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McDonald and Watts, JJ., concur and dissent.
Hotten, J., dissents.

https://mdcourts.gov/data/opinions/coa/2022/24a21.pdf

ADMINISTRATIVE LAW AND PROCEDURE – COLLATERAL ESTOPPEL – APPLICABILITY AND RECORD EVIDENCE

Facts:

In 2004, Arthur Becker, Nancy Miller, and Gaylord Brooks Realty (collectively "Becker") sought approval from Baltimore County to construct twenty single-family dwellings on a one-hundred-acre tract of land ("2004 Development Plan"). Deputy Zoning Commissioner John Murphy ("Commissioner Murphy") held a hearing on the 2004 Development Plan and ultimately denied approval of the "northern pod" due to traffic safety concerns with the intersection of Falls Road and the design of a public road to access the development.

Approximately ten years later, Becker submitted revisions to the 2004 Development Plan to address the prior denial of the northern pod's development ("2016 Development Plan"). Due to restructuring of County government, Administrative Law Judge John Beverungen ("ALJ") presided over hearings on this matter, instead of a Deputy Zoning Commissioner. The only relevant change from the 2004 Development Plan to the 2016 Development Plan was a reduction in the number of lots from ten to eight. Accordingly, the ALJ concluded that no substantial changes existed between the 2004 Development Plan and the 2016 Development Plan, and therefore the doctrine of collateral estoppel barred approval of the 2016 Development Plan.

Becker submitted a modification to the 2016 Development Plan in 2018 ("2018 Development Plan"). The 2018 Development Plan altered the 2016 Development Plan in two principal ways—(1) reducing the number of lots to be developed to five and (2) redesigning the access to the development as a private driveway instead of a public road. The ALJ determined that because substantial changes existed between the 2004 Development Plan and the 2018

Development Plan, the doctrine of collateral estoppel did not bar his consideration of the 2018 Development Plan. The ALJ further concluded that the changes in the 2018 Development Plan adequately addressed the traffic safety concerns of the intersection at Falls Road and the private driveway to the development, thus permitting approval of the 2018 Development Plan.

The Falls Road Community Association ("Community Association") opposed the approval of the 2018 Development Plan and appealed the ALJ's decision to the Board of Appeals of Baltimore County ("Board"), which reversed the ALJ's approval. Becker then noted an appeal to the Circuit Court for Baltimore County, which reversed the Board's decision and effectively reinstated the ALJ's approval. The Community Association then sought review from the Court of Special Appeals, which reversed the decision of the circuit court in an unreported opinion. Becker filed a petition for writ of *certiorari* with the Court of Appeals, which the Court granted on August 25, 2021. Becker presented the Court with one question that the Court rephrased as whether the Board erred in reversing the ALJ's determination that substantial changes existed between the 2004 Development Plan and the 2018 Development Plan, and therefore the doctrine of collateral estoppel did not bar approval of the 2018 Development Plan.

Held: Reversed.

The Court of Appeals held that the Board erred in reversing the ALJ's conclusion that collateral estoppel did not bar the approval of the 2018 Development Plan because the record contained competent, material, and substantial evidence that established material changes between the 2004 Development Plan and the 2018 Development Plan.

In its analysis, the Court of Appeals emphasized that in reviewing a decision of an administrative agency, the Court does not review the decisions of the circuit court or of the Court of Special Appeals, and therefore looks directly to the final administrative decision. Here, the Board's decision reversing the ALJ's approval of the 2018 Development Plan was subject to judicial review.

The Court of Appeals determined, that based upon a review of the record, the Board did not afford the ALJ's findings of fact sufficient deference. The ALJ recognized that the reduction in the number of lots and the designation of the access road as a private driveway were two conditions that Commissioner Murphy had specifically identified in deeming the intersection with Falls Road unsafe and denying approval of the 2004 Development Plan. The record sufficiently demonstrated that the ALJ's determination that substantial changes existed between the 2004 Development Plan and the 2018 Development Plan was supported by competent, material, and substantial evidence, which the ALJ carefully considered in concluding that the doctrine of collateral estoppel did not preclude his consideration of the merits of the 2018 Development Plan.

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Accordingly, the Court of Appeals held that the Board erred in concluding that collateral estoppel barred approval of the 2018 Development Plan and ultimately reversed the judgment of the Court of Special Appeals.

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Attorney Grievance Commission of Maryland v. Olekanma Arnette Ekekwe, Misc. Docket AG No. 53, September Term 2020, filed June 1, 2022. Opinion by Gould, J.

https://mdcourts.gov/data/opinions/coa/2022/53a20ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Court of Appeals disbarred lawyer who failed to adequately communicate with a client, represented a client while she was suspended from practicing law, and also made misrepresentations to the court about her status. Such conduct violated Maryland Attorneys' Rules of Professional Conduct ("MARPC") 19-301.4 (Communication), 19-303.3 (Candor Toward the Tribunal), 19-305.5 (Unauthorized Practice of Law), 19-308.1 (Bar Admission and Disciplinary Matters), 19-308.4 (Misconduct), and 19-742 (Order of Disbarment or Suspension).

Facts:

In 2002, Olekanma Arnette Ekekwe was admitted to the bar of the District of Columbia (the "D.C. bar"), where she later opened a solo law practice. In 2010, she was admitted to the Maryland bar.

In June 2019, the District of Columbia Court of Appeals suspended Ms. Ekekwe from the practice of law for three years for violating numerous rules of the District of Columbia Rules of Professional Conduct.

In July 2019, the Women's Law Center of Maryland appointed Ms. Ekekwe to represent Vini Sloan on a *pro bono* basis in connection with Ms. Sloan's complaint for custody. Ms. Sloan made several unsuccessful attempts to contact Ms. Ekekwe. It was only after Ms. Sloan asked the Women's Law Center to intervene on her behalf that Ms. Ekekwe finally responded and met with her.

In August 2019, the Attorney Grievance Commission ("AGC") filed a petition in this Court for disciplinary or remedial action against Ms. Ekekwe, seeking an interim suspension and reciprocal discipline for the misconduct found in the District of Columbia matter. As a result, on October 4, 2019, this Court entered an order temporarily suspending Ms. Ekekwe's license to practice law in Maryland.

On October 2, 2019—just two days before her temporary suspension in Maryland—Ms. Ekekwe appeared with Ms. Sloan for a settlement conference in the circuit court and participated on Ms. Sloan's behalf. The case was not resolved at the conference and was scheduled for a merits trial on January 30, 2020.

On October 10, the child's father moved for an emergency hearing. Ms. Ekekwe and Ms. Sloan agreed that Ms. Ekekwe would attend the hearing without Ms. Sloan. Ms. Ekekwe did not inform Ms. Sloan that she had been suspended from practicing law, and as planned, Ms. Ekekwe appeared and participated at the hearing on Ms. Sloan's behalf. After denying the child's father's motion, the court noted that although Ms. Ekekwe had not yet entered her appearance in writing, she was in the case as a result of her appearance at the hearing.

On November 20, 2019, this Court entered an order suspending indefinitely Ms. Ekekwe from the practice of law in Maryland, effective immediately. Nonetheless, Ms. Ekekwe continued working with Ms. Sloan, who was working on a settlement agreement with the child's father.

On the morning of January 30, 2020, before the merits trial, Ms. Sloan confirmed with Ms. Ekekwe that Ms. Ekekwe would attend the hearing on her behalf to submit the settlement agreement. When the case was called, Ms. Ekekwe was not present. The court called Ms. Sloan and informed her that Ms. Ekekwe had been suspended from practicing law, which was news to Ms. Sloan. Ms. Ekekwe arrived thereafter. The court pointedly asked Ms. Ekekwe about her involvement in the case, and in response Ms. Ekekwe knowingly and intentionally misrepresented to the court: (1) the nature of her involvement in the Sloan case; (2) that her appearance for Ms. Sloan was temporary; (3) that she was licensed to practice law in Maryland; and (4) that she did not represent Ms. Sloan following her temporary suspension on October 4, 2019, and her indefinite suspension on November 20, 2019. The court then postponed the hearing. Ms. Ekekwe never informed Ms. Sloan of the outcome of the hearing or her suspension from the Maryland bar. To Ms. Sloan's knowledge, the settlement agreement has never been filed.

After the hearing, the court referred this matter to Bar Counsel for an investigation. Bar Counsel sent letters to Ms. Ekekwe, each time asking her to explain her representation of Ms. Sloan following her temporary suspension. Ms. Ekekwe repeatedly failed to respond to Bar Counsel's letters. Ms. Ekekwe eventually sent Bar Counsel an affidavit that was untimely, and knowingly and intentionally false.

On December 1, 2020, the AGC, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against, alleging violations of various provisions of the MARPC.

A hearing was held on June 21, 2021. The hearing judge found that Bar Counsel proved by clear and convincing evidence that Ms. Ekekwe violated Rules 19-301.4 (Communication), 19-303.3 (Candor Toward the Tribunal), 19-305.5 (Unauthorized Practice of Law), 19-308.1 (Bar Admission and Disciplinary Matters), 19-308.4 (Misconduct), and 19-742 (Order of Disbarment or Suspension).

Held: Disbarred.

With one minor exception, the Court of Appeals adopted the hearing judge's findings and determined that disbarment was the appropriate sanction under the facts and circumstances of this case.

We agreed that Ms. Ekekwe violated Rule 19-301.4 by failing to: (1) respond to Ms. Sloan's attempts to contact her and responding only after the Women's Law Center intervened; (2) inform Ms. Sloan that she had been suspended from practicing law; and (3) inform Ms. Sloan about what happened on January 30, 2020. We further agreed that Ms. Ekekwe violated Rules 19-303.3, 19-305.5, and 19-308.4 by knowingly and intentionally misrepresenting to the court her Maryland licensure status and her role in representing Ms. Sloan, and that she was licensed to practice law in Maryland and that she had not received the suspension order. She also violated these Rules by continuously representing Ms. Sloan from October 4, 2019 through January 30, 2020, by giving Ms. Sloan legal advice, negotiating with opposing counsel, and representing Ms. Sloan in court. We agreed that Ms. Ekekwe violated 19.308.1(a) by falsely stating in her belatedly submitted affidavit to Bar Counsel that the order of suspension was not entered until December 31, 2019 and that she acted only as a paralegal on behalf of Ms. Sloan and by failing to respond to Bar Counsel's three letters. Additionally, we agreed that Ms. Ekekwe violated Rule 19-308.4 as a result of her: (1) violations of the other rules of professional conduct; (2) unauthorized practice of law; (3) knowing and intentional misrepresentations to the court and Bar Counsel, and her unauthorized practice of law; and (4) "conduct, [that] taken as a whole, most certainly [brought] the legal professional into disrepute." Finally, we agreed that Ms. Ekekwe's unauthorized practice of law constituted a violation of Rule 19-742(b).

The hearing judge found no mitigating factors, noting Ms. Ekekwe's failure to appear for the hearing and to submit any supporting evidence of same. The hearing judge found by clear and convincing evidence that Bar Counsel established multiple aggravating factors, including that Ms. Ekekwe had been suspended from practicing law in the District of Columbia for three years and had been indefinitely suspended from practicing law in Maryland; and that Ms. Ekekwe acted with a dishonest or selfish motive, citing her "multiple attempts to hide her suspension from the practice of law and to minimize her involvement in [the custody case]."

We disagree with the court's conclusion that Ms. Ekekwe acted with a dishonest or selfish motive. The admitted evidence does not reveal what motivated Ms. Ekekwe's misconduct. She took Ms. Sloan's case on a *pro bono* basis, ruling out a financial motive. And although it's possible she concealed the truth merely to protect her own standing and reputation, it's also possible that she genuinely believed that she could shepherd Ms. Sloan to a successful resolution of her matter without imposing on Ms. Sloan the need for replacement counsel and the inevitable delays that would follow. We have no way of knowing on this record.

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Attorney Grievance Commission of Maryland v. Deidra Nicole Proctor, Misc. Docket AG No. 1, September Term 2020, filed July 25, 2022. Opinion by Gould, J.

https://mdcourts.gov/data/opinions/coa/2022/1a20ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Court of Appeals disbarred lawyer who made intentional misrepresentations to multiple clients, failed to adequately communicate with a client, represented a client while she was not permitted to practice law, overcharged clients for fees and expenses, and also made misrepresentations to the court and Bar Counsel. Such conduct violated Maryland Attorneys' Rules of Professional Conduct 19-301.1 (Competence), 19-301.2 (Scope of Representation and Allocation of Authority Between Client and Attorney), 19-301.3 (Diligence), 19-301.4 (Communication), 19-301.5 (Fees), 19-301.16 (Declining or Terminating Representation); 19-303.3 (Candor Toward the Tribunal), 19-305.5 (Unauthorized Practice of Law), 19-308.1 (Bar Admission and Disciplinary Matters), and 19-308.4 (Misconduct).

Facts:

Ms. Proctor has been a member of the Maryland Bar since December 13, 2000. She was temporarily suspended for failing to pay her annual assessment to the Client Protection Fund but continued to practice law during her periods of suspension. She was temporarily decertified from the practice of law because she failed to submit her pro bono reporting forms and also continued to practice law while decertified.

In January 2006, Robin R. Belfast retained Ms. Proctor to represent her in connection with a discrimination suit against her former employer. Ms. Proctor failed to file the complaint. Over the next six years, Ms. Proctor not only failed to disclose that fact to Ms. Belfast, but she affirmatively misrepresented the status of the matter. After Ms. Proctor finally admitted to Ms. Belfast that there was no lawsuit pending, Ms. Proctor made further misrepresentations to her. Ms. Proctor also offered Ms. Belfast $250,000.00 to settle a potential malpractice claim arising against her but did not advise Ms. Belfast that she should seek the advice of other counsel in connection with the proposed settlement. Ms. Proctor made only sporadic payments. When Ms. Belfast stated she would contact the Attorney Grievance Commission (the "AGC"), Ms. Proctor made additional misrepresentations.

In October 2017, Antonia G. Colvin retained Ms. Proctor to represent her in her capacity as personal representative for her husband's estate (the "Estate") to defend a disallowed claim against the Estate. Ms. Proctor did not respond to discovery requests, failed to discuss discovery with Ms. Colvin, and failed to notify her when sanctions and fees were assessed against Ms. Colvin. Ultimately, the parties reached an agreement, but Ms. Proctor again failed to inform Ms. Colvin of the details, resulting in an increased settlement amount. At that point, Ms. Proctor counseled Ms. Colvin to reject the settlement because, she predicted, she could get a more

favorable result at an upcoming hearing, the nature of which she misrepresented. As a result, Ms. Colvin rejected the offer and was assessed damages for $20,000 more than the previous settlement amount. After Ms. Colvin terminated Ms. Proctor's representation, she requested a copy of her file, but Ms. Proctor never responded or provided her with a copy.

Steven W. Barrow retained Ms. Proctor in February 2018 to represent him in connection with his divorce. Ms. Proctor failed to file an answer or enter her appearance or file a motion to transfer venue, as she had stated she would do. She also failed to respond to discovery. Ms. Proctor's failures resulted in a court order precluding Mr. Barrow from introducing any exhibits at the hearing. She also made misrepresentations to Mr. Barrow and overcharged him for expenses.

Ms. Proctor was retained by Norman Ireland in connection with his divorce. She entered her appearance and filed an answer to the complaint, but did not serve a copy of the answer on Ms. Jacques-Ireland and declined to respond to her requests for a copy.

Ms. Belfast, Ms. Colvin, Mr. Barrow, and Ms. Jacques-Ireland filed complaints against Ms. Proctor with the AGC. Bar Counsel sent letters to Ms. Proctor but she failed to timely respond. When she did respond, she omitted key information and made misrepresentations.

On March 11, 2020, the AGC, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Ms. Proctor, pursuant to Maryland Rule 19-721. Ms. Proctor did not provide discovery, and as a result, she was precluded from presenting any documents at trial, and admissions that had been served on her were deemed admitted.

A hearing was held on September 20, 2021. On November 4, 2021, the hearing judge issued Findings of Fact and Conclusions of Law, finding by clear and convincing evidence that Ms. Proctor violated MARPC 1.1 (Competence), 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Attorney), 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), 3.3 (Candor Towards the Tribunal), 5.5(a) and (b) (Unauthorized Practice of Law), and 8.1(a) and (b) (Bar Admission and Disciplinary Matters), and 8.4 (a), (b), and (d) (Misconduct).

Oral arguments were held before this Court on March 8, 2022. By Per Curiam Order issued March 9, 2022, this Court disbarred Ms. Proctor. *Attorney Grievance Comm'n v. Proctor*, 477 Md. 631 (2022).

Held:

Pursuant to Maryland Rule 19-728(b), Ms. Proctor filed five broadly-worded exceptions to the hearing judge's findings. We found that her exceptions had no merit and were unsupported.

We found that all of the hearing judge's findings were supported by clear and convincing evidence. The facts demonstrated that Ms. Proctor provided incompetent representation, repeatedly failed to pursue her clients' claims, failed to adequately communicate with her clients

about the status of their prospective cases, failed to inform her clients of the adverse developments in their cases due to her errors and omissions, collected unreasonable fees and costs, failed to provide her clients with copies of their files, failed to respond to their requests for those files in any manner, made misrepresentations, failed to disclose pertinent information, and failed to respond to Bar Counsel.

Ms. Proctor did not offer any mitigating factors and none were found. We agreed with the hearing judge that Bar Counsel proved eight aggravating factors by clear and convincing evidence: a dishonest or selfish motive evidenced by her misrepresentations of the status of cases; a pattern of misconduct, evidenced by her repeated failings to file pleadings, motions, and discovery, and her failure to inform her clients of these shortcomings; that she committed numerous violations while representing her clients and during Bar Counsel's investigation; that she engaged in bad faith obstruction of the disciplinary process by intentionally making false statements to Bar Counsel and refusing to comply with the lawful requests for information regarding the complaints filed against her; that she made knowingly false statements and submitted false evidence; that she has not acknowledged the wrongful nature of her conduct; that she had approximately 22 years of experience; and that she repeatedly failed to make payments to Ms. Belfast pursuant to their settlement agreement and failed to reimburse Ms. Colvin or Mr. Barrow for the sanctions they were assessed because of her failings in their cases, and also failed to refund Mr. Barrow for any part of the unreasonable fee she collected.

We determined that the appropriate sanction for Ms. Proctor's conduct was disbarment. Disbarment was justified because Ms. Proctor engaged in conduct involving intentional dishonesty, including lying to her clients, Bar Counsel, and the tribunal. Additionally, disbarment was justified because her misconduct directly harmed her clients. Her clients lost claims and defenses due to her serial neglect, paid unreasonable fees, and were deprived of important information necessary to make informed decisions about their cases. Ms. Proctor failed to demonstrate any "compelling extenuating circumstances" to justify a sanction less than disbarment.

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Nagle & Zaller, P.C., et al. v. Jahmal E. Delegall, et al., Misc. Docket No. 6, September Term 2021, filed August 11, 2022. Opinion by Booth, J.

Watts, J. dissents.

https://mdcourts.gov/data/opinions/coa/2022/6a21m.pdf

COMMERCIAL LAW – MARYLAND CONSUMER LOAN LAW

Facts:

This case came before the Court of Appeals from the United States District Court for the District of Maryland (the "federal district court"), pursuant to the Maryland Uniform Certification of Questions of Law Act, Maryland Code, Courts and Judicial Proceedings Article § 12-601, to address the following question:

> Is a law firm that engages in debt collection activities on behalf of a client, including the preparation of a promissory note containing a confessed judgment clause and filing of a confessed judgment complaint to collect a consumer debt, subject to the provisions of the Maryland Consumer Loan Law, Md. Code, Commercial Law Article ("CL") § 12-301, *et seq*. and Md. Code, Financial Institutions Article ("FI") § 11-201, *et seq*. ("MCLL")?

The certified question arose in connection with debt collection activity undertaken by a law firm, Nagle & Zaller, P.C. ("Nagle & Zaller") on behalf of clients, who are homeowners associations seeking to recover delinquent assessments from homeowners. Nagle & Zaller drafted promissory notes with homeowners that memorialized the repayment terms of the delinquent assessments. The promissory notes included confessed judgment clauses. When the homeowners defaulted on their obligations, Nagle & Zaller filed confessed judgments against them.

In February 2018, Jahmal E. Delegall ("Delegall") and other putative class members filed a putative class action against Nagle & Zaller to challenge the above-described debt collection practices. Nagle & Zaller removed the case to the federal district court. Delegall's complaint included a count alleging that Nagle & Zaller had violated the MCLL, which regulates the consumer lending business by requiring, in part, that lenders obtain a license from the Commissioner of Financial Regulation of the Department of Labor ("Commission"). If a small consumer loan is made by a lender who is not licensed under the MCLL, the loan is void and unenforceable under CL § 12-314(b). Delegall alleged that the promissory notes including confessed judgment clauses drafted by Nagle & Zaller were "loans" and that Nagle & Zaller was a "lender" under the definitions of the MCLL, which required them to obtain a license. Because Nagle & Zaller were not licensed under the MCLL, Delegall argued that the promissory notes were void and unenforceable according to CL § 12-314.

Nagle & Zaller filed a motion to dismiss, arguing that the MCLL does not apply to the debt collection activities alleged in the complaint. Before ruling on the motion, the federal district court entered an order certifying a question of law to the Court of Appeals.

Held:

The Court of Appeals answered "no" to the certified question. The Court held that a law firm that engages in debt collection activities on behalf of a client, including the preparation of a promissory note containing a confessed judgment clause and the filing of a confessed judgment complaint to collect a consumer debt, is not subject to the MCLL because it is not "engaged in the business of making loans."

The Court explained that the MCLL clearly envisions that only persons who are licensed by the Commission may engage in the business of consumer lending. See CL § 12-302. The MCLL does not define what it means to be "in the business of making loans." The Court reviewed the legislative history of the MCLL and determined that the Legislature's clear intent was to curb the abuses in the consumer lending industry by regulating petty loan brokers—persons engaged in the business of consumer lending. The Court concluded that the MCLL is an industry-regulating statute that is intended to require entities or individuals "in the business of" consumer lending to obtain a license from the Commission before engaging in that activity. CL § 12-302. It applies to a more limited class of consumer transactions than the Maryland Consumer Protection Act, CL § 13-101, *et seq*.—which covers a broad range of conduct that may be considered unfair or deceptive. In other words, the applicability of the MCLL depends on whether the person lending money is in the industry of consumer lending that the General Assembly intended to regulate.

The Court concluded that the MCLL, by its plain language, applies to persons "in the business" of making consumer loans, and is intended to regulate the consumer lending industry, not law firms engaged in debt collection activity.

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Kenyatta M. Smith v. State of Maryland, No. 26, September Term 2021, filed August 15, 2022. Opinion by Getty, C.J.

https://www.courts.state.md.us/data/opinions/coa/2022/26a21.pdf

PETITION FOR WRIT OF ERROR *CORAM NOBIS* – QUALIFICATIONS FOR RELIEF – DISCRETION OF THE *CORAM NOBIS* COURT

Facts:

In 2002, the Circuit Court for Baltimore County accepted a guilty plea from Kenyatta M. Smith ("Ms. Smith") to one count of forgery and two counts of fraud/identity theft. As a result of these convictions, Ms. Smith is barred from receiving a mortgage loan originator's license pursuant to Maryland Code (1980, 2020 Repl. Vol., 2021 Supp.) Financial Institutions Article ("FI") § 11-605. In pertinent part, FI § 11-605 provides:

> (a) The Commissioner may not issue a mortgage loan originator license unless the Commissioner makes, at a minimum, the following findings:
>
> * * *
>
> (2) The applicant has not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court:
>
> (i) During the 7-year period immediately preceding the date of the application for licensing; or
>
> (ii) At any time preceding the date of application, if the felony involved an act of fraud, dishonesty, a breach of trust, or money laundering;

Counsel for Ms. Smith filed a petition for writ of error *coram nobis* with the Circuit Court for Baltimore County, requesting that the circuit court vacate Ms. Smith's forgery and fraud/identity theft convictions. After a series of circuit court rulings, appeals to the Court of Special Appeals, and remands back to the circuit court, the Circuit Court for Baltimore County ultimately denied Ms. Smith's petition for writ of error *coram nobis*. The circuit court concluded that Ms. Smith satisfied the qualifications the Court of Appeals established in *Skok v. State*, 361 Md. 52 (2000) necessary to receive a writ of error *coram nobis* but did not establish that the matter presented circumstances compelling this extraordinary remedy to achieve justice. The Court of Special Appeals affirmed the judgment of the circuit court and Ms. Smith filed a petition for writ of *certiorari* with the Court of Appeals, which the Court granted on August 25, 2021. Ms. Smith presented the Court with two questions, which the Court consolidated and restated as to whether the circuit court abused its discretion in denying Ms. Smith's petition for writ of error *coram nobis*.

Held: Affirmed.

The Court of Appeals held that the circuit court did not abuse its discretion in denying Ms. Smith's petition for writ of error *coram nobis*, as she had satisfied the *Skok* qualifications, but did not establish that the matter presented circumstances compelling the extraordinary remedy of a writ of error *coram nobis* to achieve justice.

The Court emphasized that satisfaction of the *Skok* qualifications—(1) "the grounds for challenging the criminal conviction must be of a constitutional, jurisdictional, or fundamental character[;]" (2) "the burden of proof is on the . . . petitioner[;]" (3) the petitioner "must be suffering or facing significant collateral consequences from the conviction[;]" (4) the "[b]asic principles of waiver are applicable to issues raised in [*coram nobis*] proceedings[;]" and (5) "one is not entitled to challenge a criminal conviction by a [*coram nobis*] proceeding if another statutory or common law remedy is then available"—is necessary to receive a writ of error coram nobis. However, satisfaction of the *Skok* qualifications does not result in an automatic issuance of a writ of error *coram nobis*. In addition to reviewing the *Skok* qualifications, a *coram nobis* court also has the discretion to determine whether the matter presents "circumstances compelling such action to achieve justice." If the *coram nobis* court determines that this standard is not satisfied, it may reject the petition for writ of error *coram nobis*.

Here, the circuit court found that Ms. Smith satisfied the *Skok* qualifications but concluded that the matter did not present "circumstances compelling such action to achieve justice." The circuit court reviewed the legislative purpose of FI § 11 605, which reflects a federal mandate of prohibiting individuals with felony convictions involving an act of fraud, dishonesty, a breach of trust, or money laundering from obtaining a mortgage loan originator's license, in reaching this conclusion.

The Court of Appeals held that the circuit court appropriately exercised its discretion in reviewing the legislative purpose of FI § 11-605 because granting Ms. Smith's petition for writ of error *coram nobis* would effectively circumvent the federally mandated prohibition against Ms. Smith receiving a mortgage loan originator's license. Therefore, the circuit court did not abuse its discretion in denying Ms. Smith's petition for writ of error *coram nobis*. The circuit court appropriately exercised its discretion in considering the *Skok* qualifications, examining the legislative purpose of FI § 11-605, and ultimately denying Ms. Smith's petition for writ of error *coram nobis*.

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Anthony J. Richardson v. State of Maryland, No. 46, September Term 2021, filed August 29, 2022. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2022/46a21.pdf

CONSTITUTIONAL LAW – FOURTH AMENDMENT – ABANDONMENT

CONSTITUTIONAL LAW – FOURTH AMENDMENT – PARTICULARITY – CELL PHONE SEARCH WARRANT

CONSTITUTIONAL LAW – FOURTH AMENDMENT – GOOD FAITH EXCEPTION

Facts:

On September 28, 2018, a large fight broke out behind Crossland High School in Temple Hills, Maryland. A school resource officer responded to a call about the fight. When he arrived on the scene, the officer saw approximately 30 students engaged in the melee, including a young man later identified as Petitioner Anthony J. Richardson. The officer ended the fisticuffs in which Richardson specifically was involved. Then, as Richardson got up from the ground, a backpack strapped across his body fell to the ground. Richardson and the officer reached for the backpack at the same time, but it was the officer who picked it up. After the officer picked up the bag, Richardson immediately fled the scene at "full speed."

A short time later, the officer opened the backpack, and saw a handgun, as well as Richardson's school identification card, three cell phones, and cash, among other items.

One of the cell phones in Richardson's backpack was a Rose Gold iPhone 8+ that subsequently was determined to have been stolen in an armed robbery in District Heights, Maryland, on September 25, 2018. The victim of that robbery had arranged to buy a PlayStation 4 from a seller on the mobile marketplace application "letgo," and when he arrived at a meeting point to complete the purchase, two men (one of whom was masked) robbed him of money and his iPhone. The victim reported the robbery to police, and gave police the letgo account information for the person who had agreed to sell him the PlayStation 4.

One of the other phones in Richardson's backpack was a T-Mobile Space Gray iPhone SE ("T-Mobile iPhone SE"). Police sent a message to the letgo account that the purported seller of the PlayStation 4 had used to communicate with the victim of the robbery. The T-Mobile iPhone SE then produced an alert that it had received a message via the letgo application. A Prince George's County police officer subsequently applied for a warrant to search the T-Mobile iPhone SE. In the section of the officer's supporting affidavit titled "PROBABLE CAUSE (FACTUAL BASIS)," the officer included detailed information about the armed robbery in District Heights. The officer also provided an account of the fight at Crossland involving Richardson, as well as

the school resource officer's recovery of the backpack and the handgun and cell phones that were in it.

A Judge of the Circuit Court for Prince George's County signed a search warrant for T-Mobile iPhone SE. The warrant authorized the officers to seize:

> All information, text messages, emails, phone calls (incoming and outgoing), pictures, videos, cellular site locations for phone calls, data and/or applications, geo-tagging metadata, contacts, emails, voicemails, oral and/or written communication and any other data stored or maintained inside of T Mobile Space Gray iPhone SE IMEI: 356600080434043.

The search of the T-Mobile iPhone SE revealed text messages between Richardson and his coconspirator in the robbery discussing and planning robberies through use of the letgo app. Police extracted approximately 6,000 pages of material from the T-Mobile iPhone SE.

After he was indicted on robbery, firearms, and related charges, Richardson moved to suppress evidence discovered in the warrantless search of the backpack and in the warranted search of the T-Mobile iPhone SE. The circuit court denied his motion. Richardson subsequently entered a conditional guilty plea to conspiracy to commit robbery and wearing, carrying, and transporting a handgun, preserving his right to appeal the circuit court's denial of his suppression motion. The Court of Special Appeals affirmed the circuit court's denial of Richardson's motion to suppress.

Held: Affirmed.

The Court of Appeals held that Richardson abandoned his backpack; therefore, the school resource officer did not need to obtain a warrant before searching it. The objective facts indicate that Richardson intended to relinquish his privacy interest in the backpack when he fled the scene. After the officer picked up the backpack, Richardson did not say or do anything else to suggest that he intended to return to the scene and retrieve the backpack at a later time. Rather, as soon as he saw that the officer had the backpack, Richardson ran off at "full speed." He knew he had not left the backpack in a secure location or in the care of a person who understood that Richardson intended to return for it later. At that point, Richardson reasonably understood that someone would look through the backpack, if for no other reason than to try to determine to whom it and its contents belonged.

The Court of Appeals held that the warrant to search the T-Mobile iPhone SE violated the Fourth Amendment's requirement that a warrant describe with particularity "the place to be searched, and the persons or things to be seized." The Court discussed the efforts that courts around the country have made to comply with the Fourth Amendment's particularity requirement in the context of cell phone search warrants. The limitations that such courts have imposed on the searching agents' discretion have varied depending on the facts and circumstances of the specific cases before the issuing judges. They have included requiring search protocols, limiting the search to specific areas or content in a cell phone, or including temporal restrictions.

The Court further observed that numerous courts have held that search warrants that use overbroad and/or "catchall" language effectively permitting the searching officers to seize all data on a cell phone or other electronic devices are invalid. The Court of Appeals agreed that, in general, such warrants fail to comply with the particularity requirement. The exception to this rule is for a small subset of cases, most notably child pornography and financial crimes, as experience has shown that some perpetrators of those crimes purposely mislabel electronic files or hide evidence in unusual places; thus, a search warrant authorizing a full forensic analysis of a cell phone can be appropriate when investigating one of these crimes. The Court stated that it envisions this exception as applying rarely, however, and with respect to most cell phone search warrants, given the privacy interests at stake, the particularity requirement is not satisfied by authorizing officers to search for any and all items that are evidence of a particular crime or crimes.

The Court of Appeals opined that there is no "one size fits all" solution for ensuring particularity in cell phone search warrants. In submitting and ruling upon every application for a cell phone search warrant, the affiant and the issuing judge must think about how to effectively limit the discretion of the searching officers so as not to intrude on the phone owner's privacy interests any more than reasonably necessary to locate the evidence for which there is probable cause to search. The affiant, in drafting the proposed warrant, and the issuing judge, in deciding what the warrant authorizes and requires, have a number of tools at their disposal. Ultimately, the key point is that a search warrant for a cell phone must be specific enough so that the officers will only search for the items that are related to the probable cause that justifies the search in the first place.

The Court held that the search warrant that authorized search of Richardson's cell phone for "all information" and "any other data stored or maintained inside of" the phone did not comply with the Fourth Amendment's particularity requirement. The Court concluded that the search warrant incorporated the affiant's supporting affidavit. However, the incorporation of the affidavit did not render the warrant valid in this case, because the affidavit also included catchall language that sought permission to search everything on the cell phone. While reasonable minds may differ at times on whether a warrant is sufficiently particular, one thing is clear: it is not reasonable for an issuing judge to approve a warrant that authorizes police officers to search everything on a cell phone with no limits on the agents' discretion whatsoever. Because that is what the search warrant did in this case, it violated the particularity requirement of the Fourth Amendment.

Finally, the Court of Appeals held that the good faith exception applied, as officers executing the warrant acted reasonably in relying on the warrant's validity. The information in the affidavit, which was incorporated in the warrant, provided the executing officers with detailed information about the robbery under investigation, including the suspects' use of the letgo app. Although the Court read the affidavit as seeking authorization to search for everything on the phone, an officer reading the affidavit reasonably could have interpreted it as limiting the search for evidence of the robbery. Further, until deciding this case, the Court had not analyzed whether a cell phone search warrant that allows officers to search an entire phone for evidence of a particular crime satisfies the particularity requirement. The Court therefore held that the warrant – as

supplemented by the incorporated affidavit – was not so facially deficient that the executing officers acted unreasonably in relying on it.

In the Matter of the 2022 Legislative Districting of the State, Misc. Nos. 21, 24, 25, 26 & 27, September Term 2021, filed August 31, 2022. Opinion by McDonald, J.

Getty, C.J., and Biran and Gould, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2022/21a21mo.pdf

CONSTITUTIONAL LAW – REDISTRICTING OF GENERAL ASSEMBLY – ROLE OF THE COURT – BURDEN OF PROOF – DISTRICTING CRITERIA – LEGISLATIVE PRIVILEGE

Facts:

The Maryland Constitution requires that the boundaries of the State's legislative districts be adjusted after each decennial national census. Those adjustments are necessary to ensure that each district remains reasonably equal in population following any population shifts that have occurred in the State since the previous census. Any changes to the legislative districts to account for population shifts must be made with an eye on other State and federal Constitutional requirements concerning districting: districts must have substantially equal population, may not be the result of racial or ethnic discrimination, and in geographical terms must be compact and contiguous in shape with "due regard" given to natural and political subdivision boundaries.

Pursuant to the process specified by the State Constitution, the Governor and General Assembly each developed a proposed redistricting plan based on the census data that had been adjusted in accordance with Maryland law. The General Assembly adopted its own plan by joint resolution.

The State Constitution provides for review of a redistricting plan by the Court of Appeals upon challenge by a registered voter. In accordance with a scheduling order issued by the Court, four petitions were filed challenging the redistricting plan. The Court referred the petitions to a Special Magistrate to conduct an evidentiary hearing and to provide findings of fact and recommended conclusions of law.

The Special Magistrate conducted an evidentiary hearing on an expedited basis and submitted a report to the Court of Appeals recommending that the petitions be denied and that the redistricting plan be upheld.

Held: Redistricting plan adopted by the General Assembly upheld.

The Court held that, once a districting plan is adopted pursuant to the constitutional process and an objection is made that the plan fails to comply with the State and federal constitutional criteria, the Court's role is to determine whether the adopted plan complies, not whether a better plan could be designed.

The preeminent criterion that Article III, §4 of the Maryland Constitution sets for configuring State legislative districts is that each district have "substantially equal population." The other criteria for districting in the State Constitution – compactness, contiguity, and due regard for natural and political subdivision boundaries – yield to that command and to the proscription against racial or ethnic discrimination in the federal Voting Rights Act. In practice, the criteria can be in tension with one another. Thus, the fact that a district is oddly-shaped, as the State and many of its subdivisions are, does not by itself establish a violation of the compactness requirement. A comparison of the shape of a district in Maryland to districts in other states is not particularly enlightening, especially when no comparison is made to the districts in past Maryland plans found to be compliant.

Under the Maryland Constitution, redistricting is a legislative act. Therefore, the Court accords a presumption of validity to an adopted redistricting plan. One who challenges a plan has the burden of presenting compelling evidence of a violation of the constitutional criteria. If a challenger presents evidence satisfying that standard, the State must produce sufficient evidence of compliance with the constitutional criteria.

The Court concluded that the petitioners failed to present compelling evidence to support their claim that the redistricting plan violated the Article III, §4 constitutional criteria, primarily compactness.

The Court addressed three additional issues and found that none presented grounds for overturning the plan:

First, with respect to a challenge to the mixture of single-member and multi-member delegate subdistricts in the plan, the Court cited Article III, §3 of the Maryland Constitution, which expressly permits such a practice, concluded that the constitutional provision does not on its face violate either the Maryland or the federal Constitution, and noted that the challengers had not introduced any evidence to support their allegation that the plan mixed single-member and multi-member Delegate districts in such a way as to confer an impermissible partisan advantage.

Second, with respect to a challenge to the constitutionality of the No Representation Without Population Act, State Government Article, § 2-2A-21, under which the State assigns incarcerated individuals to their last domicile for districting purposes rather than to the county in which they are incarcerated, the Court found the law constitutional on its face, whether or not its application required that a district cross county lines in order to account for those population adjustments.

Finally, regarding a challenge to a ruling by the Special Magistrate that the doctrine of legislative privilege barred discovery into information concerning the development of the plan by a committee of the General Assembly and legislative staff, the Court held that the development of the plan was a legislative function that fell within the privilege.

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Traci Spiegel, et al. v. Board of Education of Howard County, No. 18, September Term 2021, filed August 24, 2022. Opinion by Gould, J.

https://www.courts.state.md.us/data/opinions/coa/2022/18a21.pdf

SEPARATION OF POWERS – EDUCATION

The General Assembly has the constitutional authority to establish a public school system in the manner it sees fit. That authority includes the creation, modification, and abolishment of local boards of education, as well as the right to determine the qualifications of its members and the manner and methods by which they are selected. The General Assembly exercised this authority in Md. Code Ann. (2008, 2018 Rep. Vol.), Education Article ("ED") § 3-701, which establishes the student member position of the Howard County Board of Education. Thus, the student member position is not subject to the Maryland Constitution's electoral requirements.

Facts:

One of the consequences of the Covid-19 pandemic was the reliance on remote learning for public and private schools in Maryland and elsewhere. In November and December of 2020, the Board of Education of Howard County held three separate votes on motions to resume in-person instruction. Each motion failed by a 4 to 4 stalemate vote, with the student member of the Board causing the stalemate by voting against resuming in-person instruction.

Disappointed with the Board's decision to continue with remote learning, two parents, Traci Spiegel and Kimberly Ford, personally, and on behalf of their respective minor children, filed suit against the Board in the Circuit Court for Howard County. They sought to enjoin the student member on the Board from exercising any voting power and a declaration that the statute creating the student member position on the Board violates the Maryland Constitution and Declaration of Rights.

The parties cross-moved for summary judgment. Petitioners argued that Section 3-701(f) of the Education Article of the Maryland Code (2008, 2018 Rep. Vol.) violates several provisions of the Maryland Constitution and Article 7 of the Maryland Declaration of Rights.

The Board argued that the General Assembly was permitted to structure local boards of education as it saw fit, including the creation of a student member position filled through an election by the students at the county's public schools. The Board also argued that petitioners' complaint was time-barred and failed to join necessary parties.

The circuit court held that the selection method of the student member was not subject to the Maryland Constitution's requirements for elections. The court also rejected petitioners' one-person, one-vote and general governmental powers arguments. Having resolved petitioners'

claims on the merits, the court did not reach the Board's defenses based on the timeliness of petitioners' complaint and their alleged failure to join necessary parties.

On March 26, 2021, petitioners noted an appeal to the Court of Special Appeals of Maryland, but before briefs were filed in that Court, they petitioned this Court for a writ of certiorari, which we granted. *Spiegel v. Bd. of Educ. of Howard Cnty*., 474 Md. 721, 255 A.3d 1091 (2021).

Held: Affirmed.

The qualifications for, and selection process of, the student member of the Howard County Board of Education conforms with the election and voting provisions of the Maryland Constitution and Declaration of Rights.

The General Assembly had the constitutional authority to create a student member position for the Howard County Board of Education, establish a process for the election of such member by students in the Howard County public school system, and grant such student member voting rights.

Both the plain language of the Education Article and a review of the history of boards of education in Maryland demonstrate that the election by students, including minor students, of a student member of the Howard County Board of Education is not subject to the election and voting provisions of the Maryland Constitution.

The plain text of Article VIII, Section 1, the historical context in which it was adopted, and almost a century of precedent from this Court all confirm that the General Assembly has broad discretion to control and modify the composition of local boards of education, which includes the creation and selection process of student board members. Therefore, the General Assembly acted well within such discretion when it created a student board member position on the Howard County Board of Education.

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Everett Smith v. State of Maryland, No. 61, September Term 2021, filed August 26, 2022. Opinion by Biran, J.

Gould, J., and Getty, C.J., dissent.

https://mdcourts.gov/data/opinions/coa/2022/61a21.pdf

CONSTITUTIONAL LAW – SIXTH AMENDMENT – RIGHT TO A FAIR TRIAL – INHERENT PREJUDICE

Facts:

On November 20, 2019, Everett Smith was charged in the Circuit Court for Kent County by way of a Criminal Information with first-degree assault, second-degree assault, first-degree child abuse, and related charges. These charges arose from Smith's alleged assault of his 14-year-old daughter on October 3, 2019.

Between the filing of charges and Smith's trial in October 2020, the COVID-19 pandemic came to the United States. Courtroom trials were suspended for months and only resumed with heavy safety precautions, including required masking. In addition, in May 2020, George Floyd, an African American man, was killed by a white Minneapolis police officer. Bystanders' videos of Floyd's killing spread rapidly, sparking widespread outrage against police brutality and racial injustice. This social outcry brought other recent killings of African Americans to national attention. Mass protests and civil rights demonstrations spread across the United States. The "Black Lives Matter" ("BLM") movement grew exponentially and spun off movements such as "Defund the Police." Counter-protests to BLM also appeared around the country during the summer of 2020. Pro-law enforcement demonstrations, e.g., the "Blue Lives Matter" movement launched in response to murders of NYPD officers in 2014, served as a counterpoint to the BLM and "Defund the Police" movements. Some counter-protesters to BLM and pro-police protesters adopted the "thin blue line" image and flag as symbolic of their support for law enforcement.

The "thin blue line" flag has been interpreted to convey several meanings and connotations, including showing support for law enforcement, pride in law enforcement and patriotism, as well as representing a tribute to officers who have fallen in the line of duty. However, the "thin blue line" flag also has been displayed by white supremacists and violent extremists.

Smith's trial went forward on October 14, 2020. Prior to jury selection, Smith's attorney objected to the face masks the courtroom bailiffs were wearing in the courtroom. The masks were part of the uniform required by the Sheriff of Kent County and depicted a thin blue line flag. The defense argued that the display of the thin blue line symbol was prejudicial to Smith's right to a fair trial. The trial court rejected Smith's request to require the bailiffs to wear different masks, ruling that the courtroom was a public forum, and that the bailiffs had a right under the First Amendment to display a political symbol in such a forum.

Smith was convicted of second-degree assault and second-degree child abuse by a custodian. On appeal, the Court of Special Appeals stated that the trial court was incorrect when it said that a courtroom is a public forum for purposes of the First Amendment. However, the intermediate appellate court concluded that the bailiffs' wearing of the thin blue line flag masks was not so inherently prejudicial as to deprive Smith of a fair trial, because of the many different meanings that may be attributed to the thin blue line symbol.

Held: Reversed and remanded for a new trial.

The Court of Appeals held that the thin blue line flag conveys a pro-law enforcement message that bears on the criminal justice system and, as such, it has no place in the courtroom in a criminal trial. However, not all displays of a pro-law enforcement message in the courtroom rise to the level of inherent prejudice sufficient to deprive a defendant of the right to a fair trial. In order to prevail on a claim of inherent prejudice, the defendant must: (1) have objected to the challenged practice in the trial court; (2) demonstrate, based on the record of the proceeding in the trial court, that the challenged practice was observable by the jury; and (3) establish that the challenged practice created an unacceptable risk that impermissible factors would come into play in the jury's determination of the case. If the defendant meets all of these requirements, the State may attempt to show that the challenged practice was necessary to further a compelling governmental interest.

The Court concluded that the display of the thin blue line flag in this case was inherently prejudicial because it was the bailiffs who conveyed the message, creating the impression that the court approved of the flag's meanings, and because the thin blue line symbol was particularly evocative in the immediate aftermath of the protests and counter-protests that occurred in 2020.

The Court further held that the record was sufficient to find inherent prejudice in this case. The Court was satisfied that the jury had ample opportunity to view the thin blue line flag on the faces of the bailiffs throughout the two-day trial. The trial judge was vigilant about ensuring that all present in the courtroom wore face masks, and the trial court directed the jurors' attention to the bailiff many times during the trial.

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State of Maryland v. Latoya Jordan, No. 23, September Term 2021, filed August 15, 2022. Opinion by Gould, J.

Watts and Biran, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2022/23a21.pdf

HARMLESS ERROR – FAILURE TO ASK VOIR DIRE QUESTION – RIGHT NOT TO TESTIFY

The harmless error doctrine applies to the failure to ask on voir dire questions related to the defendant's right not to testify.

HARMLESS ERROR – FAILURE TO ASK VOIR DIRE QUESTION – RIGHT NOT TO TESTIFY

The failure to ask on voir dire questions related to the defendant's right not to testify is a trial error, not a structural error.

HARMLESS ERROR – FAILURE TO ASK VOIR DIRE QUESTION – RIGHT NOT TO TESTIFY

The resultant jury verdict from the failure to ask on voir dire questions related to the defendant's right not to testify does not render the jury verdict inherently infirm from a constitutional standpoint.

HARMLESS ERROR – FAILURE TO ASK VOIR DIRE QUESTION – RIGHT NOT TO TESTIFY

Voir dire questions related to the defendant's right not to testify are tools for identifying individuals who should have been stricken for cause. The possibility that an individual was empaneled who should have been stricken for cause does not render the trial fundamentally unfair.

Facts:

Mary Alexander supervised a "Youth Works" program through which she hired youths for summer jobs. Latoya Jordan's 17-year-old niece, K.J., was one such student-employee in the 2019 summer session. The Youth Works program prohibited the use of a cell phone for personal use during working hours. When a student had difficulty complying with the cell phone policy, Ms. Alexander would enlist the involvement of the parent or guardian to facilitate an agreement with the student on cell phone usage. According to Ms. Alexander, the paperwork listed K.J.'s grandmother as her guardian. It was K.J.'s cell phone use that prompted an altercation between

Ms. Alexander and Ms. Jordan on July 12, 2019, which resulted in the charges against Ms. Jordan.

Ms. Jordan was charged with one count of second-degree assault against Ms. Alexander and a separate count of second-degree assault against Milroy Harried. At Ms. Jordan's trial, during voir dire, defense counsel requested that the court ask the venire whether they would hold Ms. Jordan's silence against her if she elected not to testify. The trial court, applying settled Maryland law, declined the request because this topic would be covered in other instructions and might have confused the jury because it was unclear whether Ms. Jordan would testify.

At trial, Ms. Alexander and Mr. Harried testified for the State. Each gave a similar account of events portraying Ms. Jordan as the aggressor. According to Ms. Alexander, after she discovered K.J. using a cell phone, she spoke to K.J.'s aunt, Ms. Jordan, after she was unable to reach K.J.'s grandmother. Ms. Jordan yelled at Ms. Alexander and then came to the school. Ms. Alexander testified that when she and Mr. Harried were meeting with another student's parents, Ms. Jordan forcefully entered the conference room, called Ms. Alexander names, and tried to hit her. Mr. Harried attempted to separate the two and sustained minor injuries as a result of being hit by Ms. Jordan. Ms. Alexander also stated that she picked up a fire extinguisher during the altercation in response to Ms. Jordan picking up a "wet floor" sign. During Mr. Harried's testimony, he corroborated Ms. Alexander's version of what occurred during the parent conference.

In Ms. Jordan's defense, K.J. testified that during the phone conversation, Ms. Alexander yelled at Ms. Jordan and told her to come to the program. Ms. Jordan came to the program to help K.J. gather her things and then decided to search for Ms. Alexander. When Ms. Jordan found Ms. Alexander, Ms. Jordan opened the door and Ms. Alexander tried to fight her. During the incident, K.J. witnessed Ms. Alexander pick up the fire extinguisher in response to Ms. Jordan grabbing the "wet floor" sign.

After this testimony, Ms. Jordan decided to testify. During her testimony, she refuted Ms. Alexander's version of events. She also admitted to picking up the "wet floor" sign, but clarified that she only grabbed the sign after Ms. Alexander picked up the fire extinguisher. Ms. Jordan denied hitting either Ms. Alexander or Mr. Harried, but never explained how Mr. Harried was injured. Ultimately, the jury convicted Ms. Jordan of assaulting Mr. Harried but found her not guilty of assaulting Ms. Alexander.

Following Ms. Jordan's trial, this Court decided *Kazadi v. State*, 467 Md. 1, 9 (2020), holding that "on request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the fundamental principles of presumption of innocence, the State's burden of proof, and the defendant's right not to testify."

Ms. Jordan appealed her conviction. In a per curiam opinion, the Court of Special Appeals determined that the trial court erred under *Kazadi* and that the error was not harmless. *Jordan v. State*, No. 2594, 2021 WL 1311194, at *1-2 (Md. Ct. Spec. App. Apr. 8, 2021).

Held: Reversed.

The Kazadi error committed here was a trial error subject to the harmless error doctrine and the error was harmless.

Our assessment of the relevant caselaw brought us to the conclusion that the error here fell on the trial error side of the ledger. There is no claim that the jury was not properly instructed on matters pertaining to Ms. Jordan's fundamental constitutional rights, or that the jury was never sworn. Thus, unlike *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993), where the jury received a deficient reasonable doubt instruction, and unlike *Harris v. State*, 406 Md. 115, 130-31 (2008), where the jury was never sworn, the jury verdict here was not inherently infirm from a constitutional standpoint. In other words, unlike in Sullivan, here there *was* an "object, so to speak, upon which harmless-error scrutiny can operate." 508 U.S. at 280 (emphasis omitted).

The error committed here can readily be assessed for its impact or influence on the jury verdict. In that regard, this case aligns with *Ramirez v. State*, 464 Md. 532 (2019). In *Ramirez*, the defendant's Sixth Amendment right to an impartial jury was at stake. Similarly here, Ms. Jordan's Fifth Amendment right against self-incrimination was at stake. In *Ramirez*, the error was the seating of a juror identified in the voir dire process as someone who should have been stricken for cause. Here, the error was depriving the defendant of a tool for identifying individuals who should be struck for cause. We know that in *Ramirez*, a juror who would have been stricken for cause made it on to the jury; here, we can only speculate whether someone who should have been stricken for cause was seated on the jury. In *Ramirez*, we determined that the actual seating of a biased juror did not automatically render the trial fundamentally unfair, and therefore we could not say that the error was structural. *Id*. at 573. Thus, here, we determine that the possibility that an individual was empaneled who should have been stricken for cause did not render Ms. Jordan's trial fundamentally unfair. This case also favorably compares to *United States v. Hasting*, 461 U.S. 499 (1983), where the Supreme Court found harmless error in the prosecution's improper comments on the defendant's silence at trial.

The court's refusal to ask the question deprived Ms. Jordan of a tool for identifying individuals who should have been stricken for cause for their unwillingness or inability to comply with the court's instruction on the defendant's right to remain silent. We examined the evidentiary record to determine if that possibility was realized in this instance.

At trial, the central issue was whether Ms. Jordan was the aggressor as alleged by the State, or whether Ms. Alexander was the aggressor as argued by the defense. It was a classic credibility contest. Ms. Jordan neither disputed that she had an altercation with Ms. Alexander nor that Mr. Harried got caught in the middle of the two. That these facts were not disputed was evident in defense counsel's opening statement, cross-examination of Ms. Alexander and Mr. Harried, direct examination of K.J. and Ms. Jordan, and closing argument.

Two witnesses testified for the State: Ms. Alexander and Mr. Harried. When the State rested, the jury had more than enough credible, unrebutted testimony to convict Ms. Jordan on both counts of assault. And the jury had heard only Ms. Alexander's side of the story. As a practical matter, therefore, Ms. Jordan was all but required to put on a defense. Although K.J. testified in her defense, it is not surprising that Ms. Jordan decided that the jury should hear her side of the story directly from her.

Having examined closely Ms. Jordan's trial testimony, we were convinced beyond a reasonable doubt that her testimony did not contribute to the guilty verdict on the charge of assaulting Mr. Harried. Defense counsel's direct examination of Ms. Jordan was focused and concise. Much of her testimony established her status as K.J.'s guardian and refuted Ms. Alexander's testimony. Ms. Jordan did not just deny Ms. Alexander's account; she painted Ms. Alexander as the aggressor, spoiling for a fight. In contrast, very little of Ms. Jordan's testimony touched upon the specific allegation that she hit Mr. Harried. On cross, the State sought only to undermine Ms. Jordan's credibility, not to affirmatively support the assault charges. It is likely that Ms. Jordan's testimony had a positive effect on the jury, as evidenced by the jury's acquittal of her on the charge of assaulting Ms. Alexander.

To find harmless error, we needed to determine beyond a reasonable doubt that Ms. Jordan's testimony did not contribute to the guilty verdict on the charge of assaulting Mr. Harried. Ms. Jordan's testimony was limited to denying the allegation that she struck Mr. Harried. And although her denial clearly did not provide the jury with reasonable doubt that she struck Mr. Harried, her testimony provided no evidence that she did assault him. At worst, therefore, the jury declined to credit her denial of hitting Mr. Harried, which is a far cry from providing evidence tending to establish her guilt. Accordingly, we found that the *Kazadi* error here was harmless.

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Daniel Jay Gross v. State of Maryland, No. 32, September Term 2021, filed August 26, 2022. Opinion by Biran, J.

Gould and McDonald, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2022/32a21.pdf

CRIMINAL LAW – HARMLESS ERROR – CUMULATIVENESS

Facts:

Petitioner, Daniel Jay Gross, was accused of sexually assaulting his adopted daughter, A.M., throughout her kindergarten year and into first grade. The abuse first came to light when A.M. was in first grade and she told one of her friends that Petitioner was "ticklish in the nuts," which the friend then passed on to her mother. The friend's mother told Petitioner's wife what A.M. had said. Subsequently, the Gross family implemented an "open door policy" in their household under which A.M. did not spend time alone with Petitioner. In addition, A.M. began to have unsupervised overnight visits at the home of her biological mother and grandmother.

In June of 2015, during one such unsupervised visit, A.M. told her grandmother, C.M., about Petitioner's alleged abuse. A.M. told C.M. that she had performed oral sex on Petitioner after their nightly prayers in her room and that he had licked "[her] legs, [her] private." C.M. then immediately called A.M.'s biological mother, J.M., into the room and had J.M. record two videos in quick succession on J.M.'s tablet in which A.M. repeated the allegations of abuse (the "June 2015 video").

Several days later, C.M. reported these allegations to law enforcement. Later that evening, a social worker conducted a videotaped interview of A.M. in which A.M. reiterated that Petitioner had made her perform oral sex on him but did not say anything about Petitioner having performed oral sex on her. A little over a week later, A.M. repeated these same allegations to a child abuse pediatrician, this time including the allegation that Petitioner had also performed oral sex on her. Police then obtained a warrant to search Petitioner's home and discovered bodily fluid on the carpet next to A.M.'s bed, which was later identified as seminal fluid and spermatozoa containing the same DNA profile as Petitioner's.

Petitioner was charged with one count of sexual abuse of a minor by a household or family member, two counts of second-degree sexual offense (fellatio), and one count of second-degree sexual offense (cunnilingus).

At trial, A.M. testified that Petitioner repeatedly made her perform oral sex on him when she was in kindergarten and first grade. When asked whether Petitioner had ever done "anything with his mouth on [her] body," A.M. responded "No."

C.M. then testified about A.M.'s disclosure of the abuse to her during the overnight visit. Over defense objection, the State then played the June 2015 video in which A.M. tearfully told C.M. about the abuse, including the allegation of cunnilingus. The trial court admitted the June 2015 video as a prior consistent statement.

The State then introduced the video recording of A.M.'s interview with the social worker, after which the pediatrician testified to what A.M. had told her regarding Petitioner's abuse. In addition, the State established that semen was discovered on the carpet next to A.M.'s bed and that the DNA profile of the contributor of the semen matched Petitioner's DNA profile.

The defense called several witnesses in its case, including an expert who opined that the semen was transferred inadvertently to the carpet next to A.M.'s bed on the bottom of a sock or other footwear. The defense also called a forensic psychologist, who viewed the June 2015 video, as well as three other earlier videos made by C.M. in February and March 2015, during which A.M. made statements about how Petitioner and his wife disciplined her and otherwise discussed her life with the Gross family. The defense expert opined that the videos C.M. made with A.M. (including the June 2015 video) were "influential" in terms of "process" and "substance."

After the defense rested, the State put on a brief rebuttal case, including expert testimony from the lead forensic scientist in the Forensic Biology Unit of the Montgomery County Police Crime Laboratory. She testified that if the defense expert's transference theory was correct, she would "expect to see more areas of fluorescence entering in that room, as opposed to one."

During closing arguments, both the State and defense counsel referenced the June 2015 video, with the defense arguing that C.M. had been coaching A.M. to make accusations against the Gross family for several months and that the June 2015 video was "the final production."

The jury convicted Petitioner on two counts of second-degree sexual offense (fellatio) and one count of sexual abuse of a minor, and acquitted him on the charge of second-degree sexual offense (cunnilingus).

The Court of Special Appeals held that the trial court erred in admitting the June 2015 video as a prior consistent statement, but concluded that the error was harmless beyond a reasonable doubt.

Held: Affirmed.

The Court of Appeals held that the standard articulated in *Dorsey v. State*, 276 Md. 638 (1976), continues to remain the lodestar for harmless error analysis in Maryland. Under this standard, "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed harmless and a reversal is mandated." There are not additional requirements that the violation be "technical in nature," that the erroneously admitted evidence be "merely cumulative," or that the State provide "other overwhelming and largely uncontroverted evidence" before an error can be deemed harmless.

The Court also reaffirmed that cumulativeness is a valid consideration in harmless error analysis. While the defense argued that it is the very nature of cumulativeness in prior consistent statements that makes the improper admission of such evidence harmful, the Court disagreed. In this case, the Court held that A.M.'s statements in the June 2015 video were cumulative of several other pieces of properly admitted evidence and testimony before the jury. Finally, reviewing the record as a whole, the Court was convinced beyond a reasonable doubt that the error in this case in no way influenced the verdict. The Court noted that the DNA evidence introduced at trial was devastating to Petitioner. Also relevant was the defense's affirmative use of the June 2015 video in its closing argument. The June 2015 video provided a tangible reference point for the defense to use in suggesting to the jury that C.M. manipulated A.M. into making false allegations against Petitioner. Finally, the jury's acquittal of Petitioner on the sexual offense count based on the allegation of cunnilingus is significant. The jury's acquittal of Petitioner on that charge reflects that the jury did its job dispassionately and was not swayed by the emotional nature of the June 2015 video. The jury considered and rejected Petitioner's theory that C.M. pressured A.M. into falsely accusing Petitioner of sexual abuse in 2015, and that A.M. persisted in advancing such false claims at trial almost four years later. As such, the Court held that the error in admitting the June 2015 video was harmless beyond a reasonable doubt.

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Robert Rainey v. State of Maryland, No. 54, September Term 2021, filed August 11, 2022. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2022/54a21.pdf

CRIMINAL LAW – JURY INSTRUCTION – DESTRUCTION OR CONCEALMENT OF EVIDENCE

CRIMINAL LAW – JURY INSTRUCTION – *THOMPSON* INFERENCES

CRIMINAL LAW – HARMLESS ERROR – JURY INSTRUCTION

Facts:

On May 2, 2017, members of the Baltimore City Police Department ("BCPD") responded to a shooting in the 800 block of North Glover Street in Baltimore City. An officer found Mr. Dartania Tibbs deceased in an alley. A nearby witness identified the shooter as Mr. Robert Rainey ("Petitioner"). The witness lived in the area and had observed Petitioner outside her home "all the time[.]" Approximately thirty minutes before the shooting, the witness observed Petitioner arguing with Mr. Tibbs over money. The witness remained outside on her steps, when she heard several loud booms and saw Petitioner "with his arm raised and the other man lying in the alley." The witness saw Petitioner look up and down the street and run off. Six days later, the witness identified Petitioner in a photo array. At the time of the shooting, Petitioner wore shoulder-length dreadlocks. Approximately a month later, the witness recognized Petitioner on the street, but with a very short, close-cropped haircut. The witness called 911, and BCPD arrested Petitioner and charged him with first-degree murder, use of a handgun in a crime of violence, and possession of a firearm after a disqualifying conviction.

During a jury trial before the Circuit Court for Baltimore City, the State requested a destruction or concealment of evidence jury instruction based on evidence that Petitioner had cut his dreadlocks between the time of the murder and the time of his arrest. Over objection from defense counsel, the circuit court gave the pattern jury instruction for destruction or concealment of evidence. The jury found Petitioner guilty of first-degree murder and related gun offenses.

Held: Affirmed.

A destruction or concealment of evidence jury instruction, like any consciousness of guilt jury instruction, requires the State to provide "some evidence" to support a chain of four inferences ("*Thompson* inferences") connecting the destruction or concealment of evidence to actual guilt. In the case at bar, the State produced eyewitness testimony and surveillance video that established the defendant wore dreadlocks at the time of the murder. The eyewitness testified that the defendant was a constant presence in the area and that the defendant shot the victim

multiple times following a dispute over money. The eyewitness saw the defendant five weeks later in the same area with close-cropped hair. The Court held that the circuit court did not abuse its discretion by giving a destruction or concealment of evidence jury instruction based on the evidence that the defendant cut off his shoulder-length dreadlocks between the time of the arrest and the time of the murder.

The Court also held that the circuit court was not required to articulate its reasoning for giving a destruction or concealment of evidence jury instruction on the record. The circuit court is presumed to know and correctly apply the law. The circuit court is also not required "to spell out in words every thought and step of logic[]" when rendering a decision. *Beales v. State*, 329 Md. 263, 273, 619 A.2d 105, 110 (1993). Upon independent review, the Court concluded that there was no indication in the case at bar that the circuit court erred in finding some evidence to satisfy the four *Thompson* inferences necessary to give the destruction or concealment of evidence jury instruction.

Assuming, *arguendo*, that the circuit court erred in giving a destruction or concealment of evidence jury instruction, the Court held that the error was harmless beyond a reasonable doubt. The evidence presented at trial, as emphasized by the State, specifically concerned whether the defendant's cutting off his dreadlocks suggested consciousness of guilt. While the circuit court in the case at bar could have tailored the destruction or concealment of evidence instruction to specifically reference the change in appearance, the jury understood that the instruction referred to the cutting of dreadlocks. The instruction appropriately cautioned the jury that they first must determine whether the defendant destroyed evidence, and only then, whether the act suggested consciousness of guilt.

Luis Felepe Huggins v. State of Maryland, No. 59, September Term 2021, filed July 7, 2022. Opinion by Gould, J.

https://mdcourts.gov/data/opinions/coa/2022/59a21.pdf

SUPPRESSION OF EVIDENCE – OBJECTION AT TRIAL

The right to appeal the denial of a motion to suppress evidence is not waived if the defendant does not object to the admission of the relevant evidence at trial. The right is not waived whether the defendant remains silent or affirmatively states there is no objection.

Facts:

Luis Felepe Huggins was indicted in the Circuit Court for Howard County on charges of possessing a regulated firearm after having been convicted of a crime of violence and other related crimes. He moved to suppress the gun and the loaded magazine that police recovered inside a closed overnight bag while conducting a warrantless search of Mr. Huggins's hotel room. After an evidentiary hearing, the hearing judge denied the motion to suppress.

The State filed a superseding indictment under a new case number to add additional charges. Mr. Huggins renewed his motion to suppress in the new case. The motion was heard by a different judge. At the hearing on the motion, defense counsel explained that Mr. Huggins renewed the motion under the new case number only to ensure that the denial of the motion to suppress was preserved for appeal. The court suggested that defense counsel scan the transcript from the prior motions hearing and have it incorporated into the record. Defense counsel agreed to do so but emphasized that Mr. Huggins was preserving his objections from the original motion. The State agreed. The court directly addressed Mr. Huggins to make sure he understood what was happening. The transcript and all exhibits from the motion filed in the first case were admitted and then incorporated into the record. No additional argument was heard.

During Mr. Huggins's subsequent trial, the police officer testified about his search of the overnight bag, and the items found therein—the handgun, pictures of the handgun, and the gun's magazine—were admitted into evidence. As each was offered into evidence, defense counsel stated: "No objection."

Mr. Huggins was convicted of first-degree assault, use of a firearm during the commission of a crime of violence, possession of a regulated firearm after having been convicted of a crime of violence, and possession of ammunition after having been prohibited from possessing a regulated firearm.

Mr. Huggins appealed, arguing in part that the circuit court erred in denying his motion to suppress. In an unreported opinion, the Court of Special Appeals *sua sponte* considered whether Mr. Huggins had waived this argument, and concluded that Mr. Huggins had waived his right to

appeal the denial of his suppression motion. The Honorable Daniel A. Friedman filed a concurring opinion. Concluding he was bound by prior decisions, he wrote separately to emphasize his belief that Mr. "Huggins has a strong claim that the warrantless search of his closed bag found in his hotel room was unconstitutional[,]" which could not be raised until post-conviction. Judge Friedman opined that this inequitable result "ought to be rectified by modifying the Rule or reevaluating" precedent.

Held: Vacated and remanded.

Mr. Huggins did not waive his right to appeal the suppression ruling. The judgment of the Court of Special Appeals was vacated and the case was remanded to that Court for consideration of Mr. Huggins' appeal on the merits.

Rule 4-252 governs motions to exclude evidence obtained by unlawful means, including, as relevant here, unlawful search and seizure. A defendant claiming an unlawful search and seizure must file a pretrial motion in conformity with this Rule; the failure to do so results in a waiver of the issue. If the court grants the motion to suppress, the State has the right to take an immediate appeal. A denial of the motion to suppress "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." The denial is also reviewable "on appeal of a conviction."

Rule 4-252 applies to issues that do not lend themselves to quick, on-the-spot rulings in the presence of the jury and is instead designed to facilitate fair consideration and orderly resolution of suppression motions before trial.

Objections to the admission of evidence and any other rulings at trial are governed by a different rule, Rule 4-323. Under this Rule, objections to the admission of evidence at trial must be made when the evidence is offered for admission. Unless the court or the other party requests an explanation, saying "objection" is enough to preserve the issue for appeal, and the court must make a prompt ruling. The failure to timely object results in a waiver.

Our analysis of these two Rules revealed that they addressed different and mutually exclusive grounds for objecting: Rule 4-252(a) applies to motions that must be filed and resolved pretrial, including claims of unlawful search and seizure, and Rule 4-323(a) applies to any other grounds for objecting to the admission of such evidence. Because objections based on unlawful search and seizure are governed by Rule 4-252(a) and not Rule 4-323(a), the waiver mandated under the latter for failing to object—that is, remaining silent—does not apply.

Waiver means the "knowing and intelligent relinquishment" of a right, which here would be Mr. Huggins' right to appellate review of the unlawful search and seizure issue. The determination whether a waiver exists depends on the specific context of each case.

The trial court knows that under Rule 4-252, a claim of unlawful search and seizure has either been adjudicated or waived before the case gets to trial. The court also understands that to raise

the issue of unlawful search and seizure at trial, defense counsel must do one of two things, depending on whether there had been a prior Rule 4-252 motion to suppress. If no prior motion had been filed, the defendant would have to move for relief from the timing and procedural requirements of Rule 4-252(a) on a showing of "good cause[.]" But, if a prior Rule 4-252 motion had been filed, the defendant would have to make a motion for a supplemental or de novo hearing under Rule 4-252(h)(2)(C). In either case, the court understands that although the single word "objection" ordinarily suffices to preserve the issue for appeal under Rule 4-323, defense counsel must do more than say "objection" if it wants the court to first consider or revisit the search and seizure issue at trial.

In that context, therefore, defense counsel's "objection" at trial communicates to the judge that the defendant is asking the court to exclude the evidence, not based on a search and seizure issue, but rather on some *other* basis—one for which the single word "objection" ordinarily suffices under Rule 4-323(a) to preserve the issue for appeal. That being the case, the inverse is likewise true: if at the time that evidence is offered at trial defense counsel responds with "no objection," the court would understand that the defendant is merely not asking to exclude the evidence on some *other* ground. Put simply, there would be no reason for the court to interpret "no objection" as referring to the waiver of a perfectly viable and fully preserved appellate issue, particularly when there would be no discernable benefit to the defendant in doing so.

So too here. Mr. Huggins' pretrial motion to suppress was denied. Mr. Huggins did not move for a supplemental or de novo hearing on the motion to suppress. That issue was taken off the table and preserved well before trial, and the ruling remained binding at trial. So, when considered in the appropriate context, defense counsel's response of "no objection" referred only to the objections then in play—those contemplated by Rule 4-323. Under these circumstances, there is no cogent basis on which to conclude that defense counsel's response of "no objection" was intended by defense counsel or would have been reasonably understood by the court as a voluntary relinquishment of the fully preserved right to judicial review of the search and seizure issue.

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Seth D. Jedlicka v. State of Maryland, No. 30, September Term 2021, filed August 26, 2022. Opinion by McDonald, J.

https://mdcourts.gov/data/opinions/coa/2022/30a21.pdf

CRIMINAL PROCEDURE – CONSTITUTIONAL LAW – JUVENILE SENTENCING

Facts:

In November 2009, Petitioner Seth Jedlicka, then age 16, was one of four participants in a burglary that resulted in the murder of one of the home's residents. In the Circuit Court for Cecil County, Mr. Jedlicka was convicted as an adult of first-degree felony murder, common law conspiracy, armed robbery, first-degree assault, first-degree burglary, theft of property valued over $100,000, and use of a firearm in the commission of a felony. In May 2011, he was sentenced to life in prison with all but 60 years suspended for the felony murder conviction, and a concurrent term of 60 years in prison plus five years probation for the non-homicide offenses. Under Maryland law, Mr. Jedlicka is eligible for parole after serving 25 years in prison.

In August 2017, Mr. Jedlicka filed a motion to correct an illegal sentence pursuant to Maryland Rule 4-345(a), arguing that his sentence violated the Eighth Amendment as interpreted by the Supreme Court and this Court in several recent decisions regarding juvenile sentencing. Specifically, he argued that: (1) his 60-year sentence for the non-homicide offenses, with parole eligibility after 25 years, constituted an unconstitutional *de facto* life without parole (LWOP) sentence; (2) his life sentence was grossly disproportionate to the offense in violation of the Eighth Amendment; and (3) his life sentence was unconstitutional because he did not receive the type of individualized sentencing proceeding that the Supreme Court mandated in *Miller v. Alabama*, 567 U.S. 460 (2012).

Held: Affirmed.

The Court held that Mr. Jedlicka's term-of-years sentence was not *de facto* LWOP; his life sentence was not grossly disproportionate to the crime of first-degree felony murder; and he was not entitled to the individualized sentencing proceeding that the Eighth Amendment requires for juveniles sentenced to life *without* parole.

In 2010, the Supreme Court held that the Eighth Amendment's prohibition of cruel and unusual punishment forbids imposition of a sentence of life without parole for a juvenile non-homicide offender. *Graham v. Florida*, 560 U.S. 48 (2010). Instead, such offenders must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *id*. at 76, which the Court later equated to "hope for some years of life outside prison walls." *Montgomery v. Louisiana*, 577 U.S. 190, 213 (2016).

In *Carter v. State*, 461 Md. 295 (2018) the Court of Appeals held that a lengthy term-of-years sentence with a remote possibility of parole can, in certain circumstances, be a *de facto* LWOP sentence that also offends the Eighth Amendment. To determine when a juvenile nonhomicide offender's term-of-years sentence is unconstitutional, the Court outlined a two-part test that first considers the offender's period of parole ineligibility as compared to certain "benchmarks," including the offender's natural life expectancy, the parole eligibility of an offender serving a life sentence, legislative reforms in the wake of *Graham*, a 50-year threshold, and the typical retirement age. If comparison to the benchmarks suggests that a sentence may constitute *de facto* LWOP, the court then considers the offender's conduct on a "spectrum" of culpability. At one end, an aggregate sentence reflecting a serious crime spree is unlikely to be treated as *de facto* LWOP. At the other end, where an offender's convictions stem from a single incident, there is a stronger argument that the resulting aggregate sentence is *de facto* LWOP.

The Court rejected Mr. Jedlicka's argument that, because his convictions were all related to the one burglary, his sentence was unconstitutional. While acknowledging that his conduct was towards the less serious end of the spectrum, the Court concluded that his 25-year period of parole ineligibility (and potential for release after 20 years under the Juvenile Restoration Act, *see* Maryland Code, Criminal Procedure Article, §8-110) did not amount to a *de facto* LWOP sentence when considered against the benchmarks.

With regard to Mr. Jedlicka's life sentence with all but 60 years suspended, the Court held that the sentence was not grossly disproportionate to his offense. Earlier this term, the Court had concluded that a life sentence with the possibility of parole was not grossly disproportionate for a juvenile offender convicted of first-degree murder. *Harris v. State*, 479 Md. 84, 122 (2022). Despite some factual differences between the two cases, the same conclusion pertained with respect to Mr. Jedlicka's case.

The Court also concluded that Mr. Jedlicka's sentencing proceeding was not constitutionally deficient. In *Miller*, the Supreme Court held that the Eighth Amendment forbids sentencing schemes that impose mandatory LWOP sentences on juvenile homicide offenders. Before a court can sentence a juvenile murderer to LWOP, it must conduct a hearing where "youth and its attendant characteristics" are taken into account. *Miller*'s holding was made retroactive by *Montgomery*.

Consistent with another holding from *Harris*, the Court concluded that because Mr. Jedlicka received a partially suspended life sentence with the possibility of parole, *Miller* and *Montgomery* are not applicable to his case. Further, the Court held that Maryland's Eighth Amendment analog, Article 25 of the Declaration of Rights, does not provide any additional protections for a juvenile defendant in this situation.

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Lee Boyd Malvo v. State of Maryland, No. 29, September Term 2021, filed August 26, 2022. Opinion by McDonald, J.

Watts, Hotten, and Gould, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2022/29a21.pdf

CRIMINAL PROCEDURE – CONSTITUTIONAL LAW – JUVENILE SENTENCING

Facts:

In October 2002, Petitioner Lee Boyd Malvo, then age 17, and John Allen Muhammad, then age 41, committed a series of murders in the greater Washington D.C. area, primarily shooting a high-powered rifle concealed in the trunk of a modified at automobile randomly at people going about their daily lives. This crime spree was colloquially known as the "D.C. sniper attacks."

In 2003 and 2004, Mr. Malvo was convicted of four counts of first-degree murder in Virginia, for which he received four consecutive sentences of life without the possibility of parole (LWOP). In May 2006, he voluntarily testified against Mr. Muhammad at the latter's trial in Montgomery County, providing important information that was otherwise unknown to the authorities. In October 2006, Mr. Malvo pled guilty without a plea deal to all six counts of first-degree murder pending against him in the Circuit Court for Montgomery County. In preparation for Mr. Malvo's sentencing, defense counsel presented the court with reports from a forensic psychiatrist and licensed clinical social worker that recounted in detail the way in which Mr. Muhammad gained influence over Mr. Malvo as a troubled youth. At Mr. Malvo's sentencing in November 2006, both the prosecutor and judge acknowledged that he had been under the sway of Mr. Muhammad at the time of the murders but had since broken free of Mr. Muhammad's psychological grasp, shown remorse, and changed. Nonetheless, Mr. Malvo received six additional sentences of LWOP, to be served consecutive to each other and to his existing Virginia sentences.

More than a decade later, in January 2017, Mr. Malvo filed a motion to correct an illegal sentence pursuant to Maryland Rule 4-345(a), arguing that his sentence violated the Eighth Amendment as interpreted by the Supreme Court in *Miller v. Alabama* and *Montgomery v. Louisiana* – decisions that were issued after his sentencing and that retroactively applied to him. The Circuit Court denied the motion in August 2017. Mr. Malvo filed a notice of appeal and Court of Special Appeals stayed his appeal pending resolution of other cases concerning related issues. In the interim, Mr. Malvo petitioned the Court of Appeals for a pre-judgment writ of *certiorari*, which the Court granted in August 2021.

Held: Reversed.

The Court held that Mr. Malvo must be resentenced to ensure that his sentence complies with the substantive rule announced in *Miller* and clarified in *Montgomery* and *Jones v. Misissippi*.

At the time of Mr. Malvo's sentencing in 2006, the Supreme Court had held that the Eighth Amendment forbids the execution of juvenile offenders. *Roper v. Simmons*, 543 U.S. 551 (2005). The Court did not identify any additional constraints on juvenile sentencing until 2010, when it held that LWOP is an unconstitutional punishment for juvenile non-homicide offenders. *Graham v. Florida*, 560 U.S. 48 (2010). In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that the Eighth Amendment also prohibits sentencing schemes that impose mandatory LWOP sentences on juvenile homicide offenders. The Court later clarified that *Miller* announced a substantive rule of constitutional law with retroactive effect. *Montgomery v. Louisiana*, 577 U.S. 190 (2016). *Montgomery* explained that *Miller*'s procedural component – "a hearing where youth and its attendant characteristics are considered as sentencing factors" – is the means of implementing its substantive guarantee – "that [LWOP] is an excessive sentence for children whose crimes reflect transient immaturity." 577 U.S. at 209-10. Later, in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the Court rejected the argument that a court sentencing a juvenile murderer to LWOP must first make an implicit or explicit finding that the offender is incorrigible; in essence, an LWOP sentence imposed by a judge who had the opportunity to consider a defendant's youth is an implicit finding of incorrigibility. Because *Jones* did not disturb the holding of *Montgomery*, *Miller*'s substantive rule remains good law. Thus, a corrigible offender cannot constitutionally be sentenced to LWOP.

The Court emphasized that the comments made by the judge at Mr. Malvo's sentencing hearing could support an inference that the judge did not consider Mr. Malvo to be "the rare juvenile offender whose crimes reflect irreparable corruption" and who is constitutionally eligible for LWOP. *Miller*, 567 U.S. at 479-80. Thus, even though Mr. Malvo's discretionary sentencing ostensibly complied with the procedural component of *Miller* as articulated in Jones, it is not clear that Mr. Malvo's sentence is legal under *Miller*'s substantive rule. The judge at Mr. Malvo's sentencing could not have predicted the coming developments in the Supreme Court's Eighth Amendment jurisprudence and the constraints that the Supreme Court would place on juvenile LWOP. The Court concluded that the legality of a sentence under the Eighth Amendment is not a topic for speculation, and accordingly remanded the case to the Circuit Court for resentencing in light of the intervening Supreme Court decisions.

The Court also held that the Juvenile Restoration Act (JUVRA), which provides a juvenile offender convicted as an adult with an opportunity to move for a reduction of a sentence after 20 years, did not remedy the potential constitutional deficiency in Mr. Malvo's sentence. Given the terms of Mr. Malvo's sentences in both Virginia and Maryland and the language of the JUVRA statute, it is not clear that the law would ever provide him with the meaningful opportunity for release based on demonstrated maturity and rehabilitation that the Constitution requires for a corrigible juvenile offender. Thus, if the resentencing court were to determine that Mr. Malvo was not eligible for LWOP, JUVRA alone would not be an adequate remedy.

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Michael Farmer v. State of Maryland, No. 31, September Term 2021, filed August 26, 2022. Opinion by McDonald, J.

https://mdcourts.gov/data/opinions/coa/2022/31a21.pdf

CRIMINAL PROCEDURE – MOTION TO CORRECT AN ILLEGAL SENTENCE – COGNIZABILITY

Facts:

Petitioner Michael Farmer pled guilty in 2002 to committing two murders of homeless men in Baltimore City when he was 17 years old. He was sentenced to two consecutive life sentences with the possibility of parole. He will not be eligible for parole until he has served more than 25 years in prison.

In 2014, Mr. Farmer filed a *pro se* motion under Maryland Rule 4-345(a) to correct an illegal sentence, which he later supplemented through the assistance of counsel. Mr. Farmer asserted that the failure of the current parole system to provide State-furnished counsel transformed his sentence into a *de facto* life sentence without parole. He further argued that this *de facto* life sentence without the possibility of parole violated the requirement of the Eighth Amendment of the United States Constitution that the vast majority of juvenile offenders be afforded "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" – a requirement often satisfied through the parole system. He thus argued that the lack of State-furnished counsel during the parole process rendered his sentence illegal.

The Circuit Court for Baltimore City denied his motion, reasoning that a motion to correct an illegal sentence is not the appropriate vehicle to challenge the procedures of the parole system. The Court of Special Appeals affirmed, reasoning that the recent decision in *Carter v. State*, 461 Md. 295 (2018), foreclosed Mr. Farmer's argument that the parole system failed to provide a meaningful opportunity to obtain release.

After the Court of Appeals granted a writ of **certiorari**, the General Assembly enacted the Juvenile Restoration Act ("JUVRA"). JUVRA enables certain juvenile offenders with life sentences, such as Mr. Farmer, to file a motion to reduce the sentence. In response to this new legislation, the State filed a motion to dismiss Mr. Farmer's appeal, arguing that JUVRA provides the requisite meaningful opportunity for release, regardless of any alleged deficiency in the parole process.

Held: Affirmed.

The Court of Appeals affirmed. The Court held that Mr. Farmer's claim lies beyond the scope of a motion to correct an illegal sentence and is not cognizable under Rule 4-345(a). The Court

reasoned that the motion to correct an illegal sentence is an extraordinary remedy limited to correct errors inherent in a sentence; the motion cannot be used to fix any error that may affect a sentence, such as procedural errors at trial or sentencing, or as raised by Mr. Farmer, during a future parole hearing. Other vehicles, such as a declaratory judgment action, are available to challenge the adequacy of the parole process when Mr. Farmer becomes eligible for parole. The Court declined to decide whether JUVRA would afford the requisite meaningful opportunity to obtain release for Mr. Farmer, in light of several open questions concerning the application of JUVRA.

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State of Maryland v. Juan Pablo Bustillo, No. 56, September Term 2021, filed August 24, 2022. Opinion by Gould, J.

https://mdcourts.gov/data/opinions/coa/2022/56a21.pdf

SENTENCING AND PUNISHMENT – PROBATION

A trial court's failure to articulate the duration of the defendant's probation, as required by Maryland Rule 4-346(a), is a procedural error that must be raised at the trial level.

SENTENCING AND PUNISHMENT – ILLEGAL SENTENCE

A trial court did not impose an illegal sentence under Rule 4-346(a) when it failed to articulate the duration of the defendant's probation.

Facts:

Juan Pablo Bustillo was indicted in the Circuit Court for Prince George's County for sexually abusing his daughter from the time she was nine until she was 15, and for other related offenses. He was convicted of sexual abuse of a minor, third-degree sexual offense, and second-degree assault.

At his sentencing, both sides sought a split sentence that included a period of probation. The court did not state the length of Mr. Bustillo's probation. The court explained to Mr. Bustillo his appeal rights and told him: "You do have some paperwork that you need to sign, so just have a seat." The sentencing judge then signed and issued a written probation order. Mr. Bustillo and defense counsel both signed the order, the latter as a witness to the former's signature. The order stated that Mr. Bustillo was sentenced to supervised probation for five years, beginning upon his release, and contained various terms and conditions, including that he was required to attend alcohol and drug treatment, have no contact with the victim or her mother, and complete a sexual assault treatment program through the parole and probation department.

Mr. Bustillo noted a timely appeal to the Court of Special Appeals and argued that because the sentencing judge never articulated that he "would have to serve a specific period of probation when he finished his period of incarceration[,]" the inclusion of five years of probation on the docket entries, commitment record, and probation order were illegal. Mr. Bustillo contended that those documents required correction to reflect that the sentencing court did not order probation.

The Court of Special Appeals reversed, holding that the trial court "illegally increased [Mr. Bustillo's] sentence by adding a five-year period of probation." *Juan Pablo B. v. State*, 252 Md. App. 624, 628 (2021).

The State filed a petition for *certiorari*, which we granted. *State v. Bustillo*, 477 Md. 150 (2022).

Held: Reversed

A trial court's failure to articulate the duration of the defendant's probation, as required by Maryland Rule 4-346(a), is a procedural error that must be raised at the trial level. A trial court did not impose an illegal sentence under Rule 4-346(a) when it failed to articulate the duration of the defendant's probation.

The use of the mandatory word "shall" in Rule 4-346(a) means that the sentencing court is *required* to advise the defendant of the conditions and duration of probation; it is not optional. In determining the purpose of the Rule, in addition to the court's duty to *verbally* advise the defendant of the conditions and duration of probation, Rule 4-346(a) also requires the court to provide the defendant with a *written* order providing the same.

Here, considering the circumstances, we concluded that Mr. Bustillo did not have to resort to guesswork. First, both the State and defense counsel requested a period of probation—the State requested five years, and defense counsel requested three to four years. Second, the court's statements about the gravity of the crimes Mr. Bustillo committed indicated a likelihood that the maximum prison sentence was about to be imposed. Third, as noted above, when a court imposes a prison term and suspends the execution of a part of it, the court must also impose a period of probation attached to the suspended portion of the sentence. Fourth, after imposing a split sentence that, by definition, implied a period of probation, the court expressly referenced the "conditions of probation" and, referring to the probation order, told the defendant at the conclusion of the sentencing that "[y]ou do have some paperwork that you need to sign, so just have a seat." Mr. Bustillo's counsel would have understood that the probation order was forthcoming. Fifth, although the transcript is silent on the duration of probation, the probation order that Mr. Bustillo and his counsel signed before he left the courtroom specifies a five-year term and the conditions of probation. The probation order is not an administrative document prepared by a clerk, such as a docket entry or commitment record; it is a court order. As such, a probation order, bearing the signatures of Mr. Bustillo and his counsel, holds significant weight in our consideration of the relevant circumstances.

This was not a situation where the transcript conflicts, or is inherently incompatible, with the probation order or commitment record; the probation order merely filled the informational gap from the court's announcement of the sentence. Here, the court expressly and implicitly informed Mr. Bustillo that his sentence included probation. The probation order signed by Mr. Bustillo and his counsel provided any missing information concerning the conditions and duration of the probation. All told, no speculation was required on Mr. Bustillo's part—he knew the precise details of his sentence before he left the courtroom. Thus, pursuant to Rule 1-201(a), considering the totality of the circumstances, we hold that the purpose of Rule 4-346(a) was satisfied here. Accordingly, although the court violated a mandatory requirement of Rule 4-346(a), such violation did not, in and of itself, render the resulting sentence illegal. The error committed by the circuit court in this case was a procedural error that did not give rise to a cognizable claim of illegality.

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Ultimately, the issue came down to whether the sentencing judge had the authority to impose the sentence that he did. Here, when the sentencing judge took the bench to commence the sentencing hearing, he had the legal authority to impose a 25-year sentence, suspend all but 20 years, and place Mr. Bustillo on probation for five years. That he did not comply with the procedure for doing so constitutes clear error, but not one that rendered the resulting sentence illegal.

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Chesapeake Bay Foundation, Inc., et al. v. CREG Westport Developers I, LLC, et al., No. 53, September Term 2021, filed August 26, 2022. Opinion by Booth, J.

Hotten, J. and Getty, C.J., dissent.

https://mdcourts.gov/data/opinions/coa/2022/53a21.pdf

MARYLAND FOREST CONSERVATION ACT – FINAL DECISION FOR PURPOSES OF JUDICIAL REVIEW

Facts:

Developers in the State of Maryland are required to follow the Maryland Forest Conservation Act ("the Act"), which strives to minimize the loss of forest land to development activity by ensuring that priority areas for forest retention are identified and protected prior to development. Md. Code, Natural Resources Article ("NR") § 5-1601, *et seq*. The Act does this by establishing the requirements for the adoption and implementation of a forest conservation program by local governments with planning and zoning authority. Specifically, the Act requires developers to prepare a forest conservation plan which dictates the scope, location, and placement of the building footprint and structures on the property and explains how the existing forested areas will be protected during and after the development. The approving agency may grant developers a variance or waiver from the strict application of the Act or local forest conservation program.

In 1991, in accordance with the Act, Harford County adopted the County Forest Conservation Program, which is set forth in Chapter 267 of the Harford County Code. Harford County has designated the County Department of Planning and Zoning as the agency responsible for approving forest conservation plans in the County and has designated its Director of Planning as the individual who may grant waivers from the priority retention and protection provisions under the Harford County Conservation Program.

CREG Westport I, LLC and Harford Investors, LLP (collectively, "the Developer"), propose to develop a mixed-use commercial development containing retail venues, restaurants, a hotel, and warehouses. The site is referred to as "Abingdon Business Park" and is located along Interstate 95 in Harford County. The 326.47-acre site contains 314.73 forested acres, 85 specimen trees, nontidal wetlands, and the HaHa branch, a tributary of the Bush River which ultimately flows into the Chesapeake Bay. The Developer completed a forest stand delineation, which identified the existing forest cover and environmental features on the development site. After the forest stand delineation was approved, the Developer thereafter prepared a forest conservation plan, which was approved by the Harford County Department of Planning and Zoning in December 2019. In connection with the approval of the forest conservation plan, the Director of Planning approved a waiver that permitted the removal of 49 specimen trees from the site.

In January 2020, the Chesapeake Bay Foundation ("CBF") and adjoining landowners filed a petition for judicial review of the Developer's proposed forest conservation plan in Harford County Circuit Court, pursuant to Maryland Rule 7-202 and Section 268-28(A) of the Harford County Code, which allows interested persons to appeal "any decision of the Director of Planning" within 30 days. While this petition was pending, the Developer continued its preliminary plan application for the development, which was ultimately approved later in January 2020. CBF and the property owners did not appeal the approval of the preliminary plan.

In March 2020, the Developer and the Harford County Department of Planning and Zoning filed a motion to dismiss the petition for judicial review, arguing that the approval of the forest conservation plan was non-appealable as it was not a final administrative agency decision subject to judicial review. After a hearing, the circuit court agreed with the Developer and concluded that the forest conservation plan is only one component of the broader development process, and its approval was not a final, appealable decision. CBF appealed to the Court of Special Appeals, which affirmed the circuit court's decision.

CBF filed a petition for a writ of *certiorari*, which the Court of Appeals granted to consider whether the approval of a forest conservation plan is a final decision, and therefore, subject to a petition for independent judicial review pursuant to the appeal process established by the Harford County Code.

Held: Reversed.

The Court of Appeals reversed the finding of the Court of Special Appeals and held that the approval of a forest conservation plan and associated waiver to remove specimen trees in connection with a development plan was a final decision of the Harford Department of Planning and Zoning, and CBF, along with the neighboring landowners, had the right to file a petition for judicial review of that final decision under the applicable provisions of the Harford County Code.

The Court explained that the Act, as well as the regulations promulgated by the Department of Natural Resources ("DNR"), require that a local forest conservation program include a right to appeal the approval of a forest conservation plan. *See* NR § 5-1603(c)(2) and COMAR 08.19.02.02.C. Harford County has adopted a Forest Conservation Program, in which the Department of Planning and Zoning is the approving agency for a forest conservation plan. The County's Director of Planning has the authority to approve a waiver. Section 268-28(A) of the Harford County Code provides an avenue for appealing decisions by allowing any interested person with affected property to appeal "any decision of the Director of Planning" within 30 days of that decision.

The Court reiterated the basic tenant of administrative law that, where an administrative agency has primary or exclusive jurisdiction over a controversy, the parties to the controversy must ordinarily await a final administrative decision before resorting to the courts for resolution of the

controversy. To be "final," the order or decision must dispose of the case by deciding all questions of law and fact and leave nothing further for the administrative body to decide.

Applying these principles, the Court held that the approval of the forest conservation plan by the Department of Planning and Zoning is a separate and distinct agency decision, which establishes the location and number of trees that may be cleared from a site. The approval of the forest conservation plan is independent from the County's site plan approval process. Although it is a condition precedent to the approval of a preliminary plan or site plan, the Court rejected the Developer's characterization of the forest conservation plan as being "part and parcel" of the County's development review process. Because the approval of the plan marks the end of the County's decision-making process with respect to the location and extent of tree removal from the site, and the parameters of the forest conservation plan cannot be changed during the development process once approved, it is completely independent from other state or county development approvals. It is a separate approval required by State law with distinct substantive criteria, and for which a right of appeal is required under the Act and DNR's regulations. Thus, the Court held that the Department of Planning and Zoning's approval of the forest conservation plan and specimen tree waiver was a final decision, and CBF had a right to file a petition for judicial review under the Harford County Code.

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CX Reinsurance Company Limited, et al. v. Devon S. Johnson, et al., No. 47, September Term 2021, filed August 29, 2022. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2022/47a21.pdf

INSURANCE – GENERAL LIABILITY INSURANCE POLICIES – INTENDED BENEFICIARIES – VESTING OF RIGHTS OF TORT CLAIMANTS

Facts:

In 1994, the General Assembly passed the Reduction of Lead Risk in Housing Act, effectively capping lead-related personal injury claims at $17,000. In 1997, at least in part based on this legislation, the predecessors of CX Reinsurance Company Limited ("CX") and Liberty Mutual Mid-Atlantic Insurance Company began offering commercial general liability insurance policies to certain landlords in the Baltimore City area that included lead-exposure related coverage. The policies contained a provision stating that the insurer "will pay those sums that the Insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' arising out of the Ingestion, Inhalation, absorption of, or exposure to lead, lead-paint or other lead-based products of any kind, form or nature whatsoever to which the insurance provided by this endorsement applies." In addition, the policies contained a provision stating: "No person or organization has a right under this Coverage Part: (a) To join us as a party or otherwise bring us into a 'suit' asking for damages from an insured; or (b) To sue us on this Coverage Part, unless all of its terms have been fully complied with" but that "[a] person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative." Moreover, the policies each contained a "Changes" provision as well as a "Cancelation" provision, together allowing the first Named Insured and the insurer to modify or rescind the policy without first having to obtain the consent of any other party.

In their policy applications, or in subsequent communications, each of the landlords affirmatively stated that they had never had a lead paint related violation in their buildings. Those representations were allegedly false.

In the 2011 case *Jackson v. Dackman Co.*, the Court of Appeals held that the $17,000 damage award provision in the Reduction of Lead Risk in Housing Act violated the Maryland Declaration of Rights. 422 Md. 357, 382-83 (2011). In 2015, CX began filing rescission actions against the landlords in federal court, alleging CX had issued the policies that included lead-paint coverage based on the landlords' material misrepresentations that they had never had lead-paint related violations in their buildings. Over the following years, CX and the landlords came to a series of settlement agreements modifying, or in some cases completely rescinding, the policies.

Starting in 2018, certain individuals who had been exposed to lead-based paint at the landlords' proprieties during the periods of policy coverage filed claims against their landlords as well as CX and Liberty Mutual. Among other things, the claimants alleged that they were "intended third party beneficiaries" of CX and Liberty Mutual's insurance contracts with the landlords, and that they had not consented to the modifications or rescissions of the policies. Three of the claimants obtained final judgments against their landlords before CX and those landlords settled the applicable rescission cases. The other claimants had not obtained final judgments against their landlords before the settlements of the rescission cases involving their landlords.

The parties filed cross-motions for summary judgment and, after conducting a hearing, the circuit court granted the claimants' motion for summary judgment, finding that the claimants were intended beneficiaries of the policies, that their rights in the policies had vested before the settlement agreements were entered into, and that the settlement agreements, thus, could not and did not impact those rights. The Court of Special Appeals affirmed the judgment of the circuit court, rejecting the notion "that to be an intended third-party beneficiary of an insurance policy, the injured party must first obtain a judgment or execute a settlement agreement with a covered insured."

Held: Affirmed in part and reversed in part.

The Court of Appeals held that, except as modified by statutes or regulations, insurance contracts are governed by the same legal principles as other contracts. As such, in most circumstances, the insurer's duties arise from, and are governed by, the terms of the applicable insurance policy. The Court noted that the plain language of the relevant policy provisions at issue in this case does not reveal an intent to make tort claimants who have yet to obtain a final judgment against, or enter into an approved settlement with, their landlords the primary parties in interest to the contracts.

Moreover, the Court held that no Maryland statute, regulation, or public policy exists to override the intent of the parties who entered into the insurance contracts at issue in this case. As it currently exists, Maryland public policy does not make all tort claimants intended third party beneficiaries of general liability insurance policies. As such, an injured tort claimant's rights under the types of policies at issue here do not vest until the claimant has obtained a judgment against, or entered into a qualifying settlement agreement with, an insured. The three claimants who did obtain final judgments against their landlords before the settlements of the applicable rescission cases became intended beneficiaries of the policies at the time they obtained their final judgments. Those three claimants may enforce the pre-settlement terms of the policies. The Court therefore affirmed the judgment of the Court of Special Appeals as to those three claimants.

Those claimants who did not obtain final judgments against, or enter into settlement agreements with, their landlords prior to the applicable rescission case settlements, are incidental beneficiaries of the policies, as opposed to being intended beneficiaries. Therefore, if the rescission case settlements as to those claimants' landlords were entered into in good faith, the claimants have no right to enforce the pre-settlement terms of those policies. The Court ordered a remand to the trial court with respect to those claimants. On remand, the trier of fact shall determine whether the settlements of the rescission cases between CX and those claimants' landlords were the product of good-faith negotiations or were collusive.

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Pedro Steven Buarque de Macedo, et al. v. The Automobile Insurance Company of Hartford, Connecticut, No. 52, September Term 2021, filed August 11, 2022. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2022/52a21.pdf

INSURANCE – MOTOR VEHICLE INSURANCE LAW – HOUSEHOLD EXCLUSIONS

Facts:

In February 2016, Michael Buarque de Macedo ("Michael"), his spouse, and one of their children, died in a two-car collision in Montgomery County, Maryland. Their remaining child, Helena Buarque de Macedo ("Helena"), survived the crash but suffered permanent injuries.

Michael was driving a family vehicle when the accident occurred. He and his wife were the named insureds of a primary automobile liability insurance policy issued by The Travelers Indemnity Company ("TIC"). Michael alone was also the named insured of a personal liability umbrella policy issued by The Automobile Insurance Company of Hartford, Connecticut (collectively with TIC, "Travelers"). The umbrella policy contained a household exclusion provision that purported to preclude coverage for bodily injury or personal injury suffered by Michael or by individuals who were related to Michael and who resided in Michael's household. Following the accident, Travelers acknowledged its obligation to pay under the primary policy, but asserted that the household exclusion applied under the umbrella policy.

On February 13, 2019, Helena individually and Steven Macedo, in his capacity as Helena's guardian and the Personal Representative of the estates of Michael's deceased spouse and child (collectively, the "Macedos") filed a civil action in the Circuit Court for Montgomery County seeking, among other things, a declaratory judgment that the provisions in Michael's umbrella policy that purport to exclude claims brought against the named insured by members of the same household are void as against public policy and contrary to statute. The circuit declared the household exclusion "valid and enforceable," and granted Travelers' motion for summary judgment. The Court of Special Appeals affirmed the judgment of the circuit court.

Held: Affirmed.

Section 5-806 of the Courts and Judicial Proceedings Article provides:

> (a) This section applies to:
>
> (1) An action by an unemancipated child against a parent of the child; and
>
> (2) An action by a parent against an unemancipated child of the parent.

> (b) The right of action by a parent or the estate of a parent against a child of the parent, or by a child or the estate of a child against a parent of the child, for wrongful death, personal injury, or property damage arising out of the operation of a motor vehicle, as defined in Title 11 of the Transportation Article, may not be restricted by the doctrine of parent-child immunity or by *any insurance policy provisions, up to the limits of motor vehicle liability coverage or uninsured motor vehicle coverage*.

Md. Code, Cts. & Jud. Proc. ("CJP") (2020 Repl. Vol.) § 5-806 (emphasis added).

The Macedos argued that the plain language of CJP § 5-806(b) required the Court to conclude that this statute applies to umbrella policies, inasmuch as it applies to "any insurance policy provisions, up to the limits of motor vehicle liability coverage." The Macedos pointed out that "any" means "any and all," and that because their umbrella policy included excess motor vehicle liability coverage, § 5-806 by its plain language renders the household exclusion void up to its policy limit. The Court of Appeals concluded that the Macedos' reading of § 5-806(b) was reasonable.

The Court stated, however, that § 5-806(b) must be read in conjunction with the relevant provisions of Title 19 of the Insurance Article, Subtitle 5. That review led the Court to conclude that Travelers' interpretation of § 5-806(b) as applying only with respect to mandatory primary coverages is also reasonable. The Court noted it was significant that the General Assembly referred to "motor vehicle liability coverage *or uninsured motor vehicle coverage*" in CJP § 5-806(b). (Emphasis added.) Motor vehicle liability coverage and uninsured motor vehicle coverage ("UM") are the two mandatory coverages in a primary "motor vehicle insurance policy." Section 5-806(b)'s reference to UM coverage arguably is a strong indicator that the phrase "motor vehicle liability coverage" in § 5 806(b) refers to the other statutorily required primary liability coverage and not to optional excess coverage. Tellingly, Subtitle 5's only reference to excess coverage, such as an umbrella policy, is found at Title 19, Subtitle 5, "Motor Vehicle Insurance – Primary Coverage." Md. Code Ann., Ins. ("IN") (2017 Repl. Vol.) § 19-509(h)(1), which provides that such a policy "*may include* the [UM] coverage provided for in this section." (Emphasis added.) Nothing in the Insurance Article mandates an insurer to provide excess coverage for claims made by household members of an insured who chooses to obtain an umbrella policy. To the extent § 5-806(b) could be read to impose such a requirement, it would do so without a cross-reference in the Insurance Article acknowledging this substantive change to Maryland insurance law. That seems an unlikely scenario, the Court of Appeals concluded, given that the Insurance Article explicitly incorporates and/or cross references provisions in other parts of the Maryland Code that substantively address insurance law.

Concluding that the phrase "motor vehicle liability coverage" in CJP § 5-806(b) is ambiguous, the Court considered the legislative history of this provision. The Court of Appeals reviewed the pertinent history of parent-child immunity in Maryland. It observed that, after this Court rejected a proposed exception to parent-child immunity for motor torts in 1997, the General Assembly created such an exception by statute, enacting the original version of CJP § 5-806(b), which provided:

> The right of action by a parent or the estate of a parent against a child of the parent, or by a child or the estate of a child against a parent of the child, for wrongful death, personal injury, or property damage arising out of the operation of a motor vehicle ... may not be restricted by the doctrine of parent-child immunity or by any insurance policy provisions, *up to the mandatory minimum liability coverage levels required by § 17-103(b) of the Transportation Article*.

(Emphasis added.)

In 2004, the General Assembly enacted IN § 19-504.1, which required that when liability coverage under a policy of "private passenger motor vehicle insurance" will exceed the minimum coverage requirements of Md. Code, Transp. ("TR") (2020 Repl. Vol.) § 17-103, an insurer must offer liability coverage for claims made by a family member in the same amount as the liability coverage for claims made by a non-family member under the policy. The enactment of IN § 19-504.1 created an inconsistency in the treatment of unemancipated children compared with other family members regarding claims against primary auto liability policies. Thus, the General Assembly amended CJP § 5-806 in 2005, and replaced "mandatory minimum liability coverage levels required by § 17-103(b) of the Transportation Article" with "limits of motor vehicle liability coverage or uninsured motor vehicle coverage." The pertinent legislative history, including the Senate Floor Report and testimony from the Senate Bill's sponsor, makes clear that the General Assembly's intention in amending CJP § 5-806(b) was to put unemancipated children on an equal footing with other family members with respect to claims under primary auto policies.

The Court of Appeals noted that every source the Court has reviewed demonstrates that, at the time of the amendment to CJP § 5-806(b) in 2005, no stakeholders believed that the amendment would expand the scope of the provision to cover supplemental insurance, such as an umbrella policy. The Court thus was convinced that the General Assembly understood and intended that CJP § 5-806(b) would continue to apply only to the primary coverages that are mandatory under the Insurance Article.

Accordingly, the Court of Appeals held that the phrase "motor vehicle liability coverage" in CJP § 5-806(b) refers to coverage under a primary motor vehicle liability policy, and not to coverage under a personal umbrella insurance policy. A household exclusion in a personal umbrella policy therefore is not void as applied to wrongful death or personal injury claims brought by or on behalf of unemancipated children against their parents.

Andrea J. Hancock, et al. v. Mayor & City Council of Baltimore, et al., No. 57, September Term 2021, filed August 15, 2022. Opinion by Fader, C.J.

https://mdcourts.gov/data/opinions/coa/2022/57a21.pdf

LABOR AND EMPLOYMENT – NEGLIGENCE – NEGLIGENT HIRING OR RETENTION OF INDEPENDENT CONTRACTOR

LABOR AND EMPLOYMENT – NEGLIGENCE – CONTRACTORS AND SUBCONTRACTORS – DUTY OF CARE

Facts:

Twenty-year-old Kyle Hancock was buried alive while working at an excavation site. At the time, Mr. Hancock was employed by R.F. Warder, Inc., an independent contractor hired by Baltimore City to perform the excavation work. Keith Sutton, the sole member and employee of Sutton Building Solutions, LLC, (collectively "Sutton") was also on site at the time as a subcontractor to Warder.

Mr. Hancock's family filed a survivorship and wrongful death action in which they alleged that Warder violated numerous laws and safety standards in performing the work, causing the excavation to collapse and kill Mr. Hancock. Barred by workers' compensation laws from bringing negligence claims against Warder, the family brought claims against only Baltimore City and Sutton. They alleged that the City was liable because it failed to exercise reasonable care in hiring Warder as its independent contractor and that Sutton was liable because Mr. Sutton recognized the dangerous condition of the excavation but failed to warn Mr. Hancock of the danger. The defendants each moved to dismiss the complaint.

The circuit court granted the motions to dismiss the complaint, and the Court of Special Appeals affirmed. Both courts concluded that although the City had a duty to exercise reasonable care in hiring Warder, that duty did not extend to the employees of Warder who were engaged in that work. The courts also concluded that absent any allegation that Sutton created the dangerous condition or exercised control over it, Sutton did not owe a duty to warn Mr. Hancock of the danger.

Held: Affirmed.

The Court began its discussion by identifying two major considerations, among others, in determining whether to recognize a duty in tort: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties. The Court stated that this analysis does not focus on whether an alleged tortfeasor owes a duty in the abstract or to

the public, but whether the alleged tortfeasor owes a duty specifically to the plaintiff (or a class of which the plaintiff is a part).

As against the City, the Court explained that the general rule embodied in § 409 of the Restatement (Second) of Torts (1965) is that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or [the employer's] servants." However, § 411 of the Restatement contains an exception that makes one who hires an independent contractor liable to "third persons" for physical harm caused by the acts of the contractor "if the harm is caused by 'some quality in the contractor which made it negligent for the employer to entrust the work to [the contractor].'" Here, the Court observed, the critical question was whether Mr. Hancock fell within the class of "third persons" to whom the City owed a duty to exercise reasonable care.

The Court concluded that Mr. Hancock was not with the class of "third persons" to whom the duty recognized in § 411 was owed and held that the duty to exercise reasonable care in the hiring of an independent contractor did not extend to an employee of the contractor engaged in the duties for which it was hired. In reaching its conclusion, the Court discussed that the tort of negligent hiring generally protects individuals who are brought into contact with the hired entity as a result of the hiring decision. Here, by contrast, Mr. Hancock came into contact with Warder through their employment relationship, not because of any act by the City in hiring Warder. The Court recognized that the majority of other courts that have addressed the issue have similarly concluded that an employee of an independent contractor is not a "third person" for purposes of § 411. The Court found persuasive the rationales provided by those courts, which included that unlike members of the public, employees of contractors are protected by workers' compensation laws, and that increased potential liability would discourage employers from hiring skilled contractors. The Court also found support for its conclusion in *Rowley v. Mayor & City Council of Baltimore*, 305 Md. 456 (1986), which involved analogous circumstances related to vicarious liability exceptions to the general rule in § 409.

As against Sutton, the Court held that the duty of a contractor or subcontractor on a construction job to exercise due care to provide for the protection and safety of the employees of other contractors is owed with respect to conditions that the contractor or subcontractor creates or over which it exercises control. The Court reasoned that in the absence of involvement in creating a dangerous condition or having control over the site where the condition exists, there is no more basis for imposing a tort duty on a contractor who happens to be working at the site than on any other individual present. Because the complaint did not allege that Sutton created, owned, or had any actual or physical control over the hazard that resulted in Mr. Hancock's death, it did not owe a duty enforceable in tort to warn him of the danger.

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Mario Ernesto Amaya, et al. v. DGS Construction, LLC, et al., No. 14, September Term 2021; *Juan Carlos Terrones Rojas, et al. v. F.R. General Contractors, Inc., et al.*, No. 17, September Term 2021, filed July 13, 2022. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2022/14a21.pdf

MARYLAND WAGE AND HOUR LAW, MD. CODE ANN., LAB. & EMPL. ("LE") §§ 3-401 TO 3-431 – MARYLAND WAGE PAYMENT AND COLLECTION LAW, LE §§ 3-501 TO 3-509 – CODE OF MARYLAND REGULATIONS 09.12.41.10 –WAGES – OVERTIME COMPENSATION – HOURS OF WORK – UNJUST ENRICHMENT

Facts:

In two related cases, construction workers brought actions for unpaid wages and overtime wages under the Maryland Wage and Hour Law ("MWHL"), Md. Code Ann., Lab. & Empl. (1991, 2016 Repl. Vol.) ("LE") §§ 3-401 to 3-431, and the Maryland Wage Payment and Collection Law ("MWPCL"), LE §§ 3-501 to 3-509, and claims for unjust enrichment for the time that they waited and traveled between a parking area where their employers directed them to park and a construction site where they performed physical labor. The workers accessed the construction site via buses, supplied by the general contractor for the project, that took them from the parking area to the construction site and back. The workers were not compensated for wait and travel time, either coming or going from the parking area, which in total averaged approximately two hours per day.

The cases involved the question of whether a federal law which provides that traveling to work is not a compensable activity has been adopted or incorporated into the MWHL, the MWPCL, and the Code of Maryland Regulations ("COMAR") and the related question of whether what constitutes "work" under Maryland law for which wages are due to an employee is limited to what constitutes "compensable work" under federal law. Under the federal Portal-to-Portal Act ("PPA"), 29 U.S.C. §§ 251 to 262, which is an amendment to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 to 219, certain activities are not compensable. The workers also raised the question of whether under COMAR 09.12.41.10 a "prescribed workplace" or "worksite" includes a place that employees are required by an employer to report.

In one of the two cases, the *Amaya* case, the trial court granted summary judgment in favor of the employer, ruling that the General Assembly grafted the definition of "employ" from the FLSA into the MWHL and correspondingly the PPA was also grafted into the MWHL. Additionally, the trial court ruled that the workers did not perform "work" at the parking area, and that the parking area was not a "worksite" for purposes of the MWHL claim. In the second case, the *Rojas* case, during a jury trial, the trial court granted the employers' motion for judgment made at the close of evidence offered by the workers, ruling that no reasonable jury could find that the workers performed "principal or integral activities" at the parking area, that the workers were traveling during work hours, or that they were traveling from one worksite to another.

In each case, the Court of Special Appeals affirmed the trial court's judgment and held that the MWHL and related COMAR regulations incorporate the FLSA, the PPA, and relevant Code of Federal Regulations ("CFR") into Maryland law and that it is not necessary "for Maryland to specifically express that we have adopted an amendment to a federal statute where the Legislature has enacted a state's equivalent of the federal statute." *See Amaya v. DGS Constr., LLC*, 249 Md. App. 462, 477, 246 A.3d 616, 625 (2021); *See Juan Carlos Terrones Rojas, et al. v. F.R. Gen. Contractors, Inc., et al.*, No. 1529, Sept. Term, 2019, 2021 WL 797245, at *3 (Md. Ct. Spec. App. Mar. 2, 2021). In addition, the Court of Special Appeals held that under Maryland law, "to determine what constitutes a worksite, [the Court] examine[s] not whether the employee was required to report to a location, but instead whether the employee performed part of their job function at the location[,]" and concluded that, under that analysis, the workers did not perform job functions at the parking lot and thus the parking lot was not a worksite. *Amaya*, 249 Md. App. at 483, 246 A.3d at 629; *Rojas*, 2021 WL 797245, at *3.

With respect to the *Rojas* case, the Court of Special Appeals concluded that the employers moved for judgment on all claims, which included the unjust enrichment claim, and that the trial court properly ruled in favor of the employers on the claim. *Rojas*, 2021 WL 797245, at *6. The Court of Special Appeals determined that the trial court properly dismissed all of the claims, including the unjust enrichment claim, as the trial court found that the workers "did not perform compensable services or work when parking and riding the shuttle." *Id.*

The workers filed petitions for a writ of *certiorari*, which the Court of Appeals granted. *See Amaya v. DGS Constr., LLC*, 474 Md. 719, 255 A.3d 1090 (2021); *Rojas v. F.R. Gen. Contractors, Inc.*, 474 Md. 720, 255 A.3d 1091 (2021).

Held: Reversed and remanded.

The Court of Appeals held that the PPA has not been adopted or incorporated into Maryland law in either the MWHL, the MWPCL, or relevant COMAR regulations. Specifically, the Court concluded that 29 U.S.C. §254(a) of the PPA—which provides, among other things, that traveling to the actual place of performance of principal activity or activities which an employee is employed to perform is not compensable—has not been implicitly adopted into Maryland law. In other words, what constitutes "work" under Maryland law is not limited to what is compensable work under the PPA and FLSA. As such, in the cases, the issue of whether the workers are entitled to compensation for the time spent waiting at the parking area and traveling to the construction site and back must be resolved under Maryland law. Although the workers framed the question slightly differently, the Court stated that, under Maryland law, the critical issue is whether the workers were either required by their employer to report during work hours to a location that is the employer's premises, to be on duty, or to report to a prescribed workplace, or whether the employees were traveling from one worksite to another. If so, under COMAR 09.12.41.10, the workers are entitled to compensation.

The Court of Appeals determined that, since being enacted in 1965 and 1966 and in subsequent amendments, neither the MWHL nor the MWPCL has expressly adopted or incorporated the PPA. Indeed, neither the MWHL nor the MWPCL refers to or even mentions the PPA. The related COMAR regulations have also not expressly incorporated the PPA. The Court declined to read the General Assembly's silence on such a significant matter, such as incorporating into Maryland statutes a federal law that limits compensation for work, as dispositive of the General Assembly's intent to incorporate the PPA into Maryland law. Simply put, what constitutes "work" in Maryland is not limited to what is considered compensable work under the PPA.

The Court of Appeals concluded that the PPA has not been adopted or incorporated into the MWHL, the MWPCL, or COMAR, and we decline to judicially engraft the provisions of the PPA onto Maryland law. The MWPCL requires that an employer pay an employee "wages," *see* LE §§ 3-502, 3-505, and defines "wage" as meaning "all compensation that is due to an employee for employment" and including a bonus, a commission, a fringe benefit, overtime wages, and any other remuneration promised for service. LE § 3-501(c). The term "employ" is defined for purposes of both the MWHL and MWPCL, to mean "to engage an individual to work" and includes "allowing an individual to work" and "instructing an individual to be present at a work site." LE § 3-101(c). The term "work" or "compensable work" is not defined in the MWHL, the MWPCL, or COMAR, but COMAR 09.12.41.10 describes "hours of work." COMAR 09.12.41.10 does not adopt the restrictions in the PPA limiting compensable work or hours of work to the performance of principal activities during employment and does not broadly exclude activities such as traveling. COMAR 09.12.41.10 provides a greater scope of compensation by stating that hours of work means time that an employee "is required by the employer to be on the employer's premises, on duty, or at a prescribed workplace" and includes certain travel time. COMAR 09.12.41.10 describes what constitutes "work" in Maryland and means what it says.

The Court of Appeals concluded, however, that, in each case, there were genuine disputes of material fact as to whether the workers were required to report to the parking area and whether the parking area was the employers' premises or a prescribed workplace or whether the employees were required to be on duty as provided under COMAR 09.12.41.10, and the respective trial courts erred in granting summary judgment and judgment at the conclusion of the workers' case at trial. Accordingly, the cases were remanded to the Court of Special Appeals with instructions to remand the cases to the circuit court for findings by a trier of fact as to whether the workers were required to report to the parking area, whether the parking area was the employer's premises or a prescribed workplace, or whether the workers were required to be on duty, and hence were engaged in hours of work as set forth by COMAR 09.12.41.10.

The Court of Appeals stated that, under the plain language of COMAR 09.12.41.10A, the term "hours of work" means the time during a workweek that an employee is required by an employer to be "on the employer's premises, on duty, or at a prescribed workplace." This language provides three circumstances under which an employer's requirement results in hours of work for an employee—namely, an employee being required to be (1) on the employer's premises, (2) on duty, or (3) at a prescribed workplace. Thus, an employee could engage in hours of work as a result of being required to be on duty at a location other than a prescribed workplace and by

being required to be on the employer's premises, which may or may not be a prescribed workplace. Given this, the Court stated that it would be inconsistent with the plain language of the COMAR provision to require that an employee be engaged in the performance of actual physical labor or the performance of the principal work activities of employment in order to be compensated for hours of work. Under COMAR 09.12.41.10A, it is sufficient that the employer require the employee to be on duty, on the premises, or at a prescribed workplace. In the cases, whether the employers required the workers to be either on the employers' premises, on duty, or at a prescribed workplace would be factual matters to be determined by the trier of fact, i.e., the jury.

The Court of Appeals stated that, in addition, under COMAR 09.21.41.10C(2), travel time from one worksite to another is included in hours of work. If hours of work under COMAR 09.21.41.10A necessarily include time that an employee is required to be on an employer's premises, on duty, or at a prescribed workplace, it follows that hours of work would include time that an employee spends traveling from one prescribed workplace or location on which the employee is required to be on duty or required to be on the employer's premises to another such location. As such, a worksite would include a prescribed workplace, an employer's premises, or a location where an employee is on duty if the employee is required during work hours by the employer to be at the location. Thus, the question of whether the parking area is a worksite under COMAR 09.12.41.10C(2) is intrinsically tied to the definition of hours of work set forth in COMAR 09.12.41.10A.

In addition, in the *Rojas* case, the Court of Appeals concluded that the Court of Special Appeals erred in affirming the trial court's grant of judgment as to the unjust enrichment claim on the ground that the workers did not perform compensable work, as the determination was based on the erroneous conclusion that the PPA applied.

The Town of Upper Marlboro v. The Prince George's County Council, No. 55, September Term 2021, filed August 1, 2022. Opinion by Hotten, J.

https://www.courts.state.md.us/data/opinions/coa/2022/55a21.pdf

LAND USE – JUDICIAL REVIEW – FINAL AGENCY ACTIONS

LAND USE – MINOR AMENDMENTS TO AN APPROVED ZONING PLAN – SCOPE AND PURPOSE

Facts:

Prince George's County Council (the "Council") sought to remove the historic designation of two vacant schoolhouses in Upper Marlboro, Maryland from the 2010 *Prince George's County Historic Sites and Districts Plan*. Pursuant to the procedures outlined in the Prince George's County Code, on July 23, 2019, the Council passed an initiating resolution, CR-72-2019. This resolution directed the Prince George's County Planning Board of the Maryland-National Capital Park and Planning Commission to initiate the process for considering whether to adopt a minor amendment that would remove the two schoolhouses from the County's list of historically protected sites. Pursuant to the resolution, a joint public hearing was held on the proposed minor amendment, during which representatives of the Town of Upper Marlboro (the "Town") argued against its adoption. The Town did not seek judicial review of CR-72-2019 itself.

The Council ultimately adopted the minor amendment through a subsequent resolution, CR-98-2019, on November 19, 2019. Within thirty days, the Town filed a petition for judicial review of CR-98-2019 in the Circuit Court for Prince George's County. The Town asserted that CR-72-2019 did not properly set forth the purpose and scope of the proposed minor amendment as statutorily required. The circuit court ruled against the Town, finding that the adoption of CR-72-2019 and CR-98-2019 was not arbitrary and capricious, and was supported by substantial evidence in the record.

The Town appealed to the Court of Special Appeals, which determined that CR-72-2019 was an independently reviewable final agency action because it was an "administratively distinct" action by the Council. *Town of Upper Marlboro v. Prince George's Cty. Council*, No. 0801, Sept. Term, 2020, 2021 WL 4169198, at *4 (Md. Ct. Spec. App. Sept. 14, 2021). The court found that the Town forfeited its right to directly challenge CR-72-2019 because the Town failed to directly appeal within thirty days of the passage of the resolution. The court declined to reach the merits of whether CR-98-2019 was procedurally deficient because the challenge to CR-98-2019 was "based exclusively on alleged deficiencies with CR-72-2019." *Id*. The court concluded that the Town cannot circumvent the thirty-day appeal window by bringing "an appeal of CR-72-2019 through CR-98-2019." *Id*.

Held: Affirmed on different grounds.

Generally, an agency action is appealable only if it is final. An agency action is final when it decides all questions of law and fact and leaves nothing further for the agency to decide. *Willis v. Montgomery Cty.*, 415 Md. 523, 534–35, 3 A.3d 448, 455–56 (2010). The Court of Appeals concluded that CR-72-2019 was not a final agency action, contrary to the holding of the Court of Special Appeals, because it merely initiated the process for determining whether to remove the historic designation of the two schoolhouses, leaving the final decision to be determined by a subsequent resolution and subject to the input and comment from the public. The Council made its final decision through the passage of CR-98-2019, and the Council brought a timely challenge to the resolution within thirty days of its passage.

Before reaching the merits of whether the Council actions were procedurally deficient, the Court of Appeals determined that the correct standard of review was "limited to assessing whether the agency was acting within its legal boundaries[,]" because the Town conceded that the Council acted in a legislative, as opposed to a quasi-judicial, capacity. *Bucktail, LLC v. Cty. Council of Talbot Cty.*, 352 Md. 530, 543, 723 A.2d 440, 446 (1999) (citation omitted). The legal boundaries of Council resolutions that affect land use and zoning are outlined by Prince George's County Code ("PGCC") § 27-642. An initiating resolution, such as CR-72-2019, "shall set forth the purpose and scope of the proposed amendment[.] . . ." PGCC § 27-642(d). The Court of Appeals held that the Council acted within the legal boundaries of PGCC § 27-642 by specifying that the scope and purpose of CR-72-2019 was limited to the "public planning objective" of redesignating the historical status of two schoolhouses. The resolution did not exceed the legal boundaries of the statute by not providing further detail on the future uses of the two schoolhouses.

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Thornton Mellon LLC, et al. v. Frederick County Sheriff, et al., No. 51, September Term 2021, filed July 12, 2022. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2022/51a21.pdf

TAX SALE FORECLOSURE CASES – WRITS OF POSSESSION – EXPRESS AND IMPLIED POWERS OF SHERIFFS

Facts:

The case involved a challenge to two policies used by sheriffs in evicting people from their homes when a tax sale buyer obtains a judgment foreclosing the right of redemption with respect to a property and the homeowner does not redeem the property. Under the first policy ("the mover policy"), when serving writs of possession, sheriffs require tax sale buyers to provide movers to remove personal property from the premises at issue. Under the second policy ("the weather policy"), during bad weather conditions, sheriffs postpone the service of writs of possession.

In the Circuit Courts for Anne Arundel, Baltimore, Frederick, and Howard Counties, one or all of Thornton Mellon LLC, Ty Webb LLC, Danny Noonan LLC, and Al Czervik LLC (together, "Thornton Mellon"), Petitioners, tax sale buyers, sued the sheriffs of those jurisdictions (together, "the Sheriffs"), Respondents, seeking declaratory judgment that the Sheriffs' mover policy and weather policy were void and injunctions against enforcement of the policies. In Baltimore and Frederick Counties, Thornton Mellon LLC, which describes itself in the complaints as "a large institutional tax sale buyer," was the only plaintiff. In Anne Arundel County, all of the entities were plaintiffs and in the complaint, Ty Webb LLC, Danny Noonan LLC, and Al Czervik LLC are described as entities to which Thornton Mellon LLC "regularly assigns Judgments Foreclosing Rights of Redemption and tax sale certificates." In Howard County, Al Czervik LLC was the only plaintiff.

In each case, the circuit court concluded that the mover policy and the weather policy are valid and enforceable. Thornton Mellon appealed. The Court of Special Appeals granted a motion by the Sheriffs to consolidate the four appeals, affirmed each circuit court's grant of judgment as to the mover and weather policies, and remanded the cases to the circuit courts with instructions to issue declarations consistent with the opinion. *See Thornton Mellon, LLC v. Frederick Cnty. Sheriff*, 252 Md. App. 320, 339-40, 258 A.3d 1032, 1044 (2021). Thornton Mellon filed a petition for a writ of *certiorari*, which the Court of Appeals granted. *See Thornton Mellon LLC v. Frederick Cnty. Sheriff*, 476 Md. 585, 264 A.3d 1283 (2021).

Held: Affirmed

The Court of Appeals held that the Sheriffs have the implied authority to adopt policies for how to serve writs of possession in tax sale foreclosure cases and that, in the execution of writs of possession, both the mover policy and the weather policy constitute a valid exercise of powers fairly implied by the Sheriffs' expressly given duties and authority. The Court of Appeals determined that the mover and weather policies are neither unreasonable, arbitrary, nor capricious.

The Court of Appeals concluded that sheriffs may exercise the same fairly implied powers to which other public officials are entitled and when sheriffs are given an express power or duty by the General Assembly, a sheriff is also given all powers that are fairly implied to exercise or safely fulfill the express power or duty. Under Md. Code Ann., Cts. & Jud. Proc. (1974, 2013 Repl. Vol.) ("CJ") § 2-301(a), sheriffs must serve all papers directed to them, including writs of possession and warrants of restitution. Under Maryland Rule 2-647, when serving writs of possession, sheriffs must place plaintiffs in possession of real property. Md. Code Ann., Real Prop. (1974, 2015 Repl. Vol.) ("RP") § 8-401(f)(1)(i) requires that, in landlord-tenant cases, a tenant's personal property be removed from the premises by the landlord. Thus, under RP § 8-401(f)(1)(i), when serving warrants of restitution, sheriffs must require landlords to remove personal property from the premises. Under RP § 8-401(f)(2)(i), administrative judges may stay the execution of warrants of possession during extreme weather conditions, and sheriffs must postpone service of the warrants. The Court stated that from these statutes it can be fairly implied that the Sheriffs have the power to adopt both the mover policy and the weather policy in connection with the service of writs of possession.

The Court of Appeals concluded that the Sheriffs have the fairly implied power to adopt the mover policy. The Court stated that it would be inconsistent with the principles underlying RP § 8-401(f)(1) for the Sheriffs to not be allowed to adopt a mover policy in connection with the execution of writs of possession. The mover policy serves the goal of promoting consistency and efficiency in connection with the execution of warrants of restitution and writs of possession, which in turn furthers the goals of fair and equal treatment of residents in the eviction process, maintaining good relations between law enforcement officers and the public, and the protection of the personal property of residents who are evicted. The mover policy was plainly not arbitrary and capricious, as adopting Thornton Mellon's position would have resulted in former property owners being deprived of access to their personal property in a manner that tenants are not during evictions and in tax sale buyers being able to receive possession of real property potentially faster and at less expense than landlords due to being able to have writs of possession executed without being required to provide movers. According to the Court, the adoption of the mover policy promotes identifiably desirable and reasonable goals and cannot be said to be an arbitrary or capricious exercise of implied authority.

The Court of Appeals determined that the Sheriffs' policy of not serving writs of possession in extreme weather was consistent with the Sheriffs' express duties under CJ § 2-301(a) and the principle underlying RP § 8-401(f)(2)(I), and was not arbitrary or capricious. Under CJ § 2-301(a), Sheriffs are required to serve all papers directed to them in accordance with instructions accompanying the papers, and within the time set by the court. Under RP § 8-401(f)(2)(I), administrative judges may stay the execution of warrants of restitution in extreme weather

conditions. The Court concluded that it would not be in keeping with the principles underlying RP § 8-401(f)(2) to prohibit the Sheriffs from adopting a policy aimed at not serving writs of possession in extreme weather conditions. For the Sheriffs to follow RP § 8-401(f)(2) in connection with warrants of restitution and have no weather policy in connection with the execution of writs of possession would have caused residents in tax sale foreclosure cases to suffer disadvantages that tenants in landlord-tenant cases are not subject to.

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Bennett Frankel, et al. v. Casey Lou Deane, No. 43, September Term, 2021. Opinion by Gould, J.

Watts, J., dissents.

https://mdcourts.gov/data/opinions/coa/2022/43a21.pdf

EXPERT TESTIMONY – MEDICAL MALPRACTICE

The trial court's admission or exclusion of expert medical testimony is reviewed on an abuse of discretion standard. When assessing the admissibility of such testimony, the court may not resolve disputed material facts or witness credibility issues; such issues are for the jury to decide. The court abuses its discretion when it excludes testimony based on the court's factual determinations on genuinely disputed issues.

EXPERT TESTIMONY – MEDICAL MALPRACTICE

Under *Meda v. Brown*, 318 Md. 418 (1990), if an expert in a medical malpractice case cannot ascertain the precise cause of the injury, inferential reasoning is permissible to establish the elements of breach and causation so long as each inference is supported by expert testimony.

Facts:

When Ms. Deane awoke after the removal of her wisdom teeth by Dr. Frankel, she was in pain and couldn't speak or feel her tongue. Her condition did not improve. She had a follow-up appointment with Dr. Frankel and, although Dr. Frankel's notes reflect improvement, Ms. Deane denied reporting any improvement. Several months later, Ms. Deane's symptoms continued to show no improvement, so she scheduled an appointment with a different doctor in the practice, Dr. Clay Kim. Dr. Kim performed some tests and his progress notes state that Ms. Deane made some complaints but also stated that she was getting better. Ms. Deane maintains that she told Dr. Kim that her tongue was numb on *both* sides of the front of the tongue, that it was difficult to talk and eat, and that she was experiencing pain, throbbing, and tingling.

About two years after her surgery, she called a lawyer, who referred her to Dr. Richard Kramer. After conducting a series of sensory tests on Ms. Deane, Dr. Kramer prepared and sent a report opining that Ms. Deane sustained permanent damage as a result of the surgery.

In August 2018, Ms. Deane filed a malpractice claim against Dr. Frankel and Southern Maryland Oral and Maxillofacial Surgery, P.A., the practice that employed Dr. Kim. Ms. Deane alleged that she suffered permanent loss of feeling in her tongue because Dr. Frankel severed the lingual nerve while extracting her wisdom teeth, and because Dr. Kim failed to promptly refer her to a nerve specialist. Ms. Deane subsequently amended her complaint to add Dr. Kim as a defendant.

Ms. Deane designated two experts: (1) Dr. Kramer, to provide expert testimony on the nature and extent of her alleged injury; and (2) Armond Kotikian, D.D.S., M.D., a board-certified dentist in oral and maxillofacial surgery, to testify on standard of care and causation.

Dr. Kramer testified at his deposition that he conducted several tests on Ms. Deane and opined that the injury was permanent. Dr. Kramer did not review either Dr. Frankel's or Dr. Kim's notes prior to his examination. He testified that seeing improvement three months after surgery, as reported by Dr. Kim, was inconsistent with the conclusions he reached from his examination two years after surgery because, if the symptoms had been improving at three months, Ms. Deane's condition would not have subsequently deteriorated. Dr. Kramer opined that the only diagnosis consistent with Ms. Deane's persistent loss of taste, sensation, and feeling in her tongue for two years was a complete severance of the lingual nerve.

Dr. Kotikian was designated to testify, *inter alia*, that Dr. Frankel's failure to take precautionary steps deviated from the standard of care in oral surgery practice and caused Ms. Deane's injuries. Dr. Kotikian explained that he was skeptical about the notes from Drs. Frankel and Kim because it was not possible that Ms. Deane had an improvement in sensation, given that Dr. Kramer's tests found that she exhibited symptoms of total nerve severance, and that nerves do not degenerate over time; if anything, they improve. Dr. Kotikian further explained that although a lingual nerve injury is a known risk of wisdom teeth extraction, such injuries are usually temporary, whereas a complete severance of the nerve is permanent. And, he explained, an oral surgeon could not completely sever the nerve without deviating from the standard of care.

The defendants moved for summary judgment, arguing that the expert testimonies of Drs. Kramer and Kotikian were inadmissible under *Meda*, the *Frye-Reed* standard, and Rule 5-702, and that without expert testimony, Ms. Deane could not present a prima facie case of negligence. The court held a *Frye-Reed* hearing and a hearing on the summary judgment motions, and ultimately issued a 97-page Memorandum Opinion and Order granting the summary judgment motions and dismissing Ms. Deane's complaint with prejudice as to all defendants.

Ms. Deane noted a timely appeal. In an unreported opinion, the Court of Special Appeals reversed, finding that the trial court erred as a matter of law. *Deane v. S. Md. Oral & Maxillofacial Surgery, P.A.*, No. 0218, Sept. Term 2020, 2021 WL 3523939 (Aug. 11, 2021). The doctors petitioned this Court for a writ of *certiorari*, which we granted. *Frankel v. Deane*, 476 Md. 416 (2021).

Held: Vacated and remanded

The judgment of the Court of Special Appeals was vacated and the case was remanded to the Court of Special Appeals with instructions to reverse and remand the judgment of the Circuit Court For Calvert County.

The opinions of both of Ms. Deane's experts rested on the assumption of certain disputed facts. The circuit court, however, found fault with Dr. Kramer's opinion, concluding that it was based

primarily on his examination of Plaintiff almost two years after the fact, and on the Plaintiff's shaky, uncertain self-reporting to him then in 2018 without him having reviewed the professionally detailed notes and records of Dr. Frankel's and Dr. Kim's treatments and examination of Plaintiff. Because of his failure to review the notes and records of Drs. Frankel and Kim, the court found that Dr. Kramer's conclusions "fail[ed] to meet, directly or inferentially, the Maryland *Frye-Reed, Meda*, and Maryland Rule 5-702 standards of scientific, clinical, and analytical reliability as well as to be based on such requisite methodology as required therein." The court did not explain, however, why it subjected the notes of Ms. Deane's treating physicians to a *Frye-Reed* analysis. The court also did not explain the basis on which it determined that those notes passed the Frye-Reed test or why Dr. Kim's sensory examination passed the *Frye-Reed* test but Dr. Kramer's sensory examination did not.

The circuit court improperly took sides in a credibility contest between Drs. Frankel and Kim on one hand and Ms. Deane on the other hand. The conflicting evidence on these issues teed up a classic credibility contest for the jury—not the court—to resolve. By taking those factual issues away from the jury, the circuit court erred.

The circuit court also impermissibly gave petitioners the benefit of favorable inferences drawn from evidence susceptible to more than one interpretation. The circuit court further erred in finding that the only reliable way for diagnosing the nature and extent of Ms. Deane's injury was through exploratory surgery, which she did not have. Any tension between the two tests should have been left for the jury to sort out.

Having determined that the circuit court erred in its analysis of Dr. Kramer's proffered testimony, we also concluded that the Court erred in excluding Dr. Kotikian's testimony on the ground that it relied on Dr. Kramer's testimony. As an expert, Dr. Kim was entitled to assume that Dr. Kramer's examination and diagnosis were reliable. The court simply found Dr. Kim to be more credible than Dr. Kramer, even though as an expert, Dr. Kim was entitled to assume the reliability of Dr. Kramer's examination and diagnosis. Making that credibility determination put the Court in the position of factfinder. Thus, it was clear error to exclude Dr. Kotikian's testimony on that ground.

Finally, the circuit court erred in finding that Dr. Kotikian's testimony was inadmissible under *Meda v. Brown*, 318 Md. 418 (1990). Because the court concluded that the injuries allegedly suffered by Ms. Deane were known risks that could be realized without negligence on the surgeon's part, it determined that Dr. Kotikian's "inference of negligence" was inadmissible under *Meda*. The circuit court pointed to no evidence in the record that refuted this testimony, and the only expert testimony in the summary judgment record on this issue came from Dr. Kotikian. For the court to have nonetheless "found" that Ms. Deane's alleged injuries could have occurred without negligence, it had to discount Dr. Kotikian's testimony on that issue and impose its own interpretation of the medical literature, without the aid of any expert testimony to explain the text. Here again, Dr. Kotikian's credibility was a matter for the jury to decide.

Ms. Deane's theory of negligence substantially tracked the analysis permitted under *Meda*. Accordingly, we concluded that the circuit court mistakenly applied *Meda* in excluding Ms. Deane's experts.

We remanded this case for further proceedings. On remand, the trial court will have the discretion to determine whether and to what extent petitioners will be permitted to challenge the admissibility of Ms. Deane's experts' testimony under the standard adopted in *Rochkind v. Stevenson*, 471 Md. 1 (2020). Such discretion will include, but not be limited to, determining whether the briefing will be re-opened to allow for different arguments to be made and defining which *Daubert* factors and issues will be heard.

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Patrick Spevak v. Montgomery County, Maryland, No. 44, September Term 2021, filed August 15, 2022. Opinion by Getty, C.J.

Watts, J., dissents.

https://mdcourts.gov/data/opinions/coa/2022/44a21.pdf

WORKERS' COMPENSATION – SERVICE-CONNECTED TOTAL DISABILITY RETIREMENT BENEFITS – "SIMILAR BENEFITS"

Facts:

Patrick Spevak served as a firefighter in Montgomery County, Maryland from 1979 until 2010 when he retired due to a service related back injury that occurred in 2007. In 2010, Mr. Spevak began collecting $1,859.07 per week in service connected total disability retirement benefits. Several years after his retirement, Mr. Spevak developed a compensable degree of occupational hearing loss and filed a workers' compensation claim on June 24, 2016. The Workers' Compensation Commission (the "Commission") determined that Mr. Spevak's hearing loss was caused by his employment as a firefighter and instructed that Montgomery County (the "County") reimburse Mr. Spevak for the cost of his hearing aids.

To determine the extent of the hearing loss, Mr. Spevak filed issues with the Commission on April 3, 2017. In a hearing held on June 16, 2017, the County argued that Mr. Spevak's compensation for his hearing loss should be offset because of his service-connected total disability retirement benefits. On July 13, 2017, the Commission awarded Mr. Spevak $322.00, payable weekly for a period of 26.25 weeks, in permanent partial disability benefits. However, the Commission determined that the full amount awarded for Mr. Spevak's hearing loss was offset because his weekly retirement benefits exceeded the permanent partial disability rate. Mr. Spevak filed a petition for judicial review with the Circuit Court for Montgomery County on August 1, 2017. Ultimately, the circuit court determined that the offset provision in Md. Code (1991, 2016 Repl. Vol., 2021 Supp.), Labor and Employment Article ("LE") § 9-610 applied. Mr. Spevak appealed to the Court of Special Appeals, which affirmed the decision of the circuit court.

Mr. Spevak petitioned for a writ of *certiorari*, which the Court of Appeals granted. The Court of Appeals considered whether the offset provision contained in LE § 9-610 required that Mr. Spevak's workers' compensation benefits be offset due to his service connected total disability retirement benefits.

Held: Affirmed.

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The Court of Appeals held that permanent partial disability benefits are similar to service connected total disability retirement benefits and are therefore subject to the offset provision contained in LE § 9-610.

The Court of Appeals reviewed the plain language and legislative history of LE § 9 610. The Court of Appeals held that the appropriate test to determine whether benefits are "similar benefits" under the offset provision is the "same injury" test. The Court of Appeals also held that the legislative history of the offset provision clearly demonstrates that the General Assembly sought to preclude duplicative recovery of similar benefits at the public's expense.

Consistent the plain language and legislative history of the offset provision, the Court of Appeals determined that Mr. Spevak's permanent partial disability benefits were similar to his service connected total disability retirement benefits. The Court of Appeals reasoned that Mr. Spevak's service connected total disability retirement benefits compensate him for all injures related to his service as a firefighter, and his service connected total disability retirement benefits exceeded his permanent partial disability benefits.

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COURT OF SPECIAL APPEALS

Gregg Lamonn Wright v. State of Maryland, No. 3146, September Term 2018, filed August 30, 2022. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2022/3146s18.pdf

CRIMINAL LAW – NATURE AND ELEMENTS OF CRIME – MERGER OF OFFENSES

INDICTMENTS AND CHARGING DOCUMENTS – INCLUDED OFFENSES

CRIMINAL LAW – DETERMINATION AND DISPOSITION OF CAUSE

Facts:

In 2001, Gregg Lamonn Wright was convicted of first-degree assault in connection with a 1998 shooting that involved three victims. He was charged in three separate short-form indictments. In case no. 052, Mr. Wright was charged with murder, using a handgun in the commission of a felony or crime of violence, and unlawfully wearing, carrying and transporting a handgun. In cases nos. 053 and 054, Mr. Wright was charged with murder, first-degree assault, second-degree assault, using a handgun in the commission of a felony or crime of violence, and unlawfully wearing, carrying and transporting a handgun.

The record that is available reveals that at the end of trial, the trial court ruled that in case no. 052, it would not send manslaughter to the jury; it deleted manslaughter from the verdict sheet but, *sua sponte*, added first-degree assault in its place (which had been included in the other two indictments). The jury then was instructed on both modalities of first-degree assault: second-degree assault enhanced by the use of a firearm and assault with intent to cause serious bodily injury. The jury acquitted Mr. Wright of first-degree murder and convicted him of three counts each of first-degree assault, second-degree assault, use of a handgun in the commission of a crime of violence, and wearing, carrying and transporting a handgun. The jury was not asked to specify, and did not specify, which modality of first degree assault underlay its convictions.

Mr. Wright filed a motion to correct illegal sentence, arguing that his twenty-five-year sentence for first-degree assault is illegal because he was never charged with that crime. The Circuit Court for Baltimore City denied his motion and he filed a timely appeal.

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Held: Reversed and remanded for resentencing.

First, the Court of Special Appeals held that first-degree assault in the firearm modality is not a lesser-included offense of second-degree murder because the elements of first-degree assault in the firearm modality include the use of a firearm, while second-degree murder can be committed without the use of a firearm. Because the record was unclear as to whether the conviction for first-degree assault was based on the first-degree assault in the firearm modality or first-degree assault with intent to cause serious bodily injury, the ambiguity required deeming the conviction based on the first-degree assault in the firearm modality. The Court held Mr. Wright's sentence for first-degree assault was illegal because it was neither charged expressly nor a lesser-included of an offense that was.

Second, the Court held that after the conviction of first-degree assault was vacated, the appropriate remedy was to vacate the remaining sentences and for the case to be remanded for resentencing as to those charges. The trial court imposed the aggregate sentence as a package, and it was appropriate to reconsider the overall sentence in the context of the counts that remain.

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In re Expungement Petition of Vincent S., Case Nos. 607 and 608, September Term 2021, filed July 5, 2022. Opinion by Kehoe, J.

https://mdcourts.gov/data/opinions/cosa/2022/0607s21.pdf

CRIMINAL PROCEDURE – EXPUNGEMENT – LIMITATIONS ON A COURT'S AUTHORITY TO ORDER EXPUNGMENT AT ANY TIME FOR GOOD CAUSE SHOWN

Facts:

In March 2020, Vincent S. filed two petitions in the Circuit Court for Baltimore County requesting that the court enter orders expunging "all police and court records" relating to a 2001 first-degree burglary conviction and a 2002 felony theft conviction. In addition to these convictions, Mr. S. had subsequently pled guilty in 2003 to one count of misdemeanor possession of drug paraphernalia. And in 2005, Mr. S. was convicted of acting as a home improvement contractor without a license in violation of Md. Code, Bus. Reg. § 8-601(a).

The State filed answers to Mr. S.'s expungement petitions. The State asserted that: (1) Mr. S.'s first-degree burglary and felony theft were "not yet eligible for expungement" because of Mr. S.'s subsequent convictions; and (2) Mr. S. was not eligible for expungement of any of his convictions because he had been convicted of acting as a contractor without a license, an offense which is not among the crimes identified by the General Assembly as eligible for expungement. The State further maintained that Mr. S. had not established that he had satisfied the sentences imposed for his first-degree burglary convictions 15 years prior to filing his expungement petition, as required by Md. Code, Crim. Proc. § 10-110(a). In May 2021, the circuit court issued orders denying each of Mr. S.'s petitions.

Held: Affirmed.

On appeal, Mr. S. first argued that he had satisfied the statutory criteria for expungement of the 2001 burglary conviction and the 2002 felony theft conviction. The Court of Special Appeals held that he had not in fact satisfied the criteria for expungement as to either conviction. Mr. S. finished paying the restitution ordered by the circuit court for the burglary conviction in 2018. Crim. Proc. § 10-110(c)(3) provides that a petition for expungement of a felony conviction "may not be filed earlier than 15 years after the person satisfies the sentence or sentences imposed for all convictions for which expungement is requested, including parole, probation, or mandatory supervision[.]" Fifteen years had not expired since 2018. Additionally, as to both the burglary and the theft convictions, Mr. S. was subsequently convicted of violating Bus. Reg. § 8-601(a). Because that conviction was not eligible for expungement, his theft and burglary convictions were also "not eligible for expungement." Crim. Proc. § 10-110(d)(1).

Mr. S. also argued that Crim. Proc. § 10-105(c)(9) authorizes courts to grant a petition for expungement at any time on a showing of good cause. He contended that subsection (c)(9) grants courts plenary power to grant petitions for expungement even if the petitioner is unable to satisfy the relevant statutory criteria. He asked the Court to vacate the circuit court's orders and to remand the cases with instructions for the circuit court to conduct a hearing concerning the issue of good cause.

The Court of Special Appeals held that the plain text of § 10-105(c)(9), the legislative history, the relevant case law, and a consideration of interpretative consequences of accepting Mr. S.'s proffered interpretation of § 10-105(c)(9) all demonstrated that the General Assembly did not intend the "good cause" proviso in § 10-105 to apply to expungement petitions filed pursuant to Crim. Proc. § 10-110. When it is read in context, § 10-105(c)(9) grants courts discretionary authority to relieve a petitioner of the time requirements for filing an expungement petition only as to those circumstances described in the preceding subsections of Crim. Proc. § 10-105(c). As the Court of Appeals held in *Baltimore Retail Liquor Package Stores Ass'n v. Kernwood*, "'[A] proviso should always be construed with reference to the immediately preceding parts of the clause or section to which it is attached.'" 171 Md. 426, 431 (1937).

The legislative history showed that the General Assembly amended the statutory precursor to Crim. Proc. § 10-105 by adding the "good cause" proviso in 1988. 1988 Md. Laws Chap. 592. The 1988 Senate Judicial Proceedings Committee Floor Report suggests that the General Assembly intended the amendment to what is now Crim. Proc. § 10-105(c)(9) to authorize courts to waive only the time requirements set forth in Crim. Proc. § 10-105(c)(1) through (c)(8) for good cause shown. *See* Legislative Bill File, S.B. 429 at 6. Finally, the Court considered the interpretative consequences of accepting Mr. S.'s proposed statutory construction and held that his interpretation would render meaningless the time limitations set out in § 10-110(c)-(1)-(3) and § 10-110(d). For all of the foregoing reasons, the Court affirmed the judgments of the circuit court.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated August 10, 2022, the following attorney has been indefinitely suspended by consent:

BRIAN JEFFREY ROSENBERG

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The full text of Court of Special Appeals unreported opinions can be found online:

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