

IN THE COURT OF APPEALS OF MARYLAND

No. 145

September Term, 1992

STATE OF MARYLAND

v.

DORIN GRIFFITHS

Murphy, C.J.
Eldridge
Rodowsky
* McAuliffe
Chasanow
Karwacki
Bell,

JJ.

Dissenting Opinion by Eldridge, J.,
in which Bell, J. joins.

Filed: June 16, 1995

* McAuliffe, J., now retired, participated in the hearing and conference of this case while an active member of this

Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

Eldridge, J., dissenting:

The Court of Special Appeals held that the present case was controlled by this Court's decision in *Middleton v. State*, 318 Md. 749, 569 A.2d 1276 (1990), and that the Maryland common law principles set forth in *Middleton* required a reversal of the judgment on count one charging possession of cocaine with intent to distribute. The Court of Special Appeals also expressed the view that the Maryland common law principles set forth in *Middleton* "are not consistent with" the views expressed by the Supreme Court in *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984), which dealt with the Double Jeopardy Clause of the Fifth Amendment. See *Griffiths v. State*, 93 Md.App. 125, 132, 611 A.2d 1025, 1029 (1992).

The majority of this Court today distinguishes *Middleton* and reverses the decision of the Court of Special Appeals, employing a theory which had never been raised by either party or by either court below, which is not supported by any prior Maryland case, and which, to the best of my knowledge, is not supported by any authority elsewhere. The majority's theory appears to be another

one of those appellate contrivances designed to reach a result desired by the Court in a particular case.¹

I fully agree with the judgment of the Court of Special Appeals and with the intermediate appellate court's holding that the present case is controlled by this Court's opinion in *Middleton v. State, supra*. I disagree with the Court of Special Appeals' view that there is any inconsistency between our *Middleton* opinion and *Ohio v. Johnson, supra*. In addition, I cannot agree with the inventive theory which the majority uses to distinguish *Middleton* and to reverse the judgment of the Court of Special Appeals.

I.

This Court's holding in *Middleton v. State* was based entirely on Maryland common law principles. In particular, the *Middleton* decision was based on the interaction of Maryland law as to when there is a final judgment in a criminal prosecution and Maryland common law double jeopardy principles. Those same principles of Maryland law are fully applicable to the present case and mandate an affirmance of the Court of Special Appeals' judgment.

Both the instant case and *Middleton v. State* involve the scenario of a defendant who is expressly charged in a multi-count charging document with both a greater and a lesser included offense

¹ Cf. *Cardinell v. State*, 335 Md. 381, 386-398, 644 A.2d 11, 13-19 (1994).

(i.e., first degree rape and second degree rape in *Middleton*, and possession of cocaine with intent to distribute and simple possession of cocaine in *Griffiths*), is convicted after a full trial and sentenced for the lesser included offense, and faces retrial for the greater offense because of a grant of a mistrial or a new trial. In *Middleton*, the defendant was indicted for first degree rape (count one), second degree rape (count two), use of a handgun in the commission of a felony or crime of violence (count three), first degree sexual offense (count four), second degree sexual offense (count five), attempted first degree sexual offense (count six), attempted second degree sexual offense (count seven), and battery (count eight). The jury found Middleton guilty on counts one, two, six and seven and acquitted him on counts three, four and five.² Middleton filed a motion for a new trial and a motion to strike the guilty verdict on count one, arguing that there was an inconsistency between the verdict on count one and the verdict on count three. At the hearing on the motions, after arguments from both sides concerning alleged inconsistent jury verdicts, the trial judge denied an entire new trial, and then stated: "I grant your motion as to the 1st Degree Rape Charge." 318 Md. at 753, 569 A.2d at 1278. Immediately thereafter at the hearing, a dispute arose as to what the trial judge meant when he said "I grant your motion" etc. The trial judge ruled that the

² The State had previously nol prossed count eight.

court "had merely vacated the guilty verdict for first degree rape because of inconsistency, had awarded a new trial as to that count, but had rejected the other grounds for Middleton's new trial motion." 318 Md. at 754, 569 A.2d at 1278. At this point, no sentence had been imposed on the second degree rape conviction. Thus, at the conclusion of the hearing on the defendant Middleton's motions, neither the first degree rape charge nor the second degree rape charge had been finally disposed of. A new trial had been awarded on the first degree rape charge, and there was a guilty verdict, but no sentence, on the second degree rape charge.

Next in *Middleton*, the trial judge sentenced the defendant to fifteen years imprisonment on the second degree rape conviction. He also sentenced him to fifteen years imprisonment on the attempted first degree sexual offense conviction, with ten years suspended and five to run consecutive to the sentence for second degree rape. The trial judge merged the conviction on count seven (attempted second degree sexual offense).

Consequently, at the time of sentencing on the lesser included second degree rape count in *Middleton*, a new trial had already been awarded on the greater first degree rape charge. The *Middleton* case was in precisely the same posture as the present case. In both, when sentences were imposed on the lesser included charges, new trials had been awarded on the greater charges. In each case, the issue became whether the imposition of the sentence

on the lesser included charge precluded further proceedings and imposition of a sentence on the greater charge.

In *Middleton*, five days after the imposition of sentences on the second degree rape and attempted first degree sexual offense convictions, the State filed a motion asking the trial court to reconsider its grant of a new trial on the first degree rape charge. Prior to a hearing on the State's motion, the defendant took an appeal from the judgments on the second degree rape and attempted first degree sexual offense charges. The Court of Special Appeals, while fully cognizant of the first degree rape count, entertained the appeal and, in an unreported opinion, affirmed the judgments on the second degree rape and attempted first degree sexual offense charges. This Court denied a petition for a writ of certiorari, *Middleton v. State*, 313 Md. 8, 542 A.2d 845 (1988). The intermediate appellate court's acceptance of the first appeal in *Middleton* was consistent with settled Maryland law that a criminal conviction becomes final and appealable upon the imposition of sentence even though another count in the same charging document has not been finally disposed of by the trial court.³

³ The enactment of Ch. 506 of the Acts of 1892 created the requirement of a final judgment before there could be an appeal in a criminal case. See the discussions in *Pearlman v. State*, 226 Md. 67, 70-71, 172 A.2d 395, 396-397 (1961); *State v. Floto*, 81 Md. 600, 32 A. 315 (1895); *Avirett v. State*, 76 Md. 510, 25 A. 676 (1893); *Ridgely v. State*, 75 Md. 510, 23 A. 1099 (1892). Since
(continued...)

While the first appeal was pending in *Middleton*, the trial judge held a hearing on the State's motion and thereafter granted the State's motion, vacated the order for a new trial on the first

³(...continued)

that time, in multi-count criminal cases where a sentence or other sanction has been imposed on one or more counts, this Court has consistently treated the judgment as final and entertained the appeal even though the trial court failed to dispose of some of the counts. The Court has adopted a policy which disfavors the pendency of unresolved counts after an appeal has been taken from the verdict and sentence on one count. It has not implemented this policy, however, by treating the initial judgment as nonfinal and dismissing the initial appeal; rather, it has implemented the policy by applying, wherever possible, certain rules to dispose of the unresolved counts upon the initial appeal. See, e.g., *Fabian v. State*, 235 Md. 306, 201 A.2d 511, cert. denied, 379 U.S. 869, 85 S.Ct. 135, 13 L.Ed.2d 72 (1964) (defendant was found guilty on three counts, but the trial judge imposed sentence on only one count, leaving two counts unresolved; this Court entertained the appeal from the judgment on one count and, with respect to the other two counts, held that the failure to sentence would be deemed a suspension of sentence); *Felkner v. State*, 218 Md. 300, 306, 146 A.2d 424, 428 (1958) (a nonjury trial where the trial judge found the defendant guilty on one count, not guilty on another count, and totally overlooked three other counts; this Court entertained the appeal, reversed the final judgment on one count for insufficient evidence, and held that the trial judge's failure to dispose of three counts "amounted to a finding of not guilty on [those] counts"); *Glickman v. State*, 190 Md. 516, 60 A.2d 216 (1948); *Mechanic v. State*, 163 Md. 428, 430, 163 A.2d 711, 712 (1933); *Hechter v. State*, 94 Md. 419, 441-443, 50 A. 1041, 1043 (1902). See also *White v. State*, 300 Md. 719, 726, 481 A.2d 201, 204 (1984), cert. denied, 470 U.S. 1062, 105 S.Ct. 1779, 84 L.Ed.2d 837 (1985); *Reed v. State*, 225 Md. 566, 171 A.2d 664 (1961), cert. denied, 368 U.S. 958, 82 S.Ct. 402, 7 L.Ed.2d 390 (1962); *Buckner v. State*, 11 Md.App. 55, 57-58, 272 A.2d 828, 830-831 (1971); *Sands v. State*, 9 Md.App. 71, 78-79, 262 A.2d 583, 588 (1970).

On the other hand, in the situation where no sentence or other sanction is imposed on any count, but the trial judge grants a motion to dismiss a count when other counts have not been disposed of, the dismissal has not been regarded as a final judgment. See *Jones v. State*, 298 Md. 634, 471 A.2d 1055 (1984).

degree rape charge, and reinstated the guilty verdict on that charge. Sometime later, the trial judge imposed a separate fifteen-year sentence on the first degree rape conviction, to run concurrently with the prior sentence for second degree rape. The defendant took an appeal from this judgment, and a divided Court of Special Appeals affirmed, *Middleton v. State*, 76 Md. App. 402, 545 A.2d 103 (1988). The affirmance by the Court of Special Appeals was seven months *after* that court had affirmed the judgments on the second degree rape and first degree sexual offense convictions, and two months after this Court had denied certiorari. The effect of the Court of Special Appeals' affirmance was that the defendant had two separate fifteen year sentences for the same rape.

This Court in *Middleton* granted the defendant's petition for a writ of certiorari to review the Court of Special Appeals' affirmance of the judgment on the first degree rape count. In a unanimous opinion, we first pointed out that the first and second degree rape charges, both based upon the identical act, constituted the same offense for double jeopardy purposes. This Court reversed the judgment for first degree rape, holding that it violated Maryland's common law double jeopardy prohibition in two respects: (1) the further proceedings on the pending first degree rape count, after the imposition of sentence on the second degree rape count, violated that aspect of the double jeopardy prohibition embodied in the plea of *autrefois convict*; (2) separate sentences for both

first and second degree rape violated the prohibition against multiple punishments for the same offense.

In reaching our conclusions in *Middleton*, we expressly held that when the trial court imposed a sentence on the second degree rape charge, the judgment on that count became final despite the fact that the trial judge had vacated the verdict on the first degree rape charge and had purported to order a new trial on that count, 318 Md. at 759-760, 569 A.2d at 1281. We specifically relied upon the many cases in this Court holding that where there is a guilty verdict and sentence imposed for a "particular offense," the imposition of the sentence "constitutes a final judgment in the criminal prosecution for that offense." *Ibid.* Our holding that the proceedings and sentencing on the first degree rape charge, occurring after sentencing for second degree rape, violated common law double jeopardy principles, was fully dependent upon the finality of the judgment on the second degree rape count. Thus, we stated that the *autrefois convict* principle requires that "there had been a final" judgment of conviction. 318 Md. at 756, 569 A.2d at 1279. Moreover, we went on in *Middleton* to state that, because first and second degree rape constitute the same offense, the legal effect of imposing a sentence on count two for second degree rape was "a final judgment for the offense of rape which had been charged in counts one and two of the indictment." 318 Md. at 760, 569 A.2d at 1281.

Our multiple punishment holding in *Middleton* was also expressly dependent on the finality of the second degree rape conviction when the sentence was imposed for that offense. We stated (318 Md. at 760-761, 569 A.2d at 1281, emphasis added):

"We have repeatedly held that separate sentences, even if concurrent, for a greater and lesser included offense, based on the same act or transaction, are normally prohibited. See, e.g., *Nightingale v. State*, *supra*, 312 Md. 699, 542 A.2d 373; *State v. Frye*, *supra*, 283 Md. 709, 393 A.2d 1372; *Newton v. State*, *supra*, 280 Md. 260, 373 A.2d 262. Here, in violation of the teaching of those cases, the trial court imposed a fifteen year sentence for second degree rape and a separate fifteen year sentence for first degree rape. Usually when a trial court does this, we would vacate the sentence for the lesser included offense. In the present case, however, the sentence for the lesser included offense *had been imposed at an earlier time, had become final*, and the case was on appeal when the sentence for the greater offense was imposed. Furthermore, the case involving the lesser included offense is not before this Court at this time, is entirely final including all appeals, and is beyond our reach. Under the peculiar circumstances here, the principle precluding multiple sentences for the same offense entitles the defendant to have the sentence for first degree rape overturned."

Of course, if the judgment on the lesser included offense in *Middleton* had not been considered final until the disposition of the count charging the greater offense, it would have been before this Court at the same time we considered the judgment on the greater count.

With regard to the final judgment and double jeopardy issues, there is no pertinent factual distinction between *Middleton* and *Griffiths*. In both cases, the State expressly charged the defendants with greater and lesser included offenses, had a full trial on both offenses with a full opportunity to present its evidence, sought and obtained the guilty verdicts on the lesser included offenses, and had no objections to the imposition of sentences for the lesser included offenses.⁴ In both *Middleton* and *Griffiths*, when sentences were imposed on the counts charging the lesser included offenses, new trials were pending on the counts charging the greater offenses. The holding in *Middleton*, that the imposition of sentence for the lesser included offense resulted in a final judgment of conviction for that offense, is fully applicable to *Griffiths*.

Furthermore, under our holding in *Middleton* concerning the finality of judgments in criminal prosecutions, when the *Middleton* and *Griffiths* cases reached this Court for decisions with respect

⁴ Thus, the situations in *Middleton* and *Griffiths* were quite different from that in *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984), despite the Court of Special Appeals' view in the instant case that *Ohio v. Johnson* and *Middleton* are in conflict. *Ohio v. Johnson* did not involve the finality issue presented by the instant case and *Middleton*. Everything in *Ohio v. Johnson* occurred at the defendant's arraignment; there was never a trial in that case. Moreover, everything was disposed of in the trial court at one time. At the defendant's arraignment, the judge accepted the defendant's guilty pleas to some counts, over the prosecution's objection. The judge then "dismissed the remaining charges," 467 U.S. at 496, 104 S.Ct. at 2539, 81 L.Ed.2d at 431.

to the greater offenses, the judgments on the lesser included offenses had long been final and were not before this Court. We decided the *Middleton* case more than twenty months after we had denied a petition for a writ of certiorari to review the Court of Special Appeals' affirmance of the judgment on the lesser included offense. In *Griffiths*, the sentence on count two, charging the lesser included offense, was imposed on March 1, 1991, and the defendant took no appeal from that judgment. Thus, the judgment on the lesser included offense became completely final after the time for appeal had expired on April 1, 1991. Under our holding in *Middleton*, the judgment disposing of the lesser included offense in *Griffiths* is not before us now.

Today's majority opinion in *Griffiths* advances the theory that the conviction and sentence on the lesser included offense, while otherwise a final judgment, remained open for the limited purpose of "correcting" the sentence if, in the future, the imposition of another sentence for the same offense would create an illegality. The majority directs the trial court to vacate the sentence which had been imposed on the lesser included offense four years ago and which had never been appealed or challenged in any other way. In accordance with *Middleton's* double jeopardy holding, the majority agrees that separate sentences for the greater and lesser included offenses are illegal and cannot be imposed. Nevertheless, the majority takes the position that because, in the

majority's view, Maryland Rule 4-345(a) authorizes the judgment on the lesser included offense to be vacated, proceedings on the greater charge, which would ordinarily be barred because they could result in the creation of an illegality, are permitted. Therefore, the majority holds that the sentence on count two is before us today and that we may, in this appeal, order that the sentence on count two be vacated.

As previously discussed, this Court's opinion in *Middleton* made it clear that, if the judgment on the count charging the lesser included offense had not become final, further proceedings on the count charging the greater offense would not have been precluded by the common law principle of *autrefois convict*. 318 Md. at 756-757, 569 A.2d at 1279. Furthermore, *Middleton* held that, if the judgment on the lesser included offense count had not earlier become final, but if it were before us in addition to the judgment on the count charging the greater offense, "we would vacate the sentence for the lesser included offense." 318 Md. at 761, 569 A.2d at 1281. The majority today holds, contrary to the principles set forth in *Middleton*, that there is no bar to the subsequent prosecution and sentence for the greater offense because, if that trial results in a conviction and sentence for the greater offense, the trial court, pursuant to Maryland Rule 4-345(a), should vacate the earlier judgment on the count charging the lesser included offense. The majority distinguishes *Middleton*

on the ground that Rule 4-345(a) was not raised or mentioned in that case.

II.

If the majority's use of Rule 4-345(a) were legally sound under the circumstances of this case, I would agree that *Middleton* could properly be distinguished on the ground that the rule was neither mentioned by a party nor raised by the Court *sua sponte* in *Middleton*. Nevertheless, the majority's application of Rule 4-345(a) in this case is not legally sound.

Maryland Rule 4-345(a) states: "The court may correct an illegal sentence at any time." There are numerous problems with the majority's employment of this rule to accomplish the desired result in the present case.

The greatest flaw in the majority's reasoning is that the sentence imposed on the lesser included offense is not, and never has been, illegal. Rule 4-345(a) authorizes the vacation of "an illegal sentence." The sentence imposed upon Dorin Griffiths for possession of cocaine was legal when imposed and has remained an entirely legal sentence for that offense. No prior sentence for the offense, or for a lesser included offense, had been imposed so as to preclude on multiple punishment grounds the sentence for possession of cocaine. The majority's position is that, when there exists a legal sentence for an offense, and when further criminal proceedings culminating in a second sentence for the same offense

would create an illegality, the further proceedings and second sentence creating the illegality are nevertheless permissible. The illegality is allowed to occur, and thereafter is cured by a court *sua sponte* vacating the earlier legal sentence. This turns Rule 4-345(a) upside down.

Moreover, the majority's approach today is directly contrary to basic legal process. Whenever, either in criminal or civil law, a judicial action is entirely legal, and a subsequent judicial action would create an illegality, it is the subsequent action which is illegal and prohibited. For example, if a civil action results in a final judgment for the defendant, and the plaintiff thereafter brings another civil action against the defendant on the same cause of action, and the defendant pleads *res judicata*, it is the second action which is not allowed to proceed because of *res judicata* principles. Under the majority's approach today, if a court believes that the result of the second civil action would be preferable, it could vacate the earlier final judgment for the defendant and thus eradicate the *res judicata* issue. The majority's approach of permitting the second action which creates the illegality, and curing the illegality by vacating the first action which has become final, could revolutionize double jeopardy principles. Successive prosecutions for the same offense, after earlier final convictions, could generally be permitted by vacating the earlier judgments of conviction. The Court cites no authority,

and I am aware of none, supporting its result-oriented position.⁵

The majority's holding that the judgment on the count charging possession of cocaine, while otherwise final, remains open for correction of an "illegal sentence" pursuant to Rule 4-345(a), also cannot be reconciled with this Court's prior cases construing and applying Rule 4-345(a) or its identically worded predecessor rules. This Court has held in a series of cases that, after a sentence has been imposed for a criminal offense, and after the time for taking an appeal from that sentence has expired, a proceeding under Rule 4-345(a) is a separate, collateral action, with respect to which there is no appellate jurisdiction. The Court has held that such a Rule 4-345(a) proceeding is an independent statutory remedy in the same category as a common law habeas corpus proceeding challenging a criminal conviction. See *Valentine v. State*, 305 Md. 108, 114-120, 501 A.2d 847, 850-853 (1985); *Harris v. State*, 241 Md. 596, 598, 217 A.2d 307, 308 (1966); *Wilson v. State*, 227 Md. 99, 175 A.2d 775 (1961). See also *Telak v. State*, 315 Md. 568, 575-576, 556 A.2d 225, 228-229 (1989). The majority now treats the Rule 4-345(a) proceeding as part of the same criminal proceeding as the earlier final judgment of con-

⁵ The majority of this Court has, in the past, been adamant in refusing to set aside final, enrolled judgments. See, e.g., *Tandra S. v. Tyrone W.*, 336 Md. 303, 313-325, 648 A.2d 439, 444-450 (1994); *Andresen v. Andresen*, 317 Md. 380, 564 A.2d 399 (1989). Today's decision reflects quite a departure from the majority's normal position.

viction, and it *sua sponte* exercises appellate jurisdiction. Presumably the majority is *sub silentio* overruling the above-cited cases.⁶

In addition, the majority's holding today, as applied to a factual situation like that in the *Middleton* case, is contrary to the well-recognized limitations on a trial court's authority to act in a matter that is pending on appeal. Prior to *Pulley v. State*, 287 Md. 406, 414-419, 412 A.2d 1244, 1248-1250 (1980), the general rule set forth in numerous opinions by this Court was that a trial court lacked jurisdiction to act in a case after the filing of a notice of appeal and during the pendency of appellate proceedings. In *Pulley v. State, supra*, we narrowed that principle, holding that a trial court still retained fundamental subject matter jurisdiction. Nevertheless, we expressly held that "the trial court, from which the appeal [has] been taken, [is] prohibited from re-examining the decision or order upon which the appeal [is] based." 287 Md. at 417, 412 A.2d at 1250. In the *Middleton* case, at the time when the trial court imposed the sentence on the

⁶ The majority cites *Boyd v. State*, 321 Md. 69, 581 A.2d 1 (1990), as authority for its use of Rule 4-345(a) in the present case. *Boyd*, however, was a direct appeal from the final judgment embodying the illegal sentence. *Boyd* did not involve reliance on Rule 4-345(a) after the time for direct appeal of the sentence had expired. The majority opinion also cites *Coles v. State*, 290 Md. 296, 429 A.2d 1029 (1981). The language in *Coles* concerning the nature of a Rule 4-345(a) proceeding, however, was expressly disapproved in *Valentine v. State*, 305 Md. 108, 119, 501 A.2d 847, 852 (1985).

greater offense, and at the time when, under today's holding, the trial court should have vacated the judgment on the count charging the lesser included offense, an appeal was pending in the Court of Special Appeals from the judgment on the lesser charge. The majority's position is directly contrary to *Pulley* and its progeny, as well as contrary to the numerous cases discussed in the *Pulley* opinion.

Presumably as a justification for upholding the proceedings and sentence on the greater charge, the majority opinion points to the rule that "[o]rdinarily, when a mistrial has been declared as a result of manifest necessity . . . , retrial of the same charge is not prohibited by the Double Jeopardy Clause." Of course, as the majority recognizes by the use of the word "ordinarily," this principle is not always applicable. Where an intervening event disposes of the criminal charge after the declaration of a mistrial, a retrial is not permitted. For example, if, after the declaration of the mistrial and prior to the retrial, the prosecution nol prosses the charge, a retrial under the same charging document would not be permitted. In the present case, the imposition of sentence for possession of cocaine, creating a final judgment for that offense, was the intervening event precluding further proceedings and a sentence on the greater charge.

The majority also seems to give some significance to the fact that both the greater and lesser included charges "were

embraced within a single prosecution." Of course, occasionally double jeopardy problems can arise in the context of what began as a single charging document. See, e.g., *Smalis v. Pennsylvania*, 476 U.S. 140, 144-145, 106 S.Ct. 1745, 1748-1749, 90 L.Ed.2d 116, 121-122 (1986); *Sanabria v. United States*, 437 U.S. 54, 63-74, 98 S.Ct. 2170, 2178-2184, 57 L.Ed.2d 43, 53-60 (1978); *Butler v. State*, 335 Md. 238, 252-273, 643 A.2d 389, 396-406 (1994); *Ferrell v. State*, 318 Md. 235, 567 A.2d 937, cert. denied, 497 U.S. 1038, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990); *Wright v. State*, 307 Md. 552, 562-573, 515 A.2d 1157, 1162-1168 (1986). Moreover, when part of a proceeding is finalized, such as by a certification under Maryland Rule 2-602(b) or Federal Rule 54(b) of a claim in a civil case, or by imposition of a sentence on a count in a criminal case, the effect is to create "a wholly independent action," *Bendix Aviation Corp. v. Glass*, 195 F.2d 267, 269 (3rd Cir. 1952). By rendering a final judgment on one count in a charging document but retaining jurisdiction over another, a trial court effectively creates two separate cases.

In sum, the *Middleton* decision embodied a sound application of Maryland criminal law principles, and the Court of Special Appeals properly applied *Middleton* in the present case. The majority's refusal to apply the *Middleton* holding presents a host of difficulties under Maryland law.

As indicated earlier, I disagree with the Court of Special Appeals' view that there is a conflict between the *Middleton* holding and the Supreme Court's decision in *Ohio v. Johnson, supra*. *Middleton* was based wholly on Maryland law relating to final judgments in criminal prosecutions as well as Maryland common law double jeopardy principles. *Ohio v. Johnson* was based entirely upon the Double Jeopardy Clause of the Fifth Amendment.

Moreover, the *Middleton* decision was not inconsistent with the policy underlying the Supreme Court's decision in *Ohio v. Johnson*. The normal double jeopardy rule, set forth by the Supreme Court in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), is that a final judgment of conviction for a lesser included offense precludes further criminal proceedings or punishment for a greater offense when both are based on the same act or acts. *Ohio v. Johnson* recognized an exception to the normal rule in a situation where the defendant was allowed to plead guilty to the lesser included offense over the prosecution's objection, where the prosecution did not have an opportunity to put on its case, and particularly where the prosecution had no opportunity to present its evidence with regard to the greater offense. The Supreme Court thus stated in *Ohio v. Johnson, supra*, 467 U.S. at 501-502, 104 S.Ct. at 2542, 81 L.Ed.2d at 435:

"Respondent has not been exposed to conviction on the charges to which he pleaded not guilty,

nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial. . . . There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws."

Consequently, *Ohio v. Johnson* was in large part based on fairness to the prosecution.

As the *Middleton* opinion expressly recognized, 318 Md. at 759, 569 A.2d at 1280-1281, the circumstances of *Middleton* were vastly different from the situation in *Ohio v. Johnson*. In *Middleton*, as well as in *Griffiths*, the defendants were previously exposed to convictions for the offenses, and, under Maryland law, this exposure culminated in final judgments of conviction for rape in *Middleton* and possession of cocaine in *Griffiths*. In both cases, there were full trials on the counts charging the greater and the lesser included offenses, and the prosecution had full opportunity to present its evidence. The State sought and obtained guilty verdicts on the counts charging the lesser included offenses. If the State had objected to the imposition of sentences on the lesser included offenses, it is likely that the trial judges would not have imposed those sentences, and further proceedings on the counts charging the greater offenses could properly have taken place. Nevertheless, the State acquiesced in the imposition of

sentences for rape in *Middleton* and possession of cocaine in *Griffiths*. Under settled Maryland law, the imposition of the sentences constituted final judgments for those offenses. Under these circumstances, further proceedings and sentences on the counts charging the greater offenses necessarily would result in multiple punishments for the same offenses, which is ordinarily prohibited under Maryland law. Our decision in *Middleton*, and the decision of the Court of Special Appeals in *Griffiths*, simply did not result in the type of unfairness to the State which concerned the Supreme Court in *Ohio v. Johnson*.⁷

The issue presented by the *Middleton* and *Griffiths* cases only arises when trial judges unfortunately engage in piecemeal sentencing with regard to greater and lesser included offenses. If trial judges would not impose a sentence for a lesser included offense prior to the disposition of the greater offense, the issue would not arise. Where it does, the difference between the *Middleton* decision and the majority's decision today is between

⁷ The majority opinion today also relies on *Huff v. State*, 325 Md. 55, 599 A.2d 428 (1991). In *Huff*, like the situation in *Ohio v. Johnson*, but unlike the situation in *Middleton* and *Griffiths*, if we had accepted the defendant's argument, the prosecution would not have had an opportunity to present its evidence and have a trial on the greater offense because of the defendant's payment of a pre-set fine on the charge of the lesser included offense. *Huff* does represent a bona fide exception to Maryland common law double jeopardy principles. It is an exception justified by the fairness consideration set forth in *Ohio v. Johnson*.

vacating the sentence for the greater offense and vacating the sentence for the lesser included offense. In *Middleton*, both sentences were identical. I submit that any policy reasons which might support the majority's choice today are far outweighed by the damage done to settled Maryland law.

Judge Bell has authorized me to state that he concurs with the views expressed herein.