

Proposed Concurrence Position: ADMINISTRATION OF JUSTICE, JUDICIARY: Action to support access by indigent criminal defendants to legal counsel at every decisional stage of the judicial process, including bail hearings. (“Indigence” to be determined by the Court, based on Maryland guidelines. “Decisional stage” to be defined as any hearing before a judge or magistrate at which decisions in regard to a defendant are made. “Bail hearing” to be defined as any hearing before a judge or magistrate at which the amount and type of bail are set and/or incarceration is possible).

BACKGROUND

Maryland law now authorizes, but does not require, the appointment of attorneys to represent indigent criminal defendants at bail hearings. Currently a defendant is seldom represented by counsel when a commissioner first decides to order pretrial release or set bail. And except in five Maryland jurisdictions, indigent defendants remain without counsel when the commissioner’s bail decision is reviewed by a District Court Judge, usually 24 hours after arrest, and sometimes only by a video connection from the jail. In Baltimore City and in Anne Arundel, Harford, Montgomery and Prince George’s Counties, the state Office of the Public Defender (OPD) provides counsel at bail hearings, paid for by a state-funded pilot program or by the localities from local appropriations or federal block grant money. The localities that fund this service do so as a means of reducing the cost of their locally-funded detention centers where suspects are held. In the remaining jurisdictions, OPD does not represent indigent clients at bail hearings, resulting in many defendants having no lawyer present. . Legislation, which would require OPD to provide counsel at all bail hearings, has been filed annually in the General Assembly since 1998, and has been supported by the Governor, but has been either withdrawn by its sponsor or bottled-up in committee.

THE LAW

The U.S. Constitution’s Sixth Amendment requires that “in all criminal prosecutions, the accused shall ...have the Assistance of Counsel for his defense.” The Fourteenth Amendment applies the Sixth to the states. In the landmark *Powell v. Alabama* decision nearly 70 years ago, the U.S. Supreme Court declared that the pretrial stage from arraignment until trial is “the most crucial period for investigating criminal charges, preparing a defense and consulting with an attorney.” The Maryland Declaration of Rights, Article 21, requires “that in all criminal prosecutions, every man ... (is) to be allowed counsel...” Sections in the Maryland Code dealing with OPD include among the proceedings at which OPD “shall” provide legal representation “any...proceeding where possible incarceration pursuant to a judicial commitment of individuals in institutions of a public or private nature

may result.” In 2000, in *McCarter v. Maryland*, the Court of Appeals specifically upheld OPD Code provisions that “representation extends to all stages in the proceedings....” Many states in addition to Maryland do not, however, uniformly provide counsel for indigent defendants at bail determinations and for a lengthy period thereafter, on the premise that it is not specifically mandated under current statutory laws.

RESEARCH Studies have shown an economic justification for providing counsel to indigents at bail hearings, including a significant reduction in court congestion and overcrowded jails. This lowers the public expense for maintaining an unnecessarily large pretrial jail population, frequently including persons who would be released pending trial, if represented by legal counsel, and who are unable to make bail of \$1000 or less. Both jail and court congestion would also be reduced by earlier dispositions where defendants have initial access to attorneys. In Baltimore County, more than half of those arrested in 1998 and 1999, many of whom spent pretrial time in jail, had their cases dismissed or not prosecuted. An 18-month study by the Baltimore City Lawyers at Bail Project (LAB) showed that over 2 _ times as many represented defendants were released on recognizance from pretrial custody as were unrepresented defendants; while an equal number had their bail reduced to an affordable amount. There has been no reported increase in the number of “no-shows.” The Maryland Bar Association, as a result of its own study, has for the past four years unsuccessfully sought to persuade Annapolis lawmakers to pay for additional public defenders for bail hearings. Regardless of which jurisdiction pays and which saves the money, the state bar has argued that people who don’t need to be incarcerated should be out of the system. A Pretrial Release Project Advisory Committee, created in 2000 by Chief Appeals Court Judge Robert M. Bell, opened its October, 2001, report with the words: “Detention or release of an accused pending trial is a critical component of due process...” Among its recommendations is that “Every defendant is entitled to representation by counsel at initial appearance and bail review hearings; and every indigent defendant shall be afforded representation, if desired, by the office of the public defender at bail review hearings.”

PROS AND CONS OF PROPOSED POSITION

Opponents argue that state-mandated representation by OPD at bail hearings is not specifically required by federal and state laws and would be an intrusion into the court systems of the local jurisdictions. They point out that the governor's support has not been backed-up by including money in his budget; and that a state mandate would either cost the state money or be an unfunded or underfunded burden on the counties. Supporters argue that representation by OPD is a fair and logical reading of the federal and state constitutions and

the Maryland Code, is consistent with the basic principle of equal protection under the law, would save money now spent on incarceration, and free-up needed detention center space. Cost and savings estimates differ: the "Fiscal Note" for the most recently proposed legislation estimated that General Fund expenditures, primarily additional funding for OPD, would increase by \$1 million in the first year, but made no reliable estimate of savings. Estimates of detention costs, per inmate, per day range from \$57 to \$62 in Baltimore City, and \$17 to \$84 in the rest of the state. According to the LAB, during the months of its study, the detention population plummeted from 50% over capacity to 20% below, which on an annual basis would result in a reduction of the City's incarceration costs of \$4.5 million.

Bibliography

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