

Bail Study Fact Sheet (10-1-18)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. *Amendment VIII, U.S. Constitution*

Background

At its June 2017 State Convention, LWVMD adopted a study of corrections and bail. Several factors supported a new study. Public interest in corrections reform had been stimulated by best sellers like *The New Jim Crow* by Michelle Alexander and *Just Mercy* by Bryan Stevenson. Maryland's Justice Reinvestment Act (JRA) of 2016¹ initiated reforms designed to reduce prison populations and repeat offenses by those released from jail. In October 2016, the Maryland Attorney General issued an opinion that Maryland's pretrial system violated defendants' constitutional rights.² This prompted a judicial rule change in 2017 that revised pretrial assessment requirements and restricted the use of bail. Several bills, supported by the bail bond industry, were introduced in 2017 attempting to override this rule change, and were narrowly defeated. Although no such legislation was proposed in the 2018 session, it is likely there will be similar bills in the future.

Scope of Study

LWVMD has studied, and adopted positions on, many aspects of the administration of justice in our state, including sentencing and corrections, as summarized here:

ADMINISTRATION OF JUSTICE: Action to secure an effective, nonpartisan judiciary; and to promote fair and appropriate sentencing, including abolition of the death penalty; and a correctional system, including probation and other alternatives to incarceration, that protects society and prepares offenders for successful reintegration into the community. Action to support access by indigent criminal defendants to legal counsel at every decisional stage of the judicial process, including bail hearings (1963, 1964, 1967, 1970, 1987, 1989, 2002, 2003, 2005, 2009, 2010, 2011, 2012).³

To date, the League has not specifically considered the pretrial justice system. This study looks at detention, bail, risk assessment tools, bail bonds, and pretrial services and diversion programs.

Overview of the Pretrial Process

In our justice system, a person accused of a crime is presumed innocent until proven guilty. Consequently, our judicial standards favor allowing a person to be at liberty before trial, ideally with few limits on their daily life. . When necessary to ensure the person's appearance at trial and/or to protect the public, conditions of release may be imposed, such as regular reporting to a pretrial services officer. Pretrial detention (jail) is appropriate only when the person is deemed a flight risk or a significant threat to public safety.

When a suspect is arrested, he or she appears before a judicial officer, usually a **District Court commissioner**. Commissioners are appointed by the judges of the court and are not required to be attorneys. The judicial officer must determine whether there was probable cause for the arrest and, if so, whether the defendant should be released on personal recognizance, with conditions,

¹ [Maryland Chapter 515 2016 Justice Reinvestment Act](#)

² [AG Letter to Rules Committee on Pretrial Release](#), October 25, 2016

³ [LWVMD Study and Action](#)

or not at all. This decision is based on a set of criteria, including the nature and severity of the crime, and the defendant's employment status, criminal history and financial resources, among other factors.

For non-violent crimes and minor infractions, a judicial officer may release a defendant, particularly a first-time offender, **under personal recognizance**. The defendant pledges to appear in court when required and acknowledges that failure to appear will result in arrest.

Based on information presented at the pretrial hearing, a judicial officer may impose one or more **non-financial conditions of release** to protect public safety and ensure the defendant's appearance in court. Non-financial conditions typically consist of pretrial programs and supervision. The defendant may be required to participate in job training, educational opportunities, substance use treatment, anger management or similar programs, and to submit to testing, report regularly to a representative of the court, or wear a GPS-monitoring device.

Bail is a **financial condition of release** imposed to guarantee that a defendant will attend all court appearances. Bail is held by the court and can consist of cash, property, or intangible assets such as bank accounts or evidence of stock ownership. **Secured bail** must be posted at time of release; it can be paid by the defendant, by another person or persons over the age of 18 or by a professional bail bondsman. **Unsecured bail** is due only upon default; the court requires no upfront payment. If the defendant appears in court as required, the full bail amount is returned at the end of the trial regardless of the verdict. If the defendant fails to appear, the bail becomes the property of the court.

A **bail bond** is a method of posting secured bail. Instead of the defendant's money or other property, the court holds a bond that guarantees that the defendant will appear in court. To acquire a bail bond, the defendant pays a **bail bondsman** a fee, also called a premium, of up to 10% of the bail amount; additional collateral is sometimes required. The bondsman becomes the **surety**, or person liable for the full amount of bail if the defendant fails to appear in court. The bondsman monitors the defendant during pretrial release to ensure compliance with all imposed conditions. When the defendant attends the trial, the bond becomes void and the bail bondsman owes the court nothing. Premiums paid to bail bondsmen are not refunded.

Excessive bail is defined as "bail that is unreasonably high considering both the offense with which the accused is charged and the risk that the accused will not appear for trial."⁴ According to the National Conference of State Legislatures, the U.S. Constitution and most states have provisions which prohibit the setting of excessive bail. As of 2015, about half of the 50 states set additional requirements, including financial ability of the defendant to pay.⁵

A judicial officer orders a defendant to be held in **detention** pending trial only when no conditions of release are deemed sufficient to protect public safety and ensure the defendant's appearance in court. A defendant who is denied pretrial release must be granted a **bail review hearing** before a District Court judge immediately if court is in session, or at the next session of

⁴ Ref. Black's Law Dictionary, citing numerous decisions of the U.S. Supreme Court interpreting the Eighth Amendment, which prohibits excessive bail.

^{5R} Ref. *Guidance for Setting Release Conditions*, May 2015, Google drive

the court. Serious felony cases are reviewed at the Circuit Court level by a judge who may set conditions of release.

PRETRIAL JUDICIAL SYSTEM IN MARYLAND

History

In theory, bail satisfies the judicial system’s preference for pretrial liberty, while holding the defendant accountable for the cost to the government if he or she fails to appear in court. In practice, there have been racial and economic inequities because of the absence of standards for assessing risk and determining bail amounts, inconsistent application of judicial discretion, and a growing number of pretrial detainees leading to overcrowding in jails.

In recent years, a rising chorus called for reform of the bail system.⁶ As reported in “The High Cost of Bail,”⁷ a study published in November 2016 by the Maryland Public Defender’s Office, nearly a quarter of people incarcerated in Maryland were awaiting trial. The study also found that Maryland’s pretrial system had a disproportionate impact on racial minorities and low income communities. Over a five-year span, Marylanders paid more than \$256 million in nonrefundable bail premiums. More than \$75 million, or just under 30%, of that was paid in cases resolved with no finding of guilt, and the vast majority of it was paid by families of color. In addition, the study found that many of those in pretrial detention lose their jobs, custody of children and other support systems whether they are guilty or not. Detention also creates an increased financial burden for taxpayers.

On October 11, 2016, the Attorney General of Maryland urged the Court of Appeals to amend Rule 4-216 which provides the criteria and standards that judicial officers are to apply during pretrial hearings. The AG stated the following:

“Numerous studies have documented that Maryland’s pretrial system currently operates, though not by design or intent, in a manner that is often inconsistent with State and federal law, ineffective at addressing public safety concerns, disproportionately burdensome to communities of color, and inefficient in its use of State and local resources. Our current system also harms defendants and their families by unnecessarily depriving them of employment and income and by unnecessarily separating defendants from children and other dependents.”⁸

Of particular concern were defendants in pretrial detention solely because of inability to post bail. Existing criteria governing bail were subject to varying interpretations by judicial officers and inconsistently applied across the state. The AG’s Office issued an opinion that setting bail without individualized consideration of a defendant’s financial resources violated the Fourteenth Amendment of the U.S. Constitution.⁹ The AG’s Office also argued that bail that results in detention because of a defendant’s inability to pay would likely be judged excessive under the Eighth Amendment of the U.S. Constitution and Article 25 of the MD Declaration of Rights.¹⁰

⁶ Ref. multiple articles in resource list

⁷ [High Cost of Bail](#), Maryland OPD, November 2016

⁸ [AG Letter to Rules Committee on Pretrial Release](#), October 25, 2016

⁹ Ref. AG letter, op cit.

¹⁰ Ref. AG letter, op cit.

The Maryland Court of Appeals amended Rule 4-216 on February 7, 2017. In the amended rule, judges are instructed to (1) give preference to non-financial conditions, (2) set bail only for the purpose of ensuring future court appearances and (3) impose the “least onerous” conditions. The changes do not eliminate bail but require judges to consider the individual circumstances of the defendant, especially financial. No bail may be imposed that results in detention of the defendant solely because of inability to pay. The rule changes went into effect on July 1, 2017.¹¹

First Year Impact of Amended Rule 4-216

Multiple entities have collected data and reported on the impact of amended Rule 4-216,¹² and the findings have been consistent. The percentage of defendants released on personal recognizance and with non-monetary conditions has increased, while the percentage assigned bail has fallen significantly. At the same time, the percentage held without bail has risen sharply.

Pretrial Dispositions	July-September 2016	July-September 2017
Unsecured releases	47.1%	55.0%
Assigned bail	41.8%	22.2%
Held without bail	8.9%	21.0%

Source: [Issue Papers 2018 Legislative Session](#)

Maryland Delegate Erek Barron explained the increase in detainees as follows:

“It is true that more people are being held without bail. Typically, these are individuals who, before the new rule, would have received a very high bail by a judge on the theory that either (1) they would not be able to make that amount or (2) the high bail would keep them from doing something dangerous while out. Members of the coalition in support of the new rule, particularly domestic violence related advocates, understood that some dangerous individuals were capable of purchasing their freedom and that a high bail doesn't (make) someone less dangerous while out in the community. So, bail reform was about making sure that people aren't held simply because they are poor and that dangerous people aren't free simply because they have money. The problem we continue to have is dealing with individuals who are in a grey area in a judge's mind and making sure judges have appropriate training, information and pretrial services to make appropriate pretrial decisions regarding individuals they're not sure about.”¹³

A study prepared for the Baltimore City and Prince George's County branches of the NAACP found that average secured bail amounts declined more than 70%, and that there is better alignment between the seriousness of the charges and the bail amount after the rule change. More individuals who were charged with serious crimes were held without bond, instead of being released on bail; however, the percentage of persons charged with lower level offenses who were detained also increased. Of particular concern, the researchers found that average bail amounts

¹¹ [Maryland Court of Appeals: Defendants can't be held in jail because they can't afford bail](#). Michael Dresser, *Baltimore Sun*, February 8, 2017

¹² Ref. [MD Dept. of Legislative Services 2018 Issue Papers](#); MD Office of the Public Defender [Bail Reviewed: Report of the Court Observation Project](#); NAACP-sponsored study [Advancing Bail Reform in Maryland: Progress and Possibilities](#) and MD Administrative Office of the Courts, [Impact of Changes to PTR Criminal Tables](#)

¹³ Delegate Barron email to Edith Perry, July 4, 2018 (Google drive)

were higher for black defendants than for white, and that black defendants were more likely to be held without bail for lower level charges, both before and after the rule change.¹⁴

Data collected by the Maryland Administrative Office of the Courts shows a significant decrease in failure to appear (FTA) rates since the rule took effect. While this seems a positive trend, it may be related, at least in part, to the increased percentage of defendants held without bail.

Statewide Average as % of Total Initial Appearances	July 2016 - October 2016	November 2016 - July 2018
Assigned Cash Bail	40.2%	17.3%
Released on Own Recognizance	35.4%	42.5%
Released with Non-Monetary Conditions	9.0%	10.9%
Held without Bail	7.5%	22.4%
Failure to Appear	10.1%	8.7%

Source: *Impact of Changes to PTR Criminal Tables, July 2016-July 2018*

The Maryland Office of the Public Defender conducted a study of pretrial hearings before and after the rule change. Observers noted that judges referenced specific factors in their decision after the amended rule took effect; however, the absence of a validated risk assessment tool (see next section) continued to result in inconsistent rulings. Observers also felt that inadequate time is allotted for the determination process, with the average observed pretrial hearing lasting 6½ minutes, and the shortest only 1 minute. Because of time constraints, defendants “attend” hearings via closed circuit television, often resulting in poor communications with their lawyer and the judge, which could feel dehumanizing even if the result was fair.¹⁵

Pretrial Hearings and Risk Assessments

Rule 4-216 lays out specific criteria to be considered at the pretrial hearing. They include the nature of the crime, defendant’s prior record of appearances at trial, family ties, employment status, financial resources, reputation, character, etc., as well as the recommendation of the agency that conducts pretrial release investigations, the State’s Attorney’s recommendations and any information provided by the defendant and/or his or her attorney.

A risk assessment scoring system can be used to help judicial officers decide whether to detain defendants or impose conditions of release based on the criteria listed above. Although judicial officials retain the discretion to determine the pretrial disposition of defendants, the scoring system offers guidance and helps to provide a level of consistency.

One such system is the Public Safety Assessment (PSA) developed by the Laura and John Arnold Foundation (LJAF). Because its scores are based on analysis of 1.5 million diverse cases, the PSA eliminates factors such as race, gender, level of education, socioeconomic status, or neighborhood. According to the NAACP paper, of the six counties in Maryland that employ a risk assessment system, only Montgomery and St. Mary’s counties use a tool that has been empirically validated.¹⁶

¹⁴ [Advancing Bail Reform in Maryland: Progress and Possibilities](#)

¹⁵ [Bail Reviewed: Report of the Court Observation Project](#)

¹⁶ [Advancing Bail Reform in MD](#)

Pretrial Services

Pretrial services provide judges with alternatives to detention and bail by monitoring, training and treating defendants while they await trial. As of October 2017, 13 Maryland counties (Anne Arundel, Baltimore County, Baltimore City, Calvert, Carroll, Charles, Frederick, Harford, Kent, Montgomery, Prince George's, St. Mary's, and Wicomico) had pretrial services of varying effectiveness, and 11 counties (Allegany, Caroline, Cecil, Dorchester, Garrett, Howard, Queen Anne's, Somerset, Talbot, Washington, and Worcester) did not.¹⁷ According to the ACLU of Maryland, the increase in detentions since amended Rule 4-216 took effect is evidence of the need for expanded and improved pretrial services statewide.¹⁸

A bill to establish a Pretrial Services Program Grant Fund, sponsored by Delegate Barron, passed and was signed by the Governor in 2018. It is funded at \$1 million per year through June 30, 2023. The purpose of the Fund is to provide grants to counties to either establish pretrial services programs or to improve existing pretrial services programs. In order to receive a grant, a county must use a validated, evidence-based, race-neutral risk scoring instrument for assessing whether a defendant should be released on his own recognizance, with supervision or be held without bail. The county must also apply best practices shown to be effective in other jurisdictions and incorporate multiple levels of supervision based on defendant risk scores. Grant proposals have been solicited and will be distributed later this fall.¹⁹

Pretrial Supervision

Some defendants released without bail are monitored by county supervision units. St. Mary's County has a highly acclaimed program established in 2015 which uses an individual risk assessment to determine conditions under which a defendant may be released. In addition to reporting requirements, drug testing and, at the highest risk level, use of GPS monitoring devices, defendants may be referred to other programs such as treatment for alcohol or drug abuse. In addition to the social benefits of releasing defendants pretrial, the program has realized significant cost savings for St. Mary's County, which puts the cost of imprisoning an individual at \$149 per day while the cost of supervision is \$29 per day.

Montgomery County has used pretrial supervision since 1990. Supervision ranges from telephone contact for lower risk defendants to multiple face-to-face contacts for higher risk defendants. According to the director of the Department of Correction and Rehabilitation, fewer than 4% of defendants fail to appear for trial. Anne Arundel County uses a device that monitors for detection of alcohol and has five levels of supervision. The county also refers defendants for substance abuse treatment.

Pretrial Diversion

The Office of Problem Solving Courts is part of the Maryland Administrative Office of the Courts. It has overseen creation of problem solving courts in 21 of the 24 jurisdictions in Maryland; only Garrett, Washington and Queen Anne's counties have none. The intent of these courts is to divert defendants charged with misdemeanors and those who have special problems

¹⁷ [Fiscal Note, 2018 HB447 Pretrial Services Program Grant - Establishment](#)

¹⁸ Ref. ACLU letter to House Judiciary, January 2018 (Google drive)

¹⁹ [FY2019 Pretrial Services Program Grant](#)

away from the traditional court system and to help restore the defendant as a productive, non-criminal member of society. Successful completion of one of these court programs can also lead to expungement of the defendant's record.

Statewide, there are 32 drug courts, 6 mental health courts, 8 truancy reduction courts, 5 veterans courts, 2 re-entry courts and 1 "back on track" court. The number of services varies between counties in Maryland depending on available resources.

Drug courts work with adult defendants, juvenile offenders and parents with child welfare cases who have alcohol and other drug dependence problems. Programs are individualized but intensive and have structured treatment plans. Some allow offenders to work on community service projects as a means to dispose of their criminal cases.

Mental health courts provide an alternative for defendants with mental illness in which they voluntarily participate in a judicially supervised treatment plan developed by court staff and mental health professionals.

The Maryland Teen Court Association, an independent nonprofit, oversees teen courts in 10 counties (Anne Arundel, Baltimore City, Caroline, Charles, Harford, Montgomery, St. Mary's, Talbot and Wicomico). Teen court is a diversion program offered to first time juvenile offenders in which they admit their involvement in the offense and agree to have their case heard before a teen jury. The jury is made up of teenaged volunteers in a court setting. Judges volunteer their time and are present to answer legal questions and set the tone for the courtroom. The teen jury decides the appropriate disposition and, if the offender completes the assigned disposition within a certain period of time, the original charge is expunged.

Critics of these diversion programs say that the defendant never gets his "day in court" in the traditional sense because, in order to participate, he or she must acknowledge guilt without a trial. They also point to the large expense of these courts.

Cost of Detention

In recent years, the ACLU, Maryland Alliance for Justice Reform, LWVMD and other concerned organizations have advocated for a variety of corrections reforms aimed at reducing Maryland's incarcerated population and improving services for offenders. These efforts were instrumental in securing passage of Maryland's Justice Reinvestment Act of 2016. An important feature of this legislation was its authorization of grants to support pretrial risk assessments, services to reduce pretrial detention, specialty courts and diversion programs. Savings resulting from reductions in the prison population are intended to fund the grants.²⁰

According to the Maryland Alliance for Justice Reform, the cost for a single pretrial detainee can range from \$83 to \$153 per day.²¹ A study by the Governor's Commission to Reform Maryland's Pretrial System in 2014 estimated that the state's pretrial jail population cost between \$22 and \$44 million each year.²²

²⁰ [Maryland Justice Reinvestment Act of 2016, Chapter 515](#)

²¹ ["Bail Reform and the Cost of Detention."](#)

²² [Advancing Bail Reform in Maryland.](#)

While the cost of pretrial services varies depending on the programs offered, the experience of St. Mary's County suggests a strong financial, as well as social, benefit to release vs. detention. Maryland currently has the highest rate of decline in prison population in the nation, reflecting the impact of the 2016 Justice Reinvestment Act, as well as the shift away from bail.²³ The resulting cost savings are expected to help fund pretrial services statewide.

Bail Bond Industry

In Maryland, bail bondsmen are licensed by the Maryland Department of Insurance. To obtain a license, an individual must have at least a year's work experience in the field, pass an examination, post a surety bond and take continuing education classes. Bail bond agents usually contract with insurance companies or other credit providers to provide backup financing.

While serving a valid purpose, bail bonds can have a long-lasting destabilizing financial impact on the defendant. If the 10% bond premium is more than the defendant can afford, the bail bondsman will arrange a payment plan, with interest, that may continue to sap the defendant's income long after the trial is over. In addition, the bail bondsman acts as the collection agent, with little oversight or regulation. As reported in the NYT, in extreme cases this has led to extortion, theft and even kidnapping.²⁴

Representatives for the bail bond industry contend that the recidivism rate is higher for no bail releases than for bailed releases. Because amended Rule 4-216 states that bail can only be imposed to ensure appearance in court, they argue that the public could be endangered by defendants in felony cases who are released on personal recognizance. They also point out that risk assessment tools are not standardized and vary from one jurisdiction to another.

Other Opposition to Bail Reform

The Maryland Chiefs of Police Association and the Maryland Sheriff's Association expressed their concerns about the proposed rule change in a letter to the judges of the Court of Appeals dated December 19, 2016. They believed that the proposed changes "would send a message that the Courts do not see legal support for the arrests our officers make and more importantly that the Courts do not hold these defendants accountable for their actions." They observed that the government was not prepared to provide the services associated with the conditions of release, and feared that there would be additional pressures on law enforcement to track down defendants who fail to appear and to enforce the conditions imposed by judges. They argued that the information provided by the State's Attorney's Office and the defendant's attorney was adequate for judges to make decisions without having to follow a "hierarchy of imposing conditions." They believe that bond creates accountability. If a defendant fails to appear and bond has been provided by a surety, law enforcement has "an ally" to follow up on the defendant.

Following are arguments made by witnesses at public hearings for HB1215 during the 2017 Legislative Session and for the proposed changes to Rule 4-216 at the Court of Appeals:

²³ [*Maryland tops states in decline of prison population, report shows*](#)

²⁴ [*Extortion, or the price of freedom?*](#)

Former Solicitor General of the United States Paul Clements argued that the existing Court of Appeals Rule 4-216 was constitutional and adequate if properly enforced. He stated that “there is no constitutional right to affordable bail” and that there is a difference between excessive bail and affordable bail. Attorneys representing crime victims and child victims emphasized the reasonable expectation of victims to be safe and that the most dangerous time for victims is after a defendant has been released. Others expressed concern over public safety if more people were released pretrial. A former judge talked about the need to have someone “to chase the defendants down” when they do not appear in court. Others emphasized the need for additional pretrial services if more defendants are to be released. Several witnesses stated that Maryland already meets the gold standard for its treatment of defendants. A few witnesses said that being locked up helps addicts to overcome their addictions.

In the 2017 session of the Maryland legislature, legislation was introduced that would overturn the amendments to Rule 4-216. It was strongly supported by bail bondsmen but opposed by many who saw the rule change as appropriate. While it was passed in the Senate, it failed in the House. There was no legislation regarding bail reform introduced in the 2018 session.

Bail and Pretrial Justice Reform in Other States

The United States and the Philippines are the only countries that impose bail.

The District of Columbia eliminated money bail in the 1990's, imposing conditions on defendants such as regular check-ins by phone or in person, mandatory drug testing or GPS-equipped ankle bracelets, with the threat of jail if conditions are violated. Bail reform has since been adopted by a number of states including New Jersey, New Mexico, Connecticut, Arizona, Indiana, Illinois and the cities of New Orleans and Philadelphia.

New Mexico voters passed a Constitutional Amendment which, among other provisions, prohibits the detention of defendants who aren't deemed too dangerous or a flight risk “solely because of financial inability to pay.” Colorado, Kentucky, Illinois and Oregon have also initiated bail reform efforts. Most recently, the Philadelphia prosecutor's office announced that it would no longer impose bail for 25 crimes.

A 2016 report by the Pretrial Justice Institute cites Kentucky, Colorado, Virginia and New Jersey as models for Maryland. All four states have incorporated evidence-based risk assessments and pretrial services as part of pretrial justice reform.²⁵

²⁵ [*Finishing the Job: Modernizing Maryland's Bail System.*](#)

Consensus Discussion Questions

Some questions contain multiple options which may be combined or selected individually. You can choose more than one option. Please read each question through before answering and discuss as a whole.

- 1) A person accused of a crime should be released awaiting trial **without bail** if:
- a risk assessment tool indicates that the defendant is likely to appear in court;
 - the defendant does not pose a threat to victims, others or the community;
 - the jurisdiction has pretrial services to monitor and/or treat the defendant;

- 2) Conditions for pretrial release should be determined based on:
- a validated, evidence-based, race-neutral risk scoring instrument;
 - information presented at the initial appearance and bail review hearing;
 - an in-person assessment of the defendant whenever possible;
 - judicial discretion;

- 3) Should bail be abolished?

Even if you said, "Yes" to question 3 above, please answer question 4.

- 4) If bail continues to be authorized by law, it should be imposed:
- if there is a risk that the defendant will not appear in court for trial;
 - with consideration of the defendant's ability to pay bail;
 - if all alternatives have been considered and rejected.

- 5) Pretrial services should:
- be required in all jurisdictions;
 - provide supervision and use automated means of ensuring court appearance, when possible;
 - include a range of services including treatment programs, when possible.

- 6) Funding for pretrial services should be:
- partially funded by the state, with the balance funded by the counties
 - fully funded by the state
 - based exclusively on savings realized through reduced prison populations;
 - approved without regard to savings realized through reduced prison populations;
 - partially funded by financial contribution from defendant, when appropriate.

- 7) Should the use of bail bond agents be disallowed?

Even if you said, "yes" on question 7, please answer question 8.

8) Bail bond agents should be:

- a. closely regulated and monitored;
- b. subject to recourse for abuse;
- c. utilized to supervise released defendants and track down any who fail to appear;