



Commission on Criminal and Juvenile Justice

Minutes

November 12, 2010
U.S. Dept. of Transportation
12300 W. Dakota Ave., Lakewood, CO

Commission Members Attending:

Kathy Sasak, Chairman	Claire Levy	Michael Anderson
David Kaplan, Vice-Chairman	Jeanne Smith	J. Grayson Robinson
Gilbert Martinez	Mark Waller	Regina Huerter
Bill Kilpatrick	Don Quick	Debra Zwirn
Inta Morris	Steven Siegel	Doug Wilson (on phone)
John Suthers	Tom Quinn	Alaurice Tafoya-Modi
Rhonda Fields	Regis Groff	Debbie Rose for Jan Dempsey-Simkins

Absent: Ari Zavaras, Peter Hautzinger, Reo Leslie, John Morse, Mark Scheffel

Call to Order and Opening Remarks:

The Chairman, Kathy Sasak, called the meeting to order at 12:47 p.m. In looking forward to the next few months, the Commission will be identifying performance measures associated with the re-entry recommendations developed in 2009. The heads of agencies affected by those recommendations will be called in to give a report on the implementation of those recommendations.

Today, the Commission will be voting on recommendations prepared by the Drug Policy Task Force. As found in the by-laws, only Commission members are able to vote. In order for a recommendation to be forwarded to the Governor's office, it must receive 75% (with rounding) of the combined votes "A" (I support it) and "B" (I can live with it). If option "C" (I do not support) has 30% of the vote (with rounding) the recommendation will not be accepted.

Ms. Sasak stated that outreach has been made to Governor-elect Hickenlooper's transition team about the purpose of the CCJJ and where it is going.

Treatment Funding Group:

The Drug Policy Task Force met this past Wednesday to review and finalize their recommendation including those from the Treatment Funding Group. Paul Herman stated that there are several groups dealing with treatment funding. Three of which are the IAC, ITFT and

1352. These three groups are statutorily mandated to exist and they met as one group last week. The Treatment Funding Group recommendations were brought to that meeting for review. The IAC/ITFT/1352 group is, in principal, in agreement with the recommendations but is already actively working on some of issues. Other stakeholders need to be contacted.

The Drug Task Force agreed that the Treatment Funding Group should continue. However, because there are so many stakeholders involved in this issue, Sheriff Robinson, Christine Adams, Carmileta Muniz, and others will reach out to them.

CCJJ 2010 Report Overview:

Kim English (DCJ) presented an overview of the CCJJ 2010 Report. The Division of Criminal Justice is mandated to prepare an annual report on behalf of the Commission. This report documents the accomplishments of the Commission during the past year including the 2010 legislative recommendations. Section 5 presents a status report on the re-entry recommendations presented during the Commission's first year.

Drug Task Force Recommendations and Discussion:

Unintended consequences of HB 1347 - DUI Bill:

- 1. Shall the CCJJ recommend that technical corrections be made to any of last year's multiple offense DUI provisions as set forth in HB101347 that inadvertently created unintended consequences on first DUI violations?**

Vote: Passed

DUID - Marijuana Per Se:

- 1. Establish a "Per Se" violation for Driving Under the Influence of Marijuana by establishing that it shall be an unclassified misdemeanor traffic offense for any person to drive a motor vehicle or vehicle when the person has a level of 5 nanograms of THC/mL whole blood or more at the time of driving or within two hours after driving.**
 - a. Creates language that establishes a Per Se level of THC in the blood system.
 - b. Where did the 5 nanogram figure come from? The Drug Policy Task Force had presentations from Cindy Burbach and Laura Spicer about the meaning of THC levels in the blood system. There are several states that have a zero tolerance policy. Crash research was also reviewed and the 5 nanogram level was a good marker. The strength of marijuana plays an important part in how much can be ingested to reach the level.
 - c. How does this work with medical marijuana? It is illegal to drive under the influence of any drug. This would be the same if you take Percocet.
 - d. If the issue is that we don't want people driving under the influence of any drug, why are we only selecting marijuana? Because we have the science behind us to test for marijuana.

- e. Is the science strong enough to prove that the 5 nanogram level is where an individual reaches impairment? Yes. The amount is high right after ingestion and then tapers off.
- f. What is the science behind the testing? The testing is sensitive so there may be some litigation around the test. The time limit on a blood draw is restricted to two hours. The penalties are the same as DUI Per Se.
- g. Can someone speak about chronic users having a certain amount of THC in their blood stream? The majority opinion was that a chronic user may have a 1 or 2 nanogram level. When you reach the 5 nanogram level, you are impaired. Metabolized THC can show up for weeks. The non-metabolized THC only shows up within two hours of ingestion. Urinalysis tests are not effective in measuring non-metabolized THC.

Vote: Passed

2. Amend or clarify the express consent statute as necessary to clearly establish that in the event an officer establishes probable cause to believe that a person is Driving Under the Influence of Marijuana, the person shall submit to a blood test, if necessary.

- a. This is to make it clear that the officer can demand blood from the driver. What is the probable cause for an officer to demand a blood test?
- b. DUID is already illegal. When an officer stops someone on the street, it is because the driver did something that brought him/her to the officer's attention. If an officer believes that drugs are involved (legal or not, prescribed or not), an officer can ask for a blood draw test. But the request for a blood test must be for a specific drug. This is not the creation of a DUI drug crime that already exists, but a definition of what the DUI limit is for marijuana.
- c. It is the obvious impairment of the driver after he/she has blown into an alcohol monitoring device and the results are "zero".
- d. When a prosecutor presents a DUI case for trial, an expert will be called in to testify what level of alcohol brings impairment. The same holds true if an individual is charged with DUID.

Vote: Passed

3. Amend current administrative laws relating to driver's license revocations and hearings on revocation as applicable to establish a mandatory license revocation of three months for a first offense (DUI/DUID), one year for a second offense (DUI/DUID) and two years for a third or subsequent offense (DUI/DUID) resulting from Driving Under the Influence of Marijuana "per se." ~~Also establish a one-year revocation for any refusal to submit to a blood test.~~

- a. Under the DUI alcohol provisions, there are many ways of addressing compliance. We do not have that kind of technology for marijuana. This recommendation addresses the revocation of the offender's driver's license.
- b. The last line about refusals can be stricken. Current law addresses this issue.

Vote: Passed

4. **Amend the administrative laws where necessary to establish that a violation and/or conviction for Driving Under the Influence of Marijuana Per Se shall mirror the impacts of conviction or a per se DUID violation related to the administrative penalties and procedures for reinstatement of a license, insurance via SR-22 and court ordered treatment programs as reasonably necessary to effect the purpose of treating a DUID marijuana as seriously as a DUI alcohol offense.**

- a. This is to mirror what is currently found in the DUI statutes.
- b. Was there any discussion about an inability for an individual to drive? With DUI, an individual can ask for reconsideration of their revocation if they have an interlock device. There is no comparable instrument when discussing a drug violation. The working group decided that it was not unfair to have the revocation penalty. They also discussed having no driver's license penalty.

Vote: Passed

5. **Clarify wherever necessary in the DUI and administrative statutes the inclusion of DUID/Marijuana Per Se as a qualifying offense for application any multiple offense DUI/DWAI/habitual/UDD/vehicular homicide and assault convictions and penalties.**

- a. The administrative repercussions for an eight-point violation are virtually the same as those given for a twelve-point violation.

Vote: Passed

Parole Pilot Program:

1. **Creation of a parole pilot program to further encourage and facilitate parole approval and services for inmates currently incarcerated for low level drug felonies.**

- a. This is to address the category of drug offender that was the focus of HB 1352. We wanted to identify the current population that is in prison serving their sentence based on the same offense category. Some of these individuals have reached or passed their parole eligibility date.
- b. There are certain criteria these individuals have to meet. Such as: no current or prior felony convictions for violent crimes, no crimes against children, no weapons offenses or a sex offense, must have a good record of conduct, must have no active felony or immigration detainer, must have participated in DOC recommended programs and must have an approved parole plan.
- c. Are these individuals who, had they been sentenced under 1352, would not have been incarcerated? Yes. There are other offenders there under different charges that we would like the Parole Board to look at those with mental health issues, but this recommendation does not include them.
- d. There is a concern that individuals are not paroled because they do not have a parole plan. And parole plans are not developed because it is not certain that individuals will be paroled.
- e. This is looking at offenders with use or possession offenses and to work on the treatment of these offenders.

- f. Can we look at these criteria for a larger population of inmates that should be considered for Parole?
- g. What is the pilot project? How long will it go? What metrics are being used to measure effectiveness? How will this work with offenders that have had repeated appearances in drug court and failed to seek treatment? The pilot is to bring back the preparation of a parole plan for a specific group of offenders. The metrics are still being developed. For example, the pre-parole planning will look at an offender's failure in drug court. Has there been a possible change in attitude of the offender toward treatment?
- h. The Parole Board retains discretion at the end of the day.
- i. Are Parole Board members in support of this? The parole representative voted for this, however, this is playing catch-up. There is a larger population that should be looked at.
- j. As a pilot project, this would allow a high degree of scrutiny of a small group of people and would measure the program's worth prior to expanding the pool.

Vote: Passed

Habitual Offenders:

1. **No simple possession offense – (Class 6 felony or attempt or conspiracy to commit simple possession) - shall be used as a qualifying offense (i.e. the new offense) for the filing of habitual criminal offense charges under CRS 18-1.3-801.**
 - a. This was recommended, in part, last year by the Structure Committee that a simple possession offense (a Class 6 felony) shall not be used as a triggering/qualifying offense for the filing of a habitual offense.
 - b. Can it still be included as a predicate offense? Yes.
 - c. This change of law would be effective only for new offenses committed after the 2011 effective date of the bill.
 - d. This makes a distinction between possession offenders and distributors.

Vote: Passed

Sealing of Records

In reviewing the sealing of records, the group built on current law which allows for the sealing of arrest records as well as drug possession records after ten years. Relevant research shows that an incremental approach has value. A shorter waiting time is effective for lesser offenses. Research shows that if seven years have passed after the last offense, with no intervening crimes, an offender's risk to reoffend is about the same as someone who has never offended. District attorneys retain their discretion to object. These recommendations are for possession cases only. If anyone re-offends, the sealing is undone. The records remain open to law enforcement for any purpose.

1. For the purposes of employment, an individual can say there is no public record. Research shows a strong correlation between employment and recidivism. This has an element of government sanctioned deception.
2. Can a record be sealed if there are pending arrests? Or is it an actual conviction that you cannot have? It is the actual conviction you cannot have. If you have something pending, you cannot apply for sealing until it is resolved.
3. Will these affect juveniles? No. The Juvenile expungement is under Title 19. These changes only apply to Title 18 charges. Juvenile cases are not open to the public.
4. Is there a timeline associated with district attorney approval/objection? Due to current budget constraints, the district attorneys' offices may have difficulty reviewing these requests. The district attorney should look at the risk factors of an individual when determining if an objection will be filed.

Recommendations:

1. **Drug offense PO – can be sealed three years from final disposition of the case or release from supervision whichever is later. Sealing is automatic upon filing if pay the fee and prove there is no arrest, charge or summons resulting in conviction within the required waiting period. No notice to DA required.**
 - a. A small amount of marijuana and possession of drug paraphernalia are the only petty drug offenses that exist. Three years seems to be a fair number.
Vote: Passed
2. **Drug offense M2 and M3 - can be sealed three years from final disposition of the case or release from supervision whichever is later. Sealing is automatic if notice is sent to the DA and no objection is filed and petitioner demonstrates that there is no arrest, charge or summons resulting in a conviction during the waiting period.**
 - a. This allows for sealing after three years but allows for opposition from the district attorney.
 - b. How does a petitioner demonstrate “no arrest, charge or summons resulting in a conviction?” The petitioner would go to the CBI and request a records check. The records check would be brought to the court as evidence.
Vote: Passed
3. **Drug offense M1 – can be sealed five years from final disposition of the case or release from supervision whichever is later. Sealing is automatic is no objection is filed by the District Attorney and petitioner demonstrates there is no arrest, charge or summons resulting in conviction during the waiting period.**
Vote: Passed
4. **Drug possession – F6 and F5 - can be sealed seven years from final disposition of the case or release from supervision whichever is later. Sealing requires filing of a petition and notice to the DA. If no objection by DA, it is discretionary with the**

court whether there needs to be a hearing after review of the submission and determination if statutory criteria met. (Same as current practice but is codified.) The petitioner must demonstrate there is no arrest, charge or summons resulting in conviction during the waiting period.

Vote: Passed

- 5. Any other drug felony offenses – 10 years from final disposition or release from supervision. This will be allowable only with DA approval (veto power). Court review required re: the statutory factors. The petitioner must demonstrate there is no arrest, charge or summons resulting in conviction during the waiting period.**

Vote: Passed

- 6. DA approval shall be guided by the current statutory criteria in CRS 24 -72-308.5. Add this concept into the statutory language to provide for some consistency and transparency.**

Vote: Passed

- 7. The time lines as stated above shall be applicable but DA approval shall always be required if DA approval is required under current law. (DA approval is required for all drug offenses committed before July 1, 2008. For possession offenses between July 1, 2008 and July 1, 2011 – assuming that to be the effective date of this new bill - there will be a ten year waiting period and DA notice. Court approval shall always be required.)**

Vote: Passed

- 8. Allow sealing for all old drug petty offenses without DA approval (veto power) but with court approval.**

Vote: Passed

- 9. Under current law, there is no limitation on number of cases/criminal episodes that are eligible for sealing after the statutory waiting period. Statute should be amended to include an additional criterion that the court and the DA shall consider in consenting to/granting a petition to seal the number of convictions and the dates of the offenses.**

- a. Discussed the ability to seal more than one record. The court and district attorney should consider if the multiple cases are interrelated.**

Vote: Passed

- 10. Amend 24-72-308.5(2)(d) to state that defendant and law enforcement agencies may properly reply upon inquiry that no “public” conviction records exist with respect to the defendant.**

Vote: Passed

The next question is finding sponsorship for these recommendations. Commission members will begin working on this.

Sex Offender/Offenses Education:

David Kaplan gave an overview of the Sex Offender / Offenses Task force. Two working groups were developed, one a Registration Working Group, the other is a Refinement Working Group. These items will be brought to the Commission for vote during the December meeting.

Refinement Working Group Topics:

1. Repeal the current mandatory prison sentence provisions for commission of Unlawful Sexual Contact by Force, Threat or Intimidation (F4) and allow the offense to be probation eligible. Sexual Assault by Force, Threat or Intimidation (F-3) is probation eligible. The less egregious conduct of contact should not carry a greater penalty.
2. Extend the amount of time available on a deferred judgment and sentence for a sex offense requiring treatment and clarify when the period of the deferred begins. The maximum time frame of a deferred judgment is four years. However, treatment may be required for a minimum of five years. This creates the situation where an offender may not or cannot complete treatment within the deferred time frame. Additionally, it can take two months between the entry of the plea and the beginning of the treatment. The proposed "fix" would allow the deferred judgment to be extended for an additional two years, with consent of the parties. Also, the period of the deferred sentence should begin at the time that supervision and treatment can begin.
3. Fix the currently unconstitutional provision in CRS 18-1.3-1004(4). The statute permits the sentencing court to convert an otherwise determinate sentence to an indeterminate sentence for certain crimes related to child prostitution and child pornography. This violates the defendant's due process. The Court makes the change based on a finding of fact, rather than through a jury decision. This violates the Blakely finding. There are two potential solutions: repeal it or amend the section to permit the defendant to consent to a judge's review that may result in the sentence conversion from a determinate to an indeterminate sentence.
 - a. Has the Sex Offender Management Board weighed in on this? Yes, SOMB representatives serve on the Sex Offense/Offender Task Force.
 - b. There are two things before us. We can either repeal this or change it. What does the group want to do? Repeal it and make it clean? Or leave it open to plea arrangements?
 - c. Why would we want to fix it as opposed to repeal it? For prosecutors, it provides a tool that would be available to fix a problem that wouldn't be available any other way. Prosecutors have to make a plea offer prior to knowing the risk assessment of the offender. If a prosecutor offers a plea, and then the risk assessment comes in that

indicates the offender is a lower risk, the judge would have the discretion to “fix” the deal. Both options will remain on the table and be voted upon next month.

4. Lower the availability of the “mistake of age” defense from 15 to 14 years. Scientific evidence shows that children are physically maturing at an earlier age. Additionally, 14-year-olds are generally in high school which results in more cases now than there used to be. It allows the jury to decide whether the defendant can enter information about the age of the victim.
 - a. This subject should also be reviewed in the Juvenile Task Force.
5. Add a requirement of a 4-year age difference to the crime of Sexual Assault on a Child by One in a Position of Trust, where the victim is 15, 16, or 17. The law of “Position of Trust” is a broad term that has been applied to an 18-year-old shift supervisor at Taco Bell who supervises a 15-year-old employee. Position of Trust does not rely on an age difference. The Sex Assault on a Child crime does include the 4-year age difference provision.
 - a. This subject should also be reviewed in the Juvenile Task Force

The Refinement Working Group continues to work on the following concepts:

1. Consider shortening the time spent on indeterminate probation or parole before a defendant may request to be terminated from supervision. A conviction for an F-4 carries a minimum 10 years on probation, while an F-3 or F-2 carries a minimum of 20 years. Some offenders can get through treatment before the minimum 10 or 20 years and should be able to request the Court or Parole Board to end their supervision.
2. Explore changing the front-end sentence structure for the indeterminate crimes. The Task Force has been unable to come to consensus in finding any possible F-4 felonies that are presently subject to indeterminate sentences that may be changed to determinate sentences. The proposal to be considered will more closely follow the legislative intent of the Lifetime Supervision law. The task force is exploring a determinate prison sentence combined with lifetime supervision following parole.

Registration Working Group Topics:

1. Changes the process for de-registration for those juvenile offenders and adult deferred judgment offenders currently eligible for de-registration. There are certain offenders that are allowed to petition for de-registration. We need to look at who is eligible for de-registration. Termination from supervision and de-registration should happen at the same time. This should apply to juvenile probation and parole. This should be discussed with the Juvenile Task Force.
2. Change the fee structure for registration to be a standard fee for up to \$25.00 per registration with a maximum of \$100 (per quarter) for those required to register 4 times a year. Some jurisdictions are setting higher fees to drive offenders out of their area. Conversely, there are offenders who register in a jurisdiction with a lower fee, but they don't really live there.

3. Change the registration/cancellation of registration process in CRS 16-22-108 to provide for simultaneous re-registration and cancellation. When an offender moves, he/she is to cancel the registration in the old location and you have fourteen days to register in the new location. The goal is to have a simultaneous process – when the offender registers in the new location, the cancellation is done automatically in the old location. This would be for registrations in Colorado only. Douglas County has a software program (STAR system) that would make this registration/cancellation process for easy to implement. Douglas County is offering this software program for free.
4. When an offender is in jail for longer than 5 days, there should be an automatic re-registration (assuming the offender is registered in a different locality). The Task Force is working on the details necessary to clarify for sheriffs, jails and detention centers when they would have to register someone.
5. Define “transient” in the statute and provide a method to register those offenders who are homeless or have no permanent residence. Requires law enforcement to register transient offenders, but requires the transient to check in with law enforcement every 30 days to verify location and status. Requires law enforcement to issue a transient card to these offenders that can be “stamped” or otherwise validated to show compliance. This has been effective in other states.

There are several items that require additional study:

1. Create a risk assessment classification system that can be entered into the registry so law enforcement (and perhaps community) can have a better idea of risk. The STAR system would allow for this.
2. Create a better community notification system by allowing for some guided discretion for local law enforcement agencies. The Adam Walsh does not require community notification. If the state is found out of compliance with Adam Walsh, we lose approximately 10% of the JAG funding or approximately \$300,000.
3. Mandate state to prepare a de-registration advisement document that local law enforcement and other law enforcement agencies can use to advise eligible persons how to de-register.
4. Include in a registration bill all language needed for equivalency criteria for SVP.
5. Add some clean up language identified by law enforcement and Judicial Department on time frames around registration.
6. Expand 16-22-103(5)(a) – allowing some judicial discretion for registration for certain age offenders and certain types of offenses.
7. Consider the elimination of underlying factual basis prospectively.

8. Eliminate mandatory ISP for failure to register and consider inserting the affirmative defense from Adam Walsh about inability to register.
9. Clarify the registration requirement for jails and detention centers when persons are being held pre-trial.
10. Clarify the venue for Failure to Register
11. Compare our statutes with Adam Walsh crimes to see if Colorado has crimes for which we require register that could become discretionary.

Sentencing Task Force; New Legislation Analysis/Legislative Council Proposal:

1. The Sentencing Task Force is looking at a proposal that would allow for additional analysis of criminal justice bills. This process is intended to guide the legislature in making the policy determination of whether the new law is needed. There is a desire to send objective information to the legislature to help them make this determination.
 - a. Legislative Council could develop a memorandum that would be transmitted along with the fiscal note to the Committee. The memorandum would be for new offenses or the change of status of an offense.
 - b. The memorandum would answer the following questions: Could the offense be charged under existing law? Is the classification consistent with existing offenses that are of a similar degree? How often would the offense be charged?
 - c. Legislative Council would need the authority to prepare this memorandum.
 - d. Legislative Council would be able to reach out to subject matter experts of their own choosing.

Next meeting will be December 6, 2010. There is a possibility that additional time may be needed during that meeting. Please put a 10:00am start time on your calendars. We'll let you know if this changes.

The meeting adjourned at 4:19 p.m.