COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Training Center, 2011-D Commerce Park Drive, Annapolis, Maryland on May 15, 2009.

Members present:

Hon. Alan M. Wilner, Chair
Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Hon. Ellen L. Hollander
Hon. Michele D. Hotten
John B. Howard, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Brittany King, Rules Committee Intern
Diane Cipollone, Esq., Director, Sustainable Homeownership Project
Vicki Schultz, Esq., Department of Labor, Licensing & Regulation
D. Robert Enten, Esq.
Jeffrey B. Fisher, Esq.
Sharon R. Holback, Esq., Office of the State's Attorney for Baltimore City
Brian Kleinbord, Esq., Office of the Attorney General
Mary Ann Burkhart, Esq., Office of the State's Attorney for Baltimore City
Claire E. Rossmark, Esq., Department of Legislative Services
Jeff Nadel, Esq.
Jacob Geesing, Esq., Bierman, Geesing & Ward, LLC
Ann N. Bosse, Esq., Office of the State's Attorney for Montgomery County
Joseph I. Cassily, Esq., Office of the State's Attorney for Harford County

Ann Brobst, Esq., Office of the State's Attorney for Baltimore County
Michele M. Nethercott, Esq., Office of the Public Defender
Sandy Howell, Esq.
Katy C. O'Donnell, Esq., Office of the Public Defender
Mike A. Millemann, Esq., University of Maryland School of Law

The Chair convened the meeting. He announced that the Court of Appeals had reappointed Judge Hotten, Mr. Karceski, Judge Love, Master Mahasa, Mr. Patterson, Ms. Potter, and Ms. Smith for an additional term. There is a new member of the Committee, the Honorable W. Michel Pierson, of the Circuit Court for Baltimore City, replacing the Honorable Albert J. Matricciani, Jr. Judge Pierson could not attend the meeting today, because his son is graduating from law school. The Reporter introduced the new Rules Committee intern, Ms. Brittany King, who has just finished her first year at the University of Baltimore School of Law. She will be with the Committee during the summer, and she is available to do any research projects related to the Rules of Procedure.

Agenda Item 1. Consideration of proposed amendments to certain Rules pertaining to foreclosure of lien instruments on residential property - Amendments to: Rule 14-102 (Judgment Awarding Possession), Rule 14-202 (Definitions), Rule 14-209 (Service in Actions to Foreclose on Residential Property; Notice), and Rule 14-210 (Notice Prior to Sale)

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Ms. Ogletree presented Rule 14-102, Judgment Awarding Possession, for the Committee consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 14-102 to add a certain notice to "All Occupants" and affidavit requirement pertaining to a judgment awarding possession of residential property, as follows:

Rule 14-102. JUDGMENT AWARDING POSSESSION

(a) Motion

If the purchaser of an interest in real property at a sale conducted pursuant to the Rules in this Title is entitled to possession and the person in actual possession fails or refuses to deliver possession, the purchaser may file a motion for judgment awarding possession of the property. If the purchaser has not paid the full purchase price and received a deed to the property, the motion shall state the legal basis for the purchaser's claim of entitlement to possession. Except as otherwise provided in this Rule, Rule 2-311 applies.

Committee note: Unless the purchaser is a foreclosing lender or there is waste or other circumstance that requires prompt remediation, the purchaser ordinarily is not entitled to possession until the sale has been ratified and the purchaser has paid the full purchase price and received a deed to the property. See *Legacy Funding v. Cohn*, 396 Md. 511 (2007) and *Empire v. Hardy*, 386 Md. 628 (2005).

(b) Affidavit and Notice

The motion shall be accompanied by:

(1) an affidavit that states:

(A) the name of the person in actual possession, if known;

(B) whether the person in actual possession was a party to the action that resulted in the sale or to the instrument that authorized the sale;

(C) if the purchaser paid the full purchase price and received a deed to the property, the date the payment was made and the deed was received; and

(D) if the purchaser has not paid the full purchase price or has not received a deed to the property, the factual basis for the purchaser's claim of entitlement to possession; and

(2) if the person in actual possession was not a party to the action or instrument, a notice advising the person that any response to the motion must be filed within 30 days after being served or within any applicable longer time prescribed by Rule 2-321 (b) for answering a complaint. A copy of Rule 2-321 (b) shall be attached to the notice.

(c) No Show Cause Order, Summons, or Other Process

The court shall not issue a show cause order, summons, or other process by reason of the filing of a motion pursuant to this Rule.

(d) Service and Response

(1) On Whom

The motion and all accompanying documents shall be served on the person in actual possession and on any other person affected by the motion.

(2) Party to Action or Instrument

(A) If the person to be served was a party to the action that resulted in the sale or to the instrument that authorized the sale, the motion shall be served in

accordance with Rule 1-321.

(B) Any response shall be filed within the time set forth in Rule 2-311.

(3) Not a Party to Action or Instrument

(A) If the person to be served was not a party to the action that resulted in the sale or a party to the instrument that authorized the sale, the motion shall be served:

(i) by personal delivery to the person or to a resident of suitable age and discretion at the dwelling house or usual place of abode of the person, or

(ii) if on at least two different days a good faith effort was made to serve the person under subsection (d)(3)(A)(i) of this Rule but the service was not successful, by (a) mailing a copy of the motion by certified and first-class mail to the person at the address of the property and (b) posting in a conspicuous place on the property a copy of the motion, with the date of posting conspicuously written on the copy.

(B) Any response shall be filed within the time prescribed by sections (a) and (b) of Rule 2-321 for answering a complaint.

(4) Judgment of Possession

If a timely response to the motion is not filed, the court may enter a judgment awarding possession.

(e) Residential Property; Notice and Affidavit

After entry of a judgment awarding possession of residential property as defined in Rule 14-202 (i), but before executing that judgment, the purchaser shall:

(1) send by first-class mail a notice in the form and containing the information required by Code, Real Property Article, §7-105.9 (d) addressed to "All Occupants" at the

address of the property; and

(2) file an affidavit that such notice was sent.

Cross reference: Rule 2-647 (Enforcement of Judgment Awarding Possession).

Source: This Rule is derived in part from the 2008 version of former Rule 14-102 and is in part new.

Rule 14-102 was accompanied by the following Reporter's Note.

Proposed new section (e) conforms Rule 14-102 to new requirements of Code, Real Property Article, §7-105.9 (d), added by HB 776/SB 842, passed by the 2009 General Assembly.

Ms. Ogletree explained that Rules 14-102, 14-202, 14-209, and 14-210 were changed to conform to new legislation, Chapter 615, Laws of 2009 (HB 776) cross-filed with Chapter 614, Laws of 2009 (SB 842) and Chapter 691, Laws of 2009 (HB 798) cross-filed with Chapter 692, Laws of 2009 (SB 807) that amended several Code provisions in the Real Property Article pertaining to foreclosures.

Rule 14-102 now requires that before a party can execute on the judgment for repossession, a notice must be sent to the occupant of the property. The statute sets out the notice. The new language in section (e) of Rule 14-102 conforms the Rule to the statute, Code, Real Property Article, §7-105.9 as amended by House Bill 776 and Senate Bill 842. By consensus, the Committee approved Rule 14-102 as presented.

Ms. Ogletree presented Rule 14-202, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-202 to revise the definition of "residential property," as follows:

Rule 14-202. DEFINITIONS

In the Rules in this Chapter, the following definitions apply except as expressly otherwise provided or as necessary implication requires:

. . .

(i) Residential Property

"Residential property" means real property with four or fewer single family dwelling units <u>that are designed principally and are intended for human habitation.</u> ~~and~~ <u>It</u> includes an individual residential condominium unit within a larger structure or complex, regardless of the total number of individual units in that structure or complex. "Residential property" does not include a time share unit.

. . .

Rule 14-202 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 14-202 (i) adds to the definition of "residential property" the requirement that the units be designed principally and intended for human

habitation. This requirement is added to Code, Real Property Article, §7-105.1 by HB 798/SB 807, passed by the 2009 General Assembly.

Ms. Ogletree explained that the legislature added to the definitions in Code, Real Property Article, §7-105.1 by enacting House Bill 798 and Senate Bill 807. The amendment provides that a condominium unit has to be designed principally and intended for human habitation. The Chair pointed out that it not only applies to condominium units but to any single family dwelling unit. Mr. Enten told the Committee that he represented the Maryland Bankers Association. There had been a decision in Talbot County that gave rise to this legislation. An owner of a retail establishment had said that at times he slept in the store. Anecdotally, the court found that it was residential property and not commercial property. The bill was brought to the local senator and delegates by an attorney in Easton. The purpose of the legislation was to try to clarify when a property is commercial and when it is residential. The Chair pointed out that this is now the statutory definition, and the proposal is to change Rule 14-202 to conform to the statute. By consensus, the Committee approved Rule 14-202 as presented.

Ms. Ogletree presented Rule 14-209, Service in Actions to Foreclose on Residential Property, for the Committee's consideration.

**ALTERNATIVE DRAFT - with new section (d) and subsection (e)(5) instead of a Committee note**

**Re: notices required by local law.**

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-209 to delete the form of notice to an occupant of residential property, to add a certain notice requirement to "All Occupants," to add a new section (d) pertaining to certain notice to a county or municipal corporation, to add a reference to that notice to subsection (e)(1), to add a new subsection (e)(5) pertaining to the contents of an affidavit of that notice, and to make stylistic changes, as follows:

Rule 14-209. SERVICE IN ACTIONS TO FORECLOSE ON RESIDENTIAL PROPERTY; NOTICE

(a) Service on Borrower and Record Owner by Personal Delivery

When an action to foreclose a lien on residential property is filed, the plaintiff shall serve on the borrower and the record owner a copy of all papers filed to commence the action. Service shall be accomplished by personal delivery of the papers or by leaving the papers with a resident of suitable age and discretion at the borrower's or record owner's dwelling house or usual place of abode.

(b) Service on Borrower and Record Owner by Mailing and Posting

If on at least two different days a good faith effort was made to serve a borrower or record owner under section (a) of this Rule and service was not successful, the plaintiff shall effect service by (1) mailing, by certified and first-class mail, a copy of all papers filed to commence the action, to the last known address of each

borrower and record owner and, if the person's last known address is not the address of the residential property, also to that person at the address of the property; and (2) posting a copy of the papers in a conspicuous place on the residential property. Service is complete when the property has been posted and the mailings have been made in accordance with this section.

(c) Notice to Occupants by First-Class Mail

When an action to foreclose on residential property is filed, the plaintiff shall send by first-class mail addressed to ~~"Occupant"~~ "All Occupants" at the address of the property a notice in ~~substantially the following form:~~ the form and containing the information required by Code, Real Property Article, §7-105.9 (b).

~~NOTICE~~

~~An action to foreclose a ❑ Mortgage ❑ Deed of Trust ❑ Land Installment Contract ❑ Contract or Statutory Lien on the property located at (Insert Address) has been filed in the Circuit Court for (County).~~

~~A foreclosure sale of the property may occur at any time after 45 days from the date of this notice. You may want to consult with an attorney because you could be evicted, even if you are a tenant and have paid the rent due and complied with your lease. For further information, you may review the file in the office of the Clerk of the Circuit Court.~~

(d) If Notice Required by Local Law

When an action to foreclose on residential property is filed with respect to a property located within a county or a municipal corporation that under the authority of Code, Real Property Article, §14-126 (c) has enacted a local law requiring notice of the commencement of a foreclosure action, the plaintiff shall give notice to the county or municipal agency or official in

the form and manner required by the local law. If the manner of giving notice is not otherwise provided, notice may be sent by first-class mail.

~~(d)~~ (e) Affidavit of Service~~,~~ ~~and~~ Mailing~~,~~ and Notice

(1) Time for Filing

An affidavit of service under section (a) or (b) of this Rule~~,~~ ~~and~~ mailing under section (c) of this Rule, and notice under section (d) of this Rule shall be filed promptly and in any event before the date of the sale.

(2) Service by an Individual Other than a Sheriff

In addition to other requirements contained in this section, if service is made by an individual other than a sheriff, the affidavit shall include the name, address, and telephone number of the affiant and a statement that the affiant is 18 years of age or older.

(3) Contents of Affidavit of Service by Personal Delivery

An affidavit of service by personal delivery shall set forth the name of the person served and the date and particular place of service. If service was effected on a person other than the borrower or record owner, the affidavit also shall include a description of the individual served (including the individual's name and address, if known) and the facts upon which the individual making service concluded that the individual served is of suitable age and discretion.

(4) Contents of Affidavit of Service by Mailing and Posting

An affidavit of service by mailing and posting shall (A) describe with particularity the good faith efforts to serve the borrower or record owner by personal

delivery; (B) state the date on which the required papers were mailed by certified and first-class mail and the name and address of the addressee; and (C) include the date of the posting and a description of the location of the posting on the property.

(5) Contents of Affidavit of Notice Required by Local Law

An affidavit of notice required by local law to be given to a county or municipal corporation shall (A) state (i) the date the notice was given, (ii) the name and business address of the person to whom the notice was given, (iii) the manner of delivery of the notice, and (iv) a reference to the specific local law of the county or municipal corporation or both and (B) be accompanied by a copy of the notice that was given.

Cross reference: See the Servicemembers Civil Relief Act, 50 U.S.C. app. §§501 *et seq*.

Source: This Rule is derived in part from the 2008 version of former Rule 14-204 (b) and is in part new.

Ms. Ogletree told the Committee that there had been a notice to occupants in Rule 14-209, which consisted of a very basic form. Code, Real Property Article, §7-105.9 (b) had been amended to provide notice to occupants. The Foreclosure Subcommittee proposes to amend section (c) of Rule 14-209 to change the word "occupant" to the words "all occupants," which is the statutory language, and to require that the notice be given in the form required by the statute. Master Mahasa referred to the language in section (b) of the Rule that reads: "if the person's last known address is not the address of the residential

property...", and she asked to which "person" the statute refers. Ms. Ogletree replied that it is the borrower and record owner. The Chair added that the second line of section (b) states to whom this language refers. The Reporter noted that there are two alternate drafts of this Rule. Ms. Ogletree pointed out a new requirement of notice to local jurisdictions.

Mr. Fisher said that the General Assembly enacted a new law, Chapter 149, Laws of 2009 (HB 640), that enables local jurisdictions to pass a law requiring that they be given notice of the docketing of the action of a foreclosure sale. The first draft of the Rule addressed this by a Committee note. He knew that Prince George's County was working on a law that included a proposed $50-a-day fine for not giving the notice. Since the enabling law was directed to the person authorized to make the sale (mainly foreclosure lawyers), the foreclosure attorneys decided that it would be better to be able to argue to the County Council that enforcement of foreclosures has always been a matter in the jurisdiction of the circuit court and that the circuit court should be responsible for enforcing it.

Mr. Fisher commented that the foreclosure attorneys contacted the Foreclosure Subcommittee and came up with the language in section (d) of the Alternative draft of Rule 14-209. This refers to the requirement to comply with whatever the local law is and the proof that this has been done. The intention was to be able to inform the County Council that the Rules Committee is already working on this. There was a very unsympathetic

hearing before the Council last Tuesday, which has decided to go forward with the fine of $40 or $50 a day. Mr. Fisher expressed the opinion that the proposed language of the Alternative draft is still appropriate to discuss now, because Prince George's County is going to enact a local law, and it is not clear who else will do so.

The Chair commented that the proposal in either of the drafts has nothing to do with a $50 fine. Mr. Fisher explained that it pertains to a complete showing of compliance with the foreclosure notice requirements. He felt that it would be preferable to put this into the body of the Rule. The Chair noted that this is in new section (d) of Rule 14-209. He added that Ms. Ogletree had explained the changes to section (c). Mr. Fisher's proposal is to supplement section (c). The Chair said that section (c) simply strikes the notice form.

The Vice Chair inquired whether it is possible for a property to be located in a place that is not a county or a municipal corporation. Mr. Fisher answered in the negative. The Chair observed that this issue was raised when the Committee was discussing the emergency changes to the foreclosure rules the first time. The Rule had seemed to indicate that a place could be in both a county and a municipal corporation. If the property is in a county and also in an incorporated municipality, notice would have to be given to both. The response to this was that this is not what this language means, it only refers to the county where the property is.

Mr. Fisher asked whether the Chair was referring to the 15-day notice before the sale in subsection (b)(3) of Rule 14-206, Procedure Prior to Sale. The Chair replied that this was the Rule to which he was referring. The Rule was not changed, but now the legislature appeared to be permitting incorporated municipalities to require this notice for themselves as well. There will be at least two required notices. Mr. Fisher said that his understanding of the 15-day notice was that it was for the tax authority to know what was going on. However, the authorities do not care about this, so the notice is worthless. With respect to the alternate proposal, the actual bill itself did not give any authority on how, where, or why notice was to be given. The Prince George's County bill did not state this either. They lifted the language from the statute. The foreclosure lawyers added that notice should be by first class mail if it is not otherwise provided.

Mr. Enten told the Committee that this legislation was in response to a different issue than the issue addressed in the 15-day notice rule. It was to address the situation where a property is vacant, in foreclosure, deteriorating, and/or being used as a drug house. It was an effort to find a way to get to whoever was in control of the property at that point. A number of bills were drafted for introduction in the General Assembly to call for mandatory registration of every property in foreclosure with civil or criminal penalties. The General Assembly's view was that the person in the best position to get the lender's

attention is the attorney who is representing the lender in the foreclosure. The idea was to have enabling legislation that would allow the county to be able to index by address properties that are in foreclosure. When a county gets a call from someone complaining that the property next door to the person is deteriorating, an employee from the county can look at an index and identify the property as being in foreclosure and identify who the foreclosure lawyer is. The county or municipality can then talk to the foreclosure lawyer to find out who can be contacted, so that the property can be cleaned up. The notice only gets sent if the local government decides that they want to send it. It gets filed five days after the foreclosure case is docketed.

Ms. Schultz agreed with Mr. Enten and added that there is a dual purpose to the new legislation. Another purpose is to capture data. Her office, the Department of Labor, Licensing and Regulation ("DLLR"), maintains some data on foreclosures as does the Department of Housing and Community Development. Because municipalities and jurisdictions are trying to deal with the foreclosure problem, the DLLR is also trying to capture data as to what is happening in their jurisdictions. They want to be able to get a handle on vacant properties, but they also want to be able to capture data. This allows jurisdictions to enact legislation, so that they can get ahead of the housing crisis that they are facing. The Chair pointed out that this requirement is in the statute. The initial proposal was to call

attention to the enabling statute in a Committee note in the Rule. Mr. Fisher had suggested that this be put into the body of the Rule itself along with the requirement that if the local ordinance does not provide some other method of notice, it must be by first class mail. Ms. Ogletree remarked that it also provides that the affidavit of compliance show that the notice was sent. The Chair noted that this is also in the statute.

The Vice Chair said that it is a good idea to have a complete affidavit. She asked if there is a reason why in the third line of section (d), the reference is to "county or municipal corporation," but in the sixth line of the same section, it refers to "county or municipal agency or official." Mr. Fisher responded that he had not drafted that language. The Chair suggested that the wording should be "county or municipal corporation" in both places.

The Vice Chair pointed out that notice is to be given in the manner set forth in the local law. She inquired whether the last sentence of section (d) should use the word "shall" instead of the word "may." Mr. Fisher answered that the reason the word "may" is used is because there may be times when the notice should be hand-delivered, and no one should be limited as to how to give notice. The affidavit will provide how the notice was given. If the local law specifies how the notice must given, then that must be followed. The Vice Chair commented that notice can be given in any way, so that the last sentence of section (d) has no meaning. Mr. Fisher said that notice can be given in any

manner, as long as the person doing the notifying discloses how he or she did it. He had no problem changing the word “may” to the word “shall.” The Chair expressed the opinion that the word should be “shall.”

The Chair asked if anyone objected to changing the language “county or municipal agency or official” to “county or municipal corporation” and to substituting the word “shall” for the word “may.” The Reporter replied that the language “municipal agency or official” tracks the actual language of the statute. This is in subsection (c)(3) of Code, Real Property Article, §14-126 as amended by House Bill 640. The Vice Chair commented that an “agency or official” under local law will not have the authority to enact local law. The word “corporation” is the correct term. The Chair noted that the problem is that arguments will arise, because of the wording of the statute.

The Reporter read from the statute: “A local law enacted under this subsection shall require that within five days after filing an order to docket or a complaint to foreclose a mortgage or deed of trust on residential property, the person authorized to make the sale shall give notice of the filing to the county or municipal agency or official designated by the local law.” The Vice Chair remarked that this is correct in the context of giving notice, but those entities do not have the power to enact a local law. This may be the reason that it appears differently. Ms. Cipollone said that she would read this as responding to whatever that local agency says is the entity, official, or agency to whom

the foreclosure bar responds. The Vice Chair suggested that the wording could be: "...the plaintiff shall give notice in the form and manner required by local law." By consensus, the Committee agreed to that suggestion.

Mr. Enten observed that section (d) provides that the county or municipal corporation can enact a law requiring notice of the commencement of a foreclosure action and designate to whom notice is given. He added that he had drafted that language. The local government enacts it and designates the person at the agency to get the notice. The Vice Chair explained that the Rule does not need to state who gets the notice. The Reporter asked if the word "may" would be changed to the word "shall." By consensus, the Committee approved this change.

Ms. Ogletree pointed out that subsection (e)(5) sets out the contents of the affidavit of notice required by local law. This is in the Alternative draft that was handed out at the meeting. By consensus, the Committee approved Rule 14-209 as amended.

Ms. Ogletree presented Rule 14-210, Notice Prior to Sale, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-210 to add a certain notice requirement to "All Occupants," as follows:

Rule 14-210. NOTICE PRIOR TO SALE

. . .

(b) By Certified and First-Class Mail

Before selling the property subject to the lien, the individual authorized to make the sale shall also send notice of the time, place, and terms of sale by certified mail and by first-class mail to (1) the borrower, (2) the record owner of the property, (3) the holder of any subordinate interest in the property subject to the lien, and (4) ~~"Occupant"~~ "All Occupants" at the address of the property. The notice to "All occupants" shall be in the form and contain the information required by Code, Real Property Article, §7-105.9 (c). Except for the notice to ~~"Occupant,"~~ "All Occupants," the mailings shall be sent to the last known address of all such persons, including to the last address reasonably ascertainable from a document recorded, indexed, and available for public inspection 30 days before the date of the sale. The mailings shall be sent not more than 30 days and not less than ten days before the date of the sale.

. . .

**[Query: Should any changes to made to section (e)?]**

(e) Affidavit of Notice by Mail

An individual who is required by this Rule to give notice by mail shall file an affidavit stating that (1) the individual has complied with the mailing provisions of this Rule or (2) the identity or address of the borrower, record owner, or holder of a subordinate interest is not reasonably ascertainable. If the affidavit states that an identity or address is not reasonably ascertainable, the affidavit shall state in detail the reasonable, good faith efforts that were made to ascertain the identity or address. If notice was given to the holder

> of a subordinate interest in the property, the affidavit shall state the date, manner, and content of the notice.
>
> . . .

Rule 14-210 was accompanied by the following Reporter's Note.

> The proposed amendment to section (b) of Rule 14-210 conforms the section to the requirements of Code, Real Property Article, §7-105.9 (c), added by HB 776/SB 842, passed by the 2009 General Assembly.

Ms. Ogletree explained that the amendments to Rule 14-210 conform to the new statute, Code, Real Property Article, §7-105.9 (c) added by House Bill 776/Senate Bill 842. It changes the word "Occupant" to the words "All Occupants" and requires that they get notice prior to sale by both certified and first class mail. The Chair inquired as to whether in section (e), the following language should be added: "except as to notice to all occupants." Ms. Ogletree commented that the Rule has been changed to require that the State also be served by certified mail. The Chair said that notice to "All Occupants" has to go to the address of the property. It is not a question of knowing where the occupants are living, the notice has to go to the property. The suggested language should be after subsection (e)(1), but before subsection (e)(2). Mr. Bowen noted that since the Rule limits the opening of mail to all persons at the address, everyone would have to be present to open the mail. Ms. Ogletree explained that this was created by the legislature.

Mr. Enten commented that the legislation had not yet been signed, but he anticipated that it would be signed next week. The Rules Committee added the requirement of notice by certified mail. The statute provides that notice is to be sent to the occupants by first class mail. His view was that Rule 14-210 should comply with the legislation. The thinking was that people are not going to receive a certified mail notice. If no one is home to receive the certified mail, the person who delivers the mail will bring it to the post office, and then no one will go to pick it up. Sending it by first class mail is the best way for the people to actually get notice. The legislature did not think that it was necessary to send the notice by certified mail. The bill indicates that the legislature struck the requirement to send the notice by certified mail.

The Chair inquired as to whether the statute only applies to residential property. Mr. Enten replied affirmatively. The Chair then asked whether notice by certified mail applies to commercial property. Mr. Enten replied that there is no requirement in the law requiring that notice be sent by certified mail. This was a creation of the Rules Committee. Mr. Geesing clarified that the Rules Committee created the idea of notice to an occupant. It was never in the legislation. Since the Committee created this concept, which all of the foreclosure attorneys supported, the legislature has pre-empted that Rule with the law. The Chair questioned if Mr. Geesing recommended that the certified mail provision in the third line of section

(b) of Rule 4-210 be deleted. Mr. Geesing responded affirmatively. A notice to occupants should be sent by regular mail. Ms. Ogletree pointed out that the requirement of certified mail can only be deleted for the occupants, and not for the borrower, the record owner, and the holder of any subordinate interest. Mr. Enten agreed and added that this is a way to give the tenant notice.

Ms. Cipollone told the Committee that she was from Civil Justice, Inc., and she represents homeowners in foreclosure actions. If the Rules Committee feels that they have the authority to keep the certified mail in the Rule, they should do so, because otherwise a tenant has no way to contest the fact that the mail was never sent. Sometimes, mistakes happen, and sometimes, the notices are not sent. The only way to prove that the notice was not sent is to ask the foreclosure attorney to show the stamped paper indicating receipt of the certified mail. The Chair inquired as to who will sign the paper indicating that the notice was received if the notice is sent certified mail, addressed to "all occupants." Ms. Cipollone replied that this is a different issue. Mr. Enten reiterated that the legislature considered the option of certified mail but specifically struck this requirement. The Chair clarified that it was stricken only as to the occupants of the property.

Mr. Fisher observed that this issue was thoroughly debated at the legislature. The first draft of the bill provided for certified mail and first class mail, and the second draft

provided for first class mail with a certificate of mailing. The foreclosure attorneys told the legislature that the certificate of mailing was totally unworkable. If the legislature insisted that the notice must be documented by more than the affidavit that is filed, then it would be better to put certified mail back in. The legislature chose not to do this and opted for first class mail. The Chair said that this can be drafted by the Style Subcommittee. The issue for the Committee is whether to keep certified mail as to everyone but the occupants who would get notice by first class mail. Ms. Ogletree moved that this be the way the Rule is constructed, the motion was seconded, and it passed unanimously.

The Chair noted that there is a question pertaining to section (e) of Rule 14-210 as to the address not being readily ascertainable. It is the address of the property. The Vice Chair expressed the opinion that the Chair's suggestion to add the language: "except as to notice to all occupants" before subsection (e)(2) is not needed, because the Rule refers to "the identity or address of the borrower, record owner, or holder of a subordinate interest." Ms. Ogletree agreed that no change to section (e) is needed.

By consensus, the Committee approved Rule 14-210 as amended.

Agenda Item 2. Consideration of proposed new Title 4, Chapter 700, Post Conviction DNA Testing

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Mr. Karceski told the Committee that the next set of Rules

for discussion pertains to Post Conviction DNA testing. They are numbered Rules 4-701 to 4-710 and are new. They are designed to implement Chapter 337, Laws of 2008 (SB 211), which amends Code, Criminal Procedure Article, §8-201. The law went into effect January 1, 2009, so it is important to put these Rules on a fast track. They are patterned after the Post Conviction Procedure Rules in Chapter 400 of Title 4, Rules 4-401 through 4-408.

The thrust of the new Rules and the legislation is that under certain circumstances, a person who was convicted of certain crimes, such as murder, manslaughter, and some sexual offenses, may file a petition in a court where the charging document was originally filed in the case to seek (1) DNA testing of scientific identification evidence that the State possesses and that is related to the conviction, or (2) to request a search of law enforcement agency databases or logs for the purpose of identifying the source of physical evidence. The net result of what the petitioner is seeking is to show that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to the claim of a wrongful conviction or sentence. It is limited to the crime of which the defendant was convicted, and it is limited to that which the defendant can seek through a petition under Code, Criminal Procedure Article, §8-201 and the Rules.

Mr. Karceski presented Rule 4-701, Scope, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-701, as follows:

Rule 4-701. SCOPE

The Rules in this Chapter apply to proceedings filed under Code, Criminal Procedure Article, §8-201.

Source: This Rule is new.

Rules 4-701 through 4-710 were accompanied by the following Reporter's Note.

Rules 4-701 through 4-710 are new and implement the provisions of Chapter 337, Laws of 2008 (SB 211), which became effective on January 1, 2009 and amended Code, Criminal Procedure Article, §8-201. The general scheme of the Rules is based on the Chapter 400, Post Conviction Procedure, Rules 4-401 through 4-408.

There being no discussion, by consensus, the Committee approved Rule 4-701 as presented.

Mr. Karceski presented Rule 4-702, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-702, as follows:

Rule 4-702. DEFINITIONS

In this Chapter, the terms "biological evidence," "DNA," "law enforcement agency," and "scientific identification evidence" have the meanings set forth in Code, Criminal Procedure Article, §8-201 (a).

Committee note: In this Chapter, the terms "law enforcement database" and "law enforcement log" refer to the database or log of the particular law enforcement agency identified by the petitioner.

Source: This Rule is new.

Mr. Karceski told the Committee that Rule 4-702 explains that the terms that are set out in the Rule have meanings set forth in the statute. He had spoken with the Chair about the Committee note, and they both felt that the note may not be necessary. Further on, Rule 4-704, Petition, specifies what these terms mean. The body of the Rule should remain as it is presented.

Mr. Maloney referred to the new statute, Chapter 744, Laws of 2009 (SB 486), Petition for Writ of Actual Innocence - Newly Discovered Evidence, that added §8-301 to the Criminal Procedure Article. He asked whether a separate Rule will be drafted to conform to the legislation. The Chair responded that this new statute is not part of the Post Conviction DNA Rules, although presumably, if a defendant goes through the Post Conviction DNA procedures and gets a favorable result, the defendant may then file under this new procedure. Mr. Karceski answered that there

may be a new Rule dealing with this writ of actual innocence. The Reporter asked if the Committee note should be deleted. By consensus, the Committee approved the deletion of the Committee note. By consensus, the Committee approved Rule 4-702 as amended.

Mr. Karceski presented Rule 4-703, Who May Commence Proceeding, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-703, as follows:

Rule 4-703. WHO MAY COMMENCE PROCEEDING

A proceeding under this Chapter is commenced by the filing of a petition under Code, Criminal Procedure Article, §8-201 in the circuit court where the charging document was filed by a person who:

(a) was convicted of a violation of Code, Criminal Law Article, §§2-201, 2-204, 2-207, or 3-303 through 3-306; and

(b) seeks (1) DNA testing of scientific identification evidence that the State possesses and that is related to the judgment of conviction, or (2) a search by a law enforcement agency of a law enforcement database or log for the purpose of identifying the source of physical evidence used for DNA testing.

Source: This Rule is new.

Mr. Karceski told the Committee that the title of Rule 4-703

is incorrect and should be changed to read "Commencement of Proceeding" or something similar. The Subcommittee had combined the Rule pertaining to who may commence a proceeding with the Rule addressing what the requirements would be to go forward with the proceeding. The proceeding is commenced by filing a petition under Code, Criminal Procedure Article, §8-201 in the circuit court where the charging document was filed. The issue of the filing of the charging document in the court where the filing took place had been discussed. Scott Shellenberger, Esq., State's Attorney for Baltimore County, had commented that often in capital cases to which this Rule would apply, the venue of the trial could be changed to another jurisdiction. This proceeding should be filed where the original charging document was filed as opposed to where the case was ultimately tried.

Mr. Karceski said that section (a) requires that the person had been convicted of the crimes set out there, and they are basically the murder, manslaughter, and sexual offense charges. Section (b) explains that the person could either seek DNA testing of scientific identification evidence that the State possesses and that is related to the judgment of conviction or a search by a law enforcement agency of a law enforcement database or log for the purpose of identifying the source of physical evidence used for DNA testing. This is taken from the statute.

Mr. Johnson referred to the comment from Mr. Shellenberger that the petition should be filed in the jurisdiction where the case was originally charged. When a case is transferred to a

different jurisdiction, does the case stay in the other jurisdiction? Does the judge who tried the case retain jurisdiction over it with regard to post conviction matters? Mr. Karceski answered that the original Title 400 post conviction rules have a provision in Rule 4-406, Hearing, that the judge who heard the case should not be the judge who hears the post conviction proceeding. In some circumstances, the answer is "yes," and in some circumstances, the answer is "no." If the county has one judge, someone can be brought in to hear the post conviction proceeding. He asked the State's Attorneys and the Assistant State's Attorneys who were present if there is a point in time after the sentencing that the file is sent back to the original jurisdiction. Mr. Cassilly, the State's Attorney for Harford County, replied that he was not aware that this happens. The post conviction DNA proceeding is better located in the county where the charging document was filed, because the law enforcement agency who is responding to this petition and may still possess the evidence is in that county, and the prosecutor who tried the case is in that county. Often the Public Defender who originally represented the defendant and probably represented the defendant throughout the entire trial is back in that county. All of the State's Attorneys travel to other jurisdictions to try cases. It makes much more sense to file the post conviction DNA petition back where the original case was filed, because all of the parties are located there.

Mr. Johnson pointed out that the file would be in the

county to which the case had been transferred. Does it have any relevance to a post conviction proceeding? The Chair responded that Mr. Shellenberger's point was that it is easy to get the file back from the county to which the case had been transferred. What is being addressed is the prosecutor and the police authorities searching for the DNA evidence and that will be in the county where the charging document was filed. Mr. Cassilly added that it is easier to transfer the files than to transfer all of the people who testified in the other county.

Mr. Bowen pointed out two problems with Rule 4-703. The title of the Rule should include the word "venue," because it relates to venue. The current wording of the Rule is: "[a] proceeding...is commenced by the filing of a petition...in the circuit court where the charging document was filed by a person who...". He suggested that the language "in the circuit court where the charging document was filed" should be moved into a new section providing that the petition shall be filed and then setting out the details of the filing. Then sections (a) and (b) would follow. The Vice Chair agreed with this suggestion. By consensus, the Committee approved the suggestion.

The Vice Chair referred to the language in section (b) of the statute that reads: "[n]otwithstanding any other law governing post conviction relief...". She asked if the Subcommittee had determined that this language is not necessary in the Rules being discussed. The Chair responded that this language has some interpretative problems. At the very least,

the question of waiver that is in the post conviction law is not included. A person has a right to file this petition even if he or she did not raise the issue at trial, on appeal, or at a previous post conviction application. Mr. Cassilly remarked that this also covers the 10-year limitation for getting this petition filed, and it also covers the limitation on one post conviction. One can file multiple times to reopen the case, but theoretically, it is only supposed to be reopened for an issue that was previously raised. The statute provides that the petition for DNA testing can be filed regardless of these other proceedings. It requires a statement of all of the other court actions that have previously happened, and the court can determine from that statement whether or not the case can go forward.

The Vice Chair asked whether the language to which she had referred in the statute should be included. The Chair answered that the language is not necessary. The Vice Chair expressed the concern that if the language is not included, then the later adoption of this Rule might mean that the language no longer applies. The Chair disagreed, explaining that Rule 4-703 is not inconsistent with the statute.

By consensus, the Committee approved Rule 4-703 as amended.

Mr. Karceski presented Rule 4-704, Petition, for the Committee’s consideration.

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-704, as follows:

Rule 4-704. PETITION

(a) Content

(1) In General

Each petition shall state:

(A) the petitioner's name and, if applicable, place of confinement and inmate identification number;

(B) the date and place of trial, each offense of which the petitioner was convicted, and the sentence imposed for each offense;

(C) a description of all previous proceedings in the case, including direct appeals, motions for new trial, habeas corpus proceedings, post-conviction proceedings, and all other collateral proceedings, including (i) the court in which each proceeding was filed, (ii) the case number of each proceeding, (iii) the determinations made in each proceeding, and (iv) the date of each determination; and

(D) a statement regarding whether the petitioner is able to pay the costs of the proceeding, including the cost of testing, and to employ counsel. If the petitioner alleges an inability by reason of poverty to pay those costs or to employ counsel, the petitioner and the court shall proceed in conformance with Rule 1-325 (a).

(2) Request for DNA Testing

If the request is for DNA testing of scientific identification evidence, the petition shall contain:

(A) a description of the specific scientific identification evidence that the petitioner seeks to have tested;

(B) a statement of the factual basis for the claims that (i) the State possesses that evidence, (ii) the evidence is related to the conviction, and (iii) a reasonable probability exists that the requested DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing; and

(C) a description of the type of DNA testing the petitioner seeks to employ and a statement of the factual basis for a claim that that DNA testing method has achieved general acceptance within the relevant scientific community.

(3) Request for Search of Law Enforcement Database or Log

If the request is for a search of a law enforcement agency database or log, the petition shall:

(A) identify with particularity the law enforcement agency whose database or logs are to be searched; and

(B) state the factual basis for any claim that there is a reasonable probability that a search of the database or log will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing or will identify the source of physical evidence used for DNA testing.

(b) Amendment

Reasonable amendments to the petition shall be freely allowed in order to do substantial justice. If an amendment is made, the court shall allow the State a reasonable opportunity to respond to the amendment.

(c) Withdrawal

> On motion of a petitioner, the court may grant leave for the petitioner to withdraw a petition. If the motion is filed before the court orders DNA testing or a search of a law enforcement agency database or log, the leave to withdraw shall be without prejudice. If such an order has been issued, the leave to withdraw shall be with prejudice unless the court, for good cause, orders otherwise.
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> Source: This Rule is new.

Mr. Karceski explained that Rule 4-704 addresses the actual petition and the contents, including the petitioner's name, and if applicable, the place of confinement and inmate identification number. The reason for the language "if applicable" is the fact that there could be a petition filed pursuant to this Rule when the person is still under supervision but not necessarily in a place of confinement. Subsection (a)(1)(B) states that the petition must have the date and place of trial, each offense of which the petitioner was convicted, and the sentence imposed for each offense. Subsection (a)(1)(C) requires a description of all previous proceedings, all of which are listed. Subsection (a)(1)(D) continues to be a problem, because the situation involving post conviction DNA testing is not one where the Public Defender of the State of Maryland is required to represent a person who files this petition. There is such a requirement under the original Title 400, Post Conviction Rules. Under this Rule, cases will occur involving counsel, filing costs, and the costs of DNA testing that can be substantial, and these will have to be addressed. Subsection (a)(1)(D) refers to the person who

is unable to pay. This could be a person who files an affidavit and even has an attorney. The person states that he or she is unable to pay the costs of the proceedings. The pre-filing costs can be addressed by section (a) of Rule 1-325, Filing Fees and Costs – Indigency. When the court orders testing under Rule 4-709, Order, after a hearing, no laboratory will do the testing on the credit of the indigent defendant. At some point in time, a payment will have to be made, and, if there is a hearing, a court will have to consider whether an attorney should be appointed regardless of whether the Public Defender by law has to handle this and who that attorney should be.

Mr. Karceski said that he wanted to alert the Committee that subsection (a)(1)(D) is the beginning point of a problem that involves court costs, DNA testing, and the inability of a petitioner to hire an attorney. These petitions could be filed by inmates without the benefit of legal representation, because they would not have the ability to hire an attorney, and the Public Defender does not have the responsibility to take the case on. Rule 4-705 provides for the Public Defender to be notified of the filing of the petition. In those petitions that do not appear to be frivolous, the Public Defender may opt to enter into the case.

Mr. Karceski said that subsection (a)(1)(D) provides that if the petitioner alleges an inability by reason of poverty to pay the costs or to employ counsel, the court shall proceed in conformance with Rule 1-325. Mr. Karceski and the Chair had

spoken about this provision this morning. Rule 1-325 does not cover all of these scenarios listed in subsection (a)(1)(D). Judge Norton suggested that the language of the Rule could be changed to indicate that Rule 1-325 only affects the cost issue. The wording of subsection (a)(1)(D) appears to indicate that if one had the money for costs but not for an attorney, Rule 1-325 would apply. He acknowledged that this does not address the question of the costs of the testing.

Mr. Karceski remarked that the DNA testing is not going to be conducted unless a payment is made. In many of these cases, the only payment that can be made will be by the State. Ms. Nethercott said that she did not believe that normally court costs are not assessed in connection with the filing of a post conviction petition. The Chair responded that the reference to Rule 1-325 may not apply at all. The Chair agreed with Mr. Karceski that if the petitioner can pay court costs, no reference to Rule 1-325 is needed. But the issues of counsel and the cost of DNA testing need to be addressed. Mr. Karceski responded to Ms. Nethercott's comment about court costs. He said that he was not that familiar with post conviction relief, but he thought that the petition is opened as a civil matter. Ms. Smith noted that in Calvert County, it is opened as a criminal case. Ms. Bosse, an Assistant State's Attorney in Montgomery County, stated that in her county, the petition is filed as a criminal case. There is no initial cost for the filing of the petition. It is treated as a civil matter in some respects, but it follows the

original Chapter 400 Rules, which are in the criminal rules. The Chair asked Ms. Smith how this is handled in Calvert County. She responded that she thought that people who are using the UCS case management system have to file post convictions as a criminal case. Ms. Nethercott remarked that she had filed a number of post conviction petitions, and she had never dealt with a filing fee problem. Ms. Smith observed that it depends on in which jurisdiction the petition is filed.

The Chair suggested that the Rule could specify that this is filed in a criminal case, particularly because this could avoid costs. The Vice Chair commented that this seems to have been worked out for post convictions. She inquired if a post conviction is considered a civil action. Ms. Brobst told the Committee that she was an Assistant State's Attorney in Baltimore City. She said that whether this is a civil or criminal action varies by county. In Baltimore City, the petitions are filed in the criminal case but treated as a civil matter. As recently as five years ago, these petitions were filed as a separate civil proceeding. She suspected that in some of the smaller counties, this is still the case.

The Vice Chair observed that it may be a matter of figuring out how to avoid the filing fee. Mr. Karceski added that if the petitions were filed separately, there would be a filing fee, so some language is needed in the Rule. The Chair asked if anyone who was a prosecutor or defense attorney would know of a reason not to allow the Rule to state that the post conviction petition

is filed in the criminal part of the circuit court. Ms. Bosse replied that it would be a good idea to do this. If the case is filed as a civil matter, the State's Attorneys do not always get notice of the filing. She used to work in the Office of the Attorney General, and it was difficult to get documents that were needed for federal habeas corpus review if they did not know where the documents were. They would get the docket entries from the clerk's office, and there would be no reference to a post conviction proceeding. It is more convenient to have this filed in the criminal case.

Mr. Cassilly remarked that some of the confusion comes from the petitions for habeas corpus. When these are filed, many times, the parties are different. The case is not named as the *State of Maryland vs. the defendant*. It could be titled as *the defendant vs. the warden* of the prison in which the defendant is being held. There may be some confusion as to whether post convictions are handled like a habeas proceeding and filed civilly, or if they are filed in a criminal case. It would not hurt to specify that the post conviction petitions are filed in a criminal case.

The Vice Chair suggested that the issues about other proceedings, and when and how they are filed should be referred back to the Subcommittee. This may require changes to other rules. She drew the Committee's attention to the language in section (a) of Rule 4-703 that reads: "in the circuit court where

the charging document was filed," and she asked if this resolves the cost issue. Ms. Brobst noted that if the case had been transferred, the criminal case would be in the second county. The Rules provide that the petition should be filed where the indictment was returned, so the petition cannot be filed in the criminal case. Mr. Cassilly observed that the case number will still be in the original county. It will state that the file has been transferred to another jurisdiction. The original county still has the docket entries, and someone from that county can request the file.

The Chair commented that when an indictment or a criminal information is filed, and the clerk opens the file, the docket number stays in that county even if the file is transferred. The Rule could specify that the petition is filed in that case. Ms. Nethercott inquired as to whether the Rule could provide that there is no filing fee. The Chair replied that he was not sure, because filing fees are set by statute. If a case is filed as a civil action, the Court of Appeals may not be able to enact a rule stating that there is no filing fee. It would be better to state in the Rule that the petition is filed as a criminal case. The Vice Chair pointed out that this may not cure the problem. If this is a civil case, despite the fact that it is being filed in a criminal proceeding, state law provides the costs of filing fees in civil cases.

Ms. Potter asked what would happen if a *pro se* defendant

files the petition where the trial was held and not where the charging document was filed. The Chair responded that the Rule provides for a transfer. He questioned whether there was any objection to clarifying that the petition is filed in the criminal case where the charging document was filed, and that the reference to Rule 1-325 is not needed, because there is no filing fee paid in advance. The Reporter inquired whether the petition is filed in the original county with the same docket number if there is a transfer. Mr. Karceski answered affirmatively. In subsection (a)(1)(D) of Rule 4-704, there is no need for the citation to Rule 1-325, but the rest of the Rule leaves people unsure how to proceed. This will have to be addressed later. A suggestion is that the cost and the attorney issue are two different matters. In Rule 4-708, Hearing, if the court grants a hearing, an attorney will be appointed. The attorney issue can be addressed in this Rule. The Chair noted that the issue of the cost of DNA testing is only going to arise if the court orders the testing. It is not necessary to address the cost before that time.

The Vice Chair asked whether the language in subsection (a)(1)(D) of Rule 4-704 that reads: "the costs of the proceeding, including" would be eliminated. Mr. Karceski replied affirmatively, adding that he could see no cost other than the cost of DNA testing. The Chair commented that there is still an advance filing fee, but he inquired as to whether there are costs assessed in a criminal case. Mr. Karceski answered that there

are costs for witness subpoenas. The Chair noted that there may be court costs other than advance costs. Mr. Karceski pointed out that for every summons that is requested, there is the issue of a fee. Whether it is to be paid or not is a different matter. The Chair said that he thought that the statement in subsection (a)(1)(D) may be necessary.

The Vice Chair questioned how the cost of witness subpoenas are handled. In a case that has been concluded, if there is some judgment against the defendant, the court can assess or waive the costs of subpoenas. The Vice Chair asked if the costs are waived, because the defendant cannot pay for them. Mr. Karceski responded that he had seen this handled a variety of ways. Sometimes, there will be 100 subpoenas issued, and the court will limit this to a certain amount of money. The costs may be waived or not waived at all.

The issue comes up in every case where someone is represented privately, not where someone is represented by the Public Defender. The Chair commented that the Public Defender may have money in their budget to pay these costs. Mr. Karceski asked Ms. O'Donnell, who is an Assistant Public Defender, if there are cases where courts order the defendant to pay these costs. Ms. O'Donnell replied that she did not know of any. The Chair pointed out that this comes up on appeal, because if the defendant-appellant loses, the Public Defender pays the appellate costs.

Ms. Brobst remarked that the costs are waived by the court

at the end of the case. The court finds indigency almost 90% of the time. Occasionally, the defendant does have a marginal means, and the court assesses less than the total costs. The Vice Chair inquired if there is a rule that addresses the court's ability to address costs in the way Ms. Brobst just described. Ms. Brobst answered that they have been sent a guideline sheet. The Chair reiterated that Rule 1-325 only applies to prepaid costs.

Mr. Karceski drew the Committee's attention to Rule 4-353, Costs. The Vice Chair asked if the term "costs" is defined in the Criminal Rules. The Chair observed that Rule 4-704 does not need to address costs. Mr. Karceski noted that subsection (a)(1)(D) still must address the cost of employing counsel. The Chair suggested that the phrase "to pay the costs of the proceeding" be deleted. Mr. Karceski observed that the cost of testing and to employ counsel must be left in the Rule. The Vice Chair noted that with the changes, subsection (a)(1)(D) reads as follows: "a statement regarding whether the petitioner is able to pay the cost of testing and to employ counsel." She said that the second sentence will be taken out.

The Reporter asked if there should be an affidavit requirement. The Chair responded that the idea was to avoid frivolous petitions. Mr. Karceski said that when he and the Chair had discussed this Rule, they had spoken about the forms that were being used. Mr. Karceski expressed the view that the forms are not applicable to these Rules. The Rule is asking for

a statement. Most of the time this will consist of the statement, "I cannot pay." Is this enough to relieve the petitioner of not paying the costs? The statement gets the ball rolling, but something must follow to assure that the person really cannot pay.

The Chair noted that the Rule now pertains only to the cost of DNA testing. The petitioners will likely state that they cannot afford to pay that cost, which is probably true in most instances. Rule 1-325 invokes an affidavit where the person must state what his or her financial condition is. It is a standard form that all of the circuit and appellate courts use. Judge Norton added that the District Court also uses the form, which requires the defendant to show what his or her assets, liabilities, and circumstances are.

The Vice Chair inquired why the Rule is asking for the defendant to state an inability to afford counsel when the provision in the Rule about counsel states that the court shall appoint counsel unless the petitioner has waived the right to counsel, or counsel has already entered an appearance. Mr. Karceski answered that this is to alert the court that there is a person who is indigent. Rule 4–705, Notice of Petition, provides that if the petition alleges that the petitioner is indigent, the Public Defender's Inmate Services Division is to be sent a copy of the petition in the hope that they may help out. It sets the groundwork.

Ms. Ogletree suggested that at this point, the person should

be required to fill out the standard form, even though it is not connected to Rule 1-325. Mr. Karceski observed that the petitioner will not have the standard form. Ms. Ogletree added that if the form is required up front, there will be something more for the Public Defender to look at. Mr. Karceski noted that the problem is that the Public Defender is not required to represent the petitioner. The Rule is trying to encourage the Public Defender to handle the representation at least in some of the cases. Ultimately, if there is a hearing, there will have to be an attorney appointed and paid or work pro bono. Mr. Karceski said that he did not know if this issue can be effectively addressed in this Rule. He had no objection to including in the Rule that the petitioner must file a statement supported by an affidavit that the petitioner cannot afford to employ counsel. However, he added that this may not be that helpful, because the petitioner will make the same statement under oath unless there is some form which is required to be completed and filed with this petition.

The Chair commented that the value of the reference to Rule 1-325 was that it invoked the standard affidavit form, but the reference is not needed. The Vice Chair expressed the view that this statement by the petitioner should not be under oath. Either the Public Defender takes the case, or they do not. The Chair cautioned that the Public Defender cannot take the case unless the person is indigent under their standards. The affidavit is something that would support their decision. The

Vice Chair inquired if the Public Defender can ask for an affidavit after they are sent the petition, and the Chair replied affirmatively.

Mr. Karceski remarked that it is a problem to address this situation in the Rules, because there is no right to an attorney. This is a difficult petition to draft for any person who is not an attorney. At a certain point, an attorney will be appointed to represent the petitioner. The Chair stated that the Committee has some choices. Most of the petitioners will be indigent, because they probably will have been in prison for a long time, convicted of murder or serious sexual offenses. Currently, the Public Defender is not required to represent them. Counsel can be appointed up front on the filing of a petition.

The Subcommittee's view is that, if the case proceeds to the point where the judge is going to have a hearing, because the judge has considered the petition as well as the State's answer and any response to it, and the judge has determined that there is enough evidence to hold a hearing, counsel has to be appointed unless counsel is waived. The DNA testing does not have to be addressed until the court goes further after a hearing and decides that testing is appropriate. Rule 4-705 requires that if the petitioner makes this allegation of being unable to afford counsel, then a copy of the petition goes to the Public Defender's Office, so that they can look at it. If that happens, then the State's answer has to be served on the Public Defender, so both sides are represented. Whether the petitioner should

file the standard form affidavit or not, which may be irrelevant, the Subcommittee felt that this was helpful.

Mr. Karceski asked if the Committee should discuss whether the allegation of indigency should be under affidavit or simply be a statement as provided for in subsection (a)(1)(D). The Chair said that his assumption is that the prosecutors would be hopeful that the Public Defender will get into the case, so the prosecutors do not have to deal with *pro se* litigants even at this early stage. The Vice Chair commented that she was persuaded by Mr. Karceski's view that it does not matter whether the statement about indigency is under oath or not, because the petitioner will always aver that he or she cannot afford the cost of an attorney.

Master Mahasa noted that just because someone is in jail does not mean that the person cannot afford an attorney. The Vice Chair remarked that the question is whether putting a requirement that the statement be under oath means that the statement is more likely to be truthful. The Chair pointed out that it is more than just a statement that the petitioner cannot afford an attorney, the form of affidavit used in every other case is under oath, and it requires specific information. The Vice Chair observed that Rule 4-353, Costs, states that costs must be assessed unless the court otherwise orders.

Mr. Michael commented that the timing of the sequence of events is that before someone who may have a legitimate complaint

can get access to an attorney, on his or her own the person must meet the criteria of presenting a reasonable probability that the DNA test will lead to a reversal of the conviction or have some impact on his or her sentencing. Mr. Michael said that although he had not practiced criminal law for 30 years, he recalled his former clients and stated that the requirement to present this information could be a major challenge for a petitioner. Is there a reason to wait until after this burden has been met before the ability to get legal assistance is triggered? Mr. Karceski responded that there was discussion about when the appointment of an attorney should be implemented. The final decision was that it should be when the court allows a hearing.

Mr. Karceski agreed with Mr. Michael's view that this petition is a complicated maneuver. Even the most experienced jailhouse attorney would have some difficulty with this petition. But the petition can be freely amended, and the judge will make sure that if something appears meritorious, this matter would go to a hearing. The problem is who can be appointed and who pays for the attorney. This issue can be debated forever. Mr. Michael asked if a Public Defender is appointed for post convictions. Mr. Karceski answered that this is provided for by statute but does not apply to post conviction DNA testing cases.

Ms. Holback told the Committee that she was an Assistant State's Attorney in Baltimore City. She said that the numerous petitions for DNA testing from *pro se* litigants are a serious

problem. The issues disappear when a Public Defender rewrites the petition. It is not a good idea to require *pro se* petitioners to go through many steps before counsel gets involved. The earlier counsel is appointed the better it is from the standpoint of a prosecutor and also for judicial efficiency. She agreed with Mr. Michael that it would be extremely difficult for a *pro se* petitioner to figure out how to handle these cases. She suggested that in Rule 4-704, the petitioner should have to indicate how the item that was tested related to the petitioner's prosecution and how that resulted in a conviction. It is important to understand the theory of why the petitioner wants the item or items tested. Alleging that there was a hat at the scene of the crime is not sufficient. It should be an allegation that a witness would testify that the hat at the scene of the crime was worn by the assailant. This would give the State's Attorney some clue as to why the item is relevant.

Mr. Karceski responded that this language was added later in the Rules. He said that Mr. Michael had made a good point about appointing counsel. It could be more costly, but in subsection (a)(1)(D), language could be added that would provide that if a statement is made and if the court determines an inability to pay, counsel should be appointed. This would happen at the time of the filing of the petition. It answers the State's preference for a defense attorney being involved from the beginning of the case.

Mr. Michael inquired as to why the Subcommittee decided that counsel should not be appointed at the beginning of the case. The Chair responded that the balance is that everyone agreed that counsel should get into the case as early as practicable. This is triggered by the statement from the petitioner: "I cannot afford counsel." The issue is that no one knows how many of these petitions are going to be filed. This is unique in that it is one of the few situations where the Public Defender is not required to represent an indigent defendant. In every one of these cases that the Public Defender does not represent the petitioner, the court is going to have to appoint counsel and find some funds, which will probably come from the counties, to pay counsel. The question is if counsel is appointed up front before the petition is considered to see if it has any facial merit, or, if after the judge agrees that it does have merit and holds a hearing, then counsel is appointed. Judge Norton commented that it would be a good reason to include Ms. Holback's suggestion to require the petitioner to provide some basis in the original petition for needing the DNA testing. This is helpful for getting rid of the cases that have no merit.

The Vice Chair observed that the issue is the financial ability to pay for counsel. The Rule provides that counsel is appointed unless the petitioner already has another attorney, or counsel is waived. It does not state that this is tied to the ability to pay. She did not understand the relevance of the ability to pay. Judge Norton remarked that an attorney is

appointed only if there is a hearing. Mr. Karceski noted Mr. Michael's point that the case may not have been dismissed if the petitioner had been represented by counsel. The Vice Chair asked the reason for requiring the petitioner to state under oath that he or she can or cannot afford an attorney. The only point of a statement that the petitioner cannot afford an attorney is for a copy of the petition to be sent to the Office of the Public Defender. It has nothing to do with whether or not a petitioner will later get counsel appointed. The Chair disagreed. He said that there may be a gap in the Rule that needs to be filled, but the Subcommittee's view was that someone does not get appointed counsel, if he or she can afford counsel. Mr. Karceski pointed out that whether the statement is filed by affidavit or not, someone will have to determine if the person qualifies for appointed counsel. His view was that the affidavit is meaningless.

Mr. Maloney told the Committee that he wanted to go back to the issue of requiring the petitioner to explain clearly how the evidence to be tested is related to the conviction. The language in subsection (a)(2)(B) states that the petition shall contain: "...a statement of the factual basis for the claims that ...(ii) the evidence is related to the conviction...". He suggested that this language be amended slightly to state: "including a concise description of how the evidence is related to the conviction."

Master Mahasa referred to the language in subsection (a)(2)(B)(iii) that states: "a reasonable probability exists that

the requested DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing...". She expressed the opinion that this language does not conform to the statute, because at this point of filing the petition, the Rule should state that there may be (emphasis added) a reasonable probability that exists. The statute does not use the language "a reasonable probability exists" until the hearing. This is a higher standard, and the Rule should use the "may be a reasonable probability" language. The "reasonable probability" language does not appear until section (d) of the statute.

Mr. Cassilly noted that this language falls under the court findings. This requires that the information is in the petition that the court needs to make its findings. Master Mahasa explained that the person is filing the petition, and to require that a reasonable probability exists is a higher standard than what is in Rule 4-708, Hearing, which provides in subsection (a)(1): "...there is or may be a reasonable probability that the requested testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing." The Chair said that he did not think that there was an inconsistency. The standard in the statute for ordering testing is that there has to be a reasonable probability. This is in Rule 4-704. The petitioner has to allege this and give some basis for the allegation. Mr. Karceski added that there are not two levels of proof. There is not a

level of proof in the petition and a level of proof in the hearing.

The Chair remarked that with respect to the "is or may be" language, it is simply that this is what the hearing is to determine. The court will not order testing, unless the court finds that there is a reasonable probability. If there is an allegation that there is a reasonable probability, and the allegation is contested, there is a hearing to determine this. The Reporter commented that the person who files the petition will say that there is a reasonable probability. Master Mahasa asked if it would be adequate if Rule 4-704 (a)(2)(B) used the language "there may be...a reasonable probability...". The Chair answered that this is not enough, because the petitioner will not get the testing.

Mr. Karceski said that the discussion had moved beyond the issue of whether an attorney should be appointed at the outset or if the Rule should be left as it is. He asked if Mr. Michael had a motion for an attorney to be appointed at the beginning of the case. Mr. Michael moved that the access to an attorney be at the time the petition is filed. The motion was seconded. Mr. Karceski said that the last time he was given this information, the House of Correction at Jessup housed only inmates who were serving life sentences. He surmised that every one of these inmates would want to file a petition. This Rule may not just apply to criminal attorneys. The Chair remarked that it is not certain how this would play out. If the prisoners know that they

are entitled to an attorney, every one of them will ask for one. The statute does not just allow asking for testing. It also allows asking law enforcement agencies to search databases and logs that would have DNA evidence to show the innocence of the defendant.

The Chair acknowledged that it is a fair question as to whether an attorney should be appointed at the outset. The problem will be if there is an influx of these petitions, and even without an affidavit, they require the appointment of counsel upon the filing of the petition with a statement that the petitioner cannot afford an attorney. Where can attorneys be found to do this, and who will pay them? Mr. Karceski remarked that even within the ranks of attorneys who hold themselves out to be criminal attorneys, there is a finite number who understand anything about DNA. This creates another problem within the problem it solves. The Chair pointed out that this not only applies to capital cases, but to every murder, manslaughter, and rape case.

Mr. Michael told the Committee that he would be glad to withdraw the motion. He had wanted to get a consensus from them, and he acknowledged that he did not have all of the insight about the systemic floodgate problem this will create. The Chair commented that it is not clear what the response would be. The original DNA statute had been in existence for some time, but the new one went into effect on January 1, 2009. Mr. Michael inquired as to whether the post conviction procedure where

counsel is appointed by statute is analogous to the DNA testing situation. The Chair responded that Code, Criminal Procedure Article, §§7-101 to 7-108, the Uniform Post Conviction Procedure Act, requires the Public Defender to get into these cases when the petitioner is indigent, but this does not apply to the Post Conviction DNA Testing Rules.

Mr. Karceski referred to section (b) of Rule 4-401, How Commenced – Venue, which reads as follows: "Following DNA Testing. If a petition for DNA testing was filed pursuant to Code, Criminal Procedure Article, §8-201, and the test results were favorable to the petitioner, the court shall (1) reopen a post conviction proceeding previously commenced under section (a) of this Rule or (2) if no post conviction proceeding has been initiated, treat the petition for DNA testing as a petition under section (a) of this Rule." He inquired whether there is any possibility that since the Public Defender has to cover this section, it can be incorporated into Rule 4-704.

The Chair said that Nancy Forster, Esq., Public Defender, was not present at today's meeting, but he could predict her response. The Public Defender must get into the regular post conviction cases under the Uniform Post Conviction Procedure Act. They are not required to get into the post conviction DNA testing cases. In *Harris v. State*, 344 Md. 497 (1997), the court held that if the Public Defender declines representation, the court

cannot appoint the Public Defender as counsel[1]. Mr. Karceski expressed the opinion that if this Rule were not on the agenda for today, at some point in time when DNA testing was favorable, the Public Defender would have to take the case, because they have to take post conviction cases under Chapter 400. Why would they refuse to take a DNA post conviction case? The Reporter noted that this would only be after a favorable outcome.

Mr. Karceski acknowledged that the Reporter was correct, but he explained that the next step is that if the court grants a hearing, the Rule provides that counsel should be appointed. If testing turns out to be favorable, the case is almost a *fait accompli* at that point, because if it is favorable, the petitioner is going to get a new trial or a post conviction hearing. This is when the Public Defender has to get into the case. If an attorney is appointed and gets to that stage, does the appointment end then? The Chair responded that in this one situation, where there was a Public Defender and there was a right to counsel, the judge had to appoint counsel.

Mr. Karceski referred to Mr. Michael's suggestion to figure out at what juncture counsel should be appointed. Mr. Michael asked when counsel should be appointed other than at the beginning of the case. Mr. Karceski answered that it could be at any time, but the Subcommittee's view was that if there were to be a hearing, that would be the appropriate time to appoint

[1] This meeting occurred prior to the Court of Appeals decision in *Office of the Public Defender v. State*, 413 Md. 411 (2010).

counsel. The Chair stated that there are three possibilities of when to appoint counsel. One is when the petition is filed along with a statement of some kind that the petitioner cannot afford counsel. The second one is when the State files its answer, because then the case is at issue. The third is the way the Subcommittee recommended, which is that counsel is appointed if the court decides to hold a hearing. This will require attorneys who are competent to handle these cases, which are very technical. They will have to do investigations of what evidence there is. It is a major undertaking.

Mr. Karceski said that it appears that the decision is to continue with the language proposed by the Subcommittee. Master Mahasa inquired whether the matter can be reopened, and then the Public Defender can decide whether to get into the case if a hearing is denied. The Chair replied that section (b) of Rule 4-704 permits the petitions to be freely amended. Master Mahasa remarked that this could help with the flood of petitions. Ms. Potter told the Committee that she had never handled a criminal case, but in considering the procedure, she asked whether there could later be a post conviction filed on the ground that no attorney was involved if an attorney is never appointed. The consultants in attendance replied negatively. Master Mahasa explained that she was suggesting that the Public Defender could look at the cases that were denied. The Chair stated that once the petition is filed, if the petitioner avers that he or she cannot afford counsel, a copy of the petition is sent to the

Office of the Public Defender (OPD). When the State files its answer, it is served on the Public Defender pursuant to Rule 4-705 (d). At that point, they can decide if they would like to take the case.

The Chair asked what the Committee's view was. It is a policy decision. Mr. Michael noted that he had made a motion that had been seconded which was to appoint counsel when the petition is filed. Mr. Cassilly remarked that he would support it, but he was not sure how this Rule could be implemented. Where is the court going to be able to find the necessary attorneys? The Chair responded that the Court of Appeals will ultimately determine whether this can be done. Mr. Cassilly remarked that he understood that but asked if there is a practical effect of providing for counsel when the petition is filed. The Chair pointed out that it will depend on how many of these petitions are filed and where they are filed. Ms. Ogletree observed that it depends on whether the petitions are at all meaningful. If many petitions are filed without basis, it would be better to weed those out early on in the process by an attorney getting involved to ensure that the petition is meritorious.

Mr. Cassilly commented that he was not opposed to an attorney being appointed early in the process as he would be happy to have someone else on the other side looking at the petition. However, from a practical aspect, he asked where a judge finds an attorney to take the case if the Rule requires

counsel at the beginning of the case. Ms. Ogletree replied that it would be similar to what happens in Caroline County when an attorney is needed for a Child in Need of Assistance case. The judge calls an attorney and asks him or her to take the case.

The Vice Chair pointed out that Rule 4-708 requires counsel to be appointed if a hearing is held. Rule 4-707, Response to Answer, has the language "if counsel has not previously been appointed or retained," which appears to indicate that there can be earlier requests for appointment of counsel. The Chair commented that he did not interpret the Rule from precluding the court from appointing counsel at an earlier time, but it is not required. The Vice Chair suggested combining the two concepts so that when the petition is filed, the petitioner may request counsel, and the court may or may not allow it. Mr. Michael agreed with this suggestion. The Chair expressed the view that this is implicit in the Rules. Mr. Michael remarked that assuming that the jailhouse attorney reads the Rule, it would be obvious that the option of applying for an attorney up front is available. He said that he would amend his motion to incorporate the Vice Chair's suggestion.

Master Mahasa inquired whether the court has to review each petition to determine if counsel is necessary. The Chair commented that if a copy of the petition is sent to the Office of the Public Defender, he would assume that the court may want to wait and see what the Public Defender does. Mr. Michael pointed out that the language of the motion would require a request by

the petitioner for an attorney before the judge would be required to do anything. Master Mahasa observed that 99% of the time, an attorney will be requested. She questioned whether the first hurdle will be for the court to determine whether or not counsel will be appointed. Mr. Karceski replied that other than the court, no one can make the determination. Ms. Ogletree remarked that with counsel, the petition will be more meaningful. Every law enforcement database will not have to be searched.

The Chair suggested that another way to sequence this is to add a fourth requirement that if the petitioner wants an attorney but cannot afford one, he or she must state that in the petition. A copy of the petition goes to the Public Defender. If the Public Defender does not enter an appearance within a certain number of days, the court may appoint counsel. Many of the petitions will be weeded out as facially insufficient. One example would be that the petitioner was not convicted of a qualifying crime. The State's Attorney will file an answer that points this out. Master Mahasa commented that the court is depending on the OPD to determine which cases are meritorious. If they are not, the court still gets to review each petition. Ms. Ogletree noted that the court will have to review each one, anyway. The Chair pointed out that the decision as to whether to appoint counsel can be postponed until the State files an answer.

Judge Norton expressed the opinion that, as a practical matter, it would be better to wait to see the State's answer before counsel is appointed, because it may be that the evidence

requested to be tested does not exist. The Chair responded that it may be very important for a petitioner to have an attorney to determine why the evidence does not exist. Judge Norton noted that Rule 4-708, Hearing, allows the judge to dismiss the case without a hearing. The Chair said that assuming that the petitioner alleges an inability to pay, a copy of the petition is sent to the Public Defender. After the State answers, if the Public Defender has not entered an appearance, the court may appoint counsel. Mr. Karceski agreed that this would work.

Mr. Karceski suggested that another section be added between the answer and the response to the answer. If there is going to be an appointment of counsel, it should be before the response. It would be entitled "Appointment of Counsel." The Subcommittee can draft something that would be appropriate. The petitioner would have to aver, "I cannot afford counsel, but I want an attorney," and the OPD would get a copy of the petition. If they are going to get involved, it becomes a little murky. Since they have no responsibility, they do not have to commit. By the time that the State files its answer, the Public Defender will get the answer at the same time that it is filed with the court, and if the Public Defender is going to be involved, this will take some time. The period for responding to the State's answer is currently 60 days, but this could be lengthened. There is no way to know if the Public Defender is going to take the case, because they have no obligation to inform the court. The Chair remarked that if they do not file an appearance within a certain period of

time, then that is the answer.

The Chair asked Ms. Nethercott if she had any comments. Ms. Nethercott replied that the problem is that the Public Defender is not funded. The Chair inquired whether the Public Defender would take some of these cases, even though they are not obliged to, if there were funding. Ms. Nethercott answered affirmatively. The Reporter said that the Public Defender has already been taking some of these cases, and she asked Ms. Nethercott at what point the Public Defender decides if they are going to take them. Ms. Nethercott responded that she takes an extensive look at each case, and she reads the transcript. Obviously, she only wants to take the cases that have some merit to them. Getting into the case can be a very lengthy process, because the attorney may have to acquire documents beyond the transcript.

Mr. Karceski stated that Mr. Michael's comments are correct. Considering all that must be done, when the attorney comes in after the State files its answer, this newly appointed attorney has to look, review, and read. The Chair noted that at least the attorney has the State's answer. Mr. Karceski acknowledged that the attorney does have the State's answer, but he suggested that the response time may need to be extended. The Chair said that the first action the attorney likely would take, after making an investigation, is to amend the petition.

The Chair asked the Committee which of the choices it prefers. The Vice Chair clarified that the motion on the table

is that there be an up front provision that in the petition, the petitioner can request an attorney, including a statement that the petitioner cannot afford an attorney. If the OPD does not enter an appearance within a certain period of time, the court can appoint counsel. Mr. Karceski suggested that the new provision be placed between Rules 4-706 and 4-707. The Chair inquired whether the attorney should be appointed after the State's answer is filed. The Public Defender gets a copy of the State's answer. Then counsel could be appointed if the Public Defender does not enter an appearance within a certain number of days after that. By consensus, the Committee approved the suggestion by the Chair.

The Chair clarified that if counsel is not appointed, and the judge decides to hold a hearing, then counsel must be appointed. The Reporter asked how many days should be included in the Rule for the Public Defender to enter an appearance. Mr. Karceski answered that it should be 30 days. The Chair commented that Ms. Nethercott and the Subcommittee did not want to let too much time go by so that the cases languish, but on the other hand, it is important enough to wait for 30 days.

Mr. Karceski noted that pursuant to subsections (a)(2) and (3) of Rule 4-704, the petitioner may request DNA testing and a search of a law enforcement database or log. Mr. Maloney asked about the language "a concise description of how the evidence is related to the conviction." Mr. Karceski explained that what would be needed is a description of the specific identification

evidence to be tested, a factual basis that the State has it, how it is related to the conviction, and the reasonable probability of how it is going to produce exculpatory or mitigating evidence. Mr. Karceski added that the petition would also include a description of the type of DNA testing. This was discussed by the Subcommittee, and Rule 4-708 provides that if an appropriate method of testing is not contained in the petition, the petition can be dismissed. The Subcommittee discussed how a person in prison, who files a petition without the assistance of an attorney, would know the type of DNA testing. Mr. Maloney inquired as to what was the answer. Mr. Karceski replied that he had pointed out that to make the end result of that inability to provide the information a dismissal of the petition appears to him to be wrong. In every other respect, the petition may be extremely meritorious, and the petitioner does not know one laboratory from another. He hoped that it would not be dismissed on that basis. The Rules allow free amendment. If counsel is not appointed until after the answer, and before the response, the Rules do not cover this situation. The Subcommittee preferred to place this provision at this point in the Rules. It is a requirement of the statute that this information be contained in the petition. Mr. Maloney inquired as to whether it is required in the petition or if it is the standard of proof for the court to employ. Judge Norton pointed out that it is in the contents of the order.

Mr. Karceski remarked that he was troubled by this language.

Mr. Maloney moved to delete subsection (a)(2)(C). The motion was seconded. Mr. Karceski reiterated that a petitioner would not know one laboratory from another, and the Vice Chair added that a petitioner would not know that a testing method has been generally accepted by the scientific community. The Chair observed that once counsel gets into the case, this is something that needs to be shown. The method of testing would have to meet a Frye-Reed analysis [based on *Frye v. United States*, 293 F. 1013 (D.C. Circ. 1923) and *Reed v. State*, 283 Md. 374 (1978)]. Mr. Maloney remarked that he could foresee facial attacks on the petitions, because an inmate did not comply with subsection (a)(2)(C). Judge Hollander noted that if the State thought that a method of testing was accepted in the scientific community, they could put this into the answer.

The Chair called for a vote on the motion to delete subsection (a)(2)(C). The motion passed unanimously.

Mr. Karceski said that subsection (a)(3) is the request for search of a law enforcement database or log. The reason for this language is to avoid a shotgun approach of every agency. The petition has to set forth the "factual basis for any claim that there is a reasonable probability that a search of the database or log will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction...". Amendments are freely allowed under section (b). The State would have a reasonable opportunity to respond to the amendment. Pursuant to section

(c), if there is a withdrawal of the petition before the court orders DNA testing or a search of a database, it should be without prejudice. However, if the order has been issued, the leave to withdraw shall be with prejudice unless the court for good cause orders otherwise. When the Subcommittee discussed this, the conclusion was that there is no limit to the number of petitions that can be filed. Any person can file more than one petition.

The Chair commented that the statute does not address this as comprehensively as the Uniform Post Conviction Act. Mr. Karceski explained that if the petitioner gets to the point where the court orders the testing, and the judge does not want to go forward with the case, the petitioner can file leave to withdraw the petition. Mr. Karceski asked if this pertains only to the instant petition or if it precludes the petitioner from filing ever again. The Chair responded that he was not sure as to whether the concepts of *res judicata* would apply to a criminal case.

Ms. Holback commented that if there is a court order for testing, and costs are incurred, and then the petitioner decides to withdraw the petition, the Rule is silent as to who would have to pay the costs of the aborted testing. The Chair noted that somebody would have to pay the money up front to get the testing. The State is required to do that. Ms. Holback remarked that the State enters into contracts with private laboratories, and the

State promises to pay for the testing. The problem is often it is not clear how many tests are going to have to be run, so it is difficult to prepay. Mr. Karceski asked whether the State would pay for this up front. Ms. Holback explained that if they use the laboratory of the police department, no costs are incurred. But if they hire a private laboratory, the testing will involve a cost. However, the laboratory cannot be sure that the results are available from the first test, so it is not clear how much the testing will cost. The Chair pointed out that the State has agreed to pay. Ms. Holback clarified that the State agrees to a first-line set of expenses, and then if the testing does not work, the laboratory calls the State and asks them what the next step is.

The Chair commented that at some point if the testing has been ordered, and the laboratory begins the process, and then the petition is withdrawn, the laboratory will have to be reimbursed if they have taken any action on the testing. The Vice Chair inquired as to why the State should have to pay for the testing if the petitioner withdraws after the State is legally obligated to pay for whatever has been done so far. The Chair said that the court can assess the cost against the defendant. Ms. Brobst noted that the statute requires the defendant to pay unless the results are favorable. Subsection (h)(2) of the statute provides that if the results are favorable, the court shall order the State to pay the costs of the testing. The Chair pointed out that to get the testing done, someone will have to agree to

either put the money up front or to pay for it later. The laboratory will not conduct the testing on the unsecured credit of the defendant.

Ms. Brobst said that subsection (h)(1) of the statute provides that to get the process started, the petitioner shall pay the cost of DNA testing. The Chair noted that subsection (h)(1) of the statute reads as follows: “Except as provided in paragraph (2) of this subsection, the petitioner shall pay the cost of DNA testing...”. If the defendant is indigent, and the judge holds that the petitioner has shown enough to require the testing, and the judge has appointed counsel for the petitioner because he or she is indigent, there may be evidence to show that the conviction was wrongful. Is it possible that the petitioner is entitled to the testing but cannot get it because he or she is not able to pay the costs? Mr. Karceski answered negatively. Ms. Brobst explained that her point was that the statute contemplates that the costs are the responsibility of the petitioner unless the results of the testing are favorable.

The Vice Chair inquired if Ms. Brobst was reading the statute to mean that if the petitioner cannot afford the costs of the testing, the petitioner cannot get the testing. Ms. Brobst responded that she was addressing the question of what happens if the petitioner has requested that the testing be started and then dismisses the petition. The State is not relieved of its obligation to pay, because subsection (h)(1) would no longer apply. The Chair said that in that situation where there has

been a hearing, and the judge has found that there is DNA evidence that has the potential to show that the conviction or sentence was wrong, the judge would not refuse to order the testing simply because the petitioner cannot pay for it. The Chair added that if the testing is ordered, the State must agree that, unless the laboratory is willing to take the credit of the petitioner, the State will either have to pay the money up front or agree to pay contractually. If the testing turns out to be unfavorable, then the petitioner will be assessed with that cost.

Mr. Maloney noted that the statute addresses the allocation of cost between the petitioner and the State as to proof of whether there is exculpatory DNA or not. What it does not address is the indigency aspect -- whether there would be a separate entitlement to pay for the testing based on indigency on a pre-test basis. The statute is silent on this, and it should be addressed. The Vice Chair remarked that laboratories will not do this testing if the petition is withdrawn or if, for any other reason, the cost is assessed against the petitioner who has no funds. Mr. Karceski commented that the State must shoulder this cost. The Chair added that they will either pay it up front or agree to pay it and then hope that it can be reimbursed.

Mr. Cassilly told the Committee that he is an administrator whose budget is being cut, and he questioned as to who “the State” is when the statute provides that “the State” has to pay. Is it the county State’s Attorney, such as in Harford County, which has no money in its budget for new testing much less

testing in 20-year-old cases? He expressed doubt as to where the money is coming from unless the legislature appropriates a fund for this. He sees an issue arising if the court sends out an order that someone come up with the money for the testing. The Chair inquired as to what happens in a regular criminal case if the Public Defender decides for whatever reason that they will not represent a defendant because the person is not eligible, and the court disagrees with this. The court then appoints counsel. Will the cost of counsel be assessed against the county? Mr. Cassilly responded that attorneys from his office have gone to court and told the judge that this is not permitted. The statute clearly provides that the Public Defender shall represent indigent defendants.

The Chair noted that since the Court of Appeals has held that the Public Defender cannot be forced to represent someone, the only option would be for the court to use its inherent power to appoint counsel[2]. If this happens, the cost will be assessed against the county. The Vice Chair suggested that this comes out of the court's budget. Mr. Maloney pointed out that the court's budget comes out of the county. The Chair added that this happens in appellate cases. If the Court of Special Appeals reverses a criminal conviction, the county pays the cost. Mr. Cassilly acknowledged that the payment of appellate costs is in his budget. The Vice Chair remarked that appellate costs are

[2] *See* Footnote 1 *infra*.

usually not as significant as the costs being discussed today.

Judge Hollander commented that the costs of the various types of DNA testing differ, and she asked what the range of costs would be. Ms. Nethercott replied that a minimum cost would be $1000, generally the costs are $3,000 to $5,000, and the more complicated cases would cost $10,000 plus. Ms. Holback expressed the concern that unrepresented petitioners usually would like all of the tests. Judge Hollander responded that it does not mean that the judge would grant the petitioner's request. She said that the language of subsection (h)(1) of the statute was clear that the petitioner shall pay the cost of DNA testing. It does not say that the petitioner shall pay, but the State is going to front the costs and then collect them later. Mr. Maloney added that this provision does not address the issue of an indigent petitioner. Judge Hollander observed that language could be added to the statute to address this. Mr. Maloney cautioned that this may not be so simple.

Judge Hollander remarked that the legislature probably did consider that this would be a burden on various jurisdictions, particularly urban ones, that do not have the money to pay for these tests. Mr. Maloney said that it is not an acceptable situation if a judge has decided that the evidence may be exculpatory and orders the test, and the test is not conducted because the petitioner is indigent. This is a fundamental denial of due process. Mr. Cassilly remarked that if the judge made that kind of finding, the judge could call the Public Defender

and explain that the petition appears legitimate.

The Chair stated that the statute will have to be followed; however, there is a gap. One approach is that if a petitioner cannot pay for the test after the judge made the appropriate findings and ordered the test, the test is not conducted, or the State can be required to put the money up to get the test done, and then if it is unfavorable to the petitioner to assess the cost against him or her. However, the State will end up paying the costs. The Vice Chair questioned as to the likelihood that a defendant would be indigent, but the Office of the Public Defender has refused to represent him or her. Mr. Karceski answered that in the case of DNA testing, it is very likely. The Public Defender has already stated that they will not necessarily represent these petitioners. If it is the right set of circumstances, and they like the case, they will take it.

The Chair asked the Committee how they wanted to resolve the issues raised pertaining to Rule 4-704. The Vice Chair expressed the view that the decision should not be made until the legislature addresses the problem, so that they can provide the funding. The Chair commented that in the meantime, these cases will arise in which judges will order testing. The General Assembly does not go into session until January. Mr. Maloney noted that it has been stated that the court can appoint counsel. It is not a big jump to state that the court can order payment upon indigency. The Vice Chair remarked that the Rule could provide that the counties pay for the testing, but the counties

are divided up as entities with a budget, and the money has to come out of a budget. The court does not have statutory authority to make the counties pay.

The Chair commented that the Court of Appeals will decide this issue. The Vice Chair pointed out that there are other situations such as where the court can appoint its own expert, and this is a judiciary cost. Mr. Maloney commented that Judge Kaplan had told him that when a paternity test shows that the subject of the test is not the father, the county pays for the cost of the test. Mr. Karceski asked whether there is an up front payment when there is a paternity test. Judge Kaplan explained that Baltimore City has a contract with a testing laboratory. If the test shows that the person tested is the father of the child, then the father has to pay for the test. If he is not the father, which happens in 98% of the cases, Baltimore City pays for the testing.

The Chair said that this issue of payment for DNA testing needs to be addressed. Ms. Ogletree reiterated that indigent people cannot legally be denied DNA testing. The Chair suggested that the right to testing could be made subject to the assessment of the cost against the petitioner if the testing turns out to be unfavorable. It becomes a creditor's rights issue. Mr. Karceski remarked that the issue is who will ultimately be responsible for the payment, because the petitioner, regardless of the outcome, is not going to be paying anything. Should it not be addressed? The Rule could provide that counsel is appointed and leave it

silent as to who is responsible for the payment of the testing. The Chair pointed out that if the Court of Appeals adopts the Rule, and it provides that if the petitioner is entitled to the test but is indigent, the State will have to front the money, then someone from the Association of Counties will go to the legislature and ask for funding.

Mr. Karceski noted that Rule 4-704 does not address this issue. The Chair responded that it arises in Rule 4-709 pertaining to the order in the case. The Vice Chair suggested that the first time the word "reasonable" appears in section (b) modifying the word "amendments," it should be deleted. It does not appear in other Rules pertaining to amendments. By consensus, the Committee agreed to delete the word. By consensus, the Committee approved Rule 4-704 as amended.

Mr. Karceski presented Rule 4-705, Notice of Petition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-705, as follows:

Rule 4-705. NOTICE OF PETITION

(a) To State's Attorney

Upon receipt of a petition, the clerk shall promptly forward a copy of it to the State's Attorney and the county

administrative judge. If the petition seeks a search of the database or log of an identified law enforcement agency, the State's Attorney shall send a copy of the petition to that law enforcement agency.

(b) To Public Defender

If the petition alleges that the petitioner is unable to pay the costs of the proceeding or employ an attorney, the clerk shall promptly forward a copy of the petition to the Public Defender's Inmate Services Division.

Source: This Rule is new.

Mr. Karceski explained that upon receipt of the petition, the clerk will forward a copy to the State and to the county administrative judge. The purpose of this is to alert the court of the possibility of employment of counsel farther along in the proceedings. Mr. Cassilly inquired if the language "in the county where the charging document was filed" could be added after the word "judge" at the end of the first sentence in section (a) of Rule 4-705. The petitioner may file the petition in some other jurisdiction with the wrong State's Attorney and the wrong administrative judge. The petitioner is likely to file the petition where he was convicted, but the Rule requires that it be filed in the county where the charging document was filed. He feels that it would be helpful to add this language to the first sentence of Rule 4-705. By consensus, the Committee agreed to add this language.

Mr. Karceski noted that the Rule provides that if a search of a database or log of an identified law enforcement agency is

sought, the State's Attorney is required to send a copy of the petition to that law enforcement agency. Section (b) states that if there is an allegation of an inability to pay the cost of the proceeding or to employ an attorney, the clerk shall forward a copy of the petition to the Public Defender's Inmate Services Division. Mr. Karceski questioned the language "cost of the proceeding." The Vice Chair suggested that more appropriate language would be "cost of testing," and by consensus, the Committee agreed to this change. The Chair asked if what is intended is that the clerk is to forward a copy to the State's Attorney and the county administrative judge of the county where the charging document was filed. Mr. Cassilly responded that this is the same language in Rule 4-703 where the petition is to be filed. It is the obligation of the clerk to figure out where this is to be filed.

The Chair inquired whether it should be the obligation of the clerk to send the petition to the State's Attorney in his or her county and let the State's Attorney figure out where the proper court is. In the answer, the State's Attorney can state that the court is improper. Mr. Cassilly explained that the docket entries are going to show that the case was transferred to another county. The Chair responded that he understood this, but he questioned why the clerk has to figure this out. If the clerk just sends the petition to the State's Attorney in the clerk's county, the State's Attorney can figure out whether the petition has been sent to the proper jurisdiction. The judge has to

transfer the case, and the clerk should not have to make these decisions as to where the petition is to be sent.

By consensus, the Committee approved Rule 4-705 as amended.

After lunch, Mr. Karceski presented Rule 4-706, Answer, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-706, as follows:

Rule 4-706. ANSWER

(a) Duty to File

The State's Attorney shall file an answer to the petition.

(b) Time

The answer shall be filed within 60 days after the State's Attorney receives notice of the petition unless, for good cause, the court extends that time. If an answer is not filed within the time required by this Rule or an extended time allowed by the court, the court shall take such action as it deems appropriate to enforce the requirement.

(c) Content

The answer shall state or contain:

(1) whether the petition has been filed in the proper court and, if not, which court has venue under Rule 4-703;

(2) whether the specific scientific identification evidence that the petitioner

desires to have tested exists and, if so, the location of the evidence, the name and address of the custodian of the evidence, whether the evidence is appropriate for DNA testing, and if not, the reasons why it is not appropriate for DNA testing;

(3) if the State asserts that it has been unable to locate the evidence, an affidavit containing a detailed description of all steps it took to locate the evidence, including (A) a description of all law enforcement records, databases, and logs that were searched, (B) a description and documentation of when and how the searches were conducted, and (C) the names and addresses of the persons who conducted them;

(4) if the State asserts that the evidence has been destroyed, an affidavit containing (A) a description and documentation of all relevant protocols pertaining to the destruction of the evidence, (B) whether the evidence was destroyed in conformance with those protocols and, (i) if so, documentation of that fact, and, (ii) if not, the reasons for non-compliance with the protocols; and

(5) a response to each allegation in the petition.

(d) Service

The State's Attorney shall serve a copy of the answer on the petitioner and, if the petition alleges an inability to pay the costs of the proceeding, on the Public Defender.

Source: This Rule is new.

Mr. Karceski pointed out that section (a) of Rule 4-706 indicates a duty on the part of the State's Attorney to file an answer to the petition. Section (b) provides that the answer is to be filed within 60 days after the State's Attorney receives

notice of the petition unless for good cause the court extends the time. If an answer is not filed within the required time, the court shall take such action as it deems appropriate. Mr. Karceski asked that the remaining four words in the second sentence of section (b), "to enforce the requirement" be deleted, because it would appear that the court's only action is to order the State to file an answer when it may choose to take some other appropriate action. By consensus, the Committee approved the deletion of the last four words of section (b).

Mr. Karceski said that section (c) provides that the answer shall state or contain whether the petition has been filed in the proper court, and if not, which court has venue; whether the scientific identification evidence that the petitioner desires to have tested exists, and if it does, its location, and the name and address of the custodian of the evidence. The word "business" should be inserted before the word "address." The answer shall contain whether the evidence is appropriate for DNA testing, and if not, the reasons why it is not appropriate. If the State asserts that it is unable to locate the evidence, the answer shall contain an affidavit that has a detailed description of all steps taken to locate the evidence as described. The only change would be in subsection (c)(3)(C): the word "business" should be added before the word "addresses."

Mr. Karceski noted that under subsection (c)(4), if the State asserts that the evidence has been destroyed, the answer shall contain an affidavit that has a description of the

protocols pertaining to the destruction, whether the evidence was destroyed in conformance with the protocols, and if not, the reasons for the non-compliance with the protocols. Subsection (c)(5) provides that there should be a response to each allegation in the petition. Section (d) states that the service should be on the petitioner and also if there is an allegation of an inability to pay, the answer should be served on the Public Defender.

Ms. Holback commented that at the Subcommittee meeting, the point had been raised that if the petitioner filed the petition in the wrong venue, the prosecutor in the wrong venue should not have to respond. She thought that something was to be added to the Rule to indicate that the petition would be transferred or dismissed without prejudice. The Chair responded that subsection (c)(1) provides that the State's Attorney has to state in the answer if the venue is wrong, and what the correct venue is. Mr. Karceski added that section (b) of Rule 4-709, Order, requires a transfer if the court finds that the petition was filed in the wrong court. Ms. Holback said that Rule 4-706 should provide that the State's Attorney in the wrong jurisdiction should not have to do any work to figure out where to transfer the petition. The Chair inquired as to why the case should be dismissed, and the petitioner would have to file a new petition again. If the State thinks that the venue is wrong, the State should acknowledge this, and the court will transfer the case. Ms. Holback reiterated that she did not feel that the prosecutor in

the wrong venue should have to respond to the petition. The Vice Chair commented that Ms. Holback is making the point that the transfer should occur earlier in the process.

Mr. Klein remarked that a condition of the service on the Public Defender is an inability to pay the costs of the proceeding. He inquired whether it is actually an inability to afford counsel. Theoretically, one could afford to pay court costs but not be able to afford counsel. Mr. Karceski agreed with Mr. Klein. The Vice Chair noted that this language should be changed to conform to the change in Rule 4-705 (b). Mr. Klein observed that the issue is that the petitioner is not able to employ counsel. Is this what triggers the involvement of the Public Defender? The Vice Chair said that this language needs to be conformed, as does the language in Rule 4-705 (b). Mr. Klein asked about a petitioner who can afford testing but cannot afford counsel. The Vice Chair remarked that it should be both or either. By consensus, the Committee approved the change to Rule 4-706 to provide that a copy of the petition is to be sent to the Public Defender if the petitioner cannot afford counsel, or the costs of testing, or both.

Mr. Cassilly expressed the opinion that the service on the Public Defender should be consistent with section (b) of Rule 4-705, which provides for service on the Public Defender's Inmate Services Division. The Vice Chair inquired whether this means it goes to the same address. Mr. Cassilly noted that the State's Attorney should be directed to send it to the same division of

the OPD that the clerk was directed to send it in Rule 4-705 (b). By consensus, the Committee agreed to conform section (d) of Rule 4-706 to section (b) of Rule 4-705.

Judge Hollander questioned what the resolution was of the point about what the State's Attorney should do if venue is wrong. The Vice Chair expressed the view that the potential for an earlier transfer should be built into the Rule. If the State's Attorney in the county where the petition was filed, files an initial motion stating that the petition was filed in the wrong place, and it should be filed in a designated county, this should take place up front. Mr. Karceski agreed with the Vice Chair. By consensus, the Committee agreed that a provision for an earlier transfer should be built in. By consensus, the Committee approved Rule 4-706 as amended.

Mr. Karceski presented Rule 4-707, Response to Answer, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-707, as follows:

Rule 4-707. RESPONSE TO ANSWER

Within 60 days after service of the State's answer, the petitioner may file a response to the answer. The response may challenge the adequacy or the accuracy of the answer, request that a search of other law

> enforcement agency databases or logs be conducted, and, if counsel has not previously been appointed or retained, make or renew a request for counsel. The petitioner shall serve the response on the State's Attorney.
>
> Source: This Rule is new.

Mr. Karceski told the Committee that Rule 4-707 provides that the petitioner has 60 days to file a response challenging the accuracy of the State's answer and requesting that a search of other law enforcement agency databases or logs be conducted. The language that reads: "and, if counsel has not previously been appointed or retained, make or renew a request for counsel" should be stricken, because this will be addressed in the new Rule pertaining to appointment of an attorney that was decided upon earlier. The Vice Chair pointed out that the Committee had discussed increasing the 60 days for filing a response to the answer to a longer period of time. Mr. Cassilly inquired where the stricken language will go. Mr. Karceski replied that a new Rule will be added numbered Rule 4-707, which will pertain to appointment of counsel. Rule 4-707 will become Rule 4-708.

The Vice Chair remarked that she thought that the new Rule pertaining to appointment of counsel would be placed earlier in the Rules, but it is a drafting issue. The Chair clarified that it is a policy issue. His recollection of the resolution by the Committee was that the court would appoint counsel after the State files the answer if the Public Defender does not enter an appearance within 30 days. The Vice Chair said that the request

for counsel is up front.

Mr. Karceski said that the request is made up front, but the appointment is not made until the answer is filed. As far as the time for responding to the answer, Mr. Karceski inquired if the time period should be changed, or if the Rule should be left the same with the addition of the language "unless for good cause, the court extends the time." The Vice Chair answered that because of Rule 1-204, Motion to Shorten or Extend Time Requirements, the concept of the court extending the time should not be repeated anywhere in the Rules. Mr. Karceski said that Rule 4-706 (b) should be changed, and the Vice Chair agreed. She suggested that in place of the language allowing the court to extend the time, a cross reference to Rule 1-204 should be added. By consensus, the Committee agreed to this change.

Mr. Karceski asked about the 60-day response time in Rule 4-707. Should it be lengthened? The reason that there may be a need for an extension is because an attorney is being appointed to a case that already exists, and the answer has already been filed, so the attorney may need additional time to perform all of the actions that Ms. Nethercott has stated have to be done. Judge Norton recommended that there be more time, because the attorney may not be appointed on the first day. It may take the court a week or two to make the determination. Mr. Karceski noted that the proposed new Rule that has not yet been drafted will state how many days the Public Defender has to file a notice that it will represent the petitioner.

Mr. Klein inquired if the time should be 60 days from when counsel enters an appearance or the later of 60 days after the State files its answer. The Chair cautioned that at this point, the decision of the Public Defender to enter an appearance is discretionary, so there may not be an attorney entering an appearance. Mr. Karceski commented that the time period of 90 days is actually 75 days, because the Public Defender has 15 days before the court will act to appoint someone. The Vice Chair expressed the view that the time period should be some combination of within 60 days after service of the State's answer or within 90 days of any court order appointing counsel. Judge Hollander remarked that it is not known when the court would appoint the attorney, and she questioned whether the 60 day time-period could expire. The Chair noted that the suggestion would be the later of the two time periods that were proposed. Judge Hollander observed that a prisoner could file an answer not knowing that he or she is getting an attorney. The Vice Chair agreed and suggested that the time period needs to be looked at to see how everything fits together. Mr. Karceski asked what happens if an answer is filed. Could the attorney amend the response to the answer? This would have to be built in.

The Chair commented that if the case is transferred to another venue, the case would start over. In that situation, the State does not have to file an answer but just simply state that the venue is wrong, and the court transfers the case. The file gets sent to the new venue, and the State's Attorney has to file

an answer. Mr. Karceski remarked that this scenario would not affect the timing in Rule 4-707. The Vice Chair observed that this may work, because the way the Rule reads now, the answer is filed within 60 days after the State's Attorney receives notice of the petition, so the State's Attorney is not going to get notice of it until the case is transferred to the right county.

By consensus, the Committee approved Rule 4-707 as amended.

Mr. Karceski presented Rule 4-708, Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-708, as follows:

Rule 4-708. HEARING

(a) When Required

The court shall hold a hearing if, from the petition, answer, and any response, the court finds that the petitioner has standing to file the petition and the petition was filed in the appropriate court; and

(1) specific scientific identification evidence exists or may exist that is related to the judgment of conviction, the DNA test requested by petitioner employs a method of testing that is or may be generally accepted within the relevant scientific community, and there is or may be a reasonable probability that the requested testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of

wrongful conviction or sentencing; or

(2) if the State contends that it has been unable to locate such evidence, there is a facial genuine dispute as to whether the State's search was adequate; or

(3) if the State contends that such evidence existed or may have existed but was destroyed, there is a facial genuine dispute whether the destruction was in conformance with relevant governing protocols or was otherwise lawful.

(b) Discretionary

In its discretion, the court may hold a hearing when one is not required.

(c) Time

Any hearing shall be held within (1) 60 days after service of any response to the State's answer or, (2) if no response is timely filed, 120 days after service of the State's answer.

(d) Appointment of Counsel

If the court holds a hearing, it shall appoint counsel for the petitioner unless counsel has already entered an appearance or the petitioner has waived counsel.

(e) If No Hearing

If the court declines to hold a hearing, it shall enter a written order stating the reasons why no hearing is required. A copy of that order shall be served on the petitioner and the State's Attorney.

Source: This Rule is new.

Mr. Karceski told the Committee that section (a) of Rule 4-708 provides when the court should hold a hearing. It is when the petitioner has shown in the petition that he or she has

standing to file, that the filing is in the proper venue, that specific scientific identification evidence exists or may exist that is related to the conviction, and that the DNA test employed by the petitioner requires a method of testing that is or may be generally accepted. Based on the prior discussion, Mr. Karceski said that he still believes that the language that was deleted from the petition: "a description of the type of DNA testing the petitioner seeks to employ and a statement of the factual basis for a claim that the DNA testing method has achieved general acceptance within the relevant scientific community" should remain in Rule 4-708.

The Vice Chair inquired as to how the court will make that finding. The Chair replied that there would be a *Frye-Reed* evidentiary hearing to determine this. The Vice Chair responded that in her experience, the court may or may not have its own knowledge about whether or not this may be accepted within the scientific community. It is not something that attorneys know the answer to, so they would need expert help. The Chair agreed, noting that the State would have to allege in the answer that what the petitioner is requesting is not accepted by anyone. If there is a response to this, there would be a hearing. Judge Hollander remarked that it would be a preliminary issue at a hearing, and if the court concludes that this does not pass the *Frye-Reed* test, that is the end of the case.

The Vice Chair inquired whether there is a large number of

tests possible when the State contracts with outside laboratories. Ms. Brobst replied that there are two or three kinds of tests. This would not always be stipulated to. It will not be a battleground as to whether the form of testing is recognized in the scientific community. Mr. Cassilly added that some types of testing are recognized by legislation or by statute.

Judge Norton referred to section (a) and suggested that after the words "filed in," the words "or transferred to" should be added. The Vice Chair said that changing the word "was" to the word "is" will take care of this. By consensus, the Committee agreed with the Vice Chair's suggested change.

The Chair told Mr. Cassilly that the DNA testing has evolved, and there can be requests for many kinds of testing that are not acceptable within the scientific community. Mr. Karceski added that based on the State's answer, the petitioner has a right to freely amend the petition under Rule 4-704 and can go back to the drawing board and ask for a laboratory that is acceptable to the State. The third prong of subsection (a)(1) is that there is or may be a reasonable probability that the requested testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing. Subsection (a)(2) requires a hearing if the State contends that it is unable to locate the evidence and that is contested. The word "facial" should be deleted from both subsections (a)(2) and (a)(3), so that the Rule

would read “there is a genuine dispute...”. Subsection (a)(3) requires a hearing if the State contends that the evidence existed or may have existed but was destroyed and there is a dispute whether the destruction was lawful. Section (b) provides that the court may hold a hearing when one is not required. Section (c) sets out the time of the hearing.

Mr. Karceski said that section (d) will be redacted based on the decision to add a new Rule that was discussed previously. The Chair asked why section (d) would be redacted, because this is where appointment of counsel is mandatory. Mr. Karceski said that he thought that counsel had already been appointed. Ms. Ogletree noted that counsel may have been appointed. Judge Norton explained that up until now in the proceedings, counsel may have been appointed; at this point, counsel must be appointed. Mr. Karceski commented that his understanding was that it had been resolved that there would be an appointment of an attorney when an answer is filed. This would not be discretionary. The Chair remarked that he thought that it was discretionary at that point. The Vice Chair observed that there had been some discussion of amending section (d) to include the appointment of counsel for someone who cannot afford it. The Chair inquired whether there was any objection to making this change. Mr. Karceski noted that the new Rule will provide that the court may appoint counsel in its discretion. Section (d) provides that the court shall appoint counsel.

Mr. Karceski said that section (e) provides that if the

court decides not to hold a hearing, the court shall enter a written order stating the reasons why no hearing is requested. Judge Hollander asked whether the Subcommittee had discussed whether a copy of the order should be served on the petitioner and on counsel if one has been appointed. The Chair answered that Rule 1-321, Service of Pleadings and Papers Other than Original Pleadings, provides that if someone is represented, the service is on the attorney. The Vice Chair commented that the Criminal Rules should be reviewed as to this issue, because she remembered that the Rules refer to "counsel."

Judge Hollander inquired as to what the opinion of those present was on the time for the hearing in section (c). It is important that people do not languish in prison, but is 60 days realistic? Mr. Karceski asked whether it should be longer. Judge Hollander replied that her concern is courts with a very heavy docket. The Chair questioned whether 60 days is enough time. Ms. Nethercott replied that in some jurisdictions, it could take eight or nine months to get a hearing. Most of the work that needs to be done is before the hearing. Judge Hollander noted that the hearing is to decide whether there will be testing, and that will take a certain period of time. She inquired how long the testing takes once it is ordered. Ms. Brobst responded that it that takes two to three months.

Mr. Cassilly remarked that there is a problem with the time computations because of the change made to Rule 4-707. The times were changed, and the hearing could be scheduled before the

answer was due if there is a wait for the appointment of counsel. Section (c) of Rule 4-708 provides that the hearing shall be held within 60 days after service of any response to the State's answer, or if no response is timely filed, 120 days after service of the State's answer. How would one know that the response is timely filed, if the defense attorney still had beyond the 120 days to respond? The Chair replied that the petitioner would not have to file a response. The time to file a response would be delayed. The Vice Chair reiterated that all of the time frames in the Rules will have to be reviewed to make sure that they fit together.

Mr. Karceski expressed his agreement with Judge Hollander as to the timing. If it is going to take as much as two or three months for the testing to be completed, the hearing should be in line with the completion of the test result. The Chair pointed out that the hearing is to determine whether test results should be ordered. Judge Hollander inquired how long it takes for the order to be issued, and she was concerned about a conceivably unrealistic time period. The Chair responded that this was discussed in the Subcommittee. Judge Hotten agreed that it had been discussed, but she did not remember what the Subcommittee's view was of the earlier time period of 60 days. She expressed her preference for 90 days.

The Chair asked the Committee what time period they preferred. Master Mahasa suggested that the language could provide "whenever practicable," and then the time period could be

60 to 90 days, so that the court knows that it needs to push the case forward, but this recognizes that some jurisdictions cannot meet the deadline. Judge Hollander expressed the opinion that 90 days is reasonable. The Vice Chair moved to change the 60-day time period in section (c) to 90 days. The motion was seconded, and it carried unanimously.

The Vice Chair commented that the appointment of counsel provision in section (d) should be moved before section (c) to make clear that the appointment of counsel occurs at the same time that the court decides it is going to hold a hearing. Master Mahasa expressed some doubt as to whether the 90-day period that was just voted upon would work in Baltimore City. The Chair responded that the concern of the Office of the Public Defender was leaving these cases unresolved.

The Vice Chair reiterated that section (d) should be placed before section (c). The first phrase of section (d) should read as follows: "When the court determines to hold a hearing, it shall appoint counsel...". By consensus, the Committee agreed to this change.

By consensus, the Committee approved Rule 4-708 as amended.

Mr. Karceski presented Rule 4-709, Order, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-709, as follows:

Rule 4-709. ORDER

(a) Dismissal of Petition

The court shall dismiss the petition if it finds that:

(1) the petitioner has no standing to request DNA testing or a search of a law enforcement agency database or logs;

(2) the State has made an adequate search for scientific identification evidence that is related to the judgment of conviction, that no such evidence exists within its possession, and that no such evidence was intentionally and willfully destroyed; or

(3) scientific identification evidence exists but the method of testing requested by petitioner is not generally accepted in the relevant scientific community, or that there is no reasonable probability that DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.

(b) Transfer

If the court finds that petitioner has standing to request DNA testing or a search of a law enforcement agency database or logs but that the petition should have been filed in a different court, it shall transfer the case to the appropriate court.

(c) Grant of Petition

(1) The court shall order DNA testing if it finds that:

(A) a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing; and

(B) the requested DNA test employs a method of testing generally accepted within the relevant scientific community.

(2) The court shall order a database or log search by a law enforcement agency if it finds that a reasonable probability exists that the database search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing or will identify the source of physical evidence used for DNA testing.

(3) In its order, the court may designate:

(A) the specific evidence to be tested;

(B) the method of testing to be used;

(C) the preservation of some of the sample for replicate testing and analysis or, if that is not possible, the preservation of some of the DNA extraction for testing by the State;

(D) the laboratory where the testing is to be performed, provided that, if the parties cannot agree on a laboratory, the court may approve testing at any laboratory accredited by the American Society of Crime Laboratory Directors, the Laboratory Accreditation Board, or the National Forensic Science Technology Center; and

(E) release of biological evidence by a third party.

(4) The order shall require that the laboratory send a report of the results of the testing to the petition and the State's Attorney.

(d) Unlawful Destruction of Evidence

(1) If the court finds that the State failed to produce specific scientific identification evidence required by the petitioner and that its failure was the result of intentional and willful destruction of that evidence, the court shall:

(A) if no post conviction proceeding was previously filed by the petitioner under Code, Criminal Procedure Article, §7-102, open such a proceeding;

(B) if a post conviction proceeding is currently pending, permit the petitioner to amend the petition in that proceeding in light of the court's finding;

(C) if a post conviction proceeding was previously filed by petitioner under Code, Criminal Procedure Article, §7-102, but is no longer pending, reopen the proceeding under Code, Criminal Procedure Article, §7-104; and

(2) At any such post conviction proceeding, the court shall infer that the results of the post conviction DNA testing would have been favorable to the petitioner.

Source: This Rule is new.

Mr. Karceski said that section (a) of Rule 4-709 states that the court shall dismiss the petition if the petitioner has no standing to request, meaning that he or she has not been convicted of one of the listed offenses, the State has made an adequate search for scientific evidence that is related to the judgment, and the evidence does not exist nor was it intentionally or willfully destroyed, or that it does exist, but the method of testing is not generally accepted in the scientific community, or that there is no reasonable probability that DNA testing has a scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing. These are the situations where dismissal would be in order.

The Vice Chair remarked that she did not understand the

relationship between the judge's order that decides there is not going to be a hearing and this order in section (a). She questioned whether it means that the petitioner lost, if the judge decides that there will not be a hearing. The Chair noted that the judge could decide the other way –- that the petitioner is entitled to a hearing. The Vice Chair observed that the judge would enter an order that would state that he or she is not holding a hearing and then give the reasons or an order that tells the petitioner that there will be a hearing. Judge Hollander agreed with the Vice Chair. Judge Hollander said that she thought that the case could be dismissed on the grounds listed in section (a) without a hearing. Part of this precedes the hearing, and part of it follows the hearing.

The Chair explained that the structure is that if there is any genuine dispute about the petition, the judge will hold a hearing, because it may be necessary to take evidence to make a determination. There may be situations where the State agrees that it has the evidence, and there is no need to hold a hearing on it. The first issue is if there is a reason to hold a hearing, and if there is, a hearing is held. Evidence is taken, and unless the petitioner is able to get over the hurdles listed in section (a), the petition will be dismissed.

Judge Hollander remarked that if the petitioner listed a crime that does not qualify, the court would not need a hearing to dismiss the petition. She thought that there would be certain grounds on which a court could dismiss that never required a

hearing at all. It appeared that a portion of the Rule spoke to that, preceding the hearing itself. The court would be able to tell on the face of the petition that it was defective or needed to be transferred, etc. The Chair referred to section (a) of Rule 4-708, which provides that the court shall hold a hearing if the court finds that the petitioner has standing and the petition is filed in the appropriate court. Judge Hollander noted that the way she envisioned this structure is that there would be bases on which the court would be able to make determinations. It is a matter of the order of things. The court may be reading about the hearing when it determined that there will not be a hearing.

The Chair noted that under section (a) of Rule 4-709, if the court makes a determination that the petitioner has not been convicted of a predicate crime, no hearing has to be held. Judge Hollander suggested that the Rule could be organized differently. The Vice Chair pointed out that subsection (a)(1) of Rule 4-709 is a question of law. Usually a hearing is not necessary to determine these types of questions. On the other hand whether or not the State has made an adequate search would often be an evidentiary question. She expressed her agreement with Judge Hollander. Judge Hollander noted that it may be a style question as to how the Rule is organized. The way someone could read this is that first there is a hearing, and then after the hearing, it can be determined that no grounds exist to support the petition.

Ms. Bosse commented that the way to structure the Rule may be to have a provision addressing dismissal without a hearing. It would cover those particular issues. Judge Hollander pointed out that there may not only be a dismissal, but there may be a transfer. The Chair said that the petition could be granted without a hearing. The Vice Chair remarked that it is a long, complicated process to get to the end result. The judge could grant the petition without a hearing, or the case could go straight to testimony. The Chair disagreed, explaining that there is the second aspect of this, the database search. The law does not just cover the testing. What the defendant may want is a search of a database to see whether the item of clothing or whatever the petitioner is asking for is in existence. The Vice Chair inquired what happens if the petitioner asked for certain testing of an item, and the State agrees that the petitioner has standing and that the method is appropriate. Does the court enter an order allowing the test? The Chair noted that the comments made indicate that Rule 4-709 is being read to require that the court may only dismiss after a hearing. He added that he did not read the Rule that way. Judge Hollander responded that she was not reading the way the Chair described, but she expressed the concern that the Rule was not as clear as it could be. The Chair said that the Rule will be clarified.

Mr. Karceski questioned whether there is any other situation where the judge would dismiss without a hearing, other than the issue of standing. Judge Norton replied that if there is no

reasonable probability that the item could be tested, the petition could be dismissed without a hearing. What if the petitioner asked for testing of a palm tree in Alaska? The court would say that DNA testing of that tree would not aid the petitioner in a rape case. A petition that is patently frivolous should not require a hearing.

Mr. Cassilly commented that the State's answer could be that they have positive DNA tests on other evidence, so regardless of the evidence requested by the petitioner, that will not change the positive DNA result that the State already has. The judge would look at this and acknowledge that the petition has no merit. The Chair inquired whether there should be another rule that provides for pre-hearing dismissals and then a rule that essentially repeats the prior rule. If there is any confusion whether Rule 4-709 applies to pre-hearing, that should be made clear. Judge Norton inquired whether the addition of the language "prior to or after a hearing" at the beginning of Rule 4-709 would clarify that there need not be a hearing. The Chair remarked that he thought that the sequence of the DNA Rules followed the paternity testing law, which provides for a hearing and then an order. There can be an order prior to a hearing, but if there is any concern, the hearing can be held first.

The Vice Chair suggested that the language pertaining to dismissal without a hearing because of standing or because the petition is facially ridiculous can be put in one place. Master Mahasa inquired if this could be predicated on the State's

answer. The Chair said that it could if the situation were something like the petition states that the petitioner was convicted of shoplifting. Master Mahasa questioned what the word "ridiculous" means. The Vice Chair replied that it was not the best choice for a word. What she meant was that even if what the petitioner states in the petition is true, the petitioner could still lose.

Mr. Karceski remarked that even the situation referred to by Mr. Cassilly may not be so clear. The blood on an item may be the defendant's, but there could be an issue of principalship. A judge could not make the determination unless the petitioner writes a very long explanation. Otherwise, it may not be enough for a judge to make that decision. Mr. Cassilly responded that this is an issue that the judge can decide in determining whether to grant a hearing. It may be that there was no co-defendant or other shooter. There may have been only one defendant who already confessed to the crime, and the process is only reconfirming the defendant's guilt.

The Chair asked what the downside is of waiting until the State files its answer, so the judge has the benefit of considering it. The Vice Chair, Judge Norton, and Mr. Karceski agreed that this would be appropriate. The Chair observed that the judge would not have to look at the petition to see if it is frivolous on its face until the State files its answer. By consensus, the Committee approved the suggestion to put into Rule 4-709 that the judge could decide whether the petition would be

dismissed without a hearing after the State files its answer.

Mr. Karceski suggested that victim notification should be added. The Chair said that it is needed in Rule 4-708. By consensus, the Committee approved the addition of a reference to victim notification in Rule 4-708.

Master Mahasa pointed out a typographical error in subsection (c)(4): the word "petition" should be "petitioner." The Chair noted that in subsection (d)(1), the word "required" should be the word "requested."

Mr. Klein asked how long the State is required to keep this kind of evidence. Mr. Karceski replied that it has to be kept until the sentence or any consecutive sentence is served. There is a provision in the statute allowing the destruction of evidence, but it requires notification of the defendant and a time to respond. Mr. Cassilly added that many of these cases came into existence before the requirement to retain evidence, which began when the post conviction DNA testing statute started. Evidence that is 30 years old is being discussed. The rule on the retention of evidence then was that when the appeals are finished, and the post conviction process is over, the evidence can be destroyed.

Mr. Klein explained that the reason he asked the question was that subsection (d)(1) refers to "intentional and willful destruction" of evidence. This applies if it is required to be kept, but now it can be disposed of legitimately. If someone files one of these petitions, this triggers the "intentional and

willful" destruction. The Chair pointed out that "intentional and willful" is statutory language that pertains to the destruction of the evidence under the new statute. The problem was cases in the Court of Appeals that arose many years before the statute was passed. The Court held that if there is a claim that the evidence no longer exists, one must document that an adequate search was made and state what the previous protocols for destruction were. This is in play even from pre-statutory cases. It is going to be much more difficult for the State to justify destruction since the statute, Code, Criminal Procedure Article, §8-201 (k), went into effect.

Mr. Karceski commented that some changes will have to be made to Rule 4-709 based on the discussion about having a separate section addressing dismissal or granting without a hearing. If this is done, the dismissal based on no standing would not be a part of this particular order. The Vice Chair agreed. Mr. Karceski said that if there were a separate section for dismissal, that part would come out. The Chair expressed some uncertainty. He questioned whether there could ever be a legitimate dispute over standing. Mr. Karceski responded that one is either convicted or not convicted of the required offenses. Judge Norton added that there could be some variation of the statutory language before these current statutory versions -- are they the same offense or not according to the version of the statute 20 years ago? The Chair inquired whether the law covers convictions in other states. Mr. Karceski replied that it

does not.

Ms. Brobst remarked that there are people who were incarcerated before the sexual offense statutes were passed about 30 years ago. Judge Norton said that what might be a first degree sexual offense today might not have been a first degree sexual offense 20 years ago, because the requirements have been changed. The Vice Chair expressed the opinion that wherever this gets moved to, such as a section addressing dismissal as a question of law, if there is a dispute as to whether or not the petitioner has standing, the language "as a matter of law" can be added in. She asked about subsections (a)(2) and (3). If under subsection (a)(2), the petitioner avers that the State did not make an adequate search, and the State answers that an adequate search was made for scientific identification evidence, can the court find that the State did make an adequate search without a hearing? The Chair answered negatively, pointing out that this is the kind of situation which would require a hearing. The Vice Chair commented that this is why subsections (a)(2) and (3) belong somewhere separately by themselves because they are more likely than not to be a factual dispute. Sections (c) and (d) pertain to the hearing to order testing. The Chair added that the court must make certain findings.

Ms. Brobst inquired whether under subsection (c)(4), the following language could be added after the word "testing" and before the word "to": "as well as the case notes and raw data." Mr. Maloney asked what the "case notes and raw data" are. Ms.

Brobst answered that a report may only be one page. It might state that the unknown sample is inconclusive as to the petitioner. But if this could be amplified, it might mean that the DNA could not be ruled out.

Mr. Maloney suggested that the additional language could be "any accompanying notes and data." The Vice Chair questioned as to the meaning of "case notes." Ms. Brobst replied that they are the laboratory notes made by the people doing the DNA analysis. Ms. Holback suggested that there could be a reference in the Rule to Code, Courts and Judicial Proceedings Article, §10-915, Admissibility of DNA Profiles, pertaining to documents that must be produced and retained in a DNA case, so that if there is a challenge later on by a co-defendant or someone else, the State and the defense has all of the documents relating to the case.

Master Mahasa inquired as to how long the laboratory has to keep these documents. Ms. Holback responded that they have to operate under national guidelines. This is why it is a good idea to get all of the work product, so that if the laboratories do not keep it, it is available. Mr. Cassilly added that when the order goes to the laboratory, the laboratory knows that they must send all of these documents out. Master Mahasa pointed out that someone may have been in prison for 30 years. Ms. Holback suggested that the language to be added could be "work product as defined in Code, Courts and Judicial Proceedings, §10-915." By consensus, the Committee agreed to this change.

By consensus, the Committee approved Rule 4-709 as amended.

Mr. Karceski presented Rule 4-710, Further Proceedings Following Testing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-710, as follows:

Rule 4-710. FURTHER PROCEEDINGS FOLLOWING TESTING

(a) If Test Results Unfavorable to Petitioner

If the test results fail to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing or to identify scientific identification evidence subject to testing under Code, Criminal Procedure Article, §8-201 (b)(1), the court shall dismiss the petition and assess the cost of DNA testing against the petitioner.

(b) If Test Results Favorable to Petitioner

(1) If the test results produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing, the court shall order the State to pay the costs of the testing and:

(A) if no post conviction proceeding was previously filed by the petitioner under Code, Criminal Law Article, §7-102, open such a proceeding;

(B) if a post conviction proceeding is currently pending, permit the petitioner to amend the petition in that proceeding in light of the test results; or

(C) if a post conviction proceeding was previously filed by the petitioner under Code, Criminal Law Article, §7-102, reopen the proceeding under Code, Criminal Law Article, §7-104; or

(D) if the court finds that a substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, order a new trial.

(2) If the test results produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing but the court finds that a substantial possibility does not exist that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, it may order a new trial if it finds that such action is in the interest of justice.

(3) If the court grants a new trial under subsection (b)(1)(C) or (b)(2), the court may order the release of the petitioner on bond or on conditions that the court finds will reasonably assure the presence of the petitioner at trial.

Cross reference: Code, Criminal Law Article, §8-201 (h).

Source: This Rule is new.

Mr. Karceski explained that section (a) of Rule 4-710 states that if the results are unfavorable to the petitioner, failing to produce exculpatory or mitigating evidence or to identify scientific identification evidence subject to testing under the Code, the court shall dismiss the petition and assess the costs, including the costs of DNA testing against the petitioner. Mr. Karceski asked the Chair if the reference to “costs” should be left in the Rule, since there may or may not be other costs. Mr.

Karceski and the Chair had previously discussed changing the language to read “costs, including the cost of DNA testing...”. The Chair replied that Rule 4-710 should remain as it is.

Mr. Karceski pointed out that section (b) provides that if the test results are favorable to the petitioner, the State is to pay the costs of the testing. The Subcommittee had added one post conviction scenario. The Chair noted that the statute covers subsections (b)(1)(A) and (C), and Mr. Karceski remarked that the statute does not cover subsection (b)(1)(B). Subsection (b)(1)(D) provides that the court shall order the State to pay the costs of the testing if the court finds that a substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial. Subsection (b)(2) states that if the test results produce exculpatory or mitigating evidence relevant to the claim, but the court finds that a substantial possibility does not exist that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, the court may order a new trial if it finds that such action is in the interest of justice. Both are positive results. One results in the order of a new trial; the other involves a weighing process by the court that it undertakes, and the court can order a new trial.

Mr. Karceski questioned whether in that situation, if the court decides after the weighing process not to order a new trial, it goes back to the post conviction procedure part of the

Rule. Under subsection (b)(2), there is a positive result in favor of the petitioner. The court weighs it and may decide that even though the result is positive, there is some doubt as to whether the petitioner would have won his or her case. But after weighing it, the court can order a new trial. If the court decides that it is not going to order a new trial, the case would not be dismissed, but it would be placed into post conviction mode. At the post conviction, the petitioner would have to argue that he or she should obtain a new trial as a result of that proceeding. This is not addressed in subsection (b)(2), but it may not have to be.

The Vice Chair said that she reads section (b) as having two subsections. One is if the results are favorable, the case turns into a post conviction, and the second is that the petitioner would get a new trial. Mr. Karceski noted that under subsection (b)(2), because the Rule provides that the court may order a new trial, it leaves the potential that it may not do so. The Chair remarked that then the case would become a post conviction. Mr. Karceski asked whether subsection (b)(2) should have language indicating that if the court does not order a new trial, it becomes a post conviction matter or if this is implicit. Master Mahasa expressed the view that it should be added in for clarification.

Mr. Cassilly commented that subsection (b)(1)(A) directs the court to convert the proceeding to a post conviction. Is subsection (b)(1)(D) needed? Mr. Karceski said that it is

necessary, because it pertains to the awarding of a new trial. It jumps the post conviction hurdle altogether. Mr. Cassilly responded that this will be confusing, because subsection (b)(1) provides that the court shall order the State to pay the costs of the testing and if no post conviction proceeding was filed by the petitioner, open such a proceeding. If the court is already directed to refer the case to a post conviction proceeding, at that point in time, the court may not have jurisdiction to go beyond this, because it has been directed to refer it to a pending post conviction proceeding. The Chair explained that these are the different options the judge can choose. This comes from the statute.

The Vice Chair noted that section (b) pertains to the situation where the test results are favorable to the petitioner. If so, the court shall order the State to pay the costs of testing and choose from subsections (b)(1)(A), (B), or (C). There is another "or" before subsection (b)(1)(D). Mr. Cassilly explained that this was his problem with the wording of the Rule. The court has been directed that it must ("shall") refer the matter to a pending post conviction. If this is so, whoever has the pending post conviction can deal with it. This is confusing. The Chair and Mr. Karceski reiterated that this is what the statute provides. Mr. Cassilly noted that the way the Rule is written, it gives the court a series of options. The court can make it into a post conviction or skip that and directly enter an order.

The Vice Chair suggested that the Rule could make clear that the court shall do one of these three actions from subsections (b)(1)(A), (B), or (C), and then if the court chooses not to do one of those three actions, the court orders a new trial. Mr. Cassilly expressed the opinion that the statute is confusing. Mr. Karceski said that what the statute is saying is that if the DNA evidence is really excellent, then the court can award the petitioner a new trial. But if the evidence is simply favorable, then the court can open a post conviction. There may be degrees of how favorable it is. The Vice Chair added that if the evidence is really great, then the court can award a new trial. But if it is not really great, the court can give the petitioner a new trial. Mr. Karceski reiterated that there are degrees of greatness. Judge Norton pointed out that this is what the legislature enacted.

The Vice Chair asked where this is provided for in the statute. Mr. Karceski replied that it is in subsection (i)(3). The Chair commented that without departing from the statute, the Rule should make clear that the court can start with a new trial. If the case falls within subsection (b)(1)(D), this is what the court starts with. Next would be subsections (b)(2) and (3), a new trial. Then the court would choose the post conviction after this. Mr. Karceski remarked that this sounds better than what is in the Rule. Ms. Bosse expressed the opinion that if the Rule is structured this way, the judges will stop at the option of a new trial. This will lead to arguments in court. The Chair pointed

out that subsection (b)(1)(D) provides that if the court finds that a substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known, then the court grants a new trial. Ms. Bosse inquired as to what is favorable or unfavorable. The Chair answered that whatever it is, if the judge finds it, then the petitioner gets a new trial. Mr. Maloney remarked that it is up to the court to decide.

One of the guests suggested that section (b) could state that the court may open a post conviction or order a new trial under the following guidelines. The Chair responded that the court would have no discretion. Mr. Cassilly cautioned that the Rule has to conform to the statute. Judge Norton agreed, expressing the view that the Rule should not change the language of the statute.

Ms. Nethercott commented that there could be a result that is so powerful that subsection (b)(1) is the option, and the remainder would be in descending order. If it is a sexual assault case, and the evidence comes back indicating that it is not the defendant, and it is someone else, then logically, the judge would choose a new trial. There are other situations where the DNA results would have an impact, but it is not necessarily a clear case that justifies a new trial. This seems to be implicit in this range of options.

The Chair noted that Ms. Nethercott's first example would fall into the second category. The mere fact that the DNA

evidence shows that the DNA is not the petitioner's does not mean that the petitioner was not guilty. Ms. Nethercott said that she had added the fact that there had been a database hit on someone else. The Chair responded even if there were, it does not mean that there could not have been two people who both committed the crime. This is the kind of situation that could fall into the post conviction category, not the new trial category. If the petitioner could not have been convicted but for this evidence, that is when the petitioner gets a new trial.

Ms. Nethercott remarked that if there had been a second actor in this case, that would have been raised much earlier on. The Chair pointed out that there might not have been a second actor. In the rape case scenario raised by Ms. Nethercott, it may have been that the victim had sexual intercourse with someone else, a boyfriend or husband, and it is someone else's DNA that is the result of the test. Yet the perpetrator was wearing a condom, and there is no DNA evidence, but it does not mean that he would not have been convicted. It is just mitigating evidence. Ms. Nethercott agreed, but she explained that in this factual scenario, this point would have been raised earlier on by the State. The Chair said that the Style Subcommittee can decide on how the Rule should read.

Mr. Karceski noted that in subsection (b)(3), the reference to "subsection (b)(1)(C) or (b)(2)" is incorrect and will be changed to "subsection (b)(1)(D) or (b)(2)." Mr. Klein suggested that the Style Subcommittee should look at the language in

subsection (b)(1)(B) that reads: “in light of the test results.” The Vice Chair remarked that those words are not necessary. By consensus, the Committee agreed to delete this phrase.

By consensus, the Committee approved Rule 4-710 as amended.

Agenda Item 3. Consideration of proposed Rules changes pertaining to capital cases: Amendments to Rule 4-263 (Discovery in Circuit Court), New Rule 4-281 (Special Procedure in Capital Cases), and Amendments to Rule 4-343 (Sentencing - Procedure in Capital Cases)

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Mr. Karceski explained that Chapter 186, Laws of 2009 (SB 279) is the death penalty evidence bill. It states that someone cannot get the death penalty unless the State presents the court or jury with: (1) biological evidence or DNA evidence that links the defendant to the act of murder; (2) a video taped, voluntary interrogation and confession of the defendant to the murder; or (3) a video recording that conclusively links the defendant to the murder. One of those three issues must be proved by the State beyond a reasonable doubt before the case is eligible for the death penalty.

Mr. Karceski presented Rules 4-263, Discovery in Circuit Court, 4-281, Special Procedure in Capital Cases, and 4-343, Sentencing - for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 (d) by adding a new

paragraph (11), as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

. . .

(d) Disclosure by the State's Attorney

Without the necessity of a request, the State's Attorney shall provide to the defense:

(1) Statements

All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements;

(2) Criminal Record

Prior criminal convictions, pending charges, and probationary status of the defendant and of any co-defendant;

(3) State's Witnesses

The name and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each State's witness whom the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, together with all written statements of the person that relate to the offense charged;

(4) Prior Conduct

All evidence of other crimes, wrongs, or acts committed by the defendant that the State's Attorney intends to offer at a hearing or at trial pursuant to Rule 5-404 (b);

(5) Exculpatory Information

All material or information in any form, whether or not admissible, that tends

to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged;

(6) Impeachment Information

All material or information in any form, whether or not admissible, that tends to impeach a State's witness, including:

(A) evidence of prior conduct to show the character of the witness for untruthfulness pursuant to Rule 5-608 (b);

(B) a relationship between the State's Attorney and the witness, including the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness;

(C) prior criminal convictions, pending charges, or probationary status that may be used to impeach the witness, but the State's Attorney is not required to investigate the criminal record of the witness unless the State's Attorney knows or has reason to believe that the witness has a criminal record;

(D) an oral statement of the witness, not otherwise memorialized, that is materially inconsistent with another statement made by the witness or with a statement made by another witness;

(E) a medical or psychiatric condition or addiction of the witness that may impair the witness's ability to testify truthfully or accurately, but the State's Attorney is not required to inquire into a witness's medical, psychiatric, or addiction history or status unless the State's Attorney has information that reasonably would lead to a belief that an inquiry would result in discovering a condition that may impair the witness's ability to testify truthfully or accurately;

(F) the fact that the witness has taken but did not pass a polygraph examination; and

(G) the failure of the witness to identify the defendant or a co-defendant;

Cross reference: See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. U.S.*, 405 U.S. 150 (1972); *U.S. v. Agurs*, 427 U.S. 97 (1976); *Thomas v. State*, 372 Md. 342 (2002); *Goldsmith v. State*, 337 Md. 112 (1995); and *Lyba v. State*, 321 Md. 564 (1991).

(7) Searches, Seizures, Surveillance, and Pretrial Identification

All relevant material or information regarding:

(A) specific searches and seizures, eavesdropping, and electronic surveillance including wiretaps; and

(B) pretrial identification of the defendant by a State's witness;

(8) Reports or Statements of Experts

As to each expert consulted by the State's Attorney in connection with the action:

(A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert;

(9) Evidence for Use at Trial

The opportunity to inspect, copy,

and photograph all documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial; and

(10) Property of the Defendant

The opportunity to inspect, copy, and photograph all items obtained from or belonging to the defendant, whether or not the State's Attorney intends to use the item at a hearing or at trial.

(11) Evidentiary Statement in Capital Cases

If the defendant is charged with a first degree murder that may be eligible for a sentence of death, a statement of whether the material disclosed constitutes (A) biological evidence or DNA evidence that links the defendant to the act of murder, (B) a videotaped, voluntary interrogation and confession of the defendant to the murder, or (C) a video recording that conclusively links the defendant to the murder, and, if so, identification of the material that constitutes such evidence.

. . .

Rule 4-263 was accompanied by the following Reporter's Note.

Chapter ___, Acts of 2009 (SB 279), limits the ability to sentence a defendant to the death penalty unless the State presents the court or jury with (1) biological evidence or DNA evidence that links the defendant to the act of murder, (2) a videotaped, voluntary interrogation and confession of the defendant to the murder, or (3) a video recording that conclusively links the defendant to the murder. Code, Criminal Law Article, §2-202 (a) requires that the State give notice of its intention to seek the death penalty at least 30 days before trial. Under Rule 4-263 (d), the State must disclose to the defendant before trial certain material including (1) all written reports of experts and the substance of all

oral reports of experts regarding the results of scientific tests, as well as relevant material regarding searches and seizures, (2) all relevant material regarding electronic surveillance, and (3) all recordings that relate to the acquisition of statements from the defendant. If the State has any of the specific material required by the new statute, that material would have to be disclosed before trial in accordance with Rule 4-263. Proposed new subsection (d)(11) adds to Rule 4-263 a provision that requires the State to (1) provide a statement as to whether any of the material disclosed makes the defendant eligible for a sentence of death and (2) identify any such material.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200- PRETRIAL PROCEDURES

ADD new Rule 4-281, as follows:

Rule 4-281. SPECIAL PROCEDURE IN CAPITAL CASES

If, upon completing discovery, the State acknowledges that it does not possess (a) biological evidence or DNA evidence that links the defendant to the act of murder, (b) a videotaped, voluntary interrogation and confession of the defendant to the murder, or (c) a video recording that conclusively links the defendant to the murder, it may not file a notice of intention to seek a sentence of death and shall strike any such notice previously filed.

Cross reference: See Rule 4-263 (d)(11).

Source: This Rule is new.

Rule 4-281 was accompanied by the following Reporter's Note.

Chapter ___, Acts of 2009 (SB 279) limits the ability to sentence a defendant to the death penalty unless the State presents to the court or jury (1) biological evidence or DNA evidence that links the defendant to the act of murder, (2) a videotaped, voluntary interrogation and confession of the defendant to the murder, or (3) a video recording that conclusively links the defendant to the murder. Proposed new Rule 4-281 adds a post-discovery, pretrial provision that if the State acknowledges that it does not possess the necessary evidence required by the new statute, the State may not file a notice of intention to seek the death penalty and must strike any such previously filed notice.

**ALTERNATIVE #1**
**[Amend current Rule 4-343, without bifurcation of sentencing proceeding]**

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-343 by adding to the form set forth in section (h) a new "Preliminary" section containing five issues for determination, by adding a new paragraph to Section VI of the form referring to the new "Preliminary" section, and by deleting the last sentence of section (i), as follows:

Rule 4-343. SENTENCING - PROCEDURE IN CAPITAL CASES

. . .

(h) Form of Written Findings and Determinations

Except as otherwise provided in section (i) of this Rule, the findings and determinations shall be made in writing in the following form:

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

VICTIM: [Name of murder victim]

Preliminary

[Submit the following only to the extent these issues are presented and remain for determination by the sentencing jury.]

Based upon the evidence, we unanimously find that each of the following statements marked "proved" has been proved BEYOND A REASONABLE DOUBT and that each of those statements marked "not proved" has not been proved BEYOND A REASONABLE DOUBT.

Statement 1. The State has produced biological evidence or DNA evidence that links the defendant to the act of murder.

_____ proved _____ not proved

Statement 2. The State has produced a videotaped, voluntary interrogation and confession of the defendant to the murder.

_____ proved _____ not proved

Statement 3. The State has produced a video recording that conclusively links the defendant to the murder.

_____ proved _____ not proved

(If one or more of the above Statements are marked "proved," proceed to Statements 4 and 5. If Statements 1, 2, and 3 are all marked "not proved," proceed to Section VI and enter "Imprisonment for Life.")

Statement 4. At the time of the murder, the defendant was 18 years of age or older.

_____ proved _____ not proved

Statement 5. The State has not relied solely on evidence provided by eyewitnesses.

_____ _____

proved not proved

(If Statements 4 and 5 are BOTH marked “proved,” proceed to Section I. If one or both Statements are marked “not proved,” proceed to Section VI and enter “Imprisonment for Life.”)

Section I

Based upon the evidence, we unanimously find that each of the following statements marked "proved" has been proved BEYOND A REASONABLE DOUBT and that each of those statements marked "not proved" has not been proved BEYOND A REASONABLE DOUBT.

1. The defendant was a principal in the first degree to the murder.

_____ proved _____ not proved

2. The defendant engaged or employed another person to commit the murder and the murder was committed under an agreement or contract for remuneration or the promise of remuneration.

_____ proved _____ not proved

3. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons, and the defendant was a principal in the second degree who: (A) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (B) was a major participant in the murder; and (C) was actually present at

the time and place of the murder.

_____ proved _____ not proved

(If one or more of the above are marked "proved," proceed to Section II. If all are marked "not proved," proceed to Section VI and enter "Imprisonment for Life.")

Section II

Based upon the evidence, we unanimously find that the following statement, if marked "proved," has been proved BY A PREPONDERANCE OF THE EVIDENCE or that, if marked "not proved," it has not been proved BY A PREPONDERANCE OF THE EVIDENCE.

At the time the murder was committed, the defendant was mentally retarded.

_____ proved _____ not proved

(If the above statement is marked "proved," proceed to Section VI and enter "Imprisonment for Life." If it is marked "not proved," complete Section III.)

Section III

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "proved" has been proved BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proved" has not been proved BEYOND A REASONABLE DOUBT.

1. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more

persons.

_____ proved _____ not proved

2. The defendant committed the murder at a time when confined in a correctional facility.

_____ proved _____ not proved

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional facility or by a law enforcement officer.

_____ proved _____ not proved

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

_____ proved _____ not proved

5. The victim was a child abducted in violation of Code, Criminal Law Article, §3-503 (a)(1).

_____ proved _____ not proved

6. The defendant committed the murder under an agreement or contract for remuneration or the promise of remuneration to commit the murder.

_____ proved _____ not proved

7. The defendant engaged or employed another person to commit the murder and the murder was committed under an agreement or contract for remuneration or the promise of remuneration.

_____ proved _____ not proved

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

_____ proved _____ not proved

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

_____ proved _____ not proved

10. The defendant committed the murder while committing or attempting to commit a carjacking, armed carjacking, robbery, under Code, Criminal Law Article, §3-402 or §3-403, arson in the first degree, rape in the first degree, or sexual offense in the first degree.

_____ proved _____ not proved

(If one or more of the above are marked "proved," complete Section IV. If all of the above are marked "not proved," do not complete Sections IV and V and proceed to Section VI and enter "Imprisonment for Life.")

Section IV

From our consideration of the facts and circumstances of this

case, we make the following determinations as to mitigating circumstances:

1. The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation before judgment for a crime of violence.

(As used in the preceding paragraph, "crime of violence" means abduction, arson in the first degree, carjacking, armed carjacking, escape in the first degree, kidnapping, mayhem, murder, robbery under Code, Criminal Law Article, §3-402 or §3-403, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not

that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

3. The defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, that it is more likely than not that the above circumstance exists.

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not

that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

5. The defendant was of a youthful age at the time of the murder.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

6. The act of the defendant was not the sole proximate cause of the victim's death.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

8. (a) We unanimously find that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(If the jury unanimously determines in Section IV that no mitigating circumstances exist, do not complete Section V. Proceed to Section VI and enter "Death." If the jury or any juror determines that one or more mitigating circumstances exist, complete Section V.)

Section V

Each individual juror has weighed the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any mitigating circumstance found by that individual juror to exist.

We unanimously find that the State has proved BY A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proved" in Section III outweigh the mitigating circumstances in Section IV.

_____ yes _____ no

Section VI

Enter the determination of sentence either "Imprisonment for Life" or "Death" according to the following instructions:

a. If Statements 1, 2, and 3 in the “Preliminary” Section are all marked “not proved,” enter “Imprisonment for Life.”

b. If Statement 4 in the “Preliminary” Section is marked “not proved,” enter “Imprisonment for Life.”

c. If Statement 5 in the “Preliminary” Section is marked “not proved,” enter “Imprisonment for Life.”

~~1.~~ d. If all of the answers in Section I are marked "not proved," enter "Imprisonment for Life."

~~2.~~ e. If the answer in Section II is marked "proved," enter

"Imprisonment for Life."

~~3.~~ f. If all of the answers in Section III are marked "not proved," enter "Imprisonment for Life."

~~4.~~ g. If Section IV was completed and the jury unanimously determined that no mitigating circumstance exists, enter "Death."

~~5.~~ h. If Section V was completed and marked "no," enter "Imprisonment for Life."

~~6.~~ i. If Section V was completed and marked "yes," enter "Death."

We unanimously determine the sentence to be _____.

Section VII

If "Imprisonment for Life" is entered in Section VI, answer the following question:

Based upon the evidence, does the jury unanimously determine that the sentence of imprisonment for life previously entered shall be without the possibility of parole?

| | yes | no |
|---|---|---|
| | _____ | _____ |

| | |
|---|---|
| _____ | _____ |
| Foreperson | Juror 7 |
| _____ | _____ |
| Juror 2 | Juror 8 |
| _____ | _____ |
| Juror 3 | Juror 9 |
| _____ | _____ |
| Juror 4 | Juror 10 |

| | |
|---|---|
| _____ | _____ |
| Juror 5 | Juror 11 |
| _____ | _____ |
| Juror 6 | Juror 12 |
| or, | _____ |
| | JUDGE |

(i) Deletions from Form

Section II of the form set forth in section (h) of this Rule shall not be submitted to the jury unless the issue of mental retardation is generated by the evidence. Unless the defendant requests otherwise, Section III of the form shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Criminal Law Article, §2-202 (a) of its intention to seek a sentence of death. ~~Section VII of the form shall not be submitted to the jury unless the State has given the notice required under Code, Criminal Law Article, §2-203 of its intention to seek a sentence of imprisonment for life without the possibility of parole.~~

Committee note: Omission of some aggravating circumstances from the form is not intended to preclude argument by the defendant concerning the absence of those circumstances.

. . .

Rule 4-343 was accompanied by the following Reporter's Note.

> Amendments to Rule 4-343 are proposed to conform the Rule to Chapter 186, Acts of 2009 (SB 279), which precludes a sentence of death unless the State did not rely solely on evidence provided by eyewitnesses and there is (1) biological evidence or DNA evidence that links the defendant to the act of murder, (2) a videotaped, voluntary

interrogation and confession of the defendant to the murder, or (3) a video recording that conclusively links the defendant to the murder.

Because the issues are threshold ones, a new section is added to the beginning of the Findings and Sentencing Determination form in section (h), requiring determination as to whether any of the conditions for eligibility for the death penalty have been proved. Imposition of the death penalty also is prohibited if the defendant was under 18 years of age at the time of the murder. A determination as to that issue also is added to the new section. References to this new "Preliminary" section are added to Section VI.

The statute provides that if the State failed to present the requisite evidence and had filed a notice under Code, Criminal Law Article, §2-202 that it intended to seek the death penalty, that notice is considered to have been withdrawn, and it is deemed that the State filed the proper notice under Code, Criminal Law Article, §2-203 to seek a sentence of life imprisonment without the possibility of parole. Therefore, the last sentence of section (i), which requires the State to give §2-203 notice before Section VII can be submitted to the jury, is deleted.

**ALTERNATIVE #2**

**[Rule 4-343 - Bifurcated Sentencing Proceeding]**

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

DELETE current Rule 4-343 and ADD new Rule 4-343, as follows:

Rule 4-343. SENTENCING - BIFURCATED PROCEDURE IN CAPITAL CASES

(a) Applicability

This Rule applies when:

(1) a sentence of death is sought under Code, Criminal Law Article, §2-303; and

(2) the defendant has been found guilty of murder in the first degree, the State has given the notice required under Code, Criminal Law Article, §2-202 (a), and the defendant may be subject to a sentence of death.

Cross reference: For procedures pertaining to collection of DNA samples from an individual convicted of a felony, see Code, Public Safety Article, §2-504.

(b) Statutory Sentencing Procedure; Bifurcation of Proceeding

A sentencing proceeding, separate from the proceeding at which the defendant's guilt was adjudicated, shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Criminal Law Article, §2-303 and this Rule. Upon recording of the verdicts returned by the jury or judge, the court shall bifurcate the sentencing proceeding into two phases.

A separate Phase I Findings form required by section (h) of this Rule and Phase II Findings and Sentencing Determination form required by section (i) of this Rule shall be completed with respect to each death for which the defendant is subject to a sentence of death.

(c) Presentence Disclosures by the State's Attorney

Sufficiently in advance of Phase I of the sentencing proceeding to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court or jury for consideration in sentencing. Upon request of the defendant, the court may postpone sentencing if the court finds that the information was not timely provided.

(d) Reports of Defendant's Experts

Upon request by the State after the defendant has been found guilty of murder in the first degree, the defendant shall produce and permit the State to inspect and copy all written reports made in connection with the action by each expert the defendant expects to call as a witness at the sentencing proceeding, including the results of any physical or mental examination, scientific test, experiment, or comparison, and shall furnish to the State the substance of any such oral report or conclusion. The defendant shall provide this information to the State sufficiently in advance of Phase I of the sentencing proceeding to afford the State a reasonable opportunity to investigate the information. If the court finds that the

information was not timely provided, the court may postpone sentencing if requested by the State.

(e) Judge

Except as provided in Rule 4-361, the judge who presides at trial shall preside at both phases of the sentencing proceeding.

(f) Notice and Right of Victim's Representative to Address the Court or Jury

(1) Notice and Determination

Notice to a victim's representative of proceedings under this Rule is governed by Code, Criminal Procedure Article, §11-104 (e). The court shall determine whether the requirements of that section have been satisfied.

(2) Right to Address the Court or Jury

The right of a victim's representative to address the court or jury during a sentencing proceeding under this Rule is governed by Code, Criminal Procedure Article, §§11-403 and 11-404. Any exercise of that right shall occur during Phase II of the sentencing proceeding.

Committee note: Code, Criminal Procedure Article, §11-404 permits the court (1) to hold a hearing outside the presence of the jury to determine whether a victim's representative may present an oral statement to the jury and (2) to limit any unduly prejudicial portion of the proposed statement. See *Payne v. Tennessee*, 501 U.S. 808 (1991), generally permitting the family members of a victim to provide information concerning the individuality of the victim and the impact of the crime on the victim's survivors to the extent that the presentation does not offend the Due Process Clause of the Fourteenth Amendment, but leaving undisturbed a prohibition against information concerning the family member's characterization of and opinions about the

crime, the defendant, and the appropriate sentence.

Cross reference: See Code, Criminal Procedure Article, §§11-103 (b), 11-403 (e), and 11-404 (c) concerning the right of a victim's representative to file an application for leave to appeal under certain circumstances.

(g) Allocution

Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement, and shall afford the State the opportunity to respond. If the defendant elects to allocute during the sentencing proceeding, the statements and response shall be made during Phase II of that proceeding.

Committee note: A defendant who elects to allocute may do so before or after the State's rebuttal closing argument. If allocution occurs after the State's rebuttal closing argument, the State may respond to the allocution.

(h) Phase I of Sentencing Proceeding

(1) Issues

In Phase I of the Sentencing proceeding, only the following issues, to the extent that they are raised and remain for determination, shall be presented to the sentencing jury or judge for determination by special verdict:

(A) whether at the time of the murder the defendant was 18 years of age or older;

(B) whether at the time of the murder the defendant was not mentally retarded, as defined in Code, Criminal Law Article, §2-202 (b);

(C) whether the State has presented to the jury or judge, sitting as the trier of fact at the trial on guilt or innocence

or at the sentencing proceeding, biological evidence or DNA evidence that links the defendant to the act of murder;

(D) whether the State has presented to the jury or judge, sitting as the trier of fact at the trial on guilt or innocence or at the sentencing proceeding, a videotaped, voluntary interrogation and confession of the defendant to the murder;

(E) whether the State has presented to the jury or judge, sitting as the trier of fact at the trial on guilt or innocence or at the sentencing proceeding, a video recording that conclusively links the defendant to the murder;

(F) whether the State, at the trial on guilt or innocence or at the sentencing proceeding, has relied solely on evidence provided by eyewitnesses;

(G) whether the defendant was a principal in the first degree to the murder;

(H) whether the defendant engaged or employed another person to commit the murder and the murder was committed under an agreement or contract for remuneration or the promise of remuneration; and

(I) Whether the victim was a law enforcement officer who, while in the performance of the officer’s duties, was murdered by one or more persons, and the defendant was a principal in the second degree who: (i) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (ii) was a major participant in the murder; and (iii) was actually present at the time and place of the murder.

(2) Evidence, Instructions, and Argument

The court shall limit evidence, instructions, and argument in the Phase I proceeding to the issues submitted under subsection (h)(1) of this Rule.

(3) Findings and Determinations

The findings and determinations of the jury or judge in the Phase I proceeding shall be made in the following form, except that the requirement of unanimity applies only if the issues are submitted to a jury:

(CAPTION)

PHASE I FINDINGS

VICTIM: [Name of murder victim]

Section I

Based upon the evidence, we unanimously find that each of the following statements marked "proved" has been proved BEYOND A REASONABLE DOUBT and that each of those statements marked "not proved" has not been proved BEYOND A REASONABLE DOUBT.

1. At the time of the murder, the defendant was 18 years of age or older.

_____ proved _____ not proved

2. The State has produced biological evidence or DNA evidence that links the defendant to the act of murder.

_____ proved _____ not proved

3. The State has produced a videotaped, voluntary

interrogation and confession of the defendant to the murder.

_____ proved _____ not proved

4. The State has produced a video recording that conclusively links the defendant to the murder.

_____ proved _____ not proved

5. The State has not relied solely on evidence provided by eyewitnesses.

_____ proved _____ not proved

6. The defendant was a principal in the first degree to the murder.

_____ proved _____ not proved

7. The defendant engaged or employed another person to commit the murder and the murder was committed under an agreement or contract for remuneration or the promise of remuneration.

_____ proved _____ not proved

8. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons, and the defendant was a principal in the second degree who: (A) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (B) was a major participant in the murder; and (C) was actually present at

the time and place of the murder.

| _____ | _____ |
|---|---|
| proved | not proved |

Section II

Based upon the evidence, we unanimously find that the following statement, if marked "proved, has been proved BY A PREPONDERANCE OF THE EVIDENCE or that, if marked "not proved," it has not been proved BY A PREPONDERANCE OF THE EVIDENCE:

9. At the time of the murder, the defendant was mentally retarded as defined in Code, Criminal Law Article, §2-202 (b).

| _____ | _____ |
|---|---|
| proved | not proved |

| | |
|---|---|
| _____ | _____ |
| Foreperson | Juror 7 |
| _____ | _____ |
| Juror 2 | Juror 8 |
| _____ | _____ |
| Juror 3 | Juror 9 |
| _____ | _____ |
| Juror 4 | Juror 10 |
| _____ | _____ |
| Juror 5 | Juror 11 |
| _____ | _____ |
| Juror 6 | Juror 12 |

or, _____
JUDGE

(4) Entry of Findings

If the Phase I findings were made by a jury, the written findings shall be returned to the court and entered as special verdicts. If the findings were made by a judge, they shall be entered in the record.

(i) Phase II of Sentencing Proceeding

(1) Findings and Sentencing Determinations

(A) In Phase II, subject to the deletions permitted or required by section (j) of this Rule, the sentencing jury or judge shall complete the entire Phase II Findings and Sentencing Determination form set forth in this section if on the Phase I Findings form:

(i) the statement numbered 1 was marked “proved;”

(ii) at least one of the statements numbered 2, 3, or 4 was marked “proved;”

(iii) the statement numbered 5 was marked “proved;”

(iv) at least one of the statements numbered 6, 7, or 8 was marked “proved;” and

(v) the statement numbered 9, if answered, was marked “not proved.”

(B) In all other cases, the judge shall enter or instruct the jury to enter a sentence of “Imprisonment for Life,” and only Section VI of the Phase II Findings and Sentencing Determination form shall be completed.

(2) Form of Written Phase II Findings and Determinations

Except as otherwise provided in section (j) of this Rule, the Phase II findings and determinations shall be made in

writing in the following form:

(CAPTION)

PHASE II

FINDINGS AND SENTENCING DETERMINATION

VICTIM: [Name of murder victim]

Section I
(Aggravating Circumstances)

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "proved" has been proved BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proved" has not been proved BEYOND A REASONABLE DOUBT.

1. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons.

_____ proved _____ not proved

2. The defendant committed the murder at a time when confined in a correctional facility.

_____ proved _____ not proved

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional facility or by a law enforcement officer.

_____ _____
proved not proved

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

_____ _____
proved not proved

5. The victim was a child abducted in violation of Code, Criminal Law Article, §3-503 (a)(1).

_____ _____
proved not proved

6. The defendant committed the murder under an agreement or contract for remuneration or the promise of remuneration to commit the murder.

_____ _____
proved not proved

7. The defendant engaged or employed another person to commit the murder and the murder was committed under an agreement or contract for remuneration or the promise of remuneration.

_____ _____
proved not proved

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

_____ _____
proved not proved

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

_____ proved _____ not proved

10. The defendant committed the murder while committing or attempting to commit a carjacking, armed carjacking, robbery, under Code, Criminal Law Article, §3-402 or §3-403, arson in the first degree, rape in the first degree, or sexual offense in the first degree.

_____ proved _____ not proved

(If one or more of the above are marked "proved," complete Section II.)

(If all of the above are marked "not proved," do not complete Sections II and III and proceed to Section IV and enter "Imprisonment for Life.")

Section II
(Mitigating Circumstances)

From our consideration of the facts and circumstances of this case, we make the following determinations as to mitigating circumstances:

1. The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation before judgment for a crime of violence.

(As used in the preceding paragraph, "crime of violence" means abduction, arson in the first degree, carjacking, armed carjacking, escape in the first degree, kidnapping, mayhem, murder, robbery under Code, Criminal Law Article, §3-402 or §3-403, rape in the first or second degree, sexual

offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

3. The defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, that it is more likely than not that the above circumstance exists.

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

5. The defendant was of a youthful age at the time of the murder.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

6. The act of the defendant was not the sole proximate cause of the victim's death.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not

that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

8. (a) We unanimously find that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(If the jury unanimously determines in Section II that no mitigating circumstances exist, do not complete Section III. Proceed to Section IV and enter "Death." If the jury or any juror determines that one or more mitigating circumstances exist, complete Section III.)

Section III
(Weighing of Aggravating and Mitigating Circumstances)

Each individual juror has weighed the aggravating circumstances found unanimously to exist against any mitigating

circumstances found unanimously to exist, as well as against any mitigating circumstance found by that individual juror to exist.

We unanimously find that the State has proved BY A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proved" in Section I outweigh the mitigating circumstances in Section II.

_____ yes _____ no

Section IV
(Determination of Sentence of Death or Imprisonment for Life)

Enter the determination of sentence either "Imprisonment for Life" or "Death" according to the following instructions:

1. If, based upon the special verdicts entered in Phase I, the court finds or instructs the jury to enter “Imprisonment for Life,” enter “Imprisonment for Life.”

2. If all of the answers in Section I are marked "not proved," enter "Imprisonment for Life."

3. If Section II was completed and the judge, if sitting as the sentencing body, or the jury unanimously determined that no mitigating circumstance exists, enter "Death."

4. If Section III was completed and marked "no," enter "Imprisonment for Life."

5. If Section III was completed and marked "yes," enter "Death."

We unanimously determine the sentence to be _____.

Section V
(Parole Eligibility)

If "Imprisonment for Life" is entered in Section IV or if the judge has instructed you that the defendant's sentence is determined to be "Imprisonment for Life," answer the following question:

Based upon the evidence, does the jury unanimously determine that the sentence of imprisonment for life shall be without the possibility of parole?

_____ yes _____ no

_____ Foreperson

_____ Juror 2

_____ Juror 3

_____ Juror 4

_____ Juror 5

_____ Juror 6

_____ Juror 7

_____ Juror 8

_____ Juror 9

_____ Juror 10

_____ Juror 11

_____ Juror 12

or,

_____ JUDGE

(j) Deletions from Phase II Form

Unless the defendant requests otherwise, Section II of the Phase II form shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Criminal Law Article, §2-202 (a) of its intention to seek a sentence of death.

Committee note: Omission of some aggravating circumstances from the form is not intended to preclude argument by the defendant concerning the absence of those circumstances.

(k) Advice of the Judge

At the time of imposing a sentence of death, the judge shall advise the defendant that the determination of guilt and the sentence will be reviewed automatically by the Court of Appeals, and that the sentence will be stayed pending that review. At the time of imposing a sentence of imprisonment for life, the court shall cause the defendant to be advised in accordance with Rule 4-342 (i).

Cross reference: Rule 8-306.

(l) Report of Judge

After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

A. Date of Birth

B. Sex

C. Race

D. Address

E. Length of Time in Community

F. Reputation in Community

G. Family Situation and Background

1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)

2. Family history (describe family history including pertinent data about parents and siblings)

H. Education

I. Work Record

J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)

K. Military History

L. Pertinent Physical or Mental Characteristics or History

M. Other Significant Data About Defendant

II. Data Concerning Offense

A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)

B. Was there any evidence that the defendant was impaired by alcohol or drugs at the time of the offense? If so describe.

C. Did the defendant know the victim prior to the offense?

Yes ..... No .....

1. If so, describe relationship.

2. Did the prior relationship in any way precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim

1. Name

2. Date of Birth

3. Sex

4. Race

5. Length of time in community

6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:

Not guilty .....; guilty .....; not criminally responsible .....

B. Mode of Trial:

Court ..... Jury .....

If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel

1. Name

2. Address

3. Appointed or retained

(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity - Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pretrial notice.

B. Was the proceeding conducted

before same judge as trial? .....

before same jury? .....

If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel - If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Imprisonment for life

Death

Imprisonment for life without the possibility of parole

V. Chronology

Date of Offense

Arrest

Charge

Notification of intention to seek penalty of death

Trial (guilt/innocence) - began and ended

Post-trial Motions Disposed of

Sentencing Proceeding - began and ended

Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

.....
Judge

CERTIFICATION

I certify that on the ..... day of ....., ....., (month) (year) I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

.....
Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court and with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

Committee note: The report of the judge is filed whenever a sentence of death is sought, regardless of the sentence imposed.

Source: This Rule is derived in part from the 2008 version of former Rule 4-343 and is in part new.

Rule 4-343 was accompanied by the following Reporter's Note.

> The proposed revision of Rule 4-343 provides for a bifurcated sentencing procedure in capital cases.
>
> In Phase I, the sentencing jury or judge makes the findings necessary to determine whether the technical requirements of eligibility for the death penalty have been met.
>
> In Phase II, the sentencing jury or judge finds and weighs aggravating and mitigating circumstances and determines whether the sentence is for "imprisonment for life" or "death." Also in Phase II, if "imprisonment for life" is the sentence, whether as a result of the Phase I determinations or as a result of the Phase II process, the sentencing jury or judge then determines whether "imprisonment for life" is with or without the possibility of parole.

Mr. Karceski explained that a new subsection (d)(11) is proposed to be added to Rule 4-263. It provides that if the

defendant is charged and eligible for the death penalty, the State's Attorney shall provide to the defendant in the answer to discovery, a statement of whether the material disclosed constitutes biological evidence or DNA evidence that links the defendant to the act of murder; a videotaped, voluntary interrogation and confession of the defendant to the murder; or a video recording that conclusively links the defendant to the murder, and if so, identification of the material that constitutes such evidence. This is followed by a proposal to add a new Rule 4-281, which provides that the State, upon the completion of its discovery, may not file a notice of intention to seek the death penalty, or it must strike a notice of intention to seek the death penalty previously filed if it acknowledges that none of the three statutory elements is present. The Rule proposes a post-discovery pretrial provision to end any effort on the part of the State to go forward with the death penalty if none of its evidence provided in discovery qualifies to prove one of the three situations listed in the statute.

Mr. Maloney asked when the State "completes" discovery. What is that milestone? Mr. Karceski replied that it is ongoing, because there is a requirement that it be so. He inquired as to why Mr. Maloney was asking. Mr. Maloney explained that he was asking for purposes of fixing when this time occurs. When can it be said that the State completes discovery? The Chair remarked that it is before the trial. Mr. Cassilly inquired whether Rule

4-281 is necessary. The defense may file boilerplate motions to strike the notice of intention to seek the death penalty. There may be an evidentiary argument. The State may argue that their DNA evidence does something, and the defense may counter that the evidence does not. The Rule requires the State to acknowledge or to be in violation of the Rules that it fails to acknowledge. Having handled many of these cases, Mr. Cassilly's view was that the defense will file a notice to strike the intention to seek the death penalty for failing to comply with any of the three statutory conditions. The court will hold a pre-trial hearing to determine whether this is true. A specific Rule on this is not needed. As a State's Attorney, Mr. Cassilly stated that he is responsible enough not to waste the court's time and his money with trying to go forward with a death penalty case that is not viable. Mr. Maloney remarked that this may not be true for every State's Attorney.

The Chair commented that the idea of Rule 4-281 is to go in tandem with the alternate version of Rule 4-343. The easiest way to conform the Rule to the statute is to add three or four questions to the death penalty form. The Subcommittee was looking to see if the State does not have this evidence to be able to resolve it before trial and not wait until the sentencing to announce that they do not have this evidence. Mr. Cassilly observed that if the State does not have the evidence, then the defense will raise that in their motion to strike the notice of death. The Chair stated that he was not sure if under *State v.*

*Manck*, 385 Md. 581 (2005), the court can strike the death notice if there is no rule permitting the court to do so. Mr. Karceski added that not many courts would be comfortable with striking the death notices. The Chair said that it is not necessary to have this procedure to comply with the statute. The thought was that if the State has this evidence, it will have to disclose it in discovery. The question has been raised as to when discovery is complete. It is when the State says that it is complete. The judge can put constraints on that. If the State does not have the evidence, they have to say so. If they have it, they have to say what it is. If the State says that they do not have this evidence, then they should not file a death notice. If they have already filed one, they should have to strike it. A rule may be needed to permit the court to do this because of the *Manck* case.

Judge Hollander pointed out that under proposed subsection (d)(11) of Rule 4-263, the videotaped confession in part (B) has to be voluntary, and there is often a motion to suppress on the grounds of voluntariness. If the State loses, then the burden would fall on the State to strike its prior notice of intention to seek the death penalty. The Chair remarked that the confession part is easier, because it can be suppressed. Judge Norton inquired as to what happens if the State disagrees. Mr. Maloney expressed the view that the intent of the Rule is to avoid the enormous time and expense of a capital case if the State does not comply with the prongs of the statute. It is

similar to a pre-trial summary judgment motion. The problem is that Rule 4-281 does not quite match up. It begins: "If, upon completing discovery, the State acknowledges that it does not possess...". What if the State does not acknowledge this? The Rule should say that the court, in the absence of such evidence, may strike the notice of death. In Judge Hollander's example, what if there is a pre-trial ruling that the videotaped interrogation was not voluntary and therefore not admissible? This was what the State was relying on. At that point, the court should have the authority to take the next step and strike the notice. Judge Hollander noted that any one of the items listed in the statute would entitle the State to seek the death penalty.

The Chair said that there is a problem that the Subcommittee wrestled with for hours. If the confession is involuntary, and the State does not have the other two evidentiary items, that is the end of seeking the death penalty, because the three items never come into evidence. If the judge rules that the confession was voluntary, that does not necessarily get it to the death sentence. Mr. Maloney remarked that the Rule does not reach striking the notice where the statutory criteria are not met, because it delegates to the State's Attorney the authority to acknowledge or not.

The Chair pointed out that the practical problem is getting into issues pertaining to whether the court can do this as a matter of law, such as whether the court can find that the videotape of the crime scene does not conclusively link the

defendant to the murder as a matter of law, or that the DNA does not link the defendant to the act of murder as a matter of law. How often can the Court of Appeals find this as a matter of law? There are often factual disputes. This is what led the Subcommittee to decide that except for the confession which can be excluded from evidence, the court may hold that the videotape does not conclusively link the defendant to the act of murder, but it is admissible as evidence, unlike an involuntary confession, even though the videotape does not conclusively so link.

Mr. Maloney said that the test for the court is whether there is enough evidence to meet the statutory criteria. There has to be a time for the State to either go forward or not go forward where the State has to advance its evidence and say, as a matter of law, that it has met its burden, the same test as at the conclusion of the State's evidence in a criminal case. The Chair pointed out that these are now sentencing factors. Mr. Karceski asked Mr. Maloney if his point is that the Rule has no teeth. It will not work where the defendant files a motion because of the problem of whether a court is going to make that ruling based on a motion. Some judges have granted the motions that have been filed to strike the notice of the death penalty, but most judges have not granted the motions. It is a kind of "feel-good" measure. The State is being told that it has an obligation. What about completing discovery using the language that the State shall acknowledge that it possesses one of these

three statutory items, and if it does not, it must strike the notice?

Mr. Maloney commented that what is causing the problem is the word “acknowledge.” At some point, the State is going to have to advance how it complies with the statute on a pre-trial basis. It can be subject to a motion to strike. In the DNA context, if there is a pre-trial DNA motions practice to allow or not allow the DNA, and this is what the State is relying on for its decision to seek the death penalty, the court may throw out the DNA. At that point, the defense ought to be able to file a motion to strike the death notice. The court ought to be able to have a hearing to know whether to grant it or not.

The Chair reiterated that this issue was debated by the Subcommittee at some length. The problem is that most of the disputes are factually based and are an issue for the jury. Mr. Maloney responded that it is like summary judgment -- if a rational trier of fact could find that the State meets one of the three statutory items, then they can proceed with a death case. The Chair stated that the question is whether in a criminal case, the judge can make that kind of ruling when these are sentencing factors that a jury has to decide. Judge Norton remarked that there is a distinction between whether there is any evidence at all or whether the evidence is sufficient. The court will not want to get into whether it is sufficient -- only whether there is any evidence at all. The State may think that the videotape evidence is sufficient, but the defense may not. This is up to

the jury to decide.

Mr. Cassilly expressed the concern that he does not want to defend himself from allegations of rule violations being filed by the defense because, in their opinion, the State's Attorney should be dismissing the death notice under this Rule, when in the State's Attorney's opinion, the videotape shows someone walking into a bank, and then walking out, but does not show the death of the bank teller. The State's Attorney may be arguing that under the statute, this is enough to prove that this is the person who committed the crime. The defense may argue that under the statute, there has to be something more than the videotape. Judge Hollander said that in Mr. Cassilly's example, the word "acknowledge" may be important, because the State is not acknowledging.

The Chair commented that he and Ms. O'Donnell, an Assistant Public Defender who was present at the meeting, had previously had a conversation, and she came up with factual situations, some facts and some law, that confused the issue. The question was whether a judge, except for any inculpatory statement that is involuntary and cannot come into evidence, can decide this. Mr. Maloney expressed the opinion that where the court can rule as a matter of law that the evidence does not meet the criteria, the court ought to have the authority to strike the notice.

Mr. Millemann told the Committee that he is the Reporter to the Criminal Pattern Jury Instructions Committee a group chaired by the Honorable Irma Raker, a retired Court of Appeals judge.

At a meeting of that committee at which appellate judges, trial judges, prosecutors, assistant Attorneys General, and defense counsel attended, a similar discussion ensued. Whatever the Rules Committee decides, the Pattern Jury Instructions Committee will implement. Their feeling was that it is a good idea to have a pre-trial procedure that makes clear that a trial judge as a matter of law, could strike a death penalty notice applying a deferential matter-of-law standard because of the ambiguity that existed under *Manck*, which was a four-to-three decision. Some trial judges read the decision as authorizing the judge to strike a death penalty notice, and some read it as prohibiting a judge from striking a notice. There is confusion as to what the decision intends. For the reasons suggested by Mr. Maloney, the Criminal Pattern Jury Instructions Committee felt that it made sense to provide an explicit rule providing that under a deferential matter-of-law standard, the court could strike the notice of intention to seek the death penalty.

Ms. O'Donnell said that she was the chief attorney in the Capital Offense Division of the Office of the Public Defender. She has the opportunity to see cases all across the State. As discussed in the Subcommittee meeting, the situation is that half of the judges feel that they have the right to strike the death notice, and half of the judges feel that they do not have the right to do this, each group looking at the *Manck* decision differently. The dissent in the case suggests that the trial

court has no authority to strike a notice of intention to seek the death penalty. The judges can read this any way they want. It means that there are very different practices going on. She expressed her agreement with Mr. Millemann and with the proposed Rule. The intent of the legislation and the most efficient procedure is to have the opportunity to weigh pre-trial, so that the court can decide whether the standards are met and be able to strike the notice if they are not met. It is also correct that there will not be that many situations where as a matter of law, the court will be able to determine that the standards have not been met. If it is a factual issue, no court will make that decision. It is safer to rely on the court to make that decision when it is clear as a matter of law than to require the State's Attorney to acknowledge. State's Attorneys operate very differently across the State; they have different agendas and come from different perspectives. They will not all act in one way with regard to this Rule. In the rare situations when it is clear as a matter of law that the State has not met its burden, the court should be able to strike the death notice.

The Chair pointed out one other issue that the Subcommittee had discussed. If the judge is permitted to strike the death notice, even on an issue of pure law, there is no appellate review of that decision. The State can appeal if the court dismisses an indictment, or if the court excludes evidence. This is what the *Manck* case held. Even by a writ of prohibition, if

the judge strikes the death notice, no matter how wrong as a matter of law the decision was, there is no appeal. This is one of the reasons that the Chair was opposed to permitting this when he heard the case as a member of the Court of Appeals. The issue in *Manck* was that the judge ruled that the death notice was no good, because the aggravating factors were not listed in the indictment. Instead of dismissing the indictment, the judge struck the death notice, and there was no appeal. This is a serious jurisprudential public policy issue. It is not required by the statute. The Chair expressed the opinion that it is not a good policy to permit any trial judge to do this. If it pertains to a confession, there is already jurisprudence on that. If the judge decides the confession is involuntary, the confession is not admitted, and that is final.

Master Mahasa asked what the appellate court's rationale was in deciding that the trial court could not strike the death notice. The Chair replied that in *Manck*, the judge struck the death notice on the theory that the aggravating factors as to principalship were not stated in the indictment, there was a defect in the prosecution, and the case could not proceed to the death penalty. Instead of striking the indictment, the judge struck the death penalty notice. Everyone agreed that there was no appeal from that decision. The State tried to get an appeal by a writ of prohibition. Mr. Maloney added that there is no appeal allowed if there is a defective notice, and if there is a

late notice. There are many cases where no appeal is allowed. The Chair said that if the Committee wants to permit the court to strike a notice of intention to seek the death penalty, it can be submitted to the Court of Appeals who will make the final determination. Mr. Maloney inquired as to whether the Court is in a hurry to get this decided. The Chair answered that he thought that they were. The statute takes effect on October 1. It is unclear what the statute applies to. Most of the prosecutors are construing it as applying to any sentencing proceeding that starts on or after October 1. There are pending capital cases. Once October 1 arrives, this is a pending issue.

Judge Hollander said that she had thought about this issue. At first she could not see the downside of this, because it requires the State's Attorney to do whatever he or she is supposed to do. What purpose does it serve? If the criteria were not met, it is not a death penalty case, so what is the point of the Rule? The Chair responded that the issue of whether the criteria have been met is ordinarily for the sentencing jury. Mr. Karceski added that it saves the time of having to go through everything. The Chair said that if the State acknowledges that it does not have the required evidence, the death penalty eligibility should end there. Judge Hollander remarked that if the State does not acknowledge, the court should not be given the authority to strike the notice, because there is no appeal. The Rule is not necessary.

Mr. Maloney inquired as to whether the court has the

authority to do this at the end of the first phase of the trial. The Chair replied that this is not clear. Mr. Maloney asked if the court can refuse to allow a capital sentencing, if at the end of phase 1, the State will not allow the interrogation to come in, and there is nothing else that meets the statutory criteria. Mr. Karceski remarked that even though it is not part of the existing Rule, if it were, at the end of phase 1, the jury would make the determination, not the judge, unless a judge were determining death. Mr. Maloney hypothesized that at the end of phase 1, before the sentencing phase, in a trial of guilt or innocence, there is a finding of guilt, but the court has already suppressed the interrogation and has found that there is nothing else that came out of trial that met the criteria in the statute. The Chair noted that the State's Attorney may tell the judge that he or she did not put the videotape into evidence during the trial of guilt or innocence but that he or she does have the tape and would like to put it in at sentencing. It will show the defendant at the crime scene.

Mr. Millemann commented that the first question is what happens if the judge strikes that statement, because it is not voluntary. If it does not come in at the guilt or innocence stage, it is out. The Chair responded that the State can appeal this. Mr. Millemann said that if nothing else satisfies the statute, there is an inherent power to strike the death penalty. If there is no DNA evidence, and no videotape, but there is a videotaped confession, and the judge has ruled it inadmissible,

the judge is empowered inherently to strike the death penalty. Mr. Cassilly added that the State can file an appeal. The Chair said that the State can proceed if the Court of Appeals reverses the suppression ruling. Mr. Cassilly noted that the appeal is filed pre-trial as soon as the evidence is suppressed. The Chair observed that all of this is pre-trial.

Ms. O'Donnell reiterated that there are many decisions that cannot be appealed. As a practical matter, with half of the judges striking notices, and the other half not striking notices, the State cannot appeal that, so what results is a completely non-uniform system. Judges in the State with some degree of frequency are striking these notices with regard to lack of aggravating circumstances and to lack of principalship. Under this new Rule, judges will think that they have the power under *Manck* to strike these notices. By putting this Rule into effect, making it clear that the court can do this, it will not only follow what the intent of the legislature was, which was to derail these cases when possible, if, as a matter of law, these criteria were not met, it will also provide some kind of uniformity. Otherwise, the practice will continue, and there is no way for the State to appeal those decisions, either. The practice will depend on the judge.

Mr. Cassilly commented that he did not understand why people think that the State is going to file a death notice if the State does not meet the criteria set out in the statute. Even now, no

death notices are filed for defendants who are under 18 years of age. The Chair noted that there may be an argument over that issue. Mr. Cassilly said that he has worked as a State's Attorney for a long time and has never had a death notice stricken. He would not file a death case lightly or without a substantial amount of evidence. Mr. Cassilly expressed the concern that this Rule allows for defendants and defense counsel to move for sanctions against a prosecutor for violations of rules where the State does not want to concede or acknowledge that it does not possess the necessary evidence.

Judge Hollander pointed out that a State's Attorney could be sanctioned for other actions. Mr. Cassilly responded that he has never been sanctioned. Defense counsel has often moved for sanctions in cases, but the State's Attorney wins most of the arguments for sanctions. The Chair reiterated that there is no need to follow the procedure in Rule 4-281 to comply with the statute. The Subcommittee's only intention was to determine the statutory requirement as narrowly and efficiently as possible. Should the death penalty process be modified when it is not necessary and when the modification may be possibly going too far?

Mr. Maloney remarked that the Criminal Pattern Jury Instructions Committee, a respected group, is of the opinion that this has to be resolved. There has been testimony today that a great disparity of post-*Manck* practice exists that should be

cleared up with a bright line rule. His view was that the Committee should frame the issue for the Court of Appeals, who can take a different position if they disagree. Either there ought to be a pre-trial striking process, or there should not be. Ms. O'Donnell added that it depends on the prosecutor. She noted that Mr. Cassilly had stated that he would not proceed on a case without strong evidence. She had given an example to the Subcommittee of a recent case where there was DNA evidence. Normally, the statistics are one in a very high number, but in the recent case, the statistics on the DNA evidence linking her client to the murder was one in two and one in 19. The result was not complete. The State really wanted that evidence to be admitted. Part of the reason was that they were afraid of the application of the new law later on when the Court of Appeals reviewed the case, and they wanted DNA evidence linking the defendant to the murder. The defense filed a motion to preclude them from presenting the DNA evidence, because it was meaningless, and it had the ability to completely mislead the jury.

The Chair inquired if Ms. O'Donnell was trying to exclude the evidence from the trial of guilt or innocence. Ms. O'Donnell responded that she was completely trying to do that, but when the judge granted that motion, it was on a pure, probative, prejudicial analysis that it was ridiculous and that it meant nothing. At that point, if the new Rule had gone into effect, and if the DNA had been the only basis to proceed with the death

penalty, the defense should have been able to ask the Court to strike the notice.

Mr. Maloney noted that the fact that the notice cannot be appealed is a red herring, because the DNA Rule can be appealed. The suppression can be appealed. This appeal is basically the surrogate for striking the notice. If the court decides that the suppression was wrong, then the notice can be re-filed, and the case can proceed. **In the cases where the DNA evidence is not admitted or suppressed, and the interrogation is suppressed, since this is two-thirds of the statute, at that point, there ought to be a striking procedure.** The State at that point has the right of appeal on the suppression, and that appeal will be the surrogate for the whole death penalty issue.

The Chair cautioned that this would be only if the judge excludes it as evidence at the guilt or innocence trial. Mr. Maloney added that it could also be if the judge excludes it from evidence at the sentencing phase of the trial. The Chair said that if the judge allows it into evidence at the guilt or innocence phase and does not exclude it, but simply strikes the death notice, it cannot be appealed. Mr. Maloney asked when would it happen that there would not be a pre-trial suppression procedure for the DNA and the interrogation before the whole trial. Capital counsel is always going to have the suppression hearing before both procedures. There will not be a separate suppression hearing before the sentencing. It will either be

appealed, or those issues will be lost before the whole trial starts.

The Chair asked about the scenario of a videotape of the crime scene, where there is a motion to suppress it, because it does not conclusively link the defendant to the murder. It is difficult to tell if the recording is of the defendant. The judge says that he or she does not believe that the recording conclusively links the defendant to the murder but agrees that for purposes of guilt or innocence, a jury could find that there is a link. The judge does not suppress it as evidence but strikes the death penalty notice. Mr. Maloney responded that the judge will either allow it or not. Mr. Cassilly expressed his agreement with the Chair that the judge can limit the use of the evidence. Judge Hollander inquired if the State is allowed to appeal suppression of the evidence by statute. Mr. Cassilly responded affirmatively. Mr. Maloney commented that whether there is a rule or not, half of the jurisdictions in which the judge strikes the death notice will keep on doing this, and the half that do not will continue not to. Mr. Cassilly pointed out that only two or three notices of intention to seek the death penalty are filed each year in the entire State, and this is going to narrow down significantly because of the new statute.

The Chair noted that the defense bar would like to have a procedure for striking a death notice when a judge decides as a matter of law that there is no basis for it. This type of procedure is not needed to comply with the new statute. If such

a rule is enacted, it is not just an attempt to comply with the statute, but it is a whole new regime of death penalty litigation. Mr. Maloney remarked that there is a new statute, and the Criminal Pattern Jury Instructions Committee is in favor of this. The Chair asked if that Committee voted on this issue. Mr. Millemann replied that the Committee did vote on this, but their role is advisory only. His perspective was that the more important issue to decide is bifurcation or trifurcation.

Judge Hollander inquired whether the Committee had discussed the implications of authorizing a judge to strike a death penalty notice. Mr. Millemann responded that the conclusion was that there may be an occasional abuse of discretion by the trial judge, but that is not a basis for not adopting a policy that makes sense. The Chair said that he had called Judge Raker to alert her that the Rules Committee was taking up this issue. The Pattern Jury Instructions Committee would have to follow very quickly. Judge Raker had told the Chair that they were not going to take a position as a committee; they were only going to discuss it.

Mr. Klein inquired whether the following language could be added as an alternative to the version of the Rule providing for an acknowledgment by the State: “or the judge strikes the evidence” (suppresses it). The Chair responded that it would be appropriate for the judge to strike the evidence from the guilt/innocence stage if the judge rules as a matter of law that there is no basis for it. Mr. Klein noted that this goes beyond

the mere acknowledgment of the State, but it does not go as far as Mr. Maloney had suggested. Mr. Maloney expressed the view that what is important is that there is evidence that this is an issue that the Court of Appeals ought to consider. A disparity of practice exists, and there is a new statute. Both versions of the Rule should be presented to the Court, which will presumably have the same debate as there was today. The Chair suggested that this issue be deferred for a few minutes, so that the Committee can consider the alternatives to the death penalty Rule that is related to the statute. The alternatives offer a policy choice. If the Committee chooses to let the Court of Appeals pick one of the alternatives, then the Committee can offer a choice as to Rule 4-281.

Mr. Karceski explained that two alternatives of Rule 4-343 are proposed for the implementation of this trilogy of Rules. One amends existing Rule 4-343 by adding a "preliminary" section, keeping the rest of the Rule the same. The amended section provides that all of the evidence pertaining to sentencing and these statutory issues along with other issues that existed prior to Senate Bill 279, including the issues of mental retardation, age, principalship, and others, are submitted to the jury. Looking at Alternative #1, there would be a sentencing proceeding and all of the items in the "laundry list" would have to be presented to the jury at one time at one hearing, however long it would take to do so. Then the jury would retire, and it would make its decisions. Based on all of the evidence, the jury could

take a number of days or longer to decide. The “preliminary” section incorporates the three provisions from the statute that have been discussed today. If one of those provisions became part of the evidence, and the other two did not, and the jury decided that the one item was not proved, that would be the end of the possibility of the death penalty. The jury would move to a section of the sentencing form that would determine whether the defendant received a sentence of life imprisonment or life imprisonment without parole. In order to seek the death penalty, one of the three statutory items must exist. Should all of the evidence be placed before the jury, some or a great deal of which may not be necessary?

Mr. Karceski said that Alternative #2 calls for a bifurcated process, where a limited amount of evidence is placed before the jury with regard to the issues that would determine whether the death penalty can be sought. The jury would first determine those issues in the bifurcated process, and if those issues were met, then next there would be additional issues to meet and/or phase 2 of the sentencing proceeding.

Mr. Karceski said that the first issue to determine is whether the trier of fact should consider everything at once and what the timing is. Or should this process be bifurcated to see if any of the death-eligible items exist? This is the overall distinction between the two alternatives. The first alternative follows the current format with the addition of the preliminary section and a determination of “proved” or “not proved.” Then it

moves onto the age of the defendant and whether or not the testimony relied solely on eyewitness testimony, and those would have to be answered “proved” or “not proved.” The menu of the Rule would be followed. If certain requirements are not met, then those sections are skipped. If the requirements are met, then the Rule would be followed section by section until the issue of death is reached, considering all of the aggravators and all of the mitigators. A jury would weigh these to determine if death would be an appropriate sentence or not. Section VII addresses the situation where no death sentence is permissible, and the jury has to determine if a sentence of life imprisonment or life imprisonment without parole is appropriate.

Master Mahasa inquired as to whether the difference between the two alternatives is how much information the jury is given at one time. Mr. Karceski replied that this is an essential difference. In Alternative #1, the jury is given everything at once. In Alternative #2, the information comes in two waves. The difference is that in Alternative #1, there is no bifurcation. Everything comes before the jury, and the question is if the jury is being given more than is needed. Alternative #2 allows the jury to resolve the death penalty issue early on, and then all of the other information that the jury would have been given and that they would consider at sentencing would not be needed if they made a finding that the death penalty was not appropriate.

Mr. Cassilly remarked that even if the jury decides for life

imprisonment without parole, they would still need the other information such as the seriousness of the crime, defendant's background, psychological history, etc. All of this information has to be admitted anyway. The Chair commented that this issue had been raised at the Subcommittee meeting. Is all of the social and psychiatric evidence going to come in? The answer is probably not all of it. Mr. Cassilly noted that some of the information is very concise, such as age. All of the factors have to be met from a post conviction standpoint. If defense counsel does not present all of the information, and the defendant gets a sentence of life imprisonment without parole, there will be a post conviction issue where the defendant will say that he or she would only have gotten a sentence of life imprisonment if the attorney had only told the jury some vital piece of information. Mr. Cassilly had never participated in a case where defense counsel had said that excellent evidence about the defendant's background was available, but counsel would not put it in because the sentence would be life without parole as opposed to the death penalty.

Mr. Millemann commented that this was a very important issue for the Criminal Pattern Jury Instructions Committee. Of the eleven members, ten were overwhelmingly in favor of the bifurcation. There were three reasons. The first was that evidence of any of the three death qualifiers is going to be admitted at trial. The jury will have heard some of this evidence. The evidence is being used, or more evidence is being

admitted, and it is fresh in the jury's minds. It is logical to ask the jury, having heard the evidence at trial, supplemented by what was heard in phase 1 of the sentencing hearing, whether the State proved beyond a reasonable doubt one of the three death qualifiers. If the answer is "no" to this question, then a two- to five-week hearing with all of the aggravating and mitigating evidence will be avoided. There is a substantial efficiency from the point of view of the courts and the jury system.

Mr. Millemann said that the second reason with all of the evidence coming in at once is the critical problem of jury confusion. The State must prove beyond a reasonable doubt that one of the three qualifiers for the death penalty exists. Once the sentencing phase begins, where the State has to prove beyond a reasonable doubt that the aggravators exist, the defense must prove by a preponderance of the evidence that the mitigators exist, and the jury is instructed that they need not be unanimous on the mitigators. Any one juror can decide that there is mitigating evidence, and when all of this evidence is lumped together, the jury will be extremely confused. There will be an instruction of "beyond a reasonable doubt" for some issues, and a "preponderance of the evidence instruction" for others. For some issues, unanimity is required, and for others, unanimity is not necessary. The judges, prosecutors, and defense counsel on the Pattern Jury Instructions Committee felt that this was too much to ask a jury to do.

Mr. Millemann agreed with Mr. Cassilly that the jury will

have some of the same evidence any way. There are two differences if the jury has to choose between life imprisonment and life imprisonment without parole. One is that the jury is not being asked to admit and think about that evidence insofar as it proves aggravators, and the aggravators outweighing the mitigators. This whole structure is gone. It is a sentencing proceeding. Both aggravating and mitigating evidence is coming in, and the jury has to decide as to whether the defendant should be given a sentence of death. Also, the complexity that comes with a death penalty sentencing is not there.

Mr. Millemann told the Committee that the third reason that his committee was in favor of bifurcation is that Senate Bill 279 is not clear that if the jury finds that no death qualifier exists, it is the jury who decides whether the defendant should get life imprisonment or life imprisonment without parole. Section 2 of the bill states that in any case in which the State has failed to prove one of the three death qualifiers, "the notice of intention to seek a sentence of death shall be considered to have been withdrawn and it shall be deemed that the State properly filed notice under §2-203 of the Criminal Law Article to seek a sentence of life imprisonment without the possibility of parole." In this situation, it is not a jury decision.

The Chair responded that this is only one view. Mr. Millemann acknowledged that it is one view, and it is not necessarily correct. The language of the statute means whatever

at least four Court of Appeals judges say it means. A literal reading of the language, under one view, is that the jury does not decide this question. If the State fails to prove that death is the proper sentence, then the issue goes to the judge. The Pattern Jury Instructions Committee does not know what the answer is. The problem is confusion and avoiding a substantial part of what must be done in a death case.

Mr. Cassilly remarked that he was not certain that there is more for the jury to do after they weigh the first few questions. They are already doing this now, considering the preliminary questions of whether the defendant is over the age of 18 and whether the defendant is mentally retarded, if those issues have been raised. The State's portion of this in terms of those three statutory qualifiers is also going to be limited. Depending on what the State decides on one of the qualifiers, they may not be asked to consider the other two. The State limits the number of aggravators that they list unless the defendant asks for all of the aggravators. Normally, the number of aggravators is one or two at most. The biggest problem the juries run into is mitigators and whether the mitigators exist. If it were structured as in section I of Alternative 1 of Rule 4-343, the jury would be instructed to "go to section _____," if the jury did not make the requisite findings. Part of the issue is what the effect of the evidence is and what it proves to the jury. Mr. Millemann reiterated that there are three different standards of proof, and two different requirements as to unanimity or non-

unanimity. Jurors are being asked to do too much.

Ms. Potter asked whether both versions of Rule 4-343 are going to be sent to the Court of Appeals. The Chair answered that it is being presented to the Rules Committee as two versions proposed by the Subcommittee. The question is what the Committee wants to do. The Subcommittee's theory was that these factors that are in the bifurcated portion of the Rule are the hoops the State must jump through to qualify for death penalty eligibility. They are mostly fact-specific kinds of issues. Some psychological evidence is available if there is an issue about whether the defendant is mentally retarded. In terms of the other factors, they are fairly straightforward fact issues that do not require psychiatric, psychological, or sociological kinds of evidence that come into play in determining the aggravators and most of the mitigators in the weighing process. All that the Committee has to do is Alternative #1.

Alternative #2 is based on trying to simplify the sentencing process as long as the four factors (including evidence provided by eyewitnesses) are added in. Ms. Brobst questioned whether the Committee has considered not sending to the jury those issues which the State is conceding do not exist for the purpose of further simplifying the form as the Rule presently does with the aggravating factors which the State has not set forth. The Chair replied that the evidence would be submitted to the extent the issues are raised. Mr. Karceski pointed out this statement in subsection (h)(2) of Alternative #2: "The court shall limit

evidence, instructions, and argument in the Phase 1 proceeding to the issues submitted under subsection (h)(1) of this Rule."

Ms. Brobst inquired what the Committee is contemplating happening in the bifurcated section of the proceeding after the jury has considered and reached decisions on its issues. Does it just come back and present those decisions? The Chair answered that the Rule provides that the jury returns special verdicts and depending on what they are, it is the end of the case, or the jury goes back and decides on life imprisonment or life imprisonment without parole. Ms. Brobst asked whether it would be a jury decision as to life imprisonment or life imprisonment without parole if the jury does not find any of the factors required for a death penalty case. The Chair replied that the Subcommittee discussed the issue of whether it would be a judge or a jury matter at that point. The Chair added that he did not know what the statute means. He agreed with Mr. Millemann that the Court of Appeals will have to resolve that issue. If the defendant opts for a jury sentence, which ordinarily covers the sentence of life imprisonment or life imprisonment without parole, and the jury does not find any of the qualifiers, do they make the decision, or does it then become a court decision? Arguably, if they do not find any aggravators now, the case is not eligible for the death penalty.

Ms. O'Donnell expressed the view that the bifurcated system, even with some of the unanswered questions, is far preferable. She agreed with Mr. Millemann's reasons and said that there are

some additional reasons. Sending only discrete questions to the jury is much easier for them to understand. They are concrete questions, and most of them are fact-based. It is reasonable that the jury can address those issues quickly and efficiently. If Mr. Millemann is correct and that cuts it off when they do not find any of the qualifiers, and it goes to a court sentencing, then the entire penalty phase has been saved. Even if Mr. Millemann is not correct, and the Rule operates in the same way as aggravators or principalship that were not found by a jury under the current Rule, and the jury determines life imprisonment or life imprisonment without parole, phase 2 of the sentencing will be presented in a very different way than it ordinarily would have been presented.

Ms. O'Donnell expressed her agreement with Mr. Cassilly that even if defense counsel has good mental health and social history information, he or she will still want to present that, but it will not be presented in the same structural framework. The defense counsel will not have to go through the list of statutory mitigators and non-statutory mitigators and argue and present evidence in a way that will ask the jury to balance those things. It would be more equivalent to what a non-capital sentencing hearing would look like if defense counsel had the good social and mental health history to present to the court. This will be truncated.

Ms. O'Donnell said that she liked to consider this subject in a practical way. How can this proceeding be truncated? If in

phase 1, the criteria has not been met, and now it is a life imprisonment/life imprisonment without parole decision, whether it is before the court or a jury, the defense counsel and State's Attorney are very likely to get together at that point and negotiate the case. From the perspective of the State's Attorney, the only way to get a sentence of life imprisonment without parole if it is a jury question, is if the jury unanimously finds that the sentence should be life imprisonment without parole. The State may have some concern that they may not be able to do this. Defense counsel can ask to talk with the State's Attorney, looking for a sentence that is mutually agreeable. Affording the parties that opportunity at that stage of the case will resolve itself in a number of these cases. For all of these reasons, the bifurcated system has many advantages.

Mr. Karceski asked Ms. O'Donnell for her opinion. He hypothesized a situation where there is a death-eligible defendant, but the State chooses not to seek the death penalty but life imprisonment without parole. In that instance, there is a jury conviction. Who then decides? Ms. O'Donnell replied that the court decides. Mr. Karceski inquired why the jury would continue if the case is bifurcated, and the jury has decided the case is not death eligible. Ms. O'Donnell responded that there is a good argument that this would end the jury involvement. The language from the statute that Mr. Millemann read pertaining to the notice being withdrawn could not refer to the jury, because the jury does not withdraw notice. She agreed with Mr.

Millemann, but she recognized that the Chair is saying that as a practical matter, in a sentencing right now, if the jury did not find principalship or an aggravator, they would be directed to go to the last section of the Rule and determine if the sentence would be life imprisonment or life imprisonment without parole. The language read by Mr. Millemann focuses on the fact that the notice would be deemed to be withdrawn.

Mr. Karceski commented that if there is a bifurcation, it makes sense that it should be a court sentencing at that point. The Chair observed that this is an issue of statutory construction. The Court of Appeals will have to resolve this in a judicial capacity, not a legislative capacity. He asked Ms. O'Donnell if she could think of any case where the defense might want the jury to make the decision. Ms. O'Donnell replied that she could think of a case like that, but just as frequently, the court would appreciate the types of arguments that she would be making as defense counsel addressing the choice between life imprisonment and life imprisonment without parole much more often than a jury would.

The Chair remarked that he could envision a case where the judge says that the jury has decided the case cannot be a death case, and the judge decides to do the sentencing at that point. Defense counsel objects, stating that he or she asked for a jury to sentence. Mr. Millemann remarked that many defense counsel may take that position. He explained that he did not know the answer, but he felt that it was a plausible interpretation, and

there is a counter-plausible interpretation. It provides the possibility that bifurcation has another benefit. The Chair pointed out a middle ground which the Court of Appeals might be willing to consider -- to convert the case to a judge sentencing at the defendant's request.

Ms. O'Donnell remarked that in many instances, on the defense counsel side, the unanimity requirement is a plus for going in front of the jury. Normally, when defense counsel argues between life imprisonment and life imprisonment without parole, counsel would like to be able to talk to the judge, comparing the case with other murder cases, noting that there are worse cases and worse defendants. Jurors do not appreciate these type of arguments, and counsel cannot make an effective argument to the jury. Ms. Brobst added that the defendant can reconsider his or her election after the jury returns a verdict. The Chair responded that he had presented this viewpoint.

Ms. Brobst inquired if the proceedings could be in front of the court for the first part, and then the defendant could elect a jury on the second. The Chair answered that currently, the form does not permit this. If the defendant opts for a jury, the case is handled by the jury from beginning to end. The question is whether the Court can modify this by rule under the theory of practice and procedure. He was not sure if this would comport with the statute.

Mr. Cassilly suggested that subsection (d)(11) of Rule 4-263 could be changed by adding the phrase "where a notice of death

has been filed," as follows: "If the defendant is charged with a first degree murder where a notice of death has been filed, a statement...". The Chair said that a notice of death may not have been filed. Mr. Cassilly commented that given the number of death-eligible cases and the actual number in which a notice of intention to seek the death penalty has been filed, if the State's Attorney decides to file a notice of death, then supplemental discovery can be done and filed with the notice of death. The Chair commented that he wanted to get the Committee's consensus on the two alternatives before discussing the other issues raised. Mr. Klein inquired whether the Subcommittee had a recommendation. The Chair replied that the Subcommittee recommended that the two alternatives be sent to the Court of Appeals. The Chair asked if anyone had a motion to alter this. None was forthcoming.

The Chair stated that the pre-trial procedure would be discussed. Mr. Maloney moved that both options be sent to the Court of Appeals. The Chair asked Mr. Maloney if his preference was to permit the judge to rule as a matter of law on the existence of the three factors listed in the statute. The judge cannot rule on the fourth factor, which is that the State is relying solely on evidence provided by eyewitnesses. The Chair asked if the judge would be able to rule on age or mental retardation as a matter of law. Mr. Maloney responded that the judge could rule on age if there is no dispute. The Chair remarked that there may be a dispute on that. Mr. Maloney said

that the issue of whether the defendant is mentally retarded is almost always going to be in dispute.

The Chair questioned as to whether the judge could rule as a matter of law on only the three factors -- the biological or DNA evidence that links the defendant to the murder, a videotaped voluntary interrogation and confession of the defendant, or a video recording that conclusively links the defendant to the murder. Mr. Maloney replied affirmatively. It is those items that are capable of pretrial resolution, such as the suppression of a custodial interrogation, or the suppression of DNA evidence. It is whatever the court could rule on as a matter of law. Mr. Cassilly asked why there is a need to take any other action if that ruling is necessary, and the State has filed an appeal. It would be better to wait for the appellate decision to come down. Mr. Maloney noted that the State may or may not file an appeal. Mr. Cassilly said that if the State does not file an appeal, then there is a decision to be made. Why ask the judge to make a ruling on a motion if the State has filed an appeal? Mr. Maloney replied that if the State has filed an appeal, there would probably be no ruling at that point because the judge would wait for the appeal to be decided. However, if the State does not appeal, the court should be able to strike the death notice. He moved that the judge should be able to strike a death notice on issues that can be ruled on as a matter of law.

Mr. Karceski said that the moving party will be the defendant. The issue of the voluntariness of the confession is

easy to determine. Is the State's burden the same on the other two as it is on the voluntariness of the confession? He asked if it is by a preponderance of the evidence. Mr. Maloney responded that it is not a preponderance, it is a legal question. Mr. Cassilly remarked that if the State filed a death notice and has evidence, this will be a factual question. Mr. Maloney hypothesized a situation where the State is relying on custodial interrogation, and the interrogation is suppressed. At that point, as a matter of law when no other evidence has been admitted, the court can strike the notice. If there is a factual question such as whether it is the defendant on the videotape, this cannot be resolved as a matter of law. This forces the State to say that it is relying on this custodial interrogation to meet the statutory threshold.

Mr. Cassilly observed that he disagreed with a judge relying on a motion to strike while an appeal is going on. He knew of some judges who would do this. The State's Attorney wins his or her motion and is allowed to introduce the evidence, but the courts cannot overturn the motion to strike that was granted. Judge Norton asked about adding language to the Rule that would provide that the judge cannot rule until the resolution of any appeal that was filed. Mr. Maloney agreed that this would be appropriate. The Chair pointed out that if the judge rules as a matter of law that there is some evidence (if there is no evidence, the case is easier ), the judge rules as a matter of law that it is not the three types of statutory evidence and

therefore, it is inadmissible at any sentencing hearing, because it is irrelevant. The judge can strike the death notice, but by ruling the evidence inadmissible, it can be suppressed. The order would have to suppress the evidence at any sentencing hearing and strike the death notice.

Mr. Maloney said that if the court determines as a matter of law that the defendant is 17 years old, the court can strike the death notice. Mr. Karceski inquired as to how rare it is that the court would be able to do this. Most of these issues will not be clear-cut. Mr. Maloney commented that most of these cases will involve conflicts over DNA evidence. Mr. Karceski remarked that the DNA has to link the defendant to the act of murder, and he asked if this is a factual issue. Mr. Maloney responded that often, as was explained earlier in the meeting, the DNA evidence does not meet the statutory criteria, such as a finding that the DNA comes from one out of two persons, and the evidence is not admitted because it proves nothing. In that circumstance, the DNA does not go before the jury, and if the DNA evidence is suppressed, the statutory requirement is not met, and the death notice is stricken.

The Chair asked the Committee how they wanted to handle this. Mr. Karceski answered that the Committee should see the amended Rule before it is sent to the Court of Appeals. There may be some problems with it. Judge Norton added that it may need an appeal provision. The Chair said that theoretically, in looking at Code, Courts Article, §12-302, pertaining to what

issues the State is permitted to appeal, this goes beyond the scope of the statute.

Mr. Maloney inquired when the next Rules Committee meeting is. The Reporter answered that the meeting is June 19, 2009. Mr. Maloney suggested that some alternative language be drafted and disseminated to the Committee before the next meeting. Judge Kaplan noted that the appeal has to dispose of the suppression issue. The Reporter asked if the third option of the video recording would be included in the scope of the Rule. Mr. Maloney answered that there probably will not be many instances of this. The Chair noted that there may be some cases involving this, because of cameras in gas stations and convenience stores. Mr. Klein added that a videotape could be suppressed on the ground that someone interfered with the visual image, a computer-generated evidence issue.

The Chair stated that Rules 4-263, 4-281, and 4-343 will be redrafted and presented again in June.

There being no further business before the Committee, the Chair adjourned the meeting.