

# Criminal Law Issues Work Group

Monday, January 7, 2013

10:00 am-12:00 pm

Colorado State Patrol Academy

Building 100, Carrel Hall, 15055 S. Golden Rd., Golden, CO 80401

## Minutes

### *Work Group Members in Attendance:*

David Blair, Lauren Davis, Charles Garcia, Marco Vasquez, Larry Abrahamson, Dan Nordberg, Grayson Robinson, Brian Connors, Darrell Lingk, Stephanie Donner, Rachel O'Bryan, John Jackson, Ed Wood, Jim Davis

*Absent:* Daniel Zook

*Staff:* Anastasiya Schomaker

### I. Welcome and Introductions

The meeting was called to order by Jim Davis at 10: 07 am. Work Group members introduced themselves. Meeting goal today is to primarily set up the tasks for the next two months.

### II. Public Comment

Jim Davis opened up the meeting for public comment and set a time cap of 2 min per person. Seven members of the public addressed the work group and spoke on a variety of topics.

### III. Vision of the Work Group

Brian Connors reviewed the Governor's Executive Order creating the Amendment 64 Implementation Task Force. He also highlighted the Amendment 64 webpage created on the Department of Revenue website. A model of Colorado Commission of Criminal and Juvenile Justice is suggested to be adopted as a model for this Work Group. Mr. Connors commended Sheriff Robinson for his leadership as a Chair of the Drug Policy Task Force. This work group has a tight timeline as we need to provide recommendations to the Amendment 64 Implementation Task Force in a month.

### IV. DUID

Jim Davis commented that we have CCJJ members at the table and we don't want to spend a lot of time in this group focusing on the DUID issue as it may potentially derail our efforts. Sheriff Grayson Robinson gave a historical perspective on DUID from CCJJ and Drug Policy Task Force. DUID work group and the Drug Policy Task Force extensively looked into the issue of DUID and had an informed, detailed debate discussion. We couldn't come forward with recommendations two years ago to CCJJ as we were not in agreement among ourselves. The Drug Policy Task Force continued the discussion and recommended a DUID "per se" bill to CCJJ in November 2012. There was a great deal of discussion at CCJJ regarding "per se" of the proposed DUID bill. As a result we modified our recommendations to CCJJ to eliminate "per se" and as result there is now a DUID recommendation that CCJJ voted favorably on and is now coming out in a form of a bill. The recommendation from CCJJ is well considered. Grayson Robinson added that

DUID discussion in this body is a distraction. That work has been done by the Drug Policy Task Force. Sheriff Robinson moved that this body decline any further discussion of DUID. Lauren Davis seconded the motion. Rachel O'Bryan would like to see the text of the recommendation. Ed Wood commented that he finds it will be impractical for this group to focus on DUID. Members voted on the proposed motion. Rachel O'Bryan opposed. Motion passed.

V. Subgroups of the Criminal Law Issues Work Group

Brian Connors reviewed Article XVIII document provided to the Work Group members. An extract from Colorado Constitution stating what impact the initiatives/ amendments can have on Colorado Constitution was reviewed. Principles of constitutional construction employed by reviewing courts when reviewing Constitutional amendments were proposed to be used as principals for this working group. At this point we find three subcommittees are necessary:

1. *Statutory Change and Revision.*

This subgroup will address the issues concerning amendment of state and local laws concerning possession, sales, distribution and transfer of marijuana and marijuana products to conform them to Amendment 64's decriminalization provisions, including but not limited to, laws related to possession of drug paraphernalia, possession of marijuana and marijuana cultivation as stated in the Executive order Creating a Task Force on the Implementation of Amendment 64.

2. *Terminology and Definition.*

Examples of issues which could be considered by a subgroup examining terminology:

1. "Display" is not defined in the Colorado Constitution or in the Colorado Revised Statutes.
2. Article XVIII, Section 16 of the Colorado Constitution includes a preliminary finding that "[i]n the interest of the health and public safety of our citizenry, the People of the State of Colorado further find and declare that marijuana should be regulated in a manner similar to alcohol ...." Is section 12-47-901, C.R.S., a useful starting point in defining: 1) "consumption that is conducted openly and publicly"; or 2) consumption "in a manner that endangers others"?
3. "Openly" is not defined. "Publicly" is not defined. "Openly and publicly" is not defined.
4. Is there consensus on the meaning of the term "mature, flowering plants"?
5. Is there consensus on the meaning of the term "enclosed, locked space"?
6. Should the General Assembly amend the Colorado Clean Indoor Act to make it applicable to all marijuana, medical or otherwise?
7. Lauren Davis suggested revising current definition of distribution and taking all the references to marijuana out of §18-18-405 and creating a new §18-18-406 that would deal only with marijuana. §18-18-405 would deal with other controlled substances.
8. Clarifying child abuse for medical marijuana patients who are growing at home in child protection law and criminal law to give more guidance for courts and adults was proposed by Lauren Davis. Currently Child protection law doesn't address the term "cultivating".

9. Defining “dangerous threat” with regards to municipal laws that deal with this probable cause was proposed by Lauren Davis. Larry Abrahamson supported the need to define the term “endangerment”.
10. Lauren Davis suggested it is important to define what was intended by the ability to possess marihuana produced by a plant by someone who grows marihuana.
11. Ed Wood suggested adding diversion and distribution of marihuana issue brought up at the public comment session to be added to the list of issues.

*Discussion:*

- Grayson Robinson referred to the results of National Jewish Health study that was used as guidance when contemplating the issued related to child abuse. Lauren Davis referred to a scientist in Jefferson County who strongly opposes this study. We have the ability to bring experts who can answer questions to this group’s meeting.
- Subgroups will come up with additional issues that need to be addressed.
- Charles Garcia pointed out that the direction from the Task Force will be valuable in defining the issues this work group needs to focus on as there might be other work groups already looking at some of the questions discussed today. Also, one of today’s public comments was regarding industrial hemp, we don’t want to lose sight of this due to the short timeline we have.
- Lauren Davis made a motion to table industrial hemp portion and to propose to legislature to take it on in 2014 legislative session. Genifer Murray seconded. All in favor. Motion passed.
- Genifer Murray welcomed all members to tour a marihuana growing facility.

3. *Law Enforcement*

Examples of issues which could be considered by a subgroup considering law enforcement issues:

1. Is it possible for the Criminal Law Issues Working Group to provide guidance to the General Assembly about the impact of Amendment XVIII, Section 16 on emerging search and seizure issues?
2. How should law enforcement handle the dilemma of a blameless concertgoer seated next to someone consuming marijuana? Can the General Assembly provide any guidance on these issues?
3. On October 31, 2012, the United States Supreme Court heard oral argument in two companion cases: Florida v. Jardines (11-564) and Florida v. Harris (11-817). The Court will decide these cases by late June. Given Amendment XVIII, Section 16, and assuming that law enforcement drug dogs cannot alert based on the weight of marijuana detected, how can law enforcement make use of drug detection dogs? Is this an issue for the General Assembly or for trial court and appellate courts? Chief Johnson commented it is a great concern for law enforcement as is diversion.
4. Citizen complaints to law enforcement about marijuana smoke billow, odor from raw plants cultivation. Odor making neighbors sick, is it a criminal or a civil issue? Absent concrete information about weight of marijuana in the home or number of plants in the home, does this amount to probable cause supporting issuance of a search warrant for the home? Is this an issue for the General Assembly or for the trial court and appellate courts?

5. Plants/per capita in group living situation. Who gets charged? With what? Is there a per capita presumption in a home or vehicle? In other words, do you divide the number of plants and mature flowering plants by the number of residents over 21?

6. When law enforcement seizes plants and holds plants as evidence, does law enforcement have an obligation to maintain the plants while they are held as evidence? Law enforcement is obligated to return plants in the event of dismissal or acquittal, right? Are any of these issues the province of the General Assembly? Are we going to put monetary value? There should be some kind of cover for law enforcement. Can law enforcement be violating the federal law by returning the plants?

7. Enforcement issues and testing, additional resources for training of drug enforcement officers.

8. Standards in blood draw. Who is permitted to draw blood for drug testing?

9. When a person is brought to jail and he possesses marihuana, he is not allowed to bring it in as it is considered contraband. It is a big concern for sheriffs.

10. Marco Vasquez commented that there is existing frustration in law enforcement around Colorado regarding ambiguity in criminal case law. Lauren Davis commented that NY state has statutory provision for first time marihuana user. Sheriff Robinson, Brian Connors responded that CCJJ has proposed dramatic restructuring of drug sentencing in Colorado. It came out of SB 12-163.

*Discussion:*

- Sheriff Robinson emphasized it is important to get clarification from federal government on federal law especially as the grant cycles begin on March 1.
- Lauren Davis suggested making a recommendation to the legislature to use some extra revenue generated by the businesses to fund DRE officers.
- Charles Garcia commented that child safety was discussed at the last Task Force meeting. Jenifer Murray commented education piece should take care of that. Rachel O'Bryan asked if child safety subgroup can be added as an additional subcommittee.
- Colorado Sunshine law in relation to subcommittees' work was discussed.

Members will volunteer for a subgroup of their choice via email.

Meeting ended at 12:00 pm.