
Finishing the Job: Modernizing Maryland's Bail System

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Executive Summary

There are three major issues confronting the bail system in Maryland that leave it unfair, unsafe, and ineffective. First, current practices result in economic and racial disparities. Secured financial bonds, those requiring the actual payment of money or bail property to secure defendants' release, are used extensively throughout Maryland, leaving those defendants without the financial means to post their bonds — most often racial and ethnic minorities — in jail pending trial. Second, because of the reliance on secured financial bonds, defendants who pose a risk to community safety but have access to money can buy their way out of jail. Third, the availability of evidence-based practices, which have shown to be effective in other jurisdictions in addressing fairness and safety issues, is spotty at best in Maryland.

These issues have surfaced most prominently in Baltimore, where data show that defendants who are identified as low risk, meaning that they have very high probabilities of appearing in court and completing the pretrial period without arrest for new criminal activity, have secured bond amounts that are five times higher than those set for low-risk defendants in Montgomery County.

Several other states have implemented bail reform in recent years and can serve as models for Maryland, including Colorado and Kentucky, which have made major changes to bail laws and

implemented statewide validated pretrial risk assessment tools. New Jersey recently enacted the necessary laws to bring massive reforms to bail practices in the state starting in 2017.

In recent years, two high-level bodies have sought to identify the reforms needed in Maryland's bail system. Both the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defense, and the Governor's Commission to Reform Maryland's Pretrial System, have presented recommendations that would result in a major overhaul of bail practices. Their recommendations have been in line with reforms that other states have either implemented or are exploring. What the recommendations from these two bodies lacked, however, was a path to implementing bail reform in Maryland.

This report not only re-emphasizes why bail reform is urgently needed, but it also lays out a clear path, through specific recommendations for the short, medium, and long term, that Maryland officials can follow in planning and implementing reform. The recommendations are aimed at achieving three broad goals: (1) send fewer people to jail pending adjudication of their cases; (2) replace the current cash bail system with one that relies heavily on risk-based decision-making; and (3) restrict the use of preventive detention to the highest risk defendants.

Studies have found that detaining low- and moderate-risk defendants for as short as two days — often the time it takes to pull together the money to pay a financial bond — greatly increases instances of failure to appear and arrests for new criminal activity, as well as recidivism rates.⁴

Introduction

Bail reform is on the move around the country, backed by unprecedented support from key stakeholder groups, including law enforcement, the judiciary, prosecutors, defenders, sheriffs, and county administrators.¹ State legislatures around the country, including those in Kentucky, Colorado, and New Jersey, have re-written their bail laws to introduce major reforms.² High-ranking officials in several other states, including New York, Maine, Connecticut, Utah, Alaska, and Delaware, are pushing for bail reform.³

Bail reform efforts are receiving extraordinary funding support from both public and private entities. For example, the Bureau of Justice Assistance of the U.S. Department of Justice has launched the Smart Pretrial Demonstration Initiative, the first pretrial demonstration project supported by the Justice Department in more than a quarter of a century. Private philanthropies, including the Public Welfare Foundation, the Laura and John Arnold Foundation, and the MacArthur Foundation, have invested heavily in national pretrial justice reform efforts. In addition, a bill has been introduced in the U.S. House of Representatives – the “No More Money Bail Act of 2016,” House Bill 4611 – that would prohibit the use of money bail in the federal system and encourage state and local jurisdictions that received federal funding through the Edward Byrne Justice Assistance Grants Program to replace their existing money bail systems with ones that are risk based.

These efforts have come amid growing evidence of the devastating impact of pretrial detention. Studies have found that detaining low- and moderate-risk defendants for as short as two days — often the time it takes to pull together the money to pay a financial bond — greatly increases instances of failure to appear and arrests for new criminal activity, as well as recidivism rates.⁴ One recent study showed that persons detained for inability to post bond face up to a 30 percent increase in likelihood of conviction.⁵ Studies also show that detaining low- and moderate-risk defendants throughout the pretrial period significantly increases their likelihood of receiving harsher sentences.⁶

A new study has shown the impact that just setting financial bonds has on outcomes. The study found that, controlling for other factors, those who were assigned financial bonds had a higher likelihood of being convicted than those released non-financially. The study also found that setting a financial bond increased recidivism by four percent, and had no impact on reducing failures to appear.⁷

In a 2010 report, *Baltimore Behind Bars*, the Justice Policy Institute (JPI) also found that there were significant cost savings in using pretrial supervision services instead of incarceration. JPI reported that the the Maryland Department of Budget and Management estimated it cost \$100 per day to hold one person in the Detention Center and \$159 per person per day in Central Booking. In comparison, JPI estimated the cost of pretrial release services to be \$2.50 per person per day.⁸

In Maryland, officials have been exploring ways to address the major shortcomings in the bail system. The impetus for this attention stemmed from the Maryland Court of Appeals' 2013 ruling in the case of *DeWolfe v. Richmond*,⁹ which required that, because a defendant's liberty was at risk at the initial bail-setting hearing, defense counsel must be made available to indigent defendants at that point. Two state bodies — the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defense, established in 2013, and the Governor's Commission to Reform Maryland's Pretrial System, established in 2014 — have since looked at ways to fix the bail system, making bold recommendations to establish statewide pretrial services and to replace the money-based bail system with risk assessment. But the reports issued by these bodies did not identify a clear path to bringing those recommendations to fruition. As a result, there has not yet been any progress in enacting meaningful bail reform measures in Maryland.

The purpose of this report is to re-emphasize the need for major reform of the bail system in Maryland and to identify a plausible path to create a bail system that is safe, fair, and effective for all Maryland citizens. Given the focus on criminal justice reform over the last year by a broad array of stakeholders, the time has come for Maryland officials to take this path.

Section I of this report focuses on why bail reform is so urgently needed in Maryland. Section II reviews the efforts that have been made in recent years to bring bail practices in Maryland more in line with the latest research, but which to date have fallen short of legal and evidence-based pretrial justice. Section III presents examples of other states' approaches to building effective bail systems that Maryland officials could look to as models. The final section contains a series of recommendations laying out steps that can be taken over the next three years to build a system that works best for Maryland.

I. CURRENT ISSUES FACING MARYLAND: WHY CHANGE IS NEEDED

In Maryland, persons who are arrested and taken into custody appear before a District Court Commissioner for an initial appearance within 24 hours after arrest. If they are not released on their own recognizance (with a written promise to return to court at a specified date) or with a bond, they are sent to a District Court Judge for a bail review hearing, which occurs the next court business day.

At either hearing, for those defendants not released on their own recognizance, the courts may offer three general types of financial bonds:

- An unsecured bond, where defendants simply sign a document and personally guarantee they will appear, or pay the full bond;
- A 10 percent cash deposit on the bond; or
- A cash bond, where defendants have the option to pay the full amount prior to release, with the bond returned at the end of the case provided it is not forfeited for failure to appear; or engage the services of a commercial, for-profit bail bonding company, which guarantees, before release, the full bond amount. For this service, defendants pay a nonrefundable fee (typically around 10 percent), either as a lump sum or in installments.¹⁰ When a cash bond is set, defendants have the option of paying the full amount themselves or using a commercial bail-bonding company.

Maryland is facing three major issues with its current bail system that need to be addressed:

- Current bail policies and practices are economically and racially discriminatory;
- Current bail policies and practices put community safety at risk; and

Those who are unable to make a bond payment may fall into deeper economic despair through the loss of jobs and housing while in jail, while other important financial matters, such as child support payments, are put on hold and incur additional penalties and fees.

- There is little use in Maryland of evidence-based practices that can address both economic and racial disparities and community safety.

Economic and racial disparities

Secured financial bonds play a significant role in determining pretrial release in Maryland. In six Maryland jurisdictions studied as part of the work of the Commission to Reform Maryland's Pretrial System, 71 percent of defendants appearing at a bond review hearing had a secured financial bond set, with an average bond amount of \$39,041. Two-thirds of these defendants were unable to post their bonds and remained in jail.¹¹

Requiring defendants to post financial bonds as a pre-condition to being released pretrial has obvious implications for those of low economic means. Even when defendants are able to pay the bondsman's fees, usually about 10 percent of the full value of the bond, the money may have come out of family funds for groceries or the next month's rent. And, of course, those who are unable to make a bond payment may fall into deeper economic despair through the loss of jobs and housing while in jail, while other important financial matters, such as child support payments, are put on hold and incur additional penalties and fees.

Data from the Commission's study also showed how "justice by geography" can lead to economic discrimination. Defendants assessed as low risk — meaning that they have very high probabilities of appearing in court

and completing the pretrial period without arrests for new criminal activity — in Baltimore City had an average bond that was nearly twice that of Prince George's County, and five times greater than that of Montgomery County, a jurisdiction with a substantially higher median income.¹²

The economic disparities unleashed by the money-based bail system fall most heavily on racial minorities. Studies have consistently shown that African-American defendants have higher bond amounts and are detained on bonds at higher rates than white defendants,¹³ a factor contributing to the disproportionate confinement of persons of color. In Maryland, African-Americans comprise roughly 30 percent of the general population but make up 70 percent of prisoners.¹⁴ In Baltimore, African-Americans comprise about 60 percent of the city's residents, but 90 percent of Baltimore jail inmates.¹⁵ In the five Baltimore neighborhoods with the most jailed residents in the city — places where more than nine out of 10 residents are African-American — the average median income is \$26,164, an income level that is lower than the average bail amount offered in Baltimore City in 2013. (For defendants assessed to be low risk at first appearance, the average bail amount was \$51,000.)¹⁶ In other words, the overwhelmingly large percentage of low-income African-American defendants from these neighborhoods would likely face huge barriers raising the 10 percent nonrefundable deposit needed for a for-profit bail bondsman or, if given the option, a cash deposit on their bond.

The money-based bail system allows those defendants who are granted bail and who have access to money to purchase their pretrial release, regardless of the risk they may pose to public safety.

There have been a growing number of legal challenges to the money-based bail system around the country on the grounds that requiring indigent defendants to post financial bonds violates their equal protection rights. The civil rights law firm Equal Justice Under Law (EJUL) has amassed almost a dozen victories in class action challenges to money-based bail systems in seven states. These suits have forced the courts in those jurisdictions to drastically reform their money-based bail-setting practices.¹⁷

These suits have coincided with a series of strong statements and actions from various entities within the Executive Branch of the U.S. Government on the economic and racial disparities resulting from the use of money-based bail systems. For example:

- The U.S. Department of Justice, in a Statement of Interest filed in U.S. District Court as part of one EJUL lawsuit, wrote, “(f)undamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay.”¹⁸
- The report by the Civil Rights Division of the U.S. Department of Justice on its investigation of the justice system in Ferguson, Missouri, following the shooting death of an African-American man by police, found that Ferguson’s bail practices, which relied heavily on secured financial bonds and were solely charge-based, were unlawful and were resulting in unnecessary incarceration, disproportionately affecting people of color.¹⁹
- The White House recently hosted a meeting

of top-level stakeholders to discuss how the use of money in justice systems — including the use of secured financial bonds — is ineffective and undermines safety and fairness.

- The White House Council of Economic Advisors released an Issue Brief to coincide with this meeting, stating that reliance on secured financial bonds is “regressive, leading to pretrial detention of the poorest rather than the most dangerous defendants.”²⁰

Putting community safety at risk

The money-based bail system allows those defendants who are granted bail and who have access to money to purchase their pretrial release, regardless of the risk they may pose to public safety. Ironically, under this system, judges may actually make it easier for defendants deemed to pose public safety risks to get out when, to address those risks, they set high secured bond amounts. While the intent of the judge may be that the defendant will not be able to post the bond, the economic reality is that the higher the bond amount, the higher the profit margin for the bonding company that does business with a dangerous, high-risk defendant. For example, a commercial bail bonding company might make \$1,000 from a \$10,000 bond, but the company can earn \$10,000 from a \$100,000 bond.

And since the bonding company is only liable for bond forfeiture if the defendant fails

to appear in court — not if the defendant is arrested for new criminal activity while on bond — bonding out dangerous, high-bond defendants is a no-risk venture for the company unless the defendant also shows a strong likelihood to flee.²¹ It is not surprising that research shows that about half of high-risk defendants get out of jail pending trial.²²

This is why the International Association of Chiefs of Police has called for the use of different tools — supervised pretrial release for those with manageable risks and detention without bond for those with unmanageable risks — instead of money to protect public safety.²³

Absence of evidence-based practices in pretrial justice

The cornerstone of evidence-based pretrial justice practices is the use of an empirically derived pretrial risk assessment tool. There have been significant strides in the past 10 to 15 years in the development of such tools, and several state legislatures have enacted laws requiring their use.²⁴

Numerous pretrial risk assessment studies have demonstrated that the overwhelming majority of defendants fall into low- or medium-risk categories. For example, the study that produced the Ohio statewide pretrial risk assessment tool found that, of the three risk levels, only 17 percent of defendants fell into the high-risk category; 29 percent were in the low-risk category, and 54 percent were in the moderate category.²⁵ A study of the Virginia risk assessment tool, which has five risk categories, showed that only 15 percent of defendants were being identified as being at the highest (fifth) risk level, with 17 percent falling into the fourth risk group. Forty-seven percent fell in the two lowest risk categories.²⁶ The study of the Colorado pretrial risk assessment tool, which has four risk categories, identified only 8 percent of

defendants as being the highest risk. Twenty percent of defendants were found to be in the lowest risk level, and 49 percent were at the second lowest level.²⁷

Research is providing guidance on effectively matching identified risk levels with appropriate risk management strategies. For example, defendants who are found to be low risk have very high rates of success on pretrial release. Research has shown that these already high rates cannot be improved by imposing restrictive conditions of release on low-risk defendants. The research also shows that the only result to expect when imposing restrictive conditions of release on low-risk defendants is an increase in technical violations. Instead, the most appropriate response is to release these low-risk defendants on personal bonds with no specific conditions, and no supervision other than to receive a reminder notice of their court dates.²⁸

Other studies have found that high-risk defendants who are released with supervision have higher rates of appearing in court and completing the case without arrests for new criminal activity. For example, one study found that, when controlling for other factors, high-risk defendants who were released with supervision were 33 percent less likely to fail to appear in court than their unsupervised counterparts.²⁹

In Maryland, the availability of evidence-based risk assessment and supervision practices is spotty at best. Typically, risk assessments and pretrial supervision are conducted by pretrial services programs. Of the 24 jurisdictions in Maryland, only five, including Baltimore City, have pretrial services programs that conduct risk assessments before the defendant's bail review hearing in District Court, and only two of those programs use tools that have been empirically tested for validity. Only 11 jurisdictions in Maryland currently have pretrial services programs that supervise defendants.³⁰

In Maryland, the availability of evidence-based risk assessment and supervision practices is spotty at best.

The study requested by the Commission for its report shows how the lack of these practices is impacting decisions being made in Maryland. The study found that people assessed to be at a lower risk than others faced higher bail amounts: *“[A]t both the initial appearance and the bail review hearing, there was an inverse relationship between bail amounts and risk levels. Low-risk defendants had higher bail amounts than moderate and higher risk defendants.”*³¹

II. RECENT EFFORTS TO IMPROVE BAIL PRACTICES IN MARYLAND

Since the *Richmond* case, several efforts have been underway to enhance the bail process in Maryland.

Expanding authority for citation releases

The first effort, taken in 2012, was an attempt to reduce the number of persons brought into the system by taking them into custody. The Maryland legislature passed Senate Bill 422 (Chapter 504 of 2012), which expanded the opportunities for police to give someone a civil citation for behavior, in lieu of a formal arrest. Under the new law, an officer who has grounds to make a warrantless arrest can (1) issue a citation in lieu of making an arrest (“cite and release”), or (2) make the arrest, process (i.e., fingerprint and photograph the defendant), and subsequently issue a citation in lieu of continued custody and appearance before a Court Commissioner (“book, cite, and release”). The new law covered any misdemeanor or local ordinance violation that does not carry a penalty of imprisonment, any misdemeanor or local ordinance violation for which the maximum penalty of imprisonment is 90 days or less, and possession of marijuana under § 5-601 of the Criminal Law Article.³²

Requiring defense representation at initial bail hearings

Historically, defense representation for indigent defendants was not available at either the initial bail setting by the District Court Commissioner or the bail review hearing in District Court. A study conducted by the University of Maryland in the late 1990s first shed light on the vital role that defense representation plays at the bail hearing. It showed that the presence of legal representation at bail review hearings makes it more likely defendants would be released or see their bond reduced to a more affordable amount.³³ In the decade that followed this study, lawsuits were brought around the issue that most indigent defendants faced their initial appearance hearing before a District Court Commission without counsel.

In 2011, when the Maryland Court of Appeals ruled in *DeWolfe v. Richmond* that the Office of the Public Defender (OPD) must represent indigent defendants “in all stages” of criminal proceedings, the legislature was forced to provide funding for such representation. Elected officials heard estimates that it could cost upwards of \$27 million dollars or more just for the OPD to remedy the specific finding of the court. In 2014, legislation was offered that proposed collapsing the initial appearance and bail review hearing into one hearing before a judge, with an OPD attorney available at the hearing for indigent defendants. The legislation failed to pass. With no legislative fix in sight, lawmakers earmarked an additional \$10 million for the Maryland judiciary budget to fund appointed attorneys to represent indigent defendants at their first hearing.

A survey of practices by the Governor's Commission showed that in Baltimore City, Prince George's County, and Montgomery County, attorneys are scheduled 24 hours per day and seven days per week to provide counsel before a defendant's first appearance in front of a District Court Commissioner. In other counties, appointed attorneys are only available at certain times of the day and work in shifts of four, five, or eight hours.

As of November 2014, pretrial defendants were waiving their right to counsel at higher rates where appointed attorneys were available at limited times. At the majority of initial appearances statewide, defendants waived their right to state-furnished counsel.³⁴ Even in places like Baltimore City, where there was counsel available around-the-clock, 41 percent of defendants waived counsel.

Creating a Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defense

As one response to the *Richmond* case, the legislature passed a bill establishing a Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defense (the "Task Force") to examine and make recommendations for improving the indigent defense and pretrial release systems, and report back to the legislature at the end of 2013.³⁵

The Task Force reported its findings and recommendations calling for, among other things:

- The establishment of a statewide pretrial services agency located in the executive branch;
- The establishment of an objective, validated risk assessment tool to be used by pretrial services;
- Pretrial services to have the authority to release without conditions those

individuals for whom the validated risk assessment tool determined to be low risk;

- Judiciary deploy judges to ensure that all defendants not released by pretrial services have the benefit of an initial appearance/bail review before a judge within 24 hours of arrest;
- The critical principle of prompt presentment within 24 hours of arrest, regardless of the system passed by the legislature;
- The establishment of a system for risk-and-needs-based supervision, referral, and treatment options in all Maryland counties; and
- The complete elimination of the use of secured, financial conditions of pretrial release that require a low-risk defendant to pay some amount of money in order to obtain release, while permitting high-risk defendants with the resources to pay their bonds to leave jail unsupervised.³⁶

No legislation was put forward addressing these recommendations of the Task Force.

Creating a Governor's Commission to Reform Maryland's Pretrial System

Without a comprehensive and cost-effective solution, legislators and the executive opted again to study the problem. The Governor's Commission to Reform Maryland's Pretrial System (the "Commission") was instituted, and directed to report to the legislature and the executive before the 2015 general assembly session recommendations on ways to ensure that Maryland operates the best possible statewide pretrial system.

The Commission approved 14 recommendations, including the following:

- That a uniform pretrial services agency be created across all 24 Maryland jurisdictions, responsible for administering

The Task Force recommended the complete elimination of the use of secured financial conditions of pretrial release that require a low-risk defendant to pay some amount of money in order to obtain release, while permitting high-risk defendants with the resources to pay their bonds to leave jail unsupervised.³⁶

- a statewide risk assessment tool, and supervising those released with conditions;
- That a validated pretrial risk assessment tool be implemented;
- That the use of secured, financial conditions of pretrial release that require a low-risk defendant to pay some amount of money in order to obtain release, while permitting high-risk defendants with the resources to pay their bonds to leave jail unsupervised, be completely eliminated; and
- That state funding be used to create a shared jail management system to allow for data collection on the pretrial population statewide.

In 2015, various legislative initiatives to change Maryland's pretrial approach failed to move forward. Bills that would terminate OPD representation at the District Court Commissioner hearing, verify a defendant's indigent status, and amend the Maryland constitution to deny someone representation at first hearing all failed to be enacted. A bill that would have studied bail practices statewide focusing on disparities in bail amounts and release decisions by race, income, and court of origin also failed to be enacted.³⁷

III. NATIONAL MODELS

Both the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defense and the Governor's Commission to Reform Maryland's Pretrial System have

recommended some type of statewide approach to pretrial risk assessment and supervision. There are several different examples from other states on how to approach this.

Kentucky

Today, Kentucky is incorporating the latest in evidence-based practices, including reducing reliance on monetary bonds and basing recommendations on the results of an empirically validated pretrial risk assessment tool. In Kentucky, pretrial services are run at the state level, and they serve every county in the state.

These changes are quite recent. Until 2011, the statewide pretrial services program and the courts had put heavy reliance on monetary bonds. This began to change after the Kentucky legislature passed a bill in 2011, HB 463, which was intended to reduce the costs of housing those incarcerated in the state's prisons and jails. Among the changes in the bill were requirements that:

- Pretrial services use an empirically validated risk assessment instrument and provide supervision of defendants incorporating the latest in evidence-based supervision practices;
- Defendants who score as low risk on the validated pretrial risk assessment tool be released on their own recognizance, unless the court makes a finding on the record that such a release is not appropriate;

A study conducted after the first six months of use [of a pretrial risk assessment] showed that pretrial release rates rose from 68 to 70 percent, and the increased release rate was accompanied by a 15 percent reduction in new criminal activity of defendants on pretrial release.³⁹

- Defendants who score as moderate risk be released to the supervision of the pretrial services program, unless the court makes a finding that such a release is not appropriate; and
- For defendants charged with misdemeanor offenses who are given a monetary bond, the bond amount could not exceed the maximum fine plus court costs that the defendant could receive if convicted.

In the first two years after passage of that law, the nonfinancial pretrial release rate went from 50 percent to 66 percent, while the court appearance rate rose from 89 percent to 91 percent, and the rate of those who were arrested for new criminal activity while on pretrial release went from 91 percent to 92 percent.³⁸ In 2013, the pretrial services program began using a risk assessment tool developed and tested by the Laura and John Arnold Foundation — the Public Safety Assessment-Court (PSA-Court). A study conducted after the first six months of use showed that pretrial release rates rose from 68 to 70 percent, and the increased release rate was accompanied by a 15 percent reduction in new criminal activity of defendants on pretrial release.³⁹ Through careful analysis of risk assessment data, Kentucky Pretrial Services has been able to achieve these results without any additional supervision resources. The program has fine-tuned its recommendations to assure that supervision resources are being reserved for those defendants who need them, and provides regular reports to judges on

defendant outcomes, giving judges assurance that the program's approach is working.

Colorado

Two recent developments in Colorado have put that state on a path toward implementing evidence-based pretrial justice practices. First, in 2011, the Colorado Commission on Criminal and Juvenile Justice appointed a Bail Subcommittee to make recommendations for legislative changes that could result in more evidence-based pretrial release decision-making. That subcommittee spent a year studying federal and state legal and evidence-based pretrial justice practices. Based on the recommendations of the subcommittee, the Colorado legislature passed, and the governor signed, a bill (HB 1236) that, among other things, encourages all the jurisdictions within Colorado to establish pretrial services programs, requires all pretrial services programs in the state to use an empirically validated risk assessment tool, and discourages the use of monetary bonds.

Second, 10 pretrial services programs in Colorado embarked on an effort to develop an empirically validated risk assessment instrument using data from all 10 counties. The resulting validated instrument, which was released in 2012, has been implemented in those programs and in other counties around the state.

Table 1 shows data from the Colorado Pretrial Assessment Tool (CPAT). The table illustrates how the CPAT places defendants in categories based on the probability of success on pretrial

Table 1. Colorado Pretrial Assessment Tool

Risk Category	Public Safety Rate	Court Appearance Rate
1	91%	95%
2	80%	85%
3	69%	77%
4	58%	51%

Table 2. Colorado Study Results

Risk Level	Public Safety Rate		Court Appearance Rate	
	Unsecured Bond	Secured Bond	Unsecured Bond	Secured Bond
1 (Lowest)	93%	90%	97%	93%
2	84%	79%	87%	85%
3	69%	70%	80%	78%
4 (Highest)	64%	58%	43%	53%
Average	85%	76%	88%	81%

release. Thus, a judge knows that a defendant in Risk Category 1 has a 91 percent probability of completing the pretrial period without an arrest for new criminal activity and a 95 percent probability of making all court appearances. Data from these tools can be used to help guide decisions in individual cases.

A study of the validated pretrial risk assessment instrument looked at the effect of the type of release on the likelihood of the defendant being rearrested on a new offense while pending adjudication of the original charge or of failing to appear in court. The study was comprised of 1,919 defendants who were scored by the risk assessment instrument into one of four risk categories, going from lowest risk to highest. As Table 2 shows, regardless of the risk level, as ascertained through the use of the scientifically validated pretrial risk assessment instrument, there was very little difference in defendant success rates while on pretrial release between

those released on unsecured bond⁴⁰ and those released on secured bonds. What differences did exist were not statistically significant.

While this study found that defendants released on unsecured bonds perform just as well as defendants released on secured bonds when controlling for risk levels, the study also looked at the jail bed usage of defendants on the two types of bonds. Not surprisingly, defendants on unsecured bonds spend far less time in jail than defendants with secured bonds because defendants with secured bonds must find the money or make arrangements with a bail bonding company. Also, 39 percent of defendants with secured bonds were never able to raise the money and spent the entire pretrial period in jail.

In summary, the study found that unsecured bonds offer the same public safety and court appearance benefits as secured bonds, but

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Virginia

In 1995, the Virginia legislature passed the Pretrial Services Act⁴², which authorized state funding of locally established and administered pretrial services programs. There are currently 29 pretrial services programs in Virginia serving 127 of 133 jurisdictions, 96 percent.⁴³ In 2003, Virginia became the first state to test and implement a statewide pretrial risk assessment tool. That tool, which was re-validated in 2009, is used by all 29 pretrial services programs in the state.

Virginia officials have developed a matrix, which combines risk level — as determined through the use of the validated pretrial risk assessment tool — with seriousness of the charge to assign defendants to the appropriate risk management strategy. As part of the implementation of the matrix, a study was conducted to measure various aspects of its impact, including outcomes of cases where staff had been trained on the use of the matrix compared to those who had not undergone training. The study found that trained staff followed the matrix 80 percent of the time when formulating their recommendations, and were 2.3 times more likely to recommend nonfinancial release at the initial court appearance than the nontrained group. Moreover, judges were twice as likely to release defendants at the first appearance when working with trained staff. Defendants whose cases were worked on by matrix-trained staff were 1.3 times less likely to fail to appear or have a new arrest pending

trial than those defendants where untrained staff were involved.⁴⁴

As this study makes clear, the value of a pretrial risk assessment tool can be greatly enhanced when staff receive training on how to use the results in formulating recommendations. When judges see consistent recommendations, they are far more likely to follow them.

New Jersey

In 2014, the New Jersey legislature passed a law establishing a statewide pretrial services program, under the Administrative Director of the Courts. The program will be responsible for conducting a risk assessment on all bail-eligible defendants in every jurisdiction throughout the state. The law requires that the risk assessment be “objective, standardized, and developed based on analysis of empirical data and risk factors relative to the risk of failure to appear in court when required and danger to the community while on pretrial release.” The law also requires the program to provide supervision of defendants released on conditions by the court.⁴⁵

The law also specifies that the statewide pretrial services program will be credited \$22 million a year from the state’s 21st Century Justice Improvement Fund, which collects money from court filing and other statutory fees.⁴⁶ The law also establishes a Pretrial Services Program Review Commission with representatives from the governor, attorney general, senate, general assembly, court, prosecutor, and public defender. The duty of the Commission will be to review the annual

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report of the Administrative Director of the Court on the development and administration of the statewide pretrial services program, examine laws pertaining to pretrial release and detention, research pretrial practices from other jurisdictions, and make recommendations for legislation for enhancing pretrial services in the state.⁴⁷

The pretrial services program is currently being pilot tested in two New Jersey counties, and will launch statewide in 2017.

IV. RECOMMENDATIONS

Both the Task Force and the Commission made recommendations for a significant overhaul of Maryland's bail system. Those recommendations have great merit, but they lacked a solidifying focus of core, achievable objectives. The recommendations that follow present many previously recommended changes and a few new ones, all geared toward achieving a few fundamental goals that comprise essential changes for meaningful pretrial reform. They are:

- **Send fewer people to jail prior to the hearing or adjudication of criminal cases.** Jailhouse booking and subsequent detention increase a myriad of negative outcomes for individuals and justice systems. Strategies such as the use of citations in lieu of custodial arrest, and pre-booking diversion to treatment or services and away from deeper justice involvement, should be utilized for low-risk individuals.
- **Replace the current cash bail system with one that relies heavily on risk-based**

decision-making. Arrested people should be handled according to the risks they pose of flight and to public safety, not according to the amount of money they can afford. In fair and effective risk systems, unconvicted people should never be jailed because they lack bail money.

- **Restrict preventive detention to the highest risk defendants.** Courts should detain only those who pose clear and measurable risks and for whom no condition or combination of conditions would protect the public. Courts should be able and empowered to do so transparently, without the setting of high money bail amounts that some defendants may be able to pay.

These goals are supported by a broad base of professional stakeholders and public opinion, and reflect current best practices in the pretrial field. All the recommendations presented below are proposed in service to these goals and to create an improved and sustainable pretrial justice system in Maryland. They are laid out in terms of steps that can be taken in the short term (2016), middle term (2017), and long term (2018 and beyond).

Short-Term Recommendations (2016)

Some pretrial justice improvements in Maryland, such as statutory and possibly even constitutional change, will require long-term efforts. However, there are steps that Maryland can and should take immediately to improve pretrial justice in the state; these steps would require only changes in practice, not law.

1. *Appoint a Bail Reform Policy Team, comprised of high-level representatives from each key stakeholder group, to oversee the implementation of bail reform measures.*

The governor, president of the Senate, speaker of the House of Delegates, and chief judge of the Court of Appeals should create a Bail Reform Policy Team made up of high-level system stakeholders. The purpose of the team would be to collaboratively identify and guide a data-driven approach to pretrial justice that works for Maryland, incorporating the law and the best empirical research to achieve the goals of maximizing the appropriate use of pretrial release and detention, maximizing public safety, and maximizing court appearance.

In addition to long-term coordination, there are a number of immediate actionable activities the Bail Reform Policy Team could achieve in relatively short order, including:

- Directing the increased use of citations in lieu of arrest;
- Encouraging the use of a pretrial risk assessment instrument that has been validated in a similarly sized and resourced jurisdiction; and
- Promoting the move from secured to unsecured bond.

Rather than create an entirely new body, the existing Justice Reinvestment Coordinating Council (JRCC) could perform the duties of the Bail Reform Policy Team.

2. *Judges in Maryland should immediately begin issuing unsecured bonds for pretrial release instead of secured bonds.*

Current law allows for a number of pretrial release options, including the issuance of unsecured bonds — those that require

payment only upon a defendant's failure to appear in court. Judges in Maryland — and nationally — have relied on secured bonds more out of habit than evidence and, in fact, recent research has demonstrated that unsecured bonds are equally as effective at compelling defendants to return to court, and they reduce the time between arrest and release. The use of unsecured bonds will go a long way to eliminating wealth-based incarceration in the state.

3. *The Policy Team should conduct an analysis of Maryland statutes, court rules, and case law on all issues relating to bail to determine what changes to statutes or court rules are necessary to align the law with best practices.*

Statutory, and perhaps constitutional, changes will be necessary to create a solid legal foundation for evidence-based pretrial justice. A thorough analysis of Maryland's bail laws — state statute, state and federal case law, and state court rules — will be important for knowing what reform measures can be put in place immediately, such as the increased use of unsecured bonds, and what measures would require changes in law prior to implementation.

4. *Develop a vision statement and an implementation plan to create a statewide, data-driven pretrial justice system in Maryland.*

Guided by the legal analysis and the recommendations in this report, the Policy Team should create a vision statement that describes a safe, fair, and effective pretrial justice system for Maryland. Achieving the vision in a timely manner will require an implementation plan — a roadmap and timeline for putting vision components into practice. The plan should outline specific changes — such as expanded use of citation release, meaningful involvement of both prosecution and defense at initial bail setting, adoption and implementation

of uniform pretrial risk assessment, and development of statewide data collection and analysis — that jurisdictions and stakeholders can focus on and use to measure their achievement. Each activity and its desired outcome must be centered on ensuring the capacity for informed decision-making based on individual pretrial risk at each point in the process.

In keeping with recognized implementation science and strategy, Maryland should begin to implement statewide change in five to seven of the largest counties (i.e., those counties with the highest number of criminal case filings). This will allow for pilot testing of the tools, and policies and procedures, so that wrinkles in implementation can be ironed out.

Middle-term Recommendations (2017)

5. *The Policy Team should draft language for bills or proposed court rules and incorporate the changes in law needed to implement the plan.*

The Policy Team should focus on changing statutes and court rules to address legal issues identified in the legal analysis. As such, once those issues are identified and understood, work should begin to draft corrective language and include actionable strategies to get changes enacted (for statutes) or adopted (for court rules). Several states, including Kentucky, Colorado, and Delaware, have passed legislation requiring the use of risk assessment tools in pretrial release decision-making. Maryland should amend language in the statute regarding the use of detention without bond to bring the statute more in line with evidence-based practices, which would order that detention decisions are risk-based, rather than charge-based.

6. *Ensure that all staff who will have a role in implementing the plan are fully informed of its purpose and rationale, and receive any training needed for successful implementation.*

One of the most important keys to successful implementation of any plan is fidelity by those responsible for carrying out the plan day-to-day. If the plan is not executed as intended, the intended results will not be achieved.

Training should be included as a key part in the implementation plan. At a minimum, information and training sessions should be directed to bail-setting judicial officers, law enforcement officers, assistant states' attorneys, assistant public defenders, and pretrial services or other staff who have a role in the risk assessment or supervision.

7. *State and local law enforcement agencies should use the statewide pretrial risk assessment tool in making citation release decisions.*

As noted earlier, recent changes in Maryland law have called for greater use of citation releases by law enforcement officers. To the extent that law enforcement officers in the field can complete the risk assessment tool, it should be used as an aid in assisting the officer in making the decision to cite and release an individual rather than making a custodial arrest.

8. *State and local law enforcement agencies should implement procedures for deflecting low-risk individuals with mental health or substance abuse issues away from the criminal justice system and into community-based treatment.*

Diversion and deflection programs are already in progress in at least two Maryland jurisdictions (Baltimore City and Montgomery County). These programs seek to keep individuals with mental health conditions or substance use disorders out of the criminal justice system by directing them instead into the services that they need to address these issues. Law enforcement agencies throughout the state should monitor the outcomes and findings

of those projects, and implement the aspects of the model found to be effective.

Long-Term Recommendations (2018 and beyond)

9. Leaders in Maryland must consider what role, if any, financial bonds should continue to play in the state's bail system, and draft appropriate proposals for statutory or court rule amendments.

As Maryland's plan for an evidence-based approach to pretrial justice unfolds, it should become increasingly clear that the continued use of financial bonds is incompatible with that approach, and it will be much easier to make the case for completely replacing the money bail system.

10. The Maryland Department of Public Safety and Correctional Services should implement a uniform jail information system.

Because each local jail has its own information system, efforts to compare and contrast the impact of pretrial release practices across jurisdictions are hindered. To best assess the impact of the changes being proposed, a uniform jail information system would be very helpful. Work on developing such a system should begin immediately, but given the complexities involved, implementation of such a system is, realistically, a long-term goal.

11. Develop a plan for sustaining the changes that have been made and hold accountable those who make the changes.

Sustaining change can be very difficult, particularly as those who pushed for the changes move on. Maryland leaders and stakeholders should be mindful of this and develop a plan for sustaining reforms. This involves ensuring the statutes, court rules, and constitution all provide for codification

of these policies. It also involves robust reporting systems and transparency for the general public about the risk profile of Maryland's arrestee population, how risk assessments are used, how risk-based supervision strategies are being employed, and the results these strategies are producing regarding public safety and appearance in court.

V. CONCLUSION

There is no better time than now for Maryland officials to begin taking major steps toward meaningful bail reform. The reforms outlined here have been shown to be effective in the jurisdictions that have implemented them, so there is no reason to continue to cling to the existing money-based system, assuming that, flawed as it is, it is the best that we can do. With new research demonstrating the failings of that system, and new empirical evidence guiding us toward better approaches, the need for reform is clear. This report lays out a clear path for achieving that reform in Maryland.

ABOUT THE AUTHOR

John Clark is a Senior Technical Assistance Manager with the Pretrial Justice Institute, where he has worked since 1987. His work at the Institute focuses on advancing data-driven, empirically-derived pretrial justice practices. Spike Bradford of the Pretrial Justice Institute and Jason Ziedenberg of the Justice Policy Institute also contributed to this report.

ENDNOTES

1 The International Association of Chiefs of Police has established a Pretrial Justice Reform Initiative to raise awareness among law enforcement of how the current money-based bail system impacts officer and public safety. The Conference of Chief Justices issued a resolution calling on all courts to use evidence-based pretrial risk assessment, with the “presumptive use of non-financial conditions.” *Resolution 3*, Conference of Chief Justices, 2013. The Association of Prosecuting Attorneys issued a policy statement recognizing the value of pretrial risk assessments in helping courts make informed bail decisions. *Policy Statement on Pretrial Justice*, Association of Prosecuting Attorneys, 2011. The American Council of Chief Defenders of the National Legal Aid and Defender Association issued a policy statement calling for collaborative efforts among all criminal justice stakeholders to improve pretrial practices that follow the research and best practices. *Policy Statement on Fair and Effective Pretrial Justice Practices*, American Council of Chief Defenders, 2011. The National Sheriffs’ Association issued a resolution recognizing the importance of “pretrial risk assessment of all defendants with a validated instrument and pretrial supervision of some defendants released to the community pending trial” to “provide assistance to sheriffs in the administering of a safe jail and reducing jail crowding; and help reduce the burden on taxpayers.” *Resolution 2012-6*, National Sheriffs’ Association, 2012. The National Association of Counties’ Platform calls on all counties to employ “best practices on the pretrial release decision,” including conducting risk assessments on all defendants. *American County Platform*, National Association of Counties, 2009.

2 Kentucky House Bill 463; Colorado House Bill 13-1236, New Jersey Senate Bill 946.

3 In New York, Chief Judge Jonathan Lippman, in stating his desire to end all reliance on financial bonds in New York, announced plans to retrain all bail-setting judges to employ non-financial releases. *State’s Chief Judge, Citing ‘Injustice,’ Lays Out Plans to Alter Bail System*, The New York Times, 10/1/15. In Maine, the governor, chief justice, president of the senate and speaker of the house, have established a Task Force on Pretrial Justice Reform charged with producing recommendations for legislative action that will “reduce the financial and human costs of pretrial incarceration” without compromising public safety or the integrity of the criminal justice system. The directive establishing the task force is available at: http://www.courts.maine.gov/maine_courts/committees/2015%20PJR.pdf. In Connecticut, Governor Daniel Malloy, citing the large number of low-risk defendants in that state who are sitting in jail on low bonds they cannot afford, has asked the state’s Sentencing Commission to conduct a thorough review of the current bail system and make recommendations to assure that dangerous defendants are identified and detained while low-risk defendants are released. Letter from Governor Dannel Malloy to the Connecticut Sentencing Commission, 11/5/15. A committee of the Utah Judicial Council, the rule-making body for the judiciary, has recommended court rule changes that would include a clear statement of the presumption of release, free of financial conditions; use of a risk assessment for every defendant booked into a jail in the state; the availability across the state of supervision for moderate- and higher-risk defendants; and uniform, statewide data collection on relevant pretrial process and outcome measures. *Report to the Utah Judicial Council on Pretrial Release and Supervision Practices*, Utah State Courts, November 2015. In Alaska, in response to a request from the governor, president of the senate and speaker of the house to address severe crowding in correctional facilities, the Alaska Criminal Justice Commission has recommended that the state Department of Corrections conduct a risk assessment on all defendants throughout the state and provide varying levels of evidence-based supervision appropriate for moderate- and higher-risk defendants. *Justice Reinvestment Project*, Alaska Criminal Justice Commission, December 2015. In Delaware, Governor Jack Markell has decried the current system, whereby “a single mom gets stuck in detention because she can’t come up with a hundred bucks and has little to no family support, but a dangerous drug dealer can get his minions to bail him out.” Governor Markel’s Weekly Address, delivered December 4, 2015, available at: <http://news.delaware.gov/2015/12/04/governors-weekly-message-transcript-eliminating-barriers-while-transforming-the-criminal-justice-system/>.

4 Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention*. (New York: Laura and John Arnold Foundation, 2013.)

5 Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, (Philadelphia: University of Pennsylvania Law School, 2016.)

6 Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger. *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*. (New York: Laura and John Arnold Foundation, 2013.)

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- 11 James Austin and Johnette Peyton. *Maryland Pretrial Risk Assessment Data Collection Study* (Washington, DC: The JFA Institute, 2013).
- 12 The only county where low-risk defendants had higher than average bail amounts than Baltimore was in St. Mary's county. Less than 100 cases were studied in St. Mary's, in contrast to several hundred cases being studied in the large population counties. Austin and Peyton. *Maryland Pretrial Risk Assessment Data Collection Study*, Appendix B.
- 13 Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST Q., 170, 187 (2005); Stephen DeMuth, *Racial and Ethnic Differences in Pretrial Release and Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 880-81, (2003).
- 14 The Governor's Office of Crime Control and Prevention. *Justice Reinvestment Coordinating Council: Final Report*. (Annapolis, Maryland: 2015).
- 15 Nastassia Walsh. *Baltimore Behind Bars: How to Reduce the Jail Population, Save Money and Improve Public Safety*. (Washington, DC: Justice Policy Institute, 2011).
- 16 The five communities in Baltimore that saw the most people in jail from were, Sandtown-Winchester/Harlem Park (211), Southwest Baltimore (190), Greater Rosemont (189), Clifton-Berea (137), and Southern Park Heights (135). The median income of the five communities was \$26,164. These communities also saw 52 percent of 16 to 64 year-olds unemployed. The percentage of these communities where residents are African American was averaged between these five neighborhoods (only Southwest Baltimore saw less than 95 percent of the community residents comprised of African Americans). See Amanda Petteruti, Marc Schindler and Jason Ziedenberg, *The Right Investment: Corrections Spending in Baltimore City*. (Washington, DC: The Justice Policy Institute, 2015).
- 17 For information on these suits, go to the EJUL website at: <http://www.equaljusticeunderlaw.org>.
- 18 Statement of Interest of the United States, U.S. Department of Justice, filed in the U.S. District Court for the Middle District of Alabama in the case of *Christy Dawn Vardin v. The City of Clanton*, Case No. 2:15-cv-34-MHT-WC, at 14.
- 19 *Investigation of the Ferguson Police Department*. (Washington, D.C.: U.S. Department of Justice Civil Rights Division, 2015.)
- 20 *Fines, Fees and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor*. (Washington, D.C.: White House Council of Economic Advisors, 2015.)
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Maryland's Bail System**

By John Clark, Pretrial Justice Institute
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The Abell Foundation is dedicated to the enhancement of the quality of life in Maryland, with a particular focus on Baltimore. The Foundation places a strong emphasis on opening the doors of opportunity to the disenfranchised, believing that no community can thrive if those who live on the margins of it are not included.

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