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Brian Saccenti

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INTRODUCTION

From October 2016 to February 2017, the criminal law subcommittee of Maryland's Standing Committee on Rules of Practice and Procedure, the Standing Committee itself, and then the Court of Appeals of Maryland were presented with extensive evidence of the harm done by the criminal justice system's frequent use of unaffordable money bail as a condition of release for arrestees. Pursuant to its rule-making authority,[1] the Court of Appeals dramatically revised the procedural rules governing pretrial release and detention.[2]

The impetus for the 2017 amendments was concern, expressed by Maryland's Attorney General and others, that the practice of imposing unaffordable money bail that results in pretrial detention is unconstitutional and unjust.[3] Accordingly, the most significant changes to the rules were to (a) prohibit courts from imposing financial conditions (referred to in the rule as a "special condition of release with financial terms"[4]) that result in the pretrial detention of the defendant,[5] and (b) expressly require courts to give priority to nonfinancial conditions of release (especially unsecured bonds).[6] Other changes include:

* Chief Attorney, Appellate Division, Maryland Office of the Public Defender. The author thanks Mary-Denise Davis and Ethan Frenchman for their helpful feedback.

[1] *See* MD. CONST. art. IV, § 18(a) (providing in pertinent part that "[t]he Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law.").

[2] Court of Appeals, Rules Order to Adopt Proposed New Rule 4-216.1 and Amendments to Current Rules (Feb. 16, 2017), http://www.courts.state.md.us/rules/rodocs/ro192.pdf [hereinafter Rules Order].

[3] *See* STANDING COMM. ON RULES OF PRAC. & PROC., 192D. REPORT TO THE COURT OF APPEALS at 2–3 (2016) [hereinafter 192d Report].

[4] MD. R. 4-216.1(e)(1)(A). Unless otherwise specified, all references to Rule 4-216 are to the version that took effect July 1, 2017.

[5] *See id*.

[6] *See* MD. R. 4-216.1(b) & (d)(2)(N) advisory committee's note.

> • A prohibition on using money bail to ameliorate dangerousness;[7]
> • A requirement that the court consider "the recommendation of any pretrial release services program that has made a risk assessment of the defendant in accordance with a validated risk assessment tool and is willing to provide an acceptable level of supervision over the defendant during the period of release if so directed by the judicial officer"[8] – a provision evidently designed to account for and encourage the development of pretrial services programs and the use of validated risk assessments; and
> • An expanded list of conditions of release.[9]

These changes took effect July 1, 2017.[10] The purpose of this article is to assist judges, commissioners, prosecutors, and defense counsel as they figure out how to apply the revised rules. Part I of this article discusses the concerns about the money bail system that led to the changes.[11] Part II discusses general principles applicable to pretrial release determinations that were not changed by the rule amendments, but which guide their implementation at pretrial release hearings.[12] Part III discusses the changes made by the 2017 amendments to the rules.[13]

I. THE IMPETUS FOR THE AMENDMENTS

Although concerns about Maryland's pretrial release system are not new,[14] the reform effort started gaining unprecedented momentum in

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[7] *See* MD. R. 4-216.1(e)(1)(B) (providing in pertinent part that "[s]pecial conditions of release with financial terms are appropriate only to ensure the appearance of the defendant and may not be imposed solely to prevent future criminal conduct during the pretrial period or to protect the safety of any person or the community.").
[8] MD. R. 4-216.1(f)(1).
[9] *See* MD. R. 4-216.1(f)(2).
[10] *See* Rules Order, *supra* note 2, at 3.
[11] *See infra* Part I.
[12] *See infra* Part II.
[13] *See infra* Part III.
[14] Executive, judicial, and independent agencies have all published reports on Maryland's pretrial release system in the last fifteen years. *See* ABELL FOUND., THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM (2001), http://www.abell.org/sites/default/files/publications/hhs_pretrial_9.01%281%29.pdf

the fall of 2016.[15] The impetus for the changes proposed by the Rules Committee was an October 11, 2016, advice letter from the Office of the Attorney General to five members of the General Assembly.[16] That letter opined that:

> • "the Court of Appeals would conclude that the State's statutory law and court rules should be applied to require a judicial officer to conduct an individualized inquiry into a criminal defendant's ability to pay a financial condition of pretrial release";
> • "in the event a judicial officer determines that pretrial detention is not justified to meet the State's regulatory goals, 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 would find it violates due process"; and
> • "[i]f 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."[17]

(analyzing the pretrial release system at the behest of the Maryland State Bar Association); JUSTICE POLICY INST., BALTIMORE BEHIND BARS: HOW TO REDUCE THE JAIL POPULATION, SAVE MONEY AND IMPROVE PUBLIC SAFETY (2010), http://www.justicepolicy.org/images/upload/10-06_rep_baltbehindbars_md-ps-ac-rd.pdf.; MD. DEP'T OF LEGIS. SEV. OFF. OF POL'Y ANALYSIS, TASK FORCE TO STUDY THE LAWS AND POLICIES RELATING TO REPRESENTATION OF INDIGENT CRIMINAL DEFENDANTS BY THE OFFICE OF THE PUBLIC DEFENDER (2013), http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/018000/018924/unrestricted/20140000e.pdf; GOVERNOR'S COMM'N TO REFORM MARYLAND'S PRETRIAL SYSTEM, FINAL REPORT (2014), http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf [hereinafter Governor's Comm'n.].

[15] Editorial, *Unconstitutional Detention*, BALT. SUN (Oct. 13, 2016), http://www.baltimoresun.com/news/opinion/editorial/bs-ed-affordable-bail-20161013-story.html.

[16] *See* 192d Report, *supra* note 3, at 2–3.

[17] Letter from Sandra Benson Brantley, Counsel to the Gen. Assembly, Off. of the Attn'y Gen., to the Hon. Erek L. Barron, et al. 1–2 (Oct. 11, 2016), http://www.opd.state.md.us/Portals/0/Downloads/bail%20letter%20advice%2010-11-16.pdf.

Two weeks later, Maryland's Attorney General urged the Rules Committee to recommend amendments to the Maryland Rules to

> expressly clarify that where the judicial officer determines, based on all applicable criteria, that bail is the least onerous condition necessary to ensure the defendant's appearance or to protect public safety, that officer must conduct an individualized inquiry into the defendant's financial circumstances and may not set bail that exceeds the defendant's means for the purpose of detaining the defendant.[18]

The Rules Committee began considering proposed amendments a short time later.[19]

Among the materials submitted by the Rules Committee was a memorandum by former United States Attorney General Eric Holder and colleagues at the law firm of Covington & Burling to the Maryland Attorney General.[20] The memorandum analyzed "the wealth-based nature of Maryland's pretrial detention scheme," and explained why it was illegal, "ripe for attack on both state law and federal constitutional grounds," "irrational, unjust, and inefficient."[21] The memorandum concluded by recommending several changes that the judiciary "could initiate to improve the disturbing status quo in Maryland's pretrial detention practices," including:

> • a judicial resolution or rule change requiring that judicial officers refrain from imposing pretrial financial conditions that result in pretrial detention;

[18] Letter from Brian E. Frosh, Md. Attn'y Gen., to the Hon. Alan M. Wilner, Chair, Standing Comm. on Rules of Prac. and Proc. 1–2 (Oct. 25, 2016), http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf.

[19] After the Criminal Rules Subcommittee met and forwarded proposed amendments, the full Rules Committee considered them at a meeting on Nov. 18, 2016. *See* 192d Report, *supra* note 3 at 3.

[20] Memorandum from Eric H. Holder Jr., Former U.S. Attn'y Gen., to Brian E, Frosh, Md. Attn'y Gen. (Oct. 3, 2016), http://www.opd.state.md.us/Portals/0/Downloads/Covington%20white%20paper%20Maryland%20Wealth-Based%20Pretrial%20Detention%20Scheme.pdf.

[21] *Id*. at 1.

> • education of judicial officers on the efficacy and availability of alternatives to secured bail;
> • tracking data at commissioner and bail review hearings to better understand and address troubling disparities; and
> • operating automated court date reminder services that have been proven to increase defendants' appearances in court.[22]

Around this time, the Office of the Public Defender issued a report entitled THE HIGH COST OF BAIL: HOW MARYLAND'S RELIANCE ON MONEY BAIL JAILS THE POOR AND COSTS THE COMMUNITY MILLIONS.[23] That report analyzed more than 700,000 criminal (non-traffic) cases filed in the District Court of Maryland in eighteen jurisdictions from 2011 to 2015.[24] It found:

> 1. Maryland's reliance on money bail causes the routine, illegal incarceration of poor people: over a five-year period, no fewer than 46,597 defendants were detained on bail for more than five days at the start of their criminal case. Of these, more than 17,434 defendants were detained on bail amounts of less than $5,000.
> 2. For those who go to a bondsman, the price is steep. Maryland communities were charged more than $256 million in non-refundable corporate bail bond premiums from 2011 to 2015.
> 3. Defendants who use a bail bondsman are obligated to pay a corporate bail bond premium regardless of the outcome of the case. More than $75 million in bail bond premiums were charged in cases that were resolved without any finding of wrongdoing.
> 4. Corporate bonds extract tens of millions of dollars from Maryland's poorest zip codes, contributing to the perpetuation of poverty.
> 5. The money bail system has a disproportionate impact on racial minorities: over five years, black defendants were charged

[22] *Id*. at 1–2.
[23] Arpit Gupta, et al., THE HIGH COST OF BAIL: HOW MARYLAND'S RELIANCE ON MONEY BAIL JAILS THE POOR AND COSTS THE COMMUNITY MILLIONS (2016), http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf.
[24] *See id*. at 4 (explaining that the report focused on criminal cases filed in the District Court of Maryland from 2011 to 2015).

> premiums of at least $181 million, while defendants of all other races combined were charged $75 million.
> 6. For all these costs, secured money bail that requires a payment for release is no more effective than unsecured bonds, for which defendants pay nothing unless they fail to appear for court.[25]

In its report, the Rules Committee summarized the problems as follows:

> There have been several independent, highly credible studies of the pre-trial release system in Maryland. Each of them has found, from documented evidence, that the reliance on money bail set at levels that the defendant cannot afford is (1) not uncommon, (2) irrational, unfair, unnecessary to ensure either the defendant's appearance or public safety, (3) racially and ethnically discriminatory, and (4) fiscally unsound. These studies stress not only the fiscal cost to the State and the counties from incarcerating people who do not need to be incarcerated but also the human cost of incarceration – the loss of employment; the loss of housing, automobiles, and utilities and other services because of the loss of income; the loss of governmental benefits, such as Medicaid and Social Security SSI payments; the disruption of families – all of which can have a lasting and devastating impact on the defendant and his or her family.[26]

Merely listing the policy concerns that led to the rule changes risks missing the forest for the trees. Fundamentally, the effort was about making our system better and fairer. The Chief Judge of the District Court put it well in his testimony to the Court of Appeals:

> The point of this rule is what . . . my father would remind me of, and that's, "Can we do it better?" Can the current rule be modified so that we can have a more systematic way of performing bond reviews that go to some of the very valid concerns that the Attorney General raised in his advice letter?
> . . .

[25] *Id*.
[26] 192d Report, *supra* note 3, at 3–4.

> [T]here's an adage that I draw on. And I've heard President Kennedy refer to it, and President Obama refer to it, and it actually hails back to a Jewish leader from around the beginning of the common era named Hillel. And it's, "If not me, then who? If not now, then when? And if not here, then where?" . . . And I respectfully suggest to this Court that when you're deciding on this rule, if you apply that adage, that the answers should be, "This Court, this courtroom, and today."[27]

II. GENERAL PRINCIPLES

The amendments did not disturb the primary constitutional and legal principles applicable to pretrial release and detention decisions. Those are outlined below, as they provide the context for the rule changes discussed in Part III.

A. Pretrial liberty is the norm; detention is the limited exception

The idea that "liberty is the norm, and detention prior to trial . . . is the carefully limited exception" is the bedrock principle that guides pretrial release decisions. [28] As the Court of Special Appeals has reiterated, "[a]n individual's 'interest in liberty' is of a 'fundamental nature,' . . . and at liberty's core is the right to be free from arbitrary confinement by bodily restraint."[29] Consistent with these constitutional requirements, the amended rules adopt a preference for pretrial release by providing:

> (I) *Construction*.
> (A) This Rule is designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional conditions should be imposed on release only if the need to ensure appearance at court proceedings, to protect the community, victims, witnesses, or any other person and to

[27] *Open Meeting of the Court of Appeals to Consider the One Hundred Ninety-Second Report of the Standing Committee on Rules of Practice and Procedure (Part 3)*, COURT OF APPEALS, 12:34–12:53 & 14:46–15:25 (Jan. 5, 2017), http://www.courts.state.md.us/coappeals/media/2017openmtgs/20170105rulesmtgpt3.mp4.
[28] United States v. Salerno, 481 U.S. 739, 755 (1987).
[29] Wheeler v. State, 864 A.2d 1058, 1062 (Md. Ct. Spec. App. 2005) (internal citations omitted).

> maintain the integrity of the judicial process is demonstrated by the circumstances of the individual case. Preference should be given to additional conditions without financial terms.
> (B) This Rule shall be construed to permit the release of a defendant pending trial except upon a finding by the judicial officer 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. If such a finding is made, the defendant shall not be released.[30]

B. Standards and burdens of proof

The standards and burdens of proof applicable to pretrial release determinations vary depending on the basis for restricting release (dangerousness vs. flight risk) and whether CP § 5-202 applies.[31]

1. Dangerousness

Detention based on dangerousness is sometimes referred to as "preventative detention."[32] The Supreme Court has taken a restrictive approach, and has "upheld preventative detention based on dangerousness only when *limited to specially dangerous individuals and subject to strong procedural protections.*"[33]

Accordingly, the Court of Special Appeals in *Wheeler v. State* considered the due process requirements for pretrial detention and held that "'preventive detention' may be ordered pursuant to Md. Rule 4-216, *provided that* 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."[34]

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[30] MD. R. 4-216.1(b)(1).
[31] *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 873 (2016).
[32] Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerous for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 415 (1996).
[33] *Wheeler*, 864 A.2d at 1062 (quoting Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001).
[34] *Id.*

Put another way:

> 'preventive detention' may not be ordered unless the judicial officer is persuaded by clear and convincing evidence that no condition or combination of conditions of pretrial release can reasonably protect against the danger that the defendant poses to the safety of an identifiable person or to the community at large.[35]

This language indicates that the burden of proof is on the party seeking the detention, *i.e.*, the State.

2. Flight risk

At present, no Maryland case, statute, or rule establishes the standard of proof applicable when the State seeks to detain someone based on risk of non-appearance.

The Federal Bail Reform Act requires clear and convincing evidence for detention based on dangerousness, but is silent as to the burden of proof for detention based on risk of nonappearance.[36] In the absence of a clear standard of the "government's burden of proof for a flight risk, several courts have agreed that it is a preponderance of the evidence."[37]

A case can be made, however, that the standard of proof for detention based on flight risk ought to be the same as the standard for detention based on dangerous, *i.e.*, proof by clear and convincing evidence. As the *Wheeler* Court explained, "[i]n cases involving individual rights, whether criminal or civil, [t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' '[L]iberty is the norm, and detention prior to trial . . . is the carefully limited exception.'"[38]

If standards of proof for detention are based on the impact of detention on the liberty interest of the individual, it makes little sense to use a lower standard of proof when the reason for detention is risk of

[35] *Id*. at 1065.
[36] 18 U.S.C. § 3142(f)(2)(B).
[37] Gouldin, *supra* note 31, at 873 n.159.
[38] *Id*.; *Wheeler*, 864 A.2d. at 1065.

nonappearance instead of dangerousness. Perhaps for this reason, the American Bar Association's Standards for Criminal Justice provide that clear and convincing evidence should be the standard for both dangerousness and flight risk.[39] The commentary explains, "The 'clear and convincing evidence' criterion is a stringent one, and is intended to emphasize that secure detention should be used only when facts show that it is necessary to prevent flight or assure the safety of the community."[40]

3. Rebuttable presumption created by Criminal Procedure Article (CP) § 5-202

Maryland's Criminal Procedure Article (CP) § 5-202 prohibits court commissioners from releasing certain categories of defendants, but permits judges to do so.[41] For five of these categories,[42] the statute creates "a rebuttable presumption" that such a defendant "will flee and pose a danger to another person or the community."[43]

Construing similar rebuttable presumptions in the Federal Bail Reform Act, federal courts have held that such presumptions shift the burden of *production* to the defendant, but the burden of *persuasion* –

[39] AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE STANDARDS: PRETRIAL RELEASE §10-5.10(f) (AM. BAR ASS'N 3d ed. 2007) ("In pretrial detention proceedings, the prosecutor should bear the burden of establishing by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person.").

[40] *See id.* §10-5.10.

[41] MD. CODE. ANN. CRIM. PROC. § 5-202(b)–(f) (West 2017).

[42] These five categories are (1) defendants charged as drug kingpins, (2) defendants charged with a crime of violence who have previously been convicted of a crime of violence or certain firearm-related offenses, (3) defendants charged with committing certain crimes while released on bail or personal recognizance for a pending prior charge of committing one of those crimes, (4) defendants charged with certain firearm-related crimes who have previously been convicted of one of those crimes or a crime of violence, and (5) defendants who are registered sex offenders. *See* MD. CODE. ANN. CRIM. PROC. § 5-202(b), (c), (d), (f) & (g). Note that the presumption for the third category – defendants charged with committing certain crimes while released on bail or personal recognizance for a pending prior charge of committing one of those crimes – ceases to apply after the "final determination of the prior charge." *Id. at* § 5-202(d)(4).

[43] MD. CODE. CRIM. PRO. ANN. § 5-202(b)(3), (c)(3), (d)(4), (f)(3) & (g)(3).

the burden to justify pretrial detention – remains with the government.[44] If a defendant proffers or presents evidence to rebut the presumption, the court must determine whether detention is appropriate in light of statutory factors similar to those listed in Maryland Rule 4-216.1(f), giving due consideration to the statutory presumption as a factor militating against release.[45]

C. The nature of the evidence or information at pretrial release hearings

1. Rules of Evidence generally inapplicable

The evidentiary rules contained in Title 5 of the Maryland Rules, other than those relating to the competency of witnesses, do not apply to pretrial release proceedings under Rules 4–216, 4–216.1, 4–216.2 or 4–216.3.[46] However, the suspension of Title 5 does not mean that courts cannot hear evidence (as opposed to proffers) at bail review hearings. Like other proceedings where Title 5 is inapplicable—such as sentencing, suppression, and probation hearings—the suspension of Title 5 should best be understood as a means of expanding the universe of possible information for the court to consider without strict adherence to the rules of evidence that would govern a trial.

2. Hearsay must be reasonably reliable

Because the Rules of Evidence do not apply at pretrial release hearings, the court generally may consider hearsay evidence.[47] Thus, it is not uncommon for a court to consider a Statement of Probable Cause or an Application for Statement of Charges, which themselves are

[44] *See*, *e.g.*, United States v. Hir, 517 F.3d 1081, 1086 (9th Cir. 2008); United States v. Rodriguez, 950 F.2d 85, 88 (2d Cir. 1991) (stating that the presumption shifts the burden of production to the defendant, but the burden of burden belongs to the government).
[45] *Hir*, 517 F.3d at 1086.
[46] MD. R. 5-101(b)(6).
[47] While there is no definitive decision on the matter, many courts have upheld the use of hearsay in preliminary hearings. *See* Christine Holst, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599, 1611–12 (2010).

hearsay and also often contain hearsay statements allegedly made by witnesses.[48]

A defendant's right to due process and the standard of proof, however, prohibit a judge from detaining a person based on hearsay unless there are indicia that the hearsay is reasonably reliable.[49] Although Maryland's appellate courts have not yet addressed this issue in the context of pretrial release hearings, they have done so in the context of other hearings where the rules of evidence do not apply, and have held that courts could consider hearsay only if it was reasonably reliable and probative.[50]

As the Federal Court for the District of Puerto Rico explained in the context of a pretrial release hearing:

> [T]he Court does not doubt that FBI agents were informed by a confidential witness that defendant stated that he would "fuck" certain persons upon his return from Cuba, nor, that defendant's son stated that if Barletta were taken out of the picture there would be no more case. What is at issue here, however, is not the credibility of the special agents who have testified, but that of the confidential witness(es), who were not present at the detention hearing, hence not subject to cross-examination. It is not ultimately necessary that the Government call its confidential witnesses to testify at a detention hearing. *See United States v. Acevedo-Ramos*, 755 F.2d 203, 208 (1st Cir. 1985) (holding that hearsay testimony is admissible at detention hearing). However, the (at times double) hearsay of the confidential witnesses provided to the Court is generic and perfunctory, quite conclusory, as well as unreliable to prove the particular circumstances surrounding the event referred to. For

[48] E-mail from Mary-Denise Davis, Chief Attorney, Baltimore Central Booking Unit, Maryland Office of the Public Defender, to author (Sept. 13, 2017, 10:03 PM EST) (hereinafter "MDD email") (on file with author).

[49] *See* State v. Fuller, 306 A.2d 1315, 1318 (Md. 1987) (explaining that admission of hearsay in a probation revocation hearing may be allowed, but only after analysis of the reliability).

[50] *See id.*; *see also* In re Billy W., 875 A.2d 734, 751 (Md. 2005) (permanency plan hearing); Baker v. State, 632 A.2d 783, 790 (Md. 1993) (sentencings); Brown v. State, 564 A.2d 772, 777 (Md. 1989) (probation revocation hearings); In re Damien F., 958 A.2d 402, 420 (Md. Ct. Spec. App. 2008) (shelter care hearings); In re Delric H., 819 A.2d 1117, 1126 (Md. Ct. Spec. App. 2003) (juvenile restitution hearings).

> example, the confidential witness had reason to believe that the list of names from the computer was a "hit list". No further reasons, however, are provided to support this conclusion. Also, Harold Rivera and defendant allegedly made statements in the confidential witness' presence pertaining to witnesses and government personnel. Other than such statements themselves, the Government has not provided other details about the same, which could provide an indicia of reliability of the hearsay.[51]

3.Nature of evidence and information presented about charged crime

A judicial officer may properly consider the allegations in the case at hand when deciding whether or on what conditions to release the defendant.[52] In Maryland, judges typically obtain this information from (a) the Statement of Probable Cause or Application for Statement of Charges filed by a police officer or complaining lay witness, and/or (b) a proffer made by the prosecutor.[53] Although rarely done, prosecutors can also present live testimony or other exhibits at the hearing. In general, the parties may present "any information" relevant to the court's determination of dangerousness or flight risk.[54]

4. Insufficient proffers

Prosecution proffers in support of detention may be insufficient. Maryland's federal court has explained the extent to which pretrial detention based on prosecution proffers is appropriate, and recognized that proffers may not always be enough:

> [T]he case law supporting detention upon government proffers in no way requires a judicial officer to accept or accredit proffered evidence, nor does that case law assume that proffers in lieu of live testimony are appropriate in every case. The case

[51] *See Acevedo-Ramos*, 755 F.2d at 208 (holding that hearsay testimony at detention hearing must be sufficiently reliable).
[52] *See* MD. R. 4-216.1(f)(2)(A) (providing that "the judicial officer shall consider," *inter alia*, "the nature and circumstances of the offense charged, [and] the nature of the evidence against the defendant").
[53] *See* MDD email, *supra* note 48.
[54] *See* MD. R. 4-216.1(f)(2)(F)–(G) (2017).

> law certainly does not limit, and in fact supports, the discretion of the reviewing judicial officer to require the presentation of evidence. Of necessity, the propriety of a proffer as a basis for detention must be assessed on a case-by-case basis. When the government is able to proffer evidence that reflects ample and substantial corroboration for its contention that a defendant has committed an offense and is dangerous or a flight risk, efficiency and the need to conserve scarce judicial resources justify accepting that proffer in lieu of live testimony; and such proffers that are reflective of weighty and broad evidence of guilt, when considered with other information such as criminal history and lack of ties to the community, can be entirely proper bases for orders of detention. On the other hand, when the evidence proffered is the uncorroborated statement(s) of one or two police officers who allegedly observed a single act committed by the defendant, and when there is no other evidence proffered in support of the eyewitness testimony, the Court should consider the proffer with great care and accord it limited weight. Before entering any order of detention in such a case, the judicial officer should require the government to present live testimony able to withstand confrontation, long- and well-recognized as the "greatest legal engine ever invented for the discovery of truth."[55]

5. Courts are not required to accept the State's allegations as true.

Some judges and prosecutors continue to believe that the court must accept the State's allegations as true when making a pretrial release/detention determination.[56] This is incorrect, for the following reasons:

- It is inconsistent with the authority that places a burden of proof on the State when it seeks detention,[57] and would convert this burden of proof into a mere pleading requirement;

[55] United States v. Hammond, 44 F. Supp. 2d 743, 746 (D. Md. 1999) (internal citations omitted).
[56] *See* MDD email, *supra* note 48.
[57] *See supra* Part II.B.

> • It is inconsistent with Rule 4-216.1's requirement that the court consider "the nature and circumstances of the offense charged, the nature of the evidence against the defendant,"[58] and "any information presented by the defendant or defendant's attorney;"[59] and
> • It is inconsistent with the procedural protections that the Court of Special Appeals has required in analogous hearings.[60]

6. Procedural protections at analogous hearings

Unlike the Federal Bail Reform Act,[61] Maryland's rules governing pretrial release hearings do not describe in detail the procedural rights of the accused. To fill in the gaps, courts should look to the procedural protections required at analogous hearings.

One analogy is a shelter care hearing after a child is removed from the physical custody of a parent or guardian "to determine whether the temporary placement of the child outside of the home is warranted."[62] Just as pretrial release hearings must be conducted promptly after an arrest,[63] a shelter care hearing ordinarily must be conducted promptly after a local department of social services removes the child from the parent's or guardian's custody and places him or her in shelter care.[64] The governmental interests at stake are of comparable

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[58] MD. R. 4-216.1(f)(2)(A).
[59] MD. R. 4-216.1(f)(2)(G).
[60] *See infra* Part II.C.6.
[61] *See infra* Pt II.C.6; 18 U.S.C. §3142(f)(2) (2008 Supp.). This paragraph provides in pertinent part: "At the [detention] hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence."
[62] MD. CODE ANN., CTS. & JUD. PROC. §3-801(z) (2016 Supp.).
[63] *See* MD. R. 4-212(e)-(f); MD. R. 4-216.2(a).
[64] *See* MD. CODE ANN., CTS & JUD. PROC. §3-815(C)(2) (ii) (West 2017) ("Unless extended on good cause shown, a shelter care hearing shall be held not later than next day on which the circuit court is in session.").

importance.[65] The severity of the potential deprivation is worse for the arrestee in the pretrial release hearing than for the parent or guardian in the shelter care hearing due to both its nature (incarceration versus removal of a child from the home) and duration.[66] As with pretrial release hearings, the statute and rule governing shelter care hearings said little about how they were to be conducted. As with pretrial release hearings, the rules of evidence generally do not apply at shelter care hearings.[67]

The case of *In re Damien F.*[68] arose from two shelter care hearings where the local department proceeded solely on proffers and the circuit court denied the parent's request to call witnesses.[69] On appeal, the Court of Special Appeals considered "whether the court [at a shelter care hearing] was required to permit . . . the parents of the sheltered children[] to present witnesses at that hearing to prove their case and whether they had a right to cross-examine the Department's witnesses to contradict its case."[70] Based on (1) the right of the parent or guardian to be present at and participate in such hearings, (2) the parent or guardian's right to counsel at such a hearing, and (3) the impossibility of resolving factual disputes raised by competing proffers[71] – factors that are equally applicable at pretrial release

[65] *See* MD. R. 216.1(b)(1)(B) (showing that in pretrial release hearings, that interest is reasonably ensuring public safety and the defendant's appearance in court); *see also* MD. CODE ANN., CTS & JUD. PROC. §3-815(d)(1) (West 2017) (finding in shelter care hearings, it is in protecting the safety and welfare of the child).

[66] *See* MD. CODE ANN., CTS & JUD. PROC. §3-815(c)(4) (West 2017) ("A court may not order shelter care for more than 30 days except that shelter care may be extended for up to an additional 30 days if the court finds after a hearing held as part of an adjudication that continued shelter care is needed to provide for the safety of the child." The duration of pretrial detention, by contrast, is not expressly limited. There are provisions requiring a speedy trial, but these often permit delays of much more than 30 or 60 days. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 6-103 (West 2017) (creating a window of up to 180 days); MD. R. 4-271(a)(1) (providing that "[t]he date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events," but allowing exceptions and extensions for good cause).

[67] *See* MD. R. 4-216(h); MD. R. 5-101(b)(6)–(11) (2017); MD. R. 11-112(d).

[68] 958 A.2d 402 (Md. Ct. Spec. App. 2008).

[69] *Id*. at 411.

[70] *Id*. at 414.

[71] *Id*. at 412, 415–19.

hearings[72] – the Court held that the juvenile court's blanket refusal to allow the parent to cross-examine the department's witnesses or present witnesses was an abuse of discretion.[73] It then "set forth the following procedures to facilitate resolving the 'conflicting proffers' in an efficacious manner:"[74]

> When presented with a request by counsel for the parent or parents to be allowed to present witnesses at a shelter care hearing, as a threshold matter, the court should ask counsel to denote the allegations asserted to be in dispute. The judge should make an initial determination as to whether the competing versions of behavior or events, *viz a viz*, the proffered testimony versus the allegations in the petition, are in dispute. We hold that, unless the disputed allegation is probatively inconsequential to a determination of whether placement is required to protect a child from serious immediate danger or that removal from the home is necessary to provide for the safety and welfare of the child, the court must receive testimony as to the material, disputed allegations and a denial of the request to produce witnesses, in that instance, is an abuse of discretion.[75]

Another analogous proceeding is a probation or parole revocation hearing. In contrast to a presumptively innocent pretrial

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[72] For right to be present and participate, *see* MD. R. 4-212(e)&(f) (providing that "[t]he defendant shall be taken before a judicial officer" for the initial pretrial release determination); MD. R. 4-216.1(f)(2)(G) (requiring judicial officer to consider "any information presented by the defendant or defendant's attorney"); MD. R 4-216.2(a) (providing that "[a] defendant who is denied pretrial release by a commissioner or who for any reason remains in custody after a commissioner has determined conditions of release pursuant to Rule 4-216 shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court"). For the right to counsel, *see* DeWolfe v. Richmond, 76 A.3d 1019, 1031 (Md. 2013) (discussing initial hearings before court commissioners); *see also* MD. CODE ANN., CRIM. PROC. § 16-204(b)(2) (West 2012) (describing pretrial release hearing before judge); MD. R. 4-216.2(b) (discussing bail reviews). As to the problem of reconciling competing proffers, the Court of Special Appeals noted that this problem exists regardless of whether the underlying cases is criminal or civil in nature. *In re Damien F.*, 958 A.2d 417–19 (Md. Ct. Spec. App. 2008).

[73] *In re Damien F.*, 958 A.2d at 422–23.

[74] *Id.* at 424.

[75] *Id*.

arrestee, a probationer or parolee has a diminished liberty interest, as "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole [or probation] restrictions."[76] The Supreme Court has held that a parolee or probationer accused of violating parole or probation is entitled under the Due Process Clause [77] "to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole [or probation], and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision."[78] It explained the procedural protections required in these hearings:

> At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decision maker, and a written report of the hearing. The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the "minimum requirements of due process" include very similar elements:
>
> > "(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written

[76] Morrissey v. Brewer, 408 U.S. 471, 480 (1972).
[77] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law").
[78] Gagnon v. Scarpelli, 411 U.S. 778, 781–82 (1973).

> statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole."[79]

If a parent facing the temporary loss of custody of a child at a shelter care hearing has a conditional right to cross-examine the witnesses whose statements are being used against her and to present testimonial evidence,[80] then so should a defendant at a pretrial release hearing where she faces the possibility of being incarcerated for far longer. If a parolee or probationer facing loss of his conditional liberty has a right "to present evidence in his own behalf" and "a conditional right to confront adverse witnesses,"[81] then so should a presumptively innocent arrestee when facing a deprivation of "the absolute liberty to which every citizen is entitled."[82]

III. THE 2017 CHANGES

The 2017 changes rewrote Rule 4-216.1 and amended several rules, most notably Rules 4-216 and 4-216.2.[83] What follows is a summary of the main changes.

A. Expanded list of non-financial conditions of release

Consistent with its aim to reduce the use of money bail, the amendments expanded the list of non-financial conditions of release.

First, they embraced the option of unsecured bonds.[84] An unsecured bond is "a written obligation of the person signing the bond conditioned on the appearance of the defendant and providing for the payment of a penalty sum according to its terms"[85] without the requirement of "collateral security" (*i.e.* "property deposited, pledged, or encumbered to secure the performance of a bond")."[86] Unlike a

[79] *Id*. at 786 (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)) (internal citation omitted).
[80] *See supra* text accompanying notes 62–77.
[81] *Gagnon*, 411 U.S. at 786 (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)) (internal citation omitted).
[82] *Id*. at 781 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).
[83] *See* Rules Order, *supra* note 2.
[84] *See* MD. R. 4-216.1(b)(1)(A), (b)(3), (c)(1).
[85] MD. R. 4-216.1(a)(2).
[86] MD. R. 4-216.1(a)(3).

secured bond, which typically requires a defendant and/or his family or friends to (a) deposit some or all of the penalty sum with the clerk of the court, (b) encumber real or personal property with a value equal to some or all of the penalty sum, or (c) pay a non-refundable fee to a "compensated surety" (typically a bail bond company), which then executes the bond, an *unsecured* bond merely requires the defendant (or, if specified by the judicial officer, the defendant and a friend or family member)[87] to agree in writing to pay a penalty sum if the defendant fails to appear as required. An unsecured bond does not require the defendant or his friends or family to deposit money with the court, or pay a fee to a bondsman.[88]

Second, the amendments added more non-financial conditions of release. These are:

> • one or more of the conditions authorized under Code, Criminal Law Article, §9-304 reasonably necessary to stop or prevent the intimidation of a victim or witness or a violation of Code, Criminal Law Article, §§ 9-302, 9-303, or 9-305, including a general no-contact order;
> • reasonable restrictions with respect to travel, association, and place of residence;
> • a requirement that the defendant maintain employment or, if unemployed, actively seek employment;
> • a requirement that the defendant maintain or commence an educational program;
> • a reasonable curfew, taking into account the defendant's employment, educational, or other lawful commitments;
> • a requirement that the defendant refrain from possessing a firearm, destructive device, or other dangerous weapon;
>
> • a requirement that the defendant refrain from excessive use of alcohol or use or possession of a narcotic drug or other controlled dangerous substance, as defined in Code, Criminal

[87] *See* MD. R. 4-216.1(d)(2)(L) (authorizing the judicial officer to require, as a condition of release, the "execution of unsecured bonds by the defendant and an uncompensated surety who (i) has a verifiable and lawful personal relationship with the defendant, (ii) is acceptable to the judicial officer, and (iii) is willing to execute such a bond in an amount specified by the judicial officer").
[88] *See* Gupta, *supra* note 23, at 14; Governor's Comm'n., *supra* note 14, at 23.

> Law Article, §5-101 (f), without a prescription from a licensed medical practitioner;
> • a requirement that the defendant undergo available medical, psychological, or psychiatric treatment or counseling for drug or alcohol dependency;
> • electronic monitoring;
> • periodic reporting to designated supervisory persons;
> • committing the defendant to the custody or supervision of a designated person or organization [including a pretrial services agency] that agrees to supervise the defendant and assist in ensuring the defendant's appearance in court;
> • execution of unsecured bonds by the defendant and an uncompensated surety who (i) has a verifiable and lawful personal relationship with the defendant, (ii) is acceptable to the judicial officer, and (iii) is willing to execute such a bond in an amount specified by the judicial officer.
> • any other lawful condition that will help ensure the appearance of the defendant[][89] or the safety of each alleged victim, other persons, or the community.[90]

B. Types of release, order of preference, and applicable legal standard.

The new rule creates preferences for certain types of release, generally from least to most onerous. The most preferred type of release is personal recognizance. Next is an unsecured bond executed by the defendant alone. Third in line is release on personal recognizance or unsecured bond executed by the defendant, with special conditions other than "financial terms" (*i.e.* terms requiring collateral security or a guarantee of the defendant's appearance by a compensated surety).

[89] One relatively easy way to increase the likelihood that the defendant will appear in court is to secure a commitment from a trustworthy family member to remind the defendant of the court date as it approaches. Research on the use of texts or phone calls to remind defendants of court dates has begun to show that "simply reminding defendants of their upcoming court dates has a significant impact on reducing failure to appear rates." PUBLIC JUST. INST., REPORT TO THE PRETRIAL RELEASE SUBCOMMITTEE OF THE TASK FORCE TO STUDY THE LAWS AND POLICIES RELATING TO REPRESENTATION OF INDIGENT CRIMINAL DEFENDANTS BY THE OFFICE OF THE PUBLIC DEFENDER 8 n.12 (2013) (mentioning several studies from around the country with comparable findings).

[90] MD. R. 4-216.1(d)(2) (A)–(L) & (O).

Fourth is release on a financial term requiring collateral security. Finally, the least preferred is release on a financial term that requires a guarantee of the defendant's appearance by a compensated surety.

The following table lists the types of release, and provisions relating to preferences and required findings.

Type of release	**Preferences**	**Standard for applying (in lieu of less onerous alternative(s))**
Personal recognizance	Most preferred type of pretrial release. MD. R. 4-216.1(b)(1)(A).	
Unsecured bond	Second-most preferred type of pretrial release. MD. R. 4-216.1(b)(1)(A).	Judicial officer can use instead of personal recognizance "when necessary." MD. R. 4-216.1(b)(1)(A).
Personal recognizance or unsecured bond with special conditions *without financial terms*[91]	"If a judicial officer determines that a defendant should be released other than on personal recognizance or unsecured bond without special conditions, the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release set forth in section (d) of this Rule that will reasonably ensure (A)	"Additional conditions should be imposed on release only if the need to ensure appearance at court proceedings, to protect the community, victims, witnesses, or any other person and to maintain the integrity of the judicial process is demonstrated by the circumstances of the individual case."

[91] These are listed *supra* Part III.A.

	the appearance of the defendant, and (B) the safety of each alleged victim, other persons, and the community and may impose a financial condition only in accordance with section (e) of this Rule." MD. R. 4-216.1(b)(3). Recognizing that some conditions involve financial cost or other burdens, the Rule provides that the judicial officer must take into account "the ability of the defendant to . . . comply with a special condition." MD. R. 4-216.1(b)(2). In the same vein, the Rule also states that these conditions may be used to "the extent appropriate and capable of implementation." MD. R. 4-216.1(d)(2).	MD. R. 4-216.1(b)(1)(A).
Release on conditions including a "special condition *with financial terms*," *i.e.*, "the requirement of	Least preferred type of release. MD. R. 4-216.1(b)(1)(A). Even among this disfavored type of	

collateral security or the guarantee of the defendant's appearance by a compensated surety as a condition of the defendant's release."[92] These include: • execution of a bond in an amount specified by the judicial officer secured by the deposit of collateral security equal in value to not more than 10% of the penalty amount of the bond or by the obligation of a surety, including a surety insurer, acceptable to the judicial officer; • execution of a bond secured by the deposit of collateral security of a value in excess of 10% of the penalty amount of the bond or by the obligation of a surety, including a surety insurer, acceptable to the judicial officer.[93]	release, a requirement of a compensated surety is the most disfavored. MD. R. 4-216.1(d)(2)(N).	

[92] MD. R. 4-216.1(a)(7).
[93] MD. R. 4-216.1(d)(2)(M)–(N).

C. Factors a court must consider in determining whether to release a defendant pending trial and the conditions of any such release

Rule 4-216.1 requires the court to consider a number of factors. It provides in pertinent part:

> (1) *Recommendation of Pretrial Release Services Program*
> In determining whether a defendant should be released and the conditions of release, the judicial officer shall give consideration to the recommendation of any pretrial release services program that has made a risk assessment of the defendant in accordance with a validated risk assessment tool and is willing to provide an acceptable level of supervision over the defendant during the period of release if so directed by the judicial officer.
> (2) *Other Factors*
> In addition to any recommendation made in accordance with subsection (f)(1) of this Rule, the judicial officer shall consider the following factors:
> (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;[94]

[94] The Maryland Rules of Criminal Procedure §5-201(a) provide that
(1) The court or a District Court commissioner shall consider including, as a condition of pretrial release for a defendant, reasonable protections for the safety of the alleged victim.
(2) If a victim has requested reasonable protections for safety, the court or a District Court commissioner shall consider including, as a condition of pretrial release,

> (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[95] and any prior

provisions regarding no contact with the alleged victim or the alleged victim's premises or place of employment. MD. CODE. ANN. CRIM. PROC. § 5-201(a) (West 2017).

[95] That this factor expressly mentions "prior convictions" but not prior arrests or charges suggests that the court should not consider mere arrests or charges that did not result in a conviction. *See* Immanuel v. Comptroller of Maryland, 141 A.3d 181, 193 n.6 (Md. 2016) (explaining that "Maryland has long accepted the doctrine of *expressio* (or *inclusio*) *unius est exclusio alterius*, or the expression of one thing is the exclusion of another" (citation omitted)).

This interpretation of the rule is bolstered by two other considerations. First, most arrests and charges that did not result in convictions can be expunged. *See* MD. CODE ANN., CRIM. PROC. § 10-105 (2008 Repl. Vol. & 2017 Supp.). Interpreting to Rule 4-216.1(f)(2) to permit consideration of such unproven charges would lead to the absurd result that whether a person is detained or released would depend on whether he expunged prior charges that did not result in convictions. *See generally* Pickett v. Sears, Roebuck & Co., 775 A.2d 1218, 1224 (Md. 2001) (explaining that "[t]he words of the rule must also be construed so as not to yield a result which is unreasonable, absurd, or illogical").

Second, the mere fact that a defendant has been arrested and charged is not admissible in sentencing hearings, which are analogous to pretrial release hearings in that the rules of evidence (other than those regarding the competency of witnesses) apply in neither proceeding. *See* MD. R. 5-101(b)(6) & (9). A sentencing judge errs if he or she "consider[s] a bare list of prior arrests that did not result in convictions." Craddock v. State, 494 A.2d 971, 975-76 (Md. Ct. Spec. App. 1985) (citing Henry v. State, 328 A.2d 293, 303 (Md. 1974)). In *Henry*, the Court of Appeals quoted the following explanation with approval: "While a sentencing judge's inquiry is not limited by the strict rules of evidence, and evidence of less probative value than is required for a determination of guilt may be considered, the judge may not consider evidence which possesses such a low degree of reliability that it raises a substantial possibility that his judgment may be influenced by inaccurate or false information. Consideration of such information leads to unwarranted assumption of guilt. For this reason it has been recognized that when they stand alone, bald accusations of

> adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.[96]

D. Additional limits and requirements applicable to special conditions with financial terms (i.e., secured bonds or collateral security)

1. Affordability

"A judicial officer may not impose a special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition."[97] In determining what the defendant can afford, "the judicial officer may consider all resources available to the defendant from any lawful source."[98] A committee note following these provisions suggests sources for this information:

> Information regarding the defendant's financial situation may come from several sources. The Initial Appearance Questionnaire Form used by District Court commissioners seeks information from the defendant regarding employment, occupation, amount and source of income, housing status, marital status, and number of dependents relying on the defendant's income. The criminal and juvenile record checks made by the commissioner also may reveal relevant information. Additional information may be available to the judge at a bail review proceeding from a defense attorney, the State's Attorney, and a pretrial services unit.[99]

In the analogous situation where a court assesses a defendant's ability to afford private counsel, the Court of Appeals has cautioned

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criminal conduct for which a person either has not been tried or has been tried and acquitted may not be considered by the sentencing judge." *Henry*, 328 A.2d at 303 (internal citations omitted). Similarly, mere arrests and charges, without more, are not sufficiently reliable to be considered by a judge at a pretrial release hearing.

[96] MD. R. 4-216.1(f).

[97] MD. R. 4-216.1(e)(1)(A).

[98] *Id*.

[99] *Id*. committee note.

courts to avoid imputing assets to the defendant that are not necessarily available to him:

> Absent clear evidence of some firm commitment by the family to devote their resources to appellant's defense, those resources cannot be imputed to appellant or considered in determining his indigence because he has no right to or control over them. They are not his assets.[100]

If a judge imposes a financial condition that the defendant is unable to satisfy, Rule 4-216.3 provides a means for the court, on motion or on its own initiative, to modify or eliminate the financial condition. Subsection (b) provides:

> After a charging document has been filed, the court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of pretrial release or amend it to impose additional or different conditions of release, subject to the standards and requirements set forth in Rule 4-216.1. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record. A judge may alter conditions set by a commissioner or another judge.[101]

Prompt review by the court of unaffordable financial conditions is consistent with Rule 4-216.3's mandate that the courts monitor the situations of people held pretrial "to eliminate unnecessary detention":

> In order to eliminate unnecessary detention, the court shall exercise supervision over the detention of defendants pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.[102]

[100] Baldwin v. State, 444 A.2d 1058, 1068 (Md. Ct. Spec. App. 1982).
[101] MD. R. 4-216.3(b).
[102] MD. R. 4-216.3(c).

2. Financial terms cannot be used to address dangerousness

"Special conditions of release with financial terms are appropriate only to ensure the appearance of the defendant and may not be imposed solely to prevent future criminal conduct during the pretrial period or to protect the safety of any person or the community . . . ."[103]

It is important to note that this prohibition extends to conditions requiring "collateral security or the guarantee of the defendant's appearance by a compensated surety as a condition of the defendant's release," but not to unsecured bonds executed by the defendant alone or by the defendant and by the defendant and an uncompensated surety who has a verifiable and lawful personal relationship with the defendant (usually a family member or friend), as such unsecured bonds do not fall within the definition of a "special condition of release with financial terms."[104]

3. Other restrictions

Special conditions of release with financial terms may not be imposed "to punish the defendant or to placate public opinion."[105] They "may not be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge."[106]

4. Required advice

> "If the judicial officer requires collateral security, the judicial officer shall advise the defendant that, if the defendant or an uncompensated surety posts the required cash or other property, it will be refunded at the conclusion of the criminal proceedings if the defendant has not defaulted in the performance of the conditions of the bond."[107]

CONCLUSION

[103] MD. R. 4-216.1(e)(1)(B).
[104] MD. R. 4-216.1(a)(7); *see also* MD. R. 4-216.1(d)(2)(L).
[105] MD. R. 4-216.1(e)(1)(B).
[106] MD. R. 4-216.1(e)(1)(C).
[107] MD. R. 4-216.1(g).

The 2017 amendments to the court rules governing pretrial release and detention, if properly implemented, should eliminate the use of unaffordable bail. In theory, this change should reduce unnecessary pretrial detention. In practice, it will do so only if our courts faithfully adhere to the procedural protections that exist to ensure that "liberty is the norm, and detention prior to trial . . . is the carefully limited exception."[108]

[108] United States v. Salerno, 481 U.S. 739, 755 (1987).