

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

June 2, 2017

The North Carolina Sentencing and Policy Advisory Commission met on Friday, June 2, 2017, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Art Beeler, Judge Charlie Brown, Sheriff James Clemmons, Lisa Costner, Louise Davis, Judge Robert Ervin, Chris Fialko, Willis Fowler, David Guice, Chief Charles Kimble, the Honorable Maureen Krueger, Ilona Kusa, Senator Floyd McKissick, Dr. Harvey McMurray, Representative Allen McNeill, Robert Montgomery, Luther Moore, Judge Fred Morrison, the Honorable June Ray, the Honorable Thomas Thompson, and Susan Katzenelson.

Guests: Danielle Goldberger (Re-entry Extern), Michael Gagnon (DPS-GCC), William Lassiter (DPS-DACJJ, JJ), Kim Howes (OJD), and Amanda Witwer (SPAC Intern).

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

RECOGNITION OF OUTGOING CHAIRMAN

Michelle Hall, staff, introduced Chief Justice Mark D. Martin, North Carolina Supreme Court. He recognized the outgoing Chairman, Judge W. Erwin Spainhour, by presenting a resolution to the Commission. Luther Moore moved to adopt the resolution and the motion was seconded. Art Beeler asked that the motion be adopted by acclamation and the Commission agreed. Chief Justice Martin then conferred the “Friend of the Court” award on Chairman Spainhour. Chairman Spainhour thanked the Chief Justice and the Commission.

INTRODUCTION

Chairman Spainhour called the meeting to order and called for a moment of silence in memory of Correctional Officer Meggan Callahan who was killed in the line of duty. He then introduced two new Commissioners, Chief Charles Kimble, appointed by the President of the Association of Chiefs of Police, and Susan Katzenelson, appointed by the Governor. Finally he introduced Amanda Witwer, an intern with the Sentencing Commission for the summer.

Members and guests introduced themselves. Chairman Spainhour reviewed the agenda for the meeting. Mr. Moore moved to adopt the minutes from the February 24, 2017, meeting; the motion was seconded and carried. Ms. Hall briefly stated that members’ terms are ending June 30 and appointment letters have been sent out.

JUVENILE RECIDIVISM STUDY – 2017 REPORT HIGHLIGHTS

Chairman Spainhour recognized Tamara Flinchum, staff, to present the Juvenile Recidivism Study: FY 2013 Juvenile Sample (*see* Handout). Ms. Flinchum informed the members that this is the sixth 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, 2017. She 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 2013. Information was presented on the juvenile sample's profile – including the personal characteristics, the delinquency histories, the sample complaint/offense, and overall results for the risk and needs assessments completed during the intake process by court counselors for delinquent complaints.

Ms. Flinchum then provided the recidivism rates for the juvenile sample. Judge Robert Ervin asked if staff had recidivism rates for juveniles not involved in the juvenile justice system to use as a control group to compare to the juvenile sample. Mr. Beeler commented that data for a control group are not available. Michelle Hall, staff, added that the closest group of juveniles having no contact with the juvenile justice system from our studies would be the at-risk juveniles who participate in Juvenile Crime Prevention Councils (JCPC) programs reported in previous JCPC Studies. Susan Katzenelson mentioned that a comparable group would be to look at the first arrest in the adult system, while Ginny Hevener, staff, mentioned the closed and diverted groups have limited contact with the juvenile justice system.

After Ms. Flinchum presented recidivism rates for the juveniles adjudicated and disposed, Judge Charlie Brown asked if the juveniles adjudicated with a minor offense who had the highest recidivism rates is driven by higher risk levels compared to the juveniles with violent or serious offenses. Ms. Flinchum responded that most juveniles with a minor offense also had a low delinquency history level, but high recidivism rates are associated with higher risk levels.

Finally, Ms. Flinchum summed up the key findings from the report and the potential policy considerations and encouraged Commissioners to provide their views. Mr. Beeler agreed that the needs assessment needed to be re-normed, since there are two versions being used in the field that are not comparable. He also commented regarding the key findings that he sees a change in how juveniles are assigned programs and that the lack of funding for JCPC makes it increasingly difficult to provide meaningful programs. Mr. Beeler reported that the Wake County Teen Court had to discontinue referrals due to a lacking of staffing to accommodate the number of referrals. There is a need for more mental health programs for juveniles and there are no providers available in Granville County. Dr. Harvey McMurray offered that including a focus on teacher training especially for the 12-14 year-olds would be beneficial in reducing recidivism. Representative Allen McNeill asked if staff had examined recidivism rates by county given the diversity of the state. Ms. Flinchum responded that she had reviewed the data by the four sections used by DACJJ and found some differences, but had no specific data to report. Mr. Beeler mentioned that the local JCPCs would have risk and needs assessments available by county. Representative McNeill also mentioned that the General Assembly has requested a study on the effectiveness of JCPCs. Ms. Hall said caution should be used when reporting findings from individual counties due to the small number of juveniles involved in the juvenile system in the more rural counties, while Ms. Hevener

mentioned that the county policies may differ in how juveniles are processed in the juvenile system. Finally, Mr. Beeler added that the lack of responsivity data is another issue.

Chairman Spainhour recognized Jennifer Wesoloski, staff, to present the findings from the Youth Development Center (YDC) release sample, a new sample studied in the FY 2013 Juvenile Recidivism study (*see* Handout). Ms. Wesoloski provided some background information on YDCs and then presented the statistical profile of the YDC release sample, which included personal characteristics, delinquency history, most serious adjudicated offense, YDC commitment profile, and risk and needs levels.

Judge Ervin expressed concern that the YDC release sample was disproportionately black (70% for the YDC releases and 50% for the petition group). Louise Davis responded that income could partially explain the higher proportion of black juveniles in YDCs, while Dr. McMurray commented that the disproportionality may be more systemic than people are aware of.

Ms. Wesoloski provided the recidivism rates for the sample, overall and by commitment profile. The YDC release sample and the juveniles adjudicated group were compared using select variables; recidivism rates for the two groups were also compared. Judge Brown questioned why people typically see the lowest recidivism rates for juveniles with the least invasive response, but see similar recidivism rates for juveniles adjudicated and juveniles with the most invasive response – commitment to a YDC. Ms. Katzenelson responded that DACJJ’s system response is effective in targeting the correct juveniles for YDC placement, particularly since YDC releases have similar recidivism rates to juveniles adjudicated and the YDC population has continued to decline. Chairman Spainhour asked how many juveniles age 10-12 were currently housed in the YDCs. Mr. William Lassiter responded there were no juveniles under 12 currently in a YDC and Ms. Wesoloski added that there were only 3 juveniles in the FY 2013 sample who were 12. Mr. Moore asked how North Carolina compares to other states; Ms. Hall indicated that North Carolina cannot be compared to other states because its age of jurisdiction is different than other states. David Guice added that North Carolina’s diversion program is also unlike other states.

EFFECTIVENESS OF PROGRAMS FUNDED BY JUVENILE CRIME PREVENTION COUNCILS – 2017 REPORT HIGHLIGHTS

Chairman Spainhour recognized John King, staff, to present the findings from the Effectiveness of Programs Funded by JCPC Report (*see* Handout). Mr. King provided an overview of JCPCs – their responsibilities and duties, mandated population to be served, and the various categories of programs. Mr. King also shared reasons why JCPC effectiveness should be studied and how they were studied for this year’s report.

The FY 2013 juvenile recidivism sample was used to identify a subsequent JCPC program admission during the three-year follow-up. By using the juvenile recidivism sample, juveniles without a subsequent JCPC admission were used as a comparison group. Mr. King provided information on the differences between the JCPC and No JCPC groups in terms of personal characteristics, previous juvenile justice contacts, and risk and needs assessments. Mr. Beeler asked whether the juveniles contained in this study included at-risk or self-referred juveniles. Mr. King responded the study examined only court-involved juveniles.

Mr. King continued by sharing the arrest rates for juveniles in the JCPC group and No JCPC group by risk and needs levels. He noted that, overall, No JCPC juveniles had an arrest rate of 21% and JCPC juveniles had an arrest rate of 23%. Mr. King pointed out that in the FY 2015 report these figures were 20% and 26% respectively. Maureen Krueger noted the high percentage of juveniles who were identified through risk assessments as having school behavior problems. She asked whether staff had information on whether juveniles' recidivist arrests were school-based arrests or other law enforcement arrests. Ms. Hevener said the staff does not have information on where offenses occurred that led to an arrest. Mr. King added that staff could identify the arrest rates for juveniles assessed with school behavior problems.

Shifting focus to just JCPC juveniles and programming, Mr. King shared the categories of JCPCs and examples of types of programming contained in each category. He noted that the majority of juveniles were admitted to restorative services programming. Dr. McMurray asked whether all JCPC programming includes parental involvement. Mr. Beeler responded that parents are supposed to be involved and that some juveniles' participation is restricted because parents are unwilling or unable to participate. Mr. King continued by showing how each program category has a different composition of juveniles' risk and needs levels.

Mr. King then presented information on the JCPC juveniles' completion rates, noting that juveniles who complete their JCPC programming have lower adult arrest rates. Mr. King concluded the presentation by summarizing the findings and policy considerations contained in the report, namely, the success JCPC programs had with higher risk juveniles, the apparent connection between program completion and lower arrest rates, and the high rates at which juveniles were assessed as low needs. Mr. Beeler commented that reporting on JCPC effectiveness will improve with the addition of SPEP (Standardized Program Evaluation Protocol) scores. He added the high completion rates are suspect and are likely to go down as client tracking improves as part of SPEP implementation. Ms. Davis asked for clarification about whether the JCPC juveniles examined were all court-involved. Ms. Hall responded that only court-involved juveniles were included in this study, but that with improved data collection, she anticipates being able to include at-risk juveniles in future reports.

DWI SUBCOMMITTEE UPDATE

Chairman Spainhour recognized Sara Perdue, staff, to present the DWI Sentencing Subcommittee update. Ms. Perdue reminded the members of the Subcommittee's mandate, and shared briefly the work of the Subcommittee since the last Commission meeting. In April, the Subcommittee began work on their four goals by focusing on the idea that DWI policies should be swift and certain. At that meeting, the members explored the DWI case process from arrest to disposition by hearing presentations from various officials – from law enforcement to judges – in that process. The members discussed the information provided and at the end of the meeting identified several areas for follow-up. Ms. Perdue reported that no meeting date has been set for the DWI Sentencing Subcommittee at this time, but members will be notified when it has been set.

REQUEST – FELONY MURDER RULE

Chairman Spainhour recognized John Madler, staff, to present information regarding the request to study the felony murder rule (*see* Handout). Mr. Madler began by reviewing the request. Based on a case that occurred in her district, Senator Shirley Randleman asked if the Commission would study whether the felony murder law should allow consideration for defendants who were not aware of and did not actively participate in the underlying felony. Mr. Madler reviewed the purpose and the statutory elements of felony murder. He pointed out that the State must prove that the defendant intended to commit the underlying felony, it does not have to prove malice and specific intent to kill after premeditation and deliberation.

Felony murder is punished as first degree murder, a Class A felony. In Fiscal Year 2016, there were 66 convictions for first degree murder but it is not known how many of those were convicted under the felony murder rule. Robert Montgomery told the Commissioners that, based on a survey of appellate cases over a three-year period, he estimated that about 25 to 30 percent of first degree murder convictions are based solely on the felony murder rule, and another 5 to 10 percent appear to be based on theories of both premeditation and deliberation and the felony murder rule. There also appear to be a few cases that involve convictions based on felony murder and a theory of guilt other than premeditation and deliberation – such as torture and lying in wait.

Mr. Madler continued with a review of recent legislative efforts to change the felony murder rule. Those efforts fell into one of two categories: limit the punishment to life without parole or repeal the rule entirely. Mr. Madler concluded with a review of the status of the felony murder rule in the other states. Forty-six states have codified the common law felony murder rule, most of them as first degree murder. Four states have abolished the common law felony murder rule (Hawaii, Kentucky, Michigan, and Ohio) but two of those states (Michigan and Ohio) have statutes that incorporate elements of the felony murder rule.

Regarding Senator Randleman's request, Maureen Krueger pointed out that the law currently allows consideration for defendants who were not aware of and did not actively participate in the underlying felony; case law and the North Carolina Pattern Jury Instructions state that the mere presence of the defendant is not enough to be convicted. Members discussed the fact that the defendant's awareness of and participation in the felony is necessary for a conviction and it is a question for the jury.

Chris Fialko agreed that the defendant cannot be convicted of felony murder if he is not aware of the underlying felony but questioned whether the law allows for consideration when a defendant does not actively participate in the offense. He gave the example of the driver for a bank robbery that results in a killing; under current law, he would be guilty of the killing even if he did not know an accomplice had a gun. Mr. Fialko then referred to a recent U.S. Supreme Court case (*Rosemond v. U.S.*, 134 S.Ct. 1240 (2014)) in which the Court held that a defendant charged with aiding and abetting a federal drug offense had to have full knowledge in advance of the circumstances constituting the charged offense in order have actively participated. He suggested that this may impact felony murder situations where there are multiple participants. Chairman Spainhour agreed that the case might change the law but pointed out that no one had applied it to the North Carolina felony murder statute. Mr. Fialko also pointed out that Senator Randleman

asked whether the law should allow for consideration and suggested that they might consider a lesser punishment for offenders who aided and abetted. Commission members agreed to wait and see what impact, if any, the *Rosemond* case has on the felony murder rule.

Senator Floyd McKissick moved to respond to Senator Randleman that the felony murder law currently allows consideration for defendants who were not aware of and did not actively participate in the underlying felony and to convey to her a summary of the points raised in the discussion. The motion was seconded and carried.

KEY FINDINGS – 2017 JUSTICE REINVESTMENT IMPLEMENTATION EVALUATION REPORT

Chairman Spainhour recognized Ms. Hall to review the key findings of the 2017 Justice Reinvestment Act (JRA) Implementation Evaluation Report (*see* Handout). Ms. Hall began by reviewing the importance of monitoring the implementation of JRA and then provided data demonstrating the sentencing practices under JRA. She highlighted that the use of some tools has increased, such as the pursuit of the habitual felon status offense, while others are still not in great use, such as habitual breaking and entering. Moving to the effects of JRA on correctional practices, she highlighted that the use of the quick dip tool continues to increase while the use of the CRV is declining – perhaps due to recent legislative changes. The population under supervision remains relatively stable; the revocation rate has stabilized since its initial dramatic decline with the onset of the JRA. Ms. Hall then described some of the initiatives the Department of Public Safety (DPS) was undertaking in prisons and community corrections to expand and enhance the use of the tools and practices under JRA, such as their Administrative Response Pilot and their work with offenders with mental health diagnoses in Therapeutic Diversion Units.

Ms. Hall then reviewed the effect the JRA has had on the community corrections population, the inmate populations, and offenders' recidivism overall. While both the community corrections population and inmate populations have declined since the passage of JRA, Statewide Misdemeanant Confinement Program (SMCP) entries and population have increased. Mr. Moore inquired what the prison projections indicate for the future. Ms. Hevener responded that the prison population is currently increasing; for May it was about 36,400 inmates and the projection was 36,774, which staff considers to be within the projected range. Ms. Hall added that population predictions are discussed at the forecasting technical advisory group meeting in the fall; the group selects a growth rate for the projection model and looks at when, if, and how the criminal justice trends will change. Mr. Moore asked what that group considered when determining growth rates. Ms. Hall responded that the group considers, among other factors, the number of court filings and certain demographic trends including population growth for certain age groups. The state demographer attends and reported at the most recent meeting that overall, the most rapidly increasing sector of population is the 50+ age group. Ms. Hall noted that the age groups of interest are those who may enter the adult criminal system (youth aged 10-15), and the highest "crime producing" population, males aged 16-24. She noted that this latter group was still increasing but is doing so at a declining rate.

Turning to the SMCP, Ms. Hall reviewed how it was created under the JRA, stating that eligibility has expanded several times since being enacted. Currently, all misdemeanants with

sentences of 91 days or longer and offenders sentenced for DWI, regardless of sentence length, are sentenced to the SMCP. Ms. Hall noted that the changes have an impact on the overall jail population but that there are no data for the general jail population. Mr. Beeler added that the lack of jail population data statewide is concerning because it makes it difficult to determine the effect of offenders' incarceration in jails. He asked if there was a methodology that could be designed to capture that data. Ms. Hall stated that it is an issue of resources, to which Mr. Beeler commented that he understood that, but wanted to be on record with his concern, particularly because some of the DWI offenders can serve such a long period of incarceration. Ms. Hall noted that there are ongoing discussions with stakeholders to determine if there is any way to determine how or if the SMCP has affected the jail population.

Mr. Guice stated that the number of counties participating in the SMCP has continued to increase and there is far more capacity than what is being used. He added that 40 counties are currently working in the Stepping Up Initiative, a national program looking at mental health services for local jails. Mr. Guice commented that there is a definite need for a database to help capture medical and mental health information regarding incarcerated individuals in local facilities. Further, he stated that it is problematic when those individuals transfer from the county to the state facility because often the information does not transfer with them. Mr. Beeler added that he has previously reported about the need for a form to track such information, particularly regarding medication usage. Sheriff James Clemmons commented that when his jail transports an individual from the jail facility to a state facility, the medical record is supposed to accompany him, along with all medications prescribed. However, he noted there is a potential problem with the transfer of information because a lot of jails are outsourcing that information to different agencies due to liability and financial issues.

Ms. Hall concluded by explaining that the focus of the JRA Subcommittee and staff going forward is to continue to monitor any legislative changes, to examine offenders in the SMCP and the potential stacking effect due to the longer sentencing, and to look at outcome measures. She added that any additional topics the Commission is interested in would be welcome. Mr. Guice stated that there has been communication with DPS at a national level to look at potential diversion methods, such as the program used in Dade County, Florida. He noted that it is worth looking at current diversion programs used in North Carolina and other states close by to learn how they work and what is involved in focusing on keeping individuals out of the criminal justice system.

LEGISLATIVE REVIEW AND SESSION UPDATE

Chairman Spainhour recognized Rebecca Murdock, staff, to assist the Commission in reviewing bills and to provide an update on the legislative session. Ms. Murdock stated that since there were no new bills to review, the presentation would focus on an update on the legislative session (*see* Handout). She indicated that three bills of interest had been enrolled and were on their way to ratification by the General Assembly – HB 100, Restore Partisan Elections/Superior & District Court; HB 239, Reduce Court of Appeals to Twelve Judges; and SB 547, Restitution Remission/Notice and Hearing Requirement. Mr. Moore inquired as to whether there was a lawsuit related to HB 239, to which Ms. Murdock and several members of the Commission affirmed that there was.

Ms. Murdock highlighted a few bills of interest for the Commission, beginning with HB 551/SB 595, Strengthen Victim's Rights. After a review of the main provisions of the bill, Mr. Moore asked who was responsible for enforcing the rights outlined in the bill; Ms. Murdock responded that the bill did not specify. Mr. Fialko asked if there was an accompanying fiscal note outlining the costs of the bill, because among other expenses, it may necessitate the appointment of counsel for victims. Ms. Murdock replied that to her knowledge, a fiscal note had not been requested, but that the bill did specify counsel should not be appointed for the victims. Mr. Beeler added that lawyers may be willing to take such a case on if they thought it would be profitable. Senator McKissick added that the cost would be enormous and that he had not seen a fiscal note requested. Mr. Moore then asked who the bill sponsors were, to which Ms. Murdock responded they were Representatives Dollar, Turner, Hall, and Earle. Ms. Krueger added that the Conference of District Attorneys has heard the bill may create a cause of action against paralegals or staff within the district attorney's office. She stated that they also heard this bill could create up to 160,000 new cases. Senator McKissick stated that if the constitutional amendment passes, the provision would come back to the General Assembly for members to work out a framework for implementation, similar to the process regarding the recent passage of the constitutional amendment establishing the waiver of a jury trial. Mr. Beeler opined that this amendment would be very difficult to vote against in an election, to which Senator McKissick agreed, noting that if it did make it onto the ballot, it would probably pass, without full understanding of the impact. Both Senator McKissick and Ms. Krueger stated the protections were likely to slow the court process down when the intention of such an amendment was to speed things up. Mr. Moore inquired as to whether district attorneys carry liability insurance or whether they are self-insured by the state, to which Ms. Krueger responded that they are covered by AOC. Mr. Montgomery pointed out that these provisions include the appellate process, to which Senator McKissick added that notice is required in various hearings, even when the court is not truly hearing the case, which could be the case for many hearings before the appellate court. Ilona Kusa then made a statement on behalf of the Victim's Assistance Network. She stated that while she personally had some reservations about the specificities of the bill, there are problems with how victims are treated, mentioning specifically notice and restitution. Those issues could be addressed more effectively and this bill is a result of that. Judge Spainhour thanked Ms. Kusa for her comments.

Ms. Murdock then reviewed the two proposals for raising the juvenile age, found in HB 280 and SB 257 (the Senate's Appropriations Act). She highlighted the differences between the bills; in particular, the offenses that would be covered and the effective date.

Ms. Murdock informed the Commission that various bills of interest had been included in the handout and were organized around the work the Subcommittees had been undertaking (DWI, Collateral Consequences, and Justice Reinvestment). In the interest of time, the provisions would not be reviewed individually.

Finally, Ms. Murdock reported on a few relevant special provisions in the budget proposals. Of particular interest were the different versions of the provisions addressing emergency judgeships. Mr. Moore asked how emergency judgeships would be funded under the House's plan, since it appeared that the funding was cut but the provision still referenced active judgeships. Ms. Murdock responded that both chambers cut funding for emergency judgeships that were eliminated in 2015. Representative McNeill clarified that the Senate eliminated all emergency judges and

funding, while the House did not eliminate the funding; instead, the House asked the Administrative Office of the Courts (AOC) to come up with four lists of emergency judges (active and inactive for both Superior and District courts). He informed Mr. Moore that the differences would be worked out in conference.

Chairman Spainhour informed the members that the Research and Policy Study Group was scheduled to meet June 23 and the next Sentencing Commission meeting was scheduled for September 8, 2017. Ms. Hall then invited the attendees to a farewell reception for Chairman Spainhour in the Bradford Room.

The meeting adjourned at 2:00 p.m.

Respectfully submitted,

Shelley Kirk
Administrative Secretary