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**IN THE  
COURT OF APPEALS OF MARYLAND**

---

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.*

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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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**SUPPLEMENTAL BRIEF OF APPELLANTS**

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**SUPPLEMENTAL BRIEF OF APPELLANTS**

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**SUPPLEMENTAL STATEMENT OF THE CASE**

The declaratory judgment entered in this case by the Circuit Court for Baltimore City, pursuant to this Court’s mandate in *DeWolfe v. Richmond*, 434 Md. 444 (2013) (“*DeWolfe II*”), declares that the appellants, judicial officers of the District Court of Maryland (the “District Court Defendants”), “violated Plaintiffs’ right to due process [under Article 24 of the Maryland Declaration of Rights] by continuing with the bail hearing once Plaintiffs requested representation” (E. 34) at their initial bail hearings

before District Court commissioners. (E. 33-34.) On January 10, 2014, the circuit court, at the plaintiffs' request (E. 146-51, 209-10), entered an injunction to implement the rights declared in the declaratory judgment. (E. 226.) The injunction directs the District Court Defendants to immediately "appoint counsel for Plaintiffs at all initial bail hearings" and enjoins the District Court Defendants 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."<sup>1</sup> (E. 226.)

On March 7, 2014, this Court heard oral argument and on March 11, 2014, entered an order extending until 4:30 p.m. on June 5, 2014 a previously-ordered temporary stay of the injunction. (Supp. App. 1.) The March 11 order further provided that the Court "will not revisit" *DeWolfe II*, and "will retain jurisdiction" in this case "to revise the injunction." (Supp. App. 1.) The Court directed the parties to return for further oral argument in the case on May 6, 2014, and issued a scheduling order providing for the filing of supplemental briefs "concerning what action the Court should take to revise the injunction and what revisions should be made based on all then extant circumstances, including any legislative action." (Supp. App. 1-2.)

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<sup>1</sup> The injunction combines the provisions of two alternative injunctive orders proposed by the plaintiffs. (E. 209-10.)

## SUPPLEMENTAL QUESTION PRESENTED

In light of the District Court Defendants' record of faithful adherence to this Court's rules and given Maryland law's strong presumption that they will continue to perform their duties properly under the rules that this Court adopts to implement the constitutional right to counsel established in *DeWolfe v. Richmond*, is an injunction unnecessary and unwarranted?

## SUPPLEMENTAL STATEMENT OF FACTS

The General Assembly, during its 2014 session, did not pass legislation changing Maryland's two-stage system for determining a defendant's conditions of release. General Assembly of Md., Dep't of Legislative Servs., *The 90-Day Report*, E-13 (Apr. 11, 2014). Instead, the Fiscal Year 2015 budget restricts \$10,000,000 of the Judiciary's general appropriation for the purpose of funding the provision of attorneys to defendants at initial appearances before District Court commissioners. *Id.*; see Budget Bill, Fiscal Year 2015 (Senate Bill 170). Any costs exceeding the amount provided for this purpose in the State budget are to be billed to and paid by the county in which the representation is provided. See *90-Day Report* at E-15<sup>2</sup>; see also Budget Reconciliation and Financing Act ("BRFA") of 2014 (Senate Bill 172),<sup>3</sup> § 17.

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<sup>2</sup>Available on-line at <http://mgaleg.maryland.gov/Pubs/legislegal/2014rs-90-day-report.pdf> (last visited April 14, 2014).

<sup>3</sup> Available on-line at <http://mgaleg.maryland.gov/2014RS/bills/sb/sb0172e.pdf> (last visited April 14, 2014).

Presently pending before this Court’s Standing Committee on Rules of Practice and Procedure (“Rules Committee”) are rules that will implement the Court’s decision in *DeWolfe II* establishing the constitutional right to counsel at the initial appearance before District Court commissioners. As currently drafted, and as relevant here,<sup>4</sup> the proposed rules will amend Rule 4-213(a) of the rules adopted by this Court on November 6, 2013 (which have not taken effect) to add new subsection (1), providing that when a defendant appears without an attorney at an initial appearance, “the judicial officer shall first follow the procedure set forth in Rule 4-213.1 to assure that the defendant is either represented by an attorney or has knowingly and voluntarily waived the right to an attorney.” (Supp. App. 3.) New Rule 4-213.1 will provide procedures for appointment, appearance, or waiver of an attorney at an initial appearance before a commissioner. (Supp. App. 7–12.) Finally, Rule 4-216(a), which governs cases involving an arrest without a warrant, will be amended to assure that a judicial officer first complies with the provisions relating to counsel in Rules 4-213 and 4-213.1 before proceeding with the requirements set forth currently in Rule 4-216 relating to the setting of provisional conditions of release. (Supp. App. 13.)

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<sup>4</sup> The proposed rules will also eliminate provisions relating to representation by the public defender at initial appearances before commissioners. The Rules Committee’s Criminal Subcommittee met on April 15, 2014, adopted proposed changes to the provisional rules adopted by this Court on November 6, 2014, and distributed them on April 16, 2014. The current draft is included in the appendix. (Supp. App.3–25.)

## ARGUMENT

### I. IN DETERMINING WHETHER TO ISSUE AN INJUNCTION, THE COURT SHOULD ENSURE THAT ANY PROSPECTIVE RELIEF WOULD BE PROPERLY TAILORED TO THE EXISTING CIRCUMSTANCES.

“An injunction is an exercise of a court’s equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief.” *Salazar v. Buono*, 559 U.S. 700, 714 (2010) (plurality opinion of Justice Kennedy) (citation omitted);<sup>5</sup> *see also Kennedy v. Bar Ass’n of Montgomery County, Inc.*, 316 Md. 646, 668 (1989) (“[I]n framing an injunction for the purpose of protecting the public from continued illegal activity,” it is the “trial court[’s] responsibility” to “determin[e] . . . the scope of the decree to accomplish its purpose” to “cure the ill effects of the illegal conduct” found by the court “so far as practicable.” (quoting *United States v. United States Gypsum Co.*, 340 U.S. 76, 88–89 (1950))).

In determining whether to issue an injunction, a court must ensure that any such prospective relief “fits the remedy to the wrong or injury that has been established.” *Salazar*, 559 U.S. at 718. Thus, “a court must never ignore significant changes in . . . circumstances underlying an injunction. . . .” *Salazar*, 559 U.S. at 714 (citations and internal quotation marks omitted).

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<sup>5</sup> In setting forth the principles applicable to injunctions, this Court has repeatedly looked to decisions of the United States Supreme Court and other federal courts. *See, e.g., State Comm’n on Human Relations v. Talbot County Det. Ctr.*, 370 Md. 115, 128, 130 (2002) (citing multiple Supreme Court decisions and decisions from the United States Courts of Appeals for the First and Third Circuits); *Kennedy v. Bar Ass’n of Montgomery County, Inc.*, 316 Md. 646, 669 (1989) (citing Supreme Court decisions).

The General Assembly has provided an appropriation and legislation regarding the funding needed to implement the decision in *DeWolfe II*, and this Court will adopt rules of procedure for the judicial officers of the District Court to follow at initial appearances. “The relevant question is whether an ongoing exercise of the court’s equitable authority is supported by the prior showing of illegality, judged against the claim that changed circumstances have rendered prospective relief inappropriate.” *Salazar*, 559 U.S. at 718.

**II. AN INJUNCTION IS UNNECESSARY AND UNWARRANTED BECAUSE THE DISTRICT COURT DEFENDANTS HAVE A RECORD OF FAITHFUL ADHERENCE TO THIS COURT’S RULES AND WILL COMPLY WITH THE RULES THAT THIS COURT ADOPTS TO IMPLEMENT THE CONSTITUTIONAL RIGHT TO COUNSEL ESTABLISHED IN *DEWOLFE V. RICHMOND*.**

As relevant here, the declaratory judgment entered by the circuit court declares that the plaintiffs have a right to counsel at an initial bail hearing before a judicial officer of the District Court and that the District Court Defendants “violated Plaintiffs’ right to due process [under Article 24 of the Maryland Declaration of Rights] by continuing with the bail hearing once Plaintiffs requested representation” (E. 34) at their 2006 initial bail hearings. *See DeWolfe v. Richmond*, 434 Md. 403, 414-15 (2012) (“*DeWolfe I*”).

The District Court Defendants were complying with the law as they knew it to be when the individual plaintiffs in November 2006 requested appointed counsel at their initial bail hearings before District Court Commissioners. In proceeding with the hearings without appointing counsel for the individual plaintiffs at their initial appearances, the District Court Defendants faithfully followed the rules adopted by this Court and then in effect for the conduct of initial appearances before judicial officers of

the District Court. At that time, this Court had not yet held that the Public Defender Act guaranteed the right to counsel at an initial bail hearing, *see DeWolfe I*, 434 Md. at 430, nor had the Court yet held that defendants have a constitutional right to counsel under Article 24 of the Maryland Declaration of Rights, *see DeWolfe II*, 434 Md. at 464. As they existed in November 2006, this Court's rules did not anticipate the need to accommodate such a right.

Here, the circumstances render an injunction unnecessary to secure the District Court Defendant's compliance with the law, because, throughout the long history of this case, the District Court Defendants have complied with the law applicable at the time and have faithfully followed the rules promulgated by this Court to govern proceedings at initial appearances. Under Maryland law, there is a "strong presumption that public officers properly perform their duties," *Acting Dir., Dep't of Forests & Parks v. Walker*, 271 Md. 711, 719 (1974) (citations and internal quotation marks omitted), and that they will do "what the law require[s] of them," *Fidelity & Cas. Co. of New York v. Riley*, 168 Md. 430, 433 (1935).

Moreover, that sort of "go-thy-way-and-sin-no-more provision" in an injunction has been held to be defectively overbroad. *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 768 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999), *reaffirmed on remand in relevant part*, 206 F.3d 431, 448 (4th Cir. 2000). Thus, "the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute . . . ." *National Labor Relations Bd. v. Express Publ'g Co.*, 312 U.S. 426, 435 (1941). *See Public Interest Research Grp. of*

*N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 83 (3rd Cir. 1990) (“Overbroad language in an injunction that essentially orders a party to obey the law in the future may be struck from the order.”).

Finally, an injunction would be especially inappropriate and contrary to the public interest because the judicial officers of the District Court should not be condemned to “judicial tutelage for the indefinite future.” *Board of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 249 (1991). Such unnecessary persistence of judicial oversight poses an ongoing threat of potential prejudice and attendant cost. As the Fourth Circuit has noted, “[w]hen a continuing injunction against the violation of a statute is granted, . . . the effect is to place the one against whom it is issued under probation to observe the statute, and to add to the penalties prescribed by law for its violation the additional penalties of fine and imprisonment for contempt of court. This sort of government by injunction should not be unduly extended . . . .” *Tobin v. Alma Mills*, 192 F.2d 133, 136 (4th Cir. 1951). In addition to the looming threat of contempt proceedings, prolonging the injunction may cause intangible injury in the form of the public stigma that would arise from an unwarranted but judicially sanctioned suspicion that the judicial officers cannot be trusted to follow the law and must be monitored by a court, when they have never given any cause for such suspicion. *See, e.g., Goldberg v. Modern Trashmoval, Inc.*, 207 F. Supp. 596, 608 (D. Md. 1962) (stating that when a party is acting in good faith and will obey the law, “the stigma of an injunction is unnecessary”); *Goldberg v. Strickland Transp. Co.*, 203 F. Supp. 417, 421 (E.D. Ark. 1962) (stating that an enjoined party is “under the stigma and embarrassment of having been found to be in

violation of the law and subject to injunction, which stigma and embarrassment may have injurious effects in and of themselves”).

This Court will adopt rules to implement the Court’s decision in *DeWolfe II*. The District Court Defendants are judicial officers and, as such, must comply with the law, including the decisions of this Court and the rules promulgated by this Court. *See* Md. Rule 16-813, Rule 1.1; Md. Rule 16-814, Rule 1.1. As they have throughout the history of this litigation, the District Court Defendants will comply with the rules in effect for the conduct of initial appearances before judicial officers of the District Court. An injunction commanding that they do so is both unwarranted and unnecessary.

### CONCLUSION

The judgment of the Circuit Court for Baltimore City should be reversed and the case remanded with directions to vacate the injunction.

Respectfully submitted,

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April 16, 2014

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

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

*Appellants,*

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

*Appellees.*

\* IN THE  
\* COURT OF APPEALS  
\* OF MARYLAND  
\* September Term, 2013  
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\* \* \* \* \*

**CERTIFICATE OF SERVICE**

I certify that, on the 16th day of April 2014, two copies of the Supplemental Brief of Appellants in the captioned case were sent by e-mail to:

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I further certify that printed copies will be delivered to the Court and served by first-class mail on April 16, 2014.

\_\_\_\_\_  
Julia Doyle Bernhardt

## **SUPPLEMENTAL APPENDIX**

BEN C. CLYBURN et al.

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In the

v.

\*

Court of Appeals

QUINTON RICHMOND et al.

\*

of Maryland

\*

No. 105

\*

September Term, 2013

## O R D E R

The Court having issued a temporary stay in the above entitled case until 4:30 p.m. on March 11, 2014, it is this 11<sup>th</sup> day of March, 2014

ORDERED, by the Court of Appeals of Maryland, that the temporary stay be, and the same is hereby, extended to 4:30 p.m. on June 5, 2014; and it is further

ORDERED, by the Court of Appeals of Maryland, majority concurring, that

(1) The Court will not revisit DeWolfe v. Richmond, 434 Md. 444, 76 A.3d 1019 (2013);

(2) The Court will retain jurisdiction of this matter to revise the injunction issued by the Circuit Court; and

(3) The parties shall return to this Court for further oral argument

concerning what action the Court should take to revise the injunction and what revisions should be made based on all then extant circumstances, including any legislative action;

and it is further

ORDERED that this case will be set in for further oral argument on Tuesday, May 6, 2014, and the parties will submit further briefing as to an appropriate injunction on the following schedule: appellants' brief(s) shall be filed on or before April 16, 2014; appellees' brief(s) shall be filed on or before April 30, 2014; and appellants' reply brief(s) shall be filed on or before May 2, 2014.

/s/ Mary Ellen Barbera  
Chief Judge

MARYLAND RULES OF PROCEDURE  
TITLE 4 - CRIMINAL CAUSES  
CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-213, as follows:

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) Appointment, Appearance, or Waiver of Attorney for Initial Appearance

If the defendant appears without an attorney, the judicial officer shall first follow the procedure set forth in Rule 4-213.1 to assure that the defendant either is represented by an attorney or has knowingly and voluntarily waived the right to an attorney.

~~(1)~~ (2) 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)~~ (3) 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.

Cross reference: See Rules ~~4-216(e)~~ 4-213.1 with respect to the right to an attorney at an initial appearance before a judicial officer and Rule 4-216.1 (b) with respect to the right to an attorney at a hearing to review a pretrial release decision of a commissioner.

~~(3)~~ (4) 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)~~ (5) Pretrial Release

The judicial officer shall comply with Rules 4-216 and 4-

216.1 governing pretrial release.

~~(5)~~ (6) Certification by Judicial Officer

The judicial officer shall certify compliance with this section in writing.

~~(6)~~ (7) 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.

Cross reference: Code, Courts Article, §10-912.

(b) In District Court Following Summons or Citation

(1) Generally

When a defendant appears before the District Court pursuant to a summons or citation, the court shall proceed in accordance with Rule 4-301.

(2) Preliminary Inquiry

When a defendant has (A) been charged by a citation or served with a summons and charging document for an offense that carries a penalty of incarceration and (B) has not previously been advised by a judicial officer of the defendant's rights, the defendant may be brought before a judicial officer for a preliminary inquiry advisement if no attorney has entered an appearance on behalf of the defendant. The judicial officer shall inform the defendant of each offense with which the defendant is charged and advise the defendant of the right to

counsel and the matters set forth in subsection ~~(a) (1), (2), and (3)~~ (a) (2), (3), and (4) of this Rule. The judicial officer shall certify in writing the judicial officer's compliance with this subsection.

(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 (1) inform the defendant of each offense with which the defendant is charged, (2) ensure that the defendant has a copy of the charging document, and (3) determine eligibility for pretrial release pursuant to Rule 4-216.

Source: This Rule is derived as follows:

Section (a) is derived from former M.D.R. 723.

Section (b) is new.

Section (c) is derived from former Rule 723 a.

MARYLAND RULES OF PROCEDURE  
TITLE 4 - CRIMINAL CAUSES  
CHAPTER 200 - PRETRIAL PROCEDURES

ADD Rule 4-213.1, as follows:

Rule 4-213.1 APPOINTMENT, APPEARANCE, OR WAIVER OF ATTORNEY AT  
INITIAL APPEARANCE

(a) Right to Representation by Attorney

(1) Generally

A defendant has the right to be represented by an attorney at an initial appearance before a judicial officer.

(2) Attorney

Unless the defendant waives that right in accordance with section (e) of this Rule or another attorney has entered an appearance, if the defendant is indigent within the meaning of Code, Criminal Procedure Article, §16-210 (b) and (c):

(A) the defendant shall be represented by the Public Defender if the initial appearance is before a judge; and

(B) the defendant shall be represented by an attorney appointed by the court in accordance with section (b) of this Rule if the initial appearance is before a District Court commissioner.

(b) Appointment of Attorneys for Initial Appearance Before Commissioner

(1) Appointment

After consultation with the State and local bar associations and the Public Defender, the District Administrative Judges shall develop lists of attorneys willing to accept appointment to represent indigent defendants at initial appearances before District Court commissioners in the district on a pro bono basis or at fees equivalent to those paid by the Public Defender to panel attorneys. The District Administrative Judges shall appoint attorneys from the lists as needed for specific proceedings or to be available for blocks of time.

(2) Processing of Invoices

Invoices for fees due to court-appointed attorneys shall be processed in accordance with procedures adopted by the State Court Administrator.

(c) General Advice by Judicial Officer

If the defendant appears at an initial appearance without an attorney, the judicial officer shall advise the defendant that the defendant has a right to an attorney at the initial appearance and that, if the defendant is indigent, (1) the Public Defender will provide representation if the proceeding is before a judge, or (2) a court-appointed attorney will provide representation if the proceeding is before a commissioner.

(d) Proceeding Before Commissioner

(1) Determination of Indigence

(A) If, in an initial appearance before a commissioner, the defendant claims indigence and desires a court-appointed attorney for the proceeding, the defendant shall complete a request and

affidavit substantially in the form used by the Public Defender and, from those documents and in accordance with the criteria set forth in Code, Criminal Procedure Article, §16-210 (b) and (c), the commissioner shall determine whether the defendant qualifies for an appointed attorney.

(B) If the commissioner determines that the defendant is indigent, the commissioner shall provide a reasonable opportunity for the defendant and the court-appointed attorney to consult in confidence.

(C) If the commissioner determines that the defendant is not indigent, the commissioner shall advise the defendant of the right to a privately retained attorney and provide a reasonable opportunity for the defendant to obtain the services of, and consult in confidence with, a private attorney. The commissioner shall further advise the defendant that, unless the attorney is able to participate, either in person or by electronic means or telecommunication, within a reasonable period of time, the initial appearance may need to be postponed, in which event the defendant will be temporarily committed until the earliest opportunity that the defendant can be presented to the next available judicial officer.

(2) If Initial Appearance Postponed

If pursuant to subsection (d)(1) of this Rule, the initial appearance needs to be postponed and the defendant was arrested without a warrant, the commissioner before recessing the proceeding, shall determine whether there was probable cause for

the charges and the arrest pursuant to Rule 4-216 (a).

(e) Waiver - Initial Appearance Before Judge or Commissioner

(1) If the defendant indicates a desire to waive the right to an attorney, the judicial officer shall advise the defendant (A) that an attorney can be helpful in explaining the procedure and in advocating that the defendant should be released immediately on recognizance or on bail with minimal conditions, (B) that it may be possible for the attorney to participate electronically or by telecommunication, and (C) that any waiver would be effective only for the initial appearance and not for any subsequent proceedings.

(2) If, upon this advice, the defendant still wishes to waive the right to an attorney and the judicial officer finds that the waiver is knowing and voluntary, the judicial officer shall announce and record that finding.

(3) A waiver pursuant to section (e) of this Rule is effective only for the initial appearance and not for any subsequent proceeding.

(4) Notwithstanding an initial decision not to waive the right to an attorney, a defendant may waive that right at any time during the proceeding, provided that no attorney has already entered an appearance.

(f) Participation by Attorney by Electronic or Telecommunication Means

(1) By State's Attorney

The State's Attorney may participate in the proceeding,

but is not required to do so. When the physical presence of the State's Attorney is impracticable, the State's Attorney may participate electronically or by telecommunication if the equipment at the judicial officer's location and the State's Attorney's location provides adequate opportunity for the State's Attorney to participate meaningfully in the proceeding.

(2) By Defense Attorney

When the physical presence of a defense attorney is impracticable, the attorney may consult with the defendant and participate in the proceeding electronically or by telecommunication if the equipment is at the judicial officer's location and the defense attorney's location provides adequate opportunity for the attorney to consult privately with the defendant and participate meaningfully in the proceeding.

(g) Provisional and Limited Appearance

(1) Provisional Representation by Public Defender

Unless the Public Defender has entered a general appearance pursuant to Rule 4-214, any appearance entered by the Public Defender at an initial appearance shall be provisional. For purposes of this section, eligibility for provisional representation shall be determined by the Public Defender at the time of the proceeding.

(2) Limited Appearance

Unless a general appearance has been entered pursuant to Rule 4-214, an appearance by a court-appointed or privately retained attorney 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.

(3) Inconsistency with Rule 4-214

Section (g) of this Rule prevails over any inconsistent provision in Rule 4-214.

Source: This Rule is new but is derived, in part, from amendments proposed to Rule 4-216 in the 181<sup>st</sup> Report of the Standing Committee on Rules of Practice and Procedure.

MARYLAND RULES OF PROCEDURE  
TITLE 4 - CRIMINAL CAUSES  
CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216, as follows:

Rule 4-216. PRETRIAL RELEASE - AUTHORITY OF JUDICIAL OFFICER;  
PROCEDURE

(a) Arrest Without Warrant

If a defendant was arrested without a warrant, upon the completion of the requirements of Rules 4-213 (a) and 4-213.1, 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.

Cross reference: See Rule 4-213 ~~(a)(4)~~ (a)(5).

(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.

Cross reference: See also Rule 3.5 (a) of the Maryland Lawyers' Rules of Professional Conduct.

(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 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) Attorney~~

~~(1) Generally~~

~~(A) Right to Representation by Attorney~~

~~(i) A defendant has the right to be represented by an attorney at an initial appearance before a judicial officer.~~

~~(ii) Unless the defendant waives that right, if the defendant is indigent within the meaning of the Public Defender Act (Code, Criminal Procedure Article, §16-201) and no other attorney has entered an appearance for the defendant, the defendant shall be represented by the Public Defender or, at a proceeding before a District Court commissioner, by an attorney appointed for that purpose by the District Court pursuant to subsection (e) (1) (A) (iii) of this Rule if the Public Defender does not provide representation.~~

~~(iii) Unless the Public Defender has agreed to represent eligible defendants at initial appearance proceedings before a commissioner, the District Administrative Judges of the District Court shall appoint attorneys to represent such defendants at those proceedings in the various districts and charge the fees and expenses for such representation against the State of Maryland. Fees and expenses shall be governed by the schedule~~

~~used by the Public Defender for panel attorneys.~~

~~(B) Entry of Appearance~~

~~The appearance of an attorney representing a defendant at an initial appearance may be entered in writing, electronically, or by telecommunication. If the entry is not in written form, the judicial officer shall note in the record of the proceeding the appearance and the method by which it was received.~~

~~(C) Appearance Separate and Distinct~~

~~For purposes of section (e) of this Rule, an initial appearance before a judicial officer shall be separate and distinct from any other stage of a criminal action. This stage commences with the appearance of the defendant before the judicial officer and ends when (i) the defendant is released, or (ii) the judicial officer has complied with all applicable requirements of sections (f) and (g) of this Rule.~~

~~(2) Duty of Public Defender or Appointed Attorney~~

~~(A) Provisional Representation by Public Defender~~

~~Unless the Public Defender has entered a general appearance pursuant to Rule 4-214, any appearance entered by the Public Defender at an initial appearance of the defendant shall be provisional. For purposes of this Rule, eligibility for provisional representation shall be determined by the Office of the Public Defender as of the time of the proceeding.~~

~~Cross reference: See Code, Criminal Procedure Article, §16-210 (c)(4) concerning provisional representation by the Public Defender.~~

~~(B) Entry of Limited Appearance~~

~~Provisional representation by the Public Defender or representation by a court-appointed attorney 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, unless representation by the Public Defender is extended or renewed pursuant to Rule 4-216.1.~~

~~(C) Effect of Conflict with Rule 4-214~~

~~Section (e) of this Rule prevails over any inconsistent provision in Rule 4-214.~~

~~(3) Waiver~~

~~(A) Unless an attorney has entered an appearance, the judicial officer shall advise the defendant that:~~

~~(i) the defendant has a right to an attorney at the initial appearance and for 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 conditions and 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) unless the Public Defender determines otherwise, the~~

~~Public Defender will not further represent the defendant unless the defendant timely applies for such representation and the Public Defender determines that the defendant is an indigent individual, as defined in Code, Criminal Procedure Article, §§16-101 (d) and 16-210;~~

~~(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 be represented by a private attorney retained by the defendant and that attorney is not able to be present in person or able to participate by electronic means or telecommunication, the hearing may need to be postponed, in which event the defendant will be temporarily committed until the earliest opportunity that the defendant can be presented to the next available judicial officer.~~

~~Committee note: Rule 4-213 (a) (2) requires the judicial officer to advise the defendant of the right to an attorney generally. In providing that advice, the judicial officer should explain that it pertains to the right to an attorney for all proceedings after the initial appearance under this Rule and any review hearing under Rule 4-216.1.~~

~~(B) If, after receiving this advice, the defendant indicates a desire to waive the right to an attorney at the initial appearance and the judicial officer finds that the waiver~~

~~is knowing and voluntary, the judicial officer shall announce and record that finding and proceed pursuant to sections (f) and (g) of this Rule.~~

~~(C) Any waiver found under this Rule is applicable only to the initial appearance under this Rule.~~

~~(4) Electronic or Telecommunication Appearance~~

~~(A) By State's Attorney~~

~~The State's Attorney may participate in the proceeding, but is not required to do so. When the physical presence of the State's Attorney is impracticable, the State's Attorney may participate in the proceeding electronically or by telecommunication if the equipment at the judicial officer's location and the State's Attorney's location provides adequate opportunity for the State's Attorney to participate meaningfully in the proceeding.~~

~~(B) By Defense Attorney~~

~~When the physical presence of a defense attorney is impracticable, the attorney may consult with the defendant and participate in the proceeding electronically or by telecommunication if the equipment at the judicial officer's location and the defense attorney's location provides adequate opportunity for the attorney to consult privately with the defendant and participate meaningfully in the proceeding.~~

~~(f) (e) 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 attorney;

(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)~~ (f) 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)~~ (f) 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.

Cross reference: See Code, Criminal Procedure Article, §5-201 (a) (2) concerning protections for victims as a condition of release. See Code, Criminal Procedure Article, §5-201 (b), and Code, Business Occupations and Professions Article, Title 20, concerning private home detention monitoring as a condition of release.

~~(h)~~ (g) Temporary Commitment Order

If an initial appearance before a commissioner cannot proceed as scheduled, the commissioner may enter a temporary commitment order, but in that event the defendant shall be presented at the earliest opportunity to the next available judicial officer for an initial appearance. If the judicial officer is a judge, there shall be no review of the judge's order pursuant to Rule 4-216.1.

Committee note: Section ~~(h)~~ (g) is intended to apply to a narrow set of compelling circumstances in which it would be

inappropriate or impracticable to proceed with the initial appearance as scheduled, such as the illness, intoxication, or disability of the defendant or the inability of a private attorney selected by the defendant to appear within a reasonable time.

~~(i)~~ (h) Record

The judicial officer shall 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~~ 4-213.1 (e) 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)~~ (e) 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)~~ (f) of this Rule, the conditions of the release.

~~(j)~~ (i) Title 5 Not Applicable

Title 5 of these rules does not apply to proceedings conducted under this Rule.

Source: This Rule is derived in part from former Rule 721, M.D.R. 723 b 4, and is in part new.