



Colorado Commission on Criminal and Juvenile Justice

Minutes

January 12, 2018

Jefferson County Department of Human Services
 900 Jefferson County Parkway
 Golden, CO 80401

Commission Member Attendance

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|----------------------------|------------------------|------------------------------|
| Stan Hilkey, Chair | Jessica Jones | Rose Rodriguez |
| Doug Wilson, Vice-Chair | Daniel Kagan - ABSENT | Joe Salazar - ABSENT |
| Jennifer Bradford - ABSENT | Bill Kilpatrick | Lang Sias - ABSENT |
| John Cooke - ABSENT | Cynthia Kowert | Michael Vallejos - ABSENT |
| Valarie Finks | Evelyn Leslie | Dave Weaver |
| Kelly Friesen | Joe Morales | Peter Weir |
| Charles Garcia | Norm Mueller | Meg Williams |
| Mike Garcia | Joe Pelle | Dave Young - ABSENT |
| Tony Gherardini | Rick Raemisch - ABSENT | Joe Thome, <i>Ex Officio</i> |

Substitutions: Melissa Roberts for Rick Raemisch

CALL TO ORDER AND OPENING REMARKS

Stan Hilkey, Chair and Executive Director of the Department of Public Safety

Mr. Stan Hilkey, Chair of the Commission and Executive Director of the Department of Public Safety, called the meeting to order at 1:08 pm. Mr. Hilkey introduced Cynthia Kowert from the Attorney General’s Office and explained that she has replaced outgoing Commissioner Scott Turner. He thanked Commissioners for attending and asked them to introduce themselves. Mr. Hilkey reviewed the agenda and asked for any additions or corrections to the December minutes. A motion was made and seconded to approve the minutes and they were unanimously accepted by Commissioners.

LEGISLATIVE AND SMART ACT HEARING UPDATE

Stan Hilkey, Chair and Executive Director of the Department of Public Safety

Gabby Reed, Legislative Liaison, Department of Public Safety

Mr. Hilkey introduced the Department of Public Safety’s Legislative Liaison, Gabby Reed, and asked her to provide an update on the status of the Commission’s legislative recommendations. Ms. Reed directed Commissioners to a handout in their packets titled 2018 Legislation Update and explained that progress has been made on the re-entry recommendations as follows:

- FY17-RE #01 Allow Orders of Collateral Relief after the time of sentencing.
Representative Weissman has submitted a late bill request for this recommendation.
- FY17-RE #02 Prevent adverse private employment actions on the basis of non-conviction, sealed, and expunged records.
Representative Weissman has submitted a late bill request for this recommendation.

- FY17-RE #03 Revise statutory guidance on state licensure and employment.
Representative Weissman has submitted a late bill request for this recommendation.
- FY17-RE #04 Promote housing opportunities for people with non-conviction, sealed, and expunged records.
Senator Kagan introduced Senate Bill 18-057 which includes this recommendation and was assigned to State, Veterans and Military Affairs Committee.
- FY17-RE #05 Provide statutory guidance on public housing decisions.
Senator Kagan introduced Senate Bill 18-057 which includes this recommendation and was assigned to State, Veterans and Military Affairs Committee.

Ms. Reed explained that Representatives Weissman and Wist will sponsor legislation to continue the Commission and that in its current form the bill calls for a ten year authorization. She added that it is likely amendments will be forthcoming. Ms. Reed noted that the two Commission recommendations concerning crossover youth (FY17-JCC #01 and FY17-JCC #02) are still lacking sponsorship but that late bill status for these recommendations would not be uncommon.

Mr. Hilkey explained that he and Vice-chair Doug Wilson were both present at the Commission's SMART Act hearing earlier in the week and that legislators were particularly appreciative of the work by the Commission and the Division of Criminal Justice regarding the Community Law Enforcement Action Reporting (CLEAR) Act report which analyzed data by race/ethnicity and gender to reflect decisions made at multiple points in the justice system process.

COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE ANNUAL REPORT DISTRIBUTION

Kim English, Division of Criminal Justice

Kim English from the Division of Criminal Justice directed members to the newly released, Fiscal Year 2017 annual Commission report. She gave a brief overview of the contents and explained that an electronic version of the report can also be accessed on the Commission website at colorado.gov/ccjj. She added that the appendices in the annual reports typically include a variety of data analysis compiled for the Commission throughout the year, and because a significant amount of work in Fiscal Year 2017 centered on disproportionate minority contact, the appendices include information on both the results from the CLEAR Act Report and a history of work conducted by the Commission in the area of minority over-representation.

Ms. English explained that another handout distributed today is a one-page synopsis of the accomplishments and activities of the Commission during calendar year 2017, broken out by quarter. The document can serve as a quick reference for Commissioners who may receive inquiries about Commission work products and undertakings.

**MENTAL HEALTH/POINT OF CONTACT THROUGH JAIL RELEASE TASK FORCE:
FY18-MH #01 FINAL RECOMMENDATION PRESENTATION AND VOTE**

Sheriff Joe Pelle, Boulder County
Abigail Tucker, Community Reach Centers
Patrick Fox, Office of Behavioral Health

Sheriff Pelle addressed Commissioners and reminded them that the recommendation presented today for a vote calls for the development of post-arrest, pre-file diversion pilot programs aimed at individuals experiencing mental health disorders who meet specific criteria and are determined able to benefit from diversion to treatment rather than being processed through the criminal justice system. Sheriff Pelle introduced Dr. Patrick Fox from the Office of Behavioral Health and explained that he would offer a more detailed account of the work of the Mental Health / Jails Task Force and resulting Recommendation FY18 – MH #01. The presentation and the full context of the final recommendation can be found on the Commission website at colorado.gov/ccjj. Discussion points following the presentation are noted below the synopsis of the recommendation.

FY18-MH #01. Develop Pre-File Mental Health Diversion Pilot Programs**Recommendation FY18-MH #01**

This recommendation proposes the development of pilot programs for pre-file mental health diversion in judicial districts where the option or resources for the option may be lacking.

The pilot will:

- Develop post-arrest, pre-file diversion programs specifically for individuals experiencing mental health disorders and who meet specific criteria and are determined able to benefit from diversion to treatment rather than being processed through the criminal justice system.
- Create pre-file mental health diversion programs that utilize a stakeholder-created, reviewed, and approved model,

In addition, local officials should promote the utilization of Adult Pretrial Diversion Programs and funding as created by §18-1.3-101, C.R.S.

DISCUSSION

Sheriff Pelle explained that the Mental Health/Jails Task Force is seeking Commission approval for the pilot project model, which includes a component that calls for the Division of Criminal Justice to track outcome measures and determine the success of the pilot sites. Mr. Pelle explained that there is pushback from the Colorado District Attorneys' Council (CDAC) on one element of the recommendation. He directed Commissioners to page five of the recommendation, section 5.c., which reads:

5. Partners will receive the recommendation from the evaluator and discuss any confounding issues or concerns. Upon discussion, one of the following determinations will be made:

- Agreement to divert with a “no-file” procedure and no report back.
- Agreement to defer decision with a plan to collect or review additional information.

Disagreement to divert, resolved by the judicial officer.

Sheriff Pelle reported that the district attorneys have indicated they will support this recommendation with the removal of 5.c., which allows for judicial override on disagreements between a prosecutor and defense attorney regarding whether to divert someone to the pilot program. The district attorneys believe there are

constitutional issues with this part of the recommendation regarding their authority and discretion. Mr. Pelle stated that it is believed the actual number of cases where there may be disagreement is extremely small (approximately 1%) and he therefore supports the removal of 5.c. from the recommendation.

Pete Weir responded that the decision on whether or not to file charges is not the purview of judicial officers and after discussions with his colleagues he agrees with Sheriff Pelle that section 5.c. of the recommendation be removed. He concurred that in the vast majority of cases, given previous success with collaborative problem-solving courts, there will be agreement on which cases to divert. He summarized that he and other district attorneys support the philosophy and spirit of the proposal, if section 5.c. is stricken.

Doug Wilson replied that diversion programs and money to support those programs are already available to prosecutors statewide, and that the only thing that distinguishes this proposal from current diversion programs is the collaborative element between district attorneys, defense attorneys and the judicial officer. Mr. Wilson emphasized that the recommendation calls for the creation of voluntary pilot programs and that what sets it apart from current practice is the outcome driven, data collection piece. Mr. Wilson asked Mr. Weir if any current district attorneys would commit to participating in the program with the removal of 5.c. Mr. Weir replied that he cannot speak for his colleagues but that there is indeed strong support for the concept. He added there is concern about whether resources are truly available in communities to effectuate the proposal. Mr. Wilson replied that he understands the fundamental concern of district attorneys and that he concurs there is a potential separation of powers issue, but he added that he would be more willing to remove 5.c. if there was a commitment from a few district attorney's offices to support the pilot program.

Sheriff Pelle replied that he does have a commitment from his district attorney to support the project. He reiterated that he believes there will be agreement by all three parties (the district attorney, defense attorney and judicial officer) on a majority of the cases eligible for the diversion program. Mr. Pelle made a motion to amend the proposal to remove 5.c. and to vote on the recommendation as amended. Mr. Weir seconded the motion. Mr. Hilkey acknowledged the arrival of Abigail Tucker to the meeting and explained that she is a member of the Mental Health/Jails Task Force and was instrumental in the creation of the recommendation. He asked Ms. Tucker if she had any additional input on the proposal and seeing none he called for any other input from Commissioners.

Mr. Wilson reemphasized that the program is a pilot, is voluntary and that district attorneys are not obligated to participate. He added that only six district attorney's offices have applied for current available diversion funds and that as of 2017, over one million dollars in unused diversion funds have been reverted. His concern remains that without a commitment from district attorneys to implement the program, there is no difference between what is already available and the new proposal. He summarized that this program will have an impact on competency issues and bed space, and that it is important not only to get those with mental health conditions out of jail, but to also discontinue the use of expensive beds at the state hospital.

Dr. Fox asked Commissioners if they have any recommendations on how to increase the current participation by district attorney's offices in diversion programs, to avoid reverting hundreds of thousands of diversion dollars a year to the General Assembly.

Mr. Weir pointed out that both Adams County and Jefferson County presently operate robust, long-standing diversion programs that are not under the auspices of the Adult Pretrial Diversion Programs as created by C.R.S. 18-1.3-101. He noted that jurisdictions that already have successful diversion programs may be reluctant to participate in state funded diversion programs due to issues and constraints that

accompany state funds. Additionally, participation by other judicial districts in diversion programs may be hindered due to a lack of local resources.

Norm Mueller pointed out that the original draft of the proposal included the eligibility of low-level felony charges and low-level drug felonies, which were eventually removed to encourage participation by district attorneys. He asked Mr. Weir if, with the additional removal of 5.c., district attorneys would be more likely to participate. Mr. Weir replied that district attorneys would be more inclined to consider a broader range of offenses if they can retain decision-making in regards to charging. Mr. Weir also explained that conceptually there is strong support for the proposal, but that each judicial district has its own set of circumstances which makes it difficult to for him to say whether the pilot programs would conform to the circumstances of each individual jurisdiction. He summarized, however, that district attorneys recognize the need for these types of programs and that the criminal justice system is not the best place for individuals with mental or behavioral health issues.

Jessica Jones disagreed with Mr. Weir and explained that as a criminal defense attorney, she has struggled to work with prosecutors in places like Adams, Arapahoe and Jefferson Counties, to grant diversion or deferred judgement alternatives. Mr. Weir replied that oftentimes people are diverted into problem-solving courts to help address other issues in order to keep them from going further into the system.

Mr. Wilson and Mr. Weir agreed to keep lines of communication open around which judicial districts are interested in participating in the pilot program. Commission consultant Richard Stroker noted that the Task Force is also committed to reaching out to sheriffs, district attorneys, judicial officers and others stakeholders in the hopes of identifying interested parties in different jurisdictions and working with those who want to pursue this opportunity.

Mr. Hilkey explained that procedurally, the Commission will first vote on the motion to remove section 5.c. from the recommendation and then vote on the recommendation as a whole. The process for voting on the amendment was explained. To pass, the amendment requires approval by 66% of members, combining the A and B votes of:

A = I support it B = I can live with it C = I do not support it

Amendment Vote: FY18-MH #01

Remove Section 5.c. from Recommendation FY18-MH #01.

A: 8

B: 7

C: 1

The amendment was APPROVED

The process for voting on a final recommendation was explained. To pass, a Commission recommendation requires approval by 66% of the members, combining the A and B votes of:

A = I support it B = I can live with it C = I do not support it

Final Vote: FY18-MH #01

Develop pretrial mental health diversion pilot programs.

A: 16

B: 2

C: 0

FY18-MH #01 was APPROVED

PROPOSED COMMISSION IMPROVEMENTS**Stan Hilkey, Chair and Executive Director of the Department of Public Safety****Richard Stroker, Commission consultant**

Commission consultant Richard Stroker reminded members that during the December meeting they continued a discussion about opportunities to improve the way the Commission operates and conducts business. One of the themes that surfaced from that conversation centered on ways to improve the process by which the Commission identifies what issues to explore. One suggestion was that it would be beneficial to have the Governor, legislative leaders and the Chief Justice provide input about their expectations of the Commission. Given that discussion, along with guidance from Commission leadership, verbiage was created regarding the process for determining Commission areas of study. Mr. Stroker asked Commissioners to review the proposed language and provide feedback on whether it is appropriate and if they could support it. If the language is determined to be suitable, it will be provided to the legislators who have asked for input about the Commission during its reauthorization process.

Regarding the **Process for determining Commission areas of study:**

The Commission supports legislation that would require a letter, every May 1 of even numbered years (prior to the Commission's planning retreat in June), from the Governor that provides the Commission with suggested topics for study. The Governor shall consult with legislative leadership and the Chief Justice in preparing the letter. Upon receipt of the letter, the Commission will consider its current work areas in light of the suggested topics and it may form a new task force or other study group, or may incorporate new areas of study into existing task force work. The Commission typically studies a topic for 12-24 months prior to making recommendations.

Mr. Hilkey explained the reason for requesting input every two years rather than every year is because it typically takes a Task Force approximately two years to complete an area of study and create recommendations. If the Commission were given three to four topics a year it would quickly become overwhelmed with issues to consider, making it difficult to complete work that may already be underway.

The proposed language includes a request for input from the Chief Justice, however, Mr. Wilson noted that the Chief Justice typically avoids offering policy recommendations. Mike Garcia replied that he could discuss this concern with the Judicial Department and provide feedback to the Commission from the Chief Justice. Mr. Hilkey added that the verbiage specifies the Governor *consult with* legislative leadership and the Chief Justice, which would not require them to provide suggested topics for study.

Mr. Weir asked if the Governor's input would trump issues or study areas identified internally by the Commission. He pointed out that the Commission is comprised of 27 diverse stakeholders who have been charged with using their expertise to collectively identify the most critical issues in the criminal justice system. Mr. Stroker replied that the language specifying the Commission *may form a new task force* would allow for flexibility in determining final areas of study. Charles Garcia offered to present the draft language to members of the Governor's Office to garner feedback. Mr. Stroker replied that there has already been some indication from the Governor's Office that this recommendation would not be unwelcome. Mr. Weir questioned the need to codify the language statutorily.

Mr. Stroker reminded Commissioners that they have been asked to provide information and feedback about ideas to improve its processes, with that in mind he asked Commissioners if they are in agreement that this is an acceptable approach. Commissioners concurred that they are in support of the proposed language.

Mr. Stroker pointed out that the issue of *Commission membership* was also raised as a possible area of improvement. During the December meeting the group provided input on disciplines and positions that could be considered for inclusion in the Commission, however, outcomes from that discussion centered mostly on adding *additional* members representing disciplines that are already represented on the Commission. At the end of that discussion Commissioners agreed that it may be more critical to ensure proper stakeholder representation on Task Forces rather than adding additional members to the Commission, as Task Forces are largely the engine of the Commission's work. Commissioners agreed that this is an acceptable approach to addressing Commission membership.

Mr. Stroker concluded that there were two other possible areas of improvement discussed in December including the Commission's internal process for approving recommendations and the process for implementing recommendations after they have been approved. Mr. Stroker offered that he believes these are topics that could be better addressed during the retreat scheduled for June and Commissioners agreed.

ADDITIONAL BUSINESS

Stan Hilkey, Chair and Executive Director of the Department of Public Safety

Mr. Hilkey reported that Tony Gherardini has an issue he would like to bring to the attention of Commissioners regarding competency evaluations. Mr. Gherardini explained that the Department of Human Services (DHS) is facing an ongoing challenge with the timing of competency evaluations and that a far greater volume of competency evaluations are being ordered than DHS is equipped to handle. Moving forward, DHS will likely be holding discussions with the Commission and the Governor's Office to determine how to provide greater capacity for evaluations and restorations. The Governor is currently advocating for funding for additional beds at the State Hospital, but conversations also need to take place with Judicial about the philosophy and standards they are using to order competency evaluations.

Doug Wilson inquired about the number of people with non-Victims' Rights Act (VRA) level offenses that are being held at the State Hospital. Patrick Fox replied that 2016/17 data shows the number of individuals sent to the State Hospital for competency restoration, charged with a misdemeanor crime, who showed no signs of clinical instability (seclusion, restraint, involuntary medication) in the first 60-days was 217 out of 700+ individuals. He added that the large number begs the question of whether they truly needed a level of hospital care to effect restoration. Mr. Wilson replied that if those people could be diverted without the competency issue coming into play it would seem to significantly impact the bed issue at the State Hospital. With numbers in the hundreds, adding 15-20 additional beds is not going to address the problem. The competency requests and orders are doubling every five years so it is not going to stop unless a system is put in place to divert individuals.

Dr. Fox went on to explain that the biggest problem currently with competency evaluations is the location at which those evaluations occur. Prior to 2016, judges had discretion to determine the location for competency evaluations, whether they be at an inpatient or outpatient facility. Previously, the bulk of evaluations took place on an outpatient basis with approximately 70-85% conducted outpatient and about 25% conducted on an inpatient basis. The number of inpatient evaluations continues to increase and currently approximately 40% of the total number of evaluations are done on an inpatient basis.

Additionally, until very recently there was no state entity responsible for overseeing outpatient competency restoration. Therefore, if a judge referred someone for outpatient restoration, it was basically up to that individual to determine how to receive the appropriate services and create their own restoration plan. Now, the Office of Behavioral Health is the state entity designated to oversee outpatient restoration and will designate a statewide vendor before the end of the fiscal year to provide and manage competency restoration education services. The Office of Behavioral Health will then work in conjunction with

community mental health centers to provide mental health care as they would for anyone else who is released on bond.

Mr. Wilson replied that not all judges are aware of this shift in policy. Dr. Fox replied that the program has not yet been fully established and noted that he has a meeting scheduled in February with the Chief Judges to explain it in full detail. With this new path to competency restoration, outpatient evaluations should now be a much more viable option. This will not change whether or not someone is released from custody since that is a judicial decision. However, the Office of Behavioral Health can still determine the level of professional mental health care a person needs in order to be restored to competency. Going forward, competency evaluation reports will include that information for the judge at the front end, and the hope is to build that standard into statute over the next year. This will allow for mental health professionals to provide detailed information on the substantial likelihood of whether a person can be restored and then provide a recommendation, not an opinion, as to the least restrictive level of care necessary to effect a restoration so the Judge can take that information into consideration. Mr. Wilson asked Mr. Fox to provide information on the outcomes of competency evaluations. Mr. Fox noted that approximately 40% of the individuals referred for a competency evaluation are found incompetent while 60% are found to be competent.

ADJOURNMENT

Stan Hilkey, Chair and Executive Director of the Department of Public Safety

Mr. Hilkey thanked Commissioners for their time and asked the group for any final comments. Seeing no further business Mr. Hilkey adjourned the meeting at 2:24 p.m.