IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2013

No. 105

THE HON. BEN C. CLYBURN, ET AL.,

APPELLANTS,

v.

QUINTON RICHMOND, ET AL.,

APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(The Honorable Alfred Nance, Judge)
PURSUANT TO A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF APPELLEES

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OVERVIEW

Two years ago, this Court issued a definitive holding in this case as to whether the right to counsel at bail hearings should be stayed until policymakers decided on a "practical" means of implementing the right to counsel:

> We cannot declare that Plaintiffs have a statutory right to counsel at bail hearings and, in the same breath, permit delay in the implementation of that important right and thereby countenance violations of it, even for a brief time.

DeWolfe v. Richmond, 434 Md. 404, 440 (2012) ("Richmond II") (Barbera, J., now C.J., writing for the Court). This holding has never been more apt. Five months ago, on September 25, 2013, this Court held that indigent criminal defendants have a due process right to representation by appointed counsel at initial bail hearings, affirming on constitutional grounds the same right that this Court had affirmed on statutory grounds in Richmond II. DeWolfe v. Richmond, 434 Md. 444 (2013) ("Richmond III"). Not one indigent criminal defendant has been provided counsel at an initial bail hearing since this Court's holdings in Richmond II and III, and literally thousands have been denied their constitutional right to counsel found by this Court.

This latest appeal is an attempt by Appellants (the "District Court Defendants" or "DCDs") to make matters even worse. In appealing the injunction ordered by the Circuit Court for Baltimore City (the "circuit court"), their original goal was to seek proceedings in the circuit court that would delay implementation of the right even further, but, as their Brief itself reveals, that goal has now morphed into a nakedly political plea for the Court to reverse itself. The period of delay has emboldened leading political opponents of the right to counsel (who, according to published news accounts, include the Governor, the President of the Maryland Senate, the Speaker of the House, and, apparently, now the Attorney General) to use this appeal to push this Court to change its mind as to whether a right to counsel even exists and to reverse its decision issued five months ago. This appeal, therefore, has very little to do with the procedural issues raised by the DCDs in their cert. petition. It is, instead, a direct political challenge to this Court's plenary authority to interpret the Maryland Constitution and the Declaration of Rights, and thus

the Court's preeminent role as the protector of the rights of individual Marylanders. It threatens the independence of this Court and goes to the heart of the separation of powers necessary for a functioning democracy.

We are not overstating the stakes for the Court. Despite *never* having raised the issue in the circuit court or in their petition for a writ of certiorari, and despite this Court's prior denial of a similar motion for reconsideration by their alter ego, the State of Maryland, also seeking to reverse Richmond III, the DCDs devote virtually all of their substantive argument (26 of 31 pages) to reversing Richmond III. As this attempt to transmute the nature and scope of this appeal egregiously violates the express terms of the Court's order granting a writ of certiorari (which limited the issues to the questions presented in the DCDs' petition), this Brief includes a motion to strike the offending portions of the DCDs' brief. But the DCDs' offense goes far beyond flaunting the terms of the order granting review: their substantive argument is a direct attack on the judicial process and the basic precepts of stare decisis.

The political nature of this attack is clear from the face of the brief. Despite proclaiming that Richmond III is so "clearly erroneous" that stare decisis should not apply, the DCDs' principal legal challenge to the Court's holdings in Richmond III consists of an astonishing one-paragraph assertion that the right to counsel guaranteed by Article 24 does not protect individuals once they are detained in State custody. See DCD Br. 36. In other words, the DCDs contend that a cognizable liberty interest in a right to counsel exists only in a proceeding to determine whether a non-detained person will be incarcerated but not in a proceeding to determine whether a person already in jail after arrest will remain incarcerated. The latter proceeding, the DCDs insist, is a proceeding that merely sets "temporary conditions of release" and results in denying freedom but is not "incarceration." The DCDs *cite no case* to support this truly Orwellian distinction, and for good reason: it is utterly preposterous. A proceeding that results in a future loss of liberty is no different whether the individual enters the proceeding in handcuffs or walks into the hearing room of his or her own accord. Numerous cases confer due process rights to counsel to detained individuals. Indeed, if the DCDs' legal argument

were correct, criminal defendants would lose the constitutional right to counsel for appeals, which rests on due process. Their argument also conflicts with Richmond II, which held that an initial bail hearing *is* a proceeding that may result in incarceration.

The DCDs' other principal legal argument, that bail reviews provide sufficient due process protections, also lacks *any* cited authority in support. See DCD Br. 36. In Richmond III, this Court cited four prior cases in direct support of its rejection of the DCDs' position, yet the DCDs' argument does not cite these cases, let alone show that the Court's reliance on them was a blatant error. They also fail to address this Court's ruling in Richmond II to the same effect.

Thus, the DCDs have no legal support for their contention that Richmond III is blatantly erroneous. Instead, they repeatedly argue that this Court's 4-3 split decision in Richmond III is not worthy of stare decisis, implying what the politicians have openly declared to the press, that the decision can be reversed because the composition of the Court has changed. This brazenly political outcome – where the Governor and Senate President have vowed to scuttle a landmark precedent that they dislike merely by virtue of having new appointees to the Court – is precisely what stare decisis is supposed to prevent. Reversing Richmond III now, particularly after denying the State's motion for reconsideration making the same flimsy arguments as the DCDs do here, would surrender this Court's judicial independence and swallow stare decisis whole. The constitutional rights of indigent defendants should not be jettisoned so cavalierly.

As for the procedural issues that purportedly prompted the DCDs' cert. petition, these are insignificant as well. Plaintiffs previously agreed that the two small areas of overbreadth in the circuit court's injunction order should be fixed and proposed simple changes that solve the problem. The DCDs do not, and cannot, point to any prejudice from the court's issuance of an injunction in lieu of an order to show cause where they already had filed a "status report" that laid out their arguments. Their second alleged error by the circuit court, a purported conflict with this Court's proposed Rules to implement Richmond III, is even further off-mark. This Court directed that the circuit court should proceed with implementation proceedings and that, once an order of

implementation was entered, the Court would issue an order putting the new Rules into effect. The fact that the DCDs would argue that the circuit court erred by following this Court's instructions illustrates vividly how far the DCDs strain to justify further delay.

In sum, the DCDs' brief fails to make out a legitimate case for suspending stare decisis, ignores their own failure to seek reconsideration of Richmond III (a clear waiver), fails to show prejudicial error by the circuit court, and blatantly disregards this Court's express order limiting their brief to their procedural issues raised in their cert. petition. Rather than show an egregious legal blunder by this Court, they offer only a rehash of arguments previously made and rejected by the Court, ignore the evidence in the record and the cases relied on by the majority, and rely on the dubious proposition that they know what is best for Plaintiffs. In insisting that the loss of Plaintiffs' right to representation when their liberty is at stake is of no great moment, the DCDs' brief confirms the truth of Robert Kennedy's sage comment long ago: "The poor man charged with crime has no lobby."[1] It is up to this Court to make clear that its constitutional ruling in favor of a disadvantaged and unpopular minority (many of whom are people of color) is not overridden by political forces seeking to restore the status quo ante.

STATEMENT OF THE CASE

Counting the various motions for reconsideration, stay, and other relief filed after Richmond II and Richmond III, this is the *fifteenth* substantive brief or memorandum filed in this Court by Appellees Quinton Richmond, et al. ("Plaintiffs"). Indeed, this is the *fourth* round of full-scale briefing and oral argument. Nevertheless, apart from the

[1] Hon. Robert F. Kennedy, Statement by Attorney General Robert F. Kennedy Before Subcommittee No. 5 of the House Judiciary Committee Regarding H.R. 4816, the Proposed Criminal Justice Act, at 9 (May 22, 1963), available at http://www.justice.gov/ag/rfkspeeches/1963/05-22-1963a.pdf, quoted in Anthony Lewis, Gideon's Trumpet 211 (1964). Kennedy introduced the Criminal Justice Act ten days after the Gideon decision. As enacted in 1964, it required counsel at "every stage" of a federal criminal proceeding, including all bail proceedings. Kennedy was particularly concerned with the injustice of the bail system, which, according to the Allen Commission report he had commissioned, resulted in thousands of poor defendants languishing in jail before trial because they could not afford bail, "exact[ing] an incalculable human price." Arthur Meier Schlesinger, Jr., Robert F. Kennedy and His Times 393 (1996).

DCDs' attack on stare decisis, there is very little here or in the DCDs' brief that has not been said before once or, in many cases, multiple times. Nevertheless, in light of the DCDs' latest attempt to derail the case and in recognition of the two newest members of the Court, we reluctantly must retread the history of this case.

Seven years ago, on November 13, 2006, Quinton Richmond, Jerome Jett, Glenn Callaway, Myron Singleton, Timothy Wright, Keith Wilds, Michael LaGrasse, Ralph Steele, Laura Baker, Erich Lewis, and Nathaniel Shivers brought this class action in the Circuit Court for Baltimore City as the named representatives of the class of indigent individuals who have been or will be arrested, detained at the Baltimore City Booking and Intake Center ("Central Booking Jail," "Central Booking"), brought before a commissioner for an initial bail hearing, and denied representation by counsel at that hearing in violation of their statutory and constitutional rights to representation by counsel. The claims were brought against the District Court of Maryland; Ben C. Clyburn, Chief Judge of the District Court; David Weissert, Coordinator of Commissioner Activity for the District Court Commissioners; Keith E. Mathews, Administrative Judge of the District Court for Baltimore City; Jimmie L. Foxworth, Administrative Commissioner for Baltimore City; and the District Court Commissioners for Baltimore City. (E11, Dkt.1/0). The District Court was subsequently dismissed after the DCDs objected on sovereign immunity grounds, and Judge John R. Hargrove, Jr. and Linda Lewis were substituted for Judge Mathews and Mr. Foxworth, respectively.

The complaint alleged that, on Saturday, November 11, 2006, while detained at Central Booking, each named plaintiff was brought before a commissioner and asked for counsel to be appointed. (Apx. 1-15). On each occasion, the request was denied, and the commissioner either set bail or deferred to a bail that was "preset" by a judge in absentia at a prior hearing. Id. On Monday, November 13, while still in detention, the named plaintiffs filed a class action seeking a declaratory judgment that, under the Public Defender Act ("PDA") (Count I), the Sixth Amendment (Count II), and Article 21 (Count III), indigent criminal defendants have a right to counsel in initial bail proceedings, and an injunction against violations of that right. (E11, Dkt.1/0). On February 2, 2007,

Plaintiffs amended the complaint with new facts and claims of due process violations under the Fourteenth Amendment (Count IV) and Article 24 (Count V) (E12, Dkt.4/0).

On February 13, 2007, the DCDs moved to dismiss. (E12, Dkt.5/0). Plaintiffs cross-moved for class certification and for partial summary judgment on the statutory and due process claims. (E12, Dkt. 5/1; E13-14, Dkt.9/0). The circuit court (Berger, J.) denied the motion to dismiss (E13, Dkt.5/5-6), and, instead of seeking discovery or asserting a genuine dispute of fact, the DCDs cross-moved for summary judgment. (E15, Dkt.18/0). On October 24, 2007, the court (Nance, J.) certified the class and granted the DCDs' cross-motion for summary judgment. (E14, Dkt.9/1; E15, Dkt.21/3; E17, Dkt. 34/0). Plaintiffs appealed, and this Court issued a writ of certiorari on its own motion. The case was argued on January 9, 2009. On March 5, 2010, this Court vacated the judgment due to the lack of a necessary party (the Public Defender) and ordered conditional class decertification and dismissal if he was not added. Richmond v. Dist. Court of Md., 412 Md. 672, 672-73 (2010) ("Richmond I").

On remand, the circuit court conditionally decertified the class and ordered dismissal if the Public Defender was not joined as a defendant. (E18, Dkt.49/0). After Plaintiffs complied and sued Paul B. DeWolfe, Jr. in his capacity as Public Defender, the DCDs moved to dismiss, arguing that the claims against Mr. DeWolfe for declaratory relief were not justiciable because they did not seek "coercive relief." (R1385-92). Plaintiffs filed a third amended complaint that sought an injunction against Mr. DeWolfe. (Apx. 1-15). On July 19, 2010, the court recertified the class, and, with the parties' consent and leave of court, Plaintiffs renewed and amended their summary judgment motion to include the Sixth Amendment/Article 21 claims. (E22, Dkt.71/0). In opposing summary judgment, the DCDs again did not assert a genuine dispute of material facts that prevented summary judgment, nor did they seek discovery. Indeed, they never sought discovery below, never challenged Plaintiffs' evidence in support of summary judgment, and never presented evidence of their own to rebut Plaintiffs' evidence. For purposes of Richmond II and III, Plaintiffs' facts were undisputed, and so they remain. See Richmond II, 434 Md. at 411 n.6; Richmond III, 434 Md. at 451 n.4.

On October 1, 2010, the circuit court granted Plaintiffs summary judgment on all claims. (E238-51). After further briefing, the court entered a declaratory judgment finding that that denial of counsel at initial bail hearings violated Plaintiffs' constitutional and statutory rights to counsel. (E253-55). The DCDs and the Public Defender appealed, and Plaintiffs cross-appealed the denial of their injunction request, as the DCDs claimed that the denial was res judicata against any future request. Plaintiffs petitioned for a writ of certiorari, which this Court granted over the DCDs' objection.

On January 4, 2012, this Court held unanimously in a decision by then-Judge Barbera that the PDA required the provision of counsel at initial bail hearings and bail review hearings. See Richmond II, 434 Md. at 439-40. By a 5-2 vote, the Court denied the Public Defender's request to stay the decision until funding was earmarked by the General Assembly. See id. at 440. The DCDs moved for reconsideration, asking the Court to strike the circuit court's adverse constitutional findings (App. 82-86), and the Public Defender moved for reconsideration and for a stay. As the General Assembly signaled that it would amend the PDA to eliminate the right to representation at initial bail hearings, Plaintiffs asked the Court to decide the constitutional issues.[2] (App. 113-15). In response, the State of Maryland moved to intervene and joined the DCDs in opposing Plaintiffs' request, arguing that the case should be remanded so that the circuit could consider, in the first instance, what impact, if any, the revised legislation would have on the constitutional issues and that adjudication of the constitutional claims "would benefit from a fuller factual record" after some period of experience with the revised statute. (App. 156, 165-66). On July 9, 2012, the Court ordered the State and the DCDs to detail with specificity what new factual evidence regarding the new legislation was necessary to consider the constitutional claims. (App. 173-75). After the State and the DCDs failed to identify *any* such evidence, see App. 189-95, on August 22, the Court granted Plaintiffs' request to decide the constitutional issues. (App. 197-99).

[2] On March 30 and April 2, the General Assembly passed bills that excluded initial bail hearings before commissioners from covered proceedings under the Public Defender Act. See SB 422 and HB 261, enacted as 2012 Md. Laws chs. 504 and 505, respectively.

After substantial supplemental briefing (two sets of briefs per party and numerous amici briefs in support of Plaintiffs from the American Bar Association, the NAACP Legal Defense Fund, and other organizations) and after holding a third oral argument on these issues, on September 25, 2013, this Court held that Plaintiffs have a constitutional right to counsel at initial bail hearings under Article 24 of the Maryland Declaration of Rights. Richmond III, 434 Md. at 464. The Court directed the circuit court to revise its declaratory judgment to provide for this right, id. at 465, as the other constitutional grounds (federal due process under the Fourteenth Amendment) and the rights to counsel under the Sixth Amendment and Article 21) were not decided.

This Court issued its mandate on October 17, 2013. Immediately thereafter, Plaintiffs wrote to the circuit court requesting and proposing a new declaratory judgment (E26, Dkt.97/0), and, on October 23, the circuit court entered the new declaratory judgment proposed by Plaintiffs. (E33-34). The DCDs moved to vacate the declaratory judgment on October 28 (E27, Dkt. 98/0), which was promptly denied (E27, Dkt. 98/3).

In addition, the State – but *not the DCDs* – moved to recall the mandate, to reconsider the Richmond III decision, and to stay the decision, raising many of the arguments echoed here. (E.g., App. 200-04, E111-18). On November 6, 2013, the Court denied all three motions (E137-38) and issued a Rules Order approving provisional Rules to implement the decision, which would take effect promptly upon notice that the circuit court had entered an order requiring the DCDs to implement the decision. (E44-45).

The case formally returned to the circuit court on December 4, 2013 (E28, Dkt. 104), and the next day, Plaintiffs petitioned for further relief, asking for an injunction to compel the DCDs to appoint counsel at initial bail hearings and that the court issue an order to show cause. (E142-219). The Public Defender responded to the petition (E220-21), but the DCDs did not. On January 8, 2014, Plaintiffs wrote to the circuit court to report that the lead DCD, Judge Clyburn, had publicly declared that all logistical obstacles to immediate implementation had been resolved and that implementation could proceed as soon as this Court issued the new Rules and funding was confirmed. (E223-24). Plaintiffs asked the court to issue the order to show cause. Id.

On January 10 and again January 13, 2014, the circuit court issued an injunction directing the DCDs to provide representation to Plaintiffs at initial bail hearings. (E225-26, 231-32). Without advising the circuit court or the parties that the terms of the injunction were flawed, and without asking the court for an opportunity to be heard as to whether any injunction was appropriate, on January 14, the DCDs noted an appeal, petitioned this Court for a writ of certiorari, and moved in this Court for a stay pending appeal. None of their papers signaled any intent to ask this Court to reverse Richmond III. On January 23, 2014, this Court granted their petition and issued a temporary stay.

QUESTIONS PRESENTED

In its order granting certiorari (E235), this Court ordered that the petition was granted "limited to the following three questions presented ... in the petition":

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

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

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

But the DCDs' brief is not limited to these issues and instead asks the Court to reverse Richmond III. This new argument triggers two additional questions:

4. Is the DCDs' argument seeking to reverse Richmond III properly before the Court where the DCDs (a) never raised it in the Circuit Court or in their petition for a writ of certiorari; (b) failed to seek reconsideration of Richmond III per Rule 8-605; and (c) violated this Court's order limiting the issues to those presented in their petition?

5. Should the Court take the extraordinary step of disregarding stare decisis and reverse Richmond III as an "egregious blunder," such that stare decisis is suspended, where the Richmond III decision rested on numerous precedents of this Court, where the

DCDs fail to cite a single case that is contrary to the Richmond III legal analysis, where the DCDS ignore and mischaracterize numerous facts in the record, and where the DCDs complain years after the fact about a factual record that they never disputed below and a lack of discovery that they never requested below?

STATEMENT OF FACTS

As with the Statement of the Case, the circumstances oblige us to restate the pertinent facts of this case, even though this is now the *fourth* time that some members of the Court will have had to review and consider these. Both Richmond II and III ruled that these facts were not disputed by any party below and are established for purposes of appeal. To the extent appropriate, we cite to Richmond II and III for factual support.

A. General Facts Regarding Initial Bail Proceedings.

Plaintiffs are indigent individuals who have been or will be arrested, detained at the Central Booking Jail, brought before a commissioner for an initial bail hearing, and denied representation by counsel at that hearing in violation of their statutory and constitutional rights to representation by counsel. (Apx. 1). They challenge the first stage of Maryland's pre-trial release system as applied to Baltimore City, whereby, following their arrest, suspects are brought to Central Booking for an initial appearance and bail determination by a commissioner pursuant to Rules 4-213 and 4-216. At this proceeding, the commissioner, who is a judicial officer but usually is not a lawyer and need not, under state law, have a legal education, college degree, high school diploma, or criminal justice background, determines whether probable cause supports arrest and detention. See Apx. 2, 6; Richmond III, 434 Md. at 449. Thereafter, he/she determines whether the arrestee should be released, incarcerated, or requires bail pending trial. Id. Though the DCDs combine these decisions under a label of "presentment" (a term not referenced in the Rules), they are separate functions.

The initial bail hearing has few of the statutory and constitutional protections attendant to a criminal prosecution. It is not held in a courtroom and instead takes place deep inside the jail in a small narrow booth where the commissioner is separated from the arrestee by a plexiglass wall, requiring a speaker system for communication. Richmond