

**Sentencing Reform Task Force
MINUTES**

February 8, 2023 / 1:30PM-4:00PM
Virtual Meeting

ATTENDEES

TASK FORCE MEMBERS

Rick Kornfeld, *Task Force Co-chair*, Defense Attorney
Michael Dougherty, *Task Force Co-chair*, District Attorney/ 20th Judicial District (JD)
Taj Ashaheed, Second Chance Center
Maureen Cain, Office of the State Public Defender
Valerie Finks, Victim Compensation Program/ DA Office, 1st JD
Kazi Houston, Rocky Mountain Victim Law Center
David Kaplan, Defense Attorney
Brian Mason, District Attorney/ 17th JD
Andrew Matson, Colorado CURE
Greg Mauro, Denver Division of Community Corrections
Heather McClure, Adams County Division of Community Safety & Well-Being
Jeffrey Nowacki, Colorado State University
Tom Raynes, Colorado District Attorneys' Council
Michael Rourke, District Attorney/ 19th JD
Dan Rubinstein, District Attorney/ 21st JD
Andre Stancil, Executive Director/ Colorado Department of Corrections
Adrian Vasquez, Police Chief/ Colorado Springs Police Department

STAFF

Richard Stroker, CCJJ Consultant
Laurence Lucero, CCJJ Staff, Division of Criminal Justice
Jack Reed, Research Director, Division of Criminal Justice
Kevin Ford, CCJJ Staff, Division of Criminal Justice
Courtney Leapley, CCJJ Staff, Division of Criminal Justice
Stephané Waisanen, CCJJ Staff, Division of Criminal Justice

ABSENT

Christie Donner, Colorado Criminal Justice Reform Coalition
Bob Gardner, State Senator/ Senate District 12
Julie Gonzales, State Senator/ Senate District 34
Serena Gonzales-Gutierrez, State Representative/ House District 4
Justin "JR" Hall, Colorado State Board of Parole
Dave Hayes, Police Chief/ Estes Park Police Department
Jes Jones, Defense Attorney
Sarah Keck, Court Services/ Judicial Branch
Glenn Tapia, Director, Div. of Probation Services/ Judicial Branch

Issue/Topic	Discussion
<p>Welcome & Review of Agenda <i>Michael Dougherty & Rick Kornfeld</i> <i>Task Force Co-chairs</i></p>	<p>Rick Kornfeld, Task Force Co-chair, welcomed attendees. Rick reviewed the agenda and solicited any additions or corrections to the January 11 and 25 minutes. A motion was offered and seconded to approve the minutes. Task Force members unanimously approved the January 11 and 25 minutes. Brian Mason and Andre Stancil abstained from voting on the minutes.</p> <p>Michael Dougherty, Task Force Co-chair, welcomed new Task Force member Andre Stancil, the new Executive Director for the Department of Corrections.</p>

Issue/Topic	Discussion
<p>Presentation: Recommendation FY23-SR#04 <i>Michael Dougherty, Leader</i> <i>Sentence Structure Working Group</i></p>	<p>Michael acknowledged the substantial contributions from the Sentence Structure Working Group members to the recommendation offered today. Michael provided a brief background regarding the Sentence Reform Task Force creation and the task to address sentencing topics delineated in the 2020 Biennial letter from Governor Polis. The Sentence Structure Working Group reviewed and developed a recommendation, including four areas outlined in the Biennial Letter: Extreme Indifference Homicide and Vehicular Homicide, Mandatory Consecutive Sentences, Habitual Sentences, and Extraordinary Risk.</p> <p>Michael presented the preliminary Recommendation FY23-SR #04. Change Felony Crime Classifications and Sentence Enhancement Provisions of the Criminal Code [Statutory]</p> <p>Amends, appends, and reclassified multiple provisions of statute related to felony crimes. This recommendation comprises four elements that each include a Description, a Discussion, and Proposed Statutory Language for the following:</p> <ul style="list-style-type: none"> • Extreme Indifference Homicide and Vehicular Homicide [ELEMENT 4.1] Includes revisions and/or amendments to: <ul style="list-style-type: none"> §18-3-102. Murder in the first degree. §18-3-102.5. Attempted extreme indifference homicide. <i>[new section]</i> §18-3-107. First-degree murder of a peace officer, firefighter or emergency medical service provider. §18-12-107.5. Illegal discharge of a firearm. §18-3-106. Vehicular homicide. • Mandatory Consecutive Sentencing and Post-Conviction Review [ELEMENT 4.2] Includes revisions and/or amendments to: <ul style="list-style-type: none"> §18-1.3-406. Mandatory sentences for violent crimes §24-4.1-302. Definitions and/or §24-4.1-302.5. Rights afforded to victims. • Habitual Sentences [ELEMENT 4.3] Includes revisions and/or amendments to: <ul style="list-style-type: none"> §18-1.3-801. Punishment for habitual criminals. §24-4.1-302. Definitions and/or §24-4.1-302.5. Rights afforded to victims. • Extraordinary Risk [ELEMENT 4.4] Includes revisions and/or amendments to: <ul style="list-style-type: none"> §18-1.3-401. Felonies classified - presumptive penalties. <p>Michael explained that the Sentence Structure Working Group examined other states’ practices and data related to crime classification and sentencing and conducted an extensive crime severity analysis to ensure that the current felony offenses are adequately classified based on the seriousness of the crime.</p>

<p>Issue/Topic Presentation: Recommendation FY23-SR #04 <i>Michael Dougherty, Leader</i> Sentence Structure Working Group (cont.)</p>	<p>The work required an examination of each felony offense and its elements, including the acts to commit the offense and the requisite culpable mental state.</p> <p>The Working Group also spent significant time considering crimes where a death occurred and crimes where the possible penalties included life without the possibility of parole. There was extensive discussion of “culpable mental state” as a core concept in assessing the severity of an offense and criminal classification level. The Model Penal Code, which is the basis for the Colorado criminal code, outlines four primary culpable mental states: intentionally, knowingly, recklessly, and negligently.</p> <p>Maureen Cain offered additional background information on the proposals and encouraged feedback from the Task Force members.</p> <p><u>ELEMENT 4.1. Extreme Indifference Homicide and Vehicular Homicide</u></p> <ul style="list-style-type: none"> • §18-3-102 – Murder in the first degree. Revise subsection (3). Maintain first-degree murder as a class 1 felony, except for 18-3-102(1) (d) Extreme Indifference. Insert the following language: First-degree murder in violation of (1) (d) is a class 2 felony and punishable as an extraordinary risk crime in the aggravated range (note: range is 24 to 64 years). • §18-3-102.5 - Attempted extreme indifference homicide. Insert as a separate section 102.5. Attempted extreme indifference homicide. This crime is a Class 3 felony when bodily injury or serious bodily injury is the result and a Class 4 felony when there is no injury. • §18-3-107 – First-degree murder of a peace officer, firefighter or emergency medical service provider. This section applies to those who are a Peace Officer (PO), Firefighter (FF) or emergency medical provider/technician (EMT) in performance of their duties. Rewrite this section to eliminate references to the Death Penalty and, therefore, delete the entire subsection (4) which outlines what happens if the death penalty is determined to be unconstitutional. Preserve extreme indifference homicide of PO, FF or EMT as a Class 1 felony but address the Miller vs. Graham¹ Supreme Court issue by making the penalty for this crime 40 to life for juveniles. • §18-12-107.5 – Illegal discharge of a firearm Amend the penalties in subsection (3) with bifurcation according to intent: “knowingly” vs. “recklessly.” Illegal discharge of a weapon “knowingly” is a Class 4 felony and “recklessly” is a Class 5 felony. • §18-3-106 – Vehicular Homicide In subsection (c), create an extraordinary risk (ER) aggravated penalty range for aggravated vehicular homicide (range will be: 10 to 32 years) for the following aggravating factors: vehicular homicide qualifies as felony DUI; vehicular homicide is committed while eluding or attempting to elude law enforcement; prior vehicular homicide or vehicular assault (DUI) conviction; or vehicular homicide is committed while in flight from the commission of another criminal felony offense, not including a traffic offense. With the creation of this new crime, the statute will be revised to preclude the filing of extreme indifference homicide for aggravated vehicular homicide.
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¹ Supreme Court ruling that juveniles cannot be sentenced to life without parole without certain findings. This represents a cleanup from SB16-181.

Issue/Topic	Discussion
<p>Presentation: Recommendation FY23-SR #04 <i>Michael Dougherty, Leader</i> <i>Sentence Structure Working Group</i> (cont.)</p>	<p>Valerie Finks expressed concern that “multiple victims” is not included as an aggravator. She reiterated her opinion that the upper point in the range for vehicular homicide should be higher (currently a maximum of 12 years). Families of vehicular homicide victims struggle to understand that the maximum sentence for such a crime is 12 years. 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 considered were the culpable mental state and actions of the individual (eluding law enforcement, leaving the scene of a crime, and driving under the influence).</p> <p>Brian Mason thanked the Working Group for their work on the recommendation. He felt that the current vehicular homicide statute does not address the most egregious cases and the sentencing range for a Vehicular Homicide-DUI should be increased or include “speed” as an aggravating factor. He asked whether the Working Group considered speed as a factor. Michael responded that the Working Group did not contemplate changes to the current sentencing range for Vehicular Homicide-DUI or Homicide-Reckless. He stated that the group decided to keep the current statutes intact and added aggravated vehicular homicide to first-degree murder cases.</p> <p>Regarding the vehicular homicide cases and the application of aggravators, Andrew Matson asked whether there were discussions around individuals who eluded law enforcement due to past or current negative experiences and/or interactions with law enforcement. Michael explained that eluding was included as an aggravator to address the offender’s decision to drive recklessly to avoid law enforcement. He mentioned that the Study Group did not discuss the current negative cases between law enforcement, communities, and young individuals.</p> <p>Kazi Houston asked whether the Working Group had data on the number of times Extreme Indifference was charged beyond two years. If there have not been many cases, how relevant is the change in the statutes, and how does it fit into this proposal? Maureen responded that Extreme Indifference charges have increased following several vehicular events, and Extreme Indifference Homicide filings have increased over the years. The group agreed on the relevance of addressing Extreme Indifference, regardless of the number of cases.</p> <p>Andre Stancil asked whether the Working Group discussed the fiscal impact of extending sentencing ranges on the CDOC. Michael explained that the recommendation does not include fiscal analysis, but members are mindful of potential costs associated with extending sentence ranges.</p> <p>Dr. Jeffrey Nowacki asked Maureen whether the Working Group reviewed decisions related to Extreme Indifference and whether race, gender, and/or</p>

<p>Issue/Topic Presentation: Recommendation FY23-SR #04 <i>Michael Dougherty, Leader</i> <i>Sentence Structure Working Group</i> (cont.)</p>	<p>age differences had been evaluated. Maureen mentioned that the group did not review those variables. Jack Reed offered that the race and ethnicity data is difficult to obtain because the processes used by Judicial Department do not document race or ethnicity.</p> <p><u>Element 4.2 Mandatory Consecutive Sentencing and Post-Conviction Review</u> This element would create a “safety valve” at sentencing and post-conviction review when mandatory consecutive sentences are imposed for crime of violence (COV) offenses arising out of the same incident. This allows 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 preponderance of the evidence by the defendant at a sentencing hearing:</p> <ul style="list-style-type: none"> • Defendant has no prior Victim Rights Act felony convictions, and • 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 • The defendant’s action did not result in a serious bodily injury. <p>Amend post-conviction review regarding 18-1.3-406, C.R.S, to allow for review when mandatory consecutive sentences are imposed for COV offenses arising out of the same incident. This expanded review is only for COV sentences imposed under mandatory consecutive provisions. Excluding mandatory consecutive sentences, the current timeframe (120 days) and factors (unusual and extenuating circumstances) regarding reconsideration allowable for all COV mandatory would remain the same. The related review criteria include:</p> <ul style="list-style-type: none"> • A 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. • A defendant may only file once. • A defendant is entitled to court-appointed counsel and an evidentiary hearing. • Mandatory victim notification and opportunity to be heard at hearing. <p><i>Standard of review.</i> 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 the sentence. When there are significant changes in the law, the defendant may also request that the court consider such changes that are relevant to the defendant’s sentence.</p> <p>This element may only be applied prospectively and therefore cannot be applied retrospectively.</p> <ul style="list-style-type: none"> • §18-1.3-406. Mandatory sentences for violent crimes. Amend subsection (1) as described above regarding the provisions related to the “safety valve” and sentence reconsideration. Add this reconsideration provision as a “critical stage” in the Victim Rights section of statute (§24-4.1-302 and §24-4.1-302.5). <p><u>Element 4.3 Habitual Sentences</u> The current sentencing scheme is maintained with the following changes:</p> <ul style="list-style-type: none"> • After serving 10 calendar years in the CO Department of Corrections, the defendant may request a reconsideration if the sentence imposed is greater than 24 years.
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<p>Issue/Topic Presentation: Recommendation FY23-SR #04 <i>Michael Dougherty, Leader</i> <i>Sentence Structure Working Group</i> (cont.)</p>	<ul style="list-style-type: none"> • Defendant may only file once. • Defendant is entitled to court-appointed counsel and an evidentiary hearing. • 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. <p><i>Standard for review.</i> 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 CDC that justify a modification of the 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 range² or the 4 times the maximum of the presumptive.³ A sentence cannot be increased at the hearing.</p> <p>The application of this element shall be prospective, not retrospective.</p> <p>Discussion</p> <p>Michael Rourke expressed concern that the four elements are being “packaged” as a single proposal and asked whether the group would consider splitting each element into separate recommendations.</p> <p>Valerie Finks reminded the group that the funding for victim services has decreased and that victims go through the criminal justice process with little help or resources. Did the Working Group consider carving out these “second-look” processes to exclude VRA crimes? She also agreed with Michael Rourke that the elements should be split into four separate recommendations.</p> <p><u>Element 4.4 Extraordinary Risk</u></p> <p>This element eliminates provisions of Colorado criminal statute related to Extraordinary Risk for Class 5 and 6 felonies.</p> <p>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> <ul style="list-style-type: none"> • §18-1.3-401 – Felonies classified – presumptive penalties Eliminate extraordinary risk range for class 5 and class 6 felonies. <p>Discussion</p> <p>With no discussion of the final Element 4.4, Michael thanked the group for the discussion of the recommendation. He reiterated that the Working Group preferred a single recommendation with four elements, rather than four</p>
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² This is the increased sentence for the “little habitual.”

³ This is the increase sentence for the “big habitual.”

<p>Issue/Topic Presentation: Recommendation FY23-SR #04 <i>Michael Dougherty, Leader</i> <i>Sentence Structure Working Group</i> (cont.)</p>	<p>separate recommendations, but offered Task Force members the option to continue discussions on the matter at the next Task Force meeting on February 22.</p> <p>In summarizing next steps, Richard Stroker suggested that:</p> <ul style="list-style-type: none"> - Task Force members will resolve the structure of the recommendation at the next meeting, and - the goal is to present the preliminary recommendation to the Commission on February 24 with a vote scheduled for March 10. <p>On behalf of Glenn Tapia, Probation Working Group leader, Richard provided an update to the Task Force. The group reviewed areas of gender responsiveness and discussed effective approaches for women under probation supervision. The group will begin to examine ethnic/racial disparities at the Probation Working Group meeting in March.</p>
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<p>Issue/Topic Update: Sentencing Alternatives/Decision & Probation Working Group <i>Richard Stroker,</i> <i>CCJJ Consultant</i></p>	<p style="text-align: center;">Discussion</p> <p>On behalf of Working Group Leader Glenn Tapia, Richard provided an update to the Task Force. The group received a presentation on and discussed the topic of gender responsiveness and effective approaches to better serve the needs of women under probation supervision. Members will begin to examine evidence of ethnic and racial disparities in probation at the March 3 meeting of the Working Group.</p>
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<p>Issue/Topic Public Comment <i>Rick Kornfeld</i> <i>Task Force Co-chair</i></p>	<p style="text-align: center;">Public Comment</p> <p>Rick solicited public comment, and with none offered, he moved to the conclusion of the meeting.</p>
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<p>Issue/Topic Next Steps & Adjourn <i>Rick Kornfeld</i> <i>Task Force Co-chair</i></p>	<p style="text-align: center;">Conclusion</p> <p>Rick thanked participants for the robust conversation. He reminded the group that there is an extra SRTF meeting on Wednesday, February 22 at 1:30 pm.</p> <p>He asked whether there were any additional questions, and with none, adjourned the meeting.</p>
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Next Meeting

EXTRA Meeting, Wednesday, February 22, 2023 / 1:30-4:00 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 & ccjj.colorado.gov/ccjj-calendar).