IN THE
COURT OF APPEALS OF MARYLAND

September Term 2012

No. 100

GREGORY HALL*, et al.,*

Appellants,

v.

PRINCE GEORGE'S COUNTY
DEMOCRATIC CENTRAL COMMITTEE*, et al.,*

Appellees.

On Appeal from the Circuit Court for Prince George's County
(C. Philip Nichols, Jr., Circuit Judge)
Pursuant to Writ of Certiorari to the Court of Special Appeals

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BRIEF OF APPELLEES GOVERNOR MARTIN O'MALLEY AND SPEAKER MICHAEL E. BUSCH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Maryland Cases

Other State Cases

Constitutional Provisions, Statutes and Rules

Other Authorities

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STATEMENT OF THE CASE

At issue in this case is whether either of the petitioners, Gregory Hall and Tiffany T. Alston, has a constitutionally-protected right to one of the three seats in the Maryland House of Delegates representing the 24th Legislative District. Neither does.

Ms. Alston, who had been elected to the seat at issue in 2010, was tried before a jury and found guilty in 2012 of misdemeanor theft and common-law misconduct in office. On October 9, 2012, as part of a plea agreement that addressed sentencing on

those verdicts, as well as separate charges from another indictment (E. 213-14), the Circuit Court for Anne Arundel County struck the guilty verdict on the misdemeanor theft charge (E. 220), and sentenced Ms. Alston on the charge of misconduct in office to a suspended term of incarceration, community service, restitution, and supervised probation (*id.*). Ms. Alston waived her appeal rights. (E. 213, 220.) As contemplated by the plea agreement, Ms. Alston promptly filed a motion for modification of her sentence. On November 13, 2012, 35 days after her conviction, upon finding that Ms. Alston had completed her community service and restitution obligations, the circuit court granted the motion for modification, struck the guilty verdict, and entered probation before judgment. (E. 223.) Ms. Alston never sought to appeal her conviction.

On November 7, 2012, the Prince George's County Democratic Central Committee (the "Central Committee") submitted Mr. Hall's name to the Governor to fill the vacancy created by Ms. Alston's conviction. (E. 189, 263.) On November 16, 2012, Governor O'Malley requested that the Central Committee withdraw that submission. (E. 190, 264.) The Central Committee scheduled a vote on the withdrawal to be held at its meeting on November 20, 2012. (*Id.*) Also on November 20, 2012, before the meeting occurred, Mr. Hall filed this action seeking to enjoin the Central Committee from voting to withdraw its submission of his name to the Governor. (E. 2-3.) In anticipation of prompt future proceedings on Mr. Hall's request for emergency injunctive relief, the Central Committee postponed taking action that evening. (E. 191, 265.)

On November 26, 2012, the Central Committee was again scheduled to vote on the withdrawal of Mr. Hall's name (E. 266), and Mr. Hall again sought a temporary

restraining order (E. 4). Prior to the vote, and based on Mr. Hall's stipulation that entry of the requested temporary restraining order would be without prejudice to any party (and that he would be estopped from arguing otherwise), the circuit court entered a standstill order that prohibited the Central Committee from taking any binding vote to withdraw Mr. Hall's name. (E. 183-84.) The Central Committee proceeded to adopt a non-binding "sense of the committee" resolution indicating overwhelming support for withdrawing Mr. Hall's name. (E. 266; Hall Br. at 9)

On December 4, 2012, the Circuit Court for Prince George's County (Nichols, J.) held a merits hearing to resolve both Ms. Alston's claim that she was restored to her office when she received probation before judgment on November 13, 2012 and Mr. Hall's claim that he was legally entitled to be appointed to the same seat. On December 5, 2012, the circuit court issued a 34-page opinion in which the court concluded that Ms. Alston had been removed from office on October 9, 2012; that the Central Committee retained the right to withdraw Mr. Hall's name unless and until the Governor appointed him; and that the 15-day timeframe for the Governor to make an appointment under Article III, § 13(a)(1) is directory, not mandatory. (E. 342-72.) The circuit court simultaneously entered a declaration of rights consistent with that holding. (E. 373-74.)

On December 6, 2012, Mr. Hall noted an appeal (E. 376), petitioned this Court for a writ of certiorari, and moved in the circuit court and in this Court for a stay of the circuit court's judgment pending disposition of the petition. This Court granted the stay motion the same day. Ms. Alston noted an appeal on December 7, 2012 (E. 378), and filed a petition for a writ of certiorari on December 11, 2012. On December 13, 2012,

this Court granted both petitions, ___ Md. ___ (2012), and established an expedited briefing and argument schedule.

QUESTIONS PRESENTED

1. Did the circuit court correctly hold that Ms. Alston was removed from office by operation of law when she was found guilty of misconduct in office for using State funds to pay an employee of her private law firm; received a sentence of one-year incarceration, suspended, along with probation, community service and restitution; and waived her appeals from that conviction?

2. Did the circuit court correctly hold that Mr. Hall was not entitled to be appointed delegate as of November 26, 2012 when he was no longer the choice of the Prince George's County Democratic Central Committee and it was only as a result of this litigation that the Central Committee had not already voted to withdraw the submission of his name to the Governor?

3. Did the circuit court correctly hold that the 15-day timeframe for the Governor to make an appointment after receiving a name from the Central Committee is directory, not mandatory, where the Constitution does not specify a consequence of failing to make an appointment within 15 days and where the consequence of holding that the 15-day timeframe is mandatory would be a long-term vacancy?

STATEMENT OF FACTS

A. Ms. Alston's Criminal Conviction and Sentencing

Ms. Alston was sworn in as a member of the House of Delegates representing the 24th legislative district on January 11, 2011. On or about September 23, 2011, the grand jury for Anne Arundel County returned to the State Prosecutor a five-count indictment against Ms. Alston for using funds belonging to the campaign finance entity "Friends of Tiffany Alston" for her private benefit ("Alston I"). (E. 200-05.)

On December 15, 2011, the grand jury returned a separate two-count indictment against Ms. Alston ("Alston II") charging her with theft of property or services with a value of less than $1,000, *see* Md. Code Ann., Crim. Law § 7-104((g)(2), and with common-law misconduct in office based on allegations that she used State money to pay an employee for work at her private law firm. (E. 208-10.) Unlike the Alston I indictment, the Alston II indictment alleged criminal acts that occurred during Ms. Alston's term of office. (*Id.*)

The two cases were set for separate trials before the Honorable Paul F. Harris, Jr. of the Circuit Court for Anne Arundel County. Alston II was scheduled for trial first and, on June 12, 2012, a jury returned a guilty verdict on both counts: misdemeanor theft and misconduct in office. Judge Harris deferred sentencing.

On October 9, 2012, rather than proceed to trial on the charges in Alston I, Ms. Alston entered into a plea agreement to resolve both the pending charges in Alston I and the charges on which she was to be sentenced in Alston II. (E. 213-14.) Pursuant to the plea agreement: (1) Ms. Alston pled *nolo contendere* to the fraudulent misappropriation

by a fiduciary count of Alston I, (E. 217); (2) she received probation before judgment on the misdemeanor theft charge (Alston II, count 1) (E. 220); and (3) on the misconduct-in-office charge (Alston II, count 2), Judge Harris sentenced Ms. Alston to one year of incarceration, suspended; 3 years of supervised probation; 300 hours of community service; and restitution to the State of Maryland in the amount of $800 (*id.*). As part of the plea agreement and as reflected on the criminal hearing sheets, Ms. Alston waived her appellate rights. (E. 213, 220.)

The plea agreement contemplated that Ms. Alston could seek a modification of her sentence on the misconduct-in-office conviction, requesting that the Court strike the guilty verdict and award her probation before judgment after completing her community service and restitution obligations. (E. 213-14.) Ms. Alston filed the motion for modification and asked that it be held *sub curia* pending completion of her community service and restitution obligations.

During a hearing held on November 13, 2012, 35 days after Ms. Alston's conviction, Judge Harris granted her motion for modification, struck the guilty verdict for misconduct in office, and entered probation before judgment on that count. (E. 223.) In an attempt to undo the constitutional consequence of her conviction, Ms. Alston first presented Judge Harris with a proposed order apparently stating that her conviction had been reversed and overturned as a matter of law. (E. 388-90.)[1] Judge Harris rejected that

[1] Ms. Alston's unsuccessful attempt to embed those terms in the proposed order was hardly an accident, as "reversed" and "overturned" are the terms used in Article XV, § 2 to describe when an official whose conviction is not-yet-final can be restored to office. *See* discussion below at 9-19.

proposal, pointing out that a "probation before judgment is not a reversal of a conviction . . . nor is a conviction overturned by operation of law." (E. 390.) Ms. Alston then presented Judge Harris with a second proposed order, this one providing that the probation before judgment would be entered "nunc pro tunc." (E. 390.) Judge Harris rejected that language as well, stressing that the probation before judgment was entered "[a]s of today," not any earlier date. (*Id*.) Judge Harris similarly rejected Ms. Alston's third request, that probation before judgment be entered "nunc pro tunc for November 5th," confirming that the probation before judgment was not entered as of any earlier date, but was "effective as of today," November 13, 2012. (E. 392.)

Ms. Alston never sought to appeal her conviction.

B. The Actions of the Prince George's County Democratic Central Committee

With the understanding that the 24th Legislative District seat in the House of Delegates was vacant, on November 2, 2012, the Central Committee voted, 12-10, to submit Gregory Hall's name to Governor O'Malley to fill that seat. On November 7, 2012, the Central Committee forwarded Mr. Hall's name to Governor O'Malley. (E. 189, 263.) On November 16, 2012, Governor O'Malley requested that the Central Committee withdraw its submission of Mr. Hall's name. (E. 190, 264.) The Central Committee scheduled a vote on the withdrawal of Mr. Hall's name for November 20, 2012. (*Id.*) Between November 2 and November 20, members of the Central Committee learned information about Mr. Hall's alleged past and present legal troubles, apparently undisclosed by Mr. Hall, including current back taxes owed, recent orders to pay overdue

child support, and his involvement, more than two decades earlier, in a shootout that resulted in the death of a 13-year-old boy. (E. 262-64.)

On November 20, 2012, Mr. Hall brought this action seeking to enjoin the Central Committee from voting to withdraw its submission of his name to the Governor. (E. 2-3.) Although the circuit court did not enter an injunction, in light of the confusion created by the litigation and the Central Committee's understanding that further proceedings were imminent, the Central Committee postponed taking action that evening. (E. 191, 265.) On November 26, 2012, the Central Committee was again scheduled to vote on the withdrawal of Mr. Hall's name (E. 266), and Mr. Hall again sought a temporary restraining order (E. 4). Before the vote, and based on Mr. Hall's stipulation that entry of the requested temporary restraining order would be without prejudice to any party (and that he would be estopped from arguing otherwise), the circuit court ordered that the Central Committee refrain from making any binding vote withdrawing Mr. Hall's name. (E. 183-84.) The Central Committee proceeded to adopt a non-binding "sense of the committee" resolution indicating overwhelming support for withdrawing Mr. Hall's name. (E. 266; Hall Br. at 9.)

STANDARD OF REVIEW

"The standard of appellate review of the grant of summary judgment is whether the trial court was legally correct, because the trial court decides issues of law, and not disputes of fact, when considering a motion for summary judgment." *Piscatelli v. Van Smith*, 424 Md. 294, 305 (2012).

SUMMARY OF ARGUMENT

Ms. Alston was tried, found guilty, sentenced, and waived her appeals for the crime of misconduct in office. Under Maryland's constitutional scheme, those facts rendered her conviction final and, therefore, caused her automatic removal from office by "operation of law." The finality of Ms. Alston's conviction was not altered when, 35 days after her conviction, the circuit court granted a motion for modification and entered a probation before judgment. Once there is a vacancy in the legislature, it is the function of the Central Committee to nominate, and the Governor to appoint, a replacement delegate. These provisions protect the prerogative of the Central Committee, but do not create rights in a nominee. Moreover, the 15-day timeframe specified for the Governor to make an appointment after the submission of a name by the Central Committee is directory, not mandatory. The Central Committee remained free to withdraw Mr. Hall's nomination as of November 26, 2012, when the circuit court enjoined it from doing so, and, if the Central Committee withdraws Mr. Hall's nomination, the Governor is charged by the Constitution with the obligation to appoint a replacement legislator.

ARGUMENT

I. PURSUANT TO ARTICLE XV, § 2 OF THE CONSTITUTION, MS. ALSTON WAS REMOVED FROM OFFICE BY OPERATION OF LAW WHEN SHE WAS CONVICTED OF A QUALIFYING CRIME AND WAIVED APPEAL RIGHTS.

Ms. Alston was removed from office by operation of law as of October 9, 2012, when she was convicted of a qualifying crime and waived her appeal rights. As of that date, her conviction was final and not subject to being overturned or reversed. The version of Article XV, § 2 of the Maryland Constitution in effect at that time provided:

> Any elected official of the State . . . who during his term of office is convicted of or enters a plea of *nolo contendere* to any crime which is . . . a misdemeanor related to his public duties and responsibilities and involves moral turpitude for which the penalty may be incarceration in any penal institution, shall be suspended by operation of law without pay or benefits from the elective office. During and for the period of suspension of the elected official, the appropriate governing body and/or official authorized by law to fill any vacancy in the elective office shall appoint a person to temporarily fill the elective office . . . . If the conviction becomes final, after judicial review or otherwise, such elected official shall be removed from the elective office by operation of Law and the office shall be deemed vacant. If the conviction of the elected official is reversed or overturned, the elected official shall be reinstated by operation of Law to the elective office for the remainder, if any, of the elective term of office during which he was so suspended or removed, and all pay and benefits shall be restored.

Md. Const., Art. XV, § 2.[2]

This provision created a two-step process: (1) An elected official who is convicted of a qualifying crime is suspended; (2) if the conviction "becomes final, after judicial review or otherwise," the removal becomes permanent, but if, instead of becoming final, the conviction is "reversed or overturned," the elected official is reinstated to office.

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[2] During the 2012 legislative session, the General Assembly unanimously proposed a constitutional amendment that modified Art. XV, § 2 by (1) accelerating the trigger for suspension from "conviction," which occurs at sentencing, *see* 62 Op. Md. Att'y Gen. 365, 371 (1977), to the time of a guilty verdict; (2) mandating immediate and automatic removal of officials who enter guilty or *nolo contendere* pleas for qualifying crimes; and (3) making the provisions gender neutral. 2012 Md. Laws, ch. 147. Ms. Alston was a co-sponsor and voted in support of this amendment. On November 6, 2012, the voters approved this constitutional amendment with nearly 90 percent of the vote in favor. *See* Official 2012 Presidential General Election results for All State Questions (available at http://www.elections.state.md.us/elections/2012/results/general/gen_qresults_2012_4_00_1.html (last visited Dec. 26, 2012)) (reporting that 88% voted to approve Question 3). The amendment became effective on December 6, 2012, upon the Governor's proclamation that it had been adopted by the voters. (Apx. 1-2.) Art. XIV, § 1.

Ms. Alston's October 9, 2012 conviction for misconduct in office for using State funds to pay an employee of her private law firm qualifies as a conviction "related to [her] public duties and responsibilities" that "involves moral turpitude for which the penalty may be incarceration in any penal institution," thus triggering the application of Article XV, § 2. *See Duncan v. State*, 282 Md. 385, 387 (1978) (describing common law misconduct in office as "corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office"). Ms. Alston implicitly concedes that she was convicted of a qualifying crime on October 9, 2012, *see* Alston Brief at 12 ("Delegate Alston sought to expedite her return to the House of Delegates"), but argues erroneously that her conviction was not "final" as of that date and, therefore, she was merely suspended, not removed from office by operation of law, *id.* at 12-20.

The plain language of Article XV, § 2, establishes a binary outcome after an elected official is convicted of a qualifying crime. If "the conviction becomes final, after judicial review or otherwise," the official is removed from office as a matter of law. If, on the other hand, the conviction is "reversed or overturned, the elected official shall be reinstated by operation of Law." In this case, Ms. Alston's conviction became final on October 9, 2012, by virtue of her waiver of her appellate rights, and the conviction was no longer subject to being overturned or reversed. That finality came not through judicial review, but "otherwise," by waiver.[3]

[3] Ms. Alston has not argued that she retained any appellate rights at all after her October 9 conviction. Notably, even if Ms. Alston retained certain limited appeal rights after that date, *see*, *e.g.*, Md. Code Ann., Cts. & Jud. Proc. § 12-302(e) (allowing for review of judgment entered following a plea of guilty), those limited rights expired when

Ms. Alston contends erroneously that her conviction never became final because it remained subject to modification by the trial court under § 6-408 of the Courts & Judicial Proceedings Article and Rule 4-345. Ms. Alston's interpretation of Article XV, § 2 conflicts with both the plain language and purpose of that provision.

A. Under the Plain Language of Article XV, § 2 of the Constitution, Ms. Alston's Conviction Was "Final," and Not Subject to Being "Reversed or Overturned," as of October 9, 2012.

"Generally speaking, the same rules that are applicable to the construction of statutory language are employed in interpreting constitutional verbiage." *Bernstein v. State*, 422 Md. 36, 43 (2011) (quoting *Brown v. Brown*, 287 Md. 273, 277 (1980)). In interpreting a constitutional or statutory provision, a court's "primary goal is always 'to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by [the] particular provision, be it statutory, constitutional or part of the Rules.'" *People's Ins. Counsel Div. v. Allstate Ins. Co.*, 408 Md. 336, 351 (2009) (quoting *Barbre v. Pope*, 402 Md. 157, 172 (2007)). In interpreting a text, courts "first look[] to the normal, plain meaning of the language of the statute, reading the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *People's Ins. Counsel*, 408 Md. at 351; *see also Bernstein*,

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Ms. Alston failed to seek an appeal by November 8, 2012, 30 days after her conviction, *see* Rule 8-202(a). Thus, in either case, her conviction was final by no later than November 8, 2012, *see Pratt v. Warden*, 8 Md. App. 274, 277 (1969) ("Of course, if no direct appeal is noted, the conviction becomes final at the time the availability for appeal has been exhausted, there then being no right to petition for certiorari."), several days before Judge Harris granted her motion for modification.

422 Md. at 44 (in interpreting constitutional provision, "courts should be careful not to depart from the plain language of the instrument"). When the language is "clear and unambiguous," the inquiry ends there. *People's Ins. Counsel*, 408 Md. at 351; *see also Brown*, 287 Md. at 278 (if the words of a constitutional provision are "not ambiguous, the inquiry is terminated"). Where the language is ambiguous, courts "endeavor to resolve that ambiguity by looking to the statute's legislative history, case law, and statutory purpose, as well as the structure of the statute." *People's Ins. Counsel*, 408 Md. at 351; *see generally Bernstein*, 442 Md. at 43-44, 56-58 (discussing analogous inquiries in construing ambiguous constitutional provisions).

In this case, Ms. Alston's proffered interpretation of Article XV, § 2 conflicts with the plain language of the Constitution with respect to her construction of both the term "final" and the terms "reversed" and "overturned." This Court has expressly adopted the Supreme Court's definition of finality as "denoting the point of time when the courts are powerless to provide a remedy for the defendant on direct review." *Terry v. Warden of Maryland Penitentiary*, 243 Md. 610, 612 (1966) (citing *Hays and Wainwright v. State*, 240 Md. 482, 84 (1965)); *see also Maryland State Bar Ass'n v. Rosenberg*, 273 Md. 351, 354 (1974) (rejecting argument that criminal conviction as to which appeals on direct review had been exhausted was not final because of a pending motion for new trial based on newly discovered evidence); *Strosnider v. Warden, Maryland Penitentiary*, 245 Md. 692, 694 (1967) (quoting *Terry*, 243 Md. at 612); *Avery v. State*, 17 Md. App. 686, 692-93 (1973) (finality of a conviction is not affected by seeking collateral relief). The Supreme Court's formulation of the definition of finality adopted by this Court describes

a conviction as "final" where "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed. . . ." *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965). Thus, "final" refers to convictions that are not subject to being reversed or overturned on direct review—that is, on direct appeal or by writ of certiorari following a direct appeal. The possibility of post-conviction relief, habeas relief, modification by the trial court, or even a pardon—all possibilities that could reduce or even eliminate a conviction—is legally irrelevant in determining whether a conviction is "final." Such "[s]ubsequent actions do not alter the finality of the original conviction, even though . . . many state and federal remedies remain to correct injustice." *Avery*, 17 Md. App. at 693.

Thus, under the definition adopted by this Court and the Supreme Court, finality of a conviction does not require an absence of any possibility of a conviction being altered; it instead requires that a sentence be final in the standard legal and common-sense understanding of not being subject to being overturned on direct review. Ms. Alston's conviction thus became "final" on October 9, 2012 when she was sentenced and waived her appellate rights. As of that date, the courts were powerless to grant her any relief from her conviction on direct review, and she was removed from office by operation of law. That is sufficient to dispose of Ms. Alston's claims.

Ms. Alston's proposed interpretation of Article XV, § 2 also depends on her strained interpretation of "reversed or overturned" to encompass a post-conviction modification by the sentencing court. Under Article XV, § 2, the only basis for reinstating a suspended official whose conviction has not yet become final is if the

conviction is "reversed or overturned." The terms "reversed" and "overturned" are normally and naturally understood as actions taken exclusively by appellate courts, or by certain entities "overturning" actions of another. *See, e.g., Baltimore Co. FOP Lodge No. 4 v. Baltimore Co.*, No. 3, Sept. Term 2012, __ Md. __, 2012 Md. LEXIS 750, *53 (Nov. 19, 2012) ("Judgment of the Court of Special Appeals reversed . . . ."); *Tinsley v. Washington Metro. Area Transit Auth.*, No. 25, Sept. Term 2012, __ Md. __, 2012 Md. LEXIS 684, *16 (Oct. 16, 2012) (Court of Special Appeals "reversed the judgment of the circuit court"); *S&S Oil, Inc. v. Jackson*, 428 Md. 621, 629 (2012) (stating circumstances in which Court of Appeals "will overturn a trial judge's decision to use a particular verdict sheet"); *Downey v. Sharp*, 428 Md. 249, 258 (2012) (discussing limitations on "authority of the courts to overturn arbitration awards"); *Burruss v. Board of County Comm'rs*, 427 Md. 231, 247 (2012) (discussing "petition for referendum to overturn a bill enacted by" a county legislative body).[4]

By contrast, a court's action to modify its own earlier action in a case is described by words such as "correct," "modify," "reduce," "vacate," "revise," or "set aside." *See* Rules 4-331, 4-345; *see also* Md. Code Ann., Cts. & Jud. Proc. § 6-408 (referring to trial

[4] One exception to this use of "overturn" as generally indicating one entity overturning a decision or action of another is its use in describing an appellate court "overturning" its precedent. *See, e.g., DRD Pool Serv. v. Freed*, 416 Md. 46, 69 (2010) (plaintiffs' arguments "do not show flawed reasoning sufficient to justify overturning precedent"). Even in that context, however, the term is used to describe an appellate court using one case to overturn a holding established in an earlier case because of a subsequent determination that the holding was incorrect, *see id.*, not a trial court's decision to vacate or modify an action taken in a single case because of rehabilitative actions taken by a defendant.

court's "revisory power and control over the judgment"). If Article XV, § 2 had been intended to apply to a court taking any of these actions with respect to its own judgment, it could easily have been written to address them, rather than using "reversed or overturned."

More importantly, the terms "reversed" and "overturned" imply a flaw in a conviction, suggesting that some aspect of the conviction was improper. In those circumstances, where the basis for the suspension from office is found to be either substantively or procedurally flawed, the People, acting through Article XV, § 2, deemed it appropriate to end the suspension and reinstate the official. By contrast, a decision to revise or modify a sentence does not imply any substantive or procedural flaw in the conviction. That distinction is exemplified by the facts of this case, in which Ms. Alston's sentence was not modified because any court identified any flaw in the proceedings leading to the original conviction,[5] but only because of her *post-conviction conduct*, specifically her completion of certain rehabilitative requirements of her original sentence. As a result, in contrast to the situation if a higher court had reversed or overturned her conviction, the circuit court's modification of Ms. Alston's sentence does not undermine in any way the legitimacy of the original conviction.

Under the plain language of Article XV, § 2 Ms. Alston's conviction became "final" on October 9, 2012, when it was no longer subject to review on direct appeal as a

[5] To the contrary, in response to multiple attempts by Ms. Hall to get the circuit court to enter an order that she apparently believed would cast doubt on the legitimacy of her conviction, Judge Harris refused to do so. (E. 389-92.)

result of her waiver of her appellate rights, and the circuit court's later modification of her sentence did not "reverse" or "overturn" the original conviction.

B. Under Ms. Alston's Proffered Interpretation of Article XV, § 2, No Conviction Could Ever Be "Final."

The interpretation of Article XV, § 2 urged by Ms. Alston not only conflicts with the provision's plain language, but also is at odds with its purpose, which is to remove from office those elected officials who are found guilty of crimes that undermine the public trust in, and the integrity of, the General Assembly.[6] Under Ms. Alston's theory, an elected official could be suspended, but could *never* be removed from office because her sentence would always potentially be subject to being altered or even struck—by modification under Rule 4-345 or § 6-408 of the Courts & Judicial Proceedings Article, through post-conviction or habeas relief, or by pardon—at a later date. That interpretation would render superfluous the entire second-to-last sentence of Article XV, § 2, which addresses the consequences of a conviction becoming "final."

Historically, the power of Maryland trial judges to revise criminal sentences was unique, both as compared to other states and other areas of the law. *See* Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U.

[6] The General Assembly's unanimous adoption of the proposed constitutional amendment in 2012 and the voters' overwhelming approval of that amendment, *see* note 2, above, demonstrates that preserving the integrity of the institution remains a uniformly-held policy goal and provides recent and resounding confirmation of where the public interest lies. *Cf. Bernstein*, 422 Md. at 64-65 (discussing voters' rejection of proposed change to constitutional provision as demonstrating support for the policy embodied in the existing provision).

Balt. L. Rev. 1 (2003). So long as a motion for modification was filed within 90 days of sentence and held *sub curia* by the trial court, it could be granted at any time thereafter. *Id*. at 4-7 (discussing *Greco v. State*, 347 Md. 423 (1997), and *State v. Robinson*, 106 Md. App. 720 (1995)). The current five-year limit on the trial court's revisory power was added in 2004. *See* Rule 4-345(e).

Like other collateral criminal remedies, the revisory power available under Rule 4-345 provides for remedies that may be granted after a criminal conviction becomes final. *See State v. Griffiths*, 338 Md. 485, 496 (1995) (describing Rule 4-345(a) as providing "a method of opening a judgment otherwise final and beyond the reach of the court."). That the Circuit Court for Anne Arundel County later "struck" Ms. Alston's guilty verdict and conviction and granted her probation before judgment does not mean that the conviction never occurred, or that it never became final, for purposes of Article XV, § 2. Had the circuit court initially granted Ms. Alston probation before judgment on the common-law misconduct-in-office charge, she would not have received a "conviction" and would not have been removed by operation of law. But because the circuit court sentenced Ms. Alston, she was "convicted" for purposes of Article XV, § 2, and, when she waived her appellate rights, she was removed from office. The court's later exercise of its revisory power cannot undo that fact.[7]

[7] Ms. Alston argues in her brief that Judge Harris was legally bound to grant the motion for modification. Alston Brief at 12-14. Governor O'Malley and Speaker Busch (collectively, the "State Defendants") do not believe the issue of whether or not Judge Harris was bound to grant Ms. Alston's motion has any relevance to the issues before this Court. Moreover, contrary to Ms. Alston's claim, Alston Brief at 6 n.3, the circuit court also did not believe this issue to be of significance to its holding. (E. 351) ("whether the

Notably, in modifying Ms. Alston's sentence, the circuit court did not identify a problem of any kind with her conviction. Instead, the modification was based on Ms. Alston having fulfilled the rehabilitative obligations contained in her sentence. (E. 392.) Whatever the merits of the modification, nothing about it alters the fact that Ms. Alston was convicted of the common-law crime of misconduct in office or the fact that her conviction became final by her waiver of (or failure to exercise) her appeal rights.

The issue before this Court in not punishment (or rehabilitation), as the purposes served by Article XV, like other professional responsibility provisions, are not punishment, but preservation of the public trust. *Cf. Attorney Grievance Comm'n v. Katz*, ___ Md. ___, No. 86, September Term 2011, slip op. at 12 (Nov. 19, 2012) (purpose of attorney grievance process is "not to punish the errant attorney, but rather . . . to maintain public trust in the legal profession by demonstrating intolerance for unprofessional conduct" (internal quotation marks omitted)); *compare* 65 Op. Md. Att'y Gen. 445, 449 (1980) (observing that "the primary purpose of Article XV, § 2 clearly is to provide for the suspension from office of a convicted official; it is not concerned with the treatment of an official convicted after his term of office"). Allowing Ms. Alston to retain her seat despite her conviction would be contrary to the purposes served by Article XV.[8]

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plea was binding is not *material* to our analysis" (emphasis in original)). Nonetheless, the transcript of the proceedings before Judge Harris makes clear that he did not believe the plea agreement was an ABA binding plea agreement *and* that he informed the parties that it was his intent to grant the motion for modification if the conditions were met. (E. 281; 329-30.)

[8] In her brief, Ms. Alston argues, in essence, that Judge Harris's statements that he would grant her motion for modification if she completed her restitution and community

C. Ms. Alston's Reliance on the Legislative History of Article XV, § 2 Is Misplaced.

Ms. Alston relies erroneously on changes made during legislative consideration of the proposed language of Article XV, § 2, when she contends that a conviction is not "final" if it is subject to modification. As originally introduced, the proposed constitutional amendment would have required permanent removal upon conviction "notwithstanding any appeal which may be taken." Senate Bill 671 (1974). The Senate amended that language to provide:

> If, after exhaustion of any appeal as a matter of right within the court system in which the elected official is so convicted, the conviction is upheld, such elected official shall be removed from the elective office by operation of law. . . . If the conviction of the elected official is reversed or overturned on any appeal as a matter of right as provided above, the elected official shall be reinstated by operation of law.

Journal of the Proceedings of the Senate of Maryland 1913-14 (1974). The current language was inserted by amendment in the House of Delegates. 2 *Maryland House Journal, Part II* 4364-65 (1974).

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services obligations, combined with her own statements to Judge Harris that she intended to return to the General Assembly, constituted assurances from the court that her conviction was not final and that she would be eligible to retain her seat in the General Assembly. *See* Alston Br. at 3-5, 12-13, 15, 20. Of course, no statement by Judge Harris opining about the consequences of Ms. Alston's conviction could alter the constitutional consequence of that conviction. Moreover, Judge Harris was never asked to, nor did he, opine on whether her conviction was "final" for purposes of Article XV, § 2, or on the consequences of her conviction for her ability to retain her seat in the General Assembly. If Ms. Alston reached inaccurate conclusions about those issues, that is not to be blamed on Judge Harris, and it certainly is not a basis for exempting her from Article XV, § 2. Equally without merit are Ms. Alston's assertions that the State Prosecutor's plea agreement somehow assured her that she would be able to retain her office. *See* Alston Brief at 13-15. The plea agreement contains no such guarantee. (E. 213-15.)

Ms. Alston's contention that the phrase "final, after judicial review or otherwise" in Article XV, § 2 means that the conviction must be beyond the reach of collateral review as well as direct review is wrong for several reasons. First, as discussed above, that is not what "final" means. This Court's definition of "final" as meaning an absence of any opportunity for reversal on direct appeal came in 1965, *Terry*, 243 Md. at 612, nine years before the General Assembly drafted Article XV, § 2. The General Assembly is presumed to have been aware of that definition and if the Legislature had intended "final," as applied to criminal convictions, to have a meaning other than that commonly understood, and adopted and applied by this Court, it would have chosen different language. *Cf. People's Ins. Counsel*, 408 Md. at 364-65 (stating presumption that, "when the Legislature acts, it does so with knowledge of our decisions").

Second, although there is no indication in the legislative history as to why the House of Delegates altered the language of Article XV, § 2, neither the text of the provision nor the legislative history provide any basis for concluding that the term "judicial review" could be stretched to encompass a trial court's review of its own rulings. A much more likely explanation for the change to the phrase "final, after judicial review or otherwise" is that the House of Delegates concluded that the Senate's language—"after exhaustion of any appeal as a matter of right, the conviction is upheld"—did not account for the possibilities that a sentence could become "final" not only by taking and losing an appeal as a matter of right, but also by either declining to take an appeal of right or after further review by this Court or the Supreme Court on a writ of certiorari. The House's amendment made that plain.

Third, the plain meaning of the phrase supports the State Defendants' interpretation. Black's Law Dictionary defines judicial review as:

> 1. A court's power to review the actions of other branches or levels of government; esp. the courts' power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower court's or an administrative body's factual or legal findings.

Black's Law Dictionary 864 (8th ed. 2004); *cf.* Md. Code Ann., State Gov't § 10-222 (providing for "judicial review" of final decisions in contested cases); Md. Code Ann., Elec. Law § 6-209 (providing for "judicial review" of determinations made by the State Board of Elections regarding petitions). None of these definitions encompass a court's review of its own ruling. Neither the State Defendants nor, apparently, Ms. Alston have been able to identify any authority referring to a court's review of its own decision as "judicial review."

Fourth, as this Court explained in *Gisriel v. Ocean City Board of Supervisors*, it was not uncommon in the early 1970s for the judiciary and the General Assembly alike to conflate the concepts of "appeal" and "judicial review." 345 Md. 477, 493 (1997) (stating that, before this Court's decision in *Shell Oil Co. v. Supervisor*, 276 Md. 36 (1975), it was common for statutory circuit court actions for judicial review of administrative agency decisions to be "called 'appeals' and treated as if they fell within the appellate jurisdiction of the circuit courts").

The circuit court correctly rejected Ms. Alston's reliance on this history.

D. Ms. Alston's Reliance on Article III, § 19 of the Constitution Is Misplaced.

Finally, relying on Article III, § 19 of the Constitution, Ms. Alston contends erroneously that she has not been removed from office because only the House of Delegates, by a vote of two-thirds of its whole number, can declare a vacancy in a delegate seat.[9] Notably, however, Article XV, § 2, which post-dates Article III, § 19, was drafted and ratified by the People without any exception for members of the General Assembly, and it provides for automatic suspension and removal "by operation of law," not by a vote of one house of the General Assembly. Indeed, this precise question of the interrelation between Article XV, § 2 and Article III, § 19 arose while the General Assembly was considering proposing the Constitutional amendment that became Article XV, § 2. The Office of the Attorney General advised the General Assembly at that time that the two provisions would operate independently:

> [Y]ou have inquired as to what effect, if any, the proposed constitutional amendment [creating what is now Article XV, § 2] would have on existing Section 19 of Article III of the Constitution. . . . While there can be no question about the General Assembly's long-standing control over the determination of vacancies among its membership, the proposed constitutional amendment . . ., which applies to all elected officials and contains no exception for members of the General Assembly, would, in our

[9] Article III, § 19 provides:

> Each House shall be judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of the State, and shall appoint its own officers, determine the rules of its own proceedings, punish a member for disorderly or disrespectful behavior and with the consent of two-thirds of its whole number of members elected, expel a member; but no member shall be expelled a second time for the same offence.

> opinion, prevail over the discretion of the General Assembly as set forth in Section 19 of Article III.

Letter of Advice to J. Joseph Curran, Jr., Chair, Senate Judicial Proceedings Committee from Assistant Attorney General George A. Nilson 2 (Mar. 26, 1974) (Apx. 4.)[10] The contemporaneous advice provided to the General Assembly continued:

> We do not believe that a later enacted constitutional amendment providing on its face for suspension and removal by operation of law would be held ineffectual with respect to elected members of the General Assembly as a result of the traditional discretion lodged in the General Assembly with respect to the qualifications and expulsion of its members. Accordingly, we are of the view that once the conditions of automatic suspension or removal specified in the proposed constitutional amendment are found to be present, the General Assembly would have no further discretion in the matter since the temporary or permanent vacancy, as the case may be, would be deemed to exist as a matter of law.

Id. Article XV, § 2 thus neither requires action by the General Assembly for a suspension or removal to take effect, nor inhibits the General Assembly from taking its own action pursuant to Article III, § 19 in circumstances that do not meet the criteria of Article XV, § 2. *Id.* at 3 (Apx. 4-5.) This advice remains a sensible guide for interpreting these two provisions. Tellingly, Ms. Alston provides no alternative other

[10] This Court has accorded weight to the contemporaneous advice of the Office of the Attorney General in construing the meaning of statutes. *See State v. Burning Tree Club, Inc.*, 315 Md. 254, 299 (1989) (finding that the General Assembly's receipt of advice on severability from the Attorney General buttressed other evidence of legislative intent that provision be severable); *State v. Crescent Cities Jaycees Found., Inc.*, 330 Md. 460, 470 (1993) ("[T]he Legislature is presumed to have known of the Attorney General's statutory interpretation and to have acquiesced in that construction absent change in the statutory language."). In this case, the General Assembly proposed the constitutional amendment with this advice before it, and the People approved the language, which contains no exception for members of the General Assembly.

than her apparent personal preference for the procedure set forth in Article III, § 19.[11]

For all of these reasons, Ms. Alston was removed from her elective office by operation of law.

II. MR. HALL HAS NO LEGAL ENTITLEMENT TO BE APPOINTED AS A DELEGATE.

Mr. Hall erroneously contends that he has a constitutionally-protected right to be appointed as a delegate from the 24th Legislative District pursuant to Article III, § 13(a)(1) of the Maryland Constitution, which provides that, if the Central Committee has submitted a name to the Governor within 30 days of the occurrence of a vacancy, "it shall be the duty of the Governor to make said appointment within fifteen days after the submission [of the name] to him."[12] Mr. Hall's contention is based on three fundamental misconceptions about the operation of the 15-day timeframe in Article III, § 13(a)(1). First, that provision serves to protect the prerogatives of the Central Committee, not Mr. Hall. Second, the 15-day timeframe is directory, not mandatory. Indeed, if Mr. Hall

[11] If this Court determines that Ms. Alston is entitled to reinstatement under Art. XV, § 2, she would thus remain subject to potential proceedings in the House of Delegates pursuant to Article III, § 19.

[12] Mr. Hall spends a significant portion of his brief raising, and then knocking down, the straw-man argument that the Governor believes he is not required to appoint the Central Committee's choice to a vacant seat. Hall Br. at 13-21. To the contrary, the Governor acknowledges that the Constitution requires him to appoint the Central Committee's timely selection, provided the individual meets the constitutional qualifications for office and is a member of the political party of the vacating Delegate. The issues in this litigation are not whether the obligation to appoint is mandatory, but whether: (1) the Central Committee has the ability to withdraw a name if the original name submitted is no longer the Central Committee's choice; and (2) whether the 15-day timeframe for appointment is mandatory.

were correct that the 15-day timeframe is mandatory and expired before November 26, the result would not be that he is entitled to be appointed, but that the seat would remain vacant until the next election. That is an untenable result that requires rejection of Mr. Hall's proposed interpretation. Third, the Central Committee possesses the authority to withdraw its submission of a name to the Governor until the Governor makes the appointment. The circuit court's holding that the 15-day timeframe in Article III, § 13(a)(1) is directory and that the Central Committee has authority to withdraw its submission of Mr. Hall's name to the Governor is correct and should be affirmed.

A. The 15-Day Timeframe in Article III, § 13(a)(1) Is Intended to Protect the Prerogatives of the Central Committee, Not Mr. Hall.

Article III, § 13(a)(1) of the Maryland Constitution provides the method for appointing a replacement member of the state legislature:

> In case of . . . disqualification . . . of any person who shall have been chosen as a Delegate or Senator, . . . the Governor shall appoint a person to fill such vacancy from a person whose name shall be submitted to him in writing, within thirty days after the occurrence of the vacancy, by the Central Committee of the political party, if any, with which the Delegate or Senator so vacating, had been affiliated, at the time of the last election or appointment of the vacating Senator or Delegate, in the County or District from which he or she was appointed or elected, provided that the appointee shall be of the same political party, if any, as was that of the Delegate or Senator whose office is to be filled, at the time of the last election or appointment of the vacating Delegate or Senator and it shall be the duty of the Governor to make said appointment within fifteen days after the submission thereof to him.

Md. Const., Art. III, § 13(a)(1). Ms. Alston was removed from office on October 9, 2012 at the time her conviction became final. That began the 30-day time clock for the Central

Committee to nominate a successor, which it did on November 7, 2012, by submitting Mr. Hall's name to Governor O'Malley.[13]

As with Article XV, § 2, the primary goal in interpreting Article III, § 13(a)(1) is "to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, constitutional or part of the Rules." *People's Ins. Counsel Div.*, 408 Md. at 351. In this litigation, Mr. Hall claims a personal entitlement to be appointed by the Governor as Delegate from the 24th Legislative District. However, the manifest intent of Article III, § 13(a)(1) is to provide a process for filling a legislative vacancy with a qualified individual who enjoys the support of the local party central committee, and to do so in a timely manner so that the seat does not remain vacant. That scheme is designed to protect the prerogatives of the Central Committee in its selection of an individual to fill the vacancy, not the prerogatives of any particular individual.[14] Mr. Hall's position in this litigation, that he is entitled to be appointed Delegate notwithstanding that he is no longer the choice of the Central

[13] Alternatively, if this Court were to find that Ms. Alston's conviction did not become final until she failed to appeal her conviction within 30 days after it was rendered, then the 30-day timeframe for the Central Committee to submit a name to Governor O'Malley for a permanent replacement for Ms. Alston did not begin until November 8, 2012.

[14] In fact, the contrary interpretation—that the provision creates a property or contractual right in the individual nominee—would be contrary to long-established Maryland precedent. *See, e.g.*, *Duer v. Dashiell*, 91 Md. 660, 667 (1900) ("It has long been settled that public officials are merely agents of the State for the carrying out of public purposes and that their selection and the fixing of the length of time for which they shall serve are matters of public convenience or necessity, and do not fall within the scope of the term *contract* as applied to transactions between individuals out of which definite and vested rights of property arise.") (emphasis in original).

Committee, is thus squarely at odds with the intent of Article III, § 13(a). If the members of the Central Committee change their minds after making an initial submission of a name to the Governor—particularly if they have newly-discovered evidence of a nominee's unsuitability—they should be allowed to reconsider. Any other interpretation would encourage deception by applicants, a result that no rational policy could endorse.

B. The 15-Day Timeframe of Article III, § 13(a)(1) Is Directory, Not Mandatory, and Had Not Expired by November 26, 2012.

Mr. Hall's claim that he is entitled to be appointed Delegate is based largely on his mistaken contentions that the 15-day timeframe in Article III, § 13(a)(1) is both mandatory and expired before November 26, 2012.[15] Neither contention is correct.

1. The 15-Day Timeframe of Article III, § 13(a)(1) Is Directory, Not Mandatory.

The circuit court correctly determined that the 15-day timeframe in Article III, § 13(a)(1) is directory, not mandatory, and, therefore, that the Governor maintained the constitutional authority to make an appointment to fill the vacancy following Ms. Alston's removal. While "shall" is generally construed as mandatory language, it is not uniformly so. Rather, a court's task in construing a constitutional provision is to ascertain and effectuate the intention of its framers. *See Perkins v. Eskridge*, 278 Md.

[15] On November 26, 2012, as reflected in a written order entered on November 29, 2012, the Circuit Court for Prince George's County ordered the Central Committee not to take any binding action to rescind its submission of Mr. Hall's name to the Governor. (E. 183-84.) This standstill order reflects Mr. Hall's stipulation that the order was "without prejudice," such that if the Court found the Central Committee was entitled to rescind its submission of Mr. Hall's name as of November 26, 2012, the Central Committee would have the opportunity to do so following the Court's ruling. (*Id*.)

619, 640-41 (1976). Whether a particular statute—or, as here, a constitutional provision—"is mandatory or directory does not depend upon its form, but upon the intention of the Legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other." *Bond v. Baltimore*, 118 Md. 159, 166 (1912); *see also State v. McNay*, 100 Md. 622, 632 (1905) (same). Thus, "[p]ositive commands and positive prohibitions have alike been held directory." *McNay*, 100 Md. at 632.

In fact, there are a number of provisions of the State Constitution that would facially appear to create mandatory obligations, but that have been sensibly interpreted as directory. *See, e.g.*, Md. Const., Art. IV, § 15 (requiring, in the Court of Appeals, that "[i]n every case an opinion, in writing, shall be filed within three months after argument, or submission of the cause") (provision held to be directory in *McCall's Ferry Power Co. v. Price*, 108 Md. 96, 112-14 (1908)); Md. Const., Art. IV, § 23 ("The Judges of the respective Circuit Courts of this State shall render their decisions, in all cases argued before them, or submitted for their judgment, within two months after the same shall have been so argued or submitted") (provision held to be directory in, *e.g.*, *Myers v. State*, 218 Md. 49, 51 (1958)).

The case primarily relied on by Mr. Hall on this issue, *In re James S.*, fully supports the State Defendants' position. In *James S.*, this Court held mandatory a provision in the Court and Judicial Proceedings Article that required the filing of a petition alleging delinquency of a juvenile "within 15 days of a referral from the intake officer." 286 Md. 702, 703 (1980). Finding that the provision was instituted because of

the General Assembly's "desire that [juvenile causes] proceed expeditiously," this Court found that the 15-day timeframe was mandatory, and that the failure to meet it in that case required dismissal of the late-filed petition with prejudice. *See id.* at 713.

In reviewing this Court's precedents relating to determining whether statutes imposing deadlines for actions were mandatory or directory, this Court in *James S.* made clear the importance in that inquiry of identifying the context of, and purpose behind, the deadlines. Thus, where finding a particular provision to be mandatory would be contrary to the primary purpose of the provision, the Court has found such provisions to be directory. *See id.* at 707-11. For example, in *McCall's Ferry*, this Court identified the purpose of the requirement that it issue an opinion within 30 days of argument as having "prompt decisions of causes," and thus rejected an interpretation of that provision as being mandatory where that would only result in "further delay." *McCall's Ferry*, 108 Md. at 113 (cited in *James S.*, 286 Md. at 707-08). This Court also stated in *McCall's Ferry* that, notwithstanding the requirement that opinions be filed within three months, "there may be, as there was in this case, perfectly valid reasons for not technically complying with such requirements as this." *Id.*

Similarly, in *Maryland State Bar Association, Inc. v. Frank*, this Court identified the purpose of a statute requiring a bar association to prosecute charges of attorney misconduct no later than 60 days after an order as being "designed for the protection of the public." 272 Md. 528, 533 (1975) (quoted in *James S.*, 286 Md. at 710-11). As a result, this Court found that dismissing charges against an attorney because the bar association had failed to comply with the 60-day timeframe would "largely vitiate[]" the

purpose of the statute, and, for that reason, held "that the legislature intended the time direction of the statute to be directory and not mandatory." *Id.* at 533-34 (citing as additional cases in accord *Pressley v. Warden*, 242 Md. 405, 406-07 (1966); *Holt v. Warden*, 223 Md. 654, 657 (1960); *Myers v. State*, 218 Md. 49, 51 (1958); and *Snyder v. Cearfoss*, 186 Md. 360, 370 (1946)).

By contrast, in each of the cases discussed in *James S.* in which this Court found deadlines to be mandatory, that holding benefitted the individual or entity that the drafters intended the deadline itself to benefit.[16] In each of those cases the Court expressly recognized that the determination of whether the statutory or constitutional timeframe was directory or mandatory depended on the context or purpose of the statute.[17] Where

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[16] *See Johnson v. State*, 282 Md. 314, 321 (1978) (rule requiring defendant to be taken before judicial officer by the earlier of 24 hours, or the first session of court, after arrest—for the purpose of "insur[ing] that an accused will be promptly afforded the full panoply of safeguards provided at the initial appearance"—found mandatory where result was exclusion of statements made by defendant during interrogation before presentment), *superseded by statute as stated in Facon v. State*, 375 Md. 435, 451 (2003); *Moss v. Director, Patuxent Inst.*, 279 Md. 561, 562 (1977) (rule requiring individual to be summoned to appear "forthwith" after issuance of report found mandatory where result was individual was released from institution); *United States Coin & Currency in the Amount of $21,162.00 v. Director of Fin. of Baltimore City*, 279 Md. 185, 187 (1977) (rule requiring application for forfeiture of cash to be made within 90 days found mandatory, in light of principle that "forfeitures are considered harsh extractions, odious, and to be avoided where possible," where result was denial of application for forfeiture) (internal quotation marks omitted), *superseded by statute as stated in Director of Fin. v. Cole*, 296 Md. 607, 630 (1983).

[17] *Johnson*, 282 Md. at 321 (shall is presumed to be mandatory "in the absence of a contrary contextual indication"; "our practice has been to avoid semantic nicety and to adopt that interpretation which will best implement the policies underlying the particular rule"); *Moss*, 279 Md. at 564-65 (use of "'shall' is presumed mandatory unless its context would indicate otherwise"); *United States Coin & Currency*, 279 Md. at 187 ("use of the word 'shall' ordinarily is presumed mandatory (but may not be if the context indicates

the consequence of finding the deadlines to be mandatory furthered the goals of the statute, and the context did not dictate a finding that the deadlines were directory, they were found to be mandatory; but where the consequence would frustrate the purpose of the statute, as in *McCall's Ferry* and *Frank*, they were found to be directory.

The purpose of the 15-day timeframe in Article III, § 13(a)(1) is clearly to ensure that the seat does not remain vacant for an excessive period of time, and the intended beneficiaries of the provision are the people who lack representation while the office at issue remains vacant. Although an appointment could ordinarily be expected to be accomplished within a 15-day period, this was not an ordinary case. The modification of Ms. Alston's sentence and her subsequently-stated intent to bring a legal challenge; the Central Committee's discovery of additional information about Mr. Hall and its related decision to vote to withdraw its submission of Mr. Hall's name; and Mr. Hall's legal action against the Central Committee all combined to take this appointment outside of the ordinary context. Indeed, once it became clear that Mr. Hall was no longer the Central Committee's choice for Delegate—and, barring this litigation, that the Central Committee would have voted to rescind the submission of his name—it was eminently reasonable for the Governor to refrain from acting on the appointment before November 26, 2012,

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otherwise)"); *see also Frank*, 272 Md. at 533 ("Although, ordinarily the use of the word "shall" indicates a mandatory provision and therefore it is presumed that the word is used with that meaning, this is not so if the context indicates otherwise, as we believe it does here."); *Pope v. Secretary of Personnel*, 46 Md. App. 716 (1980) (stating that the use of "shall" is presumed mandatory, but "[a] practical qualifying pressure valve – "unless the context of the statute would indicate otherwise – is invariably adhered to a recitation of that principle").

regardless of when the 15-day period expired. *Cf.* 62 Op. Md. Att'y Gen. 453 (1977) (E. 233) (in case involving uncertainty regarding nominee to replace deceased delegate and ensuing litigation resulting in no name being submitted, Governor's failure to make appointment of successor within 15 days was not unreasonable). In such circumstances, construing the 15-day period to be mandatory not only would be unreasonable, but would require the Governor to ignore the views of the Central Committee—the very entity whose choice is supposed to prevail. The 15-day timeframe set forth in Article III, § 13(a)(1), is more reasonably interpreted to be directory, not mandatory, as unforeseen events—like those in this case and those discussed in the Attorney General's 1977 opinion—may prevent the Governor from making an appointment within 15 days.[18]

Of the factors this Court identified in *Bond* as relevant considerations in determining whether a particular provision is directory or mandatory, the one that is most significant in this case is "the consequences that would result from construing it one way or the other." *Bond*, 118 Md. at 166. If Mr. Hall were correct that the 15-day timeframe is mandatory and that it has passed, then the window for an appointment to be made is gone, neither the Governor nor anyone else would possess authority under the

[18] This is not to say that the Governor may leave the position open indefinitely. In his 1977 opinion, Attorney General Burch advised that the Governor still "has an obligation to exercise his appointment power with dispatch and within a reasonable period of time." 62 Op. Md. Att'y Gen. at 462 (E. 238.) Apparently for that reason, the court below expressly stated that it would entertain a motion to reconsider its decision if, once allowed to vote, the Central Committee did not vote to withdraw Mr. Hall's name "expeditiously and in conformity with [its] rules." (E. 369 n.35.) In this case, it is Governor O'Malley's intention and desire to appoint a duly-qualified individual to fill the vacant seat as soon as possible.

Constitution to make an appointment, and the seat must remain vacant until the next election. Such an interpretation would lead to the bizarre and untenable result that a provision intended to ensure that a vacancy was filled expeditiously would actually result in the vacancy not being filled at all. Because that result would be inconsistent with the purpose of Article III, § 13(a)(1), and would run directly contrary to the interests of the people of the 24th Legislative District in being fully represented, it cannot be the proper interpretation of that provision. *See Bernstein*, 422 Md. at 55 ("The Maryland Constitution cannot be read in a manner that is illogical or incompatible with commonsense." (internal quotation marks omitted)); 62 Op. Md. Att'y Gen. at 462 (E. 238) (concluding that 15-day timeframe in Article III, § 13(a)(2) is directory because, if it were viewed as mandatory, "it would appear that the Governor would lack the power to make the appointment, that no one else would have that power, and that the vacancy would remain unfilled for the duration of the term"). The only reasonable interpretation of Article III, § 13(a)(1) that is consistent with its purpose is that the 15-day timeframe is directory, not mandatory.[19]

Mr. Hall's position in this litigation appears to be that, if the 15-day period is mandatory, the Governor would nonetheless maintain the authority to appoint Mr. Hall after the 15th day, and could be ordered by this Court to do so. That position is

[19] The Office of the Attorney General has long advised that the 15-day timeframe for the Governor to appoint is directory, not mandatory. 62 Op. Md. Att'y Gen. 453 (1977) (E. 233-38.) Although this view was first stated in the context in which a Central Committee had failed to make a legal nomination (and thus the Governor was free to select his own nominee under § 13(a)(2)), its logic has been applied equally to the Governor's 15-day window to appoint someone nominated by an appropriate Central Committee under § 13(a)(1). (E. 242, 245-46.)

problematic for two reasons. First, Mr. Hall never identifies the source of the Governor's appointment authority *after* the 15th day. It certainly would not come from Article III, § 13(a)(1) because, if that provision is mandatory, it serves as a limitation on the Governor's appointment power and neither the Governor nor anyone else would have the authority to make the appointment after that date. Second, Mr. Hall's theory would require the Governor to make an appointment against the wishes of the Central Committee, directly contrary to the purpose of the provision.

An additional indication that the language of § 13(a)(1) is directory, though not dispositive in and of itself, is that the Constitution does not prescribe any consequence to the Governor not making the appointment within 15 days, a factor that this Court has cited as an indication that particular deadlines were not intended to be mandatory. *See Moss*, 279 Md. at 565-66; *Frank*, 272 Md. at 533; *Director, Patuxent Inst. v. Cash*, 269 Md. 331, 345 (1973). Had the framers of § 13(a)(1) intended that the Governor's failure to make an appointment within 15 days would produce a mandatory result, they could readily have specified that outcome in the text of the provision.

The only interpretation of the 15-day timeframe in Article III, § 13(a)(1) that promotes the purposes served by that provision is that the timeframe is directory, as the circuit court determined. That ruling should be affirmed.[20]

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[20] Mr. Hall argues that Article III, § 13(a)(1) cannot be directory because it not only uses the word "shall," but also uses the word "duty" to describe the Governor's obligation to appoint the nominee of the Central Committee. Hall Brief at 14-21. However, Mr. Hall never explains why the use of the word "duty" would alter the factors this Court considers when determining whether an act is directory or mandatory, or why use of that word should somehow compel the conclusion that the framers of Article III,

2. The 15-Day Timeframe of Article III, § 13(a)(1) Should Be Interpreted So As Not to Expire on a Holiday or Weekend.

Even if Mr. Hall were correct that the 15-day timeframe in Article III, § 13(a)(1) is mandatory, his argument that it had expired no later than Saturday, November 24, 2012 is mistaken. The Central Committee submitted Mr. Hall's name to Governor O'Malley on November 7, 2012. That nomination triggered the start of the 15-day timeframe, which, if measured in calendar days, would have ended on Thursday, November 22, 2012, the Thanksgiving holiday.[21] *See* Md. Ann. Code, Art. 1, § 27(a)(13). On Monday, November 26, the circuit court entered its standstill order, causing the Central Committee not to withdraw its submission of Mr. Hall's name that evening, but instead to adopt a resolution expressing its desire to do so. Thus, the question presented to this Court—which would be relevant only if the Court determines that the 15-day timeframe is mandatory *and* that Mr. Hall is not estopped from taking advantage of the fact that the only reason the Central Committee did not vote to withdraw his name on November 20th was his filing of this litigation—is when that period would have expired in the absence of the circuit court's standstill order.

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§ 13(a)(1), and the People who approved it, intended the 15-day timeframe to lead to a result manifestly contrary to the intended purposes of the provision.

[21] Mr. Hall calculates that the 15-day period would have ended on Friday, November 23, 2012. Hall Brief at 28. It is not clear why Mr. Hall believes that, but because that day was declared a State holiday as well, *see* Md. Ann. Code, art. 1, § 27(a)(16), the difference is not significant to the outcome of this case.

Mr. Hall makes two contentions with respect to when the 15-day timeframe ended. First, he argues that because the Constitution states that the Governor shall make the appointment "*within* fifteen days," the last day is not subject to extension at all, and the deadline must, if anything, be moved up before the 15th day. Hall Br. at 28-29. That contention is unsupported in Maryland law: numerous deadlines throughout Maryland's rules and statutes that use the word "within" in this manner are regularly interpreted to establish an end date that is subject to extension if it falls on a weekend or holiday.[22]

Mr. Hall's second contention is that, when counting time periods specified in the Constitution, the fact that the expiration of a time period would fall on a weekend or holiday either does not extend the time period at all, or extends the time period only for Sundays and holidays, but not for Saturdays. Hall Brief at 29-30. On this contention, the law is admittedly unclear. The Constitution does not itself contain a provision directing how to compute periods of time prescribed within it, this Court has not had occasion to provide guidance on that question, and neither of the sources that might otherwise be expected to provide interpretive guidance apply to constitutional provisions. Article 1, § 36 of the Maryland Code expressly limits its application to "any applicable statute."

[22] *See, e.g.*, Rules 2-311 (responses to motions must be filed "within 15 days after being served"), 2-321(a) (answer shall be filed "within 30 days after being served"), 2-322(c) (amended complaint shall be filed "within 30 days after entry of" order on preliminary motions), 8-502(a) (appellant's brief is due "[w]ithin 40 days after filing of the record"; appellee's brief is due "[w]ithin 30 days after the filing of the appellant's brief"; appellant's reply brief is due "within 20 days after the filing of the appellee's brief"); Md. Code Ann., Cts & Jud. Proc. § 5-101 (civil action at law must be filed "within three years from the date it accrues") (*see Ungar v. State*, 63 Md. App. 472, 484 (1985) (statute of limitations would have run on January 22, 1984, but because that date "was a Sunday . . . limitations would have run on January 23, 1984").

Similarly, Rule 1-203(a) applies only to "any period of time prescribed by these rules, by rule or order of court, or by any applicable statute."

To fill the vacuum in an analogous situation, the Attorney General of Maryland has advised that one should look first to common-law interpretive methods and then, by analogy, to the statutes and rules adopted by the legislature and the courts. *See* 79 Op. Md. Att'y Gen. 438, 439 (1994) (computing date on which State's Attorney's term of office begins) (E. 227.) The Attorney General's opinion described "a well-settled principle: events required to take place on a day that is designated by statute as a legal holiday are to occur on the next business day instead." *Id*. (citing 74 Am. Jur. 2d *Time* § 20 (1974)); *see also* Letter of Advice to T. Michael Scales, Chairman, State Central Committee of the 44th Legislative District (Feb. 12, 1998) (E. 230-31).

In the situation analyzed by the Attorney General, the common law produced the same outcome as application of the pertinent statute and court rule. Here, however, the methods suggested by statute and rule yield different results. Article I, § 36, which has been characterized as reflecting the common law at the time it was enacted (then as Article 94, § 2), *see Equitable Life Assurance v. Jalowsky*, 306 Md. 257, 262 (1986), extends a time period ending on a holiday or Sunday, but not a period ending on a Saturday. If that rule applied here, the 15-day period would have ended on Saturday, November 24. By contrast, under Rule 1-203(a), the 15-day period would be extended to Monday, November 26, an outcome consistent with other statutory provisions. *See, e.g.*, Md. Ann. Code, Election Law § 1-301(b) ("If a computation of time would require an act to be performed on a Saturday, Sunday, or legal holiday, the act shall be performed on

the next regular business day following that Saturday, Sunday, or legal holiday."). It is the State Defendants' view that the more reasonable rule extends deadlines that fall on weekends or holidays to the next business day. Furthermore, to the extent the provision is ambiguous, the reasonable interpretation of the Governor, as the official the Constitution charges with the responsibility of acting under this provision, is entitled to deference.

C. The Central Committee Has the Authority to Withdraw Its Submission of Mr. Hall's Name.

Article III, § 13(a)(1) is clear that the nominee of a central committee does not hold an elected office by virtue of that nomination, but must thereafter still be appointed by the Governor. Mr. Hall's contention that the Central Committee lacks authority to withdraw its submission of Mr. Hall's name because Article III, § 13(a)(1) does not expressly authorize the Central Committee to do so is backwards. The Central Committee needs no express authority to withdraw its submission because the power to withdraw is inherent in the power to nominate. The purpose of § 13(a)(1)—to have the appointment reflect the choice of the Central Committee—would be thwarted if the provision were interpreted to prohibit the Central Committee from changing its mind in the face of new information before an appointment is made.

Article III, § 13(a)(1) makes the Governor the appointing authority to fill a vacancy. Under this constitutional authorization, an appointment is not complete until the Governor makes it. *See Goodman v. Clerk of Circuit Court for Prince George's County*, 291 Md. 325, 329 (1971) ("To constitute a valid appointment to office there must

be some open, unequivocal act of appointment on the part of the officer of body empowered to make it."); *see also* 62 Op. Md. Att'y Gen. at 456-58 (E. 235-36.) Because the Governor has not made the appointment, Mr. Hall has no claim on the seat at issue, and the Central Committee has the right to withdraw its submission.[23]

Moreover, as discussed above, Article III, § 13(a)(1) is designed to preserve the prerogative of the Central Committee to have its choice fill a legislative vacancy. The circuit court appropriately gave effect to the intent behind that provision by holding that the Central Committee, at least until the Governor actually makes an appointment, retains the authority to withdraw its submission. *See, e.g.*, 63C Am. Jur. 2d Public Officials and Employees § 97 ("Uncompleted appointments are subject to withdrawal."); *see also In re the Petition of the Comm'n on the Governorship of California*, 603 P.2d 1357, 1365 (Cal. 1979) (same). Mr. Hall, by contrast, seeks to use this litigation to force the Governor to appoint as a delegate an individual who was not elected by the people, who is not the choice of the Central Committee, and whose name would have been withdrawn: (1) on November 20, 2012 but for the filing of this lawsuit and the Central Committee's deference to proceedings in the court below; (2) on November 26, 2012 but for the circuit

[23] Mr. Hall's attempt to analogize the process of the Central Committee nominating an individual to be appointed by the Governor to an election, Hall Brief at 23-24, is meritless. The fact that the current process replaced an earlier method of filling vacancies through special elections does not make this process the equivalent of a popular election. In an election, the voters' choice is final and there is no practicable method for discerning a change in the collectively-expressed intention of the voters. The current process for filling vacancies prioritizes the intention of the Central Committee, and there is no practical or legal reason to prevent a change in the intention of that body from being reflected in the appointment, provided it is communicated to the Governor before the appointment is made.

court's order provisionally prohibiting it (while guaranteeing that the Central Committee would have the opportunity to withdraw the name if it were ultimately determined to have had the right to do so as of November 26, 2012 (E. 183-84)); and (3) after December 5, 2012 but for the stay entered by this Court.

In this case, in which the Governor had not acted on the original name submitted by the Central Committee, and was aware that the Central Committee intended to withdraw that name, the Governor acted reasonably in waiting to take action on the appointment until the Central Committee had the opportunity to act. The circuit court correctly held that the Central Committee should have that opportunity, and that the Governor is not required to act on the appointment until it does.[24]

[24] Mr. Hall's final contention is that the Circuit Court erred in "considering" the affidavit of Terry Speigner, submitted by the Central Committee in support of its motion for summary judgment, purportedly because that affidavit was not properly attested and contains hearsay. Hall Brief at 31-34. Mr. Hall's contention is without merit, for three reasons. First, Mr. Hall fails to point to any factual allegation in Mr. Speigner's affidavit that is disputed and material. As a result, this contention appears to have no relevance to the disposition of this case. Second, although Mr. Hall's contention is based on the form of the declaration at the conclusion of the affidavit, Mr. Speigner clearly certified at the beginning of the affidavit that he had "personal knowledge of the following matters." (E. 261.) That affirmation is sufficient to meet the requirement of Rule 2-501(c) that an affidavit supporting a motion for summary judgment be "made upon personal knowledge." Moreover, Mr. Hall has not presented any reason to doubt that Mr. Speigner, the Chair of the Central Committee, did in fact have personal knowledge of the facts stated in the affidavit. Third, Mr. Hall's hearsay objection is without merit because the newspaper articles were offered to introduce the information that became available to the Central Committee after it submitted Mr. Hall's name to the Governor, not for the truth of their contents. (E. 263-64.) Thus, the contents of the articles are not hearsay. *See* Rule 5-801(c).

CONCLUSION

The judgment of the Circuit Court for Prince George's County should be affirmed.

Respectfully submitted,

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December 27, 2012

Rule 8-504(a)(9) Certification: This brief was prepared with proportionally-spaced type in Times New Roman 13-point font.

TEXT OF PERTINENT PROVISIONS
(Rule 8-504(a)(8))

Md. Const. art. III, § 13

(a) (1) In case of death, disqualification, resignation, refusal to act, expulsion, or removal from the county or city for which he shall have been elected, of any person who shall have been chosen as a Delegate or Senator, or in case of a tie between two or more such qualified persons, the Governor shall appoint a person to fill such vacancy from a person whose name shall be submitted to him in writing, within thirty days after the occurrence of the vacancy, by the Central Committee of the political party, if any, with which the Delegate or Senator, so vacating, had been affiliated, at the time of the last election or appointment of the vacating Senator or Delegate, in the County or District from which he or she was appointed or elected, provided that the appointee shall be of the same political party, if any, as was that of the Delegate or Senator, whose office is to be filled, at the time of the last election or appointment of the vacating Delegate or Senator, and it shall be the duty of the Governor to make said appointment within fifteen days after the submission thereof to him.

(2) If a name is not submitted by the Central Committee within thirty days after the occurrence of the vacancy, the Governor within another period of fifteen days shall appoint a person, who shall be affiliated with the same political party, if any as was that of the Delegate or Senator, whose office is to be filled, at the time of the last election or appointment of the vacating Delegate or Senator, and who is otherwise properly qualified to hold the office of Delegate or Senator in the District or County.

(3) In the event there is no Central Committee in the County or District from which said vacancy is to be filled, the Governor shall within fifteen days after the occurrence of such vacancy appoint a person, from the same political party, if any, as that of the vacating Delegate or Senator, at the time of the last election or appointment of the vacating Senator or Delegate, who is otherwise properly qualified to hold the office of Delegate or Senator in such District or County.

(4) In every case when any person is so appointed by the Governor, his appointment shall be deemed to be for the unexpired term of the person whose office has become vacant.

(b) In addition, and in submitting a name to the Governor to fill a vacancy in a Legislative or Delegate district, as the case may be, in any of the twenty-three counties of Maryland, the Central Committee or committees shall follow these provisions:

(1) If the vacancy occurs in a district having the same boundaries as a county, the Central Committee of the county shall submit the name of a resident of the district.

(2) If the vacancy occurs in a district which has boundaries comprising a portion of one county, the Central Committee of that county shall submit the name of a resident of the district.

(3) If the vacancy occurs in a district which has boundaries comprising a portion or all of two or more counties, the Central Committee of each county involved shall have one vote for submitting the name of a resident of the district; and if there is a tie vote between or among the Central Committees, the list of names there proposed shall be submitted to the Governor, and he shall make the appointment from the list.

Md. Const. art. III, § 19

Each House shall be judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of the State, and shall appoint its own officers, determine the rules of its own proceedings, punish a member for disorderly or disrespectful behaviour and with the consent of two-thirds of its whole number of members elected, expel a member; but no member shall be expelled a second time for the same offence.

Md. Const. art. XV, § 2 (pre-December 6, 2012)

Any elected official of the State, or of a county or of a municipal corporation who during his term of office is convicted of or enters a plea of nolo contendere to any crime which is a felony, or which is a misdemeanor related to his public duties and responsibilities and involves moral turpitude for which the penalty may be incarceration in any penal institution, shall be suspended by operation of law without pay or benefits from the elective office. During and for the period of suspension of the elected official, the appropriate governing body and/or official authorized by law to fill any vacancy in the elective office shall appoint a person to temporarily fill the elective office, provided that if the elective office is one for which automatic succession is provided by law, then in such event the person entitled to succeed to the office shall temporarily fill the elective office. If the conviction becomes final, after judicial review or otherwise, such elected official shall be removed from the elective office by operation of Law and the office shall be deemed vacant. If the conviction of the elected official is reversed or overturned, the elected official shall be reinstated by operation of Law to the elective office for the remainder, if any, of the elective term of office during which he was so suspended or removed, and all pay and benefits shall be restored.

Md. Const. art. XV, § 2 (current)

Any elected official of the State, or of a county or of a municipal corporation who during the elected official's term of office is found guilty of any crime which is a felony, or which is a misdemeanor related to the elected official's public duties and responsibilities and involves moral turpitude for which the penalty may be incarceration in any penal institution, shall be suspended by operation of law without pay or benefits from the elective office. During and for the period of suspension of the elected official, the appropriate governing body and/or official authorized by law to fill any vacancy in the elective office shall appoint a person to temporarily fill the elective office, provided that if the elective office is one for which automatic succession is provided by law, then in such event the person entitled to succeed to the office shall temporarily fill the elective office. If the finding of guilt becomes a final conviction, after judicial review or otherwise, such elected official shall be removed from the elective office by operation of Law and the office shall be deemed vacant. If the finding of guilt of the elected official is reversed or overturned, the elected official shall be reinstated by operation of Law to the elective office for the remainder, if any, of the elective term of office during which the elected official was so suspended or removed, and all pay and benefits shall be restored. Any elected official of the State, or of a county or of a municipal corporation who during the elected official's term of office enters a guilty plea or a plea of nolo contendere to any crime which is a felony, or which is a misdemeanor related to the elected official's public duties and responsibilities and involves moral turpitude for which the penalty may be incarceration in any penal institution, shall be removed from the elective office by operation of Law and the office shall be deemed vacant.

Rule 4-345

Sentencing -- Revisory power of court

(a) Illegal sentence. The court may correct an illegal sentence at any time.

(b) Fraud, mistake, or irregularity. The court has revisory power over a sentence in case of fraud, mistake, or irregularity.

(c) Correction of mistake in announcement. The court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.

(d) Desertion and non-support cases. At any time before expiration of the sentence in a case involving desertion and non-support of spouse, children, or destitute parents, the court may modify, reduce, or vacate the sentence or place the defendant on probation under the terms and conditions the court imposes.

(e) Modification upon motion.

(1) Generally. Upon a motion filed within 90 days after imposition of a sentence (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.

(2) Notice to victims. The State's Attorney shall give notice to each victim and victim's representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, § 11-104 or who has submitted a written request to the State's Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, § 11-503 that states (A) that a motion to modify or reduce a sentence has been filed; (B) that the motion has been denied without a hearing or the date, time, and location of the hearing; and (C) if a hearing is to be held, that each victim or victim's representative may attend and testify.

(3) Inquiry by court. Before considering a motion under this Rule, the court shall inquire if a victim or victim's representative is present. If one is present, the court shall allow the victim or victim's representative to be heard as allowed by law. If a victim or victim's representative is not present and the case is one in which there was a victim, the court shall inquire of the State's Attorney on the record regarding any justification for the victim or victim's representative not being present, as set forth in Code, Criminal Procedure Article, § 11-403(e). If no justification is asserted or the court is not satisfied by an asserted justification, the court may postpone the hearing.

(f) Open court hearing. The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. The defendant may waive the right to be present at the hearing. No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in subsection (e)(2) of this Rule have been satisfied. If the court grants the motion, the court ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based.

The State of Maryland

Executive Department

PROCLAMATION

Governor's Proclamation Declaring the Result of the Election of November 6, 2012 for Constitutional Amendments

WHEREAS, The General Assembly of Maryland at its Regular Session of 2011 enacted Chapter 394, relating to Qualifications for Prince George's County Orphans' Court Judges; and at its regular session of 2012 enacted Chapter 146, relating to Qualifications for Baltimore County Orphans' Court Judges; and Chapter 147, relating to Suspension and Removal of Elected Officials proposing amendments to the Constitution of Maryland; and

WHEREAS, The above recited Acts and Article XIV of the Constitution, provide for the submission of the amendments to the legal and qualified voters of the State for their adoption or rejection, at the election held on November 6, 2012; and

WHEREAS, The Acts were submitted to the legal and qualified voters of the State during that election and from the certified copies of the returns of the election:

As to Chapter 394 relating to Qualifications for Prince George's County Orphans' Court Judges (Question No. 01): 2,133,356 votes were cast for the adoption, and 296,631 votes were cast against the adoption; and

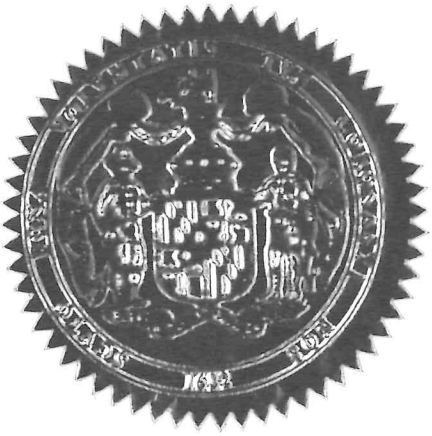
As to Chapter 146 relating to Qualifications for Baltimore County Orphans' Court Judges (Question No. 02): 2,143,521 votes were cast for the adoption, and 290,845 votes were cast against the adoption; and

As to Chapter 147 relating to Suspension and Removal of Elected Officials (Question No. 03): 2,220,425 votes were cast for the adoption, and 303,324 votes were cast against the adoption;

NOW, THEREFORE, I, MARTIN O'MALLEY, GOVERNOR, PURSUANT TO SECTION 1 OF ARTICLE XIV OF THE CONSTITUTION OF MARYLAND, DO, BY THIS PROCLAMATION, DECLARE AND PROCLAIM THAT CHAPTER 394, CHAPTER 146,

AND CHAPTER 147, HAVING RECEIVED THE MAJORITY OF VOTES CAST FOR THE ADOPTION, SHALL BECOME PARTS OF THE CONSTITUTION OF THE STATE OF MARYLAND.

GIVEN Under My Hand and the Great Seal of the State of Maryland, in the City of Annapolis, this 6th Day of December, 2012.



Martin O'Malley
Governor

ATTEST:

John McDonough
Secretary of State

OFFICES OF

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March 26, 1974

Hon. J. Joseph Curran, Jr.
Senate of Maryland
Annapolis, Maryland

Dear Senator Curran:

You have raised several questions in connection with Senate Bill 671, proposing a constitutional amendment which would add a new Section 3 to Article XV of the Constitution of Maryland prescribing certain circumstances under which an elected official convicted of a felony would be deemed suspended from his office or removed altogether therefrom. The Senate Judicial Proceedings Committee has proposed two amendments to Senate Bill 671, and unless otherwise indicated in this letter, we deal with Senate Bill 671 as amended thereby.

Basically, Senate Bill 671 provides that an elected official convicted of a felony "shall be suspended by operation of law without pay from the elective office" and that, if the conviction is upheld "after exhaustion of any appeal as a matter of right within the court system in which the elected state official is so convicted ..." then such official shall be removed from the elective office by operation of law.

First, you initially inquired as to whether the Governor would have the authority to declare an office vacant in the event the circumstances set forth in the proposed amendment as dictating the removal "by operation of law" were to be present. The short answer to this question is that such a declaration might not ordinarily be necessary since, once the specified state of facts is present, the official is deemed removed by operation of law and the office must of necessity be deemed vacant as a matter of law.

Exhibit 8

There is nothing in the Constitution which would prohibit a gubernatorial declaration to that effect, especially in cases where the Governor has the authority or the duty to fill the vacancy. In any event, this particular question has been resolved by the proposed amendment to the Bill which requires the Governor to declare a vacancy whenever the Attorney General finds a removal by operation of law has occurred, regardless of whether the Governor has the authority to fill the particular vacancy.

Secondly, you have inquired as to what effect, if any, the proposed constitutional amendment would have on existing Section 19 of Article III of the Constitution. It is there provided that "[e]ach House shall be the judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of the State; [and] shall ..., with the consent of two thirds of its whole number of members elected, expel a member ..." Under the existing provisions of the Constitution, neither the Governor nor the courts have any authority whatsoever to declare that a vacancy exists in either the House of Delegates or the State Senate. The Court of Appeals has so construed Section 19 of Article III. See Covington v. Buffett, 90 Md. 569 (1900). Under these existing provisions, once a vacancy occurs by reason of disqualification, expulsion or one of the other causes specified in Section 13 of Article III, then the Governor is required to appoint a person to fill that vacancy in accordance with the provisions of Section 13. While there can be no question about the General Assembly's long-standing control over the determination of vacancies among its membership, the proposed constitutional amendment embodied in Senate Bill 671, which applies to all elected officials and contains no exception for members of the General Assembly, would, in our opinion, prevail over the discretion of the General Assembly as set forth in Section 19 of Article III. We do not believe that a later enacted constitutional amendment providing on its face for suspension and removal by operation of law would be held ineffectual with respect to elected members of the General Assembly as a result of the traditional discretion lodged in the General Assembly with respect to the qualifications and expulsion of its members. Accordingly, we are of the view that once the conditions of automatic suspension or removal specified in the proposed constitutional amendment are found to be present, the General Assembly would have no further discretion in the matter since the temporary or permanent vacancy, as the case may be, would be deemed to exist as a matter of law. On the other hand we believe that the proposed amendment would not preclude the General Assembly from

acting to expel a member pursuant to its pre-existing authority under Section 19 of Article III even if the circumstances prompting a removal by operation of law under the proposed amendment are not present (e.g., the member has been convicted but has not yet exhausted all appeals of right).

Finally, you have inquired as to what effect, if any, Senate Bill 671 would have on elected officials of charter counties. Senate Bill 671 as introduced would have applied only to "any elected official of the State," and it is our view that this would clearly not have applied to the holder of an elective office which was created pursuant to a county charter. Such an official would not be an official of the State, but rather would be an official of the county. The amendments submitted to us, however, would clearly extend the applicability of the proposed constitutional amendment to elected officials of the State or of a county or municipality.

I trust that the above is fully responsive to your inquiry.

Very truly yours,

George A. Nilson

George A. Nilson
Assistant Attorney
General

GAN/lal

cc: Bruce Bereano, Esq.

CERTIFICATE OF SERVICE

I certify that, on this 27th day of December 2012, two copies of the foregoing Brief of Appellees Governor Martin O'Malley and Speaker Michael E. Busch were served by first-class mail, postage prepaid, and sent by electronic mail, to:

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