Drug Policy Task Force

Date: October 10, 2012 Time: 1:30 – 4:30

Chairs
Grayson Robinson / Arapahoe County Sheriff's Office – Chair (CCJJ member)

Commission Members
Bill Kilpatrick / Golden Police Department
Don Quick / 17th JD District Attorney's office
Eric Philp / Probation Services, Judicial Department

Task Force Members
Brian Connors / Public Defender's Office
Christie Donner / Colorado Criminal Justice Reform Coalition
Marc Condojani / Division of Behavioral Health
Dan Rubinstein / 21st JD District Attorney's office (via phone)
Terri Hurst / Colorado Behavioral Health Care Council
Evie Hudak / Colorado State Senator, District 19
Helen Morgan / 2nd JD District Attorney's office
John O'Dell / Colorado Parole Board
Kathleen McGuire / Public defender
Mark Hulbert / 5th JD District Attorney's office
Maureen Cain / Colorado Criminal Defense Bar
Pat Steadman / Colorado State Senator, 31st District
Vince Niski / Colorado Springs Police Department
Tom Raynes / Attorney General's Office
Chris Brousseau / 1st JD District Attorney's office
Bridget Klauber / Criminal Defense Bar

Absent:
Regina Huerter / Denver Crime Prevention and Control Commission
Reo Leslie / Colorado School for Family Therapy
Mark Waller / State Representative, District 15
Tim Hand / Department of Corrections

Guests:
Stephen Schmidt, Mike Elliott, Ed Wood, Glenn Tapia, Sherri Hackett, Robin Hackett, Mike Bouton, Laura Spicer

Staff:
Christine Adams, Adrienne Loye, Paul Herman, Peg Flick, Jana Locke

Issue/Topic:	Discussion:
Welcome and Review of Agenda **Action**	Grayson Robinson called the meeting to order at 1:40 p.m.

Issue/Topic:	Discussion:
Public Comment **Action**	Mike Elliott introduced Dr. Schmitz. Dr. Schmitz is a clinical neuropsychologist and has been working on a project entitled "Development of a research-based assessment for driving while marijuana impaired (DWMI): A pilot study." The researchers of this project have developed a competency system to be used on elderly drivers. The system uses a touch screen to test an individual's cognitive ability to drive. British Columbia uses it as its sole assessment. Kaiser Permanente completed a two year program and uses it as an assessment of their patients to see if they are competent to drive. Dr. Schmitz feels this may be a system that can be utilized to test the cognitive ability of drivers who use medical marijuana. Its use also does away with the need for a blood draw. More research is being done on this system. Dr. Schmitz just wanted to make everyone aware. Shellie Hackett stated that she does not want people driving who are unsafe. The medical marijuana patients she represents are in their forties and use medical marijuana instead of prescription meds for pain. She is currently treating folks with heated THC, which has no psychotropic effects, but will still be found when testing for THC. Another concern her patients have is how they will know what the nanogram level of THC is in their blood at any time. She stated that women will test higher than men. She has also seen individuals who have not had cannabis for three days but their THC spikes again.

Issue/Topic:	Discussion:
Structure Recommendations	Maureen Cain began the presentation by stating that the recommendations from the Structure group come to be because of the work conducted during the special legislative session. Some changes were made as a result of the special session. When the ranges were proposed a year ago, it was noted that the ranges were wider than other states. Cut points are now lower than under current law. Users and law enforcement were asked, "When does it get serious? At what point is the amount of drugs indicative of dealing as opposed to using?" Answers to these questions are what directed the final recommendations presented here. **<u>Recommendation FY13-DP#1</u>** The structure working group presents this proposal as a rewrite of the Controlled Substances Act that includes a separate sentencing framework based on a drug

	crime classification and has four felony offense levels, two misdemeanor offense levels and a petty offense level. (Note: the current petty offense level will continue as in current law and is not addressed here.) Each felony offense level includes both a presumptive and aggravated sentencing range, except for the DF1. Each felony level also has a corresponding period of parole that would be a mandatory provision of any prison sentence. Additional provisions include the following: 1a. Mandatory sentencing. All DF1 offenses carry a mandatory minimum sentence of 8 years to the Department of Corrections. There is only one sentencing range for DF1 crimes which is 8 to 32 years. 1b. Continue and encourage all current plea bargaining options. The "wobbler" as described below will not be a replacement for current options such as misdemeanor plea or a deferred judgment. No changes to current probation statutes except as described below. 1c. Support the expansion of diversion programs that is being developed and recommended by the comprehensive sentencing task force. Divert the appropriate amount of cost savings from the CCJJ approved theft statute reform, if possible and approved by CCJJ, to expand District Attorney diversion programs. Attempt to develop a dedicated fund for DA diversion with the highest priority given to those districts that currently have no program at all. • Discussion: Can you make sure this includes law enforcement diversion programs? Yes. 1d. Use of deferred judgment. Give the court discretion to accept an admission to violation of the deferred judgment or make a finding of a violation of the deferred judgment without revocation the deferred and entering the judgment of conviction. This requires a change to 18-1.3-102(2) changing the "shall" to "may" for drug offenses. This is consistent with the need for exhaustion of sanctions described below. 1e. In order to accommodate the filing structure of drug courts and other concerns of stakeholders, all drug possession offenses for schedule I/II controlled substances will continue to be a felony (DF4). However, there are two additional provisions: • All possession offenses for schedule I/II shall be a DF4 and will not be weight-based like current law. • Creation of a "Wobbler" in state law. If a defendant is convicted of an eligible DF4 offense, the felony conviction would "wobble" to a misdemeanor upon successful completion of a probation or community corrections sentence. The wobbler is available for the first two convictions (which includes a diversion or a prior dismissed deferred or a prior "wobbled" case") of the following DF 4 drug offenses: 1) simple possession when the possession quantity is 4 grams or less of Schedule I/II or 2 grams of meth, 2) the DF4 MJ/hash possession offense, 3) the transfer without remuneration of the small quantities sch I/II (TBD language) and 4) 18-18- 415 fraud and deceit crimes. Defendants are eligible for the wobble even if the defendant goes to trial. Exclusions from eligibility are: 1) prior conviction for a COV and 2) ineligibility for probation pursuant to 18-1.3-201.

	1f. There will be statutory language regarding exhaustion of remedies prior to sentencing a defendant to prison for a D4 felony offense. (This is important in trying to preserve defendant's "wobbler" opportunities.) While prison is available as a sentence in these cases, we recommend an exhaustion of remedies model for courts to follow and for all parties to consider in sentencing. Prior to revocation of community supervision or sentence, the court must determine that reasonable and appropriate response options to the violation(s) have been exhausted by the supervising agencies given: 1) the nature of the violation(s), 2) the treatment needs of the offender and 3) the risk level of the offender. The court must determine that a sentence to prison is the most suitable option given the facts and circumstances of the individual case and available resources. In making this determination, the court should, to the extent available, review the information provided by the supervising agency which shall include, but shall not be limited, to a complete statement as to what inventions have been tried and failed, what other community options are available (including lateral sanctions or placement for the community corrections clients) and the reasons why any other available options appear to be unlikely to succeed if tried or would present an unacceptable risk to public safety. Under current law, the defendant is entitled to a hearing on probation revocation. We recommend that for community corrections clients, if defendant makes a written request, there will be a court review (details still need to be worked out with community corrections if paper review or appearance review and the logistics) of the termination from Community Corrections when there is a recommendation to DOC. We have previously discussed this idea with representatives from Community corrections and need to do more work on this. 1g. COCCA (Colorado Organized Crime Act) remains the same. The COCCA statute would need to be amended to include the newly reframed drug crimes eligible for use as predicates. Address the habitual offender sentencing provisions on drug offenses. (still working on those details but anticipate a unanimous recommendation.) • <u>Discussion:</u> There has been discussion about the Habitual and what it should be. Especially if you are sentenced on the DF1 charge. If you are charged four times on the 32 year maximum sentence, it could be excessive. The DA's are willing to move on the 32 years on the habitual. But the details need to be worked out. Upper end sentence on COCCA remains 48 years. 1h. Aggregation: Preserve 18-18-405(5) which allows drug quantities to be aggregated for purposes of establishing crime level and sentencing requirements if sale/dist./possess w/intent dist I/II occurs twice or more within a period of six months so long as defendant has not been placed in jeopardy for the prior offense or offenses. 1i. Clarification that this drug sentencing scheme applies only when the defendant is sentenced for an offense under 18-18. If the defendant is convicted of another criminal offense, sentence shall be imposed as provided by current law. Court shall retain all current ability to imposed concurrent or consecutive sentences as provided by law.

	1j. Allow for a PR bond (with treatment conditions when appropriate) more readily on DF cases involving possession if defendant is not assessed as high risk on bond (as determined by a researched based risk assessment instrument). But allow for a defined waiting period on this to allow fast track drug courts to process cases as appropriate. NOTE: this is an issue that will also be included in the Bail sub-committee's recommendations to CCJJ. It is important that we preserve the Denver Drug Court and the court's fast track processes so we will need to craft language that will not affect that. 1k. No sealing waiver required on plea or included in the Rule 11. Make statute clear that a district attorney may not require a defendant to waive his/her right to petition the court to seal an eligible criminal conviction as part of plea negotiations or in the Rule 11. District Attorneys with the power to veto or object to a petition to seal should make best effort to conduct an individualized assessment of the merits (or lack thereof) of a petitioner's request to seal prior to exercising that power. 1l. Develop a data collection system for this legislation that will allow for assessment of what is happening statewide in the implementation of these changes, transparency regarding the policies and practices of District Attorneys and other criminal justice agencies, collating and tracking sentences given by the court in these cases, and allowing for assessment of outcomes. Use cost savings from bill to fund this effort, as needed. • <u>Discussion</u>: There is hope that a spreadsheet to track how drug sentences are handled by judicial district. This would also include if the judge sentenced the offender or if the DA stipulated to the sentence. 1m. In any legislation developed pursuant to drug sentencing reform recommendations, include a requirement of a post-enactment review in 3 years to use the data collected and assess implementation and make any appropriate recommendations for change. 1n. Change state law to allow probation to create and determine who is appropriate for an intensive supervision program for misdemeanor offenders. Statute should include a requirement that any placement of a misdemeanor defendant onto intensive supervised probation be based on a research-based risk/need assessment that indicates that intensive supervision is appropriate. • <u>Discussion</u>: In order to place misdemeants or felons on ISP, the decision needs to be done based on a risk assessment. We need to look at the statute(s) on Intensive Supervision and re-write it. 1o. Change state law to allow misdemeanor drug defendants to be required to participate in a residential treatment program as a condition of probation. Statute should include a requirement that placement in a residential treatment program as a condition of probation must be based on an assessed treatment need level that indicates IRT is appropriate and the Correctional Treatment Fund appropriation should be available to pay for the treatment. If the residential treatment program is offered through a community corrections program, the community corrections probation and community corrections board must both accept/approve

probation client prior to placement.

1p. Sync the quantities and classifications of bath salts, salvia and cannabinoids to the structure as necessary and appropriate. Also address flunitrazipam and ketamine as appropriate and any other pharmaceuticals, as needed.

Discussion:

1. We are still looking into how to measure the quantities on these designer drugs.
2. This is a framework on how to differentiate users from dealers.
3. The Jeffco DA does not support reducing sentences for drug dealers. The sentences are reduced by 50%. How is this consistent with public safety?
4. Did you discuss moving heroin up into the level of meth? No. If you want to raise the cut point of heroin to meth quantities, that is ok.
5. Denver will vote against the bill because we are concerned about small dealers. Denver has a large population of individuals who are homeless and are addicts. This proposal reduces what used to be a sentencing range of 4 – 16 year for any amount, to a sentencing range of 2 – 8 range for up to 14 grams of heroin. This is a huge amount and can do a lot of damage. The foreign cartels will see this and know that Denver is a good area to do business because their workers will not be significantly punished. Another issue is the problem with tracking criminal histories because of the wobblers. The deferred judgment gives Denver heartaches.
6. Our state is still higher than the federal sentencing guidelines.
7. Regarding the chart and the time frame you chose: It indicates that of those 10, five ended up with 18 or more years. Is that right? Yes. HB 1352 changed some sentences so that is why the time frame was chosen.
8. Since the inception of the Commission, the focus has been on the examination of what the State is doing and finding a way to do it better. The examination and recommendations are to follow evidence-based practices. We have been told more is better, but no one can produce the evidence that more *is* better.
9. The only difference between the ounce dealer and a kilo dealer is the ounce dealer is not trusted as much by his/her organization as the kilo dealer.
10. Denver files most of its high end cases federally because a federal sentence does not carry parole and it is day-for-day.
11. Special offender charges are pled to possession without intent with a stipulated sentencing range. The DA's can still plea bargain things differently to punish the high-end offender.
12. There was a discussion about public policy. The studies have found there is no deterrence based on the severity of punishment. What does have an effect is the certainty of getting caught.

The recommendation passed (17-3) and will be moved forward to the Commission.

FY13-DP #2 SUMMIT VIEW REPLICATION
RecommendationFY13-DP#2

Expand residential treatment capacity by allowing a state funding mechanism to local governments for the capital construction or acquisition of real property for the purposes of providing residential treatment in the community. Regional collaboration is permitted to expand residential treatment options in rural or otherwise underserved areas. Clients could include referral from criminal justice, child welfare, other agencies or voluntary admissions. (Summit View, Grand Junction replication).

Discussion

1. There is a critical shortage of residential treatment beds in Colorado. Substance abuse disorder and other mental health problems are significant expenses in the criminal justice, child welfare and medical care systems. The overwhelming majority of residential treatment beds are available only for criminal justice involved persons who are accepted into a community corrections programs.
2. Met with Henry Sobanet and found that there are no legal or Constitutional issues prohibiting the state from following through on this recommendation.
3. A physician can refer an individual? Yes.

Recommendation passed (20-0) and will move forward to the Commission.

FY13-DP #3 PRISON SENTENCE SERVED IN JAIL
RecommendationFY13-DP#3

This recommendation will allow defendants sentenced to prison with a relatively short sentence, who are in need substance abuse treatment, to serve their prison sentence in the county jail if the jail can provide the appropriate level of substance abuse treatment. The Sheriff and the DOC would need to both agree to a defendant serving his/her prison sentence in jail. DOC would be responsible to pay for the cost of incarceration at the jail per diem set by the legislature.

Discussion:

1. This would be based on a case by case review.
2. If there are a lot of individuals sentenced to county jail for treatment, the process for parole application hearings will be impacted.
3. Has the County Sheriff's Association been asked their opinion? The jails in Colorado are crowded. The sheriff can make a case by case decision that not involves the needs of the individual and the availability of space in the jail. There is a hope that the legislators will be willing to reallocate some of the funds saved by not building a DOC facility to the local jails. There may be some individuals who are placed in a county jail different from the county where the original crime occurred.
4. This is attractive to individuals who have a short DOC sentence left, to get treatment closer to the community to which he/she will be released. Has there been any thought given to individuals who have not

participated in treatment in DOC and will be looking to be moved to the county jail?

The recommendation passed (20-0) and will move forward to the Commission.

FY13-DP #4 IRT IN DOC
RecommendationFY13-DP#4

Encourage the General Assembly to provide funding to the DOC to develop or expand an intensive residential treatment program for inmates who have relatively short sentences who are assessed to need that level of treatment.

Discussion: None

The recommendation passed (20-0) and will move forward to the Commission.

FY13-DP #5 CIVIL REMEDIES
RecommendationFY13-DP#5

Allow for expansion of civil remedies (e.g. consumer protection and/or use of public health regulatory authority) as part of building more comprehensive drug policy. Areas related to this proposal include strategies to prevent and effectively intervene in prescription drug abuse/misuse and adopting medical models for detoxification programs.

Discussion: None

The recommendation passed (20-0) and will move forward to the Commission.

FY13-DP #6 TRAUMA INFORMED TREATMENT
RecommendationFY13-DP#6

If there are projected cost-savings from legislation reforming the Colorado Controlled Substances Act, the Drug Policy Task Force recommends that the General Assembly prioritize expanding access to trauma-informed treatment services for people with a substance abuse disorder to the extent that is appropriate and available

Discussion:

1. We have no idea what the fiscal note will be on this.
2. A lot of individuals use substances as a result of earlier trauma. We are trying to make sure that we are not pushing someone into a “fight” or “flight” mode.
3. There are specific treatment modalities for trauma.
4. There was some training previously provided that wasn’t later used. You need to make sure if there is training given, the training is used and that

	there is a way to ensure fidelity to the training. 5. Can there be some thought to divert some funds toward prevention? Recommendation passed (20-0) and will be forwarded on to the Commission.

Issue/Topic:	**Discussion:**
DUID Recommendations **Action**	Three recommendations will be presented to the task force. 1. Anyone can motion for an amendment to one or more of the proposed recommendations. If the amendment is supported by at least 51% of the task force then the final recommendation will be changed and that will be the item included in the A,B, C, or D vote below. 2. The group will vote on A, B, C, or D (D is none of the above). They must choose ONE of the options, or none of the above. 3. If one option has the support of 51% or more, that is the recommendation that will move on to the Commission. 4. If none of the options reach 51% a second vote will be taken between the top two options and the one with at least 51% of that vote will move on. 5. The Commission can always motion the recommendation back to the original **FY13-DP # 7a DRIVING UNDER THE INFLUENCE OF DRUGS** **Recommendation FY13-DP#7a** Establish a "per se" violation for driving under the influence of marijuana by establishing that it shall be an unclassified misdemeanor traffic offense for any person to drive a motor vehicle or vehicle when the person has a level of 5 nanograms of THC/mL whole blood or more at the time of driving or within two hours after driving. Discussion: 1. This proposal sets a level of 5 ng of THC in the blood for a per se finding. 2. Experts have conducted road tests that show 5 ng is the correct level when impairment is reached. 3. This is what has been proposed before. The Public Health Association is behind this. **FY13-DP #7b DRIVING UNDER THE INFLUENCE OF DRUGS** **Recommendation FY13-DP7b** Establish a "per se" violation for driving under the influence of marijuana by establishing that it shall be an unclassified misdemeanor traffic offense for any person to drive a motor vehicle or vehicle when the person has a level of 5 nanograms of THC/mL whole blood or more at the time of driving or within two

hours after driving and to create a rebuttable inference presumption for allegation of vehicular assault and vehicular homicide.

Discussion:

1. What we have currently in Colorado, is a per se level for alcohol impairment at 0.8. The 5 ng level of THC is structured to mirror the DUI statutes.
2. This recommendation sets sentencing DUID vehicular assault and homicide cases to mirror the alcohol related vehicular homicide and vehicular assault sentences.
4. This is a guideline for jurors when deliberating a conviction.

FY13-DP #7c DRIVING UNDER THE INFLUENCE OF DRUGS

Recommendation FY13-DP#7c

Establish a per se violation for driving ~~under the influence of all~~ with any level of any controlled substances taken illegally ~~and/or the use of legal drugs~~ or the metabolites of those substances, establishing that it shall be an unclassified misdemeanor traffic offense for any person to drive a motor vehicle or vehicle when the person ~~is under the influence of~~ has any level of drug in the driver's body and to create a permissible inference of DUID.

Discussion:

1. Setting high concentrations will fail to identify much of the drug impaired driving that occurs.
2. Any illegal or illicit drug should constitute evidence of drugged driving.
3. Rationale for zero tolerance: All controlled substances alter one mind. Controlled substances impair driving. Illegal use of controlled substances is illegal by definition.
4. Ed Wood made a suggestion to change the wording of 7C (shown above in red). These changes will more accurately reflect the meaning of zero tolerance.
5. Helen Morgan made a motion to accept the changes. Bill Kilpatrick seconded the motion. The motion passed and the new language is incorporated.

Discussion on all three proposals:

1. This idea of a 5 ng per se blood level has been brought up in the Legislature three times and has failed each time. There are ways to address this problem that will increase public safety without creating a per se level.
2. We don't know at what blood level everyone is impaired.
3. Marijuana stays in the blood stream longer periods of time. There are many ways of consuming medical marijuana. Using a topical cream allows marijuana to get into the blood stream without causing impairment.
4. There has been no new science since the last time this was discussed by the task force.

	5. We need more public education. We need more data collection and sharing ad more research. 6. Dr. Schmitz is working on finding a way to test for impairment without drawing blood. The question is whether it would work. 7. What is an unclassified misdemeanor traffic offender is? It is similar to a DUI but it doesn't fit into any of the three classifications. 8. Option "A" is included in option "B". Option B has language that addresses sentencing similar to felony vehicular assault and/or vehicular homicide DUIs. 9. Blood will always be taken in cases of vehicular assault and vehicular homicide. It is an option in cases of unclassified misdemeanor. 10. This couldn't get through the Task Force a couple of years ago because the science was not clear. What has changed in the intervening time? There have been no changes to the science. Was there any consideration given to rebuttable presumption? 11. When the 0.8 level was established for drunk driving, there was a lot of discussion about the actual level. 12. This should be a policy discussion as opposed to a scientific one. Individuals driving with a 5 ng level present a significant danger to public safety. 13. There is no proof beyond a reasonable doubt that impairment is at 5 ng. Members of the Task Force were asked to vote for only one option: "A", "B", "C", "D" (none of the above). An option that receives 51% of the vote will be forwarded to the Commission. If, after the first vote, no one option receives 51%, the top two options will be voted on again. First vote: Option A – 0 Option B – 10 Option C – 1 Option D - 9 Second vote: Option B - 11 Option D - 9 Option B passed (55%) and will move forward to the Commission.

Issue/Topic:	**Discussion:**
Treatment Recommendations **Action**	No recommendations will be presented for a vote from the Treatment Group. Instead Terri will present possible recommendations and concepts for future discussion. **<u>Issue 1:</u>** *Require a representative from a direct-service treatment provider organization to serve on the Correctional Treatment Board* 1. Pros **a.** Treatment providers are the experts in delivering treatment services and their expertise should be taken into consideration when decisions are being made that will impact them. **b.** Treatment providers can provide direct feedback on barriers to and improvements that can be made in the dissemination of treatment

funding.

c. Including treatment providers on key decisions regarding treatment funding will improve delivery of services and coordination with funding agencies & departments (i.e.: how to refer, who can be treated, what services can be provided, documentation, invoicing, billing, etc.)

2. Cons

a. It is difficult to find a direct service treatment provider that does not have a conflict of interest.

b. Most treatment provider organizations do not have a statewide view.

<u>Issue 2:</u>

Change funding language so that treatment services for behavioral health are covered (substance use disorder, mental health, and/or co-occurring)

1. Pros
   a. Treatment providers are shifting to a more integrated approach of treating substance use disorder and mental health services as 'behavioral health' services.
   b. State systems are combining substance use disorder and mental health statutes, rules and regulations into one comprehensive behavioral health system.
2. Cons
   a. Allowing funds to be used for behavioral health could dilute the effect and focus on substance use disorder & co-occurring.
   b. The allowance of funding for behavioral health could open the door for others seeking to be included in the definition of behavioral health.

<u>Future Concepts for the Treatment Workgroup to Explore</u>

Continuity of Care & Recovery Support Services

a. While HB12-1310 allows money in the Correctional Treatment Fund to be used for these purposes, no funding was allocated for FY 12-13.

b. Utilize Transition Case Managers to help individuals with behavioral health needs transition back into the community.

Detox Services & Overdose prevention (see Recommendation 20 from DPTF Structure Workgroup)

a. Increase the use of Medication Assisted Therapy with parolees and probationers, detox, and the community (methadone maintenance, Suboxone, Buprenorphine, etc.)

b. Assess detox services in Colorado, in particular for juveniles.

c. Mandate overdose prevention training to at-risk individuals prior to release.

d. Provide Naloxone to individuals who are prescribed opiates and/or who have a history of opiate addiction.

e. Possible collaboration of state and local governments to build treatment facilities that include detox as a part of the service delivery system.

	Healthcare Reform Implementation a. Ensure every individual released from prison/jail/community corrections is enrolled in a health plan (Medicaid, Colorado Health Benefit Exchange (COHBE) Plans, etc.) b. Ensure HCPF suspends Medicaid benefits per SB08-006 instead of terminating benefits when someone is incarcerated for less than a year. c. Track benefits offered in Medicaid and COHBE to track gaps in benefits offered and the impact on treatment funding.

Meeting adjourned at 4:20 pm.