rules proposal anticipates that a different set of revised rules might be appropriate in the coming months depending on actions that could be taken by the Governor and the General Assembly in the 2014 legislative session. The Rules Committee notes that the Public Defender does not intend to provide representation at initial appearances before a commissioner in the absence of appropriations and in light of this Court's determination that he is not obligated to provide this representation, *see* Sept. 25 slip opinion at 21 n.5, and the Rules Committee rightly advises that the Public Defender may not know until April 2014 whether any funding will be appropriated for this purpose. The Rules Committee also notes that two task forces have been charged with making policy recommendations with regard to possible reforms of the pretrial release system, though the timing of any final reports by those task forces is uncertain.

The provisional nature of the recommended rules changes is similar to the emergency rules proposal submitted on February 3, 2012, on which the current proposal is modeled; this Court deferred action on this earlier proposal in light of pending legislative action and the Public Defender's motion seeking reconsideration and a stay of the Court's earlier opinion in this case. In the report setting forth the earlier proposal, the Rules Committee commented that the challenge of implementing the Court's earlier decision presented significant "logistical issues" and that "ultimate forms of implementation" of the Court's ruling would take time and require additional resources. The same is true today.

It is true today, as it was following the court's earlier decision, that it will be difficult to make indigency determinations necessary to determine an arrestee's

entitlement to publicly-funded counsel in the short space of time before the current and proposed rules require the arrestee to be presented to a commissioner. *See* Rules Committee's 173rd Report at 3. Commissioners will be asked, under these proposed rules, as under those proposed in February 2012, to perform a function that previously was performed only by a judge, by evaluating whether an arrestee's waiver of the right to counsel during the initial appearance is knowing and voluntary. *See id.* at 3-4; *cf.* Rule 4-215 (waiver inquiries by judge at first court appearance); Md. Code Ann., Cts. & Jud. Proc. § 2-607 (setting forth commissioner duties); *State v. Smith*, 305 Md. 489 (1986) (discussing limited powers of commissioners). As before, the proposed rules would permit attorneys to enter their appearance provisionally, with no further obligations to their clients in subsequent stages of the proceedings. The Rules Committee has acted commendably in swiftly devising temporary solutions to address the most immediate challenges of implementing the court's ruling, but the proposed changes illustrate how fundamentally the existing procedures would be altered by requiring either a lawyer or a waiver at an initial appearance within 24 hours after arrest.

Another challenge identified by the Rules Committee in February 2012 is equally present today. As the Rules Committee observed, accommodating lawyers at initial appearances creates "logistical problems" that "vary from one location to another and from one part of the day to another" and that can be address only through "collaboration between the [Office of the Public Defender], the District Court, the several State's Attorneys, and other necessary participants (sheriffs, police officials, and detention centers that, in some areas, serve as locations for initial appearances)." 173rd Report at 3.

In Baltimore City, the Division of Pretrial Detention and Services, which operates the Central Booking and Intake Facility, has worked out an arrangement with the Public Defender to accommodate his staff's need to consult arrestees between the time they are committed by a commissioner and the time they appear before a judge (with appointed counsel, under the Public Defender Act as amended last year). But that arrangement will have to be revised to permit lawyers to interview arrestees during the booking process, before they are presented to a commissioner, because the booking process takes place in a different part of the facility, and it occurs around the clock, not just between 7:00 a.m. and 10:00 p.m. Finding space for the lawyers on the booking floor may require displacing medical staff, law enforcement agencies, or court commissioners. The increased security costs that would be incurred by hiring escort officers is estimated to exceed half a million dollars annually. Other changes to the physical plant may be necessary to accommodate lawyers at the initial appearance before the commissioners. As the Court observed, the commissioners interview the arrestees in "a tiny narrow booth," with the commissioner separated from the arrestee by a "plexiglass partition." Sept. 25 slip opinion at 5. We are informed that the Public Defender believes that having the arrestee's lawyer on the commissioner's side of the partition would inhibit communication with the client and would convey the wrong message about the lawyer's role, but the Public Defender believes that having the lawyer on the arrestee's side of the partition presents a security risk. Creating a different configuration of the booths or finding a different location for them would require significant capital expenditures. The

additional staffing and capital costs projected for the Central Booking facility will undoubtedly be experienced in other jurisdictions as well.

In some respects, the challenges of implementing the Court's September 25 decision are even more daunting than the challenges presented by the earlier ruling. Because the Public Defender is not expected to provide representation in the absence of presently-lacking appropriations for that purpose, the proposed amendments to the rules anticipate having members of the private bar fill that role: "the District Administrative Judges of the District Court shall appoint attorneys to represent such defendants at [initial appearances before commissioners] and charge the cost of such representation to the State." Proposed Rule 4-216(e)(1)(A)(iii).[3] The Public Defender has estimated that the cost of supplying this representation through his office would cost $28 million annually. *See* Steve Lash, "Private Bar May Share Bail Work," *The Daily Record* (Oct. 14, 2013). (Though the plaintiffs have vigorously disputed the Public Defender's budget estimates in earlier rounds of this litigation, they should be able to stipulate that the sum is substantial.) We lack estimates of the cost for employing court-appointed members of the private bar in place of the Public Defender's staff, but the cost would undoubtedly be more than anyone has made provision for thus far. The Rules Committee previously advised the Court that, in 2011, district court commissioners conducted more than

[3] The suggestion that the costs would be charged to the State is apparently based on the Court's reference to an arrestee's "entitle[ment] to state-furnished counsel." Sept. 25 slip opinion at 21 n.15. Ordinarily, such costs are charged to the counties and Baltimore City, not the State. *See Office of the Public Defender v. State*, 413 Md. 411, 442 n.6 (2010) (Bell, C.J., dissenting); 76 Op. Md. Att'y Gen. 341 (1991).

176,000 initial appearances and that each typically lasts "about 25 to 35 minutes." 173rd Report at 2-3. It is unclear whether enough court-appointed lawyers will be available when needed—which is to say, 24 hours a day and seven days a week.

Even if there are enough lawyers to take the court appointments, the emergency rules proposal anticipates having those attorneys enter a provisional appearance on behalf of, then consult with, and then advocate on behalf of, an arrestee at the initial appearance. Statistics from Baltimore City show that more than half of those eligible for release by a commissioner are released on their own recognizance without the aid of a lawyer. Those who are committed despite the aid of this lawyer will then be entitled to representation by an assistant public defender, who will also enter a provisional appearance, conduct the same consultation with the client (perhaps with better information available), and then make arguments about the same factors relevant to setting conditions of release (this time before a judge rather than a layperson), typically within 24 hours after the first lawyer made the arguments. This may well be the best arrangement possible in these circumstances, but it cannot be denied that it represents a fundamental alteration of the existing procedures, is likely to result in extraordinary additional costs, and will likely result in delays in presentment.[4]

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[4] The proposed emergency rules anticipate that a request for counsel may delay the initial appearance; in those circumstances, the proposed rules authorize the commissioner to commit the arrestee to the custody of the sheriff or detention center temporarily. Proposed Rule 4-216(e)(3)(A)(viii). In 2005, the Public Defender brought a class action mandamus suit to enforce compliance with the 24-hour "prompt presentment" rule at Central Booking. Baltimore City Cir. Ct., *Rodney, et al. v. Murphy,* No. 24-C-05004405. Data stipulated to by the parties in that case showed that presentment to a commissioner

The situation today, in other words, is not very different from the situation that prompted the Public Defender to seek a stay last year, after the Court's January 4, 2012 opinion. Citing the many difficult funding constraints and logistical challenges, the Public Defender requested that the Court enter a stay of approximately six months, while cautioning that, "given the daunting nature of these logistical challenges, it is entirely possible that the Public Defender would need (and be later constrained to seek) additional time" beyond the conclusion of the legislative session and beyond the beginning of the next fiscal year. Feb. 2, 2012 Motion for Reconsideration and, in the Alternative, Stay of Issuance of Mandate, at 7; *see also* Aug. 11, 2011 Opening Brief of Appellant Paul B. DeWolfe, Jr., at 23 (identifying "important implementation issues [that] must be addressed before a meaningful remedy" can be instituted). Though the Court's decision has emphasized that the burdens of complying with the Court's ruling need not be borne by the Public Defender alone, the burdens remain, and they are substantial.

The right to counsel at an arrestee's initial appearance before a District Court commissioner declared by the Court's September 25 opinion radically alters existing pretrial criminal procedures, and substantial fiscal and logistical obstacles stand in the way of implementing those procedures while honoring the newly-declared right. Both this Court and the General Assembly should be given the opportunity to closely examine

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frequently was delayed because either the arrestee had not been delivered to Central Booking or the charging papers were not available. Presentment generally followed shortly after both the arrestee and the charging papers had been processed, which is the point at which one would expect client consultation to be most fruitful, suggesting that the period for client consultation may produce delays even when counsel is available.

whether existing procedures should be maintained, and both bodies should likewise be afforded an opportunity to find ways of surmounting the fiscal and logistical obstacles. The Court should stay enforcement of the judgment until the conclusion of the General Assembly's 2014 legislative session.

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 stay of enforcement of the judgment was served by mail on, and sent by e-mail to:

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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.	*	

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

PLAINTIFFS' RESPONSE TO STATE'S MOTION FOR STAY

Appellees Quinton Richmond, et al. ("Plaintiffs"), by their undersigned counsel, respectfully oppose the State of Maryland's Motion for Stay. The Motion should be denied because it raises the same issues that this Court previously rejected two years ago, when the Public Defender made the *same request* for a stay of enforcement of a decision granting a right to representation at initial bail hearings. See DeWolfe v. Richmond, Case No. 34, Sept. Term 2011, slip op. at 33 (Jan. 4, 2012) ("DeWolfe I") ("For the same reasons, we deny the Public Defender's request that we stay for some period of time implementation of our judgment that indigent defendants are entitled to public defender representation at the bail-hearing portion of the initial appearance before the Commissioner."). DeWolfe I is the law of the case and stare decisis, but, even if it is not accorded preclusive effect, its rationale applies with even greater force now that this Court has declared a constitutional right to counsel. Constitutional rights may not be delayed merely to accommodate the State's logistical and financial needs. Indeed, the State does not provide new grounds (particularly new factual grounds supported by the record or by affidavit as required by Rule 8-431(c)), or a change of circumstances that warrant reversing the ruling in DeWolfe I that a stay is improper. The State's goal is further delay, the antithesis of this Court's duty to vindicate constitutional rights.

ARGUMENT

I. The State's Motion to Stay Should Be Denied for the Same Reasons that this Court Denied the Public Defender's Request for a Stay in *DeWolfe I.*

A. This Court already has ruled that a stay of implementation of the right to counsel at initial bail hearings is not proper.

In Berra-esque fashion, the State's arguments conjure a powerful sense of déjà vu. Two years ago, the Public Defender made precisely the same request in his DeWolfe I briefing, arguing that the circuit court had erred or abused its discretion by issuing a declaratory judgment as to Plaintiffs' right to counsel at initial bail hearings without first deciding how that right would be implemented, or, in the alternative, declaring Plaintiffs' right to counsel without first issuing a stay so that the court or the parties could devise a remedy for implementation. As the Public Defender explained:

> The Public Defender proposed two alternative procedural courses for doing so: (1) the circuit court, under its broad equitable discretion, could decline to grant any of the relief requested until it were satisfied, through further proceedings (the nature of which was spelled out at length in court papers below), that the newly declared right to counsel could and would be meaningfully and appropriately implemented; or (2) the circuit court could *declare the right and then stay the enforcement of that right* pending further proceedings on an appropriate remedy or *until such time as the Public Defender and the District Court Defendants determine how to conduct and staff effectively counseled initial bail hearings.*

DeWolfe v. Richmond, No. 34, Sept. Term 2011, Opening Br. of P. DeWolfe 21-22 (emphasis added, footnote omitted). After arguing the unfairness of requiring representation without ordering funding, the Public Defender asked the Court to order a stay until funding and remedies were developed – the very relief sought by the State:

> Alternatively, this Court may affirm the declaration of the right and then *stay the enforcement of that right*, so as to make clear that the Public Defender need not begin to supply counsel at initial bail hearings, *until such time as the Public Defender has secured adequate resources to provide counsel effectively at initial bail hearings.* A post declaration stay of judgment is supported by ample precedent.

Id. at 26 (emphasis added). Thus, the relief sought by the State is exactly the same relief that the Public Defender had sought in DeWolfe I as its alternative remedy.

This Court squarely denied the Public Defender's request as legally improper. First, DeWolfe I commented that Maryland law does not countenance denying or delaying relief due to its potential imposition of a substantial burden on government:

> We never have held that declaratory judgment is inappropriate because a party may incur a consequential, albeit substantial burden, particularly under the circumstances here, where the statutory right to counsel is at issue in a class action suit.
>
> Moreover, the budgetary concerns of the Public Defender never have played a role in Maryland appellate decisions involving defendants' statutory right to counsel.

DeWolfe I, slip op. at 30. The Court then proceeded to discuss decisions holding that, despite governmental claims of budget problems and other difficulties in complying with the law, courts should never refrain from deciding violations of rights. See id. at 30-32. Following this discussion, DeWolfe I concluded that it had failed to find any authority supporting a stay under these circumstances:

> Moreover, *we have not uncovered any instance in which we have delayed implementation of a substantive right*, much less one that affects indigent defendants' statutory right to public defender representation, *out of concern for the financial costs attendant to implementation of that right.* And the Public Defender has not been able to direct us to any Maryland authority for such a proposition.

Id. at 32-33 (emphasis added). On these grounds, this Court expressly rejected the Public Defender's request for a stay pending development of an implementation plan:

> For these reasons, we hold that the Circuit Court did not err or abuse its discretion when it issued the declaratory judgment in the Plaintiffs' favor without also considering the Public Defender's fiscal concerns and crafting a remedy to address them. For the same reasons, ***we deny the Public Defender's request that we stay for some period of time implementation of our judgment that indigent defendants are entitled to public defender representation at the bail-hearing portion of the initial appearance before the Commissioner***.").

Id. at 33 (emphasis added). The issue thus was resolved clearly and definitively.

Plaintiffs recite this extensive detail from DeWolfe I because it is conspicuously absent from the Motion for Stay. The State never acknowledges, let alone distinguishes, this express holding by this Court on the very issue at hand. Their silence is telling. By

deciding this issue in a clear holding and thorough legal analysis, the DeWolfe I ruling is law of the case and stare decisis, which precludes repetitive re-litigation of the issue anew. As this Court has stated often, this is bedrock law:

> The doctrine of the law of the case is well settled in this State. In Waters v. Waters, 28 Md. 11, 22 (1867), we stated:
>
> > "No principle is better established than that a decision of the Court of Appeals once pronounced in any case is binding upon the court below ***and upon this Court in the subsequent proceedings in the same case***, and cannot be disregarded or called in question."

Turner v. Housing Auth. of Balto. City, 364 Md. 24, 31-32 (2001) (emphasis added). The fact that the State is seeking the stay and not the Public Defender or the District Court Defendants ("DCDs") does not alter the analysis. Not only is the State in privity with the DCDs, but it shares the same counsel and is making the same arguments that the Public Defender and the DCDs made in DeWolfe I and its aftermath, even citing the Public Defender's prior arguments as support. This Motion is DeWolfe I redux.

But even if the Court were to decline to apply its rules regarding law of the case and instead gives the State a second bite at the issue, this Court's analysis in DeWolfe I is every bit as persuasive and apt here as it was in DeWolfe I. Indeed, the State provides no reason why this Court should *not* apply its holding in DeWolfe I as to this latest effort at delay. The issues are the same, the law is the same, and the result should be the same.

B. As this Court held in *DeWolfe I*, stays are not appropriate when the Court has declared vital rights of a class of plaintiffs.

Should this Court decide to consider the issue anew, it need not look further than its legal analysis in DeWolfe I. There, this Court explained in depth why enforcement of vital rights should not be delayed merely to allow governmental entities time to obtain funds or make plans for implementation sometime in the future. As the Court stated,

> Moreover, ***the budgetary concerns of the Public Defender never have played a role in Maryland appellate decisions involving defendants' statutory right to counsel.*** See, e.g., [Webster v. State, 299 Md. 581, 623, 474 A.2d 1305, 1327 (1984)] (recognizing a right to counsel under the Public Defender Act at lineups conducted before the initiation of adversary proceedings, although the issue was not decided by the lower courts or

> briefed in the Court of Appeals, without mentioning the fiscal practicability of implementation). As Judge Alan Wilner explained, writing then for the Court of Special Appeals in Baldwin v. State, 51 Md. App. 538, 555, 444 A.2d 1058, 1069 (1982), "it goes without saying that ***reductions in the Public Defender's budget and his desire to be frugal have no relevance whatever*** in the matter" of whether a defendant qualified as "indigent" under the Public Defender statute. Judge Wilner emphasized the court's obligation to uphold the law, "and ***that obligation is not subject to or in any way dependent upon the level of appropriations received by the Public Defender.***" Id., 444 A.2d at 1069; cf. Office of the Pub. Defender v. State, 413 Md. 411, 427 n.12, 993 A.2d 55, 64 n.12 (2010) (commenting upon but not deciding the legal validity of COMAR 14.06.03.05A and D(2), and quoting with apparent approval the statement in Baldwin, 51 Md. App. at 555, 444 A.2d at 1069, that "it goes without saying that reductions in the Public Defender's budget and his desire to be frugal have no relevance whatever in the matter"), superseded on other grounds by 2011 Md. Laws, ch. 244.

DeWolfe I, slip op. at 30-31 (emphasis added). Although these statements addressed the Public Defender Act, the Court cited them more broadly for any delay or denial of vital substantive rights due to the potential budgetary impact. It cited to Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978), which involved delays in scheduling disability benefits hearings, and agreed with the First Circuit that:

> "the vindication of almost every legal right has an impact on the allocation of scarce resources. And ***the courts***, while mindful of the impact of remedies upon persons not before them, ***can hardly permit the legal rights of litigants to turn upon the alleged inability of the defendant fully to meet his obligation to others***. We agree ... also that it is likely that an ultimate, comprehensive solution to the problem of hearing delays *may well require congressional action.* ***We cannot in good conscience, however, deny relief to the plaintiffs pending such action***.

DeWolfe I, slip op. at 31-32 (quoting Caswell, 583 F.2d at 17-18 (citation omitted)) (emphasis added). More directly on point, the Court cited Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010), which considered the legality of the state's delegation to counties of the duty to implement the right to counsel without adequate funding. As this Court explained, Hurrell-Harring allowed the claims to proceed (including claims of a denial of the constitutional right to counsel for bail decisions) even though:

> "a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right. *We have consistently held that enforcement of a clear constitutional or statutory mandate is the proper work of the courts, and it would be odd if we made an exception in the case of a mandate as well-established and as essential to our institutional integrity as the one requiring the State to provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them.*"

DeWolfe I, slip op. at 32 (quoting Hurrell-Harring, 930 N.E.2d at 227 (citations omitted)) (emphasis added). This statement is as apt for the State's request to delay Plaintiffs' right to counsel as it was for the Public Defender's identical request two years ago. As this Court stated, it has never "delayed implementation of a substantive right, much less one that affects indigent defendants' statutory right to public defender representation, out of concern for the financial costs attendant to implementation of that right." DeWolfe I, slip op. at 32-33. Surely a constitutional right to counsel deserves as much protection.

Moreover, multiple amici briefs in DeWolfe I discussed numerous examples of cases declaring rights without delaying implementation or deferring to legislatures if substantial costs could adhere. For example, in the landmark right-to-counsel cases, from Powell v. Alabama to Gideon to In re Gault to Argersinger, relief was not delayed notwithstanding potential budget impact and implementation difficulties for the many thousands of affected cases. See Leadership Conf. on Civil and Human Rights Br. 6-9. To the contrary, as the Society of American Law Teachers ("SALT") discussed, the Supreme Court repeatedly rejected budget-based challenges in its right-to-counsel decisions.[1] See also Mayer v. City of Chicago, 404 U.S. 189, 196 (1971) (holding that

[1] See SALT Br. 27-29 (discussing Pickelsimer v. Wainwright, 375 U.S. 2 (1963) (per curiam order applying Gideon retroactively despite dissent's arguments of administrative impracticability); Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1972) (rejecting financial burden argument); Scott v. Illinois, 440 U.S. 361, 372-73 (1979) (discussing Argersinger's rejection of cost arguments in large part because "incarceration was so severe a sanction" that counsel was required "regardless of the cost to the States implicit in such a rule"); Alabama v. Shelton, 535 U.S. 654, 665-66, 668, 679-80 (2002)

"[t]he State's fiscal interest is, therefore, irrelevant" in deciding whether indigent non-felony criminal appellants could be required to pay for transcripts). Similarly, the civil rights cases cited by the Public Defender in DeWolfe I to support delay emphasized the importance of declaring rights without delaying to shape the remedy. See NAACP Legal Defense Fund Br. 34-36 (citing Hills v. Gautreaux, 425 U.S. 284, 291 (1976) (affirming that constitutional violation must be remedied "as rapidly as possible"); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 6 (1971) (discussing Brown v. Board of Education's mandate to establish unitary school systems "at once")).

But the key point is that the Court analyzed this issue in DeWolfe I and ruled that Plaintiffs' *statutory* right to counsel at initial bail hearings should not be stayed just to give the political branches time to decide on remedies. That ruling should apply with even greater force to Plaintiffs' *constitutional* right to counsel at those hearings. Indeed, when the General Assembly eventually signaled its desire to revise the Public Defender Act in response to the DeWolfe I decision, the Court gave the legislature that opportunity, as the right in question was established by statute and could be changed by statute. Here, however, the right in question is constitutional and thus falls squarely within this Court's Article IV judicial power to construe the Maryland Constitution. In asking this Court to delay Plaintiffs' fundamental constitutional right to due process by another six months, the State wants the Court to suspend its judicial function of declaring constitutional rights in favor of giving the executive and legislative branches yet another reprieve. This would result in the ongoing violation of the constitutional rights of thousands of Marylanders for months while the other branches continue to ponder and debate how bail hearings should proceed in Maryland. The Court should not accede to this demand for more delay.

This case also stands in stark contrast to DeWolfe I in another critical respect. Here, the parties charged with implementation, the District Court Defendants and the Public Defender, do not seek a stay and, presumably, can comply with DeWolfe II without needing a stay. See Resp. of Public Defender ("PD Resp.") at 1 (affirming

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(applying Argersinger to sentences of a suspended term of imprisonment despite arguments that this would impose significant new burden on the states)).

readiness to comply). Their willingness to proceed, subject only to funding, means that only one party, the State, opposes immediate implementation. Not coincidentally, the State also is the party responsible for funding; it could fund the representation today if necessary: the Governor can approve a deficiency appropriation request by the Public Defender at any time. The State seeks delay in order to avoid the costs of immediate implementation and perhaps to lower costs if an alternative hearing structure is developed. This is not a valid ground for denying Plaintiffs' constitutional right to counsel for another six months, particularly where, as here, the uncontradicted record shows that providing counsel will save money by decreasing the cost of incarceration. It is delay for delay's sake, and that is antithetical to this Court's fundamental duty to declare and protect constitutional rights. If a stay was not appropriate for the Public Defender and the District Court Defendants to determine how they would comply with DeWolfe I, it surely is not appropriate now when neither the Public Defender nor the District Court Defendants have advised the Court that they cannot implement the constitutional ruling in DeWolfe II.

One lesson of this seven-year-old case echoes the experience in many other institutional reform cases: until courts decide the constitutional or statutory rights, the state will not find the funds. Judge Nance declared a statutory and constitutional right to counsel three years ago, and yet the upshot of the State's Motion is that little progress has been made on devising a way to implement or to fund that right (at least little progress to the satisfaction of the executive and legislative branches) during the two-year grace period that followed DeWolfe I. Given this record of inaction, the real objective of the State is clear: to delay the realization of Plaintiffs' right to counsel for as long as possible. This record of inaction, coupled with the apparent ability of the Public Defender and the District Court Defendants to comply with DeWolfe II without a stay (subject to funding, of course) makes the State's request for a stay many orders of magnitude less justifiable than the Public Defender's request that this Court rejected in DeWolfe I.

II. The State's Grounds for Seeking Further Delay Are Chimeric.

In seeking extraordinary equitable relief from this Court – a stay of enforcement of the Court's holding that defendants are violating Plaintiffs' constitutional right to counsel at proceedings that decide their liberty or incarceration – the State addresses but one side of the ledger, speculating as to the burdens on governmental entities that could result from immediate implementation but nowhere considering the impact on Plaintiffs and fellow defendants in other jurisdictions if implementation were delayed for another six months or longer. This omission is not inadvertent. Under any fair balancing of the equities, the right of indigent criminal defendants to counsel to argue for their freedom easily outweighs the various logistical concerns cited by the State.[2]

The impact on Plaintiffs should not be so cavalierly ignored. As this Court found in DeWolfe II, initial bail decisions by commissioners are maintained by district court judges in approximately half of the cases, so the lack of counsel at the initial hearing often has dispositive effects thereafter. DeWolfe v. Richmond, No. 34, Sept. Term 2011, slip op. at 4-5 (Sept. 25, 2013) ("DeWolfe II"). The loss of freedom speaks for itself. If defendants lack attorneys, they are far more likely to be incarcerated, a profound constitutional injury that can never be remedied. Moreover, as the Court explained, incarceration has stark and often dire consequences:

> As numerous briefs to this Court pointed out, the failure of a Commissioner to consider all the facts relevant to a bail determination can have devastating effects on the arrested individuals. Not only do the arrested individuals face health and safety risks posed by prison stays, but the arrested individuals may be functionally illiterate and unable to read materials related to the charges. Additionally, they may be employed in low wage jobs which could be easily lost because of incarceration. Moreover, studies show that the bail amounts are often improperly affected by race.

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[2] The State does not set forth a legal standard that controls the Court's consideration of its motion for a stay. Although there have been suggestions over the years that the federal four-part test for a preliminary injunction should be used, to Plaintiffs' knowledge the Court has not yet articulated a clear standard. We apply here a balance-of-the-equities test in the absence of further guidance.

Id. at 5. If the State's request for a stay is granted, thousands of low-income individuals, many of whom are racial or ethnic minorities, will be unnecessarily incarcerated during the interim, many of them facing these grave collateral costs. It is difficult to understand how a stay inflicting these injuries on so many indigent individuals throughout Maryland could be justified by the State's asserted concerns.

Instead of explaining how the balance tilts in favor of a stay in light of the grave risk of harm to tens of thousands of individuals, the State reiterates a litany of concerns that have been raised in the past two years. Many of these are simply the assertions of counsel, unsupported by affidavits or any other references to the record. The Motion goes so far as to make pure third-hand hearsay assertions (e.g., "We are informed that the Public Defender believes that...") (Mot. at 5). For that reason alone, their assertions should be disregarded and the Motion denied. See Rule 8-431(c) (requiring that any factual assertions in motions must be supported either by record cites or by affidavits). Others pose speculative fears that are little more than worst-case musings about what could possibly go wrong. Some are simply dead-wrong. And still more are pleas to give the legislative and executive branches yet another reprieve to consider options for "surmounting" the burdens posed by Plaintiffs' constitutional rights even though those branches have spent the last 43 years failing to do anything to address the problem, and especially even though those branches failed to utilize the Task Force created for this very purpose two years ago in the wake of DeWolfe I. Their cries of imminent disaster are factually unsupported and substantively hyperbolic. If there were any credence to their concerns, the District Court Defendants and the Public Defender would have moved for a stay or for other relief, much as they did in DeWolfe I.

The State's principal goal here is not to facilitate implementation, but rather to buy time for the legislative branch to take adverse action. Indeed, in the State's companion Motion for Reconsideration, where the State ominously warns that implementation of a right to counsel would cause a loss of liberty for Defendants, the State tips its hand as to the type of measures some politicians want to take: delaying and possibly eliminating hearings or other steps that would curtail Plaintiffs' existing rights. No equities favor

giving legislators the opportunity to retaliate by taking steps to impair Plaintiffs' liberty or, as the State euphemistically puts it, "surmounting the fiscal and logistical obstacles" (Mot. at 9) and thereby gut the impact of the Court's decision.

With these principles in mind, Plaintiffs address the State's specific concerns.

1. *Promulgation of the new Rule.* The State's lead argument that the matter should be stayed so that the Court can consider these issues in its "legislative capacity" in the new implementing Rules (Mot. at 1-2) is now moot, as the Court will consider the proposed new Rules at the same time it considers the State's motion.

2. *Deference to the General Assembly.* Next, the State cites the General Assembly's statement nearly two years ago that it intended to "monitor" these issues and argues that the legislature should therefore be given "an opportunity to thoroughly consider the implications of the Court's decision ... and to craft an appropriate response." (Mot. at 2). Ever since the DeWolfe I decision, the General Assembly has had crystal-clear notice that these issues would come to a head. Instead of addressing them, it decided to overrule DeWolfe I by stripping the Public Defender Act of its right to counsel at initial bail hearings and then delegated responsibility for "thoroughly considering" these issues to a Task Force to be organized by State officials. As the 181st Rules Committee report makes clear, the Task Force (chaired by a Cabinet-level officer of the State) declined to proceed on these issues and instead opted to wait for the Court's decision in DeWolfe II. Thus, the legislative and executive branches repeatedly failed to act despite two years of notice and ample opportunity. At this point, asking for another opportunity for the legislature to act is nothing more than a naked plea for delay. Moreover, in light of the State's threats discussed above regarding a loss of liberty, it could have even worse results: an opportunity for the opponents of reform to gut Plaintiffs' rights. No equities favor giving politicians more time for delay or mischief.

3. *Funding for the representation.* The State's heavy focus on the fact that funding for the representation has not yet been specifically identified is both ironic and misleading. It is the State, after all, that will fund the Public Defender or private counsel for the representation. The State could approve a deficiency appropriation today if it

wanted. In effect, the State's repeated invocation of the Public Defender's prior concerns about the lack of pre-designated funding criticize the State itself for its lack of support of the Public Defender. Surely the State cannot cite its own failure to step up to the plate as an excuse for delaying implementation of enforcement of Plaintiffs' constitutional rights. But the argument also is disingenuous. The State tellingly does not advise the Court that the funds will not be made available if the Court denies its motions. It does not even provide any report on the status of its discussions with the Public Defender about funding and instead asks the Court to rule based on concerns raised two years ago that have been superseded by subsequent events. Thus, as in all of the other cases where budgetary concerns were raised by the Public Defender or other state agency, the assumption must be that the State will provide the funding to ensure that compliance with the state Constitution will occur. Indeed, the only obstacle to obtaining that funding comes from the State's own efforts at delay and avoidance. If the Court orders implementation to proceed, the funding will be provided, just as it has been provided in the past.

4. *Deference to the Task Force.* This point may be the least serious in the State's motion. Despite the Task Force's record of doing nothing to address these issues for the past year and a half (to the point that the November 1, 2013 statutory deadline for the Task Force's final report has already lapsed without the report), the State suggests that the Court defer to the Task Force to decide how to fashion reforms. (Mot. at 3). It is difficult to imagine a better strategy for further delay and inaction.

5. *Logistical concerns.* Rather than provide affidavits as to current logistical barriers to implementation, the State recites various concerns that were raised two years ago after DeWolfe I without demonstrating that these remain valid issues. See Mot. at 3-4. For example, the State asserts that it "will be difficult to make indigency determinations necessary to determine an arrestee's eligibility" before presentment to a commissioner. Id. The Public Defender has had ample experience since DeWolfe I making such determinations prior to bail review hearings, and it has had two years to plan to do so prior to commissioner hearings. There is no reason to believe that this cannot be done for commissioner hearings. The Public Defender, for instance, states point-blank

that he is "ready, willing, and able to provide representation at initial hearings before District Court Commissioners, assuming the State elects to discharge its obligations through the Office of the Public Defender ... and appropriates sufficient funds for this purpose." (PD Resp. at 1). Judge Clyburn has publicly stated to the Rules Committee that the District Court does not need to stay the decision. See Rules Comm. 181st Rep., letter from Judge Wilner, at 6. If neither the Public Defender nor the DCDs are standing up in this Court to assert their inability to comply, the State's reliance on past assertions of logistical problems should be rejected out of hand. The burden is on the State to provide current evidence of logistical difficulties, but, despite having had a month to gather support for its apocalyptic vision, the State provides no evidence at all.

6. *Baltimore City logistical concerns.* The State next argues that implementation cannot proceed in Baltimore City without substantially delaying hearings (and thus delaying some Plaintiffs' releases from detention) and without substantial capital and security expenditures for Assistant Public Defenders to participate alongside their clients. See Mot. at 5-6. Our information is to the contrary, but that is beside the point. If these problems exist, they should be documented properly. The Public Defender and the DCDs are parties to this proceeding, and they have not submitted any information to support these claims. Indeed, the timing concern does not make much sense. As alleged in the complaints below, criminal defendants in the Central Booking jail never get to see a commissioner until close to the end of the 24-hour presentment period, shuttling from holding cell to holding cell during the interim. There is plenty of time for the appointment of counsel, determination of indigency, and initial interviews to occur before the presentment occurs, much as those events currently occur during the intervening period between commissioner proceedings and bail reviews before a judge. In short, the State's concerns are unsupported, fanciful, and wrong.

7. *Private bar representation costs.* The State next complains that it does not know the cost if the private bar provides the representation and speculates that the supply of private lawyers might not be adequate. (Mot. at 6). The Department of Budget and Management can determine the cost readily, but, apparently, no inquiry has been made

since DeWolfe I. As for the supply of lawyers, if it were insufficient, surely the Public Defender would report a problem. This is idle worst-case speculation by the State.

8. *Delays in hearings due to use of provisional counsel.* Here, the State speculates that cases would be delayed if criminal defendants are represented by different counsel at initial hearings and at bail reviews. (Mot. at 7). Again, this is worst-case hypothesizing. Even if it were true, the Court does not need to issue a stay merely to allow further discussions on staffing options. Finally, the State again complains about its fears of "extraordinary costs" (Mot. at 7), but ignores the undisputed evidence of record that providing counsel saves money and lowers overall costs by preventing unnecessary costly incarceration. That the requested stay actually would *cost* money underscores the injustice and further tilts the balance of equities in favor of immediate implementation.

9. *Proposed Rule 4-216(e)(3)(A)(viii).* In footnote 4, the State argues that "a request for counsel may delay the initial appearance" because proposed new Rule 4-216(e)(3)(A)(viii) would authorize a commissioner to commit a defendant to the custody of the sheriff or the detention center temporarily. (Mot. at 7-8 n.4). Again, the State is wrong. This provision is intended to accommodate defendants who would rather wait for their selected attorneys to arrive than to proceed with available assistant Public Defenders (or panel representatives). The State's suggestion that the new Rule would be misused to allow commissioners to delay presentment, perhaps even past the 24-hour deadline, indicates that the Rule should be tightened, not that the right to counsel should be denied.

10. *Prior requests by the Public Defender for a stay.* Perhaps no argument by the State better illustrates the Motion's lack of merit than the State's extensive invocation of the Public Defender's *past* requests for a stay. See Mot. at 8. The Public Defender was not shy in the past about asking this Court for relief when he believed that compliance could not occur. His failure to file a similar motion now, followed by his clear statement to this Court that he is "ready, willing, and able to provide representation" if funding is available (PD Resp. at 1) shows that substantial progress has been made toward implementing Plaintiffs' constitutional rights. The last thing this Court should do is interfere with that progress by granting a stay that the Public Defender is not seeking.

11. *Giving the General Assembly another opportunity to address the issue.* Finally, the State urges the Court to give the General Assembly "the opportunity to closely examine whether existing procedures should be maintained" and "to find ways of surmounting the fiscal and logistical obstacles." (Mot. at 8-9). Having ignored the issue for over forty years, including the last two years when it had direct notice that the issue needed to be addressed, the General Assembly apparently now seeks a further reprieve so it can wait even longer. With due respect to the political branches, they have had more than enough opportunity to assert their prerogatives to step in and devise a better system. Plaintiffs, whose constitutional rights are violated every day that this matter is delayed, have waited long enough for relief. It is high time for the practice of incarceration without representation to come to an end at long last.

CONCLUSION

For the foregoing reasons, the Motion for Stay should be denied.

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 Stay 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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Mitchell Y. Mirviss

PAUL B. DEWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al.	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	No. 34
QUINTON RICHMOND, et al.	*	September Term, 2011

ORDER

WHEREAS, this Court filed an opinion and judgment in this case on January 4, 2012. Absent a timely petition for reconsideration, this Court's mandate would have issued on February 3, 2012, pursuant to Maryland Rule 8-606(b). Timely petitions for reconsideration of the January 4, 2012 decision were filed, along with motions to stay the Court's mandate. Consequently, on March 16, 2012, this Court stayed its mandate pending a decision on the petitions for reconsideration. Subsequently, memoranda were filed and oral argument was held on issues raised in the petitions for reconsideration, and

WHEREAS, this Court, on September 25, 2013, rendered an opinion and judgment on the motions for reconsideration. Therefore, the stay of mandate pending a decision on the petitions for reconsideration expired when that decision was rendered on September 25, 2013. This Court's mandate was issued on October 17, 2013, and

WHEREAS, the State of Maryland on October 23, 2013 filed in this Court a "MOTION TO RECALL MANDATE," stating that it "reasonably expected that the mandate would not issue before" the expiration of 30 days after the filing of the Court's September 25, 2013 opinion. Actually, as the above-recitation of the facts shows, the mandate had been stayed much longer than 30 days, and the stay of the mandate pending a decision on the motions for reconsideration

expired on September 25, 2013, and

WHEREAS, the State of Maryland on October 25, 2013 filed in this Court a "MOTION FOR RECONSIDERATION" of this Court's September 25, 2013 decision re-arguing the merits of the September 25th decision. Also on October 25, 2013, the State of Maryland filed in this Court a "MOTION FOR STAY OF ENFORCEMENT OF THE JUDGMENT," contending that, for various reasons, more time is needed for the State government to comply with this Court's September 25, 2013 decision, it is this 6th day of November, 2013

ORDERED, by the Court of Appeals of Maryland, a majority of the Court concurring, that the State's motions to recall the mandate, for reconsideration, and for stay of enforcement of the judgment be, and they are hereby denied. This Court's September 25th decision only directed the Circuit Court for Baltimore City to enter a declaratory judgment in accordance with the Court's opinion. No other form of relief was then involved. Under the Maryland Declaratory Judgments Act, a declaratory judgment simply "declare[s] rights, status, [or] other legal relations," Maryland Code (1974, 2013 Repl. Vol.), § 3-403(a) of the Courts and Judicial Proceedings Article. The State of Maryland's arguments concerning the time needed to comply with the declaratory judgment ordered by the Court's September 25, 2013 decision, as well as any arguments by other parties, may be made in the Circuit Court if, and when, any party files in the Circuit Court an application for "Further relief based on [the] declaratory judgment," § 3-412(a) of the Declaratory Judgments Act. *See, e.g., Nova v. Penske,* 405 Md. 435, 458-461, 952 A.2d 275, 289-291 (2008); *Bankers & Ship. Ins. v. Electro Enterprises,* 287 Md. 641, 652-653, 415 A.2d 278, 285 (1980).

/s/ Lynne A. Battaglia
Senior Judge
of the Majority Opinion

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November 7, 2013

VIA E-MAIL AND REGULAR MAIL

William F. Brockman, Esquire
Deputy Solicitor General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202

Re: Richmond, et al. v. Clyburn, et al.
Case No. 24-C-06-009911 CN

Dear Mr. Brockman:

We write to you in your capacity as counsel for the District Court Defendants ("DCDs"), namely Judge Clyburn, Judge Hargrove, David Weissert, Linda Lewis, and the Commissioners of the District Court in Baltimore City. Instead of writing to them directly, we ask that you please deliver this letter and the request therein to each of your clients.

As you no doubt are aware, the Court of Appeals has denied your motion to recall its mandate in *DeWolfe v. Richmond* after finding that a constitutional right to appointed counsel at initial bail hearings exists, and it also has denied your motions to reconsider its decision and to stay the mandate. Similarly, the Circuit Court of Baltimore City, acting through the Hon. Alfred Nance, has issued a declaratory judgment declaring the right to appointed counsel at initial bail hearings.

Thus, there is no question that Maryland's Constitution requires the appointment of counsel to represent indigents in initial bail hearings. Now that the Court of Appeals has issued its decision and mandate, and the Circuit Court has issued its declaratory judgment, there is no basis for the DCDs – all of whom are judicial officers sworn to follow the Constitution – not to apply and enforce the law at all initial bail hearings immediately.

Some have suggested that Plaintiffs must seek and obtain coercive relief in order for the DCD judicial officers apply and enforce the law. We do not understand why this is necessary. Once the Court of Appeals has announced the law, has issued its mandate, and the lower court

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has issued its declaratory judgment in conformity with the pronouncement of the Court of Appeals, the DCD judicial officers are duty bound to enforce that law.

The Oath of Office that each of the DCDs took required them to swear or affirm that he or she would "be faithful and bear true allegiance to the State of Maryland and support the Constitution and laws thereof[.]" Maryland Constitution, Article I, § 9. Refusing to apply the Constitution as interpreted by the Court of Appeals is hardly consistent with the Oath of Office. Indeed, the Maryland Constitution, Article I, § 11, provides for penalties for violating the Oath of Office.

Violating the Oath of Office and refusing to comply with the Constitution would violate the Maryland Code of Judicial Conduct contained in Rule 16-813. This Code applies to incumbent judges of the District Court. Id. at A-109.

Section 1 of the Maryland Code of Judicial Conduct states the obvious: "A judge shall comply with the law[.]" In Section 2, Rule 2.2 provides that "[a] judge shall uphold and apply the law and shall perform all duties of judicial office impartially and fairly." Rule 2.12 requires judges to ensure that judicial officers under their control "act in a manner consistent with the judge's obligations under this Code." Thus Judges Clyburn and Hargrove are obligated to ensure that the other DCDs adhere to the Constitution in the same manner as Judges Clyburn and Hargrove themselves must do.

These rules make explicit the obvious: as judges and judicial officers, the DCDs are required to follow the Constitution and the law of the State of Maryland. The Court of Appeals and the Circuit Court have declared what the law of Maryland is insofar as the appointment of counsel at initial bail hearings. If your clients do not intend to begin enforcing Plaintiffs' constitutional rights immediately as required by the Maryland Constitution and the Code of Judicial Conduct, please so advise us no later than next Wednesday, November 13, by the close of business. If they do intend to begin enforcing Plaintiffs' constitutional rights immediately, please let us know the date certain when Plaintiffs will be provided counsel at their initial bail hearings.

Finally, your clients should understand that compliance may occur either through representation by the Public Defender or by the appointment of counsel as contemplated in new proposed Rule 4-216(e), which has been approved by the Court of Appeals and will take effect when the Court is advised that implementation is ready to proceed. Given these options, there is no basis for your clients to decline immediate implementation due to an alleged lack of funding. As you know, this was discussed and resolved in the Court of Appeals on Monday in its session

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considering the 181st Report of the Rules Committee. Indeed, we are aware of a public statement by Judge Clyburn made yesterday and reported today indicating that the DCDs are ready to commence implementation.

For all of these reasons, we formally ask the DCDs to commence implementation immediately, as the Constitution, their Oath of Office, and the Code of Judicial Conduct require.

If you have any questions, please let us know.

Sincerely,

Michael Schatzow

Michael Schatzow

Mitchell Mirviss

Mitchell Y. Mirviss

cc: Julia Doyle Bernhardt, Esq.
Ashley E. Bashur, Esq.
A. Stephen Hut, Jr., Esq.

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QUINTON RICHMOND, et al.,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
THE HON. BEN C. CLYBURN, et al.,	*	BALTIMORE CITY
Defendants.	*	Case No. 24-C-06-009911 CN

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

PETITION FOR FURTHER RELIEF

Plaintiffs Quinton Richmond, et al., by their undersigned counsel, respectfully petition this Honorable Court pursuant to Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 3-412 for further relief against certain Defendants, namely the Hon. Ben C. Clyburn, the Hon. John R. Hargrove, Jr., David Weissert, Linda Lewis, and the Commissioners of the District Court for Baltimore City (collectively, the "District Court Defendants" or "DCDs"), and state as follows:

1. On September 25, 2013, the Court of Appeals of Maryland definitively ruled that Plaintiffs are entitled to representation by counsel at their initial bail hearings under the due process clause of Article 24 of the Maryland Declaration of Rights, affirming this Court's prior ruling of October 1, 2010 that Plaintiffs have a constitutional right to counsel under Article 24. See Ex. 1, Sept. 25, 2013 decision of the Court of Appeals ("DeWolfe II").

2. On October 13, 2013, the Court of Appeals of Maryland issued its mandate returning the case to this Court per the Court's September 25, 2013 decision. See Ex. 2, mandate of the Court of Appeals.

3. Pursuant to the directive of the Court of Appeals, on October 23, 2013, this Court issued a declaratory judgment specifically finding that Plaintiffs have a right to counsel at initial bail hearings under Article 24 of the Declaration of Rights, and that the District Court

Defendants have been violating that right by failing to provide counsel. See Ex. 3, declaratory judgment entered by the Court.

4. The District Court Defendants moved to vacate this Court's declaratory judgment, and this Court denied that motion on November 1, 2013. See Ex. 4, order by this Court denying the motion to vacate. In the Court of Appeals, their counsel, acting on behalf of the State of Maryland, moved to recall the mandate, to stay implementation of the Court's decision, and to reconsider the DeWolfe II decision. On November 6, 2013, the Court of Appeals denied these motions. See Ex. 5, order by the Court of Appeals.

5. Despite (i) the definitive ruling by the Court of Appeals affirming this Court's decision that Plaintiffs have a constitutional right to be represented by counsel at initial bail hearings, (ii) the mandate issued by the Court of Appeals, (iii) the declaratory judgment issued by this Court, (iv) the decision by this Court denying the DCDs' motion to vacate the declaratory judgment, and (v) the decisions by the Court of Appeals denying the State's motions to withdraw the mandate, to stay enforcement of the mandate, and for reconsideration, the District Court Defendants continue to violate Article 24 of the Declaration of Rights by failing to appoint counsel to represent Plaintiffs at initial bail hearings.

6. On November 7, 2013, *The Daily Record* published an article (posted on its website on November 6, 2013) reporting that Hon. Ben C. Clyburn, the Chief Judge of the District Court of Maryland and a District Court Defendant, had stated in an interview that he would not seek a further delay and instead would "focus his energy on ensuring that the right to counsel at initial bail hearings is implemented by the District Court commissioners who preside at them." The article then quoted him as stating, "'I'm not fighting anything, ... I am moving

forward. We are ready to go." A copy of this article is attached as Exhibit 6. See Ex. 6, Steve Lash, Top court won't stay lawyers-at-bail ruling, The Daily Record, Nov. 7, 2013.

7. Also on November 7, 2013, the day after the Court of Appeals denied the District Court Defendants' various motions, Plaintiffs wrote to the District Court Defendants (through their counsel) to demand that they comply with the Maryland Constitution and provide counsel to Plaintiffs at their initial bail hearings. Plaintiffs noted the reported statements by Judge Clyburn indicating that the District Court Defendants were ready to comply with the constitutional rights of Plaintiffs and asked for a response by November 13, 2013.

8. On November 5, 2013, the Court of Appeals approved new Rules establishing procedures that will be used for the appointment and participation of counsel in initial bail proceedings. The Court of Appeals directed that the new Rules would take effect immediately upon further Order of the Court of Appeals. A copy of these new Rules is attached as Exhibit 7.

9. The Court of Appeals was poised to order that the new Rules would take effect immediately (with Judge Adkins dissenting), but Judge McDonald pointed out that the new Rules are mandatory and, if implemented immediately upon approval by the Court of Appeals, would put courts across the state in immediate violation of the Rules, which no one wanted. The Judges favoring immediate implementation of the Rules, particularly Judge Battaglia, who authored the DeWolfe II decision, therefore proposed an alternative solution such that the implementation should coincide with the decision of this Court, which has primary jurisdiction over the case, that implementation should proceed. Judge Battaglia stated that the Rules would go into effect as soon as this Court ordered implementation to proceed. Six judges of the Court of Appeals voted to approve this approach, with only Judge Adkins opposed. (Judge Adkins sought a delay of the Rules until July 1, 2013, which all other Judges of the Court of Appeals

rejected.) Therefore, the Rules are ready to be implemented as soon as this Court gives a green light to proceed.

10. On November 14, 2013, the District Court Defendants filed a "Status Report" in this Court reporting that they will not in fact honor the constitutional rights of Plaintiffs unless and until they are directed to do so by this Court and the set of proposed Rule revisions approved by the Court of Appeals formally takes effect. See Ex. 8, Status Report (attachments omitted). The Status Report further contends that funding is not available currently for the appointment of counsel at initial bail hearings. The District Court Defendants do not explain how they would comply with an order to provide representation if no funding is available. Nor do they explain why they now are not willing to move forward and enforce Plaintiffs' constitutional rights when Judge Clyburn has told *The Daily Record* that the District Court Defendants are ready *now* to start providing representation.

11. As a result of the District Court Defendants' refusal to appoint counsel for Plaintiffs at their initial bail hearings, the constitutional rights of Plaintiffs are being violated every day. Literally scores of indigent criminal defendants are detained on a daily basis, unnecessarily, as a result. The District Court Defendants offer no timetable or specific circumstance upon which they will begin to comply with the Maryland Constitution.

12. Despite their statements in their Status Report indicating that they are not willing to move forward, steps have been taken that make implementation possible immediately as soon as this Court directs it and the Court of Appeals approves the new Rules upon notification of this Court's action. On November 26, 2013, Chief Judge Barbera of the Court of Appeals issued an Administrative Order establishing the appointment process for attorneys to represent Plaintiffs at their initial appearances before district court commissioners. A copy of this Administrative

Order is appended as Exhibit 9. This order, which is effectively immediately, directs the Chief Judge of the District Court to direct in turn the District Administrative Judge for that district to solicit qualified private attorneys in the district who would accept representation under the fee schedule used by the Public Defender for panel attorneys. These fees would be charged to the State of Maryland. The District Administrative Judge is further directed to compile a list of such attorneys and to develop procedures for notifying attorneys of efficient and effective procedures. See Ex. 9 at 2, ¶ 1. Later that day, Judge Clyburn issued a directive to the Administrative Judges in compliance with the Administrative Order. A copy of Judge Clyburn's November 26, 2013 memorandum is appended as Exhibit 10.

13. These directives eliminate any last possible barriers for proceeding forward with implementation. The procedures are in place so that counsel will be available as soon as the Court authorizes implementation of the Rules. That will occur as soon as this Court issues an order compelling compliance and implementation. Thus, the bureaucratic obstacles cited by the District Court Defendants in their Status Report are not valid.

14. The District Court Defendants cite no authority entitling them to shun their duty to comply with the Maryland Constitution and to enforce the constitutional rights of criminal defendants appearing in their courtrooms. Having sworn an oath to obey the Maryland Constitution, they have no discretion to ignore and knowingly continue to violate Plaintiffs' constitutional rights. See Md. Const., Art. I, § 9 (requiring an Oath of Office to "be faithful and bear true allegiance to the State of Maryland and support the Constitution and laws thereof"). Yet the District Court Defendants are doing so every day that they continue to fail to appoint counsel to represent indigent criminal defendants at their initial bail hearings.

15. The Status Report cites three reasons for the District Court Defendants' continued opposition to implementation: (a) the temporary delay in implementing the Rules; (b) the lack of authorized and appropriated funding to pay for counsel, which, the District Court Defendants contend, must come from the budgets of local jurisdictions; and (c) a curious claim that the District Court Defendants are not responsible for providing counsel to the indigent. See Ex. 8, Status Report at 4, 5, 7, and 8. None of these concerns is valid, and none justifies the District Court Defendants' opposition to compliance.

16. First, as discussed above, the Court of Appeals' decision to have the Rules go into effect after this Court directs implementation to proceed is no impediment – the Judges of the Court of Appeals in the majority stated that the Court of Appeals will act immediately after this Court acts. Indeed, if the District Court Defendants were to provide this Court with the same signal that Judge Clyburn provided to the Daily Record – that they are ready to go forward – the Court could order implementation, the Court of Appeals could issue the Rules, and the Constitution would be obeyed. But the District Court Defendants have given the exact opposite signal: they oppose immediate implementation and prefer to let the Executive and Legislative Branches take yet additional looks at the issues, all the while continuing to ignore Plaintiffs' constitutional rights to counsel.

17. The second concern raised by the District Court Defendants in their "Status Report" – a purported lack of funding – is even more groundless. In its September 25, 2013 decision, the Court of Appeals specifically held that Plaintiffs were entitled to "state-furnished" counsel at initial bail hearings regardless of whether the Public Defender is utilized. See Ex. 1, DeWolfe II, slip op. at 21 n.15. Judge Barbera's Administrative Order specifically directs the District Court Defendants to charge the fees and expenses for this representation "against the

State of Maryland." (Ex. 9 at 2). So, too, does Judge Clyburn's directive to the Administrative Judges. (Ex. 10). Nothing in these directives qualifies the right to counsel to apply to only those circumstances where the State pre-appropriates funds for the Public Defender or where local jurisdictions pre-authorize funds for counsel out of their local budgets. The right to counsel must be met regardless of whether the paying authorities have pre-appropriated funds for the representation. Indeed, the Rules and Judge Barbera's Administrative Order make clear that no such barrier exists: the cost for counsel and fees will be charged to the State. The representation therefore must be provided regardless of whether the State seeks and obtains reimbursement through supplemental appropriations, local jurisdiction contributions, or other means. In arguing that funds must be appropriated in advance before the right to counsel may be honored, the District Court Defendants effectively seek to reserve in the Executive and Legislative Branches an impermissible veto power over a fundamental constitutional right.

18. Contrary to the District Court Defendants' contention that the appropriation of funds must precede any exercise of the constitutional right to counsel, the Attorney General has stated in a formal opinion issued to the Public Defender that the right to counsel must be satisfied even when funds have not been pre-authorized:

> ***[T]he lack of funds does not mitigate the State's responsibility to provide counsel for indigent defendants*** to the extent required by the Sixth Amendment to the United States Constitution, which grants to a criminal defendant the right 'to have the Assistance of Counsel for his defence.' Gideon v. Wainwright, 372 U.S. 335 (1963).

Op. No. 91-044, 76 Md. Op. Atty. Gen. 341, 342 (1991) (emphasis added) (copy appended as Exhibit 11). This opinion necessarily applies with equal force to Plaintiffs' constitutional right to counsel at bail hearings under Article 24 of the Declaration of Rights. Although the District Court Defendants refer to this opinion in their "Status Report," they fail to advise the Court that it definitively states that the right to counsel must be honored by the judiciary even if funding by

the State or local jurisdictions has not been made available. As the opinion states, if funds are not provided, appointed counsel could be required to work for free on a pro bono basis. See id. at 344 ("It may be, therefore, that until funds become available, appointed counsel will have to serve without fee."). But that is not the case here. The Court of Appeals has directed that fees and expenses be charged to the State. If this Court orders the representation to commence, the funds will be provided once the bills are submitted. The bottom line, therefore, is that courts cannot shirk their duty to appoint counsel for indigent criminal defendants whenever constitutionally required. Neither the District Court Defendants nor the State can circumvent the right to counsel merely by failing to procure funding to pay for the representation in advance.

19. Finally, the District Court Defendants' suggestion that they lack the authority to appoint counsel to represent Plaintiffs in proceedings before them, see Ex. 8, Status Report at 7 ("The District Court defendants do not provide counsel to indigents") also is clearly wrong. Not only do Judge Barbera's Administrative Order and the pending Rules provide specific procedures for the DCDs to appoint counsel, but the Maryland Code explicitly provides this authority. See Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 2-102(a) ("a court may appoint ... counsel for a party if authorized by law or rule"). The Revisor's Note to CJP § 2-102 cites former Article 27A, § 6(f) (recodified as Md. Code Ann., Crim. Proc. § 16-213) as "allow[ing] a court to appoint counsel for a criminal defendant where the public defender is in [a] conflict of interest or where there is no public defender available." 1973 Md. Laws Ch. 2 at 37.

20. The Court of Appeals has previously confirmed the judiciary's authority to appoint counsel in criminal cases without advance approval of the Public Defender or the Executive Branch or appropriated funds by the Legislative Branch. See Off. of Pub. Defender v. State, 413 Md. 411, 434 (2010) (affirming that "the trial court, pursuant to its role as 'ultimate

protector' of the defendant's Constitutional right to counsel and the provisions of [former] Art. 27A, § 6(f), may appoint an attorney from the local OPD to represent the indigent individual, unless an actual and unwaived or unwaivable conflict of interest would result thereby"), superseded on other grounds by 2011 Md. Laws, ch. 244; Workman v. State, 413 Md. 475, 485-86 (2010) (same, referring to trial court's "authority" to appoint counsel), superseded on other grounds by 2011 Md. Laws, ch. 244.. While the General Assembly responded to these decisions by shielding the Public Defender from such appointment power, the judiciary retains its constitutional and statutory power to appoint other counsel as needed to protect indigent criminal defendants' constitutional right to counsel.

21. The District Court Defendants have acknowledged that they will not comply with the DeWolfe II decision unless and until this Court issues an order compelling them to provide representation for Plaintiffs. See Status Report at 3 (stating that the amended rules would not be given effect "until there have been further proceedings in this Court"); 5 (stating that members of the Court of Appeals directed the District Court Defendants to present their concerns "to this Court instead" when Plaintiffs file an application for further relief and that "further proceedings in this Court should proceed implementation of the Rules"). Thus, the constitutional rights of Plaintiffs will continue to languish unless the Court compels the District Court Defendants to honor those rights.

22. As discussed in the accompanying Memorandum of Points and Authorities in Support of this Petition, which is incorporated by reference, the Declaratory Judgment Act vests the Court with power to order further relief whenever defendants fail to honor the declaratory judgment entered by the Court. See CJP 3-412

22. As discussed in the accompanying Memorandum of Points and Authorities in Support of this Petition, which is incorporated by reference, Plaintiffs readily satisfy the requirements for a permanent affirmative injunction compelling the District Court Defendants to provide representation for Plaintiffs as well as a negative injunction prohibiting the District Court Defendants from conducting initial bail hearings for Plaintiffs without appointing counsel for them and further prohibiting the incarceration of Plaintiffs who have not been provided counsel at such hearings. Plaintiffs have already succeeded on the merits of their claims; they are suffering irreparable harm because their constitutional rights to counsel are being violated and will be violated in the future until this Court compels the District Court Defendants to act; Plaintiffs have no adequate remedy at law; and the public interest would not be served by continued violations of Plaintiffs' constitutional rights.

WHEREFORE, Plaintiffs Quinton Richmond, et al., respectfully request that this Honorable Court:

(1) Order the District Court Defendants to show cause why the following relief should not be granted;

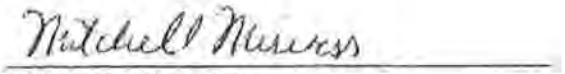
(2) Grant Plaintiffs' Petition for Further Relief; and either

(3) Enter an affirmative injunction directing the District Court Defendants to appoint counsel for Plaintiffs at their initial bail hearings; or,

(4) In the alternative, enter a negative injunction prohibiting the District Court Defendants from (a) conducting initial bail hearings for Plaintiffs without appointing counsel for them, and (b) directing the incarceration of Plaintiffs who have not been provided counsel at such hearings.

(5) Provide such further relief as the nature of this cause may require.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5th day of December 2013, copies of the foregoing Petition for Further Relief, Memorandum of Points and Authorities in Support, and proposed Orders to show cause and entering a permanent injunction (alternate versions proposed) were 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

No. 34
September Term, 2011

PAUL B. DeWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al.

v.

QUINTON RICHMOND, et al.

Barbera, C. J.
Harrell
Battaglia
Greene
Adkins
*Bell
Eldridge, John C. (Retired, Specially Assigned),

JJ.

Opinion by Eldridge, J.,
Barbera, C.J., Harrell and Adkins, JJ., dissent.

Filed: September 25, 2013

* Bell, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

Exhibit 1

In an opinion and order filed in this case on January 4, 2012, but not officially published because of motions for reconsideration, Judge (now Chief Judge) Barbera for the Court referred to "the complex procedural history of this case." Since that time, the case's procedural history has become a great deal more complex. Despite the historical complexity, however, the case both then and now has presented a single broad legal issue: whether an indigent criminal defendant is entitled to state-furnished counsel at the defendant's initial appearance before a District Court Commissioner pursuant to Maryland Rule 4-213(a).

I.

Plaintiffs in this case filed a complaint in the Circuit Court for Baltimore City alleging that they were denied Public Defender representation during their initial appearance proceedings before a District Court Commissioner. They named as defendants the District Court of Maryland, the Chief Judge of the District Court of Maryland, the Administrative Judge of the District Court in Baltimore City, and several other District Court officials in Baltimore City.[1] The plaintiffs asserted that the initial appearance proceeding, during which a District Court Commissioner determines whether there is probable cause for the defendant's arrest if the arrest occurred without

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[1] Hereafter, we shall refer to these defendants at "the District Court defendants." Later, the District Court of Maryland was dismissed as an improper defendant. The Public Defender, Paul DeWolfe, was joined as a defendant in this case after this Court remanded the case to the Circuit Court in 2010. *Richmond v. District Court of Maryland*, 412 Md. 672, 990 A.2d 549 (2010). Since this Court's opinion was filed on January 4, 2012, we granted the State of Maryland's motion to intervene as a defendant.

a warrant and whether an arrested individual is to be detained, or released on bail, or released on his or her own recognizance, is a critical stage of the criminal proceeding requiring state-furnished counsel under the provisions of the Public Defender Act, Maryland Code (2001, 2008 Repl. Vol., 2012 Supp.), §16-204(b)(2) of the Criminal Procedure Article. They also relied upon the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. In addition, they argued that the failure to furnish counsel violated the due process protections of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights. Plaintiffs sought a declaratory judgment and an injunction to enjoin the defendants from violating the plaintiffs' right to representation at initial appearances before District Court Commissioners.

Plaintiffs Quinton Richmond, Jerome Jett, Glenn Callaway, Myron Singleton, Timothy Wright, Keith Wilds, Michael LaGrasse, Ralph Steele, Laura Baker, Erich Lewis, and Nathaniel Shivers were each separately arrested for unrelated criminal activity occurring in Baltimore City. Each plaintiff was arrested for a "serious offense" as defined in the Public Defender Statute, § 16-101(h)(1)-(4). Each plaintiff was detained at the Central Booking Jail in Baltimore City and brought before a Commissioner for an initial appearance pursuant to statute and Maryland Rule 4-213.[2]

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[2] Sections 2-607(c)(1) and (2) of the Courts and Judicial Proceedings Article detail the duties of Commissioners:

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

(continued...)

While the Rules indicate that a defendant's first appearance must be before a "judicial officer," the Rules also provide that a "judicial officer" may be either a District Court Commissioner or a Judge. Maryland Rule 4-102(f). In each criminal case involving the plaintiffs in this civil case, the judicial officer was a District Court Commissioner. The parties agree that it is general practice that Commissioners, rather than District Court Judges, preside over initial appearances. A Commissioner need not be a lawyer. *See* Maryland Code (1974, 2013 Repl. Vol.) § 2-607(b) of the Courts and Judicial Proceedings Article; Rule 4-102(f); *State v. Smith*, 305 Md. 489, 501-505, 505 A.2d 511, 517-519, *cert. denied*, 476 U.S. 1186, 106 S.Ct. 2925, 91 L.Ed.2d 552 (1986).

The District Court Commissioner determines at the initial appearance, pursuant to Maryland Rule 4-216, whether a plaintiff is eligible for pretrial release. If a defendant was arrested without a warrant, the Commissioner determines whether there

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[2] (...continued)

> (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."

Maryland Rule 4-213 specifically states that a judicial officer must inform the defendant of the charges against him or her. The defendant must also be informed of his right to counsel at trial and, when applicable, his right to a preliminary hearing.

was probable cause for each charge and for the arrest. If there was no probable cause, the defendant is released with no conditions of release.

If the Commissioner finds that there was probable cause, Rule 4-216(f) details the numerous factors a Commissioner must take into consideration when imposing "on the defendant the least onerous condition or combination of conditions of release" that serves the purposes of "ensur[ing] the appearance of the defendant," "protect[ing] the safety of the alleged victim," and "ensur[ing] that the defendant will not pose a danger to another person or to the community." These factors include, among other things, the nature and circumstances of the offense charged, the defendant's prior record of appearance at court proceedings, and the defendant's family ties, employment status, financial resources, reputation, character, and length of residence in the community and in the State. The recommendation of the State's Attorney and any information presented by the defendant or defendant's counsel also must be considered.

If a Commissioner does not release an arrested individual following this initial appearance, the defendant 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."[3] As this Court pointed out in its January 4, 2012, opinion, the Commissioner's

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[3] *See* § 5-215 of the Criminal Procedure Article, which states:

> "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,
>
> (continued...)

initial bail decision is not often changed during subsequent review, with the bail set by the Commissioner being maintained by the Judge in nearly half of the bail reviews.

As numerous briefs to this Court pointed out, the failure of a Commissioner to consider all the facts relevant to a bail determination can have devastating effects on the arrested individuals. Not only do the arrested individuals face health and safety risks posed by prison stays, but the arrested individuals may be functionally illiterate and unable to read materials related to the charges. Additionally, they may be employed in low wage jobs which could be easily lost because of incarceration. Moreover, studies show that the bail amounts are often improperly affected by race.

In Baltimore City, an arrestee's initial appearance occurs in a "tiny narrow booth" in Central Booking Jail, which does not allow the public to attend the proceeding.[4] A record of the proceeding is not made. The Commissioner is separated from the arrested individual by a plexiglass partition, and all communications take place through a speaker system. There are no prohibitions against attorneys participating in these proceedings, but, in practice, arrested individuals are rarely represented by an attorney during an initial appearance before the Commissioner. The State's Attorney, however, maintains a 24-hour "war room" in Central Booking for the purpose of making recommendations to the Commissioner regarding bail. These

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[3] (...continued)
at the next session of the Court."

[4] As in our earlier opinion, we accept the plaintiffs' description of the initial appearance procedures, as their description was not contested by the other parties.

communications usually occur *ex parte* and without any public record. Without a public record of the proceedings before the Commissioner, the plaintiffs point out that "it [is] impossible to review what a Commissioner or arrestee said or to understand the basis for the ruling."

At each of the initial appearances involved in this case, the plaintiff requested an attorney to represent him or her, and also informed the Commissioner that he or she was unable to afford an attorney. Despite the plaintiffs' requests, the Commissioner declined to appoint attorneys and proceeded by setting bails.

In the present civil case, the District Court defendants filed a motion in the Circuit Court for summary judgment as to all claims, and the plaintiffs filed a cross-motion for partial summary judgment. The Circuit Court granted the defendants' motion for summary judgment and entered final judgment for the District Court defendants. The plaintiffs timely appealed and, while the case was pending in the Court of Special Appeals, this Court issued a writ of certiorari. After briefing and oral argument in this Court, we held that, under Rule 2-211(a), the Circuit Court should have dismissed the complaint because of the plaintiffs' failure to join the Public Defender as a party to the action. *See Richmond v. District Court of Maryland*, 412 Md. 672, 990 A.2d 549 (2010). We vacated the Circuit Court's judgment and remanded the case to the Circuit Court with directions to dismiss the complaint unless the plaintiffs joined the Public Defender as a party.

In the Circuit Court on remand, the Public Defender was joined as a defendant in the action. After some procedural skirmishes in the Circuit Court, which we shall not recount here, the Circuit Court granted the plaintiffs' motion for summary judgment and filed a declaratory judgment. The court, however, denied the plaintiffs' request for injunctive relief. The Circuit Court determined that the plain language of the Public Defender Act, § 16-204(b), required the Public Defender to represent indigents at the initial appearance proceedings before a commissioner. The Circuit Court also decided that the failure to provide representation during initial appearances "violated Plaintiffs' due process rights." The Circuit Court stayed its judgment pending appellate review.

Both the Public Defender and the District Court defendants noted timely appeals. The plaintiffs cross-appealed and also filed in this Court a petition for a writ of certiorari. The questions presented by the plaintiffs queried whether indigent defendants have a right to counsel at initial appearance proceedings before District Court Commissioners under any of the following: Maryland's Public Defender Act, the Sixth Amendment, Article 21 of the Maryland Declaration of Rights, the Federal Constitution's due process guarantee or the Maryland Declaration of Rights' due process guarantee. The Public Defender filed a cross-petition for certiorari, questioning whether the Circuit Court erred in issuing its declaratory judgment "without in any way addressing remedy and how . . . [a] funding shortfall" created by the need to provide counsel at initial appearances before commissioners "might be practicably addressed." This Court granted the petitions. *DeWolfe v. Richmond*, 420

Md. 81, 21 A.3d 1063 (2011).

In the opinion filed January 4, 2012, this Court held that, under § 16-204(b) of the Public Defender Act, indigent defendants are entitled to public defender representation at any initial appearance proceeding conducted before a commissioner. Because the case was decided on statutory grounds, the Court did not reach the state and federal constitutional issues.[5] The Court held that:

> "The initial appearance before the Commissioner – including the bail hearing that is part of that event – is clearly encompassed within a 'criminal proceeding,' and may result in the defendant's incarceration. The only remaining question is whether the bail determination is a 'stage' of that proceeding. Doubtless it is."

We pointed out that the Commissioner must take into account numerous considerations when determining whether a defendant is to be released on his or her own recognizance or incarcerated pending the subsequent District Court bail review. Given the number of factors considered by the Commissioner, we held that the "presence of counsel for that determination surely can be of assistance to the defendant in that process." Moreover, the Court gave credence to the plaintiffs' argument that

> "'[u]nrepresented suspects are more likely to have more perfunctory hearings, less likely to be released on recognizance, more likely to have higher and unaffordable

[5] With regard to the other questions presented in the petitions and briefs, this Court held that the Circuit Court did not err in its declaratory judgment determining that plaintiffs were entitled to appointed counsel, notwithstanding the Public Defender's alleged "funding shortfall." We also held that the "Circuit Court's denial of the Plaintiffs' request for injunctive relief does not erect a *res judicata* bar to the Plaintiffs' seeking future injunctive relief."

> 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.'"

This Court additionally rejected the District Court defendants' argument that any wrong committed by failing to furnish counsel during the initial appearance proceeding was ameliorated by the later bail review hearing by a judge. We held that "the bail-hearing portion of the initial appearance before the Commissioner is a 'stage' of the criminal proceeding, as that term is employed in § 16-204(b)(2) of the Public Defender Act." As a stage of a criminal proceeding, the Public Defender Act then provided that indigent defendants are entitled to appointed counsel during the initial appearance proceedings.

The Court further held on January 4, 2012, that, because the Public Defender Act then provided for representation for indigent persons at "any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result," representation should be provided not only to those charged with a "serious offense," but to all indigent persons requesting representation. The Court did not decide whether an indigent criminal defendant had a federal or state constitutional right to state-furnished counsel at an initial appearance before a District Court Commissioner.

While motions for reconsideration of our January 4, 2012, opinion and order were pending, the General Assembly passed and the Governor signed on May 22, 2012,

Chs. 504 and 505 of the Acts of 2012.[6] These Acts were "emergency measures," with most of the provisions, including the provisions involved in this case, taking effect upon enactment on May 22, 2012.[7] Among other things, the statutes amended § 16-204(b)(2)(ii) of the Public Defender Act to provide: "Representation is not required to be provided to an indigent individual at an initial appearance before a District Court commissioner."[8]

As such, the first opportunity an arrested indigent individual would have to consult with counsel furnished under the Public Defender Act would occur during the District Court Judge's bail review proceeding. This bail review proceeding should occur directly after the detainee's initial appearance before the Commissioner if the District Court is in session. If the District Court is not in session, however, during intervals such as weekends and holidays, the bail review hearing will occur at the

[6] The two statutes appear to be identical. Ch. 504 had been Senate Bill 422, and Ch. 505 had been House Bill 261.

[7] *See* Article XVI, § 2, of the Maryland Constitution, providing that laws enacted by the General Assembly shall take effect no earlier than June 1 of the year in which they were passed unless a law is declared to be an emergency law and was passed by a vote of three-fifths of the members of each House. An emergency law may take effect when enacted.

[8] The text of the amended portion of § 16-204(b)(2) of the Public Defender Act reads:

> "(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."

District Court's next session. This delay until the District Court's next session could result in an individual being incarcerated through the weekend or holidays before having an opportunity to consult with appointed counsel or challenge the bail set by the Commissioner.

Due to the above-quoted legislative change in the Public Defender Act, some of the parties filed motions asking this Court to decide whether there was a federal or state constitutional right to state-furnished counsel for indigent defendants at their initial appearances before District Court Commissioners. Other parties argued that, before deciding any constitutional issues, this Court should remand the case to the Circuit Court for development of a "fuller factual record based on actual experience under the revised statute." The State of Maryland filed a motion to intervene, and this Court on July 9, 2012, granted the motion.

On August 22, 2012, the Court issued an amended order determining that "a remand for further development of the factual record [was] unnecessary" and 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 States Constitution and Article 24 of the Maryland Declaration of Rights."

Supplemental briefs by the parties and *amicae* were filed, and the Court has heard

additional oral arguments.

Because of the amendment to the Public Defender statute, this Court must decide whether an indigent criminal defendant has a constitutional right to state-furnished counsel at an initial appearance before a District Court Commissioner. We shall hold 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. We shall not decide whether an indigent defendant, at an initial appearance before a District Court Commissioner, has a right to state-furnished counsel under the Sixth or Fourteenth Amendments to the Federal Constitution or under Article 21 of the Maryland Declaration of Rights.[9]

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[9] Our decision in this case is based *solely* upon the Due Process component of Article 24 of the Maryland Declaration of Rights. *See Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983). *See also, e.g., Doe v. Dept. of Pub. Safety and Correctional Services*, 430 Md. 535, 547 n.11, 62 A.3d 123, 130 n. 11 (2013)("[o]ur judgment is based exclusively upon our interpretation of the protections afforded by . . . Maryland's Declaration of Rights"); *Marshall v. State*, 415 Md. 248, 260, 999 A.2d 1029, 1035 (2010)(" we shall rest our decision, as we have often done in the past, solely upon the Maryland provisions"); *Myer v. State*, 403 Md. 463, 475, 943 A.2d 615, 622 (2008)(the trial court's error was "a violation of Maryland . . . law separate and apart from any rights [the defendant] may have under the Sixth Amendment to the United States Constitution"); *Maryland Green Party v. Maryland Bd. of Elections*, 377 Md. 127, 139, 832 A.2d 214, 221 (2003)("'We simply are making it clear that our decision is based exclusively upon the [Maryland Constitution] and is in no way dependent upon the federal [Constitution]'"). *See also Ohio v. Robinette*, 519 U.S. 33, 36–37, 117 S.Ct. 417, 420, 136 L.Ed.2d 347, 353 (1996); *Arizona v. Evans*, 514 U.S. 1, 6–10, 115 S.Ct. 1185, 1189–1190, 131 L.Ed.2d 34, 41–42 (1995).

Furthermore, as this Court has pointed out on numerous occasions, many provisions of the Maryland Constitution, such as Article 24 of the Declaration of Rights, have counterparts in the United States Constitution, and we have said that the Maryland provision is *in pari materia* with its federal counterpart. Nevertheless, we have repeatedly emphasized that

> "simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does *not* mean that the provision will *always* be interpreted or

(continued...)

II.

Article 24 of the Maryland Declaration of Rights provides as follows:

> **"Article 24. Due Process.**
>
> "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."[10]

The procedural due process component of the Maryland Declaration of Rights' Article 24 has long been construed by this Court to require, under some circumstances, state-furnished counsel for indigent defendants. *See, e.g., Coates v. State*, 180 Md. 502, 512, 25 A.2d 676, 680, *cert. denied*, 317 U.S. 625, 63 S.Ct. 33, 87 L.Ed. 506 (1942) ("In these cases now before us, our conclusion is that counsel should have been appointed as an essential of due process of law"); *Jewett v. State*, 190 Md. 289, 296-297, 58 A.2d 236, 238 (1948) ("Without attempting to trace the tenuous line between what does and what does not constitute due process in this respect, we may say that we think the wise practice, in any serious case, is to appoint counsel unless the accused

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[9] (...continued)
applied in the same manner as its federal counterpart." *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 621, 805 A.2d 1061, 1071 (2002)

This is especially true of Article 24 of the Maryland Declaration of Rights. This Court has held on several occasions that the protections provided under Article 24 are broader than those found in the United States Constitution. *See, e.g., Tyler v. College Park*, 415 Md. 475, 499-500, 3 A.3d 421, 434-435 (2010); *Dua v. Comcast Cable of Maryland, Inc., supra*, 370 Md. at 621, 805 A.2d at 1071 (2002); *Attorney General v. Waldron*, 289 Md. 683, 714, 426 A.2d 929, 946 (1981).

[10] Prior to 1978, Article 24 of the Declaration of Rights was numbered Article 23.

intelligently waives such appointment"). This interpretation of Article 24 pre-dates, by several years, the Court's construction of Article 21 to require state-furnished counsel for criminal defendants.[11]

The above-cited cases, and similar early cases, did not go so far as holding that indigent defendants had a due process right to state-furnished counsel in any proceeding involving incarceration. Nevertheless, this Court did so hold in *Rutherford v. Rutherford*, 296 Md. 347, 357-364, 464 A.2d 228, 234-237 (1983).[12] In *Rutherford*,

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[11] Article 21 of the Declaration of Rights states (emphasis added):

> **"Article 21. Rights of accused; indictment; counsel; confrontation; speedy trial; impartial and unanimous jury.**
>
> "That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; *to be allowed counsel*; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."

The wording of the Right-to-Counsel Clause in Article 21 has remained the same since the Constitution of 1776. Nevertheless, this Court's interpretation of the Clause has been an evolving process. Throughout most of our history since 1776, the clause was not construed as requiring the appointment of counsel for indigents but was "construed . . . as merely doing away with the common law rule that denied representation by counsel," *Edwardsen v. State*, 220 Md. 82, 89, 151 A.2d 132, 136 (1959), and cases there cited. By the 1980s, however, we had taken the position that "[t]here is no distinction between the right to counsel guaranteed by the Sixth Amendment and Art. 21 of the Maryland Declaration of Rights." *State v. Tichnell*, 306 Md. 428, 440, 509 A.2d 1179, 1185, *cert. denied*, 479 U.S. 995, 107 S.Ct. 598, 93 L.Ed.2d 598 (1986). More recently, we have emphasized that the Right-to-Counsel Clause of Article 21 is an "independent Maryland Constitutional provision," and that Supreme Court decisions under the Sixth Amendment would not be binding with regard to the Right-to-Counsel Clause of Article 21. *Perry v. State*, 357 Md. 37, 85-87 and n.11, 741 A.2d 1162, 1188-1189 and n.11 (1999).

For a detailed history of Article 21, *see* Judge Wilner's opinions in *Perry v. State*, *supra*, and *Baldwin v. State*, 51 Md.App. 538, 444 A.2d 1058 (1982).

[12] The *Rutherford* opinion, 296 Md. at 364 n.6, 464 A.2d at 237 n.6, noted that "[f]or several (continued...)

two defendants in civil contempt cases were found to be in contempt and were sentenced to jail. Neither defendant was represented by counsel, and neither defendant could afford counsel. This Court initially observed in *Rutherford* that the Sixth Amendment and "Article 21 of the Maryland Declaration of Rights guarantee[d] a right to counsel, including appointed counsel for an indigent, in a criminal case involving incarceration," and that this "right extends to every 'critical stage' of the criminal proceedings." *Rutherford*, 296 Md. at 357-358, 464 A.2d at 234. *Rutherford* went on to observe that the civil contempt proceedings were not stages of criminal proceedings and that, therefore, the Sixth Amendment and Article 21 were not directly applicable.

The Court in *Rutherford* then turned to the requirements of due process, stating (296 Md. at 358, 464 A.2d at 234, emphasis added):

> "Nevertheless, the constitutional right to counsel is broader than the specific guarantee of the Sixth Amendment and Article 21 of the Declaration of Rights. Under certain circumstances, the requirements of due process include a right to counsel, with appointed counsel for indigents, in civil cases *or other proceedings* not constituting critical stages of criminal trials."

The opinion then pointed out that the right to state-furnished counsel for indigents extends "to *civil* juvenile delinquency proceedings because of 'the awesome prospect of incarceration in a state institution,'" *Rutherford, ibid.*, quoting *In re Gault*, 387

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[12] (...continued)
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."

U.S. 1, 36-37, 87 S.Ct. 1428, 1449, 18 L.Ed.2d 527, 551 (1967).

The *Rutherford* opinion then reviewed cases throughout the country, pointing out that the majority of jurisdictions held that there was a right to state-furnished counsel for indigents in proceedings like the ones before the Court. This Court also pointed out that there was a minority rule that "special circumstances" were required before the right to counsel attached in such proceedings. *Rutherford* then held as follows (296 Md. at 360-361, 464 A.2d at 235, emphasis added):

> "We believe that the majority view is sound. A defendant's *actual incarceration in a jail, as a result of a proceeding at which he was unrepresented by counsel* and did not knowingly and intelligently waive the right to counsel, is fundamentally unfair. As repeatedly pointed out in criminal and civil cases, *it is the fact of incarceration, and not the label placed upon the proceeding, which requires the appointment of counsel* for indigents. With regard to the minority 'special circumstances' rule . . . , very often the 'special circumstances' requiring the assistance of counsel are not apparent until the defendant is represented by counsel. Moreover, the deprivation of liberty is itself a 'special circumstance' requiring the assistance of counsel."

The principle set forth in *Rutherford*, that the due process right to counsel under Article 24 of the Declaration of Rights is broader than the right to counsel under Article 21 or the Sixth Amendment has been reaffirmed by the Court on numerous occasions. *See, e.g., Grandison v. State*, 425 Md. 34, 54, 38 A.3d 352, 364 (2012), *cert. denied*, 133 S.Ct. 844, 184 L.Ed.2d 667 (2013) ("'We recognized in *Rutherford*

v. Rutherford, 296 Md. 347, 358, 464 A.2d 228 (1983) that the constitutional right to counsel is broader than the specific guarantee of the Sixth Amendment and Article 21 of the Maryland Declaration of Rights in that, under certain circumstances, the requirements of due process include a right to counsel, with appointed counsel for indigents, in civil cases or other proceedings not constituting stages of criminal trials,'" quoting *Sites v. State*, 300 Md. 702, 717, 481 A.2d 192, 199 (1984)); *Janice M. v. Margaret K.*, 404 Md. 661, 679-680 n.7, 948 A.2d 73, 83-84 n.7 (2008) ("We have . . . read Maryland's due process clause more broadly than the federal constitution in granting the right to counsel, *see Rutherford v. Rutherford* . . ."); *Koshko v. Haining*, 398 Md. 404, 444 n. 22, 921 A.2d 171, 194 n.22 (2007) (same); *Haas v. Lockheed Martin*, 396 Md. 469, 481-482 n.10, 914 A.2d 735, 742-743 n.10 (2007) (same); *Lodowski v. State*, 307 Md. 233, 248, 513 A.2d 299, 307 (1986) ("Article 24 . . . ha[s] long been recognized as a source of a right to counsel independent of the Sixth Amendment where critically important to the fairness of the proceedings . . . . *See Rutherford v. Rutherford* . . .") (internal quotation marks omitted).

Moreover, regardless of whether the source of an indigent defendant's right to state-furnished counsel was Article 24 or Article 21 of the Declaration of Rights, we have reaffirmed that the right attaches in any proceeding that may result in the defendant's incarceration. *See, e.g., Zetty v. Platt*, 365 Md. 141, 156, 776 A.2d 631, 639 (2001) (Applying *Rutherford*, the Court reversed a contempt judgment because the indigent defendant was denied the right to appointed counsel in a civil contempt

proceeding); *Vincenti v. State*, 309 Md. 601, 604, 525 A.2d 1072, 1074 (1987) (Constitutional right to counsel attaches to probation revocation proceedings which are civil proceedings in Maryland); *Parren v. State*, 309 Md. 260, 262, 523 A.2d 597, 598 (1987); *Lodowski v. State, supra*, 307 Md. at 248, 513 A.2d at 308 (Reiterates that "'an indigent defendant in a civil contempt proceeding cannot be sentenced to . . . incarceration unless counsel has been appointed to represent him or he has waived the right to counsel"); *Williams v. State*, 292 Md. 201, 218, 438 A.2d 1301, 1309 (1981) (There is an "absolute right of counsel if there is a danger of incarceration"); *State v. Bryan*, 284 Md. 152, 158 n.5, 395 A.2d 475, 479 n.5 (1978) ("[I]t would be hard to gainsay that a probationer in a Maryland revocation proceeding would not now be entitled to appointed counsel" as a matter of due process).

Section 16-204(b)(2)(i) of the amended Public Defender Act does grant an indigent defendant a right to state-furnished counsel at a bail *review* hearing before a *judge*. This provision, however, does not rectify the constitutional infirmity of not providing counsel for an indigent defendant at the initial proceeding before a Commissioner. As a matter of Maryland constitutional law, where there is a violation of certain procedural constitutional rights of the defendant at an initial proceeding, including the right to counsel, the violation is not cured by granting the right at a subsequent appeal or review proceeding.

Thus, in *Zetty v. Platt, supra*, 365 Md. at 155-160, 776 A.2d at 639-642, the indigent defendant was denied his right to state-furnished counsel at a civil contempt

proceeding, but, in a later hearing after the defendant filed a motion for reconsideration, the defendant was represented by counsel. This Court, in an opinion by Judge Cathell, first held that, under *Rutherford*, the defendant was denied due process of law at the initial hearing when the defendant was unrepresented by counsel. Turning to the reconsideration proceeding, Judge Cathell for the Court held as follows (365 Md. at 161, 776 A.2d at 642-643):

> "If a person's right to counsel is violated at trial, that violation is not cured by providing the person with counsel for their appeal. * * * Likewise, generally, if a person has his or her right to counsel violated at a contempt hearing, it is not cured by having counsel at a subsequent reconsideration hearing."

See Reed v. Foley, 105 Md. App. 184, 196-197, 659 A.2d 325, 321-332 (1995) (The court held that the denial of the due process right to counsel at a hearing before a master was not cured by providing the defendant counsel at the exceptions hearing before a judge). *See also Kawamura v. State*, 299 Md. 276, 291-292, 473 A.2d 438, 446-447 (1984) (Denial of the right to a jury trial in the District Court was not cured by providing a jury trial at a *de novo* appeal in a circuit court); *Danner v. State*, 89 Md. 220, 226, 42 A. 965 (1899).

Furthermore, this Court's January 4, 2012, opinion pointed to some of the problems when defendants are unrepresented by counsel at initial bail hearings, some

of the benefits when defendants have counsel at the initial hearings, and what often occurs at bail review hearings:

> "We detailed at the outset of this opinion the process by which the Commissioner must determine, by reference to a number of fact-laden considerations listed in Rule 4-216(d), whether the defendant is to be released on his or her own recognizance or incarcerated until further consideration by a District Court judge at a subsequent bail review hearing. *See* Rules 4-213(a), 4-216.[13] The presence of counsel for that determination surely can be of assistance to the defendant in that process. We are informed by the Plaintiffs that '[u]nrepresented suspects are more likely to have more perfunctory hearings, less likely to be released on recognizance, more likely to have higher and unaffordable bail, and more likely to serve longer detentions or to pay the expense of a bail bondsman's non-refundable 10% fee to regain their freedom.'
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> * * *
>
> "That a defendant *might* have bail reduced or eliminated by a District Court judge at a subsequent bail review hearing does not dispel or even mitigate the fact that, whenever a Commissioner determines to set bail, the defendant stands a good chance of losing his or her liberty, even if only for a brief time. Furthermore, the likelihood that the Commissioner will give full and fair consideration to all facts relevant to the bail determination can only be enhanced by the presence of counsel. *See* Abell Pretrial Release Project Report at iii (finding that 'most judicial officers decide whether to order release on recognizance or a financial bail without having essential information about the person's employment status, family and community ties, and ability to afford bail'). We cannot overlook, moreover, the evidence in the record that the Commissioner's initial bail decision often is not disturbed by the District Court judge on bail review. *See id.* at 32 (finding that, at bail review, District Court judges in the sample group

[13] The considerations previously listed in Maryland Rule 4-216(d) are now found in Rule 4-216(f).

> maintained prior bail conditions in roughly half the cases, released only 25% of detainees on personal recognizance, and lowered bail for only one in four individuals (27%)). Whenever the Commissioner's bail decision is left standing, the defendant will remain incarcerated for weeks, if not many months, before trial." (footnote omitted)

At a defendant's initial appearance before a District Court Commissioner pursuant to Maryland Rule 4-213, the defendant is in custody and, unless released on his or her personal recognizance or on bail, the defendant will remain incarcerated until a bail review hearing before a judge.[14] Consequently, we hold that, under Article 24 of the Maryland Declaration of Rights, an indigent defendant is entitled to state-furnished counsel at an initial hearing before a District Court Commissioner.[15]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY, EXCEPT FOR THE DECLARATORY JUDGMENT, AFFIRMED FOR THE REASONS SET FORTH IN OUR OPINION AND ORDER OF JANUARY 4, 2012. DECLARATORY JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED AND CASE REMANDED TO THE CIRCUIT COURT FOR THE ENTRY OF A DECLARATORY JUDGMENT

[14] If a defendant is charged with certain serious offenses, Rule 4-216(d) prohibits the defendant's release by a Commissioner.

[15] Some of the parties, in their supplemental briefs and oral arguments, have couched the issue in this case as whether the amended Public Defender Act, in § 16-204(b)(2)(ii), is unconstitutional. That, however, is not the issue. We are not at this time holding any provision of the amended Public Defender Act unconstitutional. Our holding is that an indigent defendant is entitled to state-furnished counsel at an initial appearance before a District Court Commissioner. If the other branches of government decide that compliance with this holding is to be accomplished by means other than Public Defender representation at initial appearances before Commissioners, they are, of course, free to do so.

IN THE COURT OF APPEALS
OF MARYLAND

No. 34

September Term, 2011

PAUL B. DEWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al.

v.

QUINTON RICHMOND, ET AL.

Barbera, C.J.,
Harrell
Battaglia
Greene
Adkins
*Bell
Eldridge, John C. (Retired,
Specially Assigned),
JJ.

Dissenting Opinion by Barbera, C.J.,
which Harrell and Adkins, JJ., join

Filed: September 25, 2013

*Bell, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in reaching the decision in this case.

Respectfully, I dissent. The majority holds that, "under Article 24 of the Maryland Declaration of Rights, an indigent defendant is entitled to state-furnished counsel at an initial hearing before a District Court Commissioner." Maj. Slip. Op. at 22. Certainly, such a right to counsel existed under a previous iteration of Maryland's Public Defender Act. *See DeWolfe v. Richmond*, ___ Md. ___, 2012 WL 10853 (2012) (*"Richmond I"*); Md. Code (2001, 2008 Repl. Vol.), § 16-204(b)(2) of the Criminal Procedure Article.[1] I do not agree with the majority that the due process protection afforded under Article 24 of the Maryland Declaration of Rights requires a right to counsel at that hearing.[2] That is particularly so given the statutory and rule changes that have been implemented in response to *Richmond I*.

Article 24 of the Maryland Declaration of Rights requires that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Article 24 and the Fourteenth Amendment to the United States Constitution have "long been recognized as a source of a right to counsel

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[1] The General Assembly, in response to *Richmond I*, amended the Act such that representation by the Public Defender at the initial appearance before a Commissioner is no longer required. Md. Code (2001, 2008 Repl. Vol., 2012 Supp.), § 16-204(b)(2)(ii) of the Criminal Procedure Article.

[2] The majority declines to consider whether an indigent defendant has a right to counsel under the Sixth or Fourteenth Amendments to the United States Constitution or Article 21 of the Maryland Declaration of Rights. Maj. Slip. Op. at 13. Because the majority does not consider the claim under the Sixth Amendment or its Maryland counterpart, Article 21, I shall not analyze those grounds and will limit my dissent to the procedural due process claim.

independent of the Sixth Amendment where critically important to the fairness of the proceedings." *Lodowski v. State*, 307 Md. 233, 248 (1986) (quoting *Sites v. State*, 300 Md. 702, 716 (1984)). I do not quarrel with the majority's recitation of those cases in which we have stated that Article 24 applies in a broader manner than the Fourteenth Amendment. I do part company with the majority's conclusion that Article 24 dictates a right to counsel at the initial bail hearing before a District Court Commissioner.

In *Rutherford v. Rutherford*, 296 Md. 347 (1983), this Court stated:

> A defendant's actual incarceration in a jail, as a result of a proceeding at which he was unrepresented by counsel and did not knowingly and intelligently waive the right to counsel, is fundamentally unfair. As repeatedly pointed out in criminal and civil cases, it is the fact of incarceration, and not the label placed upon the proceeding, which requires the appointment of counsel for indigents.

Id. at 360-61.

The majority seizes upon this language and seems to extrapolate from it to hold that the type of "proceeding" addressed in *Rutherford*—a court hearing at which an indigent person, unrepresented by counsel, is incarcerated by court order upon a judicial finding of civil contempt—is the equivalent, for purposes of Article 24, of the initial appearance before a District Court Commissioner. The majority bolsters this notion by invocation of other cases in which this Court has stated and/or held, by resort to the Maryland Declaration of Rights, that a person is entitled to counsel if there is a threat of incarceration.[3] *See Zetty v.*

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[3] The majority cites three additional cases, *Parren v. State*, 309 Md. 260, 262 (1987); (continued...)

Platt, 365 Md. 141, 156 (2001); *Vincenti v. State*, 309 Md. 601, 604 (1987); *State v. Bryan*, 284 Md. 152, 158 n.5 (1978). There is a fundamental distinction between those cases and the case at bar.

In all of the cases cited by the majority, the proceedings at issue were, to the last, 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. The initial appearance before a District Court Commissioner has none of those features.

Under the current iteration of the Public Defender Act, related statutory provisions, and applicable Rules of Procedure, the initial appearance before the Commissioner involves the following. The Commissioner evaluates whether there was probable cause for an arrest, determines whether a defendant should be released and what conditions should accompany any release, and informs a defendant of his or her right to counsel. Maryland Code (1973, 2013 Repl. Vol.), § 2-607(c) of the Courts and Judicial Proceedings Article ("CJ"). The Commissioner must make a written record of the probable cause determination and commit to writing all communications between the Commissioner and the parties, including the State's Attorney's Office. Rule 4-216(a) and (b). Furthermore, any statements made by a

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[3](...continued)
Lodowski v. State, 307 Md. 233, 248 (1986); *Williams v. State*, 292 Md. 201, 218 (1981), for the same proposition. Those cases stated the proposition, but none involved the initial question of whether the defendant had the right to counsel; rather, each involved the question of whether the defendant had properly waived that right.

defendant during the Commissioner hearing cannot be used against him or her in later proceedings. CJ § 10-922. There is a presumption at the Commissioner hearing that a defendant will be released on personal recognizance or bail unless the Commissioner determines that there are no conditions of release that can be imposed that will ensure the appearance of the defendant at a later proceeding or the safety of the victim or community at large. Rule 4-216(c). Defendants who are denied pretrial release entirely or remain in custody after the hearing because they cannot afford the bail amount set "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." Rule 4-216.1(a)(1). At those court hearings,[4] the Public Defender's Office is required to provide representation for an indigent defendant.[5] Rule 4-216.1(a)(2)(A).

The initial bail hearing before a Commissioner does not result in a final determination of incarceration because no decision made by a Commissioner will lead to a defendant's

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[4] The Public Defender has asked this Court to make clear under what standard of review a District Court judge reviews the initial bail determination made by a Commissioner. In *DeWolfe v. Richmond*, ___ Md. ___, 2012 WL 10853, *12 n.22 (2012) ("*Richmond I*"), we stated in a footnote: "We emphasize that District Court judges owe no deference to the Commissioners' initial bail determinations." The Public Defender asks that this Court "reaffirm that statement" by making such a holding explicit. To the extent that there was any confusion on this point, I would reaffirm that a District Court judge reviews a Commissioner's initial determination *de novo* and owes no deference to the decision.

[5] The General Assembly appropriated $5.4 million to the Public Defender's Office to ensure that it could provide representation at all bail review hearings. Previously, the Public Defender provided representation at some, but not all, bail review hearings in the state. According to the Public Defender, it now represents indigent defendants at all bail review hearings, but does not provide representation at the initial hearing before District Court Commissioners.

languishing in custody without judicial review. Indeed, the law affirmatively requires that the Commissioner's initial bail decision be reviewed quickly by a judge, at a formal, in-court proceeding, at which every defendant—indigent or not—is entitled to representation by counsel. The very fact of speedy review of the Commissioner's preliminary determination, by a judge at a formal court proceeding where defense counsel can argue against the Commissioner's initial bail decision, negates any realistic concern about unfair procedural process. *See Baker v. McCollan*, 443 U.S. 137, 145 (1979) (concluding that "a detention of three days over a New Year's weekend does not and could not amount" to a deprivation of due process).

Although decided under the Fourth Amendment, I find instructive the Supreme Court's reasoning in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). In *McLaughlin*, the Court examined whether a county's decision to combine probable cause determinations with arraignment violated the Fourth Amendment's requirement that warrantless arrests be followed by a prompt judicial determination of probable cause. *Id.* at 47. The Court concluded that a probable cause hearing must occur within 48 hours of arrest, and any hearings that take place within this time frame are presumptively constitutional. *Id.* at 57. The Court described this outcome as "a reasonable accommodation between legitimate competing concerns." *Id.* at 57-58.

I view the current Maryland bail-review system as a similar "reasonable accommodation between legitimate competing concerns." The procedure allows for a quick

assessment, by a neutral party, of whether the arrestee should, or should not, be released on his or her recognizance or upon satisfying a reasonable bail amount; the procedure further requires a formal judicial review of that initial determination, as soon as practicable, at which the defendant is entitled to the full benefits of counsel. The Commissioner hearing, combining a probable cause hearing with an initial bail determination, is designed to "minimize the time a presumptively innocent individual spends in jail." *See id.* at 58. In some cases, a Commissioner will either find probable cause lacking and release an arrestee, or determine that probable cause exists and allow an arrestee to be free pending trial, or to post a nominal bail amount. If that does not occur, the Commissioner's decision will be reviewed immediately by a District Court judge, and the arrestee will have the benefit of counsel to plead his or her case. This practice properly addresses the constitutional concerns.[6]

The changes adopted by the majority today will assuredly alter the Commissioner hearing from an informal process into a mini-trial, all of which can be repeated again before

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[6] The majority cites, at length, the language in *Richmond I*, 2012 WL at *11-12, in which this Court wrote about the potential for defendants to lose their liberty in a Commissioner hearing and the potential benefit of counsel for defendants in that process. I do not disagree that counsel could be of assistance at a Commissioner hearing, but the question is not whether assistance would be beneficial, but rather whether it is constitutionally compelled. Moreover, the concerns expressed in the earlier iteration of this case came at a time when a defendant did *not* have the right to counsel at a bail review hearing in District Court. At that point, defendants could spend "weeks, if not many months," incarcerated prior to trial without having had counsel argue on their behalf. That concern is no longer present under current Maryland law.

a District Court judge within 24 hours if the outcome is not favorable to the defendant.[7] I fear that these changes will prolong—not diminish—the time a defendant spends in custody prior to bail review by the District Court. I agree with the State that the Commissioner hearing, as it now stands, is "straightforward, guided by rule, and of limited duration," typically occurring "in the absence of opposing counsel" and under rules that "provide adequate substitute procedural safeguards." I would hold that such a proceeding does not violate procedural due process under Article 24 of the Maryland Declaration of Rights.

Judges Harrell and Adkins have authorized me to state that they join in the views expressed in this dissenting opinion.

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[7] The State notes that the General Assembly considered a multitude of factors in deciding not to require counsel at the initial hearing stage. These include the high monetary cost, the logistical and practical difficulties inherent in providing counsel at that early of a stage, concerns of public safety, and "the fact that many arrestees are released at this stage, without assistance of counsel."

Corrected
MANDATE
Court of Appeals of Maryland

No. 34, September Term, 2011

PAUL B. DEWOLFE, in his official capacity as the Public Defender for the State of Maryland, et al.

} Appeal from the Circuit Court for Baltimore City pursuant to certiorari to the Court of Special Appeals.

QUINTON RICHMOND, et al.

STATEMENT OF COSTS:

In Circuit Court:

Record - $60.00

Stenographer's Costs -$630.00

In Court of Appeals:

Petition Filing Fee	$	50.00
Filing Fee on Appeal (Court of Special Appeals)	$	50.00
Brief for Appellants	$	206.40
Brief of Appellants Clyburn Hargrove, et al	$	974.40
Brief of Appellants Clyburn, et al.	$	936.00
Brief of Appellees/Cross-Appellants	$	504.00
Reply Brief and Response of Appellants	$	283.20
Reply Brief of Appellees/Cross Appellants	$	86.40
Reply Brief of Appellant Paul B. DeWolfe	$	139.20
Record Extract	$	4224.00
Supplemental Brief of Appellants State of MD, et al.	$	811.20
Supplemental Brief of Appellants Dist. Ct.	$	168.00
Supplemental Reply Brief of Appellants State of MD	$	72.00
Supplement Reply Brief of Appellants Dist. Ct.	$	96.00
Supplemental Brief Appellee	$	331.20

Supplemental Brief of Appellee/Cross-Appellants.	$	201.60
Appearance Fee – Appellant	$	40.00
Appearance Fee – Appellee	$	20.00
Motions for Reconsideration.	$	100.00
TOTAL:	$	9293.60

STATE OF MARYLAND, *ss:*

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals this seventeenth day of October, 2013

Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

MANDATE

Re: Paul B. DeWolfe, in his official capacity as the Public Defender for the State of Maryland, et al. v. Quinton Richmond, et al.
No. 34, September Term, 2011

July 6, 2011 - Joint Motion to Amend Briefing Schedule filed by counsel.

July 6, 2011 - Order of the Court of Appeals filed granting the filing of the joint motion to amend briefing schedule. Brief of appellants shall be filed on or before August 11, 2011; brief of the appellees/x-appellants shall be filed on or before September 16, 2011; reply and response briefs of the appellants/x-appellees shall be filed on or before October 17, 2011; any reply brief by the x-appellants shall be filed on or before October 24, 2011.

August 11, 2011 - Motion for Enlargement of Time filed.

August 11, 2011 - Order of the Court of Appeals filed granting the motion for enlargement of time. Appellants may file their brief on or before August 15, 2011.

August 15, 2011 - Consent Motion for Enlargement of Time filed.

August 16, 2011 - Order of the Court of Appeals filed granting motion to file opening brief and record extract on or before August 16, 2011.

September 1, 2011 - Unopposed Motion for Leave to File Amicus Curiae Brief of the Society of American Law Teachers (SALT).

September 1, 2011 - Order of the Court of Appeals filed granting the filing of an amicus curiae brief by the Society of American Law Teachers (SALT). Said amicus brief to be filed on or before September 16, 2011.

September 2, 2011 - Unopposed Motion for Leave to Participate as Amicus Curiae and for Enlargement of Time filed.

September 7, 2011 - ORDERED, by the CSA, that the motion for leave to file amicus curiae brief be, and, it is hereby, granted to the extent of permitting the American Bar Association to file an amicus curiae brief in the above captioned case; and it is further

ORDERED that the request for enlargement of time to file the amicus curiae brief be, and it is hereby, granted, and the appellees' brief shall be filed on or before September 30, 2011.

September 12, 2011 - Motion of Public Justice Center, International Cure, Alternative Directions, Inc., and Justice Policy Institute for Leave to Participate as Amici Curiae filed.

September 12, 2011 - Order of the Court of Appeals filed granting the filing of an amici curiae brief of the Public Justice Center, Intel Cure, Alternative Directions, Inc., and Justice Policy Institute. Said brief to be filed on or before September 16, 2011.

September 16, 2011 - Unopposed Motion for Leave to Participate as Amicus Curiae filed by the Leadership Conference on Civil and Human Rights in support of Appellees.

September 16, 2011 - Unopposed Motion for Leave to File Amici Curiae Brief of the University of Baltimore School of Law and the University of Maryland Francis King Carey School of Law filed.

September 16, 2011 - Unopposed Motion for Leave to Participate as Amici Curiae filed by the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, the American Civil Liberties Union of Maryland, the Brennan Center for Justice at New York University Law School, the Center for Constitutional Rights, and the National Legal Aid and Defender Association.

Certification of Admission to Practice law in Maryland filed by counsel for amici curiae Christina M. Gattuso.

September 16, 2011 - Unopposed Motion for Leave to Participate as Amicus Curiae of NAACP Legal Defense and Educational Fund, Inc. in Support of Appellees filed.