COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on January 9, 2004.

Members present:

Hon. Joseph F. Murphy, Jr., Chair
Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Twilah S. Shipley, Esq.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Richard Montgomery, Director of Legislative Relations, Maryland State Bar Association
Barbara Hergenroeder, Esq., Director, Character & Fitness, State Board of Law Examiners
Bedford T. Bentley, Esq., Secretary, State Board of Law Examiners
Colette Gresham, Administrative Office of the Courts
Timothy S. Mitchell, Esq., MCDAA
Leonard R. Stamm, Esq., MCDAA
Douglas F. Gansler, Esq., Montgomery County State's Attorney Office
William M. Katcef, Esq., Anne Arundel County State's Attorney Office
Leonard C. Collins, Jr., Esq., Charles County State's Attorney Office
Robert B. Riddle, Esq., Calvert County State's Attorney Office
Nancy S. Forster, Esq., Office of the Public Defender
John J. McCarthy, Esq., Montgomery County State's Attorney Office
Sue S. Schenning, Esq., Baltimore County State's Attorney Office

The Chair convened the meeting. He announced that Robert Michael, Esq, is the new member of the Committee appointed to succeed Roger Titus, who has become a federal judge, and that the Honorable Clayton Greene, a former Rules Committee member, had been appointed to the Court of Appeals. Judge Greene served not only as a judge on the District Court, Circuit Court for Anne Arundel County, Court of Special Appeals, and now the Court of Appeals, he is the first judge to have served on all those courts as well as serve as administrative judge for the District and circuit courts and serve on the Rules Committee.

The Chair said that the 152nd Report to the Court of Appeals had been finalized, and the second Rules Order pertaining to that Report was signed by the Court of Appeals in December. The Reporter added that the changes to the Rules in that Order will be effective July 1, 2004. The Chair told the Committee that there was an article in today's Daily Record celebrating the 80th birthday of Mr. Sykes. The Chair said that two additional agenda items would be considered first.

The Chair presented Canon 5B (1)(e) of Rule 16-813, Maryland Code of Judicial Conduct, for the Committee's consideration. (See Appendix 1).

The Chair explained that a question is being posed to the Committee –- should the word "knowingly" be added to subsection (1)(e) of Canon 5B? The Reporter added that the word was in the parallel provision in the American Bar Association (ABA) Model Code of Judicial Conduct, Canon 5A (3)(d)(iii) but it was not

included in the proposed revised Maryland version. The reason for this may have been that when the Maryland Code was redrafted, the current version of the Maryland Code served as the starting point in the redrafting, and the word "knowingly" is not in the current Code. If the word is omitted, a judge may have to appear before the Commission on Judicial Disabilities for an inadvertent misrepresentation about an opponent. The Chair stated that M. Peter Moser, Esq., a consultant to the General Court Administration Subcommittee and an expert on the judicial ethics rules, has been asked about the absence of the word "knowingly," and Mr. Moser replied that absolutely the word should be added. The Vice Chair inquired as to whether the word "knowingly" should modify both misrepresentation of the candidate's own identity or qualifications and misrepresentation of an opponent's identity or qualifications. The Reporter suggested that if the word "knowingly" is added at the beginning of the subsection, both clauses would be modified, which is the ABA's recommendation. Mr. Sykes expressed the opinion that the ABA's recommendation should not be cast aside unless there is a good reason to do so. He suggested that subsection (1)(e) read as follows: [A judge] "(e) shall not knowingly misrepresent his or her identity or qualifications, the identity or qualifications of an opponent, or any other fact;...". The Committee agreed by consensus to add the word "knowingly" to proposed revised Canon 5B (1)(e).

Judge Missouri presented Rule 7-102, Modes of Appeal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 100 - APPEALS FROM THE DISTRICT COURT TO THE CIRCUIT COURT

AMEND Rule 7-102 (b)(1) to change the amount in controversy from $2,500 to $5,000, as follows:

Rule 7-102. MODES OF APPEAL

(a) De Novo

Except as provided in section (b) of this Rule, an appeal shall be tried de novo in all civil and criminal actions.
Cross reference: For examples of appeals to the circuit court that are tried de novo, see Code, Courts Article, §12-401 (f), concerning a criminal action in which sentence has been imposed or suspended following a plea of guilty or nolo contendere and an appeal in a municipal infraction or Code violation case; Code, Courts Article, §3-1506, concerning an appeal from the grant or denial of a petition seeking a peace order; and Code, Family Law Article, §4-507, concerning an appeal from the grant or denial of a petition seeking relief from abuse.

(b) On the Record

An appeal shall be heard on the record made in the District Court in the following cases:

(1) a civil action in which the amount in controversy exceeds ~~$2,500~~ $5,000 exclusive of interest, costs, and attorney's fees if attorney's fees are recoverable by law or contract;

(2) any matter arising under §4-401 (7)(ii) of the Courts Article;

(3) any civil or criminal action in which the parties so agree;

(4) an appeal from an order or judgment of direct criminal contempt if the sentence imposed by the District Court was less than 90 days' imprisonment; and

(5) an appeal by the State from a judgment quashing or dismissing a charging document or granting a motion to dismiss in a criminal case.

Source: This Rule is new but is derived in part from Code, Courts Article, §12-401 (b), (c), and (f).

Rule 7-102 was accompanied by the following Reporter's Note.

Chapter 54, Acts of 2003 (SB4) changed the amount in controversy that determines whether an appeal is de novo or on the record from $2,500 to $5,000. The District Court Subcommittee recommends a conforming amendment to subsection (b)(1) of Rule 7-102.

Judge Missouri explained that he had a District Court appeal scheduled before him, and it came to his attention that Rule 7-102 has not been conformed to the statutory change to Code, Courts Article, §12-401, which changed from $2,500 to $5,000 the amount that determines whether an appeal is *de novo* or on the record. The Rule should be modified to conform to this change. By consensus, the Committee approved the Rule as presented.

Agenda Item 1. Consideration of proposed amendments to certain Rules in Title 4, Criminal Causes: Rule 4-345 (Sentencing - Revisory Power of Court), Rule 4-401 (How Commenced – Venue), Rule 4-322 (Exhibits), Rule 4-331 (Motion For New Trial), Rule 4-252 (Motions in Circuit Court), and Rule 4-263 (Discovery in Circuit Court)

Judge Missouri presented Rule 4-345, Sentencing – Revisory Power of Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-345 to reorder several sections, to change the time for filing a motion for modification or reduction of a sentence in the circuit court from 90 to 30 days, to add a new subsection (d)(2) that provides a five-year limit on the court's revisory power for sentences involving a crime of violence except where the State's Attorney and defendant agree, and to add a cross reference after subsection (d)(2), as follows:

Rule 4-345. SENTENCING -- REVISORY POWER OF COURT

(a) Illegal Sentence

The court may correct an illegal sentence at any time.

(b) Fraud, Mistake, or Irregularity

The court has revisory power and control over a sentence in case of fraud, mistake, or irregularity.

~~(c)~~ (c) Desertion and Non-support Cases

At any time before expiration of the sentence in a case involving desertion and non-support of spouse, children, or destitute parents, the court may modify, reduce, or vacate the sentence or place the defendant on probation under the terms and conditions the court imposes.

~~(b)~~ (d) Modification ~~or Reduction - Time For~~ Upon Motion

(1) Generally

The court has revisory power and control over a sentence upon a motion filed (1) within 90 days after its imposition ~~(1)~~ in the District Court, if an appeal has not been perfected or has been dismissed, and (2) within 30 days after its imposition in a circuit court, whether or not an appeal has been filed. ~~Thereafter, the court has revisory power and control over the sentence in case of fraud, mistake, or irregularity, or as provided in section (e) of this Rule.~~ The court may not increase a sentence after the sentence has been imposed, except that it may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.

(2) Defendant Convicted of a Crime of Violence

In cases where the defendant was convicted of a crime of violence, as that term is defined in Code, Criminal Law Article, §14-101, unless the State's Attorney and the defendant agree that the court may exercise its revisory power and control over a sentence, the court shall not revise a sentence after the expiration of five years from the date the sentence was originally imposed.

Cross reference: Rule 7-112 (b).

~~(c)~~ (e) Notice to Victims

The State's Attorney shall give

notice to each victim and victim's representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, §11-104 or who has submitted a written request to the State's Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, §11-503 that states (1) that a motion to modify or reduce a sentence has been filed; (2) that the motion has been denied without a hearing or the date, time, and location of the hearing; and (3) if a hearing is to be held, that each victim or victim's representative may attend and testify.

~~(d)~~ (f) Open Court Hearing

The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in section (c) of this Rule have been satisfied. If the court grants the motion, the court ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based.

Source: This Rule is derived in part from former Rule 774, ~~and~~ M.D.R. 774, and is in part new.

Rule 4-345 was accompanied by the following Reporter's Note.

The Conference of Circuit Judges *Ad Hoc* Committee to Consider Amending Rule 4-345 has recommended several changes to the Rule, including changing the 90-day period for filing a motion for modification or reduction of a sentence to 30 days and imposing a five-year limit on the courts' revisory power when the defendant has been convicted of a crime of violence. The latter recommendation is to address concerns of the public and possibly avoid legislative action, since this issue

> has come before the legislature previously. The Criminal Subcommittee also discussed the Rule and decided that the 90-day period for filing a motion for modification or reduction should be changed to 30 days, only for motions filed in the circuit court, not the District Court. In the District Court, a defendant may appeal his or her case to the circuit court, and if the case is dismissed in the circuit court, the defendant would still have time to file a motion for modification or reduction in the District Court, if the period consists of 90 days.

Judge Missouri explained that the proposed changes to the Rule originated with the Conference of Circuit Judges ("the Conference"). He had chaired the *ad hoc* committee that worked on the Rule. A letter dated October 2, 2003 from the Honorable Daniel M. Long, Chair of the Conference, a copy of which is in the meeting materials (See Appendix 2), indicates that the Conference unanimously endorsed the proposed amendments to Rule 4-345.

The salient changes to the Rule are in section (d). In subsection (d)(1), the proposal is to change from 90 days to 30 days the time period in which a motion to modify a sentence imposed by a circuit court must be filed. This was suggested by the *ad hoc* committee and supported by the Conference. The idea behind this change is to conform the time period in subsection (d)(1) to the time periods for other post-trial procedures, such as the time for filing an appeal and the time to request a three-judge panel to review the case. Initially, the Honorable Albert Matricciani, a Judge of the Circuit Court for Baltimore City, had

expressed the opinion that changing the time period from 90 to 30 days would cause problems, but he later acknowledged that the same problems could occur with the 90-day time period. The *ad hoc* committee felt that it would be more efficient if all of the post-trial proceedings had the same time period during which they could be initiated.

Subsection (d)(2) is new and provides that when a defendant has been convicted of a crime of violence, unless the State's Attorney and the defendant agree that the court may exercise its revisory power over a sentence, the court may not revise the sentence after the expiration of five years from the date the sentence originally was imposed.

Mr. Dean said that both the Criminal Subcommittee and the Rules Committee have considered many times the issue of limiting the court's revisory power. He had sent a recommendation to the Conference that was not followed. He expressed the concern that victims and families of victims of a crime of violence have a great personal stake in the finality of the proceedings. He had requested that the time period to revise a sentence in a murder case would be no more than one year, for other violent crimes two to three years, and for other crimes five years. As Judge McAuliffe had previously pointed out, a judge may have had a bad day and issued a sentence that was not well thought out. However, five years to revise the sentence is an enormous period of time. The proposal by the Conference is a step in the right

direction. It answers the concerns of many prosecutors and is a good product. After all of the debate on this issue, the proposal balances the requirements of all sides to the issue.

Judge McAuliffe expressed the view that there should be a time limit on judges' revisory power. A limit of one year is sufficient, or three years as a compromise. Five years is too long a time period and is unnecessary. The time period should be the same for all crimes. The Conference's proposal is a move in the right direction, but the time period is too long. Mr. Sykes suggested that the time period should be three years for all crimes. Judge McAuliffe agreed, adding that this Rule is a pre-emptive strike to keep the legislature from further changing the revisory power of the courts. Judge Missouri noted that the *ad hoc* committee had considered and rejected the idea that the limit on the judge's revisory power should apply to all crimes. The Honorable James Vaughan, Chief Judge of the District Court, had participated in the discussions about the Rule, and his opinion was that this would interfere with the ability of the District Court to provide treatment to defendants with substance addictions.

Judge McAuliffe asked if a three-year limit would be sufficient to allow the judges to arrange for addiction treatment for defendants. The Chair responded that a judge may hold out as a carrot the revision of a defendant's sentence from time in prison to a probation before judgment to encourage defendants to

pay restitution and stay out of trouble. Some victims who are cheated out of money want to see the defendant go to prison, but for most victims, restitution is more important than incarceration of the defendant. Judge Norton remarked that he had a case in which the defendant swindled an elderly woman out of a substantial amount of money that she could not afford to lose. The defendant was sentenced to eight years in prison, but the court told him that his sentence could be shortened if he could pay back the money he had stolen. At some later point in time, he inherited enough money to pay the entire restitution amount to the victim, and his prison term was shortened.

Judge Heller pointed out that five years is the usual limit in probation cases, except when an extension for making restitution is needed. The Chair said that a sentencing judge can place a defendant on probation for up to five years before imposing sentence. This is not applicable to crimes of violence. Code, Criminal Procedure Article, §6-221 allows a judge to suspend the imposition or execution of sentence and place the defendant on probation on conditions that the court considers proper. The case of Benedict v. State, 377 Md. 1 (2003) holds that the court may suspend imposition of sentence and place the defendant on probation. This would mean that no sentence has been imposed, unless the defendant violates the probation, at which time the court may revoke the probation and impose sentence.

Mr. Maloney asked Delegate Vallario if there are any

prospects for a bill concerning the revisory power of the court to be before the House Judicial Proceedings Committee in the 2004 session. Delegate Vallario answered that he was not certain. Last year a bill on this issue was considered but no action was taken. He expressed the concern that a conviction for possession of a handgun (Code, Criminal Law Article, §4-306) results in a mandatory five-year sentence without the possibility of parole. If a defendant is convicted of this and other charges, it may not be appropriate to modify the sentence until after the mandatory portion of the defendant's sentence has been served. Delegate Vallario commented that he has several other concerns about the proposed Rule. The first concern is whether the Rule would apply prospectively only. The second is that when the Criminal Subcommittee considered the Rule at its meeting last August, the decision was made to wait until the Conference made its recommendations concerning the Rule. In October, the Conference approved the Rule, but there was no opportunity for the defense bar or the victims' rights groups to speak.

Delegate Vallario said that his third concern is whether any limit should apply to all crimes and not only to crimes of violence. His fourth point is that the proposed amendment to the Rule requires a hearing within five years, but more than five years may elapse if there are problems with scheduling or victim notification, or other unforeseen difficulties.

The Vice Chair inquired as to why the 90-day time period in subsection (d)(1) was retained for the District Court when the

circuit court time period is proposed to be changed to 30 days. Judge Missouri answered that the time period of 30 days is too short for the District Court because of the high volume of cases. Delegate Vallario remarked that it is important to preserve the defendant's ability to obtain reconsideration in the District Court in the situation where the defendant is convicted in the District Court and files an appeal to the circuit court. Initially, a defendant may file the appeal to get out of jail on an appeal bond and is not thinking of filing a motion for reconsideration. If the appeal is later dismissed, the defendant can then ask the District Court judge for a reconsideration of the sentence. Judge Heller noted that if the appeal is dismissed, the case goes back to the original District Court judge.

The Chair said that the 90-day window for the defendant to be able to ask the court to change the sentence is useful. When the Subcommittee discussed decreasing the 90 days to 30 days in the circuit court, there was some opposition to the change. Judge Missouri remarked that at the meetings of the Criminal Subcommittee and the *ad hoc* committee, some of the participants at both meetings wanted to make the change from 90 to 30 days; some did not. The Vice Chair commented that she accepts the recommendation of the Subcommittee as to the change to 30 days. She pointed out that the last sentence of subsection (d)(1) may need some revision. Is it correct for section (b) of both Rule

4-345 and Rule 4-331, Motions for New Trial, to state that the court can always correct a mistake, while subsection (d)(1) of Rule 4-345 states, "The court may not increase a sentence after the sentence has been imposed, except that it may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding"? The Chair replied that the "evident mistake" sentence was added to Rule 4-345 after the Court in State v. Sayre, 314 Md. 559 (1989) held that a judge who had made a slip-of-the-tongue mistake during the imposition of a sentence could not correct the sentence from "concurrent" to "consecutive" after the sentence had been "imposed."

Judge Kaplan asked why the proposal is to change the 90 days to 30 days in the circuit court, other than to be consistent with other time periods in the Rules. Judge Missouri responded that this is the only reason. Judge Kaplan pointed out that everyone is accustomed to the 90-day time period. Judge Dryden added that the time period in the District Court is 90 days. The Chair commented that this proposal to change the time period to 30 days may be a "foolish consistency." Post conviction cases may be filed where the defendant says that he told his attorney to file a motion for reconsideration, but the attorney filed after the new 30-day limit.

Judge Kaplan questioned as to why the five-year limit on reconsideration would be imposed only on crimes of violence. The

Chair answered that this provides a window for situations such as a non-violent drug addict who is in and out of rehabilitation or a defendant making restitution. Judge Missouri commented that it is not necessary to change the Rule for non-violent crimes, many of which do not affect citizen victims. Victims often accuse judges of not caring about them. On the other hand, it is important that the rights of defendants are protected. Judge Missouri stated that he has testified on this matter several times at the legislature, and he would like for the issue to be decided.

The Chair asked if any of the persons present had an opinion as to whether the limit should be five years and should only apply to crimes of violence.

Mr. Gansler said that although the majority of the people in the Office of the State's Attorney for Montgomery County favor a one year limit, they also are of the opinion that the proposed changes are a step in the right direction. Mr. Gansler told the Committee that he has several points to make. The first is that the proposed changes to the Rule reduce the troubling constitutional implication that reconsideration is simply a mechanism for a person who has been denied parole to come in through the back door. Secondly, limiting reconsideration of a sentence to five years is easier to accomplish than allowing reconsideration much later. It would be more likely that victims can be found within five years, and more likely that the original judge and prosecutor would be available. He knew of a case where

the judge heard a motion for reconsideration 13 years later, and the individuals who originally were involved in the case were no longer available. Thirdly, the changes to the Rule would assuage the concerns regarding rehabilitation of persons for drug and alcohol abuse. He agreed with Judge Missouri as to the distinction between violent and non-violent crimes. The proposed Rule changes provide a compromise as to differing factions. Mr. Gansler urged the Committee to approve the changes, which have been unanimously endorsed by the Conference of Circuit Judges.

Mr. Brault inquired as to whether the changes to the Rules and the law to improve victims' rights, including keeping victims notified of court proceedings, have been beneficial. Mr. Gansler responded that many of the Rules and laws provide that "the State's Attorney shall give notice to each victim." It would be preferable to state that "the State's Attorney shall exhaust all reasonable efforts to give notice to each victim." Mr. Brault remarked that many of the Rules including Rule 2-121, Process – Service – In Personam, and Rule 2-122, Process – Service – In Rem or Quasi in Rem, provide that notice is sufficient if given to the person's last known address. The victims or their representatives may not pay attention to the fact that the judge may state in court that if the defendant chooses a three-judge panel to reconsider the sentence, the panel may increase or decrease the sentence, or if the defendant files a motion for reconsideration, the sentence may be decreased. Mr. Gansler observed that often the victim or the victim's representative

needs finality. In one case, a judge reconsidered a sentence 26 years later. Mr. Dean noted that under Code, Criminal Procedure Article, §8-107 and Rule 4-344 (f), the decision of a three-judge panel must be made within a reasonable period of time. Under current Rule 4-345, there is no time limit for the decision. It is difficult to locate the family of a murder victim 10 years later.

The Chair said that when the judge imposes sentence, it is important that everyone knows there are potential consequences downstream. The victims and their representatives must be treated carefully, so that they are aware of the chance of a reconsideration of the defendant's sentence at some later point in time. Mr. Gansler commented that victims may think that the decision of the parole board is final, but a month later a judge shortens the sentence. The Chair pointed out that it is the responsibility of the judge to make sure victims and their representatives, who may be emotional and not registering what the judge is saying, understand the consequences of a sentence.

The Chair recognized Mr. Katcef, who said that he is an Assistant State's Attorney for Anne Arundel County. He told the Committee that some of the opinions he was about to present were personal, and some were the opinions of Frank Weathersbee, Esq., State's Attorney for Anne Arundel County. The proposed changes to Rule 4-345 are a step in the right direction, although Mr. Weathersbee feels that they do not go far enough. Five years is too long a period in which sentences can be modified, and the

limit should apply to all crimes, and not simply crimes of violence. The Association of State's Attorneys plans to offer legislation that would make the limit apply to all crimes and shorten it to one year. Certain property offenses are not crimes of violence, but they may involve enormous amounts of money taken in white collar crimes. The crime usually involves a breach of trust. The victims suffer greatly, even if they are not the victims of a murder or assault. This type of crime should not be separated out from crimes of violence.

The next speaker was Mr. Stamm, who told the Committee that he was president of the Maryland Criminal Defense Attorneys' Association. He stated that his organization opposes any change to Rule 4-345. It is the responsibility of prosecutors to educate victims and their representatives before and during the sentencing. There is no problem if judges consider a later motion for reconsideration. Mr. Stamm expressed the view that judges can be trusted to make the right decision in their exercise of discretion. The issue of reconsideration applies to very few cases. Sometimes, a judge finds that there has been a change in circumstances, so that it is appropriate to grant a reconsideration of the sentence. Crimes of violence tend to carry longer periods of incarceration, and the reasons for reconsideration cannot be anticipated. Any limitation on the right to reconsider would be arbitrary. Ironically, the judges were unanimous as to changing the Rule, but they already have the ability to self-impose the restrictions in the proposed

amendments to the Rule. They can reconsider a sentence only within five years if they so choose. There is no need for a mandatory restriction. A five-year limit may force a premature ruling on a motion for reconsideration. A judge in sentencing a defendant who was one of Mr. Stamm's clients told the defendant that if the defendant graduated from college, the sentence could be shortened. However, the defendant needed more than five years to attain this goal.

Ms. Potter asked Mr. Stamm if his association was opposed to the change from 90 to 30 days in subsection (d)(1). Mr. Stamm responded affirmatively. Most attorneys are used to the 90-day period, and if it is changed, there will be a significant increase in the number of petitions for post conviction relief filed. Ms. Potter remarked that although she did not practice criminal law, previously she had clerked for a judge who had released a defendant from prison after 15 years because the defendant was dying of cancer. Mr. Stamm noted that the proposed change to the Rule would preclude this. The Chair pointed out that the Rule contains a failsafe, which is that the prosecutor and defense attorney are able to agree at any time to a reconsideration of the sentence. Mr. Stamm expressed the opinion that the Rule gives too much power to the State; the federal system gives all of the power to the prosecutors. The Chair said that the Rule as drafted builds in the ability of the prosecution and the defense attorney to plea bargain prior to sentencing for a downstream consideration of a modification of the sentence.

Ms. Forster, Deputy Public Defender, stated that she agreed with the opinions of Mr. Stamm. There are often problems with defendants getting into drug treatment programs, and the process may take a long time.

Ms. Shipley asked if other states have similar limits on reconsideration of sentences. Mr. Dean answered that this has been a point of contention. Research has indicated that all states except Maryland have limits. Delegate Vallario noted that he had done a survey that indicated that all states have some form of a limit as to when a motion may be filed, just as Maryland has. Not all states require a decision within a certain period of time. Ms. Shipley said that she feels that the general public does not understand that the judges have revisory power. The limit is a good idea, so that victims and their families do not feel that there is no closure to the case. Some victims believe that defendants have too many rights. The Chair remarked that other people believe that victims have too many rights and defendants not enough rights.

The Vice Chair commented that she is bothered by the conflict between the executive and judicial branches of the government. It seems inappropriate that a parole board would refuse to change a sentence, yet a judge would agree to it. This should not be allowed 15 years after a sentence has been imposed.

Mr. Brault agreed that there is conflict between branches of the government. The American College of Trial Lawyers is of the

opinion that the independence of the judiciary is being eroded by legislative encroachment, and the federal judges have been complaining bitterly about the situation. There is a tension between those who feel that the principal purpose of a sentence is punishment, and those who feel that the principal purpose of a sentence is rehabilitation. Meanwhile, recidivism is alarmingly rampant.

The Chair observed that cases pending currently in which motions for reconsideration have been filed would not be affected if the proposed changes to the Rule were made. Otherwise, this would involve *ex post facto* application of the new Rule. Judge McAuliffe added that the rules order entered by the Court of Appeals can specify this. The Chair stated that the Criminal Subcommittee should consider amending language in other Rules, such as Rule 4-344, Sentencing – Review, and Rule 4-352, In Banc Review, if the Court adopts the amendments to Rule 4-345.

Judge Heller noted that the version of Rule 4-345 in front of the Committee today represents a good compromise. The five-year limit matches the period of probation, and is appropriate for restitution and drug treatment issues.

Mr. Sykes observed that it is unusual that judges would argue for a restriction of powers, yet the legislature is resistant to this. He asked Delegate Vallario what the basis of the opposition in the legislature is. Is it strong policy reasons, or is it that the legislature is not concerned about the

matter? Delegate Vallario replied that the idea is to keep discretion with respect to sentencing up to judges. The attempt to make the Sentencing Guidelines mandatory also failed. These kinds of activities are erosions on the judiciary's power. His personal feeling is that judges should be able to do what they need to do, and there should be no restrictions. Mr. Brault agreed with Delegate Vallario. The intent of the changes to the Rule is to eliminate the discretion of judges. The judiciary needs to be independent.

Judge McAuliffe commented that he had served as chair of the Sentencing Commission. He expressed his opposition to mandatory sentences. He further expressed the view that judges should not be handcuffed. The concept of reconsideration in Rule 4-345 is necessary, but there needs to be a time limit. A judge may have had a bad day, or counsel may be ineffective. A judge should have an opportunity for reconsideration of a sentence. He agreed with Ms. Shipley that the public is very concerned about this issue. The five-year limit is a step in the right direction. The 90-day time period should be the same for both the circuit and District Court. He moved that the five-year limit be adopted, and the 90-day time period be retained. The motion was seconded.

Mr. Maloney noted that this Rule has been in existence for four decades. The only controversy surrounding it has arisen in the past three years. The Washington Post published a series of articles about cases where judges reconsidered sentences. The

Rule as proposed to be changed does not address the concerns of the Post article. The motivation to change the Rule seems to be an attempt to preempt the legislature. Mr. Maloney questioned as to where any abuse of discretion has been demonstrated. No data is being shown to support the change to the Rule. The House Judiciary Committee acted appropriately to decline changing the statute. The fact that a bill proposing a change to the ability of judges to reconsider sentences has died three years in a row provides a strong signal. The Rules Committee rejected the idea of modifying Rule 4-345 two years ago based on the evidence presented.

Judge Missouri told the Committee that he is the Vice Chair of the Conference. He said that he is appreciative that everyone wants to give him discretion in sentencing, but the truth is that the judges do not feel that a change to the Rule would cause them deprivation. Unfettered discretion may seem good, but if a case is reconsidered at a much later point in time, the original judge may have retired, and another judge would have to reconsider the sentence. The judge who originally sentenced the defendant or took the plea would have a much better idea as to how to decide the motion to reconsider. If the original judge is no longer available, the case probably would go to the administrative judge who may have to review the entire transcript of a trial that may have lasted a week or longer. The second judge cannot get the full flavor of the case. The discussions at the meetings of the Conference indicated that the Rule gives judges discretion they

may not wish to have, and the limits would have a positive effect on victims. Delegate Vallario was notified about the pending changes, as were the Maryland Criminal Defense Attorneys' Association and the prosecutors. The victims' rights groups were not notified directly, but Russell Butler, Esq., who represents them, knew about the pending changes.

Mr. Sykes agreed with Mr. Maloney, but he said that he had a different perspective on the issue. A division of powers exists between the Rules adopted by the Court and the statutes enacted by the legislature. If something is procedural, it belongs in the Rules. However, the legislature has the far superior ability to deal with political considerations. Mr. Sykes expressed his concern that the legislature failed three times to pass a bill limiting the judges' ability to reconsider sentences. The Rules Committee may be venturing outside of its proper scope.

Judge Kaplan said that he had served on the Sentencing Commission with Judge McAuliffe and Delegate Vallario. The Commission resisted encroachment on judges' sentencing discretion. The Commission heard from State's Attorneys, Public Defenders, citizen groups, and sheriffs. Judge Kaplan stated that he views the proposed changes to Rule 4-345 as unnecessary, because they are changes that should be legislative. There is no reason to change the 90 days to 30 days in subsection (d)(1); the change will confuse the bar and result in more petitions for post-conviction relief being filed. He agreed with Judge Missouri that it is difficult to reconsider cases many years

later since the judge may no longer be available, but this can be handled by filing a post-conviction action. There is no reason to preempt the legislature.

Mr. Dean remarked that the purpose of the Rules Committee is to assist the Court of Appeals in the effective flow of justice. The matter of reconsideration is one area in which there is not an efficient and orderly flow of justice.

Mr. Boozer said that he had opposed mandatory sentencing and any restriction of judicial discretion. This matter belongs in the legislature.

Ms. Ogletree asked Judge McAuliffe if he would bifurcate his motion, separating out the vote on the 5-year limitation, and on changing the time period for revisory power and control in the circuit court. He agreed to bifurcate the motion.

Mr. Brault observed that once the limit is changed to five years, it is likely to be shortened even more. His view is that adding a limit is a slippery slope.

The Chair inquired as to the consequences of the legislature imposing a very short time limit, such as 60 days to modify a sentence. Would the Rules Committee be willing to override this type of limit? The Vice Chair pointed out that the Court of Appeals has the power to impose a limit on the length of time in a Rule, and the proposed change is permissible. Judge Dryden observed that if the Rules Committee does not approve the changes to the Rule, the sentiment of the public may turn, and the legislature, which in the past rejected the limit, may not

continue to do so. It is not inappropriate for the Rules Committee to consider a time period for the courts to exercise revisory power. This may be the best chance for the judges to preserve their authority.

The Chair called for a vote on the motion to leave the time period in subsection (d)(1) of Rule 4-345 at 90 days instead of changing it to 30 days. The motion passed with two opposed.

The Chair called for a vote on the motion to add to the Rule subsection (d)(2), which imposes a limit of five years for the court to exercise its revisory power and control over a sentence in cases where the defendant was convicted of a crime of violence. The vote was 10 in favor and 11 opposed. The Chair observed that four members of the Committee were not present: Mr. Johnson, Mr. Karceski, Mr. Klein, and Senator Stone, and the matter could be voted on again at the February Rules Committee meeting. Another alternative would be for those not present today to send in their vote. Judge Missouri commented that he would not be present at the February meeting and would not like his vote to be negated. The Chair responded that everyone on the Rules Committee ought to have a chance to vote. Mr. Sykes suggested that the meeting could be recessed at this time as to this issue. Mr. Maloney remarked that it may be useful to wait to see if there is any legislative activity on this issue and hold the vote until the April Rules Committee meeting. Judge Missouri stated that the Conference would not take a position if a bill on this issue is introduced in the 2004 legislature. The

Chair said that the matter could be recessed at this time and considered next month. He expressed the opinion that it is not necessary to wait to see what action, if any, the legislature takes.

The Vice Chair pointed out that in the past, the Rules Committee had presented to the Court of Appeals, as policy issues, matters of great importance. She moved that the Court should decide this matter, after it has been informed as to the vote of the Committee. The motion was seconded. Mr. Brault suggested that the Court of Appeals should be sent all of the history of the Rule as it pertains to the changes proposed today and previously. The Chair stated that the Court will be informed as to how the vote came out and will also be sent any minutes of Rules Committee meetings on this subject, including the minutes of today's meeting. When the Rule was previously considered, more extensive facts on the subject had been presented. He called for a vote on the Vice Chair's motion to transmit the matter to the Court of Appeals with all of the supporting data. The motion passed unanimously. The Reporter stated that the Rule would be sent to the Court of Appeals after the minutes of today's meeting have been approved by the Rules Committee.

Judge Missouri stated that he was withdrawing Rule 4-263, Discovery in Circuit Court, from consideration. The Conference of Circuit Judges has not yet considered the issues in the Rule and once this is accomplished, the Criminal Subcommittee will discuss the response of the Conference before the Rule comes back

before the Rules Committee.

Judge Missouri presented Rule 4-401, How Commenced - Venue, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

AMEND Rule 4-401 by adding a new section (b) pertaining to opening post conviction proceedings after DNA testing, as follows:

Rule 4-401. HOW COMMENCED - VENUE

(a) Generally

A proceeding under the Uniform Post Conviction Procedure Act is commenced by the filing of a petition in the circuit court of the county where the conviction took place.

(b) Following DNA Testing

If a petition for DNA testing was filed pursuant to Code, Criminal Procedure Article, §8-201, and the test results were favorable to the petitioner, (1) the court shall treat the petition for DNA testing as a petition for a post conviction proceeding under the Uniform Post Conviction Act in the county where the conviction took place if no post conviction proceeding had been previously initiated by the petitioner or (2) the court shall reopen a post conviction proceeding if one had been previously initiated by the petitioner.

Source: This Rule is derived from former Rule BK40.

Rule 4-401 was accompanied by the following Reporter's Note.

Recent legislation added Code, Criminal Procedure Article, §8-201, providing for persons convicted of certain crimes, including murder in the first and second degree, manslaughter, rape in the first and second degree, and sexual offenses in the first, second, and third degree, to be able

> to file a petition for DNA testing of scientific and identification evidence that the state possesses and that is related to the judgment of conviction. The statute provides a procedure for the court to open or reopen a post conviction proceeding based on test results favorable to the petitioner. The Subcommittee recommends that section (a) of Rule 4-401 be modified to add language directing attention to §8-201 of the Criminal Procedure Article.

Judge Missouri explained that Criminal Procedure Article, §8-201 was recently added to the Annotated Code. The new statute provides that persons convicted of certain serious crimes may file a petition for DNA testing of scientific and identification evidence that the State possesses and that is related to the judgment of conviction. The statute also provides that the court may open or reopen a post conviction proceeding based on test results favorable to the petitioner. The Criminal Subcommittee recommends adding a new section (b) to Rule 4-401 that would refer to the statute.

The Vice Chair asked if the language of section (b) is taken directly from the statute. The Chair commented that the language of the statute indicates that the court initiates the post conviction proceeding. The Assistant Reporter stated that the language of the statute was modified slightly to reflect what actually happens in court proceedings --the court treats the petition for DNA testing as a petition for a post conviction proceeding. The Vice Chair pointed out that since the Rule provides that after a judgment has been entered, the court may

reopen the case years later, this would affect Rule 4-331, Motions for New Trial, which may need some style revisions. Judge Missouri agreed. Judge Dryden asked if the petitioner whose previous request to reopen his or her post conviction proceeding was unsuccessful for other reasons, may try again if there is an issue relating to DNA testing. Judge Missouri answered that petitioners often file to reopen cases. The Committee approved the Rule as presented.

Judge Missouri presented Rule 4-322, Exhibits, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-322 by adding a new section (c) pertaining to preservation of evidence that contains DNA material, as follows:

Rule 4-322. EXHIBITS

(a) Generally

All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall form part of the record and, unless the court orders otherwise, shall remain in the custody of the clerk. With leave of court, a party may substitute a photograph or copy for any exhibit.

Cross reference: Rule 16-306.

(b) Preservation of Computer-Generated Evidence

The party offering computer-generated evidence at any proceeding shall preserve the computer-generated evidence, furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal, and present the computer-generated evidence to an appellate court if the court so requests.

Cross reference: For the definition of "computer-generated evidence," see Rule 2-504.3.

Committee note: This section requires the proponent of computer-generated evidence to reduce the computer-generated evidence to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence and the technology available for preservation of that computer-generated evidence. No special arrangements are needed for preservation of computer-generated evidence that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer generated evidence. However, when the computer-generated evidence involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence must make other arrangements for preservation of the computer-generated evidence and any subsequent presentation of it that may be required by an appellate court.

(c) Preservation of DNA Identification Evidence

The State shall preserve scientific identification evidence that the State has reason to know contains DNA material and that is secured in connection with a violation of Code, Criminal Law Article, §§2-201, 2-204, 2-207, or 3-303 through 3-307. The evidence shall be preserved for the duration of the defendant's sentence, including any

consecutive sentence imposed in connection with the offense.

Cross reference: Code, Criminal Procedure Article, §8-201.

Source: This Rule is new.

Rule 4-322 was accompanied by the following Reporter's Note.

> Because of the recently added statute, Code, Criminal Procedure Article, §8-201 which provides that the State must preserve scientific identification evidence that the State has reason to know contains DNA material and that is secured in connection with the following offenses: murder in the first and second degree, and sexual offense in the first, second, and third degree for the time of a defendant's sentence, the Criminal Subcommittee recommends the addition of a new section (c) to Rule 4-322 as well as a cross reference to draw attention to this preservation requirement.

Judge Missouri explained that the Subcommittee recommends adding a new section (c) to conform to §8-201 of the Criminal Procedure Article, which requires the State to preserve scientific identification evidence that the State has reason to know contains DNA material and that is secured in connection with certain serious offenses. The Vice Chair inquired as to what happens to the evidence if the investigation after conviction is inconclusive. Judge Missouri responded that section (j) of the statute covers this. Judge McAuliffe pointed out that language should be added to section (c) of the Rule to provide that this section applies where there has been a conviction. Mr. Sykes commented that the third sentence, which provides that the

evidence shall be preserved for the duration of the defendant's sentence, should be moved to the beginning of section (c). The Vice Chair questioned whether it is necessary to state how the evidence is secured. The wording could be: "The State shall preserve scientific identification evidence that the State has reason to know contains DNA material in connection with...".

The Chair asked if the evidence is part of the record. Judge McAuliffe answered negatively. Mr. Maloney pointed out that section (i) of the statute covers how the State is to preserve the evidence. He suggested that the language of section (c) could be simplified to read, "The State shall preserve scientific identification evidence in conformance with the requirements of Code, Criminal Procedure Article, §8-201." The Committee agreed to this suggestion by consensus.

The Vice Chair commented that the new section is not consistent with the title of the Rule. Delegate Vallario remarked that there is no clear definition in the statute as to how long the police actually keep the evidence. Before the bill was passed, the police did not know when to throw evidence away. The Vice Chair suggested that the new section should be placed somewhere else in the Criminal Rules. Mr. Bowen said that wherever it is placed, Rule 4-322 can be cross referenced and a Committee note added that clarifies that the statute applies to more than exhibits. The Vice Chair inquired as to whether another statute deals with preservation that only applies in post conviction review. The new language may belong in the Post

Conviction Rules or in the general provisions in Title 100. The Chair agreed that this does not belong in Rule 4-322 and remanded the matter to the Criminal Subcommittee to determine two issues -- what the statute requires of the court and where in the Rules this new language should be placed.

Judge Missouri presented Rule 4-331, Motions for New Trial, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-331 to change the time for filing a motion for new trial in the circuit court from 90 to 30 days after the imposition of sentence and add a sentence to the Committee note, as follows:

Rule 4-331. MOTIONS FOR NEW TRIAL

(a) Within Ten Days of Verdict

On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.

Cross reference: For the effect of a motion under this section on the time for appeal see Rules 7-104 (b) and 8-202 (b).

(b) Revisory Power

The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:

(1) in the District Court, on motion

filed within 90 days after its imposition of sentence if an appeal has not been perfected;

(2) in the circuit courts, on motion filed within ~~90~~ 30 days after its imposition of sentence.

Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.

(c) Newly Discovered Evidence

The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:

(1) on motion filed within one year after the date the court imposed sentence or the date it received a mandate issued by the Court of Appeals or the Court of Special Appeals, whichever is later;

(2) on motion filed at any time if a sentence of death was imposed and the newly discovered evidence, if proven, would show that the defendant is innocent of the capital crime of which the defendant was convicted or of an aggravating circumstance or other condition of eligibility for the death penalty actually found by the court or jury in imposing the death sentence;

(3) on motion filed at any time if the motion is based on DNA identification testing or other generally accepted scientific techniques the results of which, if proven, would show that the defendant is innocent of the crime of which the defendant was convicted.

Committee note: Subsection (c)(3) is not meant to preclude the parties from agreeing to DNA identification testing. Newly discovered evidence of mitigating circumstances does not entitle a defendant to claim actual innocence. See *Sawyer v.*

Whitley, 112 S. Ct. 2514 (1992).

(d) Form of Motion

A motion filed under this Rule shall (1) be in writing, (2) state in detail the grounds upon which it is based, (3) if filed under section (c) of this Rule, describe the newly discovered evidence, and (4) contain or be accompanied by a request for hearing if a hearing is sought.

(e) Disposition

The court may hold a hearing on any motion filed under this Rule and shall hold a hearing on a motion filed under section (c) if the motion satisfies the requirements of section (d) and a hearing was requested. The court may revise a judgment or set aside a verdict prior to entry of a judgment only on the record in open court. The court shall state its reasons for setting aside a judgment or verdict and granting a new trial.

Cross reference: Code, Criminal Procedure Article, §6-105 and §11-104.

Source: This Rule is derived from former Rule 770 and M.D.R. 770.

Rule 4-331 was accompanied by the following Reporter's Note.

The Criminal Subcommittee recommends changing the time for filing a motion for a new trial from 90 days after the imposition of sentence to 30 days after the imposition of sentence to conform to the proposed changes to Rule 4-345 (d)(1).

In discussing post conviction DNA identification testing, the Subcommittee observed that at times, all of the parties agree to DNA testing, and subsection (c)(3) applies only when the parties do not agree. The Subcommittee felt that it would be important to clarify this in the Rule.

Judge Missouri explained that the Subcommittee recommends

adding language to the Committee note after section (c) to clarify that the language of subsection (c)(3) does not preclude the parties from agreeing to DNA identification testing. The Vice Chair expressed the view that the note is placed incorrectly, because subsection (c)(3) does not pertain to agreeing to or ordering DNA testing. Judge Missouri asked where this language should be placed. The Vice Chair remarked that the Rules in Title 4 mix the concept of revisory power with the granting of a new trial. The Chair suggested that section (b) be eliminated. The Vice Chair noted that in the civil rules, the matter of newly discovered evidence is in Rule 2-535, Revisory Power. Judge Missouri stated that the Subcommittee will review this issue. The Chair suggested that the Subcommittee consider whether section (b) is duplicitous and whether the section pertaining to newly discovered evidence should be made parallel to the placement in the civil rules.

Judge Norton commented that Rule 4-345 provides restrictions as to sentencing, but in Rule 4-331, the restrictions pertain to the granting of a new trial. The two Rules have a different focus, and the language is not duplicitous. The Chair pointed out the internal conflict within Rule 4-331 –- section (a) has a time period of ten days, and section (b) has a time period of 90 days. Judge Norton observed that if section (b) of Rule 4-331 is deleted, relief that is not covered in Rule 4-345 would be deleted. The Vice Chair suggested that the Subcommittee look at the structure of the Rules and how they relate to verdict as

opposed to judgment. Mr. Dean suggested that the Subcommittee examine the case of Isley v. State, 129 Md. App. 611 (2000), which explains the differences between the various Rules pertaining to revisory powers in criminal cases. Rule 4-331 was remanded to the Criminal Subcommittee.

Judge Missouri presented Rule 4-252, Motions in Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-252 to add a new subsection (a)(6), a new subsection (h)(4), and a new sentence to the Committee note at the end of the Rule pertaining to bifurcation of counts between the jury and the judge, as follows:

Rule 4-252. MOTIONS IN CIRCUIT COURT

(a) Mandatory Motions

In the circuit court, the following matters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise:

(1) A defect in the institution of the prosecution;

(2) A defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense;

(3) An unlawful search, seizure, interception of wire or oral communication, or pretrial identification;

(4) An unlawfully obtained admission, statement, or confession; ~~and~~

(5) A request for joint or separate trial of defendants or offenses and

(6) A request for bifurcation of counts between the jury and the judge.

(b) Time for Filing Mandatory Motions

A motion under section (a) of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213 (c), except when discovery discloses the basis for a motion, the motion may be filed within five days after the discovery is furnished.

(c) Motion to Transfer to Juvenile Court

A request to transfer an action to juvenile court pursuant to Code, Criminal Procedure Article, §4-202 shall be made by separate motion entitled "Motion to Transfer to Juvenile Court." The motion shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213 (c) and, if not so made, is waived unless the court, for good cause shown, orders otherwise.

(d) Other Motions

A motion asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time. Any other defense, objection, or request capable of determination before trial without trial of the general issue, shall be raised by motion filed at any time before trial.

(e) Content

A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, shall state the grounds upon which it is made, and shall set forth

the relief sought. A motion alleging an illegal source of information as the basis for probable cause must be supported by precise and specific factual averments. Every motion shall contain or be accompanied by a statement of points and citation of authorities.

(f) Response

A response, if made, shall be filed within 15 days after service of the motion and contain or be accompanied by a statement of points and citation of authorities.

(g) Determination

(1) Generally

Motions filed pursuant to this Rule shall be determined before trial and, to the extent practicable, before the day of trial, except that the court may defer until after trial its determination of a motion to dismiss for failure to obtain a speedy trial. If factual issues are involved in determining the motion, the court shall state its findings on the record.

(2) (A) Motions Concerning Transfer of Jurisdiction to the Juvenile Court

A motion requesting that a child be held in a juvenile facility pending a transfer determination shall be heard and determined not later than the next court day after it is filed unless the court sets a later date for good cause shown.

(B) A motion to transfer jurisdiction of an action to the juvenile court shall be determined within 10 days after the hearing on the motion.

(h) Effect of Determination of Certain Motions

(1) Defect in Prosecution or Charging Document

If the court granted a motion based

on a defect in the institution of the prosecution or in the charging document, it may order that the defendant be held in custody or that the conditions of pretrial release continue for a specified time, not to exceed ten days, pending the filing of a new charging document.

(2) Suppression of Evidence

(A) If the court grants a motion to suppress evidence, the evidence shall not be offered by the State at trial, except that suppressed evidence may be used in accordance with law for impeachment purposes. The court may not reconsider its grant of a motion to suppress evidence unless before trial the State files a motion for reconsideration based on (i) newly discovered evidence that could not have been discovered by due diligence in time to present it to the court before the court's ruling on the motion to suppress evidence, (ii) an error of law made by the court in granting the motion to suppress evidence, or (iii) a change in law. The court may hold a hearing on the motion to reconsider. Hearings held before trial shall, whenever practicable, be held before the judge who granted the motion to suppress. If the court reverses or modifies its grant of a motion to suppress, the judge shall prepare and file or dictate into the record a statement of the reasons for the action taken.

(B) If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise. A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or on appeal of a conviction.

(3) Transfer of Jurisdiction to Juvenile Court

If the court grants a motion to transfer jurisdiction of an action to the juvenile court, the court shall enter a

written order waiving its jurisdiction and ordering that the defendant be subject to the jurisdiction and procedures of the juvenile court. In its order the court shall (A) release or continue the pretrial release of the defendant, subject to appropriate conditions reasonably necessary to ensure the appearance of the defendant in the juvenile court or (B) place the defendant in detention or shelter care pursuant to Code, Courts Article, §3-815. Until a juvenile petition is filed, the charging document shall have the effect of a juvenile petition for the purpose of imposition and enforcement of conditions of release or placement of the defendant in detention or shelter care.

(4) Bifurcation of Counts Between the Jury and the Court

If the court grants a motion to bifurcate the counts between the jury and the court, the court shall question the defendant to make sure that the defendant voluntarily waives the right to seek relief later because of inconsistent verdicts between the court and the jury or because the jury is unable to reach a verdict. The court shall enter a written order assigning the appropriate counts to the court and to the jury for a decision. If the judge defers the judge's verdict until the jury verdict comes in, and then the jury is unable to arrive at a verdict, the judge may nonetheless enter a verdict. The judge may return a verdict before the jury does so.

Cross reference: Code, Criminal Procedure Article, §4-202.

Committee note: Subsections (a)(1) and (2) include, but are not limited to allegations of improper selection and organization of the grand jury, disqualification of an individual grand juror, unauthorized presence of persons in the grand jury room, and other irregularities in the grand jury proceedings. Section (a) does not include such matters as former jeopardy, former conviction, acquittal, statute of limitations, immunity, and the failure of the charging document to

state an offense. Subsection (h)(4) does not apply to cases with multiple defendants.

Source: This Rule is derived from former Rule 736.

Rule 4-252 was accompanied by the following Reporter's Note.

> The Criminal Subcommittee considered the issue of hybrid jury/bench trials as directed by the Court of Appeals in the case of *Galloway v. State*, 371 Md. 379 (2002). The Subcommittee recommends changing Rule 4-252 by adding new subsections (a)(6) and (h)(4), which allow the Court to grant a motion to bifurcate the counts in a criminal case, so that some counts are considered by the jury and some by the judge. The Subcommittee is also proposing to add a sentence to the Committee note at the end of the Rule which clarifies that the new subsection allowing bifurcation of the counts does not apply to cases with multiple defendants.

Judge Missouri explained that in the case of Galloway v. State, 371 Md. 379 (2002), the Court of Appeals directed the Rules Committee to consider the issue of hybrid jury/bench trials. In response, the Criminal Subcommittee added proposed new subsections (a)(6) and (h)(4) to Rule 4-252, allowing a bifurcation of counts. Mr. Brault pointed out that the case of Higgins v. Barnes, 310 Md. 532 (1987) involves a similar issue in a civil trial. In that case, the court held that a judge cannot overrule a jury's finding of fact. Judge McAuliffe remarked that a judge cannot enter a verdict inconsistent with a jury finding. He expressed his concern about the language in subsection (h)(4) that provides that the defendant has to waive the right to seek relief later because of inconsistent verdicts of the jury and the

judge. He asked why the defendant should be forced to give up the right to have a jury decide the facts.

The Chair noted that there is a line of cases that state that an inconsistent jury verdict cannot stand if the judge's instructions caused the inconsistency. The defendant should not have to waive the ability to seek relief from inconsistent verdicts. He suggested that the new language read as follows: "If the court grants a motion to bifurcate the counts between the jury and the court, the court shall enter a written order assigning the appropriate counts to the court and to the jury for a decision....". Mr. Brault remarked that a jury finding is binding on the court. In Galloway, the jury did not find the defendant guilty of possessing a handgun. The judge was bound by the jury verdict. Judge Missouri reiterated that the Court of Appeals had asked the Committee to look at this issue. The Chair commented that after Galloway, the Honorable Lynne Battaglia, Judge of the Court of Appeals, had authored an opinion, Carter v. State, 374 Md. 693 (2003), holding that if the defendant has committed a prior crime, such as possession of a firearm, which impacts a later trial on another charge, bifurcation of the charges in the later trial is not necessary. However, the jury is entitled only to know that the defendant's prior crime was one that prohibited further possession of a firearm, but not all of the details of the prior crime.

Judge McAuliffe noted that the defendant should be entitled to a fair trial without the overlay of a prior felony. Mr. Dean

suggested that one remedy would be severance of the trials. The Chair said that counts for the jury and for the court to decide could be severed. Mr. Dean commented that with the availability of severance as a remedy, a rule on bifurcation is not needed because of one hybrid case. The Chair inquired as to what the federal rule provides. Mr. Brault answered that the federal rule only applies to co-defendants. He suggested that Rule 4-252 either authorize bifurcation or refer by a note to the Galloway case. A judge cannot find that there was a handgun while a jury finds that there was no handgun. Judge Heller added that the defendant can stipulate to the introduction of evidence of previous convictions that never go before the jury. Judge McAuliffe said that the jury could decide if the crime occurred, and the judge could decide whether there was a prior felony. There should not be waiver of inconsistent verdicts.

Mr. Brault pointed out that the Higgins case held that the judge is bound by the jury's findings of fact. Judge Heller expressed the concern that severance may not always be practical. Judge McAuliffe commented that a rule on bifurcation is not needed. The Chair stated that the Court of Appeals has asked for a rule. The Subcommittee should look at the rules in other jurisdictions before reconsidering this issue. The Chair remanded the matter to the Criminal Subcommittee.

Agenda Item 2. Continued consideration of proposed revised Title 16, Attorneys: Chapter 100, Board of Law Examiners and Chapter 200, Admission to the Bar (See Appendix 3)

Mr. Brault told the Committee that Una Perez, former Reporter to the Rules Committee who is serving as a consultant to redraft Title 16, was not able to be present today. No substantive changes had been intended when Ms. Perez reorganized Title 16. Mr. Bentley, Secretary to the Board of Law Examiners, and Ms. Hergenroeder, Director of Character and Fitness, are attending today's meeting to discuss the changes to the Bar Admission Rules and related Rules of the Board of Law Examiners.

Mr. Bentley presented the Rules in Chapter 100, State Board of Law Examiners and Character Committees; the Rules in Chapter 200, Admission to the Bar; and the Rules of the Board of Law Examiners for the Committee's consideration. (See Appendix 3).

Mr. Bentley explained that the idea behind the reorganization is to move the Bar Admission Rules, which now stand alone as an appendix to the Maryland Rules, forward into the main part of the Rule Book where they are more easily found. Most of the changes suggested by Ms. Perez are stylistic. Some of the matters from Title 10 of Code, Business Occupations Article pertaining to admission to the bar were incorporated into the Bar Admission Rules. However, in section (h) of Board Rule 4, the language "for all applicants" was added to the provision concerning lowering of the passing score standard. This is a substantive change. The problem with the language is that if an adjustment has to be made because of a difficulty in administering the examination, this may apply to only a small

fraction of the test-takers and not necessarily to all applicants.

The Chair suggested that the language in section (h) that reads “the passing score for all applicants” should be changed to “the passing score for one or more applicants.” Ms. Hergenroeder told the Committee that the Bar Examination is given at many sites. If during the examination at one of the sites, the power is off for 3/4 hour, the scores on the examination would have to be adjusted accordingly, but this would not be applicable to the other sites. Mr. Sykes asked whether it could happen that only one applicant is adjusted for a lower score. Mr. Bentley replied that this could happen, but usually the conditions that could require an adjustment would involve a more widespread situation, such as a defective examination or a power interruption. The lowering of the passing score only happened once in the past 16 years, and it was lowered for all who took the examination. There could be an occasion when the passing score would be lowered for fewer than all who take the examination. Mr. Sykes asked if someone would be graded on half of the examination if that person were to become ill halfway through the examination. Mr. Bentley answered that this would be discretionary, and the Board could adjust an examination in the interests of fairness to applicants. Judge Heller remarked that the examination would be adjusted for all applicants in the same or comparable circumstances.

The Chair pointed out that the Rule states that the Board

may lower but not raise the passing score standard. The Rule should provide an alternative for the one person who takes the examination and deserves to have the passing score standard lowered. Judge Heller moved that the language of section (h) be changed to read as follows: "For any particular administration of the Bar Examination, the Board may, in the interests of fairness, lower (but not raise) the passing score for one or more applicants at any time before notices of the examination results are mailed." The motion was seconded, and it passed unanimously. Mr. Bentley pointed out that the same change needs to be made to subsection (e)(2) of Rule 16-205, Bar Examination, and the Committee agreed by consensus to change that Rule, also. The Committee approved Board Rule 4 and Rule 16-205 as amended, and the remainder of the Rules as presented. The Reporter observed that by moving the Rules of the Board from the Appendix to a location following revised Title 16, Chapter 100, there is no intention to make the Board Rules subject to the Rules Committee's approval process. The redrafting by Ms. Perez and today's discussion by the Committee have helped with logical and stylistic consistency between the Maryland Rules and the Board Rules.

The Chair thanked Mr. Bentley and Ms. Hergenroeder for waiting patiently for their agenda item to be discussed. He stated that agenda items 3 and 4 will be discussed at the meeting in February.

The Chair adjourned the meeting.