Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte* Rejection of Indigent Defendants' Right to Counsel

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I. INTRODUCTION

> COURT: Is there anything you'd like to tell me about yourself, sir?
> DEFENDANT: . . . I mean I'm not denying what happened . . . .
> COURT: Sir, you need to have a lawyer just as soon as you can.[1]

This short exchange at a bail review hearing in Maryland spoke volumes about the need for counsel at that stage of the proceedings and engendered a troubling state court conviction that illuminates a criminal justice issue of national importance. The incarcerated defendant, Donald Fenner, had just been arrested for a fifty-dollar drug sale.[2] Without counsel present in court, he offered a rambling discourse[3] before making his admission, probably stating whatever he

* "Sua sponte" rulings occur when a court raises and decides an issue "on its own motion," rather than deciding an issue raised by litigants. BLACK'S LAW DICTIONARY 1464 (8TH ED. 2004). This Article refers to appellate, not trial, courts' "sua sponte" decision-making.

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1 Fenner v. State (*Fenner IV*), 846 A.2d 1020, 1023–24 (Md. 2004).

2 Reporter's Official Transcript of Proceedings (Trial on the Merits) at 27, State v. Fenner (*Fenner I*), No. 01-28360 (Md. Cir. Ct. Frederick County Jan. 15, 2002) [hereinafter Motion to Suppress and Trial I Transcript].

3 See *infra* text accompanying note 58 for Fenner's complete reply to the judge's open-ended inquiry.

thought might minimize the bail amount set[4] and avoid further detention. The danger and unfairness of such an uncounseled admission was manifest to the judge. Yet that admission became central to the prosecutor's otherwise weak case.[5] Repeatedly invoking "I'm not denying what happened" like a mantra in summation,[6] the prosecutor obtained a conviction and a twenty-year sentence.[7]

Fenner's bail proceeding illustrates why the pretrial release or bail determination hearing should be considered a "critical stage"[8] of a criminal prosecution, triggering the Sixth[9] and Fourteenth

[4] While states' bail procedures differ, Fenner's misguided attempt to influence the judicial officer to set an affordable bail and avoid lengthy pretrial detention is understandable. In Maryland's unique two-stage bail procedure, defendants initially appear before a district (lower) court commissioner within twenty-four hours of arrest. MD. R. 4-216(e)–(f); *see infra* note 48. Commissioners, like judges, are judicial officers empowered to order release on recognizance or to designate a bail amount. MD. R. 4-213(a)(4), 4-216. In Fenner's case, the commissioner ordered $150,000 bail bond. *See infra* Part II.B. Maryland procedures provide for judicial bail review. MD. R. 4-216(f). Following the commissioner's decision, Fenner appeared before a district court judge, where he made his inculpatory statement. *See infra* Part II.C.

[5] No police officer testified to observing Fenner engage in a drug transaction or could identify his voice on a recorded conversation. Reporter's Official Transcript of Proceedings (Trial on the Merits) at 273–74, 278, State v. Fenner (*Fenner II*), No. 01-28360 (Md. Cir. Ct. Frederick County March 20–21, 2002) [hereinafter Trial II Transcript]. The State was unable to introduce corroborating marked money. Motion to Suppress and Trial I Transcript, *supra* note 2, at 49–51. The State relied on the testimony of an informant and his accomplice. Trial II Transcript, *supra*, at 146–47, 182–84. See *infra* Part II.F for a detailed analysis of the State's less than persuasive case against Fenner.

[6] Trial II Transcript, *supra* note 5, at 269, 282–83.

[7] Reporter's Official Transcript of Proceedings (Sentencing) at 60, *Fenner II*, No. 01-28360 (Md. Cir. Ct. Frederick County May 9, 2002) [hereinafter Sentencing Transcript].

[8] The United States Supreme Court has identified certain pretrial stages of a criminal proceeding where counsel's presence is required because "the substantial rights of the accused may be affected." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 569 (3d. ed. 2000). In *United States v. Wade*, 388 U.S. 218, 227 (1967), the Court considered "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." Subsequently in *United States v. Ash*, 413 U.S. 300, 312 (1973), the Court explained that states must provide counsel for indigent defendants at "trial-like confrontations" where the lawyer is needed "to act as a spokesman for, or advisor to, the accused." Critical stages include judicial proceedings such as formal arraignments, Hamilton v. Alabama, 368 U.S. 52 (1961), preliminary hearings, Coleman v. Alabama, 399 U.S. 1 (1970), and confrontations outside the courtroom, such as a post-indictment lineup, *Wade*, 388 U.S. 218.

[9] The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

Amendments'[10] right to counsel. Counsel's presence was essential to protect Fenner from making a statement he thought would help to secure pretrial liberty, but which ultimately jeopardized his right to a fair trial and resulted in conviction and substantial loss of freedom. Fenner's trial attorney, however, did not advance the Sixth Amendment right to counsel argument at the pretrial suppression hearing or upon direct appeal.[11] Following the intermediate appellate court's affirmance of Fenner's conviction,[12] his public defender petitioned the Court of Appeals of Maryland (Court of Appeals) for certiorari and relied exclusively on Fifth Amendment grounds, namely that the trial court's failure to provide Fenner with *Miranda* advisements and an opportunity to consult with counsel[13] should have excluded his in-court statement at trial.[14] The defender's certiorari petition made no reference to a critical stage right to counsel.

The Court of Appeals certified the Fifth Amendment *Miranda* issue for review, but rejected Fenner's contention.[15] Finding that the judge's question did not constitute "interrogation," the court concluded that unrepresented defendants like Fenner were not entitled to *Miranda* warnings that included the right to confer with counsel before deciding whether to respond to a judge's question.[16] It held that Fenner's rambling explanation represented a "voluntary blurt"[17] that the prosecution may introduce at trial.[18] The Court of Appeals'

[10] The Court incorporated the Sixth Amendment's right to the assistance of counsel for all cases involving a possible prison sentence in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[11] Because Fenner's trial defender never raised the Sixth Amendment or statutory right to counsel at the bail stage, he failed to preserve the issue on appeal. MD. R. 8-131(a). *See infra* Part IV.A.1.

[12] Fenner v. State (*Fenner III*), No. 02-706 (Md. Ct. Spec. App. filed Aug. 12, 2003). Although the Sixth Amendment issue had not been preserved for appeal, the Court of Special Appeals ruled sua sponte that bail was not a critical stage entitling Fenner to representation of counsel. *See id.* at 10; *see also infra* Part III.A.

[13] In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Supreme Court held that a person in custody and subject to interrogation must first be informed of the right to remain silent, that anything said can and will be used against the individual in court, and of the right to consult with a lawyer and to have the lawyer present during the questioning.

[14] Petition for Writ of Certiorari at 1, Fenner v. State (*Fenner IV*), 846 A.2d 1020 (Md. 2004) (No. 03-406) [hereinafter Fenner Cert. Petition].

[15] Fenner also raised a second, non-constitutional issue in his petition. He unsuccessfully argued that the trial court's admission of a redacted version of his statement rendered it vague and misleading. *Id.* at 9. The Court of Appeals also certified this issue for review. *See infra* note 156.

[16] *Fenner IV*, 846 A.2d at 1034.

[17] *Id.* at 1029 n.10.

[18] *Id.* at 1035.

ruling negates Fifth Amendment protection for Maryland's many unrepresented detainees, who speak without counsel at judicial bail proceedings and who are not informed that their words may be used as evidence at trial.

But the *Fenner* court's ruling went beyond finding a judge's courtroom inquiry of an unrepresented and incarcerated defendant as non-coercive and not triggering *Miranda* advisements. Unexpectedly, the high court ruled upon and foreclosed the broader Sixth Amendment guarantee of counsel to indigent defendants, an issue it had not certified in granting certiorari.[19] Without the benefit of briefing by the defense and participation by the legal community, the Court of Appeals became the first state court of last resort to rule that indigent defendants' constitutional right to counsel does not include bail proceedings, even where the unrepresented accused's statement jeopardized his right to a fair trial. The *Fenner* court's constitutional denial of counsel made no mention of its ruling three years earlier that recognized an indigent defendant's *statutory* right to representation at the initial appearance stage.[20]

This Article explores what went wrong in Maryland and how to remedy the problem of suspects appearing and speaking without counsel, a familiar occurrence in state courts nationwide.[21] Because other courts will likely face the issue of whether to admit bail statements of an unrepresented defendant at trial, this Article urges that they travel a different path. First, appellate courts must avoid a sua sponte ruling that denies an accused, and indigent defendants as a class, the right to be heard and to argue against a sweeping ruling

[19] Fenner v. State, 837 A.2d 925 (Md. 2003). *See supra* note 15 and accompanying text.

[20] McCarter v. State, 770 A.2d 195 (Md. 2001) (holding that the Maryland Public Defender Act requires representation at all stages of a criminal proceeding, including the initial appearance where a judicial officer typically determines pretrial release or bail). *See also* MD. R. 4-213, 4-216; *see infra* Part IV.B. Fenner's trial counsel had not raised the statutory argument made in *McCarter* when moving to suppress his statement. *See infra* note 71 and accompanying text.

[21] Maryland is one of forty-two states that fail to guarantee counsel to indigent defendants at the bail stage throughout the state. *See infra* notes 325–28 and accompanying text. Sixteen states fail to provide counsel everywhere within their jurisdiction. *See infra* note 326 and accompanying text. Twenty-six other states, including Maryland, provide counsel in only one or two select counties. *See infra* note 327 and accompanying text. An accused's right to counsel at bail has uniform meaning in only eight states and the District of Columbia. *See infra* note 325 and accompanying text; *see also* Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002) [hereinafter Colbert, *Do Attorneys Really Matter?*]; Douglas L. Colbert, *Thirty-five Years After* Gideon*: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 [hereinafter Colbert, *Thirty-five Years After* Gideon].

that denies representation at bail. Second, when ruling on the merits, courts should recognize the critical importance of counsel at a bail proceeding to protect an accused's right to a fair trial. A lawyer's presence ensures that the attorney, not the accused, responds to a judge's general request for bail-related information and shields even the Mirandized defendant from the dangers of self-representation.

Fenner's rejection of counsel was not supposed to turn out this way. Over forty years ago in *Gideon v. Wainwright*,[22] a unanimous United States Supreme Court took a monumental step toward eliminating the sight of ill-prepared, indigent defendants attempting to defend their freedom alone when facing felony charges. Reversing the burglary conviction of Clarence Earl Gideon, an itinerant and homeless petty criminal, the Court ruled for the first time that in state felony prosecutions, every indigent defendant has the constitutional right to be defended at trial by a lawyer.[23] In contrast to the *Fenner* court, the *Gideon* Court invited and welcomed amicus briefs.[24] It assigned prominent counsel to advocate on behalf of Gideon's constitutional claim to counsel.[25]

Gideon's success had a dramatic impact. It changed state courts' practice of prosecuting and trying accused felons without a defense lawyer.[26] It led the Court to guarantee counsel to indigent defendants

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[22] 372 U.S. 335 (1963).

[23] *Gideon*, 372 U.S. at 344–45. The Supreme Court proudly declared that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.* at 344.

[24] In support of Gideon's claim to counsel, twenty-two states joined a brief submitted by the Attorney General of Massachusetts. Brief for the State Government Amici Curiae, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 75209. Additionally, the Supreme Court received briefs from the State of Oregon, Brief for the State of Oregon as Amicus Curiae, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 75207, and from the American Civil Liberties Union, Brief of the American Civil Liberties Union and the Florida Civil Liberties Union as Amici Curiae, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 75208.

[25] The Supreme Court assigned Abraham Fortas and Abraham Krash, partners in the prestigious Washington, D.C. law firm Arnold, Fortas & Porter, to represent Mr. Gideon. *Conference on the 30th Anniversary of the United States Supreme Court's Decision in* Gideon v. Wainwright*:* Gideon *and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 AM. U. L. REV. 1, 24 (1993) (remarks of Abe Krash, Esq.). Two years later, Mr. Fortas joined the Supreme Court as an Associate Justice.

[26] *Gideon*'s guarantee of counsel for indigent defendants has not resulted in States fulfilling their promise of ensuring a lawyer's "effective assistance" of representation. In many jurisdictions, an accused's right to legal representation and ability to mount an adequate defense is severely impaired because of assigned counsel's unmanageable caseload and limited resources. *See* Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact On Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531 (1988); *see also* ABA Standing Comm. on Legal Aid and Indigent Defendants, Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice*

in the more common misdemeanor case and to recognize the lawyer's crucial role before trial, when most cases are plea bargained or dismissed.[27] The Supreme Court's respect for counsel's presence resulted in extending the constitutional guarantee to pretrial "critical stages," where an accused's confrontation with a law enforcement officer or with the adversarial judicial process required a lawyer's presence to protect the right to a fair trial and avoid "reduc[ing] the trial itself to a mere formality."[28]

Gideon and its progeny acknowledged counsel's pretrial responsibility, but left unanswered a crucial issue that Fenner and arrestees everywhere face after entering a state's criminal justice system: will they have a lawyer to protect against making harmful statements when first encountering a judge and/or a prosecutor at a bail proceeding? That is, does the constitutional right to counsel translate to counsel's representation at a judicial bail determination to ensure that the accused says nothing to defeat their rights to a fair trial? Or may a State delay counsel's entry, as Maryland and most states do, until a future court proceeding and risk transforming the judicial bail hearing into an evidence gathering procedure?

Stated in constitutional terms, should bail be considered a critical stage of criminal proceedings that requires each state to provide counsel to protect indigents' right to a fair trial? The Supreme Court has not answered this question.[29] Nor has it considered whether in the absence of counsel, a judge must provide *Miranda* warnings and tell an unrepresented accused of the right to consult with a lawyer before answering the court's question. Across the nation, indigent defendants resemble the defenseless Clarence Earl Gideon when they first appear before judicial officers. Some, like Fenner, speak and argue for personal liberty before trial. Often they make damaging inculpatory statements, which, if admitted, render their eventual consultation with counsel and preparation of a defense "a mere formality."

(Dec. 2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

[27] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[28] United States v. Gouveia, 467 U.S. 180, 189 (1984) (quoting United States v. Wade, 388 U.S. 218, 224 (1967)). *See supra* note 8 for examples of what qualifies as a "critical stage."

[29] For an argument that an accused's right to prepare a defense and to regain pretrial liberty are critical stages that implicate the Sixth and Fourteenth Amendments' right to counsel, see Colbert, *Thirty-five Years After* Gideon, *supra* note 21, at 35–37, and Colbert, *Do Attorneys Really Matter?*, *supra* note 21, at 1771–75.

Fenner illustrates why lawyers must be present at state court bail proceedings to protect an accused's right to a fair trial. Absent counsel, custodial defendants, even when given *Miranda* advisements, are likely to answer a judge's broad "anything you want to say?" question in order to regain liberty[30] and risk exposing themselves to conviction at the initial bail stage. When they do make an incriminating statement, the trial option becomes less realistic and available. Moreover, when a judge's "routine" and "proper"[31] question yields evidence for prosecutorial use at trial, the separation between the judiciary's impartial role and the government's mission to convict the guilty becomes blurred.

This Article contends that state courts must give immediate attention to counsel's crucial role at the early bail stage to fully implement *Gideon*'s "noble ideal" of "assur[ing] fair trials before impartial tribunals in which every defendant stands equal before the law."[32] Had the Court of Appeals (and intermediate Court of Special Appeals) required full briefing and argument, the defense and amicus parties could have explained the limited procedural due process protections that exist at state bail hearings.[33] Maryland's high court would have considered the constitutional and statutory right to counsel with a greater appreciation for the plight of the unrepresented detainee whose personal liberty is at stake.[34] It could have then measured the impact of admitting the product of a judge's broad inquiry on the accused's fair trial rights. This Article concludes that full argument would likely have led the *Fenner* court to recognize the necessity of defense counsel's presence, advice, and advocacy at a bail proceeding.

Part Two of this Article examines the prosecution of Donald Fenner, beginning with his arrest and appearance before judicial officers and continuing to trial where, during closing argument, the prosecution made repeated references to Fenner's utterance and re-

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[30] *See supra* note 4 and accompanying text.

[31] Fenner v. State (*Fenner IV*), 846 A.2d 1020, 1028 (Md. 2004).

[32] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[33] In the typical Maryland bail hearing, a defendant appears without counsel. Defendants do not physically appear in a public courtroom. Commissioner hearings are usually conducted from inside a jail or police precinct. *See infra* note 48. At the subsequent bail review, detainees observe the proceeding on a television monitor from jail. *See infra* Part II.C. *But cf.* United States v. Salerno, 481 U.S. 739, 751–52 (1987) (upholding federal preventive detention proceedings against constitutional due process challenge after concluding that "extensive safeguards," including the rights to counsel, to appear in a public courtroom, and to confront witnesses, are in place to protect the accused).

[34] See discussion of *McCarter infra* Part IV.B.

lied upon this crucial piece of evidence for conviction.[35] Part Three analyzes Fenner's appeal before Maryland appellate courts.

Part Four of this Article considers and critiques the Maryland Court of Appeals' sua sponte practice, first in ruling upon a non-preserved and non-certified constitutional issue that the defense had not briefed, and second, by not discussing *McCarter v. State*[36] in which the Court of Appeals determined that indigent defendants have a statutory right to counsel. Part Four also explains why sua sponte rulings involving broad constitutional and class-based issues are disfavored and should be avoided, barring "most extraordinary" circumstances.[37] Part Five examines right to counsel jurisprudence and the implications of *Fenner* in Maryland and nationwide. The Article concludes by exploring the possible remedies.

II. THE TRIAL OF DONALD FENNER

A. The Charges

Donald Fenner's involvement with drugs brought him into regular contact with the criminal justice system. At the time of the instant arrest, he was thirty-one years old. In his adult life, there had been "plenty of times" when Fenner remembered being "in front of a judge."[38] Fenner's acknowledged drug problem[39] resulted in two felony and one misdemeanor convictions.[40]

In the instant case, Fenner was arrested for selling a gram of crack cocaine worth fifty dollars to a police informant.[41] There was nothing extraordinary about the arrest, which occurred on the evening of January 9, 2001.[42] It was a typical police buy-and-bust operation, involving an informant who had been told to purchase crack co-

[35] *See* Trial II Transcript, *supra* note 5, at 269, 282–83.

[36] 770 A.2d 195 (Md. 2001) (holding that the Maryland Public Defender Act requires representation at all stages of a criminal proceeding, including the initial appearance where a judicial officer typically determines pretrial release or bail).

[37] *See infra* note 230.

[38] Sentencing Transcript, *supra* note 7, at 57–58.

[39] *Id.* at 57.

[40] *See id.* at 60. At sentencing, the prosecution sought a mandatory twenty-five year prison sentence based on Fenner's two prior felonies for possession of a controlled substance with the intent to sell and distribution of cocaine. *Id.* at 4. Fenner's attorney successfully argued against the mandatory sentence. *Id.* at 48. In sentencing Fenner to twenty years, the judge noted that this was his third drug conviction. *Id.* at 60.

[41] Motion to Suppress and Trial I Transcript, *supra* note 2, at 27. A gram is equivalent to 1/28 of an ounce.

[42] *Id.* at 17.

caine from a drug dealer and who was promised favorable consideration.[43] Police officers in Maryland had targeted an apartment complex known as a drug area[44] and followed their usual covert operation procedures. They wired the informant so that they would be able to listen to his conversation, provided marked money for the transaction, and observed the scene through binoculars.[45]

Seemingly, everything proceeded as planned. According to police, the informant paid Fenner with a marked fifty-dollar bill and received three pieces of crack cocaine.[46] Police recovered the marked money from Fenner and the drugs from the informant.[47] Although no officer observed the actual transaction, police presence at the scene, combined with recorded conversations and recovered drug money, corroborated the informant's account and made the case appear to be a slam-dunk conviction when Fenner appeared before a Maryland commissioner. However, as explained in the next section, the prosecution's case was ultimately weak and tenuous, except for Fenner's inculpatory statement.

B. Stage One: Maryland's Bail Proceedings

Fenner's commissioner hearing was conducted inside the local Frederick County detention jail.[48] Because the hearing did not take

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[43] *Id.* at 18. Frederick City Police Officer Tokars, the controlling investigating officer, testified that "the operation consisted of the use of a confidential informant with the direct purpose to purchase a controlled, dangerous substance, in particular crack cocaine." *Id.*

[44] *Id.* ("The general target area was building four of John Hansen Apartments.").

[45] *Id.* at 19. Officers traveled with the informant to the apartment complex. Motion to Suppress and Trial I Transcript, *supra* note 2, at 20.

[46] *Id.* at 25. The informant testified that a second person, the middleman or steerer, introduced him to Fenner and kept one of the pieces for himself. *Id.* at 179.

[47] *Id.* at 27 ("[T]he confidential informant handed over to me two rocks of suspected crack cocaine."). The prosecutor then asked Officer Tokars, "And the $50 was found on Donald Fenner?" *Id.* The officer answered, "That's correct." *Id.* At the suppression hearing, the court suppressed the marked money. Motion to Suppress and Trial I Transcript, *supra* note 2, at 49–51.

[48] DOUGLAS COLBERT, THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM 21 n.77 (ABELL FOUND. 2001), *available at* http://www.abell.org/pubsitems/hhs_pretrial_9.01.pdf [hereinafter PRETRIAL RELEASE PROJECT]. Since 1971, Maryland district court commissioners, and then, district court judges, assume the primary responsibility for deciding pretrial release or incarceration. *See supra* note 4. District court commissioners, like judges, are judicial officers. Few, however, are lawyers or trained in law. PRETRIAL RELEASE PROJECT, *supra*, at 20 n.75. Commissioners exercise a very important role in deciding which detainees are freed and who requires bail pending trial. Md. R. 4-213. Most district court judges maintain the commissioner's bail amount when they review a commissioner's decision the following court day even though commissioners render their crucial first decision with limited information. PRETRIAL RELEASE PROJECT, *supra*, at 20 & n.76,

place in a public courtroom, no family or friends could attend. Like most defendants, Fenner had no public defender. In Maryland, indigent defendants are left to speak to the commissioner on their own behalf. They are not given *Miranda* advisements.

Fenner probably would have welcomed a lawyer. Despite his limited education and verbal skills,[49] he could anticipate that his criminal record would hinder his chance for release on recognizance. But Fenner could not have prepared for how poorly he would fare before the commissioner. The commissioner set bail at $150,000 for a fifty-dollar drug sale.[50] Since hearings are not recorded, one cannot be certain what the alleged justification was for such a decision. Perhaps the commissioner concluded that Fenner's prior convictions, other arrests, and missed court appearances warranted high bail.[51] Yet it is difficult to reconcile the extraordinary amount set with the constitutional and statutory requirement of ordering non-excessive bail.[52] One thing was clear: Fenner could not afford it. Unless he could convince the bail review judge to lower bail considerably, Fenner would remain in jail until his next court date, one month later.[53]

C. Stage Two: The Bail Review Court

Later that same day, Fenner appeared at a bail review hearing. Neither the Maryland Court of Special Appeals (Court of Special Appeals) nor the Court of Appeals described the circumstances in which Fenner's bail review proceeding was held. Nor did his appellate defender provide a picture of what Fenner experienced when he appeared unrepresented before the district court judge. Similar to many Maryland counties, Frederick County conducts bail review proceedings by video broadcast. Defendants are not brought to a court-

21–22. They lack a pretrial investigative report to verify an accused's family, employment, and community ties, and rarely see or hear from a defense attorney. *Id.* at 23–25. Hearings are often closed to the public and are typically conducted inside a jail or police precinct. *Id.* at 21. Proceedings are not recorded or transcribed.

[49] While in jail, Fenner was working towards a GED. Sentencing Transcript, *supra* note 7, at 57.

[50] Motion to Suppress and Trial I Transcript, *supra* note 2, at 54.

[51] Sentencing Transcript, *supra* note 7, at 4–10.

[52] *See* Stack v. Boyle, 342 U.S. 1 (1951); U.S. CONST. amend. VIII; MD. DECLARATION OF RIGHTS art. 25. In the author's experience, judicial officers reserve bails of $150,000 for someone charged as a major drug dealer, not for someone like Fenner who, when arrested, had no drugs on his person and no money, aside from a marked fifty-dollar bill a police informant allegedly paid him. *See* Motion to Suppress and Trial I Transcript, *supra* note 2, at 27, 35.

[53] Fenner appeared before the commissioner on January 10, 2001. Fenner v. State (*Fenner IV*), 846 A.2d 1020, 1023 (Md. 2004). His preliminary hearing was scheduled for February 8, 2001. *Id.*

room, but remain in jail and view proceedings on television. Fenner saw and heard a judge speaking and was aware of an assistant state prosecuting attorney's presence.[54] One person Fenner knew was not there was his public defender. In Frederick County, as in most other places in the state, public defenders are not present to advocate or advise indigent clients at bail reviews.[55]

The hearing transcript indicated that the District Court judge never explained bail procedures to Fenner or informed him what information he considered relevant in reviewing the commissioner's ruling. Nor did the judge warn Fenner that anything said might be used against him at trial. No pretrial representative was present to report on the importance of Fenner's personal background and community ties, and the judge did not ask specific questions about his family, employment, or ability to afford bail. At no time during the abbreviated hearing did the court inquire why the commissioner had set bail at $150,000. Instead, the judge's first words informed Fenner that a preliminary hearing had been scheduled. The judge then posed the following open-ended question:

> Sir, [regarding] your attempt through a guardian to have a preliminary hearing, we have requested a preliminary hearing which is now scheduled for February the 8th. *Is there anything you'd like to tell me about yourself, sir?*[56]

Maryland appellate courts later indicated that they understood the judge's general invitation to speak about "anything" to exclude

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[54] The Public Defender's appellate brief included the preliminary dialogue between the bail review judge and the prosecutor at the start of the bail hearing, which was, at times, incomprehensible.

> THE COURT: . . . the whether that time (indiscernible) to amount to this history of failure to appear the State hasn't let his bond of $150,000 would be secured as such.
> PROSECUTOR: Thank you
> THE COURT: Sir, your attempt through a guardian to have a preliminary hearing, we have requested a preliminary hearing which is now scheduled for February the 8th. Is there anything you'd like to tell me about yourself, sir?

Appellant's Brief at 5, Fenner v. State (*Fenner III*), No. 02-706 (Md. Ct. Spec. App. Filed Aug. 12, 2003). Fenner proceeded with his rambling statement. *See infra* note 58 and accompanying text.

[55] Like many states, Maryland guarantees legal representation at a bail review hearing in a minority of counties. At the time of Fenner's bail review, only Baltimore, Harford, and Montgomery County public defenders represented indigent defendants at bail review hearings. In the remaining nine Maryland judicial districts, defendants were unrepresented at bail review hearings. *See* Colbert, *Do Attorneys Really Matter?*, *supra* note 21, at 1723–27, 1732 n.57.

[56] *Fenner III*, No. 02-706, slip op. at 3 (emphasis added).

reference to the specific crime.[57] But the court rulings never explained why they were confident that Fenner knew not to speak about the charge or what he could be expected to understand about the legal significance of the judge's words at a bail determination. Most lawyers would have been baffled by the judge's reference to a guardian in a criminal case, who apparently recommended that Fenner ask for a preliminary hearing. While Fenner too may not have understood, he surely comprehended the high stakes of the proceeding. He heard the judge say his next court date was scheduled for February 8, almost one month later, and realized the judge's bail review decision would determine whether or not he remained incarcerated until then. But what should he say? How was Fenner to make sense of the judge's preliminary information and connect it to answering his question, "Is there anything you'd like to tell me about yourself?" The court transcript captured most of Fenner's rambling response:

> For all the yes, activities, I don't, I don't know what you're talking about over there. (Indiscernible.) I ain't gonna, I mean I gonna (indiscernible.) I can't get no help on that, you know, they try to give you help. That's all they going to do is call and put me in jail and (indiscernible). I ain't playing it with the big boy, know what I'm sayin'. (Indiscernible), Officer, what else is there for me to do? Whenever I get, whenever I get caught with a little charge they never catch a large amount of drugs on me so, according to the amount of (indiscernible) drug (indiscernible), you know what I'm saying, I mean (indiscernible) so I think like they just (indiscernible). Whenever they catch, they probably catch me with one or two pills, Your Honor, this is just for me to make ends meet, to make money for me to be able to get by. They never caught me that (indiscernible) amount of drugs on me. You know what I'm sayin'. *I mean I'm not denying what happened* but when they caught me, they didn't catch me with nothing but that $50**.**
>
> THE COURT: Sir, you need to have a lawyer just as soon as you can.[58]

Absent counsel there was no one to protect Fenner from his own nearly incoherent and unfocused statement.[59] Was his limited ability

[57] *Id.* at 9; *see infra* notes 124–38 and accompanying text (describing and critiquing the analysis of the Court of Special Appeals). *See also Fenner IV*, 846 A.2d at 1029; *see infra* notes 163–76 and accompanying text (examining the Court of Appeals' ruling).

[58] *Fenner IV*, 846 A.2d at 1023–24.

[59] At times, Fenner's speech was incomprehensible and the trial judge who decided the suppression issue indicated he had difficulty understanding the tape itself. *See* Motion to Suppress and Trial I Transcript, *supra* note 2, at 51, 53.

to articulate connected to his level of education and intellectual ability, or to his uncertainty about how to reply to the judge? Was he the "ignorant, illiterate or person of feeble intellect" the Supreme Court identified long ago as being in particular need of counsel's "guiding hand"?[60] Was Fenner sober and sufficiently alert and capable to make a voluntary statement? Or was he merely acting as the anxious, unrepresented defendant who was alone and unsure of what to say? The judge never inquired and the record is silent. But after hearing Fenner attempt to gain the court's sympathy, one fact remained clear: the District Court judge knew Fenner needed an attorney.

D. Admissibility of Evidence: The Suppression Hearing

One year later, as Fenner's case gradually moved toward trial, his public defender challenged the arrest's legality. In a pretrial hearing, the defender sought exclusion of evidence he claimed had been unlawfully obtained, namely his client's statement and the fifty dollars the police asserted they recovered.[61] At the suppression hearing, the defender convinced the judge that the police lacked probable cause to arrest. The judge suppressed the marked money, but not Fenner's admission at the bail review hearing.[62]

The judge's suppression order followed testimony in which not a single police witness testified to observing a drug transaction involving Fenner or anyone else for that matter.[63] Indeed only one of the five officers who constituted the "back-up" team had even seen Fenner before his arrest. This lone officer observed Fenner standing alone near a building when the informant and a "middleman" named King approached. According to the officer, Fenner, the informant, and King "appeared" to engage in a brief conversation before entering the building.[64] Though the police recorded the ensuing conver-

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[60] Powell v. Alabama, 287 U.S. 45, 69 (1932) ("[The accused] requires the guiding hand of counsel at every step in the proceedings against him. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.").

[61] *See* Motion to Suppress and Trial I Transcript, *supra* note 2, at 12–16.

[62] *Id.* at 50–51, 67–70.

[63] *See id.* at 29. The defense attorney asked Officer Tokars: "Officer Tokars you never observed any transaction . . . ." *Id.* The officer replied, "That's correct." *Id.* Tokars then added: "To my knowledge, I would say nobody saw the transaction." *Id.*

[64] Police Officer Stocksdale observed the informant and a second man walk to the building complex where they met "up with another subject who was later identified as Donald Anseld Fenner . . . . At that time [he] observed them all appear to be speaking together. . . . [and then] observed them all walk into the north entrance of building number four." Motion to Suppress and Trial I Transcript, *supra* note 2, at 39. The officer did not testify to hearing the actual words spoken.

sation, no officer identified Fenner as one of the persons heard speaking.

Without a police witness or recorded conversation to confirm Fenner's participation during the claimed drug transaction, and without the marked money, the prosecution's case rested heavily on the credibility of the informant and King, who also was separately charged and arrested.[65] While the informant and King pointed to Fenner as the seller, their accounts of the events made both of them vulnerable to cross-examination. Each had pending criminal charges for which they sought leniency.[66] Both acknowledged using drugs together.[67]

The prosecutor thus had great incentive to vigorously oppose the defense effort to suppress Fenner's words at his bail review hearing. From the prosecutor's perspective, Fenner's admission was extremely valuable. After all, what evidence of guilt impresses a jury more than hearing the defendant admit soon after arrest: "I'm not denying what happened." The defense, however, viewed admissibility as the State taking advantage of an unrepresented defendant, willing to say what was necessary to obtain an affordable bail and avoid extended pretrial incarceration. What had begun as the nondescript, run-of-the-mill drug prosecution now posed a direct challenge to whether the right to counsel and the privilege against self-incrimination protected an accused at the bail stage.

E. The Defendant's Unsuccessful Fifth Amendment Suppression Argument

The trial judge considered the legal arguments. Fenner's defender focused on asserting that his client's Fifth and Fourteenth

[65] John Walter King, also known as Humpty, was charged with several crimes related to the drug transaction, including conspiracy to distribute and possession of drug paraphernalia, namely a crack pipe. *Id.* at 25–28; Trial II Transcript, *supra* note 5, at 189–91, 194.

[66] The informant pled guilty to possession of a controlled substance and was awaiting sentencing. Motion to Suppress and Trial I Transcript, *supra* note 2, at 147. He also faced a violation of probation charge. *Id.* at 171–72. For his involvement in the instant transaction, middleman King entered a plea arrangement with the prosecutor in which he pled guilty to conspiracy to distribute and the remaining charges were dismissed. Trial II Transcript, *supra* note 5, at 196. King also faced a violation of probation charge when he testified. *Id.* Both the informant and King had prior criminal convictions. *Id.* at 194–96; Motion to Suppress and Trial 1 Transcript, *supra* note 2, at 170.

[67] The informant stated: "I used drugs with Humpty before. . . . he's a user." Trial II Transcript, *supra* note 5, at 150–51. King added that when he and the informant used drugs together, they would take turns purchasing the drugs. *Id.* at 200–02.

Amendment rights were violated. He argued that Fenner could not waive his privilege against self incrimination without *Miranda* warnings and the opportunity to consult with counsel. Because Fenner had been unrepresented and was in custody when the Judge posed his general "tell me about yourself" question, his defender argued that Fenner had been in a custodial interrogation and was entitled to *Miranda* advisements.[68]

Fenner's trial counsel distinguished his client's situation from the unrepresented defendant in *Schmidt v. State*,[69] where the Court of Special Appeals upheld the admissibility of an accused's statement at a bail hearing. While both Schmidt and Fenner had spoken without consulting a lawyer, Schmidt had been "Mirandized" and informed about the consequence of speaking.[70] The unrepresented Fenner, argued the defender, never received his constitutional warnings. In such a situation, he contended, *Schmidt* commanded suppression.

At the suppression hearing, the trial defender relied exclusively on the Fifth Amendment argument and never asserted Fenner's Sixth Amendment right to counsel at bail. Nor did he contend Fenner had a statutory right to representation, based upon a recent unanimous Court of Appeals finding that the public defender's duty extended to all stages of a criminal proceeding.[71] The defender also declined to challenge admissibility on due process grounds, by suggesting Fenner's mental limitations or state of mind supported the involuntariness and coercive nature of his statement to the court.[72] Failure to preserve these issues for appeal would limit Fenner's appellate strategy.[73]

The trial judge then considered the prosecutor's argument and reliance on *Schmidt v. State*. The prosecutor contended that Fenner's bail review judge, like Schmidt's, had asked a "routine" question that

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[68] Motion to Suppress and Trial I Transcript, *supra* note 2, at 60.

[69] 481 A.2d 241 (Md. 1984). Fenner's defender mistakenly argued that Schmidt had been represented by counsel. *See* Motion to Suppress and Trial I Transcript, *supra* note 2, at 60. Schmidt appeared alone at his bail hearing. *Schmidt*, 481 A.2d at 244.

[70] In *Schmidt*, the appellate court rejected the defense contention that any inculpatory statement at a bail hearing should be excluded under any circumstance. *Schmidt*, 481 A.2d at 245. Police officers informed Schmidt of his *Miranda* rights. *Id.* at 244.

[71] McCarter v. State, 770 A.2d 195, 201 (Md. 2001); *see infra* Part IV.B.

[72] Fenner's lawyer, however, contended that his client's statements were vague and irrelevant. *See* Motion to Suppress and Trial I Transcript, *supra* note 2, at 58. Additionally, he argued briefly that the statements should be suppressed as fruits of the poisonous tree. *Id.* at 66.

[73] *See infra* Part III.

was "unrelated to evidence gathering or prosecution."[74] Such a judicial inquiry, he contended, was not an "interrogation" requiring *Miranda* warnings.[75] Consequently, the prosecutor argued, the trial court should conclude that Fenner had no Fifth Amendment privilege to assert, much less waive.[76] The judge agreed. He declared that "there's nothing inherently improper about [admitting] that statement based on the *Miranda* case . . . ."[77] The judge redacted most of Fenner's comments, but indicated he would permit the portion in which the defendant said, "I'm not denying what happened."[78] When both sides objected to the abbreviated statement, the judge "convened a chambers conference in an effort to have the parties craft an appropriate stipulation."[79] Thereafter, the defender stipulated that the prosecutor could present evidence to a jury that Fenner said, "I'm not denying what happened."[80] Defense counsel preserved the redaction issue for appeal.[81]

After ruling, the trial judge made a surprising reference to Fenner's mental capacity. "I've treated Mr. Fenner as an adult when I've talked to him here in Court, I think any judge [would] and as long as we don't believe someone's incompetent [sic] is proper in treating someone as an adult . . . ." [82] Reading these comments one wonders what led the judge to refer to Fenner's competence. Had he reason to wonder about Fenner's mental capability during the hearing? Perhaps he overheard Fenner speaking to his attorney and appearing to lack comprehension of the proceeding's nature.[83] Had the judge

[74] Motion to Suppress and Trial I Transcript, *supra* note 2, at 63.

[75] *Id.* at 64.

[76] *Id.*

[77] *Id.* at 69. The trial judge ruled that *Schmidt* provided "clear guidance." *Id.* at 68. He believed that Fenner's case was "simpler" since "the [bail review] Judge was trying to elicit information about Mr. Fenner personally, . . . [and] not trying to investigate the case itself." *Id.* at 68. The judge continued: "It was custodial but it wasn't interrogation in the context of *Miranda* warnings." Motion to Suppress and Trial I Transcript, *supra* note 2, at 68.

[78] *Id.* at 71.

[79] Fenner v. State (*Fenner IV*), 846 A.2d 1020, 1024 (Md. 2004).

[80] Motion to Suppress and Trial I Transcript, *supra* note 2, at 78. The stipulation also provided that a jury would be told that Fenner had no lawyer when he made his remarks. *Id.* At trial, this information was excluded from the stipulation read to the jury. *Id.* at 245.

[81] The defender stated: "I want to go on the record though and say that by my agreeing to that stipulation that I'm, that doesn't mean I'm accepting the Court's decision in that matter . . . . I'm not agreeing that that's a correct decision." *Id.* at 79.

[82] *Id.* at 69.

[83] The following brief exchange occurred at the suppression hearing between Fenner and his defender before the State called a police officer to testify:

considered Fenner's confusing bail statements as the product of someone with limited understanding? Fenner never testified or presented an expert witness to support the claim that he did not speak voluntarily when he responded to the bail judge's question. Ultimately, the trial judge's suppression order sanitized Fenner's incoherent ramblings by eliminating most of the prejudicial remarks.[84] Thereafter, neither his counsel nor anyone else raised the issue of Fenner's mental state again at trial or before an appellate court.

F. The Trial Evidence of Guilt

At trial, the government presented the prosecution of Donald Fenner as a "real straight forward textbook type of case."[85] In his opening statement, the prosecutor built the foundation upon police testimony from members of the "drug enforcement unit."[86] Police witnesses, he said, would describe the arrangement with their confidential informant and would testify to their presence at important moments in the events leading to Fenner's arrest.[87] The recorded tape conversation would provide jurors with a glimpse into the drug world.[88] Both the police and the tape would bolster the informant's and the middleman's account.[89]

> MR. FENNER: How they got me charged (indiscernible). What would be the (indiscernible)?
> MR. HARRIS: Well see these, yeah, we're going to pick the jury today.
> MR. FENNER: All right.

Id. at 16.

Following the officer's testimony, Fenner again seemed less than clear in responding to his counsel:

> MR. FENNER: Do I leave this right here?
> MR. HARRIS: Yeah, you can leave this here. As I explained to you, these are lesser, this is a lesser included offense. They can charge you like that.
> MR. FENNER: All right, no because, you know, this thing telling me they can't do it. I mean, I mean, I know what you're saying.
> MR. HARRIS: Okay.
> MR. FENNER: I'm just (indiscernible).
> (Brief recess)

Motion to Suppress and Trial I Transcript, *supra* note 2, at 37.

[84] The trial judge considered the defendant's remarks excludable because they referred to evidence of "other crimes." *Id.* at 69–70.

[85] *Id.* at 92.

[86] *Id.* at 92–93.

[87] *Id.*

[88] *Id.* at 93–96 (describing the testimony of the informants and contents of the recorded taped conversation).

[89] Motion to Suppress and Trial I Transcript, *supra* note 2, at 93–96.

No matter how much the prosecutor focused jury attention on the police, however, he knew his case ultimately depended upon jurors believing these two individuals of questionable credibility—one seeking dismissal of pending charges, the other looking to avoid punishment for violating probation.[90] They were the only witnesses who would testify that Fenner sold drugs. Only they could confirm it was Fenner's voice on the police tape. To convict, the jury would have to accept their testimony. The prosecutor looked for corroboration. Fenner's admission fit perfectly.

For the defense, there were many places to identify reasonable doubt and to persuade a jury to acquit. Cross examination, said defense counsel, would establish that the police did not see anything that may have occurred inside the building when the transaction supposedly occurred.[91] The prosecutor provided no officer who observed a drug sale or who observed Fenner engage in drug selling activity outside the building.[92] No one testified to seeing Fenner speak to passersby (before the informant and middleman approached), or exchange money for drugs, or enter and quickly leave the building on other occasions.[93] No officer could state that Fenner even had a connection to the building.[94] Before this arrest, he was an unknown, unlike the informant and middleman, who were familiar to each other (and to the police) from the drug trade.[95] Moreover, no police witness would identify Fenner's voice on the police tape. And as a result of the suppression ruling, no officer testified that Fenner possessed marked money.[96]

Fenner's first trial ended abruptly when a discovery violation prompted the court to grant the defendant's motion for mistrial.[97] At Fenner's second trial, the prosecution's "textbook" theory remained largely intact. The prosecutor delivered a similar opening statement.[98] He told the jury what they would be hearing from police wit-

[90] *See supra* notes 65–67.

[91] *See supra* note 63 and accompanying text.

[92] *See supra* notes 63–64 and accompanying text. *See also* Trial II Transcript, *supra* note 5, at 276–78 (arguing, in closing, that without the testimony of the informant and King, the State had no case).

[93] *See supra* notes 63–64 and accompanying test.

[94] *Id.*

[95] *See supra* notes 64–67.

[96] *See supra* note 62 and accompanying text.

[97] At Fenner's first trial, the informant improperly testified to statements Fenner allegedly made after the drug transaction that the State failed to disclose during discovery. Motion to Suppress and Trial I Transcript, *supra* note 2, at 185–90.

[98] The prosecutor began by saying: "I wish I could present to you some big case you see on TV, you know lots of fun stuff and whatnot, but quite frankly what I'm go-

nesses and "middleman" King, who would support the informant's account.[99] The prosecutor referred to other officers who would testify.[100] He never mentioned Fenner's stipulated statement—"I'm not denying what happened." Instead he asked that they "listen to all that evidence [and after you do] I will give a closing argument where I ask you to convict Mr. Fenner."[101]

The defense opening rejected the prosecution's "routine and straight forward theory."[102] It highlighted the police failure to observe a drug transaction inside the building.[103] Fenner's defender urged the jury to examine closely the credibility of the informant and middleman and to consider their motivation to testify untruthfully.[104]

The trial proceeded with few surprises. The prosecution ultimately did not introduce the recorded conversation, but its three police and two lay witnesses conveyed the important details of the drug transaction.[105] The prosecution concluded its' case-in-chief by introducing Fenner's stipulated statement.[106] The defense called no witnesses and relied on cross examination to establish its' reasonable doubt defense. When both sides rested, each attorney and the trial judge had reason to believe the outcome was in doubt.

G. Closing Argument: Fenner's Words Echo Through the Courtroom

This was one of the trials where closing argument took on added importance in the jury's deliberation.[107] The prosecutor spoke first and last as part of Maryland's "sandwich" closing procedures. Pre-

ing to be presenting to you today is really just a real straight forward case." Trial II Transcript, *supra* note 5, at 88.

[99] *Id.* at 88–94. At Fenner's first trial, the prosecutor's opening statement had not mentioned King as a State witness. *See* Motion to Suppress and Trial I Transcript, *supra* note 2, at 92–97.

[100] The prosecution called Officer Stocksdale to testify to seeing the informant and middleman approach the defendant, apparently converse, and then enter and leave the building. *See supra* note 64 and accompanying text. He also called Sergeant Yingling who placed the confidential informant under arrest. Trial II Transcript, *supra* note 5, at 223–24.

[101] Trial II Transcript, *supra* note 5, at 92.

[102] *Id.*

[103] *Id.* at 93.

[104] *Id.* at 95–96.

[105] At trial, the informant testified that the defendant offered his pager number following the drug transaction. *Id.* at 163. A jury could have inferred Fenner was a drug dealer who was interested in more business. At Fenner's first trial, the informant's testimony caused a mistrial. *See supra* note 97.

[106] Trial II Transcript, *supra* note 5, at 269.

[107] *See* Anemona Hartocollis, *In Summation, Power to Win Jury's Favor: Last Chance to Tip Scales May Rest on a Wry Line*, N.Y. TIMES, Jan. 23, 2006, at B1.

dictably, the prosecutor reviewed the testimony of each witness—the officers, the informant, and the middleman King, suggesting each testified honestly and truthfully. "We have every, every piece to the puzzle. . . . [T]here are no pieces of the puzzle missing."[108] But the prosecutor must have realized that a juror could have found the lack of police eyewitness testimony and physical evidence less than convincing. Seemingly ready to conclude his summation, the prosecutor offered the final piece of evidence: Donald Fenner's own words. The prosecutor returned several times to Fenner's admissions:

> [O]h I almost forgot about the stipulation when Donald Fenner appeared before the judge at the bail hearing he says, *I'm not denying what happened.* So we have every piece of the puzzle. I mean there's no piece missing here. Okay, *I'm not denying what happened* because it did happen. Okay?
>
> So did he sell, transfer, exchange a substance that was cocaine? Absolutely, folks, absolutely. And did he conspire? Absolutely, *I'm not denying what happened.*[109]

Moments later, the defense answered most of the prosecutor's arguments. Fenner's defender cast doubt upon the credibility of the informant and the middleman.[110] He emphasized the limitations of the police observations.[111] But the defender had no response to Fenner's admission. He rested without offering an explanation for Fenner's incriminating statement.

On rebuttal, the prosecutor concentrated on proving Fenner's guilt through his own words. Discarding the "textbook" theme, the prosecutor powerfully pled for the jury to believe the informant and middleman: no one, not even the defendant, denied he had sold the drugs:

> The Defendant's not denying what happened, [middleman] Mr. King's not denying what happened, [informant] Mr. Hann's not denying what happened. What happened was Donald Fenner was dealing drugs in Hansen and he got caught. That's what happened.[112]

The prosecutor then concluded by repeating the "what happened" theme over and over:

> Once again folks, Mr. King's not denying what happened, Mr. Hann's not denying what happen[ed], Officer Tokarz isn't deny-

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[108] *Id.* at 268.
[109] *Id.* at 269 (emphasis added).
[110] *Id.* at 274–76.
[111] *Id.* at 276–78.
[112] *Id.* at 282.

> ing what happened, Officer Stockdale's not denying what happened. The Defendant at a bail hearing, I'm not denying what happened. No one on this jury should deny what happened that evening. And what happened on that evening is Donald Fenner was distributing drugs and he conspired.[113]

While one cannot know for certain what evidence or argument persuades a jury to reach a verdict, it is clear that the prosecutor built a powerful closing based upon Fenner's statement at his bail review hearing. Hearing the prosecuting attorney make fourteen specific references to the "everyone knows what happened" theme within such a brief time period could not be easily ignored. Jurors had to consider that it was the accused who admitted his guilt when he said, "I'm not denying what happened." Such evidence was crucial to the State's proof.

Fenner was convicted and sentenced to twenty years in prison for his role as the seller in a fifty dollar drug transaction.[114] His statement at a bail hearing, made without counsel present, may have been the decisive piece of evidence. Should his statement have been admitted at trial? Fenner's trial counsel had preserved only the Fifth Amendment *Miranda* question for appellate review and had not argued the Sixth Amendment issue that bail is a critical stage to the suppression judge.[115] But in affirming the judge's refusal to suppress evidence, Maryland's appellate courts demonstrated an unusual eagerness to decide the broader Sixth Amendment right to an advocate at bail.

III. FENNER'S APPEAL

Fenner's trial counsel vigorously, but unsuccessfully, asserted that his client's Fifth Amendment privilege against self incrimination precluded admission of his statement uttered without consultation with a lawyer and without being advised of either his right to remain silent or the consequences of speaking.[116] On appeal, Fenner's defender followed a similar Fifth Amendment line of argument that Maryland's intermediate appellate Court of Special Appeals also rejected. In affirming the statement's admissibility, however, the Court of Special Appeals rejected Fenner's Sixth Amendment right to counsel, an issue that Fenner's defender had not raised or briefed.[117] As discussed below, the Court of Special Appeals' sua sponte ruling set

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[113] Trial II Transcript, *supra* note 5, at 283.

[114] Fenner v. State (*Fenner IV*), 846 A.2d 1020, 1021 (Md. 2004).

[115] *See supra* note 11.

[116] *See* Motion to Suppress and Trial I Transcript, *supra* note 2, at 57–60, 66–67.

[117] *See infra* notes 183–86.

the stage for Maryland's highest court to engage in the same pattern of judicial activism and decide a constitutional issue it had not certified for review and as to which it had not invited or considered argument from the defense or outside legal community.

A. The Intermediate Appellate Court Rejects Fenner's Fifth Amendment Claim and Issues a Sua Sponte Sixth Amendment Ruling

After conviction, Fenner's public defender directly appealed to the Court of Special Appeals. In an unreported decision,[118] the court affirmed the trial judge's refusal to suppress his bail hearing statement and affirmed his conviction. Fenner's appellate defender, like his trial counsel, argued for suppression on Fifth Amendment grounds. He contended that Fenner's in-court statement should have been excluded because it had been inadmissibly "obtained in violation of [his right to counsel within the meaning of] *Miranda*."[119] The defender relied on *Schmidt*'s reasoning: "If an accused *who is represented by counsel and who is made aware of his fifth amendment right* volunteers a statement deemed helpful to his position at a bail hearing, there is no logical reason why that statement could not be used against him at trial."[120] Fenner's appellate defender argued the converse follows: if counsel's presence and an accused's knowing waiver protected a defendant's privilege against self incrimination, then statements obtained from an unrepresented defendant who had not been given *Miranda* advisements should be inadmissible.[121] At no time did the defender claim Fenner had an independent Sixth Amendment constitutional right, or a statutory entitlement,[122] to counsel at the bail stage.[123]

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[118] Fenner v. State (*Fenner III*), No. 02-706 (Md. Ct. Spec. App. filed Aug. 12, 2003).

[119] *Id.* at 5 (citing Miranda v. Arizona, 384 U.S. 436 (1966)). The Court of Special Appeals summarized the defendant's Fifth Amendment argument. "Appellant contends that his statement should have been suppressed because he was not represented by counsel at the hearing. He also claims that the statement was obtained in violation of *Miranda* . . . ." *Id.* *See* Appellant's Brief at 9–12, *Fenner III*, No. 02-706. Fenner raised two other grounds on appeal. He contended that the trial court's jury instruction on conspiracy was improper and that the court should have instructed on the law pertaining to an accused's "mere presence" at a crime scene. *Fenner III*, No. 02-706, slip op. at 1. This Article focuses exclusively on the court's sua sponte denial of counsel and its Fifth Amendment ruling.

[120] Schmidt v. State, 481 A.2d 241, 245 (Md. 1984) (emphasis added).

[121] *See* Appellant's Brief at 9–10, *Fenner III*, No. 02-706.

[122] In *McCarter v. State*, 770 A.2d 195 (Md. 2001), the defendant first appeared before a district court judge, not a commissioner, after receiving a summons for which he had not been taken into custody. The Court of Appeals held that the Maryland Public Defender Act requires representation of indigent defendants at "all" stages of

The Court of Special Appeals found little merit to Fenner's Fifth Amendment suppression argument. The appellate court saw no distinction between Fenner being uninformed about his *Miranda* rights and Schmidt having been provided *Miranda* advisements, albeit from the arresting officer and not the bail judge.[124] The Court of Special Appeals focused instead on whether Fenner had been in "custodial interrogation,"[125] thus triggering *Miranda*, when he answered the judge's open-ended question. The three-judge court conceded that the incarcerated Fenner had been in custody, but concluded that the bail judge's question had not been an interrogation.[126] The judges appeared perplexed that a colleague's courtroom inquiry could be considered to have occurred within an "inherently compulsive atmosphere"[127] or be compared to police questioning. From the appellate judges' perspective, a courtroom is unlike the coercive police station setting. Rather, a courtroom is a venue where "there are often impartial observers to guard against intimidation or trickery."[128] The appellate court viewed the bail judge's "routine questioning . . . unrelated to evidence gathering and prosecution . . . [and] general in nature rather than specifically related to any criminal offense."[129] Fenner's bail judge said the Court of Special Appeals had "*merely* asked . . . if there was anything he would like to tell him about himself."[130] The court found the judge's question "proper . . . in deter-

a criminal proceeding, including the initial appearance. *See infra* Part IV.B. *McCarter* would have supported Fenner's claim to a statutory right to counsel at the initial appearance before a commissioner and, subsequently, to a bail review before a district court judge. *See infra* notes 287–95 and accompanying text.

[123] Fenner's appellate defender likely was familiar with Maryland's strict rule of preservation, Md. R. 8-131(a), *see infra* note 215, and was aware that Fenner's trial defender had not raised the right to counsel argument during the suppression hearing or trial. *See supra* Part II.E. The appellate defender never questioned whether his colleague's failure to raise the right to counsel argument required the assignment of independent counsel to avoid a potential conflict between trial and appellate counsel, a typical situation in public defender offices for attorneys who share the same client and employer.

[124] *Fenner III*, No. 02-706, slip op. at 7–9.

[125] *Id.* at 6.

[126] *Id.* at 9.

[127] *Id.* at 7. The intermediate appellate court concluded, without further explanation, that "the *Miranda* court did not perceive judicial inquiries and custodial interrogations as equivalent." *Id.* at 8 (citing Schmidt v. State, 481 A.2d 241, 247 (Md. 1984) (citations omitted)).

[128] *Id.* at 8 (citations omitted).

[129] *Fenner III*, No. 02-706, slip op. at 7 (quoting *Schmidt*, 481 A.2d at 247).

[130] *Id.* at 9 (emphasis added).

mining an appropriate amount of bail."[131] It concluded that Fenner had not been subject to a custodial interrogation[132] and was not entitled to *Miranda* advisements.

The Court of Special Appeals presented an incomplete and misleading picture of Fenner's predicament. Overlooking the jailed circumstances in which Fenner appeared without counsel with bail of $150,000,[133] the court declined to place itself in Fenner's situation and see the judicial bail review as his only opportunity to speak and avoid further lengthy incarceration until trial. From its vantage point, the appellate court appeared to picture a courtroom bail proceeding where Fenner "was brought before a District Court judge,"[134] where "impartial observers" were present, and where the judge's benign question was not "intended to elicit any information about a specific criminal offense" or even "reasonably likely to elicit [from Fenner] an incriminating response."[135] The appellate court was con-

[131] *Id.* The Court of Special Appeals agreed with its conclusion in *Schmidt v. State* that the bail judge's question about whether the defendant knew the alleged rape victim was "unrelated to evidence gathering and prosecution." *Id.* at 7 (quoting *Schmidt*, 481 A.2d at 247). Both the *Fenner* and *Schmidt* appellate panels understood "the purpose of the question was to enable the judge to set an appropriate amount of bail, not to secure information for the prosecution." *Schmidt*, 481 A.2d at 247. Whatever the judge's conscious purpose, admitting Fenner's statement considerably strengthened the prosecution's case against Fenner.

[132] *Fenner III*, No. 02-706, slip op. at 9.

[133] The record did not describe the "totality of the circumstances" which led to Fenner's inculpatory remark before the district court bail judge, including the period he spent in pretrial detention prior to the hearing, the denial of counsel and circumstances of the commissioner proceeding, the jail setting where the public could not attend, and the impact of facing an unaffordable bail. Commissioner hearings are not recorded or transcribed. *See* Petitioner's Brief and Appendix at 11 n.4, Fenner v. State (*Fenner IV*), 846 A.2d 1020 (Md. 2004) (No. 88).

[134] Comparing Fenner's situation to the circumstances it had considered in deciding *Schmidt*, the Court of Special Appeals emphasized that Schmidt appeared "in a courtroom" when he made his statement, not "the police station . . . ." *Fenner III*, No. 02-706, slip op. at 7. The Court of Special Appeals made no mention of Fenner remaining in jail when he viewed the proceedings through a television monitor. *See supra* Part II.C.

[135] *Fenner III*, No. 02-706, slip op. at 9 (citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). In *Hughes v. State*, 695 A.2d 132 (Md. 1997), the Maryland Court of Appeals adopted the "knows or should know" standard when judging a police officer's interaction with a defendant. *Id.* at 140. "[C]ourts should carefully scrutinize the factual setting of each encounter of this type . . . keeping in mind that the critical inquiry is whether the police officer, based on the totality of the circumstances, knew or should have known that the question was reasonably likely to elicit an incriminating response." *Id.* (citing United States v. Avery, 717 F.2d 1020, 1024–25 (6th Cir. 1983). In considering the bail review judge's question to Fenner, the Court of Special Appeals rejected the notion that the judge's inquiry would generate a response such as the instant one. Predictably, Fenner sought to mitigate the seriousness of the

vinced Fenner knew, or should have known, not to say anything about the crime or attempt to mitigate culpability.

Fenner's reality, though, was drastically different. He never physically entered a public courtroom where he might have found assistance.[136] Looking at a television monitor from his jail cell, Fenner saw only a judge and prosecuting attorney.[137] No defender was present to counter the intimidating jail courtroom surroundings or to advise Fenner how to respond or explain the "intricacies of substantive and procedural criminal law"[138] related to a bail determination.

Like most unrepresented and incarcerated pretrial detainees, Fenner was isolated. From his perspective, the judge's open-ended question provided no guidance, no explanation, and no specifics about what information the court considered pertinent to a bail reduction. To the contrary, the judge's inquiry unwittingly set a verbal trap for the captive Fenner, who could easily have translated the court's words to mean, "Answer my question and I will consider reducing your bail. Do not speak and you will stay in jail until trial. You decide what to say. Do not look to me for guidance."

Perhaps out of respect for the court's presumed impartiality or because he thought he had no choice but to answer and attempt to persuade the judge to set an affordable bail, Fenner did what many would have done in the situation—he spoke. Fenner portrayed himself as a small-time drug user in need of treatment, not an unreasonable strategy for someone seeking to avoid the high bail given to major drug dealers. Fenner had not been warned that his words to the judge could later become the State's evidence at his trial. Judges, after all, are presented as neutral arbiters, not as "employee[s] of the State"[139] or extensions of the prosecutor. Still, from inside a jail cell, Fenner could feel the "inherently compulsive atmosphere" that compelled him to respond to the one person who held the key to his free-

crimes charged and show that he was likely to return to court and posed no danger to the community.

[136] *Fenner III*, No. 02-706, slip op. at 10–11.

[137] *Id.* at 11.

[138] Kirby v. Illinois, 406 U.S. 682, 689 (1972). In *Kirby*, the Supreme Court held that an accused's constitutional right to counsel attaches at the "initiation of judicial criminal proceedings, . . . [where] the government has committed itself to prosecute, . . . [and where] a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id.; see infra* notes 144, 210 and accompanying text.

[139] Blakely v. Washington, 542 U.S. 296, 314 (2004) (declaring that the State of Washington's sentencing procedures violated the defendant's Sixth Amendment right to a jury trial because facts supporting the sentencing enhancements were found only by the sentencing judge and were never submitted to a jury).

dom. The judge may not have intended to take advantage of Fenner's trust, but by asking a question and not candidly explaining the consequences of his answer, the court "tricked" Fenner into replying. The Court of Special Appeals, however, saw it differently. It found that Fenner had not been subject to interrogation and, therefore, did not have to be informed of *Miranda* requirements.[140]

The Court of Special Appeals then took a surprising second step. Although the trial and appellate defenders limited argument to the Fifth Amendment *Miranda* issue, the court asserted that Fenner's situation implicated the Sixth Amendment right to counsel. In terse language, the Court of Special Appeals summarily ruled that the "[a]ppellant's contention that he was entitled to counsel at the bail review has no merit." [141] In fact, Fenner's appellate defender had not briefed or argued the right to counsel issue at bail proceedings, either on federal or statutory grounds, because the issue had not been preserved. Nevertheless, the Court of Special Appeals decided the broad Sixth Amendment issue sua sponte, without the defendant's or defender community's participation, a court practice that Maryland's highest court would soon embrace. Before examining the Court of Appeals' ruling, the next section explains the substantial difference between an accused's Sixth Amendment right to counsel and Fifth Amendment protection that *Miranda* provides against self-incrimination during a custodial interrogation.

B. Distinguishing an Accused's Sixth and Fifth Amendment Right to Counsel

The Fifth and Sixth Amendments provide two distinct and independent rights to counsel.[142] The Sixth Amendment right has been part of our constitutional system for more than 200 years and exists to maintain the adversarial system's integrity. While counsel's guarantee did not extend to indigent defendants until 1963,[143] courts today recognize that a lawyer is necessary to balance the playing field between the accused and the State at trial and at "critical stages" before trial.[144] Absent a lawyer at these proceedings, an accused's ability to

[140] *Fenner III*, No. 02-706, slip op. at 9.

[141] *Id.* at 10 (citing Hebron v. State, 281 A.2d 547, 548–50 (Md. Ct. Spec. App. 1971)).

[142] Michigan v. Jackson, 475 U.S. 625, 629 (1986) (extending Sixth Amendment protection to suppress the statements of an unrepresented defendant, whom the police questioned following his initial court appearance where he had sought counsel).

[143] Gideon v. Wainwright, 372 U.S. 335 (1963).

[144] Brewer v. Williams, 430 U.S. 387, 398 (1977).

obtain a fair trial is jeopardized.[145] The Supreme Court has recognized that, once adversarial proceedings commence and the State initiates criminal charges, a lawyer is essential to protect the liberty and fair trial right of indigents and "unaided laymen."[146]

In contrast, the Supreme Court's ruling in *Miranda v. Arizona*,[147] calling upon counsel to protect an accused from unfair interrogation practices, sparked controversy as to whether the Court based its ruling on its general supervisory power over state criminal proceedings, or upon explicit constitutional authority.[148] *Miranda* requires a questioning state official to inform the accused of the right to confer with counsel before deciding whether to speak.[149] The Fifth Amendment's purpose in summoning counsel protects the moral autonomy of a criminal prosecution by eliminating a coercive influence during a custodial interrogation.[150] Once an accused invokes *Miranda*, the questioning must cease, and it may continue only after a lawyer has spoken to the defendant or upon waiver.[151]

Consequently, an accused's Sixth Amendment right to counsel's courtroom advocacy is considerably broader and more extensive than the limited Fifth Amendment right to obtain a lawyer's advice and counsel to counter questioning by an advantaged state actor. By definition, Fifth Amendment peril against self-incrimination is triggered whether or not adversarial proceedings have begun. Indeed, a suspect who invokes the Fifth Amendment right to counsel typically does so at a time when charges have not yet been filed and the Sixth

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[145] *Id.* at 399 (suppressing statements on Sixth Amendment grounds following defendant's lower court arraignment). "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Id.* at 398. *See also* United States v. Henry, 447 U.S. 264, 274–75 (1980).

[146] *Henry*, 447 U.S. at 291.

[147] 384 U.S. 436 (1966).

[148] *Id.* at 467. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court resolved this conflict by ruling that *Miranda* is constitutionally based and not a Court-made rule. Because *Miranda* is a constitutional ruling, the Court held that Congress lacks the power to legislate by admitting the voluntary statement of a defendant who had not been given *Miranda* advisements.

[149] *Id.* at 444–45.

[150] *Id.* at 445–46

[151] *Id.* at 444–45. *See* Edwards v. Arizona, 451 U.S. 477 (1981) (suppressing statements obtained during police interrogation conducted after defendant requested counsel); Michigan v. Moseley, 423 U.S. 96 (1975) (suppressing statements of a defendant following his express desire to exercise his right to remain silent).

Amendment right has not attached.[152] Conversely, an accused's Sixth Amendment right to counsel is triggered at a "critical" proceeding following the commencement of a criminal prosecution and continues to trial.[153] It may or may not have been preceded by a custodial interrogation. The significance of a court rejecting an accused's Sixth Amendment right to counsel, by considering it part of the Fifth Amendment *Miranda* argument, is best understood by analyzing the *Fenner* court's sua sponte denial of a lawyer at bail.

C. The Court of Appeals' Grant of Certiorari and Sua Sponte Rejection of the Right to Counsel

1. The Defender's Writ of Certiorari

Other than the litigants, no one else in the legal community was likely aware of the unpublished *Fenner* appellate opinion or knew of the Court of Special Appeals' sweeping ruling. Consequently, very few people would have reacted to Fenner petitioning the Court of Appeals to review and reverse the appellate court's ruling.

Fenner's petition for certiorari never challenged the Court of Special Appeals' sua sponte denial of a poor person's right to counsel at a bail hearing. In urging reversal of the lower courts' refusal to suppress the incriminating statement, Fenner's defender relied exclusively on the Fifth Amendment issue.[154] The defender highlighted that the unrepresented Fenner had been unaware of his privilege against self-incrimination and had not been warned of the consequence of speaking at his bail hearing.[155] While the defender's petition included other issues,[156] he never attempted to translate coun-

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[152] *See generally* Meredith B. Halama, Note, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule"*, 1998 U. ILL. L. REV. 1207.

[153] Brewer v. Williams, 430 U.S. 387 (1977).

[154] In his petition for certiorari, the defender urged the court to rule whether inculpatory statements made at a bail review hearing by a defendant who is unrepresented by counsel and who is not given any *Miranda* advisements are admissible against the defendant at trial. He urged the Court of Appeals to identify under what "circumstances" such statements should not be admitted at trial. Petition for Writ of Certiorari at 10, Fenner v. State (*Fenner IV*), 846 A.2d 1020 (Md. 2004) (No. 88).

[155] *Id.* at 9.

[156] In the defendant's petition for writ of certiorari, the public defender argued that "the trial court's admission of a redacted version of the statement made at the bail hearing was error where the redaction rendered the statement vague and misleading." *Id.* at 1. He also included a third issue, which the Court of Appeals did not certify: whether, a "mere presence" instruction is required in a case involving distribution/conspiracy to distribute drugs. *Id.* at 1, 2, 10–13.

sel's absence of Fifth Amendment protection to a separate and broader Sixth Amendment or statutory right to counsel at bail.

Only a relatively small group of appellate specialists, who follow the Court of Appeals' website and granting of certiorari,[157] would have noticed the published order certifying Fenner's Fifth Amendment issue.[158] Anyone reading it would have found no indication that the court intended to reach the issue of whether there is a constitutional right to counsel at bail.

2. The Court of Appeals' Fifth Amendment Ruling

Concentrating on the issues the Court of Appeals certified for review, the appellate defender's brief emphasized Fifth Amendment grounds for suppressing Fenner's bail statement. Citing supporting case law, the defender contended that an accused's inculpatory statement, made without counsel's advice and without a knowing and voluntary waiver of the right to remain silent, should be inadmissible at trial.[159] The prosecuting Assistant Attorney General responded to "Fenner's principal argument . . . that he was denied his rights under *Miranda*."[160] The prosecutor argued that *Miranda* did not apply to courtroom bail proceedings, which were "entirely different" from "a police-dominated coercive environment of incommunicado interrogation."[161] Fenner's statements, the appellate prosecutor asserted, were uttered "in the context of a [non-coercive] public court appearance and innocuous questioning by a judge."[162]

The Court of Appeals agreed and unanimously rejected Fenner's Fifth Amendment challenge.[163] Like the intermediate appellate court, the high court refused to treat a bail judge's inquiry as a "cus-

[157] Until recently, Maryland's daily legal newspaper, *The Daily Record*, provided the only means for learning about Court of Appeals' orders granting certiorari. Telephone Interview with Lori McGraw, Clerk, Court of Appeals (June 8, 2005). The published order included the parties' names, but did not always indicate the questions certified for review. *Id.* On February 10, 2003, the Court of Appeals began publishing grants of certiorari review on its website. Usually the order included the issues certified. If not, they "would be published soon thereafter." *Id.* According to Court of Appeals clerk Lori McGraw, the court's home page lacks a link to certiorari grants. *Id.* Readers must "keep an eye on it." *Id.*

[158] The court also certified the redaction issue. *Fenner IV*, 846 A.2d at 1022.

[159] Petitioner's Brief and Appendix at 11–19, *Fenner IV*, 846 A.2d 1020 (No. 88).

[160] Brief of Respondent at 9, *Fenner IV*, 846 A.2d 1020 (No. 88).

[161] *Id.*

[162] *Id.*

[163] *Fenner IV*, 846 A.2d at 1034.

todial interrogation" that was conducted in a coercive environment.[164] Rather than "carefully scrutiniz[ing] the factual setting"—alone, inside a jail and "appearing" in court via a video broadcast—the high court erroneously visualized Fenner standing before a judge in a public, "open court" with impartial observers present.[165] The court searched for proof that the bail judge intended to provoke Fenner's response and found none.[166] The high court refused to consider the bail judge's question within the context of a judicial bail proceeding in which Fenner's desperation and the bail judge's power to remand or release him from jail challenged the meaning of voluntariness and psychological coercion. To the contrary, the Court of Appeals believed there was no way the judge "should have known"[167] that his general question would be "reasonably likely" to prompt the incarcerated Fenner to say something to minimize the charge's seriousness and regain liberty.[168] The court concluded there was nothing about the judge's inquiry that suggested Fenner was subjected to [a] compelling influence or psychological ploy to speak.[169] It spared the bail judge from responsibility for Fenner's rather vague and often disjointed statement, which it considered less a "response" to the judge's question and "more akin to a voluntary blurt."[170]

The unanimous *Fenner* court concluded that "[q]uestions posed to an arrestee by a judge regarding matters relevant to bail, asked in the setting of a bail review hearing, do not normally amount to an 'interrogation' requiring that the arrestee be again advised of his

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[164] *Id.* The Court of Appeals explained that *Miranda* was limited to custodial interrogations, defined to "mean questioning initiated by law enforcement officers." *Id.* at 1025.

[165] *Id.* at 1025, 1027.

[166] *Id.* at 1029. "There is absolutely no indication that the District Court judge's question was designed to elicit an incriminating statement." *Id.* at 1028.

[167] "'[C]ourts should carefully scrutinize the factual setting of each encounter of this type,' . . . keeping in mind that the critical inquiry is whether the police officer, based on the totality of circumstances, knew or should have known that the question was reasonably likely to elicit an incriminating response." *Fenner IV*, 846 A.2d at 1025 (citing Hughes v. State, 695 A.2d 132, 140 (Md. 1997), *cert. denied*, 522 U.S. 989 (1997)).

[168] The court explained: "Just as an arrestee may give what turns out to be an inculpatory response to a routine booking question . . . petitioner gave what turned out to be an inculpatory response to a routine question posed by the District Court judge at petitioner's bail review hearing." *Id.*

[169] "We hold that nothing in the setting of petitioner's January 10, 2001 bail review hearing can be said to have coerced him into making his inculpatory statement." *Id.* at 1030.

[170] *Id.* at 1029 n.10.

Miranda rights [by the judge] . . . ."[171] The Court of Appeals found no difference between the judge asking an open-ended "Tell me about yourself," or a specific "Are you working?" question. Both involved "matters relevant to bail."[172] Each was intended to give the defendant "a chance to explain . . . any circumstances that may have some bearing on his bail that had not been already covered in the prior questioning."[173] Fenner's bail judge, however, had not engaged in "prior questioning," nor explained the "bail" information he was seeking when he asked, "Tell me about yourself?" It was as though the high court expected the unrepresented defendant to read the judge's mind and know what to say and what not to say.

The *Fenner* court's Fifth Amendment ruling and analysis is significant and far reaching. It represents the first time a state's high court approved a prosecutor's use of a bail statement uttered by an unrepresented and uninformed defendant to prove guilt at trial.[174] *Fenner* permits Maryland judges to initiate similar exchanges and ask general, "routine" questions of unrepresented defendants without requiring *Miranda* advisements.[175] When the judicial inquiry leads a defendant to make an incriminating response, the new evidence eases Maryland prosecutors' burden of proving a defendant's guilt.[176]

While *Fenner*'s Fifth Amendment *Miranda* ruling was startling, the decision was even more remarkable for its resolution of a constitutional issue the defense had neither preserved for appeal nor briefed or argued before the court: whether the right to counsel at bail hearings exists.

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[171] *Id.* at 1030. The court found it unnecessary to require that Fenner be Mirandized "again." *Id.* The record, however, suggests he had never been advised prior to the hearing. *See supra* Part II.E (summarizing the public defender's suppression argument, which never mentioned that the police advised Fenner of his *Miranda* rights and which distinguished *Schmidt v. State,* 481 A.2d 241 (Md. 1984), where the police did, in fact, Mirandize the defendant). Though the court found that *Miranda* was not constitutionally required, it urged trial judges to warn detainees, "as a matter of good practice and policy," that their statements may be used at trial. *Fenner IV*, 846 A.2d at 1030 n.11.

[172] *Fenner IV*, 846 A.2d at 1030.

[173] *Id.* at 1029.

[174] Bailey v. State, 490 A.2d 158 (Del. 1983) (admitting for impeachment purposes an unrepresented defendant's statement at a bail proceeding); State v. Patten, 631 A.2d 921 (N.H. 1993) (admitting statements of an unrepresented defendant at bail who had been given *Miranda* warnings); People v. North, 439 N.Y.S.2d 698 (N.Y. App. Div. 1981).

[175] *See supra* note 171 and accompanying text. The court suggested trial courts should be "extra careful" in questioning detainees and "should focus on questions relating solely to the pretrial release decision." *Fenner IV*, 846 A.2d at 1030 n.11.

[176] *See* Schmidt v. State, 481 A.2d 241 (Md. Ct. Spec. App. 1984).

3. The Court of Appeals of Maryland's Sua Sponte Denial of the Right to Counsel

Following dismissal of Fenner's Fifth Amendment claim, the Court of Appeals would have been expected to move to the only other issue that it had certified in the defendant's petition for certiorari: the trial judge's redacted version of Fenner's statement.[177] Instead, the court sharply detoured from standard appellate practice by deciding an uncertified constitutional issue: Fenner's right to a lawyer at bail.[178] The court acknowledged that Fenner's defender had not addressed or "clearly frame[d] this issue separately" in his certiorari petition,[179] and recognized that "it appears only in the context of the question relating to the *Miranda* warnings issue."[180] Indeed, it is mystifying why the high court—after already denying Fenner's suppression motion—would contravene conventional practice and decide a separate, unraised issue. Additionally, the ruling of the Court of Appeals undermined its strong policy of not deciding a constitutional issue when the court can resolve the case on non-constitutional grounds.[181] As explained below, such a non-constitutional, statutory basis existed for not sustaining the right-to-counsel ruling of the Court of Special Appeals.[182]

Despite these procedural irregularities, the high court boldly declared, without explanation, that its Fifth Amendment ruling "necessarily leads us to petitioner's next argument as to why his inculpatory statement should have been declared inadmissible—his lack of counsel at the bail review hearing."[183] Unfortunately, Fenner's "next argument" never materialized in his brief.[184] Limited by the trial record, the defender's written argument concentrated on the Fifth

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[177] *See supra* note 156.

[178] Md. Rule 8-131(b) provides that if a higher court addresses an issue not raised or decided in the lower court, ordinarily the issue must have been raised in the petition for writ of certiorari.

[179] *Fenner IV*, 846 A.2d at 1030 n.12. "The question in petitioner's certiorari petition did not clearly frame this issue separately; it appears only in the context of the question relating to the *Miranda* warnings issue**.** It was, however, argued in the briefs." *Id.*

[180] *Id.*

[181] *See infra* note 253.

[182] *See infra* notes 282–86 and accompanying text.

[183] *Fenner IV*, 846 A.2d at 1030.

[184] *See id.*

Amendment and redaction issues.[185] More accurately, the Court of Appeals raised and decided the Sixth Amendment issue on its own.[186]

The Court of Appeals' published opinion mischaracterized Fenner's appellate position. Though Fenner's brief had not included the Sixth Amendment "critical stage," right to counsel argument,[187] the court mistakenly asserted that he had "argued in the briefs"[188] in support of such a right.[189] In actuality, the ruling denying counsel at bail to indigent defendants was rendered without the benefit of briefing by the defendant or the bar. Unlike the United States Supreme Court's interest in appointing counsel and in welcoming amici briefs to protect indigent defendants' right to representation in *Gideon v. Wainwright*,[190] the Court of Appeals never provided such an opportunity to the outside legal community.

Perhaps even more alarming than not calling for defense and considering amici briefs, the Court of Appeals decided the Sixth Amendment right to counsel issue by weighing only one side's argument and briefing: the State Attorney General's. The prosecutor's Sixth Amendment brief forcefully contended that the Court of Appeals should reject a claim that bail was a critical stage requiring counsel.[191] The defender filed no supplemental reply to the State's constitutional argument.[192]

Indeed, the only time Fenner's defender mentioned the Sixth Amendment right-to-counsel argument was briefly during oral argument.[193] The defender initially tried to place the judges of the Court

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[185] During oral argument, Fenner's appellate defender briefly referenced the Sixth Amendment critical stage analysis. *See infra* notes 193–202.

[186] *Fenner IV*, 846 A.2d at 1030–33.

[187] Petitioner's Brief and Appendix at 9–19, *Fenner IV*, 846 A.2d 1020 (No. 88) (stating only two grounds: the Fifth Amendment and the redaction issue).

[188] *See supra* note 179. No such argument, however, appeared in Fenner's brief.

[189] *See Fenner IV*, 846 A.2d at 1030 n.12.

[190] 372 U.S. 335 (1963); *see supra* note 25 and accompanying text.

[191] The State's brief contended that the right to counsel had not attached at Fenner's bail proceeding because he was not facing "formal adversary judicial proceedings" and that a bail review hearing is not such a proceeding. Brief of Respondent at 20, *Fenner IV*, 846 A.2d (No. 88) (citing Fellers v. United States, 540 U.S. 519 (2004); McNeil v. Wisconsin, 501 U.S. 171 (1991); United States v. Gouveia, 467 U.S. 180 (1984)).

[192] The defender's only other point heading addressed the trial court's redacted statement. He argued redaction made the statement vague, misleading, and inadmissible. Petition for Writ of Certiorari at 9–10, *Fenner IV*, 846 A.2d 1020 (No. 88).

[193] *See* Taped Transcript of Oral Argument at 7, *Fenner IV*, 846 A.2d 1020 [hereinafter Taped Transcript of Oral Argument] (on file with author).

of Appeals in the role of Fenner's bail review judge[194] by suggesting that, had they been the presiding bail judge, each would have taken measures to "stop this guy [Fenner] from talking"[195] and would have asked narrow questions concerning bail.[196] The high court, however, showed little interest in accepting this role or in applying *Miranda* to a bail hearing[197] and creating an exclusionary rule barring an accused's bail statement at trial.[198] After the judges appeared unsympathetic to Fenner's plight of speaking without having conferred with

[194] The defender asked the Court of Appeals "to imagine yourselves, transport yourselves, to the district court. You're sitting at a bail review, and this is what you hear as they ask the accused, 'Is there anything you'd like to tell me about yourself, sir?'" *Id.* at 1. The defender proceeded to read Fenner's statement until a judge interrupted and showed little inclination to respond to the defender's scenario: "Your position is that this is a custodial interrogation at a bail review hearing." *Id.* at 2.

[195] *Id.* at 3.

[196] The defender suggested that the bail review judge might have properly asked bail-related questions that were not connected to the criminal charge. "Why can't a [judge] ask narrowly tailored questions like: Are you employed? Do you have community ties? . . . [A]re you married? Do you have children? Those sorts of things to help to determine bail." *Id.* at 4.

[197] The inquiring judge expressed strong concern that informing an accused about the right to counsel would delay the bail proceedings:

> JUDGE (MALE #2): . . . So look at *Miranda* warnings and all of them say I want a lawyer. It's just one of the ideas to qualify him for a lawyer today. Now you've got *Edwards* into it and can't ask him anything. You've gotta stop everything 'cause he says I want a lawyer. How's the judge gonna make a bail decision?
>
> . . .
>
> . . . Now if the first thing after *Miranda* is he elects a lawyer, want a lawyer, everything stops. So I want a lawyer. Everything stops.
>
> . . .
>
> . . . I can't do anything more at that point.
>
> . . .
>
> . . . And then what exactly? Well, you know what the jails are gonna look like?
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> . . .
>
> . . . Just look at the implications.
>
> . . .
>
> . . . of applying *Miranda* to this.

Id. at 2–4.

[198] *See* Taped Transcript of Oral Argument, *supra* note 193, at 2–4. The hearing continued:

> [PUBLIC DEFENDER]: . . . So I think that you have to be warned. And if you're not, your statements can't be used against you.
>
> JUDGE (MALE #2): You did this in one context by rule, by making statements made at plea bargaining inadmissible if the plea doesn't go down. That was done by rule, not by invoking any constitutional [right]. Wouldn't this be the same thing? It's just a matter of public policy.

Id. at 6.

counsel, the defender tried a different approach. He mentioned that "even the sixth amendment"[199] explained the need for legal representation at bail, but the court swiftly dismissed the Sixth Amendment's relevance.

> [Public Defender]: I just think that there is this dance that is done between the judge and the defendants: tell me about yourself. It's a strange . . . [cutoff by judge].
>
> . . .
>
> . . . I mean, as far as the constitutional question goes, as we move to the fifth amendment right to counsel and right to silence *and even the sixth amendment right to counsel,* there is this strange gap.
>
> Judge (female #1): You're not suggesting there is a sixth amendment right to counsel here?
>
> [Public Defender]: *Yeah, I think I am.* That's part of what the argument was in *Schmidt* and that's . . . [cutoff by judge].
>
> Judge (female #1): You're saying the sixth amendment right to counsel touches at a bail hearing?
>
> [Public Defender]: I think that this court can determine pursuant to the charging documents we receive at this bail hearing, which, I would argue, is much more like an arraignment than [a] bail hearing, thus triggering as a proof of stage [i.e., a critical stage] or as an adversarial proceeding [which would trigger] . . . the sixth amendment [right] of counsel. And you can do that without offending the Constitution because states have . . . [cutoff by judge].
>
> . . .
>
> . . . And you could see he's charged with felonies . . . . But there's no reason you couldn't back it up and say, look he's charged. The prosecution has begun.[200]

The limited dialogue abruptly concluded when the Court of Appeals judges returned to other Fifth Amendment concerns.[201] The defender said nothing further about the Sixth Amendment during his remaining time.[202] The court heard no response from the defender or the outside legal community when the appellate prosecutor dismissively opposed the Sixth Amendment claim to counsel at bail.[203]

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[199] *Id.* at 7.

[200] *Id.* at 6–7 (emphasis added).

[201] *See id.* at 8.

[202] *See id.* at 8–12.

[203] During oral argument, the prosecuting Assistant Attorney General summarily dismissed the contention that Fenner had the Sixth Amendment right to counsel:

> [ATTORNEY GENERAL]: . . . On the right to counsel, clearly there is no constitutional right to counsel here. That does not attach until there has been a preliminary hearing, the filing of a criminal informa-

4. The Court Ruling: Rejecting Bail as a Critical Stage

The Court of Appeals embraced the State's "fully argued" position and denied indigent defendants' right to a lawyer when they appear before a district court bail review judge.[204] From the outset, the court evidenced an interest in deciding the constitutional issue. The court overlooked Fenner's failure to raise and preserve the Sixth Amendment right to counsel during the suppression hearing,[205] which is usually a fatal procedural flaw. Instead, the court transformed Fenner's Fifth Amendment denial of counsel claim into a critical stage analysis. It inaccurately asserted that Fenner had raised the Sixth Amendment position when he "contend[ed] that the Circuit Court judge erred in allowing his statement to be admissible at trial due to his lack of legal counsel at the bail review hearing."[206] Fenner's trial attorney, however, had not argued the Sixth Amendment to the circuit court judge, thus explaining why Fenner's appellate defender limited his certiorari petition and brief to the Fifth Amendment argument.

The court's Sixth Amendment analysis reveals the danger of appellate judges deciding a constitutional issue without zealous and vigorous advocacy from both parties and the legal community. Although the State filed criminal charges against Fenner and a judicial officer had set bail, the court stated that "adversarial judicial criminal proceedings"[207] had not yet commenced that would have entitled him

> tion or a circuit court arraignment. These charges were not triable in the district court. The district court did not have jurisdiction to try these cases. Clearly, there was no right to counsel here.

Taped Transcript of Oral Argument, *supra* note 193, at 10.

[204] Fenner v. State (*Fenner IV*), 846 A.2d 1020, 1031 (Md. 2004). The court relied on a prior Court of Special Appeals ruling in *Hebron v. State*, 281 A.2d 547 (Md. 1971). *Fenner IV*, 846 A.2d at 1031. Referring to Maryland Rule 4-213, the court declared that the right to counsel was limited to critical stages of a criminal proceeding. *Id.* at 1033. The court never connected counsel's absence at the time Fenner made his statement to a critical stage "where the defense on the merits would be impaired." *Id.* at 1031 (quoting United States v. Hooker, 418 F.Supp. 476, 479 (M.D. Pa. 1976), *aff'd mem.*, 547 F.2d 1165 (3d Cir. 1976), *cert. denied*, 430 U.S. 950 (1977)). The court also never connected counsel's absence at the time Fenner made his statement to causing "'potential substantial prejudice' to 'the defendant's basic right to a fair trial.'" *Id.* (quoting Padgett v. State, 590 P.2d 432, 436 (Alaska 1979) (quoting United States v. Wade, 388 U.S. 218, 227 (1967))).

[205] *See infra* note 215.

[206] *Fenner IV*, 846 A.2d at 1030.

[207] *Id.* at 1031 (citing Brewer v. Williams, 430 U.S. 387, 398 (1977) ("[Sixth Amendment right to counsel is triggered] at or after the time that judicial proceedings have been initiated . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'") (quoting Kirby v. Illinois, 406 U.S. 682,

to counsel. The court's technical distinction between a prosecutor not commencing prosecution by filing charges, compared to initiating a "formal" accusation through indictment or information, went unchallenged. So, too, did the court's unexplained differentiation between the right to counsel "attaching" at an indigent defendant's "formal" arraignment but not applying to lower court arraignment proceedings conducted before judicial officers who advise an accused of the charges and his or her rights.[208]

Having concluded that Fenner, though facing criminal charges, did not have the Sixth Amendment right to counsel because adversarial proceedings had unexplainably not commenced, the Court of Appeals next considered the State's argument that Fenner's bail hearing was not a "critical" proceeding that required the State to provide a lawyer. Had Fenner been "'confronted, just as at trial, by the procedural system, or by his expert adversary, or by both . . . .'"?[209] Was the courtroom exchange between the bail review judge and Fenner the type of situation that "'might well settle the accused's fate and reduce the trial to a mere formality.'"?[210] Had the Sixth Amendment critical stage issue been preserved and certified, an advocate would have vigorously responded in the affirmative. The advocate could have pointed out that Fenner faced a prosecutor and a judge without counsel and was "confronted" by the procedural intricacies and nuances of a bail system when faced with the judge's question, "Is there anything you'd like to tell me about yourself?" The advocate could have asserted that "the result of this judicial confrontation," Fenner's statement, arguably shaped his fate at trial. The advocate could have applied the same case law that the Court of Appeals cited and contended that Fenner's "adversary confrontation"[211] with the judge and prosecutor had "impaired" his defense "on the merits"[212] by produc-

689 (1972))); *see also* McNeil v. Wisconsin, 501 U.S. 171 (1991); Michigan v. Jackson, 475 U.S. 625 (1986).

[208] *See Fenner IV*, 846 A.2d 1020.

[209] *Id.* at 1031 (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).

[210] *Id.* (quoting *Gouveia*, 467 U.S. at 189).

[211] *Id.* (quoting Padgett v. State, 590 P.2d 432, 436 (Alaska 1979)); *see also* United States v. Ash, 413 U.S. 300, 319 (1973). In *Ash*, Justice Blackmun noted that a lawyer's presence is critical to balance "any inequality in the adversary process" and to assure that there is "no possibility . . . that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary." *Ash*, 413 U.S. at 317–19.

[212] Gerstein v. Pugh, 420 U.S. 103, 122 (1974). In *Gerstein*, Justice Powell explained that the Court had identified a critical stage as a pretrial procedure "that would impair defense on the merits if the accused is required to proceed without counsel." *Id.* (citations omitted).

ing evidence that caused "substantial prejudice" to his "basic right to a fair trial."[213] Counsel could have refuted the court's view that the bail hearing had only been "for the purpose of setting the appropriate amount of bail."[214] An advocate would have asserted that Fenner's statement had been crucial prosecutorial evidence and derogated his right to be judged fairly at trial. No advocate, however, delivered an alternative perspective to the State's position.

This sua sponte ruling denied indigents an opportunity to reply and take issue with the court's declaration that they had no constitutional right to counsel at bail. Ruling without legal briefs by the defendant and absent advocacy from the legal community interested in fulfilling *Gideon*'s promise, *Fenner* silenced an entire class from arguing that the fundamental constitutional right to counsel should extend to bail proceedings. Part IV of this Article explains why such broad, class-based sua sponte practices are strongly discouraged.

IV. APPELLATE COURTS' SUA SPONTE PRACTICE

The troubling *Fenner* scenario stands in stark contrast to the manner in which appellate courts generally decide criminal appeals and rule on issues of constitutional dimension. In approaching such questions, the parties are usually aware of the issues that an appellate court plans to consider. They submit legal briefs to persuade the judges to rule in their favor. Like most states' rule on preservation, Maryland appellate courts only review issues that had been presented to the trial judge.[215] Issues not raised at trial are generally barred on direct appeal to the Court of Special Appeals. Thereafter, when the Court of Appeals considers and grants certiorari review, the court order specifies what questions it will decide. Aside from "a very limited number of circumstances,"[216] appellate advocates are clear that at this final level of judicial scrutiny, the Court of Appeals will "consider only an issue that has been raised in the petition for certiorari."[217] Certifying questions for high court review not only informs the parties, but

[213] United States v. Wade, 388 U.S. 218, 227 (1967).

[214] *Fenner IV*, 846 A.2d at 1031.

[215] MD. R. 8-131(a) provides that, "Ordinarily the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." None of these exceptions applied to Fenner.

[216] *McCarter*, 770 A.2d at 199 (citation omitted).

[217] MD. R. 8-131(b). *See also supra* note 178; Holbrook v. State, 772 A.2d 1240 (Md. 2001); Batson v. Shiflett, 602 A.2d 1191 (Md. 1992); McCray v. State, 501 A.2d 856 (Md. 1985); Dempsey v. State, 355 A.2d 455 (Md. 1976).

also enables those who are affected by the ruling to submit an amicus brief, sometimes at the court's invitation, to protect non-litigants' rights.[218]

As explained below, the *Fenner* court's sua sponte constitutional ruling denying counsel at bail deviated dramatically from conventional appellate practice. On direct appeal, the Court of Special Appeals rejected the Sixth Amendment claim that the defense never raised or argued at trial or preserved for appeal.[219] Then, the Court of Appeals also ruled on the same constitutional issue, although it had not certified it when granting certiorari.[220] In reaching that decision, Maryland's high court failed to consider a defense or amicus brief that could have provided an accused's perspective. Indeed, the court heard only from one side: the State's. Moreover, indigent defendants, as a class, had no input in the decision-making process. While an appellate court's sua sponte power may be invoked to decide an issue neither briefed nor certified, courts are expected to exercise such discretion in the "most extraordinary"[221] circumstances only. *Fenner* was not the exceptional situation. In sum, by not providing notice and ensuring the full participation of the defense and legal community, the *Fenner* court undermined the adversarial process and raised a serious question about the ruling's legitimacy and acceptance within legal circles.[222]

A. Maryland Appellate Court Practice

1. Preservation of issues

In an adversarial system, advocates assume the crucial role and responsibility for identifying disputed issues and assisting appellate judges in the search for fair and just outcomes. In appealing a criminal conviction, defense counsel is duty-bound to target trial rulings believed to constitute reversible error because they arguably deprived the defendant of a fair trial or otherwise infringed a constitutional or statutory right. Basic to appellate review is the requirement of preservation; a lawyer must raise and make an adequate record of an issue

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[218] MD. R. 8-511.

[219] *See* Fenner v. State (*Fenner IV*), 846 A.2d 1020 (Md. 2004) (granting certiorari on the Fifth Amendment *Miranda* issue and the court's redacted version of Fenner's statement); *see supra* note 187.

[220] *See id.*

[221] *McCarter*, 770 A.2d at 199; *see infra* note 230.

[222] *See supra* note 218 and accompanying text.

at trial, or else the matter is considered waived and non-reviewable on appeal.[223]

In Fenner's direct appeal to the Court of Special Appeals,[224] he urged reversal of the trial judge's Fifth Amendment suppression ruling that his lawyer had argued before trial. Because Fenner's trial lawyer never asserted he had been denied his Sixth Amendment or statutory right to counsel at bail, that issue is usually considered waived. Consequently, on appeal, Fenner's defender had a strong basis for believing that he could not raise the constitutional or statutory right to counsel argument. Nevertheless, the Court of Special Appeals proceeded to rule, sua sponte, that bail is not a critical stage that requires representation.[225] In its ruling, the intermediate appellate court never identified the "extraordinary"[226] circumstance or explained how *Fenner* fell within permissible judicial boundaries for exercising judicial discretion to address a non-preserved issue.[227]

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[223] *See supra* note 215. MD. R. 8-131(a) limits appellate review to issues raised before the trial court but gives the appellate court discretion to decide non-preserved issues "if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." *Id.* In *Fenner,* neither exception applied. The sua sponte ruling affirming the conviction meant that there would not be a second trial, and the appellate court's raising of a separate constitutional ground did not reduce expense and delay in the appellate process. *See also* Holbrook v. State, 772 A.2d 1240 (Md. 2001); McCray v. State, 501 A.2d 856 (Md. 1985); Dempsey v. State, 355 A.2d 455 (Md. 1976).

[224] In Maryland, a convicted defendant has the right to appeal erroneous trial rulings directly to the Court of Special Appeals. Wilson v. State, 399 A.2d 256 (Md. 1979). If the intermediate court affirms the finding, the defendant may ask the Court of Appeals to exercise its discretionary power and grant certiorari review of a particular question.

[225] *See supra* notes 19–20 and accompanying text. *See also* MD. R. 8-301.

[226] *McCarter*, 770 A.2d at 199.

[227] In *County Council of Prince George's County v. Offen*, 639 A.2d 1070, 1074 (Md. 1994), the Court of Appeals stated that there were limited circumstances when an appellate court could decide an issue not raised at trial or by the litigants. The court stated: "We have recognized on occasion that an appellate court possesses discretion to consider matters that were not relied upon by the trial judge, or perhaps not even raised by the parties. This discretion, however, is not unbridled." (internal citations omitted). Sua sponte rulings would be appropriate in the following situations:

> (a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings[; and]
>
> (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.

The court went on to recognize a third exception, (c) that "because of important public policy considerations, there is a limited category of issues, in addition to jurisdiction, which an appellate court ordinarily will address even though they were not raised by a party [including exhaustion of administrative remedies, maybe standing of party]." The court further recognized a fourth exception, (d) where an appellate court might raise an issue sua sponte in a situation in which a lower court decided a

2. Certification

Following Fenner's unsuccessful appeal, the Court of Appeals granted certiorari and expanded the disfavored sua sponte practice by considering the non-certified Sixth Amendment issue on the merits. Established practice rules for certiorari review require the high court to examine only issues identified in a defendant's petition and to certify questions deemed worthy of further consideration.[228] Since Fenner's certiorari petition had not raised the Sixth Amendment issue, the Court of Appeals did not certify that question. Consistent with usual Maryland procedure, the court should have limited review to the trial judge's Fifth Amendment suppression ruling.[229] Certiorari review is usually restricted to certified issues, although practice rules permit the high court's intervention in "'a very limited number of circumstances [that] have been treated as "extraordinary."'"[230] While court decisions delineate a wide range of recognized exceptions to the certification rule, none seemingly justified the *Fenner* court's sua sponte action.[231] Indeed, as explained below, the Court of Appeals'

case correctly but reached its result through faulty analysis. *Id.* at 1075 (internal citations omitted). None of these exceptions would have applied in *Fenner*: (a) and (b) pertain to a non-existent retrial and (d) is irrelevant since the lower court had not ruled on the Sixth Amendment issue. The court never explained or justified its ruling on (c)'s broad public policy exception. *See* Fenner v. State (*Fenner IV*), 846 A.2d 1020 (Md. 2004).

[228] MD. R. 8-131(b) states:

> Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals . . . the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals.

Id.; *see also* Jones v. State, 745 A.2d 396 (Md. 2000); Wynn v. State, 718 A.2d 588 (Md. 1998); McMorris v. State, 355 A.2d 438 (Md. 1976).

[229] Court of Special Appeals' rulings are reviewable only if the question is "raised in the petition for certiorari." MD. R. 8-131(b). S*ee supra* note 178. Fenner raised only the Fifth, not the Sixth, Amendment issue. *See supra* note 12.

[230] *McCarter*, 770 A.2d at 199 (alteration in original) (quoting Prof'l Staff Nurses v. Dimensions Health Corp., 695 A.2d 158, 161 (Md. 1997)). *See also McMorris*, 355 A.2d at 443 n.4 ("[E]xcept in most extraordinary circumstances, we will consider on an appeal resulting from a grant of a writ of certiorari only those questions raised in the petition and matters relevant to those questions . . . ." (quoting Walston v. Sun Cab Co., Inc., 298 A.2d 391, 396 (Md. 1973)). *See supra* text accompanying note 221.

[231] The Court of Appeals of Maryland has considered "extraordinary circumstances" to include consideration of:

> [a] jurisdictional questions, [b] whether a trial court's order was appealable, [c] a non-constitutional issue that will enable the Court to avoid a constitutional question presented, [d] whether the case has become moot, [e] the question whether the trial court has either failed to render a particular type of judgment required in the action . . . or has rendered a type of judgment that is beyond the court's authority, [f]

Sixth Amendment decision virtually turned one of the "most extraordinary" exceptions on its head.[232]

Appellate courts' rationale for disfavoring sua sponte rulings is clear. Deciding "new" issues not briefed and fully argued is inconsistent with guaranteeing fundamental due process and fairness to litigants and interested parties.[233] Appellate review seeks to provide notice and a fair opportunity for everyone who has an interest in the matter, or who may be affected by the decision, to speak and be heard. Guaranteeing such due process is essential to the "integrity"[234] of a system that relies on lawyers' prepared argument and competing positions.

In *Fenner,* certification had additional meaning. Since the Court of Special Appeals' unreported denial of counsel opinion had been unpublished, the outside legal community was unaware of the sweeping decision and could not be expected to intervene by submitting an amicus brief. Certification was the only means of alerting interested

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> state government sovereign immunity under Maryland law, and [g] where the failure of the Court to consider an issue would result in the violation of an important public policy, such as the requirement that administrative remedies be exhausted.

State v. Broberg, 677 A.2d 602, 616 (Md. 1996) (Eldridge, J., dissenting) (footnotes and citations omitted). Exceptions (a), (b), (d), (e) and (f) are irrelevant, (g) is too broad and its applicability is not explained, and (c) is completely opposite the *Fenner* court's approach.

[232] The *Fenner* court never considered the relevant Public Defender Act that could have justified ruling sua sponte on statutory grounds to avoid the constitutional issue. *See infra* at 287–94. Instead, the court reached out to decide the constitutional Sixth Amendment issue and neglected the statutory argument. *See* Fenner v. State (*Fenner IV*), 846 A.2d 1020, 1030 (Md. 2004).

[233] Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 253–63 (2002) (citing Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring)). Milani and Smith state:

> Allowing a party to submit briefs and arguments on what the party believes to be the issues, but denying that party the opportunity to be heard on the issue the court deems dispositive, is akin to granting citizens free speech but barring them from speaking on issues of public concern. In both situations, the exception renders the right meaningless.

Id. at 268–69; *see also* Barry Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253 (2002) (arguing against sua sponte decisions and urging court notification to the parties within an adversarial system); Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673 (1994) (criticizing the United States Court of Appeals for the Seventh Circuit for deciding issues not briefed and arguing that the circuit court should respect the parties' framing of the issue while fulfilling its obligation to do justice).

[234] Milani & Smith, *supra* note 233, at 245, 247.

parties about the potential wide-ranging impact of the intermediate court's ruling. Denying notice, on the other hand, reveals the limited value placed on amicus participation during the judicial decision-making process.

3. Critiquing Appellate Courts' Sua Sponte Practice

When appellate courts deviate from established adversarial process and exercise their judicial discretion to decide broad issues sua sponte, they are vulnerable to deserved criticism. Judges and commentators join in criticizing such courts for becoming "self-directed boards of legal inquiry,"[235] and for assuming an authoritarian model of decision-making, rather than exhibiting a commitment to judicial "neutrality and passivity."[236] An appellate court's activism and circumvention of established procedure is not trivial. As Supreme Court Justice Scalia explained: "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."[237] Within such a system, an appellate court that endorses the non-adversarial, unilateral judicial model of decision-making typically silences one of the parties or, at best, treats the litigant as a minor actor. When a court takes such action, it should provide the rationale for exercising sua sponte power so as to overcome the appearance of having prejudged or preferred an outcome, a troubling image for a judiciary bent on being viewed as the quintessential impartial arbiter.

Even then, an activist court's readiness to decide a question not briefed or fully argued may subject the ruling to considerable skepticism and doubt. Understandably, litigants and the public are less

[235] Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

[236] Milani & Smith, *supra* note 233, at 279, 277–82 (noting that the basic principle of the adversarial system is a "neutral and passive" decision-maker); STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE, THE AMERICAN APPROACH TO ADJUDICATION 2 (1988) ("[N]eutrality and passivity are essential not only to ensure an evenhanded consideration of each case but also to convince society at large that the judicial system is trustworthy.").

[237] United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). In another concurring opinion, Justice Scalia recognized that "there are times when prudence dictates the contrary" and when an appellate court should rule on its own. Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring).

willing to accept a judicial holding that has ignored their viewpoint than one that invited them to share knowledge and perspective.[238]

Additionally, the missing input and perspective from adversaries and affected parties makes a court more susceptible to deciding a case wrongly.[239] Circuit Court of Appeals Judge Richard Posner described the increased judicial risk as "taking a leap into the unknown."[240] Other commentators condemn a practice whereby an appellate court reaches decisions without hearing from the parties most affected, charging that it is "both illegal and imprudent for appellate courts to 'play God.'"[241] These commentators urge courts to follow the adversarial process in an effort to reduce the possibility that reviewing judges will be uninformed and will reach decisions by relying on "assumption[s] that simply [are] incorrect and w[ere] not raised."[242] The *Fenner* court, for instance, seemed less troubled about

[238] Milani & Smith, *supra* note 233, at 282–86. Milani and Smith argue that it is important to give the losing party the opportunity to be heard to "enhance the chances that litigants and society will believe that the losing party was given a fair opportunity to present his case." *Id.* at 286. The authors contend that denying this fundamental right is inconsistent with due process and with the adversarial system. *Id.*

[239] *Id.* at 268, 271 ("One cannot assume that a party, who has a vested interest in the outcome of the matter, will not be able to shed additional light on the issue and assist the court in analyzing the issue completely."). Professor Vestal recognized that "there is at least a possibility that other facts or other authorities might have been presented which might have changed the court's attitude on the matter. But this opportunity is not given to the losing party." Allen D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 493 (1959).

[240] Hope Clinic v. Ryan, 195 F.3d 857, 876 (7th Cir. 1999) (Posner, C.J., dissenting). An American Bar Association Report concluded that it is "[o]nly when [a judge] has had the benefit of intelligent and vigorous advocacy on both sides can he [or she] feel fully confident of his [or her] decision." Milani & Smith, *supra* note 233, at 275. In *Snider v. Melindez*, 199 F.3d 108, 112 (2d Cir. 1999), the court declared: "Providing the adversely affected party with notice and an opportunity to be heard plays an important role in establishing the fairness and reliability of the order. It avoids the risk that the court may overlook valid answers to its perception of defects in the plaintiff's [prosecution's] case." *Id.* at 113.

[241] Milani & Smith, *supra* note 233, at 252.

[242] *Id.* at 245 n.1 (quoting THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 122 (1978)). Milani and Smith refer to an anonymous appellate judge who explained to an author his reasons for opposing sua sponte rulings:

> We don't know enough about them. *You're playing God then because you haven't had the benefit of the lawyers, the judge below, or the clients, or the evidence.* You're just playing God without a record, and you have to assume a certain competence in your counsel. . . . I'm loath to do it. I have done it, I guess I really don't like to do it because it's too dangerous. There's nothing worse than a lawyer being beaten by an assumption that simply is incorrect and wasn't raised.

Id.

denying Fenner counsel or *Miranda* advisements because it "assumed" he had spoken before a sitting judge, in open court, where the public and impartial observers were present.[243] Had a knowing advocate challenged these wishful assumptions and explained that indigent defendants, like Fenner, remain in jail and "appear" through video broadcast only, the Court of Appeals might have been hard-pressed to overlook counsel's importance.[244]

The force and legitimacy of criticism against appellate courts' activism is exemplified by *Fenner*, where the sua sponte holding deprived other similarly situated defendants of the same constitutional right to counsel without an opportunity to present argument.[245] At these moments, an appellate court must control any activist impulses to abandon the adversarial process and insist upon "a vigorous defense," as well as a "vigorous prosecution."[246] To do otherwise and rule without hearing from both sides, and without protecting the class of indigent defendants, jeopardizes that court's reputation and respect within the legal community. In 1993, Justice Souter recognized the institutional danger of an appellate court deciding a constitutional issue without ensuring equal adversarial participation when the Justice observed that a "constitutional rule announced sua sponte is entitled to less deference than one addressed on full briefing and

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[243] *See* Fenner v. State (*Fenner IV*), 846 A.2d 1020 (Md. 2004).

[244] Professor Fuller captured the importance of legal advocacy:

> [B]efore a judge can gauge the full force of an argument, it must be presented to him with partisan zeal by one not subject to the constraints of the judicial office. The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his [and her] mind to its formulation.

Lon L. Fuller, *The Adversary System in* TALKS ON AMERICAN LAW 31 (Harold J. Berman ed., 1976).

[245] In a concurring opinion in *In Re Adoption/Guardianship No. 6Z000045,* 812 A.2d 271, 284 (Md. 2002) (Wilner, J., concurring), Judge Wilner criticized the court for ruling on a constitutional due process issue when the case could have been resolved on statutory grounds:

> The Court reaches out to decide a Constitutional question that it need not decide . . . and, in so doing, ignores the long-held rule that we do not decide Constitutional issues when it is not necessary to do so.
>
> The violation of this rather bedrock principle of appellate review and restraint would be bad enough if the ruling were correct; here, it is particularly egregious because the ruling is dead wrong.

Id.

[246] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572–73 (1993) (Souter, J., concurring in part and concurring in the judgment) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978)).

argument."[247] Justice Souter cautioned appellate courts to refrain from sua sponte decision-making because he feared that the legal community would give less import to a broad "rule of law unnecessary to the outcome of a case, especially one not put into play by the parties."[248] The Justice noted that courts that engage in this brand of judicial activism produce "the sort of 'dicta . . . which may be followed if sufficiently persuasive but which are not controlling.'"[249]

Justice Souter's acknowledgement of advocates' role captured the essence of the adversarial appellate process. Had the *Fenner* court invited defense lawyers' input and participation, it may have reached a different outcome that recognized an indigent defendant's statutory right[250] to counsel at the "critical" bail stage. Unquestionably, the Court of Appeals would have silenced criticism for not explaining its procedural irregularities. Instead, the court went forward and decided a non-preserved, non-certified issue "not put into play by the parties"[251] or argued below. The court failed to insist upon a "vigorous defense;"[252] rather, the court showed no interest in commanding Fenner to respond or in inviting the outside community to participate and help protect the interest of indigent defendants. Within this skewed context, the court's ultimate outcome and denial of counsel was predictable.

More surprising, the decision of the Court of Appeals conflicted with established Maryland appellate practice. Appellate courts are required to avoid ruling on a constitutional question when they are able to decide the case on non-constitutional grounds.[253] As described in Part IV.B of this Article, Fenner had a solid statutory claim to a right to counsel at bail, one that the court previously recognized

[247] *Id.* In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court overruled its prior holding in *Monroe v. Pape*, 365 U.S. 167 (1961), that had restricted federal civil rights § 1983 liability to individuals, not municipalities. *Monell*, 436 U.S. at 663. Justice Powell believed overruling *Monroe* was appropriate, in part because the issues in *Monroe* had "never actually [been] briefed or argued." *Id.* at 708 (Powell, J., concurring). Such decisions, said Justice Powell, "may be accorded less weight" and that "less deference [is owed] to a decision that was rendered without benefit of a full airing of all the relevant considerations." *Id.* at 709 n.6.

[248] *City of Hialeah*, 508 U.S. at 572 (Souter, J., concurring in part and concurring in the judgment).

[249] *Id.* (quoting Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935)).

[250] *See infra* notes 278–79 and accompanying text.

[251] *City of Hialeah*, 508 U.S. at 572–73 (Souter, J., concurring in part and concurring in the judgment).

[252] *See id.*

[253] McCarter v. State, 770 A.2d 195, 199 (Md. 2001); State v. Broberg, 677 A.2d 602, 604, 612 (Md. 1996) (avoiding a sweeping decision and resolving the case on narrow grounds affecting the parties only).

and considered sufficiently weighty to explain why it was proper to assert sua sponte or "on its own."[254] By not addressing this argument, and by invoking its rare sua sponte power to the detriment of indigent defendants, the *Fenner* court abused judicial discretion.[255] Simply stated, both the rulings of the Court of Appeals and the Court of Special Appeals were "unnecessary to the outcome;"[256] the courts already rejected Fenner's Fifth Amendment argument for non-admissibility and there was no justifiable reason to decide the Sixth Amendment issue.

Why then did the Court of Appeals reach for constitutional questions not raised in Fenner's certiorari petition, contrary to established Maryland policy and procedure?[257] What "most extraordinary circumstance"[258] justified the court's proactive ruling that extended certiorari review to issues not argued at trial or certified by the high court? The court did not answer or explain, leaving the legal community to speculate on its reasons.[259]

Perhaps most perplexingly, the Court of Appeals omitted mention of *McCarter v. State*,[260] where the high court unanimously held that the Maryland Public Defender Act[261] required defenders to represent indigent defendants at the initial appearance and at "all

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[254] *See infra* Part IV.B.

[255] Milani & Smith, *supra* note 233, at 287–90.

[256] *City of Hialeah*, 508 U.S. at 572 (Souter, J., concurring in part and concurring in the judgment); *see supra* note 215 (quoting Maryland's preservation rule, which allows non-preserved issues to be decided on appeal "if necessary or desirable to guide the trial court").

[257] Maryland Rule 8-131(b)(1) states that "[u]nless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals . . . the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari . . . ."

[258] *See supra* notes 230–31 and accompanying text.

[259] The Court of Appeals could have believed that the Sixth Amendment right to counsel was inextricably linked to Fenner's Fifth Amendment *Miranda* right to confer with counsel before waiving his privilege against self-incrimination, but these are separate and independent arguments. *See supra* notes 142–52 and accompanying text. The court might have wanted to send a clear message that it opposed extending *Gideon* to other "critical" stages of a criminal proceeding, as well as to non-criminal matters. But this should have encouraged the court to invite, not to prevent, the defense bar's participation and provides no answer as to why the high court omitted *McCarter*'s statutory right to counsel. By ruling as it did, the court may have reopened an old and painful wound, showing insensitivity and hostility to accused indigent defendants' right to counsel. *See infra* notes 297–312 and accompanying text.

[260] 770 A.2d 195 (Md. 2001).

[261] MD. CODE ANN., art. 27A, §§ 1–14 (Michie 2003).

stages" of a criminal proceeding.[262] *McCarter*, too, was a sua sponte right to counsel decision, but one where the issue had been preserved and certified, and where the court explained intervention was justified to avoid ruling upon an extraneous constitutional issue.[263] The absence of *McCarter* is a most disturbing feature of the *Fenner* court's ruling and demonstrates what likely can be expected to occur when a court decides a case without advocates.

B. McCarter v. State[264]

When Antwone Paris McCarter first appeared in the District Court for Wicomico County, Maryland, after being charged with possession of marijuana and paraphernalia, he had not retained a lawyer.[265] Questioned by the district court judge, McCarter indicated that he wanted to be tried by a judge and expressly waived his constitutional right to a trial by jury.[266] When McCarter returned for trial the following month, he had a public defender at his side.[267] The defender contended that McCarter's jury waiver was not legally binding.[268] McCarter, the defender contended, was entitled to consult with an attorney before making the crucial decision regarding whether to be tried by a jury or a judge.[269] The defender argued that the choice of "mode of trial is a critical stage of the proceedings."[270] The court rejected the argument,[271] and McCarter renewed his motion before the trial judge, who also rejected his constitutional claim and concluded that his waiver decision had been given "knowingly

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[262] *McCarter*, 770 A.2d at 200. MD. CODE ANN., art. 27A, section 4(d) states that:

> Representation by the Office of the Public defender, or by an attorney appointed by the Office of the Public defender, *shall extend to all stages in the proceedings*, including custody, interrogation, preliminary hearing, arraignment, trial . . . and appeal, if any, and shall continue until the final disposition of the cause, or until the assigned attorney is relieved by the Public Defender or by order of the court in which the cause is pending.

Id. (emphasis added).

[263] *See infra* notes 282–85.

[264] 770 A.2d 195 (Md. 2001).

[265] *Id.* at 197. McCarter requested a jury trial in the district court, and his case was then transferred to the circuit court. *Id.* at 196.

[266] *Id.*

[267] *Id.* at 198.

[268] *Id.*

[269] *McCarter*, 770 A.2d at 198.

[270] *Id.*

[271] *Id.*

and voluntarily."[272] At McCarter's bench trial, the judge convicted him of drug possession and issued a ninety-day sentence.[273]

McCarter appealed his conviction to the Court of Special Appeals.[274] Before it could consider McCarter's right to counsel argument, however, Maryland's highest court exercised its unique reviewing powers and "issued a writ of certiorari on its own motion."[275] The Court of Appeals' decision to bypass the intermediate appellate court must have surprised the adversaries, who now prepared to argue before the high court whether the *constitutional* right to counsel applied to the initial appearance. This was, after all, the "sole issue debated by the parties on this appeal"[276] and certified for certiorari review.[277]

Yet the Court of Appeals took a second unexpected approach that the parties could not have anticipated. It avoided ruling on the constitutional issue altogether and introduced a legal argument the defense had not raised: the public defender's *statutory* duty to represent indigent defendants at the initial appearance.[278] "We issued a writ of certiorari in this criminal case to determine whether a defendant has a right to counsel at an initial appearance, under Maryland Rule 4-213(c), at which time the defendant purported to waive his right to a jury trial."[279] Maryland's Public Defender Act, said the court, could resolve the case.[280] The high court explained its reasoning for taking the "extraordinary"[281] measure of using its sua sponte power: "This Court adheres to the established principle that a court will not decide a constitutional issue when a case can properly be dis-

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[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *McCarter*, 770 A.2d at 198 (citing McCarter v. State, 749 A.2d 172 (Md. 2000)). Maryland appellate practice rules permit the Court of Appeals to seize jurisdiction as a matter of judicial discretion: "In a case or proceeding described in this section, the Court of Appeals also may issue the writ of certiorari on its own motion." MD. CODE ANN., CTS. & JUD. PROC., § 12–201 (Michie 2002); *see also* Walston v. Sun Cab Co., Inc., 298 A.2d 391, 395 (Md. 1973) (granting certiorari "when review and determination by [the Court of Appeals] appears to be 'desirable and in the public interest.'") (citations omitted).

[276] *McCarter,* 770 A.2d at 198.

[277] *Id.*

[278] *Id.* at 196.

[279] *Id.* MD. R. 4-213(2) provides that "the judicial officer shall advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel."

[280] *See McCarter,* 770 A.2d at 196.

[281] *Id.* at 199.

posed of on a non-constitutional ground."[282] McCarter's Sixth Amendment contention that he was entitled to counsel at his initial appearance fell within this "established principle" and represented "one of 'a very limited number of circumstances'"[283] where the high court's interest in resolving a case on statutory, rather than constitutional, grounds trumped the usual limitations of certiorari review.[284] "Appellate policy," declared the court, mandates abstention from "unnecessary . . . constitutional issues,"[285] such as McCarter's claim that the initial appearance was a critical stage. Concluding that McCarter had a statutory right to counsel when he first appeared in court, the Court of Appeals held that he had been entitled to counsel at his initial appearance and, therefore, could not have waived his right to a jury trial in the lawyer's absence.[286]

Had Fenner preserved the right to counsel issue on appeal, the *McCarter* court's legal analysis would have been highly relevant to his appearance at the bail proceeding. As the *McCarter* court explained, the defender's statutory duty to represent indigent defendants "at all stages in the proceedings"[287] is "significantly broader than the constitutional right to counsel."[288] The court examined the statute and its explicit reference to representation at "arraignment" to determine whether McCarter's "initial court appearance" fell within the statute's scope.[289] The court concluded that legislators used the terms, "arraignment" and "initial appearance," interchangeably.[290] But instead of confining the ruling to a technical, statutory construction, the court offered a sweeping right to counsel perspective.[291] Returning to the Defender Act's broad language that guaranteed representation at "all stages," the Court of Appeals agreed that, "'All' means 'all' and it

[282] *Id.* (citations omitted). In *State v. Raithel*, 404 A.2d 264, 267 (Md. 1979), the court decided the case on evidentiary, rather than Fifth Amendment, grounds and stated: "[N]othing is better settled than the principle that courts should not decide constitutional issues unnecessarily." *Id.*

[283] *McCarter*, 770 A.2d at 199 (quoting Prof'l Staff Nurses v. Dimensions Health Corp., 695 A.2d 158, 161 (Md. 1997)).

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *See supra* note 262 and accompanying text.

[288] *McCarter*, 770 A.2d at 200 (quoting State v. Flansburg, 694 A.2d 462, 465 (Md. 1997)).

[289] *Id.* at 200–01. The State contended that McCarter's initial appearance was not an arraignment because McCarter had not entered a plea. *Id.* at 201. The Court of Appeals noted that McCarter pled not guilty. *Id.*

[290] *Id.*

[291] *McCarter*, 770 A.2d at 201.

encompasses [McCarter's initial appearance in the district court] regardless of its categorization."[292] The Public Defender Act's specific examples of when representation is mandated, from custody to arraignment and through trial, were "for purposes of illustration only."[293] An accused's right to counsel, concluded the high court, includes a defendant's initial appearance and presumably extends to "all" subsequent stages, including bail review hearings.[294]

Like the *Fenner* court, the *McCarter* court took the unusual action of ruling sua sponte in a case concerned with indigent defendants' right to counsel. Procedurally and substantively, however, the differences between the two sua sponte Court of Appeals holdings could not be greater. In *McCarter,* the court had certified a right to counsel issue that had been presented to the trial judge and preserved for appeal.[295] The court explained the reason for ruling sua sponte; it had relied on well-settled doctrine for avoiding a constitutional issue by invoking a statutory argument the parties had not raised. Substantively, *McCarter* sought to enforce indigents' right to counsel at the initial court appearance. In *Fenner*, the court never articulated the basis for ruling sua sponte and proactively choosing to reach a constitutional issue that had not been preserved, certified or briefed. Substantively, the court denied indigents a constitutional right to counsel at bail and did not consider a statutory holding that appeared to guarantee representation.

What accounted for this difference? *McCarter* would have provided strong support for Fenner and other indigent defendants' claim to counsel at bail and to suppression of his statement. But the *Fenner* court overlooked *McCarter*, contrary to a "bedrock principle of appellate review:"[296] do not rule on a constitutional issue when a case may be decided on statutory grounds.

Both *McCarter* and *Fenner* are important pieces in Maryland's right to counsel mosaic. Part V of this Article provides additional context for appreciating what happened in *McCarter* and *Fenner*.

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[292] *Id.*

[293] *Id.*; *see infra* note 316 and accompanying text.

[294] *See McCarter*, 770 A.2d at 201.

[295] *See id.* at 196.

[296] *See supra* note 245 (providing quote of Court of Appeals Judge Wilner's concurring opinion in *In Re Adoption/Guardianship No. 6Z000045,* 812 A.2d 271, 284 (Md. 2002)).

V. INDIGENTS' RIGHT TO COUNSEL AT BAIL

A. The Historic Denial of Representation at Trial

The reasoning in *McCarter* was not the only piece of legal analysis missing from the *Fenner* opinion. The court's ruling against indigents' constitutional right to counsel at bail also avoided a historic context; it never placed *Fenner* within Maryland's tortured development of indigents' right to counsel. Doing so would have helped explain the court's sua sponte ruling.

During most of Maryland's history, indigent defendants charged with serious felony and misdemeanor crimes had no right to an assigned defense lawyer and had no choice but to defend themselves at trial.[297] Typically, unrepresented defendants routinely waived a jury trial.[298] In Maryland courtrooms, it was a common sight to see an accused attempting to cross examine and question one's own witnesses before the presiding judge.[299]

In the 1930's, two United States Supreme Court constitutional rulings momentarily shifted the national momentum toward extending the right to counsel in state and federal prosecutions. In *Powell v. Alabama*,[300] the Supreme Court recognized that state defendants facing a capital charge had a Fourteenth Amendment due process claim to assigned counsel.[301] Several years later in *Johnson v. Zerbst*,[302] the

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[297] Betts v. Brady, 316 U.S. 455, 465 (1942).

[298] *Id.* at 472 (1942) ("[I]n Maryland the usual practice is for the defendant to waive a trial by jury.").

[299] *See id.* In the Supreme Court's review of Betts' habeas corpus petition, Justice Roberts noted that the Chief Judge of the Court of Appeals, Judge Bond, defended the practice of trial without counsel before a judge, rather than a jury: "Certainly my own experience in criminal trials over which I have presided (over 2000, as I estimate it), has demonstrated to me that there are fair trials without counsel employed for the prisoners." *Id.* at 472 n.31 (quoting Chief Judge Bond's opinion denying the relief requested in Betts' state petition for a writ of habeas corpus).

[300] 287 U.S. 45 (1932).

[301] *Id.* In *Powell*, the Supreme Court reversed the conviction of nine African American defendants who had been charged with raping two white women because the defendants did not know their attorney's identity until the day of trial. *Id.* at 73. Although the Court found that counsel's pretrial appointment was "vital and imperative" to protect the defendants' right to a fair trial, the Court declined to extend its ruling to every state capital and felony prosecution. *Id.* at 71. The Court explained:

> All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .

Id.

Court held that the Sixth Amendment also guaranteed indigent defendants the right to counsel in federal felony prosecutions.[303] However the momentum subsided five years later in *Betts v. Brady*,[304] when the Supreme Court rejected a Maryland habeas petitioner's due process argument[305] and refused to extend the constitutional right to counsel in *state* felony prosecutions.[306]

In *Betts*, the Supreme Court upheld Maryland's "usual practice"[307] of permitting a defendant's self-representation at a felony trial where the accused was a person "of ordinary intelligence," who was "not wholly unfamiliar with criminal procedure."[308] Because Maryland was typical of the majority of states that refused to assign counsel in a felony prosecution,[309] the Supreme Court measured the practice

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[302] 304 U.S. 458 (1938).

[303] *Id.* In *Zerbst*, the habeas petitioner, a United States Marine, was tried without counsel and convicted in federal court for having feloniously passed and uttered counterfeit money. *Id.* at 459–60. The Supreme Court held that the petitioner's Sixth Amendment right to counsel guaranteed representation "[i]n all criminal prosecutions . . . to insure fundamental human rights of life and liberty." *Id.* at 462. Relying on *Powell*, the Court declared that the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 463.

[304] 316 U.S. 455 (1942). Smith Betts, indicted for robbery and lacking funds, asked the trial judge to assign counsel. *Id.* at 456–57. The judge refused, stating that indigent defendants were entitled to legal representation only when the charge was murder or rape. *Id.* at 457. Betts opted for a bench trial. *Id.* He cross-examined prosecution witnesses and questioned his own alibi witnesses. *Id.* The trial judge convicted Betts and sentenced him to eight years imprisonment. *Id.*

[305] Betts contended that the denial of counsel was "shocking to the universal sense of justice" and violated his Fourteenth Amendment right to due process and a fair trial. *See Betts*, 316 U.S. at 462.

[306] *Id.*

[307] *Id.* at 472 (referring to the Maryland practice of conducting bench trials, not jury trials, for unrepresented defendants).

[308] *Id.* Betts, 43-years old, was previously convicted and sentenced in a larceny prosecution. *Id.* Dissenting, Justice Black described Betts as "a farm hand, out of a job and on relief," adding that "[i]t is clear from his examination of witnesses that he was a man of little education." *Id.* at 474 (Black, J., dissenting).

[309] The 6-3 *Betts* majority referred to the "great majority of the states" that did not consider counsel as a "fundamental right, essential to a fair trial." *Id.* at 471 (majority opinion). The opinion identified twenty-six states which did not guarantee a lawyer in every felony case. Many of these states assigned counsel in capital and serious or "grave" felony crimes or left it to a judge's discretion. Nearly half the states, twenty-one altogether, required appointment "in all cases." *Betts*, 316 U.S. at 470. Virginia, the forty-eighth state, had no constitutional provision requiring a lawyer's assistance in a criminal case. *Id.* at 467. The three dissenting Justices analyzed the same data and concluded that thirty-five states had a "clear legal requirement or an established practice" for assigning counsel in serious felonies that they believed entitled Betts to a defender on the charge of robbery. *Id.* at 477 n.2 (Black, J., dissenting).

of denying counsel to accused indigents against the constitutional commands of the Sixth and Fourteenth Amendments.[310] The *Betts* Court concluded that Maryland's practice of not assigning counsel to accused felons and of conducting trials without juries were not "offensive to the common and fundamental ideas of fairness."[311] For the next two decades, Maryland continued its practice of prosecuting unrepresented accused felons, as long as a trial judge concluded that they were not "at a serious disadvantage by reason of the lack of counsel," or so "handicapped" or "helpless" when defending themselves before a judge.[312]

In 1963, states' criminal defense systems and access to justice for indigent defendants changed dramatically. That year, in *Gideon v. Wainwright*,[313] the Supreme Court gave meaning to the constitutional right to counsel at a felony trial for "any person haled into court, who is too poor to hire a lawyer."[314] *Gideon*'s recognition that the Sixth Amendment's right to counsel was incorporated into the Fourteenth Amendment concept of due process fundamentally altered the legal landscape for indigent defendants in state courts. Within the next decade, the guarantee of counsel also would apply to misdemeanors and to "critical"[315] pretrial stages of a criminal proceeding.

Maryland responded to *Gideon* by revamping its indigent defense system and becoming one of a relatively few states to move to a public defender system. The 1970 Public Defender Act acknowledged the state's commitment to G*ideon*'s promise by guaranteeing counsel "at

[310] *See id.* at 461–65 (majority opinion). The Court conducted a historic analysis of the constitutions of the original thirteen states and determined that the constraints imposed by the Sixth Amendment only apply to federal trials but that the "[A]mendment lays down no rule for the conduct of the states." *Id.* at 465.

[311] *Id.* at 473. The majority concluded that "[a]t the least, such a construction by state courts and legislators cannot be said to lack a reasonable basis." *Betts*, 316 U.S. at 466. The majority expressed concern that mandating counsel in every felony prosecution "straight-jacketed" states to appoint a lawyer when it was not necessary. *Id.* at 472. The Court favored states taking a diverse approach. Maryland's "much more informal" bench trial, for instance, had "obvious" advantages: "[T]he judge can much better control the course of the trial and is in a better position to see impartial justice done than when the formalities of a jury trial are involved." *Id.* Dissenting, Justice Black reached a different conclusion and declared that denying counsel to Betts and other indigent defendants "has long been regarded as shocking to the 'universal sense of justice' throughout this country." *Id.* at 476 (Black, J., dissenting).

[312] *Id.* at 472–73 (majority opinion).

[313] 372 U.S. 335 (1963).

[314] *Id.* at 344.

[315] *See infra* note 342.

all stages in the [criminal] proceeding."[316] Implementation of the legislation, however, did not change the practice of non-representation at most Maryland bail and pretrial release proceedings. At the time when *McCarter* was decided, nine of Maryland's twelve judicial districts still did not provide legal representation at an accused's initial appearance or at bail reviews.[317] The *McCarter* court's sua sponte ruling suggests that the Court of Appeals of Maryland took advantage of the opportunity to address the reality of Maryland defendants appearing without defenders.[318]

Three years later, however, in deciding against Fenner's claim to representation at bail, the Court of Appeals of Maryland reverted to the past practice of diminishing counsel's importance. Its sua sponte Sixth Amendment ruling failed to reference *Gideon* or the post-*Gideon* period in which Maryland law embraced legal representation "at all stages in the [criminal] proceeding."[319] The court avoided mention of the public defender's duty of representation that would have protected Fenner from speaking and making his inculpatory statement.

The Supreme Court's conflicting decisions in *Betts* and *Gideon* provide context for understanding *Fenner*'s and *McCarter*'s opposite placement within Maryland's right to counsel jurisprudence. *McCarter* is well situated within the expanded philosophy of guaranteeing counsel to indigent defendants. With Maryland's Public Defender Act, the legislature acknowledged that counsel was needed to

[316] MD. CODE ANN., art. 27A § 4(a) (Supp. 2005). Section 1 of the Public Defender Act indicates that it is "the policy of the State of Maryland to . . . assure effective assistance and continuity of counsel to indigent accused taken into custody . . . in criminal and juvenile proceedings . . . and to authorize the Office of Public Defender to administer and assure enforcement" of the statute. *Id.* § 1. Section 4 refers to the "primary duty of the Public Defender to provide legal representation for any indigent defendant eligible for services," and specifies particular proceedings "where possible incarceration . . . may result." *Id.* § 4.

[317] Maryland's statewide public defender system does not provide uniform representation at bail proceedings. In 1998, only public defenders in Harford and Montgomery counties represented indigent defendants at bail review hearings. Colbert, *Do Attorneys Really Matter?*, *supra* note 21, at 1732 n.57.

[318] The high court was aware of legislative efforts to extend representation at bail statewide. During the preceding 1999 and 2000 legislative sessions, the Chief Judge of the Court of Appeals, Robert Bell, and the criminal justice community strongly supported legislation that would have guaranteed public defender representation at bail. *Id.* at 1767–69 nn.142–50. In 1999, the bill was narrowly defeated through the lobbying efforts of the powerful bail bond industry. *Id.* at 1767. In 2000, the Senate overwhelmingly passed the bill but the Chair of the House judiciary committee never permitted the bill to come to a vote. *Id.* at 1768–69 & nn. 153–54. By construing the Public Defender Act to mandate representation at the initial stage, the *McCarter* court addressed the issue directly and made new legislation unnecessary.

[319] MD. CODE ANN., art. 27A § 4(a) (Supp. 2005).

advocate for "men of intelligence," as well as "for the ignorant and illiterate [and] those of feeble instinct."[320] Maryland's statutory guarantee of counsel "at all stages" fits easily within *Gideon*'s "noble ideal."[321] *Fenner*, on the other hand, belongs on the limited side of Maryland's constitutional right to counsel jurisprudence alongside *Betts*, whose self-defense at a felony trial was not considered "offensive to the common and fundamental ideas of fairness."[322] In this restricted realm, an appellate court is less concerned with an accused's procedural guarantees of a fair trial, even when the unrepresented accused provides substantial assistance to the prosecution's proof of guilt at his trial.

Maryland's historic right to counsel trajectory may be similar to the path in other states that have failed to guarantee representation to accused indigents. Its legacy of denying counsel at bail proceedings coincide with the "great majority" of states that also refuse to provide counsel at bail proceedings. As Part V.B of this Article describes, most state and local courts still refuse to acknowledge the "intricate, complex and mysterious"[323] world that Donald Fenner and other defendants enter when they appear alone at their initial appearance and speak in response to a judicial officer's inquiry. Unless state judiciaries are prepared to revisit their historic perspective, they are likely to follow *Fenner*'s reasoning and find nothing objectionable about admitting at trial statements uttered by an unrepresented defendant at a bail proceeding.

B. The National Implications of Fenner

Throughout the country, many indigents first experience a state's criminal justice system without a lawyer.[324] When they appear

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[320] Powell v. Alabama, 287 U.S. 45, 69 (1932).

[321] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[322] Betts v. Brady, 316 U.S. 455, 473 (1942). The Court added that "while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the [Fourteenth] amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." *Id.*

[323] Johnson v. Zerbst, 304 U.S. 458, 463 (1938). *See supra* notes 302–03.

[324] *See* Colbert, *Do Attorneys Really Matter?*, *supra* note 21, at 1723–24.

> [I]n a country that prides itself on guaranteeing poor people equal access to justice, eighteen states do not provide lawyers at this initial proceeding anywhere within their borders. The remaining twenty-four states decline to provide representation at bail in all but a few of their counties. Only eight states and the District of Columbia uniformly protect an indigent person's need for counsel at the bail stage.

Id.

before a judicial officer, who will determine whether they are released on recognizance or given bail pending trial, indigent defendants often must act as their own advocate. Indeed, only eight states guarantee counsel at an accused's arraignment or initial appearance statewide.[325] Twice as many states deny counsel everywhere within its borders;[326] others provide for a lawyer's representation in one or two select jurisdictions.[327] Most states decline to consider the contradictions of a criminal justice system that professes equal justice and presumes innocence for the poor, while denying counsel to accused indigents at the bail stage and incarcerating those who cannot afford bail. Justice Scalia captured the dilemma of defendants' "Dickensian"[328] experience during the initial 48-hour, post-arrest period of jail detention as they "await the grace of a . . . bureaucratic machine [to] . . . churn[] its cycle."[329] Most are without counsel when they finally appear before a judicial officer in a state's pretrial system that resists accepting an "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his . . . liberty."[330] Most states refuse to invest the necessary resources for assigned counsel's immediate representation at a bail hearing that triggers "perhaps the most critical period of the proceedings . . . , that is to say, from the time of . . . arraignment . . . until the beginning of . . . trial . . . ."[331] It is at this initial stage when an accused's quest to regain liberty may result in

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[325] *Id.* *See* CAL. PENAL CODE § 859 (West 1998) (California); CONN. GEN. STAT. § 54-1b (West 1994) (Connecticut); DEL. SUPER. CT. CRIM. R. 44 (Delaware); FLA. R. CRIM. P. 3.130(C)(1) (Florida); MASS. R. CRIM. P. 8 (Massachusetts); N.D. CT. R. CRIM. P. 44 (North Dakota); W. VA. R. CRIM. P. 44 (West Virginia); WIS. STAT. ANN. § 970.02 (WEST 1985 & SUPP. 1996) (Wisconsin).

[326] *See generally* Colbert, *Do Attorneys Really Matter?*, *supra* note 21, at 1723–24.

[327] *See generally id.*

[328] County of Riverside v. McLaughlin, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting).

[329] *Id.* While awaiting a judicial officer's probable cause determination, Justice Scalia addressed the plight of the "ordinary" and "presumptively innocent" person accused of a crime.

> Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own.

Id.

[330] Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938); *see supra* notes 302–03.

[331] Powell v. Alabama, 287 U.S. 45, 57 (1932).

saying something that ultimately jeopardizes the right to obtain a fair trial.

Surely that was true for Donald Fenner. His effort to persuade the bail review judge to reduce bail not only failed, but his words became a crucial piece of the prosecutor's case at trial.[332] Fenner's dilemma is not unusual, as indigent defendants across the nation speak without lawyers and make damaging statements at bail hearings.[333] A judge interested in hearing the "truth" may easily rationalize asking an unsuspecting and uncounseled defendant to "say something," without warning that the reply may later be admitted at trial. Judges are not the only state actors who may be instrumental in causing an accused to speak. A prosecutor's provocative comment may generate a defendant's response to correct an exaggerated or wrongful assertion about the extent of criminal involvement or strength of the government's case.

While there is no way to know the extent to which Maryland prosecutors will look to bail proceedings to discover evidentiary nuggets to include in their case against an accused, Fenner's bail hearing illustrates why these proceedings represent an untapped source and potential goldmine for prosecutors in their search for additional evidence. A skilled prosecutor will now examine the bail hearing and study the defendant's reply to a judicial officer's inquiry and other remarks. While actual trials are rare, prosecutors could also use a defendant's recorded or transcribed statement during pretrial negotiations to induce guilty pleas and further limit trial rights. If a trial occurs, defense lawyers would find it exceedingly difficult to overcome the weight that fact-finders place on a defendant's recorded or transcribed admission. Following conviction, appellate defenders should expect the same result as Fenner's attorney when he unsuccessfully challenged the trial court's ruling. Such statements by a criminal defendant will likely be found voluntary or spontaneous.

Fenner should dramatically change the nature of a prosecutor's pretrial investigation and trial preparation by shifting attention to the importance of the bail hearing. In the defender's absence, state actors will assume a greater role in influencing what occurs there. A judge, for instance, who has the reputation of favoring the prosecution, may see bail as the opportunity to ask and encourage an unrepresented defendant to speak. A prosecutor, too, may try to take advantage and mislead an accused into speaking and uttering an

[332] *See supra* notes 5–7 and accompanying text.

[333] *See supra* note 174.

incriminating statement to be used toward conviction at trial. Judges and prosecutors must be aware of the consequences to an accused's right to a fair trial. Minimally, they should inform an accused of *Miranda* advisements, although this is likely to convince only some unrepresented defendants to refrain from speaking. To fully achieve this objective, an accused must have an attorney present.

Predictably, other states will soon be deciding similar *Fenner* admissibility issues. They will be tempted to, but should resist, following the Maryland high court's ruling. Fenner had not preserved and therefore had not argued his right to counsel at bail. Had full argument occurred, he and every indigent defendant would have had a very strong constitutional argument that bail ought to be considered a "critical stage," and a powerful basis for convincing the Court of Appeals to follow *McCarter*'s statutory entitlement to legal representation. In brief, a defense attorney's presence at a bail hearing was the type of critical "event"[334] that mandated counsel to ensure Fenner received a fair trial. Had an attorney been present, she and not Fenner would have spoken and advocated for pretrial release. Fenner's silence would have left the prosecutor with considerably less impressive evidence and, arguably, inconclusive proof of guilt at trial.

What then should other state appellate courts do when reviewing the practice of non-representation in the lower court? Which of the two trends, acceptance or rejection of a right to counsel at bail, should a state court follow when faced with the issue of whether to admit or suppress statements from an unrepresented defendant who speaks at a bail hearing? One thing is certain: procedurally, appellate courts should refrain from sua sponte rulings on a non-certified, non-preserved constitutional issue of such a "fundamental character"[335] that directly challenges the system's ability to achieve equality and fairness for indigent defendants. When deciding whether an unrepresented defendant's inculpatory statement ought to be admitted or suppressed and other issues of such vital importance, courts must appreciate the legal and "moral imperative" of ensuring defense counsel's full participation before deciding whether to travel the *Gideon* path[336] or take a *Betts* detour.[337]

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[334] Utt v. Warden, Balt. City Jail, 427 A.2d 1092, 1094 (Md. Ct. Spec. App. 1981) (holding that because a governor's extradition hearing does not touch upon an accused's guilt or innocence, it was not a critical stage "where events occur that can affect the entire trial").

[335] Gideon v. Wainwright, 372 U.S. 335, 343 (1963).

[336] *See supra* Part V.A.

[337] *See supra* Part V.A.

VI. CONCLUSION

An appellate court's power to rule sua sponte should be used only in "most extraordinary" circumstances.[338] Full appreciation of the high stakes of ruling without defense briefs and full participation should persuade an appellate court to act with extreme caution, especially when the non-argued constitutional issue involves the rights of an entire class of accused indigents. When a court determines sua sponte ruling is absolutely necessary, it should take safeguards to ensure a court's ruling receives respect and legitimacy within the legal community.

When an appellate court is considering ruling on a constitutional issue neither preserved for review nor briefed by both parties, it must take proactive measures and direct the litigants to respond. Ordering supplemental briefing ensures that the appellate court hears from parties who are most familiar with the issue. Since the ruling affects non-litigants' rights, the appellate court must inform the outside community that it intends to decide an undeclared or non-certified issue. Publishing judicial decisions and court orders is the optimal way to notify the legal community of an appellate court's intention; it also permits interested outsiders to file amicus briefs to assist judicial decision-makers with reaching a correct ruling. Additionally, appellate courts should invite affected parties to file amici briefs and consider the appointment of an independent, partisan advocate to protect the interests of non-litigants.[339] Such appointments ensure that judges have a complete factual understanding of the circumstances that unrepresented defendants face at the bail stage and avoid any appearance of a defender's conflict of interest.[340]

In *Fenner,* the Court of Appeals denied indigent defendants a right to counsel at bail without full argument.[341] In such instances,

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[338] *See supra* notes 221, 230.

[339] In *Dickerson v. United States*, 530 U.S. 428 (2000), the United States Supreme Court invited then Professor (and now Circuit Court Judge) Paul Cassell to orally argue and defend Congress's power to pass a law that sought to overrule *Miranda*'s requirements. *Dickerson*, 530 U.S. at 443 n.7. The Attorney General declined to do so. *See* United States v. Dickerson, 166 F.3d 667, 681 n.14 (4th Cir. 1999). The Supreme Court stated: "Because no party to the underlying litigation argued in favor of § 3501's constitutionality in this Court, we invited Professor Paul Cassell to assist our deliberations by arguing in support of the judgment below." *Dickerson,* 530 U.S. at 443 n.7.

[340] The reference is to a Public Defender conflict of interest if the defender is required to represent indigent defendants without adequate resources at bail hearings should the Sixth Amendment or statutory right to counsel prevail.

[341] Fenner v. State (*Fenner IV*), 846 A.2d 1020, 1022 (Md. 2004); *see infra* Part III.C.3 (discussing the court's sua sponte denial of the right to counsel).

the court should order a rehearing to restore public confidence in the impartiality of the judicial process. When an appellate court circumvents its baseline practice rules and decides an issue neither preserved nor certified for review, it must treat these transgressions sufficiently seriously to warrant such an extraordinary remedy. Fenner and indigent defendants are deserving of the opportunity to present a critical stage and statutory right-to-counsel argument.

Fenner's right to present full argument goes beyond protecting due process rights. It ensures that the appellate court reach the proper result on the merits. While Fenner's advocates may, at first, consider it extremely unlikely that the high court will reverse a prior decision, they are able to mount a very strong argument. Indeed, *Fenner* presents the classic example for why the bail hearing ought to be considered a "critical" stage and why counsel's presence would "help to avoid . . . the potential substantial prejudice inher[ent] in the particular confrontation"[342] between a defendant and a bail judge. In counsel's absence, Fenner, like most unrepresented defendants, spoke in response to the judge's inquiry and provided crucial evidence for trial.[343] A defense advocate would have immediately interceded and convinced Fenner not to say anything that might "derogate"[344] from his right to a fair trial.

Before *Fenner,* the Court of Appeals had never ruled on indigents' constitutional right to counsel at bail,[345] nor considered the impact of admitting an unrepresented defendant's statement at trial. Without a defense perspective, Maryland's appellate courts could not envision how Fenner's statement might have occurred within a coercive environment, how a judge's open-ended question might compare to an "interrogation" or "a trial like confrontation," and how other defendants can be expected to reply in similar situations. In an adversarial system, full-dressed argument is necessary to provide a defense perspective that was missing from *Fenner* and that is essential for appellate judges' understanding of pretrial detainees' experience in the lower bail courts.

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[342] United States v. Wade, 388 U.S. 218, 227 (1967).

[343] *See id.* at 224–27 (recounting precedent in favor of representation at any adversarial confrontation).

[344] *Id.* at 226. In *Wade*, the Supreme Court interpreted "critical stage" to mean "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." *Id.*

[345] *Cf.* Mapp v. Ohio, 367 U.S. 643, 671 (1961) (Douglas, J., concurring). In *Mapp*, Justice Douglas defended the Court's sua sponte Fourth Amendment ruling by asserting that "the arguments of its antagonists and of its proponents have been so many times marshaled as to require no lengthy elaboration here." *Id.*

The spectacle of poor and typically uneducated people defending their liberty and right to a fair trial is no different today than the one-sided courtroom experience that Clarence Earl Gideon faced forty years ago.[346] While from the Supreme Court's perspective, "Gideon conducted his defense about as well as could be expected from a layman,"[347] the same cannot be said about Fenner and others like him. Today, defendants—whether in Maryland or in other states—go unrepresented, compelled to speak on their own behalf to regain liberty before trial. When they do, they risk convicting themselves, contrary to the guarantees of the Fifth, Sixth and Fourteenth Amendments.

Measuring the impact of admitting an unrepresented indigent defendant's inculpatory statement at a bail hearing should move appellate courts to chart a course that reestablishes their impartial and independent role as the protector of an accused's right to a fair trial.

[346] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
[347] *Id.* at 337.