

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Joseph M. Getty
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: House Judiciary Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: House Bill 249
Attorney General – Wrongful Convictions - Investigations
DATE: January 18, 2022
(2/1)
POSITION: Oppose

The Maryland Judiciary opposes House Bill 249. This bill provides that if a court grants a petition for a writ of actual innocence it must send a copy of the order to the Attorney General (OAG). The OAG then MUST investigate a whole host of persons involved in the case, including any judge that presided over the trial, regardless of the basis upon which the writ of actual innocence was granted. If the OAG finds any misconduct by any attorney or judge and believes discipline would be appropriate, OAG “shall send a recommendation to the Court of Appeals.”

It is unclear why the OAG would investigate the original trial judge, let alone be required to investigate a trial judge, under such circumstances. The bill appears to be premised on a misunderstanding of the writ of actual innocence. In order for a Court to grant a writ of actual innocence, the court must find that there is “*newly-discovered evidence*” that “*could not have been discovered in time to move for a new trial.*” In other words, the evidence must have discovered more than ten days after the conviction, which is the period by which one must file a Motion for New Trial. If the evidence was not even discovered until after the trial, why would the OAG be required to investigate the trial judge?

Further, this bill risks infringing on the constitutional duties of the Judiciary concerning both judicial conduct and attorney conduct. Article IV, §§ 4A and 4B of the Maryland Constitution creates the Commission on Judicial Disabilities (Commission) and gives it powers including to “[i]nvestigate complaints against any judge of the Court of Appeals, any intermediate courts of appeal, the circuit courts, the District Court of Maryland, or the orphans' court” and to “issue a reprimand and the power to recommend to the Court of Appeals the removal, censure, or other appropriate disciplining of a judge or, in an appropriate case, retirement.” Section 4B also gives the Court of Appeals rulemaking authority “to implement and enforce the powers of the Commission and the practice and procedure before the Commission.” By giving essentially the same investigatory and

recommendation powers to OAG, this bill infringes on the Commission’s constitutional role.

While it is possible that OAG and Commission could investigate judicial conduct simultaneously, having multiple investigations could impair the Commission’s ability to perform effectively its duties by creating confusion or distrust among complainants, respondents, or witnesses. In addition, different findings and recommendations by OAG and the Commission could create more conflict and confusion when presented to the Court of Appeals. Even more concerning is the possible undue pressure that judges could feel if OAG had power to investigate them. OAG attorneys regularly appear in court and if OAG has power to investigate judges, it could raise real or perceived conflicts of interest in cases involving OAG attorneys. Accordingly, empowering OAG by statute to investigate possible judicial misconduct and recommend disciplinary actions violates the separation of powers between branches of State government.

Similarly, by charging OAG with investigating and recommending discipline for attorney misconduct—whether by prosecutors or defense attorneys—this bill again risks infringing on Constitutional powers of the Judicial branch. The Court of Appeals has recognized that “the regulation of the practice of law, the admittance of new members to the bar, and the discipline of attorneys who fail to conform to the established standards governing their professional conduct are essentially judicial in nature and, accordingly, are encompassed in the constitutional grant of judicial authority to the courts of this State.” *Attorney General of Maryland v. Waldron*, 289 Md. 683, 692 (1981) (citations omitted). Indeed, Article IV, § 14(a) of the Maryland Constitution gives the Court of Appeals power to “adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State” The Court has exercised that authority by creating the Attorney Grievance Commission and the position of Bar Counsel and giving them the power and duty to investigate attorney misconduct. So, like with judicial discipline, this bill risks interfering with the Constitutional authority of the Judicial branch to oversee the practice of law, including the investigation of attorney misconduct.

There also appears to be a drafting error in the bill at page 6, lines 8 through 9. The new section 6-111 refers to an “order under § 3-801 of the Criminal Procedure Article,” but it appears to mean § ~~8~~301 (title and subtitle transposed).

cc. Hon. David Moon
Judicial Council
Legislative Committee
Kelley O’Connor