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MEMORANDUM

To: House Judiciary Committee
From: Robert L. Sand
Date: March 31, 2014
Re: S. 295 – Pretrial Services Bill

Introduction

S. 295 takes the best of three existing pretrial services programs in Vermont and expands upon those programs to create a statewide system of pretrial screening, assessment, treatment and supervision. The bill, if enacted, will have a transformative impact on the criminal justice system in Vermont and will, if properly implemented, reduce instances of new offenses with a corresponding lessening of criminal justice costs.

From Chittenden County's Rapid Intervention Community Court (a precharge, deferred prosecution program) S. 295 adopts the prompt use of "evidence based" screening instruments. From the Rapid Referral Program in Chittenden County, S.295 includes referrals for clinical assessments directly from the first court appearance to a community provider. From the Sparrow Program in Windsor County, S.295 creates case managers who work with defendants and report to a judge on the progress that defendants have made in treatment. Each of these three programs has been evaluated and each has demonstrated an ability to drive down instances of repeat offenses. (The evaluations for each program can be found here: http://forms.vermontlaw.edu/criminaljustice/). S. 295 takes these successful programs and exports them to all counties in Vermont.

Myth Busting

In considering S.295 it is important at the outset to understand what the bill does not do, particularly given a fair amount of misreporting about the bill. Contrary to some reporting, under S. 295:

1. No prosecutor is obligated to create a precharge, deferred prosecution program;
2. No prosecutor is obligated to refer any person or offense to a precharge program if one exists in the county;
3. Prosecutors retain the right to file charges in court for any person or offense (assuming the existence of probable cause);
4. Judges do not need to change their bail or conditions of release decisions;
5. Even if a defendant declined to participate in a voluntary screening and assessment prior to arraignment, a judge could still order a clinical assessment and treatment as a condition of release under 13 VSA
6. (a)(1)(C) and (a)(2)(C);

7. Judges do not need to dismiss a charge even for people who successfully comply with court ordered treatment conditions;
8. Judges do not need to change their approach to sentencing;
9. A defendant's successful participation in treatment does not guarantee any particular case outcome for cases that have been filed in court;
10. For cases that have been filed in court, while defendants may be swiftly referred to treatment, they are not diverted away from the normal adjudicative process nor do they waive any due process rights;
11. With regard to the punitive components of the bill, there is no required or mandatory sentence enhancement created, only the allowance for enhanced sentences.

New Provisions

S.295 does have some critically important new provisions including:

1. The creation of the position of "compliance monitors" who will be available to work with and report on alleged offenders in all parts of the state to include alleged offenders participating in a county precharge program as well as alleged offenders who have been released on conditions by a court;
2. By allowing the compliance monitors to work with people in a precharge program, S.295 creates an incentive for prosecutors to develop precharge, deferred prosecution programs by providing the key staff position for a precharge program;
3. A statutory requirement to afford certain alleged offenders the opportunity for a swift risk and needs screening;
4. The statewide use of approved, evidence-based instruments to screen alleged offenders for risk of flight and rehabilitative needs;
5. Legislative endorsement of a wide variety of "alternative justice" programs

Recommended Changes

S. 295 as passed by the Senate is a bold and far-reaching bill that will have an impact on the criminal justice system in all parts of Vermont. The breadth of the bill is found not only from the creation of the compliance monitors who will be available to work with alleged offenders in every county but also from the very broad group of alleged offenders who fall under the scope of the bill. While the breadth of the Senate vision is laudatory, to help ensure a successful initial roll-out of the bill throughout Vermont and consistent with financial constraints, limiting the scope of the bill is appropriate at this time. The proposed modifications are as follows:

1. Risk of Flight Assessment. S. 295 envisions the use of an evidence based risk of flight assessment to better inform bail decisions. As passed by the Senate, these assessments would be offered to alleged offenders even if the prosecution was not intending to ask for bail on the alleged offenders. As this program rolls out, it makes sense to limit the offer of the risk of flight assessment only to those people on whom the prosecution intends to seek monetary bail – the people who might actually become part of the detentioner population. Proposed language to limit the use of risk of flight instruments to the population who might actually be detained is included at the end of this memo.

2. Needs Screenings. S. 295 creates a new term "eligible offense" that helps define the population of alleged offenders who must be offered risk and needs screenings and who may be offered the screenings. This total population is so broad as to encompass every single alleged offender except people charged with offenses so egregious that they may be denied bail entirely. This extraordinary initial breadth may create logistical difficulties as the program launches. As such, limiting the scope of the initial population at the outset will help ensure a smoother, more successful roll out of the program. The recommendation to require the offering of a needs screening only to people charged with "non-listed" crimes follows this memo. Roughly speaking, the non-listed crimes are less serious than the listed crimes detailed in 13 VSA section 5301. From a practical, perception, and fiscal standpoint, a

narrower initial scope for the program will help ensure its success.

S.295 Proposed Amended Language

Section 2. Risk Assessment

A. Every person who is arrested and lodged and who is unable to post bail within 24 hours of the lodging shall be offered a risk assessment prior to arraignment. To the extent that the risk assessment requires an interview with the person, participation in the risk assessment shall be voluntary.

B. Every person for whom the prosecution intends to request monetary bail at arraignment who has not already participated in or been the subject of a risk assessment in Section (A) shall be offered a risk assessment prior to arraignment. To the extent that the risk assessment requires an interview with the person, participation in the risk assessment shall be voluntary.

C. The results of the risk assessment shall be provided to the prosecution. In the event that the prosecutor files criminal charges against the person the risk assessment shall be filed with the court at the time of the filing of the criminal charges.

D. In the event that the risk assessment is not completed prior to arraignment, the court shall order that it be completed as soon as practicable and provided to the court and the parties.

Section 3. Needs Screening

A. Every person arrested or charged with a crime other than a listed crime as defined in Section 5301 of this title whose alleged offense, criminal history, or background as known by law enforcement, the prosecution, the defense, or the court indicates the person has a substantial substance abuse problem or substantial mental health needs shall be offered a needs screening as close in time to the person's arrest or citation as practicable and before the person's arraignment. Participation in the needs screening shall be voluntary.

B. The results of the needs screening shall be provided to the prosecution. In the event that the prosecutor files criminal charges against the person the needs screening shall be filed with the court at the time of the filing of the criminal charges.

C. In the event the needs screening cannot be conducted prior to arraignment, the court shall order that the needs screening made available to the defendant as soon as practicable and provided to the court and the parties upon completion.

D. By order of the court after consultation with the parties and the compliance monitors, a person charged with a listed crime may be offered the opportunity to participate in a needs screening under this section.

E. Nothing in this section shall prevent a court from ordering treatment as a condition of release as authorized by 13 VSA Section 7554(a)(1)(C) or (a)(2)(C)