IN THE COURT OF APPEALS OF MARYLAND

No. 22

September Term, 1995

STATE OF MARYLAND

v.

PAUL EVERETT BROBERG

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

Dissenting Opinion by Eldridge, J.,
in which Murphy, C.J.,
and Bell, J., join.

Filed: June 11, 1996

Eldridge, J., dissenting:

The majority's opinion holds that "[t]he photographs of Thomas Blank, Jr., taken while he was alive were probative of the deceased victim's identity," that "[t]he trial judge had discretion to determine whether this alternative form of information regarding the identity of the victim was `wholly needless under the circumstances,'" and that the trial judge's decision in this regard "was not an abuse of discretion." (Slip opinion at 16, 22).

The above-quoted holding by the majority decides an issue which was not raised in a certiorari petition, in a cross-petition, or in any order of this Court. Therefore, under Maryland Rule 8-131(b) and numerous decisions by this Court, the issue is not before us.[1] Moreover, the majority fails to resolve the sole issue

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[1] Maryland Rule 8-131(b) provides as follows:

> **"(b) In Court of Appeals - Additional Limitations. -**
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> "(1) *Prior Appellate Decision.* - Unless otherwise provide by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate

(continued...)

presented in the State's petition for a writ of certiorari. Because the majority's decision flatly violates a long established and consistently applied limitation upon this Court's exercise of its certiorari jurisdiction, I dissent.

The Court of Special Appeals held in this case, *inter alia*, that, although "[p]ictures of a homicide victim taken before his or her death will sometimes be relevant to the issue of identity," the pictures here were not admissible on this basis because "the parties stipulated to the victim's identity prior to trial." (*Broberg v. State,* Court of Special Appeals No. 458, Sept. Term 1994, slip opinion at 6).

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[1](...continued)

> capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.
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> "(2) *No Prior Appellate Decision.* - Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issue that would have been cognizable by the Court of Special Appeals."

The State's petition in this Court for a writ of certiorari did not in any way challenge this holding by the Court of Special Appeals. The State in its certiorari petition did not argue or even intimate that the trial judge had discretion to admit the photographs on the theory that they were relevant to identity. In fact, the State's petition did not even mention the word "identity" in either the "Question Presented" or the portion of the petition entitled "Reasons For Granting The Writ."[2]

The issue concerning the admissibility of the photographs which the State raised in its certiorari petition was whether they were admissible, in the discretion of the trial judge, to "allow[] the jury to become acquainted with the homicide victim through a display of `in life' photographs of the victim." (Petition For Writ of Certiorari, Question Presented, at 1). The State's arguments for admissibility set forth in the certiorari petition were that the "homicide victim may be `humanized' during the trial stage through the use of `in life' photographs," that the "jury is acquainted with the defendant by virtue of being in the courtroom, but the victim is a `faceless stranger,'" that the "State should be allowed to offer a `glimpse of the life [which the defendant] chose

[2] The word "identity" appears only once in the State's certiorari petition, in the "Statement Of Facts," where the State simply sets forth some of the Court of Special Appeals' holdings in the case.

to extinguish,'"[3] and that, "in the non-homicide context, the jury is introduced to the victim because often times, the victim testifies. Such is not the case with a homicide victim." (*Id.* at 3-4). The State specifically relied on the Maryland statutes and the constitutional provision relating to victim impact evidence and "the importance of fair treatment and representation of a victim during a criminal trial." (*Id.* at 4). The State characterized the issue which it was presenting as "a novel issue."

This Court, believing that the State had presented an issue of public importance, granted the State's petition. There was no cross-petition in this case. Furthermore, our order granting the certiorari petition did not add an issue or change the issue presented by the State. Today, however, the majority does not resolve the important question which prompted the Court to take the case. Instead, the majority reaches an issue not raised in the certiorari petition; it overturns a holding by the Court of Special Appeals which was not challenged in this Court.[4]

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[3] Quoting from *Mills v. Maryland*, 486 U.S. 367, 397, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384, 408 (1988) (Rehnquist, C.J., dissenting).

[4] In addition, the majority's approach is not very even handed. While the majority decides favorably for the State an issue not presented in a certiorari petition or cross-petition, the majority expressly refuses to reach an issue noted by the defendant, namely that the photographs "were never offered into evidence and never received into evidence." (Respondent's brief at 3). The majority justifies its position on the ground that the defendant did "not cross-appeal the denial of his motion" and did not brief

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The majority asserts that the question of whether the photographs were admissible on the ground that they were relevant to identity was raised in the State's certiorari petition because the State "also argued" in the petition that the photographs "were relevant and because their probative value was not outweighed by the potential prejudicial effect." (Slip opinion at 3, n.2). The State's reference to "relevant" in its certiorari petition had nothing to do with "identity." Rather, as previously explained, the State argued that the photographs were relevant so as to allow the jury to become better acquainted with the victim. The weighing of probative value against the likelihood of unfair prejudicial effect is a consideration with regard to almost all evidence issues. *See* 1 Wigmore, *Evidence*, § 10a, at 674 (1983); McLain, *Maryland Evidence*, § 403.1, at 297 (1987). Once it is determined

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[4](...continued)
or argue the issue before this Court. (Slip opinion at 2 n.1).

Of course, the defendant did not have to "cross-appeal" the denial of his motion. His notice of appeal from the trial court's final judgment brought up for appeal all prior rulings by the trial court in the case. Rule 8-131(d); *B & K Rentals v. Universal Leaf*, 319 Md. 127, 132-133, 571 A.2d 1213, 1216 (1990), and cases there cited. Although the defendant did not file a cross-petition for certiorari and did not argue the matter in his brief beyond noting the issue as quoted above, the State neither raised nor "noted" the identity issue in its certiorari petition, and did not argue in its opening brief that the photographs were admissible on the ground that they were relevant to identity.

I am not suggesting that the Court should address the issue noted by the defendant. Instead, the Court should treat the State and defendant alike and, with respect to both, should not decide issues which are not properly raised in this Court.

that evidence is admissible under some principle of evidence law, ordinarily a trial judge has the discretion to exclude it if the judge determines that the probative value is outweighed by the unfair prejudicial effect. The State's argument in its certiorari petition was that the relevancy and probative value of the evidence to "humanize" and acquaint the jury with the homicide victim was not outweighed by an unfair prejudicial effect.

Under the majority's reasoning, whenever a petitioner uses the words "relevancy" and "prejudicial effect," the petitioner has thereby raised virtually any issue that might exist in the entire field of the law of evidence. The issue of whether the photographs were admissible because they were relevant to the element of identity in the homicide offense, and the issue of whether the photographs were admissible because they allowed the jury to become acquainted with the homicide victim in the same way that the jury is acquainted with a victim in a non-homicide case, are clearly separate and distinct issues. The State's certiorari petition raised only the latter issue; the majority decides only the former issue.

For more than twenty years, since the time when this Court's jurisdiction became largely dependent upon the issuance of a writ of certiorari, we have consistently held that, in a case decided by an intermediate appellate court, we shall not consider an issue unless it was raised in a certiorari petition, a cross-petition, or

the order by this Court granting certiorari.[5]

Recently, in *Am. Motorists Ins. Co. v. Artra Group, Inc.,* 338 Md. 560, 568-569, 659 A.2d 1295, 1299 (1995), with regard to an issue not raised in a certiorari petition or cross-petition, Judge Chasanow for the Court flatly stated: "That issue is therefore not properly before us. . . ." *See also, e.g., McElroy v. State*, 329 Md. 136, 146, 617 A.2d 1068, 1073 (1993) ("McElroy's first argument was not made . . . in his petition for certiorari addressed to this Court. Consequently, the issue is not before us"); *Batson v. Shiflett*, 325 Md. 684, 700-701, 602 A.2d 1191, 1199-1200 (1992); *Ungar v. Handelsman*, 325 Md. 135, 147, 599 A.2d 1159, 1164-1165 (1992); *Stinnettt v. Cort Furniture*, 315 Md. 448, 452 n.2, 554 A.2d 1226, 1227 n.2 (1989); *Wagner v. Doehring*, 315 Md. 97, 103 n.4, 553 A.2d 684, 687 n.4 (1989); *Neal v. Fisher*, 312 Md. 685, 690-691 n.5, 541 A.2d 1314, 1317 n.5 (1988); *Maus v. State*, 311 Md. 85, 106, 532 A.2d 1066, 1077 (1987); *Allgood v. State*, 309 Md. 58, 82, 522 A.2d 917, 929 (1987); *Clark v. State*, 306 Md. 483, 491-492, 510 A.2d 243, 247 (1986), *cert. denied*, 476 U.S. 1084, 107 S.Ct. 1286, 94 L.Ed.2d 144 (1987); *Fred W. Allnut, Inc. v. Comm'r Lab. & Ind.,* 289

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[5] This last category would include an issue added by a subsequent order of this Court, having the effect of amending the order granting certiorari. Whenever an issue has been added by an order of the Court issued after briefing and argument, the parties have been given the opportunity to submit supplemental briefs and/or supplemental oral argument. *See, e.g., Schochet v. State*, 320 Md. 714, 717, 725, 580 A.2d 176, 177, 181 (1990).

Md. 35, 39 n.2, 421 A.2d 1360, 1362 n.2 (1980); *McMorris v. State*, 277 Md. 62, 70-71 n.4, 355 A.2d 438, 443 n.4 (1976); *Walston v. Sun Cab Co.*, 267 Md. 559, 569, 298 A.2d 392, 397 (1973).[6]

The general principle set forth in the above-cited cases has repeatedly been applied in circumstances like those here. Where, as in this case, a particular holding by the Court of Special Appeals was not challenged in a certiorari petition or cross-petition, we have refused to review that holding. As Judge Orth stated for the Court in *Gonzales v. State*, 322 Md. 62, 69, 585 A.2d 222, 226 (1991),

> "Gonzales was obviously persuaded by the reasoning of the Court of Special Appeals. He did not challenge this holding. The [issue] was not raised in his petition for a writ of certiorari, nor was it presented in our order granting the writ. Consequently, the issue is not before us. . . ."

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[6] Furthermore, even where the parties have fully briefed an issue in this Court, we have refused to consider the issue unless it was presented in a certiorari petition, cross-petition, or order of this Court. *See, e.g., Maryland State Police v. Zeigler*, 330 Md. 540, 562-563, 625 A.2d 914, 925 (1993); *Maus v. State*, 311 Md. 85, 106, 532 A.2d 1066, 1077 (1987); *Wright v. State,* 307 Md. 552, 587, 515 A.2d 1157, 1175 (1986); *Md-Nat'l Cap. P. & P. Comm'n v. Crawford*, 307 Md. 1, 36-37, 511 A.2d 1079, 1097-1098 (1986); *Clark v. Elza,* 286 Md. 208, 219 n.4, 406 A.2d 922, 928 n.4 (1979); *Mazor v. State Dep't of Correction,*, 279 Md. 355, 370-71 n.8, 369 A.2d 82, 92 n.8 (1977).

Although it makes no difference in the application of Rule 8-131(b) in the present case, as previously noted, the State's opening brief in this Court did not argue that the photographs were admissible because they were relevant to identity. Instead, the State in its brief expanded upon the argument in its certiorari petition and also made a harmless error argument.

See, e.g., Middle States v. Thomas, 340 Md. 699, 702, 668 A.2d 5, 6-7 (1995) ("these rulings by the Court of Special Appeals have not been challenged in this Court and are not before us"); *Murphy v. Edmonds*, 325 Md. 342, 375, 601 A.2d 102, 118 (1992).

Moreover, in criminal cases decided by the Court of Special Appeals, where an issue has been put forth as an alternative basis for upholding the conviction, this Court has consistently refused to consider that issue if it was not raised in a certiorari petition, a cross-petition, or the order of this Court granting the petition. *See, e.g.*, *Clark v. State, supra*, 306 Md. at 491-492, 510 A.2d at 249 ("In the case before us, however, the State has failed to file a cross-petition [raising the] issue" and "we will not consider it"); *McCray v. State*, 305 Md. 126, 135-137, 501 A.2d 856, 860-861 (1985) (the doctrine that an appellate court will affirm the trial court on any ground adequately shown by the record is not applicable in a case decided by the Court of Special Appeals unless the ground was presented in a certiorari petition, a cross-petition, or the order of this Court granting the petition, and "[i]n this case there was no conditional cross-petition filed [by the State] raising the . . . issue"); *Dean v. State*, 291 Md. 198, 202, 434 A.2d 550, 554 (1981) (the Court refused to consider the State's alternative argument, based on the petitioner's failure to raise an issue at trial, because the State failed to file a cross-

petition); *Temoney v. State*, 290 Md. 251, 262 n.8, 429 A.2d 1018, 1023-1024 n.8 (1981); *Coleman v. State*, 281 Md. 538, 547, 380 A.2d 49, 55 (1977) ("The State did not, however, file a cross-petition for certiorari raising the [alternative] issue, and we therefore will not consider it"); *Dempsey v. State*, 277 Md. 134, 142-143, 355 A.2d 455, 459-460 (1976) ("if the State believed that we should review the Court of Special Appeals' invocation of the plain error doctrine if we granted Dempsey's petition, the State should have filed a conditional cross-petition for a writ of certiorari"). *See also State v. Lancaster*, 332 Md. 385, 402 n.12, 631 A.2d 453, 462 n.12 (1993) ("In a case before us which has been decided by the Court of Special Appeals, the principle that a trial court will be affirmed for any reason adequately shown by the record is applicable only if the ground was presented in a petition for a writ of certiorari, in a cross-petition, or in this Court's order granting certiorari"); *Robeson v. State*, 285 Md. 498, 502-503, 403 A.2d 1221, 1223-1224 (1979), *cert. denied*, 444 U.S. 1021, 100 S.Ct. 680, 62 L.Ed.2d 654 (1980).[7]

Rule 8-131(b) does state that this Court "ordinarily" will

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[7] There is one exception to this principle expressly contained in an amendment to Rule 8-131(b), namely the issue of harmless error. Prior to the amendment of the rule setting forth this exception, however, this Court refused to consider the issue of harmless error unless it was raised in a certiorari petition, cross-petition, or order of this Court. *See Clark v. State*, 306 Md. 483, 492, 510 A.2d 243, 247 (1986), *cert. denied*, 476 U.S. 1084, 107 S.Ct. 1286, 94 L.Ed.2d 144 (1987); *Coleman v. State*, 281 Md. 538, 547, 380 A.2d 49, 55 (1977).

consider only an issue raised in a certiorari petition, a cross-petition, or an order of this Court. The word "ordinarily" does indicate that there are exceptions. Nevertheless, neither the use of the word "ordinarily" in Rule 8-131(b) nor the principle embodied in the rule,[8] has been treated as granting a general discretion to reach an issue whenever the Court so desires in the interests of "fairness."[9] If it did, the amendment to Rule 8-131(b), adopting an express exception for the "harmless error" issue, would have been unnecessary. Instead, we have held that the "exceptions" to the principle embodied in Rule 8-131(b) are limited to "extraordinary circumstances." *Mazor v. State Dep't of Correction*, 279 Md. 355, 370-371 n.8, 369 A.2d 82, 92 n.8 (1977); *Dempsey v. State, supra*, 277 Md. at 142, 355 A.2d at 459, *Walston v. Sun Cab Co., supra*, 267 Md. at 569, 298 A.2d at 397.

Only a very limited number of circumstances have been treated as "extraordinary" and thus within the exceptions to the requirement that an issue be raised in a certiorari petition,

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[8] The principle that this Court ordinarily will consider only issues raised in a certiorari petition, a cross-petition, or the order granting certiorari, was first set forth in *Walston v. Sun Cab Co.,* 267 Md. 559, 569, 298 A.2d 391, 397 (1973). The principle was expressly set forth in the Maryland Rules by order of this Court on May 5, 1978, effective July 1, 1978.

[9] In this respect, our exercise of discretion under Rule 8-131(b)(1) to reach an issue not presented is more limited than our exercise of discretion under the general appellate preservation principle embodied in Rule 8-131(a). *Cf. State v. Bell*, 334 Md. 178, 186-191, 638 A.2d 107, 112-114 (1994).

cross-petition, or order by the Court. They include jurisdictional questions,[10] whether the trial court's order was appealable,[11] a non-constitutional issue that will enable the Court to avoid a constitutional question presented,[12] whether the case has become moot,[13] the question whether the trial court has either failed to render a particular type of judgment required in the action (*e.g.,* a declaratory judgment) or has rendered a type of judgment that is beyond the court's authority,[14] state government sovereign immunity under Maryland law,[15] and where the failure of the Court to consider an issue would result in the violation of an important public policy, such as the requirement that administrative remedies be

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[10] *See, e.g.*, *Medical Mutual v. Evander*, 331 Md. 301, 306, 628 A.2d 170, 172 (1993); *Sisk v. Friendship Packers*, 326 Md. 152, 157, 604 A.2d 69, 71 (1992); *Yarema v. Exxon Corp.*, 305 Md. 219, 231, 503 A.2d 239, 245 (1986); *Biro v. Schombert*, 285 Md. 290, 402 A.2d 71 (1971).

[11] *See, e.g., Globe American v. Chung*, 322 Md. 713, 716, 589 A.2d 956, 957 (1991).

[12] *See, e.g., Hillard v. State*, 286 Md. 145, 150 n.1, 406 A.2d 415, 418 n.1 (1979); *State v. Raithel,* 285 Md. 478, 482-487, 404 A.2d 264, 266-269 (1979).

[13] *See, e.g., State v. Parker*, 334 Md. 576, 584-585, 640 A.2d 1104, 1108 (1994); *State v. Peterson*, 315 Md. 73, 79, 553 A.2d 672, 675 (1989).

[14] *See, e.g., Ashton v. Brown*, 339 Md. 70, 87, 660 A.2d 447, 455 (1995), and cases there cited; *Creamer v. Helferstay,* 294 Md. 107, 113, 448 A.2d 332, 335 (1982).

[15] *Md.-Nat'l Cap. P.& P. Comm'n v. Crawford*, 307 Md. 1, 10 n.3, 511 A.2d 1079, 1083-1084 n.3 (1986).

exhausted.[16]

The issue decided by the majority today, namely whether the photographs were admissible because they were relevant to identity, falls within no recognized exception to the principle that this Court will only consider issues raised in a certiorari petition, cross-petition, or order of the Court. The majority's decision is inconsistent with the basic policy of the statutory provisions authorizing our certiorari jurisdiction. As pointed out by the Court in *Walston v. Sun Cab Co., supra*, 267 Md. at 569, 298 A.2d at 397,

> "[i]t should also be kept in mind that the statute contemplated that the desirability and public interest involved in granting certiorari are shown to us by petition and the matters presented to us by petition should logically be those considered by us unless we limit those matters for consideration in our order granting certiorari."

The majority's decision cannot be reconciled with our prior cases or with the language of Rule 8-131(b). For this reason, I cannot concur with the opinion or the judgment of the Court.

Chief Judge Murphy and Judge Bell have authorized me to state that they concur with the views expressed herein.

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[16] *See, e.g., Moats v. City of Hagerstown*, 324 Md. 519, 525, 597 A.2d 972, 974-975 (1991), and cases there cited. *See also State v. Parker*, 334 Md. 576, 596-597, 640 A.2d 1104, 1114 (1994).