Circuit Court for Baltimore City
Case Nos. 114272002-003
The Honorable Thomas J. S. Waxter, Jr.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

No. 2740
September Term, 2015

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No. 1573
September Term, 2016

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JOHN HILL

v.

STATE OF MARYLAND

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Woodward, C.J.,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Friedman, J.

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Filed:

In this appeal, stemming from convictions on nine charges related to the rape of two teenagers in 1982, Appellant John Hill raises three issues for our review. Hill argues that the circuit court erred when it: (1) found no violation of Hill's Sixth Amendment speedy trial rights despite a post-accusation delay of over 30 years; (2) found no violation of Hill's Fourteenth Amendment due process rights even though he claims that the State's delay of over 30 years prejudiced his defense; and (3) found no violation of Hill's statutory right to a speedy trial when it allowed the State to re-indict him despite newly discovered evidence that the original indictment was allegedly *nol prossed* in bad faith. For the reasons explained below, we hold that the circuit court did not err with respect to the first two issues. We hold, however, that the circuit court abused its discretion when it failed to find that the State violated *Hicks*[1] in October of 1982. Pursuant to our power under Maryland Rule 4-331(c) to grant appropriate relief, we vacate Hill's convictions and remand the case to the circuit court for it to dismiss all charges against him with prejudice.

## BACKGROUND

On the night of January 2, 1982, two teenagers were raped as they were walking home near a local elementary school. One of the victims fought off the attacker by hitting

[1] As we will explain below, this is a shorthand reference to *Hicks v. State*, 285 Md. 310 (1979), and its progeny, which relate to the requirement now found in Md. Rule 4-271 and Section 6-103 of the Criminal Procedure ("CP") Article of the Maryland Code, that a criminal defendant be brought to trial within 180 days after the earlier of the appearance of counsel, or the first appearance of the defendant before the circuit court, unless good cause is shown. *Hicks*, 285 Md. at 315-16. A *Hicks* violation results in the dismissal of the charges with prejudice. *Id.* at 318.

him over the head with a glass bottle. The teenagers then fled, but not before the attacker shot one of them in the arm.

After viewing a photo array, the teenagers identified their attacker as John Hill. On February 19, 1982, the State indicted Hill, who at the time was in prison for another offense. Hill, and his counsel, made their first appearance in court on April 19, 1982. As a result, the *Hicks* deadline was 180 days later, on October 15, 1982. At a hearing on May 24, 1982, Hill entered a plea of not guilty by reason of insanity, and requested a psychological evaluation. Hill also filed a written motion for a speedy trial on the same date. The circuit court ordered the psychological evaluation, and set the trial for September 20, 1982.

Hill's psychological evaluation had still not been completed by the trial date. Although the evaluation had not been completed, the circuit court effectively postponed the trial by placing the case on the "move list."[2] On October 13, 1982, two days before the

[2] The "move list," instituted by Judge Robert L. Karwacki when he was the Administrative Judge of the Circuit Court for Baltimore City, was explained in *State v. Frazier*:

> [T]here will be occasions in any busy jurisdiction when the scheduled judge is not available to conduct a trial on the assigned date. In Baltimore City most such cases will be placed by the administrative judge on the so-called "move list," to be tried by one of the two "move courts" or by the first other available judge. A case on the move list will typically be tried by a different judge on the scheduled trial date or within a few days thereafter.

298 Md. 422, 433 (1984). Although Hill's case was added to "move list" on September 20, 1982, and therefore should have come on for trial that day or in the days immediately

*Hicks* date, the Assistant State's Attorney wrote a letter to the Superintendent of Clifton T. Perkins State Hospital ("Perkins") again requesting that Hill be evaluated. The letter described the reason for the delay in Hill's evaluation as a "procedural foul up."[3] On October 20, 1982, five days after the *Hicks* date, the circuit court entered a new order requiring Hill to undergo the psychological evaluation, and for Perkins to submit its final report, within 60 days.

Hill was finally transferred to Perkins for the evaluation on December 3, 1982. The Perkins staff completed the evaluation on December 9, 1982, and filed its report on December 15, 1982, finding Hill competent to stand trial.

Then, approximately three months later, on March 17, 1983, the State *nol prossed* the case. Specifically, the State requested that the court clerk:

> Please enter a Nolle Prosequi in the above captioned case for the following reason: HICKS PROBLEM.

thereafter, there was still no movement in the case prior to the State's entry of a *nol pros* on March 17, 1983.

[3] As we will explain below, in 2016, Hill discovered the original file from 1982-83, and pertinent records from his psychological evaluation at Perkins in late 1982. The records show that Hill was actually in Perkins in October of 1982 for a psychological evaluation related to other offenses. For reasons obscured by time, Hill was only evaluated in connection with those other offenses at that time, but not the offenses that were the subject of this case.

Although the case was *nol prossed*, an arrest warrant for Hill was left open.[4] For the next 31 years, Hill was in and out of prison on unrelated charges.[5]

In 2014, apparently because Hill was soon to be released from prison, Hill's case manager with the Maryland Department of Public Safety and Correctional Services performed a search for open warrants. That search turned up the open arrest warrant from the early 1980s. Hill moved to dismiss the arrest warrant, but the circuit court denied his motion. On September 30, 2014, based on the open arrest warrant, the State indicted Hill on the rape charges from 1982.

On the day of trial, Hill made an oral motion to dismiss the case, arguing that the greater-than-30-year delay in bringing the indictment violated his speedy trial rights under the Sixth Amendment, and his due process rights under the Fourteenth Amendment. Specifically, Hill argued that the delay prejudiced his defense as none of the information from the 1982-83 proceedings—the original file, psychological evaluation records, physical evidence from the crime scene and from the victims, and witness statements—were able to be located by the State. The circuit court denied the motion without prejudice.

[4] As we will discuss later in this Opinion, the open arrest warrant stemmed from one of two sources: Either (1) the open warrant was the *original* arrest warrant from the beginning of the case in 1982 that was left open even after the case was *nol prossed* on March 17, 1983; or (2) the open warrant was a new arrest warrant that was opened *after* the case was *nol prossed* on March 17, 1983. The record is not clear as to this point. According to all parties, the physical arrest warrant at issue cannot be located, and therefore is not part of the record.

[5] According to the commitment records, Hill was in prison from 1983-87, again from 1992-95, and then finally from 1998-present.

After a two-day trial, held from September 10-11, 2015, the jury found Hill guilty of two counts of rape, two counts of sexual offense, one count of assault with intent to commit murder, two counts of assault, and two counts of use of a handgun in commission of a crime of violence.[6] The circuit court deferred Hill's sentencing to a later date to permit a pre-sentence investigation.

On October 27, 2015, more than a month after the trial and while the pre-sentence investigation was underway, the State found and produced a microfilm that listed the docket entries in the original case in 1982-83. These entries showed the date that Hill was indicted, the date that he requested a speedy trial, and the date that his case was *nol prossed*. Despite this, however, the original file from 1982-83 was still not located.

At the time of sentencing, on January 5, 2016, Hill and the State had still not been able to locate the original file related to the 1982-83 proceedings. Based on the discovery

[6] Although Hill did not challenge the sufficiency of the evidence on appeal, we note that the evidence presented at trial was particularly thin. As mentioned above, the trial took place more than 30 years after the crimes were committed. The two complainants testified that they had been raped, but they were not asked to identify Hill as their attacker at trial, presumably because, after so long, they were unable. The only witness to tie Hill to the crimes was a "jailhouse snitch" who claimed that back in 1982, Hill had confessed to him that he raped these girls. This witness had been convicted of at least 10 burglaries, and had received immunity for pending charges and a sentence reduction for past convictions in return for testifying against Hill. The witness could not recall when or in front of whom Hill had supposedly confessed that he committed the crimes—not the date, the time of day, the day of the week, or who else was present for the confession. The witness' original statement to police in 1982 was also lost, so the defense could not compare that statement with his trial testimony for impeachment purposes. Moreover, the State could not locate any physical evidence collected from the crime scene and from the victims. All in all, the quality of the evidence presented at Hill's trial left much to be desired.

of the microfilm alone, however, Hill argued that he should be granted a new trial, citing speedy trial and due process concerns. The circuit court denied the new trial request and sentenced Hill to life in prison, with all but 25 years suspended. Hill filed a timely notice of appeal.

The original file from 1982-83 was located in the Maryland State Archives soon after sentencing. As a result, the State produced the original file and pertinent records from psychological evaluation at Clifton T. Perkins in late 1982 to Hill. One of the documents produced revealed that on March 17, 1983, the State had *nol prossed* the original charges due to a "HICKS PROBLEM." Based on the contents of the original file, and in particular the description of the *nol pros* as being due to a "HICKS PROBLEM," Hill filed a motion for new trial on February 17, 2016, pursuant to Rule 4-331(c).[7] In the motion, Hill

[7] Rule 4-331 states:

> **(a) Within Ten Days of Verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.
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> * * *
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> **(c) Newly Discovered Evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
>
> (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate

reiterated his speedy trial and due process arguments, now bolstered by the discovery of the original file. Hill also argued that the *nol pros* due to a "HICKS PROBLEM" should have precluded the State from re-indicting him in 2014. On August 22, 2016, the circuit court denied the motion in an 8-page written opinion. Hill appealed, and this Court consolidated his two appeals.

## ANALYSIS

Hill raises three issues on appeal. We will discuss each issue in turn. While we hold that the circuit court properly denied his first two allegations of error—under the Sixth Amendment speedy trial right and the Fourteenth Amendment due process right—we reverse the circuit court's determination on *Hicks*. As a result, we vacate Hill's convictions and remand to the circuit court with directions for it to dismiss all charges against him with prejudice.

### I. Sixth Amendment Speedy Trial

Hill's first argument in his pre-trial motion to dismiss, and in his post-sentencing motion for new trial, was that the greater-than-30-year delay between the issuance of the arrest warrant in the 1980s, and the indictment in 2014, violated his Sixth Amendment right

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> court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief.
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> * * *

Md. Rule 4-331(a)(c).

to a speedy trial. In denying Hill's motions, the circuit court did not engage in a full-scale constitutional speedy trial analysis—using the 4-factor balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972)—because it held that an arrest warrant cannot serve as a trigger for the constitutional speedy trial analysis. The crux of the Sixth Amendment issue in this case, therefore, boils down to one question: does the issuance of an arrest warrant alone trigger a constitutional speedy trial analysis? As we explain below, we agree with the circuit court that an arrest warrant does not. For that reason, we need not reach the *Barker v. Wingo* balancing test in this case.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a speedy trial.[8] While a defendant has a constitutional right to a speedy trial, "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused.'" *State v. Gee*, 298 Md. 565, 568 (1984) (citation omitted). "A person becomes an 'accused' *only* upon his arrest or the filing of an indictment, information or other formal charge against him." *Id.* (emphasis in original).

Hill argues that the issuance of the arrest warrant triggers a constitutional speedy trial analysis. Hill cites to this Court's statement in *State v. Lawless*, 13 Md. App. 220, 229

[8] Article 21 of the Maryland Declaration of Rights provides a similar guarantee, stating in part, that "in all criminal prosecutions, every man hath a right … to a speedy trial." Md. Const. Decl. of Rts. art. 21. Hill has not offered an argument regarding Article 21, so we shall address this solely in the Sixth Amendment framework.

(1971), repeated in *State v. Hamilton*, 14 Md. App. 582, 585 (1972), that: "it is well settled that for 'speedy trial' purposes, we look only at the time from the commencement of the prosecution (by way of *warrant*, information, or indictment) to the time of trial." (Emphasis added). At oral arguments, Hill pointed out that this Court in *Strickler v. State* also picked up on this language and held that the mere issuance of an arrest warrant triggers a constitutional speedy trial analysis. 55 Md. App. 688, 690 (1983).

Hill's citations to *Lawless*, *Hamilton*, and *Strickler*, however, are not persuasive. The year after this Court decided *Strickler*, the Court of Appeals decided *Gee v. State*. Not only did *Gee* explicitly hold that the issuance of a mere arrest warrant does not trigger a constitutional speedy trial analysis, but it also expressly disapproved of the language in *Lawless* and *Hamilton*, and the holding in *Strickler*. According to *Gee*:

> The Court of Special Appeals, however, has travelled two divergent paths. One group of its opinions reach decision[s] regarding length of delay only upon consideration of indictment, information, or actual arrest. *See … Nocera v. State … .* Another group of its opinions, dealing with prosecutions of crimes not within the jurisdiction of the Maryland District Court, apply the proposition that the speedy trial provision is in any event activated by the mere issuance of a warrant of arrest. The case at hand is representative of this group and reflects what apparently is the prevailing view of that court. *See … Strickler v. State … .*
>
> The view of the Court of Special Appeals that the speedy trial clause is in any event activated upon the issuance of an arrest warrant apparently stems from the statement in *State v. Lawless*, 13 Md. App. 220, 229 (1971), that "[i]n reckoning delay, it is well settled that for 'speedy trial' purposes, we look only at the time from the commencement of the prosecution

> (by way of warrant, information or indictment) to the time of trial." … *Lawless* was decided a few weeks prior to [the United States Supreme Court's decision in] *United States v. Marion* … which added an actual arrest to the circumstances which would invoke the speedy trial right. In *State v. Hunter* … the Court of Special Appeals modified the *Lawless* statement by adding "arrest" to comply with the *Marion* holding.
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> The times the Court of Special Appeals went astray it did so because it did not appreciate the meaning of "warrant" as used in *Lawless.* When *Lawless* is read with *State v. Hamilton* … it becomes clear, we believe, that "warrant" as used in *Lawless* referred to another manner, in addition to indictment and information, by which a defendant could be "formally charged" and thus become an "accused." As *Hamilton* … indicate[s], this would only occur when the defendant could be tried on the warrant … itself.

298 Md. at 575-76 (internal footnote omitted). Thus, although Hill attempts to divine from *Lawless*, *Hamilton*, and *Strickler* that the mere issuance of an arrest warrant triggers a constitutional speedy trial analysis, the Court of Appeals in *Gee* slammed the door on such an argument.

*Gee* stands for the proposition that the issuance of an arrest warrant alone does not trigger a constitutional speedy trial analysis. A warrant is considered "a 'formal charge' in the contemplation of the speedy trial right *when a defendant is subject to be tried on that document*." *Gee*, 298 Md. at 574 (emphasis in original). The issuance of such a warrant begins the criminal prosecution and triggers a constitutional speedy trial analysis. *Id.* If, however, the defendant cannot be tried on the basis of the arrest warrant, then "[i]ts issuance does not mark the onset of formal prosecutorial proceedings to which the Sixth Amendment guarantee is applicable, nor has the putative defendant thereby become an

'accused.'" *Id.* In sum, the constitutional speedy trial analysis can be triggered only through the arrest of the defendant, or through the filing of an indictment, an information, or a warrant on which the defendant could be tried.

The only way for Hill to sidestep *Gee* is to either show that *Gee* has been subsequently overruled (by the Court of Appeals of Maryland or by the United States Supreme Court), or to somehow distinguish the facts of this case from the facts presented in *Gee*.[9] Hill does not attempt to advance either of these possibilities. Therefore, we are left with *Gee*'s conclusion as mandatory precedent for this case; that the issuance of an arrest warrant alone does not trigger a constitutional speedy trial analysis.

We do not have the physical arrest warrant before us. Nevertheless, we can infer that Hill could not have been tried on the arrest warrant. Hill, charged with multiple felonies, could only be tried in the circuit court after an indictment from a grand jury or after a criminal information filed by the State's Attorney. *See White v. State*, 223 Md. App. 353, 379 (2015) (citation omitted) ("[Rape] crimes are felonies within the circuit court's exclusive jurisdiction. Accordingly, the State could not prosecute [the defendant] on those

[9] There is a third possibility. Hill is entitled to make a good faith argument to change the law. *See* Md. Rule 19-303.1 ("An attorney shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes, for example, a good faith argument for an extension, modification or reversal of existing law."). Here, Hill can preserve the argument—that the issuance of an arrest warrant alone triggers a constitutional speedy trial analysis—to argue in the Court of Appeals. As an intermediate appellate court, however, we cannot change *Gee*, and are required to follow it.

charges in the district court; instead … to commit to prosecution, the State would have to obtain an indictment from a grand jury or file a criminal information."). Hill could not be tried for these serious crimes on a mere arrest warrant issued by the District Court of Maryland. *See id.* (explaining that felony charges cannot be tried in the District Court); *see also* Md. Code Ann., Cts. & Jud. Proc. § 4-302(a) ("Except as provided … the District Court does not have jurisdiction to try a criminal case charging the commission of a felony."). Moreover, Hill has not argued that he could be tried on this arrest warrant. Thus, the arrest warrant in this case did not rise to the level of a "formal charge" that would trigger a constitutional speedy trial analysis.

Because we hold that the issuance of an arrest warrant, without more, does not trigger a constitutional speedy trial analysis, the greater-than-30-year delay in this case between the issuance of the arrest warrant in the 1980s, and the indictment in 2014, is of no constitutional significance. And, because the delay does not trigger a constitutional speedy trial analysis, we need not balance the *Barker v. Wingo* factors under the Sixth Amendment. Therefore, the circuit court did not err in denying Hill relief on this ground.

## II. Fourteenth Amendment Due Process

In addition to the Sixth Amendment speedy trial right, courts have also held that a part of the right of due process of law guaranteed by the Fourteenth Amendment to the

United States Constitution is a right to have one's criminal trial held in a timely fashion.[10] *Clark v. State*, 364 Md. 611, 628 (2001) (citation omitted) ("[T]he Due Process Clause plays a limited role "in protecting against oppressive delay."). Hill argues that the greater-than-30-year delay in this case violates this aspect of the due process right.

A different test governs due process claims than that which governs Sixth Amendment claims. In *Clark*, the Court of Appeals set forth a two-prong test to determine whether a defendant's due process rights were violated because of a pre-indictment delay. 364 Md. at 645. The Court held that a defendant must prove:

> (1) [that he suffered] actual prejudice …; *and*
>
> (2) that the delay was purposefully made by the State to gain a tactical advantage over the accused.

*Id.* (Emphasis in original) (relying on *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977), and their progeny).

There is no evidence, and Hill does not argue, that the delay in this case "was purposefully made by the State to gain a tactical advantage over" Hill. *See id.* Because Hill

[10] Hill describes this argument as one under the Fifth Amendment right to due process. The Fifth Amendment, however, only restricts the federal government, while the Fourteenth Amendment's due process guarantee applies against the States and is the basis of this claim. *See Spevack v. Klein*, 385 U.S. 511, 514 (1967) ("The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement … ."); *see also Smallwood v. State*, 51 Md. App. 463, 467 (1982) ("[T]he Due Process Clause of the Fifth Amendment … however, has never been held applicable to the States … . Nevertheless, Smallwood is not left adrift in a litigious sea sans sail or oar. On the contrary, available for his protection and applicable [is] … the Due Process Clause of the Fourteenth Amendment to the Federal Constitution."). We will, therefore, treat Hill's due process argument as arising under the Fourteenth Amendment.

does not fulfill the second prong of the test, we need not discuss the first prong—whether the delay caused Hill actual prejudice. Thus, we hold that the circuit court did not err when it refused to find that the pre-indictment delay violated Hill's due process rights under the Fourteenth Amendment.

## III. *Hicks*

After trial in 2015, Hill discovered microfilm of the docket entries, and later found the original file from 1982-83. Based on the contents of the original file, mainly a document written by the Assistant State's Attorney in 1983 that requested that the court clerk: "Please enter a Nolle Prosequi in the above captioned case for the following reason: HICKS PROBLEM," Hill filed a motion for new trial pursuant to Rule 4-331(c).

The circuit court, in 2016, found that there was no violation of *Hicks*. The circuit court reasoned that Hill's request for a psychological evaluation meant that he implicitly consented to a postponement beyond the *Hicks* date, as "[t]here was obvious agreement between the State and the Defendant for the 180-day rule to expire." The circuit court also found that there was "good cause for a postponement" when the evaluation could not be completed in time for the original trial date.

We will undertake our review in two steps. Preliminarily, the State argues that a motion for new trial was not the proper vehicle for Hill to assert a motion to dismiss based on an alleged *Hicks* violation. Therefore, in Part III.1, we will examine Hill's ability to move for a new trial, and the ability of this Court to grant relief, under Rule 4-331(c).

Because we hold that the motion for new trial is the proper procedural vehicle, we then turn to the primary issue of whether Hill's request for a psychological evaluation meant that there was good cause to postpone the case beyond the *Hicks* date or that he implicitly consented to such a postponement in the event that the evaluation could not be completed in time. Thus, in Part III.2, we will explain why we hold that the circuit court abused its discretion on *Hicks* in this case.

*1. Proper motion*

Hill's post-trial motion was filed pursuant to Rule 4-331, which provides, in pertinent part:

> **(a) Within Ten Days of Verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.
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> * * *
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> **(c) Newly Discovered Evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
>
> (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief.
>
> * * *

Md. Rule 4-331(a)(c). According to the Rule, the circuit court can grant a new trial or other appropriate relief on the grounds of newly discovered evidence: (1) if the evidence could not have been discovered within 10 days after the verdict, and (2) if the motion requesting such relief was filed within one year of the date that the circuit court imposed the sentence.

This case fits both parameters of the Rule. The jury returned a guilty verdict in Hill's case on September 11, 2015. The first piece of newly discovered evidence—the microfilm from 1982-83 that listed the docket entries in the original case—was discovered on October 27, 2015. The original file from 1982-83 and the pertinent records from his psychological evaluation at Clifton T. Perkins were discovered a few months after the microfilm was found—and after Hill's sentencing. Neither Hill nor the State had previously been able to locate these documents despite repeated attempts to do so. Therefore, none of the newly discovered evidence could have been discovered within 10 days after the verdict. Also, while the circuit court imposed Hill's sentence on January 5, 2016, the motion for new trial based on the newly discovered evidence was filed on February 17, 2016. Thus, the motion requesting such relief was filed well within one year of the date that the circuit court imposed the sentence. Hill's motion for new trial was timely filed.

The relief sought by Hill is also allowed by Rule 4-331(c). The Rule allows the circuit court to "grant a new trial **or other appropriate relief** on the ground of newly discovered evidence." Md. Rule 4-331(c) (emphasis added). The relief for a *Hicks* violation is dismissal of the charges with prejudice. *State v. Hicks*, 285 Md. 310, 318 (1979).

Therefore, although Hill's motion is termed "motion for new trial" based on newly discovered evidence, the relief requested by Hill—dismissing the charges with prejudice—is permitted. *See* Rule 4-331(c).

Because this case concerns a motion for new trial, we review the circuit court's denial of the motion under the abuse of discretion standard. *Jackson v. State*, 164 Md. App. 679, 700 (2005). When applying the abuse of discretion standard, we will not disturb the circuit court's ruling "unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Jackson v. State*, 216 Md. App. 347, 363-64 (2014) (internal citation and quotation omitted). An exercise of discretion based upon legal error is necessarily an abuse of discretion. *Martin v. State*, 218 Md. App. 1, 30 n.31 (2014).

*2. Hicks analysis*[11]

As described above, *Hicks* is a shorthand reference to *Hicks v. State*, 285 Md. 310 (1979), and its progeny, which relate to the requirement now found in Section 6-103 of the Criminal Procedure ("CP") Article and Rule 4-271, that a criminal defendant must be

[11] One of the interesting complexities of this case is that it arose in 1982—just after the predecessor to Section 6-103 of the Criminal Procedure Article and the predecessor to Rule 4-271 became mandatory, and just after the *Hicks* case was decided. Many of the important applications of the *Hicks* rule had not yet been decided. We hold, however, that these subsequent cases do not change or modify anything in the original understanding of Section 6-103, Rule 4-271, or *Hicks*. Rather, these cases merely highlight, develop, and explain ideas contained in the original understanding of Section 6-103, Rule 4-271, and *Hicks*. Therefore, we apply the rules explicated in *Hicks* cases subsequent to this case.

brought to trial within 180 days after the earlier of the appearance of counsel, or the first appearance of the defendant before the circuit court, unless good cause is shown. *Hicks*, 285 Md. at 315-16. A *Hicks* violation results in the dismissal of the charges with prejudice. *Id.* at 318. As we will explain below, to understand the resolution of *Hicks* in Hill's case, we must examine: (1) the date of the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court—the date of which sets the *Hicks* date as 180 days later; (2) the critical postponement for purposes of Rule 4-271—the postponement that carries the case beyond the 180-day deadline; and (3) the possible reasons for the postponement, including a good cause finding by the circuit court, waiver by the defendant, or consent of the defendant. Under this analysis, we hold that the circuit court committed legal error, and therefore necessarily abused its discretion, in failing to find that the State violated *Hicks* in October of 1982.

The scheduling of a trial date in a criminal matter is governed by Section 6-103, which states, in pertinent part:

> (a)(1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
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> (i) the appearance of counsel; or
>
> (ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.
>
> (2) The trial date may not be later than 180 days after the earlier of those events.

> (b)(1) For good cause shown, the county administrative judge or a designee of the judge may grant a change of the trial date in a circuit court:
>
> (i) on motion of a party; or
>
> (ii) on the initiative of the circuit court.
>
> (2) If a circuit court trial date is changed under paragraph (1) of this subsection, any subsequent changes of the trial date may only be made by the county administrative judge or that judge's designee for good cause shown.
>
> * * *

CP § 6-103.

We read Section 6-103 in tandem with Rule 4-271, which states, in pertinent part:

> **(a) Trial Date in Circuit Court.**
>
> (1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. … On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.

Md. Rule 4-271(a)(1).

Together, Section 6-103(a) and Rule 4-271(a)(1) require that "a criminal case be brought to trial within 180 days of the appearance of counsel or the appearance of the defendant before the circuit court, whichever occurs first." *Choate v. State*, 214 Md. App. 118, 139 (2013). This 180-day deadline is commonly referred to as the *Hicks* date. *Dorsey v. State*, 349 Md. 688, 693 (1998). The 180-day rule is "mandatory and dismissal of the criminal charges is the appropriate sanction for violation of that time period" if good cause has not been established. *Ross v. State*, 117 Md. App. 357, 364 (1997); *see also Hicks*, 285 Md. at 318. The Court of Appeals has explained, however, that while the rule was adopted to facilitate the prompt disposition of criminal cases, *Hicks* serves "as a means of protecting society's interest in the efficient administration of justice. The actual or apparent benefits of [Section 6-103] and Rule 4-271 confer upon criminal defendants are purely incidental." *State v. Price*, 385 Md. 261, 278 (2005). Unlike the Sixth Amendment speedy trial guarantee, "the *Hicks* rule is a statement of public policy, not a source of individual rights." *Choate*, 214 Md. App. at 140.

"[T]he critical postponement for purposes of Rule 4-271 is the one that carries the case beyond the 180 day deadline." *State v. Brown*, 355 Md. 89, 108-09 (1999). There are three exceptions that allow a circuit court to postpone the trial beyond the *Hicks* date: (1) if the judge makes a finding of **good cause** pursuant to Section 6-103(b)(1) and Rule 4-271(a)(1); (2) if the defendant **waives** *Hicks*; or (3) if the defendant **consents** to the postponement. *Jules v. State*, 171 Md. App. 458, 473 (2006). Therefore, to determine

whether *Hicks* was violated in this case, resulting in a dismissal of the charges against Hill with prejudice, we must look to the circumstances surrounding the circuit court's decision on September 20, 1982, to postpone the trial beyond the *Hicks* date of October 15, 1982. We hold that none of the three exceptions apply to the circuit court's postponement of Hill's trial on September 20, 1982.

The pertinent step-by-step progression of the case was as follows:

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| **April 19, 1982:** | Hill, and his counsel, made their first appearance in court, causing the 180-day *Hicks* date to be October 15, 1982, pursuant to CP § 6-103 and Rule 4-271; |
| **May 24, 1982:** | Hill requested a psychological evaluation—some five months before the *Hicks* date; |
| **September 20, 1982:** | The circuit court placed Hill's case on the "move list"; |
| **October 13, 1982:** | The prosecutor described a "procedural foul-up" to explain the delay in Hill's evaluation in a letter to the Superintendent of Clifton T. Perkins—two days before the *Hicks* date; |
| **October 20, 1982:** | The circuit court ordered the evaluation—five days after the *Hicks* date; |
| **December 3, 1982:** | Hill's evaluation at Perkins began; |
| **December 9, 1982:** | Hill's evaluation at Perkins was completed; |
| **December 15, 1982:** | Perkins submitted the report of Hill's evaluation to the circuit court; and |

**March 17, 1983:** The prosecutor *nol prossed* the case due to a "HICKS PROBLEM"—more than five months after the *Hicks* date.

*First*, there is nothing in the record to indicate that the circuit court made a finding, pursuant to Section 6-103(b)(1) and Rule 4-271(a)(1), that there was "good cause" to postpone the trial beyond the *Hicks* date of October 15, 1982. Section 6-103(b)(1) and Rule 4-271(a)(1) require that the circuit court make an express finding of good cause, and "[n]either the accused nor the prosecution nor the trial court are empowered to dispense with the mandates of [the Rules]." *Dorsey*, 349 Md. at 701 (citations omitted). Here, the record entry from September 20, 1982, the date of the postponement, only contains the words "move list." The State did not present a good cause argument as to the need to delay the trial beyond the *Hicks* date of October 15, 1982, and the circuit court in 1982 made no such finding. Without an explicit finding of good cause on the record, we may not invent one to explain the delay. *See Dorsey*, 349 Md. at 701 (citations omitted).

*Second*, there is no allegation that Hill signed a waiver to allow the State to postpone the trial beyond the *Hicks* date.

*Third*, the State argues that Hill's request for a psychological evaluation was the equivalent of consent to a postponement of the trial date. The circuit court agreed, stating:

> This Court finds that when the *Hicks* Rule's 180-day limit ran in 1982, the Defendant was at Clifton T. Perkins being evaluated as a result of his counsel's insanity plea.[12] There

[12] We note that this is not an accurate statement of the facts by the circuit court. Hill was not at "Perkins being evaluated as a result of his counsel's insanity plea" when *Hicks* ran on October 15, 1982. As we explained earlier, Hill only made it to Perkins for

> was obvious agreement between the State and the Defendant for the 180-day rule to expire. *Hicks* was not violated in 1982.

With this we cannot agree. Our precedents are clear that consent to waive *Hicks* must be affirmative and that mere silence is insufficient. *See Jules*, 171 Md. App. at 474 (stating that "a defendant's mere silence when a case is postponed to a date beyond 180 days … does not ordinarily constitute express consent to a trial date … [t]here must be some overt act evidencing an intent to consent to the delay"). The precise argument presented here—that a request for a psychological evaluation is the equivalent of a consent to a postponement of the trial date—was previously rejected. *See Dorsey*, 349 Md. at 703 ("*Hicks* carefully limited this exception to the situation where the defendant seeks or *expressly* consents to a trial date in violation of the rule. … . [B]eing dilatory in raising an insanity defense … is not seeking or *expressly* consenting to trial date.") (emphasis in original) (citations omitted). A request for a psychological evaluation is not an affirmative consent for postponement, and the circuit court here erred in so finding. Furthermore, we do not think that this argument makes much factual sense. Hill's request for a psychological evaluation came on May 24, 1982, some five months before the *Hicks* date of October 15, 1982. And the evaluation, once it finally began on December 3, 1982, was concluded, with the report of the evaluation submitted to the circuit court, in only two weeks—by December 15, 1982. But for the State's "procedural foul-up," nothing about Hill's request for a

his requested psychological evaluation—for the offenses charged in this case—on December 3, 1982.

psychological evaluation would have taken it close to the *Hicks* date, let alone over it. In such a circumstance, we refuse to hold that Hill's request for a psychological evaluation was the equivalent of consent.

Therefore, we hold that none of the three exceptions enunciated by *Jules* and other cases (*i.e.*, good cause, consent, or waiver), for a postponement beyond the *Hicks* date applies in this case. For this reason, we hold that the circuit court abused its discretion by denying Hill relief based on *Hicks*. The circuit court's legal rulings on these issues—that Hill's mere request for a psychological evaluation provided good cause and consent for the postponement—were incorrect, and necessarily constituted an abuse of discretion. Because no exception applied for the State to exceed the *Hicks* date of October 15, 1982, we reverse the ruling of the circuit court and instruct the circuit court to dismiss the charges against Hill with prejudice.[13]

[13] It is an interesting twist that the operative facts in this case occurred at precisely the same time that the modern *Hicks* rule was developing. Our review of the record in this case suggests that the relevant actors in 1982-83 (through no fault of their own) failed to anticipate the ways in which our *Hicks* law would evolve, and that this mistake shaped the way in which the parties have argued the case on appeal. We explain.

From our best reading of the record, the relevant actors' faulty perception was that when the circuit court postponed Hill's trial beyond the *Hicks* date of October 15, 1982, another 180-day *Hicks* clock began. They incorrectly thought that if the State did not bring the defendant to trial by the end of the second 180-day time period, then the *Hicks* remedy of dismissal still applied. Therefore, when Hill's case had not been brought to trial by March 17, 1983—178 days from the original trial date, and "move list" date, of September 20, 1982—the State *nol prossed* the case due to a misperceived "HICKS PROBLEM."

The primary mistake made was that the only date that matters is the original *Hicks* date of October 15, 1982, and not the date that the State entered the *nol pros*—March 17,

1983. As we explained above, once none of three exceptions (good cause, waiver, or consent) applied to postpone the *Hicks* date, then the case should have been dismissed after *Hicks* ran on October 15, 1982. If one of the exceptions would have applied—if the circuit court would have properly found good cause to postpone *Hicks*, or if Hill would have waived or consented to a postponement of *Hicks*—then there would be no second 180-day limit. *See Dorsey v. State*, 349 Md. 688, 706 (1998) (citation omitted) ("Once a postponement beyond the 180-day deadline is ordered in accordance with [Section 6-103] and [Rule 4-271] (or upon the defendant's motion or with his express consent), it would not further this purpose to utilize the dismissal sanction for subsequent violations of the statute and rule. The sanctions for such subsequent violations must be ones of internal judicial administration, relating to circuit court personnel and/or procedures."); *Farinholt v. State*, 299 Md. 32, 40 (1984) ("[A]fter a case has already been postponed beyond the 180-day period, either in accordance with [Section 6-103] and [Rule 4-271], or upon the defendant's motion, or with the defendant's express consent, the dismissal sanction has no relevance to subsequent postponements of the trial date unless the defendant's constitutional speedy trial right has been denied."); *see also Jules v. State*, 171 Md. App. 458, 474 (2006) ("Once a defendant consents to a continuance beyond the 180-day period, however, there can be no circumvention of [Rule 4-271] because the point of reference is the 180-day period and, assuming a case is not brought to trial within that time frame, the *sine qua non* of the Rule is not achieved."). Therefore, because the only date that mattered in this case was the *Hicks* date of October 15, 1982, there was no reason for the State to enter a *nol pros* on March 17, 1983.

This mistaken assumption—that the March 17, 1983 was determinative—drove the parties' arguments on appeal. Hill argued that the *nol pros* entered by the State on March 17, 1983, due to a "HICKS PROBLEM," prevented the State from re-indicting him in 2014 because, according to Hill, it is evidence that the State's purpose was to evade or circumvent the *Hicks* rule. *See State v. Huntley*, 411 Md. 288, 293 (2009) (citation omitted) ("Where (1) the purpose of the State's *nol pros*, or (2) the necessary effect of its entry, is to [evade or] circumvent the statute and rule governing time limits for trial, the 180-day period for trial begins with the triggering event under the initial prosecution, rather than beginning anew with the second prosecution."). According to Hill, the *nol pros* coupled with the later re-indictment demonstrated that the *nol pros* was entered to evade or circumvent *Hicks*. Therefore, Hill argued that *Hicks* ran in the 1980s, and that this case, instituted in 2014, should be dismissed. Although the State failed to mention the critical document, we interpret it to argue that the prosecutor's statement that the *nol pros* was due to a "HICKS PROBLEM" did not rise to the level of evasion or circumvention required to

(Continued…)

(…continued)

prevent a later re-indictment. Thus, according to the State, with whom the circuit court agreed, a new *Hicks* timeframe began after the indictment in 2014.

Although we explained that the only date that mattered in this case was the *Hicks* date of October 15, 1982, and not the *nol pros* date of March 17, 1983, we wish to address the parties' arguments regarding the intention to evade or circumvent *Hicks* evinced by the *nol pros*. This inquiry is always a question of the subjective intent of the prosecutor—whether the prosecutor intended to evade or circumvent *Hicks* when he or she entered the *nol pros*. A defendant is hampered in efforts to produce evidence of what the prosecutor intended, particularly when the prosecutor acted more than 30 years prior. Still, it is hard to find a clearer statement by a prosecutor of an intent to evade or circumvent *Hicks* than this—the prosecutor submitted on the record that the purpose of the *nol pros* was due to a "HICKS PROBLEM." The 1982 *nol pros*, coupled with the re-indictment of Hill more than 30 year later, makes the *prima facie* case that the *nol pros* was entered for the purpose of evading or circumventing *Hicks*. By putting forth this newly discovered evidence, Hill has satisfied his burden of production and persuasion on this issue. *See Jackson v. State*, 164 Md. App. 679, 686 (2005) ("At a hearing on a Motion for New Trial, the burden of persuading the trial judge that such a remedy is called for is on the defendant, as the moving party."); *Herbert v. State*, 136 Md. App. 458, 481 (2001) ("As a general rule, the moving party on any proposition, civil or criminal, has both the burden of production and the burden of persuasion. It is the moving party who attempts to persuade a judge somehow to alter the *status quo*."). The State, as the only one who can explain the prosecutor's state of mind, must then, if it can, rebut the implication of this document. It has not done so. Thus, even though this point is not necessary to decide the case, we think that the entry of the *nol pros* by the State because of a "HICKS PROBLEM" was for the purpose of evading or circumventing *Hicks*.

There may even be further evidence that the State attempted to evade or circumvent *Hicks* when it entered the *nol pros*. Hill's case was re-opened in 2014 due to an arrest warrant that had laid dormant since the early 1980s. This open warrant was either: (1) the *original* arrest warrant from the beginning of the case in 1982 that was left open even after the case was *nol prossed* on March 17, 1983; or (2) a new arrest warrant that was opened *after* the case was *nol prossed* on March 17, 1983. The record is not clear as to this point, and the arrest warrant at issue cannot be located. If, as Hill suggested at oral argument, the arrest warrant was a new warrant that was opened *after* the case was *nol prossed* on March 17, 1983, then our conclusion that the State entered the *nol pros* with the purpose to evade

## CONCLUSION

Although we hold that the circuit court did not err in denying Hill's requested relief under the Sixth Amendment speedy trial right or the Fourteenth Amendment due process right, we hold that the circuit court abused its discretion in denying Hill relief under *Hicks*. For this reason, we reverse the ruling of the circuit court and remand the case with instructions for the circuit court to dismiss the charges against Hill with prejudice.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION WITH THE DIRECTION TO DISMISS THE CASE WITH PREJUDICE. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.**

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or circumvent *Hicks* is further strengthened. Unfortunately, however, the record does not substantiate Hill's suggestion.

In sum, only the *Hicks* date of October 15, 1982, matters to the outcome of this appeal. The date that the State entered the *nol pros*—March 17, 1983—does not have legal significance. Even so, the evidence on the record dictates that State entered the *nol pros* with the intent to evade or circumvent the *Hicks* rule. Therefore, we agree with Hill, and disagree with the State and the circuit court, on this point as well.