In The

Court of Appeals of Maryland

No. 34

September Term, 2011

PAUL B. DEWOLFE, JR., *et al.*,

Appellants,

vs.

QUINTON RICHMOND, *et al.*,

Appellees.

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

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY LAW SCHOOL, THE CENTER FOR CONSTITUTIONAL RIGHTS, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

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.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, nonprofit organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Maryland is one of its state affiliates, with approximately 14,000 members statewide. Since its founding in 1920, the ACLU has repeatedly appeared before various courts, both as direct counsel and as *amicus*

[1] No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity, other than the amici and their counsel, made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

curiae, in multiple cases regarding indigent defendants' right to counsel, including *Powell v. Alabama*, 287 U.S. 45 (1932), and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Brennan Center for Justice at New York University School of Law (Brennan Center) is a non-partisan public policy and law institute focusing its work on fundamental issues of democracy and justice. The Brennan Center works to create and support policies to ensure that people of limited means obtain the effective legal representation due to all who are brought before this nation's criminal courts. Key to the Brennan Center's mission are its efforts to close the "justice gap" by working to secure the promises contained in the Eighth Amendment's prohibition against excessive bail, and the Sixth Amendment's right to counsel, applicable to the states through the Supreme Court's decision in *Gideon v. Wainwright* and its progeny.

The Center for Constitutional Rights (CCR) is a national nonprofit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, CCR has litigated numerous cases which have sought to guarantee fair treatment for all within the American justice system, including *Rasul v. Bush*, 542 U.S. 466 (2004), which ensured access to courts and counsel for detainees at the U.S. military base in Guantanamo Bay, Cuba, and

Wallace v. Kern, 520 F.2d 400 (2d Cir. 1975), which challenged the fairness of the bail-setting and review processes for indigent criminal defendants in New York City.

The National Legal Aid and Defender Association (NLADA) is a nonprofit corporation that seeks to secure equal justice by supporting excellence in the delivery of public defense and civil legal aid services for those who cannot afford to hire counsel. NLADA has approximately 700 program members, including nonprofit organizations, government agencies, and law firms, representing 12,000 lawyers. Created in 1911, NLADA is a recognized expert in public defense services and a leader in the development of national public defense standards.

Although the NACDL, ACLU, ACLU of Maryland, Brennan Center, CCR, and NLADA (collectively the "amici curiae") have different missions, all have a significant interest in guaranteeing – and all urge this Court to find – that indigent defendants have a right to counsel at initial bail hearings.

STATEMENT OF THE CASE, STATEMENT OF QUESTIONS PRESENTED, AND STATEMENT OF FACTS

The amici curiae join in and adopt by reference the Statement of the Case, Statement of Questions Presented, and Statement of Facts set forth in the appellees' brief.

ARGUMENT

I. Introduction

This case involves an important and urgent question: Are the statutory and constitutional rights of the class of indigent persons brought before Commissioners in Baltimore City for their initial bail hearings, after having been denied appointment of counsel to represent them at those hearings, being violated on an ongoing basis? The Circuit Court for Baltimore City correctly answered that question in the affirmative and, also correctly, chose to declare the rights of the plaintiff class while deferring for the moment the question of injunctive relief. This Court should affirm the declaratory judgment of the Circuit Court.

II. The Circuit Court Correctly Found That There Is A Statutory And Constitutional Right To Appointed Counsel At The Initial Bail Hearing

A. The Maryland Public Defender Act Requires Appointment of Counsel To Represent Indigent Defendants At Initial Bail Hearings

The Maryland Public Defender Act, Md. Crim. Proc. Code Ann. §§ 16-201 *et seq.*, expressly requires representation of indigent defendants at, *inter alia*, "any . . . proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result." Md. Crim. Proc. Code Ann. § 16-204(b)(1)(iv). Moreover, the statute requires representation "in all stages" of such a proceeding, *id*. § 16-204(b)(2), language which this Court has held is unambiguous: "[T]he statutory right to counsel 'extends to all stages in the

proceedings.' *'All' means 'all.'*" *McCarter v. State*, 363 Md. 705, 716 (2001) (emphasis added).

There can be no doubt that the initial bail hearing constitutes a stage in a proceeding in which confinement may result. Indeed, the Public Defender, charged with implementing the statute, agrees. *See* P.D. Br. at 14. The language of the statute is clear, and requires that counsel be appointed to assist indigent defendants at the initial bail hearing. The Circuit Court's ruling on this question should be affirmed.

B. The United States Constitution And Maryland Declaration Of Rights Also Require Appointment Of Counsel At The Initial Bail Hearing

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. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). It is "indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977). A criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him," *Powell v. Alabama*, 287 U.S. 45, 69 (1932), and the Sixth Amendment ensures that that "'guiding hand of counsel' is available to those in need of its assistance." *United States v. Ash*, 413 U.S. 300, 307-08 (1973).

The right to counsel attaches at the time judicial proceedings are initiated, *Brewer*, 430 U.S. at 398, 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." *United States v. Wade*, 388 U.S. 218, 226 (1967). "[W]hat makes a stage critical is what shows the need for counsel's presence." *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008). 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." *Ash*, 413 U.S. at 312-13.

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. *See id.* at 312.

C. The Need For Defense Counsel At The Initial Bail Hearing

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." *See Hurrell-Harring v. State*,

15 N.Y.3d 8, 20 (2010). The Circuit Court correctly found that the initial bail hearing requires the Commissioner to consider "a host of facts" about the defendant and the crime. Circuit Court Op. at 9. Specifically, the Commissioner is required to "set bond or commit persons to jail in default of bond or release them on personal recognizance if circumstances warrant." Md. Cts. & Jud. Proc. Code Ann. § 2-607(c)(2). To make that determination, the Commissioner must assess the following factors:

> (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 wilful 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.

Md. Rule 4-216(d)(1).

Thus, as the Circuit Court noted, the Commissioner may question the defendant about a variety of subjects including "residence, employment and other ties . . . to the community." Circuit Court Op. at 9. "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. *Id.*; *see, e.g., Fenner v. State*, 381 Md. 1, 5-7, *cert. denied,* 543 U.S. 885 (2004) (describing incriminating statements made by defendant at bail hearing).

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, 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.[2]

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

[2] 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. *See id.* at 1755.

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:

> '[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.

Halbert v. Michigan, 545 U.S. 605, 620-21 (2005) (citations omitted). 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.[3]

- 17 percent of the prison population has been diagnosed with a learning disability, compared with six percent of the general population.[4]

- 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.[5]

- 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 11 percent of the general population.[6]

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 holdings of *Gideon v. Wainwright* and its progeny, and with the fundamental

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[3] *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.

[4] *Id*. at 28.

[5] *Education and Correctional Populations*, U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics (Jan. 2003) at 1.

[6] *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.

principles of our Constitution. The Supreme Court has concluded with regard to the appellate process, in words equally applicable to Maryland's initial bail hearing, that "[n]avigating the . . . process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments." *Halbert*, 545 U.S. at 621.

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. *See Ash*, 413 U.S. at 312. Under these circumstances, "lawyers . . . are necessities, not luxuries." *Gideon*, 372 U.S. at 344. The Circuit Court's grant of declaratory relief under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights[7] should be affirmed.

III. This Court Should Affirm The Circuit Court's Grant Of Declaratory Relief Immediately In Order To Prompt Maryland's Legislative And Executive Branches To Ensure The Provision Of Counsel As Statutorily And Constitutionally Required

The Public Defender argues that it was reversible error for the Circuit Court to issue a declaratory judgment without addressing the practical issues of how that

[7] The right to counsel provided by Article 21 is at least as extensive as that protected by the Sixth Amendment. *See State v. Tichnell*, 306 Md. 428, 440, *cert. denied*, 479 U.S. 995 (1986).

judgment is to be implemented. As discussed further below, the amici curiae are sympathetic to the Public Defender's concerns about ability to implement the decision. However, they believe those concerns should not – indeed, cannot – prevent this Court from affirming the grant of declaratory relief. To the contrary, the amici believe that a declaratory judgment will aid the Public Defender in seeking an effective means of implementation.

Declaratory relief and injunctive relief are two different things. The federal Declaratory Judgment Act[8] was enacted specifically to provide "an alternative to the strong medicine of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 466 (1974); *see also Perez v. Ledesma*, 401 U.S. 82, 104 (1971) (Brennan, J., concurring in part and dissenting in part) (declaratory relief "is a less harsh and abrasive remedy than the injunction"). The prerequisites for issuance of a declaratory judgment are different from, and lesser than, the requirements that must be met in order for a court to issue an injunction. *See Roe v. Wade*, 410 U.S. 113, 166 (1973) ("The Court has recognized that different considerations enter into

[8] The Maryland declaratory judgment statute is, by its own terms, "interpreted and construed . . . to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees." Md. Cts. & Jud. Proc. Code Ann. § 3-414; *see Hamilton v. McAuliffe*, 277 Md. 336, 340 n.2 (1976) ("Section 3-414 of the Maryland Uniform Declaratory Judgments Act provides that the Act be construed in harmony with federal law."). The purpose of the Maryland statute is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations," and it is to be "liberally construed and administered." *Converge Services Group, LLC v. Curran*, 383 Md. 462, 478 (2004).

a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other."). For example, the availability of an adequate remedy at law bars injunctive but not declaratory relief, and a showing of irreparable harm is required for injunctive but not declaratory relief. *See Perez*, 401 U.S. at 123 (Brennan, J., concurring in part and dissenting in part); *see also Steffel*, 415 U.S. at 471-72 (lower court erred in ruling that failure to demonstrate irreparable injury precluded declaratory relief).

The legal effect of a declaratory judgment is also different from, and lesser than, the legal effect of an injunction. "[E]ven though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." *Steffel*, 415 U.S. at 471 (citation omitted); *see also Perez*, 401 U.S. at 124 (Brennan, J., concurring in part and dissenting in part) ("A declaratory judgment . . . is merely a declaration of legal status and rights; it neither mandates nor prohibits state action.").

A declaratory judgment can, however, and often does, prompt state officials to devise a remedy for the violation that is the subject of the declaration. "The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the

statute." *Steffel*, 415 U.S. at 470 (citation omitted). For this reason, state courts frequently have used the declaratory judgment as a tool to make clear the scope of constitutional or statutory rights, while allowing (and prompting) legislatures and executives to come up with practicable and effective remedies. *See, e.g., Goldston v. State*, 361 N.C. 26, 34 (2006) (declaratory judgment in case involving diversion of tax levies "would serve to clarify and settle the legal rights and responsibilities of the Governor and the General Assembly, as well as the legal status of the taxpayer funds" and would "terminate the uncertainty and controversy giving rise to the action"); *Horton v. Meskill*, 172 Conn. 615, 651 (1977) (affirming declaratory judgment that state's system of school finance violated state constitution, noting, "The judicial department properly stays its hand to give the legislative department an opportunity to act.").

Most importantly, courts have held that uncertainty over the ultimate policy solution to an issue involving constitutional or statutory rights is not a reason to refrain from issuing a declaratory judgment – to the contrary, the courts have an *obligation* to declare a violation of such rights if one is ongoing. In *Sheff v. O'Neill*, 238 Conn. 1 (1996), for example, the Supreme Court of Connecticut addressed a longstanding dispute over segregation in the Hartford public schools. The court chose to grant declaratory relief, while retaining jurisdiction to grant injunctive relief at a later date if necessary. *Id*. at 45. The court noted that the

defendants – as the Public Defender does here – "counsel [the court] to stay [its] hand entirely. They claim that no judicial mandate can properly take into account the daunting, if not intractable, difficulties of crafting a remedial solution to the problem of de facto racial and ethnic segregation in the public schools of Hartford." *Id*. at 46.

Quoting the United States Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 566 (1964), however, the court rejected the defendants' suggestion:

> 'We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. *Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.'* (Emphasis added.) Our oath, our office and the constitutional rights of the schoolchildren of Hartford, require no less of us in this case.

Sheff, 238 Conn. at 46-47.

Similarly, New York's highest court, in holding that claims of deprivation of the right to counsel were justiciable, noted the indispensable role of the courts in vindicating this fundamental right:

> It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right. We have consistently

> held that enforcement of a clear constitutional or statutory mandate is the proper work of the courts, and it would be odd if we made an exception in the case of a mandate as well-established and as essential to our institutional integrity as the one requiring the State to provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them.

Hurrell-Harring, 15 N.Y.3d at 26 (citations omitted).

To be clear, the amici curiae are unquestionably sympathetic to the concerns expressed by the Public Defender. Indeed, the amici – all of whose missions include ensuring access to legal representation among indigent populations in need of such assistance – are all too familiar with the problem of underfunding of indigent legal services. As such, the amici understand that the Public Defender's resources, in Maryland and across the country, are already stretched to – and sometimes beyond – acceptable limits. *See* P.D. Br. at 11.

The amici firmly believe, however, that the practical challenges of providing counsel for indigent defendants at their initial bail hearings should not preclude this Court from declaring that the right to such counsel exists. If that right is, in fact, guaranteed by statute and by the Sixth Amendment to the United States Constitution, as the amici believe it is, then this Court has a duty to so hold. The Public Defender does not identify any lesser form of relief that should have been granted, or that somehow would be effective in addressing the problem. If a

declaratory judgment is not granted, then there is in effect no redress for an ongoing violation of constitutional rights. That is not an acceptable outcome.

At the same time, the amici note that a declaration of the right to counsel at initial bail hearings should prompt other branches of Maryland government to address the problem. Indeed, as the cases above demonstrate, state courts have embraced the declaratory judgment as a means of resolving a controversy that implicates public policy, while deferring to the branches of government that are better positioned to find a policy solution. At the same time, courts frequently and appropriately reserve the right to use additional, stronger remedies should the other branches of government fail to act.

For example, in *State v. Peart*, 621 So. 2d 780 (La. 1993), the Supreme Court of Louisiana found that indigent defendants were generally not receiving the effective assistance of counsel required by the Constitution, but left the appropriate solution of the problem to the legislature. It warned, however, that if the legislature failed to act, the court would revisit the issue:

> If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel. We decline at this time to undertake these more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because

> the legislature ought to assess such measures in the first instance.

Id. at 791 (citations omitted).

The Circuit Court intentionally chose to take a similar course here. The Circuit Court was correct to proceed as it did, issuing its declaratory judgment, staying its order to obtain a ruling from this Court on the underlying substantive question, and deferring consideration of remedy issues until such time as they become relevant. The Circuit Court reserved its right to look at injunctive relief at a later point, if necessary, and will be in a position to address the concerns raised by the Public Defender once those issues are further developed. This simply is not the proper time for the courts to decide whether "more intrusive and specific measures" are necessary. *See Peart*, 621 So. 2d at 791. It is, however, the proper time for this Court to vindicate the rights of indigent defendants.

The powerful language of the United States Supreme Court applies with equal force here: "A denial of constitutionally protected rights demands judicial protection." *Reynolds*, 377 U.S. at 566. Indigent defendants in Maryland are being denied their right to have counsel appointed to assist them at their initial bail hearings. This Court should so declare. The appropriate means of remedying this ongoing deprivation can be addressed by the Maryland legislature, the Public Defender, and other parties to the process, and if necessary, by the courts at a later date. The potential difficulty in arriving at a solution cannot and should not,

however, dissuade this Court from affirming the Circuit Court's declaration of this fundamental right.

CONCLUSION

For the reasons discussed above, the amici curiae respectfully urge this Court to affirm the judgment of the Circuit Court for Baltimore City.

Respectfully submitted,

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PAUL B. DEWOLFE, JR., *et al.*
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----------)

I, Diana Kauffman, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by KILPATRICK TOWNSEND AND STOCKTON LLP attorneys for Amicus Curiae, to print this document. I am an employee of Counsel Press.

On the **16th Day of September, 2011**, I served the within **BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *ET AL.* IN SUPPORT OF APPELLEES** upon:

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September 16, 2011