

**Colorado Commission on Criminal and Juvenile Justice
Sentencing Reform Task Force**

**Sentence Structure Working Group
Stakeholder Listening Session #3: Felony Sentencing**

MINUTES

July 27, 2021 / 2:00PM-5:00PM
Virtual Meeting

ATTENDEES

WORKING GROUP MEMBERS

Maureen Cain, Office of the State Public Defender
Christie Donner, Colorado Criminal Justice Reform Coalition
Jessica Jones, Defense Attorney
Tom Raynes, Colorado District Attorneys' Council
Dan Rubinstein, District Attorney, 21st Judicial District (JD)

ABSENT

Michael Dougherty, *Working Group Leader*, District Attorney, 20th JD
Valarie Finks, Crime Victim Compensation, 1st JD
Lisa Wayne, Defense Attorney

STAFF

Jack Reed, Division of Criminal Justice
Damien Angel, Division of Criminal Justice
Laurence Lucero, Division of Criminal Justice
Joe Varrin, Legal Intern, Office of the State Public Defender

PARTICIPATING STAKEHOLDERS

Heather Dugan, Colorado Parks and Wildlife
Liz Porter Merrill, Public Defender's Office and Restorative Justice Council
Ty Petersburg, Colorado Parks and Wildlife
Katie Ruske, Division of Criminal Justice, Office of Community Corrections
Glenn Tapia, Division of Probation Services
Joe Thome, Division of Criminal Justice
Barb West, Lived Experience
Dan West, Lived Experience
Dean Williams, Department of Corrections

Note: The Sentence Structure Working Group also held Listening Sessions on: June 21, 2021 (#1) and June 22, 2021 (#2).

<p>Welcome & Agenda <i>Maureen Cain,</i> <i>Working Group Member</i></p>	<p>Discussion</p> <p>Maureen Cain called the meeting to order on behalf of absent Working Group Leader Michael Dougherty. Maureen called the meeting to order, provided a brief overview of the agenda and asked Working Group members and invited attendees and stakeholders to introduce themselves with each stakeholder presentation.</p>
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<p>Issue/Topic</p> <p>Restorative Justice Considerations <i>Liz Porter Merrill,</i> <i>Public Defender's Office and</i> <i>Restorative Justice Council</i></p>	<p>Discussion</p> <p>Liz Porter Merrill introduced herself and explained her commitment to Colorado and to making the state safer by supporting restorative justice and transformative justice policies, principles, and practices. She focused her time on how to better meet the needs of victims and defendants to promote accountability, healing and recidivism reduction.</p> <p>Liz’s presentation offered the following key points and takeaways:</p> <ul style="list-style-type: none"> ● Many recent studies both locally and nationally on crime victim voices show the majority of crime victim survivors prefer the options of accountability and healing rather than over-incarceration and punishment. ● Restorative justice (RJ) is defined within the criminal legal system as a process whereby the harmed person and the people who have caused harm, along with their respective support people, come together (sometimes along with community members) to discuss what happened, the impact, accountability, and what can be done to repair the harm to the greatest extent possible. ● RJ is defined in the juvenile code as well as the criminal code. ● There are more than 40 provisions in Colorado statute addressing restorative justice and restorative justice practices. ● Liz provided an overview of restorative justice laws including: <ul style="list-style-type: none"> - RJ is enumerated as one of the purposes of the criminal code. - The Victim Rights Amendment (VRA) has two provisions related to RJ including that a victim has the right to be informed about the possibility of RJ. The VRA also requires district attorneys to inform victims about the availability of RJ. - In regards to sentencing, RJ is an enumerated purpose of the sentencing statute which requires courts to consider RJ; however, this is not always happening. - RJ may also be used as the sentencing consequence instead of punishment. It can be used <i>with</i> incarceration or probation – or as a stand-alone alternative. <p>Liz shared a handout titled, <i>Colorado Restorative Justice Law</i>.¹ She noted RJ at its best empowers victims and survivors and offers healing justice through dialogue. It is more powerful and impactful for everyone if people are voluntarily brought together for the exchange of energy that happens when there is a conversation about the harm that was caused. Another powerful</p>
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¹ See *Colorado Restorative Justice Law* available under “Materials - Working Groups” at ccjj.colorado.gov/ccjj-srtf.


<p style="text-align: center;">Issue/Topic Restorative Justice Considerations <i>Liz Porter Merrill,</i> <i>Public Defender's Office and</i> <i>Restorative Justice Council</i> (continued)</p>	<p>component of RJ is that it is active instead of passive, and the defendant has the opportunity to hold themselves accountable - which is far greater at reducing recidivism and increasing public safety.</p> <p>Liz offered four recommendations, summarized as follows:</p> <ol style="list-style-type: none"> 1. <u>Protect Open and Honest Dialogue during the RJ Process.</u> The goal is to cultivate and encourage an open apology including accountability but without the fear of self-incrimination. The Children’s Code has included a confidentiality provision directly into the definition of RJ and something similar could be instituted in the adult realm. 2. <u>Create an Affirmative Right for People harmed to Request RJ.</u> People are often not informed of victim services. Statute refers to the “possibility” or “availability” of services and this language instead should state that there is “a <i>right</i> to services.” 3. <u>Increased Investment in Community-Based RJ Infrastructure & Victim Services to Ensure Equal Access Statewide.</u> There are a whole class of victims who cannot access financial support and services which is unaddressed. There is only one organization in the state that provides resources to victims who do not report incidents to police or prosecutors. A large proportion of instances are not reported by victims to authorities. There is a need invest in “front-line” organizations and in communities that are going to abide by RJ and transformative justice values serving those referred by the criminal justice system but also those referred by community-based programs (that are outside the criminal justice system). 4. <u>Enumerate RJ as a Stand-Alone Sentencing Alternative.</u> Where appropriate, RJ could be the entirety of the sentence, rather than existing solely as an option within a restitution agreement that is part of a “broader” sentence. This would allow some cases to be resolved as an RJ collaboration between the defendant and the victim and/or community. <p>DISCUSSION/QUESTIONS</p> <p>Working Group members asked questions and discussed the presentation topics.</p> <ul style="list-style-type: none"> • Maureen Cain asked whether the Children’s Code includes a confidentiality provision for both the victim and defendant. <ul style="list-style-type: none"> ○ Liz replied that the confidentiality provisions prevents any statement from being used against the defendant in court. Liz added the entire RJ process should be protected and separate from the legal system, so whatever happens during that process is solely between the participants. Often, participants will sign an agreement of confidentiality among themselves. • Jessica Jones asked Liz to expand on her statement about the current lack of accountability in restorative justice regarding confidentiality. <ul style="list-style-type: none"> ○ Liz explained that in the current system if someone makes an incriminating statement, it can be used in court against them. And, if someone apologizes it can be used in court against them, rather than protecting efforts toward an apology.
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<p style="text-align: center;">Issue/Topic Stakeholder: Restorative Justice Considerations <i>Liz Porter Merrill,</i> <i>Public Defender's Office and</i> <i>Restorative Justice Council</i> (continued)</p>	<ul style="list-style-type: none"> ○ Tom Raynes noted that the issue is that someone does have the ability to make a statement in RJ, and then be silent about it during the trial. However, if they <i>lie</i> during the trial, that is when statements made during RJ can be used in court. Dan Rubenstein raised the confidentiality of victim statements made during the RJ process. ● Maureen pointed out that many crimes of violence are intra-familial or between people who know each other, and this can lead some victims to be fearful of RJ participation. <ul style="list-style-type: none"> ○ Liz shared that RJ can be extremely impactful in interpersonal violence cases, but that, yes, some are hesitant due to shared histories. ● Dan Rubenstein asked about the recommendation regarding affirmative rights for people to request RJ. <ul style="list-style-type: none"> ○ Liz explained that the recommendation is based on situations where victim advisement is omitted, under the false assumption that the restorative justice option is not available in that particular community. District attorneys and/or victims are unaware that they <i>may</i> actually have access to the restorative justice process. The availability or possibility of RJ is not offered consistently. Liz added that there are highly skilled, trained RJ facilitators in Colorado who are willing to travel anywhere in the state, but this is not well known. The group agreed the messaging needs to be better structured and communicated. ● Christie Donner asked about RJ models and the value in terms of personal accountability in regards to RJ in cases that <i>don't</i> involve the victim. She asked whether current statute allows for "victimless" or victim-proxy options, or if the process requires the traditional victim/offender dialog. <ul style="list-style-type: none"> ○ Liz noted the statute is broad enough to encompass these types of surrogate/proxy situations; however, when the victim, defendant, AND community are <u>all</u> part of the process it is considered a <i>fully</i> restorative process. With that said, surrogate/proxy situations can also be extremely effective and transformative for defendants. ● Dan noted other difficult dynamics that can affect an RJ process. He offered an example case where, although the District Attorney's office was supportive, law enforcement (LE) imposed limitations on the process due to safety and security concerns. Ultimately, LE prohibited the RJ process altogether. <ul style="list-style-type: none"> ○ Liz replied the RJ facilitators are experts at how to use the RJ principles and values to support dialogue and transformation in a variety of circumstances and under varied conditions. This is one of the struggles around education and awareness...how to communicate the degree of adaptability of facilitators and of the RJ process. Liz added that access can often be a problem in jails and the Department of Corrections when safety and security concerns supersede and overwhelm the advantages and opportunities that the RJ process can provide. <p>Maureen thanked Liz for her presentation and input.</p>
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Issue/Topic	Discussion
<p>Stakeholder: Lived Experience Considerations <i>Dan and Barb West, Lived Experience</i></p>	<p>Dan West, on behalf of his wife Barb, offered that their son is serving time in prison, and they hope to have some impact and influence on sentencing reform. Dan explained that his son Alex suffered from severe depression and chronic anxiety. At the time of his crime, Alex was enrolled at Metro State University and was on prescribed medication and was “self-medicating.” During a psychotic episode, he constructed a situation to result in a “suicide-by-cop” by reporting a convenience store robbery to police. Police shot Alex while he was in his car and he lost control of the vehicle and struck and injured a police officer. In the end, Alex took a plea deal of 33 years in prison for the Attempted Homicide of a Police Officer (with no prior criminal history), which is longer than many actual murder sentences.</p> <p>Dan and his wife were motivated to participate in this stakeholder process, particularly regarding the topic of consistency in sentencing. The Wests expressed that, if there were a way to codify sentencing consistency, it could possibly eliminate a lot of varied extraneous influences and considerations. They added that Alex has accepted full responsibility for the event, including being shot, and wrote a letter of apology. He has also, finally, received good medical care at DOC and is on medication that has addressed his depression and anxiety. The Wests suggested reforms may be in order for these types of cases, possibly via a sentencing commission, or some other such avenue.</p> <p>Tom Raynes thanked the Wests for sharing their story. He added that, while this group is focusing on certainty in sentencing and revising the sentencing grid, there are other efforts underway regarding “Second Look Legislation.” Maureen also thanked the Wests and Christie Donner offered to meet with them offline to further discuss possible efforts related to cases like their son’s.</p>

Issue/Topic	Discussion
<p>Stakeholder: Probation Considerations <i>Glenn Tapia, Division of Probation Services</i></p>	<p>Glenn Tapia (Division of Probation Services), speaking for himself and to an extent the Probation Division, outlined that his presentation of data and suggestions might solve some problems but, admittedly, could create others.</p> <p>Glenn offered a presentation describing Probation supervision typologies and crime types with key points as follows:²</p> <ul style="list-style-type: none"> ● Glenn explained he will share some data about what people do (to penetrate the criminal justice system) and who they are from a risk/needs perspective, and where the criminal justice system fails people. ● The law and the sentencing code deal with <i>cases</i>, but downstream, in corrections, the work is around dealing with <i>people</i>, and oftentimes these things are incongruent. ● Probation uses a Risk-Needs-Responsivity (RNR) Typology that aggregates risk/need data into a single continuum of risk to determine the appropriate level of intervention. This continuum includes five categories from high risk to low risk:

² See *Probation Typologies & Crime Types* available under “Materials - Working Groups” at ccjj.colorado.gov/ccjj-srtf.

<p>Issue/Topic Stakeholder: Probation Considerations <i>Glenn Tapia,</i> <i>Division of Probation Services</i> (continued)</p>	<p>Risk-Need-Responsivity (RNR) Typologies</p> <p>Higher Risk LS: Limit Setter (Higher risk) <i>Few protective factors/more intensive criminal history</i></p> <p>CC: Casework Control (Higher risk) <i>High behavioral health needs/chronic instability</i></p> <p>CM: Case Management (Lower to Medium risk) <i>High “daily life” needs (employment, financial, housing, etc.)</i></p> <p>SIT: Selective Intervention-Treatment (Lower risk) <i>Substance abuse/mental health needs or both</i></p> <p>Lower Risk SIS: Selective Intervention-Situational (Lower risk) <i>No treatment needs</i></p>  <ul style="list-style-type: none"> ● Glenn observed that he sometimes questions why many of the lower-risk “SIS” individuals are even on Probation. This group has a success rate of nearly 80%. ● The largest group (approximately 60% of the population) is the “CM” group. They are essentially lower to medium risk people who have needs that essentially are extrinsic/environmental in nature. This group has a success rate of around 70%. ● Individuals in the “CC” and “LS” groups struggle most on probation. ● The “CC” individuals typically have treatment needs related to mental health, substance abuse, and/or both (dual diagnosis). They have penetrated the criminal justice system typically due to their unmet treatment needs. Success rates for this group are in the high 20- to low 30-percent range. ● Glenn believes that a central question to address is whether Probation is the best place for individuals with substantial intrinsic needs (the “CC” and “LS” categories), whose issues might be beyond the capacity of probation or more specifically the services available in probation to address. ● Christie pointed out that community corrections is not doing well with this population either. There’s an escalation of punitive consequence for those who don’t succeed on probation, but the “next level” (community corrections and DOC) is no better in addressing such high levels of need. She added that the pervasiveness of traumatic brain injury among criminal justice populations further complicates the ability of some persons to achieve success in the currently-designed systems. ● Maureen asked whether persons in these categories are being served or are appropriate for problem-solving courts. Glenn indicated that some in this high need population were involved in such programs, but there continues to be a tendency to select participants based on aspects of their case, rather than the needs of the person. ● Glenn reiterated the importance of viewing people through an objective lens that is focused on an individual’s risk/needs, rather than determinations based on the offense(s) included in their criminal case. ● Glenn shared a graph titled, “Distribution of Typologies within the Most Serious Crime Type Conviction: FY19 Terminations,” showing the proportion
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<p>Issue/Topic Stakeholder: Probation Considerations <i>Glenn Tapia,</i> <i>Division of Probation Services</i> (continued)</p> <p>ACTION Glenn will provide additional data to contribute to WG deliberations (broken out by gender and ethnicity)</p>	<p>of Typology categories across offense types. He summarized that, from a behavioral health perspective, there really is no relationship between what type of crime people commit and their risk/need profile. For example, substance addiction is not confined only to those involved in a drug case. Such individuals are found across the spectrum of offense types. (Alternatively, Glenn displayed the proportion of offense types within each of the Typology categories, demonstrating the same point.)</p> <ul style="list-style-type: none"> ● Christie reiterated the difficulties inherent in the “responsivity aspect” of the RNR model regarding the treatment of and intervention with people with additional layers of complex issues, like traumatic brain injuries. Their behavior sometimes is labeled as uncooperative or even anti-social and therefore “high-risk,” rather than understanding that their behavior and capacity to respond is affected by the impairments stemming from an undiagnosed brain injury. In some cases, the assessments might categorize individuals as engaging in criminal or anti-social thinking who report suspicion of authority figures, disdain for rules, or dislike of law enforcement when that may reflect the necessities one’s life experience. ● Glenn explained that, in the first thirty days on probation, a person’s typology category is assigned via a risk/need assessment, a self-report substance abuse assessment, mental health information, and criminal history information. ● Tom noted it would be beneficial to have data about a person’s Typology profile prior to sentencing. Maureen pointed out that oftentimes even the presentence investigation report (PSI-R) is waived during sentencing, further limiting the available and often critical information. ● The group discussed the difference between probation and community corrections. Katie Ruske from the Office of Community Corrections explained that community corrections is different in that it provides a setting where there is 24/7 staff supervision while people work on behavior change and learn skills for living in the community. ● Christie asked whether the use of this Typology continuum has improved probation outcomes regarding recidivism or program completion? The approach is still in the early phase and data collection will continue through this fiscal year. “Completion data” indicates poor outcomes at the higher levels of risk and good outcomes at the medium and lower levels of risk, as mentioned earlier. ● The discussion returned to the failures to effectively match (sentence) individuals to the level of community-based service that is needed, whether that placement should be, for example, in probation, a non-residential community corrections program or a residential program in community corrections. <p>Glenn will send additional Probation data to assist with deliberations. Christie asked that it include breakdowns by gender and ethnicity. Members thanked Glenn for his feedback.</p>
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Issue/Topic	Discussion
<p>Stakeholder: Parks and Wildlife Considerations <i>Ty Petersburg, Colorado Parks and Wildlife</i></p>	<p>Ty Petersburg, Assistant Chief of Law Enforcement for Colorado Parks and Wildlife (CPW) addressed the group. He explained that he will make a request regarding a couple of Parks and Wildlife statutes.</p> <p>There are only two charges referred to often in Colorado Revised Statute Title 33 that have classified felony charges. The first is §33-6-113, C.R.S., <i>Illegal sale of wildlife</i>. The other is §33-6-117, C.R.S., <i>Willful destruction of wildlife - legislative intent</i>.</p> <p>Ty explained the first statute, §33-6-113, C.R.S., <i>Illegal sale of wildlife</i>, deals with the commercialization of wildlife that hits the black market. For example, a bear’s gallbladder is highly sought after and has a higher street value than cocaine. He added the illegal sale of wildlife globally is also behind human smuggling, along with drug and weapons smuggling. This statute is critical in terms of addressing smuggling wildlife out of Colorado. The statute also addresses illegal outfitting of hunting and fishing and primarily occurs when outfitters take people out to hunt and fish illegally, which is a very large market with a significant windfall in Colorado. People who operate in this world are also often involved in drugs, illegal firearms, theft, and other crimes.</p> <p>Ty explained that CPW sees more charges in connection with the second statute, §33-6-117, C.R.S., <i>Willful destruction of wildlife - legislative intent</i>. This statute is a Class 5 Felony and is applicable in two ways. The first is when somebody kills a big game animal, detaches the trophy parts, and leaves the rest of it to rot. The second provision is when somebody shoots or takes big game and completely abandons it. These are scenarios that give hunters and hunting nationwide a bad reputation. It is also an issue important to voters and many Coloradans.</p> <p>QUESTIONS</p> <ul style="list-style-type: none"> ● Tom asked Ty what was more important to PWC, the level of the felony, or the potential sentencing range. <ul style="list-style-type: none"> ○ Ty replied that maintaining these crimes as Class 5 Felonies would be satisfactory and that he would not advocate bumping up the severity by any means. As for jail time, there is not a push to bump up the sentence length either. If someone goes to prison for this, it will likely be in conjunction with another serious crime in one of the scenarios mentioned previously. ● Tom asked if there were any incentives for self-reporting when someone accidentally kills the wrong animal (e.g. accidentally shoots an elk instead of a deer). <ul style="list-style-type: none"> ○ Ty replied there is an “incidental take” charge that carries a fine of \$100-\$1000 dollars and is used when someone shoots the wrong animal. Additionally, there are regulatory charges for failing to abide by the regulations of a license, which is an unclassified misdemeanor or petty offense with a \$100 fine.

<p>Issue/Topic Stakeholder: Parks and Wildlife Considerations <i>Ty Petersburg, Colorado</i> Parks and Wildlife (continued)</p>	<ul style="list-style-type: none"> ○ Ty explained there are approximately 20-40 cases annually for the Class 5 §33-6-117, C.R.S., Willful destruction of wildlife - legislative intent, and probably 10 cases a year of §33-6-113, C.R.S., Illegal sale of wildlife. He added, however, there are probably five times that number of cases that remain unsolved. ● Maureen asked about two of the Class 6 Felonies including §33-4-101, C.R.S., <i>License agents - reports - board of claims - penalty for failure to account</i>, and §33-12-104, C.R.S., <i>Pass and registration agents - reports - board of claims - unlawful acts – rules</i>. <ul style="list-style-type: none"> ○ Ty replied that in his 20-year history, he does not recall filing either of the two charges concerning failure to remit funds, and that he is fine with reducing both of those down to misdemeanors. <p>Ty summarized the CPW’s only request is to not downgrade the two crime categories he addressed.</p>
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<p>Issue/Topic Public Comment & Adjourn <i>Maureen Cain,</i> Working Group Member</p>	<p style="text-align: center;">Discussion</p> <p>Maureen called for any additional input from attendees and/or public comment.</p> <p>Dean Williams, Executive Director of the Department of Corrections and Sentencing Reform Task Force member, emphasized the importance of the data modeling related to the work, specifically regarding prison population projections. Working Group members agreed that the discussion around “off-ramps” (community transition options) and progression through the system will be critical during this process.</p> <p>Maureen solicited any additional business or updates and hearing no further business, she adjourned the meeting.</p>
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Next Meeting

August 3, 2021 / 3:00 PM – 5:00 PM (Virtual Meeting)*

Meeting information will be emailed to members and posted at, colorado.gov/ccjj/ccjj-meetings

* *The Aug. 3 meeting was subsequently rescheduled for Aug. 10.*