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Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

Return to ToC

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Andrew Ndubisi Ucheomumu, Misc. Docket AG No. 58, September Term 2016, filed November 16, 2018. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2018/58a16ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On the Attorney Grievance Commission's behalf, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Andrew Ndubisi Ucheomumu, Respondent, a member of the Bar of Maryland, charging him with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.2(a) (Allocation of Authority Between Client and Lawyer), 1.3 (Diligence), 1.4 (Communication), 1.5(a) (Reasonable Fees), 1.5(b) (Communication of Fees), 1.8(a), 1.8(h) (Conflict of Interest; Current Clients; Specific Rules), 1.15(a), 1.15(b), 1.15(c) (Safekeeping Property), 1.16(d) (Terminating Representation), 3.3(a)(1) (Candor Toward the Tribunal), 8.1(a) (Disciplinary Matters), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), and 8.4(a) (Violating or Attempting to Violate the MLRPC), and Maryland Rule 19-408 (Commingling of Funds).

A hearing judge found the following facts. Shannan Martin retained Ucheomumu to represent her in an appeal. For an appeal to proceed, transcripts of relevant proceedings in the trial court need to be ordered by a certain deadline. In this case, after the deadline passed, Ucheomumu requested from Martin money to cover the cost of obtaining transcripts, and she paid him $3,000. Ucheomumu, however, never ordered the transcripts or advised Martin to do so. The Court of Special Appeals issued an order directing Martin to show cause why the appeal should not be dismissed for failure to file the transcripts. Ucheomumu filed a motion for extension of time to file the transcripts in which he falsely stated that one of the reasons why there had been a delay in filing the transcripts was that Martin's previous counsel had not provided him with them.

Martin terminated Ucheomumu's representation. Although Ucheomumu had not earned the total of $6,200 that Martin had paid him, he did not refund the $6,200. Additionally, after the Court of Special Appeals denied the motion for extension of time and dismissed the appeal,

Ucheomumu falsely advised Martin that she was responsible for the appeal's dismissal. Martin filed a complaint against Ucheomumu with Bar Counsel. In his response to Martin's complaint, Ucheomumu falsely stated that he had advised Martin to order the transcripts, that she had never paid him so that he could order the transcripts, and that the Court of Special Appeals had dismissed the appeal because Martin had failed to order the transcripts.

The hearing judge concluded that Ucheomumu had violated MLRPC 1.1, 1.2(a), 1.3, 1.4, 1.5, 1.15(a), 1.15(c), 1.16, 3.3, 8.1, 8.4(c), 8.4(d), and 8.4(a), and had attempted to violate MLRPC 1.8(h)(1) and 1.8(h)(2) in violation of MLRPC 8.4(a).

Held: Disbarred.

The Court of Appeals denied Ucheomumu's requests to dismiss the attorney discipline proceeding or remand it to the hearing judge. The Court also overruled all but one of Ucheomumu's fifteen exceptions to the hearing judge's findings of fact. The Court reversed the hearing judge's conclusions that Ucheomumu attempted to violate MLRPC 1.8(h)(1) and 1.8(h)(2), thereby violating MLRPC 8.4(a), and upheld the rest the hearing judge's conclusions of law.

The Court agreed with Bar Counsel that the appropriate sanction was disbarment. The Court explained that disbarment follows as a matter of course when a lawyer is shown to be willfully dishonest for personal gain by means of fraud, deceit, cheating, or like conduct, absent the most compelling extenuating circumstances. After failing to order the transcripts, Ucheomumu falsely represented to the Court of Special Appeals that Martin's previous counsel was to blame for the delay in ordering the transcripts, and he falsely represented to Martin and Bar Counsel that she was to blame. Ucheomumu made these misrepresentations because he had the selfish motive of keeping the $6,200 that Martin had paid him. In other words, Ucheomumu was willfully dishonest for personal gain.

The Court explained that, given the absence of significant mitigating factors, much less compelling extenuating circumstances, Ucheomumu's multiple false statements, without more, would justify disbarment. It was even clearer that disbarment was the appropriate sanction when the Court took into account Ucheomumu's various other forms of misconduct, including failures of competence, diligence, and communication, collecting an unreasonable fee, and failing to maintain unearned funds in an attorney trust account. Additionally, there were seven aggravating factors, including prior attorney discipline, a pattern of misconduct, and likelihood of repetition of misconduct. The Court determined that, considered together, all of these circumstances merited disbarment.

Return to ToC

Baltimore City Detention Center v. Michael Foy, No. 3, September Term 2018, filed November 19, 2018. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2018/3a18.pdf

STATE CORRECTIONAL OFFICERS' BILL OF RIGHTS – PENALTY-INCREASE MEETING – PROCEDURAL REQUIREMENTS

Facts:

An administrative hearing board found Respondent, Michael Foy ("Foy"), a correctional officer at the Baltimore City Detention Center, Petitioner, guilty of using excessive force against an inmate. The hearing board recommended that Foy be transferred and demoted. Commissioner John Wolfe ("Commissioner") of the Baltimore City Division of Pretrial Detention and Services elected to increase the hearing board's recommended penalty.

Under the State Correctional Officers' Bill of Rights ("COBR"), codified at Maryland Code, Correctional Services Article § 10 901, et seq., the Commissioner can only increase the hearing board's recommended penalty if, among other things, the Commissioner meets with the charged correctional officer and allows the officer to be heard "on the record." Commissioner Wolfe and Foy met to discuss the potential increased sanction. During the meeting, recording equipment malfunctioned, and, consequently, no record of the meeting was captured. The parties were set to meet again but Commissioner Wolfe canceled, likely because of the impending thirty-day deadline for issuing a final disciplinary order. Commissioner Wolfe then drafted a memorandum summarizing the meeting and issued a final order terminating Foy.

Foy sought judicial review of the Commissioner's actions in the Circuit Court for Baltimore City. The court remanded the case to Commissioner Wolfe to conduct another penalty-increase meeting to cure the recording defect. Foy appealed, and a panel of the Court of Special Appeals, in a 2-1 decision, reversed the circuit court's order. The Majority held that the thirty-day deadline for issuing a final order precluded a remand to cure the procedural defect. The dissent argued that the COBR did not intend such a rigid result and suggested that a remand was the proper outcome.

Held:

The Court of Appeals held that although the Commissioner failed to satisfy the COBR's procedural requirements for increasing a recommended penalty, the proper remedy for the unforeseen technological glitch was to remand the case to the Commissioner to conduct another penalty-increase meeting on the record. The thirty-day deadline for issuing a final order does not preclude this result because Foy failed to demonstrate any prejudice caused by the recording

defect. Foy did not assert that the Commissioner overlooked material information discussed at the initial penalty-increase meeting. Nor did Foy challenge the accuracy of the Commissioner's recounting of that meeting. More is required to overturn an agency decision based solely on an inadvertent procedural shortcoming. On remand, the Commissioner must be sure to contemporaneously record the substance of the penalty-increase meeting.

Return to ToC

Rodney Lee Agnew v. State of Maryland, No. 9, September Term 2018, filed November 20, 2018. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2018/9a18.pdf

CRIMINAL LAW – EVIDENCE – MARYLAND WIRETAP ACT – RECORDED CONVERSATIONS

Facts:

Mr. Agnew was convicted of possession of a firearm after a disqualifying conviction, possession with intent to distribute heroin, and possession with intent to distribute cocaine. Mr. Agnew was sentenced to eight years of imprisonment on each count, to run concurrently. At trial, the State introduced a recorded conversation between Mr. Agnew and an unidentified person that was lawfully recovered from Mr. Agnew's cell phone. According to expert testimony at trial, the recording was "indicative of a drug deal."

Mr. Agnew objected to the admission of the recording, arguing that the unidentified person was unaware that the conversation was being recorded and therefore did not consent to its recording. Accordingly, because the recording lacked the two-party consent required by the Maryland Wiretap Act, Maryland Code, Courts and Judicial Proceedings Article, § 10-402(c)(3), Mr. Agnew reasoned that it was inadmissible against him. The trial court overruled Mr. Agnew's objection, observing that because Mr. Agnew made the recording, it was admissible against him. The Court of Special Appeals upheld the trial court's admission of the recording, agreeing that Mr. Agnew was not entitled to the protections of the Maryland Wiretap Act since he was a willing party to the conversation by surreptitiously recording it.

Held: Affirmed.

The Court of Appeals held that where a party to a conversation participates in or consents to the recording of that conversation, the Maryland Wiretap Act does not bar admission of that recording against the consenting party. The Court noted that the "protective umbrella" of the Maryland Wiretap Act extends to those who do not consent to the interception of their conversations, but does not "allow an accused to consent to the surreptitious recording of [their] conversation with another party and later cause that recording to be suppressed on the ground that the other party to the conversation did not consent." *State v. Maddox*, 69 Md. App. 296, 301, 517 A.2d 370, 372 (1986). Because Mr. Agnew recorded the conversation, it was admissible against him.

Return to ToC

Darryl Nichols v. State of Maryland, No. 8, September Term 2018, filed November 7, 2018. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2018/8a18.pdf

LAW OF THE CASE DOCTRINE – MARYLAND RULE 4-345(a) – MD. CODE ANN., CRIM. LAW (2002, 2012 REPL. VOL.) § 1-202 – MAXIMUM SENTENCE FOR CONSPIRACY – MD. CODE ANN., CTS. & JUD. PROC. (1974, 2013 REPL. VOL.) § 12-702(b) – AGGREGATE SENTENCE

Facts:

In the Circuit Court for Baltimore City, the State, Respondent/Cross-Petitioner, charged Darryl Nichols, Petitioner/Cross-Respondent, with first-degree murder, kidnapping, false imprisonment, extortion, and conspiracy to commit each of these crimes. At trial, the State offered evidence that Nichols and multiple other people kidnapped a man and arranged for his girlfriend to deliver a ransom; subsequently, the man was killed. A jury found Nichols guilty of first-degree felony murder, false imprisonment, conspiracy to commit false imprisonment, extortion, and conspiracy to commit extortion.

The circuit court sentenced Nichols to: life imprisonment, with all but fifty years suspended, for first-degree felony murder; life imprisonment, with all but fifty concurrent years suspended, for false imprisonment; fifty concurrent years of imprisonment for conspiracy to commit false imprisonment; five concurrent years of imprisonment for extortion; five concurrent years of imprisonment for conspiracy to commit extortion; followed by five years of supervised probation. Nichols's original aggregate sentence was life imprisonment, with all but fifty years suspended, followed by five years of supervised probation.

Nichols appealed. The Court of Special Appeals vacated Nichols's convictions for first-degree felony murder and conspiracy to commit extortion, vacated his sentence for false imprisonment, affirmed the balance of his convictions and sentences, and remanded for resentencing as to false imprisonment with instructions not to impose a sentence that exceeded thirty years of imprisonment.

The circuit court conducted a resentencing proceeding, at which Nichols's counsel contended that, because the maximum sentence for false imprisonment was thirty years of imprisonment, the sentence for conspiracy to commit false imprisonment could not exceed thirty years of imprisonment. The circuit court concluded that it lacked the authority to resentence Nichols for conspiracy to commit false imprisonment. The circuit court resentenced Nichols to thirty years of imprisonment for false imprisonment, consecutive to his existing fifty-year sentence for conspiracy to commit false imprisonment, making his new aggregate sentence eighty years of imprisonment.

Nichols appealed again. The Court of Special Appeals vacated Nichols's sentence for false imprisonment, affirmed in all other respects, and remanded for resentencing as to false imprisonment. Nichols petitioned for a writ of *certiorari*, and the State conditionally cross-petitioned for a writ of *certiorari*. The Court of Appeals granted the petition and the conditional cross-petition.

Held: Reversed and remanded.

The Court of Appeals held that the law of the case doctrine bars a trial court from considering under Maryland Rule 4-345(a) an issue as to the legality of a sentence where an appellate court has previously resolved the same issue. The law of the case doctrine does not, however, bar a trial court from considering under Maryland Rule 4-345(a) an issue as to the legality of a sentence that an appellate court has not resolved. In addition, the law of the case doctrine does not prohibit consideration of an issue as to the legality of a sentence under Maryland Rule 4-345(a) where a defendant could have raised, but failed to raise, the issue in a prior appeal. The Court of Appeals agreed with Nichols that, at the resentencing proceeding, he raised a new issue by contending that his fifty-year sentence for conspiracy to commit false imprisonment was illegal because it exceeded the thirty-year maximum sentence for false imprisonment.

The Court of Appeals held that, under Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol.) ("CR") § 1-202—which states: "The punishment of a person who is convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit"—where a defendant is convicted of both a crime and conspiracy to commit that crime, a trial court may not impose for conspiracy a sentence that exceeds the sentence that the trial court imposed for the crime that the person conspired to commit. The Court explained a plain language analysis of CR § 1-202 warranted the stance that it reached. And, although CR § 1-202's language is unambiguous, the Court observed, as a confirmatory matter, that CR § 1-202's legislative history required the same outcome. In other words, in enacting CR § 1-202, the General Assembly's purpose was to ensure that, in any given case, a defendant's sentence for conspiracy to commit a crime would not exceed the sentence that the defendant received for the crime that the defendant conspired to commit.

The Court of Appeals held that, under CJ § 12-702(b)—which states that, generally, on remand, a trial court "may not impose a sentence more severe than the sentence previously imposed for the offense"—an aggregate sentence of a certain number of years of imprisonment is more severe than a sentence of life imprisonment, with all but a lower number of years suspended. Where a trial court imposes an aggregate sentence of a certain number of years of imprisonment, the defendant is essentially guaranteed to serve that term of imprisonment, barring a circumstance such as the grant of parole. By contrast, where a trial court imposes a sentence of life imprisonment, with all but a certain number of years suspended, it is impossible to know in advance whether the defendant will serve only that term of years, or whether the defendant will serve a life sentence based on a potential violation of probation. If the defendant finishes the term of probation without violating any condition thereof, then the defendant will no longer be

subject to a sentence of life imprisonment. And, even if the defendant violates a condition of probation, the defendant will not necessarily become subject to a sentence of life imprisonment.

The Court of Appeals granted the State's request to vacate all of Nichols's sentences and remand to the circuit court for resentencing as to all of his three remaining convictions, which were for false imprisonment, conspiracy to commit false imprisonment, and extortion. Where an appellate court determines that at least one of a defendant's sentences must be vacated, the appellate court may vacate all of the defendant's sentences and remand for resentencing to provide the trial court maximum flexibility on remand to fashion a proper sentence that takes into account all of the relevant facts and circumstances. Under this case's circumstances, the Court found it appropriate to exercise its discretion to vacate all of Nichols's sentences. On remand, consistent with the Court's holding that the sentence of life imprisonment with all but fifty years suspended was less severe than the sentence of eighty years of imprisonment, the circuit court was required to impose an aggregate sentence that did not exceed fifty years of imprisonment.

Return to ToC

State of Maryland v. Brandon Payton, No. 14, September Term 2018, filed November 1, 2018. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2018/14a18.pdf

CRIMINAL LAW – CRIMINAL PROCEDURE – REOPENING THE STATE'S CASE-IN-CHIEF

Facts:

Respondent Brandon Payton was tried in the Circuit Court for Baltimore City for murder and related charges, following an incident during which the victim died from gunshot wounds. Mr. Payton was alleged to be the shooter. At trial, a witness to the shooting testified to his belief that the shooter's hand touched the hood of his vehicle when the shooter passed in pursuit of the victim. Lift cards of the alleged shooter's latent palm print were taken from the surface of the vehicle.

To establish the identity of the shooter, the State relied on the testimony of Sean Dorr, a certified latent print examiner at the Baltimore City Police Department. In his initial testimony, Mr. Dorr identified the latent print that was lifted from the vehicle by scanning the latent print into the Automated Fingerprint Identification System ("AFIS"). According to Mr. Dorr, the latent print matched the left palm of Brandon Payton, State Identification Number ("SID number") 2476078.

Mr. Dorr also explained that he took Mr. Payton's fingerprints on August 9, 2016 but that he did not compare the August 9 prints to the AFIS prints associated with Mr. Payton's SID number. He did, however, verify that the August 9 prints were associated with Mr. Payton's SID number.

The trial judge and Respondent's counsel expressed confusion, outside the presence of the jury, about what comparisons Mr. Dorr made. The prosecutor elicited additional testimony from Mr. Dorr that the August 9 prints were associated with SID number 2476078 then the State rested its case.

Respondent moved for judgment of acquittal without particularizing a basis. The trial judge interjected, asking the State when, if ever, it connected the unknown latent print to Mr. Payton. The State offered an explanation, and portions of Mr. Dorr's testimony were replayed. The trial judge, however, remained unpersuaded that the State connected Mr. Payton to the crime through its fingerprint evidence. The trial judge gave the State a choice: reopen its case and recall Mr. Dorr to elicit additional testimony or suffer the consequences of the court granting Mr. Payton's motion for judgment of acquittal.

Defense counsel objected to the State being allowed to reopen its case to recall Mr. Dorr. On two occasions, the trial judge referenced the crime for which Mr. Payton was charged and indicated that he was only allowing the procedure because of the nature of the crime.

The State recalled Mr. Dorr and sought to assuage the trial judge's confusion by connecting the fingerprint evidence to Respondent's SID number. Mr. Payton's attorney cross-examined Mr. Dorr. Then, the State again rested its case. Ultimately, the case was sent to the jury for deliberations, and the jury convicted Mr. Payton.

Mr. Payton appealed his conviction to the Court of Special Appeals. In relevant part, Mr. Payton challenged the trial court's decision to allow the State to reopen its case-in-chief. The Court of Special Appeals concluded that the trial judge abused his discretion. Thus, the intermediate appellate court remanded the case for a new trial.

Held: Affirmed

The Court of Appeals held that, although trial judges have discretion to allow the State to reopen its case, in this instance, the trial judge abused his discretion. First, the Court explained that criminal defendants have the right to a fair trial, which includes an impartial judge. Here, when the trial judge decided to allow the State to reopen its case, he impermissibly weighed the nature of the charges pending against Respondent to justify the recalling of the witness. Additionally, the trial judge, essentially, acted as a prosecutor when he reopened the State's case instead of ruling on Respondent's motion for judgment of acquittal. Therefore, a reasonable person could question the trial judge's impartiality when he decided to allow the State to reopen its case. As such, the trial judge abused his discretion and Respondent was deprived of his right to a fair trial.

Next, the Court considered *Booze v. State*, 334 Md. 64, 637 A.2d 1214 (1994), which explained that a trial court's discretion to reopen the State's case is limited, insofar as the reopening may not impair the defendant's right to receive a fair trial. Here, the trial court's decision unfairly prejudiced Respondent's right to a fair trial. The trial judge perceived a gap in the State's evidence. Yet, instead of ruling on Respondent's motion, the trial judge allowed the State to recall Mr. Dorr to fill that gap. As a result, the State was allowed to present the crux of its case to the jury for a second time. Mr. Dorr's testimony upon reopening was heard in isolation, and it was the last thing that the jury heard before convening. Therefore, as a matter of law, the trial judge's decision unfairly prejudiced Respondent's right to receive a fair trial. The Court concluded that Respondent is entitled to receive a new trial.

Return to ToC

Philip Paul Ingram Jr. v. State of Maryland, No. 4, September Term 2018, filed November 19, 2018. Opinion by Harrell, J.

https://www.courts.state.md.us/data/opinions/coa/2018/4a18.pdf

CRIMINAL LAW – THEFT – RESTITUTION

CRIMINAL PROCEDURE – THEFT – RESTITUTION

Facts:

Philip Ingram was caught stealing tires from his employer, BJ's Wholesale Club, and arrested. He was charged initially with two counts: theft and theft scheme of property having a value of at least $10,000, but less than $100,000. In exchange for a guilty plea to the theft count, the State agreed to nol pros the theft scheme count. Ingram pleaded guilty in the Circuit Court for Baltimore County, under revised § 7-104(g)(1)(i)(2) of the Md. Code, Criminal Law Article, of theft of property valued of at least $1,000, but less than $10,000. The total value of the stolen tires was $18,964.55.

At sentencing, neither the State nor a representative from BJ's Wholesale Club requested the circuit court to order Ingram to pay restitution.

The circuit court judge sentenced Ingram to 10 years of incarceration, with all but 18 months suspended in favor of three years of probation. The judge also ordered Ingram to pay BJ's Wholesale Club $18,964.55 in restitution.

Ingram challenged the circuit court's award of restitution on the basis that neither the State nor BJ's had requested restitution. The court rejected this challenge. Ingram filed an application for leave to appeal from his guilty plea, which was granted by the Court of Special Appeals. On appeal, Ingram argued that the circuit court was not permitted to order him to pay restitution, without a request from the victim or the State, as required under Title 11, § 11-603(b)(1) of the Criminal Procedure Article of the Maryland Code, which states: "[a] victim is presumed to have a right to restitution … if: (1) the victim or the State requests restitution. . . ." The Court of Special Appeals concluded, in a per curiam opinion, that the sentencing judge was obliged to order restitution pursuant to § 7-104(g)(1)(i)(2) of the Maryland Criminal Law Article, which states: "[a] person convicted of theft of property … shall restore the property taken to the owner or pay the owner the value of the property or services. . . ."

Ingram sought certiorari review, arguing that restitution orders fall broadly under § 11-603(b)(1) of the Criminal Procedure Article, which requires a request from the victim or the State before restitution may be ordered. The Court of Appeals granted Ingram's petition for writ of certiorari.

Return to ToC

Held: Affirmed.

The Court of Appeals determined that § 7-104(g)(1)(i)(2) of the Criminal Law Article should be read as a "theft exception" to the general restitution provision, § 11-603(b)(1) of the Criminal Procedure Article. Because § 7-104(g)(1)(i)(2) of the Criminal Law Article mandates restitution in theft cases, a request for restitution is not necessary before the Court may order it as part of the sentence, whether following conviction after a trial or based on a guilty plea.

The Court, relying on *State v. Roschchin*, 446 Md. 128, 130 A.3d 453 (2016), looked at the degree of specificity of the competing statutory sections under consideration. In determining that § 7-104(g)(1)(i)(2) of the Criminal Law Article is a "theft exception" to § 11-603(b)(1) of the Criminal Procedure Article, the Court reasoned that, although both statutes deal with restitution (one generally and one specifically), § 7-104(g)(1)(i)(2) of the Criminal Law Article directs restitution only with regard to theft crimes. The Court stated further that treating § 7-104(g)(1)(i)(2) of the Criminal Law Article as a theft exception to § 11-603(b)(i) of the Criminal Procedure Article preserves the restitution scheme obligatory for theft offenses while yet recognizing the otherwise general applicability of the other limitations and requirements to restitution found in Title 11.

Return to ToC

Bradford Owusu v. Motor Vehicle Administration, No. 10, September Term 2018, filed November 20, 2018. Opinion by Hotten, J.

Watts, J., joins in judgment only.

https://mdcourts.gov/data/opinions/coa/2018/10a18.pdf

CONSTITUTIONAL LAW – DUE PROCESS

FULL ADVISEMENT – SUFFICIENCY OF STATUTORY ADVISEMENT

Facts:

On April 15, 2017, officers of the Montgomery County Police Department stopped Bradford Owusu ("Petitioner") after he was observed driving erratically. Upon approaching the vehicle, officers detected a strong odor of alcohol on Petitioner's breath and observed bloodshot watery eyes as well as slurred speech. Suspecting that Petitioner was driving under the influence of alcohol, an officer instructed Petitioner to perform several field sobriety tests. Petitioner was unable to complete the tests in a satisfactory manner. He was detained for driving under the influence of alcohol. Officers transported Petitioner to the Montgomery County Police Department, where he was provided the DR-15 Advice of Rights form. The officer then instructed Petitioner to follow along as he read the form aloud.

A body camera used throughout the stop and arrest reveals that officers attempted to clarify whether Petitioner held a commercial driver's license ("CDL"). During their inquiry and after reading the DR-15, the officers stated the repercussions of refusing to take the test, declaring that Petitioner's driver's license would be suspended for 270 days if he refused to take a blood alcohol concentration test ("test") or 180 days if Petitioner took the test and blew a 0.08 or higher. Officers also asserted that Petitioner's work would be affected if he held a CDL, asserting that "this can affect your work for 180 days or it can affect your work for 270 days."

The officers repeatedly asked Petitioner if he wanted to take the test, but Petitioner did not respond. Based on Petitioner's lacking responsiveness, the officers treated the lack of response as a refusal. As a result, Petitioner was issued an Order of Suspension.

Petitioner filed a timely request for an administrative hearing, which was held on July 14, 2017. Petitioner testified that the officers' oral assertions after the DR-15 led him to believe that he would be able to get his license and CDL back after 270 days. Petitioner also testified that, had he known his CDL would be disqualified for a full year, he would have opted to take the test. Petitioner asserted that the officers' oral advisements and the DR-15 were false, misleading and violated his due process rights, as well as his right to "full advisement" of administrative sanctions under Md. Code, Transportation Article ("Transp.") § 16-205.1. The Administrative

Law Judge rejected Petitioner's arguments and held that the DR-15 provided sufficient advice and that the officers' oral advisements were factually correct.

On January 10, 2018, following a hearing, the Circuit Court for Montgomery County affirmed the decision of the Administrative Law Judge.

Held: Affirmed.

The Court of Appeals held that officers' oral advisements after a complete reading of the DR-15 did not operate to negate full advisement, nor did the advisements result in prejudice that violated Petitioner's due process rights. The Court held that there was no evidence that officers' oral statements misled or confused Petitioner regarding the effect a test refusal could have on his employment. Furthermore, nothing on the record demonstrated that the officers constructed an obstacle or "road block" that unduly burdened Petitioner's decision-making, nor did anything that the officers said suggest that they induced Petitioner's decision-making. *Forman v. Motor Vehicle Admin.*, 332 Md. 201, 217, 630 A.2d 753,762 (1993); *see also Hare v. Motor Vehicle Admin.*, 326 Md. 296, 304, 604 A.2d 914, 918 (1992). Because the information in the DR-15 provided full advisement and the officers' verbal assertions were not misleading or false, the Court held that Petitioner's statutory claim regarding full advisement was without merit.

The Court of Appeals also held that the DR-15 was unambiguous regarding the duration of participation in the Interlock Program and was consistent with Petitioner's right to due process and the statutory right to full advisement under Transp. § 16-205.1.

Return to ToC

COURT OF SPECIAL APPEALS

Carlos Nicholson v. State of Maryland, No. 862, September Term 2017, filed November 5, 2019. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2018/0862s17.pdf

CRIMINAL LAW – FELONY MURDER – SELF DEFENSE – HARMLESS ERROR – SUFFICIENCY OF THE EVIDENCE – SUFFICIENCY OF INDICTMENT

Facts:

Following a jury trial, Nicholson was convicted of possession of marijuana with intent to distribute, conspiracy to distribute marijuana, and second-degree felony murder. The underlying offense occurred on January 7, 2016, when Treshawn Johnson was shot and killed outside of Nicholson's home in Owings Mills, Maryland. Mancino Carpentieri had also been shot and was limping nearby when police arrived.

Nicholson was arrested three days following the shooting. He waived his *Miranda* rights and told police officers that Johnson and Carpentieri had attempted to rob him at gunpoint during a drug deal and that an altercation ensued. The detectives asked Nicholson if he could have shot the assailant during the altercation, and Nicholson responded that "maybe" he did. Nicholson told detectives that he had "tussl[ed]" with individuals attempting to rob him and that he had heard "[a] whole bunch of shots" go off during the altercation. Nicholson maintained that neither he nor his friend who was present at the time brought a firearm to the rendezvous.

Nicholson was charged with first-degree murder, attempted first-degree murder, use of a firearm in the commission of a crime of violence, possession of a firearm with a nexus to a drug trafficking crime, possession of marijuana with intent to distribute, and conspiracy to distribute marijuana. The case proceeded to a jury trial. Nicholson requested a jury instruction on self-defense, but the trial judge determined that self-defense had not been generated and declined to propound the requested instruction. The jury found Nicholson guilty of possession of marijuana with intent to distribute, conspiracy to distribute marijuana, and second-degree felony murder and acquitted him of the remaining charges. Nicholson appealed.

Held: Affirmed.

Nicholson raised three issues on appeal. First, Nicholson argued that the circuit court erred by refusing to propound his requested jury instruction on self-defense. The Court of Special Appeals discussed the standard for determining whether a trial court has abused its discretion by declining to propound a requested instruction, observing that "[f]or an instruction to be factually generated, the defendant must produce 'some evidence' sufficient to raise the jury issue." *Arthur v. State*, 420 Md. 512, 525 (2011). The Court observed that the "some evidence" standard is "a fairly low hurdle." *Id*. In this case, the Court of Special Appeals determined that Nicholson had satisfied the "some evidence" standard because the jury was presented with evidence that Nicholson was reasonably afraid for his life when he killed Johnson after being robbed at gunpoint. The Court observed that Nicholson's claim of self-defense was contradicted on many points by other evidence, but determined that Nicholson was entitled to have the jury instructed on self defense even though inconsistent theories of the defense were presented.

The Court held, however, that the circuit court's failure to instruct the jury on self defense was harmless beyond a reasonable doubt because Nicholson was acquitted of first- and second-degree murder and convicted of second-degree felony murder. The Court emphasized that under Maryland law, self-defense is not a defense to felony murder. The Court distinguished various out-of-state cases cited by Nicholson applying self-defense to felony murder and reiterated that self-defense is not applicable to felony murder under Maryland law.

The Court further addressed Nicholson's sufficiency of the evidence argument. Nicholson challenged his conviction for possession of marijuana with intent to distribute, arguing that Nicholson's confession on this point cannot alone establish his guilt. The Court observed that his confession was corroborated by text messages as well as eyewitness testimony, in addition to evidence regarding the circumstances of the shooting.

Finally, the Court addressed Nicholson's claim that the circuit court erred in submitting the charge of second-degree felony murder to the jury on the basis that it was not contained in the indictment and was not a lesser included offense of any charge contained in the indictment. The Court of Special Appeals observed that the Court of Appeals has held that the statutory short-form indictment is sufficient to charge felony murder. *Dishman v. State*, 352 Md. 279, 287-89 (1998). The Court, therefore, rejected Nicholson's claim that the criminal indictment was insufficient to charge him with second-degree felony murder.

Return to ToC

Kelvin Sewell v. State of Maryland, No. 2183, September Term 2016, filed November 29, 2018. Opinion by Leahy, J.

Friedman, J., dissents

https://mdcourts.gov/data/opinions/cosa/2018/2183s16.pdf

CRIMINAL LAW – MISCONDUCT IN OFFICE – MENS REA

Facts:

Kelvin Sewell was Chief of the Pocomoke City Police Department (the "Department") from December 2011 to July 2015. Sewell alleged that Pocomoke City terminated him in 2015 for refusing to fire Officer Franklin Savage and Lieutenant Lynell Green. Sewell's termination occurred in the same year that he and Savage filed a series of complaints with the United States Equal Employment Opportunity Commission ("EEOC") alleging various forms of racial discrimination against the Department and, eventually, the Worcester County Sheriff's Department and the State's Attorney for Worcester County.

Following Sewell's termination from the Department, and while his complaints were pending before the EEOC, the State Prosecutor began investigating Sewell's conduct as Police Chief based, in part, on information provided by the State's Attorney for Worcester County. The State Prosecutor looked specifically at Sewell and Green's handling of the investigation into a 2014 traffic incident in which Douglas Matthews, driving home from a meeting at the Prince Hall Masonic Lodge, hit and damaged two unoccupied parked cars. The State alleged that Sewell, a Mason, conspired with Green, also a Mason, to commit the common-law misdemeanor of official misconduct by directing their subordinates to resolve the incident without charging or citing Matthews because of their "membership in the Mason brotherhood." On July 16, 2016, a Worcester County grand jury indicted Sewell for corruptly committing misconduct in office and conspiring to commit the misconduct with Green.

To rebut the charge that he acted corruptly, Sewell maintained that his handling of the investigation was reasonable under the circumstances and consistent with the routine discretion that a small-town police chief exercises. He offered two expert witnesses who would have testified, among other things, to the considerations and objectives that impact a police chief's exercise of discretion during an investigation. The circuit court, however, granted the State's motion to exclude Sewell's experts' testimony, deciding that such testimony would not assist the fact-finder.

At trial, the alleged association between Sewell and Matthews through their membership in the Prince Hall Masonic Lodge did not emerge from the evidence. The State focused, instead, on eliciting testimony from officers that worked under Sewell at the time, who described Sewell's

conduct as "unusual" and out of the ordinary. The jury convicted Sewell of misconduct in office but acquitted him of conspiring with Green.

Held: Reversed

As an initial matter, the Court of Special Appeals held that the trial court did not abuse its discretion by denying, without a hearing, Sewell's motion to dismiss for government misconduct.

In reviewing the elements necessary to prove official misconduct, the Court observed that the measure of what constitutes official misconduct is an imbricating continuum of proof that runs from evidence of conduct squarely within an officer's discretion undertaken with corrupt intent (misfeasance)—to evidence of conduct clearly exceeding an official's scope of authority such that corrupt intent can be assumed (malfeasance). The Court determined that regardless of where on the spectrum between malfeasance and misfeasance that Sewell's alleged conduct fell, the ambit of his discretion remained central in the State's case for official misconduct. The Court determined that, although the State failed to show that Sewell's membership in the Prince Hall Masonic Lodge motivated his actions or had any relevance to the crimes charged, the balance of the circumstantial evidence presented at trial was enough from which a jury could infer corrupt intent.

Sewell sought to refute the State's circumstantial evidence of corrupt intent through expert witnesses who would have testified that his decision-making regarding the Matthews incident was not "unusual," but proper and consistent with how a small-town police chief would typically exercise his or her discretion under similar circumstances. The Court concluded that the trial court erred in failing to appreciate that the proffered expert testimony was relevant and would have shed light on issues that are "beyond the ken" of the average layperson, viz., the policies and procedures that a police department has in place regarding the internal handing of investigations, or the broad discretion that officers enjoy in assigning personnel and handling cases. This error prejudiced Sewell, especially given that the State's case rested on circumstantial proof of corrupt intent provided by subordinate officers who worked for the Department that Sewell alleged had discriminated against him and fired him retaliatorily.

Return to ToC

Joseph Walter v. State of Maryland, No. 814, September Term 2016, filed November 2, 2018. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2018/0814s17.pdf

CRIMINAL LAW – OFFICIAL EXPRESSIONS OF DISBELIEF IN SUSPECT'S STATEMENTS

Facts:

Appellant Joseph Walter was charged with sexual abuse of a minor, second-degree rape, and third-degree sexual offense. The victim was 12 years old at the time of the alleged offenses. Walter is the brother of the victim's stepfather.

The victim testified that in 2012, while Walter was living with her family, Walter came into her room without invitation and touched her breast outside of her clothing. She testified that, the next night, Walter returned and touched her breast and buttocks, under her clothing. She testified that, the following night, Walter put his penis inside of her. She claimed that she told her mother that Walter was trying to get into her room and that, as a result of that conversation, her parents changed the doorknob on her door to one with a lock. She did not disclose the abuse to her stepfather and mother until several years later, in early 2016.

The victim's stepfather testified that, after changing the doorknob, he confronted Walter and asked him to move out. Over objection, the stepfather testified that Walter looked as though he was "trapped" during their conversation.

The prosecution played a largely unredacted recording of an interview between the detective and Walter. Throughout the interview, Walter denied the victim's allegations, while the detective accused him of lying. The detective asked whether the victim was known to be a liar, asked why the victim was suddenly accusing Walter of sexually assaulting her years earlier, repeatedly expressed the opinion that Walter had committed various sexual offenses against the victim, and voiced disbelief in his statements. The detective went on to say that "somewhere between" the victim's account and Walter's account "is the truth." At no point during the questioning did Walter inculpate himself or alter his account. At trial, Walter moved that the detective's comments be redacted from the recording. The circuit court denied his motion.

The jury also heard from an expert who testified about factors that may cause a child to delay a report of sexual abuse. These factors include the child's age and development, the child's relationship with the alleged perpetrator, the "grooming process," and the child's own understanding of what sexual abuse is. The expert provided neutral information on the general phenomenon on delayed reporting, and admitted that delayed disclosure could be a fabrication. The expert testified that she did not know specific information about this case because she did not interview the victim or anyone else.

Walter was convicted of sexual abuse of a minor but acquitted of the other charges. The court sentenced him to 20 years of imprisonment and required him to register as a sex offender. Walter appealed.

Held: Reversed and remanded.

The questions on appeal were whether the trial court erred in: (1) admitting the recording of the police interview without redaction of the detective's comments; (2) permitting the expert witness to testify regarding delayed disclosure; and (3) admitting lay opinion testimony from the victim's stepfather.

The Court of Special Appeals held that the circuit court erred in refusing to redact the detective's official expressions of disbelief from the recorded interview, and that this error was not harmless. On that basis, the Court reversed the judgment.

It is within the jury's sole province to assess the credibility of a witness. A court may not permit a witness to express an opinion about another person's credibility in a criminal trial. A prosecutor may not ask a criminal defendant whether another witness is lying. The detective in this case repeatedly expressed disbelief in Walter's denial of culpability and accused him of touching the victim or having sex with her. Citing Casey v. State, 124 Md. App. 331 (1999), the Court held that the detective's expressions of disbelief were inadmissible. Further, even if the detective's statements had some relevance, any probative value was substantially outweighed by the danger of unfair prejudice. The statements did not induce Walter to confess or change his account and introduce inconsistencies, nor were Walter's responses more than minimally probative in the State's case.

The error in admitting the unredacted recording was not harmless, because the State's case relied heavily on credibility of witnesses. The detective's commentary on Walter's credibility may have had some effect on the jury's assessment. This was apparent in the jury's verdict, which had the appearance of a compromise. The jury convicted Walter of sexual abuse of a minor, which includes the commission of certain underlying sexual offenses, yet acquitted him of the only sexual offenses he was charged with committing.

Walter next challenged the admissibility of expert testimony regarding the phenomenon of delayed reporting of sexual abuse. The Court of Special Appeals held that there was no error or abuse of discretion in the trial court's decisions about the appropriateness of the testimony, the relevance of testimony, or the balancing of probative value against the danger of unfair prejudice.

The Court rejected Walter's argument that the testimony was not of appreciable help to the trier of fact, because the testimony concerned a psychological phenomenon that was not within a layperson's knowledge. Otherwise, without the testimony, the jurors might have dismissed the victim's testimony as noncredible. The expert provided the jury with a balanced explanation of

delayed reporting, supporting her testimony with factors that could result in delayed disclosure. The testimony was relevant because it would assist the trier of fact in understanding why a young victim may delay reporting abuse. Further, the scope of the testimony was limited so that the probative value of the expert testimony was not substantially outweighed by the danger of unfair prejudice. The expert told the jury why a victim of child sexual abuse might delay in reporting the abuse, without opining on the ultimate issue of whether the victim was sexually abused and without indicating that the jury should credit the victim's version over the defendant's.

The Court nevertheless held that the record did not disclose a sufficient factual basis for the expert's opinion. Sufficiency of factual basis requires an adequate supply of data and a reliable methodology. The expert testified about her adequate supply of data, including numerous personal experiences with delayed disclosure. However, the reliability of methodology could not be readily determined from the record. The expert provided no explanation of how she concluded that bona fide victims of child sexual abuse often, frequently, or commonly delay in reporting the abuse. The Court explained that, on remand, the State was free to develop the record to establish the reliability of the methodology and, thus, the sufficiency of the factual basis for the opinion.

Finally, the Court rejected Walter's challenge to the testimony from the victim's stepfather (Walter's brother) that Walter looked like he was "trapped" during a conversation between the two. Walter argued the court erred by admitting lay opinion testimony. The Court held that this testimony was rationally based on the stepfather's perception of Walter's conduct within the meaning of Maryland Rule 5-701. The stepfather's testimony describing Walter's conduct and appearance was more efficient than requiring the witness to identify each observation that led him to his conclusion that Walter looked "trapped."

Return to ToC

George Spell v. State of Maryland, No. 2163, September Term 2017, filed November 28, 2018. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2018/2163s17.pdf

PROBABLE CAUSE TO ARREST – SUFFICIENCY OF THE EVIDENCE – CONSTRUCTIVE POSSESSION

Facts:

While on patrol, officers noticed appellant sitting in the driver's seat of a parked vehicle with the ignition engaged. The officers knew from a prior encounter with appellant that he did not have a driver's license, so they decided to investigate further. Officers parked their police car parallel to appellant's vehicle and spoke with him. During the conversation, appellant admitted he did not have a driver's license. Officers then exited the vehicle, handcuffed and searched appellant, and found 10 vials of cocaine on his person. Nine of the vials had a yellow top, and one vial had a white top. Officers also searched appellant's vehicle and found a key. The key opened a utility room at an apartment complex across the street from where officers had searched appellant's person and vehicle. Officers found drugs, paraphernalia, and a firearm in the utility room, including vials with yellow tops matching those found on appellant. Appellant was convicted of several firearm offenses, as well as several drug offenses.

Held: Affirmed.

The police had probable cause to believe that appellant was driving without a license. Appellant admitted that he did not have a license. And there is no question that appellant's actions, sitting in the vehicle with the engine running, constituted driving. *Motor Vehicle Admin v. Atterbeary*, 368 Md. 480, 503 (2002) (motorist was "driving" when he was "sitting in the driver's seat, awake, with the vehicle's engine running"). Under these circumstances, the circuit court properly found that the officers had probable cause to arrest appellant, and to search him incident to arrest.

The evidence was sufficient for the jury to find beyond a reasonable doubt that appellant possessed the contraband in the utility room. Appellant was found across the street from the building in which a utility room containing drugs, drug paraphernalia, and a firearm, much of it in plain view, was located. Appellant had a key to the utility room, and he had yellow-topped vials of cocaine that were consistent with those found in the utility room. The jury reasonably could infer that the yellow-topped vials on appellant's person came from the utility room and that appellant exercised dominion and control over the contraband in that room.

Derek McKinney v. State of Maryland, Nos. 130 & 359, September Term 2017, filed November 8, 2018. Opinion by Moylan, J.

http://www.mdcourts.gov/data/opinions/cosa/2018/130s17.pdf

REVOCATION OF PROBATION – PROBATION MAY BE REVOKED AT ANY TIME – *MATTHEWS V. STATE* IS ALIVE AND WELL

THE LEGALITY OF THE SENTENCE – PROBATION IMPLIES THE POSSIBILITY OF ITS REVOCATION

Facts:

On the evening of May 16, 2011, the victim, Lily Hakemian, went to the home of the appellant, Derek McKinney. McKinney was in possession of a .357 Magnum Taurus revolver, which Ms. Hakemian had purchased for him because he was prohibited from doing so. McKinney ordered Ms. Hakemian to lie face down on the bed, pointed the revolver at her head, and pulled the trigger, cycling the cylinder in the revolver. He subsequently pointed the weapon at Ms. Hakemian and instructed her to place its barrel in her mouth, an instruction with which she complied. Later that evening, Ms. Hakemian and McKinney drove to two bars (where McKinney consumed alcohol) and then to McDonald's. In the McDonald's parking lot, McKinney fired the revolver into the air, pointed it at Ms. Hakemian, and again directed her to place the barrel in her mouth.

At 1:30 a.m., a police officer stopped Ms. Hakemian's vehicle for a minor traffic infraction. The officer conducted a computer check of Ms. Hakemian which revealed an outstanding protective order against McKinney. McKinney was arrested for violating that protective order, and ultimately was charged with two counts of first-degree assault, two counts of second-degree assault, two counts of use of a handgun in a crime of violence, reckless endangerment, intimidation of a juror, obstruction of justice, violation of a protective order, and related handgun violations.

The State and McKinney entered into a plea agreement whereby in exchange for his pleading guilty to one count of first-degree assault and one count of use of a handgun in the commission of a crime of violence, he would serve a sentence of 25 years all but 10 suspended and three years' probation for the former count and a concurrent 20 years (five without the possibility of parole) all but 10 years suspended for the latter count. The court accepted McKinney's guilty pleas and sentenced him in accordance with the terms of the agreement. As a condition of McKinney's probation, the court ordered that he "have no contact with Lily Hakemian."

McKinney failed to heed the court's order. He repeatedly made menacing calls to Ms. Hakemian. In light of these calls, the State filed a Motion for Appropriate Relief. At a hearing on that motion, the State produced evidence of five collect telephone calls that McKinney had made

from jail to Ms. Hakemian in which he threatened, *inter alia*, to "murder" her. The court found that the calls were not only threatening in nature but violated (i) Section 32-19 of the Montgomery County Code of Ordinances, (ii) Maryland Code, Criminal Law Article § 3-804, and (iii) two earlier protective orders. Accordingly, the court re-imposed the original sentences, with no portion of them being suspended.

Held: Affirmed.

Probation may be "revoked" for a criminal offense perpetrated before probation has begun. The revocation of probation does not constitute an inherently illegal sentence where the terms of a binding plea agreement include probation, but do not explicitly mention the possibility of its being revoked.

McKinney first contends that the court lacked the authority to find that he had violated probation because his probation had not yet commenced. While it is axiomatic that a period of active probation cannot be "violated" prior to its inception, probation may nevertheless be "revoked" for a criminal offense perpetrated before that period of active probation has begun. *Matthews v. State*, 304 Md. 281 (1985), controls this case. In *Matthews*, the Court of Appeals held that probation may be "properly revoked upon proof of criminal activity occurring between the grant of probation and its formal commencement." *Id*. at 283. McKinney's claims to the contrary notwithstanding, this holding has not been overruled, abrogated, or otherwise modified by any subsequent case law, Maryland Rule, or statute.

Though the parties consistently referred to a "violation of probation" rather than a "revocation of probation" below, the casual misuse of the former phrase in lieu of the latter does not affect the underlying nature of the proceeding or its undergirding purpose. In fact, the concept of "probation" is sufficiently broad to embrace both a defendant's immediate status (probation *in esse*) and his anticipated status (probation *in potentia*). Whether "probation" connotes probation *in esse* or probation *in potential* bears neither on the purpose for which probation is granted nor on the purpose for which it is revoked. In a sense, therefore, probation *may* be "violated" prior to its formal commencement.

McKinney next contends that "holding a violation of probation hearing under the circumstances of this case violated [his] right to due process," arguing that he was (i) denied an impartial arbiter, and (ii) given inadequate notice of the February 21, 2017, probation revocation hearing. While the former sub-contention is not preserved for appellate review, the latter is predicated on a misreading of the record. The State's Motion for Appropriate Relief was not, as McKinney claims, filed on February 3, 2017—three weeks before the revocation hearing. It was, in fact, filed on February 3, 2016—one year earlier. It is, moreover, of no consequence that the motion was styled as a "Motion for Appropriate Relief," as its content put McKinney on notice of the nature of the hearing.

Finally, McKinney contends that the court imposed an illegal sentence. He claims that his sentence (to wit, the revocation of his probation) was inherently illegal because the ostensible "probation violation" occurred prior to the onset of probation. This argument is a mere reformulation of McKinney's initial contention, and fails for precisely the same reasons as did it. Even if, moreover, McKinney's initial contention had merit, the illegality which he alleges would have been a mere procedural illegality—not an illegality which adheres in the sentence itself. Rule 4–345(a) would not, therefore, apply.

McKinney also argues that the revocation of his probation "constituted a breach of the plea agreement" because the agreement neither explicitly addressed the revocation of probation prior to its inception, nor expressly addressed the original sentences' being re-imposed before suspension. As the Court of Special Appeals held in *Carlini v. State*, 215 Md. App. 415, 450 (2013), standard conditions of probation are implicit terms of a plea agreement. In this case, probation was among the express terms of the plea agreement. That term included by implication the possibility that probation would be revoked.

Return to ToC

Peter Ibru v. Janet Ibru, No. 100, September Term 2017, filed September 27, 2018. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2018/0100s17.pdf

ESTATES AND TRUSTS – POWER OF ATTORNEY – STANDING

Facts:

Chief Michael Christopher Ibru ("Chief Ibru")—a prominent and very wealthy Nigerian business magnate—died intestate in Maryland in 2016 with most of his $2 billion in assets in Nigeria, where an estate has since been opened. One of his sons, Peter Ibru, filed the underlying suit against one of Chief Ibru's daughters, Janet Ibru, before Chief Ibru's death. Peter challenged Janet's actions as Chief Ibru's attorney-in-fact while Chief Ibru was still alive but suffering from Parkinson's Disease, including her *inter vivos* transfer of Chief Ibru's funds into an account that she held jointly with Chief Ibru until his death, at which point Janet—rather than Chief Ibru's estate—became sole owner of the funds. Following Chief Ibru's death, the circuit court dismissed Peter's action based on "standing issues," given that an estate case was pending in Nigeria. Peter appealed to the Court of Special Appeals. The central question on appeal was the justiciability of Peter's claims in the circuit court.

Held: Reversed

First, the Court of Special Appeals concluded that the assets in question were non-probate assets because Janet became joint owner of the accounts during Chief Ibru's lifetime. The Court held that the question of whether Janet fraudulently obtained and employed the powers of attorney to become the joint owner of those accounts during Chief Ibru's lifetime is a question that is squarely within the scope of the circuit court's equity jurisdiction and "beyond the jurisdiction of the Orphans' Court." *Libonati v. Ransom*, 664 F. Supp. 2d 519, 524 (D. Md. 2009) (citing *Tribull v. Tribull*, 208 Md. 490, 499-500 (1956).

Next, the Court held that the Maryland General and Limited Power of Attorney Act, Maryland Code (1974, 2017 Repl. Vol.), Estates and Trusts Article ("ET"), § 17-103(a), conferred standing on Peter, as Chief Ibru's descendant, to petition the circuit court to review Janet's actions as Chief Ibru's agent during his lifetime, and to construe the validity of the powers of attorney that were purportedly executed in Maryland and, by their terms, governed by Maryland law. The Court noted that Chief Ibru's other descendants were not necessary parties to the underlying action because Peter's complaint sought only to (1) declare the validity of the powers of attorney; (2) account for the funds contained in joint accounts as listed in the guardianship inventory, now owned by Janet solely; and (3) review Janet's actions as a fiduciary and agent. The suit, therefore, would not affect the rights of Chief Ibru's other children to inherit Chief

Ibru's estate. *Cf. First Nat'l Bank of Md. v. Dep't of Health & Mental Hygiene*, 284 Md. 720, 730-36 (1979) (holding that life beneficiaries and contingent remaindermen of a trust were not necessary parties to a suit construing the trust instrument and that, "[w]hen seemingly necessary but unjoined parties w[ere] only one of several owners or protectors of interest that was subject of litigation, but others were present before court to effectively represent that interest, that party, though normally indispensable, was not required to be joined in order to be bound by judgment entered); *Frey v. McGraw*, 127 Md. 23 (1915) (holding that a decedent-wife's personal "representatives were neither necessary nor proper parties" to a suit to collect a judgment against her husband's estate after her interest in the property, which she had held as a tenant by entirety, devolved upon her death devolved before the action arose).

Accordingly, the Court of Special Appeals reversed the circuit court's dismissal of Peter's claims.

Return to ToC

Antonio Ruiz v. Yuko Kinoshita, No. 197, September Term 2017, filed November 2, 2018. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2018/0197s17.pdf

FAMILY LAW – POST-NUPTIAL AGREEMENT – CHILD SUPPORT

APPELLATE JURISDICTION – FINALITY OF JUDGMENTS

Facts:

Antonio Ruiz and Yuko Kinoshita had two children during their marriage. After a year of separation, Yuko filed an action for divorce, custody, support, and other relief in the Circuit Court for Montgomery County. As is custom in Montgomery County, the proceedings were bifurcated into two stages: the first addressed child support and custody issues and, thereafter, the second stage determined property rights, grounds for divorce, and any other remaining issues. In a series of orders entered between August and December 2016, the court enforced a post-nuptial agreement and the transfer of a condominium property to Yuko pursuant thereto; ratified a consent order the parties reached as to custody and access; and awarded Yuko $1,540 per month in child support, including costs related to the children's private schooling, plus a portion of the costs of therapy and childcare. On March 8, 2017, the court entered a final judgment incorporating these orders and granting the parties an absolute divorce.

After Antonio filed an appeal on April 3, 2017, challenging several of the circuit court's orders relating to support and the post-nuptial agreement, Yuko moved to dismiss as untimely Antonio's appeal from the circuit court's 2016 orders.

Held: Affirmed

The Court of Special Appeals addressed Yuko's threshold argument that the time for appeal of the 2016 orders had expired. The Court held that there was no final judgment disposing of all the parties' remaining claims in the underlying divorce proceeding from which Antonio was required to appeal within 30 days until the court entered the Judgment of absolute divorce on March 8, 2017. Absent an exception to the final-judgment rule, a trial court's judgment in a bifurcated divorce proceeding is not final for the purpose of Maryland Code (1957, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 12-301, until the court resolves or disposes of all the parties claims in the proceeding, "determin[ing] and conclud[ing] the rights involved." *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989

Moving to the merits of Antonio's appeal, the Court affirmed the circuit court's interpretation of the parties' post-nuptial agreement, holding that the agreement provided no mechanism to

compensate Antonio for his interest in the condominium property in the event that the parties separated or dissolved their marriage. The Court also held that the circuit court was correct not to "gross up" (adjust upwardly) Yuko's non-taxed income because it had no discretion to do so under the applicable statute. Finally, the Court held that the circuit court was within its discretion to include in its child support calculus certain costs relating to the children's private schooling, extraordinary medical expenses, and work-related child care costs.

Return to ToC

Thomas Swift v. University of Maryland, College Park, No. 1162, September Term 2017, filed November 2, 2018. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2018/1162s17.pdf

LABOR AND EMPLOYMENT – TERMINATION – EMPLOYMENT AT-WILL

CONTRACTS – LANGUAGE OF CONTRACT – INTERPRETATION

Facts:

Mr. Thomas Swift was a model shop supervisor for the University of Maryland, College Park's School of Architecture for six years. As an employee of the University of Maryland ("University"), he was classified as a regular, full-time exempt employee and, therefore, a member of the union and a party to the collective bargaining agreements between the University and the union.

On September 18, 2013, the University sent Mr. Swift a letter warning him of potential "administrative and/or disciplinary action" if his attendance and work performance did not improve. Mr. Swift was terminated on December 13, 2013 and, consistent with the University's employment policies, he was given a six-month notice period with pay. Mr. Swift filed a timely grievance and argued that his termination failed to comply with the "disciplinary actions" provision of a Memorandum of Understanding ("MOU") between the University and the union.

The MOU stated that "[n]o employee shall be disciplined without cause." Mr. Swift contended that the language of the MOU should be interpreted to abrogate the University's notice termination policy because the notice Mr. Swift received did not state a cause for termination. The University rejected Mr. Swift's grievance. He submitted the case to advisory arbitration. The arbitrator agreed with Mr. Swift and recommended that the University reinstate him with back pay and benefits. But the final agency decision was made by an Administrative Law Judge ("ALJ") who held that the University properly terminated Mr. Swift under its employment policy. Mr. Swift sought judicial review of the ALJ's decision. The Circuit Court for Prince George's County affirmed and Mr. Swift appealed.

Held: Affirmed.

The Court of Special Appeals affirmed the administrative agency's decision to uphold Mr. Swift's termination. The presumption in Maryland is that an employment relationship is at-will unless the parties agree otherwise. *Bontempo v. Lare*, 444 Md. 344, 363–64 (2015). In this case, the University and the union agreed to additional protections for employees subject to disciplinary actions. But "disciplinary action" and "termination" are not one in the same. Based

on the express language of the agreement, the Court interpreted the University's notice termination policy to permissibly function in parallel with the MOU's for-cause requirement for disciplinary action.

Return to ToC

Irvin M. Baddock, et al., v. Baltimore County, Maryland, No. 1271, September Term 2017, filed November 28, 2018. Opinion by Zarnoch, J.

https://mdcourts.gov/data/opinions/cosa/2018/1271s17.pdf

LOCAL GOVERNMENTS – CHARTER COUNTIES – LEGISLATIVE AUTHORITY; CONSTITUTIONAL LAW – DUE PROCESS & EQUAL PROTECTION

Facts:

In 2014, Baltimore County enacted an ordinance that requires hookah lounges in the County to close between midnight and 6:00 a.m. every day. Specifically, the legislation amended the Baltimore County Zoning Regulations to include a definition of "hookah lounge" that restricts hookah lounges' hours of operation between midnight and 6:00 a.m.

A corporation that operates the Towson Nights hookah lounge, along with the landlord of the premises, challenged the bill on legal and constitutional grounds. Appellants argued that, absent the ordinance, most of the hookah lounge's business would take place between 11:00 p.m. and 2:00 a.m., and thus, the requirement to close at midnight was tantamount to a cessation of the business's lawful use, which should have entitled the hookah lounge to an "amortization" period longer than the 45 days given to comply with the act. Appellants further contended that the County's placement of time restrictions in a zoning ordinance was *ultra vires*; that the requirement to close at midnight violated substantive due process; and that singling out hookah lounges but not other businesses violated equal protection.

An administrative law judge, the Board of Appeals of Baltimore County, and the Circuit Court for Baltimore County all upheld the ordinance as constitutional and valid.

Held: Affirmed.

The Court of Special Appeals held that the restriction on hookah lounges' hours of operations was a valid exercise of the County's police power that did not violate due process or equal protection.

The appellate court first determined that Baltimore County did not act *ultra vires* by enacting time restrictions in a zoning regulation. The Court concluded that the provision was an exercise of the County's police power and not a zoning law, regardless of whether the restriction was encompassed within the County's zoning regulations' definition of "hookah lounge." Similarly, because the requirement to close at midnight did not prohibit use as a hookah lounge, the bill did not render Appellants' hookah lounge into a nonconforming use, and therefore Appellants' "amortization" claim was inapplicable.

The Court next determined that the County's restriction on hours of operation was a rational attempt at protecting the public's safety and welfare and did not violate due process. Under rational basis review, courts "perform a very limited function" when determining whether an economic regulation pursues legitimate governmental ends through rational means. *Tyler v. City of College Park*, 415 Md. 475, 500 (2010). Here, the record amply demonstrated reasonable grounds for public safety concerns: the County had noted numerous arrests related to hookah lounges over a six-month-period prior to the ordinance's enactment, as well as calls to police connecting hookah lounges to underage drinking, assault, CDS violations, and handgun violations. Additionally, public health concerns about exposure to tobacco smoke rationally supported the County's regulation of operating hours.

Finally, the Court of Special Appeals concluded that requiring hookah lounges, but not similar businesses, to close at midnight was not an arbitrary distinction that violated equal protection. Legislative bodies are permitted to make commercial classifications that distinguish between entities, provided the classification is not arbitrary and has a rational basis. *Frey v. Comptroller of Treasury*, 422 Md. 111, 163 (2011). Nor does equal protection require a legislative body to address all aspects of a problem when rationally addressing a legitimate governmental interest. Here, legitimate concerns for the public safety and welfare undergirded the County's requirement that hookah lounges close at midnight; despite Appellants' characterization of hookah lounges as basically equivalent to other sites of late-night diversion, the County's distinction was reasonable.

Return to ToC

J. Thomas Manger v. Fraternal Order of Police Montgomery County Lodge 35, Inc., No. 1021, September Term 2017, filed November 5, 2018. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2018/1021s17.pdf

MUNICIPAL CORPORATIONS – LAW ENFORCEMENT OFFICER'S BILL OF RIGHTS – REVIEW IN GENERAL

MUNICIPAL CORPORATIONS – LAW ENFORCEMENT OFFICER'S BILL OF RIGHTS – POLYGRAPH TESTS

MUNICIPAL CORPORATIONS – LAW ENFORCEMENT OFFICER'S BILL OF RIGHTS – POLYGRAPH TESTS

Facts:

Officer John Doe of the Montgomery County Police Department was the subject of an internal departmental investigation for soliciting sex from a cashier in a retail establishment. As part of that investigation, Officer Doe was ordered to sit for a polygraph examination. During the polygraph, and despite warnings from the test administrator, he engaged in counter-measures designed to thwart the test results. At the conclusion of the investigation, the Chief of Police charged Officer Doe with five charges for the alleged solicitation and an additional charge for conduct unbecoming an officer based on his interference with the polygraph test.

The Law Enforcement Officer's Bill of Rights ("LEOBR") provides procedural protections to police officers who are the subjects of internal departmental investigations or disciplinary proceedings. If an officer fears that his rights under the LEOBR may be violated, Maryland Code (2003, 2011 Repl. Vol.), § 3-105 of the Public Safety Article ("PS") authorizes him to apply to the circuit court for an order directing the agency to show cause why the right should not be granted. If the court finds that the agency violated the officer's rights, it can craft relief appropriate to the circumstances.

In this case, Officer Doe sought to have the charge related to his attempt to thwart the polygraph stricken, claiming that it violated his right under PS § 3-104(m)(1) to have the results of an investigative polygraph test excluded from evidence in an administrative hearing absent his consent. Officer Doe argued that the reference to the polygraph in the charge was tantamount to the test results' admission into evidence in the disciplinary hearing. He also argued that the Chief would be unable to prove the merits of that charge without the inclusion of the polygraph results. The circuit court agreed with Officer Doe's arguments and ordered the charge stricken. The Chief of Police appealed.

Held: Reversed

The Court of Special Appeals reversed the circuit court's decision to strike the charge. PS § 3-105 empowers the circuit court to take action to ensure that an officer's LEOBR protections are upheld in administrative proceedings. This generally takes the form of injunctive or mandamus relief. In this case, by striking the charge, the circuit court went beyond what was required to vindicate the Officer's LEOBR protections. By determining that the charge could not be proven at the administrative hearing absent the admission of the polygraph results, the circuit court improperly reached the merits of the charge and leapfrogged the administrative forum designated to vet and decide internal police matters.

The Court of Special Appeals also determined that, although it is not made explicit in the statute, police agencies are authorized to discipline officers for engaging in conduct designed to thwart a polygraph test. Because the LEOBR explicitly empowers law enforcement agencies to discipline officers for refusing to take a polygraph test, it must also permit disciplinary measures for attempting to sabotage a polygraph test. Otherwise officers would have carte blanche to interfere with internal investigations without disciplinary consequences.

Return to ToC

Board of County Commissioners of Washington County, et al. v. Perennial Solar, LLC, No. 1022, September Term 2016, filed November 15, 2018. Opinion by Reed, J.

https://mdcourts.gov/data/opinions/cosa/2018/1022s16.pdf

MUNICIPAL CORPORATIONS – LOCAL LEGISLATION

MUNICIPAL CORPORATION – CONCURRENT AND CONFLICTING EXERCISE OF POWER BY STATE AND MUNICIPALITY

PUBLIC UTILITIES – PUBLIC SERVICE COMMISSIONS OR BOARDS – JUDICIAL REVIEW OR INTERVENTION

Facts:

On September 17, 2015, Perennial Solar, LLC filed an application for special exception and variance with the Board of Zoning Appeals to construct and operate a Solar Energy Generating System ("SEGS") in Cearfoss, Maryland. According to the Washington County Zoning Ordinance, the proposed site is located in an Agricultural (Rural) zoning district. The County permits a SEGS in this district but only by a special exception.

A hearing was held before the Board of Zoning Appeals on October 21, 2015. Multiple witnesses testified both in favor and in opposition of granting the special exception. After considering the matter for two weeks, the Board granted the request for special exception and variance on November 4, 2015. As required by Maryland statute, Perennial then applied for a Certificate of Public Convenience and Necessity ("CPCN") permit in order to construct the SEGS. Neighboring landowners appealed the decision to the Circuit Court for Washington County.

Prior to the hearing, Perennial filed a Motion for Pre-Appeal Determination alerting the court to an issue of subject matter jurisdiction. Perennial argued that the Maryland Public Services Commission ("PSC"), and its law codified in the Public Utilities Article of the Maryland Code, has exclusive jurisdiction for approving the SEGS proposed by Perennial. Perennial requested that the appeal be dismissed. Appellants opposed the motion, arguing that legislative intent reveals that local regulation of SEGS – particularly their location – is not preempted by state law.

After a hearing, the circuit court agreed granted Perennial's motion. The court determined that Public Utilities Article ("PUA") §7-207 preempts the Washington County Zoning Ordinance and that the PSC has exclusive jurisdiction to approve the type of SEGS proposed by Perennial. The Board of County Commissioners of Washington County timely appealed.

Return to ToC

Held: Affirmed.

The Court of Special Appeals held that, based on PUA §7-207, local zoning regulations and comprehensive plans are impliedly preempted by state law for SEGSs requiring a CPCN. The Court relied on the decision rendered by the Court of Appeals in *Howard County v. Potomac Electric Power Co*., 319 Md. 511, 524 (1990) ("[I]t is clear that, in the field of public utility service, the General Assembly intended to grant broad powers to the PSC to execute its principal duty of assuring adequate electrical service statewide.") in determining that PUA §7-207 grants the PSC broad authority to determine whether and where the SEGS may be constructed and operated. The Court placed emphasis on the fact that the Legislature intended to have the state govern SEGS approval by requiring local government input into the state's final decision.

The Court of Special Appeals also held that the PSC is not limited to authorizing CPCNs to electric companies under §7-207(b)(1)(i). Instead, any "person" may apply for a CPCN to construct a generating station. Furthermore, PSC's denial of a CPCN application does not diminish PSC jurisdiction.

Return to ToC

Anne Arundel County, Maryland v. Janine Fratantuono, No. 1, September Term 2017, filed November 1, 2018. Opinion by Fader, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/0001s17.pdf

GOVERNMENTAL IMMUNITY – MUNICIPALITIES – PUBLIC WAYS

JURY INSTRUCTIONS – CONTRIBUTORY NEGLIGENCE

INCONSISTENT VERDICTS – MULTIPLE THEORIES OF NEGLIGENCE

Facts:

The appellant, Janine Fratantuono, was walking along a grassy strip set adjacent to both a public road and a public sidewalk and looking ahead of her when she stepped on a water meter lid, causing it to flip open. Her leg fell into the newly-opened hole, causing her to sustain injuries. She filed a lawsuit against Anne Arundel County, alleging that her injuries resulted from the County's negligence.

A jury entered judgment in favor of Ms. Fratantuono and awarded her $50,806.00 in damages. The jury found that the County was not liable under a theory of ordinary negligence but was liable under a theory that the County was negligent for violating its own regulations with respect to the construction, installation, maintenance, and replacement of the water lid.

On appeal, the County assets that the trial court erred (1) in denying its assertion of governmental immunity, (2) in declining to instruct the jury on contributory negligence, and (3) in not striking the jury's verdicts, which the County contends were fundamentally inconsistent.

Held: Affirmed.

Municipalities enjoy immunity only when performing governmental, as opposed to proprietary, functions. The Court noted that Maryland case law has consistently differentiated between the government's obligation to maintain streets, sidewalks, footways, and the areas contiguous to them, which is treated as a propriety function for which a county does not have immunity, and the maintenance of public parks and swimming pools, which is a governmental function. The Court found that because the water meter was located in a grassy strip contiguous to both a public street and a public sidewalk, and which was not blocked off to pedestrians and where pedestrians were to be expected, the claim was not barred by governmental immunity.

The Court further determined that there was no evidence to support giving either of the County's requested instructions. There was no evidence to support a general contributory negligence instruction because the County presented no evidence that Ms. Fratantuono was negligent by

looking ahead of her or that she would have seen anything amiss if she did look down at the water meter lid. Evidence also did not support giving an instruction that Ms. Fratantuono violated § 21-506(a) of the Transportation Article, which prohibits pedestrians from walking "along and on" a street when a sidewalk is present, because Ms. Fratantuono was not walking on the street at the time of her injury.

The Court also held that the jury's verdicts were not irreconcilably inconsistent. While the jury found that the County was not liable under a theory of common law negligence, it found that the County was liable for its negligence in violating a regulation. In light of the court's instructions to the jury, these responses were not inconsistent.

Return to ToC

Baltimore County v. Michael Quinlan, No. 319, September Term 2017, filed August 30, 2018. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2018/0319s17.pdf

WORKERS' COMPENSATION – OCCUPATIONAL DISEASES – BURDEN OF PROOF

Facts:

A jury in the Circuit Court for Baltimore County found that Mr. Michael Quinlan ("Appellee") suffered an occupational disease in the form of degenerative tears in the medial and lateral menisci in his right knee arising out of and in the course of his employment as a paramedic/firefighter for Baltimore County ("Appellant" or the "County"). The County appealed, asking the Court of Special Appeals to resolve a single issue: "Whether right knee degenerative tears of the medial and lateral menisci and their underlying cause, osteoarthritis, constitute[] an occupational disease as defined by the Maryland's Workers' Compensation Act[.]"

Held: Affirmed.

The Court of Special Appeals rejected the County's argument that the claimant's menisci tears and osteoarthritis cannot be compensable under the Act, as a matter of law, because they are "diseases of life" and not diseases unique to Mr. Quinlan's employment. In doing so, the Court relied, in part, on the Court of Appeals' decision in *Means v. Baltimore County*, 344 Md. 661 (1997), which rejected the argument that PTSD could not be compensable as a matter of law simply because proving causation could be difficult. *Id.* at 673 (holding that an employee may recover if she can prove "that the mental illness she suffers is due to the nature of a paramedic's job and that employment as a paramedic entails the hazard of developing PTSD"). The Court held that Mr. Quinlan adduced sufficient evidence for the jury to determine that his condition would not have developed but for his work-related activities because he satisfied the statutory requirements of LE § 9-502(d)(1) by presenting expert testimony that repetitive kneeling and squatting is (1) a regular part of a paramedic's job and (2) a risk factor for developing menisci tears, which his expert explained are "part of the continuum of osteoarthritis."

Return to ToC

ATTORNEY DISCIPLINE

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By an Opinion and Order of the Court of Appeals dated November 16, 2018, the following attorney has been disbarred:

ANDREW NDUBISI UCHEOMUMU

*

By an Order of the Court of Appeals dated November 26, 2018, the following attorney has been disbarred by consent:

ALEXANDER FERNANDEZ

*

By an Order of the Court of Appeals dated September 28, 2018, the following attorney has been indefinitely suspended by consent, effective November 27, 2018:

DALE EDWARD ROWLAND

*

Return to ToC

UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

https://mdcourts.gov/appellate/unreportedopinions

	Case No.	*Decided*
A.		
Alexander, Shelton L. v. Alexander	0175	November 1, 2018
Anderson, Derrick Donell v. M&T Bank	1636 *	November 21, 2018
B.		
Bosley, Diedre v. Hunt Valley Presbyterian Church	1126 *	November 14, 2018
Bradley, Linda v. Eisenberg	1397 *	November 9, 2018
Bradley, Thomas v. State	1380 *	November 7, 2018
Brown, Adrian v. State	2008 *	November 14, 2018
Burley, Rayvon v. State	0912 *	November 19, 2018
Butler, Dianna v. State	1353 *	November 9, 2018
C.		
Castruccio, Sadie M. v. Barclay	1234 *	November 14, 2018
Clark, Anthony v. State	2143 *	November 7, 2018
Collins, Joel v. State	0021	November 21, 2018
Conover, Donald v. Fisher	1487 *	November 26, 2018
Conteh, Jeremiah v. State	2283 *	November 13, 2018
Cullen, Jimmy Lee v. State	1491 *	November 21, 2018
Curtis, Adam v. State	1373 *	November 16, 2018
D.		
Dickerson, Perry, III v. State	1664 *	November 9, 2018
Dorsey, Tramaine Vondell v. State	2483 *	November 21, 2018
E.		
Ellis, Edward v. State	1244 *	November 15, 2018
F.		
Fagan, William Robert v. State	1789 *	November 13, 2018
Fleur, Wesly Saint v. State	1560 *	November 14, 2018

September Term 2018
* September Term 2017
** September Term 2016
*** September Term 2015

G.

Galbraith, Phillip v. Geshelin	1495 *	November 13, 2018
Garrett, James v. State	2384 *	November 13, 2018
Genevie, Paul v. County Comm'rs, Charles Co.	1643 **	November 7, 2018
Godana, Wondwosen v. Firew	1334 *	November 7, 2018

H.

Harper, Ronald v. State	2413 *	November 13, 2018
Harris, Katrina Shaneka v. State	2523 *	November 7, 2018
Hewett, Ryan v. O'Sullivan	1359 *	November 9, 2018
Horan, Timothy E. v. Marks	0143 *	November 21, 2018

I.

In re: A.A.	1953 *	November 16, 2018
In re: Adoption/G'ship of D.W.	0358	November 1, 2018
In re: Adoption/G'ship of I.M.	0266	November 1, 2018
In re: B.M.	1521 *	November 28, 2018
In re: T.R.	0367	November 16, 2018
In re: W.G. III	0048	November 16, 2018
In the Matter of Boone Kondylas, LLC	0638 *	November 9, 2018
Ingram, Trenton A. v. State	1854 *	November 13, 2018

J.

Jackson, Steven B. v. State	1237 *	November 9, 2018
Jeffers, Spence v. State	0940 *	November 28, 2018
Johnson, Casey O. v. State	2465 ***	November 14, 2018
Johnson, Nicole Lanae v. State	2509 *	November 21, 2018

K.

Kim, Ok Cha v. O'Sullivan	1825 *	November 21, 2018
Kirby, Matthew Robert v. State	2528 *	November 7, 2018
Kosinski, Nancy v. State	2297 *	November 15, 2018
Koumaiha, Mahmoud v. State	2051 *	November 21, 2018

L.

Le, Ha v. Osuji	0823 **	November 16, 2018
Lemon, Aaron v. Lemon	1754 *	November 21, 2018
Lyles, Robyne v. Kidwell	1152 *	November 15, 2018

M.

September Term 2018
* September Term 2017
** September Term 2016
*** September Term 2015

Mayo, Antione v. State	1771 *	November 14, 2018
Mbongo, Flaubert v. Ward	1526 *	November 26, 2018
Mid-Atlantic Homes v. Manufacturers & Traders Trust	1503 **	November 5, 2018
Motley, Matthew Carlos v. State	1585 *	November 16, 2018
Mullins, Melissa v. Mullins	1576 *	November 16, 2018
Munson, Jennifer v. Ward	1368 *	November 16, 2018
Murray, Michelle v. Higgs	1588 *	November 15, 2018
N.		
Nuzback Revocable Trust v. Nazario Family, LLC	1323 *	November 15, 2018
P.		
Pair, Percy v. State	1378 *	November 15, 2018
Perkins, Jeanne v. Perkins	0058	November 13, 2018
Persaud, Robert v. Goad	1125 *	November 19, 2018
Phillips, Richard S. v. Cox	1424 *	November 21, 2018
Pickett, Allan M. v. Frederick City	1100 *	November 26, 2018
Poling, Brian v. Chesapeake Employers Insurance	1288 *	November 15, 2018
R.		
Ralph, Davi v. State	2164 *	November 9, 2018
Redd, Malek Calvin v. State	1984 *	November 27, 2018
Reed, Matthew v. Sapp	2237 *	November 8, 2018
Reeves, Timothy A. v. Miller	2524 *	November 21, 2018
Reyes, Javier v. State	1192 *	November 27, 2018
Robinson, James v. State	1482 *	November 21, 2018
Robinson, Jimmie, IV v. State	2293 *	November 21, 2018
Rockaway Beach Imp. Ass'n. v. Glen Arm Homes	1753 **	November 16, 2018
Rose, Eric v. State	1601 *	November 15, 2018
S.		
Soto, Juan Albert, Jr. v. State	2386 *	November 21, 2018
State v. Alexander, Aaron Terrell	2069 *	November 20, 2018
Stedman, Markeys A. v. Turk	1108 **	November 9, 2018
T.		
Taylor, Paul v. Ward	1432 *	November 7, 2018
Telos Corporation v. Hamot	1660 *	November 27, 2018
W.		
Walls, Jachin Boaz v. State	1877 *	November 21, 2018

September Term 2018
* September Term 2017
** September Term 2016
*** September Term 2015

Return to ToC

Watson, Sandra K. v. Bank of Delmarva	0283 *	November 14, 2018
White, Joshua v. Jones	0280	November 19, 2018
Whitfield, Darnell v. State	2080 *	November 15, 2018
Williams, Kelly Mikel v. Williams	1076 **	November 16, 2018
Wireless One v. Baltimore City	1852 *	November 16, 2018

Y.

Yenty Huey, Ana B. v. Get Smart	0997 *	November 19, 2018

September Term 2018
* September Term 2017
** September Term 2016
*** September Term 2015