

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 769 (Senator Smith)
 Judicial Proceedings

Courts - Discovery - In-Custody Witness Testimony

This bill requires a State’s Attorney to take specified actions regarding testimony or information from an “in-custody witness,” including reporting the information to the Criminal Justice Information System (CJIS) Central Repository and disclosing it to the defendant. The Department of Public Safety and Correctional Services (DPSCS), through CJIS, must maintain a repository of records concerning testimony and information obtained from in-custody witnesses and benefits received. The bill has prospective application only and does not affect criminal trials or hearings before the October 1, 2019 effective date.

Fiscal Summary

State Effect: General fund expenditures increase by \$403,700 in FY 2020. Future years reflect annualization and ongoing costs. Revenues are not affected.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	403,700	155,400	159,600	164,000	168,600
Net Effect	(\$403,700)	(\$155,400)	(\$159,600)	(\$164,000)	(\$168,600)

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

Local Effect: Potential significant increase in expenditures for State’s Attorneys’ offices. Revenues are not affected.

Small Business Effect: None.

Analysis

Bill Summary: “Benefit” means any consideration given to an in-custody witness, or to a third party at the request of or on the behalf of the in-custody witness, in return for testimony or information from the in-custody witness in a criminal proceeding against a suspect or defendant. Benefit includes an offer by a State’s Attorney to (1) recommend or agree not to oppose a more favorable release status; (2) recommend or agree not to oppose a motion for modification or reduction of a sentence; (3) provide information to the Division of Parole and Probation to assist the in-custody witness or a third party in obtaining a favorable action by a probation agent, a parole officer, or the parole commission; (4) provide immunity in a civil proceeding; (5) dismiss outstanding criminal charges, criminal prosecutions, or parole or probation violations; (6) provide financial assistance; or (7) provide any assistance in obtaining an amelioration of custodial conditions, status, or incarceration conditions.

An “in-custody witness” means an individual, other than an accomplice or a co-defendant, who (1) is incarcerated at the time that the individual offers or provides testimony against a suspect or defendant and (2) receives, or has an expectation of receiving, a benefit in return for the testimony.

If a State’s Attorney obtains testimony or information from an in-custody witness, the State’s Attorney must record (1) the substance of the testimony or the information obtained, even if it is not presented in a court proceeding; (2) the purpose for which the testimony or information was used; and (3) whether the witness received a benefit, and, if so, what the benefit is or will be. This information must be reported to CJIS.

Within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court, the State’s Attorney must disclose the following information to the defendant, whether or not admissible as evidence:

- any benefits an in-custody witness has received, or expects to receive, in exchange for providing testimony or information;
- the substance, time, and place of any statement allegedly made by a suspect or defendant to the in-custody witness or made by an in-custody witness to law enforcement implicating the suspect or defendant; and
- other cases in which the in-custody witness testified or provided information, if such information can be ascertained through reasonable inquiry, and whether the in-custody witness received a benefit in exchange for providing the testimony or information in those cases.

Prior to admitting testimony of an in-custody witness, the court must conduct a hearing, unless waived by the defendant, to determine whether the in-custody witness's testimony is reliable. At the hearing, the court must consider any benefit the witness has received or expects to receive and all material or information that tends to impeach the in-custody witness. A court may not allow the in-custody witness to testify in a trial unless the State's Attorney shows by a preponderance of the evidence that the in-custody witness's testimony is reliable. If an in-custody witness receives a benefit, the State's Attorney that provided the benefit must notify any victim in the in-custody witness's case of the benefit received.

Current Law: Pursuant to Maryland Rule 4-263, which governs discovery in circuit court cases, State's Attorneys must, without the necessity of request, provide specified information to the defense, including (1) information regarding each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony and (2) material or information in any form, whether or not admissible, that tends to impeach a State's witness, including a relationship between the State's Attorney and the witness; this includes the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness. Neither the State's Attorney nor the defense is required to disclose material or information if the court finds that its disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure. The State's Attorney is not required to disclose the identity of a confidential informant unless the State's Attorney intends to call the informant as a State's witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant. Maryland Rule 4-262, which governs discovery in District Court cases, includes similar provisions.

State Expenditures: General fund expenditures increase by \$403,717 in fiscal 2020, which accounts for the bill's October 1, 2019 effective date. This estimate reflects the cost of DPSCS hiring two individuals (one administrator and one assistant) to maintain the database established under the bill. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. It also reflects costs of approximately \$300,000 to create a database capable of meeting the bill's requirements. Although DPSCS estimates that creating such a database may take up to one year, it is assumed that costs associated with doing so are all incurred in fiscal 2020.

Positions	2
Salaries and Fringe Benefits	\$92,999
Database Creation	300,000
Operating Expenses	<u>10,718</u>
Total FY 2020 State Expenditures	\$403,717

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses, including approximately \$30,000 in annual maintenance costs for the database.

General fund expenditures for the Judiciary *may* increase minimally to accommodate additional evidentiary hearings as required by the bill. The Judiciary also notes that the required disclosures within the bill may discourage in-custody witnesses from cooperating in criminal cases, potentially resulting in fewer plea bargains and increased criminal trials, further straining judicial resources; any such impact is not accounted for in this analysis.

Local Expenditures: Expenditures for State's Attorneys' offices increase, potentially significantly, due to an increase in workload for State's Attorneys/staff to report the required information to CJIS, comply with enhanced discovery requirements, handle additional evidentiary hearings, and notify victims. Such expenditures may be significant in jurisdictions that frequently utilize in-custody witnesses in their cases. For example, the Baltimore County State's Attorney's Office advises that it frequently speaks with inmates regarding their knowledge of any crimes; individuals who are arrested are also routinely asked if they have such knowledge. Although in many occasions this information is not used (and is, therefore, not subject to the discovery provisions set forth above regarding witnesses), the bill requires such information to be recorded, reported to CJIS, and disclosed, even if not presented in a court proceeding, resulting in additional expenditures. Baltimore County further advises that expenditures associated with witness relocation and protection also increase significantly, as once defendants are made aware of information or testimony provided by in-custody witnesses, the safety of such witnesses is jeopardized.

Circuit court expenditures *may* increase minimally to accommodate additional evidentiary hearings as required by the bill. To the extent that the bill discourages in-custody witnesses from cooperating in criminal cases, as referenced above, State's Attorneys' offices and circuit court expenditures are further affected.

Additional Information

Prior Introductions: None.

Cross File: HB 1361 (Delegate Moon, *et al.*) - Rules and Executive Nominations.

Information Source(s): Baltimore County; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of Legislative Services

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