IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2013

No. 105

THE HON. BEN C. CLYBURN, ET AL.,

APPELLANTS,

v.

QUINTON RICHMOND, ET AL.,

APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(The Honorable Alfred Nance, Judge)
PURSUANT TO A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

# BRIEF OF APPELLEES

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## OVERVIEW

Two years ago, this Court issued a definitive holding in this case as to whether the right to counsel at bail hearings should be stayed until policymakers decided on a "practical" means of implementing the right to counsel:

> We cannot declare that Plaintiffs have a statutory right to counsel at bail hearings and, in the same breath, permit delay in the implementation of that important right and thereby countenance violations of it, even for a brief time.

DeWolfe v. Richmond, 434 Md. 404, 440 (2012) ("Richmond II") (Barbera, J., now C.J., writing for the Court). This holding has never been more apt. Five months ago, on September 25, 2013, this Court held that indigent criminal defendants have a due process right to representation by appointed counsel at initial bail hearings, affirming on constitutional grounds the same right that this Court had affirmed on statutory grounds in Richmond II. DeWolfe v. Richmond, 434 Md. 444 (2013) ("Richmond III"). Not one indigent criminal defendant has been provided counsel at an initial bail hearing since this Court's holdings in Richmond II and III, and literally thousands have been denied their constitutional right to counsel found by this Court.

This latest appeal is an attempt by Appellants (the "District Court Defendants" or "DCDs") to make matters even worse. In appealing the injunction ordered by the Circuit Court for Baltimore City (the "circuit court"), their original goal was to seek proceedings in the circuit court that would delay implementation of the right even further, but, as their Brief itself reveals, that goal has now morphed into a nakedly political plea for the Court to reverse itself. The period of delay has emboldened leading political opponents of the right to counsel (who, according to published news accounts, include the Governor, the President of the Maryland Senate, the Speaker of the House, and, apparently, now the Attorney General) to use this appeal to push this Court to change its mind as to whether a right to counsel even exists and to reverse its decision issued five months ago. This appeal, therefore, has very little to do with the procedural issues raised by the DCDs in their cert. petition. It is, instead, a direct political challenge to this Court's plenary authority to interpret the Maryland Constitution and the Declaration of Rights, and thus

the Court's preeminent role as the protector of the rights of individual Marylanders. It threatens the independence of this Court and goes to the heart of the separation of powers necessary for a functioning democracy.

We are not overstating the stakes for the Court. Despite *never* having raised the issue in the circuit court or in their petition for a writ of certiorari, and despite this Court's prior denial of a similar motion for reconsideration by their alter ego, the State of Maryland, also seeking to reverse Richmond III, the DCDs devote virtually all of their substantive argument (26 of 31 pages) to reversing Richmond III. As this attempt to transmute the nature and scope of this appeal egregiously violates the express terms of the Court's order granting a writ of certiorari (which limited the issues to the questions presented in the DCDs' petition), this Brief includes a motion to strike the offending portions of the DCDs' brief. But the DCDs' offense goes far beyond flaunting the terms of the order granting review: their substantive argument is a direct attack on the judicial process and the basic precepts of stare decisis.

The political nature of this attack is clear from the face of the brief. Despite proclaiming that Richmond III is so "clearly erroneous" that stare decisis should not apply, the DCDs' principal legal challenge to the Court's holdings in Richmond III consists of an astonishing one-paragraph assertion that the right to counsel guaranteed by Article 24 does not protect individuals once they are detained in State custody. See DCD Br. 36. In other words, the DCDs contend that a cognizable liberty interest in a right to counsel exists only in a proceeding to determine whether a non-detained person will be incarcerated but not in a proceeding to determine whether a person already in jail after arrest will remain incarcerated. The latter proceeding, the DCDs insist, is a proceeding that merely sets "temporary conditions of release" and results in denying freedom but is not "incarceration." The DCDs *cite no case* to support this truly Orwellian distinction, and for good reason: it is utterly preposterous. A proceeding that results in a future loss of liberty is no different whether the individual enters the proceeding in handcuffs or walks into the hearing room of his or her own accord. Numerous cases confer due process rights to counsel to detained individuals. Indeed, if the DCDs' legal argument

were correct, criminal defendants would lose the constitutional right to counsel for appeals, which rests on due process. Their argument also conflicts with Richmond II, which held that an initial bail hearing *is* a proceeding that may result in incarceration.

The DCDs' other principal legal argument, that bail reviews provide sufficient due process protections, also lacks *any* cited authority in support. See DCD Br. 36. In Richmond III, this Court cited four prior cases in direct support of its rejection of the DCDs' position, yet the DCDs' argument does not cite these cases, let alone show that the Court's reliance on them was a blatant error. They also fail to address this Court's ruling in Richmond II to the same effect.

Thus, the DCDs have no legal support for their contention that Richmond III is blatantly erroneous. Instead, they repeatedly argue that this Court's 4-3 split decision in Richmond III is not worthy of stare decisis, implying what the politicians have openly declared to the press, that the decision can be reversed because the composition of the Court has changed. This brazenly political outcome – where the Governor and Senate President have vowed to scuttle a landmark precedent that they dislike merely by virtue of having new appointees to the Court – is precisely what stare decisis is supposed to prevent. Reversing Richmond III now, particularly after denying the State's motion for reconsideration making the same flimsy arguments as the DCDs do here, would surrender this Court's judicial independence and swallow stare decisis whole. The constitutional rights of indigent defendants should not be jettisoned so cavalierly.

As for the procedural issues that purportedly prompted the DCDs' cert. petition, these are insignificant as well. Plaintiffs previously agreed that the two small areas of overbreadth in the circuit court's injunction order should be fixed and proposed simple changes that solve the problem. The DCDs do not, and cannot, point to any prejudice from the court's issuance of an injunction in lieu of an order to show cause where they already had filed a "status report" that laid out their arguments. Their second alleged error by the circuit court, a purported conflict with this Court's proposed Rules to implement Richmond III, is even further off-mark. This Court directed that the circuit court should proceed with implementation proceedings and that, once an order of

implementation was entered, the Court would issue an order putting the new Rules into effect. The fact that the DCDs would argue that the circuit court erred by following this Court's instructions illustrates vividly how far the DCDs strain to justify further delay.

In sum, the DCDs' brief fails to make out a legitimate case for suspending stare decisis, ignores their own failure to seek reconsideration of Richmond III (a clear waiver), fails to show prejudicial error by the circuit court, and blatantly disregards this Court's express order limiting their brief to their procedural issues raised in their cert. petition. Rather than show an egregious legal blunder by this Court, they offer only a rehash of arguments previously made and rejected by the Court, ignore the evidence in the record and the cases relied on by the majority, and rely on the dubious proposition that they know what is best for Plaintiffs. In insisting that the loss of Plaintiffs' right to representation when their liberty is at stake is of no great moment, the DCDs' brief confirms the truth of Robert Kennedy's sage comment long ago: "The poor man charged with crime has no lobby."[1] It is up to this Court to make clear that its constitutional ruling in favor of a disadvantaged and unpopular minority (many of whom are people of color) is not overridden by political forces seeking to restore the status quo ante.

## STATEMENT OF THE CASE

Counting the various motions for reconsideration, stay, and other relief filed after Richmond II and Richmond III, this is the *fifteenth* substantive brief or memorandum filed in this Court by Appellees Quinton Richmond, et al. ("Plaintiffs"). Indeed, this is the *fourth* round of full-scale briefing and oral argument. Nevertheless, apart from the

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[1] Hon. Robert F. Kennedy, Statement by Attorney General Robert F. Kennedy Before Subcommittee No. 5 of the House Judiciary Committee Regarding H.R. 4816, the Proposed Criminal Justice Act, at 9 (May 22, 1963), available at http://www.justice.gov/ag/rfkspeeches/1963/05-22-1963a.pdf, quoted in Anthony Lewis, Gideon's Trumpet 211 (1964). Kennedy introduced the Criminal Justice Act ten days after the Gideon decision. As enacted in 1964, it required counsel at "every stage" of a federal criminal proceeding, including all bail proceedings. Kennedy was particularly concerned with the injustice of the bail system, which, according to the Allen Commission report he had commissioned, resulted in thousands of poor defendants languishing in jail before trial because they could not afford bail, "exact[ing] an incalculable human price." Arthur Meier Schlesinger, Jr., Robert F. Kennedy and His Times 393 (1996).

DCDs' attack on stare decisis, there is very little here or in the DCDs' brief that has not been said before once or, in many cases, multiple times. Nevertheless, in light of the DCDs' latest attempt to derail the case and in recognition of the two newest members of the Court, we reluctantly must retread the history of this case.

Seven years ago, on November 13, 2006, Quinton Richmond, Jerome Jett, Glenn Callaway, Myron Singleton, Timothy Wright, Keith Wilds, Michael LaGrasse, Ralph Steele, Laura Baker, Erich Lewis, and Nathaniel Shivers brought this class action in the Circuit Court for Baltimore City as the named representatives of the class of indigent individuals who have been or will be arrested, detained at the Baltimore City Booking and Intake Center ("Central Booking Jail," "Central Booking"), brought before a commissioner for an initial bail hearing, and denied representation by counsel at that hearing in violation of their statutory and constitutional rights to representation by counsel. The claims were brought against the District Court of Maryland; Ben C. Clyburn, Chief Judge of the District Court; David Weissert, Coordinator of Commissioner Activity for the District Court Commissioners; Keith E. Mathews, Administrative Judge of the District Court for Baltimore City; Jimmie L. Foxworth, Administrative Commissioner for Baltimore City; and the District Court Commissioners for Baltimore City. (E11, Dkt.1/0). The District Court was subsequently dismissed after the DCDs objected on sovereign immunity grounds, and Judge John R. Hargrove, Jr. and Linda Lewis were substituted for Judge Mathews and Mr. Foxworth, respectively.

The complaint alleged that, on Saturday, November 11, 2006, while detained at Central Booking, each named plaintiff was brought before a commissioner and asked for counsel to be appointed. (Apx. 1-15). On each occasion, the request was denied, and the commissioner either set bail or deferred to a bail that was "preset" by a judge in absentia at a prior hearing. Id. On Monday, November 13, while still in detention, the named plaintiffs filed a class action seeking a declaratory judgment that, under the Public Defender Act ("PDA") (Count I), the Sixth Amendment (Count II), and Article 21 (Count III), indigent criminal defendants have a right to counsel in initial bail proceedings, and an injunction against violations of that right. (E11, Dkt.1/0). On February 2, 2007,

Plaintiffs amended the complaint with new facts and claims of due process violations under the Fourteenth Amendment (Count IV) and Article 24 (Count V) (E12, Dkt.4/0).

On February 13, 2007, the DCDs moved to dismiss. (E12, Dkt.5/0). Plaintiffs cross-moved for class certification and for partial summary judgment on the statutory and due process claims. (E12, Dkt. 5/1; E13-14, Dkt.9/0). The circuit court (Berger, J.) denied the motion to dismiss (E13, Dkt.5/5-6), and, instead of seeking discovery or asserting a genuine dispute of fact, the DCDs cross-moved for summary judgment. (E15, Dkt.18/0). On October 24, 2007, the court (Nance, J.) certified the class and granted the DCDs' cross-motion for summary judgment. (E14, Dkt.9/1; E15, Dkt.21/3; E17, Dkt. 34/0). Plaintiffs appealed, and this Court issued a writ of certiorari on its own motion. The case was argued on January 9, 2009. On March 5, 2010, this Court vacated the judgment due to the lack of a necessary party (the Public Defender) and ordered conditional class decertification and dismissal if he was not added. Richmond v. Dist. Court of Md., 412 Md. 672, 672-73 (2010) ("Richmond I").

On remand, the circuit court conditionally decertified the class and ordered dismissal if the Public Defender was not joined as a defendant. (E18, Dkt.49/0). After Plaintiffs complied and sued Paul B. DeWolfe, Jr. in his capacity as Public Defender, the DCDs moved to dismiss, arguing that the claims against Mr. DeWolfe for declaratory relief were not justiciable because they did not seek "coercive relief." (R1385-92). Plaintiffs filed a third amended complaint that sought an injunction against Mr. DeWolfe. (Apx. 1-15). On July 19, 2010, the court recertified the class, and, with the parties' consent and leave of court, Plaintiffs renewed and amended their summary judgment motion to include the Sixth Amendment/Article 21 claims. (E22, Dkt.71/0). In opposing summary judgment, the DCDs again did not assert a genuine dispute of material facts that prevented summary judgment, nor did they seek discovery. Indeed, they never sought discovery below, never challenged Plaintiffs' evidence in support of summary judgment, and never presented evidence of their own to rebut Plaintiffs' evidence. For purposes of Richmond II and III, Plaintiffs' facts were undisputed, and so they remain. See Richmond II, 434 Md. at 411 n.6; Richmond III, 434 Md. at 451 n.4.

On October 1, 2010, the circuit court granted Plaintiffs summary judgment on all claims. (E238-51). After further briefing, the court entered a declaratory judgment finding that that denial of counsel at initial bail hearings violated Plaintiffs' constitutional and statutory rights to counsel. (E253-55). The DCDs and the Public Defender appealed, and Plaintiffs cross-appealed the denial of their injunction request, as the DCDs claimed that the denial was res judicata against any future request. Plaintiffs petitioned for a writ of certiorari, which this Court granted over the DCDs' objection.

On January 4, 2012, this Court held unanimously in a decision by then-Judge Barbera that the PDA required the provision of counsel at initial bail hearings and bail review hearings. See Richmond II, 434 Md. at 439-40. By a 5-2 vote, the Court denied the Public Defender's request to stay the decision until funding was earmarked by the General Assembly. See id. at 440. The DCDs moved for reconsideration, asking the Court to strike the circuit court's adverse constitutional findings (App. 82-86), and the Public Defender moved for reconsideration and for a stay. As the General Assembly signaled that it would amend the PDA to eliminate the right to representation at initial bail hearings, Plaintiffs asked the Court to decide the constitutional issues.[2] (App. 113-15). In response, the State of Maryland moved to intervene and joined the DCDs in opposing Plaintiffs' request, arguing that the case should be remanded so that the circuit could consider, in the first instance, what impact, if any, the revised legislation would have on the constitutional issues and that adjudication of the constitutional claims "would benefit from a fuller factual record" after some period of experience with the revised statute. (App. 156, 165-66). On July 9, 2012, the Court ordered the State and the DCDs to detail with specificity what new factual evidence regarding the new legislation was necessary to consider the constitutional claims. (App. 173-75). After the State and the DCDs failed to identify *any* such evidence, see App. 189-95, on August 22, the Court granted Plaintiffs' request to decide the constitutional issues. (App. 197-99).

[2] On March 30 and April 2, the General Assembly passed bills that excluded initial bail hearings before commissioners from covered proceedings under the Public Defender Act. See SB 422 and HB 261, enacted as 2012 Md. Laws chs. 504 and 505, respectively.

After substantial supplemental briefing (two sets of briefs per party and numerous amici briefs in support of Plaintiffs from the American Bar Association, the NAACP Legal Defense Fund, and other organizations) and after holding a third oral argument on these issues, on September 25, 2013, this Court held that Plaintiffs have a constitutional right to counsel at initial bail hearings under Article 24 of the Maryland Declaration of Rights. Richmond III, 434 Md. at 464. The Court directed the circuit court to revise its declaratory judgment to provide for this right, id. at 465, as the other constitutional grounds (federal due process under the Fourteenth Amendment) and the rights to counsel under the Sixth Amendment and Article 21) were not decided.

This Court issued its mandate on October 17, 2013. Immediately thereafter, Plaintiffs wrote to the circuit court requesting and proposing a new declaratory judgment (E26, Dkt.97/0), and, on October 23, the circuit court entered the new declaratory judgment proposed by Plaintiffs. (E33-34). The DCDs moved to vacate the declaratory judgment on October 28 (E27, Dkt. 98/0), which was promptly denied (E27, Dkt. 98/3).

In addition, the State – but *not the DCDs* – moved to recall the mandate, to reconsider the Richmond III decision, and to stay the decision, raising many of the arguments echoed here. (E.g., App. 200-04, E111-18). On November 6, 2013, the Court denied all three motions (E137-38) and issued a Rules Order approving provisional Rules to implement the decision, which would take effect promptly upon notice that the circuit court had entered an order requiring the DCDs to implement the decision. (E44-45).

The case formally returned to the circuit court on December 4, 2013 (E28, Dkt. 104), and the next day, Plaintiffs petitioned for further relief, asking for an injunction to compel the DCDs to appoint counsel at initial bail hearings and that the court issue an order to show cause. (E142-219). The Public Defender responded to the petition (E220-21), but the DCDs did not. On January 8, 2014, Plaintiffs wrote to the circuit court to report that the lead DCD, Judge Clyburn, had publicly declared that all logistical obstacles to immediate implementation had been resolved and that implementation could proceed as soon as this Court issued the new Rules and funding was confirmed. (E223-24). Plaintiffs asked the court to issue the order to show cause. Id.

On January 10 and again January 13, 2014, the circuit court issued an injunction directing the DCDs to provide representation to Plaintiffs at initial bail hearings. (E225-26, 231-32). Without advising the circuit court or the parties that the terms of the injunction were flawed, and without asking the court for an opportunity to be heard as to whether any injunction was appropriate, on January 14, the DCDs noted an appeal, petitioned this Court for a writ of certiorari, and moved in this Court for a stay pending appeal. None of their papers signaled any intent to ask this Court to reverse Richmond III. On January 23, 2014, this Court granted their petition and issued a temporary stay.

## QUESTIONS PRESENTED

In its order granting certiorari (E235), this Court ordered that the petition was granted "limited to the following three questions presented ... in the petition":

1. Did the circuit court err in granting an application for supplemental relief based on a prior declaratory judgment without first issuing a show cause order, as required by the statute governing such applications?

2. Did the circuit court err in entering an injunction directing officials of the District Court to conduct initial appearances in a manner inconsistent with the rules promulgated by this Court?

3. Did the circuit court err in ordering officials of the District Court to appoint counsel for all arrestees at initial appearances and prohibiting those court officials from conducting initial appearances for arrestees who were not provided with counsel?

But the DCDs' brief is not limited to these issues and instead asks the Court to reverse Richmond III. This new argument triggers two additional questions:

4. Is the DCDs' argument seeking to reverse Richmond III properly before the Court where the DCDs (a) never raised it in the Circuit Court or in their petition for a writ of certiorari; (b) failed to seek reconsideration of Richmond III per Rule 8-605; and (c) violated this Court's order limiting the issues to those presented in their petition?

5. Should the Court take the extraordinary step of disregarding stare decisis and reverse Richmond III as an "egregious blunder," such that stare decisis is suspended, where the Richmond III decision rested on numerous precedents of this Court, where the

DCDs fail to cite a single case that is contrary to the Richmond III legal analysis, where the DCDS ignore and mischaracterize numerous facts in the record, and where the DCDs complain years after the fact about a factual record that they never disputed below and a lack of discovery that they never requested below?

## STATEMENT OF FACTS

As with the Statement of the Case, the circumstances oblige us to restate the pertinent facts of this case, even though this is now the *fourth* time that some members of the Court will have had to review and consider these. Both Richmond II and III ruled that these facts were not disputed by any party below and are established for purposes of appeal. To the extent appropriate, we cite to Richmond II and III for factual support.

### A. General Facts Regarding Initial Bail Proceedings.

Plaintiffs are indigent individuals who have been or will be arrested, detained at the Central Booking Jail, brought before a commissioner for an initial bail hearing, and denied representation by counsel at that hearing in violation of their statutory and constitutional rights to representation by counsel. (Apx. 1). They challenge the first stage of Maryland's pre-trial release system as applied to Baltimore City, whereby, following their arrest, suspects are brought to Central Booking for an initial appearance and bail determination by a commissioner pursuant to Rules 4-213 and 4-216. At this proceeding, the commissioner, who is a judicial officer but usually is not a lawyer and need not, under state law, have a legal education, college degree, high school diploma, or criminal justice background, determines whether probable cause supports arrest and detention. See Apx. 2, 6; Richmond III, 434 Md. at 449. Thereafter, he/she determines whether the arrestee should be released, incarcerated, or requires bail pending trial. Id. Though the DCDs combine these decisions under a label of "presentment" (a term not referenced in the Rules), they are separate functions.

The initial bail hearing has few of the statutory and constitutional protections attendant to a criminal prosecution. It is not held in a courtroom and instead takes place deep inside the jail in a small narrow booth where the commissioner is separated from the arrestee by a plexiglass wall, requiring a speaker system for communication. Richmond

II, 434 Md. at 411-12; Richmond III, 434 Md. at 451-52. This jailhouse hearing is not open to the public, and even the arrestee's family and friends are not permitted to attend. Id.; Apx. 1, 8-9, 44, 47-48. It is not transcribed or recorded, making it impossible to review what a commissioner or arrestee said or to understand the basis for the ruling. Id. Public defenders are not present even though most arrestees are indigent, and private lawyers are rare. (Apx. 10). In contrast, by Rule and by practice, the commissioner may receive bail recommendations from the State's Attorney, who "maintains a 24–hour 'war room' in Central Booking for the purpose of making recommendations to the Commissioner regarding bail." Richmond III, 434 Md. at 451; Apx. 53, 59.

The initial bail hearing must be held within twenty-four hours of arrest unless a court grants an extension. Otherwise, the arrestee must be released on recognizance. In Baltimore City, arrestees move from one jail cell to another as they await a commissioner hearing. (Apx. 7). At this hearing, commissioners are supposed to follow the procedures for pretrial release set forth in Rule 4-216 and must consider a long series of factors in Rule 4-216(d) to determine conditions, if any, for release pending trial, ostensibly applying in most cases an entitlement favoring release or affordable bail. See Rule 4-216(b); Richmond III, 434 Md. at 450; Richmond II, 434 Md. at 410-11.

Detention conditions at Central Booking are overcrowded, harsh, unhealthy, and dangerous. (Apx. 12, 17, 44, 47). At times, arrestees may share a small cell meant for a few people with as many as ten to fifteen or more individuals in extremely cramped quarters. (Apx. 17, 44, 47, 147, 150, 154). In such conditions, arrestees often have no place to sleep or sit as they prepare to appear before a judicial officer. Id. An arrestee is fortunate to find space in the area surrounding the open toilet. Id. These squalid conditions were vividly described in The Baltimore Sun. See Apx. 140-44.

Arrestees often want to persuade commissioners that they can be trusted to return because they have a job or a family that depends upon them, but they may not know what to say, and commissioners may not know if the information is reliable or credible. (Apx. 18, 45, 48-49, 105-09, 148, 151-52, 155). Suspects lack a representative to verify their statements and a lawyer to help present relevant facts. Id. Thus, commissioners have

limited information available that they consider trustworthy and no means to substantiate the arrestee's answers. Id.; Apx. 105-09. Without such corroboration, commissioners are less likely to find the arrestees credible. Id. A study by the Abell Foundation authorized by Chief Judge Bell, The Pretrial Release Project: A Study of Maryland's Pretrial Release and Bail System (2001) ("Abell Study") (reprinted at Apx. 76-139A), found that 71% of commissioners had no information about the defendant's ability to post bail, yet the most onerous option (full money bond) was imposed in 93% of the cases (Apx. 97-98). The impact is especially hard on minorities. See Apx. 28 (Abell Study finding that 67% of detainees not released on recognizance by commissioners are African American).

**B. The Impact of Incarceration without Representation.**

In Richmond III, this Court aptly summarized the facts regarding the impact of incarcerating Plaintiffs without providing them with representation:

> ***[T]he failure of a Commissioner to consider all the facts relevant to a bail determination can have devastating effects on the arrested individuals.*** Not only do the arrested individuals face health and safety risks posed by prison stays, but the arrested individuals may be functionally illiterate and unable to read materials related to the charges. Additionally, they may be employed in low wage jobs which could be easily lost because of incarceration. Moreover, studies show that the bail amounts are often improperly affected by race.

Richmond III, 434 Md. at 451 (emphasis added). Richmond II quoted the Abell Study's finding that "'most judicial officers [including commissioners] decide whether to order release on recognizance or a financial bail without having essential information about the person's employment status, family and community ties, and ability to afford bail.'" Richmond II, 434 Md. at 413 n.7 (quoting Abell Study at iii) (Apx. 79); see also Apx. 105-06 (discussing commissioners' lack of information). Based on the Abell Study, this Court found that "unrepresented suspects are more likely to have more perfunctory hearings, less likely to be released on recognizance, more likely to have higher and unaffordable bail, and more likely to serve longer detentions or to pay the expense of a bail bondsman's non-refundable 10% fee to regain their freedom." Richmond II, 434 Md. at 429; see also Apx. 10, 90 n.12, 160-64, 165-81, 198); accord Richmond III, 434

Md. at 454 (quoting Richmond II); id. at 463 (same). Even if defendants are released at a subsequent bail review, the detention may result in missed work, loss of jobs, disruption of family life, or eviction from homes. (Apx. 2, 46, 49-50). When bail or a non-refundable 10% fee is paid, economic hardship often is severe. (Apx. 120-21).

This prolonged detention is costly, wasteful, and often unnecessary. Prosecutors dismiss without trial or decline to prosecute 60-70% of the charges against Baltimore City defendants. (Apx. 3). Meanwhile, defendants must languish in deplorable conditions. (Apx. 140-45). Without an attorney, requests for medical treatment or for transfer to a safer location are more likely to be ignored. (Apx. 12).

Commissioners require bail in over 60% of the Central Booking cases. (Apx. 106 n.82). The Abell study found that such rulings often are sustained or modified only slightly by bail review judges. (Apx. 104, 115-16). In both Richmond II and III, this Court relied on those findings. See Richmond II, 434 Md. at 430 ("We cannot overlook, moreover, the evidence in the record that the Commissioner's initial bail decision often is not disturbed by the District Court judge on bail review."); id. (Abell Study found "that, at bail review, District Court judges in the sample group maintained prior bail conditions in roughly half the cases, released only 25% of detainees on personal recognizance, and lowered bail for only one in four individuals (27%)," citing Apx. 116); Richmond III, 434 Md. at 464 (same); id. at 451 (citing Richmond II's finding that "the Commissioner's initial bail decision is not often changed during subsequent review, with the bail set by the Commissioner being maintained by the Judge in nearly half of the bail reviews"); id. at 454 (stating that, in Richmond II, "[t]his Court ... rejected the [DCDs'] argument that any wrong committed by failing to furnish counsel during the initial appearance proceeding was ameliorated by the later bail review hearing by a judge").

More recent evidence confirms that the Abell findings remain valid. As the DCDs affirm, the Public Defender analyzed initial bail hearings and bail review hearings over a 14-month period in 2012-13 and found that, in Baltimore City, the commissioner's assessment was not changed by even one dollar in nearly half of all bail reviews. See DCD Br. 38; see also Apx. 201. This should come as no surprise, as bail review hearings

typically are perfunctory exercises. One study (the "Paternoster Study") reported that the average bail review lasts *only 2½ minutes.* (Apx. 162). That number has not improved in subsequent years, as the recent Judiciary Task Force report cited by the DCDs found that bail review hearings typically last "*no more than a few minutes.*" (App. 19) (emphasis added). Thus, the damage from the initial bail hearing carries over to the bail review. All too often, this hearing is a rubber stamp, not an "independent" review (DCD Br. 8) as the DCDs claim. See id. ("much of the groundwork was covered by the commissioner"). The result in Baltimore City is massive over-incarceration.

When a district court judge maintains or moderately reduces a commissioner's excessive bail without meaningful benefit, "the defendant will remain incarcerated for weeks, if not many months, before trial." Richmond II, 434 Md. at 430; Richmond III, 434 Md. at 465 (quoting Richmond II).[3] Again, ample evidence was produced. In 1999-2000, one third of Baltimore's detainees were incarcerated because they could not afford bail of $500 or less. (Apx. 89 n.9]). The Preambles to the 2012 legislation state that "[m]any defendants cannot afford bail set at even a low amount of $100 and some wait in jail for weeks before a court appearance for misdemeanor crimes" with "a severely disproportionate racial impact and major social costs[.]" (2012 Md. Laws chs. 504 and 505). A recent study confirms that the system remains badly broken:

> On February 13, 2012, 62 people in the Baltimore City jail were detained because they couldn't pay bail amounts totaling $1,000 or less. These 62 people had been charged with offenses like trespassing, theft, driving on a suspended license, prostitution, failure to pay child support, minor drug charges and violations of probation.

Justice Policy Inst., Bailing on Baltimore: Voices from the Front Lines of the Justice System 5 (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/

[3] The dissenting opinion in Richmond III commented that providing counsel at bail review hearings might make this finding no longer applicable. See 434 Md. at 470 n.6 (Barbera, C.J., dissenting). Unfortunately, this optimism proved unfounded: bail reviews are no more effective now than before, as discussed above. Moreover, the Judiciary Task Force finding that the typical hearing lasts only a few minutes shows that the bail reviews are as perfunctory as ever. In any event, in Baltimore City, counsel *was* provided at most bail review hearings before the Richmond decisions, so no positive change was likely.

bailingonbaltimore-final.pdf. No doubt some detainees suffered real loss (jobs, housing, or child custody) from this senseless incarceration for minor non-violent offenses.

Unnecessary pretrial detention also impairs the defendant's chances for a positive outcome. A study examining fifteen months of arrests in New York City found that:

> Pretrial detention had an adverse effect on every case outcome that was examined. Defendants who were detained pretrial were more likely to be convicted, less likely to have their charges reduced and more likely to be sentenced to jail or prison than their counterparts who were at liberty during the pretrial period.

Mary T. Phillips, A Decade of Bail Research in New York City 115 (Aug. 2012), http://www.cjareports.org/reports/DecadeBailResearch.pdf.; see also id. at 110 ("Pretrial detention is closely related to bail amount" as "it does not take much to keep defendants in detention until disposition of the case."). The effects, therefore, are severe.

By contrast, representation provides substantial and measurable benefits. Lawyers can provide verified information about residence, employment, family, financial circumstances, and ties to the community. They can help arrestees understand the types of information that would support a request for release on recognizance and follow up in finding witnesses and information for a bail review. They can advise arrestees as to how to address the commissioner and discuss the criminal charges without self-incrimination. They can point out legal issues like a weak probable cause statement. Perhaps most important, they can advocate for arrestees who are not equipped to advocate on their own behalf. (Apx. 10, 11-12, 45-46, 49, 90 n.12, 110, 113).

These benefits are far from conjectural or ephemeral. Studies show that providing counsel shortens the length of detention and thus *saves* money by avoiding the expense of incarceration. In the Paternoster Study, lawyers defended nearly 4,000 indigent defendants charged with non-violent offenses at bail reviews. (Apx. 10-11, 158). These individuals were over 2½ times as likely as unrepresented defendants to be released on recognizance and to have their bail reduced to an affordable amount. (Apx. 158-60). A National Institute of Justice study of three pilot projects assigning public defenders to bail proceedings found that having counsel reduced jail time by 16.4%, 39.7%, and 4.8%;

case processing time was reduced by 20-25%, and sentences were reduced, resulting in significant financial savings.. (E172-75 [I Ursa Inst., Early Representation by Defense Counsel: Final Evaluation Report (1985)]. In New York, the Manhattan Bail Project found that FTA rates were much lower with law student representation, and a follow-up study by the Vera Institute found that defendants released on recognizance rose from 23% to 60%. (E110 n.12). A study by the ACLU found that defendants with counsel were five times as likely to have their cases dismissed as those without. See Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972). The Public Defender of Rhode Island has found that early representation saved the state over $9 million per year. (ABA Amicus Br. 14). This Court has found substantial benefits from providing counsel. (Apx. 191A).

None of these facts was ever disputed by the DCDs below.

**C. The Experiences of Named Plaintiffs and Others.**

The Richmond II and III courts were provided practical examples. Plaintiff Myron Singleton was arrested on a misdemeanor charge of marijuana possession; his bail was set by a commissioner at ***$10,000***, which was affirmed two days later at a bail review, even though he lived with his grandmother and worked for his grandfather's company as a cement layer,. He was released after paying a bail bondsman a 10% non-refundable fee of $1,000. (Apx. 44-45). Plaintiff Michael LaGrasse, a 46 year-old construction worker, remained in custody for *over 2½ months* on charges for theft (less than $100), an FTA, and attempted possession of a controlled dangerous substance because he could not afford a combined bail of *$300* (originally set at over $5,000 by a commissioner). He was released by a nolle prosequi on all charges. (Apx. 11-12). See also Apx. 19-20 (detailing Plaintiff Timothy Wright who was held for two days on a $150 cash bond set by a commissioner for FTA on a fourth degree burglary charge).

The experience of John R. Clayton, a 30-year old graduate student at the Johns Hopkins Bloomberg School of Public Health, illustrates the hurdles facing unrepresented arrestees. Mr. Clayton was arrested on Friday, January 7, 2006 for driving under the influence, detained at Central Booking, and brought before a commissioner that evening. Despite the fact that he was charged only with DUI and had no prior criminal record, the

commissioner set his bail at $10,000, which he could not pay, and was detained until his bail review hearing three days later, when the district court released him on personal recognizance. Until his release, Mr. Clayton was unable to contact anyone. No family members knew that he had been arrested and incarcerated. (Apx. 145-46). A lawyer would have provided the commissioner with verified information about Mr. Clayton's JHU graduate student status, his residence, his character and dependability, and the lack of prior arrests, and contacted his family and told them how to post bail. Id.

In Richmond III, the Court was provided testimony from the 2012 legislative hearings, where law students gave the principal information about Baltimore City. One student testified that three of his five clients incarcerated for minor, drug-related non-violent offenses (possession, trespass, and simple theft) were released at reconsideration hearings after drug treatment programs were found. (Apx. 195). Another testified about an 18 year-old student studying for his GED charged with second-degree assault (an alleged slight push and shove of his mother during an argument), who was incarcerated for *22 days* due to his family's inability to afford *$250 bail.* (Apx. 196). The student petitioned for re-review, and a judge released the defendant on recognizance and the charge was dropped. (Apx. 197). A third law student testified that clients had not been informed of the option of paying a fully refundable 10% cash bail directly to the court (avoiding an unaffordable bail bondsman fee) and were released once informed. (Apx. 198). The students secured release for 31 of 42 (75%) of their clients. (Apx. 200).

**D. The Amici Briefs.**

Both Richmond II and III also had the benefit of extensive information provided in amici briefs: seven different briefs in Richmond II alone. As the compressed briefing schedule and lack of notice of the DCDs' attack on Richmond III made it impossible for amici to participate in this round, we briefly summarize pertinent information.

The NAACP Legal Defense Fund ("LDF") brief showed that "the absence of counsel … disproportionately affects African Americans and other Maryland residents of color … and contributes to the unfair over-representation of people of color in the justice system." (LDF Amicus Br. 3). It cited studies showing grave racial imbalances at

detention hearings: the odds of an order resulting in pretrial detention are 96% and 150% higher for African-American and Latino defendants arrested for drug offenses, respectively, than for white defendants. Id. at 27. Bail amounts are 35% higher for African-American males than for white males. Id. at 28. Detainees who do not make bail are incarcerated for 68 days on average even though many of these cases (54% of cases initiated in the Baltimore City District Court) eventually are dismissed, nolle prosequi'd, or placed on the inactive docket. Id. at 8.

The Public Justice Center's ("PJC") amicus brief on behalf of itself, International Cure, Alternative Directions, Inc., and the Justice Policy Institute addressed "health hazards, threats to physical safety, job loss, and vulnerability of family and other dependents who rely on the liberty of the arrestee." (PJC Amicus Br. 5). Detainees often must choose between non-refundable bail fees to a bail bondsman or necessities such as food or rent. They typically are low-wage, at-will employees with little job security, putting them at high risk of job loss, particularly if they cannot contact their employers when arrested. Id. at 20-21. PJC described grave health and safety risks such as tuberculosis and other diseases, risk of assault, lack of health care, interrupted medical treatment, and deteriorated mental health: Baltimore City jails have had the highest suicide rate of any of the 50 largest U.S. jurisdictions. See id. at 5-24.

The National Association of Criminal Defense Lawyers ("NACDL"), the National Legal Aid and Defender Association, the Brennan Center for Justice, the American Civil Liberties Union, and the Center for Constitutional Rights showed the acute need for counsel at initial bail hearings due to (a) high rates of functional illiteracy, learning disabilities, and mental impairments; (b) detainees' common fears that disclosure of information will risk job loss, eviction, or immigration problems; and (c) the complexity of the Maryland rules for release and bail. See NACDL Amicus Br. 7-13.

The American Bar Association ("ABA") filed a rare state court amicus brief on its longstanding Standards and Policies calling for the appointment of counsel at the earliest stages of a criminal case and *no later than the initial appearance*, including bail. See ABA Amicus Br. 2-7 (discussing Standard 5.1 (1967), current Standards 5-6.1 and 10-4.3

(b)-(c) cmt., and Policy 1998 AM 112D); id. at 12, 14 (discussing "trend in the States" to require counsel at bail hearings). As of 2008, ten states and the Federal Government required representation at the initial appearance; in thirty states, counsel is appointed in at least some local jurisdictions; Maryland is one of ten states to deny protection. Id. at 13-14. The ABA cited studies showing that providing counsel at the earliest stages "promote[s] judicial efficiency and serve[s] the economic interests of the state" as "cases are resolved more quickly" and detention costs plummet. Id. at 14.

Finally, the Society of American Law Teachers ("SALT") explained how pretrial detention hinders the criminal defense. See SALT Amicus Br. 14-17.

**E. The *Richmond III* Decision.**

Based on this record and clear Maryland precedent, Richmond III held that denial of counsel at initial bail hearings deprives indigent criminal defendants of due process under Article 24 of the Declaration of Rights. It cited numerous cases that had held or affirmed that a right to counsel exists at any proceeding with a risk of incarceration:

> "A defendant's *actual incarceration in a jail, as a result of a proceeding at which he was unrepresented by counsel* and did not knowingly and intelligently waive the right to counsel, is fundamentally unfair. As repeatedly pointed out in criminal and civil cases, *it is the fact of incarceration, and not the label placed upon the proceeding, which requires the appointment of counsel* for indigents. With regard to [a] minority 'special circumstances' rule ..., very often the 'special circumstances' requiring the assistance of counsel are not apparent until the defendant is represented by counsel. Moreover, the deprivation of liberty is itself a 'special circumstance' requiring the assistance of counsel."

Richmond III, 434 Md. at 460 (emphasis in original) (quoting Rutherford v. Rutherford, 296 Md. 347, 360-61 (1983)). Six other cases "reaffirmed that the right attaches in any proceeding that may result in the defendant's incarceration." Id. at 461-62 (citing Zetty v. Piatt, 365 Md. 141, 156 (2001); Vincenti v. State, 309 Md. 601, 604 (1987); Parren v. State, 309 Md. 260, 262 (1987); Lodowski v. State, 307 Md. 233, 248 (1986); Williams v. State, 292 Md. 201, 218 (1981); State v. Bryan, 284 Md. 152, 158 n.5 (1978)). In Williams, 292 Md. at 218, this Court stated that there is an "absolute right of counsel if there is a danger of incarceration." Citing Zetty, 365 Md. at 161; Kawamura v. State, 299

Md. 276, 291-92 (1984); Danner v. State, 89 Md. 220, 226 (1899); Reed v. Foley, 105 Md. App. 184, 196-97 (1995)), the Court also explained why bail reviews do not mitigate a lack of counsel at initial bail hearings:

> This provision, however, does not rectify the constitutional infirmity of not providing counsel for an indigent defendant at the initial proceeding before a Commissioner. As a matter of Maryland constitutional law, where there is a violation of certain procedural constitutional rights of the defendant at an initial proceeding, including the right to counsel, the violation is not cured by granting the right at a subsequent appeal or review proceeding.

Id. at 462. The Court further pointed out that Richmond II had explained that the bail review hearings do not cure the deficiencies at initial bail hearings:

> "That a defendant *might* have bail reduced or eliminated ... at a subsequent bail review hearing does not dispel or even mitigate the fact that, whenever a Commissioner determines to set bail, the defendant stands a good chance of losing his or her liberty, even if only for a brief time. Furthermore, the likelihood that the Commissioner will give full and fair consideration to all facts relevant to the bail determination can only be enhanced by the presence of counsel. ... We cannot overlook, moreover, the evidence in the record that the Commissioner's initial bail decision often is not disturbed by the District Court judge on bail review. .... Whenever the Commissioner's bail decision is left standing, the defendant will remain incarcerated for weeks, if not many months, before trial."

Id. at 463-64 (quoting Richmond II, 434 Md. at 429-30 (emphasis in original, footnote omitted)). Thus, Richmond II and III both held that bail reviews do not mitigate a lack of counsel at the initial bail hearing stage.

Finally, the Court noted that the interval between an initial bail hearing and a bail review often exceeds 24 hours because the district court is not in session on weekends and holidays and a bail review does not occur until the district court's next session. Id. at 455. In extended holiday weekends, this can cause a lack of counsel for up to *six days*.

For these reasons, the Court held that the lack of counsel violates due process.

**F. Post-*Richmond III* Events.**

Following the circuit court's denial of the DCDs' motion to strike the circuit court's declaratory judgment, on November 6, 2013, this Court denied the State's motions to recall the mandate, reconsider Richmond III, and stay enforcement of the

decision and instead approved provisional Rules proposed by the Rules Committee (181st Report) to implement the decision. The Court was poised to put the provisional Rules into effect immediately, but, after Judge McDonald pointed out that the mandatory nature of the Rules could prove problematic in jurisdictions that were not ready, the Court decided (with Judge Adkins dissenting) that implementation should be decided by the circuit court, due to its primary jurisdiction over the case, and that once the circuit court ordered implementation, the Court would order the new Rules to take effect. (E37, 144). The process would be triggered by a petition for further relief.

After the November 6 rulings, the lead District Court Defendant, Chief Judge Clyburn, commented to the press for publication that he would not fight the right to counsel any further and would focus his energies on implementation: "I'm not fighting anything. ... I am moving forward. We are ready to go." (E143-44). In light of this comment and the constitutional duty to provide counsel found by this Court, Plaintiffs wrote to the DCDs via counsel to ask them to commence implementation immediately and thereby avoid the need for further litigation. (E139-41). The DCDs' contention that the letter meant that the Plaintiffs would not petition for further relief is wrong; the letter was a standard demand letter seeking to induce voluntary implementation (or consent to a court order) in lieu of an adversarial court-ordered injunction (E213-14 n.1), but, if that failed, litigation would be pursued, which is what transpired. Instead of responding to the letter, on November 13 the DCDs filed a "status report" in the circuit court that expressed their strong anger at the letter, summarized their steps taken in response to Richmond III, and set forth reasons why implementation could not occur promptly. (E35-42).

Implementation efforts nonetheless moved forward. On November 26, 2013, Chief Judge Barbera issued an Administrative Order establishing the appointment process for attorneys to represent Plaintiffs at initial bail hearings. (E199-201). It directed the chief judge of the district court to direct the administrative judge for each district to select qualified private attorneys to accept representation under the fee schedule used by the Public Defender for panel attorneys, with the fees charged to the State, to compile a list

of such attorneys, and to develop procedures for notice. Id. That day, Chief Judge Clyburn directed the administrative judges to comply immediately. (E202).

On December 4, the case formally returned to the circuit court, and, on December 5, Plaintiffs petitioned for further relief. While the petition was pending, the State's Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender ("State's PD Task Force") issued its final report recommending significant changes to the pretrial system: (1) a mandatory pretrial release process and statewide pretrial services system; (2) elimination of initial appearances, including bail/release hearings before commissioners, replaced by hearings before district court judges within 24 hours of arrest; and (3) an elimination of cash bail. (App. 69-81). This proposal had numerous salient advantages. First, it would allow for representation by counsel at all proceedings where bail, incarceration, or release were at issue and thus comply with Richmond III. Second, it would establish an effective system to ensure prompt release for detainees whose arrests clearly did not warrant detention or conditions on release, and thus would avoid prolonging the period of detention before release at an initial bail hearing. Third, the system would have relatively minimal costs: there would be new district court judge positions and costs for weekend hearings, a new state pretrial services program, but corresponding offsets from reduced commissioner utilization and reduced incarceration. This proposal flatly rebuts the DCDs' charge that Richmond III cannot be implemented without breaking the bank or prolonging detention.

A different but related proposal was set forth by a task force established by the Judiciary. (App. 5-24). Among other things, this proposal would eliminate initial appearances before commissioners on weekdays, install video conference capacity for all district court bail proceedings, expand pretrial services, and explore mandatory pretrial release. The costs were relatively modest: an estimated $3.6 million, plus one-time video conference costs of $1.95 million. (App. 21-22). The report confirmed critical data. As discussed above, it found that bail reviews typically last no more than a few minutes, which, for the report's conservative budget estimates, were slotted at ten minutes per case. (App. 19). It further conservatively estimated that a full initial appearance

(including the bail hearing) would take twenty minutes. (App. 20). This finding punctures the stubborn myth propagated by numerous policymakers that Richmond III would cost at least an additional $30 million per year to implement.

As Plaintiffs have previously explained, the $30 million figure rests on an ultra-platinum-standard model of staffing one public defender per commissioner. It was calculated based on the *total* work-time of commissioners, even though most of their time is not spent on bail. The calculation translates to ***2.8 hours*** per commissioner per initial appearance. (App. 120-21, 144-45). At that rate, a public defender could handle only two hearings a day. Id. By contrast, a DLS fiscal note found that initial appearances take 15-30 minutes (including non-bail issues). See App. 121, 144 (citing DLS, Fiscal Note to SB 422 (2012) at 10, 15-16). Indeed, the Judiciary Task Force report confirms that actual costs will be far, far less: the full initial appearance hearing will take only 20 minutes, a far cry from the 2.8 hours of attorney time previously projected. (App. 20). Experience bears this out: the *actual* public defender staffing for bail review hearings in Baltimore City (6.5 lawyers) comes to 4,000 bail reviews per year per lawyer. See App. 145.

Moreover, none of these estimates consider the substantial *savings* from reduced incarceration. In 1999, DLS estimated that a mere 6% reduction in the Baltimore City jail population would pay the cost of counsel. (DLS, Fiscal Note to HB 1092 (1998) at 3). The cost estimates thus look at only one side of the ledger: all pain and no gain.

In sum, the opposition of policymakers rests largely on a greatly exaggerated view of the impact of Richmond III. The $30 million cost estimate is a shibboleth. But despite the clear evidence that the estimate is greatly inflated, no more real than the Iraq WMDs, policymakers use it as an in terrorem cudgel against the right to counsel.

Chief Judge Clyburn presented the Judiciary Task Force report to the State's PD Task Force on January 6, 2014. At that time, Judge Clyburn announced that all logistical concerns regarding implementation had been resolved and that implementation could proceed immediately, subject to funding and the new Rules taking effect. See E223-34; Apx. 202-03. Thus, the DCDs' contention that compliance is not feasible flies in the face of a clear public pronouncement by the lead DCD to the contrary. Not only is it feasible,

it is perfectly doable and affordable as a short-term implementation measure while policymakers debate the best long-term solution. Judge Clyburn's report answers the DCDs' objections on feasibility and logistics.

On January 8, 2014, Plaintiffs told the circuit court of Judge Clyburn's statements and the DCDs' lack of response to the petition for further relief and asked the court to proceed. (E223-24). Between the "status report" and Judge Clyburn's announcement, the circuit court had before it full information about whether implementation was ready to proceed and the DCDs' objection (which was based on older information). The court proceeded to enter an injunction on January 10 and 13. As soon as Plaintiffs learned that an injunction was ordered, Plaintiffs wrote to the Court in its rulemaking capacity to ask that it issue a final Rules Order to make the new Rules effective. (Apx. 204-05).

Without alerting the court or the parties to its concerns about the injunction, the DCDs immediately noted this appeal and petitioned for a writ of certiorari. At no time did the DCDs ever tell the circuit court or any other court that they would use this appeal as a device to seek reversal of Richmond III.[4] Their cert. petition was silent on the issue. The DCDs' principal argument thus is a literal shot out of the blue.

Their factual presentation also presents a one-sided and inaccurate portrayal of the current options for implementation. See DCD Br. 16-17. They never address Judge Clyburn's report that all logistical obstacles have been resolved. Moreover, in claiming that the average time between arrest and a commissioner-heard initial hearing is four hours (DCD Br. 17), they refer to data from other jurisdictions, *not* Baltimore City. See App. 5. In Baltimore City, detainees are moved from jail cell to jail cell until their cases are heard shortly before the 24-hour deadline. See Apx. 7. Indeed, it took litigation to compel the DCDs just to meet the 24-hour deadline in Baltimore City. Thus, the DCDs' assertion that Richmond III would "inevitably produce delays in presentment" for

[4] Even as the DCDs remained silent as to reconsideration until this brief, the Governor and State Senate President both publicly declared their intent to get the case back to this Court to reverse Richmond III and openly acknowledged their strategy to try to exploit the change in membership of the Court. See Michael Dresser, O'Malley, Miller Don't See High Court Bail Ruling as Final, Balt. Sun, at 1 (Jan. 8, 2014).

Plaintiffs (DCD Br. 17) is false: in Baltimore City, it would not delay *any* hearings for *any* Plaintiff. Moreover, while the *Judiciary Task Force* proposal might result in delays for some detainees in some jurisdictions outside of Baltimore City, see id. the DCDs fail to discuss the *State's PD Task Force* proposal which would cause *earlier* release and would also comply with the 24-hour requirement for all detainees.

Finally, one fact cited by the DCDs bears special comment. They point out that, since September 25, "no arrestee has invoked the newly declared right." (DCD Br. 14). Putting aside the lack of record support, and even moving past the black-letter rule that a waiver of a constitutional right, including the right to counsel, has to be knowing and voluntary, see Johnson v. Zerbst, 304 U.S. 458 (1938) – and here no judicial official has ever advised arrestees of their "newly declared" right to counsel – this statement merely confirms the injustice of the DCDs' lack of implementation. Seven years after this case was brought, and five months after the constitutional right was declared, the constitution continues to be violated by judicial officers of this State every day, even though Judge Clyburn stated *two months ago* that implementation can proceed immediately, as soon as this Court lets the new Rules take effect. Blaming the arrestees for the DCDs' constitutional violations, we respectfully suggest, is beyond the pale.

## RESPONSE TO DCDs' SUMMARY OF ARGUMENT

After discussing minor alleged errors in the circuit court's injunction, the DCDs get to the real point of their appeal: their contention that Richmond III should be reversed because it would produce "the opposite effect" and "perverse result" of hindering liberty because reform proposals would eliminate a commissioner-based initial appearance. (DCD Br. 19-20). This egregious assertion is absolutely wrong:

- It ignores the fact that the State's PD Task Force proposed an inexpensive and simple reform mechanism that would (i) result in *earlier* release for many Plaintiffs; (ii) save money by eliminating the duplicative current system of dual proceedings before commissioners and district court judges; and (iii) assure that all Plaintiffs would receive hearings within the current 24-hour requirement.
- It relies on bills and proposals from opponents of Richmond III or the proposals developed by the DCDs through the Judiciary Task Force.

- It continues to rely on grossly inflated cost estimates to argue that implementation of Richmond III will be "extremely costly" and impossible to achieve.
- It ignores and contradicts Judge Clyburn's public pronouncements that logistical concerns have been resolved and that short-term implementation *can* occur immediately while long-term reforms are debated and decided.
- It fails to identify *any* barriers to compliance in Baltimore City.
- It fails to account for *any* of the core benefits that will result from Richmond III: decreased unnecessary incarceration (particularly in Baltimore City, where the problem of over-incarcerated pretrial detainees continues unabated, better substantive outcomes in criminal cases, and substantial long-term savings.

This is hardly a record, therefore, that shows any underlying error of law or fact in Richmond III. Indeed, the DCDs' concerns are largely the same ones that they raised in their prior briefing and arguments to the Court, many of which were discussed in the dissenting opinion. Having rejected them in Richmond II, and again in Richmond III, and again in denying the State's motion for reconsideration in Richmond III, the Court has made its rulings on these issues clear. It is time, once and for all, for this Court to order implementation to proceed. Once that occurs, we are confident that the policymakers will reach a long-term solution that will be cost-effective, fair, and a very positive gain for all indigent defendants unnecessarily incarcerated who, under the law, are presumptively entitled to liberty pending trial.

## ARGUMENT

### I. Standard of Review.

The circuit court's permanent injunction order is reviewed for abuse of discretion. See Colandrea v. Wilde Lake Comm. Ass'n, 361 Md. 371, 394 (2000). As for the stare decisis challenge, no standard of review applies, as the issue was not raised below.

### II. The Issuance of the Injunction without a Show Cause Order Did Not Prejudice the DCDs.

The DCDs' argument that the circuit court erred by issuing the injunction without first issuing a show cause order (DCD Br. 22-23) fails to assert any prejudice. This omission is not inadvertent: the DCDs had already told the circuit court all of their objections to implementation in their "status report," and they had a month to supplement

that report if needed to address Plaintiffs' petition for further relief. While the Public Defender responded to the petition, the DCDs did not. Even now, the DCDs proclaim that a remand to the circuit court is not necessary, as all of the information needed for this Court to decide the substantive issues is in the record and before the Court, such that this Court can decide the injunction on a plenary basis. See DCD Br. 27.

Indeed, in light of Judge Clyburn's public pronouncement that all logistical issues had been resolved, it is a complete mystery what further considerations the circuit court needed to consider before ordering compliance in the short-term while policymakers debate the best way to reach compliance in the long-term. There was no need for the circuit court to inquire as to the details (such as available attorneys) when the lead DCD had categorically pronounced that *all* details had been worked out successfully. Funding issues also had been resolved: both Richmond III and the administrative order entered by Chief Judge directed that the State should be billed. While the DCDs complained in their status report that their first needed to be an appropriation of funds, the law is squarely to the contrary. See 76 Md. Op. Atty. Gen. 341, 342 (1991) ("the lack of funds does not mitigate the State's responsibility to provide counsel for indigent defendants") (E205); Ehrlich v. Perez, 394 Md. 691, 735-36 (2006) (affirming preliminary injunction to reinstate Medical Assistance benefits for certain immigrants and their children, despite lack of budgeted funds, as "the executive and legislative budget authority is subject to the constitutional limitations of the Declaration of Rights"); Off. of Public Defender v. State, 413 Md. 411, 426 n.12 (2010) ("'it goes without saying that reductions in the Public Defender's budget and his desire to be frugal have no relevance whatsoever'" to the right to counsel) (citation omitted), superseded on other gds., 2011 Md. Laws, ch. 244.

The two cases cited by the DCDs involve prejudice. In Westport Ins. Corp. v. Bayer, 284 F.3d 489, 500 (3d Cir. 2002), the trial court granted relief "on an issue outside the scope of the relief requested" and thus gave no advance notice. Similarly, in Funes v. Villatoror, 352 S.W.3d 200, 214 (Tex. App. 2011), an injunction was ordered sua sponte by the court as supplemental relief without any request by plaintiff. Here, the DCDs knew for years that an injunction was requested, had a submitted a status report that had

laid out in detail their objections to injunctive relief, had a month to consider the terms of Plaintiffs' proposed injunctive relief, and then had full opportunity to ask the court for reconsideration to cure any errors. Neither case is remotely applicable here.

As all necessary information was before the circuit court, and as the DCDs fail to identify any prejudice and acknowledge that, based on the record before the circuit court, this Court is able to decide the issues itself on a plenary basis, the circuit court's failure to issue a show cause order does not require reversal of the injunction order.

## III. The Injunction Comports with the Procedure this Court Established for Implementation and Does Not Conflict with Existing or Prospective Rules.

The DCDs' argument that the circuit court erred by entering an injunction that is "incompatible" with both current and prospective rules (DCD Br. 22-25) ignores the operative premise for the circuit court's action: *this Court* set up the process whereby Judge Nance would issue an order compelling implementation, and then Plaintiffs would notify this Court of that fact, whereupon this Court, acting in its rulemaking capacity, would issue a Rules Order directing that the November 6 Rules Order would take immediate effect. See E 37, 144-45 ¶ 9. Plaintiffs followed that exact procedure, as immediately after learning of Judge Nance's order, Plaintiffs wrote to this Court asking it to order that the November 6 Rules Order take effect. (Apx. 204-05). The DCDs' claim that the injunction is inconsistent with the Rules ignores the process that *this Court* laid out for the parties to follow – return to the circuit court, have the circuit court compel compliance, alert this Court that the circuit court has acted, and ask this Court to issue its Rules Order for implementation to proceed.

Given that the circuit court followed the very procedure that this Court laid out for the circuit court to follow, the DCDs' claim of error is meritless. It also makes little sense. Requiring the circuit court to wait until the new Rules are in effect, when this Court expressly declined to order the new Rules to take effect until the circuit court ordered compliance, would create an impasse of perpetual inaction. The injunction was issued under the assumption that the new provisional Rules *would* be in effect when implementation commenced. The DCDs' argument is premised on the false assumption

that the new Rules would not be in effect and thus poses a false conflict arising from an imaginary failure by this Court to promulgate the new Rules.[5]

Finally, the DCDs' claim that the injunction is overbroad (DCD Br. 24-25) rests on two de minimis, easily cured issues that Plaintiffs resolved in their response to the DCDS' motion for stay by this Court – to which the DCDs have not objected.[6] Indeed, had the DCDs raised this concern below before they rushed to this Court for relief, it would have been resolved at that time, without any ado.

## IV. The Circuit Court Did Not Err by Issuing an Injunction.

The DCDs' third alleged error by the circuit court – the decision to issue an injunction – fails for the simple reason that the DCDs make no argument whatsoever regarding any error by the circuit court. See DCD Br. 26-41. Instead, they argue that *this Court* erred in Richmond III. But it is an elementary truism that an alleged error by this Court does not permit a lower court to disregard precedent. See Koshko v. Haining, 398 Md. 404, 428-29 (2007) (holding that the Court of Special Appeals correctly followed a prior ruling of this Court despite potentially contrary Supreme Court decision); Chesapeake & C. B. R. Co. v. Richfield Oil Corp., 180 Md. 192, 194 (1942) (holding that the Maryland Constitution makes judgments of this Court "final and conclusive," which means that the "decision of this Court in any cause is binding upon the lower Court and cannot be disregarded"); see also Tu v. State, 336 Md. 406, 416 (1994) ("'the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand'") (citation omitted, emphasis in original). The DCDs' remedy was to move timely for reconsideration, which they failed to pursue. Once this Court's decision

[5] The DCDs' claim that the injunction is "inconsistent" with existing Rules because commissioners lack power to appoint counsel (DCD Br. 23) is chimerical. No Rule prevents commissioners from appointing counsel, and the lack of an authorizing Rule hardly is a prohibition. The district court has plenary power to appoint counsel and can delegate that power to its judicial officers, including commissioners. In any event, given the Court's instruction that it *will* issue the new Rules, this issue is moot.

[6] The DCDs also complain that the injunction is underbroad because its application is limited to Baltimore City. (DCD Br. 24). The Plaintiff class, however, is limited to Baltimore City defendants.

was final and the mandate issued, the decision was binding on the circuit court. The DCDs do not, and cannot, argue otherwise. As they fail to make *any* argument that the circuit court erred by following Richmond III, their third ground for error lacks any merit.

## V. Motion to Dismiss or Disregard the DCDs' *Stare Decisis* Challenge to *Richmond III* Because It Violates This Court's Order Granting Their *Cert.* Petition, Violates This Court's Rules for *Cert.* Petitions, and Violates This Court's Rules for Seeking Reconsideration.

The DCDs' argument that Richmond III should be reversed comes to this Court through stealth and subterfuge: it was not raised anywhere in their cert. petition and was never raised in the circuit court. Not a word of their petition or any other filing in this Court or the circuit court signaled that this startling argument would be raised, let alone pursued as the centerpiece and obvious goal of their appeal. Such gamesmanship is improper in any case, but, for it to be utilized in a case of this significance, which decides vital constitutional rights for tens of thousands of individual defendants across the state and which, by their own admission, has tremendous impact on the administration of pretrial justice in Maryland, is absolutely unacceptable and should not be condoned. Accordingly, pursuant to Rules 8-602(a) and 8-603(c), their argument to reverse Richmond III should be dismissed or disregarded for four separate reasons: (1) it is a clear violation of the Court's express order; (2) it is a clear violation of the Rules regarding the content of cert. petitions; (3) it is a clear violation of the Rules regarding motions for reconsideration requiring these issues to be raised *before* issuance of the mandate, not five months later; and (4) the challenge to Richmond III is not cert.-worthy, which no doubt is why the DCDs did not dare raise it in the petition.

*First*, the DCDs' violation of the Court's petition-grant order is indisputable. The order could not have been clearer: the Court limited its review to *only* the three issues raised in the petition. None of those issues mention reversing Richmond III. While the DCDs try to shoehorn the issue into Question 3 (whether the circuit court erred by granting the injunction), that question by definition cannot be stretched to encompass a reversal of Richmond III because, as discussed above the circuit court *cannot* err by applying this Court's ruling. Indeed, the stated purpose of the petition was the converse

of a request to reverse Richmond III and end the case: it was to fix the injunction. The DCDs told the Court that "[t]he Court's intervention is required to correct the circuit court's precipitous action in issuing an over-broad injunction with immediate effect[.]" (DCD Pet. 6). They asked the Court to "summarily vacate and reverse the circuit court's injunction and remand for further proceedings," or have a "plenary review of the substantive challenges by the District Court Defendants, and other affected parties, as to the [merits of the] relief ordered by the circuit court." Id. at 11. Only the merits of the *relief* ordered by the circuit court was at issue, not the merits of Richmond III itself. Expanding the very modest scope of the petition from a challenge to relief ordered by the circuit court to a much belated challenge to a landmark, settled constitutional ruling is a bait-and-switch for the ages that flatly violates this Court's order.

*Second*, the DCDs' transmutation of their appeal violates this Court's rules regarding cert. petitions. Rule 8-301(a)(3) limits this Court's appellate review in this case to its writ of certiorari. Rule 8-303(b)(1) requires that the petition "shall present accurately, briefly, and clearly whatever is essential to ready and adequate understanding of the points requiring consideration." Rule 8-303(b)(1)(F) requires that the petition state "[t]he questions presented for review," and Rule 8-303(b)(1)(I) requires a "concise argument in support of the petition." Any violation of these Rules is ground for denying the petition. Rule 8-303(c). All of these Rules were violated here, and then some.

The fact that this is a bypass petition and Rule 8-131(b)(2) allows this Court to hear all issues that could have been raised in the Court of Special Appeals ("CSA") in a bypass case does not entitle the DCDS to omit the centerpiece issue in their appeal from their cert. petition. That latitude applies when the Court issues a bypass petition on its own motion, or when an appellee files a bypass petition, to avoid curtailing the appellant's right to a plenary appellate review of all issues. It does not apply to the bypass petitioner's election to limit the issues presented in its bypass cert. petition; otherwise Rule 8-131(b)(2) would swallow Rules 8-301(a)(3), 8-303(b)(1), 8-303(b)(1)(F), and 8-303(b)(1)(I) and render them meaningless for bypass petitions. Moreover, even in a bypass case, this Court "considers only those issues that would have

been properly before the Court of Special Appeals." Sweeney v. Sav. First Mortg., LLC, 388 Md. 319, 323 n.5 (2005). As the CSA has no power to reverse this Court's precedent, see Koshko v. Haining, 398 Md. at 428-29 & n.11, the issue could not come before the Court even under Rule 8-131(b)(2). In any event, Rule 8-131(b)(2) does not supersede the Court's express order limiting the issues to those raised in the petition. See Exxon Mobil Corp. v. Ford, 433 Md. 426, 459, as supplemented on denial of reconsideration, 433 Md. 493 (2013) (indicating that Rule 8-131(b)(2) "enables" the Court to consider and decide all issues, not that it requires the Court to do so).

This is a fundamental question of this Court's orderly administration of justice. If an appellant *elects* to file a bypass petition limited to discrete issues, it should not be able to use that petition as a device to skirt the Court's discretionary power under the Maryland Constitution to decide which issues to review and when. Requiring appellants to frame the issues in advance so that the opposing party may fairly respond and the Court may make an informed determination before issuing a writ is quintessential to a fair and orderly process of deciding this Court's docket. Otherwise, parties will brief by ambush, forcing the Court to decide issues that it did not accept for review, depriving appellees of their right to argue that the issue is not cert.-worthy, and forcing appellees to address major issues suddenly, without warning. The prejudice is particularly acute here, as the Court ordered an extremely compressed briefing schedule of only fourteen days for Plaintiffs' brief. By failing to give advance notice to Plaintiffs of their alchemic shift in issues, the DCDs exploited that compressed briefing schedule to the hilt.

The impropriety of these tactics is patent. As Justice Jackson observed: "[w]e disapprove the practice of smuggling additional questions into a case after we grant certiorari." Irvine v. California, 347 U.S. 128, 129-30 (1954). This Court should not reward the DCDs' tactical concealment of the centerpiece of their appeal.

*Third*, this argument is an improper, and much belated, motion for reconsideration of Richmond III. The DCDs had an opportunity to make such a motion (or join in the State's motion) and intentionally chose not to do so, perhaps in light of certain comments made to the Rules Committee shortly after Richmond III was issued. Whatever the

reason, the requirements of Rule 8-605(a) are strict: a motion for reconsideration must be filed no later than 30 days after issuance of the opinion (in this case the State was allowed to file its motion after issuance of the mandate). A losing party cannot wait until its next appeal in the case to challenge the merits of this Court's decision.

*Fourth*, this issue is not cert.-worthy. The DCDs utterly fail to show any egregious blunder by the Court or glaring injustice. See Part VI, infra.

*In sum*, the DCDs' concealment of this issue was a strategic decision to foist the issue on this Court as a fait accompli.[7] Such tactics should not be condoned. Under the circumstances, dismissal of the argument under Rule 8-602(a)(1) is the least drastic sanction for a violation of this magnitude. Indeed, after complaining mightily about the circuit court's inconsequential failure to follow the letter of CJP § 3-412(e), the DCDs should be the last ones to protest not being able to flagrantly disregard the Rules and this Court's cert. order. The Court should reject their much belated attempt to transmutate this appeal from a challenge of an injunction order to a wholesale attack on Plaintiffs' settled constitutional rights, as definitively decided by this Court in Richmond III.

## VI. The DCDs Fail to Demonstrate Any Colorable Ground for Suspending *Stare Decisis* and Reversing *Richmond III*.

Should the Court decide to consider the merits of the challenge to Richmond III, the results would be the same. They fail to assert any plausible ground for suspending stare decisis and reversing the Court's considered decision reached after three separate rounds of substantive briefing and oral argument. Reversing Richmond III on the flimsy grounds asserted by the DCDs would all but shatter the doctrine of stare decisis. Any controversial decision by the Court would be fair game for a second bite, or, as in this case, a third bite on the merits. The finality of the Court's judgments, particularly its rulings on vital constitutional rights, should not be questioned and overridden so readily,

[7] The DCDs' need to seek an emergency stay is no excuse. They had time to prepare an 11-page petition that delineated the issues. They were required to seek a stay from the circuit court (and that court had previously ordered a stay pending appeal), obviating the need for an emergency filing in this Court. In any event, they should have petitioned this Court afterwards to add this issue but instead chose to sandbag and conceal the issue.

not even if it is prominent politicians who are leading the charge to roll back and repeal the vital, hard-fought constitutional rights of indigent Marylanders to liberty.

### A. ***Stare decisis* is rejected only in cases of egregious error.**

Stare decisis is a cornerstone of the law. Without it, the Court's rulings lack finality and permanence. Issues are not resolved, and litigants are encouraged to relitigate issues as the composition of the Court changes. The law becomes mutable and soft, and cynicism toward the Court and its decisions hardens. For these reasons, the Court has established some of the most rigorous standards known in law for overturning settled precedent. The DCDs' request that the Court reverse Richmond III puts the Court's standards for disregarding stare decisis to a clear test. Nowhere do the DCDs present meaningful argument explaining how Richmond III constitutes a "glaring blunder" or "grievous injustice," or that a dramatic change in law or fact renders Richmond III obsolete. They essentially contend that, because the composition of the Court has changed, and the Court has the judicial power to reverse precedent, it should do so here simply if a majority of the newly constituted Court disagrees with Richmond III.

The Court's tests for rejecting stare decisis may not be so easily bypassed. The doctrine of stare decisis "serves to take the capricious element out of law" and give it stability. William O. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949). People must be able to rely on judicial decisions with confidence that those decisions will not be lightly abandoned. See State v. Green, 367 Md. 61, 78-79 (2001) (stating that the law "'should be fixed and established as far as possible, and the people guided in their personal and business dealings by established conclusions, not subject to change because some other judge or judges think differently.'") (quoting Townsend v. Bethlehem-Fairfield Shipyard, Inc., 186 Md. 406, 417 (1946)). As the Court explained:

> Stare decisis ... "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991). ... "[B]y the important doctrine of stare decisis ... we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." Vasquez v. Hillery, 474 U.S. 254, 265

> (1986). ... [It] "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." Id. at 265-66. While a court has the judicial power to overrule prior cases, courts generally act in a constrained manner to create predictability, "stability and integrity in the law." McMellon v. United States, 387 F.3d 329, 355 (4th Cir. 2004).

Livesay v. Balt. Cnty., 384 Md. 1, 14-15 (2004) (parallel citations omitted).

The tests for rejecting stare decisis thus are exceptionally stringent, designed to limit reversal of precedent to rare and extraordinary cases. Again, to quote Livesay,

> While we have never construed the doctrine of stare decisis to preclude us from changing or modifying a common law rule when conditions have changed or that rule has become so unsound that it is no longer suitable to the people of this State, ***departure from the rule should be the extraordinary case***, especially so when the change will have a harmful effect upon society.

Id. at 15 (emphasis added) (citing Bozman v. Bozman, 376 Md. 461, 493 (2003); Boblitz v. Boblitz, 296 Md. 242, 274 (1983)). Thus, while the rule of stare decisis is "'not an inexorable command,'" State v. Adams, 406 Md. 240, 259 (2008) (citation omitted), this Court has identified only two circumstances that justify overruling its precedent. *First*, the Court may strike a decision that is tainted by clear, manifest error – i.e., a decision that is "'clearly wrong and contrary to established principles,'" id. at 259 (quoting Townsend, 186 Md. at 417), which bars reversal "'unless it is plainly seen that a *glaring injustice* has been done or some *egregious blunder* committed.'" DRD Pool Serv., Inc. v. Freed, 416 Md. 46, 64 (2011) (emphasis added) (quoting State v. Green, 367 Md. 61, 79 (2001); Greenwood v. Greenwood, 28 Md. 369, 381 (1868))). *Second*, the Court may overturn a decision when significant changes in law or fact have rendered the older rule "so unsound that it is no longer suitable to the people of this State." Livesay, 384 Md. at 15; Harrison v. Montgomery Cnty., 295 Md. 442, 459 (1983) (requiring "changed conditions or increased knowledge that the rule has become so unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people.").

Under both tests, the threshold for suspending stare decisis is towering. Changed conditions that might justify overturning precedent do *not* include a different composition

of the Court: "Unlike the legislature, th[e] Court [of Appeals] cannot in good conscience overrule cases on the basis of different personnel." Mayor & City Council of Balt. v. Schwing, 351 Md. 178, 210 (1998) (Raker, J., concurring). Nor is it enough that current members of the Court believe an earlier decision of the Court to be "unfair" or "wrongly decided." Id. Departure from the rule of stare decisis "'demands special justification'" – the mere existence of *some* error, even if now discernible, is insufficient. Welch v. Tex. Highways & Pub. Transp. Dep't, 483 U.S. 468, 495 (1987) (citation omitted). Or the decision, though sound when rendered, must have become, over time, "'unsound in the circumstances of modern life.'" Green, 367 Md. at 79 (citations omitted). These tests lead to one conclusion: stare decisis may be rejected only in extraordinary circumstances.

**B. The DCDs fail to show any error, let alone egregious error.**

The DCDs do not try to argue that they meet the test for showing that Richmond III has been rendered obsolete and vestigial by changed circumstances. They do argue that that it is erroneous, but they never identify a specific, extraordinary "egregious blunder" or "glaring injustice" that requires reversal. Instead, they contend that this appeal "presents an opportunity for this Court to correct a mistake." (DCD Br. 28). That does not come close to meeting the standard for rejecting stare decisis.

Their cited cases that overruled precedent (DCD Br. 29-30) involved cases of glaring error (one case, Townsend, did not overrule precedent). In Unger v. State, 427 Md. 383, 417 (2012), the decision at issue conflicted with at least twenty-three prior decisions, plainly misread pertinent statutory language, and improperly inserted language not found in the text. In Cure v. State, 421 Md. 300, 320-22 (2011), the Court adopted the position that a majority of judges in the previous case had already accepted, so there was *no* stare decisis issue. In Harris v. Bd. of Educ. of Howard Cnty., 375 Md. 21, 58 (2003), the rule at issue had "not been uniformly followed by this Court," had "been inconsistently applied," and was the subject of "at least four different lines of Maryland Court of Appeals cases concerning the issue[.]" In State v. Kanaras, 357 Md. 170, 177 (1999), the issue had "unfortunately, spawned a plethora of inconsistent opinions by this Court," with six zigs and zags documented in the decision's careful analysis. In Owens-

Illinois, Inc. v. Zenobia, 325 Md. 420, 470-71 (1992), the Court restored its prior common law rule rejecting an implied malice standard for punitive damages where a standard borrowed from another jurisdiction had led to "inconsistent results" and overbroad applications. In Townsend, 186 Md. at 422, this Court *upheld* the precedent at issue, concluding that it is "more important that the law should remain settled as it is than that another interpretation possibly more logical" should replace it. And in Green, 367 Md. at 78-79, the Court found that the decision at issue contravened "numerous prior decisions," several subsequent cases, and an express statutory provision that "abrogated" the right at issue (a common law right by the State to appeal criminal sentences). None of these cases involves the situation here, where the losing party in a case simply wants to take advantage of a change in composition of the Court to achieve a different result.

The DCDs specifically argue that the decision is "based on faulty premises and erroneous factual assumptions," is "inconsistent with prior decisions of this Court," and is "inconsistent with established constitutional procedures." (DCD Br. 30). Each of these assertions is wrong, and, in any event, none constitutes an "egregious blunder."

First, they claim an "unintended consequence" of less liberty than more. (DCD Br. 30). As discussed above, this is a falsehood. Chief Judge Clyburn has confirmed that implementation can occur immediately, at commissioner-held initial appearances. In Baltimore City, no delay in release could possibly result given that the initial bail hearings are not held until near the end of the 24-hour period. As for the long-term solutions, the State's PD Task Force made clear that the system can be improved for all parties involved at less cost than any other proposal. While it is always possible that lawmakers might retaliate and delay hearings for Plaintiffs, that result would *cost* the State money (by increasing incarceration), and thus is far from a likely event: Plaintiffs continue to believe that the lawmakers will chose common sense (lower costs, better outcomes, and increased liberty) over unnecessary incarceration. This Court certainly cannot speculate as to what, if anything, the General Assembly will do, which is exactly what the DCDs presuppose. And constitutional rights certainly cannot be made conditional upon what actions a legislature *might* take in the future.

Next, the DCDs argue that the 2012 legislative reforms should have been credited by the Court. See DCD Br. 30-32. That discussion ignores the fact that, in Baltimore City, where most Plaintiffs already received counsel at bail review hearings, no increase in the right to counsel occurred at all. It also rests on a false assertion that the General Assembly concluded that only by denying representation at the initial bail hearing could the opportunity for early release be preserved. See id. at 32. No such finding was made by the General Assembly (none is cited), which, instead, created the State's PD Task Force precisely to try to devise a solution. The PD Task *did* come up with a solution, but, because the DCDs do not like it, they never take it into account. Again, the DCDs ignore the facts discussed above showing that compliance is in fact ready to commence and will not affect Plaintiffs' liberty interests at all.

The DCDs then embark on a lengthy discussion of initial appearances and posit that Richmond III somehow is in conflict with the goals of an initial appearance. See DCD Br. 32-35. But no such conflict actually exists, for all of the reasons already discussed. Indeed, it is the politicians who are proposing to collapse the dual hearing system into a single hearing system, not anything that was decided in Richmond III (or in Richmond II, which also required representation at initial bail hearings). Surely legislators cannot make an unconstitutional system constitutional by making the system worse, yet that, in a nutshell, is the DCDs' argument. To show a blatant error, the DCDs would have to find a decision that actually rejects the Richmond III holdin g. Not surprisingly, they point to no such case and instead spend pages trying to depict a conflict that does not exist. Under no reasonable construct of due process can providing counsel to defend the liberty rights of detainees at an initial bail hearing "conflict" with the goals of the initial appearance and somehow impair the detainee's rights. Their contention that providing counsel at the initial bail hearing "does not advance any" of the "fundamental constitutional guarantees" of an initial appearance (DCD Br. 35) blithely ignores the decades of rulings by this Court that counsel is required whenever freedom is at issue and further ignores all of the record evidence demonstrating counsel's value. The Court need only look at the exhaustive prior briefing in this case setting forth the long line of case

law linking the need for counsel to defend against incarceration, to know how fundamentally awry this argument really is.

Under the DCDs' logic, Richmond II's statement that "[t]he presence of counsel for that determination [by a commissioner] surely can be of assistance to the defendant in that process," 434 Md. at 429, is wrong. The Supreme Court's seminal ruling 82 years ago that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," and that "the right to the aid of counsel" accordingly is of a "fundamental character," Powell v. Alabama, 287 U.S. 45, 68-69 (1932), is wrong. The later Supreme Court decisions linking the right to counsel to denials of liberty, i.e., "actual imprisonment [is] the line defining the constitutional right to appointment of counsel," Scott v. Illinois, 440 U.S. 367, 373 (1979), "'no person may be deprived of his liberty who has been denied the assistance of counsel,'" Argersinger, 407 U.S. at 37-38 (citation omitted), and "counsel can also be influential ... in making effective arguments for the accused on such matters as ... bail," Coleman v. Alabama, 399 U.S. 1, 9 (1970) (Brennan, J., plurality), are wrong. This is the natural consequence of the DCDs' position that Plaintiffs are better off without counsel than with counsel.

It apparently bears repeating that Maryland law squarely rejects the DCDs' contention that counsel is unnecessary when a judicial officer decides a defendant's freedom pending trial. As the Court stated in Rutherford, *any* threat of a loss of freedom triggers a right to counsel, such that incarceration without representation violates due process categorically, without exception: "A defendant's actual incarceration in a jail, as a result of a proceeding at which he was unrepresented by counsel ... is fundamentally unfair" and "the deprivation of liberty is itself a 'special circumstance' requiring the assistance of counsel." Rutherford, 296 Md. at 360-61. This is black-letter law. See Zetty, 365 Md. at 158-59 (reaffirming that "[a] defendant's actual incarceration in a jail, as a result of a proceeding at which he was unrepresented by counsel and did not ... waive the right to counsel, is fundamentally unfair"). Initial appearances are not immune to this rule simply because the judicial officer is a commissioner and not a judge.

The one case cited by the DCDs in support of this argument, Johnson v. State, 282 Md. 314 (1978) (DCD Br. 33-35) does not conflict with Richmond II or III. Johnson merely held that evidence gathered from a defendant who was held in custody for more than 24 hours without being brought for an initial appearance would be excluded. It did not consider bail issues or whether counsel was required. Indeed, for all of the reasons previously discussed, affirming that the initial appearance must be held within 24 hours is entirely consistent with the goals and the holdings of Richmond II and III.

The DCDs' first assertion of actual error does not occur until the next section (Part IV-C, DCD Br. 35-39). Without even bothering to cite Rutherford or any of the six other decisions by this Court confirming that counsel is required whenever incarceration is threatened, the DCDs argue that such cases are immaterial because they involved civil contempt proceedings where the defendant "is free when the proceeding begins but may not be after the judge has ruled," while an arrestee "is already in custody." (DCD Br. 36). Thus, they conjure a constitutional line between a proceeding "to obtain one's release" (bail), which does not implicate liberty, and one that could result in incarceration (contempt), which does involve a deprivation of freedom. To call this Orwellian exercise in semantic hairsplitting a distinction without a difference does not do it justice. Nothing in Rutherford and progeny even remotely intimates that it matters, for due process purposes, whether a defendant walks *into* the hearing of his or her own accord or in handcuffs. Nor could it – the decision made by the judicial officer is the same in either case – deciding whether the defendant will *leave* in handcuffs or as a free person. Both hearings decide the individual's prospective freedom, and thus counsel is required at both. As Rutherford states, the "defendant's actual incarceration in a jail, *as a result of a proceeding* at which he was unrepresented by counsel," violates due process. Rutherford, 296 Md. at 360-61 (emphasis added). The DCDs have not addressed this language, and, not surprisingly, they fail to cite *any* case that reaches a different conclusion than Rutherford. Thus, they utterly fail to show any error, let alone the type of "glaring blunder" that would warrant suspending stare decisis. Richmond III's holding is compelled by Rutherford and progeny.

The law is squarely to the contrary. Numerous cases recognize liberty interests at bail proceedings and confer due process rights to detained individuals. See, e.g., United States v. Abuhamra, 389 F.3d 309, 324 (2d Cir. 2004) ("bail hearings determine whether a defendant will be allowed to retain, or forced to surrender, his liberty during the pendency of his criminal case"); Villanova v. Abrams, 972 F.2d 792, 797 (7th Cir. 1992) (Posner, J.) ("[T]he deprivation of liberty brought about by confining the arrestee, or a person civilly committed, is tested under the due process clause.").[8] The constitutional right to counsel for criminal appeals rests in part on due process. See, e.g., Evitts v. Lucey, 469 U.S. 387, 405 (1985) (holding that ineffective assistance of appellate counsel violates due process); Douglas v. California, 372 U.S. 353, 357 (1963) (finding due process right). Cases of probation revocation, to which a due process right to counsel clearly exists, often are heard *after* the probationer is arrested and detained. In Richmond II, this Court confirmed that an initial bail hearing *does* involve potential incarceration:

> The initial appearance before the Commissioner—including the bail hearing that is part of that event—is clearly encompassed within a "criminal proceeding," and *may result in the defendant's incarceration.* The only remaining question is whether the bail determination is a "stage" of that proceeding. Doubtless it is.

Richmond II, 434 Md. at 428-29 (emphasis added); see also id. at 431 ("We further hold that indigent defendants who are not charged with a serious offense ... do come within the reach of [CJP] § 16–204(b)(1)(iv), because the bail hearing at the initial appearance for the non-serious offense *might result in incarceration*") (emphasis added). Finally, because the presumption is that the defendant will be released, any ruling at a bail hearing that does not result in release is, inherently, an order for incarceration.

[8] See also, e.g., Lavallee v. Justices in Hampden Super. Ct., 812 N.E.2d 895, 902-03 (Mass. 2004) ("Because a defendant's liberty, a fundamental right, is at stake at a bail hearing, the principles of procedural due process in ... the Massachusetts Declaration of Rights are implicated. They include the right to be heard, which necessarily includes the right to be heard by counsel.") (citation omitted); State v. Furgal, 13 A.3d 272, 281 (N.H. 2010) ("defendant has a [due process] right to counsel at [a bail] hearing" due to the liberty interest); cf. Hurrell-Harring v. State, 904 N.Y.S.2d 296, 302 (N.Y. 2010) (the right to counsel at bail affects "a defendant's basic liberty and due process interests").

Liberty – the freedom from detention by the State – is our most essential right. As the Supreme Court put it, "the most elemental of liberty interests [is] the interest in being free from physical detention by one's own government." Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004). The DCDs' sophistic argument that a detainee lacks such an interest because he or she already is detained makes a mockery of these basic precepts.

Their next argument focuses on a purported lack of "record evidence" relating to the bail reviews and the impact of the lack of counsel. (DCD Br. 37-38). In other words, the DCDs want this Court to sit as a quasi-appellate court to review the assessment of facts by the Richmond II and Richmond III Courts. This is absolutely improper. The DCDs had their chance to move for reconsideration on this issue and elected not to do so. They cannot, months after the deadline for seeking reconsideration, challenge in this Court the quality of Richmond III Court's factual assessment of the record. Otherwise, if the DCDs' sore-loser world were indulged, no decision would ever be final and conclusive. Stare decisis would be challenged for any and every reason. In any event, in making these objections, the DCDs simply ignore the ample evidence of record. For example, regarding the bail reviews, the evidence discussed above – that they are perfunctory proceedings that frequently take only 2½ minutes (or less) to conduct; that they affirm the commissioners' decisions *dollar for dollar* nearly half the time; and that they result in the unnecessary detention of many Baltimore City criminal defendants who should be released but cannot afford the bail that was assessed – was *never* disputed by the DCDs. This was ample evidence to support the decision, and it was all unrebutted.

The DCDs' assertion that there is no record evidence to support the adverse impact of the lack of counsel (DCD Br. 38-39) is especially meritless. As discussed above, multiple studies demonstrate that providing counsel at bail hearings results in more substantive hearings, lower and affordable bail, shorter detentions, and better alternatives to the 10% non-refundable bail bondsman's fee. These studies fully substantiated Plaintiffs' argument that providing counsel at commissioner hearings would result in similar benefits. The Abell Study, for instance, examined commissioner proceedings in multiple Maryland jurisdictions, including Baltimore City and specifically

found that commissioners failed to consider relevant facts. Indeed, as discussed above, Richmond II specifically quoted the Abell Study for this very fact. See Richmond II, 434 Md. at 413 n.7 (pointing out that "'most judicial officers [including commissioners] decide whether to order release on recognizance or a financial bail without having essential information about the person's employment status, family and community ties, and ability to afford bail.'") (quoting Abell Study at iii). None of these studies was ever disputed or rebutted below. The DCDs simply ignored them, just as they do here.

Next, the DCDs' try to minimize the impact of incarceration, pointing out that it lasts no longer than the next session of court. (DCD Br. 39). But that interval lasts for multiple days over holidays and weekends. More importantly, both Richmond II and III made clear that any additional period of unnecessary incarceration is unacceptable:

> "That a defendant *might* have bail reduced or eliminated by a District Court judge at a subsequent bail review hearing does not dispel or even mitigate the fact that, whenever a Commissioner determines to set bail, the defendant stands a good chance of losing his or her liberty, even if only for a brief time."

Richmond III, 434 Md. at 463-64 (quoting Richmond II, 434 Md. at 430 (emphasis in original)).[9] See also Argersinger, 407 U.S. at 37 ("'the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation.'") (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970)). In any event, as Richmond III explained, numerous cases have held that the provision of due process at a subsequent hearing does not mitigate the denial of due process at the first hearing. See Richmond III, 434 Md. at 462 ("As a matter of Maryland constitutional law, where there is a violation of certain procedural constitutional rights of the defendant at an initial proceeding, including the right to counsel, the violation is not cured by granting the right at a subsequent appeal or review proceeding.") (citing Zetty, 365 Md. at 161; Kawamura

[9] Richmond II, of course, was decided by unanimous vote. Thus, even though the DCDs challenge Richmond III as weak precedent because it was decided by a 4-3 vote, they in fact want to reverse the *unanimous* adverse findings and conclusions in Richmond II about the initial bail hearing and bail reviews that Richmond III relies upon extensively.

v. State, 299 Md. 276, 291-92 (1984); Danner v. State, 89 Md. 220, 226 (1899); Reed v. Foley, 105 Md. App. 184, 196-97 (1995)). The DCDs ignore this analysis as well.

Finally, the DCDs make the remarkable argument that an uncounseled initial bail hearing portion of an initial appearance "principally serves to enhance liberty, by providing an early opportunity for release from custody after an arrest." (DCD Br. 40). This statement illustrates the fundamental flaw of the DCDs' opposition to Richmond III. The issue is not whether an "opportunity" for release exists: it is whether that opportunity is fair given the lack of counsel. For the indigent defendant who has to wait in jail for 24 hours or several days merely because he or she was not provided a lawyer at the initial bail hearing, the "opportunity" is meaningless. Richmond III put an end to that injustice.

In sum, the DCDs do not show *any* "erroneous factual assumptions" or *any* inconsistency with *any* decision of this Court or "established constitutional procedures" (DCD Br. 30), let alone a glaring blunder. They do not set forth any colorable basis upon which this Court could reject stare decisis and overrule Richmond III.

We therefore end where we started: this Court's conclusion in Richmond II that this Court "cannot declare that Plaintiffs have a statutory right to counsel at bail hearings and, in the same breath, permit delay in the implementation of that important right and thereby countenance violations of it, even for a brief time." Richmond II, 434 Md. at 440. The DCDs provide no compelling or even valid reason for these proceedings to continue. It is time for this Court to require implementation to commence at last. The stay of the injunction should be allowed to lapse, the injunction should be affirmed as modified, and a Rules Order should issue making the new Rules effective immediately.

## CONCLUSION

For the foregoing reasons, the injunction order should be affirmed, as modified by the proposed order attached to Plaintiffs' response to the DCDs' motion for stay. The stay should not be continued, and the Richmond III decision should not be overturned. Finally, the Court should order that the new Rules take effect immediately.

This brief was prepared in Times New Roman font.

# TEXT OF PERTINENT CONSTITUTIONAL AND RULE PROVISIONS

# TEXT OF PERTINENT CONSTITUTIONAL AND RULE PROVISIONS

## MARYLAND CONSTITUTION

### Article 24, Maryland Declaration of Rights

**Art. 24.** That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

## MARYLAND RULES

### Rule 8-131(b)

**Rule 8-131. Scope of review**

(a) **Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) **In Court of Appeals -- Additional limitations.** (1) Prior appellate decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

(2) No prior appellate decision. Except as otherwise provided in Rule 8-304 (c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

### Rule 8-301(a)(3)

**Rule 8-301. Method of securing review -- Court of Appeals**

(a) **Generally.** Appellate review by the Court of Appeals may be obtained only:

(1) by direct appeal or application for leave to appeal, where allowed by law;

(2) pursuant to the Maryland Uniform Certification of Questions of Law Act; or

(3) by writ of certiorari upon petition filed pursuant to Rules 8-302 and 8-303; or

(4) by writ of certiorari issued on the Court's own initiative.

### Rule 8-303(a)-(c)

**Rule 8-303. Petition for writ of certiorari -- Procedure**

(a) Filing. A petition for a writ of certiorari, together with seven legible copies, shall be filed with the Clerk of the Court of Appeals. The petition shall be accompanied by the filing fee prescribed pursuant to Code, Courts Article, § 7-102 unless the fee has been waived by an order of court or unless the petitioner is represented by (1) the Public Defender's Office, (2) an attorney assigned by Legal Aid Bureau, Inc., or (3) an attorney assigned by any other legal services organization that accepts as clients only those persons meeting the financial eligibility criteria established by the Federal Legal Services Corporation or other appropriate governmental agency.

(b) **Petition.** (1) Contents. The petition shall present accurately, briefly, and clearly whatever is essential to a ready and adequate understanding of the points requiring consideration. Except with the permission of the Court of Appeals, a petition shall not exceed 15 pages. It shall contain the following information:

(A) A reference to the action in the lower court by name and docket number;

(B) A statement whether the case has been decided by the Court of Special Appeals;

(C) If the case is then pending in the Court of Special Appeals, a statement whether briefs have been filed in that Court or the date briefs are due, if known;

(D) A statement whether the judgment of the circuit court has adjudicated all claims in the action in their entirety, and the rights and liabilities of all parties to the action;

(E) The date of the judgment sought to be reviewed and the date of any mandate of the Court of Special Appeals;

(F) The questions presented for review;

(G) A particularized statement of why review of those issues by the Court of Appeals is desirable and in the public interest.

(H) A reference to pertinent constitutional provisions, statutes, ordinances, or regulations;

(I) A concise statement of the facts material to the consideration of the questions presented; and

(J) A concise argument in support of the petition.

(2) Documents. A copy of each of the following documents shall be submitted with the petition at the time it is filed:

(A) The docket entry evidencing the judgment of the circuit court;

(B) Any opinion of the circuit court;

(C) Any written order issued under Rule 2-602 (b);

(D) If the case has not been decided by the Court of Special Appeals, all briefs that have been filed in the Court of Special Appeals; and

(E) Any opinion of the Court of Special Appeals.

(3) Where documents unavailable. If a document required by subsection (b) (2) of this Rule is unavailable, the petitioner shall state the reason for the unavailability. If a document required to be submitted with the petition becomes available after the petition is filed but before it has been acted upon, the petitioner shall file it as a supplement to the petition as soon as it becomes available.

(4) Previously served documents. Copies of any brief or opinion previously served upon or furnished to another party need not be served upon that party.

(c) Sanction. Failure to comply with section (b) of this Rule is a sufficient reason for denying the petition.

### Rule 8-602(a)

**Rule 8-602. Dismissal by Court**

(a) **Grounds.** On motion or on its own initiative, the Court may dismiss an appeal for any of the following reasons:

(1) the appeal is not allowed by these rules or other law;

(2) the appeal was not properly taken pursuant to Rule 8-201;

(3) the notice of appeal was not filed with the lower court within the time prescribed by Rule 8-202;

(4) the appellant has failed to comply with the requirements of Rule 8-205;

(5) the record was not transmitted within the time prescribed by Rule 8-412, unless the court finds that the failure to transmit the record was caused by the act or omission of a judge, a clerk of court, the court reporter, or the appellee;

(6) the contents of the record do not comply with Rule 8-413;

(7) a brief or record extract was not filed by the appellant within the time prescribed by Rule 8-502;

(8) the style, contents, size, format, legibility, or method of reproduction of a brief, appendix, or record extract does not comply with Rules 8-112, 8-501, 8-503, or 8-504;

(9) the proper person was not substituted for the appellant pursuant to Rule 8-401; or

(10) the case has become moot.

### Rule 8-603(c)

**Rule 8-603. Motion to dismiss appeal**

(c) **Included in appellee's brief.** A motion to dismiss based on subsection (a) (1), (2), (3), (9), or (10) of Rule 8-602 may be included in the appellee's brief. The appellant may include in a reply brief any response to the motion.

## Rule 8-605(a)

**Rule 8-605. Reconsideration**

(a) **Motion; response; no oral argument.** Except as otherwise provided in Rule 8-602 (c), a party may file pursuant to this Rule a motion for reconsideration of a decision by the Court that disposes of the appeal. The motion shall be filed (1) before issuance of the mandate or (2) within 30 days after the filing of the opinion of the Court, whichever is earlier. A response to a motion for reconsideration may not be filed unless requested on behalf of the Court by at least one judge who concurred in the opinion or order. Except to make changes in the opinion that do not change the decision in the case, the Court ordinarily will not grant a motion for reconsideration unless it has requested a response. There shall be no oral argument on the motion.

## APPENDIX

This Appendix is filed to provide materials from the record of these proceedings in this Court and the circuit court responsive to the District Court Defendants' argument that this Court should overturn its factual discussions in Richmond II and Richmond III because of a purported lack of record evidence and its argument that the Richmond III decision rests on erroneous assumptions of fact, and to provide other relevant information to the Court. The materials were not designated for inclusion in the Record Extract because the District Court Defendants never gave notice that they would seek reversal of this Court's decision in Richmond III.

| | | |
|---|---|---|
| QUINTON RICHMOND, et al., | * | IN THE |
| Plaintiffs, | * | CIRCUIT COURT |
| v. | * | FOR |
| THE HON. BEN C. CLYBURN, et al., | * | BALTIMORE CITY |
| Defendants. | * | Case No. 24-C-06-009911 CN |

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**THIRD AMENDED CLASS-ACTION COMPLAINT**
**FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Quinton Richmond, Jerome Jett, Glenn Callaway, Myron Singleton, Timothy Wright, Keith Wilds, Michael LaGrasse, Ralph Steele, Laura Baker, Erich Lewis, Nathaniel Shivers, and others of the same class, hereby file this Complaint against Defendants Ben C. Clyburn, in his official capacity as Chief Judge of the District Court of Maryland; David Weissert, in his official capacity as Coordinator of Commissioner Activity for the Maryland District Court Commissioners; John R. Hargrove, Jr., in his official capacity as Administrative Judge for Baltimore City; Linda Lewis, in her official capacity as Administrative Commissioner for Baltimore City; and the District Court Commissioners for Baltimore City, individually and collectively, in their official capacities as District Court Commissioners; (collectively, the "District Court Defendants"); and Paul B. DeWolfe, in his official capacity as the Public Defender for the State of Maryland (the "Public Defender") and the administrator of the Office of the Public Defender.

**PRELIMINARY STATEMENT**

1. Plaintiffs file this class action seeking relief on behalf of themselves and others similarly situated who have been denied their statutory and/or constitutional right to counsel at

their initial appearance before a District Court Commissioner ("Commissioner") for a bail hearing ("initial bail hearing").

2. Named Plaintiffs (the "Representative Plaintiffs") and all class members are indigent individuals who have been or will be arrested, detained at the Baltimore City Booking and Intake Center ("Central Booking Jail"), brought before a Commissioner for an initial bail hearing, and denied representation by counsel at that hearing, or are not otherwise provided representation when entitled to it, in violation of their statutory and constitutional rights to representation by counsel.

3. This case challenges the first stage of Maryland's pre-trial release system as applied to Baltimore City, whereby, following their arrest, suspects are brought to the Central Booking Jail for their initial appearance ("initial bail hearing") before a District Court Commissioner. At this judicial proceeding, the Commissioner, who is a judicial officer but usually is not a lawyer, determines whether the person arrested should be released or whether the case requires bail pending trial. This initial bail hearing commences the criminal prosecution against the arrestee, yet it provides none of the statutory and constitutional protections attendant to such a prosecution. The hearing is not held in a courtroom and instead takes place deep inside the jail. It is not open to the general public. Even the arrestee's family and friends are not permitted to attend. The initial bail hearing is never transcribed or recorded, making it impossible to review what the Commissioner or arrestee said or to understand the basis for the Commissioner's ruling. A Commissioner may receive ex parte communications from a prosecutor, but there will be no public record of such communications. Most crucial, at an initial bail hearing, a lawyer is never present, let alone at the accused's side, to provide representation. If the arrestee is indigent, he or she is not provided a public defender, in direct violation of the



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right to counsel guarantee set forth in the Maryland Public Defender Act. Even if the arrestee is not indigent, conditions at the Central Booking jail prevent private counsel's appearance and participation at the hearing.

4. The District Court Defendants' practice and/or policy of denying and failing to protect arrestees' right to representation by counsel at their initial bail hearings causes serious harm to Plaintiffs and to class members. One or more studies indicate that criminal suspects who are not represented by counsel at a bail hearing are more likely to have shorter and more perfunctory hearings, less likely to be released on their own recognizance, more likely to have higher and unaffordable bail, and more likely either to serve additional time in jail prior to their eventual release or to pay the expense of a bail bondsman's non-refundable fee to regain their freedom. Even if accused individuals are released at a subsequent bail review hearing, the detention period may result in missed work, loss of jobs, disruption of family life, or eviction from homes. Conditions at the Central Booking facility, where Plaintiffs are held until their release or conviction, are overcrowded, harsh, and sometimes dangerous, and have required oversight by this Court. Without an attorney, Plaintiffs' requests for needed medical treatment or for transfer to a safer location are much more likely to be ignored. Moreover, in addition to causing unnecessary and costly detentions, the District Court Defendants' policy of denying counsel may prejudice an arrestee's substantive defense against prosecution. Without representation by counsel, arrestees may make incriminating statements in an effort to secure their release or in response to questioning by a Commissioner. These statements may be noted and placed in the case file, which is available to a judge or prosecutor for use in future hearings.

5. Prolonged detention of many of the arrestees detained in Central Booking is costly, wasteful, and often unnecessary. According to statistics provided by Central Booking to

the Baltimore City Criminal Justice Coordinating Council and by the District Court of Maryland Criminal Case Activity Reports, prosecutors dismiss without trial or decline to prosecute approximately 60-70% of the charges brought against Baltimore City defendants.

6. The District Court Defendants' policy and practice to deny representation by counsel violates the Maryland Public Defender Act, which entitles a defendant to representation by the Office of the Public Defender or by private counsel at "all stages" of a criminal prosecution, and the Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights, as the initial bail hearing is a critical stage of a criminal prosecution subject to the constitutional guarantees of a right to counsel under those provisions.

## PARTIES AND JURISDICTION

7. Plaintiff Quinton Richmond is a resident of Baltimore City and recently was detained at the Central Booking Jail in Baltimore City.

8. Plaintiff Jerome Jett is a resident of Baltimore City and recently was detained at the Central Booking Jail in Baltimore City.

9. Plaintiff Glenn Callaway is a resident of Baltimore City and, at the time of the filing of the original complaint in this action, was detained at the Central Booking Jail in Baltimore City. Mr. Callaway currently remains incarcerated pending trial.

10. Plaintiff Myron Singleton is a resident of Baltimore City and, at the time of the filing of the original complaint in this action, was detained at the Central Booking Jail in Baltimore City.

11. Plaintiff Timothy Wright is a resident of Baltimore City and, at the time of the filing of the original complaint in this action, was detained at the Central Booking Jail in Baltimore City.

12. Plaintiff Keith Wilds is a resident of Baltimore City and recently was detained at the Central Booking Jail in Baltimore City.

13. Plaintiff Michael LaGrasse is a resident of Baltimore City and, at the time of the filing of the original complaint in this action, was detained at the Central Booking Jail in Baltimore City.

14. Plaintiff Raymond Roman is a resident of Baltimore City and, at the time of the filing of the original complaint in this action, was detained at the Central Booking Jail in Baltimore City. Mr. Roman currently remains incarcerated pending trial.

15. Plaintiff Ralph Steele is a resident of Baltimore County and recently was detained at the Central Booking Jail in Baltimore City.

16. Plaintiff Laura Baker is a resident of Anne Arundel County and, at the time of the filing of the original complaint in this action, was detained at the Central Booking Jail in Baltimore City.

17. Plaintiff Erich Lewis is a resident of Baltimore City and, at the time of the filing of the original complaint in this action, was detained at the Central Booking Jail in Baltimore City.

18. Plaintiff Nathaniel Shivers is a resident of Baltimore City and, at the time of the filing of the original complaint in this action, was detained at the Central Booking Jail in Baltimore City. Mr. Shivers currently remains incarcerated pending trial.

19. Defendant Ben C. Clyburn is the Chief Judge of the District Court of Maryland.

20. Defendant David Weissert is the Coordinator of Commissioner Activity for the Maryland District Court Commissioners.

21. Defendant John R. Hargrove, Jr. is the Administrative Judge for the Maryland District Court for Baltimore City.

22. Defendant Linda Lewis is the Administrative Commissioner for the Maryland District Court for Baltimore City.

23. Defendants the District Court Commissioners for Baltimore City are those District Court Commissioners who conduct initial bail hearings at the Central Booking Jail.

24. Defendant Paul B. DeWolfe is the Public Defender for the State of Maryland and in that capacity directs the operation of the Office of the Public Defender and its satellite offices.

25. This Court has jurisdiction over this declaratory judgment action pursuant to § 3-403 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland ("CJP").

26. Venue is proper in this Court pursuant to CJP §§ 6-201 and 6-202.

## FACTUAL ALLEGATIONS

### A. INITIAL BAIL HEARINGS

27. This case addresses the first stage of Maryland's unique bail and pre-trial release system. Under that system, following an arrest, criminal suspects are brought before a Commissioner for an initial appearance and an initial bail hearing pursuant to Maryland Rule 4-213. The governing statute, CJP § 2-607, provides that Commissioners need not be lawyers and indeed need not have any minimum qualifications for service, such as a college degree, high school diploma, or criminal justice background. The only qualification required to serve as a Commissioner under state law is that the Commissioner must reside in the county in which he or she serves. Once selected, a Commissioner is empowered to decide the issue of an individual arrestee's liberty before trial. Commissioner rulings are given considerable weight when

reviewed by the District Court, as the amount of bail set by a Commissioner typically is maintained by many bail review judges.

28. The initial bail hearing must be held within twenty-four hours of arrest. Otherwise, the arrestee must be released on recognizance. In unusual circumstances, a prosecutor may seek a judicial extension beyond the 24-hour period. At this hearing, Commissioners are supposed to follow the procedures for pretrial release set forth in Rule 4-216. They must consider various factors set forth in Rule 4-216(d) to determine conditions for release pending trial.

29. In cases where a criminal defendant fails to appear at a hearing, a District Court judge who signs a warrant for the criminal defendant's arrest for failure to appear ("FTA") typically will also "preset" a bail amount for the individual in connection with the failure to appear. This amount often is determined after consultation with a prosecutor. After the warrant ultimately is served on the criminal defendant, that defendant is brought to the Central Booking Jail and eventually appears before the Commissioner. Under Maryland law, the Commissioner has a duty to determine bail for the criminal defendant on the FTA and to provide the defendant with an opportunity to be heard on the issues pertaining to the necessity for bail and, if bail is set, the appropriate amount. Nevertheless, instead of determining whether bail is necessary and the amount appropriate for the FTA, Commissioners decline to address the preset bail previously set by the District Court in absentia, pursuant to a policy and/or a consistent practice of Commissioners. Criminal defendants' case records maintained by the courts do not indicate that any initial bail hearing is conducted by the Commissioner when the defendant is presented to the Commissioner on a preset bail amount for FTA.

30. When a preset bail is not addressed by the Commissioner, that bail remains in effect until a District Court judge conducts a bail review hearing to consider the preset bail order. The bail review hearing may take place more than 48 hours after the defendant is served with the warrant and detained on that charge. As a result, in preset bail cases, criminal defendants do not receive a hearing conducted by a judicial officer within 24 hours of arrest as required by state law, and most do not receive such a hearing within 48 hours as is constitutionally required.

31. In Baltimore City, correctional officers at the Central Booking facility administratively process arrestees during the intake and initial booking procedures. As this occurs, arrestees move from one jail cell to another during a twenty-four-hour period while they await a Commissioner hearing. Once the booking process is completed, arrestees are brought to a Commissioner's station for their initial bail hearing.

32. Detention conditions at Central Booking are overcrowded, harsh, unhealthy and sometimes dangerous. According to statistics provided by Central Booking to the Baltimore City Criminal Justice Coordinating Council, approximately 250-75 suspects are booked at Central Booking each day, with higher numbers in summer months. During February through April 2005, the facility operated at 30% over capacity and since then it has operated at or near capacity. Even those "at-capacity" conditions are extreme. At times, arrestees may share a small cell meant for a few people with as many as ten to fifteen or more individuals in extremely cramped quarters. In such conditions, often arrestees have no place to sleep or sit as they prepare to appear before a judicial officer. An arrestee may be considered fortunate to find space in the area surrounding the open toilet that every cell occupant uses. These harsh conditions were vividly described in an article published in The Baltimore Sun. See Ryan Davis, At jail, a "systems overload," Balt. Sun, Apr. 21, 2005 at 1A.

33. During the initial bail hearing, the arrestee and a Commissioner usually are the only persons present. The arrestee sits on a metal bench in a tiny, narrow semi-open booth, behind one side of a plexiglass wall, and faces the Commissioner. Arrestees and Commissioners communicate through a speaker system. Commissioners are required to inform arrestees of the crime with which they are charged, but they are not required to provide Miranda warnings to arrestees and, either by practice or policy, do not provide any such warnings. Instead, Commissioners usually ask a series of questions concerning residence, employment, family, other ties to the community, prior record, and, frequently, the current charge. Arrestees are expected to answer. Most do, not knowing that the information they provide may be used against them. Commissioners then may record such information in a closed envelope that is available to District Court judges for use in subsequent hearings. Prosecutors may have access to this information as well.

34. Arrestees may attempt to persuade the Commissioner to believe that they have a job or a family that depends upon them and can be trusted to return, if released on personal recognizance, but Commissioners may not know whether the information is reliable or credible. Suspects do not have the benefit of a pretrial representative, who, in subsequent proceedings, is available to the judicial officer to verify an arrestee's information and history, nor do they have a defense lawyer to help them represent the facts. Thus, Commissioners have limited information available that they consider trustworthy and no means to substantiate the answers that are provided by the arrestee. Without such corroboration, Commissioners are less likely to find the arrestees' information credible and more likely to place little weight on such information in rendering a pretrial release decision.

35. Because the initial hearings are not open to the public and there is no public record of the hearings, it usually is not possible to determine what information Commissioners elicit from arrestees or to ascertain whether arrestees make statements regarding the criminal charge(s). Commissioners do complete written reports following initial bail hearings that may include information provided by arrestees. They place the reports in a closed envelope in a court file that is available to District Court judges at bail review hearings and to prosecutors for subsequent use against the arrestee. If a prosecutor has had ex parte contact with the Commissioner, that fact typically will not be recorded in the case file, making it impossible for the arrestee to know whether such communications have occurred and, if so, the substance of any such communication.

36. According to statistics provided by Central Booking to the Baltimore City Criminal Justice Coordinating Council, Commissioners require bail for approximately 60-65% of the arrestees brought to Central Booking. Prosecutors ultimately dismiss without trial many of the cases, but only after those arrestees have suffered a significant loss of freedom.

37. Public defenders never are present at the initial bail hearing before the Commissioner, even though the vast majority of arrestees are indigent. Theoretically, private lawyers may represent clients before Commissioners, but, in practice, security concerns, lack of available personnel for escorts, cramped quarters, and procedural realities at Central Booking make private representation exceedingly rare. Private attorney seeking to represent their clients in these hearings typically will be turned away due to these factors. In the exceedingly rare situation when representation does occur, a private lawyer may participate only via closed-circuit television and thus does not have direct, confidential contact with the client. By contrast, a

prosecutor interested in a case may have ex parte contact with a Commissioner about the facts of the case or other factors affecting the Commissioner's decision.

38. Representation by counsel at initial bail hearings provides substantial and measurable benefits, both for the detainees and for the criminal justice system. Lawyers representing arrestees can provide verified information about their clients' residence, employment, family and other local ties to the community, thereby allowing the Commissioner to make a better informed decision. Lawyers can help the arrestee understand the types of information that would support their request for no bail or reduced bail. They can help the arrestee follow up in obtaining witnesses or other information that can be used in a subsequent bail review hearing. They can advise the arrestee as to how to address the Commissioner and how to discuss the charges brought by the State without making incriminating or damaging statements. They can help the Commissioner understand key legal issues at issue in the case, such as a weak probable cause statement, or hasten a prosecutor's review and consideration of the sufficiency of that statement. And, they can understand the position of arrestees who are not equipped to advocate on their own behalf. These benefits are far from conjectural or ephemeral. At least one published study indicates that representation by counsel at bail proceedings minimizes the amount of time spent in pre-trial confinement.

39. For these reasons, in August 1998, the House of Delegates of the American Bar Association unanimously approved a resolution proposed by the Council of Criminal Justice that would require every state to guarantee every indigent arrestee the right to have counsel appointed to represent them at initial bail hearings.

40. Over an eighteen month period, the Baltimore City Lawyers at Bail Project ("LAB") in conjunction with the University of Maryland Law School's Access to Justice and

Bail Clinic defended nearly 4,000 indigent defendants charged with non-violent offenses at District Court bail review hearings. The results of the project demonstrated the importance of providing legal representation: individuals represented at bail review hearings were more than two and one half times as likely as unrepresented defendants to be released on recognizance. Additionally, two and one half times as many represented defendants had their bail reduced to an affordable amount. Representation by counsel at initial bail hearings should attain similarly positive results.

41. Without representation by lawyers at initial bail hearings, even well-educated individuals may lack the knowledge to represent themselves effectively, let alone the ability to obtain release on their own recognizance or to achieve appropriate bail. The story of John R. Clayton, a thirty-year old graduate student at the Johns Hopkins Bloomberg School of Public Health, illustrates the difficulties facing unrepresented arrestees. Mr. Clayton was arrested in Baltimore City on January 7, 2006 for driving under the influence ("DUI"). He was detained at the Central Booking Jail in Baltimore City and brought before a Commissioner that evening. Despite the fact that Mr. Clayton was charged only with DUI and had no prior criminal record, the Commissioner inexplicably set Mr. Clayton's bail at ten thousand dollars ($10,000). When Mr. Clayton's bail review hearing was held in the District Court three days later, the prosecutor and his public defender quickly agreed that the bail set by the Commissioner was inappropriate. The District Court then eliminated the bail requirement and ordered Mr. Clayton released on recognizance. Until Mr. Clayton's release, he was unable to contact anyone. None of his family members knew that he had been arrested and incarcerated for the three days.

42. Mr. Clayton clearly would have benefited greatly from having counsel at his initial bail hearing. Had a lawyer been present, the Commissioner would have received verified

information about Mr. Clayton, including but not limited to the critical fact that he was a full-time enrolled graduate student at Johns Hopkins University School of Public Health. Counsel would have verified his current residence and presented other relevant information from people, e.g., his professors, friends and family who knew his character and dependability. A lawyer also would have emphasized that this was the first time that Mr. Clayton had ever been arrested in his life. These facts would have substantially reduced the likelihood that the Commissioner would have ordered bail at $10,000 for Mr. Clayton. Finally, a lawyer would have contacted family members, informed them about Clayton's whereabouts, and let them know how to post bail, if necessary, to obtain his release from jail.

43. Bail hearings are a critical stage of the criminal proceeding. This is an adversarial proceeding in that the state has committed itself to prosecute after it files a charging document and accuses the defendant of committing crimes. The Commissioner's determination of the terms for pretrial release holds significant consequences for the criminal defendant and grave potential for prejudice. While a prosecutor is not physically present at the commissioner hearing, the prosecutor participates in other ways: (a) an assistant state's attorney reviews every charging document filed by a police officer after a case has formally entered the criminal justice system; and (b) a prosecutor often communicates with a District Court Commissioner for the purpose of recommending bail. These communications are usually in writing, although verbal communications also may occur, and, upon information and belief, they focus principally on the charge and the defendant's criminal history. A Commissioner often relies upon and gives considerable weight to the prosecutor's recommendation, thus forcing the defendant to choose between responding and offering a statement that may contain inculpatory evidence or remaining silent.

44. Unrepresented indigent criminal defendants have little skill in arguing for pretrial release. They are unlikely to know that statements they make at an initial appearance are admissible at trial, and, when self-advocating for pretrial release, an incarcerated defendant is interested only in avoiding remaining in jail while awaiting trial. Unrepresented indigent defendants often do not understand the nature of the proceeding and are misled by their lack of familiarity with the law or are overpowered by the presence of the Commissioner and the extremely tight quarters for the hearing. In cases of preset bail, a defendant is unlikely to know that the Commissioner has a duty to consider the necessity for bail and the appropriateness for any bail amount, applying the factors set forth in Rule 4-216. A defendant also is unlikely to know that Maryland law prohibits detention without an initial bail hearing for more than 24 hours after arrest and that constitutional requirements prohibit such detention without hearing for more than 48 hours after arrest.

45. To avoid remaining in jail while awaiting trial, an unrepresented defendant may choose to make an inculpatory statement to mitigate the seriousness of the charge or to address probable cause issues, or the defendant may seek to impress a judicial officer by speaking candidly on subjects where speaking is neither required nor appropriate. A lawyer's presence protects an accused's right to a fair trial by eliminating the potential for creating substantial prejudice when such uncounseled statements are admitted at trial. A lawyer will counsel an accused not to speak or to say anything related to the charge. Advice by a lawyer is necessary for the defendant to understand those choices and to help the defendant to address the issues without providing inculpatory information or otherwise infringing upon his right against self-incrimination. Without a lawyer, there is a reasonable likelihood that such vital rights, including available defenses, will be lost. A lawyer also is critical in cases of preset bail, where the

Commissioner's failure to consider bail or to conduct an initial bail hearing violates State law and often leads to a violation of the constitutional requirements for timely presentment. Without a lawyer, it is extremely unlikely, if not certain, that these rights will not be raised, resulting in a violation of the defendant's fundamental rights to liberty, freedom and due process.

46. Initial bail hearings also are critical to criminal defendants in terms of the loss of freedom and its effect on their lives and livelihoods. Continued incarceration results in extremely damaging consequences to family relationships and employment. Jobs and income are lost. The prospect of conviction is increased when an accused is jailed between the time of arrest and final adjudication; so is the severity of sentence. Initial bail hearings thus are critically consequential to defendants facing loss of liberty, employment, income, and family.

47. A lawyer's presence at the initial appearance also is critical for ensuring that an immediate, thorough going investigation will commence, for protecting the defendants' constitutional right to prepare a meaningful defense, and for avoiding disruption to such trial preparation. The opportunity to consult with counsel, to find witnesses, to obtain evidence and, in general, to prepare a defense, is severely restricted when a defendant is kept in jail. Indeed, when counsel's appearance and direct communication with an accused is delayed following the initial appearance, there is a reasonable likelihood that there will be less factual investigation before trial and that no attempt will be made to speak to government witnesses, thereby materially prejudicing the defense.

## B. FACTS PERTAINING TO NAMED PLAINTIFFS AND DEFENDANTS' POLICY

48. Plaintiffs, all residents of Maryland, were arrested in Baltimore City and subsequently detained for up to twenty-four hours at Central Booking. They were brought

before Commissioners of the Baltimore City District Court for initial bail hearings under Maryland Rules 4-213 and 4-216.

1. **Quinton Richmond**

49. Plaintiff Quinton Richmond recently was arrested in Baltimore City for unlawfully possessing a controlled and dangerous substance ("CDS") with intent to distribute and a misdemeanor charge of CDS possession and was detained at the Central Booking Jail.

50. On November 11, 2006, Mr. Richmond was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213.

51. Mr. Richmond is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

52. At the commencement of his bail hearing before the Commissioner, Mr. Richmond informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

53. The Commissioner denied Mr. Richmond's request for the appointment of counsel and proceeded with the bail hearing.

54. Mr. Richmond is twenty-two years old and lives in Baltimore City. Mr. Richmond has completed a year in college and is employed by a security company as a security officer.

55. At the conclusion of the hearing, the Commissioner set Mr. Richmond's bail at twenty-five thousand dollars ($25,000). Mr. Richmond was released one day later, on November 12, 2006, after agreeing to pay a bail bondsman a 10% non-refundable fee of $2,500.

### 2. Jerome Jett

56. Plaintiff Jerome Jett recently was arrested in Baltimore City for the misdemeanor offense of possession of marijuana and was detained at the Central Booking Jail.

57. On November 11, 2006, Mr. Jett was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213.

58. Mr. Jett is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

59. At the commencement of his bail hearing before the Commissioner, Mr. Jett informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

60. The Commissioner denied Mr. Jett's request for the appointment of counsel and proceeded with the bail hearing.

61. Mr. Jett is twenty-eight years old and lives in Baltimore City. Mr. Jett is the custodial parent of his two children, who depend on him for support. Until recently, he worked as a short-order cook at a restaurant.

62. At the conclusion of the hearing, the Commissioner set Mr. Jett's bail at three thousand five hundred dollars ($3,500), with a 10% option ($350). Mr. Jett was released one day later, on November 12, 2006, after posting this bail.

### 3. Glenn Callaway

63. Plaintiff Glenn Callaway was arrested in Baltimore City on June 24, 2006 for a charge of CDS possession-Not Marijuana and was detained at the Central Booking Jail. His initial bail hearing was held that day, June 24, and he was released on his own recognizance.

64. On October 25, 2006, Mr. Callaway was arrested on four drug related charges (possession, possession with intent to distribute, manufacturing, and manufacturing with intent to distribute). He appeared before a Commissioner for his initial bail hearing that day, October 25, and the Commissioner set his bail at twenty-five thousand dollars ($25,000). According to the District Court records, Mr. Callaway also had a bail review hearing that same day, and at that hearing, the District Court confirmed the $25,000 bail set by the Commissioner.

65. On October 27, 2006, after Mr. Callaway allegedly had failed to appear for a hearing on the first charge, a warrant was issued by a District Court judge with a preset bail amount of one thousand five hundred dollars ($1,500). The warrant was served on Mr. Callaway on November 11, 2006, while he was detained on the second charge.

66. On November 11, 2006, Mr. Callaway was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213.

67. Mr. Callaway is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

68. At the commencement of his bail hearing before the Commissioner, Mr. Callaway informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

69. The Commissioner denied Mr. Callaway's request for the appointment of counsel and, upon information and belief, did not hold a bail hearing with regard to the preset bail.

70. Mr. Callaway is forty-eight years old. He has lived at the same address in Baltimore City for fifteen years. Mr. Callaway lives with his two sons and his elderly father, all of whom are dependent on him for support.

71. Mr. Callaway was unable to post the bail preset by the District Court and not addressed by the Commissioner, and he remained in custody at the Baltimore City Detention Center.

72. Two days later, at his bail review hearing on November 13, 2006, the District Court dismissed the $1,500 preset bail and released Mr. Callaway on recognizance (although he was already in detention for the second group of charges).

**4. <u>Myron Singleton</u>**

73. Plaintiff Myron Singleton recently was arrested in Baltimore City for the misdemeanor offense of possession of marijuana and was detained at the Central Booking Jail.

74. On November 11, 2006, Mr. Singleton was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213.

75. Mr. Singleton is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

76. At the commencement of his bail hearing before the Commissioner, Mr. Singleton informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

77. The Commissioner denied Mr. Singleton's request for the appointment of counsel and proceeded with the bail hearing.

78. At the conclusion of the hearing, the Commissioner set Mr. Singleton's bail at ten thousand dollars ($10,000). The bail set by the Commissioner was confirmed by the District Court at Mr. Singleton's bail review hearing on November 15, 2006.

79. Mr. Singleton is a lifelong resident of Baltimore City, and he currently lives with his grandmother. Currently, Mr. Singleton works for his grandfather's company as a cement layer. Mr. Singleton has seven children.

80. Mr. Singleton was released on November 15, 2006, after agreeing to pay a bail bondsman a 10% non-refundable fee of $1,000.

### 5. Timothy Wright

81. Plaintiff Timothy Wright was arrested in Baltimore City for burglary in the fourth degree on September 5, 2006, detained at the Central Booking Jail, and released a day later. Mr. Wright subsequently was arrested and for failure to appear and again was detained at the Central Booking Jail.

82. On November 11, 2006, Mr. Wright was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213.

83. Mr. Wright is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

84. At the commencement of his bail hearing before the Commissioner, Mr. Wright informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

85. The Commissioner denied Mr. Wright's request for the appointment of counsel and proceeded with the bail hearing.

86. At the conclusion of the hearing, the Commissioner set Mr. Wright's bail at a one hundred and fifty dollars ($150) cash bond.

87. Mr. Wright is thirty-six years old. He lives in Baltimore City and has worked for the same plumbing company for the last four years.

88. Mr. Wright was unable to post the bail set by the Commissioner and remained in custody at the Central Booking Jail.

89. At his bail review hearing in the District Court on November 13, 2006, Mr. Wright was released on personal recognizance.

### 6. **Keith Wilds**

90. Plaintiff Keith Wilds recently was arrested in Baltimore City for CDS possession with intent to distribute and for CDS possession and was detained at the Central Booking Jail.

91. On November 11, 2006, Mr. Wilds was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213.

92. Mr. Wilds is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

93. At the commencement of his bail hearing before the Commissioner, Mr. Wilds informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

94. The Commissioner denied Mr. Wilds' request for the appointment of counsel and proceeded with the bail hearing.

95. Mr. Wilds is forty years old and he lives in Baltimore City with his wife, their three young children, and his mother.

96. At the conclusion of the hearing, the Commissioner set Mr. Wilds' bail at five thousand dollars ($5,000). Mr. Wilds has subsequently posted bail and been released.

7. **Michael LaGrasse**

97. Plaintiff Michael LaGrasse was arrested in Baltimore City for theft – less than $100 on September 9, 2006 and was released on his own recognizance that day. He failed to appear for a proceeding on October 12, 2006, and a warrant was issued for him with a bail "preset" in the amount of one hundred dollars ($100).

98. On October 26 2006, Mr. LaGrasse was arrested in Baltimore City for attempted CDS possession and was detained at the Central Booking Jail. At his initial bail hearing on October 27, 2006, the Commissioner set his bail at five thousand dollars ($5,000). Mr. LaGrasse was unable to pay this bail and remained detained. At a bail review hearing held on October, 30, 2007, the District Court reduced the bail set by the Commissioner to two hundred dollars ($200). Mr. LaGrasse was unable to post this reduced bail and remained in custody.

99. The warrant for the failure to appear in connection with the prior charge was served on Mr. LaGrasse on November 11, 2006, while he was in custody.

100. Later that day, on November 11, 2006, Mr. LaGrasse was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213 with regard to the preset bail on the prior charge.

101. Mr. LaGrasse is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

102. At the commencement of his bail hearing before the Commissioner, Mr. LaGrasse informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

103. The Commissioner denied Mr. LaGrasse's request for the appointment of counsel and, upon information and belief, did not hold a bail hearing with regard to the preset bail. Instead, Mr. LaGrasse was committed to the Baltimore City Jail at that time.

104. Pursuant to Rule 4-216, the Commissioner had authority to make a new bail determination for the failure to appear charge. Accordingly, in failing to conduct an initial bail hearing pursuant to Rule 4-216, the Commissioner violated both the Rule as well as statutory requirements and constitutional due process requirements for presentment within 24 hours of arrest.

105. At his bail review hearing on November 13, 2006, the District Court confirmed the $100 preset bail amount. Accordingly, the overall bail for Mr. LaGrasse stood at a total of $300.

106. Mr. LaGrasse is forty-six years old and works in the construction industry.

107. Mr. LaGrasse was unable to post the bail set by the District Court and remained in custody until December 15, 2006, when a nolle prosequi was entered on the theft charge against him, which followed a nolle prosequi entered on the CDS charge on November 28, 2006.

**8. Ralph Steele**

108. Plaintiff Ralph Steele recently was arrested in Baltimore City for conspiracy to manufacture or distribute a controlled dangerous substance and CDS possession with intent to distribute and was detained at the Central Booking Jail.

109. On November 11, 2006, Mr. Steele was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213.

110. Mr. Steele is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

111. At the commencement of his bail hearing before the Commissioner, Mr. Steele informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

112. The Commissioner denied Mr. Steele's request for the appointment of counsel and proceeded with the bail hearing.

113. At the conclusion of the hearing, the Commissioner set Mr. Steele's bail at ten thousand dollars ($10,000).

114. Mr. Steele is a resident of Baltimore County, where he has lived for the last fifteen years. He currently is engaged to be married and lives with his fiancée.

115. Mr. Steele was released on November 12, after agreeing to pay a bail bondsman a 10% non-refundable fee of $1,000,

**9. <u>Laura Baker</u>**

116. Plaintiff Laura Baker was arrested in Baltimore City for CDS possession – not marijuana on October 11, 2006 and released on her own recognizance that day. She failed to appear for a proceeding on November 3, 2006, and warrant was issued for her with a bail "preset" in the amount of one hundred dollars ($100).

117. On November 11, 2006, Ms. Baker was arrested in Baltimore City on a new charge of CDS possession – not marijuana unrelated to the first charge and was detained at the Central Booking Jail. At that time, she was served with the warrant arising from the first charge.

118. Later that day, November 11, 2006, Ms. Baker was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for her initial bail hearing under Rule 4-213.

119. Ms. Baker is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

120. At the commencement of her bail hearing before the Commissioner, Ms. Baker informed the Commissioner that she could not afford a lawyer. She requested that a lawyer be appointed to represent her at the bail hearing.

121. The Commissioner denied Ms. Baker's request for the appointment of counsel and proceeded with the bail hearing.

122. At the conclusion of the hearing, the Commissioner set Ms. Baker's bail for the second CDS possession charge at three thousand five hundred dollars ($3,500). The Commissioner did not address the preset bail for Ms. Baker's first CDS possession charge, which therefore remained at one hundred dollars ($100), for a total of three thousand six hundred dollars ($3,600).

123. Ms. Baker is twenty-four years old and has lived in Pasadena in Anne Arundel County most of her life. She currently is unemployed but previously has worked in a restaurant in Pasadena and in an environmental firm.

124. Ms. Baker was unable to post the bail set by the Commissioner and remained in custody at the Central Booking Jail.

125. At her bail review hearing before the District Court on Novembr 13, 2006, the District Court did not reduce the $100 preset bail but did reduce the bail set by the Commissioner

for the second charge from $3,500 to one hundred fifty dollars ($150), giving a total bail of two hundred fifty dollars ($250).

126. Ms. Baker was unable to post the reduced bail set by the District Court and remained incarcerated. On December 13, 2006, a nolle prosequi was entered on the failure to appear and the first possession charge. Two days later, on December 15, 2006, Ms. Baker was found guilty on the second possession charge and was sentenced to sixty days but was released that day based on time served.

**10. <u>Erich Lewis</u>**

127. Plaintiff Erich Lewis recently was arrested in Baltimore City for assault in the second degree and malicious destruction of property and was detained at the Central Booking Jail.

128. On November 11, 2006, Mr. Lewis was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213.

129. Mr. Lewis is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

130. At the commencement of his bail hearing before the Commissioner, Mr. Lewis informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

131. The Commissioner denied Mr. Lewis' request for the appointment of counsel and proceeded with the bail hearing.

132. At the conclusion of the hearing, the Commissioner set Mr. Lewis' bail at a twenty-five thousand dollar ($25,000) bond.

133. Mr. Lewis is nineteen years old and lives with his grandmother in Baltimore City. He currently is employed as a trash removal operator.

134. Mr. Lewis was unable to post the bail set by the Commissioner and remained in custody at the Central Booking Jail.

135. At his bail review hearing in the District Court on November 13, 2006, the District Court confirmed the bail set by the Commissioner.

136. Mr. Lewis was released on November 14, 2006, after agreeing to pay a bail bondsman a 10% non-refundable fee of $2,500,

### 11. Nathaniel Shivers

137. Plaintiff Nathaniel Shivers recently was arrested in Baltimore City for armed carjacking, felony theft, use of a handgun in the commission of a violent crime, and other lesser offenses, and was detained at the Central Booking Jail.

138. On November 11, 2006, Mr. Shivers was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for his initial bail hearing under Rule 4-213.

139. Mr. Shivers is indigent and therefore is eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

140. At the commencement of his bail hearing before the Commissioner, Mr. Shivers informed the Commissioner that he could not afford a lawyer. He requested that a lawyer be appointed to represent him at the bail hearing.

141. The Commissioner denied Mr. Shivers' request for the appointment of counsel and proceeded with the bail hearing.

142. At the conclusion of the hearing, the Commissioner set Mr. Shivers' bail at a one million dollar bond.

143. Mr. Shivers is twenty-six years old. He currently is unemployed and lives in Baltimore City.

144. Mr. Shivers was unable to post the bail set by the Commissioner and remained in custody at the Central Booking Jail.

145. At Mr. Shivers' bail review hearing on November 13, 2006, the District Court ordered Mr. Shivers to be held without bail pending trial. Mr. Shivers currently is detained at the Baltimore City Detention Center

**Facts Common to All Plaintiffs**

146. Each of the Plaintiffs specifically requested to be represented by counsel. In each case, the Commissioner denied the Plaintiff's request for counsel and proceeded with the initial bail hearing.

147. Each of the Plaintiffs was charged with a serious offense under Maryland law.

148. Each of the Plaintiffs was indigent at the time of the initial bail hearing, each Plaintiff informed the Commissioner of that fact, and each Plaintiff therefore was eligible for representation by the Office of the Public Defender and entitled to representation by a court-appointed attorney.

149. It is the regular practice of Baltimore City District Court Commissioners not to provide arrestees with the opportunity to be represented by counsel at initial bail hearings, nor to appoint counsel for indigent arrestees, nor to take any action to enforce the guarantee of representation by counsel provided in the Public Defender Act, the Sixth Amendment to the U.S. Constitution, and Article 21 of the Maryland Declaration of Rights.

150. Under the Public Defendant Act, Md. Crim. Proc. Code Ann. ("CP") § 16-204, indigent defendants or parties are entitled to representation by a public defender at all stages of, inter alia, a criminal or juvenile proceeding in which the defendant or party is alleged to have committed a serious offense or in any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution might result. Initial bail hearings and bail review hearings are stages of a criminal proceeding. They also constitute proceedings in which confinement under a judicial commitment in a public or private institution may result. The District Court Defendants therefore are obligated to appoint counsel to represent indigent defendants at such proceedings, consistent with the Public Defender Act. Similarly, the Public Defender, through his assistants, is obligated to represent indigent defendants or parties at such proceedings.

151. Despite the clear mandate of CP § 16-204, the District Court Defendants do not recognize the right of indigent defendants to representation by a public defender at initial bail proceedings. Similarly, despite the clear mandate of CP § 16-204, the Public Defender does not represent indigent defendants or parties at initial bail hearings in Baltimore City.

## C. CLASS ACTION ALLEGATIONS

152. Plaintiffs bring this action pursuant to Rule 2-231 on behalf of themselves and all others similarly situated, as representative members of the following proposed class:

> All indigent persons arrested, detained at Central Booking, brought before a Commissioner for initial bail hearings, and denied representation by counsel at the initial bail hearings, presently and in the future.

153. The class is seeking declaratory and injunctive relief as a remedy in this matter, not damages. The Defendants in this case have acted or refused to act on grounds generally

applicable to the class as a whole, and the actions of the Defendants require injunctive relief. Certification of the class therefore is proper under Rule 2-231(b)(2).

154. The members of the class are so numerous that joining individual members is impracticable. Given that the Baltimore City District Court Commissioners hold hundreds of initial bail hearings each week, the class is comprised of thousands of members.

155. Class members can readily be identified from District Court records.

156. There are numerous questions of law and fact common to the entire Plaintiff class. These common questions predominate over any questions affecting only individual members of the class.

157. The wrongs suffered and remedies sought by the Representative Plaintiffs are identical to those of the class and result from a common course of conduct. Their claims are typical of those of the class members and are based upon the same factual and legal theories.

158. The Representative Plaintiffs will fairly and adequately assert and protect the interests of the class members. The Representative Plaintiffs' interests are not antagonistic to those of the class members. The Representative Plaintiffs have retained counsel experienced in handling class action and complex litigation. Neither the Representative Plaintiffs nor their counsel have any interest that might prevent them from actively and vigorously pursuing this action.

159. A class action is superior to other available means for the fair and efficient prosecution of this action. The prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications for individual class members.

160. A class action will result in an orderly and expeditious administration of the class members' claims, and economies of time, effort and expense, and uniformity of decision will be assured.

## SPECIFIC CLAIMS FOR RELIEF

### COUNT I: VIOLATION OF THE MARYLAND PUBLIC DEFENDER ACT

161. Plaintiffs incorporate by reference as if fully alleged herein paragraphs 1-160 set forth above.

162. Under the Maryland Public Defender Act, Md. Crim. Proc. Code Ann. § 16-204(b)(2), all indigent criminal defendants are entitled to legal representation by counsel "at all stages of a proceeding" enumerated in the preceding subsection, including a criminal proceeding in which a criminal defendant is alleged to have committed a serious offense and a proceeding that could result in confinement in a public or private institution under a judicial commitment. Initial bail hearings are subject to these requirements.

163. Plaintiffs are therefore entitled to representation at initial bail proceedings.

164. Plaintiffs have asserted this right to representation by counsel and asked to have counsel appointed to represent them at their initial bail hearings before Baltimore City District Court Commissioners, but the District Court Defendants have denied this right and refuse to appoint counsel or to otherwise provide arrestees with representation by counsel at initial bail hearings. The Public Defender will not act as counsel for indigent criminal defendants at initial bail hearings absent a resolution of the claims at issue in this lawsuit.

165. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning the right to counsel at initial bail hearings.

166. Plaintiffs, and all those similarly situated, have no adequate remedy at law and have suffered, are suffering, and will continue to suffer great and irreparable loss, damage, and injury requiring equitable relief from this Court.

**WHEREFORE,** Plaintiffs request this Court to enter an Order:

(a) Declaring that an initial bail hearing before a Commissioner of the District Court under Rule 4-213 is a stage in the criminal proceeding for the purpose of triggering the Maryland Public Defender Act, Md. Crim. Proc. Code Ann. § 16-204.

(b) Declaring that, under the Maryland Public Defender Act, Md. Crim. Proc. Code Ann. § 16-204, indigent incarcerated arrestees have a right to have counsel appointed to represent them during an initial bail hearing under Rule 4-213.

(c) Enjoining the Defendants from violating Plaintiffs' rights to representation by the Office of the Public Defender at initial bail hearings.

(d) Entering an affirmative injunction directing the Public Defender to assign the district public defender for Baltimore City, an attorney from the district Office of the Public Defender for Baltimore City, or a panel attorney to represent indigent defendants at initial bail hearings and thereafter.

(e) Awarding Plaintiffs the costs incurred in connection with this proceeding.

(f) Awarding Plaintiffs such other and further relief as this Court may deem appropriate.

## COUNT II: VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

167. Plaintiffs incorporate by reference as if fully alleged herein paragraphs 1-166 set forth above.

168. An initial bail hearing before a Commissioner of the District Court of Baltimore City under Rule 4-213 is an adversary proceeding and/or a critical stage of criminal prosecution and therefore triggers the right to counsel guaranteed by the Sixth Amendment to the United States Constitution.

169. Plaintiffs have asserted this constitutional right to representation by counsel at their initial bail hearings before Baltimore City District Court Commissioners, but the District Court Defendants have denied this right and refuse to ensure arrestees representation of counsel at initial bail hearings. The Public Defender will not act as counsel for indigent criminal defendants at initial bail hearings absent a resolution of the claims at issue in this lawsuit.

170. By denying Plaintiffs any representation by counsel at their initial bail hearings before Baltimore City District Court Commissioners, Defendants are violating Plaintiffs' rights to counsel under the Sixth Amendment, as applicable under the due process clause of the Fourteenth Amendment to the United States Constitution.

171. Defendants at all times described herein have acted under the color of the laws, policies, and rules of the State of Maryland.

172. Defendants have violated Section 1983 of Title 42 of the United States Code by denying Plaintiffs their right to counsel guaranteed under the Sixth Amendment as applicable under the Fourteenth Amendment to the United States Constitution.

173. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning the right to counsel at initial bail hearings which could be resolved by declaratory relief.

174. Plaintiffs, and all those similarly situated, have no adequate remedy at law and have suffered, are suffering, and will continue to suffer great and irreparable loss, damage, and injury requiring equitable relief from this Court.

**WHEREFORE**, Plaintiffs request this Court to enter an Order:

(a) Declaring that an initial bail hearing before a Commissioner of the District Court under Rule 4-213 is an adversary proceeding and/or a critical stage of criminal prosecution for the purpose of triggering the Sixth Amendment right to counsel.

(b) Declaring that, under the Sixth Amendment of the Constitution, indigent arrestees have a right to have counsel appointed to represent them during an initial bail hearing under Rule 4-213.

(c) Enjoining the Defendants from violating Plaintiffs' rights to representation at initial bail hearings.

(d) Entering an affirmative injunction directing the Public Defender to assign the district public defender for Baltimore City, an attorney from the district Office of the Public Defender for Baltimore City, or a panel attorney to represent indigent defendants at initial bail hearings and thereafter.

(e) Awarding Plaintiffs all reasonable legal fees, costs, and expenses of suit as provided by 42 U.S.C. § 1988 or pertinent state law or rule.

(f) Awarding Plaintiffs such other and further relief as this Court may deem appropriate.

**COUNT III: VIOLATION OF ARTICLE 21 OF THE MARYLAND DECLARATION OF RIGHTS**

175. Plaintiffs incorporate by reference as if fully alleged herein paragraphs 1-174 set forth above.

176. An initial bail hearing before a Commissioner of the District Court of Baltimore City under Rule 4-213 is an adversary proceeding and/or a critical stage of criminal prosecution and therefore triggers the right to counsel guaranteed by the Article 21 to the Maryland Declaration of Rights.

177. Plaintiffs have asserted this constitutional right to representation by counsel at their initial bail hearings before Baltimore City District Court Commissioners, but Defendants have denied this right and refuse to ensure arrestees representation of counsel at initial bail hearings. The Public Defender will not act as counsel for indigent criminal defendants at initial bail hearings absent a resolution of the claims at issue in this lawsuit.

178. By denying Plaintiffs any representation by counsel at their initial bail hearings before Baltimore City District Court Commissioners, Defendants are violating Plaintiffs' rights to counsel under Article 21 of the Maryland Declaration of Rights.

179. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning the right to counsel at initial bail hearings which could be resolved by declaratory relief.

180. Plaintiffs, and all those similarly situated, have no adequate remedy at law and have suffered, are suffering, and will continue to suffer great and irreparable loss, damage, and injury requiring equitable relief from this Court.

**WHEREFORE**, Plaintiffs request this Court to enter an Order:

(a) Declaring that an initial bail hearing before a Commissioner of the District Court under Rule 4-213 is an adversary proceeding and/or a critical stage of criminal prosecution for the purpose of triggering the Sixth Amendment right to counsel.

(b) Declaring that, under Article 21 of the Maryland Declaration of Rights, indigent arrestees have a right to have counsel appointed to represent them during an initial bail hearing under Rule 4-213.

(c) Enjoining the Defendants from violating Plaintiffs' rights to representation at initial bail hearings.

(d) Entering an affirmative injunction directing the Public Defender to assign the district public defender for Baltimore City, an attorney from the district Office of the Public Defender for Baltimore City, or a panel attorney to represent indigent defendants at initial bail hearings and thereafter.

(e) Awarding Plaintiffs the costs incurred in connection with this proceeding.

(f) Awarding Plaintiffs such other and further relief as this Court may deem appropriate.

**COUNT IV: VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

181. Plaintiffs incorporate by reference as if fully alleged herein paragraphs 1-180 set forth above.

182. An initial bail hearing before a Commissioner of the District Court of Baltimore City under Rule 4-213 decides the defendant's liberty, a fundamental right. If bail is denied or set at a level that the defendant cannot afford, the defendant is deprived of his or her freedom.

183. Because liberty is a fundamental right protected by the Fourteenth Amendment to the United States Constitution, defendants at initial bail hearings are entitled to the procedural due process protections afforded by the Due Process Clause of the Fourteenth Amendment, which include the right to be heard.

184. In a pretrial hearing to determine whether a defendant will be detained and lose his or her fundamental right to liberty, in which a judicial officer will apply detailed and intricate set of criteria to determine bail, the right to be heard necessarily includes the right to be represented by counsel.

185. Plaintiffs have asserted their constitutional and statutory rights to representation by counsel at their initial bail hearings before Baltimore City District Court Commissioners, but Defendants have denied this right and refuse to ensure arrestees representation of counsel at initial bail hearings. The Public Defender will not act as counsel for indigent criminal defendants at initial bail hearings absent a resolution of the claims at issue in this lawsuit.

186. By denying Plaintiffs, and those similarly situated, any representation at initial bail hearings before Baltimore City District Court Commissioners,, Defendants' actions, policies, and practices have violated the rights of Plaintiffs, and those similarly situated, to due process secured by the Fourteenth Amendment to the United States Constitution.

187. In addition, through the Maryland Public Defender Act, Md. Code Ann., Art. 27A § 4, Maryland has established clear laws requiring that all indigent criminal defendants receive legal representation by counsel "at all stages in the [criminal] proceeding," including initial bail

hearings. By refusing to abide by the State's laws for protecting Plaintiffs' constitutional right to liberty and/or their constitutional and statutory right to counsel, Defendants have further denied Appellants their rights to due process guaranteed by the Fourteenth Amendment.

188. Defendants at all times described herein have acted under the color of the laws, policies, and rules of the State of Maryland.

189. Defendants have violated Section 1983 of Title 42 of the United States Code by denying Plaintiffs their right to due process guaranteed under the Fourteenth Amendment to the United States Constitution.

190. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning the right to counsel at initial bail hearings which could be resolved by declaratory relief.

191. Plaintiffs, and all those similarly situated, have no adequate remedy at law and have suffered, are suffering, and will continue to suffer great and irreparable loss, damage, and injury requiring equitable relief from this Court.

**WHEREFORE**, Plaintiffs request this Court to enter an Order:

(a) Declaring that an initial bail hearing before a Commissioner of the District Court under Rule 4-213 implicates the Plaintiffs' fundamental right to liberty under the Fourteenth Amendment.

(b) Declaring that, under the Fourteenth Amendment of the United States Constitution, indigent arrestees have a right to have counsel appointed to represent them during an initial bail hearing under Rule 4-213.

(c) Declaring that, by failing to appoint counsel to represent Plaintiffs at initial bail hearings under Rule 4-213, Defendants are violating the Fourteenth Amendment to the United States Constitution.

(d) Declaring that, by failing to abide by the State's laws for protecting Plaintiffs' constitutional right to liberty and/or their constitutional right to counsel, Defendants have further denied Appellants their rights to due process guaranteed by the Fourteenth Amendment.

(e) Enjoining the Defendants from violating Plaintiffs' rights to representation at initial bail hearings.

(f) Entering an affirmative injunction directing the Public Defender to assign the district public defender for Baltimore City, an attorney from the district Office of the Public Defender for Baltimore City, or a panel attorney to represent indigent defendants at initial bail hearings and thereafter.

(g) Awarding Plaintiffs all reasonable legal fees, costs, and expenses of suit as provided by 42 U.S.C. § 1988 or pertinent state law or rule.

(h) Awarding Plaintiffs such other and further relief as this Court may deem appropriate.

**COUNT V: VIOLATION OF ARTICLE 24 TO THE MARYLAND DECLARATION OF RIGHTS**

192. Plaintiffs incorporate by reference as if fully alleged herein paragraphs 1-191 set forth above.

193. An initial bail hearing before a Commissioner of the District Court of Baltimore City under Rule 4-213 decides the defendant's liberty, a fundamental right. If bail is denied or set at a level that the defendant cannot afford, the defendant is deprived of his or her freedom.

194. Article 24 of the Maryland Declaration of Rights provides that no person may be imprisoned or otherwise deprived of his liberty without due process and application of the law of the land.

195. Because liberty is a fundamental right protected by Article 24 of the Maryland Declaration of Rights, defendants at initial bail hearings are entitled to the procedural due process protections afforded by Article 24, which include the right to be heard.

196. In a pretrial hearing to determine whether a defendant will be detained and lose his or her fundamental right to liberty, in which a judicial officer will apply detailed and intricate set of criteria to determine bail, the right to be heard necessarily includes the right to be represented by counsel.

197. Plaintiffs have asserted their constitutional and statutory rights to representation by counsel at their initial bail hearings before Baltimore City District Court Commissioners, but Defendants have denied this right and refuse to ensure arrestees representation of counsel at initial bail hearings. The Public Defender will not act as counsel for indigent criminal defendants at initial bail hearings absent a resolution of the claims at issue in this lawsuit.

198. By denying Plaintiffs, and those similarly situated, any representation at initial bail hearings before Baltimore City District Court Commissioners,, Defendants' actions, policies, and practices have violated the rights of Plaintiffs, and those similarly situated, to due process secured by Article 24 of the Maryland Declaration of Rights.

199. In addition, through the Maryland Public Defender Act, Md. Code Ann., Art. 27A § 4, Maryland has established clear laws requiring that all indigent criminal defendants receive legal representation by counsel "at all stages in the [criminal] proceeding," including initial bail hearings. By refusing to abide by the State's laws for protecting Plaintiffs' constitutional right to liberty and/or their constitutional and statutory right to counsel, Defendants have further denied Appellants their rights to due process and application of the law of the land guaranteed by Article 24 of the Maryland Declaration of Rights.

200. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning the right to counsel at initial bail hearings which could be resolved by declaratory relief.

201. Plaintiffs, and all those similarly situated, have no adequate remedy at law and have suffered, are suffering, and will continue to suffer great and irreparable loss, damage, and injury requiring equitable relief from this Court.

**WHEREFORE**, Plaintiffs request this Court to enter an Order:

(a) Declaring that an initial bail hearing before a Commissioner of the District Court under Rule 4-213 implicates the Plaintiffs' fundamental right to liberty and protection against wrongful imprisonment under Article 24 of the Maryland Declaration of Rights.

(b) Declaring that, under Article 24 of the Maryland Declaration of Rights, indigent arrestees have a right to have counsel appointed to represent them during an initial bail hearing under Rule 4-213.

(c) Declaring that, by failing to appoint counsel to represent Plaintiffs at initial bail hearings under Rule 4-213, Defendants are violating Article 24 of the Maryland Declaration of Rights.

(d) Declaring that, by failing to abide by the State's laws for protecting Plaintiffs' constitutional right to liberty and/or their constitutional right to counsel, Defendants have further denied Appellants their rights to due process and application of the law of the land guaranteed by Article 24 of the Maryland Declaration of Rights.

(e) Enjoining the Defendants from violating Plaintiffs' rights to representation at initial bail hearings.

(f) Entering an affirmative injunction directing the Public Defender to assign the district public defender for Baltimore City, an attorney from the district Office of the Public Defender for Baltimore City, or a panel attorney to represent indigent defendants at initial bail hearings and thereafter.

(g) Awarding Plaintiffs the costs incurred in connection with this proceeding.

(h) Awarding Plaintiffs such other and further relief as this Court may deem appropriate.

Mitchell Mirviss

Michael Schatzow
Mitchell Y. Mirviss
Alex Hortis
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21201
(410) 244-7400

Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 26th day of July 2010, a copy of the foregoing Third Amended Class Action Complaint was served by electronic mail and by first class mail, postage prepaid, on the following counsel for the District Court Defendants:

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H. Scott Curtis, Esquire
Julia Doyle Bernhardt, Esquire
Assistant Attorneys General
Office of the Attorney General
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1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for the Public Defender

Mitchell Y. Mirviss

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|---|---|---|
| QUINTON RICHMOND, et al., | * | IN THE |
| Plaintiffs, | * | CIRCUIT COURT |
| v. | * | FOR |
| THE DISTRICT COURT OF MARYLAND, et al., | * | BALTIMORE CITY |
| Defendants. | * | Case No. 24-C-06-009911 CN |

* * * * * * * * * * * * *

**AFFIDAVIT OF MYRON SINGLETON**

I, MYRON SINGLETON, am over the age of eighteen (18) and am competent to testify on the basis of personal knowledge the information contained herein.

1. I am a lifelong resident of Baltimore City, and live with my grandmother.

2. I was arrested in Baltimore City for the misdemeanor offense of possession of marijuana and was detained at the Central Booking Jail.

3. The facilities at Central Booking are harsh. I had to share a small cell with more than five individuals in extremely cramped quarters. I had no place to sleep or sit as I waited to appear before a Commissioner. We had to share an open toilet with no privacy.

4. On November 11, 2006, I went before a District Court Commissioner in the Central Booking Jail for my initial bail hearing. The hearing took place in a closed booth inside the jail with a glass wall separating me from the Commissioner, and it was not open to the public. The Commissioner and I spoke through a speaker system. As far as I am aware, the hearing was not recorded.

5. I am and was indigent at the time of this hearing and therefore was eligible for representation by the Office of the Public Defender.

6. At the start of the hearing before the Commissioner, I informed the Commissioner that I could not afford a lawyer and I requested that a lawyer be appointed to represent me at this bail hearing.

7. The Commissioner denied my request for the appointment of counsel and proceeded with the bail hearing.

8. During the hearing, the Commissioner informed me of the crimes with which I had been charged. He asked me a series of questions concerning residence, employment, family, other ties to the community, prior record, and, frequently, the current charge. I answered these to the best of my ability. He did not advise me of my Miranda rights, or that statements I made to him could be used against me at trial.

9. At the conclusion of the hearing, the Commissioner set my bail at ten thousand dollars ($10,000).

10. I was unable to post the bail set by the Commissioner and remained in custody at the Central Booking Jail.

11. The bail set by the Commissioner was confirmed by the District Court my bail review hearing on November 15, 2006.

12. I was released on November 15, 2006, after agreeing to pay a bail bondsman a 10% non-refundable fee of $1,000.

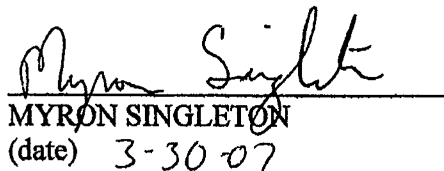
13. I do not believe that I had the proper skills or resources to argue for my pretrial release. I did not know, for instance, that my statements would be admissible at trial. I did not know the best arguments to make in favor of my release or at least in favor of lower bail. Due to my incarceration, I could not effectively demonstrate my stability and my ties to the community.

14. Had an attorney been appointed to represent me at my hearing, he or she could have highlighted many of the legal factors weighing in favor of a lower bail. An attorney could have helped

me understand the types of information that would support my request for no bail or reduced bail. An attorney could have provided verified information about my stability and ties to the community. An attorney could have helped me follow up in obtaining witnesses or other information that could have been used in a subsequent bail review hearing or in mounting an effective defense immediately following the presentation of charges against me. He or she could have advised me as to how to address the Commissioner and how to discuss the charges brought by the State without making incriminating or damaging statements. He or she could have helped the Commissioner understand key legal issues at issue in the case. And, an attorney could have helped to ensure that I advocate for my freedom effectively without making potentially incriminating statements.

15. As a result, the Initial bail hearings also are critical to defendants in terms of the loss of freedom and its effect on their lives and livelihoods. Continued incarceration results in extremely damaging consequences to family relationships and employment. Jobs and income are lost. The prospect of conviction is increased when an accused is jailed between the time of arrest and final adjudication; so is the severity of sentence. Initial bail hearings thus are critically consequential to defendants facing loss of liberty, employment, income, and family.

I SOLEMNLY AFFIRM UNDER THE PENALTIES OF PERJURY that the contents of the foregoing are true, correct and based upon personal knowledge.



MYRON SINGLETON
(date) 3-30-07

| | | |
|---|---|---|
| QUINTON RICHMOND, et al., | * | IN THE |
| Plaintiffs, | * | CIRCUIT COURT |
| v. | * | FOR |
| THE DISTRICT COURT OF MARYLAND, et al., | * | BALTIMORE CITY |
| Defendants. | * | Case No. 24-C-06-009911 CN |

* * * * * * * * * * * * *

**AFFIDAVIT OF LAURA BAKER**

I, LAURA BAKER, am over the age of eighteen (18) and am competent to testify on the basis of personal knowledge the information contained herein.

1. I am twenty-four years old and have lived in Pasadena in Anne Arundel County most of my life.

2. I was arrested in Baltimore City for CDS possession – not marijuana on October 11, 2006 and released on my own recognizance that day. I failed to appear for a proceeding on November 3, 2006, and a warrant was issued for me with a bail "preset" in the amount of one hundred dollars ($100).

3. On November 11, 2006, I was arrested in Baltimore City on a new charge of CDS possession – not marijuana unrelated to the first charge and I was detained at the Central Booking Jail. At that time, I was served with the warrant from the first charge.

4. The facilities at Central Booking are harsh. I had to share a small cell with more than five individuals in extremely cramped quarters. I had no place to sleep or sit as I waited to appear before a Commissioner. We had to share an open toilet with no privacy.

5. Later that day, November 11, 2006, I was brought before a Commissioner of the Baltimore City District Court in the Central Booking Jail for my initial bail hearing. The hearing

took place in a closed booth inside the jail with a glass wall separating me from the Commissioner, and it was not open to the public. The Commissioner and I spoke through a speaker system. As far as I am aware, the hearing was not recorded.

6. I am and was indigent at the time of this hearing and therefore was eligible for representation by the Office of the Public Defender.

7. At the start of the hearing before the Commissioner, I informed the Commissioner that I could not afford a lawyer and I requested that a lawyer be appointed to represent me at this bail hearing.

8. The Commissioner denied my request for the appointment of counsel and proceeded with the bail hearing.

9. During the hearing, the Commissioner informed me of the crimes with which I had been charged. He asked me a series of questions concerning residence, employment, family, other ties to the community, prior record, and, frequently, the current charge. I answered these to the best of my ability. He did not advise me of my Miranda rights, or that statements I made to him could be used against me at trial.

10. At the conclusion of the hearing, the Commissioner set my bail for the second CDS possession charge at three thousand five hundred dollars ($3,500). The Commissioner did not address the preset bail my first CDS possession charge, which therefore remained at one hundred dollars ($100), for a total of three thousand six hundred dollars ($3,600).

11. I do not believe that I had the proper skills or resources to argue for my pretrial release. I did not know, for instance, that my statements would be admissible at trial. I did not know the best arguments to make in favor of my release or at least in favor of lower bail. Due to my incarceration, I could not effectively demonstrate my stability and my ties to the community.

12. Had an attorney been appointed to represent me at my hearing, he or she could have highlighted many of the legal factors weighing in favor of a lower bail. An attorney could have helped me understand the types of information that would support my request for no bail or reduced bail. An attorney could have provided verified information about my stability and ties to the community. An attorney could have helped me follow up in obtaining witnesses or other information that could have been used in a subsequent bail review hearing or in mounting an effective defense immediately following the presentation of charges against me. He or she could have advised me as to how to address the Commissioner and how to discuss the charges brought by the State without making incriminating or damaging statements. He or she could have helped the Commissioner understand key legal issues at issue in the case. And, an attorney could have helped to ensure that I advocate for my freedom effectively without making potentially incriminating statements.

13. I did not know that the Commissioner had a duty to consider the necessity for bail and the appropriateness for any bail amount, applying the factors set forth in Rule 4-216 when I was brought to the Commissioner for my failure to appear. An attorney could have advised me of this duty and helped me argue that the Commissioner should have determined the necessity for bail. I also did not know that Maryland law prohibits detention without an initial bail hearing for more than 24 hours after arrest, and a lawyer could have helped me assert that right as well.

14. As a result, the Initial bail hearings also are critical to defendants in terms of the loss of freedom and its effect on their lives and livelihoods. Continued incarceration results in extremely damaging consequences to family relationships and employment. Jobs and income are lost. The prospect of conviction is increased when an accused is jailed between the time of

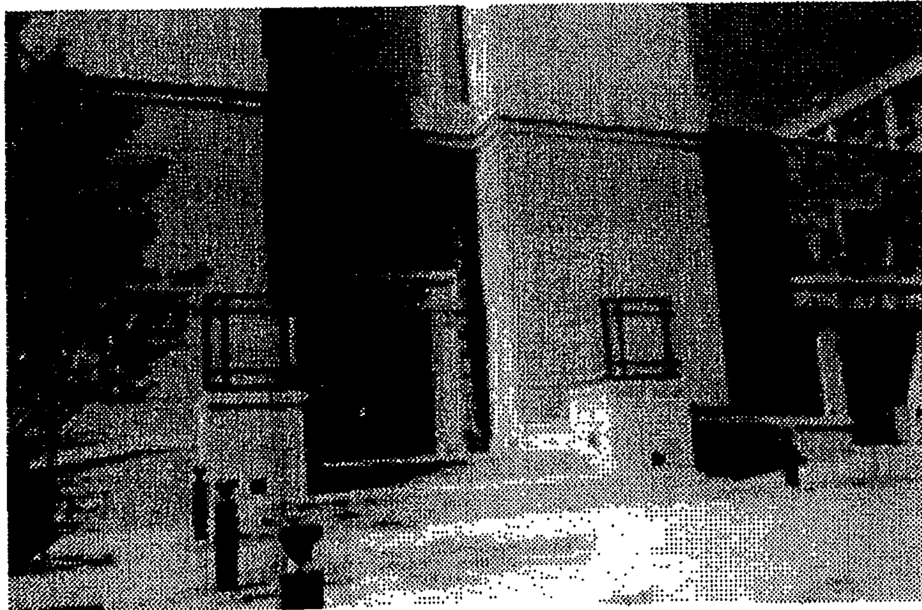
arrest and final adjudication; so is the severity of sentence. Initial bail hearings thus are critically consequential to defendants facing loss of liberty, employment, income, and family.

15.

I SOLEMNLY AFFIRM UNDER THE PENALTIES OF PERJURY that the contents of the foregoing are true, correct and based upon personal knowledge.

Laura Baker
(date)

# Central Booking and Intake Facility



# Plan for Efficient and Timely Processing on the Booking Floor

## August 2005

**Maryland Department of Public Safety and Correctional Services**

**Division of Pretrial Detention and Services**

# GLOSSARY OF TERMS

ABS System – Automated Booking System

Booking Floor – The location at CBIF where arrestee processing takes place.

Booking Shift Commander – Supervisor on the Booking Floor who supervises both booking and release processes, a Lieutenant or Major (employee of CBIF).

CBIF – Central Booking and Intake Center of the Maryland Division of Pretrial Detention and Services.

Delay in the Queue – Anything that stops the detainee from moving forward in the process to the Court Commissioner.

DPDS – Division of Pretrial Detention and Services of the Maryland Department of Public Safety and Correctional Services.

DPSCS - Maryland Department of Public Safety and Correctional Services.

Document Desk – A staging area where the arrestee's paperwork is entered into the ABS System. The actual paperwork is then forwarded to Pretrial, the War Room and back to the Document Desk before being sent to the Court Commissioner.

ITCD - Maryland Department of Public Safety and Correctional Services' Information Technology and Communications Division.

Mapping – Identification of the process of moving arrestees and their paperwork through the system.

On-call Escalation Process – When there are technical issues that cannot be resolved by on-site staff, there is a call down list for after-hours and emergency DPSCS ITCD staff. An ITCD staff person is on-call 24/7.

Part 40 Court – the Booking Center Court Room where bail hearings are held by judicial officers.

Public Safety Supervisor – A correctional supervisor (an employee of CBIF) assigned on the Booking Floor to monitor and expedite arrestees through the booking process up until presentation to Court Commissioners within the 24-hour requirement. May be a Lieutenant or a Major.

Public Safety Warden – Warden of the Central Booking and Intake Facility, Mitchell Franks.

Queue – The automated listing of booked detainees who have been charged and are currently at CBIF. The listing includes the detainee's CBIF number, name, the time the detainee was arrested (starts clock ticking) and the place where the arrestee is in the timeline of getting to the Court Commissioner.

Queue Monitor – A Public Safety Supervisor (a supervisory employee of CBIF).

Shift Commander – Lieutenant or Major (employee of CBIF).

War Room – Located at CBIF, this is a collaborative effort between the State's Attorney's Office, the State Division of Parole and Probation, DPDS and the Baltimore City Police Department to identify violent, repeat offenders. Offenders known to law enforcement on probation or parole and charged with a new arrest or violent crime will be subject to a more rigorous evaluation of court and supervision records gathered by state pretrial staff and parole and probation agents following an arrest.

Warrant Unit – Warrant Unit of CBIF, located on the Booking Floor.

# EXECUTIVE SUMMARY

## The Central Booking and Intake Facility's Plan for Efficient and Timely Processing on the Booking Floor –

***A strategic plan for a coordinated booking and intake system for Baltimore City***

**The Plan**

This plan details the process of booking and intake from start to finish at the Central Booking and Intake Facility (CBIF) in Baltimore City. It includes a description of renewed and improved communications among the criminal justice agencies who are partners in this system. The plan outlines Key Strategies and Major Goals to improve the booking and intake process. It involves all partners at every level, from streamlining the process flow to prioritizing the most serious cases. Communication is the key to the success of this plan.

**Mission**

The Mission of the Central Booking and Intake Facility is simple – Arrestees brought to the Central Booking and Intake Facility will be processed in an efficient and timely manner.

**History**

Central Booking began operations on November 28, 1995. Before the creation of CBIF, police officers took arrestees directly to their districts for booking and processing. A Court Commissioner for each district reviewed charges and determined bail or released the arrestee on personal recognizance. Arrestees who did not get or make bail were detained in the districts.

Today, police officers bring arrestees directly to CBIF and can enter Probable Cause Statements on an automated Arrest Booking System (ABS). With technological advancements, police officers can now book "remotely" as well since ABS has been installed in their districts.

There are 250-425 people processed through the Booking Floor at CBIF every day. When the volume increases, the challenge of processing everyone in a timely fashion increases exponentially. This plan has been created to address how the arrest and booking system can operate more efficiently to ensure that all individuals brought to CBIF see a Court Commissioner within 24 hours of arrest.

## Key Strategies

Baltimore City Central Booking and Intake Facility is pursuing the following critical strategies:

1. Streamlined process flow
2. Increased staffing levels
3. Prioritizing serious cases
4. New leadership and increased supervision
5. Improved communication with partner agencies
6. Updated and managed technology
7. Efficient service of open warrants

## Major Goals

Baltimore City Central Booking and Intake Facility will achieve the following goals:

- All arrestees will be presented to the Court Commissioner within 24 hours of arrest.
- Every step of the process will be reflected on the Queue – a real-time list of where each arrestee is in the process.
- Good relationships and open communication with partner agencies will be paramount.

## Attachments

- Draft Process Map
- Warrant Procedure

# CENTRAL BOOKING AND INTAKE FACILITY

## Plan for Efficient and Timely Processing on the Booking Floor

This document sets out a strategic plan for Baltimore City Central Booking and Intake Facility's processes on the Booking Floor. It includes a history of the facility and presents a series of strategies and goals that support the Baltimore City Central Booking and Intake Facility's vision and mission.

## History

When the State of Maryland took control of the Baltimore City Jail on July 1, 1991, there were discussions about developing a centralized booking facility for arrestees. In fact, the General Assembly mandated the creation of a centralized booking facility for Baltimore City (Md. Code Ann., Corr. Serv. § 5-404). As a result, the Central Booking and Intake Facility (CBIF) was built and began operations on November 28, 1995, as the centralized location for booking and processing arrestees in Baltimore City.

Before the creation of CBIF, police officers took arrestees directly to the police districts where the officers booked and processed them. A Court Commissioner for each district reviewed charges and determined bail or ordered the release of the arrestee on personal recognizance. Arrestees who did not get or make bail were detained in the districts.

Currently, police officers bring arrestees directly to CBIF and can enter Probable Cause Statements on an automated Arrest Booking System (ABS). When CBIF was first created, ABS was only available at CBIF, so the police officers booked within the facility. With technological advancements, the ABS was installed in the districts, allowing police officers to book "remotely" as well as at CBIF. Remote booking allows officers to enter the Probable Cause Statements at the districts, thereby saving valuable police time.

Probable Cause Statements are then printed at the Police Liaisons' Office located in CBIF. Assistant State's Attorneys determine whether the individual will be formally charged. The State's Attorneys share an office with the Police Liaisons who assist by contacting the arresting officers if

need be (i.e. any required documents are missing) and with processing of open warrants on arrestees.

There are 250-425 people processed through the Booking Floor a day. When the volume increases, the challenge of processing everyone in a timely fashion increases exponentially. This plan has been created to address how the facility will operate to ensure all individuals brought to CBIF see a Court Commissioner within 24 hours of arrest.

## Key Strategies

The Baltimore City Central Booking and Intake Facility is pursuing the following critical strategies:

1. Streamlined process flow
2. Increased staffing levels
3. Prioritizing serious cases
4. New leadership and increased supervision
5. Improved communication with partner agencies
6. Updated and managed technology
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## Major Goals

Baltimore City Central Booking and Intake Facility will achieve the following goals:

- All arrestees will be presented to the Court Commissioner within 24 hours of arrest.
- Every step of the process will be reflected on the Queue.
- Good relationships and open communication with partner agencies will be paramount.

## Strategic Action Programs

### I. STREAMLINING THE PROCESS

In order to begin addressing the delays in the booking process, all agencies must understand the process. The process was mapped out through several meetings held by the Criminal Justice Coordinating Council (CJCC), CBIF Mapping Subcommittee (A draft of the Process Map is attached). The mapping led to conversations to establish the responsibilities and expectations of each agency. It also allowed agencies to identify areas that need improvement as well as eliminate redundancies in the process.

For example, in the past, when charges were locked by the State's Attorney's Office, the paperwork was given to the Police Liaison and then delivered to the Public Safety Supervisor.

This Supervisor was responsible for scanning and dating documents and then scanning the documents out, and then sending them to Pretrial Services on another floor.

However, the Public Safety Supervisor at this post also is responsible for a variety of duties pertaining to arrestees, as well as fielding calls from the public, copying warrants to maintain a file, and processing paperwork for arrestees whom the State's Attorney declines to charge. As a result, there was an unnecessary delay in getting the paperwork sent to Pretrial Services. There also was no need for the Public Safety Supervisor to scan the paperwork in and out since Pretrial Services has the ability to scan. The process will be changed shortly when ITCD provides the Police Liaison access to the document screen. The change will require the Police Liaisons to send the paperwork directly down to Pretrial Services.

A Mapping Consultant will be hired by DPSCS to closely examine the current mapping process and make recommendations for further refinements, including proposals for technological improvements to the system. Although the procurement process for the consultant is not yet complete, it is expected that the consultant will be at CBIF from September 26-30, 2005. He will do the following: optimize the process flow of arrestees and the concurrent flow of paperwork and construct the flow charts of each. The attached draft flow chart will be provided to the consultant as a starting point. He also will assess the current technology, its impact on the process and recommend improvements.

## II. INCREASED STAFFING

### Queue Monitor Post Added

After a complete review by all partners, it became obvious that major delays are not caused by any one re-occurring issue. Therefore, the best way to eliminate delays is to provide one monitor to address problems as they occur. Since the ABS screen lists the times each part of the process is completed in the Queue, the information to determine where the delay is occurring is immediately available. A post has been created for a Queue Monitor who is primarily responsible for monitoring the Queue at all times. The Booking Shift Commander on each shift now assigns a Lieutenant to this post.

In the event of a delay at any point in the Queue, the Queue Monitor may need to contact:

- The WIP (Work in Progress) officer to ensure that any individual who needs to be expedited into the Court Commissioner booth is so expedited in order to meet the 24-hour deadline.
- The Document Desk to ensure any documents that are upstairs/downstairs are transmitted to the next step in the process. The Documents Desk staff shall ensure documents are being moved to their locations continuously.
- CJIS Central Repository for any arrestees who do not have fingerprint identification.
- The Police Liaison and the Assistant State's Attorney for any individual who needs probable cause statements or charging documents locked, as appropriate.

- The Warrant Unit on the Booking Floor if the individual is awaiting a warrant from the Police Department and to ensure that the Delay Screen reflects the updated information.
- The medical or the shift commander if the individual is awaiting return from the hospital or is in the CBIF medical area for treatment.
- The Part 40 Court staff if the arrestee is having a judicial bail hearing on another charge.
- Pretrial Services staff if the individual is awaiting the Pretrial Record Check step.
- The Intake/Release Area or Central Records to find out if there is a hold up assigning a bed or releasing the individual.

All contacts shall be documented in the Delay Screen and indicate: all contact names, times, agencies and special notations.

**Additional Staff when Population is Over 290**

When the population of the Booking Floor is over 290, an additional Public Safety Supervisor is assigned to monitor the Queue. There also will be at least one additional officer assigned to the Queue monitors to help troubleshoot problems as they arise. This procedure was put in place because it was recognized that one person is not able to address all the delays at that volume.

Additionally, two officers will be added to ensure all three fingerprint machines as well as both mug shot machines are staffed. If the population on the Booking Floor exceeds 290, the Shift Commander will contact the Court Commissioner Supervisor to request additional commissioners. If the Supervisor cannot resolve the staffing issue, the Warden will contact the District Court to request more commissioners on an emergency basis. These situations that require immediate attention and staffing flexibility are addressed by the daily monitoring reports submitted in real time by the Shift Commanders to the Warden.

The ability to prepare for circumstances in which the daily booking population may rise above the average of 250 can be key to maintaining an orderly and timely process. When the Baltimore Police Department (BPD) plans initiatives that may result in increased daily arrests, notification of CBIF staff of the dates and times of such initiatives can be most helpful in planning the additional staffing needed.

**War Room Staffing**

The State's Attorney's Office will expand to a 24-hour War Room operation in September. The War Room currently shuts down at 3:00 a.m.

## III. PRIORITIZING THE MOST SERIOUS CASES

If an individual is on the Queue at 15 hours, the Queue Monitor will locate the arrestee's paperwork and ensure that the agency with that arrestee's paperwork is responsible for placing the paperwork in a red folder. The red folder will denote that the case is critical in terms of meeting the 24 hour requirement and must be closely monitored. The agencies that may accept

responsibility for placing the paperwork in the red folder – depending where it is at 15 hours – are the State's Attorney's Office, CBIF or the Baltimore Police Department (BPD) These agencies have agreed to this system and to the critical 15th hour as the one to use to expedite the process. This visual management tool allows for the Public Safety Supervisors and the Court Commissioners to prioritize these cases.

After the paperwork is placed in the red folder by the responsible agency, the Queue Monitor will begin to expedite the arrestee through the process to ensure that the arrestee meets the 24-hour rule. The role of the Queue Monitor at this point is to resolve any problems which might preclude getting the arrestee before a Court Commissioner.

In the event of several red folders, the Queue Monitor contacts the WIP officer to ensure the person at the greatest risk of not complying with the 24-hour rule is seen by the Court Commissioner. However, if there are a number of cases, the Queue Monitor is responsible for bringing it to the attention of the Assistant State's Attorney. The Assistant State's Attorney determines which cases pose a public safety risk. The Queue Monitor relays the Assistant State's Attorney's determinations to the WIP Officer, who gives those cases priority.

If the arrestee is still unable to see the Court Commissioner, the State's Attorney is consulted to determine whether an exception, based upon public safety concerns, should be filed. If an exception must be filed, the Attorney General's Office is contacted. If the incident does not occur during business hours, the paperwork must be sent to the Attorney General's Office by 8:00 a.m. the next business morning.

The Shift Commander contacts the monthly Duty Officer who is on call after 5 p.m. when an arrestee is determined to be a public safety risk. The Duty Officer then advises the Shift Supervisor. The Duty Officer then faxes the paperwork to the Attorney General's Office. This includes the entire booking packet which includes the Statement of Charges, the criminal history, delay screen information, activity log (processing information), identification, medical information, and movement information.

If no exceptions are to be filed and the individual is to be released, the following process should occur:

A. A report indicating that the arrestee was released pursuant to the Temporary Restraining Order (Forced Release) shall be disseminated to the following: DPDS Deputy Commissioner, Warden, Assistant Warden, Security Chief, State's Attorney, Pretrial, Police Liaison, and DPDS Records Division.

B. The statistical information on the released individuals will be maintained by the Warden's administrative assistant, with a copy provided as soon as possible to the Police Liaison and the DPDS Commissioner's Office (Commissioner, Deputy, Assistant Commissioner).

## IV. NEW LEADERSHIP AND INCREASED SUPERVISION

### New Leadership - Mitchell J. Franks, Warden

On July 6, 2005, the Division of Pretrial and Detention Services (DPDS) appointed Mitchell J. Franks, a veteran warden and correctional administrator as the new Warden of CBIF. Mr. Franks has worked for the Maryland Department of Public Safety and Correctional Services (DPSCS) for more than 25 years. His most recent assignment was as Warden of the Maryland Correctional Pre-Release System, where he oversaw six facilities. He was credited with greatly improving the working conditions at those facilities. Before that, Mr. Franks served as Assistant Warden at the Maryland Reception, Diagnostic, and Classification Center, Maryland Correctional Institution-Jessup, and the Maryland Correctional Institution for Women. He has been hired as the Warden of CBIF because of his extensive experience in prison management and high level of expertise, which is essential to manage a facility that processes over 100,000 arrestees a year.

### Increased Supervision – New Booking Floor Administrator Position

In addition to the new Warden, a Booking Floor Administrator will be hired. The Booking Floor Administrator will be responsible for managing the daily operations of the Booking Floor. Currently, there are three Majors, one per shift, who oversee the operations on the Booking Floor. To date the Warden is the only one in management directly supervising the three Majors. The added level of supervision, through the Booking Floor Administrator, is essential to ensure supervision of the Majors who address such issues as releases, detainee property, and warrants. The Warden will then be able to focus on the management of the entire facility and be reassured there is visible leadership on the Booking Floor.

### Daily Monitoring and Communication Process Established

A daily monitoring report was established to improve communication among each shift on the Booking Floor and the administrative office of the Warden. After each shift, the Major is responsible for completing a report to the Warden. The information is submitted to the Warden on a 24 hour per day, 7 day per week basis. The information recorded in the report includes:

- Queue information on status of the numbers on the Booking Floor as well as information on individuals at risk of not going before a court Commissioner within 24 hours.
- Technology breakdowns during the shift and the efforts made for corrective action
- Staffing levels include the Queue Monitor
- Reporting serious incidents on the Booking Floor
- Medical staffing levels

- Allied Agency Communications
- Regular sanitation reports

## V. COMMUNICATIONS

### A Weekly Agency Briefing

A weekly agency briefing has improved communication among partner agencies. The goal of the meeting is to communicate agency issues and discuss operational matters pertaining to the booking process. Technology issues also are discussed so our partners can be briefed on the status of ongoing projects and the implementation of new technologies. The participating agencies include: the DPSCS' Information Technology and Communications Division (ITCD), State's Attorney's Office, District Court Commissioner's Office, CBIF Warden, DPDS and Baltimore City Police Liaison. This meeting occurs every Thursday at 11:00 a.m. in the Warden's Conference Room at the CBIF.

### Memoranda of Understanding

The Baltimore City CJCC is taking the lead in developing Memoranda of Understanding among all the partners involved in the booking process. These memoranda optimally will cover timelines for the agencies to complete their tasks.

### Headsets to Increase Communication

The facility will purchase headsets for posts that require internal communication. This will allow officers to maintain continuous communication without having to travel back and forth among posts. For example, the WIP (Work In Progress) Officer is responsible for retrieving the paperwork from the Lead Booking Officer and then hand carrying the paperwork to the Court Commissioners. The WIP also is responsible for notifying two escort officers who move the arrestees to the holding cells near the Court Commissioner booths and to the Court Commissioner. Therefore, providing headsets to these officers will facilitate better communication and increase the efficiency of the process.

## VI. TECHNOLOGY

The technology for the CBIF is a critical piece to ensuring that arrestees are presented before court commissioners within 24 hours. The following systems are essential to the mission of presenting arrestees before a court commissioner: handhelds, photo machines, touch print machines, servers and copiers.

### Procedure for Trouble Shooting Technology

If a technology problem arises, staff must call the ITCD help desk, which assigns a tracking number and a technician. In addition, the booking center has two on-site technicians who cover the facility from 7:00 a.m. – 7:00 p.m. In the event that on-site staff is not available, the on-call

escalation process (procedure for contacting the on-call ITCD technicians) is activated during the early morning hours or after 7 p.m. At the end of the business day, the onsite Information Technology Technician checks the Booking Floor with the shift commander for any outstanding technology issues.

**Management Oversight**

On Tuesdays, a technical senior manager is on site to address outstanding technology issues. On Thursdays, a technical senior manager visits ABS sites to service the police districts. Additionally, a senior manager has been assigned to give managerial oversight to the booking center.

**New Technology**

Technology meetings have been held and are ongoing with all partner agencies. As a result of this collaboration, the following items have been identified. Some are noted as completed, while others are noted with an implementation date.

- Implemented new ABS hardware and software system at Central Booking. This was a software upgrade and server replacement for ABS to run on Windows 2000.
- Purchased additional handheld scanners (11) and batteries (20). There are now 40 handheld scanners and 34 are currently operational. The remaining six (6) are back-ups. The status of each scanner is being tracked daily. A maintenance contract was procured for all of the scanners.
- A handheld replacement plan is being developed. The new handheld technology is expected to be in production by January 1, 2006.
- Weekly reports on Central Booking problem tickets are being reported and tracked – implemented mid-June.
- 142 PCs have been ordered to replace obsolete Central Booking PCs, 56 have already been deployed
- Replaced high volume Xerox printers (3) with new Lexmark printers – completed mid-June.
- Redeployed technicians' shifts to cover 7:00 a.m. – 7:00 p.m.
- Hiring technician for 7:00 p.m. – 4:00 a.m. shift. This position has been advertised.
- Purchased three touch print machines for Central Booking to replace obsolete machines. Currently being tested – early August implementation is scheduled. New touch prints will have better edits to avoid the possibility of duplicate SIDs.
- Upgraded Internet at Central Booking to Ethernet.
- Installed second mug shot PC in mid-June.
- Printers will be changed so finder print cards print more timely. Will print before charges are locked.
- Purchasing 30 signature pads to replace older units. August deployment is scheduled.
- Purchased 120 desktop scanners to replace older units. Most of these already have been replaced.

- Reorganized IT Central Booking staff. Hired dedicated Director and assigned all IT Central Booking/ABS staff to report to this position in mid-June.
- CJCC mapping committee will bring forward process changes that IT will evaluate.

## VII. PROCEDURE FOR SERVICE OF WARRANTS

### Warrant Service for Baltimore City Detainees

During the course of the booking process at CBIF, a large number of arrestees are found to have additional outstanding warrants. In the past, these warrants were being served in a piece-meal fashion and, often, with great delay. This resulted in much duplication of effort and other collateral consequences. All partner agencies have agreed that every effort should be made to serve and process warrants concurrently with the most recent charge. Therefore, on February 14, 2005, the BPD and CBIF implemented a procedure for serving individuals who are in the custody of CBIF or the Baltimore City Detention Center with open warrants. (Please see the attached Warrant Service for Baltimore City Detainees report.)

To monitor the success of the process, the assigned warrant unit supervisor is responsible for ensuring a weekly detainer statistical report is prepared. The report is due by no later than noon every Tuesday. The detainer report will contain information on numbers of detainers on hand at the beginning of period, number received, number processed, number remaining, and identification of issues of concern.

In reference to the 24 hour rule, if an arrestee is booked on multiple charging documents, each charging document shall be viewed as separate and distinct from all others on which the arrestee is being booked, and carry its own 24 hour time period from time of arrest or time a warrant is served. If there is a detainer, and the individual is to be released without charges or on personal recognizance or on bail, the 24 hour time period to receive the warrant and have the person before the Court Commissioner begins at the exact time the individual is released.

## Conclusion

This plan demonstrates the priority given by CBIF to processing all arrestees in compliance with the Maryland Rule 4-212. Staffing will be increased and supervision augmented as the number of arrestees grows. Enhanced monitoring will be utilized to track cases when an individual is still in the Queue at 15 hours after arrest, and appropriate action will be taken to expedite processing. In summary, CBIF will be taking the actions necessary to comply with the Court's Order and process persons within 24 hours after arrest.

# Process of the Person

Arrest made by Officer
(24 hour clock for the booking process starts)

Transport vehicle dispatched to arrest site

Arresting Officer fills out Toe Tag

Arrestee and Toe Tag turned over to Transport Officer

Transport Officer delivers arrestees and toe tags to CBIF
(On average it takes 2 Hours from Time of Arrest)

Sally Port Officer Accepts or Denies Arrestee
(Denial cause by visible medical issue)

DENIED
[illegible]

Sally Port Officer manually records arrestee's
Name and CBIF number
Date and Time of Sally Port arrival
Arresting Officer's Name and Sequence Number

Police Officer escorts
arrestee to a hospital

ACCEPTED
(Below process takes ~10 minutes)

Sally Port Officer [illegible]
[illegible]
[illegible]

Sally Port Officer takes custody of arrestee
[illegible]

Sally Port Officer manually records arrestee's
Name and CBIF number
Date and Time of Sally Port arrival
Arresting Officer's Name and Sequence Number

Sally Port Officer places Bracelet W/ Color Coded Barcode on Arrestee
Green, Circuit Court Warrants/Already Committed
Yellow, Currently in Custody, White, Traffic not Balt City District Ct Warrants
Blue, Balt City Police put their bracelets on Prior

Public Safety Search C[illegible]r or Point Officer escorts arrestee from Sal[illegible]ort to Search Room
(Arrestee could be placed in holding cell if there is a backlog)

Arrestee is searched by Public Safety Officer
(personal property is inventoried and bagged)
(15 Minutes)
(Arrestee could be placed in holding cell if there is a backlog)

Arrestee is escorted by Public Safety Officer and cuffed to intake window

Public Safety Intake Officer conducts intake
information put into the ABS system
(15 Minutes)

Arrestee answers no to all medical questions

Arrestee answers yes to any medical question

Arrestee is escorted to IDENT room
(If there is a backup or problem on the booking floor arrestee may be put in holding cell before identification)

Medical screening is done by Nurse

Arrestee is electronically fingerprinted and photographed
(fingerprint is added to the State database)
(automated database search performed)
(10 Minutes to Fingerprint 20 to 40 to Come Back)

Nurse determines whether the arrestee must go to the hospital

Arrestee is escorted to holding cells by payphones

If arrestee must go to the hospital they are transported by two public safety officers

Arrestee makes 1 free phone call

Arrestee is escorted to holding cell

Arrestee waits to make court commision list

Arrestee is escorted to holding cell
(near court commissioners)

Court Commissioner Decision
(12 Hour Clock for Booking Process Stops)
(15 - 30 Minutes)

[illegible]
(Release on own recognizance)

[illegible]
[illegible]

Arrestee is escorted to holding cell
(near release office)

Release officer performs warrant check and bookee's personal property is retrieved

Arrestee signs release form verifying their ID and
that they received their property

Arrestee is released

# Process of the Paperwork

Probable Cause Statement is completed and locked by the arresting officer (On average 4 1/2 Hours from Time of Arrest)

| | |
|---|---|
| Remote (Completes all the fields) | [illegible] (Computers outside SAO and Police Liaison Officer) |
| Arresting officer completes e-Signature on the signature pad | Officer submits the Probable Cause Statement in person to the State's Attorney |
| Locks the Statement | State's Attorney reviews statement while officer is present |

Hits the send button

The Probable Cause Statement prints out at CBIF in an office shared by the Police Liaisons and the State's Attorneys

State's Attorneys remove the Probable Cause Statement off the printer

State's Attorney reviews the probable cause statement (10 Minutes)

| | |
|---|---|
| State's Attorney charges the arrestee | State's Attorney does not charge the arrestee (RWOC - release without charge/declination) |
| Charges get locked in the ABS system | Charges are not locked in the ABS system |

## WARRANT SERVICE FOR BALTIMORE CITY DETAINEES

### BACKGROUND

During the course of the booking process at the Central Booking and Intake Facility (CBIF), a large number of arrestees are found to have additional outstanding warrants. These warrants have been served in a piece-meal fashion and, often, with great delay. This results in much duplication of effort and other collateral consequences. CBIF and the partner agencies all agree that every effort should be made to serve and process all warrants at the same time and concurrently with the most recent charge. In order to accomplish this goal, the warrants must be identified, located, served, and the detainee processed as soon as possible after the defendant's identity is confirmed.

Beginning February 14, 2005, the Baltimore Police Department (BPD) and CBIF will implement the following procedures for serving individuals with open warrants who are in the custody of CBIF or a Baltimore City detention facility.

**THE FOLLOWING PROCEDURE APPLIES ONLY TO BALTIMORE CITY WARRANTS.**

**THE INITIAL APPEARANCE BEFORE THE COURT COMMISSIONER WILL NOT BE DELAYED.**

**THE DETAINEE IS ON THE BOOKING FLOOR AND HAS NOT BEEN PRESENTED TO THE COURT COMMISSIONER.**

- Once the BPD Identification Section receives notification (name/SID#/fingerprint cards) from CBIF, the BPD Identification Section begins the process of researching all SID#'s associated with the detainee, any Baltimore Police Identification (BPI) numbers and aliases. This includes pulling all prior identification cards for comparison and consolidation.

- Once an individual is identified, the name and identifying information are forwarded to the BPD Hot Desk. Here, all databases (MILES, NCIC, BPD Local Warrant Database) are checked for outstanding warrants.

- When a warrant is discovered at the Hot Desk and the original pulled, the Hot Desk will fax a copy to the CBIF Warrant Section and to the Police Liaison Office (BPD Warrant Control Office) at CBIF. The Hot Desk will also call the CBIF Warrant Section to confirm receipt.

- The CBIF Warrant Section will determine if the individual is in ABS, **immediately** enter the warrant information into ABS and lodge it as a temporary detainer.

State's Attorney notifies the Police Liaison it is a decline to charge case.
**(Please see times [illegible] Procedure for warrant checks and proce[illegible]g declinations)**

Police Liaisons fax a list with the arrestees' names to the Central Records Division [illegible] located at Police Headquarters).

Police Officers at Central Records [illegible] a warrant check to determine whether there are any outstanding warrants.

[illegible] Central Records Officer faxes back the list indicating [illegible] which arrestees have open warrants.

[illegible] If the arrestee has an open warrant the [illegible] police officers are responsible for bringing the warrant [illegible] to CBIF to be executed.

If no open warrants are found the Police Liaison brings paperwork [illegible] to the release officer at the desk [illegible]

Public Safety officers conduct additional warrant checks and [illegible] personal property is retrieved [illegible]

Arrestees sign release form verifying their [illegible] that they received their personal property.

An expungement form is given to the arrestee.

Arrestee is released.

- The BPD will have the original warrant delivered to the Police Liaison Office at CBIF. (This process takes 1 hour.)

- Once the Police Liaison (BPD Warrant Control Office) receives the original or true test copy of he warrant from the Hot Desk, the Police Liaison will check ABS to insure that the warrant is in the ABS system. The Police Liaison (Warrant Control Office) will **immediately** deliver the warrant to the CBIF Warrant Section.

- The CBIF Warrant Section will insure that the defendant is made available to the BPD for service.

- The Police Liaison (Warrant Control Officer) will **immediately** match the identifiers on the warrant with the defendant. If it is determined that the defendant is the person named in the warrant, the warrant will be personally served on the defendant by a police officer who will CEPI the warrant.

- The Police Liaison (Warrant Control Office) will log the warrant into the warrant book.

- All served warrants will accompany the defendant to the Court Commissioner.

## IF WARRANT IS NOT FOR DETAINEE

- In the event the identifiers on the warrant do not match the detainee, the Police Liaison (Warrant Control Officer) will return the warrant to the Hot Desk.

- Any necessary entries will be made in the systems to prevent the wrong individual from being detained on the warrant.

## IF WARRANT CANNOT BE LOCATED BY BALTIMORE POLICE DEPARTMENT

- In the event a warrant is discovered in the database but cannot be located, the Hot Desk will validate that the warrant exists and fax a copy of the database page to the CBIF Warrant Section showing the existing warrant.

- The CBIF Warrant Section will determine if the individual is in ABS, enter the warrant information into ABS and lodge it as a temporary detainer.

- The BPD Warrant Section will notify the Administrative Clerk of the District Court or his designee if the warrant cannot be located within 24 hours of notification of the existence of the warrant and will request a true test copy.

- The Administrative Clerk or the designee will fax a true test copy of the warrant to the BPD Warrant Section within 48 hours of the request. BPD Central Records staff will pick up the hard copy no later than the next business day. Computer entries will be made of the request and transmittal (See Form B).

- The BPD Warrant Section will also notify the Police Liaison (Warrant Control Office) of the request and provide a time estimate for the warrant's arrival.

## IF WARRANT CANNOT BE LOCATED BY EITHER BPD OR THE DISTRICT COURT

- If the Administrative Clerk or the designee is unable to locate the warrant within 48 hours, the Clerk will notify the BPD Warrant Section and the Chief of the CBIF State's Attorney's Office or the designee of this fact by telephone **and** fax. The notification will include all available identifying information pertaining to the case(s) and defendant for whom the warrant cannot be located, including the SID number (See Form B.)

- The Chief of the CBIF State's Attorney's Office or the designee will promptly decide whether or not to request a recall of the warrant and to nol pros the charges, or whether to request a recall and initiate a new warrant, and will inform the BPD Warrant Section and the Clerk of the action taken. Any recall requested and nol prosses to be entered will be presented to the presiding judge at CBIF the next business day, and the computer entries reflecting the action taken will be made immediately.

## DETAINEE SEEN BY COURT COMMISSIONER BEFORE WARRANT COULD BE SERVED

- When the BPD Hot Desk discovers it is in possession of a warrant for a resident seen by the Court Commissioner before the warrant could be served, the Hot Desk will fax a detainer sheet to the CBIF Warrant Unit. The detainer sheet should contain, at a minimum, a valid SID number, along with the name(s) of the individual, judicial case number(s) and date(s) of birth of the resident. If the detainer sheet is unclear or does not contain the above information, the CBIF Warrant Unit will contact the Hot Desk to resolve discrepancies.

- The CBIF Warrant Unit will access BCJL (internal jail database) to insure the individual is in custody.

- If the individual is in BCJL, the CBIF Warrant Unit will enter the information into BCJL as an active detainer and forward a copy to DPDS Central Records for inclusion in the commitment jacket. Once the detainer is placed into BCJL, the resident's name will be placed on a detainer list. The CBIF Warrant Section will schedule the booking and charging for the next business day, and contact the BPD Warrant Control Officer and BPD Warrant Section as follows.

- A separate list will be maintained for each 24-hour period. For purposes of this procedure, the 24-hour period is from 0900 hours until 0859 hours the subsequent day.

- At 0900 hours, the preceding day's list will be faxed to the BPD Hot Desk to obtain the actual warrants. The list will also be faxed to other necessary parties: Warden (designee on weekends - BCDC, Warden (designee on weekends - CBIF, and Director of Classification and Records Department - CBIF.

- BPD will have all warrants to CBIF by no later than 1400 hours the same day as the list was received.

- At 0730 hours the following morning, CBIF will gather the residents for booking and charging on the detainers.

- By no later than 0900 hours, BPD will serve the warrants on the residents, and the booking and charging process will commence.

    1. DPDS will insure residents are available for service when specified, unless for exigent medical circumstances, in court, or committed/writted out to another jurisdiction.

    2. Any unserved warrants for the above residents will be maintained by the CBIF Warrant Section and the resident rescheduled for the next day. If for some reason the resident is no longer in the custody of CBIF, the warrant will be returned to the Hot Desk.

    3. By 1200 noon, if Baltimore Police has not arrived with the warrant, the resident will be returned to his/her housing section.

- Classification Review:

    1. The Direction of Classification shall insure monitoring of all residents rebooked and charged to that classification review occurs immediately after booking and charging.

    2. The Director of Classification shall notify traffic of any need for a changed housing assignment created by the booking and charging procedure.

**DETAINEE TRANSFERRED TO DIVISION OF CORRECTION BEFORE WARRANT IS SERVED**

- If the existence of an outstanding warrant is known, the defendant will not be

transferred to DOC until the warrant is served and processed.

- If by chance the CBIF Warrant Unit receives a detainer for an individual no longer within DPDS but in DOC, the Hot Desk will be notified, as well as the Public Defender's Office, Administrative Clerk, DOC Commitment Office, and Warden at MRDCC or his designee. The detainer sheet will be faxed to all five with this information.

- The Administrative Clerk will schedule the matter according to the procedure for Warrant Service on Division of Correction Inmates.

## MAINTAINING OF STATISTICS

- The assigned warrant unit supervisor is responsible for ensuring a weekly detainer statistical report is prepared.

- The report is due by no later than 1200 noon each Tuesday.

- The detainer report will contain information on numbers of detainers on hand at the beginning of period, number received, number processed, number remaining, and identification of issues of concern.

CMC/mg
Revised 4/6/05

# THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM

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## EXECUTIVE SUMMARY: THE PRETRIAL RELEASE PROJECT STUDY

Nearly 40 years ago, Congress transformed this nation's federal pretrial release system. Recognizing that the use of money bail and dependence on bail bondsmen disadvantaged lower-income people, Congress concluded that "proper respect for law and order is jeopardized when the disposition of justice turns upon the financial status of the accused."[1] The new federal system relied extensively on a pretrial release agency's investigation and supervision and guaranteed legal representation to indigent defendants.

The federal system provided the model for legislating reform of Maryland's pretrial release system. But it is a model only in theory, not in practice. Like its federal model, Maryland's written pretrial release rules entitle most defendants to be released on the least onerous conditions.[2] However, its practices do not follow its rules. Indigent defendants, most facing nonviolent, District Court offenses,[3] are usually unrepresented by a lawyer at the bail stage. While Maryland judicial officers released half of arrestees on personal recognizance, they invariably ordered full financial bond for the remaining half.[4] About 75,000 detainees regained their liberty pending trial in 1998 and

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[1] 18 U.S.C. section 3142. In 1963, Attorney General Robert F. Kennedy called for a national conference on bail and delivered a comprehensive report on Poverty and The Administration of Criminal Justice, leading to Congress' passage of the Bail Reform Act of 1966. *See, The Pretrial Release Project: A Study of Maryland's Pretrial Release System* (hereinafter APRP Study"), May 14, 2001, at 9-13.

[2] Md. R. 4-216(c) states that "a defendant is entitled to be released before verdict . . . on personal recognizance or with one or more conditions imposed." Md. R. 4-216(e)(3) states that "[i]f the judicial officer determines that the defendant should be released other than on personal recognizance . . ., the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release . . . that will reasonably (A) assure the appearance of the defendant . . . ."

[3] In fiscal year 1999 and 2000, approximately 92% of Maryland arrestees were charged with District Court mostly misdemeanor offenses.

[4] Maryland judicial officers required 93% of incarcerated etainees,

1999 by paying bondsmen a nonrefundable 10% fee. Collectively, Maryland's annual bail bond revenue totaled between $42.5 million and $170 million and caused economic hardship to many families who paid bail with money designated for rent, food and utilities.[5] Under Maryland's pretrial release rules, the overwhelming majority of these detainees should have been offered less onerous alternatives and been released without bondsmen. This would, of course, not include individuals who pose a threat to public safety or who represent a flight risk.

The Abell Foundation funded the Pretrial Release Project (PRP) after the Maryland State Bar Association requested that the Maryland Court of Appeals authorize "a study be undertaken to evaluate the entire bail review process."[6] Chief Judge Robert M. Bell agreed and suggested that "a comparative analysis [of Baltimore City] with other representative jurisdictions would be . . . helpful in that its findings would be more likely to lead to substantive changes in the bail and pretrial release system statewide."[7] Thereafter, the Abell Foundation

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i.e. defendants not released on recognizance, to meet the conditions of full financial bond, i.e. posting a 100% cash, property or security bond. *Id.* at note 133. Statewide, three of five detained defendants relied on bail bondsmen to meet the condition of a full bond.

[5] Seventy percent of interviewed arrestees for this Study reported that the expense of the bondsmen's fee would result in a delay paying rent and utilities and in buying less food. *Id.* at 51-52.

[6] Letter from then-President of the Maryland State Bar Association, Charles M. Preston, to the Hon. Robert M. Bell, April 20, 1999. *Id., at* Appendix A. Subsequently, Chief Judge Bell appointed a 12-person advisory committee to assist the PRP Study. For a listing of the members of the Pretrial Release Project's Advisory Committee, *see id.,* at note 3.

[7] *Id.* at Appendix B. The call for a study came after the Baltimore City Lawyers at Bail (LAB) Project, an 18-month Foundation-funded study, demonstrated the significant difference legal representation made for lower-income people charged with nonviolent charges. LAB's randomly selected clients were released on recognizance 2 1/2 times as frequently as defendants without counsel. Additionally, 2 1/2 times as many LAB clients gained release after bail was reduced to an affordable amount. Families living in poverty, or on the brink of it, were usually spared the bondsman's nonrefundable 10% fee and making the Hobson

made funding available, launching the two-year Pretrial Release Project (PRP). The PRP Study is the culmination of this project. It makes the following findings and recommendations:

## Findings and Recommendations[8]

### a. Judicial Officers Require Additional Information

Maryland pretrial release proceedings are usually conducted without a public defender or private counsel to represent the accused[9] and without a pretrial representative to provide judicial officers with verified background information about each defendant. Consequently, most judicial officers decide whether to order release on recognizance or a financial bail without having essential information about the person's employment status, family and community ties, and ability to afford bail.[10]

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choice between gaining the accused's release or buying food or paying rent, utilities or other basic necessities. LAB concluded that providing judges with additional verified information led to better informed decisions about defendants' likelihood of reappearing in court and resulted in substantial savings in pretrial detention costs. *Id.,* Appendix C, Ray Paternoster and Shawn Bushway, *An Empirical Study of the Lawyers at Bail Project.*

[8] *Id.* at 52-55.

[9] In Maryland's two-stage pretrial release system, *id.* at 19, public defenders do not represent indigent defendants at the initial appearance before a commissioner. At bail review hearings, public defenders provide representation in only two of Maryland's 26 counties (Baltimore City and Montgomery). *See, State v. McCarter,* 363 Md. 705 (decided April 16, 2001) (Md. Code Art. 27A, section 4 requires the public defender to represent indigent defendants at the initial appearance and at all stages of a criminal proceeding). Pretrial Services representatives rarely are present at the commissioner stage and are usually unable to provide bail review judges verified personal information about each defendant.

[10] *Id,* at 23-25 (commissioners' survey), 41-42 (bail review proceedings).

### b. Less Onerous Alternatives To Full Financial Bond Needed

While Maryland law provides for placing a 10% cash deposit with the court clerk and having it refunded when the case concludes, judicial officers virtually ignore this less onerous financial alternative. Only three of 100 Maryland detainees not released on recognizance gained pretrial release by posting a 10% cash alternative.[11] In Baltimore City, *only one of 450 detainees* not released on recognizance were given the opportunity to post a 10% cash alternative.[12]

Maryland law also provides judicial officers with the option of using the less onerous unsecured collateral bond, which requires the defendant's personal commitment to assume financial responsibility for willfully failing to appear in court. Only 4% of detainees statewide were given this option.[13] In Baltimore City, unsecured bonds were almost non-existent: less than one out of 100 arrestees who had a financial bail were given the option to promise to pay the full bond in the event of nonappearance.[14]

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[11] *Id.*, at 38-39.

[12] In Baltimore City in calendar year 1998, not a single person of the 13,198 who were released at commissioner stations posted a 10% cash deposit. In calendar year 1999, a total of 49 people, or 6/10 of 1%, detained defendants posted a 10% cash deposit. *Id.* at note 137. Ten percent cash deposits also were exceedingly rare in Baltimore, Eastern Shore, Fredericks, and Prince George's counties. In contrast, Howard and Carroll County judicial officers permitted one in four detainees to post a refundable 10% cash deposit. *Id.*

[13] *Id.*

[14] In calendar year 1998, only 18 of 13,198 detained arrestees or 1/7 of 1% posted an unsecured bond in Baltimore City. In 1999, the figures increased slightly: judicial officers ordered unsecured bond for 116 people or 1.5% of detained arrestees for whom bail was set. *Id.* at 38. Similarly, arrestees rarely posted an unsecured bond in Baltimore, Frederick and Prince George's counties.

c. Bail Practices in Baltimore City

Despite having the lowest per capita household income among the five counties studied,[15] Baltimore City defendants and families faced the second highest average bail amount for all offenses. The average, $13,657, set following a bail review hearing is more than 2 1/2 times greater than Harford County's average bail.[16] Baltimore City's median (50th percentile) $5,000 bail was midway among the counties studied; its $3,250 typical bail for nonviolent offenses was second lowest.[17]

Baltimore City judges released 60% of arrestees on personal recognizance, a higher proportion than the statewide 50% average. However, Baltimore City judges ordered full financial bond for 98% of detainees, more than any other Maryland county, which resulted in the highest proportion of detainees' using bondsmen to gain release. In addition, bail review judges in Baltimore City maintained the commissioner's bail ruling for three of four detainees, also more than any county studied. When the judges changed the bail, they *increased* bail for one of 10 detainees.[18]

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[15] According to the 1995 national census, the median (50th percentile) income for the typical household in Baltimore ($42,021), Frederick ($51,220), Harford (48,467) and Prince George's ($45,281) counties was 75 to 100% higher than for Baltimore City ($25,918). *See, id.*, at 51, notes 183-184. Consequently, the same dollar amount is likely to represent a greater financial hardship for individuals and families in Baltimore City.

[16] *Id.* at notes 113-116.

[17] For all crimes charged, Frederick County had the highest *average* post bail review bond amount, $15,566, and the highest median ($7,500). Harford County had the lowest average bail, $5,471, and the lowest median ($2,500) for all crimes charged. Baltimore City's *median* bail for all crimes charges was $5,000, the same as Prince George's and Baltimore County and midway between Fredericks and Harford County. *For non-violent offenses,* Baltimore City's median bail was $3,250, compared to Harford ($2,500), Baltimore and Prince George's counties ($5,000), and Frederick ($7,500). *Id.*

[18] *Id.*, at notes 118-121.

### d. Defendants Appear As Scheduled in Court

The overwhelming majority of Maryland defendants released pretrial returned to court when required. No objective basis exists for believing bail bondsmen provide a greater assurance that defendants will appear in court.

During fiscal years 1999 and 2000, Maryland District Court's Annual Statistical Reports showed that nearly 94% of defendants appeared on their scheduled District Court date, considerably higher than the national appearance rate for felony prosecutions.[19] Recently obtained District Court statistics, suggests that defendants who posted a refundable 10% cash bond with the court reappear at a higher rate than bonded defendants.[20] Further analysis of the data regarding defendants' appearance rate in court is needed.

There are misconceptions not only about the overall reliability of defendants in appearing in court, but also about how absconders are located, apprehended and returned to court. In the vast majority of cases, it is the police, not bondsmen, who perform this role, even where defendants paid bondsmen to secure their release.[21] Maryland law offers many protections to bondsmen, making the multimillion-dollar industry appear nearly risk-free.[22]

## CONCLUSION AND RECOMMENDATIONS

The bail determination is crucial to the legitimacy of the criminal process. Judges' duty to balance individual liberty, judicial efficiency and public safety require that they have essential and reliable information about each individual defendant. When all critical players are involved --- a statewide pretrial release agency, a public defender to represent an indigent accused, and an assistant state's attorney --- judicial officers are assured of

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[19] *Id.*, at 45-46 and accompanying notes 155-156.

[20] In 1999, defendants released on cash bond had a higher appearance rate than defendants released on bail bond in 24 of Maryland's 33 reported District Court locations. In 1998, the rate was comparable for both groups. *See id.*, at notes 159-162.

[21] *Id.*, at 49-50.

[22] *Id.*, at 50-51 and accompanying notes 176-181.

receiving maximum information about an accused's likelihood to reappear when required. Offering such vital information should change the current court culture in which judicial officers condition pretrial release for nearly half of arrestees on the posting of a full financial bond, resulting in arrestees relying on the commercial bail bondsmen or remaining incarcerated for lengthy periods if bail is unaffordable. When financial conditions are ordered, judicial officers should view the 10% cash deposit as at least as good an incentive for defendants reappearing in court as the surety bond, since it permits families and individuals to recover their deposit at the conclusion of the case. Further study will ensure that Maryland's practices conform to existing pretrial release rules.

This Study recommends that:

1. Maryland should expand its pretrial release investigative statewide and invest greater resources in supervising pretrial detainees, particularly those charged with nonviolent offenses.

2. The Public Defender should comply with its statutory duty to represent indigent defendants statewide at the initial appearance and at bail review hearings.

3. An assistant state's attorney should be present at bail review hearings.

4. Maryland Rules should provide an automatic 10% refundable cash bond payable to the court for all bailable criminal or traffic offenses.

5. Monetary bail should be used sparingly, limited to situations when "no [other] condition of release will reasonably assure" the defendant's appearance and the complainant's safety. Md. R 4-216 (c).

6. Judicial officers should consider an unsecured bond in lieu of a collateral bond.

7. Upon implementation of recommendations #1 through #6, Maryland should further study the viability of eliminating the bail bondsman commercial surety, as recommended by the American Bar Association Standard Relating to Pretrial Release 10.1-3.

8. Judicial officers shall receive training and education with regard to pretrial release determination prior to assuming judicial duties and at annual training seminars.

9. A community-based revolving bail fund should be established to post 10% cash bond for individuals who are employed, are caretakers, or who otherwise have reliable community ties.

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## I. INTRODUCTION

Nearly 40 years ago, a report by the United States Attorney General delivered three major conclusions: first, that conditions of pretrial release for criminal defendants should be carefully tailored to each individual situation; second, that there should be a preference for nonfinancial conditions of release; and third, that too large a role for commercial bail bondsmen endangered the fair administration of the criminal justice system. The report spurred Federal reform. Our study reaches similar conclusions about the pretrial release system in the State of Maryland.

Part II of this report provides the national historical background of pretrial release and bail. History reveals how the lessons learned in the past resonate today for Maryland. During the decades of the 60's and 70's, guided by the federal model's emphasis on eliminating the inequities of money bail and responding to corruption and scandal arising from the powerful bail bondsmen industry, many states instituted sweeping reforms of their pretrial release procedures. Part III of this study explores these states as a point of comparison with our own state.

In Maryland, a statutory framework provides for imposition of the least onerous conditions of pretrial release;[1] where financial bail is appropriate, the Maryland statute specifies what types of bail should be considered.[2] The decision whether to grant bail, what type and in what amount is to be guided by a long list of enumerated factors. Parts IV and V document the procedures actually followed statewide and in five particular counties and demonstrate that courts routinely disregard the statute. These sections also highlight

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1 Md. R. 4-216(e)(3). Imposition of Conditions of Release. If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer *shall impose on the defendant the least onerous condition or combination of conditions of release* . . . that will reasonably (A) assure the appearance of the defendant . . . ."

2 Md. R. 4-216(c). Defendants Eligible for Release By Commissioner or Judge. Rule 4-216(c) states that " a defendant is entitled to be released before verdict . . . on personal recognizance or with one or more conditions imposed . . . ." Defendants charged with crimes punishable by death or that carry a life sentence, Md. R. 4-216(d), or that are regarded as serious felonies, Md. Ann. Code Art.27 s.6161/2(c), may be denied bail where a judicial officer determines that no condition of release will reasonably ensure the defendant's appearance or the physical safety of another individual. Md. R. 4-216(d).

how, in setting bail, judicial attempts to fairly balance the prosecution's desire to ensure a defendant's appearance, public safety, and the defendant's desire for freedom are frequently hampered by the lack of representation for the accused and thus the lack of critical information on matters such as the defendant's community ties and financial situation. Consequently, judicial officers order full financial bond for most defendants not released on recognizance, which results in an overdependence on bail bondsmen in Maryland's pretrial release system. When conditioning release on financial bond, judicial officers rarely provide detainees with the alternative of posting a refundable 10% cash deposit with the court.

Part VI reveals surprising and disturbing facts about bail bondsmen, whose powerful role is based on misconceptions. There is an impression that defendants have low court-appearance rates and that bail bondsmen's aggressive efforts improve that rate. However, the truth is that Maryland defendants' appearance rate is very good to excellent - - higher than the national average - - and that Maryland defendants' reliability is as good, if not better, when a bail bondsmen is not involved. Moreover, bondsmen are usually passive and far less effective than local law enforcement in procuring the presence of defendants who fail to appear in court. They face little risk of financial loss for their clients' nonappearance and thus have little incentive to do their job. Yet their industry has grown into a highly lucrative, unregulated business in this state. This Study conservatively estimates that in 1998 bondsmen's' collective fees ranged between $42.5 million and $170 million.

The bail bondsmen's business success has come at the expense of defendants, who face economic hardship resulting from inappropriately high bail and nonrefundable fees, as discussed in Part VII. Gaining pretrial release usually required a detained defendant's family and friends to pay bondsmens' fees from money designated for rent, food and utilities.

In 1999, the Maryland State Bar Association wrote to the Maryland Court of Appeals requesting that "a study be undertaken to evaluate the entire bail review process."[3] Chief Judge Robert M. Bell indicated the Judiciary's approval for such a study and also suggested that "a comparative analysis [of Baltimore City] with other representative jurisdictions would be . . . helpful in that [such] findings would be more likely to lead to substantive changes in the bail and pretrial release system statewide."[4] Pursuant to these requests, the Abell Foundation made funding available, launching the Pretrial Release Project (PRP).

The call for a study came after the Baltimore City Lawyers at Bail (LAB) Pilot Project, also funded by the Abell Foundation, demonstrated the significant difference legal representation made for lower income people at bail review hearings. LAB lawyers provided judges additional verified information about their nearly 4,000 clients, enabling judges to make better informed decisions about defendants' reasonable likelihood of reappearing in court on personal recognizance. A University of Maryland Study tracked LAB's performance and concluded that for nonviolent offenses lawyers' advocacy led judges to release LAB clients on recognizance 2 1/2 times more often, and to reduce bails for many others to affordable amounts, when compared to cases of arrestees without counsel.[5] Legal representation at bail review helped to significantly reduce pretrial jail

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[3] Letter from then-President of the Maryland State Bar Association, Charles M. Preston, to The Honorable Robert M. Bell, Chief Judge of the Maryland Court of Appeals, dated April 20, 1999. *See,* Appendix A. Chief Judge Bell appointed an Advisory Committee to assist the Pretrial Release Project's statewide study. The Advisory Committee is chaired by C. Carey Deeley, Jr., Esq., Venable, Baetjer & Howard and includes the Hon. Stuart O. Simms, Secretary of Public Safety & Correctional Services; Hon. Andrew L. Sonner, Associate Judge, Court of Special Appeals; Hon. Angela M. Eaves, District Court Judge for Harford County; Hon. Scott G. Patterson, State's Attorney for Talbot County; Michael Elmore, District Court Administrator Commissioner for Charles County; Professor Douglas L. Colbert, University of Maryland School of Law; Robert L. Dean, Assistant State's Attorney for Prince George's County; Wilhelm H. Joseph, Jr., Executive Director Maryland Legal Aid Bureau, Inc.; Dennis J. Laye, Assistant Public Defender; Laura Kelsey Rhodes, President-elect Maryland Criminal Defense Attorneys Association; and Elizabeth Buckler Veronis, Esq., Legal Officer, Administrative Office of the Courts. Professor Colbert is the recipient of the Abell Foundation grant and serves as the Advisory Committee's main researcher and reporter.

[4] Letter from Chief Judge Bell to the Abell Foundation, May 19, 1999. *See,* Appendix B.

[5] From October to November 1998, University of Maryland Professors Ray Paternoster and Shawn Bushway of the Department of Criminology and Criminal Justice conducted a multiple regression statistical analysis in which they evaluated the effect of legal representation at the bail review hearing stage. Their report, *An Empirical Study of The Lawyers at Bail Project* (hereinafter "Paternoster-Bushway Study"), which

overcrowding at the Baltimore Centralized Booking & Intake Center (BCBIC), and resulted in substantial bed space and cost savings.[6] Moreover, 96% of LAB clients appeared in court when required.[7] The PRP Study provides follow up to LAB's representation. While a lawyer's presence at bail reviews is likely to result in more favorable bail conditions for an accused, much more is at stake: a person's ultimate liberty will depend upon the ability to afford and post bail. PRP examines Baltimore's (and Maryland's) judicial bail and pretrial release practices and evaluates the impact of requiring financial bail for low-income and working defendants, their families and dependents, and the larger community.

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was completed on May 14, 1999, compared a randomly selected group of 300 jailed defendants charged with nonviolent offenses. *See,* Daily Record, April 22, 2000. Though each defendant was eligible for representation by a LAB attorney, half were randomly assigned lawyers. The remaining individuals formed a control group that appeared without an attorney at the bail review hearing. LAB attorneys focused on corroborating their clients' residence, family and employment status. Lawyers also emphasized that their clients' financial circumstances limited their ability to post a full bail bond or to pay bail bondsmen a 10% nonrefundable fee. *See, infra,* Part IV at 17-18. In addition to finding a substantial increase in the number of detainees released on recognizance, the Paternoster-Bushway Study found that 21/2 times as many LAB clients gained release after having had their bails lowered to affordable amounts. Overall, one of two LAB clients had his or her bail reduced, compared to one out of seven for the unrepresented group. On average, judges decreased bail for represented detainees by $1,000, compared to $166 for the unrepresented group. *See,* Appendix C.

[6] When LAB began on August 25, 1998, the pretrial population at BCBIC was 1,211, nearly 50% greater than the maximum capacity of 811. During each of the next six months, the pretrial population declined steadily, until it fell below its maximum in March, 1999. LAB was not alone in its effort to address Baltimore City's overcrowded pretrial detention population. District and Circuit Court judges contributed significantly to a more manageable pretrial population by conducting twice-weekly habeas corpus bail proceedings. In addition, District Court judges, Assistant State Attorneys and Public Defenders disposed of some minor charges as part of an early disposition program. By August 1999, one year after LAB began, the pretrial population was 620, and remained in the low 600's during the Fall, 1999. Professors Paternoster and Bushway estimated that representation at bail for nonviolent offenders alone would result in a savings of 100,000 bed days and five million dollars. *See, supra,* note 7, pp. 2, 8-9

[7] The results of LAB persuaded Governor Paris Glendenning to allocate more than $500,000 to the Public Defender in July, 1999, and an additional $1.6 million in July, 2000 to represent indigent defendants in Baltimore City. In Maryland's eleven other judicial districts, only Anne Arundel, Harford, and Montgomery counties provided representation at bail review hearings when LAB commenced. In April, 2001, the Public Defender discontinued such representation in Harford County and Anne Arundel County. No Maryland county provides for representation at the defendant's initial appearance before a bail Commissioner. Conversation with David Weissert, Coordinator of Commissioner Activity, Maryland District Court, December 1999.

## HISTORICAL BACKGROUND

The public interest is not served by a pretrial release and bail system that punishes criminal defendants with onerous financial requirements to obtain release and gives bail bondsmen too powerful and profitable a role. This lesson, which emerged from the PRP study of Maryland's system, is a disturbing one. It is not, however, a new one. Indeed, nearly four decades ago, a federal report yielded similar conclusions.

In 1963 Attorney General Robert F. Kennedy delivered to Congress a comprehensive report[8] on the federal bail system. It described how bail disadvantaged individuals with little or no financial resources. Most detainees were incarcerated solely because they could not afford bail.[9] Pretrial detention translated to loss of jobs, disruption of family life, and interference with the ability to prepare a defense. At the typical bail hearing, the accused appeared without counsel.[10] Consequently, decisions on bail largely relied upon the nature of the charge, the accused's prior criminal record, and a prosecutor's recommendation. Judicial officers lacked reliable information concerning the accused's

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[8] 1963 Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (hereinafter "Attorney General's 1963 Report"). *See also,* Daniel J. Freed and Patricia M. Wald, *Bail in the United States* (1964), which summarizes the findings of the National Conference on Bail and Criminal Justice the Attorney General organized. Cosponsored by the United States Department of the Justice and The Vera Foundation (now the Vera Institute of Justice), the conference focused public attention on the defects in a bail system which denied freedom to hundreds of thousands of people unable to raise the money necessary for bail. The conference also considered the law enforcement stakes and the human and monetary costs of pretrial detention and explored alternatives.

[9] The Attorney General's 1963 Report concluded that the ultimate determination of pretrial release depended upon the financial means the accused was able to command. *Id.*, at 66. In more than one half of jurisdictions, detainees could not afford bond amounts between $1,501 and $2,500. *Id.* Three decades later, approximately one third of Baltimore City's average pretrial population of more than 2,000 detainees remain incarcerated prior to trial because they are unable to afford bail of $500 or less. Conversation with George Fredericks, Statistics Office, Baltimore Central Booking & Intake Center, November 12, 1999; Stuart O. Simms, Secretary of Maryland Department of Public Safety, July 24, 2000.

[10] Attorney General's 1963 Report, *supra,* note 8, at 62-63. Prior to the United States Supreme Court's 1963 ruling in *Gideon v. Wainwright,* 372 U.S. 335 (1963), there was no guaranteed constitutional right to counsel at trial for indigent defendants facing state criminal charges and certainly not at bail proceedings. In *Gideon,* the Court declared that the right to counsel was "a necessity, not a luxury," and was fundamental to protecting an accused's liberty. *Id.*, at 344.

personal background, i.e. family, employment, residence, and availability of financial resources.[11]

The Attorney General's 1963 Report made several recommendations. These recommendations were based in part on the Vera Foundation's Manhattan Bail Project, which showed that people who had strong family and community ties had an extremely high reliability of returning to court without requiring bail.[12] Judges should make greater use of nonfinancial conditions of pretrial release, such as release on recognizance with personal bond and out-of-court supervision, the Report stated.[13] Also, when financial bail is ordered, judicial officers should provide an automatic 10% cash alternative or a percentage cash bond. Unlike the nonrefundable bondsman's fee, such an amount would be returned when the case concluded, for a defendant who appeared in court.[14]

To make decisions about bail, more information was needed, according to the Report. The Attorney General thus urged that pretrial services representatives should be present at bail hearings to verify information regarding the accused's personal background, including criminal history.[15] Moreover, the Report highlighted the necessity for guaranteeing counsel for an accused at bail hearings. Characterizing the lack of legal representation as "a prejudice of defendant's rights,"[16] the Report referred to counsel's many roles: advising the accused, assisting the magistrate, and securing prompt review

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11 Attorney General's 1963 Report, *supra,* note 8, at 70-72.

12 The Vera Foundation's Study demonstrated the importance of providing judicial officers with relevant information at bail hearings. The Project created two groups of defendants: for one group, Vera pretrial representatives recommended release on recognizance; for the second control group, Vera was prepared to recommend release but did not. Judges granted release for 120 of 200 Vera's clients in the first group, but for only 35 of 200 clients in the control group. Only two of the defendants granted pretrial liberty failed to appear for trial. *See,* Attorney General's 1963 Report, *supra,* note 8, at 63-64.

13 *Id.,* at 76-77.

14 *Id.,* at 81. *See also, infra,* Part IV (B), notes 62-63 and accompanying text.

15 *Id.,* at 77.

16 Attorney General's 1963 Report, *supra,* note 8, at 24.

when a court orders conditions beyond the person's financial ability.[17] Counsel also played a vital role in ensuring a client's speedy discharge from custody and a return to court when required.

Finally, the powerful role of bail bondsmen, characterized as "crucial in current federal pre-release practices,"[18] was explored. The Report concluded it was a bondsman's business decision, not a judicial determination, that governed who would be released and who would remain incarcerated prior to trial. As noted in a 1964 National Conference on Bail and Criminal Justice, organized by the Attorney General, many bail bondsmen refused to write bonds for people because of their race, the particular charge, and local hostility.[19] The Attorney General concluded that the bondsmen's decisions should be scrutinized because they "affected [the] public interest."[20] His Report called for a congressional inquiry to discover whether bail bondsmen advanced the policy of pretrial release of accused persons, or whether they were merely engaged in a practice[21] that required working and lower income people to pay nonrefundable 10% fees.[22]

Following the Attorney General's 1963 Report, the Senate held hearings in 1964 and 1965,[23] resulting in the Federal Bail Reform Act of 1966.[24] Referring to nearly 700 years in

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17 *Id.,* at 24-25.

18 *Id.,* at 67.

19 *Id.,* at 32-34.

20 *Id.,* at 67.

21 *Leary v. United States,* 224 U.S. 567, 575 (1912) ("interest to produce the body of the principle in court is impersonal and wholly pecuniary."). *Id.*

22 Attorney General's 1963 Report, *supra,* note 8, at 68. During the congressional hearings, Professor Bowman from the University of Illinois College of Law compared 10% deposit bail bond in Illinois with the use of commercial sureties. He concluded "no-shows by 10% deposit releases are not greater and perhaps considerably less than the 3% who forfeit commercial bail bond." According to Professor Bowman, "most [released defendants] have employment or family ties in the community and no desire to flee." Testimony of Charles H. Bowman, August 6, 1964, before the Senate Subcommittee on Constitutional Rights and Improvements in Judicial Machinery, p.161.

23 H. R. Rep. No 1541, 89th Cong., 2nd Sess. 1966, 1966 U.S.C.C.A.N. 2293, 1966 WL 4286 (Leg.Hist.).

which common law, constitutional, and statutory principles recognized an accused's right to liberty pending trial for noncapital offenses, Congress concluded that pretrial detention was not consistent with the basic tenets of equality before the law and the presumption of innocence,[25] and that judicial responsibility for the administration of criminal justice had been abdicated to commercial bondsmen.[26]

Bail bondsmen countered that they performed a public service at little expense by assisting "good risk" indigents to make bond through family and friends and by rejecting defendants who represented a "bad risk" for reappearing in court. They insisted that the bail bonds industry was a free enterprise which the government need not regulate.[27]

Congress rejected the argument and moved to replace the existing system and implement the Attorney General's reform:

> Because Federal bail procedures rely primarily upon financial considerations rather than the accused's character or community ties, such procedures inevitably disadvantage person of limited means. Proper respect for law and order is jeopardized when the disposition of justice turns upon the financial status of the accused.[28]

Nearly twenty years later, Congress passed another reform act. Addressing concerns about individuals who had been rearrested after having been released pending trial, the Bail Reform Act of 1984[29] empowered judges to deny bail to a defendant who had

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[24] P.L. 89-465, amending 18 U.S.C. section 3146, et. seq.

[25] H.R. Rep. 89-1541, General Statement.

[26] *Supra*, note 26, at 170.

[27] *Id.,* at 177-182.

[28] §.1357, Bail Reform Act of 1966, section 2(a), Findings and Purpose.

[29] 18 U.S.C. section 3142.

been newly accused of committing a serious crime while on pretrial for an unrelated charge. Preventive detention was to be used only when there was "no condition or combination of conditions [that] will reasonably assure the appearance of the person as required and the safety of any other person and the community."[30] The Act prohibited the use of high bail to detain an otherwise bail-eligible defendant and indicated a clear preference for nonfinancial conditions of pretrial release for most defendants awaiting trial.

In *Salerno v. United States*,[31] the Supreme Court upheld the constitutionality of the provision, which required a judicial determination that no condition of release would eliminate the significant threat the defendant posed to the safety of another individual or to the community. The ruling rested upon the safeguards provided to an accused, including the right to counsel and to challenge the denial of bail. Emphasizing that "[i]n our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception,"[32] the Court concluded that the public safety consideration was narrowly tailored to meet a compelling government interest.

The spirit infusing the Bail Reform Acts guided standards of the American Bar Association, declaring that most detainees are entitled to pretrial release under less onerous nonfinancial conditions.[33] Under the 1984 Reform Act, denying pretrial release may be appropriate to a limited number of defendants who represent a potential danger to the community,[34] the ABA standards acknowledge. However, the ABA also urges judicial

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[30] 18 U.S.C. section 3142(e).

[31] 481 U.S. 739 (1987).

[32] *Id.*, at 755.

[33] Standard 10-1.1 Policy Favoring Release and Exceptions to Release, refers to conditional release pending diversion to further rehabilitation needs and diversion from prosecution. The ABA standard calls for additional funds to be provided for pretrial supervision, adding that many defendants could be safely released if only a small fraction of the costs of detention were diverted to supervision.

[34] In 1968, the American Bar Association published the first set of criminal justice Standards Relating To Pretrial Release. ABA Project on Minimum Standards for Criminal Justice: Standards Related to Pretrial Release 64-65 (1968). The 1968 standards incorporated the Bail Reform Act of 1966, including the Act's enumeration of specific factors judicial officers should take into account when making a pretrial release determination. Subsequently, the National Association of Pretrial Services Agencies and the National District

officers to refrain from using bail as punishment, such as when they impose a financial condition beyond the accused's ability to afford. Standard 10.1-3 recommends that money bail should only be used in limited circumstances and must always serve a legitimate government purpose of pretrial release.[35] The commentary suggests a 10% cash bond could serve such a purpose, since the defendant bears the risk of financial loss and has an incentive to appear to recover the money posted as security.[36] Bail bonds, on the other hand, would not serve such a legitimate purpose. Defendants did not fear an enhanced punishment for not appearing in court, and did not face a real risk of financial loss, since most were judgment proof. Consequently, Standard 10.1-3 reiterates the call for abolishing the compensated bail bondsman.[37]

The federal reform acts and the ABA guidelines are models for Maryland's rules regarding bail. Maryland Rule 4-216 entitles most defendants to be released pretrial on the least onerous conditions.[38] However, as discussed later in this study, the statute's intent

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Attorneys Association introduced the issue of potential danger to the community, which the 1985 ABA Standards followed. John Clark and Alan D. Henry, *The Pretrial Release Decision Making Process: Goals, Current Practices, and Challenges*, at 5, notes 17, 18, Pretrial Services Resource Center, November 1996.

[35] ABA Standard 10.1-3(c) proposes limiting the use of release on monetary conditions to situations when there are no other conditions to reasonably ensure a defendant's appearance. Judicial officers should impose "the lowest level necessary to ensure the defendant's reappearance and with regard for the defendant's financial ability to post bond."

[36] Twenty-five states, the District of Columbia, and the federal system use 10% cash bonds. Three other states provide judges with the discretion to determine the amount of a percentage cash bond. In six of the 28 states, a defendant is given the right to post 10% cash. D. Alan Henry, *Ten Percent Deposit Bail 1988 Update* (hereinafter "*Ten Percent Deposit Bail*"), Pretrial Services Resource Center; *infra*, at 12. When a case concludes, the 10% cash deposit is returned, less a small administrative fee. *Schilb v. Kuebel*, 404 U.S. 357 (1971). In contrast, the bondsman keeps the 10% payment as a fee, regardless of whether the defendant appears or the charges are dismissed. *Infra*, Part IV.

[37] ABA Standard 10.1-3. The 1985 Standards followed earlier ABA versions in 1980 and 1968, which had called for the abolition of surety bonds. ABA Project on Minimum Standards for Criminal Justice, Standard 10.5-5 (1980); ABA Project on Minimum Standards for Criminal Justice: Standards Related to Pretrial Release 64-65 (1968). In 1968, the -ABA Pretrial Release Project stated: "The professional bondsmen is an anachronism in the criminal process. Case analysis of his role indicates he serves no major purpose that could not be better served by public officers at less cost in economic and human terms."

[38] *Infra*, Part IV (A) at 16-18; *supra*, note 1.

has not been honored. For nearly half of arrestees, judicial officers ordered financial bail.[39] Indeed, release invariably results in the posting of the full amount of a bail bond that is guaranteed by a commercial surety. Those financially able to pay the 10% bondsmen's fee are freed, while many others remain incarcerated until their trial date. As the next section explains, other states pretrial release systems have been more successful than Maryland in implementing bail reform.

## II. OTHER STATES' PRETRIAL RELEASE SYSTEMS

After enactment of the Bail Reform Act of 1966, many states subsequently reformed their pretrial release system to favor nonfinancial supervised release and privately raised bail. These states were influenced by reasons Congress espoused in creating a federal pretrial release program that supervised many defendants awaiting trial and provided 10% cash deposit alternatives. First, legislators recognized the financial hardship to many defendants. Second, they resented bail bondsmen making decisions affecting individual liberty. Third, bail bondsmen were viewed as a self-interested group whose lucrative business created an appearance of impropriety and increased the likelihood of corruption. Finally, legislators believed that conditional release supervision would ensure a comparable defendant appearance rate.[40]

Illinois became the model for institutionalizing an automatic 10% cash deposit following a major corruption scandal in Chicago in 1959, when a municipal judge was indicted for accepting kickbacks in setting bail. Today, Illinois' automatic 10% cash alternative (defendant option) is followed in Kansas (Sheronee County), Kentucky, Nebraska, Ohio, Oregon, Pennsylvania, and Rhode Island. Twenty-two additional states, along with the District of Columbia and the federal courts, provide for a 10% cash bond at the discretion of the court (court-option).

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[39] *Infra,* notes 82-83.

[40] S*upra,* Part II, and notes 25-30.

Other states went further than Illinois and abolished the bail bond system. In the 1970's Kentucky passed a series of laws that regulated and then eliminated the bail bondsmen, based on fears of corruption and violent incidents by bounty hunters. Led by the Governor,[41] legislators created a statewide pretrial release program that required defendants be released on recognizance or on unsecured collateral bond, unless a judge determined they were a flight risk. Kentucky's 24 hour, seven day a week[42] pretrial agency has been extremely effective in reducing the state's pretrial detention population and in ensuring that defendants appear in court.[43] In fiscal years 1999 and 2000, more than 90%

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41 John Palmore, former Chief Judge of Kentucky's Supreme Court, described Governor Julian Carroll's accomplishment of creating a statewide pretrial release and supervision agency to replace the bail bond system, as the "greatest thing the Governor ever did for the people of Kentucky and for the administration of our criminal justice system." Telephone conversation, July 11, 2000. As a former legislator and Speaker of the House and Senate, Julian Carroll had attempted unsuccessfully to regulate Kentucky's bail bond system. The Courier-Journal, which supported the Governor's efforts, wrote a series of investigative articles and editorials over a four-year period. *See, e.g., Bondsman, Lawyer Practices Questioned, Courier-Journal,* May 4, 1973, at A6. The newspaper called for "a whole new way of arranging bail for persons accused of crime," and declared that "three things are wrong with the way the bail bond system works in Louisville and just about every other place it is employed:

> [First], [i]t's harshly discriminatory, and thus contributes to mistrust of and disrespect for our system of justice. [Second,] [b]ail bonds don't really guarantee that the accused will appear for trial. [And third,][f]ailure of the accused to appear for trial doesn't necessary lead even to the forfeiture of his bond. Courier-Journal, *The Professional Bail Bondsman Is An Unnecessary Evil in Court,* June 15, 1972, at A6.

Three years later, the Courier-Journal suggested that the "posting of bond with the court . . . wherever this method has been tried, the rate of return for trial is as good as or better than it is under the bail bondsman." Courier-Journal, *Time For Kentucky To End The Bail Bond Stranglehold,* Nov. 10, 1975, p. A22. Arguing that the bail bond system is difficult to defend, the editorial declared: "The concept of selling a man his freedom while he awaits trial should not be tolerated in a society that claims to believe in equal justice for rich and poor alike." *Id.*

Governor Carroll's proposed legislation sailed through the legislature, and was signed into law. Courier, *Bail On Bail Bond Industry Signed Into Law by Governor,* Feb. 11, 1976. Shortly thereafter, Kentucky's Supreme Court upheld its constitutionality. *Stephens v. Bonding Ass'n of Kentucky,* 538 S.W.2d 580 (1976). *See also, Johnson Bonding Co., Inc. v. Com. of KY,* 420 F. Supp. 331 (E.D. Ky. 1976); *Benboe v. Carroll,* 494 F.Supp. 462 (W.D. Ky. 1977).

42 Kentucky's pretrial release representatives are available on an around-the-clock basis. Often, when court is not in session on weekends or evenings, pretrial will call judges at their home and request release on nonfinancial conditions. Defendants not released appear in court the following court session, where a public defender and prosecutor are present. Telephone conversation, Starkey Ray, general manager of Kentucky=s pretrial release system, December 8, 2000.

43 The volume of arrests in Kentucky's criminal justice system is virtually the same as Maryland's. In fiscal year 2000, 197,102 people charged with misdemeanor and felonies were eligible for bail. Almost seven in ten people were released prior to trial. The breakdown of pretrial release follows below:

of Kentucky defendants appeared in court when required,[44] an extremely dramatic rate when compared to available statistics.[45]

Oregon also eliminated the professional bail bondsmen.[46] Reform occurred in 1973, after discovery of an elaborate kickback scheme in which bail bondsmen paid police and jail officials to gain speedy access to arrestees.[47] Bail bondsmen could easily recover a forfeited bail because of their cozy relationship with some judges. In place of the old system, Oregon created a "release agreement," which directed judges to place the most weight on a defendant's employment status, financial circumstances, family relationships, and residence.[48] An accused is presumed to be entitled to release on recognizance and

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|---|---|
| Release on recognizance | 22,160 |
| Unsecured bail | 13,453 |
| Nonfinancial conditions | 11,596 |
| 10% cash | 23,320 |
| 100% cash | 41,251 |
| Performance Bond | 116 |
| Judicial release on recognizance or nonfinancial conditions | 24,167 |

[44] The failure to appear rate was 8% for fiscal year 2000 and 9.4% for fiscal year 1999. The general manager of Kentucky's release system indicated that for data collection purposes, his agency --"overreports" failures to appear, i.e. the statistics includes defendants who arrive late to court on the same day when a case was scheduled. Conversation with Starkey Ray, December 8, 2000.

[45] *Infra*, notes 159. 163-169.

[46] *Burton v. Tomlinson*, 527 P.2d 123, 19 Or. App. 247 (1974) (holding that the Oregon pretrial release statute did not deprive bail bondsmen of their right to engage in the bail bond business and did not violate the Oregon Constitution or United States Constitution). *See*, William C. Snouffer, *An Article of Faith Abolishes Bail in Oregon*, 53 Or. L. Rev. 273 (1974).

[47] "In bail bonds "heyday", it was common for bondsmen to court correction officers and judges with favors. They had the power to refund or reduce a bond even when one of the bondsman's clients skipped bail. It was a spoils system, pure and simple, and it tarnished the criminal justice system's integrity." Editorial, Portland Oregonian, April 12, 1991, C10 (1991 WL 8462973); *see also*, Holly Danks, *"Making Bail"*, Portland Oregonian, Feb. 26, 1998, 1998 WL 418596 (interviewing the supervisor of Oregon's state release office who stated: "Having bail bondsmen was a real corrupt system. . . .[H]e sets up shop across the street from the jail, with neon lights. Your family sees the signs and pays him to get you out, and you never see the money again. " Our system is much fairer. You put up 10%, get the money back, or it is used to pay fines.").

[48] Snouffer, *supra*, note 46, at 275. The statute's first five pretrial release factors pertain to the accused's employment, financial condition, family relationships, residence, and people available to assist an accused's future court appearances. Or. Rev. Stat. s.135.230 (6). The method of release, i.e. release on recognizance, conditional release, and security release, is formalized by a "release decision," which considers the nine factors of "release criteria." *Id.*, at 135.245 (1998). Release assistance officers are available to

then to conditional release. If the circumstances do not allow either option and requires a financial bail, an automatic 10% cash deposit is available. Financial bail is used as a last option.[49] Bondsmen's efforts to repeal reform laws were rejected.[50]

Wisconsin's pretrial release system, also demonstrating sensitivity to defendants' financial condition, requires judges to consider the individual's ability to afford bail, and to set financial bail only when necessary to assure the defendant's appearance.[51] In the late 1970's, the State legislature eliminated the profit-making surety.[52] Wisconsin legislators then abolished money bail for indigent defendants who were charged with misdemeanor crimes.[53] The State established a correctional service fund in which revolving monies are

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assist magistrates by researching the accused's background information. *Id.*, § 135.235 (1).

[49] Snouffer, *supra,* note 46, at 305. Oregon legislators were concerned that magistrates would inflate security amounts to counteract the 10% cash option. Legislators included the following commentary: "The Commission discourages the concept of establishing the security amount 10 times the amount the magistrate considers necessary to assure appearance because the defendant may only deposit 10% of the security amount. The concept of setting the security amount 10 times higher would be counter to the intent and spirit of this Article and should not be followed." *Id.* at 308 (emphasis added).

[50] An editorial in the Portland Oregonian, April 12, 1991 (1991 WL 8462973) called for maintaining Oregon's current pretrial release system:

> The 18-year-old law that eliminated the commercial bail bondsmen from Oregon's state courts also closed the door on sleazy bonding practices. When the law passed, it was an overdue reform. It ended an era when some bondsmen would do favors for police and jail admissions officers to gain access to arrested persons. [The proposed bill] to bring the bondsmen back . . . should remain on the sideline, preferably buried so deep in paper that the overworked clerks in Judiciary won't be able to find it.

[51] Wis. Stat. section 969.01 (1998) enumerates the statutory criteria to be considered for pretrial release. In identifying twelve factors, Wisconsin's legislature began with (1) the ability of the person to give bail before proceeding to list factors (2-4) dealing with the offense and the defendant's prior criminal record. The financial hardship of monetary bail was recognized.

[52] Retired judge Fred Kessler, who previously served as a Wisconsin State assemblyman for ten years, is given the main credit for reforming the state's pretrial release system. Conversation with Milwaukee District Attorney Michael McCann, June 29, 2000. As a judge, Kessler had seen the professional surety as an "informal" corrupting force in the criminal justice system. Bondsmen had their "favorite" judges for setting bail or for returning forfeited bond money. As a legislator, Kessler knew that bondsmen had strong political support because they had contributed heavily to legislators' election campaigns. In 1979, Judge Kessler was instrumental in drafting and introducing a bill, modeled after the ABA Standards Relating to Pretrial Release, that made it illegal for suretys to charge a fee for their bonding services. Wis. Stat. section 969.12 (1998). The bill passed both houses, and Wisconsin's Republican Governor signed it into law. Conversation with Judge Kessler, July 11, 2000.

[53] In misdemeanor cases, judges' first option is to release the defendant on recognizance or with an

used to pay half the amount of bail bond for low risk defendants (the defendant or family pays the other half). In the early 1990's, Wisconsin also rejected bail bondsmen's efforts to undo bail reform.

Massachusetts and Pennsylvania also reformed their pretrial release systems.[54] Each relies heavily upon conditional release and severely limit the use of commercial bail sureties. Pennsylvania legislators acted after finding that judges too often required individuals to pay bail when none should have been ordered. Pennsylvania's Criminal Rules Committee Report recognized that people charged with nonviolent charges should be released, and endorsed the broad use of the unsecured collateral bond. Money bail is used only when necessary.

Contrary to these states' practices, Maryland's pretrial release system uses full financial bonds extensively for nearly half of arrestees,[55] many of whom are charged with misdemeanors. The following section explains how defendants in Maryland are compelled to rely on bondsmen to regain liberty pending trial, and explains the question whether judicial officers should be providing less onerous alternatives for low income defendants, particularly those charged with nonviolent offenses.

## IV. MARYLAND'S PRETRIAL RELEASE SYSTEM

### A. Nonfinancial and Financial Conditions of Pretrial Release

Maryland criminal procedure rules provide that an accused awaiting trial on all but the most serious charges is entitled to be released on personal recognizance or with one or

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unsecured bond; the second option is an appearance bond with solvent sureties; the third option is to place the defendant under a third party's supervision; the final option is to place restrictions on travel, including home detention. Wis. Stat. section 969.065 (1998). *See, Demmith v. Wisconsin Judicial Conference,* 166 W.2d 649 (1992) (striking down a misdemeanor bail schedule which allocated cash bail to the particular offense rather than the individual circumstances of the defendant).

[54] Esmond Harmsworth, *Bail and Detention: an Assessment and Critique of the Federal and Massachusetts Systems,* 22 New Eng. J. on Crim & Civ. Confinement 213 (1996).

[55] *See also, infra,* note 132-133.

more conditions imposed.[56] When personal recognizance is inappropriate, judicial officers are required to consider *the least onerous* nonfinancial or financial condition of release or a combination of conditions that would reasonably ensure the defendant's appearance in court.[57] Implicit in the statutory preference for liberty prior to trial is the deeply-rooted presumption of innocence and an understanding of the harsh impact pretrial detention has on defendants. Many detainees lose their jobs and are evicted from their homes.

Maryland's least onerous rule requires that a variety of nonfinancial pretrial release conditions be considered. They range in intensity to match the level of risk posed by the individual defendant. For instance, a judicial officer may direct that an accused be released to the custody of a parent or community organization.[58] Or the officer may place the individual under court supervision with a probation or pretrial release agency and require drug or alcohol testing.[59] Further restrictions may subject the defendant to reasonable limitations, such as a curfew or pretrial electronic monitoring.[60]

There are many advantages to nonfinancial conditions. First, they are more equitable to the person with limited financial resources who otherwise would remain incarcerated. Second, they allow the judicial officer, and not commercial bail agents, decide who is actually released. Third, pretrial supervision may deter criminal activity, and minimize the risk of pretrial misconduct. In addition, such supervision serves as an "early warning system" for defendants who present too high a risk to remain on pretrial release.[61]

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56 Md. R. 4-216(c); *see, supra,* note 2. Commissioners are not authorized to decide pretrial release for serious felonies enumerated in Art.27 section 616(c), and do not make such determinations in cases involving a present bail or a bench warrant. Conversation with David Weissert, *supra,* note 9, Nov. 14, 2000.

57 Md. R. 4-216(e)(3); *see, supra,* note 1.

58 Md. R. 4-216(f)(1). Commissioners indicate that this alternative is not used because parents or community representatives rarely appear at hearings, which are usually held in jail detention facilities or inside police precincts. *See, infra,* notes 80-81.

59 Md. R. 4-216(f)(2).

60 Md. R. 4-216(f)(3).

61 Henry, *Ten Percent Deposit Bail, supra,* note 36, at 10.

Nonfinancial release is not always sufficient. Where an accused is a flight risk or a danger to the community, the judicial officer must require bail bond. Maryland provides several alternative financial bail bonds:[62]

(A) bonds without collateral security ("unsecured");
(B) bonds with collateral security equal in value to the greater of $25 or 10% (10% cash or court deposit), or a larger amount ("percentage deposit")
(C) bonds with collateral security equal in value to the full penalty amount ("property"); or
(D) bonds with the obligation of a corporate surety in the full bond amount ("corporate surety or commercial bail bondsman'").

### B. The Different Types of Financial Bail Bonds

Unsecured bonds require only the defendant's signature and a commitment to assume the full obligation in the event that he fails to appear in court.[63] It may be appropriate for lower-income defendants who have strong community ties, are charged with nonviolent offenses, and lack the resources for bond collateral.

The 10% cash or court deposit is posted with the court clerk and is guaranteed by a surety, usually a family member or friend. If the defendant appears in court, the 10% cash deposit is returned to the surety, less administrative costs, once the case concludes. Obviously, the higher the amount of a percentage cash or court deposit bond, the more likely it will be beyond most defendants' ability to afford.

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[62] Md. R. 4-216(f)(4). A judicial officer also may subject a defendant to "any other condition reasonably necessary to ensure the appearance of the defendant." Md. R. 4-216(f)(5).

[63] Md. R. 4-216(f)(4)(A). Since noncollateral and percentage cash bonds are rarely used, *see, infra,* notes 132-134, there is no data available to evaluate concerns that such bonds may not be collectible in the event a defendant fails to appear in court. Considering Maryland's relatively low failure-to-appear rate, *see, infra,* notes 154-158, this problem is significant. Moreover, Maryland's minimal record for collecting forfeited surety bonds, *see, infra,* notes 175-180, has not persuaded judicial officers to turn to other less onerous financial incentives.

Property or full collateral bail bond[64] is used both by individuals and by professional bail bondsmen.[65] Each pledges property they own to secure the defendant's court appearance. In general, property bond is assessed at twice its tax value. However, Prince George's County (District Five) and Calvert, St. Mary's, Charles Counties (District Four) authorize professional bail bondsmen to post their own property as collateral and their calculate the bondsmen's property at *ten times* its assessed tax value.[66] Thus, bondsmen there underwrite many more bonds and substantially increase their business capacity. These bondsmen must remit a 1% payment of their total annual amount of bonds, making this arrangement profitable for local government, as well as the corporate surety.[67]

Most Maryland detainees gain pretrial release by transacting business with a local bail bondsman and paying a nonrefundable 10% fee, either as a lump sum or in installments.[68] The individual bail bond agent then shares this 10% fee with a licensed insurance company.[69] Bail bondsmen may also require individuals to post collateral security, or to cosign and take responsibility for the balance of the bond, in the event the defendant fails to appear or absconds from the jurisdiction.

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[64] 71 Md. R. 4-216(f)(4)(C).

[65] Detainees and families use the professional bail bondsman far more widely than they would use their own property (home) as collateral. Conversation with David Weissert, *see, supra,* note 7.

[66] 73 Md. 7th Jud. Circ. R. 714A(f)(1). *See, infra,* notes 138-140.

[67] Md. Ann. Code Art. 27, § 616 1/2(f)(2). When professional bail bondsmen post their own property, their profit margin increases considerably. Ordinarily, a bail bond agent is backed by a surety insurance company, licensed under state insurance laws. The company receives a portion of the customer's 10% premium fee. Usually, this amount ranges from 2% to 4% of each bond written by agents. Thus, it is greatly to the bondsman's advantage to secure bonds with his own property and avoid paying insurance companies this percentage expense. The special legislation in Prince George's, Charles, Calvert, and St. Mary's counties maximizes bondsmens' profits by retaining the defendant's entire 10% fee for them. Such unique pretrial release procedures have enabled professional bondsmen to become the dominant force there. *See, infra,* at notes 138-140 and accompanying text.

[68] *Insurance Com'r for the State v. Engelman,* 692 A.2d 474 (1997) (permitting installment payments to commercial bail bondsmen, which provides for payment of a smaller portion of the 10% fee and full payment following a detainee's release).

[69] *See, infra,* Part VI (C)(1).

C. Maryland's District Court Procedures

Maryland has a two-stage pretrial release procedure. First, the accused appears before a District Court Commissioner. Then, if still detained, he appears before a District Court judge at a bail review proceeding. The judicial officer is required to take many factors into account:[70]

(A) The nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction, insofar as these factors are relevant to the risk of nonappearance;

(B) the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(C) the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, and length of residence in the community and the state;

(D) the recommendations of an agency which conducts pretrial release investigations;

(E) the recommendation of the State's attorney;

(F) information provided by defendant's counsel;

(G) the danger of the defendant to another person or to the community;

(H) the danger of the defendant to himself or herself; and

(I) any other factor bearing on the risk of a willful failure to appear, including prior convictions.

The availability of this information varies among the jurisdictions studied.[71] Judicial officers invariably have reliable information about the specific criminal charge, the

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70 Md. R. 4-216(e)(1)(A-I).

71 *Infra*, Part V.

defendant"s criminal record, and any failure to appear on previous cases.[72] However, often lacking is salient information needed to make fair decisions, such as verified information about the detainee's ties to the community, employment status, or financial ability to afford a money bail.[73] Consequently, many judicial officers appear to give less weight to these latter factors in determining pretrial release.[74]

1. The Initial Appearance Before A Commissioner

Following arrest and processing, an accused remains in custody for up to 24 hours before appearing before a District Court Commissioner. Commissioners, who are appointed by an Administrative Judge, need not be lawyers.[75] Absent new information, a Commissioner's detention decision is likely to be sustained[76] by the District Court judge who presides at a bail review hearing, held during the next available court session (within one to three days). For this reason, and because the defendant's next court appearance is usually scheduled at least 30 days later, the Commissioner's hearing should be considered a crucial stage of the pretrial release process.

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72 *Id.*

73 *Id.* Pretrial Release conducts a background investigation of each arrestee to determine whether the individual is a good risk to reappear in court. Those findings are reported to the court, along with a recommendation for pretrial release on nonfinancial or financial conditions. A judge may release a detainee conditionally and require pretrial to ensure that the individual receive necessary social services, such as substance abuse counseling or testing. *Supra,* note 58-60.

74 *Infra,* Part IV (C)(2).

75 Recently, a four-year college degree became a requirement for the Commissioner position. A recent survey indicated that three of four Commissioners are college graduates; the remaining one quarter had been hired prior to the requirement. Appendix E, The Commissioners Survey, Table 2, at 2. More than three of four Commissioners stated that their legal training included a paralegal education. About 15% graduated from law school, and one of five commissioners had taken some law school courses. *Id.,* Table 3.

76 *Infra,* note 144. Conversation with Weissert, *supra,* note 7, December 30, 1999. Professor Paternoster's analysis of bail review decisions in five Maryland counties revealed that judges affirmed Commissioner decisions in more than half the cases; in Baltimore City and Frederick, judges maintained the same bail for three of four defendants. Appendix H at 14.

The Commissioner's bail hearing does not occur inside a public courtroom, but rather at his "office", which often is located inside a jail facility or a police precinct.[77] In Baltimore's newest pretrial jail, for instance, a Commissioner sits on one side of a jail interview booth inside the central booking facility, and the accused remains on the other side. A plexiglass wall separates them, and they communicate through a speaker system. It is not uncommon for several defendants to be located in the same "booth" area and to listen to one another"s hearings. In other jurisdictions, Commissioners may be located inside a small room in the courthouse where the handcuffed defendant is brought. While Commissioner hearings are open to the public in most of Maryland, space limitations make it difficult to observe the proceedings.[78] In Baltimore City, people are denied entrance, although they may view the proceedings on television.

Generally at this initial appearance there is neither a pretrial release representative available to assist Maryland commissioners by providing essential information about the accused.[79] In addition, there is no public defender present to represent the accused.

Typically, only the defendant and commissioner are present at this initial appearance. The commissioner has information about the charges, the factual allegations, the potential sentence, and the accused's prior criminal history and record for previously

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[77] Apparently, this was the result of pressure to reduce local prisoner transportation costs and policies that allow police officers to return to street patrol. According to David Weissert, *supra,* note 7, Commissioner hearings are held inside jail detention facilities in District One (Baltimore City), District Two (Wicomico County), District Four (Charles and St. Mary's), District Five (Prince George's), District Six (Montgomery), District Nine (Harford), and District Eleven (Frederick). Commissioner hearings also are conducted in numerous police stations, in courthouses (Baltimore County), and in an even smaller private office in Kent County. Telephone conversation, Weissert, December 16, 1999. Montgomery County also conducts some commissioner hearings at police precincts. Conversation with Laura Kelsey Rhodes, Esq., August 22, 2000.

[78] The average commissioner's office holds only four people. David Weissert, *supra,* note 7.

[79] According to David Weissert, the Coordinator of Commissioner Activity, Pretrial Services are available to assist commissioners only in Baltimore, Montgomery and Prince George's counties. Communication (e-mail), May 18, 2001. Even in these few counties, Pretrial Services' assistance appears limited; Baltimore City's agency representatives only perform a criminal record check and do not appear before the Commissioner. *Id.* In the "old days", i.e. from 1971 to 1976, Baltimore City's Pretrial representative made recommendations to the commissioner and provided relevant background information. *Id.* In preparing for bail review hearings, pretrial interviews detainees and reports relevant information to the court. *See, supra,* note 96.

failing to appear in court. The commissioner compares the defendant's responses to his information, and asks the detainee about family, residence and employment background, but not about his ability to afford bail.[80] Since commissioners are unable to verify the accuracy of a defendant's reported information, they place considerable weight upon his demeanor and responses:

> Many defendants display poor communication skills and, . . . may appear evasive, argumentative or worse . . . . When the defendant loses credibility and appears to distort crucial information, this goes to the determination of their willingness to appear for trial.[81]

In 1998 and 1999, about 195,000 people appeared annually before Maryland District Court Commissioners. Commissioners released only half of these individuals on personal recognizance or on nonfinancial conditions of release during 1998[82] and 1999.[83]

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[80] Following a decision to set a financial bond, Commissioners consider the defendant's financial circumstances. David Weissert, *supra,* note 7. Cf., *infra,* note 85 (where only 20% of Commissioners thought that obtaining information about the defendant's financial circumstances was important in the pretrial release determination).

[81] Michael Elmore, District Court Administrator Coordinator for Charles County, correspondence dated July 22, 2000. Commissioner Elmore also advocated legal representation at bail and for a pretrial representative's investigation and recommendation during the pretrial and bail review stages.

[82] Appendix D, Tables 8(a)-(b). The 1998 Annual Report of the Maryland District Court Commissioner System ("Commissioners Report" or "1998 Report") indicates that between January 1, 1998 and December 31, 1998, 194,616 people were charged with offenses and appeared before a District Court Commissioner. Commissioners ordered release on recognizance (ROR) for 49.2% of the total of initial appearances. In addition, commissioners released on recognizance an additional 3.7% after finding no probable cause to support the offense. Md. R. 4-213. Consequently 53% of arrestees were released on recognizance prior to the bail review hearing. Additionally, commissioners ordered bail for 42.2%, and denied bail to 2.8%.

Harford County District Court Commissioners (District Nine) had the highest proportion of release on recognizance, 63.4%, followed by Calvert, Charles, and St. Mary's, which released 57.1% of defendants, (District Four) and Baltimore City (District One), which released 55.5%. The remaining nine districts ordered release on recognizance less frequently, ranging between 40 to 46%. Baltimore County (District Eight) Commissioners had the lowest release on recognizance rate, 40.3%, followed by a 41.5% rate in Eastern Shore (District Two) and a 41.8% rate in Howard/Carroll (District Ten). Interestingly, commissioners in Harford, Calvert, Charles, St. Mary's, and Baltimore City, who released the most people on personal recognizance, also had the highest statewide percentage for finding a lack of probable cause; they released between 5% and 6% for this reason.

Combining releases on personal recognizance with releases attributed to a lack of finding of probable cause reveals a disparity among Maryland's twelve districts. Harford County's (District Nine) figure of 69% was the highest, followed by Calvert, Charles, and St. Mary's at 62.2% and Baltimore City at 61.5%.

To learn more about commissioners' pretrial release decisions in each of the five counties, PRP developed a questionnaire with the cooperation of the Chief Judge of the Maryland District Court, Martha F. Rasin, and her staff.[84] The following section provides a detailed picture of the commissioners' decision-making.

2. Survey of Maryland Commissioners

The PRP commissioned a survey of Maryland District Court Commissioners, to which almost 80% of the 239 Commissioners replied. University of Maryland Professor Paternoster analyzed the data and produced a report revealing that the statutory mandate, requiring the least onerous options possible for release, is routinely contravened, because judicial officers lack critical information. He describes his findings in three separate sections. The first two sections detail the Commissioners' experience and educational background and the volume of cases they decide in their various urban, suburban, and rural jurisdictions. The third section is more detailed and presents valuable information about the pretrial release process. Highlights include:

- Seventy-one percent of Commissioners had no information about the defendant's financial ability to post bail. Less than 20% of Commissioners thought such information was important; 44% considered

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On the other end of the spectrum, Baltimore County's (District Eight) Commissioners released 41.1% of detainees, followed by Howard and Carroll County's (District Ten) rate of 42%.

[83] Between January 1, 1999 and December 31, 1999, defendants' initial appearances before the Commissioner increased only slightly: 196,304 people were arrested in 1999, compared to 194,616 in 1998. In addition, Commissioners' finding of no probable cause also remained relatively constant (3.6% versus 3.7%). But in 1999, Commissioners released fewer people (46.6%) on personal recognizance than they had in 1998 (49.2%). Consequently, more arrestees received bail in 1999 than 1998 (44% versus 42.2%). *See,* Appendix D, Tables 8(c)-(d).

[84] Chief Judge Rasin wrote a cover letter and mailed the questionnaire to each Maryland commissioner. Appendix E.

this factor the least important information they sought or thought it was irrelevant.[85]

- When imposing a financial condition, Commissioners used a full bond for four of five detainees. While Commissioners thought they used less onerous options one third of the time, they actually provided such options for only one of fourteen detainees.

- In determining pretrial release, Commissioners invariably had information available concerning the charge and possible sentence, and the detainee's past criminal record, including prior convictions (87%), failures to appear in court (92%), current parole and probation status (82%), and pending cases (86%). Primacy was given to such factors in making decisions.[86]

[85] Appendix E, at Table 7. In this question, Commissioners were asked whether they had information about detainees' financial ability to afford bail and what weight they attached to these responses. Most indicated such information was unavailable and not particularly important. In a separate inquiry (Table 6), Commissioners replied that they had information about defendants' financial circumstances in more than two of three cases and used it almost two thirds of the time in rendering a decision. One way to reconcile these responses is to believe that while two of three Commissioners inquired about defendants' financial circumstances, they considered such unverified information "unavailable" and consequently of less importance in rendering a pretrial determination.

[86] Appendix E, Table 7. A score of 5.0 indicates that a given factor is "Very Important" to the Commissioner in Setting Bail.

Table 7: Bail Commissioner's Assessment as to "How Important" Each Factor is in Setting Bail

| Factor | Average Importance Score* |
|---|---|
| Prior failure to appear for trial | 4.80 |
| Nature & circumstances of charge | 4.64 |
| Prior Convictions | 4.33 |
| Nature & weight of evidence | 4.24 |
| Pending cases | 4.24 |
| Possible sentence if convicted | 4.23 |
| Parole or probation status | 4.14 |
| Prior Arrests | 3.85 |

- Commissioners lacked reliable information on, and thus gave considerably less weight to community ties pertaining to employment (85%), reputation (74%), family (66%), current school status (21%), and military status (20%).[87]

- Commissioners relied on defendants as a primary source for information in almost 60% of the sample cases. When a detainee had counsel or when family/friends were present, commissioners reported considering each as a primary source for information in about one in seven cases.

3. Bail Review Hearing

Maryland's criminal procedure rules provide for a judicial bail review hearing for every person who is denied pretrial release by a Commissioner or who remains in custody for 24 hours after a Commissioner had set conditions of release.[88] The District Court judge is required to review the Commissioner's determination and may maintain or modify bail.[89]

Bail review hearings are unlike traditional criminal court proceedings, where an accused indigent appears in a public courtroom and is represented by counsel. It is rare for an accused to be inside the courtroom; most defendants remain inside a detention facility and observe the presiding judge through a two-way video and audio transmission.[90]

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87 Appendix E. Table 7. Commissioners cumulative scores for family (3.42), employment history (3.59), school status (3.59 and military status (3.77) were considerably lower than factors related to the charge and the defendant's criminal history. *See, supra,* note 86.

88 Md. R. 4-216(g).

89 The Attorney General's 1963 Report opposed similar bail review hearings, because reconsideration often resulted in higher bails and longer time in detention. Bail reductions, for example, were infrequent in New York City where judges lowered bail in fewer than 4% of the cases. *Supra,* note 8, at 64.

90 Four of the five counties included in the Pretrial Release Project's study use video bail reviews; only Baltimore County defendants appear before a judge in a courtroom. In Baltimore City, defendants appear on a twenty-seven inch color television monitor and usually are seen sitting in one of several rows with as many as twenty-five other men. Often, the picture does not identify the individual defendant. A reporter described the scene:

Eight men in orange jumpsuits are visible. At least, the jumpsuits are visible. The detainees' body

The accused is usually unrepresented by counsel. Until the Lawyers at Bail Project (LAB) began to represent many people accused of committing nonviolent offenses at Baltimore City bail reviews in 1998,[91] Harford and Montgomery counties were the only districts in which the Office of the Public Defender guaranteed such representation.[92] Providing legal representation to indigent defendants at the bail review hearing would significantly reduce Maryland's pretrial jail population.[93] LAB's results demonstrated that a lawyer's advocacy makes a substantial difference as to bail,[94] and that the popular stereotype of arrestees is inaccurate: most arrestees had strong ties within the community and were good risks to return to court.[95]

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motion is jerky, their faces difficult to see, and their voices frequently are muffled. "Can you hear me? I can't hear you," said Judge H. Gary Bass. Then in an aside to no one in particular, "Since we've started video bail review, this equipment has never been good." An attorney added: "It's particularly hard to distinguish the faces of black detainees on the screen because of the lighting."... As bail reviews proceeded into the afternoon, the image quality never improved and the sound got worse. "This is pitiful," Bass moaned.

Joe Surkiewicz, *Just Waiting for the Videophone to Ring: Testimony Meets Technology in the Court*, Daily Record, pp. 1C-2C, September 25, 1999 (Appendix G). In December, 2000, the Public Defender successfully challenged the quality of the video bail system, and a new improved system began operating in April, 2001. *See*, Caitlin Francke, *Inmates To Be Bused To Courthouse For In-Person Hearings, Judge Rules*, Baltimore Sun at 3B, December 5, 2000 (describing a ruling by the Administrative Judge for Baltimore City, Keith E. Matthews, that the poor quality of video bail reviews violated defendant's due process rights). In May, 2001 the quality of the city's video broadcast had improved considerably.

91 *See, supra*, notes 5-6.

92 *See, infra*, at Appendix H, Comparing Bail Practices, indicating that within this project's study of five counties, only 23% of defendants had a lawyer at their bail hearing. Harford defendants represented two thirds of the comprised sample. In April, 2001 the Public Defender ceased representing indigent defendants at bail review hearings in Harford County. Conversation with District Court Judge Angela Eaves, April 30, 2001.

93 Funded by the Abell Foundation, LAB succeeded in gaining the release of one half of the nearly 4,000 people it represented during an 18 month period, beginning on August 25, 1998. This release figure is about five times greater than had occurred for defendants without counsel. *See, supra*, note 5.

94 Professor Paternoster's analysis of five counties confirmed that represented defendants were released on recognizance twice as often as people without attorneys. Appendix H at 15.

95 LAB clients were all randomly selected among detainees charged with nonviolent offenses. *See, supra*, note 5. Paternoster-Bushway Empirical Study. The typical LAB client was 32 years old, had lived in the Baltimore community for 24 years, had relatives living in Baltimore city or county, and had been with their current employers an average of four years. Additionally, four of five had never been previously convicted for a violent felony crime, half had no prior conviction for a felony offense, two out of three were not under parole and probation supervision, and two out of three had no prior failures to appear in court. *Id.*

The court frequently had the assistance of a neutral pretrial representative to provide relevant information and to make a release recommendation, to which judges usually give strong consideration.[96] Not all judges ask the pretrial representation to make a full report on background information. Some ask only for pretrial's recommendation.[97]

An assistant State's Attorney is present at some District Court bail review hearings.[98] This may work to an unrepresented defendant's disadvantage where defense counsel is not present, since a lawyer's input is likely to influence the pretrial release recommendation.

The public is able to attend the bail review proceedings, which are scheduled at a regular time and place. Most judicial districts publish a court docket of cases.[99] Hearings usually move very quickly. The quality of justice at these proceedings depends on the amount of relevant information readily available.[100]

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96 *Supra,* notes 79, 81. A Pretrial Services representative is present at bail reviews in Baltimore City and in Anne Arundel, Baltimore, Carroll, Frederick (serious traffic violations), Harford, Montgomery, Prince George's and Wicomico counties. Communication (e-mail), David Weissert, *see, supra* note 79.

97 Courtroom observations in Baltimore City and Prince George's counties reveal that the colloquy between some judges and a pretrial representative may be extremely brief.

98 In District Five (Prince George's) and District Eleven (Frederick/Washington), an Assistant State's Attorney is assigned to the bail review courtroom.

99 Baltimore City, which conducted about one out of every three bail review hearings statewide, provided no itemized docket of bail review hearings from September 1994 through calendar year 1999. LAB attorneys often experienced bail review hearings being moved from one courtroom to another without receiving notice, making it more difficult to be present. Various conversations with LAB legal director, Chris Flohr. October to November, 1999.

100 The LAB study timed the average Baltimore City hearing for a represented defendant at two minutes and 30 seconds. For the unrepresented accused, judges took an average of one minute and 45 seconds. In Frederick and Prince George's counties, judges took considerably *less* time in deciding bail reviews for the unrepresented defendant. *See, supra,* note 5, Paternoser-Bushway Study, at 2.

## V. SURVEY OF BAIL PRACTICES IN FIVE MARYLAND COUNTIES

PRP developed a questionnaire (Appendix F) and observed hearings in five judicial districts: Baltimore City, Baltimore, Frederick, Harford, and Prince George's counties. During summer 1999, observers attended 628 bail review hearings and recorded information about the individual defendant, including race, gender and age; the criminal charge; the current bail; the availability of information to the bail review court; the eventual outcome of the bail review proceeding; and the type of financial bail conditions judges ordered. Professor Paternoster's findings are included in Appendix G.[101] A summary highlighting the five-county comparative analysis follows.

### A.. Race

The typical pretrial incarcerated detainee, who is not released on recognizance at the initial appearance before a commissioner, is a 3l-year old, male (71%) African-American (67%). African Americans remain in jail awaiting trial because they cannot afford the bail amount at a strikingly higher rate compared to their overall population.[102]

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[101] Appendix H, Comparing Bail Practices. Professor Paternoster's objective in doing this study was to present a "snap shot" of how various counties process cases at the bail stage. Counties were selected to reflect a mix of urban, suburban and rural practices. The cases selected were studied over a six-to eight-week span. Because this time period for collecting data was "not atypical", Professor Paternoster concludes that his report provides an accurate "snap shot" of how different Maryland counties processes bail cases. Correspondence January 16, 2001.

[102] For example, in suburban Baltimore County, Maryland's third largest region, African-Americans constitute 12.4% of the general population, but were 54% of the pretrial detainees who appear at bail reviews. In smaller rural counties, such as Frederick and Harford counties, the ratio of African-American bail review detainees to their representation in the local population is even greater: about six times as many African-American defendants appeared at Frederick and Harford bail reviews than their single digit proportion within the county's population.

## B. Availability of Information

In each county, procedures differ as to whether a defense attorney, a prosecutor, and a pretrial release representative is present to provide judicial officers with information. Public defenders represented indigent defendants infrequently. A defense attorney's advocacy makes it significantly more likely that a judge will release a detainee on recognizance.[103] Often a State's Attorney and a pretrial representative are present. In Frederick, where a pretrial representative and a defense attorney were both absent, judges ordered the highest financial bail conditions.[104]

### 1. Defense Counsel

Lawyers represented only 23% of detainees.[105] More than two-thirds of the represented detainees were in Harford County. In the remaining four counties, it was unusual to see a lawyer speaking on behalf of an accused. For instance, during six consecutive days in Prince George's County, none of the defendants were represented at a bail review hearing; over an intermittent six-week period in Baltimore County, only one of 20 detainees was represented by counsel. In Baltimore City and Frederick County, the situation was somewhat better. Lawyers appeared on behalf of one in seven individuals.[106] Many represented defendants had retained private counsel.[107]

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[103] *See, supra,* note 5, Paternoster-Bushway Study.

[104] *Infra,* note 113.

[105] Appendix H, Comparing Bail Practices, at 6.

[106] *Id.,* at 7. In Baltimore City, lawyers appeared in 15% of the cases, while in Frederick County, private counsel was present on behalf of 13% of the detainees.

[107] In Prince George's, Baltimore, and Frederick counties, the Public Defender does not assign attorneys to bail reviews. In July 1999, Baltimore City Public Defenders began representing indigent defendants and provided full representation by Fall, 2000. At the time when this Study was conducted, the Public Defender had been representing indigent defendants in Harford and Montgomery counties. See, *supra,* note 7, indicating Harford public defender ceased representation in April, 2001.

### 2. The Defendant and Family or Friends

Only 6% of the sample group had family or friends present to provide favorable information to the presiding judge.[108] Moreover, many unrepresented detainees were unlikely to speak on their own behalf. Owing perhaps to a concern that they might utter a prejudicial remark[109] or that they lacked legal training, Baltimore City judges failed to offer an opportunity to speak to nearly four of five detainees. In Prince George's County, more than two of three defendants remained silent and were never asked to provide relevant information to the bail review judge. Consequently, in these jurisdictions, bail hearings, neither a defense counsel, a family member or friend, or the defendant speaks. Defendants in Baltimore, Frederick and Harford counties are much more likely to be given the opportunity to speak.[110]

### 3. State's Attorneys

An Assistant State's Attorney's odds of being present were about twice as great as their adversarial counterpart.[111] Prosecutors' practices, however, vary from county to county. In Prince George"s and Frederick, they attend 90% of the bail reviews. Harford prosecutors generally chose not to be present at the daily bail reviews, after having reviewed that day's docket of scheduled cases. Baltimore City and Baltimore County state attorneys attended fewer than 5% of the bail review hearings.

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108 Appendix G at 8. The data does not include the proportion of family or friends who spoke to a pretrial representative.

109 Some judges provide detainees with *Miranda* warnings just prior to being asked whether they wanted to say anything, causing many to remain silent.

110 Baltimore County judges asked 88% of detainees whether they wished to say anything, while Frederick and Harford county judges made it a common practice to include the detainee's input. Appendix H, Table 7 at 10.

111 An Assistant State Attorney was present for 43% of the 628 bail reviews that comprised the sample.

#### 4. Pretrial Release Representative

Judges usually depend upon a pretrial release representative. With the exception of Frederick County, a pretrial representative was present in each county to provide information on the charge, the defendant's past record of arrests, convictions, and failures to appear, any pending cases, and probation or parole status. For only two of five detainees was information provided as to an accused's verified community ties, such as residence, family, and employment.[112]

### C. Contrasting Bail Practices in the Five Counties

Frederick and Baltimore County Commissioners set the highest mean (arithmetic average) bail.[113] In Harford County, Commissioners' initial bail amounts were 2 1/2 times *lower* than Baltimore City's bails and substantially lower than in the other counties.[114]

The typical median (50th percentile) initial bail was highest in Frederick County and lowest in Harford County.[115] As discussed in Part VII, because Baltimore City's per-household income level is considerably lower than that in the other four counties in this Study, the same dollar amount is likely to represent the greatest financial hardship for individuals and families living there.

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112 Conversation with Professor Paternoster, January 9, 2001. *See*, Appendix G; *see also*, note 96.

113 Excluding the rare extreme bail of $150,000 or higher, which may have been set in one or two cases, *see*, *infra*, note 116, commissioners in Frederick County averaged the highest bail, $20,454, followed closely by Baltimore County, $19,408, Prince George's County, $16,449, and Baltimore City, $14,954. These figures refer only to cases where bail was set. Appendix H at 4.

114 Harford County's average $5,759 bail, excluding one extreme over $150,000 amount, was considerably lower than every other Maryland county and about two fifths of Baltimore City's average.

115 When considering nonviolent crimes only, Frederick and Harford's Commissioners again represented the high and low positions: Frederick's prereview bails for nonviolent offenses averaged $7,500, while Harford County averaged $2,500. Baltimore City's typical bail for defendants accused of nonviolent crimes was $3,250. Baltimore and Prince George's counties typically ordered $5,000 bail for offenders charged with such crimes. Appendix H at 4.

The main players' different attendance records at a county's bail review hearing may help to explain the different outcomes. Reviewed bails were the highest in Frederick, where there is neither a defense lawyer nor a pretrial representative in court, and the lowest in Harford County which provided for a Public Defender representation and a pretrial representative.[116] In addition, represented detainees were twice as likely to be released on recognizance at bail review hearings as unrepresented detainees. Release on recognizance was granted for one in four represented Harford detainees, compared to only one in fourteen unrepresented Frederick detainees.

For the entire sample group, judges released about one of four detainees on personal recognizance (24.5%) and lowered bail for one in four individuals (27%). In nearly half the cases, judges maintained the prior bail conditions.[117] It was relatively rare for a judge to increase the amount.

Yet there were substantial differences in the counties proceedings. Baltimore County judges changed bail conditions in 72% of the cases, while Frederick judges maintained the same bail for 63% of defendants and Baltimore City judges for 55%.[118] Similarly, differences existed in the frequency with which judges changed bail and ordered release on recognizance. Baltimore and Harford county bail review judges granted release on recognizance to one of four detainees, compared to their colleagues in the three other

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116 In calculating the mean (average) bail following a judge's review, Professor Paternoster excluded bails that were greater than $150,000. For example, Baltimore County had the most number of extreme bails: four bail amounts of $250,000, and one of $500,000. Baltimore City, on the other hand, had no bails that were "extreme" and over $150,000. Frederick County had one $200,000 bail and one $500,000 bail. Harford County had a $1 million bail for one of its cases, and Prince George's had a single $250,000 bail. When these unusual bails are excluded, Frederick County had the highest reviewed bail ($15,668), followed by Baltimore City ($13,657), Baltimore County ($12,359), and Prince George's County ($8,300). Harford County's reviewed bail was far and away the lowest at $5,471.

117 Forty-four percent of commissioner bails remained the same after judicial review in the five counties. Some counties, however, maintained the prior bail far more frequently. Appendix H, at 14.

118 While video jail bail reviews are the norm in the other four counties, Baltimore County detainees are the only defendants to physically appear before a judge in bail review court. This study was not designed to measure the impact of a detainee's personal courtroom appearance. Thus, it would be speculative to suggest the extent to which this factor is responsible for the likely change in Baltimore County's prereview bails.

counties who did so for fewer than one of ten individuals.[119] Baltimore County judges also reduced the dollar amount of bail in almost one half of its cases; at the other extreme, Prince George's judges rarely (3.7%) lowered the amount previously set.[120] Baltimore City and Harford judges were the most likely to *increase* bail; detainees in the remaining counties rarely suffered similar adverse rulings at bail reviews.[121]

The nature of the charge justified half of judges' review rulings in Baltimore City and County. In comparison, Harford judges declared that the particular charge was responsible for their ultimate determination in only one of five bail reviews. An accused's criminal past drove 15% of judges' decisions in the five jurisdictions. But Frederick County judges cited this factor three times as often. Finally, there were significant differences in the frequency with which judges identified a defendant's prior failure to appear in court.[122]

Only 5% of the judges based determinations on an accused's residential, family, or employment ties. It is not clear whether this is due to the lack of information or minimization of its value. It is clear that in the absence of a defense attorney, or a pretrial release representative, judges are unlikely to obtain a perspective on the detainee's reliability for reappearing in court, based on being a long-time resident of the community and having a stable or supportive home environment.

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119 Appendix D, Commissioners Report. In reviewing commissioners' bail decisions, Baltimore City judges granted release on recognizance in less than 10% of its cases, second lowest to Frederick County. Prince George's judges have a unique practice: it provides for a "pretrial option" which permits the pretrial agency to decide whether to supervise a detainee while a case is pending. Consequently, judges' ordering release on recognizance for 1% of detainees is misleading. Prince George's pretrial release agency takes the "option" for about half of its detainees. *See, supra,* note 119.

120 In Baltimore City and Frederick County, approximately one of four bail amounts were reduced following the review hearing; in Harford County, bail reductions occurred for roughly one of six detainees (17.8%). Appendix H at 14. While Prince George's judges do not often reduce bail, they follow Pretrial Release's active role and its recommendation for supervised release for one half of detainees.

121 About one in ten Baltimore City and Harford detainees had their bail amount increased. In comparison, this was a rare occurrence in Baltimore (2.4%), Frederick (2.7%), or Prince George's counties. *Id.*

122 Appendix E, Tables 6 and 7; Appendix H, Table 10, at 16.

D. Type of Bond

Because of the lack of defendants' representation, judges rarely heard applications for a less onerous financial alternative to a surety or commercial bail bond. Overall, such options were raised, presumably by the detainee or a pretrial representative, in only one out of six cases. Judges heard requests for unsecured collateral bonds nine times as frequently as they did for a cash alternative, suggesting detainees' inability to afford a money bail, even if it was refundable. Baltimore and Harford judges received the most suggestions, 20% in all, for permitting detainees to post unsecured collateral bonds. Frederick County judges heard the most requests for 10% cash alternatives: one in 10 unrepresented detainees made this application.

Finally, judges in Baltimore and Harford County and Baltimore City were the most likely to impose conditions on pretrial release. For example, one of two Baltimore County, two of five Harford, and one of three Baltimore City detainees were released upon complying with certain conditions. Stay-away orders were the most common, having been included in 43% of personal recognizance decisions. Pretrial supervision was the next most frequent condition. Judges directed 31% of released detainees to report to a pretrial agency, 15% to receive drug counseling, and 11% to be tested for drug substance abuse.

E. Impact of Bail Decision

The importance of the bail review decision is magnified when one considers the lengthy delay between the hearing and the next court appearance. Detainees typically wait 30 days and longer before returning to court.[123] As a practical matter, writs of habeas corpus offer little recourse, either because the defendant does not have an attorney or because the "emergency" writ is often not heard until many weeks after the filing date.[124]

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[123] *Supra*, note Part IV (C)(1) at 21. For example, it is not uncommon for trials in Prince George's county to be scheduled 60 days after the bail review hearing is held.

[124] Baltimore City writs of habeas corpus usually take between two to four weeks before being heard. Beginning in November 1995 when the Centralized Booking & Intake Center opened, detainees could apply for an expedited habeas hearing. The Pretrial Release agency helped detainees who appeared eligible for

Consequently, many defendants remain incarcerated unnecessarily after their bail has been reviewed, because they cannot afford bail. Maryland's pretrial jails are burdened with managing a large population, consisting of many detainees who are charged with nonviolent offenses that ultimately do not result in a conviction.[125] This Report's next section explains that many detainees remain in pretrial detention because Maryland judicial officers set full financial bail conditions that are most onerous for economically disadvantaged people.

## VI. BAIL BONDSMEN's PROMINENT ROLE IN MARYLAND

Under Maryland law,[126] judicial officers must consider *the least onerous* option before moving to the next available choice.[127] However in practice, they generally opted for the most onerous choice, a full financial bond, and rarely used unsecured or percentage cash bonds. Inadequacy of information available appears to be at the root of the problem.

### A. Analyzing Maryland's Bail Bond Options in Calendar Year 1998

The 1998 Commissioners' Report provides a nearly complete picture of the extent to which the various types of financial bail bonds were utilized to secure the pretrial release of 59,574 defendants facing criminal charges in the twelve judicial districts.[128]

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pretrial release.

[125] In fiscal year 1999, 194,468 people (about 92% of arrestees) were prosecuted in Maryland's District Courts; 59,446 were found guilty, including individuals who received probation before judgment sentences. Statewide, Maryland's District Court conviction rate was slightly more than 30% percent (30.6%). District Court of Maryland, Statistical Report for Criminal Proceedings, July 1998 to June 1999. In fiscal year 2000, the conviction rate rose to just under one third (33.1%). Appendix F, District Court of Maryland, Statistical Report for Criminal Proceedings, July 1999 to June 2000.

[126] *Supra*, Part IV at 16-19.

[127] *Supra*, note 1.

[128] Appendix I, Commissioners Report, Tables 10(a)-(d).

According to David Weissert, Coordinator of Commissioner Activity, Maryland District Court, and Joan E. Baer, Operations Specialist for the District Court of Maryland, the Report indicates that approximately 90% of District Court bail bonds were posted at the commissioner's station following the defendant=s initial appearance, either before or after the bail review hearing.[129] While the Report excludes bail bonds paid at Court offices,[130] it provides the best available source on the types of bail and conditions imposed in releasing nearly 60,000 detainees pending trial.[131]

Most pretrial detainees for whom bail was set used a corporate surety bail bond, the last option enumerated in the Maryland Rules.[132] Such bonds were used for 60% of detainees at Maryland District Court commissioner stations in 1998. Property bonds represented 19% of the overall total. Close behind were full cash deposits with a court clerk, accounting for 13%. Thus, almost 93% of defendants awaiting trial were released after posting the full amount of the financial bail bond, by a corporate surety, property, or full cash bond.[133]

Of course, many detainees were not able to afford the full amount of a financial bail bond. They may not have owned any property or the property available might have been insufficient collateral. Others may not have had the full cash amount or found it difficult to

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129 The Report categorizes 59,574 bail bonds that were posted at some point following the initial appearance, either before or after the bail review hearing. *See, supra,* note 90. The statistical breakdown does not include 4,097 bonds that defendants posted immediately following a Commissioner's pretrial release order. Weissert indicated that defendants usually paid the full amount of these 4,097 bonds by full cash or by credit card. Telephone conversation, October 9, 1999. The Report also does not include bail bonds that were posted at Maryland's Circuit Courts.

130 *Id.*

131 The Report's data do not provide precise numbers for when judicial officers imposed a particular type of financial option for defendants at bail hearings. It only indicates the type of financial bail bond people posted at Commissioner stations. While it is theoretically possible that a detainee chose to remain incarcerated on an unsecured or a percentage bond, most detainees likely remained in jail because they could not afford the amount of financial bail.

132 Md. R. 4-216(d)(4)(D)

133 Appendix D, Commissioners Report, Tables 10(a)-(b).

pay the bondsmen's 10% fee, knowing it would not be returned, even if the defendant reappeared in court and the charge was dismissed. For these detainees, the Maryland Rules theoretically provided two more accessible types of financial conditions, unsecured bail bonds and percentage cash bonds.

*Yet these were the least frequently used bonds. Less than 5% of detainees were released on an unsecured collateral bond; less than 3% deposited a 10% cash alternative.*[134]

Corporate surety bonds, the most onerous type of bond, were used nearly fifteen times as often as were unsecured bail bonds, the least onerous bond option. In addition, detainees and families paid the nonrefundable 10% fee for a corporate surety bond 20 times as frequently as they deposited the refundable 10% cash bond with a court clerk. Only one of 25 defendants signed an unsecured bond.

These results, so at variance with Maryland's statutory provisions, raise obvious questions. Why do judicial officers rely so extensively on full financial bonds? Are they aware that when they order a full bond, bail bondsmen are then the likely option for most detainees and families? Do bail bondsmen provide a greater assurance that defendants will appear? Are most defendants a poorer risk to reappear without the bondsmen's intervention? Before these questions are addressed, the next section discusses different bail practices among the five jurisdictions studied.

**B. Contrasting Statewide Bail Bond Practices**

Within Maryland's twelve judicial districts, there are startling differences in the terms of pretrial release. Consider the following:

134 *Id.*

- In 1998 and 1999, 42 of 100 Baltimore City arrestees gained pretrial release through the corporate surety bail bondsmen, the highest percentage in the State. In contrast, only 16 of 100 Howard County incarcerated arrestees and 5 of 100 Montgomery County arrestees used bail bondsmen to gain release.

While almost 60% of Baltimore City's defendants were released on personal recognizance, 84% of the remaining detainees gained pretrial release by paying a bail bondsman a 10% nonrefundable fee. In four other judicial districts, District Two (Eastern Shore), District Seven (Anne Arundel), District Eight (Baltimore County), and District Eleven (Frederick/Washington), 75% to 80% of defendants not released on personal recognizance also relied on bail bondsmen to regain their liberty pending trial.[135] Additionally, more than 80% of Prince George's detainees likely depended on a bondsman.[136]

- Judicial officers in Baltimore City and Frederick/ Washington County almost never ordered an unsecured collateral bond.

In Baltimore City in 1998, only 18 of 13,198 defendants -- one seventh of one percent -- were released on unsecured bond; in 1999, the unsecured bond was used by 1.5% of detainees. In Frederick in 1998, only five of 3,910 defendants, and in 1999, only 8 of 4,033 detainees regained their liberty by assuming responsibility for not reappearing in court. In comparison, District Ten's (Howard/Carroll counties) judicial officers used unsecured bonds 17.5% of the time, while District 3's (Cecil, Kent, Queen Anne's, Talbot, Caroline) judicial officers permitted 11.7% defendants to sign for their release.

- In 1998, Baltimore City judicial officers did not order a single refundable 10% cash alternative; in 1999, only 49 detainees, or 6/10 of 1%, were given the

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135 The exact percentage for District Two (Eastern Shore) is 79.6%; for District Eleven (Frederick), 78.9%; for District Eight (Baltimore), 78.2%; and for District Seven (Anne Arundel), 74.8%. Commissioners 1998 Report, Appendix I, Table 10(b).

136 *Id.* In Prince George's County, 32% of detainees were released directly through a surety bond; in addition, 51.4% posted property bonds, which are frequently those of professional bail bondsmen.

opportunity to post a 10% cash deposit. Anne Arundel, Baltimore, Eastern Shore and Prince George's judicial officers also made rare use of the 10% cash alternative. In contrast, Howard and Carroll county judicial officers permitted 23% to post refundable 10% cash deposits.

Overall, Maryland judicial officers overlooked the refundable 10% cash bail as a preferred financial condition. In 1998, only 3% of Maryland defendants posted such bail. In Baltimore, *none* of the defendants among the 13,198 people who obtained pretrial release posted such bail.[137] Prince George's, Baltimore, and Eastern Shore judicial officers declined to provide a 10% bail alternative for 99.9% of the individuals who eventually posted bail.

- **Two judicial districts, Prince George's (District Five) and Calvert, Charles, and St. Mary's (District Four) allow licensed bail bondsmen to profit from placing their own property as collateral. These districts rely on surety property bonds substantially more than any other Maryland jurisdiction.**

In Districts Four and Five, licensed bail bondsmen secure defendants' appearance by placing their own property with the court. Current Maryland law values the professional bail bondsman property in these districts at ten times its assessed tax value, five times more than the ordinary assessment rate.[138] Bail bondsmen still collect their standard ten percent nonrefundable fee, but avoid sharing the fee with an insurance company for

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137 Some court personnel recalled hearing about an administrative judicial order that directed Baltimore City commissioners to refrain from ordering 10% cash alternatives. However, no one could locate any such order. Current officials denied that an official policy ever existed, and insist that historically 46 Baltimore City commissioners simply declined to issue 10% cash bonds as a general practice. This practice apparently continues: Maryland law students enrolled in the Spring, 1998 clinic did not observe a single case in which Commissioners used a 10% cash alternative. While acting as attorneys under the student practice order, students regularly asked bail review judges to provide for a 10% cash alternative. Attorneys of the Lawyers at Bail Project included similar applications; judges granted 10% cash bonds in about 100 cases during the Fall, 1998. *See, supra*, note 4.

138 *Supra*, note 66.

underwriting the bond.[139] Instead, bondsmen pay a reduced 1% licensing fee to Prince George's and Calvert/Charles/St. Mary's counties, based on the total amount of bonds written annually.[140]

More than one out of two of Prince George's defendants and two out of five of Calvert/Charles/St. Mary's defendants (41%) were released on property bonds in 1998. Cumulatively, in Prince George's County, 83% of defendants were released either through property or corporate surety bonds.

- Howard/Carroll county (District Ten) has the most balanced use of less onerous bail bonds.

More than 40% of Howard/Carroll defendants gained release by posting a refundable ten percent cash or an unsecured bond. In contrast, fewer than 5% of detainees were spared full financial bond in Baltimore City (District One), and in Eastern Shore (District Two), Prince George's (District Five), Anne Arundel (District Seven), and Baltimore (District Eight) counties.141

It is not clear why so many judicial districts rely so extensively on full financial bond, or why counties' practices differ so dramatically.[142] It is clear that no objective evidence supports the notion that corporate sureties are a more reliable form of pretrial release than other less onerous conditions. It is also clear that the bail bond industry is extremely profitable. The following section examines the revenues generated by corporate surety bonds.

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139 Districts Four and Five have established a unique property bail bond system from other judicial districts. In these jurisdictions, licensed bail bondsmen may post bonds annually to the full amount of the total assessed property value. Bondsmen still collect their standard 10% fee from the defendant, but avoid paying the 2% to 4% cost to insurance companies for underwriting a surety bond. *See, supra,* note 64-69.

140 Md. Ann. Code Article 27, Sec. 616 1/2(f)(2).

141 Appendix I, Table 10(b).

## C. Revenue From Professional Surety Bonds

Statewide statistics are not maintained to indicate the annual dollar amount that corporate sureties, i.e. insurance companies and individual agents, earn from 10% premium fees. An investigation by this study revealed that in 1998, revenues from insurance companies and their agents ranged from $42.5 million to $170 million.

### 1. The Maryland Department of Insurance

The multimillion-dollar bond industry is largely unregulated. The Maryland Department of Insurance, responsible for licensing insurance companies and bail bond agents who are engaged in the insurance business within the State,[143] provides no oversight of the bail bond industry, except that each licensed insurance company must file an annual financial statement of the total business transacted here.[144] Individual agents are not required to file an annual financial statement. Indeed, the Insurance Department does not maintain even a list of the *individual* bail bond agents.

The District Court of Maryland, which requires every insurance company and every bail bond agent to register,[145] provided a complete list of 23 insurance companies licensed to do business in the State of Maryland through their 885 individual agents. In addition, 71 independent bail bond agents are authorized to write property bonds.[146]

The Department of Insurance provided annual statements for each of the 23 insurance companies, but not for any of the 71 independent bondsmen. In their annual statement, each company included a figure for direct premiums written and earned for surety bonds.

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143 Md. Ann. Code Article 10, Sec. 304.

144 Conversation with Kathleen Loughran, Department of Insurance, September 29, 1999.

145 Md. Ann. Code Article 16, Sec. 817.

146 Conversation with Cindy Spieth, Operations Specialist, Maryland District Court, May 8, 2001.

Many companies= surety premiums were divided between surety bail bonds and other types of surety bond. For example, the Lexington National Insurance Company, which is based in Baltimore and is one of the largest bail bond companies doing business in Maryland, reported total premiums for surety bonds in 1998 in the amount of $2,289,060. The company divided this amount between surety for bail bonds, $1,386,800, and surety-other, $902,260. In fiscal year 1999, the total estimated amount of bail bond premiums earned by these 23 insurance companies was $17 million.[147] However, the amount of earnings insurance companies reported is to be distinguished from its *gross* annual taxable revenue. For instance, in 1998 the Lexington National Insurance Company reported net premium earnings of $1,386,800, but actually received 10 times as much: $13,177,366.[148] *See,* Appendix J.

If every insurance company's annual financial statement reflected a similar calculation, the bail bond industry's reported revenue of $17 million should be multiplied by

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|---|---|
| Accredited Surety and Casualty Company | 31,175 |
| Allegheny Casualty Company | 307,987 |
| American Bankers Insurance Company | 28,336 |
| American Reliable Insurance Company | 2,124,985 |
| American Surety Company of Haywood | 313,225 |
| Amwest Surety Insurance Company | 356,100 |
| *(Amwest, too, reporting only net premiums received)* | |
| Atlantic Bonding Company | 948,225 |
| Bankers Insurance Company | 498,300 |
| Continental Heritage Insurance Company | 1,566,220 |
| First Community Insurance Company | 279,748 |
| Frontier Insurance Company | 1,825,524 |
| Granite State Insurance Company | -0- |
| International Fidelity Insurance | 1,749,894 |
| Legion Insurance Company | -0- |
| Lexington National Insurance Corporation | 1,386,800 |
| National American Insurance Company | 65,570 |
| National Surety Corporation of Chicago | 146,655 |
| Nobel Insurance Company | 41,329 |
| Ranger Insurance Company | 115,877 |
| Safety National Casualty Corporation | 60,677 |
| Seneca Insurance Company | 2,187,843 |
| St. Paul Mercury Insurance Company | 73,506 |

148 *See,* Appendix J, Lexington National's Schedule of Premiums.

a factor of ten. Moreover, the $17 million reported revenue does not include the income of the 71 individual bail bond agents.[149]

Here's how the system works. Anyone seeking to obtain the release of an incarcerated family member or friend through a bail bondsman goes to the local bail bond office. There, the agent demands payment of 10% and the insurance company or independent agent underwrites the full amount of the bond and guarantees payment to the State if the defendant does not appear.[150]

The individual agent bondsman and the insurance company share the customer's 10% fee. Usually, the agent pays the company 2% to 4% of the bond's face value (or 20% to 40% of the customer's 10% fee). For example, for a full bond of $10,000, the defendant's family or friend pays an agent a nonrefundable fee of $1,000. The agent receives between $600 and $800, and the insurance company receives the balance.

Consequently, when calculating gross revenue for the bail bond industry in 1998, the annual reported $17 million premiums of each insurance company must be increased by one of the following multiples:

2.5 times if the agent paid the principal company 4% of the fee charged;
5 times if the agent paid the principal 2% of the fee charged; or
10 times based on insurance companies' estimated gross taxable income.

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149 In Prince George's County, Commissioner Leila Newman, who is responsible for regulating the bail bond business, indicated that individual bail bondsmen there wrote bonds totaling $27 million in 1998. Conversation November 9, 1999.

150 See,supra, note 68 and accompanying text (indicating that the bondsman accepts installment payments and often requires the individual payee to accept financial responsibility in the event the defendant absconds).

2. District Court and Circuit Court

An alternative method of calculating the annual revenue of corporate sureties would be to calculate the combined bail bonds posted in the District Court and in the Circuit Court. Unfortunately, the District Court does not maintain data on the dollar amount of bail bonds posted at the commissioner station or at the District Court clerk's office.

However, approximately 90% of bail bonds are posted at District Court commissioner stations, and these bail bonds are recorded daily. Totaling this daily amount would provide an annual figure for most of the financial bail bonds posted in an individual judicial district.[151] To this amount, one would add the bail bonds that were posted at the clerk's office and at the Circuit Court. Obtaining this revenue information would reveal the extent to which defendants and families use each type of bail bond.

The Circuit Courts of Maryland, which handle about one twelfth the volume of District Court cases, seem a more likely candidate to retrieve information about financial bail bonds. To test this belief, relevant data was obtained from Prince George's County.[152] Similar information should be available from most other Circuit Court judicial districts.[153]

3. Insurance Companies and Bail Bond Agents

Department of Insurance and the District Court personnel suggested contacting the surety company and individual bail bondsmen to obtain the revenue information. Adding

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[151] Baltimore City provided a list of the 14,858 bail bonds posted at commissioner stations during calendar year 1998. Totaling the daily amounts, the value of the full bonds set was more than $140 million; the average bond was $8,239. Since bail bondsmen receive a 10% fee and were responsible for 84% of pretrial detainees being released, they would have earned about $12 million dollars, exclusive of Baltimore City Circuit Court bonds, and the remaining bail bonds posted at the clerk's office.

[152] See, *supra*, note 149.

[153] Telephone conversation, The Honorable Paul H. Weinstein, Administrative Judge of the Circuit Court, November 1999.

the annual income of each registered bondsmen would produce an accurate overall amount for the industry.

A State agency, such as the Department of Insurance, is in the best position to obtain such information by requiring individual bondsmen to file an individual 1040 as part of the annual licensing requirement. The District or Circuit Court also might condition authorization upon receiving information on each agent's annual income.

At present, the annual financial statements filed by insurance companies appear to be the best source for estimating the revenue generated by bail bonds. These figures suggest a wide range of income, from $42 million to $170 million. While only an estimate, it is clear that substantial amounts extracted from economically disadvantaged persons, have created a high-profit, unregulated industry. Before considering the impact of the 10% bondsmen's fee, this study analyzes the most common justifications offered in support of the corporate surety.

## D. Examining Justifications for Corporate Surety Bonds

Maryland judicial officers usually order a full financial bond as a condition of pretrial release. Detainees usually must use bail bondsmen. Indeed, bondsmen are the means by which 60% of detainees gain pretrial release.[154]

Reliance on professional sureties is based on the belief that bail bondsmen are the best guarantor for ensuring that defendants appear in court and for locating and apprehending those who fail to appear. There is no truth in such belief.

[154] *Supra,* notes 132-133 and accompanying text. Overall, almost 20% of Maryland arrestees depend upon paying a bondsman to be released from detention.

1. Defendants' Appearance Rate

Bail bondsmen claim that defendants released on surety bail have a higher appearance rate than defendants released on nonfinancial conditions and on less onerous types of bail. There is no objective support for this contention. According to the District Court's annual statistical reports, Maryland defendants appear in court at a high rate, regardless of the form of pretrial release. In fiscal year 1999, almost 95% of the 215,000 defendants charged with misdemeanor and felony offenses appeared at their scheduled District Court proceeding.[155] This rate remained relatively constant in fiscal year 2000.[156]

The no-show rates are substantially less than national figures and those in other states.[157] Maryland pretrial release programs also indicate that defendants who are supervised pending trial have a high appearance rate.[158]

Earlier last year, the Judicial Information System (JIS) for the Maryland District Court provided statistical data on the failure to appear rate for each type of pretrial release in

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[155] In fiscal year 1999, 213,343 people were charged with criminal offenses in Maryland. District Court statistics indicated that 5.3% failed to appear ("FTA") for their scheduled court date. District Court of Maryland, Monthly Statistical Reports, Criminal Filing and Disposition Statistics ("District Court Statistical Report"), July 1, 1998 to June 30,1999, Appendix F. This rate does not include defendants who failed to appear for cases that were ultimately dismissed or nolle prossed. *See, infra,* note 160, for more current data suggesting that the FTA rate is higher for District Court cases.

[156] In fiscal year 2000, 204,642 people were charged with criminal offenses. Of this number, 5.4% failed to appear in court. District Court Statistical Reports, July 1, 1999-June 30, 2000. This rate does not include defendants who failed to appear for cases that were ultimately dismissed or nolle prossed.

[157] Nationally, 14% of defendants charged with felonies in forty of this nation's seventy-five largest cities obtained pretrial release through bail bondsmen. *National Pretrial Reporting Program: Felony Defendants in Large Urban Counties 1990,* Bureau of Justice Statistics, May, 1993 at 8. The National Pretrial Services Release Center, which monitors the National Pretrial Reporting Program's data collection and reporting for the Department of Justice, has suggested a higher percentage of people use bail bondsmen in misdemeanor cases and when charged with felonies in suburban and rural areas. D. Alan Henry and Bruce D. Beaudin, *Bail Bondsmen, American Jails,* Nov/Dec 1990, at 10. *See, infra,* notes 165-169.

[158] In Baltimore City, 93% of defendants conditionally released to pretrial services appeared in court when required. Baltimore City Pretrial Release Agency, 1998-99 statistics.

Maryland counties.[159] These data belie the bondsmen's claim that bonded defendants have a higher appearance rate.

Defendants who posted refundable cash bond with the court reappeared at a higher rate than bonded defendants.[160] Bonded defendants generally reappeared in court at a higher rate than defendants released on recognizance and at a lower rate than people who posted property bond. The data, however, provide no indication of whether the difference in court appearance rate is related to the type of charge, i.e. felony or misdemeanor, or whether defendants were supervised when released on recognizance. Maryland's Circuit Courts, which includes fewer defendants facing only felony prosecutions, maintains statistics about the failure-to-appear rate for defendants who were released on various nonfinancial and financial pretrial conditions. Montgomery[161] and Prince George's[162]

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159 In some respects, the data obtained from District Court is puzzling and requires additional study. First, the higher failure-to-appear rate is significantly different than the District Court's statewide statistics. In Baltimore City, 10.8% failed to appear in 1998, and 12.8% missed their court appearance in 1999; Baltimore County's FTA rate was 15% in 1998 and 17% in 1999; Frederick County's FTA rate was 11.1% in 1998 and 11.7% in 1999; Harford County's rate was 15.1% in 1998, and 14.1% in 1999; and Prince George's County's FTA rate was 17.9% in 1998 and 17.5% in 1999. Second, the recent information seems at odds with the number and type of bonds posted by detainees at commissioner stations. *See, supra*, notes 90-91. Third, some districts report an improbable failure to appear rate. For example, while Baltimore City was one of the few judicial districts with a single digit failure to appear rate, its two smallest districts showed that 66% and 94% of defendants missed their scheduled court appearance. David Weissert, Coordinator of District Court Commissioner Activity, also believes that the new data requires further analysis. Telephone conversation, February 12, 2001.

160 In 1999, in 24 of Maryland's 33 reported district court locations, defendants released on cash bond had a higher appearance rate than defendants released on bail bond. In three other districts, the appearance rate was the same. In 1998, the appearance rate for both groups was comparable.

161 The Montgomery County Circuit Court maintained annual data, which showed that in fiscal year 1999, a total of 558 bail bonds were set. Twenty-three percent failed to appear and ultimately forfeited their bail bond. Montgomery County's breakdown showed that defendants released on surety bond and cash bond had the highest non-appearance rate of 30%, while only 21% of people released on personal bond failed to attend court. Property bonds had a slightly lower rate of forfeitures at 20% percent. Telephone conversation with Circuit Court Judge Paul H. Weinstein, Nov. 9, 1999; telephone conversation with Commissioner Leila Newman, January 21, 2000.

162 From January 1, 1998 to December 31, 1998, a total of 9,439 bail bonds were written for felony crimes in Prince George's County Circuit Court. More than half the defendants remained in pretrial detention awaiting trial. Of the 4,260 defendants released pending trial, 13% failed to appear in court. Prince George's County maintains bond forfeiture statistics for the different categories of pretrial release. According to Commissioner Leila Newman, bail bondsmen fall under two categories, corporate and surety. Compared to the overall 13% failure to appear rate for Circuit Court felonies, the rate for bonded defendants was 18%. People released on recognizance or pretrial supervision had a much better record for appearing in court: only

counties provided information which showed that defendants released on recognizance had a considerably higher appearance rate than surety bonded defendants.

Outside of Maryland, most studies have concluded that defendants appear in court less often when bail bondsmen are involved than when defendants are released on recognizance, conditional supervision, or private surety.[163] In 1981, for example, a Lazar Institute study, sponsored by the Department of Justice, showed that the failure to appear rate for nonfinancial bail (12.2%) was lower than the rate for financial bail (l3.6%).[164] In 1992, Connecticut also found a better appearance rate for defendants released on nonfinancial bail than those on financial bail: 11% versus 15%.[165] Similarly, a 1993 Arizona pretrial release study found that defendants released conditionally had a failure to appear rate nearly half that of bonded defendants.[166]

In 1992, a national study reached a different conclusion. Conducted by the Federal Bureau of Justice, the study focused on felonies in 40 of the most populous counties and revealed that bonded defendants failed to appear in 15% of their cases, while defendants conditionally released were no-shows 19% of the time.[167]

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9%, failed to attend their scheduled Circuit Court proceeding.

[163] Spurgeon Kennedy and Alan Henry, *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision, Pretrial Issues*, Nov. 1996, at p. 5.

[164] *Id.*, citing The Lazar Institute, *Pretrial Release: A National Evaluation of Practices and Outcomes: Summary and Policy Analysis*, Volume 1981, p.15.

[165] *Id.*, citing Justice Education Center, Inc., *Alternatives to Incarceration Phase I: Pretrial Evaluation* (August 1993).

[166] *Id.*

[167] National Pretrial Reporting Program: Pretrial Release of Felony Defendants in Large Urban Counties 1992, (Washington, DC: Bureau of Justice Statistics) at 10, Table 14. The Pretrial National Resource Center attributed these differences to the use of aggregate statistics which varies from jurisdiction to jurisdiction. For example, in 13 of 28 jurisdictions, the FTA rate for conditionally released defendants was lower than for bonded defendants, ranging between 5% and 16%. *Id.* at 4; Kennedy and Henry, *supra*, notes 164-167. The Center also explained the difference to bondsmen gaining early access to low-risk detainees, who would have been released conditionally or on recognizance. *Id.*

Moreover, most of these outside studies focus on rates of failure to appear rates in felony cases, and may not apply to misdemeanor charges, which represent the overwhelming majority of cases entering Maryland's criminal justice system.[168] A statewide District and Circuit study would obtain accurate information about the likelihood of people returning to court for each type of pretrial release condition.

2. Apprehending Absconders

Despite widespread beliefs to the contrary, bail bondsmen assume a less active role in securing the return of clients who failed to appear in court. Indeed, police catch absconders far more often than do bail bondsmen. Moreover, in Maryland, bondsmen face virtually no risk of financial loss for failure to obtain their clients' appearance, so there is virtually no incentive to aggressively pursue absconders.

In 1998, corporate sureties surrendered only 245 Maryland defendants,[169] one sixth of the bonded defendants who failed to appear and forfeited bail.[170] This is comparable to the national rate.

Most national studies have concluded that, contrary to popular belief, bondsmen are "relatively passive about overseeing the appearance of their clients,"[171] and that "in reality, bail jumpers are far more often caught by the police than by the bail bondsmen."[172] A 1979 American Bar Association study, for instance, found that bondsmen had no

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[168] *See, supra,* note 56.

[169] 1998 Commissioners Report, Appendix I, Table 10(a). In 1999, bondsmen apprehended only 211 defendants who had failed to appear in court. *Id.,* at Table 10(c).

[170] This figure is based upon reviewing monthly forfeitures maintained by the District Court of Maryland's District Court Headquarters for the 1999 calendar year.

[171] James G. Carr, Bail Bondsmen and the Federal Courts: Federal Probation, March 1993, at 12, who referred to the Hearings on Bail Reform Before the Subcommittee on the Constitution of the Senate (Committee on the Judiciary at 205 (Statement of Jerry Watson)); Wayne H. Thomas Jr., Bail Reform in America 1976 at xi (forward by Floyd Feeney).

[172] *Id.* ("Society's reliance on a private bounty system for such a serious purpose seems unwarranted.")

involvement in 89% of cases in which defendants were apprehended and returned. Local studies in Harris County, Texas and Pima County, Arizona reported that the police, not the bondsmen, were responsible for returning absconders on bail bonds.[173]

As stated by United States Magistrate James G. Carr: "In an era of NCIC, instantaneous communication, and ever improving methods of ascertaining and verifying identities, the claim that bail bondsmen are able to respond more effectively than federal and local law enforcement agencies to a defendant's flight is more implausible and less tenable than ever."[174] Magistrate Carr further suggests that perhaps full financial bond and corporate bondsmen are used widely because judicial officers are acting "uncritically and on the basis of local custom and practice."[175]

In theory, bondsmen are financially responsible for paying the remaining 90% of the full amount whenever a criminal defendant fails to appear and becomes a fugitive from justice. In practice, bondsman rarely pay an outstanding amount. Some attribute the lack of enforcement to the lack of state regulation over bonding activities.[176] Others explain that bondsmen shift the responsibility for paying the full bond amount to the person paying the 10% fee.[177]

Special legislation permits bail bondsmen to delay the bond forfeiture by obtaining a 90-day and a 180-day extension for the defendant to reappear or to surrender.[178] Moreover, bail bondsmen may always apply for recovery of any forfeited money when a

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173 Kennedy and Henry, *see, supra,* note 177 at 7.

174 *Supra,* note 172 at 12 n.40. ("The claim that private agents can do a better job of finding and returning fugitives than Federal and local law enforcement officers has never had empirical support.") *Id.*

175 *Id.* at 9.

176 Kennedy and Henry, *supra,* note 177, at 6; Mary A. Toborg, et. al., *Commercial Bail Bonding: How It Works (Summary of Final Report),* Washington, D.C., April 1986, at 7.

177 National Pretrial Resource Center, *supra,* notes 71-73.

178 Md. R. 4-217(i)(3); Md. Ann. Code Art. 27, s.616(e)(2)(i).

defendant appears in court *at any time* beyond the 180-day extension period.[179] Indeed, Maryland law permits the bondsmen to recover forfeited money during *a 10 year period* following a failure to appear by showing that the defendant is incarcerated at an out-of-state facility, and that the state is unwilling to issue a detainer and extradite the defendant to Maryland.[180] Finally, when forfeiture occurs, bondsmen usually are able to avoid Maryland's collection process. In 1998, Montgomery County recovered a paltry sum of $20,000 from bail bondsmen from among the 130 bonds that were forfeited.[181]

## VII. ECONOMIC IMPACT OF FINANCIAL BAIL[182]

When judicial officers condition pretrial release upon money bail, the financial hardship upon detainees and their families or friends is often substantial. To secure the defendant's release, they often must use money that is designated for rent, food, or utilities, or else borrow from others. Paying the bail bondsman an outright 10% fee to gain the release of an economic provider represents the loss of one or two weeks of that person's take home salary.

Obviously, people living in impoverished communities will be lest able to make money bail. According to the 1995 United States Census Bureau, Frederick County had the highest median income of the five counties, $51,220, compared to $25,918 in Baltimore City, $25,918[183] where one of four people are estimated to be living in poverty.[184]

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179 Md. R. 4-217(i)(5) ("When the defendant is produced in court after the [180-day] period allowed . . . the surety may apply for the refund of any penalty sum paid in satisfaction of the forfeiture less any expenses permitted by law."); Md. Ann. Code Art. 27, s. 616(e)(2)(ii).

180 Md. Ann. Code Art. 27 Sect. 616(e)(5)(ii)(1-3).

181 The total amount collected for forfeited bonds was $25,600, the difference being the amount of surety cash bail that was recovered. While the aggregate amount of Montgomery County's 130 forfeited bonds is not available, one can gain a picture of just how small the collectibles were by assuming that the typical outstanding Circuit Court bond was $10,000. If bondsmen were liable for 90%, they would have owed the county $1,170,000 ($1,300,000 less $130,000).

182 Appendix L, Report by Professor Ray Pasternoster, *Economic Impact of Financial Bail.*

183 Baltimore County's 1995 median household income was $42,021, while Prince George's was $45,281.

PRP measured the economic impact of financial bail by interviewing pretrial detainees in each of the five Maryland counties. Professor Paternoster analyzed this data and confirmed that:

-- 75% of the people who were expected to be asked to post bond believed it would be "very difficult" or "difficult" to provide the money;[185]

-- Because of paying bail, 70% of those surveyed would have to delay payment of the rent and utilities, and would be able to purchase fewer groceries;[186]

-- The inability to post bail meant that during incarceration 25% feared they would lose their job, and two in five thought they would lose their home;[187] and

-- Baltimore City defendants made an average payment of $500 to bail bondsmen, twice the average median, despite the fact that its average household income is the lowest among the five counties studied.[188]

## VIII. CONCLUSION

Maryland has a sound pretrial release and bail law, requiring the least onerous possible conditions to be set for all but the most serious charges. However, judicial officers are thwarted in their efforts to honor the letter and spirit of the law because of a dearth of essential information. Lack of counsel for the accused, a complete pretrial release

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184 Baltimore County's poverty rate was 6.65%, while Prince George's was 8.1%.

185 Appendix L at Table 10.

186 *Id.* at Table 11.

187 *Id.* at 5.

188 *Id.* at Table 9 at 3.

investigation, and an assistant state's attorney input means a lack of critical data about the defendants' community ties and financial ability to pay. As a result, 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. In the absence of these critical players, a judicial culture has evolved in which bail bondsmen play too great a role, despite the widespread and longstanding knowledge that such a role is contrary to the fair administration of the criminal justice system. Such a culture 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.

To assist in making the actual practice in Maryland in the use of bail consistent with the statutory provisions and with the fair administration of justice, this study offers a number of recommendations.

## RECOMMENDATIONS

Judicial Pretrial Release Proceedings

1. Maryland's pretrial release and supervision system should be expanded statewide to provide judicial officers with information relevant to pretrial release determinations and assistance in monitoring those determinations. Such personnel should:

   a) conduct a prerelease investigation into each defendant's background and provide, verified information about the defendant's financial circumstances and ability to afford bail, employment status and history, and family and community ties;

   b) answer queries from the defendant's family, victims, and witnesses about scheduling; ascertain the victim's interest in pursuing prosecution; and provide assistance to victims and witnesses by instructing them on

procedures and on requesting that release, if granted, may be conditioned on the defendant's staying away from victim(s) and witness(es);

c) monitor defendants prior to trial, including defendants who are on home detention and who are released to pretrial work release, treatment, or other programs, and assist them in compliance with all conditions of pretrial release; and

d) review, on an ongoing basis, the status and release eligibility of detained defendants and provide, information that may alter the release determination.

2. Maryland defendants should be provided with public defendant representation at the initial appearance and bail review hearings.

3. An Assistant State=s Attorney should be present at the bail review proceedings.

Financial Pretrial Release Conditions

4. Maryland Rules should provide an automatic 10% refundable cash bond payable to the court for all bailable criminal or traffic offenses. Md. Code Annotated, Art. 27, s.616 2 (b)(2).

5. Maryland Rules shall make clear that monetary bail should be used sparingly, limited to situations when "no [other] condition of release will reasonably assure (1) the appearance as required and (2) . . . The safety of the alleged victim." Md. R. 4-216 (c).

6. Judicial officers should consider an unsecured collateral bond and other modes of pretrial release in lieu of a collateral bond. Md. R. 4-216(f)(4)(A).

7. Upon implementation of recommendations #1 through #6 above, Maryland should study the viability of eliminating the use of the commercial surety, as recommended by American Bar Association Standards Related to Pretrial Release 10.1-3.

Judicial Officers

8. Judicial officers should receive training and education with regard to pretrial release determination prior to assuming judicial duties and at annual judicial seminars.

9. A Commissioner should determine the conditions of pretrial release for all bailable offenses after due consideration of the factors affecting pretrial release, except as to crimes punishable by death or a life sentence or instances when a judge specifies that no bail is allowable.

10. Each county's administrative judge should receive a weekly report detailing a complete list of detainees held in pretrial custody and consider whether any change is warranted in detection status. Md. R. 4-216(j).

Community-Based Revolving Bail Fund

11. In the short term detainees should be offered an alternative to paying the bondsmen's fee. A revolving bail fund would identify and post 10% cash bail for individuals who were employed, were caretakers, or otherwise had reliable community ties. Ideally, this bail project would have a visible location within the local detention facility. The bail project would educate detainees and families about the bail process.

# Addendums

Addendum 1

Addendum 2

Addendum 3

Addendum 4

Addendum 5

# At jail, a `systems overload'

*Built for efficiency, Central Booking in Baltimore is overwhelmed, keeping police waiting and people detained longer than allowed, criminal justice officials say.*
*[FINAL Edition]*

The Sun - Baltimore, Md.
Author: Ryan Davis
Date: Apr 21, 2005
Start Page: 1.A
Section: TELEGRAPH
Text Word Count: 1737

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SEE HARD COPY FOR CHART

Built a decade ago, the state-run Central Booking and Intake Center in downtown Baltimore was supposed to be the $56 million answer to gridlock in the city's criminal justice system, designed to speed an antiquated process of booking suspects.

Instead, law enforcement officials say, the facility has only made the initial stages of arrest and detention more cumbersome, frustrating police stuck for hours processing prisoners instead of patrolling, and keeping people arrested on petty crimes jailed for hours or even days longer than legally allowed.

Judges, prosecutors, police and defense lawyers say that Central Booking is broken, overwhelmed with arrestees, crowded with suspects awaiting trial and beset by inefficiencies that have complicated efforts to confront the city's crime rate.

"It's not a new problem," District Court Judge Charlotte M. Cooksey said in a recent interview. "Everybody is impacted by this in a very, very negative way."

A Circuit Court judge will preside today over a hearing intended to address some of the problems.

Evan Howard, an 18-year-old Polytechnic Institute graduate and Morgan State freshman, knows the frustrations all too well. He was arrested Friday after an officer accused him of refusing to obey orders to leave a street corner in West Baltimore.

Howard spent the next 56 hours detained at Central Booking, crammed with about 10 other people in a single-person cell, he said. He slept on the floor, using his shirt as a pillow. He was released Monday morning after prosecutors declined to charge him with a crime.

"They treat you like you're an animal in there," said Howard, who doesn't have a criminal record. "I wasn't even charged."

His is not an isolated case. The law requires that a suspect be released or see a court commissioner within 24 hours of arrest, but the Public Defender's Office says it has identified, in a recent four-day span, 122 people who were held longer than 24 hours - one for 89 hours.

Central Booking, opened in 1995, is a gray monolith that looms over the Jones Falls Expressway. The $56 million building, which put disparate law enforcement agencies under one roof, was constructed around a new system for seamlessly processing suspects. Leonard A. Sipes Jr., then the corrections

spokesman, said at the time, "This will revolutionize the way we conduct business."

It was to be the keystone of the city's criminal justice system - where police turn over suspects to the state, prosecutors decide whether to press charges, suspects get defense attorneys, and judges and court commissioners decide whom to release.

Contention

Judges, defense attorneys, prosecutors and others meet regularly to discuss fixes that could make Central Booking run the way it was envisioned. However, contention festers because no one has found a solution.

Cooksey wrote a memo Monday to city judges, prosecutors, public defenders and police: "As usual, each agency is blaming another agency, and the finger pointing is getting in the way of finding a solution." She added that the problems "require immediate attention and correction."

In her memo, Cooksey blamed the failures on a wide array of agencies and said that police and booking officials sometimes duplicate work, such as criminal record checks, causing delays that last up to eight hours.

She said prosecutors do not decide quickly enough when to file charges and that police do not promptly file their statements of probable cause. Cooksey also criticized booking officials for not prioritizing suspects to get minor offenders through the system quickly. Retrieving property for released inmates takes three hours, she wrote.

Mayor Martin O'Malley and state corrections system Secretary Mary Ann Saar recently exchanged heated letters about Central Booking.

O'Malley wrote that police are "very discouraged by the lack of urgency and commitment that they see at [Central Booking] everyday." Saar wrote back, "The simple fact is that more arrestees are coming in than was ever planned."

Margaret T. Burns, a spokeswoman for the city State's Attorney's Office, said the mayor and police have failed to filter minor offenders from the system.

Prosecutors decline to prosecute about 30 percent of people arrested, not including those picked up on warrants, concluding that either there is insufficient evidence to support an arrest or obtain a conviction, or that the time the suspect has served in jail is sufficient.

"We can't just arrest, arrest, arrest to address violent crime," Burns said. "Baltimore is in the midst of a public safety crisis."

Kristen Mahoney, chief of technical services for the city Police Department, described the system as an assembly line with constant undetected bottlenecks, such as one machine being used to take mug shots. Such problems force police to wait outside the booking center for as long as five hours until their arrestees taken in for processing.

"There are some tremendous systemic problems that need to be addressed," she said.

Mahoney said the police ability to protect the city should not be limited by the capacity of a state-run building. She said that police are making quality arrests but that prosecutors are choosing not to file charges.

Central Booking was designed to handle about 60,000 bookings a year; it is

now taking on more than 100,000. With a capacity of 895, it regularly holds nearly 1,200. Commissioner William J. Smith of the Division of Pretrial Detention and Services calls it a "systems overload."

Howard, the Morgan student majoring in civil engineering, was arrested near his home shortly before 9 p.m. Friday in the 2800 block of Winchester St. The arresting officer wrote that he had refused previous orders to leave a corner where he was talking to a friend. Howard said he had just arrived home from work at a nursing home, so he couldn't have refused any prior orders.

The officer took him to Central Booking. He "told me I would be out in the morning," Howard said.

Instead, Howard said, his confinement caused him to miss work Saturday. He spent Saturday night with his nose crammed under the door of his holding cell so he could avoid the smoke from cellmates.

"I felt as though I was at the Baltimore Zoo," he said.

Each time he asked when he would get out, a detention officer disappeared but never returned with an answer. Despite the 24-hour law, he says the detention officers told him, "You can be held for two to three days, and after that it would be against your human rights."

The new center was intended to provide a central, high-tech clearinghouse, replacing a system in which arrestees were processed at the city's nine district police stations.

With Central Booking, officers arrest suspects and a police wagon pick up the suspects at the scene. It was designed to enable officers to immediately return to work; they could write and file their statements of charges from remote stations in the districts.

The new system allows for additional filters intended to clear minor offenders out of the system before they spend excessive time behind bars. A judge is stationed at Central Booking to weed out minor cases, and prosecutors are there to determine cases not worth pursuing.

"The only thing it's done is slow things down," said Lt. Frederick V. Roussey, the president of the city's police union.

Lines and glitches

The remote computers run outdated operating systems and are regularly broken, police said. That forces the officers to drive to Central Booking to fill out forms, pulling them from the streets. In February, a printer ran out of ink, rendering the remote stations useless. Corrections workers told police it would take four days to replace the ink cartridge.

Then there are the lines of handcuffed suspects waiting in a courtyard outside the facility.

Smith said they are caused by police dumping large groups of arrestees at Central Booking without warning. But police say that doesn't explain the length of lines they often face. Police felt the problem was so bad that they started documenting their encounters. The Sun obtained some of the memos.

On March 11, 406 arrestees being detained in a temporary holding area in Central Booking had not been processed. One night in July, an officer with seven arrestees reported waiting 7 1/2 hours outside Central Booking - and still having 37 arrestees in front of him in line.

"Once they back up 40 people outside, then you're going to be there five hours," said Matt Jablow, a police spokesman.

About 15 officers patrol a district at a time, so losing a couple to Central Booking can have a large impact on the police ability to respond to emergency calls, Roussey said. Each district typically has two transport wagons working at a time, but if both get stuck at Central Booking, the officers must drive each arrestee downtown - and some officers can't do that because their cars don't have protective cages.

"You've got cops sitting on the streets, waiting for wagons," Jablow said.

When Central Booking backs up, it's announced over the police radio system - sending a message many police interpret as code for stop making arrests.

Smith said his employees at Central Booking work as quickly as possibly, while searching all arrestees for weapons and taking steps to maintain a safe facility. He noted that he can't control the suspect inflow.

"I don't have an option of turning them away," he said.

Some have blamed the overflow on O'Malley's strict policing strategy, begun four years after Central Booking opened. It called for stricter police enforcement of nearly all laws. Arrests by city police surged past 100,000 per year.

New strategies call for fewer, but smarter, arrests. The number of people put into handcuffs has dropped 30 percent this year compared with last, but booking is still overwhelmed. "We thought," Jablow said, "that would help solve [the problem] much more than it has."

Howard, the student who recently saw the troubles firsthand, said he can't imagine a worse system. He left Central Booking on Monday about 4 a.m. with a new impression of Baltimore.

"It just made me not want to live in this community anymore," he said. "It made me not want to come outside."

Sun staff writer Julie Bykowicz contributed to this article.

**[Illustration]**
PHOTO(S) / CHART(S); Caption: 1. Evan Howard - shown with his mother, Nadean Paige - was detained for 56 hours at Central Booking. 2. How central booking works; Credit: 1. MONICA LOPOSSAY : SUN STAFF 2. SUN STAFF

Credit: SUN STAFF

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**Abstract (Document Summary)**

On March 11, 406 arrestees being detained in a temporary holding area in Central Booking had not been processed. One night in July, an officer with seven arrestees reported waiting 7 1/2 hours outside Central Booking - and still having 37 arrestees in front of him in line.

About 15 officers patrol a district at a time, so losing a couple to Central Booking can have a large impact on the police ability to respond to emergency calls, [Frederick V. Roussey] said. Each district typically has two transport wagons working at a time, but if both get stuck at Central Booking, the officers must drive each arrestee downtown - and some officers can't do that because their cars don't have protective cages.

PHOTO(S) / CHART(S); 1. [Evan Howard] - shown with his mother, Nadean Paige - was detained for 56 hours at Central Booking. 2. How central booking works; Credit: 1. MONICA LOPOSSAY : SUN STAFF 2. SUN STAFF

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| QUINTON RICHMOND, et al., | * | IN THE |
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| Plaintiffs, | * | CIRCUIT COURT |
| v. | * | FOR |
| THE DISTRICT COURT OF MARYLAND, et al., | * | BALTIMORE CITY |
| Defendants. | * | Case No. 24-C-06-009911 |

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**AFFIDAVIT OF JOHN R. CLAYTON**

I, JOHN R. CLAYTON, am over the age of eighteen (18) and am competent to testify on the basis of personal knowledge the information contained herein.

1. I am 29 years old and a graduate student at the Johns Hopkins Bloomberg School of Public Health. I currently live in Baltimore City.

2. I was arrested in Baltimore City on January 7, 2006 for driving under the influence ("DUI"). I was detained at the Central Booking Jail in Baltimore City and brought before a Commissioner that evening.

3. Despite the fact that I was charged only with DUI and had no prior criminal record, the Commissioner inexplicably set my bail at ten thousand dollars ($10,000).

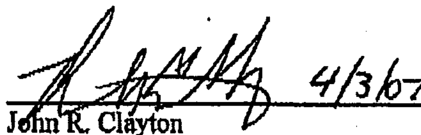
4. At my bail review hearing three days later, the prosecutor and my appointed public defender conferred with each other and quickly agreed that the bail set by the Commissioner was inappropriate. The District Court then eliminated the bail requirement and ordered that I be released on recognizance.

5. I clearly would have benefited greatly from having counsel at my initial bail hearing. Had a lawyer been present, the Commissioner would have received verified information about me, including but not limited to the critical fact that he was a full-time

enrolled graduate student at Johns Hopkins University School of Public Health. A lawyer could have also verified my current residence and presented other relevant information from people, e.g., my professors, friends and family regarding my character and dependability.

7. A lawyer also would have emphasized that this was the first time that I had ever been arrested in my life. Presentment of these facts by a lawyer would have substantially reduced the likelihood that the Commissioner would have set my bail at $10,000.

I SOLEMNLY AFFIRM UNDER THE PENALTIES OF PERJURY that the contents of the foregoing are true, correct and based upon personal knowledge.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John R. Clayton

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**AFFIDAVIT OF JEROME JETT**

I, JEROME JETT, am over the age of eighteen (18) and am competent to testify on the basis of personal knowledge the information contained herein.

1. I am twenty-eight years old and live in Baltimore City. I am the custodial parent my two children, who depend on me for support.

2. I was arrested in Baltimore City for the misdemeanor offense of possession of marijuana and was detained at the Central Booking Jail.

3. The facilities at Central Booking are harsh. I had to share a small cell with more than five individuals in extremely cramped quarters. I had no place to sleep or sit as I waited to appear before a Commissioner. We had to share an open toilet with no privacy.

4. On November 11, 2006, I went before a District Court Commissioner in the Central Booking Jail for my initial bail hearing. The hearing took place in a closed booth inside the jail with a glass wall separating me from the Commissioner, and it was not open to the public. The Commissioner and I spoke through a speaker system. As far as I am aware, the hearing was not recorded.

5. I am and was indigent at the time of this hearing and therefore was eligible for representation by the Office of the Public Defender.

6. At the start of the hearing before the Commissioner, I informed the Commissioner that I could not afford a lawyer and I requested that a lawyer be appointed to represent me at this bail hearing.

7. The Commissioner denied my request for the appointment of counsel and proceeded with the bail hearing.

8. During the hearing, the Commissioner informed me of the crimes with which I had been charged. He asked me a series of questions concerning residence, employment, family, other ties to the community, prior record, and, frequently, the current charge. I answered these to the best of my ability. He did not advise me of my Miranda rights, or that statements I made to him could be used against me at trial.

9. At the conclusion of the hearing, the Commissioner set my bail at three thousand five hundred dollars ($3,500), with a 10% option ($350). I was released one day later, on November 12, 2006, after posting this bail.

10. I was unable to post the bail set by the Commissioner and remained in custody at the Central Booking Jail.

11. The bail set by the Commissioner was confirmed by the District Court my bail review hearing on November 15, 2006.

12. I was released on November 15, 2006, after agreeing to pay a bail bondsman a 10% non-refundable fee of $1,000.

13. I do not believe that I had the proper skills or resources to argue for my pretrial release. I did not know, for instance, that my statements would be admissible at trial. I did not know the best arguments to make in favor of my release or at least in favor of lower bail. Due to my incarceration, I could not effectively demonstrate my stability and my ties to the community.

14. Had an attorney been appointed to represent me at my hearing, he or she could have highlighted many of the legal factors weighing in favor of a lower bail. An attorney could have helped me understand the types of information that would support my request for no bail or reduced bail. An attorney could have provided verified information about my stability and ties to the community. An attorney could have helped me follow up in obtaining witnesses or other information that could have been used in a subsequent bail review hearing or in mounting an effective defense immediately following the presentation of charges against me. He or she could have advised me as to how to address the Commissioner and how to discuss the charges brought by the State without making incriminating or damaging statements. He or she could have helped the Commissioner understand key legal issues at issue in the case. And, an attorney could have helped to ensure that I advocate for my freedom effectively without making potentially incriminating statements.

15. As a result, the Initial bail hearings also are critical to defendants in terms of the loss of freedom and its effect on their lives and livelihoods. Continued incarceration results in extremely damaging consequences to family relationships and employment. Jobs and income are lost. The prospect of conviction is increased when an accused is jailed between the time of arrest and final adjudication; so is the severity of sentence. Initial bail hearings thus are critically consequential to defendants facing loss of liberty, employment, income, and family.

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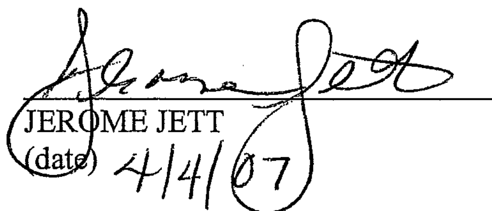

JEROME JETT
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**AFFIDAVIT OF NATHANIEL SHIVERS**

I, NATHANIEL SHIVERS, am over the age of eighteen (18) and am competent to testify on the basis of personal knowledge the information contained herein.

1. I am twenty-six years old and currently am unemployed. I live in Baltimore City and am a taxpayer to the State of Maryland.

2. I was arrested in Baltimore City for armed carjacking, felony theft, use of a handgun in the commission of a violent crime, and other offenses, and detained at the Central Booking Jail.

3. The facilities at Central Booking are harsh. I had to share a small cell meant with more than five individuals in extremely cramped quarters. I had no place to sleep or sit as I waited to appear before a Commissioner. We had to share an open toilet with no privacy.

4. On November 11, 2006, I went before a District Court Commissioner in the Central Booking Jail for my initial bail hearing. The hearing took place in a closed booth inside the jail with a glass wall separating me from the Commissioner, and it was not open to the public. The Commissioner and I spoke through a speaker system. As far as I am aware, the hearing was not recorded.

5. I am and was indigent at the time of this hearing and therefore was eligible for representation by the Office of the Public Defender. A public defender currently is representing me in my criminal trial.

6. At the start of the hearing before the Commissioner, I informed the Commissioner that I could not afford a lawyer and I requested that a lawyer be appointed to represent me at this bail hearing.

7. The Commissioner denied my request for the appointment of counsel and proceeded with the bail hearing.

8. During the hearing, the Commissioner informed me of the crimes with which I had been charged. He asked me a series of questions concerning residence, employment, family, other ties to the community, prior record, and, frequently, the current charge. I answered these to the best of my ability. He did not advise me of my Miranda rights, or that statements I made to him could be used against me at trial.

9. At the conclusion of the hearing, the Commissioner set my bail at a one million dollar bond.

10. I was unable to post the bail set by the Commissioner and remained in custody at the Central Booking Jail.

11. At my bail review hearing on November 13, 2006, the District Court ordered that I be held without bail pending trial.

12. I am currently detained at the Baltimore City Detention Center awaiting trial, which has been set for April 27, 2007.

13. I do not believe that I had the proper skills or resources to argue for my pretrial release. I did not know, for instance, that my statements would be admissible at trial. I did not

know the best arguments to make in favor of my release or at least in favor of lower bail. Due to my incarceration, I could not effectively demonstrate my stability and my ties to the community.

14. Had an attorney been appointed to represent me at my hearing, he or she could have highlighted many of the weaknesses in the charges against me, including the inconsistent statements from by the state's own witness, and the fact that the witness did not come forward until two weeks after the alleged carjacking occurred. An attorney could have helped me understand the types of information that would support my request for no bail or reduced bail. An attorney could have provided verified information about my stability and ties to the community. An attorney could have helped me follow up in obtaining witnesses or other information that could have been used in a subsequent bail review hearing or in mounting an effective defense immediately following the presentation of charges against me. He or she could have advised me as to how to address the Commissioner and how to discuss the charges brought by the State without making incriminating or damaging statements. He or she could have helped the Commissioner understand key legal issues at issue in the case. And, an attorney could have helped to ensure that I advocate for my freedom effectively without making potentially incriminating statements.

15. Initial bail hearings also are critical to defendants in terms of the loss of freedom and its effect on their lives and livelihoods. Continued incarceration results in extremely damaging consequences to family relationships and employment. Jobs and income are lost. The prospect of conviction is increased when an accused is jailed between the time of arrest and final adjudication; so is the severity of sentence. Initial bail hearings thus are critically consequential to defendants facing loss of liberty, employment, income, and family.

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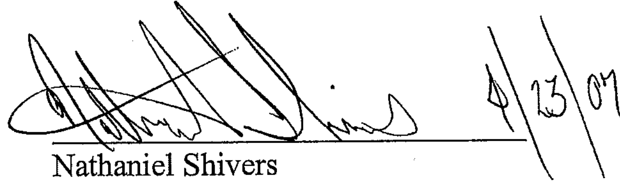

Nathaniel Shivers

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| THE DISTRICT COURT OF MARYLAND, et al., | * | BALTIMORE CITY |
| Defendants. | * | Case No. 24-C-06-009911 CN |

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**AFFIDAVIT OF GLENN CALLAWAY**

I, GLENN CALLAWAY, am over the age of eighteen (18) and am competent to testify on the basis of personal knowledge the information contained herein.

1. I am forty-eight years old, currently am unemployed and I live in Baltimore City.

2. I was arrested in Baltimore City for failure to appear and detained at the Central Booking Jail.

3. On November 11, 2006, I went before a District Court Commissioner in the Central Booking Jail for my initial bail hearing. The hearing took place in a closed booth inside the jail with a glass wall separating me from the Commissioner, and it was not open to the public. The Commissioner and I spoke through a speaker system. As far as I am aware, the hearing was not recorded.

4. The facilities at Central Booking are harsh. I had to share a small cell with more than five individuals in extremely cramped quarters. I had no place to sleep or sit as I waited to appear before a Commissioner. We had to share an open toilet with no privacy.

5. I am and was indigent at the time of this hearing and therefore was eligible for representation by the Office of the Public Defender.

6. At the start of the hearing before the Commissioner, I informed the Commissioner that I could not afford a lawyer and I requested that a lawyer be appointed to represent me at this bail hearing.

7. The Commissioner denied my request for the appointment of counsel and proceeded with the bail hearing.

8. During the hearing, the Commissioner informed me of the crimes with which I had been charged. He asked me a series of questions concerning residence, employment, family, other ties to the community, prior record, and, frequently, the current charge. I answered these to the best of my ability. He did not advise me of my Miranda rights, or that statements I made to him could be used against me at trial.

9. At the conclusion of the hearing, the Commissioner set my bail at One Thousand Five Hundred Dollars ($1,500).

10. I was unable to post the bail set by the Commissioner and remained in custody at the Central Booking Jail. I was subsequently transferred to the Metropolitan Transition Center on January 4, 2007.

11. I was unable to post bail and I am currently still detained at the Metropolitan Transition Center. My criminal trial was scheduled for the end of April.

12. I do not believe that I had the proper skills or resources to argue for my pretrial release. I did not know, for instance, that my statements would be admissible at trial. I did not know the best arguments to make in favor of my release or at least in favor of lower bail. Due to my incarceration, I could not effectively demonstrate my stability and my ties to the community.

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14. As a result, the Initial bail hearings also are critical to defendants in terms of the loss of freedom and its effect on their lives and livelihoods. Continued incarceration results in extremely damaging consequences to family relationships and employment. Jobs and income are lost. The prospect of conviction is increased when an accused is jailed between the time of arrest and final adjudication; so is the severity of sentence. Initial bail hearings thus are critically consequential to defendants facing loss of liberty, employment, income, and family.

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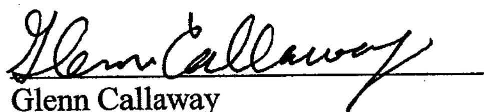

Glenn Callaway

(date) 5/14/07

# DO ATTORNEYS REALLY MATTER? THE EMPIRICAL AND LEGAL CASE FOR THE RIGHT OF COUNSEL AT BAIL

*Douglas L. Colbert**
*Ray Paternoster***
*Shawn Bushway****

## INTRODUCTION

Contrary to common belief, our legal system does not guarantee a lawyer to every person whose freedom is at stake. Instead, the indigent accused usually stands alone, without counsel to protect his liberty when first appearing at a bail hearing. Most states do not consider the right to counsel to apply until a later stage of a criminal proceeding—days, weeks or months after the pretrial release determination. During this time, many unrepresented detainees accused of nonviolent crimes languish in

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* Professor of Law, Maryland School of Law. Cindy Feathers deserves special recognition for her thoughtful comments and editing suggestions on drafts of this article. I also want to express appreciation to the many Maryland law students who participated in the Lawyers at Bail Project and who were the first to represent indigent defendants at Baltimore City bail hearings. I thank Maryland Law School for providing a generous research grant and to colleagues who contributed excellent ideas and suggestions at two faculty workshops. Finally, and most important, I fully appreciate my family's love, support, and encouragement throughout this project.

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jail. Would legal representation at the bail stage make a difference? Is there an objective yardstick that would measure the value of counsel at this stage? Can the constitutional right to counsel be evaluated to demonstrate its value to the criminal justice system?

A social science study recently completed in Baltimore, Maryland answered these questions. The project was unique, in that it was designed not only to provide counsel to suspects at an important decision point in the criminal justice process, but also to provide a rigorous empirical examination of the effect of such representation. The study presented convincing empirical data that the benefits of representation are measurable and that representation is crucial to the outcome of a pretrial release hearing. Moreover, the study revealed that early representation enhances defendants' respect for the system's overall fairness and confidence in assigned counsel.

For eighteen months at bail hearings, the Baltimore City Lawyers at Bail Project ("LAB") defended the liberty of nearly 4,000 lower-income defendants accused of nonviolent offenses. The study showed that more than two and one half times as many represented defendants were released on recognizance from pretrial custody as were unrepresented defendants. Additionally, two and one half times as many represented defendants had their bail reduced to an affordable amount. Indeed, delaying representation until after the pretrial release determination was the single most important reason for lengthy pretrial incarceration of people charged with nonviolent crimes. Without counsel present, judicial officers made less informed decisions and were more likely to set or maintain a pretrial release financial condition that was beyond the individual's ability to pay.

This is no trifling matter, considering the consequences of pretrial incarceration. As jail populations continue to swell, correction officials must deal with the added dangers of severe overcrowding, while taxpayers pay the prohibitive costs of pretrial detention and new jail construction. At the same time, incarcerated detainees often lose jobs and face eviction from their homes; and families suffer the absence of an economic provider or child caretaker. Moreover, the delay in defense investigations and witness interviews caused by pretrial incarceration, impedes preparation of a defense and is a sure-fire prescription for miscarriages of justice and convicting innocents at trial. In brief, denying representation at the bail stage makes a mockery of the claim to protect individual liberty and provide justice. Without an attorney at bail, the pretrial release hearing becomes little more

than a public relations gimmick. Lower-income pretrial detainees, who are disproportionately people of color,[1] continue to be likely to stay in jail, unable to make bail until their next court appearance.

The LAB study offers a national blueprint for improving pretrial release systems. If the right to counsel at bail became a reality in this country, the criminal justice community's players would pay greater attention to the front end of the process, where most arrestees face minor, lower court misdemeanor charges. Immediate decisions would be made to dismiss, to refrain from prosecution, or to offer diversion after arrest. At a time when many jurisdictions are seeing an increase in misdemeanor arrests because of "no tolerance police practices" and an increase in local pretrial jail populations, this representation model becomes essential for managing and reducing the costs of overburdened jail and court systems and for enhancing respect for those systems.

Part I of this Article provides a national perspective of the right to counsel at bail hearings in state and local courts. This section reveals that the great majority of states fail to provide lawyers for poor people at the pretrial release stage and delay representation for substantial periods thereafter. An overview of Supreme Court jurisprudence on the right to counsel, relevant to pretrial release determinations, is also set forth in the opening section of this article.

Part II presents a study of Maryland law students' and LAB lawyers' groundbreaking efforts to change Baltimore's criminal justice system at the bail stage. Baltimore had been typical of many jurisdictions: judges conducted bail reviews without the presence of a public defender or assigned attorney and usually maintained the financial bail conditions previously set. Following the hearing, judges postponed defendants' cases for an average of thirty to forty-five days until the next court appearance. Baltimore's bifurcated court system is representative of the overall divide between misdemeanors and felony cases: nearly nine out of ten Baltimore City defendants are prosecuted for misdemeanor crimes in the lower District Court.[2] More than two out of three

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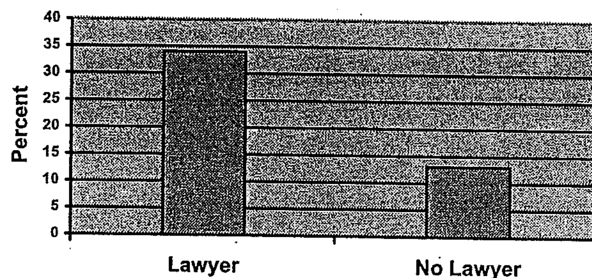
[1] *See* U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COURTS: 1994 (1998); BRIAN A. REAVES & PHENY Z. SMITH, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COURTS: 1992 (1995); BRIAN A. REAVES & JACOB PEREZ, BUREAU OF JUSTICE STATISTICS BULLETIN 1-16, PRETRIAL RELEASE OF FELONY DEFENDANTS: 1992 (1994); BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT 1-11, PRETRIAL RELEASE OF FELONY DEFENDANTS (1994); BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, BULLETIN 1-16, PRETRIAL RELEASE OF FELONY DEFENDANTS: 1990 (1992).

[2] In fiscal year 1999, Maryland's Department of Public Safety reported that 87 percent

that after the bail review hearing only 13 percent of those defendants without lawyers were released on their own recognizance, while 34 percent of LAB clients were. In other words, the LAB clients were over two and a half times more likely to be released on their own recognizance than were jailed defendants without lawyers. The presence of a lawyer, therefore, has made a substantial difference in the likelihood that a suspect would be released on recognizance. However, most jailed suspects were not immediately released on their own recognizance, but had to travel down the bail process.[117]

**Figure 1: Percent of Defendants Who Were Released on Their Own Recognizance**




The next issue to address was how successful the presence of a lawyer was in lowering the amount of bail. The initial bail was set by a bail commissioner immediately after arrest and then reviewed at the bail review hearing. The bail review hearing officer could leave the dollar amount intact, lower it, or increase it. Before the bail review hearing the two groups had approximately the same amount of bail set. After the review hearing, LAB clients fared significantly better. The bail review hearing judge reduced the bail for over one-half of the LAB clients (59 percent), but for only 14 percent of the unrepresented defendants. In other words, defendants who had a lawyer were over four times more likely to have their bail reduced. Moreover, the amount of the reduction was significant.

The amount of bail after the bail review hearing is shown in Figure 2. The average bail after the hearing for suspects with lawyers was $2,441, while for those without lawyers it was $3,012.

[117] *See supra* notes 60-64. Maryland has a two-stage pretrial release procedure. First, the accused appears before a District Court commissioner, who considers numerous factors in deciding to order release or bail. MD. R. 4-216(e)(1)(A-I). Then, if still detained, he appears before a District Court judge at a bail review proceeding. MD. R. 4-216(g).

Figure 3 graphs the pre-post bail review hearing difference in the bail set for the two groups of cases. On average the bail for LAB clients was reduced nearly $1,000, while the bail amount for the non-LAB clients was reduced only by an average of $166. Another way to look at this is that LAB clients had their original bail amount reduced almost by one-third, while those without lawyers had their initial bails reduced by less than 5 percent.

**Figure 2: Amount of Cash Bail After Bail Review Hearing for Defendants With and Without Lawyers**

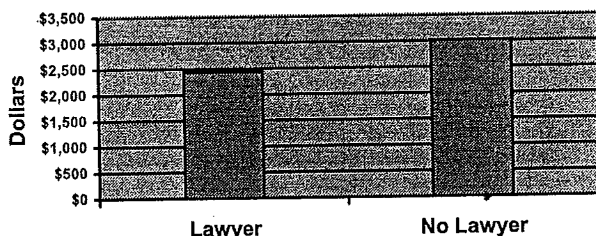
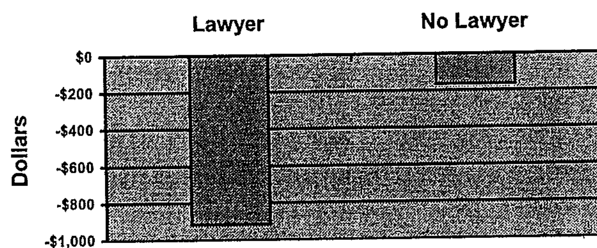



**Figure 3: Difference in Bail Amount Between Pre and Post-Bail Review Hearing for Defendants With and Without Lawyers**




There are a number of other ways to examine the effectiveness of LAB counsel at the bail review hearing. One is to examine if the LAB lawyers were successful in reducing their clients' bail to a more affordable level, say $500 or under.[118] Before the bail review hearing, a comparable percentage of defendants with and without lawyers had bails under $500; 9 percent of the LAB clients and 10 percent of the non-LAB clients had bails that were $500 or under. At the conclusion of the bail review hearing, however, the total of those with bail set at $500 or

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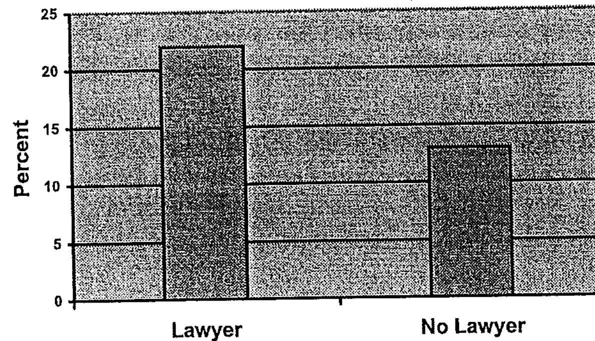
118 Should a judge set a 10 percent cash alternative, the individual could be released by posting $50 as security for a $500 bail bond. Absent a cash alternative, the individual would turn to a bail bondsmen, and pay the non-refundable $50, 10 percent fee.

under increased by 13 percent for the LAB clients, and only by 3 percent for the non-LAB clients. As Figure 4 shows, at the conclusion of the bail review hearing, 22 percent of jailed suspects with lawyers had bails of $500 or under, but only 13 percent of those without lawyers did.

**Figure 4: Percent of Defendants Who Had Cash Bails of $500 or Under After Bail Review Hearing**




One obvious consequence of the fact that suspects with lawyers at their bail review hearing were more likely to be released on their own recognizance or to have their bails reduced to a more affordable level was that they spent less time in jail. They were almost twice as likely as those without lawyers to be released on the same day they were arrested (38.7 percent v. 20.5 percent). Nearly two-thirds of those who were represented were released from jail within nine days of their arrest, while only half of those without lawyers were. The median time spent in jail was two days for represented suspects, nine days for the unrepresented.

The obvious question was why the appearance of counsel would make such a difference in the bail review hearing, often a very perfunctory event in the criminal justice process. One reason is that represented defendants could better present beneficial and verified information concerning the appropriate bail that supplemented the information provided by the pretrial release representative.[119] The hearing took slightly more time when an attorney was present: on average, two minutes and thirty-seven seconds, versus one minute, forty-seven seconds without counsel.

In sum, nonviolent criminal suspects who were provided lawyers at their bail review hearings fared substantially better than those without lawyers. Although comparable before the bail

[119] *See supra* note 63.

review hearing, suspects who were represented by LAB:

- were substantially more likely to be released on their own recognizance;
- were more likely to have their initially set bail reduced at the hearing;
- had their bails reduced by a greater amount;
- were more likely to have affordable bails ($500 or under) set;
- served less time in jail; and
- had longer bail review hearings.

The presence of a lawyer improved the substantive justice of clients at the bail review hearing. The next sections will address the cost savings representation achieved and whether there were any differences in perceived procedural fairness.

### I. *Collateral Benefits*

The main effect of LAB was an increase in the number of people who were either released on their own recognizance or had their bail lowered such that they were able to make bail or be released prior to final disposition of their case. This effect is reflected in the change in the median number of days in jail from nine to two for all arrestees who had a lawyer at their bail hearing. This simply says that the "middle" person in LAB served seven days fewer than the "middle" person in the control group.

But the arrestees who benefit most from having a lawyer at the bail hearing are not the "middle" arrestees, but rather the individuals who would not have made bail without the intervention of a lawyer. If they fail to make bail, they are held in jail until their cases are resolved. The mean average days until disposition for those who do not make bail has been estimated in Baltimore to be 67.6 days, with a median of 38 days.[120] This is a substantial period of time to be incarcerated before receiving a decision, especially when considerering that nearly 3 of 5 detainees will ultimately receive either a nolle prosequi or outright dismissal, or a stet.[121] Although we do not have evidence on the extent of

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[120] Faye S. Taxman, Karl I. Moline & Jason Marcello, Exploring Three Decision Points: An Analysis of the Baltimore Pretrial Process, at 25 (Md. Dep't of Public Safety & Correctional Srvs. 2000) (unpublished manuscript, on file with author). The fact that the median is so much smaller than the mean tells us that the distribution is positively skewed (i.e., a number of people were in jail for substantially longer that 67.6 days before receiving a disposition).

[121] In 1999, criminal charges against 58.1 percent of detainees were either dismissed or stetted, i.e., placed on the inactive docket. *See id.* Stetted cases are rarely prosecuted and

disruption in an individual's life, it is safe to assume that the cost is substantial.

To broaden this discussion, consider the result reported in the above section, namely that representation at the bail hearing increases the percent of arrestees who are released prior to disposition from 50 percent to 65 percent. This means that, for every 100 defendants, 15 will not have to spend time in jail prior to disposition. These 15 defendants would have remained incarcerated for an average of 67.6 days, even though 9 of them would ultimately have their cases dismissed or not prosecuted. Or, to put it another way, for every person given a lawyer at the bail hearing, we expect to save about 10 bed days overall, and 6 bed days for people who ultimately, have their cases dropped. It was not possible in the present project to quantify the cost of these bed days to the criminal justice system, but we conclude that these costs, too, are substantial.[122]

Given the relatively minor nature of the intervention, these effects could have a surprisingly large impact on the system in Baltimore if a) LAB was implemented system-wide and b) the program could maintain its integrity and effectiveness with larger size. For example, LAB served 4,000 clients during the time period of the study. Extrapolating the results of the experiment to these 4,000 clients, we estimate that 600 people avoided pretrial detention, reflecting a net savings of approximately 6,000 bed days. Of these, 340 ultimately had charges dropped, which reflects roughly 2,400 "unnecessary" bed days. We believe that the results of this experiment justify expanding LAB. Further study would determine whether the initial positive and large effect of LAB can be replicated as the program grows statewide. A more detailed and cost-benefit analysis is also warranted at this stage.[123]

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are automatically dismissed after three years. MD. R. 4-248.

[122] Based upon the Lawyers at Bail study, a fiscal note for proposed legislation that would guarantee statewide representation at bail included a projected savings of $4.5 million in Baltimore City. Dep't of Legislative Srvs., Maryland Gen. Assem., Fiscal Note to S.B. 138 (2000).

[123] One potential cost of LAB involves the rearrest of individuals released on offense prior to the disposition on the first offense. To explore this possibility, for all defendants in this study who were released within nine days of arrest, we estimated the rate of rearrest rate for the next six months. We found nearly identical rates of rearrest of 10 percent for those who had a lawyer at the bail hearing and those who did not, suggesting that the extra releases resulting from representation did not lead to additional crime/arrest.

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# THE URSA INSTITUTE

EARLY REPRESENTATION BY
DEFENSE COUNSEL FIELD TEST

FINAL EVALUATION REPORT

March, 1985

U.S. Department of Justice
National Institute of Justice
Office of Program Evaluation

SAN FRANCISCO, CALIFORNIA 94111 415 • 398-2040

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In this chapter we review the available data pertaining to the impact of the ERDC Field Test on the criminal justice systems in the three grantee sites. We examine this impact from three rather divergent perspectives. First, we report on the perceptions of key actors throughout the criminal justice systems of each grantee site. Second, we review some of the findings presented earlier in Chapter V and assess their implications for system impact--both actual and potential. Finally, we discuss the extent to which each of the three counties has institutionalized various aspects of the ERDC model.

## ASSESSMENT OF IMPACTS BASED ON KEY ACTOR INTERVIEWS

Interview data offer an important vantage point from which to assess the effects of the Field Test. During final round interviews with public defender staff and local key criminal justice actors, respondents were asked several questions designed to elicit their impressions regarding the impacts of the Field Test.

Attorneys at each site were asked to describe the most important effect of the Field Test on their office. In Shelby County, two of the three lower court test attorneys and four of the eleven felony attorneys interviewed cited the importance of and need for continued early investigation. In addition, several mentioned that the individualized case handling and quality representation available in lower court during the test period led to better client interactions and quicker case dispositions.

Felony test attorneys in Passaic County reported that, as a consequence of the Field Test, cases of limited consequence were screened out and those cases which arrived in upper court could be afforded better representation and were easier to control. Felony control attorneys perceived the Field Test as reducing the caseloads of felony test attorneys.

In Palm Beach County, both test and control attorneys said that the most important consequence of the Field Test for the office was the improved attorney-client relations occasioned by the early contact and representational activities. Additionally, several test attorneys mentioned that, as a result of the Field Test, clients' perceptions of the office improved and that they (i.e., the public defenders) felt more like private attorneys.

Staff at all three of the sites also were asked to evaluate how successful the Field Test was in improving the efficiency and effectiveness of the criminal justice process in their jurisdiction. At each site, nearly half of the respondents reported either not knowing what effects the test had or that the effects on the criminal justice process were "neutral." Among those attorneys who perceived effects, the overwhelming majority rated the Field Test as successful in this regard.

Finally, attorneys were asked to describe what they thought was the most important result of the ERDC Field Test in their jurisdiction. Passaic County attorneys cited better client rapport and earlier case dispositions as the major effects of the Field Test in their jurisdiction. In Shelby County, lower and upper court attorneys cited four main system benefits:

- earlier and better pretrial release decisions;
- more cases disposed of in lower court;
- generally shorter case processing time in both lower and upper court; and
- the advantages of early investigation to better representation of clients and earlier case dispostion.

Attorneys in Palm Beach County reported that the main results of the Field Test were that it improved pretrial release decisionmaking and that more cases were resolved earlier. One attorney also indicated that participation in the Field Test elevated the status of the office in the eyes of both clients and other criminal justice agencies.

The impressions of key actors in criminal justice agencies at each site also were obtained. During the final interview round these respondents were asked if the Field Test had any effect on the operations and procedures of their

agency and if it caused any changes in the criminal justice process. In all three sites, the majority reported that the Field Test did not affect the criminal justice process in general but did have some effect in terms of their particular agency.

For example, three Passaic County lower court judges reported that the test had positive effects on their courtrooms. They cited the client rapport established by early PD contact and the enhanced bail setting process as major benefits. As one said, "My courtroom is calmer, less uncontrollable. Clients listen to their PD and don't just speak out." Prosecutors at the site expressed mixed reactions. Several felt that they experienced no changes (as a result of the Field Test), although one reported that it slowed down case processing activities. Other prosecutors, however, suggested that the Field Test helped screen out "junk" cases and made case processing faster.

In Shelby County, several prosecutors reported that the test helped them to move cases faster. Judges interviewed also cited quicker movement of cases as a benefit, and one suggested that the individualized case assignment approach employed during the test period was the key to improved client and attorney attitudes. Two staff members of PTS reported that the screening function performed by their agency under the Field Test created some problems. However, another PTS staff member stated that presence of the test attorneys at bail setting relieved PTS staff of dealing with some of the legal issues involved in determining pretrial release. According to this respondent, PTS staff were happy to relenquish this aspect of their role in the bail determination process.

In Palm Beach County, the key actors interviewed reported very few effects, either positive or negative, on their agencies as a result of the Field Test. One judge indicated that the presence of the test attorneys improved the bail setting process at First Appearance and a representative of TASC, a local diversion agency, reported improved relations with the Public Defender's Office and fewer problems with clients as a result of the earlier and more extensive attorney-client contact.

## ASSESSMENT OF IMPACTS BASED ON CASE PROCESSING DATA

### Impact on Public Defender Resources

Table VII-1 provides comparisons between the amount of public defender attorney time recorded for test and control clients in Passaic and Shelby Counties. In Passaic County, the average test case required 40.5 minutes of lower court attorney time and--for those cases going to upper court--337.9 minutes (approximately 5.6 hours) of upper court attorney time. Control cases required an average of only 24.1 minutes of lower court attorney time and--for cases transferred to upper court--228.0 minutes (3.8 hours) of upper court attorney time. However, as was shown in Figure V-1 (p. 189), 74.2% of all Passaic County test cases were resolved in lower court, compared with 67.4% of control cases. Thus, the average total attorney time required for test cases was 127.7 minutes per case (40.5 x .742 + (40.5 + 337.9) x .258). The average total time required for control cases was 98.4 minutes per case (24.1 x .674 + (24.1 + 228.0) x .326), a total of 29.3 minutes per case less than the average test case.

TABLE VIII-1

Average Public Defender Attorney Time Required Per Case

| | Lower Court | Upper Court | | |
|---|---|---|---|---|
| | | All U.C. Cases | No Trial | Trial |
| **Passaic County** | | | | |
| Test Cases | 40.5 min. (n=373) | 337.9 min. (n=104) | 201.7 min. (n=90) | 1213.6 min. (n=14) |
| Control Cases | 24.1 min. (n=333) | 228.0 min. (n=107) | 123.4 min. (n=96) | 1,141.4 min. (n=11) |
| **Shelby County** | | | | |
| Test Cases | 102.2 min. (n=548) | 257.5 min. (n=196) | 257.5 min. (n=196) | Not Recorded |
| Control Cases | 77.7 min. (n=715) | 285.1 min. (n=375) | 283.3 min. (n=373) | 622.5 min. (n=2) |

As we noted in Chapter V, Passaic County's upper court attorneys were more likely to take test cases than control cases to trial. At least some of the disparity in total attorney time required is an artifact of this increased propensity to try test cases. When we confine our analysis to cases not going to trial, the net cost of ERDC services in Passaic County is reduced to 25.6 minutes per case (82.1 minutes of attorney time per test case vs. 56.5 minutes per control case).

The average Shelby County test case required 102.2 minutes of lower court attorney time and--for cases going to upper court--257.5 minutes (approximately 4.3 hours) of upper court attorney time. Control cases required an average of 77.7 minutes of attorney time in lower court, and 285.1 minutes (approximately 4.8 hours) of attorney time in upper court. However, only 28.2% of all test cases went to upper court, compared with 45.6% of all control cases. Thus, the average total attorney time required for test cases was 174.8 minutes (102.2 x 71.8 + (102.2 + 257.5) x .282) compared with an average for control cases of 207.7 minutes (77.7 x .544 + (77.7 + 285.1) x .456) of attorney time. In contrast with Passaic County, this amounts to an apparent net savings of 32.9 minutes of public defender attorney time per case. However, further adjustment must be made to compensate for the missing data for the two test cases going to trial. When the analysis is confined to cases not going to trial, the net savings is slightly reduced, to 32.1 minutes (174.8 minutes of attorney time per test case vs. 206.9 minutes per control case).

Table VII-2 shows comparable data for public defender investigator/interviewer time in Passaic County. (Upper court investigator/interviewer time was not systematically recorded in Shelby County.) The average test case required a total of 32.6 minutes of investigator/interviewer time (25.5 x .742 + (25.5 + 27.6) x .258) as compared with 39.0 minutes for the average control case (31.7 x 67.4 + (31.7 + 22.4) x 32.6). After adjusting for the greater frequency of test case trials in upper court, the mean savings per case is increased to an average of 8.1 minutes per case (29.5 minutes per test case vs. 37.6 minutes per control case).

TABLE VII-2

Average Public Defender Investigator/Interviewer Time Required Per Case

| | Lower Court | Upper Court | | |
|---|---|---|---|---|
| | | All U.C. Cases | No Trial | Trial |
| **Passaic County** | | | | |
| Test Cases | 25.5 min. (n=373) | 27.6 min. (n=103) | 15.6 min. (n=90) | 110.8 min. (n=13) |
| Control Cases | 31.7 min. (n=334) | 22.4 min. (n=107) | 18.1 min. (n=96) | 60.0 min. (n=11) |
| **Shelby County** | | | | |
| Test Cases | 41.0 min (n=553) | Not Recorded | Not Recorded | Not Recorded |
| Control Cases | 10.2 min. (n=714) | Not Recorded | Not Recorded | Not Recorded |

A major problem in interpreting all of the above findings is that attribution of upper court public defender staff time requirements to lower court ERDC service delivery is dubious at best. The picture is particularly clouded in Passaic County where those test and control cases transferred to upper court were assigned to separate units. The effects of ERDC services are potentially confounded with subsequent differences in the capabilities and enthusiasm of upper court attorneys and, even more seriously, with differences in caseloads. Thus, Passaic County assigned upper court test cases to a group consisting of five attorneys, while upper court control cases were assigned to a total of four attorneys. Since, among all cases transferred to upper court, control cases outnumbered test cases by almost 25% (141 to 113), the apparent differences in attorney time required (favoring control cases by more than 25 minutes per case) may have resulted from the additional staff time available for test cases rather from any real effect of ERDC services. In contrast, test and control cases were handled by all upper court attorneys in Shelby County, so that this potential for confounding was effectively eliminated.

While a complete analysis of the relative costs and savings potentially available through ERDC implementation is beyond the purview of this study, it is interesting to consider the range of potential impacts on Public Defender budgets. In Passaic County, there were 1,241 intakes over an 11-month period, or an annual rate of 1,354 new public defender cases. Of these, an estimated 90 cases resulted in attorney withdrawals, leaving 1,264 total cases handled through final disposition. The average increase of 25.6 minutes in public defender attorney time per case results therefore in an estimated annual increase of 32, 358.4 minutes of attorney time required to process all cases using the ERDC model. This 32,358.4 minutes is equivalent to approximately .26 of a full-time equivalent position, which in turn translates into a total annual cost of between $9,768 and $16,747, depending upon the particular attorneys selected to provide these services.

In Shelby County, the 1,953 intakes received during the 8½-month test period represents an annual intake rate of 2,757 cases. Of these, an estimated 561 resulted in attorney withdrawals, leaving 2,196 handled through final disposition. The average savings of 32.1 minutes per case amounts therefore to an estimated total annual reduction of 70,491.6 minutes in attorney time, or .57 of a full-time attorney. This, in turn, translates into a net savings of between $10,079 and $20,517 based upon Shelby County's salary scales for public defender attorneys.

All of the above analysis of costs or savings is intended to demonstrate that the financial impacts on the Office of the Public Defender itself are likely to be insignificant. This is especially true in contrast with the magnitude of potential savings created elsewhere in the criminal justice system by the introduction of the ERDC model.

Impact on Pretrial Detention

Another impact of the ERDC service model was in terms of defendants' time in jail prior to case disposition. Table VII-3 shows the mean time in detention, prior to either making bail or final disposition, for test and control subjects (excluding cases involving attorney withdrawals) at each of the three sites.

Table VII-3

Jail Time Prior to Disposition

| | Mean | Standard Deviation |
|---|---|---|
| Passaic County | | |
| Test Clients (n = 372) | 29.2 days | 55.7 days |
| Control Clients (n = 387) | 34.9 days | 61.5 days |
| Shelby County | | |
| Test Clients (n = 382) | 32.3 days | 50.6 days |
| Control Clients (n = 546) | 52.7 days | 63.5 days |
| Palm Beach County | | |
| Test Clients (n = 640) | 24.9 days | 42.9 days |
| Control Clients (n = 675) | 26.1 days | 41.8 days |

The differences in means range from 1.2 days in Palm Beach County to 20.4 days in Shelby County. As a percentage of control subjects' jail time, these differences translate into reductions of 16.4%, 38.7%, and 4.8% for Passaic, Shelby, and Palm Beach Counties respectively.

Interpretation of these reductions in jail time must be tempered by two observations made earlier (Chapter IV). First, control clients in Shelby were less likely than test clients to have prior arrest and conviction records. Thus, they might be expected to win pretrial release more frequently; and, accordingly, the 38.7% reduction shown for Shelby County may somewhat overstate real program impact. On the other hand, the more modest reductions shown for Passaic and Palm Beach Counties may in fact represent understatements of the potential effects of ERDC services. Since both of these were faced with extremely overcrowded jail conditions, it is reasonable to presume that even control clients obtained pretrial release more often than might otherwise have been the case.

Despite these caveats, it is nonetheless informative to consider the magnitude of savings which were potentially available in each grantee site. In Passaic County, there were 1,241 intakes over an 11-month period, or an annual rate of 1,354 new public defender cases. Of these, an estimated 90 cases resulted in

attorney withdrawals, leaving 1,264 total cases handled through final dispostion. The average jail time reduction of 5.7 days per case (shown in Table VII-3) thus results in an estimated total potential reduction of 7,241 days of jail time. Using a conservative estimate of $10 in variable costs per jail-inmate day, this reduction translates into a potential savings of $72,411 per year.

Similarly, in Shelby County, the 1,953 intakes received during the 8½ month test period respresents an annual intake rate of 2,757 cases. Of these, an estimated 561 resulted in attorney withdrawals, leaving 2,196 cases handled through final disposition. The total potential reduction in jail time (at 20.4 days per client) is thus 44,873 days. At $10 per jail inmate day, this results in a staggering potential savings of $448,734 per year.

Finally, in Palm Beach County, 2,467 intakes were received over a 12-month period, with an estimated 366 attorney withdrawals. The remaining 2,101 cases represent a potential reduction of 2,611 jail inmate days, or a potential savings of $26,115 per year.

Based upon these findings, it is clear that the reduction in variable jail costs which is likely to result from implementation of the ERDC model is substantial. Given the caveats mentioned above, a reasonable estimate is that potential savings amount to approximately $85 per public defender intake.

Impact on Case Processing Time

The ERDC model's potential for impact on the court system was amply demonstrated. Simple extrapolations from the data presented earlier regarding elapsed time to final disposition (Tables V-27 to V-30) suggest reduction in average case processing time in Passiac County from 17.4 weeks to 13.0 weeks, and in Shelby County from 23.7 weeks to 19.1 weeks. It is reasonable to conclude that the potential for reduction is somewhere between 20% and 25%.

The implication of this conclusion is that adoption of the ERDC model in Passaic County should result in a reduction in the average active public defender case-load of approximately 100 cases, and that implementation in Shelby County should

result in a reduction of approximately 200 cases. These potential reductions are also applicable to the average number of active cases in the criminal court system. While a full examination of the impact of such reductions on court system costs, case backlogs, etc. is beyond the scope of this study, it is safe to say that overall court system efficiency might be substantially enhanced.

Impact on Sentences

While the potential savings in pretrial detention costs and the apparent reductions which can be achieved in court backlogs are encouraging evidence of the value of the ERDC model, differences in post-trial sentencing patterns are equally noteworthy. Table VII-4 shows the percentage of all test and control clients from Passaic and Shelby Counties who received sentences including jail (lower court), prison (upper court), probation, and fines or restitution. The mean severity of each sentence alternative is also shown. Finally, Table VII-4 shows the unconditional sentence expectation (that is, the mean sentence severity across all clients, including those ultimately excused from the system) for each sentencing alternative.

These differences between sentencing expectations of test and control clients may not appear to be substantial. However, as is shown by Table VII-5, when these differences are translated into projected annual cost savings across the entire public defender caseload, the potential for fiscal impact is quite clear. Applying conservative estimates of variable costs--$10 per inmate day in jail or prison, and $3.50 per probationer day--and treating fines or restitution as revenues--Table VII-5 shows that had Passaic County applied the ERDC model to all felony clients, a net annual savings of over $350,000, or $278 per client, might have been realized. In Shelby County the potential savings were even more substantial, amounting to more than $2.3 million, or $1,065 per client.

INSTITUTIONALIZATION

One key indicator of the success of a field test is the extent to which the tested approach is retained by the participating grantees. The decision by a

Table VII-4

Sentencing Expectations

| | | Percent Sentenced | Mean Sentence | Expected Sentence |
|---|---|---|---|---|
| JAIL (Lower Court) | | | | |
| Passaic County | | | | |
| Test Clients | | 23.7% | 1.9 mos. | .45 mos. |
| Control Clients | | 25.9% | 1.7 mos. | .44 mos. |
| Shelby County | | | | |
| Test Clients | | 34.2% | 6.6 mos. | 2.26 mos |
| Control Clients | | 31.6% | 6.4 mos. | 2.02 mos. |
| PRISON (Upper Court) | | | | |
| Passaic County | | | | |
| Test Clients | | 18.6% | 25.5 mos. | 4.78 mos. |
| Control Clients | | 21.3% | 24.2 mos. | 5.15 mos. |
| Shelby County | | | | |
| Test Clients | | 38.0% | 36.5 mos. | 13.88 mos. |
| Control Clients | | 55.7% | 31.7 mos. | 17.65 mos. |
| PROBATION | | | | |
| Passaic County | | | | |
| Test Clients | Lower: | 13.8% | 13.6 mos. | 5.66 mos. |
| | Upper: | 10.1% | 37.5 mos. | |
| Control Clients | Lower: | 11.3% | 14.0 mos. | 7.21 mos. |
| | Upper: | 15.4% | 36.6 mos. | |
| Shelby County | | | | |
| Test Clients | Lower: | 13.9% | 11.4 mos. | 2.05 mos. |
| | Upper: | 1.5% | 32.0 mos. | |
| Control Clients | Lower: | 10.2% | 11.6 mos. | 1.84 mos. |
| | Upper: | 2.5% | 26.4 mos. | |
| FINES/RESTITUTION | | | | |
| Passaic County | | | | |
| Test Clients | Lower: | 31.2% | $ 278.41 | $ 130.19 |
| | Upper: | 21.3% | $ 203.82 | |
| Control Clients | Lower: | 29.9% | $ 301.67 | $ 124.49 |
| | Upper: | 25.9% | $ 132.57 | |
| Shelby County | | | | |
| Test Clients | Lower: | 16.0% | $ 188.92 | $ 31.58 |
| | Upper: | 1.5% | $ 95.00 | |
| Control Clients | Lower: | 9.8% | $ 178.59 | $ 20.26 |
| | Upper: | 4.9% | $ 55.00 | |

Table VII-5

Potential Fiscal Impact of Sentencing Differences

| | Average Sentence | Gain (Cost)* per Case | Total Gain* (Cost) | Savings (Cost) |
|---|---|---|---|---|
| **Passaic County** | | | | |
| Jail Sentences | | | | |
| Test Clients | 13.72 days | (.34 days) | (429.76 days) | $ (4,298) |
| Control Clients | 13.38 days | | | |
| Prison Sentences | | | | |
| Test Clients | 145.46 days | 11.1 days | 14,030.4 days | $ 140,304 |
| Control Clients | 156.56 days | | | |
| Probation Sentences | | | | |
| Test Clients | 172.23 days | 47.17 days | 59,622.88 days | $ 208,680 |
| Control Clients | 219.40 days | | | |
| Fines/Restitution | | | | |
| Test Clients | $ 130.19 | $5.70 | | |
| Control Clients | $ 124.49 | | | $ 7,205 |
| | TOTAL POTENTIAL SAVINGS (COST): | | | $ 351,891 |
| **Shelby County** | | | | |
| Jail Sentences | | | | |
| Test Clients | 68.66 days | (7.24 days) | (15,899.04 days) | $ (158,990) |
| Control Clients | 61.42 days | | | |
| Prison Sentences | | | | |
| Test Clients | 422.18 days | 114.79 days | 252,078.84 days | $2,520,788 |
| Control Clients | 536.97 days | | | |
| Probation Sentences | | | | |
| Test Clients | 62.30 days | (6.21 days) | 13,637.16 days | $ (47,730) |
| Control Clients | 56.09 days | | | |
| Fines/Restitution | | | | |
| Test Clients | $ 31.58 | $ 11.32 | | |
| Control Clients | $ 20.26 | | | $ 24,859 |
| | TOTAL POTENTIAL SAVINGS (COST): | | | $2,338,927 |

*As described earlier in this chapter, Passaic County had an estimated 1,264 clients per year; Shelby County had an estimated 2,196 clients per year.

grantee to retain any or all of the elements of a test design must be based upon a balancing of the benefits which institutionalization will provide against the increased costs which it will require. Therefore, the degree to which the approach is institutionalized is a practical measure of the success of the field test. To be truly successful a field test approach should both achieve positive analytical results, and be institutionalized by the participating agencies.

Each of the Early Representation by Defense Counsel grantees has institutionalized one or more of the elements it tested during the Field Test. There are elements of the test, however, which universally have been rejected. These elements should be examined first because they provide insights into the practical limitations of ERDC. They include:

- Early Client Contact. Contact with clients prior to First Appearance placed burdens on the test staff at each of the offices. None of the offices intend to retain the early screening components that had to be established for the test. For Passaic County, the difficulty of providing early contact was demonstrated by the extraordinary effort required of the Passaic test attorneys. Other municipal courts of the 14 jurisdictions which make up Passaic County also have unscheduled First Appearances and some variation in lock-up procedures. Providing early representation in a multi-jurisdictional setting presents problems to a public defender where there is more than one lock-up facility to detain defendants, and where municipal courts have no regular scheduling of First Appearances.

  The early contact component also proved difficult for the Palm Beach and Shelby County offices. For these offices, the difficulties resulted from the need to rely upon judicial appointment. The Shelby County test was affected by the private bar's resistance to early screening and any attempts to institutionalize early screening would face even stiffer opposition. The judges did not mind the screening *per se*, but would never relinquish their appointment authority.

  The Palm Beach County office continues to represent clients at First Appearance, but would have difficulty in providing services much earlier given the need to retain special staff to do so. Client contact and representation prior to First Appearance may be impractical for those public defender agencies which must rely upon judicial appointment.

- Weekend Coverage. Weekend coverage presented problems for each of the sites. The Shelby and Passaic County test attorneys were required to work on the weekends, and neither of the offices intends to provide that level of coverage to its clients in the future. The Palm Beach County test attorneys did not provide weekend coverage; however, the office has always represented defendants at First Appearance on weekends, and will

continue to do so in the future. Providing weekend client coverage would be a drain on resources for any public defender which did not have to provide such coverage otherwise.

- Continuous Representation. Certain elements of continuous representation will not be retained by the grantees. Palm Beach County will not institutionalize vertical representation. In Palm Beach County, vertical representation is incompatible with the criminal justice system since the prosecutor's office is organized horizontally, and since coverage of First Appearance and Arraignment conflicts with other attorney duties. Vertical representation is perhaps most appropriate in jurisdictions where the prosecutor is organized vertically, and where the regular scheduling of court hearings is compatible. Vertical representation should not be attempted by public defender agencies without the full cooperation of the entire criminal justice community because it places enormous pressure upon the individual public defender.

  Neither the Passaic nor the Shelby County ERDC projects realized major benefits from full continuous representation. It is possible that some means of maintaining contact with clients will be devised, but the grantees found that there are periods where their systems are "idle," and where the commitment of resources to support cases during those periods is not easily justified. Neither Passaic nor Shelby had any success in implementing their unique negotiating options. In the absence of methods that speed up the Grand Jury process or procedures that allow the prosecutor to continue negotiations, continuous coverage will not be institutionalized.

The following discussion describes the intentions of the three grantees to institutionalize certain of the ERDC procedures. One central theme that reoccurs throughout the plans of the offices is that the commitment of additional resources to the pre-Arraignment period is justified on the practical grounds of enhancing service delivery, improving the attorney-client relationship, and improving the criminal justice process--the three goals of the ERDC Field Test.

## The Passaic County Office of the Public Defender

Authorization was received from the State Public Defender to assign two staff attorneys to the pre-Arraignment stage for the 14 municipalities of the Passaic Trial Region. One of those attorneys will be the junior test attorney, whose year-long ERDC experience has prepared him well to cover the municipal court. The contract attorney system will end in Passaic County. All key actors in the criminal justice community agreed that there must be full time representation in municipal court to support the activities of the Prosecutor's screening unit.

The municipal court attorneys will not be able to provide services as early as the test required, but representation at First Appearance will be their goal. No full-time investigators will be assigned to municipal court, but the staff investigators will be made available on a case-by-case basis.

The excellent case preparation effects of the test are to be retained for all cases not resolved in municipal court, since municipal attorneys will be expected to prepare their cases for the "pass off" to felony attorneys. Procedures have been developed to ensure the smooth running of the municipal court process, and the efficient transfer of information to the superior court.

Shelby County Office of the Public Defender

The benefits of ERDC in Shelby County have not all been institutionalized. Today, public defenders in the General Sessions Court are not present at First Appearance. The bail setting process is concluded without their assistance. Thus, one of the most important benefits of the Field Test in Shelby County was not institutionalized. Some informed observers do contend, however, that the Public Defender is appointed earlier now than before the test--as much as one week earlier in some cases.

The individualized case assignment system has been institutionalized in the felony division of General Sessions Court. Three experienced public defenders have been assigned to the division, including one felony attorney and one of the three ERDC test attorneys. The addition of a third public defender reflects the added importance given to municipal court representation by the Field Test.

Perhaps the most worthy element of ERDC in Shelby County was early investigation. The Chief Public Defender had difficulty in getting this position funded by the county, and was successful only after advocating for almost a year. His efforts have been well compensated. Approximately 40 cases per month have been investigated at the General Sessions level since the test ended in August, 1983. The "refusal to prosecute" form has been institutionalized, as have earlier and more substantive negotiations.

Today, with the General Sessions felony court served by a staff of three attorneys, a "street" investigator, and a client interviewer, the General Sessions process proceeds faster than it did prior to ERDC, even with the expanded caseload. It also has enabled the office to maintain the high level of case preparation for those cases not settled in municipal court. Thus, the benefits of enhanced representation will be preserved by the office.

Palm Beach County Office of the Public Defender

The positive aspects of test services were retained in Palm Beach County by the creation of a Public Defender Intake Unit housed at the new jail complex. It is staffed by two lawyers and a full-time secretary. The intake lawyers provide early representation services, including representation at First Appearance. Intake lawyers now negotiate directly with the Intake Unit of the State Attorney, which is also housed at the new complex. When early investigation seems warranted, all investigators are available for pre-Arraignment investigation. Since a file will be opened on a case by the new Intake Unit prior to Arraignment, it is possible to pass information on to a regular felony attorney when the case is arraigned in Circuit Court.

One aspect of the test experience that the office chose to institutionalize is a commitment to standardized case management. The introduction of the AMICUS case management system represents a dramatic step in achieving this goal. The use of AMICUS should improve and expedite internal office management. The management of cases will continue to be the responsiblity of each Division, but the use of the AMICUS forms by both Intake and Felony staff will enable the central office to analyze case data centrally which will improve overall planning and reporting. Case data will be computerized to facilitate that analysis.

SUMMARY

The findings reported in this chapter reflect three substantially divergent perspectives. From the standpoint of criminal justice system participants, the primary effects of the ERDC Field Test were reported as relatively modest

improvements in case management capabilities: attorney-client relationships were improved; case processing was expedited; and the results of initial bail-setting hearings were more equitable. From the standpoint of systemwide costs and benefits, the ERDC model showed substantial promise. Overall system costs might have been reduced dramatically had the ERDC model been applied to all cases in the test sites. From the standpoint of subsequent institutionalization, only some aspects of ERDC services were retained. In general, however, all three counties are likely to continue to reap some of the benefits of the ERDC model.

Standing Committee

of the

Court of Appeals

on Pro Bono Legal Service

# STATE ACTION PLAN AND REPORT

Submitted August 1, 2005

Revised December 2006

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# State Pro Bono Action Plan
# and
# Report of Standing Committee on Pro Bono Legal Service

## INTRODUCTION

In 2002, the Court of Appeals of Maryland adopted three new rules regarding the development and practice of pro bono legal services:

1) Rule 16-901 established the Court's Standing Committee on Pro Bono Legal Service and charged it with the development of a State Pro Bono Action Plan;

2) Rule 16-902 created local pro bono committees with the responsibility of developing local action plans; and

3) Rule 16-903 required annual reporting of pro bono hours on a Pro Bono Legal Service Report form.

The Court also modified Rule 6.1 by refining the definition of pro bono *publico* legal service and by establishing 50 hours of annual service as an aspirational goal.

The Standing Committee respectfully submits this State Pro Bono Action Plan and Report in compliance with Rule 16-901. (For a list of Standing Committee members, see **Appendix A**). The purpose of this Plan is to "promote increased efforts on the part of lawyers to provide legal assistance to persons of limited means." Rule 16-901 (c) (1). In the Plan, the Committee:

a. reviews evidence of the need for pro bono services;

b. reviews the existing pro bono system in Maryland;

c. reviews and assesses the results of the Local Pro Bono Action Plans and makes recommendations for changes to the local committee rule and practices for local committees;

d. assesses the data generated by the reports required by Rule 16-903 and makes recommendations for changes to the reporting form; and

e. makes recommendations for enhancing judicial involvement in promoting pro bono service and the system of delivery of pro bono legal services.

After three years of study, extensive work with the local pro bono committees, and input from various stakeholders around the state, the Standing Committee developed this State Pro Bono Action Plan. The Plan encompasses an extensive description of the legal needs, the scope and extent of pro bono legal services in the state, a summary of the local plans and a series of recommendations for the Standing Committee, Court of

Appeals, the Administrative Office of the Courts (AOC) the bar, the bench and the legal services community. The Standing Committee submits this Plan with the understanding that it is a work in progress which should be evaluated and revised as various local committees complete their plans and as others revise their plans in response to the changing legal needs of their communities.

*Since the submission of the original Action Plan in 2005, several of the recommendations have been implemented. Others are in the process of being implemented. The status of those recommendations is incorporated in the revisions to this Plan.*

## EXECUTIVE SUMMARY

Studies on national, state and local levels demonstrate that a substantial portion of the legal needs of those with limited means remain unmet. In Maryland, despite the extraordinary efforts of staffed legal services programs, pro bono referral programs and a bar with a strong tradition of pro bono service, many poor Marylanders are unable to obtain access to lawyers to assist them with their legal problems. Although efforts of pro bono lawyers cannot address the entire unmet need, the bar has substantial untapped resources which, if mobilized, could greatly increase access to justice for those in need.

The Standing Committee has convened monthly since November of 2002 to help marshal the pro bono reporting process and analyze the results, conduct surveys to identify legal needs, facilitate organization of the local committees and provide materials and resources to the committees to assist them in their planning efforts. The Standing Committee has also met with local committees and organized regional meetings to foster the development of local pro bono plans. Local committees have formed throughout the state, and to date, nineteen (19) have produced local pro bono plans.[1] Planning on the local level has resulted in significant and innovative pro bono initiatives, some of which are summarized in this report.

The efforts of the Standing Committee and local committees have consisted of extraordinarily hard work by volunteers who have been dedicated to increasing access to justice. The efforts have been particularly effective where the judiciary has played a significant role. As a result of this work and the local plans, the Standing Committee is making twenty (20) specific recommendations. Those recommendations are found at **Appendix B**. A few of the key recommendations are summarized below:

1. Specific changes to Rule 16-902 to increase judicial involvement on local committees and to provide for the continuity and stability of local committees;

2. The publication of a Best Practices Manual on pro bono development;

[1] The only counties which have not submitted formal plans to date are: Cecil, Garrett, Kent, Queen Anne's and St. Mary's counties.

3. A mechanism by the Administrative Office of the Courts (AOC) for funding pro bono initiatives of local committees;

4. Increased publicity of training opportunities and expanded recruitment of pro bono lawyers to specifically address the unmet family law need;

5. Modification of government agency policies and practices to support pro bono legal work; and

6. Encouragement of judicial leadership and involvement in pro bono activities.

## I. EVIDENCE OF THE UNMET LEGAL NEED

### *A. National, State and Local Studies*

National, state and other studies have consistently found that the legal needs of the poor remain unmet.[2] In 1994, the ABA performed a national study to assess the legal needs of low- and moderate-income individuals.[3]

- Approximately half of the study participants had experienced a legal problem during the past year, but nearly three-quarters of the low-income households and nearly two-thirds of the moderate-income households had not received legal assistance.[4]

- The most common categories of unmet legal needs reported dealt with issues relating to personal finance and consumer problems, housing and property, community and regional issues including inadequate police and other municipal services, and family and domestic issues.[5]

Statewide studies have reached the same distressing conclusion: the legal needs of the poor, including the elderly, children, the disabled and victims of domestic violence are not being adequately addressed. Studies of unmet legal needs conducted in Maryland mirror the findings of other states. Although Maryland is one of the wealthiest states in

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[2] Dissatisfaction with the legal system is common among unrepresented persons. *See generally,* D. Michael Dale, *The State of Access to Justice in Oregon. Part I: Assessment of Legal Needs*. Sponsored by the Oregon State Bar, the Oregon Judicial Department, The Office of Governor John Kitzhaber (Mar.31, 2001) (on file with the Legal Aid Bureau, Inc.) (Studies conducted in Oregon found that almost 75% of people have negative feelings about the legal system when they are unrepresented. By contrast, most people who are represented report feeling positive about the legal system).

[3] American Bar Association, Consortium on Legal Services and the Public, *Legal Needs and Civil Justice. A Survey of Americans. Major Findings from the Comprehensive Legal Needs Study* (1994).

[4] *Id.* at approx. 1.

[5] *Id.* at approx. 3.

the United States, nearly half a million Maryland residents - including 141,000 children and over 50,000 individuals aged 65 and older live below the poverty threshold.[6] In 2005, "poverty level" is defined as having an annual income of $19,350 for a family of four.

The numbers based on the poverty level are merely the tip of the iceberg. Hundreds of thousands of Marylanders live above the poverty line but struggle daily to provide adequate shelter, food, medicine and other necessities for themselves and their families.[7] For them, a lawyer (and justice) is an unlikely, unimaginable, and unobtainable luxury.

In 1995, a survey of legal needs found that low to moderate income Marylanders experienced at least one legal problem in the previous year, but less than a third contacted an attorney.[8] Of those who contacted a lawyer, almost a third did not obtain representation.[9] The most commonly cited legal problems experienced by low to moderate income Marylanders who participated in the survey were problems relating to housing, employment, consumer and family law. None of the survey respondents who had legal needs related to housing had obtained legal representation to assist them.[10]

According to Maryland's primary legal needs study conducted by the Maryland Legal Services Corporation's Advisory Council in 1988, only 20% of individuals who were experiencing a legal problem and who were eligible for legal assistance (from state-funded sources) actually received free help. Eighty percent did not.[11] Findings from a

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[6] In Maryland, 438,676 individuals live below the poverty level. U.S. Census Bureau, American Fact Finder, *DP-3. Profile of Selected Economic Characteristics: 2000. Maryland.* http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_DP1_geo_id=04000US24.html.

[7] For a family of three, the poverty guideline is currently set at only $1,340.00 a month. However, the cost of rent alone in some Maryland counties can exhaust that amount. For example, in Montgomery County, the average cost of monthly rent for a two-bedroom apartment is over $1,100.00. Even with a housing subsidy, a family of three with income at or above the federal guideline may not be able to pay for other significant costs including food, clothes, daycare, medicine, educational supplies, and transportation. Recently, a study found that in order to make ends meet, a family of three living in Montgomery County needs an average income of $4,085 per month, which is over three times the amount established by the federal guidelines. *See generally,* Diana Pearce, Ph.D., with Jennifer Brooks, *The Self-Sufficiency Standard for Maryland.* (Dec. 2001) Prepared for Advocates for Children and Youth and The Center for Poverty Solutions <http://www.sixstrategies.org>; *See also,* Ann O'Hara and Emily Cooper, *Priced Out in 2002* 1 (May 2003) (In 2002, the average rent for a one-bedroom apartment was equal to 105 percent of the SSI benefit amount received by individuals with disabilities) http://www.tacinc.org/cms/admin/cms/_uploads/docs/PO2002.pdf.

[8] University of Baltimore, School of Law; University of Maryland, School of Law; Maryland Bar Association, *Maryland Legal Needs Assessment Survey.* Mason-Dixon Political/Media Research, Inc. 10 (Feb. 1995).

[9] *Id.* at 10.

[10] *Id.* at 9.

[11] *Action Plan for Legal Services to Maryland's Poor,* A Report of the Advisory Council of the Maryland Legal Services Corporation (1988).

1992 study regarding access to justice in family law matters were even more disconcerting: 11% or less of low income persons who needed family law legal assistance received it.[12]

### *B. Restrictions and Limitations on Representing the Indigent*

Approximately one million people in Maryland are financially eligible for free legal services.[13] There are approximately two hundred attorneys who work for staffed legal services providers throughout Maryland. That translates to a ratio of approximately one (1) legal services attorney for every 5,000 poor Marylanders, while the overall ratio for the general population in Maryland is one (1) attorney for every 173 people.[14]

Because of inadequate resources, legal services providers must reject thousands of compelling cases. Providers are placed in the difficult position of having to prioritize which applicants most need their assistance. Many organizations perform a form of legal triage, accepting only the most critical cases, providing less help than would be optimal on many cases, or providing substantial assistance in a smaller number of matters that they believe will have a substantial impact on many.

As the only statewide, federally-funded staff legal services program, the Legal Aid Bureau's mandate is to provide civil legal services to low-income persons and the elderly. There are a few restrictions on the eligible population beyond income[15] and several mandated restrictions on the type of legal needs that can be addressed.[16] There are only enough funds to support approximately eighty attorneys to respond to legal

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[12] Advisory Council on Family Legal Needs of Low Income People: A Joint Project of the Maryland Legal Services Corporation and the University of Baltimore School of Law, *Increasing Access to Justice for Maryland's Families* 50 (Mar. 1992). See also The MD Judicial Commission on Pro Bono, *Report and Recommendations.* (March 2000) (*citing* the *Action Plan for Legal Services to Maryland's Poor, A Report of the Advisory Council of the Maryland Legal Services Corporation* (1988)).

[13] The Maryland Judicial Commission on Pro Bono, *Report and Recommendations, supra,* at 2.

[14] According to the *27th Annual Report* of the Attorney Grievance Commission of Maryland, there are 30,646 attorneys admitted into practice in Maryland. Maryland has an overall population of 5,296,486. U.S. Census Bureau, American Fact Finder, *DP-1. Profile of General Demographic Characteristics:2000 Maryland.*
http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_DP1_geo_id=04000US24.html.

[15] The approximately 67,000 undocumented individuals and prisoners who Legal Aid cannot represent are but a fraction of the 1 million low-income individuals and the additional 500,000 elderly persons who make up the nearly 1.5 million persons potentially eligible for some type of services from Legal Aid.

[16] Federal regulations prohibit representation in certain fee-generating cases, specified types of drug-related public housing evictions, redistricting, abortion, euthanasia and other cases – still, a very small percentage of the legal needs of the low-income and elderly.

needs statewide.[17] As a result, Legal Aid has established strict case acceptance guidelines.

In the family law area, Legal Aid limits its representation (beyond advice, information and referral) to a narrow group of cases: custody issues where a child is at risk of abuse or neglect or where there is removal (threatened by lawsuit or actual) of a child from a long-term custodian; spousal support where the household is not eligible for subsistence income; and cases involving the Uniform Child Custody Jurisdiction Act. Thus, many custody and most visitation matters and divorces, as well as guardianships, adoptions, child support, name changes and other domestic matters, do not fall under the guidelines.[18]

Representation in housing cases is limited to priorities including: retaining public and subsidized housing, private breach of lease cases, mobile home evictions and substandard conditions. Advice and brief service is generally the only assistance Legal Aid can provide for a wide variety of other kinds of mistreatment by landlords.[19]

In 2004, the Legal Aid Bureau (LAB) reported that it served 46,431 clients and of those, 80% were given advice, brief service, negotiation without litigation, information or referral only. Removing the 7,000 Child in Need of Assistance (CINA) cases, the number served is reduced to approximately 40,000 and the number served with more than brief advice is only five (5%) percent. Approximately 7,134 additional cases were handled on a pro bono basis through attorneys affiliated with a Maryland Legal Services Corporation (MLSC) program. All MLSC grantees combined served 109,419 clients.[20]

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[17] Although Legal Aid currently employs approximately 130 attorneys, approximately fifty of them solely represent children in Child in Need of Assistance cases, which are not included in the services discussed here. Of the remaining eighty, a number have supervisory and other duties which means that some of their time must be allocated to activities in addition to direct client representation.

[18] In fact, most "garden-variety" custody disputes between recently-separated parents do not meet these guidelines, yet the demand for such representation is great. Further, the effect on primary caretakers and their children, many of whom suddenly find themselves living in poverty, and who are forced to proceed without representation, often against a represented spouse with greater financial resources, can be disastrous.

[19] Housing and family law cases form a significant portion of LAB's practice, reflecting the high demand for these litigation-intensive areas of law. In addition, LAB assists clients to obtain and retain critically important public benefits and health care, and helps to protect basic workplace and consumer rights, as well as access to education, when there are no other providers to whom aggrieved individuals and families may turn. Within each of those areas, LAB has identified types of cases which are accorded "priority", based on the potential or actual effect on the safety, health, stability or self-sufficiency of those involved.

[20] Maryland Legal Services Annual Report, July 1, 2003- June 30, 2004.

### *C. Benefits of Representation*

Studies have found that prompt legal representation can prevent a downward slide and can be a cost-effective stabilizing force. A recent study, addressing a Department of Justice report about the decline in incidents of domestic violence, found that the provision of legal services was one of three factors leading to the decline of domestic violence.[21]

In Maryland's overall legal needs study, the Department of Human Resources staff estimated that at their administrative hearings, when counsel was present (usually Legal Aid Bureau attorneys or paralegals) there was a 70-80% reversal rate in favor of the claimant as compared to 40-45% without counsel. Maryland Department of Health and Mental Hygiene staff also reported a 76% reversal rate (versus 46%) when claimants were represented by counsel.[22]

Despite the fact that having a lawyer is often the single most important factor in obtaining meaningful access to justice, many of Maryland's poor seek legal representation but continue to be refused services because of a lack of resources. Substantially increasing the pro bono effort is one method to address, at least in part, the denial of access to justice.

## II. THE PRO BONO SYSTEM IN MARYLAND

### *A. Development of Organized Pro Bono Programs*

The first organized pro bono referral program began in 1973 in Montgomery County through the local bar association. In 1981, Maryland established the Maryland Legal Services Corporation (MLSC) as the state's Interest on Lawyers' Trust Account (IOLTA) program to fund legal services. The Maryland Volunteer Lawyers Service (MVLS) was created by the Maryland State Bar Association (MSBA) at the same time specifically to match volunteer lawyers around the state with clients in need. By 1989, MVLS and other pro bono referral and legal services programs funded by MLSC were referring approximately 1800 pro bono cases statewide.

In 1989, the MSBA embarked on a volunteer recruitment campaign called the "People's Pro Bono Campaign."[23] The Campaign included letters from then Chief Judge Robert C. Murphy with a survey to all licensed attorneys in the state. Close to 60% of the

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[21] *See,* Amy Farmer and Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence,* (finding that the provision of legal services, improved educational and economic status of women, and demographic trends, largely the aging of the population, were significant factors relating to the decline).

[22] *See,* Action Plan for Legal Services to Maryland's Poor—A Report of the Advisory Council of the Maryland Legal Services Corporation (January 1988), p. 12.

[23] This was in response to the legal needs study's finding that less than twenty percent of Maryland's poor had access to an attorney and a recommendation that the Court adopt a mandatory pro bono rule. In lieu of such a rule, the MSBA pledged to the Court that it would superintend a major voluntary pro bono effort.

February 8, 2011

University of Maryland Francis King Carey School of Law
Access to Justice Clinic
500 West Baltimore Street
Baltimore Maryland, 21201

Maryland Senate Judicial Proceedings Committee
Miller Senate Office Building, 2 East Wing
11 Bladen St., Annapolis, MD 21401

RE: SB 165 and SB 422

Dear Members of the Senate Judicial Proceedings Committee,

Enclosed please find the written testimony of Meredith Healy, Nathan Horne, JaMar Mancano, and Shari Silver, second and third year law students at the University of Maryland Francis King Carey School of Law.[1] We also submit for your review, an editorial recently published in the Baltimore Sun that was written by our colleague, Jake Schaller, and a petition signed by 270 students, staff and faculty from the law school in support of the Court of Appeals' unanimous decision in *Richmond v. DeWolfe*.

We welcome further discussion of this matter. Please direct all correspondence to JaMar Mancano, who can be contacted at jmanc003@umaryland.edu.

Thank you for your time and consideration of this very important issue that seeks to guarantee the right to counsel to indigent defendants accused of a criminal offense.

Respectfully submitted,

Meredith Healy
Nathan Horne
JaMar Mancano
Shari Silver

Enclosures: 22

[1] Formally, the views expressed in the enclosed materials do not necessarily reflect those of the University System, the University, or the Law School as an institution.

**Written Testimony of Meredith B. Healy[1]**
**Third-Year Law Student, Access to Justice Clinic**
**University of Maryland Francis King Carey School of Law**
**Maryland Senate Judicial Proceedings Committee**
**February 8, 2012**

**Regarding SB 165 and SB 422**

I am writing in support of the Maryland Court of Appeals' recent unanimous ruling in *Richmond v. DeWolfe*. This decision held that low-income, indigent defendants have a right to counsel both at the initial appearance before a Maryland District Court commissioner and at the bail review hearing before a Maryland District Court judge. Before *Richmond*, representation was not provided to indigent people at the first appearance when a commissioner makes an initial bail determination, nor was it provided at most counties' bail review hearings. Absent a lawyer, most people accused of a crime waited one month – often in jail – before their lawyer appeared in court. Without the aid of counsel, unrepresented defendants were more likely to make incriminating and prejudicial statements to a commissioner or judge; many nonviolent defendants, unable to afford bail, served weeks of incarceration pre-trial.

My experience as a student-attorney in the University of Maryland Francis King Carey School of Law's Access to Justice Clinic showed me first-hand the importance of the Court of Appeals' ruling and the necessity of counsel at the initial appearance. As a Maryland Rule 16 student-attorney, I represented several low-income defendants charged with a variety of nonviolent crimes. I reviewed the charges, conducted research, verified information, and prepared arguments for bail re-review hearings. However, even when clients were released at their re-review hearing, they had already served weeks of pre-trial incarceration. Many times this incarceration jeopardized the client's ability to support or care for his or her family, maintain employment, or continue his or her education. I believe that we can change this situation by guaranteeing legal representation at the outset of a criminal proceeding.

I am convinced that lawyers can conduct similar preparation and advocacy for clients at the initial appearance. Doing so not only would protect indigent defendants' liberty before trial, but would prevent the loss of support, employment, and education. Moreover, representation at the initial appearance would keep nonviolent defendants from serving weeks, if not months, of incarceration before a finding of guilt or innocence at taxpayers' expense.

After representing clients this past year as a student-attorney and seeing my clinic colleagues do the same good job, I see that a lawyer's representation at the initial appearance is essential to protect that person's liberty interest pre-trial, and to make certain the fair administration of Maryland's criminal justice system. I believe that my advocacy at the initial appearance would have given commissioners verified information that may otherwise have been unavailable, and enabled commissioners to make a bail determination that was fair and reasonable under the law. Moreover, if a lawyer provides this information at the earliest possible

[1] My views do not represent those of the University System, the University or the Law School as an institution.

stage of the criminal proceeding – the initial appearance – then the cost to the taxpayer of incarcerating nonviolent offenders before trial will also be significantly reduced.

For the above reasons, I oppose SB 165 and SB 422, and urge this Committee to implement the Court of Appeals' ruling in *Richmond v. DeWolfe*.

**Written Testimony of Nathan Horne[1]**
**Third-Year Law Student, Access to Justice Clinic**
**University of Maryland Francis King Carey School of Law**
**Senate Judicial Proceedings Committee**
**February 8, 2012**

**Regarding SB 165, SB 422**

I am a third-year law student at the University of Maryland Francis King Carey School of Law. This past semester, I enrolled in the Access to Justice Clinic which represents people accused of non-violent crimes who remain in jail because they cannot afford the bail amount. I chose the Access to Justice Clinic because I have a strong interest in criminal law and wanted to gain valuable courtroom experience before graduation.

In the Justice Clinic, I was confronted with situations that demonstrated the undeniable benefit of representation at the initial appearance as opposed to a bail review hearing. During the semester, I represented five clients, three of which had drug or alcohol problems. I assisted those clients who expressed an honest desire to overcome their problems. Each had been arrested for a relatively minor, non-violent crime such as drug possession, trespass, and simple theft that they viewed as a by-product of their substance abuse. Two appeared primarily concerned with a more permanent solution to their problems, which usually meant an in-patient drug treatment facility. My colleagues and I called various programs and got the clients admitted for an evaluation. When we appeared before the re-review judge, we presented the option of drug/alcohol treatment and found many judges receptive to clients who expressed a sincere desire to better themselves and become a well-adjusted member of society. Many judges allowed pretrial release with the condition of continued treatment in a residential facility, which was justified as the majority of our defendants reappeared for their court date. This alternative was, to me, a better long-term solution and also saved taxpayer dollars from the expense of continued jail.

The attorney-client interview before the initial appearance would be the ideal situation to discern which defendants had an honest desire to enter a treatment facility. Once a good candidate was identified, the attorney (or social worker) could contact a treatment facility and have the acceptance papers ready for the bail review hearing the next day court was in session. Thus, instead of having a defendant sit in jail for thirty days without getting the help they need to be a fully functioning member of society, he or she would begin the recovery process.

As a student lawyer practicing under faculty supervision, I believe our justice system works best with representation at the first appearance for the individual defendant, for the taxpayers who are saving money, and for the public at large.

**For these reasons, I oppose SB 165 and SB 422.**

[1] Formally, the views I present do not necessarily reflect those of the University System, the University, or the Law School as an institution.

**Written Testimony JaMar S. Mancano**
**Third Year Law Student, Access to Justice Clinic,**
**University of Maryland Francis King Carey School of Law**
**Senate Judicial Proceedings Committee**
**February 8, 2012**

**Regarding SB 165 and SB 422**

I write in support of the Maryland Court of Appeals recent landmark ruling in *Richmond v. DeWolfe* that recognized indigent defendants' right to counsel when they first appear before a Maryland District Court commissioner and at their second appearance before a reviewing judge.

I am a third-year law student from the University of Maryland Francis King Carey School of Law. During my second and third years of law school, I had the unique opportunity of working with the Access to Justice Clinic.[1] The Access to Justice Clinic provides free representation to people at bail re-review hearings in Baltimore City. As a student attorney I directly represented clients at bail re-review hearings. My clients were generally charged with non-violent crimes, and had been in jail anywhere from one to three weeks because they could not afford the bail that was set at their initial bail hearing and bail review hearing before a judge.

I support the court unanimous ruling in *Richmond* because I have seen first hand the effect an attorney can have at a bail hearing, as well as the consequences when a defendant goes unrepresented. From my own representations and observations defendants have had a great deal of success when they have the assistance of an attorney. An attorney is generally able to provide the judge with details and verified information about the accused that help the judge determine whether to release the defendant or lower the bail.

One of my more challenging cases demonstrates exactly why it is vital to have an attorney at the initial bail hearing. My client was an 18 year-old student, working on a GED degree. He was charged with second-degree assault. At most, the allegations described his slight push and contact of his mother during an argument. He was in jail for 22 days before I began my representation because he and his family could not afford his $250 bail.

When I called his mother to verify his residence, she informed me that she had gotten into an argument with her son over finding a job and cleaning up the house, but that there no physical contact between the two. In fact, she had contacted the state's attorney office

[1] Formally, the views I present do not necessarily reflect those of the University System, the University or the Law School as an institution.

to inform them that there was no assault, but received no assistance from the office. She wanted her son to come home, but did not have the money to post the bail.

I was able to arrange for the mother to come to court for her son's bail re-review hearing to present this information to the judge. Because of my investigation, and the information provided by the mother, the judge agreed to release my client on his own recognizance. The information presented at the bail re-review was later used to dismiss the charges against my client. Had I represented my client at the initial bail hearing, I would have contacted the mother earlier and been able to provide the information to the commissioner at the bail hearing, preventing my client from remaining in jail for 22 days on a charge that would later be dismissed.

From my experiences, I believe that having an attorney at the initial bail hearing is necessary to ensure justice when the accused's liberty is at stake. Please support the Maryland Court of Appeals' unanimous decision in *Richmond v. Dewolfe* by rejecting Senate Bill 165 and 422.

**Written Testimony of Shari H. Silver**
**Second-Year Law Student, Access to Justice Clinic**
**University of Maryland Francis King Carey School of Law**
**Senate Judicial Proceedings Committee**
**February 8, 2012**

**Regarding SB 165, SB 422**

I write as an Access to Justice Clinic student attorney in strong support of the Maryland Court of Appeals decision in *Richmond v. DeWolfe.*[1] While my colleagues will address the indispensable role of a lawyer during the commissioner hearing, I will emphasize the unexpected, yet vital impact that the attorney can have outside of judicial proceedings. Sometimes, as I experienced first-hand, the lawyer can make a tremendous difference just by making a phone call.

When I arrived in Baltimore City Central Booking to meet and interview my client, Ms. S.,[2] she was surprised to see me. Ms. S had spent four days in jail for non-violent offenses, while she attempted to get in touch with her loved ones. During the interview, I made a promise to Ms. S to call Mr. D., the father of her child and her partner of over twenty years. When I called Mr. D later that day, I realized that I was the first person to contact Ms. S's family members and to educate them on the process of posting bail. I explained where the family had to go to pay the bail, as well as the meaning of a cash bond. The family had not known that money deposited with the court would be returned, which made the biggest difference since they could not afford to pay a bondsman's non-refundable fee. I called again the next day, and Mr. D said that the family was collecting money and would follow my advice. Five days later, Ms. S's family posted bail, and she returned home. Without the assistance of a lawyer, Ms. S would have remained in jail for another three weeks, simply awaiting her next court date. It took only a few minutes and a phone call to begin the process of securing Ms. S's pretrial liberty.

I also worked as co-counsel with one of my clinic colleagues, who had a similar experience. We spoke to our client's father, who also did not know about the bail procedures or that he would recover the 10% cash bail when the case was over. My colleague met the father at Central Booking and did everything possible to make the process move speedily.

I entered the Access to Justice Clinic thinking that the greatest impact I could have is in the courtroom. But, I soon realized that the work of a lawyer comprises so much more than a powerful argument in court. As a student lawyer, I strive to know my client and to gain her trust. My promise to Ms. S to call her family was, in truth, a rather small one, but it made all the difference in earning my client's confidence, informing her family of the process of posting bail, and eventually, helping Ms. S regain her liberty. I am certain I would have done the same had I represented my client at the initial appearance.

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[1] My views do not represent those of the University System, the University, or the Law School as an institution.
[2] To protect the privacy of my client and her family, I will refer to them only by initials.

The Court of Appeals guarantees representation at the first hearing. I urge the Committee to allow that decision to stand, so that every defendant can gain the benefit of a lawyer's assistance and advocacy, including making a very important call to home.

I oppose SB 165 and SB 422.

BALTIMORE SUN

January 30, 2012

# *Counsel at initial hearings: a matter of simple fairness*

By Jake Schaller

I didn't need to go to law school to learn that a person charged with a crime is innocent until proven guilty and entitled to the assistance of a lawyer. I knew it in my former life as a sportswriter, and I probably had a grasp of it back in elementary school. Heck, it's America 101.

But it wasn't until last fall, during the first semester of my second year at the University of Maryland Francis King Carey School of Law, that I learned someone accused of a crime in Maryland could spend 30 days in jail before a lawyer advocated for his or her freedom before trial.

This took a while to register: innocent until proven guilty ... yet incarcerated for weeks before benefiting from the assistance of counsel? Really?

Yes, really. No counsel is provided at the first commissioner hearing, at which a defendant's pretrial liberty or bail, if any, is determined. In most jurisdictions in the state, counsel is also not present at the next bail review hearing before a district court judge, resulting in defendants remaining in jail for 30 days before seeing a lawyer in court. That means indigent defendants, many of whom are charged with nonviolent misdemeanors, appear by themselves with their liberty on the line.

However, I also learned last semester that the process for righting this wrong was well under way. A class action lawsuit aiming to secure for indigent defendants the right to counsel at initial hearings had made its way to Maryland's highest court.

On Jan. 4, there was a breakthrough. The Maryland Court of Appeals ruled, in DeWolfe v. Richmond, that the statutory right to counsel promised accused criminal defendants a lawyer's representation at initial bail hearings. The decision was unanimous.

Less than three weeks later, however, that landmark decision is in jeopardy. Members of the House of Delegates and the Maryland Senate have proposed emergency bills that would nullify the ruling's effect by denying representation at the first hearing. The legislation is short-sighted and a mistake.

The argument in favor of the legislation is that Maryland's Office of the Public Defender already is stretched extremely thin, so it is not realistic to think it can handle commissioner hearings as well. In addition, there is concern about where Maryland would get the money to add the resources necessary to comply with the court's ruling.

While at first glance the cost of implementing the ruling might seem prohibitive, ensuring the representation of counsel at initial hearings likely would save the state money long term. With a lawyer's assistance, defendants facing nonviolent charges are far more likely to be released on recognizance or have their bail set at an affordable level, saving taxpayers the costly incarceration of many individuals, some of whom will see their cases thrown out before trial.

Yet even if the Richmond ruling would not save our state a cent, there is a far more important reason not to circumvent it with quickly slapped-together legislation: Providing counsel for indigent defendants at the initial hearing is simply the right thing to do.

During the fall semester, I participated in Maryland's Access to Justice Clinic with seven other law students. We observed bail review hearings in Baltimore County and City and watched unrepresented defendants flounder. Some chose not to speak. Others said too much. All who didn't have a lawyer could have used one.

This became clear during our work as student-attorneys. At bail re-review hearings, we represented 42 clients and regained pretrial liberty for 31 of them. I would love to give sole credit to the overwhelming power of our collective advocacy. At times, however, we simply were able to garner our clients' trust and then ask the right questions — or make the phone calls — that yielded information pertinent to the bail decision. Our efforts showed just how important it is to have representation in the pretrial criminal justice system. It meant, for some, going home to families and jobs and others to treatment programs, instead of sitting in jail (at taxpayers' expense) until trial. In other words, it meant everything.

Maryland's highest court agrees — unanimously. So saying "it's too expensive" or "too complicated right now" isn't good enough. Fairness cannot come with a price tag. Justice cannot be foiled by logistics. Legal rights cannot be compromised. Indigent defendants deserve representation at initial hearings.

Investing in public defenders for the accused? Heck, that's America 101.

*Jake Schaller is a second-year law student at the University of Maryland Francis King Carey School of Law. His email is jakeschaller@umaryland.edu.*

# Bail Review Hearings by County and Outcome

| Bail Reviews | Bail Review Result | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| County | Bail Increased | | Bail Reduced | | Bail Unchanged | | Client Released | | All Bail Reviews | |
| | Count | Percent | Count | Percent | Count | Percent | Count | Percent | Count | Percent |
| Allegany County | 6 | 2.69% | 111 | 49.78% | 65 | 29.15% | 41 | 18.39% | 223 | 1.60% |
| Anne Arundel County | 77 | 6.89% | 524 | 46.91% | 351 | 31.42% | 165 | 14.77% | 1117 | 8.03% |
| Baltimore City | 709 | 17.47% | 821 | 20.23% | 1868 | 46.02% | 661 | 16.28% | 4059 | 29.18% |
| Baltimore County | 141 | 12.75% | 409 | 36.98% | 391 | 35.35% | 165 | 14.92% | 1106 | 7.95% |
| Calvert County | 10 | 3.09% | 131 | 40.43% | 115 | 35.49% | 68 | 20.99% | 324 | 2.33% |
| Caroline County | 14 | 10.69% | 47 | 35.88% | 46 | 35.11% | 24 | 18.32% | 131 | 0.94% |
| Carroll County | 7 | 3.03% | 83 | 35.93% | 66 | 28.57% | 75 | 32.47% | 231 | 1.66% |
| Cecil County | 40 | 8.77% | 134 | 29.39% | 243 | 53.29% | 39 | 8.55% | 456 | 3.28% |
| Charles County | 8 | 1.93% | 207 | 50.00% | 92 | 22.22% | 107 | 25.85% | 414 | 2.98% |
| Dorchester County | 3 | 3.26% | 17 | 18.48% | 56 | 60.87% | 16 | 17.39% | 92 | 0.66% |
| Frederick County | 20 | 5.21% | 177 | 46.09% | 95 | 24.74% | 92 | 23.96% | 384 | 2.76% |
| Garrett County | 5 | 8.77% | 17 | 29.82% | 29 | 50.88% | 6 | 10.53% | 57 | 0.41% |
| Harford County | 55 | 10.58% | 169 | 32.50% | 187 | 35.96% | 109 | 20.96% | 520 | 3.74% |
| Howard County | 23 | 9.16% | 71 | 28.29% | 112 | 44.62% | 45 | 17.93% | 251 | 1.80% |
| Kent County | 9 | 29.03% | 7 | 22.58% | 13 | 41.94% | 2 | 6.45% | 31 | 0.22% |
| Montgomery County | 37 | 2.78% | 142 | 10.66% | 675 | 50.68% | 478 | 35.89% | 1332 | 9.58% |
| Prince George's County | 143 | 8.62% | 434 | 26.16% | 991 | 59.73% | 91 | 5.49% | 1659 | 11.93% |
| Queen Anne's County | 15 | 11.72% | 46 | 35.94% | 45 | 35.16% | 22 | 17.19% | 128 | 0.92% |
| Somerset County | 3 | 4.76% | 9 | 14.29% | 37 | 58.73% | 14 | 22.22% | 63 | 0.45% |
| St. Mary's County | 8 | 4.17% | 78 | 40.63% | 68 | 35.42% | 38 | 19.79% | 192 | 1.38% |
| Talbot County | 14 | 9.52% | 83 | 56.46% | 29 | 19.73% | 21 | 14.29% | 147 | 1.06% |
| Washington County | 32 | 9.64% | 95 | 28.61% | 174 | 52.41% | 31 | 9.34% | 332 | 2.39% |
| Wicomico County | 27 | 5.37% | 202 | 40.16% | 199 | 39.56% | 75 | 14.91% | 503 | 3.62% |
| Worcester County | 11 | 6.96% | 49 | 31.01% | 81 | 51.27% | 17 | 10.76% | 158 | 1.14% |
| **Statewide** | **1417** | **10.19%** | **4063** | **29.21%** | **6028** | **43.34%** | **2402** | **17.27%** | **13910** | **100.00%** |

Count is the number of bail reviews that occurred in the county for the specified bail review outcome.
Percent is the percentage of bail reviews in the county having the specified outcome.
Green highlights are outcome percentages above the statewide percentage

Reported 10/12/2012 at 3:21 PM

IN THE
COURT OF APPEALS OF MARYLAND

| | | |
|---|---|---|
| THE HON. BEN C. CLYBURN, in his official capacity as the Chief Judge for the District Court of Maryland, et al., | * | |
| Petitioners, | * | Petition No. 622 |
| v. | * | September Term, 2013 |
| QUINTON RICHMOND, et al., | * | |
| Respondents. | * | |

* * * * * * * * * * * *

**AFFIDAVIT OF MITCHELL MIRVISS**

Mitchell Y. Mirviss, being duly sworn, deposes and states as follows:

1. I am over the age of eighteen and am competent to testify on personal knowledge to the information contained herein.

2. I am co-counsel for the Plaintiffs in this case.

3. On January 6, 2014, I attended a public meeting of the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender. As co-counsel for Plaintiffs, I share a seat with Mr. Schatzow as a Task Force member.

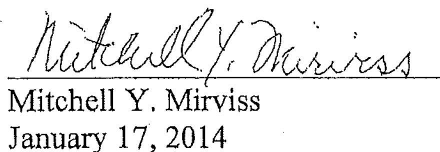
4. At this meeting, Chief Judge Clyburn presented to the task force the report of the Judiciary Task Force on Pretrial Confinement and Release.

5. After Chief Judge Clyburn ended his presentation, he accepted questions from task force members. I asked Judge Clyburn to address the status of the various

logistical concerns that had been previously raised regarding implementation of the right to counsel at initial bail hearings before district commissioners. Judge Clyburn responded that the logistical concerns that had previously been raised regarding providing representation at the commissioner hearings had been addressed and resolved, such that, from a logistical perspective, initial bail hearings with counsel present could occur immediately if the Rules were to issue and funding were to be available. He explained that adequate space had been secured at all commissioner work stations for attorneys and interpreters to be present, and all other logistical objections had been resolved.

5. I also asked Chief Judge Clyburn to address the judiciary's position regarding interim implementation of the right to counsel in locations or in graduated stages as implementation became possible. Judge Clyburn stated that the judiciary was not opposed to piecemeal implementation of steps that could be taken while long-term solutions are devised. He also affirmed that he would support quicker action where possible.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing are true and correct.



Mitchell Y. Mirviss
January 17, 2014

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**BY OVERNIGHT MAIL**

January 13, 2014

The Hon. Mary Ellen Barbera
Chief Judge, Court of Appeals of Maryland
The Hon. Glenn T. Harrell, Jr.
The Hon. Lynne A. Battaglia
The Hon. Clayton Green, Jr.
The Hon. Sally D. Adkins
The Hon. Robert N. McDonald
The Hon. Shirley M. Watts
Associate Judges, Court of Appeals of Maryland
361 Rowe Boulevard
Annapolis, Maryland 21401

Re: 181st Rules Committee Report

Dear Chief Judge Barbera and Judges Harrell, Green, Battaglia, Adkins, McDonald, and Watts:

On behalf of the Plaintiffs in the Richmond right-to-counsel-at-bail litigation, we are writing to the Court in its rule-making capacity to follow up on the Rules Order issued by the Court regarding the 181st Report by the Rules Committee. As Your Honors will recall, on November 6, 2013, the Court approved and adopted the 181st Report with modifications, but made its implementation effective upon further Order by the Court. The Court indicated at the open meeting that the Court would issue such Order when the Circuit Court for Baltimore City entered an order compelling the "District Court Defendants" to provide representation.

We are pleased to report that Judge Nance issued an order on Friday, January 10, 2014, which was entered by the Circuit Court today, January 13, 2014 (as amended), requiring the District Court Defendants to provide representation to Plaintiffs at their initial bail hearings. A copy of the amended order is attached. Accordingly, we respectfully request that the Court issue a Rules Order directing that the November 6, 2013 Rules Order takes effect immediately.

We very much appreciate the Court's consideration of this critical right to counsel and the need to proceed with interim implementation while policymakers deliberate over long-term solutions.

Please let us know if you have any questions.

Very truly yours,

Michael Schatzow (mym)
Michael Schatzow

Mitchell Mirviss
Mitchell Y. Mirviss

cc: William F. Brockman, Esq.
Julia Doyle Bernhardt, Esq.
Brian Boynton, Esq.
Ashley Bashur, Esq.
A. Stephen Hut, Jr., Esq.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 4th day of March 2014, two copies of the foregoing Brief of Appellees Quinton Richmond, et al. were sent by regular mail first class, postage prepaid, and by electronic mail to the following counsel for the District Court Defendants and the Public Defender, respectively:

William F. Brockman, Esquire
Deputy Solicitor General
Julia Doyle Bernhardt, Esquire
Assistant Attorney General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202

Attorneys for the State Defendants

Brian M. Boynton, Esquire
Ashley E. Bashur, Esquire
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

A copy also was sent by electronic mail to A. Stephen Hut, Jr., Esquire, Office of the Public Defender, 6 St. Paul Street, Suite 1400, Baltimore, Maryland 21202.

Mitchell Mirviss