



Legislative
Research
Council

MINUTES

Criminal Code Revision Commission

First Meeting
2004 Interim
Wednesday, June 16, 2004

LCR 1&2
State Capitol Building
Pierre, South Dakota

The first meeting of the interim Criminal Code Revision Commission was called to order by Senator Lee Schoenbeck, Chair, at 8:00 a.m. on Wednesday, June 16, 2004, in Legislative Conference Rooms 1 and 2 of the State Capitol Building in Pierre, South Dakota.

A quorum was established with the following members present: Senators Patricia de Hueck and Lee Schoenbeck (Chair); Representatives Joni Cutler, Richard Engels, Thomas Hennies (Vice-Chair), Tim Rave, Tim Rounds; Messrs. Mike Butler, Jeff Larson, Charlie McGuigan, Dave Nelson, and Tim Tucker. Unable to attend the meeting were Senator Gil Koetzle, Representative Sean O'Brien, and Mr. Robert A. Miller.

Staff members present included Reuben Bezpaletz, Chief Analyst for Research and Legal Services; Jacquelyn Storm, Principal Legislative Attorney; and Kris Schneider, Legislative Secretary.

All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council. For the purpose of continuity, these minutes are not necessarily in chronological order.

Opening Remarks

Chair Schoenbeck gave a brief history on how this summer study came about. The scope of the summer study is to look at the crimes, the elements of the crime, and the penalties and fines to see if they are necessary and appropriate. The study will be broken into three parts: review of Title 22, review of the drug and alcohol statutes, and a review of penalties in other parts of the South Dakota Codified Laws (Code). He stated that Title 22 was last rewritten approximately thirty years ago and most of the drug and alcohol statutes have been written since 1989. Chair Schoenbeck divided the commission into two subcommittees, Title 22 and Drug and Alcohol. Members of the Title 22 subcommittee are: Commissioners Cutler (Chair), Miller (Vice-Chair), de Hueck, Engels, Larson, McGuigan, and Rave. Members of the Drug and Alcohol subcommittee are: Commissioners Hennies (Chair), Tucker (Vice-Chair), Butler, Koetzle, Nelson, O'Brien and Rounds. A list was distributed to the commission (**Document #1**).

Mr. Bezpaletz distributed a notebook to the commission and reviewed its contents (**Document #2**). He encouraged anyone with specific ideas to have them reduced to writing.

Presentation on the Philosophy and Theory of Criminal Law

Professor M. Christine Hutton, Vermillion, USD School of Law, asked the commission to start with the simple questions when considering the reasoning behind the statutes--why, who, and how. She stated that we have criminal codes and sanctions to set boundaries for society, to keep order amongst ourselves, to teach morals, and to tell us that if we do breach the community sanctions that there are

going to be sanctions placed upon us. The Code has a symbolic function; the Legislature speaks through the Code. She asked the commission to keep in mind that enacting a law does not solve the problem; it only places a sanction on the action. Twenty years ago, the Code consisted of approximately one hundred fifty provisions; today there are five hundred. She stated that many of the statutes are redundant.

Professor Hutton stated that one of the most important aspects of our government is the separation of powers. The Legislature makes the laws, the executive branch enforces the laws, and the judicial branch interprets the laws. There is a lot of blending in the statutes and she recommends reviewing them carefully. When the Legislature sets mandatory minimums, they are taking the decision making away from the judicial branch and giving it to the executive branch.

The Code sets a standard for individual responsibility. She stated that the Legislature needs to think about whom and for what reasons the sanctions should apply. Nationally, one in thirty-seven adults has been in prison. In South Dakota, ten thousand people are either currently in prison or are on parole.

As far as a definition for felonies, usually it refers to the common law offenses (murder, robbery, or rape--the crimes that people have known for centuries are wrong). There are also many legislatively created crimes--drug and alcohol offenses. She stated that felonious crime requires a bad act plus a guilty mind. A bad act is defined as something malicious and voluntary; something one does on purpose, a willful act that causes harm to somebody else. A guilty mind means that a person realizes that some harm is being done so the mental state must also be considered. The Legislature assigns a mental state and specific intent crimes in the statute when they use words such as knowingly, willfully, maliciously, recklessly, and with the intent to. Professor Hutton also discussed how lesser included offenses can impact justice. Burglary is an add-on crime and is used when a prosecutor is going for another 10-15 years. She asked, "Is that what the Legislature intended?"

Areas in the Code that Professor Hutton suggested revising: 22-16 - Homicide; 22-32 - Burglary; 22-30A - Theft; check offenses (ISF-Class 1 v. Class 6, No Account Check-felony, and the dollar amounts need to be raised); DUI (someone with a blood alcohol level of .08 is not the same on the highway as a person with a 2.0); definition of attempt; and possession and ingestion (definitions). She would like the Legislature to fund equipment so interrogations can be taped and stated that South Dakota has a problem with racial profiling.

Discussion followed on "lesser included" and whether the Legislature needs to define what their intent is or if it should be abandoned altogether. Professor Hutton referred to a Supreme Court case.

Representative Rounds stated that "intent" places a lot of responsibility on the prosecutors; we have a responsibility to protect the citizens of the state and not make criminals out of everyone.

History of the Previous Criminal Code Revision in South Dakota

Mr. William J. Srstka, Jr., Sioux Falls, Second Circuit Court Judge, stated that he was a member of the commission that rewrote Title 22 approximately thirty years ago. He gave a brief history of the Code and the classification system. He stated that they developed a workbook and looked at each code individually. The principles they considered were: the definition of states of mind; the classification; and then they removed all the minimum sentences. They also removed all references to the death penalty as it had been declared unconstitutional. They took many concepts and rolled them into one, i.e. larceny and theft; drug laws; homicide; burglary; and forgery. In response to Chair

Schoenbeck's question on how they handled Supreme Court decisions, Judge Srstka stated that they looked at them as a precedent; however, they did not make any difference as the crimes are all statutory, not common law crimes.

Judge Srstka stated that he thinks the statute regarding aggravated assault on a law enforcement officer is too restrictive when no harm results to anyone; second degree manslaughter is an example for bracket creep; and that the minimum penalty for drugs is too much. He stated that because of the minimum penalties, he has put people in the penitentiary that he did not want to. He suggested putting all of the serious crimes in Title 22.

**Staff Presentation on Criminal Code Revision
(Scope, Focus, Methodology, and Emphases)**

Mr. Bezpaletz stated that the legislators tend to be ad hoc problem solvers and neglect to look at the statutory environment of the particular statute; thus there is a lack of systemization in the Code. He stated that the core of this summer study is to make the punishment fit the crime. He distributed and reviewed a handout entitled "Statutory Illustrations" (**Document #3**) which listed several statutes that might be considered either too lenient or too harsh. He stated that some of the statutes have problems with definitions or are badly drafted. Some crimes tend to be lumped together. He stated that as society changes, so does inflation and social morals and those statutes should be reviewed. Some are crimes du jour, i.e., the sex registry laws, computer/Internet. Mr. Bezpaletz asked the commission to look at enhancements and mandatory sentences also.

**Public Testimony
on the Scope, Focus, Methodology,
and Emphases of Criminal Code Revision**

Judge Srstka commented that the laws regarding stun guns need to be removed from the statutes.

Ms. Laurie Feiler, Department of Corrections, commented that Judge Glen Severson, a member of the Governor's Task Force on Corrections, has put together a report regarding all of the felonies that have been reported, the convictions, and the dispositions over the past five years. She stated that this report may be helpful to this commission and stated that she would provide LRC with copies. Ms. Feiler will also keep the commission informed on the happenings of the Task Force.

**Committee Discussion
of the Scope, Focus, Methodology,
and Emphases of the Committee's Assignment
and Formulation of Work Plan**

Chair Schoenbeck stated that a workbook would be a very useful tool to the commission. He asked that the model penal codes be included and that the drug and alcohol statutes be put in a separate work book. He asked that they have the workbooks within the next month so that prior to the next meeting assignments could be made. Any correspondence received should be numbered for the binder for quick reference.

Commissioner Hennies commented that he liked the workbook idea and that it would be helpful to have everyone's email address. He asked that everyone keep in mind that the current statutes have been tested in the courts and that any changes would be going through the courts again. All of the statutes are subject to interpretation and there is a lot of redundancy. He asked, "Is the goal of society met by the penalties?"

Commissioner Nelson commented that as a prosecutor he knows where all the laws are now and that it is easy for him to understand. He asked that if changes are made, that there be a good reason

for doing so. The system needs to work efficiently and protect the community and public, not just open jail cells. As to the subcommittee concept, he hopes that all members will have the opportunity to comment on both areas.

Commissioner Cutler commented that part of the first task should be to work on the elements of the crime and that use of the model penal code would be helpful in this regard.

Commissioner Tucker commented that he liked the workbook concept and asked that it be divided by the different Codes. He stated that they need to be addressing the consequences. He distributed a handout entitled "Court Suspensions and Revocations" (**Document #4**) and stated that there needs to be some consistency. He shared comments that he had received from other judges regarding the criminal code revisions (**Document #5**).

Commissioner McGuigan commented that he also liked the workbook concept. He would like to see all felonies reorganized into Title 22, especially those with a hefty penalty. He also stated that the commission needs to be aware of federal mandates. If the state fails to meet the federal requirements, there could be a loss of federal funds. He also stated that he has access to a report distributed from the Department of Justice regarding the major offenses plus grand theft. He will provide a copy to LRC staff.

Commissioner Rounds commented that this Governor's Task Force was partially the result of the overcrowding in the prison system. He stated that we have a responsibility to protect the citizens and take the criminals off the streets; however, are we making criminals out of people who are not. He asked the commission to keep in mind that the end result has to be put before the 105 legislators, all with a different point of view. He would rather see clean up legislation as a starting point and have this be a work in progress over the next few years. In regards to social and moral value issues, they could be handled as amendments or a separate piece of legislation.

Commissioner Engels commented that the judges are not the only ones confused, so is driver licensing. They would also like to see changes made to those statutes. He stated that the civil penalties on drug offenses are rarely levied. He would like to know if they are consistent also and if they are enforced and make sense. In Iowa repeat misdemeanor offenders have a separate classification, perhaps we could have a Class 6 for repeat offenders. He also distributed to the commission a letter dated June 10, 2004, from Judge Gene Kean (**Document #6**).

Commissioner Butler commented that the enabling statute is very direct in that it states that the elements and punishments have to be reviewed. He stated that he liked having the comments in writing and that he enjoyed hearing the other sides to the issue from the three speakers today.

Commissioner Rave commented that he enjoyed the speakers today; however, he sees the comparison of other states as a double-edged sword. Legislators are tired of hearing how other states do things. South Dakota should do it because it is the right thing to do.

Chair Schoenbeck stated that Commissioner Koetzle was unable to attend today but he has told him his concerns are with the increasing number of felons and the bracket creep.

The commission broke out into subcommittees for further discussion.

Reports of Subcommittees

Commissioner Cutler, Subcommittee Chair of Title 22, reported that their first task is to look at the elements and then prioritize those.

Commissioner Hennies, Subcommittee Chair of Drug & Alcohol, reported that they intend to meet all day on the first day of the next meeting. Their subcommittee would like to spend the morning brainstorming and have two speakers in the afternoon, Representative Chris Madsen regarding implied consent, and Robert Newland, Hermosa, regarding drug laws.

Research Requests and Staff Directives

Staff was directed to compile workbooks for each of the subcommittees and mail them out to the members as early as possible so they would have time to study them.

Mr. Bezpaletz will draft a memo to the commission regarding the consequences of a felony. Commissioner Tucker requested that the federal consequences also be included, i.e., student loans.

Next Meeting Dates

Chair Schoenbeck set the next meeting for 8:00 a.m. on Thursday, July 29, and until noon on Friday, July 30. He tentatively set August 24 and 25 as dates for the third meeting at which time they would take public testimony.

Adjournment

There being no further business, Chair Schoenbeck adjourned the meeting at 12:28 p.m.

