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MARYLAND RULE 2-214(a)(2) – INTERVENTION AS OF RIGHT – MD. CODE ANN., CTS. & JUD. PROC. (1973, 2013 REPL. VOL.) § 3-405(a)(1) – MARYLAND RULE 2-211(a) – MARYLAND RULE 2-214(b) – PERMISSIVE INTERVENTION – REMAND

Facts:

In 2013, the General Assembly authorized the Natalie M. LaPrade Medical Cannabis Commission ("the Commission"), Respondent, originally entitled the Natalie M. LaPrade Medical Marijuana Commission, to be responsible for pre-approving and licensing medical cannabis growers in Maryland. The Commission consists of sixteen members and is independent, but functions within the Department of Health and Mental Hygiene ("the Department"), Respondent. Md. Code Ann., Health Gen. (1982, 2015 Repl. Vol.) ("HG") § 13-3306(a)(9)(i) provides that: "The Commission shall: 1. Actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers; and 2. Encourage applicants who qualify as a minority business enterprise, as defined in § 14-301 of the State Finance and Procurement Article." On September 14, 2015, the Commission adopted Md. Code Regs. ("COMAR") 10.62.08.05, which governs the Commission's review of applications for medical cannabis grower licenses. COMAR 10.62.08.05 does not identify racial or ethnic diversity as factors to be considered in issuing medical cannabis grower licenses, but provides that "[f]or scoring purposes, the Commission may take into account the geographic location of the growing operation to ensure there is geographic diversity in the award of licenses." COMAR 10.62.08.05J.

On August 5, 2016, the Commission voted to issue pre-approvals for the applications for medical cannabis grower licenses of the top fifteen applicants, including the following eight Petitioners: Curio Cultivation, LLC ("Curio Cultivation"), Doctor's Orders Maryland, LLC ("Doctor's Orders"); ForwardGro, LLC ("ForwardGro"); Green Leaf Medical, LLC ("Green Leaf Medical"); Holistic Industries, LLC ("Holistic Industries"); Kind Therapeutics, USA, LLC ("Kind Therapeutics"); SunMed Growers, LLC ("SunMed Growers"); and Temescal Wellness, LLC ("Temescal Wellness") (together, "the Growers"). Alternative Medicine Maryland, LLC ("AMM"), Respondent, was one of the businesses whose application for a medical cannabis

grower license was not pre-approved. AMM contends that it is more than 80% African-American owned.

On October 31, 2016, in the Circuit Court for Baltimore City ("the circuit court"), AMM filed a complaint against the Commission, its members, and the Department contending that the Commission failed to consider racial and ethnic diversity in pre-approving applications for medical cannabis grower licenses, and that, as such, the Commission had violated HG § 13-3306(a)(9)(i)1. AMM sought an order prohibiting the Commission from issuing final approvals for the fifteen medical cannabis growers that had been issued pre-approvals. AMM also sought, among other relief, an order requiring the Commission to reconduct the pre-approval stage of the medical cannabis grower licensing process. AMM requested that the Commission be required to conduct a disparity study and to actively seek racial and ethnic diversity among growers.

On December 30, 2016, certain Petitioners—namely, Curio Cultivation, Doctor's Orders, ForwardGro, SunMed Growers, the Coalition for Patient Medicinal Access, LLC, and John and Jane Doe, who are minors who allege that they suffer from epileptic seizures and seek medical cannabis (together, "the Patients")—filed a Motion to Intervene. On the same date, those Petitioners also filed a motion to dismiss, contending, among other things, that the doctrine of laches barred AMM's claims. On January 25, 2017, Holistic Industries also filed a Motion to Intervene. On February 21, 2017, the circuit court conducted a hearing and denied the motions to intervene and the motion to dismiss. The circuit court concluded that Petitioners had not met the burden of proving that they were entitled to intervention as of right. The circuit court also denied Petitioners' request for permissive intervention. The circuit court concluded that the motion to dismiss was moot because Petitioners remained nonparties. Petitioners filed notices of appeal.

On May 15, 2017, AMM filed a motion for an emergency temporary restraining order, seeking a temporary restraining order and a preliminary injunction preventing the Commission from issuing final approvals for medical cannabis grower licenses and from conducting inspections of the fifteen businesses whose applications for medical cannabis grower licenses were pre-approved. On May 25, 2017, the circuit court conducted a hearing and issued a temporary restraining order.

On May 30, 2017, ForwardGro, a grower that had passed all inspections and been issued a license, filed a notice of appearance of new counsel, and stated that it intended to "govern itself as a party" in this case. All other Petitioners—the Coalition for Patient Medicinal Access, the Maryland Wholesale Medical Cannabis Trade Association (together, "the Trade Association Petitioners"), the Patients, Curio Cultivation, Doctor's Orders, Green Leaf Medical, Holistic Industries, Kind Therapeutics, SunMed Growers, and Temescal Wellness—filed renewed motions to intervene. The circuit court denied the renewed motions to intervene, and denied ForwardGro's request to "govern itself as a party." All Petitioners other than ForwardGro, Holistic Industries, and Temescal Wellness filed a notice of appeal.

While this case was pending in the Court of Special Appeals, Petitioners other than ForwardGro, Holistic Industries, and Temescal Wellness filed a petition for a writ of *certiorari* and a motion

to stay the proceedings in the circuit court. ForwardGro, Holistic Industries, and Temescal Wellness separately filed Lines in which they joined the petition. This Court granted the petition and the motion to stay. On July 27, 2017, this Court heard oral argument. On July 28, 2017, this Court issued a *per curiam* order in which this Court: (1) reversed the circuit court's judgment with respect to the denial of intervention of the Growers and remanded the case to the circuit court with instructions to grant intervention as of right to the Growers; (2) affirmed the circuit court's judgment with respect to the denial of intervention of the Trade Association Petitioners and the Patients; (3) remanded the case to the circuit court for further proceedings including determination of the issue of laches; (4) lifted a stay issued by this Court on June 2, 2017; and (5) ordered that costs in this Court and the Court of Special Appeals be paid 50% by AMM, 25% by the Coalition for Patient Medicinal Access, and 25% by the Maryland Wholesale Medical Cannabis Trade Association.

Held:

The Court of Appeals concluded that the Growers were entitled to intervention as of right under Maryland Rule 2-214(a)(2), and that the circuit court erred in denying the Growers' motion to intervene; and, the Growers were entitled to be made a party pursuant to Md. Code Ann., Cts. & Jud. Proc. (1973, 2013 Repl. Vol.) ("CJ") § 3-405(a)(1), and to joinder under Maryland Rule 2-211(a). The Court of Appeals also determined that the circuit court abused its discretion in denying permissive intervention as to the Growers under Maryland Rule 2-214(b).

The Court of Appeals determined, in relevant part, that the Growers plainly have an interest that intervention is necessary to protect. The Growers had demonstrated that intervention is essential to protect their status as pre-approval awardees and, in one instance, a medical cannabis grower licensee. The Growers had satisfied the statutory pre-approval process—and ForwardGro has been approved for a medical cannabis grower license—and expended significant resources to meet the necessary requirements for becoming fully approved licensed medical cannabis growers. The Court determined that, despite AMM's contentions, it almost goes without saying that the Growers may be disadvantaged by this case's outcome.

The Court of Appeals determined that, under the "interest-analysis" test, the Growers had shown that their interest is not fully represented or advocated by either AMM or the Commission. AMM clearly has interests that are adverse to the Growers. And, the Commission has interests that are not similar to that of the Growers, i.e., the Commission's interest is in conducting the medical cannabis grower licensing process lawfully, whereas the Growers' interest is in protecting their status and investment as pre-approval awardees.

The Court of Appeals held that, in sum, the Growers were entitled to intervention as of right because the four requirements for intervention as of right under Maryland Rule 2-214(a)(2) were satisfied—the motion to intervene was timely filed, the Growers have an interest relating to the property or transaction that is the subject of the action, the disposition of the action may impair

or impede the Growers' ability to protect that interest, and the Growers' interest is not adequately represented by the existing parties.

The Court of Appeals also concluded that the circuit court abused its discretion in denying permissive intervention for the Growers, where the requirements for permissive intervention were satisfied. Petitioners' motion to intervene was timely. The Growers plainly have a claim with questions of law and fact in common with this case. AMM contended that the Commission violated the law with respect to considering racial and ethnic diversity during the medical cannabis grower licensing process. The Growers have a claim that they have a property interest in the case and that their pre-approvals for medical cannabis grower licenses were properly issued under the relevant statutes and regulations. The respective claims involve common questions of law and fact. And, intervention would not unduly delay or prejudice the adjudication of the parties' rights. Although granting permissive intervention could perhaps result in delay, the delay would not be unreasonable or prejudice the adjudication of the parties' rights.

The Court of Appeals concluded that CJ § 3-405(a)(1) provides an independent basis for becoming a party in a declaratory judgment action. The Court explained that, given that CJ § 3-405(a)(1)'s application is more specific than that of Maryland Rule 2-214(a)(2)—CJ § 3-405(a)(1) applies only to declaratory judgment actions and Maryland Rule 2-214(a)(2) applies to all civil actions—it is logical to conclude that CJ § 3-405(a)(1) provides an independent basis for intervention. Stated otherwise, CJ § 3-405(a)(1) is relevant only in a specific class of cases where declaratory judgment is at issue; in contrast, Maryland Rule 2-214(a)(2) is applicable in any type of civil case in which a person seeks to intervene as of right, i.e., in cases involving contracts, torts, family law matters, and the like. Based on a plain reading of CJ § 3-405(a)(1), the ground for intervention under the statute is that a person either has or claims an interest that would be affected by the declaration sought in the action. In other words, CJ § 3-405(a)(1), by its plain language, does not require satisfaction of all of the requisites of Maryland Rule 2-214(a)(2). Put simply, to warrant intervention under CJ § 3-405(a)(1), a person need only show that they have or claim an interest that would be affected by the declaration. To hold otherwise would be to read into CJ § 3-405(a)(1) language that does not exist. The Court determined that, in short, the Growers were entitled to intervention under Maryland Rule 2-214(a)(2) because they satisfied the four requisites, and under CJ § 3-405(a)(1) because they clearly claimed an interest that would be affected by the declaration sought by AMM.

In contrast, the Court of Appeals concluded that the circuit court did not err or abuse its discretion in denying intervention as of right or permissive intervention as to the Patients and the Trade Association Petitioners, and that the Patients and the Trade Association Petitioners were not entitled to be made a party under CJ § 3-405(a)(1).

The Court of Appeals determined, in relevant part, that, although Petitioners' motion to intervene was timely filed, the Patients' and the Trade Association Petitioners' interests were too attenuated to satisfy the requirements for intervention as of right under Maryland Rule 2-214(a)(2). The interest claimed by the Patients, who advised that they suffer from epilepsy, is that they assert that, at some point in the future, a qualifying physician will find them to be

qualifying patients and prescribe the use of medical cannabis, which may benefit them. The interest claimed by the Trade Association Petitioners is that they advocate for prompt access to medical cannabis, patient rights, and the interests of the Growers. In the Court's view, the generalized and theoretical interests claimed by the Trade Association Petitioners and Patients were simply not adequate to satisfy the second requirement for intervention as of right under Maryland Rule 2-214(a)(2). Although the Patients' and the Trade Association Petitioners' interest may overall be in having the medical cannabis industry becoming operational without undue delay, it could not be said with any degree of certainty that the outcome of the lawsuit might cause them to incur any kind of special damage differing from that suffered by the general public.

The Court of Appeals also determined that the Patients and the Trade Association Petitioners did not have or claim an interest which would be affected by the outcome of the declaratory judgment action within the meaning of CJ § 3-405(a)(1), and thus they did not qualify for intervention under CJ § 3-405(a)(1). The Court determined that the circuit court correctly denied intervention as of right under Maryland Rule 2-214(a)(2) as to the Patients and the Trade Association Petitioners, and the Patients and the Trade Association Petitioners were not entitled to be made a party under CJ § 3-405(a)(1).

The Court of Appeals concluded that the circuit court did not abuse its discretion in denying permissive intervention to the Patients and the Trade Association Petitioners. The Court did not discern that the Patients' and the Trade Association Petitioners' claims raised a question of law or fact in common with the action, where the action concerns the constitutionality of the Commission's process and issuance of pre-approvals for medical cannabis grower licenses, and the Patients' and the Trade Association Petitioners' interests were attenuated and generalized interests in having the medical cannabis industry operational in Maryland sooner rather than later.

The Court of Appeals concluded that it would not address the issues concerning laches, administrative mandamus, and the scope of judicial review raised in the motion to dismiss. Rather, the Court determined that the case is to be remanded to the circuit court with instructions to consider the issues that Petitioners raised in the motion to dismiss in light of the Court's reversal. The circuit court's ground for denying the motion to dismiss—namely, that the issues were moot because Petitioners that sought intervention were nonparties—had become a nullity given the Court's reversal of the circuit court's denial of the motions to intervene as to the Growers.

Donta Newton v. State of Maryland, No. 86, September Term 2016, filed August 23, 2017. Opinion by Adkins, J.

Getty, J., dissents.

http://www.mdcourts.gov/opinions/coa/2017/86a16.pdf

SIXTH AMENDMENT TO THE U.S. CONSTITUTION – ARTICLE 21 OF THE MARYLAND DECLARATION OF RIGHTS – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

SIXTH AMENDMENT TO THE U.S. CONSTITUTION – ARTICLE 21 OF THE MARYLAND DECLARATION OF RIGHTS – INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Facts:

On the evening of September 20, 2004, Jerrell Patillo went to "hang out" with old friends in Baltimore City, including Petitioner Donta Newton. While Newton and Patillo were talking, Newton, for no apparent reason, began shooting at Patillo. A bullet struck Patillo in the back, and he fell to the ground. Newton attempted to shoot him again, but his gun jammed, and Patillo fled down the street. After Newton cleared his gun, he ran after Patillo, shooting at him. A second bullet struck Patillo in his left buttock. He survived his injuries.

Newton was charged with attempted first-degree murder and various handgun-related offenses in the Circuit Court for Baltimore City. His case was tried twice. On February 7, 2006, the first trial was declared a mistrial due to juror absences and scheduling conflicts. The court empaneled another jury and the second trial began that same day. During the second trial, the court again encountered attendance and scheduling issues with the jurors. As a result, the trial court asked the State and Newton's counsel whether they would agree to permit an alternate juror to be present during deliberations with instructions not to participate in case a juror had to be excused. Newton's counsel agreed to this arrangement, and the court instructed the jury not to let the alternate participate and the alternate not to participate.

The jury found Newton guilty on all counts. He was sentenced to life imprisonment for attempted first-degree murder and two consecutive five-year sentences for the handgun-related charges. Newton appealed his convictions.

On appeal, Newton raised several arguments, but he did not argue that the presence of the alternate juror during deliberations was plain error. The Court of Special Appeals rejected Newton's arguments and affirmed his convictions in an unreported opinion.

In March 2012, Newton filed a petition for postconviction relief in the Circuit Court for Baltimore City pursuant to the Uniform Postconviction Procedure Act ("UPPA"), Maryland

Code (1957, 2008 Repl. Vol.), §§ 7-101 through 7-109 of the Criminal Procedure Article ("CP"). He raised several grounds for relief, including violations of his right to effective assistance of counsel under the Sixth Amendment of the U.S. Constitution and Article 21 of the Maryland Declaration of Rights. In February 2013, the postconviction court found in favor of Newton, agreeing with him on all three issues. Accordingly, the court granted Newton a new trial. The State appealed. The Court of Special Appeals reversed.

Held: Affirmed.

The Court of Appeals held that Newton had not satisfied the prejudice prong of the *Strickland v. Washington*, 466 U.S. 668 (1984), test, and therefore his ineffective-assistance-of-trial-counsel claim failed.

Relying on *Stokes v. State*, 379 Md. 618 (2004), in which the Court held that prejudice is presumed on direct appeal when an alternate juror is permitted to participate in jury deliberations over objection of defense counsel, Newton argued that prejudice should be presumed in his case because an alternate's presence during deliberations was a structural error. Alternatively, if the Court declined to presume prejudice, Newton contended that he suffered actual prejudice because had his attorney objected to the presence of the alternate juror, he would have been entitled to an automatic reversal on appeal.

To establish an ineffective-assistance-of-counsel claim under *Strickland*, a petitioner must show that: (1) his counsel's performance was deficient; and (2) he was prejudiced by that deficient performance. The Court noted that there are two ways to establish prejudice under Strickland: (1) actual prejudice; and (2) fundamental unfairness. The Court explained that the U.S. Supreme Court recently rejected the argument that *Strickland* prejudice should be presumed in cases involving structural error in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). Instead, the Supreme Court held that a petitioner bringing an ineffective-assistance claim must still show prejudice. The Supreme Court assumed, without reaching the issue, that the prejudice prong could be satisfied if the attorney's errors were "so serious as to render [the] trial fundamentally unfair"—a category of structural error described by the *Weaver* Court.

Applying *Weaver*, the Court concluded that to succeed on his ineffective-assistance-of-counsel claim, Newton had to establish *Strickland*'s deficient performance and prejudice prongs. Because courts need not address these prongs in order and may dispose of a claim if the petitioner has not satisfied one of the prongs, the Court analyzed the prejudice prong and did not address the performance prong.

Turning to the merits of Newton's claim, the Court explained that he could establish prejudice one of two ways. He could either show that: (1) but for his attorney acquiescing to the alternate's presence during deliberations, the outcome of his trial would have been different; or (2) that the alternate's presence in the jury room rendered his trial fundamentally unfair.

The Court assumed for the purposes of its analysis that the presence of the alternate juror constituted structural error, and therefore looked to whether the error led to fundamental unfairness in Newton's case. Distinguishing *Stokes*, the Court reasoned that in Newton's case his attorney consented to the alternate juror's presence during deliberations, provided that she was instructed not to participate. Unlike *Stokes*, before the jury began deliberations, the court expressly instructed the alternate not to participate in deliberations and instructed the jurors not to let the alternate participate in deliberations.

Next, the Court discussed *Olano*, 507 U.S. 725 (1993), which although a direct appeal, the Court found instructive. In *Olano*, the defendants' attorneys agreed to let alternates sit in on deliberations, and the trial court instructed them not to participate. On appeal, the Supreme Court declined to presume prejudice and held that the unobjected-to presence of alternate jurors during deliberations did not warrant reversal. The Court reasoned that in *Newton*'s case, similar to *Olano*, the trial court instructed both the alternate and the actual jurors that the alternate was not to participate in deliberations. Like *Olano*, the Court presumed that the jury followed the court's instructions that the alternate not participate in deliberations and did not consider an alternate's presence sufficient to "chill" deliberations, especially given that she was instructed not to participate. Thus, the Court concluded that the mere presence of an alternate during jury deliberations—with the express consent of defense counsel and strict instructions to the juror to listen only— was not "fundamentally unfair."

The Court found that Newton also failed to establish actual prejudice. Because reviewing courts presume that the trial court would have acted according to the law, the Court assumed that the court would have sustained Newton's attorney's objection to the alternate, and the alternate would have been excused.

Accordingly, Newton's ineffective-assistance-of-trial-counsel claim under the Sixth Amendment and under Article 21 of the Maryland Declaration of Rights failed.

The Court further held that Newton's appellate counsel was not ineffective. Although Newton's appellate counsel's performance may have been deficient in failing to raise the alternate juror issue on appeal, he was not prejudiced by her performance. Because the issue was not preserved at trial, Newton would only have prevailed on the claim if the court concluded that it was plain error. Therefore, the Court examined the viability of the alternate juror claim on appeal. The Court explained that it rarely finds plain error, and *Stokes* indicated that the presence of an alternate may not be plain error. Given the factual similarities of Newton's case with *Olano*—his attorney consented to the procedure and the alternate was instructed not to participate in deliberations—the Court concluded that a Maryland appellate court reviewing Newton's case would likely not find the presence of the alternate to be plain error. Thus, Newton was not prejudiced by his appellate counsel's failure to raise the issue on appeal. Accordingly, Newton's ineffective-assistance-of-appellate-counsel claim under the Sixth Amendment and under Article 21 of the Maryland Declaration of Rights failed.

Schneider Electric Buildings Critical Systems, Inc. v. Western Surety Company, No. 96, September Term 2016, filed July 28, 2017. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2017/96a16.pdf

CONTRACTS – ARBITRATION CLAUSES – INCORPORATION BY REFERENCE

Facts:

In May 2009, Petitioner Schneider Electric Buildings Critical Systems, Inc. ("Schneider") entered into a contract with National Control Services, Inc. ("NCS"), an electrical subcontractor ("Master Subcontract Agreement"). The Master Subcontract Agreement included a mandatory arbitration clause, which provided that disputes between the contractor and subcontractor would be subject to arbitration.

That October, Schneider entered into a subcontract with NCS to perform work on a project ("NCS Subcontract"). The NCS Subcontract incorporated the entire Master Subcontract Agreement, including the arbitration clause, by reference. It also required NCS to furnish a performance bond for 100 percent of the NCS Subcontract value. NCS obtained a performance bond ("the Bond") from Respondent Western Surety Company ("Western"). Referring to the NCS Subcontract, the Bond stated that the "Contractor and the Surety, jointly and severally, bind themselves . . . to the Owner for the performance of the Construction Contract, which is incorporated herein by reference." By incorporating the NCS Subcontract, the Bond also incorporated the Master Subcontract Agreement, including the arbitration clause.

During construction, a dispute arose between Schneider and NCS. In February 2014, Schneider filed a demand for arbitration with NCS. Two months later, it amended the demand to include Western. Western filed a petition in the Circuit Court for Howard County seeking a stay of arbitration pursuant to Maryland Code (1957, 2013 Repl. Vol.), § 3-208 of the Courts and Judicial Proceedings Article. Western also requested that the court issue a declaratory judgment stating, in part, that Western was not bound by the arbitration clause. The case was transferred to Harford County.

In the Circuit Court for Harford County, Western filed a motion for partial summary judgment asking the court to stay the arbitration proceedings. In a memorandum opinion, the Circuit Court granted partial summary judgment in favor of Western, holding that it could not be compelled to participate in the pending arbitration proceedings between Schneider and NCS. Schneider appealed. The Court of Special Appeals affirmed.

Held: Affirmed.

First, the Court of Appeals rejected Schneider's argument that because the FAA governs the arbitration clause, the court must apply a presumption in favor of arbitration. Instead, the Court applied state contract law to determine whether an agreement to arbitrate existed between the parties.

The Court held that the term "performance" within the Bond's first paragraph, which provided, in relevant part, "[t]he Contractor and the Surety, jointly and severally, bind themselves . . . to the Owner for the performance of the Construction Contract," did not bind Western to the arbitration clause. The Court found that the use of the term "perform" in subsequent Bond provisions refers to the performance of the work NCS agreed to complete and not to every contractual provision in the incorporation-by-reference chain.

The Court also explained that the language within the arbitration clause unambiguously limited its application to disputes between Schneider and NCS. That section of the Master Subcontract Agreement was explicitly labeled "Disputes between Contractor and Subcontractor." The clause specifically used the terms "Contractor," "Subcontractor," and "parties." An earlier provision within the contract defined "Contractor" as Schneider and "Subcontractor" as NCS. "Parties" was defined as "Contractor" and "Subcontractor." Moreover, the term "surety" was used in other provisions of the Master Subcontract Agreement—"surety" and "Subcontractor" were clearly not intended to be interchangeable.

Lastly, the Court held that a clause within the Bond providing for legal remedy demonstrates the parties' intent to litigate disputes arising under the Bond, not arbitrate them. Accordingly, it affirmed the decision of the Court of Special Appeals.

State of Maryland v. Anthony Allen Crawley, No. 65, September Term 2016, filed August 2, 2017. Opinion by Barbera, C.J.

http://www.courts.state.md.us/opinions/coa/2017/65a16.pdf

CRIMINAL LAW – PLEA AGREEMENT – MANDATORY LIFE SENTENCE – CORRECTING AN ILLEGAL SENTENCE

Facts:

Respondent, Anthony Allen Crawley, was charged with first degree felony murder and armed robbery stemming from his involvement in the 1997 armed robbery and murder of a District of Columbia policeman. In exchange for his agreement to testify truthfully against his two co-actors, Crawley agreed to plead guilty to both charges.

At the outset of the plea hearing, counsel for Crawley made the following request: "We are asking the Court to bind itself to an agreement reached between the State and the Defense that the sentence in this case would be life, which the Court would be required to impose, but that all but thirty-five years would be suspended on the felony murder charge." The plea agreement, which was read at the hearing, provided in pertinent part:

> The State, the Court, and the Defendant agree that the Defendant shall be sentenced after the conclusion of the trials of codefendants Antwaun Brown and Donovan Strickland, to life suspend all but 35 years for the aforesaid felony murder charge. The underlying charge of robbery with a deadly weapon will merge, by operation of law, with the felony murder charge at sentencing.

The plea agreement did not mention probation, and the court did not utter the term "probation" during the hearing, except in the course of a somewhat lengthy colloquy with Crawley concerning the impact that his guilty plea in the present case could have on his then-current status in the criminal justice system. Neither the State nor defense counsel referred to probation in connection with the sentence presented by the plea, and neither brought up the necessity to have a period of probation attached to the suspended portion of the life sentence. The court formally accepted the plea agreement.

At the sentencing hearing, the court reiterated the agreement in imposing the sentence:

> The sentence of this Court is, as to Count One, first degree felony murder, that you be sentenced to life in prison. Pursuant to the plea agreement, all but 35 years is suspended, and that sentence is to commence as of February 27th, 1997.
>
> As to Count Two, robbery with a deadly weapon, the sentence is that the Court rules that no sentence can be imposed because under felony murder robbery with a deadly weapon merges with Count Number One.

No mention of probation was made by anyone at any time during the sentencing hearing.

In May 2011, Crawley filed a "Memorandum of Law" requesting the circuit court to "Revise Judgment of an Illegal Sentence." Crawley asserted that the trial court's failure to impose a period of probation precluded the sentence from having the status of a split sentence. Crawley argued that, under *Cathcart v. State*, 397 Md. 320, 330 (2007), the omission of a period of probation rendered his sentence a fixed term-of-years sentence of 35 years. The circuit court treated Crawley's pleading as a motion to correct an illegal sentence.

The motion came on for a hearing and the circuit court ruled that, pursuant to *Greco v. State*, 427 Md. 477, 513 (2012), Crawley's sentence was an illegal sentence and a new sentence was necessary to correct the illegality. At the resentencing hearing, the court vacated the then-extant sentence and resentenced Crawley to life imprisonment, all but 35 years suspended, with four years of supervised probation.

The panel majority of the Court of Special Appeals, in an unreported opinion, reversed the judgment of the circuit court. The panel reasoned that because the sentence was imposed pursuant to a plea agreement, and the evidence did not establish that Crawley contemplated probation when he entered into the plea agreement, that element of the sentence imposed at resentencing must be removed. *Crawley v. State*, No. 467, Sept. Term, 2013, slip op. at 20-21 (Md. Ct. Spec. App. Aug. 8, 2016). The panel majority vacated the sentence imposed by the circuit court and remanded the case for a hearing, at which Crawley would have the opportunity to negotiate a probationary period with the State. *Id*. at 21.

Held: Reversed.

The Court explained that because Crawley's sentence did not include a period of probation, Crawley's sentence would be converted to a 35-year term-of-years sentence—an illegal sentence that violates the statutorily-prescribed minimum sentence of life imprisonment for first degree murder. *See Greco*, 427 Md. at 513; *Cathcart*, 397 Md. at 330.

The Court held that a substantively illegal sentence must be corrected regardless of whether the sentence has been negotiated and imposed as part of a binding plea agreement. The principles established by the Court in *Cuffley v. State*, 416 Md. 568 (2010), and its progeny, dealing with ambiguous sentencing terms of a plea agreement, therefore had no application in Crawley's case.

The Court concluded that the circuit court followed the dictates of *Greco* by vacating Crawley's original unlawful sentence, reimposing the mandatory life sentence with all but 35 years suspended, and adding a period of probation to the suspended portion of that sentence. *See* 427 Md. at 513.

Eddie Lee Savage, Jr. v. State of Maryland, No. 82, September Term 2016, filed August 4, 2017. Opinion by Greene, J.

Barbera, C.J., Adkins and McDonald, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2017/82a16.pdf

CRIMINAL JUSTICE – *FRYE-REED* – OPINION OF NEUROPSYCHOLOGIST

CLOSING ARGUMENT – FIFTH AMENDMENT – RIGHT TO REMAIN SILENT

Facts:

The defendant, Eddie Lee Savage, Jr., was charged with second degree murder, attempted second degree murder and associated offenses stemming from a shooting incident that occurred at Mr. Savage's home. An altercation between Mr. Savage and Joshua Sparks resulted in Mr. Savage striking Mr. Sparks while he was seated in a vehicle. Mr. Sparks exited the vehicle, and several individuals attempted to restrain him. Separately, other individuals who were present, including Mr. Hills, attempted to restrain Mr. Savage. As Mr. Hill and another friend were corralling Mr. Savage into the garage, he brandished a knife then retreated into his house. Moments later, Mr. Savage emerged from the house with a gun and started to fire shots towards Mr. Sparks. One bullet struck, and killed, the father of Mr. Sparks.

Prior to trial, Mr. Savage's counsel notified the Court that Mr. Savage would be offering expert testimony from a board certified neuropsychologist who would testify about the psychological and cognitive effects of a past brain injury and lasting trauma that Mr. Savage suffered as a result of a gunshot wound to the head more than ten years earlier. The Circuit Court held a *Frye-Reed* hearing on the admissibility of the neuropsychologist's testimony.

The expert, Dr. William Garmoe, provided the Circuit Court with details about his method of assessing Mr. Savage, the tests he administered, and his conclusions as a result of the testing. The expert explained that, based on his testing and interview of Mr. Savage, he concluded that Mr. Savage "would be more likely to perceive himself to be facing an imminent threat and have greater difficulty controlling his reactions" and that Mr. Savage "views the world through an untrusting and suspicious perspective, and often is hyper-vigilant to possible threats." Defense counsel explained that Dr. Garmoe's testimony would be used to support a theory of imperfect self-defense. Although the Circuit Court qualified Dr. Garmoe as an expert, Dr. Garmoe indicated that his conclusions as to traumatic brain injury are debated endlessly in his scientific community.

The Circuit Court ruled that the *Frye-Reed* test had not been met and precluded Dr. Garmoe's testimony with respect to his conclusion about Mr. Savage's reactions in situations of chaos and stress.

Thereafter, during closing argument of Mr. Savage's trial, the prosecutor argued that Mr. Hill's testimony with regard to Mr. Savage's theory of self-defense defied logic because Mr. Hill had not previously told the police that Mr. Savage was acting in self-defense. Defense counsel objected to the prosecutor's remarks and argued that the prosecutor was questioning Mr. Savage's Fifth Amendment right to remain silent. The trial court overruled the objection.

The jury convicted Mr. Savage of second degree murder, attempted second degree murder, and reckless endangerment. In an unreported opinion, the Court of Special Appeals affirmed with the exception of the conviction of reckless endangerment.

Held: Affirmed.

The Court of Appeals held that the trial court properly excluded the admission of Dr. Garmoe's testimony. The Court concluded that Dr. Garmoe's testimony failed to bridge the "analytical gap" between the accepted science and Dr. Garmoe's ultimate conclusions on the basis of that science. Defense counsel repeatedly suggested that Dr. Garmoe would testify at trial about how he reached his conclusions about Mr. Savage's views of the world and his conduct on the day of the shooting based on the results of a Personality Assessment Inventory of Mr. Savage. Defense counsel, however, did not solicit adequate details from Dr. Garmoe at the *Frye-Reed* hearing to explain how his analysis of the Personality Assessment Inventory led to his conclusion about Mr. Savage's reactions during circumstances of chaos and stress.

The Court of Appeals assumed that Dr. Garmoe's approach is generally accepted within the relevant scientific community but determined that his opinion failed to meet the "analytical gap" that is necessary for proper admission of expert testimony under *Frye-Reed*.

Additionally, the Court of Appeals held that a prosecutor's comments during closing argument that referenced the witness's silence about a claim for self-defense did not abridge Mr. Savage's Fifth Amendment right to remain silent because the prosecutor's comment were directed to the witness's testimony, not the defendant's testimony.

Karla Louise Porter v. State of Maryland, No. 88, September Term 2016, filed August 7, 2017. Opinion by Adkins, J.

Greene, McDonald and Getty, JJ., dissent.

http://mdcourts.gov/opinions/coa/2017/88a16.pdf

HOMICIDE – IMPERFECT SELF-DEFENSE – MD. CODE (1991, 2013 Repl. Vol.), § 10-916 OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE ("CJP") – BATTERED SPOUSE SYNDROME

CONSPIRACY TO COMMIT MURDER – IMPERFECT SELF-DEFENSE

SOLICITATION TO COMMIT MURDER – IMPERFECT SELF-DEFENSE

Facts:

Petitioner Karla Louise Porter met her husband, William Raymond Porter ("Ray"), in 1982. After they were married in 1986, Ray began physically and verbally abusing Porter. At trial, Porter testified to numerous instances of violent abuse throughout their 24-year marriage, including that her husband had: beaten her with a belt; pushed her head into her mother's headstone and told her that she "should be with [her] dead mother"; stabbed a drill into her stomach; smeared dog excrement across her back; shoved her head into leaking sewage; and given her a black eye. She also testified that on multiple occasions he had threatened to kill her and forced her to drink water until she urinated on herself. Porter testified that she did not call the police or leave Ray after any of these instances of abuse because she was afraid he would retaliate.

Porter testified that Ray's physical and verbal abuse escalated in the year preceding his death. During this time, Ray repeatedly expressed a desire to move to Florida. Porter testified, "I felt if I went he was going to kill me there in Florida. I had no family there, no children." In early 2010, Ray told Porter that he did not want to take their children or his parents with them when they moved. He pointed his gun at her head and said, "Maybe I am not even going to take you. I should just kill you now." At the end of February 2010, Ray hit Porter across the back with a crutch. Porter testified that in the weeks leading up to Ray's death she was "terrified almost on a daily basis." She explained that "things were getting so bad, things were just out of control. . . . It was just day-to-day—it wasn't even day-to-day. It was minute-to-minute. Always walking on eggshells."

Beginning in mid-2009, Porter approached multiple people about killing her husband. She asked one of Ray's coworkers, Tony Fails, to kill him. When asked why she solicited Fails to kill Ray, Porter testified, "It was getting so bad that I knew that Ray was going to kill me and I just wanted to kill him first." Later, Porter's nephew put her in touch with Walter Bishop, who

agreed to kill her husband in exchange for $400. As to her mental state on the day her husband was shot, Porter testified, "In my mind, I knew he was going to kill me at any point."

On the morning of Ray's death, March 1, 2010, Ray went to the gas station the couple owned, and Bishop came in and shot Ray twice. About a week later, Porter was arrested for her role in Porter's killing. She admitted to police that she had paid Bishop to "beat [ ] up" her husband. Porter was charged with first-degree murder, conspiracy to commit first-degree murder, three counts of solicitation to commit first-degree murder, and use of a handgun in the commission of a crime of violence.

During the trial, Porter presented two expert witnesses to testify as to her mental state at the time of Ray's killing. A forensic psychiatrist concluded that Porter was suffering from major depressive disorder, posttraumatic stress disorder, and battered spouse syndrome as defined in CJP § 10-916. A clinical psychologist, testified at length about the effects of chronic abuse on an individual's mental state, including describing common reasons women do not leave their abusers. She testified that battered woman syndrome can "augment" a woman's perception of the danger that she faces—it can make it seem more threatening. She concluded to a reasonable degree of psychological certainty that Porter "experienced repeated abuse in the context of her marriage" and suffered from psychological effects as a result. Porter also presented lay witness testimony describing Ray's abuse.

At the conclusion of the trial, the State proposed an instruction on imperfect self-defense for the court to use if it decided Porter was entitled to one. The State added language to the pattern jury instruction on imperfect self-defense because it claimed that the instruction did not include all of the required self-defense elements. Porter objected to this change. She also requested that the jury be instructed to consider imperfect self-defense as applied to solicitation and conspiracy—not just murder. The court read the State's proposed instruction:

> If the Defendant actually believed that she was in immediate and imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, and the Defendant used no more force than was reasonably necessary to defend herself in light of the threatened or actual force, and that retreat from the threat was unsafe, and that she was not the aggressor, the Defendant's actual, though unreasonable belief, is a partial self-defense and the verdict should be guilty of voluntary manslaughter rather than murder.

As to Porter's request regarding solicitation and conspiracy, the court found that imperfect self-defense could apply to those crimes. To address this, it told the jury, "Self-defense is a complete defense to the crimes charged in this case."

During deliberations, the jury submitted a number of questions to the court, including: (1) "Can we see the language of the battered spouse syndrome statute?"; (2) "Clarify definitions of imminent and immediate." The court declined to provide the language of the battered spouse syndrome statute and instructed the jurors to give the words "imminent" and "immediate" "their common and ordinary meaning."

The jury found Porter guilty of first-degree murder, conspiracy to commit first-degree murder, three counts of solicitation to commit first-degree murder, and use of a handgun in commission of a crime of violence. She was sentenced to life plus 40 years in prison. Porter filed a motion for a new trial, which was denied. The Court of Special Appeals held that Porter had not presented sufficient evidence to be entitled to an imperfect self-defense instruction, and thus any error in delivering such an instruction was harmless.

Held: Reversed.

The State conceded that the trial judge gave an erroneous jury instruction on imperfect self-defense, and the Court of Appeals held that this error was not harmless. The trial court misstated the law regarding the use of force and incorrectly implied that the jury should objectively evaluate whether Porter could safely retreat.

The Court of Appeals rejected the State's argument that Porter had not presented any evidence that she feared imminent or immediate harm at the time her husband was killed, and, thus, she was not entitled to an instruction as to imperfect self-defense. After evaluating how other jurisdictions have defined imminent and immediate, the Court explained that an imminent threat is not dependent on its temporal proximity to the defensive act. Rather, it held, an imminent threat is one that places the defendant in imminent fear for her life.

The Court further held that distinguishing between "imminent" and "immediate" gives full effect to the General Assembly's intent in passing the battered spouse syndrome statute. The statute allows a defendant to present evidence regarding her abuse "[n]otwithstanding evidence that [she] was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense." CJP § 10-916(b). The Court reasoned that if it were to hold that a battered spouse who kills in a non-confrontational setting is not entitled to a self-defense instruction, it would render all or some of the evidence admissible under the battered spouse syndrome statute irrelevant. Without a jury instruction as to self-defense, it continued, the admission of evidence regarding battered spouse syndrome and the victim's abuse would be pointless.

To determine whether allowing Porter to assert imperfect self-defense strays from the reasoning behind the doctrine, the Court next analyzed the purpose of the "imminent or immediate" danger requirement. It explained that two rationales are commonly asserted to support limiting self-defense to threats of "imminent or immediate" danger: (1) a non-imminent threat may never come to fruition; and (2) there are other ways to address a non-imminent threat besides responding with defensive force. The Court reasoned that the reality of abusive relationships shows that allowing a claim of self-defense when a battered woman kills in a non-confrontational situation does not undermine these rationales.

Next, the Court rejected the State's argument that Porter was not entitled to an imperfect self-defense instruction because she hired a third party to kill her husband. The Court explained that imperfect self-defense negates the element of malice, not premeditation. A woman claiming

imperfect self-defense does not have to show that she acted spontaneously. The means by which a woman takes defensive action against her abuser does not affect whether she actually believed she was in imminent danger at the time of the killing. The Court held that a woman who recruits help in taking defensive action does not forfeit her right to claim imperfect self-defense by doing so.

The Court of Appeals held that Porter had presented at least "some evidence" that she feared imminent harm on the morning her husband was shot, and referenced her testimony, in which she described living in a constant fear of danger.

Lastly, the Court rejected the State's argument that imperfect self-defense does not apply to solicitation and conspiracy to commit murder. Because both of those crimes require malice, which imperfect self-defense negates, the Court held that imperfect self-defense can be asserted as a defense to those crimes. Accordingly, due to the erroneous instruction as to imperfect self-defense, the Court held that Porter's solicitation and conspiracy convictions must also be vacated and remanded for a new trial.

Timothy Alan Moats v. State of Maryland, No. 89, September Term 2016, filed August 31, 2017. Opinion by Barbera, C.J.

Greene and Adkins, JJ., concur.

http://www.courts.state.md.us/opinions/coa/2017/89a16.pdf

CRIMINAL LAW – FOURTH AMENDMENT – SEARCH WARRANT FOR CELL PHONE – SUBSTANTIAL BASIS

Facts:

In early January 2015, Petitioner distributed to three other teenagers marijuana and a prescription drug. Later that night, the four teenagers went to a party, where it was later alleged that one member of the group, A.D.C., was sexually assaulted. Two weeks later, Sergeant Zimmerman of the Garrett County Sheriff's Office interviewed A.D.C. and the others, including Petitioner.

Petitioner told Sergeant Zimmerman that he and the others had used drugs, but he denied any involvement in A.D.C.'s sexual assault. Relying in part on that admission, the police obtained a warrant to arrest Petitioner on the drug-related charges. Petitioner was arrested on January 23, 2015, and transported to the Garrett County jail. The police seized the cell phone he was carrying at the time of the arrest. Petitioner was released from custody the next day. His cell phone was not returned to him.

Two days after Petitioner's release, Sergeant Zimmerman prepared an application and affidavit for a warrant to search Petitioner's cell phone. The affidavit included Petitioner's admission to drug distribution. Sergeant Zimmerman further stated in the affidavit that based on his training and experience in investigating drug-related offenses, individuals who participate in "such crimes" communicate via cell phones. A judge issued the warrant.

In the course of a forensic investigation of Petitioner's cell phone, the police discovered sexually explicit photographs and a video of Petitioner's girlfriend taken in January, 2015, when Petitioner's girlfriend was fifteen years old. Petitioner, eighteen years old at that time, was indicted in the present case with three counts relating to child pornography and one count of second-degree assault.

Before trial, Petitioner filed a motion to suppress the cell phone, photographs, and video, arguing that his arrest was not supported by probable cause and the cell phone and its contents must be suppressed. Petitioner also argued that, even if that arrest was lawful, the retention of his cell phone after his release was an illegal warrantless seizure. Petitioner also attacked the search warrant for not setting forth probable cause to conduct the search.

The circuit court rejected Petitioner's argument that his arrest was not supported by probable cause and rejected the argument that the evidence must be suppressed. The circuit court also

rejected Petitioner's contention that the police did not have probable cause to retain the cell phone following his release. Finally, the court concluded that the warrant to search the cell phone was supported by probable cause and denied Petitioner's motion to suppress. Petitioner was tried on an agreed statement of facts on one count of possession of child pornography. The court found Petitioner guilty.

The Court of Special Appeals affirmed the judgment of the circuit court. *Moats v. State*, 230 Md. App. 374 (2016). The court held that the police justifiably retained Petitioner's cell phone after his release in anticipation of seeking a warrant to search it. *Id*. at 388. The court next held that the affidavit in support of the warrant provided a substantial basis to issue the warrant and that, even if there was not a substantial basis to issue the warrant, the police acted in good faith reliance upon it. *Id*.

Held: Affirmed.

The Court first held that Petitioner's cell phone was seized and retained pursuant to the search incident to arrest doctrine under *Riley v. California*, 134 S. Ct. 2473 (2014). The Court held that the police were permitted to seize Petitioner's cell phone pursuant to his lawful arrest and retain the cell phone until three days later when they obtained a warrant to search it, despite Petitioner's release from custody in the interim.

The Court noted the "great deference" owed to the warrant-issuing judge's probable cause determination, *United States v. Leon*, 468 U.S. 897, 914 (1984), which will be upheld on appeal if the warrant-issuing judge had a "substantial basis" to conclude "that a search would uncover evidence of wrongdoing," *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

The Court held that the affidavit in support of the search warrant provided a substantial basis for the warrant-issuing judge to find probable cause to search Petitioner's cell phone because the affidavit detailed allegations of Petitioner's involvement in drug-related activity and a sexual assault; Petitioner confessed that he distributed drugs; and the officer stated that, based on his training and experience as outlined in the warrant affidavit, individuals who participate in "such crimes" communicate via cell phones. The Court held that the suppression court did not err in denying Petitioner's motion to suppress the images.

Timothy Stevenson v. State of Maryland, No. 92, September Term 2016, filed August 31, 2017. Opinion by Barbera, C.J.

Greene and Adkins, JJ., concur.

http://www.courts.state.md.us/opinions/coa/2017/92a16.pdf

CRIMINAL LAW – FOURTH AMENDMENT – SEARCH WARRANT OF A CELL PHONE – SUBSTANTIAL BASIS

CRIMINAL LAW – SEARCH WARRANTS – GOOD FAITH EXCEPTION

Facts:

On July 22, 2015, an officer was called to the Moose Lodge in Glen Burnie, MD, where he found a man lying on the ground with life-threatening injuries, his pants around his ankles, and no wallet or shoes. On July 23, 2015, Appellant Timothy Stevenson was arrested in connection with a separate assault and robbery. At the time of his arrest, Appellant was found with his own cell phone and the victim's wallet and shoes.

Detective Brian Houseman sought and received a warrant to search Appellant's cell phone for:

> Any and all information, including but not limited to all pictures, movies, electronic communications in the form of text, numeric, and voice messages, detailed phone records to include all incoming/outgoing calls and Facebook messages contained within phone.

The affidavit was limited to information stored in the phone during the eighteen-hour period during which the assault occurred and stated that Appellant had admitted during an interview that he assaulted the victim. Detective Houseman concluded:

> It is through my knowledge and experience that suspects in robberies and assaults will sometimes take pictures, videos and send messages about their criminal activities on their cellular phones.

A judge issued the warrant on January 6, 2016. Upon executing the warrant, the police downloaded the cell phone data and obtained photos of Mr. Pethel beaten on the ground.

Appellant filed a motion to suppress the photos. At the suppression hearing, Appellant contended that the warrant lacked specific facts connecting the crime and the cell phone. The State responded that it is now "common knowledge" that people take pictures and videos on their cell phones of the crimes they commit. The State also emphasized the detailed facts set forth in the affidavit.

The circuit court denied the motion. The court concluded that the warrant contained adequate facts and details to satisfy the probable cause requirement. The court stated: "This Court must give due deference to the training and experience of the officer in this case. The judges who issued the warrants correctly did so as well."

Appellant elected a bench trial, and the court found him guilty of first-degree assault, second-degree assault, robbery, reckless endangerment, and theft of property valued at less than $1,000. Appellant appealed and, while that appeal was pending in the Court of Special Appeals, filed a petition for writ of certiorari, which was granted before oral argument was held in the Court of Special Appeals.

Held: Affirmed.

The Court first held that the warrant-issuing judge had a substantial basis for issuing the warrant. An affidavit in support of a search warrant need only provide "a fair probability" that evidence will be found in a particular place, and that, if the judge had a "substantial basis" to conclude that a search would uncover evidence, "the Fourth Amendment requires no more." *Gates*, 462 U.S. 213, 236, 238 (1983). This standard was met through the details in the affidavit, Detective Houseman's statement of his knowledge and experience that criminals sometimes take photos of their crimes, and the Supreme Court's recognition that "many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives . . . [and] a broad array of private information never found in a home . . . ." *Riley v. California*, 134 S. Ct. 2473, 2490–91 (2014). The suppression judge therefore properly denied Appellant's motion to suppress.

The Court further held that, even if there were not a substantial basis for the warrant, the photos fell within the good faith exception to the exclusionary rule from *United States v. Leon*, 468 U.S. 897 (1984). This exception states that, even if a warrant was invalid for lack of probable cause, the reviewing court will not suppress evidence obtained during execution of that warrant if the officers relied in an objectively reasonable way upon the warrant issued by a detached and neutral magistrate. *Id*. at 922–24. The information in the affidavit in this case was more than "bare bones"; therefore, the police relied in good faith upon the warrant when executing it.

Fredia Powell, et al. v. Maryland Department of Health, et al., No. 77, September Term 2016, filed August 28, 2017. Opinion by McDonald, J.

Getty, J., dissents.

http://www.mdcourts.gov/opinions/coa/2017/77a16.pdf

CIVIL PROCEDURE – MOOTNESS – ISSUE CAPABLE OF REPETITION YET EVADING REVIEW

CRIMINAL PROCEDURE – COMMITMENT OF DEFENDANT FOUND INCOMPETENT TO STAND TRIAL AND DANGEROUS AS A RESULT OF A MENTAL DISORDER

DUE PROCESS – COMMITMENT OF DEFENDANT IN CRIMINAL CASE FOUND INCOMPETENT TO STAND TRIAL AND DANGEROUS

Facts:

The Appellants in this case were each defendants in separate criminal cases and were each determined by the circuit court to be incompetent to stand trial and dangerous to self or others. As a result, the circuit court committed each of them to a State psychiatric facility pursuant to Maryland Code, Criminal Procedure Article ("CP"), §3-106. Each commitment order required the defendant to be admitted to a facility operated by the Maryland Department of Health ("MDH") within one day of the order. Because its inpatient facilities were "over census" and it had established a waiting list for admission, MDH failed to admit the defendants by the deadlines set forth in the commitment orders, but rather after delays ranging from 12 to 36 days. The Appellants collectively brought this action challenging the MDH's policy. The complaint sought relief on two grounds: (1) that MDH violated CP §3-106 by failing to meet the deadlines in the commitment orders and 2) that MDH's conduct violated the Appellants' Due Process rights under Article 24 of the Maryland Declaration of Rights.

MDH filed a motion to dismiss the complaint on the basis that the case was moot (because all of the appellants had been admitted to a facility) and for failure to state a claim in which relief could be granted. The circuit court did not address the mootness issue, but dismissed the complaint on the ground that it failed to state a claim. The Appellants filed a timely notice of appeal. Prior to consideration of the appeal by the Court of Special Appeals, the Appellants filed a petition for a writ of certiorari with the Court of Appeals, which was granted.

Held:

The Court of Appeals first held that, although each Appellant's individual claim for injunctive relief was moot, the claims for declaratory relief would be considered under an exception to the mootness doctrine for issues that are "capable of repetition, yet evading review."

As to the first count of the complaint, the Court held the MDH's failure to comply with the deadlines set forth in the commitment orders may have violated the respective order as to each Appellant, but did not violate CP §3-106 itself. The Court noted that the statute itself does not prescribe a deadline for admission of an incompetent defendant to a psychiatric facility; nor does it authorize a court to do so. Thus, the first count of the complaint – which alleged a violation of the statute – did not state a claim upon which relief may be granted and was properly dismissed by the circuit court.

The Court further held that, to the extent that the second count of the complaint was a "facial" due process challenge the MDH policy, it also failed to state a claim upon which relief may be granted. A facial challenge would only succeed if there was no set of circumstances in which a delay in admission would be constitutional. However, to the extent that the second count alleged that the MDH policy violated due process "as applied," it did state a claim upon which relief may be granted, as due process requires that a committed defendant be admitted to a facility within a reasonable period of time. The Court remanded the case to the circuit court for further consideration of that issue.

Natasha Burak v. Mark Burak, et al., No. 97, September Term 2016, filed August 29, 2017. Opinion by Hotten, J.

Watts, J. joins judgment only.
McDonald and Getty, JJ. dissent.

http://mdcourts.gov/opinions/coa/2017/97a16.pdf

FAMILY LAW – CUSTODY – THIRD-PARTIES – PERMISSIVE INTERVENTION

FAMILY LAW – CUSTODY – THIRD-PARTIES – UNFITNESS

FAMILY LAW – CUSTODY – THIRD-PARTIES – EXTRAORDINARY CIRCUMSTANCES

Facts:

Natasha and Mark Burak were married in 2006, and two years later, they had a child. In early 2009, Natasha and Mark engaged in a polyamorous relationship with "M". M subsequently moved into the marital home with Natasha, Mark, and the child. In addition to their sexual activities, the triad also took a variety of drugs together, including marijuana, mushrooms, ecstasy and cocaine. Prior to engaging in illicit activity, they took the child to his paternal grandparents' home. In December 2012, the sexual relationship between Natasha and M ended, but the pair continued to spend time together and M continued to have a sexual relationship with Mark. In May 2013, after two domestic violence incidents took place between Natasha and Mark, Natasha filed for, and received a Temporary Restraining Order against Mark, which required Mark to vacate the marital home. At the end of June 2013, M also vacated the marital home. Natasha subsequently filed for divorce in July 2013. On January 14, 2014, Mark and Natasha entered into a *pendente lite* consent agreement that ordered Natasha to maintain physical custody of the child with Mark retaining the right to visitation, facilitated by Mark's parents. The agreement also required both Natasha and Mark to submit to random drug testing. The same day, Natasha and Mark took a drug test, which resulted in Natasha testing positive for marijuana and Mark testing negative for all drugs. On February 20, 2014, the custody evaluator assigned to the case issued a report, which recommended that both Mark and Natasha receive a mental health evaluation, continue to undergo drug testing, and that Natasha should continue to have primary custody of the child. On April 24, 2014, the paternal grandparents filed a motion to intervene in the custody action between Natasha and Mark, seeking custody of the child. Despite opposition from Natasha, the circuit court granted the grandparents' motion to intervene on July 25, 2014. On September 4, 2014, the child exhibited behavior in school that included him kicking the assistant principal and making a threat against the school. In response, Natasha was called to the school. She spoke to both the school principal and school guidance counselor, who referred the child to the Montgomery County Crisis Center for evaluation. Rather than take the child directly to the Crisis Center, Natasha allowed the child to go with his paternal grandmother to their house, but did not inform the grandmother of the school incident or that she had received a

referral to the Crisis Center. The grandparents subsequently learned of the referral from Mark, and the grandmother took the child to the Crisis Center to be evaluated.

The merits hearing was held from September 15 through September 19, 2014, after which, the circuit court orally awarded custody of the child to the paternal grandparents. The circuit court found that both Mark and Natasha were unfit parents and that exceptional circumstances existed in this case sufficient to remove the presumption favoring parental custody of their biological child. The circuit court found that Natasha was unfit because the hearing judge determined that she: (1) was not truthful throughout the hearing; (2) did not adhere to the requests from the Best Interest Attorney; (3) was likely to continue taking drugs; (4) had told M and Mark that she had been diagnosed with Dissociative Identity Disorder, although there was no evidence to support that diagnosis; (5) allowed the adoptive parents of her biological daughter to move into the marital home with their biological daughter and multiple animals; (6) was selfish in not allowing the child to go on vacation with his paternal grandparents; (7) did not handle the child's referral to the Crisis Center appropriately; (8) failed to make adjustments to her schedule to accommodate the child's behavioral difficulties; and (9) repeatedly made excuses for everything in her life, including her drug use and polyamorous sexual activities.

The hearing judge also determined that exceptional circumstances existed by relying on the factors we espoused in *Ross v. Hoffman*, 280 Md. 172, 372 A.2d 582 (1977), which are: (1) the length of time a child has been away from the biological parent; (2) the age of the child when care was assumed by the third-party; (3) the possible emotional effect on the child of a change of custody; (4) the period of time which elapsed before the parent sought to reclaim the child; (5) the nature and strength of the ties between the child and the third-party custodian; (6) the intensity and genuineness of the parent's desire to have the child; and (7) the stability and certainty as to the child's future in the custody of the parent. Id. at 191, 372 A.2d at 593. The hearing judge found that: (1) the child had been separated from Natasha and Mark whenever they were using drugs; (2) the paternal grandparents had assumed care of the child since his birth; (3) the relationship between the child and the grandparents was extremely strong; (4) there was no intensity or genuineness on Natasha's part in having custody of the child; and (5) if the child remained in Natasha's care, he would continue to be unstable, would likely fail and remain in crisis, and would be out of the public school system.

On December 30, 2014, the paternal grandparents filed a motion for child support, seeking contribution from both Mark and Natasha. On March 24, 2015, after Natasha filed her opposition to the grandparents' motion, a magistrate issued his findings of fact and conclusions of law regarding the issue of child support. The magistrate found that Maryland law obligates biological parents to support their children and, therefore, the grandparents' resources were not an appropriate consideration in determining the amount of child support Mark and Natasha owed. The magistrate then assessed the income for both Natasha and Mark, finding that Natasha's monthly income was $3,134 and Mark's income from unemployment benefits was $1,820 per month. The magistrate also found that the child had been under the care of both a psychiatrist and psychologist since 2014 and that the child would require long-term psychiatric and psychotherapeutic care due to his diagnoses of Attention Deficit Hyperactivity Disorder, an anxiety disorder, and operational defiant disorder. The magistrate determined that the child was

covered under the grandparents' insurance plan at no additional cost, but because the psychiatrist and psychologist were not included in the network of the insurance plan, the grandparents were required to pay $1,312.50 per month out-of-pocket to cover the child's psychiatric needs. Based on his fact-finding, the magistrate recommended that Natasha pay the grandparents $1,467 per month and that Mark pay the grandparents $629 per month. The magistrate acknowledged that the sums were a significant portion of both Natasha and Mark's monthly incomes, but concluded that the psychiatric and psychotherapeutic expenses paid by the grandparents for the child's care were "extraordinary medical expenses" that warranted the increased payments. On May 26, 2015, the circuit court granted the grandparents' motion for child support and ordered Natasha to pay $1,467 per month and Mark to pay $629 per month in child support to the grandparents.

Held: Reversed.

Court of Appeals held that the paternal grandparents were permitted to permissively intervene in the custody action between Natasha and Mark because they made a prima facie showing that Mark and Natasha were unfit to have custody of the child, and that extraordinary circumstances existed in this case. The Court concluded that there was no procedural bar prohibiting a third-party from permissively intervening in a custody action if the third-party can allege sufficient facts in his or her pleading that, if true, would support a finding of either parental unfitness or the existence of exceptional circumstances that would make custody with the parent detrimental to the best interests of the child. *See McDermott v. Dougherty*, 385 Md. 320, 325, 869 A.2d 751, 754 (2005). The Court determined that the additional pleading requirement balances the constitutional right a parent has in the custody of his or her child, with the reality that there are circumstances where the presumption favoring parental custody is overcome and that the child's best interests are served in granting custody to a third-party. The Court also concluded that the additional pleading requirement will aid the circuit court in considering whether intervention by a third-party would "unduly delay or prejudice the adjudication of the rights of the" biological parents by allowing the circuit court to determine whether the third-party has alleged sufficient facts that, if true, would overcome the constitutional presumption favoring parental custody. See Maryland Rule 2-214(b)(3).

The Court of Appeals also held that the circuit court abused its discretion in finding that Natasha was an unfit parent because the hearing judge's findings of fact were not supported by the record and were, therefore, erroneous. The Court also concluded that the following factors were relevant to a circuit court's consideration of whether a biological parent is unfit within the custody context, including: 1) the parent has neglected the child by manifesting such indifference to the child's welfare that it reflects a lack of intent or an inability to discharge his or her parental duties; (2) the parent has abandoned the child; (3) there is evidence that the parent inflicted or allowed another person to inflict physical or mental injury on the child, including, but not limited to physical, sexual, or emotional abuse; (4) the parent suffers from an emotional or mental illness that has a detrimental impact on the parent's ability to care and provide for the child; (5) the parent otherwise demonstrates a renunciation of his or her duties to care and provide for the

child; and (6) the parent has engaged in behavior or conduct that is detrimental to the child's welfare.

The Court also concluded that the circuit court abused its discretion in finding that exceptional circumstances existed because the hearing judge erred in applying the facts in this case to the *Hoffman* factors referenced, *supra*. The Court acknowledged that the *Hoffman* factors serve merely as a guide in a hearing court's analysis of whether exceptional circumstances exist in a custody case, but determined that because the hearing judge relied exclusively on the factors in finding exceptional circumstances, the Court confined its review to that analysis. Addressing the first *Hoffman* factor, the Court held that for a judge to find the factor supports a finding of exceptional circumstances, there must be evidence that the biological parent gave constructive custody of the child to a third-party over a long period of time. In the case at bar, the record indicated that Natasha had remained present and active in the child's life from his birth through the custody hearing. The Court also concluded that the hearing judge erred in finding that the paternal grandparents had assumed care of the child since his birth, because the hearing judge ignored the facts presented at the hearing reflecting that Natasha was continuously and actively involved in the child's care. The Court also determined the hearing judge erred in finding that if the child remained in Natasha's care, he would likely fail or remain in crisis, because that finding ignored ample testimony indicating that Natasha was responsive to the child's behavioral difficulties and actively engaged with the child's school and her own therapist to identify ways to help the child. The Court also concluded that the hearing judge erred in not making substantive factual findings in regard to the third and fourth *Hoffman* factor, which consider the possible emotional effect on the child of a change of custody and the period of time which elapsed before the parent sought to reclaim the child. *See Hoffman*, 280 Md. at 191, 372 A.2d at 593. The Court acknowledged that the hearing judge did not err in finding that the child's relationship with his grandparents was extremely strong. The Court held that because the circuit court erred in analyzing the *Hoffman* factors, it abused its discretion in finding that exceptional circumstances existed in this case.

Ann McGeehan v. Michael McGeehan, No. 93, September Term 2016, filed August 10, 2017. Opinion by Battaglia, J.

Getty, J., concurs.

http://www.courts.state.md.us/opinions/coa/2017/93a16.pdf

MARRIAGE AND COHABITATION – AGREEMENTS CONCERNING MARRIAGE – POSTNUPTIAL AGREEMENTS – PROPERTY DISPOSITION IN DIVORCE – MD. CODE ANN., FAM. LAW § 8-201(e)(3)(iii)

Facts:

During their marriage, Ann McGeehan, Petitioner, and Michael McGeehan, Respondent, purchased a property in 1998 located on Embassy Park Road in Washington, DC ("Embassy Park"), which was titled initially as tenants by the entirety; a second property in 2000 located in Mason Neck, Virginia ("Mason Neck"), which was titled initially in Mr. McGeehan's name; and a third property in 2002 located on Farside Road in Ellicott City, Maryland ("Farside"), which was titled initially as tenants by the entirety.

In 2005, after Ms. McGeehan discovered that Mr. McGeehan had traded away her inherited stock portfolio, Mr. and Ms. McGeehan simultaneously executed deeds transferring the Embassy Park, Mason Neck, and Farside properties to Ms. McGeehan as her "sole" and "separate" properties. Ms. McGeehan also executed a new will excluding Mr. McGeehan, while Mr. McGeehan signed a waiver of his statutory share.

In 2013, the McGeehans purchased a fourth property located at Log Jump Trail in Ellicott City ("Log Jump"), which was titled as tenants by the entireties and, according to Ms. McGeehan, proceeds from the sales of the Farside and Embassy Park properties were contributed to Log Jump.

In October of 2014, Mr. and Ms. McGeehan separated. In December of 2014, Mr. McGeehan filed for absolute divorce in the Circuit Court for Howard County, which was granted in December of 2015.

During trial, Ms. McGeehan argued that the Mason Neck property and funds from the sales of Farside and Embassy Park rolled into the purchase of Log Jump were her nonmarital property, as a result of the 2005 conveyances. The Circuit Court Judge concluded that the parties had mutually agreed in 2005 that Mason Neck would be Ms. McGeehan's property, but observed that, under *Golden v. Golden*, 116 Md. App. 190 (1997), and *Falise v. Falise*, 63 Md. App. 574 (1985), the language of the agreement was required to specify that the property was to be excluded from marital property; as a result, the judge determined that Mason Neck was marital property. The trial judge also determined that the Log Jump property, titled as tenants by the

entirety, was marital property, without considering whether any portion of it was excluded by valid agreement or its source of funds.

Ms. McGeehan appealed to the Court of Special Appeals, arguing that the Circuit Court Judge had erred in failing to find that she and Mr. McGeehan had a "valid agreement," under Section 8-201(e)(3)(iii) of the Family Law Article of the Maryland Code, to exclude from marital property the properties transferred to her in 2005. The Court of Special Appeals affirmed the Circuit Court Judge.

Held: Judgment of absolute divorce affirmed, but judgment granting monetary award vacated and remanded.

The Court of Appeals held, under Section 8-201(e)(3)(iii) of the Family Law Article, that a valid postnuptial agreement does not require language reclassifying property as nonmarital in order to exclude that property from marital property in divorce. The Circuit Court Judge erred in applying the reclassification requirements of *Falise v. Falise*, 63 Md. App. 574 (1985), to obviate her finding that an agreement existed between the parties to exclude Mason Neck, as well as implicitly Farside and Embassy Park, as the nonmarital property of Ms. McGeehan. As a result, there was a valid postnuptial agreement to exclude Mason Neck as Ms. McGeehan's nonmarital property. On remand, the Circuit Court Judge also is required to consider whether there was a valid agreement to exclude Log Jump from marital property and, absent that, to consider whether the source of funds used to purchase Log Jump was traceable to Farside and Embassy Park.

Select Portfolio Servicing, Inc. v. Saddlebrook West Utility Company, LLC, et al., No. 71, September Term 2016, filed August 16, 2017. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2017/71a16.pdf

REAL PROPERTY LAW – LIENS – MARYLAND CONTRACT LIEN ACT

Facts:

To carry out a deferred financing strategy, the developer in this case, Respondent Saddlebrook West, LLC ("Saddlebrook") recorded in the land records an instrument entitled a Declaration, which provided for payments of an annual assessment by future homeowners to a related entity, Respondent Saddlebrook West Utility, LLC ("Utility"). The Declaration, which provided for the granting of a lien by future homeowners to Utility to secure the payment of the annual assessment, purported to grant priority to that lien at a date before the development was constructed or any homeowner had granted a lien under the terms of the Declaration. Utility first followed the procedures under the Maryland Contract Lien Act Maryland Code, Real Property Article ("RP"), §14-201 et seq. process to establish liens for delinquent assessments related to the property that is the subject of this case. After it had allowed those liens to expire without enforcing them, it took the position that the Declaration itself created a lien with first priority on the properties in the development.

Petitioner Select Portfolio Servicing, Inc., the holder of deed of trust that arose out of the financing of one of the homes in the development, brought this action to clarify the relative priority of its interest in that property in relation to the lien asserted by Utility for delinquent assessments. Ultimately, the Circuit Court entered judgment in favor of Saddlebrook and Utility. That court concluded that Saddlebrook created a lien on the property when it recorded a Declaration. The Circuit Court's decision was subsequently upheld by the Court of Special Appeals.

Held: Reversed.

The Court of Appeals held that the Declaration recorded by Saddlebrook did not itself create a lien on the property. Rather, Utility must follow the procedures set forth in the Maryland Contract Lien Act to establish a lien under the Declaration with respect to delinquent assessments. Recording a Declaration is part of the process necessary to create a lien, but that Declaration does not establish a lien.

Sage Title Group, LLC v. Robert Roman, No. 87, September Term 2016, filed August 4, 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/87a16.pdf

TORT – CONVERSION – COMMINGLED MONEY – ESCROW ACCOUNT

CIVIL PROCEDURE – MOTION FOR JNOV – PRESERVATION OF CLAIM – *RESPONDEAT SUPERIOR*

TORT – *RESPONDEAT SUPERIOR*

CIVIL PROCEDURE – MOTION FOR JNOV – PRESERVATION OF CLAIM – UNCLEAN HANDS/*IN PARI DELICTO*

EXPERT TESTIMONY – STANDARD OF CARE – TITLE COMPANY

Facts:

Robert Roman, Respondent, and Kevin Sniffen, an employee of Sage Title Group, LLC ("Sage Title"), Petitioner, agreed that Mr. Roman would deposit money into Sage Title's escrow account for the purpose of helping a third individual, Brian McCloskey, show liquidity in the account in order to obtain commercial building loans. Mr. Roman did not intend for the money to be a loan, and he believed that the money deposited into Sage Title's escrow account would remain his money and would be returned to him when the financing had been secured. Mr. Roman provided three checks totaling $2,420,000, which Mr. Sniffen deposited into Sage Title's escrow account. Later, Mr. Sniffen disbursed all of the funds held for Mr. McCloskey, including Mr. Roman's funds. Mr. Roman did not recover any of the money he had deposited with Sage Title.

Mr. Roman sued Sage Title for conversion/theft and negligence. Mr. Roman sought to hold Sage Title responsible under a theory of *respondeat superior* as well as under a theory of direct negligence. At trial, Mr. Roman did not provide expert testimony as to a title company's duty of care to third parties. At the close of Mr. Roman's case, Sage Title moved for judgment with respect to the negligence count. The trial court reserved but ultimately granted judgment on the negligence count at the close of the trial. The jury returned a verdict in favor of Mr. Roman on the conversion count, awarding him $2,420,000 in damages. Following entry of the judgment, Sage Title moved for judgment notwithstanding the verdict ("JNOV"), arguing that Mr. Roman's funds were commingled in Sage Title's escrow account and could not therefore be subject to conversion. The trial court granted Sage Title's JNOV. Mr. Roman appealed to the Court of Special Appeals, which affirmed as to the negligence count but reversed the trial court's grant of JNOV on the conversion count. Both parties sought review in this Court.

Held: Affirmed.

The Court of Appeals determined that monies held in an escrow account were not commingled with other funds held in that account, for purposes of a conversion claim, because the funds were specifically identifiable. The general rule in Maryland is that money is not subject to conversion. The Court has recognized that an exception exists where a plaintiff can prove that the "defendant converted specific segregated or identifiable funds." *Allied Investment Corp. v. Jasen*, 354 Md. 547, 564 (1999). Applying the *Jasen* rationale, the Court held in the instant case that Mr. Roman's funds were properly the subject of a conversion claim because the funds remained specifically identifiable by way of Sage Title's ledger report to defeat a claim of commingling and because all of Mr. Roman's funds were disbursed by Mr. Sniffen.

Next, the Court of Appeals held that Sage Title was vicariously liable for the acts of its employee, Mr. Sniffen, because he was acting in furtherance of the employer's business and Sage Title authorized the conduct. Mr. Sniffen, as the branch manager for Sage Title, was responsible for depositing checks into and disbursing funds from the escrow account. These acts were part of Mr. Sniffen's regular duties to further Sage Title's business, and Sage Title authorized him to perform these tasks.

With respect to preservation of claims, the Court of Appeals held that Petitioner had preserved the claim of *respondeat superior* when it presented that theory in a memo submitted in support of its motion for judgment at the close of the plaintiff's case. Petitioner renewed its motion for judgment at the close of the defendant's case. For purposes of a Motion for JNOV, Petitioner preserved the claim of *respondeat superior* because the trial court could identify the argument that was being made in support of the Motion for Judgment. Petitioner, however, waived its argument of unclean hands/*in pari delicto* when it raised the issue for the first time in its Motion for JNOV.

Additionally, the Court of Appeals held that the trial court properly granted Sage Title's motion for judgment on the negligence count because expert testimony was necessary to establish Sage Title's standard of care with regard to the handling of its escrow account. This Court held in *Schultz v. Bank of America*, 413 Md. 15, 28-29 (2010) that expert testimony on the applicable standard of care is not necessary where "the alleged negligence, if proven, would be so obviously shown that the trier of fact could recognize it without expert testimony." Here, the Court held that expert testimony was necessary for the trier of fact to establish what duty, if any, Sage Title owed where there was an allegation that the title company disbursed funds from its escrow account without the express consent of the individual who had deposited the funds into that account.

County Council of Prince George's County, MD Sitting as the District Council v. Chaney Enterprises Limited Partnership et al., No. 66, September Term 2016, filed July 28, 2017. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2017/66a16.pdf

REAL PROPERTY – ZONING & LAND USE – MARYLAND CODE (1957, 2012 REPL. VOL., 2016 SUPP.), § 22-407 OF THE LAND USE ARTICLE – JUDICIAL REVIEW

REAL PROPERTY – ZONING & LAND USE – AMENDMENTS TO AREA MASTER PLAN

REAL PROPERTY – ZONING & LAND USE – PREEMPTION – MARYLAND CODE (1975, 2014 REPL. VOL.), §§ 15-801 THROUGH 15-834 OF THE ENVIRONMENT ARTICLE – SURFACE MINING ACT

Facts:

For zoning and planning purposes, Prince George's County is divided into seven subregions, each with its own master plan. Subregion 5, the focus of this case, is a major source of sand and gravel for construction projects in the Washington, D.C. metropolitan area. Respondents Chaney Enterprises Limited Partnership ("Chaney") and Southstar Limited Partnership ("Southstar") own and operate sand and gravel mines in Prince George's County. Respondent Maryland Transportation Builders and Materials Association ("MTBMA") is a trade organization that represents the mining industry and has members with mining operations located in the county (collectively, "Mining Entities").

In 2002, Prince George's County approved a new general plan that divided the county into three land use areas called the Developed, Developing, and Rural Tiers. Approximately three-quarters of Subregion 5 was placed into the Developing Tier, with the remainder in the Rural Tier.

In September 2009, Petitioner Prince George's County Council sitting as District Council ("District Council") adopted the Preliminary 2009 Subregion 5 Master ("2009 Master Plan"). The 2009 Master Plan recognized that "[s]and gravel [are] essential element[s] of new construction in the Washington, D.C. [ ] region" and sought to "capitalize[ ] on the extraction of sand and gravel resources prior to the land being pre-empted by other land uses." It also set a goal of providing "commercially viable access to sand and gravel resources."

In April 2013, the District Council held a joint public hearing with the Prince George's County Planning Board ("Planning Board") on a new plan, the 2013 Subregion 5 Master Plan ("2013 Master Plan"), which contained the same goals and policies for surface mining as the 2009 Master Plan. At the hearing and in written comments, several participants expressed concern about the effects of mining operations in Subregion 5 on the surrounding communities. The

Mining Entities did not appear at the hearing or submit written comments on the 2013 Master Plan.

On July 8, 2013, the District Council met to consider several zoning matters, including the 2013 Master Plan. The meeting notice did not indicate that the District Council would be considering matters related to surface mining.

On July 24, 2013, the District Council adopted, by resolution ("Resolution"), the 2013 Master Plan with amendments added since its July 8, 2013 meeting ("the Amendments"). The District Council did not send the Amendments back to the Planning Board for comment or a public hearing prior to their approval. The Amendments "restrict[ed] sand and gravel mining to the [R]ural [T]ier." It altered the plan's goal from "capitaliz[ing]" on sand and gravel resources to "balanc[ing] the need for" them against "the potential negative impact and nuisance to nearby properties and the environment" and removed language that prioritized the extraction of sand and gravel resources over other land uses. The District Council inserted language to "[e]ncourage" mining companies to "provide specific evidence" of a mine's economic benefit. The plan was also amended to require mining companies to "mitigate on[-] and off-site transportation impacts" and potentially limit the hours and duration of mining activities. Finally, the Amendments required mining companies "to achieve post [-]mining reclamation that meets environmental needs." On August 15, 2013, the District Council published a public notice announcing its approval of the 2013 Master Plan with the Amendments.

On August 2013, the Mining Entities filed a petition for judicial review of the 2013 Master Plan in the Circuit Court for Prince George's County pursuant to Maryland Code (1957, 2012 Repl. Vol., 2016 Supp.), § 22-407(a)(1) of the Land Use Article ("LU"). The Mining Entities argued that the Amendments were invalid because the District Council failed to follow procedural requirements for their adoption. They also argued that the Amendments were preempted by Maryland's Surface Mining Act ("SMA").

The Circuit Court affirmed the District Council's adoption of the Amendments, and found that LU § 22-407(a)(1) did not authorize judicial review of master plans. The court also concluded that the Amendments were not preempted by the SMA. The Mining Entities appealed to the Court of Special Appeals, which reversed in an unreported per curiam opinion. *Chaney Enters. Ltd. P'ship v. Cty. Council of Prince George's Cty.*, 2016 WL 4698144, at *1 (Md. Ct. Spec. App. Sept. 7, 2016). The intermediate appellate court held that the 2013 Master Plan was invalid because the District Council failed to send the Amendments back to the Planning Board for written comment. On the preemption question, the court held that the SMA did not preempt the Amendments.

Held: Affirmed.

The Court of Appeals held that LU § 22-407(a)(1) authorizes judicial review of area master plans. Examining the text of LU § 22-407(a)(1), the Court concluded that "a final decision,"

broadly authorizes judicial review of any final decision the District Council has the authority to make. Moreover, the Court explained that although the scope of judicial review of a master plan is usually quite narrow, the scope broadens when a corresponding ordinance makes compliance with a master plan mandatory. In this case, special exceptions for surface mining would not be granted if they "substantially impair[ed] the integrity" of an area master plan. Therefore, the Court concluded that the 2013 Master Plan had been elevated to a regulatory device that was subject to judicial review.

Next, the Court rejected two jurisdictional arguments from the District Council that the Mining Entities had to: (1) participate in proceedings regarding the 2013 Master Plan; and (2) exhaust administrative remedies by applying for special exceptions. Addressing the participation argument, the Court noted that the District Council conflated standing to seek judicial review under the Administrative Procedure Act ("APA")—which requires a person to be party to agency proceedings to seek judicial review—with standing under LU § 22-407(a)(1). The Court reasoned that because the APA does not apply to proceedings before a county council, the APA's standing requirements also did not apply in this case. In addition, the Court declined to impose a participation requirement where the District Council's failure to follow proper procedures resulted in the Mining Entities inability to weigh in on the proposed changes to the 2013 Master Plan.

As to the exhaustion argument, the Court distinguished two cases—*Maryland Reclamation Associates v. Harford County (MRA II)*, 342 Md. 476 (1996), and *Prince George's County v. Ray's Used Cars*, 398 Md. 632 (2007)—in which the petitioners sought relief under the Declaratory Judgments Act. Here, the Court reasoned, the Mining Entities were seeking judicial review under the Regional District Act ("RDA"), and not a separate statute. Moreover, the Court explained, there is an exception to the exhaustion requirement when there is a direct attack upon the power or authority (including whether it was validly enacted) of the legislative body to adopt the legislation from which relief is sought. Here, the Mining Entities' procedural and preemption arguments attacked the validity of the District Council's adoption of the Amendments. Therefore, the Mining Entities did not have to exhaust administrative remedies before seeking judicial review under LU § 22-407.

Turning to the validity of the Amendments' adoption, the Court concluded that because the District Council failed to comply with Prince George's County Code § 27-646(a)(3), which requires that "[a]ll proposed amendments shall be referred to the Planning Board for its written comments, which shall be submitted to the [District] Council prior to its action on the amendments," the Amendments were invalid. Because the Resolution contained a severability clause, however, the Court held that the remaining portions of the 2013 Master Plan were still in effect.

Lastly, although the Court had vacated the Amendments, it exercised its discretion to address the preemption issue to avoid the expense of another appeal. As to the merits of the issue, the Court held that the SMA did not preempt local zoning and planning authority. Examining the SMA's provisions, the Court concluded that the General Assembly did not intend for the State's surface mining permitting scheme to be so "all-encompassing" as to preempt the District Council's

zoning and planning authority. The Court reasoned that SMA provisions that require counties to certify a mine's compliance with local zoning and planning laws and allow counties to "regulating surface mining, reclamation and revegetation procedures" if their laws are "as restrictive as" the SMA show that the General Assembly could not have intended to preempt local zoning and planning authority—at least to the extent of prohibiting surface mining in the Developing Tier. Accordingly, the Court affirmed the decision of the Court of Special Appeals.

COURT OF SPECIAL APPEALS

Matthew Timothy McCullough v. State of Maryland, No. 1081, September Term 2016, filed August 30, 2017. Opinion by Eyler, D.S., J.

http://mdcourts.gov/opinions/cosa/2017/1081s16.pdf

UNITED STATES CONSTITUTION – EIGHTH AMENDMENT – CRUEL AND UNUSUAL PUNISHMENTS CLAUSE – LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE – MULTIPLE NONHOMICIDE CRIMES COMMITTED BY JUVENILE – *GRAHAM v. FLORIDA*, 560 U.S. 48 (2010).

Facts:

When he was 17½, the defendant used a handgun of an older accomplice to shoot into a crowd of students in front of a high school. Four students were injured, all seriously, with one being paralyzed from the chest down. The defendant was tried as an adult and was convicted of four counts of first degree assault. The court sentenced him to the maximum term of 25 years' imprisonment for each conviction, to run consecutively, for an aggregate sentence of 100 years. The defendant will be eligible for parole at age 67. The defendant's convictions were affirmed on direct appeal. Eleven years later, he filed a motion to correct illegal sentence, arguing that his aggregate sentence of 100 years was cruel and unusual under *Graham v. Florida*, decided six years after the defendant was convicted. The circuit court denied the motion and the defendant appealed.

Held: Affirmed.

In *Graham*, the defendant was sentenced to life without parole ("LWOP") for the crime of armed robbery, which he committed when he was a juvenile. The case reached the Supreme Court, which held that it is a categorical violation of the cruel and unusual punishments clause to impose a sentence of LWOP against a defendant who committed a nonhomicide offense as a juvenile. The Supreme Court later held that *Graham* applies retroactively.

The issue in the case at bar is whether it is a violation of the cruel and unusual punishments clause to sentence a defendant, who as a juvenile committed multiple nonhomicide crimes against multiple victims, to consecutive multiple term-of-years sentences that in the aggregate exceed the defendant's natural life expectancy, and therefore are an effective LWOP sentence.

We do not read *Graham*'s holding, which concerned a juvenile nonhomicide crime committed against one victim, as extending to circumstances in which the defendant committed multiple crimes against multiple victims. Although, as the Supreme Court has held, juveniles as a class are less culpable than adults, among juvenile nonhomicide offenders, those who have committed multiple crimes against multiple victims in one series of events may be more culpable than those who have committed one crime against one victim. For that reason, the sentencing considerations in cases such as this differ from the sentencing considerations in a case like *Graham*.

Even if *Graham* applies, the defendant's aggregate sentences do not violate the cruel and unusual punishments clause. *Graham*'s categorical bar against LWOP sentences against juveniles for nonhomicide offenses is based on the concept that a juvenile nonhomicide offender should, at the outset of his sentence, have some meaningful opportunity for release during his lifetime. This case satisfies that requirement, as the defendant will have such an opportunity when he reaches age 67. Moreover, the Maryland Parole Board now is required by regulation to take into consideration factors identified as relevant by the Supreme Court in *Graham*, including the age at the time of the offense.

David Deodatus Ndunguru v. State of Maryland, No. 520, September Term 2016, filed August 30, 2017. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2017/0520s16.pdf

CRIMINAL LAW – LEGALLY INCONSISTENT VERDICTS – PRESERVATION

Facts:

On April 25, 2015, David Ndunguru, appellant, and the victim attended a party in Beltsville, Maryland. At some point that night, an altercation between appellant and the victim occurred, and appellant, along with two unknown accomplices, began kicking and punching the victim. The three assailants then began to rifle through the victim's pockets, taking his cell phone, wallet, passport, and gold necklace.

Appellant subsequently was charged with, *inter alia*, robbery and theft of property having a value of less than $100. The jury initially returned an inconsistent verdict, convicting appellant of robbery but acquitting him of theft. Before the jury was polled or the verdict harkened, the circuit court noted the inconsistency. Without a request to do so from defense counsel, the court advised the jury that its verdict was inconsistent and sent it back to continue its deliberations. The jury subsequently convicted appellant of both charges.

Held: Affirmed.

Verdicts finding appellant not guilty of misdemeanor theft but guilty of robbery were legally inconsistent. The remedy for a legally inconsistent verdict, however, is for the defense to decide, i.e., accept the inconsistent verdict or have the jury reconcile the inconsistency. The trial court may not, without a request from the defense, *sua sponte*, send the jury back to resolve inconsistent verdicts. Although the trial court erred in doing so here, appellant is not entitled to relief.

When the circuit court questioned the consistency of the initial verdicts, appellant did not object to the verdict, but rather, defense counsel requested an acquittal on the theft and robbery charges, which appellant now agrees was not warranted. When the court rejected that request and stated its intent to advise the jury to continue deliberating to reach a consistent verdict, defense counsel did not object. We conclude that, for the same reason that an appellant who does not object to an inconsistent verdict is not entitled to appellate relief, a defendant who fails to object when the trial judge *sua sponte* instructs a jury to continue deliberating to reach a consistent verdict is not entitled to appellate relief. Under these circumstances, appellant's contention on appeal that the court erred in *sua sponte* advising the jury to reconsider its verdicts is not preserved, and he is not entitled to relief on this ground.

William Louis Kranz v. State of Maryland, No. 785, September Term 2013, filed August 30, 2017. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2017/0785s13.pdf

MARYLAND UNIFORM POSTCONVICTION PROCEDURE ACT – CUSTODY REQUIREMENT – PENDENCY OF APPEAL

Facts:

This case arose out of the denial of appellant William Louis Kranz's petition for post-conviction relief by the Circuit Court for Cecil County. Kranz filed a timely application for leave to appeal, which was granted by the Court of Special Appeals. Unbeknownst at the time to the Court of Special Appeals, at some time after Kranz filed his application for leave to appeal but before his application was granted, Kranz had completed serving his sentence, including the probationary period. The State moved to dismiss the appeal, arguing that the Uniform Postconviction Procedure Act did not apply because Kranz was no longer in custody.

Held: Dismissed.

The Court of Special Appeals determined that it did not have jurisdiction to consider Kranz's appeal. The Court considered the language of Maryland Code (2001, 2008 Repl. Vol.), § 7-101 of the Criminal Procedure Article ("CP"), which provides that the Maryland Uniform Postconviction Procedure Act applies to "a person convicted in any court in the State who is: (1) confined under sentence of imprisonment; or (2) on parole or probation." The Court observed that this provision, known as the "custody requirement," is jurisdictional in nature.

The Court considered its previous opinion in *Obomighie v. State*, 170 Md. App. 708 (2006), in which the Court addressed whether a circuit court retained jurisdiction to grant postconviction relief in a case when the petition was filed while the petitioner was on probation, but the circuit court hearing on the petition took place after the probationary period had ended. The circuit court dismissed the petition. The Court of Special Appeals held that when a petitioner's "term of probation ended, [the circuit court] no longer had jurisdiction under Maryland's Uniform Postconviction Procedure Act to grant relief." *Id*. at 710.

In this case, the Court of Special Appeals reaffirmed the holding of *Obomighie*, holding that "the remedies afforded by [the Maryland Uniform Postconviction Procedure Act] are expressly limited to those who satisfy the 'custody' requirement." Although Kranz was in custody when he filed his postconviction petition and when he filed his application for leave to appeal, the expiration of his sentence while the application for leave to appeal was pending rendered Kranz ineligible for postconviction relief.

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In re: Adoption/Guardianship of T.A., Jr., No. 2110, September Term 2016, filed August 30, 2017. Opinion by Friedman, J.

http://mdcourts.gov/opinions/cosa/2017/2110s16.pdf

EVIDENCE – HEARSAY – BUSINESS DOCUMENTS EXCEPTION – HARMLESS ERROR

Facts:

Shortly after T.A.'s birth, the Baltimore City Department of Social Services ("DSS") placed him in the care and custody of the Bs. After several failed attempts by DSS to achieve permanency with Mother and Father, the Circuit Court for Baltimore City, acting as a juvenile court, terminated Mother and Father's parental rights. In DSS's case against Mother and Father, Exhibit 91—a set of reports authored by a consulting psychologist for Medical Services-Juvenile Court—was admitted over Father's objection. The juvenile court found that the documents were, as DSS argued, admissible under the business documents exception to the Maryland rules prohibiting admission of hearsay evidence.

Held:

The Court held that Exhibit 91 was not admissible under the business document exception to the Maryland rules prohibiting admission of hearsay evidence.

The Court held that that Exhibit 91's admission was harmless error.

ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated July 28, 2017, the following attorney has been indefinitely suspended by consent, effective August 14, 2017:

LAURENCE FLEMING JOHNSON

*

By an Order of the Court of Appeals dated August 15, 2017, the following attorney has been placed on inactive status by consent:

W. STEPHEN PALEOS

*

This is to certify that the name of

WILLIAM NORMAN ROGERS

has been replaced upon the register of attorneys in this Court as of August 24, 2017.

*

By an Order of the Court of Appeals dated August 29, 2017, the following attorney has been indefinitely suspended:

LAWAL MOMODU

*

By an Order of the Court of Appeals dated August 29, 2017, the following attorney has been suspended for one year, effective *nunc pro tunc* as of February 6, 2017:

PAMELA BRUCE STUART

*

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JUDICIAL APPOINTMENTS

*

On July 11, 2017, the Governor announced the appointment of **CHERI NICOLE SIMPKINS GARDNER** to the District Court of Maryland – Prince George's County. Judge Gardner was sworn in on August 3, 2017 and fills the vacancy created by the elevation of the Hon. Robin Dana Gill Bright to the Circuit Court for Prince George's County.

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On July 11, 2017, the Governor announced the appointment of **SCOTT MICHAEL CARRINGTON** to the District Court of Maryland – Prince George's County. Judge Carrington was sworn in on August 4, 2017 and fills the vacancy created by the retirement of the Hon. G. Richard Collins.

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UNREPORTED OPINIONS

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

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

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H.		
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K.		
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M.		
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O.		
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T.		
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W.		
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