

Pretrial Justice Clinic
YEAR-END
REPORT

*Outcomes,
Findings and
Recommendations*

University of Baltimore School of Law

JUNE 2017

PTJC MISSION STATEMENT

The Pretrial Justice Clinic’s mission is to provide pretrial criminal legal services to low-income Baltimore residents, to engage in systemic reform work and to educate law students in all aspects of practice in these fields. The PTJC challenges a major driver of mass incarceration in Maryland – the unjust pretrial detention of poor people accused of crimes. PTJC student-attorneys represent individual clients seeking release from pretrial detention and also collaborate on systemic reform projects. Through skills training, reflection and academic study, PTJC students learn to think critically about their role as attorneys in an era of mass incarceration and to strengthen their commitment to public service and professional responsibility.



Meet the 2016-17 team!

Top left: Fall 2016 student-attorneys Michael Bullock, Adam Shareef and Roy John Williams. (Lelia Parker is not pictured.)

Top right: Co-directors Colin Starger and Zina Makar.

Bottom right: Spring 2017 student-attorneys with Maryland Court of Appeals Judge Shirley Watts at center. From left are Aneesa Khan, Tracy Grisez, Meghan Ellis and Michelle Cole.



EXECUTIVE SUMMARY

This year-end report reviews the work of the Pretrial Justice Clinic (PTJC) at the University of Baltimore School of Law in its inaugural year and presents the PTJC's findings and recommendations based on that work. Funded by the University of Baltimore and the Abell Foundation, the PTJC opened its doors in August 2016 with the general goal of promoting pretrial justice in Baltimore City through litigation, lobbying and education. Over the past nine months, the PTJC made significant progress in each of these areas.

Litigation is the bread and butter of the clinic. Working in partnership with the Office of the Public Defender (OPD), the PTJC screened more than 75 cases and PTJC student-attorneys represented 21 low-income Marylanders in their efforts to secure pretrial release. PTJC students met with success in these efforts and most PTJC clients enjoyed favorable case outcomes.

In terms of lobbying, the PTJC worked with institutional stakeholders and the Coalition for a Safe and Just Maryland to help secure an important pretrial rule change adopted by the Maryland Court of Appeals that will go into effect July 1, 2017. When the bail-bond industry attempted to undo the rule change during the legislative session, the PTJC assisted in ultimately successful coalition efforts to defeat regressive legislation.

On the educational front, the PTJC held a well-received symposium, "Money Bail and Its Role in Mass Incarceration," which brought together advocates and stakeholders for strategic discussion and launched #BailReformMD. In addition, the PTJC helped focus the attention of media on bail issues throughout the year.

Based on its work and on an analysis of its internal data, the PTJC finds that: (1) too many Marylanders are unnecessarily incarcerated before trial; (2) the presumption of innocence is undermined in the pretrial context; and (3) the new rule from the Court of Appeals is likely to help reduce the role of money bail in Maryland but may also exacerbate the problem of excessive preventive detention. In light of these findings, the PTJC recommends more careful review of evidence before holding defendants without bail, greater collaboration to facilitate review of bail determinations, training and education about the new procedural rule, and legislation to improve pretrial data collection.

In its inaugural year, the PTJC succeeded in advancing bail-reform efforts. However, more work remains to be done. The PTJC is well-positioned to continue its work as part of the collective push for pretrial justice. The clinic has developed institutional and personal relationships with other reform advocates and has trained student-attorneys to bring passion and talent to the cause. More meaningful change is possible. ■

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CLINIC OUTCOMES

The Pretrial Justice Clinic opened its doors in August 2016. Funded by the University of Baltimore and the Abell Foundation, the PTJC formally partners with the Office of the Public Defender (OPD) to represent indigent Marylanders accused of crimes who are unnecessarily incarcerated before trial. The PTJC's goals are to:

- (1) **litigate** to establish better procedural and substantive safeguards for low-income defendants seeking pretrial release from custody;
- (2) **advocate** to end the system of money bail in Maryland and/or introduce sensible and fair legislation to reform bail standards and practices; and
- (3) **educate** the bench, bar and public about legal issues and social consequences of Maryland's current bail system and other ways to approach pretrial release.

As described in the following sections, the PTJC made substantial progress toward each of these goals in its first nine months.



At the 2017 Public Interest Attorney of the Year awards ceremony in May, PTJC student-attorney Aneesa Khan (center) is pictured with (from left) Maryland Attorney General Brian Frosh; Bar Association of Baltimore President Charles Blomquist; Thiru Vignarajah, former deputy attorney general and co-chair of the Government and Public Interest Lawyers' Committee; and Sara Gross, co-chair of the Government and Public Interest Lawyers' Committee. PTJC co-director Zina Makar (not pictured) was the recipient of the award.

LITIGATION

PTJC's litigation goal is to challenge pretrial detention practices and procedures that contribute to mass incarceration. The clinic focuses on low-income defendants seeking pretrial release from custody – defendants who are often the most vulnerable in the criminal justice system.

The PTJC, through its litigation, aims to establish better procedural and substantive safeguards for low-income defendants and to preserve the presumption of innocence. As part of the University of Baltimore School of Law's clinical program, the PTJC functions as a law office staffed by student-attorneys admitted to practice law under Maryland Rule 19-217. In the Fall 2016 semester, four student-attorneys enrolled in the PTJC. In Spring 2017, four new student-attorneys joined two returning students. Over the course of both semesters, students operated under the direct supervision of clinic co-directors Colin Starger and Zina Makar.

Per a Memorandum of Understanding between the PTJC and the OPD, the clinic receives referrals from the OPD and is authorized to “represent OPD clients in court proceedings challenging their pretrial release determinations, including but not limited to civil habeas hearings and bail re-reviews.” While the PTJC assumes responsibility for pretrial litigation, the OPD remains primary counsel for the client for trial and beyond. The PTJC handles those serious cases (felonies and violent misdemeanors) where pretrial incarceration is regarded as potentially unjust due to excessive bail or to improper findings of dangerousness.

When the OPD refers a case to the PTJC, an intake process is triggered. The purpose of intake is to evaluate whether PTJC intervention could assist the client in challenging detention and assuring the presumption of innocence. Even in cases where pretrial success seems unlikely, the clinic may accept a referral if the client's case raises important questions of law that advance the clinic's broader goals. The intake process involves substantive review of the documents and audio transcripts.

<u>PTJC INTAKE</u>	Fall 2016	Spring 2017	Total
Referrals Received by PTJC from OPD	40	37	77
Referrals Accepted as Clients for Direct Representation	10 (25%)	11 (30%)	21 (27%)
Referrals Accepted as Consults	7 (18%)	6 (16%)	13 (17%)
Referrals Declined by PTJC	23 (57%)	20 (54%)	43 (56%)

Table 1

Table 1 summarizes PTJC’s intake statistics across its first two semesters. Of the 77 total referrals from the OPD, the PTJC accepted 21 clients for direct representation. Student-attorneys visited each of these clients in a Baltimore City jail at least once (and often multiple times), interviewed them and had the client sign PTJC retainers. In addition to accepting clients for direct representation, the PTJC also provided consultation to OPD attorneys on 13 cases during the year. In consult cases, PTJC attorneys drafted litigation documents and/or produced memoranda to assist OPD attorneys in their own pretrial challenges.

After a case is accepted as a client, PTJC student-attorneys draft and then file litigation challenges to pretrial incarceration – either on the grounds that the client is being improperly held on an excessive bail or improperly held without bail (HWOB). Procedurally, these challenges take the form of a civil habeas appeal or a request for a bail re-review. *Table 2* summarizes litigation efforts across both the client and consult dockets. Overall, the PTJC directly filed challenges for 15 clients and helped file three consult challenges.¹ In some accepted cases, the clinic drafted litigation but was unable to file before the pretrial challenge “mooted out” because the client secured release from custody after posting bond or having the charges dismissed.

<u>LITIGATION FILING</u>	Fall 2016	Spring 2017	Total
Number of Clients	10	11	21
Client Challenges Filed	9 (90%)	6 (55%)	15 (71%)
Client Challenges Mooted before Filing	1 (10%)	5 (45%)	6 (29%)
Number of Consults	7	6	13
Consult Challenges Filed	2 (29%)	1 (17%)	3 (23%)
Consult Challenges Mooted before Filing	2 (29%)	1 (17%)	3 (23%)
Consult No Pretrial Challenge	3 (42%)	4 (66%)	7 (54%)

Table 2

Once a challenge is filed, PTJC student-attorneys engage in intense preparations for potential oral argument. In habeas challenges, the argument is that error infected the original bail hearing, rendering detention illegal. If the court grants a habeas challenge, the remedy is a new bail review hearing. In bail re-review cases, the argument is that changed circumstances warrant new pretrial release conditions. After any bail review hearing (following from a successful habeas or a grant of a re-review), the court may order release, set a bail or hold without bail.

¹ This statistic does not separately count multiple challenges filed on behalf of a single client. In two cases, the PTJC filed more than one challenge on behalf of a single client seeking pretrial release.

Table 3 details the litigation outcomes from the PTJC’s docket. In 10 of 15 cases (67%), the PTJC had its habeas or re-review request granted. In 3 of those 10 cases, the client obtained pretrial release. Importantly, in one-third of cases filed, the litigation was mooted because the client posted bond or had the charges dropped. In the remaining 7 of 10 cases where a habeas or re-review request was granted, the court implicitly acknowledged previous error but still detained the client (HWOB) or set bail at an amount the client could not make.

<u>PRETRIAL LITIGATION OUTCOMES</u>	Fall 2016	Spring 2017	Total
Number of Client Challenges Filed	9	6	15
Challenge Granted – Client Released	1 (11%)	2 (33%)	3 (20%)
Challenge Granted – Release Not Secured	3 (33%)	4 (67%)	7 (47%)
Challenge Denied	2 (22%)	0 (0%)	2 (13%)
Challenge Mooted after Filing	3 (33%)	0 (0%)	3 (20%)
Number of Consult Challenges Filed	2	1	3
Consult Challenge Granted – Client Released	1 (50%)	0 (0%)	1 (33%)
Consult Challenge Denied	1 (50%)	0 (0%)	1 (33%)
Consult Challenge Mooted after Filing	0 (0%)	1 (100%)	1 (33%)

Table 3

While the initial success rate for pretrial litigation may not seem very high, in context these outcomes are significant. First, the PTJC deliberately focuses on cases where the accused faces felony and/or serious misdemeanor charges.² Though such defendants are theoretically entitled to the presumption of innocence, the PTJC has found, in practice, that this presumption is not respected. (*For more analysis of this specific problem, see Finding #2.*) Second, the ultimate case outcomes for PTJC clients has been high. As detailed in Table 4, 12 of the PTJC’s 21 clients (57%) received an entirely favorable outcome – dismissal of all charges. Only 5 of the 21 clients (24%) received a less-than-favorable outcome – conviction or a guilty plea on at least one charge.

² More than half of the PTJC clients faced first- or second-degree assault charges, which carry penalties of up to 25 or 10 years, respectively. In fact, only one client faced a charge with less than a 10-year penalty – a Controlled Dangerous Substance (CDS) possession charge carrying a four-year penalty.

<u>CASE OUTCOMES</u>	Fall 2016	Spring 2017	Total
Clients	10	11	21
Favorable (<i>nolle prosequere</i> or acquittal - all charges)	3 (30%)	9 (82%)	12 (57%)
Partially Favorable (PBJ or stet – all charges)	2 (20%)	1 (9%)	3 (14%)
Less Favorable (conviction or guilty plea - at least one charge)	5 (50%)	0 (0%)	5 (24%)
Still Pending (<i>as of 5/31/17</i>)	0 (0%)	1 (9%)	1 (5%)
Consult	7	6	13
Favorable (<i>nolle prosequere</i> or acquittal - all charges)	2 (29%)	2 (33%)	4 (31%)
Partially Favorable (PBJ or stet – all charges)	1 (14%)	0	1 (8%)
Less Favorable (conviction or guilty plea - at least one charge)	2 (28%)	3 (50%)	5 (38%)
Still Pending (<i>as of 5/31/17</i>)	2 (29%)	1 (17%)	3 (23%)
Declined	23	20	43
Favorable (<i>nolle prosequere</i> or acquittal - all charges)	13 (56%)	7 (35%)	20 (48%)
Partially Favorable (PBJ or stet – all charges)	4 (17%)	2 (10%)	6 (13%)
Less Favorable (conviction or guilty plea - at least one charge)	5 (22%)	0 (0%)	5 (11%)
Still Pending (<i>as of 5/31/17</i>)	1 (4%)	11 (55%)	12 (30%)

Table 4

The PTJC's pretrial case outcomes, though small in overall number, demonstrate success in identifying and litigating meritorious cases. Further, PTJC clients who received favorable or even partially favorable case outcomes highlight the incidence of unnecessary incarceration. Pretrial challenges were critical to help clients expose improper practices and to vindicate the presumption of innocence. In sum, the data show that the need for vigorous pretrial litigation remains high. The PTJC is committed to creatively meeting this need, especially as the new rule adopted by the Maryland Court of Appeals goes into effect. ■

LEGISLATION AND LOBBYING

The PTJC works in coalition with advocates, community groups and other stakeholders to lobby for fair bail practices in Baltimore City and for the elimination of Maryland's unjust money bail system.

From its inception, the PTJC has been involved in collective advocacy that led to the adoption of a significant new pretrial release rule by the Court of Appeals in February 2017. Effective July 1, 2017, this new rule promotes pretrial release on personal recognizance or unsecured bond and ensures that every defendant's ability to pay will be considered when money bail is set. Significantly, the new rule makes clear that bail should never be used to protect public safety.

Early in the process, the PTJC provided expert opinion to stakeholders to challenge the constitutionality of Maryland's bail system. With Professor Doug Colbert of



This New York Times Op-Ed written by co-Director Zina Makar was cited to numerous times in testimony before the Court of Appeals as it weighed the rule change.

of Maryland and Baltimore criminal and constitutional law professors and submitted additional letters to support the change.

Additionally, the PTJC was proud to be a founding member of the **Coalition for a Safe & Just Maryland**. This coalition came together to promote the cause of pretrial justice in Maryland and includes the following 13 organizations, in addition to the PTJC: Power Inside, Leaders of a Beautiful Struggle, Maryland Office of the Public Defender,

Public Justice Center, Progressive Maryland, ACLU of Maryland, Justice Policy Institute, Open Society Policy Center, Pretrial Justice Center, Job Opportunities Task Force, Baltimore Action Legal Team, Out for Justice and University of Maryland Access to Justice Clinic. With these community advocates, the PTJC worked to producing positive change in Annapolis that would honor the rule change adopted by the Court of Appeals.

As part of the Coalition, PTJC student-attorneys attended weekly teleconferences to discuss lobbying strategies and community outreach. PTJC students also wrote and distributed talking points on various pending bills to House and Senate members. During the legislative session, law professors from both Maryland law schools stayed united and submitted written testimony on proposed bills and countered arguments by the bail bond industry that pushed to preserve the current system.

In addition to producing written testimony, co-directors Makar and Starger worked with PTJC students to provide on-the-ground support to Coalition lobbying efforts during the legislative session. In April, students attended the United for Justice Lobby Day in Annapolis, contributing their efforts and voices against proposed legislation that ran contrary to the Court of Appeals rule change.



Ultimately, no bail legislation passed during the session. Given the well-funded efforts by the bail bond industry to pass a bill that would undo the rule change, this outcome advanced the reform effort in Maryland. Preserving the rule change was critical to providing institutional players the opportunity to acclimate to the change and for advocates to observe and study its impact and ultimate effect on incarceration rates, especially in poor communities and communities of color. In the year to come, the PTJC looks forward to continued reform advocacy with the Coalition for a Safe and Just Maryland. ■

Student-attorneys Michelle Cole, Meghan Ellis and Michael Bullock march on United for Justice Lobby Day in Annapolis alongside Del. Erek Barron (second from left). The students' signs say: Expand Expungement, #End\$Bail, Stop Punishing Poverty.

EDUCATION

A fundamental goal for the PTJC is to educate the public, bench, bar, students, clients and other key players within our criminal justice system about pretrial justice issues. The PTJC has provided education in various forms to reach different audiences.

On Nov. 17, 2016, the PTJC hosted a symposium entitled “Money Bail and its Role in Mass Incarceration.” The symposium convened a wide variety of stakeholders from the national to the state level and featured panels on framing the issues, pretrial data and evidence-based reform, as well as on potential solutions. Attendees engaged in lively discussion and strategized on how to combat the marginalization of poor communities and communities of color destabilized by unnecessary incarceration and money bail. The

symposium also produced a [Resource Page](#) that collected a variety of useful reports, articles and other references and even introduced the successful [#BailReformMD](#) hashtag to the public.

Baltimore circuit judge was recorded saying why she set high bail



By Justin Fenton
The Baltimore Sun

SHARE THIS



A Baltimore judge was recorded saying she set a high bail knowing a defendant couldn't pay

OCTOBER 28, 2016, 5:28 AM

The University of Baltimore's legal clinic is challenging a ruling by a Baltimore circuit judge who was recorded saying that she set a high bail knowing it likely would keep the defendant behind bars.

Maryland law requires that bail be used only to assure a defendant shows up for trial, though many defense lawyers believe judges routinely skirt that standard. The comments by Judge Yolanda Tanner and the challenge by the UB Pretrial Justice Clinic come amid an emerging debate about whether the state's cash bail system is unfair and should be scrapped.

State Attorney General Brian Frosh released an opinion this month saying Maryland's system of holding defendants in jail when they can't afford to pay cash bail would likely be found unconstitutional. Judges and court commissioners must take into account the accused's ability to pay before setting bail, he said.

Student-attorney Adam Shareef challenges circuit court judge's ruling to set his client's bail to \$750,000, an amount she should not afford.

continues to explore different ways to collect and analyze pretrial data. Beyond tracking its own internal data, the PTJC has started working with the OPD, the Department of Public Safety and Correctional Services, the courts and others to develop reliable channels to make criminal justice data more accessible. Although technological and bureaucratic obstacles abound, the PTJC has made progress and looks forward to the further development of public data channels. ■

By shining a spotlight on unjust bail practices, the PTJC has helped raise the level of discourse around bail reform in Maryland. Notably, PTJC litigation has brought a media spotlight to bail issues in outlets including *The Washington Post*, *The Daily Record* and *The Baltimore Sun*.

Finally, as part of its educational efforts, the PTJC

FINDINGS

Based on our experience and research over the past nine months, the PTJC has made three basic findings about the state of pretrial justice in Maryland:

- (1) Maryland's bail scheme results in too many members of its community being unnecessarily incarcerated before trial;*
 - (2) the presumption of innocence is undermined in the pretrial context; and*
 - (3) the new Court of Appeals rule has the potential to reduce reliance on money bail but could increase the erroneous reliance on preventive detention.*
-

Finding #1: Too many Marylanders are unnecessarily incarcerated before trial

Thirty years ago, Chief Justice Rehnquist wrote in *United States v. Salerno* that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” These words expressed the understanding that incarceration prior to trial should be limited because those merely accused of crimes are still presumed innocent. Defendants facing criminal charges should be incarcerated pretrial only if they are likely to fail to appear at trial or if there is “clear and convincing evidence” that they pose a danger to the community. Any time spent incarcerated before trial when charges are ultimately dropped by prosecutors or when defendants are acquitted at trial is by definition unnecessary and unjust. This unnecessary jail time is highly disruptive to individuals, can never be recovered and should be avoided whenever possible.

The tragedy of unnecessary pretrial incarceration begins with a recognition that it is not at all uncommon for prosecutors to drop all charges (*nolle prosequere*) against defendants or for defendants to be acquitted on all charges at trial. As shown previously in *Table 4*, 57% of the PTJC’s clients (12/21) ultimately had their charges dropped or were acquitted. In addition, 31% of consults (4/13) and 48% of declined cases (20/43) also ended with entirely favorable outcomes for defendants. For all of these legally innocent individuals, any time spent incarcerated pretrial was unnecessary.

Yet the amount of unnecessary time actually served is staggering. As detailed in *Table 5* below, 11 of the PTJC’s 21 clients served a total of 307 days in jail before all of their charges were dropped by *nolle prosequere*. Including consults and declined cases, the PTJC’s docket saw 32 individuals spend a total of 1,015 days locked up on charges that came to nothing. The average time these Marylanders were incarcerated before their legal innocence was vindicated was 32 days, while the median time was 29 days – and this does not include the unnecessary time served by defendants who were ultimately acquitted at trial. Across the PTJC referral docket, four individuals spent a total of 498 days (average of 125 days) incarcerated before acquittal.

PRETRIAL DETENTION LENGTH	Fall 2016	Spring 2017	Total
Nolle Prose			
Clients (number/ total days)	2/65	9/242	11/307
Consults (number/ total days)	2/123	1/46	3/169
Declined (number/ total days)	12/366	6/173	18/539
<i>Total (number/total days)</i>	<i>16/554</i>	<i>16/461</i>	<i>32/1015</i>
<i>Average Nolle Prose Pretrial Detention Days</i>	<i>35</i>	<i>29</i>	<i>32</i>
<i>Median Nolle Prose Pretrial Detention Days</i>	<i>27</i>	<i>29</i>	<i>29</i>
Acquittal			
Clients (number/ total days)	1/225	0/0	1/225
Consults (number/ total days)	0/0	1/30	1/30
Declined (number/ total days)	1/215	1/28	2/243
<i>Total (number/total days)</i>	<i>2/440</i>	<i>2/58</i>	<i>4/498</i>
<i>Average Acquittal Pretrial Detention Days</i>	<i>220</i>	<i>29</i>	<i>125</i>
<i>Median Acquittal Pretrial Detention Days</i>	<i>220</i>	<i>29</i>	<i>123</i>
Stet + Probation before Judgment			
Clients (number/ total days)	2/101	1/30	3/131
Consults (number/ total days)	1/156	0/0	1/156
Declined (number/ total days)	4/129	2/54	6/183
<i>Total (number/total days)</i>	<i>7/386</i>	<i>3/84</i>	<i>10/470</i>
<i>Average Stet + PBJ Pretrial Detention Days</i>	<i>55</i>	<i>28</i>	<i>47</i>
<i>Median Stet + PBJ Pretrial Detention Days</i>	<i>50</i>	<i>30</i>	<i>40</i>
Guilty Plea			
Clients (number/ total days)	5/893	0/0	5/893
Consults (number/ total days)	1/62	2/150	3/212
Declined (number/ total days)	2/400	0/0	2/400
<i>Total (number/total days)</i>	<i>8/1365</i>	<i>2/150</i>	<i>10/1515</i>
<i>Average Guilty Plea Pretrial Detention Days</i>	<i>171</i>	<i>75</i>	<i>152</i>
<i>Median Guilty Plea Pretrial Detention Days</i>	<i>164</i>	<i>75</i>	<i>128</i>
Conviction			
Consults (number/ total days)	1/32	1/43	2/75
Declined (number/ total days)	3/85	0/0	3/85
<i>Total (number/total days)</i>	<i>4/117</i>	<i>1/43</i>	<i>5/160</i>
<i>Average Guilty Plea Pretrial Detention Days</i>	<i>29</i>	<i>43</i>	<i>32</i>
<i>Median Guilty Plea Pretrial Detention Days</i>	<i>30</i>	<i>43</i>	<i>32</i>

Table 5

While such grim statistics alone give pause, they do not tell the whole story. Beyond the numbers are real people whose lives are brutally affected. PTJC client George Peters (a pseudonym) provides a typical example:

Mr. Peters is a 35-year-old African-American veteran who worked full-time. He had primary custody of his two children – ages 9 and 7 – and worked to put them through private school. After a dispute with a former girlfriend, a warrant was issued for Mr. Peters' arrest. Mr. Peters strongly contested the assault charges and turned himself in as soon as he learned of the warrant. Despite having regular employment, strong community ties, no serious criminal record and no failures to appear in court, Mr. Peters was held without bail (HWOB). Just as PTJC students were about to file a habeas petition challenging this detention, prosecutors dropped all charges. Mr. Peters had spent 43 days in jail. During this time, Mr. Peters lost his job and custody of his two children – they were taken out of private school in Baltimore and sent to live with their mother in Pennsylvania. Mr. Peters' car was also towed and he incurred significant expenses for the cost of storing his car. The case against Mr. Peters was always weak and the evidence of his dangerousness rested solely the uncorroborated and ultimately rejected allegations in the complaint. Yet he was held unnecessarily and released after 43 days without compensation or apology.

Unfortunately, Mr. Peters' case is neither uncommon nor extreme. Too many Marylanders share similar experiences. Beyond the financial strain, it is difficult to quantify the losses many of our clients face from prolonged pretrial detention, as they could be intangible, such as lost time that could have been spent with a loved one who passed away during the client's jail term.

While cases involving *nolle prosequere* or acquittal are indisputable, it also seems fair to include those cases resolved by placement on the stet docket or through probation before judgment (PBJ) as examples of unnecessary incarceration. As *Table 5* shows, 10 individuals across the PTJC's referral docket spent an average of 47 days locked up before their cases were resolved through stet or PBJ. No convictions were obtained in any of these cases and so pretrial incarceration seems unjustly punitive.

The harsh conditions and destructive impact on people's lives must also be kept in mind when looking at the Guilty Plea statistics in *Table 5*. Across the PTJC referral docket, 10 defendants eventually pled guilty after spending an average of 152 days (median 128 days) incarcerated. While it is impossible to prove as a practical matter in any given case, anecdotal data suggest that at least some defendants plead guilty and accept time served as a way to escape continued confinement. Certainly, PTJC students reported that they felt this to be the case on occasion. ■

Finding #2: The presumption of innocence is undermined in the pretrial context

Although all would admit that defendants accused of crimes are presumed innocent, the PTJC has found this theoretical presumption is not respected in practice. Instead of viewing the accused as legally innocent, judges and prosecutors (and even pretrial service agents) too often presume guilt based on the mere fact that charges have been brought. As already shown, a presumption of guilt is empirically unsound – at least in Baltimore City – as charges are frequently dropped and defendants are often acquitted. In this context, it seems unwise to effectively interpret law aimed to favor defendants in a way that disfavors them. Yet this is precisely what the PTJC has observed.

Two practices commonly observed in District Court typify the legal interpretation that the PTJC sees as legally unsound and undermining the presumption of innocence. The PTJC has brought challenges to these practices with some success in the Circuit Court through habeas corpus litigation. However, district courts have not yet recognized these practices as the legal errors they are.

Legal Error #1: Standing alone, arrests that did not result in conviction should not be considered as a factor authorizing pretrial detention under MD Rule 4-216.

The PTJC has had numerous clients labelled “dangerous” based solely on their criminal records. However, for many of those clients, relatively nonviolent records were made to appear more sinister by the inclusion of arrests for violent crimes that did not result in conviction. This introduction of arrests as “proof” of dangerousness is all too common in District Court. Prosecutors and pretrial services routinely cite to nonconviction arrest records and judges rely on this when denying bail or setting very high bail amounts.³

As the PTJC has consistently argued, the practice violates the law. The plain language of Md. Rule 4-216 specifically includes “convictions” as a factor to be considered at bail review but notably fails to include arrests. Of course, not considering arrests makes perfect sense because the mere fact of an arrest proves nothing other than the one-time existence of an unsubstantiated allegation. Given how frequently charges are dropped, using arrests that did not result in conviction to justify a finding of dangerousness creates a vicious cycle. Accusations become equated with proof and unnecessary pretrial detention follows. Moreover, consideration of arrests that do not result in conviction disproportionately harms the poor. Such arrests are almost always eligible for expungement and only those individuals who do not have the means to pay the \$30 filing fee suffer.

³ There are instances in which arrests that do not result in conviction may properly be used during a bail hearing, such as when the defendant has evaded prosecution, but State has provided evidence to substantiate that proposition. This admission of “substantiated” arrests is also accepted in the sentencing context.

Legal Error #2: Standing alone, the existence of a charging document alleging serious criminal activity should not result in a finding of dangerousness justifying detention.

Since the PTJC focuses on felonies and serious misdemeanors, almost all of our clients are alleged to have committed violent crimes. However, an allegation of dangerous behavior is not the same as “clear and convincing” proof of dangerousness – the standard required to detain defendants as recognized by *United States v. Salerno* and the seminal Maryland case *Wheeler v. State*. Yet all too often, courts and prosecutors effectively conflate the existence of a charging document alleging serious crimes with proof of dangerousness. The PTJC firmly believes this is a legal error.

The existence of a valid arrest and charging document means only that probable cause has been found. A finding of probable cause permits the state to initiate a prosecution, but it does not provide clear and convincing evidence sufficient to deprive a person of his or her liberty before trial. If the state wants to detain a defendant based on the seriousness of the crime charged, it should be held to its burden to produce proof beyond the unsubstantiated allegations of dangerousness in a charging document.

Together, the two legal errors identified indicate a lack of respect for the presumption of innocence. The experience of PTJC client Shara Gaines (a pseudonym) exemplifies both errors and the injustice that results:

Ms. Shara Gaines is a 51-year-old African-American woman who has led a hard life close to the streets. For over two decades, she struggled with heroin addiction and mental health issues and has a history of petty convictions. One day she was arrested on first-degree assault charges. Despite her advanced age, enrollment in methadone treatment and the weakness of the case against her, Ms. Gaines was labelled as a dangerous criminal and held without bail.

Instead of recognizing Ms. Gaines as a struggling middle-aged woman, the system typecast her as a dangerous criminal mastermind, due in large part to her several prior arrests for violent crimes. However, none of those crimes resulted in conviction. The PTJC filed a habeas challenging her detention and a new hearing was granted. At this hearing, the prior arrests that did not result in conviction were no longer considered. However, the state maintained that the current allegation that Ms. Gaines had used a knife was sufficient to find her dangerous. Although the PTJC protested and stated that the allegation was entirely suspect, the judge agreed with the state and continued pretrial detention.

While in jail, Ms. Gaines received minimal treatment for her addiction and mental health issues and suffered severe emotional distress. After 225 days of incarceration, Ms. Gaines won a full acquittal at trial. The case against her was weak. Yet now the fact she was arrested for a crime involving a knife remains a stain on her record and could be used to detain her unjustly in the future. ■

Finding #3: New rule likely to help reduce role of money bail but may exacerbate the problem of those held without bail (HWOB)

Although the new rule on pretrial release adopted by the Court of Appeals technically does not go into effect until July, our observations and publicly available data suggest that implementation has effectively begun. As a practical matter, the rule is consistent with AG Frosh’s October advisory letter and with Maryland District Court Chief Judge John Morrissey’s subsequent email memo directing all Maryland judicial officers not to use money bail as a form of conditional release if dangerousness is the sole concern. The trends initiated by AG Frosh and Chief Judge Morrissey’s actions likely preview what is to come with the new rule.

The first trend we identify is positive: With the new rule, there should be less reliance on money bail that individual defendants cannot afford. In our first semester, the PTJC observed that district courts regularly ordered pretrial release with impossible-to-meet monetary conditions often ordered without making individualized inquiries into the defendant’s ability to pay. Courts incorrectly used money to “place a price tag” on the offense charged – the more serious the crime, the higher the bail set. As *Table 6* shows, during the Fall semester, 75% of the PTJC’s referrals (30/40) had money bail set. The average bail amount imposed was \$140,200 (median: \$62,500), amounts well beyond the means of almost all defendants. By the Spring semester, only 24% (9/37) of our referrals involved money bail. The average bail charged dropped as well. This is consistent with public reports that the imposition of outrageously high bail is on the decline.

<u>PRETRIAL STATUS AT INTAKE</u>	Fall 2016	Spring 2017	Total
Referrals Accepted as Clients – Held without Bail	3	9	12
Referrals Accepted as Consults – Held without Bail	2	5	7
Referrals Declined – Held without Bail	5	14	19
Total Referrals Received – Held without Bail	10 (25%)	28 (76%)	38 (49%)
Referrals Accepted as Clients – Secured Money Bail	7	2	9
Referrals Accepted as Consults – Secured Money Bail	5	1	6
Referrals Declined – Secured Money Bail	18	6	24
Total Referrals Received – Secured Money Bail	30 (75%)	9 (24%)	39 (51%)
Total Amount of Money Bail Imposed	\$140,200 (Average) \$ 62,500 (Median)	\$50,555 (Average) \$50,000 (Median)	\$119,513 (Average) \$ 50,000 (Median)

Table 6

While the decline of money bail is welcome, the PTJC has found an emerging trend that is disturbing: an increased use of preventive detention (HWOB). Thus, 76% of the clinic's referrals in the Spring (28/37) involved HWOB determinations. This again is consistent with early reporting from around the state that HWOB rates have risen precipitously since the AG letter, Morrissey memo and passage of the rule change.

It is easy to see how HWOB rates might rise. Given inadequate respect for presumptive innocence pretrial, it is predictable that those simply charged with violent crimes will risk increased pretrial detention. However, widespread pretrial incarceration will not solve Baltimore's very real violent crime problem. As demonstrated, far too many accusations of violence are unfounded or unprovable. Subjecting large numbers of these legally innocent individuals to incarceration is unnecessary and counterproductive. It will not increase the trust of the community in the criminal justice system and it could even exacerbate the problem. The PTJC urges that institutional players play close attention to this developing HOWB trend so that preventive detention does not become the new norm, filling the void of money bail. ■

The Dehumanizing Disconnect of CCTV

Since December 2016, PJTC student-attorneys observed over a dozen bail review dockets in Baltimore City. Throughout these dockets, students noticed a frequent problem in which defendants' appearance in court via CCTV hindered their ability to effectively communicate with their attorneys. The CCTV set-up renders impossible private exchanges between client and attorney that typically occur through brief whispers at the trial table. When bail review defendants spoke up on CCTV, the judge or defense counsel would warn the defendant to remain silent to prevent any breach of the attorney-client privilege. While preserving privilege is vital, inhibiting attorney-client communication is potentially harmful. The difference between release on recognizance or incarceration can depend on information known only by the defendant. Meaningful access to counsel during bail hearings can be critical at this stage. The experience of PTJC client Alfred Butler (a pseudonym) speaks directly to this problem:

Mr. Butler, a 58-year-old African-American man, had no recent criminal history nor any failures to appear on his record. During Mr. Butler's initial bail hearing on misdemeanor assault charges, the state's attorney alleged that Mr. Butler was a flight risk because his record indicated attempts to hide his identity by using various dates of birth and Social Security numbers. Appearing via CCTV, Mr. Butler immediately spoke out in an attempt to correct the record. As it happens, Mr. Butler had been the victim of identity theft, and he had proof to support his statements. However, he had not told his attorney this information earlier, not knowing that it would be relevant. The judge seemed annoyed when Mr. Butler spoke up on the screen and did not ask further questions about the identity mix-up. Later in the hearing, the judge directly asked Mr. Butler how much he could post in bail. Unable to consult his attorney, Mr. Butler responded that he could only afford \$1,000-\$2,000 in bail. The judge indicated that amount was "not enough" and held him without bail. Mr. Butler's case was subsequently dismissed after he spent 42 days in jail.

Had Mr. Butler been able to communicate with his attorney during the hearing, counsel could have fully refuted the state's allegations about his flight risk and Mr. Butler might never have been unnecessarily incarcerated.

RECOMMENDATIONS

In the clinical setting, the PTJC teaches its student-attorneys the value of communication and collaboration. Over both semesters, PTJC students often noticed gaps in communication among the courts, prosecutors and pretrial services that hindered potential collaboration among stakeholders. The following recommendations aim to address gaps observed by the PTJC.

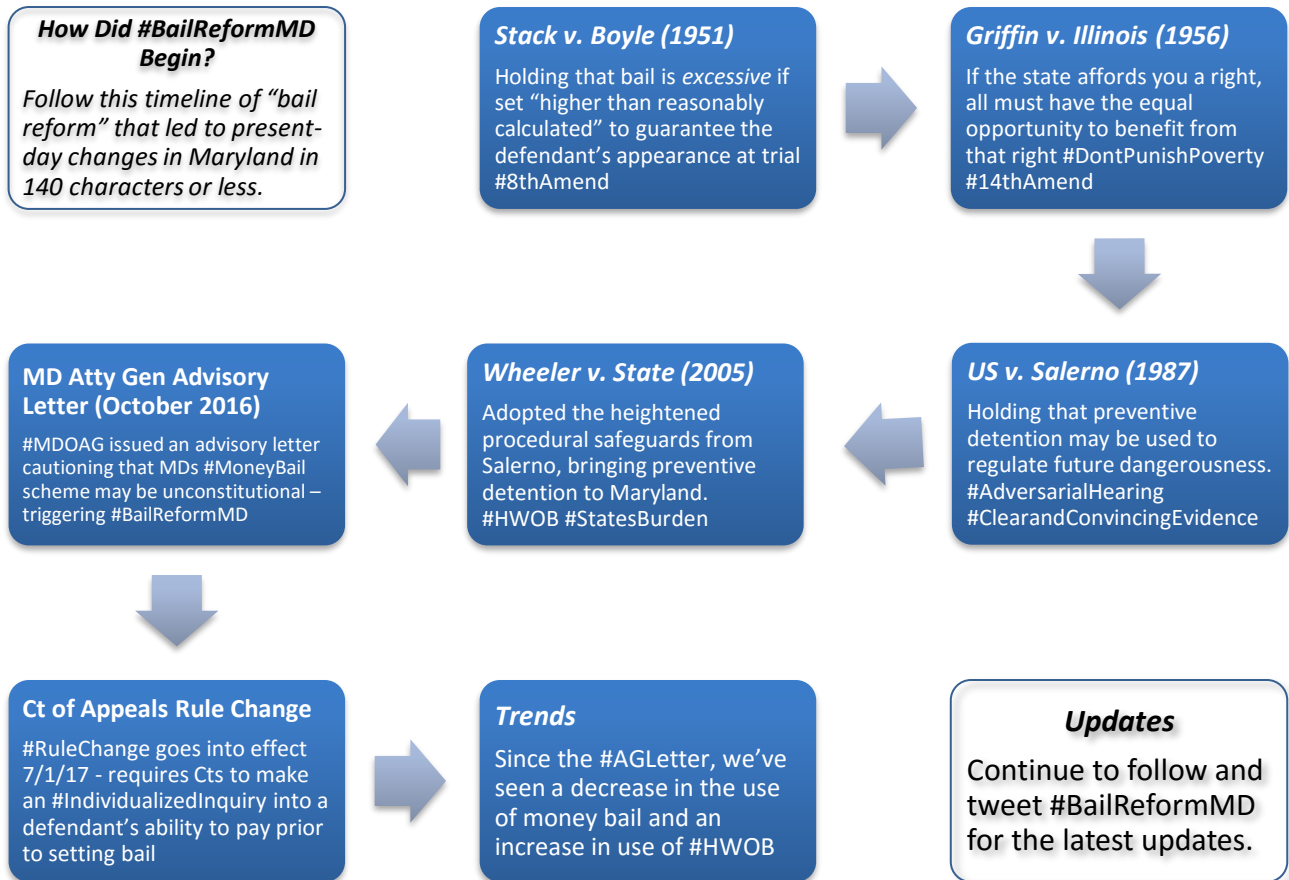
Recommendation # 1: The State’s Attorney’s Office and Pretrial Services should encourage their line attorneys and agents to produce meaningful evidence of dangerousness when recommending “no bail” at initial hearings. As noted above, the PTJC has found that too often “no bail” (HWOB) recommendations are made based solely on the charge itself rather than on a proper assessment of risk. While pretrial detention may well be justified in some cases, prosecutors and pretrial services should not recommend detention unless they have meaningfully evaluated evidence of dangerousness. Standing alone, prior arrests that did not result in conviction should not count in the dangerousness calculus. Neither should raw allegations in a charging document. Those recommending HWOB should therefore attempt to verify or substantiate allegations and not conflate “probable cause to arrest” with “clear and convincing evidence of dangerousness.” By taking additional investigative steps, prosecutors and pretrial agents could help alleviate some of the inaccuracies in bail determinations and reduce the number of individuals who are unnecessarily incarcerated.

Recommendation #2: Courts and Pretrial Services should collaborate with defense attorneys and prosecutors to expedite bail review hearings and habeas petitions to reduce unnecessary time incarcerated. The process of challenging bail determinations currently moves too slowly to help many who are unnecessarily incarcerated. As shown by *Table 2* and *Table 3*, 29% of PTJC clients had their challenges mooted before filing a habeas, while 20% of cases became moot after filing. Mootness particularly disadvantages our misdemeanor clients. Currently, it takes approximately 3-6 weeks after arrest for a misdemeanor case to resolve. Securing review of an initial bail hearing often takes 2-4 weeks. While it takes only a week to a week-and-a-half for the PTJC to file a petition, there is often a multiple-week bottleneck with the process of the court ordering an audio transcript of the initial bail hearing and reviewing the filed petition. Through communication and collaboration, it should be possible to expedite this process and facilitate quicker re-review (be it through bail modification or habeas corpus). Such streamlining would help the justice system cut down on its rate of unnecessary incarceration.

Recommendation #3: Judicial officers and attorneys should engage in training on the new rule and continuing legal education to stay up to date on case law surrounding bail. For the new rule to have the beneficial effects intended by the Court of Appeals, training and continuing legal education are crucial. All institutional players – defense attorneys, prosecutors and judicial officers alike – need to understand the rule’s requirements and should also become familiar with how other jurisdictions interpret similar statutes. Regular training should help lessen the problem of inconsistent application of rules across the district and circuit courts. Educational efforts should include exposure to case law from sister jurisdictions such as D.C., where the requirements of proof in preventative detention hearings have been meaningfully elaborated and explored.

Recommendation #4: Legislators should enact statewide reporting requirements to assist in judicial oversight of incarcerated persons. To evaluate the impact of the new rule and to assess ongoing reform efforts, data is key. Currently, there is no easy way for researchers and stakeholders to obtain regularly updated pretrial data. The PTJC thus recommends that legislators enact data collection and reporting initiatives across the state. Such initiatives should include reporting on “necessary” and “unnecessary” time spent incarcerated pretrial, as well as reporting on racial demographics. Improving reporting requirements across the state would provide all courts in Maryland jurisdictions with reliable and accurate information and would help facilitate the fair and efficient administration of justice. ■

The Origins of #BailReformMD



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