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How the Right to Speedy Trial Can Reduce Mass Pretrial Incarceration

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Kenny Johnson[1] was thirty-two years old when he was released from a Baltimore City jail—almost three years after his arrest in October 2012. Johnson was not serving a sentence, but these three years were spent under pretrial detention. He had been denied bail. Johnson's case was a rollercoaster of delays and uncertainty, particularly towards the end of his pretrial incarceration. The need for certainty convinced Johnson to plead guilty—he could not stand knowing that his pretrial incarceration could be indefinite and he wanted to be sure he was going home, guilty or not guilty.

Between the time he was arrested and finally released, Johnson's case was postponed thirteen times. Johnson already had one trial in late 2013, but the jury did not deliver a unanimous verdict, resulting in a mistrial. At the start of his first trial, Johnson had already been incarcerated for over a year, significantly longer than what speedy trial laws in Maryland allow.[2]

After being held without bail for three years, Johnson had the opportunity to walk out free mid-August 2015. The catch—Johnson had to plead guilty to a crime he maintains he did not commit. If he accepted a guilty plea, he would be released from state custody and only serve three years of probation, becoming essentially a free man, reunited with his children and significant other. Unfortunately, going through trial again was a chance Johnson could not take. As he had seen the flaws in the system, pleading guilty became the most rational choice he could make.

This is the travesty of a broken pretrial system—that an American citizen can sit in jail for three years without ever being convicted of a crime. Incarceration is punishment, and there is a growing concern that Baltimore City is using incarceration as leverage to extract guilty pleas. Liberty prior to trial should not be a bargaining chip. Improper bail determinations and lack of review of bail have substantially contributed to this problem, especially in Maryland.[3]

At an initial bail hearing, there is little to no evidence other than the "Statement of Probable Cause," which alleges the crime committed and the basic facts supporting those allegations. This creates a problem because judges cannot help but assume that the allegations are true, as there is nothing contradicting those allegations aside from the defendant's plea of innocence. This in turn has the effect of presuming guilt, putting the defendant in the unfortunate position of proving his innocence at the pretrial stage.

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* Zina Makar is a 2014–2016 Open Society Institute Fellow currently practicing law in Maryland. Ms. Makar's project is called *Pipeline to Habeas* where she utilizes the writ of habeas corpus to challenge wrongful bail determinations in partnership with the Office of the Public Defender in Baltimore City. The examples in this Article are based on real cases that Ms. Makar helped litigate in Baltimore City through the course of her Fellowship.

[1] The defendant's name has been changed to protect client confidentiality.

[2] MD. R. ANN. 4–271 (West 2015).

[3] The Maryland Rules do not mandate review of bail if the defendant remains incarcerated beyond the speedy trial limitations.

Nationally, ninety percent of arrestees never see a trial.[4] There are more people in custody simply charged of a crime than there are people serving sentences.[5] The catalyst driving mass pretrial incarceration is the excessive use of monetary bail, which is unaffordable for most, and strict denials of bail.[6] Specifically relating to the latter, when a court denies an arrestee bail, the court believes the defendant is so dangerous that the judge must put community safety before the individual's liberty.[7]

Looking back at Johnson's case, that he was denied bail but released on probation after pleading guilty is the epitome of injustice. Does pleading guilty make someone less dangerous? If the State believed he was suitable for probation why was he not suitable for pretrial release conditions? The standard for determining dangerousness is convoluted and places virtually no evidentiary burden on the part of the State at a stage where it is needed most.[8] Often, after the State provides its initial disclosures through discovery, exculpatory evidence may come to the fold or some intervening cause may necessitate the revision of bail. However, getting a court to revisit a bail determination is another hurdle, and that burden falls on the defense.

Davonte Thomas's case exemplifies both the need and unfortunately the difficulty in getting the court to review bail. [9] Thomas was in jail for 247 days before he was released and the charges against him were dropped. Thomas was nineteen-years-old at the date of this arrest, and he was spending his first stint in adult jail, held on $550,000—the equivalent to denying bail. He was actually serving a sentence for juvenile probation at the time of the alleged crime and was fitted with a GPS anklet. The defense subpoenaed the GPS records, which showed that Thomas was not near the scene of the crime at the time it allegedly occurred. Based on this information alone, defense counsel filed a writ of habeas corpus to challenge Thomas's prior bail determination. It took two months to get a hearing on Thomas's case—two months in which the State knew of and sat on this exculpatory evidence, choosing not to act on it until its hand was forced.

The habeas hearing lasted approximately one hour. Finally, both the inculpatory and exculpatory evidence was substantively weighed and analyzed. The judge ultimately ruled to release Thomas on his own recognizance. Three days later, the State dismissed Thomas's case. It seems that once the State had the benefit of reviewing its own evidence in open court, and prior to the trial, it became evident that the case was not worth pursuing.

Johnson and Thomas's cases have at least one thing in common: timing. Most felony cases are not tried on the first trial date. In fact, most defendants, if they go to trial, do not have that trial

[4] Richard M. Aborn & Ashley D. Cannon, *Prisons: In Jail, But Not Sentenced*, AM. Q. (Winter 2013), http://www.americasquarterly.org/aborn-prisons.
[5] Nastassia Walsh, *Baltimore Behind Bars: How to Reduce the Jail Population, Save Money and Improve Public Safety*, JUSTICE POLICY INSTITUTE 13 (June 2010), http://www.justicepolicy.org/images/upload/10-06_rep_baltbehindbars_md-ps-ac-rd.pdf.
[6] *Id.* at 25.
[7] *See generally* Wheeler v. State, 160 Md. App. 566, 573 (2005).
[8] If the State is moving the court to deny bail, the State has the burden to demonstrate by clear and convincing evidence that the defendant is not amenable to any conditions of pretrial release. This is a high evidentiary burden, one that courts often do not hold the State to. *See generally Wheeler*, 160 Md. App. at 573.
[9] The defendant's name has been changed to protect client confidentiality.

within 180 days.[10] Without any enforceable time limit, the duration of pretrial detention may become indefinite. To remedy this, statutory barriers must be put in place to strictly limit pretrial detention such that the accused's liberty is safeguarded. The right to speedy trial can reduce mass pretrial incarceration and further help courts assess proper conditions to pretrial release that do not violate the accused's right to due process of law.[11]

Prominent case law discussing pretrial safeguards briefly references the right to speedy trial as a clear line between reasonable and unreasonable lengths of incarceration without a conviction.[12] The pretrial and trial stages are not as independent of each other as they seem to be. The right to a speedy trial does not simply mean that a case must be heard within a certain amount of time, it also imposes discovery deadlines on the State so that the defendant sees all of the evidence against him. In Maryland, that means the State should be ready to try a case within 180 days.[13] In the context of pretrial rights, the restraints of speedy trial are intended to act as a limit to pretrial detention—creating a point during the criminal justice process in which detention without a conviction is no longer reasonable.

This idea is not revolutionary, it is supposed to be a pillar of the American criminal justice system.[14] The Maryland Court of Special Appeals has stated with no exceptions, "[pretrial] detention continues only until the time of trial, a time period that is *strictly limited in duration by the 'speedy trial' requirements of Rule 4-271*."[15]

Actualizing the right to speedy trial, however, is where work needs to be done. The American Bar Association's standards for criminal justice on pretrial release have stated that jurisdictions must accelerate trials for individuals who are detained prior to trial:

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[10] In 2012, the Maryland Judiciary produced a report on Baltimore City's Circuit Court Criminal Statistics. This report indicated that from January 1, 2012 to December 31, 2012, 65% of individuals charged with a felony accepted guilty pleas and only 5.2% of the individuals charged with a felony elected to wait for a jury trial. *See infra* Figure 1. These statistics become even more alarming when the fact that 52% of those felony cases charged in 2012 do not have a final disposition until after the 180-day speedy trial limitation has been passed. *See infra* Figure 2. Further, the Justice Policy Institute recorded that approximately 57% of individuals charged with a crime in 2012 were denied bail. *See Bailing on Baltimore: Voices from the Front Lines of the Justice System*, JUSTICE POLICY INSTITUTE 4 (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailingonbaltimore-final.pdf. [hereinafter Bailing on Baltimore]. These numbers collectively suggest that the majority of people awaiting trial are doing so in the confines of the jail and end up taking guilty pleas—perhaps for the simple reason that they can no longer sit waiting in jail.

[11] *See Bailing on Baltimore*, *supra* note 10, at 4.

[12] *See United States v. Salerno*, 481 U.S. 739, 739–40 (1987) ("Preventing danger to the community is a legitimate regulatory goal. Moreover, the incidents of detention under the Act are not excessive in relation to that goal, since the Act carefully limits the circumstances under which detention may be sought to the most serious of crimes, the arrestee is entitled to a prompt hearing, *the maximum length of detention is limited by the Speedy Trial Act*, and detainees must be housed apart from convicts. Thus, the Act constitutes permissible regulation rather than impermissible punishment." (emphasis added)); *see also Wheeler*, 160 Md. App. at 579 (The Maryland Court of Special Appeals adopted many of the safeguards put in place by *Salerno* in its 2005 opinion, equally stating with no exceptions, "[t]he detention continues only until the time of trial, a time period that is *strictly limited in duration by the "speedy trial" requirements of Rule 4-271*." (emphasis added)).

[13] MD. R. 4–271.

[14] U.S. CONST. amends. V, VI.

[15] *Wheeler*, 160 Md. App. at 579 (emphasis added).

> Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice. These accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release. *The failure to try a detained defendant within such accelerated time limitations should result in the defendant's immediate release from detention under reasonable conditions that best minimize the risk of flight and danger to the community pending trial*, unless the delay is attributable to or agreed to by the defendant.[16]

While controlling Maryland case law states that pretrial incarceration is "strictly limited" to the restraints of speedy trial, [17] it is clear that the lower courts require further guidance on this limitation. Maryland should look to other jurisdictions for guidance. The Department of Justice's Criminal Resource Manual on "Release and Detention Pending Judicial Proceedings" promotes the use of a three-factor test that was established in the Second Circuit to determine whether the length of pretrial detention is unreasonable.[18] This test provides that when an individual motions for review of pretrial detention, the court must consider the following factors: "(1) the length of the pretrial detention; (2) the extent to which the prosecution is responsible for the delay of the trial; and (3) the strength of the evidence upon which the pretrial detention was based."[19]

In the alternative, some states implement firmer restrictions on pretrial incarceration. For instance, Pennsylvania requires that if a defendant has been incarcerated prior to his trial beyond 180 days he must be entered into bail.[20] Additionally, if charges are brought based on hearsay, such as eyewitness testimony, some states, like as New York, require that the complaining witness or eyewitness provide a sworn statement to the court within six days after arrest in order to justify pretrial detention. If the State fails to authenticate the hearsay statement, while the charges are not dropped, the accused is released prior to trial.[21] These types of laws help ferret out illegitimate claims and promote the State to regularly revisit evidence to determine whether a case is worth pursuing without unnecessarily jeopardizing the defendant's liberty.

Strictly limiting pretrial detention to 180 days and triggering an immediate review of bail if incarceration exceeds such a time period would go a long way to reducing mass pretrial incarceration in Maryland and protecting defendants' liberty interests. Johnson and Thomas's cases are not isolated incidences—they are examples of an unjust pretrial system in Baltimore City that lacks the ability to protect the rights of individuals who have not been convicted of a crime. Maryland's rules on bail fail to provide opportunities to revisit bail if the length of

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[16] AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS ON PRETRIAL RELEASE ¶ 10-5.11, (3d ed. 2007) (emphasis added).

[17] *Wheeler*, 160 Md. App. at 579.

[18] Dep't of Just., *Criminal Justice Manual* § 26 (last visited Oct. 26, 2015), http://www.justice.gov/usam/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et.

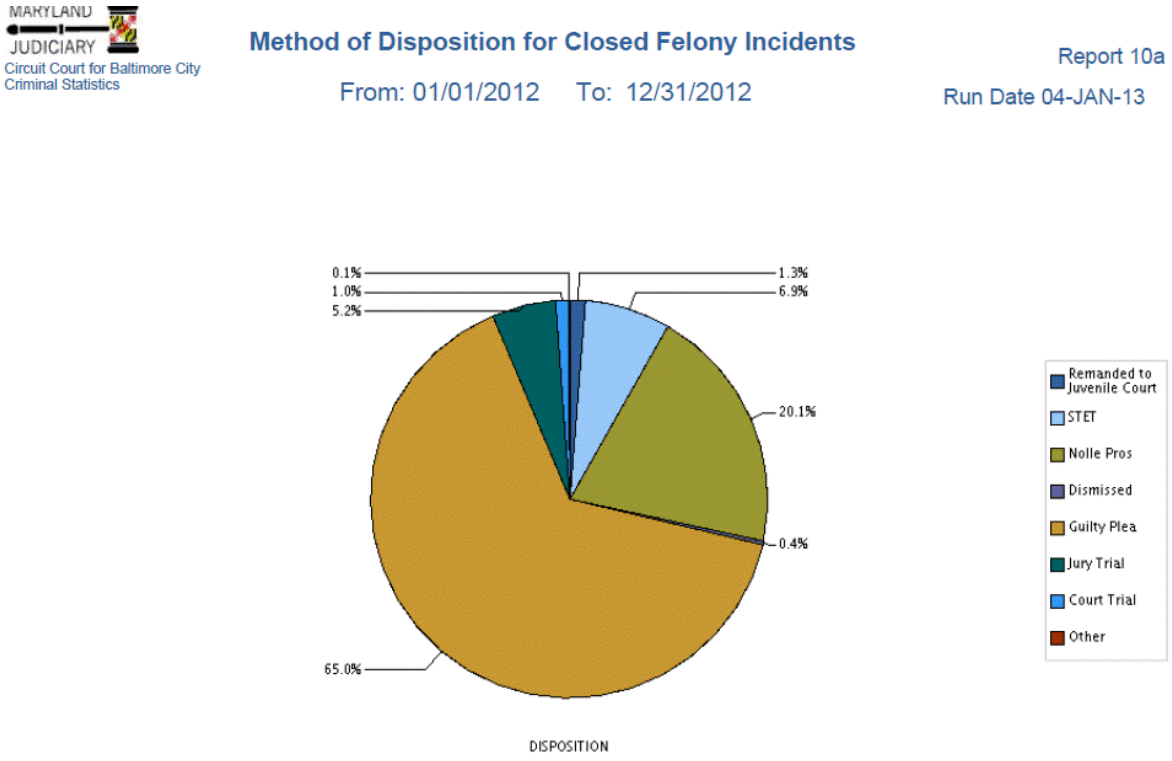
[19] United States v. Roseto, No. 1:94CR00674, 1995 WL 350815, at *2 (S.D.N.Y. June 9, 1995) (citing *United States v. Millan*, 4 F.3d 1038, 1043 (2nd Cir. 1993) (citations omitted)).

[20] PA. R. CRIM. P. ANN. 600(b) (2015). *See also* ARK. R. CRIM. P. ANN. 28.1 (West 2015); TEX. CODE CRIM. PROC. ANN. art. 17.151 (West 2015); FLA. R. CRIM. P. ANN. 3.191(p) (West 2015).

[21] N.Y. CRIM. PROC. LAW §§ 170.70, 180.80 (McKinney 2015).

detention becomes unreasonable and provides no finite cap on pretrial detention.[22] Without pro-defendant legislation safeguarding pretrial rights, the right to the presumption of innocence, speedy trial, and due process, become toothless.

Figure 1: Method of Disposition for Closed Felony Incidents in Baltimore City in 2012



[22] MD. R. ANN. 4–216.

Figure 2: Average Time Between Events for Closed Felony Incidents in Baltimore City in 2012