

To: Stan Hilkey, Bo Zeerip and Members of the Preventive Detention Working Group and the Pretrial Release Task Force of the Colorado Commission on Criminal and Juvenile Justice
From: Maureen Cain, Lucienne Ohanian and the Office of the State Public Defender (OSPD)
Re: Continuation of the Pretrial Preventive Detention Working Group
Date: May 24, 2019

We are writing today to state the position of the OSPD regarding the continuation of the work of the Preventive Detention Working Group. At this time, OSPD does not support the continuation of this work and we respectfully request that the work of this group be suspended until important groundwork for bail reform is completed.

OSPD entered into the work of this group with serious concerns about the viability of passing an initiative through the legislature for a constitutional amendment with a 2/3 majority and gaining passage of that bill by the electorate. Perhaps more importantly, OSPD was concerned about the willingness of the stakeholders around the state to implement a “hold and release without the use of money” system and the due process protections that would necessarily be required. The culture of this state, except for certain jurisdictions that have spent years building change, has been and remains deeply embedded in the money bail system.

As Cherise Fanno Burdeen of PJI recently pointed out, “To the folks around the country who are trying to change statutes, I try to emphasize that a new law works best when it’s codifying existing culture change”. We believe that this concept is even more important when considering constitutional change.

As recent bail study reports have noted, it takes a lot of “on-the-ground” work to undo the system of money bail and without that work, the efforts are destined for marginal implementation.

We believe that without a more concerted effort to “un-do” the current system and complete the groundwork, reform efforts will fail and our clients will suffer. As the recent Maryland experience demonstrates, after the state’s court of appeals implemented a new rule in 2017 intended to largely eliminate money bail for the poor, defendants who may have previously been offered bond were now 14.5 percent more likely to simply be held in jail outright, increasing jail population.

The recent failed effort to pass the “foundational” bill, HB19-1226, only highlights the bail reform problems we currently have--- from all sides of the political spectrum. The ACLU fought the use of risk assessment and the use of any tool that was not validated and studied for racial and ethnic bias. The organization also fought for a more limited standard for use of money bail. The cost of pretrial services and the need for conflict free/non-profit services caused significant problems for-profit vendors and certain jurisdictions as well. CDAC initially supported the bill but, in the end, could not support because of all of the compromises in the process and lack of designed funding for pretrial services. The lack of leadership in the Judiciary for bail reform was

apparent and the shifting concerns about what agency should lead this effort remained. Finally, it was abundantly clear that the bail industry still controls the Senate Republican caucus. Significant work and strategic planning would be needed to move forward any attempt to eliminate money bail in our state court system.

More recently, OSPD has received information from our regional offices that some judges are unwilling to comply with the limited changes to bond setting for petty offense and traffic crimes as enacted in HB19-1225. OSPD bail contract attorneys continue to highlight for us the total lack of commitment throughout the state for release on the least restrictive conditions of bond, which would include non-monetary release, even when pretrial services are available.

Given the current state of affairs, OSPD will be stepping back from preventative detention work. OSPD remains committed to working with CCJJ on reform. The CCJJ could concentrate its bail reform efforts on the revision of the CPAT instrument and its potential bias plus the essential training of all stakeholders (particularly the court and prosecutors) about risk/release and ways to support the implementation of workable systems within the communities to effect the necessary culture change. Work might also include an analysis of best practices in pretrial services and how services could be funded.

The passage of SB19-191 will affect the bail landscape since it requires stakeholders to analyze the implementation of a 48-hour rule. HB19-1297 will give us new and improved jail data that can be used to better understand who is currently in our jails so that we can better study judicial decision-making and factors that drive decision-making and revocation.

While there has been discussion of working on this project in preparation for some “down the road” implementation of a preventive detention system, OSPD believes that is not a good use of our resources at this time. Our office is not prepared to make compromises that are binding on our office while DA compromises would not be binding on CDAC. Each would be asked to make compromises that are based on a commitment for implementation that does not exist at this time. With no political strategy for passage, this effort is more of an academic exercise. Moreover, the landscape on bail will (should) no doubt change more in the coming years.

We would also add that it is not clear, after talking to Tom Raynes, that CDAC will continue to engage with CCJJ on preventative detention because of concerns it has.

All of the defense attorneys on this working group have met. OSPD cannot speak for Collette Tvedt or Rick Kornfeld but we all share a commitment to reform and a commitment to working with stakeholders to change culture. We hope to meet with the Attorney General, the Governor’s Office, the bail industry, Judicial, the ACLU and any other stakeholders in the near future to work on strategies that will get us closer to our goal of release for the pretrial population.

Thanks to all. This is a hard decision but it one that we need to make in the best interest of the clients we are duty bound to serve.