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COURT OF APPEALS

Attorney Grievance Commission v. Ozoemena Maryrose Nwadike, Misc. Docket AG No. 11, September Term, 2009, filed 25 August 2010, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/11a09aq.pdf>

ATTORNEY GRIEVANCE - DISCIPLINARY ACTION - MRPC 1.15(a) AND 8.4(a), (c), & (d) PRINCIPALLY - INTENTIONAL MISAPPROPRIATION OF TRUST ACCOUNT FUNDS - DISBARMENT IS WARRANTED WHERE AN ATTORNEY: (a) MAINTAINS FUNDS IN HIS OR HER ESCROW ACCOUNT FOR A FOREIGN ELECTION CAMPAIGN AND FOR PERSONAL EXPENSES; (b) REPEATEDLY ADVANCES CLIENT MONIES FROM THE ACCOUNT BEFORE MAKING DEPOSITS NECESSARY TO FUND THESE DISBURSEMENTS; (c) PROVIDES INACCURATE AND MOSTLY INCOMPLETE ACCOUNTING OF THE ACCOUNT'S ACTIVITY; AND, (d) OFFERS VAGUE AND EVASIVE ANSWERS TO INQUIRIES.

Facts: The Attorney Grievance Commission filed a Petition for Disciplinary or Remedial Action against Ozoemena Maryrose Nwadike ("Respondent"), charging her with professional misconduct arising out of her attempt to avoid a foreclosure sale on the property of her client, Ivo Njosa, and her pattern of repeated misuse of the funds in her attorney trust account. Bar Counsel charged Respondent with violating Maryland Rules of Professional Conduct ("MRPC") 1.15(a) (Safekeeping Property) and 8.4(a), (c), and (d) (Misconduct); Maryland Rules 16-604 (Required Deposits), 16-607 (Commingling of Funds), and 16-609 (Prohibited Transactions); and Maryland Code (1989, 2004 Repl. Vol.), Business Occupations and Professions Article, § 10-306 ("Business Occupations and Professions Article § 10-306").

Respondent represented Njosa in a divorce case in 2003. During that time, Njosa's sister informed her coworker at Long & Foster Realtors, Mr. Bolly Ba, that Njosa's home was in foreclosure and Ba expressed interest in buying the property. Before the July 23 foreclosure sale, Ba and Njosa met with Respondent, who agreed to find a lender to facilitate the removal of the Njosa property from foreclosure. The Njosas were apparently \$14,500 in default on the secured loan. Ba agreed to purchase the property and repay the loan Respondent was to procure, although this agreement was never reduced to writing.

Respondent cured the default on the Njosa property on July 22 with \$14,500 she allegedly "borrowed" from funds she kept in her attorney escrow account belonging to Eke Onuma. She stated

that Onuma was her client; there was no evidence that he consented to the "loan." On August 14, Ba returned to Respondent's office to present her with a cashier's check for \$14,500 in repayment of the loan. Ba and Respondent then executed a contract entitled "Offer to Sell [Njosa's] Real Estate," which did not accurately reflect the agreement of the parties in that it stated that Ba's \$14,500 was a "deposit" on the purchase price of the property and, thus, unrelated to the "loan" made to prevent its foreclosure. Respondent executed the contract on behalf of Njosa as a "holder of owner's/seller's Power of Attorney," even though she had no such authorization from Njosa. On August 15, Respondent was mailed a refund check in the amount of \$468.06 for overpayment of the amount in default necessary to remove Njosa's property from foreclosure; the check never cleared the issuer's account and was never deposited to Respondent's trust account. Respondent did not give the refund check to Ba.

Ba was ultimately unable to settle on the contract (appraisal problem) to purchase Njosa's property, and sought from Respondent a return of his \$14,500 "deposit." Respondent refused, replying that Ba had agreed that the money would go to Njosa's lender to remove Njosa's property from foreclosure. In response, Ba filed a civil claim in the Circuit Court for Montgomery County for misappropriation of funds, and secured a judgment of \$14,500 against Respondent. The judgment was affirmed by the Court of Special Appeals in 2008. It remains unsatisfied.

Following entry of the judgment, Bar Counsel learned of the Ba-Njosa situation and commenced a general investigation into Respondent's management of her trust account, serving Respondent with a subpoena requesting relevant financial data and records. Respondent produced incomplete records and virtually no accounting in response to Bar Counsel's request. Bar Counsel then was forced to begin its own analysis of Respondent's management of her account, which revealed a widespread, long-term pattern of mismanagement and misappropriation of funds beyond the Ba-Njosa matter. Bar Counsel discovered that Respondent used her escrow account as a repository for funds for the gubernatorial campaign of her brother, Christopher Ngige, in Nigeria. Eke Onuma, from whom Respondent had "borrowed" the money in the Njosa mortgage default avoidance scheme, was in fact a Nigerian businessman who had agreed to fund the Ngige campaign in an amount of Nigerian currency commensurate with the amount of money that Respondent raised in the United States and deposited for the campaign in her escrow account. Respondent's explanations of funds designated for the campaign and funds received from it were

devoid of nearly any documentary support. When asked about Ngige during the investigation and at the evidentiary hearing in this case, Respondent replied evasively with what the hearing judge labeled "subterfuge."

Bar Counsel's investigation also revealed numerous other aspects of Respondent's financial malfeasance and nonfeasance. From 2002 to 2006, Respondent made a total of \$134,312.85 in disbursements for her clients from her escrow account prior to making deposits necessary to fund those disbursements. Settlement sheets for several clients showed that net disbursements from the account exceeded the total payment received on behalf of those clients. Other settlement sheets Respondent provided did not depict accurately the disbursements made from the account. Bar Counsel discovered also that Respondent repeatedly used funds in her trust account to pay for sizeable personal expenses.

Based on his findings of fact, the hearing judge concluded that Respondent violated MRPC 1.15(a) and 8.4(a), (c), and (d); Md. Rules 16-604, 16-607, and 16-609; and Business Occupations and Professions Article § 10-306. Bar Counsel took no exception to the hearing judge's findings and conclusions and recommended the Court disbar Respondent. Respondent filed written exceptions to several of the hearing judge's findings of fact and all of his conclusions of law. She recommended that the Court find no violation of any Maryland regulations or, alternatively, that Respondent had violated negligently only MRPC 1.15(a) and Md. Rule 16-607, and that her sanction should be no greater than a reprimand or 30-day suspension.

Held: Exceptions overruled; Respondent disbarred. The Court agreed with the hearing judge in all his findings of fact and conclusions of law. It found that Respondent violated intentionally MRPC 8.4(c) when she misrepresented to Ba her authority to execute the property sale contract on behalf of Njosa and when she attempted to conceal from the hearing judge and Bar Counsel the identity of Ngige. Respondent violated MRPC 8.4(d) when she signed a contract that did not accurately represent the agreement of the parties and when she failed to safeguard Ba's money as a deposit. The Court concluded further that Respondent's failure to return to Ba the refund for overpayment of the amount in default on the Njosa property constituted a violation of Md. Rule 16-604, and that Respondent, having violated otherwise MRPC 8.4, also violated MRPC 8.4(a). The Court found violations of MRPC 1.15(a) and Md. Rule 16-607 when Respondent commingled clients' and third parties' funds with each other and with her own personal monies in her trust account,

supported by virtually no accounting, for over four years, and violations of Md. Rule 16-609 and Business Occupations and Professions Article § 10-306 when Respondent used this commingled trust money for purposes other than those for which her clients intended their money to be used.

The Court explained the distinction between intentional and negligent violations of the regulations in question, holding Respondent's violations of MRPC 8.4(c), Md. Rule 16-609, and Business Occupations and Professions Article § 10-306 intentional because she acted with a "conscious objective or purpose to accomplish a particular result." The Court emphasized that intentional violations of these regulations, like Respondent's in this case, are more serious than negligent violations of the same regulations. It also noted that Respondent's misconduct in violation of MRPC 8.4(d) was contrary to the administration of justice because her behavior represented a breach of an attorney's fiduciary duty to his or her clients. An attorney's failure to safeguard the money entrusted to him or her by a client tarnishes, rather than upholds, the high standard of trust and confidence expected in an attorney's work.

The Court overruled Respondent's exception to the hearing judge's determination that Onuma had not given her permission to "borrow" the funds she kept for him in escrow. The only testimony as to her authority was Respondent's, when she asserted that Onuma had consented to the "loan." The Court found, however, that given Respondent's pattern of dishonesty and failure to maintain required records regarding her trust account, the hearing judge was allowed to draw an adverse inference against Respondent for her failure to summon witnesses (notably Onuma) or produce corroboration to substantiate her claim.

The Court noted seven factors that aggravated the offensiveness of Respondent's actions, including (1) her dishonest motive; (2) her intentional misrepresentation of facts; (3) her pattern of misconduct; (4) her failure to attempt to rectify the consequences of her misconduct; (5) her dishonesty and uncooperativeness with Bar Counsel; (6) the fact that such grievous misconduct occurred although she had practiced law for 11 to 15 years, depending on the timing of the misconduct underlying the various violations, and should have known better; and, (7) her failure to show remorse for her misconduct. In her defense, the Court found no substantial mitigating factors, other than her lack of a prior disciplinary record. To best protect the public from being further victimized by Respondent's dangerous misconduct, and because dishonest, unmitigated misappropriation of client or third party funds results as a

general rule in disbarment, the Court concluded that disbarment was the appropriate sanction in this case.

Alan Tyler, et al. v. City of College Park, et al., No. 126, September Term 2009, Filed 25 August 2010, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/126a09.pdf>

CONSTITUTIONAL LAW - HOUSING - RENT CONTROL - CONSTITUTIONALITY - ARTICLE 24, MARYLAND DECLARATION OF RIGHTS - DUE PROCESS AND EQUAL PROTECTION - A MUNICIPAL RENT CONTROL ORDINANCE DOES NOT VIOLATE LANDLORDS' AND RENTER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WHERE THE ORDINANCE'S PROVISIONS, INCLUDING CAPPING RENT ON UNITS IN TRADITIONAL SINGLE-FAMILY NEIGHBORHOODS, WHILE EXEMPTING UNITS IN LARGER APARTMENT BUILDINGS, AND PROVIDING AN AVENUE FOR LANDLORDS TO RECEIVE INDIVIDUAL ADJUSTMENTS TO THE RENTAL CEILING IN PARTICULAR CASES, ARE RELATED RATIONALLY TO ITS STATED OBJECTIVES OF ENCOURAGING THE AVAILABILITY OF HOUSING FOR HOUSEHOLDS OF ALL INCOME LEVELS, PRESERVING AND IMPROVING EXISTING HOUSING STOCK, STRENGTHENING NEIGHBORHOODS BY REDUCING THE NUMBER OF SINGLE-FAMILY HOMES THAT ARE RENTAL PROPERTIES, AND SPURRING PRIVATE REINVESTMENT BY HOMEOWNERS CONSISTENT WITH NEIGHBORHOODS' SINGLE-FAMILY CHARACTER.

Facts: In 2005, the Mayor and Council of the City of College Park ("the City") considered enactment of a novel (and apparently unprecedented) rent control program for the explicit purposes of discouraging in the City the rental property market in so-called "single-family" neighborhoods and nudging renters to nearby apartment buildings or future apartment complexes, rather than for the primary purpose of protecting tenants from exorbitant rental rates, the traditional rationale underlying rent control legislation. The rent control program was designed to implement a portion of the City's 2003 Housing Plan, which recommended enactment of rent control in the City's single-family neighborhoods to impair the profitability of rental conversion and address public concerns over rising rental costs, neighborhood deterioration, and inflated purchase prices for homes in those areas. Prior to enactment of the rent control program, the City commissioned a policy analyst to produce a report evaluating the question of whether the City's stated policy objectives could be addressed reasonably through a rent stabilization program. The report confirmed the City's beliefs regarding the pattern of declining home ownership, increasing rental conversions, diminished housing affordability, and code violations in the City, and concluded that rent control was likely to stabilize rents for affected properties, enhance home ownership, and decrease code violations by reducing future rental conversions of single-family homes. The City adopted the proposed rent control ordinance ("the Ordinance") in May 2005.

As adopted, the Ordinance created a Rent Stabilization Board tasked with administering the rent control program and provided that a rent ceiling would apply to all single-family, duplex, triplex, and quadraplex rental properties, but that larger multi-unit apartment buildings would be exempt. As evidenced by the Preamble of the Ordinance, the City believed that such a plan would decrease the number of single-family properties that are rental units while encouraging the constructions of new apartment buildings, which, in turn, would improve the balance between rental supply and demand in the City. Specifically, the Ordinance outlined four intended goals of the City's rent control program, namely, (1) to encourage the University of Maryland and the private sector to provide suitable housing to meet the needs of students on or near campus; (2) to encourage the availability of housing for households of all income levels, and to preserve, maintain, and improve existing housing; (3) to strengthen City neighborhoods by reducing the number of single-family homes that are rental properties; and (4) to encourage private reinvestment by homeowners consistent with a neighborhood's character. In addition, the Ordinance provided a procedure where affected landlords may petition the Rent Stabilization Board for a different individual rent ceiling, based on factors such as increases in property taxes, increases in maintenance or operating expenses, the cost of capital improvements made to the property, and the landlord's rate of return.

Appellants, four owners of affected rental properties in the City and one student renter, brought an action against the City in the Circuit Court for Prince George's County, contending that (1) the Ordinance violated facially their rights to equal protection and due process under Article 24 of the Maryland Declaration of Rights because the provisions of the Ordinance were not related rationally to a valid government purpose; (2) the Ordinance violated facially the anti-discrimination provisions of the State of Maryland and Prince George's County Fair Housing Acts by discriminating based upon age, marital status, familial status, and/or occupation; (3) the Ordinance constituted impermissible de facto zoning by the City; and (4) the Ordinance's rent ceiling was unconstitutionally confiscatory on its face.

The City moved for summary judgment on Appellants' claims. At the hearing on the motion, Appellants highlighted, largely from materials adduced as the result of discovery, factual averments, including expert deposition testimony, which, in their view, supported the conclusion that the City was not entitled to judgment as a matter of law. Specifically, Appellants suggested, among other things, that the text and legislative history of the

Ordinance exhibited an overt animus toward renters; that the Ordinance would not achieve the traditional goal of rent control, namely, lowering rents for tenants, because the Ordinance regulates only the least expensive housing in the City, traditional single-family housing, while failing to regulate the most expensive rental housing, units in apartment buildings; that problems with code violations should be resolved by code enforcement measures, rather than economic legislation designed to segregate renters from certain neighborhoods; and that the provisions of the Ordinance were designed arbitrarily and were unsupported by research and data. In response, the City tendered other evidentiary proffers and argument to the effect that rental rates on single-family homes in the City are disproportionate to the quality of those properties; that rented single-family homes are not maintained as well as owner-occupied homes; that high rental demand has inflated artificially the cost of purchasing a single-family home in the City; that apartment buildings did not implicate the concerns the Ordinance was designed to address; and that the Ordinance's provisions for calculating the rent ceiling were not arbitrary, but rather based on research.

Following the hearing, the Circuit Court concluded that, finding no triable issue of material fact, the Ordinance was constitutional and otherwise legally valid. Accordingly, it granted the City's motion for summary judgment on Appellants' claims. Appellants noted timely an appeal to the Court of Special Appeals. Prior to proceedings in that court, the Court of Appeals granted certiorari, on its initiative, to consider whether the Circuit Court erred in ruling (1) that the Ordinance satisfied the requirements of due process and equal protection under Article 24; (2) that the Ordinance did not violate the State and County Fair Housing Acts; and (3) that the Ordinance did not constitute impermissible zoning by the City.

Held: Affirmed. The Court held that the Ordinance did not violate Article 24 because the City's stated goals in enacting the Ordinance were legitimate and the means selected to achieve those goals were rational, putting aside the likelihood of achieving the announced legislative goals. In addition, the Court determined that the Ordinance did not discriminate against student renters in violation of the State and County Fair Housing Acts, nor did it constitute an impermissible act of de facto zoning by the City. Finally, the Court found that the Ordinance did not effect a facially confiscatory taking, as it permits landlords the ability to petition the Board for individual adjustments to the rent ceiling in order to maintain a fair rate of return.

At the outset, the Court noted that, where, as here, the legislative action at issue neither interferes with a fundamental right nor implicates a suspect classification, the test for determining whether a statute violates due process or equal protection under Article 24 is whether the means chosen by the legislative body are related rationally to the achievement of legitimate governmental ends. Finding each of the stated purposes of the Ordinance to be legitimate, albeit different from the traditional object of rent control legislation, namely, the protection of tenants from exorbitant rents, the Court turned to consider whether the City possessed a rational basis to believe that the stated objectives would be achieved through operation of the Ordinance.

As to the first two stated goals of the Ordinance, encouraging the availability of housing for households of all income levels, including university students, and preserving, maintaining, and improving existing housing, the Court agreed with the City that it is reasonable to believe that capping rent in detached dwellings in single-family neighborhoods, but not in apartment buildings, would encourage builders, investors, and the University of Maryland to expedite the construction of apartment buildings capable of housing hundreds of renters in and near the City, and to believe that imposition of rent control would reduce speculative pressure on home prices in single-family neighborhoods, thereby making them more attractive for single-family use. Although the Court acknowledged Appellants' evidentiary proffers suggesting that the Ordinance would result in an increase in the cost of rental housing in the City generally and lead to further deterioration of rental properties, the Court was unable to find that the City's perceived nexus between the Ordinance and the above-noted goals was without any rational basis.

Regarding the Ordinance's goal of strengthening City neighborhoods by reducing the number of single-family homes that are rental properties, the Court noted the conflicting evidence presented by the parties as to relative number of City code citations received by renters and homeowners. Nevertheless, the Court determined that it was the City's prerogative to determine which code violations were more serious and posed a greater threat to the citizens of the City, deferring to the City's conclusions as to which code violations to target and how best to overcome their pernicious effects. In addition, the Court found that Ordinance was related rationally to the City's goal of encouraging private reinvestment by homeowners consistent with a neighborhood's character, agreeing with the City's assertion that the Ordinance may result in increased owner-occupancy and

neighborhood stability, as market prices would be less driven by absentee landlords speculating on the future of the rental market. Finally, the Court noted that the possibility that the City's rent control program may prove unsuccessful in addressing effectively the stated goals of the Ordinance; that possibility, however, the Court found, provided an insufficient basis upon which to find the Ordinance violative of Appellants' rights under Article 24.

After concluding that the Ordinance did not violate facially Article 24, the Court considered Appellants' contention that the Ordinance was prohibited under the State and County Fair Housing Acts on the grounds that it discriminated impermissibly on the basis of age, occupation, marital status, or familial status. The Court noted that, by its very terms, the classification employed by the Ordinance distinguishes only between rental units in traditional single-family neighborhoods and rental units in apartment buildings, eschewing any differentiation between groups based on some characteristic of the group. In addition, the Court found that, although the Ordinance may impact students more than any other demographic, this fact alone could not form the basis to conclude that the Ordinance discriminates facially on the basis of age, occupation, marital status, or familial status. Thus, the Court held that the Ordinance did not violate the State of County Fair Housing Acts.

Addressing Appellants' remaining contentions, the Court found that the Ordinance did not constitute de facto zoning by the City, beyond its enumerated powers, because the Ordinance did not divide the City into districts, define lot sizes, or mandate particular uses of any specific parcels of buildings; rather, the Ordinance set merely a limit on the amount of rent a single-family property owner may charge his or her tenants. Finally, the Court found that the Ordinance was not confiscatory on its face because, in a number of different sections, the Ordinance accounted clearly for means for landlords to receive a fair return on their investment, based on individual distinctions. Thus, the Court affirmed the judgment of the Circuit Court, upholding the validity of the City's rent control program.

William Edward Dillard v. State, No. 50, September Term 2009, filed August 25, 2010. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2010/50a09.pdf>

CRIMINAL LAW AND PROCEDURE - JURY TRIALS - RIGHT TO AN IMPARTIAL JURY

Facts: In late 2006, officers arrested William Edward Dillard after police observed suspected drug transactions at a residence in Charles County. Police executed a search warrant at that residence, 3125 Lewis Place; Dillard was arrested and charged with possession of cocaine, possession of marijuana, possession with intent to distribute cocaine, conspiracy to distribute cocaine, possession of drug paraphernalia and possession of a firearm in relation to drug trafficking.

During the trial, the State called Detective Smith as the primary witness and Sergeant Robert Kiesel as a drug expert. After their testimony, the court recessed for lunch. During the recess, two jurors walked by the officers, patted Detective Smith on the back and said "good job." Detective Smith did not respond. Defense counsel moved for a mistrial on the grounds of juror misconduct. As an alternative, Defense counsel moved for at least one of the jurors to be removed and replaced with an alternate. The motions were denied and Dillard was convicted on three counts.

Dillard appealed to the Court of Special Appeals which affirmed the trial court's judgment. The intermediate court held that the trial court correctly denied Dillard's motion for a mistrial. The court further held that Dillard did not preserve the complaint that the trial judge did not conduct a *voir dire* examination of the jurors because he failed to request such an examination. The intermediate court held that the jurors did not engage in any misconduct in talking to the officers and the conduct was not prejudicial to the case. The Court of Appeals granted Dillard's petition for writ of certiorari to consider whether prejudice should be presumed based on the specific juror conduct in this case.

Held: Court of Special Appeals reversed, conviction vacated and case remanded for a new trial. The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights require an impartial jury. Contact between witnesses and jurors is generally considered improper and raises concerns about the fundamental fairness of a jury trial. In cases where the conduct is "excessive and egregious," a

presumption of prejudice arises and the burden shifts to the state to prove the contact was harmless. In the instant case, the Court could not determine from the record whether the contact was sufficiently egregious to create a presumption of prejudice. The Court held that a *voir dire* examination was necessary to determine this issue. The failure to conduct an examination was an abuse of discretion by the trial court judge. The Court noted that while some juror misconduct may be rehabilitated through a curative instruction, this remedy is limited to where the judge is already aware of the extent of the possible prejudice. The judge in this case was unaware of the possible bias because no inquiry was conducted. Because the trial court judge did not abide by its affirmative obligation to inquire into possible prejudice, denial of the motion for a mistrial was an abuse of discretion.

* * *

State of Maryland v. Wilbert Hardy, No. 148, September Term 2009, filed 27 August 2010. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/148a09.pdf>

CRIMINAL LAW - PRETRIAL PROCEDURES - MARYLAND RULE 4-215:
DISCHARGE OF COUNSEL - REQUESTS TO DISCHARGE - A TRIAL JUDGE IS NOT OBLIGED TO ADHERE TO THE PROCEDURAL REQUIREMENTS OF MARYLAND RULE 4-215 IN ADDRESSING A REQUEST TO DISCHARGE COUNSEL RAISED BY A DEFENDANT DURING VOIR DIRE BECAUSE MEANINGFUL TRIAL PROCEEDINGS HAVE BEGUN BY THAT TIME. RATHER, THE JUDGE'S CONSIDERATION OF SUCH REQUESTS IS GOVERNED BY STATE V. BROWN, 342 Md. 404, 676 A.2d 513 (1996), UNDER AN ABUSE OF DISCRETION STANDARD.

Facts: Wilbert Hardy was tried in the Circuit Court for Baltimore City on charges, among others, of carjacking, robbery, first degree assault, and reckless endangerment in February 2006.

Hardy's trial commenced on 19 March 2007, whereupon the trial court swore the venire panel, introduced the factual allegations of the case to the venire, and proceeded to ask the venirepersons several questions directed at any venireperson's relationships with the participants in the trial, and receive their responses. At that point, the trial court asked Hardy and his defense counsel to approach the bench to discuss further voir dire inquiries. While at the bench, Hardy stated to the trial court that "I'm thinking about changing the attorney or something," explaining that his attorney had recommended he accept a plea deal that included a period of incarceration, which he did not want to accept, and that he had met with his attorney for less than one hour prior to commencement of the trial. The trial court then inquired of defense counsel into the amount of time Hardy had spent discussing his case, and the trial court explained that while Hardy's trial counsel could suggest that he accept a plea deal which includes incarceration, the ultimate decision whether to accept such a plea deal was up to him.

Later, at the close of voir dire, the trial court revisited the matter of Hardy's earlier expressed dissatisfaction with his defense counsel. After asking Hardy to approach the bench to note any exceptions to the voir dire questions it had asked, the trial court reiterated that Hardy's defense counsel was merely giving her honest opinion in advising him, to which Hardy responded, "I understand what you're saying." Hardy did not make any further statements during trial bearing on dissatisfaction with or discharging his counsel. The jury convicted Hardy on the counts of robbery, first degree assault, and reckless endangerment.

After sentencing, Hardy noted timely an appeal to the Court of Special Appeals, alleging four errors, the first of which was "[w]hether the trial court erred in failing the dictates of Md. Rule 4-215" The Court of Special Appeals, in an unreported opinion, reversed Hardy's convictions and remanded the case to the Circuit Court, holding that the trial court, in addressing Hardy's concerns regarding his trial counsel, failed to adhere to the mandatory procedures for consideration of requests to discharge counsel contained in Rule 4-215(e). The Court of Special Appeals held first Hardy's statement to the trial judge qualified as a request to discharge counsel, because "Hardy clearly expressed his dissatisfaction with his attorney when he said: 'I am thinking about changing the attorney'" and such a statement of dissatisfaction suffices to trigger Rule 4-215(e) when "a court could reasonably deduce that [a defendant] sought to discharge his counsel." Further, the Court of Special Appeals held that compliance with Rule 4-215(e) was required, as "meaningful trial proceedings" had not commenced when Hardy made his request, considering the jury had not yet been selected, the trial had not yet begun, and no jurors had been chosen, when Hardy voiced his displeasure with counsel.

The Court of Appeals granted the State's timely petition for writ of certiorari to consider: "(1)whether Hardy's statement that he was 'thinking about changing the attorney or something' qualified as a request to discharge his counsel, (2) if so, whether Rule 4-215(e) applies to such requests after voir dire begins, and (3) if Rule 4-215(e) applies, whether the trial court's colloquy with Hardy complied with the Rule's mandates."

Held: Reversed and remanded to the Court of Special Appeals to consider Hardy's other questions presented to it that it did not reach. A defendant's statement that he or she is "thinking about changing [his or her] attorney or something" qualifies as a request to discharge counsel. The Court relied the line of cases suggesting that there exists no "talismanic phrase" that a defendant must utter to constitute a request to discharge counsel, and that any statement by a defendant from which a trial court could conclude reasonably that the defendant desires to discharge should be interpreted as such. A defendant makes a request to discharge counsel even when the statement "constitutes more a declaration of dissatisfaction with counsel than an explicit request to discharge." Applying this law to the facts at hand, the Court explained that, like the predecessor cases, Hardy's statement was an indication of dissatisfaction with his lawyer, and therefore reasonably should have led a trial judge to conclude that Hardy wanted or was inclined to discharge his counsel.

Even though Hardy's statement qualified as a request to discharge his defense counsel, however, Rule 4-215(e) does not apply to requests to discharge counsel made after voir dire has begun. The Court noted that voir dire is a "meaningful trial proceeding" under the plain meaning of the phrase, considering "[t]here can be no trial without a trier of fact, and there can be no trier of fact in a jury trial without the jury selection process of voir dire." As such, the voir dire process represents a necessary step in any jury trial, and with the beginning of that process, "meaningful trial proceedings" have begun. Furthermore, the Court noted that prior cases recognized a functional definition of the phrase "meaningful trial proceedings," whereby such proceedings have begun whenever allowing the defendant to discharge or substitute his legal counsel would pose a risk either of disruption of trial procedure or confusing the jury. Voir dire also meets this functional definition of "meaningful trial proceedings," because, at this stage of a trial, the soon-to-be members of the jury share the courtroom with the defendant, and allowing the defendant to change his or her representation, before the eyes of potential jury members, would risk confusing the prospective jury. Further, allowing such a change to defense counsel after the entire venire panel is in the courtroom poses a risk of disruption to the trial proceedings, to the court's jury assignment system, and to the court's administration as a whole.

Because Rule 4-215(e) is not strictly applicable as the benchmark for how a trial judge is to address a request to discharge counsel after meaningful trial proceedings have begun, the Court looked to the abuse of discretion standard established in *Brown v. State*, 324 Md. 404, 676 A.2d 513 (1996), as the measuring stick for assessing whether the trial judge in Hardy's case considered appropriately Hardy's request to discharge his counsel. The Court stated that a trial court abuses its discretion only when "fail[ing] to allow a defendant any opportunity to explain his or her request at all" In this case, the Court rejected Hardy's contention that the trial court abused its discretion because the judge never asked him directly for an explanation of the reasons underlying his desire to discharge his attorney, explaining that Hardy, on his initiative, adequately volunteered those reasons, and thus the trial court fulfilled its obligation to provide an opportunity for Hardy to give an explanation when it allowed him to explain his motion without interruption.

Hugh Shaka Marshall v. State of Maryland, No. 127, September Term, 2009, filed 23 August 2010, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/127a09.pdf>

CRIMINAL LAW - SEARCH WARRANTS - INSUFFICIENT SHOWING OF PROBABLE CAUSE - GOOD FAITH EXCEPTION - DRUG-RELATED EVIDENCE SEIZED PURSUANT TO AN ASSUMPTIVELY IMPROPER SEARCH WARRANT FOR A SUSPECT'S RESIDENCE NONETHELESS FINDS SAFE HARBOR UNDER THE GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT'S EXCLUSIONARY RULE WHERE POLICE CONFIRM THAT THE SUSPECT IS SELLING DRUGS OUT OF HIS VEHICLE AND OBSERVE THE SUSPECT DRIVE HIS VEHICLE TO THE DRIVEWAY OF HIS RESIDENCE IMMEDIATELY FOLLOWING A DRUG SALE.

Facts: Hugh Shaka Marshall was tried in the Circuit Court for Prince George's County on charges of possession of controlled dangerous substances ("CDS"); possession of CDS with intent to distribute; possession of CDS with intent to distribute within 1,000 feet of a school; wearing and carrying a handgun; transporting a handgun; possession of drug paraphernalia; and obliterating the identification number on a firearm. A jury convicted him of all of these crimes based on drugs and firearms that police recovered from his vehicle and residence during the execution of a search warrant.

In April 2008, a past, proven, and reliable confidential police informant reported to Detective Aiken of the Prince George's County Police Department that a black male suspect, known as "Shaka," was using his car, a white 2005 Cadillac sedan, to store, sell, and distribute supplies of marijuana in various locations within the Upper Marlboro area. Aiken arranged for the informant to engage in a controlled drug buy from "Shaka" on 25 April 2008 at "a predetermined location in Upper Marlboro." On that date, under Aiken's observation, the informant identified and approached the white Cadillac and conducted a hand-to-hand transaction with its driver, whom the informant identified as "Shaka." "Shaka" then retrieved a small bag filled with a leafy substance from his vehicle and gave it to the informant, who afterwards delivered the bag to Aiken. Aiken confirmed that the substance in the bag was marijuana.

Aiken observed "Shaka" take several more short meetings with other individuals, and then followed "Shaka" as he drove away from the scene of the controlled buy directly to a residence located at 3500 Jeff Road. Aiken observed "Shaka" park the car in the driveway, and then left the scene for the evening. When he returned to the residence the following morning, the white Cadillac was still parked in the driveway. Aiken identified

"Shaka" as Hugh Shaka Marshall from an electronic search of the Maryland Motor Vehicle Administration Database, which revealed that Marshall lived at 3500 Jeff Road. Further investigation and another controlled buy in the Upper Marlboro area, however, revealed only that the white Cadillac was often parked in the driveway at 3500 Jeff Road and that Marshall continued to sell marijuana from the vehicle.

On 12 June 2008, Aiken submitted an application to a judge of the Circuit Court for a search warrant seeking to search both the white Cadillac and the Jeff Road residence for drugs and related paraphernalia. Aiken's affidavit in support of the application recounted his first-hand observations of Marshall's activity as narrated above. To justify his request to search the residence, Aiken relied on the conclusion, drawn from his familiarity with the drug culture that he developed from his experience and training in narcotics investigations, "[t]hat it is common for drug dealers to secrete contraband, proceeds of drug sales, and records of drug transactions in secure locations within their residences" The judge issued the warrant that day.

The warrant was executed on 13 June 2008. During its execution, police recovered drugs and related paraphernalia from the residence. Although he attempted to drive away from the scene in another vehicle, Marshall was arrested. During a search conducted incident to Marshall's arrest, police discovered two handguns and additional drugs in the vehicle and on Marshall's person.

During his trial in the Circuit Court, Marshall filed a motion to suppress the evidence obtained during the execution of the search warrant. In his motion, he claimed that (1) there was no substantial basis for the judge issuing the search warrant to find probable cause to approve the search of the residence, and (2) the good faith exception to the Fourth Amendment's exclusionary rule did not save the seizure. The court denied Marshall's motion with respect to evidence retrieved from the vehicle, but granted it with respect to evidence retrieved from the residence. It reasoned that there was no substantial basis from which to conclude that probable cause existed to search the residence, and that the warrant was so devoid of indicia of probable cause with respect to the residence that any belief that probable cause existed to search it was unreasonable.

The State noted a timely appeal to the Court of Special Appeals. The intermediate appellate court reversed, in an unreported opinion, the judgment of the Circuit Court, holding

that the good faith exception to the Fourth Amendment's exclusionary rule applied to the evidence seized in the search of the residence. It concluded that Detective Aiken possessed a sufficient basis to support his reasonable, if legally erroneous, belief that the facts and inferences he presented in his affidavit in support of the warrant established probable cause to search Marshall's residence.

Held: Affirmed. The Court, citing *McDonald v. State*, 347 Md. 452, 469, 701 A.2d 675, 683 (1987), assumed *arguendo* that there was no substantial basis for a finding of probable cause to issue the contested search warrant and proceeded directly to analyze the good faith exception question. It held that, regardless of the validity of the underlying warrant, the evidence seized during the search of the residence should not be suppressed because Aiken's affidavit, even if it did not provide a substantial basis for a finding that probable cause existed, was not "so lacking in indicia of probable cause" as to render police reliance on the issuance of the warrant entirely unreasonable.

The Court explained that evidence seized pursuant to a search warrant is denied the safe harbor of the good faith exception only when there exists essentially *no* evidence to support a finding of probable cause. In this case, the Court determined that Aiken had presented *some* evidence that supported such a finding with respect to the Jeff Road residence in that he confirmed that Marshall was selling drugs, he linked Marshall and the vehicle from which Marshall conducted drug transactions to the residence, and he observed Marshall return directly to the residence after a controlled buy. Even if insufficient to provide a substantial basis for a finding that probable cause existed, the indicia of probable cause that Aiken presented in his affidavit, considered in the light of his training and experience, were sufficient to protect the evidence uncovered in his search under the good faith exception.

State of Maryland v. Larry Edward Johnson, No. 140, September Term 2009, Filed 23 August 2010, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/140a09.pdf>

CRIMINAL LAW - SENTENCING - REVIEW OF SENTENCE - MULTIPLE PETITIONS - WHERE AN INDIVIDUAL HAS APPLIED FOR AND RECEIVED PREVIOUSLY A REVIEW OF HIS OR HER SENTENCE BY A THREE-JUDGE PANEL PURSUANT TO MARYLAND CODE, CRIMINAL PROCEDURE § 8-102, AS AMENDED BY HOUSE BILL 596 IN THE 2005 LEGISLATIVE SESSION OR HOUSE BILL 1317 IN THE 2007 LEGISLATIVE SESSION, THE INDIVIDUAL IS BARRED FROM RECEIVING, AND A CIRCUIT COURT IS WITHOUT JURISDICTION TO GRANT, FURTHER REVIEW OF HIS OR HER SENTENCE UPON A SUBSEQUENT APPLICATION FOR REVIEW.

Facts: In 1992, Larry Edward Johnson pled guilty, in the Circuit Court for Wicomico County, to daytime housebreaking and was sentenced as a subsequent offender to a mandatory minimum 25-year term of incarceration, without the possibility of parole, under then Maryland Code, Article 27, § 643B. Following two unsuccessful petitions for post-conviction relief, Johnson filed in proper person in the Circuit Court, on 28 October 2005, an application for review of his sentence by a three-judge panel. As authority for his right to file this application, Johnson relied on expressly the General Assembly's passage of House Bill 596 of the 2005 legislative session, where the Legislature amended § 8-102 of the Criminal Procedure Article to permit "a person who is serving a term of confinement for burglary or daytime housebreaking that includes a mandatory minimum sentence imposed before October 1, 1994, [to] apply for and receive one review of the mandatory minimum sentence" Under that enactment, the sentence review panel was allowed to strike the restriction against parole, but not reduce the length of the sentence. In addition, any such applications for review were required to be filed on or before 30 September 2006. On 7 June 2006, the sentence review panel entered an order leaving Johnson's sentence unchanged.

On 10 December 2007, Johnson filed, again in proper person, in the Circuit Court a second application for sentence review by a three-judge panel this time relying expressly on the General Assembly's passage of House Bill 1317 in the 2007 legislative session, which again amended § 8-102 to permit "a person who is serving a mandatory minimum sentence of confinement imposed under former Article 27, § 643B of the Code before October 1, 1994, where burglary or daytime housebreaking was a predicate offense for the imposition of the mandatory minimum sentence, [to] apply for an receive one review of the mandatory minimum sentence . . .

." This enactment, like its 2005 predecessor, granted the review panel only the ability to strike the restriction against parole (not to reduce the length of the sentence) and required that all such applications for review be filed on or before 30 September 2008.

Three days after Johnson filed his second application, the administrative judge of the Circuit Court wrote Johnson advising him that a sentence review panel was designated and stating that Johnson had fifteen days to submit in writing any information, independent of that contained in the application for sentence review, that Johnson wished for the panel to consider. The same letter was sent to the State's Attorney for Wicomico County and the local Office of the Public Defender. On 20 December 2007, Johnson wrote to the panel and the Public Defender, requesting that the panel defer any ruling on his application until he had additional time to confer with court appointed counsel. Johnson submitted no additional information to the review panel for its consideration, and, on 16 January 2008, the sentence review panel, after examining Johnson's application and without holding a hearing, entered an order determining again that Johnson's sentence should remain unchanged.

Johnson filed timely an application for leave to appeal to the Court of Special Appeals from the second sentence review panel's order, contending that the review panel denied him his right to counsel and that the panel failed to comply with the mandatory requirements of Maryland Rule 4-215 governing waiver of counsel. In response, the State argued that the order of the sentence review panel was not an appealable judgment because the panel did not increase Johnson's sentence, and that, even if it were an appealable judgment, Johnson's right to counsel was not abridged. In a reported opinion, the intermediate appellate court held that the sentence review panel's order was appealable because Johnson's claim of error was based on the panel's alleged denial of his right to counsel, rather than the decision of the panel to leave his sentence unchanged. In addition, the court determined that Johnson was entitled to counsel throughout the sentence review process, that Johnson had not been provided counsel and had not waived expressly his right to counsel, and that the sentence review panel was required to comply with Rule 4-215 prior to ruling on Johnson's application. Because, in its view, the panel failed to comply with the mandates of Rule 4-215, the court vacated the review panel's order and remanded the case for further proceedings, wherein Johnson would be provided the opportunity to secure private counsel or receive representation by the Public Defender.

The Court of Special Appeals granted the State's petition for a writ of certiorari to consider potentially whether the order of the sentence review panel was appealable because Johnson alleged deprivation of his fundamental right to counsel, and whether the review panel was bound to comply with the mandates of Rule 4-215 prior to ruling on Johnson's application. Although not contained in its petition, the State advanced, in its brief and during oral argument, an additional contention, namely, that the judgment of the Court of Special Appeals must be reversed on the ground that the Circuit Court was without jurisdiction to consider Johnson's 2007 application for sentence review because Johnson applied for in 2005 and received review in 2006 of his sentence under House Bill 596 of the 2005 legislative session.

Held: Vacated and remanded. The Court held that, because Johnson applied for in 2005 and received review in 2006 of his 1992 sentence, the subsequent review panel was without jurisdiction to consider Johnson's 2007 application for sentence review. Thus, the Court vacated the judgment of the Court of Special Appeals and remanded the case to that court with directions to vacate the Circuit Court's relevant order and dismiss the appeal.

At the outset, the Court determined that the additional question posed by the State, namely, that the Circuit Court was without jurisdiction to consider Johnson's 2007 application for sentence review, was, by virtue of its nature as a jurisdictional issue, properly before the Court despite the State's failure to raise it previously. The Court then turned to consider the merits of the State's contention in this regard.

After tracing the history of the statutory provisions granting incarcerated individuals the right to obtain review of their sentence, including House Bill 596 in the 2005 legislative session and House Bill 1317 in the 2007 legislative session, the provisions under which Johnson filed his two applications for sentence review, the Court turned to consider the State's contention that House Bill 1317 sought merely to expand the group of individuals granted the right to obtain a single sentence review, rather than providing individuals who received already a sentence review, pursuant to House Bill 596, with an additional opportunity to have their sentence reviewed.

The Court began by examining the plain language of § 8-102, the provision governing specifically the right to sentence review, which provides that "a person convicted of a crime by a circuit court and sentenced to serve a sentence that exceeds 2 years in a correctional facility is entitled to a *single sentence*

review by a review panel." The Court observed that the language of House Bills 596 and 1317 stated similarly that the incarcerated individual "may apply for and receive *one review of the mandatory minimum sentence.*" Noting that the purpose of both bills was to provide an enlarging group of certain individuals the opportunity to seek a single review of their sentence and that neither bill expanded the one-review limitation contained in § 8-102, the Court found that the plain language of § 8-102, and House Bills 596 and 1317, suggested that the review panel was without jurisdiction to consider Johnson's 2007 application, as he had received review already of his sentence in 2005-06 under House Bill 596.

The Court validated its interpretation by turning to examine the legislative history of House Bill 1317, the provision under which Johnson filed the present application. The Court noted that the Revised Fiscal and Policy Note accompanying House Bill 1317 stated that the legislation permitted specific individuals to seek "*one review of the mandatory minimum sentence.*" In addition, the Court observed that the Note described House Bill 1317 as a "corrective action" designed to remedy certain "unintended consequence[s]" of House Bill 596, which had been interpreted by the courts to deny review to certain incarcerated individuals intended by the Legislature to be within the scope of the statute. Thus, the Court found that the clear intent of the General Assembly in enacting House Bill 1317 was to remedy a perceived inequity remaining after passage of House Bill 596, rather than to grant multiple sentence reviews to certain inmates, such as Johnson.

Finally, the Court reviewed the legislative history of House Bill 596, noting that the Revised Fiscal Policy Note accompanying the bill, the testimony of one of the bill's sponsors before the House Judiciary Committee, and the testimony of a law professor in support of the bill supported the Court's conclusion that the intent of the General Assembly in enacting House Bill 596 was to grant certain individuals, including Johnson, a single opportunity to seek review of their sentence by a three-judge panel.

Based on its reading of the plain language of § 8-102, and the text and legislative history of House Bills 596 and 1317, the Court held that incarcerated individuals who were granted the right to obtain, and in fact did obtain, review of their mandatory minimum sentence by a three-judge panel under House Bill 596 in the 2005 legislative session are barred from receiving additional review of their sentence under House Bill 1317. Thus, the Court found that, because Johnson sought and

received review of his mandatory minimum sentence in 2005-06, pursuant to the provisions on House Bill 596, Johnson was not entitled to an additional sentence review in 2007-08 pursuant to House Bill 1317. As such, the Court determined that the three-judge sentence review panel in the present case was without jurisdiction to consider Johnson's 2007 application, vacated the judgment of the Court of Special Appeals, and remanded the case to that court with directions to vacate the order of the Circuit Court and dismiss the appeal.

Caldes, et al. v. Elm Street Development, et al., No. 12, September Term, 2008, filed July 22, 2010. Opinion by Murphy, J.

<http://mdcourts.gov/opinions/coa/2010/12a08.pdf>

ENVIRONMENT - CHESAPEAKE BAY CRITICAL AREA PROTECTION PROGRAM - RESIDENTIAL DEVELOPMENT IN THE RESOURCE CONSERVATION AREA

Facts: This case arises from a dispute over 22 ± acres of land in the Chesapeake Bay Critical Area, Resource Conservation Area. A subdivision plot for the land in question was recorded in 1926, fifty-eight years before the creation of the Chesapeake Bay Critical Area Protection Program, which imposed a density restriction of one dwelling unit per twenty acres. Respondents sought to develop the property and were granted a variance by the County Board of Appeals for Anne Arundel County, permitting the development of seven dwellings. Both the Anne Arundel Circuit Court and the Court of Special Appeals affirmed the decision of the County Board of Appeals. Petitioners argued to this Court that the grandfathering provisions in the Anne Arundel Critical Area Program did not exempt property from the density requirements, which would permit only one dwelling on the property.

Held: Affirmed. Under the "grandfathering" exception to the "one dwelling unit per twenty acres" limitation to development in the Resource Conservation Area, a "grandfathered" parcel of land is exempt from the "density" provisions - but from no other provisions - of the applicable Critical Area statutes, zoning ordinances, and COMAR regulations.

Valerie J. Willis v. Montgomery County, Maryland, No. 138, September Term, 2009, filed 25 August 2010. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/138a09.pdf>

WORKERS' COMPENSATION - JUDICIAL REVIEW - FINAL ORDER REQUIREMENT - THE WORKERS' COMPENSATION COMMISSION'S DECISION NOT TO REFER A PERSON TO THE INSURANCE FRAUD DIVISION PURSUANT TO MD. CODE (1999, 2008 REPL. VOL.) LABOR AND EMPLOYMENT ARTICLE, § 9-310.2 IS NOT SUBJECT TO JUDICIAL REVIEW BECAUSE IT IS NOT A FINAL ADMINISTRATIVE ORDER.

Facts: On 20 July 2001, Valerie J. Willis claimed to have injured her left knee while participating as a police officer in a departmental training exercise with the Montgomery County Police Department (the "County"). She did not miss any actual days from work because of that injury because she used three previously-scheduled days off from work to recuperate before returning to duty. She did not seek immediate medical treatment for this injury or report it in accordance with formal departmental procedures, although she advised orally her supervisor. He suggested that she file a workers' compensation claim. Willis did not act on this advice immediately. In August 2001, Willis assertedly sustained a second injury to her left knee while participating in a shooting exercise with the Police Department. She did not seek medical treatment, miss any time from work, or immediately report this event to her employer either.

On 31 December 2001, Willis sustained an injury to her left knee, while off-duty. She sought immediate medical attention. She told the first two doctors that she saw only of the December incident as the cause of her injury. She consulted thereafter with Dr. David L. Higgins, to whom she described the injuring events of July and December, but not the August episode. Dr. Higgins performed surgery on 30 January 2002 to repair injuries to her knee.

On 4 March 2002, Willis and her then attorney prepared paperwork for a claim to be filed with the Commission, asserting that she sustained injury to her left knee as a result of the training exercise on 20 July 2001. On 14 March 2002, Dr. Higgins sent a letter to Willis's attorney, expressing his opinion that her injuries were the result of the 20 July 2001 incident and that she suffered continued symptoms since that initial injury. With this letter in hand, Willis's attorney submitted the claim to the Worker's Compensation Commission (the "Commission"). A

corrected claim was filed on 21 April 2002 stating that Willis also injured her back, in addition to her knee, during the 20 July 2001 training exercise. In neither iteration of her filed claim did Willis mention the August nor December incidents or injuries. On 4 July 2002, the Commission determined that Willis sustained an accidental injury or occupational disease/illness arising out of and in the course of her employment on 20 July 2001.

Willis underwent a second surgery on her knee in September 2005, for which the County, through the Montgomery County Self-Insured Fund, paid. In April 2006, Willis claimed temporary total disability benefits dating back to 2002. The County filed issues with the Commission, requesting a hearing for referral of Willis's case to the Maryland Insurance Fraud Division (the "Division"). The County filed this request on a form provided by the Commission on its website. The form states, in part, that the undersigned alleges that the person named below violated § 9-310.2(a) of the Labor and Employment Article ("Lab. & Empl."), Md. Code (1999, 2008 Repl. Vol.), and requests a hearing before the Commission. Willis is listed as the person to be referred and the Montgomery County Self-Insured Fund is listed as the Party Requesting a Hearing. Specifically, the County alleged that, in May 2002, Willis informed the County that she sustained a work-related injury on 20 July 2001 to her left knee and that the County paid her workers' compensation benefits for that injury. When she made a claim in 2006 for temporary total disability dating back to 2002, the County discovered, for the first time, the non-work-related injurious event that occurred on 31 December 2001.

The Commission held a hearing on 17 April 2007. The Commission found that neither claimant nor her prior counsel committed fraud, and, accordingly declined to refer the case to the Division. From that decision, the County sought judicial review in the Circuit Court for Montgomery County. Willis filed a Motion for Summary Judgment or to Dismiss, arguing that the Commission's refusal to refer the case to the Fraud Division was not appealable because it was not a final administrative decision. The County opposed the Claimant's motion, arguing that the order was final because it denied the County the right to reimbursement under Lab. & Empl. § 9-310.1. The Circuit Court concluded that the Commission's order neither granted nor denied a benefit under the Workers' Compensation Act and, thus, was not a final order or decision. Therefore, the court granted Willis's motion for summary judgment and dismissed the County's petition for judicial review.

The County filed timely a notice of appeal to the Court of Special Appeals, which reversed the judgment of the Circuit Court in a reported opinion. *Montgomery County v. Willis*, 187 Md. App. 514, 979 A.2d 209 (2009). Willis filed in the Court of Appeals a petition for a writ of certiorari, which the Court granted. 411 Md. 599, 984 A.2d 244 (2009).

Held: Reversed. The Court held that the Commission's failure to grant the County's request to refer Willis to the Division was not an appealable final administrative action. The Court started with the basic premise that in order for an administrative agency's action properly to be before a court for judicial review, there must be a legislative grant of the right to seek judicial review. The right to an appeal is not a right required by due process of law, nor is it an inherent or inalienable right.

In the context of appeals from an administrative decision, Lab. & Empl. § 9-737 confers the right appeal upon a party or any other "interested person" that is "aggrieved by a decision of the Commission." An action for judicial review of an administrative action will lie only if the administrative order is final. To be final, the order or decision must dispose of the case by deciding all questions of law and fact and leave nothing further for the administrative body to decide. Furthermore, to constitute a final administrative action in the context of judicial review of a Workers' Compensation matter, the action must grant or deny a benefit. For the purposes of a Workers' Compensation administrative order, a benefit means a grant of an award under the Workers' Compensation Act, or something equivalent thereto or something awarded by the Commission.

Willis argued that the Commission's refusal to refer her to the Division was not an appealable decision because it did not grant or deny a benefit to the County, and thus the County is not "aggrieved" for the purposes of § 9-737. In response, the County argued that the Commission's order denied it a benefit because when it requested that the Commission refer Willis to the Division under § 9-310.2, it requested implicitly also reimbursement of benefits that the County paid to her in the past, pursuant to § 9-310.1, if fraud were found, although it failed to state expressly this request in its papers filed with the Commission. The County conceded that it did not request explicitly this relief, but rejoins that it did not have to because, by requesting a hearing for a referral to the Division pursuant to § 9-310.2, it should be understood necessarily, if successful, also to seek reimbursement for benefits obtained wrongfully by Willis, despite the fact that § 9-310.2 does not

itself provide for reimbursement of back benefits as a remedy.

The County supported its argument by pointing out that: there is no statute or regulation that requires a party to file separate issues with the Commission; § 9-310.1 is not mentioned on the form that the County filed with the Commission; there is not a form on the Commission's website by which an employer may ask for reimbursement of back benefits; the Commission's regulations do not provide specifically that a party must file a request for a hearing under § 9-310.1; and §§ 9-310.1 and 9-310.2 both require proof of preponderance of the evidence that a person knowingly obtained benefits. The Court rejected these arguments and concluded that §§ 9-310.1 and 9-310.2 are unambiguous. A reading of the plain language indicates that a request for a referral to the Division does not encompass necessarily or implicitly a request by the entity seeking referral for reimbursement. If the County's position were correct, there would be no reason for the Legislature to enact the two distinct statutory provisions; one of the provisions necessarily would be rendered superfluous, which is at odds with the principles of statutory construction.

The Court reiterated that a decision of the Commission that does not grant or deny a benefit necessarily is an interlocutory or interim order not subject to immediate judicial review. Therefore, the Court turned next to whether (1) the Commission's refusal to refer Willis's case to the Division granted or denied a benefit to the County, (2) the County is "aggrieved" pursuant to § 9-737, and (3) whether the Commission's decision disposed finally of the case then before it.

The Court concluded that the Commission's decision did not grant or deny a benefit to the County. It merely denied the County's request to refer the case to the Division. The decision did not require the County to pay for or be liable anew for any treatment that Willis received.

The Court held also that the County was not aggrieved by the Commission's decision. Because a request for referral to the Division is not tantamount to a request for reimbursement, the County is not estopped by the denial from seeking reimbursement. Furthermore, request for referral to the Division is not the exclusive method of reporting an individual who committed insurance fraud in the context of a Workers' Compensation case. A denial of a referral to another state agency to launch its own investigation of the claimant hardly puts the employer "out-of-court." The decision did not foreclose, as a matter of law, any of the County's pecuniary or property rights or affect the

County's ability to pursue a claim or defense alternatively.

Finally, the Court held that the Commission's decision did not dispose of the claim. The County still may seek reimbursement pursuant to § 9-310.1 or litigate Willis's request for temporary total disability benefits. Not every administrative order which determines rights and liabilities, or from which legal consequences flow, is final and thus subject to judicial review. Generally, to be final, an administrative order must also leave nothing further for the agency to do. Even though some legal consequences may flow from the Commission's decision not to refer the case to the Division, the Commission's decision did not resolve the matter of whether Willis committed fraud, leaving nothing further for the Commission to do. Therefore, the Court held that the Commission's decision was not a final order subject to judicial review and that there is no right of judicial review inherent in decisions rendered on requests for referral made under § 9-310.2.

COURT OF SPECIAL APPEALS

Sandro Baiza v. City of College Park, No. 2690, September Term, 2008. Opinion by Raker, J.

<http://mdcourts.gov/opinions/cosa/2010/2690s08.pdf>

ADMINISTRATIVE LAW AND PROCEDURE - VALIDATION OF AN ERRONEOUSLY ISSUED BUILDING PERMIT

ADMINISTRATIVE LAW AND PROCEDURE - JUDICIAL REVIEW - REMAND IN CASES OF ERROR

Facts: This case arose from a building permit erroneously issued by the City of College Park, appellee, to Sandro Baiza, appellant, for the construction of a fence on his residential property within the city limits.

In September of 2006, the City of College Park erroneously issued a building permit for appellant to construct a front yard fence, despite the fact that such improvements had been prohibited by a recent amendment to the City Code which was effective at the time the permit was issued. The City became aware of the mistake and revoked the permit in May, 2007, after appellant had begun construction.

Appellant applied for validation of the wrongly issued Permit under College Park City Code § 87-24, which provides for validation of an erroneously issued permit where four criteria are met, the fourth of which is that the "validation will not be against the public interest." The City Council found that the project would be against the public interest, relying heavily on the finding that the permit should not have been issued, and that appellant had not demonstrated the necessity of the project. The City Council denied appellant's validation request.

Appellant filed a petition for judicial review with the Circuit Court for Prince George's County, alleging that when considering appellant's request for validation, the City Council improperly had considered factors applicable to different sections of the City Code, concerning whether a permit should issue, and whether to grant a variance. Appellant further argued that the revocation of his permit was improper under vested rights and zoning estoppel theories. The circuit court affirmed the determination of the City Council not to validate appellant's request for validation.

Appellant noted a timely appeal to the Court of Special Appeals.

Held: The Court of Special Appeals reversed the circuit court and remanded the case for the court to vacate the denial of appellant's request for validation.

The Court rejected appellant's vested rights and zoning estoppel arguments. It held that no vested right could arise from an improperly issued permit. The Court noted that Maryland cases have long declined to apply the doctrine of zoning estoppel, and that although the Court of Appeals recently discussed the doctrine in a favorable light in *Maryland Reclamation Associates v. Harford County*, 414 Md. 1 (2010), that case did not adopt the zoning estoppel doctrine expressly.

The Court of Special Appeals agreed with appellant's argument that the City Council had considered improper factors in ruling on appellant's request for validation. The City relied on elements appearing under different sections of the City Code, governing whether a permit should issue and whether a variance should issue. Using these improper elements, the City concluded that appellant's project offended the public interest and refused to grant a validation.

Because the City considered improper criteria in determining not to validate appellant's permit, its decision was an abuse of discretion. The Court reversed the circuit court and remanded the case for the City to reconsider whether appellant's project was consistent with the public interest.

Steven L. Williams v. William C. Work, et al., No. 1652, September Term, 2006 and *Steven L. Williams v. Ace American Ins. Co., et al.*, No. 1653, September Term, 2006. Opinion by Kenney, J. (retired, specially assigned). Filed on May 26, 2010.

<http://mdcourts.gov/opinions/cosa/2010/1652s06.pdf>

CIVIL LAW - TORTS - WRONGFUL DEATH - SETTLEMENT- USE PLAINTIFFS

Facts: Decedent was struck and killed while standing outside of his work vehicle on the side of a highway. After settling with the insurance provider of the driver of the vehicle that struck decedent, decedent's wife and their children brought a survivorship and wrongful death action against decedent's employer's insurance carrier for underinsured motorist funds (*Williams I*). That insurer agreed to settle with the wife and her children. Appellants, decedent's children by his former wife, were not included in the settlement. Appellants were identified as "use plaintiffs" in the Second Amended Complaint, which was served upon their mother, but not filed with the court, and their approval of the settlement was not sought.

Five weeks after the line of satisfaction of judgment was entered in *Williams I*, appellants brought a separate wrongful death action against the decedent's employer's insurer and multiple other parties (collectively, appellees) related to the death of decedent (*Williams II*). A year after the settlement in *Williams I*, appellants filed a motion to reopen *Williams I*, which was denied, and a motion for reconsideration of the motion to reopen, which was also denied. In *Williams II*, the court granted summary judgment to all appellees.

Appellants appealed the denial of the motion for reconsideration in *Williams I* and the grant of summary judgment to all appellees in *Williams II*. They argued that either they should be able to bring their own wrongful death action or the settlement should be vacated because they were not included in it and their approval was not sought. The decedent's employer's insurer cross-appealed the denial of its motion for attorney's fees in *Williams II*.

Held: Judgment Vacated and returned to the Circuit Court.

Because only one action may lie for the wrongful death of a

decedent, a beneficiary who brings an action does so in a representative capacity on behalf of all known beneficiaries. Beneficiaries who choose to may affirmatively join the action, but they are not required to do so. Beneficiaries who do not join in the wrongful death action must be named as use plaintiffs in the complaint.

A beneficiary who brings the wrongful death action cannot enter into a settlement agreement until all known beneficiaries either consent to the settlement or, if consent can not be reached, the court approves the settlement. Before the court can approve the settlement, the parties must demonstrate that they have sought the approval of all known beneficiaries and explain why they could not gain their approval. A wrongful death settlement that does not provide for all known beneficiaries in accordance with the Wrongful Death Statute cannot be approved by the court.

Only one wrongful death action in relation to one decedent may be brought against a tortfeasor, but actions against other tortfeasors stemming from the death of the same decedent may be brought separately.

In *Williams I*, the proposed settlement agreement between the driver's insurer, decedent's employer's insurer, decedent's wife, and her children, and the judgment based on that settlement, was vacated and remanded to the circuit court for further proceedings. In *Williams II*, the court's denial of attorney's fees to decedent's employer's insurer was affirmed and the grants of summary judgment in favor of all defendants were reversed. The circuit court was instructed to consolidate *Williams I* and *Williams II* in any further proceedings.

Letke Security Contractors, Inc. v. United States Surety Co., No. 2038, September Term, 2008. Opinion by Raker, J.

<http://mdcourts.gov/opinions/cosa/2010/2038s08.pdf>

CONTRACT LAW = ARBITRATION – RIGHT TO COUNSEL

Facts: This case addresses the discretion of an arbitrator to deny a request for a postponement of the participatory hearing. The case arose out of the arbitration of a dispute between appellant, Letke Security Contractors, a subcontractor at Maryland's Black River Wastewater Treatment Plant, and United States Surety Co., appellee, which acted as a surety for the primary contractor's obligation to compensate appellant. Kimberly Letke served as the president of appellant at the time of this litigation.

The relationship between the primary contractor and appellant ended prematurely, and the parties agreed to arbitrate the matter of the amount due to appellant for its services until the termination of the relationship. The hearing was scheduled for January 3, 2008.

Appellant's counsel withdrew from the case in late October of 2007. At that time, appellee agreed that it would be willing to postpone the hearing to allow appellant time to retain new counsel. There was no further communication on this topic until December 21, 2007, thirteen days before the scheduled hearing, when appellee contacted the arbitrator to inquire into whether appellant would be retaining new counsel. At that point, appellee was still willing to consider a postponement for appellant to retain counsel. Kimberly Letke responded with a letter stating that she believed she had retained counsel, and that if not, she would represent the company herself.

On December 28, Kimberly Letke requested a postponement of the January 3 hearing, in order to allow counsel to prepare for the case. Appellee opposed this request, arguing that it had incurred expenses in preparation for the hearing. The arbitrator denied the request for a postponement.

The arbitration hearings occurred according to the original schedule, on January 3 and 4, 2008, with all parties present and participating. Kimberly Letke appeared on behalf of appellant, made arguments, provided testimony, introduced documents, and cross-examined witnesses. The arbitrator issued an award in favor of appellee on January 23.

Appellant sent to the arbitrator an undated letter requesting "reconsideration" of the award on merits-based grounds. The arbitrator received the letter on February 21, 2008.

On May 16, 2008, appellee filed a motion in the Circuit Court for Baltimore City to confirm the arbitration award. Appellant responded that appellee's motion to confirm the award was premature because the arbitrator had not ruled on appellant's motion for reconsideration. The circuit court denied appellee's motion on the grounds that there had been no final determination of appellant's motion for reconsideration. The same day, the arbitrator denied appellant's motion for reconsideration.

Thereafter, appellant filed a motion in the circuit court requesting that the court vacate the arbitration award because it had been prejudiced by the arbitrator's refusal to postpone the hearing. Appellee filed an opposition to the motion to vacate, and requested also that the court confirm the arbitration award in its favor.

The circuit court denied appellant's motion to vacate on the grounds that the arbitrator did not abuse his discretion in denying the postponement and requiring the parties to go forward with the hearing on the agreed date. The court issued an order denying the motion to vacate and confirming the January 23, 2008 arbitration award.

Appellant noted a timely appeal to the Court of Special Appeals.

Held: Affirmed. The Court of Special Appeals held that the arbitrator did not abuse his discretion in denying appellant's request for a postponement. The Court noted that the postponement request came at the last minute and that Kimberly Letke had indicated her willingness to proceed without counsel on the assigned hearing date, if counsel were unavailable.

Furthermore, the Court held that appellant was not improperly denied assistance of counsel. The right to counsel at an arbitration is not an absolute, particularly in cases of last-minute changes or requests to postpone.

In considered dicta, the Court discussed the issue of the timeliness of appellant's petition to vacate the arbitrator's award. Appellant argued that the proper date to begin tolling the time period for filing a petition to vacate an arbitrator's award was the date, in July, of the arbitrator's denial of the

motion to reconsider, and not the date of the initial award in January.

The Court noted that appellant's petition was probably untimely. The Court explained that practically all federal and sister state cases addressing the timeliness of a petition to vacate an arbitration award refer to the time for filing as a statute of limitations, which will be waived when the other party fails to raise it. The Court nonetheless reserved the issue of the timeliness of appellant's petition, and the question whether timeliness in this context is jurisdictional or in the nature of a statute of limitations, because these issues had not been briefed and argued, and because most other jurisdictions have found it to waivable. Accordingly, the Court affirmed the judgment of the circuit court confirming the arbitrator's award.

Monti Mantrice Fleming v. State of Maryland, No. 899, September Term, 2008. Opinion filed on August 4, 2010 by Raker, J.

<http://mdcourts.gov/opinions/cosa/2010/899s08.pdf>

CRIMINAL LAW - EVIDENCE - EXPERT TESTIMONY - FIREARMS IDENTIFICATION

Facts: This case arose from the shooting death of Shawn Powell on August 26, 2006. On that evening, appellant was involved in an altercation with Shawn Powell.

Witnesses reported seeing appellant hitting Shawn Powell in the head with a glass bottle, and then drawing a gun and shooting between four and six shots in the direction of the retreating Powell. He was found dead at the foot of a nearby stockade fence the following morning, having died as a result of a single gunshot wound to his back.

The State announced its intention to call expert witnesses in the field of firearms toolmark examination to establish that a handgun which appellant gave to his step-grandfather, shortly after the murder, was the same weapon that fired the fatal shots. The State's experts had used the "traditional comparative microscopy" method of firearms toolmark identification. Appellant filed a motion in limine to challenge the admissibility of that testimony, arguing that the testimony should not be allowed *inter alia* because the experts had not used the allegedly superior "Consecutive Matching Striae" (CMS) method of toolmark identification. Following a three-day *Frye-Reed* hearing, the circuit court ruled that it would allow the expert testimony.

In addition to the firearms testimony, the State presented at trial three eyewitnesses who identified appellant as having fired a handgun at the retreating Shawn Powell on the evening before Shawn Powell was found dead. The State further presented the testimony of appellant's step-grandfather, who testified that appellant brought him a gun to store or sell within three days after the shooting.

In closing argument, defense counsel conceded appellant's criminal responsibility for Shawn Powell's death, but argued that the State had failed to establish the intentionality required to prove first-degree murder.

The jury convicted appellant of first-degree murder in connection with Shawn Powell's death. Appellant appealed from

his conviction to the Court of Special Appeals.

Held: The Court of Special Appeals affirmed appellant's conviction, holding that in light of the overwhelming evidence against appellant, including testimony by multiple eyewitnesses as well as circumstantial evidence, and defense counsel's explicit concession as to appellant's guilt, that any impropriety in the admission of the firearms toolmark identification evidence was harmless beyond a reasonable doubt.

Even if any error was not harmless, the Court would hold that the firearms toolmark identification evidence was admitted properly. Relying heavily on a federal case by Chief Magistrate Judge for the U.S. District Court for the District of Maryland Paul W. Grimm, the Court reasoned that the traditional comparative microscopy method is used by the Maryland State Police and is widely if not universally accepted in the courts of sister states. The best that can be said of the CMS method is that it is an incremental improvement on traditional microscopy, in that it avoids some of the subjectivity inherent in the traditional method. The advent of CMS does not undermine the generally accepted nature of traditional microscopy or make it inadmissible in Maryland courts.

Calvin Almeida King v. State of Maryland, Case No. 0152, September Term, 2009. Opinion filed by Judge Rodowsky on July 7, 2010.

<http://mdcourts.gov/opinions/cosa/2010/152s09.pdf>

CRIMINAL LAW - SEARCH AND SEIZURE

Facts: Calvin Almeida King was convicted in the Circuit Court for Montgomery County on three charges arising out of his possession, while a passenger in an automobile, of a handgun and ammunition. The offenses were: (1) transporting a handgun in a vehicle, in violation of Maryland Code (2002), § 4-203 of the Criminal Law Article; (2) possession of a regulated firearm by a minor, in violation of Maryland Code (2003), § 5-133(d) of the Public Safety Article (PS); and (3) possession of ammunition by a minor, in violation of PS 5-133(d). The Court sentenced King to three years on the first conviction, a consecutive five-year sentence on the second conviction, and to five years on the third conviction. The sentences were suspended in their entirety, and King was placed on five years supervised probation.

King's conviction stemmed from activities that occurred just after midnight on July 17, 2008. The Montgomery County Police Department was alerted to a vehicle, parked on an unlighted road from which a flickering light had been seen. Two officers responded, and one questioned the occupants of the vehicle, including King. The questioning officer requested and received the driver's license and registration to run an outstanding warrant check. The check came back clean but the officer did not return the documents. Questioning of the occupants and visual inspection through the vehicle's windows did not indicate any illicit activity. The driver initially refused to consent to a search of the vehicle. Thereafter, the officer informed the occupants that he intended to call a canine unit for a drug inspection. Subsequently, the driver consented to a search of his person. Upon exiting the vehicle, the searching officer noticed what he believed to be marijuana residue on the driver's shoes and legs. From this observation, the officer returned to search the vehicle where he located a handgun under the driver's seat. Further inspection of the vehicle uncovered another handgun and various types of ammunition leading to both the driver's and King's arrest. King's motion to suppress the recovered firearm and ammunition was denied. On appeal, the constitutionality of the stop and subsequent search were challenged.

Held: Reversed and Remanded. The initial, legal stop of the vehicle had concluded before any consent was obtained. The

questioning and visual sweeps of the vehicle did not provide reasonable articulable suspicion further to detain the occupants. When the officer informed the occupants that he was calling a canine search unit after he had failed to return the driver's license, a reasonable person would not feel free to leave. Thus, at this point, prior to the consent and discovery of any handgun, the initial, legal stop had morphed into a second, unjustified stop that violated the occupants' Fourth Amendment protections against unreasonable seizure.

* * *

Mary Roe v. James Doe, Case No. 2971, September Term, 2008.
Opinion filed by Judge Rodowsky on July 7, 2010.

<http://mdcourts.gov/opinions/cosa/2010/2971s08.pdf>

TORTS - STATUTE OF LIMITATIONS

Facts: Mary Roe, in a civil suit, alleged that her grandfather, James Doe, sexually abused her while she was under the age of majority. Roe was born on September 29, 1983, and reached the age of majority on September 29, 2001. Her suit was filed on September 3, 2008. Doe claimed the suit was time barred under Maryland Code (1974, 2006 Repl. Vol.), § 5-201 of the Courts and Judicial Proceedings Article (CJ). CJ § 5-201 requires a party, now of majority but injured while a minor, to file suit within "the lesser of three years or the applicable period of limitations after the date the disability is removed." Doe relied on CJ § 5-117 extending limitations on actions arising from alleged sexual abuse to seven years after majority. Doe argued that § 5-117 did not apply because such an application would be retroactive, in violation of the legislative intent expressed in an uncodified section of the session law enacting § 5-117. Further, Doe submitted, if the General Assembly intended a retroactive application of § 5-117, it would unconstitutionally deprive him of the vested right that he had acquired when the three-year statute of limitations ran on September 30, 2004 under § 5-201. The Circuit Court for Calvert County granted Doe's motion to dismiss stating that § 5-117 "does not apply to any action that accrued before October 1, 2003."

Held: Judgment reversed on limitations issue and case remanded for further proceedings. The legislative history of § 5-117 revealed that the General Assembly intended the statute to be applied partially retroactively. The statute of limitations was extended to seven years, from three years, for victims of sexual abuse whose claims were not time barred on October 1, 2003, the enactment date of § 5-117. Doe's constitutional challenge failed to recognize the well established distinction between a time limit that is a condition precedent to the cause of action and an ordinary statute of limitations, such as § 5-117. Partial retroactive application of a statute enlarging an ordinary statute of limitations does not deprive a defendant of a substantial right.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated August 17, 2010, the following attorney has been suspended, effective immediately, from the further practice of law in this State:

HARVEY MALCOLM NUSBAUM

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By and Opinion and Order of the Court of Appeals dated August 25, 2010, the following attorney has been disbarred from the further practice of law in this State:

OZOEMENA MARYROSE NWADDIKE

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