IN THE
COURT OF APPEALS OF MARYLAND

THE HON. BEN C. CLYBURN, in his official capacity as the Chief Judge for the District Court of Maryland, et al.,	*	
Petitioners,	*	Petition No. 622
v.	*	September Term, 2013
QUINTON RICHMOND, et al.,	*	
Respondents.	*	

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

PLAINTIFFS' RESPONSE TO DISTRICT COURT DEFENDANTS' MOTION FOR STAY

Respondents Quinton Richmond, et al. ("Plaintiffs"), by their undersigned counsel, respectfully oppose the Motion for Stay filed by Petitioners, the Hon. Ben C. Clyburn, et al. (the "District Court Defendants" or "DCDs").

OVERVIEW

There is much that should be said regarding the District Court Defendants' motion for stay pending what will be the fourth round of appellate proceedings in this Court. But one point is more important than all the rest: Chief Judge Clyburn, the judicial official who has taken the lead on this issue for the DCDs, has announced that *all* of the logistical concerns that the DCDs had previously discussed as reasons for delay have been resolved. He further stated that the judiciary was not opposed to piecemeal implementation of steps that could be taken while long-term solutions are devised and indicated that he would support quicker action where possible. This statement, made at a January 6, 2014 public meeting of the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender, confirms that, at long last, the practical barriers to immediate implementation have been resolved, particularly in Baltimore City, which is the only jurisdiction directly

affected by Judge Nance's order and which would be the jurisdiction best equipped to handle swift implementation.

The DCDs' motion for a stay pending appeal therefore needs to be put into context. Contrary to what the DCDs have said below, enough progress has been made for interim implementation to occur now. Why should that progress be ignored for months on end while this fourth round of appellate proceedings is considered by this Court or the Court of Special Appeals and while long-term solutions are considered by policymakers? Why should constitutional rights continue to be violated because of the time required to reach a permanent, long-term solution? Nothing in the DCDs' motion for stay pending appeal even addresses this possibility of interim implementation, just as nothing in the motion discusses the irreparable harm that occurs every day that Plaintiffs' constitutional rights are violated in district courts across the State. Instead, the DCDs are using this appeal as yet another opportunity to stall implementation even longer.

Plaintiffs respectfully submit that this course of delay and yo-yo litigation is not tenable. Constitutional rights of indigent defendants at risk of unnecessary incarceration cannot be put into a deep freeze for more months on end, if not for another year, when interim solutions are realistic and feasible. We urge the Court to take control of the matter and use a combination of its rule-making authority and its ability to assert jurisdiction via the DCDs' cert. petition and the motion for stay pending appeal to set a schedule for interim implementation to commence.

Plaintiffs of course want implementation to occur immediately, as the State Constitution requires. Nevertheless, in an effort to break the logjam and help ensure that implementation proceeds constructively, Plaintiffs ask the Court to take the following steps at its January 23, 2014 conference:

1. Extend the stay pending appeal for another ten days, such that it will expire at 12:01 a.m. on Monday, February 3, 2014.

2. Order that the Court's Rules Order of November 6, 2013 (entered in its rule-making capacity in response to the 181st Report of the Rules Committee) shall take effect in and for Baltimore City at 12:01 a.m. on February 3, 2014, and further order that,

in and for all other jurisdictions, the November 6 Rules Order shall take effect in sixty days from the date of the Court's order.

3. Direct the Circuit Court for Baltimore City to revise its injunction order in the form attached at Exhibit 9, resolving the over-breadth issue raised by the District Court Defendants, with such revised order to take effect, by its terms, at 12:01 a.m. on February 3, 2014.

4. Grant the District Court Defendants' Petition for a Writ of Certiorari for the purpose of ordering the relief set forth above.

These steps would have the effect of (a) allowing interim implementation to proceed in Baltimore City promptly while giving officials time to make necessary final preparations; (b) allowing other jurisdictions time to prepare for implementation; (c) allow policymakers to continue their work to decide a long-term solution to implement the constitutional rights found by the Court without prolonging unnecessary violations of constitutional rights; and (d) halt the State's on-going violations of Plaintiffs' constitutional right to counsel and break through the litigation games that seem to keep this case stuck in a recurring cycle without end.

If the Court is not inclined to use this compromise approach, it should deny the motion for stay pending appeal. In light of Judge Clyburn's public acknowledgement that the logistical problems for implementation have been resolved and that the only issue preventing immediate implementation is the lack of an order directing the November 6 Rules Order to take effect (and that Rules Order addresses funding concerns by directing the DCDs to bill the State for counsel pursuant to State law), there is no good reason why implementation should be delayed any further, particularly in Baltimore City, which is the only jurisdiction that is directly subject to Judge Nance's order. The past reasons for delaying implementation have gone away, and the only remaining issue – the efforts to devise a permanent solution – do not support further delay. With much less assurance that implementation could proceed, this Court has repeatedly denied requests to stay and reconsider its rulings in Richmond I and II. Now that the logistical concerns voiced in the past finally have been resolved, the Court should not change heart now. There is no

good reason why interim implementation should not be ordered to proceed in Baltimore City, either immediately or in two weeks as suggested above.

The history of this case makes one fact indisputably clear: nothing will happen until this Court orders it to happen. Without a deadline, there is no incentive for officials to push for prompt implementation. Fortunately, the jurisdiction most ready to move forward is Baltimore City, where the commissioners and defendants are in one location (the Central Booking facility), where counsel can be most readily accommodated, and where prosecutors already are present. Plaintiffs therefore ask the Court to direct interim implementation to proceed in Baltimore City and to give other jurisdictions fair opportunity to make the necessary preparations so they can commence interim implementation two months later. This is a realistic plan and fair compromise. It also is the only one that any party has offered to date that would provide for prompt compliance with the State Constitution.

POST-*RICHMOND II* EVENTS

The Court's decision finding a constitutional right to counsel at bail hearings ("Richmond II") was issued on September 25, 2013. The mandate issued on October 13.

The State's immediate response was to seek to derail or delay the Court's ruling. On October 23, the State moved to recall issuance of the mandate, for reconsideration and for stay of enforcement of the Court's decision. Its arguments were essentially the same ones that the DCDs had raised in their motions to stay and to reconsider the Court's "Richmond I" decision finding a statutory right to counsel at bail hearings, which this Court denied, and that the Public Defender had raised as a substantive reason for rejecting any relief in the Richmond I decision, which the Court denied as a matter of law in its reported Richmond I decision.

On November 6, 2013, the Court held a public meeting to consider adoption of the Rules Committee's 181st Report. After agreeing on the content of the new amended Rules to implement Richmond II, the Court turned to the effective date. Judge Adkins proposed implementation of the new Rules in six months, but no other Judge agreed. The Judges were 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, would put courts across the state in immediate violation of the Rules, which no one wanted. Approving a suggestion by Judge Battaglia, the Court therefore decided that the amended Rules would take effect upon further order by the Court, which would occur after the Circuit Court for Baltimore City (Nance, J.) issued an injunction compelling compliance by the DCDs. The next day, the Court denied the State's motions to recall the mandate, for reconsideration, and to stay enforcement of the Richmond II decision.

On November 14, before the case returned to the Circuit Court, the DCDs filed a "Status Report" on their implementation concerns, citing (i) various objections that had been raised in the post-Richmond I session of the General Assembly, (ii) the fact that two task forces had been established to explore or devise long-term solutions, and their work was underway, and (iii) a letter by legislative leaders that objected to the Court's approval of the Rules Committee's 181st Report. Nevertheless, implementation efforts continued. On November 26, 2013, Chief Judge Barbera issued an Administrative Order establishing the appointment process for attorneys to represent Plaintiffs at their initial appearances before district court commissioners. (Ex. 1). This order directs the Chief Judge of the District Court to direct the District Administrative Judge for that district to solicit qualified private attorneys who would accept representation under the fee schedule used by the Public Defender for panel attorneys, with the fees to be charged to the State of Maryland, and to compile a list of such attorneys and to develop procedures for notifying them. (Ex. 1 at 2, ¶ 1). Later that day, Judge Clyburn issued a directive to the Administrative Judges in compliance with the Administrative Order. (Ex. 2).

The case returned to the Circuit Court on December 4, 2013. The next day, December 5, Plaintiffs petitioned the Circuit Court for further relief, asking the Circuit Court to issue an order to show cause why further relief should not be granted and to issue a permanent injunction, which was proposed in two alternative formulations. In the Petition, Plaintiffs explained and showed why implementation could occur immediately and why, under this Court's binding precedents, the DCDs' funding concerns were not a

permissible consideration. See Ex. 3, Petition for Further Relief and Memorandum in Support (exhibits and proposed Orders omitted).

The DCDs never responded to the Petition for Further Relief. They never complained of any flaw in the terms of the proposed injunction orders. They never told the Court that Plaintiffs had erred in their explanation of why implementation could now proceed. The Public Defender responded, stating that he was ready to move forward, but the DCDs decided to sit on their hands and to say and do nothing.

During this same time, both task forces completed their work. In December 2013, the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender (the "Task Force on Representation") issued its final report to the General Assembly. Its final report called for district court judges to hear initial bail hearings and for mandatory pretrial release criteria that would allow many arrestees to be released prior to their court appearance. On January 6, 2014, that task force heard a presentation by Judge Clyburn of the final report of the Judiciary Task Force on Pretrial Confinement and Release (the "Judiciary Task Force"). Judge Clyburn publicly stated at that hearing that the logistical concerns that had previously been raised regarding providing representation at the commissioner hearings had been addressed and resolved, such that, from a logistical perspective, initial bail hearings with counsel present could occur immediately if the Rules were to issue and funding were to be available. (Ex. 4, Mirviss Aff. ¶ 4). He explained that adequate space had been secured at all commissioner work stations for attorneys and interpreters to be present, and all other logistical objections had been resolved. Id. Moreover, Judge Clyburn stated that the judiciary was not opposed to piecemeal implementation of steps that could be taken while long-term solutions are devised and affirmed that he would support quicker action where possible. Id. at ¶ 5. Given these statements by Judge Clyburn, the path appears clear for interim implementation to commence.[1]

[1] Judge Clyburn previously had made similarly constructive comments in a press interview. On November 7, 2013, *The Daily Record* published an article (posted on its website on November 6, 2013) reporting that Judge Clyburn had stated in an interview

The Judiciary Task Force recommended a long-term solution that would replace commissioners with district court judges on workdays, would explore use of pretrial release criteria, and would establish video procedures to eliminate the need to transport defendants for their initial appearances. One aspect of the task force report is especially noteworthy: the time required to conduct initial appearances. Contrary to the estimates used by the General Assembly to generate the reported $28-30 million implementation cost (that an attorney would be required to spend two hours and fifty minutes per initial bail hearing), the Judiciary Task Force determined that initial appearance hearings would last for only *twenty* minutes. (Ex. 6, Judiciary Task Force Rep. at 16). Even allowing time for pre-hearing interview and preparation, the Judiciary Task Force's finding would reduce the cost of implementation by 80% under the status quo (i.e., initial bail hearings before commissioners and review hearings before judges); if a consolidated single-hearing system were used as proposed by the Task Force on Representation, the process probably would *save* money. Thus, the Judiciary Task Force confirms what Plaintiffs previously had told this Court is entirely correct: the estimates that it would cost $28-30 million to provide counsel at initial bail hearings were greatly inflated and were no more real than were the Iraqi WMDs. The Court should put to rest once and for all the in terrorem claim of a $30 million implementation cost.

On January 8, 2014, Plaintiffs wrote to Judge Nance reporting the statements by Judge Clyburn that the logistical problems had been resolved, pointing out the lack of a response by the DCDs, and asking that the order to show cause be issued. (Ex. 7). The DCDs did not respond. On January 10, the Circuit Court issued an order entering a permanent injunction, which it amended on January 13, 2014. Without bothering to let the Circuit Court know that they objected either to the content of its order or to its

---

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." See Ex. 5, Steve Lash, Top court won't stay lawyers-at-bail ruling, The Daily Record, Nov. 7, 2013.

issuance, the DCDs immediately noted an appeal, petitioned this Court for a writ of certiorari, and moved this Court for a stay pending appeal.

ARGUMENT

The motion should be denied for the same reasons that the Court rejected the Public Defender's arguments favoring a stay of any relief in Richmond I, the DCDs' motion for a stay after Richmond I, and the State's motion for a stay of enforcement of Richmond II. Indeed, based on the considerations discussed above, the reasons for allowing implementation to proceed are far stronger than even in those decisions:

- Judge Clyburn has confirmed that all logistical concerns and objections regarding implementation have been resolved.
- Judge Clyburn has further confirmed that he favors interim implementation as long-term implementation solutions are developed and approved.
- The November 6 Rules Order resolves all implementation issues regarding the changes needed in the Rules and for payment to be processed for the representation.
- The November 26 Administrative Order resolves the process for securing attorneys to provide the representation and for securing payment.
- The Judiciary Task Force report confirms that the costs for implementation are modest and not prohibitive as reported by the press and feared by legislators.
- The DCDs did not file any objections to the Petition for Further Relief, and their prior substantive objections to implementation have been addressed by Judge Clyburn's assurance that all logistical issues have been resolved.
- To date, no specific objections about implementation in Baltimore City have been raised by any stakeholder.

If the DCDs' and the Public Defender's three prior attempts did not persuade the Court to delay implementation until a long-term solution was devised, surely this latest attempt should be rejected as well. How many times does this Court have to say no? Given the above recent progress resolving *all* open issues (particularly in Baltimore City), the DCDs' opposition to implementation and Judge Nance's order rests largely on artificial and easily addressable concerns.

No calamity would befall the DCDs if the Court were not to stay Judge Nance's order pending appeal. The order applies only to Baltimore City. The District Court

Defendants' objections to the order are primarily procedural – they object to the court's failure to issue a show cause order, to a small issue regarding alleged over-breadth of the court's order, and to an unspecified "inconsistency" between current Rules for initial appearance procedures and the order requiring representation. See DCD Pet. for Writ of Certiorari ("Cert. Pet.") at 6-10. None of these objections withstands serious scrutiny.

First, the alleged "inconsistency" between the Circuit Court's order and the Rules for initial appearances is chimerical. No existing Rule prevents counsel from appearing at initial appearances, and no Rule prevents judicial officers from appointing counsel. More important, *this Court* set up the process whereby Judge Nance would issue an order compelling implementation, and then Plaintiffs would notify the Court of that fact, whereupon this Court, acting in its rulemaking capacity, would issue a Rules Order directing that the November 6 Rules Order would take immediate effect. Plaintiffs followed that exact procedure, as immediately after learning of Judge Nance's order, Plaintiffs wrote to this Court asking it to order that the November 6 Rules Order take effect. (Ex. 8). Thus, the DCDs' claim of "inconsistency" between the Circuit Court's order and the Rules ignores the process that *this Court* laid out for the parties to follow – return to the Circuit Court, have the Circuit Court compel compliance, alert this Court that the Circuit Court has acted, and ask this Court to issue its Rules Order for implementation to proceed. In entering its order compelling implementation, the Circuit Court's order plainly contemplated that this Court would issue the final Rules Order pursuant to this Court's directions in the November 6 Rules Order.

Second, the two asserted flaws in the terms of the Circuit Court's order (a need to account for waivers of counsel and for defendants not eligible for release or bail) are easily fixed. Indeed, had the District Court Defendants raised these at any time during the five weeks that lapsed between the filing of the Petition for Further Relief and the issuance of the Circuit Court's order, or upon receipt of the Circuit Court's order (instead of rushing to this Court to complain), they *would* have been addressed. Plaintiffs have attached a proposed revised order and a black-line showing the changes (Ex. 9) that resolves their concerns. Certiorari is not needed to address this simple fix.

Last, but certainly not least, the District Court Defendants tacitly acknowledge that no further hearings in the Circuit Court are necessary, as they openly invite *this Court* to address the substantive issues regarding implementation in lieu of returning to the Circuit Court for further proceedings:

> This Court may determine, however, that further proceedings in the circuit court would not be beneficial at all. ... If the Court determines that those arguments [i.e., the arguments over "the best way to implement the circuit court's declaratory judgment"] can in fact be resolved on the basis of appellate briefing and the current record, then remand to the circuit court would likely serve only to delay an ultimate resolution to the controversy.

Cert. Pet. at 10-11. As the DCDs do not identify *any* specific facts or issues that they would need to present to the Circuit Court that are not already in the record and that cannot be decided by this Court in the first instance, their Petition makes clear that their protests about the Circuit Court's decision to order final relief without first entering an order to show cause are all about form and not about substance. If the record already is complete, which is the clear implication of their Petition, the Circuit Court's failure to allow them an opportunity to show cause as set forth in Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 3-412(c) is immaterial. The DCDs should not be allowed to stay the enforcement of Plaintiffs' constitutional rights merely to redress what at most amounts to a no-harm, no-foul technicality.

Indeed, the DCDs themselves saw fit to ignore the procedural requirements for seeking a stay pending appeal. Their motion cites to Rule 8-303(e), which authorizes this Court to issue stays pending appeal. See Mot. at 1. But Rule 8-303(e) does not address the procedures for parties to request a stay pending appeal. Those are set forth in Rules 2-632, 8-422(a), and 8-425, none of which were followed by the DCDs in this case: (1) they were required to post bond in the Circuit Court or seek a waiver of a bond, but the failed to do so; (2) they were required to first seek relief in the Circuit Court, but they failed to do so; (3) they were required to file their motion seeking relief in the Court of Special Appeals, but they failed to do so; (4) they were required to explain to this Court why it was impractical for them to have followed any of these steps prescribed by the

Rules, but again they failed to do so; and (5) they refer to various facts outside the record of this Court without an affidavit. Having themselves disregarded *five* separate requirements in the Rules for seeking a stay pending appeal in order to pursue expedience and efficiency, the DCDs should not be heard to complain about the Circuit Court's comparable alleged failure to follow the letter of CJP § 3-412(c). These omissions follow their conspicuous failure to respond in any way to the Petition for Further Relief or to Plaintiffs' January 8 letter advising Judge Nance that Judge Clyburn had publicly announced that the logistical issues had been resolved and that implementation was ready to proceed.

Tellingly, the DCDs never even try to balance the equities regarding the impact of a stay. The impact on Plaintiffs should not be so cavalierly ignored. As this Court found in Richmond 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, 434 Md. 444, 450-51, 463-64 (2013). The loss of freedom speaks for itself. If defendants lack attorneys, they are far more likely to be incarcerated, losing the most fundamental right in the Constitution – freedom – a profound constitutional injury that can never be remedied. Moreover, incarceration has stark and often dire personal consequences, effects that this Court has described as "devastating":

> 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.

Id. at 451. If the DCDs' request for a stay is granted while this case winds its way through a fourth round of appellate proceedings, 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 asserted procedural and hypertechnical concerns raised by the DCDs in their Petition and motion.

Instead of explaining how the balance tilts in favor of a stay in light of the grave risk of harm to thousands of individuals, and how the facts now favor a stay that this Court has *thrice* previously refused to grant, the DCDs instead refer to the litany of concerns that have been raised in the past two years. The logistical concerns are answered by Judge Clyburn's recent statements and assurances. Thus, the real concern here is funding. Here, too the Court already has spoken definitively, both in Richmond I and in numerous prior decisions. See, e.g., DeWolfe v. Richmond, 434 Md. 403, 434 (2012) (affirming that funding concerns do not stand in the way of the statutory right to counsel because "the budgetary concerns of the Public Defender never have played a role in Maryland appellate decisions involving defendants' statutory right to counsel"); id. (adopting Judge Wilner's statement in Baldwin v. State, 51 Md. App. 538, 555 (1982), that the court's obligation to uphold a defendant's right to counsel "'is not subject to or in any way dependent upon the level of appropriations received by the Public Defender");, superseded on other grounds by 2011 Md. Laws, ch. 244. These statements apply with even greater force to the constitutional right to counsel found in Richmond II.

Indeed, this Court has squarely held that lack of pre-appropriated funds is no bar to injunctive relief to enforce constitutional rights. In Ehrlich v. Perez, 394 Md. 691 (2006), the Court addressed the issue directly, considering whether a circuit court had authority to issue a preliminary injunction to reinstate Medical Assistance benefits retroactively to cure a violation of the right to equal protection guaranteed by Article 24 of the Declaration of Rights. The State defendants argued that the circuit court "lacked the authority to issue a preliminary injunction requiring expenditure of State funds" to pay for services that were not appropriated in the State budget. Id. at 713. While the Court agreed that payment of past benefits could not be compelled through a preliminary injunction and instead had to be assessed as damages, it held that "because there is a

likelihood that Appellants' action was unconstitutional" the preliminary injunction was proper because "***the executive and legislative budget authority is subject to the constitutional limitations of the Declaration of Rights***." Id. at 735 (emphasis added). Thus, the lack of pre-authorized appropriations cannot trump Plaintiffs' constitutional rights. Ehrlich is dispositive. Neither the Executive nor the Legislative Branches can veto Plaintiffs' constitutional rights by failing to provide required funding.

Indeed, the Attorney General has stated in a formal opinion 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). This opinion necessarily applies with equal force to Plaintiffs' constitutional right to counsel at bail hearings under Article 24 of the Declaration of Rights.

For these reasons, and in light of Judge Clyburn's comments, the DCDs no longer have colorable grounds to oppose immediate implementation, especially in Baltimore City. If a defendant knowingly violates an established right of the plaintiff, a permanent injunction should issue. See Amabile v. Winkles, 276 Md. 234, 242 (1975) (holding that, where a violation is "committed with knowledge of the plaintiff's right, the courts will refuse to balance the equities or conveniences and will grant the equitable relief sought") (citing a long line of cases, including Lichtenberg v. Sachs, 213 Md. 147, 151-52 (1957)); see also Columbia Hills Corp. v. Mercantile-Safe Dep. & Trust Co., 231 Md. 379. 382 (1963) (rejecting defendant's contention that even if the requested injunction would subject defendant "to great injury and afford[ ] [plaintiff] comparatively little benefit," such that it would do more injury to the [defendant] than it would benefit the [plaintiff]," an unconstitutional result (in that case an unlawful taking of property) entitled the plaintiff to the injunction).

The balance of equities and hardships thus clearly favors immediate implementation. Indeed, the only factor standing in the way is that the policymakers have not yet decided on a long-term plan to implement Richmond II. But that process could take many months, if not longer, to complete. The Judiciary Task Force reports that its implementation plan cannot go forward until January 2015 *at the earliest.* Plaintiffs should not be required to continue to suffer irreparable harm in violation of the State Constitution for at least another year to await the results of the reform process.

The interim implementation proposed by Plaintiffs here would not interfere with the reform process. If anything, it would accelerate that process and make clear to the policymakers that they cannot delay reform. But it would finally provide Plaintiffs with relief, ending at long last the unconstitutional practice of incarceration without representation. Plaintiffs respectfully urge the Court to follow its precedents and honor Plaintiffs' constitutional rights.

CONCLUSION

For the foregoing reasons, the Motion for Stay should be denied. In the alternative, the Court should enter the following relief:

1. Extend the stay pending appeal for another ten days, such that it will expire at 12:01 a.m. on Monday, February 3, 2014.

2. Order that the Court's Rules Order of November 6, 2013 (entered in its rule-making capacity in response to the 181st Report of the Rules Committee) shall take effect in and for Baltimore City at 12:01 a.m. on February 3, 2014, and further order that, in and for all other jurisdictions, the November 6 Rules Order shall take effect in sixty days from the date of the Court's order.

3. Direct the Circuit Court for Baltimore City to revise its injunction order in the form attached at Exhibit 9, resolving the over-breadth issues raised by the DCDs, with such revised order to take effect, by its terms, at 12:01 a.m. on February 3, 2014.

4. Grant the District Court Defendants' Petition for a Writ of Certiorari for the purpose of ordering the relief set forth above.

Respectfully submitted,

Michael Schatzow
mschatzow@venable.com
Mitchell Y. Mirviss
mymirviss@venable.com
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21201
(410) 244-7400
(410) 244-7742 (fax)

Attorneys for Quinton Richmond, et al.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 17th day of January 2014, 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 District Court Defendants and for the Public Defender, respectively:

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

Attorneys for the District Court Defendants

Brian Boynton, Esquire
Ashley E. Bashur, Esquire
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

A. Stephen Hut, Jr., Esquire
Office of the Public Defender
Six St. Paul Street, 1400
Baltimore, Maryland 21202

Attorneys for the Public Defender

Mitchell Mirviss

Mitchell Y. Mirviss

Exhibit 1

IN THE COURT OF APPEALS OF MARYLAND

ADMINISTRATIVE ORDER ESTABLISHING APPOINTMENT PROCESS FOR ATTORNEYS REPRESENTING INDIGENT DEFENDANTS AT INITIAL APPEARANCES BEFORE DISTRICT COURT COMMISSIONERS

WHEREAS, On September 25, 2013, the Court of Appeals filed its opinion in *DeWolfe v. Richmond* ("*Richmond*"), which held that indigent criminal defendants have the constitutional right to representation by counsel at initial appearances before District Court Commissioners, and the Court's mandate issued on October 17, 2013; and

WHEREAS, On October 15, 2013, the Standing Committee on Rules of Practice and Procedure submitted its 181st Report to the Court of Appeals, which contained proposed rules to implement the *Richmond* decision, and which the Committee recommended be adopted on an emergency basis; and

WHEREAS, On November 6, 2013, the Court, after making certain amendments, adopted the proposed rules changes in the 181st Report, but provided that they would not take effect until the issuance of a further Order of the Court because of uncertainties regarding the possible need for further action in the trial court; and

WHEREAS, Among the rules changes in the 181st Report is an amendment to Maryland Rule 4-216, namely subsection (e)(1)(A)(iii), which establishes the process by which the District Court appoints attorneys to represent indigent defendants at initial appearances before District Court Commissioners, should the Office of the Public Defender decline representation of any eligible defendant; and

WHEREAS, The process set forth in revised Rule 4-216(e)(1)(A)(iii), when it becomes effective, is integral to the effectuation of the constitutional right to counsel and,

therefore, advance preparation for its full implementation should be established as soon as possible; and

WHEREAS, Because the Court is not ready to make all of the rules changes in the 181st Report immediately effective, it is appropriate to issue an Administrative Order, consistent with Rule 4-216(e)(1)(A)(iii), commencing the alternate private attorney appointment process for representation of eligible defendants in the District Court so that the rules changes may be implemented timely upon declaration of their effective date.

NOW, THEREFORE, I, Mary Ellen Barbera, Chief Judge of the Court of Appeals and administrative head of the Judicial Branch, pursuant to the authority conferred by Article IV, § 18 of the Maryland Constitution, do hereby order this 26th day of November, 2013, effective immediately:

1. Appointment Process. The Chief Judge of the District Court shall direct the District Administrative Judge in each district (i) with the assistance of local bar associations and other interested groups, to solicit qualified private attorneys in the district who would be willing to accept an appointment by the Court to represent eligible indigent defendants at initial appearances before commissioners in the district, the fees and expenses for such representation to be governed by the schedule used by the Public Defender for panel attorneys and to be charged against the State of Maryland, (ii) to compile a list of those attorneys who agree to serve on a standby basis, and (iii) to develop an efficient and effective procedure for notifying such attorneys of an actual appointment.

2. Rescission of Order. Subject to any further Administrative Order, this Order will

be rescinded on the effective date of the rules changes in the 181st Report.

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

Filed: November 26, 2013

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

Exhibit 2

Ben Clyburn/DC/MDCOURTS

11/26/2013 02:15 PM

To DC - District Court - Administrative Judges, DC - District Court - Administrative Clerks, DC - District Court - Commissioners - Administrative, Ben Clyburn/DC/MDCOURTS@MDCOURTS

cc Mary Ellen Barbera/AC/MDCOURTS@MDCOURTS, Alan Wilner/AC/MDCOURTS@MDCOURTS, Thomas Ross/CC/MDCOURTS@MDCOURTS, jdebelius@mcccourt.com,

bcc

Subject Implementation of Richmond Rules - Commencement of the Alternate Private Attorney Appointment Process

Dear Administrative Judges:

Attached is an Administrative Order regarding the implementation of *Richmond* (Attachment A). On November 16, 2013, the Court, after making certain amendments, adopted the proposed rules in the 181st Report, but provided that they would not take effect until the issuance of a further Order of the Court (Attachment B). The attached Administrative Order makes amended Rule 4-216(e)(1)(A)(iii), effective immediately. No other provisions of the Rules are effective until further notice.

Pursuant to the Administrative Order and amended Rule 4-216(e)(1)(A)(iii), I direct you to (1) with the assistance of local bar associations and other interested groups, to solicit qualified private attorneys in the district who would be willing to accept an appointment by the Court to represent eligible indigent defendants at initial appearances before commissioners in the district, the fees and expenses for such representation to be governed by the schedule used by the Public Defender for panel attorneys and to be charged against the State of Maryland, (ii) to compile a list of those attorneys who agree to serve on a standby basis, and (iii) to develop an efficient and effective procedure for notifying such attorneys of an actual appointment.

Susan Armiger, Assistant Chief Clerk of Finance, has contacted the Office of the Comptroller to determine how bills will be processed to the State. I will contact you once we hear from the Comptroller's office.

Thank you for your immediate attention to this Directive.

CJC

Richmond - (Attachment A).pdf

Rules Order - (Attachment B).pdf

Exhibit 10

Exhibit 3

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,

Michael Schatzow
mschatzow@venable.com
Mitchell Y. Mirviss
mymirviss@venable.com
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21201
(410) 244-7400
fax: (410) 244-7742

Attorneys for Plaintiffs

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:

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

Attorneys for the District Court Defendants

Ashley Bashur, Esquire
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

A. Stephen Hut, Jr., Esquire
Office of the Public Defender
6 St Paul Street, Suite 1400
Baltimore, Maryland 21202

Attorneys for the Public Defender

Mitchell Y. Mirviss

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

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

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR FURTHER RELIEF

Plaintiffs Quinton Richmond, et al., by their undersigned counsel, respectfully submit the following Memorandum of Points and Authorities in Support of their Petition for Further Relief seeking injunctive relief against Defendants 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 the "DCDs").

PRELIMNARY STATEMENT

Throughout this case, the DCDs have done everything possible to delay or prevent the provision of counsel to Plaintiffs at initial bail hearings. They opposed the entry of an injunction to accompany the Court's original declaratory judgment and then in the same breath argued that the Court's issuance of a declaratory judgment without an injunction would create a res judicata bar against any injunctive relief in the future. Along with the Public Defender, they argued that the Court should not grant declaratory relief until funding and logistical issues were resolved in advance. After the initial decision by the Court of Appeals of January 4, 2012 ("DeWolfe I"), where the Court of Appeals expressly held that a stay was not appropriate to give the General Assembly time to consider funding and policy issues, the DCDs nonetheless moved for a stay and for reconsideration. After the second ruling by the Court of Appeals issued on September

25, 2012 ("DeWolfe II"), the State of Maryland (represented by the same counsel) sought a stay and moved for reconsideration and to recall the mandate of the Court of Appeals. In this Court, the DCDs opposed entry of the Court's declaratory judgment and moved to vacate it. Now, in their Status Report (see Pet. Ex. 8), they ask for the Court to delay implementation of Plaintiffs' right to counsel even further, suggesting that the Court defer to the Legislative and Executive Branches for another six months (at least) to consider the issue (again) of whether and how to reform the pretrial system in Maryland. Apparently, seven years of consideration while this case has been pending are not enough.

Even worse, the DCDs again argue that the Court should not take any steps to protect Plaintiffs' right to counsel until the Executive or Legislative Branches earmark funds to pay for it. But the seven-year history of this case makes it perfectly clear that those branches will not authorize or appropriate funds until they have no choice but to do so. This creates their perfect daisy chain of perpetual constitutional violation: according to the DCDs, the Court should not act because funding is not available, and yet the record could not be clearer that funding will not be made available unless the Court acts and compels the DCDs to honor Plaintiffs' constitutional rights. In asking the Court to wait until funding is provided, they seek to create a funding veto over Plaintiffs' fundamental constitutional right to counsel.

The District Court Defendants' contention that funding must precede honoring Plaintiffs' constitutional rights upends the Constitutional structure of government that the Judicial Branch bears responsibility for declaring and enforcing constitutional rights. Legislatures do not have plenary power to negate the Declaration of Rights by failing to appropriate funds or by delaying such appropriations. Indeed, the Court of Appeals has definitively rejected the DCDs' position, holding that "the executive and legislative budget authority is subject to the constitutional

limitations of the Declaration of Rights" and therefore affirming a preliminary injunction that required the expenditure of funds without advance budget authority. Ehrlich v. Perez, 394 Md. 691, 736 (2006). The Judiciary thus may not decline to enforce the Constitution merely because the Legislative and Executive Branches have not yet come to an agreement that those rights are worthy of enforcement. By asking this Court to wait until funds are available to pay for counsel as required by the Constitution, they want this Court to cede its constitutional role to the other branches of government. Under Maryland's constitutional scheme, the DCDs' request is improper and should be rejected out-of-hand. As it is clear that nothing will happen until the Court takes action, the Court must order the DCDs, on penalty of contempt, to commence their implementation of the Court of Appeals' ruling and the Plaintiffs' constitutional right to counsel.

ARGUMENT

I. Further Relief Is Warranted and Necessary.

In its order denying the State's post-DeWolfe II motions for stay and to withdraw the mandate, the Court of Appeals anticipated further proceedings in this Court to enforce its declaratory judgment pursuant to Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 3-412. See Pet. Ex. 5, Order of Ct. of Appeals at 2 (citing Nova v. Penske, 405 Md. 435, 458-61, 952 A.2d 275, 289-91 (2008); Bankers & Ship. Ins. v. Electro Enters., 287 Md. 641, 652-53, 415 A.2d 278, 285 (1980)). The DCDs *agree* that the Court of Appeals has directed that the implementation of the new Rules will be triggered by further action by this Court pursuant to a petition for further relief pursuant to CJP § 3-412 and even chide Plaintiffs for having first demanded that the DCDs honor Plaintiffs' constitutional rights voluntarily before Plaintiffs petitioned this Court to compel the DCDs to comply on penalty of contempt. See Ex. 8, Status Report at 6-7.[1]

[1] Much of the Status Report takes umbrage at Plaintiffs for having gone to the District Court Defendants first to demand voluntarily compliance before seeking coercive relief from this Court. It is not a material

The current posture of the case makes it clear that no implementation will occur unless the Court takes further action. For these reasons and those set forth in the Petition, the Court should grant further relief to enforce the Court's declaratory judgment.

II. Plaintiffs' Constitutional Rights Do Not Take a Back Seat to the District Court Defendants' Stated Claims that Implementation Must Await Funding and Resolution of All Logistical Challenges.

The District Court Defendants' principal stated reason for opposing immediate implementation – a purported lack of funding and lack of opportunity to address logistical concerns – is not a valid ground for denying Plaintiffs their constitutional right to counsel at initial bail hearings. As discussed in the Petition, the Attorney General has stated in a formal opinion issued to the Public Defender that "the lack of funds does not mitigate the State's responsibility to provide counsel for indigent defendants." See Pls. Pet. at ¶ 18 (quoting Ex. 11, Op. No. 91-044, 76 Md. Op. Atty. Gen. 341, 342 (1991) (citing Gideon v. Wainwright, 372 U.S. 335 (1963)). That is especially the case here, where the record is clear that the funds will not be made available until the District Court Defendants are compelled to act.

The lack of pre-appropriated funds is no bar to injunctive relief to enforce constitutional rights. In Ehrlich v. Perez, 394 Md. 691 (2006), the Court of Appeals addressed the issue directly, considering whether a circuit court had authority to issue a preliminary injunction to reinstate Medical Assistance benefits retroactively to certain legal immigrants and their children who had been wrongfully denied benefits due to reductions in the State budget, in violation of the right to equal protection guaranteed by Article 24 of the Declaration of Rights. The State

---

issue for this Court, so Plaintiffs will not respond here beyond pointing out that it is common procedure to demand voluntary compliance from a defendant before petitioning a court for coercive relief. In light of Judge Clyburn's comments to the press proclaiming that the DCDs were ready to begin compliance and would not fight any further, Plaintiffs had every reason to hope that voluntary cooperation was possible. Unfortunately, the Status Report indicates a contrary intent: the District Court Defendants will continue to oppose immediate implementation and continue to seek to delay implementation well into the future.

defendants argued that the circuit court "lacked the authority to issue a preliminary injunction requiring expenditure of State funds" to pay for services that were not appropriated in the State budget. Id. at 713. While the Court of Appeals agreed that payment of past benefits could not be compelled through a preliminary injunction and instead had to be assessed as damages, it held that "because there is a likelihood that Appellants' action was unconstitutional" the preliminary injunction was proper because "***the executive and legislative budget authority is subject to the constitutional limitations of the Declaration of Rights***." Id. at 735 (emphasis added). Thus, the lack of pre-authorized appropriations cannot trump Plaintiffs' constitutional rights. Ehrlich is dispositive of the issue at hand. Neither the Executive nor the Legislative Branches can veto Plaintiffs' constitutional rights by failing to provide required funding.

In its January 4, 2012 decision, the Court of Appeals made clear that funding concerns do not stand in the way of the statutory right to counsel. See DeWolfe v. Richmond, --- Md. ---, No. 34, Sept. Term, 2011, slip op. at 29 (Jan. 4, 2012) ("DeWolfe I") ("the budgetary concerns of the Public Defender never have played a role in Maryland appellate decisions involving defendants' statutory right to counsel"); id. at 30 (adopting Judge Wilner's statement in Baldwin v. State, 51 Md. App. 538, 555 (1982), 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' of whether a defendant qualified as 'indigent' under the Public Defender statute, that it was "the court's obligation to uphold the law," and that such "'obligation is not subject to or in any way dependent upon the level of appropriations received by the Public Defender"); Office of the Pub. Defender v. State, 413 Md. 411, 426 n.12 (2010) (quoting with apparent approval the statement in Baldwin 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 right to counsel), superseded on other

grounds by 2011 Md. Laws, ch. 244. These statements apply with even greater force to the constitutional right to counsel found by the Court of Appeals in DeWolfe II.

The Court of Appeals also quoted decisions from other jurisdictions making clear that courts "'can hardly permit the legal rights of litigants to turn upon the alleged inability of the [governmental] defendant fully to meet his obligation to others'" and that it "'cannot in good conscience, however, deny relief to the plaintiffs pending such action" for legislative cures to the problem. DeWolfe I, --- Md. at ---, slip op. at 30-31 (quoting Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978)); see also id. at 31 (discussing and quoting with approval Hurrell-Harring v. New York, 930 N.E.2d 217, 227 (N.Y. 2010), where New York's top court allowed claims "'to proceed notwithstanding that a remedy ... would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities'" as this did "'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,'" especially "'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'").

Given these repeated pronouncements by the Court of Appeals, including a pronouncement in this very case, the DCDs' concerns should be rejected out-of-hand. The Attorney General reached this very conclusion over two decades ago. The failure of the District Court Defendants to secure funding in advance of implementation does not mitigate Plaintiffs' constitutional right to counsel. Implementation is both mandatory and imperative.

III. Plaintiffs Are Entitled to a Permanent Injunction Compelling the District Court Defendants to Comply with the Constitution on Pain and Penalty of Contempt.

Given the on-going failure of the District Court Defendants to comply with Plaintiffs' constitutional rights, a permanent injunction is required. As the Court of Appeals has repeatedly

stated, if a defendant knowingly violates an established right of the plaintiff, a permanent injunction should issue. See Amabile v. Winkles, 276 Md. 234, 242 (1975) (holding that, where a violation is "committed with knowledge of the plaintiff's right, the courts will refuse to balance the equities or conveniences and will grant the equitable relief sought") (citing a long line of cases, including Lichtenberg v. Sachs, 213 Md. 147, 151-52 (1957)); see also Columbia Hills Corp. v. Mercantile-Safe Dep. & Trust Co., 231 Md. 379. 382 (1963) (rejecting defendant's contention that even if the requested injunction would subject defendant "to great injury and afford[ ] [plaintiff] comparatively little benefit," such that it would do more injury to the [defendant] than it would benefit the [plaintiff]," an unconstitutional result (in that case an unlawful taking of property) entitled the plaintiff to the injunction).

An injunction also is required under the four-part test for a permanent injunction under federal law. Under that test, a party must show:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Christopher Phelps & Assocs., LLC v. Galloway, 492 F.3d 532, 543 (4th Cir. 2007); Marriott v. Cnty. of Montgomery, 426 F. Supp. 2d 1, 11 (N.D.N.Y 2006) ("The standard for a permanent injunction is essentially the same as the standard for a preliminary injunction, except that the moving party, instead of showing a likelihood of success on the merits must show actual success on the merits."). But that test changes when a constitutional right is involved.

When requesting a permanent injunction to enjoin the violation of a plaintiff's constitutional right, courts view the proven violation of a constitutional right as being so egregious that it constitutes irreparable harm by itself. See, e.g., 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed.1995)

("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); Gour v. Morse, 652 F. Supp. 1166, 1173 (D. Vt. 1987) ("Constitutional rights are so basic to our society that their deprivation must be redressable by equitable remedies. Injury from their deprivation is almost by definition irreparable."). Indeed, after a party has shown actual success on a constitutional challenge, "failure to grant [a] permanent injunction will result in irreparable injury because the constitutional right [ ] is threatened or impaired." Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 619 (E.D. La. 1999) (ordering permanent injunction after plaintiffs established a partial-birth abortion statute was facially unconstitutional and vague).

As for the public interest and balance of hardships,[2] these unquestionably favor Plaintiffs, as the denial of counsel all too often results in a loss of freedom, the most fundamental right in the Constitution. The Court of Appeals' discussion of the "devastating effects" that can result from the denial of counsel definitively addresses this point. See DeWolfe II, slip op. at 4-5 (pointing out impact of initial bail determination on bail review hearings); id. at 5 (discussing "devastating" personal effects); id. at 5-6 (discussing conditions in the initial bail hearings). Conversely, the District Court Defendants cannot credibly plead hardship: they have had *seven years* to secure advance funding and to make whatever logistical arrangements are needed to

[2] In some cases, when a positive right established by statute or the Constitution is being violated such that the right itself (and the policy supporting that right) would be abrogated, federal courts do not engage in a balance of the equities even under federal law. See, e.g., Tennessee Valley Auth. v. Hill, 437 U.S. 153, 193-94 (1978) (declining to balance the equities and hardships of an injunction issued against completion of multi-million dollar dam whose operation would bring about the extinction of the Snail Darter fish, in violation of the Endangered Species Act, regardless of the costs involved); United States v. City & Cnty. of San Francisco, 310 U.S. 16, 30-31 (1940) (reversing Ninth Circuit decision that, based "upon a balancing of the equities," had overturned an injunction, as "this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued" because the "equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective" and the clear interference with congressional intent "makes [a]n injunction to prohibit continued violation of that policy ... both appropriate and necessary").

implement Plaintiffs' right to counsel. Indeed, the DCDs have been on clear notice since this Court's declaratory judgment three years ago, the DeWolfe I decision two years ago, and the DeWolfe II decision over two months ago that they likely would have to honor and implement the right to counsel. Their Status Report does not provide any good excuse for their desire not to go forward other than their suggestion that this Court should defer to the Executive and Legislative Branches to devise solutions. Indeed, contrary to the DCDs' position, Judge Clyburn has publicly declared that he and the DCDs are ready to proceed. The Court should therefore grant the Petition and issue an injunction compelling the DCDs to comply with the Maryland Constitution by providing counsel to Plaintiffs at initial bail hearings or, in the alternative, prohibiting the DCDs from directing the incarceration of Plaintiffs absent the provision of counsel at initial bail hearings.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Further Relief and issue an injunction compelling the DCDs to comply with the Maryland Constitution by providing counsel to Plaintiffs at initial bail hearings or, in the alternative, prohibiting the DCDs from directing the incarceration of Plaintiffs absent the provision of counsel at initial bail hearings.

Respectfully submitted,

Mitchell Mirviss

Michael Schatzow
mschatzow@venable.com
Mitchell Y. Mirviss
mymirviss@venable.com
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21201
(410) 244-7400
fax: (410) 244-7742

Attorneys for Plaintiffs

Exhibit 4

IN THE
COURT OF APPEALS OF MARYLAND

THE HON. BEN C. CLYBURN, in his official capacity as the Chief Judge for the District Court of Maryland, et al.,	*	
Petitioners,	*	Petition No. 622
v.	*	September Term, 2013
QUINTON RICHMOND, et al.,	*	
Respondents.	*	

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

AFFIDAVIT OF MITCHELL MIRVISS

Mitchell Y. Mirviss, being duly sworn, deposes and states as follows:

1. I am over the age of eighteen and am competent to testify on personal knowledge to the information contained herein.

2. I am co-counsel for the Plaintiffs in this case.

3. On January 6, 2014, I attended a public meeting of the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender. As co-counsel for Plaintiffs, I share a seat with Mr. Schatzow as a Task Force member.

4. At this meeting, Chief Judge Clyburn presented to the task force the report of the Judiciary Task Force on Pretrial Confinement and Release.

5. After Chief Judge Clyburn ended his presentation, he accepted questions from task force members. I asked Judge Clyburn to address the status of the various

logistical concerns that had been previously raised regarding implementation of the right to counsel at initial bail hearings before district commissioners. Judge Clyburn responded that the logistical concerns that had previously been raised regarding providing representation at the commissioner hearings had been addressed and resolved, such that, from a logistical perspective, initial bail hearings with counsel present could occur immediately if the Rules were to issue and funding were to be available. He explained that adequate space had been secured at all commissioner work stations for attorneys and interpreters to be present, and all other logistical objections had been resolved.

5. I also asked Chief Judge Clyburn to address the judiciary's position regarding interim implementation of the right to counsel in locations or in graduated stages as implementation became possible. Judge Clyburn stated that the judiciary was not opposed to piecemeal implementation of steps that could be taken while long-term solutions are devised. He also affirmed that he would support quicker action where possible.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing are true and correct.

Mitchell Y. Mirviss

Mitchell Y. Mirviss
January 17, 2014

Exhibit 5

Top court won't [illegible]s-at-bail ruling

Posted: 7:37 pm Wed, November 6, 2013
By Steve Lash
Daily Record Legal Affairs Writer

Maryland's top court said Wednesday it will not stay its landmark decision that criminal defendants have a constitutional right to counsel at initial bail hearings -- but even so, it may have prolonged the seven-year legal fight between the accused and the state.

The Court of Appeals, in rejecting the state's request for a stay, directed the Baltimore City Circuit Court to issue a declaratory judgment ordering the state to provide counsel for indigent defendants at initial bail hearings.

However, nothing in the high court's decision stops the state from asking the circuit court for a delay based on the same argument Attorney General Douglas F. Gansler made in seeking the stay.

The state is reviewing the Court of Appeals' order rejecting the stay and has not made a final decision on what action it will take, the attorney general's office said.

In requesting the stay, Gansler said the General Assembly needs time to raise the additional $28 million that the Maryland Office of the Public Defender said it will need annually to have attorneys on call at 177,000 initial bail hearings statewide.

Chief Maryland District Court Judge Ben. C. Clyburn, who joined the stay request in the Court of Appeals, said he will not seek a further delay; instead, he will 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.

"I'm not fighting anything," Clyburn said Wednesday. "I am moving forward. We are ready to go."

An attorney for the indigent defendants who have waged the seven-year fight said he is "delighted" the District Court will not seek delay.

"I assume that means they're ready to implement immediately," added the lawyer, Michael Schatzow of Venable LLP in Baltimore.

Schatzow noted that the Court of Appeals passed procedural rules Monday

Exhibit 6

to ensure defendants are represented by counsel at initial bail hearings. The court, however, placed the rules on hold pending resolution of the Baltimore City Circuit Court litigation.

The rules, when implemented, will permit District Court administrative judges to appoint private attorneys if the public defender's office is short-staffed.

The appointed lawyers would be paid a fee based on the Office of the Public Defender's payment scale for panel attorneys – those the office hires when it cannot handle a case itself due to a conflict of interest or some other reason. The bill for services would be sent to the state.

The rules will also require commissioners to tell unrepresented defendants of their right to counsel and that an attorney will be provided if they cannot afford one.

The Maryland Judiciary's Standing Committee on Rules of Practice and Procedure proposed the rules following the high court's DeWolfe v. Richmond decision in September.

Maryland Public Defender Paul B. DeWolfe, a titular defendant in the case, said his office did not press for a stay and is not seeking any further delay.

"It is our responsibility as attorneys for indigent defendants to protect their constitutional rights," DeWolfe added.

At the initial hearings, commissioners set bail or decide to release defendants on their own recognizance. If bail is set but cannot be paid, the defendant is sent to jail, where he or she remains until a bail review hearing is held, usually within 24 hours.

In its 4-3 decision, the Court of Appeals said the Maryland Constitution's due-process provision holds that the right to counsel "attaches in any proceeding that may result in the defendant's incarceration," including an initial bail hearing.

The Richmond litigation began in November 2006 in Baltimore City Circuit Court on behalf of 11 indigent defendants. The class action challenged procedures at the city's Central Booking and Intake Facility, where a commissioner sets the initial bail.

A circuit court judge originally granted summary judgment for the state, but the Court of Appeals sent the case back in March 2010 with instructions to add the public defender as a party.

That October, Judge Alfred Nance ruled there was a right to counsel, a decision the Court of Appeals affirmed in January 2012.

The 2012 decision found a statutory right to counsel at bail under the Maryland Public Defender Act. Motions for reconsideration were pending when the General Assembly amended the law last year.

The court then reheard argument on the constitutional question this January and issued its decision, finding the right existed, on Sept. 25.

Exhibit 6

PROPOSAL OF MARYLAND JUDICIARY
FOR
IMPROVEMENTS TO PRETRIAL RELEASE SYSTEM

I. INTRODUCTION

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

---

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

II. DEFICIENCIES IN THE PRESENT PRETRIAL RELEASE SYSTEM

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

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

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

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

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

night and without available transportation.

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

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

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

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

---

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

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

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

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

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

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

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

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

III. PROPOSED ALTERNATIVES

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

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

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

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

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

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

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

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

Id. at 15.

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

---

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

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

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

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

---

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

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

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

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

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

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

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

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

IV. THE JUDICIAL RESPONSE – GENERAL OUTLINE

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

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

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

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

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

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

(2) Retain the necessary number of commissioners:

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

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

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

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

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

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

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

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

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

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

V. IMPLEMENTATION AND COST

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. BENEFITS

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

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

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

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

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

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

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

VII. CONCLUSION

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

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

Exhibit 7

VENABLE® LLP

750 E. PRATT STREET SUITE 900 BALTIMORE, MD 21202
T 410.244.7400 F 410.244.7742 www.Venable.com

January 8, 2014

VIA HAND-DELIVERY

Michael Schatzow

T 410-244-7592
F 410.244.7742
mschatzow@venable.com

The Honorable Alfred Nance
Judge, Circuit Court for Baltimore City
Room 561E, Courthouse East
111 North Calvert Street
Baltimore, Maryland 21202

Re: Quinton Richmond, et al. v. The Hon. Ben Clyburn, et al.
Civil No. 24-C-06-009911 CN

Dear Judge Nance:

We are writing to inquire about the status of Plaintiffs' Petition for Further Relief, which we filed one month ago, on December 5, 2013. In that Petition, we explained that the Court of Appeals had conditioned its issuance of Rule amendments to implement its decision finding a constitutional right to counsel at initial bail hearings upon this Court issuing an Order compelling the District Court Defendants to comply. The Court of Appeals indicated that Plaintiffs should file such a Petition and cited case law that supported providing such relief. Pursuant to Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 3-812(c), we asked the Court to issue an Order to Show Cause requiring the Defendants to answer the Petition for Further Relief. To date, the Public Defender has responded, but the District Court Defendants have not.

The procedure for moving forward is clearly laid out in the Declaratory Judgment Act. Under CJP § 3-812(c), "If the application is sufficient, the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted." No Defendant is arguing that our application is insufficient. We therefore respectfully request that the Court enter the Order to Show Cause.

The Court first granted Plaintiffs declaratory relief over three years ago, on October 1, 2010. Since then, the Court of Appeals has twice affirmed this Court's ruling. The rights in question have been established and are indisputable. We see no clear reason why implementation cannot commence immediately. Even if the District Court Defendants still disagree on that point, we see no impediment that would stand in the way of adjudicating the issues in our Petition so that the new Rules will issue and compliance will commence.

Moreover, some of the barriers to implementation raised by the District Court Defendants in their "Status Report" seem to have been resolved. The Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender has issued its final report to the General Assembly. On Monday, that task force heard

a presentation by Judge Clyburn of the final report of The Judiciary Task Force on Pretrial Confinement and Release. Judge Clyburn publicly stated at that hearing that the logistical concerns that had previously been raised regarding providing representation at the commissioner hearings had been addressed and resolved, such that, from a logistical perspective, they could occur immediately if the Rules were to issue and funding were to be available. As those latter events will occur after an Order is issued by the Court compelling the District Court Defendants to comply, the path appears clear for implementation to commence. The first step, therefore, is for the Court to issue the Order to Show Cause.

The Judiciary Task Force recommended an implementation date for its reform of January 1, 2015. To put it simply, it is not fair to the Plaintiffs to wait *another year* or longer while a long-term reform plan is fashioned and developed. This is particularly so given that the Court of Appeals has refused to stay, withdraw, or reconsider its mandate. Implementation can and should occur now, on an interim basis, while the politicians and policymakers debate the details of the long-term reforms. We know we do not need to remind the Court that the constitutional rights of scores of indigent criminal defendants are being violated every day in the City and across the State. This Court has been stalwart in stepping forward to protect the rights of indigent criminal defendants. We respectfully ask the Court to resume the process once more so that Plaintiffs may enjoy their constitutional rights promptly, rather than wait a year or longer until the long-term policy reforms are decided and developed.

Thank you for your consideration of this request.

Very truly yours,

Michael Schatzow

Mitchell Y. Mirviss /MS

Mitchell Y. Mirviss

cc: William F. Brockman, Esq.
Julia Doyle Bernhardt, Esq.
A. Stephen Hut, Esq.
Ashley Bashur, Esq.
Clerk, Circuit Court for Baltimore City

Exhibit 8

VENABLE® LLP

750 E. PRATT STREET SUITE 900 BALTIMORE, MD 21202
T 410.244.7400 F 410.244.7742 www.Venable.com

Michael Schatzow

T 410-244-7592
F 410.244.7742
mschatzow@venable.com

BY OVERNIGHT MAIL

January 13, 2014

The Hon. Mary Ellen Barbera
Chief Judge, Court of Appeals of Maryland
The Hon. Glenn T. Harrell, Jr.
The Hon. Lynne A. Battaglia
The Hon. Clayton Green, Jr.
The Hon. Sally D. Adkins
The Hon. Robert N. McDonald
The Hon. Shirley M. Watts
Associate Judges, Court of Appeals of Maryland
361 Rowe Boulevard
Annapolis, Maryland 21401

Re: 181st Rules Committee Report

Dear Chief Judge Barbera and Judges Harrell, Green, Battaglia, Adkins, McDonald, and Watts:

On behalf of the Plaintiffs in the Richmond right-to-counsel-at-bail litigation, we are writing to the Court in its rule-making capacity to follow up on the Rules Order issued by the Court regarding the 181st Report by the Rules Committee. As Your Honors will recall, on November 6, 2013, the Court approved and adopted the 181st Report with modifications, but made its implementation effective upon further Order by the Court. The Court indicated at the open meeting that the Court would issue such Order when the Circuit Court for Baltimore City entered an order compelling the "District Court Defendants" to provide representation.

We are pleased to report that Judge Nance issued an order on Friday, January 10, 2014, which was entered by the Circuit Court today, January 13, 2014 (as amended), requiring the District Court Defendants to provide representation to Plaintiffs at their initial bail hearings. A copy of the amended order is attached. Accordingly, we respectfully request that the Court issue a Rules Order directing that the November 6, 2013 Rules Order takes effect immediately.

We very much appreciate the Court's consideration of this critical right to counsel and the need to proceed with interim implementation while policymakers deliberate over long-term solutions.

Please let us know if you have any questions.

Very truly yours,

Michael Schatzow (sym)
Michael Schatzow

Mitchell Mirviss
Mitchell Y. Mirviss

cc: William F. Brockman, Esq.
Julia Doyle Bernhardt, Esq.
Brian Boynton, Esq.
Ashley Bashur, Esq.
A. Stephen Hut, Jr., Esq.

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

* *

AMENDED ORDER

Upon consideration of the Petition for Further Relief filed by Plaintiffs against certain Defendants, namely the Honorable Ben C. Clyburn, the Honorable John R. Hargrove, Jr., David Weissert, Linda Lewis, and the Commissioners of the District Court for Baltimore City (collectively, the "District Court Defendants"), any responses thereto by the parties, review of the court file, and this Court finding:

1. The Court of Appeals of Maryland ruled that Plaintiffs are entitled to representation by counsel at the initial bail hearings under the due process clause of Article 24 of the Maryland Declaration of Rights, affirming this Court's ruling of October 1, 2010, that Plaintiffs have a constitutional right to counsel under Article 24;
2. The Court of Appeals issued its mandate on October 13, 2013;
3. Pursuant to 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 Maryland Declaration of Rights, and that the District Court Defendants have been violating that said right by failing to provide counsel;

4. The District Court Defendants moved to vacate this Court's Declaratory Judgment, and this Court denied that motion on November 1, 2013;

It is this 10th day of January, 2014, by the Circuit Court for Baltimore City, hereby

ORDERED, that the Plaintiffs' Petition for Further Relief is hereby **GRANTED**. And,

ORDERED, that the District Court Defendants are to appoint counsel for Plaintiffs at all initial bail hearings. And, further,

ORDERED, that the District Court Defendants are hereby **PROHIBITED AND ENJOINED** from a) conducting initial bail hearings without appointing counsel for Plaintiffs, and/or b) directing the incarceration of any Plaintiffs who have not been provided counsel at such hearings. And,

ORDERED, that this Order shall take effect **IMMEDIATELY**.

Judge's signature appears on the original of this document.

Judge Alfred Nance
Circuit Court for Baltimore City

AN/ln

CC: Court File
All Parties

William F. Brockman, Esq.
Julia Doyle Bernhardt, Esq.
Assistant Attorneys General
200 Saint Paul Place, 20th Floor
Baltimore, MD 21202

Michael Schatzow, Esq.
Mitchell Y. Mirviss, Esq.
Venable LLP
750 East Pratt St., Ste. 900
Baltimore, MD 21202

Ashley Bashur, Esq.
Brian Boynton, Esq.
Wilmer Cutler Pickering Hale & Dorr, LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006

A. Stephen Hut, Jr., Esq.
Office of the Public Defender
6 Saint Paul St., Ste. 1400
Baltimore, MD 21202

Exhibit 9

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

* *

ORDER

Upon consideration of the Petition for Further Relief filed by Plaintiffs against certain Defendants, namely the Honorable Ben C. Clyburn, the Honorable John R. Hargrove, Jr., David Weissert, Linda Lewis, and the Commissioners of the District Court for Baltimore City (collectively, the "District Court Defendants"), any responses thereto by the parties, review of the court file, and this Court finding:

1. The Court of Appeals of Maryland ruled that Plaintiffs are entitled to representation by counsel at the initial bail hearings under the due process clause of Article 24 of the Maryland Declaration of Rights, affirming this Court's ruling of October 1, 2010, that Plaintiffs have a constitutional right to counsel under Article 24;
2. The Court of Appeals issued its mandate on October 13, 2013;
3. Pursuant to 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 Maryland Declaration of Rights, and that the District Court Defendants have been violating that said right by failing to provide counsel;

4. The District Court Defendants moved to vacate this Court's Declaratory Judgment, and this Court denied that motion on November 1, 2013;

It is this ____ day of January, 2014, by the Circuit Court for Baltimore City, hereby

ORDERED, that the Plaintiffs' Petition for Further Relief is hereby **GRANTED**. And,

ORDERED, that the District Court Defendants are to appoint counsel for Plaintiffs who are eligible for release at all initial bail hearings, unless such Plaintiff knowingly, intentionally and voluntarily waives his or her right to counsel. And, further,

ORDERED, that the District Court Defendants are hereby **PROHIBITED AND ENJOINED** from a) conducting initial bail hearings without appointing counsel for Plaintiffs who are eligible for release and have not waived their right to counsel, and/or b) directing the incarceration of any Plaintiffs who are eligible for release and have not waived their right to counsel who have not been provided counsel at such hearings. And,

ORDERED, that this Order shall take effect at 12:01 a.m. on February 3, 2014.

_____
Judge Alfred Nance
Circuit Court for Baltimore City

AN/ln

CC: Court File
All Parties

William F. Brockman, Esq.
Julia Doyle Bernhardt, Esq.
Assistant Attorneys General
200 Saint Paul Place, 20th Floor
Baltimore, MD 21202

Ashley Bashur, Esq.
Brian Boynton, Esq.
Wilmer Cutler Pickering Hale & Dorr, LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006

Michael Schatzow, Esq.
Mitchell Y. Mirviss, Esq.
Venable LLP
750 East Pratt St., Ste. 900
Baltimore, MD 21202

A. Stephen Hut, Jr., Esq.
Office of the Public Defender
6 Saint Paul St., Ste. 1400
Baltimore, MD 21202

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

* *

~~AMENDED~~ ORDER

Upon consideration of the Petition for Further Relief filed by Plaintiffs against certain Defendants, namely the Honorable Ben C. Clyburn, the Honorable John R. Hargrove, Jr., David Weissert, Linda Lewis, and the Commissioners of the District Court for Baltimore City (collectively, the "District Court Defendants"), any responses thereto by the parties, review of the court file, and this Court finding:

1. The Court of Appeals of Maryland ruled that Plaintiffs are entitled to representation by counsel at the initial bail hearings under the due process clause of Article 24 of the Maryland Declaration of Rights, affirming this Court's ruling of October 1, 2010, that Plaintiffs have a constitutional right to counsel under Article 24;

2. The Court of Appeals issued its mandate on October 13, 2013;

3. Pursuant to 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 Maryland Declaration of Rights, and that the District Court Defendants have been violating that said right by failing to provide counsel;

4. The District Court Defendants moved to vacate this Court's Declaratory Judgment, and this Court denied that motion on November 1, 2013;

It is this ~~10th~~ day of January, 2014, by the Circuit Court for Baltimore City, hereby

ORDERED, that the Plaintiffs' Petition for Further Relief is hereby **GRANTED**. And,

ORDERED, that the District Court Defendants are to appoint counsel for Plaintiffs who are eligible for release at all initial bail hearings, unless such Plaintiff knowingly, intentionally and voluntarily waives his or her right to counsel. And, further,

ORDERED, that the District Court Defendants are hereby **PROHIBITED AND ENJOINED** from a) conducting initial bail hearings without appointing counsel for Plaintiffs who are eligible for release and have not waived their right to counsel, and/or b) directing the incarceration of any Plaintiffs who are eligible for release and have not waived their right to counsel who have not been provided counsel at such hearings. And,

ORDERED, that this Order shall take effect ~~IMMEDIATELY~~ at 12:01 a.m. on February 3, 2014.

Judge Alfred Nance
Circuit Court for Baltimore City

AN/ln

CC: Court File
All Parties

William F. Brockman, Esq.
Julia Doyle Bernhardt, Esq.
Assistant Attorneys General
200 Saint Paul Place, 20th Floor
Baltimore, MD 21202

Ashley Bashur, Esq.
Brian Boynton, Esq.
Wilmer Cutler Pickering Hale & Dorr, LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006

Michael Schatzow, Esq.
Mitchell Y. Mirviss, Esq.
Venable LLP
750 East Pratt St., Ste. 900

A. Stephen Hut, Jr., Esq.
Office of the Public Defender
6 Saint Paul St., Ste. 1400
Baltimore, MD 21202

2 Workshare Compare comparison of interwovenSite://VBWS/FirmDocs/7577883/1 and interwovenSite://VBWS/FirmDocs/7577883/2. Performed on 1/17/2014.

Baltimore, MD 21202

3 Workshare Compare comparison of interwovenSite://VBWS/FirmDocs/7577883/1 and interwovenSite://VBWS/FirmDocs/7577883/2. Performed on 1/17/2014.