

Advisory Memorandum

To: United States Commission on Civil Rights
From: Maryland Advisory Committee to the U.S. Commission on Civil Rights
Date: February 23, 2018
Subject: Fees and Fines and Bail Reform in Maryland

The Maryland Advisory Committee to the U.S. Commission on Civil Rights (Committee) convened a public briefing on Tuesday, April 25, 2017, on the campus of Morgan State University in Baltimore, to gather information from government officials, legal experts, and others regarding the impact of fees, fines, and money bail on persons of limited means, on communities color, and on the administration of justice in the state of Maryland. Specifically, the Committee sought substantive information and understanding as to whether Maryland or its local jurisdictions use court-imposed financial penalties (fines and fees) and money bail in ways that may violate the constitutional and civil rights of persons on the basis of race, ethnicity, gender or disability, or in ways that may violate such rights of racial and ethnic minority groups, gender groups (particularly women) and those with disabilities who happen to be poor or otherwise live in poverty.

The Committee decided to examine the issue of Maryland’s use of fines and fees following the release of a “Dear Colleague” letter by the U.S. Department of Justice (DOJ) in March 2016. This letter included guidance to provide “greater clarity to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices.”¹ The guidance was issued by DOJ after its investigation in Ferguson, Missouri, revealed that police routinely issued tickets for petty offenses to generate revenue and courts issued arrest warrants and incarcerated residents who failed to pay fines for these petty offenses.

The Committee’s work expanded to include an examination into Maryland’s use of money bail after the Attorney General of Maryland released a letter noting that many people are held in jail in pretrial detention only because they are too poor to post bail. In the letter, Attorney General Brian Frosh stated: “Numerous studies have documented that Maryland’s pretrial system currently operates, though not by design or intent, in a manner that is often inconsistent with State and federal law, ineffective at addressing public safety concerns, disproportionately burdensome to communities of color, and inefficient in its use of State and local resources.”²

The DOJ and Maryland Attorney General letters raised additional concerns and issues for the Committee to address, including, but not limited to, whether fines, fees and money bail are imposed solely for law enforcement purposes, for exercising power and control over defendants, for enhancing or facilitating guilty pleas and convictions through pre-trial detention, or for

¹ Dear Colleague Letter from the U.S. Department of Justice, Office of Justice Programs, Civil Rights Division, Office for Access to Justice (Mar. 14, 2016), <https://www.justice.gov/opa/file/832541/download>.

² Letter on Pretrial Release from Brian E. Frosh, Attorney General of the State of Maryland, to Alan M. Wilner, Chair, Maryland’s Standing Committee on Rules of Practice and Procedure (Oct. 25, 2016), http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf (last accessed Dec. 23, 2017)..

revenue-raising purposes. Whatever the justification, the Committee sought information as to viable alternative policies and practices that are nondiscriminatory and would not fall disproportionately on racial and ethnic groups, gender groups, or persons with disabilities.

This Advisory Memorandum serves the following purposes: 1) outline the background and context for the Committee’s project; 2) report observations and themes from the April 25, 2017 public briefing;³ 3) make initial recommendations concerning these issues, and 4) mark a suspension of the Committee’s investigation of fees, fines, and money bail in Maryland pending further developments in the State.

Background:

Maryland law allows people tangled in the criminal justice system to be charged fines and fees. Fines are a monetary penalty imposed as punishment. Fees are imposed for costs, including costs for the initial arrest, a public defender, probation or parole supervision, and/or participation in drug treatment or other programs that are conditions of parole. These fees, however, are not imposed as punishment but rather to generate revenue offsetting costs associated with the state’s provision of such services. In 2009, The Brennan Center for Justice issued a report titled “Maryland’s Parole Supervision Fee: A Barrier to Reentry.”⁴ This report discussed the societal and economic costs of supervisory fees and concluded that they impose unnecessary burdens upon defendants. While these fees may be waived, judges do not uniformly do so, and the application of fees—and lack of uniformity—may burden vulnerable populations and communities of color. In 2008, only \$334,752 was collected from parole supervision fees, generating a negligible amount of money for state funds. While negligible revenue is generated, those who cannot afford to pay or who lapse in payment face economic hardship and potential ruin if fees go to collection. Failure to pay can also result in jail time.

In addition to the effects of fees and fines upon Maryland residents, concerns have also been raised that money bail in Maryland may present a burden that disproportionately impacts people of color and lower socioeconomic status. Attorney General Brian Frosh expressed concerns that the money-bail system in Maryland was discriminatory and endorsed the idea of moving away from money-bail. On July 1, 2017, a rule change went into effect in Maryland under the auspices and rule-making authority of the Maryland Court of Appeals, aiming to reduce the number of defendants held in jail because they cannot afford bail. Maryland The rule change requires judges to take into account a defendant’s ability to pay bail when setting pretrial release conditions.⁵

When discussing fees, fines, and bail in Maryland, questions of discrimination, constitutionality, the administration of justice, and possible civil rights violations are raised. The Committee

³ See Appendix 1 for the agenda.

⁴ Rebekah Diller, Judith Greene & Michelle Jacobs, *Maryland’s Parole Supervision Fee: A Barrier to Reentry*, The Brennan Center for Justice (Mar. 23, 2009), <https://www.brennancenter.org/publication/marylands-parole-supervision-fee-barrier-reentry> (last accessed Apr. 28, 2017).

⁵ Ovetta Wiggins & Ann E. Marimow, *Maryland’s highest court overhauls the state’s cash-based bail system*, The Washington Post (Feb. 7, 2017), https://www.washingtonpost.com/local/md-politics/maryland-highest-court-overhauls-the-states-cash-based-bail-system/2017/02/07/36188114-ed78-11e6-9973-c5efb7ccfb0d_story.html?utm_term=.64417886db09.

convened a public meeting in order to investigate pursuing a potential project related to these themes.

Assertions and themes from the April 25, 2017, Morgan State University Public Briefing:

1. **Fees and fines are not uniformly waived and can impose a disparate burden on people with limited means.** There are supervisory fees imposed on people on probation. The fees typically amount to \$40 per month and the usual probationary period is 36 months, resulting in a total of \$1440. The limit for probation, however, is five years, which would add an additional \$960. According to Maryland Circuit Court Judge Stephen Sfekas, this amount can present economic hardship and unfairly burden indigent persons. Furthermore, these fees may be sent to central collections, where an additional 17 percent collection fee is applied. Judges have the authority to waive the fee—and routinely do so—but this is not uniform practice among judges. Judge Sfekas claimed that these fees are: 1) bad social policy; 2) do not collect substantial money for the state; 3) put people into jeopardy; 4) result in uncollectible judgments; and 5) represent an obstacle for people to rehabilitate themselves and reenter society.⁶ Others discussed additional contexts in which court fines and fees may result in incarceration due to individuals' inability to pay them: certain types of traffic offenses and failure to pay child support. Nick Steiner, Legal and Policy Counsel of the ACLU of Maryland, confirmed that waiver of fines and fees is judge specific and is not consistently applied.⁷
2. **There is no data to support how frequently fines and fees result in people remain incarcerated.** Regular data collection and reporting is required to appraise the impact of fees and fines upon Maryland residents, especially by demographics. The presenters did not know in what other contexts fines and fees are imposed (besides probation supervision, failure to pay child support, and traffic offenses), whether incarceration may be imposed for failure to pay fines and fees in other contexts, or what alternatives to incarceration are authorized in those contexts. Douglas Colbert, Professor at the University of Maryland School of Law, stated that we do not have the data to support how frequently fines and fees result in people remaining incarcerated, much less information regarding the race of people who may be jailed in connection with fines and fees.⁸ Professor Colbert did state that he believed the Maryland Judiciary was willing to pursue and provide this data upon request. There is no uniform reporting system for the state, however, so such data is not subject to refreshing and audit. Such data should also extend to bail and pretrial detention outcomes (and must include data on “Failure to Appear”). Concerns were raised by Zina Makar of the University of Baltimore School of Law that the upcoming rule change has resulted in an increase in the amount of people in preventative detention (*i.e.* pretrial detention/jail) rather than an increase in the amount of people released on their own recognizance.⁹

⁶ Transcript of the live stream of the briefing before the Maryland State Advisory Committee, *Bail Reform and Court Imposed Fines and Fees in Maryland*, April 25, 2017 [hereinafter cited as Transcript] (statement by Stephen Sfekas) at 7.

⁷ Transcript (statement by Nick Steiner) at 9.

⁸ Transcript (statement by Doug Colbert) at 12.

⁹ Transcript (statement by Zina Makar) at 46.

3. **Modern technologies are available to supervise people in lieu of bail.** Judge Sfekas and Major Michael Merican, of the St. Mary’s County Sheriff’s Office, spoke of using technologies such as GPS and electronic monitoring (*e.g.*, house arrest) to supervise people. House arrest can be tailored to help an individual stay in contact with society; individuals can maintain their job, family, and remain integrated in their communities. In St. Mary’s County, the county pays for electronic monitoring with ankle bracelets at a cost to the county of \$3.10 per day.¹⁰ This program allows the county to avoid pretrial incarceration costs and results in significant savings for the county. While the state pays for house arrest for juveniles, there is no standard application of adult fees and payers in the rest of Maryland—the amounts of fees and who is responsible for paying them depends upon the rules of each county. Nicholas Wachinski, CEO of Lexington Insurance, which underwrites bail bonds in Maryland, stated, however, that the use of ankle bracelets for pretrial supervision impeded the liberty of pre-trial defendants when compared to pre-trial release upon posting of bail.¹¹
4. **Bail bonds companies exercise significant power over their clients.** Bonds companies can send clients to jail at will if there is a violation of the payment agreement or parole agreement, and have the power to arrest and enter the home of clients without a warrant. Even though Mr. Wachinski stated that he was not aware of an instance in which bondsmen’s power to enter homes without a warrant and arrest clients has been exercised in Maryland, these are alarming powers granted to an individual whose clients are under duress to pay them in the views of the Committee.¹² If clients (defendants) fail to pay bondsmen, they can also send fees to collections—bringing further economic hardship or even ruin. These powers raise serious concerns of an extra-judiciary form of justice, where bondsmen have discretion whether to assert such powers over their clients. Public defender Paul DeWolfe noted that from 2011-2015 in Maryland, corporate bond premiums amounted to \$256 million dollars. He further presented data indicating that most of this money comes from Baltimore City and Baltimore County, noting that payment of these premiums represent a transfer of wealth that affects the poorest communities of Maryland.¹³ Multiple presenters, including Zina Makar, noted that bail is a highly unregulated industry.¹⁴
5. **Mass incarceration extends to pretrial detention.** Zina Makar stated that 11.4 million people enter jails each year and only 5 percent of these individuals are ultimately admitted to prisons. Makar presented data indicating that there is an increase in the number of people sent to preventative detention (*i.e.* held without bail). Defendants are four times more likely to plead guilty if incarcerated before trial. Makar asserted that release on recognizance should be the standard and that preventative detention is becoming a proxy for punishment.¹⁵ Mr. Wachinski suggested that money bail was not the cause of racial disparities in pre-trial detention, citing statistics that show that racial disparities exist within the District of Columbia’s pre-trial detention population where

¹⁰ Transcript (statement by Major Michael R. Merican) at 46.

¹¹ Transcript (statement by Nick Wachinski) at 70-71.

¹² Transcript (statement by Steiner) at 16.

¹³ Transcript at 31.

¹⁴ Transcript (statement by Makar) at 46.

¹⁵ Transcript (statement by Makar) at 34-38.

money-bail is not used.¹⁶ A report completed by the Maryland Office of the Public Defender asserts that there are significant disparities in bail amounts for black defendants versus white defendants with black defendants being subject to bail amounts that are on average 45 percent to 51 percent higher than white defendants.¹⁷

6. **Pretrial services are significantly needed, especially having to do with mental health and substance abuse disorders.** Major Michael Merican has spearheaded efforts to bring pretrial services to defendants. He states that these pre-trial programs are alternatives to monetary release conditions.¹⁸ Major Merican raised concerns over the growing opioid crisis and stated that services are critically needed. Mr. Wachinski also cited a need for mental health and substance abuse services. Jacqueline Robarge of Power Inside also cited the lack of services for individuals with these disabilities in perpetuating a cycle of incarceration including pretrial detention due, to failures to appear.¹⁹ Major Merican noted that failure to appear (FTA) is an exclusion criterion for people to be referred to pretrial services.²⁰
7. **Failure to Appear (FTA) may represent an undue burden for defendants.** FTAs are tracked and exclude defendants from pretrial services, as stated by Major Merican. Defendants may be unaware they have a court date, yet these circumstances result in an FTA. Courts must do a better and more comprehensive job of notifying defendants of upcoming court dates. FTAs can have dire consequences for defendants and represent long-term consequences that negate the concept of “innocent until proven guilty.” Jacqueline Robarge noted that further data collection regarding FTA’s is needed to improve the methodologies for assessing risk for purposes of bail decisions. She pointed out that individuals who live in poverty, have unstable housing, and frequently have substance abuse and mental health issues. These individuals disproportionately experience repeated arrests for low-level crimes such as trespass and have a history of failing to appear in court due to their mental health and/or substance abuse issues, resulting in them being considered “high flight risks” and incarcerated pretrial. Maryland needs to identify where FTAs are occurring and address root causes.²¹
8. **Alternatives to money-bail work.** Paul DeWolfe stated that DC releases 92 to 95 percent of its defendants without cash bail, and over 90 percent return for court dates.²² Other states such as Kentucky, New Mexico, and New Jersey have moved away from cash bail.²³ There are successful models and programs that already exist, which Maryland can emulate.

¹⁶ Transcript (statement by Wachinski) at 67.

¹⁷ Transcript at 32.

¹⁸ Transcript (statement by Merican) at 40.

¹⁹ Transcript (statement by Jacqueline Robarge) at 42-44.

²⁰ Transcript at 58.

²¹ Transcript (statement by Robarge) at 47.

²² Transcript at 49; 33.

²³ Transcript at 49. *See also* American Bail Coalition, “New Jersey and New Mexico Heading for the Exit on Bail Reform – New Legislation Seeks Changes,” <http://www.americanbailcoalition.org/press-releases/new-jersey-new-mexico-heading-exit-bail-reform-new-legislation-seeks-changes/> (last accessed Feb. 23, 2017).

Conclusion:

Literature is compelling that fines and fees can and often do have a racially disparate impact and result in the over-incarceration of people of limited means for failure to pay certain fines and fees.²⁴ It is also clear that the practice of billing for parole supervision in the state of Maryland can contribute to mass incarceration by undercutting the state's stated commitment to reentry of people into society after prison.²⁵

The information gathered by this Committee supports the notion that issues with supervisory fees in Maryland continue to exist and can impose disparate burden on persons with limited means with very little revenue benefit to the state. The state should review this system and consider whether abandoning such fees may better contribute to the re-entry of persons to society after prison.

At the same time, the Committee's inquiry into other fees and fines and the extent to which the failure to pay such fines and fees result in incarceration has been impeded by the state's complete failure to collect this information, and related demographics, in a systematic and verifiable manner. Unless and until such information is available—comprehensively and verifiably—it is difficult to complete a meaningful assessment of whether and the extent to which the fines and fees system in Maryland may cause disparate incarceration or other burdens on people of limited means, color, ethnicity, gender and disability. The Committee strongly recommends that the Maryland court system immediately begin to collect information to enable meaningful analysis of this issue.

The issues related to Maryland's money bail system have been widely discussed and documented, resulting in the changes to court rules concerning money bail identified above. The effect of the new rules concerning money bail will not be immediately evident. While additional reforms may be important, the Committee believes that it would be useful to understand the impact of the new rules before recommending additional reforms.

Because of the current lack of systemic and verifiable data concerning fines and fees, and the recent significant changes in the rules concerning money bail, the Committee agrees to suspend its investigation into these issues. The rule change pertaining to bail will affect the landscape, and may warrant revisiting this topic at a later date. The Committee may also revisit the fines and fees matter in the event more meaningful data is collected and becomes available from the Maryland courts.

With his Advisory Memorandum, the Committee suspends its investigation regarding fees, fines, and bail in Maryland, but will consider revisiting and reopening at a later date based upon the above changes in circumstances. The transcript of the Morgan State University meeting and

²⁴ See, e.g., Tori Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189 (2015).

²⁵ Rebekah Diller, Judith Greene & Michelle Jacobs, *Maryland's Parole Supervision Fee: A Barrier to Reentry*, The Brennan Center for Justice (Mar. 23, 2009), <https://www.brennancenter.org/publication/marylands-parole-supervision-fee-barrier-reentry> (last accessed Apr. 28, 2017).

other relevant Committee documents are available at
<http://facadatabase.gov/committee/meetings.aspx?cid=258>.

The agenda of the meeting is attached as the Appendix.

Appendix: Agenda



Maryland Advisory Committee to the U.S. Commission on Civil Rights

Morgan State University, 1700 E. Cold Spring Lane, Baltimore, MD

April 25, 2017

Agenda

I. Welcome and Introductions

11:45 a.m.

II. Briefing

Panel One: Fines and Fees

12:00 p.m.

Doug Colbert, Professor, University of Maryland School of Law
Stephen Sfekas, Former Judge
Nick Steiner, Legal and Public Policy Counsel, ACLU of Maryland
Caryn York, Director of Policy and Strategic Partnerships
Job Opportunities Task Force

Panel Two: Bail Reform

Paul DeWolfe, Public Defender, Maryland Public Defender's Office
Zina Makar, Clinical Fellow, University of Maryland School of Law
Michael Merican, Assistant Sheriff, St. Mary's County Sheriff Office
Jackie Robarge, Executive Director, Power Inside

Panel Three: Bail Reform

Ivan Bates, Attorney, Bates & Garcia
Nick Wachinski, CEO, Lexington National Insurance Corporation

III. Adjournment