

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION MEETING

September 9, 2016

The North Carolina Sentencing and Policy Advisory Commission met on Friday, September 9, 2016, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Art Beeler, Honorable Charlie Brown, Paul Butler, Lisa Costner, Honorable Warren Daniel, Louise Davis, Honorable Richard Elmore, Honorable Robert Ervin, Honorable John Faircloth, Christopher Fialko, David Guice, Honorable Darren Jackson, Ilona Kusa, Honorable Floyd McKissick, Dr. Harvey McMurray, Robert Montgomery, Luther Moore, Honorable Fred Morrison, Honorable Shirley Randleman, Honorable June Ray, and Keith Shannon.

Guests: Honorable Lorrin Freeman (NCCDA), Lauren Norman (NCSA), Will Robinson (NCCALJ), and Susan Katzenelson (citizen).

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 called for a moment of silence to remember those lives lost on September 11, 2001. He then reviewed the agenda for the meeting.

Senator Warren Daniel moved to adopt the minutes from the June 17, 2016, meeting. The motion was seconded and carried.

Chairman Spainhour introduced John King, the newest member of the staff, after which Commission members, staff, and visitors introduced themselves.

REVIEW OF THE 2016 LEGISLATIVE SESSION

Chairman Spainhour recognized John Madler, staff, to provide a summary of the criminal and juvenile bills ratified during the 2016 Session of the General Assembly (*see* Handout). Mr. Madler began by informing the members that the General Assembly adjourned on July 1 and that it had passed relatively few bills that affected the criminal justice system. He reviewed the felony bills that created new criminal offenses or changed the elements of the existing offenses; there were no bills that changed the classification of existing offenses or that changed punishments this session.

Regarding the new offense of Aggravated Death by Impaired Boating in House Bill 958, Felony Death Impaired Boating/Sheyenne's Law, Art Beeler asked how the requirement that the judge sentence in the aggravated range complied with the *Blakely* decision. Mr. Madler responded that it appeared to create a new statutory maximum based solely on the offense class and the prior record level, the statute did not require any additional factors in order for the judge to sentence from the aggravated range.

Senator Floyd McKissick pointed out that several of the provisions in House Bill 958 were inconsistent with Structured Sentencing but that they were patterned after the existing Death by Vehicle/Serious Injury by Vehicle statute. The Sentencing Commission did not have an opportunity to review that bill when it was passed so it was enacted even though several provisions were inconsistent with Structured Sentencing. Senator McKissick stated it was his understanding that the General Assembly was

aware of the inconsistencies in House Bill 958 but reluctant to change one statute and not the other. He suggested that, in situations like that, the Commission might include in its findings ways to make the existing statute consistent with the proposed offense and with Structured Sentencing.

Mr. Madler then summarized the results of the Commission's annual review of proposed legislation pursuant to G.S. 164-43. During the 2016 Session, the General Assembly enacted ten felony provisions, eight of which the Commission reviewed. The Commission found three provisions to be consistent with the Offense Classification Criteria and five provisions to be inconsistent with the Criteria or with Structured Sentencing; the Commission recommended alternatives for those provisions but the General Assembly did not follow those recommendations. Mr. Madler pointed out that one bill, House Bill 958, contained four of the five inconsistent provisions. The Commission was not able to review two provisions because one was added and the other was amended after the last review date.

Senator Shirley Randleman stated that when she sees a bill moving and questions its consistency with Structured Sentencing, she contacts Commission staff to get their input and she appreciates the information they provide. Senator McKissick pointed out that he made sure staff was called on in the Senate Judiciary I Committee to provide the Commission's findings on House Bill 958. He hoped that the Commission might be able to help the General Assembly reconcile that offense and the Death by Vehicle/Serious Injury by Vehicle offense with Structured Sentencing. Representative John Faircloth expressed concern that this function of the Commission was not widely understood by the General Assembly. He suggested to Senator Randleman that it be discussed at a Joint Legislative Oversight Committee on Justice and Public Safety meeting.

Mr. Madler highlighted some of the misdemeanor bills that created new criminal offenses or changed the elements of existing offenses. There were no bills that changed the classification of existing offenses or changed punishments this session.

Mr. Madler then reviewed several bills of interest to the Commission. Members discussed the technical aspects of the changes in House Bill 678, Amend Innocence Commission Statutes, and House Bill 1021, Amend Sex offender Certain Premises.

Finally, Mr. Madler gave an overview of the relevant provisions enacted in House Bill 1030, the Appropriations Act of 2016. He mentioned several special provisions under the Judicial Department, the Department of Justice, and the Department of Public Safety. In addition, Mr. Madler pointed out that the legislature appropriated \$20,000,000 to the Department of Health and Human Services, Division of Mental Health, Development Disabilities, and Substance Abuse Services, to implement the recommendations of the Governor's Task Force on Mental Health and Substance Use.

UPDATE ON CORRECTIONAL AND DELINQUENT POPULATIONS

Chairman Spainhour recognized Ginny Hevener, staff, to present an update on correctional and delinquent populations (*see* Handouts). Ms. Hevener noted that the annual prison projections originated with the development and passage of Structured Sentencing and that the Juvenile Justice Reform of 1998 included a similar mandate to the Commission for YDC projections. The projections provide the Department of Public Safety and the General Assembly Sentencing with a long-term look at projected resource needs for these populations within the context of existing criminal justice and juvenile justice policies. The projections have played a pivotal role in changes to criminal and justice and juvenile justice policies over the years (e.g., review of sentencing laws, Justice Reinvestment Act, construction or closing of prison or YDC facilities).

The prison projections were developed using FY 2015 data on convictions and sentences imposed, along with data on all offenders in prison at the beginning of the projection period. Ms. Hevener noted that the acceptable range of accuracy for the prison projections was 2% given the size of the population being projected. The current projections were within the expected range of accuracy. The average prison population for June 2016 was 36,634 compared to the projected population of 37,095 (a difference of 1%). The prison population is currently lower than prison capacity, but is projected to be about 850 above capacity at the end of the ten-year projection period.

Dr. Harvey McMurray asked about factors that account for the growth of the population over the projection period. Ms. Hevener responded that growth rates adopted by the Forecasting Technical Advisory Group account for some of the growth. With all felons released from prison onto post-release supervision, post-release supervision violations also contribute to the growth.

In reviewing prison population trends, Ms. Hevener noted that the prison population is currently the lowest it has been since 2005. In addition to the initial declines with the JRA, two additional changes have resulted in declines to the prison population – one being the expansion of the Statewide Misdemeanant Confinement Program (SMCP) to include the remaining misdemeanants and DWIs and the second being the classification of CRV Center beds as treatment beds. Trends for these populations were included on a handout. Of the average CRV population for July (561), 70% were housed in a CRV Center and 30% were housed in prison. The SMCP population was stable at around 600 but increased to around 1,000 after the expansion to include the remaining misdemeanants and DWIs.

Ms. Hevener indicated that the criminal penalty bills from the short session were not expected to have a substantial impact on the prison population. Staff has started working with the Department of Public Safety on the next projections and hopes to have updated projections at the beginning of next year.

Ms. Hevener also presented an update on the youth development center population. This population contains all adjudicated juveniles with a level 3 disposition – whether in a youth development center (YDC), awaiting placement in an YDC, or a community-based placement. The projections were developed using data on delinquent dispositions from FY 2015 and data on the juveniles who were committed to a YDC as of July 1, 2015. The projected YDC population for June 2016 was 226 compared to the actual average population of 252, a difference of 26 or nearly 12%. Given the small numbers involved, Ms. Hevener noted that there is more of a focus on the numeric difference (versus the percentage difference) in assessing the accuracy of the juvenile projections. A review of YDC population trends indicates that, like the adult prison population, the YDC population has also been decreasing over the past few years as the result of similar population and juvenile justice trends. There were no juvenile justice bills from the short session. Staff hopes to have updated juvenile justice resource projections by the end of the year.

Luther Moore asked what effect raising the juvenile age would have on the projections. Ms. Hevener responded that staff had prepared impact projections for previous bills that would raise the juvenile age. The impact would depend on the specifics of the bill. However, the primary impact would be to community corrections. Senator Daniel asked whether the Sentencing Commission had made policy recommendations on raising the age. Michelle Hall, staff, responded that the Commission had studied the issue and had recommended in a 2007 report that the juvenile age be raised. Senator Randleman mentioned the work of the Youthful Accountability Planning Task Force. Chris Fialko asked that both reports be shared with Commission members. Commissioner David Guice stated that he is not as concerned about up-front costs because of the potential for long-term savings. Lorrin Freeman (NCCDA), noted the potential impact of such a change on court resources based on the interaction that occurs with juveniles in juvenile court. Ms. Hall stated that there would be more discussion on the juvenile age during the afternoon presentation of preliminary recommendations from the Chief Justice's Commission on the Administration of Law and Justice.

JUSTICE REINVESTMENT INITIATIVES: STATE OF THE STATES

Chairman Spainhour then recognized Michelle Hall, staff, to present information on Justice Reinvestment initiatives across the 50 states (*see* Handout). Ms. Hall began by explaining the Justice Reinvestment Initiative (JRI), which is a data-drive approach to improve public safety, examine corrections and criminal justice (and related) spending, manage and allocate criminal justice populations in a more cost-effective manner, and reinvest savings in strategies that can hold offenders accountable, decrease crime, and strengthen neighborhoods. She provided a brief history of the effort and outlined the process for states to engage in the JRI. She then reviewed the number of states with JRIs and provided a timeline showing the year in which each state engaged with the JRI. Following that, she categorized “cohorts” of states, based on their time of engagement. She noted the two biggest reasons states opt to seek technical assistance provided by the JRI are prison population growth and increasing corrections costs. Some common “drivers” of prison population growth found among JRI states include technical revocations of probation and/or parole, sentencing policies and practices, insufficient supervision and/or support in the community, and processing delays. She then reviewed some common proposals suggested by the JRI to address those drivers: risk/needs assessments, good time and earned credits, graduated sanctions, community-based treatment, sentencing changes, problem solving courts, etc. Next, she discussed how the JRI defines both savings and reinvestment as it relates to state efforts. Savings can be either averted costs (capital and/or operating) or actual savings realized from increased efficiencies. Reinvestment can include both up-front investment in anticipation of savings, and reinvestment of tangible savings. Nationally, many JRI states have seen declines in prison populations as well as slowed growth. She noted the effects on offender behavior from some JRI strategies would take years to realize – no states had completed any evaluations measuring how JRI affects offender outcomes. She concluded noting that North Carolina is a leader among states in its JRI effort – while the state is considered to be in the post-implementation phase, stakeholders continue to examine policies and practices for improved effectiveness and are dedicated to collecting and analyzing data to ensure the initiative is working as intended.

UPDATE FROM NATIONAL ASSOCIATION OF SENTENCING COMMISSIONS ANNUAL CONFERENCE

The Chairman recognized Ms. Hall to provide an update on the National Association of Sentencing Commissions (NASC) Annual Conference. She began by providing background on NASC, including its mission, organization structure and activities. The main function of the organization is to host an annual conference for its membership. The conference serves as a means for states with sentencing guidelines and/or sentencing commissions (or for those states desiring to have either) to share information on current initiatives and discuss common challenges faced by guidelines states. Ms. Hall then shared a map of member states of NASC, noting that North Carolina is a member state with both mandatory guidelines and a sentencing commission. She reviewed the results of the annual NASC survey (a survey that member states respond to yearly), provided at the 2016 Conference. The results showed that many guidelines states have similar initiatives underway (e.g., JRI, juvenile life without parole, risk assessments, and pre-trial release and bail evaluation). Some of the major challenges facing NASC members include the evaluation of commissions, risk assessments, lack of adequate data, access to treatment/lack of services, politics, and prison overcrowding. Chairman Butler inquired where North Carolina fit in, in terms of the challenges facing NASC member states. Ms. Hall responded that she did not know specifically how staff had responded to the survey in past years, but she shared her opinion that the major challenges listed for other states were not major concerns in North Carolina at this point. Chairman Butler stated that based on the list of challenges facing other states, he felt North Carolina was, comparatively, in a good place. Ms. Hall agreed.

REVIEW AND DISCUSSION OF NORTH CAROLINA COMMISSION ON THE ADMINISTRATION OF LAW AND JUSTICE INTERIM REPORT

Chairman Spainhour recognized Will Robinson, the Executive Director of the North Carolina Commission on the Administration of Law and Justice (NCCALJ), to present select recommendations from the Commission's Interim Report (*see* Handout). Mr. Robinson reviewed the time table the Commission developed in order to finalize recommendations for the Chief Justice by January 2017. The Commission had been receiving comments from the public and stakeholders throughout the summer and the committees would review and incorporate those comments into the final report during the fall. Mr. Robinson stated that he wanted to share select recommendations with the Sentencing Commission as a stakeholder in the criminal justice system and get its feedback. He added that the entire Interim Report was available on the NCCALJ website.

Mr. Robinson began with a recommendation from the Civil Justice Committee to study the effects of civil fines, fees, and penalties and their collateral consequences to ensure that an inequitable system is not taking root in North Carolina. In response to a question from Chairman Spainhour, Mr. Robinson stated that it would include the waiver of costs and fees and the civil docketing of judgments. Commissioner Guice suggested looking at the reduction or waiver of costs and fees as an incentive for offenders to complete certain programs, such as substance abuse. Representative Darren Jackson commented that the Legislature was concerned with the disparity across the state in granting waivers.

Turning to the Criminal Investigation and Adjudication Committee, Mr. Robinson reviewed draft recommendations regarding pretrial release, indigent defense, and the age of juvenile jurisdiction. For pretrial release, he stated that the Committee was looking at ways to improve the decision making process. Chairman Spainhour cited an example of case where a defendant was released pretrial pursuant to risk guidelines and subsequently committed the same crime again.

Regarding indigent defense, Mr. Robinson reviewed several proposals designed to expand the availability of Public Defenders Offices and reduce indigent defense costs. He explained one proposal to identify areas where representation is not needed by charging the Sentencing Commission with "the responsibility of identifying – on a regular basis – criminal offenses for which charges are routinely dismissed or rarely result in an active sentence and recommending whether any should be considered for repeal or reclassification as fine-only infractions." Mr. Beeler pointed out that it was important to make sure that any criminal offenses reduced to infractions did not remain part of the offender's criminal history in order to avoid any collateral consequences.

Ilonka Kusa questioned the idea of reducing the penalty to a fine only when the offenders were indigent and not able to pay. Chairman Spainhour pointed out that indigency means the defendant is financially unable to secure legal representation, not that he is necessarily bankrupt. Judge Charlie Brown referred to the 2010 Sentencing Commission study that identified misdemeanor offenses that could be reduced to infractions. In that study, the Commission recommended expanding the penalties available for infractions to include other options, such as community service, in order to address situations like indigent offenders.

The Commissioners discussed the recommendation and the type of feedback the Commission might provide to the NCCALJ. Judge Brown moved to support the recommendation; the motion was seconded.

Commissioners and guests made several other points regarding the proposals. Mr. Moore recommended that the Sentencing Commission be allowed to define "a regular basis" and suggested a period of at least two years. Susan Katzenelson, guest, commented that the Sentencing Commission had not traditionally kept charged or dismissed data. June Ray stated that the new eCourt system, once it is in

place statewide, may provide that data.

Dr. McMurray asked if the staff had any reservations about taking on a study like that. Ms. Hall responded that staff currently looks at charges that result in convictions but looking at charges that result in dismissals would require new data and a new process. Staff would have to work with Administrative Office of the Courts staff to understand that data.

Mr. Moore called the question and the motion carried.

Mr. Robinson reviewed the last recommendation to raise the age of juvenile jurisdiction to include 16- and 17-year olds. He commented on the number of policy groups and organizations that voiced support for the recommendation during the public hearings but also on the number of individuals who said they did not know that it was an issue until it happened to someone they knew.

Mr. Robinson noted that the Committee members felt strongly that the recommendation was contingent upon full funding being available. Mr. Moore asked what constituted “full funding.” Mr. Robinson responded that it was primarily up to the Department of Public Safety (DPS) but that the last study done indicated around \$50 million dollars. Commissioner Guice stated that the state had recognized savings in the adult system under the Justice Reinvestment Act and that it could do something similar with changes to the juvenile system. He had heard \$60 million dollars mentioned previously but pointed out that the real costs would be to the courts and community corrections. Mr. Moore asked whether there would be more capital or recurring costs. Commissioner Guice responded that the Department had some old, closed facilities that have extra land around them which could be used; construction usually costs less than operational costs. Senator Randleman asked if the additional costs in the juvenile system could be offset by savings in the adult system. Commissioner Guice responded that they were using savings in the adult system to address other needs there, such as mental health. He said that they would use Department money first but that they would probably have to ask for more money. Judge Brown pointed out that, due to the juvenile structure, the reality is that the offenders who are not in Classes A through E have to go through several cycles before facing a commitment to a YDC; the additional impact would be minimal. Commissioner Guice added that there are about seventy 16- and 17-year olds incarcerated in the adult system and that about two-thirds of them are there due to a failure on community corrections. Mr. Beeler added that Juvenile Crime Prevention Councils see 16-year olds age out who they could serve if they had additional funding and wrap-around services. He saw that as an opportunity to break the cycle for those offenders before they entered the adult system.

Mr. Robinson referred to past efforts in North Carolina to raise the age of juvenile jurisdiction and the potential benefits of fairness, efficiency, and eliminating the collateral consequences for those offenders as they get older. He added that North Carolina is one of only two states that still has the age of juvenile jurisdiction at 16. South Carolina and Louisiana recently raised their age of jurisdiction to 18. Mr. Moore moved to endorse the recommendation to raise the age of juvenile jurisdiction to include 16- and 17-year olds; the motion was seconded. Judge Fred Morrison asked if the motion included endorsing the proposal that Class A through E felony charges against 16- and 17-year olds would be automatically transferred to superior court after a finding of probable cause or by indictment; he pointed out that this was contrary to the Sentencing Commission’s original recommendation. Mr. Moore explained that the motion was to endorse the concept of raising the age of juvenile jurisdiction; Judge Brown added that those offenders would still be in the juvenile system until a finding of probable cause or indictment. The motion carried.

NEW SPAC PUBLICATIONS

Chairman Spainhour recognized Jennifer Wesoloski, staff, to present the findings from the Correctional Programs and Recidivism for Prison Releases research brief. The research brief is a follow-up

to the 2016 recidivism report and examines recidivism rates for the FY 2013 prison releases (i.e., prisoners with a felony offense) who were in select correctional programs during incarceration. Academic Education, Alcohol and Chemical Dependency Programs (ACDP), Correction Enterprises, Sex Offender Accountability and Responsibility (SOAR), Vocational Education, and Work Release were the six correctional (or in-prison) programs selected for analysis. Prisoners can participate in multiple programs during their incarceration period and, therefore, may be represented in more than one of the six prison programs examined.

Nearly half of the FY 2013 prison releases were in Academic Education and a little over one-third were in Vocational Education while incarcerated. When examining the number of males and females in each program as a percentage of the total population of males or females, a higher percentage of the female prison population were in Academic Education, ACDP, and Vocational Education during incarceration. A higher percentage of males were in Correction Enterprises and a similar percentage of males and females were in Work Release. Recidivism rates for prisoners in Academic Education, ACDP, and Vocational Education were fairly similar or slightly lower than those found for the overall prison population. Prisoners in Correction Enterprises, SOAR, and Work Release generally had lower recidivism rates than the overall prison population. Overall, males had higher recidivism rates than females. Males and females in Academic Education, ACDP, and Vocational Education had fairly similar or slightly lower recidivism rates than the overall recidivism rates for males and females, while males and females in Correction Enterprises and Work Release generally had lower recidivism rates than the overall recidivism rates for males or females.

Mr. Beeler asked if the Commission was going to examine cost savings for prison programs in the future. Ms. Hall responded that the Commission doesn't typically conduct cost-benefit analyses. Ms. Hevener followed up by saying that staff would like to conduct a more comprehensive analysis next recidivism cycle, using risk level as a tool to determine which prisoners the programs are targeting.

2016-17 SPAC WORK PLAN AND OTHER BUSINESS

The Chairman recognized Ms. Hall again to review the Sentencing Commission's work plan for 2016-2017 (*see* Handout). She reviewed meeting dates for the full Commission for 2017, as had been set by the Chairman. She then shared tentative meeting dates for the Commission's Subcommittees for the remainder of 2016 and early 2017. She concluded noting major report deadlines, as set in statute by the North Carolina General Assembly.

Chairman Spainhour informed the members that the next Commission meeting is scheduled for December 2, 2016, and that the meetings in 2017 are scheduled for February 24, June 2, September 8, and December 1.

The meeting adjourned at 2:20 p.m.

Respectfully submitted,

Shelley Kirk
Administrative Secretary