

# Amicus Curiarum

VOLUME 27  
ISSUE 8

AUGUST 2010

A Publication of the Office of the State Reporter

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# COURT OF APPEALS

*Talbot County, Maryland, et al. v. Miles Point Property, LLC, et al., Talbot County Council, et al. v. Shore Lands, LLC*, No. 79, September Term, 2009, filed on July 26, 2010, opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/79a09.pdf>

## ADMINISTRATIVE LAW – JUDICIAL REVIEW – ZONING & LAND USE

Facts: Respondents Miles Point Property, LLC (“Miles Point”) and Shore Lands, LLC (“Shore Lands”) own property in Talbot County, in the towns of St. Michaels and Easton, respectively. Miles Point and Shore Lands filed requests with the Talbot County Council for reclassification of their properties under the county water and sewer plan. The Council considered each request, but ultimately denied the applications for reclassification.

Each respondent pursued review of the Council’s decision, but chose a different avenue to do so. Miles Point appealed the Council’s rejection to the Talbot County Board of Appeals (the “Board”), which found that it did not have jurisdiction to hear the appeal. Miles Point then appealed this decision to the Circuit Court for Talbot County, which found that the Board did have jurisdiction to hear Miles Point’s appeal, and remanded the case to the Board for reconsideration. Shore Lands filed a petition for a writ of administrative mandamus in the Circuit Court, without pursuing an appeal before the Board. The Circuit Court, citing its decision in Miles Point’s case, dismissed the petition on the grounds that Shore Lands was required to exhaust its administrative remedies by appealing the Council’s decision to the Board before pursuing review in the Circuit Court.

Talbot County appealed the Circuit Court’s decision in each case to the Court of Special Appeals. The cases were consolidated on appeal. The Court of Appeals, on its own initiative, granted certiorari to hear the case prior to argument in the intermediate appellate court.

Held: Judgment reversed with respect to Miles Point; judgment reversed in part and vacated in part with respect to Shore Lands. The Circuit Court erred in requiring Miles Point to pursue an appeal before the Board, as the Board did not have jurisdiction to hear that appeal under Section 5 of Maryland Code Article 25A (the “Express Powers Act”). The Express Powers Act defines the limits of the appellate jurisdiction which a charter county may confer upon its board of appeals. These limits allow review of adjudicatory decisions made by a county’s council.

Adjudicatory decisions are predicated on specific facts pertaining to the unique characteristics of a particular applicant or property. If a decision is not based on specific facts, however, but is rather based on general issues of law and policy, then it is a legislative decision. In the case of the Miles Point property, the Court of Appeals held that the Council's decision was based on general issues of law and policy, and was therefore legislative. The Council's findings of fact did not address the specific characteristics of the Miles Point property in any great detail, and instead focused on matters of state and local development policy, as well as the general status of Talbot County's water and sewer infrastructure. Because the Council's decision was legislative, and because the Express Powers Act does not contemplate vesting appellate review authority of legislative decisions in a county's board of appeals, the Board could not have had jurisdiction to hear such an appeal.

With respect to the Shore Lands property, the Court held that the Circuit Court did not err in dismissing Shore Lands's petition for a writ of administrative mandamus, but did err in requiring Shore Lands to seek an appeal with the Board before pursuing judicial review. Under Maryland Rule 7-401, administrative mandamus is only available in cases involving judicial review of a quasi-judicial decision of an administrative agency, where "quasi-judicial" is synonymous with "adjudicatory." Administrative mandamus will not lie to review a legislative decision. As with the Miles Point property, the Council's findings of fact regarding the Shore Lands property primarily addressed general issues such as development policy, funding schemes, and local infrastructure, and did not focus on the specific characteristics of the parcel of land at issue. As such, the Council's decision to deny reclassification of the Shore Lands property was a legislative action, and administrative mandamus will not lie to review that action. Likewise, the Court held that common law mandamus did not lie in this case, as common law mandamus is only available in cases involving judicial review of a ministerial act. An act is ministerial only if it involves no exercise of discretion; legislative decisions are by their nature discretionary.

The Council's legislative decisions pertaining to both parcels of land are still subject to narrow review under the Circuit Court's original jurisdiction, for the purposes of evaluating whether the council acted within its legal boundaries under existing law.

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*Miller Metal Fabrication, Inc. v. Wall, et vir.*, No. 147, September Term 2009, filed July 23, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/147a09.pdf>

APPELLATE JURISDICTION- FINAL JUDGMENT- INTERLOCUTORY ORDERS- CERTIFICATION

Facts: Miller Metal, the petitioner, manufactures custom machinery. The respondent, Dawn Wall, was injured by one of Miller Metal's machines while working at a food processing plant. Ms. Wall sued Miller Metal and Country Fresh Mushroom Co., the company that commissioned the machine for the plant, alleging a single claim arising out of the same occurrence against both defendants. The complaint included counts alleging liability arising out of negligence and strict liability, for design defect, manufacturing defect, failure to warn, breach of an express warranty, breach of implied warranties of merchantability and fitness for a particular purpose, and loss of consortium.

Miller Metal filed a motion for summary judgment, which the circuit court granted. Ms. Wall then filed a motion requesting the circuit court to certify the order granting summary judgment as a final judgment pursuant to Maryland Rule 2-602(b) even though the order was not a final judgment as to all parties. Rule 2-602(b) permits a court to certify as final a judgment that is otherwise not final as to all claims or parties upon entering an express finding of "no just reason for delay." Upon finding "no just reason for delay," The circuit court granted Ms. Wall's motion for certification, and she appealed to the Court of Special Appeals.

In an unreported opinion, the Court of Special Appeals affirmed in part and vacated in part the judgment of the circuit court. As to the circuit court's certification of the order granting summary judgment in Miller Metal's favor, the Court of Special Appeals merely noted that the appeal was proper, even though the judgment was not final as to all parties, because the trial court had certified its order as a final judgment pursuant to Rule 2-602(b). Both parties petitioned for issuance of a writ of certiorari from the Court of Appeals. The Court granted certiorari on both petitions.

Although the parties presented issues related to whether the judgment of the Court of Special Appeals was correct, the Court did not address those issues. Instead, because the circuit court abused its discretion when it certified as final the order granting summary judgment in Miller Metal's favor, the Court vacated the judgment of the Court of Special Appeals and remanded the case to that court with directions to vacate the judgment of the circuit court and remand for further proceedings.

Held: The circuit court abused its discretion when it certified as final the order granting summary judgment in favor of Miller Metal because the certification order did not set forth the findings supporting certification and the record did not clearly demonstrate "the existence of any hardship or unfairness" warranting a finding of "no just reason for delay."

The Court began by noting that generally appellate jurisdiction is contingent on the entry of a final judgment as to all claims and all parties to an action and, because certification under Rule 2-602(b) is an exception to that rule, certification is to be used sparingly. The Court then reiterated that a valid certification order must expressly find "no just reason for delay" and acknowledged that the circuit court order in this case made such a finding. The Court, however, disagreed with that finding.

After conceding that the trial court is particularly well suited to considering motions for certification under Rule 2-602(b), the Court emphasized that the appellate courts, on review, have a special duty to ensure that the trial court's discretion is carefully exercised. Further, the Court explained that findings explaining a trial court's certification decision and the factors supporting the determination of "no just reason for delay" ensure meaningful appellate review. The Court then considered the federal counterpart to Rule 2-602(b), Federal Rule of Civil Procedure 54(b), and the relevant standards of appellate review applied among the Federal Court of Appeals.

Noting that a majority of federal appellate courts either require express findings supporting certification or strongly encourage trial courts to make such findings, the Court adopted the standard of review expressed by the Fourth Circuit Court of Appeals: "When a trial court, after expressly finding 'no just reason for delay,' directs the entry of a final judgment pursuant to Rule 2-602(b), but fails to articulate in the order or on the record the 'findings or reasoning in support thereof, the deference normally accorded such a certification is nullified.'" The Court clarified, however, that a failure to articulate the reasons supporting a finding of no "just reason for delay," is not fatal to the appeal if the record clearly demonstrates "the existence of any hardship or unfairness" warranting a finding of "no just reason for delay."

Having established the proper standard of review, the Court held that the circuit court abused its discretion when it granted Ms. Wall's motion for certification under Rule 2-602(b) because the circuit court did not set forth the reasons supporting a finding of "no just reason for delay" and the record gave no clear indication of hardship or unfairness warranting such a finding. Moreover, the Court concluded that permitting the

appeal was not in the interest of judicial economy because Ms. Wall's complaint alleged a single claim against both Miller Metal and Country Fresh and any subsequent appeal would likely involve the same issues. Finally, the Court noted that certification under Rule 2-602(b) was not intended to permit trial court judges to "seek the benefit of 'early review by the appellate court'" and that such an interest is not an appropriate basis upon which to certify an order.

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*Attorney Grievance Commission v. Marcalus*, Misc. Docket AG No. 2, September Term, 2009. Opinion filed on May 18, 2010, by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/2a09ag.pdf>

ATTORNEYS - LEGAL ETHICS - SANCTIONS - DISCIPLINARY PROCEEDINGS

Facts: Attorney Jeffrey S. Marcalus represented a client accused of rape. Upon discovering the identity of the alleged victim, a woman identified as "Michelle," he removed himself as counsel and went to the police to volunteer information about his prior dealings with Michelle. Marcalus informed police that he had known Michelle in the social context, and that Michelle had at one point asked him for the prescription painkiller Vicodin, which he had in his possession under a valid prescription. When Marcalus asked what he would receive in return, Michelle suggested that she would perform oral sex on Marcalus. Marcalus admitted to the investigators that he had given her a single Vicodin tablet and received oral sex. He also informed the authorities that he had sex with Michelle on subsequent occasions.

The investigators found Marcalus's information to be credible, and included it in their reports. As a result of the accounting of Marcalus's conduct contained within the reports, Bar Counsel opened an investigation into Marcalus's conduct on behalf of the Attorney Grievance Commission (the "AGC"). The AGC docketed a complaint against Marcalus, alleging that he had violated Rules 8.4(b), 8.4(c), and 8.4(d) of the Maryland Lawyers' Rules of Professional Conduct. Sitting as a hearing examiner, a judge of the Circuit Court for Anne Arundel County found clear and convincing evidence that Marcalus engaged in solicitation of prostitution, assignation, and the illegal distribution of a controlled dangerous substance. The hearing judge found that these acts violated Rule 8.4(b) because Marcalus had committed a criminal act implicating his fitness as an attorney. The hearing judge also found that these acts violated Rule 8.4(d) because Marcalus had engaged in conduct prejudicial to the administration of justice. The hearing judge found that Marcalus had not engaged in dishonest, fraudulent, or deceitful conduct for the purposes of Rule 8.4(c), and therefore did not violate that rule.

On the strength of these findings of fact and conclusions of law, the AGC recommended to the Court of Appeals that Marcalus be disbarred. Marcalus took exception to several of the hearing judge's factual findings and all of the judge's conclusions of law; he also argued that the hearing judge should have applied the *corpus delicti* rule in his case. Marcalus recommended that as a sanction for his behavior he be reprimanded, and sentenced



to 100 hours of pro bono work.

Held: The Court agreed with the hearing judge's conclusions that Marcalus violated Rules 8.4(b) and 8.4(d). Violations of Rule 8.4(b) traditionally involve crimes of "moral turpitude," a highly fact-specific assessment. The felonious distribution of a controlled substance is sufficient to meet this standard; the analysis of whether the misdemeanor of assignment would be independently sufficient was unnecessary. The hearing judge was correct in finding that Marcalus violated Rule 8.4(d) because Marcalus's actions were of a type which would impact the perception of the courts and the legal profession, which in turn would be prejudicial to the administration of justice. Finally, the Court held that the corpus delicti rule, which prevents an extrajudicial confession unsupported by corroborating evidence from being the sole basis for a criminal conviction, is inapplicable in an attorney disciplinary action, because such actions are not criminal proceedings and are not meant to be punitive.

In determining a proper sanction, the Court considered numerous factors, including those enumerated by the American Bar Association in its *Manual on Professional Conduct*. A prior disciplinary action against Marcalus weighed in favor of a higher sanction. The selflessness of Marcalus's disclosures, however, which appeared to have been made primarily for the benefit of his former client and against his own interest, mitigated against a harsh sanction. The Court recognized that without Marcalus volunteering the information at his disposal, it was unlikely that he would have ever faced disciplinary action. The qualitatively minor and isolated nature of the act - involving a single pill, lawfully possessed, and only a single occasion - also suggested a lighter sanction. The Court held that the AGC's recommended sanction of disbarment would be too harsh, and ordered a sixty-day suspension from the practice of law.

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*Attorney Grievance Commission of Maryland v. Martin Bernard Brown*, Miscellaneous Docket AG No. 3, September Term, 2009. Opinion filed July 27, 2010, by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/3a09ag.pdf>

ATTORNEY DISCIPLINE - SANCTIONS - 90-DAY SUSPENSION

Facts: Respondent Martin Bernard Brown violated the Maryland Rules of Professional Conduct ("MRPC") and Maryland Rule 16-609 in his capacity as representative of Roberto Garcia. While representing Garcia on an unrelated matter, Brown was approached by Dianne L. Coston, the grantor of a mortgage to which Roberto Garcia was a successor in interest. In order for Coston to refinance her property, she was required to pay off her mortgage, and Brown agreed to accept Coston's check for payment on behalf of Garcia. He also agreed to draft a release on her behalf and to have Garcia sign it. The money was placed into a trust account, on which Brown later drew a check in the amount of Coston's payment, payable to cash. Brown gave this check to Garcia, without using the funds for his own personal benefit, yet Garcia never signed a release for the mortgage, nor did Brown ever prepare one. Coston complained to the Attorney Grievance Commission of Maryland ("AGC") that Brown had not obtained a release from Garcia. When AGC investigated the matter, Brown knowingly misrepresented to both the AGC and Coston that he had prepared a release and sent it to his client, prompting the AGC to dismiss the matter. Three years passed, and Coston still did not receive a release. When the AGC reopened the investigation, Brown once again lied about preparing a release.

Held: 90-day suspension. The Court of Appeals held that Brown violated (1) MRPC 4.1(a)(1) (Truthfulness in Statements to Others); (2) MRPC 8.1(a) (Bar Admission and Disciplinary Matters); and (3) MRPC 8.4 (c) and (d) (Misconduct) when he made knowingly false statements to the AGC and Coston regarding the mortgage release. Additionally, Brown violated Maryland Rule 16-609 when he drew a check on the trust account payable to cash. The Court viewed Brown's dishonesty as a serious violation. There were, however, several mitigating factors, including Brown's otherwise impeccable record, his remorsefulness, and his later assistance in acquiring a mortgage release for Coston. After considering the totality of the circumstances, the Court concluded that Brown's violations warranted a 90-day suspension.

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*Monmouth Meadows Homeowners Association, Inc. v. Tiffany Hamilton*, No. 43, September Term, 2009, filed on July 27, 2010, opinion by Adkins, J.

*Montpelier Hills Homeowners Association, Inc. v. Bode & Bonike Thomas-Ojo*, No. 44, September Term, 2009, filed on July 27, 2010, opinion by Adkins, J.

*Constant Friendship Homeowners Association, Inc. v. Kevin Tillery*, No. 45, September Term, 2009, filed on July 27, 2010, opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/43a09.pdf>

CIVIL PROCEDURE – REMEDIES – COSTS & ATTORNEY’S FEES – REASONABLE FEES

Facts: Petitioners Monmouth Meadows Homeowners Association, Montpelier Hills Homeowners Association, and Constant Friendship Homeowners Association (collectively, the “Associations”) attempted to collect delinquent homeowners association assessments from residents living within the Associations (Respondents Tiffany Hamilton, Bode and Bonike Thomas-Ojo, and Kevin Tillery, respectively; collectively, the “Residents”). The legal actions were performed by the law firm of Nagle & Zaller, which had contracts with the Associations governing the fees that would be charged in pursuing such actions. Nagle & Zaller attempted to collect on the debts, but was unable to do so. The Associations then established and recorded liens on the Residents’ properties for the amounts owed in accordance with the Maryland Contract Lien Act (“CLA”). The lien amounts included principal, interest, late fees, and attorneys’ fees. The homeowners association agreements between the Associations and the Residents required that the Residents pay reasonable attorneys’ fees in connection with pursuit of delinquent assessments.

The Associations initiated suits against the Residents in the District Courts sitting in Prince George’s County (with respect to the Thomas-Ojos) and Harford County (with respect to Hamilton and Tillery). In each case, the Associations won affidavit judgments against the Residents. The Associations also sought attorneys’ fees in those proceedings, calculated under the lodestar method, which takes as a starting point for a fee award the product of the number of hours reasonably expended on a legal matter and a reasonable hourly rate for the type of legal work performed. The District Courts declined to so calculate the fee awards, and instead awarded legal fees as a flat percentage of principal sought. The Associations appealed these fee awards to the circuit courts for each county.

On appeal in the Thomas-Ojos's case, the Circuit Court for Prince George's County discussed the use of the lodestar method of determining fees, but found that it was not bound to use the method. It instead made a fee award based on the reasonable fee factors found in Rule 1.5 of the Maryland Lawyers' Rules of Professional Conduct ("MRPC"). In Hamilton and Tillery's cases, the Circuit Court for Harford County awarded fees incurred in the filing of the liens on the properties at issue, and in pursuing the actions in the District Court, but not fees incurred on appeal. The Court of Appeals granted certiorari to consider whether the fee awards were calculated appropriately.

Held: Judgments affirmed. The Court held that it was inappropriate to use the lodestar method to calculate the fee awards in these cases, contrary to what the Associations had argued. The lodestar method is generally appropriate in the context of fee-shifting statutes. Such statutes usually involve complex civil rights litigation, and frequently involve relatively small monetary awards. Use of the lodestar method may return a fee award that is substantially larger than the actual principal recovered, and is designed to reward attorneys who undertake socially beneficial litigation. The Court held that these policy concerns did not apply here, as the CLA is not a fee-shifting statute. Furthermore, the disputes between the Associations and the Residents are standard breach of contract cases between private parties. The fact that the General Assembly chose to facilitate the enforcement of private contractual obligations through passage of the CLA does not elevate those obligations to matters of public interest.

The Court also held that lower courts considering an award of attorneys' fees in cases such as these should be guided by the reasonable fee factors listed in MRCP Rule 1.5. Courts should take into account the relative size of any prospective award to the principal amount in litigation. In addition, if the fees are being incurred according to an agreed-upon fee schedule, courts should consider the risk that certain rote tasks included in the schedule are being billed at a higher than reasonable rate. Where fees incurred pursuant to a contractual agreement are being passed on to a third party, as the Associations here were passing their incurred fees on to the Residents, courts may choose to consider the fee rates established by the contract, though the courts need not be bound by the terms of such an agreement if it improperly influences a reasonable fee award.

The Court went on to hold that the circuit courts in these cases did not err in making their fee awards. The Circuit Court for Prince George's County used a fee award approach that best encapsulated the one approved by the Court of Appeals in these cases. The Circuit Court relied on the factors listed in MRCP Rule 1.5, and considered the reasonableness of the overall fee

award. The Circuit Court for Harford County also properly emphasized the reasonableness of its fee awards in making its assessments.

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*Joseph M. Della Ratta, et al. v. Edward J. Dyas, Jr.*, No. 23, September Term, 2009, filed on June 9, 2010. Opinion written by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/23a09.pdf>

CORPORATIONS AND ASSOCIATIONS - STATUTORY INTERPRETATION - "PRINCIPAL OFFICE" LANGUAGE IN DISSOLUTION AND WINDING UP STATUTES

EVIDENCE - DENIAL OF EXHIBIT DURING ACCOUNTING PHASE OF LITIGATION

CONTRACTS

Facts: Petitioner Joseph M. Della Ratta and Respondent Edward J. Dyas collaborated to build three resorts in Ocean City, forming both a partnership and a limited liability company to facilitate the projects. Unfortunately, considerable differences between the accounting practices of both men contributed to the downfall of their partnership, and the years were marked by Della Ratta's numerous attempts to "wrongfully squeeze out" his partner. Finally, on January 10, 2005, Dyas sued in Anne Arundel County for a restraining order against three capital call letters Della Ratta had issued him, and later requested a judicially supervised dissolution of their partnership and LLC. Dyas alleged that Della Ratta provided a personal loan for their first resort on terms onerous to the partnership, that he unilaterally spent partnership money to repay a loan and have the loan documents assigned to him personally, and that he maliciously issued three capital call letters to Dyas demanding repayment of purported costs and cash advances on the second and third resorts.

Della Ratta moved to transfer the case to Montgomery County Circuit Court, arguing that Corporations and Associations ("CA") Article, Sections 9A-803(a) ("Maryland Revised Uniform Partnership Act" or "MRUPA"), 4A-903, and 4A-904(b) ("Maryland Limited Liability Company Act" or "MLLCA") conferred exclusive jurisdiction for dissolution and wind up of the entities in the county of each business's principal office. Over Della Ratta's protests, the Circuit Court for Anne Arundel County held a ten-day bench trial on the merits. After trial, Judge Caroom ruled in favor of Dyas, enjoined the capital calls, dissociated Della Ratta from the partnership pursuant to CA Section 9A-601(5)(iii), and appointed an auditor to inspect the accounts of the partnership and the LLC. He also made the determination that the parties had agreed to construct one of the resorts on a fixed price basis, rather than a "cost-plus" basis. Judge Caroom, however, refused to render a final decision regarding the merits of dissolution and wind up for either business entity,

referencing the "principal office" language in the MRUPA and MLLCA. He explained to the parties that he found the facts sufficient to order dissolution and wind up, but that Della Ratta would have the opportunity to persuade the court otherwise following the transfer of the case to the Circuit Court for Montgomery County.

On June 23, 2006, Chief Judge Bell, acting under Article IV, Section 18 of the Constitution of Maryland, specially designated Judge Caroom to sit as a Judge of the Circuit Court for Montgomery County in this case and to render a verdict. Following a subsequent telephone conference with the parties, Judge Caroom ordered the dissolution of the partnership and LLC, and ordered Della Ratta to return over three million dollars to the LLC before dissolution.

During the accounting phase of the trial, Della Ratta sought to introduce into evidence checks made payable to the partnership and signed by him. Finding that Della Ratta's accounting practices rendered the records inaccurate and unreliable, the trial court declined to reopen the evidence for admission of this exhibit.

Della Ratta appealed the trial court's final judgment, and the Court of Special Appeals affirmed. The Court of Appeals granted certiorari on the following matters: the subject matter jurisdiction of the trial court; the trial court's exclusion of Della Ratta's exhibit, the court's ruling that Della Ratta had contracted with the partners' LLC to build the third resort on a fixed price basis, and Della Ratta's judicially ordered dissociation from the partnership.

Held: Affirmed. The "principal office" language in CA Sections 4A-903, 4A-904(b), 9A-803(a) confers jurisdiction for the judicial supervision of the dissolution and wind up of a LLC and the wind up of a partnership exclusively in the circuit court in the county where the principal office is located. A different reading of this language would render portions of the statutes nugatory. Furthermore, a determination on the merits of dissolution in an improper county, followed by a transfer of the case to the appropriate county simply for the issuance of a formal order will not satisfy this statutory requirement. Judge Caroom's transfer of the case, however, complied with the statutory requirements. It was not a mere formality because the judge provided an opportunity for Della Ratta to challenge the dissolution claims during a telephone conference after Judge Caroom had been specially assigned to sit in Montgomery County. It is irrelevant whether the parties actually submitted additional evidence at this point, Judge Caroom had not made a final determination on the dissolution claims until after the case was transferred to Montgomery County, and thus ensured that

the order did not violate the statutory restriction on jurisdiction.

The Court, however, did not agree with Della Ratta's interpretation of CA Section 9A-803(a) as restricting which court could accept an *application* for wind up of a partnership. The statute rather limits *who* may file an application for wind up. The former interpretation would require severance of Dyas's dissolution actions from his other twelve claims and would not be a commonsense application of the statute. Dyas would have been entitled to a stay of the dissolution actions, pending resolution of his claims in Anne Arundel County, and if he were successful on his other claims (as he was here), collateral estoppel would lead to an order of dissolution in Montgomery County. By trying the issues in Anne Arundel County, and then transferring the entire case to Montgomery County for a decision on the dissolution claim, Dyas had achieved the same result.

As to dissociation, the Court held that the record contained sufficient evidence of Della Ratta's inappropriate conduct to support the conclusion that it was not reasonably practical for the partnership to continue with him as a partner. As to the order denying introduction of checks into evidence, substantial evidence regarding the gross inadequacy of Della Ratta's accounting and proffered checks placed the trial court within its discretion to exclude them. Finally, regarding the construction contract, the Court determined that the trial court's findings were not clearly erroneous when numerous letters and change orders signed by Della Ratta directly suggested a fixed contract price, notwithstanding Della Ratta's allegation that these were clerical errors.

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*Yearby v. State*, No. 119, September Term 2009. Opinion filed June 19, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/119a09.pdf>

CRIMINAL LAW - DEFENDANT'S KNOWLEDGE OF ALLEGEDLY WITHHELD EVIDENCE - ALLEGED VIOLATION OF *Brady v. Maryland*, 373 U.S. 83 (1963)

Facts: In late 2004, police were investigating a rash of armed robberies that had taken place on or near the campus of Morgan State University. As a result of the investigation, Dameek Yearby, Petitioner, was charged with robbery with a dangerous weapon, first degree assault, and related offenses, after a victim selected his photo from an array. Yearby was convicted by a jury in the Circuit Court for Baltimore City of robbery, second degree assault, and theft of goods with a value less than \$500.

During a pretrial suppression hearing, and subsequently, during trial, Yearby's counsel cross-examined the lead investigator, Detective James B. Harrison, about other robberies that had occurred during the same time frame on or near the Morgan State campus. Defense counsel complained that the State had withheld exculpatory information regarding those other crimes, and asserted that her own independent investigation had shown that a different suspect who "look[ed] just like" her client had been implicated. Harrison responded that, based on the victim's physical description of her assailant, and Harrison's own chance encounter with Yearby following an assault against Yearby, Yearby was the only suspect he had ever considered for the particular robbery at issue. Consequently, when Detective Harrison prepared the photo array, he did not include other suspects, but rather, used photos of others who, in his opinion, matched the overall physical description given by the victim.

After the jury returned its verdict, Yearby filed a motion for new trial and raised, for the first time, a claim that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding the alleged exculpatory evidence that would be revealed in Detective Harrison's investigatory file. The trial court denied the motion for new trial, and Yearby appealed to the Court of Special Appeals, which affirmed the convictions in an unreported opinion. The intermediate appellate court held, *inter alia*, that Yearby had failed to satisfy any of the required elements of his *Brady* claim. Yearby petitioned for certiorari, and the Court of Appeals granted the petition to consider his *Brady* claim.

Held: Yearby failed to satisfy a threshold requirement of his *Brady* claim: that the State had actually suppressed the allegedly exculpatory evidence. The Court explained that a *Brady*

claim, which is based on Due Process, requires three elements: the State withheld exculpatory evidence from the defendant; the evidence was favorable to the defense, either as to guilt or mitigation of sentence; and the evidence was material, *i.e.*, the defendant must show a "substantial possibility" a different result would have ensued, but for the withheld evidence. In light of the defendant's actual knowledge of the allegedly withheld evidence, as determined from the record of the suppression hearing and the trial, the Court held that Yearby had failed to prove the State had withheld evidence, and therefore, his *Brady* claim must fail.

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*State v. Camper, No. 82, September Term, 2008, filed July 15, 2010, Opinion by Barbera, J.*

<http://mdcourts.gov/opinions/coa/2010/82a08.pdf>

CRIMINAL LAW – DEFENDANT’S RIGHT TO NOTICE OF SUBSEQUENT OFFENDER PENALTIES PRIOR TO WAIVING COUNSEL

PROCEDURE – MARYLAND RULE 4-215: WAIVER OF COUNSEL

Facts: Following the Circuit Court for Talbot County’s pretrial ruling, pursuant to Maryland Rule 4-215(d), that Respondent Jermaine Carroll Camper waived his right to counsel by inaction, Respondent represented himself at trial. The circuit court had made extensive efforts to encourage Respondent to seek counsel and warned him of the dangers of failing to do so, however, the court did not inform him of the potential for sentencing enhancement, if he were a subsequent offender. A jury tried Respondent and convicted him of attempted distribution of cocaine and conspiracy to distribute cocaine. The trial court sentenced Respondent to a mandatory ten-year sentence without the possibility of parole, pursuant to Maryland Code (2002, 2008 Cum. Supp.), § 5-609 of the Criminal Law Article, because Respondent had a prior drug offense conviction.

Respondent argued on appeal to the Court of Special Appeals that the trial court had not complied with the requirement of Rule 4-215(d) that the court, before finding a waiver of counsel by inaction, must ensure that the defendant has been informed of, among other matters, “the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.” See Rule 4-215(d); (a)(3). In particular, Respondent argued that the trial court failed to inform him that, if he were a subsequent offender, and if he were convicted of either drug charge, he might face a mandatory ten-year sentence without the possibility of parole. The Court of Special Appeals reversed the convictions and remanded the case for a new trial, holding that the trial court was required to, but did not, inform Respondent as part of the Rule 4-215(a) colloquy that he might face subsequent offender penalties and that a trial court’s failure to comply strictly with the Rule 4-215(a) requirements “can never be deemed harmless error.” The Court of Appeals granted the State’s petition for certiorari to consider whether the trial court’s error in failing to advise Respondent under Rule 4-215(a)(3) was harmless error because Respondent had actual knowledge of the information that must be disclosed pursuant to that provision of the Rule.

Held: Affirmed. The Court of Appeals rejected the State’s argument that, even though the trial court violated Rule 4-215 by not informing Respondent of the possibility of mandatory

enhancement, reversal of Respondent's conviction was unnecessary because Respondent had actual knowledge of that fact, thereby rendering the violation harmless.

In reaching that conclusion, the Court relied on *Knox v. State*, 404 Md. 76, 945 A.2d 638 (2008) in which the Court held that the Rule 4-215(a)(3) advisement includes notice of subsequent offender penalties. The Court then explained that there is no dispute that: Respondent was subject to a mandatory minimum sentence, the trial court was required to ensure that Respondent was advised of that potential mandatory penalty, and the trial court failed to comply with that requirement.

Next, the Court pointed to *Moten v. State*, 339 Md. 407, 409, 663 A.2d 593, 595 (1995) in which the Court held that the harmless error analysis does not apply to a violation of Maryland Rule 4-215(a)(3). The Court refused to depart from the rule established in *Moten*, explaining that strict compliance with the requirements of the Rule protects the defendant's constitutional right to counsel and best serves the administration of justice. The Court therefore held that Respondent is entitled to a new trial because the trial court committed reversible error in failing to inform Respondent, pursuant to Rule 4-215(a)(3), of the potential enhanced penalty to which he was subject upon conviction of either of the charged crimes.

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*TavonBomas a/k/a TavonBomar v. State of Maryland*, No. 125, September Term, 2008. Opinion filed on January 15, 2010 by Adkins, J.

<http://www.courts.state.md.us/opinions/coa/2010/125a08.pdf>

CRIMINAL LAW - EVIDENCE - EXPERT TESTIMONY- EYEWITNESS IDENTIFICATION.

Facts: Tavon Bomas ("Bomar") was tried and convicted of second-degree murder and use of a handgun in a crime of violence. The conviction was supported by eyewitness testimony, specifically, that of an off-duty police officer. The off-duty police officer saw the man he later identified as Bomar shoot a man in a crowd fifteen feet away and then flee, passing within a car length of the officer. Another witness, Dower, identified Bomar as the shooter after he was picked up for heroin, but he later recanted. The defense moved to suppress both eyewitness identifications, but the trial court denied the motion. Defense then proffered testimony from an expert witness in the field of neuropsychology. The expert discussed the effects of stress on memory, the influence of time and photo arrays on identifications and the ability of police and other trained officers relative to lay persons. The trial court, however, determined that the testimony would not be helpful to the jury because it was overly general and did not speak particularly to the key issues relating to the witnesses in this case, thus it did not permit the expert to testify. The Court of Special Appeals affirmed the trial court's decision. The Court of Appeals granted Bomar's Petition for Writ of Certiorari to consider the following two questions:

(1) Should the Court reconsider its decision in *Bloodsworth v. State*, 307 Md. 164, 512 A.2d 1056 (1986), and adopt a standard that favors the admissibility of expert testimony on eyewitness memory identification in criminal cases where the State's primary evidence of guilt is an eyewitness identification of the accused?

(2) Did the trial court improperly exercise its discretion in finding that testimony from an expert in the fields of neuropsychology and human memory would not be helpful to the jury in evaluating eyewitness identifications of the defendant?

Held: Affirmed. In exercising discretion whether to admit expert testimony by a licensed psychologist in the field of neuropsychology regarding factors that affect the

reliability of eyewitness testimony, trial courts should determine whether "the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Md Rule 5-702. While the Court conceded that its tone in *Bloodsworth* may have been negative, it affirmed the method of analysis used. Scientific advances since *Bloodsworth* have revealed a greater understanding of the mechanics of memory that may not be intuitive to a layperson, and trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert testimony in a particular case. Nevertheless, the substantive standard for admissibility set forth in *Bloodsworth* was not wrong, and is consonant with the current majority view. The Court declined to adopt the "presumptively admissible" standard for expert testimony on the mechanics of eyewitness identification that was advocated by Bomar. "Presumptive admissibility" would be improper because (1) it would wrongly shift the burden away from the party offering the expert and (2) without checks it would tend to create a battle of the experts which would add little to the jury's ability to decide cases properly. The Court concluded that the Circuit Court in this case correctly applied the "appreciable help to the trier of fact" test in excluding the expert testimony. Bomar's expert offered little testimony which spoke directly to the specific issues in this case. Furthermore, the expert offered scarce support for his generalities. Ultimately, the expert's testimony would likely not have informed the jury of any information which was both supported by adequate scientific studies and not common knowledge. Testimony such as this could create a real risk of confusion.

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*State v. Matthews*, No. 135, September Term, 2009. Opinion filed July 27, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/135a09.pdf>

CRIMINAL LAW AND PROCEDURE - MD. CODE, CRIMINAL PROCEDURE SECTION 8-301 - PETITION FOR WRIT OF ACTUAL INNOCENCE

Facts: The Respondent, George Matthews, pled guilty in the Circuit Court for Baltimore City on December 5, 2000, to murder in the second degree and use of a handgun in the commission of a felony or crime of violence. On January 11, 2001, the court imposed consecutive sentences of thirty years for murder and ten years (five without possibility of parole) for the handgun violation. In 2007, Matthews filed a *pro se* motion for new trial on the basis of newly discovered evidence, which was denied without a hearing, and Matthews appealed to the Court of Special Appeals, contending, *inter alia*, that under Maryland Rule 4-331, the Circuit Court was required to conduct a hearing before disposing of his motion. The intermediate appellate court agreed and vacated the judgment of the Circuit Court, mandating a hearing be conducted on the motion. *Matthews v. State*, 187 Md. App. 496, 979 A.2d 198 (2009). The State petitioned for certiorari, contending that the Circuit Court acted within its discretion when it denied without a hearing Matthews's motion, which had been filed six years after imposition of sentence (and there had been no direct appeal).

Three days after the mandate issued from the Court of Special Appeals, a new statute, now codified at Section 8-301 of the Criminal Procedure Article, Maryland Code, became effective. The statute permits a defendant, under conditions applicable to the instant case, to file a petition for writ of actual innocence "if the person claims that there is newly discovered evidence that . . . could not have been discovered in time to move for a new trial under Maryland Rule 4-331."

Held: The Court vacated the judgment of the Court of Special Appeals, and remanded the case with instructions to remand to the Circuit Court. Applying a general policy that courts should liberally construe pleadings, the Court held that the Circuit Court should consider Matthews's motion as a petition for writ of actual innocence.

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*Clavon Smith v. State of Maryland*, No. 105, September Term 2009, filed 23 July 2010. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/105a09.pdf>

CRIMINAL LAW - POSSESSION OF CDS (MARIJUANA) - SUFFICIENCY OF THE EVIDENCE - EVIDENCE THAT PETITIONER KNOWINGLY WAS WITHIN ARM'S REACH OF A BURNING MARIJUANA CIGAR WAS SUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION FOR CONSTRUCTIVE POSSESSION OF MARIJUANA

Facts: Clavon Smith was convicted in the Circuit Court for Baltimore City of possession of marijuana, in violation of Md. Code (2002 & Supp. 2009), § 5-601(a)(1) of the Criminal Law Article, after the police executed a search warrant at a dwelling where the occupants on one floor were found shrouded in a haze of marijuana smoke. When the police entered the middle room of the dwelling, they observed Petitioner, along with four other individuals, seated in chairs at a table. A marijuana cigar, a "blunt," was burning in an ashtray in the center of the table. All four of the individuals, including Smith, were within arm's reach of the blunt. Upon a further search, the police also discovered, in the pocket of a men's black leather jacket draped over a chair at the table, a black plastic bag containing 15 red Ziploc bags of marijuana. Smith was not seated in that chair. Smith did not reside at nor did he have a possessory interest in the dwelling. The police arrested Smith, and others, and he was charged with possession of marijuana. He received a jury trial in the Circuit Court for Baltimore City and was convicted of one charge of possession of marijuana.

Petitioner filed a timely appeal to the Court of Special Appeals, which held, in an unreported opinion, that the evidence was sufficient to sustain his conviction and affirmed.

The Court of Appeals granted Smith's petition for a writ of certiorari, \_\_ Md. \_\_, 995 A.2d 296 (2009).

Held: The Court of Appeals affirmed the judgment of the Court of Special Appeals. The proper standard of review to be applied upon a review of the sufficiency of the evidence in criminal cases is that set forth in *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979): whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone. The fact-finder has the ability to choose among differing inferences that might possibly be made from a factual situation. In that regard, the Court gives deference to the inferences that a fact-finder may draw.



The Criminal Law Article, § § 5-601(a)(1) and 5-402(d)(1)(vii) prohibit the possession of marijuana. The Legislature defined "possess" to mean "to exercise actual or constructive dominion or control over a thing by one or more persons." § 5-101(u). The Court determines whether the evidence was sufficient to sustain a conviction for possession by examining the facts and circumstances of each case. The Court has found several factors to be relevant in that determination, including the defendant's proximity to the drugs, whether the drugs were in plain view of and/or accessible to the defendant, whether there was indicia of mutual use and enjoyment of the drugs, and whether the defendant has an ownership or possessory interest in the location where the police discovered the drugs. None of these factors are, in and of themselves, conclusive evidence of possession. The only factor that the evidence and reasonable inferences in this record did not implicate Smith is ownership of premises, but, as noted, that factor alone is not dispositive.

The Court held that the circumstantial evidence upon which the State's case against Smith rested was sufficient to find, beyond a reasonable doubt, that he was in constructive possession of the blunt. He was in close proximity to it, it was in his view, he knew that the blunt contained marijuana, it was easily accessible to him, and it was reasonable to infer from the circumstances that he was engaging in the mutual use and enjoyment of the marijuana.

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*Jermaine Deeric Arrington v. State of Maryland*, No. 60, September Term, 2008, filed November 17, 2009. Opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2009/60a08.pdf>

CRIMINAL LAW & PROCEDURE - POSTCONVICTION PROCEEDINGS - REOPENING POSTCONVICTION PROCEEDINGS - WAIVER

CRIMINAL LAW & PROCEDURE - POSTCONVICTION PROCEEDINGS - MOTIONS FOR NEW TRIAL

Facts: Jermaine Deeric Arrington was convicted of second degree murder in August of 1995 at trial in the Circuit Court for Montgomery County. At his trial, the State called several eyewitnesses, and presented evidence that bloodstains on Arrington's pants were consistent with the victim's blood type. During deliberations, the jury asked three questions regarding eyewitness identification, and a specific question regarding the blood stains on Arrington's pants.

In July of 2000, Arrington filed a Petition for Post Conviction Relief, alleging ineffective assistance of counsel because his attorney at trial failed to have the blood evidence tested through a DNA analysis. The Circuit Court denied Arrington relief, finding that Arrington's counsel had made a strategic decision not to subject the blood evidence to DNA analysis. Three years later, Arrington filed a Motion to Preserve Forensic Evidence and to Conduct DNA Analysis, which the Circuit Court granted.

In 2006, Arrington filed motions to reopen the postconviction proceedings and for a new trial under Section 8-201 of the Criminal Procedure Article ("CP"). Arrington made two arguments. First, Arrington argued that DNA testing proved that the blood found on his pants did not belong to the victim. Second, Arrington argued additional ineffective assistance of counsel claims, which he did not make in his original ineffective assistance of counsel petition. The postconviction court granted Arrington's motion as to the DNA evidence, but denied his motion as to the additional ineffective assistance of counsel claims. The court also denied Arrington's motion for new trial, finding that Arrington was not actually innocent (a prerequisite for the granting of a new trial in these circumstances under Maryland Rule 4-331), and that there was no substantial or significant possibility that the jury verdict would have been affected by the newly discovered DNA evidence.

Arrington filed an Application for Leave to Appeal with the Court of Special Appeals. The intermediate appellate court denied Arrington's application, but upon Arrington's, agreed to transfer the case to the Court of Appeals as a direct appeal

pursuant to CP Section 8-201. Arrington presented the following questions:

1. Whether a petitioner whose postconviction proceeding has been "reopened" pursuant to CP Section 8-201 due to newly discovered favorable DNA evidence is entitled to introduce additional exculpatory evidence that would constitute grounds for relief separately or in combination with the DNA evidence?
2. Whether the postconviction court erred by denying [Arrington] a new trial after concluding that the DNA evidence did not raise a substantial or significant possibility that the verdict would have been different?

Held: Judgment vacated and case remanded for new trial. The Court of Appeals began its opinion by addressing the State's jurisdictional concerns. Citing its recent opinion in *Thompson v. State*, 411 Md. 664, 985 A.2d 32 (2009), the Court held that the "actual innocence" standard of Rule 4-331 did not apply, and that the "substantial probability" standard of CP Section 8-201 was the appropriate measure of Arrington's right to a new trial. The Court went on to hold that although Section 8-201 did not allow appeal under the circumstances of this case at the time Arrington appealed, the 2008 version of the statute applied retroactively. The Court also held that because Section 8-201 allowed a direct appeal to the Court of Appeals, Arrington did not have to petition for certiorari.

After recognizing jurisdiction, the Court addressed the two substantive questions raised by Arrington. With respect to the first question, the Court held that Arrington was precluded from making additional allegations of ineffective assistance of counsel because a reopening of postconviction proceeding under Section 8-201 is limited to claims based on the results of the postconviction DNA testing, and does not allow introduction of other claims that a defendant could have but did not raise in the original postconviction proceeding. Such additional claims are subject to the waiver provisions of CP Section 7-106. With respect to the second question, the Court held that the postconviction court abused its discretion when it found that there was "no substantial or significant possibility" that the jury would have reached a different conclusion at trial had the DNA evidence been available at the time. Pointing out that the State referenced the blood evidence in its opening statement, and that the jury asked a specific question about it during its deliberations, the Court concluded that there was a substantial

possibility that the jury would not have found Arrington guilty if the DNA evidence had been introduced at trial. Therefore, Arrington was entitled to a new trial under CP Section 8-201.

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*Rodney Wayne Bible v. State of Maryland*, Case No. 138, September Term, 2008, filed on October 14, 2009. Opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2009/138a08.pdf>

CRIMINAL LAW & PROCEDURE - PRESERVATION OF ISSUES ON APPEAL -  
SEXUAL CRIMES - SPECIFIC INTENT - SUFFICIENCY OF EVIDENCE

Facts: Petitioner Rodney Wayne Bible was convicted of third- and fourth-degree sexual offenses under Sections 3-307 and 3-308 of the Criminal Law Article ("CL"), as well as second-degree assault. Bible, age 49, was at a Goodwill store in Hagerstown when the store was visited by seven year-old Hannah S., her mother, and her two siblings. Hannah proceeded unaccompanied to the section of the store carrying toys, furnishings, and electronics, where Bible was present. Hannah's mother or sister periodically checked on her.

After about half an hour, Hannah and her family left the store and returned to their car. Hannah noticed Bible getting into the vehicle next to them, and became upset and anxious. She pointed to Bible, told her mother that Bible was "a pervert[,]" and said that he had touched her. Hannah's mother made note of Bible's vehicle information, returned to the store to inform an employee, and went to the police station to report what had happened.

The police traced the car to Bible and interviewed him. When Bible was asked if he was present at the Goodwill store, he initially denied recalling that he was there. As the interview proceeded, Bible admitted that he was present, but said that he did not notice any children. Hannah identified Bible, from a photo array, as the man who touched her at the store. A Goodwill employee also identified Bible as having been present at the store. Hannah's mother was unable to identify Bible from a photo array.

Bible was charged with third and fourth degree sexual offenses under CL Sections 3-307 and 3-308, and second-degree assault. At trial in the Circuit Court for Washington County, a surveillance video from the Goodwill store was introduced into evidence. The video showed Hannah and Bible together in the same section of the store, with Bible leaving a minute before Hannah. The video alternated between other cameras, however, returning to the section every few seconds. It did not show any contact between Bible and Hannah. Hannah testified that Bible stood about a foot behind her, and touched her buttocks more than once on top of her shorts, for about two seconds. She was unable to provide further detail, except to say that it did not feel to her like a "pat."

Bible argued that there was no evidence establishing that he touched Hannah aside from her testimony, and that her testimony could not establish beyond a reasonable doubt that any such touching was intentional, if it occurred at all. He rested his case without presenting any evidence. The jury found Bible guilty on all counts.

Bible appealed his conviction on the grounds that the evidence at trial was insufficient to sustain his convictions, and also argued that the buttocks were not an "intimate area" for the purposes of CL Sections 3-307 and 3-308. The Court of Special Appeals affirmed Bible's convictions, holding that Bible had not preserved the issue of sufficiency for review, but that in any event there was sufficient evidence introduced at trial to sustain the convictions.

Held: Convictions for third- and fourth-degree sexual assault reversed, and case remanded for resentencing on the second-degree assault conviction. Bible's argument on insufficiency of evidence was preserved for review. The Court of Appeals had previously held that the preservation requirement of Maryland Rule 8-131(a), which makes discretionary any appellate review of arguments not raised at trial, has the principal purpose of preventing the "sandbagging" of the trial court. That was not a concern here, as the trial court specifically instructed the jury on the intent elements for the sex offenses, and Bible had generally argued about a lack of proof at trial, even though he did not specifically address which elements of the crime were unsupported by evidence. To hold otherwise would work an unfair prejudice against Bible, and it is a goal of Rule 8-131(a) to avoid unfair prejudice to any party.

The Court further held that the buttocks are an "intimate area" within the meaning of CL Sections 3-301(d)(1)-(2). As the term "intimate" as used here is not defined in the statute or in any other statute, it is assumed that the common definition applies. An "intimate area" as described by the statute therefore includes the buttocks, because it would be so considered in common parlance.

As to the evidence of intent, sufficient evidence in this sort of case may be deduced from the circumstances of the touching or from the character of the touching. In this case, the only information available was Hannah's statement that Bible touched her for two seconds and her expression that he was "a pervert[.]" She provided no other information from which to infer intent, and no other evidence was adduced on the matter. The State could not prove that Bible had the intent to touch Hannah for sexual arousal or gratification on this evidence alone. Bible's statements to the police may arouse suspicion, but do not rise to the level of legally sufficient evidence.

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*State of Maryland v. Maurice Davis*, Case No. 48, September Term, 2009. Opinion filed June 30, 2010 by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/48a09.pdf>

CRIMINAL LAW - CRIMINAL PROCEDURE - MARYLAND RULE 4-215(e) - SUFFICIENCY OF DEFENSE ATTORNEY'S PRETRIAL STATEMENT TO TRIGGER MANDATORY INQUIRY INTO DEFENDANT'S REQUEST TO DISCHARGE COUNSEL

Facts: Defendant was arrested and charged with the burglary of a Baltimore County McDonald's restaurant and the robbery of two of its employees. On the morning of trial, in front of the Baltimore County Administrative Judge, the following colloquy occurred:

[DEFENSE COUNSEL]: Your honor, Mr. Davis is being brought up now. I spent a fair amount of time talking to Mr. Davis.<sup>[1]</sup> I told him what the guidelines are, which was six (inaudible) twelve. I indicated to him what my evaluation were [sic] of the facts of this case. He told me he didn't like my evaluation. Wanted a jury trial and new counsel.<sup>[2]</sup> I told him it was very unlikely that the Court was going to award him another attorney in this case.

[THE COURT]: Yep.

[DEFENSE COUNSEL]: So, right now its [sic] my understanding he wants a trial in this matter. And I believe he wants a jury trial. Is that correct Mr. Davis? . . .

[THE COURT]: All right. Mr. Davis, how old are you? What's your age?

[DEFENDANT]: Thirty-two.

[THE COURT]: And how far did you go in school?

[DEFENDANT]: G-

[DEFENSE COUNSEL]: He has a G.E.D. your honor.

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<sup>1</sup>According to Davis, this conversation occurred immediately before trial.

<sup>2</sup>Emphasis added.

[DEFENDANT]: A G.E.D.

[THE COURT]: Okay.

[DEFENSE COUNSEL]: He has difficulty speaking.

[THE COURT]: Sir, a jury is twelve people chosen at random in the community. You would have the right to participate in the selection of those jurors. Any verdict they render must be unanimous. And they must find you guilty beyond a reasonable doubt and to a moral certainty. Do you understand what a jury is?... Do you want a jury trial?

[DEFENDANT]: Yeah.

The administrative judge then ascertained from counsel the anticipated length of trial and called around to determine whether a judge was immediately available to begin proceedings. Soon after, the case went to trial, where the following colloquy took place:

[PROSECUTION]: Your honor, I'm calling for the record State of Maryland verses [sic] Maurice Davis. Case number K06-2076.

[DEFENSE COUNSEL]: Good morning your honor. William Giuffre for Mr. Davis, who is now present in the courtroom. We just left Judge Turnbull's courtroom. Mr. Davis made the election of a jury trial in this matter. He did wish to have new counsel. But that was denied.

A jury subsequently convicted Davis of two counts each of simple robbery and robbery with a dangerous weapon, as well as one count of second-degree burglary. Davis appealed his convictions to the Court of Special Appeals, arguing, among other things, that the Circuit Court administrative judge failed to investigate his reasons for wanting new counsel after his attorney expressed Davis's desire for a change, as required by Maryland Rule 4-215(e). The State, on the other hand, asserted that the words used by Davis's attorney did not constitute an express request for a change of counsel, and "thus the judge could have interpreted the exchange as relating to a prior conversation between [Davis] and his lawyer[,]" meaning that no further discussion on the



matter was required.

In an unreported opinion, the intermediate appellate court held that Davis's statement was "sufficient to trigger the Maryland Rule 4-215(e) mandatory inquiry." The court reversed Davis's convictions and remanded for a new trial. The Court of Appeals granted the State's Petition for Writ of Certiorari to consider whether the Circuit Court administrative judge was obligated to conduct a Rule 4-215(e) inquiry in response to defense counsel's comment that Davis had requested a new attorney.

Held: Affirmed. The Court held that a Rule 4-215(e) inquiry is required should any statement reasonably apprise a court of the defendant's wish to discharge counsel, regardless of whether it came from the defendant or from defense counsel. The statement need not be formally worded, but must simply express to the court that the defendant is dissatisfied with his or her current attorney. Here, Davis's statement to his attorney, which was relayed to the court, was plain - he wanted new counsel. It, coupled with Davis's express disapproval of his attorney's evaluation of the case, indicated a present intent to discharge counsel. The defendant's constitutional right to effective legal representation mandates that a judge fully consider any concerns that the defendant may have regarding the adequacy of his or her representation.

Under the Rule, when a defendant requests to discharge counsel, the court must provide the defendant an opportunity to explain his or her reasons for seeking the change and determine whether the request has merit. See *Gonzales v. State*, 408 Md. 515, 531, 970 A.2d 908, 917 (2009). Failure to do so is a reversible error. *Snead v. State*, 286 Md. 122, 131, 406 A.2d 98, 103 (1979) Here, even if the court was conflicted as to whether Davis was truly dissatisfied with present counsel, it could and should have questioned Davis directly regarding his attorney's statement. Failure to follow-up with the defendant once a possible Rule 4-215(e) request has been made risks appellate reversal and erring on the side of caution is advised.

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*Jamal Charles and Dwayne Drake v. State of Maryland*, No. 110, September Term 2009.

*Dwayne Drake and Jamal Charles v. State of Maryland*, No. 114, September Term 2009. Opinion filed June 18, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/110a09.pdf>

CRIMINAL LAW AND PROCEDURE - VOIR DIRE - CSI QUESTION

Facts: Dwayne Drake and Jamal Charles were tried jointly before a jury in the Circuit Court for Baltimore City on charges stemming from the shooting death of Bryant Jones at his daughter's sixteenth birthday party. Prior to trial, the State's Attorney submitted three voir dire questions concerning "CSI-type" evidence, or fictional scientific evidence portrayed on forensic crime dramas, such as the CSI series. Over defense counsel's objection, the trial judge propounded a single question, which he ostensibly drafted, that being:

[I]f you are currently of the opinion or belief that you cannot convict a defendant without "scientific evidence," regardless of the other evidence in the case and regardless of the instructions that I will give you as to the law, please rise. . . .

(Emphasis added). The jury found Drake and Charles guilty of second degree murder and use of a handgun in a felony or crime of violence. Drake also was convicted of wearing, carrying, or transporting a handgun. Drake was sentenced to consecutive terms of 30 years' imprisonment for second-degree murder and ten years' imprisonment, five without possibility of parole, for use of a handgun in a felony or crime of violence. Charles was sentenced to consecutive terms of 30 years' imprisonment for second-degree murder and 20 years' imprisonment, five without possibility of parole, for use of a handgun in a felony or crime of violence.

The Court of Special Appeals affirmed, *Drake and Charles v. State*, 186 Md. App. 570, 580, 975 A.2d 204, 210 (2009), reasoning that the voir dire question was appropriate, because "it was an inquiry made to identify venire persons who, without CSI-type evidence, would not convict any defendant" and emphasizing that "the scope and form of questions propounded during voir dire generally are within the trial court's discretion."

Held: The Court of Appeals reversed. The Court discussed the debate concerning whether there truly is a "CSI effect" and left to "another day" whether a voir dire inquiry related to the

purported "CSI effect" is appropriate at a theoretical level. Instead, the Court considered the appropriateness of the specific language used in the inquiry and determined that the use of the term "convict" in the heart of the inquiry rendered the question unacceptable. In so doing, the Court analyzed *State v. Hutchinson*, 287 Md. 198, 411 A.2d 1035 (1980), in which it was determined that the trial judge committed reversible error in failing to instruct the jury that it could return a "not guilty" verdict. The Court reasoned that like the jury instruction in *Hutchinson*, the voir dire question suggested that the jury's only option was to convict, regardless of whether scientific evidence was adduced.

The Court also found persuasive the Mississippi Supreme Court's discussion of a series of voir dire questions concerning the purported "CSI effect" in *Goff v. State*, 14 So.3d 625 (Miss. 2009). In that case, the Mississippi court determined that the voir dire questions posed by the prosecutor were phrased using neutral language, and therefore did not constitute error in their propounding. In contrast, the language of the voir dire question in the present case was not neutral, using the term "convict," solely, rather than including its alternative. Thus, the Court reversed the judgments of the Court of Special Appeals and remanded for a new trial.

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*Edwin Wright v. State of Maryland*, No. 6, September Term, 2009, filed November 16, 2009. Opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2009/6a09.pdf>

CRIMINAL LAW & PROCEDURE - VOIR DIRE

Facts: Edwin Wright was arrested and charged with possession of cocaine, possession of cocaine with intent to distribute, and unlawful distribution of cocaine. At trial in the Circuit Court for Baltimore City, he was convicted of possession and possession with intent to distribute, and sentenced to twenty-five years in prison. During jury selection, prior to the trial, the trial judge read a list of seventeen voir dire questions to the venire panel in quick succession. The judge then called each potential juror to the bench and asked if he or she had an answer to any of the questions asked. Some jurors were required to respond to the list of seventeen questions from memory more than fifty minutes after they had been read. Wright's trial counsel objected to the voir dire style, complaining that the venirepersons may have had difficulty remembering all of the questions.

Wright appealed his convictions, claiming that he was denied his right to a fair and impartial jury, as guaranteed by both the United States Constitution and the Maryland Declaration of Rights, due to the flawed voir dire method used by the court. The State argued that the voir dire method was effective in ferreting bias, as demonstrated by the substantial number of venirepersons who were struck during the voir dire process, before the trial jury was empaneled. The Court of Special Appeals affirmed the decision, agreeing that the method was flawed, but holding that it was not so flawed as to reach the level of an abuse of discretion. The Court of Appeals granted certiorari to consider whether the trial court properly exercised its discretion in relying on the chosen method of voir dire.

Held: Reversed and remanded for a new trial. The Court of Appeals held that the trial court erred by posing multiple questions to the venire panel without allowing for answers following each question. This method was too cursory an inspection of juror bias to guarantee that Wright's right to a fair trial was preserved. The overarching purpose of voir dire is to guarantee the selection of a fair and impartial jury. Trial courts are duty-bound to eliminate error from the voir dire process inasmuch as is possible. Although a trial court has discretion in conducting voir dire, that discretion is exceeded when a chosen voir dire method fails to effectively probe juror biases.

The fact that a number of venire persons were struck during the flawed voir dire process in this case does not demonstrate its effectiveness - the proper inquiry is not how many jurors were in fact struck, but how many should have been struck. Moreover, it would have been impossible for Wright to prove that he had not been prejudiced by the process used; the method itself foreclosed further investigation into the jurors' states of mind. While some jurors may have found it easy to conform accurately to the requirements of the voir dire process in this case, but given the gravity of the constitutional right at stake, the Court elected to err on the side of caution in requiring a more rigorous, careful, and systematic process.

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*James E. Hill v. Motor Vehicle Administration*, No. 82, September Term, 2009, filed on July 26, 2010, opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/82a09.pdf>

CRIMINAL LAW – VEHICULAR CRIMES – DRIVING UNDER THE INFLUENCE – BLOOD ALCOHOL & FIELD SOBRIETY – IMPLIED CONSENT – REFUSALS TO SUBMIT – LICENSE VIOLATIONS – DUE PROCESS

Facts: Petitioner James E. Hill was detained by Charles County Sheriff's Deputy Robert Herbert while driving through Pomfret. Herbert observed Hill weaving in his lane, at one point crossing the center line. Hill was driving a passenger vehicle and was authorized to do so, but was also the holder of a Class A Commercial Driver's License ("CDL"), which allowed him to operate commercial vehicles. Herbert observed, at the traffic stop, that Hill appeared unsteady on his feet, slurred his words, and had the odor of alcohol on his breath. Hill later admitted to consuming several servings of beer during the hours prior to the traffic stop.

Herbert subjected Hill to a field sobriety test, and subsequently took Hill into custody on suspicion of driving while intoxicated. Herbert advised Hill of his rights by reading to him Motor Vehicle Association Form DR-15, which explains that a detained motorist has the right to refuse an alcohol concentration test, as well as the sanctions that can result from such a refusal. Among other things, the form advises that a refusal to take the test could result in a 120-day license suspension, as well as a disqualification of commercial driving privileges for one year. The form also stated that a suspension may be modified to allow limited driving privileges pursuant to participation in an Ignition Interlock System Program (the "Interlock Program"). Hill refused to take the test, whereupon Herbert transported Hill to the Charles County Jail. Hill again refused to take the test at the jail.

Hill later requested an administrative hearing on the matter. At the hearing, Hill argued that he had been misled by the contents of the DR-15 form, because the form had not fully advised Hill of his rights, as required by due process and by the Transportation Article. Hill argued that the form led him to believe that he could retain his commercial driving privileges through participation in the Interlock Program even if he refused to submit to the test. In fact, that option applied only to passenger vehicle driving privileges. The administrative law judge ("ALJ") presiding over the hearing found that Hill had been properly advised of his rights, and imposed a 120-day suspension of Hill's passenger driving privileges, modified to allow participation in the Interlock Program, as well as a one year suspension of Hill's CDL. Hill sought review of the decision in

the Circuit Court for Charles County, which affirmed the ALJ's ruling. The Court of Appeals granted Hill's petition for a writ of certiorari.

Held: Judgment affirmed. The Court of Appeals has held that a detained driver has a due process interest in the possession of a driver's license, but that due process requires only that the State not unduly burden a detained driver's decision-making in determining whether to submit to an alcohol concentration test. In this case, the DR-15 form properly explained the applicable penalties, and did not create so serious an obstacle. Likewise, the Transportation Article requires that a detained driver be fully advised of applicable sanctions as a prerequisite for an ALJ's imposition of a suspension. The Court held that this does not require that a driver be warned of every potential sanction that could apply if a test is refused. The DR-15 form clearly advised Hill that his commercial driver's license would be disqualified if he refused the test, and that participation in the Interlock Program was limited to non-commercial driving privileges. The Court further held that it was completely within the General Assembly's discretion to create a bifurcated sanctions framework - whereby CDL disqualification would be imposed more rigorously than passenger vehicle license suspensions - and that there was no statutory ambiguity between these provisions of the Transportation Article.

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*Lydia Friedman, et al. v. Jerome B. Hannan*, No. 3, September Term, 2009. Opinion filed on January 14, 2010 by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/3a09.pdf>

ESTATES AND TRUSTS - ESTATES AND TRUSTS ARTICLE SECTION 4-105(4) - REVOCATION OF WILL PROVISIONS FOLLOWING DIVORCE - PROVISIONS "RELATING TO" THE SPOUSE

Facts: After almost 20 years of marriage, James Hannan ("Decedent") and Anna Zelinski divorced on February 6, 2001. The two did not have any children together. Decedent never remarried and died on September 10, 2006.

During the marriage, Decedent had drafted and executed a will, the relevant provision of which provided:

ITEM FOUR: Should my Wife, ANNA MARIE COVERT HANNAN, and myself die together by accident or otherwise, the estate is to be handled by LYDIA ELIZABETH COVERT FRIEDMAN and KEVIN HANNAN. All real and personal property, except jewelry belonging to my Wife and myself, be liquidated and proceeds there of [sic] be divided equally between my surviving immediate family members and those surviving [sic] immediate family members of my Wife: JEROME B. HANNAN, KEVIN HANNAN, MICHAEL HANNAN, KATHLEEN HANNAN and DANIEL HANNAN, LYDIA ELIZABETH COVERT FRIEDMAN, PATRICIA JO COVERT TOLLEY, BARBARA JANE COVERT, GENIA LOUISE COVERT, and KELLEY ANN FRIEDMAN (said KELLEY is to share her part with her sister KIMBERLY BETH FRIEDMAN).

It is assumed that the Decedent drafted the will himself, without the aid of legal counsel, although no evidence was presented to confirm that conclusion. Decedent's brother, Jerome B. Hannan ("Hannan") filed the will with the Register of Wills, and was appointed personal representative of the estate. The Orphans' Court for Baltimore City concluded that "[t]he remaining clause [in Item Four] pertaining to distribution provides that certain family members, including [Friedman], are entitled to distribution only if the Decedent died in a common disaster with his wife[.]" Accordingly, the Orphans' Court ordered that the Will not be admitted to probate, effectively leaving Decedent intestate.

Both parties appealed to the Circuit Court, seeking an interpretation of Item Four as a residuary clause and a determination as to whether Zelinski's named family members would



inherit under that clause. At trial, Zelinski testified that her named family members were her sisters and two of her nieces. She admitted that Decedent did not know her named family members prior to their marriage, and that those family members did not live with them during the marriage.

The Circuit Court agreed with the parties' interpretation of Item Four as a residuary clause, and therefore found that Decedent died testate. The court then considered the will as a whole and determined that its provisions relating to the immediate family of Decedent's "Wife" could not be fulfilled because the Decedent was no longer married. The court issued a written order, ordering that "only the immediate family members of the deceased...receive the proceeds from the estate[,] and that Friedman "be excluded from receiving any proceeds of the estate." The Court of Special Appeals affirmed in an unreported opinion and Friedman filed a Petition for Writ of Certiorari to the Court of Appeals. The Court granted certiorari to consider the following three questions:

1. Did the trial court err in deciding that the bequests to Friedman were conditioned on Decedent being married to Zelinski at the time of Decedent's death?

2. Did the trial court err in deciding that the bequests to Friedman were class gifts and not individual gifts even though the beneficiaries were individually named in the will?

3. Did the trial court err in deciding that ET Section 4-105(4) acts to revoke a person's testamentary gifts to his former spouse's specifically identified Family members when his will was executed during his marriage and unchanged after his divorce?

Held: Affirmed. The governing statute, Section 4-105(4) of Md. Code (1974, 2001 Repl. Vo 1.) Estates & Trusts Article ("ET") provides:

*Divorce or annulment.* -- By an absolute divorce of a testator and his spouse or the annulment of the marriage, either of which occurs subsequent to the execution of the testator's will; and all provisions in the will relating to the spouse, and only those provisions, shall be revoked unless otherwise provided in the will or decree. (Emphasis added).

Considering questions one and three together, the Court read "relating to" broadly, and held that ET Section 4-105(4) does not necessarily limit revocation to only those provisions that

directly benefit the former spouse. The Court drew this conclusion because the term "relating to" means that "there is a connection between two subjects, not that the subjects have to be the same." *Trimble v. BNSF Ry. Co.*, 636 F. Supp. 2d 916, 922 (D. Neb. 2009). The decision as to whether a particular provision is one "relating to" a former spouse is a factual determination to be made by the trial court. In doing so, a court should decide whether, in creating the provision, the testator was primarily motivated by the marriage or whether the testator had alternative reasons for the bequest, such as a relationship with the beneficiaries independent of the marriage. When making that decision, the court may presume that bequests made to a former spouse's family were made primarily because of the marriage, unless there is evidence of some independent reason in the will itself or the circumstances existing at the time of execution.

The Court also upheld the trial court's finding that the Decedent had created two classes of beneficiaries: his family and his wife's family. The Court held that the trial court was not confined to the traditional "class gift" criteria because such interpretive tools are subordinate to the paramount inquiry - the testator's intent. The trial court did not err when it concluded that the manner in which the Decedent listed the beneficiaries, according to family rather than alphabetically or in some other order, indicated that the Decedent viewed the bequests as to groups rather than to individuals.

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*John L. Mattingly Construction Co., Inc. v. Hartford Underwriters Insurance Company*, No. 136, September Term, 2009.  
*Wilma L. Phoebus, d/b/a Phoebus Electric Company v. Hartford Underwriters Insurance Company*, No. 144, September Term, 2009.  
Opinion filed July 27, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/136a09.pdf>

INSURANCE - WAIVERS OF SUBROGATION - POST-CONSTRUCTION LOSS

Facts: In 2002, K.B.K., Inc. and John L. Mattingly Construction Co., Inc., Petitioner, entered into an American Institute of Architects ("AIA") form contract to build an Arby's Restaurant in Dunkirk, Maryland. The contract designated K.B.K. as the "Owner" and Mattingly as the "Contractor" and provided that "the Project is" the Arby's Restaurant in Dunkirk. Section 16.5 of the form contract, governing "Waivers of Subrogation," stated that K.B.K. and Mattingly "waive[d] all rights against . . . each other and any of their subcontractors" for damages "covered by property insurance . . . applicable to the Work." "The Work," in turn, was defined in Section 6.3 of the form contract as "the construction and services required by the Contract Documents, whether completed or partially completed . . . The Work may constitute the whole or a part of the Project." (Emphasis added).

Mattingly hired several subcontractors, including Wilma L. Phoebus d/b/a Wilma Phoebus Electric Company, the other Petitioner herein, which performed electrical work. Although Phoebus was not a party to the K.B.K. - Mattingly contract, Section 10.3 of the form contract provided that subcontractors, such as Phoebus, were entitled to "all rights, remedies, and redress afforded" to Mattingly.

Construction was completed and the restaurant opened for business in October, 2003, after which K.B.K. made final payment on the contract. Subsequently, K.B.K. purchased from Hartford Underwriters Insurance Company, Respondent, a policy of property insurance insuring the restaurant, with effective coverage dates of October 1, 2004, through October 1, 2005.

Sixteen months after final payment was made, on May 8, 2005, a fire broke out, causing substantial damage to the Arby's. K.B.K. submitted a claim to Hartford for property damage totaling \$1,117,711.26, which Hartford paid, less a \$1,000 deductible. Thereafter, Hartford, as subrogee of K.B.K., filed a complaint against Mattingly and Phoebus in the Circuit Court for Calvert County, alleging negligence, breach of contract, and breach of warranty, asserting that the "failure of electrical wiring within the Arby's Restaurant" caused the fire.

Mattingly and Phoebus answered, generally denying liability and asserting various defenses. Thereafter, Petitioners filed motions for summary judgment, claiming that the waivers of subrogation clause, Section 16.5 in the AIA form contract, precluded Hartford's claim. Specifically, Mattingly and Phoebus argued that "the parties agreed to look solely to the insurance" to cover perils such as fire, and therefore, Hartford could not enforce any subrogation rights. The Circuit Court agreed, issuing an opinion and order granting summary judgment in favor of Mattingly and Phoebus, and determined that the waivers of subrogation clause was clear and unambiguous, because the term "the Work" in Section 6.3 included "the building as constructed, even after final payment." The Court of Special Appeals reversed and remanded in a reported opinion, *Hartford Underwriters Ins. Co. v. Phoebus*, 187 Md. App. 668, 979 A.2d 299 (2009), in which it concluded that the waivers of subrogation provision, read in tandem with the definition of "the Work," was ambiguous and "reasonably [could] be read to have more than one meaning temporally." *Id.* at 685, 979 A.2d at 309.

Held: The Court of Appeals affirmed, reasoning that the waivers of subrogation clause was ambiguous as to whether it encompassed losses sustained after completion of construction and final payment. The Court emphasized that the waivers of subrogation provision, including "other property insurance applicable to the Work," could refer reasonably to "other property insurance applicable" to the ongoing construction, or, "other property insurance applicable" to the completed Arby's. Thus, the waivers of subrogation clause, in which the words "the Work" are prominent, was internally inconsistent, and ergo, ambiguous.

The Court also reviewed cases from what Mattingly and Phoebus characterized as a "majority" of jurisdictions that recognize waivers of subrogation in AIA form contracts as encompassing losses sustained after completion of construction and final payment. The Court determined that those cases were inapposite, however, because the AIA contracts in those cases had additional completed project insurance clauses, specifically contemplating what to do in the event of losses occurring after the project was completed and paid for.

After determining that the waivers of subrogation clause, with the definition of "the Work" included as one of its terms, was ambiguous, the Court offered guidance to the Circuit Court on remand. When faced with an ambiguous contract, the Circuit Court must consider extrinsic evidence which sheds light on the intention of the parties at the time of the execution of the contract. In construing contract language, moreover, ambiguities are resolved against the draftsman, or, in the case of a form contract, the proponent of the contract. Although the Court of

Special Appeals stated that "there is no such extrinsic evidence" shedding light on the meaning of the waivers of subrogation clause, the Court noted that there may be other facts to explore, such as who proposed the form contract used in the present case, among the various AIA forms that may have been available. Because Mattingly and Phoebus asserted the viability of the waivers of subrogation clause as a defense, they must demonstrate by a preponderance of the evidence that Hartford cannot assert a subrogation claim against them under the form contract. In doing so, the Circuit Court must give consideration to who proposed the form contract at issue in this case, as well as any other relevant evidence of the parties' intent.

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*Suder v. Whiteford, Taylor & Preston, LLP*, No. 15, September Term, 2009. Opinion filed April 9, 2010, by Adkins, J.

<http://mdcourts.gov/opinions/coa/2010/15a09.pdf>

LEGAL MALPRACTICE - PROOF OF PROXIMATE CAUSE - TRIAL WITHIN-A-TRIAL DOCTRINE

Facts: Whiteford, Taylor & Preston's ("Whiteford") failure to timely file a request for an extension of time for its client, Suder, to elect her statutory share of her late husband's estate resulted in the trial court's refusal to allow the widow to elect her statutory share, costing her thousands of dollars. Suder subsequently filed a malpractice action against Whiteford. The firm denied liability, arguing that, although it breached its duty by missing the filing deadline, an earlier petition for an extension, which was filed by the widow *pro se* before she retained the firm, was erroneously granted. Although Suder had filed the petition before the deadline, the Orphans' Court failed to grant it until after the deadline had expired. Thus, according to Whiteford, the attorney's breach was not the proximate cause of the Suder's damages because, absent the attorney's wrongdoing, Suder would still be precluded from electing her statutory share due to this earlier violation. The firm urged the use of the trial-within-a-trial doctrine, where a tribunal dealing with the issue of legal malpractice retries the underlying case as if the attorney had never breached his duty to determine what would have been the likely result. Suder, on the other hand, argued that the doctrine should not be applied in situations, such as this one, where the parties had already engaged in the underlying litigation. She contended that the firm was limited to the defenses that had been raised by the widow's opposition, Downes, and thus, the outcome was already known because the trial had already taken place.

The Circuit Court for Talbot County granted summary judgment and entered a final judgment in favor of Suder after determining that the first extension was valid for public policy reasons. The court also ruled that, because Downes never challenged the first extension during the entire time the estate remained open, Whiteford could not later raise the issue. The Court of Special Appeals reversed the Circuit Court, holding that the grant of the first extension was a voidable order that could be contested by Downes at any time. It also approved use of the trial-within-a-trial doctrine to determine Whiteford's liability. In this regard, it concluded that, although Downes based his challenge of Suder's election on the fifth extension, Whiteford was not limited to those grounds and could challenge proximate cause by raising the validity of the first extension. Reasoning that no reasonable legatee would disregard the opportunity to prevail on the erroneous grant of the first extension if the fifth petition had been timely filed, the Court of Special Appeals reversed the Circuit Court's denial of

Whiteford's motion to dismiss and remanded the case to that court to enter a judgment in favor of the firm. Suder filed a Petition for Writ of Certiorari to the Court of Appeals, which it granted to consider the following to issues:

I. Whether the trial-within-a-trial doctrine of proving proximate cause is appropriate in a malpractice action in which the client is not denied the opportunity to proceed to trial.

II. Whether the CSA correctly concluded that, as a matter of law, Whiteford's conduct was not the proximate cause of Suder's damages.

Held: Reversed. The Court of Appeals held that the trial-within-a-trial doctrine is appropriate in legal malpractice actions where the underlying matter has already been litigated. This comports with the purpose of the doctrine, which is to determine what *would have occurred* had Whiteford timely filed the petition for the fifth extension. Thus, the question is whether Downes would have challenged the validity of the first extension had Whiteford timely filed the fifth request for extension. The trial-within-a-trial doctrine is designed to resolve that question. Ultimately, the triggering mechanism for the trial-within-a-trial doctrine is a dispute over proximate cause, not whether the client lost the chance of a trial.

Furthermore, the Court held that the attorney is not limited to the defenses actually raised by his client's opponents, but rather, may only assert those claims or defenses that the trier of fact determines the opposition would have raised if there had been no breach of the attorney's duty. To ascertain what would have happened, the trier of fact should examine the record of the underlying controversy and hear testimony from the parties and counsel. The Court disagreed with the Court of Special Appeals's assessment, however, that Downes would have challenged the validity of the first extension because "no reasonable legatee would disregard the opportunity to prevail on the erroneous grant of the first extension." There was some evidence that Downes may not have been aware that the first extension was invalid. Thus, the Court remanded the case to the Circuit Court for a trial to determine what challenges Downes would have asserted had Whiteford not breached its duty.

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*Harriette Julian v. Joseph Buonassissi, et al.*, No. 37, September Term, 2009. Opinion filed June 16, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/37a09.pdf>

REAL PROPERTY - PROTECTION OF HOMEOWNERS IN FORECLOSURE ACT - SUPERSEDEAS BOND REQUIREMENT - VOIDABLE VERSUS VOID *AB INITIO*

Facts: When facing foreclosure of her home as a result of her delinquency on a mortgage with AMC Mortgage Services, Inc., Harriette Julian became embroiled in an alleged foreclosure rescue scam perpetrated by Metropolitan Money Store, whereby she conveyed the property in fee simple to a LaShawn Wilson, who procured from Wells Fargo Bank, N.A., an Adjustable Rate Mortgage in the amount of \$482,000, which was secured by a Purchase Money Deed of Trust on the home. At settlement, Ms. Julian was relieved of her obligation under her mortgage with AMC, but did not receive a notice of her right to rescind the conveyance. Approximately one month after settlement, Wells Fargo assigned the loan to U.S. Bank, as trustee for Citigroup Trust, but Wells Fargo continued to service the loan. Approximately six months after settlement, the Deed of Trust was recorded among the land records of Charles County.

No payments were ever made on the Note, and Wells Fargo, as servicer of the loan, directed the substitute trustees to pursue a foreclosure action against the Waldorf property and Ms. Wilson under the name of the current note holder, U.S. Bank. On the same day, Ms. Julian filed with the Clerk of the Circuit Court for recording among the land records of Charles County a "Notice of Revocation of Power of Attorney and Rescission and Cancellation of Foreclosure Consultant Contract and Foreclosure Reconveyance Deed" ("Notice of Rescission"), putatively under the Protection of Homeowners in Foreclosure Act, Sections 7-301 to 7-321 of the Real Property Article, Maryland Code (1974, 2003 Repl. Vol., 2006 Supp.) (PHIFA). The substitute trustees, however, did not discover, and could not have discovered, the Notice of Rescission when they performed a title search. Thereafter, the Trustees did discover Ms. Julian's Notice of Rescission during a final title search, days before the public sale. At the sale, the substitute trustees, on behalf of U.S. Bank, purchased the property for \$480,000.

Ms. Julian intervened after the sale and filed Exceptions to the Sale alleging, among other claims, that the Deed of Trust was void *ab initio* because it was obtained in violation of PHIFA. U.S. Bank argued that Wells Fargo was a *bona fide* lender for value and U.S. Bank was a *bona fide* assignee for value, thereby allowing the sale to be ratified. After a hearing on the exceptions to the ratification of the sale, the judge in the Circuit Court for Charles County noted that, after resolving all inferences in favor of Ms. Julian, who he characterized as a victim, no evidence had been presented that either Ms. Wilson, Wells Fargo, or U.S. Bank



could be charged with "notice or knowledge of the malfeasance" of the mortgage broker, Metropolitan Money Store. The court ratified the trustees' report of the foreclosure sale and ordered the matter to be referred to the Court Auditor for the "Statement of an Audit." Ms. Julian appealed to the Court of Special Appeals (*Julian I*), but did not request a stay of the Circuit Court Ratification Order or file a supersedeas bond as required by Rules 8-422 and 8-423. The substitute trustees filed a "Motion to Require a Supersedeas Bond or Strike the Appeal"; another judge, without a hearing, ordered a supersedeas bond of \$430,000 or "such amount sufficient to secure that amount pursuant to Maryland Rule 8-423(b)(2)," in order to facilitate any stay of the Order ratifying the sale. Ms. Julian failed to file the bond, and appealed the supersedeas bond order as well (*Julian II*). The Court of Special Appeals affirmed the Circuit Court in *Julian I*, but declined to address the bond issue, which was then pending in that Court, because it had not been briefed. The intermediate appellate court held that violations of PHIFA rendered the deed voidable and not void *ab initio*. The Court also held that U.S. Bank enjoyed the same protection as a *bona fide* purchaser, because Ms. Julian failed to produce any evidence to the contrary or that Wells Fargo or U.S. Bank had sufficient notice to inquire into whether the transaction between Ms. Julian and Ms. Wilson was *bona fide*.

Held: The Court of Appeals vacated and remanded to the Circuit Court for further proceedings. The Court first held that Ms. Julian's failure to file a supersedeas bond to stay the Circuit Court's ratification of the foreclosure sale of her home did not moot the appeal, because the foreclosing bank, which also purchased the property at the foreclosure sale, was not a *bona fide* purchaser at the time of the foreclosure sale as it was "still in court and amenable to court orders." U.S. Bank argued that it was still protected under the supersedeas bond requirement as a *bona fide* assignee, but the Court maintained that although U.S. Bank may have enjoyed *bona fide* assignee status *at the time it took the assignment*, a *bona fide* purchaser, in the case of a foreclosure sale, "is a purchaser who takes the property without notice of defects in the foreclosure sale." As a result, the Court held that the Circuit Court judge was in error by assuming the *bona fides* of U.S. Bank's status at the time of the foreclosure sale, because the bank, admittedly, knew of the Notice of Rescission at the time of the foreclosure sale.

Upon reaching the merits of the case, the Court also held that Ms. Julian's conveyance of her home by Deed of Trust was merely voidable, not void *ab initio*, upon proof of violations of PHIFA. The Court engaged in statutory and legislative history analysis and concluded that the avowed failure to give the requisite notice of rescission rights may have rendered the deed in question only voidable, and not void. In remanding the case, the Court noted

that Ms. Julian would have the burden of production and persuasion regarding whether her Notice of Rescission was effective, as against U.S. Bank's interests, under PHIFA. The Court concluded that should Ms. Julian make a prima facie showing on these matters, the burden of production and persuasion would shift to U.S. Bank to give it the opportunity to prove, unlike what it failed to show as regards the supersedeas bond question, that it nonetheless was a *bona fide* purchaser or *bona fide* lender for value. The Court stated that that if U.S. Bank met its burden, the case would end, but if U.S. Bank did not carry its burden, the burden of production and persuasion would shift back to Ms. Julian to show that her rescission was valid as against U.S. Bank

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*Margaret McHale v. DCW Dutchship Island, LLC, et al.*, No. 123, September Term, 2009, filed 22 June 2010. Opinion by Harrell, J.  
<http://mdcourts.gov/opinions/coa/2010/123a09.pdf>

ZONING AND LAND USE - VARIANCES - CHESAPEAKE BAY CRITICAL AREA LAW - WHERE THE LEGISLATURE EVINCES ITS INTENT FOR AN AMENDMENT TO THE CRITICAL AREA VARIANCE REQUIREMENTS TO APPLY PROSPECTIVELY, THE AMENDMENT DOES NOT APPLY TO AN APPLICATION FOR A VARIANCE FILED PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT AND WHERE THE OBJECT OF THE APPLICATION IS TO CURE VIOLATIONS OF THE CRITICAL AREA LAW OCCURRING PRIOR TO THE EFFECTIVE DATE

Facts: DCW Dutchship Island, LLC ("DCW") owns a 1.92 acres (83,635.2 square feet) island, known as Little Dobbins Island (the "Island"), located in the Magothy River in Pasadena, Anne Arundel County (the "County"), Maryland. The entire Island lies within either the buffer or the expanded buffer of the Chesapeake Bay Critical Area program.

DCW acquired the Island in 2000. At that time, the Island contained a summer cottage of about 1,911 square feet of floor area and several other small structures and improvements. The total man-made impervious surface area on the Island was approximately 3,005 feet.

In or about 2001, Daryl Wagner, a member of DCW and a Maryland registered home builder, acting on behalf of DCW, demolished the old summer cottage and removed the debris, without the necessary permits or variances required by the Critical Area Law and County ordinances. Then, Wagner constructed several large structures (including a new home), a pool and deck, 846 square feet of sidewalks, and a boat ramp and concrete driveway with approximately 2,668 square feet of surface area to accommodate his amphibious vehicle. He did not obtain any permits or seek approval of the construction or plans for it from the County. In November 2004, the County authorities discovered the construction activities on the Island and notified DCW of the numerous violations. On 28 December 2004, DCW sought variances from the unobserved requirements of the Critical Area Law for each of the structures and improvements on the Island.

A County Administrative Hearing Officer heard the evidence for and against the requests for variances. Several community associations appeared at the hearings to oppose DCW's requests. The Hearing Officer granted some of the variances on 27 October 2005. Wagner appealed administratively the denials and the community associations and the Maryland Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Commission") appealed the decision to grant the variances, all to the County Board of Appeals. The Board of Appeals revised the Hearing Officer's decision in order to impose certain conditions on the grant of the variances. All parties sought judicial review in the Circuit Court for Anne Arundel County.

While the foregoing battles were ongoing, on September 2008, Margaret McHale, Chair of the Commission, filed another action (the present one) in the Circuit Court for Anne Arundel County, a Complaint for Restoration and Mitigation against DCW and Wagner pursuant to an amendment to the Critical Area Law, Md. Code, Natural Resources Article

§ 8-1815(a)(2)(i)(1), enacted earlier in 2008. The General Assembly adopted House Bill 1253, which included an amendment to § 8-1808(c), which provides the minimum standards for a local (in this case, the County) program sufficient to meet the goals of the Critical Area Program. The amendment at issue here required that, before a local jurisdiction could issue a permit, approval, variance, or special exception, the applicant shall prepare, and the local jurisdiction shall approve, a restoration or mitigation plan to abate the impacts to water quality or natural resources as a result of the violation. The applicant, before the local jurisdiction may take action, for example, on a variance application seeking relief from the Law's requirements, also must perform the abatement measures in the approved version of the mitigation/abatement plan. Because DCW had not prepared or carried out an approved restoration or mitigation plan, McHale alleged in her complaint that the variances granted by the Board of Appeals were null and void by operation of § 8-1808(c)(4), as amended. She sought relief in the form of the "deconstruction," removal, and abatement of the structures and improvements erected by Wagner and that the court order Wagner and DCW to restore and provide mitigation in accordance with a mitigation plan to be approved by the County.

The defendants filed a motion to dismiss arguing that the Complaint failed to state a claim upon which relief could be granted because the 2008 amendment should not be applied retrospectively to the variance application, which by the time the Complaint was filed, had been granted (in part) by the Board of Appeals. The Circuit Court granted the motion to dismiss.

McHale noted a timely appeal to the Court of Special Appeals. Before consideration of the appeal in the intermediate appellate court, the Court of Appeals, on its initiative, issued a writ of certiorari, 411 Md. 598, 984 A.2d 243 (2009).

Held: The Court of Appeals affirmed the judgment of the Circuit Court. The Court discussed the relevant statutory framework of the Critical Area Law, which the Legislature enacted to establish a Resource Protection Program for the Chesapeake and Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats. The Legislature vested the Commission with all powers necessary for carrying out the purposes of the Critical Area Law, including the authority to promulgate regulations for the administration and enforcement of the program, including regulations governing the establishment of comprehensive standards and procedures for buffer establishment and the protection and conservation of the buffer. The "buffer" means an existing, naturally vegetated area, or an area established in vegetation and managed to protect aquatic, wetlands, shoreline, and terrestrial environments from manmade disturbances. At the time of the operative facts, the buffer was, at minimum, a 100-foot area landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands. The Anne Arundel County Code expands the buffer to include contiguous sensitive areas, such as slopes of 15% or greater. With certain exceptions, new development activities may not be permitted in the buffer. The local jurisdiction has the primary responsibility of developing and implementing a Critical Area program,

subject to review and approval by the Commission. The local jurisdiction may grant a variance to the Critical Area criteria when a literal enforcement of provisions within the jurisdiction's Critical Area program would result in unwarranted hardship to an applicant.

Turning to the statutory interpretation and application questions at hand, the Court noted that, generally, all statutes are presumed to operate prospectively. There is, however, no absolute prohibition against retrospective application of a statute. The presumption against retrospectivity is rebutted only where there is clear expression in the statute to the contrary. An exception exists, however, in the context of land use and zoning cases, to the general presumption in favor of prospective application of statutes. In *Yorkdale Corp. v. Powell*, 237 Md. 121, 126-27, 205 A.2d 269, 272 (1964), the Court of Appeals held that, in the context of a land use or zoning matter, it will apply a substantive change to a statute to a matter still in litigation.

The Court held that the *Yorkdale* doctrine is applicable to the context of a Critical Area Law variance application. A review of *Yorkdale* and its progeny indicated that, in land use and zoning cases, the general presumption is that, in the absence of contrary legislative intent, a substantive change to the law occurring during the pendency of land use litigation and before any substantive rights vest, is to be applied to the pending litigation matter, i.e., understood therefore to be applied retrospectively to some extent. The Court considers first the Legislature's intent when determining whether a change to the law applies prospectively or retrospectively. The *Yorkdale* doctrine thus is actually the default rule that the Court applies where there is no clear legislative intent directing retrospective application. The doctrine does not engage where there is clear legislative intent that the law shall be applied prospectively only.

Thus, the Court applies the standard rules of statutory construction when there is an indication that the Legislature intended for the land use or zoning statute to have prospective application only. The Court's primary duty when interpreting the language of the statute is, after all, to effectuate and ascertain the intent of the Legislature.

The Court considered the uncodified language in Section 5 of House Bill 1253, as enacted in Ch. 119 of the 2008 Laws of Maryland, to shed light on the legislative intent, which provided that "and this Act may not be applied or interpreted to have any effect on or application to an alleged critical area violation that originated before the effective date of this Act." The effective date of the Act was 1 July 2008. The Court found that section was unambiguous and held that the Legislature intended for the 2008 amendment to be applied prospectively to situations where an underlying violation of the Critical Area Law pre-dated the amendment. Thus, the Court held that the requirement in § 8-1808(c)(4), as amended, to prepare and perform an approved restoration or mitigation plan, is to be applied prospectively only to variance applications seeking to cure violations occurring after the effective date of the amendment.

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# COURT OF SPECIAL APPEALS

*Dedra Billings, et al. v. County Council of Prince George's County, Maryland sitting as the District Council, et al.*, No. 2206, September Term, 2008, filed February 26, 2010. Opinion by Salmon, J.

<http://mdcourts.gov/opinions/cosa/2010/2206s08.pdf>

ADMINISTRATIVE LAW - WHAT DECISIONS OF THE DISTRICT COUNCIL OF PRINCE GEORGE'S COUNTY ARE SUBJECT TO JUDICIAL REVIEW UNDER MD. CODE (2003 REPL. VOL.), ARTICLE 28, SECTION 8-106(e).

Facts: Eastern Petroleum Corporation ("Eastern Petroleum") intended to expand upon an existing gas station and build a neighboring car wash on a 2.98-acre parcel in Prince George's County. Accordingly, Eastern Petroleum applied to the Prince George's County Zoning Hearing Examiner ("ZHE") for a special exception ("SE-4549") under the Prince George's County zoning ordinance. Also, Eastern Petroleum applied to the Prince George's County Planning Board ("the Board") for a necessary departure from Design Standards ("DDS-564").

On June 5, 2007 the Board recommended approval of DDS-564, which decision would become final within 31 days (on July 5, 2007) unless someone filed an appeal with the District Council for Prince George's County ("Council"), or the Council decided to review the Board's decision. On June 18, 2007, the Council elected to review DDS-564. Similarly, on September 4, 2007, the ZHE approved of SE-4549 with conditions, which decision would become final within 30 days (on October 4, 2007) unless someone filed an appeal with the Council, or the Council decided to review her decision. On September 24, 2007, the Council elected to review SE-4549. On October 22, 2007, however, after the time for appeals had expired, the Council announced the withdrawal of its election to review each case.

Four Prince George's County residents and a civic association representing local property owners ("appellants") filed, in the Circuit Court for Prince George's County, a petition for judicial review of the Council's actions. The Council and Eastern Petroleum moved to dismiss the petition, on the grounds that 1) the Council never made a "final decision" within the meaning of Md. Code (2003 Repl. Vol.), article 28, section 8-106(e), which authorizes judicial review of decisions of the Council, and 2) the appellants had failed to exhaust their available administrative remedies, because they never filed an appeal to the Council in either case.

Eastern Petroleum also moved to strike the petitioners' memorandum of law as untimely. The circuit court granted both motions.

Held: Judgment reversed; case remanded to the circuit court with instructions to remand both cases to the Council for further proceedings.

The Court held that the appellants had exhausted their administrative remedies because the Council's initial election to review both cases absolved the appellants of any obligation to file appeals, and that the Council's subsequent withdrawal of its elections was both illegal and constituted a "final decision" as to each case, within the meaning of article 28, section 8-106(e).

Initially, the Court held that the Council's withdrawal of each election was illegal under sections 27-312(f), 27-141, and 27-239.01(b)(9)(C)-(E) of the Prince George's County zoning ordinance, because in each case the Council failed to either affirm the decision under review, modify it, reverse it, or remand the case, and the Council failed to give written reasons for its decision. Furthermore, as to DDS-554, the Council failed to hold a required hearing.

The Court then held that the Council's withdrawal in each case constituted a "final decision" within the meaning of article 28, section 8-106(e). The Court reasoned that the withdrawals, which each occurred after the expiration of the appellants' time for appeal to the Council, had left appellants without "means of further prosecuting or defending their rights and interests in the subject matter in proceedings before the . . . [District Council], thus leaving nothing further for the [District Council] to do." *See Md. Comm'n on Human Relations v. Balto. Gas and Electric Co.*, 296 Md. 46, 56 (1983). The Court further held that the appellants had exhausted their administrative remedies, because there was nothing to appeal once the Council elected to review each case.

The appellants argued that the Court should order the circuit court to direct the Council to deny SE-4549 and DDS-554, reasoning that, under section 27-132(d), the Council had effectively approved each by failing to timely make a decision on review. The Court disagreed, holding that, as to SE-4549, the Council by its withdrawal did make a timely decision (albeit an illegal one); and that, as to DDS-554, under section 27-239.01(b)(9)(D), the time limit for a decision never began to run because the Council never held a hearing. Accordingly, the Court instead ordered the circuit court to remand the case to the Council, so that the Council could then properly affirm, modify, reverse, or remand in each case.

The Court also reversed the circuit court's decision to strike the appellants' memorandum of law. The Court held that, though the

memorandum was submitted late, Eastern Petroleum failed to demonstrate any prejudice.

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*State of Maryland v. Helen L. Holton*, No. 861, September Term, 2009, decided on July 1, 2010. Opinion by Davis, J.

<http://mdcourts.gov/opinions/cosa/2010/861s09.pdf>

CONSTITUTIONAL LAW - ARTICLE 10 OF THE MARYLAND DECLARATION OF RIGHTS - SPEECH AND DEBATE CLAUSE - MARYLAND CONSTITUTION, ARTICLE 3, SECTION 18 MARYLAND CONSTITUTION (providing that "No Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate")-  
SCOPE OF THE COMMON LAW LEGISLATIVE PRIVILEGE IN MARYLAND

*Montgomery County v. Schooley*, 97 Md. App. 107, 115 (1993), (holding that, "subject to the consequences of the Supremacy Clause, that immunity, conferred as a matter of common law, appears to be co-extensive in scope with the Constitutional immunity enjoyed by members of Congress and the Maryland General Assembly." (Citing *Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 681 (4th Cir.), cert. denied, 498 U.S. 815, 111 S. Ct. 56, 112 L. Ed. 2d 31 (1990)).

*Manders v. Brown*, 101 Md. App. 191 (1994) (holding that "[d]espite the common law origins of legislative privilege as it applies to local legislative bodies, federal and local privileges are essentially co-extensive.") (Citing *Montgomery County v. Schooley*, supra.)

SCOPE OF MD. CODE (2006 Rep. Vol., 2009 Supp.), COURTS & JUDICIAL PROCEEDINGS, C.J.P. § 5-501(providing that "[a] civil or criminal action may not be brought against a city or town councilman, county commissioner, county councilman, or similar official by whatever name known, for words spoken at a meeting of the council or board of commissioners or at a meeting of a committee or subcommittee thereof.").

Facts: Affirmed. A Baltimore City grand jury returned an indictment against appellee based on records and testimony regarding the proceedings of the Baltimore City Council and appellee's activities in her capacity as a member of the Economic Development and Public Financing Committee and as Chairperson of the Taxation and Finance Committee. The records and testimony included telephone calls and meetings with Ronald Lipscomb and Doracon Contracting, Inc., a developer owned in-part by Ronald Lipscomb, for a political survey for which appellee received payment which the State alleged was intended to influence appellee to vote in favor of public subsidies known as "payments in lieu of taxes" for the development of two parcels of land in Baltimore City. The trial court granted appellee's Motion to Dismiss the charges on the grounds that the only evidence obtained by the State, and alleged in the indictment, constituted legislative acts. The trial court ruled that the acts were protected under the common

law legislative privilege. The State Prosecutor appealed and argued that the circuit court erred and that the common law legislative privilege did not apply to local legislators in the context of a criminal prosecution.

Held: The circuit court was presented only with an argument that the common law legislative privilege did not apply to appellant in a criminal case and, therefore, the court only decided the applicability of that privilege. The Court of Special Appeals directed that the parties file supplemental memoranda after oral argument before the Court to address the applicability of C.J.P. § 5-501, which had not been raised before the circuit court. This Court affirmed the circuit court, holding that both the common law privilege and C.J.P. § 5-501 applied to protect appellee in this case.

The Court of Special Appeals first construed the speech and debate provisions of the Maryland Constitution as *in pari materia* with the federal constitutions Speech or Debate clause in *Blondes v. State*, 16 Md. App. 165, 175 (1972). Although local legislators are not expressly covered by the terms of either constitutional provision, in *Schooley, supra*, the Court of Special Appeals held that a common law legislative privilege applied to local legislators in the context of a civil action. That holding was reiterated in *Manders, supra*.

The State Prosecutor argued that the common law privilege should not apply in a State criminal prosecution of a local legislator for the reasons expressed by the Supreme Court in *United States v. Gillock*, 445 U.S. 360 (1980). The Supreme Court in *Gillock*, however, declined to apply a privilege to a State legislator in a *federal* criminal prosecution because of the Supremacy Clause.

The Court of Special Appeals held that the rationale of legislative independence is particularly applicable to local legislative bodies, which are products of State law and, thus are entitled to the same protection as State legislators in a criminal prosecution. In addition, the Court held that C.J.P. § 5-501, which provides that "[a] civil or criminal action may not be brought against a city or town councilman . . . for words spoken at a meeting of the council. . . ." also applied to the case *sub judice* and served as an additional ground for affirming the circuit court.

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*Harry Boston Palmer v. State of Maryland*, Case No. 1408, September Term 2008. Opinion filed July 6, 2010 by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2010/1408s08.pdf>

CRIMINAL LAW - CONSECUTIVE AND CONCURRENT SENTENCES - THE RULE OF LENITY

Facts: On December 19, 1980, appellant, Harry Boston Palmer, was sentenced to incarceration for ten crimes of violence. In 1995, most of the judicial record from this case was destroyed pursuant to the circuit court's records retention and disposal schedule. Only the trial court's docket sheet remained and it reflected the following sentences: "(C) Cts. 1 30 yrs. 2 Merge 3 10 yrs. 4 Merge 5 Merge 6 3 yrs. 7 30 yrs. 8 10 yrs. 9 Merge 10 3 yrs." The docket further indicated that the trial court imposed the following conditions: "Count 3 is consecutive to count 1, Count 6 is concurrent to count 3, Count 7 is concurrent to count 6, Count 8 is consecutive to count 7, count 10 is concurrent to count 8." Records from the Maryland Department of Public Safety and Correctional Services erroneously indicated that appellant was to serve a maximum incarceration of forty years when, in fact, the court's total was seventy years. In 2008, appellant moved to recalculate his sentences. The court denied appellant's motion and subsequently issued an amended order of commitment. Appellant twice moved to correct the amended order as an illegal sentence, and both motions were denied.

Held: There is no ambiguity where the trial court explicitly pronounced the way in which each count's sentence related to at least one other sentence. There is no ambiguity where the judicial record conflicts with records of the Maryland Department of Public Safety and Correctional Services, and the rule of lenity therefore does not apply. Appellant's maximum incarceration stood at seventy years, and the circuit court did not increase his sentence illegally when it issued an amended order of commitment to that effect.

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*Brandon T. Morris v. State of Maryland*, No. 2924, September Term, 2007. Opinion by Kenney, J. (retired, specially assigned). Filed on April 29, 2010.

<http://mdcourts.gov/opinions/cosa/2010/2924s07.pdf>

CRIMINAL LAW - DEATH PENALTY

CRIMINAL LAW- MERGER

Facts: Appellant, a convicted felon charged with murdering an armed police officer at a hospital while escaping custody in addition to other assault and robbery charges, contends that the Circuit Court for Howard County committed reversible error by denying his motion to strike the prosecution's notice of its intent to seek the death penalty, arguing that the death penalty is an "illegal sentence" because the Court of Appeals, in *Evans v. State*, 396 Md. 256 (2006), struck down Maryland's regulations on execution protocols.

Though he was not sentenced to death, appellant contends that he was prejudiced because his trial strategy was affected by the possibility of a death sentence. Additionally, citing studies for the proposition that jurors selected for capital cases "are more likely to convict than non-death qualifiers," appellant argues that he was prejudiced by the selection of a jury which had undergone *voir dire* for a death-penalty proceeding.

Appellant also argues that the Double Jeopardy Clause was violated when he was sentenced for both first-degree assault and armed robbery of one victim and first-degree assault and attempted armed robbery of another victim. As to each victim, he argues that the acts of assault and robbery were part of the same transaction.

Held: The Court of Appeals' decision in *Evans v. State*, 396 Md. 256 (2006), did not invalidate the death penalty. As the death penalty statute was not illegal at the time appellant received notice that the State would seek the death penalty, the trial court did not err by denying appellant's motion to strike the death penalty notice based on appellant's assertion that the death penalty was illegal.

The Court of Appeals has twice rejected the argument that seating a "death-qualified" jury denies a defendant the Constitutional right to an impartial jury at the guilt or innocence stage of the trial. Therefore, appellant was not prejudiced by the selection of a jury that had undergone *voir dire* for a death-penalty proceeding. Moreover, appellant put forth no evidence

to support his assertion that his defense strategy was prejudicially affected by the possibility of a death sentence.

The sentences for assault and robbery or attempted robbery should have merged. Defendant could not be convicted of both assault and robbery or attempted robbery, where the jury was not instructed to reach a verdict concerning a separate act of assault from that upon which the robbery or attempted robbery was based.

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*Mark E. Furda v. State of Maryland, No. 3053, September Term, 2007.* Opinion by Hollander, J. was filed on July 2, 2010.

<http://mdcourts.gov/opinions/cosa/2010/3053s07.pdf>

CRIMINAL LAW - EMERGENCY MENTAL HEALTH EVALUATION - COMMITMENT TO A MENTAL INSTITUTION - HEALTH-GENERAL ARTICLE - COMAR 10.21.01(12) - 18 U.S.C. § 922(g)(4); 27 C.F.R. § 478.11

Facts: In February 2003, the Montgomery County Sheriff's Department served a domestic protective order on Mark Furda, appellant, and transported him for an emergency mental evaluation, based on a petition filed by Karen Furda, who was then appellant's wife. At about the same time, the sheriffs seized numerous weapons from appellant's home, including regulated firearms. On July 26, 2005, in the Circuit Court for Montgomery County, Furda pleaded guilty, as a subsequent offender, to one count of violating a domestic protective order issued in September 2004. See §§ 4-506 and 4-509 of the Family Law Article of the Maryland Code. The court sentenced Furda to a suspended one-year term of incarceration and two years of probation.

On September 13, 2006, while on probation in the protective order case, Furda filed a "Motion," pro se, seeking the return of his archery equipment and "other related items" that were seized in 2003. The court denied the motion, without prejudice, on November 1, 2006. On July 30, 2007, a few days after the expiration of his probation, appellant filed another pro se "Motion," asking for the "release of all [his] property held for safe keeping by the Montgomery County Sheriff's Department." Then, on October 31, 2007, through counsel, and before the court had ruled on the July 2007 Motion, appellant filed a "Motion To Return Property," requesting return of the weapons that had been seized in 2003. After a hearing on November 7, 2007, the circuit court denied the Motion in an Order of the same date. It concluded, *inter alia*, that appellant was prohibited from possessing firearms under 18 U.S.C. § 922(g)(4), because he had previously been "involuntarily committed to a mental institution."

Held: The circuit court erred in concluding that appellant's emergency mental health evaluation in 2003 constituted an involuntary commitment to a mental institution under 18 U.S.C. § 922 (g)(4). In the context of an involuntary, emergency admission to a mental hospital, the Court was persuaded by the logic of the jurisdictions that construed "committed" as applying to situations in which, at the very least, the patient has been afforded an evidentiary hearing, held either by a court or a hearing officer; the patient or the defendant has a right to appear and has the right to counsel; and findings are made by the factfinder, based on competent medical evidence. In the absence of such minimal safeguards, the term does not extend to a brief hospitalization for

purposes of an emergency mental health evaluation. Therefore, in this case, Furda's hospitalization was not a commitment under federal law.

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*Andre Devon Arthur. v. State of Maryland*, Case No. 400, Sept. Term 2008. Opinion filed on July 2, 2010 by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2010/400s08.pdf>

CRIMINAL LAW - FAILURE TO OBEY A LAWFUL ORDER - RESISTING OR INTERFERING WITH ARREST - RIGHT TO REASONABLY RESIST AN UNLAWFUL, WARRANTLESS ARREST - DISTURBING THE PUBLIC PEACE AND DISORDERLY CONDUCT - FREE SPEECH - CONTENT - NEUTRAL RESTRICTIONS

Facts: A Frederick Police officer was on patrol when he came upon appellant, Andre Arthur. Believing that appellant had thrown a newspaper at his vehicle, the officer exited his police vehicle and said to appellant, "Hey, let me talk to you." Appellant continued to walk away while yelling obscenities at the officer, who told appellant to settle down and asked what was going on. As appellant and the officer neared the entrance to a restaurant, around which several of its patrons had congregated, appellant continued his "verbal onslaught." The officer told appellant to lower his voice and settle down. Appellant refused and continued to walk away, at which point the officer advised appellant that he was under arrest and took hold of appellant's shirt. Appellant resisted the officer's attempts to restrain him but was eventually subdued with the help of several other officers. Appellant was convicted by a jury in the Circuit Court for Frederick County of failure to obey a lawful order and resisting arrest. The court sentenced him to a term of sixty days incarceration for failure to obey a lawful order, and to a consecutive one year term of incarceration for resisting arrest.

Held: The trial court did not err when it declined to give a separate instruction on resisting arrest and used Maryland Criminal Pattern Jury Instructions 4:27.1, which adequately encompasses the right to reasonably resist an unlawful, warrantless arrest. The jury could have found that the officer acted because of the time, place, and manner of appellant's speech and not the content of appellant's speech. Therefore, there was sufficient evidence to convict appellant for failure to obey a lawful order and for resisting arrest.

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*Adan Espinoza Canela and Policarpio Espinoza Perez v. State of Maryland*, Nos. 1719 & 1944, September Term, 2006, filed July 1, 2010. Opinion by Salmon, J.

<http://mdcourts.gov/opinions/cosa/2010/1944s06.pdf>

CRIMINAL LAW - PROCEDURE - TRIAL COURT'S FAILURE TO NOTIFY DEFENSE COUNSEL OF JURY NOTES WAS HARMLESS ERROR.

Facts: The appellants, Adan Espinoza Canela and Policarpio Espinoza Perez, were found guilty of brutally murdering three children to whom they were related. In the course of the trial, the jury sent dozens of notes to the trial judge, who failed to notify the parties of six of those notes. Canela and Perez appealed and requested a new trial on several grounds, including that the court violated Md. Rule 4-326(d) by failing to notify the appellants of the jury notes.

Held: Judgments affirmed. The Court held that the trial judge's failure to disclose the six notes at issue, though error, was harmless beyond a reasonable doubt. As to three of the notes (Notes 6, 7, and 21), each was received while a witness was testifying, and asked a question involving a minor issue unrelated to the guilt or innocence of the appellants. After receiving each of these three notes, the trial judge himself queried the witness in order to answer the question on the jury's behalf. The Court found no prejudice because the appellants could not plausibly explain how their trial strategy would have differed, had Notes 6, 7, and 21 been disclosed. One of the notes (Note 23), received during the testimony of the State's forensics expert, asked how investigators had recovered DNA evidence from bloody clothing found in Perez's car. The question was effectively answered later in the expert's testimony during the prosecutor's direct examination. As to Note 23, again the Court found no prejudice because the appellants could not explain how their trial strategy was affected. One of the notes (Note 26), received during the testimony of the State's DNA expert, asked whether two different DNA experts could reach different conclusions on the basis of a single report generated by DNA evidence. The trial judge himself queried the witness on this issue, as did defense counsel on cross-examination. As to Note 26, once again the Court found no prejudice because the appellants could not explain how their trial strategy was affected. Finally, one of the notes (Note 14) alerted the judge that one of the jurors should be removed for inattentiveness. In fact, the juror had not arrived at the time Note 14 was received. The trial judge suggested dismissing the missing juror, which defense counsel opposed. After delaying the trial for an hour, the trial judge did dismiss the missing juror. Appellants argued to this Court that the failure to disclose effectively caused the delay, and that the jury likely blamed the appellants for the delay. The Court rejected the latter contention as baseless.

Separately, the Court also rejected 1) appellants' argument that the trial court improperly admitted certain testimony of the State's DNA expert that was, supposedly, outside the witness's expertise and not fully disclosed before trial; 2) appellants' argument that the court should have suppressed incriminating statements that they made to police, as fruits of an illegal arrest; 3) appellants' argument the court erroneously excluded certain testimony of a relative of the victims, as inadmissible hearsay; 4) Canela's argument that the court improperly admitted certain testimony of the State's forensics expert that was, supposedly, outside the witness's expertise and not fully disclosed before trial; 5) Perez's argument that the court erred by admitting in redacted form a statement he made to police that incriminated both himself and Canela; 6) Perez's argument that the court improperly restricted his cross-examination of witnesses at a suppression hearing; and 7) Perez's argument that the court erred by failing to deliver a jury instruction on the spoliation of evidence.

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*Aston Patrick Aguilera v. State of Maryland*, No. 313, September Term, 2008, filed July 2, 2010. Opinion By Graeff, J.

<http://mdcourts.gov/opinions/cosa/2010/313s08.pdf>

CRIMINAL LAW - JURY TRIAL WAIVER - MARYLAND RULE 4-246(b) - ANNOUNCEMENT ON RECORD OF KNOWING AND VOLUNTARY WAIVER - HARMLESS ERROR - VOLUNTARINESS INQUIRY

Facts: Prior to the start of trial, the court conducted a jury trial waiver on the record, asking appellant a series of questions about his understanding of his right to a jury trial and the consequences of waiving this right and proceeding with a bench trial. After this questioning, the court stated: "I am satisfied that the defendant understands what he is doing in his election for a bench trial in this case, so a jury trial has been effectively waived." Appellant subsequently was convicted of assault in the first degree.

Held: Judgment affirmed. The plain language of Maryland Rule 4-246(b) provides that a court may not accept a defendant's waiver of his or her right to a jury trial until it determines and "announces on the record that the waiver is made knowingly and voluntarily." Although the court here did not use the specific words "knowingly" and "voluntarily," the judge satisfied the requirements of Rule 4-246(b). The court's statement that "the defendant *understands* what he is doing in his *election* for a bench trial," along with its statement that the right to "a jury trial has been effectively waived," reflected the court's conclusion that appellant knew what he was doing in choosing a bench trial, and, with that understanding, he intentionally chose to waive his right to a jury trial.

Even if the court did not comply with Rule 4-246(b) by making the required announcement on the record, any error was harmless. Although the court did not use the words "knowingly" and "voluntarily" in finding that appellant's right to a jury trial had been "effectively made," the on-the-record finding that the circuit court did make was clearly to that effect.

The amendment to Rule 4-246(b), effective January 1, 2008, did not change prior decisions holding that a court is not required to ask specific questions regarding voluntariness, "unless there appears some factual trigger on the record, which brings into legitimate question voluntariness." *Kang v. State*, 393 Md. 97, 110 (2006). Although it is the better practice for trial judges to ask specific questions about the voluntariness of the waiver, the court is not required to ask such questions, absent a trigger. There was no trigger in this case raising "legitimate question" regarding the voluntariness of appellant's waiver. The trial court, therefore,

was not required to ask specific questions regarding whether the waiver was coerced.

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Walker v. State, No. 2152, September Term, 2008, filed May 27, 2010. Opinion by Salmon, J.

<http://mdcourts.gov/opinions/cosa/2010/2152s08.pdf>

CRIMINAL LAW - MEANING OF "FIREARM" AS DEFINED IN MD. CODE (2003 REPL. VOL.), SECTION 5-101(h) OF THE PUBLIC SAFETY ARTICLE.

APPELLATE REVIEW - PLAIN ERROR IN JURY INSTRUCTIONS.

Facts: A few hours after Leon Walker fired a gun, police searched his residence and found a starter pistol. Walker was charged in the Circuit Court for Baltimore County with, *inter alia*, possessing a "regulated firearm" after having previously been convicted of a drug felony, in violation of Md. Code (2003 Repl. Vol.), section 5-133(c)(1) of the Public Safety Article.

At trial, Walker testified that he had fired the starter pistol, but there was contrary evidence that he had instead fired an unrecovered, functional handgun. The evidence was uncontroverted that whereas some starter pistols fire projectiles or can be readily modified to do so, the recovered starter pistol was capable of neither.

Before trial, Walker had moved *in limine* to prevent the prosecutor from arguing that a starter pistol completely incapable of firing a projectile can qualify as a "regulated firearm" as the term is used in section 5-133(c)(1). The trial court had denied the motion, and the prosecutor argued in closing that, whether Walker fired a functional handgun or the starter pistol, he was guilty. Without defense objection, the trial judge instructed the jury that every starter pistol qualifies as a "regulated firearm." The jury found Walker guilty of violating section 5-133(c)(1).

Held: Judgment vacated; case remanded for a new trial.

The Court held that a starter pistol that does not and cannot be modified to fire projectiles by explosive force, does not qualify as a "firearm" as defined in section 5-101(h), and therefore does not qualify as a "regulated firearm" as the term is used in section 5-133(c)(1).

The Court turned first to section 5-101(p), which defines "regulated firearm" to mean, *inter alia*, a "handgun." The Court then turned to section 5-101(n), which defines "handgun" to mean "a firearm with a barrel less than 16 inches in length," and to include "starter . . . pistols." Finally, the Court turned to section 5-101(h), which states:

(1) "Firearm" means

(i) a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or

(ii) the frame or receiver of such a weapon.

(2) "Firearm" includes a starter gun.

Based on the plain text of section 5-101(h), its legislative history, and federal cases interpreting analogous federal statutes, the Court concluded that only a starter gun that does or can be modified to expel projectiles by explosive force (or such a starter gun's frame) qualifies as a "firearm," therefore a "handgun," and therefore a "regulated firearm."

The Court further held that, by instructing the jury to the contrary, the trial court committed plain error under Md. Rule 4-325(e). The Court reached this conclusion because 1) the erroneous instruction denied Walker a fair trial by foreclosing the possibility that the jury would find Walker not guilty on the basis of his testimony, 2) defense counsel likely failed to object out of perceived futility, because the trial court had previously denied the motion *in limine* relating to the same issue of statutory interpretation, 3) the motion *in limine* had previously raised the issue, which was not merely a matter of appellate afterthought, and 4) declining plain error review would not promote judicial efficiency, because Walker would likely succeed in a post-conviction action.

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*Jeffrey Hurd v. State of Maryland*, No. 2725, September Term, 2008, filed February 3, 2010. Opinion by Salmon, J.

<http://mdcourts.gov/opinions/cosa/2010/2725s08.pdf>

CRIMINAL LAW - MD. CODE (2007 REPL. VOL.), SECTION 10-416(b)(3)(ii) OF THE NATURAL RESOURCES ARTICLE AS A DEFENSE TO CRIMINAL CHARGES.

Facts: Jeffrey Hurd lived in Washington County near Arthur Pereschuk and his son-in-law, James Rudolph. On July 22, 2007, Pereschuk's Labrador Retriever, Bristol, ran off Pereschuk's property. Hurd, who was hunting, subsequently spotted Bristol pursuing a deer on his property, and he shot the dog to death.

On May 8, 2008, Rudolph was walking his German Shepard, Harley, when the dog ran off, onto Hurd's property. Hurd spotted Harley chasing a turkey in his yard, then shot and killed the dog.

For shooting the dogs, Hurd was charged in the Circuit Court for Washington County with two counts of aggravated cruelty to animals, Md. Code (2002), § 10-606 of the Criminal Law Article ("CL"), and two counts of malicious destruction of property valued under \$500.00, CL § 6-301. After a bench trial that proceeded on an agreed statement of facts, he was found guilty of all charges.

Held: Judgments as to charges stemming from the July 22, 2007 shooting, reversed; judgments as to charges stemming from the May 8, 2008 shooting, affirmed.

The Court held that, applying the rule of lenity, Md. Code (2007 Repl. Vol.), section 10-416(b)(3)(ii) of the Natural Resources Article ("NR") provided a complete defense to Hurd's shooting of Bristol while the dog pursued a deer, on July 22, 2007.

NR section 10-416(b)(3)(ii) states that, within several counties of Maryland (which included Washington County, at the time of the shootings), any person "may kill any dog found pursuing any deer, except in accordance with regulations" adopted by the Department of Natural Resources governing the use of dogs to hunt and recover deer. The Court recognized that the meaning of NR section 10-416(b)(3)(ii) is ambiguous, as to whether the statute authorizes the killing of 1) only those dogs being used by persons to hunt deer illegally, or else 2) any dog illegally pursuing a deer. Citing the rule of lenity applicable to criminal cases, the Court adopted the latter interpretation. Therefore, Hurd was within his rights to kill Bristol, and he should have been acquitted of the charges stemming from that incident.

The Court affirmed the remaining convictions for aggravated cruelty to animals and malicious destruction of property valued

under \$500.00, as to the shooting on May 8, 2008. The Court held, first, that there was sufficient evidence that Hurd killed Harley "cruelly," within the meaning of CL section 10-606(a)(1), because there was evidence that Hurd unnecessarily and unjustifiably caused the dog to suffer pain. Second, Hurd presented insufficient evidence to support his affirmative defense of necessity as to both charges, because there was no evidence that he acted with the intention of preventing harm to the pursued turkey or to his land. Third and finally, there was sufficient evidence that Hurd destroyed property (Harley) "maliciously," within the meaning of CL section 6-301(a), because there was evidence that, when Hurd shot Harley, he knew that someone owned the dog.

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*Mark E. Furda v. State of Maryland, No. 2240, September Term, 2008.*  
Opinion by Hollander, J. was filed on July 6, 2010.

<http://mdcourts.gov/opinions/cosa/2010/2240s08.pdf>

CRIMINAL LAW § 9-101(a)(2) - PERJURY - FALSE STATEMENT - PUBLIC SAFETY § 5-139(a); COURT ORDER - 18 U.S.C. § 922(g)(4) - COMMITMENT TO A MENTAL INSTITUTION - FIREARMS APPLICATION - OATH -SUFFICIENCY OF EVIDENCE

Facts: Following a bench trial in the Circuit Court for Montgomery County (Rubin, J.), Mark Edward Furda, appellant, was convicted of perjury, in violation of Md. Code (2002, 2007 Supp.), § 9-101(a)(2) of the Criminal Law Article ("C.L."), and giving false information or making a material misstatement in a firearm application (the "false statement" charge), in violation of Md. Code (2003, 2007 Supp.), § 5-139(a) of the Public Safety Article ("P.S."). The convictions arose from appellant's submission on January 24, 2008, of a Maryland State Police Application and Affidavit to Purchase a Regulated Firearm (the "Application"), in which Furda represented, under oath, that he had never been "committed to a mental institution."

The Sheriff's Office served Mr. Furda on February 27, 2003, with a petition for an emergency mental evaluation, initiated by appellant's former wife, Karen Furda, and with "a temporary protection order" (Case No. 0601SP006212003), issued by the District Court for Montgomery County, also in response to a petition filed by Ms. Furda. Ms. Furda claimed, *inter alia*, that appellant had several guns in the house, and she consented to a search of the home. During the search, the Sheriffs seized many weapons, including fifteen rifles, one handgun, and a large quantity of ammunition. The items are detailed on a "Seized Property/Evidence Log" prepared by the Sheriff's Department.

On February 27, 2003, Furda was transported to Montgomery General Hospital (the "Hospital") for an emergency mental health evaluation. From there, he was transferred to Potomac Ridge Behavioral Health ("Potomac Ridge"). He was discharged on or about March 4, 2003.

Ms. Furda obtained a Final Protective Order against Mr. Furda on March 6, 2003. It stated, in part: "While this Protective Order is in effect you may be subject to a federal penalty under the 1994 amendment to the Gun Control Act, 18 U.S.C. Section 922(g)(8), for possessing, transporting, or accepting a firearm."

On January 31, 2005, Ms. Furda applied for a Statement of Charges, accusing appellant of violating another Final Protective Order, dated September 21, 2004, by contacting her and threatening

her. As a result, on March 3, 2005, Furda was charged in a one-count Information with

fail[ing] to comply with [the Protective Order] . . . dated September 21, 2004, issued under Section 4-506 of the Family Law Article, that ordered the respondent to refrain from contacting and attempting to contact Karen Furda, by contacting her in writing, and is a **subsequent offender**, in violation of Section 4-509 of the Family Law Article against the peace, government, and dignity of the State.

See *State v. Furda*, Case No. 101933, Circuit Court for Montgomery County. At a hearing on July 26, 2005, appellant pleaded guilty to one count of "Protective Order - Fail to Comply/Subsequent Offender." The court sentenced him to a suspended, one-year term of incarceration and two years of probation.

During and after his probation, Furda moved for the return of the weapons seized in February 2003. The court held a motion hearing on November 7, 2007, at which appellant was present. In an "Order" dated November 7, 2007, denying appellant's motion for the return of his firearms, the court said:

Upon the evidence presented, the Court finds that Defendant Mark Furda is considered a prohibited person under 18 U.S.C. Section 922(g)(4) as a result of having been involuntarily committed to a mental institution and is thereby prohibited from possessing firearms.

On December 3, 2007, appellant moved for reconsideration of the Order of November 7, 2007. The court denied that motion on January 15, 2008. On February 13, 2008, appellant noted an appeal to the Court of Special Appeals.

In the interim, on January 24, 2008, appellant went to Gilbert's Guns and applied for the purchase of a Ruger Mark III, "a .22 pistol handgun, semiautomatic." Based on the information he provided in the Application, Furda was charged on March 26, 2008, with perjury and false statement.

The Affidavit that appellant signed on January 24, 2008, was central to the Perjury Case. The Application cautioned: "Contact an attorney prior to completing this form if you have any questions." Three of the sixteen questions on the Application were of particular significance:

7. Have you ever spent more than 30 consecutive days in any medical institution for treatment of a mental disorder or disorders? (If a physician's certificate, issued within 30 days prior to the date of this

application, certifying that you are capable of possessing a regulated firearm without undue danger to yourself, or to others, is attached to this application, then answer "N/A" for Not Applicable.)

8. Have you ever been adjudicated mentally defective or have you been committed to a mental institution?

\* \* \*

12. Did you answer 'YES' to any of the above questions? (If you answered "YES" to any of the above questions, you are prohibited by law from purchasing and/or possessing a regulated firearm. . . . If you answered 'YES', DO NOT proceed any further with this application.

Question 12 made clear that, if appellant answered "Yes" to Questions 7 or 8, he would not have been permitted to buy the gun. Appellant answered "No" to questions 7 and 8, despite his knowledge that, in the Protective Order Case, Judge Harrington had found that, under federal law, he was ineligible to possess firearms because he had previously been committed to a mental institution. Furda signed the Application on the line for "Signature of Transferee/Voluntary Registrant and Transferor." Directly above the signature line, the text of the form provided: "I, the below signed Transferee/Voluntary Registrant, certify under penalty of perjury that the above answers are true and correct and that I am not prohibited by law from purchasing or possessing a regulated firearm."

At trial, Furda insisted that he was "[a]bsolutely in the right" with regard to whether he could purchase a firearm, explaining: "I am not a felon. And I have never been mentally adjudicated nor have I ever been committed."

Furda's attorney also testified. He conceded that he shared with Furda the contents of the court's ruling on November 7, 2007; that the order was in effect until an appellate court ruled on it; appellant could not buy a gun; and he would have cautioned appellant against doing so.

Held: Affirmed. Furda knew his answer to Question 8 was directly contrary to Judge Harrington's ruling. Until such time as the Order of November 7, 2007, was stayed, reversed, or vacated, it was conclusive and binding on Furda. The Court of Special Appeals said: "That it is the cornerstone of our judicial process. Therefore, appellant could not deliberately disregard that Order by answering Question 8 in a way that was contrary to the Court's ruling, even if he personally believed it was wrong. The Court also said:

Appellant asked the circuit court in the Protective Order Case to determine whether he was entitled to the return of his weapons. He obtained an adverse ruling . . . with which he rightfully disagreed. Clearly, appellant was entitled to challenge the ruling by way of an appeal. But, he could not flout a judicial determination with which he disagreed. Before making a representation on the Application, under oath, that was contrary to the court's ruling, he should have "undergo[ne] the relatively modest inconvenience," *Graves*, 554 F.2d at 75, of awaiting the outcome of the appeal he took to challenge the ruling. That is what our judicial process required.

Moreover, the Court noted that the evidence in the Perjury Case indisputably showed that appellant had a "discrete understanding" of the circuit court's ruling. Furda asked his attorney to file a motion for reconsideration, and took that motion with him to Gilbert's Guns. In addition, his attorney discussed with appellant that the circuit court had "ruled that [Furda] was a prohibit[ed] person because he was involuntarily committed . . . ," and "cautioned" Furda against trying to buy a gun. And, the Application made clear that the answer of "Yes" to Question 8 would preclude appellant's purchase of the firearm.

The Court of Special Appeals reasoned that when appellant signed the Application, it was a FACT that he had been expressly informed, in a judicial Order, that his admission amounted to a commitment. In its view, the reversal in the companion appeal of the lower court's determination that the mental evaluation in 2003 constituted a commitment was of no consequence to its analysis of Furda's conduct at the time that he completed the Application. The Court said: "Our reversal is part of the orderly process of judicial review . . . when Furda answered Question 8, under oath, the operative fact was the court's ruling of November 7, 2007."

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*Omar Parker v. State of Maryland*, No. 2117, September Term, 2009. Opinion by Hollander, J. was filed on July 2, 2010.

<http://mdcourts.gov/opinions/cosa/2010/2117s09.pdf>

CRIMINAL LAW - SENTENCING - CALCULATION OF CREDITS - PRETRIAL DETENTION - CONCURRENT SENTENCE - CRIMINAL PROCEDURE ARTICLE § 6-218(c) AND (d); COURTS AND JUDICIAL PROCEEDINGS ARTICLE § 12-702; STATUTORY CONSTRUCTION - RULE OF LENITY

Facts: Following a trial in 2007, a jury in the Circuit Court for Baltimore City convicted Omar Parker, appellant, of second degree assault, in violation of Md. Code (2002, 2005 Supp.), § 3-203 of the Criminal Law Article ("C.L."), and retaliation for testimony, in violation of C.L. § 9-303. The court initially sentenced appellant to five years' incarceration for second degree assault and, pursuant to C.L. § 9-303(c)(2), to a concurrent term of twenty years for "retaliation for testimony." The judge imposed an enhanced sentence -- the maximum sentence for witness retaliation that she believed was permitted by law (i.e., twenty years). The court dated both sentences from February 17, 2006, the date of appellant's arrest. This Court subsequently affirmed appellant's convictions but vacated his enhanced sentence for retaliation and remanded for a new sentencing for that offense. See *Parker v. State*, 185 Md. App. 399, 404 (2009) ("*Parker I*").

On October 20, 2009, the circuit court imposed a term of five years' incarceration for the retaliation offense, commencing on July 2, 2009, the date when the Maryland Division of Correction ("DOC") released appellant with respect to his assault conviction and transferred him to the Baltimore City Detention Center ("BCDC"). At the resentencing, the circuit court did not award appellant any credit for the time he had served in pretrial detention beginning on February 17, 2006.

On appeal, appellant claimed that the circuit court erred in failing to give him credit against his five year sentence for the time he served between February 17, 2006, and July 1, 2009.

Held: The Court discerned no error in the court's imposition of a consecutive sentence of five years for retaliation, under C.L. § 9-303(c)(1). The circuit court was entitled, on remand, to change the sentence from 20 years concurrent to 5 years consecutive. However, the court erred in failing to award credit to appellant for the time he served during pretrial detention, because the Court had previously awarded that credit. The court also erred in failing to award credit for the time served for the retaliation offense while the sentence was concurrent, i.e., before the new sentence was imposed.

At the initial sentencing on July 26, 2007, the court imposed concurrent terms of confinement. Therefore, until the retaliation sentence was vacated, appellant was serving time on that sentence. Moreover, the court initially dated both sentences from appellant's arrest on February 17, 2006. Because the court imposed concurrent sentences, and dated both from appellant's arrest, the pretrial credit necessarily applied to *both* the assault and retaliation sentences. On remand, the court, in effect, changed one sentence to a consecutive sentence. But, the court could not retroactively take away the time that appellant had already served before the retaliation sentence was vacated.

With respect to the retaliation sentence, appellant served 1,230 days prior to July 2, 2009, and was entitled to a credit for that time against the five-year consecutive sentence imposed on remand. Those days were not "dead time," because the time was credited towards appellant's assault charge, separate and apart from whether it should also be allocated to the retaliation sentence. Neither were they "banked" time. C.P. § 6-218(c) emphasizes crediting a defendant for "all time spent in custody under the prior sentence."

The Court reasoned that, when it reconciled C.P. § 6-218 with C.J. § 12-702(a), it was apparent that the General Assembly intended for a defendant to receive credit for the time served on a previous sentence that is later vacated. Here, the defendant was initially awarded credit from the date of his arrest, and his sentence for retaliation was initially concurrent. It followed that appellant was entitled to credit from February 17, 2006, through July 1, 2009.

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*Frederick T. Smith v. Sandra T. Smith*, No. 134, September Term, 2009, filed May 28, 2010. Opinion by Salmon, J.

<http://mdcourts.gov/opinions/cosa/2010/134s09.pdf>

FAMILY LAW - POST-RETIREMENT MONEY PAID TO SPOUSE FOR UNUSED LEAVE, BEFORE ENTRY OF FINAL JUDGMENT OF ABSOLUTE DIVORCE, IS MARITAL PROPERTY.

Facts: On October 15, 2007, Sandra Smith filed a complaint for divorce against Frederick Smith in the Circuit Court for Prince George's County. Frederick filed a counter-complaint for divorce.

Among other property at issue was a 5.35-acre parcel of property in St. Mary's County. Frederick's mother, Alice Smith, had given the parcel to the spouses as tenants by the entirety. Frederick testified that Alice initially wanted to convey the parcel to him alone, but that she acquiesced in his suggestion that Sandra's name be put on the deed so that his wife could avoid probate if he should die. Sandra testified that Alice intended to give Frederick the parcel.

On July 17, 2008, the trial judge ruled from the bench and, insofar as pertinent to this appeal, divided the marital property (including the parcel) evenly between the spouses.

Frederick had retired from his job with the Montgomery County Public School system on June 24, 2008. Months before the order granting a judgment of absolute divorce was signed, Sandra filed a motion to open the record to receive evidence that, on July 31, 2008, Frederick's former employer paid him \$33,088.62 to reimburse him for accrued annual leave and sick leave. After taxes, he received \$19,406.46. Sandra claimed that the net proceeds were marital property, half of which she was entitled to. The trial court granted the motion to open the record but held that the post-retirement money was not marital property. A final judgment of divorce was entered on February 6, 2009.

Frederick filed a motion to amend the judgment, arguing that, because Alice intended to gift the parcel to him alone, the trial court should award him the full value of the parcel or, alternatively, ownership of the parcel itself. The court denied the motion.

Frederick appealed, and Sandra cross-appealed.

Held: Portion of judgment categorizing Frederick's post-retirement money as non-marital property, vacated; judgment otherwise affirmed; case remanded for further proceedings.

As to Sandra's cross-appeal, the Court held that, because Frederick retired and received a cash payment reimbursing him for unused leave, before entry of the final judgment of divorce, the money was "property . . . acquired by 1 or both parties during the marriage" and therefore marital property, under Md. Code (2006 Repl. Vol.), section 8-201(e)(1) of the Family Law Article. The Court distinguished *Thomasian v. Thomasian*, 79 Md. App. 188 (1989), where, at the time a judgment of divorce was granted, the husband was still employed and had accrued hundreds of hours of unused vacation and holiday time, worth more than \$12,000. *Thomasian* held that the accrued leave was too intangible and difficult to value to constitute marital property at the time of divorce, because the husband could dissipate the entitlement by taking time off from work, rather than receiving a cash payment upon retirement. In contrast, in the case *sub judice* the accrued leave had converted into a tangible asset before the divorce was final, when Frederick received the cash payment after having retired.

As to the appeal of Frederick, he conceded that the parcel was marital property under section 8-201, but argued that the trial court failed to adjust his marital award properly under section 8-205(b)(9). That statute provides that, when determining the amount of a marital award, a court should consider "the contribution by either party of property" acquired by gift from a third party. The Court held that, because Frederick contributed nothing to the acquisition of the parcel, there was no "contribution" to evaluate under section 8-205(b)(9).

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*Kristin Herlson v. RTS Residential Block 5, LLC, Et Al.*, No. 2627, Sept. Term 2007. Opinion by Kenney, J. (retired, specially assigned). Filed on April 29, 2010.

<http://mdcourts.gov/opinions/cosa/2010/2627s07.pdf>

REAL PROPERTY - CONDOMINIUM ACT - 11-126(e) - PUBLIC OFFERING STATEMENT AMENDMENTS - PURCHASER'S RIGHT OF RESCISSION

Facts: Appellant purchaser entered into a pre-construction sales contract with developer seller for the purchase of a residential condominium unit. The sales contract's Repurchase Addendum included a covenant requiring that purchaser use the unit as her "primary, year round residence," and prohibiting lease and restricting sale of the unit within the first year of ownership. The sample deed provided to purchaser as part of the Public Offering Statement (POS) filed pursuant to Maryland Code (1974, 2003 Repl. Vol.), § 11-126 of the Real Property Article (Real Prop.), reserved to seller the right to repurchase the unit from purchaser if purchaser attempted to sell, rent, or lease the unit within the first year of ownership.

After executing the sales contract, seller amended the POS and sample deed by removing the restriction on lease and increasing the restrictions on sale of the unit to the first two years of ownership. Although the amendments did not alter the terms of purchaser's sales contract, purchaser informed seller that she did not agree with the amendments to the POS and requested cancellation of the sales contract and return of her deposit.

When seller refused to rescind the contract, purchaser brought suit in the Circuit Court for Montgomery County, arguing that, pursuant to Real Prop. § 11-126(e), she was entitled to rescission of the sales contract because changes were made to the POS, which was part and parcel of her contract. She also argued that the amendments constituted material changes that affected the benefit of her bargain. Seller argued that purchaser was not entitled to rescission under Real Prop. § 11-126(e) because the amendments to the POS did not materially affect purchaser's rights under the sales contract.

The circuit court ruled in favor of seller, holding that the amendments to the POS did not materially affect purchaser's rights and purchaser was not entitled to rescission. Purchaser filed a timely appeal to this Court.

Held: Reversed. Pursuant to Real Prop. § 11-126(e), a condominium purchaser may rescind a purchase contract, within the time frame prescribed, based upon any amendment made to the POS by

the seller, without objective consideration to whether the amendment "affects materially the rights of the purchaser."

Alternatively, were materiality considered, where the seller originally advertised and promoted a seller-owned condominium community and then amended the POS to remove the leasing restrictions, the change in the nature of the community was a material change that affected purchaser's original bargain.

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*Maryland Department of State Police v. Maryland State Conference of NAACP Branches*, No. 1476, September Term, 2008, filed February 2, 2010. Opinion by Salmon, J.

<http://mdcourts.gov/opinions/cosa/2010/1476s08.pdf>

STATE GOVERNMENT - AGENCY LAW - MEANING OF "PERSONNEL RECORDS" WITHIN MD. CODE (2004 REPL. VOL.), SECTION 10-616(i)(1) OF THE STATE GOVERNMENT ARTICLE.

Facts: The Maryland State Conference of NAACP Branches ("NAACP") and the Maryland State Police ("MSP") in 2003 entered into a federal consent decree that obligated the MSP to combat racial profiling by its troopers. In 2007, to verify that the MSP was complying with its obligations, the NAACP filed with the MSP a request for information pursuant to the Maryland Public Information Act ("Act"), Md. Code (2004 Repl. Vol.), §§ 10-611-10-630 of the State Government Article. The NAACP requested, *inter alia*, all files relating to internal MSP investigations into racial profiling complaints made against individual troopers. The MSP denied this particular request. The NAACP offered to let the MSP disclose these records in redacted form, with the name of each trooper removed and replaced with a number or code, but the MSP rejected this compromise.

The NAACP filed suit in the Circuit Court for Baltimore County, to compel the MSP to provide the requested records. The MSP argued that the records were "personnel records" of the individual troopers investigated, within the meaning of section 10-616(i)(1), which generally exempts any "personnel record of an individual" from inspection under the Act. The circuit court agreed that the records were "personnel records." Nevertheless, the court concluded that the NAACP was entitled to inspect the records in redacted form, with individual troopers' names and identification numbers removed.

The MSP appealed and the NAACP cross-appealed.

Held: Portion of order providing that the records were "personnel records" vacated; remainder of order affirmed.

*En banc*, the Court held that the records of internal MSP investigations into complaints of racial profiling, were not "personnel records" within the meaning of section 10-616(i)(1). Therefore, the records at issue were not generally exempt from inspection under the Act.

Initially, the NAACP argued that it was unnecessary to decide whether the records at issue were "personnel records" because, even if they were, the records had to be provided in redacted form under section 10-614(b)(3)(iii), which requires that the custodian of a

record who denies an application for inspection nevertheless allow the inspection of "any part of the record that is subject to inspection and is reasonably severable." The Court disagreed because, if the records were "personnel records" to begin with, redaction would not change that fact, and they would be entirely exempt from inspection and section 10-614(b)(3)(iii) would therefore be inapplicable.

Alternatively, the NAACP argued, and the Court agreed, that the records at issue were not "personnel records." The Court held that MSP troopers had no reasonable expectation of privacy in the records at issue. The Court further reasoned that the records were not governed by section 10-616(i)(1), but rather the more specific provision of section 10-618(f)(1)(i), which allows a custodian to deny inspection of "records of investigations conducted by . . . a police department," under certain, specified circumstances listed at subsection (f)(2). The Court reasoned that interpreting section 10-616(i)(1) to cover records of internal MSP investigations into racial profiling complaints would effectively render section 10-618(f)(1)(i) a nullity. (The Court noted that the MSP had never attempted to deny inspection on the basis of section 10-618(f).)

In concluding that the records at issue were not "personnel records," the Court also relied upon *Kirwan v. The Diamondback*, 352 Md. 74 (1998) and *Governor v. Washington Post Co.*, 360 Md. 520 (2000) to hold that, whereas "personnel records" include documents that directly pertain to employment and the ability of an employee to perform a job, the records at issue did not seek to uncover anything about any employee's job abilities. To that effect, the Court noted that the records at issue were not stored in the personnel files of individual troopers, and that not one racial profiling complaint had thus far resulted in a disciplinary action (because no complaints had been sustained).

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## **JUDICIAL APPOINTMENTS**

On May 27, 2010, the Governor announced the appointment of the Hon. Jan M. Alexander to the Circuit Court for Baltimore County, Judge Alexander was sworn in on June 9, 2010 and fills the new vacancy created by the General Assembly.

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# ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated July 15, 2010, the following attorney has been disbarred by consent from the further practice of law in this State:

CRYSTAL ANITA GIST FISHER

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By an Order of the Court of Appeals dated July 21, 2010, the following attorney has been suspended, effective immediately, from the further practice of law in this State:

WALTER LLOYD BLAIR

\*

By an Order of the Court of Appeals dated July 21, 2010, the following attorney has been suspended, effective immediately, from the further practice of law in this State:

GRASON JOHN-ALLEN ECKEL

\*

By an Opinion and Order of the Court of Appeals dated July 27, 2010, the following attorney has been suspended for ninety (90) days, effective immediately, from the further practice of law in this State:

MARTIN BERNARD BROWN

\*

By an Opinion and Order of the Court of Appeals dated July 28, 2010, the following attorney has been indefinitely suspended from the further practice of law in this State:

RONNIE THAXTON

\*