



Colorado Commission on Criminal and Juvenile Justice

MINUTES

February 24, 2023 / 1:30pm – 2:45pm

Virtual Meeting

Commission Member Attendance

Stan Hilkey, Chair	Serena Gonzales-Gutierrez - ABSENT	Angie Paccione
Abigail Tucker, Vice Chair -ABSENT	Justin (JR) Hall	Tom Raynes
Taj Ashaheed	Dave Hayes	Megan Ring
Minna Castillo-Cohen - ABSENT	Kristiana Huitron - ABSENT	Michael Rourke
Shawn Day - ABSENT	Jes Jones	Gretchen Russo - ABSENT
Janet Drake	Kira Jukes - ABSENT	Moses (Andre) Stancil
Valarie Finks	Rick Kornfeld	Glenn Tapia
Jaime FitzSimons	Greg Mauro	Joe Thome, ex officio
Bob Gardner - ABSENT	Patrick Murphy - ABSENT	<i>Victim/Survivor rep. - VACANT</i>
Julie Gonzales	Steve O’Dorisio	<i>Leg. House Rep. (R) - VACANT</i>

Guests: Michael Dougherty, Maureen Cain

Call to Order and Opening Remarks

Stan Hilkey, CCJJ Chair

Mr. Hilkey, Commission Chair (Executive Director, CO Department of Public Safety), called the meeting to order at 1:30 pm and thanked Commissioners and members of the public for attending. Mr. Hilkey reviewed the agenda and reminded Commissioners this extra meeting was scheduled to hear the preliminary recommendation submitted by the Sentencing Reform Task Force.

SENTENCING REFORM TASK FORCE

Rick Kornfeld and Michael Dougherty, Task Force Co-chairs

Preliminary Recommendation Presentation

Mr. Hilkey invited Co-chairs Task Force Rick Kornfeld and Michael Dougherty (DA, Boulder County) to present a preliminary recommendation to the Commission. The Sentencing Reform Task Force approved the recommendation at their February 22 meeting. A summary and an excerpt of each recommendation element follow, along with the discussion points. *[Given that this recommendation is preliminary, only the title and general description are included.]*

Mr. Dougherty started the presentation by thanking the Sentencing Reform Task Force, Sentence Structure Working Group, and Sentence Structure Study Group members and the stakeholders who participated in the work to produce these significant sentencing initiatives. Mr. Dougherty also reiterated that this proposal results from extensive discussions, listening sessions with stakeholders,

examination of other states' practices, and data analysis related to criminal classification and sentencing.

Mr. Dougherty shared that there were robust discussions about particular elements at this week's Sentencing Reform Task Force meeting. A motion was moved and seconded to separate the recommendation elements to offer four recommendations instead of a package. The motion failed, and Mr. Dougherty presented the final recommendation from the Sentencing Reform Task Force as a single package with four elements.

Preliminary Recommendation FY23-SR #04. Change Felony Crime Classifications and Sentence Enhancement Provisions of the Criminal Code [Statutory]

Amends, appends, and reclassifies 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:

Extreme Indifference Homicide and Vehicular Homicide [ELEMENT 4.1]

This Element 4.1 amends, appends, and reclassifies statutory provisions related to Extreme Indifference Homicide and Vehicular Homicide. Includes revisions and/or amendments to:

- §18-3-102. Murder in the first degree. 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. The 64 years is the number that is maximum of the extraordinary risk/aggravated crime for the class 2 felony.).
- §18-3-102.5. Attempted extreme indifference homicide. *[new section]*. 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. Re-write 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. Graham Supreme¹ 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.

¹ Supreme Court ruling that juveniles cannot be sentenced to life without parole without certain findings. This represents a cleanup from Senate Bill 2016-181.

Mandatory Consecutive Sentencing and Post-Conviction Review [ELEMENT 4.2]

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. Provisions of the “safety valve” and reconsideration include the following:

- 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:
 - Defendant has no prior VRA 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 serious bodily injury.
- 2) Amend Post-conviction review statutes to 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. Excluding mandatory consecutive sentences, the current time frame (120 days) and factors (unusual and extenuating circumstances) regarding reconsideration allowable for all COV mandatory would remain the same. The related review criteria include:
 - 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.
 - 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 hearing.

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. 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.

- 3) This element may only be applied prospectively and therefore cannot be applied retrospectively.

Habitual Sentences [ELEMENT 4.3]

This Element 4.3 amends the reconsideration provisions for Habitual sentences. The current sentencing scheme is maintained with the following changes:

- 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.
- 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.

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 sentence.

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.

² This is the increased sentence for the “little habitual.”

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

The application of this element shall be prospective, not retroactive.

Extraordinary Risk [ELEMENT 4.4]

This Element 4.4 eliminates provisions of Colorado criminal statutes related to Extraordinary Risk for class 5 and 6 felonies.

DISCUSSION

Mr. Dougherty relayed concern from some Sentencing Reform Task Force members regarding Element 4.2 *Mandatory Consecutive Sentencing and Post-Conviction Review* as it relates to adding an opportunity for the defendant to file a motion for their sentence reconsidered within 2 to 5 years and thus challenging the goal of sentence certainty.

Mr. O’Dorisio asked whether the victim community was engaged in the discussions and about the reasoning and arguments for or against presenting this recommendation as a package, rather than as separate recommendations.

Mr. Dougherty responded that victims were represented and engaged in the conversations and acknowledged that some victim representatives believe the proposal does not go far enough to reflect the harm done to victims.

The recommendation includes a reconsideration (referred to as a “second look”) for Habitual and Mandatory Consecutive sentences. Such a process would necessitate the notification and participation of victims in court hearings. Some Sentencing Reform Task Force members expressed concern about victims having to re-experience the trauma that resulted from the crime. Other members of the Task Force believe that a “second look” process should be allowed for the court to review and determine whether the length of sentence is appropriate in consideration of the defendant’s conduct in the Department of Corrections.

Ms. Finks echoed the concerns expressed today. She suggested adding “multiple victims” as an aggravator in the proposed aggravated vehicular homicide statute. Ms. Finks agreed with the higher sentencing range for vehicular homicide (currently a maximum of twelve years) and believed there should be a “multiple victims” aggravator. The families of vehicular homicide victims often struggle to understand that the maximum sentence for such a crime is twelve years.

Ms. Finks reiterated concern regarding the sentence reconsideration for both Habitual and Mandatory Consecutive Sentences, given the emotional and physical impact of those crimes on the victims. She reminded the group that the funding for victim services has decreased, and victims go through the criminal justice process with fewer resources. The victims revisit their trauma at the various stages of a sentence (for example, reconsideration, parole hearings, etc.), and adding reconsideration processes, such as the three to five-year reconsideration proposal above in Element 4.2 or the habitual offender reconsideration at ten years in Element 4.3, will add significant stress to their experience.

Additionally, Ms. Finks shared that she will ask Commissioners to consider excluding Victim Rights Act (VRA) crimes from the sentence reconsideration for habitual offenses at the March 10 Commission meeting.

Mr. Raynes indicated that very few states use multiple victims as an aggravator. He clarified that the sentencing range for an aggravated offense would be a maximum of sixty-four years and cautioned that adding multiple victims as an aggravator would prevent the ability to use mandatory consecutive sentencing on individual counts.

Ms. Jones explained that sentences imposed under the habitual criminal statute related to punishment enhancement. The Habitual enhancer is filed based on the criminal history. Additional charges are added with a different sentencing scheme, three or four times the maximum sentence of the underlying crime. Ms. Jones believed this proposal would impact a few Habitual cases and agreed with the timing of the second look in the proposals, enough time for a meaningful reconsideration to allow people to change.

Mr. Ashaheed echoed Ms. Jones' comments and shared his unique perspectives as a person with lived experience of incarceration and as a victim. Mr. Ashaheed, who works with formerly incarcerated individuals and assists with their reentry into the community, concurred and offered that people do, in fact, change; that he appreciated the robust conversations at the Commission and Task Force to ensure all perspectives are considered; and that the proposals discussed today have significant impacts on both victims and offenders.

Ms. Ring reminded Commissioners this recommendation was developed thanks to the significant work from the Sentence Structure Working Group members, input from stakeholders, and significant compromises from the different perspectives represented and the individuals invited to participate in the conversations. Regarding the "second look" reconsiderations, Ms. Ring explained that, under this proposal, the current mandatory consecutive reconsideration processes would be amended (1. Rule 35(b) process that provides a second chance to argue for lesser penalties at 126 days after the sentencing hearing, and 2. Reconsideration for crimes of violence at 119 days after placement in the Department of Corrections).

Mr. Rourke explained that, at the Task Force meeting, he asked for the four elements to be split into four separate recommendation because he does not support reducing the felony class for extreme indifference from first degree to a second degree. Mr. Rourke believed that offering four separate recommendations would allow for a more thoughtful debate and discussion of each proposal. He expressed concern about having to decide whether to support the single recommendation, considering his objection to particular elements. He informed Commissioners that he intends to offer a motion to split the recommendation at the Commission meeting on March 10.

Mr. Raynes shared that he always has been a proponent of presenting recommendations with several components as a package. However, given the arguments discussed at the Sentencing Reform Task Force and the current discussion, he would agree with separating the elements into four recommendations. He felt that each element presented uniquely challenging issues that require individual attention.

Mr. Hilkey, joined by Commissioners, recognized and thanked the Sentencing Reform Task Force and Sentence Structure Working Group members for these significant efforts. Mr. Hilkey reminded the group that the CCJJ voting process and protocols allow for amendments during the final consideration of a recommendation. He strongly encouraged attendance at the Commission meeting on March 10 to ensure their perspectives are represented on this important recommendation.

PUBLIC COMMENT

Ms. Kazi Houston (Rocky Mountain Victim Law Center), who represents victims on the Sentencing Reform Task Force, offered a summary of her concerns regarding the preliminary recommendation. She began by expressing appreciation and acknowledged the value of the tremendous work of the

Sentencing Reform Task Force and Sentence Structure Working Group members. Ms. Houston emphasized the concerns she raised today do not undermine the work and compromises made within the groups. Ms. Houston struggled to see a fair compromise for the victims when filing options for extreme indifference first-degree murder are reduced, without the trade-off of increasing penalties for vehicular homicide in general. The Task Force voted on and rejected amendments that would have reflected the interests of victims, such as an increase in penalties for egregious vehicular homicide.

Ms. Houston then referenced the mandatory consecutive sentencing and post-conviction review processes. In this proposal, the court is granted an additional option to imposing consecutive sentences for defendants who had no prior VRA felony convictions and did not use or possess a firearm or explosive. She reported that the victim communities are concerned this would create two classes of victims where some defendants would be allowed a reconsideration under this statutory change and other defendants would not. Ms. Houston asked the Commission to consider removing these two factors, given the confusion, complication, and uncertainty of the sentences for the victims. She also suggested removing the VRA crime from the Habitual Sentences element.

Ms. Houston echoed Ms. Finks' concerns regarding victims revisiting their trauma at the various stages of a sentence (for example, reconsideration, parole hearings, etc.) and that these reconsideration processes will add significant stress to their experience. Ms. Houston concluded by encouraging Commissioners to recognize the impact these proposals might have on victims.

Dr. Jefferey Nowacki (Associate Professor of Sociology at Colorado State University and member of the Sentencing Reform Task Force) offered information about the criminological research on the deterrence theory of punishment. The research literature identifies three elements that contribute to public safety: the severity of punishment, the certainty of punishment, and the celerity (or swiftness) of punishment. Empirical research supports that crime deterrence is associated more with punishment that is swift and certain, but that punishment severity is less effective as a deterrent.

ADJOURNMENT

Mr. Hilkey thanked Commissioners for their attention and participation, and reminded members that preliminary recommendation presented today (FY23-SR #04) will be offered for final consideration at the March 10 meeting. With no further business, Mr. Hilkey adjourned the meeting at 2:45 pm.

The next Commission meeting is Friday, March 10, 2023, at 1:30 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).