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https://www.mdcourts.gov/data/opinions/coa/2019/29a19.pdf

INEFFECTIVE ASSISTANCE OF COUNSEL – PREJUDICE PRONG – PURPORTED ALIBI WITNESSES

Facts:

In the Circuit Court for Baltimore City, the State, Petitioner, charged Christopher "Crack" Mann, Respondent, with first-degree felony murder, kidnapping, conspiracy to kidnap, and other crimes. At trial, the State offered evidence of the following events. On April 22, 2003, sometime between 6:43 p.m. and 7:03 p.m., Mann and two of his friends, Tayvon "Tay" Whetstone and Kenneth "Kane" / "Kenny" Fleet, confronted the victim, Ricky "Little Rick" Prince, at a McDonald's on Liberty Road near its intersection with Rolling Road, about him having been a witness for the State in a criminal case. Fleet got into Prince's vehicle and drove away. Whetstone told Prince that he would take Prince to his vehicle. Mann, Whetstone, and Prince got into a vehicle. Ultimately, Whetstone drove to the area behind a nightclub called "Fantasies," which is in the Curtis Bay neighborhood of Baltimore City. There, in Mann's presence, sometime during the evening of April 22, 2003, Whetstone shot Prince.

Mann's trial counsel called four alleged alibi witnesses, who purported to account for Mann's whereabouts from approximately 7:30 p.m. or 7:45 p.m. on April 22, 2003 to the morning of April 23, 2003. Mann's trial counsel did not request, and the circuit court did not give, an alibi jury instruction.

After being convicted and pursuing an unsuccessful direct appeal, Mann petitioned for postconviction relief, contending that his trial counsel provided ineffective assistance of counsel by not requesting an alibi jury instruction. The circuit court agreed and ordered a new trial. The State successfully applied for leave to appeal, and the Court of Special Appeals affirmed. The State filed a petition for a writ of certiorari, which this Court granted.

Held: Reversed and remanded.

The Court of Appeals noted that an alibi is a defense that is based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time. The Court quoted Maryland Criminal Pattern Jury Instruction 5:00, which addresses alibis as follows: "You have heard evidence that the defendant was not present when the crime was committed. You should consider this evidence along with all other evidence in this case. In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the crime was committed and the defendant committed it."

The Court of Appeals held that Mann had failed to satisfy the burden to prove that there was a reasonable probability, or a substantial or significant possibility, that the jury would have acquitted him if his trial counsel had requested, and the circuit court had given, an alibi jury instruction. The Court determined that the circumstance that Mann's trial counsel did not request an alibi jury instruction did not prejudice Mann because none of the four purported alibi witnesses' testimony led to the conclusion that Mann could not have been at the murder scene when Whetstone shot Prince. Additionally, the Court explained that the trial court twice instructed the jury that the burden of proving the defendant guilty beyond a reasonable doubt remains on the State throughout the trial, thereby undermining Mann's claim of prejudice with respect to trial counsel's failure to request an alibi jury instruction.

The Court of Appeals noted that the question of whether prejudice resulted from Mann's trial counsel's failure to request an alibi instruction involved a fact-specific analysis. The Court observed that Mann premised his alibi on the testimony of four witnesses, who purported to account for his whereabouts from 7:30 p.m. or 7:45 p.m. through the night of April 22, 2003. The Court explained that, even if the purported alibi witnesses' testimony was deemed to be credible and the circuit court had given an alibi jury instruction, that would have done nothing to rebut the circumstance that Mann's whereabouts from approximately 6:45 p.m. or 7 p.m. on the evening of April 22—the time that he left McDonald's with Whetstone and Prince—to 7:30 p.m. or 7:45 p.m.—the time that he allegedly arrived at a purported alibi witness's house—was unaccounted for. Similarly, Mann's whereabouts from 8:45 p.m.—the time that the alibi witness left Mann at Mann's mother's house—to 9:30 p.m.—the time that another alibi witness picked him up from his mother's house—was unknown. In other words, even if the circuit court had given an alibi jury instruction and the jury had believed the purported alibi witnesses, the jury could still have believed that Mann had the opportunity to participate in the kidnapping and killing of Prince, and found Mann guilty.

The Court of Appeals explained that, in evaluating whether Mann was prejudiced by the omission of the alibi instruction, the Court needed to consider the totality of the evidence before the jury. The giving of an alibi jury instruction would not have contradicted the evidence that Mann had a heated exchange with Prince at the McDonald's restaurant about Prince having been a "snitch" and left the premises before 7 p.m. together with Prince and Whetstone, the person who was responsible for shooting Prince, and was not seen again until 7:30 p.m. or 7:45 p.m. that

evening, or that Mann's whereabouts between 8:45 p.m. and 9:30 p.m. were unknown. Nor would an alibi jury instruction have undercut a State's witness's written statement that Mann told him he was present when Whetstone shot Prince. Nor would an alibi jury instruction have changed the medical examiner's testimony that the time of death was during the evening of April 22, 2003, and that that was only an approximation as to the time of death because there were too many factors to identify the exact hour. In sum, the purported alibi witnesses' testimony did little to damage the State's case and the failure to give an alibi jury instruction was not prejudicial.

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Motor Vehicle Administration v. Ariel A. Medvedeff, No. 15, September Term 2019 Term, filed December 19, 2019. Opinion by Hotten, J.

https://www.courts.state.md.us/data/opinions/coa/2019/15a19.pdf

MARYLAND TRANSPORTATION ARTICLE – DRIVER'S LICENSES – TEST REFUSAL – ADMINISTRATIVE REMEDIES – IMPLIED CONSENT, ADMINISTRATIVE PER SE LAW

Facts:

Respondent, Ariel Medvedeff, was detained on suspicion of driving while under the influence or impaired by alcohol, after the detaining officer observed the operator of the vehicle fail to stop at a stop sign.

Upon approaching the vehicle to conduct the traffic stop, the officer observed Respondent sitting in the driver's seat and smelled alcohol on her breath and person. A purported passenger was sitting behind Respondent in the back seat of the vehicle. The officer requested that Respondent exit the vehicle for a series of Standard Field Sobriety Tests ("SFSTs"). Respondent failed the sobriety tests, including a preliminary breath test. During the traffic stop, Respondent and the other occupant alleged that Respondent had not been driving and the apparent passenger was actually the driver of the vehicle at the time of the traffic violation. The officers administered the sobriety tests on the other occupant and determined that he was also impaired.

The officer placed Respondent under arrest for driving while under the influence or impaired by alcohol. At the police station, the officer requested that Respondent submit to a chemical breath test, which she refused. As a result of her refusal, her driver's license was suspended. Respondent appealed the suspension before the Office of Administrative Hearings, and the Administrative Law Judge ("ALJ") found that the officer who detained her did not have reasonable grounds under Md. Code § 16-205.1 of the Transportation Article to request the breathalyzer. The ALJ made this determination based on the "credible testimony" of Respondent and her witness. The ALJ also found that the DR-15 Certification reflected that Respondent and the apparent passenger had switched positions so that it appeared Respondent was driving, when she had not driven the vehicle that night. In light of their testimony and the certification, the ALJ found that the detaining officer lacked reasonable grounds to request the breath test. Petitioner, the Motor Vehicle Administration, appealed the decision of the ALJ finding that the officer did not have reasonable grounds to believe Respondent was driving or attempting to drive while under the influence or impaired by alcohol, and the Circuit Court for Carroll County upheld the decision.

Held: Reversed.

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The Court of Appeals reversed the circuit court, finding that the detaining officer had reasonable grounds to believe that Respondent was driving while impaired or under the influence of alcohol. Consistent with the Court's holding in *Motor Vehicle Administration v. Krafft*, 452 Md. 589, 158 A.3d 539 (2017), the Court of Appeals clarified that the standard in a test refusal case is reasonable grounds, and Petitioner is not required to prove by a preponderance of the evidence that Respondent was in fact driving.

The Court of Appeals held that the circumstances surrounding the request for a breath test led the officer to reasonably believe that Respondent was driving or attempting to drive while impaired or under the influence. The detaining officer observed Respondent seated in the driver's seat shortly after observing the driver fail to stop at a stop sign, and upon approaching the vehicle, smelled alcohol on Respondent's breath and person. As further evidence that the inference was reasonable, Respondent failed the Standard Field Sobriety Tests and a preliminary breath test conducted at the scene revealed a blood alcohol concentration of .14—well over the legal limit. The Court of Appeals held that the ALJ effectively substituted his judgment for that of the detaining officer and allowed the Respondent to litigate the issue of the fact of driving, which is not the standard in a test refusal case. Accordingly, the Court of Appeals reversed the decision of the Circuit Court for Carroll County.

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Motor Vehicle Administration v. John W. Pollard, No. 18, September Term 2019, filed December 23, 2019. Opinion by Hotten, J.

https://www.courts.state.md.us/data/opinions/coa/2019/18a19.pdf

ADMINISTRATIVE LAW – STATUTORY REQUIREMENTS – REASONABLE GROUNDS

Facts:

On October 1, 2017, around 12:07 a.m., Trooper John Tucker ("Trooper Tucker") responded to a trespassing call and found Respondent John W. Pollard ("Respondent") parked in his vehicle off of a dirt road. Respondent's keys were in the ignition, but the vehicle was not running. Trooper Tucker woke Respondent up and was informed that he had been sleeping for a short period of time.

Trooper Tucker observed that Respondent's eyes were bloodshot, his speech was slurred, and detected a strong odor of alcohol emanating from Respondent's breath and person. Subsequently, Trooper Tucker requested Respondent perform standard field sobriety tests, including a preliminary breathalyzer test, but Respondent refused.

Thereafter, Trooper Tucker read Respondent his rights from the DR-15 Advice of Rights form. Respondent requested that Trooper Tucker contact his attorney. When the Trooper called Respondent's attorney, there was no answer. Trooper Tucker again asked Respondent to submit to a breathalyzer test, but he refused. Trooper Tucker detained Respondent, confiscated his license, and issued an Order of Suspension for refusing to take the breathalyzer test in violation of Maryland Transportation Article § 16-205.1 ("Transp.").

Respondent timely requested an administrative hearing. Trooper Tucker was subpoenaed to testify on behalf of the Motor Vehicle Administration ("MVA"). The hearing was held on July 25, 2018, but Trooper Tucker did not appear nor did he submit a written explanation for his absence. The Administrative Law Judge ("ALJ") proceeded without Trooper Tucker and heard from Respondent, who asserted that he was not subject to Transp. § 16-205.1 because he was not in actual physical control of his vehicle and was using it as shelter. The ALJ agreed with Respondent, citing *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019 (1993). However, the ALJ failed to address whether Trooper Tucker had reasonable grounds to believe that Respondent was driving or attempting to drive as required by Transp. § 16-205.1.

The MVA appealed to the Circuit Court for Caroline County, asserting that the ALJ improperly applied *Atkinson*, and the circuit court affirmed the decision of the ALJ.

Held: Reversed.

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The Court of Appeals held that an ALJ must consider and determine whether a law enforcement officer had reasonable grounds to believe that an individual was driving or attempting to drive a vehicle. The Court, citing its holding in *Motor Vehicle Administration v. Krafft*, 452 Md. 589, 158 A.3d 539 (2017), held that test refusal cases are limited to the issues enumerated in Transp. § 16-205.1. Ultimately, the Court determined that an ALJ could not correctly conclude whether a detained individual violated Transp. § 16-205.1 without evaluating whether the investigating officer had reasonable grounds to believe that the detained individual was driving or attempting to drive under the influence of alcohol. The Court held that the ALJ erred in not considering that Trooper Tucker had reasonable grounds to believe that Respondent was driving or attempting to drive while under the influence of alcohol.

The Court of Appeals also distinguished *Atkinson*, which involved a criminal statute that required the State to prove beyond a reasonable doubt the defendant was driving or attempting to drive a vehicle while intoxicated. Under Transp. § 16-205.1, the MVA only needs to prove by a preponderance of the evidence that the investigating law enforcement officer had reasonable grounds to believe that the detained individual was driving or attempting to drive while under the influence of alcohol. Accordingly, the Court held that *Atkinson* was inapplicable to test refusal cases.

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Amalgamated Transit Union, Local 1300 v. Maryland Transit Administration, No. 1591, September Term 2017, filed December 23, 2019. Opinion by Kehoe, J.

https://mdcourts.gov/data/opinions/cosa/2019/1591s17.pdf

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION – REVIEW, CONCLUSIVENESS AND ENFORCEMENT OF AWARD

ALTERNATIVE DISPUTE RESOLUTION – COMMON-LAW GROUNDS FOR VACATUR OF ARBITRAL AWARD

ALTERNATIVE DISPUTE RESOLUTION – COMMON-LAW GROUNDS FOR VACATUR OF ARBITRAL AWARD – VIOLATION OF PUBLIC POLICY

Facts:

Christopher Wilson, a bus driver, was fired after he stabbed his estranged stepfather, a retired bus driver, on MTA property. Under the terms of a collective-bargaining agreement, Wilson could be fired only for "just cause." He challenged the MTA's termination decision in an arbitration proceeding. The arbitrator ruled in Wilson's favor and ordered his reinstatement. According to the arbitrator's award, the agency lacked just cause to fire Wilson because it had not considered mitigating circumstances from Wilson's work history and a range of lesser punishments available for this kind of misconduct.

The MTA filed a petition to vacate the arbitration award in the Circuit Court for Baltimore City, arguing that enforcement of the award would violate Maryland's clear public policy against workplace violence. The circuit court, citing the MTA's policy against workplace violence, statutory criminal law and the agency's duty to ensure public safety as a common carrier, ruled that the arbitrator's award could not be enforced because it violated a clear public policy. It granted summary judgment in favor of the MTA.

Mistakenly believing that the union representing Wilson had not filed a timely response, the circuit court also noted that it did not consider the union's response to the MTA's motion for summary judgment or the union's own cross-motion for summary judgment in reaching its decision.

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Held: Affirmed.

The principal issue before the Court of Special Appeals was whether the circuit court erred in granting the MTA's motion for summary judgment, vacating the arbitral award on public-policy grounds. After explaining a general rule of judicial deference to arbitral awards, the Court explained some of the common-law grounds for vacating an arbitral award.

The Court explained that when an award is challenged on public-policy grounds, we accept the facts as found by the arbitrator and even her interpretation of the contract at issue, embodied in the arbitral award. The narrow question before the court in these cases is simply whether the agreement, as interpreted by the arbitrator, may be enforced.

The Court held that insofar as the collective-bargaining agreement at issue had been interpreted to exclude from its definition of "just cause" for termination clearly established serious acts of workplace violence, unless the MTA factors into its termination decision mitigating circumstances from the employee's work history and considers a range of less serious sanctions, the award could not be enforced in Maryland courts. Maryland public policy, explicitly set forth in Md. Code, State Pers. & Pens. § 11-105, provides that serious acts of workplace violence give a state agency cause for *automatic termination* of employment.

Additionally, the Court held that the circuit court's procedural blunder—erroneously excluding from consideration the union's response and cross-motion for summary judgment—was harmless error, since the appellate court's review of the vacatur issue was *de novo*.

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Korey Vaugh Hamilton Payne v. State of Maryland, No. 1649, September Term 2017, filed December 18, 2019. Opinion by Sharer, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/1649s17.pdf

CRIMINAL PROCEDURE – MOTION TO SUPPRESS – MIRANDA PROTECTIONS – VOLUNTARINESS OF POLICE INTERVIEW – CUSTODY

EVIDENCE – OTHER BAD ACTS – ADMISSIBILITY – IDENTITY EXCEPTION

CRIMINAL LAW – STATUTORY INTERPRETATION – LEGISLATIVE INTENT – UNIT OF PROSECUTION

CRIMINAL LAW – SENTENCING – UNIT OF PROSECUTION – RULE OF LENITY

Facts:

Police executed a search warrant on Payne's residence, yielding the recovery of, *inter alia*, four data storage devices, each containing suspected child pornography. While police searched the residence, Payne consented to speak to two detectives. Payne was informed that he was not under arrest but was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The interview lasted for 45 minutes. Payne was not arrested until charges were filed over a month later for possession of five child pornography images.

Payne moved to suppress the statement, arguing that he had been in custody during the interview and had invoked his right to counsel, but that the detectives persisted in the interview despite his assertion of the right. The suppression court denied Payne's motion to suppress, ruling that the interrogation was not custodial and, therefore, he was not entitled to *Miranda* protections.

At trial, over objection, in addition to evidence relating to the five charged child pornography images, the State introduced evidence that each of the four recovered storage devices contained both uncharged child pornography and non-child pornography images of Payne. In particular, the court permitted testimony that on one of the storage devices, there was also a video of Payne masturbating next to a sleeping woman.

Payne was convicted of and sentenced separately and consecutively on each of the five counts of possession of child pornography.

On appeal, the Payne challenged the court's denial of his motion to suppress, the admission of other bad acts evidence, and a separate sentence imposed for each of the five convicted counts.

Held: Affirmed.

Suppression: In affirming the Circuit Court for Anne Arundel County, the Court of Special Appeals agreed with the suppression court's ruling that Payne was not in custody during his interview with police, and thus, he was not subject to a custodial interrogation, for which *Miranda* protections would be applicable.

The Court reiterated that, asserting a violation of a right under *Miranda v. Arizona*, 384 U.S. 436 (1966), Payne failed to satisfy his burden of showing that he was subject to a custodial interrogation by failing to contradict the evidence that: he consented to a police interview; he was not forced or coerced to speak with police; he was told that he was not under arrest; he was not restrained or prevented from leaving the bedroom; the interview lasted 45 minutes with only two police officers; the officers used conversational tones; and, after the conclusion of the interview and the search of the home, police left Payne's home without arresting him.

Other bad acts evidence: The Court of Special Appeals also found no error in the admission of the testimony describing the video showing Payne masturbating, as satisfaction of the identity exception for other bad acts evidence, in view of his assertion, by counsel, that the pornographic images were owned by another resident of the house.

Unit of prosecution/separate sentences: Finally, the Court held as a matter of first impression that the plain language of Criminal Law Article (CR) § 11-208 is clear and unambiguous as to the Legislature's intended unit of prosecution for violations of the statute. The statute proscribes that "[a] person may not knowingly possess and intentionally retain a … visual representation showing an actual child under the age of 16 years: … engaged in sexual conduct[.]" CR § 11-208(a)(2) (2012). In affirming Payne's convictions and sentences on each of the five charges, the Court held that the unit of prosecution for violations of CR § 11-208 was for each instance of possession of each individual image of child pornography showing different child victims. The Court found support for that interpretation in the Legislature's use of the term "a" throughout the statute, qualifying each reference to a proscribed item in the singular, and its use of the phrase "actual child," denoting the importance of each singular child victim. In addition, the Court undertook an analysis of the plain language of the statute, the statutory structure and history, and the application of similar laws from other jurisdictions.

Because the Court of Special Appeals held that the statute was clear and unambiguous as to the Legislature's intended unit of prosecution for each image of the different child victims, the rule of lenity did not apply. The Court affirmed each of Payne's five convictions and separate sentences for each of the five charges of possession of the five different child pornography images showing five different child victims.

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Sebastian Albert Campbell v. State of Maryland, No. 156, September Term 2018, filed December 18, 2019. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2019/0156s18.pdf

CRIMINAL LAW – TRIAL – COURSE AND CONDUCT OF TRIAL IN GENERAL – COURTROOM SECURITY

Facts:

In February of 2012, Sebastian Albert Campbell, appellant, began living with his 11-year-old daughter (the "victim") at appellant's Rockville apartment. Approximately one month later, while the victim was asleep on the couch at his apartment, appellant pulled the victim's pants down and had vaginal intercourse with her against her will. In the months that followed, appellant engaged in non-consensual sexual intercourse with the victim "at least twice a week." At some point, the victim became pregnant with appellant's child, and, in August of 2013, the victim gave birth. Appellant was ultimately arrested and charged with multiple counts of second-degree rape and sex abuse of a minor.

Shortly after being charged, appellant was appointed an attorney by the Office of the Public Defender ("O.P.D."), but appellant ultimately discharged that attorney for a non-meritorious reason, refused substitute counsel from O.P.D., and decided to represent himself. Following that discharge, appellant filed a pretrial "Motion for Ex Parte Hearing to Establish Necessity for Appointment of Expert Witness," which the State opposed. The court then held a hearing on that motion to determine whether the State was required to provide funding for an expert witness where the defendant had refused to be represented by O.P.D. The court ultimately denied appellant's motion, finding that appellant could not "pick and choose which of the State-provided services he wishes to receive" but rather had to "utilize the [O.P.D.'s] complete 'package' of services or forego them entirely."

At the start of trial, but prior to jury selection, the trial court discussed several procedural matters with appellant, who, in addition to representing himself, was in custody. During that discussion, the court informed appellant that there was "going to be a deputy standing behind" appellant each time he approached the bench. The court also stated that, if appellant chose to approach a particular witness during direct or cross-examination, there would be "a deputy next to [appellant] at all times." The court added that the sheriffs would only follow appellant if he chose to approach the witness stand, which he did not have to; that, if appellant did approach the witness stand, the sheriffs would stay at a distance that allowed them to maintain courtroom security while also permitting appellant "to do what [he] need[ed] to do approaching the witness stand;" that the deputies would not be "disruptive;" that they would act in the "least invasive way;" that they would "quietly move behind [appellant];" and that there would be "no reference whatsoever to the fact that [appellant] was in custody."

Later, during the evidentiary portion of trial, the victim testified to the abuse. At the conclusion of that testimony, but prior to cross-examination, appellant informed the court that he wanted to play for the jury two recorded statements made by the victim. Appellant also indicated that he needed "accommodations to play [the] videos." After informing appellant that he would have to disclose the contents of the videos before they could be played for the jury, the court stated that, if the contents of the video turned out to be admissible, then the appropriate equipment would be made available. Appellant thereafter proffered that the videos each contained an interview with the victim that had been recorded prior to trial. Appellant stated that he wanted to play both videos, in their entirety, to impeach the victim's credibility.

Appellant thereafter resumed his cross-examination of the victim. During that examination, appellant confronted the victim with statements she made during one of the recorded interviews. After the victim admitted that everything she said in that interview was untrue and inconsistent with her sworn trial testimony, the trial court ruled that the video would be admitted as substantive evidence and would available to the jurors during their deliberations. Appellant did not object to the court's ruling. Appellant thereafter concluded the remainder of his cross-examination of the victim. At no point did appellant ask for the second video to be accepted into evidence, nor did he indicate that he wanted the court to take some additional action regarding either video.

During his cross-examination of the victim, appellant also asked about a letter she had written in which she claimed that her stepfather had molested her. In response to appellant's questions regarding the letter, the victim testified that everything in the letter was false. When appellant attempted to have the letter introduced into evidence, the court ruled that that the portion of the letter concerning the allegations against the victim's stepfather would be redacted as not being relevant. The court also stated that the allegations were "nothing more than speculation, hearsay."

Appellant later elected to testify in his own defense. Because appellant was representing himself, the trial court gave appellant the option of testifying from the witness stand or from the lawyer's table. Although appellant initially gave his testimony from the witness stand, he ultimately decided, mid-testimony, to switch to the lawyer's table, where he stayed for the remainder of his testimony. Later, when the parties' discussed proposed jury instructions, the court indicated that it "would be giving [] Maryland Pattern Instruction 3.0, What Constitutes Evidence." When the court asked appellant if he had any objections, appellant responded, "No." Ultimately, the court gave that instruction, which read, in part: "In making your decision, you must consider the evidence in this case. That is, testimony from the witness stand and physical evidence or exhibits that have been admitted into evidence." Appellant did not object at the time that instruction was given or at the close of the court's instructions. The jury ultimately convicted appellant of two counts of sex abuse of a minor and four counts of second-degree rape.

On appeal, appellant raised six issues: 1) whether the trial court abused its discretion in permitting courtroom security personnel to be positioned near appellant during certain portions of his trial; 2) whether the trial court violated appellant's constitutional rights in ruling that he was not entitled to funding from the Office of the Public Defender to pay for an expert witness;

3) whether the trial court erred in its handling of appellant's request to have the victim's two recorded statements played for the jury; 4) whether the trial court erred in restricting appellant's cross-examination of the victim regarding the letter she had written in which she claimed that another individual had molested her; 5) whether the trial court erred in restricting appellant's cross-examination of the victim regarding the victim's past sexual conduct; and 6) whether the trial court committed plain error in instructing the jury that evidence included "testimony from the witness stand" where appellant had testified from the lawyer's table and not the witness stand.

Held: Affirmed.

The Court of Special Appeals held that the trial court did not abuse its discretion in permitting courtroom security personnel to be positioned near appellant during certain portions of his trial. The Court noted that, in implementing the security measures, the trial court duly recognized that appellant, as his own attorney, may need to move around the courtroom during trial but that, as a prisoner, he was subject to certain protocols that the sheriffs generally followed in those situations. The Court held that, given those circumstances, the trial court's actions were reasonable. The Court also held that the security measures implemented by the trial court were not so inherently prejudicial that appellant was denied his constitutional right to a fair trial, particularly given the trial court's assurances that the deputies would not be "disruptive;" that they would act in the "least invasive way;" that they would "quietly move behind [appellant];" and that there would be "no reference whatsoever to the fact that [appellant] was in custody." Finally, the Court rejected appellant's contention that the trial court failed to exercise its discretion by deferring to the security guards with respect to how close the guards would stand in relation to appellant. The Court explained that the record as a whole established that the trial court properly analyzed the relevant facts and circumstances and then acted accordingly and within the bounds of its discretion.

The Court also held that the trial court did not violate appellant's constitutional rights in ruling that he was not entitled to funding from O.P.D. to pay for an expert witness. The Court explained that the trial court's decision was consistent with the governing statute and appellant's constitutional rights. The Court noted that appellant could have obtained a state-funded expert witness had he accepted representation by O.P.D., but he chose to reject that service and represent himself.

Regarding appellant's claim that the trial court erred in its handling of his request to have the victim's two recorded statements played for the jury, the Court held that the issue was either unpreserved or affirmatively waived because appellant failed to lodge an appropriate and timely objection to the court's actions.

As to appellant's claim that the trial court erred in restricting his cross-examination of the victim regarding the victim's out-of-court statement that her step-father had abused her, the Court held that the statement was not admissible as a prior inconsistent statement under the hearsay

exception outlined in Maryland Rule 5-802.1(a)(2) because the statement was not inconsistent with the victim's trial testimony. The Court further held that, even if the hearsay exception applied, the victim's statement was irrelevant and thus inadmissible.

Finally, as to appellant's contention that the trial court committed plain error in instructing the jury that evidence included "testimony from the witness stand" where appellant had given part of his testimony from the trial table, the Court held that plain error review was inappropriate. The Court explained that, not only was the given instruction identical to the Maryland pattern instruction, but appellant affirmatively waived his objection to the instruction when, during the parties' discussion of proposed jury instructions, he expressly stated that he had no objection to the court giving the pattern instruction as written.

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Clarence Berry v. State of Maryland, No. 2402, September Term 2018, filed December 23, 2019. Opinion by Nazarian, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/2402s18.pdf

RELIABILITY OF SCIENTIFIC EVIDENCE – DNA ADMISSIBILITY – REQUIRED PRODUCTION UNDER CJ § 10-915

Facts:

Clarence Berry and Quinton Burns had a disagreement over money. At best, Mr. Burns agreed to loan Mr. Berry his rental car until Mr. Burns could pay him for a side job. At worst, Mr. Berry stole Mr. Burns's car while armed with a black pellet gun. Mr. Berry was charged with (1) armed carjacking, (2) carjacking, (3) robbery with a dangerous weapon, (4) robbery, (5) second degree assault, (6) theft of more than $1,000 but less than $10,000, (7) theft of a motor vehicle, (8) theft of less than $1,000, (9) unauthorized use of property, and (10) possession or use of a pellet gun. The police took DNA samples from the recovered rental car, the pellet gun, and Mr. Berry himself, and the State's lab technician tested the samples. In her analysis, she produced electropherograms, visual representations of the main data and control data. The State advised Mr. Berry, under Courts and Judicial Proceedings Article § 10-915, that it intended to use the DNA evidence at trial. It gave Mr. Berry the raw data used in its analysis in the digital .fsa format and accessible copies of some of the electropherograms. But the State did not provide Mr. Berry with accessible copies of the electropherograms of the control data.

The trial court allowed the State to bypass *Frye-Reed* under CJ § 10-915 and admitted the DNA evidence. Mr. Berry was found guilty and appealed, arguing, in pertinent part, that the State did not produce all its analysis as required under CJ § 10-915. Additionally, Mr. Berry argued that the trial court improperly excluded extrinsic evidence during cross-examination of Mr. Burns.

Held: Vacated and remanded.

First, the Court of Special Appeals vacated the convictions and remanded to the trial court for a *Frye-Reed* hearing on the reliability of the DNA evidence, holding that the State failed to meet the requirements of CJ § 10-915 when it declined to produce all its DNA analysis to Mr. Berry in an accessible format.

CJ § 10-915(c)(2)(1) requires that the proponent of DNA evidence provide the opposing side "everything generated in the course of its analysis." The Court noted that the State had refused to provide accessible copies of the control electropherograms, citing changes in the State lab's document retention policy. Instead, the State provided the raw data used in its analysis in .fsa format and argued that it gave Mr. Berry all that was needed under the statute. Yet the raw data

could be opened only using an expensive program called GeneMapper, which the Office of the Public Defender does not have. To view the data, Mr. Berry would have needed to hire an expert witness with access to GeneMapper. The Court held that the proponent of DNA evidence must, as part of the statutory bargain of CJ § 10-915, provide its data to opponents in an accessible form. If the proponent of DNA evidence fails to meet that requirement, it must proceed to a *Frye-Reed* hearing.

Second, the Court of Special Appeals affirmed the trial court's exclusion of extrinsic evidence during Mr. Burns's cross-examination. At trial, Mr. Berry sought to impeach Mr. Burns by playing Mr. Burns's recorded police interview, which Mr. Berry contended contained two factual inconsistencies. In *Brooks v. State*, the Court of Appeals identified a four-part checklist for the entry of extrinsic impeachment evidence under Maryland Rule 5-613. 439 Md. 698, 716 (2014). Critical here is the requirement that "[t]he witness must have 'failed to admit having made the statement.'" *Brooks*, 439 Md. at 717 (quoting Md. Rule 5-613(b)(1)). Mr. Burns did not deny his statements in the interview on either factual inconsistency during his cross-examination. Instead, he either affirmed or contextualized his comments in the interview. Accordingly, the trial court did not abuse its discretion in excluding the extrinsic impeachment evidence.

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Lawrence Ervin Montague v. State of Maryland, No. 2033, September Term 2017, filed December 23, 2019. Opinion by Kehoe, J.

https://mdcourts.gov/data/opinions/cosa/2019/2033s17.pdf

EVIDENCE – FACTORS AFFECTING ADMISSIBILITY – PREJUDICIAL EFFECT AND PROBATIVE VALUE

EVIDENCE – RELEVANCY AND ITS LIMITS – RELATIONSHIP BETWEEN RULES

Facts:

Lawrence Montague was charged with murdering a customer who purchased cocaine with a fake $100 bill. A few pieces of evidence introduced at trial were central to Montague's arguments on appeal.

First, the prosecution introduced into evidence rap lyrics written and recited by Montague on a recorded phone call made while he was being held in pretrial detention. These included: "And, if a n---a' ever play / Treat his head like a target / You know he's dead today"; "There's a .40 when this bitch goin' hit up shit"; "Like a pickup truck /But you ain't getting picked up/ You getting picked up by the ambulance."

Second, the prosecution introduced a photo identification made by the victim's cousin, who had gone with the victim to purchase the cocaine and was waiting nearby in his pickup truck. The suspect had been identified as wearing dark clothing, and though all the men in the photo array had similar features, Montague was the only person wearing dark clothing in his mug shot. At the time she made the identification, the witness had several theft charges pending against her and, before she made the identification, asked the officer administering the photo array if he could "help [her] out with [her] case." The witness's subsequent convictions and the seemingly light sentence she received were brought up by Montague's counsel at trial, in an effort to impeach the witness.

Finally, the state presented testimony from Montague's girlfriend, who, like Forrester's cousin, placed Montague near the scene of the murder on that night. Montague's girlfriend also testified that, in the weeks between the murder and Montague's arrest, Montague would not tell her where he was and that she had asked him, "If you didn't do anything, why run?"

After a jury trial, Montague was convicted of second-degree murder and related offenses.

Held: Affirmed.

The principal issue before the Court of Special Appeals was whether the trial court erred in admitting, as substantive evidence of Montague's guilt, the rap lyrics performed by Montague on the recorded call. After providing an overview of court cases from other jurisdictions that have dealt with this issue, the Court of Special Appeals explained that the admissibility of a criminal defendant's own rap lyrics hinges on a balancing, under Md. Rule 5-403, of the lyrics' probative value and the danger of unfair prejudice posed by their admission. When the lyrics are insufficiently tethered to the charged crime and instead contain only general references glorifying violence, their minimal probative value is far outweighed by their unfair prejudicial impact as evidence of the defendant's bad character or propensity for violence in general. But when the prosecution can demonstrate a strong nexus between specific details of the composition and the circumstances of the charged crime, the probative value of defendant-composed lyrics increases. The lyrics do not simply suggest a bad character—a propensity to engage in the criminal conduct charged. Rather, they operate as direct proof of the defendant's criminal conduct—an admission or a confession that tends to prove the defendant's wrongdoing.

Applying this analytical framework to the facts of Montague's case, the Court held that the lyrics introduced into evidence alluded to details of the crime and explained Montague's possible motive for the murder. Accordingly, these lyrics were not to be considered improper propensity or bad-character evidence. Instead, they were direct proof of Montague's criminal wrongdoing, whose probative value was not substantially outweighed by any danger of unfair prejudice that their admission would entail.

Montague raised several other issues: (1) whether the trial court erred in denying Montague's motion to suppress evidence of a pretrial photo identification; (2) whether the trial court erred in giving a jury instruction on flight and concealment; and (3) whether the trial court erred in limiting cross-examination of a critical witness. The Court held that none of these contentions had any merit.

First, the photo identification did not result from an impermissibly suggestive procedure. Even though Montague was the only person in the photo array wearing black and the shooter had been described as wearing black, the other men in the photo had similar features, the administering officer did not direct the witness's attention to Montague's photograph and the identifying witness explained, before seeing any of the photos, that she had seen Montague twice before and knew exactly what he looked like.

Second, though the jury-instruction issue was preserved by substantial compliance with Md. Rule 4-325(e), there was "some evidence," mostly from the testimony of Montague's girlfriend, to support an instruction on concealment.

Finally, the trial court did not abuse its discretion by precluding defense counsel from impeaching a key witness by pointing out the disparity between the maximum possible sentence she could have received for the charges pending against her when she identified Montague as the shooter and the lesser sentence she actually received later. Defense counsel could not provide the trial court with any factual basis for the suggestion that this disparity resulted from some special treatment received by the witness in exchange for her testimony. Montague was provided with

the "threshold of inquiry," required by the Confrontation Clause, to impeach the witness's credibility.

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Ana Beti Molina v. State of Maryland; Javier Molina v. State of Maryland, Nos. 2380 & 2357, September Term 2017, filed December 23, 2019. Opinion by Leahy, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/2380s17.pdf

CRIMINAL LAW – FINANCIAL EXPLOITATION OF VULNERABLE ADULTS

Facts:

A grand jury in the Circuit Court for Montgomery County indicted appellants, Ana and Javier Molina, on several charges relating to their financial exploitation of Gustave Shapiro, a widowed nonagenarian. Ana was hired in 2012 to clean Mr. Shapiro's house after his wife passed away. Soon thereafter, she became Mr. Shapiro's primary caretaker following his estrangement from his only living son. She was present when a neurologist diagnosed Mr. Shapiro with mild senile dementia. Nevertheless, Ana obtained from Mr. Shapiro: power of attorney; healthcare power of attorney; and fee simple title to his house, subject to a life estate in Mr. Shapiro. Ana's name was added to Mr. Shapiro's bank accounts giving her access to nearly $2 million; she was added as a co-lessee on his safe deposit box; and she was made the sole beneficiary of his will. Money was withdrawn from Mr. Shapiro's bank accounts to pay college tuition for the Molinas' daughter and to purchase a new vehicle for the Molinas. Additional sums were withdrawn from ATMs near two casinos where Javier frequently gambled. Although Javier earned between $20,000 and $48,000 a year working at a car wash, gambling records show he gambled over $780,000 between 2013 and 2016. Mr. Shapiro's money was also used to buy a new house in which he lived with the Molinas, until Montgomery County Adult Protective Services removed him in 2016.

Ana and Javier stood trial as co-defendants, and the jury found each guilty of (1) theft scheme over the value of $100,000 in violation of Maryland Code (2002, 2012 Repl. Vol., 2017 Supp.), Criminal Law Article ("CR"), § 7-104; (2) conspiracy to commit theft scheme; (3) financial exploitation, value over $100,000, of an adult over 68 in violation of CR § 8-801(b)(2); (4) conspiracy to exploit a vulnerable adult; and (5) financial exploitation, value over $100,000, of a vulnerable adult in violation of CR § 8-801(b)(1). Separately, Ana was found guilty of two counts of misappropriation by a fiduciary. In separate appeals that were consolidated, Ana and Javier challenged the circuit court's admission of evidence of their financial status and gambling; the court's denial of Ana's motion to sever her trial from Javier's; the court's admission of opinion evidence by one of Mr. Shapiro's attorneys; the court's instruction on accomplice liability; the sufficiency of the evidence for some of the convictions; and the prosecution's rebuttal argument.

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Held:

Judgments of the Circuit Court for Montgomery County against Ana Molina affirmed; Judgments of the Circuit Court for Montgomery County against Javier Molina affirmed in part and remanded in part for further proceedings consistent with the opinion to vacate one of the conspiracy convictions

The Court of Special Appeals held that there was more than sufficient evidence to support Ana's convictions, and, although the evidence of Javier's intent to commit financial exploitation was largely circumstantial, it was also more than sufficient to support the jury's verdicts, except for one of his two conspiracy convictions. The evidence established that Ana knew or reasonably should have known that Gustave was a vulnerable adult who was also well over the age of 68, and that she "knowingly and willfully" exploited Gustave by obtaining his property through both deception and undue influence, so there was sufficient evidence to support the jury's verdicts under CR § 8-801(b) beyond a reasonable doubt. Similarly, there was sufficient evidence upon which a jury could find beyond a reasonable doubt that Javier violated CR §§ 8-801(b) and 7-104, and to generate an instruction on Javier's accomplice liability. Because the State adduced evidence of only one agreement between Ana and Javier, one of Javier's two convictions for conspiracy to commit financial exploitation of a vulnerable adult must be vacated.

In response to the parties' assignments of error, the Court held that: 1) the trial court was legally correct in determining that evidence of the Molinas' gambling and financial status was relevant to the crimes charged because of the special circumstances demonstrating a nexus between their financial circumstances and motive to commit the crimes; 2) the trial court did not abuse its discretion in denying Ana's motion to sever her trial from Javier's trial, as only mutually admissible evidence would be introduced at trial and joinder presented no unfair prejudice to Ana; 3) given that Ana invited any error relating to Mr. Shapiro's attorney's testimony, and subsequently opened the door to the complained-of testimony, which was cumulative of other similar evidence, the trial court also did not err in allowing the opinion testimony; and 4) the State's rebuttal argument did not comment impermissibly on the Molinas' decision not to testify in violation of their constitutional rights, so the trial court was within its discretion to overrule Ana's objection. Accordingly, the Court of Special Appeals affirmed the judgments against Ana, and all of the judgments against Javier apart from the one conspiracy conviction, for which the case was remanded, in part, for further proceedings to vacate that conviction.

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In the Matter of Ronald Meddings, No. 2096, September Term 2018, filed December 23, 2019. Opinion by Wells, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/2096s18.pdf

ESTATES AND TRUSTS – GUARDIANSHIP – GUARDIANSHIP OF THE PERSON – LESS RESTRICTIVE FORMS OF INTERVENTION

ESTATES AND TRUSTS – GUARDIANSHIP – GUARDIANSHIP OF THE PERSON – LESS RESTRICTIVE FORMS OF INTERVENTION -- STANDARD OF REVIEW

Facts:

Ronald Meddings was being treated at a Veterans Administration Hospital in Baltimore when he allegedly approached a nurse, grabbed her by the neck, and attempted to choke her. As the nurse tried to defend herself, she and Meddings fell to the floor. Security personnel had to forcibly remove Meddings from the nurse, but he continued to try to kick her. As a result of the incident, the State charged Meddings with first and second-degree assault. During that prosecution, the Department of Health and Mental Hygiene confirmed a prior diagnosis that Meddings suffered from schizophrenia. The Circuit Court for Howard County found Meddings incompetent to stand trial and committed him to the Clifton T. Perkins Hospital Center ("Perkins") on August 7, 2017.

While at Perkins, Meddings refused to take psychotropic medication or drugs prescribed to treat his atrial fibrillation. Perkins was forced to convene a Clinical Review Panel ("CRP"), a statutorily recognized group of doctors and medical professionals who may approve, at 90-day intervals, the involuntary administration of psychotropic medication. The CRP convened and approved medicating Meddings three times. Yet, the CRP was unauthorized to treat Perkins for atrial fibrillation.

Perkins filed a petition seeking the appointment of a guardian for Meddings' person, arguing that it needed a means to treat Meddings on an on-going basis because he remained actively psychotic, treatment for his atrial fibrillation was unaddressed, and the necessity of convening the CRP did not effectively allow Perkins to protect Meddings from himself or others. Meddings, on the other hand, maintained that the CRP offered him due process to protest the forced administration of psychotropic medicines. Meddings argued that two alternatives, use of an advanced directive and a surrogate decision-maker were viable, less restrictive alternatives to guardianship. After a hearing, the circuit court granted Perkins' petition for guardianship of Meddings' person.

Held: Affirmed

Meddings appealed to the Court of Special Appeals to determine whether the trial court erred in finding that a no less restrictive alternative form of intervention was available other than guardianship.

After establishing that the appropriate standard of review in an adult guardianship case should be the same as the tripartite and interrelated standard of review in child guardianship cases, the Court of Special Appeals concluded that, here, a no less restrictive form of intervention was available. The Court held an advanced directive was not a viable option because Meddings is incompetent; competency to understand and execute an advanced directive is required. For similar reasons, the Court held that a surrogate decision-maker was not be a viable option either. Finally, the Court determined that the CRP is not a less restrictive alternative form of intervention. Although the CRP provides Meddings with due process, its habitual use is not in his long-term best interests. The evidence adduced at trial showed that on one occasion, the CRP could not be convened before Meddings' anti-psychotic medicine ran out and Meddings was violent, endangering himself and Perkins' staff. Even though the CRP has approved the forced administration of psychotropic medication, Meddings remains "floridly" psychotic. Therefore, it is likely that Perkins would need to convene a CRP every 90 days for the foreseeable future. Further, based on the testimony of two psychiatrists, the CRP harms the doctor-patient relationship as the patient's treating psychiatrist must testify against the patient at the CRP proceedings. Finally, the CRP cannot address Meddings' atrial fibrillation, which if untreated would likely be fatal. For these reasons, the Court of Special Appeals held that the circuit court's appointment of a guardian in Meddings' case was not an abuse of discretion.

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In the Matter of Gerald S. Dory, No. 1084, September Term 2018, filed December 23, 2019. Opinion by Leahy, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/1084s18.pdf

ESTATES & TRUSTS – TRUSTEE – RIGHT TO COMMISSION

Facts:

By order of the Circuit Court for Prince George's County, Terry Sullivan was appointed guardian of the property of Mr. Gerald S. Dory, an elderly widower who was diagnosed with dementia and an altered mental state. Sullivan's authority as guardian was limited by the Letters of Guardianship of Property, which required her to obtain a court order before selling or otherwise encumbering Mr. Dory's real property. Accordingly, when Mr. Dory's property in the District of Columbia went into foreclosure in 2016, Sullivan filed a petition requesting the court's permission to conduct a private sale. The court issued an order authorizing Sullivan to list the property and subsequently ratified the contract of sale, which included a sales price above the property's appraised value. Sullivan then petitioned the court for a commission on the sale. As instructed by § 14.5-708(d) of the Maryland Code (1974, 2017 Repl. Vol.), Estates and Trusts Article ("ET"), Sullivan calculated the commission pursuant to the rate specified in Local Rule BR7 of the Seventh Judicial Circuit.[1] On June 25, 2018, the court denied the petition, without a hearing, after determining that the commission was not in Mr. Dory's best interest and that it was wholly inequitable when considering the time and labor expended by Sullivan. Sullivan timely noted her appeal from the court's denial of her petition.

Held: Reversed and remanded.

The Court of Special Appeals held that the circuit court applied the wrong legal standard in denying Sullivan a commission on the sale of Mr. Dory's real property. Reading together and harmonizing the provisions of ET §§ 13-218(a) and 14.5-708 with Local Rule BR7, a guardian of property is entitled to a commission for the sale of real property approved by the court and, absent a petition by an interested person or agreement to the contrary, that commission may not be diminished except in the narrow circumstances articulated in ET § 14.5-708(a)(1)(iii) and Local Rule BR7. The circuit court erred by engaging in a determination of whether the commission was in Mr. Dory's best interest, whether the commission was equitable in light of the services and labor expended by Sullivan, and whether unusual circumstances existed to allow the commission. Accordingly, the Court of Special Appeals remanded to the circuit court with

[1] Because Mr. Dory's property was located outside of Maryland, the applicable rate of commissions was the rate allowed by the local rule in Prince George's County, which falls within the Seventh Judicial Circuit.

instructions to determine Sullivan's commission at the rate set by Local Rule BR7 and to deviate from the default rate only for "sufficient cause," under ET § 14.5-708 (a)(1)(iii), or "in the event of negligence or default" on the part of Sullivan, under Local Rule BR7.

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Paul w. Nusbaum, Jr. v. Marsha R. Nusbaum et al., No. 480, September Term 2018, filed December 20, 2019. Opinion by Wells, J.

https://mdcourts.gov/data/opinions/cosa/2019/0480s18.pdf

FAMILY LAW – CHILD SUPPORT – ALIMONY – ARREARAGES –ALLOCATION OF SUPPORT PAYMENTS – SEPARATION OF POWERS

Facts:

Paul Nusbaum and Marsha Nusbaum divorced in 2005. At that time, the Circuit Court for Carroll County ordered Paul Nusbaum to pay his former wife, Marsha Nusbaum, $3250.00 per month in non-modifiable alimony. The court also ordered Mr. Nusbaum to pay Ms. Nusbaum $1,422.00 per month in child support for the benefit of their four children. At Ms. Nusbaum's request, Mr. Nusbaum became subject to an Earnings Withholding Order that required his employer to submit payments for child support and alimony to the Carroll County Office of Child Support Enforcement ("OCSE") for distribution to Ms. Nusbaum.

In 2008, Mr. Nusbaum moved to Georgia. The OCSE duly registered the Earnings Withholding Order in Georgia, obligating Georgia to collect Mr. Nusbaum's spousal and child support payments and forward them to Maryland. However, the garnishment of Mr. Nusbaum's wages did not meet the full monthly amount of either child support or alimony because his wages could not satisfy either obligation.

In 2010, Mr. Nusbaum sought to modify his monthly child support payment. By 2010, Mr. Nusbaum owed $36,264.60 in unpaid child support and $117,127.22 in unpaid alimony. After two children emancipated, the court reduced his child support payment accordingly.

In 2016, Mr. Nusbaum requested the court order OCSE to perform an audit and establish his arrears for both alimony and child support after he learned that Georgia allocated his monthly payments differently than Maryland. Whereas Maryland declared his child support arrears were $80,905.25, Georgia said his child support arrears were approximately $30,000.00. Georgia allocated a higher percentage of his monthly payment to child support, rather than alimony. Maryland did almost the opposite, allocating 70% of his payments to alimony and 30% to child support.

More importantly, when Mr. Nusbaum requested OCSE perform the audit and establish arrears, he also asked the court to credit all payments made for both spousal and child support solely to his child support obligation until satisfied. Only then, Mr. Nusbaum, argued, should any excess be credited toward spousal support. After a hearing on Exceptions to a Magistrate's findings, which essentially favored Mr. Nusbaum, the trial court ordered OCSE to perform the audit and begin crediting any future payments Mr. Nusbaum made solely to child support. Only after that

obligation (plus arrears) was satisfied, then any remaining payments should be credited against his alimony obligation.

After a hearing on Ms. Nusbaum's motion to alter or amend and OCSE's concomitant motion to reconsider, the circuit court determined that Mr. Nusbaum was judicially estopped from reallocating all of his payments solely to child support, as he requested. However, the court declined to address the threshold question of whether it was permissible for the court to order the reallocation in the first instance.

Held: Affirmed.

Ms. Nusbaum appealed to the Court of Special Appeals to determine: (1) Was the circuit court correct when it declared that Mr. Nusbaum was judicially estopped from claiming that the amounts he claimed as alimony on his tax returns should be reallocated toward his child support arrears with the OCSE?; and (2) Did the circuit court err in not determining whether it was permissible to allocate the support funds paid to a former spouse be first paid to current child support and child support arrears, prior to any payment of funds toward spousal support?

The Court of Special Appeals concluded that although the circuit court erred in its application of judicial estoppel, the circuit court could not have ordered the reallocation in any event. As for the application of judicial estoppel, although Mr. Nusbaum claimed part of his payments to Ms. Nusbaum as alimony on his income tax returns, that act was not "an inconsistent position" in different litigation, that being the first element of the doctrine of judicial estoppel. Further, despite Mr. Nusbaum claiming part of his overall payments to Ms. Nusbaum as alimony on his income taxes, that fact was not "a position accepted by the court," that being the second element of judicial estoppel. Finally, while Ms. Nusbaum may well be correct that the third element of judicial estoppel, intentionally misleading the court "to gain an unfair advantage," may have been met, because the Court of Special Appeals found that the first two elements were lacking, judicial estoppel could not apply. Further, equitable estoppel could not be established either. The Court of Special Appeals held that Ms. Nusbaum did not conclusively prove a present detriment, necessary for equitable estoppel, though she might be able to do so in the future.

More significantly, the Court of Special Appeals held that the circuit court could not have ordered the requested reallocation under the separation of powers doctrine. So long as an executive agency's method of carrying out a statutory mandate is lawful, we are precluded from ordering the agency to alter that method. Here, the executive agency's method of carrying out a legislative mandate - treating spousal and child support equally - is animated by and in harmony with federal law. Further, the agency's allocation method is not incompatible with the best interests of the child standard.

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William H. Anderson and H. Kevin Anderson v. Great Bay Solar, LLC and Board of Commissioners of Somerset County, No. 2387, September Term 2018, filed December 18, 2019. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2019/2387s18.pdf

REAL PROPERTY OWNERSHIP – PUBLIC HIGHWAYS – EASEMENTS – LACHES

Facts:

The Board of County Commissioners of Somerset County (the "County"), granted an easement to Great Bay Solar ("GBS"), a solar power company, to allow GBS to install collection system cabling underneath certain county roads to transport power generated from nearby solar panels to the general electric grid. Two of the roads in the easement agreement abut or bisect land owned by two local farmers, the Andersons. The Andersons objected to the project and argued that they owned the roadbeds, and therefore, GBS was trespassing by installing the collection systems in the roadbeds. Both the County and the Andersons sought a declaratory judgment that they owned the roadbeds in fee simple.

The circuit court ruled that neither party met their burden of proof to show fee simple ownership. It concluded, however, that the County possessed "sufficient interest" in the roads to grant to GBS the right to install the collection systems in the roadbeds, and that the Andersons were "barred from any equitable relief they seek based on the doctrines of waiver, estoppel, and laches."

Held: Reversed, in part, affirmed, in part, and remanded for further proceedings.

In the case of an ordinary highway, the general rule is that, absent evidence to the contrary, the public acquires only an easement of passage, and the adjacent landowner, subject to this easement, owns the land below the surface of the road. When a municipality acquires an easement of passage on a public street, however, it acquires the right to improve and maintain the road. Additionally, when land abutting a road is transferred, there is a presumption that title to the center of a binding street passes to the grantee under both common law and Md. Code (2015 Repl. Vol.) § 2-114(a) of the Real Property Article ("RP"). Absent evidence to the contrary, the Andersons' evidence of their ownership of the farms established they own the land under the roads in fee simple, and the circuit court should issue a declaratory judgment in that regard.

An easement holder generally cannot use the land for any purpose other than that contemplated by the grant, although the scope of the easement may account for evolving uses consistent with the easement's original purpose. Because the circuit court did not state the basis for its finding that the County had a "sufficient interest" to grant GBS the right to install the collections systems

in the roads, and because factual findings are required to resolve this issue, the case must be remanded to the circuit court for clarification regarding this issue.

Laches precludes equitable relief when there is an unreasonable delay in the assertion of rights, and that delay results in prejudice to the opposing party. A relatively short period of time may be found to constitute an unreasonable delay under the circumstances of the case. When a party knows that construction is scheduled to occur, they must diligently protect their rights, and waiting until the defendant incurs significant costs before filing suit may result in the claim being barred by laches. In this case, the court properly denied the Andersons' request that the court order GBS to remove the cables and restore the roads to their previous condition.

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Bruce Uthus v. Valley Mill Camp, Inc., No. 2366, September Term 2018, filed December 18, 2019. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2019/2366s18.pdf

TRESPASS – CIRCUIT COURT JURISDICTION – LANDLORD/TENANT – LEASE VERSUS LICENSE – OCCUPANCY INCIDENTAL TO EMPLOYMENT

Facts:

Valley Mill, Inc. operates a children's summer camp in Germantown, Maryland. The camp has been owned by Uthus's family since 1956. The sole shareholder of Valley Mill is Uthus's mother, Evelyn McEwan. Valley Mill leases the property upon which the camp operates from Seneca Joint Venture, a Maryland general partnership composed of Ms. McEwan, the Robert McEwan Trust, Valley Mill, Uthus, and Seneca Venture, LLC. Uthus is a former employee and former member of the Board of Directors of Valley Mill. In May of 2017, Valley Mill terminated Uthus's employment. Prior to Uthus's termination, Uthus had resided in an apartment unit on the property. Uthus had resided in the apartment for approximately nineteen years while employed by Valley Mill.

After the termination of Uthus's employment, Valley Mill asked Uthus to vacate the apartment, but he refused to do so. Valley Mill subsequently filed a complaint against Uthus in the Circuit Court for Montgomery County alleging, *inter alia*, that Uthus was trespassing on the property. Valley Mill moved for summary judgment on the trespass claim. The circuit court granted Valley Mill's summary judgment motion and Uthus appealed.

Held: Affirmed.

Uthus first asserted that the circuit court lacked jurisdiction to consider Valley Mill's trespass claim, arguing that the trespass claim was actually a "wrongful/forcible detainer action or a landlord/tenant action" that was, in Uthus's view, committed to the exclusive original jurisdiction of the District Court. In determining whether the dispute at issue in this case was a landlord/tenant or wrongful detainer action, the Court of Special Appeals considered whether Uthus had presented any evidence of a landlord/tenant relationship between himself and Valley Mill.

The Court observed that Maryland appellate courts had not previously expressly addressed whether an employee who occupies premises belonging to an employer is a tenant of the employer. The Court considered that other courts have generally held that "a person who occupies the premises of the person's employer as part compensation for such employment generally is considered to be in possession as an employee, rather than as a tenant, where the

occupancy is connected with and incidental to, or is required for the necessary or better performance of, the employee's services." 49 Am. Jur. 2d Landlord and Tenant § 8 (2019). The Court looked to cases from other jurisdictions holding that employees were licensees rather than tenants of their employers when the housing belonged to and was provided by the employer. The Court of Special Appeals explained that the lack of rent payment required of an employee was a strong indication that no lease was intended. The Court further observed that the Office of the Attorney General had previously addressed a somewhat similar issue in an advisory opinion. See 89 Op. Att'y Gen. 3 (2004). The Attorney General had explained that other courts had "often held that an employee who occupies premises belonging to an employer is not a tenant when the occupancy is incidental to, or necessary for, performance of the employment."

The Court of Special Appeals also considered the Court of Appeals' decision in *Delauter v. Shafer*, 374 Md. 317, 324, (2003). *Delauter* addressed a situation in which a family member had lived on family land for decades with no lease or expectation of rent and held that the family member was a licensee rather than a tenant. Although *Delauter* did not involve an employment situation, the Court of Special Appeals observed that it presented "otherwise very similar facts." Having determined that Uthus was not a tenant of Valley Mill, the Court rejected Uthus's assertion that the circuit court lacked jurisdiction to consider Valley Mill's claim on the basis that the district court has exclusive jurisdiction for actions involving landlord and tenant. The Court of Special Appeals explained that the circuit court has exclusive jurisdiction to decide the ownership of real property or of an interest in real property.

Uthus further asserted that the circuit court erred by granting summary judgment to Valley Mill on the trespass claim, arguing that Uthus was in real possession of the apartment and that this precluded Valley Mill from establishing the elements of trespass. The Court of Special Appeals determined that Uthus had pointed to no evidence that he was in possession of the apartment. Accordingly, the Court of Special Appeals determined that the circuit court appropriately determined that there were no genuine disputes of material fact and Valley Mill was entitled to judgment as a matter of law on the trespass claim.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated December 3, 2019, the following attorney has been disbarred by consent:

DAVID B. WOO

*

This is to certify that the name of

MARK HOWARD FRIEDMAN

has been replaced upon the register of attorneys in this State as of December 5, 2019.

*

By a Per Curiam Order of the Court of Appeals dated December 6, 2019, the following attorney has been disbarred:

WILLIAM CLARK PLANTA

*

By an Order of the Court of Appeals dated December 19, 2019, the resignation of

CURTIS ARNOLD, JR.

from the further practice of law in this State has been accepted.

*

By an Order of the Court of Appeals dated December 19, 2019, the resignation of

JACQUELINE MICHELLE CALLIER

from the further practice of law in this State has been accepted.

*

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*

By an Order of the Court of Appeals dated December 19, 2019, the following attorney has been disbarred:

EPHRAIM CHUKWUEMEKA UGWUONYE

*

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JUDICIAL APPOINTMENTS

*

On November 20, 2019, the Governor announced the appointment of **David Bruce Martz** to the District Court for Wicomico County. Judge Martz was sworn in on December 2, 2019 and fills the vacancy created by the retirement of the Hon. L. Bruce Wade.

*

On November 1, 2019, the Governor announced the appointment of **Richard Roger Titus** to the Circuit Court for Carroll County. Judge Titus was sworn in on December 2, 2019 and fills the vacancy created by the retirement of the Hon. J. Barry Hughes.

*

On November 1, 2019, the Governor announced the appointment of **Victor Manuel Del Pino** to the District Court for Montgomery County. Judge Del Pino was sworn in on December 6, 2019 and fills the vacancy created by the retirement of the Hon. James B. Sarsfield.

*

On December 9, 2019, the Governor announced the appointment of **Jonathan Biran** to the Court of Appeals (Fifth Appellate Judicial Circuit). Judge Biran was sworn in on December 16, 2019 and fills the vacancy created by the retirement of the Hon. Clayton Greene, Jr.

*

On November 20, 2019, the Governor announced the appointment of **Abigail Hughes Marsh** to the District Court for Wicomico County. Judge Marsh was sworn in on December 20, 2019 and fills the vacancy created by the retirement of the Hon. John P. Rue, II.

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On December 10, 2019, the Governor announced the appointment of **Magistrate Bibi Mariama Berry** to the Circuit Court for Montgomery County. Judge Berry was sworn in on December 27, 2019 and fills the vacancy created by the retirement of the Hon. Terrence J. McGann.

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On December 10, 2019, the Governor announced the appointment of **Michael Joseph McAuliffe** to the Circuit Court for Montgomery County. Judge McAuliffe was sworn in on December 27, 2019 and fills the vacancy created by the retirement of the Hon. Nelson W. Rupp, Jr.

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

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