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Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Rhonda I. Framm, Misc. Docket AG No. 73, September Term 2014, filed August 24, 2016. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2016/73a14ag.pdf

ATTORNEY GRIEVANCE COMMISSION – DISCIPLINE – DISBARMENT

Facts:

Petitioner Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Rhonda I. Framm. Petitioner alleged that Respondent violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") from her representation of Robert L. Wilson and her subsequent suit against him for attorney's fees.

Respondent represented Robert Wilson in an action to vacate a then-recently entered judgment of divorce on the grounds of incapacity. After Mr. Wilson retained her, Respondent referred him to a psychologist for evaluation. The psychologist provided a written report to Respondent concluding that Mr. Wilson has a neuro-cognitive disorder and cannot be held responsible to fully understand complex information and details (among other test results, the psychologist found Mr. Wilson's orientation to time, person, and place was erratic, that he did not know the name of the U.S. President nor the date, that he could not correctly recite the alphabet, and that both his memory and capacity for attention were flawed).

Mr. Wilson retained Respondent on June 24, 2010. Respondent arranged an initial retainer of $10,000 and an hourly billing rate of $425. Respondent failed to create and maintain records of Mr. Wilson's payments under their agreement.

On July 1, 2010, Respondent filed a motion to vacate the divorce judgment and attached the psychologist's report. In the motion, Respondent argued that Mr. Wilson lacked the capacity to understand the settlement agreement and consequently could not consent to it. Following additional psychological evaluation, Respondent determined that Mr. Wilson needed a guardian and on April 20, 2011, she filed a petition to appoint Mr. Wilson's cousin as his guardian. Her petition was twice rejected as insufficient to comply with the governing Maryland rules for guardianship petitions, but was accepted on the third attempt. The court then appointed an

attorney to represent Mr. Wilson in the guardianship proceeding. Mr. Wilson's guardianship attorney filed an answer in opposition to the petition for guardianship. In that answer, Mr. Wilson denied he was disabled and requested the petition be dismissed. Respondent then filed an opposition arguing Mr. Wilson is incapable of making decisions on his own and required a guardian. Mr. Wilson and his cousin discussed the matter, and decided they no longer wanted to pursue the guardianship. Respondent withdrew the guardianship petition. She billed Mr. Wilson for her work opposing him in the matter.

Returning to the divorce case, because Respondent took no action for more than a year after filing the motion to vacate the judgment of divorce, opposing counsel filed a motion for civil constructive contempt seeking to advance the case. Respondent charged Mr. Wilson $7,500 to defend him in the contempt matter. Respondent then twice deposed the psychologist who had prepared the report on Mr. Wilson's capacity in the absence of opposing counsel. The judge in the divorce case struck the testimony and ordered sanctions against Mr. Wilson. Respondent misrepresented the deposition matter to Mr. Wilson in a letter billing him for deposition costs.

The judge in the divorce case held a hearing on September 14, 2012 to consider the motion to vacate the divorce and Respondent's motion to vacate and reconsider the judge's order to strike the psychologist's deposition. Mr. Wilson had discharged Respondent prior to the hearing, but her motion to withdraw was not received by opposing counsel or the court. At the hearing, she requested withdrawal citing Mr. Wilson's diminished capacity. The judge ordered an evaluation by a court psychiatrist, who found that Mr. Wilson did have a diminished capacity. Based on that finding, in February 2013 the judge vacated both the divorce and the sanctions against Mr. Wilson. The judge granted Respondent's request to withdraw.

Respondent then sued Mr. Wilson for attorney's fees. From June 2010 to February 2013, Respondent billed Mr. Wilson $58,748.77. In the fees case, Respondent did not seek compensation for the guardianship case and reduced the fees to $30,000 plus pre-judgment interest in order to put the case within the jurisdictional limit of the district courts. After hearing testimony in which Respondent claimed that Mr. Wilson had "a fairly good capacity to understand agreements" and failed to testify that the judge in the divorce case had found Mr. Wilson incompetent, the court entered judgment in favor of Respondent. To satisfy that judgment, Respondent garnished Mr. Wilson's accounts.

Mr. Wilson then filed a grievance with the Attorney Grievance Commission. Acting through Bar Counsel, the Commission filed a Petition for Disciplinary or Remedial Action against Respondent.

The matter came before the Circuit Court for Baltimore County. The hearing judge conducted an evidentiary hearing and made findings of fact and conclusions of law. He concluded that Respondent violated MLRPC 1.4, 1.7, 1.15, 3.3, 8.4(a) and (c), and Maryland Rule 16-606.1(a), but did not violate MLRPC 1.1, 1.2, 1.3, or 1.5, and he drew no conclusion on the charged violation of MLRPC 8.4(d). Both Petitioner and Respondent filed exceptions. After the Court of Appeals heard oral argument, it remanded the case to the hearing judge to make additional findings of fact and clarify his conclusions regarding MLRPC 3.3(a) and 8.4(c) and (d). The

hearing judge then issued supplemental findings and conclusions of law that Respondent's violations of MLRPC 3.3(a)(1) and 8.4(c) were intentional and that she violated MLRPC 8.4(d).

Held:

The Court of Appeals concluded that Respondent failed to act competently and communicate adequately with her client. Respondent engaged in unreasonably aggressive discovery tactics that resulted in sanctions being imposed on her client, which were lifted only after the judge later determined that her client was incompetent. Respondent made a misrepresentation to her client to conceal the fact that her misconduct excluded the only available medical evidence that would have been required to support his claims. Respondent claimed fees for defending her client in a contempt case caused by her delay, for representing a party opposing him in the guardianship case, and billed over $58,000 in fees primarily for work done in misconduct and defending that misconduct. Finally, and most egregiously, Respondent lied to and deceived the court during the fees action to the detriment of her former client for her own monetary gain.

The Court of Appeals agreed with the hearing judge that Respondent violated MLRPC 1.4; 1.7; 1.15; 3.3; and 8.4(a), (c), and (d); as well as Maryland Rule 16-606.1(a), but did not violate MLRPC 1.3. In addition, the Court found that Respondent's misconduct also violated MLRPC 1.1, 1.2, and 1.5.

The Court assessed Respondent's misconduct and substantial aggravating factors, and held that disbarment was the appropriate sanction. The Court stated the longstanding rule that, where an attorney's misconduct is characterized by "repeated material misrepresentations that constitute a pattern of deceitful conduct, as opposed to an isolated instance," disbarment follows as a matter of course. Here, in addition to multiple rule violations, Respondent exhibited a pattern of deceitful conduct, and disbarment was the proper sanction.

In the Matter of the Application of Deirdre Paulette Brown for Admission to the Bar of Maryland, Misc. No. 33, September Term 2015, filed August 24, 2016. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2016/33a15m.pdf

DENIAL OF BAR ADMISSION – DUTY OF FULL DISCLOSURE – CANDOR AND TRUTHFULNESS

Facts:

On May 21, 2012 Deirdre Paulette Brown ("Ms. Brown"), filed an application with the State Board of Law Examiners ("Board") for admission to the Bar of Maryland. Thereafter, Ms. Brown's application was forwarded to the Character Committee for the Seventh Appellate Circuit ("Committee"). Ms. Brown subsequently passed the February 2013 Maryland Bar Examination. As a result of matters discovered during the course of the investigation, the Committee held a hearing to afford Ms. Brown the opportunity to demonstrate her fitness for admission to the Bar. The Committee subsequently issued a report recommending Ms. Brown's admission by a three to two vote. Thereafter, the Board conducted a hearing on the record before the Committee and voted four to three to adopt the Committee's recommendation.

Held: Admission denied.

Upon consideration of the Committee and the Board's recommendations, and an independent review of the record, the Court of Appeals held that Ms. Brown had not met the burden of establishing that she currently possessed the requisite moral character and fitness for admission to the Bar because Ms. Brown: 1) failed to disclose a prior criminal charge on her Bar application and provided no credible explanation for the omission and 2) intentionally falsified her grade point average on a law school resume for the purpose of enhancing her qualifications with a prospective employer. The Court further held that Ms. Brown's actions in failing to disclose the criminal charge and falsifying information on her resume, were indicative of a cumulative pattern of a lack of honesty and candor, contrary to the high standard of integrity expected of an attorney.

Kevin Morton, Jr., et al. v. Cindy L. Schlotzhauer, No. 72, September Term 2015, filed August 19, 2016. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2016/72a15.pdf

CIVIL PROCEDURE – MOTION TO ALTER OR AMEND JUDGMENT – STANDARD OF APPELLATE REVIEW

CIVIL PROCEDURE – STANDING – EFFECT OF PLAINTIFF'S BANKRUPTCY PROCEEDING ON STANDING TO ASSERT PERSONAL INJURY CLAIM

CIVIL PROCEDURE – REAL PARTY IN INTEREST – RELATION BACK

Facts:

On January 4, 2010, Cindy Schlotzhauer was involved in an automobile accident with Kevin Morton when he was operating a pickup truck for his employer, Uni-Select, USA, Inc. t/a Kunkel Service Company ("Uni-Select"). After the accident, Ms. Schlotzhauer retained legal counsel, evidently in anticipation of pursuing a personal injury claim, but did not file a claim until almost three years later.

In the meantime, with the assistance of a different attorney, Ms. Schlotzhauer sought relief from various debts in the United States Bankruptcy Court for the District of Maryland ("Bankruptcy Court"). On October 6, 2010, she filed a petition in bankruptcy under Chapter 7 of the Bankruptcy Code. On the schedules attached to her petition, she neglected to include her potential personal injury claim arising from the automobile accident as either an asset or exempt property. On January 19, 2011, the Bankruptcy Court granted Ms. Schlotzhauer a discharge from her debts and closed the case.

On December 26, 2012, shortly before the period of limitations for her personal injury claim would expire, Ms. Schlotzhauer filed a complaint in the Circuit Court for Queen Anne's County against Mr. Morton and Uni-Select (hereafter, collectively, "Uni-Select") seeking damages for her injuries. During discovery, Uni-Select learned that Ms. Schlotzhauer had not listed her potential personal injury claim in her bankruptcy petition.

Uni-Select moved for summary judgment on the ground that Ms. Schlotzhauer lacked standing to bring the claim because the cause of action had become property of the bankruptcy estate by the time she filed suit and that only the bankruptcy trustee had the right to pursue the claim. In response, Ms. Schlotzhauer sought to re-open her bankruptcy case to amend her petition in the Bankruptcy Court. On October 23, 2013, the Bankruptcy Court granted Ms. Schlotzhauer's request to re-open her bankruptcy case.

On January 8, 2014, the Bankruptcy Court and the Circuit Court both ruled on the motions pending before them. The Bankruptcy Court ruled in favor of Ms. Schlotzhauer, allowing her to

amend her schedules to pursue her personal injury action. It determined that the exemption of Ms. Schlotzhauer's claim was allowed as of late November 2013. The Circuit Court, believing that the claim still belonged to the bankruptcy estate, awarded summary judgment to Uni-Select and held that Ms. Schlotzhauer lacked standing to pursue the personal injury action. It determined that the bankruptcy trustee owned the claim. The Bankruptcy Court subsequently issued a supplemental order re-vesting Ms. Schlotzhauer with her personal injury claim as of October 6, 2010 – well before she had filed her complaint in the state court action.

Ms. Schlotzhauer then filed a motion to alter or amend the Circuit Court judgment pursuant to Maryland Rule 2-534, attaching the Bankruptcy Court's orders. The Circuit Court denied the motion in a written order without explanation.

Ms. Schlotzhauer noted a timely appeal from the Circuit Court's denial of the motion to alter or amend the judgment to the Court of Special Appeals. The intermediate appellate court reversed the Circuit Court. *Schlotzhauer v. Morton*, 224 Md. App. 72, 119 A.3d 121 (2015).

Held: Affirmed.

The Court first addressed whether the intermediate appellate court applied the correct standard of review when it reviewed *de novo* the Circuit Court's decision to deny Ms. Schlotzhauer's motion to alter or amend the Circuit Court's judgment. The Court determined that the intermediate appellate court had applied the correct standard of review because the Circuit Court made a legal determination when it denied the motion to alter or amend the judgment.

The Court then determined that the motion to alter or amend the judgment should have been granted. It reasoned that the Bankruptcy Court's decision to re-vest Ms. Schlotzhauer with her claim retroactively restored the claim to her as of the date she filed suit. Although the Bankruptcy Court decision does not necessarily control the decision on the motions in state court, policy reasons underlying the standing requirement, limitations periods, and bankruptcy all counsel in favor of giving effect to the bankruptcy court's retroactive re-vesting of the claim for purposes of state law. Therefore, the Court determined that the Circuit Court erred when, once informed of the re-vesting, it failed to recognize that Ms. Schlotzhauer owned the claim as of the date of her filing.

The Court also held that, even if one viewed the case from the Circuit Court's perspective when it granted Uni-Select's motion for summary judgment, the Circuit Court still committed legal error. Maryland Rule 2-201 concerning the "real party in interest" and its incorporation of the doctrine of relation back would operate to substitute a plaintiff with standing and to toll the limitations period for that plaintiff.

Under Maryland Rule 2-201, once the Circuit Court believed that the bankruptcy trustee was the real party in interest, it should have allowed a reasonable opportunity for the bankruptcy trustee to be substituted for Ms. Schlotzhauer as plaintiff. And once the Bankruptcy Court had re-vested

Ms. Schlotzhauer with her claim, she would have succeeded the bankruptcy trustee as the real party in interest and could similarly be substituted.

Under Maryland Rule 2-201, a substitution of the real party in interest relates back to the filing of the complaint. There was no unfairness in applying the doctrine of relation back because Uni-Select had notice of the operative facts of the cause of action within the period of limitations, Ms. Schlotzhauer alleged no new causes of actions or different facts, and Uni-Select did not point to any prejudice it would suffer from allowing application of the relation back doctrine.

Commissioner of Financial Regulation v. Brown, Brown & Brown, P.C., et al., No. 102, September Term 2015, filed August 19, 2016. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2016/102a15.pdf

COMMERCIAL LAW – MARYLAND CREDIT SERVICES BUSINESSES ACT – CREDIT SERVICES BUSINESS – EXTENSION OF CREDIT.

COMMERCIAL LAW – MARYLAND CREDIT SERVICES BUSINESSES ACT – ATTORNEY EXEMPTION.

Facts:

Respondent Brown, Brown & Brown, P.C. ("BB&B") was a small Virginia law firm; Respondent Christopher Brown, who was licensed to practice law in Virginia and the District of Columbia, was the managing partner and sole shareholder of the firm.

During late 2008 and early 2009, BB&B received referrals of homeowners facing foreclosure from Mortgage Analysis & Consulting LLC, a Virginia-based business that advertised on Spanish-language media. As a result, hundreds of distressed Maryland homeowners – mostly native Spanish speakers who spoke little or no English – consulted with BB&B. The firm ultimately entered into agreements with at least 57 Maryland homeowners during that period. Although the agreements varied somewhat in language and title ("Fee Agreement," "Retainer Agreement"), they all involved an advance payment by the homeowner of $2,500 to $7,500 to the firm in return for the firm's promise to attempt to renegotiate the homeowner's mortgage. If the negotiations proved unsuccessful, the agreement further provided that the firm would assess the merits of litigation for an additional fee. A few of the agreements were signed by a Maryland lawyer employed by the firm, but most were either unsigned or signed by Mr. Brown or another non-Maryland lawyer. The firm apparently did little to re-negotiate the loans, other than to send form letters to lenders.

After receiving a complaint from one of the homeowners, the Maryland Commissioner of Financial Regulation conducted an investigation of the firm's activities. Concluding that those activities violated the Maryland Credit Services Businesses Act ("MCSBA"), the Commissioner issued an administrative cease and desist order to the firm and its attorneys. BB&B and Mr. Brown requested a hearing.

A hearing was held before an administrative law judge ("ALJ") of the Office of Administrative Hearings. The ALJ concluded that the firm and Mr. Brown had committed "willful" violations of the MCSBA – among other things, the firm had not complied with the licensing, disclosure, and bonding requirements of the statute. The ALJ recommended that the Commissioner issue a permanent cease and desist order, impose a civil monetary penalty of $114,000, and award more

than $700,000 to the homeowners as treble damages. The Commissioner's designee accepted the recommendation, with minor changes.

BB&B and Mr. Brown sought judicial review. The Circuit Court for Baltimore City concluded that, while BB&B and Mr. Brown may have violated the ethical rules governing attorneys, their efforts to seek loan modifications for homeowners were "ancillary" to the provision of legal services and that the MCSBA did not apply to those activities. The Court of Special Appeals affirmed in an unreported opinion. The Court of Appeals granted the Commissioner's petition for a writ of certiorari.

Held: Reversed.

The MCSBA applies to any person who, among other things, offers to obtain an extension of credit for a consumer in return for the payment of money. Certain individuals and entities who would otherwise come within this definition are explicitly exempted from the purview of the statute. Among those exemptions is one for Maryland-licensed attorneys who undertake such activities in the course of their legal practice, but do not engage in a credit services business "on a regular and continuing basis."

The Court held that the activities of BB&B and Mr. Brown – in particular, the agreement to seek a loan modification in return for the payment of money by a homeowner – involved assisting a consumer with obtaining an extension of credit for household purposes and therefore came within the definition of "credit services business' in the statute.

The Court also held that the attorney exemption did not apply to BB&B or Mr. Brown. Neither the firm nor Mr. Brown was a Maryland-licensed attorney. More importantly, in consulting with hundreds of Maryland homeowners and entering into agreements with 57 homeowners in a nine-month period, they conducted that business "on a regular and continuing basis" during that period and thus were ineligible for the exemption for that reason, regardless of their licensing status.

The Court remanded the case for further proceedings in the Circuit Court. Although BB&B and Mr. Brown had challenged the Commissioner's finding that the violations were "willful" – which resulted in an enhanced monetary award against them –the lower courts had not ruled on that issue. The Court also noted that the Circuit Court could resolve an apparent factual dispute about whether there was sufficient evidence in the record about the amounts actually paid by the homeowners.

Baltimore County, Maryland v. Fraternal Order of Police, Baltimore County Lodge No. 4, No. 25, September Term 2015, filed August 25, 2016. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2016/25a15.pdf

CIVIL PROCEDURE – LAW OF THE CASE

PUBLIC EMPLOYEES – COLLECTIVE BARGAINING – INTEREST ARBITRATION AND GRIEVANCE ARBITRATION

PUBLIC EMPLOYEES – COLLECTIVE BARGAINING – ARBITRATION – BUDGETARY ADMINISTRATION.

Facts:

In accordance with the Baltimore County Charter and the Baltimore County Code, Baltimore County engages in collective bargaining with the exclusive representatives of various categories of its employees. Among those categories of employees are police officers below a certain rank, who are represented by the Fraternal Order of Police ("FOP"). The negotiations result in an agreement that is called a "memorandum of understanding" or "MOU." Among the provisions that may appear in an MOU are those pertaining to health insurance benefits, including health insurance benefits for retirees.

In the MOUs for the fiscal years from 1996 through 2007, the County promised to furnish the same subsidy of health insurance benefits for officers who retired between February 1, 1992 and June 30, 2007 as for current employees B during that time, a subsidy of 85 per cent of the cost of the premium. In addition, those MOUs also provided that the percentage subsidy at the time of retirement of an officer would remain in effect until the retiree (or the retiree=s beneficiary) reached age 65 (or became eligible for Medicare).

After the 2007 fiscal year, the County reduced the health insurance subsidy for current employees. Despite the language in the earlier MOUs that the health insurance subsidy at the time of retirement would remain in effect for a retiree until the retiree reached age 65 or was eligible for Medicare, the County also reduced the health insurance subsidy for existing retirees who had retired in years covered by those earlier MOUs.

Pursuant to the grievance procedure in the MOUs, the FOP filed a class grievance on behalf of police officers who had retired during the period that the MOUs included the provision that the health insurance subsidy at the time of retirement would remain in effect until age 65 or eligibility for Medicare B i.e., those who retired between February 1, 1992 and June 30, 2007.

The grievance was not resolved at the initial steps of the grievance process. In accordance with that process, the matter proceeded to binding arbitration. The arbitrator concluded that the dispute was arbitrable and ruled in favor of the FOP on the merits of the grievance. The arbitrator ordered the County to rescind its modification of the retirees= health insurance subsidy, continue the previous subsidy in accordance with the MOUs, and reimburse the retirees for the excessive deductions taken by County in the interim.

In August 2008, the County filed an action in the Circuit Court for Baltimore County to vacate the arbitration award, asserting numerous grounds. The Circuit Court granted summary judgment in favor of the FOP and declined to vacate the arbitration award. Among other things, the court rejected the County's argument that the arbitration award "usurped" the budget authority of the County Executive and County Council (the "no appropriation argument").

The County appealed that decision, asserting that the Circuit Court had erred in upholding the arbitrator=s award for nine reasons, including its no-appropriation argument. The Court of Special Appeals, in an unreported decision, did not address any of the alleged errors, but reversed on a different ground.

The Court of Appeals granted certiorari and reversed the decision of the Court of Special Appeals. 429 Md. 533, 57 A.3d 425 (2012). In its opinion, the Court primarily addressed the one issue on which the intermediate appellate court had reversed the Circuit Court. The Court also briefly addressed the substance of the Circuit Court's decision and found no reason to disturb the Circuit Court's award of summary judgment in favor of the FOP on the merits. However, the Court of Appeals did not discuss in any detail the grounds that the County had originally advanced in the Circuit Court for overturning the arbitration award, such as the no-appropriation argument. In its mandate, the Court directed the Court of Special Appeals to affirm the decision of the Circuit Court upholding the arbitration award.

The County sought reconsideration of the Court of Appeals' decision. In its memorandum in support of that motion, the County highlighted its no-appropriation argument. The Court of Appeals denied that motion.

On remand, the County refused to comply with the arbitration award, again asserting the no-appropriation argument. The Circuit Court concluded that the law of the case doctrine precluded the County from reprising the no-appropriation argument. After a damages hearing and contempt proceedings, the County ultimately paid the judgment from its Other Post-Employment Benefits Trust Fund ("OPEB Fund"), a fund to which the County Council annually appropriates funds to pay retiree health benefits.

The Court of Special Appeals affirmed the Circuit Court decision, also rejecting the County=s no-appropriation argument on the basis of the law of the case doctrine. 220 Md. App. 596, 104 A.3d 986 (2014). The Court of Appeals granted certiorari.

Held:

The Court reviewed the lower courts' invocation of the law of the case doctrine under a *de novo* standard of review. That doctrine expresses the principle, subject to some exceptions, that a court presented with the same issue decided by an appellate court at an earlier stage of the same case will rule the same way. While the doctrine does not apply to dicta, its application does not depend on the extent to which the appellate court elaborates the reasons for its ruling, so long as the court's ruling resolves the particular issue. The doctrine applies not only to arguments presented and resolved as part of the prior decision, but also arguments that could have been presented. The Court determined that it had ruled against the County on the no-appropriation argument during the first round of litigation (albeit without elaborating its reasons), that none of the exceptions to the law of the case doctrine applied in these circumstances, and that the lower courts had properly applied that doctrine in rejecting the County's no-appropriation argument during the second round of litigation.

The Court also explained that, even if the law of the case doctrine had not determined the outcome, the County's no-appropriation argument lacked merit in these circumstances. The County's argument would have more force if the arbitration award had been made in the context of interest arbitration (which involves setting the terms of an MOU) rather than grievance arbitration (which involves interpreting the terms of an existing MOU), as the County Code explicitly states that even a binding interest arbitration award is subject to acceptance by the County Council. Although the County's executive budget process is an important public policy and that public policy might, in some circumstances, override a grievance arbitration award if the County government does not appropriate money to fund a grievance arbitration award, that was not the case in this instance. There was a source of appropriated funds to pay for the retiree health care benefits that were the subject of this case – the OPEB Fund.

State of Maryland v. James Leslie Adams-Bey, Jr., No. 105, September Term 2015, filed August 25, 2016. Opinion by Barbera, C.J.

Watts, J., joins in the judgment only.

http://www.mdcourts.gov/opinions/coa/2016/105a15.pdf

CRIMINAL PROCEDURE – POSTCONVICTION – DISCRETION TO REOPEN POSTCONVICTION PROCEEDINGS

CRIMINAL LAW – POSTCONVICTION – ADVISORY ONLY INSTRUCTIONS

Facts:

In 1978, Respondent, James Leslie Adams-Bey, Jr., was convicted by a jury of first degree rape and related offenses in the Circuit Court for Anne Arundel County, and for those crimes he was sentenced to life plus ten years of incarceration.

At his trial, the court provided instructions the court characterized as advisory only. The judge's instructions were typical of jury instructions generally given at that time, consistent with the text of Article 23 of the Maryland Declaration of Rights. The trial judge instructed the jury that, under Maryland law, the jury is the judge of both the law and the facts and that, should court and counsel appear to differ as to the law that is applicable, the jury should apply the law as they found it to be. The trial court further "advised" the jury that a defendant is entitled to the presumption of innocence and his guilt must be proved to the jury beyond a reasonable doubt. At trial, Respondent did not object to the advisory only instructions. He unsuccessfully moved for postconviction relief in 2010.

In 2012, the Court of Appeals decided *Unger v. State*, 427 Md. 383 (2012), holding that a defendant could seek postconviction relief even if the defendant did not object to advisory only jury instructions at his trial. Shortly following the *Unger* decision, Respondent moved to reopen postconviction proceedings arguing that the instructions given at his trial were unconstitutional because the jury was not instructed to follow the court's explanation of the law and the court did not inform the jury of the binding nature of its instructions on the State's burden of proof or the presumption of innocence.

The circuit court denied Respondent's motion without a hearing, and Respondent noted an appeal to the Court of Special Appeals. That Court, citing the pertinent portion of the trial court's instructions, recognized that the jurors in Respondent's trial received an advisory only instruction similar to that given in *Unger*. Noting Respondent's argument that the "circuit court had abused its discretion in denying his motion" and that the Court of Appeals had clarified that an advisory only instruction was structural error mandating that a conviction be vacated, the

Court of Special Appeals reversed the circuit court's order and remanded to vacate Respondent's convictions and award a new trial.

The State appealed, and the Court of Appeals granted certiorari to review the law on the circuit court's authority to decide a motion to reopen in the first instance and the Court of Special Appeals's authority to review the circuit court's ruling.

Held: Affirmed.

Md. Code Ann., Crim. Proc. § 7-104 (2001, 2008 Repl. Vol.) vests only in the circuit court the discretion to decide whether it is in the interests of justice to grant a motion to reopen a postconviction proceeding. Nevertheless, § 7-109 of the Criminal Procedure Article authorizes the Court of Special Appeals to reverse a circuit court's decision in that regard, so long as the Court of Special Appeals reviews the circuit court's decision for an abuse of discretion. In the present case, the Court of Special Appeals properly exercised its statutory authority under § 7-109 in reversing the circuit court's order denying Respondent's motion to reopen and remanding to that court with instructions to grant the motion to reopen and thereafter grant Respondent a new trial.

Advisory only jury instructions are those that advise the jurors that they are the judges of the law and include, expressly or by implication, the presumption of innocence and the standard of proof. Such instructions constitute structural error that entitles a postconviction petitioner to a new trial. Consequently, a circuit court abuses its discretion in denying a petitioner's motion to reopen a postconviction proceeding if the jurors at the petitioner's trial were given advisory only instructions.

Dominic Givens v. State of Maryland, No. 88, September Term 2015, filed August 22, 2016. Opinion by Watts, J.

Greene, Adkins, and Battaglia, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/88a15.pdf

ALLEGEDLY INCONSISTENT VERDICTS – PRESERVATION – WAIVER

Facts:

In the Circuit Court for Prince George's County ("the circuit court"), the State, Respondent, charged Dominic Givens ("Givens"), Petitioner, with one count of first-degree premeditated murder as to six people, three counts of robbery with a dangerous weapon and robbery, three counts of attempted robbery with a dangerous weapon and attempted robbery, conspiracy to commit the same, and six counts of use of a firearm in the commission a crime of violence.

The State's theory of the case was that Givens and his three co-conspirators robbed three people and attempted to rob another three people, and that one of the people, Marvin Darrell Tomlinson ("Tomlinson"), was fatally shot during the attempted robbery. At trial, as witnesses for the State, four of the five survivors testified that four or five people robbed them of money and other items at gunpoint; Tomlinson moved toward the person with the gun, and told the others to run; and the others did so, and heard gunshots while fleeing. The State also called as a witness Givens's cousin, who testified that Givens shot one of the individuals.

In announcing the verdicts, in response to questions from the courtroom clerk, the jury's foreperson announced that the jury found Givens guilty of first-degree felony murder of Tomlinson, and conspiracy to commit robbery with a dangerous weapon and conspiracy to commit robbery of each of the six victims. The jury's foreperson announced that the jury found Givens not guilty of first-degree premeditated murder of Tomlinson, robbery with a dangerous weapon, robbery, attempted robbery with a dangerous weapon, attempted robbery, and use of a firearm in the commission of a crime of violence.

Immediately after the jury's foreperson announced the verdicts, the circuit court asked: "Any requests?" Givens's counsel's responded by asking that the jury be polled. The courtroom clerk polled the jury and hearkened the verdicts, and the circuit court discharged the jury.

On the same day, after the jury was discharged, Givens filed in the circuit court a "Motion to Strike Inconsistent Guilty Verdicts and/or Motion to Dismiss," contending that the conviction for first-degree felony murder was inconsistent with the acquittals as to robbery and attempted robbery. The State filed a response to the motion to strike; in the response, the State contended that, by failing to object before the circuit court discharged the jury, Givens waived any issue as to the allegedly inconsistent verdicts.

The circuit court denied the motion to strike. Givens noted an appeal. The Court of Special Appeals affirmed the circuit court's judgments and held that, by failing to object before the jury hearkened to the verdicts, Givens waived any issue as to the allegedly inconsistent verdicts. Givens filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that, to preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts or otherwise make known his or her position before the verdicts become final and the trial court discharges the jury. The Court held that, where a jury reaches legally inconsistent verdicts, and the verdicts are not final and the jury has not been discharged, a trial court may send the jury back to deliberate to resolve the inconsistency. The Court noted that one of the purposes of the requirement that a defendant preserve issues for review is to give a trial court the opportunity to correct any error in the proceedings. The Court explained that this method of correcting any inconsistency in the verdicts is unavailable where a defendant raises an issue as to inconsistent verdicts after the verdicts have become final and the trial court has discharged the jury. In other words, where, as in this case, a defendant raises an issue as to inconsistent verdicts after the verdicts have become final and the trial court has discharged the jury, the defendant's delay deprives the trial court of the opportunity to address any inconsistency in the verdicts. The Court noted that legally inconsistent verdicts are, more often than not, immediately recognizable; thus, it is entirely reasonable to expect a defendant to object to inconsistent verdicts before the verdicts are final and the trial court discharges the jury.

In reaching its holding, the Court adopted Part C of the concurring opinion of the Honorable Glenn T. Harrell, Jr. in *Price v. State*, 405 Md. 10, 40-42, 949 A.2d 619, 637-39 (2008) (Harrell, J., concurring). In that part of the concurring opinion, which two other judges joined, Judge Harrell stated that a failure to object to allegedly inconsistent verdicts before the verdicts become final and the trial court discharges the jury constitutes waiver. *See id*. at 42, 949 A.2d at 639. The Court also joined the vast majority of courts in other jurisdictions that have addressed the issue and concluded that a defendant must object to allegedly inconsistent verdicts before the discharge of the jury to preserve for review any issue as to the allegedly inconsistent verdicts.

The Court's conclusion that an objection to legally inconsistent verdicts must be lodged before the verdicts become final and the jury has been discharged was completely consistent with the prohibition on double jeopardy of the Fifth Amendment to the United States Constitution and Maryland common law. The Double Jeopardy Clause prohibits unequivocally the retrial of a criminal defendant following a final judgment of acquittal. There is no violation of the prohibition on double jeopardy where, before the trial court accepts the verdicts, the defendant objects on the ground that a guilty verdict is legally inconsistent with a not-guilty verdict; and the trial court agrees with the defendant and sends the jury back to resolve the inconsistency.

Return to ToC

Donzel Sellman v. State of Maryland, No. 84, September Term 2015, filed August 24, 2016. Opinion by Greene, Jr.

Watts and Battaglia, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/84a15.pdf

CRIMINAL PROCEDURE – CONSENT SEARCH OF VEHICLE

Facts:

Two officers were driving in a patrol car late at night in a high crime area. As they drove through a large apartment complex, they observed Donzel Sellman walk from a dark area on the side of an apartment building with no entry way towards an area lit by a street light. Sellman appeared startled when he saw the patrol car. The officers observed Sellman walk towards a nearby roadway where he entered a waiting car. The officers pulled the vehicle over due to observed traffic violations. The vehicle contained four occupants, and Sellman was seated in the left-rear passenger seat. The officers testified that he appeared nervous: he "was sitting completely rigid in his seat, he had his hands on his knees and was looking straight ahead and never turned his head once" until he was spoken to directly. The officers checked the driver's information using the police database as well as the status of the vehicle. No outstanding warrant was found for the driver, and the car was not reported as being stolen. The driver was given a written warning, and she consented to the search of the vehicle.

The officers asked each occupant for identification and received inconsistent stories about who resided in the complex. Sellman provided his name and date of birth, because he did not have a driver's license. The officers used their police database to check if any of the occupants had an outstanding warrant; the results were negative. The officers also accessed the Motor Vehicle Administration records, but could not locate any records for the name offered by Sellman.[1] A third officer was requested, because there were four detainees and two officers at the scene; the officers also wanted the parking lot checked to see if any cars had been broken into.

The officers testified that, pursuant to standard operating procedures, prior to searching a vehicle, the occupants are instructed to exit the vehicle and then each occupant is frisked. When Sellman was frisked, a handgun was discovered in his waistband. Sellman moved to suppress the evidence, because the officers lacked a reasonable basis to believe he was armed and dangerous. The Circuit Court denied the motion, because it found that reasonable suspicion existed to justify the frisk. In an unreported opinion, a divided panel of the intermediate appellate court affirmed the lower court's decision.

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[1] Later, after this encounter, the officers would learn that Sellman provided an alias.

Held: Reversed.

The Court of Appeals held that reasonable suspicion did not exist to justify the frisk of Sellman. Under *Terry v. Ohio*, in order to conduct a frisk, an officer must have reasonable suspicion that criminal activity is afoot and that the individual is armed and dangerous. 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). When reviewing whether reasonable suspicion exists, the test is the totality of the circumstances viewed through the eyes of a reasonably prudent officer. The validity of a frisk is determined by whether the record discloses articulable objective facts to support it.

The officers' observations of Sellman revealed innocent conduct, and the officers did not provide an objective reason to support their interpretation of that conduct: namely, that Sellman was likely involved in criminal activity or was armed. The officers did not observe furtive gestures, evasive maneuvers, bulges, bags or containers, or any instruments associated with the suspected crime. Additionally, neither officer testified that they were concerned for their safety, and the Court could not rationally infer from the facts that a reasonably prudent officer would have had reasonable suspicion to believe that Sellman was armed. Therefore, the officers did not need to frisk Sellman in order to protect themselves or bystanders. A factor relied on heavily by the State was Sellman's nervous behavior throughout the encounter, but his nervousness was not exceptional. Instead, his display of nervousness coupled with his compliance in answering questions and exiting the vehicle when ordered to do so, and the blatant lack of other suspicious circumstances were too weak, individually or in the aggregate, to justify reasonable suspicion of criminal activity or that he was armed and dangerous.

The Court of Appeals also addressed the alleged police department policy that purports to authorize officers to frisk occupants prior to conducting a consent search of a vehicle. Where reasonable suspicion that the occupant(s) is armed and dangerous is absent, the frisk of an occupant is an unreasonable intrusion on Fourth Amendment protections. This pernicious institutionalized procedure is unlawful and is counter to *Terry* and its progeny. "To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327, 129 S. Ct. 781, 784, 172 L. Ed. 2d 694, 700 (2009).

The Court of Appeals refused to adopt a bright line rule that the crime of theft of property from cars implies weapons use. Minor crimes do not, in and of themselves, justify a *Terry* frisk without additional circumstances that establish reasonable suspicion that a suspect is armed and presently dangerous.

Robert Anthony McGhie v. State of Maryland, No. 78, September Term 2015, filed August 24, 2016. Opinion by Barbera, C.J.

McDonald, J., concurs.
Raker, J., dissents.

http://www.mdcourts.gov/opinions/coa/2016/78a15.pdf

CRIMINAL LAW – PETITION FOR WRIT OF ACTUAL INNOCENCE – IMPACT OF NEWLY DISCOVERED EVIDENCE

Facts:

In 1994, Petitioner Robert Anthony McGhie was tried before a jury in the Circuit Court for Montgomery County. The State charged Petitioner with murder and related offenses for his participation in a failed armed robbery of the American Mailbox, a store in Silver Spring, Maryland. The State's case rested primarily upon the testimony of one of the co-conspirators to the attempted robbery, Edward Borrero, and several other witnesses.

As further support for Petitioner's participation in the crimes, the State called Joseph Kopera, a ballistics expert, to testify that shell casings from the crime scene matched shell casings from an unrelated shooting involving Petitioner on January 23, 1994. In testifying about his qualifications, Kopera said that he had engineering degrees from the University of Maryland and the Rochester Institute of Technology and that he was a graduate of the FBI Academy in the field of ballistics. Kopera concluded that, based on the ballistics evidence, the same gun was used in both shootings.

The jury found Petitioner guilty on all counts and the court sentenced him to life in prison. The Court of Special Appeals affirmed his conviction.

In 2013, Petitioner filed a petition for writ of actual innocence pursuant to Md. Code Ann., Crim. Proc. § 8-301 (2010, 2008 Repl. Vol., 2015 Supp.). Petitioner argued that newly discovered evidence revealed that the State's ballistics expert, Kopera, lied about his academic credentials at Petitioner's trial. Petitioner argued, and the State agreed, that Kopera testified falsely when he said he had earned engineering degrees and graduated from the FBI Academy in the field of ballistics. Based on this newly discovered evidence, Petitioner argued that without the ballistics evidence, there was a substantial or significant possibility that the verdict may have been different. The State opposed the petition.

In a written opinion, the hearing judge examined two potential standards to adopt in this situation. Under the first potential standard, a judge would consider whether the result would have been different if the false testimony about academic credentials was simply excised. Under the second potential standard, a judge would consider whether the result would have been

different if it was revealed to the jurors during the trial that the expert witness had lied to them about his educational qualifications. The hearing judge concluded that the first of the two standards—simply excision of the false testimony of exaggerated credentials—is the correct standard and, applying that standard, determined that there was no possibility that the verdict would have been different without Kopera's testimony about his education.

The hearing judge also considered Petitioner's claim under the second standard—had the jury known of Kopera's perjury—and concluded that the verdict would not have been affected under this analysis either, because ample testimony aside from the ballistic evidence implicated Petitioner in the murder. The Court of Special Appeals affirmed the judgment of the Circuit Court.

The Court of Appeals granted Petitioner's petition for writ of certiorari to consider the proper analysis a circuit court should employ when reviewing newly discovered evidence that a witness testified falsely under § 8-301.

Held: Affirmed.

The Court of Appeals held that the proper analysis in reviewing newly discovered evidence that an expert witness lied about his credentials aligns with the second standard posited by the hearing judge. A judge must look back to the trial that occurred to determine whether, had the jurors been made aware at the trial that the expert witness testified falsely about his academic credentials, the newly discovered evidence creates a substantial or significant possibility that the verdict may have been different. That determination requires the hearing judge to consider the reasonable probability that, had the jurors known of the witness's lies, they would have discredited the balance of the expert witness's testimony. The judge then must consider the remaining evidence that was before the jury to determine whether the petitioner has carried the burden of proving that the newly discovered evidence created a "substantial or significant possibility that the result may have been different."

While the hearing judge employed a different standard in his primary analysis, he applied the correct standard in the alternative and reached the same conclusion. The hearing judge found that ample testimony from multiple witnesses as to Petitioner's connection to the murder was sufficient on its own, aside from the ballistics evidence.

The Court of Appeals held that the hearing judge neither erred nor abused his discretion in making that finding and ruling that Petitioner had not carried his burden to prove that the newly discovered evidence created a substantial or significant possibility that the result may have been different.

Ira Chase v. State of Maryland, No. 85, September Term 2015, filed August 19, 2016. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2016/85a15.pdf

CONSTITUTIONAL LAW – FOURTH AMENDMENT – REASONABLE SUSPICION

CONSTITUTIONAL LAW – ARREST

Facts:

Detective Andrew Melnyk of the Baltimore County Police Department and his partner, Detective Young, assigned to the Vice/Narcotics Unit, were patrolling an area around Security Boulevard that was "known for illicit narcotic activity" due to its proximity to Interstate 70 and the Baltimore Beltway. On September 10th, Detective Melnyk and Detective Young were in the area around the Days Inn on Whitehead Court, which they knew to be a "high area of drug trafficking", when they observed a Jeep Cherokee that had backed into a parking space. Another car arrived and backed into the space next to the Jeep. The Detectives saw an individual get out of the car and enter the passenger side of the Jeep. After waiting a short period of time to see if any further activity occurred, Detectives Melnyk and Young approached the Jeep and identified themselves as police officers. Detective Melnyk testified that as he and his partner approached the Jeep, he observed furtive movements made by the driver, who reached under his seat, and the other occupant, who put his hand in his pocket. Chase and his companion were removed from the Jeep and placed in handcuffs. A frisk of Chase by Detective Melnyk did not reveal any weapons. As a result of differing stories given by Chase and the other man, Chase remained in handcuffs and a request that a K-9 unit come to the location was made. Approximately eight minutes later the K-9 unit arrived and the police dog alerted to the presence of narcotics during the "sniff" of the Jeep Cherokee. Detective Melnyk subsequently performed a search incident to arrest of Chase, which produced a motel room key. A search of the room associated with the key uncovered 138 grams of cocaine and narcotics paraphernalia. At the trial level, Chase's motion to suppress was denied, and he entered a conditional guilty plea to possession of cocaine with intent to distribute. The Court of Special Appeals affirmed.

Held: Affirmed.

The Court of Appeals held that Detectives Melnyk and Young possessed reasonable suspicion to stop Chase and ask him to leave the Jeep, based upon their belief that Chase may have been armed and dangerous. They had observed behavior by Chase and his companion in the Jeep consistent with the hiding of illegal drugs as well as "furtive" movements that suggested weapons could have been secreted in the vehicle. The Court, again, emphasized that concern for officer safety when weapons may be present may overcome concern about a limited *Terry*

intrusion, such as asking Chase to get out of the Jeep. Further, the particularized observations made by Detective Melnyk regarding the furtive movements made by Chase and ongoing concern for officer safety justified the use of handcuffs, and such use did not elevate the *Terry* stop into an arrest. The Court also determined that, although no weapons were found on Chase's person after the frisk, the officers continued fear that weapons were in the unsearched Jeep justified the continued use of the handcuffs.

State of Maryland v. Kenneth Hart, No. 74, September Term 2015, filed August 19, 2016. Opinion by Greene, Jr.

http://www.mdcourts.gov/opinions/coa/2016/74a15.pdf

CRIMINAL PROCEDURE – RIGHT TO BE PRESENT – WAIVER

Facts:

Kenneth Hart, the defendant, was present throughout the two-day trial. Jury deliberations began at 7 p.m., and at approximately 10:30 p.m., the trial court received a jury note. The judge informed the prosecutor and defense counsel, and made arrangements for the sheriffs to bring Hart to the courtroom. Defense counsel requested a "preview" of the jury note; the note indicated that the jury was deadlocked on a particular count. The judge was then informed that Hart had been transported to a hospital due to a medical emergency. After discussing the note with the prosecutor and defense counsel, the court summoned the jury foreperson for a colloquy to discuss the nature of the deadlock. Defense counsel consented to the discussion and is deemed to have waived his client's presence for the colloquy. Despite objections from defense counsel following the colloquy, the judge proceeded in absentia, received a partial verdict, and declared a mistrial on the perceived deadlocked count on the basis of manifest necessity. At a post-trial hearing, the trial judge recognized her error in receiving the partial verdict in Hart's absence, and ordered a new trial for the counts on which Hart had been convicted. The court denied Hart's motion to dismiss the deadlocked count. The Court of Special Appeals reversed the trial court's denial of the motion to dismiss. It held that Hart had a right to be present at the declaration of the mistrial. It further held, due to Hart's involuntary absence, manifest necessity did not exist, and therefore, double jeopardy barred retrial.

Held: Affirmed.

The Court of Appeals held that the colloquy with the jury foreperson was a "stage of the trial" at which Hart had a right to be present. Defense counsel waived his client's right for the limited purpose of obtaining information about the jury's deadlock. He did not request or consent to the trial court's answer to the jury communication. The Court held it was an abuse of discretion to violate Hart's right to be present by responding to the jury note *in absentia* too hastily: Hart was involuntarily absent, and the judge did not inquire as to the seriousness of his condition or the expected length of his absence prior to exercising her discretion to proceed *in absentia*. The violation of Hart's right was not harmless error.

The Court of Appeals also held that the declaration of a mistrial *sua sponte* was premature. Manifest necessity did not exist, because the defendant was involuntarily absent and the judge did not adopt any reasonable alternatives to the declaration. The judge rejected defense

counsel's request for a short continuance to ascertain Hart's status, even though granting it was feasible and would have cured the problem associated with proceeding *in absentia*. The judge also failed to consider the impact Hart's absence could have on the jury. Because the declaration occurred in the absence of manifest necessity, double jeopardy prohibits a retrial on the deadlocked count.

Michelle Bandy, et al. v. Alexandra Clancy, No. 93, September Term 2015, filed August 19, 2016. Opinion by Battaglia, J.

Barbera, C.J., Greene and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/93a15.pdf

MARITAL DEDUCTION – WILL CONSTRUCTION – ESTATE TAXES

Facts:

Thomas Clancy executed a will on June 11, 2007 that contained fourteen items that named his personal representative, instructed with respect to the payment of estate taxes, left Mr. Clancy's personal and real property to Mrs. Clancy and, with respect to the remainder of his estate, created three residuary trusts: a Marital Trust for the benefit of Mrs. Clancy representing one third of the residuary; a Family Trust for the benefit of Mrs. Clancy and their minor child equal to one half of the residue that remained after the creation of the Marital Trust; and the final, two Older Children's Trusts into which the remaining one half of the residue after the creation of the Marital Trust was to be deposited. The Will provided that any estate taxes were to be paid out of the residuary but that the Marital Trust was not to be reduced by any estate taxes. Six years later, on July 25, 2013, Mr. Clancy executed a codicil which contained a series of amendments to the Family Trust as well as explicitly included the Family Trust in a "Savings Clause" designed to protect the benefit of the marital deduction. Mrs. Clancy petitioned in the Orphans' Court for a Declaratory Judgment in which she sought a determination that the Family Trust was not obligated to pay any estate taxes. The Orphans' Court interpreted the "Savings Clause" to prohibit Mr. Clancy's Personal Representative from requiring that the Family Trust contribute to the payment of estate taxes. The Older Children appealed the Orphans' Court's interpretation of the Will and Codicil as to the payment of estate taxes by the Family Trust.

Held: Affirmed.

The Court of Appeals noted that the Older Children and Mrs. Clancy, as well as the personal representative, all agreed that the Second Codicil qualified the Family Trust for a QTIP election, which allowed for its inclusion under the marital deduction, but that Mrs. Clancy could request that the trustee invade the corpus of the Family Trust for her needs, which would reduce its value when it passed upon her death. All the parties also agreed that the Second Codicil contained a Savings Clause that amended the Savings Clause in the Will to restrict the actions of the personal representative and trustee to qualify the portion of the residuary trust allocated to the Family Trust for the marital deduction. The Second Codicil did not, however, specifically address, in any way, the Will provision that instructed that taxes were to be paid out of the residuary estate of which the Family Trust was a part.

The Court relied on the Savings Clause as an interpretive aide in determining Mr. Clancy's intent, and held that the Savings Clause prevented the personal representative from exercising any "authority, power, or discretion" to disqualify any portion of the Family Trust from the marital deduction, such as the payment of federal estate taxes, and "trumped" the item in the Will relating to payment of taxes from the residuary estate. To burden the Family Trust with payment of federal estate taxes at the time of Mr. Clancy's death when the property is conveyed in trust for the benefit of Mrs. Clancy would be in direct derogation of Mr. Clancy's intent manifested in the Savings Clause.

Return to ToC

Milton Everett Jackson v. Gayle Ann Sollie f/k/a Gayle S. Jackson, No. 62, September Term 2015, filed July 19, 2016. Opinion by Greene, J.

Watts and Hotten, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/62a15.pdf

FAMILY LAW – DIVORCE – MARITAL PROPERTY

Facts:

Milton E. Jackson ("Jackson") filed for an absolute divorce from his spouse, Gayle S. Jackson ("Sollie"). The parties were unable to reach a consensus as to how to dispose of their respective pension plans. As an older federal employee, Jackson is a participant in the CSRS pension program. Under this program, he does not qualify for Social Security benefits.[1] CSRS pensioners receive a larger pension to compensate for the lack of Social Security benefits. Sollie, however, is a participant in a traditional retirement program, and is eligible to receive retirement benefits as well as Social Security benefits.

Under Maryland law, in a divorce proceeding, retirement plans are considered marital property subject to division, and Social Security benefits are considered non-marital property, which are not subject to division. Jackson argues, however, that the marital portion of the CSRS pension should be reduced in order to reflect an offset. The offset, he states, is an embedded Social Security element representing the amount of Social Security benefits Jackson would have been entitled to had he not participated in the CSRS. By accounting for the offset, Sollie's share of the marital portion of the CSRS pension would be reduced, and, in Jackson's opinion, this would result in a more equitable distribution of the marital assets. Sollie argued that state courts are federally preempted from dividing Social Security benefits directly or indirectly by way of an offset. The trial judge agreed, and ordered the retirement plans be divided so that each party would receive 50% of the marital share of the other party's retirement plan.

Held: Judgment of the Circuit Court is vacated, and the case is remanded for the trial judge's consideration of the parties' anticipated Social Security benefits in determining whether it would be equitable to enter a monetary award.

The Court of Appeals held that, in a divorce proceeding, a trial judge is preempted by federal law from dividing Social Security benefits (including its hypothetical value) directly or by way of an indirect offset when determining the equitable distribution of marital property. On the basis of

[1] Jackson is eligible to receive limited Social Security benefits, because he previously worked in the private sector, and contributed to the program.

the evidence presented, however, a judge must consider a party's actual or anticipated Social Security benefits as a relevant factor under Md. Code (1984, 2012 Repl. Vol.), § 8-205(b) of the Family Law Article when determining whether to grant a monetary award to adjust the equities and rights of the parties concerning marital property. General consideration does not conflict with federal law, because it is not a direct or indirect offset of Social Security benefits. Furthermore, the consideration of Social Security benefits does not compel a judge to grant a monetary award. The ultimate decision of whether to grant a monetary award, and the amount of such an award, are matters entrusted to the sound discretion of the trial court.

Brenda Smith v. Delaware North Companies, et al., No. 103, September Term 2015, filed August 19, 2016. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2016/103a15.pdf

EVIDENCE – ADMISSIBILITY OF CONSENT ORDERS – HEALTH OCCUPATIONS ARTICLE § 14-410

Facts:

Brenda Smith ("Smith") slipped on the floor in the course of her employment as a cook at Camden Yards. She landed on her left knee when she fell. Smith filed a workers' compensation claim seeking compensation benefits from Delaware North Companies and its insurer (collectively "Delaware North") for a full left knee replacement. The Commission held a hearing and denied Smith's request for a total knee replacement. Smith filed a petition for judicial review of the Commission's decision in the Circuit Court for Baltimore City, electing a jury trial.

During the jury trial, Smith designated Dr. McGovern as her expert witness to testify to the casual relationship between her workplace injury and the need for full knee replacement surgery. At trial, Delaware North objected to the admission of Dr. McGovern as an expert witness and sought to introduce a consent order Dr. McGovern entered into with the Maryland Board of Physicians ("the Board"). The trial court admitted the last six pages of the consent order into evidence.

Held: (1) Md. Code (1981, 2014 Repl. Vol., 2015 Cum. Supp.), § 14-410 of the Health Occupations Article ("HO") generally prohibits the admission, as evidence in a criminal or civil action, a consent order entered into between the Board of Physicians and a physician. (2) The privilege of HO § 14-410 is not limited to tort actions for medical malpractice.

The language of HO § 14-410 is clear and unambiguous. Based on the plain language of the statute: (1) evidence that constitutes an "order" of the Board or disciplinary panel is inadmissible in a later civil or criminal action; and (2) evidence that constitutes the "proceedings, records, or files" of the Board or a disciplinary panel is not discoverable or admissible in a later civil or criminal action. HO § 14-410. There exists two exceptions to this privilege. First, the privilege is inapplicable when "all parties to a proceeding" expressly stipulate and consent to the admissibility of an order or the admissibility or discoverability of a Board's "proceedings, records, or files." *Id.* Second, HO § 14-410(b) provides that the privilege is inapplicable "to a civil action brought by a party to a proceeding before the Board or a disciplinary panel who claims to be aggrieved by the decision of the Board or the disciplinary panel."

Dr. McGovern's signature on the "CONSENT" page of the consent order does not rise to the level of "express stipulation and consent" to anything other than agreement to be bound by the terms of the consent order. HO § 14-410. As the consent order notes, by agreeing to the terms of the order, a physician acknowledges that he freely agrees to be bound by the terms of the consent order and is aware that he waives certain rights by settling the charges against him without an evidentiary hearing. Nowhere on the page entitled "CONSENT" or anywhere else in the consent order does it state that agreeing to the terms of the consent order also indicates consent to its admissibility or discoverability "in a civil or criminal action." HO § 14-410.

Based on the plain language of HO § 14-410, it is also clear that the privilege applies to all civil actions, not just tort actions for medical malpractice. This Court explicitly stated in *Unnamed Physician v. Commission on Medical Discipline of Maryland* that "judicial review of the decision of an administrative agency is a civil action." 285 Md. 1, 9−10, 400 A.2d 396, 401 (1979). The Workers' Compensation Commission "is an adjudicatory administrative agency." *W.R. Grace & Co. v. Swedo*, 439 Md. 441, 452, 96 A.3d 210, 217 (2014). Therefore, Smith's case falls squarely within the plain meaning of "a civil action." *Unnamed Physician*, 285 Md. at 9−10, 400 A.2d at 401.

United Insurance Company of America and the Reliable Life Insurance Company v. The Maryland Insurance Administration, and Al Redmer, Jr., in his official capacity as Commissioner, No. 101, September Term 2015, filed August 25, 2016. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2016/101a15.pdf

INSURANCE LAW – RETROACTIVE ENFORCEMENT – ADMINISTRATIVE EXHAUSTION REQUIREMENT

Facts:

Petitioners, United Insurance Company of America and the Reliable Life Insurance Company, offer life insurance policies to lower income individuals and families in the State of Maryland. The policies are subject to extensive regulation by Respondents, the Maryland Insurance Administration ("MIA"), the agency that administers and regulates the State's insurance market. As of December 2011, Petitioners had a combined total of approximately 135,000 in-force policies in the State, which provided, in part, that insurance proceeds would be paid upon "receipt of due proof of death" of the insured. Petitioners premium rates reflected, *inter alia*, costs savings realized by placing the obligation on beneficiaries to provide due proof of death.

In May 2012, the General Assembly passed Senate Bill 77, codified at Md. Code (2011 Repl. Vol., 2015 Supp.) § 16-118 of the Insurance Article ("Ins."), to address the growing concern of questionable and unfair settlement practices by major life insurance companies. The law became effective in October 2013. Section 16-118 imposed a duty on insurers, *inter alia*, to "perform a comparison of their in-force life insurance policies, annuity contracts, and retained assets accounts against the latest version of a death master file to identify any death benefit payments that may be due. . . ." Ins. § 16-118(c)(1). Failure to comply with the requirements constitutes an "unfair claim settlement practice," under Ins. § 27-303(10), punishable by civil and criminal penalties. Prior to this legislation, insurers were under no obligation to research whether a policyholder had died, and the statute did not indicate whether its provisions applied retroactively to existing insurance policies.

In February 2013, prior to the statute's effective date, Petitioners', through their representatives, attended a meeting with the then-Insurance Commissioner who interpreted and proposed that the statute applied to all in-force policies, including those in effect prior to the statute's effective date. The Insurance Commissioner further advised that the requirements of the statute would be enforced against all of Petitioners' in-force policies. In July 2013, Petitioners filed a declaratory action against the MIA and the Insurance Commissioner in the Circuit Court for Anne Arundel County, challenging the retroactive enforcement. Petitioners alleged, *inter alia*, that the statute conflicted with Maryland's presumption against retroactive operation of new laws, and that the statute substantially impaired their contractual rights in violation of Articles 19, 24, and 25 of Maryland Declaration of Rights, Article III, § 40 of the Maryland Constitution, and the Contract

Clause of the U.S. Constitution. The circuit court dismissed Petitioners' action and held that Petitioners were required to exhaust administrative remedies afforded by the Insurance Article before seeking relief in the court. In an unpublished opinion, the Court of Special Appeals agreed, and affirmed the judgment of the circuit court.

Held: Affirmed.

The Court of Appeals held that the administrative remedy afforded by the Insurance Article was primary, and thus, Petitioners were required to pursue and exhaust administrative remedies in challenging the constitutionality and retroactive enforcement of Ins. § 16-118 before seeking a declaratory judgment in the circuit court. The Court reasoned that Petitioners failed to rebut the presumption that the administrative remedy was primary because the Insurance Article provided a comprehensive remedial scheme that encompassed Petitioners' claim, and Petitioners' claim depended upon the statutory scheme and the expertise of the administering agency, the MIA. The Court further held that Petitioners' claim did not fall within the constitutional exception to the administrative exhaustion requirement, because Petitioners did not challenge the constitutionality of the statute as a whole, but only as applied retroactively to their in-force life insurance policies.

Kenwood Gardens Condominiums, Inc., v. Whalen Properties, LLC, No. 86, September Term 2015, filed August 19, 2016. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2016/86a15.pdf

ADMINISTRATIVE LAW – PLANNING AND ZONING – PLANNED UNIT DEVELOPMENTS – LEGISLATIVE INTENT

Facts:

Petitioners, Kenwood Gardens Condominiums, Inc., et al., challenge a Planned Unit Development ("PUD") application for a mixed-use medical services building submitted by developer, Respondent, Whalen Properties, LLC, to County Councilman Thomas Quirk. Kenwood alleges that Whalen made illegal campaign contributions to Councilman Quirk and this created an appearance of impropriety, which voided the PUD process.

Councilman Quirk subsequently introduced Resolution 108-11, which contained the PUD proposal, and the County Council unanimously approved the Resolution. Approximately eight months after the County Council adopted the Resolution, it enacted Bill 38-12. The Bill exempted PUDs in certain areas of Baltimore County from traditional zoning compatibility standards and substituted a more lenient set of compatibility objectives for all qualifying future PUD applications. Kenwood also alleges that this is evidence of an improper "special law."

Pursuant to the Baltimore County Code ("BCC"), an Administrative Law Judge ("ALJ"), is required to review the PUD for compliance with the requirements of zoning and development regulations. Kenwood challenged the proposed PUD at the hearing before the ALJ and subsequently at a hearing before the Baltimore County Board of Appeals ("Board of Appeals"). Both the ALJ and the Board of Appeals rejected Kenwood's challenge that the alleged appearance of impropriety was reviewable or invalidated the process. Upon further review, the Circuit Court for Baltimore County affirmed the decision of the Board of Appeals. The Court of Special Appeals, in an unreported opinion, affirmed the Circuit Court. The intermediate appellate court held that the ALJ's decision did not exceed the ALJ's statutory authority, did not result from an unlawful procedure or other error of law, and was supported by substantial evidence in the record.

Held: Affirmed.

The Court of Appeals held that the BCC creates a PUD approval process that is partly legislative and partly quasi-judicial in nature. This requires involve separate standards for judicial review.

Actions of a local government body that are legislative in nature, as opposed to quasi-judicial or adjudicative, are subject to a more limited review. The courts ordinarily do not review the

motives of the Legislature when reviewing a legislative enactment unless the evidence establishes that the government body or actor was acting outside its legal boundaries.

The preliminary fact-finding review processes carried out by the planning and zoning agencies prior to the introduction of the resolution and the Board of Appeal's substantive review following the passage of the resolution were quasi-judicial actions, which are subject to broader review. The Court of Appeals concluded that the introduction and passage of a resolution is a legislative action, which is subject to limited judicial review. Moreover, the alleged "appearance of impropriety" generated by illegal campaign contributions does not negate the presumption of validity of the legislative act. Councilman Quirk and the County Council were not involved directly in the proceedings before the ALJ or the Board of Appeals. Any appearance of impropriety involving Councilman Quirk or the County Council does not invalidate the ALJ's actions or the Board of Appeal's decision. The Board of Appeals was correct in concluding that it lacked the authority to review an alleged appearance of impropriety in the initiation process underlying the resolution. Therefore, the Court of Appeals held that there was substantial evidence in the record to support the Agency's final decision to approve the PUD.

COURT OF SPECIAL APPEALS

Kim L. Sydnor, et al. v. Alvin C. Hathaway, et al., No. 2319, September Term 2014, filed July 27, 2016. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/2319s14.pdf

NONSTOCK CORPORATIONS – CORPORATIONS AND ASSOCIATIONS ARTICLE, SECTION 5-209, COURT DISPOSITION OF PROPERTY OF CHARITABLE OR RELIGIOUS ORGANIZATION – TEST FOR CHARITABLE ORGANIZATION – DISPOSITION BY COURT OF CORPORATE PROPERTY UPON FINDING THAT IT IS "IMPRACTICABLE OR INEXPEDIENT TO CONTINUE CORPORATION'S ACTIVITIES" – INVOLUNTARY DISSOLUTION OF CORPORATION – STANDARD OF REVIEW FOR DENIAL OF MOTION FOR RECONSIDERATION UNDER RULE 2-535(a).

Facts:

In 1980, members of a Church formed a nonstock corporation to receive grant money from Baltimore City to purchase a dilapidated row house to renovate it for use as a coffee house for the elderly, as part of the Church's ministry. The row house was titled to the Corporation. In the 1990s, the row house was torn down and on its site and the site of several surrounding properties, all owned by the Church, the Church built a large head start center. The head start center was paid for by a grant from the State and money raised by the Church. Even though the head start center was a single building, it was situated on the one small parcel owned by the Corporation and other parcels all owned by the Church.

From the time it was formed in 1980 forward, the Corporation engaged in no activities, other than holding title to the original dilapidated row house property. The Corporation could have sought and obtained tax exempt status, but did not do so. The Corporation's charter was forfeited off and on for 25 years. The Church and the Corporation, having once worked together, were at odds over the ownership of the head start center. The Church formed an "alternate board of directors" for the Corporation, and transferred the Corporation's interest in the head start center building to the Church by quitclaim deed and then dissolved the Corporation. The Corporation brought a declaratory judgment action, seeking to set aside the acts of the "alternate board" and to establish its ownership of the original dilapidated row house lot on which a small part of the head start center stands.

The trial court ruled that the Church had no authority to establish the "alternate board" and that the acts of the "alternate board" were void. The court invoked section 5-209 of the Corporations

and Associations Article, however, which allows a court to dispose of property of a charitable organization when it is "impracticable or inexpedient to continue the corporation's activities." Under that section, the court ratified the quitclaim deed transferring title of the Corporation's portion of the head start center to the Church. After ruling on the record, the court included in its written declaratory judgment a declaration that the Corporation "is dissolved."

The Corporation filed an untimely motion for reconsideration, which was denied, and then noted an appeal that was timely only from the denial of that motion.

Held: Affirmed in part and reversed in part.

The court properly applied section 5-209, which applies to nonstock corporations, to dispose of the Corporation's interest in the head start center property by transferring it to the Church. The Corporation was a charitable organization even though it did not have tax exempt status. The test for whether a corporation is a charitable organization is whether the organization serves a useful public purpose that supplements or takes the place of public institutions, and that is not contrary to public policy. The Corporation met this test, to the extent it once served a purpose at all. The court's finding, under section 5-209, that it was "impracticable or inexpedient to continue the Corporation's activities" was supported by the evidence, and justified the court's disposing of the Corporation's only property—one of the lots on which the head start center was built—by transferring it to the Church. Finally, the court had no equitable power to dissolve the Corporation, and the statutory requirements for involuntary dissolution of the Corporation were not satisfied. Because the court's decision to dissolve the Corporation was based on a clear error of law, the court abused its discretion by denying the motion for reconsideration on the issue of dissolution.

Otis Rich v. State of Maryland, No. 601, September Term 2010, filed August 30, 2016. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2016/0601s10.pdf

CRIMINAL PROCEDURE ARTICLE – *CORAM NOBIS* – SECTION 8-401 – WAIVER OF CORAM NOBIS RELIEF UNDER *STATE V. SMITH*

CRIMINAL PROCEDURE ARTICLE – *CORAM NOBIS* – SECTION 8-401 – DEFENDANT'S BURDEN

Facts:

Otis Rich pled guilty to two drug-related charges and an assault charge in 1993, 2001, and 2002. In 2009, Mr. Rich pled guilty to conspiracy to distribute cocaine, and was given an enhanced sentence as a career offender. Shortly thereafter, Mr. Rich filed separate petitions for writ of error *coram nobis* in the Circuit Court for Baltimore City challenging the validity of his 1993, 2001, and 2002 guilty pleas on the basis that his pleas were not voluntary and on ineffective assistance of counsel. The circuit court denied each of Mr. Rich's three petitions for coram nobis relief. Mr. Rich appealed.

Transcripts of trial court testimony from the 1993 and 2002 pleas demonstrated that Mr. Rich received adequate plea colloquies which adequately explained the nature of the charges brought against him, and that his counsel provided effective assistance. The transcript for Mr. Rich's 2001 trial, however, demonstrated that the trial court did not explain to Mr. Rich the essential nature of a conspiracy, a charge that is not self-evident.

Held:

The Court of Special Appeals affirmed the Circuit Court for Baltimore City's decisions with respect to the 1993 and 2002 petitions, but vacated the court's decision as to the 2001 petition because Mr. Rich was not adequately advised of the nature of the conspiracy charge during the plea colloquy.

Coram nobis is an "extraordinary remedy" that allows a convicted defendant to "show that a criminal conviction was invalid under circumstances where no other remedy is presently available and where there were sound reasons for the failure to seek relief earlier." *State v. Smith*, 443 Md. 572 (2015). It is most commonly invoked in an enhanced-sentencing context, as here.

The Court of Special Appeals held that under *State v. Smith*, 443 Md. 572 (2015), Rich's right to seek *coram nobis* relief was not waived by his failure to withdraw a guilty plea or to seek post-

conviction relief because the record was silent as to whether the defendant knew post-conviction relief was available.

The Court also held that a criminal defendant's burden to prove a constitutional defect in order to obtain coram nobis relief is met when the defendant does not understand the nature of his guilty plea because the charges against him were not adequately explained in the plea colloquy.

The State raised laches as an affirmative defense to the *coram nobis* challenge. The Court held that the affirmative and equitable defense of laches is not available to the State on appeal when no finding of fact regarding prejudice caused by the delay has been made.

George Johnson v. State of Maryland, No. 660, September Term 2014, filed June 28, 2016. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2016/0660s14.pdf

CRIMINAL LAW – PRIVILEGE AGAINST SELF-INCRIMINATION – CO-DEFENDANTS

Facts:

Appellant George Johnson and a co-defendant were charged and tried separately for the contract killing of a bail bondsman. The co-defendant was tried first, found guilty, and appealed his conviction. During the Appellant's subsequent trial before a jury in the Circuit Court for Baltimore City, the State called the co-defendant as a witness before the jury against Appellant. However, once on the witness stand the co-defendant witness refused to answer questions and invoked his Fifth Amendment privilege against self-incrimination in front of the jury. Acting swiftly, the circuit court halted questioning and excused the jury before examining the merits of the co-defendant witness's assertion of privilege. The circuit court chose not to compel the co-defendant witness's testimony, and the witness was excused.

The jury later convicted Appellant of murder, and Appellant filed a motion for a new trial arguing, inter alia, that the State called the co-defendant witness for the impermissible purpose of using the co-defendant's reliance on the Fifth Amendment privilege to imply Appellant's guilt. During a hearing on the motion for a new trial, testimony provided by the co-defendant's appellate counsel stablished that the State was aware in advance of calling the co-defendant witness before the jury that he would likely refuse to answer questions. However, finding that co-defendant witness's appearance before the jury was brief and did not prejudice the Appellant, the circuit court denied the motion for a new trial.

Held: Affirmed.

The Court of Appeals recently clarified in *State v. Rice, Nero* & *Miller*, and *White and Goodson v. State* (consolidated) that the State may compel a witness to testify under a grant of use and derivative use immunity and that, through Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article § 9-123, a prosecutor is entitled to an order compelling testimony once properly sought by written motion. *State v. Rice*, ___ Md. ___, ___, Nos. 96, 97, 98 & 99, September Term 2015, slip op. at 2, 22 (May 20, 2016). However, "under most circumstances, it is improper for a prosecutor to require a witness to claim his privilege against self-incrimination in the presence of the jury when, as in this case, the prosecutor knows or has reason to anticipate that the witness will assert the privilege in front of the jury." *Allen v. State*, 318 Md. 166, 174 (1989) (citations omitted).

In this case, the Court of Special Appeals concluded that, where a trial court must determine whether evidence that was presented or an event that occurred during trial might unfairly prejudice the defendant, that finding is ordinarily accorded deference because the trial judge is best situated to evaluate the degree of harm to the defendant and the proceeding. According appropriate deference to the circuit court's weighing and balancing of the factors enumerated in *Vandegrift v. State*, 237 Md. 305, 309-10 (1965), the Court of Special Appeals agreed with the court's conclusion that the State did not call the codefendant witness solely to gain the benefit of "the effect of the claim of privilege on the jury" and held that the co-defendant witness's brief appearance before the jury did not prejudice the defendant and did not warrant a new trial.

The Court of Special Appeals also warned that, where the State has reason to anticipate that a codefendant witness will invoke his or her Fifth Amendment privilege if questioned in front of the jury, the proper course is to first address the issue outside the presence of the jury. Where a prosecutor fails to address the issue of compelled testimony outside of the presence of the jury, the prosecutor risks creating issues of constitutional dimension.

Antonio W. Johnson v. State of Maryland, No. 1401, September Term 2015, filed July 28, 2016. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2016/1401s15.pdf

CRIMINAL LAW – MISTRIAL ARISING OUT OF MANIFEST NECESSITY – DOUBLE JEOPARDY

Facts:

On November 5, 2012, Deborah Simon was found dead in her Baltimore City row house. Johnson was charged with first-degree murder and related crimes in connection with Ms. Simon's death, and was tried before a jury of the Circuit Court for Baltimore City.

During opening statement, defense counsel presented the jury with an extremely detailed exculpatory narrative. In order to appreciate the level of detail counsel provided, it is necessary to review the transcript of counsel's statement, which is set out in its entirety in the reported opinion. It is sufficient to note, however, that defense counsel accounted for Johnson's activities throughout the afternoon and evening hours on the day of Ms. Simon's murder, and provided explanations for Johnson's possession of items belonging to Ms. Simon and the fact that Ms. Simon's blood was found on his clothing.

The State presented evidence that, at the time of his arrest, Johnson was in possession of a rolling suitcase and that the suitcase, and its contents, were later identified as belonging to Ms. Simon. The State also presented evidence that laboratory test results revealed that Ms. Simon was the major female DNA contributor to blood stains found on Johnson's clothing.

After the State rested its case, defense counsel moved for judgment of acquittal. The motion was denied, and defense counsel advised Johnson of his right to testify. Johnson elected not to testify, and the defense rested without presenting any evidence.

The State moved for a mistrial, arguing that the defense presented its case through its opening statement, communicating what Johnson would have testified to and his explanation for events, without providing any evidence to support the assertions, and that it was prejudiced by the opening statement.

Defense counsel opposed the motion, arguing that "a mistrial is not warranted just because the defense did not put on evidence to establish everything that was said during opening statements." Defense counsel asserted that any prejudice to the State could be remedied, and proposed that the State's concerns be addressed by: (1) providing the jury with a corrective instruction; and (2) permitting the State to comment, in closing argument, on defense counsel's failure to introduce evidence to support the narrative he presented in his opening statement.

The court granted the motion for mistrial. The court found that, in light of the level of detail provided in defense counsel's opening statement, neither proposed remedy would cure the prejudice to the State. Accordingly, the court found that manifest necessity to declare a mistrial did exist.

On appeal, Johnson contended that the trial court abused its discretion in finding manifest necessity because it had two reasonable alternatives to declaring a mistrial, and thus that retrial was prohibited by the principles of double jeopardy.

Held: Affirmed.

Where "a mistrial is granted over the objection of a [criminal] defendant," the principles of double jeopardy, reflected in both the Fifth Amendment to the United States Constitution and the common law of Maryland, bar retrial, unless "there exists 'manifest necessity' for the mistrial." *Simmons v. State*, 436 Md. 202, 213–14 (2013) (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)). Whether manifest necessity exists is a fact-intensive determination, "depend[ing] on the unique facts and circumstances of the case." *Simmons*, 436 Md. at 214.

The burden is on the State to demonstrate that a "high degree of necessity" exists to justify declaration of a mistrial. *Hubbard v. State*, 395 Md. 73, 92 (2006) (internal citation and quotation marks omitted). A high degree of necessity exists where there is "no reasonable alternative to the declaration of a mistrial." *Id*. at 91–92. "'[T]o determine whether manifest necessity to declare a mistrial . . . exists, the trial judge must engage in the process of exploring reasonable alternatives and determine that there is no reasonable alternative to the mistrial.'" *Simmons*, 436 Md. at 215 (quoting *Hubbard*, 395 Md. at 92).

The court did not abuse its discretion in concluding that a corrective instruction would not be an effective remedy because, among other reasons, the instruction would have come four trial days after the improper opening statement. *See Simpson v. State*, 442 Md. 446, 463 (2015) (A trial court's corrective instruction given to the jury three days after an improper opening statement does not "'cure' the error created by the State's opening.").

The trial court understood that the State is permitted, in its closing argument, to address unsubstantiated remarks by the defense in opening statement. The court concluded that permitting the State to do so in the present case would not have been helpful to the jury in light of the level of detail provided in defense counsel's narrative. Moreover, the court recognized that a point-by-point rebuttal to defense counsel's narrative would have the adverse, and impermissible, effect of creating confusion among jury members as to which party bore the burden of proof. The trial court did not abuse its discretion in declining to require the prosecutor to make such an attempt.

Bryant Walls v. State of Maryland, No. 1085, September Term 2014, filed July 27, 2016. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/1085s14.pdf

FIFTH AMENDMENT RIGHT NOT TO TESTIFY – OPENING STATEMENT BY PROSECUTOR – REMARK THAT IS REASONABLY SUSCEPTIBLE OF AN ADVERSE INFERENCE THAT DEFENDANT'S FAILURE TO TESTIFY WOULD BE INDICATIVE OF HIS GUILT – MISTRIAL – ABILITY TO CURE MISSTATEMENT.

Facts:

Walls was arrested in the stabbing deaths of his estranged wife and her boyfriend. He gave the police a detailed recorded statement admitting to the killings but claiming that he reacted irrationally when he saw his estranged wife and her boyfriend in an embrace. He was charged and tried on two counts of first degree murder and related offenses. His defense was that he committed the killings in hot blooded response to legally adequate provocation, mitigating the crimes to voluntary manslaughter.

In opening statement, the prosecutor, describing Walls's pursuit of his estranged wife after he stabbed her boyfriend, told the jurors they would "hear [Walls] testify that he just started swinging the knife." At the bench, the court and both counsel acknowledged that the prosecutor had misspoken, meaning to say the jurors would hear this in Walls's recorded statement, not that they would hear him testify. Defense counsel moved for a mistrial, on the ground that the comment violated Walls's Fifth Amendment right not to testify, as it implied that he had an obligation to testify and if he did not, an adverse inference could be drawn. The judge recognized that the prosecutor's remark was improper and told defense counsel she would not declare a mistrial but would give a curative instruction, if he agreed. He complained that any curative instruction would highlight the improper remark. The judge disagreed, stating that after opening statements she would repeat the general instructions she already had given the venire, before *voir dire*, that the burden of proof was on the State, the defendant had no obligation to present evidence, and the defendant had an absolute constitutional right not to testify. Defense counsel declined the curative instruction and insisted on a mistrial, which was denied. Ultimately, Walls did not testify. He was convicted of two counts of first degree murder and one count of burglary.

Held: Affirmed.

In *Simpson v. State*, 442 Md. 446, 459 (2015), the Court of Appeals held that the test for whether a prosecutor's remarks in opening statement "impinged on [the defendant's] right to protection from adverse comment on his constitutional right not to testify" is "whether the prosecutor's remarks . . . were reasonably susceptible of an adverse inference by members of the jury that the

defendant's failure to testify would be indicative of the defendant's guilt." The prosecutor's remark in this case violated Walls's Fifth Amendment right under this test. The remark was minimally prejudicial, however, and could have been cured by the instructions the judge proposed giving, without highlighting the prosecutor's misstatement. On appeal, Walls argued that, under *Hardaway v. State*, 317 Md. 160 (1989), Maryland common law gives him the right to veto the giving of a no adverse inference instruction at the close of the evidence, and therefore the court could not give a no adverse inference instruction as a curative instruction after the prosecutor's misstatement, without his agreement. Because he did not agree, a mistrial was required.

Walls did not object to the giving of a no adverse inference instruction at the beginning of the trial, when the instruction was given to the venire, or at the end of the trial, when it was given to the jurors before they retired to deliberate. Thus, he did not invoke his right under *Hardaway*, and indeed waived it. He could not use that right to bar the court from giving an instruction that would have cured the prosecutor's misstatement in opening and removed the need for a mistrial.

Grant Agbara Lewis v. State of Maryland, No. 2564, September Term 2014, filed July 28, 2016. Opinion by Eyler, James R., J.

http://www.mdcourts.gov/opinions/cosa/2016/2564s14.pdf

CRIMINAL LAW – UNIFORM ACT TO SECURE ATTENDANCE OF WITNESSES

Facts:

On April 20, 2000 Heidi Bernadzikowski (the victim) was murdered. In 2012, Alexander Charles Bennett was charged with the murder. The State identified appellant as a material witness. Pursuant to the Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings, Md. Code (1973, 2013 Repl. Vol.), §§ 9-301 - 307 of the Courts and Judicial Proceedings Article (the Uniform Act), the State obtained an order and summons from a Colorado court requiring appellant to appear and testify, in Maryland, at Mr. Bennett's trial.

Appellant appeared in court at Mr. Bennett's trial. Mr. Bennett pleaded guilty and, in his proffer of facts, implicated appellant as an accomplice. Appellant was arrested and, in the Circuit Court for Baltimore County, was charged with murder and conspiracy.

After being convicted, appellant appealed. For the first time, he argued that the State violated the Uniform Act, which provides immunity from arrest and service of process for witnesses who come into the State in obedience to a summons. Appellant argued that the alleged violation was properly before the appellate court because (1) the circuit court lacked both subject matter and personal jurisdiction and (2) neither is waivable.

Held:

The circuit court had subject matter jurisdiction. The issue was whether the court properly exercised its jurisdiction. Although lack of subject matter jurisdiction may be raised at any time, the alleged improper exercise of jurisdiction is waivable and was waived. The court also had personal jurisdiction over appellant because he was served in Maryland. The challenge to personal jurisdiction is waivable and was waived.

In re: W.Y., No. 2726, September Term 2014, filed July 26, 2016. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2016/2726s14.pdf

FAMILY LAW ARTICLE – INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN – SECTION 5-607 – PLACEMENT OF DELINQUENT JUVENILES IN OUT-OF-STATE RESIDENTIAL FACILITIES

Facts:

W.Y. was adjudicated delinquent and committed to the Department of Juvenile Services ("DJS") for out-of-home residential rehabilitation. The court committed W.Y. to the category of maximum restrictiveness. In that order, the court expressly prohibited W.Y. from being placed at a named Maryland facility, and included in the order boilerplate language, taken verbatim from Section 5-607 of the Family Law Article ("FL") of the Maryland Code, that purportedly served as the requisite factual findings for placing a child out-of-state. W.Y. moved to modify that order, and the court set a hearing date to discuss W.Y.'s placement. Prior to the hearing, though, DJS placed W.Y. at a Pennsylvania facility, where W.Y. completed an eight-month program. W.Y. was placed without any notice to him or his family that he could be moved out-of-state, and without any affirmative record to support such an order. W.Y. was released from the Pennsylvania facility in 2015, at which time the juvenile court rescinded its commitment order, but W.Y. maintained his appeal, urging this Court to reach the merits.

Held: Appeal dismissed for mootness.

The Court reached the merits of case, despite undisputed mootness, as a matter of great public importance that often recurs, but evades judicial review. FL § 5-607 involves critical due process and liberty interests of juvenile defendants and their families. Boilerplate findings effectively pave the way for DJS to place a child out-of-state without ever addressing the issue at a hearing. The appellate process often lasts longer than the juvenile commitment, rendering moot many appeals presented on this issue; however, the recent repetition of this issue persuaded the Court it is worthy of appellate review.

The circuit court, after adjudicating a child delinquent, may commit the child to DJS for placement in a residential rehabilitation facility, among other remedies. As for the facility placement, the court may order the juvenile committed to a certain category of restrictiveness. From there, DJS designates the particular facility to which the juvenile is committed, so long as the assigned facility is at least as restrictive as the category ordered by the court.

DJS may select an out-of-state residential placement. The court may confirm such placement, but only after a court hearing on notice to the juvenile and the family, at which the court must find that there is no equivalent facility available within Maryland and that the out-of-state placement is in the best interest of the child and will not produce undue hardship. Such findings require an affirmative factual record to justify the intended placement for that particular juvenile and the court's order must reflect those findings.

AMT Homes LLC v. Jeremy K. Fishman, et al., No. 757, September Term 2015, filed June 2, 2016. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2016/0757s15.pdf

FORECLOSURE – ABATEMENT OF INTEREST

Facts:

AMT Homes, LLC ("AMT") purchased a property at a foreclosure sale in July 2014. The sale was reported to the Circuit Court for Prince George's County in a timely manner, but the court did not ratify the sale until six months later due to judicial backlog. Soon after ratification, AMT filed a motion for abatement of interest and taxes, arguing that Md. Rule 14-305(a) and (c) require a court to ratify a foreclosure sale within sixty days of the date of sale, and entitle the purchaser to abatement when a delay extends beyond that time frame. AMT also pointed to existing case law, which recognized the common law rule that the purchaser at a foreclosure sale takes equitable title to the property and therefore becomes responsible for interest and tax payments, left an exception where the delay is caused by the conduct of other persons beyond the purchaser's control. AMT argued that a delay in ratification caused by judicial backlog fell within the exception, and required that interest and taxes be abated. The circuit court denied AMT's motion.

Held: Affirmed.

The Court of Special Appeals held that held that Md. Rule 14-305 does not require the court to ratify a foreclosure sale within a rigid sixty day time limit, nor does a delay by the court qualify as an established "other persons" exception to the common law requirement that the purchaser pay interest on the property from the date of sale. While AMT was entitled to a timely decision, it would be inappropriate to impose financial consequences for the delay on the seller, who also had no control over the delay. Ultimately, the delay in the court's ability to consider the sale is a risk the law allocates to purchasers under normal circumstances.

Prince George's County, Maryland v. Melvin Proctor, No. 2614, September Term 2014, filed July 26, 2016. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2016/2614s14.pdf

WORKERS' COMPENSATION – SPECIAL ERRAND INCIDENT TO EMPLOYMENT

Facts:

In this Workers' Compensation case, Appellee Police Officer Melvin Proctor left his assigned police cruiser at the County's automotive repair facility for scheduled maintenance during his vacation. Two days before he was scheduled to return to work, Officer Proctor decided he would retrieve the cruiser from the maintenance facility. However, as he and his family were exiting the front door of their home, he jumped to the side to avoid knocking over his two-year-old son and was injured in the resulting fall. Officer Proctor filed a claim with the Workers' Compensation Commission ("WCC") contending he was injured while on call and performing a special errand incident to his employment because was leaving home with the intention of picking up his assigned police cruiser from the county fleet maintenance facility that day. The WCC disallowed Officer Proctor's claim and he sought judicial review. The Circuit Court for Prince George's County reversed the WCC's decision and, applying the "positional-risk test," concluded that the police officer's actions arose "out of and in the course of his employment."

Held: Reversed.

The Court of Special Appeals recognized that police officers are required to hold themselves in readiness for emergency duty. Nevertheless, the Court declined to extend concept of "out of and in the course of employment" to include an injury that occurs at a police officer's home before the officer embarks on a work-related errand, when the officer was neither on duty nor responding to an emergency. The Court's opinion also clarified that because the officer's injuries in this case arose before embarking on any work-related journey, the "going and coming" rule is not what barred his claim.

Notwithstanding the recognition in both *Livering v. Richardson's Restaurant*, 374 Md. 566 (2003) and *Roberts v. Montgomery County*, 436 Md. 591 (2014), that the positional-risk test applies beyond circumstances involving an employee on work-related overnight travel, the Court reiterated that this inquiry remains focused on whether the injury would have been sustained, "but for" the fact that the conditions and obligations of employment placed the employee where the injury occurred. Under the facts of this case, the Court concluded that the circuit court's application of the positional-risk test was incorrect and agreed with the WCC's prior determination that the officer's injury did not arise out of and in the course of his employment.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated August 16, 2016, the following attorney has been disbarred by consent:

AVROHOM REUVEN POUPKO

*

By an Order of the Court of Appeals dated August 19, 2016, the following attorney has been disbarred:

ANDRE P. BARBER

*

By an Order of the Court of Appeals dated August 19, 2016, the following attorney has been disbarred by consent:

MICHAEL LEDDEN WHITE

*

By an Opinion and Order of the Court of Appeals dated August 24, 2016, the following attorney has been disbarred:

RHONDA ILENE FRAMM

*

Return to ToC

JUDICIAL APPOINTMENTS

*

On July 1, 2016, the Governor announced the appointment of **JONATHAN GRAY NEWELL** to the Circuit Court for Caroline County. Judge Newell was sworn in on August 2, 2016 and fills the vacancy created by the retirement of the Hon. Karen A. Murphy Jensen.

*

On July 26, 2016, the Governor announced the appointment of **ADA ELIZABETH CLARK-EDWARDS** to the District Court of Maryland – Prince George's County. Judge Clark-Edwards was sworn in on August 10, 2016 and fills the vacancy created by the elevation of Hon. Erik H. Nyce to the Circuit Court for Prince George's County.

*

On July 8, 2016, the Governor announced the appointment of **CLARA EVA CAMPBELL** to the District Court of Maryland – Cecil County. Judge Campbell was sworn in on August 19, 2016 and fills the facancy created by the retirement of the Hon. Stephen J. Baker.

*

On July 26, 2016, the Governor announced the appointment of **DONNAKA VARNER LEWIS** to the District Court of Maryland – Prince George's County. Judge Lewis was sworn in on August 25, 2016 and fills the new judgeship created by the General Assembly.

*

On July 26, 2016, the Governor announced the appointment of **BRYON SETH BEREANO** to the District Court of Maryland – Prince George's County. Judge Bereano was sworn in on August 26, 2016 and fills the vacancy created by the elevation of the Hon. Karen H. Mason to the Circuit Court for Prince George's County.

*

UNREPORTED OPINIONS

	Case No.	*Decided*
B.		
Baker, Andrew v. State	1467	August 4, 2016
Baker, Melvin v. State	2713 **	August 25, 2016
Baker, William v. L&E Bustamante Concrete	1243	August 17, 2016
Belyakov, Igor v. Belyakova	0874	August 1, 2016
Benner, Dean Lee v. State	0401	August 3, 2016
Bless, Richard Sheldon v. State	0962	July 29, 2016
Boudreaux, Tiffani v. MICROS Systems	1029	August 19, 2016
Boyle, Lisa v. City of Frederick	1783 **	August 18, 2016
Brown, Everton v. DLLR	0844	August 5, 2016
Brown, Orville v. State	1870	August 19, 2016
Burris, Shelton v. State	0745	August 30, 2016
C,		
Canty, Mark Alonzo v. State	0149 *	August 11, 2016
Carrington, Susan v. McNelis	2601 *	August 11, 2016
Carroll, Wilma v. Williams	0774	August 26, 2016
Carter, Marie v. Housing Auth. Of Balt. City	1565 *	August 1, 2016
Caster, Joseph Mac v. State	0145	August 1, 2016
Chamberlain, Stephen D. v. Chamberlain	2594 *	August 24, 2016
Christian, Michael Davon v. Levitas	2392 **	August 1, 2016
Colkley, Damon v. Levitas	0070	August 11, 2016
Comm. Contractors Grp. v. FC GEN Real Estate	0921	August 11, 2016
Conopius US Insurance v. RN'G Construction	1768 **	August 1, 2016
Conover, Donald L. v. Fisher	2122 *	August 3, 2016
Coreas-Rodriguez, Marvin E. v. State	0629	August 3, 2016
Crawford, Joe Dean v. Crawford	0089 *	August 11, 2016
Crawford, Joe Dean v. Crawford	1374 *	August 11, 2016
Crawford, Joe Dean v. Crawford	2296 *	August 11, 2016
Crawley, Anthony Allen v. State	0467 **	August 8, 2016
Cunningham, Ricardo v. State	2395 *	August 18, 2016

† September Term 2016
September Term 2015
* September Term 2014
** September Term 2013

D.

Davis, Ricardo Anthony v. State	1215	August 26, 2016
Doe, John v. State	1445	July 29, 2016

E.

Estate of Charles Arnold v. Hardy	2611 *	August 17, 2016
Evans, Caren K. v. Evans	0229	August 4, 2016
Eveland, Sherry Ray v. Wilson	0766	August 17, 2016

F.

Fin. Real Estate Invest. Trust v. Frenchman's Creek	0469	August 24, 2016
Fire & Police Empl. Retirement Sys. v. Green	0113	July 29, 2016
Fuentes, Miguel A. v. State	0483 *	August 18, 2016

G.

Green, Brandyn T. v. State	1407 *	August 26, 2016
Grimm, Paul D. v. Grimm	1242	August 17, 2016
Gross, Kelly v. State	1934 *	August 4, 2016

H.

Haines, John Temple v. State	1007	August 26, 2016
Harden, Russell K. v. Bishop	0786 *	August 17, 2016
Hardy, George Edward, Jr. v. Advanced Radiology	1603 *	August 17, 2016
Harmon, Skylor v. Worcester Co. Sheriff's Ofc.	1233 *	August 17, 2016
Harris, Promise C. v. Spence	0614	August 2, 2016
Herold, Barbara v. Dept. of the Environment	0903 *	August 2, 2016
Holton, Michael v. Holton	2610 *	August 4, 2016
Hull, Andrew Stephen v. State	1776	July 29, 2016

I.

In re: Adoption/G'ship of Benjamin F.	2252	August 5, 2016
In re: Adoption/Guardianship of C.D.	1157	August 29, 2016
In re: Adoption/Guardianship of K.D. & A.B.	2359	August 29, 2016
In re: Adoption/Guardianship of S.J.	2665	August 2, 2016
In re: B. W.	2358	August 30, 2016
In re: Deangelo H.	2106	August 23, 2016

† September Term 2016
September Term 2015
* September Term 2014
** September Term 2013

In re: M. W.	2364	July 29, 2016
J.		
Jackson, Larry v. State	1606	August 17, 2016
James, Johnathan A., Sr. v. Bell	2276	August 4, 2016
Javitt, Jonathan C. v. Cunningham Contracting	1649 *	August 26, 2016
Johnson, Anthony v. State	1348	August 3, 2016
Johnson, Delores v. Rosenberg	1690 *	August 19, 2016
Johnson, Jeremy Paul v. State	0356	August 3, 2016
Johnson, Larry Jerome v. State	0371 *	August 24, 2016
Jones, Dazmon v. State	0708	July 29, 2016
Jones, Wendall v. State	1836	August 17, 2016
Jordan, Michael Anthony v. State	0208 *	August 18, 2016
Jose B. v. Maria B.	2179	August 8, 2016
K.		
Keenan, Darius Rodmond, Jr. v. State	0067	August 23, 2016
Keiser, James v. Bd. Of Comm'rs of Carroll Co.	2698 *	August 29, 2016
Kirk, Carl T. v. Dept. of Natural Resources	0399	August 5, 2016
Knight, Kelly C. v. Knight	1128	August 18, 2016
Koiner, William v. Owens	1991 *	August 4, 2016
L.		
Layfield, Mary Ann v. Insley	0177	August 17, 2016
Lewin, Genia v. Balakhani	1297	August 17, 2016
Lewis, Marquise D. v. State	1400	August 23, 2016
Lowe, Roderick Allen v. State	2477	August 17, 2016
M.		
Macklin, Demetrius v. State	1537	August 4, 2016
Manase, Judith v. Dept. of Social Services	2125 *	August 4, 2016
Martin, LaJuan F. v. Winston	0915	August 11, 2016
Mathis, Jeffery v. State	0181	August 16, 2016
McAllister, James v. State	1196	August 4, 2016
McCann, Christopher v. Shearin	2752 **	August 30, 2016
McCarty, Wendy Sue v. State	0214	August 16, 2016
McKenzie, Karen v. Anne Arundel Co.	0294 *	August 17, 2016

† September Term 2016
September Term 2015
* September Term 2014
** September Term 2013

McLean, Troy v. State	1950	July 29, 2016
Medford, Vicky v. Cruz	0073 *	August 23, 2016
Middleton, Natalie L. v. American Pride Props.	1161	August 5, 2016
Mikowski, Matthew Edmund v. State	1214 *	August 1, 2016
Miller, Allen Derrick v. State	1006	August 17, 2016
Montgomery, Bashawn Moneak v. State	1689	August 1, 2016
Moore, Antonio v. State	2675 **	August 25, 2016
Moore, Jeffrey J. v. State	2262	August 24, 2016
Murdock, Jason v. State	1292	August 4, 2016
Murphy, Skylar v. Ellison	0822	August 23, 2016
N.		
Nolton, Terrence v. Brejon, Inc.	0981	August 11, 2016
Norman, Joseph, Jr. v. State	1408	August 11, 2016
O.		
O.J.B/ Mid-Atlantic Realty JV v. GNRW Properties	0651 *	August 4, 2016
O.J.B/ Mid-Atlantic Realty JV v. GNRW Properties	2023 *	August 4, 2016
Oliver, Tyrell H. v. State	1842	August 17, 2016
P.		
Paoletti, Freddie Nicholas, Jr. v. State	2637 *	August 8, 2016
Parker, Willie Lee v. State	2568 *	August 3, 2016
Pearmon, Carlos Maurice v. State	2298	August 17, 2016
Pere, Matthew v. Pere	2279	August 19, 2016
Potee, David Andrew v. State	1820	August 8, 2016
Price, Michael Lamont v. State	2126	August 1, 2016
Prince George's Co. v. AFSCME AFL-CIO	1289	August 8, 2016
Prince George's Co. v. AFSCME AFL-CIO	1290	August 8, 2016
Prince George's Co. v. AFSCME AFL-CIO	1291	August 8, 2016
R,		
Randall-Simms, Thelma v. Fisher	0105	August 26, 2016
Ratchford, Gary Lee v. State	0594	August 26, 2016
Reger, Charles C. v. Washington Co. Bd. Of Ed.	1937 *	August 5, 2016
Reynolds, Eric v. State	1958 **	August 26, 2016
Rhea, Cortez A. v. State	2259	August 18, 2016

† September Term 2016
September Term 2015
* September Term 2014
** September Term 2013

Richards, Percell Kevin v. State	1429 *	August 2, 2016
Richardson, Major Lenell v. State	1901	August 4, 2016
S.		
Savage, Deangelo Ferdale v. State	0586	August 18, 2016
Simpson, Eatric Barcliffe v. State	1970 *	July 29, 2016
Smith, Kenyatta M. v. State	1605	August 1, 2016
Starkey, David W. v. State	2829 *	August 26, 2016
State v. Little, Avery	0247 †	August 16, 2016
State v. Potter, Herbert Stacy	1309 **	August 4, 2016
Stephens, Judonne Deangelo v. State	0802	August 4, 2016
Stewart, Michael v. State	0233	August 16, 2016
Stokes, William v. State	1396	August 3, 2016
Stone, Robert William, Jr. v. State	1621 *	July 29, 2016
Sypolt, Robert Jonathan v. State	1194	August 11, 2016
T.		
Thomas, Guy v. State	1385 *	August 26, 2016
Toepfer, Alison v. Meador	1127	August 5, 2016
Topp, Thelonious v. State	2280 *	August 18, 2016
Tucker, Deante D. v. State	1362 *	August 30, 2016
W.		
Ware, Dion v. State	1178 *	August 24, 2016
Wegman, Christopher M. v. State	2426 *	August 16, 2016
Wells, James T. v. State	2197 *	August 8, 2016
Wentworth, Lori A. v. Nevada Property 1	1584 *	August 29, 2016
West. Travone v. State	1173 *	August 25, 2016
William Realty v. Bd. Of Liquor Licence Comm'rs	1044 *	August 2, 2016
Williams, Charles v. State	1183 *	August 25, 2016
Williams, Tiesha v. State	1539	August 1, 2016
Wills, Jack v. One West Bank	0030 *	August 11, 2016
Wilson, Kitrell v. State	0569	August 11, 2016
Windsor, Belinda v. State	0907	August 1, 2016
Y.		
Young, Johnathan Darnell v. State	1956	August 30, 2016

† September Term 2016
September Term 2015
* September Term 2014
** September Term 2013