

## UPDATE TO THE PRETRIAL RELEASE TASK FORCE

by the Judicial Engagement Working Group

August 6, 2019

REGARDING: June 24, 2019 breakout meeting to discuss implementation of 2013 statutory changes in the context of judicial buy-in and training.

ATTENDEES: Honorable Judge Chris Bachmeyer, Honorable Judge Shawn Day, Monica Rotner, Bo Zeerip (by phone), Lucienne Ohanian.

PURPOSE: At prior CCJJ Preventive Detention and task force meetings, members of the task force, particularly those from the defense bar, have frequently expressed frustration over judicial officers overuse of monetary conditions of bail; the outcome being that too many people in this state are held in jail without regard for their risk because they cannot afford their bail amount. One significant barrier in improving that practice is the insistence by many on the bench that despite developments in the law and research that suggest otherwise money is an effective and legally appropriate way to (1) detain people pretrial and (2) ensure appearance in court. Consequently, this meeting was convened with approval at the June 11, 2019 task force meeting to discuss how CCJJ might work to address this perception and practice with a focus on judicial buy-in around bail reform and judicial education around pretrial detention, money bail, and risk.

The meeting was structured to address primarily three topics: (1) Judicial Training and Education, (2) Judicial Leadership, and (3) Evaluation Measures. At the outset, the group acknowledged that the judiciary could best lead improvement in bail practices in Colorado, but that other criminal justice actors, particularly prosecutors, have a significant role in affecting release outcomes. The group discussed the concept of shared risk and how pretrial services, prosecutors, and defense attorneys have an important role in improving a judge's rate of release by sharing the "risk" of the decision and by providing relevant information to support that decision.

### Training & Education:

This topic was important because the group recognized that many in the criminal justice system including judges are either not familiar with the developments in the research and law around bail reform or remain convinced that money bail is an effective and legal mechanism to keep the community safe. Therefore, one way to improve rates of pretrial release in Colorado would be to provide comprehensive education and training around pretrial reform. As an example, New Jersey spent several years engaging in focused training of the bench before instituting a preventive detention framework.

One opportunity for training and education of the bench is the annual conference. Every September, Judicial holds its annual CLE conference for state court judges and magistrates. The Municipal Bench holds separate conferences throughout the year. Every state court judicial conference has a keynote speaker on an important topic in criminal justice. Judge Bachmeyer explained that part of the challenge is getting judges excited/interested about pretrial release and that one way to pique their interest is to have an excellent keynote speaker. Because the agenda for the 2019 conference is already set, the goal would be to convince SCAO to invite such a speaker for the Fall 2020 conference. Jennifer Mendoza is the head of training for Judicial and would be the point of contact. It would be helpful to come up with a list of excellent, inspiring speakers on this topic to recommend.

Judicial conference also has lunches each day with speakers, which is another option for plenary type training. It would also be this group's recommendation that breakout sessions be provided that get into more detail about the research and the law around monetary conditions of bond.

Another opportunity for judicial training and education is “new judge school,” wherein the new judges are provided resource materials and training about the common topics they will handle as judicial officers.

Judge Bachmeyer offered to approach Ms. Mendoza and others involved in judicial training. In addition to informal conversations with SCAO about prioritizing this topic as a part of its training, this task force could produce a formal recommendation to enhance judicial education around bail practices.

Leadership:

The purpose of this topic was to discuss why the bench should be a leader in pretrial reform and what opportunities exist for it to provide that leadership.

The most obvious example of why the bench should be a leader in bail reform is the New Jersey example. Supreme Court leadership is one of the most effective ways to change a system of pretrial detention.

The participants of this meeting had somewhat divergent perspectives on whether the Colorado Supreme Court has provided leadership on bail reform. One example noted by Judge Bachmeyer of leadership was the work by the Blue Ribbon Commission. However, the perspective of others in the group is that the Blue Ribbon Commission did not produce an effective pronouncement on the value of pretrial release and provided no plan for the Colorado judiciary to improve its practices.

The group observed that one significant factor that likely tends to counter any effort to improve bail practices in Colorado is the judiciary’s focus on efficiency. Each month each judicial district is provided from the SCAO a list of cases that are “old” (cases that have remained on a judge’s caseload beyond certain standard periods). Efficiency is often a focus of judicial awards, commendations, and evaluations in this state.

The group discussed some ways that judicial efficiency can be contrary to good bail practices. For example, a judge that is adequately applying the research and law around bail must consider the individualized circumstances of each defendant, including his financial circumstances. In many jurisdictions, bail hearings are rushed and the defense lawyer is provided inadequate time to develop information useful to the court to help it arrive at appropriate bail determinations. Further, where a court has incompletely understood a defendant’s financial circumstances thereby unintentionally detaining a person on money, good bail practices require the court to reconsider the monetary conditions of bond. This takes more court time, sometimes multiple bail hearings that many courts do not have the time to schedule. Finally, where a court has released a person after a fulsome bail hearing, the likelihood is that that case will not resolve as quickly because the defendant will not face the pressures of pretrial incarceration to make decisions about plea or trial. Release obviously also increases the chance that a person will miss court, thereby delaying a case. Consequently, release of defendants pretrial is often less efficient in resolving a case.

Short of adopting the New Jersey leadership model, this group discussed some ways the Colorado Supreme Court could provide leadership on bail reform. They include: participate regularly in this task force, prioritize training on this topic, produce a CJD about how courts must structure, schedule, and staff bail/advisement hearings, regularly provide updated research about the relationship between monetary conditions and risk, create evaluation measures around bail practices similar to the age of

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case report for each jurisdiction, make this topic a priority at Chief Judge Meetings, and deprioritize efficiency or adjust efficiency measures to acknowledge those jurisdictions that are holding fulsome bail hearings and regularly releasing defendants.

Chief Judges can also be leaders in jurisdictional bail reform. While the chief judges in each judicial district can have an important role in defining a jurisdiction's approach to bail, judicial independence prevents chief judges from requiring individual judges to set bail in a particular way. The group acknowledged that different jurisdictions have different challenges around bail reform including limits on staffing, types of crimes in the jurisdiction, and the existence of pretrial services. Nonetheless, the group still believes the chief judge can affect how a jurisdiction handles bail by: modeling good practices in their bail rulings, producing bail schedules/recommendations and other Chief Judge Orders that encourage pretrial release, what they address in *en banc* meetings, their judicial caseload assignments, and how they structure, schedule, and staff bail/advisement hearings.

This task force could assist in encouraging judicial buy-in and leadership in the following ways: Producing a report that outlines these issues and makes a recommendation for change and engaging judicial about having a regular attendance at these task force meetings.

### Evaluation Measures:

The purpose of this topic was to begin a discussion around whether judicial performance measures could be an avenue for improved bail practices in the state.

The judicial members of this group were very concerned about linking judicial performance to bail outcomes for the following reasons: (1) every jurisdiction is different – has different crimes, different access to pretrial services recommendations and supervision, different docket structures. Consequently, it would be unfair to compare one judge to another from a different judicial district. How would we be able to evaluate successful or unsuccessful performance with so many factors? (2) Judicial independence is very important and so setting expectations around rate of release would invade the individual judge's decisions in the individual cases. (3) Judicial performance evaluations are structured to be general because the judges have to perform in so many different types of cases (e.g., domestic cases) and so should not be rated in just one type of case (criminal) and just one type of decision they make in those types of cases (bail). Other members of the bar would advocate for including specific performance measures that are related to their practices areas, which would be unmanageable.

Nonetheless, other members of this group feel strongly that data collection around bail practices would be an important way to assess how various judges or jurisdictions are handling bail and would help focus efforts to train and develop practices around bail. The judicial members expressed concern over how such data would be used in litigation and who should have access to such data. To allay these concerns, the group discussed possibly having SCAO collect and share data around release rates/ types of cases/ CPAT scores just with the chief judge and/or producing generic data that does not single out individual judges. Further, information around the issue of shared risk, namely where the prosecutor objected/supported a release decision might also be useful. Monica is going to bring the topic to the data group to consider.

This task force could address this question by considering legislation to create data collection requirements about bail practices and by producing recommendation to State Judicial about data collection and sharing.

Conclusion:

This meeting concluded with a brief conversation about next steps. The group was unsure if the task force supported further work on the issues raised by our conversation. At the next task force meeting, we would ask that these questions be answered:

Questions:

1. Does the task force support further work on this topic?
2. If so, what should be the scope of this group's work?
3. If so, what other members should participate in this group? Members of state judicial?
4. If so, does the task force wish that work be focused only on the judiciary's performance around bail practices or other criminal justice actors too?