

**MINUTES**  
**NORTH CAROLINA SENTENCING AND POLICY ADVISORY**  
**COMMISSION MEETING**  
**RALEIGH, NC**  
**March 26, 2010**

The North Carolina Sentencing and Policy Advisory Commission met on Friday, March 26, 2010, in the Maple Conference Room at the North Carolina Judicial Center in Raleigh, North Carolina.

**Members Present:** Chairman W. Erwin Spainhour, Tom Bennett, Honorable Stan Bingham, Honorable Charlie Brown, Louise Davis, Honorable Richard Elmore, Garry Frank, Paul Gibson, Secretary Linda Hayes, Larry Hines, Sheriff Shep Jones, Secretary Alvin Keller, Jr., Honorable Eleanor Kinnaird, Honorable Jimmy Love, Honorable Floyd McKissick, Jr., Moe McKnight, Dr. Harvey McMurray, Luther Moore, Honorable Fred Morrison, Chief Frank Palombo, Tony Rand, and Honorable Tim Spear.

**Guests:** Michelle Albaladejo (NC Central University), Amber Barwick (Conference of DA's), Carolyn Bidwell (Indigent Defense Services/Sentencing Services), Eddie Caldwell (NC Sheriffs' Association), Tracey Cline (District Attorney, Durham County), Jessica Dickerson (Office of Administrative Hearings), Stormy Ellis (Durham County District Attorney's Office), James French (Department of Prisons), Douglas Holbrook (Fiscal Research, General Assembly), Kristine Leggett (Fiscal Research, General Assembly), Chief Jose Lopez (Durham County Police Department) Charles Mann (NC Post-Release Supervision and Parole Commission), Jamie Markham (UNC School of Government), John Poteat (Fiscal Research, General Assembly), Melissa Radcliff (Our Children's Place), Mary Lu Rogers (Division of Prisons), and Nicole Sullivan (Department of Correction).

**Staff:** Susan Katzenelson, John Madler, Ginny Hevener, Karen Calhoun, Vicky Etheridge, Tamara Flinchum, Ashleigh Gallagher, David Lagos, and Sara Perdue.

**INTRODUCTION**

Judge Spainhour called the meeting to order at 10:00 a.m. Judge Spainhour recognized departing Commissioner, Charles Mann. The Commission adopted Mr. Mann's resolution. Judge Spainhour introduced new Commissioners Representative Jimmy Love, representing the House of Representatives, and Tony Rand, representing the Post-Release Supervision and Parole Commission. After welcoming everyone, Judge Spainhour asked those in attendance to introduce themselves. Luther Moore moved to adopt the minutes from the December 11, 2009 Sentencing Commission meeting; the motion was seconded and carried. Judge Spainhour then reviewed the agenda.

**STATISTICAL REPORT FOR STRUCTURED SENTENCING FELONIES AND  
MISDEMEANORS – FISCAL YEAR 2008/09**

Dr. Ashleigh Gallagher presented data from the Statistical Report for FY 2008/09, a hard copy of which was given to Commissioners at meeting. Dr. Gallagher defined a sentencing episode as the sentence imposed for the most serious conviction for a given day of court. In FY 2008/09, there were 32,266 felony convictions (excluding drug trafficking and violent habitual felon convictions) and 164,442 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 increased by 2% in the last fiscal year while misdemeanor convictions have decreased by almost 4% 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. There has been very little change in the composition of the convictions over the last 5 years for felonies and misdemeanors. Dr. Gallagher concluded that while the overall numbers of felony and misdemeanor convictions have remained fairly consistent over the past five years, there were some shifts in the types of convictions that resulted in a high number of active sentences in FY 2008/09. Compared to last year, FY 2008/09 data contained an increased number of habitual felon convictions, an increased number of drug trafficking convictions, a high number of life without parole sentences (similar to last year) and slight increases in active sentences, and decreases in community punishments for both felonies and misdemeanors.

Chief Palombo asked how the active drug sentences were broken down. Dr. Gallagher explained that this had not been done, but that she could probably do that for him. When Dr. Gallagher said that 60% of habitual felons had a Class H or Class I felony as the underlying offense, Judge Spainhour asked if that was one of the first three offenses or if it was the fourth. It was the fourth. As a followup to the habitual felon topic, Chief Palombo asked if there were statistics for the three offenses leading up to the habitual felon status. He wondered what the criminal history was prior to the 4<sup>th</sup> conviction. Dr. Gallagher stated that she had not asked for a cut of that data. Susan Katzenelson explained further that the last time that data was run was for the alternatives and that the offenses were predominantly Class G-I offenses with small percentages having more serious offenses. Ms. Katzenelson said that a special cut could be requested from the Department of Correction to obtain this data.

Senator Kinnaird asked if the life without parole sentences were up due to a decrease in death sentences. Dr. Gallagher told her that she had no way of knowing if the two were related. Judge Spainhour asked for additional questions.

Judge Brown asked how many community punishment convictions were moved up to intermediate status due to a probation violation. Ms. Katzenelson explained that the data that the staff receives is the status at the time and we have no way of knowing if that status has changed due to a probation violation. The data is received at the end of the year. Judge Brown commented that the graph on intermediate sanctions was shocking. Chief Palombo asked what effect the economy (joblessness) was having on probationers' inability to pay restitution and revocation. Judge Spainhour answered that most judges will not revoke if an offender can pay and/or has a plan to pay. If the probationer does not have a job, it is a problem. Judges have a little leeway. Chief Palombo said that it appears that prison overcrowding is being exacerbated by those probationers trying to find a job and being revoked for not paying restitution. Tony Rand interjected that if someone was trying, it was unlikely they would be revoked. The cost of reincarceration has to be considered before revocation. Senator McKissick asked what the percentage of offenders are being revoked to prison. Ginny Hevener asked him if was talking about recidivism. After he answered in the affirmative, Ms. Hevener answered that 58% were revoked for a new crime and 42% were revoked for a technical revocation. Mr. Rand asked for the definition of technical revocation. Ms. Hevener explained that technical revocations are violations of the terms of one's probation. Although he did not want to continue to belabor the point, Chief Palombo said that if a probationer has met all of his other requirements, that the State should consider a policy that would not continue to stack up fees on the probationer, but to take into account the cost of the resources of the Department of Community Corrections and release the probationer. Garry Frank said it would be extremely rare for someone meeting all other requirements to be revoked. Tom Bennett mentioned that the StreetSafe Task Force is considering this point and that he hopes that by the time the Task Force is finished, that they will have a recommendation for the General Assembly.

### **CORRECTIONAL PROJECTIONS FOR PRISON POPULATIONS, CUSTODY LEVELS, AND CAPACITY**

Ginny Hevener reviewed the Commission's recently completed prison population projections (referring to the handout, "Current Population Projections Fiscal Year 2009/10 to Fiscal Year 2018/2019"). Ms. Hevener explained that the prison population projections were completed in two parts, with the Commission preparing projections for the new prison population and the Department of Correction preparing projections for the resident prison population. She described the data received from the Administrative Office of the Courts (convictions and sentences imposed) and from the Department of Correction (current inmate data) that is used to complete the projections using a computerized simulation model.

Ms. Hevener noted that empirical data from the past year (FY 2008/09) form the basis of the projections. She noted that certain assumptions were made in producing the projections, including that in the future: the distribution of prison admissions resulting from active sentences for a new conviction and resulting from technical revocations of probation will match the distribution from FY 2008/09; the percentage of the active sentences served by Structured Sentencing Act felons and misdemeanants will be what they were in FY 2008/09; rates of active sentences and probation revocations will match rates for FY 2008/09; and the percentage of time served for Fair Sentencing Act (FSA) and pre-FSA prisoners will be what they were in FY

2008/09.

Ms. Hevener explained that the projections include the estimated prison bed savings resulting from the passage of Senate Bill 488 (Establish Proportionate Sentence Lengths) and Senate Bill 489 (Even Out Prior Criminal Record Points) – two bills that involve changes to the minimum sentence lengths and prior record point distributions in the felony punishment chart. She noted that bed savings from these bills are factored into years two through ten of the projection, with an estimated savings of just over 2,000 prison beds in FY 2018/19. Ms. Hevener stated that the projections do not account for any other legislative changes to criminal penalties from the 2009 Session of the General Assembly since the legislative changes either created new offenses for which there are no historical data or amended penalties for existing offenses with elements that could not be modeled.

Ms. Hevener informed members that the current projections represent an increase from last year's projections. Ms. Hevener indicated that the projected increase could be attributed primarily to an increase in convictions in the most serious offense classes (Classes A through D) and to an increase in revocation entries to prison.

Ms. Hevener stated that the prison population is projected to increase from 42,776 in June 2010 to 50,829 by June 2019. She indicated that the projected prison population exceeds the Department of Correction's expanded operating prison capacity for all ten years of the projection, with a projected deficit of about 8,500 for 2019. Ms. Hevener described the composition of the prison population, noting that the composition is primarily determined by the empirical distribution of offenders convicted and sentenced under the Structured Sentencing Act. While Class A through Class D convictions account for the lowest percentage of convictions (8%) and active sentences (22%), they account for the largest percentage of the projected prison population (53% for 2010) as a result of their mandatory active sentences and the long sentences imposed. On the other end of the spectrum, Class H and I convictions account for the highest percentage of felony convictions (66%) and active sentences (47%), but account for only 19% of the projected prison population for 2010.

Luther Moore asked what demographic factors were considered in making the projections. Ms. Hevener answered that North Carolina population was considered as well as specific age groups within that population. Mr. Moore then asked what the population growth was for the general population. Ms. Hevener said that there was a 2% growth, but that the prison rate is higher than the population growth. Chief Palombo wanted to know how many new laws had been passed by the General Assembly in the last session. Eighteen new felony laws were passed and more than 40 misdemeanor laws were passed. Senator Bingham asked what effect the correlation between felony and misdemeanor convictions had on recidivism. Ms. Hevener told him that he could get that information in the Recidivism Report that was coming out in April. Secretary Keller asked if positive drug tests were considered a technical revocation. Ms. Hevener explained that everything except a new crime is considered a technical revocation. Secretary Keller suggested that the definition of a technical revocation be included in this document. Susan Katzenelson explained that the definition used by the Commission staff is not a policy definition, but instead a mathematical one.

Senator McKissick asked how North Carolina compared to other similar sized states. Ms. Hevener explained that nationally prison growth has been linked to technical revocations as the crime rate is down. As a follow-up question, Senator McKissick asked if there was a better way to deal with technical revocations. Ms. Hevener mentioned that the new Justice Reinvestment Initiative will be examining the best use of North Carolina's limited resources. Justice Reinvestment focuses on maintaining public safety, while holding offenders accountable. In a Justice Reinvestment presentation by someone from Texas, Louise Davis said that Texas had put aside \$6 billion (originally allocated for building more prisons) for treatment – something that North Carolina lacks. She further commented that without an effective mental health treatment program, North Carolina will not see a decrease in prison population. Chief Palombo summed it up by saying that it is not a maximum security space problem that North Carolina is seeing, but a minimum security space problem. Secretary Linda Hayes further reiterated that she had seen the presentation from Texas and that they were using Justice Reinvestment to treat the front end – the juvenile system – and were taking it through the adult system. Judge Charlie Brown voiced his concern about labeling and differentiating between new crime and technical violations and how it relates to rearrests and recidivism. Ms. Katzenelson explained that there were really two different reports – the one that Ms. Hevener is presenting on prison population projections and an upcoming report on recidivism.

Judge Spainhour recognized Nicole Sullivan from the Office of Research and Planning of the Department of Correction. Ms. Sullivan explained that the Department of Correction (DOC) uses the Sentencing Commission's ten-year prison population projections as the starting point for the Department's custody projections. The DOC uses a custody classification model to determine at which custody level an offender should be placed (assessed custody) – close, medium, or minimum. The custody simulator projects the capacity needed for each level of custody for the adult male, youth male, and female populations for each month of the ten-year period. If an offender is going through the system positively, he/she is being promoted from a higher custody level to a lower custody level. If an offender is moving in a negative way (also called demotion), he/she is going from a lower custody level to a higher custody level. Each offender gets points for type of crime, for prior crimes, and infractions during confinement. Age and employment help to take points off. Assessed custody is determined using the custody classification model. Assigned custody is the actual custody level to which an offender is assigned and may differ from the offender's assessed custody level based on other factors (such as individual concerns, public safety, capacity). Assigned custody cannot be modeled by the simulator so target override rates are applied. For males there is about a 20% override rate, for females 10%, and for youth males 20%. Senator Kinnaird asked Ms. Sullivan if the Department of Prisons (DOP) officers were aware of this model and Ms. Sullivan answered yes. Senator Bingham asked for the definition of youth. Ms. Sullivan explained that anyone under 22 is considered youth.

Ms. Sullivan continued her presentation by talking about the custody projections for the next ten years. Overall, the capacity deficit is 14,987 beds for SOC (Standard Operating Capacity) and 8,533 beds for EOC (Expanded Operating Capacity). For adult males, the overage of close custody beds through 2017 will be followed by small deficits. Medium custody beds for

adult males will have an initial deficit and then a declining surplus through 2015 followed by increasing deficits through the end of the period. It is projected that there will be an increasing deficit in minimum custody with the deficit projected to be 5,509 by 2019. It is projected that there will be an increasing deficit in medium and minimum custody beds for females and youth males throughout the projection period.

The DOP Classification Instrument predicts behavior in prison. Rule violations are the driving force for classification scores. Age is a primary predictor of misbehavior in prison. There are many prisoners who commit no infractions. There are a few prisoners who have the majority of infractions. Total infractions from 2000-2009 seem to be going down, while the instructional violence rate is holding steady. Although there is a downward trend in staff assaults, staff assaults are a great concern. Senator Kinnaird asked if there was a breakdown for mental health in her charts. Ms. Sullivan responded that there was and she could get that data for her, but for this data, they really had to address the more serious infractions. Judge Morrison asked what percentage of inmates who were now in minimum custody had worked their way down from close custody. Ms. Sullivan said she could get that information, but that inmates had to be in prison a very long time to do that. Most inmates in minimum custody started out there. Judge Morrison then asked how an inmate would go from a minimum custody unit to a close custody unit. Ms. Sullivan answered that it would have to be a very serious infraction such as an attempt to escape.

Judge Spainhour introduced Mary Lu Rogers from the Division of Prisons (DOP) to speak on capacity. Ms. Rogers began her presentation by providing definitions of the different types of capacity. Standard Operating Capacity (SOC) allows 50 square feet per inmate or one inmate per cell. Expanded Operating Capacity (EOC) is 130% of SOC or two inmates per cell. Maximum Operating Capacity (MOC) includes medical and segregation beds. Ms. Rogers explained how DOP manages capacity through the use of jail backlog, the custody classification system, and prison construction. When an inmate is sentenced, he/she stays in the county jail until a bed is available. The inmate is put on a waiting list to be sent to one of the eight diagnostic centers when a bed is available. For the past several years, DOP has been reimbursing the jails \$40 per day for an inmate on the jail backlog. With DOP's custody and classification system, inmates are typically evaluated every six months. Inmates are placed in either a close custody facility (a single cell), a medium custody facility (dorms with two beds), or a minimum custody cell (dorms). As an inmate goes down the ladder, he/she has more privileges – they can be put on work release or home release. Senator Kinnaird asked how many close beds they have. Ms. Rogers responded with about 10,000. With prison construction, the current focus is on close custody. Senator Kinnaird asked if they were fully staffed. Ms. Rogers deferred the question to Mr. James French, Deputy Secretary of the Department of Correction who answered that they were almost there, but they had been cut by the Legislature. Mr. Moore asked that taking into account the entire prison system, what was the percentage of jobs occupied. Mr. French said that he could not answer that question off the top of his head, but that he could get that number for him.

Judge Spainhour asked how long it takes for an inmate to be put on work release when a judge recommends work release. Ms. Rogers responded that the inmate had to have five years or

less to serve on his/her sentence and had to have a job. If the inmate meets that criteria and has had no other infractions while in prison, they try to get the inmate on work release within ten days. Ms. Davis asked how many slots DOP has for work release and Ms. Rogers responded with 1,400. Ms. Davis asked if the inmate had to wait for a spot to be open and Ms. Rogers replied yes. She said that Wake Correctional Institution's work release spots usually remain full. Judge Spainhour asked if each correctional facility had a certain number of work release slots. Ms. Rogers said not all facilities have work release slots, but most do.

Returning to construction and capacity management, Ms. Rogers said they were adding on minimum and medium custody beds to increase bed space. Add-ons are planned this year for Scotland and next year for Alexander and Bertie. In 2012, there will be 1,200 add-on beds. Chief Palombo asked if the add-ons were figured into the population projections and Ms. Rogers answered yes, if funded. Some facilities have been closed as part of legislative cuts and Chief Palombo asked how many beds were lost. Ms. Rogers said that about 1,000 beds were lost but they are double celling some facilities and are compensating in other ways. Mr. Rand commented that an audit had been administered and the most inefficient units were closed, thus saving DOP money. Senator Bingham asked if a correctional officer could have been a felon. There was discussion and debate about this topic. Judge Morrison said that the answer was yes, as an inmate receives a restoration of rights certificate after he has served his sentence. Mr. French said that he thought there was a statute that barred a felon from being a correctional officer.

Ms. Rogers also described the annual audit process that is performed on each facility to insure that inmates are being treated consistently. She mentioned that DOP officials are preparing a ten-year plan to see what prison beds are needed. Mr. Moore asked what the criteria were for choosing a site for a new institution. Ms. Rogers deferred this question to Mr. French who said that this was a delicate process. Mr. Moore withdrew his question. Sheriff Jones said that he had heard that some inmates were being released to family members. He asked Ms. Rogers to address this area. Inmates can be released if they are within six months of death under the extended limits of confinement. The inmate is considered to be on parole and cannot leave the residence except to go to a doctor. Unscheduled weekly visits are made to these inmates, and if the inmate is not present, he/she is returned to prison. Under this policy, the inmate cannot be a sex offender. The other reason for release is for a permanently disabled prisoner who qualifies for Medicare and Medicaid, thus relieving the burden of care from the DOC. This inmate cannot have committed an A or B felony.

### **JUVENILE DELINQUENT POPULATION PROJECTIONS**

Tamara Flinchum presented the Juvenile Resource Projections. In the Juvenile Dispositional Chart, there are three offense classifications: violent, serious, and minor; three delinquency history levels: low, medium and high; and three types of dispositions imposed: Level I (community punishment), Level II (intermediate punishment), and Level III (Youth Development Center (YDC) commitment). In 2008/09, there were 7,369 juveniles adjudicated delinquent. The majority of juveniles (69%) committed a minor offense, and 71% had a low delinquency history. These numbers have remained stable for the last five years. Of those

adjudicated, 62% received community punishment, 35% received an intermediate punishment, and 3% were committed to a YDC. The average stay in a YDC was 12 months, which has remained fairly stable over the last five years. Ms. Flinchum pointed out that juvenile projections are not quite as accurate as adult projections because the juvenile disposition chart is more flexible, the YDC population is much smaller, and the juvenile system is more sensitive to changes in policy and/or practices. Looking at YDC population trends, the YDC population has generally declined since July 2000, as intended by the Juvenile Justice Reform Act of 1998. The YDC resource needs are projected to increase slightly over the projection period from 385 YDC beds by June 2010 to 401 YDC beds by June 2014.

Senator Bingham asked that if a youth committed a violent offense at age 15, was he moved to the adult system at age 17. Ms. Flinchum answered no. While Secretary Hayes further explained that if the 15-year old was tried in an adult court, he would already be in the adult system. Chief Palombo asked if these projections included legislation that would move 16- and 17-year olds to the juvenile system; the answer was no. Larry Hines asked how many Youth Development Centers (YDCs) were in North Carolina. Secretary Hayes said there are nine – one of which is shared with DOC (Swannanoa). She named all nine for Ms. Hines. As of today, there are 419 currently committed in YDCs. On any given day, there can be a variation of 20-40 beds. There are 217 in detention. Senator Bingham remarked that he was surprised that the numbers had gone down when he reads about gang members today. Secretary Hayes gave credit to the communities who have gang prevention and intervention programs due to legislative funds and recovery funds. Chief Palombo said that the majority of gang activity is in the 16- and 17-year old age range.

Judge Spainhour recognized staff to present recent Sentencing Commission publications. David Lagos presented the Compendium of Community Corrections Programs in North Carolina for Fiscal Year 2008/09. He explained that it was an annual report that staff updated with information from the programs. Copies would be provided to the program providers, officials within the affected agencies, and legislative staff; and an email would be sent to all trial court judges linking them to the Compendium on the Sentencing Commission website. John Madler presented the most recent version of the Structured Sentencing Training and Reference Manual. Mr. Madler explained that this version included the new felony punishment chart (for offenses committed on or after December 1, 2009), that it incorporated key case law summaries, and that the format had been updated since the last edition. This manual would also be available on the Sentencing Commission website.

John Madler also informed the members that the General Assembly would convene on Wednesday, May 12, 2010. He reminded them that the Sentencing Commission has a statutory duty to review all proposed legislation which creates a new criminal offense, changes the classification of an offense, or changes the range of punishment or dispositional level for a particular classification and to make recommendations to the General Assembly. He pointed out that the Commission would not meet again until June 4 and that it may be necessary to review bills prior to that date. He asked the Commission to authorize the Chairman to form a subcommittee to review proposed legislation and to call a meeting of that subcommittee before June 4 if it is necessary. The Commission agreed to authorize the Chairman to do so.

## **REQUEST TO CHANGE PENALTY FOR INTIMADATING WITNESSES**

Judge Spainhour called on John Madler to present a request from the Durham Country Crime Cabinet. Mr. Madler referred the members to a memorandum from Stormy Ellis, Assistant District Attorney in Durham County, to Judge Spainhour which outlined the proposal to change the punishment for Intimidating a Witness (G.S. 14-226) (*see Handout*). The offense is currently a Class H felony and the Cabinet was proposing punishing it one class lower than the felony that is the subject of the court proceeding to which the witness was summoned, acting as a witness, or requested to testify in, but in no case lower than Class H. The Cabinet asked the Commission to provide analysis and recommendations.

Stormy Ellis spoke about situations that prompted this proposal, such as prosecuting gang members and domestic violence cases. She stated her belief that a more serious punishment would act as a deterrent in many cases. District Attorney Tracey Cline and Police Chief Jose Lopez, both of Durham, spoke in support of increasing the punishment for Intimidating a Witness.

Mr. Madler then shared some background information on the offense and its current classification. He listed several related offenses and how they are classified as well as offenses that are classified similar to the proposal. Mr. Madler pointed out that all of the current offenses that tie the punishment to the classification of an underlying offense go down to misdemeanor Class 3, they do not stop at a particular class and apply that to offenses that are classified below it. In addition, the only substantive offense to use this form of classification is Interference with Electronic Monitoring Devices (G.S. 14-226.3) which the Commission found to be inconsistent with the offense classification criteria when it was proposed in 2009. Finally, Mr. Madler reviewed the Felony Offense Classification Criteria which the Sentencing Commission developed and continues to use for the classification of felony offenses.

Judge Spainhour began the discussion by explaining that the Commission's responsibility was to decide whether it was consistent with the offense classification criteria or not and, if not, recommend how it might be made consistent. Senator McKissick moved to find the proposal consistent; Judge Morrison seconded the motion. Chief Palombo stated that it was a serious problem and questioned whether it might be consistent with the criteria for a Class C felony in every case. (A Class C felony reasonably tends to result in or does result in serious long-term or widespread societal injury.) Judge Spainhour agreed that it was a problem and stated that it would probably be consistent with the criteria for a Class F felony. (A Class F felony reasonably tends to result in or does result in serious societal injury.) Gary Frank stated that it was a problem and he was not sure what classification would be appropriate. Senator Bingham asked how other states had classified the offense; Mr. Madler did not have that information. Luther Moore pointed out that the proposal does not appear to comply with structured sentencing and suggested the Commission suggest some alternatives. After some discussion, Judge Brown offered an amendment to the motion to state that the proposal was inconsistent with the offense classification criteria. He added that the offense could be consistent with the criteria for a Class C felony. Senator McKissick accepted the amendment and the motion carried.

## **UPDATE ON STUDY OF REDUCTION IN DEMAND FOR INDIGENT DEFENSE SERVICES**

Mr. Lagos presented a brief summary of the study being conducted by the Office of Indigent Defense Services (IDS), in response to a directive enacted in Section 17.15 of Session Law 2009-451 (“Study Strategies to Reduce Demand for Services of Office of Indigent Defense Services”) (*see Handout*). The General Assembly tasked IDS to study the potential cost-savings resulting from the decriminalization of low-level misdemeanors that rarely or never result in a jail sentence. Currently, IDS is required to appoint counsel for an indigent defendant in any case that carries the possibility of incarceration – including a suspended sentence. It has previously advised the General Assembly that it expends substantial funds for appointed counsel in lower-level traffic and other offenses in district court which carry the theoretical possibility of imprisonment but rarely, if ever, result in jail time. By treating these petty violations as infractions, rather than misdemeanors, the State would avoid the cost of providing appointed counsel.

Based on some preliminary analysis, IDS research staff has identified 17 misdemeanors as potential candidates for decriminalization. Prosecutors and district court judges have asked IDS to include additional offenses and issues in its study (*see Handout*). The next steps will be to analyze the charges filed in all criminal cases disposed in the last fiscal year which include at least one of the identified offenses, and to isolate the case episodes that involve only the identified offenses, or that have an identified offense as the most serious charge. After isolating the relevant charging episodes, IDS staff will analyze the outcomes for each of the 17 listed offenses. It will then estimate the potential cost savings to IDS if attorneys are no longer appointed in these cases. The data generated from the IDS study should also allow the district courts and the district attorneys to estimate their cost savings from any proposed decriminalization.

Despite some difficulties in coding the AOC data, IDS intends to have findings and recommendations ready for the 2010 short session. Its staff will distribute preliminary findings to the Sentencing Commission prior to submitting the final report to the General Assembly. This Commission may provide input on the study methodology and data analysis, as well as policy input on the merits of decriminalizing particular offenses.

Luther Moore asked if IDS wanted the Sentencing and Policy Advisory Commission to do anything at this time, and Mr. Lagos answered no. Representative Spear asked if Mr. Lagos had any AOC data that told him how they appointed counsel and how much they spent in attorney fees. Mr. Lagos explained that IDS did not have that information yet, but they were going to study that. Representative Spear asked Judge Brown if judges ever had to appoint attorneys in the case of misdemeanors. Judge Brown answered that if a person might end up going to jail, IDS had instructed the judges that they must consider the application. They definitely appoint on driving with license revoked.

Mr. Rand made a motion to request that IDS provide their study report, setting forth the

potential cost savings and other anticipated impact on the administration of justice, to the appropriate appropriations committees in the General Assembly prior to the beginning of the 2010 short session. He expressed a concern that the report be issued in time to be of use in the budget process. Judge Elmore seconded the motion. Mr. Lagos noted that Session Law 2009-451 requires IDS to include its recommendations in its reports to the legislature during the fiscal biennium, and the Sentencing Commission's directive is limited to consulting with IDS on the study. In response to a question from Chairman Spainhour, Mr. Rand confirmed that the requested report should include an assessment of current cost of providing indigent defense services for the offenses proposed for decriminalization. Inasmuch as defendants would still be responsible for court costs and fines, Senator McKissick asked where the significant cost savings would be realized. Mr. Lagos responded that the primary savings would stem from the reduced demand for appointed counsel, but some additional reductions might be realized by the courts and district attorneys' offices. Judge Brown observed that decriminalizing an offense would not necessarily allow the defendant to waive the court appearance. Chief Palombo stated that many states treated these types of offenses as infractions, and fines were just paid without going to court. Judge Brown said that there would still be a lot of work for defense attorneys in cases involving driving without a license. Defendants will want to have a license and, therefore, will want counsel. Judge Brown also wanted to know why noise violations and littering were not included. Mr. Rand responded that the DA's Conference had asked IDS to look at local ordinances. Mr. Moore called the question. It was voted to move on the motion, and the motion carried.

Judge Spainhour reminded the Commissioners of the next meeting on June 4, 2010. The meeting was adjourned at 2:00 p.m.

Respectfully submitted,

Vicky Etheridge  
Administrative Assistant