

## Comprehensive Sentencing Task Force

September 13, 2012, 1:30PM-4:30PM  
710 Kipling, 3<sup>rd</sup> Floor Conference room

### **ATTENDEES:**

#### **CHAIR**

Jeanne Smith, Chair/Division of Criminal Justice

#### **TASK FORCE MEMBERS**

Michael Dougherty/ Deputy Attorney General

Dianne Tramutola-Lawson/CURE

Joe Cannata/Voices of Victims

Judge Theresa Cisneros/4<sup>th</sup> Judicial District, District Court Judge

Pete Hautzinger/DA 21<sup>st</sup> Judicial

Doug Wilson/State Public Defender

Judge William Hood III/Denver District Court

Mark Evans/ Public Defender's office (*non-voting member*)

Christie Donner/Criminal Justice Reform Coalition

Jason Middleton/Public Defender

Claire Levy/State Representative

Joe Pelle/Sheriff, Boulder County (phone)

Tim Hand/DOC Division of Parole

Charles Garcia/Denver Crime Prevention & Control Commission (phone)

Denise Balazic/Parole Board

#### **STAFF**

Paul Herman/CCJJ consultant

Germaine Miera/Division of Criminal Justice

Kim English/Division of Criminal Justice

Peg Flick/Division of Criminal Justice

#### **ADDITIONAL ATTENDEES**

Maureen Cain/Colo. Criminal Defense Bar

Tom Raynes/CDAC

Dan Rubinstein/21<sup>st</sup> Judicial District

#### **ABSENT**

J.P. Moore/DA 17<sup>th</sup> Judicial

Glenn Tapia/Division of Criminal Justice

<p><b>Issue/Topic:</b> Welcome and Introductions</p>	<p><b>Discussion:</b> Jeanne Smith welcomes the group and previews the agenda.</p>
--	--

<p><b>Issue/Topic:</b> Extraordinary Risk Update</p> <p><b>Actions</b></p>	<p><b>Discussion:</b> Doug Wilson reviews the Extraordinary Risk proposal.</p> <p><i>DISCUSSION POINTS – EXTRAORDINARY RISK</i></p> <p><b>Issues</b></p> <ul style="list-style-type: none"> <li>• The Extraordinary Risk recommendation is up for a vote in the task force meeting today</li> <li>• The Ex. Risk working group consisted of Doug Wilson, Theresa Cisneros, Michael Dougherty and Charlie Garcia.</li> <li>• In general, the proposal would eliminate Ex. Risk, then move some child abuse and 2<sup>nd</sup> and subsequent stalking to the Crime of Violence Statute</li> <li>• The proposal includes eliminating discretionary aggravation while leaving mandatory aggravation in place</li> <li>• This would eliminate extraordinary risk ranges</li> <li>• There is a prosecutorial concern that child abuse and stalking are not currently in COV, only in Ex. Risk, and that’s the only available plea negotiation – if these are moved into COV that will still work</li> <li>• The data sheet provided to the group shows only 10% of sentences were sentenced outside the presumptive range, another 8 percent were sentenced outside the presumptive range and into exceptional circumstance.</li> <li>• The data handout shows (Table 2) that for cases filed CY2009 to CY2011, 157 people were sentenced to DOC for child abuse</li> <li>• Table 3 shows all 15 cases of knowingly and reckless child abuse deaths were sentenced to DOC</li> <li>• Moving the F2 and F3 into COV, gives the prosecution more discretion as they would have to charge under crime of violence</li> <li>• This recommendation also calls for eliminating discretionary aggravation while leaving mandatory available</li> <li>• Table 3 of the data handout shows that for F3 and F4 child abuse, 51 people were sentenced to prison.</li> <li>• Table 5 shows that for 2<sup>nd</sup> and subsequent stalking, F4, only one person went to prison</li> <li>• As far as recommendations, the proposal to get rid of discretionary aggravation could stand on its own</li> <li>• Doug says he’s pushing for getting rid of discretionary aggravation because mandatory is there for the really serious folks</li> <li>• The theory behind getting rid of discretionary is to add some sort of</li> </ul>
--	--

**Issue/Topic:**

Extraordinary Risk Update

consistency on the bench

- This reduces the maximum of the presumptive
- Is eliminating discretionary aggravation a different issue?
- Pete H. proposes - What if 12 went to 16, and then get rid of discretionary?
- Doug responds that the original goal was to “put bad people away” - which is why we Ex. Risk would stay at top end. If there is mandatory on COV the court has the ability to put people away for a long period of time.
- Unless its COV, the sentence should be in the presumptive range
- COV’s should be going to prison
- There’s a mandatory list and then there’s everything else
- Mitigating or aggravating is a cloud
- Can we come to consensus on getting rid of extraordinary risk, lowering the mandatory, adding child abuse and second and subsequent stalking?
- Are there any other offenses that might make sense to add to COV – how about retaliation against victim or witness? If we’re reducing the mandatory then we’re reducing the range.
- FOR COV class 3 felony crimes of violence, now 10-32 would be lowered to 4-32. Retaliation is a class 3 felony.
- Moving stalking to 2<sup>nd</sup> and subsequent was a compromise.
- In general, are there non extraordinary risk and non COV crimes we want to put in here?
- Keep in mind that these changes have nothing to do with period of parole, that’s still based on that class of offense.
- Are we voting on Doug’s first and second bullet points on the recommendation? How does that get us to the proposed revised sentencing ranges crime classification chart? Because we’re down to 6 classifications instead of 10 (the current sentencing ranges chart).
- Doug moves to vote on bullets 1 and 2 and the revised chart as a recommendation from this task force to CCJJ.
- How does the text of page one get us to the maximum range of crime of violence? Where’s the piece about retaining the max? If the chart is included it would take the place of the present sentencing ranges.
- On bill paper we may need to spell out the verbiage. Proposal would have to spell out the max changes. Must change language to say double the top range.
- This represents a massive reduction in judicial discretion
- Doug makes a motion to vote on recommendations 1 and 2 in his proposal, understanding that the ranges are double the old top end.
- Can we modify the verbiage on #2; insert the word mandatory

**Issue/Topic:**

Extraordinary Risk Update

before minimum so that folks understand? Yes.

- VOTE IS HELD TO MOVE #1 AND #2 - All in favor, 13 yes votes (including Jeanne vote)

*DISCUSSION POINTS -ELIMINATE DISCRETIONARY AGGRAVATION*

- Doug moves that recommendation #3 be voted on by itself, Claire seconds the motion
- Pulling out #3 represents a massive reduction in judicial discretion. Currently a judge can go as high as 12 years; this would cut that in half to 6 years.
- It does cut judicial discretion, but it rarely happens
- In the anomalous case - it allows you to avoid “bitching” somebody
- If you leave discretionary aggravation in, what was 12 now goes to 16. In the maximum range, not the presumptive range. Part of the compromise was to give the DA’s and bench more leeway, and move COV’s down to the bottom.
- There are mandatory prison sentences for COVs
- In terms of simplicity, one of the areas where sentences are appealed is around Blakely issues related to aggravation. This change would eliminate that.
- If you’re expanding the range but taking away an appellate opportunity that’s a problem.
- This is a good thing to do as far as a policy matter; the Blakely point is a good point.
- VOTE IS HELD ON #3 AS A STAND ALONE ISSUE “Eliminating Discretionary Aggravation” – 8 in favor, 4 opposed (Jeanne abstains)

*DISCUSSION POINTS -MISDEMEANORS*

- If we’re doing away with Ex. Risk at the felony level we should do away with Ex. Risk at the misdemeanor level
- The easiest way to do this is to eliminate all Ex. Risk crime misdemeanors and increase the maximum possible sentence on an M1 to 24 months
- VOTE IS HELD ON ELIMINATING ALL EX. RISK MISDEMEANORS – 9 in favor, 3 opposed (Jeanne abstains)

**What’s next**

- Present to CCJJ tomorrow for a preview, then in October for a final vote

<p style="text-align: center;"><b>Issue/Topic:</b></p> <p style="text-align: center;">Diversion Working Group</p> <p style="text-align: center;"><b>Action</b></p>	<p style="text-align: center;"><b>Discussion:</b></p> <p>Mark Evans presents his Diversion Proposal Update and Recommendation/PowerPoint to the group for discussion and a possible vote.</p> <p><i>DISCUSSION POINTS</i></p> <p><b><u>Issues</u></b></p> <ul style="list-style-type: none"> <li>• The Diversion working group consists of Mark Evans, Judge Hood, Eric Philp, Dan Rubinstein and Joe Pelle</li> <li>• This proposal has the support of everyone in the working group</li> <li>• The goal is to get task force approval, then CCJJ approval and then legislation</li> <li>• A Diversion program has three goals             <ul style="list-style-type: none"> <li>- preventing defendants from committing additional criminal acts</li> <li>- Restoring victims of crime</li> <li>- Reducing the number of cases within the criminal justice system</li> </ul> </li> <li>• A major emphasis should be placed on refocusing on the important aspect of collateral consequences that happen after a conviction – often devastating collateral consequences</li> <li>• Avoiding the conviction can have a tremendous positive impact for the individual and the community</li> <li>• Diversion also benefits the victims of crime</li> <li>• At least for theft offenses, people involved in diversion are more likely to pay their restitution</li> <li>• Preventing criminal acts and giving people an opportunity to make good are why the Diversion group went down this road</li> <li>• A lot of these same goals could be accomplished under the current differed prosecution scheme</li> <li>• However, Deferred Pros isn't happening now primarily because DA's do not have the resources, the ability to follow through with prosecution is impeded and the process inures solely to the benefit of the defendant</li> <li>• Any diversion program will have four components             <ul style="list-style-type: none"> <li>- Eligibility determination</li> <li>- Agreement</li> <li>- Monitoring</li> <li>- Termination</li> </ul> </li> <li>• The first three proposed statutory changes in this proposal track the process mentioned above</li> <li>• With this proposal, DA's would develop guidelines and defendants could be considered for diversion at any point before plea or trial.</li> <li>• Then, the defendant can enter an agreement with the DA and a statement of fact that could be used as impeachment if they don't successfully complete</li> </ul>
--	---

**Issue/Topic:**

Diversion Working Group

- Any entity approved by the DA can monitor the person / whoever the DA wants to approve
- No court filing required
- The primary areas of concern back in June when the group first discussed the proposal were that this was post filing. There was also a belief that a diversion program shouldn't involved judiciary at all. And there was a perception that if hearings are required to revoke a diversion, any efficiencies would be lost.
- This current proposal is not strictly post-filing, diversion would be allowed at any point
- If probation department is selected as the Diversion agency, then that will be filed with the court
- There is no legal reason that charges have to be filed before doing this (probation)
- This whole proposal was focused on why we don't see people being diverted right now – a lot of the reason was no DA money to do this
- For jurisdictions that don't have this, involving the judiciary allows jurisdictions to accomplish this
- Drawbacks of involving the judiciary are outweighed by allowing someone to participate in Diversion
- Diversion agreements will require the defendant to not commit "any criminal offense". 180 day extension will be available for non-payment of restitution due to inability to pay. And a criminogenic needs assessment can be made a condition of diversion and performed by the supervising authority.
- One outstanding issue still needs to be discussed - What about length of time for Diversion? Right now, it caps at 4 years for a felony and 2 years for a misdemeanor – same language from deferred sentencing statute
- In the 17<sup>th</sup> they work on about a 1 year timeframe
- In the 1<sup>st</sup> their typical timeline is about 2 years
- Deferred pros is 2 years
- The longer the timeline you have available, the more serious cases you can accept
- The group did not reach consensus on whether there should be a statutory exclusion for DV and sex crimes. Mostly, want DA's to have discretion, but not sure we want an exclusion at statutory level
- It's written right now that it's acceptable in all cases.
- Two schools of thought – If we do not exclude domestic violence cases we risk losing the whole process as a whole, the minority school of thought is that if it's good policy we should recommend it.
- In those rare cases that a DA wanted to offer Diversion on DV and sex offense then the victim would have input
- The way it is now, it would be open to any offense

**Issue/Topic:**

Diversion Working Group

- The current language is in the DV statute, not the deferred pros statute
- Joe P says he's under the opinion that exclusion for DV or sex crime will sink the effort, based on the experience in Boulder recently.
- Boulder really got vilified and came under intense fire for even having the discussion
- The argument is that the record of arrest for those crimes needs to stand
- Any good that might come out of an effort to expand Diversion will be lost on this argument if we go forward with the DV/Sex crime exclusion
- Pete H says he's inclined to think there's no problem going forth without an exemption for DV. Sex crimes probably not divertible anyway. Let's go forward and then maybe pull the plug on this particular point in the legislative process if need be?
- Get DA involved, risk assessment instrument involved, victim involved
- Going any further in the conversation without involving DV advocates is going to kill it.
- Victims groups don't want prosecutors to have discretion
- Nothing currently statutorily that precludes sex offender cases from getting diverted, but this is not the case with DV
- There is mandatory arrest but not mandatory prosecution. DA's have to put on the record that they can't prove the case
- Maureen concerns – This is more of a DV problem than a sex assault problem
- During drafting, make sure we're not making a preference toward any KIND of program – lots of different jurisdictions do this differently. RJ is really heavy in some jurisdictions.
- During drafting, we don't want to suggest it always has to be supervision either
- Want to make sure this allows for pre-filing as well
- Concerned about the sealing process, and concerned about the revocation process.
- How does criminal court get jurisdiction over these 3<sup>rd</sup> parties?
- Making sure we're not emphasizing one alternative over another is completely legitimate
- What about the issues of making sure the case doesn't have to go to court? Also, there's the other issue on revocation
- Does the potential defendant have a right to hearing in court in front of council, with certain rights, what's the burden, does judge have authority, and how do people get a right to counsel if charges aren't filed yet? How do they get an attorney appointed to represent them?
- Hearing process would be 14 days after first appearance

**Issue/Topic:**

Diversion Working Group

- And if it was determined to be arbitrary and capricious the court would dismiss the charges.
- It needs to be made clear that the only issue at that hearing is whether or not the violation occurred
- We put in that the procedural protections associated with probation revocation would apply.
- Conceptually how does this work? The way this would happen is when the DA revokes the Diversion, the offender would be served with a summons and complaint, and everything else associated.
- If defendant wants to object to revocation they have 14 days.
- The remedy would be dismissal of case if the judge finds the revocation to not be valid.
- Prelims don't happen and probation violations don't happen now anyway
- If the defendant signs an agreed statement of fact will that affect the revocation? It can only be used if the case goes forward.
- If the case is taking place in the misdemeanor world, the person wouldn't see counsel anyway. PD's are not allowed to come in on misdemeanors or non charged technical violations of felony – they would never see counsel.
- We need distinction between pre-filing and deferred pros. Do we need to have it delineated in three different ways?
- Enacting this would render deferred pros statute redundant
- Can we switch to 2 years for felony and 1 year for misdemeanor? Yes, let's make that change
- Probation revocations are not final orders
- If DA loses hearing it's dismissal of the case
- Would be valuable to give the ability to revert to a civil judgment so you don't lose restitution, etc.
- If it's true diversion, why do we need a statement of fact statement? Because there is a worry that lay witnesses could disappear.
- It's discretionary that the DA may ask for a statement, but doesn't have to
- If this is going to trial can't the defense stand up and say this is a statement without defense?
- One of the goals here was to provide enough meat to add legitimacy as a disposition offense – while making it clear that jurisdictions can make their own tweaks
- Make sure to put in the proposal details that savings from the theft revisions should be put toward diversion programs.
- Specify transparency around reporting, accountability and eligibility criteria
- We need to spell out mechanisms to transfer the money, strings

<p><b>Issue/Topic:</b></p> <p>Diversion Working Group</p>	<p>attached and accountability – Christie D</p> <ul style="list-style-type: none"> <li>• If this becomes a draft bill, there’s a section in the bill format that specifies funding, but it doesn’t go into the statute. It’s in the appropriations clause.</li> <li>• Funding mechanisms need to be in the CCJJ recommendation and in the bill</li> <li>• We should not say 100% of savings go to X, but a portion maybe</li> <li>• In Boulder there’s a pretrial program that is operated for post arrest, and an RJ program prior to arrest. There are both.</li> <li>• Mark to make tweaks, clarify revocation procedures in the way Dan proposed (Dan is struggling with the idea that the DA will struggle with the violation being strong enough, judge denies it, DA has to dismiss, or take defendant back and put him in the same program). Worry judge might use his or her discretion.</li> <li>• What if there’s a revocation hearing and the treatment provider doesn’t show?</li> <li>• This is always at the prosecutions discretion</li> <li>• Would like the ability to include DV and sex offenses</li> <li>• Can we include a statutory statement of catching savings from the theft proposal and put it here?</li> <li>• Change time frame from 4 and 2 to 2 and 1 – cap it at two years, one year extension for restitution</li> </ul> <p><b><u>What’s next</u></b></p> <ul style="list-style-type: none"> <li>• Present preliminarily to CCJJ tomorrow for a preview, then in October for a final vote</li> </ul>
---	---

<p><b>Issue/Topic:</b></p> <p>Next Steps</p>	<p><b>Discussion:</b></p> <p><u>DISCUSSION</u></p> <ul style="list-style-type: none"> <li>• Proposals to go to CCJJ tomorrow for preview</li> <li>• Proposals to be voted on at CCJJ in October</li> </ul>
--	--

**Future Meeting Dates:**

**Meeting Schedule 2012**

October 11 <sup>th</sup>	1:30pm – 4:30pm	710 Kipling St., 3 <sup>rd</sup> floor conference room
November 8 <sup>th</sup>	1:30pm – 4:30pm	710 Kipling St., 3 <sup>rd</sup> floor conference room
December 13 <sup>th</sup>	1:30pm – 4:30pm	710 Kipling St., 3 <sup>rd</sup> floor conference room