

IN RE: S.B.

IN THE  
COURT OF SPECIAL APPEALS  
OF MARYLAND  
September Term, 2019  
No. 1253

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**MOTION FOR LIMITED RECONSIDERATION**

Pursuant to Maryland Rule 8-605, Appellant S.B. hereby moves for limited reconsideration of this Court’s August 20, 2020, opinion. Specifically, S.B. moves to strike footnote 3, which states:

As a preliminary matter, we reject Appellant’s due process argument with respect to the circuit court’s reversal of the magistrate’s determinations. We acknowledge that juveniles facing delinquency adjudications are entitled to hearings with procedures that ensure “fundamental fairness” and reliable factfinding. *In re. Thomas. J.*, 372 Md. 50, 65-66 (2002). However, we dismiss the notion that Appellant did not receive such a hearing or that he was deprived of due process either under the Fourteenth Amendment to the U.S. constitution or pursuant to Article 24 of the Maryland Declaration of Rights. As discussed at length *infra*, the circuit court was neither required to defer to the magistrate’s recommendations, nor mandated to listen to live testimony. *See Wenger v. Wenger*, 42 Md. App. 596, 608 (1979) (“The appellant’s contention that a [circuit court] must listen to the recorded testimony of the proceedings or read a transcript of the proceedings before the [magistrate] in its entirety is without any support in law.”). Additionally, while the United States Supreme Court has cautioned that “court must always be sensitive to the problems of making credibility determinations on the cold record,” they have held that such determinations absent live testimony are not violations of due process. *See United States v. Raddatz*, 447 U.S. 667, 678 (1980).

*In re S.B.*, No. 1253, at 13 n.3 (Md. Ct. Special App.) (Aug. 20, 2020) (Slip Op.).

This footnote should be removed for two reasons: First, it decided an issue that was unnecessary to the Court's disposition of the case. Second, it is wrongly decided and reaches the opposite conclusion from every other court to have considered the issue.

### **I. Footnote 3 Decided a Constitutional Issue Unnecessary to the Court's Disposition of the Case**

This Court did not need to reach the due process issue to decide this case. S.B. appealed a delinquency adjudication on four counts stemming from an alleged altercation in a Baltimore parking garage: attempted robbery, conspiracy to commit robbery, attempted theft, and assault. After an adjudication hearing before a magistrate, the magistrate determined that the State had not proven its case, recommending that S.B. be found "facts not sustained" on all charges. App. 14. After the State filed an exception, the circuit court judge, who had not seen the witnesses' live testimony, found that the State had proven its case beyond a reasonable doubt on the four charges at issue. App. 19-21.

S.B. challenged the circuit court's determination on two separate, alternative grounds. First, he contended that the magistrate's recommendation that he be found "facts not sustained" turned on a credibility determination and that the circuit court violated his due process rights when it reversed that credibility determination without hearing the live witness testimony. *See* S.B. Br. 16-26; S.B. Reply Br. 2-4. Second, in

the alternative, S.B. argued that, regardless of whether the circuit court’s reversal of the magistrate’s credibility determinations violated S.B.’s due process rights, the circuit court erred by failing to apply a clear-error standard of review to the magistrate’s credibility determinations and associated factual findings. *See* S.B. Br. 27-31; S.B. Reply Br. 13.

This Court reversed the circuit court’s “facts sustained” finding as to the assault, robbery, and conspiracy to commit robbery charges solely on S.B.’s alternative argument: that the circuit court abused its discretion when it reversed the magistrate’s credibility determinations when those determinations were not clearly erroneous. *See* Slip Op. 19-23, 24-25. Given that the circuit court’s failure to apply the correct standard of review was dispositive of these counts, this Court did not also need to reach the constitutional question.

Likewise, this Court did not need to reach the due process issue on the theft count, even though it affirmed the circuit court’s holding. S.B. argued that “longstanding due process principles preclude a reviewing court from reversing a magistrate’s *outcome-determinative* credibility findings without hearing the live testimony in person.” S.B. Reply Br. 1 (emphasis added); *see* S.B. Br. 2, 3, 19, 25. But this Court’s opinion made clear that the Court did not regard the magistrate’s credibility findings on the theft count to be outcome-determinative. To the contrary, this Court explained that the circuit court did not abuse its discretion because this Court believed “the circuit court did have enough first-level facts from the transcript record and

surveillance video,” apart from the conflicting testimony, to reject the magistrate’s recommendation on this issue. Slip Op. 23. Accordingly, to the extent that the magistrate’s credibility findings on this count were not outcome-determinative, no due process issue arose.

## **II. Footnote 3 Is Wrongly Decided and Splits with Every Other Court that Has Decided the Issue**

In addition, footnote 3 is wrong as a matter of law and puts this Court at odds with every other court to have decided the issue. As the Supreme Court has recognized, in a juvenile adjudication proceeding, “the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years”; such proceedings are therefore “comparable in seriousness to a felony prosecution.” *In re Gault*, 387 U.S. 1, 36 (1967). They accordingly “must measure up to the essentials of due process and fair treatment” under the Fourteenth Amendment. *Id.* at 30 (internal quotation marks omitted); *see also In re Thomas J.*, 372 Md. 50, 65-66 (2002) (Article 24 of the Declaration of Rights requires that children in juvenile proceedings be afforded “fundamental fairness”). These procedures, however, are diminished when a circuit court reverses a magistrate’s outcome-determinative credibility determinations without having seen the witnesses testify in person. *See Wenger v. Wenger*, 42 Md. App. 596, 604 (1979) (recognizing that the presiding magistrate is in the best position to judge witness credibility because he “saw and heard the witnesses and was able to make the subtle judgments based upon appearance, upon tone of voice, upon even non-verbal

communication, etc. that are never available upon the pages of a transcript as perused after the fact”).

For these reasons, in circumstances where relatively less is at stake—for example, pretrial suppression hearings and postconviction proceedings—every federal court to have considered the question has held that a trial court may not reverse a magistrate’s outcome-determinative credibility assessments without hearing the live testimony first-hand. *See, e.g., Jackson v. United States*, 859 F.3d 495, 498-99 (7th Cir. 2017); *United States v. Hernandez-Rodriguez*, 443 F.3d 138, 148 (1st Cir. 2006); *United States v. Ridgway*, 300 F.3d 1153, 1156-57 (9th Cir. 2002); *United States v. Cofield*, 272 F.3d 1303, 1305-06 (11th Cir. 2001); *Cullen v. United States*, 194 F.3d 401, 405-07 (2d Cir. 1999); *Hill v. Beyer*, 62 F.3d 474, 482 (3d Cir. 1995); *Louis v. Blackburn*, 630 F.2d 1105, 1108-10 (5th Cir. 1980). And the only state court to have considered this due process question in the context of a juvenile delinquency proceeding has reached the same conclusion, explaining that “the interests implicated in an evidentiary hearing to adjudicate the delinquency of a juvenile are deserving of *more* protection than those implicated in an evidentiary hearing on a motion to suppress an involuntary confession.” *In re Pima County, Juvenile Action, No. 63212-2*, 631 P.2d 526, 528 (Ariz. 1981) (emphasis added).

Moreover, footnote 3 rests on a misreading of Supreme Court and Maryland Court of Appeals precedent. Although the footnote suggests that the Supreme Court has “held that such determinations absent live testimony are not violations of due

process,” Slip Op. 13 n.3 (quoting *United States v. Raddatz*, 447 U.S. 667, 678 (1980)), the Supreme Court in *Raddatz* considered only whether due process requires a reviewing court to observe the live testimony before *affirming* a magistrate’s credibility determinations. It made clear that it was not addressing a scenario, like the one in this case, in which a district court *reversed* a magistrate’s credibility determinations, stressing that for a court “to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions,” 447 U.S. at 681 n.7; *see Ridgway*, 300 F.3d at 1156-57 (“*Raddatz* addressed the constitutionality of the *acceptance* of a magistrate judge’s factual findings without conducting a de novo evidentiary hearing. The issue presented . . . here, by contrast, involves the more troubling question whether a district court can *reject* a magistrate judge’s credibility finding without itself seeing and hearing the witness.”). Indeed, “[s]ince the Court decided *Raddatz*, other circuits have taken heed of the concerns expressed by the Court and have held that a district court judge may not reject the credibility findings of a magistrate judge without holding a de novo evidentiary hearing.” *Jackson*, 859 F.3d at 498-99 (citing cases); *see, e.g., Louis*, 630 F.2d at 1109 (explaining that it was “now answer[ing] those serious questions” that *Raddatz* left open and holding that a reviewing court “should not enter an order inconsistent with the credibility choices made by the magistrate without personally hearing the live testimony of the witnesses whose testimony is determinative”).

The footnote also erroneously cites the Maryland Court of Appeals' decision in *Wenger* to support the conclusion that due process did not require the circuit court to hear the live witness testimony in this case. *See* Slip Op. 13 n.3 (citing *Wenger*, 42 Md. App. 596). But *Wenger* did not involve a due process challenge at all, much less address what the Constitution requires in a juvenile delinquency case, which, as discussed above, is "comparable in seriousness to a felony prosecution." *Gault*, 387 U.S. at 36; *cf. Wenger*, 42 Md. App. at 597 ("At issue specifically in this case is the amount of money to be awarded in 1) child support pendente lite and 2) alimony pendente lite.").

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For the foregoing reasons, S.B. respectfully requests that this Court grant reconsideration of its August 20, 2020, opinion for the limited purpose of deleting footnote 3.

Respectfully submitted,

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*September 17, 2020*

\* Admitted pursuant to Rule 19-217.

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## CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2020, I electronically filed the foregoing Motion for Limited Reconsideration with the Clerk of the Maryland Court of Special Appeals by using the MDEC filing system. Participants in this case are registered MDEC users, and service will be accomplished through the MDEC system.

*/s/ Annie L. Owens*  
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