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SUPREME COURT OF MARYLAND

Attorney Grievance Commission of Maryland v. William Francis Trezevant, AG No. 12, September Term 2022, filed July 7, 2023. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2023/12a22ag.pdf

ATTORNEY DISCIPLINE — SANCTIONS — INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission of Maryland ("Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("the Petition") against Respondent, William Francis Trezevant, an attorney not licensed to practice law in Maryland, alleging that he represented his great-niece in child custody hearings in the Circuit Court for Baltimore County without moving for admission *pro hac vice*, and that he knowingly and intentionally misrepresented his admission status on multiple occasions. The Commission asserted that Mr. Trezevant violated the Maryland Attorneys' Rules of Professional Conduct ("MARPC") 1.16(a) (Declining or Terminating Representation), 3.3(a) (Candor to the Tribunal), 4.1(a) (Truthfulness in Statements to Others), 5.5(a) (Unauthorized Practice of Law; Multi-jurisdictional Practice of Law), 8.1(a) (Bar Admission and Disciplinary Matters), and 8.4(a)–(d) (Misconduct).

Preceding the evidentiary hearing in this case, Mr. Trezevant was served with the Petition and with interrogatories and a request for production of documents. He did not file an answer and did not respond to Bar Counsel's discovery requests. Bar Counsel moved for an order of default, which the hearing judge granted. An evidentiary hearing was held on December 9, 2022. Mr. Trezevant did not appear. The hearing judge deemed admitted the allegations in the Petition and admitted into evidence Bar Counsel's Exhibits 1–35. Those exhibits included the transcripts for two remote hearings attended by Mr. Trezevant in the child custody hearings mentioned above, and communications between Mr. Trezevant and his great-niece's prior attorney, opposing counsel, and Bar Counsel.

The hearing judge found that Mr. Trezevant is an attorney who is not a member of the Maryland Bar but is admitted elsewhere. Mr. Trezevant's great-niece, C.A., gave birth to a child on whose behalf the Baltimore County Department of Social Services ("the Department") filed a child in need of assistance ("CINA") petition in the Circuit Court for Baltimore County. The Office of the Public Defender appointed a panel attorney, Shannon Stern, to represent C.A. For a year, C.A. sought unsuccessfully to regain custody of D.S.

In March 2021, C.A.'s mother asked Mr. Trezevant "to intervene on behalf of C.A." Ms. Stern called Mr. Trezevant to confirm his representation. Mr. Trezevant "did not disclose that he was not a Maryland attorney or that he was related to C.A." Ms. Stern then sent Mr. Trezevant her case files and moved to strike her appearance in the CINA case.

Mr. Trezevant appeared on behalf of C.A. at an April 2021 remote permanency planning review hearing. Mr. Trezevant "had not sought special admission as an out of state attorney in the case or filed any entry of appearance" and "failed to advise [the magistrate] that he was not admitted to practice law in Maryland." Nevertheless, he advocated for adopting a plan that would ultimately have placed C.A.'s child with C.A. at C.A.'s mother's home.

Later that month, Assistant County Attorney Deborah Hermann, who represented the Department, "asked if [Mr. Trezevant's] appearance was entered in the case and advised that she could not speak with [him] unless his appearance was entered." Mr. Trezevant falsely replied that he "filed an oral appearance at the last hearing" and was "received and accepted by the [magistrate], on the record."

Judge Sherrie R. Bailey held a May 2021 remote hearing regarding Mr. Trezevant's representation of C.A. Mr. Trezevant admitted that he was not licensed to practice law in Maryland. He knowingly and falsely stated that "I filed that [motion for my appearance], I thought orally, with the [magistrate], your colleague, pro hac vice. And the [magistrate] granted that, I thought, at the time."

During Bar Counsel's subsequent investigation, Mr. Trezevant knowingly and falsely stated that he "ha[d] not engage[d] in the Practice of Law in the state of Maryland[,]" "appeared in the hearings making clear [his] role[,]" and "never held forth, sought, advertised, or represented [him]self as an attorney barred in Maryland."

The hearing judge concluded that Mr. Trezevant committed all of the violations alleged by the Commission. The hearing judge found that Bar Counsel had proven six aggravating factors: (1) a dishonest motive; (2) a pattern of misconduct; (3) multiple offenses; (4) bad faith obstruction of the disciplinary proceeding; (5) refusal to acknowledge the wrongful nature of one's conduct; and (6) substantial experience in the practice of law. The hearing judge found one mitigating factor, the absence of a prior disciplinary record.

Held: Indefinite suspension with the right to petition for reinstatement in 90 days.

The Supreme Court of Maryland accepted as established the hearing judge's findings of fact and agreed with the hearing judge's conclusions of law. Considering the facts in light of the established aggravating and mitigating factors, the Court concluded that indefinite suspension with the right to petition for reinstatement in 90 days was the appropriate sanction. Mr. Trezevant's conduct did not warrant disbarment, but was more egregious than that of attorneys who received less severe sanctions. In addition to his improper representation of C.A. in court

and his misrepresentations to Bar Counsel, Mr. Trezevant made misrepresentations to the court, opposing counsel, and Bar Counsel on multiple occasions. In addition, the sanction imposed on Mr. Trezevant was consistent with this Court's approach in dishonest-conduct cases that feature knowing misrepresentations but not theft, fraud, harm to a client or third party, or the intentional misappropriation of funds.

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Attorney Grievance Commission of Maryland v. Gregory Wayne Jones, AG No. 1, September Term 2021, filed July 12, 2023. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2023/1a21ag.pdf

ATTORNEY DISCIPLINE – SANCTION – SUSPENSION STAYED IN FAVOR OF PROBATION

Facts:

Respondent Gregory Jones operates a solo law office in Baltimore City. On November 22, 2019, Mr. Jones entered into a Conditional Diversion Agreement ("CDA") with Bar Counsel following Bar Counsel's investigation into a complaint filed by one of Mr. Jones's clients. Bar Counsel deemed the CDA an appropriate resolution, whereby Mr. Jones acknowledged violating several Maryland Rules of Professional Conduct ("MARPC"). Bar Counsel filed a petition to revoke the CDA on September 24, 2020, alleging that Mr. Jones had failed to comply with its terms. The CDA was subsequently revoked on October 22, 2020.

On March 8, 2021, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Mr. Jones in connection with the same client matter. On September 9, 2021, the Commission filed an Amended Petition, adding a second complainant, and alleged that Mr. Jones violated MARPC 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), 19 301.15 (Safekeeping Property), 19-301.16 (Declining or Terminating Representation), and 19-308.4 (Misconduct). Bar Counsel subsequently withdrew its claim that Mr. Jones violated Rule 19-308.1 (Bar Admission and Disciplinary Matters).

The Supreme Court of Maryland designated the Honorable Dana M. Middleton of the Circuit Court for Baltimore City (the "hearing judge") to conduct an evidentiary hearing concerning the alleged violations. The hearing was conducted on May 20 and May 23, 2022. On July 7, 2022, the hearing judge issued Findings of Fact and Conclusions of Law, finding by clear and convincing evidence that Mr. Jones violated the MARPC, as alleged by Bar Counsel. Mr. Jones did not file exceptions to the hearing judge's findings and conclusions. The Court heard oral argument on November 4, 2022.

Held: 90-day suspension, stayed in favor of 12 months of probation, with conditions.

The Supreme Court of Maryland held that Mr. Jones violated MARPC 19 301.1, 19 301.2(a), 19-301.3, 19-301.4, 19-301.5(a) and (b), 19-301.15(a), (c), and (d), 19 301.16(d), and 19-308.4(a) and (d). These violations were based on the following: (1) Mr. Jones failed to act with

competence and diligence in two client matters; (2) filed a Not Criminally Responsible plea in a criminal case without the client's knowledge or consent; (3) charged and retained unreasonable flat fees; (4) failed to obtain informed consent to the deposit of fee payments into his operating account; and (5) failed to deposit and maintain unearned fees in his attorney trust account.

The Court agreed with the hearing judge that Mr. Jones proved the existence of several mitigating factors by a preponderance of the evidence: (1) absence of prior attorney discipline; (2) personal or emotional problems, specifically, personal and financial issues stemming from the COVID-19 pandemic; (3) full and free disclosure to Bar Counsel or cooperative attitude toward the attorney discipline proceedings; and (4) character or reputation. However, the Court could not conclude that Mr. Jones met his burden to show good faith efforts to make restitution and rectify his misconduct. Although Mr. Jones believes he fully earned his $6,000 fee in one of the client matters, the accounting he produced for Bar Counsel shows he performed 12.5 hours. Applying the rate of $250 per hour that was included in Mr. Jones's Legal Representation Agreement for use in calculating a refund if his services were terminated before completion of all work, Mr. Jones should have refunded $2,875 in this matter after his services were terminated. He failed to do so.

The Court further agreed with the hearing judge's assessment of two aggravating factors: a pattern of misconduct and multiple offenses. However, the Court could not conclude by clear and convincing evidence that the aggravating factor of substantial experience in the practice of law was present in this case. At the time Mr. Jones was retained in the two client matters, he had been a member of the Maryland bar for approximately seven to nine years. The Court noted that, while Maryland has no express numerical requirement, a longer period of licensure than Mr. Jones had is typically required before the Court will conclude that an attorney has "substantial" experience in the practice of law for purposes of this aggravating factor.

The Court agreed with Bar Counsel that a 90-day suspension was the appropriate sanction given the seriousness of the rules violations. The Court chose, however, to stay this sanction in favor of a one-year probationary period with conditions, given the unique circumstances in this case, including Mr. Jones's substantial, albeit ultimately unsuccessful, efforts to comply with the CDA during the COVID-19 pandemic. The Court imposed the following conditions: (1) Mr. Jones shall refund his client $2,875 no later than March 1, 2024; (2) Mr. Jones shall adhere to the MARPC; (3) Bar Counsel shall appoint a qualified attorney to monitor Mr. Jones's practice for the first six months of Mr. Jones's probationary period, at no expense to Mr. Jones; (4) the practice monitor shall report to Bar Counsel and Mr. Jones on a monthly basis during the monitoring period concerning Mr. Jones's compliance with the MARPC; and (5) in the first six months of the probationary period, Mr. Jones shall complete one CLE course on solo law practice management, which shall be pre-approved by Bar Counsel.

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State of Maryland v. Daniel Ashley McDonnell, No. 36, September Term 2022, filed July 7, 2023. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2023/36a22.pdf

CONSTITUTIONAL LAW – FOURTH AMENDMENT – SEARCHES AND SEIZURES – REASONABLE EXPECTATION OF PRIVACY – CONSENT – FORENSIC COPY OF DIGITAL DATA

Facts:

On June 1, 2019, agents of the United States Army Criminal Investigation Command ("USACIDC") visited Daniel Ashley McDonnell's, Respondent's, home for a "knock-and-talk" with him. Lacking a warrant, the agents asked for Mr. McDonnell's consent to search his home, phone, and computers as part of an investigation into his possession and distribution of child pornography. Mr. McDonnell declined. On July 12, 2019, however, Mr. McDonnell met with the agents and signed a written consent form, permitting the agents to search his home and seize electronic devices. With his signature on the consent form and initials next to each paragraph of the document, Mr. McDonnell indicated his understanding of and consent to the search of his home and the seizure and search of his electronic devices and media.

After Mr. McDonnell signed the consent form, the agents entered his home and seized a number of electronics, including a Dell laptop computer. Shortly thereafter, at their offices, the agents imaged, *i.e.*, copied, the laptop's hard drives, between July 12 and July 16, 2019. On July 19, 2019, counsel for Mr. McDonnell sent an email to USACIDC withdrawing "any purported consent to the seizure of [Mr. McDonnell's] laptop, or examination of its contents" and requesting the laptop's return. On September 3, 2019, a Special Agent of the USACIDC's Digital Forensics and Research Branch authored a report concerning the results of a forensic examination of the data on the copy of Mr. McDonnell's hard drive, which the agent had conducted between August 5 and 20, 2019. The report noted that the evidence examined was a hard disk drive containing the forensic images of the Dell laptop's operating system hard disk drive and storage hard disk drive. The report stated that "no evidence of child pornography" was found but explained that "[a]n examination of the media revealed evidence of child pornography search terms in the internet browser history[.]"

On March 26, 2023, Mr. McDonnell was indicted in the circuit court on charges of possessing, promoting, and distributing child pornography. Thereafter, Mr. McDonnell filed an omnibus motion that included a request to suppress illegally seized evidence, and later filed a memorandum in which he asked the circuit court to suppress the evidence from the forensic examination of the copy of his laptop's hard drive.

On August 16, 2021, the circuit court held a hearing on Mr. McDonnell's motion to suppress. On August 30, 2021, the circuit court issued a one-page order denying Mr. McDonnell's motion to suppress.

On September 24, 2021, the circuit court conducted a plea proceeding at which Mr. McDonnell entered a plea of not guilty with an agreed statement of facts, reserving the right to appeal the circuit court's denial of the motion to suppress. The prosecutor advised the circuit court of agreed-upon facts, which we summarize as follows. Special Agents of USACIDC had identified an IP address connected to a network that was sharing files depicting child pornography. The agents contacted Comcast to determine the IP address. The result of a subpoena revealed that the IP address that was associated with the uploaded pornography came back as Comcast subscriber Daniel McDonnell at an address in Severn, Maryland. Thereafter, on June 1, 2019, the agents conducted a knock-and-talk with Mr. McDonnell and subsequently on July 12, 2019, Mr. McDonnell met with the agents and signed the written consent form. The laptop computer was copied between July 12 and 16, 2019. On July 19, 2019, Mr. McDonnell's counsel sent an email withdrawing consent to search the laptop. Between August 5 and 20, 2019, the copy of Mr. McDonnell's hard drive was forensically analyzed. The forensic examination did not reveal images of child pornography; however, it did reveal that Mr. McDonnell had run "digital forensic deleting software" on June 7, 2019, a few days after the knock-and-talk. The examination also revealed that Mr. McDonnell had made recent searches with terms consistent with the search for child pornography. The State introduced into evidence Exhibits 1 through 6, which, among other things, included images that the parties agreed would in fact have constituted child pornography, and were related to Counts I, II, and III of the indictment.

The circuit court found Mr. McDonnell guilty of three counts of distribution of child pornography and sentenced him to ten years' incarceration on each of the three counts, consecutively, for a total of thirty years' incarceration, all suspended, and five years of supervised probation with the conditions that Mr. McDonnell register as a Tier II sex offender, have no unsupervised contact with minors, and allow authorities to monitor his computer and phone. Mr. McDonnell timely appealed.

The Appellate Court of Maryland reversed the circuit court's judgment. *See McDonnell v. State*, 256 Md. App. 284, 297, 286 A.3d 113, 120 (2022). Relying on *Riley v. California*, 573 U.S. 373 (2014), the Appellate Court concluded that, "because individuals have a legitimate expectation of privacy in the digital data within their computer," Mr. McDonnell's "revocation of his consent to examine data from his laptop computer precluded a forensic examination of the mirror-image copy of its hard drive without a warrant." *McDonnell*, 256 Md. App. at 296, 286 A.3d at 120. The Appellate Court did not accept the State's argument that Mr. McDonnell had no privacy interest in the copy of the hard drive. *See id*. at 295-96, 286 A.3d at 119-20. The State petitioned for a writ of certiorari, which the Supreme Court of Maryland granted. *See State v. McDonnell*, 483 Md. 263, 291 A.3d 776 (2023).

Held: Affirmed.

The Supreme Court of Maryland concluded that Mr. McDonnell had a reasonable expectation of privacy in the data contained on his hard drive, whether the data was electronically stored on his laptop's hard drive or the government's computer via a copy of the hard drive. The Court held that, because the government did not examine the data before he withdrew his consent, Mr. McDonnell did not lose his reasonable expectation of privacy in the data, and the examination of the data was a search. As such, the Court concluded that the government conducted an unreasonable search by examining the data without any authority to do so, by a warrant or an exception to the warrant requirement. The Court, therefore, affirmed the judgment of the Appellate Court of Maryland reversing the Circuit Court for Anne Arundel County's decision that examination of the data was not a search in violation of the Fourth Amendment.

The Supreme Court of Maryland held that Mr. McDonnell had a reasonable expectation of privacy in the digital data stored on his laptop, and, as such, in the data stored on USACIDC's copy of his laptop's hard drive. Mr. McDonnell's reasonable expectation of privacy was not eliminated by the making of a copy of his hard drive because the data was not searched or exposed prior to his revocation of consent. Central to the Court's holding was its conclusion that Mr. McDonnell's privacy interest is in the data on his hard drive, not just the particular computer or apparatus on which the data is stored (his original or USACIDC's copy). To accept the State's stance—*i.e.*, that Mr. McDonnell irrevocably lost all privacy interest in the data on his hard drive when he allowed USACIDC to copy it—would be to permit a limitless search through vast quantities and a varied array of personal data that the Supreme Court of the United States has characterized as consisting of more information than would be found in an exhaustive search of a person's home. *See Riley*, 573 U.S. at 396. Absent a warrant supported by probable cause or an exception to the warrant requirement, the Fourth Amendment does not permit such an unfettered governmental intrusion of a person's "private sphere[.]" *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206, 2213, 2221 (2018) (citation omitted).

The Supreme Court of Maryland concluded that, in the case, if any data had been revealed prior to the revocation of Mr. McDonnell's consent, that data would have lost any reasonable expectation of privacy that was previously attached to it. That is because, as to that data, Mr. McDonnell's privacy interest would have been eliminated. And lawfully so, because USACIDC had the authority, while Mr. McDonnell's consent was in effect, to search and examine his data. In such a scenario, the cat could not be put back into the bag.

As to data that was not exposed before the withdrawal of consent, however, Mr. McDonnell retained an expectation of privacy.

The Supreme Court of Maryland stated that the terms of the consent form guided its assessment of the reasonableness of the search. Per the terms of the consent form, Mr. McDonnell authorized a Special Agent or other person designated by USACIDC to conduct a complete search of all "digital media including cell[ ]phones, thum[b]drive[s], hard disk drives, laptops & any other media relevant to this investigation." (Capitalization omitted). According to the language of the form, among other things, Mr. McDonnell relinquished his constitutional right to privacy in his electronic devices and all of the information stored on them, and "authorize[d] USACIDC to make and keep a copy of any information stored on [his] devices." The form

stated that Mr. McDonnell understood that any copy made by USACIDC would be the property of USACIDC and that he would have no privacy or possessory interest in the copy. Critically, a sentence at the bottom of the form stated without qualification: "I understand that I may withdraw my consent at any time." Using the reasonableness approach discussed by the Supreme Court of the United States in *Riley* and *Carpenter*, and used by the Court in *Varriale v. State*, 444 Md. 400, 119 A.3d 824 (2015), the Court concluded that it was not reasonable for USACIDC to examine the data on the copy of Mr. McDonnell's hard drive after he withdrew his consent and that the examination was a search. It would have been objectively reasonable for Mr. McDonnell, or anyone else, to believe that the final sentence of the form advising of the ability to withdraw consent at any time applied to all of the language in the form, *i.e.*, that the withdrawal of consent applied to all of the matters agreed or consented to earlier in the form. In the case, it would not be reasonable, under the totality of the circumstances, to interpret the consent form to mean that the withdrawal of consent applied only to certain language on the form and not to the entire document.

The Supreme Court of Maryland concluded that, when Mr. McDonnell revoked his consent to the search of the laptop, he retained a reasonable expectation of privacy in *any* data that had not been exposed. Because USACIDC did not search or examine any of his data prior to the withdrawal of consent, Mr. McDonnell continued to retain a privacy interest in the entirety of his data on his laptop's hard drive and the copy thereof. Lacking Mr. McDonnell's consent, USACIDC needed another justification for the examination of the data on the copy of the hard drive, such as a warrant. But because USACIDC did not obtain a warrant or have any other justification for the search, the search of the data on the copy of the hard drive was unlawful and the evidence obtained as a result of the search should have been suppressed.

The Supreme Court of Maryland did not see cases involving consented-to blood and DNA sampling as controlling. Although the Court has held that it may be objectively reasonable for police to indefinitely retain a DNA profile created with consent and use it in subsequent investigations, *see Varriale*, 444 Md. at 415-16, 119 A.3d at 833, the same could not be said of a copy of a person's laptop hard drive. Moreover, the Court has not determined that it is objectively reasonable for law enforcement to retain and use a consented-to blood or DNA sample after consent has been withdrawn.

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Jonathan D. Smith v. State of Maryland, No. 31, September Term 2022, filed June 20, 2023. Opinion by Watts, J.

Gould and Wilner, JJ., dissent.

https://www.mdcourts.gov/data/opinions/coa/2023/31a22.pdf

DUE PROCESS – REMEDY – DISMISSAL – RETRIAL

Facts:

In 2001, Jonathan D. Smith, Petitioner, was convicted of the first-degree murder of Adeline Wilford. After unsuccessfully challenging his conviction on direct appeal and in post-conviction proceedings, Smith filed a petition for writ of actual innocence in the Circuit Court for Talbot County, which was denied. In 2020, however, the Supreme Court of Maryland determined that the circuit court abused its discretion by using an incorrect legal standard in its denial of the petition and by failing to correctly assess the materiality of evidence. The Court remanded the case to the circuit court with instructions to grant the petition for writ of actual innocence and to conduct a new trial. In doing so, the Court noted that the State had an affirmative duty to disclose certain evidence to Smith under *Brady v. Maryland*, 373 U.S. 83 (1963), and had failed to do so prior to trial.

Before retrial in the circuit court, Smith filed a motion to dismiss the charges alleging due process and double jeopardy violations. Although the circuit court concluded that the State had failed to disclose potentially exculpatory evidence prior to trial, the circuit court denied the motion to dismiss, finding that the State's failure did not satisfy the criteria for dismissal.

After the circuit court's denial of the motion to dismiss, Smith and the State entered into a plea agreement in which Smith was permitted to enter a conditional plea pursuant to Maryland Rule 4-242(d) and *North Carolina v. Alford*, 400 U.S. 25 (1970), to First Degree Felony Murder and Daytime Housebreaking in exchange for the State's agreement to a suspended sentence and probation, *i.e.*, a sentence of time served, as the appropriate sentence in the case. Under the terms of the plea agreement, Smith was permitted to not admit guilt and to preserve his right to appeal the circuit court's denial of his motion to dismiss. The parties agreed that Smith would withdraw his pending interlocutory appeal of the motion to dismiss before the Appellate Court of Maryland and that Smith could file a notice of appeal and pursue an appeal of the judgment and sentence imposed by the circuit court pursuant to the conditional *Alford* plea, including the circuit court's denial of the motion to dismiss. The agreement was memorialized in an 18-page document titled "Agreement and Proffer Statement in Support of Conditional *Alford* Plea Under Md. Criminal Rule 4-242(d) Preserving Rights to Appeal Determination of Any Pre-trial Motions to Date[,]" in which the parties agreed to a proffer of facts, and the State acknowledged that it had.

After a hearing on the plea agreement, the circuit court found a sufficient factual basis to support a finding of guilt on the charges of first-degree murder and daytime housebreaking. Per the agreement, the court imposed a sentence of life imprisonment, entirely suspended except for time served, and placed Smith on a period of supervised probation for five years. Smith appealed, contending that the circuit court erred in denying his motion to dismiss the charges.

The Appellate Court of Maryland affirmed the circuit court's denial of *Smith*'s motion to dismiss. *See Smith v. State*, 255 Md. App. 544, 549, 283 A.3d 722, 725 (2022). Smith petitioned for a writ of *certiorari*, which the Supreme Court of Maryland granted, limited to the first question set forth in the petition concerning whether dismissal with prejudice was warranted. *See Smith v. State*, 482 Md. 534, 288 A.3d 1231 (2023).

Held: Vacated.

Judgment of the Appellate Court of Maryland was vacated and the case remanded to that Court with instructions to remand the case to the Circuit Court for Talbot County with instructions to vacate the denial of the motion to dismiss and conduct further proceedings in accordance with the opinion.

The Supreme Court of Maryland held that, despite the agreement of the parties that the only remedy is dismissal of the charges, given that as a result of the conditional plea agreement, the new trial ordered by the Court did not take place and although the conditional plea agreement entered into by the parties contains a proffer with respect to the evidence, it was not possible for the Court to assess with any confidence beyond mere speculation what the evidence might have consisted of at retrial. As a result, it was not possible for the Court to meaningfully evaluate whether Smith had suffered irreparable prejudice for which dismissal of the charges was the only feasible remedy. The Court, therefore, declined to address the merits of the Appellate Court's decision affirming the circuit court's denial of the motion to dismiss.

Rather, the Supreme Court of Maryland vacated the judgment of the Appellate Court and remanded the case to that Court with instructions to remand the case to the Circuit Court for Talbot County with instructions that the circuit court vacate its denial of the motion to dismiss. Smith shall be allowed, if he chooses, to withdraw his conditional *Alford* plea, thereby leaving the parties in the same posture as they were before the circuit court's denial of Smith's motion to dismiss and the parties' entry into the conditional plea agreement. As such, the remand that the Court ordered for retrial in *Faulkner v. State*; *Smith v. State*, 468 Md. 418, 227 A.3d 584 (2020), would remain in effect unless the State elects, consistent with its position in this Court, not to prosecute.

Due to the unique nature of the case—the State's concession of the egregious nature of its misconduct, the unusual factual and evidentiary circumstances, and the procedural posture resulting from the conditional plea under which Smith will have no trial, fair or unfair, regardless of a holding on the merits—the Supreme Court of Maryland returned the case to the circuit court

so that Smith may decide whether to withdraw his *Alford* plea and, if Smith does so, the State may act in accord with its concessions in briefing and at oral argument before the Appellate Court and this Court.

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Jamaiya Oglesby v. Baltimore School Associates, et al., No. 26, September Term 2022, filed July 26, 2023. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2023/26a22.pdf

LEAD-BASED PAINT – EXPERT OPINION TESTIMONY – SOURCE CAUSATION – IQ LOSS – SUMMARY JUDGMENT

Facts:

The case arises out of a plaintiff's attempt to use expert testimony in a lead-based paint case to establish a property as a source of exposure to lead and a significant factor contributing to her alleged injuries including a loss of intelligence quotient ("IQ") points. Jamaiya Oglesby, Petitioner, initiated a lawsuit in the Circuit Court for Baltimore City against Baltimore Schools Associates, Crowninshield Management Corporation, Jolly Company, Inc., and the Estate of Mendel Friedman (together, "Respondents") for negligence, negligent misrepresentation, and a violation of the Maryland Consumer Protection Act. Ms. Oglesby alleged that Respondents, who owned and managed an apartment building (the "property") in which she lived as a child, were liable for injuries she sustained as a result of exposure to lead-based paint at the property. Ms. Oglesby designated Sandra Hawkins-Heitt, Psy.D., as an expert in the areas of clinical psychology and neuropsychology. Dr. Hawkins-Heitt evaluated Ms. Oglesby and concluded that she suffered from cognitive impairments or deficiencies in multiple areas and had an IQ of 80. Ms. Oglesby designated as a vocational expert Mark Lieberman, M.A., a Certified Rehabilitation Counselor. Mr. Lieberman evaluated Ms. Oglesby and found that she had numerous limitations and qualified as a "Cognitively Disabled" person.

Ms. Oglesby designated Steven Elliot Caplan, M.D., as an expert in the area of pediatric medicine to testify with respect to causation. Dr. Caplan reviewed 24 sets of records pertaining to Ms. Oglesby, including the reports of Dr. Hawkins-Heitt and Mr. Lieberman, and authored a report setting forth his opinions. Dr. Caplan concluded that Ms. Oglesby's likely exposure to lead at the property was a significant contributing factor to bringing about the cognitive deficiencies and impairments found by Dr. Hawkins-Heitt and Mr. Lieberman as described in his report, and to a loss of approximately 3 to 4 IQ points. In reaching his opinion as to Ms. Oglesby's IQ loss, Dr. Caplan relied on two studies—the Canfield study and the Lanphear study—which conclude, among other things, that, in children, there is an inverse relationship between blood-lead level ("BLL") and IQ.

Respondents moved to preclude Dr. Caplan's opinions and testimony, and for summary judgment. Respondents contended that Dr. Caplan lacked a sufficient factual basis for the opinion that Ms. Oglesby was exposed to lead at the property and that the alleged exposure caused her injuries. In addition, Respondents argued that the methodology Dr. Caplan used to calculate Ms. Oglesby's IQ loss was not reliable or generally accepted. After a hearing, conducted remotely, at which the circuit court simultaneously considered motions to preclude

expert opinions and testimony and motions for summary judgment in Ms. Oglesby's case and a second unrelated case, and a motion for summary judgment in a third separate case, the court granted both of Respondents' motions in Ms. Oglesby's case. The circuit court found that Dr. Caplan lacked a sufficient factual basis for his opinions due to what the court described as "factual issues in both of the cases, which [] normally could be presented to a jury" and that, without Dr. Caplan's testimony as to causation, Ms. Oglesby was unable to establish a prima facie case of negligence.

Ms. Oglesby appealed. The Appellate Court of Maryland affirmed the judgment of the circuit court, holding that the circuit court did not abuse its discretion in excluding Dr. Caplan's testimony or err in granting summary judgment. *See Jamaiya Oglesby v. Balt. Sch. Assocs., et al.*, No. 0130, Sept. Term, 2021, 2022 WL 3211044, at *8 (App. Ct. Md. Aug. 9, 2022). Ms. Oglesby petitioned for a writ of *certiorari*, which the Supreme Court of Maryland granted. *See Oglesby v. Balt. Sch. Assocs.*, 482 Md. 142, 285 A.3d 848 (2022).

Held: Reversed.

Reversed and case remanded to the Appellate Court of Maryland with instruction to remand the case to the Circuit Court for Baltimore City for trial or other further proceedings consistent with the opinion.

The Supreme Court of Maryland held that, in ruling on the motion to preclude and making determinations as to whether Dr. Caplan's opinions had a sufficient factual basis, the circuit court resolved genuine disputes of material fact. The Court concluded that Dr. Caplan's opinion regarding Ms. Oglesby's exposure to lead at the property being a significant contributing factor to her injuries, other than IQ loss, was supported by a sufficient factual basis and admissible, as Dr. Caplan had more than an adequate supply of data from which to form the opinion and the methodology he employed was reliable. As such, the circuit court abused its discretion in granting the motion to preclude and in determining that Dr. Caplan's testimony that Ms. Oglesby's exposure to lead at the property was a significant contributing factor to her injuries was inadmissible.

The Supreme Court of Maryland remanded the case, however, for further proceedings consistent with this Court's holding in *Rochkind v. Stevenson*, 471 Md. 1, 236 A.3d 630 (2020), for a determination as to whether the methodology Dr. Caplan employed under the Lanphear and Canfield studies reliably supports the conclusion that Ms. Oglesby's exposure to lead resulted in a loss of approximately 3 to 4 IQ points, should Ms. Oglesby seek to introduce such testimony at trial.

Having concluded that the circuit court abused its discretion in granting the motion to preclude, the Supreme Court of Maryland held that the circuit court erred in granting summary judgment. The circuit court's ruling—that Ms. Oglesby was unable to prove negligence without Dr. Caplan's testimony as to causation—was not warranted. Ms. Oglesby presented sufficient

evidence that the property was a reasonably probable source of her exposure to lead and that the exposure was a significant contributing factor to her injuries, other than IQ loss, to establish a *prima facie* case of negligence. Accordingly, the Court reversed the judgment of the Appellate Court and remanded the case to that Court with instruction to remand the case to the circuit court for trial or further proceedings under *Rochkind*, 471 Md. 1, 236 A.3d 630, with respect to Dr. Caplan's opinion as to IQ loss, should Ms. Oglesby seek to introduce such evidence at trial.

The Supreme Court of Maryland, for two reasons, agreed with Ms. Oglesby that the circuit court abused its discretion in excluding Dr. Caplan's testimony: (1) the record demonstrates that the circuit court impermissibly resolved issues of disputed fact in excluding Dr. Caplan's opinion; and (2) Dr. Caplan's opinion with respect to causation (other than as to Ms. Oglesby's IQ loss) was supported by a sufficient factual basis. In the case, the record demonstrated that, in ruling that Dr. Caplan did not have an adequate factual basis for his opinion, the circuit court resolved disputed issues of fact. What could be gleaned from the circuit court's ruling was that it determined that there were factual issues that could normally go to the jury, but would not in this case. Because the circuit court declined to explain what the issues with the facts were, the court did not expressly identify the factual problems or how it resolved them. Implicit in the circuit court's decision to exclude Dr. Caplan's testimony in its entirety, based on issues with the facts, instead of only his testimony concerning Ms. Oglesby's IQ loss, was that the court resolved in Respondents' favor factual disputes such as whether there was lead present at the property at the time that Ms. Oglesby lived there, whether Ms. Oglesby came into contact with lead at the property through peeling or chipping paint, and whether Ms. Oglesby was potentially exposed to lead at other locations and the condition of those properties. The Court concluded that a trial court is not permitted to resolve disputes of material fact in determining whether a sufficient factual basis exists to support an expert's opinion. Doing so is a clear abuse of discretion.

The Supreme Court of Maryland determined that, although the facts were greatly disputed, Ms. Oglesby produced more than sufficient evidence that lead was present in the building at 2000 East North Avenue, that she was exposed to lead-based paint at the property, and that the property was a source of her elevated blood-lead levels and alleged injuries (other than her IQ loss) to provide a sufficient factual basis for Dr. Caplan's opinions. The Court concluded that there was more than an adequate supply of data and information about the building to support Dr. Caplan's opinion that Ms. Oglesby was exposed to lead-based paint at 2000 East North Avenue. That Dr. Caplan did not rule out a property that Ms. Oglesby visited while living at 2000 East North Avenue or properties in which Ms. Oglesby lived before or after moving from the building as sources of her exposure to lead would not render inadmissible his opinion regarding Ms. Oglesby's exposure to lead 2000 East North Avenue being a significant contributing factor to her injuries. The Court also concluded that there was a sufficient factual basis for Dr. Caplan to render an opinion concerning the second causal link the link between specific exposure to lead at the property and Ms. Oglesby's blood-lead levels. And, the Court determined that Dr. Caplan also had a sufficient factual basis to offer an opinion as to the third causal link—the link between Ms. Oglesby's BLLs and her other alleged injuries—when concluding that Ms. Oglesby's likely exposure to lead at 2000 East North Avenue was a significant contributing factor to her cognitive impairments.

The Supreme Court of Maryland stated that Dr. Caplan relied on information about Ms. Oglesby, such as documented blood-lead levels, the results of the neuropsychological evaluation performed by Dr. Hawkins-Heitt showing that Ms. Oglesby had a full-scale IQ score of 80 and cognitive impairments, and the Lanphear study (as well as the Canfield study), to estimate specific IQ point losses. Although the Court and the Appellate Court have explicitly acknowledged that an expert may rely on and extrapolate from the Lanphear study to render an opinion as to an individual's IQ loss, Maryland case law has not yet assessed an expert's use of the Canfield study in the same way. The Court noted, though, that the Canfield study is one of the studies in the pooled analysis used in the Lanphear study. And, the Lanphear study explained that its conclusion that there was a decline of 6.2 IQ points for an increase in BLLs from less than 1 to 10 μg/dL was comparable to the 7.4 IQ decrement observed in the Canfield study.

The Supreme Court of Maryland observed that Respondents raised in the motion to preclude, and on brief in this Court, arguments that appeared to go to the reliability of Dr. Caplan's methodology as well as arguments that are better suited for cross-examination, rather than the exclusion of Dr. Caplan's testimony. Although case law demonstrated it is permissible for an expert to rely on the Lanphear study to offer an opinion that exposure to lead resulted in a specific loss of IQ points, the record in the case showed that neither Dr. Caplan's report nor his deposition testimony fully explained the basis for his calculations under either study. At deposition, Dr. Caplan testified that he made calculations using both Ms. Oglesby's peak BLL of 5.5 μg/dL and an average BLL of 3.8 μg/dL. Implicit in the calculations was that Dr. Caplan determined that the Lanphear and Canfield studies indicate that every 1 μg/dL increase in a BLL leads to a loss of 0.62 or 0.74 IQ points, respectively. Dr. Caplan did not testify, however, that this interpretation of the studies' findings formed the underpinning of his calculations.

The Supreme Court of Maryland stated that, further, assuming that Dr. Caplan, in fact, determined that the studies show that every 1 μg/dL increase in a BLL leads to a loss of 0.62 or 0.74 IQ points, it was not readily discernable from the content of the studies that these are reliable determinations, *i.e.*, that these were determinations reliably supported by information or findings in the studies. With respect to the Lanphear study, the issue was not that Dr. Caplan used the study to make calculations or that he used information in the study and extrapolated to achieve a result. The question was whether his calculations involve use of information in the study in a way that produces reliable results. Without a full explanation of Dr. Caplan's methodology, including the reasons for his choices, even though it is possible to discern the basis of the calculations, the Court could not determine whether it was an abuse of discretion for the circuit court to preclude this aspect of Dr. Caplan's testimony.

For these reasons, the Court remanded the case for a hearing under *Rochkind*, 471 Md. 1, 236 A.3d 630, for the circuit court to determine whether the calculations that Dr. Caplan employed using the Lanphear study are reliable and to assess Dr. Caplan's use of the Canfield study and the reliability of his methodology with respect to it, should Ms. Oglesby seek to introduce evidence concerning her IQ loss at trial.

Having concluded that the circuit court abused its discretion in granting the motion to preclude, the Supreme Court of Maryland held that the circuit court erred in granting summary judgment.

The circuit court's ruling that Ms. Oglesby was unable to prove negligence without Dr. Caplan's testimony on causation was not warranted. Even without Dr. Caplan's testimony (which should not have been excluded in its entirety), based on other evidence, Ms. Oglesby presented sufficient evidence that the property was a source of her exposure to lead to satisfy the first link of the causal chain. Dr. Caplan's testimony, along with other evidence, satisfied the second and third causal links. In sum, Ms. Oglesby presented sufficient evidence that there was a reasonable probability, *i.e.*, a fair likelihood, that the apartment at 2000 East North Avenue was a source of her exposure to lead-based paint and a significant contributing factor to her alleged injuries, other than IQ loss, to establish a *prima facie* case for negligence.

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APPELLATE COURT OF MARYLAND

Roseberline Turenne v. State of Maryland, No. 714, September Term 2022, filed July 28, 2023. Opinion by Wells, C. J.

https://mdcourts.gov/data/opinions/cosa/2023/0714s22.pdf

CRIMINAL LAW – CHILD PORNOGRAPHY – SEXUAL CONDUCT – "LASCIVIOUS EXHIBITION OF THE GENITALS" – STANDARD

In 2019, the General Assembly added "lascivious exhibition of the genitals or pubic area of any person" to its definition of sexual conduct but left the word "lascivious" undefined.

We decline to adopt either the federal courts' leading definition of the term, or a minority's definition. Instead, we adhere to a "totality of the circumstances" approach to determine whether a photograph depicting a child's genitals constitutes "lascivious exhibition" as now codified in the statute.

CRIMINAL LAW — CHILD PORNOGRAPHY — SEXUAL CONDUCT — "LASCIVIOUS EXHIBITION OF THE GENITALS" — SUFFIENCY OF THE EVIDENCE

The evidence, taken in the light most favorable to the State, and against the defendant, Roseberline Turenne, was sufficient to sustain her convictions for child pornography. The evidence showed that she had taken close-up photographs of the vaginas of several toddlers who were her charges at a daycare where Ms. Turenne worked, under circumstances from which the jury could rationally infer she derived sexual gratification from the images.

Facts:

In June 2021, Turenne worked as a teacher's aide in the daycare center Stepping Stones Early Learning Center in Salisbury, Maryland. She worked primarily in a classroom with toddlers (children ranging in age from approximately fourteen months to two years).

On June 10, 2021, Turenne was with another aide, in the daycare center's breakroom. Turenne handed the aide Turenne's phone to show her an online adult pornographic video that Turenne had downloaded to her phone. After watching the video clip, the aide examined the camera roll on Turenne's phone and saw multiple pictures of children's vaginas. The aide recognized that the images depicted a changing table and a bathroom in Stepping Stones. The aide did not confront

Turenne, but returned Turenne's phone to her and immediately reported what she saw to Stepping Stones' manager. The manager immediately contacted Child Protective Services.

Detective Rockwell and Social Worker Amy Kelly of the Wicomico County Child Advocacy Center arrived at Stepping Stones that same afternoon and interviewed Turenne. With Turenne's consent, Rockwell took Turenne's phone and looked through the camera roll alongside her. He saw the photos that the aide had described. When Detective Rockwell acknowledged the photos, stating they were of children, Turenne disagreed and said they were of adults and came from Google. Turenne then stated the photos were from Tik Tok, or that they had been sent to her and automatically downloaded to her phone through the application WhatsApp. Sometime after Turenne offered those explanations, Detective Rockwell left the room and inspected and photographed the changing tables in the daycare center. He confirmed that they were the same changing tables in the photos on Turenne's phone. When Detective Rockwell returned to the room where Turenne and Kelly were still seated, he asked Turenne if she had taken the photos inside the daycare. Turenne admitted to taking the photos in the daycare but repeatedly stated she took them "for no reason."

Turenne was charged in the Circuit Court for Wicomico County with eight counts of sexual abuse of a minor, eight counts of knowingly allowing a minor to engage as a subject in a visual representation that depicts a minor engaged as a subject in sexual conduct, and eight counts of possession of child pornography. A jury convicted her of all counts.

Held: Affirmed.

The Court was confronted primarily with the issue of whether there was sufficient evidence that the eight images depicted children engaged in "sexual conduct" under sections 11-207(a)(1) and 11-208(b)(2) of the Criminal Law Article ("CR"), by manner of "lascivious exhibition of the genitals or pubic area of any person" under CR § 11-101(d). The Court declined to adopt the leading interpretation of the federal circuits, which requires consideration of six narrow factors, as well as the minority interpretation, which requires the image to display objectively sexual conduct. Instead, the Court adhered to a "totality of the circumstances" approach, under which all circumstances surrounding an image are considered, such as the characteristics of the image itself, as well as the actions of the defendant in creating and/or storing the image, as well as the defendant's own preferences.

The totality of the circumstances surrounding the images in this case constitute "lascivious exhibition": all photos were taken of female infants; each photo is zoomed in to focus on the child's unclothed vagina; most if not all photos do not demonstrate diaper rash or any other ostensible health-related reason for taking the photo; and no photos contain faces. Regarding Turenne's taking of the images, seven of the eight photos were taken at times in the evening after teachers would begin to leave the daycare for the day, and some were taken in the bathroom. Turenne initially lied to the investigators by stating that the photos were from the internet, not of children in the daycare. The reasoning she ultimately alleged for taking the photos—that she was

documenting diaper rash—was not offered at the initial interview, and Turenne testified at trial that she would be unable to identify a child based on the photos. Other trial testimony demonstrated that there was no reason for Turenne to be concerned about documenting daycare attendees with diaper rash. Finally, the camera roll on Turenne's phone on which the photos were contained also contained adult pornography, and it was an adult pornographic video that Turenne was showing to a co-worker when the co-worker discovered the photos at issue.

Turenne also alleged on appeal that the images did not constitute "sexual exploitation" under CR § 3-602(a)(4)(i), because the photos did not have a sexual undertone. This Court disagreed, recognizing our Supreme Court's previous conclusion that "sexual exploitation is not limited to incidents involving physical contact and can include a wide range of behavior." *State v. Krikstan*, 483 Md. 43, 51 (2023). This Court concluded that it was for the jury to determine whether the photos had a sexual aspect, and their conclusion that they did was reasonable in light of many of the same factors articulated for "lascivious exhibition."

Finally, Turenne raised two plain error arguments regarding jury instructions and comments made in closing by the prosecutor. We declined to reach the merits of either argument, as neither involved an error so clear or obvious to be beyond dispute.

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Malik Mungo v. State of Maryland, No. 1658, September Term 2021, filed July 25, 2023. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2023/1658s21.pdf

CRIMINAL VENUE – WAIVER OF MANDATORY MOTION – CRIMINAL ORGANIZATION STATUTE – PARTICIPATION IN A CRIMINAL ORGANIZATION THAT RESULTS IN DEATH – PLAIN ERROR REVIEW

Facts:

In August 2018, a grand jury in Baltimore County indicted Malik Mungo, appellant, on multiple charges related to the shooting of Sebastian Dvorak, including participation in a criminal organization that resulted in death. On September 18, 2018, defense counsel filed a notice of appearance. Fifty-one days later, on November 8, 2018, appellant filed a motion to dismiss for improper venue, arguing that Baltimore County lacked authority to preside over the charges related to the shooting, which occurred in Baltimore City. The circuit court denied the motion.

Trial began in May 2019. The jury found appellant guilty on several drug and firearm charges. It was unable to reach a verdict on the other charges, including the murder of Mr. Dvorak and the gang charges. The court declared a mistrial on those charges and ordered a new trial.

A second trial began in October 2021. The jury convicted appellant of, among other things, first-degree felony murder and knowingly participating in a criminal organization that resulted in death. The court sentenced appellant to life imprisonment, all but 45 years suspended, on the conviction for first-degree felony murder, and five years, consecutive, on the conviction for participating in a criminal organization that resulted in death.

Held: Affirmed.

A claim of improper venue is waived if it is not timely filed unless the court finds good cause to excuse the late filing. In this case, defense counsel did not give any reason for failing to file a timely motion, and counsel did not suggest there was good cause until oral argument in this Court. Appellant has waived his improper venue argument.

Pursuant to Md. Code Ann., Crim. Law Art. ("CR") § 9-804(a) (2021 Repl. Vol.), it is unlawful for an individual to (1) "participate in a criminal organization knowing that the members of the criminal organization engage in a pattern of organized crime activity," and (2) "knowingly and willfully direct or participate in an underlying crime . . . committed for the *benefit of, at the direction of, or in association with* a criminal organization." (Emphasis added). Pursuant to CR § 9-804(e): "A person may not violate subsection (a) of this section that results in the death of a

victim." To sustain a conviction under CR § 9-804(e), participation in a criminal organization that results in death, the State must prove four elements. First, an individual participated in a criminal organization knowing that the members engage in a pattern of organized criminal activity. Second, the individual knowingly and willfully directed or participated in an underlying crime. Third, the crime was committed "for the benefit of, at the direction of, or in association with" a criminal organization. Fourth, the crime resulted in the death of the victim.

A crime is committed "in association with" a criminal organization if it is committed either with other gang members or with "the apparatus of the gang." A weapon used to commit a crime constitutes an apparatus. If a crime is committed with a weapon supplied by a criminal organization, that fact supports a jury finding that the crime was committed "in association with" a criminal organization. The use of a gang provided firearm to commit the crime here, as well as the assistance of the gang after the shooting, was sufficient evidence to support the jury's conviction on this charge.

We decline to exercise our discretion to review for plain error appellant's claim that the court erred in asking a voir dire question that he requested.

Caitlin Nichole Stanton v. State of Maryland, No. 1541, September Term 2022, filed July 25, 2023. Opinion by Wells, C. J.

https://mdcourts.gov/data/opinions/cosa/2023/1541s22.pdf

CRIMINAL PROCEDURE – INTERSTATE AGREEMENT ON DETAINERS (IAD) – REQUEST BY INMATE FOR FINAL DISPOSITION

Facts:

In the Circuit Court for Garrett County, Maryland, the State charged appellant Caitlin Nichole Stanton with possession of methamphetamine with the intent to distribute, along with several other related offenses. While Stanton was released on bond for this matter, she was arrested and sentenced to a period of incarceration in West Virginia on separate charges. When Stanton failed to appear for a motions hearing before the circuit court in Maryland, her attorney requested the court issue a bench warrant to initiate the Interstate Agreement on Detainers ("IAD") process. In July 2021, the circuit court issued a warrant for Stanton and continued her case until she was available from her incarceration in West Virginia. In May 2022, the circuit court granted Stanton's request to quash the warrant. About a month later, Stanton moved to dismiss with prejudice the charges against her, arguing that the State and circuit court had actual notice of her request to have her case heard pursuant to the IAD. The court denied her motion to dismiss, and Stanton filed a timely appeal. On appeal, she submits the following question for our review: "Did the circuit court err in denying Appellant's motion to dismiss for the State's failure to comply with the [IAD]?"

Held: Affirmed.

Stanton contended that the circuit court erred by denying her motion to dismiss the charges against her despite the State's failure to comply with the IAD. While Stanton concedes that "[w]ritten notice to the receiving state of the inmate's intent to invoke the IAD is required[,]" she points out that this notice requirement "may be satisfied by proof of actual notice." Stanton argues that an e-mail exchange she had with the State's Attorney and the motions hearing before the circuit court placed both the State and the court on actual notice that she intended to proceed under the IAD and that the State's Attorney had 180 days to bring her to trial. Because the State failed to do so, according to Stanton, it violated the IAD and therefore, the court should have granted her motion to dismiss.

The Appellate Court of Maryland has held that the notice provisions of Md. Code Ann., Correctional Services ("CS") § 8-405 (the IAD statute) are "mandatory and not directory." *Thurman v. State*, 89 Md. App. 125, 131 (1991) (citing *Hines v. State*, 58 Md. App. 637, 649

(1984)). Further, we have held that "it is actual notice and not exact compliance with the statute that matters." *State v. Coale*, 250 Md. App. 1, 39-40 (2021).

In this case, Stanton has not demonstrated that she complied with the statutory provisions of the IAD. Under CS § 8-405(a), for an inmate such as Stanton to exercise the right to be brought to trial on pending charges within 180 days, the inmate must file a written notice and request for final disposition. That request must be accompanied by:

> a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

However, Stanton presents no evidence that she filed *any* written notice or request, let alone such notice and request in compliance with the IAD.

Stanton's reliance on the email exchange with the prosecutor and the court's issuance of a bench warrant to act as a detainer to West Virginia did not put the court or the State on actual notice of Stanton's request to have her case heard in 180 days under the IAD. The issuance of a bench warrant does not start the 180-day IAD clock under which the State must bring a defendant to trial. Rather, the issuance of a warrant, and the subsequent lodging of a detainer, creates the circumstances under which the IAD applies. To start the 180-day IAD clock, the inmate must file a written request for IAD relief with the warden or other official of the institution where the inmate is currently imprisoned, who then must forward the request to the appropriate authorities in the receiving state. CS § 8-405(a). For the same reason, Stanton's email exchange with the prosecutor did not qualify as written notice to the warden of the holding facility requesting transfer under the IAD.

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Lewin Powell III v. State of Maryland, No. 721, September Term 2022, filed July 26, 2023. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2023/0721s22.pdf

UNIFORM POSTCONVICTION PROCEDURE ACT – EXTRAORDINARY CAUSE

Facts:

Under section 7-103(b) of the Criminal Procedure Article ("CP") of the Maryland Code (2001, 2018 Repl. Vol.), a petition for post-conviction relief "may not be filed more than 10 years after the sentence was imposed" "[u]nless extraordinary cause is shown[.]"

On January 26, 2009, Lewin Carlton Powell III entered a guilty plea to one count of first-degree murder. On April 3, 2009, Powell was sentenced to life imprisonment. In August 2018, approximately six months before the 10-year deadline for filing a post-conviction petition, Powell obtained post-conviction counsel. Post-conviction counsel assured Powell that counsel would timely file his post-conviction petition on Powell's behalf.

On April 2, 2019, the last day before the 10-year deadline would run, counsel attempted to file Powell's post-conviction petition, using MDEC, the court's new electronic filing system. On April 5, 2019, counsel checked MDEC, because she realized that she had not received confirmation of the filing. She discovered that she had not succeeded in filing the petition.

Powell, through new counsel, filed an amended petition for post-conviction relief. In that petition, Powell argued he could demonstrate extraordinary cause, which would excuse the late filing of his original petition.

The Circuit Court for Baltimore County held a hearing on Powell's amended petition. Powell argued that he had a statutory right to the effective assistance of counsel in filing his post-conviction petition, that counsel's error had deprived him of that right, and that the deprivation amounted to extraordinary cause. The State countered that "failing to me[et] the deadline through ordinary course" did not qualify as extraordinary cause under CP section 7-103(b).

The court agreed with Powell that the late filing occurred because of the attorney's error, but disagreed that the error rose to the level of extraordinary cause to excuse the late filing. Powell appealed.

Held: Vacated and Remanded

The Appellate Court concluded that when counsel negligently fails to file a timely post-conviction petition, as Powell's counsel did in this case, the petitioner has a remedy under the

Uniform Postconviction Procedure Act: the right to have the late filing excused under CP section 7-103(b) because of "extraordinary cause."

The Court held that "extraordinary cause" does not have a single, fixed meaning, but that its meaning depends on the context in which it is used. However, in any applicable context, the Court held that "extraordinary cause" generally means "cause beyond what is ordinary, usual or commonplace" or cause that "exceeds the common order or rule and is not regular or of the customary kind." Similarly, "extraordinary cause" has connotations of rarity, irregularity, and unusualness.

Pulling from that definition, the Court held that Powell established "extraordinary cause" to justify the late filing of his post-conviction petition under CP section 7-103, because his lawyer committed legal malpractice, which the law deems to be rare, irregular, and unusual, "beyond what is ordinary, usual or commonplace" and neither "regular" nor "customary."

The Court held that under CP section 7-108(a), Powell had a statutory right to the assistance of counsel in connection with his petition for post-conviction relief. Powell's statutory right to the assistance of counsel entails the right to the effective assistance of counsel. In failing to protect Powell's rights by filing a timely post-conviction petition before the well-known statutory deadline, the Court determined that his counsel committed legal malpractice. The Court determined that Powell was also severely prejudiced by his counsel's mistake. Unless counsel's failure to file a timely petition were deemed to constitute "extraordinary cause," Powell would be forever barred from challenging a potentially illegal conviction even though he had every reason to rely on his counsel to timely file his petition. The Court reasoned that Powell would also not even have the statutory right to attempt to reopen a post-conviction case because no post-conviction case was ever opened in the first place.

Therefore, the Court held that counsel's negligence in failing to timely file a post-conviction petition constitutes "extraordinary cause" under CP section 7-103(b). Powell had the right to have the late filing excused.

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Marco Darrin Lomax v. State of Maryland, No. 1857, September Term 2021, filed July 26, 2023. Opinion by Arthur, J.

https://www.mdcourts.gov/data/opinions/cosa/2023/1857s21.pdf

UNIFORM POSTCONVICTION PROCEDURE ACT – SUBPOENA FOR EVIDENCE IN A POSTCONVICTION PROCEEDING

Facts:

In 2013, Marco Lomax was convicted of attempted murder, largely on the basis of the testimony of three Baltimore City police officers. One of those officers was Detective Daniel Hersl, who was later convicted of racketeering, robbery, and other federal offenses as a result of his role in the infamous Gun Trace Task Force.

In a post-conviction proceeding in 2021, Lomax claimed that the State had withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In an effort to establish that claim, Lomax served an Assistant State's Attorney with a subpoena commanding her to produce "*Brady* material," including Internal Affairs ("IAD") records for Hersl and the other officers who testified at Lomax's trial, from the date of the offense through the date of the subpoena.

At the time of the subpoena, section 4-311 of the General Provisions Article ("GP") of the Maryland Code (2014, 2019 Repl. Vol.), required a custodian to deny a request for the inspection of IAD records because they were considered to be "personnel records." Under the governing law at the time of Lomax's trial and at the time of the hearing on his post-conviction petition, a criminal defendant could obtain IAD records only by demonstrating a "need to inspect" the records and persuading the court, after an in-camera review, that they might reveal or lead to admissible evidence. As of October 1, 2021, IAD records are no longer classified as "personnel records" under the PIA. GP § 4-351(a).

On the State's motion, the Circuit Court for Baltimore City quashed Lomax's subpoena on the ground that a post-conviction petitioner could not obtain what it called "discovery." The court asserted that a petitioner could not use a subpoena to compel the State to produce what "should have been provided" at trial.

At the subsequent post-conviction hearing, along with his *Brady* claim, Lomax raised the issue of ineffective assistance of counsel. Lomax contended that his trial counsel was ineffective because counsel made the decision not to present surveillance footage from the scene of the crime at his trial, because counsel failed to highlight certain information in the victim's medical records, and because counsel failed to object to the State's interpretation of the medical records in closing arguments.

The circuit court denied appellant's petition for post-conviction relief, which included his *Brady* claim and his claims alleging ineffective assistance of counsel. The Appellate Court of Maryland granted Lomax's application for leave to appeal.

Held: Affirmed in part. Reversed in part.

The Appellate Court of Maryland concluded that the circuit court erred in quashing Lomax's subpoena on the premise that it was an unauthorized effort to obtain pretrial "discovery."

The Appellate Court held that, when a post-conviction petitioner adequately alleges that the State secured the conviction without complying with its *Brady* obligations, the petitioner may issue a subpoena requiring a State witness to produce the materials that *Brady* obligated the State to disclose before the conviction was obtained. An adequate allegation requires more than a conclusory allegation or an assertion of law; it entails a clear statement of the facts necessary to establish a likely *Brady* violation.

Maryland Rule 4-265(b) expressly authorizes the issuance of a "trial subpoena" and Rule 4-265(a)(1) states that the term "trial" includes a "hearing." Rule 4-406(a) generally requires a court to hold a "hearing" in a post-conviction action, and Rule 4-406(a) permits the parties to present evidence at the hearing "by affidavit, deposition, oral testimony, or in any other form as the court finds convenient and just." The rules, therefore, expressly authorize a post-conviction petitioner to issue a subpoena for a post-conviction hearing that the court is required to hold.

The Appellate Court held that the circuit court did not err in quashing Lomax's subpoena insofar as it required the State to produce IAD records for Hersl and the other police officers. Under the law both at the time of his trial and at the time of the post-conviction hearings, IAD records were considered to be personnel records, which were mandatorily exempt from disclosure by the custodian of records under the PIA. GP § 4-311.

GP § 4-311 was amended, effective October 1, 2021, to state that, in general, "a record relating to an administrative or criminal investigation of misconduct by a police officer, including an internal affairs investigatory record, a hearing record, and records relating to a disciplinary decision, is not a personnel record for purposes" of the statute. At present, therefore, a custodian may, but need not, deny a request for the inspection of IAD records. The Appellate Court concluded that, in view of the change of law, the circuit court, on remand, may permit the petitioner to issue another subpoena for the IAD records.

Finally, the Appellate Court addressed Lomax's claims of ineffective assistance of counsel. Under section 7-106(b)(1)(i)(3) of the Criminal Procedure Article ("CP") of the Maryland Code (2001, 2018 Repl. Vol), "an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation . . . on direct appeal[.]" Lomax previously raised the issue about the surveillance footage in a motion for a new trial. He contended that his trial counsel was ineffective because he did not employ the video; the trial

court rejected that contention; and petitioner failed to challenge the ruling on direct appeal. Therefore, Lomax waived the contention. But, even if he had not waived the contention, the Appellate Court found no ineffective assistance of counsel, because trial counsel made a reasonable, strategic decision not to use the video, which had minimal evidentiary value.

The Appellate Court also found no error in trial counsel's decision not to use the ambiguous medical records or in failing to object to the State's interpretation of the medical records, because the evidence could support multiple interpretations.

Harold A. Logan, Trustee Under the Harold A. Logan Trust Agreement Dated April 30, 2007 v. Wesley J. Dietz, et al., No. 1761, September Term 2021, filed August 2, 2023. Opinion by Getty, J.

https://www.mdcourts.gov/data/opinions/cosa/2023/1761s21.pdf

MARYLAND HOMEOWNERS ASSOCIATION ACT – DEFINITION OF HOMEOWNERS ASSOCIATION

MARYLAND HOMEOWNERS ASSOCIATION ACT – DEFINITION OF DECLARATION – MANDATORY FEE

MARYLAND HOMEOWNERS ASSOCIATION ACT – AMENDMENT OF GOVERNING DOCUMENTS

Facts:

There is an eight-unit townhouse development in Ocean City, Maryland, known as Captains Quarters Townhouses. In 1978, the developer subjected Captains Quarters to a declaration with certain covenants, including a prohibition against altering the exterior of a unit without consent from the owners of the seven remaining units, covenants for the common use of some elements—such as a shared roof and parking pad—and covenants to contribute pro rata for maintenance of common use elements. At no point has the development been governed by a homeowners association or have the residents been assessed fees annually or at more frequent intervals.

In the summer of 2020, a townhouse unit owner—Wesley Dietz—renovated the exterior of his townhouse. Another owner—Harold Logan—sued in circuit court to enforce the 1978 Declaration. Dietz first claimed that covenants within the 1978 Declaration had been abandoned and were no longer enforceable. Then, he joined together with owners of four other units to amend the 1978 Declaration, forming the 2021 Declaration, without the owners of the three remaining units consenting. To do so, they cited Maryland's Homeowners Association Act ("HOA Act"), codified at Md. Code 1974, 2015 Repl. Vol., 2022 Supp.) Real Prop. ("RP") § 11B-101, *et seq.* Specifically, they relied on RP § 11B-116(c), which allows a "homeowners association [to] amend [a] governing document by the affirmative vote of lot owners in good standing having at least 60% of the votes in the development[.]" Because Dietz and the owners of the four participating units made up 62.5% of Captains Quarters, they believed they could amend the 1978 Declaration without the owners of the three remaining units.

Logan disputed the validity of the 2021 Declaration in court. He contended that the HOA Act did not apply to Captains Quarters because there was no homeowners association. Dietz countered that the development satisfied the statutory definition of homeowners association, defined by the HOA Act to be a "person having the authority to enforce the provisions of a

declaration[,]" RP § 11B-101(i)(1), and thus was governed by the HOA Act. Both moved for summary judgment on this issue. Logan and Dietz also disputed whether the development had a qualifying declaration under the Act, which states that a declaration is a recorded instrument that "creates the authority for a homeowners association to impose . . . [a] mandatory fee[.]" RP § 11B-101(d)(1). Logan argued that no dues had ever been assessed; Dietz countered that the common use maintenance obligations satisfied the requirement of a "mandatory fee."

The circuit court agreed with Dietz. Among other findings, the circuit court determined that, under the 1978 Declaration, a *de jure* or implied right existed for a homeowners association, that the one-eight pro rata contribution for maintenance obligations qualified as a "mandatory fee," and that the 2021 Declaration controlled and thus required dismissal because the 2021 Declaration had retroactively approved any alterations made to the exterior of the townhouse units. Accordingly, the circuit court granted summary judgment to Dietz and dismissed Logan's suit.

Held: Vacated and remanded.

The HOA Act does not apply to Captains Quarters. There is no "homeowners association" in the development that would be subject it to the Act. Although the definition of "homeowners association" uses the word "person," that term is defined in Title 1 of the Real Property Article, and its use in the context of the HOA Act refers to an entity or organization that operates as a homeowners association, or a representative thereof. A homeowner in an individual capacity cannot be a "homeowners association."

In addition, Captains Quarters did not have a qualifying "declaration" under the Act because it did not authorize the imposition of a mandatory fee. Although undefined by the act, the statutory context indicates that the term "mandatory fee" refers to a fee that the homeowners anticipate being assessed at regular intervals (e.g., monthly, quarterly, or annually) to support the costs for maintaining the common use facilities of a development. The requirement to share maintenance costs under a pro rata share in a declaration of common use and maintenance obligations is not a "mandatory fee."

Because Captains Quarters did not have a qualifying "homeowners association" or "declaration" under the Act, the provisions of the HOA Act did not apply. Dietz and the owners of four units could not rely on RP § 11B-116 to amend the 1978 Declaration without the consent of the owners of the three remaining units. Thus, the 2021 Declaration was not valid, and the 1978 Declaration continues to govern the dispute.

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Tami Browne v. State Farm Mutual Automobile Insurance Company, No. 1825, September Term 2021, filed July 27, 2023. Opinion by Adkins, J.

https://www.mdcourts.gov/data/opinions/cosa/2023/1825s21.pdf

INSURANCE LAW – ADMINISTRATIVE & JUDICIAL REMEDIES FOR LACK OF GOOD FAITH – APPLICATION OF COLLATERAL ESTOPPEL

TORTS – SCOPE OF LIABILITY – SUBSEQUENT NEGLIGENT MEDICAL TREATMENT

TORTS – DAMAGES – REQUIREMENT THAT MEDICAL BILLS BE FAIR, REASONABLE, AND NECESSARY

TORTS – SCOPE OF LIABILITY – SUBSEQUENT NEGLIGENT MEDICAL TREATMENT – BURDENS OF PROOF

Facts:

Tami Browne suffered injuries when the automobile in which she was riding as a passenger was rear-ended by an unidentified driver. She went to the emergency room, complaining of lower back and right-side neck pain. She was later discharged and told to follow up with her primary care doctor. She then underwent three months of non-surgical treatment for lower back, neck, and hip pain before undergoing surgery to remove a Tarlov cyst along the sacral nerve roots of her spine, which had shown up on an MRI.

Browne filed an uninsured motorist claim with her insurer—State Farm—for the $50,000 policy limit of her policy and provided documentation of medical bills exceeding that limit. State Farm contested the causal connection between the accident and the Tarlov cyst surgery and the surgery's necessity. After the parties did not settle, Browne filed a breach of contract claim in circuit court. She later filed an administrative complaint with the Maryland Insurance Administration ("MIA") for lack of good faith under Md. Code, Ins. ("IN") § 27-1001 and Cts. & Jud. Proc. ("CJP") § 3 1701. IN § 27-1001 and CJP § 3-1701 establish administrative and judicial remedies for a first-party insured against an insurer who fails to act in good faith. The statutes require the insured to receive a final decision under the administrative procedures of IN § 27-1001 before bringing an action under CJP § 3-1701 in circuit court.

The MIA adjusted the amount State Farm was to pay Browne on her claim but determined that State Farm had not failed to act in good faith. Browne requested an administrative hearing with the Office of Administrative Hearings ("OAH") as allowed after an adverse MIA decision under IN § 27-1001. The OAH agreed with the MIA's initial decision. Browne then sought to amend her pending breach of contract claim to include a lack of good faith claim against State Farm.

After the circuit court allowed the amendment, the parties both moved for summary judgment. Browne argued that she was entitled to the $50,000 policy limit because her medical expenses exceeded $50,000, and as a matter of law, even if her surgery was negligently provided, State Farm remained liable for subsequent negligent medical treatment of the injuries she suffered in the accident. State Farm moved for summary judgment on the basis that the decision the OAH issued after the administrative hearing collaterally estopped Browne from continuing the litigation in circuit court. The circuit court agreed with State Farm and granted summary judgment in State Farm's favor while denying Browne's motion as moot. Browne appealed, claiming the circuit court erred in granting State Farm's motion and denying hers.

Held:

Grant of summary judgment in State Farm's favor reversed. Denial of Browne's motion for summary judgment vacated. Case remanded.

The decision issued by the OAH after an administrative hearing did not collaterally estop Browne from litigating her breach of contract and lack of good faith claims in circuit court. CJP § 3-1701 and IN § 27-1001 first require that an insured receive a final decision under IN § 27-1001 before bringing a lack of good faith claim in circuit court. A final decision under IN § 27-1001 can occur either when a party does not request a hearing within 30 days of receiving an adverse decision from the MIA, IN § 27-1001(f)(3), or after the administrative hearing before the OAH which must result in a final decision, IN § 27-1001(f)(2). The statute does not distinguish between the two. Although collateral estoppel usually applies to bar litigation after a contested administrative case, collateral estoppel is a common law doctrine that the General Assembly is free to alter. In this case, the statutory scheme of requiring a final administrative decision—without distinguishing between one issued preliminarily by the MIA that becomes final and one that results from an OAH hearing—before bringing a claim in circuit court indicates that the legislature did not intend the common law collateral estoppel doctrine to prohibit an insured from bringing a circuit court action after receiving a final decision after the administrative hearing. CJP § 3-1701 also provides that filing an administrative lack of good faith complaint would "not limit the right of any person to maintain a civil action for damages or other remedies otherwise available under any other provision of law.' CJP § 3-1701(i). Accordingly, Browne was not collaterally estopped from proceeding to the circuit court with her lack of good faith claim under CJP § 3-1701 or from maintaining her breach of contract claim in circuit court.

Although a circuit court has discretion when denying a party's motion for summary judgment, they must do so using correct legal standards. The circuit court's incorrect determination that State Farm was entitled to summary judgment on the basis of collateral estoppel led to its determination that Browne's motion was moot. Because the circuit court was incorrect in its reasoning, we vacate the circuit court's denial of Browne's motion, allowing it to rule anew on remand.

We offer the following guidance for the circuit court's consideration on remand because our appellate courts have never discussed the interplay between the subsequent negligence doctrine under the Restatement (Second) of Torts § 457 and our precedent that medical bills must be fair, reasonable, and necessary.

Under the subsequent negligence doctrine of the Restatement § 457, an original tortfeasor remains liable for subsequent negligent medical treatment of the original injury unless the subsequent treatment is a superseding cause. The subsequent treatment may be a superseding cause in the following instances: (1) extraordinary misconduct by medical professionals, (2) intentional torts committed by medical professionals against the victim, (3) a victim's elected treatment of an ailment known to be unrelated to the injuries caused by the negligent actor, (4) treatment by a medical professional the victim was negligent in selecting, and (5) aggravation of the injury due to the victim's negligence in carrying out the treatment of her injuries.

In addition, our appellate courts have said that, to be recoverable, medical bills must be fair, reasonable and necessary. This requirement is an evidentiary safeguard to ensure that a plaintiff lays a proper foundation to introduce the bills as evidence of damages. However, when the issue of subsequent negligent medical treatment is involved, the "necessary" requirement shifts to mean "causally related" or "proximately resulted from" the original injury.

Finally, when a defendant seeks to alleviate its liability based on subsequent negligent medical treatment, the defendant has the burden of production on that issue. The ultimate burden of persuasion on the element of causation remains with the plaintiff.

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ATTORNEY DISCIPLINE

*

This is to certify that the name of

JASON ERIC FISHER

has been replaced on the register of attorneys permitted to practice law in this State as of July 6, 2023.

*

By an Opinion and Order of the Supreme Court of Maryland dated July 7, 2023, the following non-admitted attorney has been indefinitely suspended:

WILLIAM FRANCIS TREZEVANT

*

By an Opinion and Order of the Supreme Court of Maryland dated July 10, 2023, the following non-admitted attorney has been indefinitely suspended:

GEORGE L. FARMER

*

By an Order of the Supreme Court of Maryland dated July 17, 2023, the following attorney has been indefinitely suspended by consent:

ELLEN F. BIGHAM

*

This is to certify that the name of

BRIEN M. PENN

has been replaced on the register of attorneys permitted to practice law in this State as of July 28, 2023.

*

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

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