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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Mark David Wemple, Misc. Docket AG No. 69, September Term 2020, filed June 16, 2022. Opinion by Hotten, J.

<https://www.courts.state.md.us/data/opinions/coa/2022/69a20ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary and Remedial Action with the Court of Appeals, alleging that Mark David Wemple (“Respondent”) violated Maryland Attorney’s Rules of Professional Conduct (“MARPC”) 19-301.1 (Competence), 19-301.3 (Diligence), 19-301.4 (Communication), 19-303.1 (Meritorious Claims and Contentions), 19-303.3 (Candor Toward the Tribunal), 19-304.1 (Truthfulness in Statements to Others), 19-304.4 (Respect for Rights of Third Persons), 19-305.5 (Unauthorized Practice of Law; Multi-Jurisdictional Practice of Law), and 19-308.4 (Misconduct). These allegations stemmed from the failure to provide adequate representation to several clients, the abuse of the legal process to intimidate an opposing party witness, and the making of knowingly false statements to the circuit court regarding an associate’s unauthorized practice of law.

The hearing judge found that Respondent provided incompetent representation by failing to communicate his appearance to a client until the day before trial, failing to advise a client of fee arrangements, and by repeatedly failing to appear at clients’ hearings. Respondent abused the legal process by intentionally serving an unenforceable subpoena to coerce an opposing party witness to appear at a deposition and baselessly threatening to hold the opposing party witness in contempt for failing to answer questions. Respondent made knowingly false statements to the circuit court by intentionally misrepresenting that his associate, suspended from the practice of law in Maryland, was a specially admitted out-of-state attorney. Finally, Respondent submitted false evidence and statements during the disciplinary proceedings.

The hearing judge did not find any mitigating factors attributable to Respondent, nor did Respondent assert that any mitigating factors applied. The hearing judge also found eight

aggravating factors attributable to Respondent, including prior discipline, dishonest or selfish motive, pattern of misconduct, multiple violations, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rule or orders of the disciplinary agency, submission of false evidence and false statements during the disciplinary proceeding, refusal to acknowledge the wrongful nature of conduct, and substantial experience in the practice of law. The hearing judge concluded that Respondent violated each rule of professional conduct as alleged by Petitioner.

Held: Disbarred.

Based on an independent review of the record, the Court affirmed the hearing judge's legal conclusions that Respondent violated MARPC 19-301.1 (Competence), 19-301.3 (Diligence), 19-301.4 (Communication), 19-303.1 (Meritorious Claims and Contentions), 19-303.3 (Candor Toward the Tribunal), 19-304.1 (Truthfulness in Statements to Others), 19-304.4 (Respect for Rights of Third Persons), 19-305.5 (Unauthorized Practice of Law; Multi-Jurisdictional Practice of Law), and 19-308.4 (Misconduct).

The Court declined to consider an exception filed by Respondent because it relied on facts and evidence not included in the record. *Attorney Grievance Comm'n v. O'Neill*, 477 Md. 632, 648 n.12, 271 A.3d 792, 802 n.12 (2022). The Court found that the nature and circumstances of Respondent's misconduct closely resembled that of other attorneys who have been disbarred for the intentional dishonest conduct toward the tribunal, third parties, and opposing counsel. Respondent's intentional misconduct was compounded by a pattern of incompetent representation. Respondent failed to appear at his clients' hearings, causing unnecessary delay and expense for all parties. Respondent failed, at a minimum, to notify any of the parties of his inability to appear.

The Court also sustained the findings of eight aggravating factors by the hearing judge. The Court had previously reprimanded Respondent for failing to adequately communicate and safekeep clients. Respondent's intentional dishonesty and pattern of misconduct reflected a selfish motive to circumvent rules of professional responsibility. Respondent failed to fully and honestly communicate with the hearing judge and Bar Counsel and engaged in bad faith obstruction of the disciplinary proceedings by "submitting false evidence and making false statements . . . in an effort to postpone the hearing." In the aggregate, the Court determined that Respondent's conduct warranted disbarment.

In re: D.D., No. 27, September Term 2021, filed June 21, 2022. Opinion by Biran, J.

Watts, J., concurs.

Hotten and Raker, JJ., dissent.

<https://mdcourts.gov/data/opinions/coa/2022/27a21.pdf>

FOURTH AMENDMENT – SEARCHES AND SEIZURES – INVESTIGATORY
DETENTIONS – REASONABLE SUSPICION BASED ON THE ODOR OF MARIJUANA

FOURTH AMENDMENT – SEARCHES AND SEIZURES – PAT-DOWN FOR WEAPONS –
REASONABLE SUSPICION THAT THE SUSPECT IS ARMED AND DANGEROUS

Facts:

Two police officers responded to a complaint concerning the smell of marijuana in the basement of an apartment building. When they entered the building, the officers encountered D.D. (a juvenile) and four others as the five young men came up the stairs from the basement. The officers smelled a strong odor of marijuana coming from the group. The officers directed the young men to sit on the stairs, thus seizing them for purposes of the Fourth Amendment. Because the group appeared to be acting evasively, were wearing baggy clothing that could potentially conceal weapons, smelled of marijuana, and outnumbered the officers five to two, the officers decided to frisk all five young men. First, one officer frisked one of D.D.’s companions, and discovered a weapon (possibly a BB gun) in that young man’s waistband. The other officer then frisked D.D., and recovered a loaded handgun from D.D.’s waistband.

D.D. was charged as a juvenile with firearms offenses. He moved to suppress the gun recovered from his waistband on the grounds that both the initial stop and the subsequent frisk violated the Fourth Amendment. D.D. argued that following the General Assembly’s partial decriminalization of marijuana in 2014, the odor of marijuana, without more, no longer provides reasonable suspicion of criminal activity sufficient to conduct an investigatory detention, also known as a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1 (1968). D.D. also argued that, even if the officers had reasonable suspicion of criminal activity sufficient to conduct the initial stop, the officers did not have reasonable suspicion to believe that D.D. was armed and dangerous sufficient to support his frisk. The juvenile court denied D.D.’s motion to suppress and found him involved as to all counts. D.D. appealed the denial of his suppression motion.

The Court of Special Appeals reversed the judgment of the juvenile court. *In re D.D.*, 250 Md. App. 284 (2021). The intermediate appellate court reasoned that “because the ‘odor of marijuana alone does not indicate the quantity, if any, of marijuana in someone’s possession,’ . . . it cannot, by itself, provide reasonable suspicion that the person is in possession of a criminal amount of marijuana or otherwise involved in criminal activity.” *Id.* at 301. As such, the Court of Special

Appeals held that the initial stop was an unreasonable seizure in violation of D.D.'s Fourth Amendment rights. Because it came to this conclusion, the Court of Special Appeals did not reach the question of whether the officers' subsequent pat-down of D.D. independently violated the Fourth Amendment.

Held: Reversed.

The Court of Appeals held that, even following partial decriminalization, the odor of marijuana permits an officer to briefly detain an individual to investigate whether that person has committed a criminal offense. While it is no longer a criminal offense to possess any quantity of marijuana in Maryland, it is not legal for anyone to possess marijuana (except for those who qualify for a medical marijuana exemption). Rather, it is a civil offense to possess up to 10 grams of marijuana, and it is a criminal offense to possess 10 grams or more of marijuana. Given the status of marijuana after partial decriminalization, the odor of marijuana remains evidence of a crime. For this reason, the odor of marijuana provides reasonable suspicion to believe that criminal activity may be afoot. Reasonable suspicion is a lower standard than probable cause and can be supported by circumstances that are different in both quality and kind than that required by probable cause. While the odor of marijuana no longer provides law enforcement officers with probable cause to arrest a suspect, it does provide reasonable suspicion to conduct a brief investigatory stop, which is a far less intrusive interference with a person's liberty.

The Court also held that, based on the totality of the circumstances present in this case, the officers had reasonable, articulable suspicion to believe that D.D. might have been armed and dangerous. D.D.'s evasive behavior, his baggy clothing, the fact that a weapon was found on his companion, the fact that the officers were investigating the crimes of trespassing and possession of marijuana, and the circumstance that the officers were outnumbered five to two, provided reasonable suspicion that D.D. might be armed and dangerous and therefore a threat to the officers' safety.

State of Maryland v. Kirk Matthews, No. 15, September Term 2021, filed June 22, 2022. Opinion by Biran, J.

Watts, J., dissents.

<https://mdcourts.gov/data/opinions/coa/2022/15a21.pdf>

EXPERT WITNESSES – ADMISSIBILITY OF EXPERT TESTIMONY – MARYLAND RULES 5-702 AND 5-403 – REVIEW FOR ABUSE OF DISCRETION

Facts:

On June 1, 2017, police responded to the area of Scott Town Road in Shady Side, Maryland, based on a 911 call involving the sighting of a man armed with a shotgun and gunshots having been fired. The officers discovered the bodies of Linda McKenzie and Leslie Smith off Scott Town Road. The cause of death for each victim was multiple shotgun wounds to the upper extremities, at close range. Ballistics evidence indicated that the shooter used a 12-gauge shotgun, but the murder weapon was never recovered.

Officers obtained video footage from two security cameras affixed to a nearby home. While those cameras did not record the shootings, they did capture relevant events before and after the shootings. One of the cameras recorded an individual cutting across the front yard of the property, carrying what appeared to be a shotgun. The suspect’s facial features and race were completely indiscernible. It was clear, however, that the suspect was wearing some kind of head covering.

Kimberly A. Meline, a forensic scientist in the FBI’s Digital Evidence Laboratory conducted a “reverse projection photogrammetry” analysis to determine the height of the individual pictured in the video. She opined that the vertical distance from the ground to the top of the headwear of the individual captured in the video was approximately 5’8”, plus or minus two-thirds of an inch. Her report then provided a qualification: “However, due to the subject to camera distance, the resolution of the imagery, the unevenness of the landscape, and the body position of the subject, the degree of uncertainty in this measurement could be significantly greater.”

In the meantime, a grand jury returned an indictment charging Kirk Matthews with the murders of McKenzie and Smith. Matthews filed a pretrial motion to exclude expert testimony regarding the FBI’s photogrammetric analysis, contending that exclusion of such expert testimony was warranted under Maryland Rules 5-702 and 5-403, and under the then-operative *Frye-Reed* standard for admissibility of expert testimony. The trial court held an evidentiary hearing on Matthews’s motion to preclude the expert testimony, at which Meline testified. Among other things, Meline testified that she analyzed the home surveillance video taken on the night of the homicides, and identified a single image that was appropriate for use in the photogrammetric analysis (the “questioned image”). Meline then described how she went to the scene, and

identified the camera that had captured the questioned image. She examined live footage to make sure that that camera was still in the same position, and she walked to the location where the suspect was standing in the questioned image, placed a height chart at that spot, and completed overlays of herself in position as well as the subject in the image, to make sure that they were standing in the same location. Meline then created an “overlay” of the questioned image and the height chart to measure the height of the individual in the image. To indicate the height, she superimposed a yellow arrow “at the top of the headwear of the questioned individual and where it aligns on the height chart that was placed in the position the subject was standing.” The height thus indicated was 5’8.”

Meline also took measurements to estimate “the uncertainty or the error” associated with her height estimate based on the resolution of the questioned image and the positional accuracy of the height chart. Based on her calculations, Meline determined that the margin of error of her height measurement was plus or minus two-thirds of an inch. Thus, Meline opined that the suspect’s height, as measured from the ground to the top of their headwear, was 5’8” plus or minus two-thirds of an inch. Meline also captured images of herself beside the height chart at the scene to provide an additional known height value. She stated that the subject’s height appeared to be slightly shorter than her own height based on overlay, and she testified that her height was “between five-nine and a half and five-ten.” Meline opined that her estimate of the height of the subject was within a reasonable degree of scientific certainty.

The trial court denied Matthews’s motion to exclude Meline’s testimony, concluding that it was admissible under Maryland Rule 5-702. The trial court also declined to exclude Meline’s testimony under Maryland Rule 5-403, ruling that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice.

At Matthews’s trial, the State presented evidence that Matthews’s height was measured in early June 2017 to be approximately 5’9”. Meline testified at trial, in keeping with her testimony at the motions hearing, that she estimated the height of the person in the questioned image to be 5’8” plus or minus two-thirds of an inch. Meline also explained that several other factors, including the unevenness of the ground and the distance of the camera from the subject, could add to the degree of uncertainty in a way she could not calculate. Defense counsel cross-examined Meline at length concerning these variables and other points. Meline maintained that she “still was comfortable with” her opinion that the subject’s height was 5’8” plus or minus two-thirds of an inch.

The jury found Matthews guilty of two counts of second-degree murder, two counts of use of a firearm in the commission of a crime of violence, and related charges. The Court of Special Appeals reversed Matthews’s convictions and remanded for a new trial, holding that the trial court abused its discretion by admitting Meline’s expert testimony. The intermediate appellate court concluded that there was an “analytical gap” between the underlying data and Meline’s opinion.

Held: Reversed.

While Matthews's case was pending before the Court of Special Appeals, the Court of Appeals decided *Rochkind v. Stevenson*, 471 Md. 1 (2020), in which the Court adopted the analysis set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), concerning the admissibility of expert testimony. Applying the *Daubert/Rochkind* analysis to this case, the Court held that the trial court did not abuse its discretion in admitting Meline's expert testimony.

The Court rejected Matthews's argument that Meline's expert opinion was unreliable due to her inability to provide an overall margin of error for her height estimate. The reliability factors that the Court listed in *Rochkind* – including “whether a particular scientific technique has a known or potential rate of error” – are neither exhaustive nor necessarily applicable in every case. Thus, it is not sufficient to point to an unknown degree of uncertainty/error rate that applies to an expert opinion and claim that a trial court is necessarily stripped of discretion to admit that opinion. Rather, the trial court should first consider whether the unknown degree of uncertainty inheres in the expert's methodology or whether the uncertainty applies to the expert's conclusions. If the latter scenario is applicable, the trial court should determine whether the uncertainty in the expert's conclusions is the product of an analytical gap in the expert's analysis and/or whether the uncertainty ultimately renders the opinion unhelpful to the trier of fact.

In this case, there was no dispute concerning the reliability of Meline's methodology. Once a trial court is satisfied that an expert has applied a reliable methodology to an adequate supply of data (as was the case here), the court should not exclude the expert's testimony merely because the court is concerned that the expert's particular conclusions may be inaccurate. Rather, the trial court should only exclude expert testimony if it finds that it amounts to “mere speculation or conjecture.”

The Court further held that there was no analytical gap in Meline's testimony. An “analytical gap” typically occurs as a result of the failure by the expert witness to bridge the gap between his or her opinion and the empirical foundation on which the opinion was derived. Here, Meline explained in detail how she conducted the reverse photogrammetry analysis and how she calculated the known uncertainty. She explained that there were other variables that might lead to a significantly higher degree of uncertainty, and that she could not scientifically calculate them. There was no disconnect, however, between the results of the photogrammetry analysis and Meline's opinion.

The Court concluded that the trial court did not abuse its discretion under Maryland Rule 5-702 in determining that Meline's opinion would assist the jury to understand the evidence or to determine a fact in issue. First, Meline explained in detail how she conducted her analysis, which allowed the trial court to assess the rigor and care with which Meline approached her work. Second, Meline explained at the motions hearing why, despite the unknown degree of uncertainty attributable to certain variables, she nevertheless was comfortable with her height estimate of 5'8" plus or minus two-thirds of an inch. Third, given Meline's known height, and the fact that she ensured that she stood in the same spot and position as the subject in the questioned image, Meline was able to opine that the subject appeared to be slightly shorter than

Meline herself. All of these factors allowed the trial court to reasonably conclude that the height estimate of the subject as 5'8" plus or minus two-thirds of an inch would assist the jury in determining the identity of the person in the questioned image, despite the fact that Meline could not calculate the effect of all variables on the degree of uncertainty.

The Court also held that the trial court did not abuse its discretion by declining to exclude Meline's testimony under Maryland Rule 5-403. The trial court could conclude that Meline's testimony was probative of the issue of the identity of the shooter, and that such probative value was not substantially outweighed by the danger of unfair prejudice. The trial court explained that it found Meline's testimony easy to understand. The court also acknowledged the "qualifier" that was part of Meline's testimony but decided that any flaws in Meline's conclusions attributable to this qualifier were properly the subject of cross-examination or competing expert testimony.

Dawnta Harris v. State of Maryland, No. 45, September Term 2021, filed June 8, 2022. Opinion by Hotten, J.

<https://www.courts.state.md.us/data/opinions/coa/2022/45a21.pdf>

CRIMINAL LAW – FELONY MURDER – MANSLAUGHTER BY VEHICLE –
PREEMPTION

CRIMINAL LAW – CRUEL AND UNUSUAL PUNISHMENT – JUVENILE LIFE
SENTENCING – INDIVIDUALIZED CONSIDERATION

Facts:

When he was sixteen years old, Petitioner skipped school and joined three teenage companions in driving a stolen Jeep to commit a series of burglaries in Baltimore County. Petitioner drove the stolen Jeep into a neighborhood cul-de-sac to evade Baltimore County Police Officer Amy Caprio, who had responded to the location of one of the burglaries. Officer Caprio tried to prevent Petitioner from exiting the cul-de-sac by positioning her vehicle to partially block the entrance and exited the vehicle with her weapon drawn. Petitioner initially stopped the Jeep in front of Officer Caprio and opened the driver’s side door, prompting Officer Caprio to step directly in front of the Jeep. Petitioner then shut the door, accelerated, struck Officer Caprio, and drove away. Officer Caprio was taken to the hospital shortly thereafter, but ultimately died from her injuries. Petitioner alleged he had his eyes closed and head down during his encounter with Officer Caprio because he was afraid and did not realize that he struck her.

Petitioner was convicted by a jury in the Circuit Court for Baltimore County of first-degree felony murder, first-degree burglary, and the theft of the Jeep. The sentencing court considered arguments from defense counsel, a letter from Petitioner, and a pre-sentence report that presented mitigating evidence, including Petitioner’s youth and age-related deficiencies. Petitioner was sentenced to life in prison with the possibility of parole for the first-degree felony murder of Officer Caprio. Petitioner was also sentenced to twenty years and five years, respectively, for his convictions of first-degree burglary and theft of the Jeep, to be served concurrently with the life sentence.

Held: Affirmed.

The Court of Appeals held that Maryland’s manslaughter by motor vehicle statute, Md. Code, Criminal Law § 2-209, does not preempt felony murder when perpetrated by a motor vehicle. The manslaughter by motor vehicle statute preempts all common law homicide charges for an unintentional killing resulting from the operation of a motor vehicle. *See State v. Gibson*, 4 Md. App. 236, 242 A.2d 575 (1968), *aff’d*, 254 Md. 399, 254 A.2d 691 (1969); *Blackwell v. State*, 34

Md. App. 547, 369 A.2d 153, *cert. denied* 280 Md. 728 (1977). This preemption does apply to a charge of felony murder perpetrated by a motor vehicle because felony murder is not an unintended homicide. Instead, felony murder is an artificial legal concept whereby the intent to commit the underlying felony is transferred to the intent necessary for first-degree murder. Even when an accidental killing occurs during the course of a felony, we treat the individual who intended to commit the felony as if he intended to kill the victim. In this case, the State did not prove Petitioner intended to kill Officer Caprio, but did prove his intent to commit the underlying felony. Accordingly, his felony murder sentence was not an unintended homicide preempted by the manslaughter by motor vehicle statute.

This Court held Petitioner's sentence of life in prison with the possibility of parole did not violate the Eighth Amendment of the United States Constitution. The United States Supreme Court's opinion in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012) holds that a juvenile homicide offender is entitled to an individualized sentencing proceeding prior to receiving a sentence of life in prison without the possibility of parole. This requirement is inapplicable to Petitioner's sentence of life in prison with the possibility of parole. Even if it was applicable to Petitioner's sentence, Petitioner received a sentencing proceeding aligned with *Miller's* requirements. The United States Supreme Court in *Jones v. Mississippi*, ___ U.S. ___, 141 S. Ct. 1307, 1311 (2021) explained that all *Miller* requires is an individualized sentencing proceeding where the sentencing judge has discretion to give the juvenile offender a sentence that is less than life in prison without the possibility of parole. The sentencing court exercised its discretion and sentenced him to the lesser sentence of life in prison with the possibility of parole. Additionally, even though *Miller* did not require the sentencing court to expressly consider Petitioner's youth and attendant circumstances, it did so. The sentencing court expressly stated that it had considered the pre-sentence investigation and the arguments of counsel, both of which presented mitigating evidence of Petitioner's youth and its attendant circumstances.

This Court held Petitioner's sentence of life imprisonment with the possibility of parole was not unconstitutional under Article 25 of the Maryland Declaration of Rights. Article 25 is interpreted *in pari materia* with the Eighth Amendment, and affords no greater protection to juvenile offenders than the protection afforded by the Eighth Amendment.

This Court held Petitioner's sentence was not grossly disproportionate as applied. When evaluating an as-applied claim of gross disproportionality, the court considers, among other factors, the seriousness of the conduct involved. If these considerations do not suggest gross disproportionality, the review ends. Considering the seriousness of Petitioner's offense, which resulted in the loss of human life, his sentence of life in prison with the possibility of parole was not grossly disproportionate.

State of Maryland v. Rony Galicia, No. 5, September Term 2021, filed June 27, 2022. Opinion by McDonald, J.

Watts and Raker, JJ., dissent.

<https://mdcourts.gov/data/opinions/coa/2022/5a21.pdf>

CRIMINAL PROCEDURE – CONSTITUTIONAL LAW – CONFRONTATION

CRIMINAL PROCEDURE – CROSS-EXAMINATION

EVIDENCE – HEARSAY – EXCEPTION FOR STATEMENT AGAINST INTEREST

EVIDENCE – EXPERT TESTIMONY – ADJUSTMENT OF LOCATION TRACKING
FUNCTION OF A MOBILE DEVICE

Facts:

On June 5, 2017, two high school seniors were fatally shot as they sat in a parked car in a Montgomery County cul-de-sac. Four men were charged with and ultimately convicted of the murders in three separate trials. Respondent Rony Galicia was tried jointly before a jury in the Circuit Court for Montgomery County with co-defendant Edgar Garcia-Gaona and (until his attorney was unable to continue) Roger Garcia. This appeal concerns two discrete evidentiary issues arising out of the testimony of two witnesses.

The first issue concerned testimony of Luz DaSilva, Mr. Garcia-Gaona’s then-girlfriend, regarding an out-of-court confession made to her by Mr. Garcia-Gaona. That testimony was admissible only against Mr. Garcia-Gaona under the hearsay exception for the statement by a party opponent. Maryland Rule 5-803(a). At one point, Ms. DaSilva testified that Mr. Garcia-Gaona told her that “*they* just started shooting.” Counsel for Mr. Galicia argued that the undefined use of the pronoun “they” was prejudicial to Mr. Galicia – although his defense had already conceded in opening statement that there had been multiple shooters – and announced her intention to cross-examine Ms. DaSilva about what Mr. Garcia-Gaona “did say and what he didn’t say.” The trial court determined that Mr. Galicia was not prejudiced by Ms. DaSilva’s use of “they” and precluded his attorney from cross-examining her about Mr. Garcia-Gaona’s confession.

The second issue concerned a custodian of records from Google who testified that there was a “gap” in the location history data associated with Mr. Galicia’s account that included the date of the murders. The witness also testified that a Google user can disable the location tracking function. Mr. Galicia’s attorney objected on the grounds that the witness had to be qualified as an expert.

The Court of Special Appeals reversed Mr. Galicia's convictions, holding that: (1) the trial court improperly restricted Mr. Galicia's counsel from cross-examining Ms. DaSilva about statements made by Mr. Garcia-Gaona that were impliedly exculpatory as to Mr. Galicia and that should have been admitted under an exception to the hearsay rule for statements against penal interest; and (2) the trial court erred when it allowed the Google witness to testify as a lay witness that a user can turn off Google's location tracking function – testimony that offered a potential explanation for the gap in Mr. Galicia's location data.

Held: Reversed.

As to the first issue, the Court of Appeals held that the trial court did not abuse its discretion in limiting the scope of Mr. Galicia's cross-examination of Ms. DaSilva. The Court first determined that Ms. DaSilva's testimony that "*they* just started shooting" did not prejudice Mr. Galicia. A criminal defendant's constitutional right to confront the witnesses against him is not violated by a co-defendant's statement that indicates the participation of unspecified others, e.g., "me and a few other guys." See *Gray v. Maryland*, 523 U.S. 185, 195-96 (1998). Similarly, the use of "they" in the testimony at issue did not clearly inculcate Mr. Galicia, particularly given the defense's theory that multiple shooters were involved.

The Court explained that a statement by Mr. Garcia-Gaona, pulled from a transcript of a conversation between Ms. DaSilva and a police detective, that his brother, Roger "shot them guys, too" had probative value in Mr. Galicia's defense only if two other propositions were also true: (1) Ms. DaSilva would testify that Mr. Garcia-Gaona had said Mr. Galicia was not involved or had made no similar statement inculcating Mr. Galicia and (2) it appeared that Mr. Garcia-Gaona's statements to Ms. DaSilva listed all of the participants in the murders. It was never established at trial what exactly Ms. DaSilva would say as to either proposition, in part because defense counsel did not pursue the trial court's offer to clarify Ms. DaSilva's testimony outside the presence of the jury. Further, the hearsay statement inculcating Mr. Garcia-Gaona's brother was not clearly admissible as a statement against the declarant's penal interest under Rule 5-804(b)(3). The Court clarified that the burden for establishing the admissibility of a hearsay statement against the declarant's interest is the same whether the statement is introduced by the State or by a criminal defendant. Under these circumstances, the trial court did not abuse its discretion in limiting the scope of Mr. Galicia's counsel's cross-examination.

The Court also held that the trial court did not abuse its discretion in allowing the Google witness to offer testimony concerning Mr. Galicia's location history. When a court considers whether testimony is beyond the "ken" of the average lay person such that the witness must be qualified as an expert under Maryland Rule 5-702, the question is not whether the average person is already knowledgeable about a given subject, but whether it is within the range of perception and understanding. While some individuals may not personally have experience adjusting the location tracking settings on a mobile device, the fact that such devices allow users to customize the data they share with the manufacturer, the service provider, and various applications is common knowledge. The Court also drew a distinction between testimony that involves a

simple recitation of raw data, *see, e.g., Johnson v. State*, 457 Md. 513 (2018), and testimony that requires the use of an interpretive process to ascribe significance to otherwise incomprehensible data, *see, e.g., State v. Payne*, 440 Md. 680 (2014). Only in the latter situation is expert qualification required.

Maryland Small MS4 Coalition v. Maryland Department of the Environment, No. 25, September Term 2021, filed June 1, 2022. Per curiam opinion.

McDonald, Hotten, and Adkins, JJ., concur.
Getty, C.J., Watts, and Booth, JJ., concur in the judgment.

<https://www.courts.state.md.us/data/opinions/coa/2022/25a21.pdf>

ENVIRONMENTAL LAW – ADMINISTRATIVE LAW – CLEAN WATER ACT –
STORMWATER DISCHARGE PERMITS

Facts:

Pursuant to the federal Clean Water Act and state law, small Municipal Separate Storm Sewer Systems (“MS4”) within an urbanized area require a permit for the discharge of pollutants into waters of the United States. As the designated permitting agency, the Maryland Department of the Environment (“MDE”) issued a general permit, allowing 35 regulated small MS4 owners or operators to opt into the general permit or to seek an individual permit.

As with previously issued permits for medium and large MS4s, the small MS4 general permit requires a small MS4 owner or operator to perform impervious surface restoration to offset pollution entering waterways through its MS4. This permit requirement exists in lieu of more traditional end-of-pipe control technology requirements, which are infeasible in a storm sewer system that collects polluted rainwater from across wide swaths of impervious surfaces.

The Court previously upheld the use of the impervious surface restoration requirement in *Maryland Department of the Environment v. County Commissioners of Carroll County*, 465 Md. 169 (2019). In *Carroll County*, the Court held that MS4 permits may exceed the “maximum extent practicable” standard to protect water quality and that the geographic scope of the MS4 permit may extend beyond the sewer system’s service area.

Queen Anne’s County owns and operates a small MS4 system located within an urbanized area, and thus it requires a permit. Upon MDE’s issuance of its general permit for small MS4 owners and operators, Queen Anne’s County challenged the general permit as unlawful under the Clean Water Act. The County argued that the general permit unlawfully exceeds the “maximum extent practicable” standard and unlawfully regulates beyond the geographic scope of the MS4’s service area.

Held:

The Court of Appeals held that the case is controlled by *Carroll County*. The facts are not materially distinguishable, and the challengers did not present compelling reasons to overturn the

Court's prior case law. The small MS4 general permit is lawful under the Clean Water Act and federal regulations.

COURT OF SPECIAL APPEALS

Myong Nam Kim, et al. v. Board of Liquor License Commissioners for Baltimore City, No. 137, September Term 2021; *Miae Han, et al. v. Board of Liquor License Commissioners for Baltimore City*, No. 140, September Term 2021; *In the Matter of the Petition of Myong Nam Kim, Yong Doo Park, and Myongnam, Inc.*, No. 885, September Term 2021; *In the Matter of the Petition of Myong O. Friley, et al.*, No. 886, September Term 2021, filed June 29, 2022. Opinion by Beachley, J.

<https://mdcourts.gov/data/opinions/cosa/2022/0137s21.pdf>

ONE SUBJECT CLAUSE – ARTICLE III, § 29 OF THE MARYLAND CONSTITUTION

EQUAL PROTECTION CLAUSE – FACIALLY NEUTRAL GOVERNMENT ACTION – STRICT SCRUTINY – EVIDENCE OF DISCRIMINATORY INTENT REQUIRED

Facts:

During the 2020 legislative session, the Maryland General Assembly enacted Chapter 389, a bill that affected liquor licenses in the 45th legislative district in two ways. First, the bill allowed Class B beer, wine, and liquor license holders in a certain area to exchange their licenses for Class B-D-7 licenses, provided that the license holder executed a memorandum of understanding with a local community association. Second, the bill restricted the hours of operation for Class B-D-7 licenses in a completely separate area of the 45th legislative district.

Chapter 389 of the 2020 legislative session took effect on July 1, 2020. Thereafter, three separate liquor establishments, each possessing a Class B-D-7 license, were cited for being open outside the hours authorized by Chapter 389. The three establishments are: M&M Lounge, Q’s Liquors and Tavern, and Cocky Lou’s (hereinafter the “Licensees”). M&M Lounge was cited twice.

The Licensees challenged their citations before the Board of Liquor License Commissioners for Baltimore City (the “Board”). Specifically, the Licensees argued that Chapter 389 was unconstitutional for two reasons. First, the Licensees argued that Chapter 389 violated Article III, § 29 of the Maryland Constitution, which requires that all laws enacted embrace but a “single subject.” Second, the Licensees argued that Chapter 389 violated equal protection as guaranteed

by the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Constitution, asserting that the law improperly targeted African Americans because the restriction of operating hours impacted a predominantly African American community.

In all four cases, the Board held that the law did not violate the single subject requirement. Regarding the equal protection argument, the Board held that the Licensees failed to produce sufficient evidence to support their equal protection claim.

The Licensees sought judicial review in the Circuit Court for Baltimore City. The four cases were divided between two judges. One judge affirmed the Board in his two cases, and the Licensees appealed those decisions. The other judge affirmed the Board's decision regarding the single subject requirement, but reversed the Board on the basis of equal protection, and the Board appealed those two decisions. Because of the similarity of counsel, the issues, and the legal arguments presented, this Court consolidated the four appeals.

Held:

Decision of the Board of Liquor License Commissioners affirmed in all four cases.

Chapter 389 does not violate the one subject requirement in Article III, § 29 of the Maryland Constitution. The portion of the law allowing an exchange of liquor licenses in one part of the district, and the other portion restricting the operating hours for certain licenses in another part of the district “refer to and are *germane* to the same subject matter”—the regulation of alcohol in the 45th legislative district. *Md. Classified Emps. Ass’n, Inc. v. State*, 346 Md. 1, 16 (1997) (quoting *Baltimore v. Reitz*, 50 Md. 574, 579 (1879)).

The Board did not err in declining to reach the equal protection claim. Where government action is facially neutral, and a challenger alleges that the action discriminates against a suspect class (such as race) and seeks strict scrutiny review, the challenger may not simply rely on evidence of a disparate impact to obtain strict scrutiny review. Rather, the challenger must produce evidence of discriminatory purpose or intent before the burden shifts to the government (pursuant to strict scrutiny) to defend its conduct.

Here, although the Licensees produced evidence showing a disparate racial impact based on the restriction on operating hours, they produced no evidence showing any discriminatory purpose on the part of the General Assembly. Accordingly, they failed to meet their evidentiary burden for establishing strict scrutiny review of Chapter 389, and the Board correctly declined to consider their argument.

Robert L. Fooks v. State of Maryland, Case No. 269, September Term 2021, filed June 29, 2022. Opinion by Nazarian, J.

<https://mdcourts.gov/data/opinions/cosa/2022/0269s21.pdf>

CONSTITUTIONAL LAW – SECOND AMENDMENT – SECTIONS 5-133(b)(2) AND 5-205(b)(2) OF THE PUBLIC SAFETY ARTICLE – FACIAL CHALLENGE

CONSTITUTIONAL LAW – SECOND AMENDMENT – SECTIONS 5-133(b)(2) AND 5-202(b)(2) OF THE PUBLIC SAFETY ARTICLE – AS APPLIED CHALLENGE – CRIMINAL CONTEMPT

Facts:

In 2016, Robert Fooks was convicted of constructive criminal contempt for failure to pay child support, a common law offense. He received a term of imprisonment of more than four years. This conviction disqualified Mr. Fooks from possessing firearms. In 2021, Mr. Fooks was charged with unlawfully possessing firearms under two provisions of the Public Safety Article (“PS”) of the Maryland Code (2003, 2018 Repl. Vol.). PS § 5-133(b)(2) provides that “a person may not possess a regulated firearm if the person . . . has been convicted of a violation classified as a common law crime and received a term of imprisonment of more than 2 years[.]” Similarly, PS § 5 205(b)(2) provides that “[a] person may not possess a rifle or shotgun . . . if the person has been convicted of a violation classified as a crime under common law and received a term of imprisonment of more than 2 years[.]”

Mr. Fooks moved to dismiss, asserting that the firearm-related charges infringed on his right to bear arms, as guaranteed to him by the Second Amendment of the Constitution of the United States. Mr. Fooks argued that PS §§ 5-133(b)(2) and 5-205(b)(2) were facially unconstitutional and unconstitutional as applied to him. The Circuit Court for Wicomico County denied the motion to dismiss. Mr. Fooks entered a conditional plea and the court sentenced to him to two consecutive five-year terms of imprisonment, suspending all but time served. Mr. Fooks filed a timely appeal.

Held: Affirmed.

First, the Court of Special Appeals held that PS §§ 5-133(b)(2) and 5-205(b)(2) are not facially unconstitutional. Criminal contempt is a common law offense. There are no sentencing guidelines or statutory provisions to guide sentencing for criminal contempt convictions. When Mr. Fooks was convicted, he received a term of imprisonment of more than two years, so under a plain meaning of PS §§ 5-133(b)(2) and 5-205(b)(2), he is prohibited from possessing firearms. And Mr. Fooks failed to show how PS §§ 5-133(b)(2) and 5-205(b)(2) are unconstitutional in all

potential applications. Indeed, Mr. Fooks failed to show that the statutes are unconstitutional in *any* applications.

Second, the Court held that PS §§ 5-133(b)(2) and 5-205(b)(2) are presumptively lawful and thus not unconstitutional as applied to Mr. Fooks. The court concluded that a statute could be presumptively valid based solely on the legislature's determination that people convicted of a common law crime who receive a prison term of more than two years should be disqualified from possessing a firearm. PS §§ 5-133(b)(2) and 5-205(b)(2) do not provide that any common law conviction disqualifies an individual from possessing firearms. The legislature enumerated specifically that the individual had to receive a sentence of more than two years to be disqualified. It is the sentence imposed, not the classification of the common law crime, that determines the seriousness of the offense. Mr. Fooks failed to distinguish his circumstances from ordinary challenges to the Second Amendment and his conduct fell outside the scope protected by the Second Amendment.

State of Maryland v. Michael O. Grafton, No. 1218, September Term 2021, filed June 29, 2022. Opinion by Berger, J.

<https://mdcourts.gov/data/opinions/cosa/2022/1218s21.pdf>

SUPPRESSION OF EVIDENCE – DISCLOSURE OF EVIDENCE BEFORE CONCLUSION OF TRIAL – DISCLOSURE OF EVIDENCE IN TIME FOR EFFECTIVE USE AT TRIAL

Facts:

The State filed a criminal information against Michael O. Grafton, charging him with various theft-related crimes. The State alleged that Grafton stole and embezzled funds from his workplace. Trial was scheduled to begin in the Circuit Court for Baltimore County on September 28, 2021. On the eve of the trial, Grafton filed a motion to dismiss and a request for sanctions. Grafton argued under *Brady v. Maryland*, 373 U.S. 83 (1963) and Maryland Rule 4-263 that the State failed to disclose exculpatory information.

According to Grafton, on the day before trial, the State disclosed that during the same time frame that Grafton allegedly stole from his workplace, that another former employee had also been caught stealing and embezzling funds. The State further disclosed that criminal charges had been filed against the former employee and provided four case numbers and two police reports related to those criminal cases. The information provided by the State indicated that the former employee was responsible for managing some of the same accounts that Grafton was alleged to have stolen from.

A hearing was held before the circuit court to determine whether the State had suppressed evidence and violated its obligations under *Brady*. The defense argued that the information about the former employee's crimes was exculpatory and should have been disclosed. The defense maintained that Grafton's employer was aware of the former employee's theft but had failed to disclose complete information regarding the theft in response to subpoenas. The defense argued that although the prosecutor was personally unaware of the prosecution of the former employee until the day before trial, that it did not excuse the State's violation under *Brady* and its progeny. The defense requested that the court dismiss the case. The State argued that postponement was a more proper remedy as opposed to dismissal and suggested that although the total amount information regarding the former employee's theft crimes was unknown, that it could attempt to obtain the information over a few days.

The circuit court found that the State violated its obligations under *Brady* and dismissed the case. The circuit court reasoned that the lateness of the disclosure was violative of the State's obligation to disclose exculpatory information. The circuit court emphasized that the case had been significantly delayed and that Grafton's speedy trial rights were being violated. The circuit court disagreed with the State's assertion that the *Brady* violation could be remedied because the trial had not begun.

Held: Reversed and remanded.

The Court of Special Appeals first addressed whether the issue of suppressed evidence had been preserved, because according to Grafton, the State conceded that the evidence was suppressed under *Brady* and the only remaining contention was the appropriate remedy. The Court disagreed and held that the State only acknowledged an untimely disclosure of evidence regarding the former employee, and never conceded that the evidence was suppressed or that there was a discovery violation. The Court held that the State specifically argued at the hearing that dismissal is usually appropriate for a *Brady* violation after a case has gone to trial, which was unlike the current circumstances. The Court held, therefore, that the issue was properly preserved for consideration on appeal.

Turning to the specific issue of suppressed evidence and the *Brady* violation, the Court of Special Appeals considered the State's argument that no *Brady* violation occurred because the prosecutor disclosed evidence on the eve of trial. The Court also considered Grafton's argument that the timeliness of disclosure is not the crucial factor, but more importantly, is whether the evidence was disclosed in sufficient time to be effectively utilized by the defense.

The Court held that the fact that the disclosure was made the day before trial does not automatically mean that a *Brady* violation occurred. The Court noted that if a defendant learns of the information before the conclusion of the trial, with enough time to utilize the information, that there may be no *Brady* violation. The Court reasoned that the critical issue regarding the timing of disclosure and whether a *Brady* violation has occurred hinges on whether the evidence is disclosed in time to be effectively utilized by the defense at trial. The Court further noted that the length of the delay, and the nature of the evidence, will affect the defendant's ability to use the evidence at trial.

The Court held that the circuit court erred in finding that dismissal was the appropriate remedy to address the delayed disclosure of the evidence regarding the former employee. The Court reasoned that the circuit court's primary error was that it dismissed the case without complete knowledge of the nature of the evidence and the time in which it could ultimately be produced. The Court noted that at the time of the hearing that the circuit court could not fully determine whether the evidence could be effectively used at trial because only a portion of the evidence had been disclosed and the State did not know exactly what evidence was still available. The Court held that the circuit court needed to know the nature of the evidence and the length of any delay to determine whether it could be effectively used in time for trial. Lastly, the Court commented that disclosure under *Brady* is distinct from the State's discovery obligations under Md. Rule 4-263. The Court noted that the circuit court did not address the discovery violations asserted in Grafton's motion to dismiss and that the issue may be addressed on remand.

Calvin Rodney Butler v. State of Maryland, No. 1343, September Term 2021, filed June 30, 2022. Opinion by Zarnoch, Robert J.

<https://mdcourts.gov/data/opinions/cosa/2022/1343s21.pdf>

CONSTITUTIONAL LAW – CRIMINAL LAW – INEFFECTIVE ASSISTANCE OF COUNSEL – DEFICIENT PERFORMANCE OF DEFENSE COUNSEL – BUT NO PREJUDICE

Facts:

This is a post-conviction case, where Butler claimed ineffective assistance of counsel arising out of his lawyer’s failure to timely file a motion to modify sentence. The Court of Special Appeals agreed that defense counsel performed deficiently, but that Butler suffered no prejudice, because the circuit court treated the motion as timely filed and denied it on the merits.

Held: Affirmed.

Although the failure to timely file a requested motion to modify sentence results in presumed prejudice arising from “the loss of any opportunity to have a reconsideration of sentence hearing,” the Court’s opinion declined to presume prejudice under a “lost opportunity” theory because the circuit court, having reached the merits, “would have denied the motion had it been timely filed.”

ATTORNEY DISCIPLINE

*

By an Opinion and Order of the Court of Appeals dated June 1, 2022, the following attorney has been disbarred:

OLEKANMA ARNNETTE EKEKWE

*

By a Per Curiam Order of the Court of Appeals dated June 6, 2022, the following attorney has been disbarred:

LANDON MAURICE WHITE

*

By an Order of the Court of Appeals dated June 15, 2022, the following attorney has been indefinitely suspended:

GEORGE RICHARD MARSHALL SAPONARO

*

This is to certify that the name of

CHRISTOPHER BROUGHTON SHEDLICK

has been replaced upon the register of attorneys in this state as of June 15, 2022.

*

*

By an Order of the Court of Appeals dated June 16, 2022, the following attorney has been indefinitely suspended:

RICHARD MARK PAVLICK

*

By an Opinion and Order of the Court of Appeals dated June 16, 2022, the following attorney has been disbarred:

DAVID MARK WEMPLE

*

JUDICIAL APPOINTMENTS

*

On May 11, 2022, the Governor announced the appointment of **CAROL M. JOHNSON** to the District Court for Baltimore City. Judge Johnson was sworn in on June 1, 2022 and fills the vacancy created by the retirement of the Hon. Jack I. Lesser.

*

On April 20, 2022, the Governor announced the appointment of **LOUIS MICHAEL LEIBOWITZ** to the Circuit Court for Montgomery County. Judge Leibowitz was sworn in on June 9, 2022 and fills the vacancy created by the elevation of the Hon. Anne K. Albright to the Court of Special Appeals.

*

On May 11, 2022, the Governor announced the appointment of **AMY D. LORENZINI** to the Circuit Court for St. Mary's County. Judge Lorenzini was sworn in on June 10, 2022 and fills the vacancy created by the retirement of the Hon. David W. Densford.

*

On May 11, 2022, the Governor announced the appointment of **KAY N. HARDING** to the District Court for Baltimore City. Judge Harding was sworn in on June 23, 2022 and fills the vacancy created by the resignation of the Hon. Catherine Curran O'Malley.

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UNREPORTED OPINIONS

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

<https://mdcourts.gov/appellate/unreportedopinions>

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