Colorado Commission on Criminal and Juvenile Justice

Pretrial Release Task Force

Minutes

August 7th, 2018 1:30PM-3:30PM
710 Kipling, 3rd floor conference room

ATTENDEES:

TASK FORCE CHAIR

Stan Hilkey, Dept. of Public Safety

TASK FORCE MEMBERS

Steve Chin, Mesa County Pretrial Services
Bo Zeerip, District Attorney 21st Judicial District
Bill Kilpatrick, Golden Police Department
Monica Rotner, Boulder County Community Justice Services
Greg Mauro, Denver Community Corrections
Glenn Tapia, Judicial, Probation Services
Jennifer Bradford, Metro State University of Denver
Judge Shawn Day, Aurora Municipal Court
Mindy Masias, State Court Administrator's Offices
Lucienne Ohanian for Amanda Ring, Public Defender's Office
Maureen Cain, Criminal Defense Attorney

STAFF

Richard Stroker/CCJJ consultant
Kim English/Division of Criminal Justice
Germaine Miera/Division of Criminal Justice

ABSENT

Clifford Riedel, Larimer County District Attorney
Valarie Finks, Victim Services, 18th Judicial District
Kirk Taylor, Pueblo County Sheriff
Joe Salazar, Representative, House District 31
Lang Sias, Representative, House District 27
Judge Chris Bachmeyer, 1st Judicial District

ADDITIONAL ATTENDEES

Kevin Ford, Division of Criminal Justice
Laurence Lucero, Division of Criminal Justice
Joe Thome, Division of Criminal Justice
Steve Allen, Joint Budget Committee
Becca Curry, ACLU
Helen Griffiths, ACLU
Kelly Kissell, Division of Criminal Justice

Issue/Topic:	Discussion:
Welcome and Introductions	Chair Stan Hilkey welcomed Task Force members and newly appointed Commissioners and asked group members and meeting attendees to introduce themselves. He reviewed the agenda and asked for a motion to approve the minutes. A motion was made and seconded and the minutes were approved. Stan noted that Mindy Masias would be joining the meeting on the phone momentarily and in her absence he offered an update on the Bail Blue Ribbon Commission. The Commission's next meeting is scheduled for August 16th and Stan and CCJJ consultant Richard Stroker will present information on the work of this Task Force. Gregg Mauro and Doug Erler were also invited to the meeting to present information on pretrial services and the Colorado Pretrial Assessment Tool (CPAT). Stan asked if there were any other updates and Glenn Tapia followed up on a piece of homework he had from the last meeting regarding the draft recommendation calling for the State Court Administrators Office to develop and provide training and fidelity measurement of the CPAT. Glenn said he checked with Judicial about whether this could be enabled with a Chief Judge's directive, or if statutory language would be preferable. He reported that Judicial would prefer statutory language.

Issue/Topic:	Discussion:
Recap / July meeting outcomes	Richard Stroker offered a recap of the outcomes from the July meeting as follows: Two of the working groups presented information on their recommendations and in-depth discussions were had about proposed revisions. The Assessment Tools and Pretrial Services working group has incorporated that input into their recommendations and they will re-present those recommendations today for a final vote. Also in July, Bo Zeerip continued his review of the work by the Pretrial Release Detention working group. That group will also offer an update today on the progress of their recommendations. Richard reminded task force members that once the group approves recommendations those items are then forwarded to the Commission for consideration. The recommendations coming from this task force will be presented to the full Commission in the coming few months.

Issue/Topic:	Discussion:
Working Groups - Report Out **Action:**	Members of the following working groups reported on their progress and the status of recommendations. <u>Assessment Tools/CPAT/Decision making/Bond schedules/Conditions *__AND__* Pretrial Services/Supervision/Violations/Resources/Behavioral Health</u> Greg Mauro recounted that at the last meeting he and Steve Chin presented four preliminary recommendations on behalf of the two combined working groups. Greg explained that he and Steve took the feedback from that meeting and incorporated it into the final four recommendations being presented today. Greg said rather than re-hash the recommendations in their entirety, he would highlight the areas that have been changed or revised. **FY19-PR #01. Establish and Require the Use of Pretrial Risk Assessment Tools in all Colorado Counties** *DISCUSSION* This recommendation addresses the identified issue of the lack of availability of a pretrial risk assessment in all jurisdictions throughout the state. Earlier versions of this recommendation went so far as to name a risk assessment in statute (the CPAT) but after last month's meeting there was discussion to pull that reference out of this recommendation and insert it into Recommendation FY19-PR #02. This recommendation now states that "Pretrial Risk Assessment shall be available and utilized by Judicial Officers in all counties throughout Colorado for purposes of setting bond and establishing conditions of release for felony and misdemeanor level offenses." Also, language was added in the body of the recommendation about why pretrial risk assessment is a good practice. Bo Zeerip asked about the added language and whether the intent is for the recommendation to also apply to municipal courts. Greg said he recalled, during last month's discussion, that the group wanted to avoid pulling the issue of municipal courts into the recommendation. A discussion was then held about whether municipal courts should be included in the recommendation. Issues were raised including that Title 16 applies to municipal courts, the fact that bond setting takes place in municipal as well as other courts, and the equal application of the law to anybody in custody. Stan asked the group that if they do indeed believe this recommendation represents best practice, why they wouldn't want to include municipal courts as well. Greg replied that at the end of a similar discussion last month the group decided that the funding mechanism to expand pretrial services statewide is already fairly unclear when talking about state jurisdictions alone, and folding in the municipal issue made it even more

so. Maureen offered a solution of encouraging municipal courts to comply with the recommendation without necessarily mandating compliance. She added that a lot of the precursor litigation for bail/bond reform does begin in municipal courts.

Richard reminded the group that the original broad brush effort was to support the package of recommendations in a particular way, and if they are adopted and accepted it would afford an opportunity to revisit the concept at a future time with a lens toward extending this further. Stan agreed that the way the recommendation is written does not exclude participation but also doesn't mandate it. He suggested flagging this part of the recommendation for consideration by the Commission.

A proposal was made to add the following language (in red) to the recommendation:

Proposed Statutory Language

Amend CRS 16-4-103 3 (b):

- ***(3)*** *(a) The type of bond and conditions of release shall be sufficient to reasonably ensure the appearance of the person as required and to protect the safety of any person or the community, taking into consideration the individual characteristics of each person in custody, including the person's financial condition.*

  (b) In determining the type of bond and conditions of release, the court shall consider an empirically developed risk assessment instrument designed to improve pretrial release decisions by providing to the court information that classifies a person in custody based upon predicted level of risk of pretrial failure.

  (c) When determining the type of bond and conditions of release, for municipal code violations, the court shall use an empirically developed risk assessment if practicable and available in the jurisdiction. The risk assessment instrument shall be designed to improve pretrial release decisions by providing to the court information that classifies a person in custody based upon predicted level of risk of pretrial failure.

  (d) The court shall not use the results of any such instrument as the sole basis for setting type of bond and conditions of release. Other criteria may include those circumstances contained in 16-4-103 (5).

Stan asked for a motion to vote on recommendation FY19-PR #01. A motion was made by Glenn Tapia and seconded by Greg Mauro. To pass, a Task Force recommendation requires approval by 51% of the members.

Final Vote FY19-PR #01: The recommendation passed unanimously with 9 members present and voting.

FY19-PR #02. Implement Training Standards for the Administration of Pretrial Risk Assessment Tools and Create an Inventory of Approved Pretrial Assessments.

DISCUSSION

This recommendation seeks to create consistency and asks the State Court Administrator to develop an inventory of approved pretrial risk assessments to be available and authorized for use in Colorado. Revised language in this recommendation adds a little more structure by having an entity responsible to at least create a menu of options to be included in a risk assessment, without eliminating a Chief Judge's ability to customize it in a local judicial district (similar to what the 18th JD has done.) It also empowers the SCAO to create training requirements to develop standards and fidelity measures for using the tools.

The group revisited the issue of whether this recommendation should remain a policy recommendation as written here, or whether it should be a statutory proposal. Mandating the use of one tool statewide helps with things like training, data collection and consistency. However, requiring the use of a universal tool may prohibit local innovation and could hamper buy in.

In order to thread the needle, it was suggested that verbiage could be used indicating that the CPAT tool is the preferred tool, but if certain jurisdictions feel they have a better tool validated on their own population – they are free to utilize that instead. Kim English pointed out that naming one tool in statute doesn't prohibit future changes and/or upgrades to that tool.

A recommendation was made to add the following verbiage (in red) to the first paragraph of the recommendation:

The Colorado Pretrial Assessment Tool (CPAT) shall be the assessment tool utilized, however any jurisdiction may utilize an alternative assessment tool to improve pretrial decision making subject to the approval of the Chief Judge of the Judicial District. The State Court Administrator is responsible to develop an inventory of approved pretrial risk assessments available and authorized for use in Colorado. Any alternative tool approved by the Office of the State Court Administrator (SCAO) and the Chief Judge must be empirically developed and consistent with setting the type of bond and conditions of release; however, this does not prohibit a jurisdiction from utilizing additional assessment tools to advance pretrial decisions.

Group members then discussed the fourth paragraph of the recommendation which pertains to who is authorized to administer a pretrial risk assessment for the purposes of setting bond and establishing conditions of release.

Greg Mauro made a motion to approve this recommendation as written with a caveat to be placed in appropriate statute(s) (somewhere in Section 16-4). Steve seconded the motion.

Final Vote FY19-PR #02: The recommendation passed unanimously with 9 members present and voting.

FY19-PR #03. Establish a State Administered Grant Program to Assist in the Development of Pretrial Programs Statewide.

DISCUSSION

Greg explained that this recommendation is one where 'the rubber hits the road' as far as statewide pretrial and how to pay for it. Counties that have been able to pay for and implement pretrial services have already done so, leaving a gap of those who don't have the resources.

Greg noted that following a lengthy discussion about this recommendation during the July meeting, the following verbiage has been added to the proposal:

The Commission on Criminal and Juvenile Justice respectfully recommends the General Assembly create a state grant program to incentivize local jurisdictions (counties) to develop and continue supporting pretrial programs and services. Jurisdictions without pretrial programs shall be prioritized to receive funding.

Greg noted that additional language was added to the recommendation on pages 2, 3 and 4 primarily to explain the advantages to strengthening pretrial. The language also details the work of other jurisdictions and what they have been able to achieve with similar initiatives.

The group held a discussion about the fiscal impact of the recommendation, details of the proposed grant program and whether DCJ has the bandwidth to help determine what a fiscal note might look like. Kim responded that the information about the fact that 82% of cases are currently processed in jurisdictions that have pretrial services would be important to include in the recommendation.

Stan explained that for the purposes of CCJJ, the group should try to offer up what it thinks is the best public policy based on best practice, rather than getting too far into the weeds about how to address things like the specific elements of a grant program and fiscal notes. Richard agreed and encouraged the group to take advantage of things they do know for sure, like the current availability of pretrial services. With that said the task force agreed to add the following verbiage (in red) to the recommendation:

Approximately 82% of cases are currently processed in jurisdictions that have pretrial services. This recommendation would expand pretrial services so that they shall exist in all counties in Colorado.

Bo made a motion to remove the language on page 5 that in statute reads:
The chief judge is encouraged to appoint to the community advisory board at least one

representative of the bail bond industry who conducts business in the judicial district, which may include a bail bondsman, a bail surety, or other designated bail industry representative.

Maureen seconded the motion and the group voted unanimously to remove the verbiage. Greg Mauro made a motion to approve the recommendation as amended, Jen Bradford seconded the motion.

Final Vote FY19-PR #03: The recommendation passed unanimously with 9 members present and voting.

FY19-PR #04. Ensure Proxy Services are available to Provide Pretrial Functions in Jurisdictions Lacking a Pretrial Program.

DISCUSSION

This recommendation creates an opportunity to fill the gap between now and July of 2021 by authorizing, in statute, Probation to perform pretrial service functions if a jurisdiction does not currently have them. This is a proxy to fill the gap because the group agreed, in principle, that Recommendation FY19-PR #3 is the better strategy – but that it is going to take time to get to #3, and this fills the gap on services in the meantime.

A discussion was held about the pros and cons of this recommendation and whether jurisdictions might be dis-incentivized to create their own programs if services are available through Probation. It should be emphasized in the recommendation that this is a stop-gap, interim measure only. Glenn explained that there are districts in Probation that have a staffing level as low as 83% currently and that Probation is already hurting to manage the populations they have as far as probationers, let alone thinking of absorbing proxy pretrial services with current capacity.

The task force discussed whether it's smarter to simply ramp up Recommendation #3 and focus on establishing pretrial services programs, rather than creating additional costs at the state level and investing in building something for a short one-two year period. Stan proposed the idea of <u>not</u> pursuing this recommendation and instead focusing on passage and implementation of Recommendations #1 - #3. Mindy agreed that, among other things, with the shortage in staffing at Probation currently and with the philosophical differences between pretrial and probation, it makes more sense not to pursue Recommendation #4 the way it is currently written. The Task Force agreed to table this recommendation indefinitely.

<u>Pretrial Release Detention</u>

Bo Zeerip explained that his working group took the feedback from the July meeting and continues to work on revisions to the recommendation regarding pretrial release

detention. He reviewed the packet of information provided to Task Force members and noted that it contains a 4-page summary of the recommendation, a summary sheet of what the recommendation does and does not do, a 30-page document which contains all the elements of the recommendation, and a working document that lists all VRA crimes with statute, class of crimes and number of cases that each represent - which helped inform the discussion on the detention eligibility net.

Bo went on to explain that the working group has come to agreement on most of the remaining issues, but that with limited time remaining in the meeting he will instead focus on the areas where there is still no consensus.

DISCUSSION

Bo explained that the one-page summary of the proposal outlines the constitutional provisions. The prior version of this section was much longer but yesterday the work group was able to shorten the constitutional language substantially. Bo reviewed the document noting that it is critical and guides everything else in the statutory provisions. He added that almost every word in this section has been debated and discussed and has significance. A copy of the summary can be found here.

Kim noted one edit in that the "and" after the first goal and before the 2nd goal should be an "or". Bo agreed. Stan pointed out that item #3 indicates that money is still part of the equation. Bo replied that yes, money is still part of the equation insofar as monetary conditions are still allowed to be imposed on people but there would be a procedure in place if those people can't post that amount within 24 hours (the judge would have to revisit the amount.) This now makes that a constitutional right, currently it is not a constitutional right. Bo added there is a consensus in the work group that they would be supportive of getting rid of money altogether – and that if this is the will of the Task Force it should be discussed in further detail. He explained keeping money included was more of a political viability decision.

Bo went on to make the following clarifications:

- As for VRA crimes, burglary of a dwelling would be detention eligible but burglary of a building is not.
- On page 3 in the summons and arrest provisions section, this latest revision cleans up the current provisions for summons and arrest and expands summons. Local jurisdictions will have discretion to do a summons or arrest for VRA crimes that are NOT detention eligible. But while all VRA crimes are detention eligible, there's a hard cut-off at misdemeanors.
- Language on page 7 makes it clear that the proposal does include municipal courts.
- The initial hearing shall take place as soon as practicable but not later than the first day after being booked into a detention facility.
- COVA requested, and the working group agreed, to the addition of some

specific language about notification of victims. Kelly Kissell countered that the time allowed for notification needs to be revisited.

- Page 10 outlines factors to consider for release and detention decisions, including information about the risk assessment instrument.
- Page 14 outlines monetary conditions of release. Courts all over the state are currently imposing non-monetary conditions of release for purposes of public safety, so this proposal starts out by saying the court shall only impose a monetary condition of release if it finds that no non-monetary conditions or release can reasonably assure the defendant's appearance in court. This is limited to court appearance, not public safety. The hope is that if this passes the process hopefully won't be used very much.

Bo then detailed the two areas in the **Pretrial Detention Hearing** section of the proposal (starting on page 15) where there is still no agreement among work group members.

1. **Prosecuting attorney at detention hearing: evidence, witness, discovery** (page15)
   In this section of the proposal Lucy Ohanian and Collette Tvedt are requesting the following language be added to this section: "If requested by the defendant, the prosecuting attorney shall present a witness of the prosecutor's choosing with personal knowledge of the facts of the case of the investigation".
   The CDAC is opposed to any requirement that the prosecution would be required to call a witness. The defendant may subpoena witnesses if they desire the witness to be present.

2. **Findings necessary for detention** (page 17)
   In order for a court to detain somebody it would have to find probable cause that the defendant committed a detention eligible crime as defined in 16-4-107, that by a clear and convincing standard the defendant poses substantial risk of harm, or there is a substantial risk that the defendant will attempt to avoid prosecution, or there is substantial risk the defendant will attempt to obstruct the criminal justice process and that by clear and convincing standard there are no conditions of release that can reasonably assure the safety of any other person.

   Lucy and Collette request that if the prosecutor is not required to call a witness with personal knowledge at the hearing that the standard for (8)(a) (in blue above) be clear and convincing and not probable cause.

   Lucy went on to explain the concept behind this is to find a way for the court to determine if this is the type of crime where someone should be kept in jail

for the rest of the pendency of the case. The hope here is that a filing detective or police officer that spoke with different witnesses is going to have more comprehensive knowledge of the circumstances of the case and therefore would provide the court greater context of whether this is the type of person who should be held through the pendency of the case. Additionally, the more robust the process the less likely it is for the state to invoke this significant consequence to a defendant who is presumed innocent. The concern is not about the person with the F1 Kidnapping charge but the person with an M1 violation of protection order for an alleged one-time phone call that's tagged as a domestic violence case, resulting in someone detained for 6-8 month pretrial.

Maureen added that the potential consequences to this change are extremely significant and with a big net there needs to be a lot of process. In places like Maryland, without this process, the jails are blowing up with defendants.

Bo replied that when looking at the data, if everybody in the proposed detention eligibility net were detained (based only on the charge), that would be approximately 15% of current cases in Colorado. In other jurisdictions around the country approximately ½ the time the prosecutors ask for detention, and approximately ½ the time the judges agree with that. The DA response is that if the defense wants a witness, they have right and the ability to subpoena for witnesses. Lucy replied that the challenge is that these hearings should take place quickly and in the short run the defense would have much less access to information about the case than the prosecution.

Bo then detailed the third area of disagreement which is in the **Definition of Detention Eligible Crimes** section of the proposal (starting on page 19).

3. **Definition of detention eligible crimes** (page 19)
   The working group has come to consensus on all detention eligible crimes EXCEPT for domestic violence M1's. The defense wants to take Class 1 misdemeanors out of the detention eligibility net and the prosecution wants to include VRA M1's.

   Maureen explained that this distinction is important because when talking about preventive detention – these people will be held without bond and will not be allowed to make bond at any point in the proceedings.

At this point in the discussion Richard asked for feedback from Task Force members.

- Mindy asked if, where the proposal requires additional time from judges, it will require a fiscal note as well. Bo replied that this may be different from jurisdiction to jurisdiction, and that in Mesa County when somebody is being

	held on money they have a bond hearing at every single appearance. Under this system a hearing would take longer but likely wouldn't happen again and again, and therefore very well might not take more court time. Mindy replied that she could probably provide some fiscal note information before this proposal would go to the Commission. • Maureen asked if it would be possible to present some of her working group's ideas before voting on any of Bo's working group's recommendations. She noted that some of her group's proposals move the ball forward without going as far as Bo's group. Richard replied that he agrees and that what he doesn't want to see is this group possibly embracing conflicting recommendations. • Bo asked the group to think about the argument that certain class 1 misdemeanors should be included in the detention eligibility net, because it's important these decisions are based more on risk than charge. There are felonies that are less concerning than some misdemeanors. In Mesa County the most dangerous group of people are those charged with misdemeanor domestic violence and not necessarily those charged with felonies. If this group decides on just felonies Bo noted he's concerned that the legislature will actually bump up some crimes just to get them in the detention eligibility net. • Judge Day noted that the requirement to call a witness is unprecedented. The burden is clear and convincing and the prosecution is required to meet that burden in order to keep somebody detained. <u>Implementation of 2013 Statute</u> Due to time constraints Richard asked Maureen and her working group to present their recommendations at the September meeting.

Issue/Topic:	**Discussion:**
Next Steps and Adjourn **Action:**	Richard closed the meeting and summarized the next steps as follows: • He asked the group to come prepared to finalize this recommendation at the September meeting. • Maureen's working group will also present preliminary recommendations at the September meeting. • The September meeting will be expanded and will be held from 12pm – 5pm with lunch included.

<u>Next Meeting</u>

September 11, 2018 12:00pm – 5:00pm 710 Kipling, 3rd floor conference room