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Colorado Legislative Council

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Report to the
Colorado General Assembly

The Continuing Examination of the Treatment of Persons with Mental Illness Who Are Involved in the Criminal and Juvenile Justice Systems

Prepared by

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The Continuing Examination of the Treatment of Persons with Mental Illness Who Are Involved in the Criminal and Juvenile Justice Systems

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December 2011

COLORADO GENERAL ASSEMBLY

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December 2011

To Members of the Sixty-eighth General Assembly:

Submitted herewith is the final report of the Legislative Oversight Committee for the Continuing Examination of the Treatment of Persons with Mental Illness Who Are Involved in the Criminal and Juvenile Justice Systems. This committee was created pursuant to Senate Bill 04-037 and House Bill 09-1201 and is authorized through July 1, 2015. The purpose of the committee is to oversee an advisory task force that studies and makes recommendations concerning the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems in Colorado.

The legislative oversight committee did not recommended any bills to the Legislative Council for the 2012 legislative session.

Sincerely,

/s/ Senator Brandon Shaffer
Chairman

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This report is also available on line at:

http://www.colorado.gov/lcs/MICJS

Committee Charge

History

The advisory task force and legislative oversight committee concerning the continued examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems first met in the summer of 1999. In 2000, the task force and oversight committee were reauthorized, and the reestablished task force met on a monthly basis through June 2003. The General Assembly considered legislation to continue the study of the mentally ill in the justice system beyond the 2003 repeal date, but the bill failed. In FY 2003-04, the task force continued its meetings and discussions at the request of the oversight committee. The task force and oversight committee were reauthorized and reestablished in 2004 through the passage of Senate Bill 04-037 and again in 2009 with the passage of House Bill 09-1021. However, pursuant to Senate Bill 10-213, regarding the suspension of 2010 interim committees, neither the committee nor the task force met during the 2010 interim. The committee is set to repeal on July 1, 2015.

A summary of the work accomplished by these groups from 1999 through 2009 is provided in the annual reports of the committee, which are located on the Legislative Council website in the committee archive section.

The Legislative Oversight Committee

The legislative oversight committee was created to oversee the work of the advisory task force. The six-member committee reviews the task force's findings and may recommend legislative proposals. In calendar years 2005 through 2014, the committee is required to meet at least three times annually. The oversight committee is required to submit an annual report to the General Assembly by January 15 of each year, except for 2011, regarding recommended legislation resulting from the work of the task force. The task force did not recommend any legislation to the oversight committee during the 2011 interim.

The Advisory Task Force

The legislative oversight committee is responsible for appointing a task force that represents all areas of the state and is diverse in ethnicity, culture, and gender. The task force is directed to continue examining the identification, diagnosis, and treatment of persons with mental illness who are involved in the state criminal and juvenile justice systems, including an examination of liability, safety, and cost as they relate to these issues.

Charge. The advisory task force is statutorily charged with examining the identification, diagnosis, and treatment of persons with mental illness who are involved in the state criminal and juvenile justice systems. Between July 1, 2009, and July 1, 2014, the task force is required to study the following issues:

- the diagnosis, treatment, and housing of persons with mental illness or co-occurring disorders who are convicted of crimes or incarcerated or who plead guilty, nolo contendere, or not guilty by reason of insanity, or who are found to be incompetent to stand trial;

- the diagnosis, treatment, and housing of juveniles with mental illness or co-occurring disorders who are adjudicated, detained, or committed for offenses that would constitute crimes if committed by adults, or who plead guilty, nolo contendere, or not guilty by reason of insanity, or who are found to be incompetent to stand trial;
- the ongoing treatment, housing, and supervision, especially with regard to medication, of adults and juveniles who are involved in the criminal and juvenile justice systems and who are incarcerated or housed within the community, and the availability of public benefits for these persons; and
- the safety of the staff who treat or supervise persons with mental illness and the use of force against persons with mental illness.

The authorizing legislation requires the task force to meet at least six times per year. To fulfill its charge, the task force is required to communicate with and obtain input from groups throughout the state affected by issues under consideration. The task force is not precluded from considering additional issues, or from considering or making recommendations on any of the issues listed above at any time during the existence of the task force.

Subcommittees. The task force currently oversees five subcommittees that undertake an in-depth study of certain issues, including:

- medication, health care, and public benefits;
- medication consistency;
- housing;
- juvenile justice; and
- issues related to the plea of not guilty by reason of insanity.

At the monthly meetings of the task force, members of the subcommittees provide an update on their work. Subcommittees may be created and dissolved at any time as necessary.

Recommendations and reports. The task force must communicate its findings on the issues it is statutorily charged to study and make recommendations to the legislative oversight committee on or before August 1 of each year. In addition, the task force must submit a written report to the committee by October 1 of each year. The report must identify the following:

- issues to be studied in upcoming task force meetings and their respective prioritization;
- findings and recommendations about issues previously considered by the task force; and
- legislative proposals.

All legislative proposals of the task force must note the policy issues involved, the agencies responsible for implementing the changes, and the funding sources required for such implementation. The task force did not recommend any legislation to the oversight committee during the 2011 interim.

Membership. Table 1 lists the members of the advisory task force and the agencies they represent. The advisory task force consists of 30 members, 4 of whom are appointed by the Chief Justice of the Colorado Supreme Court. The 26 remaining members are appointed by the chair and the vice-chair of the task force.

Table 1
Advisory Task Force Appointees

State or Private Agency	Representative(s) and Affiliation(s)	
Department of Public Safety (1)	Jeanne Smith	Division of Criminal Justice
Department of Corrections (2)	Joan Shoemaker	Clinical Services
	Tim Hand	Adult Parole, Community Corrections, Youthful Offender System
Local Law Enforcement (2)	Keith Penry	Douglas County Sheriff's Department
	Vacant	
Department of Human Services (5)	Charles Smith	Division of Behavioral Health
	Caren Leaf	Division of Youth Corrections
	Melinda Cox	Division of Child Welfare
	Michele Manchester	Colorado Mental Health Institute at Pueblo
	Libby Stoddard	Mental Health Planning and Advisory Council/Mental Health America of Colorado
County Department of Social Services (1)	Susan Walton	Jefferson County Department of Social Services
Department of Education (1)	Michael Ramirez	School Improvement and Turnaround
State Attorney General's Office (1)	Janet Drake	Senior Assistant Attorney General
District Attorneys (1)	Bruce Langer	Boulder County District Attorney's Office
Criminal Defense Bar (2)	Kathleen McGuire	Colorado Office of the State Public Defender
	Gina Shimeall	18th Judicial District Mental Health Court
Practicing Mental Health Professionals (2)	Fernando Martinez	San Luis Valley Mental Health Center
	Scott Peterson	Colorado Coalition for the Homeless
Community Mental Health Centers in Colorado (1)	Harriet Hall	Jefferson Center for Mental Health
Person with Knowledge of Public Benefits and Public Housing in Colorado (1)	Vacant	
Colorado Department of Health Care Policy & Financing (1)	Marceil Case	Behavioral Health Specialist
Practicing Forensic Professional (1)	Gregory Kellermeyer, M.D.	Denver Mental Health Center
Members of the Public (3)	David Mosher	Member with a mental illness who has been involved in the Colorado criminal justice system
	Deirdre Parker	Parent of a child who has a mental illness and who has been involved in the Colorado criminal justice system
	Barbara Stephenson	Member with an adult family member who has a mental illness and who has been involved in the Colorado criminal justice system
Colorado Department of Labor and Employment (1)	Vacant	
Judicial Department (4)	Shane Bahr	State Problem-Solving Court Coordinator
	Greg Brown	Boulder County Partnership for Active Community Engagement Probation Officer
	Susan Colling	Juvenile Programs Coordinator, Probation Services
	Vacant	

Committee Activities

Legislative oversight committee. The legislative oversight committee met in 2011 to monitor and examine the work, findings, and recommendations of the task force. The task force did not recommend any legislation for the committee's consideration for introduction during the 2011 or 2012 legislative sessions.

Advisory task force. The task force met monthly in 2011, with the exception of July, and heard presentations about a number of issues including:

- administrative segregation;
- court-ordered treatment for individuals who are in jail;
- family advocacy programs for mental health juvenile justice populations;
- criminal justice programs within community mental health centers;
- specialty courts;
- incompetence to proceed; and
- the plea of not guilty by reason of insanity.

Administrative Segregation

Background. During the 2010 legislative session, the General Assembly approved a footnote in the Long Bill directing the Colorado Department of Corrections (DOC) to work with the advisory task force to develop a plan for the implementation and ongoing evaluation of the mental health unit at Colorado State Penitentiary (CSP).[1] A separate footnote expressed the intent to use funds appropriated for mental health beds at CSP to create an appropriate, secure, and therapeutic environment for mentally ill offenders at CSP. Such beds are not to be filled or managed solely for disciplinary purposes. The General Assembly also directed the DOC to submit a report detailing its progress related to the mental health unit at CSP by January 31, 2011.

In May 2010, the task force determined to spend the 2010 interim gathering information on Administrative Segregation (AS) and the mental health program at CSP. However, due to the passage of Senate Bill 10-213, the task force was unable to hold official meetings during the 2010 interim. Therefore, a small group of task force members volunteered to continue to study the topic and to report back to the full task force in 2011.

Administrative segregation. AS is a long-term segregation placement for inmates who display violent, dangerous, or disruptive behaviors.[2] Placement is determined through an administrative action that is separate and distinct from the usual classification and disciplinary system. The administrative action to classify an inmate to AS begins with a hearing, frequently following either a serious violation or a series of less serious infractions. Pre-hearing segregation may occur immediately following a serious incident for the safety and security of the facility. According to the DOC, specific conditions of AS may vary, but all inmates with this classification are confined in a single cell for 23 hours per day, with 1 hour allowed for showering and exercise outside of the cell.

[1] House Bill 10-1376

[2] O'Keefe, Maureen, Kelli J. Klebe, Alysha Stucker, Kristin Sturm, and William Legget. "One Year Longitudinal Study of the Psychological Effects of Administrative Segregation," Colorado Department of Corrections: 2011.

The effects of AS. Members of the task force were particularly interested in the effects that AS may have on offenders with mental illness. Specifically, the task force sought information on:

- mental health services provided to inmates in AS;
- other programs available to inmates in AS;
- the transition from AS back to general population or to the community; and
- the perspectives of mentally ill offenders housed in AS units.

In order to address these topics, the members toured the offenders with mental illness AS unit at CSP and invited various representatives from the DOC to speak at task force meetings.

In addition, the task force discussed a report prepared by the DOC in January 2011, summarizing a study of the effects of AS on inmates with mental illness.[3] The study found that, of those inmates studied, psychological well-being initially improved and then stabilized for inmates in AS. Although the study found that inmates with mental illness were more aggravated by their experiences of isolation than inmates without mental illness, this pattern held true regardless of whether the inmates with mental illness were in AS or in the general population. However, the DOC notes in its study that it did not study all possible negative consequences of AS, such as the rate of recidivism following an inmate's release to the community.

Ultimately, the task force did not recommend any legislation concerning AS to the legislative oversight committee. However, as Senate Bill 11-176, concerning solitary confinement, was debated by and enacted by the General Assembly, the task force continued to discuss the topic.

Court-Ordered Treatment for Individuals who are in Jail

Current Colorado law stipulates procedures regarding the care and treatment of persons with mental illness, including rules and regulations regarding court-ordered treatment for such persons. Under current law, jails are not defined as facilities designated for the care and treatment of persons with mental illness.

Representatives from the Denver Sheriff's Department and the City and County of Denver spoke to the task force about possible legislation to set up a process for court-ordered treatment for individuals who are in jail, but who have not yet been adjudicated, and for individuals who have been charged, but not who are yet convicted of a crime. Discussion on this topic focused on a shortage of hospital beds available to treat individuals with mental illness and on the different processes concerning court-ordered treatment for individuals detained in a prison versus those detained in a jail. The task force also discussed whether smaller communities would have the resources to implement such legislation. Finally, the task force debated how many individuals within jails would be affected by such legislation.

Ultimately, the task force decided to ask the subcommittee on Medication, Health Care, and Public Benefits to further examine the issue of court-ordered treatments for individuals who are in jail. The subcommittee continues to discuss the topic and provide updates to the task force.

[3] *Ibid.*

Family Advocacy Programs for Mental Health Juvenile Justice Populations

Background. In 2007, the General Assembly enacted House Bill 07-1057, which established the Family Advocacy Demonstration Program. The focus of the program is on youth with mental illness or co-occurring disorders who are currently involved in, or at risk of becoming involved in the juvenile justice system. The task force recommended the bill with the goal of providing youth and their families access to necessary services and supports and to assist them in navigating a complex system.

Three separate demonstration programs were created: one urban, one suburban, and one rural. All three programs began operating in 2008 and were set to conclude in 2011. State General Fund dollars were used to fund the programs and extensive evaluations were required. The programs and sites selected are:

- The Family Agency Collaboration (FAC) in Denver;
- The Federation of Families for Children's Mental Health in Jefferson County; and
- Pikes Peak Mental Health Center in Teller County.

The bill required the Division of Mental Health (DMH) in the Department of Human Services and the Division of Criminal Justice (DCJ) in the Department of Public Safety to implement and monitor the demonstration programs. The two divisions were charged with gathering information on program participants who were both admitted to and completed participation in the individual family advocacy programs between January 1, 2008, and March 31, 2010.

2010 legislation. During the 2010 legislative session, the General Assembly enacted Senate Bill 10-014, which was recommended by the task force. The bill made several changes to clarify the role of family advocates and to add family system navigators to the Family Advocacy Demonstration Program. The bill also added transition services to the required services provided under the program.

Under SB 10-014, family advocates and family system navigators are both required to have been trained in a system of care approach to assist families in accessing and receiving services, and to have worked with multiple agencies and providers such as mental health, physical health, substance abuse, juvenile justice, developmental disabilities, education, and other state and local service systems. The bill further specified that a family advocate is a parent or primary caregiver who has raised or cared for a child with a mental health or co-occurring disorder, whereas a family system navigator is an individual who has the skills, experience, and knowledge to work with children and youth with mental health or co-occurring disorders.

2011 legislation. During the 2011 legislative session, the General Assembly enacted House Bill 11-1193, which continues the Family Advocacy Demonstration Program as an ongoing program within the DHS. The bill requires the DHS to promulgate rules and standards for the program and to provide technical assistance to family advocacy programs throughout the state. The bill removed provisions related to the creation, establishment, and review of the demonstration programs, and extended the repeal date of the demonstration programs to July 1, 2021.

Family advocacy toolkit. In analyzing the Family Advocacy Demonstration Program, the Juvenile Justice subcommittee sought a method to provide guidance to family advocates in navigating the complexities of multiple systems. The subcommittee received funding from the Juvenile Justice and Delinquency Prevention Council within the Colorado Department of Public Safety to develop a family advocacy toolkit.

The subcommittee presented information about the toolkit to the full task force. According to the subcommittee, there are two toolkits, one of which provides resources for family advocates who are working with youth with mental health issues in the juvenile justice system, and one of which provides resources for systems professionals working with such individuals. Materials for the toolkits were complied by the Federation of Families for Children's Mental Health and by the Juvenile Justice subcommittee.

The toolkits are web-based and contain plain language resources and embedded videos. The toolkits are not intended to provide training or certification or to teach someone how to be a family advocate. Rather, they are intended to provide information and resources useful to family advocates and those who work with them. Topics addressed by the family advocacy toolkit include:

- who can benefit from the toolkits;
- who is a family advocate;
- what systems are involved in family advocacy; and
- helpful community resources.

Topics addressed by the systems professional toolkit include:

- what family advocates do and what family advocacy services are available;
- how working with a family advocate can enhance a system professional's work;
- how family advocacy services can be accessed; and
- who pays for family advocacy services.

Based on the subcommittee's presentation, the task force discussed how information in the toolkits would be updated and received information regarding the launch of the finalized toolkits.

The task force did not discuss any potential legislation concerning family advocacy programs. However, several task members discussed the sustainability of the family advocacy toolkits and debated whether legislative support would be available for this initiative. The Juvenile Justice subcommittee continues to provide updates to the task force on this issue.

Criminal Justice Programs within Community Mental Health Centers

The task force devoted one of its meetings to a panel presentation concerning criminal justice programs within community mental health centers. A representative from the Colorado Behavioral Healthcare Council, which is a membership organization representing Colorado's statewide network of community behavioral health care providers, summarized the types of criminal justice programs and services available in mental health centers throughout Colorado. Such programs generally fit one of five categories:

- in-house;
- in-reach (mental health professionals visit a correctional facility or jail to provide services);
- community-based;
- mental health court/dual diagnosis/diversion court-based programs; and
- prevention programs.

Information concerning "Senate Bill 97" programs, which are community-based services for juveniles and adults with mental illness involved in the criminal justice system and are funded by tobacco litigation settlement moneys, was also presented to the committee.

Representatives from the Arapahoe/Douglas Mental Health Network, the Aurora Mental Health Center, and Mental Health Partners provided information on specific services they offer. Services include:

- the 18th Judicial District Mental Health Court;
- a Crisis Intervention Team (CIT) case management team;
- an Achieving Recover, Changing Habits, and Empowering for Success (ARCHES) program;
- substance abuse treatment;
- a community transitions program at Aurora Mental Heath Center that includes in-reach services, links to community resources, a post-booking diversion program, and re-entry skills training;
- an Assertive Community Treatment (ACT) program providing intensive services to individuals with severe mental illness; and
- a Second ACT program focusing on parolees.

The task force showed particular interest in learning about the specific needs of various populations, such as individuals who are involved in the local court system, individuals who are released from the DOC, and individuals who were found to be not guilty by reason of insanity. The task force heard that the population of individuals who were found to be not guilty by reason of insanity requires intensive services. In addition, it was suggested that state hospital beds are often dedicated to members of this population and are thereby not available for use by other individuals.

Finally, the task force discussed the importance of providing individuals with consistent access to medications and other wraparound services within a community. Conversation ensued concerning methods to improve an individual's transition from a health center to the community. Various members of the task force commented on the trend in recent years to focus less on technical parole violations and more on serious parole violations.

The task force did not recommend any legislation concerning criminal justice programs within community mental health centers. However, it continues to discuss and consider the various issues raised by such programs.

Specialty Courts

Background. Specialty courts, also known as problem-solving courts, are historically created to address a specific problem. Some examples of specialty courts include:

- adult drug courts;
- juvenile drug courts;
- mental health courts;
- re-entry courts;
- tribal wellness courts;
- truancy courts;
- veterans courts;

- domestic violence courts; and
- family/dependency and neglect courts.

Specialty courts in Colorado are not created through statute. The courts are established at the local level with the inherent purpose of effective docket management. Colorado currently has 62 specialty courts, most of which were established using existing funding and resources. As a result, the existing specialty courts work mostly independently of each other. In recent years, efforts have been made to coordinate efforts and develop consistency across all specialty courts in the state. Specialty courts are located in 20 of the 22 judicial districts in Colorado. The breakdown of Colorado specialty courts is as follows:

- 22 adult drug courts;
- 13 family/dependency and neglect courts;
- 11 juvenile drug courts;
- 8 DWI courts;
- 3 mental health courts;
- 2 adult hybrid drug courts (DWI);
- 2 veteran treatment courts; and
- 1 tribal wellness court.

Specialty courts are able to focus on an issue and target services to those individuals who need them. When adult drug courts were first created, most did not allow participants with a mental illness diagnosis. However, the recognition of the number of individuals with co-occurring disorders (e.g., substance abuse and mental illness) has grown significantly in recent years. As a result, specialty courts are now allowing those individuals with a dual diagnosis to participate, with the idea that treating the whole individual leads to more successful outcomes.

Philosophies. Two main philosophies exist with regard to specialty courts. In a revocation model, individuals will generally go through a regular trial and be sentenced to probation. If they are not successful on probation and are facing a sentence to the DOC, a specialty court will offer a last chance to remain at liberty in the community under the close supervision of the specialty court. In a diversion model, candidates who are assessed as having a particular need in the pre-trial phase will be diverted from the traditional court trial directly into the supervision of the specialty court without giving them a chance to fail.

Colorado Problem-Solving Court Advisory Committee. Former Colorado Supreme Court Chief Justice Mary Mullarkey established the Colorado Problem-Solving Court Advisory Committee in April 2008. The committee consists of 19 members of the Judicial Department from across the state, with Judge Roxanne Bailin, chief judge of the 20th Judicial District, serving as the chair. The committee is charged with:

- addressing the concern that not all drug courts conform to key standards established by the Drug Court Program Office of the Office of Justice Programs of the United States Department of Justice;
- developing a staffing model;
- assisting in the development of a strategic plan that will lead to the sustainability of problem-solving courts in terms of judicial, community, and financial support;
- developing a funding model;
- assisting in the design and implementation of an automated management and evaluation system;

- developing an assessment tool for evaluating the effectiveness of problem-solving courts in improving outcomes for court clients, the Judicial Branch, and the justice system as a whole; and
- providing guidance and support for problem-solving courts through identification of best practices, identification of training and education needs, and the formulation of a problem-solving court professional organization.

18th Judicial District Mental Health Court. The task force heard a presentation on the 18th Judicial District mental health court, which has been in operation since 2010. Involvement with the mental health court entails intensive case management, a treatment plan addressing reasons behind an individual's involvement in the criminal justice system, and court supervision on a weekly basis. According to those involved in the court's operation, collaboration among the courts, probation, mental health agencies, attorneys, and others is necessary for the success of the mental health court.

In order to participate in the mental health court, individuals must have a pending felony charge within the 18th Judicial District. In addition, the charges against an individual and in his or her criminal history must be for nonviolent and nonsexual offenses. Finally, participants must have a severe and persistent clinical disorder. Participation in the mental health court is voluntary.

Treatment consists of four phases that last between 18 and 24 months. The phases are as follows:

- Phase 1: orientation and stabilization;
- Phase 2: active treatment;
- Phase 3: recovery and maintenance; and
- Phase 4: relapse prevention and transition.

Once an individual is accepted in the mental health court, he is or she is required to:

- follow all requirements of parole, probation, and court-ordered rules;
- participate in intensive community-based mental health treatment dealing with mental health, drug addiction, and criminal thinking;
- be subject to frequent urinalysis and breath alcohol testing;
- appear at mandatory weekly court sessions;
- live at a supervised residential facility through Phase 1 of treatment (generally 12 to 15 weeks);
- participate in programming Monday through Friday in Phase 1; and
- commit to remaining in the program through all four phases of the program.

Peer mentors and treatment providers are available at all times to assist individuals. Representatives from the mental health court discussed how the stresses of the job can lead to a high level of burnout among treatment providers.

As of August 2011, 190 individuals applied to the mental health court, and 53 were accepted. Approximately 75 percent of the participants have at least three prior felony convictions and would most likely be incarcerated in the DOC if not for the mental health court. The task force discussed potential savings generated by diverting individuals to the mental health court.

Veterans trauma court in Colorado Springs. The task force heard a presentation from representatives of the Division of Behavioral Health within the Colorado Department of Human Services concerning a veterans trauma court in Colorado Springs. The veterans trauma court was developed through a five-year Substance Abuse and Mental Health Services Administration Grant. The grant was written for two pilot sites, Denver and Colorado Springs, and the Colorado Springs court opened first. The grant is in its fourth year of funding.

The court focuses on veterans and active duty personnel with trauma spectrum disorders or traumatic brain injuries. The purpose of the court is to keep such individuals from entering the criminal justice system and to assure that they receive appropriate treatment for their injuries. The task force discussed statistics concerning the number of returning veterans who will have post traumatic stress disorder or traumatic brain injuries. Additional discussion was devoted to unemployment rates among veterans and the long waiting list for services provided by the Veterans Administration.

As with the 18th Judicial District mental health court, participation in the veterans trauma court is voluntary. Individuals are required to participate in treatment programs, including programs addressing substance abuse and domestic violence. Individuals who fail to meet the requirements of the program are returned to the court to face their original charge.

The veterans treatment court currently has over 90 participants and 6 graduates. Statistics concerning the average age of the participants, their previous involvement with substance abuse or mental health services, and the rate of diagnoses of traumatic brain injury were shared with the task force. Of note, 92 percent of the veterans trauma court participants reported experiencing nonmilitary trauma prior to 18 years of age. According to data provided to the task force, participants in the veterans trauma court showed improvements in functioning in everyday life, overall heath, and social connectedness.

Members of the task force expressed support for specialty courts across Colorado, but made no legislative recommendations concerning this topic.

Incompetence to Proceed

As in recent years, the task force devoted its attention to the issues of a defendant's competency and/or insanity in criminal proceedings. A panel presentation consisting of a district attorney, a public defender, and a representative from the Colorado Mental Health Institute at Pueblo (CMHIP) provided an overview of the legal issues involved in determinations of competency and sanity.

Questions of competence address a defendant's competence during the criminal proceedings, whereas questions of insanity concern a defendant's state of mind at the time of the commission of the alleged offense. Defendants found to be incompetent to proceed may not be committed for a period longer than the maximum term of incarceration that can be imposed for the offense for which they were originally charged, whereas individuals found not guilty by reason of insanity can be committed indefinitely.

Incompetent to proceed. When a criminal defendant is arraigned, he or she is asked for a plea. If the defendant pleads guilty to all of the crimes with which he or she is charged, there is no trial. The defendant may also choose to plead not guilty or not guilty by reason of insanity and

proceed with a jury trial to examine the evidence. However, Colorado law states that no one may be tried, sentenced, or executed if he or she is incompetent to proceed at any stage of criminal proceedings. Testimony provided to the task force indicated that this provision is based on the due process clause of the U.S. Constitution. A defendant is considered incompetent to proceed if he or she suffers from a mental disease or defect which renders him or her incapable of understanding the nature and course of the proceedings or of participating or assisting in his or her defense. If a defendant is unable to cooperate with defense counsel due to a mental disease or defect, he or she is also incompetent to proceed.

The issue of an adult defendant's competency may be raised by the judge, prosecution, or defense in any criminal case. The chief officer of an institution where a defendant is awaiting execution may also raise the issue of competency. The court makes a preliminary finding regarding competency after the issue is raised. A competency evaluation may be ordered, but is not required if the judge feels that he or she has enough information available and if no party objects to the judge's decision within ten days.

Competency evaluations. Competency examinations and evaluations must be conducted by a licensed psychiatrist or a licensed psychologist who is trained in forensic competency assessments. A psychiatrist or psychologist in forensic training who is practicing under the supervision of a licensed forensic psychiatrist or psychologist may also conduct a competency examination. According to data provided to the task force, approximately 20 percent of individuals needing competency evaluations are ordered to the CMHIP, while the remaining 80 percent are evaluated in jails and outpatient settings. Following a report regarding an individual's competency to proceed, a final decision on competency is made by the judge. A defendant has the right to a second opinion on the recommendations made and a right to a hearing on the question of competency.

Adults who are found incompetent may be released on bond provided that the defendant obtains available treatment and services while on bond. However, there is a presumption that the incompetency of the defendant will inhibit the ability of the defendant to ensure his or her presence for trial. Defendants who are found to be incompetent to proceed may also be committed to the custody of the Colorado Department of Human Services (DHS) or other appropriate treatment facility until they can be restored to competency or criminal proceedings are otherwise terminated. Individuals who are found to be incompetent to proceed at the CMHIP are immediately enrolled in treatment designed to restore an individual to competency and to help him or her to gain basic legal knowledge and problem-solving and rational decision-making skills. The average length of stay for an individual deemed incompetent to proceed is three to six months. No defendant who is committed may be confined for a period longer than the maximum term of incarceration that can be imposed for the offense for which he or she was originally charged.

Confidentiality. When a defendant raises the issue of competency to proceed, or when the court determines that the defendant is incompetent to proceed, any claim by the defendant to confidentiality or privilege is deemed waived, and the district attorney, the defense attorney, and the court are granted access to reports of competency evaluations, information and documents related to the competency evaluation, and the evaluator who performed the competency evaluation. However, evidence acquired directly or indirectly for the first time from a competency evaluation is not admissible against the defendant on the issues raised by a plea of not guilty. Such evidence is admissible at a sentencing hearing.

Review of competency. The court is required to review all cases of defendants who are committed or confined as incompetent to proceed at least every three months. The review must take into account the probability that the defendant will eventually be restored to competency and the justification for continued commitment and confinement. If, on the basis of the available evidence, there is a substantial probability that the defendant will not be restored to competency within the foreseeable future, the court may order the release of the defendant as follows:

- upon a motion from the district attorney or the defendant, the court may terminate the criminal proceeding and the commitment or treatment order;
- the court may order the release of the defendant on bond;
- the court or a party may commence civil proceedings to commit the defendant; or
- the court or a party may initiate an action to restrict the rights of the defendant, providing that he or she meets certain requirements concerning the care and treatment of individuals who are developmentally disabled.

A restoration hearing may be requested at any time by the judge, the prosecution, or the defense. At the hearing, the burden of proof is on the party asserting that the defendant is competent. For adult defendants, if the head of the facility where a defendant is confined or a physician treating the defendant files a report stating that the defendant is mentally competent to stand trial, either party may request a hearing or a second evaluation. If no such request is made, the court must enter a final determination.

In the event that competency is restored, judicial proceedings continue from the point at which they were suspended. The defendant is credited with any time he or she spent in confinement, either pending a determination of competency or receiving treatment, during the sentencing phase.

After its panel briefing on issues involved with competency evaluations and the plea of not guilty by reason of insanity, the task force decided to devote its attention to issues concerning the plea of not guilty by reason of insanity.

The Plea of Not Guilty by Reason of Insanity

A panel of presenters, consisting of a district attorney, a public defender, and a representative from the CHMIP provided an overview of the legal issues involved in determinations of sanity when a defendant pleads not guilty by reason of insanity. An October 2011 editorial in *The Denver Post* concerning whether the prosecution should have the right to conduct its own sanity examination of defendants who plead not guilty by reason of insanity prompted additional discussion.

Plea of not guilty by reason of insanity. At arraignment, a defendant has the option to plead not guilty by reason of insanity. The court, for good cause shown, may also permit the plea to be entered at any time prior to trial. If a client refuses to enter a plea of not guilty by reason of insanity, a defense attorney may do so on his or her behalf. In this case, the court must conduct an investigation in order to determine whether a plea of not guilty by reason of insanity is necessary for a just determination of the charge against the defendant. If the court finds that such a plea is necessary, the plea has the same effect as if it had been voluntarily entered by the defendant.

Definition of not guilty by reason of insanity. For defendants charged with offenses committed on or afer July 1, 1995, the applicable test of insanity is:

- a person was so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong; or
- a person suffered from a condition of mind caused by a mental disease or defect that preventing the person from forming a culpable mental state that is an essential element of a crime charged.

However, Colorado law notes that care should be taken not to confuse a mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions. If the act is determined to have been induced by these causes, the actor is deemed accountable. Furthermore, the law notes that "diseased or defective in mind" does not refer to an abnormality manifested only by repeated criminal or other antisocial conduct. In addition, "mental disease or defect" is defined as including only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance.

Initial sanity examination. After a defendant pleads not guilty by reason of insanity, the court must order a sanity examination. In order to conduct the examination, the defendant may be committed to the Colorado psychiatric hospital in Denver, the CMHIP, the place where he or she is in custody, or any other public institution designated by the court. Priority for placement is generally given to the place where the defendant is in custody, unless circumstances require otherwise. During the examination, one or more psychiatrists observe and examine the defendant.

Other sanity examinations. In addition to the sanity examination ordered by the court, the defendant has the right to order a separate sanity examination from a psychiatrist, psychologist, or other expert of his or her choice. For good cause shown, upon the motion of the prosecution, the defense, or the court, the court may order other or further examinations. Case law indicates that for a court to order any additional examination, there must be some basis, other than counsel's opinion, for showing that the first examination was inadequate.[4] Copies of all sanity examination reports must be provided to the defense, the prosecution, and the court.

Confidentiality. A defendant who pleads not guilty by reason of insanity waives any claim of confidentiality or privilege concerning his or her communications with a physician or psychologist during an examination or treatment. For defendants charged with offenses committed on or after July 1, 1999, the defendant must cooperate with psychiatrists and other personnel conducting a sanity examination. Failure to do so may be used to rebut any evidence introduced by the defendant with regard to his or her mental condition. Statements made by the defendant in the course of the sanity examination may only be used to rebut claims of insanity or as evidence at a sentencing hearing. Because such statements are not admissible as evidence concerning the charges against the defendant, case law indicates that a defendant's constitutional right against self-incrimination is preserved.[5]

Procedure following the sanity examination. Upon receiving the report of the sanity examination, the court must immediately set the case for trial. Generally, every defendant is

[4] *People v. Garcia*, 87 P.3d 159 (Colo. App. 2003); 113 P.3d 775 (Colo. 2005).

[5] *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2D 441 (1975); *People v. Osborn*, 42 Colo. App. 376, 599 P.2D 937 (1979); *People v. Herrera*, 87 P.3d 240 (Colo. App. 2003).

presumed to be sane. However, once any evidence of insanity is introduced, the prosecution has the burden of proving sanity beyond a reasonable doubt.

If the court finds a defendant not guilty by reason of insanity, the defendant must be committed to the custody of the DHS until he or she is found eligible for release. According to information presented to the task force, defendants who are found not guilty by reason of insanity stay at the CMHIP for an average of eight years.

Release hearing. The court may order a release hearing at any time on its own motion or on the motion of the defense or the prosecution. In addition, the court is required to order a release hearing if the chief officer of the institution in which the defendant is committed reports that the defendant no longer requires hospitalization. A release hearing is also required upon a defendant's request made 180 days after the initial commitment order. Except for the first hearing following the initial commitment order, the defendant is not entitled to a hearing within one year of a previous hearing, unless the court finds good cause to do otherwise.

After a motion for a release hearing has been made, if no sanity examination reports indicate that the defendant should be released, and the defendant is unable to show any evidence in favor of release from a medical expert in mental disorders, his or her release will be denied. A release hearing may be conducted via a jury trial upon the request of the defendant. At the hearing, if any evidence that the defendant does not meet the criteria for release is introduced, the defendant has the burden of proving by a preponderance of the evidence that he or she has no abnormal mental condition which would be likely to cause him or her to be a danger to him or herself or to the public in the reasonably foreseeable future.

Conditional release. If the court or jury finds the defendant eligible for release, the court may impose terms and conditions that it determines are in the best interests of the defendant and the community. Such terms and conditions must be reviewed at least every 12 months.

A defendant who has been conditionally released remains under the supervision of the DHS until the court enters a final order of unconditional release. The director of any community mental health center charged with the continued treatment of a defendant who was conditionally released must submit written reports every three months to the DHS and to the district attorneys for both the jurisdiction in which the defendant was committed and in which he or she receives treatment concerning the status of the defendant. Such reports must include all known violations of the defendant's terms of release and any changes in the defendant's mental status which would indicate that he or she has become ineligible for release.

If a defendant on conditional release leaves Colorado without consent or fails to comply with any conditions requiring him or her to establish, maintain, and reside at a specific residence and his or her whereabouts are therefore unknown, the defendant will be charged with escape.

Revocation of conditional release. Whenever the superintendent of the CMHIP has probable cause to believe that a defendant is ineligible to remain on conditional release, the superintendent must notify the district attorney for the district in which the defendant was committed. Following this notification, the district attorney or the CMHIP must apply for a warrant directing a sheriff or peace officer to take custody of the defendant. Once the defendant is in custody, he or she must submit to a sanity examination. The district attorney for the district in which a defendant was committed may also file a petition for the revocation of a defendant's conditional release. Within 30 days after a defendant has been committed to the CMHIP for a sanity examination, the court must hold a hearing to determine whether the defendant's conditional release should be revoked.

Denver Post editorial on sanity examinations. On October 11, 2011, *The Denver Post* published an editorial concerning sanity examinations for defendants who plead not guilty by reason of insanity.[6] The editorial referred to a case in Jefferson County in which prosecutors were denied the ability to have their own psychiatrist examine a defendant who pleaded not guilty by reason of insanity. The editorial expressed the opinion that defendants who raise the affirmative defense of not guilty by reason of insanity open themselves to examination by the prosecution. Furthermore, the editorial cited Colorado law placing the burden of proof of sanity on the prosecution. The editorial called for more discussion on this issue, and suggested that legislation to clarify the law may be beneficial.

The task force discussed the issues raised by the editorial. Conversation initially focused on whether the task force had the necessary legal expertise to examine the complicated questions raised by this issue. In particular, the task force focused on how a sanity evaluation requested by the prosecution would relate to the defendant's right against self-incrimination and to the prosecution's responsibility to prove beyond a reasonable doubt that a defendant is sane. Several members of the task force suggested that, given the task force's advisory role, further study of the issues raised by the editorial would benefit the legislature if legislation on this topic were to be introduced during the 2012 legislative session.

Appointment of subcommittee. Ultimately, the task force decided that further research into the issues raised by the plea of not guilty by reason of insanity, including the concerns of *The Denver Post's* editorial, is warranted. A subcommittee was appointed to gather further information and to update the task force throughout 2012.

[6] "Editorial: Bring Balance to Insanity Cases," *The Denver Post:* October 11, 2011, www.denverpost.com/opinion/ci_19083532

Resource Materials

Meeting summaries are prepared for each meeting of the committee and contain all handouts provided to the committee. The summaries of meetings of the legislative oversight committee and related attachments are available at the Division of Archives, 1313 Sherman Street, Denver (303-866-4900). The listing below contains the dates of committee meetings and the topics discussed at those meetings. Meeting summaries are also available on our website at:

http://www.colorado.gov/lcs/MICJS

Meeting Date and Topics Discussed

Legislative Oversight Committee

March 18, 2011

- Overview of the work of the task force

Advisory Task Force

January 20, 2011

- Conversation regarding subcommittees
- Summary of 2011 legislation
- Discussion of possible presentations and study items for 2011
- Update on the work of the Colorado Criminal and Juvenile Justice Commission Behavioral Health Group
- Overview of administrative segregation

February 17, 2011

- Summary of 2011 legislation
- Discussion of possible presentations and study items for 2011
- Update on task force membership
- Overview of administrative segregation
- Subcommittee updates

March 17, 2011

- Summary of 2011 legislation
- Presentation about possible legislation concerning treatment for individuals with mental illness who are incarcerated
- Discussion of possible presentations and study items for 2011
- Update on task force membership
- Subcommittee updates

April 21, 2011

- Report on the March legislative oversight committee meeting
- Summary of 2011 legislation
- Presentation schedule for 2011
- Update on task force membership
- Subcommittee updates

May 19, 2011

- Presentation on the Family Advocacy Toolkit
- Wrap-up of 2011 legislation
- Update on task force membership
- Subcommittee updates

June 16, 2011

- Panel presentation on criminal justice programs
- Update on the work of the Colorado Commission on Criminal and Juvenile Justice
- Update on task force membership
- Subcommittee updates

August 18, 2011

- Presentation on the 18th Judicial District mental health court
- Update on the work of the Colorado Commission on Criminal and Juvenile Justice
- Update on task force membership
- Report from the nominating committee concerning the selection of a new chair and vice-chair
- Subcommittee updates

September 15, 2011

- Presentation on issues related to mental illness in the criminal justice system
- Update on the work of the Colorado Commission on Criminal and Juvenile Justice
- Discussion of potential legislation
- Report from the nominating committee concerning the selection of a new chair and vice-chair
- Subcommittee updates

October 20, 2011

- Presentation on veterans trauma courts
- Update on the work of the Colorado Commission on Criminal and Juvenile Justice
- Discussion of the *Denver Post* editorial on "not guilty by reason of insanity"
- Report from the nominating committee concerning the selection of a new chair and vice-chair
- Discussion of November and December presentation topics
- Subcommittee updates

November 17, 2011

- Subcommittee updates
- Update from the Colorado Commission on Criminal and Juvenile Justice
- Continued discussion on "not guilty by reason of insanity"
- Discussion of December presentation topics

December 15, 2011

- Crisis Intervention Training (CIT) Presentation
- Discussion of task force vacancies
- Subcommittee updates
- Behavioral Health Transformation Council update