Commission on Criminal and Juvenile Justice

Minutes

February 5, 2010
National Enforcement Training Institute
12345 W. Alameda Parkway

Commission Members Attending:

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

Absent: John Suthers, Karen Beye, Don Quick, Regis Groff, John Morse, Mark Scheffel, Rhonda Fields, Mark Waller

Call to Order and Opening Remarks:

The Chairman, Peter Weir, called the meeting to order at 12:55 p.m. and outlined the day's agenda. There are several topics to be discussed today that will involve voting. The process that will be used today is similar to the legislative consent process. The Commission will review a recommendation (e.g., DUI bill), section by section as well as the points within that section. Each point will be discussed and voted upon. A majority of the votes (51%) is all that is needed for the point to be accepted. After the section has been discussed, the section in its entirety including any amendments will be voted upon. Again, only 51% is needed for that section to be approved. At the end of the topic, the entire topic will be voted upon and a 75% approval of the Commission is required to forward it on as an official Commission recommendation.

Director Weir introduced Dr. Sara Steen of CU-Boulder and her students who are studying sentencing reform. Members of the Commission may be contacted by these students for interviews.

The University of Colorado is offering a conference on February 19th regarding Minority Overrepresentation. This conference is open to everyone but will count as a CLE class for the attorneys who wish to attend. The Division of Criminal Justice will send out flyers for any interested Commission members.

Post-Incarceration Supervision Task Force:

David Kaplan gave an overview of the statute revisions proposed by the Post-Incarceration Task Force. During the January Commission meeting, discretionary guidelines for the Parole Board to use when deciding whether or not to release someone from prison was discussed and approved. Today's topic of a proposed revision to the parole guidelines statute (CRS 17-22.5-404) is the outcome of the task force's work to streamline or better define some of the parole processes.

Section (1): Legislative declarations

<u>This section will actually be discussed last and the minutes for this section can be found later in the minutes.</u>

Section (2): Duty by state board of parole to conduct parole hearings

<u>Discussion:</u>

1. What the Parole Board is looking at is the risk of a parolee reoffending if and when they are released on this date versus the risk of releasing them at a later date. Is this the right time for this person to be released? The Parole Board needs to be looking at all the programs and restrictions that the parolee will be functioning under when released. The working group grappled with how much to put in the statute when referring to the guideline instrument. The risk to reoffend and the readiness to be released are areas that are addressed on page six of the proposed guideline instrument.
2. The use of the term "public safety" versus the use of the term "welfare of society" was debated. When deciding if the release of the parolee would affect the welfare of society, it provides a larger umbrella. It was argued that the term "public safety" is too narrow. The working group used "public safety" because this is more commonly used term.
3. Why did the working group take out the word "first" in the sentence, "The board shall ~~first~~ consider the risk of violence to the public in every release decision it makes?" The public is more concerned about the risk of re-offense (which is more broad) versus the risk of violence (which may not apply to every crime).
4. Steve Siegel requests that the last sentence be amended to read, "The board shall first consider the risk of re-offense in every release decision it makes." Tom Quinn seconded the motion. Vote: 13 in favor, 2 opposed; amendment passed.
5. David Michaud made the motion to include the term "and the welfare of society" in the sentence … "The person's release from institutional custody is compatible with public safety." Seconded by Peter Hautzinger. Vote: 8 in favor, 7 opposed; amendment passed.
6. Claire Levy made a motion to strike "the greatest extent possible" and change it to "use evidence based practices where possible." Alaurice Tafoya-Modi seconded the motion. Vote: 13 in favor, 2 opposed; amendment passed.
7. Is there a definition of "evidence-based practices" anywhere in statute? Paul Herman said there are several good definitions that can be found and used. Ari Zavaras made the motion that the definition of "evidence-based practice" be included in this section or where applicable. The definition of evidence-based practice will be left up to DCJ staff, Paul Herman and David Kaplan. Second by Tom Quinn.

Vote: 14 in favor, 1 opposed; amendment passed

Vote of Section 2 in its entirety with the amendments. 14 in favor, 1 opposed; section passed.
The section now reads:

(2) As to any person sentenced for a class 2, class 3, class 4, class 5, or class 6 felony who is eligible for parole pursuant to section 17-22.5-403, or a person who is eligible for parole pursuant to section 17-22.5-403.7, the board may consider all applications for parole, as well as all persons to be supervised under any interstate compact, and may parole any person who is sentenced or committed to a correctional facility when the board determines, by using, ~~to the greatest extent possible~~, where available, evidence-based practices and the guidelines established by this section, that there is a reasonable probability that the person will not thereafter violate the law and that the person's release from institutional custody is compatible with public safety and the welfare of society. The board shall first consider the risk of ~~violence to the~~ re-offense ~~public~~ in every release decision it makes.

Section (3): Parole release considerations

Discussion:

1. The current parole statute uses thirteen criteria for release, however, nine of those are inappropriate because they refer to behavior of an individual after being released on parole. There are fifteen identified aggravating circumstances and nine mitigating circumstances in current statute. The criminogenic need is not addressed in current statute. The task force left the section on institutional conduct in the proposed guidelines.
2. Paragraph (h) states: "aggravating or mitigating factors from the criminal case that is relevant in determining the risk of re-offense." It is a different way of looking at aggravating and mitigating circumstances. These factors are important when deciding if an offender should be paroled, but these factors are not predictive of the offender's risk of reoffending. The parole board's files may not contain all the facts and circumstances of each case.
3. The parole decision should look at the offender and if he/she is ready for release and what is his/her risk of re-offending. The legislature sets the length of sentence related to a particular crime. The parole board should be worried about if the time is right for the offender to be released. The parole board should not be involved in reviewing the initial circumstances of the case and ensure that the offender has "done enough time." The legislature and the judge should be the entities that determine if the offender "has done enough time."
4. By putting this language into statute, this becomes the legislature dictating to the parole board that there are certain conditions that should be met before an offender can be paroled. A Commissioner commented that if the legislature wants the offender to serve longer for particular crimes, they should make the sentencing range longer, rather than dictating release conditions.
5. Gil Martinez made a motion to amend the first sentence in Section 3 to state, "In considering offenders for parole, the board shall consider THE TOTALITY OF CIRCUMSTANCE, but need not be limited to the following factors…" Tom Quinn offered a friendly amendment to state, "The totality of circumstances to include, but need not be limited to…" Ari Zavaras seconded the motion. Vote: 12 in favor, 1 opposed; amendment passed.
6. David Michaud suggests that paragraph (f) – the testimony or written statement of the victim – should be one of the first statements, making it paragraph (a).

7. Can we look at everything but f, g and h as a group? A-E, I and J will be voted on as a group: 15 in favor, 0 opposed; amendment passed.
8. Regi Huerter moved to make paragraph (f) paragraph (a). Gil Martinez seconded the motion. Vote: 14 in favor, 1 opposed; amendment passed.
9. Steve Siegel offered a motion to change paragraph (f), now paragraph (a), to state, "the testimony or written statement of the victim of the crime, relatives of the victim or designees pursuant to section 17-2-214." Second by Pete Hautzinger Vote: 15 in favor, 0 opposed; amendment passed.
10. Steve Siegel asked that paragraph (g) be amended to state, "Whether the offender has caused the victim, the victim's family or witnesses, to be harassed or threatened the victim either verbally or in writing while under sentence" Second by Pete Hautzinger. 15 in favor, 0 opposed; amendment passed.
11. Ari Zavaras made the motion to have paragraph (h) amended to read, "aggravating or mitigating factors." Isn't this statement too broad? Claire Levy offered a friendly amendment to include the phrase, "from the criminal case" so paragraph (h) states, "aggravating or mitigating factors from the criminal case." Pete Hautzinger seconded the motion. Vote: 13 in favor, 2 opposed; amendment passed.
12. Dean Condor asked if a family member's illness could not be seen as a mitigating circumstance. This concept would introduce a new factor that might be going toward a humanitarian release. It was stated by Pete Weir that circumstances such as this would likely be dealt with on a case by case basis.

Vote on Section 3 as amended in its totality. 15 in favor 0 opposed; section passed. **This section now reads:**

(3) In considering offenders for parole, the board shall consider the totality of circumstances, which includes, but need not be limited to, the following factors:

(a) the testimony or written statement of the victim of the crime, relatives of the victim or designees, ~~if the victim has died~~, pursuant to section 17-2-214

(b) actuarial risk of reoffense

(c) assessed criminogenic need level

(d) program or treatment participation and progress

(e) institutional conduct

(f) adequacy of parole plan

(g) whether the offender has or has caused the victim or victim's family to be harassed or threatened ~~the victim~~ either verbally or in writing while under sentence

(h) aggravating or mitigating factors from the criminal case ~~that are relevant in determining conditions, length, and the risk of reoffense~~

(i) the testimony or written statement from a prospective parole sponsor, employer or other person that would be available to assist the offender if released on parole.

(j) whether the offender had previously absconded or escaped while on community supervision.

Section (4): Actuarial risk assessment and structured parole decision making

Discussion:

1. The guideline instrument shall not be used in considering those inmates classified as sex offenders with indeterminate sentences for whom the Sex Offender Management Board has established separate release guidelines. It was suggested that the Sex Offender Management Board should establish guidelines for sex offenders with determinate sentences.
2. Does this mandate that the CARAS assessment tool be used? DOC is developing their own risk assessment tool for use in parole revocation. Ari Zavaras made a motion to change paragraph (4)(a) to state, "The parole board shall use the Colorado risk assessment scale as developed by the division of criminal justice of the department of public safety in considering inmates for release on parole." ~~or revocation from parole.~~ Dean Condor seconded the motion. Vote: 10 in favor, 3 opposed; amendment passed.

Voting on Section 4 with amendments: 15 in favor, 0 opposed; section passed.
This section now states:

(4) (a) The parole board shall use the Colorado risk assessment scale as developed by the division of criminal justice of the department of public safety in considering inmates for release on parole. ~~or revocation from parole~~. This risk assessment scale shall include criteria which statistically have been shown to be good predictors of risk of reoffense. The division of criminal justice shall validate the Colorado risk assessment scale whenever the predictive accuracy, as determined by data collection and analysis, falls below an acceptable level of predictive accuracy as determined by the division of criminal justice, the state board of parole and the division of adult parole. Such validation shall be carried out at least every five years.

(b) The parole board shall also use an administrative release guideline instrument in evaluating an application for parole. This instrument will provide the parole board with consistent and comprehensive information relevant to the factors listed in subsection (3). The administrative release guideline instrument will also include a matrix of advisory decision recommendations for the different risk levels.

(c) The goal of this administrative release guideline instrument is to provide a framework for the parole board to evaluate and weigh the statutorily mandated factors and victim and community impact in their decision making and to offer decision recommendations. These guidelines are advisory and parole board members retain the authority to make the release decision that is most appropriate in any particular case.

(d) This administrative release guideline instrument shall not be used in considering those inmates classified as sex offenders with indeterminate sentences for whom the Sex Offender Management Board pursuant to 18-1.3-1009 has established separate and distinct release guidelines. The Sex Offender Management Board in collaboration with the department of corrections, the judicial department, the division of criminal justice, and the state board of parole shall develop a specific sex offender release guideline instrument for use by the state board of parole for those inmates classified as sex offenders with determinate sentences.

(e) The division of criminal justice shall, in cooperation with the department of corrections and the state board of parole, provide training on the use of the administrative guideline instruments and the Colorado risk assessment scale to personnel of the department of corrections, the parole board, administrative hearing officers and release hearing officers. Such training shall be carried out on a semiannual basis.

(f) The division of criminal justice, the department of corrections, and the state board of parole shall cooperate to develop parole board action forms consistent with this statute that captures the rationale for decision-making which shall be published as official forms of the department of corrections.

Section (5): Parole revocation considerations

Discussion:

1. It was asked if Section 5 relates to just technical violations or all violations? All violations. What about new crimes? A new crime is prima facia evidence of a parole violation. David Michaud moved that "proof of conviction of a new crime" should be included as a variable. This makes it a higher standard than case law currently requires. Pete Hautzinger seconded the motion: Vote: 14 in favor, 0 oppose; amendment passed.
2. Paragraph (c) almost sanctions an arbitrary decision. The parole board must also abide by the laws in other statutes. Is paragraph (c) necessary? No. There was no intention from the task force to take away the discretion of the parole board. Gil Martinez moved to strike paragraph (c) in its entirety. Seconded by Ari Zavaras. Vote: 12 approved, 2 opposed; amendment passed.
3. David Michaud made a motion to change the introduction of Section 5 to "when conducting a parole board hearing…" Pete Hautzinger seconded the motion. Vote: 15 approved, 0 opposed; amendment passed.
4. Claire Levy made a motion to substitute the phrase "where available" in place of "to the greatest extent possible" in paragraph (5)(a). Pete Hautzinger seconded. Vote: 15 approved, 0 opposed; amendment passed.
5. In paragraph (5)(d) it states, "the parole board or administrative hearing office must make a factual finding that the parole officer has fully utilized intermediate sanctions." This could make the revocation appeals go up. The rest of the paragraph also says that intermediate sanctions may not be appropriate in some circumstances. Steve Siegel made the motion to strike the word "fully." Tom Quinn seconded the motion. Vote: 15 approved, 0 opposed; amendment passed.

Vote on Section 5 in its totality with amendments: 14 in favor, 0 opposed; section passed. **This section now states:**

(5) (a) In conducting a parole revocation hearing, ~~reviewing a complaint for parole revocation,~~ the parole board and administrative hearing officer shall consider, ~~to the greatest extent possible~~, where available, evidence-based practices and shall consider, but need not be limited to, the following factors:

(I) proof of conviction of a new crime

(II) actuarial risk of reoffense

(III) seriousness of the technical violation

(IV) frequency of technical violation(s)

(V) effort by the parolee to comply with previous corrective action plan or other remediation plan required by the parole board or parole officer

(VI) the imposition of intermediate sanctions by the parole officer in response to the technical violations which form the basis of the complaint for revocation

(VII) whether modification of parole conditions is appropriate and consistent with public safety in lieu of revocation

(b) The department of corrections in consultation with the parole board shall develop and use an administrative revocation guideline instrument in evaluating complaints filed for parole revocation. This instrument will provide the parole board with consistent and comprehensive information on the factors identified in subsection 5(a). This instrument will also include a matrix of advisory decision recommendations for the different risk levels.

~~(c) These administrative revocation guidelines are advisory and the board members and administrative hearing officers retain the authority to make the decision that is most appropriate in any particular case regarding parole revocation.~~

(c) ~~(d)~~ Prior to revoking parole for a technical violation, the parole board or administrative hearing officer must make a factual finding that the parole officer has ~~fully~~ utilized intermediate sanctions or that the modification of conditions of parole or the imposition of intermediate sanctions is not appropriate or consistent with public safety.

Section (6): Study of parole decision making

Discussion:

1. This section suggests very few changes from the existing statutes with the exception of paragraph (5)(b) which asks that if the parole board departs from the guidelines they must give a reason for such departure. What about an instance when a victim specifically asks that the parole board not release their input. The reason for departure would be reported in an aggravate format. It would not relate to a specific offender. Can we add another line that the information would be reported on an aggregate basis? Peter Hautzinger made a motion to add, "The data shall be confidential and will only be reported in the aggregate to the General Assembly." Tom Quinn seconded the motion. Can the information be submitted without case identifiers? The information from the parole board must be provided to DCJ with individual identifiers in order for the analyses to be conducted. Why not strike paragraph (b)? Senate bill 135 only requires paragraph (a). Paragraph b is an additional requirement. Vote (on Pete Hautzinger sentence): 10 in favor, 4 opposed; amendment passed.

Vote on Section 6 as amended in its entirety: 15 in favor, 0 opposed; section passed.

Section (1): Legislative declarations

Discussion:

1. The legislative declaration makes a statement that actuarial risk tools can be used to more accurately predict the likelihood of re-offense.
2. Claire Levy asked that the second paragraph be changed to read, "Research demonstrates that actuarial risk assessment tools can predict the likelihood of risk of re-offense with significantly greater accuracy than professional judgment ALONE."
3. Can the term "empirically-based" be stricken from the last sentence of the second paragraph? It might read, "The best outcomes are derived from a combination of ~~empirically-based~~ actuarial tools combined with clinical judgment." After discussion, the final wording voted on was, "The best outcomes are derived from a combination of empirically-based actuarial tools and clinical judgment."
4. Does this still allow for the discretion of the parole board? Yes.

Vote on Section 1 with amendments. 15 in favor, 1 opposed.

This section now states:
Legislative declaration. (1) The General Assembly hereby finds that:

- The risk of reoffense shall be a central consideration by the parole board in making decisions related to the timing and conditions of release on parole or revocation from parole.
- Research demonstrates that actuarial risk assessment tools can predict the likelihood risk of reoffense with significantly greater accuracy than professional judgment alone. Evidence-based correctional practices prioritize the use of actuarial risk assessment tools to promote public safety. The best outcomes are derived from a combination of empirically-based actuarial tools and ~~combined~~ ~~with~~ clinical judgment.
- Although the parole board is made up of individuals, using structured decision-making unites the parole board members with a common philosophy and set of goals and purposes while retaining the authority of individual parole board members to make decisions that are appropriate for particular situations. Evidence-based correctional practices support the use of structured decision-making.
- Structured decision making by the parole board provides for greater accountability, standards for evaluating outcomes, and transparency of decision-making that can be better communicated to victims, offenders, other criminal justice professionals, and the community.
- An offender's likelihood of success may be increased by aligning the intensity and type of parole supervision, conditions of release, and services with assessed risk and need level.

Vote on Post-Incarceration Task Force recommendations Sections 1 through 6 as amended above: (A vote of 75% in favor (a and b, combined) is needed to move this recommendation forward)
Vote: 15 (a) I support it
1 (b) I can live with it
0 (c) I do not support it
With the stated amendments, the recommendation passed.

DUI Update:

The bill version provided to the Commission is not the final draft. It was reworked on Wednesday (January 3, 2010), but the drafter did not have time to put those revisions into its final format in time for its presentation to the Commission today. The bill in front of you is to be used for a conceptual discussion and vote only.

Jeanne Smith explained that Section 1 addresses new penalties for DUS and DUD offenses if they are non-substance related (alcohol or drug). Alcohol related suspensions will still have the mandatory jail time as found in current law. This section will have an effect on county jail bed space. It was restated that at the January 2010 meeting Sheriff Robinson spoke on behalf of the state sheriffs association when he said that they all support this idea.

Section 2 discusses habitual traffic offenders. To be classified as a habitual traffic offender, you must have three major traffic offenses within 7 years. This section takes out DUS or DUD charges as qualifiers if they are non-substance related (alcohol or drug). There may be difficulty in obtaining legislative support for this section. No fiscal note has been assigned to this section yet, but estimates put it close to $7 million dollars. Representative Levy stated that it is conceivable that Section 2 will be taken out of this bill or be put forth as a stand-alone bill.

Section 42-4-1301 may come through as a new subsection of the statute. The initial sentence (up to one year) is meant to be punitive. The second portion of the sentence (probationary period) is meant to be for treatment. This concept might be put forth in the legislative declaration.

Section (b.2)(I)(A) says that there is a mandatory imprisonment of 10 consecutive days in county jail for second offenders. The person shall not be eligible for earned time, good time or trustee status. A person may participate in an existing work, educational, necessary medical treatment or substance abuse treatment.

Section (b.2)(I)(B) discusses the fine structure. The lowest fine begins at the level of the lowest fine of a DWAI following another DWAI. The highest fine level is the highest currently given for a DUI following another DUI. A similar requirement structure was established for community service time.

Section (b.2)(I)(C) and (D) discusses probation. The two-year period of probation will begin at the commencement of the sentence. If the offender does not successfully complete this two-year period of probation, an additional year of probation can be imposed. The backend sentence may be problematic. Offenders can have their probationary period extended because they have not been successful in their drug and alcohol treatment. Doug Wilson stated that they may be given the additional probationary sentence because they were drinking, not because they were drinking and driving again.

Section (b.2)(I)(D)(II) discusses a second DUI offense within five years. If the second DUI offense occurs within 5 years, alternative sentencing is not an option. If the second offense occurs after five years, alternative sentencing is an option.

Section (b.4)(I)(A) discusses a 60 day minimum mandatory sentence but no more than one year for third and subsequent offenses. The offender is not eligible for earned time, good time or trustee status. Offender will receive credit for time served in custody for this offense.

The fine and community service ranges are the same as those listed for second offenses.

Section (b.4)(I)(c)(II) states that the offender will not be eligible to participate in a work, educational or necessary medical treatment or court ordered alcohol or substance abuse treatment during the minimum period of imprisonment. Judges do not maintain any discretion on the sentence. The working group never discussed not allowing an offender medical treatment.

Judges should be clear that the use of an interlock option is available as a tool.

Doug Wilson made a motion to delete any limitations for appropriate use of work release for your third and subsequent offenders. Motion seconded by David Kaplan. Vote on Doug Wilson's motion: 9 in favor, 4 opposed, amendment passed.

Overall approval of DUI concepts: (A vote of 75% in favor (a and b, combined) is needed to move this recommendation forward)

Vote: 5 (a) I support it
7 (b) I can live with it
3 (c) I do not support it
With the stated amendments, the item passed at 80%.

The meeting adjourned at 4:45 p.m.