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COURT OF APPEALS

Appiah v. Hall, No. 33, September Term, 2009, Opinion filed on October 27, 2010 by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/33a09.pdf>.

CIVIL PROCEDURE - SUMMARY JUDGMENT - STANDARD OF REVIEW -
EMPLOYER LIABILITY - RETENTION OF CONTROL - RESTATEMENT SECOND

Facts: This case concerns the alleged liability of Respondents, the Maryland Port Administration ("the MPA") and P&O Ports of Baltimore, Inc. ("P&O"), for the death of Stephen Appiah, who was killed while working at the Seagirt Marine Terminal ("Seagirt"). Seagirt is owned by the MPA and, pursuant to contract, operated by P&O. Marine Repair Services, an independent contractor employed by Respondents, was the company that Mr. Appiah worked for as a longshoreman. Marine Repairs leased space at Seagirt from the MPA and provided the storage and maintenance of refrigerated shipping containers ("reefers"). While Mr. Appiah was in the process of connecting a reefer to a tractor trailer truck, a co-employee of Mr. Appiah inadvertently gave the truck-driver the impression that he was cleared to reverse the truck to hook onto the reefer. Mr. Appiah was pinned between the truck and the reefer and suffered severe injuries resulting in his death.

Petitioners Betty Appiah and Veronica Agyarko, wife and mother of Mr. Appiah, respectively, filed a wrongful death and survivorship action in the Circuit Court for Baltimore City, naming, among others, the MPA and P&O. The MPA and P&O each filed a motion for summary judgment against both Petitioners, claiming that they were not liable for the negligent acts that caused Mr. Appiah's death because those acts were performed by independent contractors over whose work the MPA and P&O retained insufficient control to subject them to liability. Following a hearing, the Circuit Court, on December 17, 2007, granted summary judgment, finding that the MPA and P&O did not have control over the manner in which Marine Services performed its work. Furthermore, the Circuit Court found that there was no evidence that the MPA and P&O controlled the very thing from which Mr. Appiah's injuries arose, which the court considered necessary under Maryland law for the MPA and P&O to be liable for the negligence of an independent contractor like Marine Services.

Petitioners timely noted an appeal to the Court of Special Appeals, arguing that there was sufficient evidence to demonstrate that the MPA and P&O retained sufficient control to subject them to liability and that there were disputed material facts such that the Circuit Court erred in granting summary judgment. The Court of

Special Appeals affirmed, *Appiah v. Hall*, 183 Md. App. 606, 962 A.2d 1046 (2008), holding that Petitioners failed to provide any evidence that the MPA and P&O, as the employer of independent contractor Marine Services, retained sufficient control over Marine Services' "methods of performing the specific injurious act," as required for liability to attach.

Held: Affirmed. The Court of Appeals held that the MPA and P&O could not be held liable for the negligence of Marine Services, an independent contractor, because there was no evidence that the MPA and P&O retained control over the operative detail and manner of work of Marine Services.

The Court explained that, in considering an appeal from an order granting summary judgment, the court will first determine whether a genuine dispute of material fact exists. Only after finding that such a dispute does not exist will the Court review questions of law. The Court explained that only factual disputes material to the legal question at issue—whether the MPA and P&O retained sufficient control over the work of Marine Services such that the MPA and P&O could be held liable—are sufficient to withstand a motion for summary judgment. The Court examined each of Petitioner's alleged examples of factual dispute, and in each case, determined that, when viewing the facts in the light most favorable to Petitioners, none of the evidence generated a genuine dispute of material fact relevant to the issue of the MPA's and P&O's retention of control.

Thus, the Court went on to consider whether the MPA and P&O were entitled to summary judgment as a matter of law. The Court first noted that the MPA and P&O's liability must be determined according to the employer - independent contractor relationship. Generally, an employer of an independent contractor is not liable for the negligence of the independent contractor. A employer of an independent contractor, however, will be liable for the negligence of the independent contractor under circumstances when the employer was at "actual fault" or under a theory of vicarious liability. Specifically, an employer will be liable for the negligence of its independent contractor when the employer negligently selected, instructed, or employed the contractor; when the independent contractor's negligent act involves a non-delegable duty of the employer; or when the work performed by the contractor is inherently dangerous.

The Court rejected Petitioner's contention that Respondents were vicariously liable because they had a non-delegable duty to maintain Seagirt in a reasonably safe condition under the "safe workplace" doctrine, explaining that under this doctrine Respondents would only be liable when a condition on the property, rather than an act (as was the situation in this case), caused the injury. The Court next addressed whether Petitioners could be

liable under a theory of actual fault, explaining that liability under this theory is predicated on the employer having retained control over the "very thing from which the injury arose." Thus, the very thing over which Respondents must have retained control for liability to attach is Marine Repair's work connecting reefers to trucks. Because Petitioners failed to allege any facts demonstrating this requisite retention of control to impose liability on Respondents, the Court held that Respondents are entitled to judgment as a matter of law.

Marwani v. Catering By Uptown, No. 79, September Term, 2008.
Opinion filed October 22, 2010 by Murphy J.

<http://mdcourts.gov/opinions/coa/2010/79a08.pdf>

CONTRACTS - BREACHING PARTY'S RETURN OF "NON-REFUNDABLE"

DEPOSIT REQUIRED FOR CATERING SERVICES CONTRACT - A party whose cancellation of a catering contract constitutes a breach of that contract is not entitled to the return of his or her "non-refundable" deposit on the ground that (1) although the contract calls for the catering services to be performed at licensed food services facility, the contract called for the services to be performed by an "unlicensed" caterer, or (2) the contract did not include the food service facility license number of the facility at which the catering services were to be performed.

Facts: Ofir and Monique Marwani, Appellants, argued that they were entitled to the return of a "non-refundable" deposit they paid to Catering By Uptown, Appellee, because (1) Catering by Uptown is not a "licensed" caterer, and/or (2) the contract for catering services does not include the license number of the food service facility where the catering services are to be performed. The District Court of Maryland, sitting in Prince George's County, disagreed, and the Circuit Court for Prince George's County affirmed the judgment of the District Court.

Held: The Court of Appeals affirmed the judgment of the Circuit Court. The court emphasized that it was not presented with the argument that Appellants are entitled to a return of their deposit on the ground that (1) after they "cancelled" the contract, Appellee actually "booked" an equally profitable event at the facility, or (2) they notified Appellee of their decision to cancel the planned event at a point in time that provided Appellee with a reasonable opportunity to book an equally profitable event, but Appellee did not make a reasonable effort to do so. Rather the court's review was limited to the issues of whether Appellants are entitled to a return of their deposit merely because (1) Catering by Uptown is not a "licensed" caterer, and/or (2) the contract for catering services does not include the license number of the food service facility where the catering services are to be performed.

The court stated that nothing in the food establishment licensing statute requires that the name of a corporation or a limited liability company be included on the food service facility license. Nor does that statute require that "Catering by Uptown" be included on the license. Moreover, when a catered event takes place at a licensed food service facility, it is of no consequence whether the caterer has a "separate" catering license. Therefore, even though Catering by Uptown might need a separate catering license to perform catering services at a location other than a

licensed food services facility, Catering by Uptown did not need a separate catering license to provide catering services at a facility which had valid licenses to serve food and alcoholic beverages. The court also noted that although the Appellee's failure to include the food service facility license number on the contract was in fact a violation of the Consumer Protection Act., the District Court's conclusion that the Appellants did not sustain any actual injury arising from the CPA violation was fully supported by the evidence, and affirmed the judgment of the Circuit Court.

William Pease, et al. v. Wachovia SBA Lending, Inc., No. 76, September Term, 2009, filed 21 October 2010. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2010/76a09.pdf>

CONTRACTS - MARYLAND CREDIT AGREEMENT ACT - CONFESSED JUDGMENT - GUARANTORS ASSERTING FACTUAL AVERMENTS SUGGESTING FRAUD, NEGLIGENCE, AND FIDUCIARY DUTY BY A LENDER AS GROUNDS TO OPEN, MODIFY, OR VACATE CONFESSED JUDGMENTS - THE STATUTE OF FRAUDS PROVISION OF THE MARYLAND CREDIT AGREEMENT ACT ONLY APPLIES WHEN A PARTY SEEKS TO ENFORCE EITHER (1) AN ORAL CREDIT AGREEMENT; OR (2) A VERBAL MODIFICATION OF AN EXISTING CREDIT AGREEMENT. TO THE EXTENT GUARANTORS UNDER A CREDIT AGREEMENT ADVANCE FACTUAL AVERMENTS SOUNDING IN TORT WITH AN EYE TOWARDS FILING COUNTERCLAIMS AGAINST LENDER, THE STATUTE DOES NOT APPLY TO BAR CONSIDERATION OF SUCH AN EVIDENTIARY PROFFER. TO THE EXTENT, HOWEVER, GUARANTORS ADVANCE THE SAME FACTUAL AVERMENTS WITH AN EYE TOWARDS SEEKING A DECLARATION THAT A WRITTEN CREDIT AGREEMENT WAS VOID *AB INITIO*, THE MARYLAND CREDIT ACT DOES APPLY TO BAR CONSIDERATION OF SUCH AN EVIDENTIARY PROFFER IN DECIDING WHETHER A SUBSTANTIAL AND SUFFICIENT BASIS FOR AN ACTUAL CONTROVERSY EXISTS TO JUSTIFY OPENING, MODIFYING, OR VACATING CONFESSED JUDGMENTS ENTERED UPON DEFAULT UNDER A CREDIT AGREEMENT.

Facts: In 2005, William and Michele Pease, in relocating their family to Maryland from Virginia, sought to buy a plumbing company in Maryland. Around the same time, William learned that David Kolper, owner of a Maryland-based plumbing company, was seeking to sell his company. William was referred ultimately to Jeffrey Martin, a commercial business lender for Wachovia, for assistance in obtaining commercial loans with which to buy Kolper's business. Allegedly, Martin informed the Peases that the only way they would not have to pledge their newly-purchased Maryland residence as collateral on the loan would be if they had less than twenty-percent equity in their home. Accordingly, Martin apparently advised the Peases to encumber their home with a home equity line of credit with Wachovia, which would decrease the amount of equity in the property below the twenty-percent threshold. The Peases contended that Wachovia and Martin misrepresented to the Peases that this "artificial loan" would safeguard the house from being reachable as an asset in the event of a default on the loan by the Peases and execution of any judgment thereafter obtained. Further, the Peases contended that Wachovia's valuation of Kolper's business was inflated, and that Wachovia possessed certain negative financial information about Kolper's business that it withheld from them. Ultimately, on 30 November 2007, the Peases defaulted on the commercial loan, on which over \$1 million was owed, at which time Wachovia accelerated the payments and informed the Peases of their obligation to pay in full. Having not received the accelerated payments, thereafter, on 28 January 2008, Wachovia instituted

confessed judgment proceedings in the Circuit Court for Baltimore City, and confessed judgments totaling over \$1.2 million were entered and indexed against the Peases.

On 8 April 2008, the Peases filed a motion to open, modify, or vacate the confessed judgments, asserting allegations of negligence, fraud, and breach of fiduciary duty. In support of this motion, the Peases attached an affidavit by a purported expert in banking standards of care, who concluded that both Wachovia and Martin failed to comport with reasonable banking standards when it authorized the commercial loan. Further, the Peases stated that, should the confessed judgment be opened, modified, or vacated, they intended to (1) file counterclaims on the theories of negligence, fraud, and breach of fiduciary duty; and (2) argue that the loan agreement was void *ab initio* under those same theories. In response, Wachovia argued that the Peases' affirmative claims and defenses of negligence, fraud, and breach of fiduciary duty were barred by the Maryland Credit Agreement Act, Maryland Code (2006 Repl. Vol.), Courts and Judicial Proceedings Article, § 5-408, which provides that a "credit agreement is not enforceable . . . unless it is . . . [i]n writing"

The trial court denied the Peases' motion to open, vacate, or modify the confessed judgment, relying on *ST Sys. Corp. v. Md. Nat'l Bank*, 112 Md. App. 20, 684 A.2d 32 (1996), which interpreted the Maryland Credit Agreement Act. The judge explained, like the Court of Special Appeals in *ST Sys. Corp.*, that the Act "is only upheld if tort claims based on an unenforceable alleged agreement are excluded and the torts that are alleged here as the potentially meritorious defenses are indeed based upon unenforceable alleged agreements." The Peases appealed timely to the Court of Special Appeals, and we granted certiorari on our initiative to consider whether "the [Maryland Credit Agreement Act] . . . prohibit[s] tort claim defenses to a bank's confessed judgment claim where the defendants allege the bank violated standard banking practices to fraudulently and negligently induce a borrower to accept the bank's loan of over \$1 million dollars."

Held: Reversed and remanded to the Circuit Court. The Court first construed the Maryland Credit Agreement Act. After consulting the plain language and the legislative history of the Act, the Court concluded that "a court should engage the statute of frauds portion of the Act [only] when, either through affirmative claim or defense, a commercial borrower or lender either attempts to recover on a verbal promise to lend/borrow, or seeks to enforce a verbal modification of an existing credit agreement." Because different outcomes vis á vis the application of this standard result from the Peases alternate objectives (filing counterclaims & arguing that the loan was void *ab initio*), the Court addressed each approach in turn.

Regarding the counterclaim objective, the Court stated that "[i]f the Act . . . would bar such counterclaims, or the evidence upon which they rest, the allegations and evidentiary proffers cannot constitute a 'substantial and sufficient basis as to the merits of the action' sufficient to open or vacate the confessed judgments." The Court held, however, that in filing counterclaims against Wachovia, the Peases "would not seek thereby to enforce or modify an oral agreement, but would be asserting such claims notwithstanding the . . . enforceability of the credit agreement," and thus, the Maryland Credit Agreement Act did not bar the admissibility of the evidence for such a purpose.

Regarding the void *ab initio* objective, however, the Court held that, in attempting to nullify the loan agreement, the Peases would be attempting to enforce a verbal modification of the agreement, thus bringing it within the banner of the Maryland Credit Agreement Act, and thus the Act would bar the evidence tending to nullify the agreement. The Court explained that the loan agreement set forth the rights and responsibilities of the parties - the Peases' duty to repay Wachovia, and failing repayment, Wachovia's right to seek judgment and execute on the Peases' assets - and, in attempting have this agreement deemed void *ab initio*, they would be seeking to enforce a modification of the agreement, as they would be asking a court to declare that they need not repay Wachovia, and that Wachovia may not obtain a judgment and execute on the Peases' assets.

Therefore, the Court held that the Legislature, in enacting the Maryland Credit Agreement Act, did not intend to foreclose a borrower from asserting counterclaims against a lender, "even where the asserted factual underpinnings of the tort or torts derive from transactions relating to the execution of the credit agreement." Accordingly, to the extent that the Peases' later pleading would assert counterclaims against Wachovia, evidence supporting these counterclaims are not barred by the Act in a hearing to open, modify, or vacate the confessed judgments. To the extent that the Peases' later pleading would argue that the loan agreement was void *ab initio*, however, evidence supporting such an assertion is barred by the Act, as the Peases then would be attempting to enforce a modification of the loan agreement. Because the trial judge did not make a finding as to whether, pursuant to Md. Rule 2-611(e), there exists a "substantial and sufficient basis for actual controversy as to the merits of the action," the Court remanded to the Circuit Court for Baltimore City for such a finding, after considering the yet-to-be-considered evidence.

Raymond B. Cuffley v. State of Maryland, No. 136, September Term, 2008, Filed October 28, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/136a08.pdf>

CRIMINAL LAW – BINDING PLEA AGREEMENT – INTERPRETATION OF
BINDING PLEA TERM TO SENTENCE “WITHIN THE GUIDELINES”

Facts: At a hearing on October 23, 2002, in the Circuit Court for Harford County, Petitioner Raymond B. Cuffley, Jr. pled guilty to robbery. The record of that hearing indicates that the parties agreed to, and the court accepted, a plea to a sentence “within the guidelines.” The guidelines in this case were four to eight years. At a sentencing hearing several months later, the court sentenced Cuffley to fifteen years, with all but six years suspended, plus five years of probation.

Four-and-a-half years later, Petitioner filed, in the Circuit Court for Harford County, a “Motion to Correct an Illegal Sentence,” pursuant to Maryland Rule 4-345(a). Petitioner argued that his understanding of the plea agreement at the time he accepted it was that his total sentence – including suspended and non-suspended time – would be no more than eight years. The State countered that the plea agreement called for a sentence with the non-suspended time to fall within the guidelines. The court denied the motion, finding that Petitioner had been made aware that the plea agreement would only apply to non-suspended time, and that suspended time was within the discretion of the trial court.

Petitioner timely noted an appeal to the Court of Special Appeals, which affirmed the ruling of the trial court. Citing the *Maryland Sentencing Guidelines Manual*, the Court of Special Appeals held that the guidelines range represents only non-suspended time. In addition, the Court of Special Appeals found substantial evidence that Cuffley had been informed that a sentence “within the guidelines” referred only to non-suspended time.

Petitioner filed a petition for writ of certiorari, which the Court of Appeals granted, to answer the question: Where petitioner pled guilty pursuant to a binding plea agreement, which called for a sentence within the sentencing guidelines range of four-to-eight years’ incarceration, is a sentence of fifteen years’ incarceration, with all but six years of that term suspended in favor of probation, illegal?

Held: Reversed. The Court of Appeals held that, based on the record of the plea hearing, the sentence was illegal because it exceeded a total of eight years’ incarceration.

The Court cited Maryland Rule 4-243, which articulates the procedure to be followed for plea agreements, as requiring the terms of a plea agreement to be express, on the record, and in the presence of the defendant. Further, the Court concluded that Rule 4-243 instructs that any question that later arises concerning the meaning of the sentencing term of a binding plea agreement must be resolved by resort solely to the record established at the plea hearing in order to determine what a reasonable lay person in the defendant's position would have understood to be the terms of the plea agreement. Any ambiguity in the sentence agreed upon by the parties must be resolved in favor of the defendant.

Applying that standard to the instant case, the Court of Appeals held that the plea agreement, as articulated on the record at the October 23, 2002 hearing, required that the court impose a total sentence of between four and eight years. Accordingly, the Circuit Court breached the agreement by imposing a sentence that exceeded a total of eight years' incarceration, thereby making the sentence illegal.

Paul Antoine Baines v. State of Maryland, No. 135, September Term, 2008, Filed October 28, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/135a08.pdf>

CRIMINAL LAW – BINDING PLEA AGREEMENT – INTERPRETATION OF
BINDING PLEA TERM TO SENTENCE “WITHIN THE GUIDELINES”

Facts: At a plea hearing before the Circuit Court for Prince George’s County in September, 2006, Defendant Paul Antoine Baines entered an *Alford* plea to two counts of robbery. The plea agreement specified that “sentencing [would] be within Guidelines.” The guidelines range called for a sentence of seven to thirteen years’ incarceration. The court sentenced Baines to twenty years, all but seven years suspended, for one count, and 20 years, all but six years suspended, for the other count, to run consecutively.

After the plea hearing, Baines filed a motion for reconsideration of sentence, which the court denied. Baines timely appealed to the Court of Special Appeals, arguing that the sentence was illegal in that it exceeded the terms of the binding plea agreement, which called for a maximum total sentence of thirteen years, including any suspended time. The Court of Special Appeals affirmed the sentence of the trial court, holding that the guidelines range, as referred to at the plea hearing, included only non-suspended time.

Baines filed a petition for writ of certiorari, which the Court of Appeals granted, to answer the question: Where the parties and the court enter into a plea agreement under which the court agrees to impose a sentence “within” the Sentencing Guidelines, does the court violate the agreement by imposing an executed sentence within the Guidelines as well as an additional period of imprisonment which the court suspends in favor of a term of probation?

Held: Reversed. The Court of Appeals held that, based on the record of the plea hearing, the sentence was illegal because it exceeded a total of thirteen years’ incarceration.

The Court of Appeals cites the “identical” legal issue presented in *Cuffley v. State*, ___ Md. ___, ___ A.2d ___ (2010) (No. 136, Sept. Term, 2008). In *Cuffley*, the Court interpreted Maryland Rule 4-243, which articulates the procedure to be followed for plea agreements, as requiring the terms of a plea agreement to be express, on the record, and in the presence of the defendant. Further, the *Cuffley* Court concluded that Rule 4-243 instructs that any question that later arises concerning the meaning of the sentencing term of a binding plea agreement must be resolved by resort solely to the record established at the

plea hearing in order to determine what a reasonable lay person in the defendant's position would have understood to be the terms of the plea agreement. Any ambiguity in the sentence agreed upon by the parties must be resolved in favor of the defendant.

Applying the standard articulated in *Cuffley* to the instant case, the Court of Appeals held that the plea agreement, as described on the record at the plea hearing, required that the court impose a total sentence of between seven and thirteen years. Accordingly, the Circuit Court breached the agreement by imposing a sentence that exceeded a total of thirteen years' incarceration, thereby making the sentence illegal.

Tony Williams v. State of Maryland, No. 30, September Term, 2009. Opinion filed on October 27, 2010 by Raker, J.

<http://mdcourts.gov/opinions/coa/2010/30a09.pdf>

CRIMINAL LAW - DISCOVERY - FAILURE TO PROVIDE DISCOVERY

EVIDENCE - FORMER TESTIMONY - OPPORTUNITY TO CROSS-EXAMINE

DUE PROCESS - BRADY DOCTRINE - LATE DISCLOSURE OF BRADY EVIDENCE

Facts: The issue in this case is whether petitioner was prejudiced by the admission, in his second trial, of unredacted videotaped testimony of a deceased witness. The witness had made statements to a police detective that she was "legally blind" but that statement had not been disclosed to petitioner's counsel until after the completion of the first trial, and within a month of his second trial.

Petitioner was charged with first-degree murder and tried by jury in 1999. Petitioner's fiancée Dana Drake was shot to death in her apartment building after an event at a local social hall on February 21, 1998. Petitioner reported the shooting to police, and became a suspect in the murder. The State's sole eyewitness was an elderly woman named Brenda O'Carroll who lived in Ms. Drake's apartment building. She testified to seeing petitioner firing a gun at Ms. Drake and fleeing the scene.

A jailhouse informant named S. Williams testified that petitioner admitted to killing Dana Drake because of money problems. Petitioner was convicted of first-degree murder on February 21, 1999.

In petitioner's first appeal, his 1999 conviction was vacated and remanded for a new trial because the State failed to disclose to the defense that S. Williams was a paid police informant.

The second trial commenced in March, 2007. In between the two trials, Ms. O'Carroll had died. After her death, during a suppression hearing preceding petitioner's second trial, a Baltimore City detective testified that she had described herself to him as "legally blind" during the investigation.

Petitioner moved to exclude O'Carroll's videotaped testimony in his second trial arguing that the State had suppressed *Brady* information. The trial court denied the motion and admitted the testimony, permitting the State to play Ms. O'Carroll's videotaped testimony in full but also permitting petitioner to present medical evidence surrounding Ms. O'Carroll's vision. Petitioner was convicted again of first-degree murder.

The Court of Special Appeals affirmed petitioner's conviction,

holding that even if the State's failure to disclose Ms. O'Carroll's visual impairment could be characterized initially as *Brady* information, the information had been disclosed to petitioner before the second trial, and that petitioner's second conviction was not obtained in violation of *Brady*.

The Court of Appeals granted Certiorari to consider petitioner's arguments that he was prejudiced by the admission at his second trial of Ms. O'Carroll's videotaped testimony from his first trial, and that his indictment should be dismissed because of multiple *Brady* violations.

Held: The Court of Appeals reversed and remanded the case for a new trial.

The Court explained that *Brady* had not been violated at petitioner's second trial, because Ms. O'Carroll's statement to the police was disclosed in advance of petitioner's second trial. Ordinarily, if the State's disclosure of exculpatory evidence is untimely, it will not violate the *Brady* doctrine if the evidence is available to the defense at trial. Because there was no *Brady* violation, the Court rejected petitioner's argument that his indictment should be dismissed as a result of *Brady* violations.

The Court held that the State had violated its discovery obligation in failing to disclose Ms. O'Carroll's statement at the first trial, and in its untimely disclosure in advance of petitioner's second trial. The Court considered also whether the testimony, which was hearsay, was admitted properly under the exception to hearsay as former testimony. Maryland Rule 5-804(b)(1). The Court held that petitioner was denied an adequate opportunity to cross-examine Ms. O'Carroll, because the defense was unaware of her statement that she was legally blind.

The Court explained that petitioner was prejudiced by the admission of Ms. O'Carroll's unredacted former testimony, because petitioner was permanently denied the opportunity to cross-examine the sole witness identifying him as Ms. Drake's shooter about her statement that she was legally blind. The Court reversed the judgment of the Court of Special Appeals and remanded to that court with instructions to remand to the Circuit Court for a new trial in which any of Ms. O'Carroll's testimony referring to what she saw, or dependent on her vision, should be redacted.

State of Maryland v. Caleb Micha Pair, No. 95, September Term, 2009, Filed October 7, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/95a09.pdf>

CRIMINAL LAW - INTERSTATE AGREEMENT ON DETAINERS - GENERAL APPLICATION - PENDING CHARGES IN SENDING STATE - INABILITY TO STAND TRIAL

Facts: In 2005, Caleb Pair, Appellee, was convicted of robbery by a Delaware state court and imprisoned. Subsequently, he was indicted in Cecil County, Maryland, for armed robbery. Maryland lodged a detainer with the appropriate authorities in Delaware. Appellee sent a request for a speedy trial under the Interstate Agreement on Detainers ("IAD"), Maryland Code (1999, 2008 Repl. Vol.), §§ 8-401 to 8-417 of the Correctional Services Article, which was received by Maryland officials on July 26, 2007. Maryland offered to take temporary custody of Appellee to resolve the pending Maryland charges, but Delaware refused the transfer because new charges had been brought against Appellee in Delaware, resulting from an incident during Appellee's imprisonment. On September 7, 2007, Maryland obtained, from the Circuit Court for Cecil County, a continuance of the Maryland case until resolution of the pending Delaware charges. In May 2008, Appellee was acquitted of the pending Delaware charges, but Maryland did not learn of the acquittal until July 24, 2008, when it received Appellee's second request for a speedy trial. Shortly thereafter, Maryland took temporary custody of Appellee.

The IAD requires a receiving state to bring a prisoner to trial within 180 days of receipt of the prisoner's request for a speedy trial, with two exceptions. First, a court in the receiving state may issue a continuance "for good cause shown in open court," so long as the continuance is "necessary and reasonable" and "the prisoner or the prisoner's counsel [is] present." § 8-405(a). Second, the 180-day requirement "shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." § 8-408(a).

On October 15, 2008 - the date on which his trial in Cecil County was set to begin - Appellee filed a motion to dismiss, arguing that Maryland failed to prosecute him within 180 days of his initial request for a speedy trial. Maryland argued, first, that the 180-day requirement did not apply because Appellee was in the equivalent of pre-trial confinement and therefore not subject to the IAD, and, second, that the 180-day requirement was tolled either by the continuance granted in September 2007, or because Appellee was "unable to stand trial" until July 24, 2008, when Maryland learned of the acquittal.

The Circuit Court found that the IAD applied because Appellee was imprisoned as defined under the IAD, and that the continuance was improperly obtained because it was not issued in open court with the appellee or his counsel present. The court split, into four periods, the time between when Maryland received Appellee's first request for a speedy trial (which began the 180-day period) and his trial: (1) the 42 days between the State's receipt of Appellee's initial IAD request and the date when Delaware decided not to grant temporary custody; (2) the 243 days that appellee was waiting to stand trial for the Delaware charges; (3) the 79 days between his acquittal of the Delaware charges and when Maryland learned of it; and (4) the 83 days between Maryland learning of the acquittal and the trial date. The court found that the second period of 243 days was tolled because Delaware refused to send Appellee to Maryland, but the 180-day limit was still exceeded by the combination of the first, third and fourth periods. The court concluded that the indictment must be dismissed because the 180-day period expired prior to Appellee's trial in Maryland.

Maryland appealed to the Court of Special Appeals. Before briefing and argument in that court, the Court of Appeals, on its own motion, issued a writ of certiorari to answer the question of whether the Circuit Court erred in dismissing the charges.

Held: Affirmed. The Court of Appeals upheld the Circuit Court's judgment of dismissal agreeing that the 180-day requirement of the IAD had not been met.

The Court held that the IAD applied because Appellee was serving a sentence imposed from a previous conviction and therefore had "entered upon a term of imprisonment" within the meaning of the IAD, even though he faced additional pending charges in Delaware. The Court then held that Appellee was "unable to stand trial" while Delaware was holding Appellee on pending charges in that state, so the 180-day requirement was tolled during the 243 days between when Delaware informed Maryland that it would not send Appellee to Maryland and when he was acquitted of the new charges. Next, the Court held that Appellee was not "unable to stand trial" during the 79 days between the date on which he was acquitted of the Delaware charges and the date on which Maryland learned of the acquittal because the burden of the speedy trial requirement of the IAD rests upon the party states, not the prisoners. Accordingly, Delaware's failure to inform Maryland of the acquittal can not justify, for purposes of the IAD, the inability of Maryland to bring Appellee to trial within 180 days.

Dale Albert Crispino, III v. State of Maryland, No.3, September Term 2010. Opinion filed November 9, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/3a10.pdf>

CRIMINAL LAW - JURY INSTRUCTION

Facts: Dale Albert Crispino was charged with sexual offenses committed against two sisters, Shannon J., who testified that she was "six or seven" years old at the time of the alleged abuse, and Camberly J., who testified that she was five years old at the time of the alleged abuse. Counts One through Three of the Criminal Information charged Crispino for his alleged conduct toward Camberly; more specifically, child sexual abuse in Count One, second degree sexual offense in Count Two and third degree sexual offense in Count Three. The acts against Camberly were alleged to have occurred between January 6, 2000 and January 5, 2001. Counts Four through Six of the Criminal Information charged Crispino for acts committed against Shannon; more specifically, second degree sexual offense in Count Four, third degree sexual offense in Count Five and child sexual abuse in Count Six. All of the acts against Shannon were alleged to have occurred between July 7, 1999 and July 6, 2000.

During a jury trial, the State presented the testimony of Shannon J. and Camberly J., each of whom testified to specific incidents of abuse committed by Crispino. Shannon described four incidents involving French kissing and cunnilingus, while she and Crispino were alone together in "either his or my room." Camberly J. also testified, describing an incident that occurred in a bathroom of her family's home, while she was brushing her hair. Crispino entered the bathroom and asked Camberly to pull her pants down. After she said no, Camberly testified that Crispino proceeded to pull her pants down and then "licked [her] butt and . . . vagina." Camberly testified that this incident occurred when Crispino was babysitting her and Shannon while her parents were out to dinner. According to Camberly, she was five years old at the time of this incident.

At the close of the State's case, Crispino moved for judgment of acquittal, arguing that, with regard to the charges that pertained to Shannon J., the State had failed to establish that the acts occurred between July 7, 1999 and July 6, 2000, the time frame set forth in Counts Four through Six of the Criminal Information. Crispino conceded, however, that the evidence, viewed in the light most favorable to the State, established that offenses pertaining to Camberly J. did occur between January 6, 2000 and January 5, 2001, the time frame set forth in Counts One through Three of the Criminal Information. The trial judge denied Crispino's motion, finding that the State did not need to prove that the alleged offenses occurred within the time frames

set forth in the Criminal Information.

Crispino testified that he only babysat the children during the time period between 2003 and 2005. In addition, Crispino's father testified that he knew that his son began to babysit Shannon J. and Camberly J. in the spring of 2003, although he did not know whether his son ever babysat the girls before November 2001. At the close of his case, Crispino renewed his motion for judgment of acquittal, reiterating the arguments made during his previous motion and also adding that "there was no babysitting during the time of the indictment." Finding that there was sufficient evidence to go to the jury, the judge denied the motion.

Crispino's counsel requested a jury instruction requiring unanimity as to the specific act or acts that constituted child abuse and contended that French kissing was not sufficient to constitute child abuse. Crispino's counsel also asserted that the jury instructions had to refer to the time frame alleged in the Criminal Information. The trial judge overruled Crispino's exceptions to the jury instructions. The jury returned a guilty verdict on all counts, and Crispino was sentenced to ten years' imprisonment, with all but five years suspended, as well as five years' probation. He was also required to register as a sex offender. The Court of Special Appeals affirmed Crispino's conviction in an unreported opinion.

Held: The Court of Appeals affirmed. The Court first considered whether "French kissing" could form the basis of a child sexual abuse conviction, reviewed dictionary definitions of "French kissing," as well as opinions from other courts considering analogous situations and determined that French kissing is "an intimate act that has a sexually exploitive effect," and falls within the scope of acts involving "sexual molestation or exploitation of a child," pursuant to the child sexual abuse statute. The Court rejected Crispino's argument that the jury would have to determine the specific sexual act upon which they were unanimous, reasoning that Crispino's "abuse" itself - and not a single act of French kissing or cunnilingus - was the "gravamen" of the crime. The jury instruction, then, needed, as it did, to require unanimity with regard to Crispino sexually abusing Shannon J., not that the jurors be unanimous with regard to the specific act (or acts) that supported a finding of abuse. Here, reasoned the Court, the French kissing and the cunnilingus constituted the underlying facts that made up the element of "abuse," the "gravamen" of the crime.

Next, the Court considered Crispino's argument that the trial judge abused his discretion in declining to instruct the jury as well as indicate on the Verdict Sheet that the jury must find that he committed all the acts described by the children

"within the specific time frame set out [by the State] in each count [of the Criminal Information." Crispino asserted that the jury did not appropriately weigh his testimony and that of his father regarding the fact that he did not babysit the children in 2000 and 2001, so that he could not have been in "custody" of the children, an essential element of the child abuse statute. The Court determined that the issue of "custody" concerned the sufficiency of the evidence, within the purview of the judge rather than the jury.

Robert Harvey Bishop, Jr. v. State of Maryland, No. 1, September Term 2010. Opinion filed November 4, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/1a10.pdf>

CRIMINAL LAW - PRETRIAL PROCEDURES - HYBRID PLEAS - AGREED STATEMENT OF FACTS AND STIPULATED EVIDENCE - DISPUTED EVIDENCE - HARMLESS ERROR

Facts: Robert Harvey Bishop, Jr. was charged in the Circuit Court for Cecil County with two counts of sexual abuse of a minor and related offenses. Prior to trial, Bishop filed a motion to suppress his confession to police, which the judge denied. In an attempt to preserve for appellate review the denial of his motion to suppress, Bishop chose to forgo a jury trial and, instead, enter a hybrid plea, a not guilty plea in which he stipulated to the State's evidence in what was labeled a "not guilty statement of facts." During the proceedings, the State proffered the "not guilty statement of facts," which included: Bishop's confession to police; the content of recorded telephone conversations between Bishop and one of the alleged victims, in which Bishop purportedly acknowledged his guilt; and the two child victims' alleged testimony. Bishop also signed a form, labeled a "NOT GUILTY, AGREED STATEMENT OF FACTS PLEA," which provided, *inter alia*, that Bishop was waiving his right to a trial by judge or jury, that the statement of facts was sufficient for a judge to find him guilty, and that he would no doubt be found guilty based on the statement of facts. After the State's proffer of the "not guilty statement of facts," Bishop's counsel offered the following correction, which created a dispute with regard to the telephone recordings: "The only corrections is [sic] we would say that the audio tapes or CD's of communications between Mr. Bishop and the young ladies, he did not acknowledge his guilt." Thereafter, the State's Attorney did not attempt to clarify Bishop's counsel's statement nor did he enter the telephone recordings, or the transcripts thereof, into evidence. The judge found Bishop guilty.

Bishop appealed to the Court of Special Appeals, which affirmed Bishop's conviction in an unreported opinion. The intermediate appellate court held that, although the lower court erred in denying Bishop's motion to suppress, the admission of his confession was harmless beyond a reasonable doubt.

Held: The Court of Appeals reversed, noting the convoluted nature of Bishop's plea, which appeared to contain various elements of the array of pleas that an accused may enter in a criminal proceeding, including a not guilty on an agreed statement of facts plea, a not guilty on stipulated evidence plea, a *nolo contendere* plea, and an *Alford* plea. Accordingly, due to the confusing plea and the dispute regarding the telephone

conversations, the Court determined that it was unable to attempt a harmless error analysis, because it was impossible to determine what the Circuit Court Judge had considered in finding Bishop guilty, and that, further, a trial by stipulated evidence was the incorrect vehicle for determining guilt when there existed a dispute of material fact. As a result, the Court vacated the judgment of the Court of Special Appeals and remanded the case back to the Circuit Court for Cecil County with instructions to allow Bishop to withdraw his plea.

Chuckie Donaldson v. State of Maryland, No. 83 September Term, 2009. Opinion by Greene, J. filed on October 26, 2010.

<http://mdcourts.gov/opinions/coa/2010/83a09.pdf>

CRIMINAL PROCEDURE - PROBABLE CAUSE FOR SEARCH INCIDENT TO ARREST TRIAL - PREJUDICIAL PROSECUTORIAL COMMENTS

Facts: Petitioner Chuckie Donaldson and four other people were observed by Baltimore City Police Detectives Taylor and Rice walking into an alley near the 100 block of Addison Street. Detective Taylor then saw Donaldson pull a clear plastic bag from the rear of his pants, remove several small white unidentified objects, and exchange those objects for money from two people in the group. Donaldson then replaced the clear bag into the rear of his pants. Taylor and Rice arrested Donaldson because Taylor believed he had witnessed a drug transaction. After his arrest, Donaldson conveyed a bag containing 14 gelatin capsules filled with white powder to Taylor. A chemical analysis later revealed this substance to be heroin.

Donaldson requested suppression of the bag and its 14 capsules. At the suppression hearing, Detective Taylor was accepted as an expert on the street level distribution of heroin because of his experience as a narcotics police officer. Taylor testified that because of past drug activity in the area, the conduct of Donaldson and the four other people, he believed a drug transaction had occurred. Donaldson's motion to suppress was denied.

During Donaldson's criminal trial, Taylor again testified on behalf of the State. On cross-examination, Taylor explained that he seized only Donaldson because "[t]he person selling drugs is the person that's the root of the evil." Detective Rice gave testimony consistent with Taylor's.

In closing statements, the State's prosecutor stated: "Now, Detective Taylor testified and I thought it was interesting, he said that drug dealers are the root of all evil." Donaldson's attorney objected to this statement and was overruled. The prosecutor continued, "so the problem today is seated over there," referring to Donaldson. Donaldson's closing argument attacked the absence of evidence other than Taylor's testimony that a drug transaction occurred. On rebuttal, the prosecutor responded to this argument by stating Taylor's testimony should not be called into question because, "one, they [Taylor] want to their job." Donaldson's attorney objected to this statement and was overruled. The prosecutor continued, "number two that's what gets them to keep going with the job is their credibility and their integrity."

Donaldson was convicted of possession of heroin with intent to distribute and acquitted of distribution of heroin. Donaldson appealed on two grounds. First, there was no probable cause justifying Donaldson's arrest; and second, the prosecutor's use of improper statements during closing arguments unfairly prejudiced the jury against Donaldson. The Court of Special Appeals rejected both arguments and upheld Donaldson's convictions.

Held: The Court of Appeals affirmed the trial court and Court of Special Appeals on whether probable cause existed to justify Donaldson's arrest. The Court of Appeals, however, disagreed with the Court of Special Appeals on whether the prosecutor's statements during closing arguments unfairly prejudiced the jury against Donaldson.

Probable cause existed to justify Donaldson's arrest. Though Detective Taylor could not identify the items exchanged, his expertise informed his belief that he had witnessed a drug transaction. *Williams v. State*, 188 Md. App. 78 (2009). When there is an exchange of unidentified objects, the totality of the circumstances can create probable cause to justify an arrest. *Id.*

The prosecutor's remarks during closing arguments unfairly prejudiced the jury against Donaldson. Counsel are afforded great leeway when presenting closing arguments but may not vouch for a witness' credibility or appeal to juries to convict a defendant for the safety or quality of a community. The prosecutor attempted to bolster Detective Taylor's credibility when he suggested that Taylor and Rice might lose their jobs if they lied during testimony. Additionally, the prosecutor's statements that Detective had called drug dealers "the root of all evil" and that Donaldson is "the problem" unfairly detracted the jury from judging the defendant on the evidence presented.

The prosecutor's statements were not harmless error. Because the "root of all evil" remark was central to the prosecutor's closing arguments any prejudicial influence the remark had on the jury was not harmless. The prosecutor's vouching for Detectives Taylor and Rice was similarly central to the thesis of the prosecution's rebuttal and was not harmless.

Henderson v. State, No. 20, September Term, 2009. Opinion filed on October 7, 2010 by Murphy, J.

<http://mdcourts.gov/opinions/coa/2010/20a09.pdf>

CRIMINAL LAW - SUPPRESSION OF EVIDENCE

Facts: Petitioner was one of two passengers in a vehicle that was stopped by a deputy sheriff when the driver failed to come to a complete stop at two stop signs. The deputy called for a K-9 unit to come to the location of the stop while he was obtaining information about the car's occupants. During the stop, it was determined that there was an outstanding violation of probation warrant for the other passenger. That passenger was arrested, and a search of his person turned up \$741.00. Approximately 24 minutes after the traffic stop, and 9-12 minutes after the arrest had been made, the K-9 unit arrived on the scene. When the K-9 unit gave a positive alert, the Petitioner and the driver were handcuffed and searched. Crack cocaine was discovered during the search of each. When the automobile was searched, a Glock model 23 handgun was found beneath the front passenger seat.

Petitioner filed a motion to suppress the evidence on 4th Amendment grounds. The Circuit Court for Harford County denied that motion. Petitioner was convicted of possession of a controlled dangerous substance with intent to distribute and possession of a firearm in connection with a drug trafficking crime.

While affirming those convictions, the Court of Special Appeals rejected Petitioner's argument that, after the other passenger had been arrested, the sheriffs had unlawfully detained him by extending the traffic stop until the K-9 unit could arrive.

Holding: The Court held that under *Arizona v. Johnson*:

[i]t is clear that Petitioner was "detained" from the moment that [an officer] made a forceable stop of Petitioner's vehicle.... [because] when law enforcement officers make a forceable stop of an automobile, "a passenger is seized, just as the driver is, 'from the moment [a car stopped by the police comes] to a halt on the side of the road.'"

The Court then held that "...the CAD 'dispatch' records provide irrefutable evidence that the police extended the traffic stop beyond the time reasonably necessary to (1) place the other passenger under arrest, and (2) issue traffic citations to the

driver. As one of the deputies testified, 'When the K-9 arrived, we were going to scan the vehicle for any illegal drugs.' Because the K-9 unit did not arrive during the ongoing traffic stop, any evidence obtained from the continued detention and subsequent K-9 unit search would violate the Petitioner's Fourth Amendment rights absent some independent reasonable articulable suspicion for the detention.

The State argued that Harford County Deputy Sheriffs had "reasonable articulable suspicion" to detain Petitioner until the K-9 unit arrived because, during the traffic stop, the officers on the scene learned that (1) Petitioner's name was in the Sheriff's Office "alert system," (2) he was in an automobile occupied by two other persons whose names were also in the "alert system," (3) a "failure to appear" (FTA) warrant had been issued for one of the other occupants of the automobile, and (4) \$741.00 in currency was found during the search of the person for whom the FTA warrant had issued.

While rejecting that argument, the Court concluded that the Petitioner's automobile was stopped for no reason other than the driver "failed to come to a full and complete stop" at a stop sign. [Because the State provided no explanation for how a person's name gets placed in the county's "alert system"], the fact that the occupants of that automobile were persons whose names are in the "alert system" does not provide reasonable articulable suspicion that they are drug users/sellers presently involved in criminal activity. At the time [the other passenger] was arrested, the deputies knew that (1) no drugs had been seized during the search of [the other passenger]'s person, (2) no "open" warrants justified the arrest of the driver or of Petitioner, (3) the driver was driving on a valid driver's license, and (4) the Kia owned by Petitioner's mother had not been reported stolen. From our independent constitutional appraisal of the police conduct at issue, we hold that the deputies did not have reasonable articulable suspicion to detain Petitioner pending the arrival of the K-9 unit.

Kenneth Longus v. State of Maryland, No. 68, September Term 2009, filed October 26, 2010. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2010/68a09.pdf>

CRIMINAL LAW - TRIALS - RIGHT TO A PUBLIC TRIAL

Facts: In late 2006, Kenneth Longus and two friends went to the home of Lindsay Wise to borrow a hammer. Soon afterward, a gun shop near Wise's home was robbed and the owner of the shop was assaulted. Wise later saw Longus show her roommate three guns, and heard Longus tell her roommate that Longus had taken the guns from the shop the night before. Longus was later arrested for multiple counts of robbery and assault. Wise became the primary witness for the state because the shop owner was unable to identify his assailants.

Prior to trial in the Circuit Court for Washington County, the state made a motion to exclude specific spectators from the courtroom during Wise's testimony. The prosecution made a proffer alleging witness intimidation arising from communications between the witness and three friends of the defendant. The motion was renewed before Ms. Wise took the stand, and the court granted the motion without conducting a voir dire examination of the witness. The three spectators were excluded from the courtroom. Longus was convicted of robbery and second degree assault, and sentenced to fifteen years in prison.

Mr. Longus appealed his conviction, arguing the exclusion of the witnesses violated his Sixth Amendment right to a public trial. The Court of Special Appeals affirmed his conviction on March 26, 2009. *Longus v. State*, 184 Md. App. 680, 968 A.2d 140 (2009). The appellate court held that the trial court did not abuse its discretion in excluding the witnesses. The court held that the trial court's observation of Wise's demeanor, combined with the proffer made by the state containing specific information about intimidation, undisputed by Longus, was sufficient to justify the exclusion. The Court of Special Appeals employed the "substantial reason" standard for partial trial closures in upholding the conviction.

Held: Reversed and remanded to the Court of Special Appeals to vacate the judgment of the Circuit Court for Washington County and remand to that court for further proceedings. Although a majority of the Court favored the "substantial reason" test over the "overriding interest" test as the standard governing partial closures, the evidence presented to the trial court was nonetheless not sufficient to justify a partial closure under either test.

The Supreme Court in *Waller v. Georgia* set fourth a four prong test to determine whether a defendant's right to a public trial gives way to a state interest in closure in a specific case. 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). The Court of Appeals noted that the first prong is the substantive core of the test, and requires the party seeking closure to advance an overriding interest that is likely to be prejudiced if the courtroom is to remain open to the public. The Court acknowledged that witness fear and intimidation may constitute an overriding interest, but held that in the present case, the state did not sufficiently prove that such factors were present. The Court held that a mere proffer from the state supporting a closure motion is not sufficient to justify closure of the courtroom; rather, the judge must conduct a factual inquiry into the allegations and may not provide a post hoc rationale for the closure. The Court stated Longus was denied his constitutional right to a public trial and was entitled to a new trial.

Jung Chul Park v. Cangen Corporation, No. 152, September Term, 2008, Filed October 27, 2010, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2010/152a08.pdf>

CONSTITUTIONAL LAW - FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION - ACT OF PRODUCTION - SUBPOENA DUCES TECUM

Facts: Cangen Corporation filed a replevin action in the Court of Common Pleas of Montgomery County, Pennsylvania, seeking corporate documents allegedly stolen by a former officer of Cangen after his employment was terminated. As part of the case, Cangen sought to depose Dr. Jung Chul Park, another former employee of Cangen who currently resides in Howard County, Maryland. The Court of Common Pleas directed the Clerk of the Circuit Court for Howard County to issue the subpoena, and, pursuant to the Maryland Uniform Interstate Depositions and Discovery Act, Maryland Code (1973, 2006 Repl. Vol.), §§ 9-401 to 9-407 of the Courts and Judicial Proceedings Article, the Clerk of the Circuit Court issued a Subpoena and Notice of Deposition *Duces Tecum De Bene Esse*, which were duly served on Dr. Park.

The Subpoena instructed Dr. Park to appear for a deposition and to produce certain documents in his possession. Dr. Park appeared for the deposition, but failed to produce any of the requested documents, asserting a Fifth Amendment privilege against such production. Cangen filed a motion to compel, stating that Dr. Park "does not own and has no right to possess" the documents in question. Cangen argued that "there is no privilege in the contents of documents" and "there is no Fifth Amendment protection in the production of corporate records" because "artificial entities are not protected by the Fifth Amendment," so a "custodian of corporate records cannot object to the production of business documents on self-incrimination grounds even if the records may personally incriminate the custodian." According to Cangen, this holds true for current and former employees.

Dr. Park countered that the "so-called collective entity doctrine" relied upon by Cangen has no application in this case because, as a former employee, Dr. Park holds the records in a personal capacity. Therefore, Dr. Park asserted that he is entitled to invoke the Fifth Amendment privilege because the compelled act of producing the corporate documents, under the circumstances presented, would be testimonial and incriminating.

After a hearing, the Circuit Court for Howard County entered an order granting Cangen's motion to compel. Dr. Park timely noted an appeal to the Court of Special Appeals. Before briefing and argument in that court, the Court of Appeals, on its own motion, issued a writ of certiorari to answer the question whether Dr.

Park, as a former employee of Cangen, could resist production of the subpoenaed documents by invoking the Fifth Amendment privilege against self-incrimination.

Held: Affirmed. The Court of Appeals held that a former employee has no Fifth Amendment privilege to resist production of corporate records in his possession, even though the act of producing those documents may prove personally incriminating.

The Court of Appeals explained the long-standing principle that corporations and other "collective entities," unlike individuals, cannot invoke a Fifth Amendment privilege. Accordingly, under the "collective entity" doctrine, a custodian of corporate records - acting as a corporate agent and holding the records in a representative, rather than personal, capacity - cannot refuse on Fifth Amendment grounds to produce those records, even where such production could be personally incriminating. Citing guidance from the United States Supreme Court, the Court of Appeals holds that the "collective entity" doctrine extends to former employees who hold corporate records, and, therefore, Dr. Park has no Fifth Amendment privilege to resist the demand that he produce the corporate documents in his possession.

Gail Kearney, et al. v. Berger, No. 125, September Term 2009, filed October 28, 2010. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2010/125a09.pdf>

MEDICAL MALPRACTICE - HEALTH CARE MALPRACTICE CLAIMS ACT - ARBITRATION

Facts: In 2001 and 2002, Dr. Robert Berger examined a mole on Kevin Kearney, but did not perform a biopsy. Kearney later died of melanoma. Kearney's estate and surviving family filed a medical malpractice claim in the Health Claims Arbitration and Dispute Resolution Office (HCADRO) in 2004, alleging that Dr. Berger's failure to perform the biopsy was the proximate cause of Kearney's death. The family attached a signed statement from another doctor, stating that Dr. Berger deviated from the standard of care in treating Kearney and that such deviation was the proximate cause of Kearney's death. The statement was attached to the claim form and intended to serve as the "certificate of qualified expert," which is a required element of a claim filed with the HCADRO.

Dr. Berger then responded to the claim by filing a "waiver of arbitration," resulting in the case being transferred to the Circuit Court for Anne Arundel County. The family then filed their complaint in the Circuit Court, alleging wrongful death and survivorship claims. Dr. Berger filed an answer generally denying liability. Eighteen months later, Dr. Berger filed a motion to dismiss for failure to attach a report of the attesting expert with the certificate. Dr. Berger relied on a Court of Appeals decision, *Walzer v. Osborne*, 395 Md. 563, 911 A.2d 427 (2006), which held that failure to file a proper certificate would result in dismissal. The family then filed a motion to extend time to amend the certificate, alleging good cause, arguing they filed the certificate in the manner that attorneys generally understood was required before *Walzer*. The family also filed a response to the motion to dismiss by stating Dr. Berger had waived his argument when he unilaterally waived arbitration.

The trial court dismissed the case without prejudice after the motions hearing, based on the certificate's insufficiency. The family then filed a timely appeal with the Court of Special Appeals. The court held that Dr. Berger could not waive the certification requirement because it is a condition precedent to filing medical malpractice claim. The court remanded the case because it determined a good cause extension could be granted at any time and the trial court did not determine if the family had presented good cause. The trial court held a hearing in May 2009, and found no good cause was shown because the language in the statute was not changed by *Walzer*. The judge again dismissed

the claims without prejudice.

The family appealed the dismissal to the Court of Special Appeals. The Court of Appeals issued a writ of certiorari on its own motion before oral argument in the intermediate court.

Held: Affirmed. The Court first held that the Law of the Case doctrine does not limit the Court of Appeals from addressing certain issues on bypass that would have been precluded in the Court of Special Appeals. Rather, the Court has statutory power to review a case before the Court of Special Appeals has rendered a decision, and this will not limit the issues that the Court of Appeals may address in its capacity as the highest court.

The Court evaluated each of Dr. Berger's specific claims as to the defects in the certificate. The Court ultimately held that the certificate did not satisfy the statutory requirements of the Health Care Malpractice Claims Act ("HCMCA"). The Court held that claimants must attach a report, from their attesting expert, to their certificate of a qualified expert. The report must state what the standard of care is and how the defendant allegedly departed from it. Although the Court held that the certificate sufficiently identified the defendant against whom the claims were brought, the certificate was insufficient because it did not indicate what the standard of care was or how the health care providers departed from it.

The Court of Appeals held Dr. Berger did not waive his challenge to the certificate because he included a general denial in his answer to the complaint. Further, failure to satisfy the procedural requirements is a valid defense to the certificate and requires dismissal based on the statute. The Court also held the trial court was correct in finding no good cause was shown to grant the family more time to fulfill the statutory requirement. The Court stated *Walzer* did not change the law, but instead clarified the requirements of the statute already in place at the time this case commenced.

Reiter v. Pneumo Abex, No. 72, September Term, 2008 filed November 19, 2010, Opinion by Murphy J.

<http://mdcourts.gov/opinions/coa/2010/72a08.pdf>

SUMMARY JUDGMENT - PRODUCTS LIABILITY -SUFFICIENCY OF EVIDENCE THAT DECEASED STEELWORKERS WERE EXPOSED TO ASBESTOS PRODUCTS SUPPLIED BY PARTICULAR CORPORATIONS: Petitioners' evidence was insufficient to generate a jury issue on the question of whether any particular Respondent's products were used at the specific site where the decedent actually worked. Under these circumstances, the Circuit Court's entry of summary judgment in favor of Respondents was legally correct.

Facts: Petitioners, widows of steelworkers who were employed by the Bethlehem Steel Corporation at its Sparrows Point facility, filed complaints asserting that their husbands died from lung cancer caused by exposure to the asbestos contained in the products supplied by the Respondents. The Circuit Court granted Respondents' motions for summary judgment, and entered judgment against each of the Petitioners because "the decedents did not work "directly on" or "immediately adjacent to" the crane brakes. The Court of Special Appeals affirmed.

Held: The Court of Appeals affirmed the judgment of the Court of Special Appeals, but on alternative grounds. Although the Circuit Court's opinion included a "hands on" or "adjacent to" analysis, the case at bar was not one in which the Petitioners are entitled to a reversal on the ground that an appellate court should ordinarily consider only the grounds relied upon by the trial court in granting summary judgment. In its opinion, the Circuit Court expressly concluded that the Petitioners' evidence "cannot, does not, has not placed these [decedents] in the vicinity of or proximate to any specific manufacturer's product at specific points in time."

The "specific site" where each decedent worked was the limited area in the facility where the decedent was located on a day-to-day to basis, rather than the entire facility itself. Applying this definition of "specific site", the court concluded that although the Petitioners' evidence was sufficient to generate a jury issue on the question of whether each decedent was exposed to asbestos dust at the specific site where the decedent actually worked, Petitioners' evidence was insufficient to generate a jury issue on the question of whether any of the Respondents' products were used at the specific site where the decedent actually worked.

Board of County Commissioners of St. Mary's County v. Marcas, L.L.C., Misc. No. 3, September Term, 2009, Opinion filed on September 20, 2010 by Murphy, J.

<http://mdcourts.gov/opinions/coa/2010/3a09m.pdf>

TORTS - INDIVIDUAL CLAIM

Facts: As a result of a Complaint filed in the United States District Court for the District of Maryland, that Court certified the following questions to the Court of Appeals:

1. Whether multiple tort counts and injuries as alleged in [the] Complaint [filed by Marcas, L.L.C. against the Board of County Commissioners of St. Mary's County] constitute an "individual claim" under the Maryland Local Government Tort Claims Act [{"LGTCA"}], Md. Code Ann. Cts. & Jud. Proc. § 5-303(a); and
2. Whether the multiple tort counts and injuries as alleged in [Marcas, L.L.C.'s] Complaint constitute the "same occurrence" under the Maryland Local Government Tort Claims Act, Md. Code Ann. Cts. & Jud. Proc. § 5-303(a)?

Held: In response to the first certified question, the Court held that under C.J. § 5-303(a), if a local government negligently fails to comply with applicable state and federal regulations pertaining to a particular landfill, and that negligence is the proximate cause of contamination to one or more adjacent properties, each adjacent property owner's claim for money damages would constitute an "individual claim," regardless of how many theories of recovery are asserted within that claim. Therefore, although the LGTCA is applicable only to Marcas's claims for money damages, all such claims constitute an "individual claim" under C.J. § 5-303(a), even if the Board was negligent in several different ways over an extended period of time.

In response to the second certified question, the Court concluded that if a local government negligently fails to comply with applicable state and federal regulations pertaining to a particular landfill, and that negligence is the proximate cause of contamination to one or more adjacent properties, each adjacent owner's claim for money damages would arise out of the "same occurrence," even if the local government was negligent (1) in several different ways, and (2) for an extended period of time. This conclusion is consistent with cases holding that continuous and repeated acts of negligence may constitute the

"same occurrence."

Based on its analysis of the facts asserted in the Complaint, the Court of Appeals held that, "...the numerous negligent acts alleged in [Marcas's federal] complaint - all of which occurred at the St. Andrews Landfill, where [the Board] discontinued its disposal operations nearly seven years before [Marcas] acquired the property that is the subject of [Marcas's] claims - were so uniform, routinized and regularized, and occurred at such steady and frequent intervals, that they merged into one continuous "same occurrence" under C.J. § 5-303(a)." As a result of its analysis, the Court held that the individual damages cap in C.J. § 5-303(a) was applicable to the [Marcas's] multiple claims seeking money damages.

Shoaib Hashmi v. Troy Bennett, et al., No. 15, September Term 2010. Opinion filed November 3, 2010 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2010/15a10.pdf>

TORTS - JOINT TORTFEASORS

Facts: In 2005, Troy Bennett, Geraldine Bennett, Keion Bennett, Tyshaun Bennett, and Adam Gross, Respondents, (hereinafter "the Bennetts") filed a survival and wrongful death action in the Circuit Court for Baltimore City against Emergency Physician Associates of Maryland, P.C., Shoaib A. Hashmi, M.D., and The Good Samaritan Hospital of Maryland, Inc., in connection with the death of twenty-seven year old Adrian Tyree Bennett from septic shock. Subsequently, on November 16, 2005, by a First Amended Complaint and Election for Jury Trial, Respondents joined Roman Kostrubiak, M.D. as a defendant. Dr. Kostrubiak along with Emergency Physician Associates of Maryland answered, as did Good Samaritan Hospital, generally denying liability, and asserting affirmative defenses including contributory negligence and assumption of risk. Dr. Hashmi also answered, generally denying liability and asserting contributory negligence and assumption of risk as affirmative defenses.

In 2006, the complaints against Dr. Kostrubiak and Emergency Physician Associates of Maryland, as well as Good Samaritan Hospital were dismissed with prejudice as a result of separate settlements, in accordance with Rule 2-506(a). Dr. Hashmi, however, did not settle, nor did he file any third-party claim alleging that another party's negligence contributed to Adrian's death. During the one-week trial that ensued regarding the claims against him, moreover, Dr. Hashmi did not implicate any other Good Samaritan Hospital employee or any one else, as responsible for Adrian's allegedly deficient care and subsequent death. The jury returned a verdict in favor of the Bennetts.

Dr. Hashmi, thereafter, sought to reduce the verdict, claiming that he was entitled to contribution, not only from Emergency Physician Associates of Maryland and Dr. Kostrubiak, as well as Good Samaritan Hospital, but also from "[t]hree distinct actors employed by Good Samaritan Hospital," namely (1) Dr. Hina Sahi, a hospital resident; (2) Nurse Kathleen Bosse, a hospital floor nurse; and (3) an unidentified emergency room nurse, Nurse A. Dr. Hashmi proposed a post-judgment "judicial determination" of the three employees' alleged negligence. The Bennetts resisted the reduction by three more "shares" by countering that the alleged joint tort-feasors, Dr. Sahi, Nurse Bosse, and Nurse A, "were never named as defendants, never admitted liability to Plaintiffs, and never were found liable to Plaintiffs by a court or jury" and posited that the clear and unambiguous language of

the Good Samaritan Release contemplated only one joint tort-feasor. The Circuit Court determined that the verdict would be divided among Emergency Physician Associates along with Dr. Kostrubiak, Good Samaritan Hospital, as well as Dr. Hashmi, for three shares rather than five shares, calculated on the basis of the three Good Samaritan Employees, Dr. Kostrubiak along with Emergency Physician Associates, and Dr. Hashmi.

Dr. Hashmi appealed to the Court of Special Appeals, and our colleagues on the intermediate appellate court affirmed in a reported opinion, *Hashmi v. Bennett*, 188 Md. App. 434, 982 A.2d 818 (2009), reasoning that the language of the Good Samaritan Release clearly and unambiguously identified Good Samaritan Hospital as the joint tort-feasor and that "Dr. Sahi, Nurse Bosse, and Nurse A, as non-parties to the settlement agreement, could not attain joint tortfeasor status." *Id.* at 451, 982 A.2d at 828.

Held: The Court of Appeals affirmed. The Court described the common law rule precluding contribution among joint tort-feasors, as well as the enactment of the Uniform Contribution Among Joint Tort-feasors Act. Applying the objective theory of contract interpretation, the Court determined that the Good Samaritan Release clearly and unambiguously released all employees and agents of Good Samaritan Hospital, with the exception of Dr. Hashmi, while identifying Good Samaritan Hospital, the "Released Party" as "a Joint Tortfeasor." The Release, reasoned the Court, both broadly encompassed hospital employees and agents, while nevertheless representing one joint tort-feasor share.

The Court further noted that even if the Release was ambiguous, "we would not countenance the separate, post-trial proceeding Dr. Hashmi proposes, in which he suggests that the proffer of evidence in a separate post-judgment judicial proceeding against Dr. Sahi, Nurse Bosse, and Nurse A, who are not parties to the action, would be sufficient to establish their status as joint tort-feasors in order to reduce his contribution to the adjudicated verdict." The Court emphasized that none of the three Good Samaritan employees was named as a defendant in the original action, nor did Dr. Hashmi join them as third-party defendants pursuant to Rule 2-322(a). The court concluded, relying on *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 473-75, 601 A.2d 633, 667-68 (1992), that only a party to the action may be deemed a "joint tort-feasor."

COURT OF SPECIAL APPEALS

Rashid A. Mohiuddin v. Doctors Billing & Management Solutions, Inc. et al., No. 1286, September Term 2009, filed November 1, 2010. Opinion by Moylan, J.

<http://mdcourts.gov/opinions/cosa/2010/1286s09.pdf>

CIVIL PROCEDURE - DISMISSAL OF A CLAIM FOR FAILURE TO STATE A CAUSE OF ACTION - PROCEDURAL SEQUELAE OF A DISMISSAL - FILING A NEW CLAIM - AMENDING THE OLD CLAIM

Facts: Seeking to recover unpaid wages and restitution, Appellant filed a complaint against Doctors Billing and Management Solutions, Inc. (Doctors Billing) and appellee, Physician's House Calls, Inc. (PHC), in the Circuit Court for Howard County. Appellant's operative complaint alleged that he had an employment contract with Doctors Billing; through his employment with Doctors Billing he occasionally treated patients of PHC; PHC occasionally paid him on ledger listing PHC as his employer; and he had not been fully compensated for services provided over a 10-week period. Appellant's operative complaint asserted three counts against PHC: (1) violation of Maryland's Wage Payment and Collection Law; (2) *quantum meruit*; and (3) unjust enrichment. PHC filed a motion to dismiss the complaint for failure to state a claim. On February 20, 2008, the trial court granted PHC's motion, and dismissed the case against PHC without prejudice, leaving Doctors Billing as the sole remaining defendant.

Appellant amended his complaint approximately seven months later, re-adding PHC as a defendant. Appellant's new complaint charged PHC with the same counts that were earlier dismissed, and added a breach of implied contract count. PHC filed a motion to dismiss for failure to state a claim. The trial court granted the motion, dismissing with prejudice Appellant's case against PHC, on the basis that Appellant failed to comply with Maryland Rule 2-322(c) requiring an amended complaint to be filed within 30 days of the court's February 20, 2008 order. Appellant appealed both dismissals.

Held: Affirmed. Regarding the first dismissal, the Court of Special Appeals held that the Maryland Wage Payment and Collection Law count was legally deficient because it failed to allege that Appellant was either engaged to work by PHC, or that PHC exercised any degree of control over Appellant in his work. The *quantum meruit* claim was similarly deficient, as there was no allegation that the parties agreed that PHC would pay Appellant for his services. The unjust enrichment count was also properly dismissed

because Appellant failed to assert that PHC was enriched as a result of circumstances that might make it inequitable for the company to retain the value of Appellant's services without paying for them.

The second dismissal was also proper. When a court grants a motion to dismiss pursuant to Rule 2-322, particularly if the motion to dismiss is based on subsection (b)(2), there are two sets of separate and distinct sequelae that may be dealt with in the order of dismissal: (1) whether the pleading, following dismissal, can be amended and thereby revitalized; and (2) whether a new claim can be filed against the defendant based on essentially the same factual base. Leave to amend is either expressly stated on the face of the order or it does not exist. The dismissal of a complaint "without prejudice" is not the same thing as a dismissal "with leave to amend." The requirement that, to keep the case alive, there must be an express and unqualified grant of leave to amend within the four corners of the dismissal order itself is ironclad. Appellant was foreclosed from re-adding PHC as a defendant by amending his complaint because Appellant's initial case against PHC was dismissed without prejudice, but without an express grant of leave to amend.

Davis v. State, No. 659, September Term, 2007, filed November 1, 2010. Opinion by Woodward, J.

<http://mdcourts.gov/opinions/cosa/2010/659s07.pdf>

CRIMINAL LAW - BINDING PLEA AGREEMENT - RULE 4-243 - NO RIGHT TO HAVE PLEA AGREEMENT CONSIDERED BY A SECOND JUDGE AFTER IT IS REJECTED BY THE FIRST JUDGE

CRIMINAL LAW - PRESUMPTION OF INNOCENCE - PLACEMENT OF "GUILTY" BEFORE "NOT GUILTY" ON VERDICT SHEET

Facts: Appellant appeared before Judge Kathleen Beckstead and presented a binding plea agreement that had been reached between appellant and the State. Judge Beckstead rejected the plea agreement and transferred the case to Judge Donald Davis for a jury trial. Appellant attempted to present the plea agreement to Judge Davis, who refused to consider the agreement. The case proceeded to trial, and, at trial, the trial court utilized a verdict sheet that listed two options for the jury under each charge: "Guilty" listed first, followed by "Not Guilty." Appellant was convicted of all charges.

On appeal, appellant argued that Judge Davis failed to exercise his discretion to consider the binding plea agreement under Rule 4-243. Appellant also contended that by listing the first option under each charge as "guilty," the trial court violated appellant's right to the presumption of innocence.

Held: Affirmed. The Court of Special Appeals held that Rule 4-243 does not create a right for a defendant to present a binding plea agreement for consideration by a second judge once the plea agreement has been rejected by the first judge. Even if a defendant's case is transferred for scheduling reasons to a second judge after the first judge has rejected the binding plea agreement, the second judge is not required by Rule 4-243 to consider whether to accept or reject the plea agreement.

The Court also held that the placement of the option of "guilty" before "not guilty" on the verdict sheet does not violate a defendant's right to the presumption of innocence. Accordingly, as long as the choices of "not guilty" and "guilty" are clearly given, it is not reversible error for the trial court to put "guilty" first on the verdict sheet.

Thomas Wood, Jr. v. State of Maryland, No. 1378, September Term, 2009, filed November 3, 2010. Opinion by Moylan, J.

<http://mdcourts.gov/opinions/cosa/2010/1378s09.pdf>

CRIMINAL LAW - CONSTITUTIONAL EXCLUSION OF EXTRAJUDICIAL IDENTIFICATIONS - THE FOURTEENTH AMENDMENT AND THE NECESSITY FOR STATE ACTION - PRESUMPTIVE VALIDITY OF SEARCH WARRANTS

Facts: Appellant was found guilty, on an agreed statement of facts, on two separate charges of robbery. The first robbery was committed on December 13, 2008 at a gas station in Queen Anne's County. The lone clerk on duty described his assailant as a six foot tall African-American weighing about 250 pounds. A newspaper deliveryman and a surveillance camera at the gas station observed the suspect quickly drive westbound from the gas station in a silver Lincoln Aviator. Soon thereafter, Homeland Security cameras observed an SUV matching that description and driving westbound on the Bay Bridge. The SUV's tags were registered to Appellant. From a photo array, the clerk identified Appellant as "looking like" the man who robbed him.

The second robbery was committed on December 27, 2008 at an Xtra Mart in Queen Anne's County. The only witnesses to this robbery were the on duty clerk and a female patron. The female patron was struck on the head with a black handgun, and was ordered to lie on the floor. At a photo array, both witnesses selected a photograph of Appellant as "most resembling" the robber.

The police executed a search warrant on Appellant's SUV on January 2, 2009, and recovered a black handgun. A single strand of blond hair belonging to the female patron was recovered from the gun sight. On appeal, Appellant argued, *inter alia*, that the trial court erred in failing to suppress the photo identifications because they were unreliable, and that there was no probable cause for the search warrant.

Held: Affirmed. The reliability of evidence, in and of itself, is fundamentally a jury issue and not an exclusionary issue. The exclusion of an extrajudicial identification, as a matter of law, is a constitutional question, requiring some improper "state action" by way of violating either the Sixth Amendment's right to the assistance of counsel or the due process clause of the Fourteenth Amendment. The inherent unreliability of an identification, however, is not in and of itself the fulcrum for either one of those unconstitutionalitys.

Appellant failed to assert that any suggestive or otherwise improper procedure was employed by the police officers who conducted the photographic arrays. Although two of the witnesses

testified that they saw a local newspaper include an MVA photograph of Appellant in a report on one or both of the robberies, this fact had nothing to do with the investigating police. The Fourteenth Amendment, of course, does not apply to the local newspaper, nor does it apply to the witnesses who looked at the newspaper. Although the reliability of an extrajudicial identification may sometimes serve as a counterweight to overcome what might otherwise be the exclusion of evidence based on impermissibly suggestive investigative procedures, the unreliability, *per se*, is not, and never has been, a basis for excluding such evidence.

Appellant failed to articulate how or in what way the search warrant lacked probable cause. A judicially issued search warrant is presumptively valid, and the burden is allocated to the defendant to rebut the presumed validity.

Kevin Armstead v. State, No. 469, September Term, 2009. Opinion filed on October 28, 2010 by Kenney, J. (retired, specially assigned).

<http://mdcourts.gov/opinions/cosa/2010/469s09.pdf>

CRIMINAL LAW - DUE PROCESS - INCONSISTENT THEORIES OF PROSECUTION
- ADOPTED ADMISSIONS - PLEA AGREEMENT - HARMLESS ERROR

Facts: Before Armstead, was tried on charges stemming from a murder alleged to be carried out by a group of men, an alleged co-conspirator, Washington, had been separately tried. At Washington's trial, the prosecution had called as a witness Fulton, who had taken a plea bargain from the State in exchange for his testimony. Fulton testified as to Washington's intent to kill the victim, but that he, Fulton, was not present at the time of the murder.

At Armstead's trial on charges stemming from the same incident, the State did not call Fulton as a witness. Instead, Simon, a witness alleged to be in the area on the night of the murder, testified for the State as to Armstead's involvement. Armstead indicated that he was going to call Fulton as a witness. Responding to concerns raised by the State, the court prohibited defense counsel from questioning Fulton concerning his plea bargain with the State or the details of Washington's trial.

Armstead argued that he was denied due process because the State put forward alternative theories of the case in his and Washington's trials, and because the trial court excluded evidence of Fulton's plea agreement. He also argued that the court erred by failing to order a presentence investigation report and in proceeding to sentencing immediately following verdict, that the court erred by admitting evidence that a key State's witness had been threatened, and that the evidence did not support a conviction for conspiracy to commit murder in the first degree.

Held: The State's decision to call a witness who had entered a plea agreement in the murder trial of defendant's accomplice but not in the defendant's separate murder trial did not violate defendant's due process rights where the core issue was whether either of the two accomplices committed the murder and where the testimony of the witness testifying pursuant to a plea agreement did not directly implicate the defendant in the actual murder.

The fact that the State entered into a plea agreement with a witness who testified in the murder trial of one accomplice but not the other, standing alone, does not constitute an adoptive admission when the witness testified as a defense witness in defendant's trial.

While extrinsic evidence of a plea agreement between the State and a witness, who was previously called by the State in the murder trial of a co-defendant, was relevant, it was within the court's discretion to exclude the evidence under Rule 5-403, where the court found that the value of admitting the evidence was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, and any error was harmless beyond a reasonable doubt.

The court did not err in proceeding to sentencing immediately following the verdict or by admitting evidence that a witness had been threatened, and the evidence supported the conspiracy conviction. Judgment affirmed.

* * *

Cure v. State, No. 2379, September Term, 2008, filed on October 28, 2010. Opinion by Sharer, J. (Specially Assigned).

<http://mdcourts.gov/opinions/cosa/2010/2739s08.pdf>

CRIMINAL LAW - EVIDENCE - WAIVER OF APPELLATE CHALLENGE TO IMPEACHABLE EVIDENCE - FIRST DEGREE ARSON AS AN IMPEACHABLE OFFENSE

Facts: Appellant, Deltavia Cure, was convicted in the Circuit Court for Baltimore City of various violations of the controlled dangerous substances law. In a pre-trial ruling, the circuit court determined that Cure's previous conviction of first degree arson qualified as an impeachable offense. Cure elected to testify and, after being advised by his counsel, told the jury of his prior conviction of first degree arson.

On appeal, Cure asserts (1) that by testifying to his prior conviction on direct examination he did not waive appellate review of the courts ruling as to the impeachable value of the arson conviction; and (2) that the court erred in ruling that first degree arson is an impeachable offense. Recognizing that earlier cases had held that admission by a defendant to a prior impeachable offense waives the right of appellate review, Cure argued that those cases were effectively overruled by the Court of Appeals in *Brown v. State*, 373 Md. 234 (2003), albeit based on a three-judge majority and a dissent.

Held: The Court of Special Appeals affirmed, holding (1) that "drawing the sting" by a defendant as to a prior conviction of an impeachable offense is a waiver of appellate review, and (2) that first degree arson is an impeachable offense.

The Court of Special appeals relied on *Johnson v. State*, 9 Md. App. 166, 177 (1970), in which Judge Orth wrote that "if the prior conviction was introduced by the defendant himself rather than by the State, he thereby waives objection[.]," and *Ohler v. United States*, 529 U.S. 753 (2000).

In a ruling of apparent first impression, the Court also held that a conviction of first degree arson (essentially the codified version of common law arson) satisfies the three-step test of Md. Rule 5-609 regarding the admissibility of impeachable evidence. The Court recognized that first degree arson was, at common law, an infamous crime. Moreover, Cure's conviction was within 15 years of his trial. Finally, the Court was satisfied that the trial court engaged in an appropriate balancing of the probative value of the prior conviction against potential unfair prejudice.

Antajuan Lawntee Wilson v. State of Maryland, No. 0497, September Term 2009, filed October 28, 2010. Opinion by Moylan, J.

<http://mdcourts.gov/opinions/cosa/2010/497s09.pdf>

CRIMINAL LAW - JURY INSTRUCTIONS ON MITIGATING DEFENSES - PERFECT SELF-DEFENSE - IMPERFECT SELF-DEFENSE - THE BURDEN OF PRODUCTION ON THE DEFENDANT - HOT-BLOODED RESPONSE TO LEGALLY ADEQUATE PROVOCATION - RESPONSE TO A SUBSTANTIAL BATTERY

Facts: Three men, including the victim, confronted Appellant with hostility at a gas station. Appellant abandoned the confrontation by leaving the gas station and walking to his grandmother's house several minutes away. Soon thereafter, the three men departed the gas station and walked in the opposite direction of Appellant's grandmother's house. While at his grandmother's house, Appellant changed his clothes and called his cousin in order to get "backup." When the cousin did not answer, the Appellant took a steak knife instead. Appellant returned to the gas station, and found the three men down the road. Appellant approached the men, and confronted the victim. The victim pulled a gun from his pocket, and Appellant wrenched it away. Appellant pointed the gun at the victim, waited several seconds, and fatally shot the victim four times. At trial, the court denied Appellant's request that the jury be instructed on perfect self-defense, imperfect self-defense, and the defense of provocation. Appellant was subsequently convicted of first-degree murder and related offenses. On appeal, Appellant argued that the trial court erred in not instructing the jury with regard to imperfect self-defense and the defense of provocation.

Held: Affirmed. A defendant is only entitled to a jury instruction with respect to defenses that have been fairly generated by the evidence. This is known as the burden of production. The defendant has the burden of producing a *prima facie* case with respect to each and every one of the required elements of a defense. The evidence presented at trial failed to produce a *prima facie* case with respect to several elements of the imperfect self-defense, including Appellant's status as a non-aggressor, his subjective apprehensions of harm to life or limb, and his subjective belief that the force used was not excessive. Similarly, the evidence failed to generate a *prima facie* case with respect to the elements of hot-blooded provocation.

Ray Williams v. Circuit Court, et al., No. 1394, September Term 2009, filed November 3, 2010. Opinion by Wright, J.

<http://mdcourts.gov/opinions/cosa/2010/1394s09.pdf>

CRIMINAL LAW - POST-CONVICTION PROCEEDINGS - IMPRISONMENT

Facts: Williams filed a petition in the Circuit Court for Washington County, seeking judicial review of an administrative agency decision. Along with his petition, Williams filed a request for waiver of prepayment of the filing fee. Under the Prisoner Litigation Act ("PLA"), codified at Md. Code (1973, 2006 Repl. Vol.), § 5-1002(c) of the Courts & Judicial Proceedings Article, "[a] court may waive payment of the entire required filing fee for a civil action filed by a prisoner only on a written showing under oath by the prisoner" that the prisoner is indigent, the "issue presented is of serious concern," "[d]elay in the consideration of the issues presented will prejudice the consideration of the claim," the prisoner is not likely to accumulate sufficient funds to pay the required filing fee within a reasonable period of time, and the prisoner possesses a reasonable likelihood of success on the merits of the claim.

In support of his request, Williams stated that he is incarcerated, has no money, and earns approximately \$21.50 per month, which he spends on necessities such as "soap, detergent, toiletries, etc." In addition, Williams averred that he "possesses a reasonable likelihood of success on issues of serious concern." The court denied Williams's request and ordered that the "[p]etition be accepted but not processed until \$30.00 is paid." Williams timely appealed, arguing that the circuit court abused its discretion and denied him due process when it denied his request for waiver of the filing fee.

Held: Affirmed. The circuit court acted properly when it in denied Williams' request for waiver of filing fees under § 5-1002(c) of the PLA because Williams failed to state the basis of his claim with sufficient particularity, and merely recited the statutory language by stating that he "possesses a reasonable likelihood of success on issues of serious concern." Further, Williams failed to show, or even allege, that delay in the consideration of the issues presented will prejudice the consideration of the claim.

Ray Lamont Moore v. State of Maryland, No. 1759, September Term, 2007. Opinion filed on October 29, 2010 by Kenney, J. (retired, specially assigned).

<http://mdcourts.gov/opinions/cosa/2010/1759s07.pdf>

CRIMINAL LAW - SEARCH AND SEIZURE - SEARCH WARRANT - VISUAL
BODY CAVITY SEARCH - CUSTODIAL ARREST - CONFIDENTIAL INFORMANT
- ENTRAPMENT

Facts: Baltimore County police officers obtained a search warrant of appellant's person and vehicle for controlled dangerous substances based upon evidence from a reliable confidential informant and from a prior controlled buy. Officers detained appellant while driving in Baltimore County and executed the search warrant. Officers searched the vehicle and appellant but found no controlled dangerous substances. Officers then transported appellant to a nearby police precinct and conducted a strip search where no drugs were found. Officers then conducted and a visual body cavity search of appellant's buttocks, during which officers observed a plastic bag piece protruding from the body cavity. Officers removed the bag which contained two other bags, one containing eleven baggies of cocaine and the other containing ten baggies of heroin.

Appellant moved to require the State to produce the identity of the confidential informant suspected to be involved in drawing appellant into the county on the date that the search warrant was executed. Appellant also moved to suppress the evidence recovered, arguing that the search warrant did not authorize a strip search or a visual body cavity search of his person. After a hearing, both motions were denied.

Held: A court need not disclose the identity of a confidential informant solely because a defendant has alleged that he may assert the defense of entrapment. A defendant must, by proffer or otherwise, indicate to the court (1) that there was an inducement and (2) that the defendant lacked predisposition to commit the offense. If such a proffer is made, the identity and status of the inducer may be necessary. The court must weigh the public interest in effective law enforcement against the defendant's right to prepare a defense in light of the facts of the case to determine whether disclosure should be made.

A person who is detained by police for the purpose of conducting a strip search is not under custodial arrest.

A search of the person based upon a search warrant issued on probable cause that the person is carrying drugs, supports a visual body cavity search of the person for drugs, if such a search is reasonable under the circumstances.

Judgment affirmed.

* * *

Barufaldi v. Ocean City, Maryland Chamber of Commerce, No. 815, September Term 2009, filed October 29, 2010. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2010/815s09.pdf>

EMPLOYMENT - MARYLAND WAGE PAYMENT AND COLLECTION LAW ("WPCL") - BREACH OF EMPLOYMENT CONTRACT - MATERIAL BREACH - RIGHT TO PAYMENT ALREADY EARNED - ABSENCE OF BONA FIDE DISPUTE AS A JURY QUESTION - WPCL ATTORNEYS' FEES - OBLIGATION OF COURT TO EXPLAIN BASIS FOR EXERCISE OF DISCRETION TO DENY FEES UNDER FEE-SHIFTING STATUTE.

Facts: In 2005, the Ocean City Chamber of Commerce, the appellee/cross-appellant, hired Daniel J. Barufaldi, the appellant/cross-appellee, as its new executive director. The parties thereafter entered into a written employment contract providing that Barufaldi would be employed for a term of three years at a base salary of \$52,000 with the potential for earning additional incentive pay on a quarterly basis. The Chamber never took the steps to calculate incentive pay, however, and Barufaldi never was paid any incentive compensation. Barufaldi resigned prior to the end of the term and took another job.

In the Circuit Court for Worcester County, Barufaldi filed suit for breach of contract and violations of the Maryland Wage Payment and Collection Law ("WPCL"), asserting damages in the amount of incentive pay he should have earned up until his resignation. The Chamber counterclaimed for breach of contract premised on Barufaldi's alleged failure to perform his duties under the contract and his premature termination of the contract. The trial court granted judgment in Barufaldi's favor on the counterclaim and Barufaldi's claims went to the jury. The jury found in his favor under the WCPL and for breach of contract, awarding \$60,000 in unpaid incentive pay. The jury also found that there was no bona fide dispute as to Barufaldi's entitlement to the incentive pay, but did not award treble damages. The trial court subsequently denied Barufaldi's motion for attorneys' fees.

Barufaldi appealed from the denial of attorneys' fees. The Chamber appealed the court's decision not to send the counterclaim to the jury, not to grant a motion for judgment on the issue of bona fide dispute, not to grant a jury instruction on the effect that Barufaldi's resignation prior to the end of the term, on rescission, and novation and to admit an unredacted letter into evidence.

Held: Judgment affirmed in part and reversed in part. On the Chamber's counterclaim, the court's motion for judgment is affirmed. While the evidence showed that the Chamber sustained damages as a consequence of Barufaldi's early departure, contrary

to the court's ruling, the evidence also showed that, as a matter of law, the Chamber's failure to take steps necessary to make incentive payment to Barufaldi was a material breach of the contract that relieved Barufaldi of his obligation to render future performance. Hence, Barufaldi was not required to stay for the remainder of his three-year term. Therefore, the court's error was not prejudicial to the Chamber.

On the Chamber's challenge to the verdict in favor of Barufaldi and to jury instructions and an evidentiary ruling, the judgment also is affirmed. Even if Barufaldi had materially breached by resigning before the end of the term, he still was entitled to payment for the work he had performed before the breach, including the incentive pay for that time period. And reasonable jurors could find that there was no bona fide dispute over Barufaldi's entitlement to incentive pay under the employment contract. Finally, there was no error in admitting an unredacted letter into evidence and, even if there had been error, it was harmless.

On Barufaldi's petition for attorneys' fees under the WPCL, the trial court did not adequately explain its exercise of discretion to deny an award of fees under a fee-shifting statute. Accordingly, the denial of fees is reversed and remanded for further proceedings.

In Re: Alijah Q., No. 2634, September Term, 2009. Opinion filed on October 27, 2010 by Hollander, J.

<http://mdcourts.gov/opinions/cosa/2010/2634s09.pdf>

FAMILY LAW - CINA - COURTS ARTICLE § 3-813; CRIMINAL PROCEDURE ARTICLE § 16-204(b)(1)(v), RULE 11-106; CINA CASES; STATUTORY RIGHT TO COUNSEL; WAIVER OF RIGHT TO COUNSEL

Facts: In December 2008, the Prince George's County Department of Social Services (the "Department" or "DSS"), appellee, alleged that Alijah Q., appellee, the son of Lisa Q., appellant, and Antoine A., was a Child in Need of Assistance ("CINA"). Following a hearing in February 2009, Alijah was declared a CINA, and placed in the care and custody of his father. After a review hearing in May 2009, the juvenile master recommended that Alijah remain in Mr. A.'s care, with supervised visitation granted to appellant, and that the court terminate its jurisdiction. Unhappy with that recommendation, appellant noted her exceptions. The Circuit Court for Prince George's County held a de novo exceptions hearing on October 23, 2009.

Prior to the exceptions hearing, Ms. Q's attorney did not file a motion to withdraw her appearance, pursuant to Maryland Rule 2-132. Instead, at the outset of the hearing, she orally moved to be discharged, and the court granted that request. The following colloquy is relevant:

[MS. GILHOOLY] : Good afternoon, Your Honor. Susan [Gilhooly], attorney from the Public Defender's Office. It was my intention, and I came here prepared to enter my appearance -- just give me a second here -- on behalf of Ms. [Q.], mother of the child. However, she's just most recently asked that I not represent her. Vicki [Wolfson] was the previous attorney, and that will be how the record stands.

THE COURT: All right. So, you want to be excused, is that the case?

[MS. GILHOOLY]: Please.

THE COURT: All right. We'll excuse you, unless somebody objects.

The transcript did not reflect any objections. Evidence was presented, and the court overruled Ms. Q.'s exceptions on December 23, 2009.

On appeal, Ms. Q. complained, *inter alia*, that the Court erred in discharging her counsel without first obtaining a valid waiver

of her right to counsel. She argued, in part, that Md. Rule 11-106(b) applied to CINA cases.

Held: Reversed and Remanded. The Court of Special Appeals recognized that a parent in a CINA case has a statutory right to counsel, pursuant to C.J. § 3-813 and C.P. § 16-204(b)(1)(v). However, it determined that the strict waiver of counsel provision set forth in Rule 11-106(b) does not apply to a parent in a CINA case. Therefore, the "voluntary, knowing, and intelligent" standard does not govern the parent's discharge of counsel in a CINA case. Nevertheless, given that the attorney in this matter did not file a motion to withdraw before the hearing, and instead, at the hearing, moved orally to withdraw, the Court concluded that the circuit court should have made some inquiry to the parent to verify that the parent wanted to discharge her attorney immediately before the hearing was about to begin.

Ronald Meyr v. Chona Meyr, No. 2936 September Term, 2009; *Ronald Meyr v. Chona Meyr*, No. 362. September Term, 2010, filed October 27, 2010. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2010/2936s09.pdf>

FAMILY LAW - DIVORCE - CHILD VISITATION

Facts: Mr. and Ms. Meyr met in 1996, when Mr. Meyr placed an advertisement for a wife in a newspaper, to which Ms. Meyr responded. The parties married in 1996 and had three children. On April 6, 2009, Ms. Meyr filed a Complaint for Absolute Divorce, or in the Alternative, Complaint for Limited Divorce. Mr. Meyr subsequently was reluctant to allow Ms. Meyr to visit with the children, claiming that she was unfit to meet the children's needs, based in part on her limited ability to speak English. A family therapist concluded that Mr. Meyr and his mother were actively discouraging the children from cooperating with therapy, and she opined that they were being programmed to oppose their mother, placing the children in jeopardy of lasting psychological damage.

The court issued a series of orders, including a Judgment of Limited Divorce, an award of alimony to Ms. Meyr, and an Order Regarding Custody and Visitation, which awarded primary physical custody of the children to Mr. Meyr, with visitation for Ms. Meyr. The Order also included provisions authorizing the best interest attorney "to coordinate the children's reunification therapy with Mother, for as long as she deems said therapy is needed by the family, or until she petitions to the Court to be relieved for said duties." Mr. Meyr filed a notice of appeal from that order, arguing that it was an improper delegation of judicial authority.

Held: Judgment affirmed. It is clear that a court may not delegate to other individuals decisions regarding child visitation and custody. The question in this case is whether delegation of authority regarding coordination of family reunification therapy, a matter ancillary to child custody, is permissible.

The order here was not an improper delegation of judicial decision making power. The trial court resolved the primary issues relating to custody and visitation, and its delegation of authority to the best interest attorney involved merely the coordination of family reunification therapy, a matter ancillary to custody and visitation. The trial court expressly stated that the best interest attorney's authority to oversee the therapy was "subject to supervision and modification by" the court.

ATTORNEY DISCIPLINE

The following name has been replaced on the register of attorneys in this Court effective October 29, 2010:

MARTIN BERNARD BROWN

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By an Order of the Court of Appeals of Maryland dated September 28, 2010, the following attorney has been indefinitely suspended, effective November 1, 2010, from the further practice of law in this State:

RICHARD THOMAS SIEJACK

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By an Order of the Court of Appeals of Maryland dated November 18, 2010, the resignation of the following attorney has been accepted:

JEFFREY KEITH GORDON

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