

Department of Legislative Services
 Maryland General Assembly
 2014 Session

FISCAL AND POLICY NOTE

Senate Bill 748 (Senator Zirkin)
 Judicial Proceedings

Criminal Procedure - District Court Commissioner - Initial Appearance

This bill prohibits a District Court commissioner from conducting an initial appearance for an arrested person except during normal business hours on Monday through Friday and the hours between 9:00 a.m. and 5:00 p.m. on weekends and holidays. A District Court commissioner may conduct an initial appearance at any time for an arrested person, who, for the purpose of the initial appearance before the commissioner, waives the right to representation by counsel or is represented by private counsel.

The bill also amends The Public Defender Act to specify that the Office of the Public Defender (OPD) is not required to provide legal representation to an indigent individual at an initial appearance before a District Court commissioner except during normal business hours on Monday through Friday and the hours between 9:00 a.m. and 5:00 p.m. on weekends and holidays.

Fiscal Summary

State Effect: General fund cost avoidance of \$16.1 million in FY 2015 from a reduction in OPD personnel needed to meet the bill’s requirements compared to 24 hour/7 days per week (24/7) coverage by OPD of commissioner initial appearances under the existing system and the *Richmond II* decision. Increase in general fund expenditures, perhaps significant, for the Department of Public Safety and Correctional Services (DPSCS) if the bill significantly increases the number of pretrial detentions at the Central Booking Facility as arrested persons wait for an initial appearance. General fund expenditures for the Judiciary remain the same under the bill or the status quo.

(in dollars)	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	(16,122,500)	(22,147,200)	(23,156,700)	(24,212,900)	(25,318,200)
Net Effect	\$16,122,500	\$22,147,200	\$23,156,700	\$24,212,900	\$25,318,200

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

Local Effect: Potential significant increase in local expenditures for increased pretrial detentions as arrested persons wait for their initial appearances. Additional local expenditures to the extent that the bill requires law enforcement to transport arrested persons to detention centers to be held overnight and then transport them in the morning to meet with a commissioner at an alternate location. State's Attorneys' offices that choose to appear at initial appearances may experience a reduction in expenditures compared to staffing initial appearances under the existing system.

Small Business Effect: None.

Analysis

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 **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.

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: The bill's docketing of commissioner initial appearances results in a cost avoidance of \$16,122,547 in general funds during fiscal 2015 and \$22,147,244 in fiscal 2016 as a result of reduced OPD personnel needs under the bill than under the existing system, which would require the office to provide 24/7 coverage of initial appearances in order to comply with the *Richmond II* decision. This estimate is based on the cost of implementation of the *Richmond II* decision under the existing system using full-time positions beginning on the bill's October 1, 2014 effective date, and does not account for the potential impact of a court order that could be issued as early as March 7, 2014.

To comply with the *Richmond II* decision beginning on October 1, 2014 (the effective date of the bill), OPD needs to hire an additional 237 assistant public defenders, 20 attorney supervisors, 50 support staff, 10 support supervisors, 3 information technology employees, 2 fiscal clerks, and 1 human resources specialist. The estimated cost associated with this effort is \$24,560,370 in fiscal 2015, which includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. The fiscal 2016 cost associated with this effort is \$33,000,197, which reflects one full year of expenditures. This estimate does not include expenditures associated with travel, software licenses, or facilities charges.

Alternatively, under the bill, OPD needs to employ an additional 70 assistant public defenders, 2 attorney supervisors, 70 support staff, 2 support supervisors, and 1 information technology employee to provide legal representation at commissioner stations and conduct intake on clients within the compressed eight-hour timeframe. The estimated cost associated with this effort is \$8,437,823 in fiscal 2015, which reflects the bill's October 1, 2014 effective date, and includes the expenses described above. The

fiscal 2016 cost associated with this effort is \$10,852,953, which reflects one full year of expenditures. This estimate does not include expenditures associated with travel, software licenses, or facilities charges.

While the bill may result in a potentially significant increase in general fund expenditures for DPSCS for pretrial detentions at the Central Booking Facility as arrested persons wait for an initial appearance, DPSCS advises that the bill's docketing of commissioner initial appearances does not change the costs associated with implementation of the *Richmond II* decision at the Central Booking facility. 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. DPSCS advises that the bill still necessitates 24-hour monitoring of arrestees in this area, since the alternative would involve multiple large transfers of arrested persons throughout the day, which according to the department, poses logistical and safety concerns. This estimate assumes that the section of Central Booking designated for OPD clients is able to accommodate the larger population that will be held in it as a result of the bill's provisions.

The bill is not anticipated to have an overall impact on Judiciary resources, since it is likely that the bill's requirements can be met with an internal reallocation of commissioner resources to implement the bill's provisions. The Judiciary advises that it does not anticipate a significant fiscal or operational impact on the District Court from the bill.

Additional Information

Prior Introductions: None.

Cross File: None.

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

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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.