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| **BEN C. CLYBURN, *et al.*,** | * | IN THE |
| *Appellants*, | * | COURT OF APPEALS |
| v. | * | OF MARYLAND |
| **QUINTON RICHMOND, *et al.*,** | * | September Term, 2013 |
| *Appellees*. | * | No. 105 |

* * * * * * * * * * * * *

**CERTIFICATE OF SERVICE**

I certify that, on the 18th day of February 2014, two copies of the Brief of Appellants in the captioned case were sent by e-mail to:

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_____
Julia Doyle Bernhardt

**IN THE**
**COURT OF APPEALS OF MARYLAND**

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September Term, 2013

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No. 105

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**BEN C. CLYBURN, *et al.*,**

*Appellants,*

v.

**QUINTON RICHMOND, *et al.*,**

*Appellees.*

---

On Appeal from the Circuit Court for Baltimore City
(Alfred Nance, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals of Maryland

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# BRIEF OF APPELLANTS

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February 18, 2014

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# BRIEF OF APPELLANTS

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## STATEMENT OF THE CASE

The appellants, officials of the District Court of Maryland, appeal from an injunction entered against them by the Circuit Court for Baltimore City. The circuit court issued the injunction after the plaintiffs—a class comprising indigent criminal defendants arrested in Baltimore City, whose rights were declared in a judgment issued by the circuit court on remand from this Court's September 25, 2013 decision in *DeWolfe v. Richmond*,

434 Md. 444 (2013) ("*DeWolfe II*)—initiated proceedings seeking supplemental relief based on the declaratory judgment. The injunction directed the officials of the District Court (the "District Court Defendants")[1] to immediately "appoint counsel for Plaintiffs at all initial bail hearings"; the order further "prohibited and enjoined" the District Court officials from "conducting initial bail hearings without appointing counsel for Plaintiffs" and from "directing the incarceration of any Plaintiffs who have not been provided counsel at such hearings." (E. 226.) The injunction entered by the circuit court on January 10, 2014 stated that "this Order shall take effect IMMEDIATELY." (E. 226.)

Counsel for the District Court Defendants received a copy of the January 10 order in the mail on January 13. (E. 228.) The District Court Defendants noted their appeal of the injunction later the same day. (E. 29.) On January 14, the District Court Defendants petitioned this Court for a writ of certiorari and moved, under Rule 8-303(e), for an order staying the circuit court's injunction pending disposition of the certiorari petition. Later that day, this Court entered a temporary stay order. (E. 234.) On January 23, 2014, the Court granted the petition and extended the stay until 4:30 p.m. on March 7, 2014, when the Court is scheduled to hear oral argument in this appeal. (E. 235-36.)

[1] The appellants, defendants in the underlying circuit court action in which the declaratory judgment was issued, are Ben C. Clyburn, Chief Judge of the District Court of Maryland; Barbara Baer Waxman, Administrative Judge for the District Court of Maryland for Baltimore City; David W. Weissert, Coordinator of Commissioner Activity for the District Court of Maryland; Linda Lewis, Administrative Commissioner for the District Court of Maryland for Baltimore City; and the Commissioners of the District Court of Maryland for Baltimore City. The other defendant in the circuit court action, Paul B. DeWolfe, Jr., the State Public Defender, is not subject to the terms of the injunction challenged in this appeal.

## QUESTIONS PRESENTED

1. Did the circuit court err in granting an application for supplemental relief based on a prior declaratory judgment without first issuing a show cause order, as required by the statute governing such applications?

2. Did the circuit court err in entering an injunction directing officials of the District Court to conduct initial appearances in a manner inconsistent with the rules promulgated by this Court?

3. Did the circuit court err in ordering officials of the District Court to appoint counsel for all arrestees at initial appearances and prohibiting those court officials from conducting initial appearances for arrestees who were not provided with counsel?

## STATEMENT OF FACTS

### Proceedings from 2006 to 2010

In November 2006, the plaintiffs filed a class-action complaint for declaratory and injunctive relief in the Circuit Court for Baltimore City against the District Court Defendants.[2] (E. 6-9, 11; R. 1-29.) The plaintiffs claimed that indigent arrestees in Baltimore City have constitutional and statutory rights to be represented by the Public Defender when they are presented to a District Court commissioner under Rule 4-213(a) and that the District Court Defendants violated these rights by permitting presentments to be conducted without the presence of appointed counsel. (R. 1-29.)

[2] In addition to these officials, the District Court of Maryland was itself named as a defendant, but was subsequently dismissed from the action. (E. 13.)

The District Court Defendants moved for summary judgment as to all claims (E. 15), and the plaintiffs cross-moved for partial summary judgment on their claims under Title 16 of the Criminal Procedure Article ("the Public Defender Act"), the Due Process clause of the Fourteenth Amendment, and Article 24 of the Maryland Declaration of Rights. (E. 13; R. 153, 587.) In November 2007, the circuit court granted summary judgment for the District Court Defendants on all claims (E. 17), and the plaintiffs appealed (E. 17). After granting certiorari before decision in the Court of Special Appeals, this Court ruled that, because the plaintiffs had not joined the Public Defender as a necessary party, the circuit court should have dismissed the complaint under Rule 2-211(a). *See Richmond v. District Court of Md.*, 412 Md. 672 (2010). Accordingly, the Court vacated the judgment and remanded the case with instructions that the case be dismissed if the plaintiffs failed to amend their complaint to assert claims against the Public Defender. *See id.* at 672-73.

**Proceedings After the First Remand**

After the plaintiffs filed their third amended complaint (R. 1440) and moved again for summary judgment (E. 22; R. 1556), the circuit court issued an opinion on September 30, 2010, ruling that presentment to a district court commissioner under Rule 4-213(a) is a critical stage of a criminal prosecution; that indigent arrestees in Baltimore City have a Sixth Amendment right to be represented at presentment by appointed counsel; and that denial of counsel violates the plaintiffs' due process rights. (E. 239-51.) Based on these conclusions, the court granted summary judgment against the District Court Defendants

and the Public Defender, but stayed its decision pending the conclusion of appellate proceedings. (E. 24, 251.) Both the Public Defender and the District Court Defendants noted timely appeals. (E. 24.) On December 28, 2010, at the plaintiffs' request, the court issued a declaratory judgment (E. 25, 253-55) and an amended order denying the plaintiffs' claims for injunctive relief without prejudice (E. 25, 252). On February 14, 2011, again at the plaintiffs' request, the circuit court issued an amended order in which the court again denied the plaintiffs' claims for injunctive relief, but omitted language appearing in the earlier order that suggested that the court was reserving action on those claims for further, post-appeal proceedings. (E. 256.) Both the Public Defender and District Court Defendants filed renewed notices of appeal (E. 25); the plaintiffs cross-appealed (E. 26). This Court subsequently granted the plaintiffs' petition for certiorari before decision in the Court of Special Appeals. *See DeWolfe v. Richmond*, 420 Md. 81 (2011).

**Proceedings in 2012**

On January 4, 2012, this Court issued an opinion holding that, because an arrestee's initial appearance before a commissioner is a "stage of the criminal proceeding" under the Public Defender Act, an eligible arrestee was entitled by statute to representation by the Public Defender when a commissioner provisionally establishes conditions of release at the presentment. *See DeWolfe v. Richmond*, 434 Md. 403, 430 (2012) ("*DeWolfe I*"). The Court further held that an arrestee was entitled to representation at a subsequent bail determination made by a judge. *See id.* at 440. The

District Court Defendants moved for reconsideration, seeking a technical clarification of the Court's opinion, but did not seek a stay. (App. 82-86.) The Public Defender separately moved for reconsideration and, alternatively, for a stay of the Court's judgment. (App. 88-96.) The plaintiffs opposed both motions, but in doing so made their own request for reconsideration, by asking the Court to address their unresolved constitutional claims, in light of pending legislative proposals to amend the Public Defender Act. (App. 107-116, 117-126.)

While the motions for reconsideration were pending, the General Assembly enacted emergency legislation amending the Public Defender Act.[3] The legislation amended § 16-204 of the Criminal Procedure Article to provide that "representation is not required to be provided to an indigent individual at an initial appearance before a district court commissioner"; however, the legislation expressly provided for representation by the Public Defender at a subsequent "bail hearing before a District Court or circuit court judge." Md. Code Ann., Crim. Proc. § 16-204(b)(2)(i), (ii).

The Court then solicited the parties' views as to the most appropriate course for further proceedings. (App. 174-75.) The District Court Defendants suggested that a remand for development of a concrete factual record based on experience under the amended statute and rules would be beneficial. (App. 176-83.) In proposing this approach, the District Court Defendants observed that the circuit court had not resolved

[3] *See* 2012 Md. Laws, ch. 504 (Senate Bill 422), ch. 505 (House Bill 261). The legislation became effective under Article XVI, § 2 of the Constitution, upon the Governor's signature on May 22, 2012.

disputed factual issues either in granting summary judgment for the defendants in 2007 or in reaching the opposite result in 2010. (App. 177-79.) The District Court Defendants also noted that "an additional benefit" to further circuit court proceedings would be to "allow the plaintiffs to pursue their claims for injunctive relief"; doing so would "serve the interest in judicial efficiency" because, if the plaintiffs were successful, "the circuit court would be able to tailor the relief based on actual evidence." (App. 182.) The plaintiffs and the Public Defender disagreed with this approach, however (App. 185-87, 189-95), and the Court scheduled a further round of appellate proceedings, with supplemental briefing and additional oral argument (App. 197-99).

**Proceedings in 2013 and 2014**

*The DeWolfe II Decision*

On September 25, 2013, this Court issued its decision declaring that the current procedures for the initial appearance of an arrestee are constitutionally inadequate, because the rules now in effect do not provide for representation by counsel at an arrestee's initial appearance before a commissioner of the District Court. *DeWolfe II*, 434 Md. at 464. In reaching that conclusion, the Court stated that "the procedural due process component" of Article 24 of the Maryland Declaration of Rights "has long been construed to require, under some circumstances, state-furnished counsel for indigent defendants," and the Court characterized its interpretation of that provision as "an evolving process." *Id.* at 458. The Court explained that its evolving conception of Article 24's due process guarantee had led the Court to find a due process right to counsel in civil proceedings that "may result in the defendant's incarceration." *Id.* at 458, 461-62.

As relevant here, the Court concluded that Article 24 now requires state-furnished counsel at a criminal defendant's initial appearance before a commissioner, because the arrestee is already "in custody," and a commissioner's determination not to release the arrestee will cause the defendant to "remain incarcerated." *Id.* at 465. Although the arrestee will be represented by counsel at the independent bail determination hearing before a judge shortly after the presentment, the Court concluded that this procedure does not "rectify the constitutional infirmity of not providing counsel for an indigent defendant at the initial proceeding before a Commissioner." *Id.* at 462. The General Assembly's amendment of the Public Defender Act to expressly provide counsel at a bail hearing before a judge therefore does not affect the constitutional analysis, the Court held, because "where there is a violation of certain procedural rights of the defendant at an initial proceeding, . . . the violation is not cured by granting the right at a subsequent appeal or review hearing." *Id.* (citing *Zetty v. Piatt*, 365 Md. 141, 155-60 (2001) (provision of counsel at hearing on motion for reconsideration did not cure failure to provide counsel at civil contempt proceeding resulting in defendant's incarceration); *Reed v. Foley*, 105 Md. App. 184, 196-97 (1995) (failure to provide counsel at master's hearing on civil contempt not cured by provision of counsel at exceptions hearing).

Chief Judge Barbera, joined by Judges Harrell and Atkins, dissented. 434 Md. at 465-70.

*The Court's November 6 Orders Adopting Provisional Rules Amendments and Denying Reconsideration of the Court's Ruling in DeWolfe II*

On November 6, 2013, this Court issued a rules order adopting provisional changes to the rules governing initial appearances. (E. 44.) As relevant here, the November 6 Rules Order amends Rule 4-216 ("Pretrial Release – Authority of Judicial Officer; Procedure") by striking former subsection (e) ("Initial Appearance Before a Judge") and replacing it with new subsection (e) ("Attorney"). (E. 73-78.) New subsection (e) provides that "[a] defendant has a right to be represented by an attorney at an initial appearance before a judicial officer." (E. 74.) The provisional rules anticipate that representation before a commissioner will be provided by the Public Defender or "by an attorney appointed for that purpose by the District Court . . . if the Public Defender does not provide representation." Rule 4-216(e)(1)(A)(iii) (E. 74.) Because the current Public Defender lacks funds to provide representation at initial appearances before commissioners, subsection (e)(1)(A)(iii) provides that the District Administrative Judge "shall appoint attorneys to represent such defendants" in those proceedings; and, because the District Court lacks the funds needed to pay these court-appointed lawyers from its existing budget, the provisional rules contemplate that the District Court will "charge the fees and expenses for such representation against the State of Maryland." (E. 74.)

Rule 4-216(e)(1)(B) governs the entry of appearance (which may be accomplished electronically, in writing, or by telecommunication) and (C) provides that the initial appearance is "separate and distinct from any other stage of a criminal action." (E. 74.) Rule 4-216(e)(2)(B) provides that representation by appointed counsel "shall be limited

to the initial appearance before the judicial officer and shall terminate automatically upon the conclusion of that stage of the criminal action," absent renewal or extension by the Public Defender pursuant to Rule 4-216.1. (E. 75-76.)

The amendment to Rule 4-216(e)(3) ("Waiver) would authorize commissioners to conduct waiver inquiries before continuing with the initial appearance, an authority that the commissioners presently lack. (E. 76.) Before accepting a defendant's waiver, Rule 4-216(e)(3)(A) requires the commissioner to advise the defendant that:

> (i) the defendant has the right to an attorney at both the initial appearance and any proceeding under Rule 4-216.1;
>
> (ii) "an attorney can be helpful in advocating that the defendant should be released immediately on recognizance or on bail with minimal restrictions;
>
> (iii) "if the defendant is eligible, the Public Defender or a court-appointed attorney will represent the defendant at the initial appearance";
>
> (iv) "if the defendant is represented by a court-appointed attorney, the representation is only for the purpose of the initial appearance, but the defendant will be represented by the Public Defender in any proceeding under Rule 4-216.1";
>
> (v) the defendant must timely apply and qualify in order to obtain the Public Defender's services beyond a proceeding under Rule 4-216.1;
>
> (vi) "if the defendant waives representation, the waiver is effective only for the initial appearance and not for subsequent proceedings";
>
> (vii) "if it is impracticable for an attorney to be present in person, the attorney will be able to consult privately with the defendant and participate in the proceeding by electronic means or by telecommunication"; and
>
> (viii) if the defendant desires to retain an attorney, "and that attorney is not able to be present in person or able to participate by electronic means or by telecommunication, the hearing may need to be postponed, in which case the defendant will be temporarily committed until the earliest

> opportunity that the defendant can be presented to the next available judicial officer."

Rule 4-216(e)(3)(A) (E. 76-77). If the defendant, after receiving this advice, desires to waive counsel, the amended rule authorizes the commissioner to determine whether the waiver is knowing and voluntary. If so, the commissioner must "announce and record that finding" and then proceed with the initial appearance. Rule 4-216(e)(3)(B) (E. 77). The waiver "is applicable only to the initial appearance" under Rule 4-216. *See* Rule 4-216(e)(3)(C) (E. 77).

Rule 4-216(e)(4) ("Electronic or Telecommunication Appearance") permits (but does not require) the State's Attorney to appear, either in person or by electronic means or telecommunication, if personal appearance is impracticable; the rule also allows a defense attorney to appear by electronic means or telecommunication, if personal appearance is impracticable. (E. 78.)

Under the provisional rules, if the initial appearance cannot proceed as scheduled, Rule 4-216(h) ("Temporary Commitment Order") would authorize the commissioner to enter a temporary commitment order. "[I]n that event, the defendant shall be presented at the earliest opportunity to the next available judicial officer for an initial appearance." (E. 82.)

The amendments to the rules also create new record-keeping requirements governing the initial appearance before a commissioner. Rule 4-216(i) ("Record") requires the commissioner to "make a brief written record of the proceeding, including:

(1) whether notice of the time and place of the proceeding was given to the State's Attorney and the Public Defender or any other defense attorney and, if so, the time and method of notification;

(2) if a State's Attorney has entered an appearance, the name of the State's Attorney and whether the State's Attorney was physically present at the proceeding or appeared remotely;

(3) if an attorney has entered an appearance for the defendant, the name of the attorney and whether the attorney was physically present at the proceeding or appeared remotely;

(4) if the defendant waived an attorney, a confirmation that the advice required by subsection (e)(3) of this Rule was given and that the defendant's waiver was knowing and voluntary;

(5) confirmation that the judicial officer complied with each requirement specified in section (f) of this Rule and in Rule 4-213 (a);

(6) whether the defendant was ordered held without bail;

(7) whether the defendant was released on personal recognizance; and

(8) if the defendant was ordered released on conditions pursuant to section (g) of this Rule, the conditions of the release.

(E. 82-83.)

These rules changes have not yet been implemented, because the November 6 rules order provided that the amendments will not become effective until a date to be specified in a further order of the Court. (E. 44.)[4]

On the same day that the Court issued its rules order, the Court issued an order denying the State of Maryland's motion to stay the Court's judgment in *DeWolfe II*.

[4] One piece of the provisional rules adopted on November 6 has been given effect by Chief Judge Barbera's November 26, 2013 administrative order directing District Administrative Judges to begin compiling a list of private attorneys who would be willing to serve on a standby basis to provide representation at initial appearances. (E. 200-02.)

(E. 137.) In that order, the Court directed that the fiscal and logistical concerns raised by the State in its motion should be presented instead to the circuit court in the first instance "if and when" a party filed an application for further relief based on the circuit court's declaratory judgment under "§ 3-412(a) of the Declaratory Judgments Act." (E. 138.)

*The Circuit Court Proceedings on the Plaintiffs' Application for Further Relief Based on the Declaratory Judgment*

The day after this Court issued its rules order and its order identifying the procedural mechanism that would allow the circuit court to conduct further proceedings, plaintiffs' counsel delivered a letter to counsel for the District Court Defendants. (E. 139-41.) The November 7 letter stated that "[s]ome have suggested" the necessity for further circuit court proceedings under § 3-412, but that the plaintiffs did "not understand why this is necessary." (E. 139.) The letter insinuated that continuing to conduct initial appearances in accordance with the existing rules would be a violation of the Code of Judicial Conduct and a betrayal of the District Court Defendants' oaths as judicial officers. (E. 140.)

Because the plaintiffs had signaled that they did not intend to initiate the proceedings under § 3-412 anticipated by this Court's November 6 orders, the District Court Defendants submitted a status report to the circuit court, informing the court of the most recent developments related to implementation of this Court's judgment in *DeWolfe II*. (E. 35-42.) The November 14 submission noted that the declaratory judgment that the circuit court had entered, in the form requested by the plaintiffs, declares that the defendants violate an arrestee's rights by "continuing with the bail hearing once [the

arrestee has] requested representation," but that the declaration does not prescribe the procedure to be followed if and when an arrestee invokes the right to counsel during an initial appearance. (E. 35; *see* E. 33.) (Since the *DeWolfe II* decision was issued on September 25, no arrestee had invoked the newly declared right.) The status report advised the circuit court that this Court had adopted provisional rules that would prescribe the appropriate procedures, but that those procedures had not been instituted, because the provisional rules would become effective only upon a future order of this Court. (E. 35.) The report stated that, based on this Court's November 6 orders, the District Court Defendants anticipated that full implementation of the *DeWolfe II* ruling would not occur until after further proceedings in the circuit court, and they advised the circuit court that, in the meantime, they would continue to comply with the existing rules promulgated by this Court to govern initial appearances.[5]

In their November 14 submission to the circuit court, the District Court Defendants explained that this Court's November 6 order and its opinion in *DeWolfe I* had prescribed the manner of the proceedings to be conducted in the circuit court, under § 3-412 of the Courts and Judicial Proceedings Article. (E. 35.) The status report further explained the procedure to be followed under this provision:

[5] The status report also informed the circuit court that both the Judiciary and the leadership of the General Assembly were exploring comprehensive reforms to the State's pretrial system. (E. 35.) The Judiciary's task force has since issued a report recommending substantial changes to the State's pretrial system but has indicated that these proposed reforms would not be implemented until the end of 2014, at the earliest. (App. 1.) Four bills introduced in the General Assembly, including one that would implement the Judiciary's proposed reforms (House Bill 537 (App. 64-68)), are contained in the appendix to this brief. (App. 25-68.)

> Section 3-412 allows the request for further relief to be made "either in a separate action or by application to a court [that] retains jurisdiction" after awarding declaratory relief. *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 458 (2008). Once the action has been initiated, the court, "on reasonable notice," may require "any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted." Md. Code Ann., Cts. & Jud. Proc. § 3-412(c).

(E. 40.)

On December 5, 2013, the plaintiffs initiated the proceedings contemplated by this Court's November 6 order, by filing a petition under § 3-412 for further relief based on the circuit court's declaratory judgment. (E. 28, 142.) In support of the petition, the plaintiffs noted the parties' agreement that "the Court of Appeals anticipated further proceedings in [the circuit court]" and that "the Court of Appeals has directed that the implementation of the new Rules will be triggered by further action by [the circuit court] pursuant to a petition for further relief pursuant to CJP § 3-412." (E. 213.) On January 8, 2014, plaintiffs' counsel wrote a letter to the presiding circuit court judge to "inquire about the status" of the plaintiffs' petition under § 3-412. (E. 223.) The letter advised the circuit court that "[t]he procedure for moving forward is clearly laid out in the Declaratory Judgment Act. (E. 224). Citing § 3-412(c), plaintiffs' counsel stated, "The first step . . . is for the Court to issue the Order to Show Cause." (E. 223-24.)

The circuit court did not, however, follow the procedure set forth in § 3-412 by issuing a show cause order directing the District Court Defendants to respond to the plaintiffs' application for further relief. Instead, on January 10, the circuit court entered an injunction requiring the District Court Defendants to "appoint counsel for Plaintiffs at

all initial bail hearings." (E. 226.) The order further stated that "the District Court Defendants are hereby PROHIBITED AND ENJOINED from a) conducting initial bail hearings without appointing counsel for Plaintiffs and/or b) directing the incarceration of any Plaintiffs who have not been provided counsel at such hearings." (E. 226.) Although the parties had advised the circuit court that the provisional rules adopted by this Court to authorize the appointment of counsel and to accommodate their presence at initial appearances would not take effect until a further order of this Court, the circuit court's January 10 injunction stated that "this Order shall take effect IMMEDIATELY."[6] (E. 226.)

**Pending Legislative and Judicial Proposals**

Both the legislative and judicial task forces have concluded that it makes little sense to provide defendants with counseled bail hearings twice within a 24-hour time period. As a result, several bills have been introduced in the General Assembly that, if enacted, would eliminate the two-tier system and replace it with a single bail hearing at which a defendant would have counsel. (App. 25-68.) Some of these proposals, if enacted, are expected to result in increased detention time for many arrestees who, under the current system, could expect to gain early release after their initial appearance before a commissioner. The Judiciary's task force observed in its report that the average time

[6] The circuit court entered an amended order on January 13. (E. 231-32.) The terms of the injunction were not altered. The only apparent difference is that the amended order includes Judge John R. Hargrove, Jr. among the list of District Court officials who are subject to the injunction. (Plaintiffs' counsel later advised that they would file a notice under Rule 2-231(a)(5) to reflect the substitution of Judge Waxman for Judge Hargrove, whom she succeeded as Administrative Judge of the District Court for Baltimore City.)

for presentment to a commissioner under the current system is four hours after arrest. (App. 1.) Without any change in the governing law, the decision in *DeWolfe II* will inevitably produce delays in presentment, as the Judiciary's task force reported. (App. 4-6.) Even under the legislation proposed by the Judiciary's task force to implement reforms to the State's pretrial system (House Bill 537 (App. 64-68)), many arrestees' bail determinations would be delayed, because those arrested when the court is not in session will have to wait until the next session of court and appear before a judge for their initial appearance, unless it will be more than 24 hours after arrest before the court is next in session. (App. 11-12, 67.) Under Senate Bill 748 (App. 25-27), state-furnished counsel would be provided to defendants only during normal business hours on Monday through Friday and between 9:00 a.m. and 5:00 p.m. on weekends and holidays. Defendants arrested outside of these hours will have their initial appearance delayed until the next day unless the defendant waives counsel or retains counsel. (App. 26.) Other proposed solutions involve removing all discretion from commissioners, *see* Senate Bill 920 (App. 28-41), or establishing a statewide Division of Pretrial Detention and Services, authorizing administrative pretrial release of certain arrested persons, and providing that those not so released be presented to a judge at the next session of court (which, over a holiday weekend, could be three or more days). *See* Senate Bill 973 (App. 42, 58).

## SUMMARY OF ARGUMENT

Policymakers in all three branches of government are making strenuous efforts to address the complex policy implications of this Court's ruling in *DeWolfe II*. The circuit

court's blunt injunction, by contrast, disregards these complexities, just as that court disregarded the procedures this Court spelled out in its November 6, 2013 order. The circuit court committed a clear procedural error by issuing an injunction without first issuing a show cause order, as the Declaratory Judgments Act requires when a court is presented with an application for further relief based on a prior declaratory judgment, as in this case. For this reason alone, the injunction should be vacated.

By issuing an injunction in disregard of the statutory procedures that are designed to ensure a full presentation of the relevant evidence and arguments, the circuit court deprived itself of the opportunity to obtain information that would have allowed the court to fashion a remedy tailored to the circumstances. The circuit court's precipitous action produced an injunction with substantive flaws that are so glaring that the plaintiffs agreed that this Court should grant certiorari to review and revise the injunction's terms. *See* Response to District Court Defendants' Motion to Stay (Jan. 17, 2014). The District Court Defendants were compelled to seek a stay of the injunction because its terms conflicted with the rules established by this Court and thus subjected these judicial officers to conflicting legal commands. Moreover, by entering an injunction without careful consideration, the circuit court defeated the clearly expressed expectations of this Court that legitimate concerns about the substantial logistical and fiscal challenges created by this Court's ruling in *DeWolfe II* would be presented to the circuit court so that the court could take evidence and attempt to fashion a remedy tailored to these challenging circumstances. The circuit court punted instead.

The customary cure for errors like those committed by the circuit court here would be to vacate the injunction and remand the matter to the circuit court. But the challenge of fashioning an injunction that would implement the circuit court's declaratory judgment is not likely to become easier with time. On the contrary, as the Judiciary and the General Assembly move forward with reforms to the State's system of pretrial procedures, the void between a workable injunction and the circuit court's declaratory judgment is growing wider. The problem is not merely in working out the timing and terms of an injunction; the problem is the *DeWolfe II* ruling itself, which the circuit court was tasked with implementing. The *DeWolfe II* ruling worked a fundamental—and extremely costly—alteration of the State's existing system of pretrial procedures. As a result, every reform proposal currently under consideration would end the initial appearance as we know it. Many of those reform proposals have laudable features, but the initial appearance under the existing rules—a swift, straightforward, opportunity for arrestees to regain their freedom within hours after they were arrested—also has undeniable benefits. The plaintiffs pursued their claims in the belief that a broader right to counsel would enhance liberty, but the unintended consequences of this lawsuit may produce the opposite effect.

Under this Court's precedents, the rule of *stare decisis* is not absolute, and this Court accordingly has not hesitated to overrule prior decisions when the Court becomes convinced that those decisions were wrong. Under the standards this Court has set forth for overruling a precedent, the *DeWolfe II* ruling should be overturned, because it was decided by the narrowest of margins, is inconsistent with other decisions of this Court,

and is contrary to other established principles. The reasoning of the decision is based on faulty premises and erroneous factual assumptions, and it now appears likely to produce perverse results, by delaying many arrestees' opportunity for a prompt release from custody after an arrest. This appeal presents an opportunity for this Court to more closely examine its ruling in *DeWolfe II* in light of those unanticipated consequences.

## ARGUMENT

### I. THIS COURT REVIEWS THE CIRCUIT COURT'S GRANT OF INJUNCTIVE RELIEF FOR LEGAL ERROR AND ABUSE OF DISCRETION.

The propriety of the circuit court's injunction involves the interpretation and application of statutes and rules, which an appellate court considers *de novo*. *See Salamon v. Progressive Classic Ins. Co.*, 379 Md. 301, 307 (2004). As a general matter, an appellate court reviews a circuit court's determination to grant injunctive relief for an abuse of discretion. *See State Comm'n on Human Relations v. Talbot County Detention Ctr.*, 370 Md. 115, 127 (2002) (citations omitted). However, where the applicable statutory scheme circumscribes the circuit court's exercise of discretion, the appellate court "consider[s] the propriety of the court's decision . . . with the understanding that the court's equitable discretion is limited to the extent that the Legislature articulated the applicable guidelines for injunctive relief." *State Comm'n on Human Relations*, 370 Md. at 130.

## II. THE CIRCUIT COURT ERRED IN GRANTING AN APPLICATION FOR SUPPLEMENTAL RELIEF BASED ON A PRIOR DECLARATORY JUDGMENT WITHOUT FIRST ISSUING A SHOW CAUSE ORDER, AS REQUIRED BY THE STATUTE GOVERNING SUCH APPLICATIONS.

The circuit court's injunction should be vacated because the circuit court erred in granting the plaintiffs' application under § 3-412 of the Courts and Judicial Proceedings Article without first issuing a show cause order. The circuit court had previously denied the plaintiffs' plea for injunctive relief, at their invitation, and the court had proceeded to enter a final judgment disposing of all claims, by entering a declaratory judgment pursuant to this Court's mandate. The plaintiffs had successfully argued that the circuit court's previous denial of injunctive relief would not be a bar to a future request, and this Court, in its *DeWolfe I* opinion, agreed that the vehicle for seeking such future relief was the procedure set forth by § 3-412.

The circuit court was advised by both the plaintiffs and the District Court Defendants that this Court's rulings anticipated further proceedings conducted in accordance with § 3-412. Both sets of parties informed the Court that such proceedings are initiated by an application (or the filing of a new action), followed by the court's issuance, "on reasonable notice," of a show cause order directing the adverse party to respond to the demand for further relief. The plaintiffs invoked these procedures by filing a petition under § 3-412; subsequently, their counsel correctly advised the circuit court that "[t]he first step . . . is for the Court to issue the Order to Show Cause." (E. 224.) Instead, the circuit court issued its injunction, hastily terminating the proceedings contemplated in this Court's November 6 order without giving itself the

opportunity to obtain the information that would have allowed the court to tailor the remedy appropriately. This was error under the plain language of the statute, which requires (1) a petition for further relief, Md. Code Ann., Cts. & Jud. Proc. § 3-412(b) and (2) a show cause order, requiring the adverse party, on "reasonable notice" to "show cause why further relief should not be granted." Md. Code Ann., Cts. & Jud. Proc. § 3-412(c). *See Westport Ins. Corp. v. Bayer*, 284 F.3d 489, 499 (3d Cir. 2002) (in case involving corresponding provision of the federal declaratory judgment statute, finding error where "the district court offered no notice and held no hearing after the declaratory judgment before granting further relief"); *Funes v. Villatoro*, 352 S.W.3d 200, 214 (Tex. App. 2011) (in case construing Texas version of the uniform Declaratory Judgments Act, holding that the trial court erred in granting supplemental injunction relief without, upon reasonable notice, issuing a show cause order to the opposing party). The circuit court's precipitous action circumvented this Court's direction that further proceedings be conducted in accordance with § 3-412 and defeated the clearly expressed expectations of this Court that concerns about the logistical and fiscal challenges of implementing the Court's *DeWolfe II* decision would be addressed in the first instance by the circuit court.

## III. THE CIRCUIT COURT ERRED IN ENTERING AN INJUNCTION DIRECTING OFFICIALS OF THE DISTRICT COURT TO CONDUCT INITIAL APPEARANCES IN A MANNER INCONSISTENT WITH THE EXISTING RULES PROMULGATED BY THIS COURT.

As this Court has stated, this Court "effectively 'legislates' when it adopts rules of practice and procedure." *Hudson v. Housing Auth.*, 402 Md. 18, 31 n.9 (2007) (citing *Ginnavan v. Silverstone*, 246 Md. 500, 505 (1967) ("The Maryland Rules of Procedure,

within their authorized scope, are legislative in nature.")). Under the Maryland Constitution, this Court has the power to "adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." Md. Const. art. IV, § 18(a). This Court's rules of practice and procedure are paramount, and "[t]he power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals or otherwise by law." Md. Const. art. IV, § 18(a).

The terms of the injunction entered by the circuit court (self-evidently, a "court other than the Court of Appeals"), are incompatible with both the existing rules promulgated by this Court to govern the conduct of initial appearances and the provisional rules that this Court approved on November 6, 2013, but that will not take effect without further action by this Court. The rules now in effect require commissioners to proceed with initial appearances within 24 hours of arrest without regard to whether the defendant has secured representation by counsel. The rules currently in place do not authorize commissioners to appoint counsel or to conduct a waiver inquiry for an arrestee who wishes to proceed without counsel at an initial appearance before a commissioner. *See* Rule 4-216. The provisional rules would provide this authority for the first time (E. 72-78), but those rules have not yet taken effect. The injunction mandates that counsel be provided at *all* initial appearances, without making any allowance for arrestees who elect to proceed without the assistance

of counsel. In this respect, the injunction goes beyond what the provisional rules would require, and it also exceeds the terms of the declaratory judgment it purports to enforce. The declaratory judgment entered by the circuit court (in the form proposed by the plaintiffs) states that an arrestee's rights are violated by "continuing with the bail hearing once [an arrestee has] requested representation." (E. 34, 36.) The injunction requires counsel to be appointed, whether the arrestee wants representation or not.

The provisional rules also contain necessary provisions permitting the entry of counsel's appearance electronically, in writing, or by telecommunication, Rule 4-216(e)(1)(B); provide that the initial appearance is "separate and distinct from any other stage of a criminal action," Rule 4-216(e)(1)(C) (E. 74); and that representation by appointed counsel is provisional, Rule 4-216(e)(2)(B). That is, it "shall be limited to the initial appearance before the judicial officer and shall terminate automatically upon the conclusion of that stage of the criminal action," absent renewal or extension by the Public Defender pursuant to Rule 4-216.1. *Id.* (E. 75-76.) Neither the existing rules nor the terms of the injunction permit a telephonic or electronic entry of appearance, and they do not permit counsel to enter a provisional or limited appearance for purposes of an initial appearance.

To further complicate matters, the injunction applies only to arrestees in Baltimore City, whereas the rules have statewide effect. Even worse, the injunction is incompatible with governing statutes and rules that prohibit a commissioner from setting conditions of release for certain categories of arrestees and that require the commissioner to commit those arrestees to the continued custody of officials at the Division of Pretrial Services in

Baltimore City, pending a determination by a judge. The terms of the injunction, which apply to *all* members of the plaintiff class of arrestees presented to a District Court commissioner in Baltimore City, prohibit commissioners from "directing the incarceration of *any* Plaintiffs" (E. 226 (emphasis added)) who were not provided with counsel for their appearance before a commissioner (even though the commissioner could not have released them, and even though they will be provided with counsel when presented to a judge).

The District Court Defendants are obliged to abide by the existing procedures promulgated by this Court, which do not contemplate having counsel present at an arrestee's initial appearance before a commissioner of the District Court. But the injunction prohibits the District Court Defendants from conducting initial appearances in Baltimore City without appointing counsel, even though they lack that authority under the rules now in effect and even though there currently is no funding for compensating appointed counsel. Nor did the circuit court even inquire whether enough qualified private attorneys could be found to provide free representation at the hundreds of initial appearances conducted in Baltimore City each week.

The circuit court's injunction violates Article IV, § 18(a) by impermissibly subjecting judicial officers of the District Court in Baltimore City to conflicting legal commands. The injunction should therefore be vacated.

## IV. THE CIRCUIT COURT ERRED IN ORDERING OFFICIALS OF THE DISTRICT COURT TO APPOINT COUNSEL FOR ARRESTEES AT INITIAL APPEARANCES AND PROHIBITING THOSE COURT OFFICIALS FROM CONDUCTING INITIAL APPEARANCES FOR ARRESTEES WHO WERE NOT PROVIDED WITH COUNSEL.

The errors discussed above that the circuit court committed in entering its injunction justify this Court in summarily vacating and reversing the injunction. The effect of doing so would be to return this matter to the circuit court so that it could fashion a remedy implementing its declaratory judgment, this time taking account of all the relevant circumstances. The relevant circumstances include the substantial fiscal and logistical challenges that prompted the State to move for a stay of this Court's judgment in *DeWolfe II* on October 25, 2013; indeed, it was in response to those concerns that this Court specified the procedures the circuit court was to follow, upon an application for further relief based on its declaratory judgment. The relevant circumstances have, if anything, become *more* complicated since then, with all three branches of government actively working to grapple with the policy implications of adapting the State's existing pretrial system to accommodate the right declared in *DeWolfe II*.

The District Court Defendants do not suggest that the task prescribed for the circuit court was or is an easy one—far from it. And the temptation to avoid the messy work of fashioning injunctive relief in this complex and fast-moving policy environment is understandable. That is why the District Court Defendants' petition for a writ of certiorari proposed, as an alternative to summary reversal of the circuit court's injunction, that this Court instead "undertake plenary review of the substantive challenges . . . to the relief ordered by the circuit court," and asked the Court to "place the appeal on the

calendar for full briefing and argument on the merits." Petition at 11. That plenary review should include consideration of whether *DeWolfe II* was correctly decided.

What makes the task of fashioning a workable remedy so hard in this case is the inherent tension in this Court's ruling in *DeWolfe II*, which works a fundamental alteration in Maryland's pretrial criminal procedure system, because the decision declares a constitutional right, but that right is engrafted on the initial appearance, a feature of the State's pretrial procedures that is not itself constitutionally required. This Court adopted the rules creating the State's current pretrial procedures for determining conditions of release for arrestees more than four decades ago. But it was not until five months ago that this Court determined that those procedures are constitutionally inadequate. If the initial appearance is both constitutionally unnecessary and constitutionally inadequate, why not just get rid of the initial appearance as we know it? Significantly, that is the approach embraced by every major policy proposal currently under consideration, including the Judiciary's proposal (App. 15-18, 25-27, 39-40, 51-58, 67).[7] The problem is that, although many laudable policy reforms have been proposed in response to the *DeWolfe II* ruling, the initial appearance also has undeniable benefits—for the pretrial system as a whole, but especially for arrestees, almost half of whom currently obtain their release from a commissioner at the initial appearance, without the assistance of a lawyer,

[7] One bill, S.B. 748, would not eliminate initial appearances before commissioners entirely, but would do away with the current system of conducting initial appearances on evenings and weekends. (App. 25-27.)

and without the need to appear before a judge. The ruling in *DeWolfe II* makes it difficult to preserve the salutary and liberty-enhancing aspects of the initial appearance.

By decreeing that the State must furnish a lawyer whenever it implements a procedure that offers an opportunity for a prompt release following arrest, the Court has construed the constitution to produce a perverse result, by making it more costly for the State to offer an arrestee his or her freedom. The State raised this concern when it moved for reconsideration of the *DeWolfe II* ruling. (App. 201.) The plaintiffs opposed the motion, but they acknowledged that eliminating the initial appearance would be undesirable. Indeed, the plaintiffs decried what they described as a "'Sophie's Choice" between the newly declared "right to counsel and the[] right to liberty," and they characterized then-nascent policy proposals to collapse the existing two-step sequence for determining an arrestee's conditions of release into a single appearance before a judge (with counsel) as an "undisguised threat against Plaintiffs' liberty." (App. 207.)

This appeal presents an opportunity for this Court to correct a mistake. The judgment under review is flawed not merely because it represents an unworkable approach to implementing the *DeWolfe II* ruling, but also because the *DeWolfe II* ruling is itself flawed. Thus, in answering whether the circuit court erred in ordering the District Court Defendants to appoint counsel for arrestees at initial appearances and in preventing the District Court Defendants from conducting initial appearances without appointed counsel present, this Court should conclude that due process does not require the presence of counsel at an initial appearance. Process is not an end in itself: constitutional guarantees of due process are meant to protect liberty, and the liberty-

enhancing features of the existing system of pretrial procedures should not be sacrificed to a conception of due process that was based on erroneous factual assumptions and a misapplication of established principles. The Court should overrule its decision in *DeWolfe II*.

### A. This Court Has Not Hesitated to Overrule Wrongly Decided Cases When They Are Founded on A Faulty Premise or Are Inconsistent With Established Precedent.

Under this Court's precedents, "the rule of *stare decisis* is not absolute." *Unger v. State*, 427 Md. 383, 417 (2012) (overruling a four-year-old 4-3 decision and adopting the position of the dissenting judges) (quoting *State v. Green*, 367 Md. 61, 78-79 (2001)). Accordingly, "[t]his Court has not hesitated to overrule prior decisions which are clearly wrong." *Unger*, 427 Md. at 417 (citing *Cure v. State*, 421 Md. 300, 320-322 (2011) (overruling an eight-year-old 4-3 decision and adopting the position of the dissenting judges)); *Harris v. Board of Educ.*, 375 Md. 21, 59 (2003) (overruling three prior cases after concluding that they had erroneously decided a question of legislative intent); *State v. Kanaras*, 357 Md. 170, 184 (1999) (overruling five prior decisions on the grounds that they had misinterpreted the postconviction procedure statute); *Owens-Illinois v. Zenobia*, 325 Md. 420, 470-471 (1992) (overruling cases relating to punitive damages because they were erroneous under prior Maryland law); *Townsend v. Bethlehem-Fairfield Shipyard*, 186 Md. 406, 417 (1946) (stating that "it is sometimes advisable to correct a decision or decisions wrongly made in the first instance, if it is found that the decision is clearly wrong and contrary to other established principles")); *see also Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) (overruling four-year-old 4-3 decision, in part because the prior

decision was "decided by the narrowest of margins" and explaining that considerations favoring *stare decisis* are of lesser importance in cases involving constitutional rulings because "'correction through legislative action is practically impossible'" (quoting *Burnet v. Coronodo Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting))); *Green*, 367 Md. at 78-79 (overruling a prior 4-3 decision that recognized the State's common law right to appeal a decision granting a criminal defendant's untimely motion to revise her sentence).

*DeWolfe II*, decided by the narrowest of margins, is a rule of constitutional criminal procedure that is "clearly wrong and contrary to other established principles." *Townsend*, 186 Md. at 417. The decision is (1) based on faulty premises and erroneous factual assumptions, (2) inconsistent with prior decisions of this Court, and (3) inconsistent with established constitutional principles governing criminal procedure. To make matters worse, it now appears that the costs of the decision are not merely doctrinal; rather, the ruling seems likely to produce the unintended consequence of delaying the first appearance of arrestees before a judicial officer authorized to release them from custody, rather than enhancing the arrestees' opportunity for liberty. If so, the Court's ruling in *DeWolfe II* would undermine the liberty interests that Article 24 of the Declaration of Rights was intended to protect, without justification in this Court's case law applying Article 24.

### B. The *DeWolfe II* Ruling Ignored Important Features of Maryland's Pretrial Procedures, in Disregard of this Court's Precedents.

The *DeWolfe II* decision paid scant attention to the purposes served by the initial appearance or the legislative intent behind the Court's adoption of that procedure more than four decades ago. But an understanding of the constitutional adequacy of the procedure requires an examination of the procedure's purpose.

In *DeWolfe I*, this Court rested its decision on purely statutory grounds, holding that, under the plain language of the Public Defender Act, an indigent defendant is entitled to representation by the Public Defender when a commissioner establishes conditions of pretrial release. Because the Court found the statutory text "plain and unambiguous," *DeWolfe I*, 434 Md. at 431, the Court considered neither the legislative and rules history showing a contrary intent nor the long-standing contrary interpretation of the current Public Defender's predecessors, *see id.* at 432 (stating that "given our holding that § 16-204(b) of the Public Defender Act is plain, there is no cause to delve into its legislative history"). Because the *DeWolfe I* ruling was decided on statutory grounds, the General Assembly was free to express its disagreement, and it did so. During its 2012 session, the General Assembly responded by enacting emergency legislation that gave effect to part of the *DeWolfe I* ruling, while mitigating the fiscal impact of the decision. The legislative solution (1) retained the two-tier system that provides, for the majority of arrestees, an early opportunity for release on personal recognizance or an affordable bail; (2) removed the danger of self-incrimination for all

arrestees;[8] (3) required that judges' independent bail determinations take place sooner in the process than was required to occur under the previous rules—immediately if the District Court is then in session or at the next session of the court; and (4) expressly authorized representation by the Public Defender at the independent bail determination before a judge, but did not extend this statutory right of representation to the initial appearance before a commissioner. This Court, in adopting rules to implement the 2012 legislation, further enhanced protections for arrestees by imposing express restrictions on ex parte communications with a commissioner. These legislative actions sought to strike a balance between the costs and benefits of providing appointed counsel at this early stage of the criminal process. They reflect a legislative determination that only by deferring the appointment of counsel for arrestees until, at the latest, the next court session, is it feasible to retain, for the majority of arrestees, the opportunity for early release by a commissioner. *See* Md. Code Ann., Crim. Law § 5-215 (requiring that detained defendants be presented to a District Court judge "immediately if the Court is in session, or if the Court is not in session, at the next session of the Court"); Md. Code Ann., Crim. Proc. § 16-204(b)(2)(ii) (requiring representation by the Public Defender when the defendant is presented to a judge).

The 2012 legislation preserved the existing features of Maryland's system of pretrial criminal procedure, which were the product, four decades earlier, of both a

[8] Md. Code Ann., Cts. & Jud. Proc. § 10-922 (prohibiting the use in evidence against a criminal defendant or juvenile respondent of any "statement made during the course of an initial appearance of a defendant before a District Court commissioner").

constitutional ruling and a legislative response to that ruling. The Supreme Court's declaration of a right to counsel at a preliminary hearing, in *Coleman v. Alabama*, 388 U.S. 1 (1970), served as the impetus for a fundamental redesign of Maryland's pretrial criminal procedures. The State created the District Court, established a new type of judicial officer—the District Court commissioner—and instituted a statewide Public Defender system. *See generally* District Court Defendants' Opening Brief in *DeWolfe I* (Aug. 16, 2011). The two-tier system of an initial appearance before a commissioner followed by an independent determination of pretrial release conditions by a judge for those who remained in custody after the initial appearance also was intended to protect the rights of criminal defendants. "'Prompt presentment after arrest assures impartial judicial supervision of the defendant's rights at the earliest possible stage of detention.'" *Logan v. State*, 289 Md. 460, 493 (1981) (quoting *Johnson v. State*, 282 Md. 314, 323 (1978)); *see also DeWolfe II*, 434 Md. at 469 (Barbera, C.J., dissenting) (explaining that the current procedure "allows for a quick assessment, by a neutral party, of whether the arrestee should, or should not, be released on his or her own recognizance or upon satisfying a reasonable bail amount" and "is designed to 'minimize the time a presumptively innocent individual spends in jail'" (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991))).

The purpose of the initial appearance before a commissioner within 24 hours of arrest, this Court observed in *Johnson*, was to present an arrestee before a neutral judicial officer at the earliest possible opportunity, even if court was not in session, to "insure that an accused will be promptly afforded" the "full panoply of safeguards" provided by a

presentment presided over by a neutral magistrate. *Johnson*, 282 Md. at 321 (1978) (describing the "principle of prompt presentment embodied in M.D.R. 723 [1977] . . . as a *sine qua non* in any scheme of civil liberties"). "Chief among these protections," the Court explained, "is the constitutionally compelled requirement . . . that all persons arrested without a warrant be afforded a prompt hearing at which a neutral judicial officer must determine whether sufficient probable cause exists for the continued detention of the defendant." *Johnson*, 282 Md. at 321 (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)). But the initial appearance did more than simply effectuate the constitutional right to a prompt determination of probable cause. "Of equal importance" at this early stage of the case, this Court explained, was the obligation of the "commissioner at the initial appearance to make a determination of the defendant's eligibility for pretrial release." *Johnson*, 282 Md. at 321-22 (citing M.D.R. 721 (1977)). Two of the remaining functions accomplished by the initial-appearance procedure also were intended to protect the arrestee's rights, including the right to be informed "of every charge brought against him and . . . his right to counsel," including appointed counsel if the arrestee was indigent *Johnson*, 282 Md. at 322 (citing M.D.R. 711a, 723b.1, 723b.2 (1977)). The initial appearance also facilitated early scheduling of preliminary hearings and trials. *See Johnson*, 282 Md. at 322 (citing Md. Ann. Code, art. 27 § 592 (1977); M.D.R. 723b.5, 723b.6, 727 (1977)).

These "procedural requirements," the Court has observed, "bolster in substantial fashion several fundamental constitutional guarantees, including the right of a defendant to be informed of the accusation against him, the right to be free from unauthorized and

unreasonable seizures of his person, the right to be allowed counsel, and to have counsel appointed for him if indigent, as well as the due process right to be free from coercive investigatory methods." *Johnson*, 282 Md. at 322 (citations omitted). The Court's declaration in *DeWolfe II* of a right to have counsel present at the initial appearance does not advance any of these fundamental constitutional guarantees (unlike the 2012 legislation and rules amendments, which enhanced the protection against self-incrimination, among other things).

In many ways, the ruling in *DeWolfe II* disregards the original purposes of the initial appearance, as described in this Court's precedents. Under the ruling, the initial appearance is no longer the point at which an arrestee is merely advised of the right to appointed counsel; instead, it is the point at which counsel is appointed, even though the initial appearance, unlike the preliminary hearing, does not bear the hallmarks of a critical stage of the proceedings where the Sixth Amendment and Article 21 would require the presence of counsel. And by inserting a lawyer at this early point in the process (presumably with the expectation that the lawyer will consult with the arrestee and take other steps to ascertain facts that will aid in advocating before the commissioner), the *DeWolfe II* ruling risks delaying presentment and pretrial release determinations, even though the promptness of presentment achieved by the initial appearance procedure is one of its chief virtues.

### C. The *DeWolfe II* Ruling Rested on Faulty Assumptions.

The decision in *DeWolfe II* disregarded the many elements of the initial appearance that serve to protect the rights of the accused and to enhance liberty. Instead,

the Court's analysis wrongly equated the initial appearance to in-court proceedings that have the potential to result in a judge-ordered term of incarceration. For a litigant threatened with contempt—who is free when the proceeding begins but may not be after the judge has ruled—it is appropriate to describe the proceeding as one where the alleged contemnor may be deprived of his or her liberty. By contrast, an arrestee who appears before a commissioner (within 24 hours after the arrest) is already in custody, as this Court's precedents recognize, *see Johnson*, 282 Md. at 321-22; he or she is not free, but may become free, if eligible, after the commissioner has conducted the initial appearance. The analogy relied on by the majority between an opportunity to obtain one's release from custody and an adjudication of contempt is unsustainable.

The *DeWolfe II* decision compounds the error of this analogy by mischaracterizing the nature of the subsequent bail determination made by a judge, which finds no support in either the governing rules or the record of this case. A judge's independent bail determination is not in the nature of an "appeal" or an "exceptions hearing." *DeWolfe II*, 434 Md. at 462-63 And the record of this case provides no support for the majority's implicit assumption that judges of the District Court routinely refuse to follow the law requiring them to make an independent bail determination.

The initial appearance before a commissioner involves the setting of temporary conditions of release. There is a *presumption* that a defendant will be released on personal recognizance or bail, Rule 4-216(c), and commissioners accordingly release nearly half of all arrestees without the assistance of counsel; these defendants do not appear before a judge. For the remaining arrestees, the temporary conditions of release

are in effect only until a judge makes an independent bail determination, which must take place immediately after the appearance before the commissioner if the District Court is then in session, or if not, at the next session of the court. *See* Md. Code Ann., Crim. Law § 16-204(b)(2); Rule 4-216.1(a)(2)(A). By statute and rule, a defendant is now entitled to state-furnished counsel at the independent bail hearing before the judge. *See* Md. Code Ann., Crim. Proc. § 16-204(b)(2)(i); Rule 4.216.1(a)(2)(A).

There was no record evidence to substantiate the Court's conclusion in *DeWolfe II* that the independent bail determination is in the nature of an appeal or exceptions hearing. As the Court itself stated in *DeWolfe I*, "We emphasize that District Court judges *owe no deference* to the Commissioners' initial bail determinations." 434 Md. at 430 n.7 (further emphasis added). Moreover, there was no evidence that the judges of the District Court fail to exercise independent judgment in setting conditions of release for arrestees who remain in custody after the initial appearance before a commissioner. Instead, the undisputed evidence shows that judges release a substantial number of those who remain in custody after seeing the commissioner.

In *DeWolfe I*, the Court cited a 2001 study by the Abell Foundation examining bail review proceedings during the summer of 1998 in Baltimore City, Baltimore County, Frederick County, Harford County, and Prince George's County. *See* 434 Md. at 413 n.7. That survey revealed that judges in the five jurisdictions sampled, collectively, released 24.5% of detainees on personal recognizance, reduced bail for 27%, and maintained the prior bail conditions for 44%. Abell Foundation, *The Pretrial Release Project: A Study of Maryland's Pretrial Release and Bail System* (Sept. 12, 2001). In

December 2012, the plaintiffs' Supplemental Brief in the *DeWolfe* case appended a table showing that, during a recent two-month period in 2012, judges in Baltimore City released 16.28% of detainees, reduced bail for 20.23%, maintained prior conditions of release for 46.02%, and increased the bail amount for 17.47%. This was the only *evidence* provided to the Court on the behavior of District Court judges when setting conditions of release for arrestees who remained in custody after their initial appearance before a commissioner.[9] Those statistics do not support the plaintiffs' continued insinuation that District Court judges blindly defer to determinations made by commissioners; to the contrary, in more than half the cases, the judge reached a different conclusion than did the commissioner on the appropriate conditions of release.

Nor was there any record evidence to support the plaintiffs' assertions that unrepresented suspects in the commissioner setting were "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." *DeWolfe II*, 434 Md. at 454 (quoting *DeWolfe I*, 434 Md. at 429).[10] Indeed, there could be no such

[9] More recently, the Judicial Task Force reported that in 2012, "86,000 defendants (49.75% of those having initial appearances before a commissioner) were released by the commissioner, most of them on recognizance or on unsecured bond." (App. 3.)

[10] The Court's opinion in *DeWolfe I* properly attributed its description of initial appearance procedures to the plaintiffs, rather than to evidence in the record. No discovery was conducted in either round of circuit proceedings, and the plaintiffs opposed the District Court Defendants' suggestion that appellate resolution of the plaintiffs' claims after the procedures were changed in 2012 would be aided by a concrete factual record. (App. 191-92, 176-83.)

evidence because it is undisputed that few, if any, defendants have ever had the assistance of counsel in the commissioner setting. *See DeWolfe II*, 434 Md. at 451 (stating that "in practice, arrested individuals are rarely represented by an attorney during an initial appearance before the Commissioner"). Without any evidentiary support in the record of this case, the Court asserted that commissioners fail to "consider all the facts relevant to a bail determination," a proposition the majority apparently deemed to be established by amicus briefs. 434 Md. at 451 (citing "numerous briefs to this Court"). The Court also repeated claims that arrestees "face health and safety risks posed by prison stays" and may lose employment as the result of the commissioner's initial setting of provisional conditions of release. *Id.* As the dissent pointed out, the detention authorized by a commissioner's determination lasts no longer than until the next session of court, when a judge makes an independent determination; as a result of the 2012 legislation any consequences of prolonged detention are attributable to a judge's decision, made at a proceeding where the arrestee was entitled to be represented by counsel. *See id.* at 470 n.6 (Barbera, C.J., dissenting).

### D. The Court Should Overrule Its Decision in *DeWolfe II* and Adopt the Sound Reasoning of the Dissenting Opinion.

The initial appearance before a commissioner is not a proceeding that results in incarceration within the meaning of this Court's precedents, and there is no justification for the Court's decision extending the due process right to counsel that was recognized in those precedents to the initial appearance. As the dissenting opinion in *DeWolfe II* observed, in each of the precedents relied on by the majority, "the proceedings at issue

were . . . in-court proceedings, conducted by a judge and having the potential to result in a judge-ordered term of incarceration that was final, save for the possibility of a subsequent court proceeding at which the defendant would have the right to counsel." *DeWolfe II*, 434 Md. at 467 (Barbera, C.J., dissenting). As this Court explained in *Johnson*, however, the initial appearance before a commissioner serves the purpose of presenting a defendant *who is already in custody* to a neutral judicial magistrate for the purpose of determining probable cause, informing the defendant of constitutional and procedural rights, and setting provisional conditions of release. *See* 282 Md. at 321-22.

An initial appearance conducted in accordance with the existing rules does not affect the fairness of the trial or impair the defendant's ability to defend on the merits. Instead, for most arrestees, the initial appearance principally serves to enhance liberty, by providing an early opportunity for release from custody after an arrest. And as a result of the 2012 legislation and rules amendments, Maryland provides counsel to indigent arrestees at a much earlier stage than other American jurisdictions,[11] while providing

[11] Most states do not provide for representation by appointed counsel at the initial appearance itself, but instead defer the initiation of representation to the consequential post-attachment stages. *See* Ala. R. Crim. Proc. R. 4.4; Alaska Stat. § 18.85.100; Alaska R. Crim. Proc. 5; Ariz. R. Crim. Proc. 4.2, 6.1; Conn. Gen. Stat. § 54-1b; Conn. Practice Book §§ 37-1, 37-3, 37-6; Del. Code Ann., tit. 29, § 4604; Del. Super. Ct. Crim. R. 5, 44; Ga. Code Ann. §§ 17-4-26, 17-12-23; Idaho Crim. R. 5, 44; 725 Ill. Comp. Stat., ch. 725, §§ 5/109-1, 5/113-3; Ind. Code §§ 35-33-7-5, 35-33-7-6; Iowa R. Crim. Proc. §§ 2.2, 2.28; Minn. R. Crim. Proc. 5.01; Mont. Code Ann. § 46-8-101; Neb. Rev. Stat. § 29-3902; N.J. Court R. 3:4-2; N.C. Gen. Stat. § 7A-451;; Pa. R. Crim. Proc. 122, 519; S.C. App. Ct. R. 602; S.D. R. Crim. Proc. § 23A-40-6; Tenn. R. Crim. Proc. 44; Tex. Code Crim. Proc. art. 15.17; Vt. Stat. Ann., tit. 13, § 5234; Vt. R. Crim. Proc. 5, 44; Va. Code Ann. §§ 19.2-157, 158, 159, 160; Wyo. Stat. Ann. § 7-6-105; Wyo. R. Crim. Proc. 5, 44. Of the few jurisdictions that provide expressly for the right to counsel at the initial appearance, most do not have counsel on duty to provide that service, but instead require

previously-unheard-of protection to defendants against the risk of self-incrimination. The initial appearance, as the dissent correctly recognized in *DeWolfe II*, is "straightforward, guided by rule, and of limited duration," 434 Md. at 470 and for those arrestees who do not obtain their release from the commissioner, an independent determination promptly follows, where the arrestee is represented by counsel, *cf. Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (no due process right to counsel where "alternative procedural safeguards" are in place). The current system strikes an appropriate balance among considerations of cost, public safety, and protection of the rights of the accused. The decision in *DeWolfe II* should be overruled.

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the judicial officer to defer the process until counsel is available. *See, e.g.*, Ark. R. Crim. Proc. 8.2, 8.3(b) (providing for the appointment of counsel at the initial appearance, if requested, and requiring the judicial officer, absent waiver, to defer all steps in the proceedings, *except* the determination of probable cause and conditions of pretrial release, "until the defendant and his counsel have had an adequate opportunity to confer"); N.Y. Crim. Proc. Law Ann. § 180.10(3)(a) (providing for an "adjournment for the purpose of obtaining counsel); Ohio R. Crim. Proc. 5(A)(2) (providing for a "reasonable continuance" of the initial appearance for the purpose of obtaining or appointing counsel); W. Va. Code Ann. § 50-4-3 (requiring a magistrate to immediately stay the proceedings if a defendant requests the appointment of counsel at the initial appearance).

## CONCLUSION

The judgment of the Circuit Court for Baltimore City should be reversed.

Respectfully submitted,

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February 18, 2014

Rule 8-504(a)(9) Certification: This brief has been printed with proportionally spaced type—Times New Roman, 13 point.

## TEXT OF PERTINENT PROVISIONS

## (Rule 8-504(a)(8))

## Statutes

### Maryland Code Annotated, Courts and Judicial Proceedings Article

**§ 3-412. Supplementary relief.**

(a) *Further relief*. – Further relief based on a declaratory judgment or decree may be granted if necessary or proper.

(b) *Application*. – An application for further relief shall be by petition to a court having jurisdiction to grant the relief.

(c) *Show-cause order*. – If the application is sufficient, the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted.

**§ 10-922. Statement made during initial appearance.**

A statement made during the course of an initial appearance of a defendant before a District Court commissioner in accordance with Maryland Rule 4-213 may not be used as evidence against the defendant in a criminal proceeding or juvenile proceeding.

### Maryland Code Annotated, Criminal Procedure Article (Supp. 2013)

**§ 5-215. Presentation of defendant denied pretrial release or who remains in custody**

A defendant who is denied pretrial release by a District Court commissioner or who for any reason remains in custody after a District Court commissioner has determined conditions of release under Maryland Rule 4-216 shall be presented to a District Court judge immediately if the Court is in session, or if the Court is not in session, at the next session of the Court.

**§ 16-204. Representation of indigent individual**

(a) *Providers of representation*. Representation of an indigent individual may be provided in accordance with this title by the Public Defender or, subject to the supervision of the Public Defender, by the deputy public defender, district public defenders, assistant public defenders, or panel attorneys.

(b) *Proceedings for which representation shall be provided*. — (1) Indigent defendants or parties shall be provided representation under this title in:

(i) a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense;

(ii) a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to presentment being made before a commissioner or judge;

(iii) a postconviction proceeding for which the defendant has a right to an attorney under Title 7 of this article;

(iv) any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result;

(v) a proceeding involving children in need of assistance under § 3-813 of the Courts Article; or

(vi) a family law proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article, including:

1. for a parent, a hearing in connection with guardianship or adoption;

2. a hearing under § 5-326 of the Family Law Article for which the parent has not waived the right to notice; and

3. an appeal.

(2) (i) Except as provided in subparagraph (ii) of this paragraph, representation shall be provided to an indigent individual in all stages of a proceeding listed in paragraph (1) of this subsection, including, in criminal proceedings, custody, interrogation, bail hearing before a District Court or circuit court judge, preliminary hearing, arraignment, trial, and appeal.

(ii) Representation is not required to be provided to an indigent individual at an initial appearance before a District Court commissioner.

## Rules

### Maryland Rules (2012) (as Amended Effective Jan. 2013)

**Rule 4-212. Issuance, service, and execution of summons or warrant.**

(a) **General**. When a charging document is filed or a stetted case is rescheduled pursuant to Rule 4-248, a summons or warrant shall be issued in accordance with this Rule. Title 5 of these rules does not apply to the issuance of a summons or warrant.

(b) **Summons — Issuance**. Unless a warrant has been issued, or the defendant is in custody, or the charging document is a citation, a summons shall be issued to the defendant (1) in the District Court, by a judicial officer or the clerk, and (2) in the circuit court, by the clerk. The summons shall advise the defendant to appear in person at the time and place specified or, in the circuit court, to appear or have counsel enter an appearance in writing at or before that time. A copy of the charging document shall be attached to the summons. A court may order the reissuance of a summons.

(c) **Summons — Service**. The summons and charging document shall be served on the defendant by mail or by personal service by a sheriff or other peace officer, as directed (1) by a judicial officer in the District Court, or (2) by the State's Attorney in the circuit court.

(d) **Warrant — Issuance; Inspection**.

(1) In the District Court.

(A) By Judge. A judge may, and upon request of the State's Attorney shall, issue a warrant for the arrest of the defendant, other than a corporation, upon a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document and that (A)(i) the defendant has previously failed to respond to a summons that has been personally served or a citation, or (ii) there is a substantial likelihood that the defendant will not respond to a summons, or (iii) the whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court, or (iv) the defendant is in custody for another offense, or (v) there is probable cause to believe that

the defendant poses a danger to another person or to the community. A copy of the charging document shall be attached to the warrant.

(B) By Commissioner. On review of an application by an individual for a statement of charges, a commissioner may issue a warrant for the arrest of the defendant, other than a corporation, upon a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document and that (i) the defendant has previously failed to respond to a summons that has been personally served or a citation, or (ii) the whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court, or (iii) the defendant is in custody for another offense, or (iv) there is probable cause to believe that the defendant poses a danger to another person or to the community. A copy of the charging document shall be attached to the warrant.

(2) In the Circuit Court. Upon the request of the State's Attorney, the court may order issuance of a warrant for the arrest of a defendant, other than a corporation, if an information has been filed against the defendant and the circuit court or the District Court has made a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document or if an indictment has been filed against the defendant; and (A) the defendant has not been processed and released pursuant to Rule 4-216 or 4-216.1 , or (B) the court finds there is a substantial likelihood that the defendant will not respond to a summons. A copy of the charging document shall be attached to the warrant. Unless the court finds that there is a substantial likelihood that the defendant will not respond to a criminal summons, the court shall not order issuance of a warrant for a defendant who has been processed and released pursuant to Rule 4-216 or 4-216.1 if the circuit court charging document is based on the same alleged acts or transactions. When the defendant has been processed and released pursuant to Rule 4-216 or 4-216.1, the issuance of a warrant for violation of conditions of release is governed by Rule 4-217.

(3) Inspection of the Warrant and Charging Document. Unless otherwise ordered by the court, files and records of the court pertaining to a warrant issued pursuant to subsection (d)(1) or (d)(2) of this Rule and the charging document upon which the warrant was issued shall not be open to inspection until either (A) the warrant has been served and a return of service has been filed in compliance with section (g) of this Rule or (B) 90 days have elapsed since the warrant was issued. Thereafter, unless sealed pursuant to Rule 4-201(d), the files and records shall be open to inspection.

(e) **Execution of Warrant -- Defendant not in Custody. —** Unless the defendant is in custody, a warrant shall be executed by the arrest of the defendant. Unless the warrant and charging document are served at the time of the arrest, the officer shall inform the defendant of the nature of the offense charged and of the fact that a warrant has been issued. A copy of the warrant and charging document shall be served on the defendant promptly after the arrest. The defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest or, if the warrant so specifies, before a judicial officer of the circuit court without unnecessary delay and in no event later than the next session of court after the date of arrest. The court shall process the defendant pursuant to Rule 4-216 or 4-216.1 and may make provision for the appearance or waiver of counsel pursuant to Rule 4-215.

(f) **Procedure — When Defendant in Custody.** (1) Same Offense. When a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest. When a charging document is filed in the District Court for the offense for which the defendant is already in custody a warrant or summons need not issue. A copy of the charging document shall be served on the defendant promptly after it is filed, and a return shall be made as for a warrant. When a charging document is filed in the circuit court for an offense for which the defendant is already in custody, a warrant issued pursuant to subsection (d)(2) of this Rule may be lodged as a detainer for the continued detention of the defendant under the jurisdiction of the court in which the charging document is filed. Unless otherwise ordered pursuant to Rule 4-216 or 4-216.1, the defendant remains subject to conditions of pretrial release imposed by the District Court.

(2) Other Offense. A warrant issued pursuant to section (d) of this Rule for the arrest of a defendant in custody for another offense may be lodged as a detainer for the continued detention of the defendant for the offense charged in the charging document. When the defendant is served with a copy of the charging document and warrant, the defendant shall be taken before a judicial officer of the District Court, or of the circuit court if the warrant so specifies, without unnecessary delay. In the District Court the defendant's appearance shall be no later than 24 hours after service of the warrant, and in the circuit court it shall be no later than the next session of court after the date of service of the warrant.

(g) **Return of Service.** The officer who served the defendant with the summons or warrant and the charging document shall make a prompt return of service to the court that shows the date, time, and place of service.

(h) **Citation – Service.** The person issuing a citation, other than for a parking violation, shall serve it upon the defendant at the time of its issuance.

**Rule 4-213. Initial appearance of defendant**

(a) **In District Court following arrest.** When a defendant appears before a judicial officer of the District Court pursuant to an arrest, the judicial officer shall proceed as follows:

(1) Advice of charges. The judicial officer shall inform the defendant of each offense with which the defendant is charged and of the allowable penalties, including mandatory penalties, if any, and shall provide the defendant with a copy of the charging document if the defendant does not already have one and one is then available. If one is not then available, the defendant shall be furnished with a copy as soon as possible.

(2) Advice of right to counsel. The judicial officer shall require the defendant to read the notice to defendant required to be printed on charging documents in accordance with Rule 4-202(a), or shall read the notice to a defendant who is unable for any reason to do so. A copy of the notice shall be furnished to a defendant who has not received a copy of the charging document. The judicial officer shall advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel.

(3) Advice of preliminary hearing. When a defendant has been charged with a felony that is not within the jurisdiction of the District Court and has not been indicted, the judicial officer shall advise the defendant of the right to have a preliminary hearing by a request made then or within ten days thereafter and that failure to make a timely request will result in the waiver of a preliminary hearing. If the defendant then requests a preliminary hearing, the judicial officer may either set its date and time or notify the defendant that the clerk will do so.

(4) Pretrial release. The judicial officer shall comply with the applicable provisions of Rule 4-216 and Rule 4-216.1 governing pretrial release.

(5) Certification by judicial officer. The judicial officer shall certify compliance with this section in writing.

(6) Transfer of papers by clerk. As soon as practicable after the initial appearance by the defendant, the judicial officer shall file all papers with the clerk of the District Court or shall direct that they be forwarded to the clerk of the circuit court if the charging document is filed there.

(b) **In District Court following summons.** When a defendant appears before the District Court pursuant to a summons, the court shall proceed in accordance with Rule 4-301.

(c) **In circuit court following arrest or summons.** The initial appearance of the defendant in circuit court occurs when the defendant (1) is brought before the court by reason of execution of a warrant pursuant to Rule 4-212(e) or (f)(2), or (2) appears in person or by written notice of counsel in response to a summons. In either case, if the defendant appears without counsel the court shall proceed in accordance with Rule 4-215. If the appearance is by reason of execution of a warrant, the court shall inform the defendant of each offense with which the defendant is charged, ensure that the defendant has a copy of the charging document, and determine eligibility for pretrial release pursuant to Rule 4-216.

**Rule 4-216. Pretrial release – authority of judicial officer; procedure.**

(a) **Arrest without warrant.** If a defendant was arrested without a warrant, the judicial officer shall determine whether there was probable cause for each charge and for the arrest and, as to each determination, make a written record. If there was probable cause for at least one charge and the arrest, the judicial officer shall implement the remaining sections of this Rule. If there was no probable cause for any of the charges or for the arrest, the judicial officer shall release the defendant on personal recognizance, with no other conditions of release, and the remaining sections of this Rule are inapplicable.

(b) **Communications with Judicial Officer.** Except as permitted by Rule 2.9 (a)(1) and (2) of the Maryland Code of Conduct for Judicial Appointees or Rule 2.9 (a)(1) and (2) of the Maryland Code of Judicial Conduct, all communications with a judicial officer regarding any matter required to be considered by the judicial officer under this Rule shall be (1) in writing, with a copy provided, if feasible, but at least shown or communicated by the judicial officer to each party who participates in the proceeding before the judicial officer, and made part of the record, or (2)

made openly at the proceeding before the judicial officer. Each party who participates in the proceeding shall be given an opportunity to respond to the communication.

(c) **Defendants Eligible for Release by Commissioner or Judge**. In accordance with this Rule and Code, Criminal Procedure Article, §§5-101 and 5-201 and except as otherwise provided in section (d) of this Rule or by Code, Criminal Procedure Article, §§5-201 and 5-202, a defendant is entitled to be released before verdict on personal recognizance or on bail, in either case with or without conditions imposed, unless the judicial officer determines that no condition of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community.

(d) **Defendants Eligible for Release Only by a Judge.** A defendant charged with an offense for which the maximum penalty is death or life imprisonment or with an offense listed under Code, Criminal Procedure Article, §5-202(a), (b), (c), (d), (e), (f) or (g) may not be released by a District Court Commissioner, but may be released before verdict or pending a new trial, if a new trial has been ordered, if a judge determines that all requirements imposed by law have been satisfied and that one or more conditions of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community.

(e) **Initial Appearance Before a Judge.** (1) Applicability. This section applies to an initial appearance before a judge. It does not apply to an initial appearance before a District Court commissioner.

(2) Duty of Public Defender. Unless another attorney has entered an appearance or the defendant has waived the right to counsel for purposes of an initial appearance before a judge in accordance with this section, the Public Defender shall provide representation to an eligible defendant at the initial appearance.

(3) Waiver of Counsel for Initial Appearance. (A) Unless an attorney has entered an appearance, the court shall advise the defendant that:

(i) the defendant has a right to counsel at this proceeding;

(ii) an attorney can be helpful in advocating that the defendant should be released on recognizance or on bail with minimal conditions and restrictions; and

(iii) if the defendant is eligible, the Public Defender will represent the defendant at this proceeding.

(B) If the defendant indicates a desire to waive counsel and the court finds that the defendant knowingly and voluntarily waives the right to counsel for purposes of the initial appearance, the court shall announce on the record that finding and proceed pursuant to this Rule.

(C) Any waiver found under this section applies only to the initial appearance.

(4) Waiver of Counsel for Future Proceedings. For proceedings after the initial appearance, waiver of counsel is governed by Rule 4-215.

(f) **Duties of Judicial Officer**. (1) Consideration of factors. In determining whether a defendant should be released and the conditions of release, the judicial officer shall take into account the following information, to the extent available:

(A) the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction;

(B) the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(C) the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;

(D) any recommendation of an agency that conducts pretrial release investigations;

(E) any recommendation of the State's Attorney;

(F) any information presented by the defendant or defendant's counsel;

(G) the danger of the defendant to the alleged victim, another person, or the community;

(H) the danger of the defendant to himself or herself; and

(I) any other factor bearing on the risk of a wilful failure to appear and the safety of the alleged victim, another person, or the community,

including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.

(2) Statement of reasons — When required. Upon determining to release a defendant to whom section (c) of this Rule applies or to refuse to release a defendant to whom section (b) of this Rule applies, the judicial officer shall state the reasons in writing or on the record.

(3) Imposition of conditions of release. If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release set out in section (g) of this Rule that will reasonably:

(A) ensure the appearance of the defendant as required,

(B) protect the safety of the alleged victim by ordering the defendant to have no contact with the alleged victim or the alleged victim's premises or place of employment or by other appropriate order, and

(C) ensure that the defendant will not pose a danger to another person or to the community.

(4) Advice of conditions; consequences of violation; amount and terms of bail. The judicial officer shall advise the defendant in writing or on the record of the conditions of release imposed and of the consequences of a violation of any condition. When bail is required, the judicial officer shall state in writing or on the record the amount and any terms of the bail.

(g) **Conditions of release.** The conditions of release imposed by a judicial officer under this Rule may include:

(1) committing the defendant to the custody of a designated person or organization that agrees to supervise the defendant and assist in ensuring the defendant's appearance in court;

(2) placing the defendant under the supervision of a probation officer or other appropriate public official;

(3) subjecting the defendant to reasonable restrictions with respect to travel, association, or residence during the period of release;

(4) requiring the defendant to post a bail bond complying with Rule 4-217 in an amount and on conditions specified by the judicial officer, including any of the following:

(A) without collateral security;

(B) with collateral security of the kind specified in Rule 4-217(e)(1)(A) equal in value to the greater of $ 100.00 or 10% of the full penalty amount, and if the judicial officer sets bail at $ 2500 or less, the judicial officer shall advise the defendant that the defendant may post a bail bond secured by either a corporate surety or a cash deposit of 10% of the full penalty amount;

(C) with collateral security of the kind specified in Rule 4-217(e)(1)(A) equal in value to a percentage greater than 10% but less than the full penalty amount;

(D) with collateral security of the kind specified in Rule 4-217(e)(1) equal in value to the full penalty amount; or

(E) with the obligation of a corporation that is an insurer or other surety in the full penalty amount;

(5) subjecting the defendant to any other condition reasonably necessary to:

(A) ensure the appearance of the defendant as required,

(B) protect the safety of the alleged victim, and

(C) ensure that the defendant will not pose a danger to another person or to the community; and

(6) imposing upon the defendant, for good cause shown, one or more of the conditions authorized under Code, Criminal Law Article, § 9-304 reasonably necessary to stop or prevent the intimidation of a victim or witness or a violation of Code, Criminal Law Article, § 9-302, 9-303, or 9-305.

(h) **Title 5 Not Applicable.** Title 5 of these rules does not apply to proceedings conducted under this Rule.

**Rule 4-216.1. Further proceedings regarding pretrial release.**

(a) **Review of Pretrial Release Order Entered by Commissioner.** (1) Generally. A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody after a commissioner has determined conditions of release pursuant to Rule 4-216 shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court.

(2) Counsel for Defendant. (A) Duty of Public Defender. Unless another attorney has entered an appearance or the defendant has waived the right to counsel for purposes of the review hearing in accordance with this section, the Public Defender shall provide representation to an eligible defendant at the review hearing.

(B) Waiver. (i) Unless an attorney has entered an appearance, the court shall advise the defendant that:

(a) the defendant has a right to counsel at the review hearing;

(b) an attorney can be helpful in advocating that the defendant should be released on recognizance or on bail with minimal conditions and restrictions; and

(c) if the defendant is eligible, the Public Defender will represent the defendant at this proceeding.

(ii) If the defendant indicates a desire to waive counsel and the court finds that the defendant knowingly and voluntarily waives the right to counsel for purposes of the review hearing, the court shall announce on the record that finding and proceed pursuant to this Rule.

(iii) Any waiver found under this Rule applies only to the review hearing.

(C) Waiver of Counsel for Future Proceedings. For proceedings after the review hearing, waiver of counsel is governed by Rule 4-215.

(3) Determination by Court. The District Court shall review the commissioner's pretrial release determination and take appropriate action in accordance with Rule 4-216(f) and (g). If the court determines that the defendant will continue to be held in custody after the review, the court shall set forth in writing or on the record the reasons for the continued detention.

(4) Juvenile Defendant. If the defendant is a child whose case is eligible for transfer to the juvenile court pursuant to Code, Criminal Procedure Article, §4-202(b), the District Court, regardless of whether it has jurisdiction over the offense charged, may order that a study be made of the child, the child's family, or other appropriate matters. The court also may order that the child be held in a secure juvenile facility.

(b) **Continuance of Previous Conditions.** When conditions of pretrial release have been previously imposed in the District Court, the conditions continue in the circuit court unless amended or revoked pursuant to section (c) of this Rule.

(c) **Amendment of Pretrial Release Order.** After a charging document has been filed, the court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of pretrial release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record. A judge may alter conditions set by a commissioner or another judge.

(d) **Supervision of Detention Pending Trial.** In order to eliminate unnecessary detention, the court shall exercise supervision over the detention of defendants pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.

(e) **Violation of Condition of Release.** A court may issue a bench warrant for the arrest of a defendant charged with a criminal offense who is alleged to have violated a condition of pretrial release. After the defendant is presented before a court, the court may (1) revoke the defendant's pretrial release or (2) continue the defendant's pretrial release with or without conditions.

(f) **Title 5 Not Applicable.** Title 5 of these rules does not apply to proceedings conducted under this Rule.

**Rule 4-231. Presence of defendant.**

(a) **When Presence Required**. A defendant shall be present at all times when required by the court. A corporation may be present by counsel.

(b) **Right to be Present — Exceptions**. A defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248.

(c) **Waiver of Right to be Present**. The right to be present under section (b) of this Rule is waived by a defendant:

(1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or

(2) who engages in conduct that justifies exclusion from the courtroom; or

(3) who, personally or through counsel, agrees to or acquiesces in being absent.

(d) **Video Conferencing in District Court**. In the District Court, if the Chief Judge of the District Court has approved the use of video conferencing in the county, a judicial officer may conduct an initial appearance under Rule 4-213(a) or a review of the commissioner's pretrial release determination under 4-216.1(a) with the defendant and the judicial officer at different locations, provided that:

(1) the defendant's right to counsel under Rule 4-216(e) and Rule 4-216.1(a) is not infringed;

(2) the video conferencing procedure and technology are approved by the Chief Judge of the District Court for use in the county;

(3) immediately after the proceeding, all documents that are not a part of the District Court file and that would be a part of the file if the proceeding had been conducted face-to-face shall be electronically transmitted or hand-delivered to the District Court; and

(4) if the initial appearance under Rule 4-213 is conducted by video conferencing, the review under 4-216.1(a) shall not be conducted by video conferencing.

# APPENDIX

# IN THE COURT OF APPEALS OF MARYLAND

## ADMINISTRATIVE ORDER ESTABLISHING TASK FORCE ON PRETRIAL CONFINEMENT AND RELEASE

WHEREAS, On September 25, 2013, the Maryland Court of Appeals issued its decision in *DeWolfe v. Richmond* ("*Richmond*"), which determined that criminal defendants have the constitutional right to representation by counsel at initial appearances before District Court Commissioners; and

WHEREAS, The effectuation of this constitutional right will require substantive changes to the Maryland Rules, as well as to existing court procedures and processes; and

WHEREAS, The scope and significance of the Court's decision in *Richmond*, coupled with the gravity of ancillary concerns, necessitate review of pretrial confinement and release issues; and

WHEREAS, It is appropriate that Judiciary representatives form a task force to study the issues and review the laws, rules, procedures and processes pertaining to pretrial confinement and release.

NOW, THEREFORE, I, Mary Ellen Barbera, Chief Judge of the Court of Appeals and administrative head of the Judicial Branch, pursuant to the authority conferred by Article IV, § 18 of the Maryland Constitution, do hereby order this 24th day of October, 2013, effective immediately:

1. Creation. There is a Task Force on Pretrial Confinement and Release.

2. Members and Advisors.

a. Task Force. The Task Force shall consist of the following members, appointed by the Chief Judge of the Court of Appeals:

(i) A District Court judge, who shall serve as Chair of the Task Force;

(ii) The Chief Judge of the District Court;

(iii) A third District Court judge;

(iv) The Chair of the Conference of Circuit Judges;

(v) The Chair of the Committee on Criminal Law and Procedure or her designee from among the members on the Circuit Court;

(vi) The Chief Clerk of the District Court;

(vii) The Coordinator of Commissioner Activities;

(viii) The State Court Administrator or her designee;

(ix) The Director of the Judiciary's Office of Government Relations;

(x) The Executive Director of JIS.

(xi) The Chair of the Standing Committee on Rules of Practice and Procedure or his designee.

b. Stakeholders. The Task Force may invite other criminal justice stakeholders within the State to participate in the Task Force's work, through invitations to public forums, or as otherwise deemed appropriate.

c. Compensation. Task Force members are not entitled to compensation but, to the extent that budgeted funds are available, may be reimbursed for expenses in connection with travel related to the work of the Task Force.

3. Meetings.

a. Scheduling. The Task Force shall meet at least twice, at the call of the Chair, prior to issuance of its Interim Report and thereafter, as necessary, prior to issuance of its Final Report.

b. Quorum. A majority of the authorized membership of the Task Force shall constitute a quorum for the transaction of business.

4. Functions.

a. Purpose. The purpose of the Task Force is to study pretrial confinement and release issues, from the perspective of the Judiciary, to ensure that the necessary rules, procedures, processes and funds are in place to facilitate the implementation of *Richmond*.

b. Duties. To carry out the purpose of the Task Force, it shall:

(i) review all laws, rules, procedures and processes relevant to pretrial confinement and release;

(ii) consult, as appropriate, with criminal justice stakeholders within the State, on pretrial confinement and release issues;

(iii) make recommendations as to changes to rules, operational procedures and processes necessary to implement *Richmond*, as well as an estimation of the funding necessary for implementation.

(iv) perform other tasks as may be delegated by the Chief Judge of the Court of Appeals.

5. Staff. The Task Force will be staffed by the Office of the Coordinator of Commissioner Activities.

6. Reports. The Task Force shall submit to the Chief Judge of the Court of Appeals an Interim Report on December 31, 2013, and a Final Report on April 30, 2014.

/s/ Mary Ellen Barbera
Mary Ellen Barbera
Chief Judge of the Court of Appeals

Filed: October 24, 2013

/s/ Bessie M. Decker
Bessie M. Decker
Clerk
Court of Appeals of Maryland

PROPOSAL OF MARYLAND JUDICIARY
FOR
IMPROVEMENTS TO PRETRIAL RELEASE SYSTEM

## I. INTRODUCTION

The current pretrial confinement and release system in Maryland has the following elements:

(1) Every defendant who is arrested, with or without a warrant, must be presented for an initial appearance to a judicial officer without unnecessary delay and, in any event, within 24 hours after the arrest. Md. Rule 4-212(e), (f). The actual time that elapses between arrest and initial appearance varies around the State, but the average appears to be about four hours.

(2) In nearly all cases, the initial appearance is before a District Court commissioner. The office of commissioner is created by Art. IV, § 41G of the Maryland Constitution. The authority and duties of commissioners, including the authority to release or detain arrested defendants, are mentioned in § 41G and provided for more explicitly in Code, Cts. & Jud. Proc. (CJP) Art. § 2-607. There are 278 commissioners Statewide. They are on duty (or on call) seven days a week, 24 hours a day and normally work in eight-hour shifts. In 2012, they conducted nearly 173,000 initial appearances.[1] Commissioners are not required to be lawyers.

(3) The commissioners perform five functions at an initial appearance.

(i) If the defendant was arrested without a warrant, the commissioner

[1] Under the authority of Art. IV, § 41G, commissioners also are authorized by CJP § 2-607 to issue interim domestic violence protective orders and interim peace orders when a court is not in session and, upon application of a police officer or member of the public, to issue charging documents, arrest warrants, and criminal summonses. In 2012, they dealt with 13,143 requests for interim civil protective orders (domestic violence, child abuse, and vulnerable adult abuse), 9,017 interim peace order requests, and 69,990 applications for charging documents (40,029 by the police and 29,961 by citizens).

determines, from the *paper evidence* – the charging document and the accompanying statement of probable cause – whether there was probable cause for each charge and for the arrest. If the commissioner finds no probable cause for any charge or for the arrest, the defendant must be released on recognizance. The release does not have the effect of dismissing the charge.

(ii) The commissioner informs the defendant of each charge and, if the defendant does not already have one, provides the defendant with a copy of the charging document.

(iii) The commissioner reads to the defendant or requires the defendant to read the advice of right to an attorney printed on the charging document.[2]

(iv) If the defendant is charged with a felony not within the trial jurisdiction of the District Court, the commissioner advises the defendant of the right to a preliminary hearing before a District Court judge.

(v) If the defendant is not released on a finding of no probable cause, the commissioner determines, in accordance with the criteria set forth in Rule 4-216(f) and (g) and Code, Crim. Proc. (CP) Art. § 5-201, whether the defendant shall be released

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[2] Under current Rule 4-215(c), a District Court judge, under certain circumstances, could find a waiver of counsel by inaction if the defendant appears in court without an attorney and it is shown that the defendant received a copy of the charging document containing the advice of right to counsel and was also given that advice by a commissioner. A Circuit Court judge may **not** rely on advice by a commissioner in finding a waiver by inaction. The Court of Appeals Standing Committee on Rules of Practice and Procedure has under consideration a rewriting of Rule 4-215 that would not allow a District Court judge to find a waiver by inaction based on advice by a commissioner, in part because (i) in a matter as important as waiver of a Constitutional right to counsel, the Rule should be the same for both courts, (ii) commissioner proceedings are not currently recorded, and (iii) it may be extremely difficult, if not impossible, to determine, when the waiver decision is made, what the defendant's physical, mental, and emotional condition was when the advice was given by the commissioner.

pending trial and, if so, on what conditions.[3]

(4) In 2012, 86,000 defendants (49.75% of those having initial appearances before a commissioner) were released by the commissioner, most of them on recognizance or on unsecured bond.

(5) A defendant who is not released appears before a District Court judge at the next session of the court for a "bail review" – a determination by the **judge** whether the defendant should be released pending trial and, if so, on what conditions. In 2012, District Court judges conducted nearly 80,000 bail reviews. The judge is also required to take into account the criteria for release and for conditions of release set forth in Rule 4-216(f) and (g) and CP § 5-201. The legal criteria for release and conditions of release, in other words, are the same for the commissioner and the judge.

(6) Under the two principal decisions in *DeWolfe v. Richmond*, 434 Md. 403 (2012) and 434 Md. 444 (2013) (*Richmond*), a defendant is entitled to an attorney at both an initial appearance before a commissioner and at a bail review proceeding before a judge. An indigent defendant is entitled to representation by the Office of the Public Defender (OPD) or a court-appointed attorney at an initial appearance before a commissioner. By statute, an indigent defendant is entitled to representation by OPD at the bail review hearing. CP § 16-204(b)(2)(i).

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[3] Rule 4-216(f) requires a commissioner, in determining whether a defendant should be released and the conditions of a release, to consider nine enumerated factors, bearing both on the prospect of non-appearance at subsequent proceedings and the danger the defendant may present to the alleged victim, another person, the community, or the defendant him/herself. Code, Crim. Proc. Art. (CP) § 5-201 also requires a commissioner to consider, as a condition of release, reasonable protections for the safety of an alleged victim. CP § 5-202 precludes a commissioner from releasing defendants charged with certain serious offenses. Only a judge may release those defendants. Approximately 7,000 to 7,500 defendants fall into that category each year.

## II. DEFICIENCIES IN THE PRESENT PRETRIAL RELEASE SYSTEM

Even without regard to the overlay of the *Richmond* requirements, the present pretrial release system is noticeably deficient in several respects, most of which emanate from the overarching fact that it provides for two duplicative hearings, often within 12 hours of one another, for more than 80,000 defendants a year, to resolve the **same** issue – pretrial confinement or release – in accordance with the **same** legal criteria and often on the **same** evidence**.**

(1) In many areas of the State, it requires the police, sheriffs, or detention facility officers to transport defendants at all hours of the day or night to commissioners' offices, some of which are many miles from the police station, detention center, or place of arrest, and to remain at the commissioner's office during the 25-30 minute hearing. For the 80,000 defendants who are not released by the commissioner, it requires that they be transported a second time – to the court at the next court session – and that the officer remain there with the defendant pending a decision by the judge.

(2) In some instances, if several defendants have been arrested within a short period of time, there will be a queue at the commissioner's station, requiring officers and defendants to wait their turn, which not only can create significant security issues but precludes the officers from attending to other duties, which may impair the public safety of the community.

(3) If the defendant has been brought from a police station or detention center and either (i) is not released or (ii) is to be released but has clothing or other belongings back at the station or detention center, the officer has to transport the defendant back to the station or center.

(4) If a defendant who is to be released was arrested on the street and was brought directly to the commissioner's office or, if brought from a police station or detention center has no belongings remaining there, the defendant is released at the commissioner's office and must find his or her own way home, possibly in the dead of

night and without available transportation.

(5) Although the public has a right to attend and observe commissioner hearings, in many areas of the State, because of cramped quarters or security concerns, there is insufficient space for the public to attend commissioner hearings. This is a special problem for victims. CP §§ 5-201 and 11-203 require the commissioner, when deciding upon pretrial release, to consider the safety of victims, including a no-contact condition, but that may be difficult if the victim is unable to attend or, because of the cramped quarters, may be placed in the immediate vicinity of the defendant.

The two *Richmond* decisions, recognizing a Constitutional right to an attorney at both an initial appearance before a commissioner and at a bail review hearing before a judge, have created additional logistical and fiscal issues.

By virtue of the defendant's Constitutional right to an attorney at an initial appearance before a commissioner, it will be necessary, unless the defendant waives an attorney, for an attorney not only to appear at the initial appearance but to have the ability to consult privately with the defendant. This may have several impacts:

(1) Under Federal Constitutional law, a defendant who has a right to an attorney also has a right to waive that right and proceed without an attorney. A waiver cannot be accepted, however, unless it is knowing and voluntary, which will require commissioners, for the first time, to advise the defendant regarding the right to an attorney at the initial appearance and, if the defendant indicates a desire to proceed without an attorney, to conduct an inquiry to assure that the waiver is knowing and voluntary.[4] Proposed amendments to Rule 4-216, now pending before the Court of

[4] As noted above, commissioners currently must advise defendants of their right to an attorney at subsequent proceedings, but they do not conduct waiver inquiries regarding that right. The new requirement, emanating from *Richmond*, is advice that they have a right to an attorney at the commissioner hearing, which has a limited purpose. If the defendant desires to waive an attorney with respect to that hearing, a waiver inquiry will be required.

Appeals, provide for the giving of such advice and the conducting of such an inquiry by the commissioner. The need for such an inquiry, which involves not only an explanation of the right but a dialog with the defendant, will likely lengthen the proceeding, thereby exacerbating the problems noted above.

(2) Unless arrangements can be made for a remote appearance by electronic means, which would require acceptable equipment at both the commissioner's office and wherever the attorney may be, *Richmond* will require the physical appearance of the attorney, which, at least in some cases, may induce the appearance of a prosecutor as well. That may require larger commissioners' offices, both for the hearing itself, to provide space for private consultations between the defendant and the attorney, and to provide a way for private communication between the attorney and any interpreter.

(3) If the defendant wishes the assistance of an attorney and the attorney is unable to participate when the defendant is brought before the commissioner, the hearing cannot be held, and the defendant will be temporarily committed pending a hearing before the next available judicial officer. Apart from the fact that the defendant will have been transported to the commissioner's station in vain, the result is that the defendant's exercise of the Constitutional right to an attorney will necessarily mean confinement, possibly overnight.

(4) A defendant who is not released by the commissioner will be presented to a judge, where he/she likely will be represented by a different attorney, who may or may not have had an opportunity to confer with the attorney who appeared at the commissioner hearing – two different lawyers within 12 to 24 hours.

(5) In short, the logistical and operational problems in maintaining the present system of initial appearances before commissioners, especially in light of the *Richmond* requirements, are real and substantial. They will require renovated or additional facilities at a number of commissioner stations, an uncertain cost.

Apart from the *logistical* problems noted, it is estimated that an additional

appropriation to OPD of $28,000,000 to $30,000,000 each year will be required in order to provide the additional attorneys or other personnel necessary to provide quality representation at initial appearances before commissioners.

## III. PROPOSED ALTERNATIVES

In the aftermath of the first *Richmond* decision in January 2012, the General Assembly created a Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender. The Task Force regarded its mission as considering and recommending ways to improve the two systems (initial appearance and bail review) and the representation of indigent defendants.

The draft Report of the Task Force contains 16 recommendations, essentially as proposed by the Task Force's subcommittees. The first five recommend further studies regarding the issuance of citations or summonses in lieu of arrest, provided for in 2012 Md. Laws, Chs. 404 and 405 (CP § 4-101). No immediate changes in that law are proposed. One proposal, considered but ultimately rejected by the Task Force was eliminating commissioners altogether and having judges perform **all** of the duties now assigned to commissioners, 24 hours a day, seven days a week, 365 days a year. We are unaware that any fiscal note or operational impact analysis was prepared with respect to that proposal.

The balance of the Task Force's recommendations fall into four basic areas.

(1) Having judges conduct all initial appearances, within 24 hours after arrest, 24 hours a day, seven days a week, 365 days a year, but retaining commissioners to perform their other statutory duties. That would require District Courts to be open throughout the State at night and on weekends. No operational plan for achieving that objective and no indication of the fiscal impact of that recommendation, either on the Judiciary or on any of the other components of the criminal justice system, are provided.

(2) Relying on a risk assessment device or matrix to determine pretrial release. Various versions of that proposal were considered and approved by the Task Force. *See* Recommendations 7, 8, 12, 13, and 14. Certain aspects of the those proposals bear comment.

(i) Although several risk assessment devices have been created,[5] it appears that the Task Force considered principally the one developed by the Laura and John Arnold Foundation, which the Foundation concludes "reliably predicts the risk a given defendant will reoffend, commit violent acts, or fail to come back to court with just nine readily available data points." *See Developing a National Model for Pretrial Risk Assessment*, LJAF Research Summary (Appendix 1 to Task Force Report, at 14).

(ii) Although the Foundation contends that the nine data points can be determined based on historical records, without the need for any personal interviews and at minimal expense, it makes clear that the device is **not** a substitute for judicial discretion:

> "It is critically important to note that tools such as this are not meant to replace independent discretion of judges; rather, they are meant to be one part of the equation. We expect that judges who use these instruments will look at the facts of a case, and at the risk a defendant poses, and will then make the best decision possible using their judgment and experience."

*Id*. at 15.

(iii) Based on that caveat, it seems evident that such a risk assessment device or matrix is not intended to replace the need for a hearing of some sort, but merely to guide the ultimate decision. To the extent it is found reliable, it may make

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[5] *See*, for example, Baradaran and McIntyre, *Predicting Violence*, 90 Tex. L. Rev. 497 (2012).

initial appearance hearings more informative and perhaps shorter in duration, but it will not reduce the number of them or eliminate the need for counsel at any hearing in which judicial discretion is exercised.[6]

(iv) If the effective recommendation is that embodied in Recommendation 13, it would appear inconsistent with the Foundation's clear caveat that these risk assessment devices are **not** a substitute for discretion but merely a guide to the exercise of that discretion. Although Recommendation 13 would not immediately apply to domestic violence and sex offenses, it presumably would apply to situations in which there are other victims or witnesses who may be at risk. It would not apply, however, to any release in which any condition is attached, presumably including standard conditions such as obeying all laws. Given these ambiguities, it is not clear what the actual effect of using such a device would be – how many defendants would, in fact, be released without the benefit of a hearing.

(v) Although it appears that the Foundation's device has been or is being tested in Kentucky based on data from that State, it has not been tested based on Maryland data, and it is not clear, if the device were to be used in Maryland, who would

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[6] The Task Force recommendations regarding this risk assessment device are not entirely clear on this point. Recommendation 7 is that "a statewide system that utilizes a standard, validated pretrial risk screening tool at which the pretrial detention/release decision is made be implemented." Recommendation 8 is that "a statewide system that utilizes risk-and-need-based supervision, referral, and treatment options in all Maryland counties be implemented." Recommendation 12 is that "an objective, validated risk assessment tool for use by pretrial service agents be adopted." Recommendation 13 states:

> "That the PSA (the Executive Branch Pretrial Services Agency proposed in Recommendation 11) release those persons for whom the validated risk assessment tool recommends release **without conditions**. Until such time as a validated risk assessment tool is developed for domestic violence offenses and sexual offenses, the PSA may not be authorized to release persons charged with those offenses." (Bolding added).

be responsible for collecting and assessing the local data, what actual categories of crimes the matrix could be relied upon to assess the risk of either non-appearance or public safety, and how, where, and for how long it would be tested before being mandated Statewide.

(3) Eliminating the requirement of secured bail, either totally or for as yet undesignated categories of crimes or defendants, and relying instead on monitored special conditions attached to release — from house arrest to various kinds of required therapies. Recommendation 6 proposes that "the use of secured, financial conditions of pretrial release (cash, property or surety bond) that require a low-risk defendant to pay some amount of money in order to obtain release, while permitting high-risk defendants with the resources to pay their bond and leave jail unsupervised be completely eliminated." No criteria are suggested for determining high or low risk, either of non-appearance or further criminal behavior. Nor is it made clear whether a defendant who is released on some special condition would have the right to challenge the condition(s) in court and, if so, what form that challenge might take – a review hearing by the District Court or by habeas corpus petition filed with any judge.

(4) Creating a new Statewide pretrial release unit within the Executive Branch, to collect information, provide recommendations to judges, and monitor compliance with conditions attached to pretrial release. We are unaware that any fiscal note has been prepared with respect to that proposal. An October 2013 Report from the Public Justice Institute, attached as Appendix 3 to the Task Force Report indicates that Baltimore City and 10 Maryland counties ( including Anne Arundel, Baltimore, Montgomery, and Prince George's) currently have a pretrial services program of some sort but that "there is no consistent compliance with national standards and evidence-based practices." Appendix 3 at 62, 63. Of interest, in light of Recommendation 13, the PJI Report notes that"[s]tandards and evidence-based practices say that pretrial services programs should make recommendations to the court that are based upon the risk

assessment findings," not make and execute release decisions themselves based solely on a risk assessment tool.

In summary, although some of the Task Force recommendations, upon further study and analysis, may prove to have merit, so far there has been no public explanation of how most of those approaches would actually work, how they would relate together, what they realistically could be expected to achieve, when they could be implemented, how they would impact the various components of the criminal justice system, or what they would cost.

The Judiciary's proposal takes account of most of what is recommended by the Task Force, but, by giving consideration to all of the structures and "moving parts" in the system, in both an operational and fiscal context, casts its recommendations in terms of what realistically can be put into place in the short-term future with a minimum of additional resources and what needs, and will get, further study. Importantly, the Judiciary has developed reliable data to measure the operational and fiscal impact of its recommendations.

## IV. THE JUDICIAL RESPONSE – GENERAL OUTLINE

After consideration of the available data regarding how the present system operates, both qualitatively and quantitatively, and the practicality and realistic benefits of the various alternatives that have been under consideration, the Judiciary offers the following recommendations:

(1) Commencing January 2015, eliminate, as much as possible, the current two-tiered system by having defendants, within 24 hours after their arrest, make their initial appearance before a District Court judge rather than a commissioner.

(i) A careful review of the available data leads the Judiciary to conclude that it would be both operationally feasible and cost-effective to have District

Court judges, with some assistance from Circuit Court judges cross-designated as District Court judges, conduct nearly all initial appearances, within 24 hours following arrest, for defendants who are arrested between 9:00 Sunday morning and noon on Friday. How that would work and what it would entail and cost are set forth in Part V below. That would eliminate approximately 130,000 commissioner hearings (75% of the total) and the cost and logistical burdens attendant to those hearings.

(ii) The Judiciary believes that this recommendation could become effective by January 2015, but likely not earlier than that. As noted in Part V, some additional judges would be necessary. Some statutes and rules may need to be amended, some realignment of judicial resources and operations would be necessary, and new arrangements with detention centers and other components of the criminal justice system would need to be worked out. A target date of January 2015 would allow the necessary time for those requirements to be in place.

(iii) The Judiciary gave serious consideration to the prospect of having judges conduct **all** initial appearances, including those on weekends and holidays. Although it was clear that more additional judges, clerks, and bailiffs would be needed and that the cost of opening courthouses throughout the State for two additional days each week would be significant, it was impossible, given the time available, to estimate with any degree of certainty the overall fiscal and operational impact of such an extension, on the Judiciary or on other State and local agencies. The Judiciary intends to examine further the utility, cost and impact of having judges handle weekend and holiday initial appearances based on the actual experience in Maryland of judges handling initial appearances on the weekdays, and develop a reasoned recommendation with respect to such a prospect.

(2) Retain the necessary number of commissioners:

(i) To continue conducting initial appearances on Saturdays, Sundays, and holidays;

(ii) To perform the other functions committed to commissioners:

- Issuance of interim protective and peace orders when court is not in session; and
- Issuance of warrants and summonses upon application by police and members of the public; and

(iii) To utilize the time saved from not having to conduct initial appearance hearings on Monday through most of Friday to perform, at least on an interim basis, some of the functions of a Statewide pretrial release unit (except in those counties that already have such a unit and wish to retain it), to gather and verify necessary information and make appropriate written recommendations to the District Court judges.

(3) Conduct as many initial appearances before a judge as possible by reliable video-conferencing, which is already permitted by Rule 4-231(d). Because District Court judges (and Circuit Court judges, when acting as District Court judges through cross-designation) have Statewide jurisdiction, video-conferencing would allow a judge sitting in one courtroom in one county to handle initial appearances remotely for defendants in several counties. That would maximize the ability of the Judiciary to carry out this function with existing resources.

(4) With the assistance of other interested groups, the Judiciary will undertake the study and testing, for future implementation, the viability and usefulness of a variety of other techniques, including those recommended by the Task Force, for either reducing the number of defendants requiring a pretrial release hearing or making such hearings more efficient, such as:

(i) Determining whether a reliable FTA/security risk assessment matrix can be developed that may allow at least some release decisions to be made safely and quickly on the basis of the matrix, with or without the need of a hearing;

(ii) In lieu of confinement and subject to monitoring, attaching special conditions to a pretrial release, as is done with probation orders, including such

things as house arrest, ankle bracelets, no contact with designated persons, and participation in designated therapies, and permitting a judicial hearing on those conditions, in the District Court, only upon the defendant's written request;

(iii) Examining the feasibility, from both an operational and cost perspective, of having judges conduct initial appearances on weekends and holidays by video conference.[7]

## V. IMPLEMENTATION AND COST

The Judiciary estimates that the presentment of defendants arrested between 9:00 a.m. on Sunday through noon on Friday for one appearance before a District Court judge would require an additional 12 District Court judges, clerks, and bailiffs. The annual cost for those additional judges, clerks, and bailiffs would be $3,601,680. Those conclusions are based on the following analysis.

(1) Although all additional judges would be part of the total District Court complement of judges and would be assigned to the full range of judicial duties, the need for them is driven not by a general overload of **cases**, which involve trials, motions, etc., but solely by the need to handle over 125,000 initial appearances within a compressed time period. The Judiciary concluded that the standard criteria used for certifying a need for new judges, which would have resulted in a need for at least 25 new judges, was unrealistic and unsupportable. We looked instead at how much actual time would need to be devoted to handling just those additional dockets – several each day in most, if not all,

[7] In constructing that list, the Judiciary is not ignoring the several recommendations of the Task Force for studying the prospect of expanding the use of citations snd summonses in lieu of arrest or of decriminalizing additional offenses. The Judiciary is certainly willing to participate in any such studies but believes that the Executive or Legislative Branches should take the lead in that effort.

of the District Courts – and how much of that time could reasonably be added to the workload of existing judges, both District Court and Circuit Court judges. Because of the requirement of providing an initial appearance within 24 hours after arrest, those hearings cannot be postponed like other cases when there is an overload. They need to occur to meet the need each day; one or more judges must be available to handle them. The net deficiency, and that alone, is what produced the estimated need of 12 additional judges, rather than 25.

(2) The backup data will be supplied. In summary, the analysis is as follows:

(i) In 2012, commissioners conducted 173,000 initial appearances, each taking an average of 30 minutes. Approximately 130,000 of those hearings were conducted on Mondays through Fridays. Commissioners conducted just over 23,000 hearings on Saturdays and just over 19,000 on Sundays – a total of roughly 42,000 weekend hearings.

(ii) **Actual experience** in Maryland has shown that video-conference **bail review** hearings before judges consume considerably less time, in many instances no more than a few minutes. That is because much of the groundwork was covered by the commissioner. Based on that actual experience but leaving room for error, the Judiciary estimates an average time of 10 minutes for a bail review hearing.

(iii) An **initial appearance** hearing may take longer, but not as long as those conducted by commissioners. There are several reasons for that assumption:

- Because, as is the case now with commissioners, a determination of probable cause is based solely on the papers – the charging document and the statement of probable cause – that determination is not expected to take any more time than it does at a commissioner hearing.
- Indigent defendants will be represented and will have been counseled by the attorney. Although defendants could still opt

to waive counsel, because the OPD attorneys (and private attorneys) will be in court and will have conferred with the defendants, that is less likely. OPD has asserted that, in most instances, it will be able, at that stage, to make a determination whether a defendant qualifies for OPD representation, not just for the initial appearance but generally. To the extent that is so and OPD is able to enter a general appearance, the required advice that commissioners must give regarding the right to counsel could be eliminated.

- If the defendant has received a copy of the charging document and acknowledges that counsel has explained the charges, the court will not have to read them to the defendant or have the defendant read them aloud.
- If the judge and counsel have a written report and recommendation from a commissioner or other pretrial services agent, which would include a record check and basic information regarding the defendant, the hearing will be more focused. This would be especially true if a reliable risk assessment device is developed.
- Whether the hearing is conducted with the defendant in court or by remote video-conferencing, the defendants can be queued up for a set docket, thereby eliminating dead time.

Leaving some room for error, the Judiciary estimates an average of 20 minutes for an initial appearance.

(iv) In 2012, District Court judges conducted approximately 80,000 bail review hearings, devoting approximately 50 hours/day to that effort.

(v) If judges had conducted the initial appearances that the

commissioners conducted on Monday through Friday (excluding holidays), they would have conducted approximately 125,000 initial appearances. They also would have conducted approximately 21,500 bail reviews for the initial appearances conducted by commissioners on the weekend and holidays. In the aggregate, they would have needed to devote an additional 160 hours/day to deal with those dockets. In addition, they would have needed to devote an additional 13.8 hours/day to deal with bail review hearings for defendants who had initial appearances before a commissioner on Saturday or Sunday and were not released.

(vi) As noted, the proposal to shift initial appearances to judges will require several additional District Court dockets each day. In order to align those dockets with available courtrooms, the District Administrative judges may need to consider creating additional morning dockets and later afternoon dockets and using available courtrooms when judges are working in chambers.

(vii) The cost of an additional District Court judge, together with an additional bailiff and courtroom clerk is estimated at $300,140 per year, as follows:

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|---|---|
| • Compensation and benefits for judge: | $210,900 |
| • Compensation and benefits for bailiff: | $ 37,496 |
| • Compensation and benefits for clerk: | $ 51,738 |
| TOTAL: | $300,140 |

(ix) Multiplying $300,140 by 12 produces the estimated cost for new judges and staff as $3,601,680.

There will be other costs as well associated with this proposal.

(1) The Judiciary has considered the prospect of additional facility needs – courtrooms, chambers – to accommodate new judges. A study in each district would need to be made to determine whether, and to what extent, the additional judge or judges can be accommodated, at least initially, in existing facilities, those that readily can be made available, or those that will be needed in any event to accommodate additional judgeships

for which a need has already been certified. A preliminary review indicates that $514,000 would be needed to expand space.

(2) Some additional expenditure would be required to purchase and install, where necessary, the equipment necessary to conduct video-conference hearings. The cost of that is estimated at $1,950,100, most of which would be a one-time expenditure for equipment. That includes the cost of equipment needed by the local detention centers. That expenditure would likely be considerably less than what would be required to conduct commissioner hearings by video-conferencing, simply because there would be many more commissioner stations needing the equipment.

(3) Because, under this proposal, commissioners will continue to conduct initial appearances on weekends, there will be some additional costs to OPD. The Judiciary is unable to make that estimate. Nor is the Judiciary able to estimate the overall fiscal impact on local detention centers. There may be some additional operating cost to the detention centers in an expansion of video-conferencing initial appearances before judges, but that would likely be more than offset by eliminating the transportation of prisoners twice – to commissioners and to court.

## VI. BENEFITS

(1) The predominant benefit of this proposal is that it eliminates the cost and expense of duplicative hearings, including, upon implementation of the proposal, the need to increase the budget of OPD by $28 to $30 million. Even if commissioners continue to handle weekend and holiday initial appearances, the proposal would eliminate the duplicative hearing process in about 75% of the cases. To that extent, it would eliminate not just the costs of commissioner hearings but all of the logistical problems connected with them – transportation, attorneys, security.

(2) By having the proceeding in open court, it will provide much greater

transparency and public confidence. Victims will have a better opportunity to be present and would not have to go to the trouble of appearing twice within the span of 12-24 hours to express any concerns they may have. Required interpreters will be better accommodated, not to mention the news media and the public generally.

(3) It will substantially reduce and may eliminate the need for preliminary hearings.

(4) It will not eliminate commissioners, who will remain in place to perform other functions. They would continue to be available for interim protective orders during evening hours, weekends, and holidays and to deal with walk-ins from the public and the police. As their hearing caseload will be substantially reduced, however, they can serve as pretrial release investigators, gathering and verifying information and preparing a written report and recommendation for the judge – *i.e.*, serve the function, other than monitoring compliance, of a pretrial release unit in those counties that do not already have such a unit.

(5) By serving that function, they can make the initial appearance before the judge a more informative one and possibly lead to earlier plea negotiations. That, in turn, may help reduce the number of jury trial prayers and actual trials.

(6) It has been suggested that, by allowing the defendant only one pretrial release hearing in the District Court, there might be more habeas corpus petitions filed in the circuit courts – to continue the prospect of having "two bites at the apple." At this point, of course, that is entirely speculative and incapable of measuring. We do note that, under Rule 15-303(b), (i) because a judge will already have determined the appropriateness of any bail, unless the petition for habeas corpus raises new issues not considered at the initial appearance, the judge who is presented with a habeas corpus petition may deny it without a hearing; and (ii) because the defendant will have been represented by an attorney at the initial appearance, it should be unlikely that there would be issues raised in the habeas corpus petition that were not considered at the initial appearance.

## VII. CONCLUSION

The Judiciary believes that its proposals are feasible, that they would produce a more rational and cost-effective pretrial release system than that which now exists, one that would be in greater conformity with what is done elsewhere in the country. The Judiciary believes as well that they would far better accommodate the Constitutional right to counsel than any collection of band-aid approaches. The proposals are supported by the data currently available to the Judiciary, but some additional studies do need to be made to evaluate that data and to make a reliable estimate of the operational and fiscal impact of the proposals and alternatives on other components of the law enforcement community, both State and local.

With constructive collaboration on the part of the various stakeholders, the Judiciary believes that its proposals can be evaluated by the General Assembly in its 2014 session and that the major components can be put into place by the end of that year. That provides clear light at the end of a reasonably short tunnel.

# SENATE BILL 748

E2 4lr1805

By: **Senator Zirkin**
Introduced and read first time: January 31, 2014
Assigned to: Judicial Proceedings

A BILL ENTITLED

AN ACT concerning

**Criminal Procedure – District Court Commissioner – Initial Appearance**

FOR the purpose of prohibiting a commissioner from conducting an initial appearance for an arrested person except during certain time frames with certain exceptions; authorizing a commissioner to conduct an initial appearance for certain arrested persons under certain circumstances; clarifying that the Office of the Public Defender is not required to provide representation to an indigent individual at an initial appearance before a District Court commissioner except during certain time frames; and generally relating to an initial appearance by a District Court commissioner.

BY adding to
Article – Criminal Procedure
Section 5–216
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

BY repealing and reenacting, with amendments,
Article – Criminal Procedure
Section 16–204
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

**Article – Criminal Procedure**

**5–216.**

EXPLANATION: **CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.**
**[**Brackets**]** indicate matter deleted from existing law.

**(A) EXCEPT AS PROVIDED IN SUBSECTION (B) OF THIS SECTION, A DISTRICT COURT COMMISSIONER MAY NOT CONDUCT AN INITIAL APPEARANCE FOR AN ARRESTED PERSON EXCEPT DURING:**

**(1) NORMAL BUSINESS HOURS MONDAY THROUGH FRIDAY; OR**

**(2) THE HOURS BETWEEN 9 A.M. AND 5 P.M. ON WEEKENDS AND HOLIDAYS.**

**(B) A DISTRICT COURT COMMISSIONER MAY CONDUCT AN INITIAL APPEARANCE AT ANY TIME FOR AN ARRESTED PERSON WHO, FOR THE PURPOSE OF THE INITIAL APPEARANCE BEFORE THE COMMISSIONER:**

**(1) WAIVES THE RIGHT TO REPRESENTATION BY COUNSEL; OR**

**(2) IS REPRESENTED BY PRIVATE COUNSEL.**

16–204.

(a) Representation of an indigent individual may be provided in accordance with this title by the Public Defender or, subject to the supervision of the Public Defender, by the deputy public defender, district public defenders, assistant public defenders, or panel attorneys.

(b) (1) Indigent defendants or parties shall be provided representation under this title in:

(i) a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense;

(ii) a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to presentment being made before a commissioner or judge;

(iii) a postconviction proceeding for which the defendant has a right to an attorney under Title 7 of this article;

(iv) any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result;

(v) a proceeding involving children in need of assistance under § 3–813 of the Courts Article; or

(vi) a family law proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article, including:

1. for a parent, a hearing in connection with guardianship or adoption;

2. a hearing under § 5–326 of the Family Law Article for which the parent has not waived the right to notice; and

3. an appeal.

(2) (i) Except as provided in subparagraph (ii) of this paragraph, representation shall be provided to an indigent individual in all stages of a proceeding listed in paragraph (1) of this subsection, including, in criminal proceedings, custody, interrogation, bail hearing before a District Court or circuit court judge, preliminary hearing, arraignment, trial, and appeal.

(ii) Representation is not required to be provided to an indigent individual at an initial appearance before a District Court commissioner **EXCEPT DURING:**

**1. NORMAL BUSINESS HOURS MONDAY THROUGH FRIDAY; OR**

**2. THE HOURS BETWEEN 9 A.M. AND 5 P.M. ON WEEKENDS AND HOLIDAYS**.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2014.

# SENATE BILL 920

E2 4lr1478

By: **Senator Miller**
Introduced and read first time: January 31, 2014
Assigned to: Judicial Proceedings

A BILL ENTITLED

AN ACT concerning

**Criminal Procedure – Pretrial Release**

FOR the purpose of repealing the authority of a District Court commissioner to set bond or commit persons to jail in default of bond; prohibiting a District Court commissioner from issuing an arrest warrant based solely on an application for a statement of charges filed by a certain person; providing that on the filing of an application for a statement of charges by a certain person, a District Court commissioner who finds probable cause may issue a summons for the defendant to appear at a preliminary appearance before a judge; authorizing the Chief Judge of the District Court to add to the misdemeanors that are subject to citation in lieu of arrest under a certain provision of law; authorizing a District Court commissioner who finds probable cause to release a defendant charged with a felony from pretrial detention under certain circumstances; prohibiting a District Court commissioner who finds probable cause from authorizing the pretrial release of a defendant charged with a felony if a law enforcement officer certifies by affidavit and articulates under oath certain specific facts; requiring a law enforcement officer to appear at a certain pretrial release hearing if the law enforcement officer submits a certain affidavit; requiring a District Court commissioner to release a defendant charged with a misdemeanor on personal recognizance under certain circumstances; prohibiting a District Court commissioner who finds probable cause from authorizing the pretrial release of a defendant charged with a misdemeanor if a law enforcement officer certifies by affidavit and articulates under oath certain specific facts; requiring a District Court commissioner to release a certain defendant to the custody of a certain pretrial services agency under certain circumstances; requiring a law enforcement officer to appear at a certain pretrial release hearing if the law enforcement officer submits a certain affidavit and the defendant is not released to the custody of a certain pretrial services agency; providing that, notwithstanding any other law or rule, a defendant who is detained in custody after being brought before a District Court commissioner shall be taken before a

EXPLANATION: **CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.**
**[**Brackets**]** indicate matter deleted from existing law.

certain judicial officer without unnecessary delay and in no event later than a certain time; and generally relating to pretrial release.

BY repealing and reenacting, with amendments,
Article – Courts and Judicial Proceedings
Section 2–607
Annotated Code of Maryland
(2013 Replacement Volume and 2013 Supplement)

BY repealing and reenacting, with amendments,
Article – Criminal Procedure
Section 4–101
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

BY repealing and reenacting, without amendments,
Article – Criminal Procedure
Section 5–202
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

BY adding to
Article – Criminal Procedure
Section 5–202.1, 5–202.2, and 5–202.3
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

**Article – Courts and Judicial Proceedings**

2–607.

(a) (1) The administrative judge of each district, with the approval of the Chief Judge of the District Court, may appoint the number of commissioners necessary to perform the functions of the office within each county.

(2) In multicounty districts, the administrative judge shall obtain the recommendation of the resident judge in each county as to the number of commissioners required in the county and as to the persons to be appointed.

(b) (1) Commissioners shall be adult residents of the counties in which they serve, but they need not be lawyers.

(2) Each commissioner shall hold office at the pleasure of the Chief Judge of the District Court, and has the powers and duties prescribed by law.

(3) Except without additional compensation, unless otherwise fixed by law, an employee of the District Court, who is an adult, may be granted, in the same manner, commissioner powers and duties in the county where the employee is employed.

(c) (1) **[**A**]** **EXCEPT AS PROVIDED IN PARAGRAPH (6) OF THIS SUBSECTION, A** commissioner shall receive applications and determine probable cause for the issuance of charging documents.

(2) **[**A**]** **EXCEPT AS PROVIDED IN PARAGRAPH (6) OF THIS SUBSECTION, A** commissioner shall advise arrested persons of their constitutional rights, **[**set bond or commit persons to jail in default of bond or**]** release them on personal recognizance if circumstances warrant, and conduct investigations and inquiries into the circumstances of any matter presented to the commissioner in order to determine if probable cause exists for the issuance of a charging document, warrant, or criminal summons and, in general, perform all the functions of committing magistrates as exercised by the justices of the peace prior to July 5, 1971.

(3) There shall be in each county, at all times, one or more commissioners available for the convenience of the public and police in obtaining charging documents, warrants, or criminal summonses and to advise arrested persons of their rights as required by law.

(4) A commissioner may exercise the powers of office in any county to which the commissioner is assigned by the Chief Judge of the District Court or a designee of the Chief Judge of the District Court.

(5) The Chief Judge of the District Court may authorize one or more commissioners to perform the duties of a commissioner regarding persons arrested in a county other than the county in which the commissioner resides and for which the commissioner was appointed when the arrested persons are brought before the commissioner by a peace officer of the jurisdiction in which that arrest was made.

(6) (i) An individual may file an application for a statement of charges with a District Court commissioner.

(ii) **[**On**]** **SUBJECT TO SUBPARAGRAPH (IV) OF THIS PARAGRAPH, ON** review of an application for a statement of charges, a District Court commissioner may issue a summons or an arrest warrant.

(iii) A District Court commissioner may issue an arrest warrant only on a finding that:

1. There is probable cause to believe that the defendant committed the offense charged in the charging document; and

2. A. The defendant previously has failed to respond to a summons that has been personally served or a citation;

B. The whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court;

C. The defendant is in custody for another offense; or

D. There is probable cause to believe that the defendant poses a danger to another person or to the community.

**(IV) A DISTRICT COURT COMMISSIONER MAY NOT ISSUE AN ARREST WARRANT BASED SOLELY ON AN APPLICATION FOR A STATEMENT OF CHARGES FILED BY A PERSON OTHER THAN A PEACE OFFICER OR A STATE'S ATTORNEY.**

**(V) ON THE FILING OF AN APPLICATION FOR A STATEMENT OF CHARGES BY A PERSON OTHER THAN A PEACE OFFICER OR A STATE'S ATTORNEY, A DISTRICT COURT COMMISSIONER WHO FINDS PROBABLE CAUSE MAY ISSUE A SUMMONS FOR THE DEFENDANT TO APPEAR AT A PRELIMINARY APPEARANCE BEFORE A JUDGE.**

(d) (1) The authority under this subsection applies only to a respondent who is an adult.

(2) A commissioner may issue an interim order for protection of a person eligible for relief in accordance with § 4–504.1 of the Family Law Article or a petitioner in accordance with § 3–1503.1 of this article.

(e) Notwithstanding the residence requirements set out in subsection (b) of this section, the Chief Judge of the District Court or a designee of the Chief Judge of the District Court may assign a commissioner of the District Court to serve temporarily in any county.

**Article – Criminal Procedure**

4–101.

(a) (1) In this section the following words have the meanings indicated.

(2) (i) "Citation" means a written charging document that a police officer or fire marshal issues to a defendant, alleging the defendant has committed a crime.

(ii) "Citation" does not include an indictment, information, or statement of charges.

(3) "Fire marshal" means:

(i) the State Fire Marshal;

(ii) a deputy State fire marshal; or

(iii) as designated under § 6–304 of the Public Safety Article:

1. an assistant State fire marshal; or

2. a special assistant State fire marshal.

(4) "Police officer" has the meaning stated in § 2–101 of this article.

(b) Within areas of the National Park System, a United States Park Police officer may exercise the authority of a police officer to issue a citation under this section.

(c) (1) (i) Subject to paragraph (2) of this subsection, in addition to any other law allowing a crime to be charged by citation, a police officer shall charge by citation for:

1. any misdemeanor or local ordinance violation that does not carry a penalty of imprisonment;

2. any misdemeanor or local ordinance violation for which the maximum penalty of imprisonment is 90 days or less, except:

A. failure to comply with a peace order under § 3–1508 of the Courts Article;

B. failure to comply with a protective order under § 4–509 of the Family Law Article;

C. violation of a condition of pretrial or posttrial release while charged with a sexual crime against a minor under § 5–213.1 of this article;

D. possession of an electronic control device after conviction of a drug felony or crime of violence under § 4–109(b) of the Criminal Law Article;

E. violation of an out–of–state domestic violence order under § 4–508.1 of the Family Law Article; or

F. abuse or neglect of an animal under § 10–604 of the Criminal Law Article; or

3. possession of marijuana under § 5–601 of the Criminal Law Article.

(ii) Subject to paragraph (2) of this subsection, in addition to any other law allowing a crime to be charged by citation, a police officer may charge by citation for:

1. sale of an alcoholic beverage to an underage drinker or intoxicated person under Article 2B, § 12–108 of the Code;

2. malicious destruction of property under § 6–301 of the Criminal Law Article, if the amount of damage to the property is less than $500; or

3. misdemeanor theft under § 7–104(g)(2) of the Criminal Law Article.

(2) A police officer may charge a defendant by citation only if:

(i) the officer is satisfied with the defendant's evidence of identity;

(ii) the officer reasonably believes that the defendant will comply with the citation;

(iii) the officer reasonably believes that the failure to charge on a statement of charges will not pose a threat to public safety;

(iv) the defendant is not subject to arrest for another criminal charge arising out of the same incident; and

(v) the defendant complies with all lawful orders by the officer.

(3) A police officer who has grounds to make a warrantless arrest for an offense that may be charged by citation under this subsection may:

(i) issue a citation in lieu of making the arrest; or

(ii) make the arrest and subsequently issue a citation in lieu of continued custody.

(d) (1) Subject to paragraph (2) of this subsection, in addition to any other law allowing a crime to be charged by citation, a fire marshal may issue a citation for:

(i) discharging fireworks without a permit under § 10–104 or § 10–110 of the Public Safety Article;

(ii) possessing with intent to discharge or allowing the discharge of fireworks under § 10–104 or § 10–110 of the Public Safety Article; or

(iii) maintaining a fire hazard under § 6–317 of the Public Safety Article.

(2) A fire marshal may issue a citation if the fire marshal is satisfied with the defendant's evidence of identity and reasonably believes that the defendant will comply with the citation.

(e) (1) This section does not apply to a citation that is:

(i) authorized for a violation of a parking ordinance or a regulation adopted by a State unit or political subdivision of the State under Title 26, Subtitle 3 of the Transportation Article;

(ii) authorized by the Department of Natural Resources under § 1–205 of the Natural Resources Article; or

(iii) authorized by Baltimore City under § 16–16A (special enforcement officers) of the Code of Public Local Laws of Baltimore City for violation of a code, ordinance, or public local law of Baltimore City concerning building, housing, health, fire, safety, zoning, or sanitation.

(2) Except as otherwise expressly provided by law, the Chief Judge of the District Court shall prescribe a uniform, statewide form of a citation.

(3) Except for the uniform motor vehicle citation form, the law enforcement agencies of the State, the United States Park Police, and the Office of the State Fire Marshal shall reimburse the District Court for printing the citation forms that law enforcement officers and the State Fire Marshal require.

**(F) THE CHIEF JUDGE OF THE DISTRICT COURT MAY ADD TO THE MISDEMEANORS THAT ARE SUBJECT TO CITATION IN LIEU OF ARREST UNDER THIS SECTION.**

5–202.

(a) A District Court commissioner may not authorize pretrial release for a defendant charged with escaping from a correctional facility or any other place of confinement in the State.

(b) (1) A District Court commissioner may not authorize the pretrial release of a defendant charged as a drug kingpin under § 5–613 of the Criminal Law Article.

(2) A judge may authorize the pretrial release of a defendant charged as a drug kingpin on suitable bail and on any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community.

(3) There is a rebuttable presumption that, if released, a defendant charged as a drug kingpin will flee and pose a danger to another person or the community.

(c) (1) A District Court commissioner may not authorize the pretrial release of a defendant charged with a crime of violence if the defendant has been previously convicted:

(i) in this State of a crime of violence; or

(ii) in any other jurisdiction of a crime that would be a crime of violence if committed in this State.

(2) (i) A judge may authorize the pretrial release of a defendant described in paragraph (1) of this subsection on:

1. suitable bail;

2. any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community; or

3. both bail and other conditions described under item 2 of this subparagraph.

(ii) When a defendant described in paragraph (1) of this subsection is presented to the court under Maryland Rule 4–216(f), the judge shall order the continued detention of the defendant if the judge determines that neither suitable bail nor any condition or combination of conditions will reasonably ensure that the defendant will not flee or pose a danger to another person or the community before the trial.

(3) There is a rebuttable presumption that a defendant described in paragraph (1) of this subsection will flee and pose a danger to another person or the community.

(d) (1) A District Court commissioner may not authorize the pretrial release of a defendant charged with committing one of the following crimes while the

defendant was released on bail or personal recognizance for a pending prior charge of committing one of the following crimes:

(i) aiding, counseling, or procuring arson in the first degree under § 6–102 of the Criminal Law Article;

(ii) arson in the second degree or attempting, aiding, counseling, or procuring arson in the second degree under § 6–103 of the Criminal Law Article;

(iii) burglary in the first degree under § 6–202 of the Criminal Law Article;

(iv) burglary in the second degree under § 6–203 of the Criminal Law Article;

(v) burglary in the third degree under § 6–204 of the Criminal Law Article;

(vi) causing abuse to a child under § 3–601 or § 3–602 of the Criminal Law Article;

(vii) a crime that relates to a destructive device under § 4–503 of the Criminal Law Article;

(viii) a crime that relates to a controlled dangerous substance under §§ 5–602 through 5–609 or § 5–612 or § 5–613 of the Criminal Law Article;

(ix) manslaughter by vehicle or vessel under § 2–209 of the Criminal Law Article; and

(x) a crime of violence.

(2) A defendant under this subsection remains ineligible to give bail or be released on recognizance on the subsequent charge until all prior charges have finally been determined by the courts.

(3) A judge may authorize the pretrial release of a defendant described in paragraph (1) of this subsection on suitable bail and on any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community.

(4) There is a rebuttable presumption that a defendant described in paragraph (1) of this subsection will flee and pose a danger to another person or the community if released before final determination of the prior charge.

(e) (1) A District Court commissioner may not authorize the pretrial release of a defendant charged with violating:

(i) the provisions of a temporary protective order described in § 4–505(a)(2)(i) of the Family Law Article or the provisions of a protective order described in § 4–506(d)(1) of the Family Law Article that order the defendant to refrain from abusing or threatening to abuse a person eligible for relief; or

(ii) the provisions of an order for protection, as defined in § 4–508.1 of the Family Law Article, issued by a court of another state or of a Native American tribe that order the defendant to refrain from abusing or threatening to abuse a person eligible for relief, if the order is enforceable under § 4–508.1 of the Family Law Article.

(2) A judge may allow the pretrial release of a defendant described in paragraph (1) of this subsection on:

(i) suitable bail;

(ii) any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community; or

(iii) both bail and other conditions described under item (ii) of this paragraph.

(3) When a defendant described in paragraph (1) of this subsection is presented to the court under Maryland Rule 4–216(f), the judge shall order the continued detention of the defendant if the judge determines that neither suitable bail nor any condition or combination of conditions will reasonably ensure that the defendant will not flee or pose a danger to another person or the community before the trial.

(f) (1) A District Court commissioner may not authorize the pretrial release of a defendant charged with one of the following crimes if the defendant has previously been convicted of one of the following crimes:

(i) wearing, carrying, or transporting a handgun under § 4–203 of the Criminal Law Article;

(ii) use of a handgun or an antique firearm in commission of a crime under § 4–204 of the Criminal Law Article;

(iii) violating prohibitions relating to assault pistols under § 4–303 of the Criminal Law Article;

(iv) use of a machine gun in a crime of violence under § 4–404 of the Criminal Law Article;

(v) use of a machine gun for an aggressive purpose under § 4–405 of the Criminal Law Article;

(vi) use of a weapon as a separate crime under § 5–621 of the Criminal Law Article;

(vii) possession of a regulated firearm under § 5–133 of the Public Safety Article;

(viii) transporting a regulated firearm for unlawful sale or trafficking under § 5–140 of the Public Safety Article; or

(ix) possession of a rifle or shotgun by a person with a mental disorder under § 5–205 of the Public Safety Article.

(2) (i) A judge may authorize the pretrial release of a defendant described in paragraph (1) of this subsection on:

1. suitable bail;

2. any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community; or

3. both bail and other conditions described under item 2 of this subparagraph.

(ii) When a defendant described in paragraph (1) of this subsection is presented to the court under Maryland Rule 4–216(f), the judge shall order the continued detention of the defendant if the judge determines that neither suitable bail nor any condition or combination of conditions will reasonably ensure that the defendant will not flee or pose a danger to another person or the community before the trial.

(3) There is a rebuttable presumption that a defendant described in paragraph (1) of this subsection will flee and pose a danger to another person or the community.

(g) (1) A District Court commissioner may not authorize the pretrial release of a defendant who is registered under Title 11, Subtitle 7 of this article.

(2) (i) A judge may authorize the pretrial release of a defendant described in paragraph (1) of this subsection on:

1. suitable bail;

2. any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community; or

3. both bail and other conditions described under item 2 of this subparagraph.

(ii) When a defendant described in paragraph (1) of this subsection is presented to the court under Maryland Rule 4–216(f), the judge shall order the continued detention of the defendant if the judge determines that neither suitable bail nor any condition or combination of conditions will reasonably ensure that the defendant will not flee or pose a danger to another person or the community before the trial.

(3) There is a rebuttable presumption that a defendant described in paragraph (1) of this subsection will flee and pose a danger to another person or the community.

**5–202.1.**

**(A) EXCEPT AS PROVIDED IN § 5–202 OF THIS SUBTITLE AND SUBSECTION (B) OF THIS SECTION, A DISTRICT COURT COMMISSIONER WHO FINDS PROBABLE CAUSE MAY RELEASE A DEFENDANT CHARGED WITH A FELONY FROM PRETRIAL DETENTION:**

**(1) IF THE DEFENDANT POSTS A PRESET BOND IN ACCORDANCE WITH A SCHEDULE ADOPTED BY THE CHIEF JUDGE OF THE DISTRICT COURT; OR**

**(2) IF, BY RELEASING THE DEFENDANT TO THE CUSTODY OF THE AUTHORIZED PRETRIAL SERVICES AGENCY, IF ANY, THE PRETRIAL SERVICES AGENCY DETERMINES THE DEFENDANT TO BE ELIGIBLE AND ACCEPTS THE DEFENDANT INTO ITS PROGRAM.**

**(B) (1) A DISTRICT COURT COMMISSIONER WHO FINDS PROBABLE CAUSE MAY NOT AUTHORIZE THE PRETRIAL RELEASE OF A DEFENDANT CHARGED WITH A FELONY IF A LAW ENFORCEMENT OFFICER CERTIFIES BY AFFIDAVIT AND ARTICULATES UNDER OATH SPECIFIC FACTS TO SUPPORT THE CONTENTION THAT THE DEFENDANT:**

**(I) IS A FLIGHT RISK; OR**

**(II) POSES A CREDIBLE PUBLIC SAFETY RISK.**

**(2) IF A LAW ENFORCEMENT OFFICER SUBMITS AN AFFIDAVIT UNDER THIS SUBSECTION, THE LAW ENFORCEMENT OFFICER SHALL APPEAR AT**

**A PRETRIAL RELEASE HEARING FOR THE DEFENDANT HELD BEFORE A JUDGE ON THE NEXT DAY THAT THE COURT IS IN SESSION.**

**5–202.2.**

**(A) EXCEPT AS PROVIDED IN § 5–202 OF THIS SUBTITLE AND SUBSECTION (B) OF THIS SECTION, A DISTRICT COURT COMMISSIONER SHALL RELEASE A DEFENDANT CHARGED WITH A MISDEMEANOR ON PERSONAL RECOGNIZANCE.**

**(B) (1) EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS SUBSECTION, A DISTRICT COURT COMMISSIONER WHO FINDS PROBABLE CAUSE MAY NOT AUTHORIZE THE PRETRIAL RELEASE OF A DEFENDANT CHARGED WITH A MISDEMEANOR IF A LAW ENFORCEMENT OFFICER CERTIFIES BY AFFIDAVIT AND ARTICULATES UNDER OATH SPECIFIC FACTS TO SUPPORT THE CONTENTION THAT THE DEFENDANT:**

**(I) IS A FLIGHT RISK; OR**

**(II) POSES A CREDIBLE PUBLIC SAFETY RISK.**

**(2) IF A LAW ENFORCEMENT OFFICER SUBMITS AN AFFIDAVIT UNDER THIS SUBSECTION, THE DISTRICT COURT COMMISSIONER SHALL RELEASE THE DEFENDANT TO THE CUSTODY OF THE AUTHORIZED PRETRIAL SERVICES AGENCY, IF ANY, IF THE PRETRIAL SERVICES AGENCY DETERMINES THE DEFENDANT TO BE ELIGIBLE AND ACCEPTS THE DEFENDANT INTO ITS PROGRAM.**

**(3) IF A LAW ENFORCEMENT OFFICER SUBMITS AN AFFIDAVIT UNDER THIS SUBSECTION AND THE DEFENDANT IS NOT RELEASED TO THE CUSTODY OF THE PRETRIAL SERVICES AGENCY, THEN THE LAW ENFORCEMENT OFFICER SHALL APPEAR AT A PRETRIAL RELEASE HEARING FOR THE DEFENDANT HELD BEFORE A JUDGE ON THE NEXT DAY THAT THE COURT IS IN SESSION.**

**5–202.3.**

**NOTWITHSTANDING ANY OTHER LAW OR RULE, A DEFENDANT WHO IS DETAINED IN CUSTODY AFTER BEING BROUGHT BEFORE A DISTRICT COURT COMMISSIONER SHALL BE TAKEN BEFORE A JUDICIAL OFFICER OF THE DISTRICT COURT OR CIRCUIT COURT WITHOUT UNNECESSARY DELAY AND IN NO EVENT LATER THAN THE NEXT SESSION OF COURT AFTER THE DATE OF ARREST.**

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2014.

# SENATE BILL 973

E2 4lr1627
CF HB 1232

By: **Senator Frosh**
Introduced and read first time: February 7, 2014
Assigned to: Judicial Proceedings

A BILL ENTITLED

AN ACT concerning

**Criminal Procedure – Pretrial Confinement and Release**

FOR the purpose of altering certain findings and policies regarding the creation of the Division of Pretrial Detention and Services; requiring the Secretary of Public Safety and Correctional Services, on or before a certain date, to establish a Pretrial Release Services Program in the Department to offer, in each county, an alternative to pretrial detention; establishing certain requirements for the program; authorizing the Secretary to establish the terms and conditions of the program by regulation; authorizing administrative pretrial release of certain arrested persons; prohibiting administrative pretrial release of certain arrested persons; authorizing certain counties to continue to operate a certain pretrial release services program in a certain manner; requiring the Secretary, in consultation with the Governor's Office of Crime Control and Prevention, to enter into agreements with certain counties to reimburse the county for certain costs; providing for the contents of a certain agreement; requiring the Secretary to allocate certain funds in a certain manner; requiring the Secretary of Public Safety and Correctional Services to establish and maintain a certain electronic information sharing system and to adopt regulations to implement the system; repealing the authority of a District Court commissioner to perform certain duties regarding certain arrested persons; clarifying that certain duties shall be performed by a District Court judge instead of a District Court commissioner; repealing provisions prohibiting the use of certain statements of certain defendants; establishing that a defendant who is not administratively released must be presented to a District Court or a circuit court judge at a certain time; requiring that representation be provided by the Office of the Public Defender to certain indigent individuals at a certain initial appearance before a District Court or circuit court judge; repealing a provision that provides that representation is not required to be provided by the Office of the Public Defender to certain indigent individuals at a certain initial appearance before a District Court commissioner; establishing the Pretrial Release Commission; providing for the membership and duties of the Commission; providing for the

EXPLANATION: **CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.**
**[**Brackets**]** indicate matter deleted from existing law.

election of a chair of the Commission; requiring the Governor's Office of Crime Control and Prevention to provide staff for the Commission; prohibiting members of the Commission from receiving compensation; authorizing a member to receive certain reimbursement; requiring the Secretary to adopt, by regulation, a certain pretrial risk assessment tool based on the recommendation of the Commission; requiring the Chief Judge of the District Court to make a certain determination regarding the number of District Court commissioners necessary to perform certain duties; requiring the Secretary to give priority to certain District Court commissioners for certain hiring decisions; making conforming and clarifying changes; defining certain terms; providing for the termination of certain provisions of this Act; providing for the effective dates of this Act; and generally relating to pretrial confinement and release.

BY repealing and reenacting, with amendments,
Article – Correctional Services
Section 5–102
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

BY adding to
Article – Correctional Services
Section 5–303; 5–3A–01 and 5–3A–02 to be under the new subtitle "Subtitle 3A. County Pretrial Release Services Programs"; and 9–614
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

BY repealing and reenacting, with amendments,
Article – Courts and Judicial Proceedings
Section 2–607 and 9–203(a) through (d)
Annotated Code of Maryland
(2013 Replacement Volume and 2013 Supplement)

BY repealing
Article – Courts and Judicial Proceedings
Section 10–922
Annotated Code of Maryland
(2013 Replacement Volume and 2013 Supplement)

BY repealing and reenacting, with amendments,
Article – Criminal Law
Section 9–304(d)
Annotated Code of Maryland
(2012 Replacement Volume and 2013 Supplement)

BY repealing and reenacting, with amendments,
Article – Criminal Procedure
Section 2–106, 4–201(f), 5–202, 5–205, 5–215, 9–114, 9–115, 9–117, and 16–204

Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

BY repealing and reenacting, with amendments,
Article – Natural Resources
Section 8–2003(a)
Annotated Code of Maryland
(2012 Replacement Volume and 2013 Supplement)

BY repealing and reenacting, with amendments,
Article – Transportation
Section 26–202(c), 26–401, 26–402, and 26–403
Annotated Code of Maryland
(2012 Replacement Volume and 2013 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

**Article – Correctional Services**

5–102.

(a) The creation of the Division is based on the findings and policies set forth in this section.

(b) **[**(1)**]** Each year a large number of individuals have criminal charges placed against them **[**in Baltimore City**]** **IN THE STATE** and remain on pretrial status until these charges are adjudicated.

**[**(2) Many of the individuals on pretrial status were formerly committed to the Baltimore City Jail.**]**

(c) There is an important public need to centralize and coordinate the provision of services to individuals on a pretrial status **[**in Baltimore City**]** **THROUGHOUT THE STATE**.

(d) **[**Baltimore City does not have the financial resources to fund a local correctional facility at a level sufficient to meet the needs of those incarcerated.

(e)**]** The State recognizes the need to provide effective and efficient services to the public through management of the pretrial population **[**in Baltimore City**]** **THROUGHOUT THE STATE**.

**5–303.**

**(A) THE SECRETARY SHALL:**

**(1) ON OR BEFORE OCTOBER 1, 2014, ESTABLISH A PRETRIAL RELEASE SERVICES PROGRAM IN THE DEPARTMENT THAT OFFERS, IN EACH COUNTY, ALTERNATIVES TO PRETRIAL DETENTION IN EACH COUNTY; AND**

**(2) ESTABLISH BY REGULATION THE TERMS AND CONDITIONS OF THE PROGRAM, INCLUDING ADOPTION OF A VALIDATED RISK ASSESSMENT TOOL.**

**(B) THE PRETRIAL RELEASE SERVICES PROGRAM SHALL:**

**(1) SCREEN ALL ARRESTED PERSONS;**

**(2) GATHER AND COMPILE LOCAL AND NATIONAL CRIMINAL JUSTICE INFORMATION FOR EACH ARRESTED PERSON; AND**

**(3) PREPARE, FOR THE APPROPRIATE JUDICIAL OFFICER, A WRITTEN REPORT OF ALL INFORMATION GATHERED FOR EACH ARRESTED PERSON, WITH OR WITHOUT A RECOMMENDATION REGARDING PRETRIAL RELEASE.**

**(C) SUBJECT TO THE AUTHORITY OF THE SECRETARY AND IN ADDITION TO ANY OTHER DUTIES ESTABLISHED BY LAW, THE PRETRIAL RELEASE SERVICES PROGRAM:**

**(1) SHALL:**

**(I) SUPERVISE ALL PERSONS RELEASED ON NONSURETY RELEASE, INCLUDING RELEASE ON PERSONAL RECOGNIZANCE, PERSONAL BOND, AND NONFINANCIAL CONDITIONS;**

**(II) 1. COORDINATE FOR OTHER AGENCIES AND ORGANIZATIONS IN THE STATE THAT SERVE OR ARE ELIGIBLE TO SERVE AS CUSTODIANS OF PERSONS RELEASED PRETRIAL UNDER SUPERVISION; AND**

**2. ADVISE THE COURT REGARDING THE ELIGIBILITY, AVAILABILITY, AND CAPACITY OF THOSE AGENCIES AND ORGANIZATIONS;**

**(III) ASSIST PERSONS RELEASED PRETRIAL UNDER THE SUPERVISION OF THE PROGRAM WITH SECURING NECESSARY MEDICAL OR SOCIAL SERVICES; AND**

**(IV) INFORM THE COURT OF THE FAILURE TO COMPLY WITH PRETRIAL RELEASE CONDITIONS OR THE ARREST OF PERSONS RELEASED UNDER THE SUPERVISION OF THE PROGRAM AND RECOMMEND MODIFICATIONS OF RELEASE CONDITIONS, AS APPROPRIATE; AND**

**(2) MAY ORDER THE ADMINISTRATIVE PRETRIAL RELEASE OF AN ARRESTED PERSON DETERMINED ELIGIBLE FOR PRETRIAL RELEASE AFTER AN ASSESSMENT THAT UTILIZES A VALIDATED RISK ASSESSMENT TOOL ADOPTED BY THE SECRETARY BY REGULATION.**

**(D) THE PRETRIAL RELEASE SERVICES PROGRAM MAY NOT AUTHORIZE THE ADMINISTRATIVE PRETRIAL RELEASE OF AN ARRESTED PERSON CHARGED WITH:**

**(1) A DOMESTICALLY RELATED CRIME AS DEFINED IN § 6–233 OF THE CRIMINAL PROCEDURE ARTICLE;**

**(2) A CRIME FOR WHICH, ON CONVICTION, REGISTRATION WOULD BE REQUIRED ON THE STATE'S SEX OFFENDER REGISTRY UNDER TITLE 11, SUBTITLE 7 OF THE CRIMINAL PROCEDURE ARTICLE; OR**

**(3) A CRIME FOR WHICH PRETRIAL RELEASE IS PROHIBITED UNDER § 5–202 OF THE CRIMINAL PROCEDURE ARTICLE.**

**SUBTITLE 3A. COUNTY PRETRIAL RELEASE SERVICES PROGRAMS.**

**5–3A–01.**

**(A) SUBJECT TO SUBSECTION (B) OF THIS SECTION, IN COUNTIES THAT OPERATED A PRETRIAL RELEASE SERVICES PROGRAM ON OR BEFORE JUNE 1, 2014, THE COUNTY MAY CONTINUE TO OPERATE THE COUNTY'S EXISTING PRETRIAL RELEASE SERVICES PROGRAM.**

**(B) THE ADMINISTRATION OF A PRETRIAL RELEASE SERVICES PROGRAM BY A COUNTY UNDER SUBSECTION (A) OF THIS SECTION SHALL:**

**(1) BE GOVERNED BY REGULATIONS ADOPTED BY THE SECRETARY;**

**(2) BE ADMINISTERED IN A MANNER CONSISTENT WITH THE STATE PRETRIAL RELEASE SERVICES PROGRAM ESTABLISHED UNDER § 5–303 OF THIS TITLE;**

**(3) BE CONSIDERED A PART OF THE STATE PRETRIAL RELEASE SERVICES PROGRAM FOR PURPOSES OF INFORMATION SHARING; AND**

**(4) USE THE SAME VALIDATED RISK ASSESSMENT TOOL AS THE STATE PRETRIAL RELEASE SERVICES PROGRAM TO DETERMINE WHETHER AN ARRESTED PERSON IS ELIGIBLE FOR PRETRIAL RELEASE.**

**5–3A–02.**

**(A) THIS SECTION APPLIES TO COUNTIES THAT OPERATED A PRETRIAL RELEASE SERVICES PROGRAM ON OR BEFORE JUNE 1, 2014.**

**(B) THE SECRETARY, IN CONSULTATION WITH THE GOVERNOR'S OFFICE OF CRIME CONTROL AND PREVENTION, SHALL ENTER INTO AGREEMENTS WITH INDIVIDUAL COUNTIES TO REIMBURSE A COUNTY AS PROVIDED IN THE STATE BUDGET FOR THE COSTS OF OPERATING THE COUNTY'S PRETRIAL RELEASE SERVICES PROGRAM, INCLUDING THE ADMINISTRATION OF THE VALIDATED RISK ASSESSMENT TOOL ADOPTED BY THE SECRETARY UNDER § 5–303 OF THIS TITLE AND THE SUPERVISION OF PERSONS RELEASED AFTER ARREST.**

**(C) SUBJECT TO SUBSECTION (D) OF THIS SECTION, AN AGREEMENT ENTERED INTO UNDER SUBSECTION (B) OF THIS SECTION SHALL:**

**(1) PROVIDE FOR PAYMENTS TO A COUNTY FOR THE COSTS OF ADMINISTERING THE PRETRIAL RELEASE SERVICES PROGRAMS AT FUNDING RATES AGREED TO BY THE SECRETARY AND THE COUNTY, INCLUDING SALARIES, OVERHEAD, GENERAL LIABILITY COVERAGE, WORKERS' COMPENSATION, AND EMPLOYEE BENEFITS; AND**

**(2) UTILIZE THE SAME BUDGET CATEGORIES AS APPROPRIATIONS IN THE STATE BUDGET FOR THE STATE PRETRIAL RELEASE SERVICES PROGRAM ESTABLISHED UNDER § 5–303 OF THIS TITLE.**

**(D) THE SECRETARY SHALL ALLOCATE THE TOTAL AMOUNT FOR REIMBURSEMENT AS PROVIDED IN THE STATE BUDGET IN A MANNER THAT PROVIDES TO EACH COUNTY THAT ENTERS INTO AN AGREEMENT UNDER THIS SECTION AN EQUAL AMOUNT OF FUNDING.**

**9–614.**

**(A) THE SECRETARY SHALL ESTABLISH AND MAINTAIN AN ELECTRONIC INFORMATION SHARING SYSTEM THAT CONTAINS INFORMATION ON EACH**

**INMATE WHO IS OR WHO HAS BEEN CONFINED IN A STATE OR LOCAL CORRECTIONAL FACILITY.**

**(B) THE SECRETARY SHALL ADOPT REGULATIONS TO IMPLEMENT THIS SECTION, INCLUDING REGULATIONS SPECIFYING:**

**(1) THE INFORMATION TO BE COLLECTED;**

**(2) PROCEDURES FOR PROTECTING THE CONFIDENTIALITY OF INFORMATION IN THE SYSTEM;**

**(3) THE PERMISSIBLE USE OF INFORMATION COMPILED BY THE SYSTEM; AND**

**(4) STANDARDS FOR MAINTAINING SECURITY AND RELIABILITY OF COLLECTED INFORMATION IN THE SYSTEM.**

SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland read as follows:

**Article – Courts and Judicial Proceedings**

2–607.

(a) (1) The administrative judge of each district, with the approval of the Chief Judge of the District Court, may appoint the number of commissioners necessary to perform the functions of the office within each county.

(2) In multicounty districts, the administrative judge shall obtain the recommendation of the resident judge in each county as to the number of commissioners required in the county and as to the persons to be appointed.

(b) (1) Commissioners shall be adult residents of the counties in which they serve, but they need not be lawyers.

(2) Each commissioner shall hold office at the pleasure of the Chief Judge of the District Court, and has the powers and duties prescribed by law.

(3) Except without additional compensation, unless otherwise fixed by law, an employee of the District Court, who is an adult, may be granted, in the same manner, commissioner powers and duties in the county where the employee is employed.

(c) (1) A commissioner shall receive applications and determine probable cause for the issuance of charging documents.

**[**(2) A commissioner shall advise arrested persons of their constitutional rights, set bond or commit persons to jail in default of bond or release them on personal recognizance if circumstances warrant, and conduct investigations and inquiries into the circumstances of any matter presented to the commissioner in order to determine if probable cause exists for the issuance of a charging document, warrant, or criminal summons and, in general, perform all the functions of committing magistrates as exercised by the justices of the peace prior to July 5, 1971.**]**

**[**(3)**] (2)** There shall be in each county, at all times, one or more commissioners available for the convenience of the public and police in obtaining charging documents, warrants, or criminal summonses **[**and to advise arrested persons of their rights**]** as required by law.

**[**(4)**] (3)** A commissioner may exercise the powers of office in any county to which the commissioner is assigned by the Chief Judge of the District Court or a designee of the Chief Judge of the District Court.

**[**(5) The Chief Judge of the District Court may authorize one or more commissioners to perform the duties of a commissioner regarding persons arrested in a county other than the county in which the commissioner resides and for which the commissioner was appointed when the arrested persons are brought before the commissioner by a peace officer of the jurisdiction in which that arrest was made.**]**

**[**(6)**] (4)** (i) An individual may file an application for a statement of charges with a District Court commissioner.

(ii) On review of an application for a statement of charges, a District Court commissioner may issue a summons or an arrest warrant.

(iii) A District Court commissioner may issue an arrest warrant only on a finding that:

1. There is probable cause to believe that the defendant committed the offense charged in the charging document; and

2. A. The defendant previously has failed to respond to a summons that has been personally served or a citation;

B. The whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court;

C. The defendant is in custody for another offense; or

D. There is probable cause to believe that the defendant poses a danger to another person or to the community.

(d) (1) The authority under this subsection applies only to a respondent who is an adult.

(2) A commissioner may issue an interim order for protection of a person eligible for relief in accordance with § 4–504.1 of the Family Law Article or a petitioner in accordance with § 3–1503.1 of this article.

(e) Notwithstanding the residence requirements set out in subsection (b) of this section, the Chief Judge of the District Court or a designee of the Chief Judge of the District Court may assign a commissioner of the District Court to serve temporarily in any county.

9–203.

(a) In any criminal proceeding in which a warrant is issued for the purpose of requiring the attendance of a person as a material witness for the State, the witness must be taken promptly before a District Court **[**commissioner**]** **JUDGE** before he is committed to jail.

(b) If the **[**commissioner**]** **JUDGE** determines, after a hearing, that the person brought before him should be held as a witness for the State, he shall set a reasonable bond for the appearance of the witness in the criminal proceedings when required.

(c) If the witness is unable to post the bond set by the **[**commissioner**]** **JUDGE,** he shall be committed to jail until he posts the bond.

(d) Upon the commitment to jail of a witness, the **[**commissioner**]** **JUDGE** shall notify immediately the State's Attorney of the county where the witness is being held. The sheriff, warden, or other custodian of the jail in which the witness is held shall also notify immediately the State's Attorney.

**[**10–922.

A statement made during the course of an initial appearance of a defendant before a District Court commissioner in accordance with Maryland Rule 4–213 may not be used as evidence against the defendant in a criminal proceeding or juvenile proceeding.**]**

**Article – Criminal Law**

9–304.

(d) A District Court **[**commissioner**]** **JUDGE** or an intake officer, as defined in § 3–8A–01 of the Courts Article, may impose for good cause shown a condition

described in subsection (b)(2) of this section as a condition of the pretrial release of a defendant or child respondent.

**Article – Criminal Procedure**

2–106.

(a) (1) A peace officer, who is appointed in the jurisdiction in which a person is arrested, may keep custody of the arrested person in another jurisdiction in which a District Court **[**commissioner**]** **JUDGE** is located to bring the person before the District Court **[**commissioner**]** **JUDGE** in the other jurisdiction.

(2) The peace officer has the same power to keep custody of the arrested person under paragraph (1) of this subsection that the peace officer has in the jurisdiction for which the peace officer is appointed and the arrest is made.

(b) (1) A peace officer, who is appointed in the jurisdiction for which a charging document is issued for a person who is arrested in another jurisdiction, may obtain custody of the arrested person in the other jurisdiction to bring the person before a District Court **[**commissioner**]** **JUDGE** in the jurisdiction in which the charging document is issued.

(2) The peace officer has the same power to keep custody of the arrested person under paragraph (1) of this subsection that the peace officer has in the jurisdiction for which the peace officer is appointed.

**[**(c) This section does not affect or extend the time period for bringing an arrested person before a judicial officer after arrest.**]**

4–201.

(f) (1) In this subsection, "common carrier" means a steamboat, railroad train, motor bus, airplane, or other means of intercity or interstate public transportation.

(2) Subject to paragraph (3) of this subsection, a prosecution for an indictable crime committed on a common carrier may be brought, and a District Court **[**commissioner**]** **JUDGE** may hold the defendant to bail if the crime is bailable, in any county from, to, or through which the common carrier runs.

(3) If the accused is held to bail under this subsection by a District Court **[**commissioner**]** **JUDGE**, prosecution for the crime shall be in the county where the defendant is held.

5–202.

**(A) IN THIS SECTION, "PRETRIAL RELEASE SERVICES" MEANS THE PRETRIAL RELEASE SERVICES PROGRAM IN THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES.**

**[**(a)**] (B) [**A District Court commissioner**] PRETRIAL RELEASE SERVICES** may not authorize pretrial release for a defendant charged with escaping from a correctional facility or any other place of confinement in the State.

**[**(b)**] (C)** (1) **[**A District Court commissioner**] PRETRIAL RELEASE SERVICES** may not authorize the pretrial release of a defendant charged as a drug kingpin under § 5–613 of the Criminal Law Article.

(2) A judge may authorize the pretrial release of a defendant charged as a drug kingpin on suitable bail and on any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community.

(3) There is a rebuttable presumption that, if released, a defendant charged as a drug kingpin will flee and pose a danger to another person or the community.

**[**(c)**] (D)** (1) **[**A District Court commissioner**] PRETRIAL RELEASE SERVICES** may not authorize the pretrial release of a defendant charged with a crime of violence if the defendant has been previously convicted:

(i) in this State of a crime of violence; or

(ii) in any other jurisdiction of a crime that would be a crime of violence if committed in this State.

(2) (i) A judge may authorize the pretrial release of a defendant described in paragraph (1) of this subsection on:

1. suitable bail;

2. any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community; or

3. both bail and other conditions described under item 2 of this subparagraph.

(ii) When a defendant described in paragraph (1) of this subsection is presented to the court under Maryland Rule 4–216(f), the judge shall order the continued detention of the defendant if the judge determines that neither suitable bail nor any condition or combination of conditions will reasonably ensure

that the defendant will not flee or pose a danger to another person or the community before the trial.

(3) There is a rebuttable presumption that a defendant described in paragraph (1) of this subsection will flee and pose a danger to another person or the community.

**[**(d)**] (E)** (1) **[**A District Court commissioner**]** **PRETRIAL RELEASE SERVICES** may not authorize the pretrial release of a defendant charged with committing one of the following crimes while the defendant was released on bail or personal recognizance for a pending prior charge of committing one of the following crimes:

(i) aiding, counseling, or procuring arson in the first degree under § 6–102 of the Criminal Law Article;

(ii) arson in the second degree or attempting, aiding, counseling, or procuring arson in the second degree under § 6–103 of the Criminal Law Article;

(iii) burglary in the first degree under § 6–202 of the Criminal Law Article;

(iv) burglary in the second degree under § 6–203 of the Criminal Law Article;

(v) burglary in the third degree under § 6–204 of the Criminal Law Article;

(vi) causing abuse to a child under § 3–601 or § 3–602 of the Criminal Law Article;

(vii) a crime that relates to a destructive device under § 4–503 of the Criminal Law Article;

(viii) a crime that relates to a controlled dangerous substance under §§ 5–602 through 5–609 or § 5–612 or § 5–613 of the Criminal Law Article;

(ix) manslaughter by vehicle or vessel under § 2–209 of the Criminal Law Article; and

(x) a crime of violence.

(2) A defendant under this subsection remains ineligible to give bail or be released on recognizance on the subsequent charge until all prior charges have finally been determined by the courts.

(3) A judge may authorize the pretrial release of a defendant described in paragraph (1) of this subsection on suitable bail and on any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community.

(4) There is a rebuttable presumption that a defendant described in paragraph (1) of this subsection will flee and pose a danger to another person or the community if released before final determination of the prior charge.

**[**(e)**] (F)** (1) **[**A District Court commissioner**] PRETRIAL RELEASE SERVICES** may not authorize the pretrial release of a defendant charged with violating:

(i) the provisions of a temporary protective order described in § 4–505(a)(2)(i) of the Family Law Article or the provisions of a protective order described in § 4–506(d)(1) of the Family Law Article that order the defendant to refrain from abusing or threatening to abuse a person eligible for relief; or

(ii) the provisions of an order for protection, as defined in § 4–508.1 of the Family Law Article, issued by a court of another state or of a Native American tribe that order the defendant to refrain from abusing or threatening to abuse a person eligible for relief, if the order is enforceable under § 4–508.1 of the Family Law Article.

(2) A judge may allow the pretrial release of a defendant described in paragraph (1) of this subsection on:

(i) suitable bail;

(ii) any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community; or

(iii) both bail and other conditions described under item (ii) of this paragraph.

(3) When a defendant described in paragraph (1) of this subsection is presented to the court under Maryland Rule 4–216(f), the judge shall order the continued detention of the defendant if the judge determines that neither suitable bail nor any condition or combination of conditions will reasonably ensure that the defendant will not flee or pose a danger to another person or the community before the trial.

**[**(f)**] (G)** (1) **[**A District Court commissioner**] PRETRIAL RELEASE SERVICES** may not authorize the pretrial release of a defendant charged with one of the following crimes if the defendant has previously been convicted of one of the following crimes:

(i) wearing, carrying, or transporting a handgun under § 4–203 of the Criminal Law Article;

(ii) use of a handgun or an antique firearm in commission of a crime under § 4–204 of the Criminal Law Article;

(iii) violating prohibitions relating to assault pistols under § 4–303 of the Criminal Law Article;

(iv) use of a machine gun in a crime of violence under § 4–404 of the Criminal Law Article;

(v) use of a machine gun for an aggressive purpose under § 4–405 of the Criminal Law Article;

(vi) use of a weapon as a separate crime under § 5–621 of the Criminal Law Article;

(vii) possession of a regulated firearm under § 5–133 of the Public Safety Article;

(viii) transporting a regulated firearm for unlawful sale or trafficking under § 5–140 of the Public Safety Article; or

(ix) possession of a rifle or shotgun by a person with a mental disorder under § 5–205 of the Public Safety Article.

(2) (i) A judge may authorize the pretrial release of a defendant described in paragraph (1) of this subsection on:

1. suitable bail;

2. any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community; or

3. both bail and other conditions described under item 2 of this subparagraph.

(ii) When a defendant described in paragraph (1) of this subsection is presented to the court under Maryland Rule 4–216(f), the judge shall order the continued detention of the defendant if the judge determines that neither suitable bail nor any condition or combination of conditions will reasonably ensure that the defendant will not flee or pose a danger to another person or the community before the trial.

(3) There is a rebuttable presumption that a defendant described in paragraph (1) of this subsection will flee and pose a danger to another person or the community.

**[**(g)**] (H)** (1) **[**A District Court commissioner**] PRETRIAL RELEASE SERVICES** may not authorize the pretrial release of a defendant who is registered under Title 11, Subtitle 7 of this article.

(2) (i) A judge may authorize the pretrial release of a defendant described in paragraph (1) of this subsection on:

1. suitable bail;

2. any other conditions that will reasonably ensure that the defendant will not flee or pose a danger to another person or the community; or

3. both bail and other conditions described under item 2 of this subparagraph.

(ii) When a defendant described in paragraph (1) of this subsection is presented to the court under Maryland Rule 4–216(f), the judge shall order the continued detention of the defendant if the judge determines that neither suitable bail nor any condition or combination of conditions will reasonably ensure that the defendant will not flee or pose a danger to another person or the community before the trial.

(3) There is a rebuttable presumption that a defendant described in paragraph (1) of this subsection will flee and pose a danger to another person or the community.

5–205.

(a) A District Court judge may:

(1) set bond or bail;

(2) release a defendant on personal recognizance or on a personal or other bail bond;

(3) commit a defendant to a correctional facility in default of a bail bond;

(4) order a bail bond forfeited if the defendant fails to meet the conditions of the bond; and

(5) exercise all of the powers of a justice of the peace under the Constitution of 1867.

(b) (1) Except as provided in paragraph (2) of this subsection, if an order setting "cash bail" or "cash bond" specifies that it may be posted by the defendant only, the "cash bail" or "cash bond" may be posted by the defendant, by an individual, or by a private surety, acting for the defendant, that holds a certificate of authority in the State.

(2) Unless otherwise expressly ordered by the court **[**or District Court commissioner**]**, an order setting "cash bail" or "cash bond" for a failure to pay support under Title 10, Title 11, Title 12, or Title 13 of the Family Law Article may be posted by the defendant only.

(c) (1) This subsection does not apply to a defendant who has been arrested for failure to appear in court or for contempt of court.

(2) (i) Notwithstanding any other law or rule to the contrary, in a criminal or traffic case in the District Court in which a bail bond has been set and if expressly authorized by the court **[**or District Court commissioner**]**, the defendant or a private surety acting for the defendant may post the bail bond by:

1. executing it in the full penalty amount; and

2. depositing with the clerk of the court **[**or a commissioner**]** the greater of 10% of the penalty amount or $25.

(ii) A judicial officer may increase the percentage of cash surety required in a particular case but may not authorize a cash deposit of less than $25.

(3) On depositing the amount required under paragraph (2) of this subsection and executing the recognizance, the defendant shall be released from custody subject to the conditions of the bail bond.

(d) (1) When all conditions of the bail bond have been performed without default and the defendant has been discharged from all obligations in the cause for which the recognizance was posted, the clerk of the court shall return the deposit to the person or private surety who deposited it.

(2) (i) If the defendant fails to perform any condition of the bail bond, the bail bond shall be forfeited.

(ii) If the bail bond is forfeited, the liability of the bail bond shall extend to the full amount of the bail bond set and the amount posted as a deposit shall be applied to reduce the liability incurred by the forfeiture.

5–215.

A defendant who is **[**denied pretrial release by a District Court commissioner or who for any reason remains in custody after a District Court commissioner has determined conditions of release under Maryland Rule 4–216**]** **NOT ADMINISTRATIVELY RELEASED BY THE PRETRIAL RELEASE SERVICES PROGRAM IN THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES** shall be presented to a District Court judge immediately if the Court is in session, or if the Court is not in session, at the next session of the Court.

9–114.

(a) The arrest of a person may be lawfully made also by any law enforcement officer without a warrant upon reasonable information that the accused stands charged in a court of a state with a crime punishable by death or imprisonment for a term exceeding 1 year.

(b) When an accused is arrested under subsection (a) of this section:

(1) the accused must be taken before a judge **[**or District Court commissioner**]** with all practicable speed;

(2) complaint must be made against the accused under oath setting forth the ground for the arrest as in § 9–113 of this title; and

(3) thereafter, the answer of the accused shall be heard as if the accused had been arrested on a warrant.

9–115.

If, from the examination before the judge **[**or District Court commissioner**]**, it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under § 9–106 of this title, that the person has fled from justice, the judge **[**or District Court commissioner**]** must, by a warrant reciting the accusation, commit the person to the local correctional facility for a term specified in the warrant but not exceeding 30 days, as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the executive authority of the state having jurisdiction of the crime, unless the person gives bail as provided in § 9–116 of this title or until the person is legally discharged.

9–117.

If the accused is not arrested under warrant of the Governor within the time specified in the warrant or bond, a judge **[**or District Court commissioner**]** may discharge the accused or recommit the accused for a further period not to exceed 60 days, or a judge **[**or District Court commissioner**]** may again take bail for the accused's appearance and surrender, as provided in § 9–116 of this title, but within a period not to exceed 60 days after the date of the new bond.

16–204.

(a) Representation of an indigent individual may be provided in accordance with this title by the Public Defender or, subject to the supervision of the Public Defender, by the deputy public defender, district public defenders, assistant public defenders, or panel attorneys.

(b) (1) Indigent defendants or parties shall be provided representation under this title in:

(i) a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense;

(ii) a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to presentment being made before a **[**commissioner or**]** judge;

(iii) a postconviction proceeding for which the defendant has a right to an attorney under Title 7 of this article;

(iv) any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result;

(v) a proceeding involving children in need of assistance under § 3–813 of the Courts Article; or

(vi) a family law proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article, including:

1. for a parent, a hearing in connection with guardianship or adoption;

2. a hearing under § 5–326 of the Family Law Article for which the parent has not waived the right to notice; and

3. an appeal.

(2) **[**(i) Except as provided in subparagraph (ii) of this paragraph, representation**]** **REPRESENTATION** shall be provided to an indigent individual in all stages of a proceeding listed in paragraph (1) of this subsection, including, in criminal proceedings, custody, interrogation, **INITIAL APPEARANCE OR** bail hearing before a District Court or circuit court judge, preliminary hearing, arraignment, trial, and appeal.

**[**(ii) Representation is not required to be provided to an indigent individual at an initial appearance before a District Court commissioner.**]**

**Article – Natural Resources**

8–2003.

(a) Whenever a person is halted by a regular or special police officer for an offense on publicly owned watershed property punishable as a misdemeanor and which is either a violation of law or a violation of watershed regulations, and is not taken before a District Court **[**commissioner**]** **JUDGE** as would otherwise be required or is permitted by law, the officer may prepare a written or electronic citation containing:

(1) A notice to appear in court;

(2) The name and address of the person charged;

(3) The offense charged;

(4) The time and place the person shall appear in court;

(5) An acknowledgment of receipt of the citation by the person charged made in a manner determined by the Department; and

(6) Other pertinent information as necessary.

**Article – Transportation**

26–202.

(c) A person arrested under this section shall be taken without unnecessary delay before a District Court **[**commissioner**]** **JUDGE**, as specified in § 26–401 of this title, unless the arresting officer in his discretion releases the individual upon the individual's written promise to appear for trial.

26–401.

If a person is taken before a District Court **[**commissioner**]** **JUDGE** or is given a traffic citation or a civil citation under § 21–202.1, § 21–809, § 21–810, § 21–1414, or § 24–111.3 of this article containing a notice to appear in court, the **[**commissioner or**]** court shall be one that sits within the county in which the offense allegedly was committed.

26–402.

(a) This section does not apply if the alleged offense is any of the offenses enumerated in § 26–202(a)(3)(i), (ii), (iii), and (iv) of this title.

(b) If a police officer arrests a person and takes the person before a District Court **[**commissioner**]** **JUDGE** as provided in this title, the person shall be released on issuance of a citation if:

(1) **[**A commissioner is not available;

(2)**]** A judge, clerk, or other public officer, authorized to accept bail for the court is not available; and

**[**(3)**]** **(2)** The person charged gives the person's written promise to appear in court.

26–403.

A District Court **[**commissioner**]** **JUDGE** may not set bail in an amount greater than the maximum allowed as a fine for the alleged offense.

SECTION 3. AND BE IT FURTHER ENACTED, That:

(a) There is a Pretrial Release Commission.

(b) The Pretrial Release Commission consists of the following members:

(1) two members of the Senate of Maryland, appointed by the President of the Senate on or before July 1, 2014;

(2) two members of the House of Delegates, appointed by the Speaker of the House on or before July 1, 2014;

(3) the Governor, or the Governor's designee;

(4) the Public Defender, or the Public Defender's designee;

(5) the Chief Judge of the Court of Appeals, or the Chief Judge's designee;

(6) the Superintendent of State Police, or the Superintendent's designee;

(7) the Attorney General, or the Attorney General's designee;

(8) the Secretary of Public Safety and Correctional Services, or the Secretary's designee; and

(9) the following individuals, appointed by the Governor on or before July 1, 2014:

(i) a representative of the Maryland State's Attorneys' Association;

(ii) a representative of the Maryland Chiefs of Police Association, Inc.;

(iii) a representative of the Maryland Sheriffs' Association;

(iv) a representative of the Maryland Correctional Administrators Association; and

(v) a representative of the Pretrial Justice Institute.

(c) The Pretrial Release Commission shall elect a chair from among its members.

(d) A member of the Pretrial Release Commission:

(1) may not receive compensation for serving as a member of the Commission; but

(2) is entitled to reimbursement for expenses under the Standard State Travel Regulations, as provided in the State budget.

(e) The Governor's Office of Crime Control and Prevention shall provide staff for the Pretrial Release Commission.

(f) On or before September 1, 2014, the Pretrial Release Commission shall recommend to the Secretary of Public Safety and Correctional Services for adoption by regulation a pretrial risk assessment tool for use in making an administrative pretrial release determination.

(g) The pretrial risk assessment tool shall:

(1) be objective, standardized across the State, evidence–based, and validated;

(2) include an assessment of an arrested person's risk of:

(i) committing a new offense while on pretrial release;

(ii) not appearing for trial; and

(iii) committing a future violent act; and

(3) prohibit the pretrial release of an arrested person by the Pretrial Release Services Program established in the Department of Public Safety and Correctional Services under § 5–303 of the Correctional Services Article, as enacted by Section 1 of this Act, before presentation of the arrested person for an initial appearance if the person is charged with:

(i) a domestically related crime as defined in § 6–233 of the Criminal Procedure Article;

(ii) a crime for which, on conviction, registration would be required on the State's Sex Offender Registry under Title 11, Subtitle 7 of the Criminal Procedure Article; or

(iii) a crime for which pretrial release is prohibited under § 5–202 of the Criminal Procedure Article.

(h) The Secretary of Public Safety and Correctional Services shall adopt, by regulation, a pretrial risk assessment tool for purposes of § 5–303 of the Correctional Services Article, as enacted by Section 1 of this Act, based on the recommendation of the Commission established under this section.

SECTION 4. AND BE IT FURTHER ENACTED, That:

(a) The Chief Judge of the District Court shall determine the number of commissioners necessary to perform the functions of District Court commissioners after the repeal of the authority of a District Court commissioner to perform duties regarding the initial appearance of an arrested person under Section 2 of this Act.

(b) If the Secretary of Public Safety and Correctional Services determines that there is a need to fill positions within the State Pretrial Release Services Program established under Section 1 of this Act, the Secretary, in hiring to fill those positions, shall give priority to District Court commissioners whose positions were eliminated as the result of the enactment of Section 2 of this Act.

SECTION 5. AND BE IT FURTHER ENACTED, That Section 2 of this Act shall take effect October 1, 2014.

SECTION 6. AND BE IT FURTHER ENACTED, That, except as provided in Section 5 of this Act, this Act shall take effect June 1, 2014. Section 3 of this Act shall remain effective for a period of 1 year and 1 month and, at the end of June 30, 2015, with no further action required by the General Assembly, Section 3 of this Act shall be abrogated and of no further force and effect.

# HOUSE BILL 537

E2 4lr2757
CF 4lr1882

By: **Chair, Judiciary Committee (By Request – Maryland Judicial Conference)**
Introduced and read first time: January 29, 2014
Assigned to: Judiciary

A BILL ENTITLED

AN ACT concerning

**Criminal Procedure – Pretrial Confinement and Release of Criminal Defendants – Initial Appearance and Representation by the Office of the Public Defender**

FOR the purpose of requiring a District Court commissioner to conduct certain duties relating to an initial appearance of a defendant in accordance with certain court rules; authorizing a commissioner to gather and verify certain information under certain circumstances; requiring a certain person to be presented before a District Court judge within a certain amount of time after arrest for a certain initial appearance under certain circumstances; requiring a certain person to be presented before a commissioner for a certain initial appearance under certain circumstances; providing that a certain initial appearance may be conducted through the use of video conferencing in accordance with a certain court rule; requiring the Office of the Public Defender to provide representation at a certain initial appearance; repealing a provision that provides that representation is not required to be provided by the Office of the Public Defender to certain indigent individuals at a certain initial appearance before a District Court commissioner; providing for a delayed effective date; making this Act contingent on the taking effect of another Act; and generally relating to pretrial confinement and release of criminal defendants and initial appearances and representation by the Office of the Public Defender.

BY repealing and reenacting, with amendments,
Article – Courts and Judicial Proceedings
Section 2–607
Annotated Code of Maryland
(2013 Replacement Volume and 2013 Supplement)

BY adding to
Article – Criminal Procedure

EXPLANATION: **CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.**
**[**Brackets**]** indicate matter deleted from existing law.

Section 5–202.1
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

BY repealing and reenacting, with amendments,
Article – Criminal Procedure
Section 16–204
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

**Article – Courts and Judicial Proceedings**

2–607.

(a) (1) The administrative judge of each district, with the approval of the Chief Judge of the District Court, may appoint the number of commissioners necessary to perform the functions of the office within each county.

(2) In multicounty districts, the administrative judge shall obtain the recommendation of the resident judge in each county as to the number of commissioners required in the county and as to the persons to be appointed.

(b) (1) Commissioners shall be adult residents of the counties in which they serve, but they need not be lawyers.

(2) Each commissioner shall hold office at the pleasure of the Chief Judge of the District Court, and has the powers and duties prescribed by law.

(3) Except without additional compensation, unless otherwise fixed by law, an employee of the District Court, who is an adult, may be granted, in the same manner, commissioner powers and duties in the county where the employee is employed.

(c) (1) A commissioner shall receive applications and determine probable cause for the issuance of charging documents.

(2) **[**A**]** **FOR AN INITIAL APPEARANCE CONDUCTED BEFORE A COMMISSIONER, A** commissioner shall **[**advise arrested persons of their constitutional rights, set bond or commit persons to jail in default of bond or release them on personal recognizance if circumstances warrant, and conduct investigations and inquiries into the circumstances of any matter presented to the commissioner in order to determine if probable cause exists for the issuance of a charging document, warrant, or criminal summons and, in general,**]** **PERFORM DUTIES IN ACCORDANCE WITH MARYLAND RULES 4–213 AND 4–216.**

**(3) FOR AN INITIAL APPEARANCE TO BE CONDUCTED BEFORE A JUDGE, A COMMISSIONER MAY GATHER AND VERIFY RELEVANT INFORMATION AND FORWARD THAT INFORMATION AND A RECOMMENDATION BASED ON THE INFORMATION TO THE JUDGE FOR CONSIDERATION IN DETERMINING WHETHER AND ON WHAT CONDITIONS THE DEFENDANT SHOULD BE RELEASED.**

**(4) A COMMISSIONER SHALL** perform all the functions of committing magistrates as exercised by the justices of the peace prior to July 5, 1971.

**[**(3)**] (D)** There shall be in each county, at all times, one or more commissioners available for the convenience of the public and police in obtaining charging documents, warrants, or criminal summonses and to advise arrested persons of their rights as required by law.

**[**(4)**] (E)** A commissioner may exercise the powers of office in any county to which the commissioner is assigned by the Chief Judge of the District Court or a designee of the Chief Judge of the District Court.

**[**(5)**] (F)** The Chief Judge of the District Court may authorize one or more commissioners to perform the duties of a commissioner regarding persons arrested in a county other than the county in which the commissioner resides and for which the commissioner was appointed when the arrested persons are brought before the commissioner by a peace officer of the jurisdiction in which that arrest was made.

**[**(6)**] (G) [**(i)**] (1)** An individual may file an application for a statement of charges with a District Court commissioner.

**[**(ii)**] (2)** On review of an application for a statement of charges, a District Court commissioner may issue a summons or an arrest warrant.

**[**(iii)**] (3)** A District Court commissioner may issue an arrest warrant only on a finding that:

**[**1.**] (I)** There is probable cause to believe that the defendant committed the offense charged in the charging document; and

**[**2.**] (II) [**A.**] 1.** The defendant previously has failed to respond to a summons that has been personally served or a citation;

**[**B.**] 2.** The whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court;

**[**C.**] 3.** The defendant is in custody for another offense; or

**[**D.**] 4.** There is probable cause to believe that the defendant poses a danger to another person or to the community.

**[**(d)**] (H)** (1) The authority under this subsection applies only to a respondent who is an adult.

(2) A commissioner may issue an interim order for protection of a person eligible for relief in accordance with § 4–504.1 of the Family Law Article or a petitioner in accordance with § 3–1503.1 of this article.

**[**(e)**] (I)** Notwithstanding the residence requirements set out in subsection (b) of this section, the Chief Judge of the District Court or a designee of the Chief Judge of the District Court may assign a commissioner of the District Court to serve temporarily in any county.

**Article – Criminal Procedure**

**5–202.1.**

**(A) (1) IF THE COURT IS IN SESSION, A PERSON ARRESTED SHALL BE PRESENTED BEFORE A DISTRICT COURT JUDGE WITHIN 24 HOURS AFTER ARREST FOR AN INITIAL APPEARANCE IN ACCORDANCE WITH MARYLAND RULE 4–213.**

**(2) IF THE COURT IS NOT IN SESSION AND MORE THAN 24 HOURS WILL PASS BEFORE THE NEXT SESSION OF THE COURT, A PERSON ARRESTED SHALL BE PRESENTED BEFORE A DISTRICT COURT COMMISSIONER FOR AN INITIAL APPEARANCE IN ACCORDANCE WITH MARYLAND RULE 4–213.**

**(B) AN INITIAL APPEARANCE MAY BE CONDUCTED THROUGH THE USE OF VIDEO CONFERENCING IN ACCORDANCE WITH MARYLAND RULE 4–231.**

16–204.

(a) Representation of an indigent individual may be provided in accordance with this title by the Public Defender or, subject to the supervision of the Public Defender, by the deputy public defender, district public defenders, assistant public defenders, or panel attorneys.

(b) (1) Indigent defendants or parties shall be provided representation under this title in:

(i) a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense;

(ii) a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to presentment being made before a commissioner or judge;

(iii) a postconviction proceeding for which the defendant has a right to an attorney under Title 7 of this article;

(iv) any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result;

(v) a proceeding involving children in need of assistance under § 3–813 of the Courts Article; or

(vi) a family law proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article, including:

1. for a parent, a hearing in connection with guardianship or adoption;

2. a hearing under § 5–326 of the Family Law Article for which the parent has not waived the right to notice; and

3. an appeal.

(2) **[**(i) Except as provided in subparagraph (ii) of this paragraph, representation**]** **REPRESENTATION** shall be provided to an indigent individual in all stages of a proceeding listed in paragraph (1) of this subsection, including, in criminal proceedings, custody, interrogation, **INITIAL APPEARANCE,** bail hearing before a District Court or circuit court judge, preliminary hearing, arraignment, trial, and appeal.

**[**(ii) Representation is not required to be provided to an indigent individual at an initial appearance before a District Court commissioner.**]**

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect January 1, 2015, contingent on the taking effect of Chapter ____ (S.B. ____)(4lr2195) of the Acts of the General Assembly of 2014, and if Chapter ____ (S.B. ____)(4lr2195) does not become effective, this Act shall be null and void without the necessity of further action by the General Assembly.

# Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender

**Department of Legislative Services**
**Office of Policy Analysis**
**Annapolis, Maryland**

**December 13, 2013**

## Contributing Staff

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# Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender
## Membership Roster

Gary D. Maynard, **Chair**[1]

**Appointed by Governor**

Cherise Burdeen
Debra Lynn Gardner, Esq.
John Patrick Gross, Esq.
Michele J. Hughes
Tanya M. Jackson
William H. Jones, Esq.
Dorothy J. Lennig, Esq.
Mary Lou McDonough
Michael A. Millemann, Esq.
Michael A. Pristoop
David R. Rocah, Esq.
Michael Schatzow, Esq.
Scott D. Shellenberger, Esq.
Johanna Steinberg, Esq.

**Appointed by Senate President**

Joseph M. Getty
Victor R. Ramirez

**Appointed by House Speaker**

Curtis S. Anderson
Joseph F. Vallario, Jr.

[1] Mr. Maynard's last day as Secretary of Public Safety and Correctional Services was December 11, 2013. Gregg Hershberger, new Secretary of Public Safety and Correctional Services, took over as chair beginning December 12, 2013.

## Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender Membership Roster (Continued)

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**Ex Officio**

Tammy M. Brown, Executive Director, Governor's Office of Crime Control and Prevention[2]
Franklyn Musgrave, Assistant Attorney General[3]
Ben C. Clyburn, Chief Judge, District Court of Maryland
Gary D. Maynard, Secretary of Public Safety & Correctional Services
Major Woodrow Jones, Maryland State Police[4]
Paul B. DeWolfe, Jr., Public Defender
David W. Weissert, Coordinator of Commissioner Activity, District Court of Maryland

**Staff**

Shirleen M. Pilgrim
Claire E. Rossmark

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[2] Designee for Martin J. O'Malley, Governor
[3] Designee for Douglas F. Gansler, Attorney General
[4] Designee for Col. Marcus L. Brown, Secretary of State Police

# Contents

# Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender

## Final Report

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## Background

In *DeWolfe v. Richmond,* No. 34 (September Term 2011), the Maryland Court of Appeals held on January 4, 2012, that under the then-effective version of the Maryland Public Defender Act, no bail determination may be made by a District Court commissioner concerning an indigent defendant without the presence of counsel, unless representation by counsel is waived ("*DeWolfe I*").

The *DeWolfe I* opinion was based on the wording of the Maryland Public Defender Act, including language that the Office of the Public Defender (OPD) must represent an indigent defendant "in all stages" of a criminal proceeding. The court did not address the plaintiffs' federal and State constitutional claims of a right to representation. However, the Circuit Court for Baltimore City had previously held, based on *Rothgery v. Gillespie County,* 554 U.S. 191 (2008), that indigent arrestees have a federal and State constitutional right to be appointed counsel at an initial appearance.

*DeWolfe I* sparked a heated debate during the 2012 session of the General Assembly. There was much concern about how the State would fund the obligation of OPD to begin representing people at an initial appearance phase. It was estimated that the cost to OPD alone (aside from costs that would be incurred by the Judiciary, the Department of Public Safety and Correctional Services, State's Attorneys offices, law enforcement agencies, and local correctional facilities) would exceed $27 million annually. On the other hand, serious questions were raised about whether people do possess a constitutional right to legal representation at an initial appearance, regardless of cost. This debate prompted broader questions about and scrutiny of Maryland's criminal justice system, including the District Court commissioner and pretrial release systems. A number of bills were introduced to attempt to counteract or mitigate the effect of *DeWolfe I.* The House Judiciary and Senate Judicial Proceedings committees spent a considerable amount of time exploring these issues and dialoguing with stakeholders including the Office of the Public Defender, the Judiciary, law enforcement agencies, State's Attorneys, and civil liberties advocates.

Ultimately, the General Assembly passed Chapters 504 and 505 of 2012, which were signed into law by the Governor on May 22, 2012. These Acts (1) amend the Public Defender Act to specify that OPD is required to provide legal representation to an indigent defendant at a bail hearing before a District Court or circuit court judge but is not required to represent an indigent criminal defendant at an initial appearance before a District Court commissioner;

(2) prohibit a statement made during an initial appearance before a District Court commissioner from being used as evidence against the defendant in a criminal or juvenile proceeding; (3) codify the rule that a defendant who is denied pretrial release by a District Court commissioner or who remains in custody after a District Court commissioner has determined conditions of release must be presented to a District Court judge immediately if the court is in session or, if the court is not in session, at the next session of the court; (4) require a police officer to charge by citation for specified offenses if certain conditions are met; (5) authorize a District Court commissioner to issue an arrest warrant based on an application for a statement of charges filed by an individual only if specified criteria are met; (6) establish the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender (task force); and (7) require specified entities to develop a format and procedures to record specified citation data and require the Maryland Statistical Analysis Center within the Governor's Office of Crime Control and Prevention (GOCCP) to analyze citation data for five years beginning January 1, 2013.

## The Task Force

Chapters 504 and 505 established the membership of the task force as follows:

(1) two members of the Senate of Maryland, appointed by the President of the Senate on or before May 1, 2012;

(2) two members of the House of Delegates, appointed by the Speaker of the House on or before May 1, 2012;

(3) the Governor of Maryland, or the Governor's designee;

(4) the Public Defender of Maryland, or the Public Defender's designee;

(5) the Chief Judge of the District Court of Maryland, or the Chief Judge's designee;

(6) the Coordinator of Commissioner Activity of the District Court of Maryland, or the Coordinator's designee;

(7) the Superintendent of State Police, or the Superintendent's designee;

(8) the Attorney General of Maryland, or the Attorney General's designee;

(9) the Secretary of Public Safety and Correctional Services, or the Secretary's designee; and

(10) the following individuals, appointed by the Governor on or before May 1, 2012:

(i) a representative of the Maryland State's Attorneys' Association;

(ii) an attorney representing the plaintiffs in the *DeWolfe v. Richmond litigation*;

(iii) a representative of the Maryland Chiefs of Police Association, Inc.;

(iv) a representative of the Maryland Sheriffs' Association;

(v) a representative of the Maryland Correctional Administrators Association;

(vi) an advocate for the rights of victims of domestic violence;

(vii) a victims' rights advocate;

(viii) a representative of the Maryland Association of Counties;

(ix) a representative of the Pretrial Justice Institute;

(x) a representative of the Public Justice Center;

(xi) a representative of NAACP – Legal Defense;

(xii) a representative of the National Association of Criminal Defense Lawyers;

(xiii) a representative of the American Civil Liberties Union; and

(xiv) an academic expert in the provision of counsel to the indigent.

The legislation required the Governor to appoint a chair of the task force from its membership on or before May 1, 2012, and required the Department of Legislative Services to provide staff for the task force. The legislation also provided that a member of the task force may not receive compensation for serving as a member of the task force but is entitled to reimbursement for expenses under the Standard State Travel Regulations, as provided in the State budget.

The legislation charged the task force to:

(1) study the adequacy and cost of State laws and policies relating to:

(i) representation of indigent criminal defendants by the Office of the Public Defender; and

(ii) the District Court commissioner and pretrial release systems; and

(2) consider and make recommendations regarding options for and costs of improving:

(i) the system of representation of indigent criminal defendants; and

(ii) the District Court commissioner and pretrial release systems.

Finally, the legislation required the task force to submit an interim report of its findings and recommendations to the Governor and, in accordance with § 2–1246 of the State Government Article, the Senate Judicial Proceedings Committee, and the House Judiciary Committee, on or before November 1, 2012, and to submit a final report on or before November 1, 2013.

## 2012 Task Force Activities

The task force met for the first time on October 16, 2012. After call to order by Chairman Gary D. Maynard, Secretary of Public Safety and Correctional Services, and introduction of members, staff reviewed the *DeWolfe v. Richmond* litigation and decision and outlined the provisions of Chapters 504 and 505.

Next, David Weissert, Coordinator of Commissioner Activity, District Court of Maryland gave a presentation on the history of the District Court commissioner system, the authority of the commissioner, the requirements of and training for the job, work profile for commissioners, and the commissioners' impact on defendants/citizens.

The next presenter, Mary Lou McDonough, Director of Prince George's County Department of Corrections, gave an overview of the pre-trial release systems in local correctional institutions throughout the State.

Wendell France, Director, Central Region, Department of Public Safety and Correctional Services, then discussed Baltimore City's pre-trial release process, which is operated by the State.

Paul DeWolfe, Jr., Public Defender of Maryland, spoke next about the history and duties of OPD. He then informed the task force about the status of OPD's compliance with Chapters 504 and 505, reporting that OPD was able to hire new staff in order to meet the legislation's requirement that OPD represent indigent defendants at bail review. However, overall, caseloads for OPD have been increasing while the workforce has been decreasing.

Deputy Chief Legal Counsel for the Baltimore Police Department, James Green, then updated the task force on the implementation of issuing citations as required by Chapters 504 and 505. Mr. Green reported that law enforcement has been working to meet the requirements of the legislation without jeopardizing public safety. Guideline policies are nearly

complete and Mr. Green indicated that law enforcement has been working with the Governor's Office of Crime Control and Prevention (GOCCP) and the District Court to make sure that full implementation is complete by January 1, 2013.

Tammy Brown, Executive Director of GOCCP added to Mr. Green's presentation that the reporting requirements of Chapters 504 and 505 are being implemented in conjunction with the citations component, and that the use of electronic citations is being addressed.

After the presentations were concluded, four subcommittees were established: Criminal Citations, District Court Commissioner Study, Pretrial Release, and Public Defender Access. Task force members volunteered for membership on the subcommittees according to their interests.

The task force issued an interim report on November 1, 2012.

The task force met for the second time on December 4, 2012. At that time, a general discussion was held and the subcommittees reported on their activities, progress, and plans.

## 2013 Activities and Developments

At meetings of the task force on February 4, 2013, April 22, 2013, and June 3, 2013, general discussions were held and the subcommittees reported on their activities, progress, and plans.

At the meeting of the task force on September 10, 2013, Pretrial Justice Institute (PJI), presented the results of its analysis of data from bond review court observations in five Maryland jurisdictions (Baltimore City and Frederick, Harford, Montgomery, and Prince George's counties) and survey of Maryland pretrial services programs to the task force. The subcommittees also reported on their progress and plans.

Following briefing and oral argument, on September 25, 2013, the Court of Appeals issued an opinion in the *DeWolfe* case holding 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 ("*DeWolfe II*").

At a meeting of the task force on October 9, 2013, Paul DeWolfe, Public Defender of Maryland, briefed the members about *DeWolfe II.* In addition, Department of Public Safety and Correctional Services officials briefed the members about the financial impact of the decision on the department. Following a discussion and subcommittee progress reports, the task force voted to delay the submission of its final report until December 2013 to enable it to fully evaluate and incorporate the implications of *DeWolfe II.* The task force also decided to pursue legislation

during the 2014 legislative session to extend its termination date from May 31, 2013, to May 31, 2014.

On November 14, 2013, the task force met and heard a presentation by Anne Milgram of the Arnold Foundation on a nationally validated risk assessment tool. **Appendix 1**, "Developing a National Model for Pretrial Risk Assessment", summarizes the information provided by Ms. Milgram. The subcommittees also reported on their progress.

Written reports with recommendations were submitted by the Criminal Citations, Pre-trial Release, and District Court Commissioner Subcommittees. These reports were circulated to the full membership of the task force and are attached hereto as **Appendices 2** through **4**.

On December 12, 2013, the task force met to discuss and agree upon the recommendations to be included in this final report. The task force discussed many potential recommendations. During the discussion, several members of the task force expressed their concern that the current practice by some law enforcement agencies of mandatorily designating offenses as "book, cite, and release" incidents is not consistent with the policy adopted within Chapters 504 and 505; however, no formal recommendation relating to that concern was adopted by the full task force. The adopted recommendations of the task force are set forth below.

## Recommendations

**Recommendation 1:** That follow-up surveys be conducted quarterly with law enforcement agencies to evaluate how the citations component of Chapters 504/505 has affected the delivery of services to the public.

**Recommendation 2:** That a simple report be devised for law enforcement commanders to complete and return via e-mail, fax, or web service to GOCCP relating any positive or negative sentiments regarding the issuance of citations that are brought before them by their officers.

**Recommendation 3:** That surveys of the District Court Commissioners and local correctional institutions in the State be conducted to determine whether a significant decrease in the number of defendants brought before them has indeed taken place and what the actual numbers can tell us about the effectiveness of the citations component of Chapters 504/505.

**Recommendation 4:** That a follow-up study be conducted to evaluate the number of defendants issued citations who fail to appear for their court dates to gain knowledge of how seriously defendants view the issuance of criminal citations.

**Recommendation 5:** That a recidivist study be conducted to analyze the behavior of a set of individuals over a period of time who were arrested for offenses (now deemed qualifying offenses) and those who were issued criminal citations and compare the number of crimes

committed and the number of new offenses. Race-based data, geographical occurrences, and population density should be factors in this study.

**Recommendation 6:** That the use of secured, financial conditions of pretrial release (cash, property, or surety bond) that require a low-risk defendant to pay some amount of money in order to obtain release, while permitting high-risk defendants with the resources to pay their bonds to leave jail unsupervised, be completely eliminated.

**Recommendation 7:** That a statewide system that utilizes a standard, validated pretrial risk screening tool at which the pretrial detention/release decision is made be implemented.

**Recommendation 8:** That a statewide system that utilizes risk-and-need-based supervision, referral, and treatment options in all Maryland counties be implemented.

**Recommendation 9:** That a shared jail management database system to ensure consistency in data collection across the State be implemented.

**Recommendation 10:** That an annual statewide jail report that provides for indicators of process and outcomes related to pretrial and post-adjudication policies and practices be mandated.

**Recommendation 11:** That a statewide pretrial services agency ("PSA") be created, to be located within the executive branch.

**Recommendation 12:** That an objective, validated risk assessment tool for use by pretrial services agents be adopted.

**Recommendation 13:** That the PSA release those persons for whom the validated risk assessment tool recommends release without conditions. Until such time as a validated risk assessment tool is developed for domestic violence offenses and sexual offenses, the PSA may not be authorized to release persons charged with those offenses.

**Recommendation 14:** That the PSA provide continued supervision of those persons released under conditions as may be deemed appropriate.

**Recommendation 15:** That the judiciary deploy judges in such a manner as to ensure that all defendants not released by the PSA have benefit of an initial appearance/bail review before a judge within 24 hours of arrest.

**Recommendation 16:** That whatever system the legislature passes, the critical principle of prompt presentment no later than 24 hours of arrest.

**IN THE COURT OF APPEALS OF MARYLAND**

| | | |
|---|---|---|
| PAUL B. DEWOLFE, *et al.,* | * | |
| *Appellants,* | * | September Term, 2011 |
| v. | * | No. 34 |
| QUINTON RICHMOND, *et al.,* | * | |
| *Appellees.* | * | |

* * * * * * * * * * * * * *

**MOTION FOR RECONSIDERATION**

Appellants Ben C. Clyburn, John Hargrove, David W. Weissert, Linda Lewis, and the Commissioners of the District Court of Maryland for Baltimore City (the "District Court Defendants") request, under Rule 8-605, that the Court revise the decision announced in its January 4, 2012 opinion in this case. The District Court Defendants do not ask for reconsideration of the Court's core holdings, but seek instead merely to conform the disposition of the case to the reasoning set forth in the Court's opinion. Specifically, the District Court Defendants ask that the Court revise its judgment to direct the entry of a revised declaratory judgment that is consistent with the reasoning of this Court's opinion, rather than affirming the circuit court's declaratory judgment in its present form, which declares legal propositions that this Court has not endorsed.

1. The Court has held that the language of the Public Defender Act, Md. Code Ann., Crim. Proc. §§ 16-101—16-403, requires that the statutory right to appointed counsel under the Act must extend to two events in a criminal proceeding that are established by the rules adopted by this Court—an arrestee's initial appearance before a commissioner that is

governed by Rules 4-213(a) and 4-216 and, in cases where the commissioner has denied pretrial release, the subsequent bail-review determination by a judge of the District Court that is governed by Rule 4-216(f). *See* slip op. 28-29, 37-38. The District Court Defendants do not seek reconsideration of that holding.

2. Because the Court's decision identifying a statutory right to counsel fully resolved the controversy presented by the plaintiffs' complaint and afforded them all the relief they sought, the Court did not address the plaintiffs' alternative arguments asserting a right to counsel on constitutional grounds. *See* slip op. 15-16. Instead, the Court adhered to the "'established principle that a court will not decide a constitutional issue when a case can properly be disposed of on a non-constitutional ground.'" *Id.* at 16 (quoting *Baltimore Sun Co. v. Mayor of Baltimore,* 359 Md. 653, 659 (2000)).

3. The circuit court's December 28, 2010 declaratory judgment (E. 334-36), however, did resolve the very constitutional issues that this Court declined to address. That declaratory judgment contains 18 paragraphs in which various facts and legal propositions are "ordered, decreed, and adjudged." (*Id*.) Almost none of these declarations have been endorsed by this Court. In fact, only a single paragraph of the circuit court's declaratory judgment conveys the core holding of this Court finding a statutory right to counsel at an arrestee's initial appearance before a district court commissioner. That paragraph states that "by proceeding without Plaintiffs having representation by counsel at their initial bail hearings[] before the Commissioner, Defendants violated Plaintiffs' right to counsel as

declared by the Sixth Amendment, Article 21 of the Maryland Declaration of Rights, and the Public Defender Act." (E. 335.) Another declaration states that the plaintiffs' due process rights guaranteed by the Fourteenth Amendment and Article 24 of the Declaration of Rights were violated by conducting the initial appearance after the plaintiffs requested representation. (E. 336.)

4. Thus, embedded within the declaratory judgment under review in this appeal are declarations of constitutional law that this Court expressly declined to address in its opinion in this case. Furthermore, although this Court's opinion does not disturb the holding in *Fenner v. State*, *see* slip op. 24 n.19, the circuit court's order is in tension with the Court's determination in *Fenner* that a bail-review proceeding is not a critical stage of a criminal case for Sixth Amendment purposes, *see* 381 Md. 1, 21 (2004): to the extent that the circuit court's rulings declaring a constitutional right to the assistance of counsel at the initial appearance would necessarily entail a constitutional right to counsel at bail-review proceedings as well, *cf.* slip op. 38 (stating that statutory right to counsel at bail review "follows quite naturally" from identification of statutory right to counsel at initial appearance), those rulings cannot be reconciled with this Court's decision in *Fenner*.

5. Despite the limited scope of this Court's opinion, the disposition of the appeal that is stated at the conclusion of the Court's opinion indicates that the circuit court's broad declaratory judgment is "affirmed." A mandate incorporating this disposition would properly be "read in light of the opinion," *Couser v. State,* 256 Md. 393, 399 (1970); *see generally*

*Harrison v. Harrison,* 109 Md. App. 652, 659-66 (1996) (surveying Maryland case law and concluding that, when a mandate "is ambiguous, then the opinion may be referred to and considered an integral part of that mandate"), which should remove any uncertainty about the effect of this Court's judgment.

6. Nevertheless, to avoid any confusion and to assure consistency between the judgment of this Court and that of the circuit court, the District Court Defendants ask that the Court clarify the disposition of the appeal by stating that the circuit court's judgment is affirmed in part and modified in part, and by remanding the case to the circuit court for entry of a declaratory judgment consistent with the Court's opinion. *See* Rule 8-604(b), (e); *see also Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 790-791 (1993) (affirming in part, modifying in part, and remanding for entry of a declaratory judgment consistent with the Court's opinion); *Donnelly Advertising Corp. v. Baltimore*, 279 Md. 660, 672 (1977) (reversing and remanding for entry of declaratory judgment consistent with the Court's opinion); *Savings Bank of Baltimore v. Bank Comm'r*, 248 Md. 461, 476 (1968) (same). Alternatively, the Court may wish to exercise its power under Rule 8-604(e) to "enter an appropriate judgment directly" rather than "order the lower court to do so."[*]

[*] The District Court Defendants are aware that the Public Defender has announced his intention to seek a stay of the Court's mandate and that some legislators also have requested that the Court delay issuance of the mandate. Although the District Court Defendants recognize that, by operation of Rule 8-605(d), issuance of the mandate will be delayed until this motion for reconsideration is decided, the District Court Defendants anticipate that their request for a technical modification can be dealt with swiftly. Though the Public Defender and other interested parties may have legitimate reasons for delaying

Respectfully submitted,

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John Hargrove, David W. Weissert,
Linda Lewis, and the Commissioners of the
District Court of Maryland for Baltimore City

Dated: February 1, 2012

implementation of the Court's decision, the District Court Defendants are prepared to perform their roles in conformance with the Court's ruling as soon as it becomes effective.

## CERTIFICATE OF SERVICE

I certify that, on February 1, 2012, a copy of the foregoing motion for reconsideration was served by first-class mail on:

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– and –

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Attorneys for Appellees Quinton Richmond, *et al.*

_____
William Brockman

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| PAUL B. DeWOLFE, JR., *et al.*, | * | IN THE |
| Appellants, | * | COURT OF APPEALS |
| v. | * | OF MARYLAND |
| QUINTON RICHMOND, *et al.*, | * | September Term, 2011 |
| Appellees. | * | No. 34 |

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**APPELLANT PAUL B. DeWOLFE, JR.'S MOTION FOR RECONSIDERATION AND, IN THE ALTERNATIVE, STAY OF ISSUANCE OF MANDATE**

Pursuant to Maryland Rule 8-605, Appellant Paul B. DeWolfe, Jr., in his official capacity as the Public Defender for the State of Maryland ("the Public Defender"), respectfully moves for reconsideration of this Court's Opinion dated January 4, 2012, to the extent it denied the Public Defender's request for a stay of the enforcement of the newly-declared right to counsel at initial bail hearings and bail review hearings. In the alternative, pursuant to Maryland Rule 8-606, the Public Defender moves for a stay of the issuance of the mandate for at least 180 days. *See Massey v. Sec'y, Dep't of Pub. Safety and Corr. Servs.*, 389 Md. 496, 525 (2005) ("Rule 8-606(b) permits the Court to advance or delay the issuance of the mandate" in light of "important practical considerations," including where action is required by another political branch to make effective the Court's ruling.).

The Public Defender is committed to doing everything in his power to carry out the Court's Opinion as expeditiously as possible. Unfortunately, and as set forth in the annexed Affidavit of Paul B. DeWolfe, Jr., however, the Public Defender believes that compliance by February 3, 2012—the date on which the mandate is expected to issue—

simply is not possible in light of the persistent and severe resource constraints facing his Office.

As the Public Defender explained in his earlier filings in both this Court and the court below, those resource constraints, to the extent they remain unaddressed, render his Office unable to supply counsel at initial bail hearings while still meeting its existing constitutional and ethical representation obligations. *See, e.g.*, Br. of Pub. Defender at 19 (filed Aug. 11, 2011). Well before the Court issued its Opinion, the Office's attorney caseloads were stretched to—and in some instances, even beyond—the acceptable limit. Indeed, in nearly every jurisdiction in the State, the Office has been out of compliance with both Maryland and American Bar Association caseload standards in recent years. DeWolfe Aff. ¶ 6. Nonetheless, the Office has continued to sustain significant funding and personnel reductions. It has repeatedly been forced to request supplemental funds just to meet the basic organizational needs of the Office, as it has had to cope with an increase in new cases as a result of the decisions in *Office of Public Defender v. State*, 413 Md. 411 (2010), and *Workman v. State*, 413 Md. 475 (2010). *Id.* ¶ 5. Under the most recent State Budget, for FY 2012, the Office received an appropriation of about $85 million and authorization for 535 attorney positions, both of which were less than its FY 2011 allocation. *Id.* In short, the Office has been asked to do more, with far fewer resources, than at any other time in recent memory.

Nevertheless, since the Court issued its Opinion on January 4th, the Public Defender has made diligent and extensive efforts to comply with the Court's holdings requiring the provision of public defender representation at initial bail hearings and bail

review hearings statewide to all qualifying defendants. *Id.* ¶ 7. For example, by the end of the very same day that the Court issued its Opinion, the Public Defender had scheduled a compliance meeting with numerous stakeholders, including representatives of the Commissioners, the District Court, the Judiciary Rules Committee, local law enforcement and corrections officers who control access to and operate detention centers where many initial bail hearings occur, State's Attorneys, District Public Defenders, the Office of the Attorney General, the Governor's office, and the Plaintiffs' attorneys. *Id.* That meeting was held on January 11, 2012. *Id.* ¶ 8. At the meeting, the participants discussed and outlined the substantial logistical and other issues that would need to be addressed to ensure that counsel could be provided at initial bail hearings and bail review hearings by February 3, 2012, in compliance with the Court's Opinion. *Id.* Apart from that meeting, the Public Defender has also undertaken various information-gathering efforts, engaged in additional discussions with involved stakeholders, and participated in Rules Committee meetings, all for the purpose of preparing a comprehensive plan for compliance with the Court's ruling by February 3rd, or the earliest possible date thereafter. *Id.* ¶ 9. In addition, District Public Defenders have been meeting with Commissioners, representatives of local detention centers, and law enforcement officers to prepare compliance plans for each district. *Id.*

These efforts, however, have only served to confirm that the Public Defender cannot comply with the Court's mandate at this time in light of his Office's current resource constraints. *Id.* ¶ 10. According to information obtained by the Public Defender, there are approximately 180,000 initial bail hearings conducted each year

before Commissioners on a 24-hours-a-day, seven-days-a-week basis at more than 40 locations throughout the State. *Id.* ¶ 11. The District Court Commissioners Office reports nearly 500,000 Commissioner work-hours annually. *Id.* Thus, the Public Defender estimates that his Office would have to match attorney work-hours statewide to Commissioner work-hours statewide to meet its new representation obligations. *Id.* ¶ 12. Given the Office's already overstretched attorney caseloads, the Public Defender estimates that his Office would need to add the equivalent of more than 250 new attorney positions in order to supply counsel at every initial bail hearing. *Id.* The Public Defender also foresees having to provide substantial additional support staff and services. *Id.*

Alternatively, and as a temporary measure, the Public Defender has considered relying on panel attorneys and temporary support services to comply with the Court's mandate regarding initial bail hearings, but he estimates that this option would cost approximately $28.2 million on an annualized basis. *Id.* ¶ 13. Moreover, the Public Defender believes that the number of attorney work-hours required to staff all initial bail hearings exceeds the amount of work-hours that panel attorneys could provide statewide. *Id.* The Office has thus far been unable to identify a sufficient number of attorneys from the private bar (whether supplying services on a for-pay or pro bono basis) to supplement the shortage of panel attorneys by February 3, 2012. *Id.* Finally, while the Office has actively begun to recruit pro bono assistance from students and the private bar, given the sheer volume of initial bail hearings (and bail review hearings), as well as the need to ensure the provision of effective assistance of counsel, it is unrealistic and impractical to expect that this mandate can be fulfilled by relying substantially on volunteers. *Id.* ¶ 14.

With respect to bail review hearings, there are approximately 85,000 such hearings per year at 35 district courthouses statewide. *Id.* ¶ 15. These hearings occur during regular court hours, Monday through Friday. *Id.* The Public Defender currently receives funding to provide representation at some or all bail review hearings in Baltimore City, Harford County, and Montgomery County. *Id.* In order to provide representation at every bail review hearing across the state, the Public Defender estimates that his Office would need to hire an additional 34 attorneys, as well as support staff, at a cost of between $3.6 million and $6.3 million per year. *Id.* If he elected to use panel attorneys for these hearings, he estimates the cost would be about $6.7 million per year. *Id.*

Unfortunately, the Public Defender does not have the funding and/or personnel resources available to comply with the Court's mandate. *Id.* ¶ 16. The Office's current FY 2012 operating budget was appropriated in April 2011. *Id.* It not only did not include authorized positions or funding to provide counsel at either initial bail hearings or bail review hearings statewide, but was actually about $420,000 less than the FY 2011 appropriation and provided for 38 *fewer* positions. *Id.* ¶ 5. Moreover, the Office's current FY 2013 allowance does not include authorized positions or funding either to hire additional staff attorneys or to retain panel attorneys in order to meet the Office's new representation obligations. *Id.* ¶ 16.

Significantly, the Office is prohibited by State law from expending funds or hiring for new positions that are not included in its authorized appropriation without approval from the appropriate State budget authorities. *Id.* ¶ 17. While the Office has submitted supplemental funding requests for FY 2012 and for FY 2013 to the Department of Budget

and Management, even if adequate funding were provided, FY 2012 funding would not become available until after the FY 2013 Budget bill has been enacted, which is not projected to occur before April 2, 2012 (at the earliest). *Id.* ¶ 18. If the Public Defender were to receive an adequate additional appropriation for FY 2013, the earliest that funding would become available is July 1, 2012. *Id.* In the meantime, the Office has no legal way to expend the funds or hire the attorneys and staff necessary to comply with the Court's mandate. *Id.* ¶ 17.

Moreover, there are significant logistical impediments to providing representation at initial bail hearings that cannot be addressed before February 3rd. *Id.* ¶ 19. For example, assuming funding is eventually provided for hiring new agency attorneys or using panel attorneys, those attorneys will require training so they are prepared to provide effective assistance of counsel at initial bail hearings. *Id.* As another example, the Office has learned that many jurisdictions are not yet in a position to provide staff attorneys, panel attorneys, and/or support staff with secure access to facilities where Commissioner hearings occur, and in many instances physical alteration to those facilities will be required if counsel were to represent their clients in any meaningful way. *Id.* The Office has also determined that its computer network requires substantial hardware and software upgrades to support the increased workload associated with providing representation at bail hearings. *Id.* Such upgrades cannot be performed until and unless additional funding is made available, at the earliest, through a FY 2012 deficiency appropriation. *Id.* ¶ 20.

In light of all the considerations discussed above, the Public Defender estimates that the earliest date by which his Office could possibly comply in any meaningful

fashion with the Court's mandate is August 1, 2012. *Id.* ¶ 20. That timeframe takes into account the fact that the Office may not receive a substantial additional appropriation sufficient to cover the costs of providing counsel at initial bail hearings and bail review hearings before the start of FY 2013, which is July 1, 2012. *Id.* The Public Defender would then require, at the very least, an additional 30 days to hire and train new attorneys and support staff (or recruit panel attorneys and temporary services staff), as well as to address any remaining logistical issues, such as access to facilities and Office infrastructure upgrades. *Id.* Indeed, given the daunting nature of those logistical challenges, it is entirely possible that the Public Defender would need (and be later constrained to seek) additional time beyond August 1st in order to have attorneys in place at all bail hearings across the state, though he would make every effort to comply by the earliest date possible once his Office has received adequate funding to do so. *Id.*

Accordingly, for the foregoing reasons, the Public Defender respectfully requests that the Court reconsider its denial of the Public Defender's request for a stay of the judgment. The newly-declared right to counsel at initial bail hearings and bail review hearings simply cannot be effectuated in any meaningful sense unless and until the Public Defender receives an additional budget appropriation during the current legislative session. Rather than have the Public Defender face the threat of contempt proceedings while he awaits the results of a budgetary process that is entirely out of his control, he believes the far more prudent course would be to stay the implementation of the right for at least 180 days so as to allow his Office a realistic opportunity to comply with the Court's mandate.

In the alternative and for these same reasons, the Public Defender respectfully requests that the Court stay the issuance of the mandate for at least 180 days. Whatever concerns the majority may have had with taking into account the Public Defender's resource constraints when ruling on the statutory interpretation question before, it is clear that such "important" practical and equitable considerations may be taken into account on a motion to stay the mandate pursuant to Rule 8-606, particularly where action is required by another political branch to make effective the Court's ruling. *See Massey*, 389 Md. at 525; *see also Conaway v. Deane*, 401 Md. 219, 355-356 (2007) (Raker, J., dissenting) (Court should have exercised its discretion under Rule 8-606 and withheld the mandate for 180 days "to give the General Assembly time to consider and enact legislation" regarding the rights of same-sex couples as the relief to which appellants were entitled could not be provided immediately.).

While it is true that the Court has exercised this discretion under Rule 8-606 "rarely", *Massey*, 389 Md. at 525, the reasons for delaying the mandate in this case are at least as compelling as they were in *Massey*, where the Court withheld the mandate for 120 days, if not more so. There, the Court declared certain prison disciplinary proceedings invalid because they were not enacted in conformance with the Administrative Procedure Act, but stayed the mandate because of "important practical considerations," namely that declaring them immediately ineffective would "bring prison disciplinary proceedings to a halt." *Id.* Here, because the Public Defender cannot immediately provide representation at initial bail hearings with his Office's existing resources, indigent defendants would be faced with the unpalatable choice of having to

forgo a bail determination (and remain in custody indefinitely) or waive the right to counsel. *See DeWolfe v. Richmond,* slip op. at 37-38. Thus, in light of these significant practical and equitable considerations, the Court should stay the mandate for at least 180 days so as to allow his Office a realistic opportunity to comply with the mandate in this case.

## CONCLUSION

For the reasons set forth above, the Court should grant the motion and either reconsider its denial of the Public Defender's request for a stay of the judgment or stay the issuance of the mandate for at least 180 days.

Respectfully submitted,

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*Counsel for Appellant*
*Paul B. DeWolfe, Jr.*

Font: Times New Roman 13

Dated: February 2, 2012

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| PAUL B. DeWOLFE, JR., *et al.*, | * | IN THE |
| Appellants, | * | COURT OF APPEALS |
| v. | * | OF MARYLAND |
| QUINTON RICHMOND, *et al.*, | * | September Term, 2011 |
| Appellees. | * | No. 34 |

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**ORDER**

Upon consideration of Appellant's Motion for Reconsideration and, in the Alternative, Stay of Issuance of Mandate, it is this _____ day of _____, 2012,

ORDERED that the Motion for Reconsideration is GRANTED such that the Court's denial of the Public Defender's request for a stay of the judgment is withdrawn and a stay is hereby granted for a period of not less than 180 days from the date of this Order;

or, in the alternative, ORDERED that the Motion for Stay of Issuance of Mandate is GRANTED and the mandate is hereby stayed for a period of not less than 180 days from the date of this Order.

By the Court:

_____

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 2nd day of February, 2012, a copy of the foregoing motion was served by electronic mail and first class mail, postage prepaid, on:

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| PAUL B. DeWOLFE, JR., *et al.*, | * | IN THE |
| Appellants, | * | COURT OF APPEALS |
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**AFFIDAVIT OF PAUL B. DeWOLFE, JR. IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION AND, IN THE ALTERNATIVE, STAY OF ISSUANCE OF MANDATE**

PAUL B. DeWOLFE, JR., being duly sworn, deposes and says the following based upon personal knowledge of the matters set forth below or review of pertinent documents and records:

1. I am over the age of 21 and otherwise competent to make this affidavit. I am the Public Defender for the State of Maryland. In that capacity, I oversee the Office of the Public Defender. My office address is 6 St. Paul Street, Suite 1400, Baltimore, MD 21202. I submit this affidavit in connection with the Public Defender's Motion for Reconsideration and, in the Alternative, Stay of Issuance of Mandate.
2. The Office of the Public Defender currently provides representation for indigent defendants in criminal trials, appeals, juvenile cases, post-conviction proceedings, parole and probation revocations, Child in Need of Assistance proceedings, and involuntary commitments to mental institutions.
3. The Office of the Public Defender currently provides representation for indigent defendants at some or all bail review hearings before district court judges in Baltimore City, Montgomery County and Harford County.

4. The Office of the Public Defender does not currently provide representation for indigent defendants at initial bail hearings before District Court Commissioners in any district in Maryland, including Baltimore City.

5. The Office of the Public Defender currently employs 535 attorneys statewide and in the most recent State Budget, FY 2012, received an appropriation of $85 million. This figure was approximately $420,000 less than the FY 2011 appropriation and provided for 38 fewer positions than the previous year. The FY 2012 cuts followed on the heels of several previous years' worth of funding and personnel reductions. As a result of these reductions, the agency has lost 20 percent of its workforce, including 50 percent of its intake staff, in recent years. Meanwhile, compliance with this Court's decisions in *Office of Public Defender v. State*, 413 Md. 411 (2010), and *Workman v. State*, 413 Md. 475 (2010), has added on average ten percent more cases to agency caseloads statewide.

6. The Office's attorney caseloads exceed Maryland and/or American Bar Association caseload standards for effective assistance of counsel in nearly every case type and every jurisdiction in the State. For instance, circuit court attorneys in the Upper Shore district and in Baltimore County are double Maryland caseload standards. District Court attorneys in Harford, Prince George's, and Montgomery Counties carry caseloads that are also double recommended caseload standards. In only two districts do circuit court attorneys have caseloads in compliance with caseload standards. In no district do District Court attorney caseloads comply with caseload standards.

7. The Office of the Public Defender has made every effort to comply with the opinion of the Court of Appeals in the above-captioned case, which was issued on January 4, 2012. By the end of that day, I had scheduled a compliance meeting with numerous stakeholders, including representatives of the Commissioners, the District Court, the

Judiciary Rules Committee, local law enforcement officers who control access to detention centers where many initial bail hearings occur, State's Attorneys, District Public Defenders, the Office of the Attorney General, the Governor's office, and the Plaintiffs' attorneys.

8. That compliance meeting was held on January 11, 2012. In attendance were representatives of: the Office of the Public Defender; the District Court; the District Court Commissioners; the Governor's Office; the Administrative Office of the Courts; the Judiciary Rules Committee; the Office of the Attorney General; the State's Attorneys Association and State's Attorneys from several jurisdictions; the Baltimore City Central Booking and Intake Facility; the Montgomery County Department of Corrections; the Prince George's County Department of Corrections; Plaintiffs' counsel; and the private criminal defense bar. At this meeting, the participants discussed and outlined the issues that would need to be addressed to ensure that counsel could be provided at initial bail hearings and bail review hearings in compliance with the Court's Opinion, which all agreed would be made effective on February 3, 2012, unless the Court stayed the issuance of the mandate.

9. The Office, through its senior management as well as its court attorneys, has also undertaken various information-gathering efforts, engaged in additional discussions with involved stakeholders, and participated in Rules Committee meetings, all for the purpose of preparing a comprehensive plan for compliance with the Court's ruling by February 3rd or the earliest possible date thereafter. In addition, District Public Defenders have been meeting with Commissioners, representatives of local detention centers, and law enforcement officers to prepare compliance plans for each district.

10. After gaining a better understanding of the scale of the effort and resources that will be necessary to provide for public defender representation at all initial bail hearings and bail review hearings across the State, I have determined that the Office is unable to comply with the Court's mandate at this time in light of its current resource constraints.

11. According to information provided by the District Court Commissioners, there are approximately 180,000 initial bail hearings conducted before Commissioners across the State each year. These hearings are conducted by approximately 280 Commissioners and take place at more than 40 locations throughout the state. The District Court Commissioners Office reports nearly 500,000 Commissioner work-hours annually. In the busiest jurisdictions, such as in Baltimore City, Commissioner hearings occur 24-hours-per-day, seven-days-per-week (including holidays) with multiple Commissioners serving on any given shift. In less busy jurisdictions, Commissioners are available 24-hours-per-day, seven-days-per-week (including holidays) and are made available either through staffing regular shifts with one or more Commissioners or by having Commissioners remain on-call.

12. Based upon information obtained to date about Commissioner staffing, I estimate that my Office would have to match attorney work-hours statewide to Commissioner work-hours statewide (*i.e.*, 500,000) to meet its new initial bail hearing representation obligations. Given the Office's already overstretched attorney caseloads, I estimate that my Office would need to add the equivalent of more than 250 new attorney positions in order to supply counsel at every initial bail hearing. I also foresee the Office having to provide substantial additional support staff and services.

13. Alternatively, I have considered relying in the short-term on panel attorneys and temporary support services to comply with the Court's mandate regarding initial bail

hearings. I estimate that to retain panel attorneys to cover each Commissioner shift at almost 500,000 Commissioner work-hours per year would cost approximately $28.2 million on an annualized basis. However, the Office has learned through preliminary surveys of its panel attorney lists that the number of attorney work-hours required to staff Commissioner hearings exceeds the amount of work-hours that panel attorneys could provide statewide. The Office has thus far been unable to identify a sufficient number of attorneys from the private bar (whether supplying services on a for-pay or pro bono basis) to supplement the shortage of panel attorneys by February 3, 2012.

14. I have also considered relying on pro bono assistance from students and the private bar to comply with the Court's mandate, and the Office has actively begun to recruit such assistance. Nevertheless, given the sheer volume of initial bail hearings (and bail review hearings), as well as the need to ensure the provision of effective assistance of counsel at these hearings, it is unrealistic and impractical to expect that this mandate can be fulfilled by relying solely or substantially on volunteers.

15. With respect to bail review hearings, there are approximately 85,000 such hearings per year at 35 district courthouses statewide. These hearings occur during regular court hours, Monday through Friday. My Office currently receives funding to provide representation at some or all bail review hearings in Baltimore City, Harford County, and Montgomery County. However, in order to provide representation at every bail review hearing across the State, I estimate that my Office would need to hire an additional 34 attorneys, as well as support staff, at a cost of between approximately $3.6 million to $6.3 million per year. If I elected to use panel attorneys for these hearings, the cost would be about $6.7 million per year.

16. The Office of the Public Defender does not have any authorized positions or funding in its FY 2012 appropriation, which was made in April 2011, nor in its current FY 2013 allowance to hire the new attorneys and staff that would be required to provide representation at all initial bail hearings and bail review hearings statewide. Nor does the Office have funding in its FY 2012 appropriation or its FY 2013 allowance to retain panel attorneys in order to meet its new representation obligations.
17. A state agency can only expend funds that have been appropriated to the agency through the annual Budget process. Similarly, a state agency can only employ staff whose positions have been authorized through the annual Budget process. Accordingly, the Office has no legal way at this time to expend the funds or hire the attorneys and staff necessary to comply with the Court's mandate.
18. The agency has submitted supplemental funding requests for FY 2012 and for FY 2013 to the Department of Budget and Management to be able to comply with the Court's mandate. Even if the Office were to receive adequate funding through these requests, FY 2012 funding would not become available until enactment of the Budget bill, projected to occur on April 2, 2012, and FY 2013 funding would not become available until July 1, 2012.
19. In addition to the Office's resource and personnel constraints, there are significant logistical impediments to providing representation at initial bail hearings that cannot be addressed before February 3rd. For example, assuming funding is eventually provided for hiring new staff attorneys or using panel attorneys, those attorneys will require training so they are prepared to provide effective assistance of counsel at bail hearings. As another example, District Public Defenders and other representatives of my Office have learned, after meetings with corrections and court officials in virtually every

jurisdiction across the State, that in many locations current space limitations and security concerns would prevent or make it extraordinarily difficult to permit consultation between attorney and client, and in many instances physical alteration to those facilities will be required if counsel were to represent clients in any meaningful way.

20. I have also determined that the Office's computer network requires substantial hardware and software upgrades to support the increased workload associated with providing representation at initial bail hearings. Such upgrades cannot be performed until additional funding is made available, at the earliest, through a FY 2012 deficiency appropriation.

21. In light of all of these considerations, I believe the earliest date by which my Office could possibly comply in any meaningful fashion with the Court's mandate is August 1, 2012. That timeframe takes into account the fact that the Office likely will not receive a substantial additional appropriation sufficient to cover the costs of providing counsel at initial bail hearings and bail review hearings before the start of FY 2013, which is July 1, 2012. My Office would then require, at the very least, an additional 30 days to hire and train new attorneys and support staff (or recruit panel attorneys and temporary services staff), as well as to address any remaining logistical issues, such as access to facilities and Office infrastructure upgrades. That said, given the daunting nature of those logistical challenges, it is entirely possible that my Office would need more time beyond August 1st to have attorneys in place at all bail hearings across the state, though my Office would make every effort to comply by the earliest date possible once we have received adequate funding to do so.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing are true and correct.

Paul B. DeWolfe, Jr.

IN THE
COURT OF APPEALS OF MARYLAND

| | | |
|---|---|---|
| PAUL B. DeWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al., | * | |
| Appellants, | * | No. 34, September Term, 2011 |
| v. | * | |
| QUINTON RICHMOND, et al., | * | |
| Appellees. | * | |

* * * * * * * * * * * *

**RESPONSE TO MOTION FOR RECONSIDERATION**

Appellees Quinton Richmond, et al. ("Plaintiffs"), by their undersigned counsel, respectfully respond to the Motion for Reconsideration filed by Appellants, the Hon. Ben C. Clyburn, et al. (the "District Court Defendants," "DCDs"). The Motion should either be denied outright, or, in the alternative, the Court should proceed to decide the constitutional issues that it did not address in its January 4, 2012 decision.

**OVERVIEW**

We will not mince words about the DCDs' outrageous objective here. Their description of their Motion as seeking "a technical modification" that would "merely ... conform the disposition of the case to the reasoning set forth in the Court's opinion" (Mot. at 1, 4 n.1) is a euphemistic fig-leaf for the ages.[1] Far from a minor "technical" request, this motion is part of a one-two punch intended to strip Plaintiffs of all benefit of the Court's decision and the judgment below, leaving Plaintiffs with no greater access to counsel than when they brought this case five years ago and requiring Plaintiffs to start their constitutional litigation anew in the circuit court. With a strong left, the General Assembly is in the process of enacting legislation that would repeal the Public Defender

[1] See also Ex. 1, Feb. 1, 2012 transmittal letter to the Clerk explaining that the Motion is "seeking a technical modification of the Court's January 4, 2012 decision in this case."

Act provisions requiring counsel at initial bail hearings before commissioners. And with a menacing right, the DCDs ask that the circuit court's judgment be "conformed" to the Court's decision, a euphemism for striking the circuit court's constitutional rulings and forcing Plaintiffs to re-litigate the constitutional issues from scratch. They want the Court to bail them out and magically transform the circuit court's adverse rulings into an unearned victory, leaving Plaintiffs without counsel to protect against loss of liberty and another long, arduous litigation road just to regain lost ground.

This is the inevitable effect of the DCDs' motion. If their request that the circuit court "conform" its decision to this Court's opinion is combined with the anticipated gutting of the Public Defender Act ("PDA") in the General Assembly, Plaintiffs would have no avenue for relief except re-litigating their five-year-old constitutional claims. Of course, the DCDs do not acknowledge this obvious motive, making no reference to the General Assembly's activities and preferring instead to focus on the innocuous fact that the circuit court's constitutional rulings have not yet been reviewed on appeal.

The audacity of this request cannot be overstated. Without even going to the bother of prevailing on the merits or proving any error by the circuit court, the DCDs effectively seek to vacate a fully litigated judgment that they are committing major constitutional violations. This is the legal equivalent of spinning straw into gold. Losing parties are not entitled to vacate a judgment merely because they might be inconvenienced by its effect while they renew their appeal of its terms. Their remedy is to seek a stay pending appeal, not a vacatur that would leave them free to violate constitutional rights with seeming impunity and relieve them of any further need to appeal to reverse the circuit court's adverse judgment.

The DCDs do not argue any deficiency in the judgment that would require vacatur: they do not ask for it to be vacated because it is illegal, or because it is legally or procedurally erroneous, or because the circuit court lacked jurisdiction, or because it is moot, or for any other valid legal reason for vacating a judgment. Rather, they want to "conform" (i.e., vacate) it merely because it has not yet been affirmed on appeal and allegedly is in "tension" with the Court's non-precedential sua sponte decision in Fenner

v. State. In other words, they are asking for appellate success (vacating the lower court judgment) without actually succeeding on appeal. This request is an outrage, and it should be denied out-of-hand. If the DCDs want to bring the constitutional issues back to the Court for review, the appeals rules are available and allow them to seek a stay.

An alternative mechanism may be procedurally superior at this juncture. Under Rule 8-605(e), the Court may decide the constitutional claims without requiring further argument. Given that the Court already has had two full rounds of briefing and oral argument on the constitutional issues, it could decide those issues now, without requiring further litigation in the circuit court. Particularly in light of the impending effort in the General Assembly to roll back the statutory right to counsel, all parties would benefit from a definitive ruling by the Court on the constitutional issues. Although this would delay issuance of the mandate, Plaintiffs understand that it may be more prudent to remove the uncertainty surrounding these issues (as several legislators have stated) than to litigate compliance with a judgment still subject to appellate review.

## FACTS

Plaintiffs brought this action on November 13, 2006. Four years later, on December 28, 2010, the Circuit Court for Baltimore City issued a declaratory judgment finding that the District Court Defendants and the Public Defender were violating Plaintiffs' statutory right to representation at initial bail proceedings under the Public Defender Act and their constitutional rights to counsel at those proceedings under the Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights and to due process under the Fourteenth Amendment and Article 24. The Public Defender acknowledged the violations. Through this judgment, Plaintiffs were accorded both statutory and constitutional rights to counsel at initial bail proceedings in Baltimore City before commissioners of the District Court. The DCDs appealed and challenged each of those rulings; the Public Defender also appealed, not as to the merits of the declarations, which he supported, but the fact that they had been entered without provision for funding to support implementation. Over the DCDs' objection, this Court granted a bypass writ of certiorari.

On January 4, 2012, the Court affirmed the judgment below on statutory grounds. It did not address the constitutional findings by the circuit court, finding that the case could "'properly be disposed of on non-constitutional grounds.'" See DeWolfe v. Richmond, --- Md. ---, 2012 WL 10853, at *7, No. 34, Sept. Term 2011, slip op. at 16 (Jan. 4, 2012) (quoting McCarter v. State, 363 Md. 705, 712 (2001)). The Court denied the Public Defender's request to stay the decision for a period of time to enable the General Assembly to provide funding. Id., 2012 WL 10853, at *15, 18, slip op. at 33, 38.

On February 1 and 2, 2012, respectively, the last dates available under Rule 8-605, the DCDs and the Public Defender separately moved for reconsideration. These motions stayed issuance of the mandate, providing the Public Defender and the DCDs with a temporary respite from compliance. Although the Public Defender agrees that Plaintiffs have statutory and constitutional rights to representation at bail hearings and that his failure to provide this representation violates those rights, he refuses to provide representation absent additional funding and is demanding a 41% budget increase.

Members of the General Assembly have responded to the Court's decision by trying to roll back the right to counsel. Both the House and the Senate have approved similar bills that would eliminate the right to counsel at initial bail hearings before commissioners and limit that right to bail review hearings (which most Plaintiffs in Baltimore City already enjoy). See HB 261 (2012); SB 422 (2012). The Senate bill at least would require that bail reviews be held no later than 48 hours after the commissioner hearing. (SB 422 at 9 ll. 26-28). As of this filing, therefore, the statutory right to counsel at initial bail proceedings before commissioners found by the Court is in great jeopardy. By the time the Court hears these motions at its next conference of March 16, 2012, the General Assembly might have stripped that right away from the PDA. While the bills would allow representation at bail reviews, Plaintiffs would receive scant relief, as representation already occurs in most Baltimore City bail reviews. This legislative action thus threatens to nullify the Court's decision for most Plaintiffs.

In light of this legislative activity, the premise of the Court's decision not to address the constitutional findings by the circuit court, namely that the case can be

resolved on non-constitutional grounds, no longer is true. The DCDs' motion vividly demonstrates that the constitutional issues are moving to the forefront of the case and in all likelihood need to be addressed now in order to resolve the claims in this case.

## ARGUMENT

### I. The DCDs Are Not Entitled to Vacatur of Constitutional Rulings that this Court Has Not Yet Reviewed.

The DCDs do not seek a mere "technical" modification of the Court's decision. Far from it: they seek an outright vacatur of the circuit court's declaratory judgment that Plaintiffs enjoy constitutional rights to counsel at bail hearings. Although they lack the temerity to argue for this relief explicitly, their motion leaves no doubt that, in asking the Court to order the circuit court to "conform" its declaratory judgment to the Court's ruling (which addresses only the statutory claim) and render it "consistent with the reasoning of this Court's opinion," Mot. at 1, they in fact are seeking the most extreme relief possible: vacatur of the circuit court's constitutional rulings.

The motion rests solely upon the Court's disposition, "**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED,**" id., 2012 WL 10853, at *18, slip op. at 39 (emphasis in original). Because this disposition does not explicitly state that the statutory portion of the circuit court's judgment is affirmed but that the constitutional portions were not decided, the DCDs assert a lack of "consistency between the judgment of this Court and that of the circuit court." (Mot. at 4 ¶ 6). They realize that no one would reasonably construe this disposition as affirming the circuit court's declaration of constitutional rights and concede that this is not a plausible reading of the disposition. See id. at 4 ¶ 5 (stating that the Court's decision "remove[s] any uncertainty about the effect of the Court's judgment"). Indeed, no one could possibly read the decision as affirming constitutional rulings that the Court declined to address. Nevertheless, for purposes of "clarification," the DCDs ask the Court to order the circuit court to "conform" its judgment and make it "consistent" with the Court's decision. Id. They never say how that would be done, but there is only one way the circuit court could meet the DCDs' demand, and that is to vacate the constitutional rulings.

Indeed, the motion provides clear signs of this subversive intent. First, the DCDs do not ask for the obvious "technical" solution to this purported ambiguity: clarifying that only the statutory ruling of the circuit court is affirmed. Second, the DCDs claim that the circuit court's constitutional rulings are in "tension" with the Fenner decision, id. at 3 ¶ 4. This is a clear recourse to the merits. Finally, the DCDs conspicuously do not and dare not say how they expect the circuit court to "conform" its declaratory judgment.

Thus, "conform" is code for "vacate." The real question is whether the DCDs are entitled to have portions of a declaratory judgment vacated that the Court did not review. They provide no authority for that extraordinary relief,[2] and for good reason. The Court lacks authority to vacate a lower court ruling absent a finding of error. Rule 8-604(b), the provision relied upon by the DCDs, see Mot. at 4, is clear on this point:

> (b) **Affirmance in part and reversal, modification, or remand in part.** ***If the Court concludes that error affects a severable part of the action***, the Court, as to that severable part, may reverse or modify the judgment or remand the action to a lower court for further proceedings and, as to the other parts, affirm the judgment.

Rule 8-604(b) (italics and underlined emphasis added). The Court therefore may vacate the circuit court's constitutional rulings ***only*** if it first finds error in those rulings. Due process demands no less: an appellate court may not vacate a lower court's declaratory judgment ruling simply because the appellate court declined to review that ruling for

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[2] The DCDs cite three cases in which the Court directed the trial court to issue a new decision consistent with the Court's opinion. Mot. at 4. None of these cases involved rulings by the trial court that had not been reviewed and reversed by the Court on appeal. Indeed, none are even remotely pertinent here. See Bausch & Lomb, Inc. v. Utica Mut. Ins. Co., 330 Md. 78, 790-91 (1993) (affirming in part, modifying in part, and remanding for entry of a declaratory judgment consistent with the Court's opinion, where the Court decided all issues in case except one, and remanding to the circuit court to adjudicate one last issue that had not yet been decided by any court); Donnelly Advertising Corp. v. Baltimore, 279 Md. 660, 672 (1977) (reversing and remanding for entry of declaratory judgment consistent with the Court's opinion where the Court affirmed each of trial court's five rulings dismissing plaintiff's claims but failed to issue a separate declaratory judgment separate from these five rulings); Savings Bank of Baltimore v. Bank Comm'r, 248 Md. 461, 476 (1968) (reversing denial of relief below *on the merits* and remanding for entry of declaratory judgment conforming with Court's substantive opinion).

prudential reasons. Indeed, this outcome – leaving Plaintiffs with no constitutional ruling whatsoever and at imminent risk of losing some or all of their statutory rights – would contradict the fundamental principle that circuit courts *must* declare the rights of the parties as requested in an action for declaratory judgment. See, e.g., Savings Bank of Baltimore, 248 Md. at 470 ("This Court has said time and again that seldom, if ever, should a bill or petition in a declaratory judgment proceeding be dismissed without a declaration of the rights of the parties.").

This result hardly leaves the DCDs without a remedy. If the constitutional rulings are enforced against them, they remain free to appeal the rulings and to seek a stay or injunction pending that appeal. Plaintiffs, by contrast, would be gravely prejudiced by the vacatur sought by the DCDs. Not only would they lose the benefit of a judgment that was fully litigated below, but, in light of the impending action in the General Assembly, they could lose rights gained through this litigation to date, all without the DCDs prevailing on any issue in the circuit court or in this appeal. Plaintiffs would have to re-litigate a judgment they already won, without any showing of error. In light of the vital constitutional issues at stake – incarceration of indigent criminal defendants without representation– this perverse result would be an egregious miscarriage of justice. The DCDs' motion is outrageous and should be summarily denied.

## II. To Avoid Uncertainty and Further Delay, the Court Should Decide the Constitutional Issues.

The efforts currently underway in the General Assembly to repeal the Public Defender Act's guarantee of representation at all stages of a criminal proceeding and roll back the principal relief accorded to Plaintiffs by the Court's decision challenge the basic premise for the Court's decision not to decide the constitutional issues. The Court avoided the constitutional issues because it was not necessary to decide them due to the statutory ruling's broad relief, see DeWolfe, 2012 WL 10853, at *7, slip op. at 16, but the current legislative activity suggests that this no longer is true. If the proposed legislation is enacted, Plaintiffs will have no statutory right to counsel at initial bail proceedings before commissioners. Even if the General Assembly preserves the right to counsel at

bail review hearings, that would provide little benefit to Plaintiffs, who already are represented at most bail reviews in Baltimore City.

The Court's general rule against reaching constitutional issues unnecessarily applies only "'when a case can properly be disposed of on a non-constitutional ground.'" McCarter, 363 Md. at 712 (quoting Baltimore Sun v. Mayor and City Council of Baltimore, 359 Md. 653, 659 (2000)). In light of the impending legislation, it is increasingly unlikely that this case "can properly be disposed of on a non-constitutional ground.'" The legislative action moves the constitutional issues to the forefront.

Indeed, the constitutional-avoidance principle is a prudential rule of restraint, not an absolute prohibition. In Rutherford v. Rutherford, 296 Md. 347 (1983), this Court decided a constitutional due process right to counsel at civil contempt proceedings in lieu of deciding the case under the PDA, as the rule allows leeway:

> [The concurring opinion] takes the position that the constitutional right to counsel issue should not be reached in light of the general rule that courts do not decide constitutional questions unnecessarily. We continue to adhere to the principle that "[*o*]*rdinarily* courts do not pass upon a constitutional question ... if there is also present some other ground upon which to dispose of the case," Employ. Sec. v. Balto. Lutheran H.S., 291 Md. 750, 754 n.2 (1981) (emphasis added). As indicated by the above-quoted language, this rule is not absolute. It reflects a policy of "judicial restraint" (Caplan Bros. v. Village of Cross Keys, 277 Md. 41, 45 (1976)) or a "general practice of this Court" (State v. Insley, 64 Md. 28, 30 (1885)). Like other such general rules, it is not without exceptions. ... For several years the question of whether due process requires the appointment of counsel in cases like the instant ones has been a recurring matter in Maryland trial courts. ... The question has been of major concern to the trial judges of this State.

Id. at 363 n.6 (citations omitted) (emphasis added).

The Court has authority under Rule 8-605(e) to decide the constitutional issues now in light of the pending motions for reconsideration. See Rule 8-605(e) ("If a motion for reconsideration is granted, the Court may make a full disposition of the appeal without reargument, restore the appeal to the calendar for argument, or make other orders, including modification or clarification of the opinion, as the Court finds

appropriate."). Such relief would address the DCDs' concern that the circuit court's constitutional rulings should not be left to stand without this Court's review. It also would provide the most efficient way of reaching a complete and final decision in this case. If the General Assembly does roll back the statutory right to counsel, Plaintiffs will need to enforce the circuit court's constitutional ruling, which inevitably would prompt further appeal and require the Court to decide the constitutional issues anyway. Though Plaintiffs are loathe to support further delay of the mandate, on balance it is much more efficient for the Court to decide the issues now while the matter is pending before the Court. Otherwise, Plaintiffs might have to await several years of further litigation before receiving any relief.

The Court already has had the benefit of two separate rounds of briefs and oral arguments on these issues. It thus can decide them without a third round of briefing and oral argument. The issues are teed up and ready for decision. As the General Assembly appears bent on curtailing Plaintiffs' statutory rights, the Court should proceed to decide Plaintiffs' constitutional rights.

## CONCLUSION

For the foregoing reasons, the Court should deny the Motion for Reconsideration or, in the alternative, decide the constitutional issues.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5th day of March 2012, a copy of the foregoing Response to Motion for Reconsideration was served by electronic mail and by first class mail, postage prepaid, on the following counsel for the District Court Defendants and the Public Defender, respectively:

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IN THE
COURT OF APPEALS OF MARYLAND

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| PAUL B. DeWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al., | * | |
| Appellants, | * | No. 34, September Term, 2011 |
| v. | * | |
| QUINTON RICHMOND, et al., | * | |
| Appellees. | * | |

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**RESPONSE TO PAUL DeWOLFE'S MOTION FOR RECONSIDERATION AND, IN THE ALTERNATIVE, STAY OF ISSUANCE OF MANDATE**

Appellees Quinton Richmond, et al. ("Plaintiffs"), by their undersigned counsel, respectfully respond to the Motion for Reconsideration and, in the alternative, for Stay of Issuance of Mandate, filed by Appellant Paul B. DeWolfe, Jr., in his official capacity as the Public Defender for the State of Maryland (the "Public Defender"). The Motion should be denied, as it repackages the same arguments that the Public Defender raised in his previous briefs and oral argument. It fails to identify any material error of law or fact in the Court's denial of the same request or any change of circumstances warranting a change of decision. This is a transparent ploy to buy time for the General Assembly to gut the right to counsel ostensibly supported by Mr. DeWolfe.

Indeed, the Public Defender's position reaches new heights of illogic. On the one hand, he claims to agree wholeheartedly that Plaintiffs enjoy statutory and constitutional rights to counsel at bail hearings, that these rights are important, and that Plaintiffs should prevail on the merits of their claims. Yet he has not taken one meaningful step to comply with the law and to stop violating the rights of Plaintiffs who, after all, are his clients. Representation has not occurred at a single initial bail proceeding or at any additional bail reviews. He has not taken any effective moves to secure funding to satisfy his clients'

constitutional rights, such as using existing funds to pay for the representation and asking for a supplemental appropriation later in the year; suing the state for adequate funding; or demanding the immediate release of his clients unconstitutionally detained without representation. In the General Assembly, he has not opposed efforts to repeal portions of the Public Defender Act ("PDA") to negate much of the Court's decision. He has provided the key ammunition for those efforts by submitting bloated in terrorem budget numbers that hyperbolically inflate the cost of complying with this Court's decision to an incredible 41% over current levels. Coming on the heels of his prior insistence that the Court should not declare the rights of Plaintiffs – rights of his own clients that he *admits* he violates every day – the Public Defender's actions belie any basis for solicitude by this Court. Over a year and a half ago, he told the circuit court that no injunction was needed because he would comply with this right to counsel if it were declared by the courts. It is time to hold him to his word.

In criticizing the Public Defender, we understand that his current budget is not sufficient. But the right to counsel at bail is under attack, and, even though he claims to support that right, he has not defended it in the General Assembly.[1] He submitted outrageously inflated budget projections (e.g., assuming that attorneys would spend 2.8 hours per initial appearance, fewer than three initial appearances a day) that have fueled the legislative efforts to undo this Court's decision. If the Public Defender truly wanted to comply, he would be suggesting creative solutions, not using in terrorem tactics to scare the legislature. The right to counsel deserves better treatment than death by phony, hyper-inflated budget numbers that would not withstand thirty seconds of scrutiny by this Court if they were used to justify a damages award in a tort or breach of contract case.

Plaintiffs oppose the Motion for the following reasons:

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[1] Mr. DeWolfe testified that HB 261 and SB 442 are "reasonable." See Feb. 29, 2012 Hr'g, House Appropriations Comm. Subcomm. on Pub. Safety and Admin., available at http://mgahouse.maryland.gov/House/Viewer/?peid=72887e5224984a90a81125cfb4f1110e1d, at approximately 1:11-14.

1. The Court already has denied essentially the same request. Remarkably, the Public Defender does not even mention the following ruling by the Court:

> Moreover, we decline the Public Defender's request for a stay in implementing today's holding affirming that right. The Public Defender's asserted defense of budgetary impracticability, though evidently pertinent in many contexts, is not a proper consideration for the judiciary. We cannot declare that Plaintiffs have a statutory right to counsel at bail hearings and, in the same breath, permit delay in the implementation of that important right and thereby countenance violations of it, even for a brief time.

DeWolfe v. Richmond, --- Md. ---, 2012 WL 10853, at *18, No. 34, Sept. Term 2011, slip op. at 38-39 (Jan. 4, 2012). He fails to assert any particular matter that the Court overlooked in this ruling and instead makes the same request as before, the only difference being that he now seeks a stay to August 1, 2012, as opposed to the June 30, 2012 date proposed at oral argument. This is an improper motion for reconsideration.

Motions for reconsideration are not occasions to re-litigate arguments previously briefed and decided by the Court. Rather, they are supposed to address (i) issues that the Court may have overlooked, (ii) errors where the Court may have misapprehended facts or legal issues, or (iii) changed circumstances. The general standard is well-established:

> Under rules of appellate procedure in many states, a party may move for a rehearing in an appeal on the ground that the appellate court has failed to consider, overlooked or misapprehended an argument, questions involved in the case, and other material matters. Arguments presented in the appellate brief and not overlooked, but considered and rejected by the court in the original hearing, are not grounds for a rehearing.

CJS Appeal and Error, § 798 (2011) (footnotes omitted); cf. Park Land Corp. of Balto. v. City of Balto., 128 Md. 611, 620 (1916) (advising appellants to move for reargument if the Court overlooked an issue); 3 Md. Law Enc. Appeals § 179 (2011) (same). Here, where the Court credited the Public Defender's budget woes but found them insufficient cause to justify a stay and further violations of the PDA, see DeWolfe, 2012 WL 10853, at *18, slip op. at 38-39, the Public Defender cannot plausibly contend that the Court did not hear these arguments in the last round.

2. The Public Defender does not assert any change of circumstances warranting reconsideration or rehearing.

3. Much of the Motion contradicts itself. The Public Defender claims to have made "diligent and extensive efforts to comply with the Court's holdings," Mot. at 2, yet the described efforts consist of various meetings and discussions to prepare compliance plans that do not address the core budget gap that allegedly prevents him from complying with the law. Compare Mot. at 2-3 with id. at 3-6. Either the budget issue is not a true bar to compliance, or these meetings were not true preparations for compliance.

4. The Public Defender relies on the same bloated budget figures that he used to scare the General Assembly to roll back the right to counsel. He claims that he needs an additional $28.2 million per year to represent defendants at initial bail hearings (not counting infrastructure costs) and up to $6.7 million per year to pay for representation at bail reviews. (Mot. at 4, 5). As his FY 2012 budget is $85 million, id. at 2, this $34.9 million total amounts to a 41% annual increase. These numbers are wildly inflated.

a. In calculating the cost of providing representation at initial bail hearings, the Public Defender relies upon the total number of hours worked by commissioners on their various tasks: almost 500,000 total work-hours, DeWolfe Aff. ¶ 11, which, according to the Department of Legislative Services ("DLS"), actually totaled 493,067 work-hours in FY 2011. See DLS, Fiscal Note to SB 422 ("SB 422 Fiscal Note"). But commissioners have significant responsibilities other than determining bail: e.g., they issue warrants upon citizen complaints and determine the existence of probable cause for warrantless arrests. DLS acknowledges this fact. See id. at 9 ("these hours include hours spent on numerous other commissioner functions"). Despite the obvious fact that a commissioner work-hour spent doing multiple tasks does not equate to an attorney work-hour devoted exclusively to representing a defendant at a bail hearing, the Public Defender has made no effort to try to determine the amount of time that actually would be required and instead uses ludicrous numbers that exceed even the most dire worst-case scenario. His core assumption as to the workload is false.

b. The commissioners conducted 176,523 initial appearances in FY 2011. Therefore, the Public Defender's budget figures assume that ***an average of 2.8 hours would be spent representing each defendant at the initial appearance*** (176,523

initial appearance hearings divided by 493,067 hours). This number defies all reason. Bail hearings can be conducted in just a few minutes, and the representation itself probably would require a half hour or less. See SB 422 Fiscal Note at 10 (initial appearances last for 15 to 30 minutes). Bail review hearings, for instance, are short summary proceedings that typically last three minutes in duration from start to finish.[2] Thus, the Public Defender seeks compensation for huge chunks of non-bail time: ***at 2.8 hours/case, the lawyer would handle fewer than three cases a day***, a preposterously low workload. Moreover, most of the verification work could be done by paralegals, lowering the cost even further. Even if a half-hour of attorney-time were required, this would cut the cost-estimate by 80%, i.e., from $28 million to closer to $5.6 million per year. Nevertheless, the General Assembly is relying on these patently unrealistic estimates as justification to repeal the right to counsel found by the Court.

c. The Public Defender further inflates the numbers by providing cost-estimates for using panel attorneys at $50/hour. Panel attorneys take one case at a time, which explains the high reimbursement level. But the Public Defender proposes to use this rate for full-time work: at $50/hour working 40 hours/week at 50 weeks/year, the total compensation would come to $100,000 per panel attorney for work that entry-level lawyers could easily do (law students at the Access to Justice clinic of the University of Maryland School of Law have been handling bail hearings for years). A more reasonable compensation level would lower the cost by close to half (even if benefits are included).

d. The Public Defender's bail review cost estimates fare no better. To staff additional bail reviews across the state, he projects that 34 additional attorneys and additional support staff would be needed. (Mot. at 5, DeWolfe Aff. ¶ 15). If this were filled by direct hires, he calculates a cost from $3.6 to $6.3 million, and if it were met with panel attorneys, he projects a cost of $6.7 million. Assuming that 34 attorneys

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[2] E.705, Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardoza L. Rev. 1719, 1755 (2002). This study found that providing counsel at bail reviews did not prolong the hearings: with counsel, the hearings lasted on average, for two minutes and thirty-seven seconds, versus one minute, forty-seven seconds without counsel. Id.

would be needed, this translates from $106,000 to $185,000 per direct hire attorney and *$197,000 per panel attorney*. The Public Defender has indicated, and DLS assumes, that panel attorneys will be used initially, see DLS, Fiscal Note to SB 165, at 8.

e. The Public Defender has yet to explain how providing representation at initial bail hearings and bail reviews could possibly require a whopping 41% increase in his annual budget.

f. The General Assembly is contemplating action that could significantly reduce these costs even further. SB 422 would require police to issue citations for low-level misdemeanors punishable by three months of incarceration or less and would give them discretion to issue citations in lieu of detention for most other low-level crimes. This could reduce the volume of initial appearances quite substantially – the bill's lead sponsor, Senator Frosh, has estimated a large reduction in detention rates, which would cut the costs of compliance by a comparable amount in addition to eliminating the costs of incarceration.[3] (Statement of Sen. Frosh, Feb. 24, 2012, available at http://mlis.state.md.us/asp/listen.asp, Friday, Feb. 24, 2012 Session #1, at 1:14-17, 1:20; see also statement of Pres. Miller, id. at 1:36 (stating that this provision "takes half of the people out of the process altogether"). Senator Frosh even suggested that the savings might exceed the cost of providing counsel at bail reviews. Id. at 1:17-18 (stating that the cost possibly might be less than "what we have now"). These reforms would significantly reduce the costs of compliance with the Court's decision even further.

g. The budget estimates also do not account for the uncontroverted evidence of record that providing counsel saves money by reducing incarceration costs. DLS previously found that providing counsel would save the State money in Baltimore

[3] Reportedly, 44% of all detainees are released on their own recognizance at the initial appearance. (SB 422 Fiscal Note at 9). Opponents of the Court's decision have cited this statistic as evidence that providing counsel at the initial appearance is over-inclusive and wasteful. That argument is just as illogical as the contention by opponents of Gideon decades ago that providing counsel to guilty criminal defendants wastes scarce resources. In any event, SB 422 addresses that issue by mandating use of citations instead of detention for the lowest level crimes and allowing citations for many others.

City if it decreased the number of pretrial detainees by more than a mere *6%*.[4]

5. Members of the General Assembly and opponents of the right to counsel are relying on the Public Defender's inflated budget numbers to justify their legislative efforts to curtail the right to counsel found by the Court. Thus, the Public Defender's false alarms are succeeding in eliminating the very statutory right to counsel of his clients at bail hearings that he purports to support. Plaintiffs respectfully submit that the right to counsel is far too vital an interest to be decided based on ludicrous budget estimates that are wholly divorced from reality.

6. The Public Defender fails to explain why he needs a stay now given his ample notice and opportunity to make necessary preparations for the Court's decision. He acknowledged the existence of a right to counsel in the spring of 2010 and has officially supported representation at bail hearings ever since, yet he has taken no steps to honor that right since he was made a party to these proceedings nearly two years ago. He previously said that he would comply with any decision by the circuit court and opposed an injunction on grounds that it was unnecessary. See E.205 n.1 (stating that Plaintiffs' request for an injunction was "largely immaterial" and "essentially cumulative" as the Public Defender would have to provide representation once the right to counsel was declared by the Court); E.265 n.10 (same, stating that further proceedings to seek an injunction would be "essentially meaningless"). Having promised immediate compliance to avoid issuance of an injunction, the Public Defender should not be heard to complain now that he cannot comply unless the General Assembly provides immediate funding and further appropriates $34.9 million to be available on July 1.

7. Moreover, the Public Defender has failed to live up to prior promises to facilitate prompt implementation. As the Court will recall, in the summer of 2010, he repeatedly told the circuit court that he was forming an "intergovernmental workgroup" to study how to implement the right to counsel and insisted that this was the best way to develop a solution and warranted a 6-9 month stay for the workgroup to complete its

[4] DLS, Fiscal Note to HB 1092 (1998), at 3.

work. (E.191-92, 409, 257-58). The workgroup was established (albeit not as broad-based as promised, see E.257-58, 409, 852-61), a stay pending appeal was entered, and yet the workgroup's final report, *did not address bail* (E.320-26) and the Public Defender *never requested funding* (DCD Br. 21). As far as Plaintiffs are aware, the meetings that occurred after the Court issued its decision on January 4, 2012 constituted the Public Defender's *first* efforts to discuss implementation of the right of counsel. Their current request for stay is the latest step in a pattern of delay.

8. The Public Defender's stated reason for a stay is improbable on its face. In promising compliance by August 1, he assumes that his $34.9 million budget increase will be funded, even though legislative leadership has indicated that full funding will not be provided unless a constitutional right to counsel is found by the Court. He does not say what he will do if the funding is not provided; indeed, he does not explain what he would have done had the Court denied his Motion on February 16. In fact, contingency plans do exist and would have gone into effect had the stay not occurred, despite the lack of funding. In short, the Public Defender's assertion that he cannot comply now but will do so if he receives another six months respite is wrong. Compliance will or will not occur irrespective of whether a stay is granted. The real objective here is further delay to give the General Assembly time to undo much of the Court's decision.

9. The Public Defender's claim that, if a stay is denied, criminal defendants will have to choose between waiving counsel and waiving bail (Mot. at 8-9) merits particular comment. Given his prior promise that he will comply with the law once it is finally declared, rendering an injunction "essentially unnecessary," this abandonment of his clients' rights is especially disappointing. In any event, the choice is a false one. The choice falls on the State, which has to choose between providing counsel and granting liberty pending trial, not the defendant, whose constitutional rights to counsel *and* to bail cannot be pitted against each other. See Lavallee v. Justices in Hampden Super. Ct., 812 N.E.2d 895, 910-12 (Mass. 2004) (ordering release of defendants not provided counsel within seven days of arrest). This Court already ruled in its initial decision that the Public Defender's budget concerns do not balance against the irreparable harm inflicted

by perpetuating these violations of Plaintiffs' fundamental rights. It is unfortunate that the Public Defender does not place his clients' freedom in similar high regard.

10. Finally, the Public Defender's authorities do not support the request for a stay. In Massey v. Dept. of Corrections, 389 Md. 496, 525 (2005), the Court ordered a short stay of the mandate to give the Department of Corrections an opportunity to promulgate its administrative discipline standards as regulations under the APA to allow federal due process protections for inmates to remain in effect. The stay was "essential" to protect the inmates' due process rights. Id. at 529 (Bell, J., dissenting). In Conaway v. Deane, 401 Md. 219, 355-56 (2005) (Raker, J., dissenting), Judge Raker suggested in dissent that the Court should stay the mandate and direct the General Assembly to enact civil unions in light of the Court's affirmance of the statutory prohibition against same-sex marriage. She suggested a stay to give the General Assembly time to *provide* rights to same-sex couples that the Court had failed to require. Here, the Public Defender wants a stay knowing full well that the General Assembly is using the delay to strip rights away from Plaintiffs that the Court has declared. The situations are polar opposites.

## CONCLUSION

For the foregoing reasons, the Court should deny the Public Defender's Motion for Reconsideration and, in the Alternative, for Stay of Issuance of Mandate.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5th day of March 2012, a copy of the foregoing Response to the Motion of Paul DeWolfe for Reconsideration and, in the Alternative, for Stay of Issuance of Mandate was served by electronic mail and by first class mail, postage prepaid, on the following counsel for the Public Defender and the District Court Defendants, respectively:

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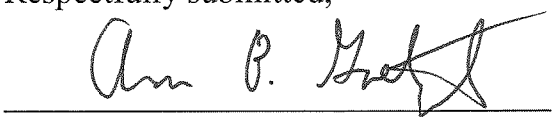
|---|---|---|
| PAUL B. DeWOLFE, JR., *et al.*, | * | IN THE |
| Appellants, | * | COURT OF APPEALS |
| v. | * | OF MARYLAND |
| QUINTON RICHMOND, *et al.*, | * | September Term, 2011 |
| Appellees. | * | No. 34 |

* * * * * * * * * * *

**APPELLANT PAUL B. DeWOLFE, JR.'S MOTION FOR LEAVE TO FILE REPLY TO APPELLEES' RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION AND, IN THE ALTERNATIVE, STAY OF ISSUANCE OF MANDATE**

Appellant Paul B. DeWolfe, Jr., in his official capacity as the Public Defender for the State of Maryland, respectfully requests leave to file the attached Reply to Appellees Quinton Richmond, *et al.* ("Plaintiffs")' Response to the Motion for Reconsideration and, in the alternative, Stay of Issuance of Mandate filed by the Public Defender. As grounds therefor, the Public Defender states that Plaintiffs' Response contains numerous unsupported assertions that mischaracterize certain facts that they consider relevant to adjudication of the Public Defender's Motion and thus requires a response to assist the Court and clarify the record.

Respectfully submitted,



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Dated: March 12, 2012

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|---|---|---|
| PAUL B. DeWOLFE, JR., *et al.*, | * | IN THE |
| Appellants, | * | COURT OF APPEALS |
| v. | * | OF MARYLAND |
| QUINTON RICHMOND, *et al.*, | * | September Term, 2011 |
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* * * * * * * * * * *

**APPELLANT PAUL B. DeWOLFE, JR.'S REPLY TO APPELLEES' RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION AND, IN THE ALTERNATIVE, STAY OF ISSUANCE OF MANDATE**

Appellees Quinton Richmond, *et al.* ("Plaintiffs")' Response to the Motion for Reconsideration and, in the alternative, Stay of Issuance of Mandate filed by Appellant Paul B. DeWolfe, Jr., in his official capacity as the Public Defender for the State of Maryland ("the Public Defender"), focuses on irrelevant issues, relies upon myriad unsupported assertions that have little or no basis in fact, mischaracterizes the record in several important respects, and requests that this Court now wade into (and resolve) fact issues that Plaintiffs had long maintained were properly committed to the other branches of State Government. For these reasons, which are explained in more detail below, as well as those previously set forth in the Public Defender's Motion, the Court should grant the Motion and either stay the effectiveness of the newly-declared right to counsel at initial bail hearings and bail review hearings or stay the issuance of the mandate until at least August 1, 2012. The Public Defender's Motion was premised on a very basic and incontrovertible fact: Given his Office's severe resource constraints, the Public Defender is currently unable to supply counsel at initial bail hearings and bail review hearings

statewide in compliance with the Court's mandate in this case. *See* Motion at 2, 3. Notably, Plaintiffs do not dispute that core fact anywhere in their Response; indeed, they have never disputed it in any of their many previous filings before either this Court or the circuit court and here they once again confirm its veracity. *See* Plaintiffs' Response at 2 ("In criticizing the Public Defender, we understand that his current budget is not sufficient.").

Instead, Plaintiffs devote much of their brief to commenting on recent developments in the General Assembly, making unsupported and inaccurate assertions about the Public Defender's efforts to obtain necessary funding and prepare his Office for compliance, and criticizing the Public Defender's cost estimates. None of this controverts (or is even relevant to) the central fact at issue in the Motion, *i.e.*, that the Public Defender does not currently have access to the additional funding, personnel, and/or infrastructure resources needed to implement the newly-declared right in any meaningful way. *See* Motion at 5-6. That is why the Public Defender has requested some amount of time so as to allow his Office a realistic opportunity to comply with the Court's mandate.[1]

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[1] To be clear, because of these demonstrated resource constraints, the Public Defender has never "promise[d] immediate compliance," Response at 7, with a newly-declared right to counsel at initial bail hearings and bail review hearings. Although Plaintiffs reach far back into the record in this case to attempt to characterize the Public Defender's position on this point, *see id.*, they need only have looked at his Reply Brief filed in this Court where he reiterated that were a right-to-counsel declaration to become operative, he "*would endeavor to comply with it* just as though an injunction had issued commanding him to do so." PD Reply Br. at 9 (emphasis added). That is precisely what he has done since the Court issued its decision, as he explained at length in the Motion.

Notwithstanding the irrelevance of many of Plaintiffs' unfounded assertions, several warrant particular comment so as to clarify certain misimpressions that Plaintiffs' Response may have created.

*First*, it is simply not true, as Plaintiffs claim, that the Public Defender "has not taken one meaningful step to comply with the law . . . ." Response at 1. As the Public Defender described at length in his sworn Affidavit annexed to his Motion, he (and others in his Office) have made diligent and extensive efforts to comply with the Court's holdings, beginning with a compliance meeting involving numerous stakeholders, including Plaintiffs' counsel, at which many (if not all) of the immediate obstacles to providing counsel at initial bail hearings were discussed at length so that they could be addressed and (if possible) solved. *E.g.*, DeWolfe Aff. ¶¶ 7, 8, Feb. 2, 2012. The most significant, of course, is the Office's resource shortfall.

As Plaintiffs are no doubt aware, the Public Defender cannot simply create additional funding for his Office; rather, funding for his Office's operations (like other State agencies) is appropriated through the annual budget process, which is defined by law and involves the Executive and Legislative branches. *Id.* ¶ 17. It is undisputed that neither the Office's FY 2012 appropriation nor its FY 2013 allowance included any authorized positions or funding necessary to provide counsel at initial bail hearings and

bail reviews statewide. *Id.* ¶ 16.[2] Accordingly, once the Court issued its decision on January 4, the Public Defender immediately set about to determine the cost of compliance using information obtained from involved stakeholders and shortly thereafter prepared supplemental budget requests, which he submitted to the Department of Budget and Management (as well as the Department of Legislative Services) in accordance with State law. *Id.* ¶ 18. Since then, Office representatives have participated in meetings with Executive and Legislative budget analysts to review the requests and determine necessary revisions (if any). DeWolfe Aff. ¶¶ 1, 2, Mar. 12, 2012. Office representatives have also testified at budget hearings before House and Senate Committees, as well as conducted additional briefings with legislators. *Id.* ¶¶ 1, 3, 4.

In short, the Office has been fully engaged in the budget process and has taken all necessary steps to date to attempt to secure funding for compliance with the Court's mandate.[3] That said, the Public Defender has no authority over the budget process and thus cannot control the timing of and extent to which his Office receives funding for the provision of counsel at bail hearings. Indeed, as a practical matter, the General Assembly

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[2] Plaintiffs' suggestion that the Public Defender "us[e] existing funds to pay for the representation and ask[] for a supplemental appropriation later in the year", Response at 2, is meritless. The Public Defender cannot take money that was specifically authorized under the FY 2012 Budget for another purpose and simply reallocate it toward providing counsel at initial bail hearings. Whatever small amount of discretionary funding the Public Defender does have, it is certainly not enough to cover the cost of providing counsel at initial bail hearings for any appreciable time period. DeWolfe Aff. ¶ 5 Mar. 12, 2012

[3] Indeed, Plaintiffs should be well-aware of the Public Defender's efforts in this regard, as their counsel have been present at many of the public budget hearings and meetings during which the Public Defender's funding requests have been discussed. *Id.* ¶¶ 4, 6.

is highly unlikely to appropriate any additional money for this purpose until it takes final action on pending legislation (*i.e.*, SB 422 and HB 261) that would amend what the Public Defender Act requires.

*Second*, far from being "phony" and "outrageously inflated," Response at 2, the compliance cost estimates prepared by the Public Defender, which are explained in detail in his Affidavit of Feb. 2, 2012 at ¶¶ 11-15, are based on the best objective information currently available. Plaintiffs take particular aim at the Public Defender's reliance on total annual Commissioner work-hours in calculating the cost of staffing initial bail hearings. But it is entirely reasonable to assume that attorneys will spend essentially the same amount of time (if not more) as the Commissioners on initial bail hearings because, in addition to participating in the hearings themselves, attorneys will have other tasks associated with the hearings, namely preparation and follow-up such as family outreach and employment verification, which must be taken into account. If nothing else, certainly Plaintiffs must agree that the Office would need fully to staff every Commissioner shift statewide. Moreover, although Plaintiffs argue that the 493,000 Commissioner work-hour figure relied upon by the Public Defender includes work-hours spent on "responsibilities other than determining bail," Response at 4, a representative of the Commissioners recently confirmed (at a meeting attended by Plaintiffs' counsel) that the 493,000-figure consists of *only* work-hours related to initial bail hearings. DeWolfe Aff. ¶ 6, Mar. 12, 2012. Indeed, and notably, the Commissioners, with whom Office attorneys must coordinate to ensure the provision of counsel at initial bail hearings, have not disputed any of the assumptions used in the Public Defender's cost estimates.

Separate and apart from the accuracy of the total work-hour figure, Plaintiffs also take issue with the Public Defender's estimates because the estimates assume that "an average of 2.8 hours would be spent representing each defendant at the initial appearance." Response at 4. Plaintiffs contend that "[b]ail hearings can be conducted in just a few minutes, and the representation itself probably would require a half hour or less." *Id.* at 5. Putting aside that Plaintiffs offer no credible support for their "half-hour of attorney-time" estimate, that estimate is nearly impossible to reconcile with Plaintiffs' previous representations to this Court regarding what *effective* assistance of counsel at initial bail hearings entails. *See* Pls. Br. at 35 (filed Sept. 16, 2011) (counsel will "begin an immediate thorough-going investigation and preparation to prepare an adequate defense" and have a "meaningful discussion with one's client of the realities of his case") (internal quotations omitted); *id.* at 10 (counsel will "help present relevant facts" and/or "verify [arrestees'] statements" regarding employment, housing, financial ability to post bond, criminal history, warrants and failures to appear, dependents, and family circumstances). Similarly, Plaintiffs' amici asserted that counsel, in connection with representation provided at initial bail hearings, will perform numerous tasks to advance their clients' cases, including, *inter alia*, reviewing the charges, conferring with the client, investigating the client's criminal record, interviewing the client's employer, friends and neighbors, investigating the client's employment status and history, investigating the client's community ties, investigating physical evidence, requesting psychological and medical tests, developing a record of the client's demeanor, locating

and interviewing witnesses, and personally investigating the crime scene. *See, e.g.*, Br. of SALT at 12-16; Br. of NACDL at 9-10; Br. of Pub. Just. Ctr. at 26; Br. of ABA at 7-8.

It is simply not possible to accomplish even the most basic of these tasks, not to mention also participate in a bail hearing, in the limited amount of time now proposed by Plaintiffs. Thus, Plaintiffs' unfounded cost-estimate of $5.6 million per year – a sum of money that the Public Defender does not have access to regardless – should not be credited. In any event, after objecting to the Public Defender's numerous requests for a court hearing on remedies that would have addressed, for example, cost projections – and having prevailed on that issue – Plaintiffs are in no position now, in response to a post-decision motion, to question the validity of the Public Defender's cost-estimates without the benefit of any factfinding on the resource challenges involved in providing effective assistance of counsel at bail hearings. Nevertheless, if the Court is to resolve any resource-related questions, the Public Defender renews his previous request for a remedies hearing.

But ultimately, the Court need not and should not decide whose cost estimates are correct because it is entirely irrelevant to the issues now before the Court. No one disputes that the Public Defender requires substantial additional resources, which he currently does not possess, to comply with the Court's mandate. Moreover, the Public Defender's cost estimates (including the bases for its estimates) currently are being reviewed by legislators as well as Executive and Legislative budget officers and analysts. Whether they are accurate, inflated, or understated will be determined by this independent review, and the resulting appropriation for the provision of counsel at bail

hearings will reflect the political branches' informed conclusions about necessary staffing and funding levels.

* * *

Finally, the Public Defender disagrees with Plaintiffs' request in its Response to the District Court Defendants' Motion for Reconsideration that the Court decide, without further briefing or proceedings, previously-raised constitutional issues in light of pending legislation that would amend the Public Defender Act so as not to require counsel at initial bail hearings.[4] While the Public Defender continues to support the right to counsel at initial bail hearings, it would be premature for this Court to rule on Plaintiffs' constitutional claims: whatever version of the pending legislation is enacted (if any) will almost certainly change the contours of the constitutional analysis in significant ways that were not contemplated when these issues were litigated before the circuit court several years ago or even when this case was argued in this Court last year.

At the time of this filing, for example, both SB 422 and HB 261 expressly extend the right to counsel to all bail review hearings statewide (including a substantial number of additional hearings in Baltimore City) and SB 422 mandates that arrestees receive a bail review hearing before a judge no later than 48 hours after the initial bail hearing. As a result, bail review hearings would be held on at least one weekend day in every

[4] Plaintiffs' request is in effect an out-of-time attempt to move for reconsideration of this Court's January 4 decision. Plaintiffs could have filed a motion for reconsideration within the 30-day period provided by Rule 8-605(a), but chose not to for whatever reason, even though it was clear even then that the General Assembly was going to consider the very same bills that Plaintiffs now argue require reconsideration and modification of the Court's decision. *See, e.g.,* Jan. 25, 2012 Letter from Hon. Joseph F. Vallario, Jr. to Hon. Robert M. Bell, Chief Judge, attached as Exhibit 1.

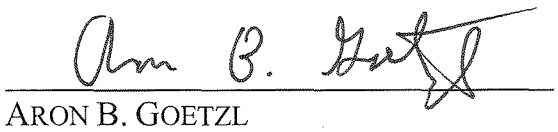
jurisdiction. In other words, under either bill as currently written, indigent arrestees will be guaranteed representation at a bail determination that generally would occur within 48 to 72 hours after arrest. As another example, both SB 422 and HB 261 currently prohibit the use of certain statements made by arrestees at initial bail hearings against them at subsequent criminal proceedings. This provision would almost certainly be germane to a court's analysis of whether the Constitution requires the provision of counsel at initial bail hearings. *See, e.g.*, Pls. Br. at 31-32 (citing *Estelle v. Smith*, 451 U.S. 454, 470-71 (1981)).

At the very least, these recent legislative developments would render the circuit court's prior analysis and resolution of the Plaintiffs' constitutional claims out-of-date and incomplete. Indeed, it is theoretically possible that the bill that is ultimately enacted (if any) might address most if not all of the concerns that are present in the right-to-counsel constitutional analysis. The state of play on these issues is therefore in flux and the Court should exercise judicial restraint and decline Plaintiffs' invitation to rule in the abstract on constitutional issues based on what are likely soon-to-be obsolete circumstances.

## CONCLUSION

For the foregoing reasons, the Court should grant the Motion and either reconsider its denial of the Public Defender's request for a stay of the judgment or stay the issuance of the mandate until at least August 1, 2012.

Respectfully submitted,



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Dated: March 12, 2012

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 12th day of March, 2012, a copy of the foregoing motion and reply was served by electronic mail and first class mail, postage prepaid, on:

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IN THE
COURT OF APPEALS OF MARYLAND

| | | |
|---|---|---|
| PAUL B. DeWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al., | * | |
| Appellants, | * | No. 34, September Term, 2011 |
| v. | * | |
| QUINTON RICHMOND, et al., | * | |
| Appellees. | * | |

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**PLAINTIFFS' RESPONSE TO PAUL B. DeWOLFE, JR.'S MOTION FOR LEAVE TO FILE REPLY OR, IN THE ALTERNATIVE, PLAINTIFFS' CONDITIONAL MOTION FOR LEAVE TO FILE SURREPLY**

Appellees Quinton Richmond, et al. ("Plaintiffs"), by their undersigned counsel, respectfully respond to the Motion by Appellant Paul B. DeWolfe, Jr. (the "Public Defender") for "Leave to File Reply to Appellees' Response to Appellants' Motion for Reconsideration or, in the Alternative, Stay of Issuance of Mandate" (the "Leave Motion") In the alternative, if the Court grants the Public Defender's motion, Plaintiffs seek leave to file a brief surreply (the proposed memo is attached). The Leave Motion should be denied for the following reasons:

1. The Public Defender's proposed reply fails to discuss the principal problem with his motion for reconsideration/stay (the "Reconsideration Motion"): the fact that the Reconsideration Motion merely repackages the same request for a stay due to lack of funding that the Court has already denied.

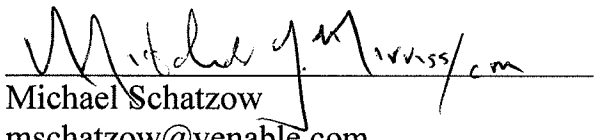
2. The proposed reply also fails to discuss the second foremost problem with the Reconsideration Motion: its premise is false. Instead of seeking time to secure the funding to *comply* with the Court's decision, the Public Defender instead seeks time to *negate* the decision through legislative repeal of the key portions of the Public Defender

Act, depriving Plaintiffs of almost all relief in this case. The proposed reply confirms this subversive intent.

3. The proposed reply introduces many new facts and issues, including yet another affidavit by the Public Defender discussing new facts, which is improper. For example, the Public Defender uses this as an excuse to address at length the Plaintiffs' response to the *District Court Defendants'* motion for reconsideration and makes an entirely new argument based on new impending legislative developments. See proposed reply at 8-9. If this improper briefing is allowed, Plaintiffs should be permitted to respond with a surreply.

WHEREFORE, the Court should deny the Public Defender's Leave Motion, or, in the alternative, should the Court grant the Leave Motion, it should grant Plaintiffs leave to file the accompanying proposed surreply memorandum.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 15th day of March 2012, a copy of the foregoing Response to the Motion of Paul B. DeWolfe, Jr. for Leave to File Reply or, in the Alternative, Plaintiffs' Conditional Motion for Leave to File Surreply, was served by electronic mail and by first class mail, postage prepaid, on the following counsel for the Public Defender and the District Court Defendants, respectively:

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IN THE
COURT OF APPEALS OF MARYLAND

| | | |
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| PAUL B. DeWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al., | * | |
| Appellants, | * | No. 34, September Term, 2011 |
| v. | * | |
| QUINTON RICHMOND, et al., | * | |
| Appellees. | * | |

* * * * * * * * * * * *

**PLAINTIFFS' SURREPLY TO PAUL B. DeWOLFE, JR.'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, STAY OF ISSUANCE OF THE MANDATE**

Appellees Quinton Richmond, et al. ("Plaintiffs"), by their undersigned counsel, respectfully submit the following Surreply to Appellants' Motion for Reconsideration or, in the Alternative, Stay of Issuance of Mandate filed by Appellant Paul B. DeWolfe, Jr. (the "Public Defender"). Plaintiffs offer the following response.

First, the proposed reply disingenuously continues to proclaim the false objective of seeking time to *comply* with the Court's decision. See proposed reply at 2 ("the Public Defender has requested some amount of time so as to allow his Office a realistic opportunity to comply with the Court's mandate"). The Public Defender never disputes the key fact that he *supports* the legislative efforts to *repeal* his clients' statutory right to counsel at initial bail hearings. Thus, beneath the shrill invective, the Public Defender in fact seeks this stay in order to deprive Plaintiffs of almost all relief received under the Court's decision and to allow him to avoid nearly all cost of compliance for Plaintiffs .

Second, the proposed reply complains that the facts and argument in Plaintiffs' response regarding the Public Defender's budget estimates and legislative activities are unfounded and "irrelevant." Id. This is ludicrous: the *Public Defender* raised these cost

estimates in his initial Reconsideration Motion and attached a lengthy affidavit in support. Plaintiffs have every right to rebut these alleged facts with argument and facts showing that they are grossly inflated and wholly unbelievable, just as Plaintiffs are entitled to cite to show that, contrary to the Public Defender's claim that a stay is needed to comply with the Court's decision, the stay actually is sought in order to negate the Court's decision and to repeal the very right the Public Defender professes to support.

Third, the Public Defender's defense of his budget numbers (which rest on an estimate of 2.8 hours per initial appearance case) makes no sense. On the one hand, he claims that he needs 2.8 hours per case to conduct "numerous" "other tasks" outside of the initial bail hearing before the commissioner. See proposed reply at 5-7. Yet at the same time, he also insists that the initial bail hearing lasts for the full 2.8 hours and cites hearsay statements attributed to David Weissert, administrator of the commissioner office and a District Court Defendant. Id. at 5. The truth is that neither alternative is possible.

a. If initial bail hearings last 2.8 hours, commissioners can handle an average of *only two such hearings a day*, an utter impossibility.

b. ***The DLS Fiscal Note for the impending legislation reports that full initial appearances (not just the initial bail hearing) last for less than a half-hour.*** See SB 422 Fiscal Note at 15-16 ("Initial appearances currently take between 15 to 30 minutes to complete."). Presumably this conclusion is based on information supplied by the Public Defender or Mr. Weissert.[1] Thus, Plaintiffs' assessment that the likely cost would be 20% or less than what the Public Defender reports is based *directly* on the facts

[1] The Public Defender's assertion that Mr. Weissert stated recently that the 493,000-hour figure of commissioner time reflects initial-appearance time only, see proposed reply at 5, ignores prior statements by both the Public Defender and Mr. Weissert (as reported by the DLS Fiscal Notes) that the time reflected total commissioner time. See, e.g., HB 112 Fiscal Note at 9 ("District Court commissioners worked 493,067 hours during fiscal 2011. Though these hours include hours spent on numerous other commissioner functions, it is assumed that to comply with the order, OPD would have to provide staff to accommodate all commissioner hours worked.")

reported in the DLS Fiscal Note, not, as the Public Defender asserts, "unsupported" claims by Plaintiffs.

c. The Public Defender ignores the fact that the additional tasks that he asserts which occur outside of the hearing (and, perhaps, are included in his 2.8-hour estimate), are tasks that the Public Defender *already* conducts in the case, either when the representation commences or subsequently. See proposed reply at 6-7 (mentioning "reviewing the charges," "investigating the client's criminal record," "investigating physical evidence," requesting psychological and medical tests," "locating and interviewing witnesses," "investigating the crime scene," etc.). The only issue is *when* those activities commence; their cost will remain the same. For that reason, the Public Defender's request for a *41% budget increase* just to represent criminal defendants at initial bail hearings and additional bail reviews is ludicrous on its face.

d. The best evidence of how much time would be required already exists, and the Public Defender fails to provide it. Providing initial representation at a bail review is functionally the same task as providing initial representation at an initial bail hearing before a commissioner. Thus, the time spent by assistant public defenders at existing bail reviews is the best measure of the actual time that would be incurred. Even though the Public Defender surely has this information available or could readily obtain it, he does not provide it. The reason is clear enough. Indeed, in Baltimore City, 6.4 attorneys are assigned to bail reviews, see SB 165 Fiscal Note at 12, which, at 25,000 bail review hearings amounts to nearly 4,000 bail reviews per year per lawyer.[2] By contrast, the Public Defender seeks over 250 lawyers to staff the 176,000 initial appearances, which translates to only approximately 700 hearings per year per lawyer. Again, the evidence is conclusive that the Public Defender's budget estimates are wildly inflated.

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[2] The Public Defender reports that 85,000 bail reviews are conducted each year statewide. See Mot. for Recon. at 5. As Baltimore City accounts for approximately 30% of all initial-appearance cases (32% in FY 2010 and 30% in FY 2011), see SB 422 Fiscal Note at 15 (Ex. 2), it is likely that approximately 25,000 bail reviews occur in Baltimore City per year. Even if the number were closer to 20,000, the same analysis would apply.

Lest there be any doubt, one need merely attend a Baltimore City bail review hearing in district court and see the handful of minutes spent per case to realize that the Public Defender's numbers are nonsensical.

Fourth, the Public Defender misrepresents Plaintiffs' position regarding his efforts to secure funding. Plaintiffs' concern is that, contrary to his promise to the circuit below, the Public Defender did not take any step to implement the right counsel, until *after* the Court's decision of January 4, 2012. See Pls. Resp. at 8 ("As far as Plaintiffs are aware, the meetings that occurred after the Court issued its decision on January 4, 2012 constituted the Public Defender's *first* efforts to discuss implementation of the right of counsel. Their current request for stay is the latest step in a pattern of delay."). The Public Defender's recitation of his post-January 4, 2012 efforts, see proposed reply at 3-4, merely confirms the record of delay, as these should have commenced long ago. [3] In any event, in light of the Public Defender's budget estimates, these meetings have largely focused on why compliance with the Court's decision should *not* occur, as opposed to meetings to try to implement the Court's decision.

Fifth, the Public Defender misconstrues the point here. It is not whether compliance is reasonable and affordable. Rather, these facts go both to the Public Defender's motives and candor in seeking a stay of the Mandate as well as the necessity (or lack thereof) for such extraordinary relief. Having asked the Court to provide extraordinary equitable relief, and having submitted the very budget information that he now says is "irrelevant" to the Court's decision, the Public Defender protesteth too much in finding his numbers exposed as inflated and false.

Finally, the Public Defender's lengthy comment on Plaintiffs' response to the District Court Defendants' motion for reconsideration (proposed reply at 8-9) is improper and should be stricken or disregarded. As for its substance, it is (a) wrong (the

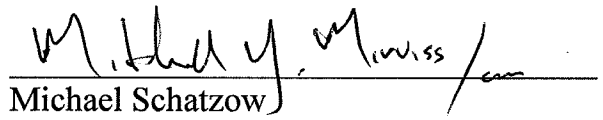
[3] The Public Defender's assertion that he never "'promise[d] immediate compliance'" (proposed reply at 2 n.1) fails to provide any other explanation as to why he opposed an injunction below on grounds that an injunction was "largely immaterial," "essentially cumulative" and "essentially meaningless." (E.205 n.1, E.265 n.10).

requirement for weekend bail review hearings has been stripped from SB 422, meaning that the period of detention without counsel would resume to the status quo, which can stretch to five days (124 hours) on three-day weekends (and longer over Thanksgiving), not the 48-72 hours cited by the Public Defender), (b) disappointing (the Public Defender calls for a wholly unnecessary remand to the circuit court to consider the constitutional issues anew rather than allow the Court to decide the issues once and for all), and (c) self-contradictory (the Public Defender again claims to support the constitutional right but proceeds to cite provisions in the impending legislation that "might address most (if not all) of the concerns in the right-to-counsel constitutional analysis"). But it does confirm one key fact: the Public Defender's foremost goal remains the same, namely to delay the declaration of a right to counsel for as long as possible.

## CONCLUSION

For the foregoing reasons, the Court should deny the Public Defender's Motion for Reconsideration and, in the Alternative, for Stay of Issuance of Mandate.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 15th day of March 2012, a copy of the foregoing proposed Surreply to the Motion of Paul DeWolfe for Reconsideration and, in the Alternative, for Stay of Issuance of Mandate was served by electronic mail and by first class mail, postage prepaid, on the following counsel for the Public Defender and the District Court Defendants, respectively:

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**IN THE COURT OF APPEALS OF MARYLAND**

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|---|---|---|
| PAUL B. DEWOLFE, *et al.,* | * | |
| *Appellants,* | * | September Term, 2011 |
| v. | * | No. 34 |
| QUINTON RICHMOND, *et al.,* | * | |
| *Appellees.* | * | |

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**RESPONSE TO ANSWER TO MOTION FOR RECONSIDERATION**

Appellants Ben C. Clyburn, John Hargrove, David W. Weissert, Linda Lewis, and the Commissioners of the District Court of Maryland for Baltimore City (the "District Court Defendants"), with the Court's permission, submit this response to the plaintiffs' answer to the District Court Defendants' pending motion for reconsideration and the plaintiffs' request for reconsideration of the Court's January 4, 2012 decision in this case.

## I. THE PLAINTIFFS MISAPPREHEND THE EFFECT OF THE JUDGMENT THAT RESULTS FROM THIS COURT'S DISPOSITION OF THE APPEAL.

In making their motion, the District Court Defendants sought, in the interest of clarity, a technical modification of the Court's decision that would not disturb its holding, by asking that the Court direct entry of (or itself enter) a declaratory judgment that embodies that holding. The plaintiffs object to this "outrageous" request. Plaintiffs' Response at 1. While promising not to "mince words" and claiming that the "audacity of this request cannot be overstated," the plaintiffs mix their metaphors and overstate their case: plaintiffs accuse the District Court Defendants of speaking in "code," of concealing their "subversive objective"

behind a "euphemistic fig leaf for the ages," and of joining with legislators in a "one-two punch intended to strip" the plaintiffs of the "benefit of . . .the "judgment below." *Id.* at 1, 2, 6.

In fact, what the plaintiffs perceive as a pugilistic enterprise is merely the ordinary operation of the judicial and legislative processes. This Court, properly acting in its judicial role, determined the original "legislative purpose" of the Public Defender Act from the statute's "plain and unambiguous" language, slip op. 28; the General Assembly, properly acting within its legislative authority, has considered bills that, if enacted, would clarify the *present* legislative purpose of the Act. In the meantime, the Court's Standing Committee on Rules of Practice and Procedure ("Rules Committee") determined that amendments to the rules "are necessary to provide a procedural structure for implementing" the Court's decision, and also suggested that "amendments to the Public Defender law may be required." Letter from Hon. Alan Wilner (Feb. 3, 2012) (transmitting the Rules Committee's 173rd Report, recommending, on an emergency basis, the adoption of new Rule 4-216.1 and the amendment of certain other Title 4 rules), at 1, 3. There is nothing untoward about this conjunction of the judicial and legislative processes. Indeed, both the Public Defender Act and the 1977 revisions to the rules that replaced the arraignment with the initial appearance were undertaken as legislative responses to judicial determinations about the right to counsel at certain points in the criminal process, *see generally* District Court Defendants' Reply Brief, at 3-10, though both the Rules Committee and the General Assembly have acted with more haste and less opportunity for deliberation this time around.

There is likewise nothing untoward in seeking to conform the disposition of this appeal to the reasoning in the Court's decision. The plaintiffs do not claim that the declaratory judgment entered by the circuit court (E. 334-36), with its constitutional pronouncements, presently conforms to this Court's decision, and they do not disagree that this Court's mandate—with or without the modification requested by the District Court Defendants—would necessarily be read in light of the Court's opinion. To the contrary, the plaintiffs acknowledge that "no one would reasonably construe this [Court's] disposition as affirming the circuit court's declaration of constitutional rights." Response at 5. Yet the plaintiffs resist the entry of a declaratory judgment that accurately reflects the appellate mandate. The apparent reason is that they believe the circuit court's constitutional rulings can be enforced by virtue of their inclusion in the circuit court's declaratory judgment, even though they have not been affirmed on appeal. This belief reflects a fundamental misapprehension about the operation of the mandate rule, the doctrine of law of the case, and the preclusive scope of a judgment that has been appealed.

"[T]here is only one judgment in a case—the ultimate judgment, which is that of the appellate court." *Speyer, Inc. v. Goodyear Tire & Rubber Co.,* 295 A.2d 143, 146 (Pa. Super. Ct. 1972). Thus, the mandate rule ensures that the appellate court's grounds of decision, not the trial court's, will define both the law of the case and the preclusive scope of the judgment. The final judgment in this case will be "controlled by the actual appellate disposition." 18A Wright, Miller & Cooper, Federal Practice & Procedure § 4432, at 63 (2d ed. 2002). And, when "an appellate court terminates the case by final rulings as to some

matters only, preclusion is limited to the matters actually resolved by the appellate court." *Id*.; *accord* Moore's Federal Practice – Civil § 131.30. Accordingly, the scope of the judgment that the plaintiffs will be entitled to enforce on remand or in future proceedings is defined by this Court's mandate, not by any terms of the circuit court declaratory judgment that this Court has not endorsed, and the mandate will be "read in light of the opinion." *Couser v. State,* 256 Md. 393, 399 (1970); *see also Harrison v. Harrison,* 109 Md. App. 652, 659-76 (1996).

The Restatement explains how different appellate dispositions affect the judgment: First, [i]f a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court (or by the court of first instance in pursuance of the mandate of the appellate court), this latter judgment is conclusive between the parties." Restatement (Second) of Judgments § 27 cmt. o. Second, "[i]f the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient and accordingly affirms the judgment, the judgment is conclusive as to both determinations." *Id*. Third, '[i]f the appellate court upholds one of these determinations as sufficient but not the other, and accordingly affirms the judgment, the judgment is conclusive as to the first determination." *Id.* Finally, if, as here, "the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination" only. *Id.*

Here, the circuit court rested its decision on both statutory grounds and constitutional grounds, "either of which standing independently would be sufficient," *id.*; this Court has upheld the decision on statutory grounds and declined to address the constitutional grounds; the result, once the mandate issues, is that the parties will be bound to comply with the statutory ruling, but there will be no conclusive ruling on the constitutional issues that governs their relationship. *See, e.g., Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 327-28 (4th Cir. 2005) (holding that preclusive scope of judgment did not extend to constitutional rulings made by trial court because appellate court had affirmed trial court's decision without reaching the constitutional issues). The plaintiffs thus misstate the law when they complain that they will "lose the benefit of a judgment," Response at 7, if the District Court Defendants' request is granted (and if the General Assembly enacts legislation narrowing the scope of the statutory right declared by the Court[1]). Under a correct understanding of the law of judgments, the modification sought by the District Court Defendants would merely clarify, not alter, the effect of the judgment that will result when the mandate issues. If, on the other hand, the plaintiffs' mistaken understanding of the

[1] In decrying the effect of the legislation under consideration in the General Assembly, the plaintiffs complain that they would receive little benefit from compromise measures that would require representation by the Public Defender at Rule 4-216(f) bail review, but not at an initial appearance before a commissioner. It is true that the Public Defender presently provides representation at bail review in Baltimore City, but he has done so because the General Assembly has made appropriations for that purpose, not because the General Assembly has expressly mandated the services. In fact, the General Assembly, in five consecutive legislative sessions, consistently rebuffed efforts by plaintiffs' counsel and other advocates who urged passage of bills that would have amended the Public Defender Act to expressly require statewide provision of counsel at bail review, but not at the initial appearance. *See* District Court Defendants' Brief at 40.

preclusive effect of the circuit court's judgment prevailed, the effect would be to "deprive [the District Court Defendants] of a statutory right of appeal." *Speyer*, 295 A.2d at 146; *accord Hannahville Indian Community v. United States*, 180 Ct. Cl. 477, 485 (1967).

As this Court recognized when it remanded this case after the first appeal because of the plaintiffs' failure to join the Public Defender as a necessary party, *Richmond v. District Court of Maryland*, 412 Md. 672 (2010), the District Court Defendants do not provide counsel to the indigent. Rather, they are judicial officers. They conduct proceedings, and they do so in accordance with their understanding of the rules adopted by this Court, the pertinent statutes enacted by the General Assembly, the State and federal constitutions, and the case law developed by this Court and the Court of Special Appeals.[2] The District Court Defendants' role in this litigation, then, has been to defend their conduct of initial appearances under Rule 4-213(a) and to defend their understanding of what the law requires of them. Their *interest* in this litigation has been to present their arguments in a way that will aid the Court in its analysis and to ensure that what the law requires of them is *clear*.

The District Court Defendants will faithfully adhere to the Court's mandate, any rules that the Court adopts to implement the mandate, and the requirements of the Public Defender Act. The District Court Defendants are not subversively conspiring with political actors. Rather, they have sought reconsideration in the interest of clarity, and the plaintiffs' response has demonstrated the benefit that clarification would provide. The plaintiffs predict that the

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[2] In applying the case law developed by the appellate courts, the District Court Defendants do not feel free to disregard a holding of this Court as "non-precedential" by labeling it "*sua sponte*." Plaintiffs' Response at 2; *cf.* District Court Defendants' Opening Brief at 21 n.9.

General Assembly will enact legislation that alters the effect of the Court's mandate, and they threaten to seek enforcement of the circuit court order's constitutional rulings, without regard to the narrower scope of the appellate mandate and without regard to any legislative changes the General Assembly might make to the Public Defender Act. In these circumstances, the modification that the District Court Defendants have requested would promote clarity and the efficient administration of justice. The Court should amend its opinion to clarify that the circuit court's declaratory judgment is affirmed in part, and the Court should either remand the case for entry of a declaratory judgment consistent with the Court's opinion or enter the judgment directly, under Rule 8-604(e).

## II. ANY FURTHER ADJUDICATION OF THE PLAINTIFFS' CONSTITUTIONAL CLAIMS SHOULD BE CONDUCTED ON A DEVELOPED FACTUAL RECORD AND SHOULD NOT BE DECIDED BY THIS COURT WITHOUT SUPPLEMENTAL BRIEFING AND ARGUMENT.

In its January 4 opinion in this case, this Court appropriately adhered to the "'established principle that a court will not decide a constitutional issue when a case can properly be disposed of on a non-constitutional ground.'" *Id.* at 16 (quoting *Baltimore Sun Co. v. Mayor of Baltimore,* 359 Md. 653, 659 (2000)). When the Court issued its decision, and when the mandate would ordinarily have issued 30 days later, the case could in fact properly be disposed of on statutory, rather than constitutional, grounds. That remains true as of the date of this submission, even though issuance of the mandate now has been delayed by two months. But the plaintiffs predict that the General Assembly will pass, and the Governor will approve, legislation that would have the effect of overturning this Court's decision. Consequently, even though they have vociferously criticized the Public Defender

for seeking a stay of the mandate, the plaintiffs encourage the Court to withhold the mandate in anticipation of this legislation and to address their constitutional claims without further briefing or argument. In essence, the plaintiffs anticipate a new claim—that the Public Defender Act, if amended to clarify that the Public Defender is not obligated to provide representation at an initial appearance before a District Court commissioner, is unconstitutional—and the plaintiffs seek appellate resolution of that anticipated claim by this Court in the first instance.

The District Court Defendants submit that an adjudication of those claims would benefit from the development of a fuller factual record based on actual experience under the revised statute if it ultimately is amended, and the plaintiffs' motion for reconsideration should therefore be denied. If, however, the Court determines that the existing record supplies an adequate basis for resolving the plaintiffs' constitutional claims, the District Court Defendants suggest that the Court would benefit from supplemental briefing, and ask that the Court exercise its authority under Rule 8-605(e) to "restore the appeal to the calendar for argument" in the September 2012 Term.

The plaintiffs assert that their constitutional claims have been "fully litigated" in the circuit court. In two very important respects, those claims have not been fully litigated. First, the circuit court decided the entire case as a matter of law without the benefit of a factual record, both in 2007, when the court granted the defendants' motion for summary judgment on all claims, and in 2010, when the court performed an about-face and granted summary judgment to the plaintiffs on all claims. In both rounds of the circuit court

proceedings, the plaintiffs consistently maintained that their Sixth Amendment and Article 21 claims could not properly be resolved until the plaintiffs had an opportunity to substantiate their allegations through discovery. (E. 550-51 (Rule 2-501(d) affidavit of plaintiffs' counsel attesting to need for discovery).) The Public Defender, upon his entry in the lawsuit, agreed that the plaintiffs' Sixth Amendment and Article 21 claims were not "ripe for summary judgment" and that discovery was required. (E. 172-73.) Both the plaintiffs and the Public Defender changed their tune only after the circuit court informed the parties that they were to assume that the court would rule in the plaintiffs' favor on the constitutional claims. (E. 434.)

To be clear, the District Court Defendants do not believe that the factual issues pointed to by the plaintiffs are material to the constitutional analysis required to adjudicate the plaintiffs' claims. The right to counsel afforded by the Sixth Amendment and Article 21 requires that counsel be provided for "critical stages" of the prosecution—that is, at an "adversarial proceeding between an individual and agents of the state" or a "trial-like confrontation," *Rothgery v. Gillespie County*, 554 U.S. 191, 212 n.16 (2008), where "the results might well settle the accused's fate and reduce the trial itself to a mere formality," *United States v. Wade*, 388 U.S. 218, 224 (1967). And the constitutional guarantee of due process does not create a broader right to the assistance of counsel in criminal proceedings than the Sixth Amendment. An event in the criminal process is not transformed into a critical stage by the possibility that the accused might utter incriminating statements, or because prosecutors have participated in assembling the materials reviewed by a judicial officer, or

because the terms of any pre-trial release conditions may be set (provisionally or otherwise), or because counsel could get an earlier start on trial preparation. Yet these are the factual matters that the plaintiffs have identified as areas of inquiry relevant to their constitutional claims. *See* Brief of Appellees at 31-35. And, as the Public Defender has pointed out, the bills under consideration by the General Assembly contain provisions that bear on these factual matters, which, in his view, could "change the contours of the constitutional analysis in significant ways. . . ." Public Defender's Reply in Support of Motion for Reconsideration at 8.

The other significant respect in which the plaintiffs' claims have not been fully litigated concerns their request for injunctive relief. Though the plaintiffs were content to save their claims for injunctive relief for another day, that day will almost certainly come, as this Court predicted. *See* slip op. 36 ("[I]t is more than mere conjecture that the Plaintiffs will seek future injunctive relief. . . ."). And, if the disputes aired between the plaintiffs and the Public Defender in their responses, replies, and surreplies in connection with the Public Defender's motion are any indication, the facts that a court would consider in fashioning injunctive relief will be intensely disputed. The District Court Defendants do not regard most of the facts that are so hotly contested in those filings as material to the resolution of the plaintiffs' claims for *declaratory* relief (even if some may be relevant to the Public Defender's request for a stay), but any effort to fashion *injunctive* relief would require consideration of facts relating to implementation of the Court's mandate and any amendments made to the Public Defender Act. The factual disagreements between the

plaintiffs and the Public Defender that have arisen since the Court issued its opinion demonstrate the difficulty of resolving factual disputes in an appellate court. Resolution of those issues on a concrete factual record that has been developed based on experience under the procedures that result from the Court's mandate and any legislative changes is best performed by a trial court. This would serve the interest in judicial efficiency in two respects: any challenge to the terms of an injunction could be considered at the same time as any challenge to the terms of a declaratory judgment on the plaintiffs' constitutional claims, and the Court's consideration of both would be aided by a factual record.[3]

If the Court determines that its consideration of the plaintiffs' constitutional claims will not be impeded by the absence of a developed factual record based on experience under the hypothesized enactment of legislation that narrows the statutory right declared by the Court, the District Court Defendants submit that the Court would benefit from supplemental briefing addressed to the likely effects of that legislation and any rules promulgated to implement the legislation. And, in light of the fact that oral argument in both appeals in this case has focused primarily on the plaintiffs' statutory claims (and the propriety of withholding declaratory relief based on the Public Defender's resource constraints), the

[3] In recognition of the absence of adjudicated record facts in this case, the Court's opinion appropriately describes facts concerning conduct of the initial appearance by reference to the plaintiffs' assertions. *See, e.g.,* slip op. 4 ("The Plaintiffs report that. . . ."), 5 ("The Plaintiffs further report that. . . ."), 6 ("The Plaintiffs also inform us that. . . ."), 25 ("We are informed by the Plaintiffs that. . . ."). In important respects, the District Court Defendants dispute the plaintiffs' assertions, including, for instance, their claims that commissioners regularly engage in *ex parte* communications with prosecutors, that commissioners continue to defer to "pre-set" bail determinations, and that commissioners routinely abandon their judicial role to report incriminating statements to police or prosecutors.

District Court Defendants submit that the Court would benefit from oral argument addressed to the constitutional claims and the changed circumstances that would make adjudication of those claims necessary.

## CONCLUSION

If the Court decides the case on the grounds set forth in its January 4, 2012 opinion, the Court should modify the decision by specifying that the circuit court's declaratory judgment is affirmed in part, and, in the interest of clarity, the Court should either direct the entry of a declaratory judgment that embodies the holding set forth in the opinion or it should enter the judgment directly, under Rule 8-604(e). The Court should deny the plaintiffs' motion for reconsideration that seeks adjudication of their constitutional claims, as applied to procedures that would be implemented in response to the anticipated passage of legislation amending the Public Defender Act. If the Court decides to adjudicate those claims in the first instance, rather than on appeal from a circuit court judgment applying the law to the hypothesized changed circumstances, the Court should restore the appeal to the argument calendar for the September 2012 Term and direct the parties to submit supplemental briefing.

Respectfully submitted,

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Dated: April 3, 2012

## CERTIFICATE OF SERVICE

I certify that, on April 3, 2012, a copy of the foregoing response to the appellees' answer to the pending motion for reconsideration was served by first-class mail on:

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**IN THE COURT OF APPEALS OF MARYLAND**

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|---|---|---|
| PAUL B. DEWOLFE, *et al.,* | * | |
| *Appellants,* | * | September Term, 2011 |
| v. | * | No. 34 |
| QUINTON RICHMOND, *et al.,* | * | |
| *Appellees.* | * | |

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**STATE OF MARYLAND'S CONDITIONAL MOTION TO INTERVENE**

The State of Maryland, through the Attorney General of Maryland and under the authority of § 3-405(c) of the Courts and Judicial Proceedings Article, conditionally moves to intervene in this appeal in order to (1) defend the constitutionality of § 16-204 of the Criminal Procedure Article and (2) protect any other interests of the State that would be affected by a limitation on the authority of the General Assembly to determine the scope of representation to be afforded indigent criminal defendants in an initial appearance under Rule 4-213(a) and related proceedings. The State seeks to intervene in these appellate proceedings only if the Court grants the plaintiffs' request, made in their March 5, 2012 answer to the pending motion for reconsideration made by Appellants Ben C. Clyburn, John Hargrove, David W. Weissert, Linda Lewis, and the Commissioners of the District Court of Maryland for Baltimore City (the "District Court Defendants"), that the Court reconsider its January 4, 2012 decision in this case, by addressing the plaintiffs' constitutional claims.

1. The plaintiffs' Third Amended Class-Action Complaint for Declaratory and Injunctive Relief alleged that the District Court Defendants and Appellant Paul B. DeWolfe, the State Public Defender, were violating the plaintiffs' rights to counsel under the Public Defender Act and the federal and State constitutions. The plaintiffs did not, however, directly challenge the constitutionality of § 16-204 of the Criminal Procedure Article or any other statute.

2. After this Court issued its January 4, 2012 opinion finding a right to counsel under the Public Defender Act and while the Court's mandate has been stayed, the General Assembly passed Senate Bill 422 and House Bill 261. The House bill was passed by both houses unanimously as emergency legislation under Article XVI, § 2, and would thus become effective (with exceptions not pertinent here) immediately upon approval of the legislation by the Governor. Both bills would amend § 16-204(b)(2) of the Criminal Procedure Article to clarify that the statutory right to counsel does not extend to an initial appearance before a commissioner of the District Court of Maryland; both bills would also expressly mandate representation by the Public Defender of arrestees at bail review hearings under Rule 4-216(f), but would postpone that requirement until June 1, 2012.

3. If either bill becomes law, the right to appointed counsel under the Public Defender Act will not extend to the initial appearance before a commissioner. The plaintiffs have suggested that, in these circumstances, this Court should defer issuance of the mandate and should decide the plaintiffs' constitutional claims. The plaintiffs have not expressly sought a declaration that the Public Defender Act, if amended, is unconstitutional, but their

unresolved constitutional claims, if successful, would necessarily place the constitutionality of the amended statute at issue in these proceedings. In addition, as the General Assembly has found, any expansion of the right to counsel beyond that authorized by statute would present serious fiscal and practical implications for the administration of criminal justice in the State. *See* Preamble, Senate Bill 422 (finding that "[i]mplementation of the changes called for by the DeWolfe decision will be extremely costly at a time when the State is already struggling with revenue shortfalls"); Preamble, House Bill 261 (same).

4. Under § 3-405 of the Courts and Judicial Proceedings Article, if a statute is alleged to be unconstitutional, the Attorney General is entitled to "be heard, submit his views in writing within a time deemed reasonable by the court, or seek intervention pursuant to the Maryland Rules." Md. Code Ann., Cts. & Jud. Proc. § 3-405(c); *see also* Rule 2-214(b).

5. The District Court Defendants, although represented by the Attorney General in this case, do not have the same interest as the State itself in protecting all of the fiscal and policy interests of the State that might be affected by an expansion of the right to counsel in criminal proceedings. The Public Defender likewise does not have an interest in protecting the interests of the State as a whole. Accordingly the State is entitled to intervene in order to protect these interests. *See* Rule 2-214(a) (providing right of intervention when "the disposition of the action may as a practical matter impair or impede the ability to protect [an] interest unless it is adequately represented by existing parties").

6. The State agrees with the position stated by the District Court Defendants in their April 3, 2012 response to the plaintiffs' answer to the District Court Defendants' motion

for reconsideration—namely, that the circuit court is the proper forum for the plaintiffs to present, in the first instance, their constitutional challenge to any amended version of the Public Defender Act. If the Court agrees and issues the mandate (with or without the accompanying stay that the Public Defender has sought), the Attorney General would have an opportunity to intervene on behalf of the State in any future proceedings in the lower courts. If, however, the Court withholds the mandate and grants the plaintiffs' request for reconsideration, the State requests that it be permitted to intervene in this appeal so that it may defend the validity of duly-enacted legislation and the interests of the State as a whole in this appeal and in any future proceedings in this case, on remand or further appeal.

A proposed order is attached.

Respectfully submitted,

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Dated: April 13, 2012

**CERTIFICATE OF SERVICE**

I certify that, on April 13, 2012, a copy of the foregoing conditional motion of the State of Maryland to intervene in these appellate proceedings was sent by e-mail to, and served by first-class mail on:

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Attorneys for Appellees Quinton Richmond, *et al.*

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William Brockman

IN THE
COURT OF APPEALS OF MARYLAND

| | | |
|---|---|---|
| PAUL B. DeWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al., | * | |
| Appellants, | * | No. 34, September Term, 2011 |
| v. | * | |
| QUINTON RICHMOND, et al., | * | |
| Appellees. | * | |

* * * * * * * * * * * *

**PLAINTIFFS' RESPONSE TO STATE OF MARYLAND'S CONDITIONAL MOTION TO INTERVENE**

Appellees Quinton Richmond, et al. ("Plaintiffs"), by their undersigned counsel, respectfully respond to the State of Maryland's Conditional Motion to Intervene in this appeal. Plaintiffs doubt that intervention is appropriate or even permissible under these circumstances, but, so long as the State is not granted a right to separate arguments, briefs, and counsel, and instead will consolidate its arguments with those by the District Court Defendants ("DCDs"), Plaintiffs do not object. The Court should be aware, however, that the State's proposed legal issue (whether the pending amendment to the Public Defender Act ("PDA") eliminating the statutory requirement for representation at initial bail hearings is constitutional) does not materially alter the issues pending before the Court (whether the defendants' *practice* of denying representation at initial bail hearings is constitutional). For the reasons previously discussed, the Court should decide those issues now and not require Plaintiffs to wait several additional years until the constitutional violations are addressed and resolved by this Court.

**DISCUSSION**

The State's request to intervene has numerous problems. First, the Rules do not provide for intervention in an appeal. Rule 2-214, the State's cited basis for intervention,

applies only to proceedings in a circuit court. See Rule 1-101(b). No appellate analogue exists. Indeed, Rule 8-401, addressing parties, allows for substitution of parties and adopts the circuit court rule for substitution of parties (Rule 2-241), see Rule 8-401(b), but it does not provide for intervention. Thus, no rule permits the State to intervene. Second, the DCDs successfully moved to dismiss the District Court of Maryland as a defendant for "all constitutional claims" in the case on the ground that, as an entity of the State, it cannot be sued under 42 U.S.C. § 1983 and "cannot be held liable for violations of the Maryland Declaration of Rights." (Dkt. 21, DCD Cross-Mot. for Sum. J. at 31-32) (citing Ashton v. Brown, 339 Md. 69, 103 (1995)). Third, the "new" issue that the State wants to defend has been at issue all along in this case. From a constitutional perspective, it makes no difference whether the failure to provide counsel at initial bail hearings results from a firm State policy or a specific State statute. The legal, fiscal, and public policy issues are essentially the same. The landscape has not materially changed such that the State needs to participate when it did not before.

Indeed, the DCDs' premise that Plaintiffs must challenge the constitutionality of the pending legislation is not correct. A simple declaration of what representation is required would suffice. For example, the pending amendment to the PDA would not *preclude* representation at hearings: it merely strips the current requirement *compelling* representation by the Public Defender out of the statute. The Public Defender remains free to appear at initial bail hearings if he so chooses. The amendment also would not preclude the DCDs from securing the appointment of counsel outside of the PDA, much like courts may do under this Court's Workman and Office of Public Defender decisions despite last year's amendment (2011 Md. Laws, ch. 544) shielding the Public Defender from involuntary judicial appointments. See Md. Code Ann., Crim. Proc. § 16-213.

Thus, the State has no compelling justification for intervention. Indeed, the amendments to the PDA have not even been entered into law. To the extent the motion was intended to delay even further the Court's resolution of the pending motions and issuance of the mandate, the Court should resist that effort and should instead decide the issues as currently scheduled for its April conference.

That being said, even though the Rules do not provide for intervention, Plaintiffs do not object to intervention by the State so long as it will not prejudice Plaintiffs. The State should not be allowed to file separate briefs, make separate arguments, or otherwise alter the procedural balance that already exists in this case.

What is most critical is that the Court should proceed to decide the constitutional issues now that the General Assembly has rejected the Court's ruling in significant part. That is particularly true for Plaintiffs, most of whom already receive representation at Baltimore City bail review hearings and who thus would receive almost none of the help promised by the Court. Remanding the case back to the Circuit Court, or, even worse, vacating the judgment below and requiring Plaintiffs to rewind and re-litigate the constitutional issues, could delay a final resolution by several years. Well over 300,000 initial bail hearings have been held in Baltimore City without representation since this case was brought in 2006, and, as a consequence, tens if not hundreds of thousands of indigent criminal defendants have been needlessly incarcerated without representation and deprived of their freedom and their constitutional right to affordable bail. For the tens of thousands of additional defendants that would face a similar fate if the DCDs' request is granted, justice delayed will indeed mean justice denied.

Finally, the State's reference to a legislative finding about the alleged cost of providing representation at initial bail hearings (Mot. at 3 ¶ 3) bears comment. The record of this case is clear that providing representation saves money by preventing unnecessary incarceration. The fiscal notes relied upon by the General Assembly do not address that point. They also fail to factor in the savings that would be achieved by the new citation amendments that are intended to steer low level offenses away from incarceration and thus substantially reduce the number of initial bail hearings. Most important, they accept unconditionally the Public Defender's ludicrous estimate that each initial bail hearing will add an average of 2½ hours of attorney-time to the Public Defender's workload. For the reasons previously explained, these in terrorem projections are no more real than were the Iraqi WMDs.

## CONCLUSION

For the foregoing reasons, so long as the State does not receive separate briefs, argument, or counsel, the Court should grant its Conditional Motion to Intervene if that would assist the Court in deciding the constitutional issues.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 16th day of April 2012, a copy of the foregoing Response to the Motion of the State of Maryland for Conditional Intervention was served by electronic mail and by first class mail, postage prepaid, on the following counsel for the State of Maryland and the District Court Defendants and for the Public Defender, respectively:

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Attorneys for the Public Defender

Mitchell Mirviss

Mitchell Y. Mirviss

IN THE COURT OF APPEALS OF MARYLAND

| | | |
|---|---|---|
| PAUL B. DEWOLFE, JR., ET AL. | * | In the |
| v. | * | Court of Appeals |
| QUINTON RICHMOND, ET AL. | * | of Maryland |
| | * | No. 34 |
| | * | September Term, 2011 |

**ORDER**

This matter came before the Court on the grant of a writ of certiorari. The Court heard oral argument on the matter on November 8, 2011 and issued an Opinion affirming the Circuit Court's judgment in favor of Plaintiff-Appellees on January 4, 2012, on the ground that § 16-204(b) of the Public Defender Act provides a right to representation at the initial bail hearing before a Commissioner. In light of that holding, it was unnecessary to decide, and the Court did not decide, whether Plaintiff-Appellees were entitled to relief on the basis of the right to counsel provided in either or both the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.

Appellants Ben C. Clyburn, John Hargrove, David W. Weissert, Linda Lewis, and the Commissioners of the District Court of Maryland for Baltimore City (District Court Defendants) thereafter timely filed on February 1, 2012 a motion for reconsideration of the Court's opinion. Separately, Appellant Paul B. DeWolfe, Jr. (Public Defender) timely filed on February 2, 2012 a motion for reconsideration or, in the alternative, stay of issuance of the mandate. Plaintiff-Appellees Quinton Richmond, et al. (Plaintiffs) filed responses to the

motions, and, subsequently, Appellants District Court Defendants and Public Defender filed replies to Plaintiffs' responses. In response to the District Court Defendants' motion for reconsideration, the State of Maryland filed a motion to intervene in these proceedings, conditioned upon the Court's grant of Plaintiffs' request to decide immediately the pending constitutional issues, in light of the Legislature's response to the Court's January 4, 2012 opinion.

Among the matters presented in the foregoing filings is whether this Court, if it should decide to review the Federal and State constitutional claims raised by Plaintiffs but not decided in the January 4, 2012 opinion of the Court, first should remand the matter to the Circuit Court for further factfinding on the constitutional questions. District Court Defendants assert "that an adjudication of [the constitutional] claims would benefit from a fuller factual record based on actual experience under the revised statute." Plaintiffs counter that "[the Court] could decide [the constitutional claims] now, without requiring further litigation in the Circuit Court."

It is the opinion of the Court, majority concurring, that further development of this issue will inform the disposition of the pending motions. Therefore, it is this 9th day of July, 2012,

ORDERED, that, within twenty (20) days of the issuance of this order, Appellant District Court Defendants shall submit to the Court a memorandum of law limited to detailing, with specificity, the intended factual evidence they would proffer, not already found within the record currently before the Court, that Appellant District Court Defendants

believe is necessary to consideration and resolution of the Federal and State constitutional claims raised by Plaintiffs; and, it is further

ORDERED, that the State of Maryland is hereby granted leave to intervene in these proceedings and may file a memorandum concurrently with the District Court Defendants; and, it is further

ORDERED, that, within fifteen (15) days thereafter, Appellee Plaintiffs and Appellant Public Defender may submit memoranda in response to those memoranda submitted by Appellant District Court Defendants and/or the State of Maryland.

/s/ Robert M. Bell

Chief Judge

**IN THE COURT OF APPEALS OF MARYLAND**

| | | |
|---|---|---|
| PAUL B. DEWOLFE, *et al.,* | * | |
| *Appellants,* | * | |
| | | September Term, 2011 |
| v. | * | |
| | | No. 34 |
| QUINTON RICHMOND, *et al.,* | * | |
| *Appellees.* | * | |

* * * * * * * * * * * * * *

**RESPONSE TO COURT'S JULY 10, 2012 INQUIRY**

Appellants Ben C. Clyburn, John Hargrove, David W. Weissert, Linda Lewis, and the Commissioners of the District Court of Maryland for Baltimore City (the "District Court Defendants") and Intervenor State of Maryland submit this memorandum in response to the Court's request for elaboration on the benefits that remand proceedings might provide, in view of material changes in the facts and law that have occurred while this appeal has been pending.

The plaintiffs brought this lawsuit in 2006, and the operative complaint, although filed in 2010, continues to make allegations concerning the implementation of the Public Defender Act and court rules governing initial appearances that are based on conditions in 2006 in one jurisdiction, Baltimore City. (E. 210-52.) Many of the facts alleged by the plaintiffs are contested and have not been established in the record before the Court. More importantly, both the statute and the rules have recently been amended, resulting in significant differences in the way the Public Defender and the District Court Defendants carry out their duties, both

in Baltimore City and statewide. The plaintiffs, it appears, contend that the performance of those duties in accordance with the amended Public Defender Act and the rules recently adopted by this Court results in the deprivation of the constitutional rights of indigent arrestees, at least in Baltimore City. But the plaintiffs' grounds for this contention are necessarily different from the grounds they asserted in 2006, when they first challenged the constitutionality of criminal procedures that were in place then.

The Court has asked what evidence might be adduced in remand proceedings that would inform the analysis of the plaintiffs' constitutional claims. That question, we submit, is best posed to the plaintiffs. As the District Court Defendants explained in their April 3, 2012 response to the plaintiffs' request for reconsideration, it was the plaintiffs who complained that they could not substantiate their Sixth Amendment and Article 21 claims without discovery. (E. 550-51.) The plaintiffs identified eight areas of inquiry that they asserted should be the subject of discovery, which, they also asserted, would yield information that "would be material and relevant" to their due process claims as well. (E. 551.) The Public Defender agreed. (E. 172-73, 175-77.) Yet no discovery was conducted in either round of proceedings in the circuit court. Now, with new court rules in place and with new duties imposed on the Public Defender, the facts that would be adduced in discovery have changed. The Public Defender agrees. *See* Public Defender's March 12, 2012 Reply in Support of Motion for Reconsideration ("[W]hatever version of the pending legislation is enacted . . . will almost certainly change the contours of the constitutional

analysis in significant ways that were not contemplated when these issues were litigated before the circuit court. . . .").

Although the plaintiffs previously believed discovery was necessary to establish their entitlement to relief on their constitutional claims, they changed their position after the circuit court announced its intention to rule in their favor on those claims. (E. 434.) And, as the Court has indicated, the plaintiffs now ask to have their constitutional claims decided in this Court, without "further litigation in the Circuit Court," which is to say, without amending their complaint to conform its allegations to current procedures, *cf. Scott v. Jenkins*, 345 Md. 21, 27-28 (1997) (emphasizing importance of pleadings in "defin[ing] the boundaries of litigation"), and without an adjudication of those factual allegations by a trial court, *cf. Hartley v. State*, 238 Md. 165, 168 (1965) (observing that this Court's power is "limited to appellate review, and [the Court] cannot invade the province" of trial courts by engaging in factfinding). If the plaintiffs persist in their revised position that a factual record is unnecessary to adjudicate their constitutional claims, then the Court should refuse to credit factual assertions that are not supported by the existing summary judgment record. *See Imbraguglio v. Great Atl. & Pac. Tea Co.*, 358 Md. 194 (2000) (movant "must place before the court facts which would be admissible in evidence").

To be clear, as the District Court Defendants stated in their April 3 submission, they (and the State) "do not believe that the factual issues pointed to by the plaintiffs are material to the constitutional analysis required to adjudicate the plaintiffs' claims." The State and the

District Court Defendants likewise do not regard the descriptions of the initial appearance procedures that appear in the Court's January 4, 2012 opinion, to the extent they are based merely on representations made by the plaintiffs or the plaintiffs' contested allegations, *see* slip opinion at 4, 5, 6, 25, as material to the Court's holding. The Court's opinion appropriately attributes those descriptions to the plaintiffs, rather than to evidence in the record. Despite the absence of uncontradicted evidence in the record, the plaintiffs appear to rest many of their arguments on factual assertions; many of those assertions are controverted, and many are indisputably wrong. Thus, unadorned assertions, unsupported by admissible evidence, should play no part in the Court's analysis of the plaintiffs' constitutional claims.

The plaintiffs have argued that the risk of an arrestee making an incriminating statement during presentment before a District Court commissioner supports their claim of a right to counsel during this initial appearance. *See* Plaintiffs' Brief at 2, 3, 11, 31-33. The State and the District Court Defendants disagree, as a matter of law. Whatever risk of self-incrimination exists, however, has been radically altered by the legislation that amended the Public Defender Act and that also created a bar to the admissibility of statements made during an initial appearance before a commissioner. *See* Md. Code Ann., Cts. & Jud. Proc. § 10-922. Nevertheless, the plaintiffs' complaint alleges that "arrestees may make incriminating statements" that may be used against them in future hearings. (E. 212.)

The plaintiffs have also asserted, as support for their claim of a constitutional right to counsel in an initial appearance, that prosecutors engage in ex parte communications with commissioners. *See* Plaintiffs' Brief at 9, 10, 31, 34, 42. This Court has now adopted rules that specifically apply to the initial appearance and that augment Rule 2.9 of the Code of Judicial Conduct by defining what types of ex parte communications are permissible and by requiring that they be disclosed to the other party and made a part of the written record. The District Court has adopted a form for that purpose. Nevertheless, the plaintiffs' complaint alleges that commissioners "may receive ex parte communications from a prosecutor, but there will be no public record of such communications." (E. 211.)[1]

Another contention advanced by the plaintiffs is likewise based on allegations that may or may not have described the situation in 2006, but that are almost certainly inaccurate in 2012. Specifically, the plaintiffs contend that judges issuing failure-to-appear warrants specify the amount of bail and that commissioners reflexively impose this "preset" bail amount without independently considering the factors now set forth in Rule 4-216(f) (formerly Rule 4-216(d)). *See* Plaintiffs' Brief at 4, 10, 40, 44. The Administrative Office

[1] The plaintiffs' arguments also emphasize "prosecutorial involvement" in the presentment process, but the involvement they point to is, for the most part, a feature that is unique to Baltimore City, where assistant state's attorneys review charging documents prepared by the police before the arrestee sees a commissioner. This arrangement was instituted to allow prosecutors to recommend early-resolution dispositions, and in practice it allows prosecutors to make declination decisions before presentment, with the result that a substantial proportion of arrestees are released (according to data from 2006 and 2007) without even seeing a commissioner. (E. 692.)

of the Courts has provided extensive guidance to commissioners and lower-court judges, in a series of memoranda issued in March, May, and December 2010. That guidance explains the limited circumstances in which bail may be preset and discusses acceptable alternative mechanisms such as so-called "direct-deposit" warrants that require the arrestee to be brought before the issuing judge. There is no indication that judges and commissioners have not adhered to this guidance, and the record contains no evidence of a current practice of deferring to preset bail amounts. Nevertheless, the plaintiffs' complaint alleges that commissioners "decline to address the preset bail . . . pursuant to a policy and/or a consistent practice." (E. 216.) Similarly, there is no record evidence to substantiate the plaintiffs' insinuation that judges fail to conduct an independent analysis when setting pretrial release conditions at bail review and instead merely maintain the amount provisionally set by commissioners. (E. 215-16.)

The plaintiffs and their amici generally argue that the Court should find a right to counsel at an initial appearance because having a lawyer present may be helpful in arguing for lower bail or immediate release (in those cases where a commissioner is authorized to make these dispositions) and in various other respects. The Public Defender has described the benefits attributed by the plaintiffs to providing representation at presentment as "conjectural." (E. 133.) And he is right that the record contains no evidence to substantiate the plaintiffs' assertions (putting aside a 10-year-old study that examined the effects of providing counsel in some jurisdictions for some types of offenses—at bail review, not at the

initial appearance). Under the amended Public Defender Act, the Public Defender now provides representation to indigent defendants at bail review hearings statewide (including all arrestees in Baltimore City, rather than a subset of those arrestees, as was the case in 2006). Bail review is also required to be conducted sooner than was required under the rules before their recent amendment.

The Public Defender's experience providing this representation would surely inform the analysis and allow the plaintiffs' assertions to be tested with admissible evidence. Thus, for instance, the Public Defender may be able to provide evidence about whether it is feasible, within the period between arrest and presentment, to have a "meaningful discussion with one's client of the realities of his case" and to "begin an immediate thorough-going investigation and preparation to prepare an adequate defense" so that the lawyer can vouch for the arrestee's statements regarding employment, housing, financial resources, criminal history, warrants, dependents, and family circumstances. Plaintiffs' Brief at 10, 35.

An additional benefit to the development of a concrete factual record based on actual admissible evidence about experience under the amended statute and rules is that it would allow the plaintiffs to pursue their claims for injunctive relief. *See* slip opinion at 36 ("[I]t is more than mere conjecture that the Plaintiffs will seek future injunctive relief. . . ."). Allowing the plaintiffs to take up their claims for injunctive relief in remand proceedings would serve the interest in judicial efficiency. And, if the plaintiffs are successful, the circuit court would be able to tailor the relief based on actual evidence. To take one example: if the

evidence shows that effective representation by counsel requires more time than is typically available before presentment occurs, should a request for counsel be deemed a waiver of the right to prompt presentment? Alternatively, since presentment is purely a creature of the rules, the rules should yield to the constitutional analysis, and the evidence may suggest that the requirement of *effective* assistance of counsel is best served by decoupling the probable-cause determination made at presentment from the bail determination that is sometimes authorized to be made at presentment. Consideration of such issues, and the many issues concerning resource constraints that were the basis for the Public Defender's appeal and his stay motion, would be aided by a concrete factual record.

Respectfully submitted,

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for Baltimore City

Dated: July 30, 2012

**CERTIFICATE OF SERVICE**

I certify that, on July 30, 2012, a copy of the foregoing response to the Court's inquiry made in its July 10, 2012 order was sent by e-mail to, and served by first-class mail on:

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William Brockman

**IN THE COURT OF APPEALS OF MARYLAND**

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|---|---|---|
| PAUL B. DeWOLFE, JR., *et al.*, | * | |
| Appellants, | * | |
| | | September Term, 2011 |
| v. | * | |
| | | No. 34 |
| QUINTON RICHMOND, *et al.*, | * | |
| Appellees. | * | |

* * * * * * * * * * *

**APPELLANT PAUL B. DeWOLFE, JR.'S RESPONSE TO APPELLANT DISTRICT COURT DEFENDANTS' AND INTERVENOR STATE OF MARYLAND'S "RESPONSE TO COURT'S JULY 10, 2012 INQUIRY"**

Appellant Paul B. DeWolfe, Jr., in his official capacity as the Public Defender for the State of Maryland ("the Public Defender"), agrees with Appellants Ben C. Clyburn, *et al.* (the "District Court Defendants") and Intervenor State of Maryland ("the State") that the newly enacted legislation and related implementing Court rules are clearly relevant to the disposition of Plaintiffs' constitutional claims but respectfully suggests that a remand to the Circuit Court for further factual development is unnecessary. The Public Defender believes the Court can and should decide Plaintiffs' constitutional claims on the current record following further briefing and argument.

As noted in the July 30, 2012 Response of the District Court Defendants and the State, recent amendments to the Public Defender Act and newly adopted Court rules bear on the constitutional claims presented by Plaintiffs in a number of respects. But while the constitutional landscape has changed, the Court need not remand this case to the Circuit Court for additional development of the factual record in order to rule on Plaintiffs'

claims. Whether the absence of counsel at initial bail hearings deprives Plaintiffs of their rights under the Sixth and/or Fourteenth Amendments to the United States Constitution (or Articles 21 and/or 24 of the Maryland Declaration of Rights)—even in light of the recent amendments to the Public Defender Act—is a legal question that requires no further fact-finding to resolve. The "material changes" addressed in the July 30, 2012 Response of the District Court Defendants and the State are principally changes to the law and to Court rules and guidance, not changes to facts relevant to the disposition of Plaintiffs' constitutional claims. To the extent Plaintiffs believe they can pursue their constitutional claims without further factual development, they are entitled to attempt to do so. If the District Court Defendants and the State believe that Plaintiffs' claims turn on contested facts that Plaintiffs have not proven, they can so argue. Consequently, there is no need for any additional factual development below.

However, because the Court has not had the benefit of briefing or argument on the effect of the new statutory provisions (and related implementing rules) on Plaintiffs' constitutional claims, the Public Defender believes that additional briefing and argument before this Court would be appropriate. The Public Defender therefore requests that the Court set a new briefing schedule and, if the Court believes it would be helpful, a new argument date so that the parties may have an opportunity to address the changed contours of the constitutional analysis.

Respectfully submitted,

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*Paul B. DeWolfe, Jr.*

Font: Times New Roman 13

Dated: August 14, 2012

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 14th day of August, 2012, a copy of the foregoing motion was served by electronic mail and first class mail, postage prepaid, on:

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Ashley Bashur
ASHLEY BASHUR

IN THE
COURT OF APPEALS OF MARYLAND

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|---|---|---|
| PAUL B. DeWOLFE, et al., | * | |
| Appellants, | * | |
| v. | * | |
| | | No. 34, September Term, 2011 |
| QUINTON RICHMOND, et al., | * | |
| Appellees. | * | |

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**PLAINTIFFS' REPLY TO STATE DEFENDANTS' "RESPONSE" TO COURT'S JULY 10, 2012 ORDER**

Appellees Quinton Richmond, et al. ("Plaintiffs"), by their undersigned counsel, respectfully reply to the Response ("Resp.") filed by Appellants The Hon. Ben Clyburn, et al. (the "District Court Defendants" or "DCDs") and Intervenor-Appellant the State of Maryland (collectively, the "State Defendants") to the Court's July 10, 2012 Order (the "Order") requiring them to detail "with specificity" what "intended factual evidence they would proffer, not already found within the record currently before the Court, that [they] believe is necessary to consideration of the Federal and State constitutional claims raised by Plaintiffs[.]" (Order at 2-3). This Order was entered in response to their assertion that "'an adjudication of [the constitutional claims] would benefit from a fuller factual record based on actual experience under the revised statute.'" Id. at 2.

The State Defendants fail to comply with the Order in three key respects:

1. They *never* detail the "intended factual evidence *they* would proffer" that "is necessary to consideration" of the constitutional issues. Id. (emphasis added).

2. They instead rewrite the Order to address a different question that the Court did not ask, an "elaboration on the benefits that remand proceedings might provide, in view of the material changes in the facts and law that have occurred while this appeal has been pending." (Resp. 1). Later, they further rewrite the Order to shift its focus to

*Plaintiffs* ("That question, we submit is best posed to the plaintiffs") and discuss facts that *Plaintiffs* should address in a remand proceeding. Id. at 2, 2-8.

3. They violate the Court's express directive limiting their memorandum to this issue. See Order at 2 (the DCDs "shall submit to the Court a memorandum of law *limited* to detailing, with specificity, the intended factual evidence they would proffer..."). Rather than comply with that limitation, they discuss issues that they *never* previously raised as preventing summary judgment in this case.

The Order could not have been clearer. It ordered the State Defendants to address one issue: to detail, with specificity, what new evidence as to the new law prevents the Court from deciding the constitutional issues, and to not address any other issue. Rather than comply, they chose to defy. The Court should reject this nonresponsive "Response."

## ARGUMENT

### I. The State Defendants Fail to Answer the Court's Question.

The Court's Order is simple and straightforward. In response to the DCDs' argument that "an adjudication of [the constitutional claims] would benefit from a fuller factual record based on actual experience under the revised statute," the Court ordered the DCDs to declare what new facts regarding the new legislation *they* would proffer that are necessary for the Court's resolution of the constitutional issues:

> Appellant District Court Defendants shall submit to the Court a memorandum of law limited to detailing, with specificity, the intended factual evidence *they* would proffer, not already found within the record currently before the Court, that [they] believe is necessary to consideration of the Federal and State constitutional claims raised by Plaintiffs[.]

(Order at 2-3) (emphasis added). The State Defendants answer this explicit Order with a resounding, deafening silence. Their 8-page Response does not state, let alone detail with specificity, *any* factual evidence that *they* intend to proffer that is not already in the record. The obvious answer to the Court's question is "none." But because one of their objectives is delay, the State Defendants do not want to make any admissions that would clear the path to a final resolution of this almost seven-year-old case. So, rather than admit that no further evidence is needed, they chose disingenuity over candor and use the

Order as an opportunity to raise new arguments that they waived in prior briefing. They demand that *Plaintiffs* proffer new evidence in support of their claims, see Resp. at 2, even though the Order is directed at them, not Plaintiffs. We respectfully submit that, when the Court orders parties to answer its question, they should answer as asked and not rewrite the question to their liking and demand that the opposing party answer instead.

If the new legislation does create new factual issues that prevent the Court from deciding the constitutional issues on the current record, this was the State Defendants' opportunity to explain with specificity what further evidence, if any, *they* need to present. Avoiding the question by rewriting it to assert fact disputes that they waived and ignored for the past six years hardly is responsive. Their 8-page analysis of areas where the record would be "enhanced" by factual development is a blatant attempt to change the subject. The Court should rule that they have failed to show a factual basis for opposing the Court's resolution of the constitutional issues based on the current record.

## II. The State Defendants Fail to Show that the Amendments to the Public Defender Act Raise New Factual Issues Requiring a Remand.

The State Defendants fail to answer the Court's question for an obvious reason: the recent legislation does not raise new factual questions regarding the constitutional claims. This is clear from their arguments. None of the three amendments that they mention – (1) providing counsel at bail review hearings; (2) prohibiting ex parte communications with commissioners; and (3) protecting against self-incrimination at an initial bail hearing – requires factual exposition for the Court to assess their legal impact.

1. *Providing counsel at bail review hearings.* The State Defendants cite the new amendment that requires representation at bail review hearings, see Resp. 6-7, but this change will have little effect on Plaintiffs, most of whom *already* are represented at Baltimore City bail review hearings. Indeed, until this amendment, the DCDs have consistently pointed to the representation in Baltimore City bail reviews as a reason why due process is not violated by the lack of counsel at initial bail hearings. Little has changed, therefore, and certainly nothing that requires further fact-finding. Their claim that "[t]he Public Defender's experience providing this representation would surely

inform the analysis and allow the plaintiffs' assertions to be tested with admissible evidence," *id.* at 7, ignores the fact that this same information has long been available through the identical pre-amendment bail reviews and yet was never raised by the DCDs. The Court's Order hardly justifies belatedly raising this issue now, after two rounds of summary judgment briefing in the Circuit Court and two appeals in this Court – nearly seven years of litigation.[1] This amendment will have little impact in Baltimore City and none that materially affects the constitutional issues before the Court.

2. *Prohibiting ex parte communications by prosecutors with commissioners.* See Resp. 5. Here, too, the State Defendants fail to identify any change in law requiring factual exposition. It is true, of course, that Plaintiffs alleged that prosecutors had ex parte contact with commissioners and that such ex parte access supported the right to counsel. This ex parte contact was never seriously contested: Rule 4-216(d)(1)(E) permits it, the State's Attorney for Baltimore City staffs a 24-hour war room in Central Booking for this purpose (E466, 472), and, in the recent legislative session, State's Attorneys openly admitted such contacts. In any event, the practice of ex parte communications now has been prohibited, so the issue is moot.[2] No further fact-finding is needed to flesh out the impact of a practice that has been prohibited as a matter of law.

3. *Prohibiting self-incrimination at initial bail hearings.* See Resp. 4. This issue is in the same posture as the ex parte communication issue above. The new rule prohibiting use of self-incriminating statements made in initial bail hearings renders the self-incrimination issue moot. Again, the DCDs do not identify any aspect of this new prohibition that requires further fact-finding. See Resp. 4.

Thus, none of the legislative changes raises a fact question that prevents the Court from deciding the constitutional issues. The answer to the Court's inquiry is "none."

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[1] For example, *none* of the DCDs' four briefs or two oral arguments in this Court ever asserted that the Circuit Court's grant of summary judgment on Plaintiffs' constitutional claims was erroneous due to a genuine dispute as to material facts.

[2] The injustice of allowing prosecutors access to commissioners while denying counsel to the detainee remains an issue, but that problem predates the new legislation.

## III. The State Defendants Take Unacceptable Liberties with the Order that They Limit Their Response to the Question Posed by the Court.

In addition to refusing to answer the Court's question, the State Defendants ignore the Order requiring them to limit their response to the question posed by the Court. Nearly all of their Response is off-point: they discuss issues that could "enhance" the record if developed in a trial, and they argue fact disputes that they previously failed to raise. None of this is material. The DCDs had ample opportunity to oppose Plaintiffs' motion for summary judgment by showing a genuine dispute of material fact, and they never attempted to do so, even after the Court's remand of the first appeal, when the motion was renewed and amended. They never argued in this Court that the Circuit Court erred by failing to recognize a genuine dispute of material fact. They let this argument lapse for six years, raising it now only after losing their appeal on statutory grounds and, apparently, desperate to avoid a decision on the constitutional grounds.

Apart from the three new reforms discussed above, the State Defendants scour Plaintiffs' complaint and a six-year-old request by Plaintiffs for discovery to conjure fact disputes. See Resp. 1 ("the operative complaint, although filed in 2010, continues to make allegations ... based on conditions in 2006 in one jurisdiction, Baltimore City"); id. at 2 ("Now, with new court rules in place and with new duties imposed on the Public Defender, the facts that would be adduced in discovery have changed."); id. at 3 (claiming an "absence of uncontradicted evidence in the record"). None of this discussion is relevant. The question is what additional evidence is needed for the Court to decide the constitutional issues, and the answer is clear: none is necessary.

Indeed, after implying that fact disputes must exist because the complaint alleges facts that they never admitted, the State Defendants tack 180 degrees and argue that material fact disputes do *not* exist. See Resp. 3 (stating that they "'do not believe that the factual issues pointed to by the plaintiffs are material to the constitutional analysis required to adjudicate the plaintiffs' claims'") (quoting DCDs' April 3 memorandum). Thus, even the State Defendants believe that it is possible for the Court to decide the constitutional claims based on the current record.

Their remaining points fare no better. For example, in discussing the legislative reforms, the State Defendants do not identify new fact issues requiring a trial and instead argue the merits of how the reforms have resolved some of Plaintiffs' allegations. See id. at 4-6. They contend that Plaintiffs' claims regarding the benefits of representation are not supported by admissible evidence (id. at 6), yet they fail to acknowledge that, in the two rounds of summary judgment briefing below and in their four briefs in this Court, they never challenged or objected to studies presented by Plaintiffs demonstrating those benefits or to rebut the cases making similar findings.[3] Having concocted a false gap in the evidence, they suggest that "[t]he Public Defender's experience providing this representation [at bail reviews] would surely inform the analysis and allow the plaintiffs' assertions to be tested with admissible evidence." Id. at 7. Again, they ignore the fact that the Public Defender has been representing Plaintiffs at Baltimore City bail reviews for more than a decade, giving them ample opportunity to draw evidence to rebut the studies, but they waived the issue. So, too, when they refer to a series of administrative guidances in 2010 that may have ended the practice of "preset bail" through the use of an alternative "direct deposit" warrant (id. at 5-6), they discuss an issue that they already raised in their Reply Brief in this Court. See DCD 10/18/11 Reply Br. 28 n.18). They did not argue then that they needed a remand to "develop" facts to "inform the analysis."

Finally, the State Defendants' argument that the Court should remand the case so that Plaintiffs can litigate their injunction request to "aid in judicial efficiency" (Resp. 7-8) warrants a response. These post-decision proceedings arise under the DCDs' motion for reconsideration seeking to strike the constitutional rulings below. It is the DCDs who oppose issuance of the mandate and allowing the Circuit Court's constitutional rulings to

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[3] The assertion that Plaintiffs' evidence at summary judgment was limited to one "inadmissible" study, see Resp. 6, is incorrect. Multiple studies and cases were presented without any challenge by the DCDs. See E.503 n.12, 700-07, 708-25, 734; Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (citing study in which defendants with counsel were five times as likely to have their cases dismissed as those without); United States v. Mahard, 612 F. Supp. 940, 947 (W.D. Tex. 1985) (discussing net cost savings by providing counsel). Until this Response, the DCDs never disputed any of these studies and judicial findings.

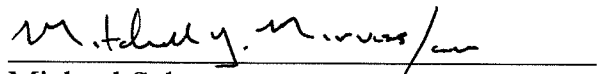
take final effect. If the DCDs are now withdrawing their motion for reconsideration and no longer oppose returning to the Circuit Court for enforcement of the Circuit Court's declaratory judgment, they should say so. But that of course is not what the State Defendants mean. They simply want to avoid a constitutional ruling by this Court at all costs and are willing to make any argument that would further delay this case.

In sum, having failed to raise fact disputes in the prior six years of litigation of this case, the DCDs should not be heard at this extraordinarily late juncture to raise fact issues that they could have asserted years ago in defense against Plaintiffs' summary judgment motion. And they especially should not be permitted to do so when the Court expressly ordered them to limit their Response to the question posed by the Court. By failing to answer the Court's Order, they have forfeited their objection to resolution of the constitutional claims.

## CONCLUSION

For the foregoing reasons, the Court should find that the State Defendants have waived the DCDs' objection to the Court's resolution of the constitutional issues and that no factual obstacles preclude the Court from deciding those issues now.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 14th day of August 2012, a copy of the foregoing Reply to the Response by the State Defendants to the Court's July 10 Order was served by electronic mail and by first class mail, postage prepaid, on the following counsel for the State Defendants and for the Public Defender, respectively:

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Attorneys for the Public Defender

Mitchell Y. Mirviss

IN THE COURT OF APPEALS OF MARYLAND

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| PAUL B. DEWOLFE, JR., ET AL. | * | In the |
| v. | * | Court of Appeals |
| QUINTON RICHMOND, ET AL. | * | of Maryland |
| | * | No. 34 |
| | * | September Term, 2011 |

**AMENDED ORDER**

This matter came before the Court on the grant of a writ of certiorari. The Court issued an Opinion on January 4, 2012, affirming the Circuit Court's judgment in favor of Plaintiff-Appellees on the sole ground that § 16-204(b) of the Public Defender Act provides a right to representation at the initial bail hearing before a Commissioner. Appellants Ben C. Clyburn, John Hargrove, David W. Weissert, Linda Lewis, and the Commissioners of the District Court of Maryland in Baltimore City (District Court Defendants) timely filed, on February 1, 2012, a motion for reconsideration of the Court's opinion. Separately, Appellant Paul B. DeWolfe, Jr. (Public Defender) timely filed a motion for reconsideration or, in the alternative, a stay of issuance of the mandate. Plaintiff-Appellees Quinton Richmond, et al. (Plaintiffs) filed responses to the motions, and, subsequently, Appellants District Court Defendants and Public Defender filed replies to Plaintiffs' responses. Additionally, the State of Maryland filed a motion to intervene in these proceedings, which the Court granted on July 9, 2012.

While these motions were pending, the General Assembly amended the Public

Defender Act, by enacting 2012 Md. Laws ch. 504–05. In response to these anticipated revisions, Plaintiffs asked in their filings for the Court to decide if they were entitled to relief on the basis of the right to counsel provided in either or both the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights and/or either or both the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights, arguments which they presented in their successful petition for writ of certiorari, but were not decided by the Court in its opinion of January 4, 2012. Plaintiffs and the Public Defender asserted that the Court could decide these constitutional claims without remand to the Circuit Court for additional proceedings. District Court Defendants disagreed, and sought in their filings, in part, a remand to the Circuit Court to allow for "the development of a fuller factual record based on actual experience under the revised statute."

On July 9, 2012, the Court ordered a memorandum of law be presented by the District Court Defendants detailing any factual evidence not already found within the record that the parties believed necessary to the consideration and resolution of the Federal and State constitutional claims raised by Plaintiffs. Additionally, the Court allowed the State of Maryland leave to file a memorandum on the same subject. The District Court Defendants and the State of Maryland jointly filed a memorandum of law in response to the July 9 order on July 30, 2012. Plaintiffs and Appellant Public Defender were permitted to, and did, submit memoranda in response to the joint filing.

The Court, majority concurring, is of the opinion that a remand for further

development of the factual record is unnecessary. The Court is also of the opinion that the Court and the parties would benefit from supplemental briefing and additional oral argument on the issue of whether Plaintiffs are entitled, under the recently amended Public Defender Act, to relief on the basis of the right to counsel provided in either or both the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights and/or either or both the Fourteenth Amendment to the United State Constitution and Article 24 of the Maryland Declaration of Rights. Therefore, it is this 22nd day of August, 2012,

ORDERED, that the portion of the District Court Defendants' motion requesting a remand of the matter to the Circuit Court is DENIED; and, it is further

ORDERED, that this case shall be set for oral argument in the January 2013 session of the Court; and, it is further

ORDERED, that Appellants, the District Court Defendants, the Public Defender, and the State of Maryland, shall file any supplemental briefs on or before September 26, 2012, and that Appellees, Quinton Richmond, et al., shall file any supplemental brief on or before October 26, 2012.

/s/ Robert M. Bell

Chief Judge

**IN THE COURT OF APPEALS OF MARYLAND**

| | | |
|---|---|---|
| PAUL B. DEWOLFE, *et al.*, | * | |
| *Appellants*, | * | |
| | | September Term, 2011 |
| v. | * | |
| | | No. 34 |
| QUINTON RICHMOND, *et al.*, | * | |
| *Appellees*. | * | |

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**MOTION FOR RECONSIDERATION**

The State of Maryland, through counsel, moves, under Rule 8-605, for reconsideration of the Court's September 25 opinion in this case. In a motion for stay of enforcement of the judgment that is being filed contemporaneously with this motion, the State explains that implementation of the Court's ruling presents substantial fiscal and logistical challenges and that the ruling works a fundamental alteration in Maryland's pretrial criminal procedure system. Confronting these challenges and evaluating the desirability of altering the existing pretrial system are tasks that require legislative, not doctrinal, judgments; accordingly, this Court, in its legislative capacity as a rules-adopting body, and the General Assembly should be afforded an opportunity to thoroughly and deliberatively explore policy options, and a stay is therefore warranted.

The State's motion for reconsideration, by contrast, requests the Court to reexamine the doctrinal judgment it has made, because the Court's constitutional ruling in this case threatens to foreclose policy options that responsible policymakers may wish to consider. Those options include instituting or maintaining procedures that arguably do

more to advance the liberty interests of the plaintiff class than providing them counsel to argue for pretrial release conditions before two judicial officers in quick succession. If the liberty protected by Article 24 of the Declaration of Rights truly requires the State to furnish a lawyer whenever it implements a procedure that offers an opportunity for a prompt release following arrest, then the constitution has perversely made it more costly, rather than less costly, to offer an arrestee his or her freedom. That should not be the law.

The existing features of Maryland's system of pretrial criminal procedure are the product of both a constitutional ruling and a legislative response to that ruling. The Supreme Court's declaration of a right to counsel at a preliminary hearing, in *Coleman v. Alabama*, 388 U.S. 1 (1970), served as the impetus for a fundamental redesign of Maryland's pretrial criminal procedures. In response, Maryland created the District Court, established a new type of judicial officer—the District Court commissioner—and instituted a statewide public defender system. *See generally* Aug. 16, 2011 Opening Brief of Defendant Officials of the District Court, at 10-19. The rules adopted at the inception of the District Court created the unique feature of Maryland criminal procedure at issue in this case, the initial appearance procedure, along with the requirement of presentment to a judicial officer within 24 hours of arrest. Instituting this procedure and this requirement served to "insure that an accused would be promptly afforded the safeguards provided by presentment to a neutral magistrate," *Johnson v. State*, 282 Md. 314, 321 (1978); prompt presentment also served to ensure that indigent defendants would be advised of their right to appointed counsel and afford sufficient time for the appointment of counsel in advance of the preliminary hearing, without causing delays in

conducting the preliminary hearing, *see Report of the Governor's Commission for the Study of the Public Defender System* (1970).

Following the Court's September 25 ruling, the initial appearance is no longer the point at which an arrestee is merely advised of the right to appointed counsel; it is the point at which counsel is appointed, even though the initial appearance, unlike the preliminary hearing, does not bear the hallmarks of a critical stage of the proceedings where the Sixth Amendment and Article 21 would require the presence of counsel. Moreover, by inserting a lawyer at this early point in this process, within 24 hours after an arrest, the Court's ruling may serve to delay presentment and the opportunity for a prompt release from detention following arrest that the initial appearance was originally designed to accomplish. As noted in the accompanying motion for a stay, more than half of those eligible for release by a commissioner in Baltimore City are released on their own recognizance from detention following arrest, without the aid of a lawyer. Many others have bail set at an affordable amount that allows them to regain their freedom without appearing before a judge (where a lawyer is currently provided). It is important to emphasize, as this Court did in its earlier opinion in this case, *see* Jan. 4, 2012 slip opinion at 26 n.22, that the appearance before a judge is not an "appeal" or a "review" of the commissioner's determination, but instead requires the judge to exercise independent judgment in a de novo proceeding; the Court's failure, in its more recent opinion, to acknowledge the non-deferential nature of this proceeding undermines the Court's conclusion that an arrestee's right to counsel is not fully realized by the assistance of

appointed counsel at this stage in the process, typically within a day after the initial appearance, *see* Sept. 25 slip opinion at 18-19.

These unique features of Maryland's system are entirely salutary, and they serve to enhance liberty. But they remain creatures of rule, and are not themselves constitutionally compelled. Thus, sensible policymakers confronted with the fiscal and logistical challenges presented by the requirement to furnish counsel twice in the space of 48 hours for the purpose of making the same arguments, first to a layperson and then to a judge, could reasonably conclude that the two-step sequence of an initial appearance before a commissioner and a subsequent, independent determination by a judge should be collapsed into a single appearance, before a judge, at the next session of court, as is currently the case for arrestees charged with certain categories of offenses. (Under such a single-step process, the determination of probable cause could be decoupled from the determination of the conditions for pretrial release, in order to comply with the requirements of the Fourth Amendment. *See Gerstein v. Pugh*, 420 U.S. 103 (1975).) This hypothetical single-step bail determination process would be entirely consistent with due process, but it would come at the expense of liberty.

The error in the majority's analysis that produces this perverse result is the failure to distinguish between proceedings instituted by the State from which incarceration may result, on the one hand, and proceedings instituted by the State that offer an opportunity for release, on the other hand. The interests of liberty are served by constitutional doctrines that impose additional costs on the first type of proceeding, *see, e.g., Rutherford v. Rutherford*, 296 Md. 347 (1983); the interests of liberty are *not* served when those

doctrines are invoked to make liberty-granting procedures more costly to implement. The Court should reconsider its ruling elevating due process over the liberty that due process is supposed to protect.

Respectfully submitted,

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October 25, 2013

## CERTIFICATE OF SERVICE

I certify that, on this 25th day of October 2013, a copy of the foregoing motion for reconsideration was served by mail on, and sent by e-mail to:

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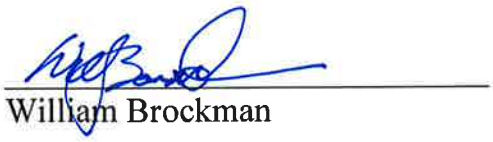

William Brockman

IN THE
COURT OF APPEALS OF MARYLAND

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|---|---|---|
| PAUL B. DeWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al., | * | |
| Appellants, | * | No. 34, September Term, 2011 |
| v. | * | |
| QUINTON RICHMOND, et al., | * | |
| Appellees. | * | |

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**PLAINTIFFS' RESPONSE TO STATE OF MARYLAND'S MOTION FOR RECONSIDERATION**

Appellees Quinton Richmond, et al. ("Plaintiffs"), by their undersigned counsel, respectfully respond to and oppose the State of Maryland's Motion for Reconsideration.

**ARGUMENT**

Plaintiffs have three short responses to the State's Motion for Reconsideration.

*First*, as discussed in Plaintiffs' Response to the State's Motion to Recall Mandate, which is incorporated by reference, the Motion for Reconsideration is untimely, having been filed eight days after the issuance of the mandate contrary to Rule 8-605(a).

*Second*, the Motion for Reconsideration asserts old arguments under new garb. In *three* previous rounds of full briefing and oral argument, the District Court Defendants ("DCDs") argued that bail review procedures obviated any due process violations at the preceding initial bail hearings before commissioners and that requiring counsel to be provided at initial bail hearings would delay release in some cases. See, e.g., DCD 8/15/11 Opening Br. 47 ("Adding a mandatory right to the appointment and assistance of counsel during presentment would not further any of the purposes of the prompt presentment rule," and "[i]nstead, it would inevitably introduce delay"); DCD 12/19/12 Supp. Rep. Br. 15 (arguing that due process is satisfied at initial bail hearings because

commissioners "establish temporary conditions of release that are promptly replaced by the independent determination of a judge in a proceeding at which the defendant has the right to representation of appointed counsel"). Yet these same two points constitute the entire legal and factual basis of the State's Motion for Reconsideration. This rehash of an argument that this Court previously rejected is not a proper basis for reconsideration.

*Finally*, the only aspect of the Motion for Reconsideration that is even remotely new is its ominous argument about what the State may do in response to the Court's ruling. According to the State, the Court erred by treating the existing two-step process of initial bail hearings and bail review hearings as a two-step process and did not collapse them as a hypothetical single-step process. See Mot. at 4. As having two hearings is not constitutionally required, the State hypothesizes that the "sensible policymakers" might abolish the two-step hearing process in favor of a "hypothetical single-step bail determination process" that would "come at the expense of liberty." Id. In other words, the State argues that, however flawed the current system may be and however much it may violate fundamental precepts of due process, if the Court does not reconsider its decision, the State's supposedly "sensible policymakers" may act to make matters even worse for Plaintiffs. Thus, the State's Motion for Reconsideration is a blatant, unabashed "Sophie's Choice" threat of retaliation, imposing on the Court a false choice between Plaintiffs' right to counsel and their right to liberty. With this undisguised threat against Plaintiffs' liberty, the State calls for the Court to reconsider its decision. See id. at 4-5.

Plaintiffs have a clear response to this brazen attempt at intimidation: we are confident that "sensible policymakers" of the State will do the right thing and respond to the Court's decision as they had said they would do if the Court ruled that a constitutional right to counsel existed – they would ensure that Plaintiffs' rights are protected and that funds would be found to ensure that the Constitution and the right to liberty are protected. If, on the other hand, the policymakers do as the State threatens and decide to replace one due process violation with another, the litigation will continue to another round. The State speculates that the policymakers will not do the right thing. Plaintiffs are not so cynical and respectfully submit that the Court needs to hold these legislators to their word

and not bow down to the State's threats. These threats are wholly improper and in any event are not a valid basis for reconsideration.

## CONCLUSION

For the foregoing reasons, the Court should deny the Motion for Reconsideration.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 4th day of November 2013, a copy of the foregoing Response to the Motion for Reconsideration was served by electronic mail and by first class mail, postage prepaid, on the following counsel for the State of Maryland and the District Court Defendants and for the Public Defender, respectively:

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