

Department of Legislative Services
 Maryland General Assembly
 2014 Session

FISCAL AND POLICY NOTE

Senate Bill 1114 (Senator Zirkin, *et al.*)
 Judicial Proceedings

Criminal Procedure - Initial Appearance and Representation by the Office of the Public Defender

This bill proposes a constitutional amendment to establish that Article 21 of the Maryland Declaration of Rights may not be construed to require the Office of the Public Defender (OPD) to represent a defendant at an initial appearance before a District Court commissioner.

Fiscal Summary

State Effect: General fund cost avoidance of \$21.2 million in FY 2015 for OPD, the Department of Public Safety and Correctional Services (DPSCS), and the Judiciary if adoption of the constitutional amendment absolves the State of its responsibility to provide legal counsel at initial appearances before District Court commissioners under a recent decision by the Court of Appeals. Future years reflect annualization and ongoing savings. It is assumed that the potential for increased costs to include any constitutional amendments proposed by the General Assembly on the ballot at the next general election will have been anticipated in the State Board of Elections’ budget.

(\$ in millions)	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	(21.2)	(34.0)	(35.5)	(37.2)	(38.9)
Net Effect	\$21.2	\$34.0	\$35.5	\$37.2	\$38.9

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

Local Effect: Potential significant cost avoidance for local detention facilities and State’s Attorney’s offices if adoption of the amendment absolves the State of its responsibilities under a recent decision by the Court of Appeals. It is assumed that the potential for increased costs to notify voters of any constitutional amendments proposed by the General Assembly, and to include any proposed constitutional amendments on the

ballot at the next general election, will have been anticipated in local boards of elections' budgets.

Small Business Effect: Potential meaningful to the extent that private counsel is hired to provide “State-furnished” representation.

Analysis

Background/Current Law: 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 June 5, 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?

In an order issued on March 11, 2014, extending the stay until June 5, 2014, the court stated that it (1) will not revisit its decision in *Richmond II*; (2) retains jurisdiction to revise the circuit court’s injunction; and (3) will hear oral arguments on May 6, 2014 concerning potential actions regarding the circuit court’s injunction based on existing circumstances, including any legislative action.

State Expenditures: Assuming that adoption of the constitutional amendment absolves not just OPD, but the State of its responsibility to provide counsel for indigent defendants at initial appearances before District Court commissioners, the amendment results in general fund cost avoidance of \$21.2 million in fiscal 2015 and nearly \$34.0 million in fiscal 2016 for OPD, DPSCS, and the Judiciary. The fiscal estimate represents costs that would otherwise be incurred between December 4, 2014, and June 30, 2015, as discussed below. This estimate does not account for potential costs incurred if the Court of Appeals directs the State and local jurisdictions to comply with the *Richmond II* decision before the adoption of the constitutional amendment.

Pursuant to Article XIV of the Maryland Constitution, constitutional amendments take effect upon the Governor’s proclamation of the election results on the ballot question pertaining to the amendment. In 2012, the Governor’s proclamations on the ballot questions were dated December 6, 2012, one month after the November 6, 2012 general election. Applying this same timeline to the November 4, 2014 general election results in an effective date of December 4, 2014.

OPD – Cost Avoidance of Full Implementation of Richmond II Decision

Enactment of a constitutional amendment absolving OPD of its responsibility to provide legal representation to indigent individuals at District Court commissioner initial appearances results in a general fund cost avoidance of \$18.8 million in fiscal 2015, which reflects the cost that would no longer be incurred of hiring 237 assistant public defenders, 50 support staff, 20 attorney supervisors, 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 amendment's presumed December 4, 2014 effective date. The fiscal 2016 cost avoidance associated with this effort is \$33.0 million which reflects one full year of expenditures. This estimate does not include expenditures associated with travel, software licenses, or facilities charges.

DPSCS – Cost Avoidance of Central Booking Costs Associated with Richmond II Decision

According to DPSCS, in order to accommodate OPD consultations with clients at the Central Booking Facility in Baltimore City, 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, which is not included in the Governor's proposed fiscal 2015 budget for DPSCS. Passage of the constitutional amendment results in a general fund cost avoidance of \$494,140 in fiscal 2015, which reflects costs that would no longer be incurred from December 4, 2014, to June 30, 2015.

Judiciary – Cost Avoidance of Court Smart Technology

General fund expenditures decrease by \$1.9 million in fiscal 2015 and \$80,000 each year thereafter due to elimination of the Judiciary's need to procure "Court Smart" technology to digitally record all District Court commissioner proceedings in the State. Included in the Judiciary's proposed fiscal 2015 budget is \$1.9 million in general funds for the procurement of this new technology, which the Judiciary is purchasing in response to the *Richmond II* decision. Should the State no longer be required to provide counsel to indigent defendants at initial appearances before District Court commissioners as a result of the adoption of the constitutional amendment, the need for this technology would be eliminated. In addition to the fiscal 2015 procurement cost, maintenance costs for the technology are estimated at \$80,000 annually in future years.

State Board of Elections

State costs of printing absentee and provisional ballots may increase to the extent inclusion of the proposed constitutional amendment on the ballot at the next general election would result in a need for a larger ballot card size or an additional ballot card for a given ballot (the content of ballots varies across the State, depending on the offices, candidates, and questions being voted on). Any increase in costs, however, is expected to be relatively minimal, and it is assumed that the potential for such increased costs will have been anticipated in the State Board of Elections' budget. Pursuant to Chapter 564 of 2001, the State Board of Elections shares the costs of printing paper ballots with the local boards of elections.

Local Expenditures: Adoption of the constitutional amendment results in a potential significant cost avoidance for local correctional facilities that would be required to alter current procedures and employ additional staff to incorporate legal representation of arrestees by OPD and any increased populations due to the delays in the initial appearance process as a result of the *Richmond II* decision. Adoption of the constitutional amendment also results in a potential significant cost avoidance for State's Attorneys' offices to the extent that these offices planned to staff initial appearances at which a public defender is present.

The Montgomery County Department of Correction and Rehabilitation advises that in order to accommodate the *Richmond II* decision, it would need to hire 12 additional officers to provide continuous coverage of a hearing supervision post and a pre-hearing movement post, at an estimated annual cost of \$936,000. The department would also have to renovate its existing space to accommodate public defenders and State's Attorneys, at an estimated cost of \$5,000 per renovated cell, plus additional information-technology costs for use of network devices by attorney. The department further advises that delays in the process that could occur as a result of the *Richmond II* decision could significantly impact the jail population.

The Office of the State's Attorney for Montgomery County advises that staffing initial appearances 24 hours per day/7 days per week results in increased annual expenditures of \$600,000 to \$750,000, depending on whether the office employs contractual attorneys or full-time employees.

Local boards of elections' printing and mailing costs may increase to include information on the proposed constitutional amendment with specimen ballots mailed to voters prior to the next general election and to include the proposed amendment on absentee and provisional ballots. It is assumed, however, that the potential for such increased costs will have been anticipated in local boards of elections' budgets.

Additional Comments: The Judiciary advises that the amendment’s elimination of OPD’s responsibility to provide legal representation at initial appearances before District Court commissioners does not eliminate the requirement under the *Richmond II* decision that, under Article 24 of the Maryland Declaration of Rights, an indigent defendant is entitled to “State-furnished” counsel at an initial appearance before a District Court commissioner. Accordingly, some mechanism to determine eligibility for State-furnished counsel may be required, and the Judiciary or another entity may have to appoint members of the private bar to comply with a State-representation requirement.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Montgomery County, 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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ncs/kdm

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