



Testimony for the Senate Judicial Proceedings Committee
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**SB 942 Criminal Procedure - Government-Funded Legal Representation -
Initial Appearance**

OPPOSE

The ACLU of Maryland opposes SB 942, which attempts to circumvent the Court of Appeals decision in *DeWolfe v. Richmond (Richmond II)*,¹ by amending the Maryland Declaration of Rights such that it would not be interpreted to require representation by counsel at an arrestee's initial appearance before a District Court Commissioner.

As an initial matter, SB 942 offensively attempts to amend the state constitution to undercut the rights of everyday Marylanders facing the criminal justice system.

SB 942 does not address the myriad harms resulting from the current bail system

In *Richmond II*, the Court of Appeals acknowledged the many ills of the existing system.² For example, the court mentioned the health and safety risks associated with prison stays as well as the possibility of job loss for those in low-wage earning employment.³ The court further recognized the hazards of the current system for illiterate defendants, who may not be able to read documents related to their charges, and the likelihood that bail decisions are improperly affected by race.⁴ By attempting to sidestep the Court of Appeals decision, SB 942 calls on the legislature to turn a willfully blind eye to the deficiencies of the current bail system, which were clearly noted in *Richmond II*.

The Court of Appeals' decision in *Richmond II* will continue to hold under the Federal Constitution

Although the Court of Appeals did not base its decision on Federal Constitutional grounds, its decision will continue to hold if the Federal Constitution is applied, and the existing system will fail to pass Federal Constitutional muster.

In *Richmond II*, the Court of Appeals held that under the Due Process component of Article 24 of the Maryland Declaration of Rights, an indigent defendant has a right to state-furnished counsel at an initial appearance before a District court commissioner.⁵ The principle behind this due process guarantee is the same principle behind the right to counsel under the Sixth Amendment to the U.S. Constitution. In *Gideon v. Wainwright*, the U.S. Supreme Court employed arguments similar to those articulated in *Richmond II*, to hold that criminal defendants have a right to counsel under the Sixth Amendment to the U.S. Constitution. Like the Maryland Court of Appeals, the Supreme Court reasoned that a lay person without the aid of counsel lacks the "skill and knowledge

¹ *DeWolfe v. Richmond*, 76 A.3d 1019 (Md. Ct. Appeals 2013).

² *Id.* at 1023.

³ *Id.*

⁴ *Id.*

⁵ *DeWolfe v. Richmond*, 76 A.3d 1019, 1026 (Md. Ct. Appeals 2013).

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adequately to prepare his defense, even though he have a perfect one [...] [and] he faces the danger of conviction because he does not know how to establish his innocence.”⁶ More recently, in *Rothgery v. Gillespie*, the Supreme Court noted the principle that the right to counsel attaches at the first appearance before a county court commissioner.⁷

Therefore, the *Richmond II* decision will continue to hold under the Sixth Amendment to the U.S. Constitution and SB 942 does not save the existing bail review system from Federal Constitutional infirmities.

SB 942 may cause the state to pay exorbitant attorneys fees by forcing the *Richmond* case to be litigated solely on Federal Constitutional grounds

Prevailing plaintiffs in Federal Constitutional cases are entitled to attorneys’ fees under 42 United States Code Section 1988.⁸ If SB 942 is passed, the *Richmond* case may be litigated solely on Federal Constitutional grounds. Should the *Richmond* plaintiffs prevail in a Federal Constitutional claim challenging the proposed SB 942, the state may be forced to pay astronomical attorneys fees incurred throughout the case, which has been ongoing since 2006. The history of the *Richmond* line of cases weighs heavily in favor of the plaintiffs and the plaintiffs will likely prevail in a claim against the proposed SB 942. Moreover, this cost would come in addition to the cost of implementing the *Richmond* decision.

To conclude, SB 942 does not remedy the ills of the existing bail review system; will likely be held unconstitutional under the Federal Constitution; and could cost the state an outrageous sum of money in the form of attorneys’ fees.

For the foregoing reasons, the ACLU of Maryland urges an unfavorable report on SB 942.

⁶ *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

⁷ *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 203 (2008) (citing *McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991)).

⁸ 42 U.S.C.A. § 1988 (West).