Governor's Commission to Reform Maryland's Pretrial System
Individual Rights and Collateral Consequences Subcommittee

Wednesday, September 10, 2014
1:00 PM – 3:00 PM

House Office Building
6 Bladen St.
Annapolis, Maryland 21401

Participating Commission Members:

Paul DeWolfe

Sarah Love

Judge Morrissey

Delegate Peña-Melnyk

Jacqueline Robarge

Michael Schatzow

Reverend Todd Yeary (Co-Chair)

Staff:

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

Guests:

Mike Canning, Manis, Canning & Associates

Douglas Colbert, University of Maryland School of Law

Amy Devadas, Department of Legislative Services

Ricardo Flores, Office of the Public Defender

Courtney Glass, Office of the Prince George's County Executive

Kevin Loeb, Department of Public Safety and Correctional Services

Karen Morgan, Department of Legislative Services

Suzanne Pelz, Maryland Judiciary

Shirleen Pilgrim, Department of Legislative Services

Drew Snyder, Maryland Judiciary

I. Welcome and Introductions

The meeting was called to order at 1:07 PM. After everyone in the room introduced themselves, Rev. Yeary briefly went through the agenda for the meeting.

II. Approval of Minutes

The members reviewed hard copies of minutes from last meeting and submissions from members.

Judge Morrissey asked to clarify points in the minutes.

Members approved the minutes.

III. What can we learn from other jurisdictions?

Delegate Pena-Melnyk reported out on trip to Kentucky. The Delegate stated that she and others were able to observe the Kentucky pretrial and booking process. We saw pretrial services workers administer tool that is race and gender blind. Pretrial workers made calls to judge to make release decisions based on relevant factors. There is no commercial bail in Kentucky, and bail means bail as set by judges. We saw that tool at work. The take away from Kentucky was that we should pilot risk assessment tool in a few counties in Maryland as soon as possible to see if it works. Using a tool would help provide uniformity across the state.

In Kentucky, the pretrial services agency also monitors and determines the needs of pretrial defendants to reduce risk of re offense. In Maryland, we have 11 counties with pretrial programs but none are consistent. We have commissioners, but not pretrial workers statewide.

Kevin Loeb added that the Kentucky pretrial agency falls under the judiciary. They are also piloting administrative release concept, as permitted by judges. There is considerable judicial discretion in all cases, which is considered a vital component of Kentucky's system.

Judge Morrissey verified that in Kentucky, defense counsel is not present at the telephone call release, so that type of system would not solve Richmond.

Jacqueline Robarge would like to know how the algorithm for the tool works. Important to make sure that instability not factored heavily in case of homeless individuals.

Delegate Pena-Melnyk added that many jurisdictions are using validated risk assessment tools. Kentucky has been using a risk assessment tool for many years.

Rev. Yeary stated that while we have learned some things from Kentucky, we cannot transfer the entire system to Maryland. The risk assessment tool does not replace the pretrial process, but it can inform it.

Professor Colbert stated that many people are charged with minor crimes and many of them are released in Maryland.

Judge Morrissey clarified the facts of a Baltimore County case that was discussed in the last meeting of this subcommittee. Judge Morrissey had looked into the case and the defendant had additional charges on his record. Judge Morrissey cautioned subcommittee members from drawing conclusions about Richmond implementation based on anecdotal evidence.

Rev. Yeary pointed out that the group primarily needs to focus on a proposal related to the use of an objective validated risk assessment. The second item to focus on is the use of factors outside of tool.

Judge Morrissey stated that the group needs to look at how a risk assessment tool will address the Richmond problem. Judge Morrissey state that he is required to implement attorney program pursuant to Richmond.

Jacqueline Robarge stated that anecdotal evidence tells us about criminogenic needs of particular offenders based on gender etc.

Kevin Loeb said that it will be important for this group to think through the difficult questions and the hard data aside from anecdote.

Rev. Yeary said that the big question is how we comply with Richmond.

Delegate Pena-Melnyk asked whether it makes sense to have judges do the bail reviews so we don't have issue of public defender at all.

Judge Morrissey stated that the Judiciary's proposal last year was to have judges do review and that was unsuccessful. There were approximately 150,000 initial appearances and 52% released before they get to judge. If we double amount of bail hearings before judges, there is enormous cost. 12 judges plus clerks and bailiffs and opening court. A telephone conference like in Kentucky would be unconstitutional in Maryland because there are no witnesses and it cannot be recorded. Also, there would be no defense counsel which would be an issue.

Judge Morrissey stated that there are also delays when we insert defense counsel and States Attorneys at initial appearances. This may be the cost of implementing a right. Data is being cherry picked. I would like to see a months worth of data because the data that we have does not show an increase from 4 to 17 hours.

In Baltimore city commissioners do not see defendants for initial appearances until 23 hours after they are detained in some cases. Not all delays are related to tasks of commissioners and judges. Court staff cannot do anything with a case until the defendant arrives.

Rev. Yeary said that the group understands that some things are out of the judiciary's control. We are building a system. We are not pinpointing the blame. Some areas may need additional changes and thoughtfulness. Are we taking more time to do initial appearance post Richmond?

Judge Morrissey responded that yes, it takes 1-1.5 hour longer per initial appearance. We have learned that we can delay up staffing because of delays in getting the body before us.

Judge Morrissey read Mr. Schatzow's submission and agrees with a lot of points in it, including that maybe the Judiciary should not be appointing attorneys. Judge Morrissey stated that he is the only Chief Judge he knows who is running a law firm. He has no opinion on who should take over. Judiciary should be last one to implement because of ethical concerns. Judge Morrissey stated that the Judiciary would cooperate in turning program over to Maryland Legal Services Corporation or another entity.

Initial Appearance attorneys cannot turn over their notes due to confidentiality concerns. They cannot give the notes to the commissioner or the jail.
Judge Morrissey stated that he is doing everything he can to administer the appointed attorney program ethically.

Mr. Schatzow stated that the commission/subcommittee was created to figure out if there is a better way to implement Richmond and operate pretrial. It is not about blame and who did what. Does it make sense to have defendants sit in Baltimore city for up to 15 hours WITH opportunity to consult with counsel? We want a system that is more efficient and fair and protects individual rights for purposes of this subcommittee. How do we fix the system?

We do not need to limit based on legislature or influence of bondsmen.

Rev. Yeary stated that everyone understands this situation is uncomfortable. We cannot hold a good process hostage to the perfect in the beginning. We know the system now does not work.

Judge Morrissey stated that 52% are released on recognizance in July post-Richmond. ROR has increased since Richmond.

Rev. Yeary asked about risk assessment.

Mr. DeWolfe asked for an update from GOCCP about piloting a risk assessment tool.

Lisa Smith responded that GOCCP is looking at an outside entity to pilot a tool.

Delegate Pena-Melnyk asked whether attorneys see their client prior to the initial appearance? She stated that there were many proposals and politics last session. Many legislators thought it was judiciary problem and they didn't need to act.

Rev. Yeary suggested that the subcommittee use the recommendations from the earlier report as starting point. We need something that is cost effective. This won't be free. We need to protect rights of citizens in the legal process. A dollar value is not necessary to protect integrity of criminal justice system in Maryland. It does not matter what we think about Richmond. Our job is to make recommendations and not to answer every potential criticism about cost.

Ms. Robarge stated that there is currently no way to correlate data about the entire system. We are working in the dark without data. Is there racial bias? No data on front end. This commission should request data even if manually produced. Scrape up volunteers such as students.

Mr. Dewolfe stated that the indigency determination can happen earlier. We must acknowledge that Judge Morrissey inherited this system and is doing to best he can with implementation. Waiver is coercive. Can the indigency determination be determined up front instead?

Judge Morrissey said that attorneys cannot see clients before because it would lead to liability. Sometimes people waive even when attorneys are waiting. We cannot speculate why that happens. The system is not designed to take longer. Judiciary does not have all the OPD staff. Commissioner gives defendant opportunity to take advantage of right to counsel.

Mr. Schatzow said that in the federal system no one waives counsel. He believes here is something in the system that is making people waive. Maybe it's the rules. Maybe it's rule interpretation. Let's not lose sight of savings. Risk assessment was about diverting people prior to judicial hearing. When people have counsel there are fewer people incarcerated and more cost savings. If there is a problem with rules let's recommend a change. Let's not be constrained by feeling that court created a problem.

Rev. Yeary said that the rules should be reviewed and it should be determined whether or not the interpretation makes sense.

Sara Love suggested that the subcommittee look at the efficiency of the system. Based on literature and the prior Task Force, OPD representation should be increased. This would cut out duplication and continuity of counsel issues. She also mentioned that the subcommittee has prior recommendations to work from. The subcommittee should look at the Task Force recommendations and build on them. Are we adopting and adding new ones or using as template?

Judge Morrissey stated that the Judiciary can track total initial appearances, the number of waivers of counsel, the number of defendants represented by private and appointed counsel, the number of findings of no PC, etc. Programmers can readily do track this data without structural changes.

Delegate Pena-Melnyk and Rev. Yeary requested that gender, race and socioeconomic status be tracked as well. This may be through the indigency assessment. This can then be compared to waiver of counsel numbers. Judge Morrissey will run this suggestion through the Judiciary's legal department.

Delegate Pena-Melnyk would like to know about waiver of counsel for nonenglish speaking defendants.

Mr. Schatzow would like to know if the subcommittee can get statistics from DPSCS on commissioner hearings? We want to know which data points DPSCS collects. Kevin Loeb stated that he will look into it.

Rev. Yeary then recapped the initial recommendations.

Delegate Pena-Melnyk asked if the subcommittee should request an OAG opinion about the court rules interpretation.

Mr. Schatzow suggested that the subcommittee wait until January to make this request.

Rev. Yeary said that the subcommittee can make the request.

Mr. DeWolfe suggested that the subcommittee recommend that attorneys available to speak with clients be allowed to do so prior to presentment even if this requires rule change. He is convinced that high rate of waiver is related to this rule.

Delegate Pena-Melnyk agrees with Mr. DeWolfe.

Ms. Robarge suggests the the subcommittee should look into why people are waiving. Are there cultural factors to consider? Defendants are being presented with a new option to have an attorney and we don't know whether they understand option.

Mr. Schatzow asked whether the police can help explain the delay. Can GOCCP help figure out what is going on with this issue?

The September 22, 2014 full Commission meeting with be held at the Judiciary Education and Conference Center from 1:00 – 4:00 PM. The Subcommittee's will be reporting out.

Pena-Melnyk made two data requests. First, she would like Mr. Karceski to request a status report of the amount and time of delays and why they are happening. The report should include those factors that are contributing to the delays as well as what resources are needed to address the delays.

Second, she would like to make the request for an opinion to the OAG about the court rules.

Other data requests include, the number of waivers, the number of hours from arrest to evaluation and evaluation to presentment?

Ms. Robarge would like to know what information is made available to the appointed attorneys?

There was a request for the data points that the Kentucky tool uses.

Ms. Robarge would like to look into the collateral consequences.

IV. Next Steps

Should there be a smaller group to work on recommendations? How would the subcommittee like to handle this?

The next full Commission meeting is scheduled for September 22, 2014 from 1-4PM at the Judiciary Education and Conference Center.