MARYLAND ALLIANCE FOR JUSTICE REFORM

Citizens working to reform criminal justice in Maryland

The Honorable Alan M. Wilner
Chair, Rules Committee
2011-D Commerce Park Drive
Annapolis, Maryland 21401

November 16, 2016

Re: Comment as to proposed Rule 4-216.1 and Reporter's Note

Dear Judge Wilner:

I offer these comments as a member of the Executive Committee of Md. Alliance for Justice Reform (MAJR), not as a Circuit Court judge. I note that MAJR is a nonprofit, advocacy group composed of approximately 40 endorsing organizations and 1,000 individuals, including lawyers, retired judges, retired corrections professionals, "returning citizens," and other concerned Marylanders.

MAJR joins Attorney General Frosh and the Rules Subcommittee in strong support for the proposed changes that would create Maryland Rule 4-216.1 and revise related provisions to safeguard equal protection for low income Marylanders from inconsistencies and disparate impact of Maryland's current pretrial / money bail practices. We also thank the Committee for its expeditious response to the Attorney General's Request.

We share with other advocates three primary suggestions to improve to the new Rule:

1) In amended Rule 4-216 (c), we suggest that "***considered*** for release" is redundant in that the preceding clause recognizes the Court may find exceptions to the preference for release under enumerated exceptions. "Considered" here could be misconstrued to imply that a judicial officer might add another layer of discretion *unbound by any of the foregoing exceptions*.

2) Proposed Rule 4-216.1 blurs the distinction between personal recognizance and unsecured bond. The Rule should not inadvertently eliminate the potential of personal recognizance with no bond.

3) Proposed Rule 4-216.1 repeatedly uses the troublesome term "no reasonable likelihood." Maryland's Court of Appeals Volodarsky v. Tarachanskaya, 397 Md. 291 (2007) reviewed the potential alternate meanings of "likely" in Md. Code, Family Law Art., sec. 9-101 and concluded (Wilner, J.) that a "preponderance" standard should be applied. MAJR urges that, to avoid inconsistent interpretations and potential years of litigation, the Rule should simply incorporate "preponderance" as a more readily understood embodiment of the same standard.

MAJR would supplement these shared concerns with two more technical requests:

4) Proposed Rule 4-216.1 (b)(1) calls on judicial officers to release a defendant absent "finding that, if the defendant is released, there is a reasonable likelihood that the defendant (A) will not appear when required, or (B) will be a danger to an alleged victim, another person, or the community." We urge the Committee to ***add after the word "finding" the additional words "specific facts indicating."*** Without the requirement of specific facts, a judicial officer may simply make a conclusory statement to avoid any defendant's release without individualized consideration.

   The same concern applies to proposed Rule 4-216.1 (c)(1) that prefers personal recognize or unsecured bonds, unless the judicial officer "finds that no permissible non-financial condition attached to such release will reasonably ensure (i) the appearance of the defendant, and (ii) the safety of each alleged victim, other persons, or the community." Again, we urge Committee to ***add after the word "finds" the additional words "specific facts indicating."*** Without this, a judicial officer could revert to the improper practice of setting money bonds in preference to the less onerous alternative and could do so without any individualized explanation.

5) One clerical error appears in proposed Rule 4-216.1(d)(7). The phrase "***conditions authorized by Code, Criminal Law Art., secs. 9-302, 303 and 305***" is misplaced as conditions are authorized only by ***sec. 9-304***; the other provisions cited contain only substantive offenses and penalties.

Last, but not least, MAJR thanks the Rules Committee for including the ***Reporters Note on Subsection (f)(1)*** reference to sound public policy reasons for adoption of statewide, uniform, validated risk assessment.
We also urge that the Rules Committee might recognize these additional reasons for such a risk assessment system:

a) Judges and commissioners receive no systematic training on pretrial risk assessment and repeated studies haves shown wide inconsistencies between the percentage of defendants release pretrial, the types and amounts of bail set. Recalling America's "Willie Horton" nightmare, cautious judges too often may chose to err if at all on the side of detention or unrealistically high money bail for poor defendants. See, for example, "The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions" (November 2016- Md. Office of the Public Defender) and "Commission to Reform Maryland's - Pretrial System Final Report" (December 2014), including its appendices comparing counties' diverse performances. A uniform risk assessment, creating a rebuttable presumption for release, greatly could aid judges' confidence in their pretrial risk decisions, could improve consistency between counties, and could boost public confidence in the process.
b) The few Maryland counties that now have risk assessments in their pretrial screening and supervision units now may include demographic factors (marital status, education level, employment history, etc.) widely-criticized in recent years as inadvertently racially-discriminatory. A newer, nondiscriminatory, validated risk tool used by all Maryland counties could resolve these concerns. See, e.g., Virginia's recently published "Race and Gender Neutral Pretrial Assessment" (Nov. 2016) and the nationally-accepted, nondiscriminatory Arnold Foundation "Public Safety Assessment."

c) Some critics of alternatives to money bail suggest that adoption of a system truly implementing a preference for the "least onerous" conditions financially could harm Maryland taxpayers. To the contrary, Maryland studies have shown the daily cost of pretrial supervision to be more than ten times the cost of pretrial supervision. See 2014 Pretrial Commission, *supra*. St. Mary's County, Maryland recently demonstrated the taxpayer benefits by substantially reducing its pretrial population and expenses via pretrial supervision within an existing budget. Similar results have been achieved on a grander scale in Allegheny County (Pittsburgh, Pa.) and many other jurisdictions. See "The transformation of Pretrial Services In Allegheny County" (Oct. 2007).

d) In conclusion, the most important policy reason for preferring pretrial release to pretrial detention whenever practicable may be this: Pretrial detention, reliable studies show, causes harmful, punitive impacts on the lives of those detained. Within as little as three days, many defendants may lose their jobs, become unable to pay rent, and face family hardships; substantially increased likelihood of recidivism results. See, e.g., "The Hidden Costs of Pretrial Detention," p. 3 (Lowenkamp, et al.-Nov. 2013).

The same Constitutional concerns that prompted Maryland's Court of Appeals to adopt DeWolfe v. Richmond, 434 Md. 444 (2013) also should support its approval of the proposed revisions to Maryland Rule 4-216.1 and related provisions. Maryland Alliance for Justice Reform again thanks the Court for its consideration of these comments and for its careful attention to the need for individuals' rights to fair consideration for pretrial release, regardless of poverty or race.

Respectfully submitted,

PHILIP CAROOM for
Maryland Alliance for Justice Reform –
Executive Committee

cc: MAJR Exec. Com.