COVINGTON & BURLING LLP

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Memorandum

To: Brian E. Frosh, Maryland Attorney General

From: Eric H. Holder, Jr.
Kevin B. Collins
Timothy M. Visser
Ryan O. Mowery
Kyle Haley
Patrick Stanton

Re: Maryland's Wealth-Based Pretrial Detention Scheme

Usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. The factor is simply money. How much money does the defendant have?
Robert F. Kennedy, Attorney General, 1964

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.
United States v. Salerno, 481 U.S. 739, 755 (1987)

Any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment.
Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, 2016

Despite over half a century of moral, legal, and economic critiques of pretrial money bail practices that rely heavily on the use of the commercial bail industry, Maryland continues to operate an irrational, unjust, costly, and unconstitutional wealth-based pretrial detention scheme that disproportionately affects minority communities.

This memorandum addresses Maryland's problematic pretrial practices. Part I reviews key analyses that demonstrate the wealth-based nature of Maryland's pretrial detention scheme. Part II explains why this scheme is illegal and ripe for attack on both state law and federal constitutional grounds. Part III articulates why Maryland's wealth-based pretrial detention scheme is not only illegal, but also irrational, unjust, and inefficient. The memorandum closes by outlining commonsense, immediate reforms the Maryland Judiciary could initiate to improve the disturbing status quo in Maryland's pretrial detention practices. These include a judicial resolution or rule change requiring that judicial officers refrain from imposing pretrial financial

conditions that result in pretrial detention; education of judicial officers on the efficacy and availability of alternatives to secured bail; tracking data at commissioner and bail review hearings to better understand and address troubling disparities; and operating automated court date reminder services that have been proven to increase defendants' appearances in court.

As the above quotes remind us, any scheme that focuses primarily on the means of the accused and detains individuals solely because they cannot pay bond is antithetical to the core principles of our nation's justice system. As the below analysis demonstrates, reform in Maryland is sorely needed.

I. MARYLAND'S WEALTH-BASED PRETRIAL DETENTION SCHEME

Multiple studies over the last fifteen years have shown that the dispositive factor in the pretrial detention of the majority of Maryland defendants is not the danger they pose to society nor risk that they will flee prior to their trial. Rather, it is simply their inability to post a bond amount set by a Maryland judicial officer.[1]

In 2001, following calls by then-Chief Judge Robert M. Bell and the Maryland State Bar Association to review the State's pretrial release process, the Abell Foundation released a study of Maryland's bail system.[2] The study concluded that Maryland's judicial officers "virtually ignore[d]" the State's dictate that "the least onerous possible conditions [ ] be set for all but the most serious charges."[3] The report found that as a result of this practice, "judicial officers impose full financial bond for nearly half of arrestees and set bail too high for low income defendants, particularly those charged with nonviolent offenses."[4] As for the practical implications of such a scheme, the Abell Foundation concluded that the culture of Maryland's pretrial bail practices is "particularly damaging to individual criminal defendants and creates a devastating hardship on their financial and family situation and ability to obtain liberty before trial."[5]

Thirteen years later, in order to address the decision in *DeWolfe v. Richmond*, 434 Md. 444 (2013) and recognizing that "a fair and equitable pretrial system should release detainees who are expected to appear in court and pose minimal risk to public safety," Governor Martin O'Malley ordered the formation of a Commission to Reform Maryland's Pretrial System.[6] The

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[1] Initial appearances in Maryland generally are heard by District Court commissioners and then reviewed by District Court judges. As a shorthand, the memorandum will refer to both commissioners and judges as "judicial officers."

[2] THE ABELL FOUNDATION, THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE SYSTEM 52 (2001) [hereinafter A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM].

[3] *Id.* at iv, 52–53.

[4] *Id.* at 53.

[5] *Id.*

[6] MD. CODE REGS. 01.01.2014.08 (2014); *see also* COMMISSION TO REFORM MARYLAND'S PRETRIAL SYSTEM, FINAL REPORT 12 (2014) [hereinafter 2014 GOVERNOR'S COMMISSION FINAL REPORT].

Commission's findings were startling. It found that while Maryland's violent crime rate had significantly *diminished* between 1998 and 2014, the State's pretrial jail detainee population had *increased* over the same period.[7] Specifically, the Commission determined that pretrial detainees accounted for two-thirds of the overall state inmate population and that 68% of the pretrial detainees were only detained because they could not post a bond amount set by a judicial officer.[8]

If this were not troubling enough, the 2014 Governor's Commission concluded that there was *no* relationship between a pretrial detainee's perceived risk and the bond amount set.[9] As a result, the Commission recommended that "[t]he use of secured, financial conditions of pretrial release (cash, property, or surety bond) that require a low-risk defendant to pay some amount of money in order to obtain release, while permitting high-risk defendants with the resources to pay their bonds to leave jail unsupervised, be completely eliminated."[10]

In 2016, the Abell Foundation published another report yet again calling on Maryland to modernize its bail system. The report reiterated that Maryland operates a wealth-based pretrial bail scheme that is not rationally related to ensuring community safety or a defendant's appearance at trial.[11] The report added that these practices had a disproportionate affect on racial minorities and highlighted the particular injustices occurring today in Baltimore City, where approximately 90% of the jail population is made up of pretrial detainees.[12] The report noted that African-Americans make up 90% of Baltimore's jail inmates, despite making up only 60% of the city's residents.[13] Additionally, the 2016 Abell report highlighted the illogical fact that low risk defendants in Baltimore were ordered to pay secured bond rates that were five times higher than comparable low risk defendants in Montgomery County.[14]

To put these trends in disturbing context, the 2016 Abell report noted that while the average median income in Baltimore City in 2013 was $26,164, the average bail amount for low risk defendants was $51,000.[15] In other words, in Baltimore City a presumptively innocent defendant who has been determined to not be a risk to society is frequently ordered to pay a bail amount that is double his or her annual income. As a result, that defendant likely faces the

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[7] 2014 GOVERNOR'S COMMISSION FINAL REPORT, *supra* note 6, at 12–13.

[8] *Id.* at 13, 20.

[9] *Id.* at 18.

[10] *Id.* at 23.

[11] John Clark, *Finishing the Job: Modernizing Maryland's Bail System*, Volume 29, THE ABELL REPORT, No. 2 (June 2016) [hereinafter *Modernizing Maryland's Bail System*].

[12] 2014 GOVERNOR'S COMMISSION FINAL REPORT, *supra* note 6, at 6.

[13] *Modernizing Maryland's Bail System*, *supra* note 11, at 4.

[14] *Id.* at 1.

[15] *Id.* at 4.

prospect of making a *nonrefundable* payment of nearly *one-fifth* of his or her annual salary to a commercial bail bondsman just to avoid sitting in jail awaiting trial.[16]

During testimony before the Senate Judiciary Committee in 1964, Robert F. Kennedy noted that bail practices in the federal system had "become a vehicle of systemic injustice"; that "the rich man and the poor man do not receive equal justice in our courts[,] and [that] in no area is this more evident than in the matter of bail."[17] Sadly, those comments apply with equal force to Maryland's current bail practices. Over fifteen years of bipartisan studies, commissions, and reports empirically demonstrate that in Maryland, pretrial detention outcomes are based primarily on the means of the accused. The result is a pretrial bail scheme that is unconstitutional, illogical, wasteful, and ineffective.

II. MARYLAND'S WEALTH-BASED PRETRIAL DETENTION SCHEME IS ILLEGAL

Maryland's wealth-based pretrial detention scheme violates Maryland's own pretrial detention laws and the Federal Constitution. Both federal and state judicial and legislative bodies have abolished schemes that systematically discriminate against and imprison accused persons solely because they cannot afford bail. The Federal Government has also recently endorsed attacks on similar schemes and in March of this year issued guidance explicitly reminding judicial and executive officers nationwide that "*any* bail practices that result in incarceration based on poverty violate the Fourteenth Amendment."[18] Consequently, Maryland's current practices expose the State to significant litigation risks.

Unsurprisingly, numerous criminal justice and legal professional organizations have taken positions advocating for the abolition of wealth-based bail practices similar to those used in Maryland, including the American Bar Association,[19] National Association of Pretrial Services Agencies,[20] National Association of Counties,[21] American Jail Association,[22] International

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[16] In order to procure a commercial bail bond, defendants are typically required to pay bondsmen a nonrefundable fee of 10% of the bail amount. *See, e.g.*, JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 9 (2012) [hereinafter BAIL FAIL].

[17] *Hearing on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964) (statement of Robert F. Kennedy, Attorney General).

[18] U.S. Dep't of Justice, Civil Rights Division, Dear Colleague Letter (Mar. 14, 2016), at 7 (emphasis added), https://www.justice.gov/crt/file/832461/download.

[19] AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, Standard 10-1.4(e)–(f) (3d ed. 2007), at 44 (prohibiting "the imposition of financial conditions that the defendant cannot meet" and stating that "compensated sureties should be abolished"), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

[20] NAT'L ASS'N OF PRETRIAL SERVICES AGENCIES, STANDARDS ON PRETRIAL RELEASE 4 (3d ed. 2004) (citing as "key principles" the "abolition of compensated sureties" and the use of financial conditions "only when no other

(continued...)

Association of Chiefs of Police,[23] American Council of Chief Defenders,[24] American Probation and Parole Association,[25] the Conference of State Court Administrators,[26] and the Conference of Chief Justices.[27]

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conditions will reasonably assure the defendant's appearance and at an amount that is within the ability of the defendant to post"), https://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf.

[21] NAT'L ASS'N OF COUNTIES, THE AMERICAN COUNTY PLATFORM AND RESOLUTIONS 2011–2012: JUSTICE AND PUBLIC SAFETY 5 (2012) ("Counties should establish written policies that ensure . . . the least restrictive conditions during the pretrial stage," including release on recognizance, non-financial supervised release, and preventive detention.), http://www.naco.org/sites/default/files/documents/American%20County%20Platform%20and%20Resolutions%20cover%20page%2011-12.pdf.

[22] AM. JAIL ASS'N, RESOLUTION ON PRETRIAL JUSTICE (Oct. 24, 2010) (recognizing the limited purposes of bail and opposing commercial sureties), https://www.pretrial.org/download/policy-statements/AJA%20Resolution%20on%20Pretrial%20Justice%202011.pdf.

[23] INT'L ASS'N OF CHIEFS OF POLICE, LAW ENFORCEMENT'S LEADERSHIP ROLE IN THE PRETRIAL RELEASE AND DETENTION PROCESS 3, 6 (2011) (noting that "financial bail has little or no bearing on whether a defendant will return to court and remain crime-free"), http://www.pretrial.org/wp-content/uploads/2013/02/IACP-LE-Leadership-Role-in-Pretrial-20111.pdf.

[24] AM. COUNCIL OF CHIEF DEFENDERS, POLICY STATEMENT ON FAIR AND EFFECTIVE PRETRIAL JUSTICE PRACTICES 14 (2011) (noting that "when financial conditions are to be used, bail should be set at the lowest level necessary to ensure the individual's appearance and with regard to a person's financial ability to post bond"), https://www.pretrial.org/download/policy-statements/ACCD%20Pretrial%20Release%20Policy%20Statement%20June%202011.pdf.

[25] AM. PROBATION & PAROLE ASS'N, RESOLUTION, PRETRIAL SUPERVISION (June 2010) (opposing commercial bail bonds because "the bond industry serves as the de facto decision maker of who is released from jail and these decisions are based on monetary considerations whereby pretrial supervision agencies' decisions are based on likelihood of court appearance and community safety considerations"), https://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_Resolution&wps_key=3fa8c704-5ebc-4163-9be8-ca48a106a259.

[26] *See generally* CONFERENCE OF STATE COURT ADMINISTRATORS, 2012–2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE (2013), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

[27] CONFERENCE OF CHIEF JUSTICES, RESOLUTION 3 (Jan. 30, 2013) (endorsing the 2012–2013 COSCA policy paper), http://www.pretrial.org/wp-content/uploads/2013/05/CCJ-Resolution-on-Pretrial.pdf.

A. Maryland's Judicial Officers Routinely Violate Md. Rule 4-216

Pretrial release and bail in Maryland are governed by Maryland Rule 4-216. For all but a handful of specified—mostly violent—charges, the rule establishes a presumption of release, either on personal recognizance or bail, "*unless* the judicial officer determines that no condition of release will reasonably ensure, (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community."[28]

In determining whether release is appropriate and, if it is, the appropriate conditions of release, a judicial officer is required to take into account several factors, including the defendant's financial resources.[29] Notably, the rule mandates that judicial officers "impose *the least onerous condition or conditions of release*" once they have determined that pretrial detention is not necessary.[30]

Judicial officers in Maryland are thus required to take into account each defendant's unique circumstances, including the defendant's financial resources, and to "impose the least onerous conditions necessary" to reasonably ensure the appearance of the defendant at trial and the protection of the community. If it is determined that no conditions of release will reasonably safeguard against the risk of flight or danger to the community, Maryland law requires that judicial officers find "clear and convincing" evidence to support the imposition of preventive detention.[31]

In sum, a judicial officer may set bail only after (1) concluding that preventive detention is not necessary; (2) making an individualized assessment of the factors outlined in Rule 4-216(e)(1), including the defendant's financial resources; and (3) determining that bail is part of the "least onerous condition or combination of conditions" necessary to assure appearance and limit risk to the community. Once this process has been followed, Maryland law places the actual setting of a bail amount "within the sound discretion of the trial court."[32] Despite this discretion, the Court of Appeals has stressed that "rather than to punish the surety or enrich the State's treasury, the purpose of the bond is to secure a trial."[33] Moreover, the Maryland legislature has made clear that in implementing a pretrial bail scheme, the law "shall be liberally construed to carry out the purpose of relying on criminal sanctions *instead of financial loss* to

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[28] Md. Rule 4-216(c)–(d) (emphasis added).

[29] Md. Rule 4-216(e)(1).

[30] Md. Rule 4-216(e)(3) (emphasis added).

[31] *See Wheeler v. State*, 160 Md. App. 566, 579 (2005) ("'Preventive detention' may not be ordered unless the judicial officer is persuaded by clear and convincing evidence that no condition or combination of conditions of pretrial release can reasonably protect against the danger that the defendant poses to the safety of an identifiable person or to the community at large.").

[32] *Id.* at 580.

[33] *See Wiegand v. State*, 363 Md. 186, 194 (2001) (internal quotation marks omitted).

ensure the appearance of a defendant in a criminal case before verdict or pending a new trial."[34] Maryland's pretrial bail practices routinely fail to follow these principles.

As a general proposition, Maryland's judicial officials charged with executing the above-referenced rules do not properly and consistently consider defendants' individual circumstances, and particularly their financial resources, in making bail determinations. As a result, arrestees in Maryland habitually face extended periods of pretrial detention not as a result of their dangerousness to the community or because they pose a substantial risk of flight, but solely because they are unable to pay bail. The widespread, systematic imposition of secured bail in Maryland, without individualized consideration of ability to pay, thus violates the presumption that conditions of release in excess of personal recognizance must be "the least onerous condition or combination of conditions" possible to ensure appearance at trial and protect the victim and the community.

Additionally, the extreme levels at which bail amounts are consistently set and the rates of pretrial detention due simply to the accused's failure to pay those amounts expose Maryland judicial officers to the claim that they are using unnecessarily high bail amounts as a replacement for the required findings necessary to order pretrial detention. Maryland rules prohibit this practice, and courts across the country have found such approaches illegal.[35] Indeed, this is one of the specific practices the Federal Government sought to abolish when it reformed the federal bail scheme.[36] Steps should be taken to ensure that judicial officers in Maryland recognize the practice as violating the State's law.

B. Maryland's Wealth-Based Pretrial Detention Scheme Violates the Fourteenth Amendment

As shown in the Abell Foundation reports and the 2014 Governor's Commission's findings, as well as the daily realities of jails across Maryland, the State's pretrial bail scheme disproportionately and irrationally affects the poor. The Supreme Court has long held that such

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[34] Md. Code Crim. Proc. § 5-101(a) (emphasis added).

[35] *See, e.g., State v. Anderson*, 127 A.3d 100, 127 (Conn. 2015) (quoting *State v. Olds*, 370 A.2d 969 (Conn. 1976)) (noting that Connecticut's bail clause "prevents a court from fixing bail in an unreasonably high amount so as to accomplish indirectly what it could not accomplish directly, that is, denying the right to bail"); *Mendonza v. Commonwealth*, 673 N.E.2d 22, 25 (Mass. 1996) (noting that the equivalent of Md. Rule 4-216 "should end any tendency to require high bail as a device for effecting preventive detention because it directs that all decisions based on dangerousness be made under the procedures set forth for that specific purpose"); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.").

[36] *See, e.g., United States v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985) (noting that changes to federal law "eliminate the judicial practice of employing high bail to detain defendants considered dangerous and substitute a procedure allowing the judicial officer openly to consider the threat a defendant may pose"); s*ee also United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988) (explaining that the Bail Reform Act "proscrib[ed] the setting of a high bail as a de facto automatic detention practice").

practices violate the Fourteenth Amendment of the U.S. Constitution. Specifically, the Court has found that in criminal proceedings, "a State can no more discriminate on account of poverty than on account of religion, race, or color."[37] Such a practice likely also violates Maryland's constitution.[38]

In *Griffin v. Illinois*, the Supreme Court held unconstitutional an Illinois law that prevented indigent defendants from obtaining a trial transcript to facilitate appellate review, explaining that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[39] Since *Griffin*, the Supreme Court has held in a long line of cases that individuals may not be incarcerated solely because of their inability to pay.

In *Williams v. Illinois*, the Court confirmed that a state may not subject a defendant to a prison sentence longer than the statutory maximum because he or she cannot afford to pay a fine.[40] The Court explained that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."[41] The Court extended its holding in *Williams* the following year, holding that a state may not impose a prison term solely because a defendant is indigent and cannot afford to pay a fine imposed under a fine-only statute.[42]

In *Bearden v. Georgia*, the Court further held that a defendant's probation may not be revoked for failure to pay a fine or restitution, absent evidence that the failure to pay was willful or that alternative forms of punishment would be inadequate.[43] The Court explained that "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the

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[37] *Griffin v. Illinois*, 351 U.S. 12, 17–18 (1956).

[38] Maryland Declaration of Rights Article 24 is interpreted coextensively with the Fourteenth Amendment of the U.S. Constitution. *Evans v. State*, 396 Md. 256, 327 (2006) ("Finally, Evans contends in this regard that, even if his complaint does not pass muster under the Eighth and Fourteenth Amendments to the Federal Constitution, it does under Articles 16, 24, and 25 of the Maryland Declaration of Rights. We have consistently construed those provisions as being *in pari materia* with their Federal counterparts and are not convinced that they should be read more broadly (or narrowly) in this context."); *Oursler v. Tawes*, 178 Md. 471, 483 (1940) ("[Article 24] of the Maryland Declaration of Rights is in harmony with the 5th and 14th amendments to the Federal Constitution, and the term 'due process of law' as used in said amendments has been construed to be synonymous with the expression 'Law of the Land' as used in said article.").

[39] 351 U.S. at 19.

[40] 399 U.S. 235, 240–41 (1970).

[41] *Id.* at 241–42.

[42] *See Tate v. Short*, 401 U.S. 395, 398 (1971).

[43] 461 U.S. 660, 665 (1983).

fundamental fairness required by the Fourteenth Amendment."[44] As a result, the Court held that both the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit "punishing a person for his poverty."[45]

The longstanding principle that the criminal justice system should not operate differently depending on the financial resources of the defendant applies with even greater force in the pretrial detention context. In *United States v. Salerno*, the court considered the constitutionality of the Bail Reform Act of 1984, which permits pretrial detention after an adversarial hearing in the face of "clear and convincing" evidence that no conditions of release would adequately assure the safety of the community.[46] Upholding the constitutionality of the statute, the Court made clear that individuals have a constitutionally recognizable "strong interest in liberty" when it comes to pretrial release.[47] The Court further confirmed that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[48]

Courts across the country have invoked this line of cases to find that wealth-based pretrial detention schemes are unconstitutional.[49] The United States Department of Justice has endorsed this conclusion, recently filing statements of interest and amicus briefs in support of the proposition that certain wealth-based bail practices violate the Fourteenth Amendment.

For example, in *Walker v. City of Calhoun*, pretrial detainees challenged the City of Calhoun's bail system, which mandated payment of a fixed amount without consideration of other factors, including risk of flight, risk of dangerousness, and financial resources.[50] The trial court invoked the *Griffin* and *Bearden* line of cases, finding that the principle of those cases was especially applicable "where the individual being detained is a pretrial detainee who has not yet been found guilty of a crime."[51] The court found that the system violated the Equal Protection

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[44] *Id.* at 672–73.

[45] *Id.* at 671.

[46] 481 U.S. 739 (1987).

[47] *Id.* at 750.

[48] *Id.* at 755.

[49] *See, e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc) (recognizing that bail should serve the limited function "of assuring the presence of [the] defendant" at trial, and thus "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible"). *See also Williams v. Farrior*, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("[I]t is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements."); *Alabama v. Blake*, 642 So. 2d 959, 968 (Ala. 1994) (also finding that a wealth-based pretrial bail scheme "violates an indigent defendant's equal protection rights guaranteed by the United States Constitution.").

[50] No. 4:15-cv-0170, Order Granting Preliminary Injunction, Dkt. No. 40 (N.D. Ga. Jan. 28, 2016), at 48–50.

[51] *Id.* at 51.

Clause since "incarceration of an individual because of the individual's inability to pay a fine or fee is impermissible."[52] The issue is currently under consideration by the Eleventh Circuit Court of Appeals, where the Justice Department has filed a brief in support of striking down the City's bail scheme.[53]

The Justice Department likewise filed a statement of interest in *Varden v. City of Clanton*.[54] There, the court approved a settlement agreement between the parties creating a new bail scheme and confirmed that the previous bail scheme was unconstitutional because it allowed for secured bail "without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail."[55] In doing so, the court observed that "[c]riminal defendants, presumed innocent, must not be confined in jail merely because they are poor. Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all."[56]

As these cases make clear, Maryland's current pretrial scheme is ripe for constitutional challenge under the Fourteenth Amendment and such an attack could very well garner the support of the Justice Department. Litigation of that nature is all the more probable since Maryland's practices also routinely violate the Eighth Amendment's right against excessive bail.

C. Maryland's Wealth-Based Pretrial Detention Scheme Violates the Eighth Amendment

In addition to the Fourteenth Amendment's Equal Protection and Due Process clauses, wealth-based pretrial detention schemes like the one used in Maryland contravene the Eighth Amendment's proscription of excessive bail.[57] Again, this practice likely violates Maryland's constitution as well.[58]

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[52] *Id.* at 49–50 (citing *Tate*, 401 U.S. at 397–98).

[53] *See* U.S. Amicus Br., *Walker v. Calhoun*, No. 16-1052 (11th Cir.) (filed Aug. 18, 2016), *available at* https://www.schr.org/files/post/files/2016.08.18%20USDOJ%20AMICUS%20BR..pdf.

[54] U.S. Dep't of Justice, Statement of Interest of the United States, No. 2:15-cv-34, Dkt. No. 26 (M.D. Ala. Feb. 13, 2015), *available at* https://www.justice.gov/file/340461/download.

[55] No. 2:15-cv-34, Opinion, Dkt. No. 76 (M.D. Ala. Sept. 14, 2015), at 8.

[56] *Id.* at 11.

[57] U.S. Const. amend. VIII. The Supreme Court has held that the Eighth Amendment's proscription of excessive bail applies to the States through the Fourteenth Amendment. *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

[58] Maryland courts have held that Maryland Declaration of Rights Article 25 is analogous to the Eighth Amendment to the U.S. Constitution. *See, e.g.*, *Mills v. State*, No. 2385 Sept. Term 2014, 2016 WL 2851741, at *17 (Md. App. May 16, 2016) (describing Maryland Declaration of Rights Article 25 as "an analogous provision" to the Eighth Amendment); *Walker v. State*, 53 Md. App. 171, 181 (1982) (explaining that Article 25 is the "virtually verbatim Maryland counterpart" to the Eighth Amendment's Excessive Bail Clause).

The seminal case interpreting the Excessive Bail Clause is *Stack v. Boyle*.[59] In *Stack*, the Supreme Court considered the meaning of "excessive" bail, and confirmed that bail has a single purpose: to assure the presence of the accused at trial.[60] Thus, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[61]

Under *Stack*, "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."[62] Other courts have thus held that bail amounts are excessive when they are not narrowly tailored to this purpose.[63] Available evidence suggests that this standard is not being met in Maryland. This reality is more than a legal technicality; it gets to the very heart of judicial fairness and integrity. As Justice Vinson wrote in *Stack*, "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against."[64]

III. MARYLAND'S WEALTH-BASED PRETRIAL BAIL SCHEME RESULTS IN AN IRRATIONAL, INEFFECTIVE, INEFFICIENT PRACTICE THAT UNNECESSARILY COSTS TAXPAYERS MONEY AND DISPROPORTIONATELY AFFECTS RACIAL MINORITIES

A. Maryland's Wealth-Based Pretrial Detention Scheme is Not Rationally Related to the Goal of Protecting Public Safety

The evidence is overwhelming: Maryland's pretrial bail scheme as currently operated is not rationally related to the goals of protecting public safety and reducing the risk of flight. As the 2014 Governor's Commission concluded, there is <u>no</u> relationship between safety and appearance risks and the bond amount set by the court.[65] The irrationality of the scheme was highlighted by the Commission's finding that "[a]t both the initial appearance and bail review hearings, there was an *inverse* relationship between bail amounts and risk levels. Low risk defendants had higher bail amounts than moderate and higher risk defendants."[66] In fact, the *majority* of defendants unable to secure pretrial release are low and moderate risk individuals,

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[59] 342 U.S. 1 (1951).

[60] *Id.* at 5.

[61] *Id.*

[62] *Id.*

[63] *See, e.g., United States v. Arzberger,* 592 F. Supp. 2d 590, 605 (S.D.N.Y. 2008) ("[I]f the Excessive Bail Clause has any meaning, it must preclude bail conditions that are (1) more onerous than necessary to satisfy legitimate governmental purposes and (2) result in deprivation of the defendant's liberty.").

[64] 342 U.S. at 6.

[65] 2014 GOVERNOR'S COMMISSION FINAL REPORT, *supra* note 6, at 18.

[66] *Id.* at 23 (emphasis added).

and two-thirds of those individuals are held solely because they are not able to post bond.[67] By detaining these individuals, Maryland is depriving them of their basic right to liberty through a system that has no rational relation to the fundamental goals of pretrial detention. Additionally, wealth-based schemes that rely heavily on secured bail make it far more likely that wealthy defendants can secure release regardless of the threat they may pose to public safety.[68]

In practice, secured money bail schemes are even further detached from the goals of criminal law because it is frequently the commercial bail bondsman, not the judicial officer, determining whether a defendant is released. As the Justice Policy Institute recently observed:

> The for-profit bail industry does not have a mechanism with which to consider dangerousness as a factor in their decision to bond . . . The decision by the bondsman to write or not write a bail bond is driven solely by a profit motive . . . For them, cases in which bail is set very high are more appealing, as they represent higher profit with no increased risk.[69]

Such observations are not new, nor do they fully capture the damage that is done by such relegation of judicial decisions to private businessmen and women. As Judge Skelly Wright noted more than fifty years ago:

> [T]he professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.[70]

In many cases, a truly disturbing irony results from the irrational detention of impoverished defendants who pose little risk to society but are unable to pay the nonrefundable fee for a commercial bond. As one observer recently noted:

> Because most pretrial detainees are charged with minor offenses, they probably would not receive a sentence of incarceration if convicted. Thus, ironically, they will be required to spend far more time behind bars pretrial while they are presumed innocent

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[67] *Id.*

[68] *See* INT'L ASS'N OF CHIEFS OF POLICE, RESEARCH ADVISORY COMMITTEE RESOLUTION 005.T14, at 15 (2014) (noting that money-based pretrial release systems enable over 50 percent of defendants who are rated higher risk to be released pretrial).

[69] JUSTICE POLICY INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 17 (2012) [hereinafter FOR BETTER OR FOR PROFIT].

[70] *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963).

than they will be required to serve after they are convicted and are subject to punishment.[71]

B. Maryland's Wealth-Based Pretrial Detention Scheme is Not Rationally Related to the Goal of Reducing the Risk of Flight

An individual's wealth does not determine how likely he or she is to appear in court. Studies have repeatedly shown that defendants released on their own recognizance, under conditional supervision, or private surety appear in court more often than when commercial bail bondsmen are involved. For example, the Abell Foundation's 2001 report noted that in Montgomery County, defendants released on surety and cash bonds actually had the *highest* failure to appear ("FTA") rates.[72] Additional studies have reached similar conclusions and noted that alternative means of pretrial release such as pretrial supervision result in equally good, if not better, appearance rates by defendants.[73]

The lack of a connection between good FTA rates and secured bail can be seen in the FTA rates of states that have already moved away from money bail systems and other states that have studied alternatives to such systems. For example:

- In the District of Columbia, approximately 85% of defendants are released pretrial under the District's long-established supervised release program. Of these defendants, 90% appear in court.[74]
- In Kentucky, the court system saw appearance rates remain constant or even increase when the State moved away from reliance on a traditional money bail system and toward a risk assessment and pretrial services system.[75]
- A Colorado study found that a simple reminder call to defendants reduced FTA rates from 21% to 12%.[76]

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[71] Cynthia Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. OF LEGIS. & PUB. POL'Y 919, 936 (2013) [hereinafter *Give Us Free*] (citing Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1309 (2013)).

[72] A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM, *supra* note 2, at 47, n.161.

[73] *See, e.g.*, Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* 17 (Nov. 2013) (finding that supervised defendants were significantly more likely to appear for court than unsupervised defendants); *see also* Tara Boh Klute & Mark Heverly, REPORT ON IMPACT OF HOUSE BILL 463: OUTCOMES, CHALLENGES AND RECOMMENDATIONS 6 (2012) (finding legislation shifting Kentucky's system in favor of risk-based pretrial release supervision, as opposed to reliance on money bail, resulted in lower FTA rates).

[74] 2014 GOVERNOR'S COMMISSION FINAL REPORT, *supra* note 6, at 24.

[75] Klute & Heverly, *supra* note 73, at 6.

[76] JEFFERSON COUNTY, COLORADO COURT DATE NOTIFICATION PROGRAM FTA PILOT PROJECT (2005).

- A Nebraska study found that even postcard reminders reduced FTA rates from 12.6% to 9.7%.[77]

C. Maryland's Wealth-Based Pretrial Detention Scheme Imposes Unnecessary Costs on Maryland Taxpayers

Not only is Maryland's wealth-based pretrial detention scheme illogical, it is also inefficient. These inefficiencies, which are not supported by any rational policy considerations or the goals of the criminal justice system, come at a considerable cost to Maryland's taxpayers. The 2014 Governor's Commission succinctly summarized the issue as follows:

> In Maryland, over the past ten years, the State's pretrial jail population has ranged from 60-65.8%. Maryland's FY2014 pretrial jail population of 65.8% is the highest recorded in the State since the county jails began collecting this data in 1998. At any given time in Maryland, there are roughly 7,000 – 7,500 defendants detained in jail awaiting trial with an average length of stay of 39 days. This costs the State approximately $22.65 - $44.75 million each year ($83-$153 a day in jail) in detention costs.[78]

The Commission went on to note that "[t]he United States Courts determined that it is roughly *10 times cheaper* to put a defendant on pretrial supervision than to detain them in jail."[79]

It is not surprising that those charged with managing local detention facilities have made clear that any conversation about controlling costs must begin with a focus on reducing pretrial detention rates.[80] This has become particularly true for jurisdictions that rely on secured bail schemes following the Great Recession. One observer noted that "[t]he net result [of] a system that relies on money to determine pretrial release is that when defendants cannot pay, the costs shift to the jail."[81] Given that "[j]ails are becoming more and more facilities whose primary role is to hold persons while the charges against them are resolved," this observer concluded that the current practice "is an antiquated approach that our new economic realities can no longer sustain."[82]

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[77] Mitchel Herian & Brian Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, THE NEBRASKA LAWYER (Sept. 1, 2010), at 12.

[78] 2014 GOVERNOR'S COMMISSION FINAL REPORT, *supra* note 6, at 12 (citations omitted).

[79] *Id.* at 20 (emphasis added) (citations omitted).

[80] *See* NAT'L ASS'N OF COUNTIES, COUNTY JAILS AT A CROSSROADS: AN EXAMINATION OF THE JAIL POPULATION AND PRETRIAL RELEASE 10 (2015) ("The jail population, and especially the pretrial population, is growing, while county corrections costs are registering a steep upward trajectory . . . . County jails understand the need to reduce the jail population, including for particular groups within the jail population that drive up jail costs.").

[81] John Clark, *The Impact of Money Bail on Jail Bed Usage*, AMERICAN JAILS (Jul. 2010), at 54.

[82] *Id.* at 48, 54.

Baltimore City serves as a case in point for such trends. A 2011 Justice Policy Institute study noted that Maryland was poised to spend $97 million on the Baltimore City Detention Center and another $53.6 million on the Baltimore Central Booking and Intake Center in fiscal year 2011.[83] It costs those facilities $100 and $159 per day respectively to hold detainees, the majority of whom are being held pending trial.[84] By contrast, it is estimated that the costs of pretrial release services are as low as $2.50 per day per person.[85] As a result, the Justice Policy Institute estimated that "[m]oving just 1,000 people from the Detention Center to the Pretrial Release Services Program for 30 days, which is the average amount of days until trial, could save Maryland $29.2 million per *month*."[86]

D. Maryland's Wealth-Based Pretrial Detention Scheme Disproportionately Harms Racial Minorities

Overwhelming evidence establishes that Maryland's wealth-based pretrial detention scheme disproportionately affects racial minorities.

In secured bail schemes minorities are less likely to be released on their own recognizance,[87] and are assessed bail amounts that can are often double the amount imposed on white defendants, even when controlling for severity of offense, number of felony charges, and criminal history.[88] The result is that minorities are more likely to be detained. For example, one analysis determined that African-Americans are 66% more likely to be detained than their white counterparts, and Hispanic defendants are 91% more likely to be detained than white

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[83] Natasha Walsh, BALTIMORE BEHIND BARS: HOW TO REDUCE THE JAIL POPULATION, SAVE MONEY AND IMPROVE PUBLIC SAFETY (Justice Policy Inst. 2011), at 17.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 18 (citations omitted).

[87] BAIL FAIL, *supra* note 16, at 15 (citing John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions,* JUSTICE QUARTERLY (2012)); Tina Freiburger, Catherine Marcum, & Mari Pierce, *The Impact of Race on the Pretrial Decision*, 35 AM. J. OF CRIM. JUSTICE 76 (2010) (finding that race has a strong impact on the probability that a defendant will be released on personal recognizance, with African-Americans being less likely to be released on that basis).

[88] *Give Us Free*, *supra* note 71, at 950 (citing Robert R. Weidner, RACIAL JUSTICE IMPROVEMENT PROJECT PRETRIAL DETENTION AND RELEASE DECISIONS IN SAINT LOUIS COUNTY, MINNESOTA IN 2009 & 2010 (2011)) (finding that median bail for minority defendants was twice the amount set for white defendants); *see also* Isami Arifuku & Judy Wallen, RACIAL DISPARITIES AT PRETRIAL AND SENTENCING AND THE EFFECT OF PRETRIAL SERVICES PROGRAMS 7 (2013) (finding that among defendants charged with a felony, Hispanics had an average bail amount of $67,000, African Americans had an average bail amount of $46,000 and Whites had an average bail amount of $37,000); K.B. Turner & James Johnson, *A Comparison of Bail Amounts for Hispanics, Whites, and African Americans: A Single County Analysis*, 30 AM. J. CRIM. JUSTICE 35, 36 (2005) (finding that the average bail for Hispanic defendants was 2.5 times greater than for the average white defendant).

defendants.[89] Other studies have found that racial minorities are more likely than white defendants to be detained because of an inability to post bail, and that the inability to "make bail" is the primary explanation for African-American and Latino defendants' greater likelihood of pretrial detention.[90]

These general racial trends appear to have taken hold in Maryland as well. As the 2001 Abell Foundation report noted, minorities are disproportionately hurt by Maryland's pretrial bail scheme. No population appears to bear the brunt of this reality in Maryland more than African-Americans. The Abell Foundation determined that this population "remain[s] in jail awaiting trial because they cannot afford the bail amount at a strikingly higher rate compared to their overall population."[91] Specifically, it was determined in 2001 African-Americans made up 67% of Maryland pretrial detainees who were not released on personal recognizance.[92]

Making this disproportionate detainment of minorities even more insidious is the fact that pretrial detention has a ripple effect on a defendant's case. Multiple studies have shown that defendants detained through their pretrial period are more likely to be convicted and more likely to be sentenced to longer periods of incarceration than their released counterparts.[93] This disparity of outcomes stems from a number of factors, including the defendant's limited access to defense counsel and inability to participate in the preparation of his or her defense. A more troubling but equally prevalent explanation for this disparity is that defendants facing the economic hardship of pretrial detention are more likely to enter guilty pleas regardless of actual guilt or innocence. This is especially true for those charged with lower level crimes.[94]

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[89] Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 895 (2003); *see also* Cassia Spohn, *Race, Sex and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 KAN. L. REV. 879 (2008–2009) (finding that detention rates were higher among African-American defendants than white defendants).

[90] Demuth, *supra* note 89, at 899.

[91] A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM, *supra* note 2, at 28.

[92] *Id.*

[93] Megan Stevenson, DISTORTION OF JUSTICE: HOW THE INABILITY TO PAY BAIL AFFECTS CASE OUTCOMES 3 (2016) (pretrial detention leads to a 6.6% increase in the likelihood that a defendant will be convicted); Christopher Lowenkamp, Marie VanNostrand, & Alexander Holsinger, INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 11 (2013) (low-risk defendants detained pretrial received sentences that were 2.8 times as long as released defendants).

[94] *See, e.g.*, Vanessa Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (Winter 2013); *see also* Nick Pinto, *The Bail Trap*, THE N.Y. TIMES MAGAZINE (Aug. 13, 2015) (noting that data from the New York Criminal Justice Agency indicate that detention itself creates enough pressure to increase guilty pleas).

E. Maryland's Wealth-Based Pretrial Detention Scheme Increases Recidivism

The empirical evidence shows that pretrial bail schemes further harm communities by increasing recidivism. According to one study, defendants who are detained pretrial are 30% more likely to recidivate when compared to defendants released sometime before trial.[95] Even defendants who are released prior to trial but were detained for several days while securing enough money for bail are 39% more likely to commit a new crime prior to trial than defendants who were never incarcerated.[96] Anecdotal evidence shows that this increase is at least partially explained by the fact that securing the necessary funds for bail drains defendants of the money they need to live once released and encourages subsequent criminal activity.[97]

The prevalence of such trends in Maryland was also addressed in the 2014 Governor's Commission Report. Commenting on a recent study by the Arnold Foundation, the Commission observed:

> The study found that low risk defendants who spent just two to three days in jail after arrest, often the time needed to post a monetary bond, were 39% more likely to be rearrested while their cases were pending than low risk defendants who were released within one day of arrest. Low risk defendants who spent four to seven days in jail were rearrested at a rate that was 50% higher than for low risk defendants who were released within a day. The same pattern holds for medium risk defendants.[98]

F. Maryland's Wealth-Based Pretrial Detention Scheme Creates Harmful Externalities

Maryland's money bail scheme not only unnecessarily and irrationally increases pretrial incarceration and long-term recidivism rates, it also wreaks havoc on the social networks of the accused.

The 2001 Abell Foundation Report looked into bail practices in five Maryland counties, including Baltimore City. The study found that three-quarters of people who were expected to pay a pretrial bail amount felt that they would have a "very difficult" or "difficult" time "making bond."[99] Moreover, 70% of the study's respondents indicated that paying bail would mean that

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[95] Christopher Lowenkamp, Marie VanNostrand, & Alexander Holsinger, THE HIDDEN COST OF PRETRIAL DETENTION 19 (2013).

[96] *Id*. at 4.

[97] *See* JUSTICE POLICY INST., BAILING ON BALTIMORE: VOICES FROM THE FRONT LINES OF THE JUSTICE SYSTEM 14 (2012) [hereinafter BAILING ON BALTIMORE]; *see also* A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM, *supra* note 2, at 52 (finding that pretrial detention would mean the loss of employment for 25% of defendants, and 40% of defendants would lose their housing).

[98] 2014 GOVERNOR'S COMMISSION FINAL REPORT, *supra* note 6, at 24.

[99] A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM, *supra* note 2, at 51–53.

they would be unable to afford other important costs like rent, utilities, or groceries.[100] Two in five of the respondents noted that pretrial detention due to an inability to pay bail would lead to the loss of a home.[101] Finally, a quarter of the respondents feared that just a short period of pretrial incarceration while attempting to secure the funds necessary to make bail would result in loss of employment.[102]

The negative externalities of pretrial detention likely exceed the loss of housing, employment, and food. For example, at the opening of the U.S. Department of Justice's 2011 National Symposium on Pretrial Justice, it was noted that pretrial detention also impacts health and healthcare costs:

> This link between financial means and jail time is troubling in its own right. But it's compounded by the fact that many inmates become ineligible for health benefits while they're in jail – imposing an additional burden on taxpayers when they're released, and often are forced to rely on emergency rooms for even the most routine medical treatments.[103]

Frequently, the only way defendants can hope to mitigate these harsh realities is by relying on family and friends to carry the financial burden of making nonrefundable payments to a commercial bail company in amounts that are frequently significant portions of payers' annual incomes.[104]

Our system of justice is predicated on the notion that punishment should not precede a finding of guilt. Imposing on presumptively innocent individuals and their networks unnecessary debt, joblessness, homelessness, and further financial duress prior to trial when the result neither protects communities nor has a meaningful impact on trial appearance rates is unconscionable.

IV. FIVE COURT-LED REFORMS CAN FIX MARYLAND'S PRETRIAL DETENTION SCHEME

The current realities of Maryland's pretrial detention scheme are alarming. Fortunately, as many other jurisdictions and the Federal Government have realized, they can be remedied—and Maryland's judicial branch can lead the effort. Below are five concrete steps the Maryland Judiciary can take to reform the pretrial process and end the practice of detaining individuals simply because they lack the resources to post bail.

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[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Eric Holder, Remarks at the National Symposium on Pretrial Justice (June 1, 2011).

[104] *See supra* Part I.

A. Judicial Resolution

As it did in addressing the practice of shackling children in juvenile court,[105] the Maryland Judicial Council and Maryland Judiciary should pass a resolution recognizing the injustice perpetuated by continued reliance on money bail in Maryland, and endorsing language directing judicial officers to refrain from setting bail that cannot reasonably be met by the defendant. For example, a resolution could endorse the following two directives:

1. *The judicial officer shall not impose a financial condition that results in the pretrial detention of the defendant.*[106]

2. *The judicial officer shall not impose a financial condition unless the record indicates and the judicial officer finds, in writing and on the record, that the defendant has the present ability to meet the financial condition without hardship.*[107]

Such resolutions would send a strong reminder to Maryland's judicial officers that wealth should not determine whether a defendant is deprived of his or her liberty while awaiting trial.

B. Rule Change

The Maryland Judicial Council and Maryland Judiciary should sponsor a change to Maryland Rule 4-216 incorporating the resolution language suggested above. This language, when combined with the detention authority already present in Rule 4-216(c) and (d), would strike a just and meaningful balance between the State's interests in public safety and the appearance of defendants at trial on the one hand, and the fundamental liberty interests of presumptively innocent defendants on the other.[108]

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[105] Maryland Judiciary, Resolution Regarding Shackling of Children in Juvenile Court (Sept. 21, 2015), http://www.courts.state.md.us/judicialcouncil/pdfs/resolutionregardingshackling20150921.pdf.

[106] This language is derived directly from the following sources: AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, 10-1.4(e), 10-5.3(a), 10-5.3(e) (3d. ed. 2007); Bail Reform Act of 1984, 18 U.S.C. § 3141(c)(2); U.S. Dep't of Justice, Statement of Interest of the United States, *Varden v. The City of Clanton*, No. 2:15-cv-34, Dkt. No. 26 (M.D. Ala. Feb. 13, 2015).

[107] This language is derived from Maryland civil contempt cases requiring the defendants' present ability to pay a sanction or purge amount, *see, e.g.*, *Arrington v. Dep't of Human Res.*, 402 Md. 79, 83 (2007), as well as the test for indigency for public counsel under Md. Code Ann., Crim. Proc. § 16-210 (West 2015).

[108] The Supreme Court of Indiana recently ordered a similar change to Indiana's criminal rules that highlights the presumption of releasing a defendant without money bail unless he or she presents a "substantial risk of flight or danger." *See* Indiana Supreme Court, Order Adopting Criminal Rule 26 (Sept. 7, 2016), http://www.in.gov/judiciary/files/order-rules-2016-0907-criminal.pdf.

As discussed above, Rule 4-216 provides judicial officers with the ability to detain individuals for whom no condition of release—including bail—will "reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community."[109] Under these current provisions, high-risk defendants can be detained pending trial so long as a required showing is made. As a result, amending Rule 4-216 to incorporate the judicial resolution language proposed above would eliminate the practice of detention based solely on financial status without undermining valid state interests and the availability of pretrial detention.

C. Judicial Education

Educating judicial officers is an important component of any meaningful effort to reform Maryland's unjust and inefficient pretrial detention scheme. The Maryland Judiciary should educate its members on the efficacy and availability of alternatives to detention and secured money bail, including unsecured bonds and pretrial supervision. Furthermore, as discussed below, judicial education on this topic should incorporate data derived from all Maryland jurisdictions to increase awareness of troubling disparities in bail setting practices and encourage uniform best practices that are more closely aligned with the goals of a high-functioning, effective, and just pretrial scheme.

D. Data Monitoring

The Maryland Administrative Office of the Courts (MAOC) should track data on commissioner and bail review hearings with the goal of identifying problems and ensuring that low risk defendants are released and dangerous defendants are detained.

Many Maryland jurisdictions apply pretrial detention rules in a manner that results in releasing the most high-risk defendants, while detaining those posing little or no risk. Additionally, substantial disparities exist across jurisdictions in Maryland when it comes to pretrial detention practices, particularly with respect to bail amounts imposed in relation to the income of defendants.[110] As mentioned, further disparities are found in the treatment of minorities in the current system. Effective data monitoring will enable the MAOC to track these disparities and focus education resources on the most problematic jurisdictions.

E. Automated Court Reminders

The Maryland Judiciary should implement use of a text message or calling service that automatically reminds defendants of upcoming court dates. The implementation of such automated court date reminders across various U.S. jurisdictions has demonstrated that they are a proven low cost method of reducing failure to appear rates, and are an effective alternative to secured bail.

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[109] Md. Rule 4-216(c) & (d).

[110] *See, e.g.*, *supra* notes 10–15, and accompanying text.

For example, Multnomah County, Washington, experienced a 45% decrease in its FTA rate—and saved $1.6 million in a year—after adopting an automated call system to remind defendants of upcoming court dates.[111] Similarly, a 2005 study found that a simple reminder call to defendants reduced FTA rates from 21% to 12% in Jefferson County, Colorado. In addition, efforts such as the Court Messaging Project led by Legal Tech Design provide a helpful example of the use of automatic text messages as a low cost method of reducing FTA rates.[112]

V. CONCLUSION

Numerous studies have empirically established what many have long known: Maryland operates an unconstitutional wealth-based pretrial detention scheme in which results are largely unhinged from valid criminal justice concerns and instead turn merely on the wealth of the accused. It has been over fifty years since Attorney General Robert F. Kennedy highlighted the injustice of such outcomes, and fifteen years since Maryland's judicial officers acknowledged the need to take a closer look at the State's own wealth-based practices. The time for reform in Maryland is long overdue.

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[111] Judge Theresa Doyle, *Fixing the Money Bail System*, KING COUNTY BAR BULLETIN (Apr. 2016).

[112] *See* http://www.legaltechdesign.com/CourtMessagingProject.