Utah Sentencing Commission 2016

SUBCOMMITTEE NOTES & VOTES

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UTAH SENTENCING COMMISSION BY-LAWS

Article VII – Committees:

1. *Special ad hoc committees may be created by the Commission to serve for a specified period of time. Non-Commission members may serve on these committees as deemed appropriate.*

2. *Advisory committees related to any aspect of sentencing may be established within the Commission. Non-Commission members may serve on these committees as deemed appropriate.*

Subcommittee Meetings Held in May 2016:

Guidelines: May 5 at 12 p.m.
Misdemeanors: May 23 at 12 p.m.
Anomalies: May 24 at 11:30 a.m.
Juvenile Justice: May 27 at 12 p.m.

ad hoc
adjective, adverb
/ˈæd ˈhɑk, -ˈhoʊk/ /ad häk/

› formed, arranged or done for a particular purpose only

› American English from Latin origin, meaning "for this" or "for this situation."

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Guidelines Subcommittee:

The Guidelines Subcommittee discussed a proposal from the Board of Pardons & Parole to remove the word "immediate" from the exceptions to the graduated sanction caps contained in Form 10. Specifically, the language would now state that departure would be justified based upon a "substantial public safety threat," as opposed to an *immediate and* substantial public safety threat. Concern was expressed that a presumptive definition of a "substantial public safety threat" should be developed.

Unanimous vote in support of removal of the word "immediate."

Members to solicit feedback regarding the inclusion of a presumptive definition of substantial public safety threat.

A number of specific proposals which were presented previously by representatives from Weber County were also discussed. Concerns were expressed that developing a separate drug offense matrix could create a system similar to what has existed at the federal level and which is contrary to much of the work that went into the Justice Reinvestment Initiative. No interest was expressed in pursuing a minimum mandatory sanctioning schedule. Preference was expressed to maintain judicial and BOPP discretion in both sentencing and release decisions.

Some interest was expressed in further nuancing the crime categories (columns) in the Guidelines to better reflect the distinction between possession offenses and distribution or manufacturing offenses.

No interest was expressed to include an enhancement with a specific number of years for the use or possession of a weapon during the offense. The Weldon Angelos case in the federal system was discussed as an example of how such enhancements reduce judicial discretion and place such discretion in the hands of

prosecutors. Most agreed that if a weapon is used during the commission of an offense, prosecutors should take the time to establish the underlying elements of the offense. Some concern was also expressed that the comprehensive review of the Guidelines which occurred in 2014 as part of JRI included specific statutory instructions that the Guidelines remove double counting. The use of a weapon in the current offense was specifically recommended for removal from the Guidelines since it should be an element of the offense.

Some interest was expressed in establishing presumptive amounts for distribution offenses in order to distinguish between possession and possession with intent to distribute. However, there is currently no consensus amongst prosecutors, some of whom argue that even a minimal amount may be possessed at the time of arrest and the amount may or may not be the most determinative factor as to whether the individual is engaged in distribution of the controlled substance. There was no consensus as to whether the Guidelines would effectuate such a policy change or whether legislation would be needed to do so.

Members to further discuss these issues with their respective groups and report back as to any consensus.

AP&P proposed an alternative version of the RIM which would be more applicable to Community Corrections Centers. Members had various questions regarding the fiscal impact, the number of parolees impacted, whether there was any "pilot" or other test data as to the actual impact. Dan Blanchard and Jennifer Valencia indicated they would follow up and report back.

Pre-Trial and Parole release decision making tools were briefly discussed. The long term goal would be to better incorporate the entire criminal justice process from pre-trial to parole within the Sentencing Guidelines. Jennifer indicated that feedback on the addition of probation and parole sanctions and incentives has been positive. Some have expressed that a more complete picture of the process from start to finish would be helpful.

Jennifer indicated that Doreen Weyland, JRI Implementation Task Force Coordinator, has produced a number of graphic illustrations that have been helpful for legislators in illustrating JRI impacts. The suggestion was made to include an info-graphic in this year's Guidelines to explain where the various tools are used in the process. The info-graphic would be intended to better distinguish between the usefulness of the various tools at various stages. If a graphic illustration is not readily available, further written explanation of the different tools and their intended use would be helpful.

CCJJ is currently working with the Judicial Council on the selection of a statewide pre-trial tool. The County Performance Incentive Grant Funds were prioritized last year by CCJJ to develop a statewide pre-trial tool (Priority B). The BOPP also recently obtained a grant and are in the process of developing better public safety tools for their release decision-making process. Once those tools are identified and developed, the subcommittee will again address the issue for full incorporation into the Guidelines.

Unanimous vote to take the issue under advisement.

A complete review of the aggravating and mitigating circumstances was also briefly discussed. Jennifer provided a handout of various suggestions she has received. Peter suggested that the current forms 2 and 4 be reviewed first.

Unanimous vote to take the issue under advisement.

The issue of earned compliance credits for both sex offenders and DUI offenders was briefly discussed. The issue has been raised that there is a disparity in terms of probation and parole offenders' eligibility for such credits. Jennifer indicated she thought that was intentional under JRI, but would report back at the next subcommittee meeting.

The other issue which has been raised is that offenders who are eligible for such credits appear to be more actively engaged in supervision and more compliant with case action plans. Compliance by all offenders would appear to be of equal importance. If supervision is simply a set number of years of observation, as opposed to active engagement in programs or treatment to reduce risk of re-offense, the value of supervision services would appear to be of limited use.

Unanimous vote to request that the DUI Subcommittee of USAMHAC (formerly USAAV) address the issue of DUI supervision time credits first and to take both issues under advisement. **The next subcommittee meeting will be scheduled at the June 1 USC meeting.**

Anomalies Subcommittee

The Anomalies Subcommittee addressed two specific proposed pieces of legislation regarding felony theft and aggravated kidnapping.

Included in the felony theft proposed legislation was both the removal of incidental possession of a dangerous weapon at the time of a theft; and adding a threshold amount for charging felony theft on a third or subsequent violation in ten years.

A legislator recently inquired regarding a case filed in Salt Lake County as a 2nd degree felony theft where the individual had allegedly committed a theft and incidentally had a concealed weapon on his person (not used, displayed, brandished, etc. during the course of the alleged theft). Members had previously requested actual data regarding filings. At issue is whether this was an isolated incident.

Utah Court data was obtained for filings in FY 2015. A total of 737 theft charges were filed as a 2nd degree and 1,447 theft charges were filed as a 3rd Degree (referencing 76-6-404). **6** of the 2nd degree thefts included a reference to a firearm and **2** of the 3rd degree thefts included a reference to a firearm. Another weapon was listed (not a firearm) in **18** of the 3rd degree thefts. In summary, a total of **26** theft offenses were filed with a weapon referenced (***not*** filed as an aggravated robbery, burglary, etc); **8** of which referenced a firearm.

Peter indicated his concern that if this is a prosecutorial charging issue or an isolated incident, perhaps we should not revise the statute. Paul indicated that this portion of the statute has existed since 1973, prior to the enactment of concealed carry laws. Jennifer indicated that if the ability to charge is listed in a statute, we should not expect prosecutors not to charge it.

The proposal also included a threshold amount of $250 in order to file as a 3rd degree felony theft (with two priors including 1 Class A within 10 years of the current offense). The amounts of $50 and $100 were also discussed as potential alternatives. There was no consensus on a specific amount.
Several concepts were discussed: whether spending $29,000 per year to house an offender for a nominal amount is a wise use of limited correctional resources; general and specific deterrence; whether the existence of the enhancement deters repeat behavior; the deterrent effect on low vs high risk offenders; requiring counties to have imposed at least 6 months time in a county jail on prior offenses before the case could be filed as a felony; or some requirement that the maximum amount of sanctions authorized for prior offenses have been actually imposed before utilizing state prison beds.

Jennifer will follow up with locating more specific information on the two cases she is aware of where the amount of the theft appeared to be nominal. She will also follow up with locating the Pew/CCJJ data slides which were presented in 2014 as part of the JRI comprehensive data collection and forward any information to the group via email.

A proposed amendment to aggravated kidnapping statute was also discussed. The proposal was drafted with the expressed concern that unlawful detention as a predicate offense for aggravated kidnapping can give rise to a charge where no underlying kidnapping actually occurred.

Several concerns were expressed, including various scenarios where the time of the detention may have been brief, and therefore only sufficient to establish unlawful detention as opposed to kidnapping, but the manner of detention was quite violent.

Peter suggested that the unlawful detention statute should be further nuanced to include an aggravated unlawful detention if unlawful detention is removed as a predicate offense for aggravated kidnapping. Support was expressed to further pursue that proposal.
Unanimous vote to take both issues under advisement and encourage further discussion with the respective groups for a resolution. Any further drafts or proposals should be forwarded to Jennifer prior to the next subcommittee meeting.

Next subcommittee meeting will be held **Tuesday June 21 at 12:00 p.m.**

Misdemeanor Subcommittee:

The Misdemeanor Subcommittee discussed the most recent draft of criminal accounts receivable, which was dated January 2016.

Meetings are intended to be scheduled with the Office of Crime Victims, SWAP, and Adult Probation and Parole. Jennifer will contact representatives of each to schedule a meeting.

Unanimous vote to "staff" the draft with interested groups and report back.

Rick Schwermer also mentioned that the Administrative Office of the Courts recently received a "Dear Colleague" letter from the U.S. Department of Justice, which likely should be considered in conjunction with any recodification of criminal accounts receivable.

Driver License issues were briefly discussed in the context of the *Ainsworth* decision and HB475.

Unanimous vote to request the DUI Subcommittee of USAMHAC (formerly USAAV) to address the driver license issues first and to take the issue under advisement.

The issue of expungements was also discussed. Several pieces of legislation enacted since 2012 have impacted policies and procedures, the net result of which has been a significant increase in the number of misdemeanor offenders sent to BCI for fingerprinting.

Judge McCullagh indicated he would review both the 2012 and

2014 legislation and prepare a draft for the next subcommittee meeting for consideration.

The next subcommittee meeting will be **Friday July 29, 2016 at noon**. Specific group discussions are to occur prior to July 29 with additional input to be incorporated into a draft for that meeting. Those drafts will then be on the agenda for the August 3 full USC meeting for discussion.

Please contact jvalencia@utah.gov if you would like to request a meeting directly with interested agencies/groups.

Juvenile Justice Subcommittee

The Juvenile Justice Subcommittee discussed two specific proposed pieces of legislation regarding delayed reporting of sexual offenses committed while a juvenile; and strict liability for juvenile sex offenses between juveniles of a similar age.

Wally Bugden was present at the meeting along with Dr. Monica Money asking the subcommittee to consider two cases filed in Utah County which had no apparent basis for a delayed filing in District Court (for offenses which were alleged to have been committed as a juvenile).

Various concerns with the proposed legislation were discussed and suggestions for improvements were made.

General consensus was expressed that alleged juvenile offenses should be filed in juvenile court, where resources and interventions are more readily available and age appropriate. A revised draft will be circulated to the group for further feedback.
Unanimous support expressed to pursue legislation in this area.
Pam and Jennifer to schedule further meetings with specific legislators once the draft is finalized in order to determine whether legislative support exists to pursue legislation.

A proposal regarding strict liability for juvenile sex offenses between juveniles of a similar age was also discussed. The 2007 *In re Z.C.* case and the absurdity doctrine was discussed in detail. In addition, the 2015 *In re T.C.* case was also discussed. Pam also indicated that 2-3 additional cases were filed recently in Salt Lake County with very similar fact patterns (where the offender and victim are slightly more than the 2 year presumptive age difference).

Steve Beck and Monica Maio with Utah Juvenile Defender's Association were also present and questioned whether the legislature has actually had an opportunity to consider this issue since *Z.C.* The issue presented was whether the legislature actually intended for a juvenile to be both an offender and a victim based solely upon age or whether rape of a child was actually developed with an adult offender in mind.

Concern was expressed that although overt coercion or force may not be used, a child who is 12 or 13 years of age may not be able to distinguish between "mutually welcome" sexual contact and some level of manipulation.

Pam indicated her concern was, in part, that a 1st Degree Rape of a Child conviction is one of the most severe penalties in the entire criminal justice system and will follow a 15 or 16 year old offender forever, even though the offender may have honestly believed they were in love.

In addition, often these offenses are filed as a 1st degree felony and then plead down to a Class A or even B Misdemeanor. A three or four step reduction causes concern that these offenses can be easily overcharged.

While there was no consensus that sexual activity which is currently classified as a 1st degree felony rape of a child should not be a crime, there was some support for the creation of more graduated offenses short of a 1st degree felony. Pam will continue to revise this proposal and disseminate it for future consideration and discussion.

Further discussions also occurred regarding the revised draft of Juvenile Disposition Guidelines. The PSRA and PRA data were compared by the Juvenile Administrative Office of the Courts and Darin developed additional slides for the groups' consideration, which was extremely helpful. General consensus was expressed that rows I and IV are minimally impacted by whether the PSRA or PRA scores are used, with the most significant impact in rows II and III.

Darin further explained that from the perspective of not wanting to increase the rate by which juvenile offenders are recommended for secure care, we may want to consider reducing the number of "4's" and "4/3's" on the grid to reflect the percentage currently recommended. Members agreed the intention was not to increase the number of juveniles committed to secure care. Members also agreed that the PSRA is generally a more representative sample of juveniles who are referred to juvenile court (although it still excludes non-judicial case closures so it is not representative of all youth who may offend). The PRA is generally a more representative sample of juveniles who are committed to secure care or community placement.

The next meeting of the Juvenile Justice Subcommittee will be held on **Friday June 17 at noon**.

AD HOC COMMISSION MEMBERS

The Sentencing Commission extends its sincere thanks to the many non-commission members who so generously volunteer their time and effort in assisting the USC Subcommittees. Both Commission and non-commission members voluntarily attend subcommittee meetings, coordinate information, suggest revisions to both legislation and guidelines, and engage in a vetting process for proposals which are ultimately acted upon by the full Commission. Please contact jvalencia@utah.gov if you are interested in participating in any of the subcommittee meetings. While not a complete list of all individuals who have made contributions, some of the ad hoc members who have participated or are participating include:

Rick Schwermer, Utah Administrative Office of Courts

Debra Moore, Utah Administrative Office of Courts

Krista Airam, Juvenile Court Probation Administrator

Dawn Marie Rubio, Juvenile Court Administrator

Judge Brendan McCullagh, West Valley City

Judge Reuben Renstrom, Weber & Davis County

Judge David Marx, Cache County

Judge Paul Dame, Washington County

Judge Dennis Fuchs (ret.), Salt Lake County

Ed Montgomery, South Jordan City Prosecutor

MaryLou Emerson, Utah Substance Abuse and Mental Health Advisory Council

Melanie Scarlet, Utah Department of Human Services

Brent Kelsey, Utah Department of Human Services

Santiago Cortez, Clinical Consultants

Larry Haefeli, Salt Lake County Probation

Patrick Corum, Salt Lake Legal Defenders

Lacey Singleton, Salt Lake Legal Defenders

Mike Haddon, Department of Corrections

Dan Blanchard, Department of Corrections

James Swink, Cache County Attorney

Dave Fowers, LCSW

Gini Highfield, Juvenile Probation

Natalie Kelker, Juvenile Probation Officer

Tiffany Pew, Juvenile Probation Officer

Kelly Lundberg, University of Utah

Rob Butters, University of Utah

Christian Sarver, University of Utah

Ned Searle, Utah Domestic Violence Planning and Advisory Council

Cuong Nguyen, Utah Board of Juvenile Justice

Doreen Weyland, JRI ITF Coordinator

Benjamin Peterson, Ph.D., CCJJ Researcher