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POSITION ON PROPOSED LEGISLATION

BILL: HB 736

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

House Bill 736 is unconstitutional on its face, as it violates the 14th Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights. This Committee should not advance an unconstitutional bill that results in the illegal confinement of countless presumptively innocent defendants.

The United States Supreme Court has held that individuals charged with crimes cannot be detained pending trial without due process. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”). House Bill 736 creates an irrebuttable presumption that persons charged with certain crimes and having certain prior convictions are dangerous and ineligible for bail. The bill creates an illegal, irrebuttable presumption at a hearing before a judge that the facts alleged in a charging document are true. Irrebuttable presumptions resulting in a deprivation of liberty are unconstitutional. *See Cleveland Board of Education v. Laflour*, 414 U.S. 632, 644 (1974) (“permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments”) (citing *Vlandis v. Kline*, 412 U.S. 441, 452 (1973)); *see also Mahoney v. Byers*, 187 Md. 81, 87 (1946) (“it may readily be conceded, that a statute that should make evidence conclusive, which was not so of its own nature and inherent force, and by that means preclude the party from showing the truth, would be simply void.”) (internal citations omitted).

In *DeWolfe v. Richmond*, 434 Md. 444, 461 (2013), the Maryland Supreme Court (formerly the Court of Appeals) reaffirmed that, under Article 24 of the Declaration of Rights, the right to counsel “attaches in any proceeding that may result in the defendant's incarceration.” The right to counsel at a bail hearing would be rendered meaningless if the detention of the defendant at such a hearing was required by statute.

Maryland Criminal Procedure §5-202 already contains rebuttable presumptions against pre-trial release for certain types of cases and offenders. As public defenders, we believe these provisions are inherently problematic because no person should be presumed guilty or dangerous when faced with allegations of criminal conduct. For better or worse, they currently exist in the statute. However, there is absolutely no need to add irrebuttable presumptions to this statute and take away due process altogether for certain persons.

As a practical matter, and setting aside the constitutional defects, this bill will inevitably lead to disastrous outcomes. The Public Defender's Office has seen an alarmingly large number of clients falsely accused, including in cases where someone with an ax to grind filed bogus charges against our clients and then, being frustrated with the client's pretrial release on the first bogus charge, filed more bogus charges. In our experiences, those most often falsely accused have criminal histories, particularly for crimes of violence, because society and the criminal justice system unfairly presume their guilt based on their past.

Fortunately, there has been a trend over the last decade or so to remove such arbitrary barriers to the success of our returning citizens. This bill cuts against that progress, which is particularly troubling in Maryland, which has had the highest percentage of African-Americans in our prison population of any state in the country. This bill forbids judges from reviewing the allegations brought against anyone charged with a crime of violence who has another such charge pending or in their recent past. It also deprives such persons of any bail review hearing at all, deprives their counsel of making any arguments on their behalf, and deprives them of any opportunity to have a neutral magistrate consider whether it is fair for them to be detained pending trial, taken away from their families and denied the opportunity to make a living to support them. This is inherently wrong.

First Degree Assault is one of the enumerated "crimes of violence" in Maryland. It requires proof of either an assault with a firearm or an assault where someone intentionally causes or attempts to cause serious bodily injury. As Public Defenders, we have witnessed many clients charged with a First Degree Assault that didn't even come close to meeting either statutory definition. In these cases, the First Degree Assault felony is almost universally dismissed by the State at, or shortly before, the preliminary hearing set thirty days after the initial appearance. Some of these cases even include "citizen complaints" where the police investigated the allegations, but refused to charge anyone, and then the complaining witness filed an application for a statement of charges with a District Court Commissioner on their own,

often in barely legible handwritten form. In one such case, a complaining witness accused a female friend of attempting unsuccessfully to stab him with a fork, in front of a law enforcement officer, at which time he pushed her and she (the defendant) fell and hit her head. Despite this allegedly having occurred in front of a police officer, no officer filed charges. The complaining witness did file charges, perhaps fearing charges himself, and the client was charged with first degree assault, in a case that appears to have been dismissed. Such overcharged and falsely charged defendants, if they have a prior crime of violence or another pending crime of violence, are automatically detained without an opportunity to defend themselves under this bill. Simply put, this is outrageous.

Oftentimes, the State at bail review proceedings reads a person's criminal history from an "NCIC" printout that is confusing or misconstrued. This bill thus enhances the risk of our clients being erroneously detained without a bail hearing until we can investigate and confirm whether or not they in fact have the criminal history alleged, particularly in cases where the government alleges that someone has an out-of-state conviction. Convictions for out-of-state offenses such as robbery can be based on conduct that would not constitute a crime of violence in Maryland. In Ohio, for example, it is considered a robbery if an individual is arrested for shoplifting and the police find a weapon in their pocket, even if they never brandished it, took it out, or intended to use it. That is not a robbery in Maryland.

The bottom line is that due process affords every person the right to argue for their freedom when accused of a crime. This bill rips away that constitutional right from an entire class of people, including some who may have no prior criminal convictions.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on House Bill 736.

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

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