Circuit Court for Baltimore City
Case Nos. 196026023,196026024

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 908

September Term, 2022

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ON MOTION FOR RECONSIDERATION

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RODNEY W. PITTS

v.

STATE OF MARYLAND

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Graeff,
Beachley,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: August 8, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

**At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

On October 3, 1997, a jury, sitting in the Circuit Court for Baltimore City, convicted appellant, Rodney W. Pitts, of first-degree murder, second-degree murder, and related weapons offenses.[1] The charges arose from a double homicide committed in December 1995. On February 5, 1998, the court sentenced Pitts to life imprisonment without the possibility of parole for first-degree murder, a consecutive 30-year term for second-degree murder, and an aggregate three-year concurrent term for the remaining offenses.

On May 18, 2022, Pitts, representing himself, filed a petition for a substance abuse evaluation and commitment to an addiction treatment facility pursuant to Maryland Code (2000, 2019 Repl. Vol.), §§ 8-505 and 8-507 of the Health – General Article ("HG"). In that petition, Pitts attributed his purported drug and alcohol addictions to a history of childhood trauma. Pitts further advised the court of his academic achievements and other accomplishments while incarcerated. On June 23, 2022, the court denied Pitts's petition

[1] The record transmitted to this Court is exceedingly thin. It contains neither the commitment order nor the trial transcripts. We attribute such sparsity to this being Pitts's third appeal and our having resolved his former assignments of error—arising from either trial or post-conviction proceedings—in *Pitts v. State*, 250 Md. App. 496, *cert. denied*, 475 Md. 714 (2021), and *Pitts v. State*, Case No. 352, Sept. Term 1998 (filed December 7, 1998). *See Evans v. Cnty. Council of Prince George's Sitting as Dist. Council*, 185 Md. App. 251, 255 n.2 (2009) ("[W]e can take judicial notice of our own opinions."); *see also* Md. Rule 1-104(b) ("An unreported opinion of either [appellate] Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority."). We will, therefore, confine our recitation of the facts and procedural history to that necessary to resolve the issue presented. When necessary, we will take judicial notice of the docket entries in the circuit court, as they are available on the Maryland Judiciary website. *See Lewis v. State*, 229 Md. App. 86, 90 n.1 (2016) ("We take judicial notice of the docket entries . . . found on the Maryland Judiciary CaseSearch website, pursuant to Maryland Rule 5-201."), *aff'd*, 452 Md. 663 (2017).

without a hearing, reasoning: "Since [Pitts] is serving a sentence for a crime of violence and is not eligible for parole, the [c]ourt has no authority to order an evaluation or treatment as requested."[2]

On appeal, Pitts presents a single question for our review, which we rephrase as follows:

> Did the circuit court violate the constitutional prohibitions against *ex post facto* laws when it concluded that it had no authority to consider Pitts's petition for a substance abuse commitment pursuant to the 2018 amendments to HG § 8-507?[3]

We answer this question in the affirmative and will, therefore, reverse and remand with instructions that the circuit court consider the merits of Pitts's petition.[4]

[2] As currently codified, HG §§ 8-505 and 8-507 prohibit a court from ordering the Department of Health ("the Department") to evaluate or treat a defendant serving a sentence for a violent crime until he or she is eligible for parole. HG § 8-505(a)(2)(i); HG § 8-507(a)(2)(i).

[3] In his informal brief, Pitts articulated the question presented as follows: "Did The Lower Court Err When Denying Mr. Pitts Motion For Drug And Alcohol Evaluation Pursuant To Health General Article § 8-505 & § 8-507?" For the sake of simplicity, we will treat Pitts's appellate contention merely as a challenge to the court's denial of his request for commitment pursuant to HG § 8-507. Given that HG §§ 8-505 and 8-507 both prohibit a court from granting violent offenders relief pursuant thereto until they are eligible for parole, our analysis with respect to the latter statute applies with equal force to the former.

[4] Although the circuit court erred in concluding that it lacked the authority to grant Pitts's petition, we express no views concerning the merits of the petition.

## DISCUSSION

### *Standard of Review*

"When the issue before us requires the interpretation and application of Maryland law, we 'must determine whether the [circuit] court's conclusions are legally correct under a *de novo* standard of review.'" *Dietrich v. State*, 235 Md. App. 92, 97 (2017) (quoting *Dep't of Pub. Safety & Corr. Servs. v. Doe*, 439 Md. 201, 219 (2014)).

### *The Prohibitions Against Ex Post Facto Laws*

Article I, Section 10 of the United States Constitution sets forth the federal prohibition against *ex post facto* laws, and provides: "No State shall . . . pass any . . . ex post facto Law[.]" U.S. Const. art. I, § 10. The Maryland counterpart to the federal *Ex Post Facto* Clause is found in Article 17 of the Maryland Declaration of Rights, which similarly states: "That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty; wherefore, no ex post facto Law ought to be made; nor any retrospective oath or restriction be imposed, or required." Md. Decl. of Rts., art. 17. The Supreme Court of Maryland has held that "Maryland's *ex post facto* clause has been viewed generally to have the 'same meaning' as its federal counterpart."[5] *State v. Raines*, 383 Md. 1, 26 (2004) (quoting *Watkins v. Dep't of Pub. Safety & Corr. Servs.*, 377 Md. 34, 48 (2003)). Thus,

[5] At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

the two constitutional provisions have generally been construed *in pari materia*. *See e.g.*, *Long v. Dep't of Public Safety & Corr. Servs*., 1, 15–19 (2016). Accordingly, consideration of federal case law is appropriate.

"By enacting the *Ex Post Facto* Clause, 'the Framers sought to assure that legislative Acts give fair warning of their effect.'" *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)). The prohibition contained therein likewise "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Booth v. State*, 327 Md. 142, 174 (1992) (quoting *Weaver*, 450 U.S. at 29). "In accord with these purposes, . . . two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Secretary, Dep't of Pub. Safety & Corr. Servs. v. Demby*, 390 Md. 580, 609 (2006) (quoting *Weaver*, 450 U.S. at 29).

In *Calder v. Bull*, 3 Dall. 386 (1798), the United States Supreme Court set forth the following four categories of laws that violate the *ex post facto* proscription:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed*. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

*Id.* at 390 (emphasis added). The third is the only *Calder* category potentially pertinent to the case at bar. In *Hill v. State*, 247 Md. App. 377 (2020), we articulated the following test

with respect to that third breed of *ex post facto* law: "Does the change in law create a 'significant risk' of increasing the punishment attached to the crimes?" *Id.* at 392 (citing *Peugh v. United States*, 569 U.S. 530, 539 (2013) ("The touchstone of this Court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'"); *Garner v. Jones*, 529 U.S. 244, 251 (2000) ("The question is whether the amended [law] creates a significant risk of prolonging respondent's incarceration."); *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995) ("In evaluating the constitutionality of the [change in law], we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.")).

"[A]n increase in the possible penalty is ex post facto regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier." *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (citations omitted). Whether a change in law creates a "'sufficient risk of increasing the measure of punishment' . . . is 'a matter of degree'; the test cannot be reduced to a 'single formula.'" *Peugh*, 569 U.S. at 539 (quoting *Morales*, 514 U.S. at 509). On the one hand, a law need not "increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause." *Id.* On the other, "mere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice." *Id.* In determining "[w]hether a retrospective . . . statute ameliorates or worsens

conditions imposed by its predecessor . . . [,] [t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." *Weaver*, 450 U.S. at 33 (citations omitted).

***The Appellate Courts' Applications of § HG 8-507 as Amended***

Relying on our opinion in *Hill v. State*, 247 Md. App. 377 (2020), Pitts contends that the circuit court's retroactive application of the 2018 amendments to HG § 8-507 violated the *Ex Post Facto* Clause of the United States Constitution and Article 17 of the Maryland Declaration of Rights. Because those amendments prohibit violent offenders from being committed pursuant to HG § 8-507 until they are eligible for parole, Pitts claims that "his prison term has been prolonged" by the application thereof.

In *Hill*, we addressed whether the retroactive application of the 2018 amendments to HG § 8-507 violated the *Ex Post Facto* Clause of the United States Constitution. *Id.* at 389–402. Hill was convicted of first-degree assault and related firearm offenses in 2011. *Id.* at 380. The court sentenced him to a total term of twenty-five years' imprisonment. *Id.* On March 4, 2019, Hill filed a petition pursuant to HG § 8-507, seeking commitment to a substance abuse treatment facility. *Id.* On May 10, 2019, the court granted Hill's petition "pending availability of a bed." *Id.* at 381. Shortly thereafter, however, the Department advised the court that "as the result of amendments to HG § 8-507, Hill would not be eligible for the treatment program 'until parole eligibility after May 10, 2024.'" *Id.*

At the time of Hill's conviction, HG § 8-507 provided, in pertinent part:

> (a) Subject to the limitations in this section, a court that finds in a criminal case or during a term of probation that a defendant has an alcohol or drug dependency may commit the defendant as a condition of release, after conviction, or at any other time the defendant voluntarily agrees to participate in treatment, to the Department for treatment that the Department recommends, even if:
>
> (1) The defendant did not timely file a motion for reconsideration under Maryland Rule 4-345; or
>
> (2) The defendant timely filed a motion for reconsideration under Maryland Rule 4-345 which was denied by the court.

*Id.* at 381–82; *see also* 2009 Md. Laws, ch. 720. Effective October 1, 2018—approximately five months before Hill filed his petition—the General Assembly amended HG § 8-507(a) to prohibit courts from committing violent offenders for drug and/or alcohol treatment until they were eligible for parole. *Hill*, 247 Md. App. at 382. As amended, that subsection provided (and continues to provide):

> (a)(1) Except as provided in paragraph (2) of this subsection and subject to the limitations in this section, a court that finds in a criminal case or during a term of probation that a defendant has an alcohol or drug dependency may commit the defendant as a condition of release, after conviction, or at any other time the defendant voluntarily agrees to participate in treatment, to the Department for treatment that the Department recommends, even if:
>
> (i) The defendant did not timely file a motion for reconsideration under Maryland Rule 4-345; or
>
> (ii) The defendant timely filed a motion for reconsideration under Maryland Rule 4-345 which was denied by the court.
>
> (2)(i) *If a defendant is serving a sentence for a crime of violence, as defined in § 14-101 of the Criminal Law Article, a court may not order the*

> *Department to treat a defendant under this section until the defendant is eligible for parole.*
>
> (ii) Nothing in this paragraph may be construed to prohibit a defendant who is serving a sentence for a crime of violence, as defined in § 14-101 of the Criminal Law Article, from participating in any other treatment program or receiving treatment under the supervision of the Department under any other provision of law.[6]

HG § 8-507(a) (emphasis added).

At a hearing held on August 16, 2019, Hill argued that the amended subsection, as retroactively applied to him, violated the prohibition against *ex post facto* laws. *Hill*, 247 Md. App. at 382. The circuit court disagreed and therefore denied Hill's petition for commitment. *Id.* at 382–83. Hill timely appealed that judgment. *Id.* at 383.

In *Hill*, we observed that when he was convicted and sentenced in 2011, Hill "was eligible for commitment pursuant to HG §§ 8-505 and 8-507." *Id.* at 399. Because Hill was serving a sentence for a violent crime, however, that eligibility "ended with the passage of the 2018 amendments."[7] *Id.* We therefore concluded that "the 2018 amendments as

[6] The General Assembly contemporaneously amended HG § 8-505 to provide that "If a defendant is serving a sentence for a crime of violence . . . , a court may not order the Department to evaluate a defendant under this section until the defendant is eligible for parole." HG § 8-505(a)(2)(i); *see also Hill*, 247 Md. App. at 399 n.4.

[7] Although the General Assembly again amended HG § 8-507 by Acts 2009, ch. 720 and Acts 2016, ch. 515, the sections at issue remained substantively unchanged until 2018. Thus, as of Hill's 2011 conviction, inmates enjoyed "an essentially unrestricted right to file petitions requesting commitment to the Department of Health for substance abuse treatment pursuant to [HG § 8-507] as it existed prior to October 1, 2018." *Hill*, 247 Md. App. at 379.

applied to Hill violate[d] the . . . proscription of *ex post facto* laws because the amendments create[d] a 'substantial risk' of increasing Hill's punishment by prolonging his term of incarceration."[8] *Id.* at 390. We further noted that the record reflected that the circuit court had initially intended "to release Hill from his 'sentence of incarceration' in favor of residential treatment." *Id.* at 401. Thus, the 2018 amendment of HG § 8-507 not only presented a "significant risk" of increasing Hill's punishment; "his prison term [was] *actually* . . . prolonged" thereby, and consequently presented "the quintessential *ex post facto* violation[.]" *Id.* at 402.

The State seeks to distinguish *Hill*, arguing that although eligibility for commitment pursuant to HG § 8-507 was "essentially unrestricted" when Hill was convicted in 2011, "that was not the case in 1995—the point in time against which any changes must be assessed for *ex post facto* purposes where Pitts is concerned." Specifically, the State asserts that in 1995 when Pitts committed his offenses, the law provided that "a criminal defendant, once convicted, was ineligible to seek an H.G. § 8-507 commitment after the 90-day time post-sentencing to file a motion for sentence modification had passed." Because Pitts failed to file such a motion within 90 days, the State argues that he "is equally ineligible for H.G. § 8-507 commitment under either version of the statute." Therefore,

[8] Hill also claimed that the 2018 amendments to HG § 8-507 violated Article 17 of the Maryland Declaration of Rights. Having held that "the 2018 amendments violate[d] the federal prohibition on *ex post facto laws*," we did not reach Hill's Article 17 claims. *Id.* at 390 n.3.

the State concludes, "application of the current statute to him does not violate the *Ex Post Facto* Clause."

The State relies, in part, on the Supreme Court of Maryland's decision in *Clark v. State*, 348 Md. 722 (1998). The appellant in that case called upon the Court to interpret HG § 8-507(a), which from January 1, 1990, until October 1, 2004, provided:

> If a court finds in a criminal case that a defendant has an alcohol or drug dependency, the court may commit the defendant as a condition of release, after conviction, or at any other time the defendant voluntarily agrees to treatment to the Department for inpatient, residential, or outpatient treatment.

1989 Md. Laws, ch. 782, § 3; *Clark*, 348 Md. at 724. Based on relevant legislative history and pertinent public policy considerations, the Maryland Supreme Court declined Clark's invitation to interpret the subsection as "provid[ing] inmates with a mechanism for early release by obtaining court-ordered commitment to drug or alcohol treatment programs other than in conjunction with the existing methods of reconsideration of sentences." *Clark*, 348 Md. at 730. Instead, the Court held that a defendant's "request to be placed in a drug treatment program is limited by the time constraints for modification or reduction of sentence contained in Rule 4-345."[9] *Id.* at 731. In other words, the Court construed the

[9] Maryland Rule 4-345 governs the circuit court's revisory power and provides, in pertinent part:

> (e) **Modification Upon Motion.**
>
> (1) **Generally.** Upon a motion filed within 90 days after imposition of a sentence (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a circuit court, whether or not an

phrase "'at any other time the defendant voluntarily agrees to treatment' to include anytime [sic] pursuant to a motion filed within the ninety-day period the court has revisory power over a sentence pursuant to Rule 4-345." *Id.* If, therefore, a defendant failed to file such a motion within the 90-day period prescribed by Rule 4-345, the Court opined that a "court has no authority to amend a sentence, unless the sentence involved 'fraud, mistake or irregularity.'" *Id.* at 732 (quoting Rule 4-345(b)).

The State correctly concedes, however, that the General Assembly superseded the holding in *Clark* by repealing and reenacting HG § 8-507, with amendments, effective October 1, 2004. As amended, HG § 8-507 provided, in relevant part:

> (b) Subject to the limitations in this section, a court that finds in a criminal case that a defendant has an alcohol or drug dependency may commit the defendant as a condition of release, after conviction, or at any other time the defendant voluntarily agrees to participate in treatment, to the Department for treatment that the Department recommends, *even if:*
>
> (1) *The defendant did not timely file a motion for reconsideration under Maryland Rule 4-345*; or
>
> (2) The defendant timely filed a motion for reconsideration under Maryland Rule 4-345 which was denied by the court.

2004 Md. Laws, chs. 237 & 238 (emphasis added). As is clear from its plain language, subsection (b), paragraph (1) permitted an inmate to file an HG § 8-507 petition after the

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> appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.

expiration of Rule 4-345(e)(1)'s 90-day deadline, thereby rendering the Maryland Supreme Court's holding in *Clark* obsolete. *See Howsare v. State*, 185 Md. App. 369, 384 (2009) ("[HG] § 8-507 allows the circuit court to order drug treatment even if the defendant did not file a motion for reconsideration within 90 days (the time limit set forth in Md. Rule 4-345)[.]").[10]

***Analysis***

Although the State recognizes that the 2004 and 2006 amendments to HG § 8-507 made Pitts "potentially eligible to seek commitment," the State maintains that "the current H.G. § 8-507 does not impose a punishment any more severe than the version . . . in effect

[10] In 2006, the General Assembly again amended HG § 8-507, in part for "the purpose of removing a limitation that a certain commitment made by a court for treatment for a defendant . . . applies only to certain defendants for whom no sentence of incarceration is currently in effect or detainer is currently lodged[.]" 2006 Md. Laws, ch. 338. In so doing, the Legislature struck former subsection (a) and added the following italicized language to then subsection (e):

> (e)(1) A court may not order that the defendant be delivered for treatment until:
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> (i) The Department gives the court notice that an appropriate treatment program is able to begin treatment of the defendant;
>
> (ii) *Any detainer based on an untried indictment, information, warrant, or complaint for the defendant has been removed; and*
>
> (iii) *Any sentence of incarceration for the defendant is no longer in effect.*

2006 Md. Laws, ch. 338 (HB 656) (emphasis added). In *Howsare*, we construed HG § 8-507 as requiring that, in granting an inmate's petition for commitment, "the court suspend[] the executed portion of the sentence" he or she is serving, explaining that "when the entire sentence of incarceration is suspended, the sentence is no longer in effect and therefore the requirements of H.G. Art., § 8-507(e)(1)(iii) are met." 185 Md. App. at 388.

when [Pitts] committed his offenses." The State reasons that "[u]nder either the 2022 statute or the 1995 statute, Pitts is ineligible for H.G. § 8-507 commitment." The State effectively asks that we simply compare the current codification of HG § 8-507 to the 1995 iteration, without consideration of the intervening ameliorative amendments.

The State's view, however, overlooks the effect of the 2004 amendments to HG § 8-507. In enacting the 2004 amendments, the General Assembly clearly intended to make alcohol and drug treatment more available to qualifying prisoners. *See* S.B. 194, 2004 Leg., Reg. Sess. (Md. 2004), Fiscal and Policy Note, at 10–11, https://mgaleg.maryland.gov/2004rs/fnotes/bil_0004/sb0194.pdf. As part of that express legislative policy, the General Assembly eliminated the 90-day deadline for filing a post-sentence § 8-507 petition. As we shall explain, the elimination of the 90-day filing deadline applied retroactively to Pitts's case, thereby making Pitts eligible to file "essentially unrestricted" § 8-507 petitions after the effective date of the amendment.

In Maryland, statutes are generally presumed to operate prospectively. *See Dabbs v. Anne Arundel County*, 458 Md. 331, 362 (2018); *Grasslands Plantation, Inc. v. Frizz-King Enters., LLC*, 410 Md. 191, 226 (2009) ("The basic reason we presumptively apply new legislation prospectively is our concern that a retrospective application may interfere with substantive rights."). That rule is, however, subject to certain exceptions. "One such category of exceptions concerns legislative enactments that apply to procedural"—rather than substantive—changes. *Gregg v. State*, 409 Md. 698, 714 (2009) (quoting *Langston v.*

*Riffe*, 359 Md. 396, 406 (2000)). "Ordinarily[,] a change affecting procedure only . . . applies to all actions and matters[,] whether accrued, pending[,] or future, unless a contrary intention is expressed." *Estate of Zimmerman v. Blatter*, 458 Md. 698, 730 n.7 (2018) (brackets in original) (quoting *Langston*, 359 Md. at 407). A procedural law "control[s] only the method of obtaining redress or enforcement of rights and do[es] not involve the creation of duties, rights, and obligations." *Nielsen v. Gaertner*, 96 F.3d 110, 113 (4th Cir. 1996) (quoting *Harris v. DiMattina*, 462 S.E.2d 338, 340 (1995)) .

"Legislative enactments that have remedial effect and do not impair vested rights also are given retrospective application." *Gregg*, 409 Md. at 715. "Generally, remedial statutes are those which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries." *Id.* A "vested right" is "an immediate right of present enjoyment or a present fixed right of future enjoyment." *Estate of Zimmerman*, 458 Md. at 730 (quoting *Langston*, 359 Md. at 420).

Not only is HG § 8-507 "remedial in nature," *Collins v. State*, 89 Md. App. 273, 293 (1991), but the General Assembly's elimination of the 90-day deadline for filing a post-sentence § 8-507 petition was procedural in nature. Absent evidence or other indicia of a contrary legislative intent, we construe the 2004 amendments as applying retroactively to inmates serving sentences for crimes committed prior to its effective date.[11] *See Estate of*

[11] We also note that the Maryland general savings statute does not prohibit the retroactive application of the ameliorative amendments at issue. Currently codified as Maryland Code (2014, 2019 Repl. Vol.), § 1-205 of the General Provisions Article ("GP"),

*Zimmerman*, 458 Md. at 730 n.7 ("Ordinarily[,] a change affecting procedure only . . . applies to all actions . . . unless a contrary intention is expressed." (first alteration in original) (quoting *Langston*, 359 Md. at 407)). A retrospective statute is "applied so as to determine the legal significance of acts or events that occurred prior to its effective date[.]" *State Ethics Comm'n v. Evans*, 382 Md. 370, 382 (2004) (quoting *Allstate v. Kim*, 376 Md. 276, 289 (2003)).

Our determination that the 2004 amendment to HG § 8-507 applies retroactively places Pitts, for *ex post facto* purposes, in a position as if the 2004 amendment was the applicable law when he committed the offenses of which he was convicted and for which he was sentenced. *Cf. State v. Ramseur*, 843 S.E.2d 106, 113 (N.C. 2020) ("The General Assembly, . . . by giving the [Racial Justice Act ("RJA")] retroactive effect, has declared that the RJA was the applicable law at the time the crimes were committed . . . , and we note that the *Ex Post Facto* Clause does not prohibit the retroactive application of laws

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the savings statute provides in pertinent part: "Except as otherwise expressly provided, the repeal, repeal and reenactment, or amendment of a statute does not release, extinguish, or alter a criminal or civil penalty, forfeiture, or liability imposed or incurred under the statute." GP § 1-205(a). "[A] 'penalty, forfeiture, or liability' within the contemplation of the statute was 'something in the nature of a criminal or civil sanction actually incurred by reason of the statute's operative provisions.'" *Young v. State*, 14 Md. App. 538, 554 (1972) (quoting *Sherrill v. State*, 14 Md. App. 146, 154 n.6 (1972)). The requirement that an inmate file a petition pursuant to HG § 8-507 within 90 days of sentencing is not a "penalty, forfeiture, or liability" within the meaning of GP § 1-205(a); *see also Aviles v. Eshelman Elec. Corp.*, 281 Md. 529, 533 (1977) ("Absent a contrary intent made manifest by the enacting authority, any change made by statute or court rule affecting a remedy only (and consequently not impinging on substantive rights) controls all court actions whether accrued, pending or future.").

that—like the RJA—are ameliorative in nature.").[12] In short, the 2004 amendment

[12] The State relies on two out-of-state cases—*Meola v. Dep't of Corrections*, 732 So.2d 1029 (Fla. 1998), and *Perez v. Comm. of Corrections*, 163 A.3d 597 (Conn. 2017)—for the proposition that, for *ex post facto* purposes, one must compare the statute in effect at the time of the offense to the challenged statute. We initially note that both *Meola* and *Perez* rely on dicta in *Lynce v. Mathis*, 519 U.S. 433, 449 (1997), that appears in a single paragraph at the end of the Court's opinion and contains minimal relevant analysis. Nevertheless, we have no quarrel with the proposition, as articulated in *Meola*, that "[i]f, at the time of the offense, the inmate could not have even contemplated receiving the benefit, he could not have had any 'expectation' at all under the *Ex Post Facto* Clause." 732 So.2d at 1032. But *Meola* and *Perez* are distinguishable.

The courts in *Meola* and *Perez* construed amendments to prison overcrowding and parole eligibility statutes, respectively, that purported to rescind credits inmates could earn toward early release. In examining the inmates' *ex post facto* claims, both courts compared the statutes in effect at the time of the offense to the challenged statutes. *Meola*, 732 So.2d at 1033; *Perez*, 163 A.3d at 612. Under the lens that an *ex post facto* claim may be based on the probability of increased punishment, both *Meola* and *Perez* held that the legislatures could constitutionally reduce statutorily authorized diminution credits provided that doing so did not reduce the credits the inmates reasonably expected to earn under the law as of the date of their offenses. Accordingly, the Florida and Connecticut statutes at issue addressed substantive rather than procedural statutory changes governing inmates' ability to secure early release. Moreover, while the appellants in those cases were ineligible for the diminution credits at issue when their respective offenses were committed, Pitts was unquestionably eligible for HG § 8-507 commitment when his crimes were consummated, and the State cites no authority to support its proposition that we must examine Pitts's "expectation" to receive a benefit, for *ex post facto* purposes, *as of the date of his sentencing* in February 1998—much less *90 days thereafter*. When comparing the 1995 iteration of HG § 8-507 with the 2018 amended version from Pitts's perspective when he committed his crimes, the latter's categorical prohibition against committing violent offenders for treatment until they are parole eligible is clearly more onerous than the former, which contains no such restriction. Absent that severable provision and otherwise applying the contemporary statute, Pitts would be eligible to file and the court would be authorized to grant a HG § 8-507 petition. *See Weaver*, 450 U.S. at 36 n. 22 (1981) ("[O]nly the *ex post facto* portion of the new law is void as to petitioner, and therefore any severable provisions which are not *ex post facto* may still be applied to him.").

With respect to the State's reliance on *Clark*, the Court held that HG § 8-507 did

eliminating the 90-day filing deadline effectively placed Pitts in the same position as Hill—prior to the 2018 amendments, Hill and Pitts were both entitled to file petitions for commitment pursuant to HG § 8-507.[13] Accordingly, because Pitts became permanently ineligible for commitment to the Department for drug and alcohol treatment with the enactment of the 2018 amendments, the 2018 legislation created a sufficiently significant risk of increasing the measure of his punishment in violation of the prohibition against *ex post facto* laws. *See Hill*, 247 Md. App. at 400–02.

We reiterate that, on remand, the court is not required to grant Pitts's HG § 8-507 petition. Our holding merely requires the court to exercise its discretion in considering the merits thereof.

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not confer upon circuit courts authority to grant petitions filed pursuant thereto independent of the procedural requirements set forth in Rule 4-345. As we have articulated in our opinion, the General Assembly's 2004 amendments to HG § 8-507 vitiated that judicial interpretation. Indeed, the State acknowledges that the 2004 amendments "effectively overruled *Clark*." Unlike the statutes construed in *Meola* and *Perez*, the 2004 amendments to HG § 8-507 were both ameliorative and procedural in so far as they removed the 90-day filing requirement and made drug and alcohol treatment more available to qualifying inmates. In contrast to *Meola* and *Perez*, both of which construed intervening amendments that granted benefits that were later rescinded, the unlimited period to file a HG § 8-507 petition as provided in the 2004 amendments has not been rescinded. In sum, we cannot say that Pitts, at the time of his offense, "could not have even contemplated receiving the benefit" of a HG § 8-507 commitment. *Meola*, 732 So.2d at 1032.

[13] We reject the State's reliance on *State v. Green*, 367 Md. 61 (2001). *Green* held that an inmate sentenced to a mandatory minimum 25-year sentence was not "eligible for sentencing under § 8-507" because no portion of the 25-year sentence could be suspended. *Id.* at 82. Unlike Green's sentence, Pitts's life without parole sentence could be suspended in favor of an HG § 8-507 commitment.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO RULE ON THE MERITS OF APPELLANT'S PETITION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.**