IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2013

No. 105

BEN C. CLYBURN, *et al.*,

Appellants,

v.

QUINTON RICHMOND, *et al.*,

Appellees.

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

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SUPPLEMENTAL REPLY BRIEF OF APPELLANTS

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SUPPLEMENTAL REPLY BRIEF OF APPELLANTS

The supplemental briefs submitted by the plaintiffs and the Public Defender are a study in contrasts, but each, in its own way, demonstrates why issuing an injunction at this point is unnecessary and unwise.

The plaintiffs seem to recognize that, if this Court acts on a pending rules proposal that would change the way officials of the District Court conduct initial appearances, the amended rules would afford them all the relief they sought when they were directed to

institute supplemental proceedings for injunctive relief in the circuit court. The plaintiffs are not concerned with the precise details of the rules proposal—they dismiss the changes as "technical" and assert that they would not "affect implementation" of the Court's September 2013 ruling in this case. Supplemental Brief at 5. Though the law presumes that judicial officers will faithfully adhere to rules adopted by this Court, the plaintiffs reject that presumption; they cannot bring themselves to trust the judicial officers they sued, apparently because these "DCDs" disagreed with the plaintiffs' legal arguments. The plaintiffs therefore propose that the Court enter an injunction in the form they proposed in January 2014. The blunt terms of their proposed injunction—essentially, "Thou shalt appoint counsel, and thou shalt not conduct an initial appearance without the presence (or a waiver) of counsel"—do not show the careful attention to detail reflected in the Rules Committee's deliberations. As a legal device for controlling the conduct of the District Court officials, the proposed injunction is inferior in every respect to the detailed instructions and grant of authority embodied in the rules proposal.

The Public Defender takes a very different tack. He clearly has reflected extensively about the challenges of implementation, and he offers detailed and helpful suggestions. Chief Judge Clyburn, Chief Judge-Designate Morrissey, Coordinator of Commissioner Activity Weissert, and the other defendant officials of the District Court welcome the Public Defender's suggestions for and participation in implementation planning. But the detailed requirements he suggests, most of which are directed to the conduct of appointed lawyers who are not bound by the injunction, do not provide a helpful framework for fashioning the terms of an injunction.

The plaintiffs scold the "DCDs" for their "outrageous," "surreptitious," and "desperate[]"conduct, Supplemental Brief at 6, but they do not contend that an injunction should be ordered as punishment. What then is the justification for the injunction? The only justification offered is a claim of past obstinacy, but this claim is based on an inaccurate account of the history of this litigation. The plaintiffs fault the defendant officials of the District Court for taking the position, in November 2013, that the circuit court should conduct proceedings that would allow the court to tailor the terms of an injunction to the circumstances, taking account of the logistical and fiscal challenges of implementing this Court's September 2013 ruling. But the plaintiffs acknowledge that the choice of this course of proceedings "was made by *this Court*." *Id.* at 3 (emphasis in original). What the plaintiffs do not acknowledge is the explanation the Court gave for its choice on November 6, 2013, by indicating that these circuit court proceedings would provide a superior forum for addressing the concerns raised by the State of Maryland in its motion requesting a stay of enforcement of the Court's September 25 judgment. (E. 138.)

Of course, the circuit court did not conduct the proceedings anticipated by this Court's November 6 order. Instead, the circuit court abruptly issued an injunction, without addressing the fiscal challenges of complying with that injunction, without accounting for the fact that this Court had adopted provisional rules to facilitate implementation but had decreed that the amended rules would not go into effect immediately, and without considering whether the political branches should be given an

opportunity to explore policy proposals for reforming the State's pretrial release system. As a result, this Court was deprived of a factual record that would allow it to fashion a carefully tailored remedy to replace the circuit court's flawed injunction.

The appellants explained in their April 16 supplemental brief that an injunction is not warranted at this point, and a remand to develop a factual record is therefore unnecessary. The plaintiffs are taken aback and believe they have not been given an "explanation for this turnaround." Supplemental Brief at 4. The explanation is that the circumstances have changed, in three significant respects. First, the General Assembly has appropriated funds for the purpose of compensating attorneys. Second, the Rules Committee will be considering a proposal next week to revise the rules governing initial appearances to take into account the existence of a funding mechanism that was missing from the rules the Court tentatively adopted last November. With these developments, the two most substantial obstacles to implementation of the Court's September 2013 ruling have been addressed. The third development is that the General Assembly session has ended without conclusive action on the various proposals for reforming the State's pretrial release system, including the Judiciary's proposal. For the time-being at least, the existing pretrial system will not be substantially changed, so we know that this is the system that will have to be adapted to accommodate lawyers at initial appearances before commissioners. Officials of the District Court have been working vigorously since the General Assembly authorized the appropriation (less than a month ago) to put new procedures and systems in place. When the Court has approved amended rules to go into

effect, the commissioners and judges of the District Court will comply with those rules, as they have always done.

The implementation process is much more challenging than the plaintiffs would have this Court believe. The plaintiffs were not bothered before by the absence of funds to compensate appointed attorneys—they argued for conscripting unpaid attorneys to staff the thousands of initial appearances conducted each week in forty-some locations across the State. (E. 149.) And they exhibit little concern for the details of procedural changes, preferring instead the blunt terms of the injunction they proposed in their January 17 opposition to the appellants' stay motion.[1] This inattention to detail undermines their call for an injunction, which must be "sufficiently specific to give a defendant a fair guide as to that expected of him." *Harford County Educ. Ass'n v. Board of Educ. of Harford County*, 281 Md. 574, 587 (1977). For example, the plaintiffs assert that their January 17 proposal cures a problem of overbreadth in the terms of the injunction entered by the circuit court. Specifically, the terms of the circuit court's injunction would have prevented commissioners from conducting appearances without counsel even where the arrestee has waived counsel and even in situations where the commissioner lacks authority to set the conditions for pretrial release. These terms were not compatible with the rules this Court had provisionally adopted on November 6, 2013. The plaintiffs propose insertions to address this incompatibility, but they appear to be unaware that the proposal under consideration by the Rules Committee contemplates

[1] For the Court's convenience, Exhibit 9 to the plaintiffs' January 17 submission is reproduced in the appendix to this brief.

counsel participating (perhaps to contest probable cause determinations) even in cases where the arrestee is not eligible for release by a commissioner.[2] Whatever version of the rules the Court ultimately approves, the rules will surely provide more useful directions to officials of the District Court than the terms of the injunction proposed by the plaintiffs.

The rulemaking process is superior to the adjudicatory process in other respects as well. This Court has authority, in accordance with Rule 8-604, to craft the terms of an injunction and "enter an appropriate judgment directly," rather than remanding for entry of an order by the circuit court. But that course of action presents two problems here. First, the Court is not equipped to take evidence that would inform the tailoring of an injunction that is sufficiently specific to give fair guidance to those who would be bound by it, and no record was developed in the circuit court to supply that evidence. When the Court acts in its legislative capacity as a rules-adopting body, it does not face the same constraints. The Court can obtain answers to its questions about implementation through

[2] The proposed revision to Rule 4-213(a) requires the commissioner to "first follow the procedure set forth in Rule 4-213.1 to assure that the defendant is either represented by an attorney or has knowingly and voluntarily waived the right to an attorney." (Supp. App. 3.) Only after counsel is present or waived, may the commissioner proceed to advising the defendant of the charges, the right to counsel, the right to a preliminary hearing, where applicable, and complying with Rules 4-216 and 4-216.1 governing pretrial release. (Supp. App. 3–5.) Rule 4-216(a) requires the commissioner, "[i]f the defendant was arrested without a warrant, upon the completion of the requirements of Rules 4-213(a) and 4-213.1," to "determine whether there was probable cause for each charge and for the arrest. . . ." Unlike the rules adopted on November 6, 2013, Rule 4-213.1(d)(2) of the current proposal provides that, "if the initial appearance needs to be postponed, and the defendant was arrested without a warrant, the commissioner before recessing the proceeding, shall determine whether there was probable cause for the charges and the arrest pursuant to Rule 4-216(a)." (Supp. App. 9.)

the rulemaking process. Second, if an injunction is crafted with the specificity that Rule 15-502(e) requires, it may contain provisions that will require revision in the future, as circumstances change. To which court should an applicant address a request for revision of the terms of an injunction, the circuit court (with its factfinding capacity) or this Court? The rulemaking process offers greater flexibility for addressing unanticipated difficulties and changed circumstances than the procedure for revising an enrolled judgment.

The plaintiffs believe, incorrectly, that an injunction is the only way for this Court to supervise the efforts of District Court officials to implement the Court's ruling declaring a right to counsel at initial appearances. Under the Maryland Constitution, the Chief Judge of the Court of Appeals is "the administrative head of the Judicial system of the State," Md. Const. art. IV, § 18(b), and she designates the Chief Judge of the District Court, who serves at her pleasure. Md. Const. art. IV, § 41E. The administrative officers of the District Court are appointed by and serve at the pleasure of the Chief Judge of the District Court. Md. Const. art. IV, § 41F. These lines of authority are sufficient to provide adequate supervisory oversight of District Court officials as they create the necessary administrative infrastructure and implement the rules governing appointment of counsel for indigent defendants at initial appearances. In addition, the Constitution provides the authority to sanction any judicial officer who refuses to follow the law. *See* Md. Const. art. IV, § 4B; Md. Rule 16-813, Rule 1.1; Md. Rule 16-814, Rule 1.1.

The Public Defender also favors entry of an injunction, and he offers a series of recommendations that he believes will facilitate "meaningful implementation" of the

right to counsel this Court has declared by ensuring "*effective* representation." The Public Defender does not contend that an injunction is needed because he mistrusts the officials who would be bound by the injunction; rather, his concerns seem to be more about the lawyers who would provide representation. The reason the Public Defender gives as justification for an injunction (whether devised by this Court or by the circuit court) is that, then, "any indigent defendants not provided [effective] representation can seek enforcement of the injunction." Supplemental Brief at 1. This presents several problems. The injunction would be enforceable only against the defendant officials of the District Court, who will be responsible for appointing attorneys, not for monitoring their effectiveness in individual cases. Contempt sanctions against District Court judges and commissioners are not the remedy for individual instances of ineffective representation. *This* Court supervises the members of the Bar. To the extent that a contempt petition might seek to address a more systematic problem, it threatens to blur the lines of accountability prescribed by the Constitution, by permitting a circuit court judge to correct perceived deficiencies in the rules adopted by this Court, *but see* Md. Const. art. IV, § 18(a), or perceived deficiencies in the performance of other judicial officers, *but see* Md. Const. art. IV, § 18(b).[3]

[3] The limited experience we have from allowing individual defendants to enforce the terms of a circuit court injunction to redress grievances about individual pretrial release determinations is not encouraging. In the brief period after the existence of the circuit court's injunction was discovered and before it was stayed by this Court, the Office of the Public Defender asserted that defendants appearing (with counsel) before District Court judges for a bail determination were entitled to release without any conditions because they had earlier appeared before a commissioner without counsel.

The Public Defender's suggestions should certainly be considered by this Court as it considers rules amendments, and some suggestions may be considered as officials of the District Court create new systems and internal procedures to implement those rules, but most of the suggestions are ill-suited to an injunction governing the conduct of the District Court officials. One of the Public Defender's recommendations deserves special mention here: in a situation where the initial appearance is delayed "due to the unavailability of appointed counsel," he recommends that the defendant simply be released (so long as the person is eligible for release by a commissioner). Supplemental Brief at 3. The proposed rule changes under consideration take a different approach, by directing the commissioner to commit the defendant temporarily "until the earliest opportunity that the defendant can be presented to the next available judicial officer." Rule 4-213.1(d)(1)(C). (Supp. App. 9.) The Public Defender's brief does not elaborate on his alternative approach, and the Court should not adopt it without first giving serious consideration to the implications of his proposal for public safety. Many arrestees who are eligible for release are charged with dangerous offenses and should not be released without conditions, and some should not be released at all.[4]

The Public Defender then presented petitions for writs of habeas corpus to the circuit court judge who issued the injunction in this case. The judge did not act on the petitions.

[4] Commissioners have authority to release defendants charged with many serious felonies and crimes of violence, *see* Md. Code Ann., Crim. Proc. § 5-101, 5-201, 5-202; Rule 4-216(b), (c), and a commissioner must set conditions of release that will "ensure the appearance of the defendant as required," "protect the safety of the alleged victim by ordering the defendant to have no contact with the alleged victim or the alleged victim's premises or place of employment or by other appropriate order," and "ensure that the defendant will not pose a danger to another person or to the community." Rule 4-216(f);

CONCLUSION

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

Respectfully submitted,

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May 2, 2014

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

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see also Md. Code Ann., Crim. Proc. § 5-210 (requiring that a commissioner when releasing a defendant consider including, as conditions of release, reasonable protections for the safety of the alleged victim.) In addition, § 5-101 of the Criminal Procedure Article prohibits the release on recognizance of a defendant charged with a crime punishable by life imprisonment without parole; a defendant charged with a crime punishable by life imprisonment may be released only on bail or subject to other conditions of release, Md. Code Ann., Crim. Proc. § 5-102.

SUPPLEMENTAL REPLY APPENDIX

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

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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

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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,

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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

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