



**Testimony for the Senate Judicial Proceedings Committee
March 27, 2013**

**HB 153 – Office of the Public Defender – Representation at Bail Hearing -
Provisional**

OPPOSE

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The ACLU of Maryland opposes HB 153, a bill that denies the constitutional right to representation by the Office of the Public Defender to an indigent individual after the conclusion of the bail hearing.

In 2012, in *DeWolfe v. Richmond*, _ A.3d _, 2012 WL 10853 (Md 2012), the Maryland Court of Appeals held the right of indigent defendants to counsel includes at bail proceedings in the State, and that representation is required at all stages of the case after a bail review hearing. *DeWolfe* is ongoing, regarding issues of when an indigent defendant is entitled to representation. Because the Court is deciding a case that would affect the statute that HB 153 seeks to amend, we recommend that this body defer action at this time.

However, should this committee decide to report on HB 153, we oppose this bill for various reasons.

The Maryland Public Defender Act

The Maryland Public Defender Act, Md. Crim. Proc. Code Ann. §§ 16-201 *et seq.*, expressly requires representation of indigent defendants at, *inter alia*, “any . . . proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result.” Md. Crim. Proc. Code Ann. § 16-204(b)(1)(iv). Moreover, the statute requires representation “in all stages” of such a proceeding, *id.* § 16-204(b)(2), language which the Court of Appeals has held is unambiguous: “[T]he statutory right to counsel ‘extends to all stages in the proceedings.’ ‘All’ means ‘all.’” *McCarter v. State*, 363 Md. 705, 716 (2001) (emphasis added).

HB 153 is Practically and Constitutionally Problematic

Under current law, an individual applies to the Office of the Public Defender (“OPD”) for representation for their bail review hearing. This representation continues throughout the pendency of the case. HB 153 would terminate that representation after the bail hearing. This would not only deprive the defendant of representation at a critical time in his or her case, but would also require additional, duplicative and unnecessary work on the part of the OPD and the defendant to re-qualify the defendant for continued representation.

When the General Assembly created a Statewide public defender system, the “purpose was to implement the underlying Constitutional mandate- to provide for the realization of the constitutional guarantees of counsel in the representation of indigents ... in criminal and juvenile proceedings within the State....” *Baldwin v.*

State, 51 Md. App. 538, 549-50, 444 A.2d 1058, 1065-66 (1982) (internal citations omitted).

The right to the assistance of counsel in criminal proceedings is a fundamental right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). It is “indispensable to the fair administration of our adversary system of criminal justice.” *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Effective representation by OPD goes to the heart of realizing criminal defendant’s sixth amendment guarantees. There can be no doubt that defendants “require[] aid in coping with legal problems” and can benefit from the assistance of counsel. *United States v. Wade*, 388 U.S. 218, 312 (1967).

HB 153 runs afoul of constitutional requirements, as an individual “is entitled to the presence of appointed counsel during any “critical stage” of the postattachment proceedings.” *Rothgery v. Gillespie County*, 554 U.S. 191, 211-12, 128 S.Ct. 2578, 2591 (2008); *See also McCarter v. State*, 363 Md. 705, 716 (2001) (upholding the statutory right to counsel in all stages of a criminal proceeding). OPD meets with and qualifies a defendant for representation prior to the bail review hearing, providing time for the defense attorney to effectively prepare to make their client’s case. HB 153 would then deprive this defendant of counsel during the post-bail review time, during which a defense attorney would be interviewing witnesses and preparing the client’s case, as well as being present during any interview by the prosecution. Having continued representation after the bail hearing and through trial and beyond is crucial to preserving a defendant’s sixth amendment rights.

While an amendment to this bill created an exception to termination of representation for an individual who remains incarcerated after a bail hearing, individuals undergoing criminal proceedings who are released from jail after the bail hearing still face extreme difficulties. The fact remains that this bill will compound the already difficult burdens on defendants to prove their income-eligibility by denying them representation as they await eligibility by the OPD. Whether or not that individual is released from jail, that individual is undergoing criminal proceedings against him or her and is entitled to counsel. *See Rothgery*, 554 U.S. at 211-12, 128 S.Ct. at 2591; *McCarter*, 363 Md. at 716.

Racial and Social Impact

The need for counsel after bail hearings is especially acute in Maryland where there are wide racial disparities as to who is arrested and detained. For example, despite making up only 64 percent of Baltimore residents, African Americans comprise 89 percent of the people held in the Baltimore jail. Justice Policy Institute, *Baltimore Behind Bars*, at 15 (June 2010). The vast majority of these minority defendants are poor and require the assistance of public defenders. Thus, refusing to provide counsel after a bail hearing will have a disproportionate impact on African-Americans and exacerbate their overrepresentation in detention.

The need for the assistance of counsel in this setting is urgent in light of the

particular obstacles that the class of indigent defendants faces. For instance, the Supreme Court has observed the following with regard to indigent defendants:

[Sixty-eight percent] of the state prison populatio[n] did not complete high school, and many lack the most basic literacy skills. [S]even out of ten inmates fall in the lowest two out of five levels of literacy – marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article. Many . . . have learning disabilities and mental impairments.

Halbert v. Michigan, 545 U.S. 605, 620-21 (2005) (citations omitted). Extensive research confirms that indigent defendants tend to be among the least educated and least literate members of society, and as a result, are less able than the average citizen to cope with a proceeding in which they are called upon to advocate for themselves and may make statements that could affect their lives and liberty. See *Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey*, U.S. Dept. of Education National Center for Education Statistics (May 2007), at 6-7, 13; *Education and Correctional Populations*, U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics (Jan. 2003) at 1; *Mental Health Problems of Prison and Jail Inmates*, U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics (Sept. 2006) at 1, 3.

Budgetary Concerns

After the Court in *DeWolfe* held that under the Public Defender Statute, defendants are entitled to representation at the commissioner stage, the legislature made statutory changes such that representation was restricted to bail review hearings. The stated reason for this was budgetary.

We agree with the Court of Appeals' finding in *DeWolfe* that budgetary concerns cannot play a role in determining the validity of a claim or right to counsel or in delaying implementation of a substantive right. *DeWolfe*, __ A.3d __, 2012 WL 10853, 14. Nor should alleged fiscal concerns drive further deprivation of counsel as is proposed here.

Only the defendant's financial ability may be taken into account for public defender representation

Some proponents of this legislation have claimed that reliance upon inferences of wealth for which there is no support in the record and upon resources over which a defendant has no control is sufficient evidence for them to be terminated from OPD represented and forced to re-apply. This argument is both false and unconstitutional.

“Eligibility for the services of the [OPD] shall be determined on the basis of the need of the person seeking legal representation.” *Baldwin*, 51 Md. App. at 551. As *Baldwin* stated,

Need shall be measured according to the financial ability of

the person to engage and compensate competent private counsel and to provide all other necessary expenses of representation. Such ability shall be recognized to be a variable depending on the nature, extent and liquidity of assets; the disposable net income *of the defendant* ; the nature of the offense; the effort and skill required to gather pertinent information; the length and complexity of the proceedings; and any other foreseeable expenses.

Baldwin, 51 Md. App. at 550-51.

The Court in *Baldwin* found that it is improper to infer a defendant's wealth based on the resources of the defendant's family or the ability of the defendant's family to afford private counsel. *Baldwin*, 51 Md. App. at 554. In *Baldwin*, the defendant's family had pledged their home as collateral for the defendant's bail bond. *Id.* However, the uncontradicted evidence in that case showed that defendant had *no* liquid assets and little or no disposable net income himself. *Id.* *Baldwin* rejected the notion that eligibility can be determined "based entirely upon liquidity and immediately available resources." *Baldwin*, 51 Md. App. at 554. "[A] defendant's financial ability must be measured in terms of *his* resources- the extent and liquidity of *his* assets, *his* disposable net income." *Id.*

We urge the Committee to give an unfavorable report to HB 153.