

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
No. 0659
September Term, 2016

DAVID BRIGHT

v.

STATE OF MARYLAND

Kehoe,
Graeff,
Rodowsky, Lawrence F.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: January 27, 2017

Appellant, David Bright, asserts that a condition of his probation is illegal. Pursuant to a plea agreement, the Circuit Court for Baltimore City directed that Bright "be supervised under COMET," the Collaborative Offender Management Enforcement Treatment program for certain sex crimes offenders that was enacted long after Bright's crimes were committed. He contends that that probation condition is an *ex post facto* law. As explained below, we shall affirm the denial of his motion to correct the allegedly illegal sentence.

In the summer of 1977, a jury convicted Bright for having kidnapped a twenty-four-year-old woman at gunpoint from a Cherry Hill bus stop whom he and two other men raped for several hours. In January 2013, those convictions were overturned pursuant to *Unger v. State*, 427 Md. 383, 48 A.3d 242 (2012), and Bright was granted a new trial. On October 22, 2015, Bright pled guilty to, *inter alia*, first-degree rape, first-degree sex offense (sodomy), use of a handgun in the commission of a violent crime, and kidnapping. Under the plea bargain, he received credit for time served beginning July 19, 1977 – thirty-eight years, three months and five days. This satisfied the sentences for all convictions except rape, for which the sentence was life imprisonment. That sentence was suspended, except for time served, and five years' probation upon his immediate release was imposed.

As a condition of his probation – and pursuant to the written plea agreement – the court directed the Division of Parole and Probation to supervise Bright's five-year probation under "COMET."

COMET

The COMET supervision program, created by Chapter 4 of the Acts of 2006, 1st Special Session, "mandated the establishment of sexual offender management teams for the supervision of sexual offenders." *Russell v. State*, 221 Md. App. 518, 523, 109 A.3d 1249, 1252 (2015). The 2006 legislation was amended by Chapters 176 and 177 of the Acts of 2010. These Acts were and are codified under Subtitle 7, "Sex Offender Registration," Title 11, "Victims and Witnesses," of the Criminal Procedure Article.

Maryland Code (2001, 2008 Repl. Vol., 2016 Cum. Supp.), § 11-725(b) of the Criminal Procedure Article (CP) addresses the composition of the management teams. It provides:

- "(b) A sexual offender management team:
 - "(1) consists of:
 - "(i) a specially trained parole and probation agent; and
 - "(ii) a representative of a sexual offender treatment programor provider; and
 - "(2) may include:
 - "(i) victim advocates or victim service providers with recognized expertise in sexual abuse and victimization;
 - "(ii) faith counselors;
 - "(iii) employment counselors;
 - "(iv) community leaders;
 - "(v) a polygraph examiner with recognized expertise in sexual offender-specific polygraph examination;
 - "(vi) a law enforcement officer;
 - "(vii) an assistant State's Attorney;
 - "(viii) an assistant public defender; and
 - "(ix) a foreign or sign language interpreter."

A management team "shall submit a progress report" on each person under its supervision every six months "to the sentencing court." CP § 11-725(c)(1).

The 2006 legislation dealt with parole and required extended supervision of certain sex crime offenders for a period of three years to life. Supervision was conducted by management teams that reported to the Parole Commission. *See* Fiscal and Policy Note to S.B. 280 of the 2010 Legislative Session. "[U]nintentional operational difficulties" were created by the 2006 legislation. The 2010 enactments "eliminate[d] extended supervision for a period less than life," *id.*, and "transfer[red] most of the responsibilities for extended, now lifetime, supervision of sex offenders to the courts." *Id.*

A person convicted of rape in the first degree is among the class of offenders whose sentences "shall include a term of lifetime sexual offender supervision[.]" CP § 11-723(a)(2). With exceptions not relevant here, "the term of lifetime sexual offender supervision imposed on a person for a crime committed on or after October 1, 2010, shall:

- "(i) be a term of life; and
- "(ii) commence on the expiration of the later of any term of imprisonment, probation, parole or mandatory supervision."

§ 11-723(c)(1).

Bright's objection to his probation agreement originates in the provisions of CP § 11-723(d)(3), which reads:

"(3) The conditions of lifetime sexual offender supervision may include:

"(i) monitoring through global positioning satellite tracking or equivalent technology;

"(ii) where appropriate and feasible, restricting a person from living in proximity to or loitering near schools, family child care homes, child care centers, and other places used primarily by minors;

"(iii) restricting a person from obtaining employment or from participating in an activity that would bring the person into contact with minors;

"(iv) requiring a person to participate in a sexual offender treatment program;

"(v) prohibiting a person from using illicit drugs or alcohol;

"(vi) authorizing a parole and probation agent to access the person's personal computer to check for material relating to sexual relations with minors;

"(vii) requiring a person to take regular polygraph examinations;

"(viii) prohibiting a person from contacting specific individuals or categories of individuals; and

"(ix) any other conditions deemed appropriate by the sentencing court or juvenile court."

For a court to impose a sentence that includes a term of lifetime sexual offender supervision, it must first obtain a presentence investigation. CP § 11-723(d)(2)(i). Then, the sentencing court "shall impose special conditions of lifetime sexual offender supervision on the person at the time of sentencing ... and advise the person of the length, conditions, and consecutive nature of that supervision." CP § 11-723(d)(1).

Factual and Procedural Background

At the outset of Bright's October 2015 plea hearing, the State conveyed the terms of the parties' written plea agreement to the court. Most importantly, for purposes of this appeal, the State informed the court that the agreement contemplated a five-year period of probation, during which time Bright would participate in, and comply with, COMET supervision. The court articulated its understanding of what COMET supervision would entail; defense counsel concurred:

"THE COURT: Okay, so he has to comply with the requirements of specialized sexual offender supervision, including *offense specific treatment, medication, polygraph testing, computer monitoring, electronic tracking and related curfew and/or geographic restrictions*. That's their summary of the COMET program.

"[DEFENSE COUNSEL]: *Right, right.*"

(Emphasis added).

The parties agreed, moreover, that Bright would not be required to register as a lifetime sex offender because the sex offender registry did not exist when Bright committed his sexual offenses. *See generally, Doe v. Department of Public Safety & Correctional Servs.*, 430 Md. 535, 62 A.3d 123 (2013). With the terms of the agreement confirmed, the State offered the following facts in support of the plea and COMET supervision:

"On November 6, 1976, at approximately 11:30 p.m., [victim] was waiting for a bus in Cherry Hill, the 600 block of Cherry Hill Road, which is in Baltimore City, State of Maryland. She was abducted and forced into a car at gunpoint. The Defendant, who she would identify as David Bright, who is sitting to the immediate right of Defense Counsel, is who the victim would identify as the driver of the car, as well as the one who had a gun and forced her into the car.

"The Defendant's brother, Joseph Bright, and another co-defendant, Norman Chase, were also present in the car. The Defendant drove to a woode[d] area in Anne Arundel County, where victim was repeatedly raped, that is the three men forced vaginal intercourse on the victim. The three men then took the victim to a vacant house in an unknown location, which is in Northwest Baltimore, but the exact location unknown. Again, in Baltimore City. There the Defendant told the victim that he had to kill her so she wouldn't quote 'squeal.' The victim begged Defendant not to kill her, and she swore not to call the police.

"Defendant then repeatedly had forced vaginal intercourse with the victim as well as anal intercourse. Co-defendants Joseph Bright and Norman Chase also had forced vaginal intercourse with the victim as well. After the multiple rapes and sexual assaults, the Defendant did agree to let the victim go if she was willing to give her real name, address and phone number. The victim agreed out of fear and she actually gave her friend's phone number, because she did not have a phone, her friend being [Ms. S.].

"The Defendants took victim to the 3600 block of Kimber Road, where they dropped her off. This was in Baltimore City, State of Maryland. The friend – later on that day the friend, [Ms. S.], told the victim – I'm sorry, sorry I apologize. Later that morning, the Defendant called the victim's friend, [Ms. S.], and was asking questions about where the victim lived. [Ms.

S.] told the victim that someone had gotten – that she had gotten a call from an unknown person and they were asking personal information about the victim. It was at this point that the victim reported to her friend, [Ms. S.], that she had been raped and the incident was reported to police, and she underwent a sexual assault forensic examination.

"An investigation was conducted and on November 12, 1976, the victim had essentially set up a sting with the police, and that being the victim went with the police to a location where the victim had agreed to meet the Defendant, and this was done through telephone. When the victim gave a pre-arranged signal that was the person she was supposed to meet, and that being David Bright, had appeared and sat down – she gave a pre-arranged signal and the police converged. It was at that point that the Defendant said 'I thought you weren't going to call the police' and ran. He was ultimately apprehended and was transported to Headquarters, where he escaped from Headquarters.

"The Defendant, again Mr. Bright, then called the victim's friend and threatened to kill the victim once again. The Defendant was ultimately arrested December 1, 1976 and a co-defendant was arrested in Connecticut in a stolen car with a .22 caliber magazine and nine bullets were recovered from the car."

The court accepted Bright's guilty plea and imposed "a total sentence of life, suspend all but time served, followed by five years' probation." The court informed Bright of the general conditions of his probation, as well as the agreed upon special condition that he comply with COMET supervision. Bright was released from prison the following day, on October 23, 2015.

The preprinted "Probation/Supervision Order" of October 22, 2015, states that the "Length of Probation" is "5 yrs." A block for "Lifetime Sexual Offender Supervision by Management Team" is left blank on the form. In longhand on the margin the order provides, "Defendant to be supervised under COMET." None of the preprinted special conditions are checked.

The Violation of Probation and Motion to Correct Illegal Sentence

Less than three months after Bright's release, the Department of Public Safety Division of Parole and Probation requested that a violation of probation warrant be issued for Bright's refusal to "sign an authorization for sex offense treatment" and to take the "initial polygraph examination."

Bright was arrested. On March 30, 2016, Bright's defense counsel – who was not his attorney at the time of the guilty plea – filed a Motion to Correct an Illegal Sentence and Dismiss the Violation of Probation. The motion argued that imposing COMET supervision as a condition of Bright's probation violated Maryland's prohibition on *ex post facto* laws, because its retroactive application "substantially alters his rights and threatens his liberty to [his] disadvantage[.]"¹

At a motions hearing on April 6, 2016, defense counsel articulated his position that requiring Bright to comply with COMET supervision was a retroactive application of law, stating:

"Your Honor, the issue that I have is that all of the provisions of the COMET Program are being applied to Mr. Bright. So it's being applied to him in a situation where he, these provisions did not exist at the time that he committed the offense."

As to the "disadvantage" resulting from the imposition of COMET supervision, defense counsel said "it requires Mr. Bright to go above and beyond and do additional things," "he has to give over all different types of information," and that "[t]his supervision

¹On January 19, 2016, Bright had filed a *pro se* motion in which he advanced a similar argument.

is extraordinary." (Emphasis added). The court pressed defense counsel on whether, hypothetically, the court could have imposed each of the supervisory conditions directly, rather than through the COMET program itself.

"THE COURT: So you said I couldn't – *suppose I just laid it out. So as I laid it out, I said he's got to comply, he's got to give a polygraph, he's got – there's a whole, I mean – so if I laid that out, you're saying – could I have done that?*

"[DEFENSE COUNSEL]: I'm not saying that Your Honor couldn't – *I wouldn't say that Your Honor couldn't do that. I haven't researched that specific issue, so I mean I can't –*

"THE COURT: *But I don't know what the difference is.*"

(Emphasis added).

The State took the position that there simply was no *ex post facto* issue, and that COMET supervision was an agreed upon condition of Bright's early release, stating "[o]nce you've pled guilty and agreed to be under probation, under the Maryland Rules a judge can add COMET and any other associated conditions that are necessary to supervise you, as well as to ensure public safety." The State urged, moreover, that Bright's compliance with COMET supervision was nothing less than the cornerstone of the parties' plea agreement, citing the exceptionally brutal nature of Bright's sexual offense and his subsequent threats of lethal violence toward the victim:

"[W]e're talking about an individual who was convicted of and subsequently pled guilty to what was an extremely brutal kidnapping, rape and was intended to be a murder of a young woman who is, obviously is older now, but was at the age of 24. This is also an individual who, after being apprehended, escaped from police custody and called the victim to let her know that if and when given the opportunity, he was going to kill her in retaliation for her having called the police on him. And he repeated that threat multiple times over time, both by calling her and writing to her.

"As a result, this isn't your regular situation. And the fact that the State's hands were somewhat tied in attempting to recreate a case from the 1970's where essentially the Defendant received a new trial on what was essentially a technicality – it wasn't an innocence issue, he wasn't exculpated. And I wasn't part of that decision making process, but that the State agreed to do this only, only under the condition of this Defendant be in total compliance with probation. And *the only component of that probation that was designed to have any impact on public safety was the COMET Program, to include the medical information being accessed by the Agent, the subsequent evaluation, the treatment plan and the polygraph.*"

(Emphasis added).

By the end of the April 6 hearing, Bright agreed to sign the limited release of medical records and indicated that he would submit to a future polygraph examination. He maintained, however, his objection to COMET supervision as being in violation of the state prohibition on *ex post facto* laws. The court formally denied Bright's motion to correct an illegal sentence at a subsequent hearing on May 2, 2016, at which time he was also found to be in violation of his probation. The court did not impose any portion of the suspended life sentence and continued Bright on probation. The court made clear that he was to comply with COMET supervision going forward. This appeal followed. Additional facts will be incorporated as they become relevant.

Discussion

On this appeal, Bright's flagship contention is the following:

"The circuit court violated the *ex post facto* clauses of the Maryland and Federal Constitutions by sentencing Mr. Bright to COMET supervision. The sentence was punitive and worked to Mr. Bright's disadvantage, and the

COMET program was not instituted until nearly 30 years after Mr. Bright's offense."²

Before addressing this contention, we make clear from the outset what the contention does *not* involve. This contention does *not* require us to consider the *ex post facto* implications of sex offender registration – a topic which this Court and the Court of Appeals have discussed at considerable length in several recent decisions. *See, e.g., Department of Public Safety & Correctional Servs. ("Doe II")*, 439 Md. 201, 94 A.3d 791 (2014); *Doe v. Department of Public Safety & Correctional Servs. ("Doe I")*, 430 Md. 535, 62 A.3d 123 (2013); *Long v. Maryland State Dep't of Public Safety & Correctional Servs.*, 230 Md. App. 1, 146 A.3d 546 (2016); *In Re: Nick H.*, 224 Md. App. 668, 123 A.3d 229 (2015); *Connor v. State*, 223 Md. App. 1, 115 A.3d 201 (2015); *Quispe del Pino v. Maryland Dep't of Public Safety & Correctional Servs.*, 222 Md. App. 44, 112 A.3d 522 (2015); *Rodriguez v. State*, 221 Md. App. 26, 108 A.3d 438 (2015); *Sanchez v. State*, 215 Md. App. 42, 79 A.3d 405 (2013).

The terms of Bright's probation explicitly excluded registration as a sex offender. Therefore, while the above decisions provide guidance as to the appropriate analytic framework, they do not control the substantive issue on this appeal. Bright's contention, and our analysis of it, concerns only the *ex post facto* implications (if any) of requiring him

²Notwithstanding Bright's express agreement to comply with COMET supervision – in exchange for his early release from prison – the appeal is properly before us. The appeal is framed as a challenge to an illegal sentence. An individual cannot consent to an illegal sentence, *Holmes v. State*, 362 Md. 190, 195-96, 763 A.2d 737, 740 (2000), and an illegal sentence may be corrected at any time. *Taylor v. State*, 224 Md. App. 476, 500, 121 A.3d 167, 181 (2015); Maryland Rule 4-345.

to comply with COMET supervision as a condition of his probation. Put simply, this appeal concerns sex offender supervision and not sex offender registration.

I

The federal prohibition on *ex post facto* laws is set forth in Article 1, § 10 of the United States Constitution and directs that "[n]o state shall ... pass any ... ex post facto Law[.]" Maryland's corresponding prohibition appears as Article 17 of the Maryland Declaration of Rights. It reads:

"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 be made; nor any retrospective oath or restriction be imposed, or required.*"

(Emphasis added).

Maryland's prohibition has traditionally been viewed *in pari materia* with its federal counterpart. *See, e.g., Anderson v. Department of Health & Mental Hygiene*, 310 Md. 217, 223, 528 A.2d 904, 907 (1987); *cf., Doe v. Department of Public Safety & Correctional Servs.*, 430 Md. 545, 62 A.3d 123 (2013). Historically, the *ex post facto* prohibition extends to any retroactively applied criminal or penal law which "changes the punishment, and inflicts greater punishment, than the law annexed to the crime when committed." *Calder v. Bull*, 3 U.S. 386, 1 L. Ed. 648 (1798).

"The Ex Post Facto Clause is a limitation upon the powers of the Legislature ... and does not of its own force apply to the Judicial Branch of government." *Marks v. United States*, 430 U.S. 188, 191, 97 S. Ct. 990, 992 (1977). The Clause does not reach erroneous decisions by the courts. *Frank v. Mangum*, 237 U.S. 309, 344, 35 S. Ct. 582, 594 (1915).

But, the Clause does reach "every form in which the legislative power of a state is exerted" including "a regulation or order of some other instrumentality of the state exercising legislative authority." *Ross v. Oregon*, 227 U.S. 150, 163, 33 S. Ct. 220, 223 (1913); *Lomax v. Warden, Maryland Correctional Training Center*, 356 Md. 569, 576, 741 A.2d 476, 480 (1999).

Here, the 2010 legislation does not operate to place appellant under COMET supervision. There is no term of lifetime supervision that is part of the October 22, 2015 probation order. COMET supervision expires (unless the order is earlier modified by the court) when the five-year probationary period expires. The legal authority for the COMET supervision is the probation order and not the 2010 statute. A judicial order is not an *ex post facto* law.

Turner v. State, 307 Md. 618, 516 A.2d 579 (1986), is analogous to the distinction that we draw. Turner had been placed on probation under an order that obliged him to pay court costs, but he failed so to do. He contended that his probation could not be revoked because Maryland Code (1957, 1982 Repl. Vol.), Article 38, § 4(c) provided that no person shall suffer imprisonment for failure to pay court costs. Turner, however, had not been ordered to pay costs under Article 38, § 1 authorizing a court finding a person guilty to sentence the person to the prescribed fine or penalty "and further provid[ing] that the person 'shall be liable for the costs of his prosecution[.]'" *Turner*, 307 Md. at 621, 516 A.2d at 580. Because the obligation to pay costs was imposed by the probation order, and not directly by the statute, the condition of the probation order was subject to review for an abuse of discretion.

Russell v. State, 221 Md. App. 518, 109 A.3d 1249 (2015), demonstrates that COMET probation supervision for a sexual offender can be authorized independently of applying the 2006 and 2010 legislation. In April 2010, Russell was placed on five-years' probation following conviction for certain sexual offenses at a retrial. In April 2012, he was placed on three-years' probation following conviction of sexual offense in the third degree. In February 2013, the court modified the probation order, at the request of the probation agent, to require COMET supervision. Russell claimed, *inter alia*, that the polygraph component of COMET was not authorized in his case because he was not subject to lifetime sexual offender supervision. Rejecting that contention, we said:

"Simply put, nothing about the 2006 and 2010 legislation relied upon by Russell affects the trial court's authority to impose conditions of probation in any manner. ... We find illogical any reading of this statute that would allow these conditions to be imposed during lifetime sexual offender supervision, but disallow these conditions to be imposed during the limited duration of one's probation."

Id. at 543, 109 A.3d at 1264.

Appellant Bright is legally required to be supervised under COMET by virtue of a judicial order which is not a legislative act.

II

In this case, the sentencing court in its probation order, jointly requested by the parties, took advantage of a supervision program that the Legislature financed after Bright had committed the crimes which he acknowledged having committed. Even if the provision in the order makes the order a law, it is not an *ex post facto* law because the provision does not effect a change in a court's power to impose conditions of probation that

are "reasonable and have a rational connection to the offenses." *Meyer v. State*, 445 Md. 648, 680, 128 A.3d 147, 166 (2015).³

For a retroactive application of law to violate the *ex post facto* prohibition, it must actually *change* – and particularly, for the worse – the consequences of one's prior criminal conduct from what they could have been at the time of the offense. *See Calder v. Bull*, 3 U.S. at 391, 1 L. Ed. 648 ("Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited."); *Anderson v. Department of Health & Mental Hygiene*, 310 Md. 217, 226, 528 A.2d 904, 909 (1987) ("[N]ot every law passed after the commission of an offense, which changes the consequences of that offense, is barred by the *ex post facto* prohibition."); *Long v. Maryland State Dep't of Public Safety & Correctional Servs.*, 230 Md. App. 1, 20, 146 A.3d 546, 558 (2016) ("[W]e apply [the intent-effects test] only to the aspects of the amendments to the [Maryland Sex Offender Registration] Act that are different from the

³Bright, equating the challenged condition of probation with the 2006 and 2010 legislation, argues that we should determine whether the condition is an *ex post facto* law by applying the "disadvantage" test espoused by the plurality decision in *Doe v. Department of Public Safety & Correctional Servs.*, 430 Md. 535, 62 A.3d 123 (2013). We have since held, however, that because the intent-effects test was "the position taken by those Members [of the Court] who concurred in the judgment on the narrowest grounds," *In Re: Nick H.*, 224 Md. App. 668, 686, 123 A.3d 229, 239 (2015) (quoting *Wilkerson v. State*, 420 Md. 573, 594, 24 A.3d 703, 715 (2011)), it remains the proper test to be applied. *Id.* at 686, 123 A.3d at 239. *See also Long v. Maryland Dep't of Public Safety & Correctional Servs.*, 230 Md. App. 1, 13, 146 A.3d 546, 553 (2016) ("Until our recent decision in the case of *In Re: Nick H.*, there was confusion in Maryland as to what test should be used[.]").

We do not reach the "disadvantage/intent-effects" issue because the probation condition here is not a law and effects no change to the *ex post facto* law analysis.

registration requirements that existed at the time of appellant's criminal acts."). Looking then to the state of the Law in 1976 is a critical step.

Although the COMET program did not exist at that time, Maryland's probation system – along with its attendant system of supervision – most certainly did exist. *See* H.B. Mutter, *Probation in the Criminal Court of Baltimore City*, 17 Md. L. Rev. 309, 310 (1957) (Observing that Maryland established its state-wide probation program in 1894, through Chapter 402 of the Acts of that year). Probation, moreover, has long been considered "an act of grace" which may be conditional:

"[W]e do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as [the legislature] may impose."

Scott v. State, 238 Md. 265, 273, 208 A.2d 575, 579 (1965) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S. Ct. 818, 819 (1935)); *Smith v. State*, 306 Md. 1, 6, 506 A.2d 1165, 1167-68 (1986) ("Probation is a matter of grace which is in effect a bargain made by the people with the malefactor that he may be free so long as he conducts himself in a manner consonant with established communal standards and the safety of society.").

As to what conditions of probation could have been imposed upon Bright at the time of his offense, Maryland Code (1957, 1976 Repl. Vol), Article 27, § 641A, provided as follows:

"Upon entering a judgment of conviction, the court having jurisdiction, may suspend the imposition or execution of sentence and place

the defendant on probation *upon such terms and conditions as the courts deem proper.*"⁴

(Emphasis added).

A "proper" term and condition for purposes of § 641A was any term and condition which was "clear, definite, and capable of being properly comprehended," *Watson v. State*, 17 Md. App. 263, 274, 301 A.2d 26, 31-32 (1973), was "reasonable," *id.*, and had "a rational basis." *Id.* So long as those basic requirements were satisfied, the universe of potential terms and conditions was limited only by budget restraints. The same is true today.

Returning to the issue at hand, if we measure the supervisory or reporting conditions that may potentially be required of Bright as part of the COMET program against the judicial discretion to formulate conditions under the law prevailing at the time of Bright's offense, the result is, conceptually a complete overlap. It may well be that some of the supervisory tools now available to a COMET team were not known or were financially unavailable for inclusion in a probation order at the time of Bright's offenses. But these practical limitations were not legal limitations on the power of a court to impose conditions of probation at the time of Bright's offenses.

For his part, Bright does not direct us to any particular provision of COMET supervision which legally could not have been imposed at the time of his offense. In his

⁴The current statute is set forth at CP § 6-221, in largely the same terms:

"On entering a judgment of conviction, the court may suspend the imposition or execution of sentence and place the defendant on probation on the conditions that the court considers proper."

brief, Bright asserts that the COMET program "changes the consequences of his having committed an offense," and "changed [his] situation to his disadvantage," but fails to go into any specifics. At most, Bright claims that the "numerous impositions" of the COMET program are simply *too* numerous:

"[The COMET Program] provides for numerous impositions on a subject's life, including polygraph testing, intensive supervision, electronic monitoring, and computer monitoring. In light of the disadvantages and restrictions it imposes upon liberty, the numerous impositions provided for under COMET make the program punitive."

Appellant's Brief at 7 (citation omitted).

A term of supervised probation will, however, inherently involve a number of "impositions" and "restrictions." That is by design. When the predicate convictions underlying the term of probation include exceptionally violent sex offenses, it may reasonably be expected that the number of impositions and restrictions will be increased, and lawfully so. By way of illustration, at around the time of Bright's offenses the Maryland Department of Parole and Probation provided for three levels of supervised probation: intensive (maximum supervision), stand-by (medium supervision), and honors (minimum supervision). R.C. Little, Comment, *Rights of the Maryland Probationer: A Primer for the Practitioner*, 11 U. Balt. L. Rev. 272, 282-83 (1982). On the basis of his first-degree rape conviction, Bright would have been subject to the maximum level of supervision available.

"Depending on the seriousness of the offense, the probationer's prior record, and any psychological imbalances, the probationer will be assigned to one of three categories of supervision: intensive (maximum supervision), stand-by (medium supervision), and honors (minimum supervision). The

probationer's reporting requirements will vary depending upon the category of supervision assigned.

"The intensive category is reserved for those offenders convicted of murder, rape, robbery, arson, and serious narcotic offenses. Persons with psychological or emotional imbalances are also placed in the intensive category. A person placed in this category will be required to meet with his agent at least twice each month, and the agent will be required to visit the probationer's home at least once each month for the purpose of conversing with either the probationer or a family member. Verification of employment and attendance at prescribed counseling programs is also required on a monthly basis. Finally, in order to determine if the probationer has committed any new offenses, a record check must be performed once every three months."

Id. (emphasis added; footnotes omitted) (referencing Division of Parole and Probation, Md. Dep't of Public Safety and Correctional Services, Community Supervision Program Guide (1980)). The fact that the COMET program "provides for numerous impositions on a subject's life" in no way sets it apart from what Bright could have faced at the time of his offense. Impositions and restrictions are part and parcel to supervised probation.

Bright has failed to demonstrate how COMET supervision, as it has been applied to him, changes in any way the consequences of his criminal conduct from what they could have been at the time of his offense, much less how COMET supervision effects a change for the worse. Without such a demonstration, retroactive application of the law by itself is insufficient to implicate the *ex post facto* prohibition.

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY
AFFIRMED.**

**COSTS TO BE PAID BY THE
APPELLANT.**