

IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2011

NO. 34

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in his official capacity as the
Public Defender for the State of Maryland, *et al.*,
APPELLANTS,

V.

QUINTON RICHMOND, *et al.*,
APPELLEES.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF THE AMERICAN BAR
ASSOCIATION AS *AMICUS CURIAE* IN
SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether, under the United States Constitution, the Maryland Constitution, or the Maryland code, an indigent defendant has a right to the public appointment of counsel when appearing before a judicial officer on the question of bail or pretrial release, at which point the defendant's liberty is at stake.

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INTEREST OF AMICUS CURIAE¹

The American Bar Association (“ABA”) respectfully submits this brief as *amicus curiae* in support of Appellees. In addressing whether the United States Constitution, the Maryland Constitution, or Maryland law require the appointment of counsel for indigent defendants at the bail or pretrial release proceeding, the ABA respectfully requests that this Court consider the ABA’s long-standing conclusion that indigent defendants should be provided counsel at the earliest possible stage of criminal proceedings.

The ABA is the world’s largest voluntary professional association and the leading organization of legal professionals in the United States. Its nearly 400,000 members include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors, and law students.² The ABA’s mission is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence, and respect for the law.

Since its founding in 1878, the ABA has been committed to the goal of ensuring that indigent criminal defendants have appointed counsel. Among its most prominent

¹ Pursuant to Maryland Rule 8-511, *amicus curiae* certifies that no counsel for a party authored any part of this brief, and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

² Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the ABA’s Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

efforts in this endeavor has been the ABA STANDARDS FOR CRIMINAL JUSTICE (“ABA Standards”).³ Since their first publication as the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (ABA 1st ed. 1967) (hereinafter, “1967 ABA Standards”), they have reflected the “consensus among judges, prosecutors and defense counsel that appointment of counsel at the earliest possible stage is a critical aspect of providing representation that is truly valuable and effective.” Standard 5.1(a) cmt., 1967 ABA Standards.

The Supreme Court has described the ABA Standards as reflecting the “[p]revailing norms of practice,” *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and as helpful “guides to determining what is reasonable.” *Cullen v. Pinholster*, 131 S. Ct. 1388, 1428 n.22 (2011).⁴ The Supreme Court also cited an ABA amicus brief as indicative of the “overwhelming consensus practice [of the states and federal government to] conform[] to the rule that the first formal proceeding is the point of attachment”—*i.e.*, when the Sixth Amendment right to counsel attaches. *Rothgery v.*

³ Begun in 1964, the ABA Standards continue to be refined through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public, and other groups. They are published in volumes according to topical area. A complete set of the current Standards and a history of their development are available at http://www.americanbar.org/groups/criminal_justice/policy/standards.html (last visited Sept. 27, 2011); see also Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the process by which the Standards are developed and promulgated). The Standards become official ABA policy only after adoption by vote of the ABA House of Delegates (“HOD”). The HOD is composed of 560 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. See ABA House of Delegates — General Information, available at <http://www.abanet.org/leadership/delegates.html> (last visited Sept. 27, 2011).

⁴ Indeed, the Supreme Court has cited the ABA Standards in more than 120 opinions since their adoption. Marcus, *supra* note 3, at 10.

Gillespie Cnty., Texas, 554 U.S. 191, 205 (2008) (citing ABA amicus brief, which “describ[ed] the ABA’s position for the past 40 years that counsel should be appointed ‘certainly no later than the accused’s initial appearance before a judicial officer.’”).

In determining the scope of a defendant’s Sixth Amendment right to counsel, this Court also has cited the ABA Standards. *E.g.*, *State v. Brown*, 342 Md. 404, 414, 676 A.2d 513, 518 (1996) (Sixth Amendment requires that “defendant’s waiver of the right to counsel . . . be ‘knowing and intelligent’”); *Baldwin v. State*, 51 Md. App. 538, 554, 444 A.2d 1058, 1068 (1982) (neither presumed resources of defendant’s family nor posting of bond may be grounds to deny defendant’s Sixth Amendment right to appointed counsel). In determining the issues in the present case, the ABA requests that the Court include the consensus view of the legal profession, as set out in the ABA Standards.

ARGUMENT

This Court’s decision on whether the Sixth Amendment, the Maryland Constitution, or the Maryland code require appointment of counsel for an indigent accused prior to the first appearance before a judicial officer on the question of bail or pretrial release is an issue of significant import to the ABA. For over four decades, the ABA Standards have consistently maintained that counsel should be appointed at the earliest possible stage of criminal proceedings, and certainly no later than before the accused’s initial appearance before a judicial officer. While the ABA Standards do not purport to articulate what the federal Constitution or Maryland law require, they embody the consensus of the legal profession and are consistent with the Supreme Court’s

“pragmatic” approach in addressing the real-world consequences of an indigent defendant’s real-world need for counsel. *See, e.g., Patterson v. Illinois*, 487 U.S. 285, 298 (1988) (defining “the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular stage of the proceedings in question, and the dangers to the accused of proceeding without counsel”).

A. Appointment of Counsel For Bail And Pretrial Release Hearings Is Consistent With The Supreme Court’s Pragmatic And Evolving Approach To The Sixth Amendment Right To Counsel

1. In determining the scope of the Sixth Amendment right to counsel, the Supreme Court’s “pragmatic assessment” includes an examination of “what purposes a lawyer can serve at the particular stage . . . in question, and what assistance he could provide to the accused at this stage.” *Id.*; *see also Maine v. Moulton*, 474 U.S. 159, 170 (1985) (“[T]he right to the assistance of counsel is shaped by the *need* for the assistance of counsel”) (emphasis added). To that end, “[t]he right to counsel has historically been an evolving concept” that has been expressed, in part, by “the policy prescriptions of the legal profession itself, and the contributions of the organized bar and individual lawyers [representing indigent defendants.]” *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring in result) (discussing 1967 ABA Standards).

Standard 5.1 of the 1967 ABA Standards stated: “Counsel should be provided to the accused as soon as feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest.” Even then, this standard was founded on the “consensus among judges, prosecutors and defense counsel that appointment of counsel at the earliest possible stage is a critical

aspect of providing representation that is truly valuable and effective.” Standard 5.1 cmt., 1967 ABA Standards. Indeed, the 1967 ABA Standards provided that effective defense counsel was needed not only at trial, but at “every phase of the process, including determinations on pretrial release.” ABA Standard 1.5, 1967 ABA Standards.

Now published as ABA Standard 5-6.1 of the ABA STANDARDS FOR CRIMINAL JUSTICE, *Providing Defense Services* (3d ed. 1992), it states in relevant part:

Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest.

Substantively unchanged, this standard remains precisely the type of “policy prescription” reflective of the broad views of the legal profession.

2. Despite this long-standing consensus, however, the ABA’s House of Delegates received a report from its Criminal Justice Section in 1998 (“ABA Report”) that stated that “the overwhelming majority of indigent defendants are not represented by counsel when bail is initially set in State courts.” ABA Report at 2.⁵ In response, the ABA adopted Policy 1998 AM 112D,⁶ which recommends that *every* jurisdiction should ensure that indigent defendants receive counsel when bail is determined—and removes any

⁵ Available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/20110325_aba_112d.pdf (last visited Sept. 27, 2011).

⁶ Policy 1998 AM 112D was adopted at the ABA’s 1998 Annual Meeting, in response to Report with Recommendation No. 112D. While only a recommendation becomes ABA policy, both the Report and Recommendation for Policy 1998 AM 112D are available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/20110325_aba_112d.pdf (last visited Sept. 27, 2011).

doubt as to the legal community's commitment to the appointment of counsel during the proceedings at issue in this case:

RESOLVED, That the American Bar Association recommends that all jurisdictions ensure that defendants are represented by counsel at their initial judicial appearance where bail is set; and

FURTHER RESOLVED, That each jurisdiction provide adequate resources to support effective implementation of such representation by counsel for indigent defendants.

Because these "policy prescriptions of the legal profession," *Argersinger*, 407 U.S. at 44 (Burger, C.J., concurring in result) are based on an indigent defendant's real-world "need for the assistance of counsel," *Moulton*, 474 U.S. at 170, a conclusion by this Court that counsel should be appointed at an indigent defendant's bail or pretrial release proceedings, the ABA asserts, would be consistent with the Supreme Court's pragmatic and evolving approach.

B. The ABA Standards Address An Indigent Defendant's Real-World Need For Counsel At Bail And Pretrial Release Hearings

1. One of the principle aims of the ABA Standards and related Policies is to safeguard the rights of the accused. Although the Supreme Court in *Rothgery* did not have occasion to address whether counsel must be appointed at initial bail and pretrial release hearings, other decisions from the Court recognize that "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused" and that "counsel can also be influential . . . in making effective arguments for the accused on such matters as . . . bail." *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *see also United States v. Ash*, 413 U.S. 300, 307-12 (1972).

ABA Standard 5-6.1 and Policy 1998 AM 112D, discussed above, are consistent with these and other pragmatic observations by the Supreme Court, and demonstrate “the usefulness of counsel to the accused . . . , and the dangers to the accused of proceeding without counsel . . . ,” *Patterson*, 487 U.S. at 298, at bail and pretrial release hearings. In particular, they are based on the ABA’s recognition of the disparate treatment frequently received by the poor in criminal proceedings: defendants who can afford counsel often obtain the benefit of legal representation “well before formal commencement of adversary proceedings.” ABA Standard 5-6.1 cmt.⁷ Counsel may, at that time, “marshal facts in support” of pretrial release and convince a prosecutor or a commissioner at a bail hearing “to dismiss unfounded charges, to charge the accused with less serious offenses, or to divert the case entirely from the criminal courts.” *Id.*; see also Standard 5.1 cmt. (1st ed. 1967) (stating that early representation “is essential to forestall the institution of unfounded proceedings through effective use of the preliminary examination and other screening devices”); ABA Standard 10-4.3 (b)-(c) cmt. (recommending that counsel have the opportunity to confer with the client prior to the first appearance proceeding to acquire knowledge of the defendant’s background, community ties, prior record, relevant documents, and to properly review the charges).

By contrast, the accused who lacks the resources to hire counsel for a bail hearing must independently navigate the complicated rules of the criminal justice system and offer lay arguments to a judicial officer that release, reduced charges, or reduced bail are

⁷ Unless noted otherwise, the ABA Standards and Commentary cited are from the Third Edition, published in 1992.

appropriate. Defendants with little or no working knowledge of the legal process and of their rights may not know what options exist. Indeed, the Supreme Court has recognized that an indigent accused may not even realize, without aid, the “advantages of a lawyer’s assistance.” *Coleman*, 399 U.S. at 9; *see also Argersinger*, 407 U.S. at 34 (holding that counsel is needed “so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution”).

Moreover, without counsel at a bail hearing, an indigent defendant “may speak in an effort to regain his freedom and then make incriminating statements” that might later be used against him. Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 12. These concerns are not without basis. As this Court has held, an inculpatory statement (“I’m not denying what happened”) by an unrepresented defendant at a bail hearing—where the defendant attempted only to persuade the magistrate to reduce bail—was admissible at the defendant’s subsequent trial. *State v. Fenner*, 381 Md. 1, 8, 846 A.2d 1020, 1034-35 (2004).

The lack of counsel at bail hearings has other, less obvious, adverse effects on the accused. A recent study has shown that, when states deny counsel at the initial bail hearing, many jurisdictions often postpone criminal cases for significant periods of time. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 386-87 (2011) (hereinafter, “*Prosecution Without Representation*”). Not only does that prolong

the incarceration of a defendant—prior to any adjudication as to guilt or innocence—but it also “add[s] further delay to assigned counsel’s in-court representation.” *Id.* at 387.

Indeed, there are significant economic and social consequences for an indigent defendant who remains in jail due to the inability to post bail as a result of a lack of counsel. Prolonged detention “may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.” *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (citing Ronald Goldfarb, *Ransom: A Critique of the American Bail System*, 32-91 (1965); Lewis Katz et al., *JUSTICE IS THE CRIME*, 51-62 (1972)).

2. Nor are indigent defendants in Maryland immune to the adverse effects that can result from proceeding without counsel when bail or pretrial release is first determined. To the contrary, the repercussions from denying counsel at this stage in Maryland courts were underscored in the ABA Report that accompanied Policy 1998 AM 112D. As stated in the Report, research from that period showed that when Maryland failed to provide counsel at bail hearings, pretrial detainees who could not post bail could remain incarcerated with no opportunity to meet with an attorney until their next court appearance—often 30 days later. ABA Report at 2, 3 n.6. As a result, indigent Maryland detainees spent substantial time in jail awaiting trial on minor charges, *see id.* at 2, even though more than half of Maryland’s criminal cases never resulted in conviction, *see id.* at 3 n.6.⁸ Had counsel been appointed in these cases at earlier stages in the criminal

⁸ Specifically, the ABA Report cited the following Maryland statistics: “During fiscal year 1995-1996, there were 178,935 criminal cases filed statewide in Maryland’s District Court. Of this total, 90,523, or slightly over 51%, criminal cases were nolle prossed, dismissed, or placed

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proceedings, counsel could have presented better arguments supporting pretrial release, proposed more favorable bail alternatives, and, at a minimum, assisted in explaining to the accused the bail-posting procedures. *Id.* at 5.

Subsequent studies of Maryland's criminal justice system only confirm the ABA Report's findings. A 2002 study published by the Baltimore City Lawyers at Bail Project and the University of Maryland Law School demonstrated the extraordinary effect of providing representation to nearly 4,000 lower-income defendants accused of nonviolent offenses at bail review hearings in Baltimore City. 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, 1720 (2002) (hereinafter, "*Do Attorneys Really Matter?*"). Defendants with counsel were 2.5 times more likely than similarly-situated but unrepresented defendants to be released on their own recognizance at the bail hearing. *Id.* at 1752-53 (34% of represented defendants were released, compared to 13% of unrepresented defendants). Defendants with counsel also were four times more likely to obtain a reduction of bail, often to an affordable amount. *Id.* at 1753-54 (59% of represented defendants obtained bail reduction, compared to 14% of unrepresented defendants). Moreover, nearly 40% of represented defendants in the study were released from custody on the same day they were arrested, compared to just 20% of unrepresented defendants. *Id.* at 1755.

Footnote continued from previous page
on the inactive calendar." ABA Report at 3 n.6 (citing District Court of Maryland, Criminal Filing and Disposition Statistics, July 1995-June 1996).

3. Not only does appointment of counsel affect an indigent defendant's ability to be released pretrial or to have bail set at an affordable level, but it also can protect the accused's right to a fair trial through an early assessment and investigation of the prosecution's case and by preventing self incrimination, thus demonstrating further "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to the accused at that stage." *Patterson*, 487 U.S. at 298. Counsel's early presence "can also sometimes serve to convince the prosecutor to dismiss unfounded charges, to charge the accused with less serious offenses, or to divert the case entirely from the criminal courts." Standard 5-6.1 cmt..

For many defendants, as the Supreme Court has recognized, the period from "their arraignment until the beginning of their trial" will be "the most critical" in the entire proceedings. *Powell v. Alabama*, 287 U.S. 45, 57 (1932). Defendants thus are "as much entitled to such aid [of counsel] during that period as at the trial itself." *Id.*; see also *Moulton*, 474 U.S. at 170 (recognizing "that the assistance of counsel cannot be limited to participation in a trial," because "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself").

Ensuring representation for the indigent accused at the initial bail hearing not only protects the pretrial and trial rights of indigent defendants but, in helping to minimize disparity between those who cannot afford counsel and those who can, it advances a principal tenet of our judicial system: equal justice under the law. This principle applies with even greater force today, when the overwhelming majority of criminal cases are

resolved by guilty plea and never reach the trial stage. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 & n.13 (2010) (“Pleas account for nearly 95% of all criminal convictions.”).

C. Denying Counsel To Indigent Defendants At Bail And Pretrial Hearings Is Counter To The Evolving Trend In The States And Federal Government

1. Many states and the federal government now have concluded that counsel should be appointed at an indigent accused’s initial appearance before a judicial officer for a bail or pretrial release hearing. In *Rothgery*, the Supreme Court reiterated what it recognized nearly two decades ago—that “[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused,” and . . . that ‘in most States, at least with respect to serious offenses, free counsel is made available at that time.’” *Rothgery*, 554 U.S. at 203 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 180-81 (1991)). The *Rothgery* Court further observed that, in 2011, “not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel ‘before, at, or just after initial appearance.’” *Id.* at 203-04 & n.14 (listing 43 states). The modern trend, as acknowledged by the Supreme Court, is clearly in the direction of appointment of counsel at the bail and pretrial hearing stage.

In fact, federal courts have been required to provide counsel at an indigent defendant’s initial appearance since 1966, when Federal Rule of Criminal Procedure 44(a) was amended in the wake of *Gideon v. Wainwright*, 372 U.S. 335 (1963)—which established the right to counsel in state court trials for indigent defendants accused of serious crimes—and the Criminal Justice Act of 1964, Pub. L. No. 89-670, 78 Stat. 552. Prior to that amendment, the federal rules did not provide for any such appointment and

the 1944 version of Rule 44 explicitly stated that defendants had *no* right to assigned counsel at preliminary proceedings. Rule 44(a), Advisory Committee Notes (1944 Adoption). By contrast, the Advisory Committee Notes for subdivision (a) of the 1966 Amendment provided that the revisions to the rule (which added the phrase, “from his initial appearance before the commissioner or court”) were “intended to require the assignment of counsel as promptly as possible after it appears that the defendant is unable to obtain counsel.” *See* 1966 Amendment Advisory Comm. note, sub. (a). Rule 44(a) now states: “A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.” Fed. R. Crim. P. 44(a).

With respect to the states, the trend toward requiring the appointment of counsel at bail hearings is even more striking. In 1998, only eight states and the District of Columbia guaranteed the actual presence of counsel *at* (as opposed to soon after) a defendant’s initial appearance proceeding. *Prosecution Without Representation*, at 385-86. Twenty-four states typically refused to provide counsel, and eighteen other states uniformly denied counsel. *Id.* A decade later, there had been “a marked change.” *Id.* at 386. By 2008, criminal procedure laws and practices in ten states guaranteed the presence of counsel at a defendant’s initial appearance, and thirty states assigned counsel for indigent defendants’ initial appearance in at least some local proceedings. *Id.* at 337 n.17, 395. Whereas in 1998 eighteen states uniformly denied appointment of counsel at

bail hearings, a decade later only ten states—including Maryland—deny such protection. *Id.* at 395-96.

2. The clear trend toward the appointment of counsel at the earliest stages of the criminal proceedings should not be surprising. Not only does the appointment of counsel at initial bail and pretrial release hearings protect the rights of the accused, but counsel also promote judicial efficiency and serve the economic interests of the state. As the ABA has observed, if indigent defendants are appointed counsel, the “[d]efense and prosecuting attorneys could quickly identify individuals who are eligible for pretrial release, thereby freeing limited jail space for those who require pretrial detention.” ABA Report at 3. Moreover, the criminal justice system will be able to more quickly identify the “charges that are inappropriate for criminal prosecution.” *Id.*

Indeed, during the first nine months of the Baltimore City Lawyers at Bail Project, “the detention population plummeted from 50 percent over capacity to 20 percent below capacity” at the Baltimore Centralized Booking and Intake Facility, resulting in “substantial cost savings” for the state. *Do Attorneys Really Matter?*, at 1722-23. Other jurisdictions also have reported significant savings as a result of providing early representation. *Prosecution Without Representation*, at 391 n.309 (noting that the Public Defender of Rhode Island reported that early representation saved the state “about nine million dollars a year”). These reports are consistent with the Department of Justice’s 1984 findings that cases are resolved more quickly—providing relief to congested court dockets and overcrowded jails—when counsel represented a defendant at the bail-setting stage. U.S. Dep’t of Justice, Nat’l Inst. of Justice, *Early*

Representation by Defense Counsel Field Test: Final Evaluation 361-65 (Aug. 1984)
(concluding that the early appointment of counsel improved the accuracy of bail setting
and facilitated the expeditious release of defendants without danger to the public).

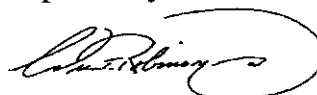
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The Supreme Court's pragmatic assessment in determining the right to counsel under the Sixth Amendment, together with the longstanding "policy prescriptions of the legal profession," *Argersinger*, 407 U.S. at 43-44 (Burger, C.J., concurring in result), and the growing trend among the state courts (as well as federal court procedure under Rule 44(a)) provide significant support for a conclusion that the time has come when counsel should be appointed for an indigent defendant when appearing before a judicial officer on the question of bail or pretrial release, at which point the defendant's liberty is at stake.

CONCLUSION

For the reasons stated above, *amicus curiae* American Bar Association respectfully requests that this Court affirm the judgment below.

Respectfully submitted,



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I hereby certify that a copy of the foregoing *Amicus Curiae* Brief, was served by Federal Express, this 29th day of September 2011, to:

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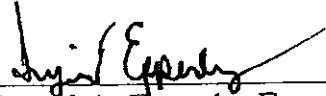
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