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RECENT DEVELOPMENT

***DEWOLFE V. RICHMOND*: IN ACCORDANCE WITH ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS, AN INDIGENT DEFENDANT HAS A RIGHT TO STATE-FURNISHED COUNSEL AT AN INITIAL APPEARANCE BEFORE A DISTRICT COURT COMMISSIONER.**

By: Kristine L. Dietz

The Court of Appeals of Maryland held that an indigent criminal defendant appearing at an initial hearing before a District Court Commissioner has a right to state-appointed counsel under the due process protections of Article 24 of the Maryland Declaration of Rights. *DeWolfe v. Richmond*, 434 Md. 444, 76 A.3d 1019 (2013). Further, the court noted that this right to a furnished counsel attaches in any proceeding that may result in the defendant's incarceration. *Id.* at 461, 76 A.3d at 1029.

Quinton Richmond ("Richmond") and ten other defendants were arrested for separate, unrelated "serious offenses" in Baltimore City. They were detained at the Central Booking Jail and brought before a commissioner pursuant to Maryland Rule 4-213. Richmond and each of the other arrestees requested an attorney to represent him or her; however, none of them had the financial resources to retain private counsel. Each arrestee was denied an attorney during their initial hearings before a District Court Commissioner and bail was set.

Richmond and the others filed a complaint in the Circuit Court for Baltimore City against city and state officials alleging that they were denied representation by appointed counsel at their initial appearances, thereby violating their statutory and constitutional rights. They sought declaratory and injunctive relief to enjoin the government officials from violating the right to representation at initial appearances before District Court Commissioners.

The circuit court judge entered summary judgment in favor of the government officials, and the arrestees appealed the Court of Special Appeals of Maryland. *DeWolfe*, 434 Md. at 452, 76 A.3d at 1023. While pending in the Court of Special Appeals of Maryland, on its own initiative, the Court of Appeals of Maryland issued a writ of certiorari. *Id.* The court determined that the circuit court should have dismissed the complaint for failing to join the Public Defender as a party and "vacated the [c]ircuit [c]ourt's judgment and remanded the case to the [c]ircuit [c]ourt with directions to dismiss the complaint unless the plaintiffs joined the Public Defender as a party." *Id.* On remand, the circuit court granted the arrestees' motion for summary judgment; however, the circuit court denied their request for injunctive relief. *Id.* at 452, 76 A.3d at 1024.

The parties appealed and cross-appealed, and the arrestees also filed a petition for writ of certiorari in the Court of Appeals of Maryland. The Public Defender also filed a cross-petition for certiorari. The Court of Appeals of Maryland granted both petitions and on January 4, 2012, held that “indigent defendants are entitled to public defender representation at any initial appearance proceeding conducted before a commissioner.” *DeWolfe*, 434 Md. at 453, 76 A.3d at 1024. However, while motions for reconsideration of the January 4, 2012, opinion were pending, the Maryland General Assembly passed emergency measures which amended the Public Defender Act to provide that “representation [was] not required to be provided to an indigent individual at an initial appearance before a District Court Commissioner.” *Id.* at 454-55, 76 A.3d at 1025 (citing MD. CODE ANN., CRIM. PROC. § 16-204 (West 2012)). On August 22, 2012, in light of the amendment to the Public Defender Act, the Court of Appeals of Maryland issued an amended order recommending supplemental briefing and additional oral argument on whether indigent arrestees are entitled to relief based on a constitutional right. *Id.* at 456, 76 A.3d at 1026.

Pursuant to Maryland Rule 4-216, a District Court Commissioner determines at the initial appearance whether the arrestee is eligible for pretrial release. *DeWolfe*, 434 Md. at 450, 76 A.3d at 1022. Notably, the commissioner is not required to be an attorney. *Id.* at 449, 76 A.3d at 1022. If the arrest was made without a warrant, the commissioner also determines whether there was probable cause for the charges and arrest. *Id.* at 450, 76 A.3d at 1022. Upon a finding of probable cause, Rule 4-216(f) requires the commissioner to determine the least burdensome condition(s) of release that will secure the appearance of the defendant, protect the alleged victim, and ensure the defendant will not pose additional danger. *Id.* Potential factors to consider include the nature of the offense charged, the defendant’s record, and various other factors relating to the defendant’s family and community ties, employment status, and character and reputation. *Id.* If the commissioner does not release the arrestee, the defendant must appear before a District Court Judge during the next available court session for subsequent review. *Id.*

The Court of Appeals of Maryland emphasized that although the District Court Judge is assigned review of the commissioner’s decision, the judge affirms the bail set by the commissioner in almost half of all bail reviews. *DeWolfe*, 434 Md. at 451, 76 A.3d at 1023. The court then rejected the argument that review by the District Court Judge is sufficient. *Id.* at 462, 76 A.3d at 1029. “As a matter of Maryland constitutional law, where there is a violation of certain procedural constitutional rights of the defendant at an initial proceeding, including the right to counsel, the violation is not cured by granting the right at a subsequent appeal or review proceeding.” *Id.* Therefore, where an indigent defendant is denied his right to counsel at an initial appearance before a commissioner, this violation is not cured by providing counsel before the District Court Judge. *Id.* at 462-63, 76 A.3d at 1029-30.

Continuing its analysis, the court emphasized the shortfalls of initial appearances in Baltimore City's Central Booking Jail. *DeWolfe*, 434 Md. at 451, 76 A.3d at 1023. Specifically, the court emphasized that the public is prohibited from attending the proceedings and all communications take place between a plexiglass partition using a speaker system. *Id.* Most notably, there is no record of the proceedings; therefore, it is nearly impossible to review the commissioner's basis for his or her decision. *Id.* This leaves the potential for perfunctory proceedings where commissioners fail to consider all of the relevant facts when determining bail. *Id.* at 451, 454, 76 A.3d at 1023-24.

The Court of Appeals of Maryland also highlighted that "[t]he procedural due process component of Maryland Declaration of Rights' Article 24 has long been construed . . . to require, under some circumstances, state-furnished counsel for indigent defendants." *DeWolfe*, 434 Md. at 458, 76 A.3d at 1027. *Rutherford v. Rutherford* held that "indigent defendants had a due process right to state-furnished counsel in any proceeding involving incarceration." *DeWolfe*, 434 Md. at 459, 76 A.3d at 1028 (citing *Rutherford v. Rutherford*, 296 Md. 347, 357-64, 464 A.2d 228, 234-37 (1983)). *Rutherford* also held that Article 24 provides a right to counsel that "is broader than the specific guarantee of the Sixth Amendment and Article 21"; therefore, Article 24 requires a right to counsel in not only the critical stages of criminal proceedings, but also in civil cases and other proceedings that may result in incarceration. *DeWolfe*, 434 Md. at 459-60, 76 A.3d at 1028 (quoting *Rutherford*, 296 Md. at 358, 464 A.2d 228 at 234).

The dissent disagreed with the majority's opinion that there was no possibility for review of the commissioner's decision, and countered that any concern about unfair procedural process would be remedied by speedy judicial review in the district court. *DeWolfe*, 434 Md. at 468-69, 76 A.3d at 1033 (Barbera, C.J., dissenting). Further, the dissent offered that the holding could transform initial appearances into "mini-trials," thereby wasting time and resources. *Id.* at 470, 76 A.3d at 1034.

In *DeWolfe*, the Court of Appeals of Maryland held that an indigent defendant has a constitutional right to state-furnished counsel at an initial appearance before a District Court Commissioner. This is a pioneering decision that will increase the scope and involvement of the Public Defender's Office across the state. While it is likely that funding and logistical issues will arise, attorneys providing public defender representation should pay special attention to ensure that their clients are receiving zealous representation at each and every proceeding, beginning with the initial appearance.