

MINUTES
NORTH CAROLINA SENTENCING AND POLICY ADVISORY
COMMISSION MEETING
September 6, 2013

The North Carolina Sentencing and Policy Advisory Commission met on Friday, September 6, 2013, at the North Carolina Judicial Center in Raleigh, North Carolina.

Members Present: Chairman W. Erwin Spainhour, Art Beeler, Honorable Charles Brown, Paul Butler, Sheriff James Clemmons, Chief Scott Cunningham, Louise Davis, Honorable Richard Elmore, Honorable Robert Ervin, Honorable John Faircloth, Chris Fialko, David Guice, Honorable Darren Jackson, Honorable Maureen Krueger, Ilona Kusa, Honorable Floyd McKissick, Dr. Harvey McMurray, Honorable Fred Morrison, Honorable June Ray, and Honorable Tommy Thompson.

Guests: Caitlin Brooks (Office of the General Counsel, Department of Public Safety), William Childs (Fiscal Research, General Assembly), Brad Fowler (Administrative Office of the Courts), Lisa Fox (Fiscal Research, General Assembly), Sharon Gladwell (Administrative Office of the Courts), James Gorham (Division of Juvenile Justice, Department of Public Safety), Doug Holbrook (Department of Public Safety), David Huffman (NC Governor's Crime Commission), Keenon James (NC Sheriffs' Association), Joyce Kuhn (Pre-Trial Services), Kristine Leggett (Fiscal Research, General Assembly), Margaret McDonald (Office of the General Counsel, Department of Public Safety), Shaunis Mercer (Office of the Juvenile Defender), Tim Moose (Division of Adult Corrections, Department of Public Safety), John Poteat (Fiscal Research, General Assembly), Joe Prater (Department of Public Safety), Anne Precythe (Community Correction, Department of Public Safety), Brenda Rice (Pre-Trial Services), Mike Rieder (Division of Juvenile Justice, Department of Public Safety), John Smith (Administrative Office of the Courts), George Solomon (Prisons, Department of Public Safety), Mildred Spearman (Administrative Office of the Courts), Jon Williams (Administrative Office of the Courts), Kimberly Williams (NC Governor's Crime Commission), and Yolanda Woodhouse (AOC Court Programs).

Staff: Susan Katzenelson, Ginny Hevener, John Madler, Vicky Etheridge, Tamara Flinchum, Michelle Hall, Sara Perdue, Jennifer Wesoloski and Rebecca Wood.

INTRODUCTION

Chairman Spainhour called the meeting to order at 10:00 a.m. He introduced new Commissioners Maureen Krueger, Art Beeler, returning Commissioner David Guice, and new staff member Rebecca Wood. Members and visitors introduced themselves. After Judge Spainhour reviewed the agenda for the meeting, June Ray moved to adopt the minutes from the June 12, 2013, meeting; the motion was seconded and carried.

REVIEW OF THE 2013 LEGISLATIVE SESSION

Sara Perdue presented the Criminal and Juvenile Bills ratified during the 2013 Session of the General Assembly (*see handout*). She highlighted a number of felony bills that either create new criminal offenses or change the elements of the existing offenses, make changes to the classification of existing offenses, or make changes to punishments.

Regarding House Bill 937, Amend Various Firearm Laws, Judge Ervin asked what qualifies as a “prior firearm-related offense” for purposes of the new Armed Habitual Felon status offense. Ms. Perdue answered that firearm-related offenses are felonies committed in which the person used or displayed a firearm while committing the offense.

Mr. Fialko asked if the previous firearm enhancement law had been repealed. Ms. Perdue said that it still existed but was amended. Mr. Madler explained that the enhancement for Class A through E felonies is the same as the previous one except that the 60 months was changed to 72 months; enhancements were added for Class F through I felonies.

In response to questions regarding Senate Bill 465, Prohibit Use of Tax Zapper Software, Senator McKissick explained that a tax zapper is a small device, like a memory chip, that a merchant can install in the cash register. The device reduces the amount of sales recorded so that the merchant could avoid paying sales tax or withholding taxes on the suppressed amount. Tax zappers are already illegal in several states.

Regarding Senate Bill 683, Safe Harbor/Victims of Human Trafficking, Judge Spainhour asked Ms. Perdue whether a person convicted of patronizing a prostitute would have to register as a sex offender; Ms. Perdue answered yes.

Regarding House Bill 149, Caylee’s Law/Report Missing Children, Judge Elmore asked how long a child has to be missing for the offense of failure to report a missing child applies. Mr. Madler read a provision from the bill that indicated it was 24 hours.

Regarding House Bill 26, Strengthen Laws/Vehicle Theft, Judge Spainhour asked if the chop shop bill was broad enough to include tractors and vehicles other than automobiles. Ms. Perdue said that it was.

Regarding House Bill 29, Methamphetamine/Offense/Penalties, Judge Ervin asked whether adding 24 months to the minimum sentence for the enhancement would increase the maximum by 24 months. Mr. Madler responded that the new maximum sentence would be the maximum that corresponds with the new minimum sentence.

Regarding House Bill 361, Justice Reinvestment Technical Corrections, Judge Ervin asked why the felony punishment chart was being changed. Ms. Perdue explained that three of the maximum sentences were calculated incorrectly in the original Justice Reinvestment Act. Judge Spainhour commented that this would increase the number of grids the judges would have on

the bench with them. Judge Ervin said that this was not practical; they would now be dealing with a total of seven charts.

Representative Faircloth asked to discuss Judge Ervin's concerns regarding the changes to the grids and the number of grids for which the judges were responsible. He asked Judge Spainhour if the Commission should address this with the General Assembly. Judge Spainhour said that the Commission should. Judge Ervin said that it would help if the General Assembly just left the charts alone for a few years. Some of them will no longer apply over time and it would give everyone enough time to see how well the JRA was functioning. Ms. Kruegger asked if there was an application that could be put on the computer to select the right chart and calculate the sentence. Mr. Madler explained that Jamie Markham of the UNC School of Government had won an award to develop a sentencing application. Ms. Katzenelson added that it would eliminate errors as long as the user selected the correct year. Judge Ervin said that was key as it was very difficult to correct a sentence once the person left the courthouse. Commissioner Guice asked for everyone's patience as Mr. Markham worked on this project.

Ms. Perdue also summarized the results of the Commission's annual review of proposed legislation pursuant to G.S. 164-43. During the 2013 Session, the General Assembly enacted 71 felony provisions, 41 of which were reviewed by the Commission. For 11 of the 41 provisions, the Commission's Offense Classification Criteria were found to be inapplicable; 22 provisions were found consistent with the Offense Classification Criteria or with Structured Sentencing; and 8 were found to be inconsistent with the Criteria or with structured sentencing. The Commission did not recommend an alternative offense classification for any of the 8 provisions. Of the 30 felony provisions that the Commission did not review, 2 were added to the relevant bills after the Commission's June 14, 2013 review date, 26 were amended after the review date, and 2 were ratified before the review date.

Ms. Perdue pointed out the section of the report containing misdemeanor bills that either create new criminal offenses or change the elements of existing offenses, make changes to the classification of existing offenses, or make changes to punishment. She highlighted Senate Bills 182 and 402 which reclassify a number of misdemeanor offenses to either Class 3 misdemeanors or infractions. She also described the changes Senate Bill 402 makes to the misdemeanor punishment chart. The bill amends Class 3, Level II, to authorize a community punishment only if the offender has one to three prior convictions and a community or intermediate punishment if he has four prior convictions (was community or intermediate punishment for all offenders in that cell). The bill further provides that unless a specific offense provides otherwise, the judgment for a person convicted of a Class 3 misdemeanor who has not more than three prior convictions shall consist of a fine only. No juvenile justice bills were ratified. Ms. Perdue mentioned bills of interest to the Commission.

Regarding Senate Bill 91, Prohibit Expunction Inquiry, Chief Cunningham stated that inquiries by police and sheriffs' departments would be exempt. Ms. Ray asked if the military was exempt; staff stated that the military is not listed in the bill.

Mr. Beeler asked what North Carolina has done in response to the Supreme Court decision in *Miller v. Alabama*. Mr. Madler explained that the General Assembly addressed the *Miller* decision last session by creating the option of a sentence of life with parole for offenders who were under 18 at the time of the offense.

John Madler gave a brief overview of the provisions enacted in Senate Bill 402, Appropriations Act of 2013, as modified by House Bill 112. He mentioned several cuts as well as expansions in the Judicial Department, the Department of Justice, and the Department of Public Safety. In particular, Mr. Madler pointed out that the legislature closed five prison units, totaling approximately 1,900 beds, but added 175 new probation and parole officers. The legislature also closed one youth development center and two detention centers for delinquent juveniles.

Mr. Fialko asked where youthful offenders would be housed when Western Youth Institution closed. Mr. Madler said that he did not know but that Commissioner Guice could address that in his presentation in the afternoon.

UPDATE ON CORRECTIONAL AND DELINQUENT POPULATIONS

Ginny Hevener presented an update on correctional and delinquent populations. As part of this update, Ms. Hevener summarized the potential impact of the bills ratified during the long session. The Sentencing Commission is legislatively mandated to provide impact projections for each bill that affects criminal penalties or juvenile justice. Ms. Hevener noted that this mandate relates directly to one of the key principles of Structured Sentencing – that sentencing policies should be balanced with correctional resources. Sentencing Commission staff prepared 68 impact projections during the session. The impact projections include an estimate of the number of prison beds (criminal justice) or youth development center beds (juvenile justice) affected by the proposed bill. Depending on the availability of data relating to the proposed change, the impact projections are produced either by using the Commission’s computerized simulation model (information available) or using threshold estimates (no information available) for each offense class. A threshold analysis is a projection that is based on the number of convictions that it would take to create the need for one additional prison bed in the first year. During the legislative session, a total of 44 felony offenses and 24 misdemeanor offenses were created or expanded; 15 felony offenses and 31 misdemeanor offenses were reclassified; and there were two punishment changes (sentencing enhancements) for felony offenses and two punishment changes for misdemeanor offenses. Ms. Hevener stated that there are no hard numbers on the prison impact of the criminal bills from this past session because the majority of changes involved the creation of new offenses or the expansion of existing offenses for which no historical data are available. The greatest potential for prison impact comes from the amendments to the firearms laws. However, the impact will depend on how often the new armed habitual felon status offense or the firearm/deadly weapon sentencing enhancements are used.

Ms. Hevener continued with an update on the prison population (*see attached handout*). The projections were developed using FY 2012 data on convictions and sentences imposed, along with data on all offenders in prison at the beginning of the projection period. Ms. Hevener reminded Commissioners that the projections were based on assumptions about how the criminal justice system will operate under the Justice Reinvestment Act of 2011 (JRA). Limited empirical data were available on criminal justice practices under the JRA for FY 2012 since many of the provisions went into effect midway through the fiscal year. The prison population is projected to increase from 36,838 to 37,680 across the ten-year projection period, an increase of just over 2%. The projected prison population is below Expanded Operating Capacity, but above Standard Operating Capacity, for the projection period. As a result of changes in demographic trends, continued declines in crime trends, and the enactment of policy changes (prior to and including the passage of JRA), the current prison projections indicate a decline in the prison population compared to the previous projections.

Ms. Hevener reviewed a graph depicting prison population trends from July 2003 through July 2013. After years of growth (about 3% per year on average), the prison population began to stabilize in 2009. The leveling off from 2009 to 2011 is a function of continued declines in criminal justice trends, such as arrests and convictions, and of changes to the felony punishment chart that were passed in 2009. While declines in arrests and convictions continue to factor into the lower prison population during FY 2012 and FY 2013, Ms. Hevener noted that the declines from July to December 2011 primarily can be attributed to changes to earned time credits that went into effect in June 2011, while the declines from the second half of FY 2012 and into FY 2013 can be attributed to changes in prison entries as a result of the JRA. From FY 2011 to FY 2012 there was a 17% decrease in prison entries, primarily as a result of the shift of most misdemeanants from prison to local jails through the Statewide Misdemeanant Confinement Program and also as a result of the legal change that places limits on revocations and confinement for technical violations of probation. The legal change to revocations accounts for much of the 10% decrease in prison entries from FY 2012 to FY 2013. Ms. Hevener noted that in January 2013 the prison population was the lowest it has been since 2006. The prison population has been around 37,500 in recent months.

Ms. Hevener provided a comparison of the projections for FY 2013 with the actual prison population for that time period. The average prison population for June 2013 was 37,470 compared to the projected population of 36,838 (a difference of less than 2%). The prison population is currently lower than prison capacity, with this trend projected to continue based on current data. Ms. Hevener mentioned that staff has started working with the Department of Public Safety on the next projections.

Ms. Hevener also presented an update on the youth development center population (*see attached handout*). 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 2012 and data on the juveniles who were committed to a YDC as of July 1, 2012. The projection for the end of FY 2013 is 276, and remains stable over the five-year

projection. Ms. Hevener reviewed a graph depicting YDC population trends from July 2004 through July 2013. Like the adult prison population, the YDC population has also been decreasing over the past few years as the result of similar demographic and juvenile justice trends. Ms. Hevener provided a comparison of the YDC projection for FY 2013 with the actual YDC population for that time period. The projected YDC population for June 2013 was 276 compared to the actual average population of 253, a difference of 23 or 8.3%. Staff has started working with the Department of Public Safety on the next projections and hopes to have updated projections by the end of this year.

Judge Ervin asked if anyone was tracking the Statewide Misdemeanant Confinement Program numbers, and Ms. Hevener said that the Sheriffs' Association has a monthly report that includes this information. She told him she did not have that number at this time, but would get it for him. Mr. Madler thought that it was less than 700.

Ms. Kruegger asked if there was any way to drill down in the data to distinguish between population shifts due to crime rate vs. Justice Reinvestment. Judge Ervin asked if the crime rate is taken into account in the ten year projections. Ms. Hevener answered both of those questions. The crime rate is factored in, and a technical advisory group meets every year to discuss criminal justice trends to determine the growth rate to be used in the projection. It's difficult to tease this information out in the projection itself, but it can be monitored through data on the Statewide Misdemeanant Confinement Program or CRVs, for example. Ms. Katzenelson further commented that the number of court filings from AOC data should also be considered. Commissioner Guice also commented that in 2009 56% of prison returns were due to revocation violations and, of those, 73% were technical violations. Last year 30% were revocation violations.

Mr. Beeler asked Commissioner Guice how much operational capacity was being lost due to the prison closings. Commissioner Guice answered about 2,000. Dr. McMurray disagreed with Ms. Hevener that her report had anything to do with luck, and complimented Commission staff on the detailed work producing the projections. Representative Faircloth said that another causal factor in the crime rate reduction is technology. Many of those who would normally commit crimes know that cameras are out there as well as other technology.

Judge Spainhour read a letter from David Guice requesting the Sentencing and Policy Advisory Commission to study the statutory provisions provided in N.C.G.S. 15-196.1 -196.4 related to the awarding of time credits against sentences of imprisonment and confinement. Judge Spainhour asked for a motion recommending the appointment of a subcommittee to study this. Sheriff Clemmons so moved; the motion was seconded and carried. Judge Spainhour called for volunteers for this subcommittee before appointing members himself.

AGENCY UPDATES

Judge Spainhour recognized Judge John Smith, Director of the Administrative Office of the Courts (AOC), for an update. Judge Smith described the basic mandate and responsibilities

of the AOC as well as some of its recent challenges. He also reviewed the courts' budgetary provisions, restored positions, and needs. Finally, Judge Smith addressed questions regarding the use of CJ Leads, Drug Courts, fines and forfeitures collected by the courts, and AOC's plans to address its core functions, priorities, and unfunded mandates.

Judge Spainhour invited Commissioner Guice to give an update on the Department of Public Safety's (DPS) Division of Adult Correction (DAC). Mr. Guice introduced the Division's two Deputy Commissioners: Tim Moose, Operations, and Joe Prater, Administration, as well as George Solomon, Director of the Division of Prisons, and Anne Precythe, Director of Community Corrections. Ms. Precythe reported on Community Corrections' current caseload of over 100,000 offenders in the community, and the Justice Reinvestment-induced changes in their supervision utilizing risk and needs assessments and evidence-based practices. She also noted efforts to increase their staffing by transitioning surveillance officers into the role of probation/parole officer.

George Solomon described some of the prison closings, the newly identified efficiencies in managing the prison population of over 37,000 inmates, and the help provided by jails housing most misdemeanants. He also mentioned the role of the Central Prison hospital in saving on inmate health costs, and the plans to close Western and move the 50 plus youths into a dedicated space at Foothills, noting that no 16-17 years olds will be placed with the 18-21 population.

Finally, Deputy Commissioners Prater and Moose described some of the support that Administration and Operations provide for the safe and efficient running of prisons and community corrections. A question by Judge Spainhour highlighted the daily dangers of working in prisons, and Mr. Beeler pointed out that correctional officers risk their lives daily and, while they are underpaid and many of them have to work second jobs to feed their families, the majority of them are not corrupt.

Commissioner Guice announced that, as a part of the continuing effort to consolidate agencies and increase efficiency, the Department will merge the adult and juvenile functions into the new Division of Adult Correction and Juvenile Justice. The consolidation is expected to bring increased efficiency in upper management, combined resources in the field, and streamlined community supervision. While the two entities will continue to have different missions, there will be no mixing of juveniles and adults, they will work as a team to achieve the goal of making a safer community. Reviewing the needs of juvenile justice and adult corrections, the Department identified several shared areas, including facility management, and educational-, food-, health-, programming-, and training-services.

Commissioner Gorham noted that with the consolidation he will be working directly with Commissioner Guice, while Mike Rieder will continue to oversee juvenile court counselors across the state and report to the Deputy Director of Community Corrections. Dave Hardesty will oversee Youth Development Centers and detention centers, and will report to the Deputy Director of Custodial Operation. Juvenile Crime Prevention Councils and all programming will

be under Nicole Sullivan, who will report to Joe Prater.

Chairman Spainhour recognized David Huffman, director of the Governor's Crime Commission (GCC). Mr. Huffman discussed the GCC grant cycle and priorities, and a reduction in their direct research and analysis activities. Representative Faircloth noted that citizens of local jurisdictions should have a say early on regarding programs funded by the GCC, because eventually these programs will be kept at the citizens' expense and should cater to the actual needs of their community. Mr. Huffman responded that some counties or cities already have hearings to that effect, however he did understand that many do not.

Chairman Spainhour announced that the next meeting of the Sentencing Commission will be on Friday, December 6th.

The meeting was adjourned at 3:08 p.m.

Respectfully submitted,

Vicky Etheridge
Administrative Assistant