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Facts:

On August 7, 2015, in the Circuit Court for Anne Arundel County, a grand jury indicted David Leander Ford, Petitioner, for first-degree premeditated murder, second-degree murder, manslaughter, and carrying a weapon openly with the intent to injure. The charges arose out of an incident that occurred on the evening of July 8, 2015, during which Ford allegedly engaged in an altercation with Mohamed Bashir Eltahir and fatally stabbed him.

From September 19 to 22, 2016, the circuit court conducted a jury trial. At the start of trial, the prosecutor *nol prossed* the charge of first-degree premeditated murder. During the State's opening remarks, the prosecutor set forth the State's theory of the case, positing that Ford instigated a verbal argument with Eltahir, and was responsible both for escalating the argument to a physical altercation and for subsequently introducing a knife into the physical altercation.

Ford's theory of the case was that he acted in self-defense. During Ford's opening statement, his counsel posited that, although Ford insulted Eltahir, Eltahir was younger, bigger, faster, and stronger than Ford, and Eltahir was the aggressor who initiated physical contact. Among other things, Ford's counsel stated: "[Yo]u are going to hear evidence that [Eltahir] is younger than [] Ford, faster than [] Ford, bigger than [] Ford, and stronger than [] Ford"; "[a]nd [] Ford is not the person [who] initiates any physical contact, that's [Eltahir]"; "[s]o [] Ford finds himself being attacked by someone that's larger, someone that's stronger, someone that's faster, and someone that's bigger"; "you'll realize that [] Ford was in a situation where he was overmatched. He was in a situation where he was reacting out of fear, and that he certainly wasn't the aggressor"; and "[h]e made an offhand verbal comment but he was not the physical aggressor."

As a witness for the State, Barbara McQueen testified that she knew Eltahir for approximately six months, and when asked about Eltahir's demeanor, she testified: "Quiet, juts overall a nice person." Over objection, McQueen testified that Eltahir "[w]as [a] quiet, nice person. Nice to everybody." And, when asked if she was aware of Eltahir's reputation for peacefulness or aggression, over objection, McQueen testified "[y]es[,]" and explained: "We would sit on the bench and talk, and we went to restaurants and ate with him."

As to the events of evening of July 8, 2015, McQueen testified that Eltahir and Everett Kane were sitting on a park bench drinking, and Ford arrived and sat on the park bench. Two women walked by, and Ford told Eltahir that he "want[ed] to (expletive) [his] sister[.]" Following a verbal exchange, Ford stood up and "got in [Eltahir]'s face" and then Ford hit Eltahir, who stumbled back; according to McQueen, Ford hitting Eltahir was the first physical contact made during the altercation. Eltahir then hit Ford, who fell to his knees; Ford got back up and hit Eltahir in the chest. A short time later, Ford started "hitting" Eltahir again, and when Eltahir sat down, McQueen saw blood. Ford left the scene, and as he passed by McQueen, he had a knife in his hand and blood running down his arm. During an interview with detectives, McQueen identified Ford from a photographic array as the person who stabbed Eltahir. McQueen testified that there was no doubt in her mind that Ford stabbed Eltahir. McQueen also testified that there was no blood on Eltahir's shirt when he arrived at the park bench, and that Ford was the only person to make physical contact with Eltahir's chest.

As a witness for the State, Kane testified that Eltahir was a "quiet person. You know, we always sat and talked. . . . And he was never, you know, hostile or anything." Ford's counsel objected, and the circuit court sustained the objection. At a bench conference, the prosecutor stated that she was seeking Kane's opinion as to "Eltahir's character for peacefulness." The circuit court stated that it had sustained the objection because of "[t]he context of the question." Ford's counsel argued that a proper foundation had not been laid. The prosecutor responded that "[t]hey said that the victim was the aggressor, in that, that their client wasn't the aggressor. . . . And I believe that in opening, when they throw the issue down that my person was the aggressor, that I am able at that point, under that rule to rebut it." Ford's counsel argued that remarks in opening statement were not evidence and that there was nothing to rebut yet. The circuit court ruled that Ford's counsel had "opened the door" and that the prosecutor could "present testimony that the victim . . . was of a peaceful nature" or otherwise present "testimony that would rebut [] your opening about his aggressiveness." The prosecutor then asked Kane for his opinion of Eltahir's peacefulness, and, over objection, Kane testified: "He was a cool person. He was never, you know nasty or hostile, or anything."

As to the evening of July 8, 2015, Kane testified that he and Eltahir picked up some beer and sat on a park bench, and, at some point, Ford arrived and sat down on the bench. Ford told Eltahir "I want to (expletive) your sister[,]" and Ford and Eltahir began arguing. Kane saw Ford and Eltahir "pushing each other back and forth[,]" but he did not see "who pushed who first" because he had his back turned. At some point thereafter, Kane saw blood on Eltahir's shirt. There had not been blood on Eltahir's shirt before the physical altercation with Ford, and nobody other than Ford had touched Eltahir. Kane initially falsely told detectives that he did not see anything and that he was not present during the altercation. After learning that Eltahir died, however, he told

the officers the truth and identified Ford from a photographic array as the person who stabbed Eltahir. Kane told officers that he was "a hundred percent" sure about his identification of Ford.

As a witness for the State, Sheila Brown, Ford's ex-girlfriend, testified that, on the evening of July 8, 2015, Ford arrived at Brown's home unannounced, and asked if he could stay at Brown's home "for a while because he said that he had got[ten] into a confrontation with a friend of his, or something. And the friend hit him in his head, and he stabbed him." Brown asked Ford why he did not wait for law enforcement, and Ford replied that "he was afraid, he didn't want to get into that[,]" and that he "was scared" of "[t]he police with all the drama with -- because the guy had hit him first, or something, and he had stabbed him." Ford told Brown that he had learned that Eltahir had died. Ford also told Brown that he had made a comment to Eltahir about "having sex with" Eltahir's sister. Ford told Brown that he had first stopped at his mother's house and left the knife "[t]hat he had stabbed the boy with" there.

The following morning, Brown advised Ford that he could not stay at her home and "that he had to go." The prosecutor then asked Brown: "What was [Ford's] reaction when you told him he could not stay?" Ford's counsel objected, and the circuit court initiated a bench conference, at which Ford's counsel argued that Ford's reaction was "completely irrelevant" and "more prejudicial than probative." The prosecutor responded that Ford's reaction went "to consciousness of guilt. He's wanting [Brown] to allow him to stay there, so that he can hide." The circuit court overruled the objection. Brown then testified that, when she asked Ford to leave her house, "he cursed [her] out, and he slammed back the front door and left."

Parts of detectives' interrogation of Ford were played for the jury, and, over Ford's counsel's objections, the circuit court admitted the recording and transcript of the interrogation. During the interrogation, Ford advised the detectives that he "cut" Eltahir. Among other things, Ford told detectives that Eltahir hit him, and "[t]hat's when I told him, 'You done messed up,' and I cut him." Ford said that he hid the knife on his mother's property. Ford also said that, when Eltahir hit him, it did not knock him out, but it "hurt [him] and [he] went to swing and that's all [he] remember[ed]."

After the State rested its case, Ford's counsel moved for judgment of acquittal as to carrying a weapon openly with intent to injure, arguing that the knife did "not meet the statutory definition of a deadly and dangerous weapon[.]" The circuit court granted the motion for judgment of acquittal as to the count for carrying a weapon openly with intent to injure. Ford's counsel also made a motion for judgment of acquittal as to second-degree murder, which the circuit court denied. Ford was then advised of his right to testify, and he elected to remain silent. Ford rested without calling any witnesses, the circuit court instructed the jury, and counsel gave closing arguments. Following closing arguments, the jury began its deliberations. The jury found Ford guilty of second-degree murder. On December 20, 2016, the circuit court sentenced Ford to twenty-five years' imprisonment, with all but twenty years suspended, followed by five years' probation.

Ford appealed. On December 20, 2017, in a reported opinion, the Court of Special Appeals affirmed Ford's conviction. *See Ford v. State*, 235 Md. App. 175, 204, 175 A.3d 860, 876

(2017). On February 8, 2018, Ford petitioned for a writ of *certiorari*, and on April 9, 2018, this Court granted the petition. *See Ford v. State*, 458 Md. 580, 183 A.3d 156 (2018).

Held: Affirmed.

The Court of Appeals held that Maryland Rule 5-404(a)(2)(C) does not permit a prosecutor to offer evidence of an alleged victim's trait of peacefulness to rebut statements made by defense counsel in opening statement because opening statements are not evidence, and Maryland Rule 5-404(a)(2)(C) specifically requires that "evidence that the victim was the first aggressor" be introduced before the prosecutor may rebut such evidence with "evidence of the alleged victim's trait of peacefulness[.]" Ford's counsel's remarks during opening statement did not "open the door" for the prosecutor to present evidence of Eltahir's trait of peacefulness. This is so because, even if Ford's counsel's remarks placed Eltahir's actions and character at issue and somehow indicated that Ford would perhaps offer evidence to prove that Eltahir was the aggressor, Maryland Rule 5-404(a)(2)(C) definitively requires evidence that the victim was the first aggressor—not merely a statement indicating that some evidence might possibly be introduced—to trigger the State's ability to rebut with evidence of the victim's trait of peacefulness. The Court held that, accordingly, the circuit court erred in concluding that Ford's counsel had "opened the door" for the State to present evidence of Eltahir's trait of peacefulness, and in permitting the State, over Ford's objection, to elicit testimony in its case-in-chief from McQueen that Eltahir was a "quiet, nice person[, n]ice to everybody[,]" and from Kane that Eltahir "was a cool person[, h]e was never, you know nasty or hostile, or anything." The Court, nonetheless, concluded that the error was harmless beyond a reasonable doubt.

The Court of Appeals held that the circuit court properly permitted Brown to testify about Ford's reaction to being told that he had to leave her home—that he "cursed [her] out, and he slammed back the front door and left"—as evidence of consciousness of guilt. The circuit court did not err in determining that this evidence was relevant, and that it did not abuse its discretion in concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice or considerations of cumulative evidence.

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Ronald Cornish v. State of Maryland, No. 12, September Term 2018, filed October 30, 2018. Opinion by Greene, J.

https://www.courts.state.md.us/data/opinions/coa/2018/12a18.pdf

CRIMINAL PROCEDURE – MARYLAND RULE 4-331 – NEWLY DISCOVERED EVIDENCE – PRIMA FACIE

CRIMINAL PROCEDURE – MARYLAND RULE 4-331 – NEWLY DISCOVERED EVIDENCE – RIGHT TO A HEARING

Facts:

Mr. Cornish was convicted of first degree murder and related offenses, which stemmed from a drug deal gone awry. The State's star witness, Richard Pope ("Mr. Pope"), testified that he had connected Mr. Cornish with the victim for the drug deal. According to Mr. Pope's testimony at trial, while getting out of the victim's car to conduct the drug transaction, he heard a struggle and two gunshots that led to the victim's death. Mr. Pope then claimed that Mr. Cornish instructed him to help dispose of the body and the victim's car and that the two of them then burglarized the victim's home.

At trial, Mr. Pope acknowledged that in his discussions with police, he initially downplayed his knowledge and involvement in the murder but that he later implicated himself in the events. In his trial testimony, however, Mr. Pope contradicted these earlier statements in which he distanced himself from the murder. For example, he admitted to being with Mr. Cornish during the murder and subsequent crimes. Upon being asked why he had suddenly decided to admit to being present during the crime, Mr. Pope said it was the "right thing to do." Thereafter, Mr. Cornish was convicted and later sentenced to life plus twenty years.

Unknown to Mr. Cornish or his defense counsel, prior to the crimes that occurred on November 8, 2012 and during the trial of Mr. Cornish, Mr. Pope was under investigation for various crimes. As a result of those investigations, Mr. Pope gave certain statements to investigators that directly contradicted the testimony he gave at Mr. Cornish's trial. Once Mr. Cornish learned of Mr. Pope's statements to investigators, Mr. Cornish filed a Motion for New Trial in the Circuit Court. His motion alleged that two statements made by Mr. Pope, one in May 2013 and another on December 9, 2016, constituted newly discovered evidence that warranted a new trial. In the May 2013 statement, Mr. Pope distanced himself from the murder, which directly contradicted his testimony at trial. In the December 9, 2016 statement, Mr. Pope indicated that he was pressured to testify by the investigating detective for the case. Specifically, Mr. Pope stated that he was threatened with prosecution for the murder if he did not testify. This contradicted his testimony that he testified because it was the "right thing to do."

Without conducting a hearing on Mr. Cornish's Motion for New Trial, the trial court denied the motion. Mr. Cornish appealed the denial to the Court of Special Appeals which held, in an unreported opinion, that the trial court did not err in denying the motion for new trial. The intermediate appellate court concluded, without further explanation, that Mr. Cornish did not establish a *prima facie* basis for granting a new trial. The court assessed the merits of Mr. Cornish's pleading and concluded that "there was no substantial or significant possibility that the jury's verdict would have been affected." Finally, the Court of Special Appeals determined that Mr. Pope's change in his version of events on the day of trial "did not constitute 'newly discovered evidence[.]'"

Held: Reversed.

The Court of Appeals held that the facts alleged in Petitioner's Motion for New Trial on the grounds of Newly Discovered Evidence established a *prima facie* basis for granting a new trial. It also held that the Circuit Court erred when it denied Petitioner a hearing on his motion. Maryland Rule 4-331(c) and (f) requires that a hearing be held on the merits of a petition if the movant can establish, on a prima facie basis, that 1) newly discovered evidence exists that could not have been discovered by due diligence and 2) was material to the result at trial. The May 2013 and December 9, 2016 statements referred to in his motion established that newly discovered evidence existed that *may* warrant a new trial for the movant. The Court explained that establishing a *prima facie* basis does not guarantee that the movant's motion for new trial will be granted on the merits—only that the movant is entitled to a hearing.

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Siyyaha Crawford et al. v. State of Maryland, No. 1611, September Term, 2017, consolidated with Nos. 1605, 1606, 1607, 1608, 1609, 1610, 1612, 1613, 1798, & 1799, September Term, 2017, filed October 31, 2018. Opinion by Graeff, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/1611s17.pdf

CIVIL PROCEDURE – CONSTRUCTIVE CIVIL CONTEMPT

Facts:

The Circuit Court for Baltimore County issued separate orders for the Maryland Department of Health ("the Department") to admit appellees, 11 individuals who had been charged with crimes, to a state psychiatric hospital by deadlines set forth in the orders. After the Department failed to admit appellees by the deadlines, appellees petitioned the court to hold the Department in constructive civil contempt. The court subsequently issued an order of constructive civil contempt against the Department and several of its officials, even though, at the time, all appellees had been admitted to state psychiatric hospitals.

Held: Reversed.

Civil contempt proceedings are "intended to preserve and enforce the rights of private parties to a suit and to compel obedience" with court orders and decrees. *Dodson v. Dodson*, 380 Md. 438, 448 (2004) (quoting *State v. Roll and Scholl*, 267 Md. 714, 728 (1973)). "Civil contempt 'proceedings are generally remedial in nature and are intended to coerce future compliance.'" *Royal Inv. Group, LLC v. Wang*, 183 Md. App. 406, 447 (2008) (quoting *Roll*, 267 Md. at 728), *cert. granted*, 408 Md. 149 (2009), *appeal dismissed*, 409 Md. 413 (2009). Regardless of the penalty imposed in a civil contempt action, it "must provide for purging." *Dodson*, 380 Md. at 448. A purge provision offers the party "the opportunity to exonerate him or herself, that is, 'to rid him or herself of guilt and thus clear himself of the charge.'" *Jones v. State*, 351 Md. 264, 281 (1998) (quoting *Lynch v. Lynch*, 342 Md. 509, 520 (1996)).

A party generally may not be held in constructive civil contempt for delayed compliance with a court order if he or she has complied with the order prior to the contempt finding. Because the

purpose of civil contempt is to coerce compliance with a court order, once the party has done what he or she was ordered to do, compliance has been achieved, and there is nothing to coerce. Holding the party in civil contempt at that point does not have the effect of coercing compliance, but rather, of punishing the party for the past failure to comply. In a case where compliance with a court order is delayed, but there is ultimate compliance prior to the contempt hearing, a court generally is limited to proceeding against the party for criminal contempt, where punishment for a past violation of a court order is permissible.

The circuit court erred in finding the Department in constructive civil contempt when, at the time of the hearing, it had complied with the court orders and admitted appellees to Department facilities.

Charles Ray Reid, IV v. State of Maryland, et al., No. 2609, September Term 2016, filed September 27, 2018. Opinion by Battaglia, J.

https://mdcourts.gov/data/opinions/cosa/2018/2609s16.pdf

DECLARATORY JUDGMENT – SPECIAL FORM OF REMEDY

Facts:

Charles Reid was charged with one count of second-degree assault. A few months later, the State, for reasons not pertinent on appeal, entered a *nolle prosequi* on that charge.

A little over two years later, Reid filed a complaint against the State seeking declaratory judgment, alleging he had suffered various "stigma" from the "public display" of his *nolle prosequi* on Maryland Judiciary Case Search. Reid complained that the expungement process, which required a $35.00 fee and "upwards of $250.000 in legal fees,"[1] unduly burdened him, thus, depriving him "of his rights or property under Article 24 of the Maryland Declaration of Rights." As such, Reid suggested that the State be required to remove every case with a disposition of *nolle prosequi* or not guilty from Case Search.

The State subsequently filed a motion to dismiss, arguing that a declaratory judgment was inappropriate because Sections 10-101 through 10-109 of the Criminal Procedure Article of the Maryland Code already provided the relief sought. The State also argued that there was "no constitutional right to expungement" and that "the criminal records that are on the books for Mr. Reid are public records of past criminal proceedings" and "are not, in and of themselves, punitive."

Reid responded that public access to the information on Case Search had "significant ramifications for ordinary people," such as "being exiled from the community" and being unable to secure "better housing" or "a job." Reid also claimed that, in the case of a nolle prosequi disposition, the expungement process amounted to an "unconstitutional burden" placed upon a person who, as a matter of fact, was not found guilty of anything.

The circuit court granted the State's motion to dismiss, finding that Reid's request for a declaratory judgment was "an impermissible one" because Reid could easily apply for expungement in accordance with the already existing statutory remedy. The court also found that Reid was not constitutionally harmed because he chose not to fill out an expungement petition.

[1] As of October 1, 2017, there is no attendant charge to file a petition to expunge a case with a disposition of acquittal, dismissal, probation before the judgment (PBJ), *nolle prosequi*, stet, or not criminally responsible.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err in dismissing Reid's complaint for declaratory judgement.

In so holding, the Court reasoned that the history and breadth of Maryland's statutory scheme for expungement of court records insures that the Legislature intended for the statute to act as the primary means by which a person could have court records expunged, if certain statutory criteria are met. Thus, appellant's request for declaratory judgment was barred by Section 3-409(b) of the Courts and Judicial Proceedings Article of the Maryland Code, which provides that a declaratory judgment is inappropriate "[i]f a statute provides a special form of remedy for a specific type of case[.]"

The Court further noted that, should Reid be denied expungement of his criminal charge, he may have declaratory relief available to address any lingering constitutional concerns. If Reid achieves expungement of his criminal charge, however, he will certainly have gotten his remedy.

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Daquan Middleton v. State of Maryland, No. 911, September Term 2017, filed August 28, 2018. Opinion by Battaglia, J.

https://mdcourts.gov/data/opinions/cosa/2018/0911s17.pdf

CRIMINAL LAW – REQUIRED EVIDENCE TEST – RELATIONSHIP BETWEEN SPECIFIC-INTENT SECOND-DEGREE MURDER AND SPECIFIC-INTENT FIRST-DEGREE ASSAULT

CRIMINAL PROCEDURE – CONVICTION OF UNCHARGED LESSER-INCLUDED OFFENSE – WHEN UNCHARGED OFFENSE IS BASED UPON A SEPARATE ACT THAN THE CHARGED GREATER OFFENSE

Facts:

One evening, after leaving work on his bicycle, Robert Ponsi was accosted by a group of "between five and eight" juveniles, including Daquan Middleton, Antwan Eldridge, and fifteen-year-old P.G. During the attack, P.G. had produced a knife and stabbed Ponsi eleven times and inadvertently stabbed Middleton twice in the leg in the process.

As Ponsi lay on the ground, the attackers took his phone and bicycle; Middleton and Eldrige having made off with the bicycle. Ponsi died later that evening from the stab wounds. After abandoning the bicycle, Eldridge decided to call 911 to seek assistance for Middleton's leg, claiming the two had been "attacked."

After connecting the Ponsi attack and Middleton "attack," police obtained statements from Middleton and Eldrige. In those statements, both acknowledged that the group had intended to rob Ponsi, but not to hurt him. Both also admitted to having either "kicked" or "stomped" Ponsi as he lay on the ground.

At a bench trial, the court found Middleton guilty of robbery, conspiracy to commit robbery, and first-degree assault, a charged not included in the indictment. The trial judge found that the assaultive acts underlying Middleton's first-degree assault conviction included the intent to frighten as well as the "stomping," committed as part of a group assault on the victim, but not the stabbing.

On appeal, Middleton argued that he was convicted of an offense not expressly or impliedly charged in the indictment, and as such, his conviction and its attendant sentence were illegal. In support of this contention, he first averred that assault in the first degree is not a lesser-included offense of murder. In the alternative, Middleton asserted that because the trial court found that the first-degree assault and the murder of the victim were not based upon the same act, he could not be properly convicted of assault in the first degree.

The State argued that Middleton received adequate notice that he had been charged with an assault and that the merger of offenses should not apply here.

Held:

Conviction of assault in the first degree vacated. Sentences for robbery and conspiracy to commit robbery vacated. Case remanded to circuit court for resentencing for robbery and conspiracy to commit robbery.

The Court of Special Appeals first reiterated that, "a defendant may only be convicted of an uncharged lesser included offense if it meets the [required evidence] test," and the "offenses are based on the same act or acts."

The Court, thus, first found that "this variety of first-degree assault" is, under the required evidence, a lesser-included offense of second-degree murder based upon the specific intent to inflict grievous bodily harm.

The Court, however, next found that the stabbing (hence the murder) and the assault committed by Middleton were two separate acts. Because the only charged first-degree assault in this case was subsumed within the murder charge, it could not be that first-degree assault which the court convicted Middleton, especially since he was acquitted of murder.

The Court, therefore, was compelled to hold that Middleton's conviction of first-degree assault was based upon a separate act than the murder. The only first-degree assault impliedly charged was a lesser-included offense of murder. Hence, Middleton was convicted of an offense that was not charged, either expressly or impliedly, in the indictment, and, under *Johnson v. State*, 427 Md. 356, 378 (2012), the judgment of conviction and its attendant sentence were found to be illegal and ordered vacated.

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State of Maryland v. Travis Thaniel, No. 936, September Term 2017, filed August 29, 2018. Opinion by Battaglia, J.

https://mdcourts.gov/data/opinions/cosa/2018/0936s17.pdf

CRIMINAL PROCEDURE – POSTCONVICTION PROCEDURE – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR AGREEING TO THE CLOSURE OF THE COURTROOM DURING VOIR DIRE

CRIMINAL PROCEDURE – POSTCONVICTION PROCEDURE – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO OBJECT WHEN THE TRIAL COURT AND COUNSEL ADDRESSED A JUROR NOTE IN PETITIONER'S ABSENCE

CRIMINAL PROCEDURE – POSTCONVICTION PROCEDURE – INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE THE ISSUE OF THE TRIAL COURT'S PURPORTED ERROR IN ADDRESSING A JUROR NOTE IN THE PETITIONER'S ABSENCE

CRIMINAL PROCEDURE – POSTCONVICTION PROCEDURE – CUMULATIVE EFFECT OF MULTIPLE ATTORNEY ERRORS

Facts:

In 2005, a jury convicted Travis Thaniel of first-degree murder, attempted second-degree murder, and the use of a handgun in the commission of a crime of violence. A panel of this Court affirmed his convictions on direct appeal.

Thaniel subsequently filed a postconviction petition, raising claims of ineffective assistance of both trial and appellate counsel. The postconviction court granted his petition and ordered a new trial. The State thereafter filed an application for leave to appeal, which was granted. On appeal, the following questions were presented:

I. Whether the postconviction court erred in concluding that trial counsel was ineffective in agreeing to close the courtroom during jury selection;
II. Whether the postconviction court erred in concluding that trial counsel was ineffective in failing to object when the trial court and counsel addressed a note from the jury in Thaniel's absence;
III. Whether the postconviction court erred in concluding that appellate counsel was ineffective in failing to raise on appeal an unpreserved claim that the trial court erred in addressing a note from the jury in Thaniel's absence; and
IV. Whether the postconviction court erred in concluding that the cumulative effect of trial counsel's alleged errors warranted postconviction relief.

Held: Vacated.

Case remanded to the circuit court with instructions to grant appellee the right to file belated motions for modification of sentence and for sentence review by a three-judge panel. The Court of Special Appeals answered the aforementioned questions accordingly:

The Court found that trial counsel had a reasonable basis for agreeing to the closure of the courtroom during voir dire, given the evidence that trial counsel had acted, at least in part, to avoid a possible outbreak of violence between spectators sympathetic to his client and spectators sympathetic to the victim. The postconviction court, therefore, erred in finding that trial counsel had performed deficiently. Furthermore, in light of *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), Petitioner failed to demonstrate prejudice. The court further found that, because trial counsel affirmatively waived the Petitioner's right to a public trial during voir dire, Petitioner's postconviction claim that his right to a public trial was violated was conclusively waived.

The Court also found that trial counsel waived Petitioner's presence at a bench conference, during jury deliberations, at which court and counsel addressed a note from the jury. Because Maryland Rule 4-231(c) expressly allowed trial counsel to do so, trial counsel did not act unreasonably in waiving Petitioner's presence. Moreover, Petitioner failed to show that, had trial counsel ensured that he was present at the bench conference, there is a reasonable probability that the outcome of the trial would have been different. Accordingly, the postconviction court erred in granting relief on this claim.

The Court next found that because trial counsel did not object to Petitioner's absence at the bench conference at issue, any claim that the trial court erred in conducting that bench conference in Petitioner's absence was unpreserved. Although there is no hard-and-fast rule that appellate counsel has no obligation whatsoever to raise an unpreserved issue, it is nonetheless true that, under these circumstances, Petitioner bore a high burden—he was required to show that there is a reasonable probability that the appellate court would have granted him relief on his underlying claim under the plain error doctrine. Because Petitioner made no such showing, the postconviction court erred in granting relief on this claim.

The Court, lastly, held that the only errors Petitioner did establish were trial counsel's failure to file timely motions for modification of sentence and for sentence review by a three-judge panel, as they were not contested by the State. The only relief to which he is entitled is the right to file belated motions seeking those avenues of relief. Because Petitioner has otherwise failed to show that either trial counsel or appellate counsel performed deficiently, his cumulative prejudice claim (which presupposes those non-existent errors) must fail.

Jason Andrew Poole v. Bureau of Support Enforcement O/B/O Jessie Roebuck, No. 1985, September Term 2016, filed August 28, 2018. Opinion by Battaglia, J.

https://mdcourts.gov/data/opinions/cosa/2018/1985s16.pdf

CHILD SUPPORT – CONTEMPT

CONTEMPT – NATURE AND FORM OF REMEDY

ATTORNEY'S FEE – AMERICAN RULE

ATTORNEY'S FEES – AMERICAN RULE – EXCEPTION

Facts:

In June of 2015, the Bureau of Child Support Enforcement filed a Petition for Contempt and Incarceration of Jason Poole ("Father") for failing to comply with a consent order, requiring him to pay $300.00 per month for child support and $10.00 per month toward arrearages, which, at that time, amounted to $20,517.09.

Father stipulated that he was in contempt of the consent order. At subsequent hearings, evidence was adduced that Father had regularly not made payments, purposely lied about his income, and stated he would not provide Jessie Roebuck ("Mother") any additional money until the "cuffs c[a]me out[.]"

Mother testified that she incurred attorney's fees and expenses related to the prosecution of the contempt action. Mother was required to retain private counsel because, despite removing layers of potential conflict, Father took issue with any State entity prosecuting the case due to Mother's employment at the Bureau of Child Support Enforcement of the Carroll County State's Attorney's Office.

The court determined that Father had failed to pay the contempt purge amount, that Father had the present ability to pay the purge amount, and that Father had an intent "to hide his income to avoid payment." As such, relying on Section 12-103 of the Family Law Article of the Maryland Code, the circuit court awarded Mother attorney's fees.

On appeal, Father challenged Mother's award of attorney's fees. He contended that attorney's fees are not available in a contempt action, pursuant to Maryland Rule 15-207. Mother, nonetheless, asserted that the circuit court did not err in awarding attorney's fees pursuant to the provisions of Section 12-103 of the Family Law Article.

Held: Affirmed.

The Court of Special Appeals first concluded that, Rule 15-207 does not provide for the recovery of attorney's fees in civil contempt proceedings. Upon this determination, however, courts are prompted to consult those rules or statutes governing the underlying action to determine the context under which attorney's fees may be available. In so doing, the Court found that the underlying action here was governed by Sections 12-101 et seq. of the Family Law Article. Section 12-103 of that Article specifically provides for the recovery of attorney's fees in child support cases.

The issue presented, then, became whether the provisions of Section 12-103, which permit the recovery of attorney's fees in child enforcement actions, are applicable in a contempt action governed by Rule 15-207(e).

The Court found that, with the passage of the new Family Law Article in 1984, the General Assembly intended to provide for attorney's fees incurred as a result of the enforcement of a child support order for the necessaries of a minor. Looking to other jurisdictions that have reviewed similar actions, governed by similar statutory provisions, the Court concluded that the collection of attorney's fees in this context also extends to contempt actions.

Here, an exception to the "American Rule," which generally prohibits a prevailing party from collecting attorney's fees absent an agreement, rule, statutory provision, or limited case law, existed because the child support enforcement statute specifically provides for the collection of attorney's fees.

County Council of Prince George's County, Sitting as the District Council v. Convenience & Dollar Market/Eagle Management Company, No. 1415, September Term 2014, filed September 5, 2018. Opinion by Kehoe, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/1415s14.pdf

LAND USE – MARYLAND-WASHINGTON REGIONAL DISTRICT ACT – PRINCE GEORGE'S COUNTY DISTRICT COUNCIL REVIEW OF PLANNING BOARD DECISIONS

Facts:

Convenience & Dollar is the owner of a small commercial property, improved by an 800-square-foot building and a parking area. Since the 1980s, the property has been used for retail purposes, and had been zoned as Commercial Shopping Center ("C-S-C"). Retail stores are permitted in C-S-C districts. In 2010, the District Council approved a new master plan and sectional map amendment, and rezoned the property from C-S-C to Residential-Townhouse ("R-T"). Because retail stores are not permitted in the R-T district, Convenience & Dollar needed to obtain a nonconforming use certification.

In 2012, Convenience & Dollar filed an application for certification. The planning staff found the documentary information submitted with the application to be scanty and inconsistent. Public records indicated a braid shop had been operating on the property for some time, but it was not clear if it operated without interruption of 180 days or more since the rezoning occurred. It also was not clear to the Board whether the braid shop operated independently of a convenience store on the property.

The Planning Board held an evidentiary hearing, at which neighbors testified that the convenience store had been in operation for at least the last thirteen years. They also testified a braid shop had shared the premises from 2007 to 2009. The owner of Convenience & Dollar confirmed this testimony.

The Planning Board granted the property owner's request to supplement the record with additional financial and tax records. When the hearing resumed, a representative of the planning staff testified that, in light of the additional documentation, staff recommended that the application be granted. The Planning Board voted unanimously to approve the application.

The County Council, sitting as the District Council ("District Council") elected to review the Board's decision, and reversed the Planning Board's decision. Based upon its de novo assessment of the evidence, the District County found that the evidence presented at the Planning Board hearing was insufficient to persuade it that the application should be granted. The Council's decision noted the absence of documentary evidence such as tax records, business records, public utility installation or payment records, and sworn affidavits.

Convenience & Dollar filed a petition for judicial review. The Circuit Court for Prince George's County reversed the decision of the District Council, concluding that the District Council exercised appellate jurisdiction over the Planning Board's decision. The circuit court remanded the case to the District Council for it to "review the Planning Board's decision regarding Petitioner's request for certification of a nonconforming use to determine whether the Planning Board's decision . . . was arbitrary, capricious, discriminatory, or illegal." The District Council filed a timely appeal.

Held: Affirmed.

The Court of Special Appeals held that the District Council erred when it reversed the Planning Board's decision. The County Council of Prince George's County, sitting as the District Council, exercises appellate rather than de novo jurisdiction when it reviews a decision by the Planning Board to grant or deny an application for a nonconforming use certification. Deciding whether something is a nonconforming use is a quintessentially local question, and therefore is within the Planning Board's original jurisdiction.

A nonconforming use certification application should be granted if the applicant proves: (1) when the nonconforming use began; (2) that, subject to certain exceptions, the use has continued without an interruption of more than 180 days; and (3) that there are no local code violations pending against the property other than its failure to have a use and occupancy permit. Because these inquiries are limited to the property in question, they are quintessentially local in nature. For that reason, the Court of Special Appeals held that deciding a non-conforming use certification application is a local zoning function, and that the Planning Board as original jurisdiction over such applications.

Because the District Council did not have original jurisdiction in this case, it could reverse the decision of the Planning Board only if the Board's decision was "not authorized by law, is not supported by substantial evidence of record, or is arbitrary or capricious." *County Council of Prince George's County v. Zimmer Development Co.*, 444 Md. 490, 573 (2015). This standard equates with the standard that courts apply in judicial review proceedings. *Zimmer*, 444 Md. at 573-74.

There is nothing in the District Council's decision to suggest that the Council viewed the Planning Board's decision as arbitrary, capricious, flawed by a misunderstanding of the law, or not supported by substantial evidence. Instead, the District Council conducted its own review of the evidence, weighed the evidence differently than did the Board, and concluded that it was not persuaded that the nonconforming retail use should be certified. In doing so, the District Council exceeded the proper scope of its review in cases in which the Planning Board has original jurisdiction.

Generally, if the Court reverses the decision of the District Council because it applied the incorrect standard of review, the Court should remand the case to the Council for further

proceedings. However, the *Zimmer* Court noted that remand is not necessary where it would be futile. 444 Md. at 581. Remanding the present case to the District Council for further deliberations would be futile. The District Council would have no choice but to affirm the Board's decision because it was unaffected by an error of law, was based upon substantial evidence, and was not otherwise arbitrary or capricious.

County Council of Prince George's County, Md., Sitting as the District Council v. FCW Justice, Inc., No. 2664, September Term 2014, filed September 5, 2018. Opinion by Kehoe, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/2664s14.pdf

LAND USE – MARYLAND-WASHINGTON REGIONAL DISTRICT ACT – PRINCE GEORGE'S COUNTY DISTRICT COUNCIL REVIEW OF PLANNING BOARD DECISIONS

Facts:

FCW Justice, Inc. ("FCW") owns a 3.3 acre property in Lanham, Maryland. The property was zoned light industrial (I-1) in the 1960s and has retained that classification since. The I-1 zone is a Euclidian—as opposed to a floating— zoning district. In 2003, the property was subdivided. The Planning Board granted the subdivision application but, concerned about building design, signage, and screening, imposed a condition that a detailed site plan be submitted and approved prior to any development. The Planning Board approved a detailed site plan in 2004, but the project was never built and the detailed site plan approval expired three years later.

In 2012, FCW purchased the property and proposed to build 12,755-square-foot building on the property to house a laundromat, car wash, and restaurant—all uses permitted in the I-1 zone. FCW submitted a detailed site plan for its proposed project pursuant to the condition imposed by the Planning Board in 2003, as well as a landscape plan, photometric plan, tree conservation plan, a conceptual stormwater management plan, drawings depicting all four sides of the proposed building, and a perspective drawing illustrating how the building would appear from the road.

In 2013, the planning staff recommended some minor changes to the plan. After FCW made those changes, the staff concluded that the detailed site plan met the statutory criteria and recommended approval to the Planning Board.

The Planning Board held a public hearing on the application, at which neighbors and nearby residents objected. While recognizing the objections, the Planning Board concluded that the detailed site plan met the requirements of the zoning ordinance and approved the plan. In its resolution, the Planning Board summarized FCW's proposal, described the surrounding uses, and noted that the proposed uses were permitted in the I-1 District, and that the building layout, setbacks, and green spaces complied with the requirements of the zoning ordinance.

The County Council of Prince George's County, sitting as the District Council ("District Council") exercised its authority to review the decision on its own motion, and held another public hearing. Two months after the hearing, the District Council adopted an order reversing and denying the decision of the Planning Board, perceiving several flaws in the Planning Board's

decision. The District Council found that the Planning Board failed to consider whether FCW's detailed site plan conformed to the land use recommendations of the master plan, and from that premise, conducted its own independent review of evidence produced at the Planning Board hearing.

FCW filed a petition for judicial review. In 2015, the Circuit Court for Prince George's County issued an opinion and order reversing the decision of the District Council and ordering the District Council to affirm the Planning Board's decision in its entirety. The District Council then filed a timely appeal to the Court of Special Appeals.

Held:

The Court of Special Appeals held that the District Council erred when it reversed the Planning Board's decision because the Planning Board's decision was supported by substantial evidence, and was neither flawed by a legal error nor otherwise arbitrary or capricious.

The Court of Special Appeals held that the Prince George's County, sitting as the District Council, exercises appellate jurisdiction when it reviews a decision by the Planning Board approving or denying a detailed site plan that is submitted to the Board pursuant to a requirement imposed by the Board's approval of a preliminary subdivision application for a property located in a Euclidian zoning district. The Planning Board exercises original jurisdiction over subdivision applications as well as "local function[s] related to planning, zoning, subdivision, or the assignment of street names and house numbers." *County Council of Prince George's County v. Zimmer Development Co*., 444 Md. 490, 570 (2015). Detailed site plans pertain to matters such as building location and design, the design of parking lots, grading, landscaping, the location of sidewalks, streets, dumpsters, recreational facilities within a development, and the design of entry signs. *See* PGCC § 27-282(c). These are matters of purely local impact, and so fall within the original jurisdiction of the Planning Board.

Additionally, when the District Council reviews a decision of the Planning Board granting or denying a detailed site plan application, the Council's review is limited to the specific issues addressed by the Planning Board. The District Council asserted that the Planning Board committed legal error by limiting its review to the three issues identified by the Planning Board: building design, signage, and screening. Pursuant to its authority in Prince George's County Code §§ 27-269(a)(3) and 27-286(a), the 2003 Planning Board limited the reviewable issues in the requested site plan to building materials and architecture, signs, and screening. The Court concluded that the Planning Board not only had the authority to condition approval of a proposed development on submitting a detailed site plan, but that the Board had the authority to limit the scope of the detailed site plan.

Generally, if the Court reverses the decision of the District Council because it applied the incorrect standard of review, the Court should remand the case to the Council for further proceedings. However, the *Zimmer* Court noted that remand is not necessary where it would be

futile. 444 Md. at 581. Remanding the present case to the District Council for further deliberations would be futile. The District Council would have no choice but to affirm the Board's decision because it was unaffected by an error of law, was based upon substantial evidence, and was not otherwise arbitrary or capricious.

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ATTORNEY DISCIPLINE

*

This is to certify that the name of

MAXWELL CLIFFORD COHEN

has been replaced upon the register of attorney in this State as of October 25, 2018.

*

By an Order of the Court of Appeals dated October 26, 2018, the following attorney has been disbarred by consent:

MICHAEL DAVID DOBBS

*

By an Order of the Court of Appeals dated October 26, 2018, the following attorney has been disbarred by consent:

MATTHEW PETER GORMAN

*

By an Order of the Court of Appeals dated October 26, 2018, the following attorney has been disbarred by consent:

CHARLES LEE TOBIAS

*

By an Order of the Court of Appeals dated October 26, 2018, the following attorney has been disbarred by consent:

SANDY N. WEBB

*

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JUDICIAL APPOINTMENTS

*

On September 21, 2018, the Governor announced the appointment of **PAMELA KNOOP ALBAN** to the Circuit Court for Anne Arundel County. Judge Alban was sworn in on October 11, 2018 and fills the vacancy created by the retirement of the Hon. Paul F. Harris, Jr..

*

On September 21, 2018, the Governor announced the appointment of **ELIZABETH SHEREE MORRIS** to the Circuit Court for Anne Arundel County. Judge Morris was sworn in on October 11, 2018 and fills the vacancy created by the retirement of the Hon. Paul G. Goetzke.

*

On September 21, 2018, the Governor announced the appointment of **ROBERT JEFFREY THOMPSON** to the Circuit Court for Anne Arundel County. Judge Thompson was sworn in on October 15, 2018 and fills the vacancy created by the retirement of the Hon. Michele D. Jaklitsch.

*

On September 20, 2018, the Governor announced the appointment of **ERIC WILLIAM SCHAFFER** to the District Court of Maryland – Frederick County. Judge Schaffer was sworn in on October 19, 2018 and fills the vacancy created by the retirement of the Hon. O. John Cejka.

*

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Ninety-Sixth Report of the Standing Committee on Rules of Practice and Procedure was filed on October 10, 2018.

http://mdcourts.gov/sites/default/files/rules/order/ro196_0.pdf

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UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

https://mdcourts.gov/appellate/unreportedopinions

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