

UTAH SENTENCING COMMISSION ANNUAL REPORT 2005

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Utah Sentencing Commission

The Utah Sentencing Commission is responsible for developing sentencing guidelines for adult and juvenile offenders and for proposing recommendations to all three branches of government regarding the sentencing and release of adult and juvenile offenders. The following policy statement guides the Sentencing Commission in these efforts: The primary purpose of sentencing are to punish the offender, protect and compensate the victim and society, and reduce the likelihood of future crimes by the offender through rehabilitation or incapacitation.

Adult Sentencing and Release Guidelines

Drug Offenses

Drug offense issues continue to be an area of paramount concern to the Sentencing Commission. The Commission has continued to evaluate sentencing practices for drug offenses and has considered whether those practices warrant the development of a separate guideline for drug offenses. The Commission studied lengths of stay for drug offenders compared with other offenders, rates of commitment to prison for drug offenders, and the availability of drug treatment. The Commission noted that all types of drug offenses were grouped in the same offenses category and discussed whether distinctions should be made in the sentencing guidelines for drug "possession only" offenses, drug manufacturing offenses, and drug distribution offenses.

Ultimately, the Commission concluded that while some changes to the sentencing guidelines were necessary to distinguish between drug "possession only" offenses and drug manufacturing and distribution offenses, a separate sentencing guideline for drug offenses was not needed. Rather, the Commission

concluded to amend the current Adult Sentencing and Release Guidelines by adding two new offense category columns for drug "possession only" offenses. The new columns recommend prison for drug "possession only" offenses at a slightly lower rate than for drug manufacturing and drug distribution offenses and recommend slightly shorter prison sentences for those offenders convicted of a drug "possession only" offense who are sentenced to prison compared with drug manufacturing and distribution offenses.

The primary purpose of these modifications to the guidelines is to delineate the differences in nature between drug "possession only" crimes and drug manufacturing and distribution crimes. An additional purpose is to encourage treatment for those offenders whose criminal conduct is driven in large part by a substance abuse addiction. The Sentencing Commission recognizes, without condoning any criminal conduct, that drug "possession only" crimes and related property crimes can be significantly reduced, without threatening public safety, by providing a balance of punishment and adequate treatment to drug "possession only" offenders. However, the Sentencing Commission also recognizes that drug manufacturing and distribution offenses require a more severe punishment as they present a greater threat to public safety and society's quality of life. These recognitions are reflected in the amended Adult Sentencing and Release Guidelines which are effective 2006.

Penalty Anomalies

At the request of the Law Enforcement and Criminal Justice Interim Committee, in 2005 the Sentencing Commission reviewed a number of statutory provisions compiled by the Office of Legislative Research and General Counsel. The Commission was asked to examine the provisions supplied for penalty enhancements, particularly those penalties tied to locations such as drug-free zones. Additionally, the Commission was asked to make recommendations and additions to the list compiled by the Office of Legislative Research and General Counsel as necessary.

Upon receipt of the Interim Committee request, the Sentencing Commission assigned the task of review to its Anomalies Committee. The Anomalies Committee carefully examined applicable statutes over

a period of four months and thereafter reached a consensus on rationale justifying status quo of a majority of the examined provisions along with rationale for eliminating or modifying other enhancement provisions. The Sentencing Commission subsequently submitted several observations and recommendations to the Interim Committee. Below are a few examples of the observations and recommendations submitted and given priority by the Commission:

1. Drug-Free Zones (*U.C.A. Section 58-37-8*)

- a. Presently, this provision enhances the penalty for drug-related offenses one level upward where the offense occurs within 1000 feet of a specified area. For example, an offense occurring within the drug-free zone, which would be a second degree felony (1-15 years) if committed outside the drug-free zone, is enhanced to a first degree felony (5 to life). Historically, first degree felony offenses have been reserved for offenders such as murderers, rapists and armed robbers.
- b. It is difficult to identify an area that does not constitute a drug-free zone in urban Utah due to the 1000 foot radius from sites including: schools, churches, parks, shopping malls and parking lots, etc.
- c. Most drug offenses in drug-free zones appear to be accidental or incidental and actually occur in a residence as opposed to a school, church or public park. These residences just happen to be within the 1000 foot zone and few offenses are in the presence of children.
- d. The Commission has received a few reports of disparate enforcement throughout the state—some jurisdictions file enhanced charges, others refrain though the site of illegal activity occurs within the 1000 foot zone. Additionally, a few law enforcement agencies will arrange drug buys with an agent in a drug-free zone for purposes of obtaining an enhanced penalty. For example, a drug buy arranged in a church parking lot at 2am.
- e. A concern arises that this expansive zone may exceed the original intent of the Legislature. The Sentencing Commission recommended the Interim Committee to seek legislative clarification as to what the intended protected interests are and what size of zone best comports to protect those identi-

fied interests. Presuming that children rank the highest of protected interests, the Commission additionally recommends that the language "in the immediate presence of a person younger than 18 years of age. . ." as contained in provision 4(a)(x), be modified by specifying or defining what is meant by "immediate presence." It was further recommended that DCFS may have a definition that might be beneficial in better identifying and protecting this paramount interest.

2. Hate Crimes (U.C.A. Section 76-3-203.3)

- a. While not identified on the original list supplied by the Interim Committee, The Commission identified this statute as a problematic anomaly in that it presently contains penalty enhancement features that increase the penalty multiple levels as opposed to a gradual increase of one additional level as is the traditional practice. The enhancement increases the penalty from (in most cases) a class B misdemeanor to a third degree felony. This large jump is usually more penalty than is appropriate for the activity and makes it much less likely to be enforced.
- b. Additionally, the Commission resolved that this is not actually a "hate crimes" statute because it does not deal with crimes motivated by animus. Rather, it is a civil rights statute dealing with keeping persons from exercising their rights (see State of Utah In the interest of J.W. 30 P3rd. 1232(2001) 2001 UT APP 208).
- c. Further, the division of the intent requirement makes the statute confusing to the jury. The "intent to intimidate" language in paragraph 2 is less clear than the "fear" language used to define it in paragraph 3.
- d. The listing of predicate offenses is not necessary, nor reflective of all criminal acts which are likely to be used to interfere with civil rights.
- e. Finally, Paragraph 4 is unnecessary now that case law requires all enhancement language to be pled in the charging document called a "criminal information" and proved to the jury beyond a reasonable doubt.
- f. In accordance with the above observations, the Commission recommended repealing the existing statute and reenacting it with supplied specific language which could be an effective prosecution tool and civil right protection.

3. Influencing, impeding, or retaliating against a judge or member of the Board of Pardons and Parole (U.C.A. Section 76-8-316)

The Commission also noted that this penalty enhancement, applicable to those who commit retaliatory

crimes against judges and members of the Board of Pardons, should also include prosecutors within the identified class as they presumably fall within the same protected interests as judges and members of Board of Pardons. A draft of proposed legislation was provided to the Interim Committee.

4. Escape and aggravated escape — Consecutive sentences – Definitions (U.C.A. Section 76-8-309)

The Commission found the penalty enhancement of one degree to be appropriate in this sort of crime but noted disparate statutory treatment depending on whether the offender escapes custody while serving a jail or prison sentence. The offender who escapes while serving a prison sentence (though that offender may have been sentenced to prison but reside in a county jail by way of contract) receives a second degree felony while the offender who escapes while serving a jail sentence receives a third degree felony. The Commission recommended amending this statute to make all escapes, regardless of jail or prison placement, second degree felonies.

For the most part, the Commission found those penalty enhancement provisions reviewed at the request of the Interim Committee to be sound with substantial public policy support. The Commission will continue to place a premium emphasis on identifying and evaluating potential anomalies in our state criminal statutes and has given the Anomalies Committee responsibility to continually conduct assignment-specific and general statutory reviews.

Sentencing Commission Support for 2006 Legislation

As of January 23, 2006, the Sentencing Commission SUPPORTS the following 2006 General Session pending bills:

HB 56 Sex Offender Registration Amendments
(Rep. Lawrence)

HB 60 Controlled Substance Amendments
(Rep. Oda)

***HB 90 Criminal Penalty Amendments**
(Rep. Litvack)

HB 102 Sentencing for First Degree Murder (Rep. Fowlke)

HB 104 Commission on Racial and Ethnic Fairness
(Rep. Bourdeaux)

HB 208 Aggravated Murder Amendment
(Rep. Wyatt)

HB 212 DNA Database Amendments
(Rep. Adams)

HB 244 Aggravated Assault by Prisoners Amendment
(Rep. Wyatt)

HB 249 3rd District Juvenile Court Judge
(Rep. Hogue)

SB 18 Driving Under the Influence Amendments
(Sen. Walker)

SB 51 Driving with Controlled Substance in Body
(Sen. Walker)

SB 52 Antiphishing Provisions
(Sen. Arent)

SB 106 Uniform Interstate Enforcement of Domestic Violence Protections Orders
(Sen. Hillyard)

SB 110 Protection of Certain Voter Information
(Sen. Hillyard)

SB 122 Repeal of Libel Provisions
(Sen. McCoy)

SB 149 Providing for Indigent Defense
(Sen. Bell)

***SB 150 Expungement Amendments**
(Sen. Bell)

SB 159 4th District Court Judge
(Sen. Madsen)

***SB 167 Juvenile Offenses – Diversion Amendment**
(Sen. Arent)

** denotes high priority*



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Representative Duane Bourdeaux House of Representatives	Dan Maldonado Juvenile Justice Services
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