Colorado Commission on Criminal and Juvenile Justice

Pretrial Release Task Force

Minutes

September 11th, 2018 12:00PM-5:00PM
710 Kipling, 3rd floor conference room

ATTENDEES:

TASK FORCE CHAIR

Stan Hilkey, Dept. of Public Safety

TASK FORCE MEMBERS

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
Clifford Riedel, Larimer County District Attorney
Valarie Finks, Victim Services, 18th Judicial District
Kirk Taylor, Pueblo County Sheriff
Judge Chris Bachmeyer, 1st Judicial District

STAFF

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

ABSENT

Steve Chin, Mesa County Pretrial Services
Joe Salazar, Representative, House District 31
Lang Sias, Representative, House District 27

ADDITIONAL ATTENDEES

Joe Thome, Division of Criminal Justice
Steve Allen, Joint Budget Committee
Becca Curry, ACLU
Helen Griffiths, ACLU
Kelly Kissell, Division of Criminal Justice
Doug Erler, Weld County

Terry Scanlon, Judge Legislative Liaison
Judge Margie Enquist
Sterling Harris, COVA
Denise Maes, ACLU
Courtney Kramer, Boulder County
Elisabeth Epps, Colorado Freedom Fund
Rebecca Wallace, ACLU
Christine Burns, El Paso County

Issue/Topic:	**Discussion:**
Welcome and Introductions	Chair Stan Hilkey welcomed Task Force members and asked them, and the other 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 the expectation for today's meeting is to thoroughly review the recommendation coming forward from the Pretrial Release Detention working group, with a plan to vote on the recommendation at the October meeting. With that said Stan emphasized the importance of task force attendance at the October 9th meeting. Stan added that today's meeting also includes a preliminary presentation from the working group studying the Implementation of the 2013 statute.

Issue/Topic:	**Discussion:**
Recap / August meeting outcomes	Richard Stroker offered a recap of the outcomes from the August meeting as follows: The Task Force approved three recommendations presented by the Assessment Tools and Pretrial Services working group. The recommendations centered on pretrial risk assessment tools, risk assessment training standards and the expansion of pretrial services statewide. Richard noted that the three approved recommendations will be presented to the full Commission in October, with a vote scheduled for November. Also in August, Bo Zeerip continued his review of the work by the Pretrial Release Detention working group and began to outline the substantial recommendation coming forward that has both statutory and constitutional policy implications. Bo will continue to explain the details of that recommendation today and Richard emphasized that today is also the time for people to share any concerns and thoughts about the proposal.

Issue/Topic:	**Discussion:**
Report Out: Bail Blue Ribbon Commission	Glenn Tapia offered an update on the progress of the Bail Blue Ribbon Commission. The Commission held another information gathering meeting last week which included a video conference with the State of New Jersey, their Chief Justice and their project manager. Representatives from Colorado Counties, Inc. and the Sheriff's Association were also in attendance.

	The presenters from New Jersey educated Commissioners and offered data and hints about obstacles that may lie ahead if Colorado considers reform initiatives. when the road forward. They emphasized not to expect any sort of reform to go smoothly the first time out. As for advocacy regarding bail reform – the presenters noted that in New Jersey it was an inter-governmental initiative which helped balance the counter-efforts. Additionally, Governor Christie was supportive and called for a special session of the legislature - so there was a big political push all the way around. There was also a huge campaign and media effort around reform. New Jersey also provided substantial training to all key stakeholders. In New Jersey's reform package, they created something like a virtual courtroom to hold hearings over the weekends so people didn't have to actually go into court. New Jersey sheriffs thought that was helpful because it eliminated transport issues on the weekends. Glenn noted that Colorado Counties, Inc. had concerns about the cost of things like hiring new judicial officers and the need for new courtroom space. CCI was also more supportive of the idea of formula funding for counties rather than grant funding, because grants are optional whereas formula funding in theory is more permanent and directive. The Commission is scheduled to meet again in the next couple of weeks.

Issue/Topic:	Discussion:
Working Groups - Report Out **Action:**	Members of the following working groups reported on their progress and the status of recommendations. **<u>Implementation of 2013 Statute</u>** Maureen Cain updated the task force on behalf of the Implementation of 2013 Statute working group. She added that Jen Bradford would be providing additional information during the presentation. Maureen explained that the goals of the group were to look at the 2013 legislation that passed and the resulting outcomes. She added that the proposals from her group do not require eliminating money bond and to not require a constitutional amendment, but that they move the ball forward by making statutory improvements quickly. Maureen began a PowerPoint presentation which can be found here. At the conclusion of her presentation Maureen directed Task Force members to four recommendations in their packets as follows. The four draft recommendations can be found here.

FY19-PR #06. Establish a more Effective Pretrial Release Front End Process

DISCUSSION

This recommendation calls for each Judicial District to develop, by December 1, 2019, a screening process to assess a person upon arrival at the county jail for consideration of immediate release without financial conditions (on a PR bond or on a summons), without appearing before the court, pursuant to release criteria developed within the judicial district. The goal of this change is for the release of persons who will be recommended for release at a court hearing anyway.

Maureen explained the person would come in, would be assessed, and then it would be determined whether they meet the criteria for detention. Individual jurisdictions would determine, based on their own criteria, whether or not the person has to be booked. This does not change the law regarding conditions of release and offenses like domestic violence would still go before a judge. Jen Bradford noted that this type of procedure is not unprecedented and does currently happen in some jurisdictions already, including Larimer and others.

The recommendation basically calls for the Chief Judge to appoint a bonding commissioner with releasing authority in every jurisdiction to assist in releasing people who would be receiving a PR bond anyway more quickly, which would minimize dockets and jail time.

Statutory criteria are that the release of the person should be presumed with the least restrictive conditions and without the use of financial conditions unless there is substantial risk of safety of another person or persons, substantial risk that the person will willfully attempt to avoid prosecution, substantial risk of obstruction, or that there are NO non-financial conditions of that release that will reasonably assure the safety of another person.

Maureen added her group is also recommending there should be a presumption of summons on misdemeanors, class 5 or 6 felonies and level 4 drug felonies unless it's a VRA crime or a 2nd time DUI. Incarceration is possible if the person presents a danger. Maureen explained that all the details on the recommendation would have to be reflected in an Administrative Order and discussed, worked out and implemented by stakeholders in that process. Judge Bachmeyer asked for clarification on how the process would actually work. Maureen replied that if a person does not meet criteria for release as determined by the administrative order, the person shall be held until the next court bail setting but no later than 48 hours. Jen Bradford clarified that any crime where a victim is listed would not meet the release criteria. Maureen summarized that the goal of this recommendation is to get the low level people out as soon as possible, as recidivism goes up the longer someone is kept in jail.

Greg Mauro noted they Denver is about to implement something similar called Pre-

Advisement Release, which is sort of an amped up summons process and incorporates risk assessment. He explained that they're running into two issues: one is around case law about bond commissioners not being able to order conditions of release, the second piece centers around people who are arrested - and the statutory requirements around medical screens and seeing a nurse. Once someone is in custody one of the requirements of the Sheriff's Department is to provide certain core services.

Cliff added that certain things would need to be done before someone is released like getting prints and mug shots on people so they can be tracked for purposes down the road. Stan agreed that it's important because the prints send an alert to the supervising entity.

Jen mentioned that even if someone meets criteria for release by a bonding commissioner, the booking process may trigger things like an ICE hold, out of state warrant or extradition request. She emphasized that someone would have to genuinely, legitimately meet the criteria for release. Judge Day asked how this addresses issues regarding equal protection. Maureen replied that this proposal pushes the ball forward.

Maureen added that she plans on creating statutory language to accompany the recommendation. Cliff suggested Maureen add the verbiage No reasonable non-financial conditions. Valarie asked Maureen to clarify verbiage around victim notification.

Stan inquired about the oversight, mandate or 'hammer' to ensure the recommendations in the proposal are followed. Maureen replied that one of the recommendations in the packet is around training so all the judges, DA's and defenders are trained and informed as the criteria are being developed. Cliff suggested adding verbiage that the SCAO shall review the relevant research and assist local jurisdictions with the creation of criteria.

A discussion was held about current release processes and criteria and how much of an impact this change would have. Maureen replied that it could be 3 people or 20 people depending on each individual jurisdiction's arrest criteria. Richard offered a recommendation on a title for this particular proposal as "Require each Judicial District, with assistance from the State Court Administrator's Office, to develop screening criteria that can be used to release eligible individuals prior to an initial bond hearing." Maureen agreed to this verbiage.

FY19-PR #07. Regarding Judicial Decision Making, Time Frames and Reconsideration of Monetary Conditions of Bond

DISCUSSION

This recommendation is based on current law and calls for an arrested person to be brought before a judicial officer for an initial court appearance, as soon as practicable,

but not later than 48 hours after the person's booking into a detention facility. For jurisdictions that don't have a weekend court this would require that one be instituted.

Greg asked why 48 hours instead of 24 hours. Maureen replied that her group used 48 hours because they didn't think it was feasible to get 24 hours pushed through. She said the hope is that the lowest risk people will already be gone by this point in the process. Bo added that there are two federal circuit court of appeals decisions that say 48 hours is a constitutional right. Greg argued that he believes 48 hours is too long and if this group is recommending best practices it should be less than 48 hours. Bo countered that something like 30 hours might even be more feasible.

Maureen reviewed the remaining details of the recommendation. The second element of the proposal calls for felony filings within 72 hours unless good cause is shown. Bo shared that he talked to Tom Raynes about this requirement and that it could have an opposite effect because they DA may feel under time pressure and may not have enough time to look at the case thoroughly - so they may be rushed to just file something. It will also result in a lot more amended complaints later. Cliff agreed that there will be people charged who may not have been otherwise charged, because the DA will feel under the gun.

Valarie inquired about the verbiage on the bottom of the first page of the recommendation that reads "consider the nature and severity of the alleged offense and victim input, if received, pursuant to CRS…" and asked Maureen if she would be willing to strike "pursuant to CRS 24-4.1-302". Valarie pointed out that for initial bond setting it's not actually required.

At this point in the meeting Stan asked Maureen if she could delay presenting her final two proposals until the October meeting in order to begin the review of the proposal from the Pretrial Release Detention working group. Maureen agreed and asked the task force members to review the final two recommendations in their packets (listed below) before the next meeting.

FY19-PR #08. Require Best Practices Bail Training
FY19-PR #09. Regarding Public Defender Involvement.

<u>Pretrial Release Detention Working Group</u>

Bo Zeerip began his presentation by mentioning that the summer issue of the ABA Judges Journal contains a wide variety of information about bail reform, the history of bail, changing money bail, etc. and added that it is an excellent resource. He also mentioned that California just passed a new law that completely eliminates all money bail, which is the first jurisdiction to do that. They've joined other jurisdictions in instituting a robust detention system (Federal, D.C., N.J., N.M.).

Bo offered a PowerPoint presentation and explained that he first presented the same slides a couple meeting ago – but that there are quite a few new people in the room

that may not have seen that presentation and that he wanted to ensure everyone was on the same page. The slideshow offers a broad view of the proposal and presentation can be found here.

DISCUSSION

Judge Bachmeyer asked about the increase in the number of hearings under this proposal and if there is an idea of how many people would get detention. Bo answered that if everybody in the initial detention net were detained it would be about 15% of the defendant population. In other jurisdictions with detention schemes prosecutors ask for detention about ½ of the time. Bo replied that prosecutors in N.J. and D.C. report that detention hearings take approximately 15 minutes and witnesses are rarely called.

After the PowerPoint presentation Bo reviewed the packet of information provided to task force members and noted that it contains a one-page summary of the proposal, the four-page recommendation and a 27-page document which contains all the detailed elements of the recommendation. The handouts can be found here. Bo began by walking task force members through the 27-page document with the following discussion highlights:

1. **Constitutional provisions** (page 2)
   Bo reviewed this section of the proposal and noted that the conditions of release include provisions for both an initial and a secondary charge net. There is a charge net and a process net for an initial appearance and a different charge and process net for subsequent issues (for example if someone violates bond conditions and returns to court). Maureen noted that on the secondary net she's concerned about cases where someone who is homeless, with a DF4, who drops a dirty UA resulting in violation of bond conditions – could end up detained for months. Bo replied that these are constitutional provisions and the statutory ones are tighter. Maureen replied that it's still a pretty big net. Judge Enquist countered that the net is already huge, and this is an attempt to make it smaller. She added the statutory provisions in the recommendation require written findings and hearings. Bo added this is the tightest net of any of the other jurisdictions. Lucy noted that the ACLU would like to see additional language clarifying 'substantial' harm rather than just harm, to raise the harm level.

2. **Pre-conviction release and detention / Legislative declaration and Scope of Article 4** (page 3)
   Bo explained that this section provides a backdrop for the rest of the proposal.

3. **Initial hearing** (page 7-9)
   -Bo noted that the 48-hour provision in this section of the proposal is rooted in

case law. There's a Supreme Court case that states there needs to be a PC determination within 48-hours.
-A discussion was held about the time for an initial hearing and Bo agreed to add detailed verbiage regarding out-of-county cases.
-Another discussion was held about prosecuting attorney's presence at the initial hearing and whether the verbiage should read "shall" or "may". The group agreed to add the verbiage "appears and" to section (7) of 16-4-102 on page 7.
-The group discussed temporary detention when a defendant has a pending criminal case. Verbiage was added to section (8) in 16-4-102 that reads "The defendant has another pending criminal case, is in community corrections, or currently…".
-Under the section on Release Decision (provision 9), the group updated the first sentence to read "subsections (7) and (8)" on page 9.

4. **Factors to consider for release and detention** (page 10)
Bo explained that the verbiage about the risk assessment instrument section is consistent with the Assessment Working Group's recommendations. A request was made to add the words "and validated (and approved by the SCAO)" to section (1) of 16-4-103.

5. **Discretionary conditions of release** (page 13)
Bo stated that this section contains important language due to over-conditioning. A conversation was held about section (i) which states "In home detention which may be monitored by an electronic monitoring device". The group agreed to add the following verbiage "for defendants who are charged with a detention eligible crime pursuant to 16-4-107".

6. **Defendant's rights at detention hearing, and right to testify** (page 16)
Bo pointed out that this section stipulates "The defendant shall also have the right to testify. The defendant's statements made during a detention hearing may not be used against the defendant during a trial for the pending charges, except that such statements may be used for additional investigation and for impeachment purposes if the defendant chooses to testify at any subsequent proceeding, and the defendant may be prosecuted for perjury or other crimes for any false statements made at a detention hearing."

Bo added that this section is where there's a significant disagreement in the work group between the defense and the prosecution. Bo suggests keeping the verbiage as written. Lucy and Colette will likely be asking for an amendment that says "at the defendant's discretion they may require the prosecution to call a witness". The group agreed to circle back around to this issue after going through the entire proposal.

7. **Determination of probable cause, and detention hearing may serve as preliminary hearing** (page 17)
   The issue of victim notification was raised and the group agreed to add he word "victim" to the last sentence of this section as follows "In the discretion of the prosecuting attorney, and with notice to the victim, defendant and the court…".

8. **Findings necessary for detention** (page 17)
   Lucy noted that there is disagreement in the working group between the defense and prosecution on this item.

   Bo summarized the defense is concerned about too many people being detained, especially those with lower-level, less serious crimes. The defense is proposing a few different options. One is to take misdemeanors out of the net. Another proposed compromise was instead of probable cause, the prosecution would have to prove by clear and convincing evidence that the defendant committed a detention eligible crime. The third proposal is that the defendant would have the ability to require the prosecution to call a witness. The defense is concerned the prosecution would show up at a detention hearing and would never have a witness and would ask the judge to make the decision based on the CPAT and the affidavit.

   The DA's perspective is that taking Class 1 misdemeanors out of the net is not an option. Similarly, the "clear and convincing" alternative is also a non-starter for DA's because once it goes to clear and convincing, it's a mini-trial. For DA's the least bad of the three options, which they are also not in favor of, is the requirement to call a witness.

   Lucy noted that option (a) in this section that reads "At the conclusion of the detention hearing the court shall order the detention of a defendant if the court finds: a. There is probable cause that the defendant committed a detention eligible crime as defined in 16-4-107" does not provide adequate procedural due process protections because by this point the judge has already reviewed a probable cause affidavit and has found probable cause because that's required at the temporary detention hearing. In most cases the most serious charge is the one listed on the PC affidavit. Lucy explained that therefore (a) does not provide more protection.

   Lucy went on to say these issues are all inter-related. She added there is a respectful disagreement between the defense and prosecution in that the defense believes the more process there is, the fewer people will be detained. More process requires the court and the DA's to make difficult decisions about

whether they want to spend the time and the effort to detain certain people. If it's a big net and an easy process those difficult decisions will not be required of the system – and people will be detained somewhat thoughtlessly. Bo countered that there are no other jurisdictions that require a witness, but that other jurisdictions do allow for the defense to call a witness.

The group held an in-depth conversation about this item in the proposal. Richard noted that there are approximately three issues where the defense and prosecution are still unable to come to an agreement, and that the best way to move forward is to finalize this recommendation the way it is written and when it comes time for a vote in October – amendments can be offered to the proposal and votes will be taken on the amendments at that time.

9. **Definition of detention eligible crimes** (page 19)
   Bo described the list of offenses in the detention eligible net. As compared to other jurisdictions, Washington D.C. does have a charge-based net, N.J. has essentially no charge-based net, N.M. is all felonies but no misdemeanors, the statute in California states any crime the prosecutor believes poses substantial risk. The federal system doesn't have a net.

10. **Warrant for failure to appear in court** (page 21)
    The group discussed various FTA issues and agreed to modify the language here to include something along the lines of "the court shall issue a warrant with re-release if the court does not have reason to believe the person is a danger or a flight risk".

11. **Court decision at hearing** (page 22)
    Bo outlined the language in this section and explained the philosophy behind the narrower, initial net is due to trying to predict what someone might do based on risk assessment history, etc. On this secondary net, once someone has been released they have actually demonstrated, by their actions, what they're going to do – so the net can be more liberal and wider.

    Lucy explained that there are a couple points of contention between the prosecution and defense on this item but where the defense really struggles is on item number ii below:

    At the conclusion of a hearing pursuant to this section, and after considering the factors specified in 16-4-103 and the possible conditions of release identified in 16-4-104 and 16-4-105, the court may:

    a. Revoke the defendant's release and order that the defendant be detained if the defendant has been at liberty on a summons or pursuant to a release order for an offense for which incarceration could be imposed, and the court finds;

i. *There is probable cause that the person committed a felony, or a class one misdemeanor or comparable municipal code violation, while at liberty on a summons or pursuant to a release order; or*
ii. *The person has violated a condition of release without justifiable excuse in the pending case including failing to appear in court as directed; or*

Lucy explained that one concern is if the person misses court once they have violated a condition of their release and they become detention eligible – and it doesn't matter what charge they are currently at liberty on. The concern is about a singular fail to appear turning into potential detention. The defense remains worried about the history of over-conditioning, and the violation of inappropriate conditions resulting in detention for folks that are really not causing a risk.

Bo offered to change the verbiage and split this item into two pieces, and to make a distinction regarding repeated failure to appear between those who are a safety risk and those who are not - verbiage that says something like "there's reason to believe that the person is attempting to flee prosecution". The group agreed to modify the verbiage.

12. **Defendant's rights at hearing** (page 23)
Bo included his own draft language in this section in anticipation of a potential compromise. There was no compromise and the following language (with strikethrough) was deleted:
"At a hearing pursuant to this section the defendant shall have all of the same rights as specified in 16-4-106 (3) for a pretrial detention hearing. ~~except that for a hearing under this section the prosecution shall not be required to have a witness present at the hearing at the request of the defendant."~~

13. **Speedy trial for detained defendants** (page 24)
The group agreed to add verbiage here referencing cases not bound over and preliminary eligibility.

14. **Expedited appellate review of pre-conviction release and detention orders** (page 25)
Judge Bachmeyer raised multiple concerns about the verbiage, time frames and access to transcripts in this portion of the proposal. Bo and the judge agreed to meet and work on revised wording and to bring that back to the full group in October.

15. **Release and detention after conviction** (page 26)

	Bo explained that this part of the proposal pertains to post-conviction and is not substantially different from the current statute, but is definitely clearer. The group discussed the wording and requested the addition of verbiage regarding Rule 35. At the conclusion of the discussion Bo explained that he would take all the feedback and comments, rework the proposal, and return it to staff before the October meeting. Richard added that the final version will be re-distributed to task force members in time for review before the meeting. Bill suggested the amendments be submitted before the task force meeting as well. The task force discussed the optimal plan for rolling out this initiative not only to the Commission but to the community as well. It was noted that it took a year and a half for this group to become thoroughly educated about the intricacies involved in the proposal. The group agreed that education will be a key component as this recommendation is unveiled

Issue/Topic:	**Discussion:**
Next Steps and Adjourn **Action:**	Richard closed the meeting and summarized the next steps as follows: • He asked the task force members to come prepared to vote on the Pretrial Release Detention Working Group recommendation and any amendments at the October meeting. • The Implementation of the 2013 Statute Working group will continue to present the remainder of their recommendations at the October meeting. • The October meeting will be expanded and will be held from 12pm – 5pm with lunch included.

Next Meeting

October 9, 2018 12:00pm – 5:00pm 710 Kipling, 3rd floor conference room