

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

**Sentence Structure Working Group**  
**MINUTES**

February 7, 2023 / 3:00PM-5:00PM  
Virtual Meeting

**ATTENDEES**

**WORKING GROUP MEMBERS**

Michael Dougherty, *Working Group Leader*, District Attorney/ 20<sup>th</sup> Judicial District (JD)  
Maureen Cain, Office of the State Public Defender  
Valarie Finks, Crime Victim Compensation/ 1st JD  
David Kaplan, Defense Attorney  
Tom Raynes, Colorado District Attorneys' Council  
Dan Rubinstein, District Attorney/ 21st JD

**STAFF**

Stephané Waisanen, CCJJ Staff, Division of Criminal Justice  
Kevin Ford, Division of Criminal Justice  
Laurence Lucero, CCJJ Staff, Division of Criminal Justice  
Jack Reed, Division of Criminal Justice

**ABSENT**

Jessica Jones, Defense Attorney

**GUESTS**

J.R. Hall, Chair/ Colorado State Board of Parole  
Jocelyn Rhymer, Mothers Against Drunk Driving (MADD)  
Mike Tessean, Director/ Colorado State Board of Parole

Issue/Topic	Discussion
<p>Welcome  <i>Michael Dougherty,                      Working Group Leader</i></p>	<p>Michael Dougherty, Working Group Leader welcomed participants and reminded members that the Motor Vehicle Theft (<b>FY23-SR #02</b>) and the Reclassification of Selected Felony Crimes (<b>FY23-SR #03</b>) recommendations, approved by the Sentencing Reform Task Force at the January 11, 2023 meeting, were approved at the extra Commission meeting on January 27, 2023.</p> <p>He provided an update on behalf of the Study Group and mentioned that, because there were interdependent issues in the provisions related to Extreme Indifference Homicide/Vehicular Homicide, Mandatory Consecutive Sentencing, Habitual Sentences, and Extraordinary Risk, the group decided to create a single recommendation with four sections.</p>

Issue/Topic	Discussion
<p>Recommendation FY23-SR #04                      Change Felony Crime Classifications and Sentence Enhancement Provisions of the Criminal Code [Statutory]  <i>Michael Dougherty, WG Leader                      Maureen Cain, WG Member</i></p>	<p>The meeting goal was to review and discuss the <b>Recommendation FY23-SR #04. Change Felony Crime Classifications and Sentence Enhancement Provisions of the Criminal Code [Statutory]</b>. A preliminary presentation of the recommendation will occur tomorrow (February 8, 2023) at the Sentencing Reform Task Force meeting.</p> <p>Maureen Cain offered additional background information on the four elements of the proposal and encouraged feedback from the Working Group.</p> <p><b><u>Recommendation FY23-PR #04</u></b>                      Amends, appends, and reclassifies multiple provisions of statute related to felony crimes. This recommendation comprises four elements that each include a description, discussion, and proposed statutory language for the following:</p> <ol style="list-style-type: none"> <li>1) Extreme Indifference Homicide/Vehicular Homicide [ELEMENT 4.1]</li> <li>2) Mandatory Consecutive Sentencing and Post-Conviction Review [ELEMENT 4.2]</li> <li>3) Habitual Sentences [ELEMENT 4.3]</li> <li>4) Extraordinary Risk [ELEMENT 4.4]</li> </ol> <p><b><u>Element 4.1. Extreme Indifference Homicide and Vehicular Homicide</u></b></p> <ol style="list-style-type: none"> <li>1) 18- 3-101(1) – First-degree murder. Maintain first-degree murder as a class 1 felony except for 18-3-101(1)(d) Extreme Indifference. Insert the following language: “<i>First-degree murder in violation of (1)(d) is a class 2 felony and punishable as an extraordinary risk crime in the aggravated range</i>” (Note: Range is 24 to 64 years). Or call it second-degree murder as a class 2. Or create a new name: Extreme Indifference Murder – class 2</li> <li>2) 18-3-101(1)(d) [Insert as a separate section] - Attempted extreme indifference homicide resulting in bodily injury/serious bodily injury – F3</li> <li>3) 18-3-101(1)(d) – Attempted extreme indifference homicide - no injury - F4</li> </ol> <p><i>Note: This revision is to better align with current law 18-3 -202(1)(c) - extreme indifference first degree assault – intent to commit SBI and cause SBI is F3 – and attempted extreme indifference assault – F4.</i></p>

<p><b>Issue/Topic</b>                  Recommendation FY23-SR #04                  Change Felony Crime Classifications                  and Sentence Enhancement                  Provisions of the Criminal Code                  [Statutory]  <i>Michael Dougherty, WG Leader</i>  <i>Maureen Cain, WG Member</i>                  (continued)</p>	<p>4) 18-3-107 – First-Degree murder of a peace officer (PO), Firefighter (FF) or EMT is performance of their duties. Re-write this section to eliminate references to the Death Penalty. Preserve extreme indifference homicide of PO, FF or EMT as a class 1 felony but fix the Miller vs. Graham<sup>1</sup> Supreme Court issue and make this crime 40 to life for juveniles.</p> <p>5) 8-12-107.5(3) - Illegal discharge of a weapon – knowingly – F4 from F5 and recklessly – F5</p> <p>6) 18- 3-106 Vehicular Homicide (VH) – Create an extraordinary risk (ER) aggravated penalty range for aggravated VH (range will be: 10 to 32 years) for the following aggravating factors: VH qualifies as felony DUI, VH is committed while eluding or attempting to elude law enforcement, or VH is committed while in flight from the commission of another criminal felony offense not including a traffic offense. Preclude the filing of extreme indifference homicide for aggravated VH.</p> <p>Discussion</p> <p>Valerie Fink expressed concern that multiple victims are not included as an aggravator. She reiterated her belief that the range for vehicular homicide should be higher (currently a maximum of 12 years), and there should be an aggravator when there are multiple victims. Families of vehicular homicide victims struggle to understand that the maximum sentence for such a crime is 12 years.</p> <p>Michael and Maureen acknowledged Valarie’s concern and added that the Study Group engaged in robust discussions when reviewing vehicular homicide and the aggravators. The group also reviewed other states’ and Colorado’s current sentencing schemes. The aggravating factors take into account culpable mental state and actions of the individual (eluding law enforcement, leaving the scene of a crime, and driving under the influence).</p> <p><b><u>ELEMENT 4.2. MANDATORY CONSECUTIVE SENTENCING AND POST-CONVICTION REVIEW</u></b></p> <p><b>4.2. Description</b>                  This Element 4.2 creates a “safety valve” at sentencing and a post-conviction review when mandatory consecutive sentences are imposed for crime of violence offenses arising out of the same incident.</p> <p>1) Create a “safety valve” at sentencing to allow the court an additional option other than imposing consecutive sentences when the defendant has been convicted in a single criminal episode of multiple offenses if the parties agree to waive ineligibility or the following factors are proven by a preponderance of the evidence by the defendant at a sentencing hearing:</p>
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<sup>1</sup> Refers to a Supreme Court ruling that juveniles cannot be sentenced to life without parole without certain findings. This represents a cleanup from *Senate Bill 2016-181 (Sentencing Juveniles Convicted of Class 1 Felonies)*.

<p><b>Issue/Topic</b>                  Recommendation FY23-SR #04                  Change Felony Crime Classifications                  and Sentence Enhancement                  Provisions of the Criminal Code                  [Statutory]  <i>Michael Dougherty, WG Leader</i>  <i>Maureen Cain, WG Member</i>                  (continued)</p>	<ul style="list-style-type: none"> <li>• Defendant has no prior VRA felony convictions, and</li> <li>• Defendant did not use or possess a firearm or explosive in the commission of the offense or threaten the use of a firearm or explosive during the commission of the offense, and</li> <li>• The defendant’s action did not result in serious bodily injury.</li> </ul> <p>2) Amend Post-conviction review statutes - - allow for additional time/additional factors for an 18-1.3-406 sentence modification review when mandatory consecutive sentences are imposed as required by 18-1.3-406(1) (a) (i.e., COV offenses “arising out of the same incident”). This expanded review is only for COV sentences imposed as mandatory consecutive. The current timeframe (120 days) and factors (unusual and extenuating circumstances) regarding reconsideration allowable for all COV mandatory, but not mandatory consecutive sentences, remains the same.</p> <ul style="list-style-type: none"> <li>• Defendant may file for a modification of the sentence after 2 calendar years up to 5 calendar years after the judgment of conviction is final.</li> <li>• Defendant may only file once.</li> <li>• Defendant is entitled to court-appointed counsel and an evidentiary hearing.</li> <li>• Mandatory victim notification and opportunity to be heard at hearing.</li> </ul> <p>Standard of review. The court may modify a sentence when the case involves substantial mitigating factors and the defendant has demonstrated actions toward rehabilitation evidenced by positive programming and engagement at the CDOC that justify a modification of sentence. <u>The defendant may also request that the court consider a significant change in the law.</u></p> <p>The Working Group recommends the prospective application of this element and not retroactive.</p> <p><i>Prior to the SRTF presentation on Wednesday (2/8) staff will rewrite the above underlined sentence to better reflect the intended meaning (that the judge’s reconsideration decision reflects any relevant changes to law since the defendant was sentenced).</i></p> <p>Discussion</p> <p><i>Is the recommendation referring to the current definition of serious bodily injury? Dan Rubenstein explained that the Colorado District Attorneys’ Council (CDAC) recommended a recent legislative change in the injury definition (in addition to death or a disfigurement). Tom Raynes interjected there was a hearing on the bill last night (2/6/2023), and the definition for serious bodily injury will include penetrating knife or gunshot wound.</i></p>
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<p style="text-align: center;"><b>Issue/Topic</b></p> <p>Recommendation FY23-SR #04 Change Felony Crime Classifications and Sentence Enhancement Provisions of the Criminal Code [Statutory] <i>Michael Dougherty, WG Leader</i> <i>Maureen Cain, WG Member</i> (continued)</p>	<p><b><u>Element 4.3. Habitual Sentences</u></b></p> <p><b>4.3. Description</b> This Element 4.3 amends the reconsideration provisions for Habitual sentences. The current sentencing scheme is maintained with the following changes:</p> <ul style="list-style-type: none"> <li>• After serving 10 calendar years in the Department of Corrections, the defendant may request a reconsideration if the sentence imposed is greater than 24 years.</li> <li>• A defendant may only file once.</li> <li>• A defendant is entitled to court-appointed counsel and an evidentiary hearing.</li> <li>• Mandatory victim notification and opportunity to be heard at the evidentiary hearing. This would include all victims of any offenses that served as convictions for the purpose of imposing a habitual sentence.</li> </ul> <p>Standard for review. The court may modify a sentence when the case involves mitigating factors and the defendant has demonstrated actions toward rehabilitation evidenced by positive programming and engagement at the CDOC that justify a modification of a sentence.</p> <p>The re-sentencing range is the mid-point of the aggravated range to the top end of the current sentence imposed (e.g., the 3 times the maximum of the presumptive range<sup>2</sup> or the 4 times the maximum of the presumptive.<sup>3</sup> A sentence cannot be increased at the hearing.</p> <p>The application of this element shall be prospective, not retroactive.</p> <p>Discussion</p> <p>Valarie reminded the group that the funding for victim services had decreased, and victims go through the criminal process with little help. She expressed concern about victims having to revisit their trauma at the various stages of a sentence (reconsideration, parole hearings, etc.) and adding reconsideration processes, such as the mandatory consecutive sentencing proposal (the “3 to 5-year” reconsideration proposal above) or the habitual offender reconsideration (at 10 years), will add significant stress to their experience. Has the Working Group considered excluding these processes for VRA crimes vs. non-VRA crimes?</p> <p>Maureen responded the consensus of the Study group was that five years was not enough time and agreed that ten years was sufficient time served in prison for an individual to demonstrate change.</p>
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<sup>2</sup> This is the increased sentence for the “little habitual.”

<sup>3</sup> This is the increase sentence for the “big habitual.”

<p><b>Issue/Topic</b>                  Recommendation FY23-SR #04                  Change Felony Crime Classifications                  and Sentence Enhancement                  Provisions of the Criminal Code                  [Statutory]  <i>Michael Dougherty, WG Leader</i>  <i>Maureen Cain, WG Member</i>                  (continued)</p>	<p><b><u>ELEMENT 4.4. EXTRAORDINARY RISK</u></b></p> <p><b>4.4. Description</b>                  This Element 4.4 eliminates provisions of Colorado criminal statutes related to Extraordinary Risk for class 5 and 6 felonies.</p> <p><b>4.4. Discussion</b>                  In an attempt to simplify parts of the criminal code, the extraordinary risk classification was eliminated for almost all misdemeanor offenses in Senate Bill 2021-271. In discussions around felony offenses, it was determined that the extraordinary risk ranges have value for more serious offenses and an extraordinary risk range was added for one Class 2 felony (see recommendation Element 4.1). The discussion recognized that the elevated range for Class 5 and 6 felonies are unnecessary.</p> <p>Michael Dougherty believed that “second-look” sentencing proposals will possibly be introduced during this legislative session from entities outside of the Commission that have not received similar consideration, discussion, and analysis that occurred at the Working Group.</p>
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<p><b>Issue/Topic</b>                  Public Comment  <i>Michael Dougherty,</i>  <i>Working Group Leader</i></p>	<p><b>Discussion</b>                  Michael asked if there was any public comment, and with none, he reviewed the next steps.</p>
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<p><b>Issue/Topic</b>                  Next Steps &amp; Adjourn  <i>Michael Dougherty, WG Leader</i></p>	<p><b>Discussion</b>                  Michael informed the group that an overview of the recommendation will be presented to the Sentence Reform Task Force tomorrow, with a vote at an extra SRTF meeting on February 22. The SRTF will present the preliminary recommendation to the Commission at an extra CCJJ meeting on February 24, with a final presentation and vote planned for the CCJJ meeting on March 10.</p> <p>Michael thanked members for their feedback and adjourned the meeting.</p>
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**Next Meeting**

Tuesday, March 7, 2023 / 3:00 pm - 5:00 pm

**Details of the next meeting will be forwarded to the group and posted on the CCJJ web and calendar ([ccjj.colorado.gov/ccjj-meetings](http://ccjj.colorado.gov/ccjj-meetings) & [ccjj.colorado.gov/ccjj-calendar](http://ccjj.colorado.gov/ccjj-calendar)).**

*[NOTE: The March 7 meeting was subsequently canceled.  
 The next meeting is scheduled April 11, 2023.]*