



Commission on Criminal and Juvenile Justice

Minutes

September 11, 2009
National Enforcement Training Institute
12345 W. Alameda Parkway

Commission Members Attending:

Peter Weir, Chairman	Gilbert Martinez	Dean Conder
David Kaplan, Vice-Chairman	Jeanne Smith	Tom Quinn
Peter Hautzinger	Claire Levy	Regina Huerter
Bill Kilpatrick	Don Quick	Debra Zwirn
Inta Morris	Steven Siegel	Doug Wilson
John Morse	Jeaneene Miller for Ari Zavaras	David Michaud
Reo Leslie, Jr.	Tom Raynes for John Suthers	Alaurice Tafoya-Modi

Absent: Regis Groff, Ellen Roberts, Karen Beye, Grayson Robinson, Mark Scheffel, Rhonda Fields

Call to Order and Opening Remarks:

The Chairman, Peter Weir, called the meeting to order at 12:49 p.m. Mr. Weir welcomed the new member of the Commission, Alaurice Tafoya-Modi. The focus of today's meeting is to review some of the ideas that have come out of the Sentencing Task Force. The Sentencing Task Force and Drug Policy Task Force were to identify topics in sentencing law and examine those areas to see if there is common ground. A report is due to the General Assembly in February. The report may contain recommendations or it may identify areas where further discussion and work needs to take place. If there are not areas with broad agreement, we cannot rush the process.

CCJJ Guiding Principles, Goals and Ground Rules Review by Paul Herman:

Paul Herman reviewed the guiding principles established by the Commission. He also reviewed the purposes of sentencing as put forth by the Commission. It is important to keep in mind these guiding principles and purposes are the lenses through which the issues are examined.

The presentation from the Sentencing Task Force was to begin with a presentation and clarification of current law. Next, the pros and cons of the current law were to be outlined. Potential recommendations were then to be put forth with discussions to follow.

Sentencing Task Force – Escape by Doug Wilson:

What does it mean to escape? According to current law, if an offender confined to a secured facility leaves the facility by some means - that is an escape. If an offender in Community Corrections through a diversion placement, a transition placement, or an Intensive Supervised Parole placement walks away, that is considered an escape. These actions and the consequences for such actions were the focus of the working group on Escape. If an offender on parole walks away, that is not considered escape because the individual is not considered an inmate (i.e., "on inmate status.")

What does the law state? C.R.S. 18-8-209 mandates an automatic consecutive sentence if an offender is convicted of Escape or Attempted Escape. If the offender's original felony conviction was a class 1 or 2 felony, Escape is a class 2 felony. If the original felony conviction was a class 3, 4, 5 or 6 felony, Escape is a class 3 felony. The escape sentence is tacked on to the existing sentence.

What are the issues? In 2008 there were four *traditional* escapes by DOC inmates. In 2008, there were 384 individuals sentenced to DOC with a controlling sentence of Escape. (A controlling sentence is the sentence given from the most serious crime the individual committed at the time.) In 2008, there were 974 inmates doing time in DOC whose controlling sentence was Escape. Between the middle of 2004 to 2009, Denver filed 1082 walk-away Escapes from Community Corrections. The minimum sentence that could have been given was one year in DOC. The majority of escapes from Community Corrections occur on impulse. No other state has a similar mandatory consecutive sentence as that which exists in Colorado. Younger inmates are more likely to escape than older individuals.

Discussion: How much time passes before a failure to report is labeled an escape? The standard practice by Community Correction facilities is to allow two hours after the expected return time before an individual is considered an escapee.. There is no time frame specified in state law. If a new crime is committed after an escape, a longer sentence for the new crime will be applied than if the new crime was committed while not under escape status. The felony conviction of Escape can increase the probability of the filing of habitual charges.

Recommendations:

E-1 states: Any sentence imposed following conviction of an offense under sections 18-8-201 to 18-8-208 or section 18-8-211 shall run consecutively and not concurrently with any sentence THAT the offender was serving at the time of the conduct prohibited by those sections EXCEPT THAT IF THE DEFENDANT IS CONVICTED OF AN OFFENSE PURSUANT TO SECTIONS 18-8-208 OR 18-8-208.1 AND THE DEFENDANT WAS NOT IN CUSTODY OR CONFINEMENT IN A CORRECTIONAL FACILITY DESCRIBED IN 17-1-104.3 C.R.S., OR A COUNTY JAIL FACILITY, THE ABOVE MANDATORY CONSECUTIVE SENTENCE SHALL NOT BE REQUIRED.

Background:

1. Recommendation amends 18-8-209 and 18-8-209.1
2. The recommendation does not apply to an individual escaping from a Department of Corrections facility. It applies only if an individual walks away from a Community Correction facility or is on Intensive Supervision – Parole (ISP).
3. The recommendation would remove the requirement for a mandatory consecutive sentence.
4. The recommendation assumes that no new crime was committed while on escape status.
5. Pros: More judicial discretion. Substantial savings without impacting public safety. These individuals are already in the community by virtue of their placement in Community Corrections or ISP.

Discussion:

1. Some of the individuals being discussed are escaping from residential facilities as well as non-residential facility. Are individuals who report to non-residential facilities also included? No.
2. In eliminating the consequence of prison time, are you not eliminating an incentive for individuals to comply with their sentence? Yes. But in the pilot project, other intermediate sanctions, such as being sentenced to county jail, would be utilized.
3. The District Attorneys' Council would like to have a sunset provision included in case it is found that the recommendation does not work. The substance of the legislation would not need to be changed.
4. In compiling the statistics of who comprises "walk-aways," was there a check of previous acts of domestic violence? The answer to this question would address concerns of victims.

E-2 states: Community Corrections will develop a Walk-Away Pilot Project.Background:

1. The pilot project would involve only walk-aways from Community Corrections.
2. The escape period for offenders in the pilot project would be a short, defined period of time (to be determined locally.)
3. No new crime would have been committed during the escape period.
4. District Attorney's office or Community Corrections office would retain the ability to file escape charges.
5. The parties that review the participants for inclusion in the pilot projects are: the District Attorney, Community Corrections Board, Community Corrections programs, sheriff, Chief Judge or Chief Probation officer and the local representative of the Department of Corrections.
6. A system of intermediate sanctions would be included in the pilot project, such as regression in a facility or time in a county jail (with reimbursement to the County for the expense).
7. Data would be collected to determine the pilot project's effectiveness. A report to the Governor would be prepared by the Division of Criminal Justice.

8. Questions of interest would include, will the number of walk-aways change as a result of the pilot project? Will the use of intermediate sanctions curtail escape charges for walk-aways?

Discussion:

1. Prosecutors have discretion to not file escape charges. An elected district attorney may feel more comfortable not filing an escape charge if there is a program designed to address the offender's actions.
2. This is an opportunity to engage in evidence-based research.
3. Would this require a legislative change? Yes.

E-3 Absconding from Community Corrections – the Mitch Morrissey proposal.

Background:

1. An individual who walks away from Community Corrections would no longer be considered an "escapee." He/she would be considered an "absconder."
2. When a person absconds from Community Corrections on a diversion sentence, his/her sentence is changed to a DOC sentence. No new charges have to be filed.
3. When a person absconds while serving a Community Corrections transition sentence, he/she would be returned to DOC to complete the sentence.
4. A person who absconds from Community Corrections is not eligible to re-apply for Community Corrections placement.
5. No new crimes can be committed during the period of time the individual has absconded.
6. This proposal does not apply to escapes from ISP.
7. Pros: No new charges are filed which saves time and money. Does not add another felony conviction to someone's record.
8. Cons: Does not allow for judicial discretion. There is still a habitual-eligible category. Does not cover escape from ISP?

Discussion:

1. Does this affect an individual's right to a due process hearing? There is no right to a due process hearing after an escape.
2. Limits an individual's ability to be eligible for a Community Corrections sentence ever again.
3. Instead of making someone ineligible for subsequent Community Corrections, can the Community Corrections Board take into account that the individual escaped from Community Corrections on a previous sentence.

E-1b states the charge of escape would be based upon the status of the offender.

Background:

1. Individuals directly sentenced to Community Corrections (diversion sentence) would be considered "absconders."

2. Intensive Supervised Parolees would be considered “absconders.” ISP individuals have been released to parole and their status is no longer that of an inmate.
3. Individuals who are transitioned from DOC into Community Corrections would be eligible for Escape charges. These individuals are on inmate status.
4. Pros: Escape charges would be filed on true inmates, based on status only. They would be treated the same as those who broke out of a correctional facility. Gives the Courts discretion. Would decrease the number of habitual eligible folks who were not DOC inmates at the time of the walk-aways. There would be cost savings.
5. Cons: Would not pertain to the entire group of individuals who walk-away. These offenders tend to act on impulse and their behavior may not be modified by intermediate sanctions.

Discussion:

1. This recommendation would result in treating offenders differently. If someone walks away from a diversionary setting for five hours, he/she is not sentenced the same as an individual who walks away while on “inmate” status.
2. Can additional information be provided as to who these individuals are?
3. Can the management tool on absconders include the intermediate sanction of county jail time?
4. There needs to be more victim input.

Straw Polling: (Judge Gil Martinez abstains. These are policy determinations that may require statutory changes.)

Based on what was discussed today, is it important for the current statute on Escape to be changed? Vote was unanimously in favor of this statement.

Being able to vote on only one recommendation, do you support ...

E-1 (18-8-209 Consecutive Sentences) Yes: 8

E-1a (the Mitch Morrissey proposal) Yes: 2

E-1b (the status based) Yes: 8

Being able to voting on as many of the recommendations as you want, do you support

E-1: Yes 17

E-1a: Yes 7

E-1b: Yes 17

Who is in support of the Pilot Project?

Yes: 16 No: 1

Further work on the Escape issue: Doug Wilson will take recommendation E-1 and E-1b back to his working group. Mr. Wilson has been directed to:

1. Use comments from today’s meeting as well as any other issues members of the Commission submit to Adrienne Loye, to strengthen both recommendations E-1 and E-1b.

2. The working group will also be tasked with combining E-1 and E-1b into one recommendation.
3. Mr. Wilson will bring the reworked recommendations back to the Commission for further discussion in October.

Sentencing Task Force – Aggravated Ranges, Extraordinary Risk and Mandatory Minimums – by Beth McCann:

Rep. McCann explained that current sentencing laws offer a number of different sentencing provisions. Among crimes of violence, the mandatory minimum is the midpoint of the presumptive range. If a deadly weapon is used to commit the crime, the sentence has a mandatory aggravator of five years. According to Blakely, the jury must make a finding that the crime was committed under aggravated circumstances.

The working group discussed which charges fell into which category. Should Intimidation of a Witness be included? They suggested removing certain crimes from the mandatory sentencing ranges. These included Stalking, Escape, Criminal Extortion, Controlled Substances and First Degree Arson. It was agreed that sexual assault crimes not be included in their discussions. The working group also agreed there would be no recommendations for crimes committed while on bond, etc.

There are separate pleading requirements unless the offense is a *per se* crime. Mandatory sentencing can also come into play if a crime is committed while the offender is on parole, probation or awaiting sentencing on another charge. Current law is confusing and difficult to explain to a victim of crime as well the defendant. The working group also discussed other factors that would influence a sentence. What was the intent of offender? What kind of injury was caused? Was a deadly weapon used?

In general, the working group draft recommendations will have an impact on the habitual criminal statutes. If judges are sentencing to the mid-point of the minimum range, any judge who sentences to less than the mid-point would be required to submit findings.

A-1 Eliminate crimes of violence and extraordinary risk crimes from the code and instead have one category of crimes that carry a mandatory minimum sentence with a broad range of possible sentences (no presumptive ranges to avoid Blakely problems)

A-2 Single category of crimes is created as to which the Court may consider an enhanced sentence, and must sentence to a mandatory minimum not a mandatory midpoint. The range of possible sentences for these crimes incorporate the minimum and maximum sentences currently provided for crimes of violence and extraordinary risk crimes. A broad range of possible sentences is established for these specified crimes as follows:

- | | | | |
|------------|--------------|------------|-------------|
| a. Class 2 | 8 – 48 years | d. Class 5 | 1 – 8 years |
| b. Class 3 | 4 – 32 years | e. Class 6 | 1 – 4 years |
| c. Class 4 | 2 – 16 years | | |

A-3 The most important factors in considering whether a crime should require a mandatory sentence are the following: 1) mental intent; 2) serious bodily injury; 3) use of a deadly weapon (some discussion about a clearer definition of deadly weapon). It is recommended the following crimes require a mandatory minimum.

- a. Murder in the 2nd Degree (18-3-103(1))**
- b. Assault in the First Degree (18-3-209(1)(b), (c), (e), (e.5), (f))**
- c. Assault in the 2nd Degree (18-3-203(1)(b), (c), (d), (f), (f.5), (g))**
- d. First Degree Kidnapping (18-3-301)**
- e. Second Degree Kidnapping (18-3-302)**
- f. First Degree Burglary (18-4-202)**
- g. Aggravated Robbery (18-4-302)**
- h. Child Abuse (18-6-401)**
- i. Aggravated Intimidation of a Witness (18-8-705)**

Discussion:

How many times has a judge reviewed a mandatory sentence 120 days after its imposition and reduced the sentence? Based on the current numbers for the year and projecting them to the end of 2009, there would be eight such instances. This does not appear to be a significant factor. It does not appear the judges are in favor of routinely changing mandatory sentences.

The recommendations put forth by this working group pertain to violent offenders only. Will we get to non-violent offenders? This working group was only looking at crimes with mandatory minimums. Property crimes do not require mandatory minimums. The group decided to retain the current sentencing grid. There have been discussions by the Commission to develop a drug grid.

Pete Hautzinger said he is only willing to talk about these recommendations if the top end of the sentences is expanded. He also believes that if the judge sentences below the midpoint, the judge needs to submit a written finding. This only applies to violent crimes. There might be more consensus among other district attorneys if all crimes are addressed and not just violent crimes.

Steve Siegel presented a document outlining the impacts of these recommendations. The recommendations reduce the minimum sentence by half, or more, for certain crimes and eliminates the mandatory sentence for others.

Will a judge still have the option to sentence at the maximum of the range? Yes. The sentence applied is at the discretion of the judge.

This is not a decrease in the sentence range. The research will bear out that the bench comes to the middle of the sentencing range. When we talk about the sentencing range, the range today keeps the extraordinary risk top end. This is not a decrease in anything.

Don Quick discussed the structure of the two task forces. One was to address drug sentencing where consensus was thought to be easily reached. The second was going to address general sentencing which would require longer deliberations. He felt that after a month, all that is being suggested is to drop the floor on these offenses by 50%. These are hot points for the victims groups and the prosecutors. He felt that the task force had not engaged in enough deliberation. He also observed that there had not been a presentation of evidence-based research to provide a foundation for the recommendation.

In response to Mr. Quick, it was described that the sentencing task force was established to look at more systemic issues – the issues that would not be handled during the upcoming legislative session. However, this task force was also given the charge to examine other areas with potential for rapid consensus. The Commission agreed that possible areas to be examined were escape, mandatory minimums, aggravated ranges and extraordinary risk.

The working group examined combining three areas into one (mandatory minimums, aggravated ranges and extraordinary risk crimes). The evidence-based research shows that the more individually tailored the considerations at sentencing, the better the outcome. The working group was not recommending reducing the range – in fact the recommendation was to adopt the extraordinary risk ranges on the upper end. There is no evidence-based research that identifies what is the appropriate sentencing range for a crime.

Concern was expressed that the working group was selecting ranges too arbitrarily. If the research does not currently exist to guide the range decisions maybe we need to conduct the research.

There was a request for more in-depth research. With 74% of offenders incarcerated for non-violent crimes, why not focus attention on these offenders?

Rep. Levy said there is an expectation in the legislature that this sentencing issue will be addressed. What we do know is that judges need a whole lot more information when sentencing violent offenders. Is this information that can be obtained through risk assessments?

Would it help to break down the topic? What should be kept in mind is that the information from the task force represents the start of the sentencing conversation. It may help us narrow down the issues. Are we trying to do too much with this one proposal?

If the Commission cannot generate recommendations for this legislative session, then so be it. We will continue the discussions of the issues.

This area of criminal sentencing is driven by the purposes of sentencing, focusing on incapacitation and punishment. Sentencing ranges may be validly established through evidence or through philosophical and policy determinations.

We need to create the circumstances to support the most effective use of judicial discretion by giving judges the necessary tools and information to make the best possible sentencing decisions.

How do we pursue this issue in a rational manner to address the discussions from today's meeting? We have to determine how to identify the pertinent issues brought up today and how to approach them.

It is recommended that the working group articulate what data they need when discussing these issues and obtain it from DOC.

If someone has suggestions or questions they want the working group to address, please send them to Adrienne Loye, who will forward them on.

Sentencing Task Force – Probation Eligibility and Two Prior Felony Rule by Tom Quinn:

Tom Quinn's working group handed out their recommendations regarding ~~on~~ probation eligibility and the two prior felony rule. There was no time to discuss this issue. Please review the hand out and send any comments and thoughts to Tom Quinn.

Next Meeting:

The next meeting will be on Friday, October 16, 2009 at 12:30 at the NETI location.

The meeting adjourned at 4:50 p.m.