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POSITION ON PROPOSED LEGISLATION

BILL: HB1356 Criminal Procedure - Pretrial Release - Bail

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: March 4, 2025

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 1356. This bill seeks to preclude a commissioner from releasing certain individuals on their own recognizance or on unsecured bond, and for those same individuals, requiring that a judge impose a money bail if they seek to release the person at all. If passed, House Bill 1356 will bring Maryland back to its disparate – and possibly unconstitutional – money bail system and will sweep individuals into the jail system who lack the risk factors appropriate for pretrial incarceration.

The problems with money bail, and its once-universal application under Maryland law, are well established. [A report by our office](#) quantifying the costs of bail found that, in 2011-2015, Maryland defendants and their families were charged nonrefundable premiums totaling an estimated \$256 million (\$51 million per year), with nearly 30% of these corporate bond premiums paid in cases where the defendant was ultimately not convicted of any crime. Especially troubling, and heightening constitutional concerns, money bonds were significantly higher for Black defendants and the highest corporate bond costs were imposed on two of Maryland's poorest neighborhoods.

In October 2016, then-[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](#), the [American Bar Association](#), and scores of other officials and advocates, the Maryland Court of Appeals adopted Court Rule 4-216.1 "designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond."

If passed, House Bill 1356 will raise the same constitutional concerns and equity issues that existed prior to rule change. Moreover, it removes the individualized determination needed to protect the due process rights that attach to the liberty interests inherent in pretrial bond determinations.

House Bill 1356 is also completely unnecessary. Research shows that unsecured bonds are as effective as cash bonds with greater fiscal benefits for the state and reduced inequities for indigent individuals and their families. [A 2019 study in Colorado](#), comparing individuals at the same risk levels who were released on either unsecured bond or cash bond, found that individuals released on unsecured bond had slightly higher public safety rates (were less likely to be charged with a new crime) and slightly higher court appearance rates. The differences were statistically insignificant, which is consistent with the reality that unsecured bonds and cash bonds have the same ultimate effect – if an individual commits a new crime, the cash bond is not revoked and so serves no deterring role; and if the individual fails to appear in court, the unsecured bond has the same financial penalty as if it was paid upfront. Similar to the reality of a secured bond for OPD clients and others without financial means, revocation of an unsecured bond due to failure to appear in court may result in years of debt for the individuals and their loved ones.

While the distinction between unsecured and secured bond was not statistically significant for safety and court appearances, the Colorado study found that unsecured bonds were significantly more cost effective in that they freed up jail beds more quickly for people who did not need to be incarcerated. Individuals provided with an unsecured bond were generally able to

be released within one day while individuals who had to secure the funds for a money bond often remained incarcerated for several days while their family negotiated a payment contract with a bail bondsman and/or gathered existing funds to make the payment. The study concluded that “[t]en days of jail incarceration were required for defendants with cash or surety bonds to achieve the same overall release threshold as defendants with unsecured bonds because there were statistically significant differences for the first nine days.”

Beyond the substantive concerns, the bill’s drafting also results in an exceptionally sweeping application of its provisions. The first clause, proposed Crim. Proc. 5-202(H)(1), would prohibit a commissioner from releasing someone on their own recognizance or unsecured bond if they were charged with a crime and previously released on unsecured bond **or** if they failed to appear in court while released on unsecured bond. Because either factor would preclude a commissioner from releasing the person on recognizance or unsecured bond, it would apply to anyone arrested within five years after a prior arrest where they were released, regardless of their level of compliance or the outcome of their prior case. This includes someone who complied with all of the requirements of their prior unsecured bond and was never convicted of a crime. For individuals who lack the means to pay a money bail, the mere fact that they were charged twice would thus require their incarceration.

The second clause, proposed Crim. Proc. 5-202(H)(2), requires the judge to impose a money bail upon anyone held by the commissioner under the terms of proposed Crim. Proc. 5-202(H)(1). Once again, this is without regard to whether the person had previously violated the terms of their release or whether there is any other indication that they are a safety or flight risk. This provides judges with less discretion and fewer options for circumstances that may involve a very low risk and would otherwise not require the state to incur any costs of incarcerations.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on House Bill 1356.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

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