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I wish to begin by congratulating the editors of the *University of Baltimore Law Forum* on an excellent issue that features a number of articles that will be of value to many members of the bar, including one that traces six judicial decisions that have had a major impact on Maryland law. This issue also marks the 30th anniversary of the *Law Forum*. Over three decades, this important publication has provided current analysis of significant judicial and legislative developments affecting Maryland law. The *Law Forum* continues to be a great service to its readers, and we should take this opportunity to thank and acknowledge the efforts of the many UB law students over the years whose hard work and dedicated effort have made possible the publication of this valuable journal.

In one respect, this will be a different Dean’s Forum from those I have written in the past. I recently was offered and accepted the position of Consultant on Legal Education to the American Bar Association. In that role, I will oversee the accreditation process for law schools throughout this country and assist law school deans in preparing themselves and their schools to face the challenges of legal education in the early 21st century. It is an opportunity for me to make a major contribution over the next few years to the improvement of legal education throughout the country.

I will be leaving UB at the end of July to assume these new responsibilities. As I look back over the seven years of my deanship, I take great pride in what we have achieved, with the hard work of the faculty and staff, the excellent cooperation of President Turner and the rest of the University leadership, and the outstanding support that you, the alumni of the School of Law, have given us.

We have revised the curriculum with the object of preparing our students even more fully for the practice of law. We built on what was already the best clinical program in Maryland by developing two new clinics, the Disability Law Clinic and the Community Development Clinic, and now over a third of our graduates each year have taken at least one intensive clinical course. Our students are encouraged to develop in-depth knowledge of at least one area of law practice through our thirteen areas of concentration, including a newly approved concentration in e-commerce.

The Center for International and Comparative Law, which was established in 1994, has been wonderfully successful and is attracting national and international attention. The activities of the Center have enabled our faculty to assist law schools throughout the world in developing their programs, and our students’ education is enriched by the many distinguished teachers and scholars from around the world that visit UB. This summer we are expanding our summer JD programs by adding a new program, at the University of Haifa in Israel, to the long-established program in Aberdeen, Scotland.

The fine faculty of teachers and scholars that Professor of Law and Dean Emeritus Laurence Katz built has been enhanced by the addition of a number of excellent new faculty members, many of them with extensive experience in law practice. Through the generosity of some key supporters, we have been able to establish four new distinguished faculty positions to recognize outstanding senior members of the faculty.

Exciting things are happening at the Law School. Through the leadership of Professor Barbara Babb, we have reached agreement with a committee of the American Bar Association to establish at UB the ABA/UB Center for Families, Children and the Courts. Professor Babb will direct the Center, and Professor Jane Murphy and others associated with our fine Family Law Clinic will be significantly involved in the work of the Center. The Center will provide assistance to states and localities that are seeking to establish unified family courts, and will undertake other research and law reform projects of importance to families and children.

Another fine new faculty member will join us in August, Professor Angela Vallario. Professor Vallario is a 1991 cum laude graduate of the School of Law. Her practice experience has focused on trusts and estates and estate planning, and she has been an attorney-advisor to a judge on the United States Tax Court. For the past two years, she has been Visiting Assistant Professor at Howard University School of Law. She will be teaching Trusts & Estates, Planning for Families and Seniors, and Estate Planning.

Adequate financial resources are of course essential to support these excellent programs and our fine faculty and students. Good legal education today requires many small classes, in order to provide the necessary training in writing,
analysis and other lawyering skills. Good legal education also requires expensive technology. President Turner and I will continue to seek significant increases from the state in the appropriation for the Law School to assure the base of financial resources that is essential in order for the school to continue to provide high quality legal education.

By the time you read this, an excellent Interim Dean will have been appointed to lead the Law School through the next academic year. A search committee also will be established shortly to undertake the important task of recruiting a new permanent dean for the school, beginning in the summer of 2001, if not earlier. I will be working closely with the Interim Dean to assure a smooth transition, and I am also committed to making significant efforts to assist in the recruitment of the school’s next dean.

I believe that the School of Law is well positioned to meet the challenges that it will face in the coming years, and to continue the progress that we have made together over the past seven years. I will also be working hard as your dean over the next few months to complete some important initiatives that will further enhance the ability of the school to provide outstanding legal education to our students.

John A. Sebert
Dean and Professor of Law
Thirty years have passed since the first volume of the University of Baltimore Law Forum was published. Over that period the University of Baltimore Law Forum has evolved from a recent legal events newspaper into a recognized legal journal that concentrates on recent developments in Maryland law and scholarly articles to benefit Maryland practitioners. Volume 30.1 is a culmination of the effort and foresight of each and every past and present University of Baltimore Law Forum member.

In addition to the many recent developments in Maryland law, Volume 30.1 has expanded the Articles section of the journal. Professor Lynn McLain comments on a recent Court of Special Appeals of Maryland decision regarding the admission into evidence of prior statements of an intimidated witness. The Court of Appeals of Maryland Time Capsule article is a true collaboration of some of the brightest legal minds in Maryland and traces six cases over the last century that have had a profound effect on Maryland law. Jason Frank explains the importance of Medicaid planning as our population grows older. Jennifer Stearman, a University of Baltimore School of Law graduate, proposes an amendment to the United States Constitution arguing for the protection of victims’ rights, and Eric Singer examines the exercise of the spousal privilege in Maryland’s federal courts.

The Forum Faces section features the newest member of Maryland’s highest court, the Honorable Glenn T. Harrell, Jr. In Volume 30.2, the Forum Faces section will feature the newest member of the Court of Special Appeals of Maryland, the Honorable Peter B. Krauser. The Law Forum congratulates both new members of Maryland’s appellate courts.

The Law Forum thanks the Director of Finance and Administration, Nikhil M. Divecha, and our Faculty Advisor, Professor Robert Lande, for their continued support and guidance. The Law Forum also thanks Gregory P. Jimeno and Gwen S. Lubbert, and the Editorial Board of Volume 29, for their continued advice and support as well as each and every member that has helped to shape the Law Forum over the last 30 years. The Law Forum also wishes Dean John A. Sebert much success in his new position as Consultant on Education to the American Bar Association.

Walter W. Green
The Problem of the Intimidated Witness: The Need to Shore Up the Nance Doctrine Regarding the Admission of Prior Statements

by Lynn McLain, Esq.

a. The Problem

On March 15, 2000, three defendants were acquitted at the close of their trial for the murder of Shawn Suggs.1 The defendants “slapped hands in exultation.”2

There had been serious problems with the State’s case. Among these was that the State’s key witness recanted her prior statement inculpating the defendants. The victim’s mother was quoted in the newspaper as saying that the witness was scared of being murdered, and the mother didn’t blame her.3 After all, another State’s witness had been murdered.4 A third, who had been “kept in protective custody for three years while the case waited for trial, [had] disappeared.”5

When the preliminary draft of Title 5 of the Maryland Rules was being prepared by the Evidence Subcommittee of the Court of Appeals’ Standing Committee on Rules of Practice and Procedure, Judge John Prevas of the Circuit Court of Baltimore City testified that the problem of recanting witnesses is a formidable obstacle to the pursuit of justice. He stated that the witnesses cooperate immediately after they see a serious crime, but by the time of trial, they all too often have been threatened by the accused’s family or friends or the witnesses have been persuaded, in some way, that they would be safer if they did not “get involved.”6

Under traditional common law rules, followed in Maryland until 1993, a witness’s prior inconsistent statements were admissible for impeachment purposes only and not as substantive evidence (unless of course, they were not offered to prove the truth of the matter asserted7 or they fell within a recognized hearsay exception).8

b. Response in Nance

In Nance v. State,9 trial Judge David B. Mitchell took a bold step. In their trial testimony, three principal State’s witnesses10 denied all relevant knowledge of the crime – a drug turf related murder. This testimony was at complete odds with their grand jury testimony and the pretrial signed, written statements that they had made to the police. One of the witnesses also had given a signed statement to police and to an assistant State’s attorney that he had been contacted by a friend of one of the defendants and taken to the office of that defendant’s lawyer, to whom he said that he would not testify against the defendants.11 Another gave a signed written statement of warnings he had received from that defendant and another.12 When questioned at trial, the witnesses “remembered some parts of these earlier events, did not remember others, and outright denied or repudiated other parts. Their lapses of memory conspicuously occurred

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2 Id.
3 Tim Craig, Murder Trial Key Witness Withdraws I.D. of Suspects, The Baltimore Sun, Mar. 9, 2000, at B18.
4 Francke, supra note 1, at 6A, col. 3.
5 Id.
8 See id. Parts 801(4), 801(5), and 803-804(5).
10 They were recalled as court’s witnesses after they had recanted at trial. This step would no longer be necessary today, because of the adoption of Md. Rule 5-607.
11 See id. at 556, 629 A.2d at 636.
whenever the questions at trial approached matters potentially implicating Nance and [a co-defendant] in the murder.” Absent the substantive use of the witnesses’ prior statements, a judgment for acquittal would have had to be granted, as there was no other evidence identifying the defendants as the guilty parties.

Breaking with traditional Maryland case law, Judge Mitchell found the prior statements reliable and admitted them as substantive evidence. In 1993, the court of appeals, in a scholarly opinion by Judge McAuliffe for a unanimous court, affirmed that both of the witnesses’ prior inconsistent statements, (1) their grand jury testimony, and (2) written statements, based on the witnesses’ first-hand knowledge, which were signed or otherwise adopted by them, had been properly permitted to be admitted as substantive evidence, since the witnesses were present at trial and thus subject to cross-examination. Judge McAuliffe quoted Judge Learned Hand’s comments that, when a witness denies earlier statements, it “may be highly probative to observe the mark and manner of his denial. . . .” The jury will evaluate the evidence, “from what they see and hear of that person in court.”

**c. Codification of Nance**

In 1994, Maryland Rule 5-802.1(a) codified and expanded the court of appeals’s decision in *Nance*. Under the Rule, the following types of prior inconsistent statements of a declarant who testifies at trial and is subject to cross-examination concerning the prior statement are admissible as substantive evidence:

1. statements put in writing (not necessarily by the declarant) and then signed (or otherwise adopted) by the declarant;
2. statements made under oath in a formal proceeding, such as a grand jury proceeding, deposition, or trial; and
3. statements stenographically or electronically recorded.

The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule . . .


**MD. RULE 5-802.1(a)(2) permits the substantive use of: “[a] statement that is inconsistent with the declarant’s testimony, if the statement was . . .” when the requirements of the stem of MD. RULE 5-802.1 are met. Subsection (a)(2)'s restriction to only signed statements was a deliberate rejection of the Hawaii rule’s extension to written statements that are signed or otherwise adopted or approved. Stewart v. State, 342 Md. 230, 237 n.2, 674 A.2d 944, 948 n.2 (1996). But even a signed statement “might not be admissible if the circumstances suggest that the declarant did not clearly intend to adopt it by signing.” *Id.* at 238 n.3, 674 A.2d at 948 n.3.

*See e.g.,* Stewart v. State, 342 Md. 230, 674 A.2d 944 (1996) (grand jury testimony); Makell v. State, 104 Md. App. 334, 656 A.2d 348 (1995). Md. Rule 5-802.1(a)(1) permits the substantive use of: “[a] statement that is inconsistent with the declarant’s testimony, if the statement was (1) given under oath subject to the penalty of perjury at trial or hearing and who is subject to cross-examination concerning the prior statement are admissible as substantive evidence: [1] as substantive evidence: (1) statements put in writing (not necessarily by the declarant) and then signed (or otherwise adopted) by the declarant;

2. statements made under oath in a formal proceeding, such as a grand jury proceeding, deposition, or trial; and

3. statements stenographically or electronically recorded.

In adopting subsection (a)(3), the court of appeals used “stenographic” to mean contemporaneously preserved by a reliable stenographer, not, e.g., any police officer’s “shorthand.” Notes of November 18, 1993, open hearing, on file with author.
Under the pre-Maryland Rule 5-607 common law voucher rule, the party calling the witness could not impeach the witness by prior inconsistent statement, unless both surprised and affirmatively damaged by the witness’s testimony. No such surprise need be shown in order to introduce a statement under Rule 5-802.1(a), because it is offered not to impeach, but as reliable, substantive evidence.21

d. Erosion of the Nance Policy in Tyler

In Tyler v. State,22 the evidence established that either Tyler or the declarant, who were seated together in a car, had shot the victim (Len Bias’s brother, Jay). The declarant had given sworn testimony, at his own trial for the murder, that his cohort, Tyler, had killed the victim. But when asked about the shooting at Tyler’s subsequent trial, the declarant repeated only “I can’t answer that question,” despite the court’s order to answer.23 The witness’s attorney had informed the court that someone in a brown car had followed the witness and struck his car the night before he was to appear at Tyler’s trial and that the witness felt he was “in great danger if he testify[ed] in this case.”24

The court of appeals, in an opinion authored by Judge Chasanow, became stymied by the analytical problem of whether the assertion, “I can’t answer that question,” was inconsistent with the earlier testimony. The witness did not say, for example, “I fired the shots,” or “I never saw anything,” both of which clearly would have been inconsistent with his earlier testimony. What he said was, in this author’s opinion, and in accordance with the thrust of now Chief Judge, then Judge Joseph Murphy’s concurrence in the Court of Special Appeals’ decision affirming Tyler’s conviction,25 more akin to saying, “I have no memory now.” Several federal courts have treated a witness’s testimony to lack of present memory as “inconsistent” with prior statements in which the witness had purported to have memory.26

The court of appeals held that the witness simply had refused to testify at Tyler’s trial, and therefore not only had not “testified” inconsistently with his prior testimony at his own trial, but was not “subject to cross-examination” concerning that prior testimony.27

Some other states’ codifications, like Maryland’s, have dropped the requirement that the prior inconsistent statement be under oath. ARIZ. R. EVID. 801(d)(1)(A); DEL. UNIF. R. EVID. 801(d)(1)(A); MONT. R. EVID. 801(d)(1)(A); HAWAI I R. EVID. 802.1(1) provides for the admission of prior inconsistent statements which either were made under oath in a proceeding or in a deposition; or were “[r]ecorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means ....” PUERTO RICO R. EVID. 63 classifies all prior statements of a witness, both consistent and inconsistent, as falling within a hearsay exception. See also Graham, Proposed Amendments to Rules 801(d)(1)(A) and 613(b), in ABA, Litigation Section, Proposed Amendments to the Federal Rules of Evidence 53–66 (1985) (Graham proposes broadening FED. R. EVID. 801(d)(1)(A) to be more similar to the Hawaii rule and to read as follows: “A statement is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and [t]he statement is inconsistent with his testimony, and (i) is proved to have been made under oath subject to penalty of perjury at a trial, hearing or other proceeding or in a deposition, or (ii) is made by a declarant having personal knowledge of the underlying event or condition the statement narrates, describes, or explains and (1) the statement is proved to have been written or signed by the declarant, or (2) the making of the statement is acknowledged to have been made either (a) by the declarant in his testimony in the present proceeding or (b) by the declarant under oath subject to the penalty of perjury at a prior trial, hearing or other proceeding or in a deposition, or (3) the statement is proved to have been accurately recorded by a tape recorder, videotape recorder, or any other similar electronic means of sound recording ...”); Note, Substantive Admissibility of a Non–Party Witness’ Prior Inconsistent Statements: Pennsylvania Adopts the Modern View, 32 VILL. L. REV. 471 (1987).

23 See 342 Md. at 771-72, 679 A.2d at 1130.
24105 Md. App. at 508, 660 A.2d at 992-93.
26See infra note 46.
27342 Md. at 776-79, 679 A.2d at 1132-33.
Unfortunately, that conclusion permits the easy circumvention – by a witness’s repeating the mantra “I can’t answer that question” (instead of, as in Nance, “I don’t remember”) – of the policy behind Nance and Maryland Rule 5-802.1(a): the unwillingness to let a recalcitrant or threatened witness’s failure to testify at trial thwart justice. In an attempt to curtail the undesirable effects of the court of appeals’s decision in Tyler – with both possibly guilty parties not being convicted, even though the facts were clear that one of them was the shooter – the court, therefore, took pains to caution strongly against severance of the trials of co-perpetrators.28

### e. Corbett and the Further Multiplication of Divergent Paths

In Corbett v. State,29 the Court of Special Appeals further contributed to the undermining of the policy behind Nance and Maryland Rule 5-802.1(a), as well as Maryland Rule 5-104(a). The Corbett trial court had admitted, under Rule 5-802.1(a), a twelve-year-old alleged sexual abuse victim’s written and signed statement, made to the police, when at trial she testified to some of the surrounding events and to her making the statement, but stated that at trial she “could not remember” the abusive incident itself. A panel of the court of special appeals, in a well-researched opinion by Judge Byrnes, found this to be reversible error.

The appellate court held that the prior statement would be “inconsistent” with the witness’s trial testimony only if the trial court had found, under Rule 5-104(a), that the witness did remember, but was being evasive. The court of special appeals held, on the other hand, that the prior statement could not come in under Rule 5-802.1(a) if the trial judge believed that the witness really could not remember. The appellate court held that the trial court had erroneously admitted the prior statement, absent an explicit finding on this question, under Rule 5-104(a).

Interestingly, the Corbett decision is contrary to the opinion of another panel of the court of special appeals in Makell v. State,30 where, in a thorough and thoughtful opinion authored by Judge Moylan, the court of special appeals held that total loss of memory does not make the statement inadmissible, nor does it make the witness unavailable for cross-examination.

The distinction between feigned and real memory loss is not without support, however, in some of the lower federal courts’ case law, which is widely divergent on this controversial issue.31 But it seems to make no practical difference to the character or quantum of the witness’s trial testimony, whether the witness now is lying when she says she cannot remember (only then is the prior statement admissible under Corbett), the witness is telling the truth when she says she cannot remember (then the prior statement is inadmissible under Corbett), the witness testifies that she “can’t answer that question” (then the prior statement is inadmissible under Tyler), or the witness testifies “I didn’t see anything” (then the prior statement is admissible under Nance).

These are differences without distinction to the fact-finder. In each of these situations, the witness’s trial statements are inconsistent with his or her prior statements in which, as Chief Judge Murphy has explained, the witness implicitly said “I can answer,”32 or “I do remember.”

### f. The Confrontation Clause: The Heart of the Matter

The gravamen of the question seems more to be whether the witness is “subject to cross-examination concerning the statement,” as required by Rule 5-802.1(a). The witness is at trial and the fact-finder can see the witness’s demeanor.

The United States Court of Appeals for the Fourth Circuit, in affirming a conviction based in part on the grand jury testimony of a witness who, at trial, denied knowledge

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29No. 755 (Md. App. Mar. 1, 2000) (at the time of this writing, the time for filing a petition for certiorari has not expired).


31See infra notes 36-40 and 46 and accompanying text.

of the relevant facts, has pointed out the value to the fact-finder of seeing the witness at trial, and seeing the witness cross-examined, even if he did not testify to any relevant fact:

In this case, of course, Robinson [the witness] did appear on the witness stand. Indeed, the defendants complain that this prejudiced their cases in the minds of the jurors, but the judge ordered the initial examination of Robinson in the presence of the jury in order that the jury would not be left with speculation about the reason for Robinson’s absence, speculation which might have suggested inferences more hurtful to the defendants than Robinson’s refusal to testify. He was presented for cross-examination only after Robinson had stated in an in camera hearing that he might answer the questions of defense counsel, and that he could not tell whether he would respond until they asked the questions. Though, as we have indicated earlier, the jurors may have taken Robinson’s earlier disclaimers of knowledge as equivalent to a later explicit refusal to testify, they also may have received such disclaimers, with Robinson’s statement that his grand jury testimony was inaccurate, as exculpatory. In any event, the jury saw and heard Robinson on the witness stand. What they saw and heard may have been of substantial assistance to the jury in assessing the truthfulness of his grand jury testimony.33

In finding the admission of evidence constitutional, the Fourth Circuit relied on the fact that corroborating evidence proved the reliability of Robinson’s prior grand jury testimony.34 That avenue subsequently has been foreclosed by the United States Supreme Court’s decision in *Idaho v. Wright*,35 which held that the presence or absence of corroborating evidence is irrelevant to whether an out-of-court statement is sufficiently reliable to survive a confrontation clause challenge, and is relevant only to whether an error in admission was harmless or reversible.

But, in 1988, the United States Supreme Court, in *United States v. Owens*,36 held that a witness who presently had no memory of the subject matter of the prior statement is nonetheless “subject to cross” at the trial. The Court, in an opinion authored by Justice Scalia, rejected the argument that the confrontation clause required a distinction between a witness who feigned memory loss and a witness who really had memory loss.37 After all, “the witness’ assertion of memory loss – which . . . is often the very result sought to be produced by cross-examination, . . . can be effective in destroying the force of the prior statement.”38

33 See id. (“We do not hold, however, that this cross-examination under these difficult circumstances was adequate to meet the requirements of the Confrontation Clause. It is enough that the grand jury testimony was admissible because of its strong corroboration by the testimony of Miss McKee and the undeniable records.”) (citations omitted).

34 497 U.S. 805 (1990). See, e.g., *Simmons v. State*, 333 Md. 547, 636 A.2d 463 (1994) (reversible error to admit declaration against penal interest – signed confession made during police interrogation – of defendant’s cohort, who refused to testify; although “necessity” requirement of *Ohio v. Roberts* was met, State failed to meet its burden of showing particularized guarantees of trustworthiness of the statement, which did not fall within a “firmly rooted” exception; declarant had admitted to playing only a minor role in the offense and shifted major blame to others; *Idaho v. Wright* forbade consideration of corroborating evidence on question of trustworthiness, although corroborating evidence may be considered as to whether error was harmless). See *id.*


36 See *id.* See, e.g., *United States v. DiCaro*, 772 F.2d 1314 (7th Cir. 1985); *Van Hatten v. State*, 666 P.2d 1047 (Alaska App. 1983) (feigning witness is still “subject to cross-examination”).


The making of a statement qualifying under Md. Rule 5-802.1(a) need not be proved by the declarant’s trial testimony. See *Makell v.*

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The *Owens* majority held that an assault victim’s prior identification of the defendant as his attacker was admissible under Federal Rule of Evidence 801(d)(1)(C), as he was “subject to cross-examination concerning the statement,”<sup>39</sup> when he testified at trial that he remembered making the statement to an FBI agent but had no present recollection of the identity of his attacker and was unable to explain the basis for the identification. The victim’s memory loss was a result of severe head injuries caused by the beating at issue. The Court also held that the confrontation clause was not violated. The opportunity to cross-examine suffices.<sup>40</sup> (A different situation arises if the witness is called to the stand at the trial but refuses to testify by invoking a privilege.)<sup>41</sup>

Indeed, in apparent recognition of *Owens*, the court of special appeals in *Corbett* states that “the parties do not dispute that [the witness] was present at trial and subject to cross-examination concerning the statement.”<sup>42</sup> Yet the *Corbett* court requires the result as to admissibility to turn on the very distinction that *Owens* had rejected.

Moreover, despite the fact that the record provided sufficient indicia to support a reasonable inference that the child was feigning memory loss because she was reluctant to testify, the appellate court reversed and remanded, because the trial judge had not made such a finding on the record. Maryland Rule 5-104(a) does not, on its face, require that trial judges make every preliminary factual finding on the record. To impose such a requirement would be needlessly to build in a torrent of reversible error, even when the record suffices to support an *implicit* finding by the trial court.

**g. Comparison of Corbett with the Lower Federal Courts’ Approach**

Federal Rule of Evidence 801(d)(1)(A),<sup>43</sup> although narrower than Maryland Rule 5-802.1(a) in scope (in federal court, the prior inconsistent statement must have been under oath, in a formal proceeding),<sup>44</sup> has the same threshold requirements: that the declarant testify at trial.

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<sup>39</sup>484 U.S. at 561.

<sup>40</sup>See *id.* at 557-61 (noting, *inter alia*, that the advisory committee note to Fed. R. Evid. 804(a)(3), which defines a witness testifying to a loss of memory as unavailable, states that Fed. R. Evid. 804(a)(3) “clearly contemplates his production and subjectio to cross-examination”).

<sup>41</sup>See *United States v. Owens*, 484 U.S. at 561-62; *United States v. Torrez-Ortega*, 184 F.3d 1128 (10th Cir. 1999) (confrontation right precludes admission of prior grand jury testimony under Fed. R. Evid. 801(d)(1)(A), even when witness repeatedly invokes an unavailable privilege); *Weinstein’s Federal Evidence* § 801.10[2][a] & [b][ii][i] at 801-17-19 (Joseph M. McLaughlin, ed.) (2d ed. 1999) (prior inconsistent statement cannot be used if a privilege is successfully invoked but may be used if witness lacks memory). *Cf.* *Douglas v. Alabama*, 380 U.S. 415 (1965) (when declarant of out-of-court confession invoked self-incrimination privilege and was thus unavailable for cross-examination, defendant’s right to confront was violated by admission of confession).

and be subject to cross-examination concerning the prior statement.\textsuperscript{45}

United States v. Owens dispensed with the need to distinguish between feigned and real memory loss for confrontation clause purposes. Under the lower federal courts’ rulings, the trial court, in its discretion, may determine that a particular witness’s claimed lack of memory is sufficiently inconsistent with a prior statement to permit admission.\textsuperscript{46}

\textbf{h. Other Alternatives Pursued in the Federal System}

But it is important to recognize that, in the federal system, the problem of the recanting witness has been addressed in two additional ways. First, several courts, including the United States Court of Appeals for the Fourth Circuit, have applied Federal Rule of Evidence 804(b)(5) [now Federal Rule of Evidence 807], the hearsay residual exception, to admit reliable prior grand jury testimony of the now uncooperative or unavailable witness.\textsuperscript{47}

Maryland’s inhospitable decision in State v. Walker,\textsuperscript{48} however, seems to make it unlikely that the Court of Appeals of Maryland would permit such evidence under Maryland’s corollary rule, Rule 5-804(b)(5).

Second, under the new provision found in Federal Rule of Evidence 804(b)(5), an accused waives his or her confrontation right by procuring the absence or silence of a witness.\textsuperscript{49} The Rules Committee should evaluate whether to propose the adoption of a similar rule in Maryland.

\textbf{i. Conclusion}

Maryland’s courts must not lose sight of the policy determinations faced squarely in Nance. Shoring up the Nance doctrine, by rejecting the distinction drawn by the court of special appeals in Corbett and retreating from

\textsuperscript{45}See e.g., United States v. Murphy, 696 F.2d 282 (4th Cir. 1982) (at first trial, witness testified he did not remember; at second, the witness refused to be sworn).

\textsuperscript{46}345 Md. 293, 691 A.2d 1341 (1997).

\textsuperscript{47}FED. R. EVID. 804(b)(5) provides: “(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (5) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Cf: United States v. Fiore, 443 F.2d 112, 115 (2d Cir.1971) (a pre-Federal Rules of Evidence case, finding reversible error in admission of recalcitrant witness’s grand jury testimony; although witness took the stand at trial, he refused to be sworn, but did make answers such as “I don’t recall”).

In Fiore, the court of appeals suggested that, on re-trial:

[I]t is beyond possibility that the Government may be able to establish that [the witness’s] recalcitrance was due to “the suggestion, procurement or act of the accused,” see Motes v. United States, 178 U.S. 458, 471-472, 20 S. Ct. 993, 998, 44 L. Ed. 1150 (1900) in which event, as recognized in Douglas v. Alabama, supra, 380 U.S. at 420, 85 S. Ct. 1074, a different rule would apply. If ever there was a case where resort to the principle of Bryan v. United States, 338 U.S. 552, 560, 70 S. Ct. 317, 94 L. Ed. 335 (1950), is appropriate, this is it.

443 F.2d at 116.
the position taken in *Tyler*, is imperative. So, too, is an open mind to the appropriate use of Maryland Rule 5-804(b)(5)’s residual hearsay exception and the possible adoption of a rule like new Federal Rule of Evidence 804(b)(5) regarding wrongdoing that procures the unavailability of a witness. The problem of the recanting, intimidated witness will not go away; it threatens Maryland’s criminal justice system and must be forcefully addressed.

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INTRODUCTION

This article made its debut as a dramatic presentation at the Maryland State Bar Conference in Ocean City, Maryland on June 10, 1999. It presents a profile of six constitutionally significant cases argued before the Court of Appeals of Maryland. These cases, spanning a 150-year period, combined great lawyers, great issues and historic resonance.

State v. Buchanan was a sequel to McCullough v. Maryland and the 19th Century predecessor to the more recent savings and loan scandals. The case rewrote Maryland conspiracy law and featured an appearance by the U.S. Attorney General. It was also Luther Martin’s last big prosecution. Baltimore v. State involved the State’s takeover of the Baltimore City Police Department. It caused as much controversy as the State’s takeover of the Baltimore City School Board in 1997. The early property rights case, Weyler v. Gibson, anticipates modern takings, and constitutional torts litigation. University v. Murray laid the groundwork for the later Supreme Court decision in Brown v. Board of Education. The court’s decision in Schowgurow v. State had a devastating impact on the criminal justice system. The decision ultimately resulted in hundreds of retrials and two Supreme Court decisions on double jeopardy. Finally, Stuart v. Board of Supervisors, reminds us that it was not so long ago that a married woman was recognized legally only by the name of her husband.

The arguments below were developed and drafted based on a number of historical resources including appellate briefs, the case as reported in the Maryland Reporter, and other historical and biographical information provided by the Maryland Archives and the Administrative Office of the Courts. The authors of the arguments include the Honorable Glenn Harrell, Court of Appeals of Maryland, the Honorable Alan Wilner, Court of Appeals of Maryland, the Honorable Arrie Davis, Court of Special Appeals of Maryland, and attorneys Kevin Arthur, Michael P. Smith, Ralph Tyler, and Robert Zarnoch.

Narrator: The Court of Appeals of Maryland is probably the oldest appellate court in the United States.1 Although created by the State Constitution of 1776, its origin goes back more than a half century before, when the Governor and his Council exercised an appellate jurisdiction roughly equivalent to that of the House of Lords.2

Despite its ancient lineage, the court has not yet entered middle age. Its arteries are sound. It’s gait is sprightly and its heart and pulse beat strongly as it marches toward the millennium. Today, we will look at a small cross-section of the court’s history - six cases spanning 150 years. We do not claim that these are the six greatest cases in the court’s history. It might be impossible to assemble such a list. The greatest cases could still be waiting to be argued. But these six cases do have one thing in common; they resonate with history — legal history, Maryland history — the history of excellent lawyering in the State. And we hope you will agree that they ring with modern truths.

Journey back to the early part of the 19th Century — 1821 to be exact. The court is presently composed of six appointed judges who were also trial judges.3 It has

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1 See Proceedings of The Court of Appeals of Maryland, at the opening of the Court, statements of Judge Wilson K. Barnes, Oct. 10, 1972, 266 Md. at xxiii [hereinafter Opening of the Court].

2 See id.

3 See Carroll T. Bond, An Introductory Description of the Court of Appeals of Maryland, 4 MD. L. REV. 333, 334 (1940) [hereinafter Description of the Court of Appeals].
been located in a room in the State House for some 40 years, although the court also sits on the Eastern Shore.\(^4\)

We believe the judges wore robes, but they probably did not have an elevated bench. The room looks very much like a trial courtroom. There was no limit on the length of oral argument.\(^5\) It would not be until 1826, that the court would fix a six-hour limit on arguments on the Western Shore.\(^6\) Arguments by members — of what was probably a genuine appellate bar — could run for days and were marked by dramatic performance, flights of eloquence, learned allusions and, given their length, a great deal of tedium.

Our first argument combines two well-known components of Maryland legal history - banking scandals, like those experienced in the State in the 1960’s and 1980’s, and Luther Martin — venerable Attorney General, distinguished delegate to the Constitutional Convention, “the bulldog of federalism,” “Lawyer Brandy Bottle,” and early-American super-lawyer.\(^7\)

Toward the end of his long career, Martin, much like Ahab and the whale, became obsessed with the evils of the National Bank. He argued in the Supreme Court and lost 

\[\textbf{McCulloch v. Maryland},^8\] which held that the State could not tax a branch of the United States Bank. Undeterred, in 

\[\textbf{State v. Buchanan},^9\] Martin continued his assault. However, his was not a frivolous obsession. When Bank officers, James Buchanan, George Williams and James McCulloch wanted money from the bank, they simply took it without giving security or bothering to inform the Bank’s directors.\(^10\) Martin sought to indict them — charging a conspiracy to defraud and impoverish the Bank.\(^11\) While making the criminal presentments, Martin suffered a disabling stroke.\(^12\) The case moved forward, but upon a demurrer of the defendants, two judges of the County Court of Harford County (over a dissent) dismissed the case, apparently concluding that the indictment charged no crime and that the State court had no jurisdiction.\(^13\) The State appealed.

Despite the confusion of the official reports, in the court of appeals the defendants were represented by Daniel Raymond and William Pickney.\(^14\) The State was represented primarily by Henry M. Murray and Robert Goodloe Harper.\(^15\) Also involved in the case was United States Attorney General William Wirt, who was specially admitted after taking the required oath declaring his “belief in the Christian religion.”\(^16\) We will hear from Murray and Raymond.

\[\textbf{THE STATE v. BUCHANAN}\]^17

\begin{quote}
Henry M. Murray for Appellant: The first count of the indictment charges the Defendants, Mr. Williams, Mr. Buchanan and Mr. McCulloch with an executed conspiracy — falsely, fraudulently, and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish the President, Directors and the Company of the Bank of the United States.

These three men conspired together to obtain and embezzle a large amount of money and promissory notes
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\[^4\text{See id.}\]
\[^5\text{See Carroll T. Bond, The Court of Appeals of Maryland, A History 81 (1928) [hereinafter A History].}\]
\[^6\text{See id. at 137.}\]
\[^7\text{William L. Reynolds II, Luther Martin, Maryland and the Constitution, 47 Md. L. Rev 291, 321 (1987) [hereinafter Maryland and the Constitution].}\]
\[^8\text{17 U.S. (44 Wheat) 316 (1819).}\]
\[^9\text{5 H. & J. 317 (1821).}\]
\[^10\text{See Buchanan, 5 H. & J. at 319-322.}\]
\[^11\text{See id. at 323.}\]
\[^12\text{See Maryland and the Constitution, supra note 7, at 320.}\]
\[^13\text{See Buchanan, 5 H. & J. at 324.}\]
\[^14\text{See id. at 328.}\]
\[^15\text{See id. at 324.}\]
\[^16\text{See id.}\]
\[^17\text{5 H. & J. 317 (1821).}\]
for the payment of money, commonly called bank notes, the entire sum having a value of Fifteen Hundred Thousand Dollars in United States currency. This money was the property of the President, Directors, and Company of the Bank of the United States. It came out of the office of discount and deposit of the Bank in the City of Baltimore, the very office where Buchanan was president and McCulloh was the cashier, without the knowledge or consent of the President, Directors, or Company of the Bank of the United States.

The purpose of the conspiracy was to have and enjoy the money of the Bank for a long space of time — two months — without paying any interest or other sum and without securing the repaying of the money. In furtherance of this scheme, James W. McCulloh, the cashier of the office of discount and deposit, would falsely and fraudulently state and represent to the directors of the office of discount and deposit that the monies and promissory notes that were loaned had sufficient and ample security — the capital stock of the Bank. Williams, Buchanan and McCulloh carried out the scheme in abuse and violation of their duty and in violation of the trust reposed in them as officer of the Bank.

It is not open to question that the matters charged in the indictment amount to an offense that could be prosecuted as crime. Conspiracy is a crime and an offense at common law. The gravamen of the offense consists of the unlawful combination or confederacy to injure a third person. The State does not have to show actual execution of that unlawful or wrongful purpose. This was clearly the law of England. But when our ancestors came to this land and they settled the colony of Maryland they brought the common law of England with them as part of their birthright. The law of conspiracy was part of that law and it remains in full force here today as it was in England then. So the act of criminal conspiracy should be recognized by the courts of this State as it has already been recognized by other states in the United States.

Now the Defendants argue that Maryland courts cannot hear the case because the charges refer to the Bank of the United States. Nothing in Art. III section 2 of the Constitution requires the case to be filed in a United States court. The Ninth Amendment states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People.” The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States.” So therefore, the State of Maryland has retained the power to have these charges heard in its courts.

Daniel Raymond for Appellees: Your honors, the indictment below was properly dismissed. The statute 33 Edward §1 is the origin of the Law of Conspiracy. This statute does not include conspiracies to cheat. Cheating itself, with one or two exceptions like cheating with false weights, false measures or false dice, is not an offense that is punishable at common law. It would therefore be an absurdity to punish an agreement to cheat, when cheating itself is not punishable by the State.

Now the State has cited many, many cases either in argument or in submissions to you. Almost all of those cases are conspiracies to do acts which are themselves indictable. They have no application here. I am sure that in those many, many cases you might find a few of a different character, that are from doubtful authority, from which one might weave together a principle of law that is just absurd on its face — that you can be indicted for conspiracy to do something that in and of itself you cannot be indicted for. Those questionable cases do not justify a reversal here.

The State also contends that our ancestors brought with them the common law of England, and that that law as it sees it must be taken as established at the time of their emigration. Even if that is so, the common law in England at the time was that a conspiracy is not a crime unless it is to do some act which is itself indictable.

In addition, the indictments were properly dismissed because even if a naked agreement to cheat is indictable in this State, it must still be an agreement to cheat some person or being known to the laws of the state of Maryland. The Bank of the United States was created by a government foreign to Maryland. The Bank was created under the laws of the United States. An agreement to cheat the Bank of the United States is no more an offense against the laws of Maryland, than an agreement to cheat the Bank of England would be. So if this Court decides that the matters charged in the indictments are offenses punishable as a crime, the courts of this State still have no jurisdiction over the case. Such a crime being perpetrated
against an entity created by the United States is only cognizable in the Courts of the United States under Article III, Sections 1 and 2 of the Constitution.

Narrator: In 1821, the court reversed the dismissal of the indictment. Judge John Buchanan (no relation to the Bank officer), in a lengthy opinion, noted that Maryland had inherited the English common law on conspiracy and that the offenses were indictable even if nothing had been done in execution of the conspiracy. The court also held that the matters charged were not a crime against the United States, but a common law offense against the State of Maryland. Finally, Judge Buchanan said:

It may be admitted, that the legislature of the state has no right to pass laws calculated to control or impede the operations of the bank. But it is difficult to imagine, how a general power in the judicial tribunals of the state, to punish an offence against the State, can be considered as an unconstitutional interference with the concerns of the Bank of the United States, or in any manner endangering its security, only because its officers happened to be the objects of the prosecution . . . .

Despite the State’s victory in the court of appeals, the scoundrels eventually prevailed. Buchanan and McCulloch were later tried in Harford County and acquitted by the same 2-1 vote that marked the initial decision. Subsequently, Williams was acquitted, because by himself he no longer could be found guilty of a conspiracy.

Martin never recovered from his stroke. He moved to New York to be cared for by one of his former clients — Aaron Burr. Martin died in 1826.

In 1860 the court still occupied its traditional quarters in the State House, but a great deal had changed. As a result of the Reform Constitution of 1851, judges (who were now called “justices”) were elected. To protest the change, the entire membership of the court declined to run for election. In addition, the court of appeals now consisted of only four judges. Bowing in 1828 to Jacksonian democracy, judges no longer wore distinctive dress, and the Constitution now required written opinions.

Bigger changes were taking place in the State. Recurrent election day violence in Baltimore City by members of the Know Nothing Party had won for the City the unenviable title of “Mobtown.” Roving gangs with blood-curdling names such as the “Rip Raps,” the “Plug Uglies,” and the “Blood Tubs” “cooped up” drunks and led them to cast multiple votes for their own party, while intimidating the opposition from voting with bullets.

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18 See id. at 368.
19 See id. at 352.
20 See id. at 361.
21 See id. at 362.
23 See id.
brawn and mayhem — oftentimes with the assistance or sufferance of City Police officers. 34

In 1860 legislation came before the General Assembly to curtail such acts of lawlessness by creating a four-member Police Board of Baltimore City. 35 Unable to kill the bill on the merits, the Know Nothings piled on obnoxious amendments such as one banning “Black Republicans” or “endorsers or supporters of the Helper Book,” an anti-slavery tract, from serving on the new Board. 36 Nevertheless, the bill was enacted and was immediately challenged by the City, which contended that its charter was a constitutional one that could not be diminished by the transfer of control of the City Police; that only the Governor, not the General Assembly, could control appointments to the Board; and that the “Black Republican” disqualification was unconstitutional and not severable from the remainder of the Act. 37 Following a loss in the Superior Court, the City appealed. 38 Within weeks the case was before the court of appeals. Arguing for the City was Thomas Alexander. 39 Among those arguing for affirmance was legal legend Reverdy Johnson. 40

Baltimore City v. State 41

Thomas S. Alexander for Appellants: In the late session, the General Assembly of this State passed an Act for the purpose of repealing the powers of the Mayor and City Council of Baltimore to establish and regulate a police force, and in place of that power providing a permanent police for the City of Baltimore. The chartered rights of a large, prosperous city have been invaded by a legislative enactment which has no warrant in the Constitution.

The Constitution does not confer upon the legislature the power to appoint members of the Police Board. Appointment to office is peculiarly an executive, not legislative, power. Section 11 of Article 2 of the Constitution gives the legislature, in creating an office, power only to proscribe the mode of appointment. This can, by no legitimate manner of construction, be interpreted to grant the power of legislative appointment.

The Act transfers the whole existing police force of the City of Baltimore — officers and men — from the city government to the Commissioners. That is unconstitutional and illegal. The charter of 1796, in giving to Baltimore a local government, by unavoidable implication gave all the means necessary for the purpose of government, among which was a police power to maintain the peace and security of the governed. This is an inherent right, co-existent with the government, and cannot be separated from it. If the legislature has no power to repeal the charter of 1796, it also has no power to dismember the government created by it, by annulling and destroying important and indispensable powers.

It is further provided by section 6 of the Act, “that no Black Republican ... shall be appointed to any office under said Board.” The prohibition of the Black Republican introduces into our legislation the broad principle of proscription for the sake of political opinion. The invaluable birthright of every freeman is that he may express at pleasure his opinions on all subjects of public policy, restrained only by positive enactment to the contrary.

If a legislature in former days had proscribed the Roman Catholic or the naturalized citizen, it is presumed this Court would have no difficulty in pronouncing against the constitutionality of the provision. In principle, the proscription is the same. In degree the difference is that whilst the test of religion or of birth is susceptible of evidence, the test created by the Police Bill rests in the pleasure of the Police Board. What is Black Republicanism? A Black Republican may be defined to be one who thinks the area of slavery ought not to be enlarged. Again, he may be defined to be one who thinks Congress has power to legislate over the subject of slavery.

35 See art. 4, 1860 Md. Laws 312.
36 See id. at 315.
38 See id. at 380-401.
39 See id. at 407.
40 See id. at 411.
41 15 Md. 376 (1860).
in the territories. It is certain that in the letter of the proscription there is an elasticity which will, with willing minds, justify its expansion over two-thirds of the population of Baltimore. If this disqualifying clause is an operative part of the Act, the whole Act must be pronounced unconstitutional.

Reverdy Johnson for Appellees: The questions regarding the judgment of the court below fall under two heads: the first relating to the authority of the legislature to create a Board of Police and to appoint its members; and the second relating to the powers conferred on the Board.

As to the ability of the General Assembly to create and fill an office, it is sufficient to refer to Article 2, Section 11 of the Constitution which provides that the governor shall nominate and, by and with the advice and consent of the Senate appoint, all civil and military officers of the State whose appointment or election is not otherwise provided for “unless a different mode of appointment be prescribed by the law creating the office.” The power of appointment to office is not, under our form of government, a purely and inherently executive function.

The City of Baltimore maintains that because the Constitution recognizes the city as part and parcel of the organized government of the State, its charter is therefore placed beyond the power of the legislature to modify or change it. Yet it will hardly be pretended that it is beyond the power of the legislature to enlarge the limits of the city, by bringing portions of the county within its borders, or to confer upon the city authorities the discharge of other duties than those they now possess. Such has never been the construction of the Constitution. The charter of the city, from the day of its passage to the present, has constantly been subject to alteration and amendment by the legislature, and the inconveniences which would result from now placing it beyond the power of such alteration and amendment are so obvious that they need not be pressed. Nothing but plain and explicit language in the Constitution could effect such a result. Such language cannot be found in that instrument. It is clear that the people when they adopted the Constitution never supposed they were parting with the power to govern and control the City of Baltimore, and to pass such laws as they might deem the public good required to meet the constantly changing and increasing necessities of its population.

An objection is raised to the proviso that “no Black Republican, or endorser or supporter of the Helper Book, shall be appointed to any office under said Board.” It is said that this proviso proscribes persons for the sake of their political opinions. But, if such proscription was designed, it is totally at variance with the other provision of the law which requires the Commissioners to take an oath that they will not appoint any person to, or remove any person from any office under “on account of his political opinion.” It is a provision interjected into the Act repugnant to its whole scope and object, and if it imposes a disqualification for office not sanctioned by the Constitution, it will be stricken from the law without impairing the efficiency of the other parts of the law.

Narrator: As quickly as the case arrived in the court of appeals, it concluded. The justices had little trouble upholding the law, reasoning that the City was a creature of the State and that the Governor had no exclusive power to appoint that was infringed by the Police Reform Act. As to the “Black Republican” qualification for office, the Court’s opinion stated that “we cannot understand, officially, who are meant to be affected by the provis[ion], and, therefore cannot express a judicial opinion on the question.” Thus, this particular confrontation between City and State ended and order was restored on City election days. Of course, as a result of a series of later General Assembly enactments, the City regained control over its police force. However to this day, the City Police is by law a “state” agency. It would not be the last time that the General Assembly would transfer a major function from the City to the State. With varying degrees of City consent, in the 1990’s the jail and the local board of education were made subject to State control.

\[42\] See id. at 459-61.
\[43\] See id. at 468.
\[45\] See id.
It is nearly 50 years later. The court survived the Civil War and two more Constitutional Conventions. But a great deal had changed. There was no longer a special appellate bar and lawyers no longer wore long black coats and high silk hats. More elaborate briefs were required. Arguments were shorter and no longer sprinkled with classical allusions. “Justices” became “judges” again. By 1914 the judges would return to black silken gowns as the ceremonial dress. Most importantly, in 1903, after 122 years, the eight judges of the court moved out of the State House into a new courtroom on State Circle. One reason for the move, the need to house an expanding State law library, suggested the increasing complexity of the 20th century legal scene.

Our next case appears to be a small one. The Plaintiffs recovered a one-cent judgment against the State. Naturally, the Government appealed. However, appearances are deceiving and the eventual influence of the decision is immense. Ironically, it involved a dispute over a portion of “Great Constitution” Street in Baltimore City. The roadbed was owned by the Gibsons and on this property the State, without their consent, built an extension of the Maryland Penitentiary. The Gibsons sued John Weyler, the warden of the institution in ejectment. Weyler, the user, not the taker of the property raised the defense of sovereign immunity. Judge Alfred Niles rejected the defense and ordered judgment for the Plaintiffs, including a nominal damage award. On appeal, Weyler was represented by Attorney General Issac Lobe Strauss and the Gibsons by Frederick Fletcher.

**WEYLER v. GIBSON**

**Attorney General Issac Lobe Strauss for Appellant:** The State of Maryland may not be sued in this matter directly, nor indirectly through the warden of its penitentiary. The State, without its assent, cannot be impeded and ousted by its own courts from the possession and management of its institutions and property while discharging its public duties owed to the people composing our State. This is a firmly settled principle of law and public policy, supported by a legion of case authorities. I would note further to this honorable court that Warden Weyler, for the purposes of an action in ejectment, is not the true tenant in possession, nor is he a true party claiming adversely to the appellees’ interests. The warden is but a mere servant at will of the directors of the penitentiary. The directors, were they a named defendant here, could assert the immunity of the State, as well as the equitable defense that the appellees should not be heard in ejectment now when they stood by silently, resting on their rights, while the State expended public monies to erect the enlarged prison across Great Constitution Street. The warden, however, as a mere functionary, cannot personally assert such defenses. Appellees should not be permitted to maneuver this suit to choose an opponent whose choice of weapons with which to defend himself is so limited.

Finally, as the public closure of Great Constitution Street has not been consummated in a complete legal sense by the Baltimore City authorities, appellees are not entitled to maintain an action in ejectment for land that legally

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46 *See A HISTORY, supra* note 5, at 188-89.
47 *See id.* at 188.
48 *See Opening of the Court, supra* note 1, at xxiv.
49 *See Opening of the Court,* statements of Chief Judge Robert C. Murphy, *supra* note 1, at xxii.
50 *See* Weyler v. Gibson, 110 Md. 636, 651, 73 A. 261 (1909).
51 *See id.* at 648, 73 A. at 261.
52 *See id.* at 648-49, 73 A. at 261.
53 *See id.* at 650, 73 A. at 262.
54 *See id.* at 650-51, 73 A. at 261.
55 *See id.* at 648, 73 A. at 261.
56 *See id.* at 637, 73 A. at 261.
57 110 Md. 636, 73 A. 261 (1909).
remains impressed with a public easement as a street. If appellees have any right to sue, it is to sue the City and its commissioners for opening (and apparently closing) streets, for completion of the abandonment process and for a determination as to whether the value of their property interest is greater or lesser for having the street closed and whether the value of any public benefit accruing from closure would result in an assessment against appellees.

**Frederick H. Fletcher for Appellees:** It cannot be, indeed it has not been, disputed that my clients, the heirs of the late Governor Carroll and his wife, are lawfully the owners of the fee of the roadbed of Great Constitution Street. Likewise, it is patent that the State, without my clients’ permission and without compensation being paid to them, has taken upon itself to appropriate that land for use as part of the Maryland Penitentiary, thereby also denying to the public the former use of the land for its dedicated public easement as a road. Further, the State concedes, as it must, that its efforts to close Great Constitution Street legally were incomplete and imperfect.

My clients have every right to maintain this suit in ejectment. It may be argued that we are arrogant to ask any court to order the State to move or remove a structure, built with considerable public tax revenues, that is fifty-five feet tall with walls three feet thick. That, however, is not necessarily our objective. We ask rather that the wrong committed against my clients be remedied as the court sees fit.

Our Declaration of Rights declares that every man for any injury done to him in his person or his property ought to have remedy by the course of the law of the land, and that no man ought to be deprived of his property, but by the judgment of his peers, or by the law of the land, and section 40, Article 3 of the Constitution prohibits the passing of any law authorizing private property to be taken for public use, without just compensation as agreed between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation. Nor shall any State deprive any person of his property without due process of law. Speaking of the 14th Amendment of the Constitution, Judge Dillon says:

“[i]t was of set purpose that its prohibitions were directed to any and every form and mode of State action - whether in the shape of constitutions, statutes, or judicial judgments - that deprived any person, white or black, natural or corporate, of life, liberty, or property, or of the equal protection of the laws. Its value consists in the great fundamental principles of right and justice which it embodies and makes part of the organic law of the nation.”

If these rights are to have any meaning, the State cannot evade its obligations here.

**Narrator:** The court of appeals affirmed Judge Niles, resting its decision on constitutional grounds. The judges said that:

[I]t would be strange indeed, in the face of the solemn constitutional guarantees, which place private property among the fundamental and indestructible rights of the citizen, if [the] principle of [sovereign immunity] could be extended and applied so as to preclude him from prosecuting an action of ejectment against a State Official unjustly and wrongfully withholding property . . . .

The judges in essence told the State to settle the case or condemn the Gibson property. So presumably, they received a little more than a penny.

Although rarely cited for 80 years, in the 1980’s and 1990’s Weyler v. Gibson became the cornerstone of the court’s unique constitutional torts jurisprudence. As a result of Weyler, State and local officials have no immunity from a state constitutional claim such as taking of property or deprivation of due process. It is hard to imagine a greater deterrent to arbitrary and unconstitutional State conduct.

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58 See id. at 653-55, 73 A. at 263-64.
59 Id. at 654, 73 A. at 263.
60 See also Clea v. City of Baltimore, 312 Md. 662, 541 A.2d 1303 (1988)(reads Wyler v. Gibson as eliminating immunity for state constitutional torts).
A major event in the history of the Court of Appeals also happened to be a major event in the history of the civil rights movement and a major event in the life of Thurgood Marshall. It began in 1930 when Marshall was denied admission to the University of Maryland Law School solely because of his race.61 Instead of being allowed to attend a school in his home state that was a 10-minute trolley ride from his home, for three years Marshall had a grueling commute to Howard University in Washington, D.C.62 At Howard, Marshall graduated first in his class.63 After he passed the Maryland bar, he entered private practice.64 Soon, however, his major occupation was helping to rebuild the Baltimore branch of the NAACP65 and planning litigation to open doors for African Americans, particularly at post-graduate institutions such as the University of Maryland Law School.66

Marshall helped choose an ideal plaintiff to attack the segregationist policies of the law school — Donald Gaines Murray, a 20-year old Amherst graduate.67 Murray wrote once to the University and received back a form letter advising him of the school’s separatist policies, but of the possibility of a scholarship at an out of state school.68 He applied once, then twice to Maryland, but was denied admission on both occasions.69 The last letter notified Murray of the “exceptional facilities open to you for the study of law” at Howard University.70 Soon thereafter, Marshall filed a mandamus action against the University of Maryland, seeking Murray’s admission.71 Using the “Separate but Equal” doctrine as a sword, Marshall charged that the University’s policies denied equal protection because there was no state law school for African American students.72 Although there had never been a court-ordered desegregation of a public school, Marshall convinced Baltimore City Judge Eugene O’Dunne that the University’s exclusionary policy was unconstitutional and that a mandamus should issue.73 An appeal followed to the court of appeals. Arguing for the State was Assistant Attorney General Charles LeViness; for Murray, Thurgood Marshall.74

UNIVERSITY v. MURRAY75

Charles LeViness for Appellant: While preserving Maryland’s traditional policy of separation of the races, the State has met the demand of the negroes for higher education by establishing a system of scholarships to institutions out of the State for the exclusive use and benefit of colored students. This scholarship policy was launched by the Legislature of 1933, which provided that the Board of Regents of the University of Maryland might set apart a portion of the State appropriation for Princess Anne Academy and establish scholarships for negro students who might wish to take professional courses or other work not offered in Princess Anne but which were offered white students at the University of Maryland.

To its negro citizens who desire to take up law work, Maryland says substantially this: “under our policy of separate schools for both races it is permissible and proper

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63 See id. at 47-48.

64 See id. at 47-48.

65 See id. at 61.

67 See id. at 69.

68 See id. at 75.

69 See id. at 77.

70 See id. at 77.

71 See Appellee’s Brief at 4, University v. Murray, 169 Md. 478, 182 A. 590 (1936) (No. 53).

72 See id. at 5-6, Murray (No. 53).

73 See id. at 4, Murray (No. 53).

74 See id. at 6, Murray (No. 53).


76 See id. at 5-6, Murray (No. 53).

77 See Appellee’s Brief at 7, Murray (No. 53).

78 See id. at 7, Murray (No. 53).

79 See id. at 479-80, 182 A. at 590.

80 169 Md. 478, 182 A. 590 (1936).
for the University of Maryland Law School to deny your admittance. If you were admitted, you would have to pay the tuition fee of $203 a year. We cannot yet give you a separate law school in the State: there is no sufficient demand for it, nor sufficient money available to start it. However, to even things up, we will pay your tuition at some law school of your own selection out of the State. You will save the $203 tuition fee at Maryland and you may apply this money to your maintenance at the law school of your choice.”

The classification of students is a matter of internal State policy. If it were unconstitutional to classify on the basis of race, it also would be improper to classify on the basis of studies, or on the basis of sex. Certainly, it cannot be contended that if a state provided a law school for its citizens it also must provide a medical school, or an engineering school. The University of Maryland includes among its Baltimore schools a law school and a medical school. It does not include an engineering school. Yet, this is a discrimination in favor of those desiring to study law or medicine and against those desiring to study engineering. Similarly, a state might provide, without encountering constitutional objections, a certain school for men without a corresponding school for women. Distinctions on the basis of sex uniformly have been upheld by the courts.

In the absence of statute compelling mixture of the races at professional levels, it is submitted that the Regents are entirely within their rights in cleaving fast to Maryland’s traditional policy of separation.

Thurgood Marshall for Appellee: What is at stake here is more than the rights of my client. It is the moral commitment stated in our country’s creed. The State is under no compulsion to establish a state university. Yet if a state university is established, the rights of white and black are measured by the test of equality in privileges and opportunities. No arbitrary right to exclude qualified students from the University of Maryland is claimed by appellants except as to qualified Negroes, whom the administrative authority would reject on the sole ground of race or color.

While the Board of Regents of the University of Maryland has large and discretionary powers in regard to the management and control of the University, it has no power to make class distinctions or practice racial discrimination. The reason is obvious. A discrimination by the Board of Regents against Negroes today may well spread to a discrimination against Jews on the morrow; Catholics on the day following; red headed men the day after that.

The dual and inferior standard which appellants apply to Negro education is evidenced by the pitiful attempt of the President of the University on the witness stand to assert that just as good a course was offered at Princess Anne as at College Park. May it please the Court, a college of technology for Negroes does not compare equably with a college of law for white students, whatever the cost. It is the essence of the idea of “equality” in this case that the facilities be the same. There is no school of law for Negroes in the State of Maryland. Further it does not sound well for the agents of the State to complain that there is no great demand on the part of Negroes for collegiate and professional education, when the State itself has made it difficult for Maryland Negroes to qualify for collegiate and professional education because of the inferior elementary schools which the State and counties maintain and the absence of adequate high school facilities for Negroes.

The State’s scholarship program is a specious gesture to delude the Negro population of Maryland and keep it quiet. The scholarship is but a tempting mess of pottage held out to induce my client to sell his citizenship rights to the same treatment which other citizens of Maryland receive, no more and no less. Equivalents must also be considered in terms of self-respect. Appellee is a citizen ready to pay the same rate of taxes as any other citizen, and to go as far as any other citizen in discharge of the duties of citizenship to state and nation. He does not want the scholarship or any other special treatment.

We do not concede that it is constitutional for a State to export its obligations and to exile one set of its citizens beyond its borders to obtain the same education which it is offering to citizens of different color at home. It is not without significance that all the “free scholarships” which the State provides for its white citizens are in Maryland colleges and universities. Only its Negro citizens are exiled.

Finally, Mr. Murray is an individual. His years and days are numbered, and he cannot wait for his education until there is a mass demand to the satisfaction of the
A citizen’s constitutional rights receive protection on an individual basis.

**Narrator:** On January 15, 1936, Martin Luther King’s seventh birthday, a unanimous court of appeals affirmed, agreeing that Murray had to be admitted to the University of Maryland Law School. The building of a second school was not deemed an available alternative remedy. Chief Judge Bond wrote that “[c]ompliance with the Constitution cannot be deferred at the will of the State. Whatever system it adopts for legal education now must furnish equality of treatment now.”

We all know what happened to Marshall. In *Brown v. Board of Education*, he successfully attacked as unconstitutional the separate but equal doctrine he relied on in *Murray*, as the Supreme Court opened the doors of segregated public schools throughout the country. Then, as Solicitor General and later as Justice of the Supreme Court, Marshall continued his lifelong dedication to the preservation of civil rights. One biographer of Marshall has said that he was actually hoping for a loss in *Murray*, so that the issue might be taken to the Supreme Court for a ruling of greater impact. However, upon his retirement from the Court in 1991, Marshall admitted that his 1936 victory was “sweet revenge.”

After losing to Marshall, Assistant Attorney LeViness was quoted as saying that he hoped that Murray would “lead[] the class in law school.” Like his classmates, Louis Goldstein and Fred Malkus, Murray did not finish first in his class. But he graduated, became a respected member of the bar, practiced in Baltimore, and continued to devote his energies to NAACP civil rights work. His statue can be found in Lawyer’s Mall in Annapolis, not far from that of Marshall’s, on the very spot where the court of appeals building once stood.

It is 28 years later, and once again, much has changed both with respect to the court of appeals and the judicial system. A 1944 constitutional amendment reduced the size of the court to five judges, but more importantly confirmed the court’s key executive and legislative roles in the administration of the state judicial system. By the 1960’s, the Supreme Court’s criminal justice revolution foreshadowed the need for an intermediate appellate court to handle the suddenly heavy workload of criminal cases. However, Maryland was to create its own mini-criminal justice revolution stemming from a routine murder case tried in the Circuit Court for Cecil County in the late summer of 1964.

Lidge Schowgurow, a Buddhist who disavowed a belief in God, was accused of murdering his wife. He was indicted by a grand jury and convicted by a petit jury required by Article 36 of the Maryland Declaration of Rights to believe in the existence of God. Challenging his conviction of first degree murder as a violation of the First and Fourteenth Amendments to the United States Constitution, Schowgurow appealed to the court of appeals. He was represented by J. Grahame Walker; the State, by Assistant Attorney General Roger D. Redden.
**SCHOWGUROW v. STATE**

**J. Grahame Walker for Appellant:** Mr. Schowgurow was raised in the Buddhist faith. In an affidavit duly filed, he stated that the Buddhist religion to which he adheres does not teach a belief in the existence of God or a Supreme Being. He challenged the compositions of the grand jury which indicted him and the petit jury which tried and convicted him because Article 36 of the Declaration of Rights requires jurors to express a belief in God and that requirement deprives him of due process and equal protection of the law.

Four years ago, in *Torcaso v. Watkins*, the Supreme Court told the State of Maryland that it’s requirement that public officers believe in God invaded their freedom of religion. What is unconstitutional for an officer is no less offensive for jurors.

The jurors in this case were sworn in accordance with the requirements of Article 36 and obliged to profess their belief in God. It is common knowledge that substantial minorities do not profess to believe in God and it is presumed that such persons exist among the citizens of Maryland and the residents of Cecil County.

We do not need to know how many Buddhists live in Cecil County or whether they were deliberately excluded from the grand and petit juries. No proof of discrimination is needed where the State Constitution requires the exercise of discrimination. Article 36, by its very terms, sets apart and discriminates against a segment of citizens who do not believe in the existence of God. It clearly prohibits an accused, whether a believer or a non-believer, from being tried by a jury composed of persons who do not believe in God, as well as persons professing a belief in God. Its application can easily result in prejudice to an accused when his lack of belief is manifested to the jury by his failure to take the oath before testifying.

The First Amendment proscribes the use of essentially religious means to serve governmental ends. The trial, conviction and punishment of an offender is solely a government function for the protection of society. Its secular character is obvious, but is perhaps best illustrated by the imposition of a death sentence, which would be hard to justify under any known religion. If the doctrine of separation of church and state is to mean anything, this Court should find that Article 36 has violated Appellant’s constitutional rights and his conviction must be set aside.

**Assistant Attorney General Roger D. Redden for Appellant:** Due process of law is an oracular concept, which eludes expository definition. Even the prodigious intellect of Justice Frankfurter found the task staggering. But, however complex the problem of definition, one finds solace, and at least visceral comprehension, in resort to due process’s equivalent and basic measure — fairness.

The question before this court is one of fairness alone, and in that portion of the criminal process which is devoted to the selection of jurymen, fairness requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammeled by any arbitrary and systematic exclusions.

The Appellant, a Buddhist, asserts that his co-religionists have been *a priori* excluded from Cecil County jury service because (1) they do not believe in the existence of God and (2) nonbelievers are excluded from Cecil County jury service on account of Article 36 of the Maryland Declaration of Rights.

Here is the center of dispute. Mr. Schowgurow has proved nothing beyond his own allegiance to the Buddhist faith. He has not even tried to prove anything else. There is nothing in the record to show that there has ever been a single adherent of Buddhism resident in Cecil County who, aside from the belief-in-God issue, was otherwise qualified to serve as a juror, let alone that any Buddhist was excluded from the call or, being called, was excluded from the panel for failure to affirm his belief in the existence in God.

The only pertinent evidence of any kind is the uniform declaration of the oaths administered by the Clerk of the Circuit Court for Cecil County: “In the presence of Almighty God, you . . . do solemnly promise and declare that . . . .” This declaration is no filter through which nonbelievers cannot pass. Appellant negotiated it himself without difficulty when he testified during his trial, a fact which exposes the desperate emptiness of his present claim, something conjured up from a series of unfounded assumptions.

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240 Md. 121, 213 A.2d 475 (1965).
As to the Torcaso decision, it helps not hurts the State’s position. First, to the extent that Maryland caselaw may be construed to opine that the discovery of a single nonbeliever on a panel voids that panel’s action, it was overruled by Torcaso, which held that expression of a belief in the existence of God could not be imposed as a condition precedent to holding public office.

Second, Mr. Justice Black’s identification of Buddhism as an atheist religion in Torcaso does nothing but confirm what the encyclopedists tell us. It does not create any presumption as to the extent of Buddhist practice in Maryland. It does not plant nor evangelize Buddhism on the Eastern Shore. It does not oblige the State’s Attorney for Cecil County to canvass the countryside for naysaying witnesses to prove what is a good deal closer to common knowledge than the tenets of Buddhism - that resident adherents to Buddhism are unknown to Cecil County.

The Appellant has not met minimal standards of showing unfairness and his conviction should be affirmed.

Narrator: The Schowgurow case was reargued and the panel included specially assigned Circuit Court Judge Shirley Jones, the first woman to sit on the Court of Appeals (however briefly). The court, in October 1965, announced its anguished but almost inevitable decision that the belief in God requirement for grand and petit jurors was unconstitutional.89 Rejecting the State’s and a dissent’s contention that no prejudice had been shown, the majority held that an actual showing of discrimination was not necessary when the exclusion of nonbelievers was “not only authorized but demanded by the Maryland Constitution.”90 In a seeming victory for the State, the court held that its decision did not apply retroactively “except for convictions which have not become final.”91 But later decisions made it clear that a defendant could not implicitly waive this issue if his or her conviction was not final before Schowgurow.92 According to the Attorney General, this meant that two or three thousand defendants had to be reindicted.93

Not only did Schowgurow move the criminal justice system into overdrive, but when some defendants on retrial received a higher sentence, double jeopardy claims were pressed. These Maryland cases eventually reached the Supreme Court and convinced the Justices for the first time to apply the Double Jeopardy Clause of the Fifth Amendment to the states.94 As to Lidge Schowgurow, after his retrial resulted in a hung jury and a mistrial, he pled guilty in exchange for an 18-year sentence.95

Our last argument occurred some 28 years ago and, although the Court appeared to change very little since 1965, the world had changed immeasurably. The typical woman was no longer a “June Cleaver.” She had entered the workforce, the marketplace, and the practice of law. She was no longer imprisoned by stereotypes or quietly willing to accept discrimination. Mary Emily Stuart was such a woman.

Married to Samuel Austell, Ms. Stuart continued after her marriage to use her birth name.96 But when she tried to register to vote with the local election board, she was told that under state law she had to register as Mrs. Austell.97 Stuart promptly filed suit in the Circuit Court for Howard County, raising both statutory and constitutional claims to the apparent state bar to the use of her real name.98 Denied relief, she appealed to the court of appeals

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89 See id. at 131, 213 A.2d at 482.
90 See id.
91 See id. at 131-32, 213 A.2d at 482.
92 See e.g., Schiller v. Lefkowitz, 242 Md. 461, 219 A.2d 378 (1966) (holding that while the rule of Schowgurow applies to civil cases, it does not apply retroactively even to those cases not finalized prior to the date of Schowgurow).
97 See id. at 442, 295 A.2d at 224.
98 See id.
and was joined by a number of Friends of the Court, including the ACLU represented by Ruth Bader Ginsburg. Stuart was represented by Arold Ripperger; the State Election Board by E. Stephen Derby.

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STUART v. BOARD OF SUPERVISORS

Arold Ripperger for Appellant: Mary Emily Stuart testified below that her marriage to Samuel Austell was “based on the idea that we’re both equal individuals and our names symbolize that.” Indeed, she said she would not have gotten married if it would have jeopardized her name. Her name is on charge accounts, her driver’s license and social security registration. Everyone, she testified, knows her by the name Mary Stuart.

Neither Maryland common law nor its election laws force her to deny the truth and register to vote in her husband’s name. The common law rule is that a person may adopt any name he or she wishes in the absence of fraud or deceit.

As it was at common law, so now is it the option of a married woman to choose the name that she desires to use. Nellie Marie Marshall retained the name of her first husband at the time of her second marriage. Amy Vanderbilt, who has been married four times, said, “I have always used my maiden name.” Lynn Fontanne, of the fabled Lunt and Fontanne acting team, adopted a hyphenated name, Fontanne-Lunt, as her legal name. Lucy Stone looked upon the loss of a woman’s name at marriage as a symbol of a loss of her individuality and consulted several eminent lawyers, including Salmon P. Chase, later Chief Justice of the United States, and was assured that there was no law requiring the wife to take her husband’s name, only a custom. She remained Lucy Stone.

It is true that § 3-18 of the Election Code requires clerks of court to notify election boards of the “present names” of women over the age of 18 after being advised of a “change of name by marriage.” However, that statute does not apply in this case. Mary Stuart did not change her name by marriage. There was no duty to advise the clerk, no duty on the part of the clerk to advise the election board, and no duty or authority of the election board to question the name under which Mary Stuart sought to register to vote.

If Maryland’s law required a false registration by Mary Stuart, it would be unconstitutional. As the Amicus ACLU has argued, sex like race and alienage is an immutable trait, a status into which class members are locked by the accident of birth. The requirement that a married woman assume her husband’s name to register to vote is not reasonable, but places her in equal status with infants, lunatics and convicted felons. By whatever name the Board of Elections calls its practice - administrative convenience, necessary procedure, mandatory requirement, it is discrimination and discrimination based solely on sex. In its simplest terms, a married woman is denied the statutory right to contract with her husband or she is denied her constitutional right to vote.

Assistant Attorney General E. Stephen Derby for Appellees: Today it is almost a universal rule in this country that upon marriage, as a matter of law, a wife’s surname becomes that of her husband. While a wife may continue to use her maiden name for professional and other purposes, her name as a matter of public record is that of her husband.

The provisions of § 3-18 on their face are premised upon an assumption by the legislature that a woman’s name does change when she marries, in accordance with the common law rule. Any other conclusion would deprive the provisions of meaning because the only information possessed by the clerk of court is the fact of the marriage. The administrative application of the statute to require every woman voter who has married to change her name on the registration books gives the section meaning. If a married woman could elect whether to adopt her married name for voting, then the purpose of the statute in furthering the State’s interests in preventing voter fraud, in providing an accurate trail of identification, and in uniform record keeping would not be served.

The State Elections Administrator testified that there are approximately 1,762,000 registered voters in

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99 See id. at 441, 295 A.2d at 223.
100 See id. at 441, 295 A.2d at 223-24.
101 266 Md. 440, 295 A.2d 223 (1972).
Maryland. Assuming one half are female and the majority of them are or will be at some time married, it will be necessary to have a trail to identify persons and to prevent voter fraud. If a married woman could register under different names, the identification trail would be lost. As a practical matter, the election boards of the State are not in a position to make complicated factual determinations as to whether a married woman voter is not and has never been known by her married surname. Therefore, it is reasonable for the boards, to insist always upon use of the surname adopted by marriage unless a married woman has taken the relatively easy step of changing her name legally for all purposes by a court order.

There is simply no constitutional issue in this case involving a denial of the right to vote because appellant has not been denied that right. It is completely within her power and discretion to register to vote. She is required to do so in her legal name, whether by common law or custom, but no burden is imposed upon her which impinges upon her right to vote.

To the extent that the court may find that a discrimination does exist, it is one based on sex and marriage because of the automatic consequent that, absent a legal change of name, a woman’s surname becomes that of her husband upon marriage. If it exists, the discrimination is one caused by the uniform common law rule or custom, applicable to married women, and it is not one involving the elective franchise. The right involved is the right to assume any name a person wishes. However, the right to assume a name of one’s choice does not have constitutional status. Rather it is based on common law. Furthermore, the Supreme Court has yet to hold that discriminations based on sex are inherently suspect.

Whatever inconvenience the State rule may cause Appellant is slight when weighed against the interests of the State in uniform recordkeeping, in accurate identification of voters, and in preventing voter fraud.

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**Narrator:** A month before state voters approved an Equal Rights Amendment, and on October 9, 1972, in his first opinion of his 24-year career on the court, Chief Judge Robert C. Murphy, concluded that Maryland common law permits a Maryland woman to retain her birth name and to use it nonfraudulently after her marriage.\(^{102}\) The majority, over one dissent, also found that state election laws did not forbid such use because Stuart did not undergo a “change in name by marriage.”\(^ {103}\)

The very next day, the judges dedicated a new courthouse on Rowe Boulevard — the court’s present location.\(^ {104}\) At the same time, the court adopted distinctive new judicial garb — actually a return to the dress worn by members immediately after the Revolutionary War: scarlet rather than black robes and a stock with tabs.\(^ {105}\) More than location and robes would change, as within a few short years, the court would have its first woman and African-American members. Now more than 223 years old, the Court of Appeals of Maryland remains a progressive and respected institution, with much of its glorious history remaining to unfold.

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THE NECESSITY OF MEDICAID PLANNING
by Jason A. Frank, Esq.

I. Introduction

Lawyers counseling clients on the legal means to reduce expenses by maximizing societal benefits is a venerated legal tradition. As Judge Learned Hand opined:

We agree with the . . . taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.1

Yet the specific practice of lawyers advising elderly disabled clients of the benefits obtainable under the Medicaid Program is often attacked as a scurrilous perversion of the intent of the law to provide assistance only to the “truly needy.”2 The reality, however, is that the extraordinarily high cost of long term care, particularly in relation to a typical senior’s income, makes qualification for the Medicaid program an inevitability.

As we enter the new millennium the picture of long term care in America can be painted in stark contrasts. The population of elderly is increasing with almost Malthusian precision. With that increase is a concomitant increase in demand for long term care services. The cost of long term care, however, can so severely diminish a lifetime of savings that Medicaid planning becomes a necessity for all but the very wealthy. This article will discuss the cost of long term care services and why private pay options may be insufficient to cover the expense of such care. This article will also explore how the practice of Medicaid planning provides an essential service to those individuals seeking to utilize the benefits provided under Medicaid law.

II. Background

In 1996 the population of persons aged 65 and older in the United States was estimated to be 33.9 million, or 12.8 percent of the total population.3 This figure represents an eight percent increase over previous estimates for this segment of the population.4 This dramatic rise in the elder population is traced to a number of factors, including the population explosion known as the post World War II “Baby Boom” and the significant advances in medicine that have resulted in an increase in the average life expectancy.5 The most rapid growth in the elder population is expected between the years 2010 and 2030 when it is projected that approximately 70 million persons, or 20 percent of the United States population, will be over the age of 65.6 This surge in the elder population will most certainly necessitate an increased demand for long term care services. Statistics show that in 1995 1.4 million or four percent of persons over the age of 65 were nursing

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1Helvering v. Gregory, 69 F.2d 809, 810 (1934).
3AARP & THE ADMINISTRATION ON AGING, PROFILE OF OLDER AMERICANS, 2 (1997). Within the over 65 population, approximately 55 percent are aged 65-74, 34 percent are aged 75-84, and 11 percent are aged 85 and over. See id.
4See id.
5See id. at 3. As of 1996, the average life expectancy for a female at age 65 is 19.2 years and 15.5 years for a male. See id.
6See id.
Articles

home residents. Today it is estimated that 43 percent of those 65 and older will require some form of nursing home care.

Not only will the number of people requiring nursing home care increase, but the age of the average nursing home resident will increase as well. The age of a resident is a significant factor in determining the resident’s economic status. For example, a nursing home resident who is over the age of 80 is likely to have been retired for at least 15 years. Any retirement income acquired during the resident’s lifetime would have suffered a substantial decrease and left the resident with severely depleted financial resources. As reported in the study entitled, The Economic Status of Elderly Nursing Home Users, Joshua M. Wiener found that:

Financial status declines precipitously between retirement age and first nursing home use. At the time of their first entry to a nursing home, 31 percent of nursing home admissions had less than half of their income and financial assets at age 67. About half had less than 70 percent of their initial retirement income and assets at the time of admission to a nursing home.

This study further suggests that, on average, nursing home residents are “fairly low-income” and have “relatively few assets, except for a house.”

These income statistics for the over 65 population are not encouraging when one considers the prospect of paying for long term care. In 1995 the median annual income for a male over 65 was $16,684 and only $9,626 for a female over 65. The Administration on Aging reports that “[f]or all older persons reporting income in 1996 (31.2 million), 40% reported less than $10,000. Only 18% reported $25,000 or more. The median income reported was $12,214.” Almost one-fifth of those over 65 was poor or near poor in 1996. Among the elderly population, persons who are unmarried or widowed, living alone, and chronically disabled, tend to have higher poverty rates. These traits “[a]lso describe the nursing home population.” Women, for example, constitute as much as 75 percent of the nursing home population. Based on the foregoing data, it is likely that the average nursing home patient is female, lives in poverty, and is totally incapable of paying for her long term care.

III. The Cost Of Long Term Care Services – Current Options

Financing nursing home care is a nearly insurmountable problem. Of particular concern is the skyrocketing cost of services. In 1992 the annual cost of nursing home care ranged from $18,000 to $60,000 with an average estimated cost of $37,000. Of these costs,
at least one half were paid out of pocket by the elderly nursing home resident. In 1993 the out of pocket expense for an elderly nursing home resident represented 51 percent of the $54.7 billion dollars spent that year on nursing home services. This figure, which does not take into account the subsidiary expenses associated with long term care, is expected to increase 147 percent by the year 2018. Given the astronomical cost of nursing home care, it is virtually impossible for an individual or a couple to privately finance the total cost of nursing home services out of income alone. Only the very wealthy, categorized as having an income of at least $5,000 per month, have resources that can sustain fifteen or more years of post retirement support.

Private pay of nursing home services at an average cost of $37,000 depletes an individual’s savings and inevitably strains the resources of the individual or family member responsible for financing the nursing home care. In many cases, private pay only delays the inevitable resort to public assistance. With private pay rates substantially above medical assistance reimbursement rates, private pay presents a particular hardship to those individuals who are admitted for shorter stays. Once these residents return to the community, they must attempt to provide for their daily needs with little or no assets. As one commentator noted, “[i]f an individual has to exhaust most of the assets accumulated over a lifetime the first time a long-term care need arises, then both the individual and spouse will thereafter have to depend upon the faceless bureaucracy of the welfare system.” Faced with total impoverishment in the face of private pay rates far above income, many of the nation’s elderly are searching for alternatives.

A. Private Pay

Given the high cost of care, many of the elderly residents in nursing homes already are or will become impoverished as a result of their institutionalization. The House Select Committee on Aging estimated that in 1987 “over 600,000 elderly Americans were forced into poverty paying for their health care for themselves or for their loved ones.” It is also estimated that approximately half of those who privately pay for nursing home care must turn to public assistance within three to five years of institutionalization. This problem is further compounded by the fact that the nursing home patient also suffers at least one disability. When one considers that “56.9 percent of disabled elderly age 75 and older had less than $10,000 in financial assets [excluding home equity] . . .” private pay is not a viable option.

B. Family Contribution

Many times when an elderly relative requires nursing home care, the family will finance the cost of such care out of their own pockets. However, family contribution to the cost of nursing care is not a realistic alternative as it serves to reduce the ability of future generations to provide for their own long term care by diminishing the assets available for later generations. Thus, a strong economic argument exists against encouraging family members to take on the burden of financing an elderly family member’s long term care needs. Moreover, “[o]ut of pocket expenditures also hobble the efforts of these caregivers to save for retirement while simultaneously caring for their elders, their children, and trying to put aside enough for their children’s higher education.” In many cases, the financial contribution required from a family member who assumes

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21See id. at 19.

22Such costs include health insurance premiums, co-pays, and deductibles; items not covered by medical insurance such as hearing aides, eye glasses, and dentures, and items not covered by public assistance.

23See Wiener & Illston, supra note 20.

24INFORMATION PLUS, INFORMATION SERIES ON CURRENT TOPICS: GROWING OLD IN AMERICA, 90 (1994).


26See Rein, supra note 18, at 248.

27Id.
the costs of paying for nursing home care could have catastrophic effects on future generations.

In addition to the financial drain on existing assets and resources, family caregivers suffer financial loss in the form of diminished income and earnings.30 Family members who assume responsibility for the care of family members may need to take time off from work, and in some instances outright departure from the workplace is necessary.31 The net effect of the financial and emotional strain placed on family caregivers is a reduction in the accumulation of wealth and private retirement pension benefits available to support these family members in their own retirement years.32 According to a study commissioned by the American Association of Retired Persons (“AARP”), “40.6 percent of caregivers incurred some expenses as part of their role . . . .”33 Further, “10.1 percent of caregivers were found to have spent 25-50% or more of their income on home care needs.”34 Within this group, 6.8 percent exhausted more than half of their income.35 The net result is that caregivers “pay the price” of long-term care needs of family members.36 Not only do family caregivers suffer the loss of financial security, but they also suffer the loss of time spent away from their own families and friends, loss of physical and mental well being, and a loss of recreation time.37

C. Long Term Care Insurance

Long term care (“LTC”) insurance is the often-cited panacea for the problem of financing long term care. However, LTC insurance imposes a major financial burden on those consumers who can and do purchase policies. Long term care insurance is privately funded insurance which provides coverage for costs that may result from care provided in a long term care facility such as a nursing home, assisted living facility, adult medical day care, respite care, or for individual services provided in the patient’s home. Generally, insurance carriers or Medicare pay expenses arising from hospitalization. The Medicare coverage may cease immediately upon discharge from the hospital or may continue for a short time if the patient is admitted to a nursing home and their medical condition justifies skilled medical care. When the health insurance coverage ends, the patient must pay privately for continuing long term care.

The premiums for a LTC policy are a significant expense. As the likelihood of requiring long term care increases with age, so do the premiums.38 In addition, a number of questions exist concerning the affordability, quality and reliability of available insurance products. Presently, LTC policies are not popular with consumers.39 A consumer study conducted by UNUM Life Insurance Company of America found that 37 percent of those polled “had not purchased long-term care insurance because they think they can’t afford it.”40 Furthermore, between 40 percent to 85 percent of senior citizens cannot afford LTC insurance premiums.41

Several problems exist which contribute to the significant expense of LTC insurance. The first problem is that LTC insurance is only desirable if one anticipates a

\[^{30}\text{See id.}\]
\[^{31}\text{See id.}\]
\[^{32}\text{See id at 269.}\]
\[^{33}\text{Rein, supra note 18, at 268.}\]
\[^{34}\text{Id.}\]
\[^{35}\text{See id.}\]
\[^{36}\text{See id. at 269.}\]
\[^{37}\text{See id.}\]
need for long term care. As one study suggests, “[t]he dilemma is that when people’s interest in purchasing long-term care is greatest - when they are elderly - the policies are unaffordable.” Thus, the trend toward purchasing LTC insurance because of need directly affects its affordability.

Second, LTC insurers cannot offer affordable policies since the LTC market, unlike other insurance markets, cannot avoid adverse selection. That is, insurers cannot draw premiums from a large and varied pool of clients which contain a significant number or beneficiaries who will never require long term care. In addition, since “[c]alculation of risk and assignment of value are among the central precepts in the insurance industry,” a primary problem in the LTC insurance market is that insurers are not able to spread the risk among purchasers. The inability to spread the risk also leads to the industry standard that involves disqualification of many potential elderly clients due to preexisting conditions. This is reflected in the limited coverage that many LTC insurance policies offer. It is estimated that 61 percent of people now in nursing homes would not have received any benefits from their LTC policies. One study found that:

Generally, long term care policies [will not] cover the following: health problems you had before you bought the insurance policy — called preexisting conditions; mental or nervous disorders or diseases other than Alzheimer’s or related dementia; alcohol or drug addiction; illnesses caused by an act of war, self-inflicted injuries, attempted suicide, and any treatment already paid for by the government.

It is therefore evident that many elderly consumers will simply not qualify for a LTC policy, and would be unable to purchase private insurance to finance their long term care.

A third factor contributing to the high cost of LTC policies is that the majority of policies are sold individually to elderly clients. Compared to the private health insurance markets, where insurers are able to let employers absorb the administrative costs associated with marketing private health insurance policies, many elderly consumers individually pay higher administrative costs including marketing and advertising.

Presently, the high cost associated with LTC insurance makes the purchase of such policies appropriate only for select individuals. In order to consider purchasing LTC insurance, “[g]enerally, a married couple should have at least $100,000 in assets, excluding their home, and a single person should have at least $40,000 in assets.” Thus, a “catch-22” dilemma arises: LTC insurance is only affordable to those persons with a minimum amount of assets; this in turn limits the number of persons available to purchase LTC insurance. If this trend continues, LTC insurance will remain unaffordable.

Another problem with the purchase of LTC insurance is that it is difficult to predict what kind of long term care benefits an individual will need. Advocates argue that LTC policies are most affordable when consumers are younger and healthier. For example, a LTC policy purchased at age 55 might only cost $500 a year. This same policy would cost at least double if the same person purchased

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42See Erick J. Bohlman, Financing Strategies: Long-Term Care For The Elderly, 2 ELDER L.J. 167, 187 (1994). “In the area of long-term care, the average person generally has less than an eight percent probability of requiring nursing home care for more than five years.”

43Id.

44Wiener & Illston, supra note 20, at 19.

45See id.

46See id. note 42.

47See id. at 186. In addition, most policies exclude coverage for conditions which first appear six months after purchasing the policy. See id.

48See Rein, supra note 18, at 285.
this policy at age 65.\textsuperscript{52} Consumer Reports states that “[r]oughly two thirds of men now 65 will never enter a nursing home.”\textsuperscript{53} Thus, purchasing policies at a younger age means paying thousands of dollars in premiums for over twenty years or more without ever receiving any benefits. Another danger lies in purchasing an inadequate policy at age 55, for example, which would not cover the actual long term care costs incurred due to the lack of realistic expectations at the time of purchase as to what kinds of benefits would be required 25 years later.\textsuperscript{54} In fact, many LTC policies are overly restrictive and will not pay benefits if you go to the wrong type of nursing facility.\textsuperscript{55} At present, LTC insurance is not a viable option for addressing the long term care needs of the growing elderly population.

IV. The Medicaid Program

The foregoing demonstrates that private pay, financial assistance by family members, and long term care insurance do not begin to solve the problem of financing long term care for those persons with limited assets and resources. Take, for example, a couple with assets valued at $100,000. Private pay for nursing home care at cost of $37,000 annually for just one spouse would deplete their total financial resources in less than three years and result in total impoverishment of the healthy spouse and the disabled spouse. Asking family members to help defray the cost of care proportionately reduces that family member’s ability to pay for their own long term care needs. Finally, long term care insurance is not an option for the couple in this example since their total assets are valued at $100,000 or less. While this hypothetical couple would not be considered “poor” in the strictest sense, they face the potential of total impoverishment in order to meet the costs of their long term care needs. Consumer Reports states that “[f]or the nonpoor elderly, the need for nursing-home care often spells the end of financial as well as physical independence.”\textsuperscript{56} It is, therefore, no surprise that many elderly, once middle class, inevitably turn to the state medical assistance program to help defray the cost of long term care.

“Medical Assistance, or Medicaid, is a means-tested program that provides long-term care coverage to institutionalized persons who meet the technical, financial, and medical eligibility criteria established in federal and state law.”\textsuperscript{57} The program, which was established under federal law, is the largest insurer of long term care.\textsuperscript{58} “Medical Assistance provides comprehensive medical insurance for long-term care, including nursing facility services, services that are equivalent to nursing facility services and are provided by any institution, and services provided under a home and community based waiver.”\textsuperscript{59} Medicaid providers agree to accept the Medicaid reimbursement rate as payment in full and may not seek from a recipient the difference between the Medicaid payment and their private-pay rate.

Medicaid is a welfare program designed to assist those families or individuals with limited resources and income with their medical needs. The eligibility requirements are quite specific and state agencies must administer individual programs in compliance with federal statutory and regulatory requirements.\textsuperscript{60} The majority of states establish income and resource limits, using the

\textsuperscript{52}See Merline, supra note 48 at 16.

\textsuperscript{53}Long Term Care Insurance Special Report: What to expect from Medicaid, supra note 40, at 40.

\textsuperscript{54}See Who Pays for Nursing Home?, CONSUMER REPORTS, Vol. 60, No. 9, p. 591 (Sept. 1995).

\textsuperscript{55}See Long Term Care Insurance Special Report: What to expect from Medicaid, supra note 40, at 43.

\textsuperscript{56}Id. at 36.

\textsuperscript{57}Jason A. Frank, Elder Law in Maryland, 1996, at 394.

\textsuperscript{58}Medicaid covers 68 percent of nursing home residents and over 50 percent of nursing home costs. Health Care Financing Administration, Medicaid Eligibility, (last modified Aug. 2, 1999) <http://www.hcfa.gov/medicaid/melibig.htm>.

\textsuperscript{59}Frank, supra note 57.

Supplemental Security Income ("SSI") rules as the base. An exception to the SSI based requirement involves existing programs which were allowed to continue to exist under a grandfather provision (commonly referred to as 209b states).

Categorically needy recipients are mandatory Medicaid coverage groups and include, for example, recipients of SSI. States may also include certain aged, blind, or disabled adults who have income above those requiring mandatory coverage but below the Federal poverty level, or institutionalized individuals with income and resources below specified limits.

The medically needy program permits states to extend Medicaid eligibility to additional qualified individuals who have too much income to qualify under the categorically needy groups. The medically needy option allows an individual to "spend down" their income and resources in order to qualify for Medicaid. Spending down is achieved by offsetting excess income by incurring medical or remedial care expenses. This offset results in a reduction of total income to a level below the eligibility maximum. One can also qualify as medically needy by paying monthly premiums to the state in an amount equal to the difference between family income and the income eligibility standard. The Health Care Financing Administration states that "[l]ow income is only one test for Medicaid eligibility; assets and resources are also tested against established thresholds." Medicaid eligibility is not entitlement, rather, it is a means tested program that requires one to meet the eligibility requirements in order to receive benefits.

Financial eligibility under Medicaid is determined by countable resources and the income of the applicant, or for married applicants, by the applicant and spouse. The financial eligibility requirements for Medicaid may be met if the individual’s total countable resources do not exceed the medical assistance resource standard at any point during the month of application. For example, in the State of Maryland, the resource standard is $2,500 for an individual and $3,000 for a couple sharing a room. If a Medicaid recipient acquires resources that lead to excess resources, he or she must spend down to the applicable resource level within 30 days to maintain uninterrupted Medicaid benefits.

Resources are spent down by purchasing items for the recipient, paying debts, pre-paying for funeral expenses, or reimbursing the Medicaid program for expenditures made for the recipient’s care. However, if the resources are not reduced below the resource standard within 30 days of when the resource is received, eligibility will terminate. The recipient must then pay privately for his or her care at the current private pay rate until he or she has again spent down to the resource level.

V. The Necessity Of Medicaid Planning

The complex structure of the eligibility requirements forces individuals to seek help in order to assess their potential eligibility and plan accordingly. Understanding Medicaid and its requirements, eligibility rules, income thresholds, resource tests, exceptions, exemptions and allowances necessitates careful evaluation and planning. Planning for Medicaid eligibility has evolved as a necessary part of receiving Medicaid benefits under any circumstances. Furthermore, the increasing complexity of the Medicaid rules and regulations has lead to more complex Medicaid planning.

See 42 U.S.C. § 1396r (1995). An exception to the SSI based requirement involves existing programs which were allowed to continue to exist under a grandfather provision (commonly referred to as 209b states).

See Medicaid Eligibility, supra note 58.

See id. See also 42 U.S.C. § 1396d(a) (1994).

See Medicaid Eligibility, supra note 58.

Id.
A. Medicaid De Facto Policies

The Medicaid program has a number of de facto policies that militate in favor of Medicaid planning. For example, the program policies and rules regarding asset transfers, calculation of penalties, and allowable exemptions all require planning in order to properly understand and make use of the program provisions that must be followed in order to qualify for benefits. It would be irrational to assume that the Medicaid program has adopted requirements which are meant to be ignored or that can only be met by chance. All statutory provisions that allow eligibility, given certain criteria, are intended to be available for those persons who can meet such criteria.

The Medicaid criteria governing asset transfers authorizes individuals to make such transfers without incurring a period of ineligibility for benefits under limited circumstances.68 These kinds of asset transfers are considered “exempt” asset transfers. An example includes Medicaid authorized transfers to a spouse or to a third party for the sole benefit of the spouse.69 The rules also allow asset transfers to certain disabled individuals or to certain kinds of trusts established for those individuals.70 A person who wishes to become eligible for Medicaid may, therefore, transfer assets to protect needy and disabled family members and still receive benefits. Even those asset transfers that are not expressly authorized by Medicaid (considered “non-exempt”) do not prohibit benefits altogether, but only limit an individual’s eligibility for Medicaid.

Non-exempt asset transfers are subject to the look-back period of the Medicaid program. This means that if a transfer of assets for less than fair market value is found within 36 months (or within 60 months for trusts)71 of an individual’s application for Medicaid, the state must withhold payment for various long term care services for a period of time referred to as the penalty period.72 Medicaid does not, however, prohibit eligibility altogether. It merely penalizes the asset transfer for a certain period of time.73 The fact that transfers are only looked at for 36 months prior to application clearly indicates that asset transfers prior to 36 months will not compromise an individual’s Medicaid eligibility. The adoption of the 36 month look back period is one de facto policy of the Medicaid program that promotes planning of asset transfers.

The calculation of the penalty period is another de facto policy of the Medicaid program that requires complex analysis in order to understand how the calculation operates. Effectively, the provision for a penalty calculation devised under the Medicaid program promotes the transfer of countable assets prior to an application for Medicaid benefits. The asset transfer penalty is determined by dividing the total uncompensated value of the asset transferred by the average private-pay cost of care in the state.74 For example, if the private-pay cost of care in state “A” is equal to $4,300, then state A will penalize an individual one month of ineligibility for every $4,300 transferred. The penalty begins the first day of the month in which the transfer is made. This means that an individual can give away $4,300 in each month that he or she does not ask Medicaid to pay for the nursing home care. Therefore, the total cost for each month not subsidized by Medicaid as a result of a period of ineligibility equals the difference between an individual’s income and the private-pay cost of care plus $4,300. Dividing the value of the individual’s total countable resource by this amount determines the maximum number of months an individual

69See id.; see also Health Care Financing Administration, Transfers of Assets, (last modified Nov. 18, 1996) <http://www.hcfa.gov/medicaid/obs8.htm>.
71See id.
72See id.
can transfer resources while retaining sufficient funds to cover the cost of care during the transfer penalty period.\textsuperscript{75}

For individuals with increased assets, but insufficient income to pay their cost of care (e.g., individuals with assets of $250,000 to $400,000), the de facto policy is that they can protect any assets beyond what it costs to pay for their care for three years. As previously mentioned, the 36 month look back period requires that any transfer of assets must take place 36 months prior to an application for Medicaid.\textsuperscript{76} However, these individuals must retain enough assets to pay for their cost of care for three years. Therefore, as long as an individual can afford to pay privately for care during the three year look-back period, the Medicaid program allows asset transfers for an individual with increased assets. In order to understand whether an individual may transfer assets and what penalty, if any, will be imposed after an asset transfer, an individual must engage in a certain amount of evaluation and planning.\textsuperscript{77}

\textsuperscript{75}For example, if an individual has assets valued at $94,900, nursing home costs of $4,500 per month, and an income of $1,500 per month, the appropriate amount of assets that the individual should transfer would be calculated as follows: The difference between the cost of care ($4,500) and monthly income ($1,500) is the “deficit” ($3,000). The deficit is added to the state “A” penalty rate of $4,300 month. (i.e., [\$4500 - \$1500] + [\$4300] = \$7,300) Dividing the total assets ($94,900) by $7,300 equals 13, which is the number of months an individual must be able to privately-pay the deficit. Therefore, the individual should retain $39,000 (13 x $3000) and transfer $55,900 ($55900 / $4300 = 13 months). This formula is a mathematical equation which has evolved as a result of the statutory penalty provision for asset transfers, known as the “half loaf” formula, because protecting half of the assets for the family is better than protecting none. It would be unreasonable to expect an individual to pay more than what is absolutely necessary or required. Medicaid in effect authorizes asset transfers after the fact through the imposition of the penalty period. The de facto policy for individuals is that they can protect half of their assets if they are willing to pay the other half for their care.

\textsuperscript{76}See 42 U.S.C. § 1396r-5.


\textsuperscript{79}See id.

\textsuperscript{80}See id.

\textsuperscript{81}See id.

\textsuperscript{82}See id.

\textsuperscript{83}See id.

\textbf{B. Spousal Impoverishment}

In addition to these policies regarding non-exempt asset transfers, Medicaid policies also exist regarding exempt asset transfers that promote the need for Medicaid planning. One such policy arises from the provisions designed to protect against spousal impoverishment.\textsuperscript{78} The spousal impoverishment provisions apply where the member of a couple who is in a nursing facility or medical institution is expected to remain there for at least 30 days.\textsuperscript{79} When the couple applies for Medicaid, an assessment of their resources as of the first day of the month of institutionalization is conducted. The couple’s resources are combined and exemptions for the home, household goods, an automobile, and burial funds are deducted.\textsuperscript{80} The resultant figure is used by the state to determine the community spouse’s protected resource allowance.\textsuperscript{81}

The community spouse’s protected resource allowance is an amount equal to one-half of the couple’s combined countable resources as of the first day of the month of nursing home placement.\textsuperscript{82} However, this amount may not exceed the federal maximum resource standard nor may it be less than the federal minimum resource standard.\textsuperscript{83} Spend down of the unprotected resources can be made for the benefit of the community spouse depending on individual state medical assistance policy. At minimum, the use of annuities to spend down assets by purchasing an income stream for the community spouse allows medical assistance eligibility for institutionalized spouses in a matter of two or three months.

Another Medicaid provision that protects against spousal impoverishment concerns the income of the
community spouse. Income in the community spouse’s name is not considered available to the spouse who is institutionalized. The state, therefore, uses income eligibility standards for one person rather than two. This policy encourages a community spouse to plan accordingly and to purchase annuities to boost his or her monthly income while having the nursing home spouse’s care subsidized by Medicaid. These provisions compel a certain amount of planning for couples who face the prospect of one spouse requiring institutionalization. These guidelines, as with others, must be taken into consideration when an individual considers whether Medicaid will subsidize the cost of long term care.

Creation of a trust represents another type of exempt asset transfer under the Medicaid regulations. There are five types of trusts that are exempt from resource consideration for Medicaid eligibility purposes. These trusts include: (1) Miller trusts, (2) pooled asset trusts managed by non-profits, (3) trusts funded for disabled children or other disabled individuals under age 65, (4) supplemental needs trusts funded by third parties, and (5) any trust funded with the assets of a disabled person who is under the age of 65. In the case of an exempt trust, the trust funds are not counted as resources available to the Medicaid applicant. Transfers of assets into exempt trusts are not penalized; rather, federal Medicaid law and regulations sanction the practice.

VI. Income Tax Planning vs. Medicaid Planning: A Comparison

The types of asset transfers involved in Medicaid planning are not unlike those used for tax planning. Though the techniques involved in both practices are the same, the practice of tax planning is widely accepted in this country while the practice of Medicaid planning is often criticized. Federal tax law creates a number of options that allow taxpayers to defer or avoid paying income tax and to conserve family resources. Complete tax avoidance deprives the government of revenue. For example, the practice of investing in deferred income “tax shelters” converts the government from the role of “tax-gatherer” to that of investor. Some investments such as triple tax-free municipal bonds allow individuals to avoid paying taxes altogether. Arguably, the most common tax avoidance technique to reduce overall tax liability is the deductibility of mortgage interest. Other exemptions, such as those found in federal gift and estate tax law, allows an individual to give away up to $675,000 without incurring any tax liability. In addition, an individual may give away an unlimited amount of assets in increments of $10,000 or less in order to escape taxes. The tax avoidance techniques of gifting funds, retitling assets, and funding trusts are often the same tools used in Medicaid planning. Furthermore, it is often asserted that the federal government had the same goal in mind, that of conserving resources for families, when it developed the Medicaid and tax law.

As quoted above, Judge Learned Hand extolled the value of paying minimal income tax. This value is imbedded in the American way of life. Every taxpayer attempts to manipulate the tax laws in order to receive the maximum amount of deductions, exemptions, and other tax breaks. Each year millions of dollars in tax are not paid to the federal government due to the efforts of professional tax planners who use the allowances created under statutory guidelines. As Congressman William Green stated:

Taxes are always paid grudgingly and heavy taxes naturally meet with much opposition, however necessary they may be. . . . So much ingenuity has been used in inventing methods whereby less taxes would be paid that we have been obliged from time to time to change our revenue laws to meet these evasions . . . .

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85See 42 U.S.C. § 1396p(d)(4)(C) (1994). In the case of a d(4)(a) trust, medical assistance eligibility will not be compromised provided that, at the termination of the trust, the funds will be used to reimburse the state for Medicaid benefits paid to that applicant. See 42 U.S.C. § 1396(p)(d)(4)(a) (1994).


Generally, while the practice of tax planning is sanctioned and ethical considerations are not debated when speaking of not paying income tax, the practice of Medicaid planning is viewed with disdain. While tax attorneys are rarely criticized for counseling their clients to take advantage of the federal tax laws, some Medicaid attorneys are scorned for counseling their clients to take advantage of federal and state Medicaid law. The bottom line is that tax planning is a practice that sets out to deprive the federal government of revenue, while Medicaid planning allows individuals to receive much needed long term care at a time when they are most financially vulnerable. The distinction between practices that allow senior citizens with limited resources to receive government funded health care and allowing individuals of any age to conserve their personal wealth by avoiding payment of their share of income or gift and estate tax is an illusory one.

Although it is argued that Medicaid was originally intended for the “truly impoverished,” the legislative structure of Medicaid demonstrates otherwise. The “truly impoverished” do not need to worry about asset transfers, property exemptions, and other resource guidelines because the “truly impoverished” presumably do not have the kind of resources that these Medicaid provisions were designed to protect. It is, therefore, arguable as to whom Medicaid was intended to cover. What is clear, however, is that if an individual meets the eligibility criteria, he or she is entitled to receive benefits.

VII. Support For Medicaid Planning

An individual’s right to receive Medicaid benefits was confirmed by the recent focus of federal legislators on Medicaid planning. As discussed in the foregoing section, federal law allows certain transfers of assets up to 36 months prior to an application for Medicaid benefits and certain transfers to trusts up to 60 months. Such transfers result in a period of ineligibility for medical assistance.\(^88\) In 1996 Congress attempted to criminalize asset transfers under Medicaid. Section 217 of the Health Insurance Portability and Accountability Act of 1996\(^89\) was signed into law on August 21, 1996. Section 217 applies to any individual who:

\[\text{[K]}\text{nowingly and willfully disposes of assets . . . . in order for an individual to become eligible for medical assistance under a state plan under title XIX, if disposing of the assets results in the imposition of ineligibility for such assistance under [42 U.S.C. § 1396p(c) . . . will be guilty of a misdemeanor if convicted and subject to fines up to }\$10,000\text{ or imprisonment of up to }1\text{ year or both.}\]

However, it was quickly realized that this provision could not criminalize lawful asset transfers.

In Peebler v. Reno,\(^90\) plaintiffs filed an action for declaratory relief seeking a judicial declaration that 42 U.S.C. § 1320(a)-7b(a)(6) was unconstitutional. The court found that an individual, who had “waited out” the ineligibility penalty period before filing a Medicaid application, even if the individual transferred assets during that period, did not trigger Section 217.\(^91\) A person, therefore, who transfers assets and waits for three years or until the penalty period has expired to apply for Medicaid incurs no criminal liability.

Congress subsequently replaced Section 217 with Section 4734 which provided that whoever:

\[\text{[F]}\text{or a fee and knowingly and willfully counsels or assists an individual to dispose of assets (including any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance . . . .}\]

\(^88\)See 42 U.S.C. § 1396p(c) (1994).
\(^89\)See 42 U.S.C. § 1320a-7b(a)(6).
\(^90\)Id.
\(^91\)965 F. Supp. 28 (D. Or. 1997).
\(^92\)See id. at 31.
This modification attempted to criminalize counseling for the disposition of assets in order to qualify for Medicaid rather than the actual transfers themselves. However, the change was an unsuccessful attempt to curtail what had been thought of as the widespread use of Medicaid planning to qualify improperly for Medicaid. On March 11, 1998, Attorney General Janet Reno wrote to Congress refusing to enforce Section 4734. The Attorney General stated:

[T]his is to respectfully inform you that, after close and careful scrutiny of the matter, the Department of Justice will not defend that constitutionality of Section 1128B(a)(6) because the counseling prohibition in that provision is plainly unconstitutional under the First Amendment and because the assistance prohibition is not severable from the counseling prohibition.94

The Attorney General’s letter further declared:

[T]he new Section 1128B(a)(6) of the Social Security Act would prohibit attorneys and other professional advisors from ‘counsel[ing]’ their clients to engage in an estate-planning strategy that itself is lawful. Under these unique circumstances, and in light of the fact that, pursuant to this provision, professional advisors such as attorneys would be prohibited from providing truthful, non-misleading advice to their clients about lawful behavior, we are unable to identify a governmental interest that would justify this restriction on protected speech.95

Finally, the Attorney General informed Congress that the Department of Justice would not bring any criminal prosecutions under the current version of Section 4734.96

In New York State Bar Association v. Reno,97 the New York State Bar Association challenged the constitutionality of section 4734 on the grounds that it violated the First and Fifth Amendments.98 The court issued a preliminary injunction preventing the federal government from enforcing the statute that made paid counseling or assistance to, an individual attempting to shift assets in order to qualify for Medicaid punishable by a fine or one year in prison.99

Other courts have similarly upheld the legality of medical planning. In In re John XX,100 an elderly man suffered a stroke, was hospitalized, and then transferred to a nursing home. The man suffered significant and permanent cognitive dysfunction.101 The guardian petitioned the court for approval to transfer $640,000 of the disabled man’s assets to his children.102 The transfers were “intended as a Medicaid and estate planning device to shield the bulk of... assets from a potential Medicaid lien for the cost of the nursing facility services...”.103 The Supreme Court of New York found that “there being little question that, barring death, John will require continued nursing home care, the cost of which will exhaust his assets, it cannot be reasonably contended that a competent, reasonable individual in his position would not engage in the estate and Medicaid planning proposed in the petition.”104 The court also found that during the relevant period, federal law made no provision for the imposition of any penalty for transfers made prior to the look-back

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98 See id. Specifically, the New York State Bar Association argued that section 4734 was unconstitutional because: (1) it unconstitutionally restricted free speech; (2) it was overly broad and violative of the First Amendment; and (3) it was vague and violative of the Fifth Amendment. See id at 713.
97 See id. at 716.
101 See id. at 81.
102 See id.
103 Id.
104 Id. at 82-83.
date. The court stated that “the simple fact is that current law rewards prudent ‘Medicaid planning.’”

Similarly, in In re Daniels, the New York Supreme Court recognized the value and reasonableness of asset transfers when it held that “a competent, reasonable individual . . . would prefer that his property pass to his child rather than serve as a source of payment for Medicaid and nursing home care bills where a choice is available.”

This court also acknowledged the lawfulness of Medicaid planning when it stated that “[i]t appears that . . . the law provides a manner for her to preserve a portion of her estate for the benefit of her daughter and the issue of her other daughter.” The court’s opinion in Daniels not only upheld the legality of Medicaid planning, it also recognized the significance of preserving personal wealth for future generations. In effect, this was also recognition of the value of inheritance.

Inheritance is another legislative process through which individuals and couples are able to plan how to dispose of property and other assets in the event of death. In Magoun v. Illinois Trust & Sav. Bank, the Supreme Court held “[t]he right to take property by devise or descent is the creature of the law . . . .” The Court, in Keeney v. Comptroller of New York, later held that the power to regulate inheritance is within the domain of state power, and, “the State may confer particular rights of succession, but with them impose conditions, limitations, classifications, and impositions upon the right of each particular succession granted.”

Thus, inheritance represents yet another legislative vehicle that may be used to convey property, subject to fees and limitations imposed by the federal government, with the primary objective of conserving wealth.

The practice of passing property on to future heirs through inheritance is solely a creature of law, and as such is accepted without question as a legitimate practice. In addition, the widespread ratification by state legislatures and courts of the inheritance process reflects the social value inherent in that process. As one author suggests, “[i]nheritance does seem to occupy a special place in the hearts of many Americans, even those who cannot realistically expect to inherit anything of significance.”

This value is reflected in the fact that approximately $150 billion passes at death each year. This tradition of inherited wealth is firmly rooted in our historical customs. These historical customs have been embodied in legislative enactments and judicial holdings. The customs involved in Medicaid planning are similarly embodied in federal regulations and have, thus far, been upheld by the courts.

VIII. Conclusion

The gross disparity between the average income of the disabled elderly and the cost of long term care mandates that some public assistance program be available. Medicaid, the only such program currently available, predicates eligibility for assistance on meeting strict income and asset tests along with a number of carefully circumscribed exceptions. As the number of disabled elderly grows into the millions, and cures for the causes of institutionalization continue to elude medical science, both

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105 See id at 83.

106 Id.

107 618 N.Y.S.2d 499 (Sup. Ct 1994).

108 Id. at 504.

109 Id.

110 70 U.S. 283 (1898).

111 Id. at 288.

112 222 U.S. 525 (1911).

113 Id. at 529-30.


115 Id. at 75.

116 See id. at 72.

117 In his Commentaries, Blackstone stated that “[a] man’s children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became, therefore, generally the next immediate occupants, till at length, in process of time, this frequent usage ripened into general law.” 2 William Blackstone, Commentaries *11-12.
the social and personal costs of long term care will continue to increase.

Those who advocate abandonment of long term care funding in favor of privately financed care, either through personal or family responsibility or private long term care insurance, are ignoring the realities of the costs of long term care. Family assets and hopes for better lives for children and grandchildren pass from the realm of possibility when a relative is institutionalized. The considerable cost of financing long term care results in depleted resources for both the institutionalized individual and, in many situations, a family member who assumes responsibility for such care. Additionally, long term care insurance, drawn from a pool of the healthy and wealthy, can never provide a comprehensive private alternative to a direct government role in financing long term care.

Until the need for Medicaid planning is eliminated, this service will remain an absolute necessity for the millions who face the financial devastation of paying for long term care. The perhaps all too human urge to get the most benefit at the least cost, such as tax avoidance, has resulted in a demand for lawyers whose practice includes a detailed knowledge of the Medicaid eligibility rules and how best to plan for eligibility.

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AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS: EXPLORING THE EFFECTIVENESS OF STATE EFFORTS

by Jennifer J. Stearman, Esq.

“They explained the defendant’s constitutional rights to the nth degree. They couldn’t do this and they couldn’t do that because of his constitutional rights. And I wondered what mine were. And they told me, I haven’t got any.” — a victim

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1PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, at 114 (1982) [hereinafter FINAL REPORT].

2See U.S. CONST. amend. IV (providing freedom from unreasonable searches and seizures and requisite probable cause for issuance of warrant); U.S. CONST. amend. V (requiring a grand jury indictment for trial on a capital offense, prohibiting double jeopardy, protecting against self-incrimination, guaranteeing due process of law); U.S. CONST. amend. VI (providing in criminal trials the right to a speedy, public trial by an impartial jury, the right to notice of charges, the right to confront witnesses, and the right to an attorney); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment).

3Several legal commentators have attempted to provide an explanation for the lack of constitutional provisions protecting the rights of crime victims. See generally Richard Barajas & Scott Alexander Nelson, The Proposed Crime Victims’ Federal Constitutional Amendment: Working Towards a Proper Balance, 49 BAYLOR L. REV. 1, 8-11 (1995) (providing historical information regarding the role of the crime victim and indicating that the English common law tradition was one of private prosecutions); Jennie L. Caisse, Passing the Victims’ Rights Amendment: A Nation’s March Toward a More Perfect Union, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 647, 649-53 (1998) (describing the evolution of the justice system that initially provided private prosecutions in England and Colonial America, to a more organized criminal-law system which includes public prosecutions); Kathleen Kalaher, The Proposed Victim’s Rights Amendment: Taking a Bite Out of Crime or a Dog With No Teeth?, 22 SETON HALL LEGIS. J. 317, 323-324 (1997) (examining the historical background of the victims’ rights movement, and tracing the evolution underlying the movement from private actions against the defendant to state involvement); Thad H. Westbrook, At Least Treat Us Like Criminals! South Carolina Responds to Victims’ Pleas for Equal Rights, 49 S.C. L. REV. 575, 576-78 (1998) (tracing the United States system of justice to early English law that placed responsibility for justice on the victim, not the modern-day prosecutor).

4See generally FINAL REPORT, supra note 1, at 114 (documenting crime victim testimony that reflects frustration and feelings of re-victimization by the criminal justice system due to institutionalized disinterest); Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment, 1994 UTAH L. REV. 1373, 1375 (stating that crime victims “have come to believe that the criminal justice system is out of balance, that their voices are not heard, and that the system is preoccupied with defendants’ interests and rights”).


6For individual state electoral support, see Appendix A.

7See infra Part II.C.
Despite the apparent public support for VRAs, not everyone supports this sweeping movement. Some legal scholars have suggested that VRAs would only be “symbolic” victories, and would fail to provide any real expansion of crime victims’ rights. Scholars and legislators are also concerned about the potential impact a federal VRA would have on defendants’ rights. Recently, United States Senators, critical of the effort to enact a federal constitutional amendment regarding the rights of crime victims, suggested that before passing such legislation, “[a]t a minimum, we should explore the effectiveness of the state efforts and the nuances of their various approaches before grafting a rigid, untested standard onto the U.S. Constitution.”

While much scholarly debate has transpired over the efficacy of a federal VRA, little scholarly inquiry has been devoted to assessing the actual effectiveness of those VRAs adopted and in use by the states. This article presents an initial step in the process of exploring the effectiveness of state efforts to provide constitutional rights to victims of crime. It is designed to address the concerns raised by Congressional leaders in considering the federal proposed amendment.

The article begins with a brief historical overview of the modern victims’ rights movement, including the legislative history relevant to the proposed federal amendment and an examination of the current proposed federal amendment. It then provides a comparison of rights afforded crime victims by the variety of adopted state VRAs. Thereafter, the article surveys state appellate court decisions interpreting VRAs. In light of these rulings, the article suggests how the proposed federal amendment is likely to be construed.

II. BACKGROUND
A. The Modern Victims’ Rights Movement in the United States

The political momentum of the modern crime-victim movement began to escalate during the 1970s, when federal and state statutes aimed at providing rights for crime victims were enacted. These statutes provided crime victims with monetary restitution and an enhanced opportunity to participate in the prosecution, sentencing, and parole of criminal defendants.

In 1982 President Ronald Reagan established a Presidential Task Force (“Task Force”) to investigate the treatment of crime victims by the American criminal justice system. The final report, issued by the Task Force in December 1982, made startling observations about the treatment of crime victims by the criminal justice system. The Task Force observed that:

The American criminal justice system is absolutely dependent on [ ] victims to cooperate. Without the cooperation of victims and witnesses in reporting and testifying about...
crime, it is impossible in a free society to hold criminals accountable. When victims come forward to perform this vital service, however, they find little protection. They discover instead that they will be treated as appendages of a system appallingly out of balance. They learn that somewhere along the way the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.\textsuperscript{16}

In response to its observations, the Task Force formulated sixty-seven recommendations for action,\textsuperscript{17} including a modification to the Sixth Amendment of the United States Constitution to include a victims’ rights provision.\textsuperscript{18}

The Task Force proposed the following language as an addition to the last sentence of the Sixth Amendment: “Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.”\textsuperscript{19} The actions and findings of the Task Force have been considered a catalyst to the modern victims’ rights movement. Indeed, in 1985 victims’ rights advocates began to focus their efforts on amending state constitutions in order to secure rights that were more meaningful for crime victims.\textsuperscript{20} The success of these efforts is evidenced by the enactment of victims’ rights amendments in thirty-one states over the past sixteen years.\textsuperscript{21}

\section*{B. Political Efforts Towards a Federal Constitutional Amendment}

No serious effort was made to amend the federal constitution until nearly fourteen years after the Task Force released its final report. Congressional action toward a federal constitutional amendment began during the 104th Congress when the Victims’ Bill of Rights Constitutional Amendment (“Bill”) was introduced in both the United States Senate and House of Representatives.\textsuperscript{22} The introduction of the Bill coincided with the 1996 presidential election and was endorsed by both Republican Presidential candidate Robert J. Dole and President William J. Clinton.\textsuperscript{23} Both the United States House of Representatives and the Senate Judiciary Committee held public hearings on their

\textsuperscript{16}See id. at 115-16. The Task Force made recommendations targeted to federal and state executive and legislative bodies, police, prosecutors, the judiciary, parole boards, hospitals, the ministry, the bar, schools, the mental health community, and the private sector. See id.

\textsuperscript{17}See id. at v.

\textsuperscript{18}Id. at 114.

\textsuperscript{19}See Victims’ Bill of Rights Amendment: Hearings on S.J. Res. 6 Before the Senate Committee on the Judiciary, 105th Cong. (1996) (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law) (detailing the history of the victims’ rights movement in the quest for a constitutional amendment; stating that organizations supporting a victims’ rights amendment decided at a 1985 national conference to proceed on a state-by-state basis first, then continue the effort for a federal constitutional amendment).

\textsuperscript{20}For a table indicating states with VRAs and the percentage of electoral support received, see Appendix A.


\textsuperscript{22}See President William J. Clinton, Remarks by the President at Announcement of Victims’ Rights Constitutional Amendment, 32 WEEKLY COMP. PRES. DOC. 1134 (June 25, 1996). In announcing his support of the federal proposed VRA, President Clinton stated:

Having carefully studied all of the alternatives, I am now convinced that the only way to fully safeguard the rights of victims in America is to amend our Constitution and guarantee these basic rights—to be told about public court proceedings and to attend them; to make a statement to the court about bail, about sentencing, about accepting a plea if the victim is present, to be told about parole hearings to attend and to speak; notice when the defendant or convict escapes or is released; restitution from the defendant, reasonable protection for the defendant and notice of these rights.

The full Senate Judiciary Committee held hearings on the proposed victims’ rights constitutional amendment on April 23, 1996. Representative Henry Hyde, Chairman of the House Judiciary Committee, conducted a full-committee hearing on the proposed amendment on July 11, 1996. On September 30, 1996, Senators Kyl and Feinstein introduced a new version of the proposed amendment. Senators Kyl and Feinstein introduced a new version of the amendment on April 1, 1998. On July 7, 1998, the Senate Judiciary Committee voted eleven to seven in support of the Resolution.

With each congressional session, the proposed federal amendment continues to be considered and enjoys bi-partisan support. In 1999, the version of the Bill adopted by the Senate Judiciary Committee was reintroduced in the Committee during the 106th Congress and additional public hearings were held in Committee. On May 26, 1999, the Senate Judiciary Committee’s Subcommittee on the Constitution, Federalism, and Property voted in favor of Senate Joint Resolution 3, which would create a VRA to the United States Constitution. On September 30, 1999, the Senate Judiciary Committee voted twelve-to-five to recommend enactment of the Senate Joint Resolution that would create a VRA to the United States Constitution. In the House, on August 4, 1999, Ohio Representative Steven Chabot introduced a House version of the proposed federal VRA for consideration.

C. The Current Proposed Federal Constitutional Amendment

During the past three congressional sessions when the federal VRA has been considered, there have been incremental changes in the language and scope of the proposed amendment. This section examines the current language adopted by the Senate Judiciary Committee for the proposed federal amendment and compares the current language with significant changes from prior versions of the amendment.

The current proposed federal amendment is divided into five sections and provides:

Section 1: A victim of a crime of violence, as these terms may be defined by law, shall have the rights: to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime; to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence; to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender; to reasonable notice of a release or escape from custody relating to the crime; to consideration of the interest of the victim that

24The full Senate Judiciary Committee held hearings on the proposed victims’ rights constitutional amendment on April 23, 1996. Representative Henry Hyde, Chairman of the House Judiciary Committee, conducted a full-committee hearing on the proposed amendment on July 11, 1996. On September 30, 1996, Senators Kyl and Feinstein introduced a new version of the proposed amendment in the Senate.


27The Senate Judiciary Committee held a public hearing on the Senate Joint Resolution on April 16, 1997. A full hearing was held before the House Judiciary Committee on June 25, 1997.


32The proposed House version of the VRA contains provisions similar to the version adopted by the Senate Judiciary Committee on September 30, 1999. One important distinction is that H.J. Res. 64 would encompass victims of all felony crimes and “any other crime that involves violence.”
Section 2: Only the victim or the victim’s lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

Section 3: The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

Section 4: This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

Section 5: The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States.33

The current version of the proposed federal VRA has subtle differences from earlier proposed amendments. In particular, the scope of the amendment has changed. Earlier versions of the proposed amendment provided that the amendment was applicable to “[e]ach victim of a crime of violence, and other crimes that Congress may define by law.” 34 This language has been changed and now states that the amendment is applicable to “[a] victim of a crime of violence, as these terms may be defined by law.” 35 Thus, the current version limits the applicability of the amendment solely to victims of violent crime.

In addition to establishing the scope of the proposed federal amendment, the first section establishes the affirmative rights of crime victims. Unlike most of the state VRAs, the proposed federal constitutional amendment does not mention the right of the victim to be “treated with fairness and respect.” 36 Among the rights conferred by the amendment are the right to notice of and not to be excluded from public proceedings related to the crime, to be heard, to receive notice of the accused’s release from custody, the right to a trial free from unreasonable delay, to restitution, to consideration of the victim’s safety in determining conditional release from custody, and to notice of the victim’s rights.37

After listing the affirmative rights granted to crime victims, section two of the proposed amendment addresses standing and limitations on enforcement of the amendment. 38 This section explicitly denies any grounds for a victim to stay or continue a trial or challenge a decision or conviction. 39 Section two also provides that violation

33S.J. Res. 6, 105th Cong., 1st Session (1997) § 1 (emphasis added). Interestingly, the version considered in the House of Representatives provided: “[e]ach individual who is a victim of a crime for which the defendant can be imprisoned for a period longer than one year or any other crime that involves violence.” H.J. Res. 71, 105th Cong., 1st Session (1997).


35See S.J. Res. 3.

36See id at § 1.

37See id. at § 2.

38See id.
of the amendment does not give rise to a claim for damages against the government.\textsuperscript{40}

The third section of the proposed amendment empowers Congress to enforce the article “by appropriate legislation.”\textsuperscript{41} Section three also limits exceptions to the rights conferred in the amendment to when “necessary to achieve a compelling interest.”\textsuperscript{42} Earlier versions of the proposed amendment empowered both the states and Congress to enforce the article, as well as to enact exceptions “required for compelling reasons of public safety or for judicial efficiency in mass victim cases.”\textsuperscript{43} The current version limits the power of enforcement to legislation by Congress, and is silent on the appropriate legislative body to enact exceptions to the article.

Sections four and five address the amendment’s relevance.\textsuperscript{44} The rights conferred in the proposed amendment are applicable to federal, state, District of Columbia, and other territorial proceedings.\textsuperscript{45} These proceedings are deemed to include military and juvenile proceedings.\textsuperscript{46}

III. STATE VICTIMS’ RIGHTS AMENDMENTS

A. A Comparative Analysis of State Victims’ Rights Amendments

While the federal government continues to consider a constitutional amendment, many states already have adopted constitutional amendments providing rights to victims of crime. In 1982, California became the first state to adopt a constitutional amendment providing rights to crime victims.\textsuperscript{47} California’s amendment is narrow in scope, simply providing victims with the right to restitution,\textsuperscript{48} that relevant evidence shall not be excluded in any criminal proceeding,\textsuperscript{49} and that a judge shall consider public safety when setting bail amounts.\textsuperscript{50}

Four years after California adopted its VRA, Rhode Island became the second state to adopt a constitutional amendment providing rights to crime victims.\textsuperscript{51} Rhode Island’s amendment is also comparatively narrow in scope, providing crime victims the “right to be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process.”\textsuperscript{52} The amendment further provides restitution and the right to address the court at sentencing regarding the impact of the crime on the victim.\textsuperscript{53}

Thereafter, four other states adopted VRAs in the 1980s: Florida,\textsuperscript{54} Michigan,\textsuperscript{55} Texas,\textsuperscript{56} and Washington.\textsuperscript{57} With these new amendments also came new rights afforded to crime victims. The Michigan amendment, for example, provided nine enumerated rights to the crime victim: (1) to be treated with fairness and respect; (2) to timely disposition of the case; (3) to be reasonably protected from the accused; (4) to notification of proceedings; (5) to attend proceedings; (6) to confer with the prosecution; (7) to make a statement at sentencing; (8) to restitution;
and (9) to information about the conviction, sentence, imprisonment, and release of the accused. 58

From these initial state amendments, the momentum of state VRA adoption gradually increased during the 1990s. Arizona passed a VRA in 1990, and New Jersey followed in 1991. 59 Between 1992 and 1994 eleven states enacted VRAs, 60 and eight additional states passed VRAs in 1996. 61 Today, the majority of states have adopted VRAs. 62

Despite the increasing number of states with VRAs, the existing VRAs vary widely in strength and scope. 63 The most common rights afforded crime victims in the state amendments are the right to notification of proceedings and the right to attend proceedings. 64 These two rights are, however, limited by language in some of the amendments. In some state amendments, a crime victim has constitutional rights to the extent that those rights do not interfere with the constitutional rights of the defendant. Other state amendments afford crime victims the right to attend proceedings, but limit this right by requiring that victims not be a material witness in the matter.

Another right, afforded in varying degrees by twenty-five of the state amendments, is the right to be heard at proceedings. 65 This right primarily refers to victim-impact testimony or testimony at sentencing. Sixty-four percent of the state amendments give victims a constitutional right to be treated with fairness, dignity and respect. 66

Several provisions appear in over one-third of the VRAs. One of these is the right of crime victims to be informed of their rights. 67 A second provision provides victims with the right to be protected from the accused. 68 In addition, more than one-half of the VRAs provide one or more of the following rights: to confer with the prosecutor, to restitution, to be protected from the accused, to a speedy disposition, and to notice of the sentence, release, or escape of the perpetrator. 69

Other rights are less pervasive in the various state VRAs. VRAs in only five states—Alaska, Idaho, Missouri, South Carolina, and Utah—provide some rights or authorize the legislature to extend victims’ rights at the juvenile level. Only three state VRAs—Arizona, Idaho, and Louisiana—provide a crime victim the right to refuse an interview related to the crime and initiated by the defense. 70 New Mexico provides victims with the constitutional right to “have the prosecuting attorney notify the victim’s employer, if requested by the victim, of the necessity of the victim’s cooperation and testimony in a

59 See infra Appendix A.
60 The eleven states adopting constitutional amendments between 1992 and 1994 were: Alabama, Alaska, Colorado, Idaho, Illinois, Kansas, Maryland, Missouri, Ohio, Utah, and Wisconsin. See id.
61 The eight states adopting constitutional amendments in 1996 were: Connecticut, Indiana, Nevada, North Carolina, Oklahoma, Oregon, South Carolina, and Virginia. See id.
62 See id. While Montana does not have a constitutional amendment analogous to these states, in November 1998, Montana voters approved a more limited constitutional amendment that broadens the state’s criminal justice system to include restitution to the crime victim. See MO. CONST. art. I, § 32 (1992).

Additionally, Oregon voters ratified a crime victims’ rights amendment to the state constitution in 1996. See OR. CONST. art. I, § 42 (1996). The Oregon VRA was the most comprehensive of any of the state amendments, providing 14 enumerated rights for crime victims. See id. In 1998, however, the Oregon Supreme Court invalidated the amendment on the ground that it combined several distinct constitutional amendments that should have been voted on separately under the state’s constitutional provisions governing amendments through an initiative petition. See Armatta v. Kitzhaber, 959 P.2d 49 (Or. 1998).

In addition to Montana and Oregon, the remaining states without a state constitutional amendment that provides victims’ rights are: Delaware, Georgia, Indiana, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, New York, North Dakota, Pennsylvania, South Dakota, Vermont, West Virginia, and Wyoming.

63 See Appendix B (providing a state-by-state index of crime victim rights).
64 See id.
courth weapon that may necessitate the absence of the
victim from work for good cause.” 77

The actual terms of the VRAs tend to either be short,
broad versions of the intended language or detailed
enumerations of an individual’s rights.72 For instance,
Florida’s amendment simply states that victims are “entitled
to the right to be informed, to be present, and to be heard
when relevant, at all crucial stages of the criminal
proceedings, to the extent that these rights do not interfere
with the constitutional rights of the accused.” 73 Similarly,
Colorado’s amendment states that victims “have the right
to be heard when relevant, informed, and present at all
critical stages of the criminal justice process.” 74 On the
other end of the spectrum are amendments in Arizona and
South Carolina that each enumerate twelve specific rights
of crime victims. 75

Half of the state amendments are silent on the
question of enforcement. 76 Another third provide that a
violation of the rights shall not be a cause for civil damages,
but do not preclude actions for injunctive relief. 77 There
are a variety of approaches to enforcement and limitations
on the remedies provided victims. The Texas VRA
specifically forbids a victim standing as a party in a criminal
proceeding, and denies the right to contest the disposition
of any charge. 78 The Maryland VRA prohibits the victim
from being able to stay a criminal justice proceeding. 79

The Ohio VRA is more general and “does not confer upon
any person a right to appeal or modify any decision in a
criminal proceeding.” 80 The VRAs for Idaho, Illinois,
Kansas, Missouri, and New Mexico, although silent as to
a victim’s standing, contain language limiting the impact of
the VRA on the disposition of cases. 81

B. Appellate Interpretation of State Victims’ Rights
Amendments

To understand the potential interpretations and
implications of the language in the proposed federal VRA,
it is helpful to consider how state appellate courts have
interpreted VRAs. This section considers relevant state
appellate court interpretations of language in state VRAs
similar to the proposed federal constitutional amendment. 82

The proposed federal amendment includes eight
rights for crime victims: (1) the right to “reasonable notice”
of public proceedings relating to the crime; (2) the right
to notice of release or escape from custody; (3) the right
to reasonable delay; (4) the right to be notified of release
or escape from custody; (5) the right to be free from
unreasonable delay; (6) the right to an order of restitution;
(7) the right to have safety considered in determining
conditional release from custody; and (8) the right to
“reasonable notice” of these rights. The interpretation of
each of these proposed rights under analogous state VRA
provisions is analyzed in this section.

71 See N.M. CONST. art. II, § 24(10).

72 See NATIONAL VICTIM CENTER, THE 1996 VICTIMS’ RIGHTS SOURCEBOOK: A
COMPILATION AND COMPARISON OF VICTIMS’ RIGHTS LAWS (1996) (providing
a state-by-state index of enforcement language or restrictions in the state
constitutional amendments).

73 See FLA. CONST. art. I, § 16(b).

74 See COLO. CONST. art. II, § 16a.


76 See NATIONAL VICTIM CENTER, supra note 72.

77 See id.

78 See TEX. CONST. art. I, § 30(5)(e).

79 See MD. DECL. OF RIGHTS art. 47(e).

80 See OHIO. CONST. art. I, § 10(a).

81 See IDAHO CONST. art. I, § 22(10); ILL. CONST. art. I, § 8.1(10)(d); KAN.
CONST. art. 15, § 15(c); MO. CONST. art. I, § 3(4); N.M. CONST. art. II, §
24(B).

82 The scope of consideration in this section is limited to state appellate
court decisions promulgated under a state VRA, and does not include
decisions decided under implementing statutes for the VRAs.
1. The right to “reasonable notice” of public proceedings relating to the crime

The first right of a crime victim in the proposed federal amendment is the right “to reasonable notice of . . . any public proceedings relating to the crime.”83 The right of the crime victim to be notified of proceedings involving his or her case is found in nearly every state constitutional amendment.84 Several cases have interpreted the victim’s right to be notified of proceedings involving the victim’s case. In People v. Superior Court,85 the Court of Appeal of California held that the failure of a probation officer to comply with that officer’s duty to notify the crime victim of the probation and sentencing hearing did not deprive the trial court of jurisdiction to proceed.86

In State v. Holt,87 a Kansas court considered whether, under the Kansas state VRA, a crime victim is entitled to notice when a district court grants parole to a defendant convicted of a misdemeanor who has partially served the sentence.88 The Supreme Court of Kansas held that the granting of parole to such a defendant was at the discretion of the trial court; therefore, crime victims did not have the right to be notified when the trial court determined, sua sponte, to grant parole to the defendant.89 Although the Kansas Constitution provides crime victims with “the right to be informed of and to be present at public hearings,”90 in considering the appeal, the court noted that the implementing statutes to the state VRA lacked “any mandatory rights for crime victims, and the provisions are merely directive or permissive [and] there are no provisions for enforcement of the suggested rights and no sanctions imposed if they are not followed.”91 The court found that a public hearing for the purpose of granting parole to a misdemeanor defendant who has served a portion of the sentence was not purely discretionary and that no abuse of discretion had been shown.92 In dicta, the court encouraged trial courts in cases involving parole to “carefully consider holding a public hearing and notifying crime victims in cases where the court deems it advisable and when it can be accomplished without undue burden on the judicial system.”93

In 1998, the Rhode Island Supreme Court considered whether a cause of action for monetary damages accrues against the state or its officers when there is a failure to notify the crime victims of their constitutional rights.94 The court found that crime victims could not sue the state in an effort to compel the state to inform them of their rights.95 In Bandoni v. State,96 the victims were injured after being hit by a drunk driver.97 The victims requested the state to update them on the criminal case against the driver.98 The defendant was permitted to plead no contest to a lesser charge without the victims’ knowledge.99 Thereafter, the victims brought action against the state for failure to advise them of their rights as crime victims contrary to the Rhode Island VRA and Victim’s Bill of Rights.100 The victims alleged a negligence theory against the state for failure to notify them of the pending criminal case and demanded monetary damages under the

83S.J. Res. 3 § 1, 106th Cong. (1999).
84For a chart illustrating the states that afford the right to be notified of proceedings, see Appendix B.
86See id at 586-87.
87847 P.2d 1183 (Kan. 1994).
88See id. at 1186.
89See id. at 1187.
90See id. at 1185 (quoting KAN. CONST. art. 15, § 15(a)).
91See id. at 1186 (referring to KAN. STAT. ANN. § 74-7333(a)(1994)).
92See id. at 1187.
93Id. at 1188.
95See id. at 601.
96See id. at 583.
97See id.
98See id.
99See id.
100See id.
state VRA. The trial judge dismissed the action for failure to state a claim upon which relief could be granted. The appellate court declined to recognize either claim and found that there was no action for negligence arising from the Victim’s Bill of Rights. The court further held that the VRA was not self-executing, and “[did] not provide a sufficient rule by which the rights given may be enjoyed or protected.” In so holding, the court stated that the cause of action “must arise from the floor of the General Assembly and not from the bench of the supreme court.”

Significantly, none of the VRAs, including the proposed federal VRA, provide a cause of action for damages in the event that officials who are charged with informing crime victims of their rights fail to provide such notice. Like the proposed federal amendment, approximately one-half of the states have VRAs providing that an official’s noncompliance will not result in a cause of action for damages or the right to vacate an otherwise lawful conviction. The remaining states have VRAs that are silent on the matter or empower the legislature to enact enforcement provisions.

2. The right not to be excluded from any public proceedings

Twenty-six state amendments include the right of victims to attend proceedings. This right, however, is not uniform among state VRAs. Instead, the right to attend proceedings is granted in different degrees using varying language. In particular, some of the state VRAs do not refer to the right in the negative sense, “not to be excluded;” rather these state VRAs provide the affirmative right to attend proceedings. Appeals based on this right typically take the form of a defendant claiming that the victim’s presence at the proceeding interfered with the right to a fair trial. Several state appellate courts have considered a victim’s constitutional right to be present at proceedings related to the crime.

In State v. Beltran-Feliz, the Supreme Court of Utah held that a victim exercising her state constitutional right to be present during the trial did not violate a defendant’s rights under the Fifth Amendment of the United States Constitution. The Utah Constitution provides that a victim has the right “[u]pon request to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court . . . .” State legislation further articulated the victim’s right not to be excluded from trial. On appeal, the defendant contended that the combination of the victim’s presence in the courtroom, the victim’s testimony as the last witness for the State, and a reference to the victim by the prosecutor as “our victim,” had the cumulative effect of denying the defendant a fair trial.

The court in Beltran-Feliz held that to sustain this constitutional challenge, the defendant had the burden of proving that he was denied a fair trial, and must “show

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101See id. at 582.
102See id. at 583.
103See id. at 584.
104Id. at 589.
105Id. at 596.
106See NEV. CONST. art. 1, § 8(3); UTAH CONST. art. 1, § 28(2).
107See MICH. CONST. art. 1, § 24(2); NEB. CONST. art. 1, § 28.
108For a table indicating which states provide specific rights, including the right of victims to attend proceedings, see Appendix B.
109Although not a state appellate court case, the “Oklahoma City Bombing” case dealt with mass tort victims seeking to be present at trial without being barred from giving victim-impact testimony at sentencing. See United States v. McVeigh, 958 F. Supp. 512 (D. Colo. 1997). For discussion of the quest of these victims to be present at the trial, their subsequent denial to be present, and other implications relevant to the proposed federal VRA, see The Rights of Crime Victims: Hearings on S.J. Res. 44 Before the Senate Committee on the Judiciary, 106th Cong. (1997) (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law).
111See id. at 35.
112See id. at 32-33 (quoting UTAH CONST. art. 1, § 28(b)).
113See id. at 33 (quoting UTAH CODE ANN. §§ 77-38-4(1) & 77-38-2(5)(c)).
114See id. at 32-34.
more than the mere possibility that [the victim] conformed her testimony to that of other witnesses."115 The court found that the defendant’s assertion, based only on a single reference that the victim’s testimony was tailored in what was not suggested to be a critical element of the case, was insufficient to meet the burden of proving the defendant was prejudiced by the victim’s rights.116

The Arizona Supreme Court has also considered a victim’s exercise of the right to be present at jury selection. In State v. Gonzales,117 the court held the presence of victim of aggravated assault and armed robbery in a courtroom during jury selection did not prejudice or deny the defendant’s right to a fair trial.118 The court recognized that the victim had a constitutional right to attend all of the same criminal proceedings that the defendant had a right to attend.119 The court also noted that there was no evidence that prospective jurors noticed the victim or knew who she was during jury selection.120

Florida’s appellate courts have considered a victim’s right not to be excluded from proceedings on several occasions. In Bellamy v. State,121 the defendant in a sexual battery prosecution claimed that his accuser could not be classified as a “victim” where the jury was not made aware that the accuser was declared a “victim” under the VRA amendment.122 The court held that because the State did not attempt to call the accuser as a rebuttal witness, and because the accuser did not display any emotion or otherwise draw attention to herself while sitting in the courtroom, the Florida VRA did not destroy the defendant’s presumption of innocence, or otherwise prejudice the jury against the defendant.123

In Gore v. Florida,124 a defendant was convicted of first-degree murder and sentenced to death.125 The defendant appealed the trial court’s decision on the ground that the court erred in excusing the victim’s stepmother from the rule of witness sequestration because she was a relative of the victim.126 The court determined that the presence of the victim’s stepmother in the courtroom during the trial did not prejudice the defendant in this case.127 Notwithstanding, the court cautioned, “while in general relatives of homicide victims have the right to be present at trial, this right must yield to the defendant’s right to a fair trial.”128

After Gore, the Florida Supreme Court heard Martínez v. Florida,129 in which a defendant appealed his conviction on the grounds that the victim’s constitutional right to be present conflicted with his right to a fair trial by having the witness sequestered. The court held that the victim should not have been permitted in the courtroom during opening statements.130 Nevertheless, the court found this was a harmless error and affirmed the defendant’s conviction.131

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113See id. at 35.
114See id. at 34. In dicta, the court expressed concern that its decision “may give rise to constitutional challenge every time a victim is allowed to remain in the courtroom during a criminal trial.” Id. at 35 n.6. To avoid this effect, the court reiterated that inconsistent statements by a witness or victim is an issue of credibility for the fact finder to consider, and under state precedent there have been numerous findings of no prejudice in allowing a victim to remain present throughout the trial even if he or she later testifies. See id.
116See id. at 848.
117See id. (citing Ariz. Const. art. 2, § 2.1(A)(3)).
118See id. at 848-49.
120See id. at 338.
3. The right to be heard

The right to be heard under the proposed federal amendment includes the right to be heard, if present, at a “proceeding to determine conditional release, acceptance of a negotiated plea, or a sentence . . . [and] at a parole proceeding that is not public, to the extent [that] afforded to the offender.” Most state VRAs provide victims the right to be heard in criminal proceedings, particularly at sentencing hearings. This right typically is exercised via oral or written victim-impact statements presented at sentencing.

In 1991, the United States Supreme Court addressed the use of victim-impact statements in capital sentencing. Although the Court in *Payne v. Tennessee*, did not consider a state constitutional amendment, its ruling has been significant in a number of subsequent state-appellate court cases addressing VRAs and victim-impact evidence. In *Payne*, the United States Supreme Court held that the Eighth Amendment to the United States Constitution, prohibiting cruel and unusual punishment, does not bar “the admission of victim-impact evidence during the penalty phase of a trial.” This holding specifically relates to the use of victim-impact evidence at the sentencing phase of a capital crime. Chief Justice Rehnquist, writing for the majority, traced the historical development of criminal sentencing philosophy, and noted that most of the states had approved admitting victim-impact statements at sentencing. *Payne* resulted in an elimination of the constitutional bar to victim-impact statements in death-penalty cases. Consequently, *Payne* has allowed state courts to uphold victim-impact statement language in state constitutions and statutes.

i. Victim-impact evidence in state appellate courts after *Payne*

In view of the Supreme Court’s holding in *Payne*, state appellate courts have consistently rejected defendant claims of due process, equal protection, right to confrontation, and cruel and unusual punishment violations in capital-sentencing cases where victims were permitted to introduce victim-impact evidence.

In *State v. Gentry*, the Washington Supreme Court became the first state appellate court to consider victim-impact evidence while taking into account the holding in *Payne* and the Washington VRA. The court in *Gentry* found that the state constitutional rights of a victim in criminal cases under the Washington VRA must be harmonized with a defendant’s rights, including due process rights during the sentencing phase of trial. The court acknowledged the “potential tension between the

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132 S.J. Res. 3 § 1.


134 Whether victim-impact statements should be admitted during capital sentencing is a very controversial issue, producing considerable scholarly debate, but is not within the scope of this article.

135 501 U.S. 808 (1991) (overruling the Court’s earlier decisions in *Booth v. Maryland*, 482 U.S. 496 (1987)(holding by a 5-4 majority that victim-impact evidence was inadmissible at capital sentencing)); see also *South Carolina v. Gathers*, 490 U.S. 805 (1989) (holding by a 5-4 majority that evidence concerning victims in the sentencing phase of a capital case was inadmissible).

136 See *supra* notes 60 to 84 and accompanying text.

137 *Payne*, 501 U.S. at 811.
due process rights of the capital case Defendant” and the victim’s rights that are created by the VRA. Despite this tension between rights, the court held that victim-impact evidence was admissible at a proceeding considering death sentencing. The court in Gentry explicitly limited its holding to the admissibility of victim-impact evidence in the sentencing phase of capital cases.

Subsequent to the holdings in Payne and Gentry, other states also considered the admissibility of victim-impact statements. In Kansas v. Gideon, the Supreme Court of Kansas held that when victim-impact statements are made to a judge, not a jury, the victim’s right to make a statement at a sentencing proceeding under the state’s VRA did not violate the defendant’s constitutional right to confrontation, equal protection, or due process. At trial, over the objection of the defendant, the deceased victim’s family made statements regarding how the victim’s death had affected them. On appeal, the defendant argued that a sentence was imposed “under the influence of passion, prejudice, or other arbitrary factors.” The court held that although the trial court had mentioned the family’s statements before sentencing, this did not demonstrate improper consideration of the victim’s statements.

In State v. Muhammad, the New Jersey Supreme Court reversed the lower court’s denial of a victim’s right to be heard at the sentencing hearing for a defendant charged with kidnapping, rape, and murder. Unlike Washington’s VRA, the New Jersey VRA did not specifically allow for victim-impact statements at sentencing hearings. As such, the court relied on Payne, the New Jersey VRA, and enabling legislation, which mandated that such statements could be admitted under certain circumstances. The court noted that “[i]n the absence of the Victim’s Rights Amendment, we might have continued to hold that victim-impact evidence should not be admitted during the sentencing phase of a capital case. However, the electorate, by passing the Victim’s Rights Amendment . . . have mandated that victim-impact evidence be admitted.”

Similarly, Arizona courts have held that a judge’s decision to impose the death penalty is not affected by

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143 See id. at 1141 (stating that “the categories of evidence which are admissible at a death sentencing proceeding can be expanded to include victim-impact evidence”). In dicta, the court cautioned, that “[b]ecause we conclude that victim-impact statements do not per se violate the Washington Constitution, this does not mean that any and all such evidence is admissible.” Id. at 1142.

144 See id. at 1142 (indicating that trial courts should exercise discretion in deciding the scope of permissible victim-impact testimony on a case-by-case basis).

145 Id. at 864.

146 894 P.2d 850 (Kan. 1995).


148 Gideon, 894 P.2d at 862-63.

149 See id. at 864. The court cautioned that:

When victims’ statements are presented to a jury, the trial court should exercise control. Control can be exercised, for example, by requiring the victim’s statements to be in question and answer form or submitted in writing in advance. The victim’s statement should be directed toward information concerning the victim and the impact the crime has had on a victim and the victim’s family. Allowing the statement to range far afield may result in reversible error.

Id.


151 See N.J. Const. art. 1, § 22.


153 Muhammad, 678 A.2d at 174-75.
victim-impact evidence. In State v. Mann, victim-impact evidence was allowed to rebut a capital-murder defendant’s mitigation evidence. The record did not indicate that the sentencing judge improperly gave weight to the opinions of the victim’s immediate family members that the death penalty should be imposed. The sentencing judge stated that the finding of aggravating circumstances was based solely on evidence adduced at trial, and that he understood the family’s feelings. In upholding the decision in Mann, the Arizona Supreme Court endorsed the use of victim-impact evidence in capital sentencing.

ii. Sentence recommendations by crime victims

The Supreme Court in Payne made a distinction between victim-impact evidence “concerning a murder victim’s personal characteristics or the impact of the crime on the victim’s family and community,” and victim-impact evidence providing the “opinions of the victim’s family about the crime, the defendant and the appropriate sentence.” The Court did not address the issue of the constitutionality of a sentence recommendation by a victim in a death penalty case. Likewise, the state courts discussed above distinguished between the two types of statements, specifically approving descriptions of the impact of the crime on the victim’s family.

In State v. Heath, the Kansas Court of Appeals approved the use of a sentencing request by the victim’s family. In Heath, the defendant, who was accused of driving while intoxicated, pled “no contest” to a charge of involuntary manslaughter. State sentencing guidelines called for a presumptive prison term of up to five years, but the trial judge placed the defendant on five-years probation. The court’s decision to reduce the sentence was influenced by the urging of the victim’s father.

Similarly, in Salt Lake City v. Johnson, the Court of Appeals of Utah held that the trial court had authority to dismiss a domestic violence charge at the victim’s request. In another case regarding sentence recommendations by victims, the Missouri Court of Appeals in Sharp v. State, held that a victim was permitted to make a sentencing recommendation despite the public prosecutor’s plea agreement with the defendant not to recommend a sentence.

4. The right to notice of release or escape from custody

The proposed federal amendment and seventeen states provide the right to notice of sentence, release, or escape from custody. Currently, no state appellate cases have substantially considered this constitutional right of crime victims.

155 See State v. Mann, 934 P.2d 784 (1997); see also State v. Gonzales, 892 P.2d 838 (Ariz. 1995) (holding that a capital murder defendant failed to establish that aggravated assault victim’s recommendation that defendant receive death penalty affected sentencing decision); State v. Gulbrandson, 906 P.2d 579 (Ariz. 1995) (stating that in capital cases the admission of statements of the victim’s family regarding impact of crime did not violate constitutional rights of defendant convicted of first-degree murder and did not require vacating a death sentence; and noting that there was nothing in the record to indicate that trial judge, in determining sentence, gave weight to the victim’s family’s statements).

156 See id.

157 See Mann, 934 P.2d at 788.

158 See id.

159 Payne, 501 U.S. at 832-33 (O’Connor, J., concurring).

160 See, e.g., Gentry, 888 P.2d at 1140.


162 See id. at 31.

163 See id.

164 See id. at 31-32.

165 See id. at 1022 (Utah Ct. App. 1998).

166 See id. (citing Utah Const. art. I, § 28; Utah Code Ann. § 77-36-2.7 (Supp. 1997) (allowing a trial court to dismiss charges of domestic violence “at the request of the victim if the court has reasonable cause to believe that the dismissal would benefit the victim”)).

167 See id. at 755.

168 For a table designating rights provided by each state VRA, including the right to notice of sentence, release, or escape from custody, see Appendix B.
5. The right to be free from unreasonable delay

The proposed federal amendment and twelve states provide the victim with the right to be free from unreasonable delay. This right can be analogized to a defendant’s right to a speedy trial. While much case law has developed interpreting a defendant’s right to a speedy trial, no state appellate courts have decided issues regarding a victim’s right to be free from unreasonable delay.

6. The right to an order of restitution

Nineteen states provide the right to an order of restitution in their VRAs. Appellate courts in Arizona and Michigan have considered this right. In State ex rel. McDougall v. Superior Court In and For County of Maricopa, the Court of Appeals of Arizona held that a motorist, who pled guilty to leaving the scene of an automobile accident involving injury, could not be ordered to pay restitution for injuries resulting from the underlying accident where none of the injuries for which the state sought restitution was caused by motorist’s criminal conduct of leaving the scene of accident. The Arizona Constitution provides victims with a right to restitution. Under article 2, section 2.1(A)(8), crime victims have a right to “receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.”

According to the court, the plain language of the constitutional provision “requires restitution only for losses caused by the criminal conduct for which [the] defendant was convicted.” Because the injuries for which restitution was sought involved the violation of a civil traffic offense, restitution was not warranted.

In People v. Peters, the Supreme Court of Michigan also considered a crime victim’s constitutional right to restitution. In Peters, the trial court entered a restitution order under authority of the Michigan VRA. On appeal, the Supreme Court of Michigan considered whether an order of restitution should abate where a convicted criminal defendant died pending appeal of his conviction. The court reasoned that because the provision of the Michigan VRA providing crime victims the right to an order of restitution was primarily intended to compensate crime victims, rather than penalize a defendant, a restitution order should be enforced after a defendant’s death. The restitution amount approximated losses incurred by the city fire department and amounts paid by defendant’s insurer as a result of twenty-five fires in which arson was suspected, and the restitution order was entered under authority of the Michigan VRA and Crime Victim’s Rights Act. The court distinguished between an instance where a defendant dies pending an appeal of a criminal conviction, and the status of fines, penalties, and orders that may accompany a criminal conviction. The court held that where the intent behind a fine or order is to compensate the victim, the fine or order may survive the death of the offender.

7. The right to consideration of safety of victim in determining conditional release

Ten states provide crime victims the constitutional right to be protected from the accused. Not all of these states consider safety in determining conditional release. To date, no state court opinions have directly interpreted this constitutional right.
8. The right to reasonable notice of rights

Ten states provide crime victims the constitutional right to be informed of their rights.179 Arizona’s intermediate appellate court considered the state’s failure to inform a victim of her constitutional rights as provided by the Arizona constitution.180 In State ex. rel. Hance v. Arizona Board of Pardons & Paroles, a rape victim brought a petition before the Court of Appeals of Arizona requesting that the court vacate an order by the Arizona Board of Pardon and Paroles (the “Board”) releasing a prisoner.181 The victim complained that she did not receive prior notice of either the parole hearing or her constitutional rights.182 The Board had sent notice of the first parole hearing, however, the notice was sent to the victim’s last known address and was returned as undeliverable.183 No additional efforts were made to contact the victim and when the prisoner was released eight years after the initial hearing, the victim sued the Board.184 In addition to not receiving proper notice of the hearing, the “victim was never informed of her constitutional right to request notice of and to participate in post-conviction release proceedings.”185

The Arizona Constitution provides that crime victims have the right “to be present at and, upon request, to be informed of all criminal proceedings where the defendant has a right to be present,” as well as the right “[t]o be heard at any proceedings involving a post-arrest release decision, a negotiated plea, and sentencing.”186 In addition, the Arizona Constitution provides victims the right to be informed of their constitutional rights.187 Pursuant to these constitutional provisions, the Arizona Court of Appeals acknowledged that the state has an affirmative obligation to inform victims of their state constitutional rights.188 The court refused to allow the victim’s failure to request notice of the proceedings, as required under implementing legislation, to serve as a defense because the victim was not first informed of her constitutional rights.189 In so holding, the court stated:

The constitutional mandate is clear: victims must be informed of their rights. Armed with this knowledge, victims may choose to exercise these rights. Conversely, an uninformed victim may not exercise her rights because she is unaware of them, or unaware that the right to notice of a release hearing requires that she first file a request for such a notice.190

The court held that the failure to inform the victim of her constitutional right to request notice of and to participate in the proceedings violated her constitutional rights and rendered the release proceedings defective.191 In Hance, the court further found that the Board failed to make “reasonable efforts” to locate the rape victim.192 As a result, the victim’s right to be informed of her state constitutional right to request notice of and to participate in the post-conviction proceedings concerning her attacker was violated.193 The Arizona Court of Appeals held that the Arizona Constitution protects a victim’s due process rights,194 but due process requires only that efforts to

179See Appendix B.


181See id. at 826.

182See id.

183See id.

184See id. at 831.

185See id. at 830.

186Id. at 829 (citing Ariz. Const. art 2, § 2.1(A)(3)-(4)).

187See id. (citing Ariz. Const. art 2, § 2.1(A)(12)).

188See id. at 830.

189See id.

190Id.

191See id.

192See id. at 830-31.

193See id. at 830.

194See id. at 831 (citing Ariz. Const. art. 2, § 2.1(A)).
provide notice must be “reasonably calculated” to notify the individual.195 Under these circumstances, the court found that the Board not only had failed to make reasonable efforts to locate the victim, but also had made no efforts to locate the victim “since it sent a letter to her last known address in 1984, a decade after the conviction.”196 Although the Board asserted that it satisfied its obligation to notify the victim by notifying the county attorney of the upcoming hearings, the court failed to find that notifying the county attorney was sufficient to provide notice to the victim.197 The court in Hance held that, pursuant to Arizona statute, the appropriate remedy for the violation of the victim’s right to notice of her constitutional rights was for the result of the release hearings to be set aside and have a new hearing ordered.198

C. Appellate Interpretation of Crime Victim Attempts to Enforce State Constitutional Rights

Section two of the proposed federal amendment states that standing to enforce the amendment is limited to “the victim or the victim’s lawful representative.”199 In enforcement of victim’s rights and standing, the differences in state court interpretations also appear to be a result of the differing language and limitations of each state’s VRA.

Appellate courts in Colorado, Texas, Arizona, and Rhode Island have specifically held that crime victims cannot achieve standing under their respective state VRA. In Gansz v. People,200 the Colorado Supreme Court refused to allow a disgruntled crime victim to contest the dismissal of a case. In State ex. rel Hilbig v. McDonald,201 a Texas appellate court ruled that a crime victim lacked a constitutional right to review a prosecutor’s file. In State v. Lamberton,202 the Arizona Supreme Court held that the state VRA did not provide crime victims the right to file petitions for review in criminal cases.

In Bandoni v. Rhode Island,203 victims of an automobile accident caused by a drunk driver brought an action for alleged violations of the state VRA and Victims’ Bill of Rights. The Supreme Court of Rhode Island held that there was no cause of action for negligence in tort arising from the Victim’s Bill of Rights.204 Furthermore, the court refused to create a new cause of action.205 Therefore, there was no monetary award for failure to comply with the VRA because it failed to provide for a private cause of action.206 The court concluded that the state’s VRA merely indicates principles, but lacks any rules by which to enforce those principles.207

The New Jersey Supreme Court, in State of New Jersey in the Interest of K.P. D.O.B. 3/31/81,208 held that a victim had standing to oppose a petition by a newspaper to open a juvenile sexual assault trial.209 The court found that crime victims have an inalienable right to be present during a criminal proceeding subject only to rules concerning sequestration.210

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196Id.

197See id.

198See id. at 831-32.


200888 P.2d 256 (Colo. 1995).


203See id.

204See id.

205The court also held Rhode Island’s VRA is not self-executing. See id. at 589.

206See id. at 585-86.

207See id. at 586.

208See id. (citing N.J. Const. art. 1, § 22).


210See id. (citing N.J. Const. art. 1, § 22).
D. Other Issues Considered by Appellate Courts Interpreting Victim’s Rights Amendments

This section addresses state appellate court decisions considering the definition of a victim and the appropriate result when a conflict arises between the constitutional rights of both the victim and the defendant.

1. Determining who is a victim

The definition of “victim” for most VRAs extends at least to the immediate family of the one who has been killed or is otherwise unable to speak. Some state appellate courts have interpreted this to include extended family, such as a sister-in-law. In Kansas v. Parks, the court held neither the state VRA, nor statutory bill of rights for crime victims, barred a murder victim’s sister-in-law from submitting a victim-impact statement or from making a statement at the sentencing hearing. The court held that the VRA does not restrict the ability of non-victim and non-family members to testify and submit statements during the sentencing phase of criminal proceedings. The court noted that the purpose of the enactment is “to guarantee rights, not restrict rights.”

In State v. County of Maricopa, the Supreme Court of Arizona held that the VRA does not require a victim to suffer personal injury in order to fall within definition of “crime victim.” The court found that the owner and driver of an automobile damaged by an intoxicated driver qualified as a “victim” under the state’s VRA, even though the owner was not injured. Similarly, in People v. Beck, the California appellate court held that the term “victims” was not limited to natural persons.

Arizona courts have also held a victim cannot be the “accused.” The victim must be a victim as to the alleged criminal offense with which the defendant is charged. In Knapp v. Martone, the Arizona Supreme Court held that the mother of two children alleged to have been murdered was a “victim” under the Victims’ Bill of Rights. As a victim, the mother could properly refuse a request of the defendant, her husband, to depose her, even though the defendant was charged with murder. As an accessory, the mother was an unnamed and uncharged co-conspirator, but not an accused. Similarly, in Stapleford v. Houghton, the Arizona Supreme Court held that a person is not a victim for the purposes of the state constitution’s Victims’ Bill of Rights if that person is in custody or is the accused.

2. Balancing the rights of victims and defendants

One of the more important observations about VRAs is its potential for victims’ rights to encroach upon the well-established constitutional rights of the criminal defendant. When faced with the issue, state appellate courts typically have sided with the countervailing rights of the defendant.

In State v. Bible, the Arizona Supreme Court held that victims of crime and their families have certain rights, but those rights do not, and must not, conflict with defendant’s right to a fair trial. In Bible, the prosecutor indicated in closing argument that not only did the defendant have rights, such as the right to a fair trial, but the victim...
also had rights under the Arizona VRA. The prosecutor further suggested that it was the jurors’ duty to protect the rights of both the defendant and the victim. The court held that these comments, coupled with the prosecutor’s opening statement that the goal of the trial was not necessarily to give the defendant a fair trial, but to do justice, were improper.

Similarly, the Arizona Supreme Court in Romley v. Superior Court in and for County of Maricopa, found a direct conflict between a defendant’s constitutional right to due process and the Victim’s Bill of Rights. The court held that the due process clause of United States Constitution takes precedence over the provisions of a state constitution. In Romley, the defendant, relying upon a justification defense, required access to medical records in order to cross-examine and impeach the victim. The court recognized the right of the victim to refuse a defendant’s discovery request for medical records, however, the court held that when the information is exculpatory and essential to presentation of the defendant’s defense, or is necessary for impeachment of the victim, then the right of the victim must fail.

IV. DISCUSSION

Victim participation is an important element of our criminal justice system. We rely on victims to report the crime, testify, and facilitate prosecution. It is therefore reasonable that victims expect certain rights in the prosecutorial process. The criminal justice system is beginning to recognize the necessity of treating crime victims with fairness, dignity, and respect.

Balancing the rights of victims with the rights of defendants has proved to be a challenge to our system of criminal justice and has stirred much debate. Although some of the rights afforded crime victims by state VRAs have not been difficult to enforce—such as the right of the victim to provide victim-impact testimony at sentencing—upholding the rights of victims prior to the defendant’s conviction presents a more serious challenge. For example, a jury may be unduly influenced by the victim’s right to remain present during proceedings, or a defendant may be unjustly prejudiced by a victim’s participation in the process. The rights of victims make it more difficult for the court to strike a fair balance between the defendant’s right to a fair trial, and the victim’s rights under a VRA. This difficulty undoubtedly has resulted in numerous appeals by defendants, a factor to be considered in any judicial economy analysis.

In view of the state appellate case law that has developed concerning the VRAs, problems have arisen that do not appear to be remedied in the drafting of the currently proposed federal VRA. As a practical matter, if a conflict arises, it is much easier for a judge to deny a victim his or her rights rather than provide a defendant an arguable issue to raise on appeal. Moreover, if the judge opts to deny the victim his or her state constitutional rights, it is difficult for the victim to obtain redress. A criminal defendant, however, who is denied his or her constitutional rights may have a conviction overturned or seek civil damages under civil rights law. No such remedies are provided to the victims of crime. Thus, the proposed federal constitutional amendment appears to fall victim to the problems suffered by its state counterparts, in that there is no legitimate enforcement mechanism. The proposed federal amendment explicitly limits the remedies provided, while establishing none.

Notwithstanding the lack of an explicit enforcement mechanism, the case law that has developed under the state counterparts of the proposed federal VRA tend to reveal only limited problems with the enactment of such a Constitutional Amendment. This survey of case law reveals that state appellate courts have addressed the largest fears of those opposing a federal VRA—that a defendant’s
rights will be hindered. When faced with legitimate conflicting rights, state appellate courts have consistently acknowledged that the liberty rights of defendants are paramount.

V. CONCLUSION

Amending the United States Constitution is a long and arduous process. Even if Congress approves the proposed amendment, ratification by three-fourths of the state legislatures within seven years is still required. In this country’s history, it is rare that an issue has garnered enough support to warrant the substantial step of a Constitutional Amendment. Only time will tell if the political momentum of the modern victims’ rights movement will endure to effectuate an amendment to the Constitution of the United States to protect the rights of crime victims.

About the Author: Jennifer J. Stearman received her Bachelor of Arts in Political Science and Criminal Justice from the University of South Carolina. She then graduated cum laude from the University of Baltimore School of Law with her Juris Doctor. She is currently a judicial clerk for the Honorable James R. Eyler of the Court of Special Appeals of Maryland. Thereafter, she will be an associate with the law firm McGuire, Woods, Battle & Boothe, LLP in Baltimore, Maryland.

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APPENDIX A

STATE VICTIMS’ RIGHTS AMENDMENTS: 
ENACTMENT DATE AND PERCENTAGE OF 
ELECTORAL SUPPORT\textsuperscript{231}

<table>
<thead>
<tr>
<th>State</th>
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| Rhode Island | 1986        | Passed by 
Constitutional Convention |
| South Carolina | 1996   | 89%               |
| Tennessee    | 1998        | 89%               |
| Texas        | 1989        | 73%               |
| Utah         | 1994        | 68%               |
| Virginia     | 1996        | 84%               |
| Washington   | 1989        | 78%               |
| Wisconsin    | 1993        | 84%               |

\textsuperscript{231}See \textit{National Victims’ Constitutional Amendment Network}, NVCAN Background Kit, at 14 (April 1998).
APPENDIX B

SUMMARY OF STATE CONSTITUTIONAL RIGHTS OF CRIME VICTIMS

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<tr>
<th>State</th>
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SETTING LIMITS ON SPOUSAL PRIVILEGES IN MARYLAND’S FEDERAL COURTS: THE VIRTUES AND VICES OF BRIGHT-LINE RULES

by Eric H. Singer, Esq.

I. INTRODUCTION

Under federal common law, in criminal cases a would-be witness spouse holds the exclusive privilege to refuse to testify against the other spouse with respect to matters that might incriminate the non-testifying spouse. This privilege, known as the adverse spousal testimonial privilege or the “anti-marital facts privilege,” is supposed to apply not simply to conduct or events occurring during the marriage, but to pre-marital events as well. But Maryland’s district court has split on the question of premarital applicability in two relatively recent, yet unnoticed decisions, with one district judge ruling embracing a per se rule against the privilege, and another decidedly, but respectfully, rejecting such a rule.

This split, which is discussed in Part II of this Comment, leads one to question how Maryland’s federal courts will decide a facet of the “confidential marital communications privilege,” a sibling of the anti-marital facts privilege. The confidential marital communications privilege, which may be asserted by either spouse notwithstanding one spouse’s willingness to testify against the other, bars testimony concerning intra-spousal confidential expressions made during the marital relationship. But should the privilege still apply when the communications at issue occur between spouses who, though still legally married, are separated, and if not, at precisely what degree of separation should the privilege yield? This issue, which has not yet been addressed by any reported Fourth Circuit opinion, is the focus of Part III.

II. THE ADVERSE SPOUSAL TESTIMONIAL PRIVILEGE: THE DISTRICT COURT’S SPLIT ON PREMARITAL CONDUCT

In In re Grand Jury Subpoena of [Witness], the potential witness spouse, or “Ms. Witness,” as the court referred to her, invoked the adverse spousal testimonial privilege in a move to quash a grand jury subpoena for her testimony in a fraud investigation of her new husband, “Mr. Target.” Mr. Target and Ms. Witness, who had been romantically involved for several years, married one month after Ms. Witness was served with the subpoena and just before her expected grand jury appearance. The court found that the timing, if not the fact, of their marriage, was substantially motivated by the couple’s desire to acquire the spousal privilege protection. Although the court held that the marriage did not qualify as an outright “sham,” which would have precluded any use of the marital privilege, it denied the motion to quash, or, as the court termed it, the “wedding gift” they had most sought — the spousal privilege to block the wife’s grand jury testimony against her husband with respect to pre-marriage acts.

In so holding, the court did not limit its decision to the particular facts of the case. Rather, the court adopted a per se rule from the Seventh Circuit case, United States v. Clark, which held that the adverse spousal testimonial

5 See id. at 189.
6 See id. at 190.
7 See id.
8 See id. (citing United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975)).
9 See id. at 192.
10 712 F.2d 299 (7th Cir. 1983).
privilege does not cover acts occurring prior to marriage.\textsuperscript{11} The court in \textit{Clark} believed such a categorical rule would be salutary as courts could avoid "mini-trials" on the sincerity of the couple's marriage.\textsuperscript{12} Further, the ruling in \textit{Clark} was in accord with the Supreme Court doctrine calling for privileges to be narrowly construed and subordinated to the greater interest of fact-finding.\textsuperscript{13}

The second Maryland federal district court case to address the adverse spouse testimonial privilege was \textit{A.B. v. United States}.\textsuperscript{14} In \textit{A.B.}, "Ms. A.B." moved to quash a grand jury subpoena for her testimony in an investigation of her husband, a drug trafficking suspect.\textsuperscript{15} The subject of pre-marital collusion was not at issue in this case. However, the government did seek to question Ms. A.B. about events that occurred before her marriage, and Ms. A.B. did assert the adverse spousal testimonial privilege.\textsuperscript{16} In support of its request, the government offered the holding in \textit{In re Grand Jury Subpoena of [Witness]}, and argued that the privilege did not apply to premarital events.\textsuperscript{17} The court in \textit{A.B.}, however, rejected the bright line rule in \textit{In re Grand Jury Subpoena of [Witness]}, and granted Ms. A.B.'s motion to quash.\textsuperscript{18}

The \textit{A.B.} court noted that two cases decided by the Seventh Circuit after \textit{Clark} specifically stated, albeit in dicta, that the general rule was that the adverse testimonial privilege includes matters that occurred prior to the marriage.\textsuperscript{19} Following these decisions, the court in \textit{A.B.} stated that the purpose of the spousal testimonial privilege was to protect "family harmony by preventing spouses from becoming adversaries in criminal proceedings."\textsuperscript{20} Furthermore, the court noted that the purpose of the privilege would be undermined and that "the effect on a marriage would be equally damaging whether the facts about which the witness testified occurred before or after the marriage."\textsuperscript{21} The court concluded that if a valid marriage exists, then the privilege against adverse spousal testimony should apply to all matters, whether they occurred before or after the marriage.\textsuperscript{22} Although the court in \textit{A.B.} appeared sensitive to concerns about the \textit{bona fides} of the marriage, it believed that the bright-line rule of \textit{In re Grand Jury Subpoena of [Witness]} had gone too far and stated that "[a]lthough it may be necessary for a court to delve occasionally into peripheral issues in determining the legitimacy of a marriage, this is a far more satisfactory outcome than simply eliminating all premarital matters from the scope of the privilege."\textsuperscript{23}

Of course, the United States Court of Appeals for the Fourth Circuit will be the penultimate arbiter of the conflict between \textit{In re Grand Jury Subpoena of [Witness]} and \textit{A.B.} In \textit{In re Grand Jury Subpoena of [Witness]}, the court went so far as to predict that the Fourth Circuit would agree with its conclusion and that of the Seventh Circuit in \textit{Clark}.\textsuperscript{24} In fact, however, the rejection of the bright line rule in \textit{A.B.} in favor of an ad hoc factual inquiry seems more likely to prevail in light of the Fourth Circuit's warning that the marital privilege should not become an "empty promise."\textsuperscript{25}

Predictions aside, the court in \textit{A.B.} does seem to have the better argument. As one federal court has found,

\begin{enumerate}
\item See id. at 302.
\item See id.
\item See id.
\item 24 F. Supp.2d 488 (D. Md. 1998).
\item See id. at 489.
\item See id.
\item See id. at 491.
\item See id. at 494.
\item See id. (citing United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984); United States v. Lofton, 957 F.2d 476, 477 (7th Cir. 1992)).
\item See id. n.1 (quoting In re Grand Jury Proceedings, 640 F.Supp. 988, 989 (E.D. Mich. 1986)).
\item Id. at 492.
\item See id.
\item Id.
\item See In re Grand Jury Subpoena of Witness, 884 F. Supp. at 191.
\item See United States v. Morris, 988 F.2d 1335, 1339 (4th Cir. 1993).
\end{enumerate}
the rejection of the Proposed Federal Rule of Evidence 505(c)(2) in 1975, which would have precluded the spousal privilege for premarital acts, signals the rejection of a per se premarital acts exception. Furthermore, at least one other federal district court has concluded that the categorical premarital acts exception found in In re Grand Jury Subpoena of [Witness] simply cannot be harmonized with the policy behind the adverse spousal testimonial privilege. Finally, although the bright-line rule in In re Grand Jury Subpoena of [Witness], like all bright-line rules, has the virtue of being easy to administer and does spare the courts a “mini-trial” in the marital arena, “sham marriages are not common enough to make the occasional mini-trial a great burden.” In short, the court’s holding in A.B. seems to strike the proper balance between maintaining a privilege that remains socially valued and protecting against the strategic maneuver of marrying to suppress testimony.

III. THE MARITAL COMMUNICATIONS PRIVILEGE: A RULE FOR SEPARATED SPOUSES?

As noted above, the confidential communications privilege bars “one spouse from testifying as to conversations or communications with the other spouse made in confidence during their marriage.” Unlike the adverse testimonial privilege, the marital communications privilege belongs to both spouses and may be asserted by either one. The privilege looks not to the particular marriage, but rather “seeks to protect the institution of marriage generally as a haven for confidential communication.” The privilege is “premised on the assumption that confidences will not be sufficiently encouraged unless the spouses are assured that their statements will never be subjected to forced disclosures.”

The Fourth Circuit, however, has not addressed whether a defendant who has confidentially conveyed information to his or her spouse when the two had been separated can still rightfully assert the privilege. At the state level in Maryland, the defendant may still assert the privilege. In Coleman v. State, the Court of Appeals of Maryland held that the marital communications privilege applied, even though, for all practical purposes, the defendant’s marriage had ended at the time of the confidential communication. The court in Coleman found that courts would generally have trouble determining the viability of the marriage, and that since the legislature had codified the marriage privilege without qualification, it was up to the legislature, and not the courts, to provide clarification. At least one commentator has suggested that the federal courts should adopt precisely this kind of categorical rule of non-inquiry into the viability of marriages.

It seems, however, far too late for the federal courts to adopt such a rule. Tasked with interpreting common law privileges, including the marital privileges, “in light of reason and experience” under Federal Rule of Evidence 501, federal courts have clearly decided that the de jure validity of a marriage cannot per se “reasonably” trump the quest for full and complete fact-finding. The question for Maryland’s federal district court and all other courts in the Fourth Circuit is not whether the marital communications privilege yields when the communications at issue occurred when the spouses were separated, but at what point in the separation (prior to divorce) it should yield.

The Fourth Circuit will have to choose between the relatively easily applied rule of “permanent separation” adopted by the Seventh Circuit in Byrd, and the more detail-oriented and apparently higher threshold of “separation plus irreconcilability” created by the Ninth

29 2 Weinstein’s Evidence, supra note 2, at § 505-6.
Articles

Circuit in United States v. Roberson.\textsuperscript{35}

In Byrd, the Seventh Circuit ruled that:

[S]ociety’s interest in protecting the confidentiality of the relationships of permanently separated spouses is outweighed by the need to secure evidence in the search for truth that is the essence of a criminal trial, and that proof of permanent separated status at the time of the communication between the defendant and the defendant’s spouse renders the communications privilege automatically inapplicable.\textsuperscript{36}

In Byrd, the defendant, who was charged with arson, and his wife had been separated for approximately one year when Mr. Byrd uttered some cryptic yet inculpatory remarks to her.\textsuperscript{37} The couple had lived in separate homes during the separation, although the wife allowed the defendant to use her basement as a workroom.\textsuperscript{38} Prior to the defendant’s trial, the wife filed for divorce.\textsuperscript{39} Although the court in Byrd never defined “permanent separation,” it remarked that the “defendant’s conversations are unprivileged because they were all made during a long-term separation of the spouses . . . .”\textsuperscript{40} Though Byrd’s standard of “permanent separation” is imprecise, clearly it is not synonymous with the notion of “irreconcilability.” As the court in Byrd stated, “[w]e refuse to extend the communications privilege to permanently separated couples on the theory a guaranteed protection of confidentiality at this stage might save some troubled marriages.”\textsuperscript{41}

In United States v. Roberson, the Ninth Circuit rejected what it called Byrd’s “categorical rule of ‘permanent separation’”\textsuperscript{42} when it created a rule allowing the spouse to assert the marital communication privilege unless at the time of the communication the couple was irreconcilably separated.\textsuperscript{43} In Roberson, two months after the husband left the marital home, the defendant/husband told his wife about a rape he had committed.\textsuperscript{44} Immediately upon leaving the marital home, the husband had initiated an action for dissolution of the marriage.\textsuperscript{45} At the same time, the wife had obtained a temporary restraining order preventing the husband from re-entering the home or from contacting her.\textsuperscript{46} At trial, the wife testified, and the husband agreed, that the marriage had failed before the time of communication.\textsuperscript{47} After considering the Roberson’s pending divorce action, the temporary restraining order, and the testimony, the trial judge concluded that at the time of the communication the marriage was all but defunct.\textsuperscript{48} The appeals court affirmed and held that the trial judge had correctly concluded that at the time of the communication the marriage was effectively over and that the marital communications privilege should not apply.\textsuperscript{49}

The court in Roberson rejected Byrd and prescribed a two-step inquiry. After the trial court determines whether the husband and wife have separated at the time of the communication, it must then “undertake a more detailed

\textsuperscript{35} 859 F.2d 1376 (9th Cir. 1988).
\textsuperscript{36} Byrd, 750 F.2d at 593.
\textsuperscript{37} See id. at 588.
\textsuperscript{38} See id.
\textsuperscript{39} See id.
\textsuperscript{40} Id. at 592 n.3. The Second Circuit has also held that the duration of physical separation is the primary factor in determining “permanent separation.” See In re Witness Before Grand Jury, 791 F.2d 234, 238 (2d Cir. 1986).
\textsuperscript{41} Id. at 593.
\textsuperscript{42} Roberson, 859 F.2d at 1381.
\textsuperscript{43} See id.
\textsuperscript{44} See id. at 1377.
\textsuperscript{45} See id.
\textsuperscript{46} See id.
\textsuperscript{47} See id.
\textsuperscript{48} See id. at 1378.
\textsuperscript{49} See id. at 1382.
investigation into the irreconcilability of the marriage” at that time and into whether the couple “had abandoned all hope.”\footnote{See id. at 1381.} Factors that the trial court must consider when making its determination include the stability of the marriage at the time of the communication, any divorce actions filed at the time, divorce pleadings, settlement agreements or proposed property agreements, allegations of gross misconduct or grievances over a period of time, reasons given by the parties for prolonged absence from the home, and the couple’s statements as to irreconcilability.\footnote{See id.}

When deciding whether the privilege applies, other federal circuits have referred to both \textit{Byrd} and \textit{Roberson} without choosing the standard from either case.\footnote{See e.g., United States v. Frank, 869 F.2d 1177, 1179 (8th Cir. 1989), \textit{cert. denied}, 493 U.S. 839 (1989); United States v. Treff, 924 F.2d 975 (10th Cir. 1991), \textit{cert. denied}, 500 U.S. 958 (1991).} The Fourth Circuit, however, should affirmatively select the Seventh Circuit’s marital communications privilege rule of “permanent separation” over the Ninth Circuit’s rule of “irreconcilability” for three reasons.

First, it is relatively easy for couples to follow and rely upon the “permanent separation” standard. While it is true that the “[marital communication] privilege only weakly serves the purpose for which it exists, in that few couples presumably know of this privilege or rely on it when making marital confidences[,]\footnote{Byrd, 750 F.2d at 593.} the permanent separation standard would generate less uncertainty than would “irreconcilability” as to when spousal communications will remain confidential. Second, if the courts are to continue assessing marital viability, determining whether a couple is substantially physically estranged is far easier for the courts than determining whether their marriage is irrevocably defunct.\footnote{See id. at 592-93.} Third, and more important, this bright-line rule, unlike that adopted in \textit{Clark} and \textit{In re Grand Jury Subpoena of [Witness]}, does little violence to the specific purposes of the marital communications privilege itself. Because evidentiary privileges impede the truth-seeking process, they are meant to be construed narrowly.\footnote{See United States v. Nixon, 418 U.S. 683, 710 (1974).} In \textit{Roberson}, however, the Ninth Circuit struck a balance between privilege and fact-finding unduly favorable to spouses.

\textbf{IV. CONCLUSION}

“[S]ociety has little interest in protecting the confidentiality of separated couples whose marriage has failed by the time of the communication.”\footnote{Roberson, 859 F.2d at 1380 (citing United States v. Byrd, 750 F.2d 585, 593 (7th Cir. 1984)).} However true, whether the marital communications privilege should give way to society’s truth-seeking interests \textit{only} when irreconcilability is established is open to serious doubt. Do separated couples actually maintain an expectation of confidentiality up until the time they view their marriages as defunct, as opposed to when they are permanently separated? Should the community’s interest in truth-seeking in criminal trials really be suspended until marriage has failed, as opposed to when the couple has permanently separated? It will be interesting to see just how solicitous of the privilege the Fourth Circuit will prove to be.

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**Attorney Grievance Comm’n of Maryland v. Painter**

An Attorney Who Commits Repeated Domestic Violence and Has Been Convicted for Similar Conduct Is Subject to Disbarment

By Valerie G. Esch

In a case of first impression, the Court of Appeals of Maryland held that an attorney who commits acts of violence on his wife and children, and violates court ordered probation, has engaged in conduct prejudicial to the administration of justice and is subject to disbarment. *Attorney Grievance Comm’n v. Painter*, 356 Md. 293, 739 A.2d 24 (1999). This issue was uniquely treated by the court compared to other jurisdictions, which have imposed much lighter sanctions. Where other courts have merely imposed suspensions, the court of appeals disbarred an attorney with a history of repeated domestic violence.

Richard Painter was a member of the District of Columbia and Maryland bars, and had various legal jobs during his career including a People’s Court judge. While holding this position, it was alleged that he hit a female acquaintance and threatened her with a revolver. In 1960, Painter returned to private practice until 1993 at which time he voluntarily closed his law office after being a member in good standing of the Bar for forty-two years. His “self-imposed exile” from practicing law was, according to him, due to his “mental state.”

Richard Painter was married in 1978 and had two children. From the time of his honeymoon, and throughout his marriage, Painter engaged in a course of violent conduct by physically and mentally abusing his wife and children. Despite a protective order, Painter was caught stalking his wife with two loaded handguns. Painter was charged on a twelve-count indictment claiming various degrees of domestic violence against his family. He ultimately pled guilty to two counts of transporting a handgun and two counts of battery.

In his defense, Painter argued that there was no medical evidence that he inflicted any physical injuries on his family. He argued further that the court analogized his behavior to President Clinton’s, reasoning that what happened behind closed doors had not influenced his fitness as an attorney. Despite his arguments, the Circuit Court for Montgomery County found it apparent from the record, and from Painter’s comments in court, that he neither appreciated, nor could account for, the violence he inflicted on his family. Painter’s criminal conduct was not an isolated incident, but rather was conduct that spanned a sixteen-year period.

Under the authority granted by Maryland Rule 16-711, the Court of Appeals of Maryland remanded the matter to the circuit court and subsequently adopted the findings of fact and law therefrom. *Painter*, 356 Md. at 295, 739 A.2d at 26. After reviewing Painter’s history of domestic violence and criminal conduct, the only issue the Court of Appeals of Maryland considered was Painter’s sanction. The court based its decision largely on whether Painter’s criminal conduct “reflect[ed] adversely . . . on his fitness as a lawyer in other respects” and/or “[was] prejudicial to the administration of justice.” *Id.* at 300, 739 A.2d at 28 (quoting Maryland Rules of Professional Conduct, Rule 8.4(b) & (d)).

The court began its analysis by reviewing similar cases in other jurisdictions that dealt with violations of professional conduct rules and the role of an attorney, similar to Maryland Rule of Professional Conduct 8.4. *Id.* at 299, 739 A.2d at 28. Rule 8.4 provides in pertinent part that “[i]t is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; . . . or . . . (d) engage in conduct that is prejudicial to the administration of justice.” *Id.* at 295, 739 A.2d at 25. The court noted that when an attorney is guilty of serious misconduct, the outrageous behavior is “a world apart from what this Court, the profession, and the public is entitled to expect from members of the bar.” *Id.* at 299, 739 A.2d at 28 (quoting *Attorney

The court recognized that the instant case was unique, in that the conduct at issue involved domestic violence, rather than relating to “traits so closely associated with the legal profession . . . .” Id. at 302, 739 A.2d at 29. The lack of Maryland law on this particular issue forced the court to examine the law of other states, particularly those with similar domestic violence statutes and a strong public policy against such acts. Id. at 302-03, 739 A.2d at 29-30. The court noted that most courts addressing the issue used suspension as the imposed sanction consistent with American Bar Association (“ABA”) Standard 5.12, which provides that “[s]uspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer’s fitness to practice.” Id. at 304, 739 A.2d at 30. The court further stated that cases in which an attorney was disbarred generally involved aggravated assaults in conjunction with other misconduct. Id. at 305, 739 A.2d at 31. According to ABA Standard 5.11, disbarment of an attorney is generally appropriate when: “(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice . . . ; or (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.” Id. at 302 n.4, 739 A.2d at 29.

From its review of cases that involved disbarment, the court found that an attorney’s repeated conduct involving domestic violence was seen as “prejudicial to the administration of justice” and could impact an attorney’s ability to practice law. Id. at 305, 739 A.2d at 31. The court also recognized that “conduct prejudicial to the administration of justice” provides courts with the authority and obligation to consider certain conduct of a person who is an officer of the court, in relation to the duties of a profession that invites public trust and confidence. Id. at 306, 739 A.2d at 32. In that regard, the court acknowledged that “conduct that impacts on the image of the perception of the courts or the legal profession and that engenders disrespect for the courts and for the legal profession may be prejudicial to the administration of justice.” Id. Furthermore, the court stated that “[l]awyers are officers of the court and their conduct must be assessed in that light.” Id. In the instant case, the court found that Painter committed serious criminal acts against his wife and children resulting in a conviction within the meaning of Rule 8.4 of the Maryland Rules of Professional Conduct and Maryland Rule 16-710(e). Id. at 300, 739 A.2d at 28.

The court compared the instant case to Protokowicz, in which the court imposed an indefinite suspension, with the right to apply for reinstatement after one year, for a one-time isolated incident of criminal conduct, where excessive consumption of alcohol was involved. Id. at 301, 739 A.2d at 29. In distinguishing the instant case from Protokowicz, the court of appeals put much emphasis on the length of time during which the misconduct occurred, Painter’s past disciplinary history, and the fact that it was unmitigated by alcohol abuse or mental illness. Id.

The court further noted that Rule 8.4(b) recognizes, by its reference to character traits, that the commission of certain crimes demonstrates a character flaw that, if applying for admission to the bar, could prohibit admission, or, if already admitted, could result in disbarment. Id. at 306, 739 A.2d at 31-32. Under the facts of the instant case, the court held that Painter, an attorney and an officer of the court, who committed repeated acts of violence on both his wife and children, and who violated court ordered probation, at the very least, engaged in conduct that was “prejudicial to the administration of justice.” Id. at 307, 739 A.2d at 32. In so holding, the court concluded that where the conduct is repetitious and involves a conviction for similar conduct, the appropriate sanction is disbarment. Id.

The Court of Appeals of Maryland in Painter, as a matter of first impression, held that repeated domestic violence by officers of the court will not be tolerated. In so holding the court sets an example that this issue is serious and such ill acts on the part of an officer of the court will be punished by the Maryland judiciary. This case expands outside the practice of law and shows that for
purposes of disciplinary actions, not only is an attorney’s professional conduct considered, but their personal conduct is relevant as well.
Baynor v. State
Maryland Rule 4-263 Requires the State to Produce Relevant Information Regarding the Acquisition of Statements Made During a Custodial Interrogation that the State Intends to Use at Trial

By Anabelle Berges

The Court of Appeals of Maryland held that Maryland Rule 4-263(a)(2)(B) requires the state to disclose relevant information regarding the acquisition of inculpatory statements made during a custodial interrogation. Baynor v. State, 355 Md. 726, 736 A.2d 325 (1999). The court held that the State was not required to produce information regarding the circumstances of an entire one hour and fifty-three minute interrogation, where only a nine minute taped confession was introduced at trial. Rather, the prosecutor was only compelled to disclose relevant information regarding the acquisition of the inculpatory statement the State intended to use at trial.

On September 26, 1996, Gary Baynor (“Baynor”) was arrested and charged with murder and other related offenses. At police headquarters, Baynor was interviewed by Detective Michael Glenn and Detective Wayne Jones of the Homicide Unit. Baynor asked the detectives why he was brought to the unit, and Detective Glenn indicated that he was charged with murder. Baynor then asked what punishment he could receive and Detective Glenn stated he could receive life imprisonment or the death penalty. At the suppression hearing the detective testified inconsistently regarding his statement to Baynor. He first testified that he told Baynor he could “be put to death summarily or life.” He later testified, however, that he told Baynor, “he could receive life or the death penalty.” Baynor subsequently agreed to answer the detectives’ questions without a lawyer present. Although the interrogation started at 1:28 p.m. and ended at 3:21 p.m. the detectives did not begin recording the interrogation until 3:12 p.m. In the recorded portion of the interrogation, Baynor admitted to the shooting and was subsequently indicted.

Baynor was convicted of second degree murder, attempted second degree murder, and other related offenses by a jury in the Circuit Court for Baltimore City, and was sentenced to one hundred years incarceration. The Court of Special Appeals of Maryland affirmed Baynor’s conviction. The Court of Appeals of Maryland granted the petition for writ of certiorari.

The court began its analysis by addressing the issue of whether, under Maryland Rule 4-263, the State is required to produce the complete details of an interrogation, including exculpatory statements made by the defendant. Baynor, 355 Md. at 735, 736 A.2d at 329-30. Maryland Rule 4-263 states, in pertinent part, that the “State’s Attorney shall furnish to the defendant: . . . (2) Any relevant material or information regarding: . . . (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial . . . .” Id. at 735, 736 A.2d at 330.

The court recognized that the statement the prosecutor intended to use at the hearing or trial was the recorded portion of the interrogation that contained Baynor’s confession. Id. at 736, 736 A.2d at 330. The State had no intention of admitting the exculpatory statements made by Baynor prior to his confession. Id. at 737, 736 A.2d at 330. Moreover, the court stated that the recorded portion of the interrogation disclosed the information that was required under Rule 4-263(a)(2)(B), because the tape disclosed the time and place that the statements were made, the persons present during the interrogation, and Baynor’s waiver of rights. Id. at 737, 736 A.2d at 331. As a result, the court held that information regarding Baynor’s exculpatory statements “simply would not be relevant to the statements that the State actually intended to use.” Id.

Defense counsel argued that the State should disclose the circumstances of the complete interrogation, so as to allow the trier of fact to consider the totality of the circumstances when determining
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voluntariness of a confession. *Id.* The court stated that Rule 4-263(a)(2)(B) did not intend to place such a responsibility on the State. *Id.* Furthermore, the State was not required to “disclose essentially a verbatim account of a custodial interrogation that ultimately results in an oral inculpatory statement.” *Id.* The court concluded that the State did not violate Rule 4-263 by not disclosing a complete account of the custodial interrogation. *Id.* at 740, 736 A.2d at 332.

The court also rejected the argument that all interrogations must be tape recorded to determine whether the interrogation was voluntary under a totality of the circumstances. *Id.* at 738, 736 A.2d at 331. The court pointed out that a majority of other jurisdictions do not require that a custodial interrogation be tape recorded in order for a confession to be voluntary. *Id.* The court reasoned that the creation of a rule requiring that all interrogations be recorded is best left in the hands of the legislature. *Id.* at 740, 736 A.2d at 332.

The court next addressed the issue of whether the trial court restricted defense counsel’s cross examination of the detectives during the pretrial hearing and trial, thereby barring him from eliciting evidence of the entire custodial interrogation. *Id.* at 740, 736 A.2d at 332-33. The court noted that Baynor testified at the pretrial suppression hearing, and was questioned by defense counsel regarding the circumstances surrounding the interrogation. *Id.* at 740, 736 A.2d at 333. Therefore, Baynor could have testified at trial regarding the details of the custodial interrogation. *Id.* He chose, however, not to testify. *Id.*

The court also stated that defense counsel’s examination of the detectives during the pretrial hearing and trial adequately disclosed evidence regarding the complete interrogation. *Id.* at 741, 736 A.2d at 333. This evidence consisted of, *inter alia,* Detective Glenn’s statement to Baynor that he could receive the death penalty, the fact that only nine minutes out of the entire custodial interrogation were recorded, and testimony that Detective Glenn’s notes of the interrogation did not contain all of Baynor’s statements. *Id.*

The court of appeals concluded that the trial court did not limit defense counsel’s examination of the detectives. *Id.* at 749, 736 A.2d at 337. Defense counsel presented to the court and jury, testimony regarding the details of the recorded portion of the custodial interrogation. *Id.* at 741, 736 A.2d at 333. The court concluded that the evidence elicited by defense counsel was sufficient for the court and jury to consider the totality of the circumstances in determining the voluntariness of the confession. *Id.*

As a result of the holding in *Baynor,* the State has no duty to disclose the complete account of a custodial interrogation that results in an inculpatory statement. By strictly construing Rule 4-263 to require the State to only disclose relevant information regarding the portion of the defendant’s statement that the State intends to use at trial, the Court of Appeals of Maryland has made access to information relating to the entire custodial interrogation more difficult to obtain. More importantly, State agents can continue to interrogate defendants for extended periods of time while only tape recording inculpatory statements made by the defendant.
The Court of Appeals of Maryland held that a medical patient was entitled to a jury instruction stating that the violation of a statute may be considered evidence of negligence. *Bentley v. Carroll*, 355 Md. 312, 734 A.2d 697 (1999). Moreover, the court concluded that when a jury is determining causation in a medical malpractice case, it may consider non-expert as well as expert medical testimony. The court of appeals also held that an expert may not offer an opinion as to the truthfulness of a party, but may only offer an opinion based on the facts sufficient to show the basis for that opinion.

Beginning in 1978 and continuing until 1988, then two-year old Christine Ann Bentley ("Bentley") received medical treatment from Dr. Alan Carroll ("Carroll") and the late Dr. George L. Morningstar for a series of ailments including urination problems and vaginal inflammation. During this same ten-year period, Bentley had allegedly been sexually abused by her mother’s boyfriend on a regular basis.

In 1996, Bentley filed suit against Carroll, the estate of George L. Morningstar, and Morningstar and Carroll, P.A., in the Circuit Court for Frederick County, alleging medical malpractice. Bentley claimed that Carroll breached the standard of medical care by failing to report, as required by Article 27, section 35A of the Maryland Annotated Code that the sexual abuse of a child was possibly occurring. Bentley proposed the jury instruction that violation of a statute could be considered evidence of negligence which the trial court refused. The jury returned a verdict in favor of Carroll, and a timely appeal was noted to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland, *sua sponte*, granted certiorari.

The court of appeals began its analysis by examining Article 27, section 35A of the Maryland Annotated Code, Maryland’s Child Abuse Act, and Bentley’s proposed jury instruction. *Bentley*, 355 Md. at 318, 320, 734 A.2d at 701-02. In examining Bentley’s proposed instructions in conjunction with Maryland Rule 2-520, the court opined that a requested jury instruction should be given only if (1) the instruction correctly states the law; (2) the matter at issue is not fairly covered by an instruction already given; and (3) the law is applicable in light of the evidence before the jury. *Id.* at 324-25, 734 A.2d at 704 (citing *Holman v. Kelly Catering*, 334 Md. 480, 639 A.2d 701 (1994)). After applying this standard to Bentley’s proposed instruction, the court rejected Carroll’s argument that it would be inappropriate to include section 35A in a jury instruction. *Id.* at 326, 734 A.2d 705. Rather, the court of appeals found that the trial court erred, in that Bentley’s proposed jury instruction should have been given. *Id.* The court of appeals concluded Bentley’s proposed instruction was legally accurate and its inclusion of section 35A was appropriate given the evidence in the instant case. *Id.*

Before continuing, the court noted that it could have remanded the case solely on the jury instruction error, but in the interest of providing guidance for future parties, it would address the other issues raised by Bentley. *Id.* at 329, 734 A.2d at 707. The court then considered whether the jury should have been instructed that it could consider non-expert, as well as expert testimony, in determining causation. *Id.* at 329-30, 734 A.2d at 707. The court found that an instruction to a jury is erroneous if it restricts evidence that tends to establish material facts. *Id.* at 331, 734 A.2d at 708 (quoting *Singleton v. Roman*, 195 Md. 241, 72 A.2d 705 (1950)). Therefore, the court of appeals held in the instant case, that the trial judge improperly limited the scope of deliberations by only allowing the jury to consider expert testimony in determining causation. *Id.* The court concluded that the jury should have been
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permitted to consider non-expert material such as interrogatories and depositions which may have shed light on material facts in the case. *Id.*

The court of appeals then examined whether the trial court erred in not striking the testimony of an expert witness who called into question the victim’s veracity. *Id.* at 332, 734 A.2d at 708-09. The expert testified that based on the results of a professionally accepted test, Bentley exhibited no signs of an individual who had suffered sexual abuse and may have exaggerated her symptoms. *Id.* at 333, 734 A.2d at 709. The expert further stated that he based his conclusions on the Minnesota Multiphasic Personality Inventory (“MMPI”) test which functioned as a “mini truth, or lie detector . . . .” *Id.*

The court noted that in Maryland, courts are not the proper forum for the introduction or interpretation of devices that measure a witness’s veracity. *Id.* at 334, 734 A.2d at 709 (citing *Guesfeird v. State*, 300 Md. 653, 480 A.2d 800 (1984)). The court additionally stated that Maryland courts have consistently held that an expert witness may not give his opinion as to the truthfulness of a witness. *Id.* at 334, 734 A.2d at 709-10 (citing *Bohnert v. State*, 312 Md. 266, 539 A.2d 657 (1988)). In the instant case, the court held Carroll’s expert’s reliance on what he perceived to be a “truth detector,” coupled with his comments as to the veracity of Bentley, were impermissibly prejudicial and thus, inadmissible as a matter of law. *Id.* at 335, 734 A.2d at 710.

Finally, the court addressed whether Bentley’s expert’s opinion that Bentley’s injuries were the result of sexual abuse was admissible. *Id.* The court first noted that an expert witness may not offer an opinion based solely on the complainant’s version of the cause of his or her injuries. *Id.* at 330, 734 A.2d at 710 (citing *Bohnert v. State*, 312 Md. 266, 539 A.2d 657 (1988)). Rather, the expert opinion must be based on facts that sufficiently show the basis for their opinion. *Id.* In the instant case, the court of appeals found that the expert witness based his opinion on facts that were insufficient to support his testimony. *Id.* at 336, 734 A.2d at 711. As a result, his testimony that Bentley’s injuries were the result of sexual abuse impermissibly bolstered the credibility and argument of Bentley. *Id.* at 338, 734 A.2d at 712.

The court of appeals’s holding in *Bentley* supports the rights of those seeking redress for sexual abuse. The court clearly articulated that abuse victims are entitled to a jury instruction that considers a violation of Maryland’s Child Abuse Act as evidence of negligence. This decision will make it easier for victims to show a breach of the standard of care by physicians, in that it expands the amount of evidence that juries can consider. In addition, juries will not be restricted solely to considering expert testimony, but will be allowed to consider non-expert testimony that might emotionally swing a jury.
The Court of Appeals of Maryland held that pursuant to its plain language interpretation of the 1992 amendments to Article 5 of the Maryland Constitution’s Declaration of Rights, juries consisting of at least six individuals are sufficient for condemnation damages proceedings. *Bryan v. State Roads Comm’n*, 356 Md. 4, 736 A.2d 1057 (1999). The court based its holding largely on the 1992 amendments to, and legislative history for, Article 5 of the Maryland Constitution’s Declaration of Rights and section 8-306 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland. The court’s ruling determined that a condemnation proceeding is a civil action, and that a jury of at least six is the minimum required under applicable Maryland law.

In order to expand New Hampshire Avenue in Montgomery County, the State Roads Commission of the State Highway Administration (the “Commission”) required a portion of Wesley and Wona Bryan’s (the “Bryan’s”) property to be condemned. A trial was held to discover the amount of just compensation the Bryans were to receive for their inconvenience and loss of property. Under the Maryland Constitution and the law of eminent domain, the Bryans were entitled to have a jury of their peers determine the damages to be awarded.

The Commission filed a “quick take” petition in the Circuit Court for Montgomery County which was subsequently followed by a formal condemnation petition. At trial, the Bryans requested a twelve person jury under Article III, section 40 of the Maryland Constitution. The court denied the Bryans’ request, and held that a six member jury was appropriate in a condemnation damages case under Courts and Judicial Proceedings section 8-306. A six member jury subsequently awarded the Bryans $12,800. Disappointed with the jury’s award, the Bryans appealed to the Court of Special Appeals of Maryland to determine if they, as landowners in a condemnation damages proceeding, had a constitutional right to a twelve person jury. The Court of Special Appeals of Maryland affirmed the lower court’s decision. The Bryans then filed a petition for a writ of certiorari in the Court of Appeals of Maryland.

The court began its analysis by pointing out that a general jury trial is guaranteed in the Maryland Constitution’s Declaration of Rights in Articles 5, 21, and 23. *Id.* at 7, 736 A.2d at 1059. The court noted that in 1992, Article 5, which discusses the right to a jury in civil trials, was amended through the addition of paragraphs (b) and (c). The amended sections state that parties to civil proceedings are entitled to a jury of at least six where the right to a jury trial has been preserved. *Id.* The court also added that the Maryland Constitution does not state, or imply, that a jury of less than twelve is prohibited in the same circumstance. *Id.* Article 23 discusses in part that a jury will decide issues of fact in civil proceedings that exceed $10,000. *Id.* at 8, 736 A.2d at 1059.

The court found that common law historically provided for no jury trial in condemnation cases in Maryland. *Id.* at 9, 736 A.2d at 1060. This was generally because condemnation proceedings were viewed as “special proceedings.” *Id.* at 10, 736 A.2d at 1060. Condemnation cases were reviewed by a “commission of viewers, or appraisers, usually three or five in number” who would discuss and resolve the question of damages without the usual characteristics of a trial. *Id.*

The court went on to explain that Article III, section 40, of the Maryland Constitution provides a specific guarantee to “a right to have a jury determine just compensation in condemnation cases.” *Id.* at 10, 736 A.2d at 1060-61. More specifically, the constitution provides...
a provision that covers highways and “quick-take” proceedings. Id. at 8, 736 A.2d at 1059. This provision allows the Commission to immediately take the property needed for construction of a highway, with payment tendered to the owners at that time. Id. at 8, 736 A.2d at 1059-60. However, it also provides that any later additional sums awarded to the owners by a jury must also be paid. Id.

The court cited Baltimore Belt R.R. Co. v. Baltzell, 75 Md. 94, 23 A. 74 (1891), a case on point that dealt with jury trials in condemnation cases, and also cited to Article III, section 40, as support for its holding. Id. at 10, 736 A.2d at 1060-61. The landowners in Baltzell argued that a statute, which authorized the railroad company to make an “application to a justice of the peace,” was a violation of the right provided by Article III, section 40. Bryan at 11, 736 A.2d at 1061. (quoting Baltzell, 75 Md. at 98, 23 A. at 74). The statute allowed the justice of the peace to put together a panel of twelve persons, out of a group of twenty qualified to be jurors, to determine the question of damages. Bryan at 11, 736 A.2d 1061. (quoting Baltzell, 75 Md. at 98, 23 A. at 74). In Baltzell, the court of appeals held that “either a common law jury or a special jury of twelve” complied with Article III, section 40. Id. (quoting Baltzell, 75 Md. at 108, 23 A. at 77). The court pointed out that Maryland has traditionally defined “jury” to mean a common law jury. Id. However, in condemnation cases broader meanings of the term “jury” are used. Id. The court further explained that Article III, section 40, was in place to provide that the owner of property not be relieved of their property without just compensation. Id. at 12, 736 A.2d at 1062. (quoting Baltzell, 75 Md. at 108, 23 A. at 77). Additionally, the court noted that owners should have the right to have twelve persons decide the amount of compensation to be paid. Id.

During the period between 1851 and 1992 Article III, section 40, entitled landowners during condemnation cases to a twelve person jury. Id. at 13, 736 A.2d at 1062. The court looked to the 1992 amendment of Article 5, however, to see if that constitutional right had been modified. Id. The Bryans objected, stating that their right to a twelve person jury was not derived from Article 5, but from Article III, section 40. Id. The Court of Appeals of Maryland disagreed, pointing to the plain language of Article 5, paragraphs (b) and (c). Id. The court deduced that a six-person jury was available in “any proceeding in which there is a right to a jury trial, except a criminal proceeding.” Id. Condemnation cases, the court concluded, qualify as “any civil proceeding,” and have been consistently treated as such. Id. at 14, 736 A.2d at 1062. Finally, the court reiterated that nowhere in the state constitution was a jury in a civil proceeding prohibited from being less than twelve persons. Id. at 14, 736 A.2d at 1063.

Due to the intrusive nature of eminent domain, the court’s holding in Bryan may lead to the public feeling cheated by the Maryland Constitution, in that they are not entitled to as many jurors as in the past. Landowners are ultimately being deprived of their property and may feel entitled to a larger panel to determine the amount of their damages based on loss and inconvenience. A jury of six will provide less of a cross section of the public, possibly reducing, or conversely, increasing the amount of damages received. The practitioner should be aware that while a jury of twelve is permissible, due to cost and difficulty of obtaining jurors, a judge may be more inclined to limit or permit a jury of as few as six persons.
Carter v. State

To Overcome a Defendant’s Sixth Amendment Right to a Public Trial, the Court Must Provide a Compelling Interest Evidenced by Case-Specific Reasons

By Akia Fox

The Court of Appeals of Maryland held that a defendant’s Sixth Amendment right to a public trial can only be set aside by providing a compelling state interest supported by case-specific reasons and findings of fact. Carter v. State, 356 Md. 207, 738 A.2d 871 (1999). The court opined that a trial court’s closure of a courtroom during the testimony of a fourteen year old sexual abuse victim, without the support of case-specific reasons in the record demonstrating a sufficient basis for the action, violated the accused’s Sixth Amendment right. In so holding, the court of appeals determined that in the absence of a hearing and case-specific findings at the trial level, an appellate court’s post hoc rationale would not be sufficient to deny the accused of his constitutional right to a public trial.

Robert Ciana Carter (“Petitioner”), was charged in a nine-count indictment for rape, second and third degree sexual offenses, attempted sodomy and child abuse of his wife’s daughter. Before the fourteen year old victim testified, the state moved to clear the courtroom due to her age and the sensitive nature of her testimony. In response to the state’s motion, defense counsel objected on the basis of defendant’s constitutional right to a public trial. However, the trial court granted the state’s motion and subsequently cleared the courtroom. The defendant was convicted in the Circuit Court for Harford County of three counts of second degree sexual offense, three counts of third degree sexual offense, and child abuse. The court of special appeals affirmed the circuit court’s ruling. The Court of Appeals of Maryland granted certiorari.

The court of appeals began its analysis by looking at the presumptive right of the accused to a public trial. The court recognized that the presumption that the accused is entitled to a public trial has been deeply embedded into our criminal justice system. Carter, 356 Md. at 214, 738 A.2d at 874. The Sixth Amendment of the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right to a public trial.” Id. at 215, 738 A.2d at 875 (quoting In Re Oliver, at 270). The court of appeals noted that the Supreme Court further recognized that a public trial could also serve as an “effective restraint on possible abuse of judicial power.” Id. (quoting In Re Oliver, at 270).

In reviewing its own case law, however, the court of appeals recognized that the right to a public trial is not absolute. Id. at 216, 738 A.2d at 875. In Baltimore Sun Co. v. Colbert, 323 Md. 290, 593 A.2d 224 (1991), the court held that in order to overcome the defendant’s Sixth Amendment right, the burden is on the moving party to show that it had an overriding interest and that no reasonable alternatives existed. Id. at 216, 738 A.2d at 875. In order to ensure that the moving party met its burden, the court concluded that it was incumbent upon the trial judge to make specific findings of fact upon the record to support its decision to set aside a defendant’s Sixth Amendment rights. Id. If that burden was not satisfied, the accused’s right to a public trial could not be denied. Id.

In applying the above analysis to the instant case, the court of appeals examined the procedure that
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the trial court followed in rendering its decision. *Id.* at 219, 738 A.2d at 877. The court of appeals found that the circuit court record failed to show whether the court gave case-specific findings of fact to support its decision to deny the defendant his Sixth Amendment rights, as well as whether the trial court explored reasonable alternatives to closure. *Id.* Although the court of appeals recognized that the state had a compelling interest to protect child victims, it declined to lightly disregard the rights of the accused by deviating from its previously established procedural standards.

The court of special appeals defended the trial court’s ruling by stating that the “victim’s trial testimony ultimately bore out the appropriateness of the judge’s decision to clear the courtroom.” *Id.* at 220, 738 A.2d at 878. In her testimony, the child indicated that she was relieved that the courtroom had been cleared. *Id.* The court of appeals, however, disagreed with this reasoning, holding that the requirement of a case-specific finding is to ensure that the reviewing court will be able to evaluate the accurateness of the lower court’s ruling by analyzing the record. *Id.* Furthermore, the court clearly stated that “an appellate court may not provide a post hoc rationale for why the trial judge would have closed the trial had it held a hearing and made findings.” *Id.* In the absence of a record that supports the lower court’s ruling, the appellate court cannot exercise its function. *Id.* Therefore, in light of the absence of case-specific findings, the court of appeals concluded that the defendant’s Sixth Amendment rights were violated and ordered a new trial. *Id.* at 226, 738 A.2d at 881.

The Court of Appeals of Maryland’s holding in *Carter* strikes a damaging blow to the prosecution of sexual and other highly sensitive criminal cases in Maryland. Fearing that the courts may not protect their interests, victims of sexual crimes, especially young victims, may be less likely to report these crimes and later testify. In order to protect the interests of both the victim and state, state’s attorneys must insure that findings of fact are on the record before calling witnesses that require them to ask the judge to clear the courtroom. If the court of appeals’s ruling proves to be detrimental to both victims and the state, the legislature may find it necessary to revise the rules of criminal procedure, to reflect the requirement that judges must make the necessary findings of fact on the record before ordering a clearance of the courtroom.
**Recent Developments**

**Coates v. Southern Maryland Electric Cooperative, Inc.**

Utility Pole Owners Have a Duty to Refrain from Creating Unreasonable Risks to Roadway Travelers

By Brent Bolea

The Court of Appeals of Maryland held that utility pole owners have a duty to place their poles in a reasonable position so as not to expose roadway travelers to a potentially dangerous situation. *Coates v. Southern Maryland Electric Cooperative, Inc.*, 354 Md. 499, 731 A.2d 931 (1999). The court stated that although utility pole owners are not under a duty to inspect all existing poles, a factual question is raised regarding unreasonable risk if a utility pole owner knows that its pole has been involved in previous collisions. The court also found that utility pole owners must consider road and site conditions when placing poles, but that an owner’s duty is presumably met when a government body mandates placement.

On August 19, 1991, George Thompson ("Thompson") lost control of his pick-up truck and hit a utility pole located approximately three feet from the edge of a winding, two-lane roadway. Passenger Mary Anne Coates was killed in the accident, and her pregnant daughter, also a passenger, sustained injuries which caused the loss of her baby. The utility pole was owned by Southern Maryland Electric Cooperative, Inc. ("SMECO"). Trial evidence showed that no government body gave SMECO precise instructions as to pole placement, and that the utility pole had been involved in a previous collision, the details of which were unknown.

Mary Anne Coates’s mother brought suit in the Circuit Court for Charles County. The court granted summary judgment for SMECO, finding that it owed no duty to the plaintiffs. The lower court determined that SMECO’s only duty was to keep its poles from interfering with the “proper [ ] and reasonable use of the highway by vehicles.” Prior to being heard by the Court of Special Appeals of Maryland, the Court of Appeals of Maryland reviewed the circuit court’s holding.

In the first stage of its analysis, the court of appeals explored Maryland law finding that utilities have been found liable for utility pole collisions only when, “(1) the utility chose the location of the pole, free from governmental direction, and (2) the pole created a danger to persons while on the traveled portion of the road.” *Coates*, 354 Md. at 514, 731 A.2d at 938. Although the court found no Maryland law imposing liability where a vehicle struck a utility pole while off the traveled portion of a road, it acknowledged that such liability had never been ruled out. *Id.* at 514, 731 A.2d at 938-39.

The court then examined various factors used by other states to decide utility pole owner liability. The court found that some jurisdictions had based their decision in terms of the utility’s duty, while others used proximate cause of the accident. *Id.* at 514-15, 731 A.2d at 939. Additional factors considered by the court were: (1) whether pole placement was directed by a government agency; (2) proximity to roadway; (3) nature and condition of roadway; (4) history of collisions; (5) driver conduct; (6) feasibility of pole relocation; and (7) cost and effectiveness of requiring pole relocation by imposing tort liability. *Id.* at 514, 731 A.2d at 939.

The court also looked at A.L.R annotations and, therefrom, derived the general proposition that “liability depends on whether the pole is located in or so close to the traveled portion as to constitute a danger ‘to anyone properly using the highway, and on whether the location of the pole is the proximate cause of the injury.’” *Id.* at 515, 731 A.2d at 939. The court also examined the Restatement Second of Torts, focusing particularly on section 368(b), which states that a utility could be liable if a person foreseeably leaves the highway in the ordinary course of travel. *Id.* at 516, 731 A.2d at 940.

In addition to its current case law analysis, the court further stated that public policy considerations play
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a necessary role in determining whether a duty exists. *Id.* at 523-24, 731 A.2d at 944. Factors to consider, the court pointed out, are “convenience of administration, the extent of the burden on the utility and its capacity to bear that burden, the benefit or detriment to the community, the desire to prevent future injuries, and any moral blame associated with the placement of the pole.” *Id.*

After examining the above-mentioned sources, the court of appeals made a multi-faceted conclusion. First, that a utility has a duty not to endanger those traveling on the portion of a roadway intended for lawful travel. *Id.* Further, that a utility has presumptively complied with its duty if a pole is placed at the direction or approval of a government body. *Id.* at 525, 731 A.2d at 944. If, however, some extraordinary circumstance makes the placement obviously dangerous, a duty may be created for the utility to avoid or resist putting the pole in that location. *Id.* at 525, 731 A.2d at 944-45. The court also held that a utility may ordinarily assume that travelers will use roads in a reasonable, lawful manner, and that given a choice, a utility must place a pole in the least dangerous position, taking into account road conditions and topography. *Id.* at 525, 731 A.2d at 945. Finally, the court held that if a utility is aware that a pole has been in “frequent accidents or an accident that is not freakish and indicates a likelihood of future collisions, a question of fact is created whether the pole ‘incommodes’ or unreasonably imperils traffic on the road.” *Id.*

Applying these principles to the instant case, the court upheld SMECO’s motion for summary judgement, concluding that it did not have a duty to anticipate and guard against Thompson’s deviation from the roadway. *Id.* at 526, 731 A.2d at 945. In so holding, the court noted the posted 35 miles per hour speed limit, the pole’s location on the opposite side of the road from where Thompson was driving, and Thompson’s history of traveling on the same road repeatedly without incident. *Id.* The court also pointed out that according to expert testimony, the pole was not awkwardly placed from Thompson’s perspective, and that anyone travelling under 52-56 miles per hour should not leave the roadway. *Id.* Finally, the court stated that SMECO’s duty was unrelated to Thompson’s negligence, and that a previous collision with the same pole was irrelevant to its holding because the nature of that incident was unknown. *Id.*

The Court of Appeals of Maryland in *Coates*, attempts to clarify utility pole liability by defining the nature of a utility pole owner’s duty to roadway travelers. The court has adopted a flexible approach toward determining liability, as it was not willing to grant utilities complete immunity, but the court also wanted to avoid imposing on them an undue burden. Its efforts, however, may create more confusion than clarity. Ultimately, the vague nature of the court’s holding may result in increased litigation, an outcome the court was trying to avoid.
**Ferris v. State**

After Completion of a Routine Traffic Stop, Separate Reasonable Articulable Suspicion Is Required to Support a Continued Detention or Seizure

By Kristin E. Blumer

In its first opportunity to consider the issue, the Court of Appeals of Maryland held that an initially valid stop can evolve into an unreasonable seizure under the Fourth Amendment when continued detention is not supported by separate, articulable suspicion. *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (1999). Once the purpose of the initial stop has been fulfilled continued detention amounts to a “second stop” which must be either consensual or justified by reasonable, articulable suspicion to be valid under the Fourth Amendment. If elements of coercion are present and no articulable suspicion is found, then the second stop is unlawful.

Maryland State Trooper Andrew Smith (“Trooper Smith”) observed a Toyota Camry traveling on Interstate 70 in Washington County, Maryland, in the early morning hours of May 7, 1996. Trooper Smith, using a laser speed gun, clocked the vehicle going ninety-two miles per hour in a sixty-five mile per hour zone. Trooper Smith stopped the car, approached the vehicle, and observed Peter Michael Ferris (“Ferris”), the driver, and Michael Discher (“Discher”), the passenger, in the front seat. Trooper Smith asked Ferris for his driver’s license and registration. At that time, Trooper Smith noticed that Ferris’s eyes were bloodshot and that Ferris appeared nervous.

After Trooper Smith returned to his patrol car to request a driver’s license check and write out a citation, he noticed Ferris and Discher moving around and looking back towards him three or four times. At that time, Deputy John C. Martin (“Deputy Martin”) of the Washington County Sheriff’s Department arrived on the scene and parked behind Trooper Smith. He approached the patrol car and spoke with Trooper Smith briefly, and also noted that Ferris and Discher were acting nervous.

Trooper Smith returned to the Camry and handed Ferris his license and the citation, but he did not advise Ferris that he was free to leave. Instead, Trooper Smith “asked [Ferris] if he would mind stepping to the back of his vehicle to answer a couple of questions. [Ferris] stated he didn’t mind.” Ferris accompanied Trooper Smith to the back of the car. As a result of the questioning, Trooper Smith searched the vehicle and found marijuana.

Ferris was charged with possession of marijuana and possession in sufficient quantity to reasonably indicate an intent to distribute. Prior to trial, Ferris moved to suppress all evidence and statements relating to the seizure of the marijuana. At the hearing, the judge denied Ferris’s motion, and Ferris was later convicted in the Circuit Court for Washington County. The Court of Special Appeals of Maryland affirmed his conviction in an unreported opinion. The Court of Appeals of Maryland granted certiorari to address two issues: (1) whether a person is seized within the meaning of the Fourth Amendment when asked to get out of his car for questioning upon the completion of a routine traffic stop, and (2) was the seizure justified by reasonable, articulate suspicion.

The court first noted that the initial stop for exceeding the posted speed limit was justified under the Fourth Amendment by probable cause. *Ferris*, 355 Md. at 369, 735 A.2d at 498. The court focused its analysis on the actions of the trooper after issuing the citation for speeding and returning Ferris’ driver’s license. *Id.* Ferris argued that the initially legitimate detention developed into an illegal stop once the purpose of the traffic stop was satisfied. *Id.* at 369-70, 735 A.2d at 498. The court noted that it had not yet considered the issue, but two prior decisions of the Court of Special Appeals of Maryland were relevant. *Id.*

In *Snow v. State*, 84 Md. App. 243, 578 A.2d 816 (1990), the court of special appeals held there was no reasonable suspicion to justify
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detaining a vehicle to be searched once the officer issued a warning to the driver, pursuant to a valid traffic stop. *Id.* at 370-71, 735 A.2d at 498. A similar holding was reached in *Munafó v. State*, 105 Md. App. 662, 660 A.2d 1068 (1995), where the court of special appeals found that once a citation or warning has been issued, which was the purpose of the traffic stop, the continued detention of the car constitutes a second stop, which must be justified by separate, reasonable suspicion. *Id.* at 371, 735 A.2d at 498-99. Based on these cases, the court of appeals determined that once the initial purpose of a traffic stop is completed, a continued detention implicating the Fourth Amendment will be honored only if: (1) the driver gives consent to the further detention, or (2) the officer has, at the least, reasonable suspicion of criminal activity. *Id.* at 372, 735 A.2d at 499 (citing *United States v. Sandoval*, 29 F.3d 537, 540 (10th Cir. 1994)). The court concluded that Trooper Smith’s initial detention of Ferris was complete when the trooper delivered the citation and handed back his license. *Id.* at 373, 735 A.2d at 500. At that time, Ferris was technically free to leave, absent reasonable suspicion or consent. *Id.*

The court then considered whether the second stop of Ferris was a detention in violation of the Fourth Amendment, or merely a “consensual encounter.” *Id.* at 374, 735 A.2d at 500. The State argued that Ferris consented to stepping from the car, which did not transform the encounter into a seizure. *Id.* The court disagreed, noting that mere questioning of an individual does not constitute a seizure; however, the court opined that if a reasonable person felt compelled to remain, and no consent was given, the officer violated the Fourth Amendment prohibition against unreasonable seizures. *Id.* at 374-75, 735 A.2d at 500-01.

The court applied the “totality-of-the-circumstances” approach in evaluating whether Ferris was free to leave the scene of the traffic stop after Trooper Smith gave him a citation and his license. *Id.* at 376, 735 A.2d at 501. The court noted that the issue was fact-specific, identifying “certain factors as probative of whether a reasonable person would have felt free to leave.” *Id.* at 377, 735 A.2d at 502. The factors cited by the court were:

- the time and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person’s documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave.

*Id.*

In finding that the stop was more coercive than consensual, the court first noted that the pre-existing, lawful seizure intensified the coercive nature of the situation. *Id.* at 378, 735 A.2d at 502. The court described the transition between the lawful stop and the second, unlawful seizure as “seamless,” so that it was unlikely that Ferris knew that he was free to leave once the traffic stop was over. *Id.* at 379, 735 A.2d at 503.

The court also considered the fact that Trooper Smith never informed Ferris that he was free to leave. *Id.* Although there is no constitutional requirement that a detainee be advised that he is free to leave, the court noted that an officer’s failure to so inform the detainee is relevant to the determination of consent. *Id.* at 379-80, 735 A.2d at 503 (citing *Ohio v. Robinette*, 519 U.S. 33 (1996)).

The court emphasized the fact that the trooper removed Ferris from his vehicle, placing him in a more coercive situation. *Id.* at 382, 735 A.2d at 505. The court additionally found that the coercive nature of the stop was furthered by the presence of two uniformed officers. *Id.* at 383, 735 A.2d at 505. Finally, the court noted that the environment of the situation, late at night on a empty stretch of rural highway, heightened the coerciveness felt by Ferris. *Id.* at 383, 735 A.2d at 505-06. The court found that although no single factor, when considered on its own, was indicative of a coercive situation, the totality of the circumstances indicated that a reasonable person in Ferris’s situation would not have felt free to leave. *Id.* at 384, 735 A.2d at 506.
Therefore, the second stop was not consensual and constituted a seizure under the Fourth Amendment. *Id.*

In addressing the validity of the second stop, the court noted that it must have been supported by reasonable, articulable suspicion. *Id.* An officer’s “hunch” is insufficient; rather, the standard is “whether a reasonably prudent person in the officer’s position would have been warranted in believing that Ferris was involved in criminal activity . . . .” *Id.* The court found that mere bloodshot eyes, nervousness, and a lack of odor of alcohol, the factors argued by the State, were insufficient to constitute articulable suspicion of criminal activity, warranting the second stop. *Id.* at 387, 735 A.2d at 507-08.

The Court of Appeals of Maryland in *Ferris* strengthened the application of the Fourth Amendment prohibition against unreasonable searches and seizures in Maryland. The opinion, however, does not address the hypothetical situation of a police officer questioning Ferris under the same circumstances before handing him the citation and his license. The court states that the transition between a lawful traffic stop and an unlawful seizure can be so “seamless” that the detainee does not recognize that a “second stop” has been effectuated. In reality, this “seamless” line of demarcation may create difficulties for law enforcement officers in attempting to stay within such a gray area of the Fourth Amendment jurisprudence and effectively do their jobs.
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**Giant Food, Inc. v. Department of Labor, Licensing and Regulation**

Disqualification of Unemployment Eligibility under Section 8-1004 of the Labor and Employment Article Is Lawful when There Is Substantial Curtailment at the Individual Facility or Premises

By Traci Gladstone Corcoran

The Court of Appeals of Maryland held that disqualification of unemployment benefits under section 8-1004 of the Labor and Employment Article of the Annotated Code of Maryland ("section 8-1004"), applies when there is a substantial curtailment of work caused at the employee’s individual location of employment. *Giant Food, Inc. v. Department of Labor, Licensing, and Regulation*, 356 Md. 180, 738 A.2d 856 (1999). In so holding, the court ended an ongoing judicial debate over whether “substantial curtailment” means an individual place of employment or an entire business entity.

Giant Food, Inc. ("Giant"), is a retail grocer that owns and operates several distribution centers, warehouses, stores, and plants in Maryland and other Mid-Atlantic states. Teamsters Local 639 ("Teamsters"), represented by the Department of Labor, Licensing, and Regulation ("DLLR"), is a union of truck drivers who delivered to all of Giant’s Mid-Atlantic locations. The Teamsters went on strike after a collective bargaining agreement between Giant and the Teamsters expired. The strike caused Giant’s warehouse, distribution centers, and manufacturing plants to cease operation, resulting in an estimated four million dollars of lost profit. Subsequently, over one thousand employees who participated or assisted in the strike, applied for unemployment benefits.

The Board of Appeals of the DLLR, the Circuit Court for Montgomery County, and the Court of Special Appeals of Maryland all found that the employees were entitled to unemployment benefits. The Court of Appeals of Maryland granted Giant’s writ of certiorari to decide if the Teamsters were disqualified, due to a substantial curtailment of Giant’s operations, from receiving unemployment benefits.

The court of appeals began its analysis by acknowledging its role to review and determine if the administrative agency’s decision was based on proper legal standards. *Giant*, 356 Md. at 184-85, 738 A.2d at 858. The legal issue before the court was whether, under section 8-1004, which replaced Article 95(A) section 6(e), the Teamsters were “disqualified” from receiving the unemployment benefits. *Id.* at 186, 738 A.2d at 859.

The court of appeals cited section 8-1004, specifically the language:

(a) grounds for disqualification . . . (1) an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits for each week for which the Secretary finds that unemployment results from a stoppage of work, other than a lockout, that exists because of a labor dispute at the premises where the individual was last employed.

*Id.* (citing Md. Code Ann., Lab. & Empl. § 8-1004 (1991)). The court first applied the fundamentals of statutory construction, opining that the plain meaning of the rule is “not absolute,” and that a court must review a statute in light of the “purpose, aim, or policy of the enacting body.” *Id.* at 189, 738 A.2d at 861. The court further stated that any unrealistic interpretation should be avoided. *Id.*

The court next analyzed whether “premises” is defined as one particular unit of a business operation, or the entire business entity. *Id.* at 190, 738 A.2d at 861-62. The court noted that when section 8-1004 was enacted, “factory, establishment, or other premises,” was replaced with merely “premises.” *Id.* at 191, 738 A.2d at 862. Based upon its comprehensive review of the statute’s history, the court of appeals held that the difference in word choice had no effect on the statute’s substantive meaning. *Id.* In further support of its holding, the court relied on a legislative report which expressly...
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stated that the purpose of the changed semantics in the revised section was to modernize and clarify, and not to create a new policy. *Id.* According to the court, the report also indicated that there was a valid attempt made “to ensure that a proposed revision conforms as nearly as possible to the intent of the General Assembly . . . .” *Id.* The court then turned to subsection (a)(2) of section 8-1004 which states, “if separate branches of work that usually are conducted as separate businesses in separate premises are conducted in separate departments on the same premises, each department shall be considered a separate premises . . . .” *Id.* at 193-94, 738 A.2d at 863.

The court also discussed the fact that the Maryland statute originated from an English statute. *Id.* at 192, 738 A.2d at 862-63. In *Saunders v. Maryland Unemployment Compensation Board*, 188 Md. 677, 53 A.2d 579 (1947), the court noted that the English statute is virtually identical to the Maryland statute, and that “the English disqualification statute, since its inception, has maintained a definition of place of employment or work limited to each individual site of employment, not the employer’s entire operations.” *Id.* (citing *Saunders*, 188 Md. at 687-88, 53 A.2d at 583-84).

The court went on to analyze the meaning of the “stoppage of work” language of section 8-1004. *Id.* at 196, 738 A.2d at 864. The court referred to *Employment Security Admin. v. Browning-Ferris, Inc.*, 292 Md. 515, 438 A.2d 1356 (1982), where it held that a majority of jurisdictions held the “stoppage of work” to a “substantial curtailment” standard. *Id.* at 197, 738 A.2d at 865 (citing *Browning-Ferris*, 292 Md. at 528-30, 438 A.2d at 1364-65). Aware that substantial curtailment varies and that it is dependent upon “the type of business” at issue, the court applied this standard to the facts of the instant case. *Id.* at 198-99, 738 A.2d at 866. In so doing, the court held that Giant’s activities had completely ceased, and that the Teamsters’ strike had constituted a “stoppage of work” under section 8-1004. *Id.*

In support of its decision, the court of appeals utilized persuasive authority from other states with “similarly-worded” statutes. *Id.* at 199-200, 738 A.2d at 866-67. The most poignant aspect of this analysis came from the Supreme Court of Nebraska. *Id.* at 200-01, 738 A.2d at 867. The Court of Appeals of Maryland cited *Magner v. Kinney*, 141 Neb.122, 130, 2 N.W.2d 689, 693 (1942), which held “that a ‘stoppage or curtailment of work’ may occur in one of three forms: (1) total cessation of work in the premises; (2) cessation of work by part of the employees, which prevents others in the premises from working; or (3) diminished patronage by customers, which produces unemployment.” *Id.* (quoting *Magner*, 141 Neb. at 130, 2 N.W.2d at 693). The court of appeals also cited a case from Illinois, which held that a “stoppage of work” occurs or affects the individual plant, or place of employment, but “not the employer’s business as a whole.” *Id.* at 201, 738 A.2d at 867 (quoting *Central Foundry Div. v. Holland*, 36 Ill.App.3d 998, 1002, 345 N.E.2d.143, 147 (1976)).

The Court of Appeals of Maryland concluded that the distribution centers, the warehouse centers, and the manufacturing plants ceased operation as a result of the strikes, consistent with the intent of section 8-1004. *Id.* at 203-04, 738 A.2d at 869. Accordingly, the employees were disqualified from receiving unemployment benefits because “there was a substantial curtailment of operations at each of these premises to cause a stoppage of work.” *Id.* at 205, 738 A.2d at 870.

In *Giant Food, Inc.*, the court of appeals sets the standard for review in cases arising out of labor disputes, which result in work stoppage, where the employees are subsequently disqualified from receiving unemployment benefits. This decision will have a profound effect on workers in Maryland because the courts have, in previous cases, been unwilling to disqualify them from receiving unemployment if the employer’s company still operated as a whole despite the strike. Yet courts will now be less apt to allow benefits to workers even where only the individual’s place of employment ceased operations. Likewise, the holding in this case gives Maryland labor attorneys a bright line standard with which to assess their active and potential cases relating to labor disputes.
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Hayes v. State
Substitution of an Alternate Juror May Be Done at any Time before the Jury Closes the Jury Room Door to Begin Deliberations

By Jennifer Golub

In a case of first impression, the Court of Appeals of Maryland recently considered the meaning of the phrase “when the jury retires to consider its verdict” from Md. Rule 4-312(b)(3), and how it applies to substituting an alternate juror. The court of appeals found the rule’s intention to be that the substitution of an alternate juror is impermissible after the jury has left the courtroom to consider its verdict and has closed the jury room door for deliberations. Hayes v. State, 355 Md. 615, 735 A.2d 1109 (1999).

The court declared that closing the jury room door marks the point at which the ability to substitute a juror ends.

Following closing arguments and jury instructions in the trial of John Hayes (“Hayes”), Judge Kahl of the Circuit Court for Baltimore County thanked and excused the alternate juror. The judge directed the remaining jurors to retire to the jury room and begin deliberations. Soon thereafter, the judge called Hayes back into the courtroom and told him that one of the jurors became ill as soon as the jury had left to begin deliberations. The judge notified Hayes that because he felt actual jury deliberations had not yet begun, he would substitute the sick juror with the excused alternate juror who had not yet left the building. Defense counsel objected.

The jury convicted Hayes of robbery and various handgun charges and sentenced him to twenty-five years in prison. Hayes appealed to the Court of Special Appeals of Maryland, which affirmed the circuit court’s holding. Hayes then appealed to the Court of Appeals of Maryland, which reversed the intermediate appellate court’s decision.

The major issue before the court of appeals was at what point in a trial does the jury “retire to consider its verdict,” pursuant to Maryland Rule 4-312(b)(3). Hayes, 355 Md. at 620, 735 A.2d at 1111. The court highlighted Rule 4-312(b)(3) as the current law dealing with alternate jurors in criminal cases. Id. at 621, 735 A.2d at 1112 (citing Md. Rule 4-312(b)(3)).

Because the court had not previously considered the meaning of the phrase “when the jury retires to consider its verdict,” nor had the court ever determined the effect of a violation of the rule, the court turned to both state and federal case law of other jurisdictions which have dealt with the issue of timing and violations regarding the substitution of an alternate juror. Id. at 622-23, 735 A.2d at 1112-13. In so doing, the court analyzed two categories of cases: (1) cases where the substitution was made before the beginning of deliberations; and (2) cases where the substitution was made after the commencement of deliberations. Id. In the former situation, most courts have upheld the substitution prior to the commencement of deliberations, and in the latter, courts have been mixed in their holdings. Id.

The court examined Rule 24(c) of the Federal Rules of Criminal Procedure (“FRCP”) which allows, foregoing its amendment in April of 1999, substitution “prior to” the time the jury retires. Id. However, the court observed that in practice, this rule has been applied beyond its limitations. Id. The court then focused on the most recent changes to FRCP 24(c). Id. at 625, 735 A.2d at 1114. The Supreme Court’s April, 1999 amendment to FRCP 24(c) became effective December 1, 1999, and the rule now allows substitution of alternates after deliberations have begun. Id. The new provision states that “when the
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The court held that the jury, in its discretion, may retain the alternate jurors during deliberations. Id. (quoting Amendments to the Federal Rules of Criminal Procedure, 119 S. Ct. Ct. R-5, 8 (1999)). The rule now indicates, however, that if an alternate replaces an impaneled juror after deliberations have begun, the jury should be instructed to begin new deliberations. Id. The court acknowledged that the change to Rule 24(c) allows the federal courts to continue a practice already in existence. Id. at 626, 735 A.2d at 1115.

The court of appeals also discussed various cases which address the meaning of the current language of Rule 24(c). Id. at 626-34, 735 A.2d at 1115-20. The federal cases cited by the court show that, prior to the amendment, federal courts allowed jurors to be substituted after the start of deliberations, concluding that substantial rights were not violated. Id. The court noted that federal cases also suggested that it was permissible to recall an alternate juror who had been discharged. Id. at 632, 735 A.2d at 1118. The court recognized that other decisions have been upheld by the use of the harmless error doctrine. Id. at 634, 735 A.2d at 1119.

The court of appeals stated that they could not change the language of Rule 4-312(b)(3), nor could they “circumvent the rule through an expansive harmless error or presumptive non-prejudice doctrine that is entirely foreign to our jurisprudence.” Id. at 635, 735 A.2d at 1119-20. Any change in the rule, Hayes did preserve his complaint regarding the substitution. Id. The court remanded the case back to the Circuit Court for Baltimore County to determine how it was concluded that deliberations had not yet begun. Id. at 638, 735 A.3d at 1121. There was nothing on the record to make that issue clear to the court of appeals, nor was there any evidence shown that there was any examination of the dismissed alternate to determine whether he was subjected to any outside influences. Id.

In Hayes, the Court of Appeals of Maryland declined to follow federal practice. Accordingly, Maryland law is now distinctively different from federal law with regard to the substitution of alternate jurors. It is important for Maryland practitioners to recognize this distinction so that they may tailor their litigation to comply with the correct interpretation of the rule which applies in their respective situations. The court also sets forth a bright line test in a case of first impression and provides that, in Maryland, deliberations commence when the jury room door shuts and the time the door shuts should be made part of the record.
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**MVA v. Richards**

The Exclusionary Rule of the Fourth Amendment Does Not Extend to Civil Administrative Driver’s License Suspension Proceedings

By Lee A. Dix

The Court of Appeals of Maryland declined to extend the exclusionary rule of the Fourth Amendment to Motor Vehicle Administration license suspension hearings. *Motor Vehicle Admin. v. Richards*, 356 Md. 356, 739 A.2d 58 (1999). The court specifically held the rule inapplicable in civil administrative license suspension hearings under section 16-205.1 of the Transportation Article of the Annotated Code of Maryland. The court further held that the constitutionality of a motor vehicle stop may not be challenged in the resulting administrative proceeding.

On October 24, 1997, at approximately 12:30 a.m., a Maryland State Trooper, patrolling in the Carroll County town of Westminster, observed a vehicle stopped in the middle of the road. Aware that Westminster had been experiencing a wave of nighttime burglaries and vehicle thefts, the trooper decided to follow the vehicle.

The trooper then stopped the vehicle to determine what business the driver had in the neighborhood. As the trooper spoke to the driver, David Richards, (“Richards”) he detected a strong odor of alcohol. The trooper administered a field sobriety test, and Richards was subsequently arrested. While under custodial arrest, Richards refused to take a chemical breath test to determine his blood-alcohol level. In accordance with administrative procedure section 16-205.1 of the Transportation Article of the Annotated Code of Maryland, the trooper issued an order suspending Richards’s driver’s license.

Richards requested a hearing under section 16-205.1(f) to determine the validity of his driver’s license suspension. The Administrative Law Judge (“ALJ”) concluded that Richards’s license was properly suspended, based on his refusal to take the chemical breath test. Moreover, the ALJ concluded that reasonable grounds existed for the stop and that the trooper acted in good faith. The Circuit Court for Carroll County, on judicial review of the ALJ’s determination, reversed the suspension of Richards’s license, stating that insufficient justification existed to support the stop. The Motor Vehicle Administration (“MVA”) petitioned the Court of Appeals of Maryland for a writ of certiorari, which it granted to consider whether the exclusionary rule applies in driver’s license suspension proceedings conducted pursuant to section 16-205.1(f) barring the introduction of evidence obtained during an unlawful motor vehicle stop.

The court began its analysis by reviewing the language of section 16-205.1, specifically the implied consent provision. *Richards*, 356 Md. at 363, 739 A.2d at 62. The court noted that the statute established that any person driving on a public roadway in Maryland has implicitly consented, if reasonably requested, to a test to determine breath or blood alcohol level. *Id.* Additionally, the statute provided that refusal to take the test will result in automatic suspension of the person’s license to drive. *Id.* The court of appeals, in reviewing the statute, stated that section 16-205.1(f)(7) provides that the administrative hearing is not to consider the constitutionality of the stop, or the possible exclusion of unconstitutionally seized evidence. *Id.* at 367, 739 A.2d at 64.

The court examined the Supreme Court’s position in extending the exclusionary rule of the Fourth Amendment beyond the criminal trial context. Upon review of numerous decisions issued by the Supreme Court during the past quarter century, the court of appeals concluded that the Supreme Court refused to extend the exclusionary rule to civil proceedings, with the exception of civil in rem forfeiture proceedings. *Id.* at 368, 739 A.2d at 65. The Supreme Court viewed the in rem forfeiture proceedings as quasi-criminal in nature and, therefore, warranted application of exclusionary rule. *Id.* In 1998, the
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Supreme Court again refused to extend the exclusionary rule beyond criminal proceedings. *Id.* Furthermore, the Supreme Court held that the exclusionary rule is “applicable only where its deterrence benefits outweigh its ‘substantial social costs.’” *Id.* at 369, 739 A.2d at 65 (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

The court of appeals next examined the case law of Maryland addressing the applicability of the exclusionary rule to civil proceedings. *Id.* at 370, 739 A.2d at 66. The court found that outside of the criminal trial context that the exclusionary rule is applicable only in civil in rem forfeiture proceedings due to the quasi-criminal nature of the hearings. *Id.* In so holding, the court of appeals reiterated the Supreme Court’s statement that “the ‘prime purpose’ of the rule, if not the sole one, ‘is to deter future unlawful police conduct.’” *Id.* at 371, 739 A.2d at 67 (quoting *United States v. Janis*, 428 U.S. 433, 446 (1976) (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974))).

Additionally, the court stated that the marginal deterrence of extending the exclusionary rule, coupled with the substantial cost, does not justify its application in civil proceedings. *Id.*

After completing its examination of the language of section 16-205.1, the Supreme Court’s application of the exclusionary rule, and the case law of Maryland, the court of appeals addressed the issue of whether the exclusionary rule applied in administrative license suspension proceedings conducted pursuant to section 16-205.1(f). The court rejected the proposition that proceedings under this section are quasi-criminal in nature. *Id.* at 372, 739 A.2d at 67. The court stated that although the suspension or revocation of one’s license under section 16-205.1 may appear “purely punitive” and “quasi-criminal” in nature, the ultimate goal is to prevent unscrupulous or incompetent persons from continuing to drive automobiles. *Id.* at 373, 739 A.2d at 68.

Having decided that the license suspension proceedings were not quasi-criminal, the court used the traditional cost benefit analysis to determine whether the exclusionary rule applied in administrative license suspension proceedings. *Id.* at 372, 739 A.2d at 67. The court opined that whether the case involved test refusal or test failure, the deterrent effect of exclusion would be insignificant, as the police already suffer exclusion of unlawfully seized evidence from criminal proceedings. *Id.* at 374, 739 A.2d at 69.

Additionally, the court noted that the MVA and police departments operate as independent agencies, and imposing the exclusionary rule in license suspension proceedings would do little to deter unlawful police action. *Id.* at 375, 739 A.2d at 69.

Turning to the cost side of the test, the court concluded that applying the exclusionary rule in hearings conducted pursuant to section 16-205.1 would create substantial cost. *Id.* at 376, 739 A.2d at 69. The court stated that applying the rule would complicate the proceedings and severely undermine its purpose to protect the public. *Id.*

With it decision in *Richards*, the court of appeals continues to strictly adhere to its prior decisions and the Supreme Court’s precedent of refusing to extend the exclusionary rule to civil proceedings. The court clearly stated that any future extension of the rule to civil proceedings in Maryland will occur only when the goal of deterring unlawful police practices outweighs the social benefit of not applying the rule.
Office of the State Prosecutor v. Judicial Watch, Inc.

Grand Jury Investigation Materials Are Not Subject to “Vaughn Index” under Maryland Public Information Act because the Act Does Not Trump Grand Jury Secrecy Rule

By Brent Bolea

The Court of Appeals of Maryland held that a court may not order a “Vaughn index” under the Maryland Public Information Act (“PIA”) to determine whether grand jury investigatory information shall remain secret. Office of the State Prosecutor v. Judicial Watch, Inc., 356 Md. 118, 737 A.2d 592 (1999). Rather, the court held that the decision whether to release grand jury information is dictated by applicable Maryland Grand Jury Rules applied by a court in the grand jury’s jurisdiction. In so holding, the court of appeals declared that the PIA right to disclosure does not override the traditional rule of grand jury investigation secrecy. The court additionally held that a trial court’s order under Section 10-623 of the PIA is an immediately appealable injunction.

On July 7, 1998, the Office of the State Prosecutor (“OSP”) announced a grand jury investigation into Linda Tripp’s alleged violations of Maryland’s Wiretap and Electronic Eavesdropping Statute. Subsequently, Judicial Watch, Inc. (“Judicial Watch”), a conservative watchdog group, filed with the OSP a request for “all documents and things related to, among others, Linda Tripp, Lucianne Goldberg, Monica Lewinsky, Kenneth Starr, and the White House,” pursuant to the PIA. The OSP denied the request on the grounds that Judicial Watch was not a person in interest, and that information sought was part of a law enforcement or prosecutorial investigatory file. Consequently, Judicial Watch filed a complaint in the Circuit Court for Baltimore County, alleging that the OSP’s denial violated the PIA. The trial court ordered the OSP to submit a “Vaughn index” that “word for word, paper for paper” identified all information sought. The OSP made a timely appeal to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland granted certiorari on its own motion prior to any action by the Court of Special Appeals of Maryland.

The court initiated its inquiry by addressing the issue of appealability, and held that the trial court’s order under the PIA to produce a “Vaughn index” was an injunction. Judicial Watch, Inc., 356 Md. at 127, 737 A.2d at 596. The court of appeals concluded that the trial court’s order was immediately appealable by reasoning that the harm against which protection was sought would occur with the submission of the “Vaughn index.” Id. at 128, 737 A.2d at 597.

The court then addressed the issue of whether the trial court erred in ordering the OSP to provide a detailed “Vaughn index” to assist it in determining if the information sought was protected from disclosure under the PIA. Id. at 128, 737 A.2d at 598. The court first noted that section 10-615 of the PIA states that a “custodian must deny inspection of public records that are, by law, privileged or confidential, or when inspection would be contrary to a State statute or rules adopted by the court of appeals.” Id. at 130, 737 A.2d at 598. Cognizant of this section, the court emphasized the importance of secrecy to “the proper workings of the grand jury system.” Id. In exploring the policies behind grand jury secrecy, the court referenced two main cases; In re Criminal Investigation No. 437, 316 Md. 66, 557 A.2d 235 (1993), and Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). In general, these cases pronounce secrecy as the “lifeblood of the grand jury,” which encourages participation by witnesses, prevents indictees from fleeing, and protects those accused but then exonerated by the grand jury from public scorn. Id. at 130-31, 737 A.2d at 598-99.

The court turned to Maryland Rule 4-642, which embodies the disclosure policies discussed in the cases, and declared that the rule unambiguously states that inspection of grand jury files can occur only when a court so orders after a hearing.
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convened on a motion filed in the jurisdiction where the grand jury takes place. *Id.* at 131-32, 737 A.2d at 599-600. The court emphasized how this rule was not followed in the circuit court in the instant case. First, the proceeding regarding disclosure was undertaken pursuant to the PIA when it should have been under Maryland Rule 4-642. *Id.* at 132, 737 A.2d at 600. Second, the court noted that the Circuit Court for Baltimore County was the improper venue in the wrong jurisdiction. *Id.* at 133, 737 A.2d at 600. Declaring that Judicial Watch used the PIA in an attempt to circumvent grand jury secrecy, the court expounded its concern that allowing such a practice would undermine the grand jury process. *Id.*

The court then held that the “PIA does not trump or override the traditional rule of grand jury secrecy,” and that the trial court erred in hearing and deciding the case, in light of Maryland Rule 4-642. *Id.*

The court went on to provide instructions to be utilized if the Circuit Court for Baltimore County decided to transfer the matter to Howard County. *Id.* The court explained that the applicable standard for a court deciding grand jury disclosure issues is whether there is a strong showing of particularized need for the information. *Id.* In defining “particularized need,” the court of appeals analyzed *In re Criminal Investigation*, 316 Md. 66, 557 A.2d 235 (1983), which states that: “(1) the material sought must be necessary to avoid possible injustice; (2) the need for disclosure must outweigh the need for secrecy; and (3) the request must be narrowly structured so as not to disclose unnecessary information.” *Id.* at 134, 737 A.2d at 600. The court noted that none of these factors were asserted in the circuit court. *Id.* Even if they had been, the court stated that the request still would have failed not only because Judicial Watch was not a person in interest under the PIA, as it was unrelated to any party in the criminal investigation, but it was not a government or law enforcement entity. *Id.*

The court of appeals also analyzed the PIA to determine what explanation, if any, the OSP had to supply for denial of the PIA request. *Id.* at 134, 737 A.2d at 600-01. According to the court, section 10-618(f)(1) does not require that an enumerated agency provide an explanation for denial unless a “person in interest,” as defined in section 10-611(e), is involved in the request. *Id.* at 136, 737 A.2d 601-02. Even if a person in interest is involved, the court concluded that under *Faulk v. State’s Attorney*, 299 Md. 493, 474 A.2d 880 (1984), the agency need only provide a “generic” determination that disclosure would interfere with a pending criminal investigation. *Id.* at 137, 737 A.2d at 602.

Furthermore, the court held that an enumerated agency under section 10-618 was presumed to have compiled records for a law enforcement or prosecutorial purpose. *Id.* at 140, 737 A.2d at 604. Even though the OSP is not an enumerated agency, the court stated that it should receive the benefit of the presumption because it was acting at the request and in the manner of the State’s Attorney for Howard County, which is an enumerated agency. *Id.* Consequently, the court of appeals found that the OSP “stood in the shoes” of an enumerated agency. *Id.*

The court determined in *Judicial Watch, Inc.*, that because the OSP was acting as an enumerated agency, and Judicial Watch was not a person in interest under the PIA, there was no explanation owed for the refusal to disclose the requested information. Based on these findings, the court concluded that under the circumstances of this case, a “Vaughn index” cannot be ordered by a court to determine whether requested information is immune from a PIA request.

Although the public’s interest in having free access to information gathered by its government is far-reaching, it is not absolute. In certain realms of government activity, secrecy is of more value to society than disclosure. Such is the case in grand jury proceedings. This concept could have been no better illustrated than under the facts at hand. The Court of Appeals of Maryland has struck the proper balance in this case between the public’s right to know and the government’s need to keep certain information confidential.
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The Court of Appeals of Maryland held that statements made to the Internal Affairs Division of a Maryland police department are in the possession of the prosecution, and therefore discoverable by the defendant for purposes of cross-examination. Robinson v. State, 354 Md. 287, 730 A.2d 181 (1999). The court found that statements made by two police officers to the Internal Affairs Division (“IAD”), regarding the incident for which the petitioner was on trial, should have been disclosed to the defense for inspection of any exculpatory or impeaching evidence. The court of appeals also held that the trial judge erred in instructing the jury regarding the credibility of a witness. Through this holding, the court expanded Maryland’s version of the Jencks doctrine to include IAD statements made by police officers.

The facts of this case were in dispute. The State offered testimony from the two investigating officers that on January 18, 1996, two masked men entered a 7-11 store in Forestville, Maryland, and robbed the store at gunpoint. The officers testified that upon reaching the 7-11 store they saw two masked men, one later identified as Ramone Robinson (“Robinson”), exit the store and enter a vehicle. Officer Smith testified that the vehicle came straight toward him, at which point he fired in the vehicle’s direction. Corporal Hooper testified that shots were fired by the assailants at both police officers and that they returned fire. The police officers both testified that Robinson exited the vehicle with a gun in his hand, screamed, and fired in their direction. The police officers fired back at Robinson, hitting him four times.

Robinson testified that he did not play any part in the robbery of the 7-11 store, but admitted to driving the vehicle involved in the incident. He testified that he was waiting in the vehicle for his friend to come out of the 7-11 store. Robinson stated that shots were fired at him as he drove away from the store, and that he exited the vehicle unarmed with his hands raised.

During cross-examination of the police officers, defense counsel discovered they had given statements to the IAD regarding the incident. Defense counsel then requested the opportunity to determine if the IAD statements contained any exculpatory or impeaching material. After denying the request and conducting an in camera review of the statements, the court instructed the jury that the officers were cleared of any wrongdoing, and that the IAD statements contained no exculpatory material. The jury requested the court to define “exculpatory”, to which the court answered “it means free from guilt . . . the opposite of guilty.”

Robinson was thereafter convicted of assault with intent to murder, robbery with a dangerous weapon, and other related offenses by a jury in the Circuit Court for Prince George’s County. Robinson appealed to the court of special appeals, which affirmed the lower court’s decision, holding that “the statement is confidential under state law, and developed for non-prosecutorial purposes, and held by a division of a law enforcement agency that is not working in conjunction with the prosecutor.” The Court of Appeals of Maryland granted certiorari.

The court of appeals began its analysis by explaining the current law regarding disclosure of Jencks/Carr material. Through Carr, Maryland adopted the “underlying principals” of the United States Supreme Court’s holding in Jencks, recognizing that defense counsel must be afforded the opportunity to effectively cross-examine a witness to determine whether their testimony is inconsistent with prior written statements. Robinson, 354 Md. at 300-01, 730 A.2d at 188 (citing Jencks v. United States, 353 U.S. 657 (1957); Carr v. State, 284 Md. 455, 397 A.2d 606 (1979)). The Supreme Court in Jencks held that after the direct
examination of a prosecution witness, defense counsel may request the prosecution to produce all written reports or statements made by the witness regarding their testimony. Id. at 301, 730 A.2d at 188.

Following the Jencks decision, Congress created the “Jencks Act,” 18 U.S.C. § 3500 (1994). Id. at 303, 730 A.2d at 189-90. Although Maryland has not wholly adopted the Jencks Act, Maryland courts frequently use it as an analytical guide. Id. at 303, 730 A.2d at 190 (citing Kanaras v. State, 54 Md. App. 568, 460 A.2d 61 (1983)). The Jencks Act requires that for a witness’s statement or report to be discoverable, the following requirements must be shown: (1) the witness must testify on direct examination; (2) defense counsel must request the statement; (3) the statement must qualify as a discoverable statement; (4) the statement must relate to the subject matter of the witness’s testimony; and (5) the statement must be in the possession of the prosecution. Id. at 319-20, 730 A.2d at 198.

The court of appeals continued its analysis by stating that the only issue in the present case was whether the prosecutor was in possession of the officers’ IAD statements, making them discoverable. Id. at 304, 730 A.2d at 190. The court noted that many courts have considered the police department to be an arm of the prosecution, therefore requiring prosecutors to sometimes produce written reports or statements in the department’s possession. Id. However, because of their confidential nature, jurisdictions are divided on whether the IAD of a police department is part of the prosecutorial “arm.” Id. at 305, 730 A.2d at 190. In the instant case, the court held that the IAD was part of the police department and, therefore, an arm of the prosecution. Id. at 309, 730 A.2d at 192-93. As such, the statements and records were in the possession of the police department, and therefore constructively in the possession of the prosecution. Id.

The prosecution argued that because the IAD statements were confidential, it did not have possession of those statements. Id. at 306-07, 730 A.2d at 191. In response, the court held that confidentiality, not possession, dictated whether or not the statements were discoverable. Id. at 309, 730 A.2d at 192. Moreover, the court must balance the “confidentiality interest . . . against the confrontation and due process rights of the defendant.” Id. at 309, 730 A.2d at 193. The court also noted that although the IAD statements were confidential, the defendant’s right to due process was fundamental, and therefore more important. Id. at 308, 730 A.2d at 192. (citing Chief, Montgomery County Dep’t of Police v. Jacocks, 50 Md.App. 132, 144, 436 A.2d 930, 936-37 (1981)).

The court next addressed whether or not the trial judge’s in camera review of the IAD statements was proper. Id. at 311-13, 730 A.2d at 193-94. The State, relying on Zaal v. State, 326 Md. 54, 602 A.2d 1247 (1992), and the Jencks Act, argued that an in camera review is an alternative available to the court when dealing with confidential records. Id. at 311-12, 730 A.2d at 194. The court rejected this argument, stating that Jencks and Carr held that only defense counsel can properly determine if statements contain inconsistencies for purposes of cross-examination. Id. at 312-13, 730 A.2d at 194-95. The court added that because the instant case was largely a credibility battle between Robinson and the police officers, defense counsel had an even greater need for the officers’ IAD statements. Id. at 313, 730 A.2d at 195. As such, the prosecution had a legal duty to submit the IAD statements to the defense. Id. at 313, 730 A.2d at 195.

Finally, in focusing on the trial court’s instruction to the jury regarding the IAD statements, the court concluded that it was the jury’s task to judge the credibility of a witness. Id. “[T]he general rule is that it is error for the court to make remarks in the presence of the jury reflecting upon the credibility of a witness . . . .” Id. at 314, 730 A.2d at 195 (citing Elmer v. State, 239 Md. 1, 209 A.2d 776 (1965)). Accordingly, the court of appeals determined that the circuit court improperly instructed the jury regarding the officers’ wrongdoing and the lack of exculpatory evidence in the IAD statements. Id. at 315-16, 730 A.2d at 196. As a result, the court of appeals held that the jury instruction constituted prejudicial error by the trial court. Id. at 317, 730 A.2d at 196.

The court’s decision highlights the importance for defense counsel to have discovery available in order to effectively cross-examine prosecution
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witnesses and to determine whether any evidence is exculpatory. More importantly, the court of appeals has emphasized the significance of the defendant’s due process rights when balanced against the confidentiality of the information sought. This decision has expanded the discovery available to a defendant, and has thus allowed access to certain information that could change the way police officers are cross-examined by defense counsel.
The Court of Appeals of Maryland held that Maryland Rule 4-271 and Art. 27, § 591 do not require an administrative judge to articulate a good cause reason for postponing a trial date beyond the 180-day limitations period. *State v. Fisher*, 353 Md. 297, 726 A.2d 231 (1999). The court further held that the defendant has the burden of demonstrating the existence of a speedy trial violation based on either a clear abuse of discretion standard or a lack of good cause as a matter of law. In so holding, the court afforded state administrative judges wide discretion when postponing a trial date past the 180-day limit.

James Quinn Fisher (“Fisher”) was charged with various drug offenses, including possession of crack cocaine with the intent to distribute. *Id.* at 299, 726 A.2d at 232. On July 10, 1997, Fisher’s attorney entered his appearance, triggering the 180-day period in which the case would have to be tried under Rule 4-271 and Art. 27, § 591. *Id.* The case was scheduled for a bench trial on December 2, 1997, but because the defendant requested a jury trial on or about that day, the case was postponed 42 days beyond the 180 day limit. *Id.* at 300, 726 A.2d at 232.

On February 17, 1998, when the matter was again called for trial, the defendant moved to dismiss the case based on a speedy trial violation under § 591 and Rule 4-271. *Id.* The trial judge denied the motion, stating that the administrative judge had the authority to postpone the case and had done so upon good cause. *Id.* at 301, 726 A.2d at 233. Subsequently, the defendant pled not guilty, and was tried on an agreed statement of facts. *Id.* Fisher was convicted on all charges in the Circuit Court for Washington County and was sentenced to nine years in prison. *Id.*

The Court of Special Appeals of Maryland reversed, holding that Rule 4-271 and § 591 were violated because Fisher was not tried within the prescribed time limit and the administrative judge neglected to articulate a good cause finding. *Id.* The court of appeals granted the State’s petition for certiorari and reversed. *Id.* at 303, 726 A.2d at 234.

The Court of Appeals of Maryland relied on prior case law to support its conclusion that the court of appeals’s holding was inconsistent with previous Maryland decisions regarding the defendant’s right to a speedy trial. *Id.* The court first visited *Goins v. State*, 293 Md. 97, 442 A.2d 550 (1982), where the defendant was not tried within the 180-day limit due to the extensive examination period resulting from a “not criminally responsible” plea. *Id.* at 303, 726 A.2d at 234. In *Goins*, the court of appeals held that Rule 4-271 and § 591 were satisfied anytime an order by the administrative judge effectively postponed a trial, so long as it was done in good cause. *Id.* at 305, 726 A.2d at 235 (citing *Goins*, 293 Md. at 111-112, 442 A.2d at 557-558).

The court also analyzed *State v. Frazier*, 298 Md. 422, 470 A.2d 1269 (1984), in which the court of appeals re-affirmed *Goins* by holding that an administrative judge’s decision to postpone a trial is a “discretionary matter, rarely subject to reversal upon review.” *Id.* at 306, 726 A.2d at 235 (citing *Frazier*, 298 Md. at 451, 470 A.2d at 1284). In *Frazier*, the court discussed the standard for finding an absence of good cause for a postponement beyond the 180 day limit. *Id.* (citing *Frazier*, 298 Md. at 454, 470 A.2d at 1286). The court held that a judge should not find an absence of good cause unless “the defendant meets the burden of demonstrating either a clear abuse of discretion or a lack of good cause as a matter of law.” *Id.*

Based on the rationale given in *Goins* and *Frazier*, the court in the instant case held that the burden is not on the administrative judge to explain the reasons amounting to...
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good cause, but instead on the defendant to demonstrate either a lack of good cause as a matter of law or a clear abuse of discretion by the trial judge. *Id.* at 307, 726 A.2d at 236. Here, the court held that Fisher failed to meet this burden. *Id.* at 308, 726 A.2d at 236.

Fisher also argued that the length of delay from the original 180-day mark to the actual trial date was an “inordinate” delay, and therefore violated Article 27, § 591 and Rule 4-271. *Id.* at 309, 726 A.2d at 237. The court of appeals again looked to *Frazier* for guidance in determining which delays are considered “inordinate.” In *Frazier*, the court held that a delay of 86 days beyond the 180-day mark was not a violation of § 591 or Rule 4-271 because there was no clear abuse of discretion shown on the part of the administrative judge. *Id.* at 310, 726 A.2d at 237 (citing *Frazier*, 298 Md. at 462, 470 A.2d at 1290). The *Frazier* court explained its refusal to find a clear abuse of discretion by stating that an administrative judge is in a much better position than either a trial or appellate judge to determine whether there is good cause to re-schedule a trial, because he or she is more aware of the number of cases on the criminal docket. *Id.* at 309-10, 726 A.2d at 237. Thus, the *Fisher* court concluded that because extending the 180-day limit by 86 days did not constitute an “inordinate” delay, a delay of 42 days would not violate Rule 4-271 or § 591 either. *Id.* at 311, 726 A.2d at 238. As such, the administrative judge neither failed to show good cause, nor abused his or her discretion in postponing Fisher’s trial.

With its holding, the Court of Appeals of Maryland placed the burden of proving a speedy trial violation on the defendant. Once thought of as a Constitutional protection for the defendant, the court of appeals narrowed the defendant’s right to speedy justice by significantly broadening an administrative judge’s discretion. While trial delay is often beneficial to the defense, this decision reduces the likelihood that Maryland defendants will ever incorporate the speedy trial rule into their trial strategy. Moreover, the court of appeals’s interpretation of the speedy trial rule gives Maryland prosecutors more confidence when requesting a strategic postponement, even if that date falls beyond the 180-day limit.
**Strickler v. Greene**

Reasonable Probability that Disclosure of Withheld Evidence Would Have Led to a Different Outcome at Trial Is Required to Obtain Relief under the Brady Rule

By Rosemary E. Allulis

The United States Supreme Court held that to establish a constitutional violation under *Brady v. Maryland*, 373 U.S. 83 (1963), there must be a reasonable probability that disclosure of evidence withheld by the prosecution would have changed the outcome of the trial. *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936 (1999). Affirming a decision in the United States Court of Appeals for the Fourth Circuit, the Court held that although the petitioner demonstrated cause for failure to raise a timely claim, and satisfied two of the three elements of a *Brady* violation, petitioner failed to establish material prejudice sufficient to obtain relief.

In January 1990, Leanne Whitlock (“Whitlock”) was abducted from a Virginia shopping mall, robbed, and brutally murdered. The murder weapon was a sixty-nine pound rock that was dropped on her head. Given the weight of the rock, forensic evidence suggested that two people had committed the murder; one by holding Whitlock down, the other by dropping the rock that crushed her skull. Police arrested and charged Tommy Strickler (“Strickler”) and Ronald Henderson (“Henderson”) for the three offenses. During separate trials, the prosecutor presented evidence from the murder scene, Whitlock’s abandoned car, and eyewitness accounts linking both defendants to the crime. One essential eyewitness, Anne Stoltzfus (“Stoltzfus”) provided the only narrative account of what transpired during the abduction. Claiming she possessed “an exceptional memory,” Stoltzfus confidently described in vivid detail the aggressive and dominant role Strickler played, portraying him as the one who had initiated and directed the abduction.

Although both defendants were found guilty, Henderson was convicted of the lesser offense of first-degree murder, while Strickler was convicted of capital murder and sentenced to death. The Virginia Supreme Court affirmed Strickler’s conviction and sentence. After appointing new counsel to represent Strickler during state habeas corpus proceedings, the circuit court dismissed the petition and the state supreme court affirmed.

In 1996, Strickler filed a federal habeas corpus petition in the United States District Court for the Eastern District of Virginia. The district court granted Strickler’s *ex parte* petition to obtain all files that were relevant to his case. While examining these documents, Strickler’s attorney discovered previously undisclosed notes taken from interviews between a police detective and Stoltzfus, which the attorney concluded could have significantly impeached Stoltzfus’s credibility. A comparison of her testimony and the documents would have revealed the disparity between Stoltzfus’s detailed description of the violent abduction, and her previously “vague memory” of the same incident that she “totally wrote [] off as a trivial episode of college kids carrying on.” Strickler contended that because the documents contained critical exculpatory and impeaching evidence that was withheld from defense counsel, the resulting *Brady* violation rendered his conviction constitutionally invalid.

The district court granted summary judgment in favor of Strickler, holding that the prosecution’s failure to disclose the documents amounted to prejudice sufficient to undermine confidence in the verdict. However, the United States Court of Appeals for the Fourth Circuit reversed the district court, holding that the *Brady* claim was procedurally flawed because Strickler failed to raise it during state proceedings. Alternatively, the court of appeals held that the evidence would not have materially affected Strickler’s conviction or sentence. The United States Supreme Court
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granted certiorari to determine: 1) whether there was a Brady violation; 2) whether there was sufficient cause for the procedural default by raising the Brady claim; and 3) whether the undisclosed evidence prejudiced Strickler’s right to a fair trial.

The Supreme Court began its analysis with a discussion of the essential elements of a Brady violation. Strickler, 527 U.S. at ____, 119 S. Ct. at 1948. The Brady rule requires the prosecution to disclose all evidence favorable to an accused, where that evidence is material to either guilt or punishment. Id. (citing Brady v. Maryland, 373 U.S. at 87). The rule encompasses both exculpatory and impeachment evidence known to anyone acting on behalf of the government that has been withheld either purposefully or inadvertently, regardless of whether it was requested. Id. (citing United States v. Bagley, 473 U.S. 667, 676 (1985); Kyles v. Whitley, 514 U.S. 419, 437 (1995)). The Court noted that a true Brady violation does not result, however, unless the accused establishes prejudice by meeting the “reasonable probability” standard that suppressed evidence would have produced a different verdict had it been disclosed to the defense. Id.

The Supreme Court held that in the instant case, two of the three essential elements of a Brady violation, the prosecution’s failure to disclose documents to the defense, and the impeaching character of that evidence, were “unquestionably established.” Id. The Court was also satisfied that Strickler showed cause sufficient to excuse the procedural default. Id. at ____, 119 S. Ct. at 1952. The Court stated that by relying on the prosecutor’s open file policy, Strickler was justified in believing the file would contain everything known to the state. Id.

In narrowing the issue to whether Strickler satisfied the “materiality” element of Brady, the Court noted that “without a doubt,” Stoltzfus’s testimony made Strickler’s conviction “more likely than not,” without which the outcome of the trial “might have” been different. Id. To obtain relief, however, the Court reiterated the correct standard as being a “reasonable probability” of a different outcome, and not a “more likely than not” standard. Id. The question, thus, was whether the “favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Id. (quoting Kyles, 514 U.S. at 435). Applying this standard to the facts of the case, the Supreme Court held that Strickler failed to satisfy his burden. Id. at ____, 119 S. Ct. at 1955. Although a “reasonable possibility” of a different outcome existed, Strickler’s burden was to establish a “reasonable probability.” Id. at ____, 119 S. Ct. at 1953 (quoting Kyles, 514 U.S. at 434).

In his dissenting opinion, Justice Souter parted company with the majority, concluding that Strickler had satisfied his burden with respect to the sentence. Id. at ____, 119 S. Ct. at 1956. Reiterating that the materiality analysis does not end at the conviction stage, he maintained that there was a reasonable probability that impeachment of Stoltzfus’s testimony would have swayed at least one juror away from recommending the death sentence. Id. During the sentencing phase, Justice Souter reasoned, it was likely that Stoltzfus’s testimony portraying Strickler as the ringleader influenced the jury’s assessment of his future dangerousness. Id. at ____, 119 S. Ct. at 1960.

Justice Souter emphasized that the continued use of the shorthand term “reasonable probability” creates the risk of confusing the correct standard. Id. at ____, 119 S. Ct. at 1956. Suggesting “significant possibility” as a better standard, Justice Souter opined that this alternative would more clearly demonstrate the degree to which undisclosed evidence actually undermined a verdict or sentence. Id. at ____, 119 S. Ct. at 1957.

With its decision in Strickler v. Greene, the United States Supreme Court has firmly established the standard for obtaining relief under Brady as a “reasonable probability” that the outcome would be different. Although the Court stresses the special role of prosecutors to ensure justice through truth, the use of this ambiguous nomenclature leaves little promise for the truly innocent in the face of an erroneous decision. Likewise, the application of this vague standard during the sentencing phase could mean the difference between life and death.
The Court of Appeals of Maryland held that a gun retailer, from whose store a gun was stolen and used in the commission of a murder, owed no duty to the murder victim to prevent the theft and criminal misuse of the gun. *Valentine v. On Target, Inc.*, 353 Md. 544, 727 A.2d 947 (1999). To impose an indefinite duty on gun merchants to the general public, the court explained, would be tantamount to regulating the market, a responsibility reserved for the legislature. The court’s holding was confined to the specific facts and allegations pled by the petitioner.

In July 1993, Edward Wendell McLeod and another stole several handguns from On Target, Inc. (“On Target”), a gun retailer in Anne Arundel County. In September of that year, Joanne Valentine (“Valentine”) was murdered by an “unknown assailant” using one of the handguns stolen from On Target. Vincent Valentine (“Petitioner”), personal representative, surviving spouse, and next friend of their children, filed a wrongful death suit against On Target in the Circuit Court for Anne Arundel County. Petitioner alleged that On Target breached its duty to the deceased in several ways, ranging from failing to properly train its employees to failing to properly secure the handguns.

The trial court granted On Target’s motion to dismiss for failure to state a claim pursuant to Maryland Rule 2-322(b)(2). The petitioner appealed to the Court of Special Appeals of Maryland, which affirmed the trial court’s dismissal but on different grounds. The Court of Appeals of Maryland granted certiorari and affirmed.

The court of appeals began its analysis by narrowing the issue to whether On Target owed Valentine a duty based on the facts particular to the case at hand. *Valentine*, 353 Md. at 550, 727 A.2d at 950. For example, the court noted that the petitioner alleged that respondent owed a duty to exercise reasonable care in the display of handguns, yet Petitioner did not set forth how the handguns were displayed. *Id.* at 547, 727 A.2d at 948.

The court identified the applicable legal standard of care a plaintiff must set forth in a negligence complaint to be “reasonable conduct in the light of the apparent risk.” *Id.* at 550, 727 A.2d at 950 (quoting W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 356 (5th Ed. 1984)). Likewise, sustaining a cause of action in negligence requires a “legally recognized duty” owed by the defendant to the plaintiff or to a group of plaintiffs. *Id.* at 549, 727 A.2d at 949.

The court explained that the policy reason for allowing a cause of action in negligence is to discourage or encourage specific behaviors by one person for the benefit of another. *Id.* at 550, 727 A.2d at 950. According to the court, no purpose is achieved if the creation of a duty does not benefit the plaintiff. *Id.*

In the instant case, the court applied two “concepts,” which create the existence of a duty: “relationship or nexus of the parties and foreseeability.” *Id.* at 550-51, 727 A.2d at 950. Foreseeability, the court stated, is the notion that one should not be liable for “unreasonably remote consequences.” *Id.* at 551, 727 A.2d at 950 (citing *Rosenblatt v. Exxon*, 335 Md. 58, 77, 642 A.2d 180, 189 (1994)). The court expressed that Petitioner did not allege that On Target knew or should have known that guns would be stolen from the store or that an “unknown party” would obtain a stolen gun and use it to commit a crime. *Id.* The court explained that imposing a duty based on a general notion that it was foreseeable that guns would be used to commit crimes would equate to imposing a duty based on “an imprecise notion of a foreseeability of risk of harm to the public in general.” *Id.* The court noted that other factors, such as intervening parties or circumstances, must be
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considered before any and all foreseeable harm creates a duty. *Id.*

Relying on its previous decision in *Scott v. Watson*, which held that “a private person is under no special duty to protect another from the criminal acts of a third person,” the court concluded that one cannot be expected to owe a duty to the entire world to protect it from harm caused by third persons. *Id.* at 551-53, 727 A.2d at 950-51 (citing *Scott v. Watson*, 278 Md. 160, 166, 359 A.2d 548, 552 (1976)). Requiring a duty, such as that proposed by Petitioner, to an “indeterminate class of people, known and unknown” would create a “tremendous burden on shop owners while providing only a hypothetical benefit to the public at best.” *Id.* at 553, 727 A.2d at 951.

The court distinguished cases cited by Petitioner in support of his argument and noted that the cases were either factually distinguishable, or their rationales were not ones the court was prepared to recognize. *Id.* at 553-56, 727 A.2d at 951-52 (citing *Estate of Strever v. Cline*, 924 P.2d 666 (Mont. 1996); *Pavlides v. Niles Gun Show, Inc.*, 637 N.E.2d 404 (Ohio App.3d 1994); *Berly v. D & L Security Services and Investigations, Inc.*, 876 S.W.2d 179 (Tex.Ct.App. 1994)).

The court concluded that finding a duty in this case would create an improper cause of action. *Id.* at 556, 727 A.2d at 952-53. The court, however, noted that this holding did not mean that gun store owners can never be liable for negligent displays or sales of guns. *Id.* at 953. The court reiterated public policy as the basis for its decision and noted that to impose a duty on gun shop owners would, in effect, be regulating merchants, a role reserved for the legislature. *Id.*

Judge Raker, in her concurrence in which Chief Judge Bell and Judge Eldridge joined, agreed with the majority’s holding, based on insufficiency of the pleading. *Id.* However, she disagreed with the majority’s analysis that shop owners do not owe a duty to exercise ordinary care in securing, displaying, and selling handguns. *Id.* at 560, 727 A.2d at 955. Judge Raker explained that it is foreseeable that when a handgun is improperly secured it may be used in the commission of a crime, and therefore a duty should attach. *Id.* at 561, 727 A.2d at 955. She also noted that if shop owners knew they could be subjected to liability, they might exercise extra care in the sale of handguns. *Id.* at 565, 727 A.2d at 957.

The holding in this case reflects the divisive issue of who is to blame when innocent people are hurt by stolen guns. Petitioner alleged that On Target owed a duty to exercise reasonable care, yet Petitioner did not show how On Target breached its duty. This case is one of the first in Maryland in a national trend of suits against gun retailers and manufacturers. The impression given in this opinion by the Court of Appeals of Maryland is that under slightly different facts and pleadings, a duty to exercise reasonable care may be found. Judge Raker’s concurrence reads more like a dissent and, in the near future, the court may find that her statements resonate public opinion and the growing trend regarding liability when guns stolen from retailers are used in the commission of a crime.
The Honorable Glenn T. Harrell, Jr., the newest member of the Court of Appeals of Maryland, graduated from the University of Maryland School of Law in 1970. Prior to his appointment to Maryland’s highest court, Judge Harrell served on the Court of Special Appeals of Maryland for eight years, during which time he authored over 900 opinions. He also teaches legal writing as an Adjunct Professor at the University of Baltimore School of Law.

Judge Harrell began his legal career as an Associate County Attorney for Prince George’s County, where he practiced for two years and his responsibilities included counsel to the Prince George’s County Council, acting in its zoning capacity, and civil legal advisor to the Prince George’s County Police Department and Health Department. Judge Harrell was the Deputy Managing Partner at O’Malley, Miles & Harrell (now O’Malley, Miles, Nylen & Gilmore) prior to his appointment to the Court of Special Appeals of Maryland. Judge Harrell joined the Prince George’s County based law firm in 1973 and focused his practice on administrative law, with an emphasis on matters relating to the development of real property, such as zoning, public utilities, permits, subdivisions, legislation, licenses, and regulation. Judge Harrell also served as a contractual hearing examiner for the Maryland State Board of Education, on the Board of Directors of the Prince George’s County Bar Association, as the President of the Prince George’s Chamber of Commerce, and as the Chair of the Prince George’s County United Way Campaign.

Judge Harrell is a member of the Maryland State Bar Association, and is Co-Chair of the Appellate Practice Committee, Litigation Section. He also serves on the Administrative Law Sections Council. Judge Harrell is also a member of the Prince George’s County Bar Association, and on the Advisory Board for the Family Crisis Center of Prince George’s County, Inc.

Judge Harrell is regarded by Maryland’s legal community as a hard-worker with a sharp legal mind, but with a well-developed sense of humor. Judge Harrell takes the law very seriously, but is said never to take himself too seriously. Judge Harrell’s chamber’s decorations include a judicial “wheel of fortune,” which can spin to “Reverse,” “Affirm,” or “Dismiss,” and a wall-mounted Monty Python’s Gumby Man print announcing “My brain hurts.” Judge Harrell regards humor as an essential part of everyday life and agrees with the words of Jimmy Buffett, “If we couldn’t laugh, we’d all go insane.”

Judge Harrell has lived in Prince George’s County for over 30 years and currently resides in the declasse suburbs of Upper Marlboro with his wife of 32 years, Pamela. Judge Harrell and his wife also have two chronologically adult sons.
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