

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE
Revised

House Bill 153
Judiciary

(Delegate Anderson, *et al.*)

Judicial Proceedings

Office of the Public Defender - Representation at Bail Hearing - Provisional

This bill specifies that the representation provided by the Office of the Public Defender (OPD) to an indigent individual at a bail hearing before a District Court or circuit court judge must be limited solely to the bail hearing and terminates automatically at the conclusion of the hearing. The bill does not apply to an individual who remains incarcerated after a bail hearing.

Fiscal Summary

State Effect: Potential significant increase in general fund expenditures for OPD to conduct additional intakes/eligibility evaluations for individuals who wish to continue as OPD clients after their bail hearings. OPD also expends \$22,900 in FY 2014 only for computer programming changes to comply with the bill. Revenues are not affected.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law/Background: When an individual is arrested, he or she must go before a judicial officer for an initial appearance. The judicial officer, usually a District Court commissioner, has a number of duties at the initial appearance, among which is to determine whether there was probable cause for the arrest and, if so, whether the defendant should be released on his or her own recognizance, on bail, or not at all.

Under the Maryland Rules, a defendant who is denied pretrial release by a District Court commissioner or who for any reason remains in custody after a District Court

commissioner has determined conditions of release must be presented to a District Court judge immediately if the court is in session or, if the court is not in session, at the next session of the court. Historically, OPD has not provided representation to indigent defendants at the initial appearance phase in any jurisdiction in the State. Prior to 2012, public defender representation was provided to indigent defendants at bail review only in Montgomery and Harford counties and Baltimore City.

DeWolfe v. Richmond: In *DeWolfe v. Richmond*, No. 34 (September Term 2011), the Maryland Court of Appeals held on January 4, 2012, that under the then-effective version of the Maryland Public Defender Act, no bail determination may be made by a District Court commissioner concerning an indigent defendant without the presence of counsel, unless representation by counsel is waived.

The January 4, 2012 opinion was based on the wording of the Maryland Public Defender Act, including language that OPD must represent an indigent defendant “in all stages” of a criminal proceeding. The court did not address the plaintiffs’ federal and State constitutional claims of a right to representation. However, the Circuit Court for Baltimore City had previously held, based on *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), that indigent arrestees have a federal and State constitutional right to be appointed counsel at initial appearance.

Activity During the 2012 Legislative Session: The *DeWolfe* decision sparked a heated debate during the 2012 session of the General Assembly. There was much concern about how the State would fund the obligation of OPD to begin representing people at the initial appearance phase. On the other hand, serious questions were raised about whether people do possess a constitutional right to legal representation at initial appearance, regardless of cost. This debate prompted broader questions about and scrutiny of Maryland’s criminal justice system, including the District Court commissioner and pretrial release systems.

Ultimately, the General Assembly passed Chapters 504 and 505 of 2012 (SB 422 and HB 261), which were signed into law by the Governor on May 22, 2012. Among other things, the Acts amended the Public Defender Act to specify that OPD is required to provide legal representation to an indigent defendant at a bail hearing before a District Court or circuit court judge, but is not required to represent an indigent criminal defendant at an initial appearance before a District Court commissioner.

Subsequent Developments: On August 22, 2012, the Court of Appeals issued an order stating its intention to rule on the issue of whether the plaintiffs in the *DeWolfe* case are entitled, under the recently amended Public Defender Act, to relief on the basis of the federal and/or State constitutional right to counsel provisions. The court heard oral arguments on this issue in January 2013.

State Expenditures: General fund expenditures may increase significantly for OPD to hire additional staff to assist with the increase in administrative duties generated by this bill.

As previously noted, OPD began representing indigent individuals at judicial bail reviews statewide on June 1, 2012. Based on current statistics, OPD is on pace to participate in approximately 78,000 bail reviews annually.

OPD intake specialists conduct an intake interview to determine an individual's eligibility for OPD services. Intake procedures typically consist of a 15-20 minute interview, followed by entry of the information into OPD's computer system and creation of a client file. Individuals attest to their financial eligibility through affidavit. For bail review clients, this intake interview takes place before the bail review hearing while the client is in custody. An individual who is an OPD client at his/her bail review hearing remains an OPD client for the remainder of his/her case unless OPD representation is terminated.

Individuals who are not in custody and were not represented by OPD at their bail review hearings can apply for representation at one of OPD's district offices. OPD also conducts rounds in detention centers to determine if anyone wishes to apply for OPD services. An individual must apply for OPD representation at least 10 days before his/her trial date.

OPD advises that the bill requires OPD to (1) conduct an additional intake interview at a district office for an individual who was already deemed eligible for OPD services at his/her bail review and (2) create a two-folder administrative system to keep track of bail review clients who may retain OPD services by visiting an OPD office between their bail review hearings and the application deadline.

OPD also notes that it lost 50% of its intake personnel during the economic downturn, and any increase in intake volume at its already short-staffed district offices will place a significant strain on OPD resources. Intake *supervisors* coordinate office functions and oversee proper file maintenance and data entry. Intake *specialists* are currently fulfilling these functions in the districts without supervisors.

OPD advises that it needs 10 intake *supervisors* (and no additional intake *specialists*) to handle the additional administrative tasks generated by the bill. OPD's estimate is based on (1) the lack of intake supervisors in 7 of its 12 districts, including less populated/rural districts covering several counties; (2) the need for coordination of files with the two-file provisional/permanent client filing system that needs to be established to comply with the bill; (3) coordination between multiple OPD offices within districts; and (4) the monitoring of compliance with proper procedures for auditing purposes to guarantee that OPD is representing all eligible individuals.

While the Department of Legislative Services agrees that there is an arguable need for OPD intake supervisors, this bill alone does not generate the need requested by OPD, which is the cumulative result of years of increases in OPD responsibilities and demand for OPD representation without a corresponding increase in OPD personnel and budgetary resources. Furthermore, due to the language of the bill, the extent of the increased intake volume at OPD offices resulting from the bill remains unclear at this time and cannot be reliably determined without actual experience under the bill. Also, given that the majority of the additional administrative work created by the bill involves the functions performed by intake *specialists*, it is unclear how the hiring of 10 additional intake *supervisors* will address increased office volume.

Increased Office Volume: The bill states that it does not apply to “an individual who remains incarcerated after a bail hearing,” but does not provide any further guidance as to the circumstances under which a person “remains incarcerated” after a bail hearing. Thus, this analysis assumes that, in keeping with the plain language meaning of the term “remains incarcerated,” the bill does not apply to a person who continues to be incarcerated after a bail review hearing for whatever reason and however briefly. As a result, the bill does not apply to a person who remains incarcerated due to a denial of pretrial release or a person who is issued bail but cannot afford to post bail *immediately after* his/her bail review hearing. Thus, a significant portion of OPD’s clientele could be included in this population and exempted from the bill’s provisions.

Alternate Office Procedures: The increase in OPD office intake volume anticipated as a result of the bill could also be mitigated to the extent that OPD can develop alternate administrative procedures to avoid duplicate intake interviews. One example of an alternate office procedure is a “Reinstitution of OPD Legal Representation” form that a client released after a judicial bail review can sign under which (1) the client accepts OPD legal representation and (2) the client attests that his/her financial circumstances have not changed since the initial OPD intake interview (which may have occurred hours or days before the bail review hearing). The development and implementation of such a system could reduce the number of office intake interviews and the number of duplicate files that need to be tracked or maintained.

Depending on the extent of the increase in office intakes generated by the bill, the bill may result in a significant increase in general fund expenditures for OPD to employ additional intake personnel. The cost associated with hiring one additional intake specialist in fiscal 2014 is \$47,775, which accounts for the bill’s October 1, 2013 effective date, and includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses. The cost associated with one additional intake specialist in fiscal 2015 is \$61,187. The cost associated with hiring one additional intake supervisor is \$58,305 in fiscal 2014 and \$75,706 in fiscal 2015. OPD also incurs additional general

fund expenditures of at least \$22,900 for computer reprogramming to comply with the bill's provisions.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Office of the Public Defender, Department of Legislative Services

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