

Bail Reviewed:

Report of the Court Observation Project



Maryland Office of the Public Defender
Justice, Fairness and Dignity for All
March 2018

About

The Maryland Office of the Public Defender (OPD) is an independent state agency created in 1971 by the Maryland General Assembly. With over 900 employees, including 570 attorneys, OPD is the largest legal services organization in Maryland. Its mission is to provide superior legal representation to indigent defendants in the State of Maryland.

Acknowledgments

The Community Court Watch was supported by the Open Society Institute – Baltimore (OSI-Baltimore). OSI-Baltimore is the only U.S. field office of Open Society Foundations. They focus on the root causes of three intertwined problems in Baltimore and in Maryland: drug addiction, an over-reliance on incarceration, and obstacles that impede youth succeeding inside and out of the classroom. They also foster and support a network of 190 Community Fellows, a corps of dynamic activists and social entrepreneurs implementing projects that address problems in underserved communities in Baltimore City.



The authors would also like to thank the organizations that helped recruit community volunteers: Baltimore Hebrew Congregation, Homewood Friends, Justice and Recovery Advocates, Justice Policy Institute, Leaders of a Beautiful Struggle, Out for Justice, NAMI- Howard County, and University of Baltimore School of Law.

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Executive Summary

Whether someone accused of a crime is detained pending trial is among the most critical factors in the outcome of the case and the person's well-being. Pretrial detention impacts the ability to work, care for one's family, and maintain housing - regardless of what ultimately happens in the case.

The pretrial status of an accused can also impact the ultimate result in their case. Most criminal cases do not go to trial, and what pleas are offered by the prosecutor and accepted by the defendant are heavily weighted by whether the person is currently in jail. The need to get out of jail and return home is a powerful incentive to accept a plea, regardless of the fairness of the offer and sometimes even the person's culpability.

Despite the incredible importance of this phase of the proceedings, the general public knows very little about the pretrial process. Unlike criminal trials, pretrial hearings are rarely covered by the media, portrayed in entertainment, or taught in schools. The Pretrial Court Observation Project was designed to educate community members about the pretrial process, while helping gather important data at the critical time of the recent implementation of a Maryland Court Rule change.

This report documents the observations and findings of sixty-four volunteers who observed bail review hearings in Baltimore City, Baltimore County, Frederick County, Howard County and Montgomery County. While their observations show clear progress, particularly with the decreased use of money bail, they also identified areas of concern, including the overuse of holding people without bail.

The concerns that were identified have identifiable solutions. Among those were the need for a validated assessment tool and the availability of a sufficient range of pretrial services which are needed to ensure pretrial determinations are consistent, fair, and minimize the extent to which presumptively innocent individuals are jailed.

The recommendations in this report come from the Community Court Watch observers and are based on their assessments of what is needed to make pretrial a more fair process:

- **Recommendation 1:** Provide judges with resources that encourage release while helping to ensure defendants return to court.
- **Recommendation 2:** Provide judges with tools that measure risk.
- **Recommendation 3:** Educate judges, commissioners and the community.
- **Recommendation 4:** Accused individuals should be present for their bail review hearing.

Contents

Executive Summary	1
Introduction	3
Overview of Maryland Pretrial System	4
Methodology	6
General Observations	8
Analysis	11
Conclusions and Recommendations	15
Endnotes	19
Appendix – Observation Survey	21

Introduction

Historically in Maryland, individuals accused of a crime were often required to post bail in order to be released while awaiting trial. Between 2011 and 2015, more than 46,000 presumptively innocent individuals were detained on bail for at least the first 5 days of their case.¹ Of these, nearly 30,000 were held on a bail of more than \$5,000.²

The costs of this money bail system were enormous. Individuals who could not afford to pay were at risk of losing their job, jeopardizing their housing, and accepting an inappropriate plea to secure release; while families were forced to choose between allowing a loved one to remain incarcerated or to be indebted to a bail bondsman. In 2011-2015, defendants and their families were charged non-refundable premiums totaling an estimated \$256 million (\$51 million per year).³ More than \$75 million of these corporate bond premiums were paid in cases where the defendant was ultimately not convicted of any crime.⁴ Especially troubling, and heightening constitutional concerns, money bonds were significantly higher for black defendants⁵ and the highest corporate bond costs were imposed on two of Maryland's poorest neighborhoods.⁶

In October 2016, Maryland Attorney General Brian Frosh issued a letter expressing concern with the constitutionality of Maryland's reliance on money bail.

While imposing a financial condition is allowed under current State law and is not unconstitutional in and of itself, the Court of Appeals would likely hold that ... a judicial officer may not impose a financial condition set solely to detain the Defendant. ... Setting the bail in an amount not affordable to the defendant, thus effectively denying release, raises a significant risk that the Court of Appeals [Maryland's highest court] would find it violates due process. If pretrial detention is not justified yet bail is set out of reach financially for the defendant, it is also likely the Court would declare that the bail is excessive under the Eighth Amendment of the U.S. Constitution and Article 25 of the Maryland Declaration of Rights.⁷

Spurred on by the Attorney General's guidance, as well as similar concerns raised by former U.S. Attorney Eric Holder,⁸ the American Bar Association,⁹ and scores of other officials and advocates, the Maryland Court of Appeals adopted a new rule designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond."¹⁰

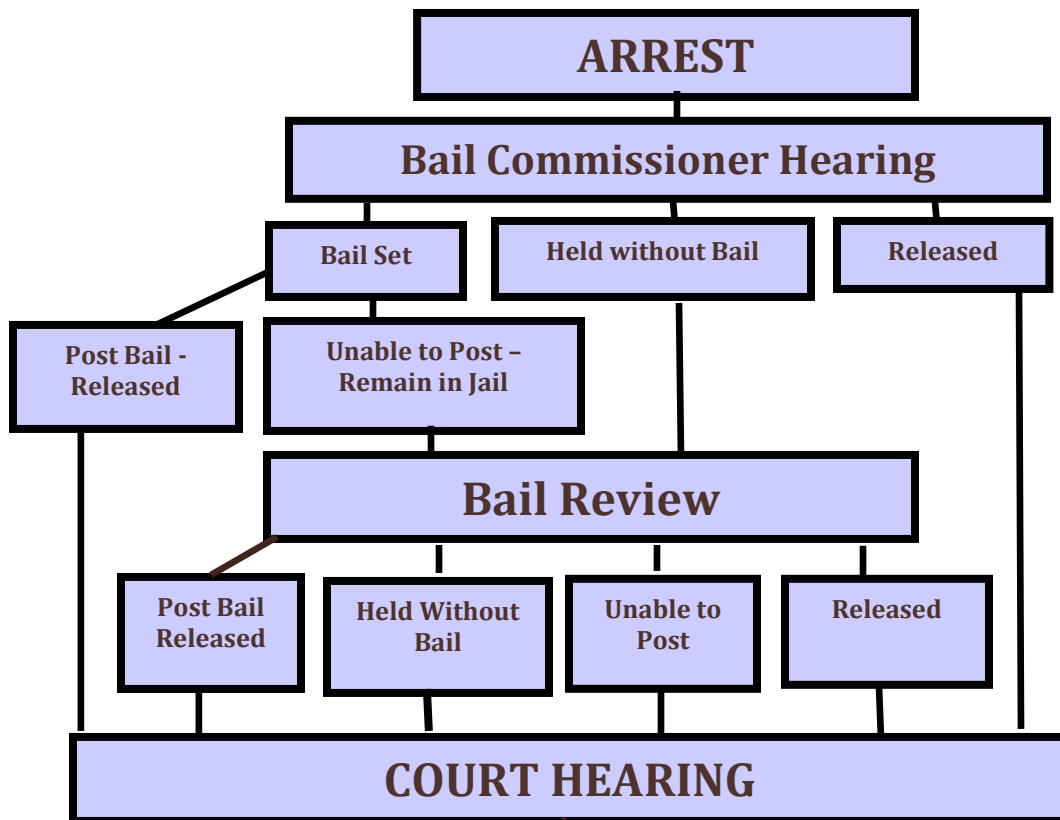


The Court of Appeals passed this new Rule in February 2017 with an effective date of July 1, 2017. To prepare for the new rule's enactment, bail commissioners and judges were provided with a Letter of Advice from Judiciary leadership, presentations and communications regarding proper interpretation of the rule, and a plenary session by the Chair of the Maryland Judiciary's Standing Committee on Rules of Practice and Procedure at the annual Judicial Conference.¹¹

The Court Observation Project focused on the implementation of the new court rule. Volunteers observed bail review hearings, documented the proceedings, and provided general impressions of whether the proceeding conformed to the spirit and letter of the new rule.

Overview of the Maryland Pretrial System

Maryland has a two-tiered pretrial process. First, an individual who is arrested goes before a bail commissioner, who ensures the defendant understands the charges against them and the possible penalties, advises the defendant of the right to an attorney and their responsibility to obtain one, and makes the first determination of whether probable cause exists to charge the individual and whether the defendant should be released or held pending trial. More than one-third of all defendants are released after the commissioner hearing.¹² If a defendant is not released within one business day after the commissioner hearing, a bail review hearing is held before a District Court Judge who provides the same advisements and conducts its own pretrial determinations.



Both commissioners and judges may decide that a defendant should be released on recognizance, held pending trial, or require a money bail or other conditions. However, a commissioner is required to hold some defendants without bail based on certain charges alleged or if the person is subject to extradition.¹³ At the bail review hearing, a judge has the complete range of options available for all defendants, regardless of charges alleged.

A defendant has a right to an attorney at both phases of bail review consideration,¹⁴ although this right is often waived at the Commissioner hearing in order to expedite the determination. Except for those who have retained private counsel, the Office of the Public Defender provisionally represents indigent defendants at the bail review hearing before a judge.

Commissioner hearings and bail reviews are different from trials and may have more relaxed rules. Defendants are not present in the courtroom but remain held at the jail where they appear via closed circuit television. In some jurisdictions, the defense attorney is at the jail with their client; in others, the attorney is in the courtroom with the judge and prosecutor. Recommendations are typically made by the prosecutor and/or a pretrial agent, depending on the jurisdiction, and the defense attorney.

If a money bail is imposed, it can be posted through a bail bond company, or by an individual posting cash or property valued at the bail amount to secure a Defendant's release. Any bail set at \$2,500 or less automatically has a ten percent cash option, with the lowest cash bail being \$100 or ten percent of \$1,000. While a money bail is returned if the Defendant attends all of their court dates, a corporate bail bondsman will usually impose a 10 percent nonrefundable fee on the individual or family.

Even before the Court's recent rule change, in assessing whether someone should be detained or released pending trial, commissioners and judges were required to consider:

- A. the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction;
- B. the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;
- C. the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;
- D. any request made under Code, Criminal Procedure Article, § 5-201 (a) for reasonable protections for the safety of an alleged victim;
- E. any recommendation of an agency that conducts pretrial release investigations;
- F. any information presented by the State's Attorney and any recommendation of the State's Attorney;
- G. any information presented by the defendant or defendant's attorney;
- H. the danger of the defendant to an alleged victim, another person, or the community;
- I. the danger of the defendant to himself or herself; and
- J. any other factor bearing on the risk of a willful failure to appear and the safety of each alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.¹⁵

The factors to be considered did not change with the new rule. Rather, the Court of Appeals provided guidance on how to use this information, with the stated intent of "promot[ing] the release of defendants on their own recognizance or, when necessary, unsecured bond."¹⁶ In particular, commissioners and judges were to give priority to nonfinancial conditions of release, and were prohibited from imposing an unaffordable financial condition or using money bail to ameliorate dangerousness.¹⁷

Methodology

The Court Observation Project focused on the implementation of the new court rule. It was designed to educate community members about the pretrial process, while helping gather important data.

All court observers were voluntary, unpaid participants. Volunteer observers were solicited from a variety of sources, including outreach to communities, advocacy networks, grassroots organizations, faith institutions, and local law schools. Word of mouth further generated interest and increased recruitment in the later months of the project.

Prior to beginning the court watch program, more than half of the community observers came to the issue with no understanding of the process. Only 19 of the 64 observers reported having attended a bail review hearing before this project. Several observers had been engaged in a similar court watch effort through the Homewood Friends, a Quaker group in Baltimore City. That effort included observing dockets in Baltimore City but did not involve as detailed a documentation or any data collection. In the interviews and focus groups, participants from Homewood Friends provided impressions on how the bail reviews changed before and after the rule change.

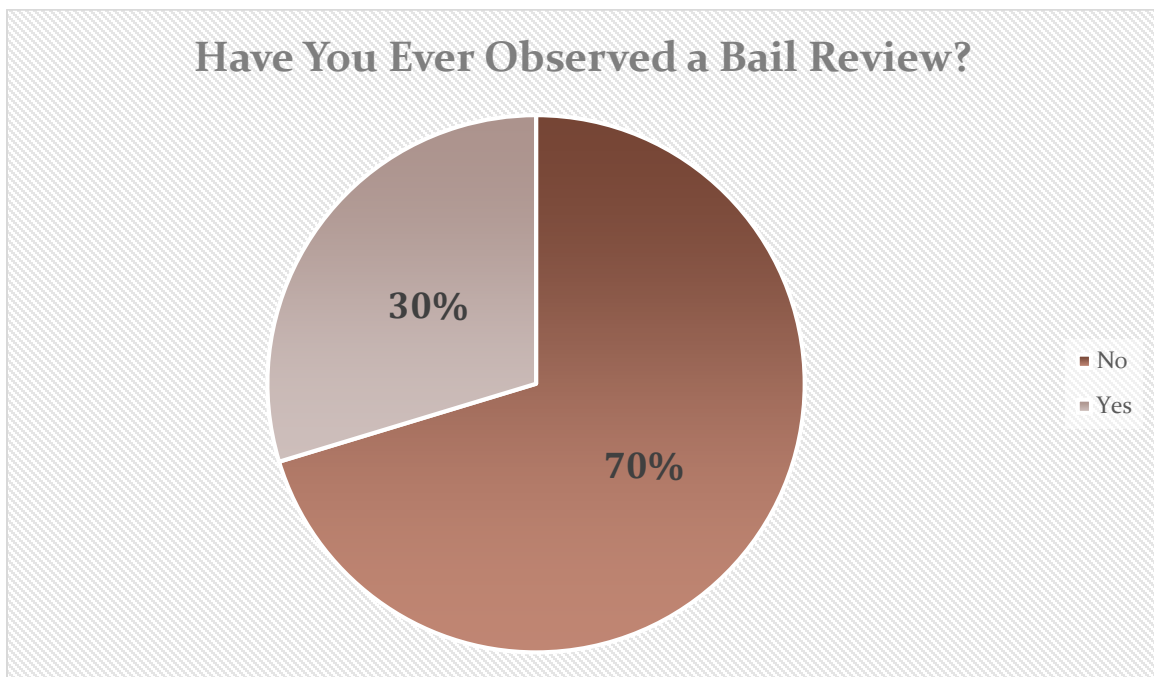


Figure 1: Prior Exposure to Bail Reviews.

“I now understand each step that goes into setting bail. I also understand the entire pre-trial system much better.... I feel much more prepared to talk to people about how our bail and pretrial system actually works.” - Samantha

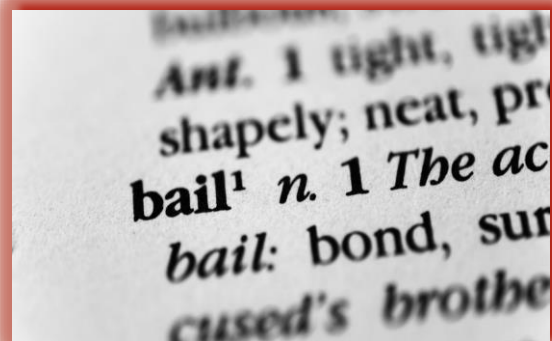
Regardless of whether they were previously familiar with the pretrial process, all participants were required to attend a 2-hour training led by OPD staff. The training included an overview of the pretrial process, expectations of volunteer observers, and a detailed explanation of the survey instrument on which observers would record information from the bail reviews they were observing.

Participants from the first training observed bail review hearings in Baltimore city prior to the new rule’s enactment. These observations were used to refine the training and survey instrument and to ensure a cadre of capable observers as soon as the rule was enacted.

The survey instrument, a copy of which is provided in the Appendix, was developed to capture as much information for aggregated analysis as possible. Due to the fast pace of bail review hearings, observers were often not able to capture every data point in the survey instrument. As a result, they were instructed to prioritize: the defendant name or case number (for cross reference and verification, when needed), the recommendations made by the parties and pretrial services, the charges, and the court’s determination. Only hearings with these items were included; and no other data points were aggregated. Hearings that were postponed, typically due to medical or psychiatric issues or the need for an interpreter, were also not included.

In total, 1,652 bail reviews were observed and included in this study: 962 in Baltimore city (210 prior to the July 1, 2017 enactment of the rule change; 752 after the rule change); 554 in Baltimore County (130 prior to the rule change; 424 after the rule change); 67 in Montgomery County, 55 in Howard County and 13 in Frederick County. Observations made prior to July first were only included in analysis comparing results over time (Figure 2). All other data points are based solely on hearings observed between July 1 and November 30, 2017.

In addition to compiling information from the survey instrument and accompanying notes submitted by observers, OPD conducted online surveys, telephone interviews, and in-person focus groups with participants to gather feedback.



General Observations

At the conclusion of the project, most observers felt that the pretrial process could be and should be improved. Criticisms included that the process was too subjective, that relevant information was often unknown or inaccurate without enough time to ascertain needed details such as failures to appear or verification of addresses, and that the format was harmful to defendants. Participants who observed bail reviews both before and after the rule change, however, did see progress.

Observers noted how quick the process was and virtually all felt that there was not enough time given to adequately determine if someone should be released. Observations in which the start and end time of the bail review hearing was recorded showed a range of hearings that lasted from 1 minute to 32 minutes, with an average hearing time of 6.32 minutes.

“Up until the time that the new rules went in place (last summer) I witnessed gross inconsistency in bail decisions. This inconsistency began with preparation. Some judges came into court having read through the cases, but some never seemed to. Some were determined to go through the docket in an hour, no matter how many cases. Others took more time. Some outlined the entire process to the defendants, others did not or skipped over it briefly. There was little justification provided about bail decisions. In many cases, the commissioners’ judgment reigned, but in other cases the pre-trial opinion prevailed. It seemed like there were many different hands on the pot. Some judges worked hard to uncover all of the ramifications related to social services, etc. Others ignored that. Often, pre-trial services were recommended, but it was unclear what these services actually were.

“When the rules were clarified, I witnessed a marked change in the discourse of the judges about their dispensations. For almost every case, they spoke about flight risk and danger to community and would justify their decisions by those standards.” - Donna

“Bail hearings only last a few minutes. How can a judge actually evaluate flight risk? Risk of a serious crime? If the defendant has the ability to pay?” – Rhonda

“Not enough [time] in some cases. It simply isn't possible to go into any detail in such a short hearing.” – Laurie

“We also question why investigators are unable to verify so many cases... [The judge] really takes that into account in her decisions.” – Kathryn



The defendant's absence from the courtroom and appearance by closed-circuit video was also highlighted as troubling, particularly in Baltimore City where defendants with cases on the bail review docket are held in a room together where they watch and are collectively recorded for the closed-circuit feed. Some observers stated that the absence of defendants from the courtroom at times made it difficult to see who was talking and hear what was being said. The video equipment, at times, did not work properly. One observer reported that the judge could not see the defendant on the screen during the bail review hearing:

*The monitor facing the court malfunctioned, so only those of us in the galley could see the defendants. The court could not, although the judge could hear them. At one point, the judge had to ask me what the defendant look like. She was weeping, and I said so.*¹⁸

Observers who attended multiple dockets reported that the result of a bail review hearing seemed to vary based on the judge presiding. Some judges were consistently identified as especially attentive or caring, while others were criticized for processing cases too quickly and lacking empathy or consideration of an individual's situation.

“Some judges formed an opinion before they got into the courtroom, based on what papers they had.” - Maria

Observers also noted a racial disparity in who appears in bail reviews – specifically the overrepresentation of African American and Latino individuals -- and questioned whether all defendants were treated equally. Because defendants appear on a small television screen (and in Baltimore City as a group), observers could not consistently document the race of the defendant. However, data on the pretrial population – in Baltimore City, Maryland, and nationally – all confirm this racial disparity.¹⁹

Analysis

A. Money Bail is Significantly Less Relied Upon in Baltimore City

Prior to the Court’s rule change, money bail was considered a driving force in pretrial determinations. In Baltimore City that has changed dramatically, with a clear decrease in the use of money bail after the rule went into effect.

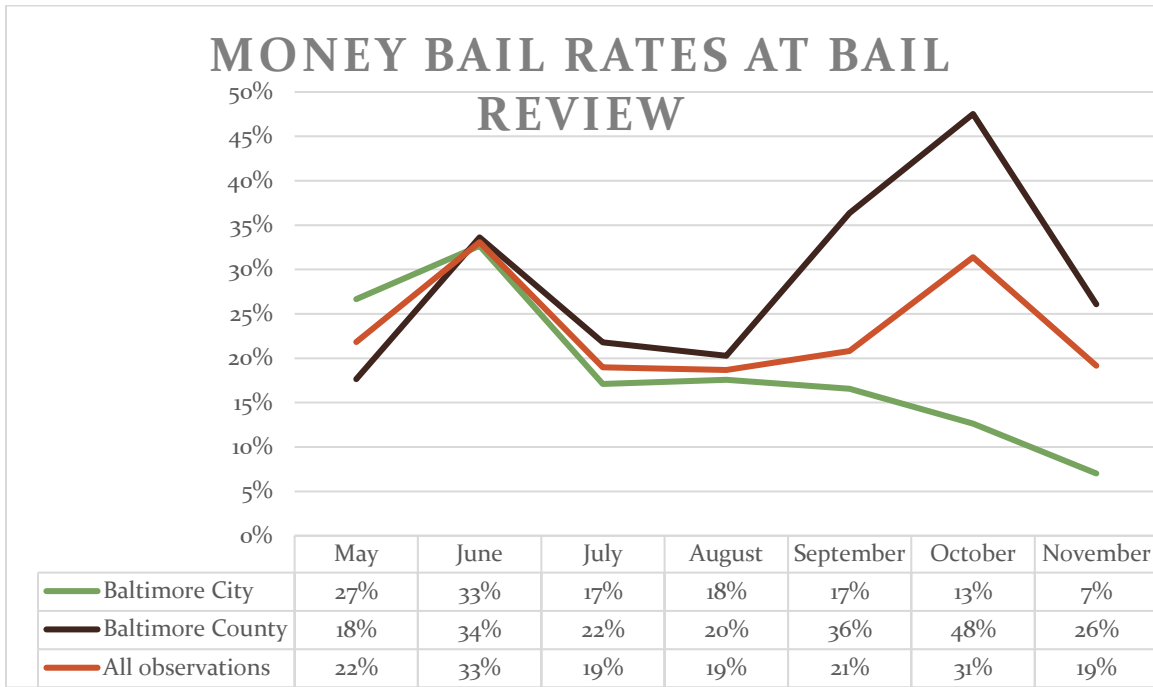


Figure 2: Percentage of bail reviews resulting in a money bail.

(All observations include all five participating jurisdictions.)

The judiciary data shows similar trends when focused exclusively on bail review appearances. When factoring in all cases – including those resulting in release at the commissioner level – the decrease in the use of money bail is more dramatic in the city and statewide.

B. Too Many People are Held Without Bond for Nonviolent or Misdemeanor Charges

“[I]t seemed like the default was “no bail” – Mary Jo

“We question the disproportionate number of no bails by commissioners, especially since investigators recommend ROR because people aren’t flight risks or dangerous” - Kathryn

“Pre-trial services has no way to monitor people effectively, so the judges seem to decide it’s better to keep people in jail rather than release them.” - Dan

Both before and after the rule change, Maryland law contemplated that defendants could be held without bail upon a specific finding that there is no conditions or combination of conditions of pretrial release that can reasonably protect against the danger that the defendant presents to an identifiable potential victim and/or the community.²⁰ Historically, money bail had potentially been used at times to hold someone without bail without making the requisite findings.²¹ The rule change explicitly prohibits this practice.²² Since the rule change, judges appear to have expanded their definition of dangerousness to include a presumption of danger for charges that are generally considered a low risk. This was particularly notable in cases where the most serious charge was a drug offense or misdemeanor assault.

1. Drug Cases

Whether accused of mere possession or of possessing drugs with the intent to sell, drugs in and of themselves do not suggest an articulable danger nor an unlikelihood to appear in court. Nonetheless, some judges would cite the opioid epidemic to note the danger of drug cases. By this reasoning virtually anything deemed to be criminal activity could be considered dangerous to warrant pretrial detention.

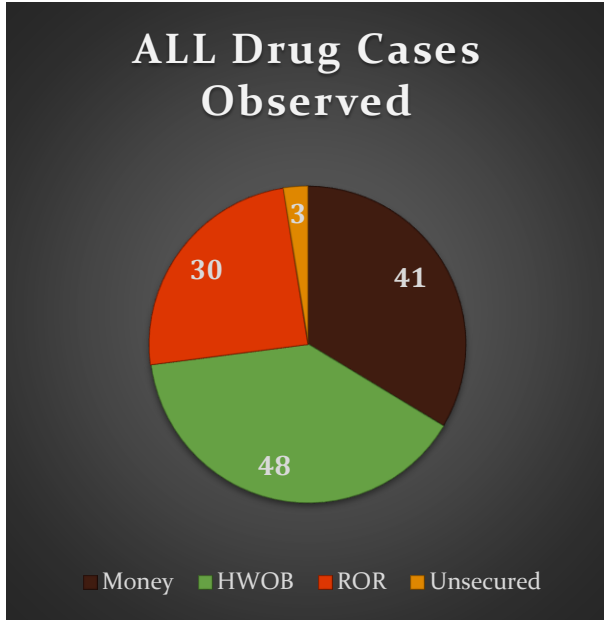


Figure 3a: Bail Review Determinations of Drug Charges.

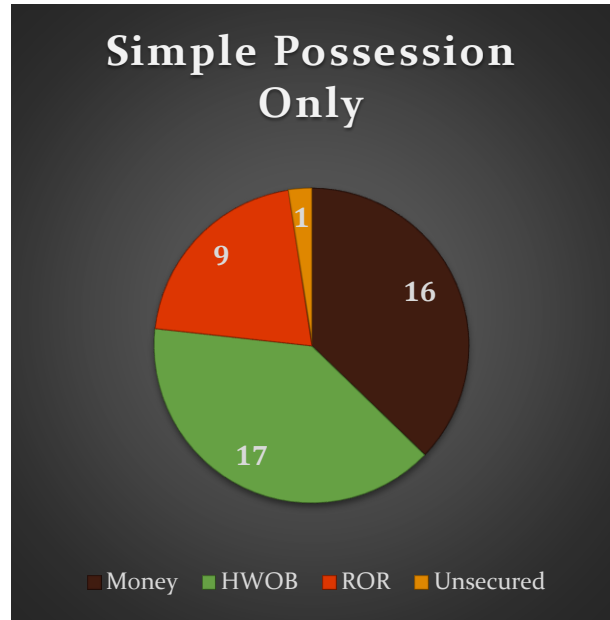


Figure 3b: Bail Review Determinations of Drug Possession Charges.

Observed cases in which a drug charge was the most serious offense alleged were more likely to result in being held without bail than any other pretrial disposition. This analysis excluded cases with charges involving a weapon, a violence offense as defined by Md. Crim. Law § 14-101, or assault in the second degree – all of which could potentially increase the safety risks. In the remaining cases involving any drug charge 39 percent resulted in a held without bail decision. Among cases where only possession was charged, 40 percent were held without bail. This overreliance on detention was true for Baltimore City and Baltimore County individually as well.²³

“It was obvious that many judges were concerned about releasing someone who would turn around and commit a crime. I witnessed some public defenders suggesting a small bail with the knowledge that without that, a defendant who could possibly be RoR would be held without bail. I imagine the numbers of defendants held without bail went up.” - Donna

2. Misdemeanor assault

Maryland Criminal Law only provides for two types of assault: first degree assault, which requires intent to cause serious injury, attempt to cause serious physical injury, or the use of a firearm; and second-degree assault, which covers any other assault or battery. Second degree assault is a nonviolent misdemeanor under Maryland sentencing law and covers a wide variety of behaviors – ranging from an intent to frighten to battery.

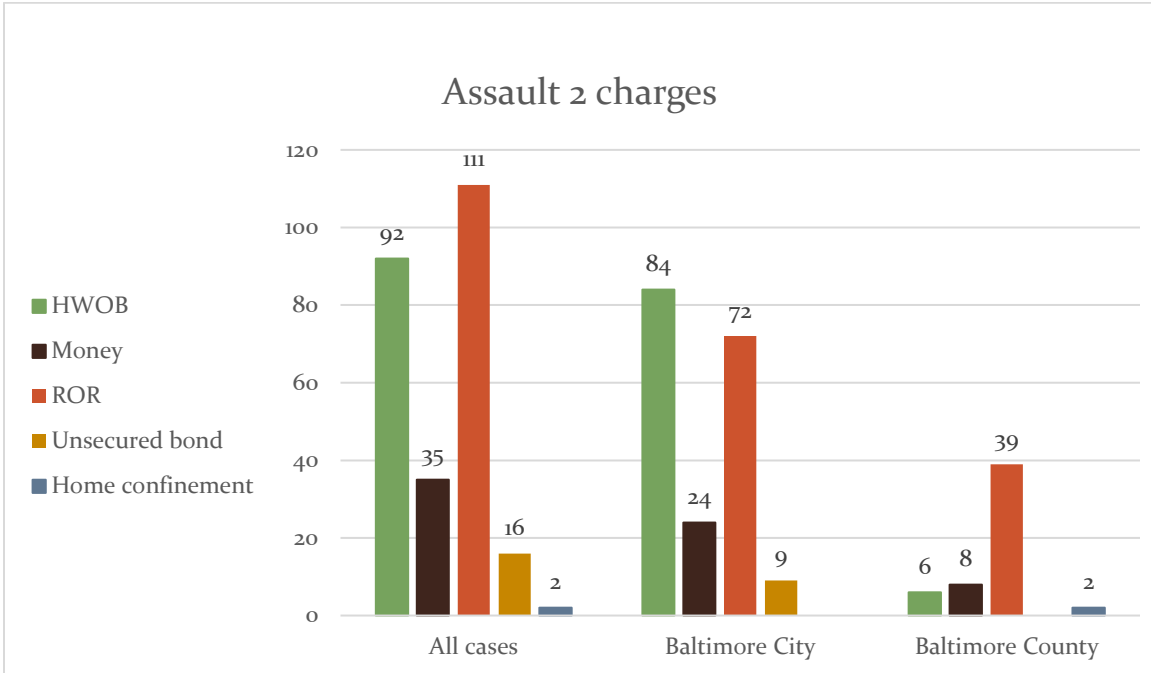


Figure 4: Pretrial Disposition of Assault 2 Charges.

In the cases observed where the top charge was assault in the second degree (i.e. there were no violent charges), Baltimore County judges held the person without bail 17 percent of the time, while Baltimore City judges held the person without bail 44 percent of the time.

“[B]etter defining assault crimes would help keep decisions more consistent.” - Donna

Conclusion and Recommendations

Participants in the Court Observation Project reported that they found the experience both rewarding and troubling. They appreciated learning first-hand about the pretrial process, serving as a witness to this process, and providing accountability for the community at a time when pretrial reform is receiving unprecedented attention.

Participants who had observed bail review hearings prior to the rule change identified promising trends – such as a reduced reliance on money bail, and some judges providing more focused, articulated reasoning. However, they also noted barriers that stymied justice. The recommendations below come from their assessments of what is needed to make pretrial a more fair process.

“Judges seem to want to release many defendants and have lamented lack of alternatives such as house arrest, tracking technology, etc.” - Dan

“At the beginning of the session, the judge would make a big to do for the record asking the pretrial services agent what services were available, asking if they could provide various potential services and when pretrial responded ‘no,’ the judge would say that’s for the record....” - Kathryn M

Recommendation 1: Provide judges with the pretrial resources that are needed to encourage them to release defendants and to ensure that they will return to court for trial.

Observers generally felt that too many people were held without bail, but were also sympathetic to the lack of options available to judges.

Observers made note of judge’s frustrations over the lack of options available to them. They frequently asked what services were available in the community and they often asked about the supervision limits of existing pretrial services.

An expansion of pretrial condition options, particularly recognizing service providers and community-based services, could effectively broaden release options that maintain public safety and minimize the failure to appear risk, with notable cost savings.

“[[Judges need more options with pretrial services such as home detention, etc. These services must go hand in hand with the new rule.” - Donna M

“Pretrial release program appears hampered by lack of means to monitor individuals on release. Judges use this fact as a pretext for keeping Defendants locked up unnecessarily” - Barbara

Recommendation 2: Provide judges with tools that measure risk.

Observers noted a lack of consistency in assessing whether a defendant posed a risk to public safety or not appearing at their next court date. The new rule requires that the commissioner or judge consider a pretrial recommendation deriving from a validated risk assessment tool.²⁴ However, few Maryland jurisdictions have a validated risk assessment tool. During this project, Montgomery County was the only participating jurisdiction with a validated assessment tool during the observation period.²⁵

“The process is so subjective. Judges will say it’s the rule of law, but if you watch judges they all have their peccadilloes...Each judge has their own line in the sand. A few judges were the exception to that rule. [One] judge in particular really tried to understand the situation, but others would quickly go boom, boom, boom and be done.” - Kathryn



Judges and commissioners need tools that help identify and distinguish the relatively small category of individuals who truly pose a danger risk from those who should be entitled to remain at liberty while awaiting trial. An assessment tool would encourage consistency across judges and jurisdictions and encourage a greater focus on factors posing the greatest safety risk.

“Pre-trial services never had total information on any individual. The State’s Attorney’s office always seemed happy to take the Commissioner’s recommendation for bail without any thought. And the Public Defender never seemed to have had enough time to get all the information about their client.” - Samantha



Recommendation 3: Educate judges, commissioners and the community.

Observers reported that they found it informative to learn about and observe the pretrial process. As a critically important and distinct process, they recommend that more information be available to the general public to encourage greater transparency and understanding. In particular, the community needs a greater understanding of how pretrial determinations are made and what they can do to hold the system accountable.

Observers also questioned the extent of training and information that was provided to both court commissioners and judges since the rule change went into effect. In light of the inconsistencies that they saw both between jurisdictions and between judges in the same courthouse, they felt strongly that more education was needed. Specifically, observers recommended that judges be provided with more detailed information on how to assess risk, what resources are and should be available, and best practices across jurisdictions.

“It is rewarding to be involved in a program that is trying to ensure that persons charged with crimes are given a “fair shake.” - Eric

“The opportunity to, at least in a very small way, hold our criminal justice system accountable for its injustices.” - Brandi



Recommendation 4: Accused individuals should be present for their bail review hearing.

Between the quick pace, the rote presentation of information, and the lack of defendant involvement, observers found the bail review hearings to be a dehumanizing experience. The defendant’s presence via closed circuit television was particularly noted as problematic. While they recognized the need to balance safety concerns and hold bail review hearings promptly, observers also felt that the bail hearing should be treated with the same level of importance as a trial. This would require defendants to be brought to the courthouse so that they can appear in person and effectively communicate with their lawyer and potentially the judge during the hearing.

“The defendants are already [seen as] in jail. The judge sees the defendant on a CCTV from a room that looks like a cell, dressed in a jumpsuit, and shackled. Some defendants were still bloody and injured from whatever altercation that brought them to jail. Some were falling asleep because they had yet to be given a bed. This doesn’t do a lot to impress innocence and humanity.” – Samantha



Endnotes

¹ Maryland Office of the Public Defender, THE HIGH COST OF BAIL: HOW MARYLAND’S RELIANCE ON MONEY BAIL JAILS THE POOR AND COSTS THE COMMUNITY MILLIONS 6 (2016), *available online at* <http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf> (hereinafter “HIGH COST OF BAIL”).

² HIGH COST OF BAIL at 6.

³ HIGH COST OF BAIL at 8.

⁴ HIGH COST OF BAIL at 10.

⁵ HIGH COST OF BAIL at 11

⁶ HIGH COST OF BAIL at 12-13. Park Heights and Sandtown-Winchester, both in Baltimore City, had more than \$22 million in premium over the five-year study period. *Id.*

⁷ Letter from Brian E. Frosh, Attorney General for Maryland, to the Hon. Alan M. Wilner, Chair Standing Committee on Rules of Practice and Procedure (Oct. 26, 2016), *available online at* [http://www.marylandattorneygeneral.gov/News%20Documents/Rules Committee Letter on Pretrial Release.pdf](http://www.marylandattorneygeneral.gov/News%20Documents/Rules%20Committee%20Letter%20on%20Pretrial%20Release.pdf) (quoting letter from Sandra Benson Brantley, Counsel to the General Assembly, Office of the Attorney General, to the Honorable Erek L. Barron, the Honorable Kathleen M. Dumais, the Honorable Shelly Hettleman, the Honorable Marc Korman, and the Honorable Brooke E. Lierman (Oct. 11, 2016).

⁸ Memorandum from Eric H. Holder, Jr., et al., Covington & Burling LLP, to Attorney General Brian E. Frosh (Oct. 3, 2016), *available online at* <http://www.opd.state.md.us/Portals/0/Downloads/Covington%20white%20paper%20Maryland%20Wealth-Based%20Pretrial%20Detention%20Scheme.pdf>.

⁹ Letter from Linda A. Klein, President, American Bar Association, to the Hon. Alan M. Wilner (Nov. 15, 2016), *available online at* [https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent Defendants/lsc_laid_letter_md_money_bail_11_15_16.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_Defendants/lsc_laid_letter_md_money_bail_11_15_16.authcheckdam.pdf).

¹⁰ Rule 4-216.1.

¹¹ Maryland Judiciary, IMPACT OF CHANGES TO PRETRIAL RELEASE RULES (November 2016) (hereinafter “Judiciary Data Report”).

¹² According to the Judiciary Data Report, July to October 2016, which predates any consideration of the rule change, 35.4% of individuals were released on recognizance at the initial appearance; 9% were released on unsecured bond; 40.2% were held in default of bond, and 7.5% were held without bail. Judiciary Data Report at 7. After an advice letter anticipating the rule change was disseminated in October 2016, the percentage of individuals released on recognizance at the initial appearance increased to 41.5%, released on unsecured bond increased to 10.5%, held in default of bond decreased to 20.8% and held without bail increased to 19.3%. *Id.*

¹³ Md. Rule 4-216(d). Commissioner must hold a Defendant without bail, for consideration by a District Judge, if they are charged with a crime that holds a maximum penalty of life imprisonment, *id.*; or escape from a correctional facility or other place of confinement; drug kingpin; a crime of violence if the Defendant has been previously convicted; a new charge of arson, burglary in the first, second or third degree, child abuse, crime related to a destructive device, crime related to a controlled substance, manslaughter, or crime of violence while on pretrial release; and violation of an ex parte order or order for protection, MD. Crim Proc. § 5-202.

¹⁴ *DeWolfe v. Richmond*, 434 Md. 444 (2013).

¹⁵ Md. Rule 4-216.1(f)(2) (2017) (previously codified at Md. Rule 4-216(e)(1)).

¹⁶ Md. Rule 4-216.1(b).

¹⁷ Md. Rule 4-216.1 (d)(2)(N) Committee Note, (e)(1).

¹⁸ Interview with observer Rhonda F

¹⁹ *See, e.g.*, John Clark, *Finishing the Job: Modernizing Maryland's Bail System*, Vol. 29 THE ABELL REPORT, No. 2 (June 2016); COMMISSION TO REFORM MARYLAND'S PRETRIAL SYSTEM, FINAL REPORT 29 (2014); Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 J. LEGIS. & PUB. POL'Y 919 (2013); JUSTICE POLICY INSTITUTE, BALTIMORE BEHIND BARS: HOW TO REDUCE THE JAIL POPULATION, SAVE MONEY AND IMPROVE PUBLIC SAFETY 15 (2011).

²⁰ *Wheeler v. State*, 160 Md. App. 566, 574, 864 A.2d 1058, 1062 (2005).

²¹ *See, e.g.*, Justin Fenton, Woman who appealed high bail is ordered held without bail , Baltimore Sun, Nov. 1, 2016, available online at <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-bail-appeal-folo-20161101-story.html> (courthouse recording equipment picked up judge telling clerk she was imposing \$750,000 bail, knowing it was unaffordable, to "throw defendant a bone"); Editorial, Freedom for Sale, Baltimore Sun, Jan. 15, 2015 (editorial questioning the imposition of \$2.5 million bail for defendant that judge stated she could not trust).

²² Md. Rule 4-216.1(e)(1)(B).

²³ The other jurisdictions did not have enough drug cases observed to provide any meaningful analysis.

²⁴ Md. Rule 4-216.1(f)(1).

²⁵ Since the conclusion of this project, Baltimore County has begun a pilot project in which it began utilizing the risk assessment tool validated in Montgomery County. CITE TO NEWS ARTICLE.

Appendix: Observation Survey Form

DATE: _____

COURT: _____

COURTROOM: _____

OBSERVER NAME: _____

CLIENT NAME _____

CASE NUMBER/S _____

BAIL REVIEW JUDGE _____

PUBLIC DEFENDER/PRIVATE COUNSEL _____

ASSISTANT STATE'S ATTORNEY _____

CURRENT BAIL (COMMISSIONER) _____

PRE-TRIAL RECOMMENDATION _____

ASA RECOMMENDATION _____

OPD/COUNSEL RECOMMENDATION _____

DETERMINATION BY JUDGE _____

SECURED/UNSECURED? _____

CONDITIONS ON RELEASE? _____

CONDITIONS RECOMMENDED BY? _____

FAMILY/OTHERS IN COURTROOM _____

CHARGES: _____

CLIENT NAME: _____

BAIL REVIEW START TIME: _____ BAIL REVIEW END TIME: _____

DEMOGRAPHICS: Race/Ethnicity: _____ Age of Defendant: _____ Gender Identity: _____ M _____ F

CONSIDERATIONS	Pretrial	SAO	OPD/ Defense	Judge	Notes
BACKGROUND					
Family/Children/Ages/Who With					
Length of Residence/Place					
Employed YES or NO					
Financial Resources - Post Bail YES or NO					
Education: School/Trade YES or NO					
Military Experience YES or NO					
Ties to community, volunteer, etc. YES or NO					
CRIMINAL JUSTICE RELATED - USE <input checked="" type="checkbox"/>					
Nature/Circumstances of Charges					
Nature of Evidence					
Criminal History					
Pending Cases and Jurisdictions					
Currently Under P&P Supervision					
Violence History					
FTA History					
HEALTH RELATED USE <input checked="" type="checkbox"/>					
Currently in Need of Medical Attention					
Mental Health Conditions/Concerns					
Substance Abuse History					
Mental Health or Drug Evaluation Ordered					
BAIL RELATED USE <input checked="" type="checkbox"/>					
Risk Assessment Used					
Used term "least onerous condition"					
Dangerous/Public Safety Threat/Victim Safety					

JUDGE'S REMARKS (e.g. language when detaining, etc.)

ANYTHING ELSE OF NOTE: DEFENDANT REFUSED PRETRIAL INTERVIEW YES NO

Court Observer Name: _____