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COURT OF APPEALS

CONSTITUTIONAL LAW - FIRST AMENDMENT - MINISTERIAL EXCEPTION

Facts: The respondent was employed as an organist at St. Catherine Labouré Parish from 1958 to 1976 and again from 1991 to 2002. During these periods, he did not have a written employment contract. In 2001, the respondent and the Pastor of the Parish entered into an employment contract for respondent's services as "Organist/Pianist/Keyboard Accompanist," for a term of two years. The contract outlined the respondent's responsibilities.

In 2001, the respondent informed the pastor that he had been sexually abused by a Parish choirmaster from 1958 to 1964. The employment relationship allegedly deteriorated and in early 2002, the respondent's employment was terminated unilaterally and without advance notice, based on his "apparent inability to work cooperatively." The respondent brought an action alleging breach of contract, wrongful discharge, and intentional infliction of emotional distress against the petitioners.

The petitioners moved to dismiss the respondent's complaint. It argued that the court lacked subject matter jurisdiction and, based on the religious guarantees of the U.S. and Maryland Constitutions, the complaint failed to state a claim. The trial court denied the motion, so that the parties could engage in limited discovery as to the nature of the organist position, a matter critical to determining whether the "ministerial exception" would apply.

In answers to interrogatories and answers to requests for admissions, the respondent admitted that his contract enumerated several religious purposes. In those answers, he denied, however, discharging any of those duties and stated that he "did not encourage the congregation to assume an active part in their musical participation."

In moving for summary judgment, the Archdiocese argued that the respondent's position was covered by the ministerial exception. It emphasized that the respondent's undisputed duty was to play music at religious services for the Catholic Church. The motion was granted, precipitating the respondent's appeal to the Court of Special Appeals.

In an unreported opinion, the Court of Special Appeals reversed the judgment of the Circuit Court. It held that the court erred in

granting the petitioners' motion for summary judgment. We granted the petitioners' petition to this Court for a writ of certiorari.

Held: Affirmed. The Title VII "ministerial exception" does not apply to a church organist who did not perform any ministerial duties.

Archdiocese of Washington, et al., v. William T. Moersen, No. 69, September Term 2005. Filed June 14, 2007. Opinion by Bell, C.J.

CONSTITUTIONAL LAW - JURY TRIAL - CITIZEN JURORS - THE COMMON LAW RIGHT TO A JURY COMPOSED ENTIRELY OF U.S. CITIZENS HAS BEEN ABROGATED BY LEGISLATIVE ACTION COVERING THE ENTIRE SUBJECT MATTER OF JURY SELECTION - STATUTORY RIGHT TO A JURY OF U.S. CITIZENS IS WAIVED IF DEFENDANT FAILS TO ASK FOR VOIR DIRE QUESTION TO DISCOVER ANY NON-CITIZENS - BOYD V. STATE, 341 MD. 431 (1996) PARTIALLY OVERRULED.

Facts: Marcus Dannon Owens was tried in the Circuit Court for Howard County, before a presiding judge and a jury of twelve individuals, on charges of murder and child abuse resulting in death. The jury convicted Owens of second degree murder and child abuse in the death of his stepson, Kevonte Davis.

On the morning of 30 July 2003, Kevonte appeared normal, but did not appear so when Owens, the sole custodian of the child during the day, picked up his wife from work approximately 10 hours later. Kevonte's eyes were closed, he was foaming at the mouth, had cold hands, and was "moaning like he was in pain." The couple took Kevonte to Howard County General Hospital ("the Hospital"), where the child died after approximately thirty minutes of failed attempts to revive him. The autopsy revealed that "the cause of death was multiple blunt force trauma" inflicted less than four to six hours before death.

At about 6:30 p.m., Howard County Police Detectives Eric Kruhm

and Vicki Shaffer encountered and interviewed Owens for 10 to 15 minutes in the playroom of the Hospital's pediatric ward, where he was tending his other stepson, Dacquan. That conversation, to which Owens was apparently a free participant, yielded some additional background on the day's events. The detectives noted that Owens seemed nervous during their conversation and muttered several potentially inculpatory comments. The interview ended when Owens left the room.

Several hours later, around 9:48 p.m., the detectives conducted a second interview. The detectives approached Owens, who was in the Hospital parking lot, and asked him to come back inside for another interview. Owens complied with the request and also did not object to the audiotaping of the interview. The two plain-clothes detectives and their suspect, Owens, convened in an empty room in the pediatric ward, several doors down from the playroom where the first interview took place. The detectives took possession of Owens's car keys prior to the interview. The interview lasted somewhere between 20 and 30 minutes and was terminated at Owens's initiative. The police arrested Owens two days later on 1 August 2003.

The jury in Owens's trial returned its verdict on 10 June 2004. Later that same evening, Steven Merson, the Howard County Jury Commissioner, received a voicemail message from Juror No. 10, Adeyemi Alade. Alade, a Nigerian national and "permanent resident alien," indicated that he became concerned about the propriety of his jury service because he was not a U.S. citizen. Alade had checked the jury questionnaire that he was qualified to serve; however, due to a post-trial query by a fellow student, he only then questioned the propriety of that response.

On 18 June 2004, the Circuit Court held a hearing regarding this revelation. For Alade's part, the court found no intent to misrepresent his status to the court. Apparently, the Jury Commissioner's office does not review for accuracy the responses provided by juror candidates unless some information is missing or an obvious discrepancy is apparent.

Owens filed a Motion for a New Trial, arguing that Owens was deprived of a lawful jury because Alade, as a non-U.S. citizen, was not qualified to serve as a juror. The Circuit Court, on 21 July 2004, denied Owens's motion. The court reasoned that neither the U.S. nor Maryland Constitutions mandate a jury composed of U.S. citizens only. As to Owens's contention that Alade's non-citizenship status could not reasonably have been discovered because *voir dire* questions relating to statutory disqualifications are not mandatory, the court pointed out that neither party sought a *voir*

dire question on the subject of citizenship. Had it been proposed, the court ventured that the citizenship question would have been propounded to the jurors and Alade would have been disqualified as a juror.

Also, prior to trial, Owens sought to suppress any statements he made to Detectives Kruhm and Shaffer during their two interviews because the detectives had not advised him of his *Miranda* rights previously. The Circuit Court denied the motion to suppress the interviews based on a totality of the circumstances analysis. The court examined numerous factors in concluding that the interrogation of Owens was not custodial, including: the neutral venues and short length of the interviews; the small number of officers present and their relaxed posture; whether Owens was a suspect and treated as such; Owens's willingness to commence the interviews; the lack of use of physical restraint; the absence of force or coercion; and, that Owens was not placed under arrest.

Owens noted timely an appeal to the Court of Special Appeals, which affirmed the judgment of the Circuit Court on much the same grounds as explained by the trial court. The intermediate appellate court concluded that Owens's right to a citizen jury was purely statutory, not constitutional, in nature. *Owens v. State*, 170 Md. App. 35, 71, 906 A.2d 989, 1009 (2006). Because the *voir dire* process is the means by which defendants are accorded the opportunity to identify and challenge unqualified jurors, a failure to pose relevant questions and object during that time amounts to a waiver of that opportunity. *Owens*, 170 Md. App. at 71-73, 906 A.2d at 1009-10. The Court of Special Appeals reinforced its conclusion by examining Maryland and federal cases involving jurors whose statutory disqualifications were discovered only after a verdict was rendered and motions for new trials were denied because it was held that the right to object to unqualified jurors had been waived. As for the custodial interrogation issue, the Court of Special Appeals reasoned that the encounters between the detectives and Owens were not very long and that a reasonable person in Owens's position would have felt free to leave the interviews. *Owens*, 170 Md. App. at 99, 906 A.2d at 1025. The Court of Appeals granted Owens's petition for a writ of certiorari. 396 Md. 12, 912 A.2d 648 (2006).

Held: Affirmed. The Court of Appeals reviewed the English common law surrounding the right to a criminal jury trial, finding implicit support for the notion that jurors were required to be citizens of England. That common law, transposed to Maryland, became our common law in 1776. The Court noted, however, that the common law may be abrogated either when the Legislature addresses the entire subject matter on which the common law spoke, or when a

legislative enactment is in conflict with the common law. In reviewing the statutory scheme for jury selection developed by the General Assembly, the Court noted that the scheme required jurors to be U.S. citizens. Therefore, the Court concluded that the statutory jury selection scheme completely overbore the implicit common law citizen qualification for jurors, making the right to a citizen jury of statutory, not constitutional, origin. The Court also relied on Supreme Court precedent for the proposition that it is not a violation of substantive due process for a non-citizen to be empanelled on a criminal jury.

Because the right to a citizen jury is statutory in nature, a waiver of the right to object to a non-citizen juror is analyzed more leniently than were it constitutional in nature. Waiver of this statutory right can be achieved by inaction on the part of the defendant or his attorney and the failure to propose proper *voir dire* questions. The Court concluded that Owens waived his right accordingly when he did not seek a *voir dire* question as to the citizenship status of the venire. This conclusion was reached notwithstanding the rule announced in *Boyd v. State*, 341 Md. 431, 671 A.2d 33 (1996), which stated that requested *voir dire* questions concerning minimum statutory qualifications need not be asked by the trial judge. The Court overruled this notion, which did not change the outcome in the present case. The Court noted that simply because it is *not mandatory* for a judge to pose a particular question does not make it a *prohibited* question. Because Owens did not pursue the possibility, he waived the right to object to a non-citizen juror. The interests of judicial economy and integrity support this conclusion.

As to the suppression issue, the Court held that Owens was not "in custody" when he was questioned by the detectives on both occasions at the Hospital. The Court was persuaded by Owens's consent to commence the interviews, their short duration, the public setting where they were conducted, the lack of restraint placed on Owens, Owens's consent to audiotape the second interview, and the fact that Owens was not arrested that night. Most importantly, the Court noted that Owens broke off the questioning on his initiative on both occasions, proving that he must not have felt unable to leave the situation. Thus, because the interviews were not custodial in nature, no *Miranda* warnings were required.

Marcus Dannon Owens v. State of Maryland, No. 103, September Term 2006, filed 5 June 2007. Opinion by Harrell, J.

CONSTITUTIONAL LAW - PETITION FOR WRIT OF CERTIORARI - TIME LIMITATIONS - DISMISSAL - PURSUANT TO MARYLAND RULE 8-302(a), A PETITION FOR WRIT OF CERTIORARI IS UNTIMELY IF FILED MORE THAN 15 DAYS AFTER THE COURT OF SPECIAL APPEALS ISSUES ITS MANDATE.

Facts: Ms. Sterling filed a civil suit against Atlantic, her former employer, for two types of workplace sexual harassment and for retaliation. The Circuit Court for Montgomery County entered judgment in her favor. Atlantic filed a timely appeal to the Court of Special Appeals and Ms. Sterling filed a cross-appeal concerning the extent of the trial court's award of fees. The Court of Special Appeals filed an unreported opinion on September 5, 2006. It determined that eight of Atlantic's nine claims were without merit. As to the remaining issue, the court ruled that the trial judge had improperly instructed the jury as to the parties' respective burdens of proof. It therefore vacated the judgment and remanded the case for a new trial.

The intermediate appellate court issued its mandate on October 11, 2006. Ms. Sterling filed a petition for writ of certiorari with the Clerk of the Court of Appeals on October 30, 2006, 19 days after the Court of Special Appeals issued its mandate. On November 2, 2006, Atlantic filed a motion to dismiss Ms. Sterling's petition as untimely, and, on November 13, filed a conditional cross-petition for writ of certiorari. This Court granted both petitions and ordered that both parties brief the question of the timeliness of the petition.

Held: Petition and Conditional Cross-Petition dismissed. This Court concluded that Ms. Sterling failed to timely file her petition for writ of certiorari. Md. Code (1974, 2006 Repl. Vol.), § 12-201 of the Courts and Judicial Proceedings Article, entitled "Certiorari to Court of Special Appeals" provides that any party may file a petition for writ of certiorari but must do so no later than the time prescribed by the Maryland Rules. Maryland Rule 8-302 prescribes the time limit - it explains that a petition for writ of certiorari may be filed before or after the Court of Special Appeals has rendered a decision, "but not later than 15 days after the Court of Special Appeals issues its mandate."

The Court of Appeals determined that the language of Rule 8-302 clearly requires that petitions for writ of certiorari be filed with the Clerk within 15 days after the Court of Special Appeals issues its mandate. Because Ms. Sterling's petition for writ of certiorari arrived in the Clerk's office four days after the prescribed deadline, it violated Rule 8-302. The Court concluded that Ms. Sterling had ample time to prepare and file her petition because the intermediate appellate court filed its opinion on September 5 and

did not issue its mandate until 36 days later, six days longer than the date on which the Clerk usually issues the mandate, in accordance with Rule 8-606(b). The Court also determined that Maryland Rule 1-203(c), which adds three days to prescribed situations where service triggers the clock and the parties are served by mail, does not apply to petitions for writ of certiorari because the Court of Special Appeals issues mandates, and issuance of a mandate is not synonymous with service.

Sterling v. Atlantic Automotive Corp., No. 105, September Term 2006, filed June 4, 2007. Opinion by Greene, J.

CONSTITUTIONAL LAW - SEARCH AND SEIZURE - FOURTH AMENDMENT - REASONABLENESS - PLACE OF SEARCH - EXIGENCY

Facts: On September 29, 2000, members of the Baltimore County Police Department received information from a confidential informant who told them that later that evening petitioner, John August Paulino ("Paulino"), would be in the 1100 block of North Point Road, Dundalk, Maryland and would be in possession of a quantity of controlled dangerous substance. The informant also advised the police that Paulino typically hides the controlled dangerous substance in his buttocks area. Acting on the information provided by the informant, the police established surveillance in the 1100 block of North Point Road. Later that night, Paulino was observed entering the surveilled location, a public car wash, riding as a passenger in a Jeep Cherokee. When the vehicle pulled into the car wash, the vehicle was stopped immediately by the police. Paulino was arrested and removed from the vehicle. With Paulino laying on the ground, the police lifted up Paulino's shorts, and one of the detectives, donning a pair of gloves, spread Paulino's butt cheeks apart and found a quantity of drugs. Paulino was charged with possession with intent to distribute cocaine and possession of cocaine. Subsequent to his arrest, Paulino filed a motion to suppress, which, following a hearing on the motion, was denied. Proceeding on an agreed statement of facts, the trial judge found

Paulino guilty of possession with intent to distribute, and sentenced him as a subsequent offender, to a mandatory ten-year sentence. The Court of Special Appeals affirmed the judgment of the Circuit Court in an unreported opinion.

Held: Reversed. To determine the reasonableness of a search under the Fourth Amendment, the Court must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. Accordingly, the Court of Appeals balanced each of the four factors holding that the police officers' search of Paulino was unreasonable because the officers conducted a highly intrusive search in the parking lot of a public business in the presence of others, at least 15 people, namely officers and 3 civilians, when there were no exigent circumstances requiring an immediate search.

John August Paulino v. State of Maryland, No. 75, September Term, 2006, filed June 4, 2007. Opinion by Greene, J.

CONTRACT LAW - LATE FEES - THE GENERAL ASSEMBLY, BY ENACTING COMMERCIAL LAW § 14-2002(G)(1)(I), DELEGATED TO PRIVATE CONTRACTING PARTIES IN PERSONAL USE MOTOR VEHICLE LEASES THE AUTHORITY TO SET THE AMOUNT CHARGEABLE FOR LATE FEES, WHICH IT IMPLIED WOULD NOT BE DEEMED INTEREST, OBVIATING THE APPLICATION OF THE MAXIMUM CONSTITUTIONAL RATE OF INTEREST PRESCRIBED BY MARYLAND CONSTITUTION ARTICLE III, § 57.

CONSTITUTIONAL LAW - SEPARATION OF POWERS - THE GENERAL ASSEMBLY, BY ENACTING COMMERCIAL LAW § 14-2002(G)(1)(I), DELEGATED PROPERLY TO PRIVATE CONTRACTING PARTIES ITS AUTHORITY TO DETERMINE MAXIMUM INTEREST RATES.

Facts: Ronnette McDaniel and two other representative, putative

class action plaintiffs (collectively "the Appellants") executed lease agreements for personal use motor vehicles, entered between May 1997-98, with American Honda Finance Corporation and its various entities ("American Honda"). Each agreement, although involving different dealerships, contained a nearly identical term providing for a "late charge." Each plaintiff alleged that American Honda assessed, and each plaintiff paid, a single late fee prescribed by the above-quoted term for failing to remit timely a monthly amount due under their respective leases.

On 13 December 2000, in the Circuit Court for Prince George's County, McDaniel and the other plaintiffs filed a First Amended Complaint. The First Amended Complaint alleged that the late fees provision was an unlawful liquidated damages contract term exceeding the 6% per annum constitutional limit on interest, as well as a violation of the Maryland Motor Vehicle Leasing Act and the Maryland Consumer Protection Act. Compensatory and statutory damages, as well as declaratory and injunctive relief, were sought. Reformation of the leases was not sought. The Circuit Court stayed the proceedings twice over the course of five years in contemplation of the disposition of two cases in the Court of Appeals which the trial court felt raised issues bearing directly on those in the present case: *Dua v. Comcast Cable of Md, Inc.*, 370 Md. 604, 805 A.2d 1061 (2002), and *Simpkins v. Ford Motor Credit*, 160 Md. App. 1, 862 A.2d 471 (2004). On 21 March 2006, the Circuit Court lifted the stay because of the Court's decision to remand *Simpkins* to the trial court for the consideration of procedural issues unrelated to the merits of the case.

American Honda filed a Motion to Dismiss for failure of the First Amended Complaint to state a cause of action upon which relief may be granted. After conducting a hearing on the motion, the trial court, on 1 September 2006, dismissed all claims and declared that American Honda was entitled to charge late fees, as framed in the contracts, pursuant to Commercial Law § 14-2002(g). Article III, § 57 of the Maryland Constitution provides, in pertinent part, that the legal rate of interest is 6% per annum "unless otherwise provided by the General Assembly." (emphasis added). As understood by the Circuit Court here, the General Assembly so provided by enacting Commercial Law § 14-2002(g), which states that, if a motor vehicle lease permits, a lessor may impose late payment fees on a lessee. In reaching this conclusion, the Circuit Court relied on the intermediate appellate court's reasoning in *Simpkins*, holding that late fees authorized by Commercial Law § 14-2002(g) are not interest and are exempt from the constitutionally prescribed maximum interest rate. 160 Md. App. at 11-12, 862 A.2d at 477. Appellants noted a timely appeal to the Court of Special Appeals. Before the intermediate appellate court could decide the case, Appellants

petitioned for, and we granted, a writ of certiorari. 396 Md. 12, 912 A.2d 648 (2006).

Held: Affirmed. Article III, § 57 of the Maryland Constitution provides, in pertinent part, that the legal rate of interest is 6% per annum "unless otherwise provided by the General Assembly." (emphasis added). Application of the principles of statutory interpretation lead the Court to the conclusion that the General Assembly "provided otherwise" by enacting Commercial Law § 14-2002(g)(1)(i), which applies to consumer motor vehicle leasing contracts such as those binding Appellants. The plain language of § 14-2002(g)(1)(i) authorizes late fees and also indicated that the authorized "late charges" were not to be considered interest because of the label used by the General Assembly. The Court was persuaded by the fact that the General Assembly, particularly at the time § 14-2002(g)(1)(i) was enacted, demonstrated that it knew how to distinguish "late charges" from "interest." Accordingly, whatever late fees Appellants incurred before 1 June 2000 (the effective date of § 14-1315(d)(1)) and after 1 January 1996 (the effective date of § 14-2002(g)(1)(i)) were not interest, and therefore were not subject to the limitation of 6% per annum interest rate imposed by Art. III, § 57.

As for any late fees that may have been assessed after 1 June 2000, the Court held that Commercial Law § 14-1315(d)(1) controls the issue of late fees. Section 14-1315(d)(1) was enacted by the General Assembly in response to *United Cable Television of Baltimore v. Burch*, 354 Md. 658, 732 A.2d 887 (1999) (*Burch I*), specifically to clarify that "[a] late fee imposed under [a consumer contract] is not . . . [i]nterest." Because Commercial Law § 14-1315(d)(1) states that late fees assessed in accord with consumer contracts like those executed by the Appellants are not interest, it renders unsound the foundation of their argument that any late fees charged after 1 June 2000 are interest.

To the extent that § 14-1315(d)(1) is construed to govern any late fees assessed to and/or paid by Appellants after 1 June 2000, Appellants argued incorrectly that the application of the statute to their leases executed before the effective date of the statute impairs their contract rights impermissibly. There is no question that a contractual relationship pre-existed the effective date of § 14-1315, but as the Court's holding that the controlling law pre-existing § 14-1315 designating the late fees here as non-interest made plain, there was no appreciable change in law. The Court's analytical conclusion is unaffected, whether § 14-2002(g)(1)(i) or § 14-1315(d)(1) is applied. In either case, the late fees are not interest, obviating the application of Art. III, § 57.

Appellants argued that even if the General Assembly intended for Commercial Law § 14-2002(g) (1) (i) to allow motor vehicle lessors and lessees to determine whether to assess, and the permissible amount of, late fees, such an act constitutes an unlawful delegation of law-making authority because Art. III, § 57 vested in the Legislature the exclusive authority to provide for an interest rate in excess of 6% per annum. While it is true that the General Assembly cannot delegate its fundamental decision-making authority, it may enact statutes expressing its general disposition and policy decisions on certain matters. Those statutes, by virtue of their delegation of a degree of interpretive or enforcement authority to other branches or agencies of government, or individual persons, do not equate necessarily with the wholesale delegation of law-making authority. There is a vast difference between the Legislature abdicating completely its law-making authority, and the enactment of a statute that vests a certain degree of discretion to parties affected by the statute. In the present case, the General Assembly did not hand over to motor vehicle lessors and lessees the authority to pass statutes pertaining to late fees, but merely enacted a statute recognizing the ability of private contracting parties to agree on their own accord to terms regarding late fees. Indeed, aside from Commercial Law § 14-2002(g) (1) (i), the *Burch I* Court identified previously, without invalidating them, several statutes leaving to contracting parties the question of whether to permit late fees. The Court also found compelling the determination in *Fish Market Nominee Corp. v. G.A.A., Inc.*, 337 Md. 1, 650 A.2d 705 (1994), that the General Assembly's "ability to otherwise provide [under Art. III, § 57] is unrestricted."

Ronnette McDaniel, et al. v. American Honda Finance Corporation, No. 108, September Term 2006, filed 12 June 2007. Opinion by Harrell, J.

CRIMINAL LAW - ARRESTS

Facts: In the case sub judice, the Charles County Sheriff's Department received a tip from a confidential informant. Claiming that he had both witnessed and videotaped a drug transaction in front of the Saint Charles Towne Mall, the informant produced a videotape showing two men, including the petitioner, get into a Ford Expedition, which was parked in the mall parking lot, and remain there for a short time, while a third person stood by the driver's door. No drugs, paraphernalia, or money could be seen on the videotape. The police set up surveillance at the mall and with regard to the vehicle.

The petitioner drove away from and, a short time later returned to, the mall. Upon his return, he was followed into the mall by a second detective, who then observed him meeting with the two people with whom he earlier had been seen, and recorded, in the videotape. As was the case in the videotape, although the three people were together, no drugs actually were observed on this occasion. When one of these people left the mall and was stopped by the police, a consented-to search of the car revealed a small amount of drugs.

A certified drug sniffing dog was brought to the mall to scan the petitioner's Ford Expedition, which was again parked on the mall parking lot while the petitioner was inside the mall. The dog did not alert to the presence of any drugs in the car.

Subsequently, the petitioner left the mall, driving his Expedition. He was stopped by a third detective, who informed the petitioner that he believed that there were drugs in his vehicle. When the petitioner declined to consent to a search of the vehicle, the detective, although aware of the prior negative scan, called for the dog to scan the Expedition again. While waiting for the dog to arrive, the petitioner was placed in handcuffs.

During this second scan, the driver's side window was down, and, as with the first one, the engine was turned off. Upon scanning the exterior of the vehicle, this time, the dog alerted, indicating the presence of drugs in the area of the rear "wheel well underneath the vehicle." A subsequent search uncovered no drugs in the rear area of the vehicle or underneath it, however. The dog then was allowed into the vehicle, at which time she alerted to the center console area of the ceiling. A search of that area uncovered a pill bottle containing crack cocaine.

The petitioner, indicted by a Charles County grand jury on charges of possession of cocaine with intent to distribute and possession of cocaine, moved, prior to trial, to suppress the pill

bottle and the cash as the fruits of an illegal search of his truck and of his person. The Circuit Court for Charles County denied the motion, ruling that the informant's videotape and the drugs found in his cohort's car provided sufficient reasonable suspicion to warrant the stop, which it found continued for no more than 15 minutes before the discovery of the drugs in the ceiling console.

The court did find that Longshore had been handcuffed at the scene before Tonya arrived to perform the second scan. Regarding the search of Longshore's vehicle, the court ruled that probable cause existed once the dog alerted to the presence of drugs. It also indicated that the videotape alone gave the police probable cause to search. An appeal to the Court of Special Appeals was noted by the petitioner.

The petitioner argued that, when he was handcuffed, he was effectively arrested, and that the police did not, at that time, have probable cause to effectuate a warrantless arrest. The State argued, in response, that the initial stop was simply a detention and that it was supported by reasonable articulable suspicion. Even if the detention constituted an arrest, it maintained, the police possessed probable cause to justify it. The Court of Special Appeals held that the stop was an arrest, not a detention, but concluded, ultimately, that the stop was supported by probable cause. That Court, in an unreported decision, affirmed the trial court judgment.

Longshore filed, in the Court of Appeals, a petition for writ of certiorari, and the State filed a conditional cross-petition. Both petitions were granted by this Court.

Held: Reversed; case remanded to that Court with instructions to remand to the Circuit Court for Charles County for further proceedings consistent with this opinion. A person is under arrest, for Fourth Amendment purposes, when he is asked to step out of his car and placed in handcuffs, when no special circumstances, such as a risk of flight or danger to the police officers, exists justifying the use of handcuffs.

Longshore v. State, No. 139, September Term, 2004. Filed June 8, 2007. Opinion by Bell, C.J.

CRIMINAL LAW - CRIMINAL PROCEDURE - JUVENILE "REVERSE WAIVER"

Facts: Appellant, Deandre Smith, then seventeen years of age, was indicted for motor vehicle theft, theft over \$500., unauthorized use of a motor vehicle, willful and malicious destruction of property, attempting to flee and elude a police officer in a vehicle, attempting to flee and elude a police officer on foot, willful failure to obey a reasonable and lawful order of a law enforcement officer, obstructing justice by resisting arrest, and carrying a handgun. Although Smith was 17 at the time of the offenses, the handgun violation was an "excluding charge" over which the juvenile court did not have jurisdiction under Section 3-8A-03 of the Courts and Judicial Proceedings Article (1974, 2002 Repl. Vol.). Smith, nevertheless, filed a motion to remove the proceedings to juvenile court under Section 4-202 of the Criminal Procedure Article, Maryland Code (2001, 2004 Cum. Supp.), which was denied by the criminal court.

Subsequently, Smith and the State entered into a plea agreement by which Smith pled guilty to motor vehicle theft and attempted fleeing and eluding an officer in a vehicle, in exchange for having the disposition of his charges handles by the juvenile court pursuant to Section 4-202.2 of the Criminal Procedure Article, Maryland Code (2001, 2004 Cum. Supp.), because the handgun charge would be nolle prossed. The criminal court accepted the plea, found that Smith was amenable to treatment available in the juvenile justice system, and transferred jurisdiction of the case to the juvenile court. The juvenile court conducted the disposition hearing and committed Smith to the Department of Juvenile Services, which placed him in Bowling Brook Preparatory School.

Smith subsequently escaped, was apprehended and appeared again before the juvenile court. The juvenile court found that Smith was not amenable to treatment in the juvenile justice system , and remanded Smith to the criminal court for sentencing. On remand, Smith was sentenced to four years imprisonment on the motor vehicle theft charge, with all but six months suspended, followed by three years supervised probation; with respect to the attempted fleeing and eluding an officer in a vehicle charge, Smith was sentenced to one year imprisonment, suspended, concurrent with the sentence for the motor vehicle theft charge.

Smith noted an appeal to the Court of Special Appeals and subsequently, the Court of Appeals issued, on its own initiative, a writ of certiorari prior to any proceedings in the intermediate appellate court.

Held: Reversed. The Court of Appeals vacated the decision of the criminal court and remanded the case to the juvenile court,

holding that the juvenile court did not have the power to return the case to the criminal court for sentencing after the case had been transferred to it under Section 4-202.2 of the Criminal Procedure Article, Maryland Code (2001, 2004 Cum. Supp.). The Court stated that because juvenile courts were created by statute and had limited jurisdiction, they may only exercise those powers expressly designated by statute. The Court noted that Section 4-202.2 does not include any provision permitting the juvenile court to remand the case to the criminal court. Moreover, the Court remarked that because the legislative history of section 4-202.2 reflected that the section was enacted to transfer a case to the juvenile court to afford the offender rehabilitative treatment opportunities, to permit a juvenile court to reverse the decision of a criminal court that the juvenile is amenable to treatment and return jurisdiction to the criminal court would contradict the nature and purpose of the juvenile justice system.

Deandre Smith v. State of Maryland, No. 135, September Term 2006, filed June 8, 2007. Opinion by Battaglia, J.

CRIMINAL LAW - SECOND-DEGREE MURDER - SPECIFIC INTENT TO INFLICT GRIEVOUS BODILY HARM - LIKELIHOOD REQUIREMENT

Facts: On August 30, 2002, Tamere Hassan Thornton, who at the time was sixteen years old, was at the Towson Town Center Shopping Mall with friends to shop for the upcoming school year when they ran into "Jason," who was also with a group of friends, among them seventeen-year-old Kevin Taylor. Jason and a man named "Beard" started arguing and then fistfighting. Thornton testified that Taylor was angry that Beard was winning the fight. Thornton also testified that Taylor came toward him and threatened him saying "I dare you to jump in it, you look like you [sic] about to jump in it," and "I'm going to pop one of you all." Taylor did not have a weapon. As Taylor approached Thornton, Thornton lunged forward, apparently to punch Taylor in the stomach. Taylor froze, and his white shirt immediately burst bright red. Thornton testified that he stabbed Taylor in the leg because he thought Taylor was going to

hurt him. After a bench trial, Thornton was found not guilty of first-degree murder, but guilty of second-degree murder and carrying a deadly weapon openly with the intent to injure. The trial court merged the weapons conviction with the conviction for second-degree murder. Thornton was sentenced to fourteen years imprisonment for second-degree murder.

During the trial, Dr. Aronica-Pollak, Assistant Medical Examiner for the State of Maryland and an expert in the field of forensic pathology, was called as a witness for the State. She testified that the autopsy showed that there were two stab wounds and one cutting wound, and that the victim died from complications with those wounds. The "stab wound [was three inches deep] to the left inguinal area injured the left external iliac artery and vein (major blood vessels), resulting in extensive bleeding." Another stab wound cut one-and-a-half inches deep and was approximately two and a half inches from the three-inch wound. Dr. Aronica-Pollak agreed that that particular wound was a "nonlife-threatening soft tissue wound" and she testified that the cutting wound to the right forearm was a defensive wound, and injured only skin and soft tissue as well. She stated that the wounds "all contribute because they all produced blood, which is why I called them all together in my cause of death, but this one [the three-inch wound] is the one that injured the major blood vessel and the structures."

The Court of Appeals clarified the definition of second-degree murder of the "intent-to-inflict-grievous-bodily-harm variety." The qualification, "that death would be the likely result," both circumscribes and clarifies the intent element of second-degree murder of the type under consideration. Second-degree murder of the intent to inflict grievous bodily harm is neither a strict liability crime nor a crime predicated upon a theory of negligence. Accordingly, the State must prove intent to injure the victim so severely that death would be the likely result even though the defendant did not intend that the victim should die. Malice remains an element of the prosecution's case. It can be satisfied by proving the intent to inflict such grievous bodily harm that death would be the likely result. Conversely, in the prosecution for an assault, in either the first or second degree, the State is not required to prove, in either case, that death would be a likely result of the defendant's conduct or that the defendant's conduct was malicious. These are crucial distinctions that were omitted from the intermediate appellate court's analysis when it stated that "to prove second-degree murder, the evidence need *only* show that the death of the victim resulted from the intentional infliction of serious bodily harm."

"[G]enerally, there are two components to every crime, the *actus reus* or guilty act and the *mens rea* or the guilty mind or

mental state accompanying a forbidden act." *Garnett v. State*, 332 Md. 571, 577-78, 632 A.2d 797, 800 (1993). The requisite *mens rea* is measured by an objective standard, i.e., could or should a reasonable person, under the circumstances, have foreseen that death would likely ensue as a result of his or her conduct. Thus, the likelihood requirement is no more than an objective, not a subjective, standard used to circumscribe and clarify the elements of intent and malice. It is the absence or presence of malice, which distinguishes murder from manslaughter. *Selby*, 361 Md. at 331-32, 761 A.2d at 342.

Held: Reversed. No presumption arises from the use of deadly force in a case of homicide. The trial judge, as the trier of fact, was permitted, but not required, to infer from Thornton's wilful act of thrusting the knife outward and into the victim that Thornton intended to commit such grievous bodily harm from which death would likely ensue; however, the trier of fact was not permitted to presume, from Thornton's conduct, that he intended to inflict grievous bodily harm as a matter of law or to presume anything from his use of the knife.

In order to determine whether the trial judge and the intermediate appellate court correctly interpreted and applied the intent element of second-degree murder to the facts of the instant case, we will review the *mens rea* requirement for that offense, focusing on the definitions of murder, malice, and grievous bodily harm, including the meaning of the phrase "that death would be the likely result." We emphasize that where murder is predicated upon a theory of intent to commit grievous bodily harm, the intended harm must be grievous bodily harm and must be the legal equivalent of malice. Furthermore, in the context of a murder prosecution, intent to inflict grievous bodily harm means such harm that a reasonable person could or should know, under the circumstances, would likely result in death to the victim.

We shall hold that the Court of Special Appeals erred in affirming the trial court's interpretation and application of the intent element for the crime of second-degree murder. The trial judge's mistaken conclusions of law, which modified the specific intent requirement and unconstitutionally shifted the burden of proof to Thornton, warrants our reversal of Thornton's conviction for murder in the second degree and a remand of the case for a new trial. See *Lipinski v. State*, 333 Md. 582, 592, 636 A.2d 994, 999 (1994) (holding that where the trial judge improperly defined the elements of deliberation and premeditation a remand for a new trial was proper).

Tamere Hassan Thornton v. Maryland, No. 62, September Term 2005, filed March 20, 2007, Opinion by Greene, J.

EVIDENCE – ADMISSIBILITY OF SCIENTIFIC AND MEDICAL EVIDENCE – EXPERT
MEDICAL TESTIMONY

JUDICIAL REVIEW – LIMITED REMAND

Facts: Respondents filed claims before the Workers' Compensation Commission claiming sick building syndrome due to mold exposure at their workplace. The Commission disallowed two of respondents' claims and granted partial compensation to the remaining respondents. Respondents filed motions for judicial review in the Circuit Court for Howard County. Before trial, petitioner filed a motion *in limine*, seeking a *Frye-Reed* hearing to address the admissibility of testimony from respondents' expert medical witness. The Circuit Court denied that motion and allowed the expert witness. The jury returned verdicts in favor of respondents. Petitioner appealed and the Court of Special Appeals affirmed. Petitioner then filed a petition for writ of certiorari to the Court of Appeals, which was granted.

Held: Reversed. The Court of Appeals held that the Circuit Court should have conducted a *Frye-Reed* hearing to determine whether the medical community generally accepts the theory that mold exposure causes the illnesses that respondents claimed to have suffered, and the propriety of the tests the medical expert utilized to make his diagnosis. The Court noted that its opinion in *Reed v. State*, 283 Md. 374, 391 A.2d 364, requires a court to exclude testimony based on scientific opinion that is not generally accepted in the scientific community, and that because the medical expert's testimony was based on scientific opinion regarding the causal link between mold exposure and sick building syndrome, it was a proper subject for *Frye-Reed* analysis.

After noting petitioner's arguments before the Circuit Court, which included claims that the witness' diagnoses are not recognized by the Center for Disease Control, the Institute of Medicine, or the National Institute of Occupational Safety and Health, the Court of Appeals concluded that the expert's medical diagnoses are not so widely accepted in the scientific community to be the subject of judicial notice of reliability.

The Court of Appeals remanded the case for the limited purpose of holding a *Frye-Reed* hearing to determine whether the medical expert's theory of causation and testing methods were properly admitted at trial. The Court noted that a limited remand for the purpose of holding a *Frye-Reed* hearing was appropriate because the issue to be resolved was collateral to the main issues to be resolved at trial.

Montgomery Mutual Insurance Company v. Josephine Chesson, No. 110, September Term, 2006, filed May 23, 2007. Opinion by Raker, J.

INSURANCE - DUTY TO DEFEND

Facts: Dr. Moscarillo brought suit against Professional Risk Management Services, Inc., Property and Casualty Insurance Guaranty Corporation, and Legion Insurance Company (collectively, "Legion") alleging breach of contract. Moscarillo argued that Legion had a duty to defend Moscarillo in a suit brought by William M. Mercer and Marsh & McLennan (collectively, "Mercer"). In that suit Mercer alleged that Dr. Moscarillo and his patient, Evelyn Toni Mulder (Mulder), engaged in fraud and conspiracy to defraud in connection with Mulder's application for and receipt of disability benefits. The exceptions section of the policy stated that the "policy does not apply to: . . . "[a]ny Claim arising out of or in connection with any dishonest, fraudulent, criminal, maliciously or deliberately wrongful acts or omissions, or violations of law committed by an Insured."

Dr. Moscarillo sought both a declaratory judgment and damages to reimburse the losses he incurred in defending against the lawsuit brought by Mercer. The Circuit Court denied Dr. Moscarillo's motion for partial summary judgment and granted Respondents' cross-motions for summary judgment, finding no duty to defend existed under Legion's policy because the allegations against Dr. Moscarillo were related to intentional misconduct and not negligent conduct. On appeal, the Court of Special Appeals held that the Policy did not provide coverage for fraud. Additionally, that court held that the complaint and extrinsic evidence only supported a cause of action for fraud. This court considered the issue of whether Legion had a duty to defend Dr. Moscarillo in the lawsuit brought against him by Mercer.

Held: Affirmed. There was no duty to defend Moscarillo because there was no potentiality of coverage under the Policy.

This court applied the two-part inquiry established in *St. Paul Fire & Marine Ins. Co. v. Pryseski*, 292 Md. 187, 438 A.2d 282 (1981), which asks 1) what is the scope of the coverage under the policy and 2) could any claim in the litigation in question potentially fall within the scope of the policy's coverage. As the Court of Special Appeals held, it is "clear that the policy covered negligent acts or omissions and not intentional torts." This court read the policy as a whole, in light of the principles of construction and according to the ordinary meaning of the words used, to say that the parties did not intend to cover any claim brought against Moscarillo based on an alleged fraudulent act or omission. Therefore, in answer to the first prong of *Pryseski*, the policy did not obligate the insurer to defend the insured when the pleadings alleged only fraudulent conduct.

Furthermore, as to the second prong of the *Pryseski* inquiry, there is no intimation in the Mercer litigation that the injury resulted from the negligent acts of Dr. Moscarillo. Mercer intended to lay the foundation for fraud and not to prove a case of negligence. There was no reasonable potential that the issue of negligence would have been generated at trial. Moscarillo contends that the pleadings in the case are extrinsic evidence that there was a potentiality that negligence would have been a central issue at trial. Evaluating each pleading in its totality, the court concluded that, although standard of care language is used, each filing advanced a cause of action for fraud. In *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 852 A.2d 98 (2004), this court warned that "pulling stray phrases out of . . . letters and discovery" does not act to transform allegations into coverage triggering claims. The substance of the issue to be tried was one of fraud.

Additionally, Moscarillo asserted that the fraud exclusion contained in the professional liability insurance policy issued by Legion was inapplicable and therefore did not discharge the insurer's duty to defend. Moscarillo argued using the term "committed" in the policy, limited the exclusion to scenarios in which the act of fraud had been proven. Interpreting the Policy and its "fraud exclusion" in conformity with well settled principles of contract interpretation, the court held that the exclusion reasonably may be read as intending to exclude coverage for claims of fraud, whether they are proven or unproven. The "Exclusions" subheading indicated that the Policy did not apply to any of the situations outlined in the paragraphs that follow. And the conduct at issue in the Mercer litigation was exactly the sort of conduct the policy sought to exclude from coverage; claims of intentional conduct, whether finally adjudicated or not.

Frank M. Moscarillo v. Professional Risk Management Services, Inc., et al., No. 61, September Term, 2006. Opinion by Greene, J.

PUBLIC SERVICE COMMISSION - REHEARINGS - JUDICIAL REVIEW - PARTY IN INTEREST

Facts: The petitioners filed an application with the Public Service Commission ("the Commission") seeking authorization to build a wind turbine facility for the purpose of generating electricity. As required, the petitioners notified the public of its application, specifying a date, time, and location of a scheduled pre-hearing conference. The total project would be constructed on Backbone Mountain.

An adjudicatory hearing regarding the petitioners' proposal was held. The petitioners, the Department of Natural Resources's Power Plant Research Program, the staff of the Public Service Commission, and the Office of People's Counsel were the named parties to the proceeding. Pursuant to PUC § 3-106, four individual members of the public intervened and were granted party status. Among those in attendance were respondents Tribbey and Bounds, members of a group known as Friends of Backbone Mountain, who also testified. Although both Tribbey and Bounds submitted citizen comment letters following the conclusion of the hearing, neither they, nor Friends, sought to intervene.

The hearing examiner issued a proposed order that contained and recommended settlement conditions to which all of the parties had agreed, which the Commission subsequently adopted. It issued a final order approving the petitioners' plan. Tribbey, then, writing on behalf of Friends, submitted a letter to the Commission requesting a rehearing. Sprenger filed an Application to Intervene and a Motion for Reconsideration and for Modification of the Order of the Public Service Commission. The Commission denied the requests, explaining that Friends was not a "party in interest" under PUC § 3-114 because it had not properly intervened under PUC § 3-106. It also determined that Friends' filing was beyond the thirty-day period during which parties may request rehearing, and that Sprenger's filings were still further beyond the thirty-day period during which parties may request rehearing.

Tribbey, on his own behalf, and not on behalf of Friends, filed a petition for judicial review of the order; on the same day, a separate petition for judicial review of the commission's order was filed by the respondents Sprenger, Bounds, and Gnegy. The actions having been consolidated, the petitioners each filed a motion to dismiss the petitions as untimely. Before the Circuit Court, the respondents did not contend that they were "parties" to the proceeding, just that they were "persons in interest." Tribbey argued, in addition, that although Friends was not a "party in interest," its application for rehearing tolled the time for filing

a petition for judicial review.

The Circuit Court dismissed both actions, ruling that none of the respondents had filed a timely request for rehearing and that their petitions for judicial review were similarly untimely. It noted that Sprenger filed an untimely request, but even if it had been timely, however, the statute restricted petitions for rehearing before the Commission to parties in interest. It concluded that although Friends' request for rehearing may have been timely filed, its request was invalid because Friends was not a "party in interest" and, thus, was not entitled to a rehearing under PUC § 3-114.

The respondents noted an appeal to the Court of Special Appeals, which, in an unreported opinion, reversed the judgment of the Circuit Court. The Court of Appeals granted the petitions for writ of certiorari filed by both Clipper and the Commission,

Held: Reversed with case remanded to that Court with instructions to affirm the judgment of the Circuit Court for Baltimore City. In order to seek rehearing under PUC § 3-114, the requesting entity must be a "party in interest," and only parties in interest may seek a rehearing. To become a "party" to the proceeding, pursuant to PUC § 3-106, the requesting entity must have properly intervened. The right to judicial review of orders and decisions of the Commission, however, is available to a broader spectrum of entities, providing that the review is timely requested, i.e., one may, pursuant to PUC § 3-202(a), seek judicial review if they are "a party or person in interest . . . dissatisfied by a final decision or order of the Commission . . ." and do so in a timely fashion.

Clipper Windpower, Inc., et al. v. Paul C. Sprenger, et al., No. 136, September Term, 2005. Filed June 8, 2007. Opinion by Bell, C.J.

TORTS - MEDICAL MALPRACTICE - SUMMARY JUDGMENT - DISCOVERY VIOLATIONS

Facts: Respondents, James N. Clarke and his wife, Joan Dietrich-Clarke, filed a complaint, through counsel, against Petitioners, Alejandro Rodriguez, M.D., Sharin F. Engineer, M.D., Central Maryland Urology Associates, P.A., and Howard County General Hospital, Inc., for medical malpractice.

The Clarkes' claim was removed from arbitration and filed in the Circuit Court for Howard County on May 14, 2002. Due to various circumstances, the trial date for the case was ultimately postponed three times. During the course of discovery, Petitioners propounded interrogatories in which the Clarkes were asked for a list of the medical experts they expected to call at trial and for a summary of their experts' opinions. The Clarkes responded to each such interrogatory by stating that "[e]xpert witnesses will be identified in accordance with a Scheduling Order." When the Clarkes filed their Preliminary Designation of Expert Witnesses, they listed nine different experts, six of whom were located out of state, and, after each expert designation, noted that the expert "will be provided for deposition at a mutually convenient date, time and location." The Clarkes subsequently filed, through counsel, a Pretrial Statement adding a tenth expert, located in Maryland.

On July 29, 2004, counsel for the Clarkes moved for leave to withdraw his appearance, and the judge granted the motion. The Clarkes subsequently requested an extension of their deadlines to designate expert witnesses to December 31, 2004, to enable them to obtain new counsel, and the Circuit Court granted the request. Thereafter, Petitioners, filed motions to dismiss, alleging that the Certificate of Merit filed by the Clarkes did not comport with the requirements of Section 3-2A-04 (b) of the Maryland Courts and Judicial Proceedings Article because it contained only a blanket statement that failed to specify which individual health care provider breached the standard of care. The Clarkes subsequently filed, pro se, an Amended Preliminary Designation of Expert Witnesses, changing one of their expert designations.

On December 21, 2004, December 27, 2004, January 12, 2005, January 25, 2005, and February 2, 2005, each of the Petitioners sent letters to the Clarkes requesting dates that the Clarkes' expert witnesses would be available to be deposed. When the Clarkes failed to respond to any of the requests, Petitioners filed Motions to Compel Discovery, requesting that the Clarkes be compelled to provide deposition dates in light of the fast-approaching May 30, 2005 discovery deadline. Two months after the discovery deadline had passed, and one month before trial, Petitioners filed a Supplemental Motion to Compel Discovery, alleging that they had been

severely prejudiced in their ability to prepare a defense by not having the opportunity to depose the Clarkes' experts, and requesting that the case be dismissed pursuant to Maryland Rule 2-433.

One month before trial, the Circuit Court for Howard County held a motions hearing, at which the judge postponed ruling on the merits of the motions to dismiss and motions to compel discovery for five days, in order to give the Clarkes an opportunity to file an amended Certificate of Merit comporting with the requirements set forth by Section 3-2A-04 (b) of the Maryland Courts and Judicial Proceedings Article. Before the Clarkes filed their Amended Certificate of Merit, the Petitioners filed a Motion for Summary Judgment alleging that "[the Clarkes] have failed to respond to numerous requests for deposition dates for their identified experts," and, "[s]ince the . . . discovery deadline has passed and [the Clarkes] have no experts in this matter," "[the Clarkes] are unable to sustain their burden in this case."

The Circuit Court subsequently held another motions hearing two weeks later, only two weeks before trial, and concluded that, despite the Petitioners' good faith efforts to schedule the depositions of the Clarkes' expert witnesses, the Clarkes had totally failed to respond to those requests, and that it would be prejudicial two weeks before trial for the Petitioners to find out who the experts are going to be, and then have to try to take depositions. The circuit court, therefore, granted the Petitioners' motions for summary judgment finding that the Petitioners were entitled to judgment as a matter of law, given the fact that the case required expert testimony, and all expert testimony had been precluded.

The Clarkes timely filed an appeal, pro se, to the Court of Special Appeals, which reversed the summary judgment and determined, in an unreported opinion, that the Clarkes' failure to provide their experts for depositions did not constitute a breach of any Maryland Rule and that, absent any violation of the Maryland Rules, the Clarkes' expert witnesses should not have been stricken, and summary judgment should not have been entered for the Petitioners.

Held: Reversed. In light of the Respondents' continued discovery violations and complete lack of good faith, both in providing access to discoverable information, and also in attempting to resolve discovery disputes, the sanction of precluding all expert witnesses was proportionate to the discovery abuse. The Court further concluded that, because expert witnesses generally are required in order to establish both negligence and causation in medical malpractice actions, when all of their expert witness testimony was stricken, Respondents could not meet their burden of

proof, so that summary judgment was appropriate.

Alejandro Rodriguez, et al. v. James Clarke, et al., No. 102, September Term, 2006, filed May 31, 2007. Opinion by Battaglia, J.

COURT OF SPECIAL APPEALS

CRIMINAL LAW - EVIDENCE - OTHER CRIMES EVIDENCE: Proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident; Md. Rule 5-404(b); *Klaunberg v. State*, 355 Md. 528, 547-49 (1999); although membership in a gang has been held in some jurisdictions, under certain circumstances, to constitute a bad act, circuit court properly admitted evidence to show motive on the part of appellant.

PROMPTLY PRESENTMENT TO COURT COMMISSIONER: Maryland Rule 4-212(e); *Hiligh v. State*, 375 Md. 456, 472 (2003); *Williams v. State*, 375 Md. 404, 415-16 (2003); Circuit Court properly found that there was no collaboration between jurisdictions in which law enforcement authorities in one jurisdiction in an attempt to insulate the authorities in a sister jurisdiction by keeping appellant beyond the reach of the laws of the sister jurisdiction in violation the holding in *Facon v. State*, 375 Md. 435, 449-50 (2003).

FAILURE TO GIVE REQUESTED JURY INSTRUCTION: Maryland Rule 4-325(c); where instructions propounded were virtually identical to Pattern Jury Instructions 4:17.2 (Homicide) and 6:01 (Aiding and Abetting) and covered the substance of the instruction requested, the trial court properly refused to give appellant's instruction that, "[i]f one participant is determined to have a more culpable state of mind or intent, it is possible to find that another participant has a less culpable state of mind or intent. ... The state of mind of each participant must be considered separately."

INFLAMMATORY OR PREJUDICIAL NATURE OF AUTOPSY PHOTOGRAPHS: prejudicial effect of photographs did not substantially outweigh their probative value; *State v. Broberg*, 342 Md. 544, 553 (1996); rejecting appellant's argument that photographs shown to the jury in an enlarged form over a video monitor were cumulative of each other and the testimony of the medical examiner, were highly prejudicial and had no significant probative value or relevance, the trial court did not abuse its discretion in admitting the photographs based on their probative value, e.g., refuting appellant's contention that he acted in self-defense or defense of others or that he struck the victim only once, reluctantly, because he was pressured to do so by the accomplices.

Facts: Appellant was convicted of first-degree murder and sentenced to life imprisonment for his part in helping two companions beat the victim to death with bats and a golf club at a cemetery after a night of drinking.

The State produced evidence that the perpetrators were members of a violent Latino gang called "MS-13." At trial, appellant argued self-defense, defense of others and that he would have had faced retaliation by his companions for not participating.

Appellant was apprehended in New York and questioned there before returning to Maryland where he gave a second statement.

Held: Affirmed. Rejecting appellant's contention that evidence of association and gang related activity constituted prior bad acts, the trial judge properly admitted evidence of two pretrial statements made by appellant wherein he admitted membership in MS-13 and testimony from a gang expert who indicated that "the work" of MS-13 is to "get at" other gang members, particularly 18th Street gang members, on the basis that the testimony provided motive for an otherwise senseless beating.

Rejecting appellant's argument that he was vulnerable as he had lived in the United States only a few years and had only a fourth grade education, the trial court considered that appellant was advised of his *Miranda* rights and had signed a translation of his statement before an interpreter and questioning detective and, accordingly, properly concluded that appellant's statements made to police were voluntary under the circumstances. Because questioning took place in foreign jurisdiction before appellant went before a magistrate, the motions court properly found the delay not to be attributable to an attempt to circumvent Md. Rule 4-212(e).

Because the trial court specifically defined the intent required to convict appellant of the various crimes with which he was charged and instructions were virtually identical to the Patterned Jury Instructions, the trial judge properly ruled then it was unnecessary to give a jury instruction regarding *mens rea* of each of multiple participants in a crime.

Ayala v. State, No. 943, September Term, 2005, decided May 23, 2007. Opinion by Davis, J.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated June 13, 2007, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

PHILIP JAMES GEORGE

*

By an Order of the Court of Appeals of Maryland dated June 19, 2007, the following attorney has been placed on inactive status by consent, effective immediately, from the further practice of law in this State:

ANDREW JACKSON GRAHAM

*

By an Order of the Court of Appeals of Maryland dated June 19, 2007, the following attorney has been disbarred by consent from the further practice of law in this State:

FRITZ H. SCHNEIDER

*

By an Opinion and Order of the Court of Appeals of Maryland dated June 7, 2007, the following attorney has been indefinitely suspended, effective July 7, 2007, from the further practice of law in this State:

ROBIN KEITH ANNESLEY FICKER

*