

Support SB 763 – Prosecutorial Information

MARYLAND ALLIANCE FOR JUSTICE REFORM
Working to end unnecessary incarceration and build strong, safe communities



TO: Chair Will Smith and Senate Judicial Proc. Com.
FROM: Phil Caroom, MAJR Executive Committee
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Maryland Alliance for Justice Reform (MAJR - www.ma4jr.org) supports SB 763. Crucially, the bill will shed light on the extent that plea bargain practices, by which 95% of all criminal charges are resolved, contribute to the nation-leading disparity in the rate at which Maryland incarcerates black citizens.

What's the problem?: The General Assembly, more than 20 years ago, created the Maryland State Commission on Criminal Sentencing Policy [MSCCSP] with a mission to “reduce unwarranted disparity, **including any racial disparity**, in sentences for criminals who have committed similar crimes and have similar criminal histories.” Md.Code, Crim.Proc.Art.,sec.6-202 (Emphasis added.) However, MSCCSP has neglected this function, especially in the central context of plea bargains.

The [Justice Policy Institute](#), just before the onset of the pandemic - late in 2019, reported that our state's criminal justice system incarcerates black Marylanders disproportionately at a higher rate than any other U.S. state, including the runner-up sister-state Mississippi. Our incarceration for black citizens is more than double the national average. This report sparked calls from the Baltimore [Sun](#), the Washington [Post](#), community leaders and advocates around the State for investigation and change.

How would this prosecutorial transparency bill help?: SB 763 would require the Administrative Office of the Courts (AOC) to collect data from States Attorneys' offices that is key to gaining insight into how plea-bargaining and other exercises of prosecutorial discretion may contribute to the disproportionately high incarceration rate of black Marylanders. Gathering this data would allow Maryland to study racial disparity resulting from plea bargaining practices as has been done in other jurisdictions. For example, A September 2020 Harvard University study of Massachusetts racial disparities found that *initial* charges are heavier against black & minority defendants; this, in turn, weakens their bargaining position in plea agreements. - A July 2020 Wisconsin report found blacks' rate of incarceration on violations of probation especially disproportionate. -A prior local Wisconsin study found 74% more likelihood for white defendants than black defendants to receive a plea agreement without incarceration.

Despite the [well-known phenomenon that plea bargains dispose of 95% of all criminal charges](#), the MSCCSP has taken few steps to collect data on plea bargain practices. Yet, as U.S. Supreme Court Justice Anthony Kennedy wrote for the Court's 2011 decision [Missouri v. Frye](#), plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”

Under section 15-505 of the bill, MSCCSP would receive such data annually and, “at least twice per year, publish issue-specific reports that provide in-depth analysis of one or more areas of prosecutorial decision making.” At least one such report, would “focus on racial disparities.”

What have other States done to focus on this problem?: The State of Connecticut passed a bill to provide prosecutorial transparency in 2019 passed a bill similar to SB 763 which was approved with unanimous support in both that state's House and Senate-

Fiscal impact: In 2021, a Fiscal Impact Statement suggested that the State's cost to implement this system might be minimal (under \$105,000 per year) but that local State's Attorneys' costs could be much higher (from \$140,000 per year in Dorchester County to \$1.3M per year for Montgomery County). The widely disparate estimates of the cost impact of SB 763 may reflect a lack of appreciation for just how little effort will be required to collect the data elements identified in the bill. Data could be gathered by having State's Attorney personnel make a few more keystrokes as they enter data into the existing Maryland Electronic Courts (MDEC) system and the MSCCSP sentencing guidelines system known as the Maryland Automated Guidelines System (MAGS). Both systems already are automated and are completed online by current States' Attorney personnel or court personnel.

SB763 would add only a few more details as to pretrial status (as discussed further below). As to plea agreements, the assigned prosecutor to every Circuit Court case will complete a MAGS sentencing worksheet before every plea. SB 763, MAJR suggests, would not add appreciably to the several minutes currently required for prosecutors to complete such worksheets.

The few items not currently collected by existing databases include:

- 1) Local State's Attorneys' listing of staff, resources, and disclosure of written policies. This is a simple one-time or annual disclosure; not an ongoing, daily task. (Please note that, if a policy doesn't exist, the office may comply by saying "no policy has been adopted.")
- 2) Reasons that criminal cases are dismissed. These could be expressed in a few words such as "insufficient evidence, victim's request, or diversion program" as used in the MAGS system to explain sentencing guidelines deviations.
- 3) Identification of a trial judge at sentencing or dismissal. MAJR suggests that this, perhaps, is a misguided policy because identification of sentencing judges is commonly believed to encourage more harsh sentencing in light of Maryland's contested Circuit elections.
- 4) Additional details related to plea offers such as discovery status, time limits imposed, and diversion programs offered. This group of items presents the most challenge, but MAJR still suggests that the staff and time requirements from 2021 fiscal impact statement is substantially overstated.

Rather than create an entirely new system, SB 763 calls for the MSCCSP "in coordination with the Administrative Office of the Courts [to] determine the manner in which the Administrative Office of the Courts provides to the [MSCCSP] Commission the information collected under § 15-502 of this subtitle." This will offer a good first step towards avoiding duplication of current data collection via MDEC and MAGS. If legislators fear approval of SB 763 because of costs concerns, MAJR urges consideration of an amendment to require an initial study of the logistics and costs to be reviewed before implementation this sorely-needed system in the 2023 Maryland General Assembly session.

Conclusion: For all the reasons stated above, MAJR strongly encourages the Committee to give SB 763 a favorable report --or, if too concerned with local fiscal impact, to approve a study or joint report from the Administrative Office of Courts, the MCSSCP, and designees representing State's Attorneys from a small and a larger county as to how to reduce the fiscal and staffing requirements to gather such information.

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PLEASE NOTE: Phil Caroom files this testimony for MAJR and not for the Md. Judiciary.