

Tuesday January 31, 2012

Delegate Joseph F. Vallario, Jr., Chair & Members of the Judiciary Committee  
Chair, House of Delegates Judiciary Committee  
House Office Building, Room 101  
6 Bladen Street  
Annapolis, MD 21401

Delegate Kathleen M. Dumais  
Vice Chair, House of Delegates Judiciary Committee  
House Office Building, Room 101  
6 Bladen Street  
Annapolis, MD 21401

Dear Delegates Vallario, Dumais & Members of the Judiciary Committee,

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation and the only national bar association working in the interest of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 10,000 members nationwide, joined by 90 state, local, and international affiliate organizations with another 40,000 members. Its membership, which includes private criminal defense lawyers, public defenders, and law professors, is committed to preserving fairness within America's criminal justice system.

It is the position of NACDL that a defendant has the constitutional right to the assistance of counsel under the Sixth Amendment at the time they are brought before a judicial officer who has the power to set restrictions on their liberty. The right to representation at the time a determination is made regarding bail is a critical stage of criminal proceedings which requires the

presence of counsel.<sup>1</sup> NACDL fully supports those portions of the proposed legislation that would authorize the Office of the Public Defender to represent defendants at Bail Hearings in District Court. However, NACDL regards the denial of counsel to defendants during a hearing before a District Court Commissioner where bail is set as a violation of a defendant's Sixth Amendment right to counsel. NACDL opposes any amendment to Maryland Criminal Procedure which would somehow restrict the Office of the Public Defender from representing defendants before District Court Commissioners.

The right to the assistance of counsel in criminal proceedings is a fundamental right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.<sup>2</sup> It is "indispensable to the fair administration of our adversary system of criminal justice."<sup>3</sup> A criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him,"<sup>4</sup> and the Sixth Amendment ensures that that "'guiding hand of counsel' is available to those in need of its assistance."<sup>5</sup>

The right to counsel attaches at the time judicial proceedings are initiated,<sup>6</sup> and guarantees that the accused "need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."<sup>7</sup> "[W]hat makes a stage critical is what shows the need for counsel's presence."<sup>8</sup> Thus, the courts scrutinize all pretrial proceedings to determine "whether the accused required aid in coping with legal problems or assistance in meeting his adversary"; the right to counsel applies whenever counsel can provide assistance by acting "as a spokesman for, or advisor to, the accused."<sup>9</sup> Maryland's initial bail hearing clearly qualifies as such an occasion. For the reasons discussed below, there can be no doubt that defendants at such hearings "require aid in coping with legal problems" and can benefit from the assistance of counsel.<sup>10</sup>

The initial bail hearing is of critical importance to defendants, involving as it does their "pretrial liberty interests . . . with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents."<sup>11</sup> Commissioners are required to consider a host of facts about the defendant and the alleged crime. Specifically, the Commissioner is required to "set bond or commit persons to jail in default of bond or

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<sup>1</sup> This has long been the position of the American Bar Association, See *ABA Standards for Criminal Justice: Providing Defense Services, Third Edition* (1992). Recently the National Legal Aid and Defender Association's American Council of Chief Defenders *Policy Statement of Fair and Effective Pretrial Justice Practices* also calls for the provision of defense counsel when a determination regarding bail is made.

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

<sup>3</sup> *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

<sup>4</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

<sup>5</sup> *United States v. Ash*, 413 U.S. 300, 307-08 (1973).

<sup>6</sup> *Brewer*, 430 U.S. at 398.

<sup>7</sup> *United States v. Wade*, 388 U.S. 218, 226 (1967)

<sup>8</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

<sup>9</sup> *Ash*, 413 U.S. at 312-13.

<sup>10</sup> See *id.* at 312.

<sup>11</sup> See *Hurrell-Harring v. State*, 15 N.Y.3d 8, 20 (2010).

release them on personal recognizance if circumstances warrant.”<sup>12</sup> To make that determination, the Commissioner must assess the following factors pursuant to Md. Rule 4-216(d)(1):

- (A) the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction;
- (B) the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;
- (C) the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;
- (D) any recommendation of an agency that conducts pretrial release investigations;
- (E) any recommendation of the State's Attorney;
- (F) any information presented by the defendant or defendant's counsel;
- (G) the danger of the defendant to the alleged victim, another person, or the community;
- (H) the danger of the defendant to himself or herself; and
- (I) any other factor bearing on the risk of a willful failure to appear and the safety of the alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.

A Commissioner may question the defendant about a variety of subjects including residence, employment and other ties to the community. Defendants are expected to answer these questions and most often they do, thereby risking self-incrimination by possibly making an inculpatory statement that they mistakenly believe might entitle them to bail.<sup>13</sup>

At the same time, defendants may refuse to disclose information that might entitle them to bail, mistakenly believing that such information could lead to other unwanted consequences. For example, if a Commissioner asks whether the defendant is employed, the defendant may be reluctant to answer because he does not want his employer notified of the arrest, or for fear of revealing a job that pays in cash and thus sparking an IRS inquiry or retribution against the employer. Defendants asked about family in the area may be hesitant to speak if family members are in this country illegally or other immigration concerns exist.

Defendants may be concerned about revealing where they live if, for example, they are not on the lease and the landlord is not aware of their presence. Defendants who live in subsidized housing,

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<sup>12</sup> Md. Cts. & Jud. Proc. Code Ann. § 2-607(c)(2).

<sup>13</sup> See *Fenner v. State*, 381 Md. 1, 5-7, cert. denied, 543 U.S. 885 (2004) (describing incriminating statements made by defendant at bail hearing).

homeless shelters, or transitional housing are often hesitant to share that information with the court for fear that if their arrest becomes known, they will be forced out of their homes. Without legal counsel, defendants, confused or afraid about answering such questions, may simply decide not to respond, which too often is interpreted as a failure to cooperate.<sup>14</sup>

On the other hand, there are many ways that defense counsel can ensure that the Commissioner hears the strongest case on behalf of the accused:

- In the twenty-four hours between arrest and the initial bail hearing, defense counsel can interview the client to elicit relevant information. Defense counsel is likely to be able to elicit a greater quantity and quality of information than a Commissioner can, because counsel's interview can be conducted confidentially, face to face, without the presence of third parties, and with the assurance that counsel is on the client's side. Moreover, defense counsel can ask and obtain answers to more nuanced questions that are relevant to the specific statutory factors being considered by the Commissioner.
- Defense counsel can take steps to verify and amplify the client's assertions regarding community ties, trustworthiness, and other relevant issues. For instance, in regard to the client's previous record of appearances at court proceedings, defense counsel may be able to explain and verify absences due to illness or other legitimate reasons. After interviewing the client, defense counsel can call the client's employer to learn whether the circumstances of the client's hiring, and perhaps the employer's willingness to continue the client's employment despite the arrest, demonstrate the employer's level of trust in the client.
- At the hearing itself, counsel can present this information to the Commissioner. A Commissioner is likely to accord greater weight to facts for which counsel can present verification than to facts merely asserted by the accused. Defense counsel may present information about unusual circumstances that the Commissioner's questioning is unlikely to elicit. For example, a Commissioner might inquire about employment history, and receive the true answer that the accused is unemployed and has been for over six months. However, a follow-up question may reveal that the unemployment was due to the entire business shutting down, not poor personal performance, a fact highly relevant to the Commissioner's assessment of the accused's trustworthiness.

The need for the assistance of counsel in this setting is urgent in light of the particular obstacles that the class of indigent defendants faces. For instance, the Supreme Court has observed the following with regard to indigent defendants:

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<sup>14</sup> The circumstances surrounding most bail hearings exacerbate these inherent problems. In the city of Baltimore, defendants appear before the Commissioner inside an enclosed area within the jail and sit in the small booth, separated from the Commissioner by a plexiglass wall, with communications accomplished via an audio speaker system. See Colbert, Paternoster & Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 *Cardozo L. Rev.* 1719, 1733 (2002). On average, a defendant has only minutes to formulate a cogent and compelling presentation under the relevant statutory factors, a task that few will ably perform.

'[Sixty-eight percent] of the state prison populatio[n] did not complete high school, and many lack the most basic literacy skills.' '[S]even out of ten inmates fall in the lowest two out of five levels of literacy – marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article.' Many . . . have learning disabilities and mental impairments.<sup>15</sup>

Extensive research confirms that indigent defendants tend to be among the least educated and least literate members of society, and as a result, are less able than the average citizen to cope with a proceeding in which they are called upon to advocate for themselves and may make statements that could affect their lives and liberty. For example:

- A 2003 study revealed that half or more of the adult prison population functions at a basic or below basic level of literacy. This means they have trouble with such tasks as locating the intersection of two streets on a clearly labeled map, circling the date of an appointment on a hospital appointment slip, and calculating the cost of a sandwich and salad from a menu.<sup>16</sup>
- 17 percent of the prison population has been diagnosed with a learning disability, compared with six percent of the general population.<sup>17</sup>
- As of 2003, approximately 40 percent of all prison and jail inmates had not completed high school or its equivalent, compared with 18 percent of the general population.<sup>18</sup>
- As of 2005, more than half of all prison and jail inmates had a mental health problem, meaning they had suffered from a recent history or symptoms of a mental health problem within the prior 12 months, compared with an estimated 11percent of the general population.<sup>19</sup>

To expect this challenged population to cope with the intricacies of a legal proceeding without the presence and assistance of counsel is inconsistent with the fundamental principles of our Constitution.

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<sup>15</sup> *Halbert v. Michigan*, 545 U.S. 605, 620-21 (2005) (citations omitted).

<sup>16</sup> *Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey*, U.S. Dept. of Education National Center for Education Statistics (May 2007), at 6-7, 13.

<sup>17</sup> *Id.* at 28.

<sup>18</sup> *Education and Correctional Populations*, U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics (Jan. 2003) at 1.

<sup>19</sup> *Mental Health Problems of Prison and Jail Inmates*, U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics (Sept. 2006) at 1, 3.

In short, the initial bail hearing is rife with pitfalls for the unwary and unrepresented indigent defendant. These defendants desperately need counsel who can act as their advisors and spokespersons.<sup>20</sup> Under these circumstances, “lawyers . . . are necessities, not luxuries.”<sup>21</sup>

Sincerely,

John P. Gross

National Association of Criminal Defense Lawyers  
Indigent Defense Counsel

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<sup>20</sup> See *Ash*, 413 U.S. at 312.

<sup>21</sup> *Gideon*, 372 U.S. at 344