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

SUPPLEMENTAL BRIEF OF APPELLEES

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Plaintiffs Quinton Richmond, et al., by their undersigned attorneys, submit the following Supplemental Brief responding to the Supplemental Brief of Petitioners ("DCD Supp. Br.") filed by Petitioners Ben C. Clyburn, et al. (the "District Court Defendants" or the "DCDs").

STATEMENT OF THE CASE

Plaintiffs adopt the DCDs' Supplemental Statement of the Case.

QUESTION PRESENTED

In its March 11 order calling for supplemental briefing and oral argument, the Court asked the parties to answer the following issue:

> What action should the Court take to revise the injunction and what revisions should be made based on all then extant circumstances, including any legislative action?

See Supp. App. 2 (Mar. 11, 2014 Order at 2). The DCDs significantly recast the Court's March 11 Order in rhetorical and essentially circular terms, asking whether, in light of their purported "faithful adherence to this Court's rules" and an asserted presumption of their future compliance, "is an injunction unnecessary and unwarranted?" (DCD Supp. Br. 3). As discussed below, the DCDs' self-congratulatory question oversimplifies matters to some extent.

STATEMENT OF THE FACTS

Plaintiffs adopt the DCDs' Supplemental Statement of the Facts, with one caveat. The DCDs refer to further proposed revisions to the Rules that are being considered by the Rules Committee (Supp. App. 3-25) but do not discuss their substance or significance. See DCD Supp. Br. 4. In fact, the proposed Rules do not significantly change the revisions to the Rules that the Court has already approved when it considered the 181st Report of the Rules Committee on November 6, 2013. Most of the change is re-organizational, eliminating the provisions of Rule 4-216(e) (see Supp. App. 15-19) and instead adding a new Rule 4-213.1 to govern the procedures for providing representation at initial appearances (see Supp. App. 3, 7-10). The only substantive change is an elimination of specific provisions for representation by the Public Defender at initial

appearances. See DCD Supp. Br. 4 n.4. That small proposed change would not require the Court to delay any further the implementation of the right to counsel in deference to the process of finalizing these additional amendments to the Rules. Indeed, even the DCDs do not suggest that further delay is warranted.

ARGUMENT

For the thousands of indigent Marylanders who must try to defend themselves at an initial bail hearing without representation, light at the end of the tunnel finally has arrived. In their Supplemental Brief, the District Court Defendants abandon their prior insistence that they cannot now comply with DeWolfe v. Richmond, 434 Md. 444 (2013) ("Richmond III") and that implementation of that decision should be stayed until January 2015 or later. Instead, they now proclaim that the injunction called for by this Court in its Order of November 6, 2013 is "unwarranted and unnecessary" because they "will comply with the Rules that this Court adopts to implement the constitutional right to counsel[.]" (DCD Supp. Br. 9, 6) (heading font altered). For the first time in this 7½-year case, the DCDs agree that they *can and will* comply with their constitutional obligation to provide counsel.

Unfortunately, the DCDs do not provide details as to *when* they will comply with those Rules. The reasonable reading of their Supplemental Brief is that, as soon as the revised Rules are issued and take effect, compliance will commence in full throughout the State. We take the DCDs at this implicit meaning. If the DCDs are in fact promising immediate compliance, e.g., within ten days of the Rules taking effect (and, outside of Baltimore City, no later than July 1, 2014, when the funding authorized by the General Assembly will become available), then we agree that an injunction is not necessary. If, however, that understanding is not correct and immediate implementation across the State is not assured, then an injunction remains necessary to compel the DCDs to protect the constitutional rights of indigent criminal defendants. In light of the many years it has taken to get to this point, this Court should not abandon its prior ruling that an injunction is needed, unless the DCDs make it clear that compliance and implementation will occur promptly, as soon as the revised Rules take effect. Otherwise, the Court will invite

further delay, further litigation, and further appeals – all to the detriment of the Plaintiff class.

In considering the implementation date and whether an injunction is required, the Court should bear the following points in mind:

1. The decision to have the circuit court issue an injunction as the trigger for implementation of Richmond III was made by *this Court*, in its legislative rule-making capacity. See E44-45 (Rules Order issued after the November 6, 2013 public meeting held by the Court to consider adoption of the Rules Committee's 181st Report). As the Court has already decided that an injunction should issue, the DCDs should be much clearer in promising immediate compliance if they want the Court to reverse its decision.

2. As the Court previously determined that the proper way to secure implementation was for Plaintiffs to secure an injunction from the circuit court, the Court should continue with that position unless it is convinced that implementation will occur immediately upon issuance of the revised Rules without requiring further litigation.

3. Plaintiffs had previously taken the position that an injunction requiring post-declaratory judgment compliance would not be necessary *if* the DCDs complied with a final declaratory judgment providing a right to counsel. See E355 in Case No. 34, Sept. Term, 2011, Pls. Feb. 17, 2011 letter to the Hon. Alfred Nance at 2 (explaining that Plaintiffs wanted to reserve the right to seek future injunctive relief upon "a failure by Defendants to abide by the law as declared by this Court in its Declaratory Judgment"); E358 (reiterating that Plaintiffs would seek supplementary relief only for "future violations, namely a failure to provide counsel in disregard of the Court's declaratory judgment" as "[t]he question of whether Defendants will continue to violate the law once the appellate courts affirm the Court's judgment is not yet ripe and might never arise").

4. The DCDs did not promptly comply with the circuit court's injunction orders of January 10 and 13, 2014 and instead took steps to seek a stay pending appeal, which was filed on January 14, 2014. No representation was provided during the interim, and certain District Court judges asked the Public Defender not to make motions in public seeking compliance with the injunctions.

5. The DCDs' current position that no injunction is needed is remarkably contrary to their position below following the Court's Richmond III and post-Richmond III rulings that an injunction *is* required. As the Court will recall, following the Court's final rulings of November 7, 2013, Plaintiffs wrote to the District Court Defendants to urge voluntary immediate compliance without requiring further litigation to obtain an injunction; Plaintiffs argued that the DCDs' constitutional duty to enforce the law required them to do so. (E139-40). The DCDs took offense at the contention that they were violating their duties and complained in their Status Report filed one week later that Plaintiffs had pressed them for implementation instead of petitioning for an injunction. (E35, 40-41). Their assertion in this Court that an injunction is not required is a 180-degree reversal of position. The DCDs offer no explanation for this turnaround.

6. The Court already has approved the Rule revisions needed to implement Richmond III. (E44-45). It delayed final issuance in lieu of allowing the circuit court to determine if an injunction should issue. Now that the DCDs have dropped their resistance to prompt implementation, no further delay is needed.

7. The *new* proposed revisions before the Rules Committee are not controversial and do not warrant a further delay in implementation. The revisions already approved by the Court are more than sufficient to guide proceedings under Richmond III.

8. At the last oral argument on March 7, 2014, Judge Adkins questioned counsel for Plaintiffs as to whether the District Court Defendants had in fact secured names of attorneys who would accept appointments to provide representation at initial bail hearings. Plaintiffs explained that our understanding was that the attorneys had been recruited, but some members of the Court seemed skeptical. Counsel for the DCDs did not volunteer any information on the subject. As it turns out, at a hearing held on February 12, 2014 before the House Budget Committee pertaining to the Judiciary budget, Chief Judge Clyburn testified that the lists of attorneys to provide the representation "have been compiled" by the DCDs. He flatly declared: "What should happen if the stay [of the injunction order] is lifted? ***Well, the District Court is ready to go.***" After explaining the steps that the Judiciary had taken, Chief Judge Clyburn further

stated that, "if the Court of Appeals should lift the stay, t he Judiciary is ***currently prepared*** for such an eventuality with the exception of a funding source within the State budget for appointed counsel and a method of billing the State as mandated by Richmond." (Hr'g on judiciary budget, H. Budget Comm., 420 Gen. Assemb., Reg. Sess. (Feb. 12, 2014), available at http://mgahouse.maryland.gov/house/play/801b0c2bf1014f31bbccb1d8c3bd0089/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=521656) (accessed Apr. 28, 2014) (video and audio recording at 46:45 – 48:39) (emphasis added). This crystal-clear statement by Judge Clyburn should settle the matter. Implementation indeed *can* proceed immediately, now that the funding issue has been clarified by the General Assembly.

9. The DCDs do not address the specific terms of the injunction ordered by the circuit court, apparently dropping their prior opposition to certain terms. Accordingly, if the Court determines that an injunction should be ordered, the Court should order that the injunction be issued in the form of Exhibit 9 to Plaintiffs' Response to the DCDs' Motion for Stay, filed on January 17, 2014.

10. Finally, the DCDs do not indicate that they have any remaining concerns regarding the final approval of the revised Rules that the Court has held in abeyance since November 6, 2013. As final issuance of those revised Rules was delayed by the Court so that the circuit court could determine whether an injunction should issue, subject to the Court's review, and as the DCDs no longer believe that an injunction is required because they are prepared to implement Richmond III, the revised Rules should issue immediately. At this point, no further reason exists for delay: the additional revisions currently under consideration by the Rules Committee are technical and do not materially alter the Rules or affect implementation, and the DCDs no longer are contesting implementation.

* * *

This case has had far too many delays and detours for this Court to accept at face value the DCDs' vague promise of future compliance. They have fought implementation tooth and nail for the last seven months, to the point of taking positions in this Court that

flatly contradicted repeated public statements by Chief Judge Clyburn that the DCDs were ready to move forward. If the DCDs do not want to be subject to an injunction, they should be clear and specific as to the dates when *full* implementation will occur in each jurisdiction. If the DCDs do not promise immediate implementation, e.g., within 10 days of the Rules taking effect (and outside of Baltimore City no later than July 1, 2014, when the funding authorized by the General Assembly will become available), then the Court should order that the injunction be issued in the form of Exhibit 9 to Plaintiffs' Response to the DCDs' Motion for Stay, filed on January 17, 2014.

The DCDs' legal argument that an injunction order would be premature under any circumstance (DCD Br. 7-8) is difficult to take seriously at this late date. This Court directed the circuit court *six months* ago to issue an injunction as the means to commence implementation. The DCDs' response was to seek a stay and further delay and then, after securing the stay and persuading the Court to issue a writ of certiorari on the purported ground that the circuit court's injunction order was premature and defective, to argue in this Court for reversing Richmond III on the merits – an outrageous departure from their cert. petition, which never mentioned the issue. Having opposed implementation for months, even though the procedures were in place to allow implementation to proceed, and then using surreptitious means to reach this Court to beseech it to reverse Richmond III, the DCDs should not be rewarded with a decision that an injunction is no longer needed based simply on their vague commitment to comply in the future. If the DCDs are not willing to make a clear and specific commitment to immediate compliance, the record of this case provides ample basis for the Court to order an injunction to compel immediate compliance.

The right to counsel is constitutionally required. For more than seven months, in tens of thousands of cases across the State, it has been violated without redress. For more than seven years, it has been contested vigorously, if not desperately, by the DCDs and the State. Now, the DCDs argue that, because of their self-proclaimed record of good will and good faith, they should be trusted to implement Plaintiffs' right without any further directive from this Court or the circuit court, even though they coyly fail to

provide any details or specific commitments about when and where that would occur. Plaintiffs respectfully submit that enough is enough. If the DCDs will not make it clear that full implementation will occur immediately across the State, the Court should proceed with its prior course of approving an injunction compelling the DCDs to obey immediately the constitutional rights of all criminal defendants in Maryland at initial bail hearings.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the following relief:

(1) The Court should order that the revised Rules will take effect immediately in Baltimore City and on July 1, 2014 in other jurisdictions.

(2) If the DCDs do not provide a clear and specific commitment to immediate and full implementation of Richmond III in all cases, the Court should order an injunction in the form of Exhibit 9 to Plaintiffs' Response to the DCDs' Motion for Stay, filed on January 17, 2014, effective ten days after the Rule revisions take effect.

(3) The Court should vacate the circuit court's injunction order.

This Supplemental Brief was prepared in 13-point, Times New Roman font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 30th day of April 2014, two copies of the foregoing Supplemental Brief of Appellees Quinton Richmond, et al. were sent by regular mail first class, postage prepaid, and by electronic mail to the following counsel for the District Court Defendants and the Public Defender, respectively:

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