Commission on Criminal and Juvenile Justice

Minutes

October 12, 2012
Jefferson County District Attorney's Office
500 Jefferson County Parkway
Golden, CO 80401

Commission Members Attending:

James H. Davis, Chair	Doug Wilson, Vice-Chair	Jeanne Smith, Ex Officio
Theresa Cisneros	Henry Jackson, Jr.	Norm Mueller
Michael Dougherty	Bill Kilpatrick	Eric Philp
Kelly Friesen	Steve King	Don Quick
Charles Garcia	Julie Krow	J. Grayson Robinson
Peter Hautzinger	Evelyn Leslie	Alaurice Tafoya-Modi
Kate Horn-Murphy (by phone)	Claire Levy	Mark Waller
Regina Huerter	John Morse	Anthony Young
Tim Hand for Tom Clements (non-voting) **Absent**: Debbie Rose		

Call to Order and Opening Remarks:

The Chair, James H. Davis, called the meeting to order at 9:43 a.m.

Regina Huerter moved to approve the minutes from September 14, 2012. Pete Hautzinger seconded the motion. The minutes were approved by unanimous vote.

In FY 2009, the Commission forwarded a recommendation to the Legislature to expand the ability of defendants ages 18 and 19, to be sentenced to the Youth Offender System (YOS). The bill derived from the recommendation passed as H.B. 09-1122. YOS is pleased with how the population blends in and reports that this change has been positive. Written into the legislation was a termination period of October 1, 2012 (18-1.3-407.5 (4), C.R.S.). Consequently, this law expired two weeks ago.

The Department of Corrections is planning to introduce a piece of legislation during the upcoming session to reinstate the YOS expansion to 18 and 19 year olds. Unless the Commission feels otherwise, DCJ staff will assist DOC/YOS in drafting this legislation.

Discussion:

1. Will there be a problem with sentencing for the next three months until that goes into effect? Yes.
2. Do we know why this happened? DOC is studying why the termination date slipped through the cracks. Of the 109 people sentenced under this bill, only two did not do well. The original bill only addressed the ability for 18 and 19 year old violent offenders to be considered for YOS. The legislation moving forward may also include a possible expansion to include non-violent offenders.
3. How long will the bill and signing process take before this could be restored in the law? The bill could be introduced, passed as quickly as possible, and be immediately effective upon signature. If this rapid process does not occur, it could be a bill that would not become effective until July.

MINORITY OVERREPRESENTATION

Primer, Recommendation Discussion and Vote

Kim English gave an overview of and a brief background on the Minority Over-Representation Committee. With H.B. 08-1119, the General Assembly directed the Commission to study the reduction of racial disparities within the criminal justice system.

- In 2010 DOC/Probation compiled a report on behalf of CCJJ and MOR literature was summarized in the CCJJ annual report by CJJ staff.
- In 2011, the Commission identified seven policy and legislative recommendations that were approved in June of that year.
- One legislative recommendation (FY12-MOR1) was passed by the Commission in January 2012. This recommendation calls for the development of a Minority Impact Statement by Legislative Council to be attached to all sentencing legislation. This recommendation will be developed into a bill in the 2013 legislative session.
- Another, of the original seven recommendations (FY13-MOR1), was originally approved by CCJJ in 2011 but not officially voted on. This proposed recommendation suggests that justice agencies track and report on the racial and ethnic diversity of their staff. If approved by the CCJJ, this recommendation will fold into the Minority Impact Statement bill to be addressed in the 2013 legislative session.

Recommendation:

FY13-MOR#1. Justice agencies to track racial and ethnic diversity of staff.

All justice agencies should track the racial and ethnic diversity of their staff. Law enforcement agencies, sheriff's offices, prosecutors' offices, the public defender's office, courts, probation, community corrections, the Department of Corrections, the Department of Public Safety, and the Division of Youth Corrections, shall track the racial and ethnic composition of their staffs and report the data to the Division of Criminal Justice on an annual basis. Additionally, every organization should actively recruit minority candidates for both job opportunities and as members of boards and commissions.

Discussion:

1. The goal of this recommendation is twofold: The first is to track ethnic diversity of the staff of all justice agencies. The second goal is to inform and promote minority job applications to justice organizations.
2. CALEA (the Commission on Accreditation for Law Enforcement Agencies) attempted to incorporate a requirement for law enforcement agencies to reflect the ethnic make-up of the community they serve. CALEA found, over a long period of time, that agencies had difficulty meeting this standard. This is sometimes due to a limited hiring pool.
3. The Golden Police track the ethnicity of its staff and report it to the Feds every two years. Golden does not track the ethnicity of job applicants. Is the recommendation to track applicants? No, just staff.
4. What are the consequences if an agency is not successful?
5. There should be a model recruitment program created and a training piece on recruiting minorities in place.
6. The gathering of data would not be a problem for DCJ. Outreach to local law enforcement agencies to ensure the data being submitted is accurate may require additional staff by DCJ. The recommendation has the potential for a fiscal note.
7. When looking at recruiting, you have to take a long-term approach. Law enforcement needs to change its image.

Michael Dougherty moved to approve the recommendation. Pete Hautzinger seconded the motion.

VOTE: I support it - 20
I can live with it - 1
I do not support it - 0

Recommendation FY13-MOR #1: Passes.

COMPREHENSIVE SENTENCING TASK FORCE
Primer, Recommendation Discussion and Vote

Ms. English presented an overview and background of the work by the Comprehensive Sentencing Task Force. The guiding principles for sentencing are: to strive for internal consistency, prioritize clarity and transparency, consider the impact of sentencing on MOR, good behavior should be rewarded with incentives, balance judicial discretion and judicial accountability, apply evidence based practices when possible, respect victims and community, and promote consistency across judicial districts. Also, the goals of sentencing reform are to simplify the sentencing code and provide the prosecution and bench with more discretion in sentencing.

Recommendation:

FY13-CS #3. Eliminate Colorado's Extraordinary Risk Statute.

Colorado's Revised Statutes pertaining to Crimes of Violence, Extraordinary Risk Crimes, and Aggravated Ranges are complex, convoluted and often duplicative. The CCJJ Comprehensive Sentencing Task Force recommends the following changes:

1. Eliminate Extraordinary Risk (18-1.3-402(10)) and move child abuse (18-6-401(1)(a);(7)(a)(I) and 18-6-401(1)(a);(7)(a)(III) and 2nd and subsequent stalking (18-3-602(3)(b)) to the Crime of Violence Statute (18-1.3-406) and strike 18-3-602(5) as follows:

   > If, at the time of the offense, there was a temporary r permanent protection order, injunction, or condition of bond, probation, or parole or any other court order in effect against the person prohibiting the behavior described in this section, the person commits a class 4 felony. ~~In addition, when a violation under this section is committed in connection with a violation of a court order, including but not limited to any protection order or any order that sets forth the conditions of a bond, any sentence imposed for the violation pursuant to this subsection (5) shall run consecutively and not concurrently with any sentence imposed pursuant to this section 18-6-803.5 and with any sentence imposed in a contempt proceeding for violation of the court order.~~
2. Change Crime of Violence and mandatory minimum (18-1.3-401(8)) ranges to set to the minimum of the presumptive range.
3. The upper end of the sentencing ranges for Crimes of Violence mirrors the current upper end ranges in the statute.

Discussion:

1. This recommendation moves child abuse and stalking to the Crimes of Violence list.
2. This recommendation changes all of the mandatory minimums to the lowest point of the presumptive range.
3. The preliminary recommendation presented last month proposed eliminating discretionary ranges. Based on last month's conversation and yesterday's Comprehensive Sentencing Task Force meeting, the discretionary ranges now remain included in the sentencing structure.
4. The group has not talked about habitual criminal sentencing and presumptive ranges for crimes of violence. When we discuss extraordinary risk crimes, the presumptive ranges change.
5. Can we amend the recommendation as follows: Can Habitual Criminal sentencing reflect the presumptive ranges that are found in the non-crime of violence range?

Charlie Garcia moved to approve the recommendation with the amendment. Pete Hautzinger seconded the motion.

Discussion: The current statutes on Habitual Criminal already include basing sentencing on the presumptive range. The amendment is not needed.

Charlie Garcia moved to strike the amendment from the recommendation. Pete Hautzinger seconded the motion. The final vote was taken to approve the original form of the recommendation.

VOTE: I support it - 16
I can live with it - 2
I do not support it - 0

Recommendation FY13-CS #3: Passes.
(Note: FY13-CS #1 and #2 were passed at the July CCJJ Meeting)

Recommendation: (for discussion only)

FY13-CS #4. Expand the availability of adult pretrial diversion options within Colorado's criminal justice system.

The Comprehensive Sentencing Task Force recommends enhancing the availability of pretrial diversion options throughout the state, as well as developing appropriate funding alternative, by:

1. Replacing the existing deferred prosecution statute (C.R.S. 18-1.3-101) with the three statutory sections proposed below.
    a. 18-1.3-101 Pretrial Diversion Authorized: the intent is to encourage pretrial diversion when diversion is consistent with preventing defendants from committing additional criminal acts, restoring victims of crime, and reducing the number of cases in the criminal justice system. The offense may be diverted for a period not to exceed two years. It can be extended an additional time up to one year. Each DA shall adopt policies and guidelines delineating eligibility criteria for pretrial diversion. Before consenting to diversion, the DA may require a defendant to provide information regarding prior criminal charges, education, family and work experience. A diversion program's receipt of funding is contingent upon the DA's office having adopted pretrial diversion programs. The diversion programs may include those operated by law enforcement, district attorney's offices, ~~or~~ under supervision by the probation dept.
    b. 18-1.3-101.1 Diversion Agreement: shall be signed by the defendant; shall include a written waiver of the right to a speedy trial; include a statement than an assessment of the defendant's criminogenic needs may be performed; may include a statement of the facts upon which the charge is based and a provision that, if the defendant fails to fulfill the terms of the diversion agreement and criminal proceeds are resumed, the statement will be admissible as impeachment evidence against the defendant; and no defendant shall be required to enter any plea to a criminal charge as a condition of pretrial diversion.
    c. 18-1.3-101.2 Diversion Outcomes: Upon the satisfactory completion of and discharge from supervision, any charge against the defendant shall be dismissed with prejudice; at any point after the agreement is entered, the defendant may petition the court to seal all arrest and other criminal records pertaining to the offense; and, if the diversion agreement is violated, the defendant and the court shall be provided a written notice of the violation.

2. Amending the Victim's Rights Act to ensure victims are able to provide input to the pretrial diversion decision.

Discussion:

1. Diversion programs have four goals: preventing defendant from committing additional criminal acts, restoring victims of crime, reducing the number of cases within the criminal justice system, and limiting defendants' penetration into the criminal justice system.
2. This proposal makes diversion programs more readily available to criminal justice practitioners statewide. However, it does not require individual district attorneys' offices to offer diversion nor does it allow diversion where deferred prosecution would not be available – such as with domestic violence offenses.
3. How is funding addressed? HB1357 funds are available once the district attorney's office attempts to set up a system. Funding will not be restricted to only new diversion programs.
4. Were there any discussions of the use of risk assessment in the decision making process prior to deciding to offer a deferred sentence? The use of the CPAT tool can provide an assessment of the offender's risk of absconding.
5. What happens if a defendant can't afford to hire an attorney to assist him/her when entering into a diversion agreement? The Public Defender's Office can only become involved when charges are filed.
6. We need to do more work on the Victim Right Act (VRA) piece of this proposal.
7. How will diversion help misdemeanants? Will diversion be available for defendants facing misdemeanor charges? Some offices only offer diversion for felony offenders due to limited resources, but, yes, it can be used for misdemeanor offenses.

A final vote on this proposal will occur at the November meeting.

BAIL SUBCOMMITTEE
Primer, Recommendation Discussion and Vote

Ms. English presented an overview and background on the work of the Bail Subcommittee. The purposes of bail are to allow pretrial release of the accused, ensure court appearance of the offender and enhance public safety. In 2008 there were five bail recommendations passed by the CCJJ. The current subcommittee was tasked to review the five recommendations and expand the study of this area. The subcommittee developed a new set of four recommendations and is offering them for consideration.

Bail is the process of releasing a defendant from jail with conditions set to reasonably assure public safety and court appearance. Bond is the method of release. In many cases, offenses are assigned a predetermined dollar amount for bond. This is known as the bond schedule. Pretrial is the period of time in a criminal defendant's case that begins with an arrest and ends at final disposition. Pretrial supervision is the act of managing, directing or overseeing a defendant who has been released from secure custody (after an arrest) but has yet to be convicted. A pretrial

assessment tool has recently been created for Colorado and it is called the Colorado Pretrial Assessment Tool (CPAT).

The federal system has eliminated the use of money bonds completely. Washington, D.C. has also eliminated the use of money bonds as have four other states. National best practice standards call for individualized risk-based decisions regarding bail and/or the reduced use of money. The use of a risk assessment tool should drive the release decision rather than top charge. There is also a national issue of jail crowding with 40-60% of those housed in jails being held in pre-trial status.

Critics of the current bail system are concerned that poor people remain in jail while awaiting trial solely due to their inability to pay even low bail amounts. Proponents argue that the current money system fosters local businesses by employing bail bondspersons and that court appearance rates are enhanced by the current money system. However, in a study of 1200 offenders in Jefferson County, there was no indication that posting bond ensured court appearance. Of the 1200, approximately 20% of individuals released on personal recognizance or no bond failed to appear and 20% of the individuals released on a monetary bond also failed to appear meaning money bond made no difference in court appearance.

The following recommendations are presented as "opt in" alternatives preserving local control options.

Recommendation:

FY13-BL #1. Implement evidence-based decision making practices and standardized bail release decision making guidelines.

Judicial districts should implement evidence-based decision making practices regarding pre-release decisions, including the development and implementation of a standardized bail release decision making process.

Discussion:

1. There are some provisions in statute where no bond is allowed, for example, 1st Degree murder. More frequently the system just uses a predetermined bond schedule.
2. The recommendation is that a risk assessment *should* be used to make release decisions, but is not required. The CPAT risk assessment tool could be used, but is not required. This gives local entities the freedom to determine if they are going to use a risk assessment tool and which one.
3. How does this look in statute? The word "should" is not usually seen on bill paper. The four concepts were not prepared in bill form. The concept is what is being approved now and the language will be put together by the bill drafters.
4. We should refrain from naming a specific assessment tool in statute because updated or better tools may become available and statute should allow the opportunity and flexibility to adopt better tools.
5. How are we going to track the final bill to ensure the intent is carried forth? That is the responsibility of the Commission's Legislative Subcommittee.

6. The matrix attached to the recommendation should include monetary bonds figures in the areas showing a higher risk assessment score.

VOTE: I support it - 20
I can live with it - 1
I do not support it - 0
Recommendation FY13-BL #1: Passes.

Recommendation:
FY13-BL #2. Discourage the use of financial bond for pretrial detainees and reduce the use of bonding schedules.

Limit the use of monetary bonds in the bail decision making process, with the presumption that all pretrial detainees are eligible for pretrial release unless a due process hearing is required pursuant to Article 2 Section 19 of the Colorado Constitution and CRS 16-4-101.

Discussion:
1. How much did the task force take into account public perception? The public has an expectation of some financial bond amount that is tied to the severity of the crime. The task force looked at this issue from a public policy perspective. Education of the judiciary and the public will have to take place.
2. Did the task force do due diligence on the outcomes from the four states and the District of Columbia who have eliminated monetary bonds? Yes.
3. Because this is a voluntary, opt-in proposal at the local level, how is this implemented? It could be pretrial services, probation services or a private pretrial services program. The hope is that, with fewer individuals held in local jails because they could not make bond, it will produce savings that can be used to create pretrial service programs. Even with the "opt in" nature of the proposal, it needs to be a statutory change.
4. Was there a representative of the bail bond community on the task force? Yes, there were two.
5. Do we have something today that would show the Commission what the statutory change would look like? No. This would require the assistance of staff from Legislative Services.
6. Are there privatized pretrial services programs in the United States? Yes, but not in Colorado.
7. This approach causes concern regarding public safety when the charges are for violent crimes and/or domestic violence.

VOTE: I support it - 16
I can live with it - 2
I do not support it - 3
Recommendation FY13-BL #2: Passes.

Recommendation:
FY13-BL #3. Expand and improve pretrial approaches and opportunities in Colorado.

Expand and improve pretrial approaches and opportunities in Colorado.

Discussion:
1. There are ten jurisdictions that do not have pretrial service programs.

VOTE: I support it - 21
I can live with it - 0
I do not support it -0
Recommendation FY13-BL #3: Passes.

Recommendation:
FY13-BL #4. Standardize jail data collection across all Colorado jurisdictions.

Implement a standardized data collection instrument in all Colorado jurisdictions and jails that includes, but is not limited to, information on total jail population, index crime, crime class, type of bond, bond amount if any, length of stay, assessed risk level, and the proposition of pretrial, sentenced and hold populations.

Discussion:
1. Currently, there is inadequate and unreliable data available, especially when attempting to find consistency from jurisdiction to jurisdiction, for pretrial detention statistics.
2. This may cause some financial difficulty for smaller jails that may not have the financial resources to create a data collection system.

VOTE: I support it - 21
I can live with it - 0
I do not support it -0
Recommendation FY13-BL #4: Passes.

JUVENILE JUSTICE TASK FORCE
Primer, Recommendation Discussion and Vote:

Judge Plotz gave an overview of the Juvenile Justice recommendations.

Recommendation:
FY13-JJ #3. Revise the Sex Offender De-Registration Statute to allow a person who *committed* an offense while under 18 years of age to deregister as an adult after successful completion of the terms of the sentence.

Revise the language of the current section of the sex offender deregistration statute 16-22-113 (1)(e) as follows:

(e) Except as otherwise provided in section (1.3)(b)(II), if the person was younger than eighteen years of age at the time of ~~disposition or adjudication~~, the commission of the offense, after the successful completion of and discharge from ~~the~~ a juvenile sentence or disposition, and if the person prior to such time has not been subsequently convicted ~~of~~ or has a pending prosecution for, ~~of~~ unlawful sexual behavior or of any other offense, the underlying factual basis of which involved unlawful sexual behavior and the court did not issue an order either continuing the duty to register or discontinuing the duty to register pursuant to paragraph (b) of subsection (1.3) of this section. Any person petitioning pursuant to this paragraph (e) may also petition for an order removing his or her name from the sex offender registry. In determining whether to grant the order, the court shall consider whether the person is likely to commit a subsequent offense of or involving unlawful sexual behavior. The court shall base its determination on recommendations from the person's probation or community parole officer, the person's treatment provider, and the prosecuting attorney for the jurisdiction in which the person was tried and on the recommendations included in the person's presentence investigation report. In addition, the court shall consider any written or oral testimony submitted by the victim of the offense for which the petitioner was required to register. Notwithstanding the provisions of this subsection (1), a juvenile who files a petition pursuant to this section may file the petition with the court to which venue is transferred pursuant to section 19-2-105, C.R.S., if any.

Discussion:

1. The Sex Offender Management Board has no problem with this recommendation.
2. In 2011, 175 juveniles were charged with a sex offense; 43 were sentenced as adults.
3. This would not apply to a juvenile who is the subject of a direct file to adult court.
4. This would not apply to an individual who faces new charges.

Charlie Garcia moved to approve this recommendation. Don Quick seconded the motion.

VOTE: I support it - 21
I can live with it - 0
I do not support it -0

Recommendation FY13-JJ #3: Passes.

Recommendation:

FY13-JJ #4. Revise 18-8-208 Escapes to provide that an adjudicated juvenile who turns 18 while in custody, but is not in custody in a state-operated facility, commits a class 3 misdemeanor rather than a felony if convicted of an escape.

Add 18-8-208(4.1) to provide:

(4.1) A person commits a class 3 misdemeanor if, having been ~~adjudicated~~ committed to DYC for a delinquent act and is over 18 years of age, escapes from a staff secure facility as defined in C.R.S. 19-1-103(101.5) other than ~~the Adams Youth Services Center, the Gilliam Youth Services Center, the Foote Youth Services Center, The Mount View Youth Services Center, the Platte Valley Youth Services Center, the Grand Mesa Youth Services Center, the Lookout~~

~~Mountain Youth Services Center, the Pueblo Youth Services Center, the Spring Creek Youth Services Center, and the Zebulon Pike Youth Services Center .~~ a state-operated locked facility.

Amend 18-8-208(9) to provide:

(9) The minimum sentences provided by sections 18-1.3-401, 18-1.3-501, and 18-1.3-503, respectively, for violation of the provisions of this section shall be mandatory, and the court shall not grant probation or a suspended sentence, in whole or in part; except that the court may grant a suspended sentence if the court is sentencing a person to the youthful offender system pursuant to section 18-1.3-407. The provisions of this section, however, shall not apply to section (4.1) of this statute.

Delete 18-8-208(10):

~~(10) Any person held in a staff secure facility, as defined in section 19-1-103 (101.5), C.R.S., shall be deemed to be in custody or confinement for purposes of this section.~~

Discussion:

1. The proposed change will eliminate the scenario where a youth, who is committed to an *unsecured facility* and subsequently leaves without authorization, could be charged with a felony escape and placed in DOC. A person in such a situation would still have criminal liability, but could only be convicted of a Class 3 misdemeanor. This gives a judge the option of sentencing a juvenile to county jail or probation. A juvenile who escapes from a *secured facility* could still be charged with a Class 3 felony.
2. When originally proposed in September, the facilities were identified in the statutory language. This was identified as a problem because the applicable facilities could change over time requiring constant monitoring of this language. Does this version solve that problem? Yes, by using the term, "state-operated locked facility."
3. Is this retroactive? No.

Eric Philp moved to approve the recommendation. Anthony Young seconded the motion.

VOTE: I support it - 21
I can live with it - 0
I do not support it -0

Recommendation FY13-JJ #4: Passes.

DRUG POLICY TASK FORCE
Primer, Recommendation Preview and Discussion

Ms. English presented an overview of the Drug Policy Task Force. One working group of the Task Force, known as the Structure Working Group, studies potential drug sentencing reforms. This group believes in the underlying premise that, in general, users sentenced to DOC do not receive optimal substance abuse treatment and that there are more effective ways to manage such offenders.

In 2009, the Structure Working Group presented two approaches to comprehensive drug sentencing reform to the CCJJ:

- Option One proposed that the Structure Working Group proceed directly with a rewrite of the entire Controlled Substances Act ("18-18").
- Option Two, which was the option chosen, proposed a staggered approach:
  - A. First (in 2010)
    - -- Revise statute to differentiate sentences for drug possession from those for drug sale and manufacture
    - -- Use cost savings to expand funding for offender treatment ($8M)
    - -- Efforts resulted in H.B. 2010-1352
  - B. Next
    - -- Consolidate the various treatment funding silos to improve the delivery of offender treatment
    - -- Efforts resulted in S.B. 2012-104
  - C. Then
    - -- Rewrite the Controlled Substances Act

Senate Bill 12-163 directed the Commission to consider the development of a comprehensive drug sentencing scheme. The Commission referred this charge to the Task Force who developed, via the Structure Working Group, the following recommendations.

Recommendation (for discussion only):
FY13-DP#1. Revise drug sentencing classifications and ranges.

The Drug Policy Task Force and Structure Working Group present this proposal for a rewrite of the Controlled Substances Act that includes a separate sentencing framework based on a drug crime classification that has four felony offense levels, two misdemeanor offense levels and petty offenses. (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 Drug Felony level 1 (DF1). Each felony level also has a corresponding period of parole that would be a mandatory provision of any prison sentence.

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 [in 1.e.] 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.

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. Discussion:

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 or heroin, 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.)

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 efforts 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.

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.

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 began by looking at statutes in other states, meeting with offenders, addicts, probation, and other task forces to develop this grid.
2. The proposed ranges are substantially the same as those presented a year ago.
3. DF1s listed in the handout are the special offender crimes. This lowers the quantity for schedule I and II drugs. The question was at what point or at what amount of the drug does the possession begin to involve dealing and guns?
4. When looking at DF1 crimes, the maximum sentence is lowered from 48 to 32 years. What is the current mandatory minimum for a DF1 crime? It depends. Some offenses may be four years, others twelve years. The new sentencing structure has a mandatory minimum of 8 years in DOC.
5. DF2 felonies are listed in the packet. This includes sale to minors and marijuana sales. There are different cut points in terms of quantity when determining sentencing. Anyone with a criminal history is eligible for sentencing in the aggravated range.
6. All possessors of Schedule I and II drugs will be charged as felons – DF4.
7. Does the "wobble" automatically shift to a misdemeanor or is this shift at the discretion of the DA? The conviction automatically "wobbles" down to a misdemeanor.
8. Why was heroin categorized with "meth"? Because, after looking at usage levels across a variety of drugs, heroin logically seemed to align most closely with usage levels of meth.
9. In the attempt to "synch" quantities and classifications, will the purity of drugs also be factored in? Yes.
10. Does the "wobbler" become the default plea bargain and eliminate the option for deferred sentences and misdemeanors? This was one of the potential consequences discussed and why the recommendation encourages the continued use of deferred sentences.

Recommendation: (For discussion only)

FY13-DP #2. Replicate the Summit View model of state/local partnerships for residential treatment in communities.

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. This recommendation attempt to fill a gap that has been around for years. There are not enough residential treatment beds.

2. Of the residential treatment options available, they are only an option after an offender has been convicted of a felony.
3. Summit View in Grand Junction is a community facility. One can be referred there from the criminal justice system or from a medical facility. Additionally, if beds are available, individuals in the community may be served on a "walk-in" basis.
4. Residential treatment should include detox.
5. There are some child welfare facilities that are empty that may be used. Can we tweak this to say we will look at existing vacant facilities prior to building anything new?

Recommendation: (For discussion only)
FY13-DP #3. Develop a jail option for the completion of specific drug-related, short prison sentences.

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 relevant Sheriff and DOC must agree on appropriate offenders and coordinate the completion of prison sentences in a jail. DOC would be responsible to pay for the cost of incarceration at the jail per diem set by the legislature.

Discussion:
1. The idea is that some offenders sentenced to prison may have a short sentence. By the time an offender gets sent to a facility most of his/her sentence has been served in DRDC and there would be not enough time to provide the offender treatment.
2. It may not be possible to by-pass the DRDC process. Further discussion with DOC needs to occur.
3. If the DRDC process can be by-passed, offenders may serve their sentence in a jurisdiction that differs from the county where they were sentenced. There may be available bed space and/or optimal treatment in other county jail locations.
4. Currently, when offenders enter DRDC with an imminent parole eligibility date, the Parole Board often recommends placement in Community Corrections where the offender can receive treatment.

Recommendation: (For discussion only)
FY13-DP #4. Expand IRT availability in DOC.

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:
1. More dialogue is needed with DOC.

2. Are you tying this into Community Corrections? This idea is for offenders who have short sentences. We are not doing a good job of getting services to offenders with short sentences.
3. This works in conjunction with the sentencing scheme.

Recommendation (For discussion only)
FY13-DP #5. Expand civil remedies for substance abuse treatment.

Allow for the expansion of civil remedies (e.g. consumer protection and/or use of public health regulatory authority) as part of building a 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:
1. This provides support to efforts to increase the capacity of other (non-criminal justice) systems that provide substance abuse treatment.
2. Use the public health system in better ways.
3. Has anyone used civil commitments? Oregon does.

Recommendation: (For discussion only)
FY13-DP #6. Expand access to trauma-informed substance abuse treatment.

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 this is appropriate and available.

Discussion:
1. Unsure of impact.
2. Individuals with substance abuse histories often suffer from some form of trauma.

Recommendation: (For discussion only)
FY13-DP #7. Establish a "per se" violation for driving under the influence of marijuana.

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. Per se levels are about presumptions. The alcohol presumption is established.

2. Per se is not an automatic conviction for a certain level. The defendant can still argue that the level did not impair his/her ability to drive.
3. Alcohol is water soluble and is easily measured whereas cannabis in the blood is fat soluble and can still be measured in the blood after 28 days.
4. High levels of THC remain in the blood long after use whereas driving impairment occurs closer to the time the drug was consumed.
5. Chronic use can lead to tolerance. There are alternative ways of ingesting cannabis that would each affect the THC level differently.
6. The previous CCJJ recommendation establishing a "Per Se" level of 5 ng did not pass the legislature because the recommendation included the revocation of one's driver's license which carried a fiscal note (SB12-117/SB12S-1005 in the special session).
7. The current recommendation passed the Drug Task Force by a narrow margin.
8. Is the rebuttable inference available only for felony charges and not on misdemeanors? The hope was to mirror alcohol. This point will be further reviewed by the Task Force.
9. Civil penalties were intentionally not included.

The next meeting will be November 9, 2012 and will be a half-day meeting.

The meeting adjourned at 4:18 p.m.