

CCJJ: Sex Offense/Offender Task Force Recommendations

December 10, 2010

[Handout with Amendments and Vote Outcome]

PASS/FAIL or other notations indicate the outcome from the December 10, 2010 meeting of the Colorado Commission on Criminal and Juvenile Justice. Other grayed text indicates corrections made during the CCJJ review and discussion.

Registration Working Group

PASS - FY11-SO #1. Create a simultaneous termination hearing/de-registration process for those juvenile offenders currently eligible for de-registration under CRS 16-22-113 (e).

Reason: Many offenders who are eligible to de-register fail to do so or are uninformed of the option.

Proposed fix: Amend the relevant statutes as necessary in CRS Titles 16 and 19. This would not change the substance of current law in CRS 16-11-113, only the procedures. This does not alter which juvenile offenders would be eligible for de-registration. This will create a simultaneous hearing/process to terminate jurisdiction/supervision and registration. Proper notice can be given to all parties and the court will have treatment records for juvenile. This should apply to juvenile probation and juvenile parole. Victim notice would still be accomplished.

PASS - FY11-SO #2. Create a simultaneous termination hearing/de-registration process for adult offenders with a deferred judgment who are currently eligible for de-registration under CRS 16-22-113 (d).

Reason: Many offenders who are eligible to de-register fail to do so or are uninformed of the option.

Proposed fix: Amend the relevant statutes as necessary in CRS Titles 16 and 18. This would not change the substance of current law in CRS 16-11-113, only the procedures. This does not alter which **ADULT juvenile** adult offenders would be eligible for de-registration. This will create a simultaneous hearing/process to terminate jurisdiction/supervision and registration. Proper notice can be given to all parties. This would not change the substance of current law, only the procedures. Victim notice would still be accomplished.

PASS - FY11-SO #3. Modify CRS 16-22-108 (7) to establish a consistent fee structure for sex offender registration.

Reason: This is a state-wide issue raised by law enforcement requiring attention due to the reported problems created by the inconsistencies in registration procedures and the wide disparity in registration fees. The registration fee was not intended to pay for the administration of registries. It is more important that sex offenders are registered than strict adherence to the collection of the registration fee.

Proposed fix: This recommendation would include the following statutory elements:

- Change CRS 16-22-108 to allow for a fee up to \$25.00 for each initial annual or quarterly re-registration.
- No allowable fee for updates to address, employment, email, etc or registration cancellations.
- It would allow for collection of fees civilly and would include specific language that allows a jurisdiction to waive the registration fee, if the offender is indigent.
- This would require law enforcement to accept sex offender registrations, even if the offender does not have the money to pay the fee.

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Registration Working Group (cont'd)

PASS - FY11-SO #4. Create a simultaneous registration/cancellation of registration process in CRS 16-22-108 for registrations within Colorado.

Reason: This is a state-wide issue raised by law enforcement. The lag time between a cancellation and a new registration would be eliminated along with unnecessary failure to register charges. This would reduce the burden on offenders who are often required to return to a previous location to cancel a registration before being allowed to register in a new jurisdiction.

Proposed fix: Law enforcement agencies would simultaneously submit a notice of registration cancellation to a previous jurisdiction when registering an offender. This would be more efficient for offenders and law enforcement. This would only apply to registries within the state of Colorado. An electronic registration system would allow for streamlined implementation of this improved process. For example, the STAR system developed in Douglas County and being implemented in Denver County is a secure, web-based system to manage sex offender registration, allowing for multi-jurisdictional access.

PASS - FY11-SO #5. Add and clarify language in CRS 16-22-106 (3) (a) regarding the registration of offenders sentenced to or held in jail.

Reason: The added language requires re-registration of offenders held in jail pending court disposition for more than 5 days. This re-registration and notification to law enforcement will prevent unnecessary investigation into offenders presumed to have failed to register. The clarified language for offenders sentenced to jail would specify that the re-registration requirement applies to offenders sentenced to jail for *any offense* and not just sex offenses and would include a notification to the previous registration jurisdiction.

Proposed fix: Amend CRS 16-22-106 (3) (a) (I) as follows:

IF A PERSON WHO IS REQUIRED TO REGISTER PURSUANT TO 16-22-103 IS HELD IN A COUNTY JAIL PENDING COURT DISPOSITION FOR ANY OFFENSE FOR MORE THAN FIVE (5) WORKING DAYS, THE SHERIFF OF THE COUNTY IN WHICH THE COUNTY JAIL IS LOCATED, OR HIS OR HER DESIGNEE, SHALL TRANSMIT TO LOCAL LAW ENFORCEMENT OF THE JURISDICTION IN WHICH THE PERSON WAS LAST REGISTERED AND THE CBI CONFIRMATION OF THE PERSON'S REGISTRATION ON A STANDARDIZED FORM PROVIDED BY THE CBI, USING THE ADDRESS OR ADDRESSES AT WHICH THE PERSON WILL RESIDE WHILE IN CUSTODY OF THE COUNTY JAIL, AND INCLUDING THE PERSON'S DATE OF BIRTH, A CURRENT PHOTOGRAPH OF THE PERSON, AND THE PERSON'S FINGERPRINTS.

(II) If a person who is required to register pursuant to 16-22-103 is sentenced to a county jail FOR ANY OFFENSE, the sheriff of the county in which the county jail is located, or his or her designee, as soon as possible following sentencing, shall transmit TO LOCAL LAW ENFORCEMENT OF THE JURISDICTION IN WHICH THE PERSON WAS LAST REGISTERED AND the CBI confirmation of the person's registration on a standardized form provided by the CBI, using the address or addresses at which the person will reside while in custody of the county jail, and including the person's date of birth, a current photograph of the person, and the person's fingerprints.

(III) The provisions of this paragraph (II) shall apply to persons sentenced on or after January 1, 2005.

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Registration Working Group (cont'd)

WITHDRAWN* - FY11-SO #6. Define “transient” in statute and provide a method to register those offenders who are homeless or have no permanent residence.

Reason: This is a state-wide issue raised by law enforcement. The current method to register and track transient offenders is inadequate.

Proposed fix: This recommendation includes the following statutory elements for drafting:

- Require law enforcement to register transient offenders.
- Require law enforcement to issue a transient card to these offenders that can be “stamped” or otherwise validated to show compliance.
- Require transient offender to check in with law enforcement every 30 days to verify location and status; this “check-in” would not be considered a re-registration event.
- Does not create a new failure-to-register crime just for offenders who are transient. Rather, the failure to check in would be considered “disobedience of a lawful order” that is punishable by up to 10 days in jail. This offense alone would not subject the offender to the requirements of evaluation and identification required in CRS 16-11.7-104 or the treatment required by CRS 16-11.7-105.
- Monitor the effectiveness of the system to determine whether warrants and additional sanctions should be considered for missing the 30-day check-in.
- Determine whether “card-stamping authority” could be extended to officers on the street, parole officers and probation officers to increase the options for the 30-day check-in.
- Accommodate, in the definition of “transient,” elements necessary to describe those offenders who live in an automobile (The current statute already includes offenders who live in motor homes or trailers, 16-22-108 (3) (a.5), CRS).

* No vote. Task Force withdrew the recommendation for additional study and development.

PASS - FY11-SO #7. Modify CRS 16-22-108 (1) (b) to allow annual re-registration to occur within 5 business days of the offender’s birthday.

Reason: The change would eliminate a burden to time registration exactly on or around an offender’s birth date. The statute currently requires re-registration to occur on an offender’s birthday or on the first business day following a weekend or holiday birthday. The change will allow an offender to register within 5 business days before or after the offender’s birthday.

Proposed fix: Amend CRS 16-22-108 (1) (b) as follows:

Except as otherwise provided in paragraph (d) of this subsection (1), each person who is required to register pursuant to section 16-22-103 shall reregister ~~on~~ WITHIN FIVE BUSINESS DAYS OF the person's first birthday following initial registration and annually ~~on~~ WITHIN FIVE BUSINESS DAYS OF the person's birthday thereafter. ~~If a person's birthday falls on a Saturday, Sunday, or holiday, the person shall reregister on the first business day following his or her birthday.~~ Such person shall reregister pursuant to this paragraph (b) with the local law enforcement agency of each jurisdiction in which the person resides ~~on~~ WITHIN FIVE BUSINESS DAYS OF his or her birthday, in the manner provided in paragraph (a) of this subsection (1).

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Registration Working Group (cont'd)

PASS - FY11-SO #8. Modify CRS 16-22-108 (3) to add “within 5 business days” as the time required to re-register due to the changes in life circumstances listed in the statute.

Reason: The statute currently includes no time reference for the requirement to re-register. The change will provide a clear expectation for this registration requirement to occur within 5 business days before or after the change in offender circumstances detailed in the subsection.

Proposed fix: Amend 16-22-108 (3) as follows: Any person who is required to register pursuant to section 16-22-103 shall be required to register WITHIN 5 BUSINESS DAYS each time such person:

PASS - FY11-SO #9. Add to the place of trial venues in CRS 18-1-202 (12) the county where an offender completed his/her last registration.

Reason: This is a state-wide issue raised by law enforcement. The change provides another option for law enforcement to deal with offenders who fail to register.

Proposed fix: Amend CRS 18-1-202 (12) as follows:

If a person commits the offense of failure to register as a sex offender as provided in section 18-3-412.5, the offense is committed and the offender may be tried in the county in which the offender was released from incarceration for commission of the offense requiring registration or in the county in which the offender resides or in the county in which the offender is apprehended OR THE COUNTY WHERE AN OFFENDER COMPLETED HIS/HER LAST REGISTRATION.

PASS - FY11-SO #10. Eliminate the language requiring mandatory ISP as a condition of probation or parole for failure to register in CRS 18-3-412 (2) (b) and 18-1.3-1007 (1.5).

Reason: The change provides judicial discretion to determine whether ISP is appropriate.

Proposed fix: Amend CRS 18-3-412 (2) (b) as follows:

Any person convicted of felony failure to register as a sex offender shall be sentenced pursuant to the provisions of section 18-1.3-401. If such person is sentenced to probation, the court ~~shall~~ MAY require, as a condition of probation, that the person participate until further order of the court in an intensive supervision probation program established pursuant to section 18-1.3-1007. If such person is sentenced to incarceration and subsequently released on parole, the parole board ~~MAY shall~~ require, as a condition of parole, that the person participate in an intensive supervision parole program established pursuant to section 18-1.3-1005.

And: Amend CRS 18-1.3-1007 (1.5) as follows:

In addition to the persons specified in subsection (1) of this section, the court ~~shall~~ MAY require any person convicted of felony failure to register as a sex offender, as described in section 18-3-412.5, and sentenced to probation to participate, as a condition of probation and until further order of the court, in the intensive supervision probation program established pursuant to this section.

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Registration Working Group (cont'd)

PASS - FY11-SO #11. Add affirmative defense for failure to register from Adam Walsh.

Reason: Although, in practice, charges may infrequently be filed under these circumstances, an affirmative defense for failure to register should be established in statute to accommodate uncontrollable circumstances. The Adam Walsh Act provides a model for this affirmative defense.

Proposed fix: Introduce into statute, regarding 16-22-103 CRS and 18-3-412.5 CRS, for example...

AFFIRMATIVE DEFENSE. In a prosecution for a violation of failure to register, it is an affirmative defense that (1) uncontrollable circumstances prevented the individual from complying; (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and (3) the individual complied as soon as such circumstances ceased to exist. [See Adam Walsh Act, Title 1, Sec. 141, § 2250 (b)]

PASS - FY11-SO #12. Request State Public Defender's Office to create informational documents for offenders on registration/re-registration and de-registration.

Reason: Many offenders are uninformed regarding requirements to register and eligibility to de-register. There are instructions on the state judicial web site but more substantive documentation and timely distribution of information with advice would be advantageous.

Proposed fix: Request the Colorado State Public Defender's Office to prepare a registration and re-registration information fact sheet and a de-registration fact sheet that public defenders, local law enforcement and other law enforcement agencies can use to advise eligible persons on the registration, re-registration and de-registration processes. The SPDO should collaborate with relevant agencies and stakeholders. Provide the documents to CCJJ and the Sex Offender/Offense Task Force or any successor subcommittee for review.

FAIL - FY11-SO #13. Add language to CRS 16-13-902 (and relevant sections in Title 18) on SVP equivalency criteria.

Reason: Currently missing from statute is the language to establish the process and who is responsible to evaluate sex offenders entering from other states who may meet the definition of sexually violent predator. This has led to inconsistencies across jurisdictions when dealing with offenders from particular states.

Proposed fix: The language for this statutory fix was included in the vetoed HB 10-1364, Concerning the SOMB. Amend CRS 16-13-902 (5) as follows:

"Sexually violent predator" means a sex offender who is identified as a sexually violent predator pursuant to section 18-3-414.5, C.R.S., or who is found to be a sexually violent predator or its equivalent in any other state or jurisdiction, including but not limited to a military or federal jurisdiction. FOR PURPOSES OF THIS SUBSECTION (5), "EQUIVALENT", WITH RESPECT TO AN OFFENDER FOUND TO BE A SEXUALLY VIOLENT PREDATOR OR ITS EQUIVALENT, MEANS A SEX OFFENDER CONVICTED IN ANOTHER STATE OR JURISDICTION, INCLUDING BUT NOT LIMITED TO A MILITARY, TRIBAL, TERRITORIAL, OR FEDERAL JURISDICTION, WHO HAS BEEN ASSESSED OR LABELED AT THE HIGHEST REGISTRATION AND NOTIFICATION LEVEL IN THE JURISDICTION WHERE THE CONVICTION WAS ENTERED AND WHO SATISFIES THE AGE, DATE OF OFFENSE, AND CONVICTION REQUIREMENTS FOR SEXUALLY VIOLENT PREDATOR STATUS PURSUANT TO COLORADO LAW. A SEX OFFENDER CONVICTED IN ANOTHER JURISDICTION WHO IS DESIGNATED AS A SEXUALLY VIOLENT PREDATOR BY THE DEPARTMENT OF PUBLIC SAFETY FOR PURPOSES OF COLORADO LAW SHALL BE NOTIFIED OF HIS OR HER DESIGNATION AND SHALL HAVE THE RIGHT TO APPEAL THE DESIGNATION IN DISTRICT COURT.

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Registration Working Group (cont'd)

PASS - FY11-SO #14. Add Second degree kidnapping, CRS 18-3-302 (3) (a), as a sex offense when the underlying offense is the offense of sexual assault.

Reason: It was assumed that offenders convicted of the second degree kidnapping where a sex assault was involved would simultaneously be convicted of the sex offense. This has not occurred. Some violent offenders convicted of second degree kidnapping have not been convicted of the associated sex crime and are therefore not required to register.

Proposed fix: Add second degree kidnapping, CRS 18-3-302 (3) (a), as a sex offense when the underlying offense is the offense of sexual assault to the offenses requiring registration, CRS 16-22-102(9).

PASS - FY11-SO #15. Add tribal and territorial offenders in the list of those required to register, CRS 16-22-103 (1) (b), pursuant to Adam Walsh Act requirements.

Reason: To enhance compliance with Adam Walsh requirements and improve consistency in Colorado statute.

Proposed fix: Amend CRS 16-22-103 (1) (b) as follows:

Any person who was convicted on or after July 1, 1991, in another state or jurisdiction, including but not limited to a military, TRIBAL, TERRITORIAL or federal jurisdiction, of an offense that, if committed in Colorado, would constitute an unlawful sexual offense, as defined in section 18-3-411 (1), C.R.S., enticement of a child, as described in section 18-3-305, C.R.S., or internet luring of a child, as described in section 18-3-306, C.R.S.; and

SUPPORTED* - FY11-SO #16. Create an improved risk assessment classification of registered sex offenders and a public notification system that is more functional to law enforcement and more informative to the community.

Reason: The current registry does not provide gradation of risk beyond those categorized as SVP and everyone else. An improved risk designation would be helpful to law enforcement and would inform the public which offenders may be a public risk. The degree of risk would determine the method by which public notification could occur. Not all registrations necessarily warrant a public meeting, which could be reserved for those offenders who may present the greatest risk to the public.

Proposed fix: As per 16-11.7-103 (4) (c.5), the SOMB working in collaboration with representatives of the Division of Criminal Justice, Judicial and the Probation Division, the Division of Parole, the Department of Corrections, and law enforcement should revise the risk assessment screening system to assign sex offenders to categories based on risk and devise a set of notification options commensurate with the level of risk. This initial screening based on static risk factors should not preclude subsequent assessments of risk during the monitoring and treatment of sex offenders in justice agencies such as the department of corrections, probation, parole, or community corrections.

* No vote. CCJJ members support continued work in this area.

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Refinement Working Group

PASS - FY11-SO #17. Repeal the current mandatory prison sentence provisions for commission of Unlawful Sexual Contact by Force, Threat, or Intimidation, 18-3-404 (3).

Reason: Unlawful *Sexual Contact* by Force, Threat, or Intimidation is a mandatory prison F4, while *Sexual Assault* by Force, Threat, or Intimidation (which involves sexual penetration or intrusion, not merely sexual contact) is a probation eligible F3. The less egregious conduct of contact should not carry a necessarily greater penalty.

Proposed fix: Amend 18-3-404(3) as follows:

(3) If a defendant is convicted of ~~the class 4 felony of unlawful sexual contact pursuant to paragraph (b) or subsection (2)~~ SUBSECTION (1.5) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406; ~~except that this subsection (3) shall not apply if the actor engages in the conduct described in paragraph (g) of subsection (1) of this section.~~

PASS - FY11-SO #18. 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.

Reason: For the majority of sex offenders, treatment will take longer than 4 years. However, the statute currently only permits a maximum of 4 years for a deferred judgment. Also, because a sex offense requires an evaluation before treatment can begin, there is often a two-month lag between the entry of the plea for the deferred and the beginning of that treatment. The period of the deferred needs to begin at the time supervision and treatment can begin.

Proposed fix: Amend the Deferred Judgment statute, C.R.S. 18-1.3-102, to provide that for offenses listed in C.R.S. 16-11.7-102(3) (i.e., those requiring sex offender treatment), the court is permitted, with the consent of the parties, to extend the length of the Deferred Judgment period for an additional two years for good cause. In addition, amend the same statute to make clear that the period of the deferred for any plea begins the date the plea is entered if no presentence investigation report or offense specific evaluation is ordered; but if a presentence investigation or offense specific evaluation is ordered, the case is to be set over for another date so those reports can be completed. At that subsequent court date, the period of the deferred will begin.

PASS - FY11-SO #19. Fix the currently unconstitutional provision in C.R.S. 18-1.3-1004(4).

Reason: This section of the statute purports to permit the sentencing court to convert an otherwise determinate sentence to an indeterminate sentence for certain crimes related to child prostitution and child pornography (often called commercial or economic sex crimes). This can be done if the Court finds, based on an SVP analysis, that the defendant is likely to commit sexual assault or sexual assault on a child in the future. There are two problems with this provision. First, it is unconstitutional, as it permits increasing the maximum penalty to which a defendant is exposed based on a fact-finding by the Court, rather than a jury. Second, even if such a Court finding were sufficient, the SVP analysis is by definition inapplicable to these cases, because the first question in the SVP analysis is whether the defendant was convicted on a sexual assault or sexual assault on a child. In these cases, the defendant was not.

Proposed fix: Two possible solutions were discussed, and the task force agreed to bring them both forward.

TASK FORCE OPPOSED - 19 (a): Repeal subsection (4) of 18-1.3-1004.

TASK FORCE APPROVED - 19 (b): Amend subsection (4) to permit its use provided the defendant agrees to have the judge make such a finding; and require the development of a different analytical tool to be used that makes sense in this area. The prosecutors involved in the discussion have used this provision as a plea bargain, where an otherwise indeterminate charge is plead to one of these crimes, with an agreement that the Court would have the power to make the statutory finding. This gives a useful tool to resolve cases that may otherwise have to go to trial.

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Refinement Working Group (cont'd)

FAIL - FY11-SO #20. Lower the availability of the “mistake of age” defense from 15 years to 14 years.

Reason: Current law provides that if a child victim is 15, 16, or 17 years old, the defendant can offer as an affirmative defense that he reasonably believed the child was 18. However, if the victim is 14 or younger, no such evidence can be offered, regardless of whether the belief was reasonable or not. Given the scientific evidence that children are physically maturing at an earlier age, and the fact that 14-year-olds are generally in high school, there are likely to be more cases now than there used to be where it would be reasonable to believe that a 14-year-old is 18. It would be fair to permit the defendant to offer evidence for the jury’s consideration on this point.

Proposed fix: Amend C.R.S. 18-1-503.5 as follows:

- (1) If the criminality of conduct depends on a child being younger than eighteen years of age and the child was in fact at least ~~fifteen~~ FOURTEEN years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older. This affirmative defense shall not be available if the criminality of conduct depends on the defendant being in a position of trust.
- (2) If the criminality of conduct depends on a child’s being younger than eighteen years of age and the child was in fact younger than ~~fifteen~~ FOURTEEN years of age, there shall be no defense that the defendant reasonably believed the child was eighteen years of age or older.
- (3) If the criminality of conduct depends on a child being younger than fifteen years of age AND THE CHILD WAS IN FACT FOURTEEN YEARS OF AGE, IT SHALL BE AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT REASONABLY BELIEVED THE CHILD TO BE EIGHTEEN YEARS OF AGE OR OLDER. THIS AFFIRMATIVE DEFENSE SHALL NOT BE AVAILABLE IF THE CRIMINALITY OF CONDUCT DEPENDS ON THE DEFENDANT BEING IN A POSITION OF TRUST. ~~it shall be no defense that the defendant did not know the child’s age or that the defendant reasonably believed the child to be fifteen years of age or older.~~
- (4) IF THE CRIMINALITY OF CONDUCT DEPENDS ON A CHILD BEING YOUNGER THAN FIFTEEN YEARS OF AGE AND THE CHILD WAS IN FACT YOUNGER THAN FOURTEEN YEARS OF AGE, IT SHALL BE NO DEFENSE THAT THE DEFENDANT DID NOT KNOW THE CHILD’S AGE OR THAT THE DEFENDANT REASONABLY BELIEVED THE CHILD TO BE EIGHTEEN YEARS OF AGE OR OLDER.