



Commission on Criminal and Juvenile Justice

Minutes

May 9, 2008  
 National Enforcement Training Institute  
 12345 W. Alameda Parkway

**Commission Members Attending:**

Peter Weir, Chairman	Regis Groff	Reo Leslie, Jr
David Kaplan, Vice-Chairman	Jeanne Smith	J. Grayson Robinson
Melissa Esquibel	Ellen Roberts	Regina Huerter
Bill Kilpatrick	Don Quick	Debra Zwirn
Inta Morris	Steven Siegel	Terrance Carroll
Peter Hautzinger (via phone)	Doug Wilson	Debbie Allen for David Michaud
Tom Quinn		

**Absent:** John Suthers, Dean Conder, Karen Beye, Ari Zavaras, Ted Harvey, Rhonda Fields, Ken Gordon, Gilbert Martinez

**Call to Order and Opening Remarks:**

The Chairman, Peter Weir, called the meeting to order at 1:09 p.m. Today the Commission hears from three leaders in the area of sentencing laws. They will discuss the evolution of the sentencing structure, as well as offer suggestions and recommendations on issues the Commission may want to explore at a later date.

The issue of the LSI (Level of Supervision Inventory) was raised during the April meeting. Kim English provided the Commissioners a copy of the LSI and a coversheet which briefly describes the document.

The Commission members then introduced themselves for the benefit of the guest speakers.

**Commission review of CCJJ Committee on Re-Entry presented by Reggie Huerter:**

Reggie Huerter is the Chair for the Oversight Committee on Re-Entry. Re-entry begins when an offender first comes in contact with the system. If the first contact is through community corrections, how can Comm Corr staff help the offender become successful? The goal of re-entry is to help devise a system where the offenders have the greatest chance in being successful to not re-offend.

The Committee on Re-Entry will be divided into four task forces. Probation will be headed by Commission member Gil Martinez with the assistance of Mike Reide (recently retired from

Probation in Jefferson County). Incarceration will be headed by Commission member Grayson Robinson with the assistance of Michelle Skyes. Transition will be headed by Commission member Regis Groff along with Louis Boris. The final task force, Post Incarceration, will be headed by Commission member Dave Kaplan and assisted by Christie Donner.

The overall charter for the Re-Entry Committee is to review, analyze, assess and coordinate the recommendations from each of the task forces. Each task force will study the practices and outcomes through the lens of evidence-based practices. They will also be examining their focus area with an eye toward issues revolving around gender, mental health, and disproportionate number of minority inmates.

Probation will be looking at statutes that govern probation and supervision. It will also be looking at special populations such as sex offenders.

Incarceration will also be reviewing state statutes. They will be examining both county jails and prisons. Often those incarcerated in prison begin with a probation sentence, with the next step being the county jail. This task force will be looking at assessment, treatment, and post release options.

Transition “is the meat of the sandwich.” Its work overlaps with the work done inside a facility and dovetails with the post-release (parole or no supervision) period. It will examine the services prior to the release of an offender and extend into the first few months after release. Those first few months are critical. If we can help people be successful during that time frame, they will be less likely to re-offend.

Post-Incarceration will focus around the structure of the system such as laws and policies. The Chairs from the Transition and Post-Incarceration task forces met to make sure their scopes of work do not overlap.

There will be three phases of work. Phase one will be to develop recommendations. Phase two will be the presentation of the recommendations to the Commission for discussion in August and September. The Commission will carefully examine each recommendation and vote on them in October. This will be done at a one to one and one-half day retreat. The final phase is submitting the recommendations to the Governor in November.

The first meeting for the Transition task force is set for Wednesday, May 14<sup>th</sup> from 4: 00 – 6:00. Ms. Huerter will send out the task force meeting dates and times to all the Commission members in case they want to attend.

**Panel on Sentencing in Colorado: Catherine Adkisson, (Assistant Solicitor General), Christopher Munch, (District Court Judge, 1<sup>st</sup> Judicial District), and Phil Cherner (Defense Bar):**

When Governor Ritter took office, there was significant support to take a comprehensive look at the sentencing structure. There has not been a comprehensive review of sentencing laws since

the early 1970s. As a result, the state has a complex and complicated system. Sentencing cannot be reviewed in a vacuum. What is envisioned is a comprehensive overview of where we are as a state. This will be an opportunity to ask questions about current practices and policies. There are no boundaries or restrictions.

Mr. Weir introduced the members of the panel. Judge Christopher Munch is a leader on the sentencing laws and can identify presumptive sentencing ranges for criminal charges. Mr. Phil Cherner is one of the leading criminal defense attorneys in the state. He is well known in judicial advocacy groups and is an expert in sentencing. Catherine Adkisson is the Assistant Solicitor General in the Attorney General's Office and heads the Appellate Division.

**Judge Munch** began by outlining the classifications associated with crimes. If one of the possible penalties for a crime is prison, then it is classified as a felony. You cannot go to prison for a misdemeanor, petty offense or traffic offense. You can be sentenced to county jail for these offenses as well as for violations of a city ordinance.

Prison is a possible, but not always mandatory, sentence for felonies. An offender can receive a sentence of probation, probation and county jail time, or a monetary fine. You can be sentenced to 90 days in the county jail with work release or educational release for up to two years. Home detention is also an option.

To be sentenced to Community Corrections, the County Community Corrections Board must agree to pay for the offender. The facility must accept the offender and the judge must decide to sentence him to community corrections.

Felonies are classified by classes. A Class 1 felony is 1<sup>st</sup> Degree Murder and can result in a life in prison sentence, or even death. A Class 2 felony is 2<sup>nd</sup> Degree Murder. Class 3 felonies can be Armed Robbery, Home Burglary, Theft over \$20,000, 1<sup>st</sup> Degree Assault, or possession of certain controlled substances over a certain weight. Class 4 felonies include business burglary, Theft over \$1,000, possession over one gram of hard drugs, etc. There are also Class 5 and Class 6 felonies. This is not an inclusive list.

Judge Munch then presented a PowerPoint presentation. Figure 1.1 illustrated a historical representation of sentences. In the 1970's, Class 3 felonies had a presumptive range from 5 – 40 years. Then there was a push to make sentences more consistent between judicial districts. In 1979, the Gorsuch bill attempted to take a look at what these offenders were really being sentenced to. A Class 3 offense that had a sentencing range from 5 – 40 years was changed to 4 - 8. In 1985, the Mielke bill increased the sentences. The Class 3s went from a 4 - 8 year presumptive range to 4 - 16. In 1989, the legislature created the category of a Class 6 felony and moved crimes into different categories. 1993 changes resulted in our current law by modifying sentences by changing some of the end range of time. Legislation also created a subclass 3 that didn't change the presumptive ranges at all.

**Ms. Adkisson** then spoke about the complications arising from using the sentencing guidelines. Other statutes impact the presumptive minimums and maximums. Sentencing enhancement statutes become a major factor in plea bargaining. A prosecutor is entitled to file whatever

charges he / she wants to so long as there is evidence to support the charge. The defense will try to negotiate a plea to a charge with the lowest possible sentence.

In a crime of violence, probation is not an option. If this sentencing enhancement is used, the minimum sentence is the mid-point of the presumptive range. It has significantly increased the number of people serving time in DOC. If the offense fits into the category of a crime of violence, and if the weapon used is considered a dangerous weapon, there is an automatic 5 year consecutive sentence that is added. Crimes of violence are responsible for the longer sentences being served in DOC.

Another sentencing enhancer is the category of extraordinary risk offenses which include crimes of violence, child abuse, some of the drug offenses, stalking and sale/ distribution to manufacture drugs. This category changes the maximum sentence. A Class 3 offense is increased by 4 years. Extraordinary risk increases the top end of the range.

Extraordinary aggravating circumstances also impact a sentence. Was the defendant on probation, parole or on bond at the time of the commission of the crime?

Habitual criminal charges must be filed by the District Attorney. Whether those charges are filed or not become a factor when negotiating a plea agreement. These statutes can also increase the number of people in DOC that are serving long sentences.

If a defendant is convicted of multiple charges in the same criminal episode the sentence can be concurrent, unless there are multiple victims - then the sentence can be consecutive. Escape sentences are consecutive.

**Mr. Cherner** explained the criminal system - from arrest, to sentence and beyond. The decision to arrest is made by the police and the prosecutor. The decision what to charge is made by the prosecutor. (Is there a likelihood of conviction using the standard beyond a reasonable doubt?)

The plea bargaining decisions are made by both the prosecutor and the defense and begin the moment the attorneys get the case file. It is an ongoing process. The agreement is reached most often at the preliminary hearing. From a prosecution standpoint, they look at the damage done by the defendant during the commission of the crime and, to some extent, the defendant's criminal history. Other factors are the defendant's intent and his/her level of participation in a crime. From the defense standpoint, the length of sentence and the possibility of getting a felony conviction are most important. The next thing down the list is guilt or innocence.

Mandatory minimums do not give a judge much choice in how a defendant is sentenced. The prosecution and defense often make agreements that include what a defendant will plea to as well as what the sentenced will be. The judge can go along with the sentencing agreement or not. Some post-sentencing decisions the judge can make include sentencing to probation, community corrections, parole or revocation.

Being convicted of a felony has collateral damage. A person cannot vote if they are in prison or on parole. They cannot own a gun. They have trouble getting or keeping a professional license.

They are exposed to civil liability. They face ostracism. If it is a sex offense, they have to register as such. Increasingly there are immigration issues. If you are in a job that requires you be bonded, it is harder to get bonded.

Discussion:

If you go back to the sentencing law in the 1970's there was a feeling that judges had too much discretion and there was too much disparity between what could happen between different counties or different courtrooms. With our current sentencing structure, the crime an individual is convicted of is getting further and further away from reality.

It is difficult to assimilate the complexity of sentencing and apply it to how legislation is formulated. There is a political piece associated with a crime that legislators must deal with. The education piece is lacking from the political piece. As the Legislature looks at new laws or changing criminal laws, it is being done without a general structure or framework. This is adding to the confusing nature of sentencing.

Mr. Weir asked if everyone had to identify a current area where our sentencing structure needed work, what would that be, what part is the most challenging?

Mr. Kaplan said the important questions are: How did we get here? What are the goals that we want? Have we lost sight through piecemeal legislation and patchwork legislation and now it doesn't work? What are we trying to achieve? Retribution? Rehabilitation? When the Commission finally addresses sentencing, it should outline its goals.

**Ms. Adkisson** then spoke about parole. The primary consideration when granting parole is public safety. The purpose of parole is to punish a convicted offender but also ensure the length of sentence is fair. It is administered by the Division of Parole in DOC. Prior to 1993, all parole was discretionary. After 1993, parole is mandatory. Determining parole eligibility is a layered process. In 1993 the legislature added mandatory parole with the idea of having a mandatory transition period for people coming out of prison. It was a 1, 3 or 5 year period. If a parolee violates the terms of his/her parole, he/she is returned to DOC to finish serving the sentence. If the parolee gets credit for any time served while on parole, this is outlined in the initial case sentencing guidelines.

There are several factors that are used to help determine when an inmate is eligible for parole such as good time or earned time. About 6 months before an inmate is eligible for parole, a release plan is developed. The Parole Board reviews the release plan and looks at a wide list of factors such as the victim impact statement, payment of any restitution, child support, participation in counseling, etc. There are also factors that deal with the offender's criminal history, what level of participation the inmate had in the crime, the level of violence etc.

If the Parole Board does grant parole, it can place whatever restrictions it wants on the parolee. A parolee can be released whenever the Parole Board determines the parolee is ready to be released.

Parole revocation occurs when the parolee fails to meet the terms and conditions of parole. A parole hearing is called before a neutral decision maker. The hearing office can continue the parolee on parole, modify terms and conditions of parole, or return them to DOC.

**Mr. Cherner** discussed sex offenders. Lifetime sex offender sentencing is found in C.R.S. 18-1.3-101 et. seq. If you are convicted of any type of serious sex crime, you can get a life sentence. You can get prison or probation, but it is a life sentence. The Parole Board makes the determination when someone is released from prison, but the sentence continues for life. When an offender is offered a reduced charge through a plea agreement that involves prison, but does not include the life sentence, it is a powerful offer.

As of March 2008, there are 1233 inmates sentenced under lifetime provisions. Seven offenders on parole (1 additional offender was paroled and the parole was subsequently revoked). There are now more people in prison under a lifetime sentence that are charged with a sex offense than there are for people charged with murder.

#### Discussion and Recommendations:

Kim English outlined the treatment of sex offenders. Prior to 1997 – 1998, civil commitment for sex offenders was sweeping the country. The states utilizing the civil commitment system put offenders in treatment hospitals at \$100,000 per year per bed. There are 20 states that utilize civil commitments for sex offenders. Colorado was the second state in the nation that had a lifetime sentence in lieu of civil commitments.

How many are people are in treatment in DOC? There are offenders that are in denial and are not eligible for parole until they get into treatment. Parole is asking to develop a denial group in DOC and get them into a program. However, there is not enough money available for those who want treatment and no budget for a denial group.

#### If there is one thing that is working in the Colorado sentencing structure what is it?

Mr. Cherner stated Probation is the state's hidden gem and it needs to be properly funded. When done right, it can be a deterrent as well as a rehabilitation mechanism. All the budget cuts in the past took an under-funded system and just gutted it. Community Corrections is just below probation. We need more community corrections bed.

Ms. Adkisson stated the state has protected public safety and locked up the vast majority of offenders that are a danger to the public. In the Appellate Division of the AG's office, the majority of the appeals they see deal with the complexity of the system. That sentencing ranges are used as part of plea bargaining.

Judge Munch is pleased by what appears to be a greater level of professionalism exhibited by the District Attorney's and defense attorneys. Our Community Corrections programs are very good at helping those individuals who are subject to being helped.

What is making your job harder to do?

Mr. Cherner expressed concern about the number of minorities being put into prison. He asked the Commission to find out what is going wrong and look at fixing it.

Ms. Adkisson asked the Commission to simplify the system would help. This would help at all levels of the system.

Judge Munch also requested simplifying the system. It would be a much better system if it was easier for people to understand and administer. We have to be careful to look at the implications of what we do. For example in sex offender probation we have tied the hands of judges, DA and probation. What we are requiring the offender to do is complete an entire system of classes that can cost around \$1,000 a month. These classes take place during the day and at the same time, the offender is expected to have a job. Because of the conditions that are mandated, these offenders are unable to complete the required programs no matter how hard they try.

What should the Commission do to try to stop offenders working their way into the system?

Judge Munch stated there was a time that resources were put into programs at the front end in an attempt to try to deter bad conduct at that point. Then there was time that more money was being put into the back end of the system (incarceration). If we use the same resources earlier in the game we may end up saving some souls.

Mr. Cherner stated not to confuse process for substance. Don't lose the target which is fundamental change. Clarity is good, but is not the goal.

What about truth in sentencing and sentencing guidelines?

Ms. Adkisson replied she was not in favor of sentencing guidelines. The federal system uses this system and it is extremely cumbersome. As far as recommendations, the Commission should look at the system we have and decide how much discretion you want to give judges. Do we want to look at mandatory minimums?

Judge Munch stated he is favor of sentencing ranges and then let the judge decide what sentence to apply within those guidelines. Then the Appellate Court can decide if the judge was too harsh or too lenient.

Phil Cherner asked for truth in sentencing. He wants to abolish the Parole Board. The Board says "no" so many times that it teases the offender and the victim. Worst of all the public is cheated because they don't know what the sentence is.

What are your thoughts on mandatory minimums?

Mr. Cherner stated they embody a lack of trust in the judges. When someone gets shot, someone is going to get prison time. The notion that judges are too soft and don't send people off is wrong. Right now, the power of sentencing has shifted to the prosecutors because of the plea bargains they can offer.

Ms. Adkisson agreed on the need to trust Judges. The judiciary takes its responsibility seriously and we should give them back their power.

Mr. Weir asked if there are specific areas or issues that the Commission wants researched with regard to sentencing; please give those areas / issues to Kim English or her staff so they can begin doing the research.

Don Quick suggested looking at getting a system like YOS with a 19% recidivism rate for the 18 – 25 year olds offenders who currently have a 50% recidivism rate.

**Overview of June meeting:**

Next meeting will be June 13, 2008. Topics to be discussed will be:

Updates from Committee on Re-entry  
Overview of Juvenile Justice System

David: in the next few months, when he speaks to others, and they ask questions about what about juvenile or sentencing, that they can see we are overlapping the subcommittees. As we unwind on one area, we begin to ramp up in another.

The meeting adjourned at 4:25 p.m.