

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY
COMMISSION MEETING
RALEIGH, NC
September 17, 2010

The North Carolina Sentencing and Policy Advisory Commission met on Friday, September 17, 2010, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Tom Bennett, Honorable Stan Bingham, Honorable Alice Bordsen, Honorable Charlie Brown, Honorable Richard Elmore, Honorable Robert Ervin, Garry Frank, Paul Gibson, Bill Hart, Secretary Linda Hayes, Larry Hines, Secretary Alvin Keller, Jr., Honorable Eleanor Kinnaird, Honorable Jimmy Love, Honorable Floyd McKissick, Jr., Moe McKnight, Dr. Harvey McMurray, Luther Moore, Honorable Fred Morrison, Tony Rand, Rhonda Raney, June Ray and Billy Sanders.

Guests: Andy Barbee (Council of State Governments Justice Center), Susan Brooks (Indigent Defense Services), Megan Grasso (Council of State Governments Justice Center), Michelle Hall (Youth Accountability Planning Task Force), Brenda Rivena (North Carolina Children's Advocacy), Nicole Sullivan (Office of Research and Planning, Department of Correction).

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

INTRODUCTION

Judge Spainhour called the meeting to order at 10:05 a.m. After welcoming everyone, Judge Spainhour asked those in attendance to introduce themselves. Luther Moore moved to adopt the minutes from the June 4, 2010 Sentencing Commission meeting; the motion was seconded and carried. Judge Spainhour then reviewed the agenda.

REVIEW OF THE 2010 LEGISLATIVE SESSION

John Madler presented a review of the criminal and juvenile justice bills ratified during the 2010 Session of the General Assembly. Mr. Madler informed the members that the General Assembly had convened the Session on May 12 and adjourned on July 10. During that time, the General Assembly ratified 13 bills that created new offenses or changed the elements of existing offenses, changed the classification of existing offenses, or changed a punishment or disposition for a class of offense. He pointed out that there were relatively few new offenses compared to previous sessions and that the bills primarily created Class H felonies and Class 1 misdemeanors. Mr. Madler presented the report prepared by Sara Perdue of the staff and highlighted some of the relevant bills (*see* handout).

Mr. Madler also reviewed various other bills of interest to the Commission, including the appropriations bill. He pointed out the reductions to the budgets of the Justice and Public Safety agencies as well as certain special provisions. Mr. Madler highlighted a directive to the

Sentencing Commission to review all Class 3 misdemeanors and to provide recommendations to the General Assembly for reclassifying each one as either an infraction or a Class 2 misdemeanor. He mentioned that David Lagos would discuss that directive in greater detail later in the meeting.

Turning to the Sentencing Commission's review of proposed legislation, Mr. Madler presented a summary of how the Commission's findings compared to the bills that were ratified during the session. He reported that the General Assembly passed 17 different felony provisions. The Commission reviewed three of those provisions, finding all three of them to be consistent with the offense classification criteria. The Commission did not review 14 of the 17 provisions that passed; one was changed after the last review date and thirteen were added after that date. Mr. Madler reported that the General Assembly also passed 19 misdemeanor provisions. The Commission reviewed one of those provisions, finding it to be inconsistent with the proposed offense classification criteria. The Commission did not recommend any change to that provision to make it consistent and the Legislature did not change it before ratifying it. Eighteen of the provisions were introduced after the last review date. Mr. Madler pointed out that the felony and misdemeanor offenses were added in the last two weeks of the session and that a few bills contained a large number of the provisions.

Ginny Hevener presented the impact of the ratified bills on the prison population. Sentencing Commission staff is responsible for preparing impact projections for each bill that affects criminal penalties or juvenile dispositions. There are two types of impact projections: 1) projections in which complete data are available for the proposed change and the computerized simulation model can be used and 2) projections in which there are no historical data and a threshold projection is provided based on offense class. During the 2010 session, the staff prepared impact projections for 20 bills.

With the ratified bills, Sentencing Commission staff calculations indicate that 11 new felony offenses and 15 new misdemeanor offenses were created. Many of the new felony offenses created apply to a limited group of people and are not expected to generate a large number of convictions. As a result, none of the ratified bills are expected to have a substantial impact on the prison population. Unless large numbers are affected, misdemeanors typically do not have an impact on the prison population, but may have an impact on local jails.

Commissioners also received a handout, Prison Population Update, which provides a comparison of the projected prison population with the actual prison population for June 2010. The projected prison population for June 2010 was 42,776, while the average prison population was 40,905 – a difference of about four and one-half percent, which is within the acceptable accuracy range for projections. Ms. Hevener noted that the current prison population still exceeds prison capacity even with the prison population being lower than projected.

According to a recent report from the Pew Center on the States, nationwide 27 states had decreases in their prison populations from end of year 2008 to end of year 2009. Ms. Hevener summarized factors that may be contributing to the lower than projected prison population for North Carolina including: 1) population and demographic trends; 2) decreases in arrests and in the crime rate; 3) decreases in felony and misdemeanor filings, dispositions, and convictions; and 4) a

decline in prison entries. She noted that the prison population has been averaging out at about 40,000 since February 2010, and did not experience the seasonal increase that typically occurs with the prison population from February through May. Currently, the prison population is lower than it was at the same time last year.

Ms. Hevener mentioned that staff is in the process of preparing the annual statistical report and projections data. The projections are prepared using the most recent empirical data available. With fewer felony convictions in FY 2009/10, it is expected that the new prison population projections will be adjusted downward. It is not known whether the decreases seen in FY 2009/10 are the beginning of a downward trend or a one-time phenomenon. This uncertainty, in combination with last year's legislative changes to the felony punishment chart, will make the projections more difficult to prepare and may also have an impact on the accuracy of next year's projections. As the projections are prepared, staff will continue to monitor the trends that factor into the growth of the prison population.

Senator Kinnaird asked if sentences involving jail time were included in the projections, and Ms. Hevener answered that only prison beds were included. Senator Kinnaird pointed out that they were entitled to an attorney that impacted the system in other ways.

Tony Rand asked why the end of 2008 differed from the beginning of 2009. He asked if June was a heavy month for prisoners to be released. Ms. Hevener answered that there were seasonal changes and that there are typically fewer convictions in June.

Judge Brown noticed that there was an increase in revocation entries last year but a decline this year. He asked for Ms. Hevener's insight. She answered that one of the factors contributing to this increase was an increase in revocations following the Eve Carson murder.

Tom Bennett asked if Ms. Hevener had aggregate numbers for the decline in violent and property crimes. Ms. Hevener answered that there was a 3% decrease.

Representative Bordsen wanted to know if there was a reliable way to frame the projections with the sociological trends. She wanted to know how expansive the research was. Ms. Hevener said that the research is expansive. Each year the Sentencing Commission convenes the Forecasting Advisory Group, which is comprised of experts from different state agencies. This group meets each fall to discuss relevant trends and predict growth rates for convictions. Representative Bordsen commented that usually when economic times are bad, crime goes up. However, it isn't going up in these bad economic times. She asked for the reason. Senator Kinnaird asked if the Crime Prevention Councils had been looked at for the work they are doing in the communities on crime prevention as it relates to this decrease. Ms. Hevener answered that it was something that could be looked into. Judge Spainhour asked if there was a chance that economic downturn has nothing to do with the crime rate. Susan Katzenelson said that there are two separate issues – how many younger people are out there to commit crime and the resources that the communities have to arrest and try those arrested. Representative Bordsen did not agree with this statement. She thinks that this is just an odd time in our nation.

Luther Moore asked Moe McKnight about the shoplifting rate. Mr. McKnight responded that in his company, the crime rate is down, but there are also fewer managers on the floor to detect the crime. Also, there are better prevention techniques with the use of technology. Rhonda Raney attended a conference in which she heard that some of the reduction in crime could be related to war – the younger group are serving and, therefore, not available to offend.

Billy Sanders mentioned that the juvenile crime rate is also decreasing. Secretary Hayes explained that there is a huge effort among juvenile experts. In ten years, the population has declined in both detention numbers and YDC numbers. There has been a phenomenal effort by the law enforcement partners to identify gang members through Gang Net. The Department of Correction has done a great job of identifying gang members. Community Watch Programs are trying to replace cuts in law enforcement.

Senator McKissick asked how North Carolina compares to other states. Ms. Hevener explained that it's hard to say due to significant variations in the states.

Representative Bordsen stated that North Carolina is putting more of an emphasis on diverting the 16 and 17-year old group. Senator Kinnaird also remarked that North Carolina is doing more to train its law enforcement officers to deal with the mentally ill and divert them to the mental health system and not the criminal justice system.

MISDEMEANOR RECLASSIFICATION SUBCOMMITTEE

Mr. Lagos reviewed a legislative mandate enacted as part of the 2010 Appropriations Act, which directs the Commission, in consultation with the Conference of District Attorneys, Office of Indigent Defense Services (IDS), and UNC School of Government, to recommend a reclassification of each existing Class 3 misdemeanor offenses as either an infraction or as a Class 2 misdemeanor, thereby eliminating misdemeanor Class 3. The Commission was further authorized to recommend other misdemeanor offenses for reclassification as infractions. Mr. Lagos reminded the Commission of a similar mandate given to IDS enacted in 2009, which directed it “to formulate proposals aimed at reducing future costs, including the possibility of decriminalizing minor misdemeanor offenses that rarely or never result in jail sentences.” The mandate to the Commission does not express an underlying purpose or any standard for making the reclassification decisions.

Chairman Spainhour recognized John Poteat from the General Assembly's Fiscal Research Division, to speak about the background of the mandate. The General Assembly would like to only have three misdemeanor punishment levels: Class A1, Class 1 and Class 2. The Sentencing and Policy Advisory Commission will review all Class 3 misdemeanors and decide if they can be classified as infractions or reclassified as Class 2 misdemeanors. There were 80,000 filings of Class 3 misdemeanors – 25,000 convictions and 2100 probationers. It is the intent of the General Assembly to reduce court time and Indigent Defense Services time resulting in lower costs to the State.

Mr. Lagos announced Judge Spainhour's appointment of the Misdemeanor

Reclassification Subcommittee, which would be chaired by Luther Moore. Judge Brown would serve as vice-chair. Because the Commission was directed to report to the 2011 Session of the General Assembly, convening in January of 2011, the subcommittee intended to present its report to the Commission at its meeting on December 3, 2011. Chairman Moore had selected meeting dates of October 1 and October 29, 2010, with a third meeting scheduled for November 12, 2010 if needed.

To assist the Subcommittee, the Commission was provided an opportunity to discuss the mandate as a group. Mr. Lagos presented an overview of Class 3 misdemeanors (*see* Handout), beginning with the definitions of “misdemeanor” and “infraction” and tracing the history of misdemeanor classifications prior to and under Structured Sentencing. He noted the Commission’s development of its Misdemeanor Offense Classification Criteria in response to a 2005 legislative mandate to reclassify all misdemeanor offenses based on severity. Although the General Assembly did not enact the classifications recommended by the Commission, the Commission continued to use the classification criteria in its annual reviews of proposed legislation that created or amended misdemeanor offenses.

Mr. Lagos briefly compared the punishments for Class 3 and Class 2 misdemeanor offenses under Structured Sentencing. He noted that the options for imposing a Community Punishment, Intermediate Punishment, or Active Punishment are the same for Class 2 and 3 misdemeanors across every prior conviction level (PCL) on the misdemeanor punishment chart. The difference between the two offense classes is that the maximum jail sentence for a Class 2 misdemeanor is three times that of a Class 3 misdemeanor for each PCL. Mr. Lagos provided some general sentencing data for Class 2 and Class 3 misdemeanors from Fiscal Year 2008/09, which showed that although the type of dispositions received by these offenses were quite similar, the active sentences imposed for Class 2 misdemeanors were 2.5 to 3 times as long as those for misdemeanors in Class 3. Mr. Lagos provided a list of the ten most frequently charged Class 3 misdemeanor offenses in Calendar Year 2009.

Mr. Lagos described some possible approaches to the mandate. He explained that there are approximately 315 Class 3 misdemeanor offenses. However, only 45 Class 3 misdemeanors have been assigned an offense code by the Administrative Office of the Courts (AOC). Because coded offenses account for 98% of all Class 3 misdemeanor convictions, the offenses without an AOC offense code are rarely or never charged. Accordingly, one approach to the mandate would be to “clean up” the criminal statutes by reclassifying these unused offenses as infractions. A second filter or approach to reclassification would be to assess the criminal nature or severity of the offense based, for example, on any statutory provisions related to punishment or enhancements for second or subsequent violations, or on data reflecting how the courts tend to sentence for the offense. The Commission could also make an independent judgment about offense seriousness based on its Misdemeanor Offense Classification Criteria or a similar standard, as well as the Commission’s 2006 recommended classifications for offenses in Chapter 14, 18B, and 20 of the General Statutes. Mr. Lagos further suggested that the Commission could establish a presumption or default rule, with the idea that most offenses will be reclassified as either Class 2 misdemeanors or as infractions. He noted that these options were by no means exclusive but were merely offered to stimulate the Commissioners’ discussion of the mandate.

Senator Kinnaird asked if the court could require restitution from someone who violates an infraction. Judge Ervin answered that in a civil action, restitution can be awarded but that it requires the other party to be involved, which is usually not the case with infractions. Billy Sanders asked if unpaid restitution could result in jail time. Mr. Lagos answered the court can use contempt with a person who fails to pay the penalty for an infraction.

Mr. Moore asked how many convictions there were for unlawful concealment. Mr. Lagos responded that there were 5,600 convictions. Mr. Lagos added that there were 10,000 trespassing convictions.

Senator Kinnaird asked if the staff could give the Commission a one-page list of convictions for the most frequent Class 3 misdemeanor offenses. Judge Ervin asked whether or not motor vehicle offenses would be examined. He said that IDS was very interested in that because that is where a lot of money is spent.

Billy Sanders suggested that the list of recommended reclassifications from the Misdemeanor Classification Subcommittee in 2006 would be a good starting point. Bill Hart asked the legislators if the intent of this Subcommittee was to absolutely eliminate Class 3 misdemeanors. He suggested that some of these offenses may best fit in Class 3; offenses such as begging and drunk and disruptive would not work as well as infractions because law enforcement would not be allowed to arrest them and get them off of the street, but they would not rise to the level of Class 2 either. Representative Bordsen made the point that arresting these people is going to take resources that the State does not have. Some cost-saving is needed. This Subcommittee has a lot of discretion. Judge Ervin commented that police could arrest someone if they are trying to protect the person from themselves or for public safety.

COMMISSION STAFF WORK PLAN FOR FY 2010/11

Susan Katzenelson presented the work plan for the Sentencing and Policy Advisory Commission staff for the next year. Most of the tasks are legislatively mandated. It is great to be found useful by policy makers, and we welcome mandates. The long-session is coming up and it will require much of the staff's time. The Commission reviews legislation and determines if it is consistent with Structured Sentencing. Some of the tasks include simulation of the adult and juvenile populations. The Statistical Report is prepared every year. The Correctional Program Evaluation, Juvenile Recidivism, and the Effectiveness of Juvenile Crime Prevention Council are all ongoing. The Juvenile Recidivism and the JCPC Report are both due to the General Assembly by May 2011. The Compendium of Community Corrections is compiled every year. The staff provides training and public information. John Madler will be explaining Structured Sentencing to Federal Court in October. The staff participates in special projects such as developing a "risk" instrument, supporting the Justice Reinvestment Project, and supporting the Youth Accountability Planning Task Force. Management/Administration is ongoing. Luther Moore moved to adopt the work plan. Representative Bordsen seconded the motion, and the motion carried.

JUSTICE REINVESTMENT INITIATIVE

Andy Barbee, Senior Research Associate from the Council of State Governments Justice Center, reported on the status of the Justice Reinvestment initiative. The Justice Center has come into North Carolina at the invitation of Governor Perdue, Chief Justice Parker, and both leadership and minority parties of the General Assembly. North Carolina is the 13th state to request Justice Reinvestment's technical assistance in reviewing the state's criminal justice system and offer possible improvements. Justice Reinvestment is a three-phase process – analysis, implementation, and accountability. The analysis phase has been nearing completion, and the Justice Reinvestment team is preparing to offer its input to the 2011/12 General Assembly. Mr. Barbee's presentation provided the results of their detailed data analysis.

Following a review of some long-term demographic trends, crime rates, and prison population changes, Mr. Barbee focused on improvements in managing lower level felony offenders as the key to a more effective system. He highlighted sentencing policy and practice regarding Class G, H and I felons, and recommended the enhanced use of risk-based community supervision, a reliance on best practices in probation, and the availability of 'earned time' during short-term incarceration to be followed by re-entry help upon release. He also explained the role that revocations – especially those not prompted by the commission of a new crime – play in increasing prison expenditures.

Finally, Mr. Barbee touched upon two additional topics: the composition and penalties for the habitual felons group, and the practice, unique to North Carolina, of using expensive prison resources to manage some misdemeanor offenses. The presentation ended with Ms. Megan Grasso of Justice Reinvestment listing the stakeholders that were involved in this process, and the next steps they were planning to make.

YOUTH ACCOUNTABILITY PLANNING TASK FORCE UPDATE

Michelle Hall gave an update on the continuing work of the Youth Accountability Planning Task Force. The Legal Issues work group, which was tasked with determining which State laws should be conformed or amended as a result of the age change, presented its recommendations to the full Task Force on August 27, 2010. The Programs and Benefits working group was scheduled to submit its recommendations to the Task Force on October 15, 2010.

Chairman Spainhour reminded the Commission that its next meeting would be December 3rd at the Judicial Center. He adjourned the meeting at 2:45 p.m.

Respectfully submitted,

Vicky Etheridge
Administrative Assistant