

VERMONT SENTENCING COMMISSION
Minutes of Meeting
September 16, 2019

The ninth meeting of the Vermont Sentencing Commission commenced at approximately 1:35 p.m. at the Supreme Court in Montpelier. Present were Chair of the Commission Judge Thomas Zonay, Chief Judge Brian Grearson, Judge John Treadwell, Karen Gennette, Martin LaLonde (on behalf of the chair of the House Committee on Judiciary), Monica Weeber (designee for the Department of Corrections), Matthew Valerio, Marshall Pahl, Elaine Boyce, Rebecca Turner, Jordana Levine, John Campbell, David Cahill, Michael Schirling, and David Scherr (designee for the Attorney General). Absent was Richard Sears.

I. Approval of Minutes

The meeting opened with the Chair Thomas Zonay’s welcome and invitation to approve the minutes of the prior meeting on July 16, 2019.

John Campbell moved to approve the minutes; Karen Gennette seconded. The motion passed unanimously on a voice vote.

II. Committee Reports and Discussion

A. Committee A

Report and Discussion

Karen Gennette spoke on behalf of Committee A. Committee A did not have a report for this meeting.

B. Committee B

Report and Discussion

Marshall Pahl spoke on behalf of Committee B. Committee B did not have a report for this meeting.

C. Committee C

Report and Discussion

Judge Treadwell delivered the report for Committee C. Judge Treadwell asked David Cahill to review Committee C’s amended proposal regarding property crime classification (“2019-09-10

Property Crime Classification Proposal B-w_more_less”) and address some of the questions raised by the Commission at the prior meeting, specifically relating to how other states approach property crimes. David Cahill directed members to a Pew analysis of changes to property crime thresholds in 37 states over the last 10 years. (attached to “2019-09-10 Property Crime Classification Proposal B-w_more_less”). He noted that the closest sentencing structure to what was being proposed by Committee C was found in South Carolina who raised the misdemeanor (30-day maximum sentence)-felony (five-year maximum sentence) threshold to \$2,000 in 2010. David noted as an aside that property crime thresholds should be reviewed and raised every twenty-five years in order to account for inflation.

David Cahill addressed the concern that while the proposal de-felonizes a large number of property crimes where the harm or damage is below \$10,000, certain crimes might see increases in penalties. By way of example, he highlighted credit card fraud that currently has a penalty threshold tied to damage above or below \$50. Because the crime on either side of this threshold is a low-level misdemeanor, prosecutors often will charge felony false pretenses for credit card fraud that results in a large property loss. So, while the classification proposal increases the maximum penalties for credit card fraud in statute, the practical effect is that the maximum penalty for conduct that amounts to credit card fraud but is charged as false pretenses will actually decrease in most cases.

Marshall Pahl raised a concern regarding an aspect of the proposal that called for a standard increase in penalty by one tier for subsequent offenses. He indicated that this sort of regime would be new for Vermont, would drastically and negatively impact many of his clients, and is not supported by research on deterrence. Marshall Pahl and Judge Zonay also expressed a concern about the retroactivity of the one tier enhancement and the impact on current statutes that already contain penalty enhancements for second or subsequent offenses. Judge Zonay noted that the classification proposal did not depend upon the subsequent offense enhancement structure being included, and that this issue could be dealt with by the legislature on an offense by offense basis.

Martin LaLonde wondered if the classification structure might include some differentiation for offenses that involve a breach of trust, such as, embezzlement. Judge Treadwell indicated that the sentencing tiers were based solely on the dollar amount of harm, but that a court could consider factors like a breach of trust when imposing a sentence within the proscribed range. Rebecca Turner reiterated a concern that by raising the potential penalty for some offenses, the Commission would be ignoring statutory language in the enabling statute prohibiting such recommendations absent a “compelling rationale.” She also raised a concern that the Committee C proposal did not consider reductions to the fine structures associated with these offenses. David Cahill mentioned that the vast majority of sentences would decrease, and the vast majority of convicted offenders do not receive fines. By way of example, Robin Joy noted that over a 10-year period for which she had court data, the State has seen 481 convictions for Grand Larceny over \$900, which carries a maximum fine of \$5,000. Of these convictions, fines were imposed in five instances, the highest of which was \$500. Marshall Pahl argued that the low utilization of fines suggested no rationale for increasing them. David Scherr endorsed the proposed classification structure with the uniform enhancement removed on the grounds that the benefit to

the vast majority of individuals outweighed the detriment to the minority of individuals who might be facing an increased sentence.

Motion

David Scherr moved that the Commission adopt as a recommendation to the Legislature Committee C's property crime classification proposal ("2019-09-10 Property Crime Classification Proposal B-w_more_less") with the uniform subsequent offense enhancement scheme removed, explicitly note for the legislature the offenses where the potential sentence increased under the proposal, and remain silent on changes to fine structures. David Cahill seconded the motion.

Discussion

Rebecca Turner questioned how the proposal dealt with classifying offenses that did not involve a specific dollar amount of damages, such as Tapping Cable TV (13 VSA 3786) or Removing Survey Markers (13 VSA 3834). David Cahill indicated that these offenses would follow the automatic classification and fall into the Class E misdemeanor category. Monica Weeber suggested that the Class E misdemeanor category should be explicitly defined in the proposal.

Alternative Motion

Rebecca Turner proposed an alternative motion to table David Scherr's motion until the next meeting of the Sentencing Commission. Matt Valerio seconded this motion.

Discussion of Alternative Motion

Marshall Pahl indicated that he did not want to vote on David Scherr's motion until some of the outstanding questions regarding Class E misdemeanors and how offenses with no specific dollar amount of damages was explicitly incorporated into the proposal.

Vote on Alternative Motion

The motion to table David Scherr's motion failed on a vote of 6 to 8.

The following members voted in the affirmative: Karen Gennette, Monica Weeber, Matthew Valerio, Marshall Pahl, Rebecca Turner, and Jordana Levine.

The following members voted in the negative: Chief Judge Brian Grearson, Judge John Treadwell, Martin LaLonde, Elaine Boyce, John Campbell, David Cahill, Michael Schirling, and David Scherr.

Judge Thomas Zonay abstained.

Vote on David Scherr's motion

The motion passed on a vote of 8 to 6.

The following members voted in the affirmative: Chief Judge Brian Grearson, Judge John Treadwell, Martin LaLonde, Elaine Boyce, John Campbell, David Cahill, Michael Schirling, and David Scherr.

The following members voted in the negative: Karen Gennette, Monica Weeber, Matthew Valerio, Marshall Pahl, Rebecca Turner, and Jordana Levine.

Judge Thomas Zonay abstained.

Judge Treadwell then reviewed Committee C's proposal regarding reclassification of motor vehicle offenses ("2019-09- 19 T 23 draft.pdf"). Committee C built a classification scheme that centered around the most serious misdemeanor offenses, DUI-2 and Negligent Operation with Death Resulting. These two offenses are classified as Class A Misdemeanors, and the remaining Title 23 offenses are reclassified into a tiered system in relation to these offenses. This system resulted in a reduction to the maximum penalties for all offenses other than Boating Under the Influence, second offense.

After hearing the general overview of the proposal, Martin LaLonde requested that further consideration of the proposal be tabled until the next meeting of the Sentencing Commission.

Rebecca Turner indicated that she will be presenting a reclassification of crimes against persons at the next meeting of Committee C.

Judge Zonay turned to the question of whether the Commission should vote to recommend decriminalizing some or all fine-only offenses. John Campbell raised a concern regarding the collateral impacts of decriminalizing certain Fish and Wildlife fine only offenses. Judge Treadwell suggested that Commission might start with a recommendation to decriminalize the fine-only offenses that are archaic or have not been charged in a number of years. Judge Zonay referred the question of decriminalization of certain fine-only offenses to Committee C to report back for the next meeting.

David Scherr then reported on the progress of the expungement subcommittee. This subcommittee has been working with stakeholders in the Department of Motor Vehicles and the Judicial Bureau to discuss expungement of civil offenses. David Scherr expects to present a recommendation on expungement to the full Commission at the next meeting. Judge Grearson and John Campbell noted the need for more resources in order to accommodate further expansion of expungement eligibility.

III. Discussion Regarding Report to Legislature

Judge Zonay indicated that the report to the legislature would largely track the enabling statute requirements and reflect the recommendations voted on by the Commission. The report will include how each member voted on the individual recommendations.

IV. New Business

Ellen Whelan-Wuest, Deputy Program Director for Council of State Governments' Justice Center briefly addressed the Sentencing Commission regarding the scope of work and timeline for its Justice Reinvestment II project. She indicated the recommendations will likely relate to gaps in the criminal justice and mental health systems related to behavioral health. Given the overlap between this project and the work of Committee B, Martin LaLonde, with the agreement of Richard Sears, asked that this Committee temporarily suspend Committee B's work until the Justice Reinvestment II recommendations have been published.

V. Scheduling next meeting

The Commission set its next meeting date for Monday, October 21st, 2019 at 1:30 p.m. Location to be determined.

I. Adjourn

The meeting was adjourned at approximately 3:20 p.m.