

**MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION
MEETING**

February 24, 2017

The North Carolina Sentencing and Policy Advisory Commission met on Friday, February 24, 2017, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Art Beeler, Judge Charles Brown, Sheriff James Clemmons, Lisa Costner, Louise Davis, Judge Richard Elmore, Judge Robert Ervin, Representative John Faircloth, Christopher Fialko, Willis Fowler, Honorable Maureen Krueger, Senator Floyd McKissick, Dr. Harvey McMurray, Representative Allen McNeill, Luther Moore, Senator Shirley Randleman, and Honorable Thomas Thompson.

Guests: Mr. Brad Fowler (NCAOC) and Jamie Markham (UNCSOG).

Staff: Michelle Hall, John Madler, Ginny Hevener, Tamara Flinchum, Rebecca Murdock, Sara Perdue, John King, Jennifer Wesoloski, and Shelley Kirk.

INTRODUCTION

Chairman Spainhour called the meeting to order at 10:00 a.m. He informed the members that Chief Cunningham and Mr. Butler had retired from the Commission and read Resolutions recognizing their service. Luther Moore moved to adopt the Resolutions as printed; the motion was seconded and carried. Chairman Spainhour introduced two new Commission members: Representative Allen McNeill, appointed by the Speaker of the House, and Willis Fowler, the Chairman of the Post-Release Supervision and Parole Commission. Members and guest introduced themselves. Chairman Spainhour reviewed the agenda for the meeting. Art Beeler moved to adopt the minutes from the December 2, 2016, meeting; the motion was seconded and carried.

DWI SUBCOMMITTEE UPDATE

Chairman Spainhour recognized Sara Perdue, staff, to give the members a brief update on the work of the DWI Sentencing Subcommittee. Mrs. Perdue reminded the Commission of where the DWI Sentencing Subcommittee began and how it has evolved. She informed them that, most recently, the Subcommittee met on January 20, 2017, and had a very active and robust discussion, refining the members' concerns with the DWI laws, developing a set of working goals, and making decisions regarding the direction of the Subcommittee.

At the January 20 meeting, the Subcommittee developed their top 5 concerns with the DWI laws, agreed upon at their October 2016 meeting. First, "swift resolution" became "getting to trial quicker for a swifter response to offense." "No access to existing tools" was refined into two parts: "access for probation officer to delegated authority to improve chance of successful completion of probation and treat offenders consistently" and "access for court to pretrial tools (investigation, supervision) for earlier control." Then "availability/adequacy of treatment" lead to "effective

treatment in jails (program & logistics) and community in order to implement the sentence and reduce recidivism and address unforeseen consequences.” Finally, “complexity of laws” and “structure and administration of sentence” were refined together into “more truthful sentencing, like Structured Sentencing.”

Next, the members turned the concerns into working goals for the Subcommittee to use in guiding its work. They concluded that DWI Policies should be swift and certain, be truthful in sentencing, enhance public safety, and be effective in reducing recidivism.

In the afternoon of the January meeting, Sara Perdue presented a compilation of how other states address DWI offenses. Mrs. Perdue stated that she looked at neighboring states – Alabama, Florida, Georgia, Maryland, South Carolina, Tennessee, Virginia – and the only sentencing guideline state where DWI offenses are sentenced pursuant to the guidelines – Pennsylvania. Generally, the other Southeastern states’ DWI policies look quite like North Carolina’s did in the early 1980’s before the Safe Roads Act.

Finally, members were asked to make a tentative decision regarding how they would like to approach changes to DWI laws in North Carolina. The members decided that DWI is a different type of offense and should be treated as such. The members agreed that they should begin by exploring ways to amend existing laws to meet their goals. Mrs. Perdue concluded by stating that the next steps for the Subcommittee will be to begin considering options for existing DWI laws to achieve the defined goals of the Subcommittee.

Judge Elmore asked whether good time and gain time policies will still be considered in the Subcommittee’s work, and Representative McNeill asked whether the Subcommittee is also looking at felony death by motor vehicle. Judge Spainhour responded that felony DWI offenses fall outside the scope of the DWI Sentencing Subcommittee. He reminded the members that the Subcommittee originated in response to a request to study the sentence credit policies, so it would certainly be considered by the group. Judge Brown stated that there were no good arguments in support of maintaining good time but Judge Ervin pointed out the cost of eliminating it. Michelle Hall reminded the members that impact projections are a part of the Subcommittee’s mandate and will be formulated as well.

Senator Randleman asked about the potential of having a product in time for the legislative session in 2018. Judge Spainhour responded that it was possible.

COURT STATISTICS – FY 2016

Chairman Spainhour recognized John King, staff, to present the Structured Sentencing Statistical Report for Felonies and Misdemeanors. Mr. King noted the report was published annually, the 2017 report covers convictions from July 1, 2015 to June 30, 2016 (FY 2016). He highlighted ten-year conviction trends (see Handout) and noted that felonies decreased 1% this year after last year’s 4% increase, while misdemeanors continue to decrease. A number of legislative changes have been made in recent years which contributed to the misdemeanor decline, including the reclassification of a number of misdemeanor offenses to infractions, and changes made to the offense of Driving While License Revoked (DWLR). Mr. King reviewed some

offender characteristics, including a comparison of the age distribution of felony and misdemeanor offenders in FY 2007 and FY 2016. For both felony and misdemeanor convictions, a smaller percentage of offenders are under 21 years of age than ten years ago and a larger percentage are over the age of 50. Senator Randleman asked whether a similar comparison had been done for 16- and 17-year-olds. Mr. King reported that had not been done. Mr. Beeler commented that health care costs for those over 50 years old are three times higher. Mr. Fialko clarified that the rate of crime among offenders 50 and older is not increasing, but that this segment of the population is increasing. Representative McNeill also commented that the state's population is aging. Sheriff Clemmons shared that the aging of the offender population is reflective of the same offenders becoming older.

Mr. King then shared FY 2016 data on felony convictions (N=28,593) by class, crime type, punishment imposed, and listed the most common convictions. As is intended by Structured Sentencing, the active rate decreases as offense seriousness decreases, while the active rate increases as the offenders' prior record level increases. The average minimum sentence length imposed for active sentences falls closer to the lowest possible minimum sentence than the highest possible minimum sentence. Mr. King attributed this to the fact that offenders in the three lowest prior record levels receive a majority of all active sentences (55%) and that very few sentences are imposed in the aggravated range. Mr. Beeler asked whether *Blakely* has affected the percentage distribution of aggravated, presumptive, and mitigated sentences. Mr. Madler replied that it has not. Chairman Spainhour commented that the reason Class C and Class D sentences are mitigated so often is because of habitual felon pleas.

Mr. King then shifted to information on probation sentences. Probation was imposed in 62% of all felony convictions in FY 2016 and has fluctuated within just a few percentage points over the past ten years. The average probation length decreases as offense seriousness decreases, with offenders convicted of person crimes receiving longer probation sentences on average. The average length of probation for felony convictions was 27 months and 98% of felony probation sentences required supervised probation. In examining five-year trend data for habitual felon convictions, the percentage of Class E habitual felon convictions has increased in each of the past three years.

Mr. King closed the felony portion of his presentation by offering a few key points related to felony convictions. He remarked that the Felony Punishment Chart contributed to stability in sentencing over time; Class H and I felonies accounted for the largest proportion of felony convictions and had the lowest active rates; person offenses were most likely to result in active sentences, while non-trafficking drug offenses were least likely to result in active sentences; non-active sentences were imposed more frequently than active sentences, while supervised probation was ordered more than unsupervised probation; and habitual felon convictions have increased as felony convictions overall have decreased.

Shifting to misdemeanor convictions (N=98,396), Mr. King provided a breakdown by class, prior conviction level, crime type, punishment imposed, and shared the five most common convictions. He presented the misdemeanor active rates and average active sentence lengths by crime type. He pointed out that, unlike with felony convictions, the active rates for misdemeanors do not decrease in a stair step fashion as offense seriousness decreases. The active rate has

increased approximately ten percentage points over the past ten years, which can most likely be attributed to active punishments stemming from credit for time served sentences. In FY 2016, 63% of all active sentences for misdemeanor convictions were credit for time served sentences – a percentage that has been steadily increasing since FY 2007 (45%). He added that the 10-year average credit for time served when the credit is equal to or greater than the active sentence was 22 days. Chairman Spainhour commented that he would have thought the average number of credit days in this scenario would have been greater. Ms. Krueger agreed. Mr. Beeler wondered if there has been an analysis on why these offenders are not posting bail and suggested perhaps it is because of prior convictions. Chairman Spainhour mentioned that sometimes these offenders are serving more than is allowable because they cannot post bail. Ms. Hevener shared that the AOC does not have data on reasons why offenders cannot post bail. Ms. Davis noted offenders' propensity for repeatedly entering and exiting the criminal justice system and the need for more mental health facilities.

Mr. King noted that sentence lengths increase as both offense seriousness and prior conviction level increase. For non-active sentences, the percentage of convictions where no probation is ordered increases as offense seriousness decreases and the percentage of convictions where supervised probation is ordered decreases as offense seriousness decreases. Mr. King concluded the misdemeanor portion of his presentation with a few key points. He remarked that misdemeanor convictions continued to decrease; prior conviction level was more strongly related to the imposition of an active sentence than offense class; the overall active rate has increased over time and this increase can be primarily attributed to an increase in credit for time served sentences; and non-active sentences were imposed more frequently than active sentences, with nearly equal proportions receiving supervised, unsupervised, or no probation.

Mr. King then asked if there were any questions about the data presented. Mr. Fialko asked why we do not count cases disposed of by magistrates as convictions. Ms. Hevener responded that if the method of disposition in ACIS is clerk or magistrate, the convictions have not been counted. Discussion followed regarding the types of cases clerks and magistrates typically dispose of. Judge Brown then asked whether misdemeanor convictions are really decreasing or are the decreases shown in the Statistical Report just a product of the reclassification of certain misdemeanors to Class 3 (which are not covered in the Statistical Report). He commented that he is not seeing decreases in cases in his district. Ms. Krueger mentioned the amount of additional work the reclassification of DWLR has caused her office and that her staff has to examine a lot of DWLR cases for court appointed attorney eligibility. Mr. Beeler recommended a footnote be added to the report explaining the effect of the misdemeanor reclassifications on the counting of misdemeanor convictions. Ms. Hevener stated that a footnote about the misdemeanor reclassification is included in the report. She followed with a comment that misdemeanors are decreasing according to AOC data on filings, dispositions, and convictions that were presented at the annual Forecasting Technical Advisory Group Meeting.

CURRENT PRISON POPULATION PROJECTIONS – FY 2017 to FY 2026

Chairman Spainhour then introduced Ginny Hevener, staff, to review the current prison population projections. She noted the projections are used to determine how many prison beds are needed (capacity) and what type of beds are needed (custody level). She stated that, pursuant to

statute, the projections are prepared annually in conjunction with Department of Public Safety's Division of Adult Correction and Juvenile Justice (DPS-DACJJ).

The prison population is projected to increase from 36,774 to 38,442 across the ten-year projection period – an increase of 5%. The current projection is lower than the previous year's projection, which is consistent with continued declines in criminal justice trends and with decreases in felony convictions over the previous year. Comparing the projected prison population with the capacity estimates provided by Prisons Administration, the projected prison population is projected to be below Expanded Operating Capacity for all but the last two years of the projection. Ms. Hevener noted that the capacity estimates, as well as the prison projections, exclude probationers who are housed in Confinement in Response to Violation (CRV) Centers. With the reclassification of CRV Center beds as treatment beds (effective January 1, 2016), the prison population is currently around FY 2005 levels.

Representative McNeill asked why the projected population increases each year until 2019 and then declines. Ms. Hevener explained that staff have been exploring whether it is a function of evolving data under the JRA (such as revocation rates and time to revocation), growth rates, or a model adjustment. Judge Ervin commented that the changes to habitual felon sentencing could also be a factor. Senator Randleman asked what kind of treatment is provided in CRV Centers. Ms. Hevener responded that it is primarily cognitive behavioral programming.

Ms. Hevener also described the impact that different offense class groupings have on the prison population. While Class A – D convictions account for 8% of convictions, they comprise over half (54%) of the prison population as a result of their mandatory active sentences and long sentence lengths. Class H-I convictions impact the prison population through their high volume (representing 64% of convictions), but have a limited impact on the prison population (accounting for 21% of the population) due to their lower rate of active sentences (28%) and shorter time served (10 months on average).

REQUEST FROM NASC

Chairman Spainhour recognized Michelle Hall, staff, to present a request from the National Association of Sentencing Commissions (NASC). Ms. Hall reminded the Commission about the structure, mission, and function of NASC. She stated that NASC holds an annual conference, with the purpose of providing an opportunity for states with sentencing guidelines and/or sentencing commissions to discuss topics or issues each of their respective states face. The Executive Committee of NASC had asked if the North Carolina Sentencing Commission would be willing to host the 2018 NASC Conference. Ms. Hall noted that North Carolina, although having one of the long-standing Sentencing Commission in the country, had never served in the role of "host state" for the annual conference.

Mr. Moore asked whether there was a cost associated with hosting the conference. Ms. Hall replied that the Executive Committee indicated either a cash contribution or in-kind contribution for example, for printed materials, is standard practice for the host state. She indicated her thought that AOC would be willing to partner on print materials. Brad Fowler, AOC, indicated his agreement with willingness on behalf of the agency to assist with conference materials. Ms. Hall

then added that the demands for hosting the conference would fall more to staff than Commissioners, however, the commitment of staff time would be manageable.

Judge Spainhour noted he had attended a number of past NASC conferences and found them to be very valuable and worthwhile. The Commission then voted in favor of serving as a host state for the 2018 NASC Conference.

REQUEST – FELONY MURDER RULE

The Commission reviewed a request from Senator Randleman, which asked the Commission to review the Felony Murder Rule in North Carolina. The Commission voted to accept the request, and asked staff to gather background information. Commissioners planned to revisit the request and issues raised at its next regular meeting (June 2, 2017).

LEGISLATIVE REVIEW AND SESSION UPDATE

Chairman Spainhour recognized John Madler, staff, to provide an update on the legislative session. Mr. Madler stated that this is the first session of the 2016-17 biennium. The General Assembly convened on January 11 to organize, adjourned, and then reconvened on January 25 to begin conducting business.

Turning to the legislative review, Mr. Madler explained the process the Commission follows and reviewed the Commission's policies and offense classification criteria. He then presented the bills for review.

HB 63 – Citizens Protection Act of 2017 [Ed. 1].

(G.S. 14-100.1) Judge Elmore moved to find the proposed Class G felony inconsistent the Offense Classification Criteria but that it would be consistent with the Offense Classification Criteria for a Class I felony. Judge Ervin seconded the motion and the motion carried.

(G.S. 20-30(2)) Luther Moore moved to find the proposed Class G felony inconsistent the Offense Classification Criteria but that it would be consistent with the Offense Classification Criteria for a Class I felony. Judge Elmore seconded the motion and the motion carried.

(G.S. 20-30(7)) Art Beeler moved to find the proposed Class G felony inconsistent the Offense Classification Criteria but that it would be consistent with the Offense Classification Criteria for a Class I felony. Luther Moore seconded the motion and the motion carried.

HB 65 – Require Active Time Felony Death MV/Boat [Ed. 1].

(G.S. 20-141.4) Judge Ervin moved to find the proposed punishment change inconsistent with Structured Sentencing. Judge Elmore seconded the motion and the motion carried.

(G.S. 75A-10.3) Judge Elmore moved to find the proposed punishment change inconsistent with Structured Sentencing. Judge Ervin seconded the motion and the motion carried.

HB 69 – Constitutional Carry Act [Ed. 1].

Judge Elmore moved to find the proposed Class H felony for second and subsequent

offenses inconsistent with Structured Sentencing pursuant to the policies adopted by the Sentencing Commission and to point out that the punishment chart takes a defendant's prior record into account through the Prior Record Level. Judge Ervin seconded the motion and the motion carried.

SB 28 – Electronic Pawn & Metals Database [Ed. 1].

Judge Elmore moved to find the proposed Class I felony for second and subsequent offenses inconsistent with Structured Sentencing pursuant to the policies adopted by the Sentencing Commission and to point out that the punishment chart takes a defendant's prior record into account through the Prior Record Level. Judge Ervin seconded the motion and the motion carried.

HB 107/SB 93 – Common Sense Compromise to Repeal HB 2 [Ed. 1].

Judge Ervin moved to find the proposed punishment change inconsistent with Structured Sentencing and to point out that committing an offense in a public changing facility could be an aggravating factor. Mr. Beeler seconded the motion and the motion carried.

HB 78 – HB2 Repeal/Equality for All [Ed. 1].

(G.S. 15A-1340.16E) Judge Ervin moved to find the proposed punishment change inconsistent with Structured Sentencing. Judge Elmore seconded the motion and the motion carried.

Judge Ervin moved to point out that committing an offense in a public changing facility could be an aggravating factor. Mr. Moore seconded the motion and the motion carried.

(G.S. 14-27.33) Judge Ervin moved to find the proposed Class I felony inconsistent with Offense Classification Criteria but that it would be consistent with the Offense Classification Criteria for a Class H felony. Mr. Beeler seconded the motion and the motion carried.

HB 186 – Repeal HB2/State Nondiscrimination Policies [filed].

(G.S. 15A-1340.16E) Mr. Beeler moved to find the proposed punishment change inconsistent with Structured Sentencing and to point out that committing an offense in a public changing facility could be an aggravating factor. Judge Ervin seconded the motion and the motion carried.

(G.S. 14-202(c)) Mr. Beeler moved to find the proposed Class I felony inconsistent with Offense Classification Criteria but that it would be consistent with the Offense Classification Criteria for a Class H felony. Mr. Moore seconded the motion and the motion carried.

(G.S. 14-277.3A) Mr. Moore moved to find the proposed Class H felony consistent with the Offense Classification Criteria. Judge Elmore seconded the motion and the motion carried.

(G.S. 14-27.33) Mr. Beeler moved to find the proposed Class I felony inconsistent with Offense Classification Criteria but that it would be consistent with the Offense Classification Criteria for a Class H felony. Judge Ervin seconded the motion and the motion carried.

HB 128 – Prohibit Drone Use Over Prison/Jail [Ed. 1].

(G.S. 15A-300.3(b)(1)) Mr. Moore moved to find the proposed Class H felony consistent with the Offense Classification Criteria. Judge Ervin seconded the motion and the motion carried.

(G.S. 15A-300.3(b)(2)) Judge Elmore moved to find the proposed Class I felony consistent with the Offense Classification Criteria. Judge Ervin seconded the motion and the motion carried.

HB 138 – Revise Gang Laws [Ed. 1].

Mr. Madler informed the members that this bill was identical to the draft version they reviewed at the December 2, 2016, Sentencing Commission meeting. Judge Ervin moved to ratify the Commission’s previous decisions. Mr. Moore seconded the motion and the motion carried.

HB 152 – Hate Crime/Increase Scope & Penalty [Ed. 1].

(G.S. 14-34.11(c)) Mr. Beeler moved to find the proposed Class F felony inconsistent with the Offense Classification Criteria. The motion died for lack of a second.

Mr. Moore moved to find the proposed Class F felony consistent with the Offense Classification Criteria. Sheriff Clemmons seconded the motion and the motion carried.

Chris Fialko noted that making the race, color, religion, etc., of the victim an element of the crime would prohibit the prosecutor from using it as an aggravating factor, as he currently can.

(G.S. 14-34.11(d)(1)) Judge Elmore moved to find the proposed Class E felony consistent with the Homicide Offense Classification Criteria. Senator McKissick seconded the motion but the motion failed.

Mr. Moore moved to find the proposed Class E felony inconsistent with the Homicide Offense Classification Criteria but that it would be consistent with the Homicide Offense Classification Criteria for a Class B felony. Judge Ervin seconded the motion and the motion carried.

(G.S. 14-34.11(d)(2)) Senator McKissick moved to find the proposed Class E felony consistent with the Offense Classification Criteria. Sheriff Clemmons seconded the motion and the motion carried.

HB 181 – First Responders Act of 2017 [Ed. 1].

(G.S. 14-401.14A(b)) Judge Elmore moved to find the proposed Class H felony inconsistent with the Offense Classification Criteria but that it would be consistent with the Offense Classification Criteria for a Class F felony. Mr. Moore seconded the motion and the motion carried.

Mr. Beeler asked if staff could add a note pointing out that there are current offenses that address assaults inflicting serious injury on emergency personnel and that they are classified in different classes. Without objection, the Commission agreed to add the note.

(G.S. 14-401.14A(c)) Mr. Moore moved to find the proposed Class F felony consistent

with the Offense Classification Criteria. Senator McKissick seconded the motion and the motion carried.

(G.S. 14-401.14A(d)) Mr. Fialko moved to find the proposed Class E felony inconsistent with the Offense Classification Criteria but that it would be consistent with the Offense Classification Criteria for a Class F felony. Mr. Beeler seconded the motion and the motion carried.

SB 109 – Hate Crime Against Emergency Worker [Ed. 1].

(G.S. 14-34.11(c)) Judge Ervin moved to find the proposed Class H felony consistent with the Offense Classification Criteria. Mr. Moore seconded the motion and the motion carried.

(G.S. 14-34.11(d)) Judge Ervin moved to find the proposed Class F felony consistent with the Offense Classification Criteria. Judge Elmore seconded the motion and the motion carried.

(G.S. 14-34.11(e)) Mr. Moore moved to find the proposed Class E felony inconsistent with the Offense Classification Criteria. Judge Ervin seconded the motion and the motion carried.

(G.S. 14-34.11(f)) Judge Ervin moved to find the proposed punishment change inconsistent with Structured Sentencing. Judge Elmore seconded the motion and the motion carried.

Chairman Spainhour stated that the Commission is required by statute to review proposed legislation within 10 days after the last day for filing bills and that that deadline would come before the June 2 Sentencing Commission meeting. He asked if there were any objection to him convening a subcommittee to review bills before the next Commission meeting. There being no objection, he announced that a subcommittee would meet on Friday, April 7, and asked Commissioners to notify staff if they would be willing to serve on that subcommittee.

SPAC COMMUNICATIONS UPDATE

Chairman Spainhour recognized Michelle Hall, staff, to discuss recent efforts to improve the Commission's communication efforts. She noted two ways the Commission currently uses to communicate information are through its website and through its publications. She discussed recent efforts at AOC and within the Judicial Branch to improve the nccourts.org website and that SPAC's own website would be included in the update to nccourts.org. She encouraged Commissioners to visit the Commission's website and provide any feedback to staff on improvements they would like to be incorporated. Ms. Hall revealed the Commission had a new web address: www.ncspac.org, which she thought was much more memorable than the previous and very lengthy web address used by the Commission. Both urls would still direct users to the same web page, but going forward ncspac.org would be the published web address for the Commission.

Ms. Hall then noted that staff plan to begin using certain social media platforms, namely Twitter, to increase the visibility of some of the Commission's work. Any tweets from the Commission would come under the Judicial Branch's handle, and include the hashtag #NCSPAC. Lastly, Ms. Hall informed the Commission that a Branding Committee comprised of Commissioners and staff had been working for months on developing a logo for the Commission.

She showed the Commission artwork that had been used on past Commission publications, to demonstrate the lack of consistency between reports and across years. She outlined some of the benefits of having a logo, before unveiling the new Commission logo (*see* Handout). The logo embodies symbolism related to the Commission including the five principles of Structured Sentencing, represented by the five bars in the graphic of the logo (a column). The column in the logo also represents “foundation” – Ms. Hall noted that sentencing is the foundation of the criminal justice system. She also noted the two colors in the column, and their resulting shape – a gold “delta” – is meant to symbolize progress – which is key to the Commission’s mandate in advising the state on criminal justice policies.

Judge Brown praised the new logo, and noted the bars of the columns also conjure images of data, which are critical to the Commission’s work. Other Commissioners expressed appreciation for the new logo as well. Ms. Hall concluded her presentation, noting that upon adjournment of the meeting, Commissioners were invited to celebrate the new logo, by enjoying a cake bearing its image.

Chairman Spainhour informed the members that the next Sentencing Commission meeting was scheduled for June 2, 2017, and that the JRA Subcommittee meeting was scheduled for April 24, 2017.

The meeting adjourned at 1:50 p.m.

Respectfully submitted,

Shelley Kirk
Administrative Secretary