

Department of Legislative Services
 Maryland General Assembly
 2014 Session

FISCAL AND POLICY NOTE

Senate Bill 920 (Senator Miller)
 Judicial Proceedings

Criminal Procedure - Pretrial Release

This bill makes several changes to the duties and responsibilities of District Court commissioners, including the ability of a commissioner to issue an arrest warrant based on a specified application, and the ability of a commissioner to authorize the pretrial release of an arrested person. The bill also authorizes the Chief Judge of the District Court to add to the misdemeanors that are subject to citation in lieu of arrest.

Fiscal Summary

State Effect: Assuming that the bill absolves the Office of the Public Defender (OPD) of its responsibilities under the *Richmond II* decision, the State will experience a general fund cost avoidance of \$24.6 million in FY 2015, offset partially by increased general fund expenditures for pretrial detentions at the Central Booking Facility in Baltimore City if law enforcement officers file affidavits in a significant number of cases. The cost avoidance grows to \$37.8 million by FY 2019.

(in dollars)	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	(24,560,400)	(33,000,200)	(34,514,100)	(36,098,800)	(37,757,900)
Net Effect	\$24,560,400	\$33,000,200	\$34,514,100	\$36,098,800	\$37,757,900

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Local expenditures for pretrial detentions increase, perhaps significantly, if law enforcement officials file affidavits in a significant number of cases, especially cases involving individuals who would otherwise be released by commissioners under the existing system. Local law enforcement agencies may also incur significant expenditures for officers to attend hearings under the bill. Law enforcement officers currently do not attend judicial bail review hearings.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Issuance of Arrest Warrants by a District Court Commissioner: The bill prohibits a District Court commissioner from issuing an arrest warrant based solely on an application for a statement of charges filed by a person other than a peace officer or a State's Attorney. If a District Court commissioner receives such an application and finds probable cause, the commissioner may issue a summons for the defendant to appear at a preliminary appearance before a judge.

Pretrial Release of a Defendant by a District Court Commissioner: Except as prohibited under existing statute, a District Court commissioner who finds probable cause may release a defendant charged with a felony from pretrial detention if (1) the defendant posts a preset bond in accordance with a schedule adopted by the Chief Judge of the District Court or (2) by releasing the defendant to the custody of the pretrial services agency, if any, the pretrial services agency determines the defendant to be eligible and accepts the defendant into its program.

A commissioner who finds probable cause is prohibited from authorizing the pretrial release of a defendant charged with a felony if a law enforcement officer certifies by affidavit and articulates under oath specific facts to support the contention that the defendant (1) is a flight risk or (2) poses a credible public safety risk. A law enforcement officer who files such an affidavit must appear at a pretrial release hearing for the defendant which must be held before a judge on the next day that the court is in session.

The bill requires a District Court commissioner to release a defendant charged with a misdemeanor on personal recognizance unless (1) the defendant is ineligible for pretrial release by a commissioner under existing statute or (2) a law enforcement officer certifies by affidavit and articulates under oath specific facts to support the contention that the defendant is a flight risk or poses a credible public safety risk. If a law enforcement officer submits such an affidavit, the District Court commissioner must release the defendant to the custody of an authorized pretrial services agency, if any, if the pretrial services agency determines the defendant to be eligible and accepts the defendant into its program. A law enforcement officer who files such an affidavit must appear at a pretrial release hearing for the defendant held before a judge on the next day that the court is in session.

The bill maintains existing statutory provisions prohibiting a District Court commissioner from authorizing the pretrial release of specified individuals.

Defendants Detained After Being Brought Before Commissioner: Notwithstanding any law or rule, a defendant who is detained in custody after being brought before a District Court commissioner must be taken before a judicial officer of the District Court or circuit court without unnecessary delay and in no event later than the next session of court after the date of arrest.

Current Law:

Initial Appearance of a Criminal Defendant: Within 24 hours after arrest, a criminal defendant is taken before a judicial officer – typically a District Court commissioner – for an initial appearance. At the initial appearance, the defendant is advised of (1) each offense charged; (2) the right to counsel; and (3) the right to a preliminary hearing, if applicable. In some jurisdictions, the defendant is given a District Court trial date at the initial appearance. Otherwise, the defendant is told that notice of the trial date will follow by mail.

If the defendant was arrested without a warrant, the commissioner must determine whether there was probable cause for the arrest. If it is determined that there was no probable cause, the defendant is released on personal recognizance with no other conditions of release. If it is determined that there was probable cause, the commissioner must also determine whether the defendant is eligible for release from custody prior to trial and, if so, under what conditions. A defendant who is denied pretrial release by the commissioner, or one who remains in custody 24 hours after the commissioner has set the conditions of release, is entitled to a bail review hearing before a judge. The primary purpose of the bail review hearing is to determine whether the conditions of release set by the commissioner should be continued, amended, or revoked.

Pretrial Release of a Criminal Defendant: A criminal defendant is entitled to be released pending trial unless a judge ultimately determines that no conditions can be placed on the defendant's release that would reasonably ensure the defendant's appearance at trial and the safety of the alleged victim, another person, and the community. Historically, approximately 50% of people who appear before commissioners are released on personal recognizance. However, if a judicial officer determines that release on personal recognizance alone is not appropriate, or the defendant is by law ineligible for release on recognizance, the defendant may be released prior to trial only by posting bail in an amount set by the judicial officer.

In determining whether a defendant should be released and the conditions of pretrial release, the judicial officer is required to take into account the following information, if

available: (1) the nature and circumstances of the offense; (2) the nature of the evidence against the defendant and the potential sentence upon conviction; (3) the defendant's prior record and history with regard to appearing in court as required; (4) the defendant's employment status and history, family ties, financial resources, reputation, character and mental condition, and length of residence in the community and the State; (5) the potential danger of the defendant to himself or herself, the victim, or others; (6) recommendations of the State's Attorney and any agency that conducts a pretrial release investigation; (7) information provided by the defendant or the defendant's counsel; and (8) any other factor bearing on the risk of a willful failure to appear and the safety of the alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.

In most cases, pretrial release determinations are made at the defendant's initial appearance before a District Court commissioner. A commissioner may not, however, authorize the release of certain defendants, including defendants registered with the sex offender registry maintained by the Department of Public Safety and Correctional Services (DPSCS) and defendants charged with specific offenses (*e.g.*, crimes of violence, violation of a protective order, drug kingpin, etc.). Pretrial release of such defendants may be authorized only by a judge, and only on suitable bail, on any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to others, or on both bail and such other conditions. Please see the **Appendix – Defendants Ineligible for Pretrial Release by a District Court Commissioner** – for a more comprehensive list of defendants ineligible for pretrial release by a District Court commissioner.

At the initial appearance, the commissioner has access to several criminal justice databases to review the defendant's criminal history and to determine whether there are any pending charges, any prior occasions when the defendant failed to appear in court, or any outstanding warrants. The commissioner also relies on information provided in the statement of probable cause or charging document, the defendant's Record of Arrest and Prosecution (RAP) sheet, and information learned from the defendant.

In some jurisdictions, a pretrial investigation services unit provides verified factual information that becomes available to assist the judge in setting conditions for release at a bail review hearing. The investigation by the pretrial services unit could include a community background check, verification of employment, information provided by the defendant or the defendant's family, and additional factors concerning the defendant's criminal history that were not available to the commissioner.

Citations: A police officer must issue a citation for possession of marijuana or any misdemeanor or local ordinance violation that does not carry a penalty of imprisonment

or for which the maximum penalty of imprisonment is 90 days or less, except for (1) failure to comply with a peace order or protective order; (2) violation of a condition of pretrial or posttrial release while charged with a sexual crime against a minor; (3) possession of an electronic control device after conviction of a drug felony or a crime of violence; (4) violation of an out-of-state domestic violence order; or (5) abuse or neglect of an animal.

A police officer may charge a defendant by citation only if (1) the officer is satisfied with the defendant's evidence of identity; (2) the officer reasonably believes that the defendant will comply with the citation; (3) the officer reasonably believes that the failure to charge on a statement of charges will not pose a threat to public safety; (4) the defendant is not subject to arrest for another criminal charge arising out of the same incident; and (5) the defendant complies with all lawful orders by the officer. A police officer who has grounds to make a warrantless arrest for an offense that may be charged by citation may (1) issue a citation in lieu of making the arrest or (2) make the arrest and subsequently issue a citation in lieu of continued custody.

Background: 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 ("*Richmond I*").

The *Richmond I* 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 an initial appearance.

Richmond I 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 an initial appearance phase. On the other hand, serious questions were raised about whether people do possess a constitutional right to legal representation at an 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. A number of bills were introduced to attempt to counteract or mitigate the effect of *Richmond I*. The House Judiciary and Senate Judicial Proceedings committees spent a considerable amount of time exploring these issues and dialoguing with stakeholders including OPD, the Judiciary, law enforcement agencies, State's Attorneys, and civil liberties advocates.

Ultimately, the General Assembly passed Chapters 504 and 505 of 2012, which were signed into law by the Governor on May 22, 2012. Among other things, these Acts amend 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.

On September 25, 2013, the Court of Appeals issued an opinion in the *Richmond* case holding that, under the Due Process component of Article 24 of the Maryland Declaration of Rights, an indigent defendant has a right to State-furnished counsel at an initial appearance before a District Court commissioner (“*Richmond I*”). The Court of Appeals has issued a temporary stay of implementation of the *Richmond II* decision until March 7, 2014 and granted writ of certiorari limited to the following questions presented:

- Did the circuit court err in entering an injunction directing officials of the District Court to conduct initial appearances in a manner inconsistent with the existing rules promulgated by this court?
- Did the circuit court err in granting an application for supplemental relief based on a prior declaratory judgment without first issuing a show cause order, as required by the statute governing such applications?
- Did the circuit court err in ordering officials of the District Court to appoint counsel for all arrestees at initial appearances and prohibiting those court officials from conducting initial appearances for arrestees who were not provided with counsel?

According to a survey conducted for the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by OPD, 11 of the State’s 24 jurisdictions have a pretrial services program, as indicated in **Exhibit 1**. However, the programs vary in their policies and duties.

Exhibit 1
Pretrial Services Units in Local Jurisdictions

Jurisdictions with Pretrial Services Units

Anne Arundel County
Baltimore City
Baltimore County
Calvert County
Carroll County
Dorchester County
Frederick County
Harford County
Montgomery County
Prince George's County
Wicomico County

Jurisdictions Without Pretrial Services Units

Allegany County
Caroline County
Cecil County
Charles County
Garrett County
Howard County
Kent County
Queen Anne's County
St. Mary's County
Somerset County
Talbot County
Washington County
Worcester County

Source: Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender – Survey by Pretrial Justice Institute

State Expenditures: Assuming that the bill absolves OPD of its responsibility to provide legal representation to indigent individuals at initial appearances, there is a general fund cost avoidance of \$24,560,370 in fiscal 2015, which accounts for the bill's October 1, 2014 effective date and reflects the cost of hiring 237 assistant public defenders, 50 support staff, 10 support supervisors, 3 information technology employees, 2 fiscal clerks, and 1 human resources specialist and includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses starting on the bill's effective date. The fiscal 2016 cost avoidance associated with this effort is \$33,000,197, which reflects one full year of expenditures. This estimate does not include expenditures associated with travel, software licenses, or facilities charges.

OPD advises that according to its reading of the bill, the bill does not eliminate the office's responsibility under the *Richmond II* decision, since it still entails a commissioner making a decision with potential incarceration ramifications, even though the commissioner has little, if any, discretion in the matter.

To the extent that the bill diverts additional defendants to hearings before judges for pretrial release determinations, OPD may require additional resources to supplement

existing legal representation staff at bail review hearings. Any such increase cannot be reliably determined at this time due to the unavailability of relevant data.

The cost avoidance discussed above may be offset by a potentially significant increase in general fund expenditures for pretrial detentions at the Central Booking Facility in Baltimore City if law enforcement officers file the affidavits described under the bill in a significant number of cases, especially cases involving individuals who could otherwise be released by a commissioner under the existing system. Under the existing system, available data indicate that approximately 50% of all initial appearances result in a release on recognizance and 45% of initial appearances result in a judicial bail review.

However, if the Chief Judge of the District Court expands the list of offenses eligible for citation and the expanded list significantly reduces the number of arrests, then general fund expenditures for pretrial detentions in Baltimore City may decrease significantly.

Local Expenditures: Local expenditures for pretrial detentions increase, perhaps significantly, if local law enforcement officers file affidavits in a significant number of cases. Counties without pretrial services programs are likely to experience more of a fiscal impact from the bill than counties with programs that can accommodate arrested individuals referred to them by commissioners.

However, if the Chief Judge of the District Court expands the list of offenses eligible for citation and the expanded list significantly reduces the number of arrests, then local expenditures for pretrial detentions may decrease significantly.

Small Business Effect: The bill may have a meaningful impact on bail bondsmen or surety insurers if (1) more individuals are released on bond; (2) the preset bond schedule presents a more affordable option to obtain a bond for arrested persons than under the existing system; or (3) if the list of citation-eligible offenses is expanded significantly, thereby reducing the number of individuals arrested.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Governor's Office of Crime Control and Prevention, Judiciary (Administrative Office of the Courts), Maryland Association of Counties, Department of State Police, Office of the Public Defender, Department of Public Safety and Correctional Services, State's Attorneys' Association, Maryland State Commission on Criminal Sentencing Policy, Department of Legislative Services

Fiscal Note History: First Reader - February 18, 2014
mc/kdm

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Appendix – Defendants Ineligible for Pretrial Release by a District Court Commissioner

Please refer to Criminal Procedure Article, § 5-202 for complete information on defendants who are not eligible for pretrial release by a District Court commissioner.

In General

In most cases, pretrial release determinations are made at the defendant's initial appearance before a District Court commissioner. A commissioner may not, however, authorize the release of certain defendants, including defendants who are registered sex offenders and defendants charged:

- with a crime punishable by life imprisonment;
- with escaping from a correctional facility or any other place of confinement in the State;
- as a drug kingpin;
- with a crime of violence (as defined under Criminal Law Article, § 14-101), if the defendant has been previously convicted of a crime of violence under the laws of this State or has been convicted under the laws of another state of a crime classified as a crime of violence in Maryland; and
- with violating the provisions of a domestic violence protective order (temporary or otherwise) ordering the defendant to refrain from abusing or threatening to abuse a person eligible for relief (applies to orders issued by a court in Maryland, another state, or by a Native American tribe).

Repeat Offender – Defendant Charged with a Specified Crime Who Has a Prior Conviction for a Specified Crime

A District Court commissioner may not authorize the pretrial release of a defendant charged with one of the following crimes ***if the defendant has previously been convicted of one of the following crimes:***

- wearing, carrying, or transporting a handgun;
- use of a handgun or an antique firearm in commission of a crime;
- violating prohibitions relating to assault pistols under § 4-303 of the Criminal Law Article;
- use of a machine gun in a crime of violence;
- use of a machine gun for an aggressive purpose;

- possessing, using, wearing, carrying, or transporting a firearm during and in relation to a drug trafficking crime under § 5-621 of the Criminal Law Article;
- possession of a regulated firearm under § 5-133 of the Public Safety Article;
- transporting a regulated firearm for unlawful sale or trafficking; or
- possession of a rifle or shotgun by a person with a mental disorder.

Repeat Offender – Defendant Charged with Committing a Specified Crime While Released on Bail or Personal Recognizance on a Prior Charge of Committing a Specified Crime

A District Court commissioner also may not authorize the pretrial release of a defendant charged with committing one of the following crimes ***while the defendant was released on bail or personal recognizance for a pending prior charge of committing one of the following crimes:***

- aiding, counseling, or procuring arson in the first degree;
- arson in the second degree or attempting, aiding, counseling, or procuring arson in the second degree;
- burglary in the first, second, or third degree;
- child abuse or sexual abuse of a minor;
- manufacture or possession of a destructive device;
- various offenses related to controlled dangerous substances (CDS), except for possessing or administering CDS;
- manslaughter by vehicle or vessel; and
- a crime of violence.