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Court restores right to public defenders at bail hearings

By [Tricia Bishop](#), The Baltimore Sun

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Maryland's highest court ruled Wednesday that poor suspects should have access to counsel at all bail hearings, advertisement overturning the General Assembly's attempt to spare already-stretched public defenders from attending hundreds of thousands of proceedings each year.

In a 4-3 decision issued Wednesday, the Court of Appeals found that indigent defendants should have access to public defenders when court commissioners set their bail. The ruling said suspects have that right "in any proceeding that may result in the defendant's incarceration."

State officials argued that indigent clients get adequate representation over the course of the judicial process and that it would be too costly for the Maryland public defender's office to staff so many hearings.

After a similar court ruling in 2012, lawmakers passed a law making clear that free representation would be available starting with bail review hearings, at which judges review commissioners' decisions.

"Thousands of individuals have not had constitutionally required representation," said Mitchell Y. Mirviss, one of two Venable attorneys handling the case, which grew from a 2006 class-action filing in Baltimore. He said he was "elated" by the ruling but disappointed it took so long to reach.

Wednesday's decision was also a victory for University of Maryland law professor Douglas Colbert, who along with his students has been advocating for such representation for 15 years, particularly for nonviolent offenders. Their work led to the class action.

"It's a remarkable decision," Colbert said. "It's the most important right-to-counsel decision for poor people" since the U.S. Supreme Court ruled in 1963 that the government had to provide legal counsel to indigent people.

"Now a poor person has a chance to regain liberty before trial as the law provides," said Colbert.

The Maryland attorney general's office, which argued against representation at the commissioner stage, declined to comment Wednesday.

Public defender Paul DeWolfe said his office would "do our best to implement the court's decision."

"Obviously, it would entail resources well beyond what we currently have," DeWolfe said. "We struggle to provide adequate representation on all levels for our clients, and this is an additional requirement that will take enormous amounts of additional resources.

"It doesn't just affect the public defender's office," he added, but also "the police, the commissioners, the corrections people and the state's attorneys, [who] are now going to have to decide how they're going to be present at all these hearings."

One analysis estimated that the state would need to hire nearly 250 more public defenders to attend the 180,000 or so annual commissioner hearings that occur around the clock statewide.

Mirviss argued the cost estimates are inflated. "Every study that has looked at the effect of providing counsel to criminal defendants has found that it saves the state money by eliminating the costs of unnecessary incarceration," Mirviss said.

Because of cost concerns and in response to the first court ruling, Maryland legislators amended the state's Public Defender's Act last year to expressly state that lawyers aren't required before commissioners. The legislation also expanded access to public defenders at bail review hearings before judges.

Those hearings are typically held within 24 hours, unless the court is closed for a holiday or weekend.

DeWolfe said about 35 new public defenders were hired to comply with the law, which cost up to \$6 million to put into practice.

Del. Kathleen Dumais, vice chairwoman of the House Judiciary Committee, said the legislature also created a task force to continue to examine the issue of adding attorneys during commissioner hearings, but it hasn't come to any conclusions.

"Everybody has been sort of waiting to see what the court does," Dumais said. Now the work will begin anew and may become an issue in the next General Assembly session, which begins in January.

"We as a legislature may have to sort of look at 'Well, what's the right thing to do?'" Dumais said.

The three dissenting judges ruled that the legislature's quick fix of providing lawyers at the review hearing was good enough under state law.

"The changes adopted by the majority today will assuredly alter the commissioner hearing from an informal process into a mini-trial, all of which can be repeated again before a District Court Judge within 24 hours if the outcome is not favorable to the defendant," Chief Judge Mary Ellen Barbera wrote on behalf of the dissenters, who included Judges Glenn T. Harrell Jr. and Sally D. Adkins.

The majority judges said it was a constitutional issue, however.

"As a matter of Maryland constitutional law, where there is a violation of certain procedural constitutional rights of the defendant at an initial proceeding, including the right to counsel, the violation is not cured by granting the right at a subsequent appeal or review proceeding," wrote retired Judge John C. Eldridge, who was joined by Judges Lynne A. Battaglia, Clayton Green Jr. and retired Judge Robert M. Bell.

Wednesday's majority opinion also repeated language from the earlier ruling, citing the stance by plaintiffs that unrepresented suspects "are more likely to have more perfunctory hearings, less likely to be released on recognizance, more likely to have higher and unaffordable bail, and more likely to serve longer detentions or to pay the expense of a bail bondsman's non-refundable 10% fee to regain their freedom."

District Court judges are also unlikely to overturn the commissioners' rulings, they wrote.

"This ought to be looked at as a win-win situation," said Colbert, the professor, "because the system can now focus more seriously on the people — on the limited number of people — who must remain in jail awaiting trial and the many other individuals charged with nonviolent crimes can be released."

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