

Comprehensive Sentencing Task Force Colorado Commission on Criminal and Juvenile Justice

Minutes

August 6, 2013, 1:30PM-4:30PM
710 Kipling, 3rd Floor Conference room

ATTENDEES:

CHAIR

Norm Mueller, Co-Chair/ Private Defense Attorney

TASK FORCE MEMBERS

Dianne Tramutola-Lawson/CURE
Kate Horn-Murphy/Victims Representative, 17th JD
Mark Evans/ Public Defender's office (*non-voting member*)
Matt Durkin/Attorney General's office
Rhoda Pilmer for Dave Young/DA 17th Judicial District
Maureen Cain/Colo. Criminal Defense Bar
Dana Wilks/Judicial Department
Steve Hager/Department of Corrections

STAFF

Paul Herman/CCJJ consultant

ABSENT

Jeanne Smith, Co-Chair/Division of Criminal Justice
Joe Pelle/Sheriff, Boulder County
Charles Garcia/Denver Crime Prevention & Control Commission
Judge Martin Egelhoff/Denver District Court
Denise Balazic/Parole Board
Claire Levy/State Representative
Jason Middleton/Public Defender
Michael Dougherty/1st Judicial District
Glenn Tapia/Division of Criminal Justice, Office of Community Corrections

Issue/Topic:	Discussion:
Welcome and Introductions	Norm Mueller welcomed the group and previewed the agenda.

Issue/Topic:	Discussion:
Sex Offense Working Group Update	<p>Kate and Norm updated the group on what was discussed at the first two Sex Offense Working Group meetings.</p> <p><i>DISCUSSION POINTS</i></p> <ul style="list-style-type: none"> • We've had two meetings so far with a lot of discussion about research as well as presentations from DOC and a comprehensive report about lifetime supervision (this report comes out annually in November). • During the last meeting, working group members were asked to poll constituents on the need for determinate F4 and the issues around creating a determinate F4 sex offense. Feedback will be gathered at tomorrow's meeting. The group will also look at the challenges of lifetime supervision. • There have been several discussions comparing our state system to that of other states. We're finding that this comparison can't be done given other states' civil commitments and or indeterminate systems. So this won't really provide useful data. • There have been two interesting meetings with very engaged working group members. But this is a big task and will likely be a slow process. We're not going to have anything in a month or two but when we started; we planned for this to take 12-18 months before we can provide solid recommendations to the Commission. • Questions <ul style="list-style-type: none"> ○ Who is on the working group? Laurie Kepros, Tom Raynes, Maureen Cain, Leora Joseph, Kellie Wasko, Birgit Fisher, Angel Wendt, Jeff Geist, Roxanne Bailin, Erin Jemison, Chris Lobanov-Rostovsky. The goal was to keep it around 12 or 13 so it can be a real working group.

Issue/Topic:	Discussion:
<p data-bbox="164 281 464 380">Value-Based Non-Violent Working Group Update</p> <p data-bbox="272 422 355 449">Action</p>	<p data-bbox="561 245 1409 308">Mark Evans and Matt Durkin updated the group on the working group's discussions.</p> <p data-bbox="561 352 800 380"><i>DISCUSSION POINTS</i></p> <ul data-bbox="586 390 1528 1917" style="list-style-type: none"> <li data-bbox="586 390 1490 489">• This working group was tasked with looking at other value-based criminal offenses (besides straight theft) and seeing if the new theft offense levels could be applied to those. <li data-bbox="586 499 1474 562">• This follows the original goal of this group to set up a template with one offense and then apply it to other offenses. <li data-bbox="586 573 1528 741">• We've discussed criminal mischief, aggravated motor vehicle theft, fraud by check, defrauding a secured creditor or debtor, unauthorized use of a financial transaction device, and computer crime. We are looking at these crimes because the offense level is set by the value of the goods or property involved. <li data-bbox="586 751 1528 1917">• The group is not at a point where they've reached a final recommendation but they can speak to what is currently being discussed. <ul style="list-style-type: none"> <li data-bbox="634 825 1528 1245">○ Criminal mischief is damaging the personal real property of another person. It currently has the same offense level break down of the old theft offenses, so the group wondered if they could simply apply all of the new theft levels. However, unlike theft, there is a perception that CM is often used as a way to intimidate someone. So far we've agreed that it would be a good idea to eliminate the nonsensical gaps in offense levels that exist. There should be a petty offense and there should be a spectrum of offenses up to an F3. What we're still working on is where exactly the felony cut off is going to be. Peg put together some data. What we see is that the bulk of the criminal mischief offenses are at the low end of the crime level spectrum. So establishing a petty offense will have real value. <ul style="list-style-type: none"> <li data-bbox="683 1255 1528 1392">▪ Maureen points out that when you look at the data you can see the groupings. There will be crimes where the felony cut points will be lower than they currently are, but there will be F5 and 6's so they will be more spread out. <li data-bbox="683 1402 1498 1497">▪ Maureen also feels that creating cut points that are different than theft is not a good idea. It would make the code even more complicated. <li data-bbox="683 1507 1528 1644">▪ Matt stated that from his perspective theft values don't always equal those of criminal mischief because the latter is more of "person" crime than a property crime. He believes both prosecution and defense would benefit from spreading them out. <li data-bbox="683 1654 1528 1917">▪ Was the M1 left out? Yes. This is an ongoing conversation and what is on this handout was created just a few days ago. At the last conversation there was a bit of an impasse on how to approach this. It was suggested to leave the M1 out but slide all of the felonies down. The group decided to look at it and think about it. It's possible that we could start the felonies at \$1000, which is where it is now, and put an M1 in there for \$750-\$1000. As compared to the theft statutes this would only extend the F6 down slightly. This is

<p>Issue/Topic: (continued)</p> <p>Value-Based Non-Violent Working Group Update</p> <p>Action</p>	<p>where there is more work to be done with these numbers. But conceptually we're all on board with spreading out the offense levels.</p> <ul style="list-style-type: none"> ▪ At the last meeting we discussed how criminal mischief is more harmful than pure theft. Has the group discussed leaving the property values the same but working in some other way of working in an aggravator? We did discuss this but the prosecutors in the group resisted this. Adding aggravators would complicate things and would increase the burden of proof for the prosecution whereas spreading out the value crime levels adds flexibility. This also pulls us away from the value basis that we're trying to develop. ▪ Table 4 shows that 77% of the criminal mischief charges had a second charge. Was this the same for theft? Are additional charges being added to work around the need for these aggravators? Matt explained that from his perspective criminal mischief and theft are truly not the same and other charges may be added for a whole variety of reasons. ▪ Tracking with theft doesn't make sense because you'd have to destroy property of \$100,000 to reach an F3 which isn't likely to happen. ▪ When we discussed how to address theft there was a concern that sometimes theft is committed in a very big and culpable way. This is why the F2 was created for theft. There's been a fair amount of discussion about whether any of these crimes should have an F2. Mark feels very strongly that this isn't necessary. Creating an F2 for many of these crimes would be largely symbolic because if someone actually obtains \$1 million with any of these other crimes you could charge them with theft. It just doesn't make sense to put many of these on the same plane as extremely violent crimes (e.g., second degree murder). ▪ Nothing is finalized but Mark's hope is that these offenses will remain topped out at an F3. ▪ This is a way to recognize that criminal mischief is different than straight theft but we asked Peg to look at the data to see if and what other crimes are also being charged. ▪ With the other charges we can't assume that that there would be a consecutive charge. <ul style="list-style-type: none"> ○ Since the group touched on the other crimes already, Mark skipped aggravated motor vehicle theft and just addressed the last four. <ul style="list-style-type: none"> ▪ It was explained that Mark copied the statutes from West Law and struck through the language that would be eliminated. ○ Fraud by check was previously an M1, M2 or F6 depending on the value of the check. We would just adopt the new theft amounts from P1 up to an F6. We could stop at an F6 because what's really being punished is the actual use of the check. If you use the check and get a million and one dollars you can be charged with theft. <ul style="list-style-type: none"> ▪ This will be an obsolete crime in a few years anyway. ○ Defrauding a secured creditor or debtor was previously an M1, M2, or F3 or F5. We would adjust the values to ranges from P1 to F3.
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<p>Issue/Topic: (continued)</p> <p>Value-Based Non-Violent Working Group Update</p> <p>Action</p>	<ul style="list-style-type: none"> ○ Unauthorized use of a financial transaction device is currently an M1, F5, or F3. We would again adjust the values to ranges from P1 to F3. ○ Computer crime is an interesting beast. When you look at subsection 1 you can see that there are multiple ways that you can commit a computer crime. It's only 1a and 1g that have set levels and we're not messing with those. 1b through 1f which currently have the same values as the old theft statute. For those value based subsections we would substitute in the values of the new theft statute. ● To summarize, for these offenses (excluding criminal mischief) we're plugging in the new theft values but the statutes stay the same. It creates more of a distribution and extends the petty offense level. ● Aggravated MV theft – there is currently 1st and 2nd degree MVT. There is no such thing as an un-aggravated MVT. There is a list of things in statute that make it 1st degree. <ul style="list-style-type: none"> ○ The group agrees that currently 1st degree aggravated MVT is an F3 or F4 if the vehicle is more or less than \$20,000. We would adopt into this the new theft statute evaluations for F5, F4, and F3s. No petty offense will be established, it will still be a felony. F5 when the value of the vehicle is less than \$20,000 (this means that the bulk of MVTs will be F5s); F4 when the vehicle is worth between \$20,000 and \$100,000; and F3 when the vehicle is worth more than \$100,000 or if the person has two prior MVTs. This is similar to the current statute. ○ Second degree presents a philosophical divide. Mark and Maureen feel that when you don't have the things that make something 1st degree it equates to what was once thought of as joy riding. Peg's analysis shows that 30% of these cases have defendants that are under 18 and another 20% (approximately) are between 18-22 years. <ul style="list-style-type: none"> ▪ If the car's coming back within 24 hours it doesn't make sense for this to be a value based distinction. And this is not felonious behavior, unless you're making a habit of this. ▪ This crime is currently a misdemeanor unless you have two priors, then it's a felony. Concern exists that if there is a way to make it a misdemeanor or a felony some people are confused about where the crime should be filed (county or district). The first published appellate opinion states that if this can become a felony it has to be filed in district court. So recognizing this concern there was discussion about making two prior convictions for MVT one of the elements that gets you to 1st degree MVT. It is not a universal opinion that 2nd degree MVT should be a misdemeanor so this is an ongoing discussion. ▪ The philosophical divide starts with the term joy riding. Matt stated that this term says that there was no crime which is not the case. The top 6 cars that are stolen have blue book values that are a few thousand dollars that are equal to felony level values. Cars are taken for an average of 14 days and are often linked to other crimes (e.g., drug crimes). Typically cars are passed from person to person and when someone is finally caught with the car the prosecution can't establish the elements that make it a 1st degree crime. So what we have is a 14 day crime not a joy ride (e.g., taking mom and dad's
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<p>Issue/Topic: (continued)</p> <p>Value-Based Non-Violent Working Group Update</p> <p>Action</p>	<p>care for a few hours). The prosecution doesn't see the data supporting the move to make all 2nd degree crimes a misdemeanor.</p> <ul style="list-style-type: none"> ▪ These tables present a somewhat distorted picture because they show the highest filing charge. We have previous data from Peg that shows the frequency of 1st and 2nd degree MVT filings is not that different. ▪ It makes sense to define 2nd degree MVT by whether you've done this before, not the value of the car. And if it's used in the commission of another crime and you have evidence of this you'll charge the 1st. ▪ How do you decide when to charge 2nd or 1st degree MVT? It's not based on being more than 24 hours since the car was stolen? Not necessarily. We may not be able to prove that this person has had it the whole time. It sounds like you could never charge 1st degree based on time? Not saying never but rarely. ▪ Do we agree that 2nd degree shouldn't be value based? Matt says that he doesn't have a good answer for this. He thinks it shakes out fairly well when it is based on value. But isn't the hardship the same for someone who has a \$1000 car vs. the person who has the \$25,000 car? Wouldn't the person with more the more expensive car have the money to rent a car such that the hardship would be worse for the person with the cheaper car? ▪ How often are people being charged with 2nd degree MVT repeatedly? But because the value being under \$20k OR two priors is part of the same subsection there may not be a way to break this apart. Mark will talk to Peg about this to see what is possible. She will be able to tell us how many people are being filed on under 2a (the time frame). Or are they being charged under other things? The DA's wanted this separation (when joy riding was changed to 2nd degree MVT) because they didn't have to prove that there was intent to permanently deprive. There is disagreement on what joyriding used to look like. How do you define harmless joy riding? ▪ It would also be nice to hear from Sheriff Pelle to hear his perspective on the type of people we're seeing commit this crime. <p>○ Rather than conducting our next WG meeting now, are there suggestions for how we might look at this issue or data we might consider?</p> <ul style="list-style-type: none"> ▪ How was joyriding defined? One element was no intent to permanently deprive. We can see how this might be difficult to prove. This was a misdemeanor or felony if there were priors. But this went away and now we have 1st and 2nd degree MVT where a difference in intent doesn't really matter. They have to take the car knowingly, so there is a mental state, but to get to first degree you have to have done one of the things listed in subsection 2. ▪ Maureen said that she would find exactly what joyriding was and why and how it changed. The question is does it need to be a felony. ▪ See if Peg can look at how many times the various aggravators were actually charged. ▪ This information will be useful but the problem is that in every other statute stealing something that is worth \$2000 is a felony – except for here.
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<p>Issue/Topic: (continued)</p> <p>Value-Based Non-Violent Working Group Update</p>	<p><u>What's next</u></p> <ul style="list-style-type: none"> • We will continue to discuss criminal mischief and motor vehicle theft. • Maureen will find out exactly what joyriding was before it was changed to 2nd degree MVT. • Mark will talk to Peg about obtaining more data on the aggravators for MVT.
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<p>Issue/Topic:</p> <p>Extraordinary Risk Working Group Update</p>	<p>Discussion:</p> <p>The new draft bill from the Commission was passed out and the main points were described. To remind everyone, there was a draft bill and a sponsor last year, however, there were issues in the legislature. Norm, Matt, Jason and Michael Dohr met to redraft the bill. It is now simpler and no longer deals with drug offenses. There's really no action required since the Commission has already approved the concept.</p> <p>It is the job of the Legislative Task Force to find legislative support for these recommendations.</p> <p>Norm mentioned that Jason Middleton suggested that the problem may have been in the legislative summary. The summary is not completely accurate.</p> <p><i>DISCUSSION POINTS</i></p> <ul style="list-style-type: none"> • The commission approved these recommendations 18-0. • This gives more flexibility to the judge but it is still a mandatory sentence. It's also minimum presumptive instead of mid-point. • The range is bigger to cover all crimes of violence but no one liked the complexity of extraordinary risk. • The maximum stays the same but now the mandatory is the minimum of the range. <p><u>What's next</u></p> <ul style="list-style-type: none"> • Norm will talk to Jeanne to determine if this task force really needs to do anything with this bill since the concept has already made it through the Commission.
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<p>Issue/Topic:</p> <p>Non-Value Non-violent Working Group Update</p>	<p>Discussion:</p> <p>This was primarily something that Jeanne was working on. But everyone received something stating that this group has yet to meet. We will table this until the next meeting when Jeanne is here.</p>
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Issue/Topic:	Discussion:
Diversion	<p>A recommendation approved by the CCJJ last year and signed into law expands the availability of adult pre-trial diversion programs. The law becomes effective tomorrow. Part of this recommendation stated that the task force will strive to make the model agreement form available to criminal justice practitioners either through education or by inclusion in the rules of criminal procedure. How should this be approached?</p> <p>If this model agreement form is something that can be found on the Judicial cite it adds a sense of validity that will help it to be used. Can we get a JDF? Because Judicial is doing the RFPs for Diversion? Maybe we can talk to Eric Philp about including it as a standard Judicial form?</p> <p><u>What's next</u></p> <ul style="list-style-type: none">• Send the model form to Dana to proceed with Eric about including it on the website.

Future Meeting Dates:**Meeting Schedule 2013**

September 3rd (Tuesday) 1:30pm – 4:30pm 710 Kipling St., 1st floor conference room