VIA ELECTRONIC EMAIL TO ejcrulesreview@mdcourts.gov

July 1, 2021

Hon. Daniel A. Friedman, Chair
Rules Review Subcommittee of the Equal Justice Committee
401 Bosley Avenue, Suite 502A
Towson, MD 21204

Dear Judge Friedman:

The Public Justice Center offers the enclosed submission and attachments, including proposed language for simple rules revisions with potential significant impact, as a member and on behalf of the Coalition for a Safe and Just Maryland, a broad coalition that has worked for years to eliminate money bail and otherwise reduce all forms of pretrial detention in Maryland. *See* https://www.safeandjustmd.org/. We seek to demonstrate the ways in which, currently, preventive pretrial detention is overused unlawfully in Maryland and disproportionately impacts people and communities of color, does not achieve its purported ends, and exacerbates the implicit, explicit, and systemic bias that exists throughout criminal proceedings. You have also received submissions from other organizations addressing pretrial detention, such as the Office of Public Defender, Baltimore Action Legal Team, and the Pretrial Justice Institute. The PJC supports their proposals as well and urges integration of all of these recommendations into a comprehensive effort to bring a better measure of pretrial justice to Maryland. I am happy to assist in any way with such an effort.

I would like to acknowledge the enormous contributions of the following to the preparation of this submission: Professor Colin Starger, University of Baltimore School of Law, Director, Legal Data and Design Clinic; Open Justice Baltimore; Nicole Hanson-Mundell, Executive Director, Out for Justice; Jacqueline Robarge, Executive Director, Power Inside; K'Shaani Smith, former Murnaghan Appellate Advocacy Fellow at the PJC; and Maryam Abidi, former PJC law clerk.

Thank you very much for your consideration and for the critical work of the Subcommittee.

Sincerely,

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Enclosures

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SUBMISSION OF THE COALITION FOR A SAFE & JUST MARYLAND TO THE RULES REVIEW SUBCOMMITTEE OF THE COMMITTEE ON EQUAL JUSTICE

THE NEED FOR RULES REFORM TO ADDRESS BIAS IN EXCESSIVE AND UNLAWFUL USE OF PREVENTIVE DETENTION IN MARYLAND

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Would that this were actually true. On any given day, the United States detains almost half a million individuals before trial, with over 60 percent of the U.S. jail population comprised of individuals who have not yet been convicted. Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U.L. Rev. 1399, 1401 (2017). In Maryland, 65.8 percent of the local jail population in 2014 were awaiting trial. Md. Alliance for Just. Reform, *Pretrial Fact Sheet*, http://www.ma4jr.org/pretrial-fact-sheet.

Prior to 2017, most of these Marylanders were detained pretrial not for any public safety reasons, but because they are unable to post a bond amount set by a commissioner or judge. *See* John Clark, *Finishing the Job: Modernizing Maryland's Bail System*, 29:2 The Abell Report (2016). With urging and support from Attorney General Brian Frosh, the Maryland Court of Appeals adopted Rule 4-216.1 in 2017 to "promote the release of defendants on their own recognizance." Rule 4-216.1(b)(1). It requires the release of a defendant unless the judicial officer finds that, "if the defendant is released, there is a reasonable likelihood that the defendant (i) will not appear when required, or (ii) will be a danger to an alleged victim, another person, or the community." *Id.* The Rule creates a presumption in favor of release on recognizance, requiring the "least onerous" conditions of release and an individualized inquiry into a person's specific circumstances, including but, critically, not limited to, ability to meet financial conditions of release. Rule 4-216.1(b).

Since implementation of this Rule, the number of Marylanders being held on unaffordable bail has decreased significantly. Md. Judiciary, *Impact of Changes to Pretrial Release Rules* 4 (2017), http://mdcourts.gov/reference/pdfs/impactofbail reviewreport.pdf. But the number of individuals being held without bail (HWOB or preventive detention) has increased dramatically. *Id.* Statewide, that number increased from 6.7 percent in July 2016 (one year before the Rule became effective) to 25.1 percent in September 2017 (just three months after it took effect). *Id.* at 16–33. Such a sharp increase cannot be attributed to a newfound surge in dangerous or fleeing defendants. Rather, judicial officers are incorrectly applying Rule 4-216.1 and causing a growing number of Marylanders to be improperly held without bail in contravention of the Rule's purpose. Notably, the percentage of individuals released on recognizance, the pretrial status the rule was explicitly intended to promote, has remained static, approximately 19 percent in 2016 and 20 percent in 2020. *See* Data gathered by Professor Colin Starger from Maryland Judiciary Case Search (MJCS) on file with author (HWOB Data).

TO AVOID BIASED DECISION-MAKING, DISTRICT COURT JUDICIAL OFFICERS NEED GUIDANCE TO ENSURE CONSISTENT INTERPRETATION, IMPLEMENTATION, AND EXERCISE OF DISCRETION UNDER RULE 4-216.1.

The System has Maintained its Status Quo Despite the Rule's Purpose.

Pursuant to Md. Rule 4-216, preventive detention may only be ordered when "the judicial officer is persuaded by clear and convincing evidence that no condition or combination of conditions of pretrial release can reasonably protect against the danger that the defendant presents to an identifiable potential victim and/or to the community." *Wheeler v. State*, 160 Md. App. 566, 574 (2005). And for all but a few specified—mostly serious, violent—charges, the Rule created a presumption of release. *See* Rule 4-216.1(b), (c). However, some judicial officers are flipping this presumption to one requiring detention. Enough are doing so in enough cases that the status quo ante has essentially been preserved, contrary to the Rule's purpose.

In fairness, the news is not all bad. Over the last four years, the Rule has significantly reduced reliance on secured money bail. Today many fewer Marylanders suffer pretrial incarceration solely due to inability to afford a bond, although there are still many who are languishing in jail for weeks or months because they cannot post $1000 and even far less.

And yet, profound problems persist. The bottom line is that Maryland's pretrial population has not significantly dropped after the implementation of the Rule. Data from the Governor's Office of Crime Control and Prevention tells the basic story:

Year	Pretrial Pop (Jan 1)
2016	6391
2017	5838
2018	6523
2019	6261
2020	6072

Fig. 1 – Pretrial Population Snapshot January 1 2016-2020

See GOCCP Data on file with author. From 2016 to 2020, the statewide pretrial population dropped by just 319—under 5 percent.

The reason we have not seen a significant reduction in the pretrial population is simple: Judges and commissioners have dramatically increased their reliance on preventive detention. From 2016 to 2020, the average overall percentage of preventive detention rose from 17 percent to 46 percent. During this same period, the overall percentage reliance on bail fell from 55 percent to 15 percent. *See* HWOB Data, *supra*. The very purpose of the Rule has been thwarted.

It is unlikely that, suddenly, all of these accused individuals could have presented the requisite risk of flight or danger to the community to warrant their detention such that *no* condition could have reasonably protected the community or ensured their appearance. "Conditions of release are to be tailored to the individual circumstances of each person. . . . What these numbers show is that for far too many people in too many courts in this country, the promise and protections of the justice system have not yet materialized." Pretrial Just. Inst., *The State of Pretrial Justice in America* 15 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=99c5aa38-8756-581b-b722-a61bf0fb20e6&forceDialog=0.

Two additional points bear emphasis. All of these individuals are presumed innocent. Unless we align our standards with the Supreme Court's dictate in *Salerno* that pretrial detention be the "carefully limited exception," 481 U.S. at 755, this foundational constitutional tenet is rendered a mere lofty ideal out of Maryland's reach. Moreover, we should not be mistaken in assuming that this is merely a technical question of whether time is served before or after trial. While all pretrial detainees are technically "awaiting trial," a large majority will eventually have all of their charges *nolle prossed* and thus every day, week, or month of their imprisonment will have been entirely "unnecessary [and inappropriate] incarceration." *See* Colin Starger, *The Argument that Cries Wolfish*, MIT Computational Law Report (2020) (finding widespread unnecessary incarceration for pretrial detainees as the result of a 60% *nolle pross* rate in District Court cases in Baltimore City, Baltimore County, Montgomery County, and PG County from 2013 to 2017).

That Status Quo is Poisoned by Bias—Implicit, Explicit, Institutional, and Structural.

The way the Rule has been operationalized has exacerbated racial and other inequities that already exist throughout the criminal legal system and which will not be belabored here. Focusing on pretrial detention, data again obtained from MJCS shows the extent of the disproportionate impact of preventive detention in Maryland. This data reflects bail review outcomes by race.[1]

1. *MDEC Counties*[2]

The outcomes of 275,553 District Court bail review hearings in MDEC jurisdictions since July 1, 2017, are summarized below using the following categories: HWOB (held without bail (preventive detention)); ROR (released on own recognizance); MONEY (secured money bail or cash bond); UPB (unsecured personal bond or promise to pay bond).

[1] Racial categories in MJCS do not include Latine in any form. Thus, all of the racial data for groups other than Black and white were consolidated into an "Other" category. All data underlying *Figs. 2-10c* is on file with Professor Starger. Due to rounding, percentage totals do not always equal 100.

[2] Data in MJCS is recorded differently and so must be gathered and reported separately for MDEC and non-MDEC jurisdictions.

Outcome	Total	Percent
HWOB	112,040	41
ROR	96,438	35
MONEY	40,946	15
UPB	26,129	9

Fig. 2 – District Bail Outcomes 7/1/17-5/31/21

The overall racial makeup of the defendants in these 275,553 hearings is:

Race	Total	Percent
White	141,401	51
Black	122,536	44
Other	11,616	4

Fig. 3- District Bail Race of Defendants 7/1/17-5/31/21

Figure 3 demonstrates the inequity that exists even before Rule 4-216.1 is interpreted. Although Black Marylanders make up only approximately 31% of the state's population (and likely less in MDEC jurisdictions; see list of jurisdictions below at *Figure 4*), they constitute 44% of the defendants at bail review hearings. This shows that Black Marylanders are arrested, prosecuted, and denied release by a commissioner at much higher rates than white Marylanders. Thus, even before the court comes into play, structural bias is already significant.

MDEC County	Total Hearings
Baltimore	59160
Anne Arundel	45911
Wicomico	15804
Cecil	15073
Harford	14103
Washington	14087
Worcester	13951
Frederick	13914
Charles	11250
Howard	11167
Calvert	9692
Carroll	9257
Saint Mary's	9095
Allegany	8938
Dorchester	4792
Queen Anne's	4277
Talbot	4053
Caroline	3595

MDEC County	Total Hearings
Somerset	3528
Garrett	2317
Kent	1589

Fig.4 – District Court Bail Review County Totals 7/1/17-5/31/21

Unfortunately, the preexisting inequity only grows at bail review hearings. *Figure 5a* shows that 43 percent of Black defendants were held without bail while only 39 percent of white defendants were. Conversely, 37 percent of white defendants were released on recognizance while only 33 percent of Black defendants were.

	HWOB%	ROR%	MONEY%	UPB%
Black	43	33	15	8
White	39	37	15	10
Other	37	31	11	20

Fig. 5a- Bail Outcomes by Race (percent of race)

Figure 5b shows the same numbers cut a different way. Although Black Marylanders constitute 44 percent of all defendants and only 33 percent of the population, they make up 47 percent of all people held without bail. No matter how one looks at it, Black Marylanders suffer by comparison to whites under the current Rule 4-216.1 regime.

	Black%	White%	Other%
HWOB	47	49	4
ROR	43	54	4
MONEY	45	51	3
UPB	39	52	9

Fig. 5b- Bail Outcomes by Race (percent of outcome)

2. *Non-MDEC Jurisdictions*

A similar picture of both preexisting and exacerbated bias emerges when looking at non-MDEC jurisdictions. *Figure 6* shows the outcomes for the 220,495 District Court bail review hearings in data obtained for July 1, 2017, to May 31, 2021. Note: Because of the different way records are kept in non-MDEC jurisdictions, the MONEY category includes both secured and unsecured bonds (MONEY and UPB for MDEC counties above).

	Total	Percent
HWOB	90481	41.04
MONEY	71910	32.61
ROR	58104	26.35

Fig. 6 – District Bail Outcomes 7/1/17-5/31/21

Figure 7 shows the racial composition of defendants at bail review hearings. Although the non-MDEC jurisdictions (Baltimore City, Montgomery County, and Prince George's County, *see Figure 8*) have a higher proportion of Black Marylanders than MDEC jurisdictions, Black Marylanders are still dramatically over-represented from the outset. Thus, while Baltimore City, Montgomery County, and Prince George's County are approximately 61 percent, 20 percent, and 65 percent Black, respectively, Black Marylanders represent a whopping 77 percent of defendants at District Court bail review hearings in these jurisdictions.

	Total	**Percent**
Black	170448	77.3
White	40999	18.59
Other	9048	4.1

Fig. 7 - District Bail Race of Defendants 7/1/17-5/31/21

	Total	**Percent**
Baltimore City	102800	46.62
Prince George's	69423	31.49
Montgomery	48272	21.89

Fig. 8 - District Court Bail Review County Totals 7/1/17-5/31/21

As with the MDEC counties, the preexisting inequity is exacerbated at the bail review hearings. *Figure 9* shows the bail outcomes by race across all three non-MDEC jurisdictions. Black defendants suffer significantly higher preventive detention rates than whites—43 percent versus 35 percent. And while Black defendants seem to have marginally higher release rates than whites (26.5 percent versus 26.1 percent), this is more than offset by white defendants securing MONEY bail at much higher rate (39 percent versus 31 percent).

	HWOB%	**ROR%**	**MONEY%**
Black	42.65	26.54	30.81
White	34.76	26.09	39.15
Other	39.16	23.96	36.88

Fig. 9 - Bail Outcomes by Race (percent of race)

Looking closer, the summary data provided in *Figure 8* is broken down by jurisdiction in *Figures 10a-10c*. These figures show: (1) Montgomery and Prince George's County rely more heavily on unsecured bond (MONEY); and (2) only Prince George's County boasts roughly similar rates of preventive detention (HWOB), release (ROR), and unsecured bond (MONEY) between Black and white defendants. Of course, this exception to unequal application of Rule 4-216.1 only proves the rule of bias. While Prince George's County demonstrates that inequity need not result from the interpretation of Rule 4-216.1, Baltimore City, Montgomery, and all of the MDEC counties show that it does.

	HWOB%	ROR%	MONEY%
Black	54.16	26.87	18.98
White	41.7	34.98	23.31
Other	53.19	27.82	18.99

Fig. 10a - Bail Outcomes by Race (Baltimore City)

	HWOB%	ROR%	MONEY%
Black	33.88	14.14	51.98
White	32.56	14.62	52.82
Other	29.68	16.88	53.44

Fig. 10b - Bail Outcomes by Race (Montgomery)

	HWOB%	ROR%	MONEY%
Black	29.41	32.1	38.48
White	29.81	32.75	37.44
Other	32.52	32.58	34.9

Fig. 10c - Bail Outcomes by Race (PG)

Pretrial justice in the courts is part of a larger law enforcement and legal system that includes well-documented bias in policing and prosecutorial practices. Implicit bias allowed by court rules cannot be understood outside of the inequity in the entire system that the courts operate in. Data presented show that Black defendants are seriously overrepresented in arrests that lead to bail review hearings. The situation worsens significantly when interpretation of Rule 4-216.1 comes into play, the time when judges are called upon to render careful and individualized justice instead. Black defendants suffer preventive detention at higher rates and win release on recognizance at lower rates that white defendants. This is not justice.[3]

The big picture is clear: Maryland's criminal legal system suffers from racial inequity, which must be addressed on many fronts. Taking the next step to achieve the promise of Rule 4-216.1 is a step the judiciary can take on its own.

[3] We have not undertaken a regression analysis of the factors that might "explain" the observed disparities. However, such a regression analysis (looking at seriousness of crimes charged, for example) would not help to understand the current injustice in Rule 4-216.1's application. Even if seriousness of crimes charged were to be factored into the analysis of bail outcomes, it would not control for bias in the arrests and charging of those crimes before entering the bail system. In this sense, the inequity both speaks for itself and cannot be explained away. Moreover, there is no reason to believe that crimes are disproportionately committed by members of different races, rather that they are disproportionately policed, charged, and prosecuted as ample research beyond the scope of this submission has demonstrated.

Preventive Detention is Unnecessary in the Great Majority of Cases.

Rule 4-216.1 requires judicial officers to start from the presumption that defendants will be released on their own recognizance or with an unsecured bond, and then the prosecutors must demonstrate that a bond or conditions of release will not ensure the defendants' appearance or that the defendants pose a threat to the community. *See Wheeler*, 160 Md. App. at 574. In some parts of the state, this has increased the number of people being safely released to the community either on their own recognizance or under some form of pretrial supervision. Open Soc'y Found., *Steps in the Right Direction*, *Maryland Counties Leading the Way in Pretrial Services* 2 (2018), http://www.ma4jr.org/wp-content/uploads/2018/01/Steps-in-the-Right-Direction-Maryland-Counties-Leading-the-Way-in-Pretrial-Services-OSI-Baltimore-2018.pdf. However, "some judges have responded to the rule changes by holding an increased number of defendants in jail, viewing pretrial incarceration as the only option available to them for far too many people." *Id.* Some of those judges do so because they perceive local pretrial services to be inadequate, e.g., for not having the ability to provide electronic monitoring, but this flies in the face of the evidence that such monitoring does not have a significant impact on either failure to appear for court or re-arrest while awaiting trial. Open Soc'y Found., *supra* at 13, 15.

In fact, existing pretrial release services programs in Maryland are highly effective and lead to consistently low rates of re-arrest and failures to appear in court. *Id.* at 14. These services can include "in-person visits, telephone contact, home visits, random or scheduled urinalysis, addiction assessment, curfew, and any other condition ordered by the court." *Id.* at 13. In fiscal year 2017 in Baltimore City, more than 93 percent of individuals in its pretrial services supervision program appeared for all court dates, more than 97 percent had no new arrests, and of the few who were rearrested, most were for non-violent crimes. *Id.* "Jurisdictions across Maryland are increasingly realizing the value of pretrial release programs, finding them a safer, cheaper and more effective alternative to pretrial incarceration. . . . [L]ike Baltimore City, jurisdictions can successfully operate a pretrial release program [even] without electronic monitoring technology." *Id.* at 15.

Despite this, judges may be inclined to add supervision and conditions of pretrial release, especially electronic monitoring. However, passing the cost on to defendants causes many to be incarcerated, not due to dangerousness or risk of flight, but because they cannot afford the fees associated with wearing an electronic monitor. Joseph Shapiro, *Measures Aimed At Keeping People Out Of Jail Punish The Poor*, NPR, May 24, 2014, https://www.npr.org/2014/05/ 24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor. This "means people with money [still] get to go home, while those without go to jail." *Id.* If judges choose to impose this financial condition of release, they must account for the individual's indigency as required by Rule 4-216.1.

Additionally, "excessively stringent release conditions can result in large numbers of technical violations, which lead people back into custody." Human Rights Watch, *Not in it for Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*

(2013), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly. For instance, one study found that electronic monitoring did not improve results for high-risk individuals and correlated to significantly increased violation rates for low-risk individuals. Marie VanNostrand et al., U.S. Dep't of Just. Off. of the Fed. Detention Tr., *Pretrial Risk Assessment in the Federal Court* 32 (2009), https://www.pretrial.org/ download/risk-assessment/Pretrial%20Risk%20Assessment %20in%20the%20Federal% 20Court%20Final%20Report%20(2009).pdf (stating that low-risk defendants were 112 percent more likely to violate condition of release). Judges may default to using electronic monitoring, "even in cases for which they might otherwise release without conditions. But replacing pretrial incarceration with electronic monitoring may still result in significant infringements on liberty, particularly in minority communities that receive disproportionate police enforcement." Human Rights Watch, *supra*. Consistent with the plain language of the Rule, unnecessary conditions in all forms must be avoided.

Rather than relying on expensive, often privatized electronic monitoring services, Maryland should utilize community-based supervision and simple measures like court date reminders which have proven to be effective and cost-efficient. *See*, *e.g.*, Jason Tashea, *Text message reminders are a cheap and effective way to reduce pretrial detention* (2018), https://www.abajournal.com/lawscribbler/article/text_messages_can_ keep_people_out_of_jail. Even the notion that failure to appear equates with flight risk is a fallacy. The vast majority of defendants are not flight risks, they are merely at risk of forgetting a court date or being prevented from attending by unforeseen circumstances. *Id.* Further, conditions requiring addiction assessment or drug screening are also commonly ordered with no showing of a need, leading to detention if the defendant cannot afford the unnecessary costs or misses a screening appointment. In short, no condition of confinement can lawfully be imposed under the Rule without an individualized determination of the need, and any condition beyond release on recognizance must be justified by evidence. This means that no conditions other than to appear in court and obey the law should be treated by any judge as standard or imposed routinely or rotely.

Currently, the only way to secure relief from such orders usually involves herculean efforts from community groups and public defender staff to engage high up the chain of command in the offices of states attorneys to obtain agreement to modify conditions and secure release. Otherwise, such efforts typically fall on deaf judicial ears. This is the opposite of a system explicitly based on a presumption of pretrial release.

Maryland's judges should receive training and education to understand this landscape. Leadership to send these important messages to trial judges is also critical.

This Subcommittee should propose revisions to ensure that Rule 4-216.1 is uniformly interpreted and implemented across the state. As reflected above, the number of individuals held without bail has steadily increased since the Rule was adopted. Pretrial

detention determinations must be reasonably consistent to ensure equitable outcomes for all Marylanders.

PEOPLE SUFFER SEVERE DETRIMENTAL CONSEQUENCES FROM UNNECESSARY PRETRIAL DETENTION.

Several studies have discussed the harmful burdens of pretrial detention on individual defendants, their families, and communities. Research has shown that pretrial detainees suffer the same deprivations of liberty, property, and privacy that the criminal justice system imposes on convicted defendants. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1353–54 (2014). This is despite the fact that the U.S. Department of Justice estimates that non-dangerous defendants make up approximately two-thirds of the [] defendants held pretrial in jails at any given time." *Id.* at 1352. Also, as noted above, the charges against 60 percent of those detained pretrial are ultimately dismissed. And finally, these burdens fly in the face of the constitutional prohibition on punishing pretrial detainees.

Pretrial Detention Causes Rather than Decreases Crime.

Empirical evidence suggests that detained defendants are more likely to recidivate after case disposition than released defendants. Yang, *supra* at 1426. One study found that defendants who are detained pretrial are 30 percent more likely to recidivate when compared to defendants released sometime before trial. Christopher Lowenkamp et al., *The Hidden Cost of Pretrial Detention*, Arnold Found. 9–10 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf. Defendants who are detained even for a few days before being released pretrial are 39 percent more likely to commit a new crime prior to trial than defendants who were never incarcerated. *Id.* at 4. Individuals who were detained before trial are over ten percent more likely to be rearrested for a new crime within two years after the initial arrest. All of this suggests that these individuals commit new crimes because they are unable to find employment and/or lose their housing due to their incarceration. Yang, *supra* at 1426–27. Though the primary goal of the criminal justice system is to protect the public, the pretrial detention phase, also largely justified for public safety, only creates more crime.

Pretrial Detention Increases the Incentive for Innocent Defendants to Plead Guilty.

For individuals who have been charged with misdemeanor offenses, the worst punishment they endure may come before conviction. For them, conviction generally means getting out of jail, as people detained on misdemeanor charges are routinely offered sentences for "time served" or probation in exchange for tendering a guilty plea. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277, 308 (2011). This increases the incentive for them to plead guilty even if they are innocent. Many pretrial detainees feel pressured to plead guilty instead of proceeding to trial, whether detention is due to unconstitutional bail,

unconstitutionally unaffordable costs of pretrial services, or improper preventive detention:

> [D]etention alters the incentives for fighting a charge. A detained defendant generally has less to lose by pleading guilty; detention may have already caused major disruption to her life. And whereas for a released defendant the prospect of a criminal sentence—custodial or otherwise—represents a serious loss of liberty, for a detainee it is, at worst, an extension of the status quo.

Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 722 (2017). As one detained individual has described it: "You know I'm going to have to take the plea because I can't get out because I can't pay…. Six months later or however long it takes, you decide to give me a nicer offer of two years, time served and then a year of probation. And now I've got a conviction." Just. Policy Inst., *Bailing on Baltimore: Voices from the Front Lines of the Justice System* 16 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailingonbaltimore-final.pdf (*Voices*).

Such pressures to plead guilty may be overwhelming. Pretrial detention leads to private costs for these individuals beyond their loss of liberty. According to the Pretrial Justice Institute, research shows "that keeping such individuals locked up for as few as three days can have dangerously destabilizing effects. They risk losing their homes, their jobs, and their families." Pretrial Just. Inst., *The State of Pretrial Justice in America* 15 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=99c5aa38-8756-581b-b722-a61bf0fb20e6&forceDialog=0; *see also* Open Soc'y Found., *supra* at 2 ("Even just a few days of pretrial incarceration can result in the loss of housing or employment, missed payments and negative credit consequences, disruptions to family relationships and medical care, and more."); *Voices*, *supra* at 16 (describing a detained individual who lost a job of 10 years, including his seniority, benefits, and retirement plan.)

This loss of freedom also includes the psychological and mental costs of being physically incapacitated and the risk of injury or death while in jail. Yang, *supra* at 1417; *see* Jennifer Gonnerman, *Kalief Browder*, *1993-2015*, New Yorker (June 7, 2015), http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015 (describing the tragic death of Kalief Browder, a teenager who committed suicide after enduring three years of detention, two in solitary confinement, while awaiting a trial, on a charge of stealing a backpack, that never happened because he was eventually released instead of prosecuted).

Pretrial Detention Causes Adverse Case Outcomes.

Pretrial detention can also hinder the ability of defendants to mount a successful defense or to gather evidence. A detained "defendant must recruit friends or family members to collect evidence and witnesses and will often have difficulty communicating with his attorney due to limited visiting hours." Wiseman, *supra* at 1351. This difficulty is

exacerbated when detained individuals are incarcerated in facilities far away from where they live, which "can inhibit a defense attorney from consulting with the pretrial detainee." Douglas J. Klein, *Note: The Pretrial Detention "Crisis": The Causes and the Cure*, 52 Wash. U. J. Urb. & Contemp. L. 281, 294 (1997). Detention also might limit the financial resources available to dedicate to the defense (if, for instance, detention results in loss of wages). Heaton, *supra* at 722. Difficulty in preparing a defense can obviously increase the probability of conviction and incarceration.

Also, pretrial detention itself adversely affects case outcomes. Talk about implicit bias! Pretrial detention increases the probability that a felony defendant will be convicted, in some cases "because judges and jurors believe that detained defendants are more likely to be guilty." Yang, *supra* at 1419. "[T]he tendency of pretrial detainees ultimately to be found guilty may reflect juror bias. Jurors may reason that if the defendant was incarcerated, then he must be guilty of the charged offense because the government would not have jailed the defendant in the first place." Klein, *supra* at 294. Meanwhile, "released defendants are significantly less likely to be found guilty of an offense, to plead guilty to a charge, and to be incarcerated following case disposition." Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108:2 Am. Econ. R. 201 (2017).

Individuals who are detained also receive longer jail and prison sentences than similarly-situated people who were released before trial. Pretrial Just. Inst., *supra* at 15. For example, defendants detained pretrial who have charges that could result in sentences of less than one year in jail have four times the likelihood of being sentenced to jail and, on average, receive three times longer sentences than defendants released pretrial. Pretrial Just. Inst., *Bail in America: Unsafe, Unfair, Ineffective* (2014), http://www.pretrial.org/the-problem. "[D]efendants already in jail receive and accept less favorable plea agreements and do not have the leverage to press for better ones." Vera Inst. of Just., *Incarceration's Front Door: The Misuse of Jails in America* 14 (2015), http://www.courtinnovation.org/sites/default/files/incarcerations frontdoorreport.pdf.

Pretrial detention also prevents an accused person from engaging in behavior that might mitigate her sentence or increase the likelihood of acquittal, dismissal, or diversion. Heaton, *supra* at 722. This conduct includes paying restitution, seeking drug or mental health treatment, and demonstrating commitment to educational or professional advancement. *Id.*

All of this evidence demonstrates that the effects of unnecessary pretrial detention endure for years after release regardless of the ultimate disposition of the charges.

Pretrial Detention Detrimentally Affects Detained Individuals' Families and Communities, and Maryland as a Whole.

In addition to disproportionately affecting conviction rates and sentencing, and possibly future offenses, through this chain of events, pretrial detention may affect the lives of

defendants' children, other family members, and their communities. *See United States v. Barber*, 140 U.S. 164, 167 (1891) (stating that those detained prior to trial "usually belong to the poorest class of people" and "their families would be deprived, in many instances, of their assistance and support"). Families of detained individuals "suffer from lost income and forfeited education opportunities, including a multi-generational effect in which the children of detainees suffer reduced educational attainment and lower lifetime income." Open Soc'y Just. Initiative, *The Socioeconomic Impact of Pretrial Detention* 12 (2011), http://www.unicef.org/ceecis/Socioeconomicimpactpretrialdetention.pdf.

Eventually, children with fathers who have been incarcerated are significantly more likely to be expelled or suspended from school, and more likely to exhibit criminal behavior due to parental separation, loss of child custody, lack of role models, and lower parental resources following incarceration. *See* Rucker C. Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, *in* Do Prisons Make Us Safer? The Benefits & Costs of the Prison Boom 177, 202 (Steven Raphael & Michael A. Stoll eds., 2009). These consequences are particularly troubling when they result from unwarranted pretrial detention and the downward spiral that can result. Pretrial detention may also affect the welfare of other family members who may have to assume financial or caregiving responsibilities during the defendant's detention. Dobbie, *supra*; Yang, *supra* at 1427.

The over-use of pretrial detention harms not only those detained, but the community as a whole, "depriving it of parents, income-earners, teachers, role models, and political leaders. The community impact of excessive pretrial detention furthers the social exclusion of marginalized groups, increases their poverty, and decreases their political power." Open Soc'y Just. Initiative, *supra* at 33. Community-level consequences are most evident among Black and Latine communities, as they are disproportionately represented in the jails across the country. "While blacks and Latinos combined make up 30 percent of the general population, they are 51 percent of the jail population." Vera Inst. of Just., *supra* at 15. Black males, in particular, are arrested at higher rates than white males, and are excessively held pretrial. *Id.* High arrest rates also lead to increased bail amounts and increased preventive detention, due to the use of racially fatally flawed risk assessment tools. George Joseph, *Justice by Algorithm*, CityLab, https://www.citylab.com/equity/2016/12/justice-by-algorithm/505514/ (2016). *See also*, Cherise Fanno Burdeen, et al., *The Case Against Pretrial Risk Assessment Instruments*, ABA Criminal Justice Section, https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2021/spring/the-case-against-pretrial-risk-assessment-instruments/ (2021).

These racial disparities also persist at sentencing. Black and Latine men in the state and federal court systems tend to receive longer sentences than their white counterparts convicted of similar crimes and with similar criminal histories. *Written Submission from Am. Civil Liberties Union on Racial Disparities in Sentencing*, Hearing on Reports of Racism in the Justice System of the United States, to the Inter-Am. Comm'n on Human Rights 1–2 (Oct. 27, 2014).

For the state, pretrial detention leads to increased expenses, reduced revenue, and fewer resources for other programs. *Id.* Indeed, "it costs $198.04 per person per day to house an individual in jail in Baltimore City." Open Soc'y Just. Initiative, *supra* at 14. By increasing release on recognizance, minimal pretrial supervision, and other lesser intrusive but effective measures, the state can save taxpayer dollars that can be spent on more beneficial endeavors. "The U.S. federal court system has calculated that it is on average roughly 10 times cheaper to put an individual under pretrial supervision in the community than to detain them in jail. As recently as 2010, it cost only $2.50 per day to serve a person released under [pretrial] supervision." *Id.*

REVISING THE RULE IS NECESSARY TO BEGIN TO ADDRESS THESE INEQUITIES

The accompanying proposed simple changes to court rules (Attachment 1) aim to inhibit judges from too quickly and too easily relying on preventive detention or ordering conditions of release that in effect prevent release. This approach is solidly supported by neuroscience on interrupting bias. *See, generally*, Daniel Kahneman, *Thinking, Fast and Slow* (2011). Although the 2017 rule as written made it clear that release was supposed to be the default option, this is not how it has worked in practice. The proposed changes therefore address the following illicit practices that our experience (and the experience of our partners at OPD and in the community) tell us are common and make resort to preventive detention and conditions that lead to detention instead of release all too easy.

The proposal generally requires a particularized record of the individualized consideration required by Rule 4-216.1(b)(2) and expressly prohibits:

- Assuming the truth of the charges in the charging document
- Justifying preventive detention based on the charge alone
- Using prior arrests that did not result in conviction as evidence of dangerousness
- Punishing the defendant
- Placating public opinion, i.e., seeking to avoid adverse media attention

The proposal also sets preponderance of the evidence as the burden of proof for preventive detention based on flight risk, and clear and convincing evidence as the burden of proof for preventive detention based on dangerousness, instead of the current "reasonable likelihood" for both. Maryland law is clear that the standard of proof for dangerousness is clear and convincing evidence. *Wheeler*, 160 Md. App. at 574. "Reasonable likelihood" has not proven to deter unnecessary preventive detention for so-called flight risk as the Rule intended.

Finally, the proposal includes several other changes that would close additional loopholes that allow unjust pretrial detention in specific contexts:

- Tightening the imposition of unaffordable pretrial conditions of release by clearly requiring the individualized consideration of ability to pay as for bail

- Applying the individualized consideration to determinations of release after alleged violations of pretrial release, parole, and probation
- Prohibiting predetermined bail or preventive detention on failure to appear warrants and body attachments and requiring application of the individualized consideration to these proceedings[4]
- Reviving a 2018 Rules Committee proposal, not yet acted upon, to require prompt presentment of individuals detained for violation of probation[5]

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[4] When defendants fail to appear at a scheduled court proceeding, judges issue bench warrants for arrest. Rule 4-217(i)(1). Even though the absent defendants cannot offer an explanation or mitigation for missing court at that time, many judges proceed to order a preset preventive detention or money bail based upon the failure to appear as permitted by that rule. Thereafter, when defendants appear either voluntarily or by arrest on the bench warrant, the reviewing (usually different) District Court judges almost always feel bound to follow the colleague's previous preset bail or detention. By doing so, the reviewing judges disregard the legal requirement of providing an independent review and exercising judicial discretion based upon Rule 4-216.1 factors in deciding whether to release defendants. Consequently, for example, defendants in Baltimore City who previously failed to appear are almost certain to remain incarcerated for the next 60 days, because District Court judges also routinely continue such proceedings for that length of time. Moreover, the data on these rubber-stamped presets is egregious: In Baltimore City from 2019 through 2020, in 946 presets, 41 percent were bail presets, 58 percent were preventive detention presets, and only 1 percent were release on recognizance presets. For the bail presets (387 of the 946) the average bail amount was $6,846 and the median bail amount was $2,500. Thus, nearly 99 percent of individuals detained on a failure to appear warrant languish in jail for a completely unnecessary and unjustifiable 60 days or more. This practice appears to violate the applicable statute. *See* Md. Crim. Proc. Code § 5-213, the plain language of which provides that the court may take such action only *after* presentment and not before.

One recent example highlights how egregiously unfair this procedure can be. A disgruntled customer with a history of filing peace order proceedings filed one against a woman with a small online business claiming that the business owner had robbed her. In connection with the proceedings, a warrant was issued for the respondent's arrest with a predetermination that she be held without bail pending the hearing on the peace order. Fortunately, she has not yet been arrested pursuant to the warrant. The peace order proceeding was dismissed when the petitioner failed to appear for the hearing. But the warrant has never been recalled, despite the respondent having presented information to challenge its validity and repeatedly requesting of the court clerk that it be recalled. She has had this threat of impending arrest and automatic "preventive" detention hanging over her head for approximately six weeks so far. *See* records on file with Out for Justice.

[5] For background specific to this item, *see* Attachment 2 (excerpts from 2018 Rules Committee and Court of Appeals proceedings).

CONCLUSION

The impact of indiscriminate and excessive use of pretrial detention can be dire, creating negative consequences for those detained, their families, and their communities. And while it is understandable that judges try to protect the public, it is important that they understand that unwarranted pretrial detention does not accomplish that goal and may ultimately exacerbate the conditions that can give rise to threats to public safety.

The Subcommittee should recommend the attached rules revisions to prevent these detrimental effects, ensure consistent interpretation and implementation of Rule 4-216.1, and promote the Rule's purpose of protecting Marylanders from unnecessary deprivations of liberty.