

Draft Discussion Notes Concerning H.41 January/February 2023

RE: *Tim Lueders-Dumont, Esq., Department of State's Attorneys and Sheriffs provides the notes below for the purposes of discussion concerning H.41 (An act relating to referral of domestic and sexual violence cases to community justice centers("CJs")) (2023 Session)*

January 30, 2023

DATE:

Arizona Pilot RESTORE.

In 2013/2014 Arizona piloted the RESTORE¹ Model in a limited geographic area. The RESTORE program should be reviewed in the context of H.41. The RESTORE model provided for a structured framework with protective guardrails, currently lacking in H.41. It should be noted that the RESTORE model appears to have been discontinued.² The Arizona, RESTORE, Model required, amongst other guardrails:

- that only Prosecutors/State's Attorney would review each potential referral and that only Prosecutors could make referrals to CJC/RJ (*followed by voluntary consent of the parties*);
- that a forensic evaluation take place (*similar to what we do after someone is convicted of a sex crime in VT*);
- that both the victim and person accused of causing the harm were given access to legal counsel before a decision to refer was made; and that,
- that those accused of causing the harm engage in sex offender programming and engage with accountability before they participate in a restorative meeting with the victim (*or a person in the place of the victim*).

As a related aside: Vermont's Windsor County Model³

During the course of testimony of H.41 in House Judiciary, the Windsor County model has been discussed. However, it should be noted that the Windsor County model does not allow for pre-charge referrals, requires buy-in from the State's Attorney, and is post-adjudication with oversight from DOC. And, in Windsor, those accused of the causing the harm must plead guilty and engage with the accountability of their actions. No outcome reporting or analysis is yet available, and Windsor has had less than 30 participants according to the Windsor County State's Attorney.

Ongoing Questions and Concerns about H.41.

Victim Liaisons at CJs. Victim Liaisons are not in each CJC. If a program is to occur there should be funding and training to provide for a victim liaison at each location where there may be an SV/DV referral.

CJC Variations and Lack of Oversight. In speaking with prosecutors and victim advocates about H.41 there was a noted concern with how different CJs currently handle cases without statewide or professional standards or oversight. Different geographic areas have different resources at the CJC-level which may lead to inequitable and different outcomes. H.41 lacks central statewide oversight of CJs engaging in this work and the bill does not mention law enforcement or prosecutorial input or buy-in. Lack of oversight of MOU process by a central group may lead to disparate outcomes and inconsistent data reporting methods. While CJC informality may be a strong suit in many cases, the process for how CJs report information will vary from CJC to CJC and this may lead to opaque tracking of success and recidivism. Prior to implementation in a county, the State's Attorney for that county should be consulted in setting up a local practices or programs and should provide a voice in this process. State's Attorney involvement is especially important as State's Attorneys are countywide constitutional officers who elected by the voters of the county. In practice, State's Attorneys currently work with law enforcement to provide referrals to

¹ [RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes | Office of Justice Programs \(ojp.gov\)](#); [The RESTORE program of restorative justice for sex crimes: vision, process, and outcomes - PubMed \(nih.gov\)](#); [14 04 24 RESTORE On-line published\[3\].pdf \(arizona.edu\)](#).

² [H.41~Marshall Pahl~Restorative Justice for Domestic Violence Offenders- A Randomized Control Trial~1-18-2023.pdf \(vermont.gov\)](#) ("At the very least, the Arizona experiment did not produce worse conditions 10 than the standard court-mandated BIP, suggesting that RJ could be a safe alternative to 11 conventional approaches to treatment.").

³ Information concerning the Windsor County Model was gathered after feedback was provided by the Windsor County State's Attorney.

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CJCs for qualifying offenses. A State's Attorney referral to a CJC is intrinsically related to prosecutorial discretion as a referral is, or may be, a choice of a prosecutor to forego criminal prosecution or attempt to forego prosecution.

Voluntariness. In speaking with prosecutors and victim advocates about H.41, the question of what does "voluntary" look like has continued to arise, especially, in the pre-charge concept, because DV/SV issues of coercive control and cycles of violence (*control over shared bank accounts or financial resources, concern over issues of transportation and isolation from other family, etc.*) may override voluntariness. Certain encounters may appear voluntary but may also risk that a victim completely forfeit their case in an attempt to pursue a CJC pathway under duress or in a manner that is not otherwise entirely voluntary. As noted in the discussion of house bill 45 (*abusive litigation*), those who cause harm in SV/DV cases may use every aspect of the system to continue to attempt to control victims and survivors. It is possible that those who cause harm in SV/DV cases might pressure an intimate partner to pursue or engage in an CJC SV/DV referral. A DV/SV prosecutor suggested that there be specific protocols for timing given that cycles of DV/SV violence provide that certain points in time may result in nearly complete negation of voluntary participation.

Inequitable Outcomes. Those with financial means may enjoy more access to a CJC referral and each CJC does things differently depending on geographic location. There is a concern that expansion of participation in CJCs for SV/DV cases will allow more affluent perpetrators to enjoy inequitable outcomes in their favor when compared to more vulnerable and less affluent perpetrators (*wealthier Vermonters may be better situated to be successful in DV/SV CJC programming when compared to other Vermonters with fewer financial resources and wealthier Vermonters may be more likely to have an attorney prior to arraignment and charge*).

Safety. DV/SV prosecutors and victim advocates have raised concerns about safety during CJC process. Given the overwhelming data that a large percentage of homicides in Vermont also involve some aspect of domestic violence and access to firearms, safety concerns and harm reduction should remain at the heart of all "presumed voluntary" referrals. Recidivism rates and violent crime rates as they relate to DV/SV cases make these cases of particular concern regarding future conduct. One concern is that if referrals are made pre-charge there will be no conditions of release. In a criminal case, conditions of release are specifically designed to protect the victim-survivor and the public. DV/SV prosecutors and victim advocates have noted concern that well-intended but disparate CJC processes may not be equipped to handle the delicate and dangerous nature of DV/SV cases.

Expungement Issues. If a police report/affidavit is filed or an investigation is commenced by law enforcement and a referral is made to the CJC but the case is either dismissed or not prosecuted, the file and evidence of the SV/DV will eventually be expunged for lack of prosecution. This will be an issue if the person has a future incident, if a future RFA might rely on the expunged incident, or if the person is a law enforcement officer (*as to employment and law enforcement certification*). If a case is referred pre-charge or post-charge and successfully completed, all records of the case would be destroyed via expungement and the non-prosecution. This might be problematic as any future re-offense, including with future different victims, would be ignorant of the evidence from a prior non-conviction that was completed through the CJC.

Fiscal Note and Fiscal Equity. H.41 has no fiscal note as to staffing or other resource needs or how training might be funded equitably or consistently applied across the state to each participating CJC.

Discussion / Conclusion:

Ultimately, H.41 contemplates a policy choice. The Legislature had originally prohibited these types of cases from going to the CJC. If there is going to be an exception, there should be careful review of any process and oversight. While CJC and restorative justice practices have tangible benefits in current non-prohibited cases, core questions and concerns remain and merit discussion and consideration if there is to be a CJC expansion and exception to referral of DV/SV cases.