

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY
COMMISSION MEETING
RALEIGH, NC
February 24, 2012

The North Carolina Sentencing and Policy Advisory Commission met on Friday, February 24, 2012, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Tom Bennett, Honorable Charlie Brown, Sheriff James Clemmons, Christopher Clifton, Chief Scott Cunningham, Honorable Leo Daughtry, Louise Davis, Honorable Richard Elmore, Honorable Robert Ervin, Clark Everett, Honorable John Faircloth, Chris Fialko, Paul Gibson, Bill Hart, Honorable Eleanor Kinnaird, Chief Deputy Secretary Jennie Lancaster, Honorable Floyd McKissick, Jr., Moe McKnight, Dr. Harvey McMurray, Luther Moore, Honorable Fred Morrison, Sandy Pearce, Tony Rand, June Ray, and Honorable Tim Spear.

Guests: Honorable Alice Bordsen (NC House of Representatives, Former Commissioner), Anya Drabkin (Duke University), Doug Holbrook (NC Department of Public Safety), Mary Jennings (NC Department of Public Safety), Alvin Keller, Jr. (Post-Release Supervision and Parole Commission, Former Commissioner), Jamie Markham (UNC School of Government), John Poteat (NC General Assembly, Division of Fiscal Research), Melissa Radcliff (Our Children's Place), Rhonda Raney (NC Department of Public Safety, Former Commissioner), Joel Rosch (Duke University), Susan Sitze (NC General Assembly, Research Division), Mildred Spearman (NC Administrative Office of the Courts), and Nicole Sullivan (NC Department of Public Safety).

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

INTRODUCTION

Chairman Spainhour called the meeting to order at 10:04 a.m. He began by having all those present introduce themselves and indicate the entity they represented. Chairman Spainhour introduced the three new members of the Sentencing and Policy Advisory Commission: Representative Leo Daughtry, representing the North Carolina House of Representatives, Sheriff James Clemmons, representing the Sheriffs' Association, and Chief Deputy Secretary Jennie Lancaster, representing the Department of Public Safety.

Chairman Spainhour recognized two of the five departing Commissioners: he read a resolution recognizing Secretary Keller's service to the Commission. Luther Moore moved to adopt the resolution; Judge Ervin seconded the motion and the motion carried. Chairman Spainhour read a resolution recognizing Rhonda Raney's service to the Commission. Luther Moore moved to adopt the resolution; Bill Hart seconded the motion, and the motion carried.

The Chairman presented the minutes from the December 2, 2011, Commission meeting.

Luther Moore made a motion to accept the minutes as written, Moe McKnight seconded the motion, and the motion carried. The Chairman then reviewed the agenda.

CHILDREN OF INCARCERATED PARENTS

Chairman Spainhour reminded the Commissioners that at the end of the report from Michelle Hall and David Lagos, he would ask for a motion to approve the letter to Secretary Reuben Young of the Department of Public Safety which was written at the request of the Commission at the December meeting. This letter asks Secretary Young to direct the Section of Prisons and the Community Corrections Section to enhance their current data collection processes to ensure a more complete accounting of the children of incarcerated parents.

Michelle Hall presented the draft report on the topic of children of incarcerated parents. This report is in response to a legislative request from Representative Alice Bordsen to study issues surrounding children of incarcerated parents including the short and long-term effects of parental incarceration on children; what North Carolina is currently doing to assist children of incarcerated parents, and what else North Carolina could do to assist these children (*see handout*).

Ms. Hall said that Commission staff undertook a review of relevant research on issues surrounding children of incarcerated parents. Published research has mainly examined two areas; the impact of parental incarceration on children and the effectiveness of interventions for both children and incarcerated parents. The volume of research is substantial; however, most researchers note difficulties in studying the population due to lack of data, lack of strong empirical evidence and findings, and methodological differences.

Part III of the report addressed what is being done in North Carolina regarding data collection, policies, and services. Part IV addressed what could be done in North Carolina by examining other states' and national programs and policies, legislative directives (interagency collaboration), and legislative resolutions. In the conclusion, Ms. Hall stated that the Sentencing Commission recognizes the significant obstacles faced by many children of incarcerated parents. Though child-serving agencies (*e.g.*, local Departments of Social Services, local schools, the Department of Juvenile Justice and Delinquency Prevention) may be addressing incarceration of parents in client-centered case plans for children, there is currently no way to document this or to measure its impact. The lack of statewide data hinders North Carolina's ability to intervene on behalf of these children or to evaluate the merits of any intervention. In December, the Commission had identified the development of an effective data-collection capacity as a vital first step to addressing this issue. The Commission suggested the Chairman request that the Secretary of the Department of Public Safety examine the data collection practices within the Division of Adult Correction and make the modifications necessary to ensure a more complete accounting of the children of offenders under its jurisdiction. With complete and accurate data, policymakers may better evaluate and address the impact of parental incarceration on the lives of these children.

Ms. Hall and Mr. Lagos opened the floor to questions or comments. Jennie Lancaster from the Division of Adult Correction spoke about visitation policies. She said that an eighteen year-old is not considered a minor child, and may nor may not have a criminal record or may be on probation, so the DAC tries to consider on a case-by-case basis visitation for that child. DAC does realize that it is important that all children be allowed to visit a parent, and not just the minor children. She also said that travel to the prison for minor children is provided by the local Department of Social Services if relatives or caretakers cannot take them. Louise Davis said that it was her opinion that the Department of Public Instruction, who has contact with every child in the State, in conjunction with the local Department of Social Services, should collect the data. To that end, she thinks the Commission should consider a recommendation that the Department of Public Instruction be engaged to collect this data. Senator Kinnaird wanted everyone to know that termination of parental rights cannot be triggered by incarceration. One of the things that inmates always say they want is time with their children. She thinks that a vehicle must be found by our State to handle this.

Senator McKissick asked what was being done in the federal system. Mr. Lagos explained that the Federal Bureau of Prisons has a secure email system for children to correspond with their incarcerated parents as well as a more robust furlough program for parents to spend time with their children (Mothers and Infants Nursing Together). Also, Skype and other video visitations are being used around the nation. Senator McKissick asked what the next steps were for this study. He wanted to know if Ms. Hall and Mr. Lagos had reviewed what could be done in our state. Ms. Hall said that the enhancement of data collection methods was a first step the Commission had identified as a foundation for empirical research on the impact of parental incarceration and interventions or programs. Mr. Lagos added that additional programming would require additional resources. Given the current budgetary climate, there may be reluctance to allocate additional resources without some empirical justification.

Chairman Spainhour asked if there was a motion that the report be accepted. Senator Kinnaird so moved; Luther Moore seconded the motion, and the motion carried. Chairman Spainhour then referred the Commissioners to the letter to Secretary Young. Mr. Moore suggested that the letter include Ms. Davis's recommendation to ask the Department of Public Instruction to assist in the collection of data. Ms. Lancaster amended the suggestion to ask for a collaboration between the Department of Public Safety and other Departments as long as it is suggested as an idea for discussion. Dr. McMurray moved to accept the letter as amended; Ms. Davis seconded the motion, and the motion carried.

STRUCTURED SENTENCING STATISTICAL REPORT FY 2010/11

Chairman Spainhour recognized Dr. Ashleigh Gallagher to present the Structured Sentencing Statistical Report for Fiscal Year 2010/2011. Dr. Gallagher informed Commissioners that, as the report is currently being printed, they had been given a copy of the Power Point presentation that she would be showing, plus the two most important tables in the report – Tables 4 and 19 – which are the felony and misdemeanor punishment charts populated with this year's data (*see Tables 4 and 19 and the Statistical Report Power Point Presentation handout attached*).

Dr. Gallagher defined a sentencing episode as the sentence imposed for the most serious conviction for a given day of court. In FY 2010/11, there were 29,446 felony convictions (excluding drug trafficking and violent habitual felon convictions) and 150,810 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 2% in the last fiscal year and misdemeanor convictions have decreased by 2% in the last fiscal year. Dr. Gallagher presented information on the number of convictions by crime type (felons and misdemeanants), punishments imposed (felons and misdemeanants), distribution by offense class (felons and misdemeanants), distribution by prior record level (felons), distribution by prior conviction level (misdemeanants), active sentences by offense class (felons), sentence location by range (felons), types of intermediate sanctions imposed (felons), and types of community punishments imposed (misdemeanants). Dr. Gallagher also presented information on several special issues including life and death sentences, habitual felon convictions, and drug trafficking convictions.

Judge Brown asked Dr. Gallagher about the change in felony distribution by prior record level. He said that the changes seem largely due to the different point ranges of the new grid. He asked if she had compared the change in the numbers over the past five years, attributed to Prior Record Level I now including prior convictions, correlated to punishments imposed in the past five years. Dr. Gallagher said that she had not broken down the numbers in precisely that way. Judge Ervin, using the Felony Punishment Chart, demonstrated that there was a slight shift in the criminal history points. He noted, for example, that an offender who has nine prior criminal points used to be in Prior Record Level IV which allowed active time as his/her punishment. That offender would now be in Prior Record Level III and no longer eligible for active time. So, there would be a change in the numbers because the criminal history columns have changed. Judge Brown clarified that he was asking how those numbers changed over time because it is counter-intuitive that the active punishment rate has risen from five years ago by three percentage points and the community punishment rate has declined by two percentage points. Ginny Hevener explained that there has been a decrease in minimum sentences imposed as a result of the change. With the shift to a lower prior record level, some offenders may still be shifted to cells with an active option. Ultimately, there still may be changes in the active rates. Staff will be monitoring changes to the active rates in each grid cell over time.

After Dr. Gallagher described the data for non-trafficking drug offenses, Tony Rand clarified that these numbers only included sentences imposed, not those who were on probation and had been revoked, and Dr. Gallagher affirmed that was correct. Bill Hart asked if habitual felons were excluded from person, property and non-trafficking drug offenses and only counted in the "Other" category. Dr. Gallagher explained that for this slide, habitual felons were only captured under "Other." Judge Brown asked District Attorney Clark Everett if he thought that the number of aggravated sentences was increasing as prosecutorial practices catch up with the Blakeley change. Mr. Everett answered yes, but that for a while they were not doing aggravated sentences unless it changed an outcome, such as manslaughter with aggravators. Some judges refuse to send a case with aggravating factors to the jury. He does not see the number going up as he thinks they will be plea-bargained.

Mr. Rand wanted to know why the percentages did not add up to 100% in the chart of types of intermediate sanctions imposed for felons. Judge Ervin told him that sometimes an offender received more than one intermediate punishment. Chris Fialko asked why there was a decrease in drug trafficking cases. Mr. Everett answered that sometimes the cases could be transferred to the federal courts. His county has a full-time assigned Federal prosecutor to screen the trafficking cases; several other counties do as well.

For misdemeanants, Judge Brown wanted to know if the house arrest intermediate sanctions had declined. Dr. Gallagher did not have information available, but told Judge Brown that she would look it up for him. Dr. McMurray asked if the Sentencing Commission staff had data on plea bargaining. Ms. Hevener explained that there are no automated data on plea bargaining. Commission staff previously had completed a study on sentencing practices (the charge to conviction process), but there is no specific information on the occurrence of plea bargaining. Mr. Rand asked how many probationers are revoked for felonies. Ms. Hevener said that 40% of felony exits from probation were due to revocation. Tony Rand said that the Post-Release Supervision and Parole Commission was trying to estimate how many probationers might be revoked. Ms. Hevener explained that the information from the Commission's recidivism report on how many probationers are revoked during follow-up might be useful to address this question. Ms. Katzenelson further explained that there are multiple ways to look at revocations – probation exits, prison admissions, and recidivism. Mr. Everett asked if any record keeping had been kept for G.S. 90-96 dispositions as to whether any of them had been revoked. Justice Reinvestment has changed things dramatically and it will make the numbers change. The State needs to know if these G.S. 90-96 diversions are working or not. Ms. Hevener reported that there were no automated records on the statewide usage of G.S. 90-96.

CORRECTIONAL AND DELINQUENT POPULATION PROJECTIONS

Ginny Hevener presented the Current Population Projections for Fiscal Year 2012 to Fiscal Year 2021. The projections were prepared in conjunction with the Department of Public Safety's Office of Research and Planning (*see handout*).

Ms. Hevener noted that, as a result of the significant changes to the criminal justice system passed through the Justice Reinvestment Act (JRA) this past legislative session, two prison population projections were prepared. 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 2010/11. The JRA projection provides an estimate of the prison population based on assumptions about how the criminal justice system will operate under JRA. Assumptions for the JRA Projection were made by extrapolating from other sources where possible or by making informed estimates based on the legal interpretation of the JRA and policies and procedures developed for implementation.

Ms. Hevener noted that the prison population is projected to increase from 40,392 to 41,342 across the ten-year projection period under the Pre-JRA Projection compared to a projected increase from 39,142 to 39,976 under the JRA Projection. A comparison of the projections with Expanded Operating Capacity indicates that the projected prison population will be below prison capacity for the majority of the ten-year projection period.

She also described demographic trends, criminal justice trends, and policy changes that factor into the decline of the prison population that preceded the passage of the Justice Reinvestment Act. Changes in the growth of the prison population began in the fall of 2009. Declines in the prison population correspond to declines in felony convictions and prison entries, with a decrease of nearly 9% in felony convictions and 4.5% in prison entries since FY 2009. She noted that North Carolina's crime rate, as well as the overall number of arrests, has also dropped substantially over the past three years.

Ms. Hevener summarized the assumptions that were used to develop the Pre-JRA and JRA Projections, and noted differences in assumptions between the two projections. Mr. Rand asked how she factored in post-release supervision (PRS) and revocations. Twelve-thousand inmates are projected to be on supervision and he is wondering how many of them will be revoked. Ms. Hevener said that with all felons receiving PRS, the revocation rate is assumed to increase due to higher recidivism rates for lower-level (Class H and I) felonies. Last year 21% of new admissions were from revocations. Mr. Rand said that would result in several thousand more people going back to prison. He wanted to know if that would increase the prison population. Ms. Hevener responded that increases here would possibly be counter-balanced by prison bed savings resulting from other changes under JRA. Mr. Moore asked about projected growth of the prison population. Ms. Hevener said the projections assume a negative growth rate (-1%) for 2012, a zero percent (0%) growth rate for 2013, and a one percent (1%) growth rate for each of the remaining years. She also noted that the prison population has declined for the first time in a decade.

Representative Faircloth asked if the aging of the general population contributed to the decline. Ms. Hevener said that it was a factor. She said that one of the largest growing populations is the group over 50. Representative Daughtry asked, of those inmates released, what would be the percentage to return. Ms. Hevener said that, based on the Commission's recidivism report, 36% of inmates released in FY 2005/06 were reincarcerated. Representative Daughtry asked if there was a decline in reincarceration in inmates released who received PRS. Ms. Hevener answered that the rearrest rate was 45% for those with PRS (Class B1 through E felons) and 51% for those with no PRS. Lower-level offenders are typically more recidivistic than those with more serious offenses. Secretary Keller asked if staff factored in soldiers returning from the war in Iraq as it winds down – they will need services. Ms. Hevener said that they had in an indirect way through the growth rates determined by the Forecasting Advisory Group.

Ms. Hevener presented the assumptions used to develop the pre-JRA and JRA projections. Judge Brown asked if the PRS and Parole Commission had been consulted on the lag time decrease and, if so, what is the reason for the decrease. Mr. Rand answered no but that they were trying to figure out what they were going to do with the projected triple increase in supervisees. He believes that some of them will be revoked several times. Ms. Hevener explained that data from the recidivism report was used to estimate lag-time. As data become available under JRA, the data will be utilized to develop the projections.

Mr. Everett explained that Class C habitual felons typically receive a sentence in the mitigated range. With the changes to the habitual felon law under JRA, he doubts that habitual felons with Class H and I offenses would be plea-bargained to the mitigated range. Ms. Hevener stated that this was consistent with the assumption used for the JRA projection. Mr. Moore asked if there were any projections regarding FSA and Pre-FSA ever becoming zero. Ms. Hevener said that most of those inmates had life or death sentences, and Mr. Rand said it would be a long, long time.

FY 2011/12 COMMISSION SUBCOMMITTEE STATUS REPORTS

Judge Ervin, Chair of the Classification of Homicide and Drug Offenses Subcommittee, said that this subcommittee met for the first time on January 27th. The Subcommittee interpreted their mandate as asking them to develop criteria that the Commission could use in its assessment of what offense class a proposed homicide or drug offense should be. In the end, the Subcommittee wanted an instrument that allowed continuity in their review of proposed bills. The Subcommittee decided to start with homicide offenses. They have decided to keep the one misdemeanor homicide offense in the list for consideration but not to review second or subsequent offenses of the same offense, in keeping with the Commission's decision at its December meeting. Staff will research how other states deal with the classification of these offenses. The staff has also been asked to compare the punishment imposed in other South-Eastern states to the punishment imposed in North Carolina, to see if North Carolina practices are consistent or not. The staff will also research how to define the intent element of these crimes. Currently, North Carolina tends to differentiate homicide crimes by the intent element of the crime. This subcommittee will meet again on February 24th.

Judge Brown, Chair of the Justice Reinvestment Implementation Subcommittee, explained that this Subcommittee was created in response to a mandate of the General Assembly. Its mandate is to assist with an evaluation of implementation of the Justice Reinvestment Act. The Subcommittee met for the first time on February 10th. The first evaluation is due April 15th, and the subcommittee will have the assistance of Commission staff to meet that deadline. During the first meeting, the subcommittee reviewed the major provisions of the Justice Reinvestment Act (JRA) including the challenging deadlines of a series of effective dates. There were discussions regarding training and presentations. The UNC School of Government, represented by Jamie Markham, and the Division of Adult Corrections, represented by Tracy Little, presented on training for the implementation of the JRA. Post-Release Supervision and Parole Commission, represented by Tony Rand, the Sheriffs' Association, represented by Keenon James, and the North Carolina Association of County Commissioners, represented by Paul Gibson all gave presentations on policy and program changes. They will meet on February 24th and will have more presentations from various agencies and groups. Judge Brown asked the permission of the Commission to continue meetings in order to consider possible recommendations to the Commission. Luther Moore moved to authorize the Justice Reinvestment Subcommittee to continue to meet and develop recommendations. Judge Ervin seconded the motion and the motion carried.

Chairman Spainhour reminded the Commissioners of the meeting dates for the rest of the year: June 15, September 7, and December 14.

He adjourned the Commission meeting at 12:10 for lunch and the two Subcommittee meetings in the afternoon.

Respectfully submitted,

Vicky Etheridge
Administrative Assistant