

PS COMMITTEE #1
October 30, 2014

MEMORANDUM

October 28, 2014

TO: Public Safety Committee

FROM: Susan J. Farag, Legislative Analyst *SJK*

SUBJECT: **Update: Implementation of the *DeWolfe* Decision at the Central Processing Unit**

Today, the Committee will receive an update on the implementation of the *DeWolfe v. Richmond* decision that held that an indigent criminal defendant has a state constitutional right to legal counsel during the initial appearance before a District Court Commissioner. The following are expected to brief the Committee:

Art Wallenstein, Director, Department of Correction and Rehabilitation (DOCR)
Robert Green, Warden, DOCR
Laura Chase, Assistant State's Attorney
Michael Subin, Executive Director, Criminal Justice Coordinating Commission
Bruce Meier, Office of Management and Budget (OMB)

Background

Several years ago, 11 plaintiffs filed a complaint in the Circuit Court for Baltimore City, stating they were denied Public Defender representation at their initial appearance before a District Court Commissioner. The plaintiffs alleged the initial appearance was a critical stage of the criminal proceeding, and therefore required counsel. In 2012, the Court held that indigent defendants are entitled to a public defender at the initial appearance.

Facing potentially large expenditures, the State appealed the decision in court, and the Maryland General Assembly modified the State Public Defender Act in 2012 to specify that "representation is not required to be provided to an indigent individual at an initial appearance before a District Court commissioner."¹ The legislative change prompted some parties to file a motion to consider whether defendants had a state constitutional right to representation at the initial appearance. The Court of Appeals ultimately held that defendants do have such a constitutional right to counsel.

¹ Chapters 504 and 505 of the Acts of 2012.

During the 2014 State legislative session, several bills were introduced to mitigate costs of the Court's decision by proposing various reforms to the bail review process. None of these bills passed. Instead, the General Assembly included \$10 million in the Budget Reconciliation and Financing Act (BRFA of 2014) for the District Court of Maryland to pay for contractual panel attorneys who provide legal representation for indigent defendants at their initial appearances. Any costs that exceed the appropriated \$10 million are to be billed to the Counties. At the time various reform initiatives were considered during Session, cost estimates for the program were closer to \$30 million. The program was implemented on July 1, 2014. (see attached at © 1-4).

Implementation in Montgomery County

The Department of Correction and Rehabilitation (DOCR) and the State's Attorney's Office (SAO) implemented the new bail process on July 1, 2014. The SAO provides one Assistant State's Attorney at the Central Processing Unit at all times other than midnight to 7am on Mondays, and 3am to 7am on the other six days of the week. The SAO has also hired contract attorneys at an hourly rate during a trial period, until final decisions are made regarding staffing needs. DOCR operates the CPU 24 hours a day, seven days a week. Correctional Officers maintain security and safety during the initial appearances with District Court Commissioners. The District Court of Maryland's Appointed Attorneys Program provides panel attorneys to function as legal counsel for indigent arrestees. The Public Defender's Office is not involved in this process.

Process: Once newly arrested individuals are booked at the CPU, they are required by State law to see a District Court Commissioner within 24 hours of arrest. Once an arrestee appears before the Court Commissioner, he or she is advised of the right to counsel. At that time the arrestee can request an attorney or waive the right. If the arrestee wishes to be represented, the Court Commissioner then determines if the arrestee is indigent. If so, he or she is assigned to speak with a panel attorney provided by the District Court. After speaking to the attorney, the arrestee is brought before the Commissioner for the initial appearance.

Experience to Date: From July 1 to October 9, 2014, CPU has processed 3,104 arrestees. Of these, 1,432 (or 47.5%) have requested legal representation. The following data reflect arrests from July 1st through September 30, 2014.

- 2,742 arrests were processed;
- 1,292 requested a panel attorney;
- 1,283 waived their right to an attorney;
- 35 requested a private attorney;
- 48 were temporarily committed;
- None were released directly by the Court Commissioner;
- 201 required medical assessments; and
- 26 required police to be called to return to CPU to escort an ambulance or take an arrestee to the hospital.

Average Processing Times Per Arrestee		
	Traffic Charge	Criminal Charge
Pre DeWolfe (up until June 30)	4.0 hours	8.2 hours
Post DeWolfe (beginning July 1)	9.2 hours	16.0 hours

Staffing and Overtime: Both DOCR and the SAO have experienced the need for additional staff and/or increased overtime. DOCR's baseline CPU staffing pattern prior to July 1 included five Correctional Officers per shift, with three shifts per day. Since the implementation, DOCR has needed to provide two extra Correctional Officers on each shift (42 shifts per week or 336 hours of weekly overtime) to accommodate the increased number of arrestee movements and increased length of time in custody. These numbers are being tracked to determine appropriate staffing. On August 23, DOCR advises trend data showed the ability to reduce the CPU staffing pattern to six Correctional Officers during five weekend shifts, thereby reducing the scheduled overtime from 336 to 296 hours per week.

The SAO has hired temporary contract attorneys and limited the number of hours worked to minimize budget impacts while they evaluate the process.

Initially, the District Court assigned two panel attorneys covering the 8am – 4pm shift, and one panel attorney each for the evening and midnight shifts. It became clear that the number of panel attorneys was insufficient to meet needs. As of October 1, the evening shift (4pm to midnight) Monday through Friday has been increased two panel attorneys.

Training: In anticipation of having panel attorneys and Assistant State's Attorneys in the CPU on a regular basis, DOCR developed and implemented a training program. The training was developed to provide the attorneys the ability to move throughout the facility without an escort, and provide education on important custody and security aspects of CPU operations, particularly within the Commissioner's area where they are located. Following the training, staff provides a tour of CPU and identifies evaluation routes. The following topics are included in the training:

- Proper entry into the facility;
- Inappropriate attire;
- Unauthorized/contraband items and permitted items;
- The function of the CPU and Commissioners' areas;
- County Non-smoking Policy; and
- Prison Rape Elimination Act (PREA).

Initial Impacts: As expected, the new process has resulted in increased wait times (approximately twice as long as before) for arrestees being held at CPU. While the actual numbers of arrestees did not change, the increased amount of time in custody still has operational impacts. DOCR staff indicate the longer wait times make it more likely that some arrestees become impatient, agitated, and often more aggressive toward one another and toward staff. This has resulted in an increase in Use of Force incidents in the CPU area. In addition, when individuals are held longer, it increases the risk of health (mental and physical) deterioration that requires additional care and/or transport. The panel attorneys also work a different shift than the Correctional Officers, SAO attorneys, and Court Commissioners. Their shifts are off by one hour.

Executive staff also indicates that the use of the interpreter service is challenging. It can be slow to respond, which adds time to a hearing. The current physical layout only permits the Commissioner and arrestee to be on the phone with the remote interpreter, not the panel attorney or Assistant State's Attorney.

The State's Attorney's Office has also experienced some staffing issues. During the first three months, the SAO has had one resignation from the contract attorneys. Recruitment and retention for contract positions historically has been challenging.

Panel Attorneys: The State has provided \$10 million to fund panel attorneys. After that, the Court will bill local jurisdictions for the costs, which by some estimates are expected to be closer to \$30 million. Executive staff indicates that the County's portion of the \$10 million is expected to be \$860,000 and does not anticipate that the County will be billed at all during FY15, given current staffing levels.

Discussion Issues

1. DOCR mentioned there has been some increase in Use of Force incidents. Has DOCR examined the incidents to determine whether additional staffing or some other action may reduce the number of incidents?
2. DOCR mentioned the shifts differ between the panel attorneys and the rest of the staff working in CPU (Correctional Officers, SAO attorneys, and Court Commissioners). Would aligning them help accelerate hearings?
3. DOCR and SAO appear to have taken conservative steps in upstaffing their respective programs to meet the new program's needs. What are DOCR's and the SAO's plans with respect to staffing moving into FY15?
4. While the District Court has indicated the panel attorneys program will be fully funded this year, what are funding expectations going forward? What are panel attorney program costs to date?
5. Do any of the stakeholders see possible program changes that would expedite the process?

This packet includes the following:

	©#
DOCR and SAO Response to Questions	1-4
District Court of Maryland Appointed Attorneys Program	5-7

CPU/ DeWolfe v Richmond Status Update - Council Questions

1) Please describe the process (for example, how are panel attorneys assigned? Do they work by shift? When do panel attorneys speak to their clients? What information, if any, is provided to arrestees regarding subsequent need for legal representation? What is the State's Attorney's process? Is the SAO present at every initial appearance where a panel attorney has been requested?)

The Maryland District Court Appointed Attorney Program Coordinator's Office in Annapolis assigns all panel attorneys. They work three shifts – 8 a.m.-4 p.m., 4 p.m.-12:00 a.m., and 12:00 a.m.-8 a.m., seven days per week. The two District Court Commissioners try to take the cases roughly in the order they appear on the Board, but occasionally certain types of cases take priority (for example, jail service or medical necessity). When a commissioner finishes reading a case and researching the arrestee's criminal history, he/she asks DOCR staff to bring the arrestee in for a hearing.

Once an arrestee appears before the District Court Commissioner, he or she is advised of their Right to Counsel. The arrestee can convey to the District Court Commissioner that they want to be represented or they can waive their Right to Counsel. If they wish to be represented, the District Court Commissioner then determines if an arrestee is indigent. If it is determined that an arrestee is indigent, he or she is assigned to speak with a panel attorney. After the arrestee speaks with the panel attorney, they are brought before the District Court Commissioner for their Initial Arraignment hearing. When an arrestee requests representation, it frequently requires that the arrestee be placed in holding to await their private attorney or for a panel attorney to become available.

The State's Attorney's Office has one Assistant State's Attorney present at Central Processing Unit around the clock except from midnight to 7 a.m. Mondays, and 3 a.m. to 7 a.m. the other six days of the week. The State's Attorney's Office hired contract attorneys at an hourly rate during this trial period until final decisions are made regarding the final process. The State is present at every hearing except those that occur when staff are not at the CPU. It is not clear how many hearings with attorneys take place during that window.

2) Please provide data on the total number of arrestees seen since July 1, as well as the number of those who requested panel attorneys at their initial hearings.

As of October 9, 2014: since July 1, 2014, a total of 3,014 arrestees have been processed in CPU, of which 1,432 (47.5% of total) have requested to be represented by an attorney.

3) Please provide data on average length of time arrestees spend at CPU before their initial appearances: (1) before July 1; (2) after July 1 when requesting an attorney; and (3) after July 1 when not requesting an attorney.

The arrestee processing length of time depends on the total number of arrestees already in CPU when an arrestee arrives, how many arrestees choose representation, how many panel attorneys are present, and how many commissioners are on duty. Note the following data elements:

- July 1st through September 30th, 2014 – 2,742 arrests processed
- Average processing time per arrestee

	<u>Traffic</u>	<u>Criminal</u>
Pre Richmond	4.0 hours	8.2 hours
Post Richmond	9.2 hours	16.0 hours
- Disposition at initial appearance:
 - 1,292 requested panel attorneys
 - 1,283 waived right to attorney
 - 35 private attorney requested
 - 48 temporary commitments
 - 0 released directly by commissioner
- 201 medical assessments (not to include return follow-up care) were conducted on arrestees being held in CPU.
- 26 times police were called to return to CPU to escort an ambulance or take an arrestee to the hospital.

4) Have you seen any trends over time in attorney requests?

There has been a slow trend towards more arrestees waiving the right to an attorney. Adding to this trend is arrestees who (based on above factors) have been waiting a long period of time eventually realize that the process is faster for other arrestees who have waived the right to counsel. In order to expedite their own process, more arrestees will inform the Officer they would like to waive the right to counsel.

5) It is my understanding that MCDC developed and implemented a training program for attorneys (both panel attorneys and state's attorneys) who provide legal counsel at the CPU. If so, please describe it.

The Attorney training was developed to provide the Attorneys access to move throughout the facility without an escort, and provide education on important custody and security aspects of facility operations, particularly regarding the Commissioner's area where they are located.

Following the training, a tour of CPU is provided and evacuation routes identified. The following topics are included in the training:

1. Proper entry into the facility
2. Inappropriate attire
3. Unauthorized/Contraband items and items permitted
4. The function of CPU/Commissioners area
5. County Non- Smoking Policy
6. Prison Rape Elimination Act (PREA)

6) What has the impact been on staffing and overtime for both DOCR and the State's Attorney's Office, if any?

Prior to the new process, five Correctional Officers (CO's) were scheduled to operate the CPU Unit three shifts each day. This baseline staffing pattern resulted in 105 scheduled CO's per week at CPU. Protocol indicated that if there were more than 15 arrestees waiting to be seen by the Commissioners and attorneys, the on-duty Shift Commander was authorized to increase the staff for the on-coming shift by one CO. This occurred an average of seven shifts per week resulting in an additional 96 hours of scheduled overtime per week.

DOCR has needed to provide two extra officers, 24/7 on overtime, or 42 shifts per week (336 hours of overtime) to accommodate additional arrestee movements and the increased length of time in custody.

On August 23rd trend data indicated an ability to reduce the CPU staffing pattern to six CO's during five weekend shifts or a reduction from 42 CO's to 37 CO's per week. This reduced the scheduled overtime from 366 to 296 hours per week.

The State's Attorney's Office hired temporary contract attorneys and limited the number of hours worked to minimize budget impacts while we evaluate this process.

7) Is the number of panel attorneys sufficient?

Initially two panel attorneys were provided to cover the 8:00 a.m.- 4:00 p.m. shift. One panel attorney was provided to cover each evening and each midnight shift. This was not sufficient, as having one panel attorney in the evening decreased productivity. As of October 1, 2014, the evening shift (4:00 p.m.-12:00 a.m.) Monday through Friday has two panel attorneys.

8) Has the process experienced any challenges? If so, what?

Practically any complicated new process will experience challenges, and this one has had a few. But one great thing about the environment at MCDC/CPU is that everyone has positive attitudes. That helps transform big problems into small ones.

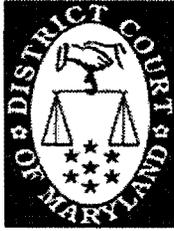
Post-Richmond decision arrestees are held in CPU for a longer period of time. This can cause them to decompensate and deteriorate medically. The wait time to appear for an initial arraignment hearing before the District Court Commissioner has increased. Due to the longer wait time, arrestees become impatient, agitated and much more aggressive towards each other and staff. This has resulted in an increase of Use of Force incidents occurring in the CPU area.

Another challenge is that panel attorneys work a different shift schedule from CO's, SAO Attorneys and Commissioners. Currently there is a one hour differential:

The interpreter service is still challenging. It is frequently slow to respond, which can add time to a hearing. Moreover, the physical layout is designed for only the commissioner and arrestee to be on the phone with the remote interpreter.

Perhaps the most substantial problem for the State's Attorney's Office is staffing the CPU Assistant State's Attorneys. In the first three months, the State's Attorney's Office has had one resignation from the contract attorneys. Recruitment and retention for contract positions has always been challenging when compared to permanent positions.

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District Court of Maryland Appointed Attorneys Program

The District Court of Maryland Appointed Attorneys Program helps provide attorney representation to indigent criminal defendants during initial appearances. The program provides compensation to attorneys who contribute their time and legal expertise.

The program was created in May 2014 in response to a ruling issued by the Maryland Court of Appeals that held that indigent criminal defendants have a state constitutional right to appointed counsel during initial appearances before a judicial officer.

- See Rules Order (<http://mdcourts.gov/rules/rodocs/183ro.pdf>) pertaining to Rule 4-213, *et seq.*
- See *DeWolfe v. Richmond*, 434 Md. 444 (2013) (<http://www.mdcourts.gov/opinions/coa/2013/34a11mr.pdf>).

This website may require <http://www.mdcourts.gov/plugins/> to view content.

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District Court of Maryland

APPOINTED ATTORNEYS PROGRAM Fact Sheet



The Maryland Judiciary is actively seeking attorneys to serve in the District Court of Maryland Appointed Attorneys Program. The program was created in response to a ruling issued by the Maryland Court of Appeals that held that indigent criminal defendants have a state constitutional right to appointed counsel at initial appearances before District Court commissioners. This program provides attorneys with the opportunity to contribute their valuable legal expertise to assist low income Marylanders, while receiving compensation from the state.

Selection of Attorneys

To be eligible for the District Court of Maryland Appointed Attorneys Program, an attorney must:

- Be licensed to practice in the state of Maryland, in good standing and not subject to any pending disciplinary proceedings;
- Comply with the District Court's training requirements (attend an in-person training or a webinar) and certify that the rules on initial appearances have been reviewed;
- Agree to compensation of \$50 an hour, plus reimbursement of mileage and tolls, for services rendered or receive pro bono credit; and
- Complete an application form and sworn statement.

Scheduling

Scheduling needs may vary according to the jurisdiction. For example, participants could elect to work for a few hours a week or as many as 40 hours each week, depending on the demand for service. Upon appointment, a District Court representative will contact the attorney to schedule his/her shifts. Unless a general appearance has been entered, an appearance by a court-appointed attorney is limited to the initial appearance and terminates automatically upon the conclusion of that hearing. The start date for the program is July 1, 2014.

Training

In-person and online training will be provided to attorneys participating in the program. For attorneys barred less than six months, the attorney must attend a two-hour training session coordinated by the Maryland Professionalism Center, Inc. Other attorneys may attend or watch the training video.

How to Apply

Interested attorneys may download an application at mdcourts.gov or email their contact information, including jurisdictional preferences to appointedattorneys@mdcourts.gov, or call 410-260-1230. Alternatively, an attorney can fill out a paper application and forward the application to:

Office of the Coordinator of Commissioner Activity
ATTN: District Court of Maryland Appointed Attorneys Program
251 Rowe Boulevard, Suite 341
Annapolis, MD 21401

For additional information, please email appointedattorneys@mdcourts.gov or visit mdcourts.gov.

MEMORANDUM

October 29, 2014

TO: Public Safety Committee

FROM: Susan J. Farag, Legislative Analyst 

SUBJECT: **Update: Implementation of the *DeWolfe* Decision at the Central Processing Unit**

The Executive forwarded certain updated information regarding processing times and other data. The changes from the original packet are as follows:

- 1) The Central Processing Unit (CPU) has processed 3,123 arrestees from July 1 through September 30th (not 3,104) (attached at ©2);
- 2) Average processing times per arrestee increased under DeWolfe, but are different than data originally given:

Average Processing Times Per Arrestee		
	Traffic Charge	Criminal Charge
Pre DeWolfe (up through June 30)	3.93 hours	5.07 hours
Post DeWolfe (beginning July 1)	7.04 hours	9.04 hours

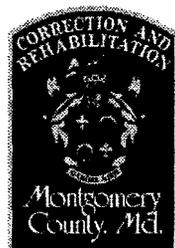
- 3) DOCR has provided a chart illustrating the percentage of arrestees who have waived the right to an attorney from July 1 through September 30 (attached at ©3);
- 4) DOCR has provided a chart illustrating total number of arrestee hours in custody compared to the total number of arrestees from January 1 through September 30, 2014 (attached at ©4). This chart underscores that while the total number of arrestees remains fairly constant month to month, the total number of hours they spend in the CPU spiked sharply in July when DeWolfe was implemented. It has fallen slightly from its high of 9,551 hours in July to 8,134 hours in September.

**MONTGOMERY COUNTY
DEPARTMENT OF CORRECTION AND REHABILITATION, DOCR**

**CENTRAL PROCESSING UNIT (CPU)
BAIL REFORM IMPACT REPORT**

**Public Safety Committee
Montgomery County Council
October 30, 2014**

9:30 A.M.



IMPACT ANALYSIS ON DOCR

- April 1st through June 30th, 2014 – 3,222 arrests processed (Pre Richmond)
- July 1st through September 30th, 2014 – 3,123 arrests processed (Post Richmond)
- Average processing time per arrestee (corrected from previous)

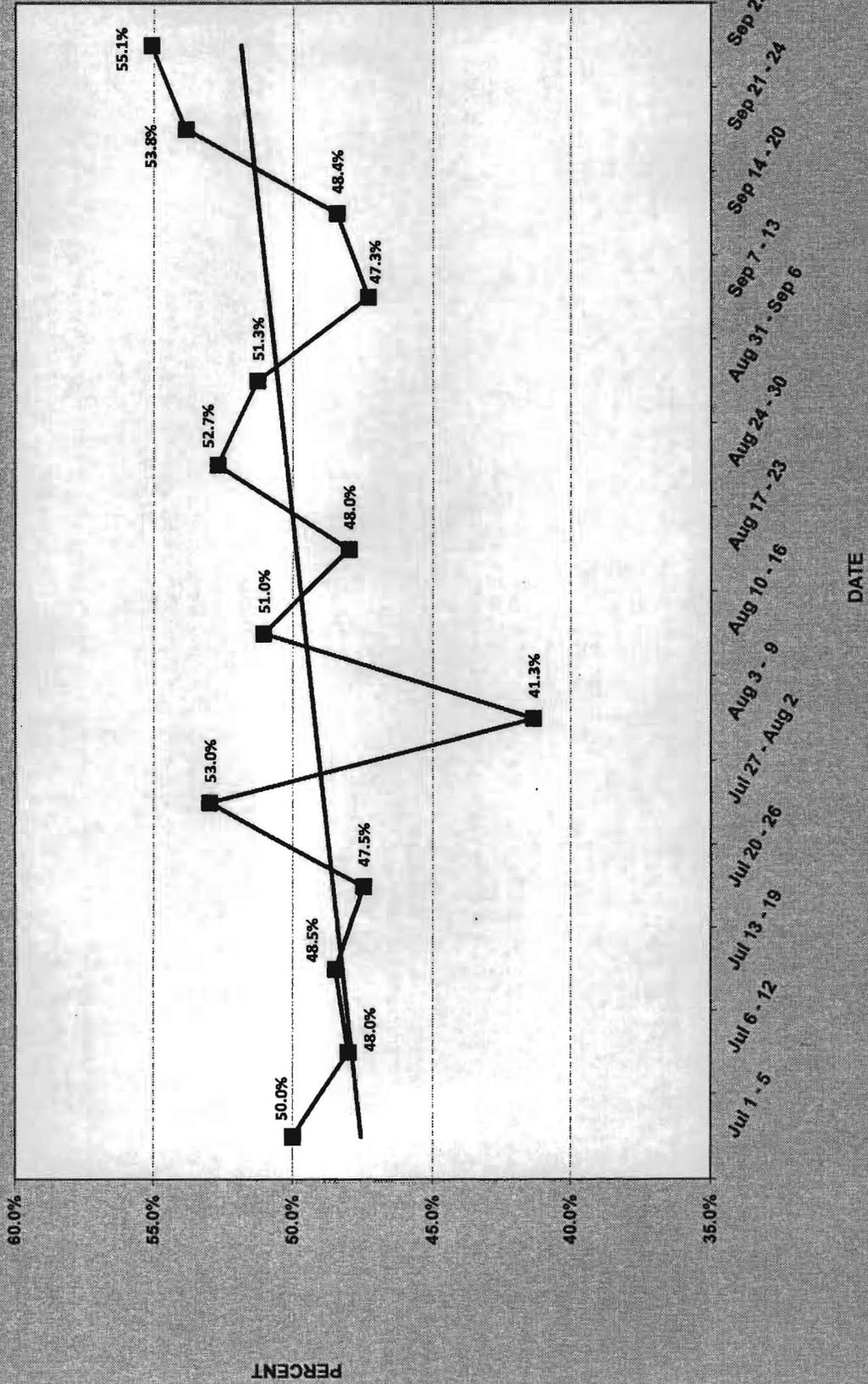
	<u>Traffic</u>	<u>Criminal</u>
Pre Richmond	3.93 hours	5.07 hours
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- Disposition at initial appearance:
 - 1,292 requested panel attorneys
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 - 48 temporary commitments
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- 201 medical assessments (not to include return follow-up care) were conducted on arrestees being held in CPU.
- 26 times police were called to return to CPU to escort an ambulance or take an arrestee to the hospital.
- Prior to the Richmond process, five Correctional Officers (CO's) were scheduled to operate the CPU Unit three shifts each day. Protocol indicated that if there were more than 15 arrestees waiting to be seen by the Commissioners, the on-duty Shift Commander was authorized to increase the staff for the on-coming shift by one CO. This resulted in an average of 7 additional correctional officer shifts per week.
- DOCR began the Richmond process by providing two additional officers, 24/7 on overtime, or 42 shifts per week (336 hours of overtime) to accommodate additional arrestee movements and the increased length of time in custody associated with Richmond. On August 23rd data indicated an ability to reduce the CPU staffing pattern to six CO's during five weekend shifts or a reduction from 42 CO's shifts to 37 CO's shifts per week. This reduced the scheduled overtime from 336 to 296 hours per week.
- The State's Attorney's Office hired temporary contract attorneys and limited the number of hours worked to minimize budget impacts while we evaluate this process.



DEPARTMENT OF CORRECTION AND REHABILITATION PERCENTAGE WAIVING ATTORNEY RIGHTS

JULY 1, 2014 - SEPTEMBER 30, 2014





DEPARTMENT OF CORRECTION AND REHABILITATION

ARRESTEE HOURS IN CUSTODY IN CPU

NUMBER OF PEOPLE PROCESSED IN CPU

JANUARY 1, 2014 - SEPTEMBER 30, 2014

