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http://www.mdcourts.gov/opinions/coa/2014/13a13.pdf

CRIMINAL LAW – POST-CONVICTION PROCEEDINGS – INEFFECTIVE ASSISTANCE OF COUNSEL – CHALLENGE TO STATE'S SCIENTIFIC EVIDENCE

Facts:

The Petitioner, James Kulbicki, was convicted in 1995 of first-degree murder. At trial, the State offered the testimony of Agent Ernest Peele of the Federal Bureau of Investigation, who, using Comparative Bullet Lead Analysis ("CBLA"), testified that a bullet fragment found in Kulbicki's truck and a bullet found inside the victim were "what you'd expect if you were examining two pieces of the same bullet", and moreover, that a bullet recovered from a handgun found in Kulbicki's home "could have been in the same box" as the bullet taken from the victim. After his conviction was affirmed on direct appeal, Kulbicki filed a petition for post-conviction relief under the Uniform Postconviction Procedure Act, contending, inter alia, that the admission of "unreliable" CBLA evidence constituted a due process violation and, moreover, that his attorneys rendered ineffective assistance of counsel by failing to adequately cross-examine Agent Peele. The Circuit Court denied relief and the Court of Special Appeals affirmed.

Held:

The Court of Appeals reversed, concluding that Kulbicki's attorneys had rendered ineffective assistance of counsel. The Court applied the two-part standard to claims of ineffective assistance of counsel as articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), under which a convicted defendant must show that her attorney rendered deficient performance and that performance prejudiced her defense.

The Court noted that, in 2006, it issued *Clemons v. State*, 392 Md. 339, 896 A.2d 1059 (2006), which held that CBLA evidence was inadmissible under the *Frye-Reed* standard because the conclusions experts drew using CBLA were not generally accepted by the scientific community.

One of the major flaws of CBLA, the Court observed, was that it had been predicated on the assumption that each source of lead from which bullets were derived was unique, allowing bullets that come from different batches to be distinguished from one another, an assumption the Court determined in *Clemons* to be questionable. In 1991, Agent Peele co-authored a report ("the 1991 Peele Report"), which presaged this very flaw when it indicated that two bullets produced fifteen months apart were compositionally identical. At Kulbicki's 1995 trial, however, Agent Peele was never questioned regarding the 1991 Peele Report or the possibility of having two bullets produced from different sources of lead with the same composition. The failure to discover the report and question Agent Peele regarding this variance, the Court reasoned, was significant, because it would have allowed Kulbicki's attorneys to challenge Agent Peele's conclusions that the compositional similarities among the bullets found in the victim, Kulbicki's truck, and his revolver necessarily implied that they were associated. The Court concluded, finally, that the failure to adequately cross-examine Agent Peele prejudiced Kulbicki's defense, because the State relied heavily on forensic evidence, including CBLA, to connect Kulbicki to the murder.

Wardell Monroe Brooks v. State of Maryland, No. 46, September Term 2013, filed August 27, 2014. Opinion by McDonald, J.

Adkins, J., concurs.

Harrell and Greene, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2014/46a13.pdf

EVIDENCE – IMPEACHMENT OF WITNESS – PRIOR INCONSISTENT STATEMENT

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SENTENCING – MERGER OF CONVICTIONS – RAPE AND FALSE IMPRISONMENT

Facts:

Wardell Monroe Brooks was convicted in the Circuit Court for Harford County of first degree rape, second degree rape, second degree assault, and false imprisonment of Laura B. The court merged the second degree rape and assault convictions into the first degree rape conviction, and gave Mr. Brooks consecutive sentences for the first degree rape and false imprisonment convictions.

At trial, Laura B. testified that Mr. Brooks, a handyman who had previously done odd jobs at her deceased mother's house, broke into the house while she was napping in the bedroom, demanded that she have sex with him, and began to beat her. After she hit him over the head with a ceramic statue and they struggled, she ultimately submitted to his demands and he raped her. She also testified that, after the rape, Mr. Brooks followed her around the house like a "shadow" until she was able to call 911 and escape the house. In the defense case, Mr. Brooks testified that Laura B. had invited him into the home and offered to sleep with him as advance payment for cleaning windows. He testified that they had consensual sex, and that she hit him with the statue because he told her that the window cleaning would be delayed for a day.

At trial, the defense sought to impeach Laura B.'s testimony with a police report summarizing her statements to a deputy sheriff on the night of the alleged rape. Although the police report indicated that she told the officer that Mr. Brooks had raped her, it might have been interpreted to say that he had been invited to her home that night - as opposed to being an unexpected intruder. The trial court denied a defense motion to admit the officer's report as evidence.

Also at the trial, the forensic nurse who examined and interviewed Laura B. on the night of the incident testified as an expert regarding Laura B.'s extensive injuries. The prosecutor asked the nurse whether Laura B.'s statements to the nurse were "consistent or inconsistent" with the

injuries the nurse observed on Laura B., and the nurse replied that her findings "would verify" what Laura B. had told her.

On appeal, Mr. Brooks raised three issues: First, whether the court should have admitted the police report for the purpose of impeaching Laura B. with a prior allegedly inconsistent oral statement. Second, whether the court erred in not striking the forensic nurse's answer that Laura B.'s injuries "would verify" Laura B.'s statements to the nurse. Mr. Brooks argued the words "would verify" were an impermissible comment on Laura B.'s credibility. Finally, Mr. Brooks argued the court should have merged his false imprisonment conviction into his first degree rape conviction for sentencing purposes, and the consecutive sentence for false imprisonment should be vacated.

Held: Affirmed in part and reversed in part.

The Court held that Rules 5-613 and 5-616 control admission of evidence of prior inconsistent statements used to impeach a witness, and allow evidence to be admitted even where it is inadmissible as substantive evidence under Rule 5-802.

The Court also held that a third party's written account of another witness's prior allegedly inconsistent oral statement cannot be introduced to impeach the witness who made the oral statement unless the writing is "a substantially verbatim version of the oral statement," or the declarant previously acknowledged the writing as an accurate summary of the oral statement. Here, the defense failed to show the police report was either a substantially verbatim version of Laura B.'s oral statement or that Laura B. had previously acknowledged its accuracy. The trial court did not err when it excluded the report.

Regarding the forensic nurse's statement that Laura B.'s injuries "would verify" her story, the Court held that the trial court was correct both in allowing the prosecution's question and in declining to strike the nurse's answer. While one witness may not comment on the credibility of another witness, a witness may testify about whether another witness's statement is consistent with other facts known to the testifying witness. The phrase "would verify" was virtually synonymous with saying "is consistent with," and, in context, was not an impermissible comment on Laura B.'s credibility. The Court also held that, even if the nurse's testimony did constitute an impermissible comment on Laura B.'s credibility, it was harmless error, given the amount and weight of evidence supporting Mr. Brooks' conviction.

Finally, the Court held that Mr. Brooks' false imprisonment conviction should have been merged into his first degree rape conviction. Merger protects a defendant's Fifth Amendment right against double jeopardy, ensuring that the defendant is not punished multiple times for the same offense. Two convictions merge when they arise out of the same "act or acts," and the same evidence is required to prove both the greater and lesser offenses. A false imprisonment conviction based only on the duration of the rape would arise out of the same act and would be

supported by the same evidence as a first degree rape conviction. Although a false imprisonment conviction based on a time period before or after the rape would rely on different "act or acts" and would not merge, it was not readily apparent from the record which time period the jury used to make its decision. Where there is ambiguity, the court resolves that ambiguity in favor of the defendant and concludes that the jury convicted him for false imprisonment based only on the duration of the rape. Therefore, the false imprisonment conviction should have been merged into the first degree rape conviction.

Spacesaver Systems, Inc. v. Carla Adam, No. 98, September Term, 2013, filed August 27, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/98a13.pdf

EMPLOYMENT LAW – INTERPRETATION OF EMPLOYMENT CONTRACT – EMPLOYMENT CONTRACT CONTAINING FOR-CAUSE PROVISION AND NO DEFINITE TERM OF EMPLOYMENT – FOR-CAUSE PROVISION NEGATES THE PRESUMPTION OF AT-WILL EMPLOYMENT

EMPLOYMENT LAW – INTERPRETATION OF EMPLOYMENT CONTRACT – EMPLOYMENT CONTRACT CONTAINING FOR-CAUSE PROVISION AND NO DEFINITE TERM OF EMPLOYMENT – "CONTINUOUS FOR-CAUSE," NOT LIFETIME CONTRACT

Facts:

Respondent, Carla Adam, worked as an executive for Petitioner, Spacesaver Systems, Inc. ("SSI"). Adam's Executive Employment Agreement (the "Employment Agreement") contained a provision authorizing termination for cause, but it did not define the durational term of employment. After SSI terminated Adam, she filed a Complaint in the Circuit Court for Montgomery County, alleging that she was terminated without cause in violation of her Employment Agreement.

Before trial, Adam and SSI moved for summary judgment. The hearing judge denied the motions, finding the Employment Agreement ambiguous. After three days of testimony, the trial court concluded that the Employment Agreement transformed what had previously been an "at-will relationship" to a "lifetime contract," such that Adam could only be terminated for cause, death, or disability. The trial judge found a breach of the Employment Agreement and awarded Adam $255,868.20 for lost salary and commission. SSI appealed. The Court of Special Appeals partially affirmed and partially reversed the trial court, holding that the contract's plain language created a "continuous contract terminable for-cause."

SSI petitioned for writ of certiorari to the Court of Appeals, which this Court granted to consider: (1) whether there is any difference between lifetime and "continuous for-cause" contracts; (2) whether the Court of Special Appeals erred in applying dicta from *Towson University v. Conte*, 384 Md. 68, 862 A.2d 941 (2004), which suggests that a "just cause" provision transforms at-will employment into lifetime employment terminable only for cause; and (3) whether the presence of a for-cause provision, which does not state employment is terminable only for cause, transforms at-will employment to lifetime employment terminable only for cause.

Held: Affirmed.

The Court of Appeals embraced the dicta in *Conte* that a for-cause provision in a written employment contract negates the presumption of at-will employment. After finding the Employment Agreement unambiguous, the Court held that as both a legal and terminological matter, "continuous for-cause" better describes the nature of Adam's Employment Agreement than the term "lifetime contract" because the Agreement contains an express for-cause provision in writing. The Court emphasized that its holding in no way erodes the employment at-will doctrine, as the presumption for at-will employment persists and is only defeated when the parties explicitly negotiate and provide for a definite term of employment or a clear for-cause provision.

Muriel Peters v. Early Healthcare Giver, Inc., No. 86, September Term 2013, filed August 13, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/86a13.pdf

WAGE PAYMENT AND COLLECTION LAW ("WPCL") – INCLUSION OF OVERTIME WAGES IN THE DEFINITION OF WAGES

MD. CODE (1991, 2008 REPL. VOL., 2013 SUPP.), § 3-507.2 OF THE LABOR AND EMPLOYMENT ARTICLE – REQUIRED FINDING REGARDING WITHHOLDING OF WAGES PURSUANT TO A BONA FIDE DISPUTE

MD. CODE (1991, 2008 REPL. VOL., 2013 SUPP.), § 3-507.2 OF THE LABOR AND EMPLOYMENT ARTICLE – NO PRESUMPTION OF TREBLE DAMAGES WHEN WAGES WITHHELD PURSUANT TO A BONA FIDE DISPUTE

MD. CODE (1991, 2008 REPL. VOL., 2013 SUPP.), § 3-507.2 OF THE LABOR AND EMPLOYMENT ARTICLE – CALCULATION OF TREBLE DAMAGES

Facts:

Appellant Muriel Peters, a certified nursing assistant, worked as an employee of Appellee Early Healthcare Giver, Inc. ("EHCG"). Throughout her employment, Appellant consistently worked 119 hours per two week period, and Appellee paid Appellant her base wage of $12 for each hour she worked, including overtime hours. After concluding her employment with Appellee, Appellant filed a complaint in the Circuit Court for Montgomery County against EHCG, alleging that it unlawfully withheld her overtime pay.

At trial, EHCG's president admitted to not paying overtime wages but advanced two defenses: (1) Appellant exercised during work hours, and (2) Appellant was exempt under the Fair Labor Standards Act's ("FLSA") "companionship services" label because she was paid pursuant to a federal program. Though the court rejected Appellee's assertion that overtime was withheld because Peters exercised at work, it concluded that federal law preempted Maryland law and exempted the employer from paying overtime. Thus, the trial court denied Appellant's claim for overtime wages. Peters appealed to the Court of Special Appeals, which held that the FLSA exemption did not apply and remanded the case to determine whether Peters could recover overtime pay under the Maryland Wage and Hour Law ("WHL") and the Maryland Wage Payment and Collection Law ("WPCL"). On remand, Appellant filed a claim under the WHL and WPCL, requesting unpaid overtime and treble damages under Md. Code (1991, 2008 Repl. Vol., 2013 Cum. Supp.), § 3-507.2(b) of the Labor and Employment Article. The Circuit Court awarded Appellant $6,201 in unpaid overtime wages but denied her request for enhanced damages.

Peters appealed the order and filed a Writ of Certiorari to the Court of Appeals, which the Court granted to consider: (1) whether overtime wages are recoverable under the WPCL, (2) whether it is an abuse of discretion for a trier of fact to fail to award enhanced damages under the WPCL when there is no claim of a bona fide dispute, and (3) whether an award of up to treble damages under the WPCL should be made in addition to the award of unpaid wages.

Held: Vacated and Remanded.

The Court of Appeals reiterated its previous holding that the WPCL is a proper vehicle to recover unlawfully withheld overtime wages. The Court of Appeals also explained that determining whether to grant enhanced damages requires a predicate finding as to whether the employer withheld overtime pursuant to a bona fide dispute, and the circuit court failed to make this determination. Despite holding that there was no evidence of a bona fide dispute, the Court remanded the matter to the circuit court. The Court remanded the case because the record did not reveal whether the trial court considered the absence of a good faith basis for withholding overtime, or gave appropriate consideration to the availability of enhanced damages. Additionally, the Court of Appeals held that in drafting the WPCL, the Legislature intended to preserve the fact-finder's discretion and that no presumption in favor of granting an award exists. Finally, the Court of Appeals held that the total amount of damages an employee may recover under the WPCL is three times the unpaid wage.

NIHC, Inc. v. Comptroller of the Treasury, No. 63, September Term 2013, filed August 18, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/63a13.pdf

TAXATION – INCOME TAX – CORPORATIONS – TAX ASSESSMENT OF SUBSIDIARY WITHOUT ECONOMIC SUBSTANCE SEPARATE FROM PARENT CORPORATION ON INCOME SHIFTED FROM PARENT TO SUBSIDIARY

Facts:

Nordstrom, Inc. ("Nordstrom") created several subsidiary corporations in Colorado, including Petitioner NIHC, Inc. ("NIHC"). The subsidiaries then engaged in a series of inter-company transactions in 1999 with Nordstrom and with each other that involved the right to license Nordstrom's trademarks. As a result of those transactions, Nordstrom retained the right to use the trademarks but incurred royalty expenses that reduced its income taxable in Maryland. Part of that income was effectively shifted to its subsidiaries in different forms. As part of the transactions, NIHC became the owner of the trademarks and distributed, as a dividend, the right to license them to another subsidiary that was its immediate parent; that subsidiary in turn licensed the trademarks to Nordstrom in return for royalty payments.

Under federal tax law, NIHC recognized a gain – referred to as "§311(b) gain" – from the distribution of the dividend. The §311(b) gain was to be deferred over 15 years on the consolidated tax returns that Nordstrom and its subsidiaries filed. In addition, the transaction created a basis for the other subsidiary that was to be amortized over the same 15 years in identical amounts on the consolidated federal returns.

NIHC filed Maryland income tax returns for 2002 and 2003 – the tax years in question in this case – that reported the deferred §311(b) gain as income, but apportioned none of that income to Maryland on the theory that NIHC had no nexus with Maryland. The Comptroller issued notices of assessment against Nordstrom and its subsidiaries, including NIHC, based on the theory that income-shifting in the form of trademark royalty expenses had resulted in an underpayment of the companies' Maryland income tax.

Nordstrom and its subsidiaries appealed the assessments to the Tax Court, which held that, because the subsidiaries lack economic substance separate from their parent, they had a nexus with Maryland as a result of Nordstrom's business activities in Maryland. At the Tax Court hearing, NIHC argued, among other things, that it had included the deferred §311(b) gain amounts on its 2002 and 2003 Maryland returns by mistake and that, under Maryland's separate entity reporting requirement, it should have reported the entire gain on its 1999 Maryland return, which was outside the period of limitations. NIHC sought judicial review of the Tax Court decision in the Circuit Court for Baltimore County. The Circuit Court remanded the case back to the Tax Court to determine: (1) whether NIHC's §311(b) gain had a constitutional nexus with

Maryland and, (2) if so, (i) whether the §311(b) gain was taxable income under Maryland tax law; and (ii) whether the Maryland requirement of separate entity reporting would prevent taxation of the deferred §311(b) gain.

On remand, the Tax Court held that NIHC's §311(b) gain had a nexus with Maryland, that the gain was taxable under Maryland law, and that the requirement of separate entity reporting did not prohibit the taxing of the deferred gain. NIHC again sought judicial review. The Circuit Court affirmed the Tax Court on the first two issues, but reversed on the ground that the separate entity reporting requirement obligated NIHC to report the gain in 1999, and consequently, prohibited the Comptroller from assessing a tax on the deferred income reported on NIHC's 2002 and 2003 Maryland returns.

On appeal, the Court of Special Appeals reversed the Circuit Court in an unreported decision. The Court of Appeals granted a writ of certiorari.

Held:

The separate reporting requirement did not prevent the assessment given the Tax Court's findings that NIHC lacked economic substance separate from Nordstrom, and that the deferred income reported on NIHC's 2002 and 2003 returns had a nexus with Nordstrom's business activities in Maryland during those tax years, and in light of the facts that the income actually reported by NIHC correlated with the figures reported on the federal return, and NIHC had never amended its returns to reflect what it asserted was its new understanding, as of 2005, as to how it should have reported that income in Maryland.

Chesapeake Bay Foundation, Inc. and Magothy River Association, Inc., et al. v. DCW Dutchship Island, LLC, et al., No. 77, September Term 2013, filed August 4, 2014. Opinion by Adkins, J.

Harrell, J., joins in judgment only.

Watts, J., concurs.

http://www.mdcourts.gov/opinions/coa/2014/77a13.pdf

ADMINISTRATIVE LAW – STANDING TO PARTICIPATE BEFORE COUNTY BOARD OF APPEALS

MD. CODE (2013, 2013 REPL. VOL.), § 10-305 OF THE LOCAL GOVERNMENT ARTICLE – EXPRESS POWERS ACT – HOME RULE COUNTY POWER TO CREATE RULES OF PROCEDURE FOR BOARD OF APPEALS

ADMINISTRATIVE LAW – DUE PROCESS – RIGHT TO CROSS-EXAMINE WITNESSES

ZONING LAW – COUNTY BOARD OF APPEALS – APPLICATION FOR VARIANCE

Facts:

In 2000, DCW Dutchship Island, LLC, a corporation owned solely by Daryl Wagner, purchased an island in the Magothy River within the Chesapeake Coastal Bay—an island protected from improvement in part by the Critical Area Law. After purchase, Wagner razed the pre-existing house on the island, so that he could construct, among other things, a new home, a boat ramp, a pool, and a deck. Wagner did not obtain the required permits or variances necessary to build this home as mandated by Anne Arundel County ordinances and the Critical Area Law before beginning construction.

In 2004, Anne Arundel County discovered Wagner's construction and notified Wagner of his violations. Subsequently, Wagner sought the required after-the-fact variances before an Anne Arundel County Administrative Hearing Officer ("AHO"). Over the Magothy River Association's ("MRA") opposition, the AHO granted some after-the-fact variances but denied others. Wagner, MRA, and the Chesapeake Bay Foundation ("CBF"), who did not appear as a party in front of the AHO, then appealed the decision to the Anne Arundel County Board of Appeals ("the Board").

The Board first determined that CBF had no standing to appeal because § 3-1-104(a) of the Anne Arundel County Code ("AACC") required CBF to participate in front of the AHO to have standing with them. Regarding the variances, the Board modified the AHO's decision by granting some variances, but altering others. MRA and CBF appealed the Board's decision to the Circuit Court for Anne Arundel County, which affirmed the Board's decision.

The Court of Special Appeals then affirmed the Circuit Court, and the Court of Appeals granted certiorari to answer the following questions: (1) Did CBF have standing to participate in the variance proceedings before the Board of Appeals on the grounds that MRA, which advocated the same position, had standing?; (2) Does AACC § 3-1-104(a) violate the Express Powers Act, thus making the Board's denial of standing to CBF on the basis of it erroneous?; (3) Did the Board of Appeals violate its own rules when it held that CBF could not cross-examine witnesses, resulting in CBF being denied due process?; (4) Did the Board of Appeals err in granting Wagner after-the-fact variances?

Held: Affirmed in part, and vacated and remanded in part.

The Court of Appeals first held that CBF was not wrongfully denied standing to participate before the Board. The Court explained that being on the same side as a party that does have standing to appear before the Board does not confer standing on other interested individuals or groups. The Court then explained that under the Express Powers Act, counties may create reasonable rules of procedure for their administrative agencies. For this reason, Anne Arundel County did not exceed its power when it enacted AACC § 3-1-104(a). Finally, the Court held that the Board did not deny CBF due process by preventing CBF from cross-examining witnesses. CBF did not proffer what questions it would have asked at the administrative hearing. Additionally, MRA, a group with interests identical to CBF, was allowed to fully cross-examine all adverse witnesses. For this reason, the Court held that CBF did not demonstrate that its questions would have been meaningfully different, or that its interests were not adequately represented.

Turning to the merits of the Board's decision, the Court held that there was substantial evidence for all of the Board's determinations except for its finding that the variance granted was the minimum variance necessary. The Court emphasized that under the AACC, the variance granted must be the minimum necessary to afford relief such that the applicant will maintain a reasonable and significant use of the property. In addition to the impervious surface area that historically existed on the island, the Board granted Wagner a variance for an additional 320 square feet of impervious surface to construct a boat ramp. The Court held that the Board did not adequately explain why this additional impervious square footage was necessary for Wagner to maintain a reasonable and significant use of the property. Furthermore, the Court explained that a variance may not be required for a boat ramp, which could be a "water-dependent facility" under the Board's interpretation of Anne Arundel County's Critical Area Law. But because the Board did not provide this or any other appropriate justification for the boat ramp variance, the Court remanded the matter to the Board.

COURT OF SPECIAL APPEALS

Nathaniel Adel Stewart-Bey v. State of Maryland, No. 2525, September Term 2012, filed on July 31, 2014. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2014/2525s12.pdf

CRIMINAL PROCEDURE – COMPETENCY

Facts:

Appellant, Nathaniel Adel Stewart-Bey ("Stewart-Bey"), was convicted in the Circuit Court for Charles County of thirty-two counts of criminal conduct involving counterfeiting checks, issuing counterfeit instruments, theft, and attempted theft. At trial, Stewart-Bey utilized the "flesh and blood" defense strategy, which is based upon an assertion that the courts lack jurisdiction over a defendant. Stewart-Bey referred to himself as a "free sovereign living flesh and blood inhabitant on the land" and argued that the case against him should be "dismissed with prejudice for lack of jurisdiction." Stewart-Bey also refused to receive various documents handed to him by the prosecutor or by the court, including a copy of his indictment, a copy of an order to participate in a competency evaluation, and a copy of the State's proposed voir dire questions.

The issue of Stewart-Bey's competency was first raised at his initial appearance on June 22, 2012. When the defense attorney announced that he was appearing on behalf of Stewart-Bey, Stewart-Bey objected to counsel appearing on his behalf. Defense counsel entered the appearance of the Public Defender's Office, and stated, "We'll raise competency." Stewart-Bey replied, "Objection," and said following: "[The defense attorney] is not going to represent me. In fact, you're fired." Because the issue of competency was raised, the circuit court explained that it would order a competency evaluation. Stewart-Bey refused to participate in the competency evaluation. Ultimately, the court ordered Stewart-Bey undergo three separate competency evaluations. Stewart-Bey refused to participate in any of them.

The court entered two separate competency findings on August 6, 2012 and September 24, 2012. Prior to making its competency findings, the court heard testimony from mental health professionals and considered reports prepared by mental health professionals.

The circuit court further found that Stewart-Bey was competent to discharge counsel and act as his own counsel. Stewart-Bey had repeatedly asserted that he did not wish to be represented by an attorney. Prior to permitting Stewart-Bey to discharge counsel, the circuit court applied Maryland Rule 4-215. The court found that Stewart-Bey's reasons for discharge were not meritorious, informed Stewart-Bey of the trial date, ensured the Stewart-Bey had received a copy of the charging document, informed Stewart-Bey of the importance of assistance of counsel, and

advised Stewart-Bey of the nature of the charges and maximum penalties. The circuit court found that Stewart-Bey waived his right to counsel "freely, voluntarily, and knowingly."

The case proceeded to trial with Stewart-Bey unrepresented by counsel. The jury found Stewart-Bey guilty of thirty-two counts of counterfeiting checks, issuing counterfeit instruments, theft, and attempted theft. The underlying events were based upon various transactions and attempted transactions at Sam's West, Inc. and Lowe's Home Centers, Inc. Stewart-Bey was convicted of three separate counts associated with each incident: counterfeiting, issuing a counterfeit document, and theft or attempted theft. Stewart-Bey received as sentence for each separate offense. The circuit court did not merge the convictions for sentencing purposes.

Held: Affirmed in part and reversed in part.

The Court of Special Appeals held that the circuit court's competency determinations were not clearly erroneous. The Court observed that there was significant evidence in the record upon which the circuit court based its competency findings on both August 6, 2012 and August 24, 2012. Before the trial court made its initial competency finding on August 6, 2012, it considered the testimony of licensed psychologist Dr. Andrew Good, Dr. Good's written report, and its own observations of Stewart-Bey's conduct.

The Court of Special Appeals noted that after concerns were expressed about Stewart-Bey's competency a second time, the trial court -- out of an abundance of caution -- ordered a second competency evaluation. The Court noted that at the September 24, 2012 hearing, prior to making a competency finding, the circuit court considered two reports prepared by Dr. Teresa Grant, one report prepared by Dr. Good, as well as its own observations of Stewart-Bey's conduct. The Court of Special Appeals observed that the trial court considered the psychologists' testimony in reports, as well as its own observations of Stewart-Bey, when concluding that Stewart-Bey's refusal to participate was based on his own obstinance. The Court of Special Appeals further noted that Stewart-Bey's refusal to participate in competency evaluations did not preclude the trial court from finding the defendant competent.

Regarding Stewart-Bey's competency to discharge counsel, the Court of Special Appeals noted that the necessary competence to choose self-representation over the right to counsel is same degree of competence that is required to stand trial. Because the trial court had already determined that Stewart-Bey was competent to stand trial, the trial court properly determined that Stewart-Bey was competent to discharge counsel.

The Court of Special Appeals did not reach the merits of Stewart-Bey's contention regarding the prosecutor's opening statement. The Court addressed the issue on preservation grounds only, noting that Stewart-Bey offered a specific objection rather than a general objection to the prosecutor's opening statement. The Court of Special Appeals noted that although a contemporaneous general objection to the admission of evidence ordinarily preserves all grounds for appellate review, when an objector provides the ground for an objection, appellate review is

limited to the ground assigned by the objector. Accordingly, the Court did not address Stewart-Bey's contention on appeal, which involved grounds of error that were not raised before the trial court.

With respect to Stewart-Bey's contention regarding merger, the Court of Special Appeals noted that the State conceded that Stewart-Bey was improperly sentenced. The Court noted that when multiple convictions arise out of the same transaction, and there is no indication in the language of the statutes that the legislature intended separate punishments for the offenses arising out of the same transaction, the rule of lenity requires a merger of the conviction for the offense carrying the lesser penalty into the conviction for the offense with the greater possible penalty. Accordingly, the Court of Special Appeals vacated the sentences for two of the offenses associated with each transaction, leaving only one sentence remaining for each transaction.

Brandon Wallace v. State of Maryland, No. 2100, September Term 2012, filed August 27, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/2100s12.pdf

PRETRIAL IDENTIFICATIONS – IMPERMISSIBLY SUGGESTIVE PROCEDURES

INCONSISTENT VERDICTS – LEGALLY INCONSISTENT JURY VERDICTS

INCONSISTENT VERDICTS – SAME-TRANSACTION ANALYSIS

Facts:

Matthew Womack was beaten and robbed by two men in the early morning hours of November 4, 2011. Minutes before, he had engaged in a brief discussion with Brandon Bernard Wallace. Shortly after the robbery, Mr. Wallace was seen at two convenience stores where Mr. Womack's stolen credit card was used.

A few weeks after the robbery, two detectives went to Mr. Womack's house to show him a photo array. But before showing him the array, the detectives informed him that they had found the culprit. Mr. Womack then identified Mr. Wallace as one of the two men who robbed him. Mr. Wallace was arrested, charged, and convicted of robbery and related crimes, but was ultimately acquitted of second-degree assault. The court sentenced him on the robbery charge to fifteen years, with all but eight years suspended, to be followed by five years of supervised probation. Mr. Wallace appealed.

Held: Conviction for robbery vacated and remanded for new trial; judgments affirmed in all other respects.

On appeal, Mr. Wallace argued that insufficient evidence supported his conviction for robbery with a dangerous weapon and that the trial court erred by denying his motion to suppress Mr. Womack's extrajudicial identification of him from a photo array and by accepting an inconsistent jury verdict.

Mr. Wallace conceded that Mr. Womack was the victim of a robbery, but argued that the prosecution failed to produce sufficient evidence to establish that he was one of the robbers. The Court observed that the jury inferred Mr. Wallace's role in the crime from circumstantial evidence regarding his whereabouts between the time he spoke with Mr. Womack at the bus stop and when surveillance cameras captured him making purchases at the same time and same stores at which Mr. Womack's stolen credit card was used. Because the Court found that the jury did not need to resort to speculation or conjecture to infer from the evidence produced that Mr.

Wallace robbed Mr. Womack during that intervening time, the Court held that the evidence supported Mr. Wallace's robbery conviction.

The Court recognized that extrajudicial identifications obtained through impermissibly suggestive procedures are not admissible. *See James v. State*, 191 Md. App. 233, 251-52 (2010). Mr. Wallace argued that Mr. Womack's identification of him in a photo array was impermissibly suggested when one of the detectives, before displaying the array, informed Mr. Womack that the police had "found the person that did it." In determining whether the identification procedure employed by the detectives was impermissibly suggestive, the Court focused on whether the detectives contaminated the test by slipping the answer to Mr. Womack, *see Jenkins v. State*, 146 Md. App. 83, 126 (2002), and whether they left it to Mr. Womack to select the person who had committed the robbery. *See Gatewood v. State*, 158 Md. App. 458, 476 (2004). Concluding that the detective did not in any way suggest which photograph was of the suspect or why the person in the photograph was suspected of having committed the robbery, the Court held that the trial court correctly precluded Mr. Wallace from suppressing Mr. Womack's extrajudicial identification.

Noting the recent shift in Maryland case law prohibiting legally inconsistent verdicts, *see McNeal v. State*, 426 Md. 455, 458 (2012); *Price v. State*, 405 Md. 10, 35 (2008) (Harrell, J., concurring), the Court recognized that jury verdict inconsistency occurs when a jury convicts a defendant on one charge, but acquits on another charge that is an essential element of the first charge, *i.e.*, a lesser-included offense. Mr. Wallace and the State agreed that second-degree assault, the crime for which Mr. Wallace was acquitted, was a lesser-included offense of robbery, the crime for which he was convicted. However, the State argued that the acquittal for second-degree assault was not legally inconsistent because the evidence produced at trial supported two separate and distinct instance of assault. Analogizing case law from the merger context, the Court evaluated whether the robbery and second-degree assault charges arose out of one or more than one criminal transaction. See *Morris v. State*, 192 Md. App. 1, 39 (2010). But instead of looking to whether the *testimony* offered at trial supported a finding of separate instances of assault, the Court looked to whether separate instances of assault were *actually charged*. *See id.* at 42; *Williams v. State*, 187 Md. App. 470, 477 (2009). *Gerald v. State*, 137 Md. App. 295, 312 (2001). Observing that Mr. Wallace was not charged with a separate assault and that the indictment was ambiguous as to the particular act giving rise to the second-degree assault charge, the Court concluded that his second-degree assault and robbery charges arose from the same criminal transaction. As a result, the Court held that the acquittal on the second-degree assault charge was legally inconsistent with the guilty robbery verdict and that the trial court erred in accepting inconsistent verdicts.

Miguez A. Guardado v. State of Maryland, No. 2232, September Term, 2011, filed August 27, 2014. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2014/2232s11.pdf

APPELLATE OPINIONS – OPINION WITHOUT MAJORITY

INEFFECTIVE ASSISTANCE OF COUNSEL – RETROACTIVE APPLICATION OF *PADILLA V. KENTUCKY*, 559 U.S. 356 (2010) – CORAM NOBIS PROCEEDINGS

Facts:

On May 7, 2008, in the Circuit Court for Anne Arundel County, Guardado pled guilty to conspiracy to commit theft over $500. Guardado was represented by counsel during the guilty plea proceeding. The court accepted his plea and sentenced Guardado to imprisonment for one year with all but two days suspended, subject to one year of supervised probation and Guardado's payment of restitution to the victim. While receiving Guardado's plea, in relevant part, the circuit court advised Guardado that "if you are not a United States citizen[,] this case may affect your status in this country. This case may lead to other consequences such as deportation. If you have concerns in that area you should speak to your attorney before entering this guilty plea. Do you understand that?" Guardado answered affirmatively and did not request an opportunity to confer with his counsel before entering the guilty plea at any time after the court's advisement. Guardado neither filed a motion to withdraw the plea pursuant to Maryland Rule 4-242(f) nor filed an application for leave to appeal pursuant to Md. Code Ann. (2006) § 12-302(e) of the Courts and Judicial Proceedings Article and Maryland Rule 8-204.

Thereafter, the United States Department of Homeland Security ("DHS") initiated removal proceedings against Guardado, asserting that he was subject to removal pursuant to 8 U.S.C. § 1182(a)(6)(i). On May 5, 2011, Guardado was detained by United States Immigration and Customs Enforcement ("ICE") as a result of his guilty plea.

On July 13, 2011, Guardado, represented by different counsel, filed a petition for a writ of error *coram nobis* pursuant to Maryland Rule 15-1202. He asserted that his conspiracy conviction caused him to be detained by ICE and barred him from filing a petition for asylum. Additionally, he claimed that his guilty plea was entered in violation of the Sixth Amendment of the United States Constitution because his then-attorney had failed to advise him about the immigration consequences of the plea. Guardado asserted that, had he known of these consequences, he would not have pled guilty to the charge. He asked the circuit court to vacate his conviction for these reasons.

Following a hearing, the circuit court denied the petition. In a written opinion, the court expressed some doubt as to whether a claim for ineffective assistance of counsel was cognizable in the context of a petition for writ of error *coram nobis*. Resolving that issue in Guardado's

favor for purposes of analysis, the court found that he had demonstrated ineffective assistance by his guilty-plea counsel, but that he suffered no prejudice as a result. Guardado appealed.

Held: Affirmed.

On appeal, the State contended that Guardado did not bring a cognizable claim for ineffective assistance of counsel pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010) in the context of his petition for writ of error *coram nobis* because, pursuant to *Miller v. State*, 435 Md. 174 (2013), *Padilla* did not apply retroactively to the time when Guardado entered his plea of guilty. The Court agreed.

As a preliminary matter, the Court noted that in a case in which the Court of Appeals does not offer a majority opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Derr v. State*, 434 Md. 88, 114 (2013), cert. denied sub nom, *Derr v. Maryland*, __ U.S. ___, 2014 WL 2560480 (2014). Applying this principle to *Miller*, the Court concluded that, as between the plurality opinion by Judge Battaglia and the concurring opinion by Judge McDonald, Judge Battaglia's opinion represents the narrower holding.

The Court then reviewed the holding in *Miller*, stating that in *Miller*, the Court of Appeals concluded that *Padilla* does not apply retroactively to proceedings for a writ of error *coram nobis* unless the petitioner can demonstrate an independent state law basis for his claim of ineffective assistance of counsel. A claim based on Article 21 of the Maryland Declaration of Rights or a violation of former Maryland Rule 4-242(e) does not support a redressable claim. Guardado offered no other basis to support the argument that his claim was redressable. As such, the Court concluded that the circuit court did not err in denying Guardado's petition for a writ of error coram nobis because the lynchpin of his contentions, namely, that *Padilla* applied retroactively to his case, was incorrect.

Walter Paul Bishop, Jr. v. State of Maryland, No. 2106, September Term 2011, filed August 26, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/2106s11.pdf

JUDICIAL CONDUCT – RECUSAL – APPEARANCE OF IMPROPRIETY

JUDICIAL CONDUCT – RECUSAL – BIAS

SENTENCING – MERGER – CONSPIRACY AND MURDER

Facts:

The defendant was convicted in a murder-for-hire scheme of killing his co-defendant's husband, and he ultimately confessed to doing so. The capital crimes laws in effect at the time exposed him to the death penalty, although ultimately he was convicted and sentenced to life with the possibility of parole. Prior to trial, the defendant sought the specially-assigned trial judge's recusal on two grounds. *First*, the defendant had discovered that years earlier, the trial judge (then a prosecutor) had been the victim of an (obviously unsuccessful) murder-for-hire plot by a criminal defendant whom he had prosecuted. At that time, he had submitted a victim impact statement in which he discussed the fear he felt after discovering the plot. The defendant in this case argued that the trial judge could not preside over his case impartially because of his prior victim status. *Second*, the defendant claimed that the judge should recuse himself because an intern in his chambers had once worked on the defendant's case when she served as an intern in the public defender's office. The trial judge denied the motions for recusal, and the trial went forward.

After the defendant's conviction, it was left to the jury (because the State sought the death penalty) to determine the defendant's sentence on the murder charge. It sentenced the defendant to life with the possibility of parole. The court then sentenced the defendant on the separate conspiracy and handgun charges; the defendant claimed that any sentence should run concurrent to the life sentence imposed by the jury because, according to him, it would effectively undermine the jury's decision to make parole possible to add a longer sentence. The judge declined to merge the sentences, and the defendant appealed.

Held: Affirmed.

The trial judge's decision not to recuse himself based on his having been the planned victim of a murder plot years ago when he was a prosecutor did not have any effect on his ability to preside over this case, which presented an entirely different factual scenario. The trial judge properly noted that he had an obligation to hear the case unless the defendant presented a proper case for recusal, and there was no legal precedent or logical basis for him to do so here. The trial judge

also properly declined to recuse himself based on the intern's work in his chambers. Her mere *presence* there did not suggest any personal bias on the part of the judge, particularly when he told her early in her tenure that they should not discuss the case, and no further discussions were had.

The trial court also did not err when it declined to merge the two sentences. The conspiracy to murder was a separate crime from the underlying crime of murder, as demonstrated by the fact that even if the victim had not died, the defendant could still have been convicted for *conspiracy* to commit murder. And the trial court's decision to impose sentences for conspiracy and possession of a handgun *consecutive* to the murder sentence did not constitute an abuse of discretion; that decision did not undermine the jury's sentence on the murder charge, and the defendant didn't actually point to any facts that suggested the trial judge was motivated by any personal bias or vindictiveness in sentencing.

Dontaya Preston a/k/a Dontae Preston v. State of Maryland, No. 1293, September Term 2012, filed July 30, 2014. Opinion by Raker, J.

http://www.mdcourts.gov/opinions/cosa/2014/1293s12.pdf

CRIMINAL PROCEDURE – JURY INSTRUCTIONS – WITNESS PROMISED BENEFIT

Facts:

Dontae Preston, appellant, was convicted of first degree murder. Nichelle Payton, one of two eyewitnesses, went to the police station and told police what she saw. A few days later, the police agreed to move Ms. Payton to protective housing, which cost the State several thousand dollars.

Appellant's trial counsel asked the court to instruct the jury with the MSBA Criminal Pattern Jury Instruction 3:13, "Witness Promised Benefit." The instruction advises the jury that the testimony of a witness who received or expected to receive a benefit in exchange for testimony in the case should be considered "with caution." The court declined to provide the requested instruction.

Held: Affirmed.

The Court of Special Appeals held that a "witness promised benefit" instruction is not a mandatory instruction, and it is within the discretion of the trial court to determine whether to give that instruction. Several federal courts have held that a special informant instruction is discretionary, and the general credibility instruction given by the trial court fairly covered the issue. *United States v. Cook*, 102 F.3d 249, 252 (7th Cir. 1996). The Court of Special Appeals agreed with the Seventh Circuit. Ordinarily, the general instruction on the credibility of witnesses fairly cover the credibility concerns with witnesses who received a benefit from the State. The Court explained that should the facts suggest that a witness who received a benefit presents particular risk, the trial judge retains discretion to instruct the jury accordingly.

William R. Kyler v. State of Maryland, No. 142, September Term 2013, filed July 31, 2014. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2014/0142s13.pdf

WAIVER – RIGHT TO A PUBLIC TRIAL – DRUG KINGPIN – CL § 5-613 – MERGER-ILLEGAL SENTENCE – CL § 5-612 – CL § 5-602 – REQUIRED EVIDENCE TEST – RULE OF LENITY

Facts:

Calvert County undercover police officers conducted a several month investigation of appellant's drug trafficking activities. Based on their observations, and the result of the execution of search warrants, including finding evidence of large quantities of drugs and materials to package drugs in a photo shop owned by appellant and $100,000 in cash in appellant's storage locker, the police opined that appellant was a mid-to-high level drug dealer. The jury convicted appellant, *inter alia*, of being a drug kingpin, possession with intent to distribute more than 448 grams of cocaine, possession with intent to distribute more than 50 grams of cocaine base, possession of cocaine with intent to distribute, and possession of cocaine base with intent to distribute.

Held:

Sentences imposed pursuant to CL § 5-612 vacated, judgment otherwise affirmed. A claimed violation of the right to a public trial must be preserved for appellate review by a timely objection at trial. Where defense counsel did not object to the procedures employed by the court to protect the identities of undercover police officers, appellant's appellate contention that his right to a public trial was violated is not preserved for our review.

To qualify as a drug kingpin pursuant to Maryland Code (2012 Repl. Vol.) § 5-613 of the Criminal Law Article ("CL"), there must be evidence that the accused acted as a leader in a drug trafficking network, and he or she exercised a measure of control over the drug conspiracy. The evidence in this case was sufficient to support appellant's conviction as a drug kingpin.

CL § 5-602, entitled "Manufacturing, distributing, possession with intent to distribute, or dispensing controlled dangerous substance," and CL § 5-612, entitled "Volume dealer," do not merge under the required evidence test, as each of these offenses contains an element that the other does not. CL § 5-602 requires an intent to distribute, which is not required by CL § 5-612, and CL § 5-612 requires a minimum quantity of drugs, which is not required by CL § 5-602. These offenses do merge, however, pursuant to the rule of lenity. Where it appears that the General Assembly did not intend that volume dealing be punished separately from the offense of

possession with intent to distribute, or, at the very least, the intent is ambiguous, the rule of lenity requires that we resolve that ambiguity in appellant's favor.

Andrew Lindsey v. State of Maryland, et al., No. 495, September Term 2012, filed August 27, 2014, Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2014/0495s12.pdf

RESTITUTION – PLEA AGREEMENT – PROBATION AND CONDITIONS OF PROBATION – MOTION FOR RECONSIDERATION OF DENIAL OF RESTITUTION REQUEST – INCREASE IN SENTENCE.

Facts:

Andrew Lindsey, the appellant, was shot and seriously injured in the course of an attempted robbery. The perpetrators of the robbery were Shyquille Griffin and Antonio Whitely. Both men were charged with multiple offenses in the Circuit Court for Prince George's County. Griffin subsequently entered into a plea agreement with the State in his case, agreeing to plead guilty to attempted robbery, with a sentencing cap of 15 years, suspend all but 18 months, and to testify against Whitely. The plea agreement said nothing about probation or restitution.

At a plea hearing, the court accepted the plea agreement. At a later sentencing hearing, Lindsey, through a representative, requested restitution. The court denied the request on the ground that the plea agreement did not call for restitution and provided that it was the entire agreement between Griffin and the State.

Thirty days after sentencing, Lindsey filed a motion pursuant to section 11-103 of the Criminal Procedure Article, asking the court to reconsider its denial of restitution. At a hearing on that motion, the court reiterated that it could not order restitution because the plea agreement did not call for restitution. The court also ruled that because Griffin already had been sentenced, ordering restitution would be an illegal increase in his sentence, even if it were ordered as a condition of probation. Lindsey filed an application for leave to appeal from that ruling, which was granted by the Court of Special Appeals. The State and Griffin appeared as appellees, and Griffin moved to dismiss the appeal.

Held:

Griffin's motion to dismiss was denied and the order of the circuit court denying the motion to reconsider the denial of the request for restitution was vacated. While Lindsey did not file a timely application for leave to appeal from the judgment of conviction, he did file a timely application for leave to appeal from the denial of his motion for reconsideration. Because that motion was denied on the same ground as the court denied restitution at sentencing, and on the additional ground of illegality, both issues were properly before the Court. Both issues are

questions of law. If the court based its denial of the motion for reconsideration on an error of law, it abused its discretion.

There was no mention of probation in the plea agreement, but a plea agreement that includes suspended time must include a period of probation for the total time agreed upon to have any meaning. Thus, probation was an implied term of Griffin's plea agreement. The State cannot by virtue of a plea agreement waive the victim's right to restitution; and restitution is a standard and frequently imposed condition of probation when properly requested and supported by evidence. Therefore, a reasonable person in Griffin's position, entering into the plea agreement in his case, would expect that probation would be imposed and that the payment of restitution could be ordered as a condition of that probation. The plea agreement did not preclude the court from ordering restitution as a condition of probation, and the court erred in concluding it did.

The court committed the same error in denying Lindsey's motion for reconsideration. It also erred in concluding that ordering restitution as a condition of probation on a motion for reconsideration would be an illegal increase in the sentence already imposed. Even if the addition of restitution would be an increase in sentence, it would not be illegal because the legislature has authorized courts to reconsider a denial of restitution after sentencing, and to order restitution on reconsideration. Also, the double jeopardy right not to be punished multiple times for the same offense would not be violated. When the statutory framework for sentencing creates an expectation on the part of the defendant that his sentence can be increased during a particular post-sentencing interval, the defendant does not have a reasonable expectation of finality as to the severity of his sentence until that interval is over.

Ottus Savoy v. State of Maryland, No. 2612, September Term 2012, filed July 31, 2014. Opinion by Raker, J.

http://www.mdcourts.gov/opinions/cosa/2014/2612s12.pdf

CRIMINAL PROCEDURE – RIGHT TO TESTIFY – KNOWING AND VOLUNTARY WAIVER – ATTORNEY AND CLIENT – DETRIMENTAL RELIANCE

Facts:

Ottus Savoy was convicted in the Circuit Court for Baltimore City of second degree murder and use of a handgun. In August 2011, Sean Ames was shot and killed outside a residence in Baltimore. At the end of the State's case, trial counsel advised Savoy, on the record, that if he testified, he could be impeached with his prior conviction for first degree assault. That advice was incorrect. The court did not correct trial counsel's misstatement, and Savoy waived his right to testify after further consulting with his attorney during the overnight recess.

Held: Affirmed.

The Court of Special Appeals held that although the trial court should have intervened and corrected counsel's erroneous misstatement about the law and impeachable offenses, the defendant did not meet his burden to show that he relied upon the erroneous advice of his attorney in declining not to testify. Although the trial court has no affirmative duty to advise a defendant of the right to remain silent, when the trial court is aware of a clearly erroneous advisement of the right, the court should intervene and correct the misstatement. Nonetheless, counsel's incorrect legal statement does not warrant reversal when the defendant did not rely on the erroneous statement in the decision not to testify.

Brian Clark v. State of Maryland, No. 701, September Term 2013, filed July 31, 2014. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2014/0701s13.pdf

JURY TRIAL WAIVER – RULE 4-246(b) – STIPULATION TO CONVICTION UPON FINDING BY JURY OF PREDICATE OF POSSESSION OF REGULATED FIREARM – HARMLESS ERROR – UNIT OF PROSECUTION FOR VIOLATIONS OF PUBLIC SAFETY ARTICLE 5-133 – RULE OF LENITY IN SENTENCING ON CONVICTIONS FOR WEARING, CARRYING, OR TRANSPORTING A HANDGUN AND TRANSPORTING A HANDGUN IN A VEHICLE.

Facts:

Defendant was charged with robbery and related offenses, including possession of a regulated firearm after commission of a crime of violence and possession of a regulated firearm by a prohibited person. His prior conviction was for robbery. At the outset of trial, the defense and the State stipulated that the counts for possession of a regulated firearm after commission of a crime of violence and possession of a regulated firearm by a prohibited person would be "severed," in that they would not go to the jury for consideration, and if the jury found the defendant guilty of possession of a regulated firearm, the court would enter verdicts of conviction on the two "severed" counts. This stipulation was put on the record, and was described by the prosecutor as an agreement that the "severed" counts would be resolved by a "bench trial" instead of by the jury. Although defense counsel took time to discuss the stipulation with the defendant during the court proceeding, the discussion was not on the record in open court. The defendant was not examined on the record in open court about waiving his right to a jury trial and there was no finding by the court that the defendant had knowingly and voluntarily waived his right to a jury trial on the "severed" counts.

Among his convictions, the defendant was found to have violated Public Safety Article 5-133 in three ways: by possessing a regulated firearm after conviction of a crime of violence, by a prohibited person, and by a person under the age of 21. The court imposed separate sentences for these convictions.

The defendant was convicted of wearing, carrying, and transporting a handgun, and of transporting a handgun in a vehicle. The court imposed separate sentences.

Held:

Convictions for possession of a regulated firearm by a person under twenty-one and possession of a regulated firearm by a disqualified person vacated. Sentence on conviction for transporting

a handgun in a vehicle vacated. Sentence on conviction of possession of a regulated firearm after conviction of a crime of violence vacated and case remanded for resentencing on that conviction. Judgments otherwise affirmed.

The stipulation to a conviction entered by the court on the "severed" possession of a regulated firearm counts either was not a jury trial waiver or, if it was and there was any error in the jury trial waiver procedure that was followed, the error was harmless beyond a reasonable doubt. The stipulation did not call for any fact-finding or decision-making by the court on the severed counts. It simply was an agreement that if the jury found the defendant guilty of possessing a regulated firearm, the court would enter convictions on the "severed" counts of possession of a regulated firearm after conviction of a crime of violence and possession of a regulated firearm by a prohibited person. This process, which was followed, ensured that the jurors would not receive evidence of the defendant's prior robbery conviction in a case in which he was being tried for robbery.

Even if the procedure indeed was a jury trial waiver on the severed counts, any error either was not preserved or was harmless beyond a reasonable doubt. The failure of the court to make a finding on the record that the waiver was knowing and voluntary was not preserved for review. The failure of the court to ensure that the defendant was examined on the record and in open court about the jury trial waiver was harmless error because the precise non-jury decision procedure that the defendant requested with regard to the severed counts was what he received, and it is evident that, had an examination taken place on the record, the outcome of the case would not have changed.

Public Safety Article 5-133 provides several ways in which that statute can be violated. There is a single unit of prosecution for violation of the statute, no matter how many different ways it was violated. The defendant should not have been convicted of violation of that statute by possessing a regulated firearm after conviction of a crime of violence, by a prohibited person, and by a person under the age of 21. There should have been one conviction only, for the modality that carried the most severe sentence. Accordingly, the other two convictions are vacated.

When convictions for wearing, carrying, and transporting a handgun and transporting a handgun in a vehicle arise out of a single and continuous course of conduct, the rule of lenity requires that the sentences merge.

Jane Gray, et al. v. Howard County Board of Elections, et al., No. 690, September Term, 2014, filed August 28, 2014. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2014/0690s14.pdf

ELECTION LAW – REFERENDUM PETITION – REVIEW OF ADMINISTRATIVE AGENCY'S DECISION

Facts:

Ten days after the Howard County Council enacted Ordinance 32-2013, which adopted the 2013 Comprehensive Zoning Plan of Howard County, appellant Citizens Working to Fix Howard County submitted a proposed referendum petition to the Election Director, challenging portions of that plan. The county's Election Director responded, in a letter, that he had determined that "the front page formatting of the petition" complied with the "technical" legal requirements but stressed that "a fair and accurate summary [was] required on the back of the petition that includes the substantive provisions of the law being referred" to referendum. He then concluded his letter by noting that his office was "making no judgment as to whether the information in the summary presented fully satisfies all legal requirements."

After appellants had tendered the required number of signatures, within the prescribed time period, the Election Director, in a letter, confirmed that appellants had met the signatory requirement for certification but apprised them that, "[a]fter a board meeting and on advice of legal counsel," he had "determined" that their petition did "not meet all legal requirements as set forth in 6-201(c)(2)(i) of the election law, which states: 'a fair and accurate summary of the substantive provisions of the proposal' is required if the petition seeks to place a question on the ballot." That being so, he informed appellants that he could not approve certification.

Thereafter, appellants filed a petition for judicial review, in the Circuit Court for Howard County, challenging the Election Director's determination "that the referendum petition on parts of CB 32-2013 did not contain a 'fair and accurate summary of the substantive provisions of the proposal'" and his refusal to certify their petition.

Following numerous delays engendered by appellants' interlocutory appeals and petitions for certiorari, the circuit court ultimately agreed with the Election Director. In its memorandum opinion, the court pointed out a number of deficiencies in appellants' summary of the contested portions of the ordinance and characterized appellants' petitionary description of certain provisions of the ordinance they were challenging as either "not accurate," "misleading," "lacking in precision" or "clarity," and as "intended to create an emotional reaction" from potential signatories. The court therefore concluded that "[t]aken as a whole, the attempt to summarize the potions of the Ordinance for the referendum [fell] well short of the fair and accurate standard."

Held:

The Court of Special Appeals concluded that appellants' referendum petition clearly failed to meet the "fair and accurate" standard of section 6-201(c)(2)(i) of the Election Law Article of the Maryland Code. The Court so held because, among other things, the summary of the ordinance in the referendum petition specifically listed properties that had nothing to do with the challenged law, it failed to explain the purported impact that the referendum petition would have on those properties or their zoning classifications, and it used misleading language that appeared nowhere in the contested ordinance.

Brian McAllister v. Theresa McAllister, No. 1453, September Term 2013, filed August 1, 2014. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2014/1453s13.pdf

CHILD CUSTODY HEARING – JUDICIAL REVIEW – ABUSE OF DISCRETION – MOTION TO DISQUALIFY OPPOSING COUNSEL

Facts:

Brian and Theresa McAllister, natural parents to Ian (13) and Ethan (10) McAllister, divorced in early 2012. As part of the "parenting agreement" that resulted from the divorce, Ms. McAllister retained sole physical and legal custody of the boys, while Mr. McAllister received rights of visitation.

Mr. McAllister's relationship with Ian became quite strained, culminating, on April 14, 2012, with a text message from Ethan to his mother during one of the boys' visit with their father. Ethan stated that his father was "beating Ian." Ms. McAllister pressed criminal charges, which later were dropped, and sought on her children's behalf a protective order, which was later denied. After his arrest, Mr. McAllister did not have any visitation with Ethan or Ian for several months; he asserted that his ex-wife had obstructed his visits and tried to turn his sons against him. Ms. McAllister argued that despite her best efforts, the sons would refuse to visit with their father.

On July 30, 2012, Mr. McAllister filed with the juvenile court a complaint for modification of custody, in which he requested sole custody of the children. At that same time, Mr. McAllister began to withhold his required monthly alimony and child support payments, and to apply them to mortgage payments on the family home.

Ms. McAllister responded to this withholding of payments by petitioning to have Mr. McAllister held in contempt. She also responded to Mr. McAllister's custody modification complaint with an answer, and a motion for the court to appoint a Best Interest Attorney, or "BIA," to represent her sons. The court granted the motion.

The court scheduled a custody hearing before a master, to begin January 30, 2013. On January 23, the BIA participated in a conference call with counsel for both parents. The BIA stated that she would recommend to the master that Mr. McAllister's custody complaint be dismissed. During that call counsel for the parents agreed that Ian should participate in reunification counseling with one Dr. Sack.

At the hearing on January 30, counsel for Mr. McAllister, arriving late, insisted that his client have more than the normally allotted time to present his case. The master acquiesced. Mr.

McAllister took a full day to present his case, and rested his case without reservation and without setting aside any of his time for rebuttal evidence.

Prior to January 30, Mr. McAllister had received an unsigned letter from one Karen McClelland, a licensed clinical social worker who had previously counseled the McAllisters, including two sessions involving Ian and his father. In the letter, Ms. McClelland opined that Ian was "severely alienated from his father" and "visibly conflicted about having a relationship with him." Ms. McClelland recommended that the court order "reconciliation therapy," and further stated that Ms. McAllister had withdrawn Ian from the sessions even though Ms. McClelland claimed to have been making progress. Mr. McAllister had known of Ms. McClelland's opinions prior to the hearing, and had learned that she would not be able to testify for Mr. McAllister on that date. Yet, prior to resting his case without reservation, he declined to alert the master of either Ms. McClelland's existence or her opinions about Ian and the custody dispute.

Mr. McAllister instead attempted to persuade the BIA to call Ms. McClelland as a witness. When that failed, Mr. McAllister submitted a written motion to reopen his case. Both Ms. McAllister and the BIA filed motions opposing this motion. The circuit court denied the motion on April 12, 2013, just before the custody hearing was to resume.

Mr. McAllister then filed a motion to strike the BIA – i.e., he asked the court to disqualify his children's lawyer. His motion contained many arguments, including allegations that the BIA had been incompetent, and had acted with bias toward Mr. McAllister in cross-examining him. The circuit court denied Mr. McAllister's motion to strike.

The custody hearing resumed, and concluded, on April 15, 2013. Ms. McAllister and the BIA presented their respective cases. Then, at closing arguments, Mr. McAllister, in an about-face, abandoned his request for physical and legal custody, and instead asked for sole legal custody. (Ms. McAllister would retain physical custody.)

Four days later, the master issued her report and recommendations regarding custody. Her evenhanded findings assigned blame to both parties, but effectively rejected Mr. McAllister's contention that his ex-wife had alienated his children from him. The master emphatically rejected Mr. McAllister's belated assertion that he should have sole legal custody while his wife retained physical custody, characterizing such a proposition as "a disaster for this family." The master recommended that the children receive counseling, but that Ms. McAllister's legal and physical custody should remain undisturbed. The master finally found Mr. McAllister in contempt for failure to pay over $11,000 in alimony, child support, and childcare expenses after visitation had ceased.

In its written report and recommendation on fees, dated June 7, 2013, the master allocated fees as among the parties on various grounds. The master then turned her attention to the BIA, noting that she had gone "the extra mile to try to understand the situation, the demeanor of the parties, the nature of the conflict, and the needs of her clients." The master concluded by finding that the BIA's efforts were "appropriate" and that she "went above and beyond what would be expected of a BIA."

On August 12, 2013, the circuit court held a hearing on Mr. McAllister's 27 exceptions to the master's findings. Four days thereafter, the court fully adopted the master's recommendations. The court held Mr. McAllister in contempt, denied Mr. McAllister's request to modify custody, and modified visitation to (1) permit Ian and his father to meet in supervised public places and (2) to participate in joint counseling with Dr. Sack. Mr. McAllister noted his timely appeal to this Court.

Held: Affirmed as to all issues.

First, Mr. McAllister's noncompliance with Maryland Rule 8-501(c), requiring the filing of an adequate record extract, does not require dismissal. The many deficiencies had been supplied by Ms. McAllister in an appendix to her brief, and she had not been prejudiced. But Mr. McAllister must pay the printing costs incurred by Ms. McAllister in including the omitted materials in the appendix.

1. The trial court did not abuse its discretion in denying Mr. McAllister's motion to reopen his case-in-chief.

Mr. McAllister unsuccessfully attempts to paint himself as a litigant whose case has unfairly been dismissed out of hand. He demanded and received extra time to present his case. The court allotted him an entire day, and he rested his case without reservation. At that time he already knew of Ms. McClelland's letter and opinions regarding the custody dispute – opinions Mr. McAllister asserts were helpful to his case. Mr. McAllister further knew that Ms. McClelland could not attend on the day of his case-in-chief, but failed to alert the master of this fact before resting his case.

Moreover, the court had very good reason to deny the motion. (1) The BIA, in her discretion, had declined to waive the privilege between Ian and Ms. McClelland (see Md. Code (2013 Repl. Vol.) § 9-109 of the Courts and Judicial Proceedings Article); and (2) the testimony was unnecessary, because by the time of the motion to reopen, all parties already had agreed that reunification therapy – one of Ms. McClelland's several recommendations in the letter – was a shared goal. We therefore hold that the trial court has not abused its discretion.

2. The trial court did not abuse its discretion in denying Mr. McAllister's motion to strike the BIA from the hearing.

As a creation of Maryland statute, the BIA enjoys broad court-appointed authority to represent a minor child in proceedings concerning custody, visitation, or "the amount of support of a minor child." The BIA acts as any other lawyer inasmuch as she is not immune from civil suit and must "exercise ordinary care and diligence in the representation of [the] minor child." *Id*.

The Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access ("BIA Guidelines") set forth the BIA's characteristics, obligations, and professional prerogatives. Unlike traditional guardians ad litem,

the BIA enjoys independence from the court and the other parties, and "advances a position that the attorney believes is in the child's interest[,]" even where that child's views may differ. Although the BIA must follow certain steps in the process of that representation, he or she enjoys wide latitude in the strategies employed and conclusions reached in advancing the child's interests.

The BIA thus will take positions that commonly displease one, if not both, parties to a custody dispute. A displeased parent asserting negligence reserves the right to file a malpractice suit at the close of proceedings. However, where the parent seeks to have the BIA removed, or stricken, from the ongoing proceedings, it is appropriate for courts to view such an effort with a measure of skepticism.

This is consistent with common practice in trials not involving custody proceedings. "When an opposing party moves for disqualification of the other party's counsel, the court will take a hard look at such a motion." *Klupt v. Krongard*, 126 Md. App. 179, 206, cert. denied, 355 Md. 612 (1999). This is because such a tactic can so easily be employed to "block, harass, or otherwise hinder the other party's case." *Id*. Courts generally require the moving party to "identify a specific violation of a Rule of Professional Conduct," *id*. at 203, such as a disabling conflict of interest. In cases such as this, where a BIA exercises her independence and discretion in the child's name alone, courts should view a motion to strike with the same guarded skepticism.

Here Mr. McAllister has claimed no ethical violation or clear conflict of interest, and has not even asserted that the BIA has violated any of the few requirements imposed on BIAs by the BIA Guidelines. Instead, he bases his attack on mere vociferous disagreement with how the BIA chose to conduct her representation of Mr. McAllister's son. We hold that Mr. McAllister does not have the right to remove the BIA on such grounds.

Moreover, the trial court noted that the BIA did an "excellent job" in representing Ian's interests, and went "above and beyond what would be expected of a BIA."

3. The trial court did not arbitrarily limit Mr. McAllister's time to present his case-in-chief.

At the close of proceedings before the master, Mr. McAllister asked for and was denied additional time to present rebuttal evidence. The circuit court later rejected Mr. McAllister's exception to that decision. We hold that the trial court did not abuse its discretion in denying Mr. McAllister's subsequent exception.

We reject Mr. McAllister's attempt to conjure a constitutional violation out of a routine discretionary ruling regarding the order of proof at trial. The master gave Mr. McAllister a full day, *i.e.*, more than the time normally allotted in such proceedings, to present all facets of his case. He rested his case without reservation. Yet, despite arriving late for both days of the proceedings, Mr. McAllister's counsel failed to use any of that time to reserve any of his allotted time for rebuttal purposes.

In view of the master's well-supported finding that Mr. McAllister lacked substantial justification to maintain the already extended action after the first day of trial, the court could not conceivably have abused its discretion by precluding him from unnecessarily prolonging proceedings even further. While Mr. McAllister might have misunderstood that he needed to reserve extra time for rebuttal purposes, such a misunderstanding does not give rise to abuse of discretion by the trial court.

4. The trial court did not abuse its discretion in its independent review of Mr. McAllister's exceptions

The trial court did not fail to exercise "proper, independent judgment" in denying Mr. McAllister's 27 exceptions to the master's findings and recommendations.

When reviewing a master's report, a trial court and an appellate court defer to the master's first-level findings unless they are clearly erroneous. While the trial court may be guided by these recommendations, it must make its own independent decision as to the ultimate disposition, which the appellate court reviews for abuse of discretion.

We reject Mr. McAllister's argument that the trial court accepted the master's recommendations without proper scrutiny while "fail[ing] to grasp that Ms. McAllister has poisoned Ian[,]" or that "Ian has adopted his mother's views as his own." The lengthy transcript reveals the court's painstakingly thorough review of Mr. McAllister's several dozen, scattershot exceptions. The court reviewed each exception and provided a cogent and incisive rationale for each of the conclusions it reached. In short, the court continually gave ample bases for supporting the master's decision to reach conclusions contrary to Mr. McAllister's wishes.

Andrew A. Green v. Betty J. McClintock, No. 929, September Term 2013, filed August 1, 2014. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2014/0929s13.pdf

SUBJECT MATTER JURISDICTION – ORPHANS' COURTS – WILL PROBATE – COLLATERAL ESTOPPEL

ATTORNEY-CLIENT PRIVILEGE – TESTAMENTARY EXCEPTION

FRAUD – WILL CONTEST

Facts:

This case centers on a disputed will of Kenneth Green. Kenneth never married and had no children. His closest relative was his brother Albert. In 2003, Kenneth executed a will in which he made his friend and former co-worker, Betty McClintock, the prime beneficiary. Kenneth was motivated to make this will after a dispute with Albert over his mom's estate and at the suggestion of Maryland Fuel Corporation President James Oberhaus. Kenneth believed that he should have sole control over Green farm where he grew up and continued to live, whereas Albert believed the property should be split. Oberhaus had an interest in Green Farm because Maryland Fuel owned the mineral rights under Green farm. In addition to hiring a lawyer to represent Kenneth in the dispute with his brother, Oberhaus referred Kenneth to Maryland Fuel's lawyer Donald Nelson. Oberhaus then strongly encouraged Kenneth to include a provision in his will that provided Maryland Fuel the option to purchase Green farm from Kenneth's estate after his death. At the time of the execution of this will, Kenneth made it clear that he did not want Albert's wife Stella to benefit from this will. He said that he felt the estate should go to McClintock because she was a hard worker and had devoted a great deal of effort to raising her children after her husband's death. Neither Oberhaus nor Nelson knew McClintock.

In May 2006, Kenneth was diagnosed with rectal cancer. Over the course of the next few years, he alternated between staying with various family members (Albert's daughter and Albert's grandson) and returning to the Green farm. During this time, he gave McClintock a healthcare power of attorney and requested that McClintock keep all of his banking and investment records. McClintock also took him on errands weekly and when necessary, to his chemotherapy appointments.

At the end of July 2009, the cancer had spread, and Kenneth was admitted to a hospital. Upon his admission, Kenneth's discharge plan was that he would return to Albert's grandson's home upon his release. A few days after Kenneth's admission to the hospital, however, Albert told the hospital staff that he was willing to take Kenneth to Kentucky and that he did not want Kenneth to live in a nursing home. Kenneth's medical records, however, contained no previous mention of a nursing home.

On August 7, 2009, Linda Malamis, an employee of Maryland Fuel and friend of Kenneth, brought Kenneth's advance directive to the hospital, and it was inserted into his medical records. While Malamis was at the hospital, Kenneth informed her that he wanted McClintock to perform some tasks for him, and they discussed giving her a power of attorney. Kenneth then spoke by telephone with Nelson, who prepared a limited power of attorney in favor of McClintock.

On McClintock's regular, daily visit to the hospital on August 9, 2009, Kenneth told her that he had to go to Kentucky with Albert. Otherwise, Kenneth said, he would have to go to a nursing home. Kenneth had never previously said anything to McClintock about going to Kentucky after his discharge. McClintock offered to allow Kenneth to stay at her house and questioned why he would want to leave Maryland and stay with Stella, whom he disliked. During the conversation, Kenneth became distraught and had a breakdown. McClintock did not pursue the issue further.

On August 11, 2009, the hospital "staff" informed a hospital social worker that Kenneth wanted to go to Kentucky. According to Kenneth's medical records, the social worker had talked to Albert's wife, Stella, who told her that they want to bring him back to the farm where they live and where he grew up. The circuit court found that the reported statement was blatantly and deliberately false, as Kenneth had gone to Kentucky only once in his life – for his brother's deposition in their litigation over their mother's estate.

In addition, according to the medical records, Stella reportedly warned the social worker to be careful of McClintock, saying that she was an old co-worker with the reputation of being a "black widow" and that she was using a power of attorney to keep Kenneth in Maryland.

A few days later, Albert and his son Andrew took Kenneth to Albert's home in Kentucky. The following day, August 14, 2009, Andrew downloaded a power of attorney from the internet. Andrew called a friend and a notary to request that they come to Albert's home to witness the signing of a power of attorney by his uncle. Kenneth was seated in a hospital bed when Andrew read the document to him. Kenneth executed the power of attorney, which was in favor of Albert.

A day or two later, Andrew and Albert returned to Maryland to obtain control of Kenneth's assets. They went first to the First Peoples credit union, where Albert presented the new power of attorney. There, they learned that Kenneth's account had been closed and the proceeds disbursed, pursuant to Kenneth's instructions to McClintock in the limited power of attorney. Upon receiving that information, Andrew and Albert telephoned Kenneth and told him that McClintock had closed the account and taken his money. Andrew and Albert then went to M & T Bank and obtained Kenneth's records, using the power of attorney. In addition, they effected a change of address to Albert's home in Kentucky. A few days later, Albert, using the power of attorney, withdrew $10,162.55 from Kenneth's M & T bank account.

On August 23, 2009, Andrew asked two friends and a notary to come to Albert's house to witness Kenneth's signing of several additional documents: a statement denying that Kenneth

had executed the power of attorney in favor of McClintock; a document indicating his desire to transfer his farm to Albert; and a statement directing Nelson to cease activity on Kenneth's behalf. On that same day, Kenneth executed another power of attorney, this one in favor of Andrew.

By September 2, 2009, a Kentucky attorney had drafted a new will for Kenneth. The circuit court found no evidence, however, that the attorney actually knew Kenneth or had ever met him. Instead, Andrew had communicated with the attorney about the will, and Albert and Stella had picked up the draft will from the attorney's office. Andrew then asked a few of his friends to come to his father's home and witness the execution of the new will. While Kenneth was in his hospital bed, Andrew stood beside the bed and read the will. Kenneth "agreed" with the will and executed it, and it was witnessed and notarized.

The day after the execution of the will, Andrew traveled to Maryland to see his Maryland attorney. Using his power of attorney, Andrew executed a deed by which he conveyed Kenneth's farm to Albert. The deed recites that Kenneth is "incapacitated."

By October 1, 2009, Albert and Andrew had succeeded in changing all beneficiary designations on Kenneth's accounts from McClintock to Albert. Andrew or Albert sold Kenneth's cattle during this time period as well.

Between October 1, 2009, and December 31, 2009, Albert withdrew $21,338.38 from Kenneth's account to pay for an addition to Albert's home. Also, on January 15, 2010, four days before Kenneth's death, Albert paid Andrew $2,000 from Kenneth's account as "reimbursement for travel."

Beginning in mid-August 2009, Kenneth's friends in Maryland repeatedly tried to communicate with him in Kentucky, but were largely unsuccessful. While Kenneth was in Kentucky, he was homebound. He was completely dependent on his brother and sister-in-law for food, shelter, and medical care.

After Kenneth died, Nelson sought to introduce the 2003 will, while Andrew tried to introduce the 2009 will. In his notice of judicial probate, Andrew specifically asserted that Kenneth was domiciled in Allegany County at the time of his death. On June 18, 2010, the orphans' court held a hearing for the purpose of admitting the 2009 will to probate. At the hearing, Andrew asserted that, although Kenneth's death certificate states that Allegany County was his usual residence, he had established a residence in Kentucky by the time of his death. Thus, Andrew asserted that the estate should be opened in Kentucky rather than Maryland. The orphans' court, however, unanimously decided that the estate should remain in Maryland. In so doing, the court accepted the 2009 will for probate and appointed Andrew to administer the estate. Andrew did not appeal the orphans' court's rejection of his argument that Kentucky, and not Maryland, was the appropriate forum for the proceedings to probate Kenneth's estate.

On September 9, 2010, McClintock filed a petition to caveat the 2009 will, alleging that the will was procured as a result of fraud, undue influence, or duress imposed by Albert or Albert's other

family members. In response, Andrew petitioned to transfer the caveat proceeding to the circuit court.

After a lengthy bench trial, the Circuit Court for Allegany County held that the 2009 will was invalid because it was procured by fraud and undue influence. As a consequence of that decision, the earlier will, which favored McClintock, became the decedent's last will and testament. Andrew appealed that decision.

Held: Affirmed.

Maryland has subject matter jurisdiction over Kenneth Green's estate. The orphans' court has the statutory power to conduct judicial probate and transmit issues of fact to a court of law.

It is an incorrect statement of law to say that in a probate case in Maryland, a court has subject matter jurisdiction only if the decedent was domiciled in Maryland at the time of his or her death. Rather, if the decedent was domiciled in a particular county at the time of death or if the decedent had more property in that county than in anywhere else in the State, the orphans' court for that county is the proper venue for probate proceedings. But because a court can be a proper venue only if it has jurisdiction, jurisdiction cannot depend solely on whether the decedent was domiciled in Maryland at the time of his or her death: the court may also have jurisdiction if the decedent simply had property in Maryland at the time of death.

When the orphans' court rejected his jurisdictional challenge to a Maryland court's power to administer Kenneth's estate, Andrew had the right to appeal either to this Court or to the circuit court, because the ruling was a "final judgment" in the context of the probate proceedings. Indeed, Andrew was not only permitted to appeal the ruling on jurisdiction, but he was required to appeal if he continued to dispute the court's power to administer the estate. When an orphans' court rejects a party's challenge to its jurisdiction, the party must immediately exercise its right to appeal, and must prevail on its appeal, or else he or she will be barred from raising future challenges to the court's jurisdiction due to collateral estoppel. Collateral estoppel barred Andrew from relitigating the issue of jurisdiction after it had been "raised, litigated and determined" against him in a final, appealable judgment, from which he had the right to appeal, but from which he failed to appeal.

While ordinarily, an attorney may not disclose a client's confidential communications even after the client dies, Maryland recognizes a "testamentary exception" to the attorney-client privilege. That exception establishes that in a dispute between putative heirs or devisees under a will or trust, the attorney-client privilege does not bar admission of testimony and evidence regarding communication between the decedent and any attorneys involved in the creation of the instrument, provided that evidence or testimony tends to help clarify the donative intent of the decedent. The testamentary exception not only applies to the will that is being contested, but to earlier wills as well. Even if the circuit court erred in allowing Nelson's testimony about the 2003 will, we would still affirm, because the testimony was cumulative and thus harmless.

Generally, undue influence amounts to physical or moral coercion that forces a testator to follow another's judgment instead of his own. Although there is not a specific test to determine the existence of undue influence, seven factors are used: 1) the benefactor and beneficiary are involved in a relationship of confidence and trust; 2) the will contains substantial benefit to the beneficiary; 3) the beneficiary caused or assisted in effecting execution of will; 4) there was an opportunity to exert influence; 5) the will contains an unnatural disposition; 6) the bequests constitute a change from a former will; and 7) the testator was highly susceptible to the undue influence. A caveator need not prove the presence of all seven of these factors, but the first and seventh factors (relationship of confidence and trust, and high susceptibility to undue influence) do appear to be necessary conditions for a finding of undue influence. Nearly all of the factors are present in this case, including the essential first and seventh factors.

Fraud in the inducement is sufficient to invalidate a will. McClintock generated sufficient evidence of fraud.

In re K'Amora K., No. 2213, September Term 2013, filed August 1, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/2213s13.pdf

CHILD CUSTODY – TERMINATION OF PARENTAL RIGHTS – EXCEPTIONAL CIRCUMSTANCES

Facts:

DSS took custody of Child only six days after her birth because Mother would not administer physician-recommended medication to Child (Child was born HIV-positive, and the medication would have reduced her risk of contracting HIV from in utero exposure to almost nothing), and because her behavior at the hospital was erratic, and led hospital staff to have concerns about Child's safety. Over the next two years, Child lived with the same foster family and thrived there. Mother had sixty-one scheduled visits with Child, but missed twenty-seven. When she did visit with Child, the visits were generally not positive and those who watched the two together saw no bond form between Mother and Child—Mother even told one social worker that she was not Child's real mother. This social worker was familiar with Mother because she had worked with Mother and her other children: Mother's oldest daughter had been removed from her care, and two other children were in the custody of their fathers, as Mother had never demonstrated she could capably care for either of them. Mother declined to attend recommended mental-health treatment, as she was of the opinion that she did not need it. She also made unsupported accusations of abuse against the foster family.

The trial court determined that under Md. Code (1984, 2006 Repl. Vol.), § 5-323(b) of the Family Law Article ("FL"), "exceptional circumstances" existed that justified terminating Mother's parental rights. It examined the factors under FL § 5-323(d), pointing out that Mother had been uncooperative since day one after Child's birth, she missed nearly half her visits with Child and failed to bond with her when she did attend, she had a poor track record with her other children, and Child was flourishing after two years with her foster family. Mother appealed.

Held:

Under FL § 5-323(b), the trial court is not required to find both unfitness of a parent and exceptional circumstances to justify terminating a parent's rights by statute. It may base such a finding on exceptional circumstances only, and the trial court should look among other factors to the parent's behavior and character, and whether the parent's failure to establish a bond with the child might mean that severance of the relationship would not be detrimental to the child, but would help the child achieve permanency with a foster family.

Where Mother had refused to administer physician-recommended medication to her daughter at birth, and the Child was removed from her care six days later, trial court did not err in finding that "exceptional circumstances" justified terminating Mother's parental rights even without a concomitant finding of unfitness. Exceptional circumstances included Mother's total failure to bond with Child over the course of her first two years of life, Mother's refusal to acknowledge or get help for diagnosed mental health issues, Mother's history with the Department of Social Services based on her care of her three older children, and the Child's having developed a strong bond in a happy, loving relationship with a foster family whom she had lived with since she was six days old.

Mayor and Council of Rockville, et al. v. William A. Pumphrey, et al., No. 599, September Term 2013, filed July 31, 2014. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2014/0599s13.pdf

ZONING AND LAND USE – TEXT AMENDMENT – ZONING ACTION: LEGISLATIVE ACTION OR ADJUDICATORY ACTION.

Facts:

William Pumphrey and RAP Leasing Corporation (hereinafter "Pumphrey"), the appellees, are the owners of the Robert A. Pumphrey Funeral Home in Montgomery County. The funeral home has been in operation since 1930 and wished to expand its parking area to an adjoining lot it also owns. In 2010, Pumphrey applied for a text amendment to the Montgomery County Zoning Ordinance that would allow expansion of the parking area for a nonconforming use on a property in a single dwelling unit residential zone when the use has been in continual existence since August 3, 1932 (the date that Montgomery County first adopted a zoning ordinance). The Mayor and Council adopted the 2010 text amendment by a three to two vote. The owner began the application process for combining the funeral home lot and the adjoining lot, because the expanded parking area had to serve the lot on which it would be located. Before that process was completed, local elections resulted in a change in the composition of the Council, so that a majority of the Council was composed of people who disagreed with the 2010 text amendment. In 2012, the Mayor and Council proposed a new text amendment that would undo the 2010 text amendment. After a hearing, the Mayor and Council voted three to two in favor of the 2012 text amendment.

In the meantime, the process to combine the lots continued. The Planning Commission denied the application to combine the funeral home owner's two lots.

Pumphrey filed an action for judicial review of the decision of the Mayor and Council enacting the 2012 text amendment and the decision of the Planning Commission denying the application to combine the lots. The Circuit Court for Montgomery County consolidated the two cases, denied a motion by the Mayor and Council to dismiss the action for judicial review of the enactment of the 2012 text amendment, and reversed both decisions. The Mayor and Council and the Planning Commission noted appeals and are the appellants.

Held: Reversed.

The Mayor and Council's enactment of the 2012 text amendment was not an adjudicatory act; it was a legislative act. Therefore, it was not subject to judicial review. The Mayor and Council held a hearing but did not take evidence or make factual findings. Their decision-making

focused on general issues of policy and law, in particular, the City's interest in limiting the expansion of non-conforming uses, so that most eventually will revert to residential use. Their decision-making did not focus on the unique characteristics of the funeral home property. The Mayor and Council's decision to adopt the 2012 text amendment was broad-based and policy oriented. Because passage of the 2012 text amendment was a legislative act, it was not subject to judicial review, and the circuit court erred in denying the motion to dismiss.

The circuit court also erred in reversing the decision of the Planning Commission, which was supported by substantial evidence in the record and was in accordance with the regulation governing lot sizes in the applicable zone.

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ATTORNEY DISCIPLINE

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By and Opinion and Order of the Court of Appeals dated July 18, 2014, the following attorney has been indefinitely suspended, effective August 18, 2014:

VAUGHN MILES MUNGIN

*

By an Order of the Court of Appeals dated August 26, 2014, the following attorney has been suspended for thirty days by consent:

LEONARD JEROME SPERLING

*

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Eighty-Fourth Report of the Standing Committee on Rules of Practice and Procedure was filed on August 26, 2014:

http://mdcourts.gov/rules/rodocs/184ro.pdf