvestment Implementation Report Subcommittee to gather data, provide feedback, and make recommendations to the Commission on possible improvements to the JRA. The Subcommittee met three times in 2012 and 2013 (following the submission of the first evaluation report). Ms. Hall noted the current report covers implementation activities a full year into the implementation of the JRA.

She provided background information, including topics covered in the 2013 report. She noted the source of information for the report was agencies and organizations involved in the implementation of the JRA. She then explained the JRA Implementation Timeline (*see* Handout), which illustrated the major finding regarding implementation in the report; the implementation of the JRA has been staggered. The main reasons for the staggered implementation include the design of the legislation (multiple effective dates for the provisions), and the delay of certain provisions of the Act to allow agencies adequate time for policy development and training. Few cases were processed under the new law in CY 2012 and the cases that were processed are not necessarily representative of what sentencing and correctional practices may emerge in the future.

Ms. Hall then provided information about agency efforts related to implementation, starting with AOC. She noted AOC has updated court forms to reflect the changes mandated under the JRA, but the agency has not modified its automated data systems to capture and automate data related to the JRA. She then provided information about DPS implementation efforts in Community Corrections including the implementation of a new risk and needs assessment for probationers, Treatment for Effective Community Supervision (TECS), quick dips, Confinements in Response to Violation (CRV), and resources.

George Pettigrew, Department of Public Safety, noted that 75 counties now have contracts for TECS programs. Dr. McMurray inquired about the difference in programs from year to year, in terms of recidivism rates. Ms. Katzenelson responded that staff would look at the recidivism rates of the TECS population as part of its bi-annual recidivism study; however, the programs just recently began serving offenders so it is too early to draw any conclusions about effectiveness or recidivism. Mr. Pettigrew added that DPS plans to study types of programs and offender success in the future. Ms. Davis asked about the target number of offenders to be served by TECS. Mr. Pettigrew responded TECS is serving 1,000 probationers and offenders on PRS now, but would be serving 30,000 in the future. Ms. Hevener noted that the number of TECS participants grew from 1,000 to 2,200 in three months.

Ms. Hall continued with her presentation, providing information about Advanced Supervised Release, the Post-Release Supervision and Parole Commission, and then concluded

with information related to the Statewide Misdemeanant Confinement Program (SMCP). Ms. Pearce asked if any discussions had been held by the Sheriffs' Association regarding programs for the SMCP. Keenon James, NC Sheriffs' Association, responded the organization is trying to plan for programs for SMCP inmates that would be comparable to the programs available to prisoners. This programming would be available to the CRV population only. Sheriff Clemmons added that there has also been discussion about providing programming to all inmates in local jails, not just the CRVs. Ms. Katzenelson asked if the results of the risks and needs assessment are available to local confinement facilities. Mr. James responded, not necessarily.

Judge Spainhour reminded the members that the next full Commission meeting would be on September 6th.

The meeting was adjourned at 2:40 p.m.

Respectfully submitted,

Vicky Etheridge
Administrative Assistant