

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 839
Judiciary

(Delegate Vallario)

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. 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.

In *DeWolfe v. Richmond*, 434 Md. 403 (2012), 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 plaintiffs in the case represented a class of indigent criminal defendants who were arrested, detained at the Central Booking and Intake Facility in Baltimore City (CBIF), brought before a commissioner for initial bail hearings, and requested and were denied representation by counsel at the initial bail hearings. The facts were undisputed that the initial appearances of criminal defendants in Baltimore City were not conducted in a courtroom, open to the public, or recorded. The initial appearances occurred at CBIF, in a small room, with the defendant and the commissioner on opposite sides of a plexiglass window talking through a speaker system. Evidence was presented that the commissioner’s initial bail decision often was not disturbed by the District Court judge on bail review.

The *Richmond I* opinion was based on the then-effective 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 the initial appearance phase. It was estimated that the cost to OPD alone (aside from costs that would be incurred by the Judiciary, the Department of Public Safety and Correctional Services, State’s Attorneys’ offices, law enforcement agencies, and local correctional facilities) would exceed \$27 million annually. 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. A number of bills were introduced to attempt to counteract or mitigate the effect of *Richmond I*.

Ultimately, the General Assembly passed Chapters 504 and 505 of 2012, which, among other things, amended the Maryland 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.

Subsequently, the Court of Appeals was asked to decide whether there was a federal or State constitutional right to State-furnished counsel for indigent defendants at their initial appearances before a District Court commissioner. On September 25, 2013, the Court of Appeals issued an opinion (434 Md. 444 (2013)) 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 issued a temporary stay of implementation of the *Richmond II* decision pending legislative action. On May 27 and 28, 2014, the Court of Appeals adopted changes to the Maryland Rules to implement *Richmond II*'s requirement that indigent defendants be provided counsel at initial appearances and lifted the stay of *Richmond II* effective July 1, 2014.

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

OPD processed 218,370 applications in calendar 2016. As previously noted, OPD began representing indigent individuals at judicial bail reviews statewide on June 1, 2012. OPD advises that it provided legal representation in approximately 32,803 judicial bail review hearings in fiscal 2016. Assuming OPD bail review hearing volume and intake application volume remain constant, the bill results in a 15% increase in the intake application workload for OPD.

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 has historically advised 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 places a significant strain on OPD resources. OPD currently has 109 intake workers (10 intake supervisors and 99 intake specialists). Other OPD personnel (*e.g.*, attorneys, investigators, etc.) perform intake duties in those offices with insufficient intake staff.

The amount of resources needed to conduct additional evaluations under the bill cannot be reliably determined at this time and depends on demand and staffing levels at OPD offices. However, *for illustrative purposes only*, if all 32,803 fiscal 2016 OPD bail review clients decided to continue OPD representation, OPD spends an additional 10,934 hours processing their applications under the bill, using a 20 minutes per application time standard. Assuming each intake specialist works 2,000 hours per year, this results in the need for 5.5 additional intake specialists. The cost associated with hiring 5.5 additional intake specialists is \$249,197 in fiscal 2018, which accounts for the bill's October 1, 2017 effective date, and includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. The cost associated with hiring 5.5 additional intake specialists in fiscal 2019 is \$305,272.

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 exempt 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. 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.

Additional Information

Prior Introductions: HB 589 of 2016 received a hearing in the House Judiciary Committee but was later withdrawn. HB 530 of 2015 received a hearing in the House Judiciary Committee. No further action was taken on the bill. HB 1277 of 2014 was withdrawn after receiving a hearing in the House Judiciary Committee. HB 153 of 2013 passed the House and Senate with amendments; no further action was taken on the bill after the appointment of a conference committee.

Cross File: None.

Information Source(s): Anne Arundel, Baltimore, Dorchester, Garrett, Howard, and Montgomery counties; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Department of Public Safety and Correctional Services; Department of Legislative Services

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