

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
Revised

Senate Bill 422

(Senators Frosh and Colburn)

Judicial Proceedings

Judiciary

Criminal Procedure - Criminal Defendants - Citations and Appearances

This emergency bill (1) repeals the requirement that legal representation be provided by the Office of the Public Defender (OPD) at all stages of a proceeding eligible for OPD representation under the Maryland Public Defender Act; (2) specifies that OPD is required to provide legal representation to an indigent defendant at a bail hearing before a District Court or circuit court judge applicable to bail hearings occurring on or after June 1, 2012; (3) specifies that OPD is not required to represent indigent criminal defendants at an initial appearance before a District Court commissioner; (4) prohibits a statement made during an initial appearance before a District Court commissioner from being used as evidence against the defendant in a criminal or juvenile proceeding; (5) codifies the requirement under Maryland Rule 4-216 regarding the scheduling of a bail review hearing when a defendant has been denied pretrial release by a District Court commissioner or remains in custody after the District Court commissioner has determined the conditions of pretrial release; (6) requires a police officer to issue a citation for specified offenses if certain conditions are met; (7) as of January 1, 2013, authorizes a District Court commissioner to issue an arrest warrant based on an application for a statement of charges filed by an individual only if specified criteria are met; (8) establishes the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender; and (9) requires specified entities to develop a format and procedures to record specified citation data and requires the Maryland Statistical Analysis Center (MSAC) within the Governor's Office of Crime Control and Prevention (GOCCP) to analyze citation data for five years beginning January 1, 2013.

Fiscal Summary

State Effect: General fund expenditures decrease by \$2.5 million in FY 2012 as a result of the bill's elimination of required OPD legal representation at District Court

commissioner appearances. Out-years reflect annualization and inflation. The limitations on the issuance of arrest warrants by commissioners and the issuance of citations in lieu of custodial arrests may result in reduced expenditures or efficiencies, perhaps significant, for the District Court and State law enforcement operations. Such potential effects cannot be reliably estimated without any actual experience under the bill.

(in dollars)	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	(2,523,600)	(27,160,500)	(27,432,100)	(27,706,400)	(27,983,500)
Net Effect	\$2,523,600	\$27,160,500	\$27,432,100	\$27,706,400	\$27,983,500

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

Local Effect: Potential significant decrease in local expenditures for State’s Attorneys, local law enforcement, and local correctional facilities as a result of the bill’s (1) elimination of OPD legal representation at initial appearances; and (2) changes to the issuance of arrest warrants and citations.

Small Business Effect: None.

Analysis

Bill Summary:

Citations

The bill requires a police officer to 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.

The bill authorizes a police officer to 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.

Arrest Warrants

The bill authorizes a District Court commissioner to issue an arrest warrant based on an application for a statement of charges filed by an individual only on a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document and (1) the defendant previously has failed to respond to a summons that has been personally served or a citation; (2) the defendant's whereabouts are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court; (3) the defendant is in custody for another offense; or (4) there is probable cause to believe that the defendant poses a danger to another person or the community. If the commissioner is not authorized to issue an arrest warrant based on application for a statement of charges filed by an individual, he/she may issue a summons.

Task Force

The bill establishes the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender. The task force must include specified individuals or their designees, and the membership of the task force includes representatives of the Governor, the General Assembly, OPD, the District Court, District Court commissioners, the Maryland State's Attorneys' Association, the Attorney General, the State Police, DPSCS, the plaintiffs in *DeWolfe v. Richmond*, and various interest and advocacy groups. The Governor must appoint a chair of the task force from its membership by May 1, 2012, and the Department of Legislative Services must provide staff for the task force.

The task force must (1) study the adequacy and cost of State laws and policies relating to representation of indigent criminal defendants by OPD; and (2) consider and make recommendations regarding options for and costs of improving the system of representation of criminal indigent defendants and the District Court commissioner and pretrial release systems.

The task force must submit an interim report of its findings and recommendations to the Governor, the Senate Judicial Proceedings Committee, and the House Judiciary Committee on or before November 1, 2012. The task force must submit a final report of its findings and recommendations on or before November 1, 2013. The provisions pertaining to the task force remain effective until June 1, 2014.

Data Collection

The bill also requires the Police Training Commission and MSAC, in consultation with the Administrative Office of the Courts, to develop a format and procedures for the

efficient recording of data required under the bill. Each time a law enforcement officer issues a citation, the officer must report the following information/data on the Maryland Uniform Citation Form in that format:

- the date, location, and time of the issuance of the citation;
- the offense charged;
- the offender's gender;
- the offender's date of birth;
- the state and, if available, the county of residence of the offender; and
- the offender's race or ethnicity.

On or before December 31, 2012, the Police Training Commission, in consultation with MSAC, must develop (1) guidelines that each law enforcement agency may use as a management tool to evaluate the data collected from citations for use in counseling and improved training; and (2) a model policy against the issuance of a citation based on race that a law enforcement agency can use in developing its own policy.

The bill's reporting requirements sunset August 31, 2018.

Continued Monitoring

The bill expresses the intent of the General Assembly to continue to monitor the issues relating to the representation of indigent defendants and to determine whether modification of the provisions of the bill is required during the 2015 legislative session or earlier if an appellate court issues a decision related to relevant issues in *DeWolfe v. Richmond* or after the task force issues its report and recommendations.

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 **Appendix 1** 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.

Right to Counsel

Criminal defendants are advised of their right to legal representation upon arrest and at their initial appearance. Written notice of this right is included with the charging document, which is given to and discussed with the defendant at the initial appearance. The notice is read to those who are unable to read and is typically signed by the defendant to acknowledge its review and receipt. The notice explains how a lawyer can be helpful to the defendant and advises the defendant that OPD provides legal representation to a defendant who is subject to incarceration on conviction and is unable to afford private counsel. The defendant is referred to the court clerk for assistance in locating and applying for assistance from the public defender.

The defendant is also told not to wait until the day of trial to get a lawyer and that the right to counsel can be waived by a defendant's inaction. The defendant is advised that if he or she appears for trial without a lawyer, a judge could require the defendant to proceed to trial without representation.

If the defendant is served with a criminal summons or citation rather than arrested, the initial appearance is before a judge on the date of arraignment or trial. The judge will advise the defendant of the nature of the charges and the right to counsel and confirm that the defendant received a copy of the charging document.

If an appropriate judicial officer has not previously advised the defendant of these rights before the trial date, the case will be postponed so the defendant can have an opportunity to obtain counsel and prepare a defense.

Office of the Public Defender

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that states must provide legal representation to criminal defendants charged with serious offenses who are unable to afford their own attorneys. Under the Maryland Public Defender Act, an indigent defendant or party must be provided representation in:

- a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense;
- a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to presentment being made before a commissioner or judge;
- a postconviction proceeding for which the defendant has a right to an attorney under Title 7 of the Criminal Procedure Article;
- any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result;
- a proceeding involving children in need of assistance under § 3-813 of the Courts Article; or
- a family law proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article, including (1) for a parent, a hearing in connection with guardianship or adoption; (2) a guardianship review hearing for which the parent has not waived the right to notice; and (3) an appeal.

Legal representation must be provided to an indigent individual in all stages of a proceeding listed above, including criminal proceedings, custody, interrogation, preliminary hearing, arraignment, trial, and appeal. Representation of an indigent individual by OPD or by a panel attorney must continue until the final disposition of the case or until the assigned attorney is relieved by the Public Defender or order of the court in which the case is pending.

Arrest

The criminal justice process generally begins when a person is alleged to have committed a crime that is observed by or reported to a law enforcement officer. This is followed by either a warrantless arrest or the issuance of a charging document.

An arrest is the detention of a suspected offender for the purpose of potential criminal prosecution. An arrest may be made either on the issuance of an arrest warrant after a charging document has been filed or without a warrant in certain situations.

A law enforcement officer may make a warrantless arrest when (1) a crime is committed in the officer's presence; (2) the officer has probable cause to believe that a felony was attempted or committed, even though the crime did not occur in the officer's presence; or

(3) the officer has probable cause to believe that one of a limited number of misdemeanors was committed (*e.g.*, illegally carrying a handgun or other weapon, theft, domestic abuse, stalking) even though the crime did not occur in the officer’s presence. Otherwise, for a police officer to be authorized to make an arrest, a judge or District Court commissioner must first issue a warrant based on a finding of probable cause.

Charging Documents

The issuance of a charging document, regardless of whether an individual is arrested, formally initiates the criminal process. The charging document is a written accusation alleging that the defendant has committed a crime. A charging document may come in the form of a citation, a statement of charges, an information, or an indictment.

A charging document must contain (1) the identity of the accused; (2) a concise and definite statement of the essential facts establishing the offense; (3) the time and location of the offense; and (4) the rights of the accused, including the right to counsel. The statute or other law allegedly violated must follow each charge or count in the charging document.

There are four types of charging documents. **Exhibit 1** provides a summary of which official or entity files each type of charging document and the court in which each type of charging document is filed.

Exhibit 1
Summary of Charging Documents

<u>Charging Document</u>	<u>Filed by</u>	<u>Where Filed</u>
Citation	Law Enforcement Officer	District Court
Statement of Charges	Judge or Court Commissioner (based on application made by a law enforcement officer or any other individual)	District Court
Information	State’s Attorney	District Court or Circuit Court
Grand Jury Indictment	Circuit Court	Circuit Court

Source: Department of Legislative Services

Citation

A citation is issued to a defendant by a law enforcement officer and filed by the officer in the District Court. Citations may only be used to charge offenses that may be prosecuted in the District Court. In addition to any other law allowing a crime to be charged by citation, including traffic laws, a police officer may issue a citation for:

- sale of an alcoholic beverage to an underage or intoxicated person;
- malicious destruction of property, if the amount of property damage is less than \$500;
- disturbing the peace or disorderly conduct; or
- misdemeanor theft.

The term “citation” means a written charging document that a police officer or fire marshal issues to a defendant, alleging the defendant has committed a crime. It does not include an indictment, information, or statement of charges.

A police officer may issue a citation to a defendant if the officer is satisfied with the defendant’s evidence of identity and reasonably believes that the defendant will comply with the citation.

The Chief Judge of the District Court is required to prescribe a uniform, statewide form of a citation. Except for the uniform motor vehicle citation form, the law enforcement agencies of the State, the U.S. Park Police, and the Office of the State Fire Marshal must reimburse the District Court for printing the citation forms that law enforcement officers and the State Fire Marshal require.

Statement of Charges

Before the arrest of an alleged offender, a statement of charges may be filed by a judicial officer with the District Court based on an application of a law enforcement officer or any other individual (including a private citizen). The application contains an affidavit demonstrating probable cause that the defendant committed the crime charged. The judicial officer has the authority to determine whether the application establishes probable cause.

Although the judicial officer may be a judge, it is more likely that the officer will be a District Court commissioner. District Court commissioners are available 24 hours a day for judicial duties. A statement of charges may only be used for offenses that may be prosecuted in the District Court.

If a law enforcement officer makes a warrantless arrest, the officer must then apply for a statement of charges to be filed in the District Court, along with an affidavit showing probable cause.

Information

An information is filed by a State's Attorney in either a circuit court or the District Court. Any offense within the jurisdiction of the District Court may be tried on an information, although some offenses may be tried by information in a circuit court.

Grand Jury Indictment

Rather than filing an information, a State's Attorney may seek to have the accused charged by grand jury indictment when the charge is a felony. The circuit court files an indictment returned by a grand jury.

Summons or Arrest Warrant

Once a charging document is filed, the court must issue a summons or arrest warrant. A copy of the charging document accompanies the summons or warrant. A summons notifies the defendant of the time and place to make an initial appearance to answer the charges. It may be served on the defendant by mail or in person. A summons will be issued unless (1) an arrest warrant has been issued; (2) the defendant is in custody; or (3) the charging document is a citation.

There are several circumstances in which an arrest warrant may be issued in lieu of a summons. An arrest warrant may be issued from either the District Court or a circuit court if the defendant is not in custody and there is a substantial likelihood that the defendant will not respond to a summons. Additionally, the District Court may issue an arrest warrant if either the defendant previously failed to respond to a summons or citation or the defendant's whereabouts are unknown, or if there are concerns about the safety of the victim.

Background: In *DeWolfe v. Richmond*, No. 34, (September Term 2011), the Maryland Court of Appeals held that under 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.

In the case, the facts were undisputed that the initial appearances of criminal defendants in Baltimore City are not conducted in a courtroom, open to the public, or recorded. The initial appearances occur at the Central Booking and Intake Facility (CBIF) in a small room with the defendant and the commissioner on opposite sides of a plexiglass window talking through a speaker system. The commissioner is not required to give Miranda

warnings. The commissioner may ask the defendant about residence, family, employment history, and community ties and the answers may be used against the defendant at trial. If the commissioner does not release the defendant at this appearance, the defendant is presented to a District Court judge for a bail review hearing immediately or at the next session of court.

The plaintiffs in the case represent a class of indigent criminal defendants who were arrested, detained at CBIF, brought before a commissioner for initial bail hearings, and denied representation by counsel at the initial bail hearings. In a class action complaint filed in 2006, the plaintiffs named as defendants: the District Court of Maryland; the Chief Judge of the District Court of Maryland; the State Coordinator of Commissioner Activity; the Administrative Judge of the District Court for Baltimore City; the Administrative Commissioner for Baltimore City; and the Commissioners of the District Court of Baltimore City. Both parties filed cross-motions for summary judgment. After a hearing on the motions, the circuit court certified the class action and granted summary judgment in favor of the District Court defendants.

The plaintiffs filed an appeal to the Court of Special Appeals. While the case was pending in the intermediate court, the Court of Appeals granted a writ of certiorari on its own initiative and vacated the circuit court's order, directing that the case be dismissed if the plaintiffs failed to assert claims against the Public Defender.

On remand to the circuit court, the plaintiffs added the Public Defender as a defendant. The Public Defender argued that the plaintiffs had strong federal and State constitutional claims for representation at the initial appearance, but the court should not find for the plaintiffs and order legal representation absent the necessary funding. The Public Defender asked for a stay and other remedies that would delay relief until funding was found.

In 2008, while the case was being litigated, the United States Supreme Court issued an opinion in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008). In *Rothgery*, an individual who was mistakenly identified as a felon was arrested for possession of a firearm by a felon. Mr. Rothgery was taken before a Texas magistrate, who found probable cause for his arrest, informed him of the charges against him, and set bail at \$5,000. Rothgery was released after posting a surety bond but was later indicted by a grand jury. After the indictment, Mr. Rothgery was rearrested and jailed. Following these events, the court appointed an attorney for him. Appointed counsel was able to determine the mistake and was able to have the indictment dismissed, but only after Mr. Rothgery spent three weeks in jail because he was unable to post bail. Mr. Rothgery filed a civil rights action against Gillespie County on the grounds that had he been appointed counsel at the magistrate hearing, he would not have been subsequently indicted, rearrested, and incarcerated.

The Supreme Court held that the Sixth Amendment right to counsel attached at the magistrate hearing because it was the point at which a defendant learns of the charges against him and is subject to restrictions on liberty, and as such, is the initiation of adversarial judicial proceedings that trigger that right. However, the court did not conclude that the hearing was a critical stage requiring appointment of counsel. Instead the court opined that counsel “must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.” *Rothgery*, 554 U.S. at 212.

In 2010, the Circuit Court for Baltimore City issued its order that the initial appearance before a commissioner is a critical stage of a criminal prosecution and therefore indigent arrestees in Baltimore City have a federal and State constitutional right to be appointed counsel. The circuit court cited the *Rothgery* case for this proposition. The court also ruled that the plaintiffs were entitled to counsel under the Maryland Public Defender Act. After the court issued an order staying the decision pending appellate review, both parties appealed to the Court of Special Appeals. For a second time, the Court of Appeals granted certiorari.

The plaintiffs presented the following questions for review: (1) do indigent defendants have a statutory right to counsel at initial bail hearings under the Public Defender Act; (2) do indigent defendants have federal and State constitutional rights to counsel at initial bail hearings; and (3) did the trial court err by failing to order an injunction that the decision would be stayed pending appeal. The Public Defender asked if the circuit court had erred in its declaratory judgment that the plaintiffs had a right to representation without addressing a remedy and how the funding shortfall may practicably be addressed.

The Court of Appeals held that the plaintiffs have a right under the Maryland Public Defender Act to be represented in any bail hearing conducted before a commissioner, but the court did not address the plaintiffs’ federal and State constitutional claims of a right to representation. The Court of Appeals also held that the circuit court did not err in issuing its decision without consideration of the costs and provided that the plaintiffs may seek future injunctive relief.

The Court of Appeals stated that the language of the Maryland Public Defender Act was plain and unambiguous. The court found that an initial appearance marks the beginning of the formal criminal adversarial process, is clearly encompassed within the statutory term “criminal proceeding,” and may result in the defendant’s incarceration. According to the court, the commissioner is required to determine whether or not the defendant should be released on personal recognizance or incarcerated until the bail review hearing and makes the determination based on personal facts obtained, in large part, from the defendant. The court noted that a defendant may make incriminating statements at the initial hearing that might result in the defendant remaining incarcerated for weeks or months until the trial. For these reasons, the court held that the initial bail hearing is a

stage of a criminal proceeding. The court also noted that the Public Defender agreed that the plaintiffs have a right to counsel in the initial bail hearings.

The court also cited several prior cases for the proposition that the budget of the Office of the Public Defender has never been relevant in the court's obligation to uphold the law. The court was unable to recall any instance in which it had delayed implementing a substantive right, such as the statutory right of an indigent defendant to public defender representation, out of concern for the financial costs of the implementation.

The ruling was originally expected to take effect through a court mandate on February 4, 2012. However, OPD filed a motion requesting that the new requirements be stayed until August 1, 2012. The Court of Appeals considered OPD's motion on February 16, 2012, and requested that the parties submit answers to pending motions by March 5, 2012. While there was speculation that the Court of Appeals would issue its mandate on various dates in March and April, the court has yet to issue one. As of the preparation of this note, the State has moved to intervene as a party, and the plaintiffs have responded to that motion. The plaintiffs have also asked the Court of Appeals to rule on the constitutional issues presented in the case.

State Expenditures: Assuming that the Court of Appeals will issue a mandate in the *De Wolfe* case effective June 1, 2012, general fund expenditures decrease by \$2.5 million in fiscal 2012 due to the bill's elimination of required OPD legal representation at initial appearances before a District Court commissioner. By fiscal 2016, general fund expenditures decrease by \$28.0 million.

Additional decreases in general fund expenditures, perhaps significant, may occur for the Judiciary, DPSCS, and the Department of State Police as a result of the bill's limitation on the issuance of arrest warrants by District Court commissioners and the issuance of citations in lieu of custodial arrests. The extent of this decrease cannot be estimated without actual experience under the bill.

I. Elimination of Required OPD Representation at Initial Appearances Before a District Court Commissioner

The bill's elimination of required OPD legal representation of indigent defendants at initial appearances would reduce general fund expenditures for OPD by \$2.5 million in fiscal 2012 and by \$27.2 million in fiscal 2013, which reflects the potential June 1, 2012 deadline for OPD compliance with the *DeWolfe* ruling. This estimate reflects the cost of employing panel attorneys and temporary support staff to meet this portion of the requirement in *DeWolfe*.

Office of the Public Defender

Assuming an effective date of June 1, 2012, general fund expenditures for OPD decrease by \$2.5 million in fiscal 2012 and by \$28.0 million in fiscal 2016 due to the bill's elimination of required OPD representation at initial appearances.

This estimate reflects the cost of:

- employing panel attorneys at a rate of \$50 per hour for 493,067 hours per year (the number of commissioner work hours in fiscal 2011) to provide adequate coverage and legal representation at initial appearances before District Court commissioners throughout the State;
- employing the following temporary support staff employees at a rate commensurate with their full-time State employee counterparts (50 intake specialists, 2 fiscal accounts clerk, 1 human resources associate, and 3 information technology specialists).

Given the potential June 1, 2012 judicial deadline for OPD compliance with the *DeWolfe* ruling, this estimate assumes that OPD will opt for the quickest method of implementation, which is the use of panel attorneys and temporary administrative support staff. Because panel attorneys are employed at a rate of \$50 per hour, they are typically a more expensive option.

This estimate assumes:

- that the requirement that OPD provide legal representation at initial appearances will go into effect on June 1, 2012;
- that it is feasible for OPD to comply with the judicial order within the timeframe mandated by the court;
- that OPD will be able to find and employ sufficient panel attorneys to provide legal representation to indigent defendants at initial appearances;
- that to ensure adequate coverage and timely legal representation at initial appearances before a District Court commissioner, OPD will have to employ panel attorneys sufficient to match the number of District Court commissioner work hours per year; and
- that given the timeframe for initial appearances and the 24/7 nature of initial appearances, OPD will not have adequate time to conduct a financial assessment of potential clients and will likely agree to represent any individual who agrees to OPD representation at an initial appearance.

These estimates are based on meeting the judicial order with increased temporary staffing and use of panel attorneys. Actual cost avoidance/savings realized as a result of the bill may be lower in future years if, absent this bill, reduced actual staffing needs, use of regular positions, streamlined procedures, or technological developments provide a more cost-effective way of meeting the legal representation requirements.

These estimates do not address current OPD caseloads that are in excess of caseload standards. OPD caseloads have been a chronic issue. For the fiscal 2010 baseline budget, the Department of Legislative Services estimated that OPD needed \$3.7 million for 55 new staff attorneys and \$952,000 for 25.5 law clerks/secretaries/social workers to meet caseload standards. The total cost associated with this initiative was \$4.6 million.

According to *Managing for Results*, in calendar 2009, 8% of OPD district offices met District Court caseload standards. Since then, no OPD districts have met District Court caseload standards. Since calendar 2009, 17% of OPD district offices have met circuit court caseload standards.

Initial Appearances Before District Court Commissioners

There are 278 District Court commissioners in the State, including the Coordinator of Commissioner Activity. Commissioners occupy 41 stations with 125 desks throughout the State and handled 171,144 initial appearances in fiscal 2010 and 176,523 initial appearances in fiscal 2011, as detailed in **Exhibit 2**. According to the Judiciary, commissioners granted a release on personal recognizance to 77,704 defendants (44%) in fiscal 2011.

District Court commissioners worked 493,067 hours during fiscal 2011. Though these hours include hours spent on numerous other commissioner functions, it is assumed that to comply with the order, OPD would have to provide staff to accommodate all commissioner hours worked.

Exhibit 2
Initial Appearances by Jurisdiction
Fiscal 2010 and 2011

County	FY 2010 Initial Appearances	FY 2011 Initial Appearances
Allegany	2,141	2,034
Anne Arundel	13,481	14,475
Baltimore City	54,058	52,686
Baltimore	17,477	17,527
Calvert	2,035	2,162
Caroline	888	1,004
Carroll	2,025	2,225
Cecil	2,946	3,651
Charles	4,684	4,514
Dorchester	1,106	1,188
Frederick	3,827	3,719
Garrett	630	850
Harford	3,361	3,213
Howard	4,240	3,988
Kent	485	533
Montgomery	14,668	15,008
Prince George's	26,745	30,340
Queen Anne's	1,154	1,277
St. Mary's	2,760	2,469
Somerset	625	722
Talbot	922	1,098
Washington	2,577	3,016
Wicomico	4,336	4,311
Worcester	3,973	4,513
Statewide Total	171,144	176,523

Source: Administrative Office of the Courts

Judiciary/Administrative Office of the Courts

Currently, a typical initial appearance involves the defendant and the commissioner, and the appearance must occur within 24 hours of arrest. Initial appearances currently take between 15 to 30 minutes to complete. It is unclear at this time to what extent the addition of a public defender and a State's Attorney (should the State's Attorney wish to participate) will increase the average time spent on an initial appearance. If the average

time for an initial appearance is extended to the point that commissioners are unable to meet the 24-hour requirement, the District Court may need to employ additional commissioners.

Public Safety and Correctional Services

In Baltimore City, District Court initial appearances take place at CBIF, which is operated by DPSCS. Commissioner appearances are conducted in small rooms (some as small as 3 feet x 5 feet), with plexiglass separating the commissioner from the defendant. Police officers or guards are present in the room when the defendant makes his/her appearance. Additional security may be needed with the addition of a public defender and (possibly) a State's Attorney within this confined space.

Additional costs may be incurred if internal spaces within CBIF need to be remodeled to accommodate the additional participants in commissioner appearances and provide space for public defenders to meet with clients confidentially. DPSCS advises that CBIF cannot be expanded.

This increase could be offset by more arrestees obtaining pretrial release through legal representation at initial appearances as well as possible diversion to alternative programs to incarceration through early identification by and advocacy of a public defender. The extent to which legal representation at these stages by a public defender would result in earlier releases than occurs under the existing system cannot be reliably quantified at this time.

Department of State Police

Should the ruling result in delays in the initial appearance process, State troopers will have to spend more time with detainees while they wait for their attorneys, resulting in reduced patrol time and potential overtime costs. Since the bill eliminates mandatory OPD legal representation at initial appearances, the Department of State Police could experience significant future general fund savings as a result of the bill.

II. Required OPD Legal Representation at Judicial Bail Reviews Beginning June 1, 2012

As previously mentioned, the Court of Appeals was expected to issue a mandate on various dates in February, March, and April 2012. However, the court has yet to issue a mandate in the *DeWolfe* case. Assuming that the Court of Appeals will issue a mandate in the *DeWolfe* case effective June 1, 2012, the bill's requirement that OPD represent indigent criminal defendants at judicial bail reviews beginning June 1, 2012 will not affect general fund expenditures. The fiscal 2012 supplemental budget includes \$706,400 in general funds for OPD to provide legal representation at judicial bail reviews

from June 1, 2012 to June 30, 2012. The fiscal 2013 budget includes an appropriation of \$5.4 million for OPD to comply with this requirement.

III. Arrest Warrants and Citations

The bill also (1) authorizes a District Court commissioner to issue an arrest warrant based on an application for statement of charges filed by an individual if specified criteria are met; and (2) expands the authority of a police officer to charge a person by citation by requiring issuance of a citation for specified offenses under specified conditions.

Both of these measures will reduce the number of pretrial detentions and initial appearances and the expenditures associated with these events and the arrest process. As a result, State expenditures for the Judiciary, the Department of State Police, and DPSCS in Baltimore City will decrease, perhaps significantly. The extent of these decreases cannot be reliably estimated at this time, and can only be determined after actual experience under the bill. It is assumed that any savings experienced by DPSCS, the Judiciary and the State Police through a reduction in initial appearances and arrests will be shifted to other operations.

Exhibit 3 shows the numbers of applications for a statement of charges made by private citizens and law enforcement and the number of arrest warrants issued based on these applications in fiscal 2010 and 2011.

Exhibit 3
Applications for Statement of Charges and Warrants Issued Based on Applications Made to District Court Commissioners

	<u>Fiscal 2010</u>	<u>Fiscal 2011</u>
Applications by Citizens	28,295	28,095
Applications by Law Enforcement	37,445	40,026
Warrants Issued Based on Citizen Applications	13,333	12,907
Warrants Issued Based on Law Enforcement Applications	15,652	15,152

Source: Administrative Office of the Courts

According to the Judiciary, in fiscal 2011, the sources for cases appearing before District Court commissioners were as follows: (1) 68,121 from applications for statements of

charges made by private citizens or law enforcement; (2) 2,303 based on a criminal information; and (3) 103,689 from warrantless arrests made by law enforcement officers. District Court commissioners conducted 176,523 initial appearance hearings in fiscal 2011, of which 72,834 were based on arrest warrants or bench warrants.

IV. Task Force

The estimate assumes that expenditures incurred by the task force created under the bill can be absorbed by all agencies involved, including the Department of Legislative Services, which is required to provide staffing.

V. Data Collection

MSAC is in GOCCP which, among other responsibilities, does analysis of traffic stop data. Currently, upon issuing a criminal and/or civil citation, law enforcement agencies forward a paper copy of their physical citations to the Maryland Judiciary. The courts process those citations and upload citation information into the Maryland Judiciary's Judicial Information Systems database. GOCCP reports that the bill's requirement for analysis of citation data can be handled with existing budgeted resources.

Local Expenditures: Local expenditures significantly decrease as a result of the bill's provisions.

State's Attorneys

The recent ruling does not require State's Attorneys to be present at commissioner initial appearances. Whether State's Attorneys adopt a policy of appearing at all initial appearances at which a public defender is present or only appearances for particular defendants remains to be seen and will vary by jurisdiction. However, the ruling may necessitate the hiring of additional State's Attorneys, which would result in significant increases in local expenditures.

Local Law Enforcement

In some jurisdictions, commissioner appearances are conducted in one location (often referred to as a central processing unit) with its own security staff. In those jurisdictions, law enforcement officers transport defendants to the central processing unit and transfer custody of the defendant to the unit's security staff. In other jurisdictions, the law enforcement officer who made the arrest maintains custody of the defendant and waits with the defendant until the conclusion of the initial appearance, when the arrestee is either released or transferred to the local jail. If the ruling's changes to commissioner hearings results in lengthier hearings and longer waiting periods between an arrest and initial appearance, then law enforcement officers units in smaller jurisdictions will spend

more time waiting for hearings and less time on patrol. These jurisdictions may need to hire additional officers to maintain patrol duties. Talbot County, for instance, only assigns two police officers to patrol the county at night.

Local law enforcement may experience efficiencies or reductions in expenditures if the issuance of citations requires less processing time than custodial arrests. Because local law enforcement agencies already report data covered under the bill to the Maryland Judiciary, no additional reporting efforts by law enforcement agencies will be required as a result of the bill.

Local Correctional Facilities

As previously mentioned, recent changes to the initial appearance process may result in a backlog of cases. This backlog could result in an increase in expenditures due to an increase in the average daily population of local correctional facilities and the potential need for additional space. This increase could be offset by more arrestees obtaining pretrial release through legal representation at an initial appearance and possible diversion to alternative programs instead of incarceration through early identification by and advocacy of a public defender. The extent to which legal representation by a public defender would result in earlier releases than occurs under the existing system cannot be reliably quantified at this time. Per diem operating costs of local detention facilities have ranged from approximately \$60 to \$160 per inmate in recent years.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): 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, Office of the Attorney General, Governor's Office of Crime Control and Prevention, United States Supreme Court, Brennan Center for Justice, National Legal Aid and Defender Association, National Associates of Criminal Defense Lawyers, Gazette.net, *Cumberland Times-News*, *Daily Record*, *Baltimore Sun*, Department of Legislative Services

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Appendix 1

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 death or 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:***

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

- (6) 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;
- (7) possession of a regulated firearm under § 5–133 of the Public Safety Article;
- (8) transporting a regulated firearm for unlawful sale or trafficking; or
- (9) 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:***

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