FREDERICK VAUGHN,	IN THE
Appellant	COURT OF SPECIAL APPEALS
v.	OF MARYLAND
STATE OF MARYLAND	September Term, 2015
Appellee	No. 1884

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of May, 2016, three copies of the Appellant's Reply Brief in the captioned case were delivered to

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COURT OF SPECIAL APPEALS OF MARYLAND

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Appellant

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APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(THE HONORABLE MICHAEL A. DIPIETRO PRESIDING)

APPELLANT'S REPLY BRIEF

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Public Defender

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APPELLANT'S REPLY BRIEF

ARGUMENT

DEFENDANTS MAY PRESENT EVIDENCE BEARING ON DANGEROUSNESS AND FLIGHT RISK AT BAIL REVIEW.

Appellant and the state agree that bail review courts must determine danger and flight risk, not guilt or innocence. Therefore, the question is not, as the state contends, whether bail review courts must "conduct a mini-trial on the question of guilt or innocence[.]" (Appellee's Br. at 1). The question is whether defendants may present evidence at bail review hearings, provided that such evidence has a

bearing on the bail assessment of dangerousness or flight risk and is non-cumulative. Md. Rule 4-216(e)(1); (Appellant's Br. at 15, 21, 26, 32).

Bail review is a two-sided, adversarial hearing at which a judge must determine whether the defendant poses a danger or flight risk and, if so, what if any conditions of release can ameliorate the risk. The court's decision will have enormous consequences for the defendant, who may be deprived of his or her liberty for months or longer. In making this determination, judges at bail review routinely rely on the statement of probable cause or application for statement of charges, a sworn affidavit by the complaining witness that, in nearly every case, contains a narrative description of the defendant's alleged criminal activity. This affidavit generally serves as a substitute for the live testimony of a complaining witness or police officer. Moreover, in certain circumstances, Rule 4-216(d) and Criminal Procedure Article § 5-202 create a rebuttable presumption that no conditions of release will be adequate to reasonably ensure the defendant will not pose a danger or a flight risk.[1]

In either case, if the defendant seeks to remain at liberty, he or she must rebut the allegations of danger and flight risk. The plain language of Rule 4-216 indicates that the defendant can present "any information" bearing on dangerousness or flight, including but not limited to "the nature and circumstances

[1] Md. Code Ann., Crim. Proc. § 5-202(f) (West 2015) applies to defendants with certain criminal histories and charged with certain crimes, and provides in relevant part: "There is a **rebuttable presumption** that a defendant described in paragraph (1) of this subsection will flee and pose a danger to another person or the community." (Emphasis added).

of the offense charged," "the nature of the evidence," and "any other factor." Rule 4-216(e)(1)(A), (F), and (I).[2] The phrase "any information" "is broad and encompasses **any information**," "including any witnesses and any documents or physical evidence." *Dove v. State*, 415 Md. 727, 739 (2010) (interpreting identical language with respect to sentencing hearings) (emphasis added). Moreover, the Rule requires, in mandatory language, that the court "shall" take such information into account "to the extent available." Md. Rule 4-216(e)(1). In light of the plain

[2] Maryland Rule 4-216(e) provides in relevant part:

(e) **Duties of Judicial Officer.**

(1) *Consideration of Factors*. In determining whether a defendant should be released and the conditions of release, the judicial officer shall take into account the following information, to the extent available:

(A) the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction;

(B) the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(C) the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;

(D) any recommendation of an agency that conducts pretrial release investigations;

(E) any recommendation of the State's Attorney;

(F) any information presented by the defendant or defendant's attorney;

(G) the danger of the defendant to the alleged victim, another person, or the community;

(H) the danger of the defendant to himself or herself; and

(I) any other factor bearing on the risk of a wilful failure to appear and the safety of the alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.

(Emphasis added).

language of the Rule and the liberty interests at stake, defendants at bail review must be allowed to rebut the state's case or a statutory presumption of dangerousness and flight risk with evidence of their own.

With respect to the question of whether defendants may present evidence bearing on dangerousness and flight risk at bail review, **the parties also appear to agree on the following:**

1. **The court is "obliged to hear evidence directly related to [dangerousness and flight risk]."** (Appellee's Br. at 35-36, 3-4, 18-19).

2. **"[T]he rule directs the court to consider…the specifics of the allegations in order to [assess dangerousness]."** (Appellee's Br. at 10, 33).

The logical conclusion of the state's own argument is: the bail review court is "obliged to hear evidence" as to "the specifics of the allegations." Yet the state resists this conclusion, ignores the plain language of Rule 4-216, and insists that **only the state, not defendants**, may present information as to the specifics of the allegations, such as a sworn affidavit by an eyewitness. Without any basis in Rule 4-216, the state argues that defendants must be forced into silence with respect to factors that the both the rule explicitly defines as relevant, and the state acknowledges are relevant. The state's argument goes against the very idea of an adversarial hearing.

In support of this extreme position, the state makes three arguments: (A) the purpose of bail review is not for a determination of innocence,[3] (B) defendants' evidence as to "the nature and circumstances of the offense and the nature of the evidence" is irrelevant because a finding of probable cause makes the state's version incontestable,[4] and (C) it is "unworkable" for courts to have the discretion to hear material evidence at bail review.[5] The state also argues in the alternative (D) that defendants must be limited to proffers,[6] (E) that this Court should decline to hear Appellant's moot appeal,[7] and (F) that Appellant's "true complaint" is whether the District Court abused its discretion in refusing to reopen the initial bail hearing.[8] This reply addresses each argument in turn.

A. Bail review requires a judicial determination of dangerousness and flight risk, not innocence.

Appellant agrees that "[b]ail review hearings are not for determining guilt or innocence," and has never argued otherwise. (Appellee's Br. at 8). The state attempts to distract this Court with 30 pages of argument on this **uncontested** issue. (Appellee's Br. at 3-5, 7-30, 35-37). Following a 17-page review of cases cited by Appellant, the state comes to the unsurprising conclusion that "[t]here is no legal authority for the proposition that judges are required to conduct a hearing on the question of guilt or innocence at a bail review proceeding." (Appellee's Br.

[3] (Appellee's Br. at 3-5, 7-30, 35-37).
[4] (Appellee's Br. at 3, 10, 21-22, 32).
[5] (Appellee's Br. at 5-7).
[6] (Appellee's Br. at 11-12).
[7] (Appellee's Br. at 5-6).
[8] (Appellee's Br. at 7, 30-31)

12-16, 19-30). Of course there isn't. The state argues Appellant's point: bail review courts must not decide guilt or innocence when considering the specifics of the allegations at pretrial detention hearings.[9] (Appellee's Br. 23-28).

It bears repeating that the issue in this case is whether defendants, and not just the state, may present information bearing on the determination of flight risk and dangerousness at the adversarial bail review hearing. The state contends that Appellant "attempted to… have a bail review court conduct a mini-trial to determine guilt or innocence." (Appellee's Br. at 36-37). The record proves this wrong. At each bail hearing, the court was presented with the sworn affidavit of a police witness (the statement of probable cause) as to his eyewitness account of the underlying events. The prosecutor cited specifics facts from this sworn affidavit in support of the state's contention that Mr. Vaughn was a danger and a flight risk. (T1. 5-6; T2. 24-26). In addition, Appellant faced a "**rebuttable** presumption," generated by his gun charge and criminal history, that he posed a

[9] Appellee also distinguishes cases on the grounds that many cases refer to a "rebuttable presumption" in favor of pretrial detention so long as "the proof is evident and the presumption of guilt is great." (Appellee's Br. at 24). This distinction is irrelevant. First, Mr. Vaughn faced a similar "rebuttable presumption," and has the opportunity to rebut the presumption with evidence under Rule 4-216. Second, the Maryland provision requiring courts to consider "the nature of the evidence" is broad and includes consideration of whether the "proof is evident." Third, even if "the nature of the evidence" does not include whether the evidence creates proof of guilt, such information may be relevant to flight risk and dangerousness, and consequently would fall into Md. Rule 4-216's catch-all provision for court's to consider "any other factor" related to flight risk and dangerousness. Finally, this purported distinction is much ado about nothing—these cases merely demonstrate that courts receive evidence relevant to the specifics of the allegations at pretrial detention hearings and that such an opportunity is not, as the state argues, unworkable.

danger and flight risk. As is appropriate at an adversarial hearing, Appellant attempted to rebut the state's allegations and the sworn affidavit of a police witness with an eyewitness and three-minute videotape of his own for the purpose of obtaining pretrial release. Appellant did not seek a determination of innocence.

Judge DiPietro correctly ruled that Appellant's eyewitness and videotape were relevant to dangerousness and flight risk, not because they are probative of innocence, but because under Rule 4-216 such evidence is explicitly relevant to dangerousness and flight risk under the factors "the nature and circumstances of the offense and the nature of the evidence." (T2. 10–12; App. 2–4). As Judge DiPietro said, "If there's no evidence showing that the Defendant possessed a handgun, well then that should be a factor considered in the bail review." (T2. 6). Judge DiPietro recognized that bail review courts consider the specifics of the allegations without determining guilt or innocence all the time. (T2. 10-13). In this respect, a bail review hearing is no different than a suppression hearing—in both proceedings, trial courts inevitably consider evidence that may also be relevant to guilt or innocence without determining guilt or innocence.

The state agrees, as it must, that "[t]he bail court is required to assess dangerousness, and thus the rule directs the court to consider the nature of the charges and the specifics of the allegations in order to make that determination." (Appellee's Br. at 10). In this case, the state was permitted to argue facts from the statement of probable cause, a sworn affidavit that effectively served as a substitute for the live testimony of the two alleged police eyewitnesses. (T1.5-6;

T2.24-26; Appellee's Br. at 10, 33). The state thus has no qualm with courts considering the specifics of the allegations at bail review, so long as defendants are forced into silence at what the state concedes should be an adversarial hearing.

B. The plain language of Rule 4-216 contradicts the state's interpretation.

Without any apparent authority, the state argues that a finding of probable cause makes the state's version of "the nature and circumstances of the offense and the nature of the evidence" incontestable at bail review. (Appellee's Br. at 3, 10, 21-22, 32). The plain language of Rule 4-216 forecloses the state's inventive interpretation.[10]

Rule 4-216(e)(1) provides a list of express factors—(A) through (H)—that judges must consider at bail review.[11] Among these factors are "the nature and circumstances of the offense charged," "the nature of the evidence," and "any information presented by the defendant." Furthermore, the rule requires courts to consider "any other factor bearing on the risk" of flight or dangerousness. The addition of this catch-all indicates first, that factors (A) through (H) bear on flight risk and dangerousness, and second, that the court's inquiry is not limited to factors (A) through (H), but can include any other information that bears on flight risk and dangerousness. Therefore defendants can present "any information" relevant to flight risk and dangerousness, whether it is the "nature and

[10] As explained at in detail in Appellant's brief, the state's argument is also inconsistent with the right to counsel and due process, as well as the ABA Standards for Criminal Justice: Pretrial Release 10-5.10 (3d. ed. 2007).

[11] See *supra*, fn. 2.

circumstances of the offense," the specifics of the allegations, or any other relevant information. The Rule further mandates that the court "shall" take such information into account "to the extent available." Rule 4-216(e)(1).

The state's argument simply ignores the fact that defendants may present "any information" pertaining to any factor, including "(A) the nature and circumstances of the offense" and "the nature of the evidence," and "(I) any other factor bearing on" flight risk and dangerousness. The rule no more excludes from "**any** information" that which pertains to factors (A) and (I) than it excludes evidence like "character witnesses" and "employment and community ties" pertaining to factor (C), which the state concedes may be presented at bail review. (Appellee's Br. at 35-36, 3-4, 18-19). Having acknowledged that defendants may present evidence relevant to factor (C), the state **must** concede that defendants may also present evidence as to factors (A) and (I).

Moreover, a finding of probable cause to support certain charges, when combined with a defendant's criminal history, may generate a "rebuttable presumption" that the defendant is dangerous and at risk of flight and not, as the state would have it read, an *irrebuttable* presumption. Rule 4-216; Crim. Proc. 5-202. Interpreting a similar "rebuttable presumption" in the Federal Bail Reform Act, federal courts have held that such a provision shifts the initial burden of production (but not persuasion) to defendants, who must come forward with evidence that they are not dangerous and will return to court. *See, e.g. U.S. v. Jessup*, 757 F.2d 378, 380-84 (1st Cir. 1985) (Breyer, J.); *U.S. v. Portes*, 786 F.2d

758, 764 (7th Cir. 1985).[12] Under the state's inventive reading, a "rebuttable presumption" is an *irrebuttable*, or conclusive presumption that the state's allegations are true. This would not be a presumption at all, but rather a rule that the state's version is the incontestable law of the case at bail review, whatever the evidence may be to the contrary. How else may defendants rebut a presumption, but with evidence?

Nor can the state offer any reason why a finding of probable cause must categorically limit the inquiry at an adversarial hearing. Unlike bail review, a probable cause hearing (aka a "*Gerstein* hearing") is a one-sided presentation where a commissioner reviews a sworn affidavit, warrant, or grand jury indictment for legal sufficiency. The task is mechanical and usually left to court commissioners, who are not lawyers. Bail review, on the other hand, is an adversarial hearing where judges make a holistic assessment of defendants' flight risk and dangerousness in order to determine whether they can be released. The assessment is a wide-ranging one with enormous consequences for the defendant, hence the requirement that the state must demonstrate "clear and convincing **evidence**" to support detention for dangerousness. *Wheeler v. State*, 160 Md. App. 566, 574 (2005) (emphasis added). It is imperative that the court's determination is accurate, informed, and the result of a "full-blown adversary hearing," not limited or one-sided. *See U.S. v. Salerno*, 481 U.S. 739, 746-56 (1987). In this case, the

[12] As discussed *supra*, this rebuttable presumption and resulting evidentiary rule is also similar to out-of-state provisions generating a rebuttable presumption for certain crimes.

sworn statement of the eyewitness police officer was directly contradicted by a three-minute videotape and a civilian eyewitness. In addition, the police statement did not mention how the police, after packaging the evidence and leaving the scene, returned later that day, unpackaged the evidence, and staged photographs. (T4. 98). As Judge DiPietro observed, a sworn police statement "may not contain all the information associated with the matter." (T2. 11).

The state wrongly suggests that federal defendants may not present evidence at pretrial detention hearings related to the specifics of the allegations because "the government need only show 'probable cause.'" (Appellee's Br. at 22-23). In fact, the government must demonstrate flight risk or dangerousness, not merely probable cause. *See* Bail Reform Act of 1984, 18 U.S.C. § 3142(d); *Salerno*, 481 U.S. at 750. As required by *Salerno* and the Bail Reform Act, federal courts *do* hear defendants' evidence disputing the specifics of the allegations because such evidence bears on flight risk and dangerousness. 18 U.S.C. § 3142(g); *Salerno* at 750. For example, in *U.S. v. Jones*, 583 F.Supp.2d 513 (S.D.N.Y. 2008), the court heard from alibi witnesses who testified the defendant was not present for the shooting of a government witness. *Id*. at 516. The court determined that the witnesses were not credible and held the defendant without bail after concluding that he posed a danger. 583 F.Supp.2d. at 516. Later, the court heard additional evidence of the defendant's alibi, including video and documents not available at the time of the initial hearing, and released him pending trial. *Id*. at 514.

The following hypothetical illustrates the absurdity of the state's proposal. A defendant without a criminal record is charged with a brutal assault based on an eyewitness identification. The state argues that the defendant must be detained because the nature and circumstances of the offense and the nature of the evidence demonstrate that the defendant is a danger. However, the defendant has a perfect alibi: on the date and time of the offense, the defendant was in a coma. Under the state's rule, the defendant may not contest the allegation of dangerousness with his alibi, which is indisputably relevant to his dangerousness. Nor may the defendant present a hospital record or medical witness to support his alibi. In all likelihood the defendant would be detained for his alleged dangerousness even though he is not a danger. This result is absurd and violates the core constitutional requirement that pretrial detention procedures be "specifically designed to further the accuracy of" detention determinations. *Salerno*, 481 U.S. at 751. Due process of law guarantees defendants the right to be heard, and present evidence, at a "full-blown adversary hearing." *Id.* at 750-52.

C. Rule 4-216's reference to "any information" includes evidence.

The state argues in the alternative that Rule 4-216's reference to "any information" limits defendants to a mere proffer. (Appellee's Br. at 11-12). The state's argument is undone by its own concession that the bail review court is "obliged to hear evidence directly related to [dangerousness and flight risk]." (Appellee's Br. at 35-36, 3-4, 18-19). Even more, the state does not even attempt

to distinguish the Court of Appeals's view that the phrase "any information" "is broad and encompasses any information," "including any witnesses and any documents or physical evidence." *Dove*, 415 Md. at 739.

Even more, proffers alone cannot provide defendants the meaningful opportunity to be heard at bail review. Proffers play an important role in both allowing courts to determine whether evidence is relevant and non-cumulative, and allowing defendants to present information when no evidence is readily available. However, it is difficult for courts to make factual or credibility determinations based on proffers alone. *See, e.g., Barnes v. State*, 31 Md. App. 25, 34 (1976). *Salerno* therefore requires that detention decisions follow a "full-blown adversary hearing" where defendants may present witnesses and evidence. *Salerno*, 481 U.S. at 750-52. And the right to counsel at bail review further indicates that a defendant may do more than simply proffer. *See In re Damien F.*, 182 Md. App. 546, 571 (2008).

D. Consideration of evidence at bail review hearings is workable and reasonable.

The state's argument boils down to the assertion that compliance with the plain language of Rule 4-216 is "unworkable." Criminal defendants may be incarcerated for months or longer before trial and face the collateral consequence of losing their jobs, homes, and children. There is no reason why an adversarial bail review hearing, where the stakes are so high, should be any different than any other informal adversarial hearing, such as small claims hearings, sentencings, and

shelter care hearings. If a defendant has evidence material to flight risk or dangerousness, Rule 4-216 and due process guarantee the defendant the opportunity to present it at bail review. Taking evidence at adversarial hearings is what courts *do*.

In any event, the state's workability concerns are smoke, not fire. There is nothing "unworkable" about giving the court discretion to consider, as here, the testimony of a single eyewitness and a three-minute videotape, especially in light of current practice. Maryland courts already consider evidence at bail review. The state concedes that defendants have the present ability to call "character witnesses" and evidence related to "employment and community ties." (Appellee's Br. at 35-36). Courts routinely consider sworn affidavits in the form of statements of charges and statements of probable cause, which effectively serve as evidence. Defense counsel observed that she had "never heard of such a thing" as a "[c]ourt [that] won't look at evidence at [bail review] that completely contradicts what the State has proffered." (T1. 13).

With many courts already considering evidence at bail review,[13] hearings usually take no more than a few minutes. One study found that bail review with

[13] Appellee's brief refers to 153,000 commissioner hearings conducted annually. This case is about bail review, not commissioner hearings, and therefore this statistic is irrelevant. "Roughly half [of defendants are] released on recognizance after having been brought before Maryland commissioners empowered to make the initial pretrial release determination." Ray Paternoster et. al., Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail, 23 CARDOZO L. REV. 1719, 1732 (May 2002).

counsel takes on average two minutes and thirty-seven seconds.[14] A recent policy proposal regarding video bail hearings observed that they take, "in many instances[,] no more than a few minutes."[15] The durations of the hearings at issue in this case are therefore typical. The District Court hearing lasted less than five pages of transcript, (T1. 3-8); the Circuit Court bail review, involving protracted legal and factual argument, took thirty-four pages of transcript. (T2. 16-40). Of course, the Circuit Court hearing would likely have been even shorter had the court simply watched the three-minute videotape, rather than forcing the defendant to make a lengthy proffer.

Few defendants have evidence relating to the specifics of the allegation, and even fewer have such evidence available for use at bail review, which must occur within 48 hours of arrest. Fewer still, in possession of such evidence, will choose to disclose their evidence to the state at such an early stage. If the state presents a full and fair picture—rather than only the inculpatory parts—then there will be no need for the defense to offer additional information because there will be no material dispute. And parties may still agree to proceed by proffer if they wish.

Moreover, to the extent that some bail reviews will take a few more minutes, this is hardly unreasonable for a hearing that may potentially jail

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[14] Paternoster et. al., *supra,* at 1755.

[15] Proposal of Maryland Judiciary for Improvements to Pretrial Release System, at 15 (Jan. 3, 2014) https://marylandassociationofcounties.files.wordpress.com/2014/01/full-maryland-judiciary-proposal.docx).

presumptively innocent persons for weeks, months, or years. The bail decision often results in unemployment, eviction, and the loss of child custody. This important decision too often is made with inadequate information, a problem that this Court can address. In light of the deprivation of liberty that results from a pretrial detention decision, courts should have the information necessary to get it right.

Finally, courts will retain discretion to act as the gatekeepers of their courtrooms. Pursuant to Rule 4-216 and the requirements of due process, judges must take into account defendants' evidence at bail review, provided the evidence bears on dangerousness or flight risk, the evidence is not cumulative of other information already before the court, and there is a reasonable possibility that the evidence might affect the court's determination as to whether the defendant should be released and the conditions of release. So long as this requirement is satisfied, judges will retain discretion to impose reasonable limits on the number of witnesses and the length of their testimony.

E. This Court should exercise its discretion to hear this moot appeal.

Judge DiPietro requested the guidance of this Court on the question of whether defendants have the right to present evidence at bail review. This Court has never addressed the question directly, because questions arising from bail review, although recurring, evade appellate review. As this case demonstrates, lower courts disagree as to how to conduct this adversarial hearing. This Court

should address the question presented by the Application for Leave to Appeal, and give courts below much-needed guidance on their discretion to consider defendants' evidence at bail review.

F. Appellant's "true complaint" is that he was not afforded the opportunity to present evidence bearing on the bail determination.

The state asserts that appellant's "true complaint" is whether the District Court judge abused his discretion in refusing to reopen the bail review for late evidence. The state again tries to distract this Court from the question presented. Judge DiPietro ruled that Appellant could not present an eyewitness and three-minute video that the court recognized had a bearing on the bail determination of flight risk and dangerousness. The issue here is not whether the District Court abused its discretion; the question is whether at bail review hearings defendants may present evidence bearing on flight risk and dangerousness.

CONCLUSION

Bail review is an adversarial hearing at which a judge must determine whether a defendant is a danger or flight risk and should be deprived of his or her liberty, often for months or longer. Rule 4-216 requires judges, before determining whether a defendant should be released and the conditions of release, to take into account, "to the extent available," "any information presented by the defendant or the defendant's attorney" bearing on dangerousness or flight risk, including information concerning "the nature and circumstances of the offense charged" and "the nature of the evidence against the defendant." The phrase "any information"

is "broad and encompasses any information," "including any witnesses and any documents or physical evidence."

This Court should hold that, under Rule 4-216 and as a matter of due process, a judge at bail review must allow a defendant to present evidence bearing on dangerousness or flight risk if there is a reasonable possibility that the evidence might affect the court's determination as to whether the defendant should be released and the conditions of release. Under this rule, the court would retain the discretion to impose reasonable limits on the number of witnesses, the length of their testimony, and unduly cumulative evidence.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 4514 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

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_____
Ethan Frenchman

PERTINENT AUTHORITY