

**Governor's Commission to Reform Maryland's Pretrial System**

**Monday September 22, 2004**

**1:00 – 4:00 PM**

**Maryland Judiciary Education and Conference Center**

**2011D Commerce Park Drive**

**Annapolis, Maryland 21401**

**Participating Members:**

Richard Karceski (Chair)  
Tammy Brown  
Delegate Luke Clippinger  
Paul DeWolfe  
Wendell France  
Brian Frank  
Paul Kemp  
Dorothy Lennig  
Timothy Maloney  
Mary Lou McDonough  
Capt. Michael Merican  
Hon. John Morrissey  
Delegate Joseline Pena-Melnyk  
Hon. Steven Platt  
Jacqueline Robarge  
Angela Talley  
Senator Christopher Shank  
Rev. Dr. Sheridan Todd Yeary  
Senator Robert Zirkin

**Presenters:**

Arthur Ago, Public Defender Service for the  
District of Columbia  
Cliff Keenan, Pretrial Services Agency (DC)  
Spurgeon Kennedy, Pretrial Services Agency (DC)  
Hon. Lynn Leibovitz, Superior Court of the District  
of Columbia  
David Rubinstein, United States Attorney's Office

**Guests:**

Mark Adams, Bail Bondsman  
Eric Beane, Governor's Office  
Mike Canning, Manis Canning & Associates  
John Clark, Pretrial Justice Institute  
Douglas Colbert, University of Maryland School of  
Law  
Amy Devadas, Maryland Department of Legislative  
Services  
Terry Kokolis, Anne Arundel County Department  
of Detention Facilities  
Steve Lash, Daily Record  
Kevin Loeb, Department of Public Safety and  
Correctional Services  
Sara Love, American Civil Liberties Union  
Beth McCoy, Prince George's County  
Natasha Mehu, Maryland Association of Counties  
Sara Morningstar, Montgomery County Office of  
Intergovernmental Relations  
Kelley O'Connor, Maryland Judiciary  
Shirleen Pilgrim, Maryland Department of  
Legislative Services  
Claire Rossmark, Maryland Department of  
Legislative Services  
Drew Snyder, Maryland Judiciary  
Kevin Stewart, Governor's Office of Crime Control  
& Prevention  
Mimi Teahan, Office of the Public Defender  
Dave Weissert, Maryland Judiciary  
Hon. Alexandra Williams, Baltimore County  
District Court

**Staff:**

Lisa Smith, Governor's Office of Crime Control & Prevention

Jeff Zuback, Governor's Office of Crime Control & Prevention

**I. Welcome and Introductions**

The meeting was called to order by the Chair at 1:15 PM. The commission members briefly introduced themselves by name and agency/organizational affiliation. The minutes from the previous Commission meeting on July 14<sup>th</sup> were approved.

**II. District of Columbia Presentation**

Five representatives from the District of Columbia attended to provide an overview of the pretrial justice system in DC.

Arthur Ago: Deputy Chief, Trial Division, Public Defender Service

Cliff Keenan: Director, Pretrial Services Agency

Spurgeon Kennedy: Director, Office of Strategic Development, Pretrial Services Agency

Hon. Lynn Leibovitz, Superior Court of the District of Columbia

David Rubinstein, Assistant United States Attorney, United States Attorney's Office

Cliff Keenan provided a general overview of the DC Pretrial Service Agency (PSA) which was created in 1967. In 1992, preventive detention legislation changed the philosophy of pretrial in DC. The statute states that a defendant may not be detained pretrial for the sole reason that he/she cannot pay the money to get out. Currently, the jail population in DC is only at 54% capacity. One of the primary reasons for this is that 85% of pretrial defendants are released into the community. The 15% that are not released are either a danger to the community or a flight risk. The current budget of PSA is \$58 million budget, but it used to operate on a much smaller budget with only one supervisor and four interviewers. Cliff added that an evidence based pretrial program could be replicated in Maryland at a much lower budget than in DC. Prosecutors in DC screen all cases before they go before a judge.

Spurgeon Kennedy told the Commission to view their presentation not just as a DC model, but as a national best practice model of pretrial justice. This model can be replicated within any jurisdiction. In addition to DC, he mentioned that Kentucky, Multnomah County, Oregon, and Mesa County, Arizona also have well run pretrial programs. The first step to an evidence based pretrial program is to correctly assess the risk of defendants using a validated risk assessment instrument. There are at least 5 or 6 validated risk assessment instruments that could be implemented within any jurisdiction. A risk assessment should never tell a judge what to do, rather, a risk assessment should only be used to make recommendations to a judge on who should be released and who should be detained. In DC, nearly all (99%) defendants are screened by PSA before their bail review hearing.

David Rubenstein provided an overview of the DC pretrial system from a prosecutor's perspective. All local charges in DC are prosecuted by the US Attorney's Office. All cases are

screened by a prosecutor and roughly 40-50% are ultimately not prosecuted. A total of 25 prosecutors are part of the screening team in DC. Similar to Maryland, DC has multiple offenses that are eligible for criminal citations and rather than being arrested, they receive a citation with a notice to appear in court. If a defendant who receives a criminal citation does not show up to court, a warrant for their arrest is issued. Court is open 6 days a week from Monday – Saturday. All defendants arrested and processed by PSA before 10:30 am go before the judge during the 1:00 pm court session. The prosecutors receive information from PSA including a release recommendation and present the information to the judge.

Arthur Ago stated that the public defender statute in Maryland is different from DC as they do not represent defendants charged with misdemeanors punishable by a sentence of less than 6 months. In DC, the public defender receives a list by 9:30am each day. The public defender then has an opportunity to interview his/her client(s). Vertical representation, where the same public defender represents a client through all stages of the criminal justice process, is encouraged in DC. If a defendant is preventively detained by a judge, the defendant can request a second hearing that will take place 3-5 days later to review the judge's decision. Public defenders represent 40% of the defendants in DC. The remaining 60% are represented by panel attorneys. Panel attorneys are selected by the judges and report on a rotating basis.

Judge Leibovitz explained that judges in DC are given a lot of information from PSA up front to make informed decisions. They receive information about the defendant's criminal record, residence, employment, and the nature of the charge. In DC, 85% of defendants are released and 25% of those have no pretrial conditions set. Sometimes there are extra pretrial conditions attached such as mandatory reporting or drug testing. A typical bail review session lasts from 1:00 – 6:00 pm. The judge will articulate the risk of each defendant aloud during the hearing. Decisions are based solely on risk and not money. There are judicial Magistrates in DC that hear preliminary hearings.

The preventive detention statute provides for pretrial detention when the defendant poses a risk to public safety. The statute also ensures that any defendant detained pretrial other than those arrested for serious violent crimes should be given a trial within 100 days.

Cliff Keenan added that all agencies are involved early in the pretrial process and gather information for the judges. DC has a 9% FTA rate and only 11% are rearrested pretrial including less than 1% for a violent offense. Defendants will be charged with contempt of court if they violate the conditions of their pretrial release.

The presentation concluded and was opened up for questions.

Delegate Pena Melnyk asked if there is a conflict with the judges selecting panel lawyers. Judge Leibovitz responded that a panel of judges select the lawyers and no one judge has the authority to choose an attorney.

Tim Maloney asked if DC uses a citizen application process like Maryland. The panel responded that this does not occur in DC. Tim also asked for the number of defendants who are released on criminal citations to which Director Keenan responded that roughly 25% of the defendants receive criminal citations. DC also has a post and forfeit option for municipal violations where the defendant pays a collateral amount and does not have to come to court. Lastly, Tim asked if

they use commercial bail in DC. Although it is still legal, commercial bail is rarely used in DC due to the preventive detention statute. Money is still used during fugitive cases.

Brian Frank asked what happens if a defendant released with pretrial conditions does not think that the conditions are fair. The response from DC was that the alternative for the defendant is preventive detention. The Court of Appeals also found that the pretrial conditions DC places on defendants are constitutional. Spurgeon Kennedy responded that you follow the risk principle where you place conditions on certain defendants to ensure their success.

Judge Morrissey asked about the monitoring staff in DC. PSA has 90 pretrial supervision officers who supervise roughly 4,500 defendants at any given time.

Paul DeWolfe asked if using a risk assessment tool discriminates against minorities. Spurgeon Kennedy responded that most risk assessment factors are based on a defendant's criminal history and that researchers have made every effort to look at racial and gender disparities when including risk factors.

Paul Kemp asked if there is a 36 hour lag for some defendants waiting for a bail review hearing. Judge Leibovitz responded that this does occur with some defendants arrested on Saturday who have to wait until Monday for a hearing. DC does have a 48 hour statute however as opposed to Maryland's 24 hour statute.

Richard Karceski asked about the training of panel attorneys and how they are paid. Arthur Ago responded that the Public Defender's Office trains them and the attorneys are usually paid hourly, which varies based on the type of case they are representing.

Judge Morrissey wanted to clarify that DC does not have night court and Judge Leibowitz indicated that they do not.

Delegate Clippinger asked when indigence is determined. Judge Leibovitz responded that this happens during the information gathering phase before each client is heard by a judge.

Richard Karceski asked if defendant can waive their right to counsel. Judge Leibovitz responded that this does not happen as all defendants have counsel.

Paul Dewolfe asked when attorneys have access to their client. Arthur Ago responded that they can be with their client up until the hearing and can also request to see their client if they are moved from the courtroom to their cell.

Tammy Brown asked if the panel attorneys receive any information from pretrial to which Arthur Ago responded that these lawyers have access to secure databases and also receive a report from PSA.

### **III. Lessons Learned from Other Jurisdictions with Pretrial Service Agencies**

Senator Shank visited both Kentucky and Colorado to learn about their pretrial process. His opinion is described below. They have a very robust supervision aspect in Colorado with various technological enhancements including GPS monitoring. Pretrial in Colorado is county run. Kentucky was much different as they have a statewide pretrial system. Colorado was a more deliberative process where the judge reviews the risk assessment score with pretrial. In Kentucky, a risk level is discussed with the judge over the phone.

Delegate Pena Melnyk added that there are certain elements in Kentucky that would work and certain elements that would not work in Maryland. She thinks that an assessment tool should be piloted in Maryland. Kentucky offered Maryland to use their tool free of charge.

Capt Merican liked how minor offenses are handled very quickly in Kentucky.

Kevin Loeb learned that the purpose of the pretrial programs he saw in Kentucky and DC is to minimize the number of people in jail and maximize the services that are provided to these defendants in the community.

Judge Williams stated that it was good to see the perspective of another state and that the more information that is provided to the judge up front, the better. In addition she feels that the process in Kentucky expedites the risk assessment tool process through a judge phone call. She said that the judiciary currently assesses risk in Maryland but does not use a tool as a shortcut.

In Kentucky, Tammy Brown saw a pretrial program run statewide that operates efficiently, shares information, produces statistics and outcomes, and shows that decisions are based on risk and not money. She also learned that pretrial supervision is not needed in most cases and a simple court reminder may be all that is needed for most. She also mentioned that there is no data to show that the court commissioners are making risk based decisions in Maryland.

Lisa Smith added that no system is perfect but we are missing the essential piece of a statewide pretrial agency. We could leverage resources from the 11 counties currently and create a system where defendants are treated fairly everywhere.

Brian Frank asked the Commission what is the target failure to appear rate the state is looking for and how much it costs the state for an FTA. The Commission did not know the answer. Angela Talley replied that 3.5% of their supervision population fails to show up for court. She also stated that her supervision numbers have gone up since Richmond.

Senator Shank added that in Kentucky, they know the failure to appear and public safety data in every jurisdiction.

Pete France added that judges in Montgomery County and Baltimore City refer certain defendants to pretrial service. He also let the Commission know that there is no universal screening conducted by pretrial anywhere in the state.

Judge Morrissey had the Judiciary pull data on the bond amounts of defendants for one week. 16 of 650 defendants had a bond posted at less than \$500 while all defendants with a bond at \$1,000 will have their cases heard by the end of September. He also stated that the 5 largest jurisdictions in the state all include elements like DC including an early resolution docket and diversion programs. Tim Maloney asked if Judge Morrissey has this breakdown for bonds less than \$10,000. Judge Morrissey does not have that breakdown but could have Dave Weissert do a one week snapshot to get the data. Judge Williams stated that there are only 10 inmates at the Baltimore County Detention Center on a bond less than \$1,000. Mike Merican added that jail snapshot data could be acquired through the Maryland Correctional Administrators Association and would not need to be compiled by the Courts.

Paul DeWolfe said that DC releases 85% of their population and does it safely so Maryland must be doing something wrong. Delegate Pena Melnyk states that Maryland is detaining pretrial

defendants at twice the average rate and there is no uniformity around the state because there is no risk assessment tool.

Tim Maloney stated that as a Commission, we have to decide if we would rather supervise defendants or have them post bond through a bail bondsman. He mentioned that we need to reallocate resources from detention to supervision.

Tammy Brown said that we do not want a charge based or money based system, but rather a risk based system. This includes the risk of failing to appear for court or for being re-arrested. Judge Morrissey responded that the Judiciary in Maryland already assesses risk it is just not standardized.

Senator Shank reminded the Commission that we do not need to replicate everything in DC. We could create statewide pretrial for a lot less money. Kentucky's pretrial system is only \$12 million statewide.

Judge Platt stated that money and data are the two essential elements for this Commission. Richard Karceski agrees that we need data before the Commission can make any recommendations. He briefly talked about putting together data for a pilot program to compare court commissioner outcomes with what a risk assessment tool score provides.

Rev. Yeary mentioned that we need to identify the changes in the system that we want to make, quantify the costs, and talk with the legislators to adopt the proposal that we want.

#### **IV. Reports of the Subcommittees**

##### ***Managing Public Safety through Risk Based Decision Making***

Angela Talley reported out that this subcommittee has met twice. The first meeting provided an overview of risk assessments, and there was an informal consensus to begin to study a risk assessment tool and either adopt a pre-existing tool or create a tool through a validation study. There was no consensus on how long a study should last. Senator Shank added that with the lack of data available, we need to do a prospective study rather than a retrospective study. We need to look at a risk assessment instrument and compare it to the decisions that currently are being made. Judge Morrissey indicated that he knew nothing about this study or risk assessment tool and opposed moving forward without being able to view the tool and its factors. Chairman Karceski then indicated Ms. Brown could provide more information.

Tammy Brown provided more details about the study that was discussed at the last Risk Subcommittee meeting. GOCCP met with the National Institute of Corrections (NIC) last week who recommended that Maryland choose a validated tool, run the scores on a sample of Maryland defendants and compare those scores with the release decisions that the Court Commissioners and Judges are making. The tool will not be implemented for decision making purposes. This study will be piloted in 7 jurisdictions including Anne Arundel County, Baltimore City, Harford County, Montgomery County, Prince George's County, St. Mary's County, and Washington County. One jail administrator from each shift will run the tool on defendants. Data will be collected over a period of 2 weeks, and then a report will be written based on the findings.

Judge Williams asked for the factors in the tool to be studied and questioned how we could know it was evidenced based. Ms. Brown listed the factors and agreed to circulate the tool that was

recommended by NIC to the Commission. Judge Morrissey stated that the Subcommittee did not bring an official recommendation regarding the pilot to the full Commission for a vote. Judge Morrissey stated that he had not seen the tool or heard anything about the study prior to this meeting. In addition, an Executive branch review of judicial decisions constitutes a violation of the separation of powers. Ms. Brown further clarified the tool was not being implemented or used to make any decisions but rather just to collect data and that the local intake workers at the jails would be doing it because the Court Commissioners could not assist with this due to all of their existing duties.

Senator Shank replied on behalf of the Risk Subcommittee that the pilot will show how a validated tool will work in Maryland. This tool contains factors that have already been validated. Mr. Karceski stated that the study results will tell us more about release decisions are being made and is necessary to provide data for the report due in December. Delegate Pena-Melnyk asked what we need to do in order to come together and get this study done. Judge Williams stated that it appears that GOCCP is making up the rules. Ms. Lennig further replied I think there is bias across the state and we should use a tool to eliminate biases.

Mr. Yeary reminded everyone of the Commission's mandates:

1. Conduct a comprehensive examination of ideas that the State of Maryland could implement to ensure that Maryland operates an equitable and efficient statewide pretrial program;
2. Review approaches of other states and municipalities that use validated risk assessment tools;
3. Recommend how an objective validated risk assessment tool could be used in the State of Maryland;
4. Consider other methods to reduce the amount of time that low-risk arrestees are detained and other methods of pretrial diversion;
5. Develop and issue recommendations, including recommendations for legislation, that the State of Maryland should undertake to achieve these goals;
6. Assist and advise the State on issues arising from the ongoing implementation on a pilot basis of a risk assessment tool in one or more counties; and
7. Consider other related matters as the Commission deems necessary.

Ms. Robarge stated that there have been many data requests, and the study is actually a survey that will provide data that currently don't exist.

Mr. Karceski urged Commission members to do the pilot and start somewhere so we can move forward, "If we don't do it, we might as well punt now. It's fourth down." Paul Kemp made a motion to adopt the NIC recommendation. Judge Morrissey asked for additional discussion and argued that the mandate of the Commission does not permit the Commission to run a pilot and you can call it an instrument study or data gathering, but it is still a pilot. Senator Zirkin indicated it would be a violation of the separation of powers. Ms. Brown again clarified this was not the Executive branch making judicial decisions; it is just gathering data to understand how decisions are being made. Ms. Love then asked why there is pushback if this study will provide data the Commission members want. Delegate Pena-Melnyk asked what we need to do in order to come together and get this study done. Yearly seconded the motion. The Chairman brought the motion to a vote. The Commission voted to support the risk assessment instrument study, with 15 member majority in support. Judge Morrissey indicated he abstained because he could not vote on something he had not seen. Senator Zirkin also abstained.

### ***Individual Rights and Collateral Consequences***

Rev. Yearly provided an overview of this Subcommittee which has met twice. Many Subcommittee members have submitted recommendations to GOCCP that will go into a larger report for this Subcommittee. This section will ultimately go in the Commission report due December 1<sup>st</sup>.

### ***Pretrial System Improvement***

Judge Platt provided the overview. The Commission has met once and discussed a variety of pretrial system ideas such as creating a statewide pretrial agency, which agency that responsibility should fall to, and also recommending prosecutorial screening on all cases before they go before a judge in conjunction with adopting a statewide pretrial risk assessment tool.

Richard Karceski asked if all Subcommittee chairs report out on the recommendations of the three committees by October 6<sup>th</sup>. The meeting adjourned at 4:22 pm

### **V. Next Meeting**

The next Commission meeting will be held on October 22<sup>nd</sup> from 9:30-11:30AM in the Baltimore City Delegation Room (Rm. 405) in the House of Delegates Building in Annapolis, Maryland.