

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

*Appellants,*

v.

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

*Appellees.*

\* \* \* \* \*

\* IN THE  
\* COURT OF APPEALS  
\* OF MARYLAND  
\* September Term, 2013  
\* No. 105

**CERTIFICATE OF SERVICE**

I certify that, on the 5th day of March 2014, the Reply Brief of Appellants in the captioned case was sent by e-mail to and two copies were served by first-class mail on:

Michael Schatzow, Esq.  
Mitchell Y. Mirviss, Esq.  
Venable LLP  
750 East Pratt Street, Suite 900  
Baltimore, Maryland 21202

Attorneys for Appellees Quinton Richmond, *et al.*

—and—

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

Attorneys for Paul B. DeWolfe, Jr.

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Julia Doyle Bernhardt

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**IN THE  
COURT OF APPEALS OF MARYLAND**

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September Term, 2013

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No. 105

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

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

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**RESPONSE TO MOTION TO DISMISS AND  
REPLY BRIEF OF APPELLANTS**

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DOUGLAS F. GANSLER  
Attorney General of Maryland

WILLIAM F. BROCKMAN  
Deputy Solicitor General

JULIA DOYLE BERNHARDT  
Assistant Attorney General  
200 Saint Paul Place, 20th Floor  
Baltimore, Maryland 21202  
jbernhardt@oag.state.md.us  
(410) 576-7291

Attorneys for Appellants

March 5, 2014

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**REPLY BRIEF OF APPELLANTS AND  
RESPONSE TO MOTION TO DISMISS**

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The appellants, officials of the District Court of Maryland (the “District Court Defendants”) have appealed from the final judgment of a circuit court. *See* Md. Code Ann., Cts. & Jud. Proc. § 12-301 (granting a party the right to appeal from a final judgment entered in a civil case by a circuit court except where “expressly denied by law”). The plaintiffs complain that the appellants’ brief addresses an issue not

encompassed by the Court's grant of certiorari<sup>1</sup> and the plaintiffs have moved to dismiss that part of the appeal. Plaintiffs' Brief at 30-33. As an initial matter, the plaintiffs are wrong to think that the issues addressed in the District Court Defendants' brief differ from those raised in their petition for a writ of certiorari.

In their petition, the District Court Defendants argued that two of the three issues they presented were so clear-cut that the Court could summarily vacate and reverse the circuit court's injunction on those grounds alone. Indeed, at the time that the plaintiffs answered the petition, it was not clear that there was even a controversy between the parties on either of those issues. As to the circuit court's error in disregarding the procedures for issuing a show cause order under the Declaratory Judgments Act, counsel for the appellees had already gone on record (in a letter delivered to the presiding circuit court judge) with their position that "the procedure for moving forward is clearly laid out in the Declaratory Judgment Act" and that the "first step . . . is for the [circuit court] to issue the Order to Show Cause." There is no dispute that the circuit court did not follow this procedure. The petition also urged summary reversal on the ground that the circuit court's blunt injunction was overbroad and inconsistent with rules promulgated by this Court and thus improperly subjected the defendant officials of the District Court to conflicting legal commands. In their answer to the petition, the plaintiffs agreed that the terms of the injunction should be revised. Finally, the petition suggested that a simple

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<sup>1</sup> The record extract mistakenly contains the order granting certiorari that the Court issued initially and withdrew shortly afterwards. The correct order is contained in the appendix to this brief at Rep. App. 1.

remand for further circuit court proceedings might not be adequate to address the more insoluble aspects of this case, and the appellants therefore broadly asked the Court to undertake plenary review of the substantive relief ordered by the circuit court. As part of their briefing on this issue, the District Court Defendants have invited the Court to reexamine whether *DeWolfe II* was correctly decided. *DeWolfe v. Richmond*, 434 Md. 444 (2013). Naturally, the Court may decide to resolve the appeal on other grounds, but there is no merit to the plaintiffs' insistence that the Court is precluded from considering the issues addressed in the District Court Defendants' brief, all of which are properly before the Court.

### **RESPONSE TO MOTION TO DISMISS**

There is a fundamental difference between an appellate court's exercise of discretion declining to address an argument in a case that can be resolved on other grounds, on the one hand, and a court's *dismissal* of that part of an appeal, on the other hand. The plaintiffs have not cited any authority to support their arguments that this Court has the power to dismiss part of this appeal and they do not rely on any of the reasons stated in Rule 8-602(a), which governs an appellate court's authority to dismiss an appeal. Instead, the plaintiffs rely on perceived violations of Rules 8-131, 8-301(a)(3), 8-303, and 8-605.<sup>2</sup> The plaintiffs also argue that this Court should dismiss part of the appeal based on a perceived failure to meet the standards that the Court employs when

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<sup>2</sup> Rule 8-131 governs the scope of review in the appellate courts; Rule 8-301(a)(3) provides that appellate review by this Court may be obtained by writ of certiorari; Rule 8-303 governs the contents of a petition for a writ of certiorari; and Rule 8-605 applies to motions for reconsideration.

deciding whether to exercise its discretion to grant a petition for a writ of certiorari—whether review “is desirable and in the public interest.” *See* Plaintiffs’ Brief at 31 (asserting that “this issue is not *cert.-worthy*”). *See* Md. Code Ann., Cts. & Jud. Proc. § 12-203. No authority supports the disposition they seek—dismissal of part of an appeal that was properly and timely taken from the circuit court’s judgment.

Rule 8-131(b) governs the scope of review in this Court. Under this rule, this Court has authority to issue a “limited” writ of certiorari only when the Court is reviewing a case pursuant to Rule 8-131(b)(1), which applies where the Court is reviewing a “[p]rior appellate decision” by the Court of Special Appeals or a circuit court acting in an appellate capacity. By contrast, Rule 8-131(b)(2) applies where, as here, the Court “issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court. . . .” The plaintiffs ask the Court to apply standards set forth in Rule 8-131(b)(1), which provides that the Court “ordinarily” will consider only issues included in the petition or a cross-petition and preserved for review, a provision that clearly grants this Court discretion over the issues to be considered in reviewing a decision of the Court of Special Appeals. Rule 8-131(b)(2), by contrast, directs that this Court “*will consider* those issues that would have been cognizable by the Court of Special Appeals” (emphasis added), a command that the plaintiffs ask this Court to flout, by urging the Court to refuse to consider issues clearly encompassed within the scope of this appeal.

The plaintiffs mistakenly assert that Rule 8-131(b)(2)’s provision for plenary review applies only “when the Court issues a bypass petition on its own motion, or when

an appellee files a bypass petition. . . .” By its plain terms, however, Rule 8-131(b)(2) permits the Court to issue a limited grant of certiorari only as “provided in Rule 8-304(c),” when responding to a request from the intermediate appellate court for certification under Rule 8-304. In that limited context, this Court may either “refuse the certification” or “issue a writ of certiorari that (1) accepts the certification as submitted, (2) modifies the questions of law certified, (3) includes the entire action although only a question of law was certified, or (4) limits review to only a question of law although the entire action was certified.” Rule 8-304(c). Because this case does not arise under Rule 8-304, the provisions of Rule 8-304(c), which authorize a limited grant of certiorari, do not apply.

Because there has been no prior decision by the intermediate appellate court in this appeal, this Court’s review is governed by Rule 8-131(b)(2), and the Court’s review is therefore plenary. Rule 8-131(b)(2) states that, “[e]xcept as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals *will* consider those issues that would have been cognizable by the Court of Special Appeals.” Rule 8-131(b)(2) (emphasis added); *see Exxon Mobil Corp. v. Ford*, 433 Md. 426, 458-59 (2013); *Wildwood Med. Ctr., L.L.C. v. Montgomery County*, 405 Md. 489, 496 (2008)).<sup>3</sup>

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<sup>3</sup> The plaintiffs incorrectly distinguish *Exxon Mobil* on the grounds that *Exxon Mobil* “indicat[ed] that Rule 8-131(b)(2) ‘enables’ the Court to consider and decide all issues, not that it requires the Court to do so.” Plaintiffs’ Brief at 32 (citing *Exxon Mobil*, 433 Md. at 459). In fact, however, the plaintiffs in that case made the same argument the

None of the plaintiffs' arguments even arguably supports dismissal in this case. They have provided no authority for the notion that this Court, acting pursuant to Rule 8-131(b)(2), has discretion to refuse to consider a cognizable issue. Under the plaintiffs' unprecedented approach, this Court, by the device of issuing a "limited" grant of certiorari before decision in the Court of Special Appeals, has the discretion to limit a party's right to litigate a cognizable appellate issue. Doing so not only would be contrary to the express terms of Rule 8-131(b)(2), but also would deny the appellants their appeal as of right from a final judgment. *See* Md. Code Ann., Cts. & Jud. Proc. § 12-301; *Long v. State*, 371 Md. 72 (2002) (reversing judgment that deprived appellant of right to litigate the merits of appeal). And, under the plaintiffs' approach, the Court would lack the authority in a "bypass" case either to change the common law prospectively or to overrule a prior decision, because those are powers that the Court of Special Appeals lacks. Yet, this Court has exercised both of these powers in cases that proceeded under Rule 8-131(b)(2). *See State v. Green*, 367 Md. 61 (2001) (overruling prior decision and abrogating State's common law right to appeal a decision granting a criminal defendant's motion to revise sentence); *Robinson v. State*, 307 Md. 738 (1986) (modifying common law depraved heart murder); *Boblitz v. Boblitz*, 296 Md. 242 (1983) (abrogating interspousal immunity); *Lewis v. State*, 285 Md. 705 (1979) (abolishing common law rule

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plaintiffs have made here, based on a premise that is indisputably present here—namely, that in the absence of a judgment rendered by the Court of Special Appeals, this Court could decline to address issues properly within the scope of the appeal. Instead, this Court confirmed in *Exxon Mobil* that, in those circumstances, the Court decides the entire case on appeal.

that accessory could not be tried before final judgment in principal's case); *Lusby v. Lusby*, 283 Md. 334 (1978) (abrogating interspousal immunity for intentional torts).

The plaintiffs' motion to dismiss part of the appellants' direct appeal from the circuit court's judgment should be denied.

### **REPLY ARGUMENT**

As previously explained, most of the factual assertions made by the plaintiffs in previous rounds of this litigation, which they repeat here (Plaintiffs' Brief at 10-16, 17-19) were either immaterial or were not supported by admissible evidence in the summary judgment record; therefore, the defendants were not required to produce evidence to controvert them. *See* District Ct. Defs.' Brief at 35-39; App. 178-83. *See Imbraguglio v. Great Atl. & Pac. Tea Co.*, 358 Md. 194 (2000) (movant "must place before the court facts which would be admissible in evidence"). Equally inappropriate is the plaintiffs' reliance on selective portions of hearsay statements by Chief Judge Clyburn. Plaintiffs' Brief at 8 (citing E. 223-24).

### **THE CIRCUIT COURT'S ERROR IN ISSUING AN INJUNCTION WITHOUT FIRST ISSUING A SHOW CAUSE ORDER, AS REQUIRED BY THE STATUTE GOVERNING SUCH APPLICATIONS, WAS PREJUDICIAL.**

The plaintiffs do not argue that the circuit court followed the procedures required by this Court's November 6 order and § 3-412 of the Courts and Judicial Proceedings Article. Instead, they claim that the District Court Defendants and other affected State officials and entities were not prejudiced by the admitted violations because the District Court Defendants had filed a status report in the circuit court before the plaintiffs filed

their petition for supplemental relief. In that status report, however, the District Court Defendants did not attempt to show cause why the plaintiffs would not be entitled to the supplemental relief the plaintiffs later requested, nor did the District Court Defendants attempt to supply evidence or argument to guide the circuit court's discretion in fashioning relief. Instead, the District Court Defendants explained that they would await action by the plaintiffs to make an application for supplemental relief, which they had not yet done and which they did not do for several more weeks. The status report informed the circuit court that this Court's November 6 "order states that the concerns raised by the State" in its October 25 stay motion "should be presented to [the circuit court] instead, 'if, and when, any party files in the Circuit Court an application' for further relief based on this Court's declaratory judgment, in accordance with § 3-412 of the Courts and Judicial Proceedings Article." (E. 39.) The State's stay motion, of course, had addressed not only conditions in Baltimore City, including the physical conditions and security issues at the Central Booking Intake Facility, but also the fiscal and statewide logistical challenges posed by the prospect of securing and compensating sufficient private attorneys to handle approximately 173,000 initial appearances, providing adequate security for those attorneys, making the necessary modifications to facilities, and addressing the fiscal impact on local jurisdictions and the State, which had an anticipated \$400 million state budget shortfall in the current fiscal year.

The District Court Defendant's status report further explained:

This Court's November 7 declaratory judgment was entered pursuant to a mandate issued by the Court of Appeals, and its present effect must be

gauged by what the Court of Appeals has said—“arguments concerning the time needed to comply with [this Court’s] declaratory judgment . . . may be made if, and when, any party files in the Circuit Court an application” under § 3-412—and by what the Court of Appeals has done—suspending the rules needed to implement the right declared in this Court’s declaratory judgment until a date to be specified in a further order by the Court of Appeals. The District Court defendants will continue to conduct initial appearances in accordance with the rules prescribed by the Court of Appeals, and they will participate respectfully in any future proceedings in this Court—“if and when” the plaintiffs initiate such proceedings, giving this Court an opportunity to tailor a remedy to the circumstances, taking into account the substantial fiscal and operational challenges associated with adapting the State’s existing pretrial procedures to accommodate the newly-declared right to counsel.

(E. 40-41.) It is plain that the District Court Defendants did not view the status report, submitted several weeks before the plaintiffs even filed their petition for supplemental relief, as their only chance to show cause why the relief requested in the not-yet-filed petition should be granted. It is equally plain that other affected State officials reasonably would have expected that the circuit court would issue the show cause order anticipated by this Court, requested by the plaintiffs, and required by the statute, and that this procedure would a full opportunity to provide the circuit court with the necessary information to enable the court to tailor appropriately any relief granted.

The circuit court’s precipitous entry of an injunction in violation of the statute, the current and provisional rules, this Court’s order, and basic requirements of due process prejudiced both the District Court Defendants and the other State officials who must contend with the serious fiscal and logistical challenges caused by the radical alteration

of existing pretrial procedures created by this Court's decision in *DeWolfe II*. The circuit court's injunction should be vacated.<sup>4</sup>

## CONCLUSION

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

Respectfully submitted,

DOUGLAS F. GANSLER  
Attorney General of Maryland

WILLIAM F. BROCKMAN  
Deputy Solicitor General

JULIA DOYLE BERNHARDT  
Assistant Attorney General  
200 Saint Paul Place  
Baltimore, Maryland 21202  
jbernhardt@oag.state.md.us  
(410) 576-7291  
(410) 576-6955 (facsimile)

Attorneys for Appellants

March 5, 2014

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<sup>4</sup> The Public Defender has submitted a brief arguing that the reform proposals under consideration in the General Assembly may produce valuable benefits for indigent defendants and the criminal justice system as a whole. The District Court Defendants agree that these proposals have many laudable features, and they believe the pendency of this legislation and the change in circumstances that a legislative enactment would produce should have been a relevant consideration for the circuit court in acting on the plaintiffs' application for supplemental relief. The Public Defender also urges the Court to adhere to its ruling in *DeWolfe II*, though he agreed in the previous round of appellate proceedings that the existing system would meet constitutional standards if two minor aspects of the system were addressed. The District Court Defendants respectfully disagree that the reliance interests served by the judicial policy of *stare decisis* would be harmed by reconsidering a ruling that has not yet been implemented and that itself fundamentally altered the existing system of pretrial procedures that this Court adopted more than four decades ago.

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

**TEXT OF PERTINENT PROVISIONS**  
**(Rule 8-504(a)(8))**

**Rule**

**Rule 8-304. Certification from Court of Special Appeals.**

(a) *Initiation.* At any time before issuance of a mandate, the Court of Special Appeals or the panel of that Court to which the action has been assigned may certify a question of law or the entire action to the Court of Appeals. Upon transmission to the Court of Appeals, a copy of the certification shall be forwarded to the Chief Judge of the Court of Special Appeals and to the parties. The Court of Appeals may consider the certification pursuant to its authority to issue a writ of certiorari on its own motion.

(b) *Content.* The certification shall briefly describe the action, state the question of law and the facts on which the question arises, and state the reason for certification.

(c) *Disposition of Certification.* The Court of Appeals may refuse the certification or may issue a writ of certiorari that (1) accepts the certification as submitted, (2) modifies the questions of law certified, (3) includes the entire action although only a question of law was certified, or (4) limits review to only a question of law although the entire action was certified. The Clerk of the Court of Appeals shall send the order refusing the certification or the writ of certiorari to the Court of Special Appeals and to the parties.

(d) *Record Extract and Briefs.* If the Court of Appeals issues a writ of certiorari, the filing of a record extract and briefs shall be governed by Rules 8-501 through 8-511 unless the Court orders otherwise.

## **APPENDIX**

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

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

**v.**

\* **Petition Docket No. 622**  
\* **September Term, 2013**

**QUINTON RICHMOND, et al.**

\* **(No. , Sept. Term, 2013**  
\* **Court of Special Appeals)**

## **O R D E R**

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is this 23rd day of January, 2014

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, granted, limited to the following three questions presented by Appellants in the petition:

1. “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 existing rules promulgated by this Court?”
2. “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?”
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?”

and it is further

ORDERED, that said case shall be transferred to the regular docket as No. 105, September Term, 2013; and it is further

ORDERED, that counsel shall file briefs or memoranda and printed record extract in accordance with Md. Rules 8-501 and 8-502, appellants' brief(s) or memoranda and record extract to be filed on or before February 13, 2014; appellees' brief(s) or memoranda to be filed on or before February 27, 2014; and reply brief(s) or memoranda to be filed on or before March 5, 2014; and it is further

ORDERED, that this case shall be set in for oral argument on Friday, March 7, 2014; and it is further

ORDERED, that the temporary stay order issued by this Court on January 14, 2014 shall be extended through to 4:30 p.m. on Friday, March 7, 2014.

/s/ Mary Ellen Barbera  
Chief Judge

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

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

**v.**

\* **Petition Docket No. 622**  
\* **September Term, 2013**

**QUINTON RICHMOND, et al.**

\* **(No. , Sept. Term, 2013**  
\* **Court of Special Appeals)**

**WRIT OF CERTIORARI**

STATE OF MARYLAND, to wit:

TO THE HONORABLE THE JUDGES OF THE  
COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, BEN C. CLYBURN, et al. v. QUINTON RICHMOND, et al., No. , September Term, 2013 is pending before your Court and the Court of Appeals is willing that the record and proceedings therein be certified to it.

**YOU ARE HEREBY COMMANDED TO HAVE THE RECORD TRANSMITTED TO THE COURT OF APPEALS OF MARYLAND ON OR BEFORE February 6, 2014**, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS the Chief Judge of the Court of Appeals of Maryland this 23rd day of January, 2014.

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