

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE

Senate Bill 942 (Senator Hough, *et al.*)
 Judicial Proceedings

Criminal Procedure - Government-Funded Legal Representation - Initial Appearance

This proposed constitutional amendment establishes that Article 24 of the Maryland Declaration of Rights may not be construed to require government-funded legal representation of an indigent defendant at an initial appearance before a District Court commissioner.

Fiscal Summary

State Effect: General fund expenditures decrease by \$5.3 million in FY 2017 for the Judiciary and the Department of Public Safety and Correctional Services (DPSCS) due to elimination of the State’s responsibility to provide legal counsel at initial appearances before District Court commissioners under a recent decision by the Court of Appeals. Future year savings are annualized and adjusted for inflation.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	0	(5,313,100)	(10,967,000)	(11,092,300)	(11,219,600)
Net Effect	\$0	\$5,313,100	\$10,967,000	\$11,092,300	\$11,219,600

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

Local Effect: Potential significant decrease in expenditures for local detention facilities and State’s Attorney’s offices due to elimination of the State’s responsibilities under a recent decision by the Court of Appeals.

Small Business Effect: Minimal impact on private attorneys who have been able to work for compensation in the Appointed Attorneys Program.

Analysis

Background/Current Law: 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 the Office of the Public Defender (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 initial appearance.

Activity during 2012 Legislative Session

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, DPSCS, 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 (1) amended 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; (2) prohibited 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; (3) codified the rule that a defendant who is denied pretrial release by a District Court commissioner or who 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; (4) required a police officer to charge by citation for specified offenses if certain conditions are met; (5) authorized 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; (6) established the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender; and (7) required specified entities to develop a format and procedures to record specified citation data and required the Maryland Statistical Analysis Center within the Governor's Office of Crime Control and Prevention to analyze citation data for five years beginning January 1, 2013.

2012-2013 Developments

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 appearance 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.

The task force created by Chapters 504 and 505 met several times during 2012 and 2013 and submitted a final report containing 16 recommendations, including elimination of the money bond system; implementation of a statewide pretrial services agency that utilizes risk and need-based supervision, referral, and treatment options in all Maryland counties; and adoption of an objective, validated risk assessment tool for use by pretrial services agents.

2014 Developments

Several bills were introduced during the 2014 session to specifically address the *Richmond II* decision. Proposals considered involved establishing a statewide pretrial release services program, requiring that release decisions be based on risk assessments, limiting the authority of District Court commissioners, altering procedures relating to the initial appearance process and the filing of criminal charges by police officers, expanding

the hours of operation of the District Court, establishing a task force on pretrial risk assessment, and amending the State constitution to establish that the Maryland Declaration of Rights may not be construed to require OPD to represent a defendant at an initial appearance before a District Court commissioner. Additional funding for OPD was also a major topic of discussion for the budget committees.

Although no bills specifically addressing the *Richmond II* decision passed, the fiscal 2015 budget restricts \$10,000,000 of the Judiciary's general fund appropriation to be used only for the purpose of providing attorneys for required representation at initial appearances before District Court commissioners, consistent with the *Richmond II* decision. Any funds not expended for this purpose must revert to the general fund. The Budget Reconciliation and Financing Act of 2014 (BRFA) specifies that authorization of State funds in the fiscal 2015 State budget for this purpose represents a one-time allocation and provides no authority for additional State expenditures or commitment of funds without separate authorization in the State budget as passed by the General Assembly.

The BRFA also requires that, in implementing the holding of the Court of Appeals in *DeWolfe v. Richmond*, if attorneys are appointed in a county to provide legal representation at an initial appearance before a District Court commissioner in fiscal 2015, the cost of compensating the attorneys beyond the amount restricted for that purpose in the State budget must be billed by the appointing authority to the county in which the representation is provided and must be paid by that county.

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;
- the Judiciary created the District Court of Maryland Appointed Attorneys Program to provide attorney representation to indigent criminal defendants during initial appearances; and
- the Governor issued an executive order establishing the Governor's Commission to Reform Maryland's Pretrial System to look at best practices from around the country and recommend how an objective-validated risk assessment tool could be used in Maryland to help determine who should be detained and who should be released before trial. The executive order directed the 23-member panel to identify ways to reduce detainment times, assist and advise the State on issues arising from the ongoing implementation on a pilot basis of a risk assessment tool in one or more counties, and develop and issue legislative recommendations.

To be eligible to participate in the District Court of Maryland Appointed Attorneys Program, an attorney must be licensed to practice law in the State of Maryland and be in good standing and not subject to any pending disciplinary proceedings; attend an in-person training session or a webinar and certify that the rules on initial appearances have been reviewed; and agree to compensation of \$50 an hour for services rendered (or receive *pro bono* credit). From July 2014 through December 2014, 73,708 initial appearances were conducted statewide. The Appointed Attorneys Program represented defendants in approximately 34% of those proceedings, while the defendant waived counsel in approximately 64% of the proceedings. Preliminary determinations of release and private counsel representation accounted for the remaining 2% of initial appearances.

The Governor's Commission to Reform Maryland's Pretrial System met several times during 2014. Three subcommittees were established at the second meeting: (1) the Managing Public Safety through Risk-based Decision Making Subcommittee; (2) the Pretrial System Improvement Subcommittee; and (3) the Individual Rights and Collateral Consequences Subcommittee. The subcommittees worked independently and kept the full task force abreast of their progress. The commission submitted its final report in December 2014.

State Expenditures: General fund expenditures for DPSCS and the Judiciary decrease by \$5.3 million in fiscal 2017, by nearly \$11.0 million in fiscal 2018, and by more than \$11.1 million annually thereafter. The fiscal 2017 estimate represents costs that would otherwise be incurred between January 2, 2017 and June 30, 2017, as discussed below. Future year estimates reflect a full year of cost avoidance.

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 2014, the Governor's proclamations on the ballot questions were dated December 29, 2014, nearly two months after the November 4, 2014 general election. Applying this same timeline to the November 8, 2016 general election results in an effective date of January 2, 2017.

DPSCS – Overtime Costs at Central Booking

DPSCS projects that it will incur \$1,760,000 in increased general fund expenditures in fiscal 2015 for overtime costs to accommodate *Richmond II* implementation at the Central Booking facility in Baltimore City. Due to inflation, these costs increase to \$1,795,376 in fiscal 2017. A constitutional amendment effective January 2, 2017 results in \$879,734 in avoided costs in fiscal 2017. Future year decreases in general fund expenditures are annualized and adjusted for inflation.

	<u>FY 2016*</u>	<u>FY 2017</u>	<u>FY 2018</u>	<u>FY 2019</u>	<u>FY 2020</u>
General Fund Expenditures	(\$0)	(\$879,734)	(\$1,813,330)	(\$1,831,463)	(\$1,849,778)

*Fiscal 2016 expenditures are not affected since the constitutional amendment, if ratified, takes effect in January 2017.

Judiciary – Appointed Attorneys Program

General fund expenditures decrease by \$4,433,651 in fiscal 2017 as a result of the amendment eliminating the need for the existing Appointed Attorneys Program. Future year estimates are annualized and adjusted for inflation.

	<u>FY 2016*</u>	<u>FY 2017</u>	<u>FY 2018</u>	<u>FY 2019</u>	<u>FY 2020</u>
General Fund Expenditures	(\$0)	(\$4,433,651)	(\$9,153,627)	(\$9,260,803)	(\$9,369,859)

*Fiscal 2016 expenditures are not affected since the constitutional amendment, if ratified, takes effect in January 2017.

The Judiciary projects to spend \$8.5 million in fiscal 2015 for payments to attorneys for representation of indigent defendants at initial appearances. This estimates assumes that the demand for representation and current waiver rates remain consistent.

Currently, the Judiciary is absorbing administrative costs associated with the program using Judiciary personnel who have been reassigned to this task or have been asked to perform additional duties. The Judiciary advises that in order to properly administer the program, it requires the following nine positions: three accounting clerks, one accounting supervisor, one manager, and four clerks/support staff employees. Though not currently funded, this estimate assumes that the Judiciary is no longer able to absorb these functions by redirecting existing staff; thus, the estimate includes those positions as part of the cost for the implementation of the *Richmond II* decision through the Appointed Attorneys Program.

State Board of Elections (SBE)

State costs of printing 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). However, it is assumed that the potential for such increased costs have been

anticipated in the SBEs' budget. Pursuant to Chapter 564 of 2001, SBE 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 decrease in expenditures for local correctional facilities and State's Attorneys' offices. According to information provided by the Maryland Judiciary and included in the final report of the Governor's Commission to Reform Maryland's Pretrial System, local corrections departments and State's Attorney's reported \$2.2 million in additional costs incurred during July 1 to November 30, 2014 as a result of implementation of the *Richmond II* decision.

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 ballots. It is assumed, however, that the potential for such increased costs will have been anticipated in local boards of elections' budgets.

Additional Information

Prior Introductions: SB 1114 of 2014, a similar bill, received a hearing in the Senate Judicial Proceedings Committee. No further action was taken on the bill.

Cross File: HB 496 (Delegate Vallario, *et al.*) - Judiciary.

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

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