

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY
COMMISSION MEETING
RALEIGH, NC
December 3, 2010

The North Carolina Sentencing and Policy Advisory Commission met on Friday, December 3, 2010, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Tom Bennett, Honorable Stan Bingham, Honorable Charlie Brown, Joe Cheshire, Louise Davis, Honorable Richard Elmore, Honorable Robert Ervin, Garry Frank, Paul Gibson, Bill Hart, Larry Hines, Honorable Floyd McKissick, Jr., Moe McKnight, Dr. Harvey McMurray, Luther Moore, Honorable Fred Morrison, Chief Frank Palombo, and Billy Sanders.

Guests: Susan Brooks (Sentencing Services), Michelle Hall (Youth Accountability Planning Task Force), Susan Sitze (General Assembly, Research Division), Rick Shreve (General Assembly, Research Division), Eric Zogry (Indigent Defense Services/Juvenile Defenders Office), Gregg Stahl (Administrative Office of the Courts), Sandy Pearce (Administrative Office of the Courts), John Poteat (General Assembly, Fiscal Research Division), Karen Calhoun (retired staff), Lavee Hamer (Department of Correction, representing Secretary Alvin Keller), Willis Fowler (Post-Release Supervision and Parole Commission, representing Tony Rand).

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

INTRODUCTION

Judge Spainhour called the meeting to order at 10:05 a.m. After welcoming everyone, Judge Spainhour recognized staff member Karen Calhoun who was retiring after 31 years of service to the State of North Carolina. On behalf of the Governor, he presented her with the Order of the Long Leaf Pine. Judge Spainhour then asked those in attendance to introduce themselves. Luther Moore moved to adopt the minutes from the June 4, 2010 Sentencing Commission meeting; the motion was seconded and carried. Judge Spainhour then reviewed the agenda.

MISDEMEANOR RECLASSIFICATION SUBCOMMITTEE REPORT

Luther Moore, Chair of the Misdemeanor Reclassification Subcommittee, presented the Subcommittee's final report to the Commission (*see* Handout). He noted that the Commission established the Subcommittee at its September 17, 2010 meeting in order to respond to the legislative mandate enacted in Session Law 2010-31, Section 19.5. The mandate expressed the legislature's intention that there be only three misdemeanor classes: Class A1, 1, and 2. Accordingly, it directed the Sentencing Commission, in consultation with the Conference of District Attorneys, Office of Indigent Services, and School of Government, to recommend a reclassification for each current Class 3 misdemeanor as either an infraction or a Class 2 misdemeanor. The Commission was also authorized to recommend other misdemeanor offenses

for reclassification as infractions. To perform its task, the Subcommittee held two meetings on October 1 and 29. It reviewed the history of the infraction system and the classification of misdemeanors under Structured Sentencing, as well as the development of the Sentencing Commission's misdemeanor offense classification criteria. It also heard from its legislative members, as well as from General Assembly staff, that the mandate was motivated by a desire to reduce system costs, particularly the cost of appointing indigent defense counsel in low-level misdemeanor cases. The Subcommittee received conviction and sentencing data on both Class 3 and Class 2 misdemeanors.

Faced with more than 300 Class 3 misdemeanor offenses, the Subcommittee identified the Class 3 misdemeanors which have been assigned an offense code by the Administrative Office of the Courts (AOC). Coded offenses account for 98% of all misdemeanor convictions. The Subcommittee made an individualized reclassification decision for each coded offense, based on a variety of factors, including the legislature's goal of cost reduction. Based on preliminary votes taken at the October 1 meeting, the Commission staff estimated the net effect on aggregate jail time served for the Subcommittee's recommended reclassifications. Because jail sentences for Class 2 misdemeanors are nearly three times as long as sentences for Class 3 misdemeanors, it appears that the reclassifications recommended by the Subcommittee would result in an increase in jail days served for these offenses, even after subtracting the jail days saved by reclassifying certain of the offenses as infractions. Although system costs might be reduced in other areas, counties would see increased costs in their jails.

For the uncoded offenses, the Subcommittee established a presumption in favor of reclassification as an infraction, unless a member selected a particular offense for review. The Subcommittee then reviewed the selected offenses individually for reclassification. The remaining uncoded offenses were reclassified as infractions. The Subcommittee's recommended reclassifications for all Class 3 misdemeanors appear as Appendices A and B in its final report.

As authorized by the mandate, the Subcommittee identified five Class 2 misdemeanor offenses which could be appropriately enforced as infractions. All of these offenses are found in the Uniform Driver's License Act in G.S. Chapter 20, Article 2. They are listed in Appendix E of the Subcommittee report.

The Subcommittee made some additional recommendations related to the mandate. First, it recommended that the General Assembly expand the range of sanctions available for infractions and increase the \$100.00 maximum monetary penalty established in 1985. Second, because tiered offense classifications are inconsistent with Structured Sentencing, the Subcommittee recommended the repeal of all misdemeanor offense enhancements based on second and subsequent violations of the same offense. Third, the Subcommittee recommended that the legislature consider the requirements of federal law prior to decriminalizing an offense, and preserve any misdemeanor offense that is required for the receipt of federal funds. Finally, the Subcommittee recommended that the General Assembly reconsider its intention to eliminate misdemeanor Class 3. If the goal is to reduce system costs, the Subcommittee suggested that the legislature reclassify certain Class 3 misdemeanors as infractions while retaining misdemeanor Class 3 for the remaining offenses.

MISDEMEANOR RECLASSIFICATION – DISCUSSION AND VOTE

Mr. Moore moved that the Subcommittee's report and recommendations be adopted by the full Commission. Chief Palombo seconded the motion, which carried unanimously.

Mr. Moore thanked the staff, Vice-Chair Brown, and the members of the Subcommittee for all of their hard work.

YOUTH ACCOUNTABILITY PLANNING TASK FORCE – STATUS REPORT

Michelle Hall presented an update on the Youth Accountability Planning Task Force and the progress made by the three working groups – Legal Issues, System Costs, and Programs and Benefits – since the last Commission meeting.

The Programs and Benefits Working Group has made thirty-three recommendations to the Task Force. Some of those recommendations include proposals to eliminate disproportionate minority contact, changes to community programs, a proposed Legislative Study Commission, blended or braided funding for child serving agencies, working to target DJJDP resources via Risk/Needs Assessments, better training for court counselors to address the 16 to 17 year old population, and incentivize treatment in community in lieu of YDC commitment.

Senator Bingham questioned the affordability of in-community treatment services for smaller counties. Susan Katzenelson answered that there is multi-county programming available for counties with fewer resources. Chief Palombo echoed Senator Bingham's concerns, stating that many counties are already faced with insufficient resources and incentivizing in-community treatment would just further strain their budgets. Ms. Hall indicated that the System Costs working group recognized resource needs throughout their recommendations and that she would address those issues when she presented their recommendations. Other recommendations from the Program and Benefits working group included participating in the Juvenile Detention Alternatives Initiative (JDAI), by the Annie E. Casey Foundation to study ways to reduce detention numbers, providing proper psychological assessments of offenders upon entry into the system, and creating empirically-based programming for 16 to 17 year olds who tend to be higher risk and who spend a longer time in the system.

Ms. Hall next revisited the Legal Issues Working Group's recommendations. She stated that the Legal Issues Working Group looked at eliminating intermittent confinement as a dispositional alternative versus modifying or limiting its use. Ultimately, the working group did not choose one or the other; therefore, the Task Force decided to include all three options in the final report for further consideration.

Ms. Hall also explained that, since the last update, the System Costs Working Group had revisited the Legal Issues Working Group's recommendation to house 16 and 17 year olds who have been transferred to the adult system in juvenile facilities pretrial. She stated that this Working Group recommended housing 16 to 17 year old Class A through E felon transferees in

adult jails. The deciding factor for this recommendation was the costliness of housing such offenders in juvenile facilities.

Dr. McMurray asked Ms. Hall about that recommendation. Ms. Hall indicated that once a juvenile is charged with an A through E felony, they are viewed by the court as an adult, so housing them in a jail is consistent with their status in the eyes of the court. Chief Palombo asked about the impact of housing 16 and 17 year old class A through E felons with juvenile misdemeanants in juvenile facilities. Ms. Hall stated that the length of stay in a facility awaiting transfer is quite long – nine to twelve months – and that is a huge cost driver. She also reminded the Commission that the federal Juvenile Justice and Delinquency Prevention Act requires that offenders under eighteen years of age must have sight and sound separation from older offenders when housed in adult facilities. Senator McKissick echoed the monetary concerns, stating that the cost to house these offenders in juvenile facilities is staggering.

Ms. Hall then presented the update from the System Costs Working Group. She stated that this group was charged with examining the costs and benefits associated with moving the 16 and 17 year old population from the Department of Correction to the Department of Juvenile Justice and Delinquency Prevention. The working group has been gathering data from various agencies regarding the costs of a policy change and has been working in conjunction with the VERA institute to prepare actual cost projections for such a policy change. She stated that the group presented preliminary figures last week and plans to have a draft of the costs/benefits analysis ready in two weeks.

The final Task Force meeting is scheduled for January 14, 2011. At that meeting the final report, including the recommendations from the working groups and the costs/benefits analysis, will be voted on and submitted to the General Assembly.

Ms. Hall opened the floor to questions. Senator McKissick asked, particularly in regards to the budget, whether this issue is dead for all practical purposes. Ms. Hall responded that as she understands it, the legislators still intend to introduce a bill regarding this matter. Ms. Katzenelson indicated that whether or not such legislation is passed this year, it would not need appropriations for the planning period and thus would not be an immediate cost for at least two years. Furthermore, the legislature can delay the start date. Chief Palombo stated that he has spoken with the Chiefs of Police and Sheriffs around the state, and that there is a consensus that change is necessary, but there is unanimous opposition to the legislation unless it is completely funded. Senator McKissick stated that he believes that there could be some picking and choosing of the “no-cost” fixes found in the report and that he would be comfortable supporting such incremental changes. Mr. Sanders stated that he assumes it is possible to use money typically spent on housing offenders in jail on keeping offenders in more cost-effective community programs and thusly creating a savings for the State. Ms. Katzenelson answered that that is not the case and that, based on the recommendations as they have been presented today, there is no savings. Dr. McMurray commented that Disproportionate Minority Contact is really resulting in a lost generation of youth. Judge Spainhour responded that most of the guilty pleas he sees in court are young people and that very few of those have a high school degree; he feels that the savings would be found in keeping these youth in school. Ms. Hall added that the Task Force was

charged with looking into the compulsory school attendance age, and the Legal Issues Working Group decided not to delve into it at this time. Ms. Davis echoed the drop-out concern, and stated that in Wake County most of the teens she sees in Teen Court are those on long-term suspension for misdemeanor violations. Senator McKissick reiterated that the focus must really be education and that the money should be spent on education.

STAFF UPDATES

Susan Katzenelson presented a staff update to the Commission, highlighting what the staff can expect with the upcoming legislative session and the budget issues.

First, she touched on the Commission's mandated reports, stating that the next report due is the Prison Population Projections. She stated that it is her understanding that there is no money appropriated for prison construction right now. The full impact of the sentencing changes, which were passed in 2009, will result in some reduction in numbers. Also, last year there was a slight drop in prison population, which is unlikely to be a new trend, but rather is a function of the reduced resources throughout the State. She reiterated that there is still a bed shortage despite the lower prison population and that the daily numbers show that the population has already begun to rise again.

The second report Ms. Katzenelson discussed was the Statistical Report. She stated that it is used by the legislature, Fiscal Research and the Commission as a database that basically summarizes the products of the courts for a given fiscal year. Next, she talked about the two upcoming juvenile recidivism reports – the Juvenile Recidivism Report and a first time report looking at JCPC's. Finally, the Compendium of Community Corrections Report will be out soon and it, too, is used as resource for people who would like to know what programs are available in the community and how many participants go through the programs.

As a result of the recent elections, the staff anticipates to offer Structured Sentencing training for new Commissioners and new legislators. As always, the Commission is mandated to review all new bills that may affect sentencing. The staff will also be working on fiscal notes, helping to project resources needed for any new bills. At the end of the session, the staff will compile a Legislative Report.

If needed, the staff will be available to present and explain the Misdemeanor Reclassification Subcommittee Report to the legislature. Also, Staff has been very involved with the Youth Accountability Task Force and will be available to help wrap up their work and make any necessary presentations with regard to the Task Force's work.

Finally, Ms. Katzenelson updated the Commission on the Justice Reinvestment study. She indicated that the focus of the study is on misdemeanors and low level felonies. In particular, Justice Reinvestment is considering changes to probation, changes to Felony Classes G, H, and I dispositions, using unsupervised probation for low-level misdemeanants, and supervising according to risk. Ms. Katzenelson indicated that the Commission staff is concerned that Justice Reinvestment does not fully understand the nuances of the Structured Sentencing system in place

and the ways in which some recommended changes might affect its functions. In response to Mr. Moore, Ms. Katzenelson stated that there might not be one single report, but that the Justice Reinvestment team hopes to have some information and recommendations available for the General Assembly in the upcoming session. She added that Justice Reinvestment will be in North Carolina for at least another year.

Next, Ms. Katzenelson touched on some concerns related to the budget, indicating that staff will be working to assist the General Assembly in every way possible.

Chairman Spainhour opened the floor to questions and remarks. Dr. McMurray again thanked Luther Moore and the staff for their hard work on the Misdemeanor Reclassification Subcommittee. Chairman Spainhour echoed his praise and then reminded the Commission that there will likely need to be a Legislative Review Subcommittee formed for the long session, and stated that it is always an important and entertaining Subcommittee on which to serve. The Chairman then informed the Commission that its 2011 meetings are scheduled for March 25, June 3, September 16, and December 2. One final time, Chairman Spainhour congratulated Karen Calhoun on her retirement and her service to the Commission.

Senator Bingham made a final comment concerning the budget and the costs associated with the Misdemeanor Reclassification Subcommittee recommendations. Ginny Hevener replied that regarding cost projections, any bill introduced based on the Subcommittee report will be treated like all other bills and that a fiscal note will be prepared with as much data as is available from all of the affected agencies. For clarification, Chief Palombo asked about the increased costs associated with strictly following the Misdemeanor Reclassification Study mandate. Ms. Hevener replied that if the General Assembly proposed elimination of all Class 3 misdemeanors as the mandate states, then there would be an increase in cost associated with making the changes. If, however, the General Assembly follows the recommendation of the Misdemeanor Reclassification Subcommittee and does not eliminate Class 3 misdemeanors but rather reclassifies a number of those offenses as infractions and retains the others as Class 3 misdemeanors, there will be a cost savings.

Chairman Spainhour adjourned the meeting at 11:42 a.m.

Respectfully submitted,

Sara Perdue
Research and Policy Associate