

Department of Legislative Services
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FISCAL AND POLICY NOTE

House Bill 537 (Chair, Judiciary Committee)(By Request - Maryland
 Judicial Conference)

Judiciary

**Criminal Procedure - Pretrial Confinement and Release of Criminal Defendants -
 Initial Appearance and Representation by the Office of the Public Defender**

This bill makes several changes to statutory provisions governing an initial appearance by an arrested person. The bill requires an arrested person to be presented before a District Court judge within 24 hours after arrest for an initial appearance in accordance with Maryland Rule 4-213 if a court is in session. If the court is not in session and more than 24 hours will pass before the next session of the court, an arrested person must be presented before a District Court commissioner for an initial appearance in accordance with Maryland Rule 4-213. An initial appearance may be conducted through the use of video conferencing in accordance with Maryland Rule 4-231.

The bill takes effect on January 1, 2015, contingent on the taking effect of HB 500 of 2014, which increases the number of associate judges of the District Court in certain districts.

Fiscal Summary

State Effect: General fund cost avoidance of \$5.5 million in FY 2015 from implementation of the bill’s requirements in lieu of full implementation of the *Richmond II* decision. Future years are annualized and adjusted for inflation. The Department of Public Safety and Correctional Services (DPSCS) may incur significant general fund expenditures to house individuals arrested on weekdays until their initial appearances before a District Court judge.

(in dollars)	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	(5,468,100)	(18,231,600)	(19,183,700)	(20,180,100)	(21,222,700)
Net Effect	\$5,468,100	\$18,231,600	\$19,183,700	\$20,180,100	\$21,222,700

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

Local Effect: Local expenditures increase significantly to house individuals arrested on weekdays until their initial appearance hearings before a District Court judge during normal court hours and transport them to court the next day. State's Attorneys' offices that planned to be present at initial appearances under the *Richmond II* decision may experience reduced expenditures due to the bill's scheduling of weekday judicial initial appearances during normal court hours of operation.

Small Business Effect: None.

Analysis

Bill Summary: The bill repeals provisions governing what a commissioner must do at an initial appearance and instead requires that at an initial appearance before a commissioner, a commissioner must perform his/her duties in accordance with Maryland Rules 4-213 and 4-216.

For an initial appearance to be conducted before a judge, a commissioner may gather and verify relevant information and forward that information and a recommendation based on the information to the judge for consideration in determining whether and on what conditions the defendant should be released.

The bill also requires the Office of the Public Defender (OPD) to provide legal representation to an indigent individual at an initial appearance.

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 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 II*"). 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?

State Expenditures: General fund cost avoidance of \$5,468,118 in fiscal 2015 from implementation of the bill's requirements in lieu of full implementation of the *Richmond II* decision. DPSCS may incur significant general fund expenditures for pretrial detentions in Baltimore City as individuals arrested on weekdays wait for an initial appearance before a judge during normal court business hours.

I. Judiciary

Additional Judgeships: The bill consolidates a commissioner initial appearance and judicial bail review hearing into one hearing before a judge on weekdays and applies the current process to weekends and holidays, during which an arrested person will receive an initial appearance hearing from a commissioner and a bail review hearing in front of a District Court judge if he/she is denied pretrial release by a commissioner or remains in custody 24 hours after his/her initial appearance before a commissioner.

According to the Judiciary, the elements of an initial appearance consume more time than a judicial bail review, which focuses on changes in a defendant's circumstances since his/her initial appearance. After conferring with judges and judicial personnel, the Judiciary determined that these new hearings could consume 20 minutes of court time, and that given the changes to the judicial system, 12 judges (5 in Baltimore City, 3 in Prince George's, 2 in Baltimore County, 1 in Montgomery, and 1 in Anne Arundel), clerks, and bailiffs could be required to handle the increased court volume and ensure a smooth transition. This is the same request for additional judgeships contained in HB 500, upon which passage of this bill is contingent. The increase in general fund expenditures associated with these additional judgeships are \$3,553,813 in fiscal 2015, including equipment costs of \$213,600, and renovation costs of \$514,000 to accommodate the additional judges who will conduct initial appearance hearings. This estimate assumes a 90-day start-up delay, pursuant to HB 500.

Video Conferencing and Court Smart Technology: The Judiciary plans to implement videoconferencing and multi-county hearings to implement the bill's requirements. To accomplish this, the Judiciary must install video equipment in approximately 14 detention centers, at a cost of \$1,950,100 in fiscal 2015.

Included in the Judiciary's proposed fiscal 2015 budget is \$1.9 million for new technology related to the *Richmond II* decision for the procurement of "Court Smart" technology, a digital system to record all District Court commissioner proceedings in the State. In addition to the fiscal 2015 procurement cost, maintenance costs for the technology are estimated at \$80,000 annually in future years. The Judiciary has expressed a willingness to reallocate this appropriation towards the video conferencing equipment mentioned above. However, it is unclear at this time to what extent Court Smart is needed given that under the bill, commissioners have to conduct initial appearances on weekends and holidays at which public defenders are present.

District Court Commissioner Positions: Given that the bill requires District Court commissioners to perform pretrial services functions during judicial initial appearance hearings on weekdays and perform their existing functions during weekends and holidays, this estimate assumes that the bill does not result in the elimination of District Court commissioner positions.

II. Office of the Public Defender

Compliance with the Bill's Requirements: As a result of the bill's changes to the pretrial release/initial appearance process, OPD is required to represent indigent individuals at initial appearances before judges on weekdays, initial appearances before District Court commissioners on weekends and holidays, and bail review hearings before District Court judges on weekdays for individuals who were seen by a District Court commissioner during the weekend, but were denied pretrial release or were still in custody 24 hours following their initial appearances.

OPD currently represents clients at bail review hearings conducted at 41 sites statewide. OPD advises that due to its presence at District Court bail review hearings, as long as the office is fully staffed for its current weekday hearings, OPD requires one additional attorney and intake specialist for each judicial docket added during normal court business hours. OPD determined after implementation of statewide bail review representation that its bail review activity was under-supported by seven attorneys: five in Central Booking (Baltimore City), one in District 5 (Prince George's County) and one in District 8 (Baltimore County). Assuming that the 12 judges mentioned above add 12 dockets to the current schedule, OPD requires 19 attorneys and 19 intake specialists to comply with the bill's requirements for the weekday initial appearance hearings.

In addition, in order to cover six weekend shifts of initial appearances in front of commissioners, OPD requires 69 additional staff attorneys with 4 attorney supervisors, 15 support staff, 3 support staff supervisors and 2 information technology employees. The administrative support and supervision positions are required on the weekends because there is no OPD infrastructure in place during weekends.

General fund expenditures associated with this effort are \$5,557,904 in fiscal 2015, which accounts for the bill's January 1, 2015 effective date and includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. General fund expenditures for fiscal 2016 are \$10,875,016. Expenditures for OPD may increase if the District Court adds additional dockets to accommodate hearings.

Full Implementation of the Richmond II Decision: If OPD had to comply with the *Richmond II* decision as of the bill's January 1, 2015 effective date, general fund expenditures associated with that effort are \$16,529,935 in fiscal 2015, which accounts

for the bill's January 1, 2015 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 general fund expenditures associated with this effort are \$33,000,197, which reflects one full year of expenditures. This estimate does not include expenditures associated with travel, software licenses, or facilities charges.

III. Department of Public Safety and Correctional Services

According to DPSCS, to accommodate OPD consultations with clients at the Central Booking Facility in Baltimore City in accordance with the *Richmond II* decision, DPSCS plans to separate arrested persons who wish to be represented by OPD, contain them in one section of the facility, and guard them until their commissioner appearances. The cost associated with this endeavor is estimated at \$867,000 per year based on a 24/7 operation, which is not included in the Governor's proposed fiscal 2015 budget for DPSCS. As previously noted, the bill limits commissioner initial appearances to weekends and holidays. Thus, it is likely that a person arrested between 12:00 p.m. (noon) on Friday and 9:00 a.m. on Sunday will be seen by a District Court commissioner. Though this time period represents two out of seven days of the week, it is assumed that DPSCS requires a buffer of time before and after this time period to accommodate transitions between weekday and weekend procedures. As a result, general fund expenditures for DPSCS decrease by \$495,428 annually (4/7 of the \$867,000 total) to accommodate OPD's presence at District Court commissioner initial appearances. Accordingly, general fund expenditures for DPSCS decrease by \$247,714 in fiscal 2015, which reflects the bill's January 1, 2015 effective date.

The projected cost avoidance may be diminished to the extent that DPSCS experiences an increase in general fund expenditures if arrested individuals are detained for longer periods of time as they wait for an initial appearance hearing before a judge during normal court business hours.

Local Expenditures: Local expenditures increase significantly to house individuals arrested on weekdays until their initial appearance hearings before a District Court judge during normal court hours and transport them to court the next day. Currently, arrested persons are presented before a District Court commissioner 24 hours per day. Local jurisdiction may incur additional costs if detention facilities need to be expanded to accommodate the increased pretrial population.

Local jurisdictions may also incur significant expenditures to transport individuals arrested on weekdays to local detention centers to be held overnight for transport to District Court the next day for their initial appearances before a District Court judge.

Alternatively, jurisdictions where law enforcement has to travel a long distance to reach a commissioner may benefit from initial appearances conducted by video conference.

Washington County advises that the bill results in lengthier pretrial detentions than under current practice, and requires the county sheriff's detention center to feed detainees and house them for longer periods of time. The county anticipates increased expenditures of approximately \$75,000 in fiscal 2015 and \$143,000 in fiscal 2016 to increase staff in its central booking facility.

Local expenditures for pretrial detentions may decrease to the extent that an initial appearance before a judge increases the number of individuals ordered to comply with court-ordered conditions (*e.g.*, home monitoring) instead of pretrial detention.

State's Attorneys' offices that plan to be present at initial appearances due to the *Richmond II* decision may experience reduced expenditures due to the bill's scheduling of weekday judicial initial appearances during normal court hours of operation.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore City; Montgomery, Washington, and Worcester counties; Governor's Office of Crime Control and Prevention; Judiciary (Administrative Office of the Courts); Maryland Association of Counties; Office of the Public Defender; Department of Public Safety and Correctional Services; Department of Legislative Services

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mm/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.