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DECLARATORY JUDGMENTS ACT – AVAILABILITY OF ANCILLARY INJUNCTIVE RELIEF

Facts:

Respondent Oregon, LLC ("Oregon") leased from Baltimore County ("County") a small parcel of land located on the grounds of a county park (the "property") for the purpose of operating a restaurant. To permit that use of the property, the County (as landlord) filed several administrative petitions, which were opposed to some extent by community organizations and which culminated in a 1995 Board of Appeals order that permitted Oregon to convert an existing building in the property into a restaurant but set conditions on that use. Among those conditions were that 1) Oregon was prohibited from hosting parties, weddings, and other outdoor events on the property; 2) Oregon was permitted to have an outdoor seating area, but was not permitted to use this area for anything other than sit-down dining; and 3) Oregon was prohibited from having "tents, canopies, or other similar overhead covering[s]."

The 1995 Board of Appeals order also incorporated the terms of a restrictive covenant agreement that Oregon had entered into with a local community organization, in which Oregon agreed that 1) there would be no outdoor bars, live music, tents or other similar overhead coverings in the outdoor dining area, and that 2) the parking area at the restaurant would remain a non-paved surface.

In addition, Oregon and the County executed a Supplemental Lease Agreement that included Oregon's promise to comply with the 1994 administrative order as well as restrictions contained in the covenant with the local community organization.

In 2002, Oregon initiated another administrative proceeding to modify the 1995 Board of Appeals order. However, the resulting 2004 Board of Appeals order denied Oregon's petition to permit paving of the parking lot and to allow outdoor tented events on the property.

In August 2008, the Falls Road Community Association filed a complaint in the Circuit Court for Baltimore County against the County and Oregon when it discovered that the entire parking lot had been paved, that the lot contained additional parking spaces, and that objects it described as "canopies" appeared on the outdoor dining area. (Testimony at trial established that the County parks department had ordered Oregon to pave the parking lot when the County allegedly received complaints that the lot was not compliant with the Americans with Disabilities Act ("ADA").) The first three counts of the complaint asked the court to issue writs of mandamus ordering the County to enforce limitations on the paved surface area of the parking lot, the number and location of parking spaces, and the use of the property for outdoor events. The complaint identified the basis for such enforcement action as the 1995 and 2004 orders of the Board of Appeals, the Supplemental Lease Agreement, and the County Charter, County Code and zoning regulations, including the impervious surface limitation.

The fourth and final count of the complaint was brought under the Maryland Uniform Declaratory Judgments Act § 3-401 and included a list of five desired declarations, one request for injunctive relief, and a general prayer for "other" relief. In that count, the Community Association asked the court to conclude that the ADA did not require paving of the entire paving lot and that Oregon had violated the orders, the lease agreement, and the impervious surface limitation in the County zoning regulation. The fourth count also asked the court to require Oregon to remove all paving from the parking area of the property that was not required to be paved under the ADA.

The circuit court awarded summary judgment in favor of Oregon and the County as to the mandamus counts of the complaint, holding that mandamus relief was not available to direct the County to enforce the orders of the Board of Appeals. But the court denied summary judgment as to the fourth count, finding that the claims for declaratory relief could depend on the resolution of certain disputed facts.

In September 2010, the circuit court conducted a bench trial. At the conclusion of the trial, the court indicated that the Community Association may have failed to exhaust its administrative remedies, but nevertheless addressed the merits of the claims for declaratory relief. It concluded that the objects on the patio were "very large umbrellas" rather than canopies and that the paving of the entire parking lot did not violate the impervious surface limitation. But it also found that the paving of the lot and the addition of parking spaces violated the orders of the Board of Appeals, concluding that the paving of the entire parking lot was not required by the ADA.

The trial court nonetheless ruled in favor of Oregon and the County, concluding that declaratory relief could not be granted because a declaratory judgment would not terminate the uncertainty or controversy giving rise to the action. It also concluded that it lacked the authority to issue an injunction directing Oregon or the County to "tear up the parking lot" as part of a declaratory judgment proceeding. The court noted that the complaint requested that Oregon, not County, be ordered to remove paving from the parking lot and questioned whether a request for injunctive relief could properly be part of a declaratory judgment count. The Community Association appealed.

The Court of Special Appeals affirmed the judgments of the circuit court, holding that the Community Association was required to exhaust administrative remedies before seeking relief in court. But it went on to address the appropriateness of mandamus and declaratory relief. The Court of Special Appeals held that a writ of mandamus may lie to compel the County to enforce the orders of the Board of Appeals because the County Code and County Charter imposed a non-discretionary duty on County officials to enforce the orders. It agreed with the circuit court that a declaratory judgment would not resolve the controversy and further held that the Community Association had not adequately pled or proven a claim for injunctive relief ancillary to a declaratory judgment. The Court of Appeals issued a writ of certiorari to consider the holding on mandamus, declaratory relief and exhaustion of administrative remedies.

Held:

(1) The Court held that the Community Association was not required to pursue an administrative remedy prior to seeking either mandamus or declaratory relief to enforce the Board of Appeals orders, which were themselves final administrative orders.

(2) The Court held that the circuit court correctly decided that a writ of mandamus was not available to compel the County to take actions desired by the Community Association. The Court explained that the writ of mandamus is ordinarily not available where the decision to be reviewed is discretionary or depends on personal judgment, and concluded that enforcement of zoning violations at issue was a discretionary act.

(3) The Court held that the circuit court has authority to issue a declaratory judgment in the circumstances of the case. It explained that the issuance of a declaratory judgment does not depend on the specificity of a party's request for ancillary relief to enforce the declarations.

Attorney Grievance Commission of Maryland v. Steven Gene Berry, Misc. Docket AG No. 62, September Term 2012, filed February 26, 2014. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2014/62a12ag.pdf

ATTORNEY DISCIPLINE – ATTORNEY MISCONDUCT – DISBARMENT

Facts:

The Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Steven Gene Berry, charging violations of Rules 1.15(a). 3.3(a)(1) and 8.4(a), (c) and (d) of the Maryland Lawyers' Rules of Professional Conduct, resulting from Berry's assumption of the duties of successor personal representative for the Estate of Patricia Mae Bowles ("Bowles Estate"), Berry withdrew more than $50,000 without court authority, deposited his own funds into the Bowles Estate account to cover deficiencies, and submitted multiple accounts to the Orphans' Court containing false statements and misrepresentations to conceal unauthorized withdrawals from the Bowles Estate account. Additionally, Bar Counsel alleged that Berry failed to hold and maintain the funds of clients in trust, while depositing his own funds in his attorney trust account to cover overdrafts, as well as using client funds to reimburse other clients.

The Court of Appeals referred the matter to the Circuit Court for Montgomery County for a hearing, after which the hearing judge issued written Findings of Fact and Conclusions of Law. The hearing judge found that Berry filed nine Accounts and three Petitions for Interim Personal Representative Commissions and Attorney Fees containing misrepresentations and omissions, to conceal disbursements he made to himself without authorization from the court. Additionally, the hearing judge found that Berry used certain clients' funds being held in trust to pay other clients.

Held:

The Court of Appeals held that the trial judge's conclusions of law were supported by the findings of fact and imposed disbarment as the sanction. The Court of Appeals rejected Berry's request for an indefinite suspension with the right to reapply after one year because of his intentionally dishonest conduct, repeated over a seven year period in twelve separate filings.

Attorney Grievance Commission of Maryland v. John Mark McDonald, AG No. 38, September Term 2012, filed February 21, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/38a12ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland ("the Commission"), Petitioner, charged John Mark McDonald, Respondent, with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 8.4(a), (b), (c), and (d).

A judge specially assigned to the Circuit Court for Queen Anne's County conducted an evidentiary hearing, and found subsequently that McDonald, while employed as the Deputy State's Attorney for Queen Anne's County, engaged in a pattern of misconduct, from 2008 until his resignation in late 2011, stemming from his infatuation with a former co-worker, Melissa Knotts. The hearing judge found that McDonald entered, or caused to be entered, *nolle prosequi* dispositions for five traffic citations issued to Knotts between 2008 and 2011, each time as a personal favor to Knotts and without a legitimate business purpose. McDonald also reached an arrangement with Knotts where he would submit timesheets for pay periods indicating that he had used personal leave on days when he had, in fact, been working, so that Knotts could then take days off and submit her own timesheet showing that she had been working on those days.

Later, after the State's Attorney discovered that Knotts, the office manager, was embezzling funds from the Office, McDonald took various steps to interfere with the criminal investigation and prosecution of Knotts. McDonald "had daily or near-daily communications" with the State's Attorney, an investigator for the State's Attorney's Office, and the Special Prosecutor assigned to the case after agreeing, and being told repeatedly, that he should not be involved in the investigation. During that same time period, McDonald "was in constant contact with Knotts and her criminal defense attorney," who McDonald solicited to represent her. McDonald also entered Knotts's former office the day after her employment was terminated and deleted personal emails from her computer until confronted and told to leave.

The hearing judge concluded that McDonald violated MLRPC 8.4(d) (conduct prejudicial to the administration of justice) by entering *nolle prosequi* dispositions for Knotts's five traffic citations and interfering with her criminal prosecution. Consequently, the hearing judge found that McDonald also violated MLRPC 8.4(a) (violating or attempting to violate provisions of the MLRPC). As to the charges of violating MLRPC 8.4(b) (criminal conduct reflecting adversely on the lawyer's honesty, trustworthiness or fitness) and 8.4(c) (dishonesty, fraud, deceit, or misrepresentation)), however, the hearing judge found that Bar Counsel did not prove by clear and convincing evidence that McDonald's conduct rose to the level of criminal conduct or dishonesty, fraud, deceit, or misrepresentation.

Bar Counsel and McDonald filed exceptions: Bar Counsel to the hearing judge's conclusions of law as to MLRPC 8.4(b), (c), and (d); and McDonald to a number of the judge's findings of fact, procedural issues arising before, during, and after the hearing, and the conclusions of law that were unfavorable to him.

Held:

Bar Counsel's exceptions relating to the hearing judge's conclusions of law as to MLRPC 8.4(c) and (d) were sustained, but the Court declined to rule on Bar Counsel's exceptions as to MLRPC 8.4(b). All of McDonald's exceptions were overruled. The Court disbarred McDonald. In sustaining Bar Counsel's exceptions to the Circuit Court's conclusion that McDonald's actions did not constitute violations of MLRPC 8.4(c), the Court reasoned that, based on prior case law, the term "dishonesty," as it is used in 8.4(c), is a broad term that encompasses "conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness," and that Bar Counsel proved, by clear and convincing evidence, that each of the types of misconduct McDonald committed fit within that description. The Court also sustained Bar Counsel's exceptions to the conclusion that McDonald did not violate MLRPC 8.4(d) by deleting emails from Knotts's computer because the evidence demonstrated that McDonald's act affected the criminal investigation of Knotts, and therefore impeded the administration of justice. Stating that its sanction would not change if MLRPC 8.4(b) violations were also determined, the Court declined to consider Bar Counsel's exceptions with regard to that Rule. The Court overruled McDonald's exceptions concerning several of the Circuit Court's factual findings on the ground that none of the exceptions met the burden of showing clear error. McDonald's exceptions to various procedural issues in the case, and his single exception to the Circuit Court's conclusions that he violated MLRPC 8.4(a) and 8.4(d), were also overruled.

As to the sanction, the Court noted the presence of several aggravating factors (dishonest and selfish motives, pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of the conduct, substantial experience in the practice of law), but identified only one mitigating factor (no prior disciplinary record). Weighing those factors, and considering McDonald's former position as a public official as well as the disciplinary goals of protecting the public, maintaining the public's confidence in the legal profession, and deterring similar misconduct by other public figures in the future, the Court determined that disbarment is the appropriate sanction.

Attorney Grievance Commission of Maryland v. Lawrence Paul Pinno, Jr., AG Nos. 30 & 40, September Term 2011, filed February 24, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/30a11ag.pdf

ATTORNEY DISCIPLINE – SANCTION – DISBARMENT

Facts:

This attorney discipline matter consists of two consolidated cases in which Lawrence Paul Pinno, Jr. was charged with violating the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") as a result of his neglect of clients, abandonment of his practice, and failure to return unearned fees.

Mr. Pinno did not participate in the disciplinary process. The hearing judge found that Mr. Pinno violated MLRPC 1.1 (competence), MLRPC 1.3 (diligence), MLRPC 1.4 (communication), MLRPC 1.16 (declining and terminating representation), and MLRPC 8.4(d) (engaging in misconduct prejudicial to the administration of justice) with respect to one or more of the five complainants. No exceptions were filed to the hearing judge's findings of fact and conclusions of law. The Court of Appeals found that the pattern of misconduct demonstrated in this case, which affected at least five clients and spanned two years, was an aggravating factor.

Held:

The Court of Appeals held that Mr. Pinno violated MLRPC 1.1, 1.3, 1.4, 1.16(d), and 8.4(d). Mr. Pinno engaged in a pattern of misconduct, including the failure to perform agreed-upon legal work and the abandonment of clients without notice and without returning unearned fees. Such actions demonstrate a lack of competence and diligence, involve a failure to communicate with clients and to properly terminate the attorney-client relationship, and are prejudicial to the administration of justice. Mr. Pinno's actions warrant disbarment.

TIG Insurance Company v. Monongahela Power Company, et al., No. 31, September Term 2013, filed February 24, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/31a13.pdf

CHOICE OF LAW – INSURANCE CONTRACT

Facts:

Respondent Allegheny Energy, Inc., is a holding company whose subsidiaries own power-generating facilities. This case arose out of a litigation between the holding company and its subsidiaries (collectively "Allegheny") and Allegheny's insurers regarding the terms of the liability insurance policies Allegheny purchased between 1970 and 1985. Among the insurers was TIG Insurance Company ("TIG").

Disputes regarding the policies between Allegheny and its various insurers ensued after Allegheny was sued by its former contractors' employees, who alleged that they sustained bodily injuries because of exposure to asbestos while working at Allegheny's power-generating facilities. The holding company contended that Pennsylvania law applied in interpreting the policies, because all of its insurance procurement functions were centralized in its Insurance Department, located in Greensburg, Pennsylvania, and its insurance broker was located in Pittsburgh, Pennsylvania, during the relevant time periods. It argued that the policies were delivered to its Insurance Department, and that it was "not until the point that the insurance polic[ies] [were] actually physically received and reviewed by Allegheny" that it would pay the policy premiums and consider itself bound to the policies.

The insurers filed a motion for partial summary judgment arguing that New York law applied to the insurance policies and noting that Allegheny's corporate headquarters were in New York City at the relevant time. TIG joined in the arguments of other insurers in support of the application of New York law.

After a hearing on the motions for partial summary judgment, the circuit court ruled that Pennsylvania law "applies to the construction and effect of all policies which are the subjects of this law suit." The circuit court declared that Pennsylvania law applied to the interpretation of "all insurance policies at issue in the case of [Allegheny's] coverage claims" and denied any motion to the contrary. TIG appealed to the Court of Special Appeals.

The Court of Special Appeals affirmed the circuit court's grant of summary judgment. It held that the law of the state where a contract is made controls its validity and construction, and a "contract is made in the place where the last act occurs necessary under the rule of offer and acceptance to give the contract a binding effect." It noted that Allegheny provided "uncontested evidence" that insurance policies were received and reviewed by its insurance department, located in Pennsylvania, via its broker in Pennsylvania. It also noted that TIG offered no

information to support the conclusion that insurance policies were delivered to New York or that premiums were paid from New York. The court concluded that TIG failed to generate a genuine dispute of material fact as to where the contracts were made.

The intermediate appellate court also addressed an argument that TIG raised for the first time in oral argument that New York law should be applied in interpreting the policies because the policies were countersigned in New York. The court rejected TIG's argument, holding that, even if the countersignature was made in New York, New York law did not apply because "countersigning of the policies was not the last act necessary to give the policies binding effect." The court went on to apply Pennsylvania law in interpreting the policies and ruling on the rest of the substantive issues raised by the parties.

Held: Affirmed.

This Court affirmed the decision of the Court of Special Appeals. It adopted the opinion of the Court of Special Appeals as its own with the exception of its two-paragraph discussion addressing TIG's argument that the place of countersigning a policy determines the applicable state law. The Court explicitly noted that it does not adopt the two paragraphs concerning the significance of countersignature because TIG's argument on that issue was not preserved in the circuit court and the record was insufficiently developed on that issue.

State of Maryland v. Stanley Goldberg, et al., No. 8, September Term 2013, filed February 26, 2014, Opinion by Harrell, J

Adkins & Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2014/8a13.pdf

CONSTITUTIONAL LAW – DUE PROCESS & TAKINGS – VESTED RIGHTS – GROUND RENTS.

Facts:

A group of lessors holding ground leases brought this action against the State challenging, on Maryland Constitutional grounds, Chapter 286 of the 2007 Laws of Maryland, which replaced ejectment with a lien-and-foreclosure process for defaulting lessees of ground lease when more than six months of rent is overdue. The Circuit Court for Anne Arundel County held Ch. 286 invalid as an abrogation of vested rights, relying on *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 30 A.3d 962 (2011). The State appealed, arguing that the Legislature is allowed to alter remedies by statute and that no vested property rights are implicated. Before the Court of Special Appeals decided the appeal, the Court of Appeals granted certiorari to determine if the General Assembly has authority to invalidate ejectment clauses present in extant ground leases.

Held: Affirmed.

Article 24 of Maryland's Declaration of Rights, guaranteeing due process of law, and Article III, § 40 of Maryland's Constitution, prohibiting government taking of private property without just compensation, prohibit the retrospective reach of statutes that would result in the abrogation of vested property rights. The Court began its opinion by applying the Landgraf retrospectivity analysis, concluding that Chapter 286 of the 2007 Laws of Maryland acts retrospectively to impair a strand of the ground lease holder's bundle of rights, namely its right to reentry in the event of default.

The Court concluded that *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 30 A.3d 962 (2011), controlled the determination of whether this impaired right was vested. In *Muskin*, this Court stated that "[a] ground rent lease creates a *bundle of vested rights* for the ground rent owner, a contractual right to receive ground rent payments *and the reversionary interest to re-enter the property in the event of a default* or if the leaseholder fails to renew." *Id.*, at 559, 30 A.3d at 971 (emphasis added). The *Muskin* Court explained specifically that "[t]hese two rights cannot be separated one from the other; *together they are the essence of this unique property interest, and as such, vested rights analysis must consider them together*." *Id.*

(emphasis added). In this case, the Court concluded that this clear language in *Muskin* directs that this Court, in considering a ground lease, should review the estate of the lessor as a unitary object because of the strength of the interconnection between the rents and the reversionary interest (the reversion and the right to re-entry). To sever the bundle of the lessor's rights into pieces ignores the unique nature of the ground lease system in this State. Thus, because the impaired right—the right to re-enter the property in the event of default—is included in this bundle (as part of the lessor's reversionary interest), Ch. 286 acted retrospectively to impair a vested right.

Moreover, the Court rejected the State's argument that, because the landlord's reversionary interest remains intact in the replacement of ejectment with the foreclosure-and-lien remedy in Chapter 286, no right is lost. The Court concluded that the foreclosure-and-lien remedy did not provide the same safeguards for leaseholders as the prior ejectment remedy did.

Tyrone Bryant v. State of Maryland, No. 37, September Term 2013, filed February 3, 2014. Opinion by Greene, J.

McDonald and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2014/37a13.pdf

SENTENCING – ILLEGAL SENTENCE

Facts:

Tyrone Bryant ("Petitioner") was convicted of distribution of cocaine and conspiracy to distribute cocaine. The State sought a mandatory, enhanced sentence of 25 years without the possibility of parole under Maryland's subsequent offender statute, Md. Code (2002), § 5-608(c) of the Criminal Law Article, which requires the defendant to have served at least one term of confinement of at least 180 days and to have two separate qualifying prior convictions. At sentencing, in order to prove the qualifying prior convictions, the State submitted certified copies of docket entries showing two separate drug convictions under the name Tyrone L. Bryant, date of birth April 23, 1971, SID number 000992305. The first indicated that Bryant was sentenced in Baltimore City Case No. 295243003, to three years for possession with intent to distribute heroin, and the second that he was sentenced to ten years in Baltimore City Case No. 200271002, for possession with intent to distribute heroin. The State also presented a Correctional Case Management Specialist from Patuxent Institution, who testified that an inmate file contained a photograph of a man named Tyrone Bryant with the date of birth of November 22, 1969, described as a black male with brown eyes. The file further indicated that Tyrone Bryant was incarcerated in Case No. 200271002 from October 9, 2000 to September 12, 2007.

Before the fingerprint specialist took prints from Petitioner for an in-court comparison, the sentencing judge stated that these steps were unnecessary to prove the prior offenses. The judge then asked defense counsel if he was arguing that the convictions were not Petitioner's, to which counsel replied that he "can't say that [the offenses are not Mr. Bryant's] right now." The trial judge thus found that the qualifications for § 5-608(c) had been met and sentenced Petitioner to a mandatory, enhanced sentence of 25 years without the possibility of parole for each offense, to be served concurrently. Petitioner noted a timely appeal. The Court of Special Appeals, in an unreported opinion, held that the trial court erred in imposing two–albeit concurrent–subsequent offender sentences, but affirmed the imposition of one of the subsequent offender sentences. This Court granted *certiorari* to consider whether Petitioner's sentence is illegal for the purposes of review under Md. Rule 4-345(a).

Held: Affirmed.

There are limited grounds on which a sentence may be properly reviewed by an appellate court despite the failure to object at the time of the proceedings. One such avenue for review is Md. Rule 4-345(a),which provides that a "court may correct an illegal sentence at any time." This exception to the general rule of finality is a limited one, and only applies to sentences that are "inherently" illegal. The distinction between those sentences that are "illegal" in the commonly understood sense, subject to ordinary review and procedural limitations, and those that are "inherently" illegal, subject to correction "at any time" under Rule 4-345(a), is generally the difference between a substantive error in the sentence itself, and a procedural error in the sentencing proceedings. In this case, the two underlying convictions did satisfy the requirements of the enhanced sentencing statute. The issue was whether there was sufficient evidence of Petitioner's identity to prove beyond a reasonable doubt that the predicate convictions belonged to Petitioner, where there was some discrepancy in the record as to Petitioner's birth date and incarceration dates. This is a challenge to an alleged procedural flaw, subject to the general preservation rules. Thus, the Court concluded that there was no "inherent illegality" for the purposes of appellate review despite the failure to object during sentencing under Rule 4-345(a), and therefore the issue was not properly before the Court.

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Michael Gambrill v. State of Maryland, No. 42, September Term 2013, filed February 27, 2014. Opinion by Battaglia, J.

Greene, J., concurs.

http://www.mdcourts.gov/opinions/coa/2014/42a13.pdf

CRIMINAL PROCEDURE – RULE 4-215(e) – REQUEST TO DISCHARGE COUNSEL

Facts:

Michael Gambrill, Petitioner, appeared before the circuit court prior to trial with his assigned public defender. During an exchange between the public defender, prosecutor, and the court, the prosecutor stated that Gambrill was "looking at backing up fourteen years" on a probation violation. The public defender then stated that Gambrill wanted to hire private counsel "if we can't work his case out", at which time the court sent the parties to discuss the possible disposition of the probation violation with another judge assigned to that matter. After returning, there was no indication of what, if anything, happened before the judge assigned the probation violation, but Gambrill's attorney stated, "Your Honor, on behalf of Mr. Gambrill, I'd request a postponement. He indicates he would like to hire private counsel in this matter."

Gambrill was convicted, and before Court of Special Appeals, argued that his statements indicated that he wanted to discharge his attorney and, thus, triggered the court's duty pursuant to Rule 4-215(e) to allow him to explain his reasons for requesting a discharge of counsel. The Court of Special Appeals disagreed, concluding that Rule 4-215(e) was not implicated, because Gambrill did not express a "clear intent" to discharge counsel.

Held:

The Court of Appeals reversed the judgment of the Court of Special Appeals. Rule 4-215(e) requires a court to allow a defendant to explain his or her reasons for requesting a discharge of counsel, although what constitutes a "request" to discharge counsel is not defined. The Court, however, has established that a request to discharge counsel is any statement from which a court could reasonably conclude the defendant wanted to discharge counsel. The Court observed that the purpose of Rule 4-215(e) is to give practical effect to a defendant's constitutional choices. Ambiguity in a statement that could be reasonably construed as a request to discharge counsel, then, triggers the requirement that a court engage in a Rule 4-215(e) colloquy with a defendant. The court, therefore, erred in failing to allow Gambrill an opportunity to explain the reasons for his request to discharge counsel when his attorney requested a postponement to allow Gambrill to hire private counsel, which a court could have reasonably concluded was a request to discharge counsel.

Cervante Pearson v. State of Maryland, No. 49, September Term 2013, filed February 21, 2014. Opinion by Watts, J.

Harrell, J., concurs.
Adkins and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2014/49a13.pdf

VOIR DIRE – VICTIM OF CRIME – STRONG FEELINGS – MEMBER OF LAW ENFORCEMENT AGENCY

Facts:

The State, Respondent, charged Cervante Pearson ("Pearson"), Petitioner, with various drug-related crimes. Before a jury trial in the Circuit Court for Baltimore City ("the circuit court"), Pearson's co-defendant proposed that the circuit court ask during *voir dire* whether any prospective juror had ever been the victim of a crime or a member of a law enforcement agency. The circuit court declined to do so. During voir dire, the circuit court asked: "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?"

At trial, all of the State's witnesses were members of the Baltimore City Police Department. The jury convicted Pearson of various drug-related crimes. Pearson appealed, and the Court of Special Appeals affirmed. Pearson petitioned for a writ of *certiorari*, which the Court of Appeals granted.

Held: Reversed.

The Court of Appeals held that a trial court need not ask whether any prospective juror has ever been the victim of a crime, as: (1) a prospective juror's experience as the victim of a crime lacks a demonstrably strong correlation with a mental state that gives rise to specific cause for disqualification; (2) the "victim" *voir dire* question consumes an enormous amount of time; and (3) the Court of Appeals has already held that, on request, a trial court must ask whether any prospective juror has strong feelings about the crime with which the defendant is charged. Thus, the circuit court did not abuse its discretion in declining to ask during *voir dire* whether any prospective juror had ever been the victim of a crime.

The Court of Appeals held that, on request, a trial court must ask: "Do any of you have strong feelings about [the crime with which the defendant is charged]?" The circuit court abused its discretion in phrasing the "strong feelings" *voir dire* question as: "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for

you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?" Phrasing the "strong feelings" voir dire question as such allows each prospective juror himself or herself to decide whether the prospective juror's "strong feelings" (if any) about the crime with which the defendant is charged would make it difficult for the prospective juror to fairly and impartially weigh the facts, and conflicts with this Court's holding in *Dingle v. State*, 361 Md. 1, 759 A.2d 819 (2000).

The Court of Appeals held that, where all of the State's witnesses are members of law enforcement agencies and/or where the basis for a conviction is reasonably likely to be the testimony of members of law enforcement agencies, on request, a trial court must ask during *voir dire*: "Have any of you ever been a member of a law enforcement agency?"; where all of the State's witnesses are members of law enforcement agencies and/or where the basis for a conviction is reasonably likely to be the testimony of members of law enforcement agencies, a prospective juror's experience as a member of a law enforcement agency has a demonstrably strong correlation with a mental state that may give rise to specific cause for disqualification.

Shih Ping Li v. Tzu Lee, No. 50, September Term 2013, filed February 21, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/50a13.pdf

FAMILY LAW – MARITAL SETTLEMENT AGREEMENTS – LACK OF INFORMED CONSENT – VOIDABILITY

Facts:

On 12 June 2003, Shih Ping Li ("Husband") and Tzu Lee ("Wife") married, after rekindling a romantic relationship from years past and divorcing their respective prior spouses. Between 2003 and 2008, Attorney Yu Gu provided legal services concerning the couple's relationship with regard to four legal matters: two immigration proceedings and two Marital Settlement Agreements. The first immigration proceeding occurred in 2003, when Gu filed documents with the federal government for the purpose of seeking permanent resident status in the United States for Wife, a Canadian citizen. The required documents included a petition in Husband's name and an affidavit of support. To show that Husband could support financially Wife for the purposes of the immigration documents, Wife provided Gu with copies of Husband's recent tax returns, payroll statements, and bank account statements.

The second immigration matter occurred in 2007, when Wife sought to remove a condition on her permanent resident status resulting from the 2003 immigration filings. Removal of the condition required the filing of a petition and proof of a bona fide marriage, including evidence that Husband and Wife owned property jointly. Wife provided Gu with documents concerning several aspects of the couple's joint finances and property ownership, but included no documentation concerning Husband's individual finances. Regarding both immigration proceedings, Husband and Wife each signed a Notice of Appearance for Gu to file the necessary documents.

The first Marital Settlement Agreement occurred in 2005 after Wife discovered that Husband engaged in an extra-marital affair. The couple discussed separation, and reached an oral agreement under which a home the couple contracted to be built would be titled solely in Wife's name. They agreed further that Husband would continue to contribute monthly $4,000 to the mortgage and home expenses. The couple then sought to memorialize their agreed terms. Wife contacted Gu to draft a Marital Settlement Agreement (the "2005 Agreement"). Gu sent electronically a draft agreement to Wife, who forwarded it to Husband. Husband requested two substantive edits, which Wife submitted to Gu with directions to draft a final version. The parties signed the final version on 18 October 2005, and titled solely their new home in Wife's name. They reconciled and moved into the home together rather than separating.

In late 2007, Wife discovered that Husband engaged in another extra-marital affair. The parties commenced discussion of another settlement agreement to address issues not resolved in the

2005 Agreement. Based on their discussions, Wife asked Gu to draft another agreement ("2008 Agreement"). Gu emailed a draft Agreement to Wife, which she forwarded to Husband. The parties partook directly in several discussions and electronic exchanges regarding the terms of the 2008 Agreement, some of which included attached versions of the agreement showing Husband's numerous requested changes. Eventually, the parties reached a final agreement, which they executed on February 8, 2008.

With regard to all four of the matters in which Gu's services were used, Husband and Gu never communicated directly. Each version of the 2005 and 2008 agreements contained an identically-worded provision labeled "Independent Counsel," which contained language to the effect that Gu represented only Wife in connection with the Agreements, that Husband was advised to, and afforded the opportunity to, seek the advice of independent counsel in connection with the Agreements, that Gu provided Husband with no legal advice in connection with the Agreements, and that Husband's election to execute the Agreements without independent counsel was free and voluntary. Furthermore, the record revealed that, in 2001, Husband sought advice of his own counsel in connection with a marital settlement agreement he reached with his prior spouse, but represented himself in the actual divorce proceedings.

In 2009, Husband filed a Complaint for Judgment of Absolute Divorce in the Circuit Court for Montgomery County, in which he alleged that the 2005 and 2008 Agreements were "void and unenforceable." Wife disputed those allegations. She claimed that the 2008 Agreement superseded the 2005 Agreement and was valid and enforceable. The Honorable Ronald B. Rubin presided over a hearing on Husband's Motion to Set Aside Marital Settlement Agreements on 19 April 2010. After hearing testimony from both parties and Gu, Judge Rubin ruled that the Separation Agreements were not unconscionable and entered an Order, on 22 April 2010, denying Husband's Motion as to both Agreements. Subsequently, the Circuit Court docketed, on 20 May 2010, a Judgment of Absolute Divorce incorporating, but not merging, both Agreements.

On 11 June 2010, Husband filed timely a Notice of Appeal from the Circuit Court's Judgment. While that appeal was pending before the Court of Special Appeals, Husband filed a Motion to Revise the Circuit Court's 22 April 2010 Order based on evidence he obtained via a federal Freedom of Information Act request. The intermediate appellate court stayed Husband's appeal pending resolution of his Motion to Revise, which the Circuit Court denied on 22 December 2011. Husband noted an appeal of that denial on 24 January 2012. The Court of Special Appeals lifted the stay on Husband's initial appeal and consolidated the two appeals.

On 4 March 2013, the intermediate appellate court decided the two appeals in a reported opinion. *Li v. Lee*, 210 Md. App. 73, 62 A.3d 212 (2013). With regard to the Circuit Court's denial of the Motion to Set Aside, the Court of Special Appeals held that the Circuit Court did not err in finding that the Agreements were not unconscionable substantively; that the Circuit Court did err in finding that no attorney-client relationship existed between Gu and Husband in connection with the immigration matters, but the immigration matters and Separation Agreements were not "substantially related," and therefore Gu could not have violated MLRPC 1.9 by neglecting to obtain Husband's informed consent to her representation of Wife in connection with the Agreements; and, that the Separation Agreements were not procedurally unconscionable.

Husband filed timely a Petition for Writ of Certiorari in the Court of Appeals, which the Court granted on 20 June 2013, *Li v. Lee*, 432 Md. 211, 68 A.3d 286 (2013), to consider the following question:

> Does an attorney's failure to [obtain] informed consent, confirmed in writing, pursuant to the Maryland Lawyers' Rules of Professional Conduct, render a separation agreement voidable at the election of the client who did not give informed consent, confirmed in writing?

Husband argued that he was a client of Gu's in connection with the immigration matters, and, thus, that Gu violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.7, or, in the alternative, 1.9, by failing to obtain Husband's informed consent, confirmed in writing, to her representation of Wife in connection with the Separation Agreements. Husband argued further that Gu's conflicted representation and failure to explain the implications of the conflict deprived Husband of any meaningful choice in signing the Agreements and, therefore, the Agreements should be voidable at his demand. Wife argued that, even assuming Gu violated MLRPC 1.7 or 1.9, setting aside the Agreements is not the appropriate remedy on this record.

Held:

The Court held that, on this record, even assuming a violation of either MLRPC 1.7 or 1.9 occurred, the Separation Agreements are not voidable at Husband's demand. The Court reasoned that the facts belied Husband's argument that he was deprived of any meaningful choice. Namely, in the Court's view, the independent counsel provisions in the agreements put Husband on notice that Gu was not representing his interests and that he should seek independent counsel, and his use of his own counsel in connection with the settlement agreement with his prior spouse suggested that he understood the importance of independent counsel in connection with such agreements. Addressing the legal authorities upon which Husband grounded his arguments, the Court reasoned that they were all distinguishable or inapposite. In particular, the Court rejected Husband's reliance on *Post v. Bregman*, 349 Md. 142, 707 A.2d 806 (1998), which he quoted from in support of two assertions: (1) that the MLRPC may act with the force of law outside of the attorney disciplinary context; and, (2) that a violation of one of the Rules may be a ground on which to invalidate a resulting contract. The Court explained that *Post v. Bregman* distinguished clear and flagrant Rules violations from technical, incidental, or insubstantial violations, and determined that if a violation occurred in this case it was of the technical/incidental/insubstantial variety.

Carolyn Delorise Patton v. Wells Fargo Financial Maryland, Inc., No. 3, September Term 2013, filed February 24, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/3a13.pdf

CREDIT GRANTOR CLOSED END CREDIT LAW – STATUTE OF LIMITATIONS – STATUTORY INTERPRETATION

CREDIT GRANTOR CLOSED END CREDIT LAW – ASSIGNMENT – CONTRACTUAL DUTIES OF ASSIGNEE

Facts:

Carolyn Delorise Patton purchased a car from Fox Chevrolet, Inc. ("Fox Chevrolet"), a car dealership located in Maryland. Ms. Patton entered into a retail installment sales contract with Fox Chevrolet to finance the purchase.

In a section entitled "Applicable Law," the contract form stated that the Credit Grantor Closed End Credit law ("CLEC") governed the contract. After the sale of the car to Ms. Patton, Fox Chevrolet assigned the loan contract to Wells Fargo Financial Maryland, Inc. ("Wells Fargo Financial").

Ms. Patton stopped making the monthly payments required by the contract. Wells Fargo Financial repossessed and sold the car. More than two years after she had been notified that Wells Fargo Financial had sold the car, Ms. Patton sued Wells Fargo Financial in the Circuit Court for Anne Arundel County, alleging various violations of CLEC in connection with the repossession and sale of the car, as well as breach of contract and other claims.

The Circuit Court dismissed the claims under CLEC, apparently on limitations grounds, and dismissed the breach of contract claim, apparently on the basis that the provisions of CLEC were not incorporated into the contract as contractual obligations. Ms. Patton appealed to the Court of Special Appeals. Prior to a hearing or decision by the Court of Special Appeals, the Court of Appeals issued a writ of certiorari on its own initiative.

Held: Reversed and remanded.

The Court of Appeals considered the appropriate statute of limitations for a claim brought by a consumer borrower against a credit grantor for violation of CLEC to determine whether Ms. Patton's claims alleging violations of CLEC were timely. The Court considered whether the requirements of CLEC become part of the contractual obligations incorporated in a contract regulated by CLEC, such that a violation of CLEC also constitutes a breach of contract.

Wells Fargo Financial argued that a one-year statute of limitations in the Maryland Equal Credit Opportunity Act, Commercial Law Article ("CL") §12-707(g), applied to Ms. Patton's CLEC claims because that statute provides that it applies to "this title" – i.e., Title 12 of the Commercial Law Article, which includes CLEC. Although the "plain meaning" of CL §12-707(g) may lead to a conclusion that it applies to the entirety of Title 12 of the Commercial Law Article, including an action for violation of CLEC, the legislative history of the Maryland Equal Credit Opportunity Act indicates otherwise. CL §12-707(g) was intended to apply solely to actions for violations of the Maryland Equal Credit Opportunity Act; it was drafting error for the statute to refer to "this title" rather than "this subtitle" – *i.e.* the Equal Credit Opportunity Act.

The appropriate statute of limitations can be found in CLEC itself – CL§12-1019, which provides that an action for a violation of CLEC must be brought no later than six months after satisfaction of the loan. The legislative history of that statute and other canons of construction confirm that it is the appropriate period of limitations.

Ms. Patton's complaint also alleged breach of contract on the theory that the consumer protection provisions of CLEC had been incorporated into the contract and that the alleged violations of CLEC by Wells Fargo Financial were a breach of its contractual obligations. The Court found that when Fox Chevrolet and Ms. Patton entered into the financing agreement, Fox Chevrolet had the option under Maryland of having an agreement subject to the Retail Installment Sales Act ("RISA") or to CLEC. The Court also found that Wells Fargo Financial voluntarily chose to take assignment of a loan contract that incorporated CLEC. In accepting the assignment, Wells Fargo Financial expressly agreed to be governed by CLEC in the exercise of its rights under the contract.

In summary, the Court held that an action by a borrower alleging that a lender violated CLEC in the course of repossessing and selling collateral must be brought no later than six months after the loan is satisfied, pursuant to CL §12-1019. The one-year period of limitations set forth in the Maryland Equal Credit Opportunity Act, CL §12-707(g), does not apply to such an action. The Court also held that an originating lender who enters into a retail installment contract with a consumer borrower may choose, through a written election in the contract, to have the contract governed by CLEC. If the originating lender assigns that contract, the assignee is obligated to comply with the provisions of CLEC in carrying out its right to repossess and sell collateral upon default by the consumer borrower. A failure to do so is a breach of contract.

COURT OF SPECIAL APPEALS

Jeffrey Scott Sanchez v. State of Maryland, Nos. 1367 and 2714, September Term 2012, filed November 6, 2013. Opinion by Alpert, J.

http://www.mdcourts.gov/opinions/cosa/2013/1367s12.pdf

CONSTITUTIONAL LAW – EX POST FACTO – SEX OFFENDER REGISTRY – APPLICATION OF *Doe v. Department of Public Safety and Correctional Services*, 430 Md. 535 (2013)

Facts:

In 2002, Jeffrey Scott Sanchez was convicted of fourth degree sex offense in the Circuit Court for Frederick County and sentenced to a one-year term of imprisonment. Although he was not required to register as a sex offender at the time of his conviction, in 2010 the Maryland General Assembly amended the sex offender registry statute to require registration, retroactively, for those who had been convicted of a fourth degree sex offense. On July 2, 2012 and on January 7, 2013, Sanchez was convicted on a not guilty agreed statement of facts in the Circuit Court for Frederick County of failing to register as a sex offender based on his 2002 conviction. See Md. Code Ann., Criminal Procedure ("C.P.") Art., § 11-721(a). He appealed his two failure to register convictions, arguing that they must be reversed because retroactive application of the sex offender registry statute violated his right to be free from *ex post facto* laws under the Maryland Declaration of Rights.

Held: Reversed.

The Court of Special Appeals decision was based on *Doe v. Department of Public Safety and Correctional Services*, 430 Md. 535 (2013). In *Doe*, the Petitioner pled guilty in 2006 to a single count of child sexual abuse. At the subsequent sentencing hearing, the court imposed a ten-year sentence, suspending all but four and one half years, and three years probation upon his release from prison. Neither the plea agreement nor the sentence addressed registration as a sex offender.

In 2009 and 2010, the Maryland General Assembly passed new amendments changing, among other things, the sex offender registration requirements. As a result, Petitioner was categorized as a Tier III sex offender and required to register every three months for life. *See* C.P. § 11-707(a).

Petitioner filed a civil complaint in the Circuit Court for Anne Arundel County seeking a declaration that he not be required to register and that he be removed from the Maryland Sex Offender Registry. The circuit court denied his request and he appealed.

The Court of Appeals in a plurality opinion held that requiring Petitioner to register violated the prohibition against *ex post facto* laws contained in Article 17 of the Maryland Declaration of Rights. The Court applied the long-standing "disadvantage analysis" to interpret application of the *ex post facto* prohibition. Under that analysis, the Court reasoned that "requiring Petitioner to register has essentially the same effect on his life as placing him on probation" and that probation was "a form of a criminal sanction." The Court additionally noted many negative consequences placed on Petitioner due to the amendments, specifically: Petitioner must report in person to law enforcement personnel every three months for life, give notice of his address and any changes of address, and notify law enforcement before being away from his home for more than seven days. *See* C.P. §§ 11-705, 11-706, 11-707. Additionally, the amendments require him to disclose to the State a significant amount of information, some of which was highly personal. *See* C.P. §§ 11-706, 11-707. The three member plurality concluded that dissemination of this type of information was tantamount to the historical punishment of "shaming."

The Court of Special Appeals held that *Doe* was directly on point and reversed Sanchez's failure to register convictions. The Court of Special Appeals rejected the State's arguments attempting to distinguish *Doe*, holding that it is irrelevant that: 1) in *Doe* the petitioner sought relief from the registry requirements by filing a civil complaint for declaratory judgment where here Sanchez sought reversal of his criminal convictions for failing to register on direct appeal, and 2) Sanchez may still be required to register as a sex offender under the Federal Sex Offender Registration and Notification Act because he challenges only his State convictions under Maryland constitutional law.

Michael E. Donati v. State of Maryland, No. 1538, September Term 2012, filed January 29, 2014. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2014/1538s12.pdf

AUTHENTICATION OF E-MAIL MESSAGES – MARYLAND RULE 5-901 – STATUTORY INTERPRETATION – UNIT OF PROSECUTION UNDER E-MAIL HARASSMENT STATUTE – CLOSING ARGUMENT – RELEVANCE – BAD ACTS EVIDENCE – VOICE IDENTIFICATION

Facts:

Appellant was arrested for CDS violations at Growlers Pub in Gaithersburg. Thereafter, while his charges for the incident at Growlers were pending, appellant began a campaign to harass and otherwise intimidate the head of Growlers' security team, Jason Allen, and the owner of Growlers, Alex Zeppos. Appellant sent e-mails to several law enforcement officers from various e-mail addresses, in which he alleged that Mr. Allen and Mr. Zeppos were involved in marijuana distribution and other crimes. In some of the e-mails to law enforcement, appellant, using false names, attempted to exchange information about Mr. Zeppos and Mr. Allen in exchange for the charges against him being dropped in the CDS case. Based on his campaign of harassing e-mails to Mr. Zeppos and e-mails to law enforcement regarding Mr. Zeppos and Mr. Allen, appellant was convicted of 15 counts of e-mail harassment, two counts of making false statements to a law enforcement officer, two counts of obstruction of justice, and two counts of intimidating a witness.

Held: Affirmed.

The circuit court did not abuse its discretion in admitting State exhibits containing dozens of e-mail messages. To authenticate an e-mail, there must be evidence to support a finding that it is what its proponent claims. The most direct method of showing the authenticity of an e-mail is testimony by someone with personal knowledge that the evidence is what it is claimed to be. Accordingly, the portions of the e-mail conversations sent by the law enforcement officers were properly authenticated through the officers' testimony that the e-mails were sent by them. With respect to the e-mails allegedly sent by appellant from various addresses, these e-mails were properly authenticated by circumstantial evidence. This evidence included evidence found in appellant's home containing some of these addresses, as well as the common theme and contents of the e-mails.

The circuit court properly declined to merge appellant's fifteen convictions for e-mail harassment, pursuant to the version of Md. Code (2002 Repl. Vol) § 3-805 of the Criminal Law Article ("C.L.") that was in effect at the time of appellant's trial and sentencing. The plain,

unambiguous language of C.L. § 3-805 indicated that the unit of prosecution was one e-mail message, and this interpretation was supported by the legislative history. The court properly found that each harassing e-mail sent by appellant subjected him to a separate penalty under the statute.

The circuit court properly exercised its discretion in controlling the scope of defense counsel's closing argument to the issues at trial.

The court properly admitted into evidence a message found in defendant's basement. The message was relevant in that it tied appellant to several e-mail messages at issue, and it was not inadmissible bad acts evidence because it was relevant to establish appellant's identity as the author of the e-mails.

The circuit court acted within its discretion in allowing three witnesses to identify appellant's voice on a 911 call and a videotape found in his home, where one witness heard appellant's voice within an hour prior to making the identification, another witness previously lived with appellant and had numerous conversations with him, and the third witness spoke to appellant prior to making the identification, and the court commented on the distinctive intonation of appellant's voice.

Aaron Harrison-Solomon v. State of Maryland, No. 2253 September Term 2011, filed February 25, 2014. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2014/2253s11.pdf

CP § 3-122 – JURISDICTION TO EXTEND CONDITIONAL RELEASE

Facts:

Appellant was found guilty of various crimes on two occasions, one pursuant to a plea and the other by a jury. He was found, however, to be not criminally responsible ("NCR"), and he was committed to the Department of Health and Mental Hygiene ("DHMH") for institutional care and treatment. On June 3, 2006, he was released subject to certain conditions, including that he remain on medication and submit to continued monitoring of his mental health.

Several days before the Order of Conditional Release ("OCR") was due to expire, DHMH sought a four-year extension of the OCR, asserting that: (1) appellant had indicated that he intended to stop taking his medication upon his release; and (2) appellant's physician recommended against termination of the OCR. After the date on which the OCR was scheduled to expire, the Circuit Court for Prince George's County granted DHMH's petition. The court subsequently denied appellant's Motion to Alter or Amend.

Held: Affirmed.

As long as an application for a change in conditional release is filed before the expiration of the conditional release term, the court retains jurisdiction over the case and may extend the term of conditional release, even if the order is issued after the order for conditional release otherwise would have expired.

Joshua Gabriel Prince v. State of Maryland, No.1129, September Term 2012, filed February 26, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/1129s12.pdf

OBJECTIONS – PRESERVATION

LAYWITNESS TESTIMONY – BY POLICE OFFICER – TO OBJECTIVE FACTS

CONTINUANCE – DISCRETION OF TRIAL JUDGE

Facts:

After Allana Garbe called off her relationship with Joshua Prince, he began text-messaging Ms. Garbe over a period of several days with emotional pleas that she return to him. When he found that she had another man in her apartment, he retaliated by damaging her car. Several days later, Ms. Garbe went to her car and found Mr. Prince poised a half-floor above her in the parking lot of their apartment complex, aiming a rifle at her. She hid behind the bumper of her car and after she heard Mr. Prince fire the rifle, she ran into her apartment building to call police. They later recovered the weapon and ammunition, and Mr. Prince ultimately turned himself in. He was charged with, among other crimes, attempted first-degree murder. Although a psychologist had found Mr. Prince competent to stand trial notwithstanding his prior diagnosis with post-traumatic stress disorder ("PTSD"), Mr. Prince sought a postponement shortly before trial claiming he needed more time for a second mental health provider to evaluate him. The court denied his request.

At trial, the State called two police officers to testify, Detective Brian Stafford and Officer Ryan Costello. Neither was qualified as an expert. Detective Stafford testified that when Mr. Prince first pulled the trigger, the gun misfired, so that the bullet that went through Ms. Garbe's car was actually his *second* shot. Counsel for Mr. Prince objected that Detective Stafford had improperly testified as an expert, but the court overruled the objection. Officer Costello testified that he examined Ms. Garbe's car and placed "trajectory rods" through the bullet holes made by the shot Mr. Prince fired, which showed that the bullet entered through the roof of her car and headed through the backseat and into the trunk (suggesting he was aiming at her as she cowered behind the car). After a jury convicted Mr. Prince of attempted murder and related charges, he appealed.

Held: Affirmed.

Even assuming the trial court erred in allowing Detective Stafford to testify as an expert when he had not been qualified as one, Mr. Prince's counsel did not lodge a timely objection to Detective Stafford's testimony. The Court of Special Appeals explained that by the time counsel objected,

the prosecutor had actually moved on to another area of testimony, so the trial court had no real opportunity to correct the purported defect.

As to Officer Costello, the Court held that his testimony about the placement of trajectory rods to mark the bullet's path through Ms. Garbe's car did not constitute that of an expert under Maryland Rules 5-701 and 5-702. He did not provide any subjective testimony about what he thought the path of the bullet was, nor did he rely on his expertise as an officer such that he had to be qualified as an expert; rather, he simply testified to putting the rods through the bullet holes to show the bullet's path.

Finally, the trial judge did not abuse his discretion when he denied Mr. Prince's request for a continuance to conduct another psychological exam about whether he did in fact suffer from PTSD, and whether that may have played a part in his actions. Mr. Prince failed to demonstrate that the doctor likely would have provided any such testimony to a reasonable degree of medical certainty in the first place, and he delayed in making the request (which came the day before trial), so a continuance was not warranted.

Brian Han Keyes v. State of Maryland, No. 2552, September Term 2011, filed January 28, 2014. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2014/2552s11.pdf

CRIMINAL PROCEDURE – PETITION FOR WRIT OF ACTUAL INNOCENCE

Facts:

Appellant was convicted of 1st degree murder, attempted robbery with a deadly weapon, and use of a handgun in the commission of a crime of violence on February 14,1995. He was sentenced to life imprisonment without possibility of parole. Appellant appealed alleging that the trial court erred in unduly inhibiting his cross examination of a key State's witness. At the trial, appellant attempted to impeach the witness based on a charged commission of a prior bad act, namely distribution of a controlled dangerous substance. The State objected pointing out that there had been no conviction for CDS distribution. The trial court sustained the State's objection and prohibited appellant from impeaching the witness with the charged CDS distribution activities. This Court affirmed the trial court's ruling.

In the instant matter, appellant asserts that in 2011 he obtained two police reports that mention his name and constitute "newly discovered evidence" that creates a significant possibility that the result of his trial may have been different. Specifically, that the reports "which the prosecutor suppressed . . . would have been favorable to him" because they were "somewhat exculpatory" and "provided the basis for impeaching two out of the three State's key witnesses who testified." The circuit court issued an order summarily denying appellant's petition for writ of actual innocence without a hearing.

Held:

The trial court did not err in denying appellant's petition without a hearing because the petition does not sufficiently plead grounds for relief under the Criminal Procedure Article §8-301. The claimed "newly discovered evidence" asserted in appellant's petition is not, in fact, newly discovered evidence, and, even if newly discovered, fails to create a substantial possibility that the result may have been different. Police reports that include events that took place after appellant was convicted and sentenced could have had no effect on his trial and do not qualify as newly discovered. Reports mentioning that the State's key witness from appellant's trial was a "small time" drug seller would be merely impeaching evidence and do not satisfy the requirement of the statute, even if they might be considered newly discovered evidence. Impeachment evidence falls short of having a direct bearing on the merits of the trial, and even if such evidence "may" produce a different result at a new trial, there is not a substantial or

significant possibility it would do so. Moreover, the court is not required to consider an unsupported factual allegation in appellant's petition.

Marcus Lee Smiley v. State of Maryland, No. 2237, September Term 2012, filed January 29, 2014. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2014/2237s12.pdf

CRIMINAL PROCEDURE – EVIDENCE – HEARSAY – SIXTH AMENDMENT – CONFRONTATION CLAUSE – CRAWFORD v. WASHINGTON – GILES v. CALIFORNIA – FORFEITURE BY WRONGDOING – MD. RULE 5-804(b)(5)(B) – MD. CODE, COURTS & JUDICIAL PROCEEDINGS ARTICLE, § 10-901

Facts:

Smiley was convicted by a jury in the Circuit Court for Wicomico County of attempted first degree murder and related offenses arising out of a shooting that occurred on December 10, 2011. At trial, the State introduced the recorded statement of a witness to the shooting, Elmer Duffy, given on December 13, 2011. On December 14, 2011, Smiley made two intercepted telephone calls from jail, one to his mother and one to an unidentified female, in which he asked that a series of messages be passed on to his nephew, Heathcliffe Parker, to the effect that Heathcliffe needed to get Duffy "out of the picture" and make sure that Duffy did not "come to court." On February 20, 2012, Duffy was murdered. Heathcliffe Parker was subsequently indicted for Duffy's murder.

At a pretrial hearing, the court found by clear and convincing evidence that Smiley had engaged in, directed or conspired to commit the wrongdoing that procured Duffy's unavailability as a witness. Accordingly, the court ruled that Duffy's out-of-court statement was admissible via an exception to the hearsay rule, Md. Rule 5-804(b)(5)(B) and Md. Code, Courts & Judicial Proceedings Article, § 10-901.

Held: Affirmed.

Under the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008), an out-of-court statement by an unavailable witness is admissible in a criminal trial, despite the Sixth Amendment Confrontation Clause, if the witness's unavailability at trial was procured by wrongdoing of the defendant intended to prevent the witness from testifying. This firmly rooted hearsay exception dates to *Lord Morley's Case*, 6 How. St. Tr. 769 (1666), and was codified, after *Crawford*, at Md. Code, Courts & Judicial Proceedings Article, § 10-901.

Section 10-901 applies to criminal trials for felonious violations of Title 5 of the Criminal Law Article and crimes of violence. It allows the admission of a sworn recorded or written out-of-court statement, despite the hearsay rule, "if the statement is offered against a party that has

engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement." The statute requires the court to decide admissibility at a hearing outside the presence of the jury, at which the rules of evidence are strictly applied, and requires the court to find "by clear and convincing evidence that the party against whom the statement is offered engaged in, directed, or conspired to commit the wrongdoing that procured the unavailability of the declarant."

In this case, there was sufficient evidence for the hearing judge to find, by a clear and convincing standard, 1) that Smiley ardently and insistently sent word to his nephew to get rid of Elmer Duffy, 2) that Elmer Duffy was subsequently murdered, 3) that Smiley jubilantly reacted to the news of the murder, and 4) that Smiley's nephew Heathcliff Parker was, indeed, then charged with that murder. Although Parker would enjoy a presumption of innocence at his own trial for the murder of Duffy, he enjoys no such presumption at a non-jury hearing in an unrelated matter involving a different defendant. Parker's indictment for Duffy's murder was admissible evidence at the hearing to help show Smiley's involvement in procuring Duffy's unavailability.

Tracey Hawes v. State of Maryland, No. 146, September Term 2011, filed February 25, 2014. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2014/0146s11.pdf

WRIT OF ACTUAL INNOCENCE – SECTION 8-301 OF THE CRIMINAL PROCEDURE ARTICLE – DISMISSAL OF PETITION WITHOUT A HEARING – PETITIONER MUST PLEAD FACTS THAT CAN ESTABLISH NEWLY DISCOVERED EVIDENCE THAT WAS NOT AVAILABLE IN TIME TO FILE A MOTION FOR NEW TRIAL UNDER RULE 4-331(c) – FINAL LITIGATION AND WAIVER PROVISIONS OF THE UNIFORM POST CONVICTION ACT DO NOT PRECLUDE FILING OF PETITION FOR WRIT OF ACTUAL INNOCENCE.

Facts:

In 1994, the appellant was convicted of first-degree murder and sentenced to life in prison and a consecutive ten years. He unsuccessfully pursued a direct appeal, a postconviction proceeding, two petitions to reopen the postconviction proceeding, a petition for writ of *habeas corpus*, and a motion for new trial not based on newly discovered evidence. In 2010, he filed a petition for writ of actual innocence. The circuit court dismissed the petition without a hearing. On appeal the appellant argued that he was entitled to a hearing on his petition, and therefore the circuit court's ruling was in error.

Held: Order dismissing petition affirmed.

The circuit court did not err in dismissing the petition for writ of actual innocence without a hearing. A petitioner must allege "newly discovered evidence" that creates a significant or substantial possibility that the result of the trial may have been different and that the newly discovered evidence could not have been discovered in time to move for a new trial under Rule 4-331. The petition must "state in detail the grounds on which the petition is based." The court may dismiss the petition without a hearing if it fails to state grounds on which relief may be granted.

The appellant's trial counsel's acknowledgment, in 2005, that he should have objected to the first-degree murder instruction and should have asked for an alibi instruction, is not an allegation of "newly discovered evidence," as a matter of law. It is not evidence at all, and cannot serve as a basis for a petition for writ of actual innocence.

Despite a discovery request, the appellant was not given a report by police officers of their interview of the primary witness against him. He obtained the report through a Maryland Public Information Act ("MPIA") request. In his petition for writ of actual innocence, he did not allege

facts that could show that he did not receive the report in time to file a motion for new trial based on newly discovered evidence, however. Under subsection c of Rule 4-331, a motion for new trial based on newly discovered evidence may be filed up to a year **after** the date the court imposed sentence **or** the date the court received the mandate issued by the final appellate court to consider a direct appeal, whichever is **later**. The record shows that the appellant made his MPIA request before this Court filed its opinion on direct appeal affirming the convictions. The appellant does not allege when he received the report, but erroneously asserts that his deadline for filing a motion for new trial based on newly discovered evidence expired in February 1995, when in fact it expired in March 1996, more than a year after the MPIA request was made. The appellant does not allege facts to show that he did not receive the police report before that date, and therefore could not have filed a timely motion for new trial based on newly discovered evidence. Accordingly, the petition for writ of actual innocence did not state a claim for which relief could be granted and properly was dismissed without a hearing.

Contrary to the State's argument, the appellant was not precluded from filing a petition for writ of actual innocence by the final adjudication and waiver provisions of the Uniform Postconviction Act. In *Douglas v. State*, 423 Md.156 (2011), the Court of Appeals made clear that the procedure and remedies afforded by the statute creating the writ of actual innocence are separate and apart from the procedure and remedies governed by the Uniform Postconviction Act.

In re: Joy D., No. 693, September Term 2013, filed January 29, 2014. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2014/693s13.pdf

CJP § 3-812(d) – REUNIFICATION – WAIVER OF REASONABLE EFFORTS REQUIREMENT

Facts:

Crystal D. appealed from an order of the Circuit Court for Baltimore City, sitting as a juvenile court, granting the motion of the Baltimore City Department of Social Services ("BCDSS") to waive its obligation to continue to make reasonable efforts to reunify her with her daughter, Joy D.

Ms. D., who was diagnosed with borderline personality disorder and displayed erratic behavior with explosive anger, had a long history with BCDSS and the court system, involving each of her five children: Joshua, born June 19, 1991; India, born July 7, 1996; Linda, born July 21, 1999; Malachi, born June 11, 2007; and, Joy, born September 21, 2002. In 1998, Ms. D. consented to the removal of Joshua and India from her custody, and the children were placed with their maternal grandparents. Joshua was never reunified with Ms. D. In 2003, Ms. D.'s parental rights with respect to India and Linda were terminated after a contested hearing.

Joy subsequently was found to be a CINA, and in May 2013, Ms. D. became unwilling to continue to work with social workers. Subsequently, BCDSS filed a motion to waive the requirement that it continue to make reasonable efforts to reunify Joy and with Ms. D. The motion was made pursuant to Md. Code (2013 Repl. Vol.) § 3-812 of the Courts & Judicial Proceedings Article ("CJP"), which provides that, if the court finds by clear and convincing evidence that certain circumstances exist, including that the parent has involuntarily lost parental rights of a sibling of a child, the court shall waive the requirement that reasonable efforts be made to reunify the child with the child's parent or guardian.

The motion noted that Joy had been out of Ms. D's care continuously since June of 2011, Ms. D. had a long history of not being able to provide for her children, and on November 6, 2003, the court had involuntarily terminated her parental rights to Linda and India. BCDSS asserted that it had not sought a waiver previously because it was attempting to give Ms. D. another opportunity to address the reasons for Joy's placement in BCDSS's care, and in deference to the court's decision to continue a plan of reunification. Ms. D., however, had demonstrated repeatedly that she had no understanding of her untreatable condition. BCDSS asserted that, in addition to the authority provided by statute, it was in the children's best interest that efforts for reunification cease, noting that Ms. D.'s condition had not improved since 1998. Accordingly, BCDSS requested that the court waive the requirement that it make reasonable efforts at reunification, and it requested a permanency planning hearing, and the court granted the motion.

On appeal, Ms. D. asserted that, despite the mandatory language of CJP § 3-812, the court was required to exercise discretion before granting the motion. she further asserted that if the statute was mandatory, it violated her fundamental constitutional right to raise her children free from undue and unwarranted interference on the part of the State.

Held: Affirmed.

When a local department requests the court to waive its obligation to continue reunification efforts, pursuant to CJP § 3-812(d), and the court finds, by clear and convincing evidence, that one of the statutory waiver conditions exists, including that the parent involuntarily lost parental rights to a sibling child, the court is required to grant the motion. The constitutional claim was not preserved for review.

David Payne et ux. v. Erie Insurance Exchange, et al., No. 46, September Term 2013, filed January 29, 2014. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2014/0046s13.pdf

AUTOMOBILE LIABILITY INSURANCE – OMNIBUS CLAUSE – FIRST PERMITTEE – SECOND PERMITTEE – PERMISSIVE USE

Facts:

Alan Dwyer owned a 1995 Subaru automobile that was insured by Erie Insurance Exchange. He gave unlimited permission to use the Subaru to his daughter, Karen Dwyer. He specifically forbade the father of Karen's children, Ameen Abdulkhalek, from driving the Subaru. Karen and the children lived with Dwyer; Abdulkhalek did not. On February 11, 2008, Karen was feeling ill and asked Abdulkhalek to go without her to pick up their children from school, which was located two blocks from the Dwyer house, using the Subaru that he was prohibited from driving. Instead of going directly from the Dwyer house to the school, Abdulkhalek drove to a gas station for an unknown reason. After leaving the gas station, Abdulkhalek collided with the rear of an automobile driven by David Payne.

Payne filed suit against Abdulkhalek and others in the Circuit Court for Prince George's County. Erie Insurance Exchange claimed that Abdulkhalek's use of the Subaru was not covered under the omnibus clause of its liability insurance policy. The circuit court granted summary judgment in favor of Erie and Payne appealed to the Court of Special Appeals.

Held: Affirmed.

A named insured's grant of permission to use a vehicle to a first permittee can implicitly extend coverage to a third person the first permittee enlists to drive the vehicle in her presence and for her benefit. The first permittee must be present inside the vehicle while the third person is driving, and the use of the vehicle must be within the permitted scope defined by the named insured.

In this case, the named insured explicitly forbade Abdulkhalek from driving the car. Coverage cannot be implicitly extended, in the face of that explicit prohibition, because the first permittee, Karen Dwyer, was not present in the vehicle when Abdulkhalek collided with Payne, and, in any event, Abdulkhalek exceeded the scope of any implicit permitted use by not going directly to the school to pick up the children. The circuit court correctly found that the accident was not covered by the omnibus clause in Erie's insurance policy.

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ATTORNEY DISCIPLINE

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By a Per Curiam Order of the Court of Appeals dated February 12, 2014, the following attorney has been disbarred:

JOSEPH LEE FRIEDMAN

*

By an Order of the Court of Appeals dated February 20, 2014, the following attorney has been disbarred by consent:

KELLY STEBBINS CROMER

*

By an Opinion and Order of the Court of Appeals dated February 21, 2014, the following attorney has been disbarred:

JOHN MARK MCDONALD

*

By an Opinion and Order of the Court of Appeals dated January 24, 2014, the following attorney has been indefinitely suspended, effective February 24, 2014:

MELISSA DONNELLE GRAY

*

By an Opinion and Order of the Court of Appeals dated February 24, 2014, the following attorney has been disbarred:

LAWRENCE PAUL PINNO, JR.

*

*

By an Opinion and Order of the Court of Appeals dated February 26, 2014, the following attorney has been disbarred:

JAMES ALBERT FROST

*

By an Opinion and Order of the Court of Appeals dated February 27, 2014, the following attorney has been disbarred:

GLENN CHARLES LEWIS

*

By an Order of the Court of Appeals dated February 27, 2014, the following attorney has been reprimanded by consent:

SUSAN WHITTINGTON RUSSELL

*

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Eighty-Second Report of the Standing Committee on Rules of Practice and Procedure was filed on February 20, 2014:

http://www.mdcourts.gov/rules/rodocs/182ro.pdf