

**VIA E-MAIL**

September 9, 2014

Alexandra Staropoli, Esq.  
Senior Policy & Legislative Analyst  
Governor's Office of Crime Control & Prevention  
300 E. Joppa Road, Suite 1105  
Baltimore, Maryland 21286

Michael Schatzow

T 410.244.7592  
F 410.244.7742  
mschatzow@venable.com

Dear Miss Staropoli:

I write in response to your email of September 4, 2014 requesting that members of the Individual Rights Subcommittee provide our specific concerns regarding individual rights in connection with pretrial justice. My major concern presently is that the decision of the Court of Appeals in the Richmond case is not being properly implemented. As a result of the failure to implement the Richmond decision in a way that gives meaning to the rights found in the Richmond decision, indigent defendants are either being denied their right to counsel, or being punished for their efforts to exercise that right.

Many of the problems stem from the fact that the Public Defender is not allowed to qualify individual defendants for representation on the basis of indigency, and is not allowed to represent indigent defendants at their initial appearance. In many of the large jurisdictions, including Baltimore City, defendants are waiting many hours before they see a commissioner for the commissioner to determine eligibility for appointed representation. Instead of having defendants qualified for indigency by the Public Defender or another entity during the fifteen to eighteen hours that defendants are doing nothing while waiting to see a commissioner in Baltimore City, nothing is done until they appear before the commissioner. Then, without ever having had the opportunity to consult with an attorney, defendants are being told that while an attorney can be appointed to represent them, if they waive their right to an attorney they can have the question of their bail taken up immediately. I am concerned that the inadequate warnings that individual defendants are being given about waiver, and the coercive element of unnecessary delay before they can meet with a lawyer and reappear before the commissioner, render these waivers constitutionally infirm as they are not being entered knowingly, intelligently, and voluntarily.

These problems concerning the effective right to counsel are compounded by what happens after an attorney is appointed. Instead of an attorney being able to consult with a client and confirm relevant background investigation during the numerous hours that the defendant is

Alexandra Staropoli, Esq.  
September 9, 2014  
Page 2

simply waiting to see the commissioner, the attorneys and defendants must wait until after the eligibility session with the commissioner. At that point, there are other features of the current system that interfere with the attorney's ability to do his job and provide effective representation.

In some jurisdictions, attorneys are not allowed to use their own telephones to verify information. This means that verified information, an important underlying basis for the decision in Richmond, is not available to the commissioner. In some jurisdictions, such as in Prince George's County, attorneys are allowed to use a phone that belongs to the state, but without any assurance that the state will not monitor the call. This is a direct interference with attorney work product, and may impact the attorney client privilege.

Once the initial bail hearing ends, the courts and correctional system are taking the position that the attorney's representation of the client ends immediately. Consequently, there are no means for the attorney to get his or her notes and other relevant information about the client to the Public Defender who will be representing that same defendant at that defendant's bail review hearing, to take place within 24 hours. Attorneys have requested that the Public Defender be able to place a locked box where the attorneys could leave their notes, and that request has been denied. Moreover, the correctional department is refusing to allow attorney's to speak to their clients immediately after the initial bail hearing, interfering with the attorney-client relationship and preventing the attorney from providing advice to the defendant about how to conduct himself or herself pending their meeting with their next counsel.

This interference with the right to counsel is no doubt unconstitutional. Under the Richmond decision, there is a Maryland constitutional due process right to be represented by counsel at an initial bail hearing. Under the Supreme Court decision in Rothgery v. Gillespie County, 554 U.S. 191 (2008), the right to counsel attaches at the initial appearance, which includes the initial bail hearing. There is no authority in Rothgery or any other United States Supreme Court opinion for the State to take appointed counsel away from an indigent once the right to counsel has attached and counsel has been appointed. Yet that is precisely what is happening in Maryland now and the taking away of counsel is made worse and magnified by the State's refusal to let appointed counsel provide any advice to defendants after the conclusion of the initial bail hearing and the failure to make possible the communication of information learned from and/about the defendant by his or her first attorney to his or her second attorney.

Virtually all of the problems above could be solved if the Public Defender were charged with representing all indigents at initial bail hearings, and given the opportunity to qualify indigent defendants for representation as soon as they are present in the holding facility. In this way, there would be no need to have two appearances before a commissioner—one for eligibility/waiver, and the next for setting bail. Eligibility would have been determined by the

Alexandra Staropoli, Esq.  
September 9, 2014  
Page 3

Public Defender, who would then use the many hours that defendants wait to see the commissioner the first time to meet with a defendant and gather information to be used in the initial bail hearing and verify that information when possible. The Public Defender would be able to advise the defendant about whether waiver of the right to counsel was in his or her interest, and for those defendants who chose not to waive the right to counsel, there would be no delay attached to the refusal to waive and there would be no problem with continuity of counsel because the Public Defender would continue to represent eligible indigents at their bail review hearing or in their case.

The above concerns are the most pressing. Other problems with our pretrial justice system include the use of money bail, the commissioner system that allows a non-lawyer to decide legal issues such as bail, the lack of training for commissioners and judges in the setting and review of bail, and the absence of a state-wide Pre-Trial Services Agency.

Very truly yours,

  
Michael Schatzow



August 29, 2014

The ACLU of Maryland shares the following concerns regarding pretrial reform in Maryland:

**I. The reportedly high rates at which defendants waive their right to counsel**

It has been reported in the news and by criminal defense attorneys that a substantial portion of defendants who are now entitled to, and given access to, attorneys at the bail review phase are foregoing this right and proceeding pro se. We are particularly concerned that:

- a. Defendants' decision to waive their right to an attorney is influenced by the wait-time for being appointed an attorney. We recommend that data be collected to estimate the average length of time that defendants face when awaiting their attorney;
- b. Defendants are not fully informed of the potential consequences of waiving their right to an attorney. We would like to obtain any training materials that the bail Commissioners receive, including but not limited to the colloquy which defendants are read when waiving their right to an attorney; and
- c. Poor persons and persons of color may be disparately impacted in the current system. We would like to have greater demographic data about those who opt to proceed pro se—their race, income, gender, and education level.

**II. The impact of cash bail**

We recommend the elimination of cash bail because a person's liberty should not hinge on their financial means. The system of cash bail has the potential to create a perverse result wherein a low-risk individual may be incarcerated due to her inability to pay, whereas a high-risk individual may be released. This result is neither fair to defendants, nor does it promote public safety.

**III. The pilot program**

The governor's office ordered that a pilot program be implemented to assess the value of a risk assessment tool—that program has not yet begun. We are concerned that without observing the outcomes of a tested pilot program in Maryland, the legislature will be reluctant to consider the implementation of a risk assessment tool statewide. We therefore urge

AMERICAN CIVIL  
LIBERTIES UNION OF  
MARYLAND

MAIN OFFICE  
& MAILING ADDRESS  
3600 CLIPPER MILL ROAD  
SUITE 350  
BALTIMORE, MD 21211  
T/410-889-8555  
F/410-366-7838

FIELD OFFICE  
6930 CARROLL AVENUE  
SUITE 410  
TAKOMA PARK, MD 20912  
T/301-270-2258

WWW.ACLU-MD.ORG

OFFICERS AND DIRECTORS  
COLEMAN BAZELON  
PRESIDENT

SUSAN GOERING  
EXECUTIVE DIRECTOR

ANDREW FREEMAN  
GENERAL COUNSEL

the relevant agencies to begin implementing that pilot program as soon as possible.

#### **IV. Data collection**

We are concerned that the data being collected under the current system is inadequate. In order to ferret out institutional biases in the current system, it is critical that the relevant agencies collect demographic information (race, gender, socioeconomic status, etc.) of persons who are processed through the bail hearings.

#### **V. Defendants' access to attorneys after bail has been set**

We are concerned by reports that defendants are being denied access to their attorneys after bail has been set. The scope of an attorney-client relationship includes not only representation, but counseling as well. Therefore, it is important that a defendant maintain access to the attorney who represented her even after the bail hearing, in order for the attorney to debrief the defendant on the proceedings and answer any questions the defendant may have.

## Delegate Joseline A. Peña-Melnyk Statement

“Several concerns were raised at the August 19th meeting, including waiver of counsel, continuity of counsel, bias against poor people and minorities, the value of pretrial supervision instead of detention, and attorneys’ access to clients prior to presentment and initial appearance.

All of these issues are important and need to be addressed, but they **MUST** be addressed in a clear and consistent manner across the State. Currently of the 24 major jurisdictions (23 counties plus Baltimore City) in Maryland, 11 have pretrial services of varying forms. Only five of the eleven use a risk assessment tool, and only two of those use a validated risk assessment.

Uniformity across the state is critical to ensure that all Maryland citizens are treated equally, with access to the same pretrial services, regardless of race, gender, financial situation, or jurisdiction of residence. Otherwise the system is inherently unfair. The details of the revamped pretrial system, assuming they are arrived at by consensus will almost certainly be reasonable. Only by applying the changes across the State will they also be fair.”