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POSITION ON PROPOSED LEGISLATION

BILL: SB 457 -- Workgroup to Study Trial in Absence

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: 2/15/2022

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on Senate Bill 457.

The Maryland Office of the Public Defender has sincere concerns about the constitutional and practical implications of permitting trials in absence.

First, the impact on represented and unrepresented individuals could be significantly different. If a person is absent, but an attorney proceeds on their behalf, there may be post conviction, attorney grievance commission, or other proceedings generated due to concerns over the attorney's efficacy. If neither an attorney nor the accused appear, there is a possibility that a warrant would be issued without notice to the accused person. Moreover, if an accused person is absent but an attorney is present, the entry of a plea – guilty, not guilty, or nolo contendere – may be left up to the attorney, despite the fact that the entry of a plea is a decision in the purview of the accused alone.

Second, if an accused person is unable to receive contact from the Court, the 30 days to file an appeal may come and go without that person having an opportunity to exercise their right to that appeal.

Third, practically, an empty defense table, or one with only an attorney, has a significant impact on a trier of fact. Even the most “minor” misdemeanor could have large impacts on someone's life and thus must be handled cautiously and fairly. The trier of fact should observe the accused person as they evaluate the case, not just a name on a docket entry.

Moreover, should a trial in absence be permitted for misdemeanor offenses, there is a strong argument that it would need to be limited to offenses with maximum sentences of 90 days or less because the accused person, proceeding in absentia, would likely have to waive right to jury trial.

Finally, and arguably most importantly, proceeding with a trial in the absence of the accused conflicts with critical constitutional and statutory protections afforded to someone when facing a criminal trial. A trial proceeding without the accused person would be contrary to the right of a criminal defendant to be present at every critical stage of a trial, provided by Article 5 of the Maryland Declaration of Rights, and the right of a defendant to confront their witnesses, provided by the Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights. *See also State v. Hart*, 449 Md. 246, 264-65 (2016). In addition to constitutional protections, trials proceeding without the accused would be contrary to the guarantee of Maryland Rule 4-231 that a criminal defendant has the right to be physically present in person at a preliminary hearing and every stage of a trial, except at a conference or argument on a question of law or when a *nolle prosequi* or stet is entered. Currently, there are only three circumstances that now permit a determination that the right to be present has been waived by the accused: (1) when the accused person is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; (2) when the accused person engages in conduct that justifies exclusion from the courtroom; or (3) when the accused person, either themselves or through counsel, agrees to or acquiesces in being absent. There is far too much at risk during any criminal proceeding to expand these circumstances.

For these reasons, the Maryland Office of the Public Defender urges an unfavorable report on Senate Bill 457.

Submitted By: Government Relations Division of the Maryland Office of the Public Defender.