



## Commission on Criminal and Juvenile Justice

### Minutes

June 12, 2009  
National Enforcement Training Institute  
12345 W. Alameda Parkway

#### Commission Members Attending:

David Kaplan, Vice-Chairman	Ari Zavaras	Dean Conder
Peter Hautzinger	Jeanne Smith	J. Grayson Robinson
Bill Kilpatrick	Ellen Roberts	Regina Huerter
Inta Morris	Don Quick	John Morse
John Suthers	Steven Siegel	Doug Wilson
Rhonda Fields	Karen Beye	David Michaud
Reo Leslie	Gilbert Martinez	Tom Quinn
Mark Scheffel	Claire Levy	

**Absent:** Peter Weir, Debra Zwirn, Regis Groff

**Guests:** Bart Prieve for Sen. Morgan Carroll, Rep. Andy Kerr, Mark Hurlbert, Sen. Pat Steadman, Rep. Su Ryden, Rep. Beth McCann, Rep. Sal Pace, Repl. Joe Miklosi and Rep. Michael Merrifield, Rep. Daniel Kagan

#### Call to Order and Opening Remarks:

The Vice-Chairman, David Kaplan, called the meeting to order at 12:47 p.m. The Commission members introduced themselves and identified the entities they represent.

The Commission has decided to move onto another area of focus, that being sentencing. Are there areas in sentencing where reforms can be made while still ensuring public safety? Today's meeting begins the educational piece on sentencing. The Commission must understand what sentencing is and what it entails before being able to ask the appropriate questions. The educational component will continue into the July meeting.

#### Considerations in Sentencing by Judge John L. Kane, US District Court, District of Colorado:

Judge Kane began his remarks by comparing the criminal justice system to a pyramid based on discretion. The base is comprised of criminal activity that has not been discovered or reported to law enforcement. The next level involves law enforcement officers who are given the discretion to arrest and charge. Prosecutors are at the next level and use their discretion to file charges and

accept plea bargains. The next level is the court system. County Courts handle misdemeanor violations and the preliminary matters on felonies. In the federal system, the case is brought to the Grand Jury who has the discretion to indict or advance the charges.

Judge Kane has found that when criminal cases get to his level in federal court, offenders have had a good amount of experience with the state criminal justice system. However, they usually have not served any time on their state offenses and are now facing mandatory time through the federal system. What is the state system teaching them? The lesson these individuals have learned is that the system is preaching a lot but teaching very little. Whatever we are doing is not working.

He participated in a federal offender research project that focused on offenders under the age of 30 with prior law enforcement contact. 92.3% of the offenders in this category began committing crimes when they were juveniles at an average age of 15. There are not enough county courts and enough jails to house people who could be charged.

What are they learning from the system? They are not learning to *not* violate the law. There is no preparation for the sentences being given in federal court.

Judge Kane quoted Sen. Jim Webb who stated, "America's criminal justice system has deteriorated to the point where it is a national disgrace. Our prison population has quadrupled. In short, we are not protecting our citizens from criminals, and we are locking up too many people who shouldn't be in jail." Sen. Webb has introduced a bill to create a committee to look at our national criminal justice system.

Kent Kyle of the University of New Mexico conducted a study on his state's system. 16% of the prisoners in the New Mexico system have been diagnosed as psychopaths. In Colorado, there is no MRI system to diagnose these individuals. Neuroscience can contribute to the criminal justice system.

Judge Kane's formal conclusions are: there are not enough judges, jails and prisons to house everyone. When you look at recidivism rates, what we are doing is not working. We are taking young people and putting them in prison. What are they going to do when they get out? When it comes to criminal justice, we are engaged in a failing system. We need to be willing to re-examine the issue. Our assumptions have outlived their usefulness and we need to think differently.

### **Discussion:**

On the war on drugs and drug convictions: More than \$55 billion is spent on the war on drugs. We need to put people in prison who sell drugs to children. However, putting drugs on black market is like the prohibition. Just like you got rid of Prohibition, you should get out of prohibiting drugs. If you eliminate the black market, a lot of the attendant crime goes out the window. The drug interdiction has had no affect on the availability of drugs in this country and we need to look at this issue differently. There are a lot of non-violent offenders in custody because they didn't know enough to cut a deal with law enforcement officers. There are

offenders smart enough to know to plea to the drug offense and have the weapons charge dropped.

On mandatory sentences versus greater judicial discretion and flexibility: While sentencing guidelines were not mandatory, a lot of judges stuck closely to them. Then Congress decided that, in some areas, there are mandatory minimums. Title 18 has certain criteria which judges use. They have a little more discretion on sentencing. The big difference in sentencing is how many times nothing happens in the state system, as opposed to what is happening in the federal system. The federal probation officers are just as overworked as the state probation officers. We need better diagnostics on the person charged, and better diagnostics on where and why the person is placed.

On the mentally ill individuals in prison: 20 – 25% of offenders have mental illness when they come into the system. 50 years ago we had mental health institutions to address this issue. Now, we have mentally ill people on the street or in prisons, which have become the de facto mental health institutions. One of the things we need to do is diagnosis and treat individuals earlier (between ages 1 and 6) to reduce crime. There are several mental illnesses that can be stopped by early intervention. We've allowed and encouraged private corporations to build prisons. We should have tied those contracts to building of prisons based on their recidivism rate.

On intermediate community based options as alternative sentencing schemes: If Judge Kane is presented with an alternative sentencing plan for a defendant, he is open to reviewing the plan to see if it fits the needs of the defendant and society. There is a correlation between literacy and criminality.

On offender-based sentencing versus offense-based sentencing: This will work if you have alternatives and have the discretion to demand a better sentencing plan and analysis. Why not get a better return on the dollar?

### **Evidence-Based Sentencing Practices by Judge Roger K. Warren, Director of the National Sentencing Reform Project, National Center for State Courts:**

Judge Warren spoke about recidivism reduction and the ineffectiveness of the state criminal justice system. 95% of sentencing is done in the state system.

Evidence-based sentencing is all about recidivism reduction. What can we do better in our state sentencing systems than we are doing now that can reduce crime? 60% of the offenders in the state court system have had previous convictions. These are the one that more likely to commit another offense.

What is the history of sentencing reform?

1. Prior to 1975, Colorado had indeterminate sentencing. Sentencing was easy. The judge could sentence someone from 3 -30 years and then the Parole Board would determine how long the individual served.
2. Between 1975 and 2005, the crime rate rose. The country moved to determinate sentencing. The legislature would prescribe what the sentences should be and the judge

would sentence within the guidelines. The harsher penalties resulted in several consequences:

- a. Highest incarceration rates in the world.
  - b. Unprecedented recidivism rates.
  - c. Growing costs
  - d. Disparity of who is in jail. Minority over-representation
  - e. 25% of the reduction in our crime rate since 1990 can be attributed to deterrence and incapacitation for only violent offenders. Deterrence and incapacitation does not have the same effect on non-violent offenders.
  - f. 10% increase in incarceration results in 2% - 4% reduction in crime rate.
3. We know what works to reduce recidivism, it is not followed.

What is the public's opinion on sentencing?

1. The public supports rehabilitation
2. Supports more judicial discretion
3. 61% supports treatment instead of prison for non-violent offenders
4. Punishment and rehabilitation is not an either/or proposition.
5. Public believes sentences are too lenient for violent offenders.
6. 81% said the punishment should fit the crime.
7. 72% said keeping violent offenders in prison was important.

Judge Warren was asked about the survey. For those who felt treatment is better for non-violent offenders, were they asked if they would feel the same no matter how many prior convictions the offender had? The research did not go that far.

What are the various purposes of sentencing? We want to integrate all of them.

1. Punishment is in proportion to the crime. Historically sentencing was focused on this.
2. Public Safety. Can we rehabilitate the offender and keep him/her from doing this again? Can we scare them enough so they won't do this again? Is sentencing sending a message to others? Do we want to incapacitate the offender so the ability or opportunity to commit a crime is not there?
3. Providing restitution to victim or restore sense of safety to the community.

There is not a lot the sentencing judge can do with sentencing to reduce the likelihood of recidivism of violent offenders going to prison. Recidivism reduction should be focused on non-violent offenders.

What are the concerns of the state trial judges?

1. High rates of recidivism
2. Ineffectiveness of traditional probation supervision in reducing recidivism
3. Absence of effective community corrections programs
4. Restrictions on judicial discretion that limit the ability of judges to sentence more fairly and effectively.

Washington State Institute for Public Policy analyzed 571 evidence based studies. They found for adult evidence-based programs that reduced recidivism by 10-20%, there was a cost benefit

ratio of \$2.50/\$1.00. They found that a moderate increase in evidence-based practices would avoid two new prisons, save \$2.1 billion and reduce crime by 8%.

Principles of evidence-based practices:

1. Who will we be working with? The level of supervision or services should be matched to the risk level of the offender. Higher risk offenders should receive more intensive supervision and services.
2. What are the characteristics that you want to focus on? The targets for intervention should be those offender characteristics that have the most effect on the likelihood of reoffending. What are the criminogenic risk factors? – Anti-social attitudes; anti-social friends and peers; anti-social personality patterns; family and/or marital problems. Substance abuse, educational issues, employment issues, anti-social leisure activities.
3. How are we going to change them? The most effective services in reducing recidivism are cognitive behavioral interventions based on social learning principles.

You cannot reduce recidivism without knowing the risk factors in an offender's life. We need a risk assessment tool to identify the offenders who should be targeted for interventions. If they are a low risk offender, certain treatments and sentences are effective. If they are a high risk offender, then most of the treatments won't work.

Social learning theory: Higher risk offenders are more successfully treated by the use of rewards - sanctions (i.e. punishment) is not effective. You also address social cognitive behavior. Recidivism can be reduced by using evidence-based treatment programs that fit the offender.

Examples of evidence-based sentences for drug offenders for people who USE drugs (not dealers):

1. Person misuses drugs and are pro-social people. Sentenced to low-level supervision and low-level services. This person would be frightened of going back into the criminal justice system. Do not put in treatment with high-level offenders.
2. Person who misuses drugs and is anti-social: Sentenced to intensive supervision and strict monitoring/control conditions. Swift and certain sanctions are effective on this person. These people are not put into treatment.
3. Person who is addicted to drugs and is pro-social: Needs intensive supervision services. This person needs treatment. Don't need to load a bunch of restrictions on them. These people will relapse, but that is part of the process of breaking their addiction. The longer the person is in treatment, the more successful it is. If the offender misses treatment, round them up and bring them back.
4. Person who is addicted and is also anti-social: This person has a lot of dynamic risk factors. Have to start with the addiction. To make headway with treatment, you also have to address the anti-social risk factors.

### **Discussion:**

Mandatory sentences came about because of the lack of judicial accountability with indeterminate sentences. How are judges in California held responsible for their performance? Measuring the performance of individual judges may be dangerous because they may not be

hearing the same type of cases. But you can hold the court responsible. Legislature may expect reporting back from the courts on their success for reducing recidivism. If the Commission were to set parameters and goals for everyone in the criminal justice system, the judiciary would be glad to meet them.

Juvenile crimes: Being a juvenile judge is more of a parenting role. If you let your own kids slide when they make a mistake, their behavior will get worse. The state criminal justice system does not have the swift and certain sanctions that are needed. There is no reason to do swift and certain sanctions on probation violators.

### **Wrap-up and Next Meeting:**

There will be additional educational pieces regarding sentencing at the next meeting. The Commission also needs to decide the structure that will be used during its examination of sentencing reform.

A brainstorming meeting was held before today's CCJJ meeting to gather ideas on how to approach the subject of sentencing reform and how to do it in a way where we can accomplish some things for the next legislative session.

The consensus reached at that meeting was to look at forming two new sub-committees:

1. The first subcommittee would be charged with coming back with examining drug offenses/sentences and presenting recommendations in time for the next legislative session. This examination would look how drug offenses currently fit into the sentencing structure. Other states have a separate sentencing structure for drugs. What do we want to do with drug offenses? Do we want to have a separate structure? We would also task that subcommittee with substance abuse, especially with chronic DUI's in Colorado.
2. The second subcommittee would be more expansive. Conceptually it could be set up with two phases. Phase one would deal with "low-hanging fruit" – other issues that could be addressed for the next legislative session. (i.e. escape, aggravated felonies, crimes of violence and extraordinary risk crimes, chronic DUS.) Phase two could examine minimum-mandatory sentencing or the whole classification system.
3. The Parole Task Force will continue to address what Parole what to look like.

### **Discussion:**

What about minority issues? When will this be discussed? We will have to spend some time where we decide to place that.

Did the participants in the brainstorming meeting know that there is a DUI task force that has come forward with legislative proposals?

There is the temptation is to do something quickly, but not necessarily better. The drug classifications can have a separate sentencing grid and that is why it was chosen. We do not want to make changes that are as equally confusing as what we have now.

If Commission members have other areas, concerns or interests that they would like these subcommittees to examine, the suggestions should be communicated to Germaine Miera before the next meeting.

Has the makeup of the subcommittees been formed? No. The meeting was an additional meeting to look for some common ground and to come to this session with some ideas for Commission members to think about.

The meeting adjourned at 4:36 p.m.