Amicus Curiarum

VOLUME 35
ISSUE 8 AUGUST 2018

A Publication of the Office of the State Reporter

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Adkins, Harrell, and Raker, JJ., concur and dissent.

https://www.mdcourts.gov/data/opinions/coa/2018/83a09ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

In the United States District Court for the District of Maryland, Walter Lloyd Blair, Respondent, a member of the Bar of Maryland, was convicted of: nine counts of money laundering; one count each of witness tampering, obstruction of justice, and making a false statement; and two counts of willful failure to file federal income tax returns. Blair appealed.

While the appeal was pending, on behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Blair, charging him with misconduct based on the serious crimes of which he was convicted. The Court of Appeals immediately suspended Blair from the practice of law in Maryland with the invitation to request reconsideration if the Fourth Circuit ruled in his favor.

The Fourth Circuit affirmed thirteen of Blair's convictions, reversed his conviction for obstruction of justice due to insufficient evidence, and remanded his criminal case for resentencing. In its opinion, the Fourth Circuit stated that Blair "concocted and executed a scheme to launder drug proceeds that he obtained from a client."

According to the Fourth Circuit, Elizabeth Nicely Simpson, a prospective client, told Blair that she possessed a safe that contained drug money belonging to Anthony Rankine, who had operated a large marijuana distribution ring. Among other things, Blair invented a lie regarding drug money being from a legitimate source, and told Simpson to tell the lie if anyone inquired about the drug money. Without being asked to do so, Blair caused to be created a corporation through which Simpson could use the drug money to buy and sell real estate.

After agents of the Federal Bureau of Investigation contacted Simpson to interview her, Blair told Simpson not to tell the agents about the drug money, and to instead talk to the agents only

about a car that Simpson had bought for Rankine. Blair told Simpson that, if the money came up, she should use the lie that he had made up regarding the money being from a legitimate source.

In a federal court in Virginia, Blair applied for admission *pro hac vice* to represent one of Rankine's associates as co-counsel. In his *pro hac vice* application, Blair misrepresented that he had never been subject to disciplinary action by a bar association. Contrary to Blair's application, the Supreme Court of Appeals of West Virginia had previously suspended him from the practice of law in West Virginia based on witness tampering.

During an investigation of the marijuana distribution ring and money laundering scheme, it was discovered that Blair had failed to file federal income tax returns for two years, including the year in which he had taken some of the money from the safe for himself.

On remand, United States District Court for the District of Maryland resentenced Blair to an aggregate sentence of ninety-seven months of imprisonment, three years of supervised release, and a $100,000 fine. After being released from federal custody, Blair filed with the Court of Appeals a Petition for Reinstatement, in which, for the first time, he informed the Court and Bar Counsel of the opinion in which the Fourth Circuit disposed of the first appeal in his criminal case by affirming thirteen of his convictions. Afterward, Bar Counsel filed a Motion for Final Disposition or, in the Alternative, Further Proceedings, recommending that the Court disbar Blair.

Held: Disbarred.

The Court of Appeals noted that there was no need for a hearing judge to determine whether Blair had committed the serious crimes in question, as he had not denied his convictions—to the contrary, he had unequivocally admitted them. It had been conclusively established that Blair had engaged in several instances of dishonest, criminal conduct. The Fourth Circuit affirmed Blair's convictions nine counts of money laundering, one count each of witness tampering and making a false statement, and two counts of willful failure to file federal income tax returns. The Court of Appeals concluded that every one of these thirteen crimes constituted a violation of Maryland Lawyers Rules of Professional Conduct 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), and 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice).

The Court concluded that there was no reasonable basis on which to exercise its discretion to designate a hearing judge for the purpose of determining whether there were any mitigating factors. The Court explained that the case for disbarment was overwhelming, as, generally, disbarment is the appropriate sanction for a lawyer's misconduct where the lawyer commits a crime that establishes that the lawyer is unfit to continue to practice law. Additionally, the Court had disbarred attorneys who have committed tax-related violations with fraudulent intent. Moreover, absent compelling extenuating circumstances, disbarment is ordinarily the sanction

for intentional dishonest conduct. The Court stated that, in light of the dishonest and criminal nature of Blair's misconduct, the number of instances of misconduct, and the egregiousness of the conduct, compelling extenuating circumstances would be necessary to preclude disbarment.

The Court explained that there was no indication of the existence of any evidence that would come close to establishing compelling extenuating circumstances, and the evidence of the mitigating factors that Blair and his counsel had suggested was insufficient to preclude disbarment. At oral argument, in response to questions about the possibility of establishing mitigating factors, Blair and his counsel identified certain circumstances that, if proven, would not even constitute mitigating factors, such as Blair's age and the purported need for his services.

Although Blair had not expressly alleged delay in the attorney discipline proceeding as a mitigating factor, the Court noted that the circumstances did not establish that this factor mitigated Blair's misconduct. Bar Counsel initiated the attorney discipline proceeding by filing the Petition for Disciplinary or Remedial Action within five months after Blair was convicted. Thus, there was no unreasonable delay on Bar Counsel's part in initiating the attorney discipline proceeding. Although approximately seven-and-a-half years passed between the filing of the Petition for Disciplinary or Remedial Action and the filing of the Motion for Final Disposition or, in the Alternative, Further Proceedings, the time lapse was attributable to Blair's failure to comply with his obligation to report the outcome of the appeal in his criminal case.

The Court noted that Blair had expressed remorse, and had proffered that certain individuals would testify that he was a good person. The Court explained that, even assuming, for argument's sake, that Blair would be able to establish at an evidentiary hearing remorse and good character or reputation, these mitigating factors did not come close to constituting compelling extenuating circumstances or mitigating factors that would preclude disbarment.

The Court concluded that disbarment was the appropriate sanction. Alone, any one of the eleven felonies that Blair committed—nine instances of laundering drug money, one instance of witness tampering, and one instance of making a false statement—would heavily weigh in favor of disbarment. Making matters worse, each of the eleven felonies that Blair committed involved knowing and/or intentional dishonesty—which, in and of itself, heavily weighed in favor of disbarment. Blair also willfully failed to file federal income tax returns for two years, including the year in which he took some of the drug money for his own use. Blair's thirteen convictions made clear that disbarment was necessary to protect the public and to deter other lawyers from embarking on criminal enterprises similar to the one that Blair so brazenly executed.

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Attorney Grievance Commission of Maryland v. Ross D. Hecht, Misc. Docket AG No. 97, September Term 2016, filed May 10, 2018. Opinion by Getty, J.

Greene and Watts, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2018/97a16ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

On February 23, 2017, the Attorney Grievance Commission of Maryland ("Bar Counsel") filed a Petition for Disciplinary or Remedial Action ("Petition") alleging that Ross D. Hecht ("Hecht") had violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"). The Petition alleged that Hecht, during representation of Diana Lynn Crummitt, had violated the following rules of the MLRPC: 1.1 (Competence); 1.2(a) (Scope of Representation); 1.3 (Diligence); 1.4(a); and (b) (Communication); 1.16(a) and (d) (Declining or Terminating Representation); 3.2 (Expediting Litigation); 3.3(a) (Candor Toward the Tribunal); 3.4(c) and (d) (Fairness to Opposing Party and Attorney); 4.1 (Truthfulness in Statements to Others); 5.5 (Unauthorized Practice of Law); 8.1(a) (Bar Admissions and Disciplinary Matters); and 8.4(a), (b), (c), and (d) (Misconduct).

A hearing judge found the following facts. Hecht took on representation of a client who had been involved in a Frederick County car accident. Hecht was later suspended from the practice of law due to a separate matter. Even though Hecht was suspended, he failed to communicate to his client that he was suspended, made misrepresentations to the client about his suspension, continued to render legal assistance on behalf of the client, and made misrepresentations to Bar Counsel during the investigation.

Held: Indefinite suspension with the right to petition for reinstatement after twelve months from the date of the opinion.

The Court of Appeals held that Hecht's conduct violated MLRPC 1.1, 1.3, 1.4(a) and (b), 1.16(a) and (d), 3.2, 3.3, 3.4(d), 4.1, 5.5(a) and (b), 8.1, and 8.4(a), (b), (c), and (d). Consistent with the hearing judge's findings of fact and conclusions of law, the Court of Appeals determined that Hecht erred when he failed to alert his client about his suspension. Hecht then compounded that mistake when he continued to render legal assistance on behalf of his client and made misrepresentations to Bar Counsel during the investigation.

The Court of Appeals concluded that the appropriate sanction for Hecht's misconduct was an indefinite suspension with the right to petition for reinstatement after twelve months from the date of the opinion. The Court of Appeals noted that Hecht had received prior attorney

discipline, that Hecht has practiced law for a substantial period of time, and that Hecht's conduct involved deceit. The Court of Appeals also considered Hecht's good reputation in the legal profession, his multiple attempts to find his client new counsel, and his remorse.

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Attorney Grievance Commission of Maryland v. Dana Andrew Paul, Misc. Docket AG No. 4, September Term 2017, filed June 22, 2018. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2018/4a17ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – SUSPENSION

Facts:

On March 16, 2017, the Attorney Grievance Commission of Maryland filed a Petition for Disciplinary or Remedial Action ("Petition") alleging that Dana A. Paul ("Paul") had violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"). The Petition alleged that Paul had violated the following rules of the MLRPC: 3.1 (Meritorious Claims and Contentions); 8.2(a) (Judicial and Legal Officials); and 8.4(a), (b), (c), and (d) (Misconduct).

A hearing judge found the following facts. While returning from a pretrial settlement conference in Salisbury, Paul, an Anne Arundel County attorney, engaged in dangerous driving in Wicomico and Dorchester counties. Paul's conduct consisted of driving closely to other cars, a confrontation at a traffic light, and an accident with another vehicle. Paul was charged with and later convicted of failure to remain at the scene of an accident and negligent driving. Paul served twenty days of incarceration for these convictions.

In a separate matter, following contentious litigation, an opposing attorney filed a complaint with the Attorney Grievance Commission alleging that Paul had misrepresented whether his client had signed a non-disclosure agreement.

Held: Thirty-day suspension.

The Court of Appeals held that Paul's conduct violated MLRPC 8.4(a), (b), and (d). The Court of Appeals determined that Paul's dangerous and threatening conduct during the "road rage" incident reflected adversely on his trustworthiness and fitness as an attorney. Additionally, the Court of Appeals found that Paul did not misrepresent whether his client had signed a non-disclosure agreement because Paul retained the legal right to sign his client's name on the agreement.

The Court of Appeals concluded that the appropriate sanction for Paul's misconduct was a thirty-day suspension. In determining the appropriate sanction, the Court of Appeals analyzed the *Eckel*, *Smith*, *Sutton*, and *Marcalus* cases. Paul's misconduct was aggravated by three factors: his prior attorney discipline, his refusal to admit his wrongdoing, and his criminal conduct. The Court of Appeals also recognized that Paul had been timely, cooperative, and thorough with his response letters, deposition testimony, and various filings with the hearing court, that Paul had a good reputation, and that Paul had successfully completed his criminal sentence.

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WSC/2005 LLC, et al. v. Trio Ventures Associates, et al., No. 75, September Term 2017, filed July 30, 2018. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/coa/2018/75a17.pdf

ARBITRATION – MARYLAND UNIFORM ARBITRATION ACT – VACATING ARBITRATION AWARD – GROUNDS – MANIFEST DISREGARD OF THE LAW

ARBITRATION – MARYLAND UNIFORM ARBITRATION ACT – VACATING ARBITRATION AWARD – ATTORNEY'S FEES:

Facts:

The Washington Science Center Joint Venture ("WSCJV") owns land and commercial buildings on Executive Boulevard in Rockville, Maryland including 6100 Executive Boulevard and 6011 Executive Boulevard. Respondents Trio Venture Associates, Myron Levin, Jean Levin, Lawrence Guss, and the Guss Family Limited Partnership (collectively "Trio") owned 58 1/3% of the WSCJV.

In 2005, Trio and the remaining joint venturers were embroiled in contentious litigation stemming from Trio's attempted sale of its ownership interest. The parties settled, and Trio sold its ownership interest to Petitioners WSC/2005 LLC, and Simon and Ruth Wagman (collectively "WSC").

The settlement was memorialized in a Purchase and Sale Agreement ("PSA"), which set forth several detailed provisions regarding the price WSC would pay for Trio's ownership interest. Paragraphs 3.A–3.C required an initial payment of $10 million from WSC to Trio. Paragraph 3.E also required WSC to pay an additional $3.5 million if one of two things happened. First, the payment was required if the government tenants at 6011 or 6100 Executive Boulevard renewed their leases for at least ten years. Second, payment was required if, in the event that the government tenants did not renew, both 6011 and 6100 Executive Boulevard, are not re-leased by other tenants at certain levels. Paragraph 3.E provided that "WSCJV [would] use commercially reasonable efforts to obtain renewal leases on terms and conditions acceptable to WSCJV as soon as is practical." The parties signed the PSA in 2005.

One year later, WSC sold 6100 Executive Boulevard to a third party without informing Trio. In 2010, Trio, still unaware that the property had been sold, inquired about the leasing at both properties. WSC responded by explaining that the government leases had not yet expired so no payment was due. In 2014, Trio ran a title search on 6100 Executive Boulevard, and learned that WSC sold the building. Trio demanded that WSC pay the fees specified in Paragraph 3.E of the PSA. WSC refused and the parties submitted their dispute to arbitration.

Trio's arbitration demand asserted several claims stemming from the sale of WSC including payment due under terms of the PSA and payment due for failure to comply with commercially reasonable standards requirement. Trio moved for summary judgment on these grounds. The Arbitrator granted Trio's motion and concluded that the sale of 6100 Executive Boulevard breached the PSA and required WSC to pay Trio the $3.5 million fee.

Shortly thereafter, WSC filed a petition to vacate the arbitration award in the Circuit Court for Montgomery County pursuant to Md. Code (1973, 2013 Repl. Vol.), § 3-224(b) of the Court and Judicial Proceedings Article ("CJP"). WSC argued that the Arbitrator "manifestly disregarded well-established Maryland law in several significant respects," and that the Arbitrator wrongly concluded that WSC breached the PSA. Trio moved to dismiss the petition, arguing that WSC had not alleged any of the statutorily permitted vacatur grounds enumerated at CJP § 3-244(b). Trio also filed a request, pursuant to CJP § 3-228(a)(2), for attorney's fees and costs incurred in defending and enforcing the arbitration award in the Circuit Court. After a hearing, the Circuit Court dismissed the petition. The order stated that the arbitration award did "not manifestly disregard applicable law" but denied Trio's request for attorney's fees and costs.

WSC filed a timely appeal in the Court of Special Appeals. The intermediate appellate court, in an unreported decision, affirmed the Circuit Court's order. *WSC/2005 LLC v. Trio Venture Assocs.*, Nos. 946, 1531 & 1784, 2017 WL 4422973, at *7 (Md. Ct. Spec. App. Oct. 5, 2017).

Held: Affirmed.

CJP § 3-224(b) provides certain grounds upon which a circuit court shall vacate an award. WSC maintained that the vacatur grounds set forth in CJP § 3-224(b) are not exclusive. Specifically, WSC argued that, in addition to the grounds set forth in subsection (b), a court may set aside an arbitration award when the award manifestly disregards applicable law. Although the Maryland Uniform Arbitration Act ("MUAA") provides specific grounds for vacatur, WSC contended that the statute was never intended to eliminate the common-law grounds of vacatur, chiefly manifest disregard of the law.

The Court recognized the degree of deference owed to an arbitrator's decision. Courts have often refused to review the merits of arbitration awards because the "purpose of arbitration is 'to compose disputes in a simple and inexpensive manner' . . . ." *Board of Educ. of Prince George's Cty. v. Prince George's Cty. Educators' Ass'n*, 309 Md. 85, 98 (1987). Statutory and common-law grounds for vacating and reviewing an arbitration award have long existed in Maryland. *See e.g.*, *Roloson v. Carson*, 8 Md. 208, 220–21 (1855).

In *Prince George's Cty. Educators' Ass'n*, 309 Md. at 101–02, the Court recognized an additional common-law ground of review: manifest disregard of applicable law. "[M]anifest disregard of the law must be something beyond and different from a mere error in the law or

failure on the part of the arbitrators to understand or apply the law." *Id*. An award will be vacated by this standard when the arbitrator makes "a palpable mistake of law . . . ." *Id*. at 113.

Recognizing that manifest disregard of the law is a common-law ground for vacating an arbitration award, the Court of Appeals then concluded that the General Assembly had not expressly abrogated the common law vacatur grounds because there was no evidence of legislative intent to do so. Allowing arbitration awards to be set aside for manifest disregard of the law would not conflict with the statutory grounds for vacating awards. In addition, the MUAA had not preempted the entire field of arbitration law.

A reviewing court will only vacate an award under manifest disregard when there is a palpable mistake of law or fact apparent on the face of the award. A reviewing court looks for an error that is readily perceived or obvious; clear or unquestionable.

The Court concluded that the Arbitrator did not manifestly disregard the applicable law. The Arbitrator decided that WSC's sale of 6100 Executive Boulevard breached the PSA because WSC failed to use good faith or commercially reasonable efforts to re-lease the building. The Arbitrator then concluded that Trio was entitled to the fee specified in Paragraph 3.E as compensation for WSC's breach. The Court of Appeals held that the Arbitrator's decision was entirely consistent with Maryland law.

The Court of Appeals also held that the CJP § 3-228(b), which permits a party that successfully defends or vacates an arbitration award to seek attorney's fees in circuit court, is discretionary. The Circuit Court's did not abuse its discretion when deciding not to award attorney's fees to Trio.

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Attorney Grievance Commission, et al. v. Ty Clevenger, No. 64, September Term 2017, filed June 21, 2018. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2018/64a17.pdf

JURISDICTION – WRIT OF MANDAMUS – ATTORNEY GRIEVANCE COMMISSION INVESTIGATIONS

Facts:

The appellee, Ty Clevenger, submitted a complaint to the Attorney Grievance Commission regarding three Maryland-barred attorneys. The Office of Bar Counsel declined to investigate the complaint because Mr. Clevenger had no personal knowledge of the allegations in his complaint and was not an aggrieved party or client.

Mr. Clevenger sought to compel Bar Counsel to investigate the allegations in his complaint by filing a petition for writ of mandamus in the Circuit Court for Anne Arundel County. The circuit court granted Mr. Clevenger's petition and ordered Bar Counsel to investigate.

Held:

The Court of Appeals held that the circuit court lacked jurisdiction to consider a petition for writ of mandamus that concerned an attorney disciplinary matter. The Court reasoned that attorney disciplinary matters are within the Court's original and exclusive jurisdiction, and Bar Counsel's initial decision whether to investigate was part of an attorney disciplinary matter. Therefore, the Court remanded the case to the circuit court with instructions to dismiss the petition.

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Allan Jackson v. State of Maryland, No. 78, September Term 2017, filed July 12, 2018. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2018/78a17.pdf

EVIDENCE – MARYLAND RULE 5-901 – AUTHENTICATION – VIDEO SURVEILLANCE FOOTAGE

EVIDENCE – MARYLAND RULE 5-803(b)(6) – BUSINESS RECORDS EXCEPTION – BANK STATEMENTS

Facts:

Mr. Jackson was charged with, among other crimes, theft and first-degree assault, related to an alleged home invasion on April 29, 2015. The State alleged that Mr. Jackson stole the victim's bank ATM card, personal identification number, as well as his vehicle, and then made four unauthorized withdrawals from the victim's bank account. The four withdrawals totaled $1,112. To prove that Mr. Jackson withdrew the funds without authorization from the victim's account, the State introduced two ATM receipts, two surveillance footage videos, two still photographs of Mr. Jackson standing near the ATM, as well as the bank statements from the victim's bank account.

Among the evidence that was admitted at trial was an ATM receipt that showed a withdrawal at 11:43 p.m. on April 29, 2015. One of the surveillance videos showed activity at the ATM for the same day between the time period of 11:15 p.m. and 11:35 p.m. Although there was no surveillance video of the ATM at 11:43 p.m., the State introduced a still photograph of Mr. Jackson at the ATM at 11:43 p.m. on that night. Additionally, the State moved to admit, through the victim's testimony, the bank statements from the account that had four unauthorized ATM withdrawals. A jury convicted Mr. Jackson of first-degree assault and theft of at least $1,000.

On appeal, Mr. Jackson challenged the authenticity of the video surveillance video and authenticity of the bank statements. The basis of Mr. Jackson's challenge was that the surveillance video was not properly authenticated because the video did not show what the State purported it showed—a withdrawal at 11:43 p.m. on April 29, 2015. Mr. Jackson also challenged the authenticity of the bank statements on the basis that the account owner could not authenticate the statements as a business record. The Court of Special Appeals affirmed the convictions and held that the video surveillance footage and bank statements were properly admitted. Mr. Jackson petitioned this Court.

Held: Affirmed.

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The Court of Appeals held that a compact disk containing video surveillance footage from a bank's ATM was properly authenticated after the bank's protective services manager testified as to the process he used to view the ATM surveillance footage. Once he viewed the surveillance footage, he then requested that the footage be copied and sent directly to the detective investigating the alleged crimes. The testifying witness was unable to cut, paste, modify or enhance the footage in any way. The witness verified that the video segment moved into evidence was the video segment he had previously viewed. The Court explained that the video serves as a silent witness of the ATM's activity between 11:15 p.m. and 11:35 p.m. Any discrepancy between the running clock on the video footage and the State's suggestion that the video footage supported a withdrawal at 11:43 p.m. was a matter for the jury to resolve based on all of the evidence it had before it.

Additionally, the Court held that the bank statement was properly authenticated. First, the bank statement was authentic under Rule 5-901. The account holder's testimony was sufficient to establish that he had received the statement from the bank's personnel the day after unauthorized withdrawals were made from his account and that he was aware of which transactions on the statement were unauthorized. The bank statement was also authentic under Rule 5-803(b)(6), the business record exception to hearsay. Based on the account holder's testimony, the bank statement satisfied the four requirements of Md. Rule 5-803(b)(6), because it was made at or near the time of the unauthorized withdrawals, it was made by the Bank, which had knowledge of the transactions, it was a statement "made and kept in the course of a regularly conducted business activity" and, finally, it was the regular practice of PNC bank to make and keep these statements.

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Carl Franklin Burnside v. State of Maryland, No. 71, September Term 2017, filed July 11, 2018. Opinion by Greene, J.

Watts and Getty, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2018/71a17.pdf

CRIMINAL LAW – EVIDENCE – PRIOR CONVICTION IMPEACHMENT

CRIMINAL LAW – EVIDENCE – MARYLAND RULE 5-609

Facts:

On April 4, 2016, shortly after midnight, Mr. Nicholas Knight was stopped for operating a vehicle with only one illuminated headlight. Petitioner, Mr. Carl Burnside was a passenger in the vehicle. The vehicle was registered to a Mr. Joey Jones in Philadelphia, Pennsylvania. The officer testified that Mr. Knight and Mr. Burnside stated that Mr. Knight was helping Mr. Burnside move from Philadelphia, Pennsylvania and that Joey Jones was Mr. Burnside's cousin. According to the arresting officer, Mr. Burnside informed him that he may have had outstanding traffic warrants. The warrant check confirmed that Mr. Burnside had an outstanding warrant for driving without a license and the officer conducted a search of Mr. Burnside incident to his arrest. The search of Mr. Burnside produced $5,169.69 cash in mostly $20 bills, and a cell phone.

Due to the large amounts of cash found on Mr. Burnside, one of the arresting officers requested a K-9 unit to conduct a "free air sniff" of the vehicle. The K-9 unit officer alerted to controlled dangerous substance near the trunk of the car. The vehicle search recovered a partially smoked marijuana cigarette, three hypodermic syringes associated with heroin usage, a metal spoon, with "white powdery residue on the bowl and black burn marks on the bottom side," a large quantity of Ziploc baggies, each containing heroin or cocaine, a large quantity of empty Ziploc baggies, a digital scale with heroin residue on it, a duffle bag, and a shower bag containing toiletries.

At trial, the Defense's theory centered around the fact that there was another individual, Mr. Nicholas Knight, in the vehicle with Mr. Burnside and that Mr. Knight could have been in actual or constructive possession of the drugs recovered from the vehicle. Mr. Knight was called as a State witness. On direct examination, Mr. Knight testified that he was charged with intent to distribute heroin and crack cocaine, with possession of controlled paraphernalia, and for driving on a restricted license. He testified that he entered a plea agreement with the State in which he pled guilty to possession of controlled paraphernalia, Criminal Law § 5-620 (2002, Rep1. Vol. 2012), in exchange for "pre-trial sentencing and probation."

Mr. Burnside's counsel requested that the trial judge conduct a Rule 5-609 balancing test regarding the admissibility of Mr. Burnside's prior conviction for possession with intent to

distribute, the same crime for which he was on trial. Defense counsel sought this advance ruling to inform Mr. Burnside's decision on whether he would testify. The trial judge declined to conduct an advance 5-609 balancing test, stating that Mr. Burnside would need to testify and that the State would have to attempt to introduce the prior conviction before the trial judge made any decision regarding the admissibility of the prior conviction. Mr. Burnside opted not to testify.

Mr. Burnside appealed to the Court of Special Appeals. The Court of Special Appeals affirmed the trial judge's decision, holding that it would have been premature for the trial judge to conduct a balancing test before Mr. Burnside testified. Mr. Burnside petitioned this Court.

Held: Reversed and remanded.

The Court of Appeals held that the trial court abused its discretion in failing to exercise its discretion to conduct a Rule 5-609 balancing test. According to the Court of Appeals, the trial court had enough information to reasonably conduct a balancing test prior to Mr. Burnside's election whether to testify. The trial court had adequate means of assessing how Mr. Burnside would likely testify, given the clear theory of the defense. Additionally, the trial court was aware that Mr. Burnside felt prejudiced by the delay in the ruling. The Court of Appeals held that the trial court had the benefit of case specific knowledge as well as other well-established principles to inform an advance ruling. For example, the trial court was aware of a defendant's constitutional right to testify. Additionally, the trial court knew that admitting, for the purposes of impeachment, a prior conviction for the same crime for which the defendant was on trial, had "the net effect . . . to discourage the defendant from taking the stand." *Cure v. State*, 421 Md. 300, 330, 26 A.3d 899, 917 (2011) (quoting *Ricketts v. State*, 291 Md. 701, 703, 436 A.2d 906, 908 (1981)). Lastly, the trial court had guidance from the Court of Appeals stating that "[m]any are the times when a trial court *can* and, therefore, *should* decide a motion *in limine* involving a Rule 5-609 issue before the defendant makes the election." *Dallas v. State*, 413 Md. 569, 586, 993 A.2d 655, 665 (2010) (emphasis added).

The Court of Appeals further held that in the rare instance when a judge defers his ruling on the defendant's Rule 5-609 motion, before deferring the ruling, the trial judge should first assess all reasonable efforts to accommodate a defendant by making an advance ruling on the admissibility of a defendant's criminal record to enable the defendant to make an informed decision whether to testify or not. This assessment, whether it ultimately leads to an advance ruling or a deferred ruling, should appear on the record.

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State of Maryland v. Casey O. Johnson, No. 22, September Term 2017, filed April 20, 2018. Opinion by Barbera, C.J.

Adkins and Hotten, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2018/22a17.pdf

CRIMINAL LAW – FOURTH AMENDMENT – PROBABLE CAUSE TO SEARCH TRUNK OF VEHICLE

Facts:

One evening in January 2015, Respondent was driving her car in a high-crime area in Germantown, Maryland. She had two passengers: Mr. Haqq in the front seat, and Mr. Helms in the back seat. Officer Sheehan, a twelve-year veteran of the Montgomery County Police Department with drug interdiction experience, was on patrol and activated his lights to stop Respondent's car for a broken taillight.

After activating his lights, Officer Sheehan saw Respondent and Mr. Haqq simultaneously make "furtive movements" inside the car. Respondent leaned over and reached toward the passenger seat as if she was manipulating something. Mr. Haqq raised and lowered himself in the seat three or four times, reaching to the floor area. When Officer Sheehan approached her car on foot and introduced himself, Respondent bounced back into the driver's seat, and Mr. Haqq sat upright and tucked his sweatshirt over his knees.

Officer Sheehan observed that Respondent and Mr. Haqq's nervousness were greater than for an otherwise routine traffic stop. Respondent's voice was shaky, and her hands trembled as she looked for her driver's license. Mr. Haqq did not help when Respondent asked him to retrieve her registration. Respondent gave evasive answers regarding the movements inside the car, her relationship with her passengers, and their destination.

When Officer Sheehan returned to his car to input Respondent's information, Mr. Haqq's furtive behavior continued. He began moving back and forth, appearing to reach around the inside of the car, lifting off his seat, and leaning back. Later, after inputting the passengers' information, Officer Sheehan learned that both had convictions for drug possession with intent to distribute or drug distribution. When a canine unit arrived, Officer Sheehan saw Respondent look up and put her head down. She would not answer when initially asked if the canine unit would "hit" on her car and responded "No" after being asked a second time.

A consent search of Mr. Haqq revealed over thirteen grams of marijuana and an odor of PCP on his breath. After arresting Mr. Haqq and searching the passenger compartment, the police searched Respondent's trunk, revealing a digital scale and bag with 104.72 grams of marijuana. Respondent was arrested, and a further search of her person revealed $544.00.

Respondent filed a motion to suppress the evidence found during the traffic stop. The suppression court determined that the police had reasonable suspicion that the occupants were involved in criminal activity. The suppression court also concluded that the police had probable cause under *Carroll v. United States*, 267 U.S. 132 (1925), to believe that Respondent's trunk contained evidence of drug-related activity. A jury found Petitioner not guilty of conspiracy to possess marijuana with intent to distribute, and, after a retrial, guilty of possession with intent to distribute.

The Court of Special Appeals reversed the judgment of the circuit court. *Johnson v. State*, 232 Md. App. 241 (2017). The court did not address whether the police had reasonable suspicion to continue detaining Respondent after the initial traffic stop ended. In concluding that the police did not have probable cause to search Respondent's trunk, the court specifically focused on the drugs the police found on Mr. Haqq's person and the PCP smelled on his breath. Based "solely" on those two facts, the Court of Special Appeals held that the police did not have probable cause to search Respondent's trunk.

Held:

The Court of Appeals held that the above facts, viewed in their totality, gave rise to probable cause to search Respondent's trunk under *Carroll* and its progeny. By the time the police searched Respondent's trunk, they had reason to believe that additional drugs or contraband were located somewhere within her car, regardless of who owned the drugs. As a result, the officers were authorized to search "every part of the vehicle and its contents that may conceal the object of the search," including Respondent's trunk. *United States v. Ross*, 456 U.S. 798, 825 (1982).

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State of Maryland, v. Crystal Brookman and *State of Maryland v. Marvin Randy Carnes*, No. 29, September Term 2017, filed July 31, 2018. Opinion by McDonald, J.

Hotten and Getty, JJ., concur.
Greene, Adkins, and Watts, JJ., dissent

https://mdcourts.gov/data/opinions/coa/2018/29a17.pdf

CRIMINAL PROCEDURE – PROBATION – APPELLATE JURISDICTION

CRIMINAL PROCEDURE – PROBATION CONDITIONS – DUE PROCESS – SANCTIONS IMPOSED UNDER DRUG COURT PROGRAM

Facts:

Crystal Brookman participated in a drug court program in Montgomery County as a condition of her probation from a suspended sentence. The program involved regular urinalysis to test for drug use. She twice tested low for creatinine, which may indicate attempts to dilute urine. The program penalized two low creatinine results by treating the second result as if it were a positive indication of drug use.

Under the program procedures, a negative test results in sanctions. In her sanctions hearing, Ms. Brookman requested a postponement so she could determine the reliability of the test and whether her result was within the margin of error. The drug court did not rule on this request, and imposed sanctions including, among other things, overnight incarceration.

Marvin Carnes participated in the same drug court program as a condition of his probation from his suspended sentences for theft and credit card fraud. One day, Mr. Carnes called the program early in the morning to determine if he was scheduled for random urinalysis on the day he called, apparently before the schedule had been updated. He left for work, but his truck broke down and required several hours to repair later in the day. He arrived home about 1 a.m. the next morning, and called again to determine if he had been scheduled for urine testing. After learning that he had been scheduled for testing the day before, he contacted drug court staff members and reported for testing at approximately 3:00 am. That test result was negative, as were full blood and urine tests he took later the same day.

Mr. Carnes argued at his sanctions hearing that he did not miss his urinalysis, but rather submitted it late, and requested some degree of leniency. The judge responded that he lacked the authority to consider mitigating circumstances and was required to impose several sanctions that the judge considered to be mandatory, including overnight incarceration.

Ms. Brookman and Mr. Carnes filed applications for leave to appeal, which the Court of Special Appeals granted and consolidated. The State argued that neither had the right to appeal. The Court of Special Appeals ruled that it had appellate jurisdiction, and that the Circuit Court had violated the due process rights of both parties. 232 Md. App. 489 (2017). The State filed a petition for a writ of certiorari, to which Ms. Brookman and Mr. Carnes filed a joint cross-petition, arguing that the cases were moot because both were no longer in the drug court program. Both were granted.

Held: Affirmed.

The Court of Appeals declined to dismiss the cases as moot. Although recognizing that the Court could not afford relief to Ms. Brookman or Mr. Carnes, the issues raised in this appeal are matters of important public concern which may frequently recur yet evade review.

The Court of Appeals held that there was appellate jurisdiction for intermediate sanctions of incarceration entered under a drug court program. The Court did not view the sanctions hearings as producing final judgments that could be appealed as of right, nor as comparable to the decision to enroll in a drug court program for which no appeal would lie. Instead, the court treated the periods of incarceration as partial revocations of probation for which appeal could be sought by application for leave to appeal under the provision concerning appeals of probation revocations. Courts and Judicial Proceedings Article, §12-302(g).

The sanctions of incarceration were partial revocations of parole because no other source of law would permit the court to incarcerate drug program participants. *See DiMeglio v. State*, 201 Md. App. 287, 305 (2011). Furthermore, the time spent was credited against the suspended sentences of the participants. Maryland Rule 16-207(g). Finally, the fundamental jurisdiction of a drug court to enter sanctions depends on the fact that they are divisions of a circuit court subject to ordinary mechanisms of appellate review. *Brown v. State*, 409 Md. 1, 8-9& n.1. Therefore, the drug court participants could file for leave to appeal from their sanctions of incarceration. The Court of Appeals declined to extend appellate jurisdiction to sanctions that merely extend participation in the program.

On the merits, the Court of Appeals held that the drug court failed to comply with the minimum standards of due process that apply when probation may be revoked. Specifically, with respect to Ms. Brookman, the drug court violated due process by denying her the opportunity to contest adverse evidence. Although the court was not necessarily required to postpone the proceeding or allow Ms. Brookman to present whatever evidence she chose, at a minimum it should have addressed her requests after an opportunity to explain why they were necessary. With respect to Mr. Carnes, the drug court violated due process by failing to take into account mitigating circumstances and not recognizing its discretion in selecting a sanction. Although the result may have ultimately been the same, due process requires recognizing and exercising informed discretion.

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Jason Adam Fallin v. State of Maryland, No. 79, September 2017, filed July 12, 2018. Opinion by McDonald, J.

Watts and Getty, JJ., concur and dissent.

https://mdcourts.gov/data/opinions/coa/2018/79a17.pdf

CRIMINAL PROCEDURE – WITNESS CREDIBILITY – EXPERT WITNESS

Facts:

Petitioner Jason Adam Fallin was charged with sexual abuse of his daughter, S, by inappropriately touching S's genitals on three occasions when S was between five and eight years old. The first incident allegedly occurred while S was lying in bed with her mother and Mr. Fallin at her paternal grandparents' home. The second happened when Mr. Fallin and S were taking a walk together on a trail outside her paternal grandparents' home. The third took place at her paternal grandparents' home when Mr. Fallin and S were watching television together. At trial, the State sought to prove its case against Mr. Fallin through S's direct testimony about two of the incidents, as well as her out-of-court statements to, among others, a State child protective services investigator and a licensed counselor. The licensed counselor, Meredith Drum, had conducted a forensic interview of S that consisted of four sessions. During those sessions, S stated to Ms. Drum that Mr. Fallin had touched her genitals on two occasions.

Before Ms. Drum testified at trial, defense counsel objected to her testimony. Specifically, the defense objected to the anticipated testimony by Ms. Drum as to whether she had observed "signs of fabrication" by S during her sessions with S. Mr. Fallin argued that the admission of that kind of testimony from Ms. Drum would violate the Court's holding in *Bohnert v. State*, 312 Md. 266 (1988), in which the Court held that a social worker's statement that she believed that a child had been abused was tantamount to a declaration that she believed the child was telling the truth. Mr. Fallin argued that Ms. Drum's testimony on the existence of signs of fabrication by S would amount to an opinion on whether S was telling the truth. The trial court overruled Mr. Fallin's objection, reasoning that Ms. Drum's testimony was admissible because Ms. Drum would not directly opine on the ultimate issue of whether S had been sexually abused. Mr. Fallin then asked for a continuing objection to the line of questioning, which the court granted.

Ms. Drum testified concerning her forensic evaluation of S. Ms. Drum detailed S's disclosures that Mr. Fallin had inappropriately touched her genitals on two occasions. Throughout her testimony, Ms. Drum consistently denied observing any signs of fabrication or coaching in S during their sessions together. Toward the close of Ms. Drum's testimony, the prosecution asked whether Ms. Drum had "any concern that [S] was being coached?" to which Ms. Drum answered that she did not. In a later bench conference, Mr. Fallin's defense counsel indicated that he had thought this question was included in the continuing objection, but to the extent it was not, he moved to strike it. After the bench conference, the prosecution asked whether Ms. Drum had

any "concerns" that S's statements were incorrect. Mr. Fallin objected, and the court sustained the objection but declined to give the curative instruction requested by the defense.

At the close of the evidence, the jury convicted Mr. Fallin on three counts related to one of the alleged incidents and failed to reach a verdict on the rest of the charges. Mr. Fallin appealed the convictions to the Court of Special Appeals. The Court of Special Appeals affirmed Mr. Fallin's convictions. Among other things, the Court of Special Appeals held that Ms. Drum's testimony was admissible under *Bohnert*. In the intermediate appellate court's view, Ms. Drum had applied objective knowledge in testifying that S did not exhibit the signs of fabrication or coaching and had not opined directly as to whether S was telling the truth. Mr. Fallin petitioned the Court of Appeals for certiorari on several questions, including whether Ms. Drum's testimony was admissible. The State cross petitioned, arguing that Mr. Fallin failed to preserve, at least in part, his objection to Ms. Drum's testimony. The Court of Appeals granted both petitions.

Held: Reversed.

The Court of Appeals held that Mr. Fallin had preserved his objection to Ms. Drum's testimony. In the Court's view, the record demonstrated that the defense lodged a continuing objection under Bohnert to the line of questions concerning whether Ms. Drum observed signs of fabrication or coaching in S's statements. The questions and answers Mr. Fallin complained of on appeal were within the scope of that continuing objection.

The Court then held that Ms. Drum's testimony concerning whether she saw signs of fabrication or coaching in S's testimony was inadmissible. Applying the general rule that one witness may not opine on the credibility of another witness's testimony, the Court reasoned that the inevitable conclusion from Ms. Drum's testimony was that she believed that S's statements that Mr. Fallin touched her were true. The Court noted that Ms. Drum's testimony was indistinguishable from the testimony held inadmissible in *Bohnert*. The Court compared Ms. Drum's testimony to evidence derived from a polygraph examination. The Court recognized that polygraph evidence is widely held to be inadmissible because it amounts to expert testimony on a witness's credibility; the polygraph examiner uses the test to look for indications of deception in a witness's statements just as Ms. Drum looked for signs of fabrication in S's statements, in a manner less precise and more subjective than a polygraph analysis.

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William Louis Kranz v. State of Maryland, No. 63, September Term 2017, filed June 21, 2018. Opinion by Barbera, C.J.

Hotten, J., dissents.

https://mdcourts.gov/data/opinions/coa/2018/63a17.pdf

CRIMINAL PROCEDURE – MARYLAND UNIFORM POSTCONVICTION PROCEDURE ACT

Facts:

On July 31, 2009, Petitioner was sentenced. On February 17, 2012, Petitioner filed a timely petition for post-conviction relief. Following denial of relief by the post conviction court, Petitioner filed, on June 19, 2013, an application for leave to appeal. On April 7, 2015, Petitioner completed his sentence, including his probationary period. On August 31, 2016, the Court of Special Appeals granted the application.

The Court of Special Appeals dismissed the appeal. *Kranz v. State*, 233 Md. App. 600 (2017). The Court of Special Appeals held that it was divested of jurisdiction to entertain Petitioner's appeal because he was no longer incarcerated, on parole, or on probation and therefore was not "in custody" for purposes of the Maryland Uniform Postconviction Procedure Act ("UPPA"), Md. Code Ann., Crim. Proc. ("CP") § 7-101.

Held:

The Court of Appeals held that jurisdiction under the UPPA is determined upon the filing of a petition for post-conviction relief and, absent a procedural default by the petitioner, is not defeated upon the petitioner's release from custody prior to completion of any appellate review. Reading the UPPA as a whole, the Court reasoned that CP § 7-101 requires the petitioner to be "in custody" at the time of filing, but the petitioner is not required to remain in custody throughout the litigation of the petition, including the appeal, if any.

The Court of Appeals also overruled the Court of Special Appeals' decision in *Obomighie v. State*, 170 Md. App. 708 (2006). There, the Court of Special Appeals held that a circuit court was divested of jurisdiction to entertain a post-conviction petition once the petitioner was released from custody.

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Albert Gustav Givens v. State of Maryland, No. 31, September Term 2017, filed July 12, 2018. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/coa/2018/31a17.pdf

CRIMINAL JUSTICE – CRIMINAL PROCEDURE ARTICLE § 8-201 – POST-CONVICTION DNA TESTING:

Facts:

Albert Gustav Givens was first convicted in 1993 of first-degree murder for the murder of Marlene Kilpatrick. After filing for post-conviction relief, Givens was granted a new trial in 1999. His second trial, in 2003, ended in a mistrial after the jury could not reach a unanimous verdict. Givens was tried again in 2004, but the Court of Special Appeals reversed his conviction due to evidentiary errors. A fourth trial began in 2006, but also ended in a mistrial. Givens's fifth trial took place in 2006, and he was again convicted of first-degree murder and sentenced to life without parole.

Marlene Kilpatrick's body was discovered by her daughter, Lisa Kilpatrick O'Connell, in Kilpatrick's home in Arnold, Maryland, on January 3, 1992. Kilpatrick had suffered blunt force trauma to her skull, which caused multiple skull fractures and injuries to her brain. She had also been stabbed three times. There was no sign of forced entry to Kilpatrick's home, although the telephone line had been cut. A cup of coffee and a partially full bottle of Coca-Cola were found on Kilpatrick's kitchen table. There was a substantial amount of blood in the kitchen, leading to the bedroom where Kilpatrick's body was found. Only Kilpatrick's blood was found at the crime scene. Based on the circumstances, the police theorized that the crime had been committed by an acquaintance of the victim. Givens was a friend of the victim's son, Jay, and had done handyman work for the victim.

Swabs obtained from the Coca-Cola bottle revealed that Givens could be a match, and he was arrested in July 1993. After executing warrants, police discovered a large toolbox containing over 100 tools in Givens's car. Dr. William Vosburgh, the State's expert in forensic serology and blood stain pattern analysis, had examined the contents of the toolbox in 1992. He testified that the majority of the tools were dirty, but one, a 15-inch Sears Craftsman crescent wrench, was unusually clean in comparison.

The State's theory, presented at all of Givens's trials, was that Givens had used the wrench to bludgeon Kilpatrick before stabbing and further assaulting her, and that Givens had cleaned the wrench after the murder. At Givens's 2006 trial, Vosburgh testified that there was no serological testing that could show with any certainty that there was human blood or tissue had been present on the wrench. Vosburgh took a swab and scraping from the wrench and sent them for additional DNA testing. Both Givens and the State introduced expert witness testimony regarding whether the wrench could have caused Kilpatrick's injuries.

Dr. Charlotte Word, the State's expert in DNA identification, testified that Givens was a match to the DNA present on the Coca-Cola bottle. She also testified about Cellmark's attempts in 1992 to identify and test DNA on the scraping and swab. Cellmark made repeated attempts using polymerase chain reaction ("PCR") amplification to locate sufficient DNA for testing but could not obtain a result. Word testified that she was unable to determine whether there was insufficient DNA to obtain a sample, whether the DNA was too degraded to obtain results, or whether there was any DNA present at all.

Givens filed this petition for DNA testing in the Circuit Court for Anne Arundel County under Md. Code (2001, 2008 Repl. Vol., 2017 Supp.), § 8-201 of the Criminal Procedure Article ("CP"). He sought DNA testing of the scraping obtained from the wrench. Givens sought to apply more advanced testing, short tandem repeat ("STR") analysis. He claimed that this would prove that the wrench was not the murder weapon. The State opposed Givens's petition, maintaining that because the evidence had previously been unsuccessfully tested, it was not likely to contain adequate biological material for analysis, and any results of the testing would not be exculpatory or mitigating.

The Circuit Court denied Givens's petition. It concluded that STR testing was a generally accepted method within the scientific community. The Circuit Court found that, although it was not likely that biological material remained, that was not a sufficiently compelling reason to deny Givens's petition. Rather, the Circuit Court concluded, based on the facts of the case, there was no reasonable probability that test results would produce exculpatory or mitigating evidence. Givens sought review under CP § 8-201(k)(6), which permits a direct appeal to the Court of Appeals from a circuit court order entered under CP § 8-201.

Held: Affirmed.

CP § 8-201(b)(1) authorizes a person convicted of certain crimes to file a petition in circuit court seeking DNA testing of scientific identification evidence in the State's possession that is related to the person's conviction. CP § 8-201(d) requires a court to order DNA testing if the petitioner satisfies two conditions. First, that there is a reasonable probability that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence that is relevant to a claim of wrongful conviction or sentencing. Second, the method of testing is generally accepted within the relevant scientific community. Evidence is exculpatory if it would tend to clear the accused of guilt, or tend to establish the accused's innocence.

Although the record shows that earlier attempts at identifying and amplifying DNA in the scraping were not successful, and it is unlikely that there is testable biological material in the scraping, the Court of Appeals deferred to the hearing judge's finding that there was a chance that biological material remains that could be extracted for testing. Givens satisfied the second condition in CP § 8-201(d), because STR analysis is generally accepted within the relevant scientific community.

The Court of Appeals concluded that Givens failed to make the other showing required in CP § 8-201(d), namely that there was any reasonable probability that the results of the testing had the scientific potential to produce exculpatory or mitigating evidence. If Kilpatrick's DNA was found on the wrench, that would be inculpatory. Finding Given's DNA on the wrench would not be inculpatory or exculpatory because it was his wrench. His DNA could have been transferred to the wrench while cleaning it after the murder, or simply during ordinary use. If no results were obtained, that would be consistent with the existing evidence—namely, that there was no DNA to be obtained from the wrench.

Finding an unknown individual's DNA in the scraping would not, as Givens claimed, eliminate the wrench as the murder weapon. Givens had asserted that the wrench was in his possession before and after the murder. The wrench was found in Givens's toolbox seven months after the crime was committed. The extended gap—in time and place—between the crime and the discovery of the wrench only increased the chance that someone else had handled the wrench. Because none of the possible outcomes tended to clear Givens of guilt or establish his innocence, the Court of Appeals affirmed the judgment of the Circuit Court.

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Linda H. Lamone v. Nancy Lewin, et al., No. 85, September Term 2017, filed July 31, 2018. Opinion by McDonald, J.

Getty, J., concurs.
Watts and Hotten, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2018/85a17.pdf

ELECTION LAW – PRIMARY ELECTIONS – BALLOTS – WITHDRAWAL OR DISQUALIFICATION OF CANDIDATE

ELECTION LAW – PRIMARY ELECTIONS – BALLOTS – WITHDRAWAL OR DISQUALIFICATION OF CANDIDATE – CONSTITUTIONALITY

Facts:

Nathaniel Oaks, a State Senator for Legislative District 41, was charged with federal crimes related to "corrupt use of his office in a bribery scheme." While those felony charges were pending against him, Mr. Oaks filed a timely certificate of candidacy for his State Senate seat, as well as for a position on his party's district central committee. He did not withdraw his certificate of candidacy by the deadline for doing so set forth in the election law. Subsequently, he pled guilty to two of the felony charges; if imprisoned as a result of a felony conviction he would become ineligible to serve in office. Sentencing was scheduled to take place after the 2018 primary election. Because Mr. Oaks had not withdrawn by the deadline, nor had yet become disqualified, the State Board of Elections included his name on the primary election ballot when it certified the ballot.

Appellees Nancy Lewin, Elinor Mitchell, and Christopher Ervin – all registered voters within Legislative District 41 – filed a complaint against Appellant Linda Lamone in her official capacity as State Administrator of Elections to have Mr. Oaks' name removed from the primary election ballot. They argued that the State Board had discretion under the election law to take Mr. Oaks' name off the ballot and that including Mr. Oaks' name on the ballot would violate the federal and state constitutional rights of voters within the district. They asserted that Mr. Oaks would inevitably be sentenced to imprisonment and become ineligible to serve as State Senator. Keeping his name on the ballot, when it was certain that he would eventually be disqualified to serve, would confuse voters, cause voters to vote for Mr. Oaks by mistake, and cause those votes to be wasted and those voters to be disenfranchised. The Appellees requested a preliminary injunction, ordering the State Board to remove Mr. Oaks' name from the primary election ballot.

The State Board argued that it did not have the discretion under the election law to remove Mr. Oaks' name from the ballot. Specifically, the State Board contended that EL §5-504(b) and §5-601 mandated that the name of a candidate like Mr. Oaks who filed a timely certificate of candidacy, did not withdraw by the deadline, and neither became deceased or disqualified as

known to the State Board by the relevant deadline "shall appear" and "shall remain" on the ballot to be submitted to voters. The State Board also argued that, even if it had the authority to remove Mr. Oaks' name, to do so would be difficult at this point in the process of printing ballots.

Originally, the Circuit Court denied the Appellees' motion. The court found that while Mr. Oaks' disqualification from the general election was anticipated, it was not legally certain, as Mr. Oaks had not yet been sentenced. Shortly thereafter, however, at the request of Appellees, Mr. Oaks withdrew his voter registration, which also disqualified him from holding office. In light of this development, the Appellees asked the Circuit Court to reconsider their request for a preliminary injunction. This time, the Circuit Court granted the motion, ordering the State Board to immediately remove Mr. Oaks' name from the primary election ballot.

Ms. Lamone filed a petition for a writ of certiorari to the Court of Appeals, which the Court granted. The Court also stayed the preliminary injunction. Following oral argument, the Court of Appeals vacated the preliminary injunction and remanded the case to the Circuit Court with direction to dismiss the complaint in a per curium order. The Court later filed an opinion stating its reasons for that decision.

Held: Reversed.

The Court of Appeals determined that under the Election Law Article the State Board had no discretion to remove Mr. Oaks' name from the ballot. Construing EL §5-504(b) and §5-601, the Court held that the plain language of those provisions mandate that the name of a candidate who files a timely certificate of candidacy and does not withdraw or become disqualified or deceased by the relevant deadlines "shall appear" and "shall remain" on the ballot to be submitted to voters. In the Court's view, nothing in the statute gave the State Board the authority to deviate from that mandate, exercise unspecified discretion without direction from the Legislature, and remove a candidate's name from the ballot.

Next, the Court held that the provisions EL §5-504(b) and §5-601 are constitutional as applied to keep Mr. Oaks' name on the ballot. The Court found that these provisions impose a minimal burden on voters' rights; they do not prevent any voter from voting for the candidate of his or her choice who appears on the ballot. The Court further held that these provisions are reasonable, nondiscriminatory restrictions. The provisions ensure the State Board can lay out, certify, format, and print ballots in time to accommodate the various requirements of State and federal law necessary to conduct a free and fair election. The provisions are also nondiscriminatory – they deadlines apply equally to all candidates.

Applying the election law to the case before it, the Court held that the Appellees failed to show a likelihood of success on the merits of their claim. Under the Election Law Article, the State Board had no discretion to remove Mr. Oaks' name from the ballot, and EL §5-504(b) and §5-

601 were constitutional as applied to keep Mr. Oaks' name on the ballot. Therefore, the Appellees were not entitled to a preliminary injunction.

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Amy Shealer v. George Straka, No. 38, September Term 2017, filed April 26, 2018. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2018/38a17.pdf

ESTATES & TRUSTS – PROBATING A WILL – PETITION TO CAVEAT

ESTATES & TRUSTS – PROBATING A WILL – TRANSMITTING ISSUES TO A COURT OF LAW

Facts:

Andrea Ayers Straka ("the decedent") died on March 28, 2016 from pneumonia caused by methicillin-resistant staphylococcus aureus (MRSA). Two days later on March 30, 2016, George M. Straka ("Mr. Straka"), the decedent's father, filed a petition for administrative probate of a regular intestate estate with the Worcester County Register of Wills. In filing the petition, Mr. Straka affirmed that he made a diligent effort to search for the decedent's will. As a result, the Register of Wills issued Letters of Administration, appointing Mr. Straka as personal representative.

In the afternoon of March 30, 2016, the Last Will and Testament of the decedent was filed with the Register of Wills office. The Last Will and Testament shows that it was executed on July 15, 2015. The filed version of the decedent's will appointed William Jay Mumma, Jr. ("Mr. Mumma), the decedent's best friend, and Amy Shealer ("Ms. Shealer") as personal representative. Moreover, the decedent bequeathed her real property and personal property to Mr. Mumma, Ms. Shealer, and the decedent's godchildren: Ava and Abigail Simone. The decedent bequeathed $70,000 to Mr. Straka and $30,000 divided between Mr. Straka's two daughters, the decedent's half-sisters. The will provided that any remainder of the decedent's estate was to be distributed equally between Mr. Mumma and Ms. Shealer.

On April 5, 2016, Ms. Shealer filed a petition for administrative probate of a regular estate with a specific request that the decedent's will be admitted to judicial probate and that the orphans' court find that the decedent's will had been duly executed, the decedent was legally competent to make the will, and that the will was attested to and duly executed by two witnesses. In response to Ms. Shealer's petition, the Register of Wills appointed Ms. Shealer as personal representative of the decedent's estate. The Register of Wills also issued a notice of judicial probate and notice of hearing, which was sent to Mr. Straka. That same date, the Register of Wills issued a letter to Mr. Straka that revoked the Letters of Administration that were previously issued to him and appointed him special administrator of the estate until the judicial probate hearing.

After receiving the notice and letter from the Register of Wills, Mr. Straka obtained counsel. On April 15, 2016, Mr. Straka's attorney filed a motion for postponement asserting that the judicial probate hearing was no longer necessary because Mr. Straka intended to file a petition to caveat

and petition to transmit issues. That same day, counsel for Mr. Straka filed a petition to caveat, which alleged that the decedent's will should not be admitted to probate for several reasons, including that the will was procured by undue influence and the decedent lacked the capacity to make the will. However, the petition to caveat was incomplete as it lacked a final list of interested parties.

The Orphans' Court for Worcester County held a judicial probate hearing on April 19, 2016, before two orphans' court judges. Mr. Straka, Ms. Shealer, and Mr. Mumma all appeared at the hearing with counsel. The orphans' court first permitted the parties to make an opening statement. Counsel for Mr. Straka informed the court that he had previously filed a petition to caveat and had filed that day a complete petition to caveat with a final list of interested parties. Mr. Straka's attorney argued the petition to caveat stayed the action until the issues in the petition are determined. In addition, Mr. Straka's counsel informed the court that they were filing a petition for issues in which they request certain factual issues to be transmitted to the circuit court for a jury trial. The orphans' court did not rule on Mr. Straka's petition to caveat, amended petition to caveat, or the request to transmit issues to a court of law, but instead proceeded with the judicial probate hearing and allowed Ms. Shealer's counsel to call witnesses to testify. Before the witnesses began their testimony, counsel for Mr. Straka objected to any testimony, claiming that the only immediate duty of the orphans' court upon the filing of a petition to caveat was to appoint a special administrator of the estate. The orphans' court overruled the objection.

After the testimony, counsel for Mr. Straka orally moved to frame issues and transmit them to the circuit court for a trial by jury. After reconvening from a recess to deliberate, the orphans' court denied Mr. Straka's motion to transmit issues to the circuit court. The orphans' court also refused to consider Mr. Straka's petition to caveat on the grounds that the originally filed petition was incomplete. As such, the orphans' court issued an order dated April 19, 2016, accepting the decedent's will into probate, removing Mr. Straka from his role as special administrator, and naming Ms. Shealer personal representative of the estate. Mr. Straka subsequently filed a motion to reconsider or alter and amend the orphans' court judgment, arguing that the orphans' court erred when it did not stay the matter after the petition to caveat was filed and also erred when it ruled on the judicial probate after Mr. Straka requested the orphans' court to transmit issues to the circuit court. By memorandum and order dated June 21, 2016, the orphans' court denied Mr. Straka's motion to reconsider or to alter and amend judgment.

Mr. Straka filed a timely Notice of Appeal of the orphans' court's April 19, 2016 order, which admitted the Decedent's Will to probate, removed Mr. Straka as special administrator, and named Ms. Shealer as personal representative. The Court of Special Appeals reversed the judgment of the orphans' court in an unreported opinion issued on May 19, 2017. Specifically, the Court of Special Appeals held that a petition to caveat stays all proceedings until the caveat is addressed. Matter of Estate of Straka, No. 1023, 2017 WL 2210122, at *5 (Md. Ct. Spec. App. May 19, 2017). In addition, the Court of Special Appeals concluded that the orphans' court erred when it did not stay the proceedings after Mr. Straka filed a petition to caveat, and that such error was not harmless. *Id*.

Held: Affirmed in part and reversed in part.

The Court of Appeals conducted a legislative intent analysis, looking first to the plain language of Md. Code (1974, 2011 Repl. Vol.), Estates & Trusts ("ET") § 5-207 and then to the legislative history in order to determine what procedure the Maryland General Assembly intended when enacting ET § 5-207(b). The Court initially determined that the language of the statute is unambiguous: when an interested person files a petition to caveat after a petition for administrative probate, then the orphans' court will hold a judicial probate hearing before admitting the will to probate. The Court also considered the legislative history of ET § 5-207 to confirm its interpretation of legislative intent. Specifically, the Court reviewed the 1968 Second Report to the Governor submitted by the Commission to Review and Revise the Testamentary Law of Maryland, which recommended a new testamentary article in the Maryland Code as well as substantive changes to the law. In the Second Report, the Commission's comment to § 5-207 stated in pertinent part that "the Commission has substituted the single, simple procedure contained in Section 5-207" "[i]n place of all of the provisions of the prior law relating to a notice to caveat and the caveat procedures[.]" The Comment further indicated that "[i]n the event of a caveat, judicial probate is mandatory." As such, the Court of Appeals concluded that the legislative history confirmed that the General Assembly intended a judicial probate hearing to serve as the new procedure after a party files a petition to caveat, eliminating the need for a party to file a notice of intention to caveat.

In so holding, the Court clarified that the filing of a petition to caveat does not invoke a stay on the entire proceeding; instead, a petition to caveat simply prevents the orphans' court from admitting the will to probate until after the judicial probate proceedings are concluded. The Court reversed the Court of Special Appeals to the extent that the lower appellate court held that a petition to caveat prevents the parties and the orphans' court from pursuing any of the permissible actions related to the same judicial probate proceeding, such as appointing a special administrator of the estate. *See* Md. Rule 6-454(a). Moreover, the Court concluded that any case decided before the Commission recommended and the legislature enacted ET § 5-207(b) was irrelevant to the meaning and effect of the statute. *See e.g., Keene v. Corse*, 80 Md. 20, 22–23 (1894); *Gilbert v. Gaybrick*, 195 Md. 297, 305 (1950); *Gessler v. Stevens*, 205 Md. 498, 504 (1954); *Kent v. Mercantile-Safe Deposit & Tr. Co.*, 225 Md. 590, 594 (1961).

The Court of Appeals also analyzed the proper procedure when an interested party requests that certain issues be transmitted to a court of law pursuant to ET § 2-105. Again, the Court looked to the plain language of the statute and the legislative history. Ultimately, the Court concluded that the plain language of ET § 2-105 requires an orphans' court to transfer issues to the circuit court for a trial when a party makes a request to transmit issues of fact prior to the orphans' court's final determination on those issues. Once again, the Court determined that the legislative history confirmed the legislative intent. Specifically, the Commission's Second Report included a comment to ET § 2-105, stating that the statute "is intended to continue the present practice[.]" Ultimately, the Court held that the General Assembly did not intend to change the procedure for transmitting issues to a court of law.

Although there were many procedural abnormalities in the case, the Court concluded that the Orphans' Court for Worcester County erred in denying George M. Straka's request to transmit issues to a court of law. Specifically, the Court determined that the denial constituted error because the orphans' court had not made a final determination on the issues at the time of the request and because the orphans' court had sufficient information to determine that the parties disagreed on key factual issues contained in the incomplete petition to caveat. In addition, the Court held that the error was not harmless because it deprived George M. Straka, a caveator, the significant right to have factual issues sent to a court of law for a trial by jury. The Court of Appeals reasoned that in denying Mr. Straka's motion to transmit issues, the Orphans' Court for Worcester County also denied the caveator of the opportunity to present witnesses, evidence, and arguments to a jury, which likely affected whether the orphans' court ultimately admitted the decedent's will to probate. *See Crane v. Dunn*, 382 Md. 83, 91 (2004) ("Prejudice will be found if a showing is made that the error was likely to have affected the verdict below."). The Court of Appeals was also persuaded that the error was not harmless because the procedural abnormalities in the case did not permit Mr. Straka the opportunity to file an amended petition to caveat or Ms. Shealer time to respond to the petition to caveat before the orphans' court admitted the decedent's will to probate. As such, the Court agreed with the Court of Special Appeals that the error was not harmless.

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In re: Adoption/Guardianship of H.W., No. 70, September Term 2017, filed July 16, 2018. Opinion by Adkins, J.

Hotten, J., concurs and dissents.

https://mdcourts.gov/data/opinions/coa/2018/70a17.pdf

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS – EXCEPTIONAL CIRCUMSTANCES – CONSIDERATION OF NON-STATUTORY FACTORS – FACTORS PERTAINING TO CUSTODY

Facts:

H.W. was born in 2012 to S.B. ("Mother") and M.W. ("Father"). Four months before H.W.'s birth, Father had been extradited from Maryland to Connecticut and incarcerated there. He was released in January 2013 and remained in Connecticut on probation. H.W. was initially adjudged a child in need of assistance ("CINA") at the age of six months after nearly drowning in the bathtub. Ultimately, he was returned to Mother's custody. Mother gave birth to twins in 2014. After one of the twins suffered severe burns after being left unattended in a bath, H.W. and his siblings were removed and declared CINA. H.W. and the twins were placed in a foster home belonging to the M. family.

H.W.'s caseworker, Lori Lee, attempted to locate Father, but was not successful. Father learned in late 2014 that H.W. was in the State's custody and traveled to Baltimore for a CINA hearing in December 2014. Father spoke to Lee and learned that the hearing was taking place at a different time than he had initially thought. Father indicated that he wanted to visit H.W., whom he had never seen, but he had to return to Connecticut. He told Lee that he would speak to his probation officer about returning to Baltimore. Father did not immediately return to Connecticut, but made alternate travel arrangements. He did not attend the hearing, or visit H.W.

Father had a phone call with Lee in January 2015. Lee sent Father additional letters notifying him of hearings. Father did not attend any hearings and did not contact Lee until October 2015, when he sent her a letter notifying her that he had been incarcerated again in August 2015 for violating his probation. Father identified some relative resources for H.W., asked Lee for assistance with resources, and requested information about H.W.'s placement. Lee investigated a relative resource Father identified, but the relative declined to be a resource for H.W. Lee continued sending Father letters with information about H.W.'s case but did not receive any further communications from Father.

The Baltimore City Department of Social Services ("Department") filed a Petition for Guardianship with the Right to Consent to Adoption or Long Term Care Short of Adoption for H.W. Mother and Father objected, but later consented. Father withdrew his consent. The matter proceeded to a contested hearing in 2017. Lee and Father both testified at the hearing.

The juvenile court considered the testimony, as well as court orders, medical records, the records of Lee and Father's communication, and a bonding evaluation between H.W. and the M. family. The juvenile court applied the statutory factors set forth in Md. Code (1984, 2012 Repl. Vol.), § 5-323(d) of the Family Law Article ("FL"). The court also analyzed nine additional factors set out in *Ross v. Hoffman*, 280 Md. 172 (1977), to determine whether exceptional circumstances existed. The juvenile court concluded that there was not clear and convincing evidence that Father was unfit, but found that, by clear and convincing evidence, exceptional circumstances existed that made continuation of the parental relationship detrimental to H.W.'s best interests. It awarded guardianship to the Department.

The Court of Special Appeals vacated the juvenile court's decision in a reported opinion, *In re Adoption/Guardianship of H.W.*, 234 Md. App. 237 (2017). It concluded that the juvenile court erred by using factors related exclusively to custody of the child in deciding to terminate Father's parental rights.

Held: Reversed.

When terminating parental rights, a juvenile court must base its decision on the statutory factors set forth in FL § 5-323. Consideration of exclusively custodial factors risks confusing important distinctions between parents and third-party custodians. In this case, however, the inclusion of custody-specific factors did not taint the juvenile court's decision because it made specific findings based on the relevant statutory factors and its findings under the *Ross* factors were substantively the same as the appropriate statutory findings.

FL § 5-323(b) requires that, to terminate parental rights ("TPR"), a juvenile court must consider the factors set forth in the statute and find by clear and convincing evidence either that a parent is unfit to remain in a parental relationship with the child, or that exceptional circumstances exist that would make continuation of the parental relationship detrimental to the child's best interests. The statute sets forth a list of factors for consideration in FL § 5-323(d).

FL § 5-323(d) does not contemplate that the statutory factors are exclusive. But four of the factors the juvenile court considered pertain exclusively to custody: (1) the possible emotional effect on the child if custody changed to the biological parent; (2) the possible emotional effect on the child if custody was given to the caretaker; (3) the stability and certainty of the child's future in the custody of the parent; and (4) the stability and certainty of the child's future in the custody of the caretaker.

The Court reiterated that unfitness and exceptional circumstances analyses in TPR cases are different than the analyses in custody cases. To justify a decision to terminate parental rights, the juvenile court must focus on the continued parental relationship, rather than custody. The Court had previously emphasized that the statutory factors in FL § 5-323(d) served as the criteria to determine whether terminating parental rights is in a child's best interests, as well as criteria to

assess the kinds of exceptional circumstances that suffice to rebut the presumption favoring preservation of the parental relationship.

Upon examination of the juvenile court's findings, the Court determined that the juvenile court thoroughly analyzed and considered the relevant statutory factors and made detailed findings while according deference to the presumption that a continued parental relationship was in H.W.'s best interests. The Court concluded that using purely custodial *Ross* factors risks according third-party custodians equal footing with parents. Although some *Ross* factors are related to the statutory factors, juvenile courts should adhere to the statutory factors. Here, the juvenile court came very close to abusing its discretion, but because its findings under the *Ross* factors were essentially repetitions of its findings under the statutory factors, the inclusion of additional factors did not upset the legislative balance set out in FL § 5-323.

The facts set out before the hearing judge demonstrated that the passage of time that Father and H.W. were apart made continuation of the parental relationship detrimental to H.W.'s best interests. Therefore, the juvenile court did not abuse its discretion when it concluded that exceptional circumstances existed that made continuation of the parental relationship detrimental to H.W.'s best interests.

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In re: J.C.N., No. 73, September Term 2017, filed July 31, 2018. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2018/73a17.pdf

MENTAL HEALTH LAW – INVOLUNTARY ADMISSION – PROCEDURAL REQUIREMENTS – TIMELINESS OF A HEARING

MENTAL HEALTH LAW – INVOLUNTARY ADMISSION – INVOLUNTARY ADMISSION HEARING – ELEMENTS OF INVOLUNTARY ADMISSION – DANGER TO LIFE OR SAFETY OF SELF OR OF OTHERS

Facts:

Petitioner, J.C.N., was taken to the University of Maryland Baltimore Washington Medical Center on November 17, 2015, pursuant to a petition for emergency evaluation of her mental state. Once in the emergency department, J.C.N. was determined not to be medically stable, so she was transferred to a medical unit. J.C.N. was then transferred to the hospital's psychiatric unit for proposed involuntary admission on November 24 after she was medically stable and a psychiatric bed became available.

J.C.N.'s involuntary admission hearing was held before an administrative law judge ("ALJ") on December 1, fourteen days after J.C.N. arrived at the emergency department and seven days after her transfer to the psychiatric unit. At the hearing, Dr. Sandeep Sidana, a stipulated and accepted expert in psychiatry, testified about J.C.N.'s mental state. Dr. Sidana testified that he had diagnosed J.C.N. with bipolar disorder type 1 characterized by grandiose delusions. He stated, among other things, that J.C.N. did not have insight into her mental illness, had refused to take prescribed medications for her mental and somatic illnesses, had partial paralysis on the right side of her body, had attempted to purchase a car with apparent intent to drive, and did not have sufficient judgment to maintain herself outside of an institutional setting. He stated that J.C.N. should be involuntarily admitted.

Despite J.C.N.'s counsel's arguments to the contrary, the ALJ found that the hearing was timely under Md. Code, Health-Gen. § 10-632(b) and that J.C.N. met the criteria for involuntary admission under Md. Code, Health-Gen. § 10-632(e), including that she was a danger to the life or safety of herself or others. J.C.N. was thus involuntarily admitted. Upon judicial review, both the Circuit Court for Anne Arundel County and the Court of Special Appeals affirmed the decision of the ALJ.

Held: Affirmed.

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The Court of Appeals first held that J.C.N.'s involuntary admission hearing was timely. The hearing occurred seven days after J.C.N.'s admission to the psychiatric unit, which was "within 10 days of the date of the initial confinement of the individual" as required by the Mental Health Law involuntary admission provisions, Md. Code, Health-Gen. § 10 632(b). The Court interpreted the phrase "initial confinement," based on the surrounding statutory context, to mean an individual's confinement in a facility. The term "facility" is defined in the Mental Health Law as "any public or private clinic, hospital, or other institution that provides or purports to provide treatment or other services for individuals who have mental disorders." Md. Code, Health-Gen. § 10-101(g). Here, that was the hospital's psychiatric unit, where J.C.N. had been transferred seven days before the hearing.

The Court further upheld the ALJ's decision that J.C.N. met all criteria for involuntary admission under Md. Code, Health-Gen. § 10-632(e), including that she was a danger to the life or safety of herself or others. Based on Dr. Sidana's testimony at the involuntary admission hearing, the ALJ found that J.C.N. presented such a danger. The Court of Appeals held that there was substantial evidence to support the ALJ's decision, including J.C.N.'s lack of insight into her illnesses, refusal to take medication, and attempt to drive. The Court therefore upheld J.C.N.'s involuntary admission.

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In the Matter of the Honorable Mary C. Reese, Judge of the District Court of Maryland for Howard County, Tenth Judicial Circuit, Misc. Docket JD No. 2, September Term 2017, filed July 31, 2018. Opinion by Hotten, J.

Watts, J., concurs.

https://mdcourts.gov/data/opinions/coa/2018/2a17jd.pdf

JUDGES – REMOVAL OR DISCIPLINE – NO SANCTION – STANDARD OF REVIEW

JUDGES – REMOVAL OR DISCIPLINE – NO SANCTION – PROCEEDINGS AND REVIEW – SANCTIONABLE CONDUCT

Facts:

Judge Mary C. Reese is an Associate Judge of the District Court of Maryland, District Ten, which includes both Howard and Carroll counties. On July 31, 2015, the Women's Law Center of Maryland ("the Women's Law Center") filed a complaint against Judge Reese with the Maryland Commission on Judicial Disabilities ("the Commission"). The Women's Law Center averred that Judge Reese violated the Maryland Code of the Judicial Conduct while overseeing peace order and protective order matters. Two of the individual petitioners referenced within the complaint by the Women's Law Center also filed individual complaints against Judge Reese.

Based on the complaints against Judge Reese, the Commission filed a Statement of Charges on April 16, 2017. The Commission charged Judge Reese with violating Maryland Code of Judicial Conduct Rules 18-101.1, 18-101.2, 18-102.2, 18-102.3, 18-102.5, and 18-100.4.

On November 11, 2017, the Commission conducted an evidentiary hearing. On December 19, 2017, the Commission issued Findings of Fact, Conclusions of Law, Order and Recommendations. The Commission issued an amended version of the Findings of Fact, Conclusions of Law, Order and Recommendations on December 22, 2017.

In its Order, the Commission found that Judge Reese committed sanctionable conduct by clear and convincing evidence, based on a finding that Judge Reese was not in compliance with legal standards in a peace order matter. As a result, the Commission concluded that Judge Reese violated Maryland Code of Judicial Conduct Rules 18-101.1 and 18-102.5(a). Based on the evidence presented, the Commission determined that Judge Reese would benefit from additional education, and recommended that she be ordered to attend specialized training approved by the Commission, for at least five calendar days. Thereafter, the Commission referred the matter to the Court of Appeals for review.

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On March 6, 2018, the Court of Appeals heard oral argument and, on March 22, 2018, issued a *per curiam* order, disagreeing with the Commission's conclusion and dismissing the matter with prejudice.

Held: Dismissed.

The Court of Appeals held that Judge Reese did not commit sanctionable conduct pursuant to Maryland Rule 18-401, which is defined as "misconduct while in office, the persistent failure by a judge to perform the duties of the judge's office, or conduct prejudicial to the proper administration of justice." Judge Reese analyzed the facts presented, applied the law to the facts, and rendered a reasonable decision. Her exercise of judicial discretion did not meet the definition of sanctionable conduct.

Judge Reese did not violate Maryland Code of Judicial Conduct Rules 18-101.1 and Maryland Rule 18-102.5(a). Rule 18-101.1 provides that "[a] judge shall comply with the law, including this Code of Judicial Conduct." Rule 18-102.5(a) provides that "[a] judge shall perform judicial and administrative duties competently, diligently, promptly, and without favoritism or nepotism." Judge Reese considered the testimony of the witnesses before her, and determined that the petitioner was not eligible for the relief requested. No Maryland Rule, including Rules 18-101.1 and 18.102.5(a), require that a judge make a specific inquiry prior to rendering a decision. Judge Reese's consideration and analysis of the circumstances presented, and ultimate decision, neither lacked competence, diligence, and promptness, nor did it demonstrate favoritism or nepotism.

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C&B Construction, Inc. v. Jeffrey Dashiell, et al., No. 76, September Term 2017, filed July 30, 2018. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2018/76a17.pdf

CONSTRUCTION – INTERPRETATION – THE MARYLAND CONSTRUCTION TRUST STATUTE

Facts:

This matter concerns a breach of contract action brought by Petitioner, C&B Construction Inc. ("Petitioner") against Respondents, Jeffrey Dashiell and Edward J. Maguire ("Respondents"). Respondents co-owned a general contracting company, Temco Builders Inc. ("Temco") and entered into six construction contracts with Petitioner. Petitioner agreed to provide various construction based services, including tasks such as the installation of drywall and ductwork. Although Petitioner completed the assigned tasks, and Temco received payment from the owners of the projects, Petitioner was not paid.

On October 1, 2015, Petitioner filed a breach of contract complaint in the Circuit Court for Wicomico County against Temco, and Respondents, individually, pursuant to the Maryland Construction Trust Statute. The Maryland Construction Trust Statute, codified in Md. Code (1974, Repl. Vol. 2015), § 9-201 *et seq*. of the Real Property Article ("Real Prop."), permits the imposition of personal liability against the owners of a general contracting company, pursuant to several enumerated requirements. Petitioner argued that Respondents misappropriated and diverted the funds to themselves individually, or paid other expenses. During the pendency of the matter, Petitioner entered into a consent judgment with Temco for $225,607. Thereafter, Petitioner continued to pursue its claims against Respondents individually.

Respondents filed a Motion for Judgment at trial, arguing that Petitioner had failed to demonstrate that the Maryland Construction Trust was applicable, and that Petitioner did not demonstrate that the requirements of Real Prop. § 9-204 had been satisfied. Respondents asserted that Real Prop. § 9-204 explicitly states, as prerequisite to the invocation of the Maryland Construction Trust Statute generally, that the underlying contracts giving rise to the suit are subject to the Maryland Little Miller Act or the Maryland Mechanics' Lien Statute. Petitioner claimed that no such requirement existed. The trial court ruled that Petitioner was required to satisfy the requirements of Real Prop. § 9-204 and having failed to satisfy this burden, the court granted Respondents' Motion for Judgment. Petitioner noted an appeal to the Court of Special Appeals. The Court of Special Appeals issued its reported opinion on November 1, 2017. *See C & B Constr., Inc. v. Dashiell*, 234 Md. App. 424, 430–31, 172 A.3d 960, 964 (2017*), cert. granted*, 457 Md. 137, 177 A.3d 72 (2018). In affirming the trial court, the Court of Special Appeals determined that the plain language of Real Prop. § 9-204 is limited to contracts that are subject to the Maryland Little Miller Act or the Maryland Mechanics' Lien Statute. Thereafter, the Court of Appeals granted *certiorari*. 457 Md. 137, 177 A.3d 72 (2018)

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Held: Affirmed.

The Court of Appeals affirmed the judgment of the Court of Special Appeals. In reaching this conclusion, the Court reviewed the purpose of the Maryland Construction Trust Statute. First, the Court reaffirmed the longstanding purpose of the statute, which is designed to "protect subcontractors from dishonest practices by general contractors and other subcontractors for whom they might work." *Ferguson Trenching Co., Inc. v. Kiehne*, 329 Md. 169, 174-75, 618 A.2d 735, 737 (1993). Next, the Court examined the plain language of the statute to ascertain the legislative intent behind its enactment. In doing so, the Court concluded that Real Prop. § 9-204 controls the application of the subtitle as a whole and explicitly indicates that the statute is limited to claims where the underlying contracts are subject to the Maryland Little Miller Act or the Maryland Mechanics' Lien Statute. Further, the Court found that the General Assembly intended that the Maryland Construction Trust Statute be applied in a manner consistent with the Maryland Mechanics' Lien Statute and the Maryland Little Miller Act. Accordingly, the Court affirmed the judgment of the Court of Special Appeals.

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Bernadette Fowler Lamson v. Montgomery County, Md., No. 67, September Term 2017, filed July 31, 2018. Opinion by Hotten, J.

Watts, J., concurs.

https://mdcourts.gov/data/opinions/coa/2018/67a17.pdf

CIVIL LITIGATION – MARYLAND PUBLIC INFORMATION ACT – DISCRETION OF THE TRIAL COURT

CIVIL LITIGATION – MARYLAND PUBLIC INFORMATION ACT – METHODS OF REVIEW

Facts:

This case arises from a suit instituted by Petitioner, Bernadette Fowler Lamson ("Petitioner") against her employer, the Office of the Montgomery County Attorney ("Respondent"). During Petitioner's tenure as an employee at the Montgomery County Attorney's office, she received top performance ratings. However, in 2015, Silva Kinch ("Ms. Kinch), Petitioner's supervisor, downgraded her performance rating from "highly successful" to "successful." As such, Petitioner was precluded from receiving a 20-year, 2% performance bonus. At issue was the denial of Petitioner's Maryland Public Information Act ("MPIA") request, which sought the release of her personnel file.

On September 1, 2015, Respondent complied with the request, in part, after redacting three pages of notes from the file. In addition there were allegedly additional notes regarding Petitioner's performance contained in a private journal retained by Ms. Kinch, which Respondent withheld. On October 8, 2015, Petitioner filed a MPIA request, identifying 16 categories of information, including both sets of missing notes. On January 27, 2016, Respondent provided several responses to the MPIA request. Respondent averred that the notes were not subject to disclosure pursuant to Montgomery County Personnel Regulation § 4-8, which permits an agency to withhold "supervisory notes" when granting access to personnel folders. Additionally, Respondent argued that the notes constituted attorney work product, or were otherwise privileged by law. Regarding the other categories of the information request, Respondent either provided the documentation or denied its existence.

Petitioner filed a Complaint for judicial review in the Circuit Court for Montgomery County on February 24, 2016, arguing that Respondent improperly denied her MPIA request and asking the court to determine whether the documents were subject to disclosure. Respondent asserted that the notes were not personnel records, were privileged or confidential, or otherwise not subject to disclosure. Respondent filed a Motion for Summary Judgment, or in the alternative, a Motion to Dismiss. In opposition, Petitioner proposed a *Vaughn* index, which would require Respondent to submit an itemized list of all the relevant documents with an explanation justifying their non-

disclosure. Instead Respondent proposed that the court review the notes *in camera* to determine whether they are subject to disclosure. On June 22, 2016, after considering arguments the trial court orally granted Respondent's Motion to Dismiss. The court concluded that the notes were not subject to disclosure pursuant to Montgomery County Personnel Regulation § 4-8. Thereafter, Petitioner noted a timely appeal to the Court of Special Appeals.

The Court of Special Appeals issued its unreported opinion on August 25, 2017. *See Lamson v. Montgomery Cty*., No. 892, Sept. Term 2016, (Md. Ct. Spec. App. Aug. 25, 2017), 2017 WL 3668171, *cert. granted*, 456 Md. 523, 175 A.3d 151 (2017). The Court made two primary determinations. First, the Court concluded that the MPIA preempts any county regulation that could be asserted to preclude disclosure of public records. As such, the trial court erred in granting Respondent's Motion to Dismiss on these grounds. Second, the Court determined that because the Motion to Dismiss was erroneously granted, additional inquiry was required to determine if the notes are subject to disclosure pursuant to an MPIA request. However, the Court limited its ruling to the notes that were removed from Petitioner's physical personnel folder. Regarding the notes that were contained in Ms. Kinch's personal journal, the Court determined that the notes were not public records and therefore not subject to a MPIA request. Thereafter the Court of Appeals granted *certiorari*.

Held: Vacated and remanded.

Upon review, the Court of Appeals made several findings relative to the MPIA and a trial court's review of an MPIA request. First, the Court examined the MPIA generally. We noted that the MPIA creates an affirmative right for all persons granting "access to information about the affairs of government and the official acts of public officials and employees." Gen. Prov. § 4-103. *See also Glass v. Anne Arundel Cty.*, 453 Md. 201, 207-08, 160 A.3d 658, 661-62 (2017). Further the Court held, that there is a presumption in favor of disclosing government or public documents. *See Maryland Dep't of State Police v. Maryland State Conference of NAACP Branches*, 430 Md. 179, 190, 59 A.3d 1037, 1043 (2013). The Court also noted that the bounds of the MPIA are not limitless, but are controlled by four categories of exceptions that prevent the disclosure of documents that are controlled by state, federal, or other force of law. *See* Md. Code, (2014), § 4-301 of the General Provisions Article, ("Gen. Prov."). Additionally, the exceptions provide discretion to custodian of record in some instances. *Glass* at 209, 160 A.3d at 662–63. Finally, that the MPIA grants an agency the power to temporarily deny an MPIA if certain enumerated requirements are met. *Id*. at 210, 160 A.3d at 663.

The Court determined that there are initial considerations that require a trial court to closely review a MPIA request. First, the trial court must determine whether the document at issue is a public record covered within the parameters of the MPIA. Next, the trial court must identify the type of public record at issue and apply the appropriate MPIA provisions. Finally, the trial court must determine if there are additional provisions that affect the disclosure of the document. In conducting this systematic inquiry, the trial court must make a determination regarding the exceptions offered and evaluate the evidentiary support for each exception. To achieve this goal,

the trial court may invoke one of three methods. The first method is a *Vaughn* index, which originates from the case of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). As stated *supra*, this method requires the submission of a detailed list of the records that pertain to the request and an explanation of the exceptions offered for each. The second method permits the submission of testimony or affidavits, which detail the nature of the denial and establish the basis for each. The final method permits the trial court to conduct an *in camera* review of the documents to evaluate the merits of a denial of an MPIA request by an agency. The Court ultimately concluded that regardless of the method employed, the trial court must determine whether there is adequate support for the exceptions offered. Accordingly, the Court vacated the judgment of the Court of Special Appeals and remanded to that Court with instructions to remand the case to the circuit court for further proceedings consistent with the opinion.

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Brian Donlon v. Montgomery County Public Schools, No. 68, September Term 2017, filed July 12, 2018. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/coa/2018/68a17.pdf

STATE WHISTLE BLOWER PROTECTION ACT – COUNTY SCHOOL BOARDS AND TEACHERS – NOT STATE EMPLOYEES NOR UNITS OF THE EXECUTIVE BRANCH FOR PURPOSES OF THE WHISTLEBLOWER PROTECTION ACT

JUDICIAL ESTOPPEL – ELEMENTS – APPLICABILITY

Facts:

In 2012, Brian Donlon, a teacher at Rockville's Richard Montgomery High School ("RMHS") in the Montgomery County Public School ("MCPS") system, discovered what he believed to be an inflation by RMHS staff and administration of its Advanced Placement ("AP") course statistics. He accused RMHS of "awarding students credit on their report cards and transcripts when the[] [relevant] classes were in fact [Middle Years Program] classes and did not meet the criteria set by the College Board for AP credit." Donlon informed a journalist at The Washington Post of RMHS's "wrongdoing." As a consequence, Donlon contends that members of RMHS' faculty supervisors retaliated against him, in violation of the Maryland State Whistleblower Protection Law, Md. Code (1993, 2015 Repl. Vol., 2016 Supp.), §§ 5–301–314 (the "WBL"), for his disclosure to the print media.

Donlon filed with the Maryland Department of Budget and Management ("DBM") a WBL complaint against MCPS. The DBM found that Donlon was not a State employee and did not come under the purview of the WBL. Donlon appealed the DBM's ruling to the Maryland Office of Administrative Hearings ("OAH"). An OAH Administrative Law Judge ("ALJ") affirmed the DBM's decision. Donlon petitioned for judicial review in the Circuit Court for Montgomery County. The circuit court reversed the ALJ's decision, finding Donlon to be a State employee. MCPS appealed to the Court of Special Appeals. The Court of Special Appeals reversed the Circuit Court finding that "that public school teachers employed by county boards of education are not employees of the Executive Branch of State government." *Mont. Cnty Pub. Sch. v. Donlon*, 233 Md. App. 646, 665, 168 A.3d 1012, 1023 (2017), *cert. granted*, 456 Md. 522, 175 A.3d 150 (2017).

Donlon petitioned the Court of Appeals for a writ of certiorari, which the Court granted to consider two questions:

> I. What is the relationship of county school employees to the State in the context of Maryland whistleblower protection laws?
> II. What distinctions [, if any,] matter in Maryland's application of the doctrine of judicial estoppel?

Held: Affirmed.

The Court of Appeals addressed the central inquiry of whether county boards of education are units of the State Executive branch for purposes of the WBL. Donlon urged upon the Court that the frequency of Maryland cases holding county school boards to be agents of the State compel it to read the WBL to extend protection to public school teachers. Further, the Maryland State Board of Education ("MSBE") is listed in Md. Code (2017, 2018 Repl. Vol.), Educ. § 2-101 of the Education Article ("Educ.") as a principal department of the State. The MSBE exercises considerable administrative influence, control, and oversight over county boards.

The Court noted that its jurisprudence does refer, in fact, to county boards of education as State entities, but only in dictum, often with no meaningful analysis as to why that might be so. Moreover, in the prior determinations that a county board of education is a State entity arose in recent times most frequently in the context of Eleventh Amendment/sovereign immunity challenges. Sovereign immunity is extraneous to the purpose and legislative history of the WBL.

The Court distinguished, in depth, county boards of education from the MSBE regarding county employee personnel matters. The Court, though professing that the MSBE exercises strong dominion and control over local boards in many other areas, concluded that county school boards are "hybrid" in nature possessing characteristics indicative of both a State and local entity. County boards retain unique autonomy (in various contexts), distinct from the MSBE's authority. County boards, therefore, defy "simple and definitive categorization as either a 'State' or 'local' agency or instrumentality for any and all purposes." *Wash. Suburban Sanitary Comm'n v. Phillips*, 413 Md. 606, 630, 994 A.2d 411, 426 (2010). In reaching this conclusion, the Court relied significantly on *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129, 747 A.2d 625 (2000), where it held that local boards of education are not divisions or units within the State government (in budgetary contexts) for purposes of a general contract procurement law.

Thus, notwithstanding claims involving Eleventh Amendment/sovereign immunity purposes, the legislative intent and plain language of the WBL, as well as cumulative relevant opinions from the Court, the MSBE and the Maryland Attorney General's Office, support the Court's holding that local boards of education and their employees do not garnish WBL protection generally. Entities "may qualify as a State agency for some purposes, while being classified as a local agency for other purposes." *Phillips*, 413 Md. at 632, 994 A.2d at 427. The Court made clear that "[c]ounty school boards have both State and local characteristics, and the appropriate designation of a county board (be it State versus local) depends on the context of the board's particular authority or function under the microscope."

The Court utilized, moreover, the canon of statutory interpretation that calls upon a reviewing court to interpret harmoniously statutory provisions that are in pari materia (in other words, dealing with the same subject matter) with each other, if possible. Donlon's view of the WBL and §§ 6-901–906 of the Education Article, i.e., the Public School Employee Whistleblower

Protection Act (the "PSEWPA"), would give, what he believes, full effect to the WBL, by extending WBL protection to public school teachers. The Court disagreed, stating that it "did not believe the two statutes can be read harmoniously." The WBL and PSEWPA accord whistleblower protection to different classes of employees, the PSEWPA excludes explicitly State employees from the definition of "Public School Employees," and the remedial mechanisms of the statutes are not comparable. Moreover, the Court explained that "[t]he Legislature was of the view that the PSEWPA was needed because the WBL did not extend whistleblower protection to public school teachers."

Turning to the final question posed by Donlon, the Court held inapplicable the doctrine of judicial estoppel. For judicial estoppel to apply three elements must be satisfied:

> (1) one of the parties takes a [ ] position that is inconsistent with a position it took in previous litigation, (2) the previous inconsistent position was accepted by a court, and (3) the party who is maintaining the inconsistent positions must have intentionally misled the court in order to gain an unfair advantage.

Bank of New York Mellon v. Georg, 456 Md. 616, 625, 175 A.3d 720, 724-25 (2017). The Court found it superfluous to address further judicial estoppel when the first element failed to be satisfied here. Contending "that an entity is immune from suit on the grounds of sovereign immunity resulting from its State stature is not inconsistent with the assertion that county boards are neither units of the Executive Branch of our State government, nor entities of the State, for purposes of the WBL." The Court was of the view that estopping MCPS from asserting its local stature for present purposes could have potentially profound future implications in other litigation contexts.

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Stanley Sugarman, et al. v. Chauncey Liles, Jr., No. 80, September Term 2017, filed July 31, 2018. Opinion by Adkins, J.

Getty, J., concurs and dissents.

https://mdcourts.gov/data/opinions/coa/2018/80a17.pdf

EXPERT WITNESS TESTIMONY – MARYLAND RULE 5-702 – SUFFICIENT FACTUAL BASIS

EXPERT WITNESS TESTIMONY – MARYLAND RULE 5-702 – MEDICAL CAUSATION

TORTS – NEGLIGENCE – DAMAGES – IMPAIRMENT OF EARNING CAPACITY — SUFFICIENCY

Facts:

Respondent Chauncey Liles was born in 1998. At the age of 2, Liles's blood lead level ("BLL") measured 11 mcg/dL. Liles sued Petitioners, Ivy Realty and Stanley Sugarman (collectively "Sugarman"), in the Circuit Court for Baltimore City, alleging injury and damages caused by lead paint exposure at a residential property owned by Sugarman. The parties stipulated that, due to Sugarman's negligence, Liles was exposed to deteriorating lead paint at the property. The parties also stipulated that the exposure caused Liles's elevated BLLs. The only remaining questions for the jury were whether the lead exposure caused Liles any injury, and if so, what damages he incurred.

Liles called several experts at trial. Dr. Robert Kraft conducted a neuropsychological examination of Liles and testified that Liles had attention deficits. After IQ testing, Dr. Kraft discovered a "statistically significant" discrepancy between some of Liles's sub-scores, which indicated that Liles had some form of brain impairment. Dr. Kraft opined that Liles had deficits in auditory encoding of information in the working memory and information processing speed.

Dr. Jacalyn Blackwell-White testified about the effects of childhood lead poisoning. She explained how lead can disrupt brain processes and impeded "learning pathways." Dr. Blackwell-White relied extensively on the United States Environmental Protection Agency's Integrated Science Assessment for Lead ("EPA-ISA"). She testified that the EPA-ISA found causal relationships between lead exposure and attention problems in children. Dr. Blackwell-White offered her opinion, within a reasonable degree of medical certainty, that Liles "suffered brain damage as a result of his early lead exposure." She also testified that the cognitive deficits Dr. Kraft described were caused by Liles's early lead exposure. She also relied on a study by Dr. Bruce Lanphear ("Lanphear Study") to conclude that Liles lost four IQ points because of his lead exposure.

Mark Lieberman, Liles's vocational rehabilitation expert, opined that the attention deficits identified by Dr. Kraft would prevent Liles from earning an Associate's degree. He further opined that, without those attention deficits, Liles would have been able to earn an Associate's degree. Dr. Michael Conte, an economist, then testified as to the reduced earnings of a individual with a high school education and some college versus those of an individual with an Associate's degree.

Sugarman moved for judgment at the end of Liles's case in chief and at the end of all the evidence. Both times, Sugarman argued that that Liles had not proven that his elevated lead levels caused any injury, and that he had not proven the existence of any damages beyond mere speculation. The Circuit Court denied both motions and submitted the question of injury and damages to the jury. The jury returned a verdict for Liles in the amount of $1,302,610 ($600,000 in non-economic damages and $702,610 in economic damages). Final judgment was entered in the amount of $1,277,610 after a reduction consistent with the statutory cap on non-economic damages.

Sugarman filed a timely appeal and argued that Dr. Blackwell-White did not have a sufficient factual basis for her opinions regarding causation. Sugarman also contended that Liles had not sufficiently proven that his claimed injuries had resulted in any damages. In a reported opinion, the Court of Special Appeals affirmed the final judgment of the trial court. *See Sugarman v. Liles*, 234 Md. App. 442 (2017).

Held: Affirmed.

Sugarman contended that Dr. Blackwell-White's opinion on general causation (that lead caused the attention deficits identified in Liles) suffered from the same "analytical gap" identified in *Rochkind v. Stevenson*, 454 Md. 277 (2017). The Court rejected this argument. In *Rochkind*, the expert relied on the EPA-ISA for a conclusion that lead exposure can cause Attention Deficit Hyperactivity Disorder ("ADHD"). That conclusion suffered from an "analytical gap" because the EPA-ISA never found a causal relationship between lead and ADHD. Instead, it found a causal link between lead and attention deficits. Here, Dr. Blackwell-White testified that the attention deficits identified by Dr. Kraft fell within the umbrella of attention deficits discussed by the EPA-ISA. She also explained how lead exposure damages the brains of children and affects attention. Dr. Blackwell-White had a sufficient factual basis to offer an opinion about general causation—that lead can cause attention deficits. For this reason, and unlike in *Rochkind*, Dr. Blackwell-White's testimony did not suffer from an "analytical gap."

Sugarman next contended that Dr. Blackwell-White provided insufficient evidence to find that Liles's lead exposure caused a loss of 4 IQ points. The Court relied on *Levitas v. Christian*, 454 Md. 233 (2017) for the conclusion that an expert may rely on the Lanphear study, as well as other scientific research, as a factual basis for an opinion that a plaintiff's elevated BLLs caused the loss of a specific number of IQ points.

Dr. Blackwell-White offered testimony that the results of Liles's IQ testing revealed brain injury and explained why Liles's specific deficits were more consistent with an injury than another cause. Like the expert in *Levitas*, Dr. Blackwell-White relied on Liles's documented BLLs, the results of his neuropsychological evaluation, and the Lanphear Study, to estimate a specific IQ point loss. This provided a sufficient basis to use her knowledge and expertise to extrapolate a loss of IQ points according to the methodology outlined in the Lanphear Study.

The Court held that Dr. Blackwell-White's testimony provided sufficient evidence for the jury to draw the inference that, more likely than not, Liles's elevated BLLs caused a measurable loss of IQ points. For that reason, the trial court appropriately denied Sugarman's motions and allowed the question to go to the jury.

Sugarman also contended that Liles did not put forth sufficient evidence to prove damages. Even if lead exposure caused Liles's injuries, Sugarman argued, Liles did not prove any damages beyond mere speculation. According to Sugarman, Lieberman should have used the same methodology as Sugarman's vocational rehabilitation expert—that takes into account parental benchmarks to measure a child's likely outcomes absent injury. Sugarman insisted that Lieberman's opinion rested on the "baseless" assumption that without deficits, Liles would have obtained an Associate's degree.

The Court of Appeals concluded that Lieberman's opinion was based on substantial evidence. He interviewed Liles, conducted additional vocational testing, and reviewed his educational and medical records. He also reviewed and relied upon the neuropsychological evaluation and conclusions of Dr. Kraft. Additionally, Lieberman relied on his years of experience as a vocational rehabilitation counselor during which he has helped thousands of students attend college. After reviewing this data, he concluded that Liles was not likely to receive a college degree due to the attention problems Dr. Kraft identified. He further proffered that, in his expert opinion, Liles would have been able to earn a college degree without his disabilities.

Although an award for lost earning capacity is necessarily less certain than pecuniary damages in other contexts, the Court viewed Liles's evidence as similar to—if not stronger than—the evidence offered by the plaintiffs in *Adams v. Benson*, 208 Md. 261, 265–66 (1955), *Anderson v. Litzenberg*, 115 Md. App. 549, 573–77 (1997), and *Lewin Realty III, Inc. v. Brooks*, 138 Md. App. 244 (2001), *aff'd* 378 Md. 70 (2003), *abrogated on other grounds by Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594 (2011). Liles put forth sufficient evidence to prove the damages that will "certainly or reasonably and probably" result from his injuries. *Adams*, 208 Md. at 272–73.

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Leroy C. Bell, Jr. and Bon Secours Hospital Baltimore, Inc. v. Patricia Chance, Individually and as Personal Representative of the Estate of Brandon Mackey, No. 36, September Term 2017, filed July 12, 2018. Opinion by McDonald, J.

https://mdcourts.gov/data/opinions/coa/2018/36a17.pdf

MEDICAL MALPRACTICE – MENTAL HEALTH LAW – INVOLUNTARY ADMISSION – STATUTORY IMMUNITY

Facts:

Respondent Patricia Chance filed a complaint against Petitioner Dr. Leroy Bell and his former employer, Petitioner Bon Secours Hospital, alleging that their negligence caused the death of her 23-year-old son, Brandon Mackey. After attempting to commit suicide, Mr. Mackey was brought to Bon Secours Hospital and confined there pursuant to an application for involuntary admission. As required under Maryland Mental Health Law, a hearing to determine whether Mr. Mackey should be involuntarily admitted or released was scheduled for 10 days after his initial confinement at Bon Secours. But believing Mr. Mackey's condition had improved to the point where he no longer fit the criteria required for involuntary admission, Dr. Bell decided to discharge Mr. Mackey two days before that hearing was to take place. The day after he was released, Mr. Mackey committed suicide.

In her complaint, Ms. Chance contended that Dr. Bell breached the applicable standard of care when he decided to release Mr. Mackey from Bon Secours, and that that decision was the proximate cause of Mr. Mackey's suicide. Ms. Chance also contended that Bon Secours, as Dr. Bell's employer at the time, was vicariously liable for his negligence. Dr. Bell and Bon Secours moved for summary judgment, arguing that Dr. Bell's decision to discharge Mr. Mackey was immune from civil liability under Health-General Article ("HG") §10-618 and Courts & Judicial Proceedings ("CJ") §5-623 of the Maryland Code. These provisions provide civil and criminal immunity to a facility, and its agents and employees, when they act in good faith and with reasonable grounds pursuant to Part III of subtitle 6 of Title 10 of the Health-General Article, which part governs involuntary admission. Part III of the statute prohibits a facility from admitting an individual involuntarily unless the individual meets the statutory criteria for involuntary admission. Dr. Bell had determined that Mr. Mackey no longer met two of the criteria, and thus, pursuant to Part III, Dr. Bell released him. Accordingly, Dr. Bell and Bon Secours argued his decision to do so is immune from civil liability as a matter of law. The circuit court denied their motions, holding that the immunity statutes applied only to the initial decision to confine a patient and not to a later decision to release a patient before the statutorily-required involuntary admission hearing. The case went to trial.

At trial, Dr. Nicola Cascella testified as an expert witness on behalf of Ms. Chance, opining that Dr. Bell's decision to release Mr. Mackey was a breach of the applicable standard of care that proximately caused Mr. Mackey's death. At the close of the evidence, the jury found Dr. Bell

and Bon Secours liable and returned a verdict for Ms. Chance. The trial court granted a motion for judgment notwithstanding the verdict ("NOV") in part because it decided that HG §10-618 and CJ §5-623 applied to Dr. Bell's decision, and Dr. Cascella failed to demonstrate how Dr. Bell's decision to discharge Mr. Mackey breached the applicable standard of care. Ms. Chance appealed.

A divided Court of Special Appeals reversed the Circuit Court's grant of judgment NOV. Without discussing the immunity statutes, the majority decided Dr. Cascella's opinion was sufficient to support the jury verdict. Dr. Bell and Bon Secours appealed, and the Court of Appeals granted certiorari to address whether HG §10-618 and CJ §5-623 applied to Dr. Bell's decision to discharge Mr. Mackey.

Held: Reversed.

The Court of Appeals first addressed whether Dr. Bell and Bon Secours preserved the issue of whether the immunity statutes applied to Dr. Bell's decision to discharge Mr. Mackey. The Court recognized that the Circuit Court rejected the argument in Dr. Bell's motion for summary judgment, and a different judge of the Circuit Court, who presided over the trial, relied in part on the statutory immunity granted in HG §10-618 and CJ §5-623 when that judge overturned the jury verdict. Finding that the issue was thus both raised in and decided by the trial court, the Court found the issue preserved.

Next, the Court examined the Mental Health Law to determine whether the decision to discharge a patient after the patient has been initially confined in a facility is covered by the immunity in HG §10-618 and CJ §5-623. Those provisions cover all actions taken in good faith and with reasonable grounds in compliance with Part III of the Mental Health Law. Construing Part III and related provisions of the Mental Health Law, the Court held that under the statute involuntary admission is a process that begins with the initial application for the involuntary admission of an individual and ends upon the hearing officer's decision whether to admit or release that individual. Thus, if during that process, a physician concludes in good faith and with reasonable grounds that an individual no longer meets the statutory criteria required for involuntary admission, the physician acts in compliance with Part III.

The Court then interpreted the meaning of "in good faith" and "with reasonable grounds." Specifically, the Court found that "in good faith" refers to a person's subjective intent; if a physician acts in compliance with Part III "in good faith" it means that he or she makes a decision without actual knowledge of any error in the decision. In the Court's view, "with reasonable grounds" means that, for the statutory immunity statutes to apply, there must be a reasoned articulation in the record that relates the decision to admit or release an individual to the statutory criteria.

Finally, the Court applied its interpretation of the statute to the case before it. It decided that Dr. Bell's decision to discharge Mr. Mackey was made in compliance with Part III. Moreover, the

Court found that there were no serious contentions that Dr. Bell acted in bad faith or without reasonable grounds. Accordingly, Dr. Bell – and vicariously Bon Secours – was entitled to immunity under HG §10-618 and CJ §5-623. Because Dr. Cascella opined that Dr. Bell's decision to discharge Mr. Mackey was a breach of the standard of care, his opinion was inconsistent with Maryland law. It thus could not support a jury verdict.

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COURT OF SPECIAL APPEALS

Charles A. Peterson, et al. v. Evapco, Inc., et al., No. 778, September Term 2016, filed July 5, 2018. Opinion by Leahy, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/0778s16.pdf

COURTS AND JUDICIAL PROCEEDINGS – PERSONAL JURISDICTION – CONSENT TO JURISDICTION

Facts:

North Carolina residents Charles A. Peterson and Carmen A. Peterson founded, owned, and operated Tower Components, Inc. ("TCI") in North Carolina from 1990 to 2005. They sold TCI in 2005 through a stock purchase agreement to a Maryland company, Evapco Products ("EvapProducts"). EvapProducts is a holding company that Evapco, Inc., another Maryland company, created to hold TCI's stock. At the time of the sale, Mr. Peterson—but not Mrs. Peterson—signed a separate Confidentiality Agreement and continued to work for TCI.

The Confidentiality Agreement prohibited Mr. Peterson from using confidential information "in any way detrimental" to the interests of Evapco, Inc. or its subsidiary companies. The Agreement also included a non-compete clause and designated Maryland as the forum in which to resolve any disputes arising from it. Mr. Peterson continued to work for TCI as a sales manager until 2014 when TCI fired him for conducting business in direct competition with Evapco, Inc. and its subsidiaries via two LLCs that he and his wife wholly owned: American Cooling Tower Products, LLC ("ACTP") and Evergreen Composite Technology, LLC ("Evergreen").

Evapco, Inc. and its wholly-owned subsidiaries, EvapTech, Inc. ("EvapTech"), EvapProducts, and TCI (collectively, "Evapco,"), filed suit in the Circuit Court for Carroll County for injunctive relief and damages against Mr. and Mrs. Peterson, ACTP and Evergreen (collectively, "Appellants"). The plaintiffs alleged, mainly, that Mr. Peterson breached the Confidentiality Agreement and that the other defendants tortiously interfered with the Confidentiality Agreement and with Evapco's prospective advantage. The defendants moved to dismiss Mrs. Peterson, ACTP, and Evergreen for lack of personal jurisdiction, but the court denied the motion.

The contentious litigation that ensued took a relatively unusual course after the court entered a default judgment against the defendants as a spoliation sanction and reserved only the issues of injunctive relief and damages to be tried before the court. Of the four defendants, only Mr.

Peterson, without counsel, appeared at the damages hearing, and presented no evidence on his own behalf. The circuit court found the defendants jointly and severally liable for $3,181,054 in compensatory and punitive damages plus attorneys' fees.

The defendants appealed, contesting the circuit court's exercise of personal jurisdiction over the Mrs. Peterson, Evergreen, and ACTP. They also argued that the circuit court's spoliation sanction was an abuse of discretion and that the circuit court erred by: rejecting their request for a jury trial, denying Mr. Peterson's request for a continuance, and refusing to permit Mr. Peterson to present evidence in defense of the claims against Evergreen and ACTP.

Held: Affirmed.

After surveying the federal and state courts throughout the country that have addressed this question, the Court of Special Appeals adopted the relatively modern "closely related" doctrine that most of those jurisdictions apply. The Court held that Mrs. Peterson and the two LLCs consented to jurisdiction in Maryland because (1) the Confidentiality Agreement contained a valid forum-selection clause; (2) Evapco's claims arose out of the non-signatory Appellants' status in relation to the Confidentiality Agreement; and (3) Mrs. Peterson, Evergreen, and ACTP were closely related to the Confidentiality Agreement, thus making it foreseeable that the forum-selection clause would be enforced against them.

The Court then disposed of the remainder of the Appellants' issues on appeal. The Court held that the circuit court did not abuse its discretion by finding Appellants in default as a spoliation sanction due to Appellants' high degree of fault and the prejudice suffered by Evapco. Additionally, the Court held that circuit court did err by: rejecting Appellants' jury request for the damages hearing because Appellants were in default; refusing to grant a continuance because Mr. Peterson never sought one; and prohibiting Mr. Peterson from presenting a defense on behalf of Evergreen and ACTP—two LLCs which were not represented by counsel as required by Maryland Rule 2-131.

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Kathy A. Netro, Personal Representative of the Estate of Barbara Bromwell, deceased v. Greater Baltimore Medical Center, Inc., No. 1990, September Term 2016, filed July 5, 2018. Opinion by Salmon, J.

https://mdcourts.gov/data/opinions/cosa/2018/1990s16.pdf

CONSTITUTIONAL LAW – PREEMPTION – DAMAGES

Facts:

Kathy Netro, as personal representative of the Estate of Barbara Bromwell, deceased, filed suit in the Circuit Court for Baltimore County against Greater Baltimore Medical Center, Inc. The personal representative, in a jury trial, proved that, the defendant, Greater Baltimore Medical Center, Inc., was negligent in the treatment of the decedent, Ms. Bromwell. The personal representative proved that between June, 2011 and June 29, 2013, the decedent received medical bills from various healthcare providers that totaled $451,956.00. At the time she received those bills, Ms. Bromwell was eligible to receive Medicare benefits as well as benefits from CareFirst Blue Cross Blue Shield (hereinafter "CareFirst"), her health care insurer. Medicare made conditional payments to Ms. Bromwell of $157,730.75; CareFirst also paid part of the bills that were submitted, and Ms. Bromwell and/or her personal representative paid $47,609.00 in out-of-pocket expenses. The amount actually paid amounted to $389,014.30 because $62,941.70 of the medical bills had been written off by the health care providers.

Although the personal representative at trial was allowed to put into evidence all of the medical bills received, which totaled $451,956.00 the actual amount expended was $389,014.30 ($451,956.00 - $62,941.70).

The jury entered judgment in favor of the personal representative and against Greater Baltimore Medical Center, Inc. in the amount of $451,956.00. The defendant filed a post-trial motion, pursuant to Courts and Judicial Proceedings Article § 3-2A-09(d)(1), in which the defendant asked that the judgment be reduced from $451,956.00 to the amount actually paid, $389,014.30. That motion was granted and, accordingly, the judgment was reduced to the smaller amount.

The personal representative argued at trial, and on appeal, that Section 3-2A-09(d)(1), which allowed for the post-trial reduction of past medical expenses, was preempted by federal law as set forth in the Secondary Payer Act ("SPA") which, in so far as here relevant, is codified in 42 U.S.C. § 1395y(b)(2)(b). The SPA provides that when Medicare makes a conditional payment of benefits to a beneficiary and the beneficiary, by a judgment, receives reimbursement for the medical expenses, then Medicare has a right to recover from the tortfeasor the conditional payments it made. In the subject case, that meant that Medicare was entitled to recover from the Greater Baltimore Medical Center the sum of $157,730.75.

In the trial court, and on appeal, the personal representative contended the reason that the MSP preempted the Maryland Act was because, if the provisions of the Maryland Act did not exist, Medicare would receive approximately $18,500.00 in repayment of the $157,730.75 conditionally paid by Medicare, than it would receive if the Maryland Act was enforced. Her preemption argument was based on regulations that are set forth in 42 C.F.R. (Code of Federal Regulations) § 411.37 which governs how the MSP should be implemented. That federal regulation allows the plaintiff in a tort suit who has made a recovery against an insurer, or self-insured, to charge back against the government a portion of the procurement costs in obtaining the judgment. C.F.R. § 411.37(c) reads:

> (a) Recovery against the party that received payment—
>
> (1) General Rule. Medicare reduces its recovery to take account of the cost of procuring the judgment or settlement, as provided in this section, if—
>
> (i) Procurement costs are incurred because the claim is disputed; and
>
> (ii) Those costs are borne by the party against which CMS [Centers for Medicare and Medicaid Services] seeks to recover.
>
> * * *
>
> (c) Medicare payments are less than the judgment or settlement amount. If Medicare payments are less than the judgment or settlement amount, the recovery is computed as follows:
>
> (1) Determine the ratio of the procurement costs to the total judgment or settlement payment.
>
> (2) Apply the ratio to the Medicare payment. The product is the Medicare share of procurement costs.
>
> (3) Subtract the Medicare share of procurement costs from the Medicare payments. The remainder is the Medicare recovery amount.

To illustrate how C.F.R. § 411.37(c) operates, consider the following hypothetical: A plaintiff incurs $100,000.00 in procurement costs (legal fees, bills from experts and other costs) in order to obtain a $500,000.00 verdict for past medical expenses in a negligence case in which Medicare has made conditional payments of $250,000.00. In that hypothetical, Medicare's pro rata share of the procurement costs would be 50% of $100,000.00 or $50,000.00. But, if the total judgment is reduced from $500,000.00 to $400,000.00 for some reason, such as implementing the Maryland Act, Medicare's pro rata share of the procurement costs would be 62.5%

($250,000.00 is 62.5% of $400,000.00) and Medicare would have to pay $62,500.00 toward the procurement costs rather than $50,000.00.

The personal representative's argument was that because when the trial judge reduced the final judgment to $389,014.30 this meant that Medicare's share of the procurement costs increased. According to the personal representative, this would thwart the intent of Congress in as much as Congress intended when it enacted the MSP, to increase revenue to the U.S. Government "to the maximum extent possible." The trial judge rejected that argument and, accordingly, reduced the judgment.

Held: Affirmed.

The Court of Special Appeals ruled that the intent of Congress when it enacted the SPA was not to increase governmental revenues "to the maximum extent possible." Instead, Congress intended that the MSP provisions be construed to make the Medicare a secondary payor to the maximum extent possible. 42 C.F.R. § 411.21 states: "secondary payments means payments made for Medicare covered services or portions of services that are not payable under other coverage that is primary to Medicare. The Court ruled that applying the Maryland Act ("MA"), in this case, will not interfere with the goal of the MSP Act as annunciated in the federal register. Here, if the Maryland Act is enforced, the Greater Baltimore Medical Center will be required to pay 100% of the conditional payments to appellant who, in turn, must reimburse Medicare. In other words, GBMC and not Medicare, will be the primary payor. The fact that Medicare, based on its own regulations, has to pay a higher portion of the procurement costs than it would if the Maryland Act did not exist does not change that result.

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Tamere Thornton v. State of Maryland, No. 1569, September Term 2016, filed July 25, 2018. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2018/1469s16.pdf

CRIMINAL PROCEDURE – FOURTH AMENDMENT – ATTENUATION DOCTRINE

Facts:

Police officers arrested Tamere Thornton upon discovering a handgun in his possession, shortly after they detained him for a parking violation across the street from his home. Thornton was charged with various offenses related to possession of the handgun. He moved to suppress the evidence obtained at the time of his arrest.

Two witnesses testified at the suppression hearing: Baltimore City police officers Kenneth Scott and Jeremy Zimmerman. The officers testified that, at around 2:00 p.m. on January 11, 2016, they were travelling in an unmarked police vehicle when they noticed a sedan parked on the wrong side of a two-way street, with its left hand wheels next to the curb. Thornton was seated in the driver's seat of the sedan.

The officers pulled the unmarked police vehicle directly behind Thornton's sedan and activated their emergency lights. Officer Zimmerman walked to the driver's side of the sedan, Officer Scott walked to the passenger side, and a third officer remained inside the police vehicle. The officers wore tactical vests with the word "POLICE" displayed in bold letters across their chests.

The officers questioned Thornton for less than one minute. Thornton had a "laid back" demeanor and he said nothing unusual during the exchange. Nevertheless, the officers suspected that Thornton might be carrying a weapon because of certain hand movements that he made. Officer Scott offered only vague descriptions of these alleged movements, but Officer Zimmerman testified in relatively greater detail about the alleged movements.

Officer Scott testified that, as he approached the sedan, he saw Thornton look back in his rear-view mirror and then make a series of movements toward his waistband. Officer Scott testified that he stood observing Thornton's conduct as Officer Zimmerman questioned Thornton from the opposite side of the vehicle. Officer Scott then asked Thornton to consent to a vehicle search, but Thornton declined. Officer Scott told Thornton that they would need to wait for a K-9 unit to arrive with an odor-detecting dog. Officer Scott then told Officer Zimmerman to pull Thornton out of the vehicle for a weapons pat-down.

Officer Zimmerman testified that, as he approached Thornton's vehicle, he saw Thornton raise his right shoulder, bring his elbows together, and push downward toward his waistband. Officer Zimmerman performed an in-court demonstration of these movements. Officer Zimmerman

further testified that he saw Thornton make multiple adjustments near the front of his waistband during questioning.

Officer Zimmerman testified that he opened the driver's door and instructed Thornton to step out of the car. Officer Zimmerman told Thornton to place his hands on his head. Thornton complied. Officer Zimmerman claimed that, at that point, he had not made any physical contact with Thornton. Officer Zimmerman then started to pat down Thornton's front waistband area. Officer Zimmerman did not feel a weapon as he first made contact.

The officers testified that, as soon as Officer Zimmerman started to touch Thornton's waistband, Thornton pushed Officer Zimmerman aside and tried to run away. They saw Thornton slip and fall after he ran a short distance. The officers restrained Thornton and handcuffed him. When they moved him from where he had fallen, they found a handgun on the ground.

In an oral ruling, the circuit court announced that it would deny the motion to suppress.

The court declined to conclude that the officers had reasonable suspicion to believe that Thornton was armed and dangerous. The court said that Officer Scott's testimony was "unconvincing" and did not establish justification for the pat-down. The court recognized that Officer Zimmerman's testimony was "substantially different," in that it included greater detail about movements that could be consistent with adjusting the position of a gun. Nevertheless, the court reasoned that the observation of a waistband adjustment was not enough to generate reasonable suspicion for the pat-down, absent other circumstances that might indicate that Thornton was dangerous or involved in criminal activity.

The court went on to conclude that, even if the pat-down was unlawful, the evidence should not be suppressed. The court relied on the attenuation doctrine, under which an event occurring after an illegal search or seizure might attenuate the connection between the police misconduct and the subsequent discovery of evidence. The court reasoned that the time lapse between the pat-down and the discovery of the handgun was minimal; that the act of fleeing from the officers was an intervening circumstance; and that the pat-down was "arguably illegal" but may have been the product of a "reasonable mistake."

Thornton entered a plea of not guilty and submitted the case for a bench trial on an agreed statement of facts. The court found Thornton guilty of one count of possessing a regulated firearm after a previous conviction for a crime of violence. Thornton appealed.

Held: Affirmed.

The question on appeal was whether the circuit court erred in denying Thornton's motion to suppress. Within that challenge, there were three main areas of dispute: (1) whether the discovery of the handgun occurred before or after an event implicating Thornton's constitutional rights; (2) whether the pat-down was justified at its inception by reasonable suspicion that Thornton was armed and dangerous; and (3) whether, if the officers lacked adequate justification

for the pat-down, the evidence discovered after Thornton's must be suppressed. The Court of Special Appeals upheld the denial of the suppression motion based solely on the third issue: attenuation.

The Court of Special Appeals rejected the State's "threshold" argument that the Fourth Amendment was not implicated at all before the discovery of the handgun. An initial *seizure* occurred through Thornton's submission to the multiple shows of authority during the traffic stop. A *search* occurred when Officer Zimmerman touched Thornton's waistband, notwithstanding that Thornton ran away before the search was completed. A second *seizure* occurred when the officers physically restrained Thornton, placed him in handcuffs, and moved him from where he had fallen.

Thornton did not challenge the lawfulness of the two seizures, but he did challenge the lawfulness of the search. Thornton was not required to show that he was continuously seized while he was running from the officers. He was only required to show that the pat-down was unlawful and that a sufficient connection existed between the unlawful pat-down and the evidence discovered after it.

The Court rejected the State's argument that the record was sufficient to show that the officers had reasonable suspicion to believe that Thornton was armed and dangerous.

The Court concluded that it would be inappropriate to view the facts in the light most favorable to the State on the issue of reasonable suspicion, because the State bore the burden of persuasion on that issue and because the circuit court could not say that the State had carried that burden. Without the benefit of inferences favorable to the State, the Court did not accept the State's assertions that the circuit court "credited" all of Officer Zimmerman's testimony. The Court would not infer that Thornton made multiple adjustments to his waistband where the circuit court mentioned only the shoulder-raising movement that Officer Zimmerman observed as he initially approached the vehicle.

Citing *In re Jeremy P.*, 197 Md. App. 1 (2001), Thornton contended that the officer's observation of a waistband adjustment was not enough to justify a frisk. He argued that the State could not establish reasonable suspicion unless the officers recounted other facts, in addition to the waistband adjustment, to suggest the presence of a weapon. The State argued that any such requirement was satisfied because, in this case, Thornton made the waistband adjustment while he could see the officers, a circumstance that might indicate that Thornton was trying to conceal something.

Maryland cases have held that furtive hand movements can contribute to reasonable suspicion in combination with other factors (such as extreme nervousness or suspected drug activity). No case, however, has held that a furtive hand movement alone justifies a frisk where essentially all other objective circumstances indicate that the person is peaceful, compliant, and law-abiding, save for a minor parking infraction.

Thornton suggested that the Court of Special Appeals should remand the case to allow the circuit court to resolve ambiguities in the court's ruling on the issue of reasonable suspicion. The Court concluded that a remand was unnecessary, because the Court would assume that the officers lacked reasonable suspicion to justify the pat-down.

Under the attenuation doctrine, evidence discovered after a Fourth Amendment violation should not be suppressed if the connection between the violation and the evidence is remote or has been interrupted by some intervening circumstance so that the constitutional interest would not be served by suppression. In *Brown v. Illinois*, 422 U.S. 590 (1975), the Supreme Court identified three factors to guide this analysis: (1) the temporal proximity between the unreasonable search or seizure and the discovery of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the unconstitutional conduct.

In this case, the time lapse between the pat-down and the discovery of the handgun was a matter of seconds. Thus, the temporal proximity factor weighed in Thornton's favor.

The Court held that a person's flight in response to unlawful police conduct may constitute an intervening circumstance if the flight itself constitutes a new and distinct crime. In this case, Thornton ran away from an allegedly unlawful pat-down during an admittedly lawful traffic stop. By doing so, he appeared to commit the crime of "fleeing and eluding" the officers in violation of Md. Code, § 21-9004(b)(2) of the Transportation Article. This apparent commission of a new crime justified a second, lawful seizure, which in turn produced the evidence that led to his conviction. Under these specific facts, where Thornton appeared to commit the offense of fleeing and eluding an officer after a lawful stop, his conduct qualified as an intervening circumstance.

The third factor (the purpose and flagrancy of the police misconduct) also weighed in favor of the State. The Court rejected Thornton's argument that the officers committed a flagrant violation when they initiated the pat-down. Any conclusion that the pat-down was unlawful because the officers' suspicions were not objectively reasonable, even if ultimately correct, was far from obvious.

The presence of the intervening circumstance (the apparent commission of a new crime), along with the absence of any flagrant or purposeful misconduct, outweighed the close temporal proximity between the pat-down and the discovery of the evidence. Overall, the connection between the pat-down and the evidence was sufficiently attenuated that the evidence should not have been excluded.

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Christopher Noble v. State of Maryland, No. 2476, September Term 2016, filed July 25, 2018. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2018/2476s16.pdf

IMMUNITY FROM SANCTION OF VIOLATION OF PROBATION BASED ON EVIDENCE DISCOVERED AFTER A CALL FOR ASSISTANCE FOR A MEDICAL EMERGENCY

Facts:

On April 29, 2016, paramedics responded to a call for "an unresponsive person, thought to be in cardiac arrest." They discovered appellant in the bathroom, lying on his back. He was unresponsive and suffering from respiratory depression, i.e., he was breathing approximately four times a minute. Based on appellant's pinpoint pupils and his respiratory depression, the paramedics concluded that appellant was suffering from an opiate overdose, and they administered Naloxone. Appellant regained consciousness within minutes. He initially stated that "he was just working hard that day, and he took some Benadryl." Appellant later told the police that he had taken several Percocet. He declined to go to the hospital.

The circuit court found that appellant violated the terms and conditions of his probation by, *inter alia*, failing to abstain from illegal substances. As a result, the court revoked appellant's probation.

Held: Vacated and remanded for further proceedings.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature." *Williams v. Peninsula Reg'l Med. Ctr.*, 440 Md. 573, 580 (2014). The legislative history of Md. Code (2017 Supp.) § 1-210 of the Criminal Procedure Article ("CP") makes clear that it was intended to address the opioid crisis within the State, and its purpose was to save lives by providing immunity from prosecution and other sanctions to encourage people to call for medical assistance when a person is believed to be suffering from an overdose. The statute reflects a shift in the legal system's approach to drug use, and it reflects the General Assembly's determination that encouraging persons to seek medical assistance to save lives was a higher priority than prosecuting those persons for certain, limited, crimes.

Based on our review of the statutory scheme and the legislative history, we hold that, pursuant to CP § 1-210(d), a person may not be sanctioned for a violation of probation if evidence of the violation was obtained solely as a result of a person seeking, providing, or assisting with the provision of medical assistance. As in CP § 1-210(c), it is not required that the person experiencing the medical emergency be the one to call for help.

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Comptroller of the Treasury v. Richard Reeves Taylor, No. 2198, September Term 2016, filed July 25, 2018. Opinion by Shaw Geter, J.

https://mdcourts.gov/data/opinions/cosa/2018/2198s16.pdf

CIVIL – TAX-GENERAL CODE ANNOTATED – MARYLAND QUALIFIED TERMINABLE INTEREST PROPERTY – MARYLAND ELECTION

Facts:

On December 1, 1989, John Wilson Taylor died with a valid will, which directed the creation of a "residuary marital trust." His will further directed that all of the net income from the residuary marital trust be paid to his wife, Margaret Beale Taylor, at least annually for and during her lifetime. At that time, the Taylors were residents of Wayne County, Michigan. Upon his death, Mr. Taylor's Estate filed a timely federal tax return with the Internal Revenue Service, in which his estate claimed a deduction for the marital trust, known as a qualified terminable interest property ("QTIP") election. Mrs. Taylor continued to reside in Michigan until 1993, when she moved to Washington County, Maryland. She died testate on January 15, 2013.

Appellee, the personal representative of Mrs. Taylor's Estate (the "Estate" or "appellee"), Richard Reeves Taylor, filed a federal Estate (and Generation-Skipping Transfer) Tax Return with the Internal Revenue Service, which included Mrs. Taylor's terminable life interest in the marital trust. Appellee also filed a Maryland estate tax return, in which the personal representative excluded the value of the marital trust. Appellee explained that, under Section 7-309(b)(6)(i) of the Maryland Tax-General Code Annotated, the martial trust was not subject to taxation because Mr. Taylor had not filed a timely tax return in Maryland, and therefore, no "marital deduction qualified terminable interest property election was made for the decedent's predeceased spouse on a timely filed Maryland estate tax return."

After examining the Taylor's Estate Maryland estate tax return, the Comptroller of the Treasury (the "Comptroller" or "appellant"), disallowed the claimed exclusion of Mrs. Taylor's interest in the marital trust, adding back the value to the federal gross estate and the corresponding Maryland estate. The Comptroller then sent appellant a Deficiency Notice, as well as additional interest charges and late payment penalties. Appellee petitioned the Tax Court, seeking reversal and an abatement of the assessments. The Tax Court affirmed the Comptroller's inclusion of the value of the interest in the marital trust and the assessments of interest, but waived and abated the late payment penalty. Appellee filed a timely petition for judicial review in the circuit court, and appellant filed a cross-petition. After a hearing, the circuit court reversed the Tax Court's assessment of taxes and interest against the estate.

Held: Affirmed.

The Court of Special Appeals held the Tax Court erred in finding the QTIP was included in Mrs. Taylor's Maryland estate, and taxable by Maryland. Section 7-309(b)(5-6), entitled "Determination of the Maryland estate tax," details and limits when and how assets of QTIP trusts may be included in the calculation of the Maryland estate. It explicitly requires "an irrevocable election made on a timely filed Maryland estate tax return." "[I]t is the established rule not to extend the tax statute's provisions by implication, beyond the clear import of the language used, to cases not plainly within the statute's language, and not to enlarge the statute's operation so as to embrace matters not specifically pointed out." *Comptroller of the Treasury v. Citicorp Intern. Commc'ns, Inc.*, 389 Md. 156, 170 (2005) (quoting *Comptroller of the Treasury v. John C. Louis Co.*, 285 Md. 527, 539 (1979)). In case of doubt, tax statutes are construed 'most strongly against the government, and in favor of the citizen. *Id*. The Comptroller's contention that Maryland could tax the assets of a QTIP for which no Maryland election was made is "not plainly within the statute's language," nor "specifically pointed out." The statute explicitly delineates that an election be made on "a timely filed Maryland estate tax return." No such election exists here, and therefore, the Comptroller lacked the authority to tax the assets of the QTIP as part of Mrs. Taylor's Maryland estate.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated July 9, 2018, the following attorney has been disbarred by consent:

ANGELA M. BLYTHE

*

By an Opinion and Order of the Court of Appeals dated July 13, 2018, the following attorney has been disbarred:

WALTER LLOYD BLAIR

*

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JUDICIAL APPOINTMENTS

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On June 6, 2018, the Governor announced the appointment of **GEOFFREY GILES HENGERER** to the District Court of Maryland – Baltimore City. Judge Hengerer was sworn in on July 2, 2018 and fills the vacancy created by the retirement of the Hon. George Lipman.

*

On June 6, 2018, the Governor announced the elevation of **JUDGE GREGORY SAMPSON** to the Circuit Court for Baltimore City. Judge Sampson was sworn in on July 3, 2018 and fills the vacancy created by the retirement of the Honorable Edward R.K. Hargadon.

*

On June 6, 2018, the Governor announced the appointment of **ROBERT KINSEY TAYLOR, JR.** to the Circuit Court for Baltimore City. Judge Taylor was sworn in on July 3, 2018 and fills the vacancy created by the retirement of the Honorable Alfred Nance.

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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