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To: Governor Ritter, the Attorney General Suthers, the Chief Justice Mullarkey of the State Supreme Court, the Judiciary Committees of the House of Representatives and Senate, and the Executive Committee of the General Assembly, pursuant to C.R.S. 16-11.3-103 (2.5); Members of the Colorado Commission on Criminal and Juvenile Justice; Members of the Commission’s task forces and working groups

From: Peter Weir, Executive Director of the Department of Public Safety, Chair of the Commission on Criminal and Juvenile Justice

Re: Addendum to November report from the Commission on Criminal and Juvenile Justice

During the 2009 Legislative Session, C.R.S. 16-11.3-103 (2.5)(d)(l) was modified by Senate Bill 286 to require that the Colorado Commission on Criminal and Juvenile Justice “prioritize the study of sentencing and prepare findings, recommendations and a plan for the ongoing study of sentencing.” The legislation required the Commission to document these in a report by November 30, 2009. That report has been published and is posted on the Commission’s web site and is available at http://cdpsweb.state.co.us/cccj/Commission_Reports.html.

However, the short time period mandated in S.B. 286 resulted in the need for an “addendum” to the November report. The addendum, attached to this memo, includes sentencing recommendations that required additional discussion by the Commission. The addendum should be read in conjunction with the November 2009 report because the report provides the context for the recommendations, including a description of the Commission’s process for studying sentencing and its voting protocol.

The Commission’s November 2009 report contains 40 recommendations for sentencing reform, and the attached addendum includes an additional 5 recommendations. The first of the 5 attached recommendations is a statement philosophy that provides the foundation for reform of the drug statutes, and this recommendation is approximately 6 pages long. Also note that the numbering scheme is not sequential but comports with the November report.

Please note that the attached addendum completes Phase One of the Commission’s study of sentencing. Section 4 of the November 2009 report includes a description of the Commission’s evolving plan to continue its comprehensive study and analysis of sentencing in Colorado. Future Commission reports and memoranda will document its work in this area.

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GOVERNOR

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Division of
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Office of Preparedness,
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December Addendum¹
Colorado Criminal and Juvenile Justice Commission
2009 Recommendations for Sentencing Reform

POLICY STATEMENT AND DRUG LAW PHILOSOPHY²

D-1³

The following policy statements provide the context for the recommendations that follow and were developed, in part, as a proposed replacement of C.R.S. 18-18-401.

Providing community-based treatment for offenders who suffer from alcoholism and drug abuse -- and mental health problems associated with these addictions -- will improve public safety by reducing the likelihood that such individuals will have further contact with the criminal justice system. This strategy will provide substantial savings to the taxpayer. The research unequivocally finds that substance abuse treatment reduces drug use and criminal behavior. Research demonstrates that *successful* treatment:

- a) occurs at the earliest possible opportunity;
- b) is based on an individual treatment plan that incorporates natural communities and pro-social supports;
- c) includes family members when they offer a positive impact on the recovery process; and
- d) provides a continuum of community-based services.

To reduce recidivism, therapeutic intervention rather than incarceration alone is required to treat alcoholism and illicit drug use disorders as well as mental illnesses related to these addictions. Prison should be reserved for violent, frequent or serious offenders. Savings that are achieved from reduced confinement of drug offenders shall be directed toward the counties to implement evidence-based sentencing and treatment interventions.

Recommendations related to the above policy statement

- The Commission on Criminal and Juvenile Justice recommends that the public policy of Colorado recognize alcoholism and substance use disorders as illnesses and public health problems affecting the health, safety, economy, and general welfare of the state.

¹ Per C.R.S. 16-11.3-103 (2.5), the Colorado Commission on Criminal and Juvenile Justice was mandated to prepare a report on sentencing recommendations by November 31, 2009. The report includes 40 recommendations regarding criminal sentencing and is available at http://cdpsweb.state.co.us/ccj/Commission_Reports.html. This document includes additional recommendations that remained under consideration at the time the November report went to press and constitutes an addendum to the November 2009 report.

² Much of the research that supports these recommendations and statements can be found at <http://www.drugabuse.gov/drugpages/cj.html>. This page contains links to multiple reports conducted and/or supported by The National Institute on Drug Abuse (NIDA) regarding criminal justice and drug abuse.

³ The recommendations included in these pages are referred to with letters and numbers. The letters correspond to the topic. Specifically, D refers to “drugs,” HTO represents “habitual traffic offender,” DUI equals “driving under the influence” of drugs or alcohol, and SP refers to “special offender.”

- The Commission recommends that the Colorado General Assembly seek to improve public safety, reduce recidivism, and promote substance abuse treatment by implementing a system of evidence-based sentencing practices and community-based interventions that focus on the individual defendant.

This approach will combine accountability, risk and needs assessments, criminal penalties, and appropriate treatment for individuals who are addicted to substances and convicted of criminal offenses. This system will differentiate among the following types of individuals:

- (a) a defendant who is an illegal drug user but is not addicted or involved in other criminal activity;
 - (b) a defendant who is addicted but is not otherwise engaged in other criminal activity;
 - (c) a defendant who is addicted and engaged in nonviolent crime to support their addiction;
 - (d) a defendant who is addicted and engaged in violent crime; and
 - (e) a defendant who is engaged in drug trafficking or manufacture for profit who is not addicted to illegal drugs.
- Persons addicted to or dependent on controlled substances and whose criminal behavior is associated with the addiction should, upon conviction, be sentenced in a manner most likely to promote rehabilitation and to be consistent with public safety.
 - For those sentenced to the community for a drug crime and who are found to be addicted to or dependant on controlled substances, meaningful interventions should be available and applied to non-violent as well as violent offenders based upon individual needs and demonstrated risk to the community.
 - The manufacture, distribution and delivery of illicit controlled substances have a substantial and detrimental effect on the health and general welfare of the people of this state, especially children. As such, persons who habitually or commercially engaged in the trafficking of illicit substances and prescription drugs present a menace to public health and safety.
 - The purpose of sentencing *occasional users and experimenters* is to induce them to shun further contact with controlled substances and to learn acceptable alternatives to drug abuse. This approach requires differentiating recreational or one-time users with few or no addiction treatment needs from those who are chemically dependent and require treatment.
 - Because addiction is a chronic disease, drug relapse and return to treatment are common features in the path to recovery for individuals with substance use disorders. Therefore, judges, district attorneys, public defenders, private attorneys, probation officers, parole officers, and other professionals involved in the criminal justice system must anticipate, recognize, plan for, and appropriately respond to the potential for relapse that may occur for individuals involved in treatment.

- The purpose of sentencing *defendants with treatment needs* can be achieved by promoting evidence-based sentencing of individuals convicted of drug-related offenses. Strategies include the following:
 - a) Allowing judges and other judicial officers to use available information and resources to develop informed and flexible evidence-based sentencing plans that meet the needs of the individual offender, that
 - i) ensure appropriate safeguards to protect the defendant's rights while assigning the individual to appropriate treatment programs, and
 - ii) are based on, when practical, the risk level and treatment needs of the offender as determined by objective assessment tools.
 - b) Allowing for the appropriate combination of supervision and treatment based on research indicating that this combined approach has the greatest likelihood of recidivism reduction and protecting the public.
 - c) Allowing for consideration of the significant collateral consequences that a criminal record has on employment and lifetime earnings of drug-related convictions, and how such convictions can undermine successful community reintegration.
 - d) Using treatment programs with demonstrated rates of success.
 - e) Targeting interventions to offenders with moderate- to high-level treatment needs rather than those identified with low-risk and low-needs.
 - f) Targeting individuals who could benefit from appropriate treatment programs.

D-2

Identify a working group to develop funding strategies.

The Commission shall identify a working group for the purpose of developing a funding strategy to expand treatment resources. This is necessary to ensure the successful implementation of the recommendations presented here.⁴

D-3

Ensure statutory reforms are consistent with sentencing policy, evidence-based practices and recidivism reduction.

The complex nature of Colorado statutes pertaining to drug-related sentences requires detailed analysis and careful study to ensure that any recommended modifications conform to broader sentencing policies and structures. Before any suggested reforms can be recommended, the Commission must first undertake this analysis to guarantee that any recommended statutory reforms will be consistent with evidence-based practices and

⁴This working group was identified by the Commission in November 2009 and its work is underway.

recidivism reduction.

D-4

Establish a transparent mechanism to ensure that fiscal savings resulting from CCJJ recommendations are reallocated toward treatment programs.

A transparent mechanism must be immediately established to ensure the reallocation of any fiscal savings realized from the implementation of the Commission's recommendations concerning drug and DUI law modifications. This reallocation must be directed toward expanding and sustaining evidence-based community- and jail-based treatment programs and evaluating the efficacy of these programs.

D-5

Design differential intervention approaches for defendants.

Criminal activity, addiction, and illegal drug use can intersect in significantly different ways. Decision makers, including those representing the criminal defense and prosecution, must distinguish among the variety of circumstances surrounding drug offenses. Differential approaches must be designed for defendants who are:

- (a) illegal drug users but not addicted or involved in other criminal activity,
- (b) addicted and engaged in drug activity but not otherwise engaged in other criminal activity,
- (c) addicted and engaged in nonviolent crime to support their addiction,
- (d) addicted and engaged in violent crime, and
- (e) engaged in drug trafficking or manufacturing for profit but not addicted to illegal drugs.

D-6

Community-based treatment should be expedited for alcohol and drug-involved defendants.

Research shows that timely and relevant consequences produce the most successful outcomes for individuals who are addicted to alcohol or drugs. Sanctions that include community-based treatment should be expedited for alcohol and drug-involved defendants. Due process rights should be protected in expedited cases.

D-7

Intermediate sanctions and rewards should be authorized when working with drug-involved offenders.

Probation and parole officers should be granted the authority to administer intermediate sanctions and rewards when working with drug-involved offenders.

D-8

Judicial districts should develop a collaborative decision-making process for cases involving drug-addicted offenders.

Each judicial district should develop a collaborative decision-making process that involves prosecutors, defense attorneys, community supervision officers, treatment providers, and defendants' support systems for cases involving drug-addicted offenders.

D-9

Those prosecuting drug-involved defendants must proactively address minority over-representation.

Those involved in the prosecution of drug-involved defendants (e.g., policy makers, administrators, supervising officers, and other criminal justice system professionals) must proactively address minority over-representation in drug offenses. This should include, among other efforts, careful consideration of the following practices:

- (a) Frequent law enforcement patrols in specific neighborhoods,
- (b) Use of pleas for drug possession defendants that may avoid a felony record, and
- (c) Cultural competency of those delivering substance abuse treatment.

D-10

Modify court sanctions for first-time offenders to help individuals maintain or obtain employment.

Research demonstrates that individuals with a felony record have reduced employment and earnings potential, a burden that can last a lifetime. Court sanctions should expand non-felony sentencing options for first-time offenders who are charged with drug possession, thereby increasing offenders' ability to maintain or obtain employment.

D-11

Allow felony arrest records to be sealed when the conviction is for a misdemeanor drug crime.

Statutes should allow for the ability to seal the record of A felony drug arrest that results in misdemeanor conviction.

D-12

Assess all drug-involved defendants for risk and treatment needs as early as possible in the criminal court process.

The court, prosecution and defense must have objective information about the risk and treatment needs of drug-involved defendants prior to disposition and sentencing. All drug-involved defendants must be assessed for risk and treatment needs as early as possible in the criminal court process. The assessment requires the use of a standardized and validated assessment tool that would provide the necessary details for treatment planning.

D-13

Remove barriers to conducting risk and treatment needs assessments while protecting a defendant's Constitutional rights.

The Commission should assign a workgroup of prosecutors and defense counsel to determine how to remove barriers to conducting these assessments while addressing concerns regarding a defendant's Constitutional rights against self-incrimination and the confidentiality of medical records.

D-14

Treatment programs that receive state funding should be evaluated and evaluation data should be coordinated through the Division of Behavioral Health at the Colorado Department of Human Services.

Colorado statute should require and provide resources for the development of evidence-based standards, for performance measures within community-based treatment programs, and for the evaluation of those programs. Treatment programs that receive state funding should be required to capture data that allow for the monitoring of each program's compliance with evidence-based standards and the evaluation of the effectiveness of the program to reduce recidivism. To prevent redundancy, data collection for annual evaluations should be coordinated through the Division of Behavioral Health at the Colorado Department of Human Services so that treatment providers would have a single reporting system. The data should include, but not be limited to:

- (a) population description,
 - i. treatment history
 - ii. level of addiction
 - iii. criminal history
 - iv. risk and needs assessment
- (b) number of individuals served,
- (c) program completion criteria,
- (d) definition of success,
- (e) success rate, and
- (f) cost per client.

D-15

The Division of Criminal Justice, State Judicial Branch, and the Division of Behavioral Health should collaborate in the evaluation of alcohol and drug treatment programs.

On behalf of the Commission, the Division of Criminal Justice, State Judicial Branch, and the Division of Behavioral Health should collaborate in the evaluation of alcohol and drug treatment programs. DCJ and Judicial will examine arrest and reconviction data to determine recidivism rates for offenders participating in state-funded programs.

D-16

Develop empirically-based core competencies and standards of practice in offender management along with standardized training and regulation for providers working with offenders.

The Division of Behavioral Health, the State Judicial Branch, and the Division of Criminal Justice should develop empirically-based core competencies and standards of practice in offender management to be used to qualify and evaluate service providers. Standardized training should be developed that addresses these core competencies and practice standards and be required for all providers working with offenders. This training should be regulated.

DRIVING UNDER THE INFLUENCE OF ALCOHOL AND DRUGS

HTO-1⁵

ELIMINATE SOME NON-ALCOHOL/DRUG DRIVING OFFENSES AS PREREQUISITES FOR HABITUAL TRAFFIC OFFENDER

Eliminate non-alcohol related Driving Under Revocation (DUR), Driving Under Suspension (DUS) and Driving Under Denial (DUD) as a major offense for consideration by the Division of Motor Vehicle (DMV) for a habitual traffic offense.

HTO-2

ELIMINATE SOME NON-ALCOHOL/DRUG DRIVING OFFENSES AS PREREQUISITES FOR HABITUAL TRAFFIC OFFENDERS AND ELIMINATE MANDATORY JAIL SENTENCES FOR NON-ALCOHOL OFFENSES.

Eliminate non-alcohol related Driving Under Revocation (DUR), Driving Under Suspension (DUS) and Driving Under Denial (DUD) as a major offense for consideration by the DMV as a predicate offense to classification as a Habitual Traffic Offender. Eliminate mandatory jail sentences for non-alcohol related DUR, DUS and DUD while still retaining them as discretionary.

DUI-9⁶

MODIFY BOND STATUTES FOR DEFENDANTS ACCUSED OF 3rd AND SUBSEQUENT ALCOHOL AND DRUG RELATED DRIVING OFFENSES

On a 3rd and subsequent alcohol-related driving arrest, if the defendant is granted bond, the conditions of the bond must include participation in a treatment program and regular monitoring such as electronic monitoring, alcohol testing and/or vehicle disabling devices. Relief from these conditions can only occur upon motion of the defendant, a hearing, and a written finding by the court that these conditions are not in the interests of justice and that public safety is not endangered by the removal of the conditions.

CONTROLLED SUBSTANCES

SP-1⁷

Limit to 100 feet the current 1,000 foot zone that pertains to the sale, distribution, and manufacture of controlled substances.

DISCUSSION

This recommendation was previously published in the Commission's November 2009 report with a note that the Commission was still considering modifying the list of zones to which this perimeter applies. After further discussion, no further modifications to C.R.S. 18-18-407(2)(a) were made. The paragraph below reflects the recommended statutory change.

⁵ HTO refers to Habitual Traffic Offender recommendations.

⁶ DUI refers to Driving Under the Influence recommendations.

⁷ SP refers to Special Offender recommendations.

C.R.S. 18-18-407(2)(a) *A defendant shall be a special offender if the defendant is convicted of selling, distributing, possessing with intent to distribute, manufacturing, or attempting to manufacture any controlled substance in violation of section 18-18-405 either within or upon the grounds of any public or private elementary, middle, junior high, or high school, vocational school, or public housing development, or within ~~one thousand~~ **one hundred** feet of the perimeter of any such school or public housing development grounds on any street, alley, parkway, sidewalk, public park, playground, or other area or premises that is accessible to the public, or within any private dwelling that is accessible to the public for the purpose of the sale, distribution, use, exchange, manufacture, or attempted manufacture of controlled substances in violation of this article, or in any school bus as defined in section 42-1-102 (88), C.R.S., while such school bus is engaged in the transportation of persons who are students at any public or private elementary, middle, junior high, or high school. The court is required in addition to imposing the sentence to imprisonment in the department of corrections required by subsection (1) of this section, to fine the defendant without suspension at least twice the minimum fine provided for in section 18-1.3-401 (1) (a) (III) if the defendant's offense is a felony or in section 18-1.3-501 (1) if the defendant's offense is a misdemeanor.*

SP-2

Create a new crime category involving the sale of any controlled substance (other than marijuana) by a person over the age of 18 to a minor.

Create a new crime of sale of any controlled substance (other than marijuana) by a person over the age of 18 to a minor. If the sale is made by a person over the age of 18 who is less than two years older than the minor, the offense will be a class 4 felony. If the sale is made by a person over the age of 18 who is 2 or more years older than the minor, the offense will be an aggravated class 3 felony, special offender status, and subject to a mandatory prison sentence.

DISCUSSION

This recommendation creates a new crime category with enhanced penalties for the distribution and/or sale of drugs to a minor.