

**SENTENCING REFORM TASK FORCE**  
FINAL RECOMMENDATION PREPARED FOR THE  
COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE  
January 14, 2022

**FY22-SR #05. Implement Individualized Behavioral Responses to Probation Violations**  
**[Statutory]**

**Recommendation FY22-SR #05**

Amend §16-11-205, §16-11-209, §16-11-2?? (new section), §16-11.5-101, §16-11.5-102(1)(c), §16-11.5-105, §18-1.3-102, and any other required conforming revisions to statute to reflect contemporary best practice guidelines that serve people on probation and deferred sentences, especially those diagnosed and/or dealing with substance use disorders. Such practices provide corresponding systems that include a range of individualized and structured behavioral responses to substance use and other behaviors that violate typical conditions of probation. This recommendation specifically prioritizes modern methods of rehabilitative and reparative justice that align with the statutory purposes of probation (*included in CCJJ Recommendation FY22-SR #01. Define the Purposes of Probation*) rather than the finite and limited responses in current statute that reflect retributive, punitive, and deterrent-based justice methods.

[See **PROPOSED STATUTORY LANGUAGE** below.]

**DISCUSSION**

Contemporary best practice guidelines for both probation and problem-solving court programs compel community supervision agencies to have smarter tolerance for substance use, especially for those with diagnosed substance use disorders. Agencies and programs that align with best practices respond to substance use and other violation behavior with corresponding systems of individualized and structured responses. Ideal response systems prioritize cognitive-behavioral, motivational, psycho-educational, and therapeutic responses over retributive and punishment-based sanctions. This recommendation provides an opportunity to align probation's responses to violation behavior, including substance use, with the recommended statutory purpose of probation (*included in CCJJ Recommendation FY22-SR #01. Purposes of Probation*). This recommendation specifically prioritizes rehabilitative, reparative, and restorative justice methods over retributive, punitive, and deterrent-based justice methods.

§16-11-209, CRS (Duties of Probation Officers) was created as law during a period of the 1980s where the criminal justice system prioritized punitive rather than therapeutic responses as a response to drug and alcohol abuse for people on probation. As a result, current law is in conflict between CRS §16-11-209 (2) and (3) where responses to first and second and subsequent positive drug tests are primarily punitive; while law from 1991 legislation (§16-11.5-105) approaches drug use with a more balanced model that includes both punitive sanctions and motivational incentives. This recommendation is intended to create consistent and modernized law for community-supervision that establishes a system of individualized behavioral responses to positive drug tests and other violation behavior for persons supervised on probation.

Current law prioritizes rehabilitative over punitive responses to violation behavior for the juvenile justice system but not for the adult criminal justice system. CRS §16-11-209 (2) and (3) require responses to positive drug tests that are finite, limited, and primarily punitive rather than giving probation staff other behavioral tools, beyond punishment, to respond to ongoing substance use. The requirements in law are ineffective and misaligned with criminological and addiction medicine best practice standards. Our legislature recognized this when it reformed Title 19 (Colorado Children's Code) via Senate Bill 19-108

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(Juvenile Justice Reform) to prioritize rehabilitative over punitive responses to violation behavior for the juvenile-justice system.

CRS §16-11-209 (2) and (3) also present potential legal and liability problems for probation staff and agencies. This can occur in cases where probation responds to positive drug tests with cognitive-behavioral or other intermediate responses that do not strictly adhere to the finite list of punitive response in sections (2)(a) through (d) and (3)(a) through (e). Probation cannot operate outside this legal requirement without compromising personal and organizational risks.

Colorado's probation and parole agencies engaged in a multi-state study of revocation trends with the Crime and Justice Institute (CJI) in 2020. The outcomes, findings, and recommendations of that work are expected to be published formally with a state report in late 2021 with the finding that positive drug tests are one of several drivers to probation revocations. The CJI has also drafted recommendations for Colorado to modernize state law to include CRS §16-11-209 as well as for the State Court Administrator's Office to revise the Standards for Probation in Colorado and Division of Probation Services training around the use of responses to violation behavior (see the *Principles of Effective Intervention* and *Core Correctional Practices* at [cj institute.org](http://cj institute.org)). This recommendation, if implemented, will align with the findings and recommendations of this revocation study from the Crime and Justice Institute who will be publishing a national report of its work in early 2022 in addition to a Colorado-specific report.

Consequences for drug-related probation violations should not inherently be less discretionary than other types of violations with greater potential public harm, such as violations of protection orders and other contact with victims.

For the criminal justice system overall, there are downstream consequences of probation operating strictly within the limited requirements in CRS §16-11-209 (2) and (3). Specifically, people on probation with low level offenses such as Petty Offenses and Drug Misdemeanors could experience a premature escalation of criminal justice involvement due to revocations that originate from 2<sup>nd</sup> and subsequent positive drug tests. This can lead to not only collateral consequences for justice-involved people but also for the justice system itself in the misapplied use of public resources for jails and prisons. Because the list of required responses to positive drug tests is finite and primarily punitive, local criminal justice resources are squandered on unnecessary administrative and legal proceedings for revocation of those who test positive for substances. In this respect, current law consumes probation, court, prosecutor, defense, and victim resources for unnecessary revocation proceedings that are required by current law.

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**PROPOSED STATUTORY LANGUAGE**

**16-11-205. Arrest of probationer - revocation**

[NOTE: Regarding §16-11-205 (1) (c), there are now municipal and other petty offenses that are (due to law changes) not eligible for arrest and should be dealt with by summons.]

(1) A probation officer may arrest any probationer when:

(a) **THE OFFICER He** has a warrant commanding that the probationer be arrested; or

(b) **THE OFFICER He** has probable cause to believe that a warrant for the probationer's arrest has been issued in this state or another state for any criminal offense or for violation of the conditions of probation; or

(c) Any offense under the laws of this state **THAT IS STATUTORILY ELIGIBLE FOR ARREST** has been or is being committed by the probationer in **THE OFFICER'S his** presence; or

~~(d) He has probable cause to believe that a crime has been committed and the probationer has committed such crime; or~~

~~(d) (e) THE OFFICER He~~ has probable cause to believe that the conditions of probation have been violated and probable cause to believe that the probationer is leaving or about to leave the state, or that the probationer will fail or refuse to appear before the court to answer charges of violation of the conditions of probation, or that the arrest of the probationer is necessary to **PROTECT THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY** prevent physical harm to the probationer or another person or **PREVENT** the commission of a crime.; ~~or~~

~~(f) The probationer, who is on probation as a result of a conviction of any felony except a class 1 felony, has been tested for the illegal or unauthorized use of a controlled substance and the result of such test is positive.~~

(2) **UNLESS ANY OF THE CIRCUMSTANCES AS PROVIDED IN PARAGRAPH (1) OF THIS SECTION EXIST, THE PROBATION OFFICER MUST** ~~if a probation officer has reason to believe that the conditions of probation have been violated by any probationer, he may~~ issue a summons requiring the probationer to appear before the court at a specified time and place to answer charges of violation of the conditions of probation. **WHEN A PROBATION OFFICER HAS REASON TO BELIEVE THAT THE PROBATIONER VIOLATED CONDITIONS OF PROBATION AND A PETITION FOR REVOCATION IS NECESSARY AND APPROPRIATE SUBJECT TO THE PROVISIONS OF (Cite the structured response language).** The summons, unless accompanied by a copy of a complaint, shall contain a brief statement of the violation and the date and place thereof. Failure of the probationer to appear before the court as required by the summons shall be deemed a violation of the conditions of probation.

*Subsections (3) and (4) unchanged.*

(5) A complaint alleging the violation of a condition of probation may be filed either by the probation officer pursuant to subsection (4) of this section or by the district attorney. Such complaint shall contain the name of the probationer, shall identify the violation charged and the condition of probation alleged

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to have been violated, including the date and approximate location thereof, **SHALL INCLUDE A SUMMARY OF THE VIOLATION BEHAVIOR HISTORY AND ANY BEHAVIORAL RESPONSES APPLIED CONSISTENT WITH THE STRUCTURED AND INDIVIDUALIZED BEHAVIORAL RESPONSES DEVELOPED PURSUANT TO (*Insert CRS citation*)** and shall be signed by the probation officer or the district attorney. A copy thereof shall be given to the probationer a reasonable length of time before he appears before the court.

*Subsection (6) unchanged*

**Add (6.5) UNLESS THERE IS REASON TO BELIEVE THAT A PROBATIONER WOULD NOT APPEAR, WOULD INTERFERE WITH THE CRIMINAL JUSTICE PROCESS, OR POSES SUBSTANTIAL RISK OF SERIOUS HARM TO OTHERS, PROBATION OFFICERS SHALL ISSUE A SUMMONS RATHER THAN REQUEST A WARRANT WHEN FILING A PETITION FOR REVOCATION.**

*Subsection (7) unchanged*

**§16-11-209. Duties of Probation Officers**

(1) It is the duty of a probation officer to investigate and report upon any case referred to him or her by the court for investigation. The probation officer shall furnish to each person released on probation under his or her supervision a written statement of the conditions of probation and shall instruct the person regarding the same. The officer shall keep informed concerning the conduct and condition of each person on probation under his or her supervision and shall report thereon to the court at such times as it directs. Such officers shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvement in their conduct and condition. Each officer shall keep records of his or her work; shall make such reports to the court as are required; and shall perform such other duties as the court may direct.

~~(2) Any probationer, on probation as a result of a conviction, who is under the supervision of a probation officer pursuant to this part 2 and who is initially tested for the illegal or unauthorized use of a controlled substance and the result of such test is positive shall be subject to any or all of the following actions:~~

- ~~(a) An immediate warrantless arrest;~~
- ~~(b) An immediate increase in the level of supervision;~~
- ~~(c) Random screenings for the detection of the illegal or unauthorized use of a controlled substance, which use may serve as the basis for additional punishment or any other community placement;~~
- ~~(d) Referral to a substance use disorder treatment program.~~

~~(3) If any probationer described in subsection (2) of this section is subjected to a second or subsequent test for the illegal or unauthorized use of a controlled substance and the result of such test is positive, the probation officer shall take one or more of the following actions:~~

- ~~(a) Make an immediate warrantless arrest;~~
- ~~(b) Seek a probation revocation in accordance with sections 16-11-205 and 16-11-206;~~
- ~~(c) Immediately increase the level of supervision;~~
- ~~(d) Increase the number of drug screenings for the illegal or unauthorized use of controlled substances;~~

[As Approved]

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~~(e) Refer the probationer to a substance use disorder treatment program.~~

*Subsections (4) and (5) unchanged*

*Place in New Section in Statute (not under Duties of a Probation Officer)*  
**§16-11-2??**

**(#?) BEFORE JULY 1, 2023, THE STATE COURT ADMINISTRATOR SHALL DEVELOP A SYSTEM OF STRUCTURED AND INDIVIDUALIZED BEHAVIORAL RESPONSES, INCLUDING INCENTIVES AND SANCTIONS, TO GUIDE PROBATION OFFICERS IN DETERMINING HOW BEST TO MOTIVATE POSITIVE BEHAVIOR CHANGE AND THE APPROPRIATE RESPONSE TO A VIOLATION OF TERMS AND CONDITIONS OF PROBATION.**

**(#?) A SYSTEM OF STRUCTURED AND INDIVIDUALIZED RESPONSES SHALL INCLUDE AN ACCOUNTABILITY-BASED SERIES OF BEHAVIORAL RESPONSES, INTERMEDIATE SANCTIONS, INCENTIVES, AND SERVICES DESIGNED TO RESPOND TO A PROBATIONER'S VIOLATION OF PROBATION QUICKLY, FAIRLY, CONSISTENTLY, AND PROPORTIONALLY. THE SYSTEM OF STRUCTURED AND INDIVIDUALIZED RESPONSES SHALL ALSO BE DESIGNED TO MOTIVATE POSITIVE BEHAVIOR CHANGE, SUCCESSFUL COMPLETION OF PROBATION, AND A PROBATIONER'S INDIVIDUAL BEHAVIORAL OR TREATMENT GOALS.**

**(#?) PROBATION DEPARTMENTS SHALL USE THE SYSTEM OF STRUCTURED AND INDIVIDUALIZED BEHAVIORAL RESPONSES DEVELOPED PURSUANT TO THIS SUBSECTION OR DEVELOP AND USE AN EQUIVALENT AND LOCALLY DEVELOPED SYSTEM THAT IS ALIGNED TO BEST PRACTICES.**

**§16-11.5-101. Legislative declaration**

The general assembly hereby declares that substance abuse, specifically the abuse of alcohol and controlled substances, is a major problem in the criminal justice system of the state of Colorado and in the entire nation. Substance abuse is a significant factor in the commission of crimes and it is a significant factor in impeding the rehabilitation of persons convicted of crimes which results in an increased rate of recidivism. Therefore, the general assembly hereby resolves to curtail the disastrous effects of substance abuse in the criminal justice system by providing for consistency in the response to substance abuse throughout the criminal justice system and to improve and standardize substance abuse treatment for ~~offenders~~ **PEOPLE** at each stage of the criminal justice system and to provide ~~punitive measures~~ **A RANGE OF INDIVIDUALIZED BEHAVIORAL RESPONSES** for ~~offenders~~ **PEOPLE who refuse to cooperate with and WHO DO NOT** respond **SUCCESSFULLY** to substance abuse treatment while such ~~offenders~~ **PEOPLE** are involved with the criminal justice system.

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**§16-11.5-102(1)(c). Substance abuse assessment - standardized procedure**

*(MAKE CONFORMING REVISIONS TO THE FOLLOWING)*

(c) A system of punitive sanctions for offenders who test positive for the use of substances subsequent to the initial test and after being placed in an education or treatment program. The sanctions developed pursuant to this paragraph (c) should allow for appropriate responses by the criminal justice system to each occurrence of a positive test by an offender, each of which shall become a permanent part of the offender's record.

**§16-11.5-105. Departments shall develop testing AND BEHAVIORAL RESPONSE SYSTEMS programs—~~punitive sanctions revocation.~~**

*Subsection (1) unchanged*

(2) Any offender who tests positive for the use of alcohol or controlled substances subsequent to the initial test required by section 18-1.3-209, C.R.S., shall be **SUBJECTED TO A SYSTEM OF STRUCTURED AND INDIVIDUALIZED BEHAVIORAL RESPONSES** ~~a punitive sanction~~. The judicial department, the department of corrections, the state board of parole, and the division of criminal justice of the department of public safety shall cooperate to develop and make public a range of **STRUCTURED AND INDIVIDUALIZED BEHAVIORAL RESPONSES** ~~punitive sanctions~~ for those ~~offenders~~ **PEOPLE** under the jurisdiction of each agency which are appropriate to the ~~offenders~~ **PEOPLE** supervised by each particular agency. ~~Such punitive sanctions shall be formulated in such a way as to promote fairness and consistency in the treatment of offenders and may include, but shall not be limited to, increases in the level of an offender's supervision, increases in the use of electronic monitoring of an offender, loss of earned time granted pursuant to section 17-22.5-405, C.R.S., and referral of the offender to the court or the state board of parole for resentencing or revocation of probation or parole.~~ **A SYSTEM OF STRUCTURED AND INDIVIDUALIZED BEHAVIORAL RESPONSES SHALL INCLUDE AN ACCOUNTABILITY-BASED SERIES OF BEHAVIORAL RESPONSES, SANCTIONS, INCENTIVES, AND SERVICES DESIGNED TO RESPOND TO AN OFFENDER'S VIOLATION BEHAVIOR QUICKLY, FAIRLY, CONSISTENTLY, AND PROPORTIONALLY. THE SYSTEM SHALL ALSO BE DESIGNED TO MOTIVATE POSITIVE BEHAVIOR CHANGE, SUCCESSFUL COMPLETION OF SUPERVISION, AND AN OFFENDER'S INDIVIDUALIZED TREATMENT OR BEHAVIOR CHANGE GOALS USING RESEARCH-INFORMED STRATEGIES DESIGNED TO REDUCE THE LIKELIHOOD OF CONTINUED INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM.**

It is the intent of the general assembly that any offender's test which is positive for the use of controlled substances or alcohol ~~shall result in an intensified level of testing, treatment, supervision, or other sanctions designed to control abuse of substances for such offender~~ **IS ADDRESSED WITH A RANGE OF BEHAVIORAL RESPONSES PRIOR TO CONSIDERATION FOR REVOCATION OR RE-SENTENCING BY THE COURT OR PRIOR TO CONSIDERATION OF REVOCATION BY THE STATE BOARD OF PAROLE.**

(3) The judicial department, the department of corrections, the state board of parole, and the division of criminal justice of the department of public safety shall cooperate to develop **AND IMPLEMENT** a range of incentives for offenders under the jurisdiction of each particular agency to **MOTIVATE RECOVERY FROM A SUBSTANCE USE DISORDER AND ABSTINENCE FROM HARMFUL USE OF** ~~discontinue abuse of~~ alcohol or controlled substances.

*Subsection (4) unchanged*

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**18-1.3-102. Deferred sentencing of defendant**

*Subsections (1), (3) and (4) unchanged*

(2) Prior to entry of a plea of guilty to be followed by deferred judgment and sentence, the district attorney, in the course of plea discussion as provided in sections 16-7-301 and 16-7-302, C.R.S., is authorized to enter into a written stipulation, to be signed by the defendant, the defendant's attorney of record, and the district attorney, under which the defendant is obligated to adhere to such stipulation. The conditions imposed in the stipulation **AND THE RESPONSES TO VIOLATION BEHAVIOR** shall be similar ~~in all respects to conditions permitted as part of~~ probation. A person convicted of a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1), shall stipulate to the conditions specified in section 18-1.3-204 (2)(b). In addition, the stipulation may require the defendant to perform community or charitable work service projects or make donations thereto. Upon full compliance with such conditions by the defendant, the plea of guilty previously entered shall be withdrawn and the charge upon which the judgment and sentence of the court was deferred shall be dismissed with prejudice. The stipulation shall specifically provide that, upon a breach by the defendant of any condition regulating the conduct of the defendant, the court shall enter judgment and impose sentence upon the guilty plea; except that, if the offense is a violation of article 18 of this title, the court may accept an admission or find a violation of the stipulation without entering judgment and imposing sentence if the court first makes findings of fact on the record stating the entry of judgment and sentencing would not be consistent with the purposes of sentencing, that the defendant would be better served by continuing the deferred judgment period, and that public safety would not be jeopardized by the continuation of the deferred judgment. If the court makes those findings and continues the deferred judgment over the objection of the prosecution, the court shall also impose additional and immediate sanctions upon the defendant to address the violation, to include, but not be limited to, the imposition of further terms and conditions that will enhance the likelihood of the defendant's success, respond to the defendant's noncompliance, and promote further individual accountability, including extending the time period of the deferred judgment for up to two additional years or incarceration in the county jail for a period not to exceed ninety days consistent with the provisions of section 18-1.3-202 (1), or both. When, as a condition of the deferred sentence, the court orders the defendant to make restitution, evidence of failure to pay the restitution shall constitute prima facie evidence of a violation. Whether a breach of condition has occurred shall be determined by the court without a jury upon application of the district attorney or a probation officer and upon notice of hearing thereon of not less than seven days to the defendant or the defendant's attorney of record. Application for entry of judgment and imposition of sentence may be made by the district attorney or a probation officer at any time within the term of the deferred judgment or within thirty-five days thereafter. The burden of proof at the hearing shall be by a preponderance of the evidence, and the procedural safeguards required in a revocation of probation hearing shall apply.