Circuit Court for Frederick County
Case No.: C-10-CR-19-000537

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2250

September Term, 2019

ERNESTO C. TORRES

v.

STATE OF MARYLAND

Arthur,
Beachley,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: July 6, 2021

In May of 2019, Ernesto Torres, a doctor practicing in Frederick, Maryland, was indicted on one count of rape in the second degree,[1] one count of sexual offense in the

[1] At the time of the offense, Section 3–304 of the Criminal Law Article, Maryland Code (1957, 2012 Repl. Vol.), defined rape in the second degree as:

> (a) A person may not engage in vaginal intercourse or a sexual act with another:
>
> (1) by force, or the threat of force, without the consent of the other;
>
> (2) if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual; or
>
> (3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

Pursuant to Section 3–301(e) of the Criminal Law Article, Maryland Code (1957, 2012 Repl. Vol.), a "sexual act" was defined as:

> (d)(1) "Sexual act" means any of the following acts, regardless of whether semen is emitted:
>
> (i) analingus;
>
> (ii) cunnilingus;
>
> (iii) fellatio;
>
> (iv) anal intercourse, including penetration, however slight, of the anus; or
>
> (v) an act:
>
> 1. in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and
>
> 2. that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.
>
> (2) "Sexual act" does not include:
>
> (i) vaginal intercourse; or
>
> (ii) an act in which an object or part of an individual's body penetrates an individual's genital opening or anus for an accepted medical

(continued . . .)

fourth degree,[2] and one count of assault in the second degree.[3] The charges against Torres

(. . . continued)
purpose.

[2] At the time of the offense, Section 3–308(b) of the Criminal Law Article, Maryland Code (1957, 2012 Repl. Vol.), defined a fourth-degree sexual offense as:

> (1) sexual contact with another without the consent of the other;
>
> (2) except as provided in § 3–307(a)(4) of this subtitle, a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 4 years older than the victim; or
>
> (3) except as provided in § 3–307(a)(5) of this subtitle, vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 4 years older than the victim.

"Sexual contact" was defined as:

> (e)(1) "Sexual contact", as used in §§ 3–307, 3–308, and 3–314 of this subtitle, means an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party.
>
> (2) "Sexual contact" does not include:
>
> (i) a common expression of familial or friendly affection; or
>
> (ii) an act for an accepted medical purpose.

Maryland Code (1957, 2012 Repl. Vol.), Section 3–301(f) of the Criminal Law Article.

[3] At the time of the offense Section 3–203 of the Criminal Law Article, Maryland Code (1957, 2012 Repl. Vol.), defined second-degree assault as:

> (a) A person may not commit an assault.
>
> (b) Except as provided in subsection (c) of this section, a person who violates subsection (a) of this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding $2,500 or both.

arose from an incident which occurred in April of 2019 in Frederick, involving R.J.[4]

Following a bench trial in the Circuit Court for Frederick County, which occurred in October of 2019, Torres was found guilty of the commission of a fourth-degree sexual offense and the second-degree assault. The trial court merged the second-degree assault into the fourth-degree sexual offense and sentenced Torres to one year of imprisonment, to be served in the Frederick County Adult Detention Center. The judge gave Torres credit for time served of 230 days.

On appeal, Torres asks us to vacate his conviction, by presenting the following question:

> Was Appellant's Sixth Amendment Constitutional right to confront his accuser violated when the Trial Court precluded him from impeaching the complainant with prior inconsistent statements, on the grounds that these statements were contained in records that were privileged under Maryland Annotated Code, Health Occupations §14–410?

In answering the question, we shall remand the case to the trial court with instructions to accept a proffer from Torres of the alleged inconsistent statements, in order for the judge to determine whether any were, in fact, inconsistent with R.J.'s trial testimony and whether a new trial is warranted. We explain.

[4] We refer to a victim of sexual assault using her initials, in order to protect her privacy. *See, e.g.*, *Lindsey v. State*, 235 Md. App. 299, 305 n.2 (2018).

Prior to trial, in discovery, the State provided a transcript of an interview of R.J., which had been conducted by an investigator for the State Board of Physicians ("the Board") as well as a transcript of R.J.'s testimony under oath during a hearing before an Administrative Law Judge ("ALJ"), during which he appealed the Board's suspension of his medical license. The State, preliminarily, then filed a Motion in Limine, which requested various evidentiary rulings, including, "That there be no mention by either the State or the Defendant of any prior hearings or any testimony taken during any prior hearings." In his response to the State's motion, Torres stated, "The Defendant agrees that no reference should be made by either side in opening statements to prior hearings. The Defendant reserves his right, under the Confrontation Clause, to confront any witness presented by the State with prior inconsistent statements related to these allegations."

On the first day of the trial, the judge, in ruling on various motions, reserved ruling on whether Torres could use, for impeachment purposes, R.J.'s previous statements. R.J., who was the first witness called by the State, testified regarding the events that led to the indictment for the sexual offenses and second-degree assault. The following colloquy occurred prior to her cross examination:

> [DEFENSE COUNSEL:] Your Honor, at this point I think I need to ask for a recess because I need the Court to advise me on what I can and cannot do.
>
> THE COURT: I'll tell you what. I don't know that we need a recess. Would you go sit in the front over there?
>
> R.J.: Yes.

The judge then convened a bench conference, during which the conversation continued as follows:

> THE COURT: I'm intrigued on what you are planning to do.
>
> [DEFENSE COUNSEL:] Your Honor, I think I have the right to, the Court has already heard that there's been, that there's a written statement the complainant made.
>
> THE COURT: Uh-huh.
>
> [DEFENSE COUNSEL:] I will proffer that the State also disclosed an interview that, a transcript from an interview that the complainant made and I have the transcript. But with regards to cross-examination I believe that if there's any prior inconsistent statement that she has made with regards to this incident that I can cross-examine here if I was in possession theoretically of a transcript from another proceeding that is confidential under Maryland law. I think the defendant's right under the Confrontation Clause --
>
> THE COURT: Here's what I want you to do. I want you to go, to do your cross-examination except for that. Are you able to do that?
>
> [DEFENSE COUNSEL:] It's very - -
>
> THE COURT: Or do you need me to make the decision right now?
>
> [DEFENSE COUNSEL:] Well, the problem is I've - -
>
> THE COURT: Because I read COMAR. COMAR says it's confidential, period.[5]

In response, Torres's attorney stated that her client's "rights under the Confrontation Clause trump the statute." The prosecuting attorney responded, "Your Honor, if I could, I was wondering if [Torres's counsel] could proffer, I don't, I did not

[5] The Judge was apparently referring to COMAR 10.32.02.15, which concerns hearings before the Board of Physicians, in relevant part, provides: "Except for formal charging documents, notices of intent to deny, or as otherwise provided by law, the proceedings of the Board and the disciplinary panels are confidential, and the confidentiality of the proceedings cannot be waived by the parties."

hear anything inconsistent. I just am wondering what it is[.]" The trial judge, without responding to the State's request for a proffer, recessed the proceedings, stating that he would "decide" whether Torres's attorney would be allowed to use the transcripts for impeachment purposes.

When the court reconvened, the trial judge discussed the issues related to R.J.'s prior statements:

> Counsel has made a motion and wants to use certain transcript and information from a prior hearing in cross-examination. There's much case law that says in ascertaining legislative intent we look first to the language of the statute giving it its natural and ordinary meaning. Where the plain language of the statute is unambiguous we end our inquiry as to legislative intent and "apply the statute as written without resort to other rules of construction". *Bricken v. Lindsay* and there's many cases that actually cite that.
>
> The applicable statute is Maryland Code Health Occupations 14–410 as it applies to the Maryland Board of Physicians. Except by express stipulation and consent of all parties to a proceeding before the board of disciplinary panel or any of its other investigative bodies or in any similar civil or criminal action the proceedings, records or files of the board in disciplinary panel or any of its other investigative bodies are not discoverable and are not admissible in evidence.
>
> Nor is any order passed by the board admissible in evidence. The statute is clear and unambiguous.

The following colloquy, then, ensued in open court:

> [DEFENSE COUNSEL:] Your Honor, I would like to proffer, I would to proffer for the record at the bench what the information is that the defense is in possession of --
>
> THE COURT: Is it something different than what I just described? Yes or no?

[DEFENSE COUNSEL:] In terms of the law?

THE COURT: No.

[DEFENSE COUNSEL:] I'm sorry.

THE COURT: Is, does it not, is it part of the, hold on one second, proceedings, records, files?

[DEFENSE COUNSEL:] Your Honor, I will, what I am going --

THE COURT: I just need a yes or no to that one.

[DEFENSE COUNSEL:] I think it's, I'm not sure how to answer. I think it's a yes and no. I think the difficulty for this --

The judge then convened a bench conference, during which the colloquy resumed:

[DEFENSE COUNSEL:] But, however, I possess information because I will proffer to the Court I have questioned this witness on a prior occasion and I will proffer to the Court that in a prior proceeding I have information --

THE COURT: Don't tell me what she said.

[DEFENSE COUNSEL:] Well, I think I need to proffer --

THE COURT: You can't. I'm the trier of fact. Is the proceeding, is the proceeding the hearing in front of the panel of physicians?

* * *

[DEFENSE COUNSEL:] Well, so it is a, it was, I will proffer that it was a hearing before an administrative law judge regarding an appeal.

* * *

[DEFENSE COUNSEL:] The Court will not allow me to proffer to make a record of what the information is that I would like to --

THE COURT: You can proffer --

[DEFENSE COUNSEL:] -- include?

THE COURT: You can proffer that it was part of your hearing that resulted from this but it was the appeal to the ALJ. You've done that. And my ruling is that is all part of the proceedings relative to the board.

[DEFENSE COUNSEL:] And the Court, I just want to be clear. I'm --

THE COURT: And it protects your client as well.

[DEFENSE COUNSEL:] I, no[,] I understand the intent of the statute but I guess why I'm asking, I'm inquiring of the Court, I'm requested that the Court allow me to proffer what the specific information is --

[STATE'S ATTORNEY:] Just for the record. Just --

THE COURT: I would do that if it was, if we were in a trial in front of a jury. It's a trial in front of me that was elected. I'm not going to let you do it. I don't think that's appropriate.

[DEFENSE COUNSEL:] I understand. Thank you.

THE COURT: And the appellate [court] may decide otherwise if it goes that far.

During the course of cross-examination, the following exchange took place between Torres's attorney and R.J.:

[DEFENSE COUNSEL:] Do you recall and I'm referring to State's discovery page 174 just so everybody knows what I am doing. Do you recall speaking to an investigator regarding this incident around May 29, 2019?

R.J.: Are you referring to the police officer that I talked to or the detective like?

[DEFENSE COUNSEL:] I'm speaking with regards to another investigator that you spoke with and you gave a recorded statement.

R.J.: Oh, yes. On that Sunday, yes.

[DEFENSE COUNSEL:] And do you recall the investigator asking you questions about this[?]

The State objected to the question, after which a bench conference occurred, in which the following discussion took place:

THE COURT: There wasn't anything objectionable yet.

[STATE'S ATTORNEY:] She's referring to the transcript. She is not --

[DEFENSE COUNSEL:] This is the State gave me discovery.

[STATE'S ATTORNEY:] It's the transcript.

[DEFENSE COUNSEL:] What I proffered to the Court is a transcript that I have from --

THE COURT: You can't use that.

[DEFENSE COUNSEL:] But the State provided this to me. This is not what I am referring to.

THE COURT: I don't care. They shouldn't have.

* * *

THE COURT: Because they fouled up doesn't mean it's admissible. You can't use it. It's not admissible. That was my ruling.

[DEFENSE COUNSEL:] I apologize. I'm not trying to circumvent the Court's ruling. I was querying the Court on the other hearing that --

THE COURT: I understood --

[DEFENSE COUNSEL:] -- the Court references.

THE COURT: -- that was the appeal from that, right?

[DEFENSE COUNSEL:] This is, I'll proffer to the Court that the State disclosed discovery on pages 173 through 188 as this was brought up to --

THE COURT: I understand that they did that. They shouldn't have. And it doesn't by them doing that wouldn't make it admissible.

[DEFENSE COUNSEL:] I would just, I understand the Court's ruling. I feel that again I would just put on the record --

THE COURT: You are objecting to it. I understand.

[DEFENSE COUNSEL:] -- the defendant has the right to an effective cross-examination under the Confrontation Clause.

THE COURT: You are doing good so far.

[DEFENSE COUNSEL:] And we're in a difficult position if we can't use the discovery that the State's provided.

THE COURT: You can use it all except when the statute says what you want to use is not admissible. You can use anything else.

[DEFENSE COUNSEL:] I understand, Your Honor.
THE COURT: Unless I rule otherwise.
[DEFENSE COUNSEL:] I understand.

Torres's attorney, upon resumption of cross-examination, attempted to impeach R.J. with other statements that she had given to the police days after the incident.

Following R.J.'s testimony, the State called several additional witnesses, including R.J.'s parents, as well as former employees of Torres, and Pamela Holtzinger, a registered nurse, who was qualified as an expert in the field of general nursing. At the close of the State's case, Torres moved for a judgment of acquittal on all three counts of the indictment, and the trial judge reserved his ruling.

Torres's attorney subsequently returned to the issue of "preserv[ing] the record with regards to the issue about, that I cannot name . . . with regards to the medical board . . . proceedings" by "putting the exhibits in [the record]" under seal. The State, rather than opposing the idea, suggested that the sides "come to some kind of an agreement" regarding the record of the testimony "because we obviously don't want any appeal issues[.]" The discussion regarding this issue continued in chambers, following the adjournment of proceedings for the day.[6]

The next morning, the discussion of R.J.'s statements before the Board resumed in open court:

[6] There is no record of the in-chambers' discussion.

[DEFENSE COUNSEL:] Well, then I would proffer to the Court the Defense -- and this is regarding the defendant's rights under the Confrontation Clause to effectively cross-examine witnesses against him in full compliance with the Maryland rules -- the defendant would introduce under seal a packet that contains two transcripts. One I will reference as State's 173 to 188 and the other is pages 146 to 217 of another hearing.

THE COURT: All right. And my understanding, just so the record is clear, is that you had wanted to cross examine. I had ruled under the statute --

[DEFENSE COUNSEL:] Right.

THE COURT: -- that the pages that you're talking about are inadmissible. And you're offering this as an exhibit but to remain sealed.

[DEFENSE COUNSEL:] Correct.

THE COURT: So that it preserves exactly what it is you were talking about for any appellate review.

[DEFENSE COUNSEL:] That is absolutely correct, Your Honor. I'm not asking the Court to review it and I don't think legally I can.

THE COURT: I'm not intending to review it.

[DEFENSE COUNSEL:] I can provide it to the State.

[STATE'S ATTORNEY:] Your Honor, I did get the other transcript that defense counsel is referring to. I have reviewed. Again, I don't think that --

[DEFENSE COUNSEL:] Objection to the State's opinion on the transcript.

In response to the objection, the Court convened a bench conference, during which the conversation continued:

THE COURT: When we left, there were two ways we could go. When you are offering it this way, I figured that you all had talked and that's the way we were going. Am I correct?

[STATE'S ATTORNEY:] Your Honor, actually counsel for the Board of Physicians this morning right before Your Honor took the Bench my understanding is that on such short notice they can't waive such

confidentiality.

THE COURT: Okay. All right. That's fine.

[STATE'S ATTORNEY:] I don't -- I wish that we could do that because there is nothing --

[DEFENSE COUNSEL:] Objection --

THE COURT: No, no, no.

[DEFENSE COUNSEL:] -- to the State's opinion.

THE COURT: Don't. Don't. Don't get into it because I'm not letting them put anything about it. I'm not letting you put anything about it. It's inadmissible. That's my ruling and if it's inadmissible it's inadmissible. So I called you up just to make sure they weren't calling back your witness to proceed because that was small but at least a possibility. And I didn't figure that you were going to be able to get it all done on such short notice. So, all right. I'll come off this.

The sealed documents were marked as Defendant's Exhibit No. 2 and "admitted for the purposes stated."[7]

The following day, the judge ruled that the State had not met its burden regarding the second-degree rape charge and granted Torres's motion for a judgment of acquittal on that count, but found Torres guilty of fourth-degree sexual conduct and second-degree assault and sentenced Torres to serve one-year imprisonment in the Frederick County Adult Detention Center.

[7] Upon request, Defendant's Exhibit 2 was released to this panel, but we can find no precedent for a seminal review by an appellate court.

In the present case, the confluence of the Constitutional Right of Confrontation protected by the Sixth Amendment to the U.S. Constitution and its Maryland counterpart, and the statutory prohibition of admissibility of "proceedings" before the Board of Physicians is in issue. The Sixth Amendment, made applicable to the States by the 14th Amendment, *see Pointer v. Texas*, 380 U.S. 400 (1965), provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Article 21 of the Maryland Declaration of Rights, which has been interpreted as in *pari materia* with the Confrontation Clause, proclaims: "That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him." *Craig v. State*, 322 Md. 418, 430 (1991); *White v. State*, 223 Md. App. 353, 389 n.30 (2015).

The Confrontation Clause guarantees a defendant the right to confront witnesses through, mainly, cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004); *Ashton v. State*, 185 Md. App. 607, 621 (2009) ("'Central to that right is the opportunity to cross-examine witnesses.'") (quoting *Pantazes v. State*, 376 Md. 661, 680 (2003)); *Owens v. State*, 161 Md. App. 91, 109 (2005) (stating that "The primary purpose of the Confrontation Clause is to protect the right of cross-examination."). A defendant's rights under the Confrontation Clause are, thus, "trial" rights. *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (plurality opinion); *see also Goldsmith v. State*, 337 Md. 112, 129 (1995); *State v. Johnson*, 440 Md. 228 (2014).

The statutory privilege of Section 14–410 of the Health Occupations Article, Maryland Code (1981, 2014 Repl. Vol.),[8] includes the following language:

> (a) *Records not discoverable or admissible — In general.* — Except by the express stipulation and consent of all parties to a proceeding before the Board, a disciplinary panel, or any of its other investigatory bodies, in a civil or criminal action:
>
> (1) The proceedings, records, or files of the Board, a disciplinary panel, or any of its other investigatory bodies are not discoverable and are not admissible in evidence; and
>
> (2) Any order passed by the Board or disciplinary panel is not admissible in evidence.
>
> (b) *Records not discoverable or admissible — Exception.* — This section does not apply to a civil action brought by a party to a proceeding before the Board or a disciplinary panel who claims to be aggrieved by the decision of the Board or the disciplinary panel.
>
> (c) *Other evidence not affected.* — If any medical or hospital record or any other exhibit is subpoenaed and otherwise is admissible in evidence, the use of that record or exhibit in a proceeding before the Board, a disciplinary panel, or any of its other investigatory bodies does not prevent its production in any other proceeding.

In addressing the issue of whether the Constitutional Right of Confrontation outweighs the statutory privilege, Torres argues that the Statute's preclusion of admissibility of testimony must give way to his Constitutional right to confront R.J., through cross examination, with what, he alleges, were prior inconsistent statements. Torres seminally, asserts, however, that, because Section 14–410 was enacted for the purpose of fostering effective peer review among medical professionals and protecting

[8] Unless otherwise noted, all references to Section 14 are to the Health Occupations Article, Maryland Code (1981, 2014 Repl. Vol.).

the privacy of doctors who have been disciplined by the Board, he should not have been prevented from impeaching R.J. with inconsistencies between her trial testimony and her previous statements. Torres also suggests that the statutory privilege applies only to R.J.'s statement to the Board investigator, because her testimony during the appeal hearing, Torres asserts, did not occur during "proceedings before the Board."[9]

The State responds that the trial judge correctly precluded the defense from impeaching based on R.J.'s previous statement and testimony. With respect to Torres's

[9] With respect to Torres's argument that the Statute applies to only one of the two statements that R.J. gave, related to Torres's medical license, the privilege would apply to both, because proceedings before the Board would include the appeal hearing before an Administrative Law Judge ("ALJ"). *See Pepsi Bottling Group v. Plummer*, 226 Md. App. 460, 476 (2016) (explaining that the term "proceedings," as used in Section 14–410 of the Health Occupations Article, Maryland Code (1981; 2014 Repl. Vol.), denotes that "the scope of the protection afforded by the privilege [includes] all matters placed before or considered by the Board."); *see also* Section 14–405(a) of the Health Occupations Article, Maryland Code (1981; 2014 Repl. Vol.) (providing an opportunity for a doctor, who is subject to a disciplinary action of the Board of Physicians, an opportunity for a hearing before a "hearing officer."); *and* COMAR 10.32.02 (defining regulations applicable to "Hearings before the Board of Physicians).

Torres asserts that since his appeal hearing was overseen by the Office of Administrative Hearings, and not the Board, the proceedings, then, were subject to COMAR 10.32.02.15, which, renders such proceedings confidential. Torres asserts that his rights under the Confrontation Clause constitute an exception of the regulation, which allows for disclosure "as otherwise provided by law."

Torres's argument is without merit. Although the regulations contained in COMAR 10.32.02 applied to Torres's appeal hearing, that hearing constituted his appeal of the Board's summary suspension of his medical license, the opportunity for which was provided by Section 14-405(a) of the Health Occupations Article. The Health Occupations Article constitutes one statutory scheme for medical licensure and discipline. *See Maryland Board of Physician Quality Assurance v. Felsenberg*, 351 Md. 288, 300 (1998). Therefore, Section 14-410 would apply to R.J.'s testimony before the ALJ.

assertion that the statutory privilege is inapplicable to R.J.'s testimony before the ALJ, the State argues that Torres failed to preserve that as a basis for appeal, because, during trial, he focused solely on the primacy of his rights under the Confrontation Clause. As to the merits of Torres's appeal, the State suggests, while appearing to concede that the Confrontation Clause may overcome a privilege, such as that created by Section 14-410, that Torres failed to show that the privileged materials contained "exculpatory information necessary for a proper defense[.]"

We shall first address Torres's argument that Section 14–410 was enacted only to protect the privacy interests of doctors who had been investigated and/or disciplined by the Board, so that he should be able to use the statements of R.J. as the "protected" individual. This argument is without merit, based upon our interpretation of the Statute.

The basic tenets of statutory interpretation, oft-told by the Court of Appeals, require that:

> In statutory interpretation, our primary goal is always to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, Constitutional or part of the Rules. We begin our analysis by first looking to the normal, plain meaning of the language of the statute, reading the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory. If the language of the statute is clear and unambiguous, we need not look beyond the statute's provisions and our analysis ends. Occasionally we see fit to examine extrinsic sources of legislative intent merely as a check of our reading of a statute's plain language. In such instances, we may find useful the context of a statute, the overall statutory scheme, and archival legislative history of relevant enactments.
>
> If, however, the language is subject to more than one interpretation, it is ambiguous, and we endeavor to resolve that ambiguity by looking to

> the statute's legislative history, case law, statutory purpose, as well as the structure of the statute. When the statute is part of a larger statutory scheme, it is axiomatic that the language of a provision is not interpreted in isolation; rather, we analyze the statutory scheme as a whole considering the purpose, aim, or policy of the enacting body, and attempt to harmonize provisions dealing with the same subject so that each may be given effect.

Harrod v. State, 423 Md. 24, 33 (2011) (quoting *Evans v. State*, 420 Md. 391 (2011)).

The operative language in Section 14–410 provides: "in a civil or criminal action: (1) The proceedings, records, or files of the Board, a disciplinary panel, or any of its other investigatory bodies are not discoverable and are not admissible in evidence[.]" Section 14–410(a). The Statute allows for proceedings to be admissible only "by the express stipulation and consent of all parties to a proceeding before the Board[.]" Section 14–410(a). The term "parties" is not defined in the statute, nor in the statutory scheme, but clearly R.J., the complainant nor any representative of the State, including the Board, did not expressly stipulate and consent. Clearly there was no "express stipulation and consent of all parties."

Insofar as Torres is asserting that the intent of the statute somehow abrogates the plain meaning, he also is incorrect, for its plain meaning is confirmed by its legislative history. *See*, *e.g.*, *Deville v. State*, 383 Md. 217 (2004).

The precursor of the statutory framework, of which Section 14–410 is a part, was Chapter 429 of the Laws of 1888, which was enacted in order "to promote the public health and regulate the practice of medicine in the State of Maryland." The law required those who sought to practice medicine in the State to first obtain a certificate from the

Board of Health. Section 7 of the law empowered the Board of Health to "refuse [or revoke] certificates . . . to individuals guilty of professional or dishonorable conduct[.]" *Id.* Failure to comply with the terms of the law was "deemed a misdemeanor," pursuant to Section 8. *Id.*

The General Assembly has frequently revised the statutory framework to create and/or reorganize the state agency responsible for medical discipline.[10] From 1888

[10] The Court of Appeals recounted the history of the statutory framework pertaining to discipline of healthcare providers in *Maryland Board of Physician Quality Assurance v. Felsenberg*, 351 Md. 288 (1998). Various state agencies have been responsible for medical discipline in Maryland. The Board of Health was responsible for credentialing and disciplining doctors in the State, from 1888 through 1892. *Id.* at 297. In 1892, the General Assembly created "two separate boards of medical examiners—one appointed by Med Chi and one 'representing' and appointed by the Maryland State Homeopathic Medical Society of the State of Maryland." *Id.* at 298 (quoting 1892 Maryland Laws, Chapter 296). The Medical and Chirurgical Faculty of the State of Maryland, or "Med Chi," was the state medical society. *Id.* at 292. Both Boards were empowered to license doctors within the State. *Id.* Neither Board was empowered to discipline doctors, however, until 1902, when the General Assembly enacted Chapter 612 of the 1902 Laws of Maryland. That law conferred to both boards the authority to revoke licenses of doctors who had been convicted "of a crime of moral turpitude." *Id.*

In 1957, the General Assembly established a Board of Medical Examiners, thereby consolidating the responsibilities of the two previous boards into a single body. *Id.*

In 1968, the General Assembly replaced the Board of Medical Examiners with a Commission on Medical Discipline, which had the responsibility of licensing and disciplining doctors within the state. *Id.* at 299. Two years later, the General Assembly established a Board of Medical Examiners for the purpose of licensing doctors within the State. The Commission on Medical Discipline, which no longer handled licensing, retained the power to discipline doctors. *Id.*

In 1988, the General Assembly consolidated medical licensing power and disciplinary power into a Board of Physician Quality Assurance. *Id.* at 300. That agency was replaced, in 2003, by a Board of Physicians, which is the agency that is presently tasked with investigating and meting out discipline.

through 1975, however, the relevant statutory schemes did not incorporate a provision, such as the one under review, by which the proceedings of the agency charged with medical discipline were privileged.

In 1976, the General Assembly enacted Senate Bill 671, which, for the first time, prohibited the admission, in civil and criminal proceedings, of any records of proceedings of the Commission on Medical Discipline. 1976 Maryland Laws, Chapter 601. The Law provided:

> [T]he records of any proceeding before the commission or of any of its investigatory bodies or any order passed by the commission may not be admitted into evidence in any proceeding, civil or criminal, except by the express stipulation and consent of all parties to the proceeding. This section may not be construed to prevent the production of medical records, hospital records, or any other exhibit in any other proceeding, provided that the medical records, hospital records, or other exhibit is legally subpoenaed and is otherwise admissible.

Id.

In 1980, the Law was amended to expressly prohibit the production of Commission records in discovery:

> Proceedings, records and files of the Commission, and its investigatory bodies are confidential and are neither discoverable nor admissible into evidence in any proceedings, civil or criminal, except by the express stipulation and consent of all parties to the proceeding. Commission orders are not confidential but are inadmissible into evidence as provided above. This section does not apply to a civil action brought by a party to a Commission proceeding who claims to be aggrieved by a Commission decision. Also, this section may not be construed to prevent the production of medical records, hospital records, or any other exhibit in any other proceeding, provided that the medical records, hospital records, or other exhibit is legally subpoenaed and is otherwise admissible.

1980 Maryland Laws, Chapter 493.

In May of 1980, then Attorney General Stephen H. Sachs sent a letter to the Governor, in which he expressed his view that House Bill 1860, which contained the revised language that was enacted later that year, had "substantially rewritten" the Law and that "In our view, the projected prohibition against discovery and admissibility is substantially broader than the present prohibition against admissibility." Letter from Attorney General Stephen H. Sachs to Governor Harry Hughes (May 5, 1980) (on file with the Thurgood Marshall State Law Library).

The next year, the Statute was revised again, pursuant to Chapter 8 of the 1981 Laws of Maryland. The revision, which included renumbering the provisions as Section 14–510 of the newly created Health Occupations Article, provided:

> (a) Except by the express stipulation and consent of all parties to a proceeding before the commission or any of its investigatory bodies, in a civil or criminal proceeding: (1) the proceedings, records, or files of the commission or any of its investigatory bodies are not discoverable and are not admissible in evidence; and (2) any order passed by the commission is not admissible in evidence.
>
> (b) This section does not apply to a civil action brought by a party to a proceeding before the commission who claims to be aggrieved by the decision of the commission.
>
> (c) If any medical or hospital record or any other exhibit is subpoenaed and otherwise is admissible in evidence, the use of that record or exhibit in a proceeding before the Commission or any of its investigatory bodies does not prevent its production in any other proceeding.

1981 Laws of Maryland, Chapter 8. A Revisor's Note, which was included in the Session Law, explained that "the Commission to Revise the Annotated Code has given effect to the intent of the General Assembly to enlarge the class of protected material." *Id.*

The Statute was revised next in 1984, when the word "proceeding" was replaced with "action," in sub-section (a). 1984 Maryland Laws, Chapter 430. The purpose of the revision was to "provid[e] that the definition of 'civil action', which includes health claims arbitration actions, applies to all the appropriate provisions of the Maryland Medical Practice Act, thus extending confidentiality to certain records of the Medical Disciplinary Commission in health claims arbitration actions." *Id.* In 1990, the Statute was renumbered as Section 14–410 of the Health Occupations Article. 1990 Laws of Maryland, Chapter 6. Chapter 401 of the Laws of 2013, which established the Board of Physicians, incorporated the language under scrutiny in this case.

The legislative history as recounted, however, does not contain any suggestion that a doctor who had been the subject of an investigation could unilaterally seek to invoke admissibility of testimony adduced in the proceedings in a subsequent criminal trial. The terms of the Statute expressly require "express stipulation and consent of all parties."

Torres's reliance on *Pepsi Bottling Group v. Plummer*, 226 Md. App. 460 (2016) and *Smith v. Delaware North Companies*, 449 Md. 371 (2016), is unavailing. Torres relies on these cases to support his assertion that, because the Board proceedings against him concerned the same incident, which led to his prosecution, his use of R.J.'s statements to the Board in his criminal trial would not have "breached" his privacy,

which he asserts is the key to Section 14–410, nor R.J.'s privacy. In each case, however, a doctor was subject to an attempt to impeach by adverse counsel through admission of portions of Board proceedings against the doctor, but both cases turned on the "express stipulation and consent of all parties" language upon which we rely, so that neither supports Torres's argument. *Pepsi Bottling*, 226 Md. App. at 463; *Delaware North*, 449 Md. at 404-05.

We continue to the main issue – whether the Confrontation Clauses of the U.S. Constitution and the Maryland Declaration of Rights, read in *pari materia*, supersede the privilege against admission in Section 14–410.

Torres argues that he had a "guaranteed right," under the Confrontation Clause, to impeach R.J. with alleged inconsistencies between her trial testimony and statements contained in the privileged records. The State, for the first time on appeal, argues that Torres had the burden to demonstrate to the trial court that the privileged materials contained "exculpatory information necessary for a proper defense[,]" and that Torres failed to carry that burden.

"[A] witness may be cross-examined on such matters and facts as are likely to affect his credibility, test his memory or knowledge or the like, [as it] is a fundamental concept in our system of jurisprudence." *State v. Cox*, 298 Md. 173, 183-84 (citations omitted). Cross-examination to undermine a witness's credibility, or impeach, includes confronting a witness with her prior statements, which are inconsistent with her testimony at trial. 1 Kenneth S. Brown, et al., MCCORMICK ON EVIDENCE, Section 33

(Robert P. Mosteller, ed., 8th ed. 2020) ("McCormick"). The use of a prior inconsistent statement for impeachment rests "upon the notion that talking one way on the stand and another way previously . . . raises doubt about the truthfulness of both statements." McCormick, Section 34.

There are two methods of impeachment using a witness's prior inconsistent statements. The first method involves only questioning regarding inconsistencies between the witness's prior statement and trial testimony. McCormick, Section 36; *see also Hardison v. State*, 118 Md. App. 225 (1997). The second method of impeachment involves the admission into evidence of the prior inconsistent statement. McCormick, Section 36; *see also Brooks v. State*, 439 Md. 698, 716 (2014). The distinction between the two methods of impeachment is embodied in Rule 5–613, which provides:

> (a) **Examining Witness Concerning Prior Statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> (b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

The "rub" comes when there is an evidentiary privilege attached to the alleged inconsistent statement, such that there is a conflict between the prohibition of use of a witness's statements and the confrontation rights of the person on trial. The Court of Appeals, in *Goldsmith v. State*, 337 Md. 112 (1995), presaged the conflict with which we are faced when, in dicta, it acknowledged that "the defendant's constitutional rights to a fair trial may outweigh the right . . . to assert a privilege at the trial stage." *Id.* at 130.

We recognize, nevertheless, that the right to impeach a witness with prior inconsistent statements is protected under the Sixth Amendment. *See California v. Green*, 399 U.S. 149 158-59 (1970); *see also Robinson v. State*, 354 Md. 287, 309 (1999) (explaining that where a statutory privilege prevents a defendant from inspecting a witness's prior statements for inconsistencies, "the confidentiality interest [recognized by the privilege] must be balanced, . . . against the confrontation and due process rights of the defendant."). *See also State v. Stinson*, 43 Kan. App. 2d 468 (2010) (holding that a trial court's preclusion of the use of a witness's non-privileged prior inconsistent statements for impeachment had "destroyed the effectiveness of defense counsel's cross-examination[,]" and, as a result, violated the Confrontation Clause.). We, however, acknowledge that we have found no case that provides what course of action a trial court should take and an appellate court giving guidance should offer, in the situation in which a defendant already has received the prior statements of the witness, which are shielded from use at trial, but within which he alleges are contained inconsistencies, which would trigger his Confrontation Clause rights when the witness testifies.

Torres asserts that he is entitled to a new trial, relying exclusively on *Davis v. Alaska*, 415 U.S. 308 (1974),[11] because his Sixth Amendment right of confrontation was violated when the trial court did not evaluate his proffer. The State, for its part, appears to concede that a defendant's rights under the Confrontation Clause would outweigh the privilege created by Section 14–410, but asserts that, during the trial, Torres failed to establish that he was entitled to use R.J.'s earlier statements in impeachment, so that his conviction should be affirmed.

A new trial or an affirmance of Torres's conviction, however, would be premature, because the trial court must evaluate whether the allegations of inconsistency are

[11] *Davis v. Alaska*, 415 U.S. 308 (1974) concerned the conflict between a statutory privilege and a defendant's Constitutional right to impeach with a suggestion that a witness had a motive to give false testimony. At the time the offense with which Davis had been charged was committed, Green, who subsequently served as an important prosecution witness, had been sentenced to probation by a juvenile court. *Id.* at 311. The records of such juvenile proceedings were inadmissible in criminal proceedings, pursuant to a state statute. *Id.* at 311 n.2.

Davis's attorney, seeking to use Green's probationary status to cross-examine him regarding whether he had a motive to testify falsely against Davis, provided the trial court with a detailed proffer of the theory by which he intended to impeach Green. *Id.* at 311. The trial court, relying on the Statute, prevented Davis from pursuing the line of impeachment and Davis was convicted. *Id.* at 312.

The Alaska Supreme Court affirmed the conviction, reasoning that Davis's rights under the Confrontation Clause had not been violated, because, according to that court, Davis had been able to cross-examine Green adequately. *Id.* at 314-15.

The Supreme Court, in reversing Alaska's Supreme Court, balanced Davis's confrontation rights against the State's interest in rendering juvenile proceedings confidential and ordered a new trial. The Court explained that, based on the facts of the case, the State's interest in protecting the confidentiality of juvenile proceedings, although important, had to give way to Davis's rights under the Confrontation Clause. *Id.* at 319. *Id.* at 320.

justified. In ordering a limited review of the proffers of inconsistent statements, we derive guidance from cases in which inconsistent statements were the gravamen of a controversy regarding discovery.

In *Robinson v. State*, 354 Md. 287 (1999), Robinson was on trial for numerous offenses related to the robbery of a convenience store, during which he had been shot by two officers, both of whom testified as prosecution witnesses. *Id.* at 290-91. During cross-examination, the officers revealed that they had given statements to the Internal Affairs Division ("IAD") regarding events surrounding the robbery, both of which were shielded from public disclosure. *Id.* at 292.

After the second officer testified during cross-examination that he had given a statement to the IAD, Robinson's attorney, in demanding the production of the officers' statements, argued that the statements had become discoverable once "the witness was on the witness stand or had finished direct examination." *Id.* at 292. The prosecutor, in response, "expressed her belief that the statements were not discoverable[.]" *Id.* at 293. The trial judge, in response to the request, "'asked the prosecutor to inquire of the availability of those statements only to determine whether there is anything exculpatory within them and for no other purpose at this point.'" *Id.*

Robinson's attorney subsequently resumed the cross-examination of the second officer, during which he attempted to show that the officer had been represented by an attorney during the IAD investigation, to which the State objected. *Id.* Declaring his decision that he would sustain the State's objection to the line of questioning, the judge,

in a bench conference, stated he determined that the officers' previous statements were "'totally consistent with their testimony here today.'" *Id.* The judge, apparently, also iterated his determination to the jury:

> I will tell you the Internal Affairs investigation cleared the two police officers. I will tell you that I have examined the two statements that were made by the two police officers to the Internal Affairs people and have found nothing in there that is exculpatory in this case. And for that reason neither the investigation nor those statements will be coming into this case. But now that the issue has been opened, I want the issue to be fully presented to you.

Id. at 315.

Robinson was convicted, after having provided testimony that contrasted significantly with the testimony of the two officers. *Id.* at 291.

In affirming Robinson's conviction, this Court explained that

> under the principles adopted by the Court of Appeals in *Carr v. State*, 284 Md. 455, . . . (1979), as well as *Jencks v. United States*, 353 U.S. 657, . . . (1957), and the "Jencks Act," 18 U.S.C. § 3500 (1994), a defendant is entitled to the production of a witness' prior statement if, *inter alia*, the prosecution or the prosecutorial arm of the government is in "possession" of the statement.

Id. at 297 (quoting *Robinson v. State*, 117 Md. App. 253, 257 (1997)). The Court held that Robinson was not entitled to the production of the statements, reasoning that

> when a statement is confidential under state law, and developed for non-prosecutorial purposes, and held by a division of a law enforcement agency that is not working in conjunction with the prosecutor, the State does not have access to the statement for the purposes of the *Jencks/Carr* rule[.]"

Id.

The Court of Appeals reversed and ordered a new trial, rejecting our conclusion that the Statute's confidentiality provisions rendered the statements outside of the prosecution's possession for the purposes of discoverability, and held that the statements were constructively in the possession of the prosecution. *Id.* at 309.

Proceeding with an analysis of whether an *in camera* review of the materials for inconsistency was sufficient to serve Robinson's rights as well as those protected by the confidentiality of the officers' statements, the Court, then, iterated that under the Supreme Court's decision in *Jencks v. United States*, 353 U.S. 657 (1953), "in criminal cases, after a witness has testified on direct examination for the prosecution and upon motion by the defense, the prosecution must produce for inspection all written reports or statements made by the witness concerning the subject matter of the testimony." *Id.* at 301. The Court also rejected the State's argument that the trial judge's *in camera* review was sufficient, under *Jencks*. When disclosure is compulsory, pursuant to *Jencks*, the Court explained, an *in camera* review such as the one performed by the trial judge, was inappropriate: "it is defense counsel, rather than the trial judge, who should review a witness's prior statement for inconsistency with his or her trial testimony." *Id.* at 311 (citations omitted).[12]

[12] The dissent in *Robinson v. State*, 354 Md. 287 (1999), emphasized that the Jencks Act, 18 U.S.C. Section 3500 (1994), itself, as well as federal cases interpreting the Act, provided for *in camera* review, which the majority rejected in favor of a broader interpretation provided by the *Jencks v. United States*, 353 U.S. 657 (1953). *Robinson*, 354 Md. at 323. (Raker, J., dissenting) (citing *United States v. Boyd*, 53 F.3d 631 (4th (continued . . .)

The inquiry does not end with *Robinson*, however, because of its emphasis on mandatory disclosure of the IAD file under *Jencks*. In cases in which the disclosure of privileged information is not mandated by common law or by statute, the Court of Appeals has accepted the efficacy of proffer and *in camera* review by the trial court to balance the disclosure of privileged data against the confrontation rights of a defendant.

In *Goldsmith v. State*, 337 Md. 112 (1995), Goldsmith was charged with sexual offences against his stepdaughter that occurred years earlier. *Id.* at 115. He filed a pre-trial motion to compel production of the psychotherapy records of the stepdaughter, based on his assertion that the records "may enable him to confront his accuser in some meaningful way[,]" but did not proffer any "likelihood that relevant information would be obtained by reviewing the records." *Id.* at 117.

Goldsmith's motion for pre-trial disclosure was denied. *Id.* at 118. Goldsmith, however, "requested and was issued a subpoena . . . for [the therapist] to appear and produce his records at trial." *Id.* at 119. During the trial, however, the therapist "was never called to testify." *Id.* Goldsmith was convicted.

We affirmed, and on certiorari, the Court of Appeals held that, "[n]either due process, compulsory process nor the right to confront adverse witnesses establishes a [Constitutional] pre-trial right of a defendant to discovery review of a potential witness's

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Cir. 1995); *United States v. Lopez*, 6 F.3d 1281 (7th Cir. 1993); *United States v. Marshall*, 985 F.2d 901 (7th Cir. 1993)).

privileged psychotherapy records." *Id.* at 127. With respect to the issuance of a trial subpoena for the therapist's records, however, the Court explained that, "the defendant's constitutional rights to a fair trial may outweigh the right of the victim to assert a privilege at the trial stage[,]" such that, "the privilege may not always protect a doctor from furnishing exculpatory evidence at trial pursuant to a trial subpoena or subpoena *duces tecum* under Md. Rule 4–265." *Id.* at 130 (footnote omitted).

Recognizing various distinctions between entitlement to disclosure of privileged material pre-trial, of which there was none, and disclosure at trial after a witness had testified, the Court recognized the gatekeeping role of the judge in determining whether, in fact, the evidence was exculpatory:

> After the victim testifies on direct examination, the trial judge will be in a better position to evaluate what is exculpatory evidence and what is irrelevant. The balancing of the defendant's need for exculpatory information against the need to protect the victim's psychotherapist-patient privilege will be a much more informed decision at trial.

Id at 131. The Court also explained that an *in camera* review of privileged materials during a trial would be more efficient, because "the trial judge will know . . . that the privileged material will actually be needed for a trial defense. In addition, the trial judge will be in a better position to determine what the contested issues are and evaluate the relevancy of information the defense is seeking." *Id.*

The Court, in framing all of these issues suggested what has come to be known as the "*Goldsmith*" standard, by which a defendant, who seeks to abrogate a privilege, "must

establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense." *Id.* at 133-34.

In *State v. Johnson*, 440 Md. 228 (2014), the Court of Appeals considered the denial of the defendant's request to obtain, during his trial, the minor victim's mental health records, which were privileged pursuant to Sections 9–109 and 9–121 of the Courts and Judicial Proceedings Article, Maryland Code (1973, 2013 Repl. Vol., 2014 Suppl.). *Id.* at 237-38.

Johnson sought the records to know the diagnosis and his propensity for veracity. The trial court found the proffer insufficient, and this Court reversed, concluding, in an unreported opinion, that Johnson had "sufficiently established the likelihood that the records sought would provide exculpatory information." *Id.* at 235.

On certiorari, the Court of Appeals, after affirming Johnson's constitutional rights did outweigh the psychotherapist-patient privilege in play in the case, put forth the procedure to balance a defendant's need against the victim's privacy. The first step of which, according to the Court, requires that a defendant make a "preliminary showing, [in the form of a proffer], which . . . must meet the threshold established in *Goldsmith*[:] . . . 'in order to abrogate a privilege such as to require disclosure at trial of privileged records, a defendant must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense.'" *Id.* at 247-48 (quoting *Goldsmith*, 337 Md. at 133-34). Under that standard, "in order to gain access to any information in those records," the Court explained, "the defendant may (and must) be

able to point to *some fact* outside those records that makes it *reasonably likely* that the records contain exculpatory information." *Id.* at 252 (emphasis in original). Were this requirement met, the Court proceeded, then "the trial judge is required to conduct an *in camera* review of the privileged records to determine whether the records actually contain exculpatory material." *Id.* at 247. In the case at bar, Johnson had failed at the proffer stage, and his conviction was affirmed. *Id.* at 253-54.

Thus, *Goldsmith* and *Johnson*, read in the context of non-mandatory disclosure of privileged information, as was palpable in *Robinson*, provides a guidepost in the present case for accommodating Torres's Constitutional Right of Confrontation against the privilege attached to R.J.'s statements under Section 14–410. In the present case, the trial judge refused to exercise his gatekeeping role, as was mandated in *Goldsmith* and *Johnson*, to take a proffer and determine whether the statements made by R.J., under Section 14–410, were, in fact inconsistent with her trial testimony. This was in error.[13]

To correct the error, we shall, pursuant to Rule 8–604(d)(1),[14] order a limited

[13] A judge, in a bench trial operates as a trier of fact and trier of law. We have explained that a judge as a trier of fact and law in a bench trial must "sometimes determin[e] what he is permitted to consider as a fact finder and what he is not permitted to consider." *Polk v. State*, 183 Md. App. 299, 207 (2008). The fact that a trial judge operates to determine fact and law does not divest him of the obligation to determine if constitutional entitlements and rights are protected.

[14] Under Rule 8–604(a)(5), an appellate court may dispose of an appeal by "remand[ing] the action to a lower court in accordance with section (d) of this Rule[.]" Rule 8–604(d), in relevant part, provides:

(continued . . .)

remand to determine whether R.J.'s statements are consistent within Rule 5–613, based initially upon a proffer by Torres's counsel regarding how R.J.'s earlier statements were not consistent with her trial testimony. Torres's proffer must meet the *Goldsmith* standard that the prior statements of R.J. contain "exculpatory information necessary for a proper defense." *Goldsmith*, 337 Md. at 135. The proffer and the State's response must be on the record.

The trial judge, then, *in camera*, must review R.J.'s earlier statements, which are alleged to be inconsistent with her trial testimony and determine whether those earlier statements contain anything that impeaches R.J.'s trial testimony. The trial court's findings regarding whether the proffered statements are inconsistent or not must, then, be placed on the record. If the trial court finds that the statements proffered do not impeach R.J.'s testimony, then, the conviction remains intact. If there are impeaching statements,

(. . . continued)

> If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

Rule 8–604(d)(1). *See also Warrick v. State*, 326 Md. 696, 713 (1992) (ordering a limited remand for the purpose of the trial court conducting an *in camera* examination of a confidential government informant to determine whether the defendant, who had been convicted of distributing cocaine, was prejudiced by the failure to disclose the informant's identity).

then the trial court should order a new trial.

CASE REMANDED, WITHOUT AFFIRMANCE OR REVERSAL, FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY FREDERICK COUNTY.