

ISSUE 31.2

UNIVERSITY OF BALTIMORE

LAW FORUM

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Letter From the Editor-in-Chief

The Editorial Board and Staff of the *University of Baltimore Law Forum* have worked hard to ensure that Volume 31.2 continues to be interesting and insightful as well as informative. I, along with the Editorial Board, am extremely satisfied about the combination and variety of these cases covering both the state and federal level, providing the Maryland practitioner with an excellent tool with which to act quickly and decisively.

In this issue, the Editorial Board would like to thank Nikhail Devecha for all of his help in guidance throughout the years in ensuring the success of the *University of Baltimore Law Forum*. Mr. Devecha left his position at the Law School to pursue other goals, and we extend our best wishes to both him and his family.

In addition to our usual sampling of Recent Developments and Articles, this issue also includes several Legislative Summaries of the key bills that have passed in the most recent session of the General Assembly. Amy Mezewski provides a useful summary of the Electronic Transactions Protection Act, while Youngju An describes the legislative intent behind permitting sexual orientation to be a protected class against discrimination in Maryland.

I would like to thank my editorial board for their significant contributions to the publication of this issue, especially Managing Editor Kristin Blumer and Manuscripts Editor Valerie Esch, whose countless hours never went unnoticed. Other people who went out of their way to ensure the *Law Forum* was successful include the Dean Gilbert Holmes and Professor Robert Lande, whose support and counseling helped the journal staff continue on the right course toward our goals.

Finally, I extend my best wishes to Tiffany Turner and the entire Editorial Board for Volume 32. I only hope that this group of outstanding individuals may work as well together as this year's Editorial Board.

Brian J. Kelly
Editor in Chief

SENTENCE ENHANCEMENT STATUTE DOES NOT PERMIT COURT TO USE TIME SPENT IN PRETRIAL DETENTION IN COMPUTING STATUTORY PREDICATE THAT DEFENDANT MUST HAVE SERVED “AT LEAST ONE TERM OF CONFINEMENT OF AT LEAST 180 DAYS IN A CORRECTIONAL INSTITUTION.”

By Donna Novak

I. INTRODUCTION

The notion that the sentence a defendant receives upon conviction depends on the judge at sentencing is well settled. Nicknames like “Maximum Bob” have been used to describe members of the bench and are a testament to the fact that justice, in all its forms, is not an exact science. While judicial discretion is a recognized component of the criminal justice system, a lesser known, but equally compelling, aspect of the judicial process is prosecutorial discretion. Prosecutorial discretion is especially apparent in mandatory sentencing provisions, particularly as they relate to repeat violations of controlled dangerous substance laws.

Whether a defendant receives a mandatory sentence depends, not upon the judge before who he appears, but upon the discretion of the prosecutor trying the case. Mandatory sentencing provisions must be invoked by the prosecutor in order to take effect. When a prosecutor exercises discretion and invokes the mandatory penalties provided by the statute for third-time felony drug offenders, the defendant is imprisoned for a mandatory twenty-five years without parole.

The use of mandatory sentencing in drug cases has come under increased scrutiny by members of the legal community and by the general public. There is growing concern over statutorily prescribed discretion given to prosecutors and the questionable effectiveness of these laws intended to curtail escalating national drug epidemic. As of June 30, 1998, there were 1,277,866 inmates in state and federal prisons,¹ with 60% of inmates in federal prisons, and 23% of inmates in state prisons serving sentences for drug violations.² Because of a general increase in the use of harsh, punitive, “tough on crime” policies, a significant portion of prisoners are serving mandatory sen-

tences.³

There has been an increase in the number of “three-strikes” laws,⁴ designed to ensure that repeat offenders are incarcerated for mandatory, minimum sentences.⁵ “Since Washington State pioneered the concept in 1993, twenty-two other states have passed some form of three-strikes law.”⁶ There has been an increase in the number of minimum sentencing laws in every state,⁷ in addition to almost sixty such statutes under federal law.⁸ As seen in a number of other jurisdictions,⁹ Maryland has enacted mandatory sentencing provisions.¹⁰

Maryland’s repeat drug offenders are subject to prosecutorial discretion when sentenced under Article 27, section 286(d) of the Maryland Code.¹¹ When a prosecutor invokes the mandatory penalties provided by the statute,¹² offenders must be imprisoned for a mandatory 25 years without parole.¹³ Rather than removing discretion from the sentencing stage,¹⁴ mandatory sentencing statutes shift the discretion from judge to prosecutor.¹⁵ Section 286(d),¹⁶ which provides a mandatory sentence of 25 years, can only be imposed when a state’s attorney has served notice to the defendant, or his counsel, of the intention to invoke an enhanced sentence.¹⁷

Discretionary sentencing provisions are being displaced by determinate sentencing schemes and mandatory enhanced sentences.¹⁸ Mandatory sentencing statutes continue to be a topic of debate in the legal community,¹⁹ and have led to a number of sentencing issues. In *Melgar v. State*,²⁰ the Court of Appeals of Maryland addressed the issue of the time spent by a defendant in pretrial detention. The court examined whether pretrial detention may be considered when computing the statutory predicate that a defendant serve “at least 1 term of confinement of at least 180 days in a correctional institution as a result of a conviction of a previous” drug felony

conviction, before he can be subject to a mandatory enhanced penalty under Article 27, section 286(d).²¹ In *Melgar*, the court found that Maryland's sentence enhancement provision did not permit the court to add any time spent in pretrial detention on to time served post-conviction.²² The court concluded that to do otherwise would be inconsistent "with the Legislature's desire to accord to a defendant a true opportunity and fair chance at rehabilitation before being sentenced under the enhanced penalty statute."²³

This article first examines the court of appeals' decision in *Melgar* by tracing the historical development of sentence enhancement provisions for drug offenses, emphasizing Maryland law.²⁴ Next, the article will discuss the facts and the Court's decision in *Melgar*.²⁵ This article will then address the implications of the court's determination in *Melgar* on the legislature's goal to accord offenders a "fair chance at rehabilitation in the prison system."²⁶ Finally, this article examines the *Melgar* decision in the wake of present debates over mandatory and enhanced sentencing provisions and their success at deterring crime.²⁷

II. HISTORICAL DEVELOPMENT

A. *The History of Mandatory Sentencing Laws*

In the 1970's, Congress began to assume a more active role in defining sentencing goals and practices.²⁸ In 1984, Congress passed the Sentencing Reform Act.²⁹ Congress codified the purpose and objective behind sentencing by specifying the kinds of sentences that could be imposed, and by establishing the factors to be considered.³⁰ The Sentencing Reform Act created the United States Sentencing Commission.³¹ The Commission was authorized to further the Sentencing Reform Act's objectives, including working towards eliminating sentencing disparities, and helping ensure fair punishment.³²

Throughout the nation there has been a gradual displacement of discretionary sentencing by determinate sentencing schemes and mandatory enhanced sentences.³³ While determinate sentencing "directs judges to a whole complex of factors,"³⁴ mandatory sentencing "emphasizes a single aggravating factor."³⁵ Mandatory sentence enhancement laws "require substantially increased punishment when a specified aggravating circumstance exists in

connection with the commission of a crime."³⁶ Critics argue that mandatory sentencing is "applied unevenly, with those exercising their right to trial often receiving harsher penalties."³⁷

Mandatory sentencing statutes "generally provide that when a specified circumstance exists in connection with the commission of a crime (1) the court must sentence the defendant to prison and (2) the duration of the defendant's incarceration will be substantially longer than it would have been in the absence of the circumstance."³⁸ While requiring an enhanced punishment for various felonies, the laws focus particularly on violent crimes and drug trafficking.³⁹ By enacting mandatory sentencing laws, both federal and state legislatures are attempting to send a message to habitual offenders: those who continue to commit specific drug offenses and other violent crimes may receive mandatory sentences without the possibility of parole.⁴⁰ The principal purposes of mandatory sentencing laws are deterring crime and imprisoning and punishing serious offenders.⁴¹ To this end, legislatures use one of two approaches -- charge-based sentencing or conduct-based sentencing.⁴²

Charge-based sentencing "requires courts to impose mandatory punishment only when the prosecution has alleged the facts triggering the sentencing provisions as part of the charging instrument and has proven them at trial, or the defendant has admitted them."⁴³ It provides prosecutors with a bargaining chip to force the defendant to plead guilty to any terms the State may dictate.⁴⁴

Conduct-based sentencing "directs the court to determine the facts that trigger the mandatory minimum sentence at the time of sentencing, even if they have not been alleged in the charging instrument and proven at trial."⁴⁵ While charge-based sentencing requires formal charges containing factual allegations that trigger mandatory sentencing, conduct-based sentencing imposes the enhanced sentence regardless of the charges.⁴⁶

B. *Maryland's Statute Imposing Enhanced Penalty in Drug Offenses*

Maryland's statute is a charge-based sentencing law, requiring two prior felony drug convictions, as well as a mandatory confinement of 180 days for at least one prior felony conviction.⁴⁷ Article 27, section 286 of the Maryland Code mandates specific punishments for the unlaw-

ful manufacture, distribution, and possession of certain controlled dangerous substances.⁴⁸ Section 286(d), added to the statute in 1988, specifically provides that an individual who has two prior drug convictions,⁴⁹ where the convictions do not stem from the same incident, and the individual has served at least one term of confinement of at least 180 days on a conviction,⁵⁰ shall be sentenced to a term of not less than 25 years without parole.⁵¹

Introduced in the General Assembly in 1982, section 286 was intended to impose “mandatory sentences for persons previously convicted of certain offenses relating to the manufacture or distribution of controlled dangerous substances and altering the penalties for certain offenses relating to the manufacture or distribution of certain controlled dangerous substances.”⁵² Repealed and then reenacted with amendments in 1988, the revised section specified that “for the purpose of certain subsequent offender penalties, certain offenses are prior offenses,”⁵³ and it prohibited the suspension of certain penalties.⁵⁴ While stylistic changes have been made over the last eleven years, the effect of section 286 has changed little.⁵⁵

Through the language in section 286, the Maryland General Assembly drew a distinction between second offenses and third and fourth offenses.⁵⁶ The Legislature did not intend to simply assign a more severe punishment on a repeat offender.⁵⁷ If so, then the statute would have provided for an enhanced sentence every time a defendant had a previous conviction.⁵⁸ Rather, the Legislature provided that, in addition to the requirement that the defendant has two prior convictions, the defendant must also have served 180 days confinement in a correctional institution.⁵⁹

III. MELGAR v. STATE

A. The Facts of the Case

In *Melgar v. State*,⁶⁰ the Court of Appeals of Maryland considered whether the time a defendant spent in pretrial detention may properly be considered under the statute imposing an enhanced penalty on drug defendants who had two prior drug convictions and had served at least 180 days of term of confinement in a correctional institution, imposed as a result of previous drug convictions.⁶¹ The court held that the required 180 days of confinement could not include time spent by a defendant in

pretrial detention for prior narcotic violations.⁶²

In July 1997, Jose Emondo Melgar was indicted by the Grand Jury for Prince George’s County on the following counts: 1) possession of cocaine with intent to distribute; 2) possession of cocaine; 3) making a false statement to a police officer; and 4) resisting arrest.⁶³ Melgar was found guilty on all four counts.⁶⁴ Because he had two previous drug convictions under section 286(b),⁶⁵ the State served notice informing the Defendant of its intention⁶⁶ to seek mandatory sentencing under section 286(d).⁶⁷ The State intended to produce evidence of Melgar’s two previous drug convictions, and the concomitant term of incarceration he had served for those convictions, as the basis for the State’s decision to invoke an enhanced sentence.⁶⁸

At the time of sentencing, Melgar did not dispute the fact of his first two convictions, nor did he contest that he had served a single term of confinement of 248 days as a result of his prior drug convictions.⁶⁹ When the sentencing court found that the State had satisfied the requirements of the statute, the Defendant was sentenced to twenty-five years in prison without the possibility of parole.⁷⁰

A timely appeal was made to the Court of Special Appeals of Maryland.⁷¹ On appeal, Melgar argued that he did not qualify for the three-time drug offender enhanced sentence.⁷² He argued that the State had failed to demonstrate that he had served the required 180-day term of confinement under section 286(d)(1)(i).⁷³ Melgar claimed that he had not served the required 180 days as a result of a previous conviction under section 286,⁷⁴ but only 141 days, thereby not qualifying for the enhanced penalty.⁷⁵ When arrested on the 1996 charge, Melgar was unable to make bail, and spent 107 days in pretrial detention.⁷⁶ At sentencing, the trial judge gave him credit for these 107 days toward his sentence.⁷⁷ The Court of Special Appeals of Maryland held that “the 180-day term of confinement mandated by section 286(d)(1)(i) implicitly includes pretrial detention served in relation to the same underlying, qualifying offense.”⁷⁸ The Court of Appeals of Maryland granted Melgar’s petition for a writ of certiorari.⁷⁹

Melgar argued that his pretrial detention had been improperly considered by the trial court when computing his term of confinement.⁸⁰ Melgar claimed that the 107

days of pretrial detention could not count toward the statutory 180-day period.⁸¹ He argued that he was not detained “as a result of conviction” as is required under section 286(d), but was being held because he had been unable to post the required bail.⁸² Melgar argued that the fact that the sentencing court “gave him credit for the 107 days of pretrial incarceration, cannot convert into time served as a result of a conviction.”⁸³

The State countered, arguing that Melgar’s prior convictions resulted in a sentence of one year and one day, and acknowledged that Melgar did receive credit for the 107 days that he had served in the pretrial detention.⁸⁴ Therefore, Melgar’s actual time of confinement was 248 days.⁸⁵ The State’s argument was based on an interpretation of section 286(d)(1)(i), that both the actual time of confinement and the pretrial detention time should count toward the statutory 180-day requirement.⁸⁶ The State suggested that Melgar’s argument was not legitimate since he had already benefited from having this time credited to his sentence.⁸⁷ The State argued that Melgar could not have it both ways – benefit from the time served in pretrial detention, while not having it count towards prior time of confinement.

B. Statutory Interpretation

In *Melgar*, the court of appeals was faced with interpreting the Legislature’s intent and determining the meaning of the provision requiring “at least one term of confinement of at least 180 days in a correctional institution as a result of a conviction of a previous conviction.”⁸⁸ In its review of the statute, the court noted that Art. 27, section 286(d)(1)(i), mandating 25 years incarceration without parole under certain conditions, is highly penal, and as such required that the court strictly construe the statute.⁸⁹ The court applied the rule of lenity, as is proper any time there is a question as to the punishment imposed by statute.⁹⁰

The court reaffirmed the rule that “where the General Assembly has required or permitted enhanced punishment for multiple offenders, the burden is on the State to prove, by competent evidence and beyond a reasonable doubt, the existence of all of the statutory conditions precedent for the imposition of enhanced punishment.”⁹¹ The court concluded that the language “as a result of a conviction” was clear and unambiguous.⁹² The 180-day

requirement of section 286(d) did not permit the addition of time spent in pretrial detention because this time was not “as a result of a conviction.”⁹³ The court distinguished the section, which considers time served “as a result of a conviction,” from section 638C, which permits the granting of credit against a sentence for “time spent in custody.”⁹⁴ The court noted the stylistic differences of the two statutes, as well as the Legislature’s deferring purposes in enacting them.⁹⁵

C. Application of *Jones v. State*

Both parties in *Melgar* relied on the holding in *Jones v. State* to support their interpretation of Art. 27, section 286(d) of the Maryland Code.⁹⁶ In *Jones v. State*,⁹⁷ the court considered “whether the State had proved the necessary predicate for the enhanced punishment imposed upon Jones.”⁹⁸ The court held that a finding that the 180-day mandatory time predicate has been met cannot be based merely on the fact that a defendant had been sentenced to more than 180 days, even if the defendant had been sentenced to one year of unsuspended time.⁹⁹ The burden remains on the State to show that the defendant did in fact serve at least 180 days.¹⁰⁰

In *Melgar*, the State argued that “even though [the *Jones*] court refused to permit the cumulating of confinements for separate convictions or incidents to satisfy the 180-day requirement” the [*Jones*] court “did not rule out totaling the entire period of confinement with respect to a single charge and conviction.”¹⁰¹ The State relied on a statement in *Jones* that “Jones was given credit for time served [in pretrial detention]” which effectively started “the term of confinement” at the moment Jones’ pretrial detention began.¹⁰² The State argued that this statement established a rule permitting pretrial detention time to be used to compute the required 180 days under section 286(d)(1)(i).¹⁰³

On the other hand, Melgar argued that the issue of the significance of the words “as a result of conviction,” was not before the *Jones* court.¹⁰⁴ In fact, Melgar suggested that the court “lend little credence to a one sentence dictum upon which the State would hinge our present analysis.”¹⁰⁵

The *Jones* court did not answer the question of whether the words “as a result of conviction” meant time served in pretrial detention.¹⁰⁶ The court held that trial

courts may not find that the State has met its burden of proof by merely showing that the defendant had been sentenced to one year of unsuspended time without showing that the required time had, in fact, been served.¹⁰⁷

Significantly, the *Jones* court noted that the legislative intent in section 286(d)(1)(i) was rehabilitative.¹⁰⁸ “By imposing the 180-day minimum, the purpose of the statute was to ensure that those who received the enhanced punishment had been accorded a fair chance at rehabilitation in the prison system and had not responded.”¹⁰⁹ But the *Jones* court made it very clear that the phrase “term of confinement” meant time actually served.¹¹⁰

D. Strict Construction in the Context of a Penal Statute

Section 286 of Article 27 of the Maryland Code, is an enhanced penalty statute.¹¹¹ Because “an enhanced penalty statute is by nature highly penal,” it “must be strictly construed.”¹¹² The court of special appeals has interpreted strict construction of a penal statute, as meaning, “a construction favorable to the accused, and against the State.”¹¹³

The *Melgar* court noted that the aim of enhanced punishment is to target those who do not respond to rehabilitation.¹¹⁴ Identifying and punishing those who “had been accorded a fair chance at rehabilitation in the prison system and had not responded,” is one of the goals of sentence enhancement statutes.¹¹⁵

The *Melgar* court recognized the need to strictly interpret the statute due to its highly penal nature.¹¹⁶ The rule of lenity requires that when there is any doubt about the exact punishment imposed by the statute, the court should not interpret the statute in such a manner as to increase the penalty.¹¹⁷

IV. THE IMPLICATION OF MELGAR

The *Melgar* decision generated strict guidelines for Maryland’s trial courts. It concluded that time spent by a defendant in pretrial detention “may not be tacked on to time served post-conviction in a term of confinement so as to satisfy the 180-day predicate under section 286(d)(1)(i).”¹¹⁸ This was consistent with the desire of the Legislature to “accord to a defendant a true opportunity and fair chance at rehabilitation before being sentenced under the enhanced penalty statute.”¹¹⁹

The decision in *Melgar* reflects the recognition that mandatory sentencing statutes are highly punitive.¹²⁰ It is also demonstrative of the current reassessment of mandatory sentencing.¹²¹ The holding in *Melgar* reflects the court’s continued faith in the rehabilitative purpose of incarceration, and reaffirms the need to strictly construe penal statutes.¹²² This decision is indicative of the court’s concern over taking discretion away from the judges, and the effectiveness and propriety of mandatory sentencing of non-violent offenders.¹²³

The *Melgar* decision may be viewed as an anti-prosecution statement, since to some extent it decreases the State’s bargaining position. While time served before sentencing will count towards reducing actual time to be served,¹²⁴ it will not count towards time needed to meet the requisite 180 days.¹²⁵ Fewer defendants will qualify for the enhanced sentence since it requires two prior convictions as well as a prior minimum period of incarceration of 180 days.¹²⁶

As a result, a class of defendants is created who, despite extensive narcotics records, may not qualify for a mandatory sentence, while defendants with less serious records may.¹²⁷

V. MELGAR: RAMIFICATIONS IN THE WAKE OF THE MANDATORY SENTENCING DEBATE.

The decision in *Melgar* raises issues that are at the heart of continuing discussions in the criminal justice community.¹²⁸ The decision reflects frustration with an overwhelming drug problem, and society’s re-evaluation of the effectiveness of mandatory sentencing.

A. Judicial Frustrations

As a result of increased incarceration rates, prison overcrowding, sentence disparities, and a strain on the operation of an otherwise beneficial system of sentencing guidelines,¹²⁹ certain federal and state judges have expressed their opposition to mandatory sentencing.¹³⁰ Proliferation of harsh mandatory sentences has driven some judges to resign and others to openly voice their frustration.¹³¹

The opposition against mandatory sentencing was discussed in the May 17, 1993 issue of the *National Law Journal*.¹³² The article noted that Jack B. Weinstein and Whitman Knapp of New York are among fifty senior fed-

eral judges who, by May of 1993, had exercised their prerogative to refuse to hear drug cases.¹³³ In other cases, federal judges have found the defendant guilty of the possession of lesser amounts of drugs in order to circumvent the mandatory sentences, or have raised the burden of proof from a preponderance of the evidence standard to a clear and convincing standard.¹³⁴

The trend to displace federal guidelines and impose more lenient sentences continues to grow.¹³⁵ In 1999, there were 55,000 criminal cases sentenced in the federal courts,¹³⁶ but only 65% of sentences fell within the guidelines.¹³⁷ When compared with figures over the last ten years, this number has continued to increase. In 1989, 82% of the criminal cases were sentenced within the guidelines.¹³⁸ In contrast, only 0.6% of the criminal cases sentenced in the federal courts in 1999 went above the guidelines.¹³⁹ Even more alarming is the fact that the Department of Justice appealed only 19 of the 8,000 cases in 1999 that fell below the guidelines.¹⁴⁰

While individual judges have voiced dissatisfaction with mandatory guidelines, "official judicial bodies have not formally opposed them."¹⁴¹ Resolutions for the repeal of federal mandatory minimum sentences have been enacted by judges of every federal circuit court, the Judicial Conference of the United States, the American Bar Association, and the Federal Court Study Committee.¹⁴²

B. Displacement of Violent Offenders

Critics also point out that when judges sentence offenders under mandatory sentences, prisons must make room for these inmates.¹⁴³ This has been identified by some as the cause of mushrooming prison populations.¹⁴⁴ Aggressive use of mandatory sentencing often results in the early release of violent as well as nonviolent offenders to make room for the growing number of drug offenders being sentenced under these mandatory sentencing statutes.¹⁴⁵

The release of violent offenders in order to make room for drug offenders sentenced under the mandatory statutes has proved counter-productive.¹⁴⁶ While police officers are spending a disproportional amount of their time chasing down drug offenders, less time is available to pursue other violent and nonviolent criminals.¹⁴⁷ It is possible that legislatures are not considering these factors and other repercussions when they enact mandatory sentences.

C. Results in Unwarranted Disparities

Mandatory sentencing does not provide consistent and proportional punishment.¹⁴⁸ Numbers indicate that African-Americans are more frequently subjected to mandatory sentencing than are white criminal offenders. While 12% of our population is African-American, almost 50% of the women and more than 50% of the men in U.S. jails and prisons are African-American.¹⁴⁹ These numbers are exacerbated by the growing use of zero tolerance policies that have the result of targeting minorities.¹⁵⁰ These policies, aimed at those who violate drug and gun laws, target inner-city neighborhoods which tend to be predominantly minority.¹⁵¹

Critics note that most of the drug offenders being sentenced under these mandatory sentences, and receiving lengthy incarcerations, are low-level, non-violent offenders.¹⁵² The lowest level drug dealer standing on the neighborhood street corner can receive the same punishment as the highest level member of that drug network. Maryland's mandatory and enhanced sentence statutes do not distinguish based on the severity of the crime.¹⁵³

D. Failure to Stem the Growth of Drug Crimes

Mandatory sentencing statutes have failed to stem the growth of crime in general, and drug crimes specifically. In 1980 there were 24,000 drug offenders in the United States Bureau of Prisons population.¹⁵⁴ By 1993, this number had grown to 90,000.¹⁵⁵ Perhaps even more alarming was the projection that this figure would grow to 130,000 by the year 2000.¹⁵⁶ In 1998, for the first time more than one million men and women were incarcerated in federal and state prisons for nonviolent crimes varying from passing bad checks to dealing drugs.¹⁵⁷

The Department of Justice's Uniform Crime Report shows a constant growth in crime in the nation.¹⁵⁸ In 1988, the same year that the Maryland General Assembly imposed mandatory sentencing under Article 27, section 286(d) of the Maryland Code,¹⁵⁹ the total number of arrests for crime index offenses was 7,945,783.¹⁶⁰ In 1997 this figure rose to 9,226,709, a 16.1% increase.¹⁶¹ A breakdown of these figures shows that during the same time period violent crime increased 23.3%, while property crime decreased 7.6%.¹⁶² More alarming are the statistics on drug offenses. A total of 659,616 men and women were arrested for drug abuse violations

in 1988.¹⁶³ This figure increased 48.2% up to a staggering 977,789 people in 1997.¹⁶⁴ These figures indicate that during the period of 1988 to 1997, the increase in drug arrests was nearly three times that of total arrests in the nation.¹⁶⁵

It is evident that despite existing mandatory sentencing statutes, the number of arrests and convictions for drug offenses continues to increase. In light of these figures, it appears that toughened sentencing standards that incarcerate repeat drug offenders for longer periods of time, are not solving the problem.

E. Shift in Power and Discretion

Maryland's mandatory sentencing statutes have shifted the power and discretion in sentencing from judges to prosecutors.¹⁶⁶ Issues of fairness arise under Maryland Rule 4-245(b),¹⁶⁷ when we consider that prosecutors are given the discretion to decide whether or not they are going to seek an enhanced penalty.¹⁶⁸ In *Beverly v. State*,¹⁶⁹ the Court of Appeals of Maryland held that "Rule 4-245 did not remove prosecutorial discretion to plea bargain away a mandatory minimum subsequent offender sentence."¹⁷⁰ The court further held that "the prosecutor may validly choose not to meet the statutory conditions by not giving notice and by not presenting evidence sufficient to prove beyond a reasonable doubt that a defendant has a prior conviction."¹⁷¹ Rule 4-245 allows the prosecutor discretion in plea-bargaining, while providing the defendant with the opportunity to consider the consequences of pleading not guilty.¹⁷² As a result, two drug offenders, arrested for the exact same crime, could be sentenced differently solely based on the discretion of the prosecutor.

F. Equal Protection Issue

Mandatory sentencing provisions are not invoked in all instances,¹⁷³ and when they are, they are typically part of a plea-bargaining strategy as evidenced by *Beverly v. State*.¹⁷⁴ Between 1997 and 1999, judges have increasingly sentenced offenders below the guidelines.¹⁷⁵ This discrepancy, dramatically noted in drug offenses, raises important due process and equal protection issues.¹⁷⁶

There is considerable disparity in compliance with the guidelines in drug cases.¹⁷⁷ Sentences that fall within the guidelines range from 18.3% to 67.3%,¹⁷⁸ while those

falling below the guidelines range from 10.3% to 79.9%.¹⁷⁹ In contrast with these numbers, sentences which were above the guidelines ranged from 1.8% to 22.4%.

There is widespread disparity among the Maryland circuits in sentencing within the guidelines. Overall compliance with the guidelines shows disparity in sentencing between the circuits for all crimes,¹⁸⁰ not just for drug offenses.¹⁸¹ The disparity, however, is particularly dramatic in sentencing for drug offenses.¹⁸² When reviewing the severity of sentencing in drug cases, it is evident that sentencing in the First,¹⁸³ Second,¹⁸⁴ and Fourth¹⁸⁵ Circuits, the Eastern Shore and Western Maryland, appears tough on drug offenders. In contrast, the Eighth Circuit, Baltimore City, is particularly lenient on its drug offenders.¹⁸⁶

These statistics show that mandatory guidelines and sentence enhancement statutes are not being followed.¹⁸⁷ This variance in sentencing indicates a lack of consensus in how to deal with the drug problem.¹⁸⁸ This analysis raises the valid question of why Maryland has "guidelines" and "mandatories"¹⁸⁹ when they are not applied uniformly within the State. It may be inferred that there is a similar disparity in the invocation of mandatory sentencing provisions. There is no hard data on the percentage of cases where the mandatory applies and was imposed.

Maryland's mandatory sentencing statutes have continued to receive mixed support with State prosecutors. Carroll County's State's Attorney Jerry F. Barnes has made it clear that his county "will seek a mandatory sentence every time" it prosecutes a repeat drug offender.¹⁹⁰ Sandra A. O'Connor, Baltimore County State's Attorney views Maryland's mandatory sentences as an effective tool for prosecutors.¹⁹¹ Anne Arundel County State's Attorney Frank R. Weathersbee also supports the legislature's continuing move toward mandatory sentencing, as does Harford County State's Attorney Joseph I. Cassilly.¹⁹² But an examination of the statistics in Baltimore City implies that the State's Attorney Patricia Jessamy, does not seem to support mandatory statutes.¹⁹³

In response to dramatic and uncontrolled increases in violent crime and drug dealing, mandatory sentences have been enacted.¹⁹⁴ While prosecutors have supported mandatory sentences, some judges have voiced displeasure because they limit a judge's discretion and ability to consider each case and each sentence individually.¹⁹⁵

Many agree that dangerous murderers, armed rob-

bers, sex offenders, and other violent offenders should be off the streets, out of society, and in prison. Beginning with America's War on Drugs, nonviolent drug offenders have been added to this list. Since the 1980's, there has been a drive toward tougher sentences for drug crimes, including mandatory sentences.¹⁹⁶

VII. CONCLUSION

While the Court of Appeals of Maryland's decision in *Melgar* serves as one interpretation of the mandatory sentencing statute¹⁹⁷ it also underscores the failure of the statute to deter the drug related offenses it was designed to address.¹⁹⁸

Many states, including Maryland, have followed the example of the federal government and have adopted strict mandatory enhanced sentences for drug offenders.¹⁹⁹ However, despite these new statutes, drug arrests continue to increase.²⁰⁰ Thus, a conclusion can be inferred that the imposition or threat of severe mandatory penalties for repeated violations of the drug laws has had little, if any, significant impact on crime rates, particularly drug offenses.²⁰¹

While not every drug defendant qualifies for the enhanced sentence under Article 27, section 286(d) of the Maryland Code, not all jurisdictions are applying the law to every defendant who qualifies.²⁰² Sentencing in drug cases varies dramatically from circuit to circuit, as does, by inference, the invocation of mandatory sentences.²⁰³ Circuits should, at the very least, strive for uniformity. This does not mean that mandatory sentencing statutes are inappropriate, or that they should be repealed. Rather, a continued increase in crime indicates that the law is not solving the problems for which it was intended.²⁰⁴ If drug offenses have not decreased in the eleven years since the statute was added to the Maryland Code, they will not decrease in the next eleven years. The Maryland General Assembly needs to look towards another solution.

Mandatory sentencing provisions fail to address the economics of the drug trade. While the imprisonment of a violent criminal may work to deter crime, the imprisonment of one drug dealer neither deters drug offenses nor diminishes the availability of drugs for long. The economics of drugs are a classic reflection of supply and demand. Remove one drug dealer from the streets and sup-

ply is diminished only for a short time. Demand continues, and there are other dealers ready, willing and able to take over. Destroy one drug network and another moves in to take its place. As long as there is a demand for drugs, there will be someone to supply it.

Mandatory sentencing provisions also do not take into account the fact that not all drug dealers are the same, nor are all drug dealers violent. Drug dealers vary from the big time supplier who will resort to violence to maintain his market, to the street level dealer who deals to support a habit. There are dealers of various types, and enforcers who utilize force and violence to protect their turf. While not all drug dealers fit the same profile or impose the same threat to society, all can be subjected to the same mandatory sentencing provisions.

This is not to suggest that mandatory sentencing is not appropriate in certain circumstances. There are certain violators who do pose a serious threat to society and need to be incarcerated for significant periods of time. However, a "one-size fits all" approach to sentencing in drug cases, even for repeat violators, has not, and will not, work to deter the drug epidemic.

It may be time to consider the possibility that a drug-free society is impossible.²⁰⁵ It may be time to ask why legislatures continue to pass statutes that fail to demolish the growth of the drug trade.²⁰⁶ It may be time to look more seriously at the idea that we need to treat the drug problem as a health problem.²⁰⁷

Drug dealers would not exist if it were not for the drug addicts. It therefore seems clear that a major part of any anti-drug effort needs to focus on eliminating the demand of addicts. This can only occur through intensive treatment and aftercare. Mandatory need not always mean imprisonment. The term can also be used in conjunction with treatment.²⁰⁸

It is unrealistic to view mandatory sentencing, with its attendant problems of prosecutorial discretion, lack of judicial discretion, and inconsistent implementation, as the sole answer to the drug epidemic. For whatever reason, these statutes have not stemmed the course of the drug problem. At the very least, passage and continued implementation of such measures needs to be re-evaluated.

¹ David Dolinko, *The Future of Punishment*, 46 UCLA L. REV. 1719, 1721 (1999) (citing *The Sentencing Project, Briefing/Fact Sheets: Facts About Prisons and Prisoners* (visited July 2, 1999) <<http://www.sentencingproject.org/brief/1035.htm>>).

² See U.S. Department of Justice, Bureau of Justice Statistics: Prison Statistics (last modified June 13, 1999) <www.ojp.usdoj.gov/bjs/prisons.htm> (noting the significant increase in the inmate-to-population ratio). See also 7 Fed. Sentencing Rep. 28 (1994) (providing findings from a Department of Justice study on mandatory minimum sentences and low-level drug offenders).

³ Dolinko, *supra* note 1, at 1721.

⁴ *Id.*

⁵ The Court of Appeals of Maryland examined the legislative intent of one particular habitual criminal statute in *Montone v. State*, 308 Md. 599, 521 A.2d 720 (1987). At issue in this case was a provision that reads in pertinent part: "Any person who has served three separate terms of confinement in a correctional institution as a result of three separate convictions of any crime of violence shall be sentenced, on being convicted a fourth time of a crime of violence, to life imprisonment without the possibility of parole." MD. ANN. CODE art. 27, § 643B(b) (1957, 1982 Repl. Vol. & Cum. Supp. 1986). The court noted that the purpose of this provision was "to identify individuals incapable of rehabilitation and lock them up forever." *Montone*, 308 Md. 599, 613, 521 A.2d 720, 727. The court went on to state that "[t]he statute is narrowly directed towards repeat offenders of violent crimes who, having been exposed to the correctional system three distinct times, have failed to learn to coexist peacefully with society." *Id.* at 614, 521 A.2d at 727.

⁶ Dolinko, *supra* note 1, at 1721 (quoting *Most States Making Little Use of Three-Strikes Law, Study Finds*, CRIM. JUST. NEWSL., Sept. 1, 1998, at 5).

⁷ See *id.* at 1722. See also, Michael Hill, *New York Reconsiders Tough Drug Laws but DA Association Urges Caution*, THE DAILY RECORD, Feb. 23, 2001, at 5c (discussing New York's Rockefeller Drug Laws which provide for a mandatory sentence of 15 years to life).

⁸ See *id.*

⁹ See, e.g., ALA. CODE § 13A-5-9 (1994); ARIZ. REV. STAT. ANN. § 13-604.02 (1982); CAL. PENAL CODE

§ 667.75 (West 1988); DEL. CODE ANN. tit. 11, § 4214 (1987 & Supp. 1994); FLA. STAT. ANN. § 775.087 (West 1992); LA. REV. STAT. ANN. § 15:529.1 (1992 & Supp. 1995); MICH. COMP. LAWS ANN. § 791.234 (West Supp. 1992); MISS. CODE ANN. § 99-19-83 (1972); N.J. STAT. ANN. § 2C:43-6(c) (West Supp. 1992); N.Y. PENAL LAW § 70.04 (McKinney 1987); 42 PA. CONS. STAT. ANN. § 9712 (West 1982); WASH. REV. CODE ANN. § 9.94A.3103 (West Supp. 1992).

¹⁰ For examples of other mandatory sentencing provisions and their treatment by the courts, see *Diaz v. State*, 1999 WL 989138 (Md. App.) (Construing MD. ANN. CODE art. 27, § 293 (1996)); *State v. Thompson*, 332 Md. 1, 629 A.2d 731 (1993) (construing MD. ANN. CODE art. 27, § 286(c) (1992)); *Jones v. State*, 324 Md. 32, 595 A.2d 463 (1991) (construing MD. ANN. CODE art. 27, § 286(d)(1) (1987 & Supp. 1990)); *Malcolm v. State*, 314 Md. 221, 550 A.2d 670 (1988) (construing MD. ANN. CODE art. 27, § 286(b)(2) (1982 & Supp. 1985)); *Montone v. State*, 308 Md. 599, 607-12, 521 A.2d 720, 723-26 (1987) (comparing Maryland's habitual offender statute with statutes of other jurisdictions); *Calhoun v. State*, 46 Md. App. 478, 418 A.2d 1241 (1980) (construing MD. ANN. CODE art. 27, § 643B(c) (1957)); *Gatewood v. State*, 244 Md. 609, 224 A. 2d 677 (1966) (construing MD. ANN. CODE art. 27, § 366 (1957)).

¹¹ MD. ANN. CODE art. 27, § 286(d) (1998 & Supp. 1999).

¹² Invoking the mandatory penalties is discretionary and can vary among prosecutors offices and even among prosecutors within the same office. In *Beverly v. State*, 349 Md. 106, 108, 707 A. 2d 91, 92 (1997), the Court of Appeals held that a trial court is not bound to impose a mandatory minimum as per subsequent offender statute, and that this is a matter of prosecutorial discretion. See Mike Farabaugh, *Drug Dealer Receives Mandatory Sentence; Man First in County to Get 25 Years Without Parole*, BALT. SUN, Nov. 4, 1999, at 3B (voicing Carroll County State's Attorney Jerry F. Barnes' support of Maryland's mandatory sentencing laws, and his resolve that Carroll County "will seek a mandatory sentence every time.")

¹³ MD. ANN. CODE art. 27, § 286(d) (1998 & Supp. 1999).

¹⁴ See *infra* Part V.E.

¹⁵ Sentencing discretion has traditionally been a power of the trial judge who is a member of the judicial branch. The State's Attorney is a member of the executive branch of government. See Maryland Manual <<http://www.mdarchives.state.md.us/msa/mdmanual/html/mmtoc.html>> (describing the Maryland executive branch and judiciary, as well as the origin and function of the court).

¹⁶ See MD. ANN. CODE art. 27, § 286(d) (1998 & Supp. 1999).

¹⁷ See MD. RULE 4-245(b) (1997) (requiring that the State's Attorney serve notice on the defendant or his counsel of an alleged prior conviction).

¹⁸ See Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993).

¹⁹ See Book Notes, *Determinate Sentencing and Judicial Participation in Democratic Punishment*, 108 HARV. L. REV. 947 (1995) (reviewing LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING (1994) (discussing judicial frustration and judicial criticisms of mandatory sentencing); Thomas R. Goots, "A Thug in Prison Cannot Shoot Your Sister": Ohio Appears Ready to Resurrect the Habitual Criminal Statute—Will It Withstand an Eighth Amendment Challenge?, 28 AKRON L. REV. 253 (1995) (discussing the history, support and criticism of mandatory sentencing); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993) (arguing that mandatory punishment is bad policy and that it undermines the goals of determinate sentencing); James Wootton, *Truth in Sentencing—Why States Should Make Violent Criminals Do Their Time*, 20 U. DAYTON L. REV. 779 (1995) (discussing the failure of America's criminal justice system, public support for mandatory sentencing and the pressure being placed upon the legislature).

²⁰ See *Melgar v. State*, 355 Md. 339, 734 A.2d 712 (1999) (examining the statutory provisions of MD. CODE ANN., art. 27, section 286(d)(1)(i) (1996).

²¹ *Id.*

²² *Id.* at 351, 734 A.2d at 719.

²³ *Id.*

²⁴ See *infra* Part II.A.

²⁵ See *infra*. Part III.

²⁶ See *infra*. Part IV.

²⁷ See *infra*. Part V.

²⁸ See The Honorable Orrin G. Hatch, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 185, 188-96 (1993) (providing a historical review of Congressional action in sentencing reforms and mandatory minimum sentencing).

²⁹ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

³⁰ Hatch, *supra* note 28, at 188. As provided for in the Sentencing Reform Act, these objectives were: "(1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with educational or vocational training, medical care, or other correctional treatment." 18 U.S.C. § 3553(a)(2)(1988).

³¹ *Id.* at 189.

³² *Id.*

³³ Lowenthal, *supra* note 18, at 61.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 69.

³⁷ See *id.* at 61 (suggesting that those who exercise their right to a trial are often those who receive the harsher penalties). For example, consider the case of Denise Smith, who was arrested for her second felony drug offense, turned down a plea bargain, went to trial and lost. Smith received a ten- to twenty-year sentence while the minimum for similar repeat offenders is four and a half to nine years. See Hill, *supra*, note 7. See also *id.* at 108 (discussing the case of *State v. Cocio*, 709 P.2d 1336 (Ariz. 1985). In *Cocio*, Cocio's truck collided with Rodriguez' car, resulting in the death of a passenger in the latter's vehicle. Although both were charged with manslaughter and DUI, as well as with mandatory punishment, Rodriguez received only two days in jail, a fine, and a year of probation by entering into a plea bargain. Cocio exercised his right to a trial and received a mandatory life sentence with no possibility of parole for twenty-five years).

³⁸ Lowenthal, *supra* note 18, at 64.

³⁹ *See id.* at 62. *See also id.* Part I, at 66 (discussing these statutes).

⁴⁰ *See id.* at 64. *See also supra* notes 11 and 12 and accompanying text.

⁴¹ *See id.* at 65 (suggesting that in reality legislatures are targeting certain classes of offenses and offenders and then imposing severe punishment).

⁴² *See id.*

⁴³ *See id.* In Maryland, proof of judgment of conviction is not enough. The State must prove that the defendant has served time for a prior drug offense. *Jones v. State*, 324 Md. 32, 595 A.2d 463 (1991).

⁴⁴ Lowenthal, *supra* note 18, at 65. Critics have argued that mandatory minimum enhanced sentencing statutes act to deprive a defendant of his right to a trial by jury when his choice is to accept a plea bargain deal or face the possibility of a long incarceration. These statutes give enormous sentencing power to the state's attorney who makes the decision whether or not to invoke the mandatory. In Maryland, this discretion is properly used by the state's attorney in plea-bargaining. *Jones*, 349 Md. 106, 126, 707 A.2d 91, 100.

⁴⁵ Lowenthal, *supra* note 18, at 65-66.

⁴⁶ *See id.* at 74. The facts of *Jones v. State* can be used to show how a charge-based sentencing law would differ from a conduct-based sentencing law. Jones was charged with a drug offense in 1985 and was sentenced to 15 years in the Division of Correction, all but one year suspended. In addition, Jones was to receive credit for 17 days served pretrial. Following his release, Jones was to be placed on supervised probation for five years. He actually served one hundred days on this first conviction. In 1986 Jones was charged with a second drug offense for which he received five years supervised probation, to follow the period of probation in the first conviction. A charge-based sentence, such as Maryland's, would require that the State give notice to the defendant that it will seek to invoke the enhanced sentence. The State is required to show that the requisite convictions and time served have been satisfied. A conduct-based sentence requires that the court make a finding at the time of sentencing, taking into account the circumstances of the offense and the defendant's criminal history.

⁴⁷ *See MD. ANN.CODE art. 27, § 286(d)* (1996) (requiring that the State establish three predicates: (1) that the defendant is presently convicted of violating or conspiring to violate § 286(b)(1) or (b)(2); (2) that the defendant has two prior convictions, not arising out of a single incident, for violating § 286(b)(1) or (b)(2); and (3) that the defendant has served at least one term of confinement of at least 180 days in a correctional institution as a result of conviction of previous violation of § 286 or § 286A).

⁴⁸ MD. ANN. CODE art. 27, § 286 (1970).

⁴⁹ *See MD. ANN. CODE art. 27, §§ 286(a) and (b)(1) and (2)* (1996) (indicating specific prohibited conduct).

⁵⁰ This confinement was the result of a conviction under section 286(b)(1) or (b)(2), or under section 286A. *See MD. ANN. CODE art. 27, § 286A (1)* (making the importation into the State of indicated amounts of certain controlled dangerous substances illegal and subject to the penalty).

⁵¹ MD. ANN. CODE art. 27, § 286 (1996 & Supp. 1999). This statute provides in relevant part:

(d)(1) A person who is convicted under subsection (b)(1) or subsection (b)(2) of this section or of conspiracy to violate subsection (b)(1) or (b)(2) of this section shall be sentenced to imprisonment for the term allowed by law, but, in any event, not less than 25 years and subject to a fine not exceeding \$100,000 if the person previously:

(i) Has served at least 1 term of confinement of at least 180 days in a correctional institution as a result of a conviction of a previous violation of this section or §286A of this article; and

(ii) Has been convicted twice, where the convictions do not arise from a single incident:

1. Under subsection (b)(1) or subsection (b)(2) of this section;

2. Of conspiracy to violate subsection (b)(1) or subsection (b)(2) of this section;

3. Of an offense under the laws of another state, the District of Columbia, or the United States that would be a violation of subsection (b)(1) or subsection (b)(2) of this section if committed in this State; or

4. Of any combination of these offenses.

(2) Neither the sentence required under paragraph (1) of this subsection nor any part of it may be suspended, and the person may not be eligible for parole except in accordance with §4-305 of the Correctional Services

Article.

(3) A separate occasion shall be considered one in which the second or succeeding offense is committed after there has been a charging document filed for the preceding offense. MD. ANN. CODE art. 27, § 286(d) (1999 Supp.).

⁵² Act of May 25, 1982, ch. 470, 1982 Md. Laws 3046.

⁵³ Act of May 17, 1988, ch. 439, 1988 Md. Laws 3228.

⁵⁴ See MD. ANN. CODE art. 27, § 286(d)(2) (1988) (stating that “[n]either the sentence required under paragraph (1) of this subsection nor any part of it may be suspended, and the person may not be eligible for parole except in accordance with Article 31B, § 11 of the Code.” In 1999, the statute was repealed and reenacted with amendments which in relevant part removed “Article 31B, section 11 of the Code” and substituted “section 4-305 of Correctional Service Article MD. ANN. CODE art. 27, § 286(d)(2) (1999).

⁵⁵ See Act of May 25, 1982, ch. 470, 1982 Md. Laws 3046, and House Bill 1189. On May 25, 1989, the Legislature added the crime of conspiracy to section (d) (see House Bill 682); on April 13, 1999, the Legislature changed the exception for eligibility for parole from “in accordance with Article 31B section 11 of the Code” to “Section 4-305 of the Correctional Services Article” (see House Bill 88); and on May 13, 1999, the Legislature added “and subject to a fine not exceeding \$100,000.” Note that this change had no effect on either the length of confinement or the mandatory nature of the statute.

⁵⁶ See *State v. Polley*, 97 Md. App. 192, 202, 627 A.2d 562, 567 (1993) (contending that the Legislature intended to make this distinction).

⁵⁷ See *id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 355 Md. 339, 734 A.2d 712 (1999).

⁶¹ 355 Md. at 342, 734 A.2d at 713.

⁶² *Id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See MD. ANN. CODE, art. 27, § 286 (1999).

⁶⁶ The State is required to “serve a notice of the alleged prior conviction on the defendant or counsel at

least 15 days before sentencing in circuit court or five days before sentencing in district court.” MD. RULE 4-245(c) (1997).

⁶⁷ See *Melgar*, 355 Md. at 343-44, 734 A.2d 714-15. In order to invoke the mandatory penalty of twenty-five years in prison without parole, the State must establish three predicates. First, the State must prove that a defendant is presently convicted of violating or conspiring to violate section 286(b)(1) or (b)(2). Next, the State must prove that a defendant had two prior convictions for violating or conspiring to violate section 286(b)(1) or (b)(2), and that the two prior convictions did not arise out of the same incident. Finally, the State must prove that the defendant had served one term of confinement of at least 180 days in a correctional institution, and that this confinement was the result of a previous violation of either section 286 or section 286A.

⁶⁸ See MD RULE 4-245 (1997).

⁶⁹ 355 Md. at 345, 734 A.2d at 716.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.* Although *Melgar* was raising this issue for the first time on appeal, the court agreed to consider it and noted that “when the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court,” 734 A.2d at 715 n. 2 (citing *Walczak v. State*, 302 Md. 422, 427, 488 A.2d 949, 951 (1985)). See also *Passamichali v. State*, 81 Md. App. 731, 744, 569 A.2d 733, *cert. denied*, 319 Md. 484, 573 A.2d 808 (1990) (noting that the constitutionality of a statute was sufficiently raised at the trial court level, to be considered on appeal).

⁷³ See 355 Md. at 344, 734 A.2d at 715.

⁷⁴ 355 Md. at 345, 734 A.2d 715. See also MD. ANN. CODE art. 27, § 286(d)(1)(i).

⁷⁵ See 355 Md. at 345, 734 A.2d at 715.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² *Id.*

⁸³ See 355 Md. at 346, 734 A.2d at 716.

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See id.* at 346, 734 A.2d 716, n. 3. The Court noted that under MD. ANN. CODE art. 27, § 638C(a), any person convicted and sentenced is to receive credit for all time spent in the custody of any state, county or city jail, correctional institution, hospital, mental hospital or other agency as a result of the charge for which sentence is imposed.

⁸⁸ *See* 355 Md. at 345, 734 A.2d at 715. *See also* MD. ANN. CODE art. 27, § 286(d)(1)(i) (1998).

⁸⁹ *See* 355 Md. at 347, 734 A.2d at 716 (*citing* Jones v. State, 324 Md. 32, 38, 595 A.2d 463, 466 (1991) (noting that section 286(d)(1)(i) is highly penal and must be strictly construed)). *See also* Gargliano, 334 Md. at 437, 639 A.2d at 679 (noting that strict construction will better reflect the intended punishment); Dickerson v. State, 324 Md. 163, 172, 596 A.2d 648, 652 (1991) (noting the importance of strict construction in interpreting penal statutes in order that only the punishment contemplated by the language of the statute be meted out); Wynn v. State, 313 Md. 533, 539-40, 546 A.2d 465, 468 (1988) (arguing that a penal statute should be strictly construed).

⁹⁰ *See* 355 Md. at 347, 734 A.2d at 717 (explaining the policy behind the rule of lenity is “that the Court will not interpret a . . . criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the Legislature] intended”) (*citing* White v. State, 318 Md. 740, 744 569 A.2d 1271, 1273 (1990) (quoting Simpson v. United States, 435 U.S. 6, 15, (1978) (in turn quoting Ladner v. United States, 358 U.S. 169, 178 (1958)). *See also* Gargliano, 334 Md. at 437, 639 A.2d at 679 (1994); Monoker v. State, 321 Md. 214, 222, 582 A.2d at 529 (1990). *See infra* note 129-130 and accompanying text.

⁹¹ *See* Jones, 324 Md. at 37, 595 A.2d at 465 (*citing* Bowman v. State, 314 Md. 725, 733, 552 A.2d 1303, 1306-07 (1989)); Ford v. State, 73 Md. App. 391, 400-06, 534 A.2d 992, 996-99 (1988); Irby v. State, 66 Md. App. 580, 584-85, 505 A.2d 552, 554 (1986), *cert. denied*, 308 Md. 270, 518 A.2d 732 (1987); Teeter v. State, 65 Md. App. 105, 113-14, 499 A.2d 503, 507

(1985), *cert. denied*, 305 Md. 245, 503 A.2d 253 (1986); Sullivan v. State, 29 Md. App. 622, 630-32, 349 A.2d 663, 668-69 (1976).

⁹² 355 Md. at 348, 734 A.2d at 717.

⁹³ MD. ANN. CODE art. 27, § 286(d)(1)(i) (1998).

⁹⁴ 355 Md. at 348, 734 A.2d at 717. *See also* MD. ANN. CODE art. 27, § 638C (a) (1998); MD. ANN. CODE art. 27, § 286(d)(1)(i) (1998).

⁹⁵ 355 Md. at 349, 734 A.2d at 718 n. 4 (discussing the court of special appeals incorrect interpretation of the relationship of these two provisions). The court of appeals noted that there is no indication that the intent of the Legislature was for sentencing courts to impose lengthier sentences on those defendants who were detained prior to trial. Melgar at 349, 734 A. 2d 718 n. 4 (examining the General Assembly’s awareness of the relationship between section 286(d) and section 638C). In fact, the *Melgar* court recognized that the court of special appeals seems to have ignored the fact that pretrial release is permissive and not mandatory. *Id.* This court further criticized the Court of Special Appeals’ holding for minimizing “the significance of the greater rehabilitative services extended to sentenced inmates versus the lack of such made available to pretrial detainees.” *Id.*; *see also id.* at 352, 734 A.2d 719 n. 6 (noting those jurisdictions that participate in the federal “High Intensity Drug Trafficking Area” program).

⁹⁶ 355 Md. at 349, 734 A.2d at 718.

⁹⁷ 324 Md. 32, 595 A.2d 463 (1991).

⁹⁸ 355 Md. at 349, 734 A.2d at 718.

⁹⁹ 324 Md. at 32, 595 A.2d at 463 (holding that the State did not satisfy its burden to prove that Defendant had actually served the requisite 180 days, when it merely introduced evidence that defendant had been sentenced to one year of unsuspended time).

¹⁰⁰ The burden does not shift to the defendant to prove that he did not serve a minimum of 180 days. In the administration of criminal law, it has always been emphasized that “the prosecution has the burden of coming forward with evidence and the burden of persuading the factfinder as to the guilt of the accused.” WAYNE R. LAFAYE, HANDBOOK ON CRIMINAL LAW § 21 (1972), at 152. The exception to this rule is affirmative defenses—excuses or justifications allowed to the defendant. *See id.* at 152-54 (discussing affirmative defenses). This is not an affirmative defense, and shifting the burden of persuasion on the

defendant. Rather, this is a statutorily created sentencing provision that requires that the State provide its applicability.

¹⁰¹ 355 Md. at 349, 734 A.2d at 718.

¹⁰² *See id.* at 349-50, 734 A.2d at 718 (citing Jones, 324 Md. at 39, 595 A.2d at 467).

¹⁰³ *Id.* at 350, 734 A.2d 718.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See* MD. ANN. CODE art. 27, § 286(d)(1)(i) (requiring that “as a result of a conviction of a previous violation of this section or section 286A of this article”).

¹⁰⁷ *See* 324 Md. at 37, 595 A.2d at 465. The appellant was charged with a violation of Article 27, section 286(c). On a prior charge, he had been convicted, and served one year of unsuspended time. At sentencing, the State introduced the circuit court files to prove prior conviction, but did not obtain any records from the Department of Correction (as required under MARYLAND CODE ANN., Courts and Judicial Proceedings § 10-204), to prove actual time served. The court found that proof of judgment of Jones’ conviction and the sentence imposed did not prove that he had served the required 180 days.

¹⁰⁸ *Id.* at 38, 595 A.2d at 466.

¹⁰⁹ *Id.*

¹¹⁰ 355 Md. at 350, 734 A.2d at 718 (citing Jones at 38, 595 A.2d 466).

¹¹¹ MD. ANN. CODE art. 27, § 286 (1998 & Supp. 1999).

¹¹² 325 Md. at 38, 595 A.2d at 466 (citing Wynne v. State, 313 Md. 533, 539-40, 546 A.2d 465, 468 (1998)).

¹¹³ State v. Polley, 97 Md.App.192, 200, 627 A.2d 562, 565 (1993).

¹¹⁴ 355 Md. at 351, 734 A.2d at 719.

¹¹⁵ *See id.* (citing Jones, 324 Md. at 38, 595 A.2d at 466 (quoted in Gargliano v. State, 334 Md. at 443, 639 A.2d at 682)).

¹¹⁶ 355 Md. at 347, 734 A.2d at 716.

¹¹⁷ *See id.*, 734 A.2d at 717 (citing White v. State, 318 Md. 740, 744, 569 A.2d 1771, 1273 (1990) (quoting Simpson v. United States, 435 U.S. 6, 15 (1978) (in turn quoting Ladner v. United States, 358 U.S. 169, 178 (1958)); *see supra* p. 29 and note 99.

¹¹⁸ *Id.*

¹¹⁹ *Id.* *See* Montone, 308 Md. 599, 521 A.2d 720 (1987) (discussing the purpose of habitual criminal statutes is to identify individuals who have been exposed to the system on prior occasions, who have been given the opportunity to prove they have reformed, and who continue to commit these crimes, to be identified and locked up forever). *See also* Polley, 97 Md. App. 192, 202, 627 A.2d 562, 567 (1992) (providing an interesting argument that the legislature intended to make a distinction between second offenses and third and fourth offenses; that distinction being to punish multiple offenders in section 286(c), and recidivist behavior in section 286(d) and (e)).

¹²⁰ *See* Dickerson v. State, 324 Md. 163, 172, 596 A.2d 648, 652 (1991) (discussing Maryland’s strict drug laws and the need for them to be liberally construed in order to accomplish their purpose).

¹²¹ *Id.* at 173-74, 596 A.2d at 653.

¹²² *See* Harmelin v. Michigan, 501 U.S. 957 (1991) (noting that severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense); *Gargliano*, 334 Md. at 473, 639 A.2d at 679 (discussing the need to strictly construe highly penal statutes).

¹²³ *See infra*. Parts V.A. and C. (discussing judicial frustrations and unwarranted disparities).

¹²⁴ *See* MD. ANN. CODE art. 27, § 638C (explaining that credit is to be given to the defendant for any time spent in custody before conviction or acquittal); *see also* Maus v. State, 311 Md. 85, 107, 532 A. 2d 1066, 1066 (1987) (noting that subsection (a) of MD. CODE ANN. art. 27, § 638C is an attempt by the General Assembly to avoid inequitable stacking of punishment).

¹²⁵ 355 Md. at 349, 734 A. 2d at 718.

¹²⁶ *See* MD. ANN. CODE art. 27, § 286(d)(i) (1988, Supp. 1999).

¹²⁷ For example, consider Defendant “A,” who has one prior drug conviction and upon conviction of his second drug offense, he is eligible for a maximum sentence of 20 years, the first 10 without parole. Consider defendant “B,” who has two prior drug convictions, upon conviction of his third drug offense, is eligible for 25 without parole, only if he has served the mandatory 180 days. Otherwise, the maximum sentence he can receive is 40 years with parole. Defendant “B” is not eligible for 10 without parole because this is not his second conviction, and he is not eligible for 25 without parole because he has not served

the mandatory 180 days subsequent to a conviction. Thus, you have a situation where a defendant with a less serious record can be sentenced to non-parolable time while a defendant with a more serious record cannot.

¹²⁸ See Lowenthal, *supra* note 18 and accompanying text.

¹²⁹ *Determinate Sentencing and Judicial Participation in Democratic Punishment* at 947.

¹³⁰ See Don J. DeBenedictis, *The Verdict Is In: Throw Out Mandatory Minimum Sentences, Judges Tell ABA Journal Poll*, A.B.A. J., Oct. 1993, at 78 (noting that 90% of the federal judges and 75% of the state judges oppose mandatory sentencing).

¹³¹ See *Determinate Sentencing and Judicial Participation in Democratic Punishment*, *supra* n. 21. See also, *Federal Judge Quits Over Law on Sentencing*, MIAMI HERALD, July 4, 1992, at 7A.

¹³² See Cris Carmody, *Revolt to Sentencing Is Gaining Momentum*, NAT'L L. J., May 17, 1993.

¹³³ See *id.* at 10 (noting that senior judges are permitted much more control over their dockets than are ordinary district judges and that under 28 U.S.C. 294(b), a senior judge may "perform such judicial duties as he is willing and able to undertake").

¹³⁴ See also, Matt Fleischer, *A Judge Carries Burden of Proof*, NAT'L L. J., July 3, 2000, 1A. In a federal drug case in Syracuse, New York, a 32-year-old Panamanian immigrant was found guilty of peddling cocaine. At the sentencing, and for the first time, the federal prosecutor accused the defendant of being the triggerman in an unsolved double murder. Insisting that the drug-related slaying was "relevant conduct" the prosecutor asked that the defendant be sentenced accordingly. This would result in a sentence of 30 years, rather than the 12.6 to 15 years mandated by the guidelines for conviction of the smuggling of cocaine. After conducting a six-day hearing into the role of the defendant, Judge Howard Munson made his decision. He held that he was 51% certain that the defendant had killed the two drug users, but went on to note that he believed that this standard of proof was insufficient to raise the sentence to 30 years. Instead he held that the appropriate burden of proof in this instance was "clear and convincing."

¹³⁵ Jim Abrams, *More U.S. Judges Go Below Sentencing Guidelines*, THE DAILY RECORD, Oct. 16, 2000,

at 5C.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* This number reflects only those sentences that did not include defendants who received a lesser sentence because they had agreed to cooperate with the authorities.

¹⁴¹ David B. Kopel, *Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety*, POLICY ANALYSIS NO. 208 (May 17, 1994) <<http://www.cato.org/pubs/pas/pa-208.html>>

¹⁴² See *id.*

¹⁴³ Lowenthal, *supra* note 18, at 112 (noting that correctional authorities are often forced to release early persons serving non-mandatory sentences in order to make room for those who will be serving mandatory sentences). See also Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2611 (1994) (noting that by 1989, 21% to 24% of the 395,553 inmates in county and city jails were drug offenders; 25% to 35% of the 710,054 being held in state and federal prisons were drug offenders; and, another 150,000 were being held for drug-related crimes).

¹⁴⁴ *Id.*

¹⁴⁵ See Barnett, *supra* note 143 (reviewing Steven B. Duke & Albert C. Gross, *America's Longest War: Rethinking Our Tragic Crusade Against Drugs* (1993)). Barnett discusses the "opportunity costs" of early release programs to make room for drug offenders, and police time spent on pursuing drug offenders. *Id.* at 2611.

¹⁴⁶ See *id.*, Part III, at 2610 (discussing the social costs of drug prohibition).

¹⁴⁷ *Id.*

¹⁴⁸ Lowenthal *supra* note 18, at 65.

¹⁴⁹ Paul Butler, *Retribution, For Liberals*, 46 UCLA L. REV. 1873, 1881 (1999).

¹⁵⁰ See also, Robert Guy Matthews, *Battle Looming Over Zero Tolerance*, BALT. SUN, Aug. 25, 1996, 1B.

¹⁵¹ See Butler, *supra* note 149, at 1882 n.38 (discussing the recent use of zero tolerance policies in high-crime, inner-city neighborhoods).

¹⁵² Butler, *supra* note 149, at 1881 n. 31 (citing

Steven R. Donziger, *The Real War on Crime: The Report of the National Criminal Justice Commission*, 333, 335-36 (1996), and noting the large number of people incarcerated for nonviolent offenses and the fact that not only is the United States' rate of incarceration the highest in the western world, but that it totals more than the combined population of the cities of Cleveland, Denver, and Seattle on any one day).

¹⁵³ See *supra* Part II.B.

¹⁵⁴ See 7 FEDERAL SENTENCING REPORTER 28, (1994).

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *More Than 1 Million in Prison in '98 for Nonviolent Crimes*, BALT. SUN, March 25, 1999 at 19A (noting a study by the Justice Policy Institute based on Justice Department statistics).

¹⁵⁸ See Uniform Crime Report, 1997, FBI, U.S. Department of Justice (providing statistics on crime in the United States).

¹⁵⁹ MD. CODE ANN. art. 27, § 286(d) (1988).

¹⁶⁰ Uniform Crime Report, 1997, at 226.

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* (noting a 48.2% increase for drug abuse violations, and an increase of 16.1% for total arrests for this time period).

¹⁶⁶ See *supra* Part I.

¹⁶⁷ See MD. RULE 4-245(b) (1997) (requiring that the State's Attorney serve notice on the defendant or his counsel of an alleged prior conviction).

¹⁶⁸ MD. RULE 4-245 (1997) which provides in relevant part:

(b) Required Notice of Additional Penalties.— When the law permits but does not mandate additional penalties because of a specified previous conviction, the court shall not sentence the defendant as a subsequent offender unless the State's Attorney serves notice of the alleged prior conviction on the defendant or counsel before the acceptance of a plea of guilty or nolo contendere or at least 15 days before trial in circuit court or five days before trial in district court, whichever is earlier.

¹⁶⁹ *Beverly v. State*, 349 Md. 106, 707 A.2d 91

(1997).

¹⁷⁰ *Id.* at 126, 707 A.2d at 100.

¹⁷¹ *Id.*

¹⁷² *Id.* at 125, 707 A.2d at 100.

¹⁷³ See *State Commission on Criminal Sentencing Policy Study* (January, 1997-1999) (noting graphically the disparity in judicial compliance with the guidelines).

¹⁷⁴ See generally *Beverly v. State*, 349 Md. 106, 707 A.2d 91.

¹⁷⁵ See *State Commission on Criminal Sentencing Policy Study* (noting that only 49.2% fall within the guidelines while 43.2% are below, and only 7.6% are above guidelines).

¹⁷⁶ See *id.* (indicating that for drug offenses, only 37.0% are within guidelines while 44.7% are within the guidelines for all offenses; 48.6% are within the guidelines for offenses against persons; and, 62.2% are within the guidelines for property offenses).

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* (indicating that in the First Circuit only 26.9% of those sentenced for all offenses fell within the guidelines while in the First Circuit 64.4% of those sentenced for all offenses fell within the guidelines).

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ The First Circuit includes Dorchester, Somerset, Wicomico, and Worcester Counties. In this Circuit, 67.3% of the drug offenders were sentenced within the guidelines; 22.4% were sentenced above the guidelines; and, only 10.3% were sentenced below the guidelines. *Id.*

¹⁸⁴ The Second Circuit includes Caroline, Cecil, Kent, Queen Anne's, and Talbot Counties. In this Circuit, 59.0% of the drug offenders were sentenced within the guidelines; 22.5% were sentenced above the guidelines; and only 18.4% were sentenced below the guidelines. *Id.*

¹⁸⁵ See *id.* The Fourth Circuit includes Allegany, Garrett, and Washington Counties. In this Circuit, 56.6% of the drug offenders were sentenced within the guidelines; 18.5% were sentenced above the guidelines; and only 24.9% were sentenced below the guidelines.

¹⁸⁶ See *id.* The Eighth Circuit includes Baltimore City.

In this Circuit, only 18.3% of the drug offenders were sentenced within the guidelines and only 1.8% were sentenced above the guidelines. In the Eighth Circuit, 79.9% of the drug offenders were sentenced below the guidelines.

¹⁸⁷ *See id.* (noting that only 18.3% of the drug offenses fell within the guidelines).

¹⁸⁸ *See id.* (indicating a spread from 18.3%, in the Eighth Circuit, to 67.3% in the First Circuit for drug offense sentences falling within the guidelines).

¹⁸⁹ One might argue that they are not really mandatory since there is discretion in invoking them.

¹⁹⁰ Farabaugh, *supra* note 12, at 3B.

¹⁹¹ Joan Jacobson, *Bill Called Threat to Law; Mandatory Sentencing Viewed as Weakened; Prosecutors Urge Veto; 'Intelligent Legislation'; Panel Could Reduce Terms; Md. Judges Also Oppose the Measure*, BALT. SUN, April 23, 1999, at 1B.

¹⁹² *See id.*

¹⁹³ *See supra*, notes 169-174 and accompanying text.

¹⁹⁴ *See supra*, Part II.A. (tracing the history of mandatory sentencing laws) and V-D (examining statistics and showing growth of crime since 1980).

¹⁹⁵ *See supra*, Part V.A. (noting judicial frustrations).

¹⁹⁶ *See supra*, Part II.A.

¹⁹⁷ *See supra* Part III.

¹⁹⁸ *See supra* Part V.D.

¹⁹⁹ *See supra* Part II.B.

²⁰⁰ *See supra* Part V.D.

²⁰² *See supra* Part V.D.

²⁰² *See supra* Part V.F.

²⁰³ *See supra* Part V.F.

²⁰⁴ *See supra* Part II.B.

²⁰⁵ Barnett, *supra* note 143, at 2617.

²⁰⁶ *See id.* (suggesting that legislators who support such policies are doing so for the wrong reasons).

²⁷⁷ *See* Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501 (1990) (supporting the idea that drugs should be made a public health responsibility). There has been a re-evaluation of the need for drug treatment, but in fact, we find that fewer of these programs are available.

²⁰⁸ One popular drug treatment program, supervised by Baltimore City Judges, has been the Drug Treatment

Court. *See* William D. McColl, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, MD. L. REV. (1996) (discussing the Baltimore City Drug Treatment Court as a new form of justice). Under this program, defendants who are "deemed amenable to treatment" are given the option to agree to participate, in exchange for jail time. Caitlin Francke and Michael Dresser, *Drug Court Turns Away Admissions*, BALT. SUN, Jan. 20, 2000, at 1B. This program includes intensive monitoring for up to 18 months, and requires that the participants report to court about twice a month to have their treatment performance evaluated. *Id.* If they are doing badly, the judge can put them in jail. While the drug court has served as a fairly successful alternative to jail time, it is presently over capacity and forced to turn away qualified addicts. *Id.* Treatment is not available for those who want it, or for those who are qualified to receive it, and the State has chosen not to add to the treatment resources. *See id.* (noting Baltimore justice officials worry that requested funding will be overshadowed by Lt. Gov. Kathleen Kennedy Townsend's Break the Cycle program. Townsend's program monitors parolees and probationers for drug use while the drug court targets selected offenders and allows judges to determine the offender's fate).

Johnson v. State:
**An Inchoate Crime Sentence Shall Not Exceed the Maximum Sentence,
Without Enhancements, of the Target Crime**

By *Camela J. Chapman*

The Court of Appeals of Maryland held that life imprisonment without the possibility of parole is not a legal sentence for conspiracy to commit murder. *Johnson v. State*, 2001 Md. LEXIS 18 (2001). The court's ruling clarified that death or life imprisonment without the possibility of parole are "enhanced" sentences for first degree murder, and thus are dependant upon special circumstances. *Id.* at 6. Accordingly, when a sentencing provision provides that the punishment for an inchoate crime shall not exceed the maximum punishment provided for the target crime, the provision only contemplates the basic maximum sentence available for the target crime and does not incorporate the enhanced penalty provisions. *Id.* at 11.

On November 10, 1997, Judy Forrester, a disabled woman, was found in her home bound with duct tape and fatally shot. Rondell Johnson ("Johnson") was convicted of murder, robbery, conspiracy to commit those crimes, and other offenses.

Johnson was found guilty in the Circuit Court for Prince George's County of first-degree

premeditated murder, robbery with a deadly weapon, first-degree burglary, use of a handgun in the commission of a felony or crime of violence, conspiracy to commit murder, and conspiracy to commit robbery. Johnson was sentenced to life imprisonment without the possibility of parole for the first-degree premeditated murder conviction and a consecutive sentence of life without parole for the conspiracy to commit murder. On appeal, the court of special appeals affirmed Johnson's sentence. The court of appeals granted Johnson's petition for a writ of certiorari to determine whether life without parole is a legal sentence for the crime of conspiracy to commit murder.

First, the court examined Maryland case law interpreting Maryland Code (1957, 1996 Repl. Vol.), Art. 27, § 38 and § 412(b). *Id.* at 4. Section 38 mandates the punishment for conspiracy and provides that the punishment cannot exceed the maximum punishment provided for the substantive offense. *Id.* In addition, § 412(b) provides that the punishment for first-degree murder "shall be imprisonment for life" unless the State seeks death or life without parole. *Id.* at 5.

The State must meet other special conditions for death, or life without parole. *Id.* at 5.

Second, the court reviewed *Sucik v. State*, which held that "death and life imprisonment without the possibility of parole are enhanced sentences for first-degree murder, and are dependent upon special circumstances," and because an enhanced punishment is "highly penal," it has to be strictly construed. *Id.* at 7 (citing *Sucik v. State*, 344 Md. 611, 616-617, 689 A.2d 78, 80 (1997)). The court remarked "conspiracy" is a common-law inchoate offense for which the General Assembly limited, by statute, the punishment to the maximum sentence of the substantive crime. *Id.* at 8. The court also observed that Maryland precedent recognizes that this limitation on the conspiracy sentence, in reference to the maximum sentence of the substantive or target offense, means the "basic maximum sentence of the target offense and does not include any enhanced penalty provisions" for such an offense. *Id.* The United States Supreme Court has taken the same position in construing a federal statute providing that the sentence for attempt or

conspiracy “may not exceed the punishment prescribed for the offense which was the object of the attempt or the conspiracy.” *Id.*

Next, the court reviewed *Deleon v. State*, in which the same sentencing issue was involved but with a different target crime. *Id.* at 11 (citing *Deleon v. State*, 102 Md. App. 58, 72, 648 A.2d 1053, 1059 (1968)). In *Deleon*, the court held that when a sentencing provision states that the punishment for an inchoate crime shall not exceed the maximum punishment provided for the target crime, the provision only contemplates the basic maximum sentence available for the target crime and does not incorporate the enhanced penalty provisions. *Id.* Moreover, in support of its holding, the *Deleon* court pointed out, “that parole was not an inherent part of the judicial sentencing function and that, except in those limited circumstances when the Legislature has expressly empowered the courts to impose no-parole provisions under certain very specifically designed circumstances, the parole function is exclusively within the control of the executive branch of government.” *Id.* at 12. *Deleon* further pointed out that the Legislature made provisions for enhanced penalties for some particular types of conspiracies and if they wanted to “specifically [] provide enhanced penalties for ... conspirators, it knows how to do so expressly and does not rely

on implication.” *Id.* at 13 (citing *Deleon*, 102 Md. App. at 86, 648 A.2d at 1066-1067). The court held that life imprisonment without the possibility of parole is not a legal sentence for conspiracy to commit murder. Accordingly, the judgment of the court of special appeals was reversed. *Id.* at 17.

Johnson v. State clarifies the statutory sentencing provisions for inchoate offenses in Maryland. This holding illustrates that the Maryland Legislature did not intend to allow trial judges to use their discretion to enhance the sentencing penalties of inchoate crimes. With this holding, the court informs trial judges that “enhanced” sentence provisions are “sentencing options” available for special cases and special defendants and are not intended to apply to inchoate crimes of the target offense.

Roberts v. State:

Parties Must Be Afforded An Opportunity To Present Evidence Regarding Competency to Stand Trial

By Victor A. Lembo

The Court of Appeals of Maryland held that when a defendant makes an allegation of incompetency to stand trial and there is no evidence in the record as to the defendant's incompetency, an accused must be afforded an opportunity to present evidence upon which a valid determination can be made. *Roberts v. State*, 361 Md. 346, 761 A.2d 885 (2000). In so holding, the court ruled that the trial court erred in denying an attorney's motion for a mental examination of the defendant for competency to stand trial where the motion included a proffer sufficient to overcome the presumption of competency. *Id.*

In July 1996, Dr. Stephen Olowu ("Dr. Olowu") was found dead in Bonnie Roberts' ("Petitioner") home in St. Mary's County, Maryland. The cause of death was determined to be a single, close-range gunshot wound to the chest. The gun used in the shooting belonged to Petitioner and, according to some accounts, was found lying in the victim's hands. At trial, the defense argued that Dr. Olowu accidentally shot himself while cleaning the gun, while the State contended that Petitioner murdered Dr. Olowu and staged

the crime scene to look like an accident. Various witnesses, including neighbors and emergency response personnel, testified as to their discovery of the body and the crime scene. Ballistics experts confirmed that the fatal shot was fired inside the house from Petitioner's gun.

Petitioner was subsequently arrested and brought to trial for Dr. Olowu's murder. In February 1999, Petitioner's attorney filed a motion requesting a mental examination of Petitioner in the Circuit Court for St. Mary's County. The motion included a long history of Petitioner's psychiatric problems and a request for a competency evaluation. In its answer to the motion, the State argued that the Petitioner had not properly raised the preliminary threshold of mental incompetency, in that a plea of not criminally responsible by reason of insanity should have been entered pursuant to Maryland Rule 4-242. The trial court denied the motion without a hearing, and a trial on the merits commenced. The jury found the Petitioner guilty of second-degree murder and use of a handgun in the commission of a felony. Petitioner was sentenced to consecutive terms of

imprisonment of twenty and ten years. Petitioner appealed to the court of special appeals, which affirmed the conviction in an unreported decision.

Before the court of appeals began its analysis, it examined the Maryland Code and clarified the distinction between competency to stand trial and responsibility for a criminal act. *Roberts*, 361 Md. at 357, 761 A.2d at 891. The State had argued that Petitioner did not properly raise the preliminary threshold of mental incompetency since she did not enter a plea of not criminally responsible. *Id.* However, the court stated that this was an improper interpretation of Maryland law, and agreed with the court of special appeals in that "the sole issue of competency to stand trial is not raised by a plea and its determination is a matter resting exclusively in the court." *Id.* (quoting *Strawderman v. State*, 4 Md. App. 689, 695, 244 A.2d 888, 891 (1968)).

The United States Supreme Court stated "it is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Id.* at 359, 761 A.2d at 892. In

accordance with this principle, section 12-103 of the Health General Article of the Annotated Maryland Code provides the standard for court determination of competency. *Id.* It states that if the defendant in a criminal case appears to be incompetent or alleges to be incompetent, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial. *Id.*

In order to determine if Petitioner was competent to stand trial, the court reviewed the legislative intent behind the statutory enactment of section 12-103. *Id.* at 360, 761 A.2d at 892. The primary intent can be found in the plain language of the statute, with the words given their ordinary and natural meanings. *Id.* at 360, 761 A.2d at 893. In addition, the court used the general policy or purpose behind the statute, as well as the development of the statute, to discern intent that might not be initially evident. *Id.* at 360-61, 761 A.2d at 893.

The court examined the statute and found that the Maryland Legislature intended for court determination of competency, which is generally accomplished through a hearing. *Id.* at 363-64, 761 A.2d at 894-95. The language of section 12-103 (a) mandates trial courts undertake three steps when an accused's competency is properly called into question. *Id.* at 364, 761 A.2d at 895.

First, a determination of competency may be made at any time before or during a trial. *Id.* Petitioner's motion was filed before trial, in accordance with the time limitations

of section 12-103. *Id.* at 369, 761 A.2d at 897.

Second, the trial court has a duty to determine competency when the defendant in a criminal case appears to be incompetent or the defendant alleges incompetence to stand trial. *Id.* at 364, 761 A.2d at 895. This duty is triggered in one of three ways: 1) upon motion of the accused, 2) upon motion of the defense counsel or 3) upon a *sua sponte* determination by the court that the defendant may not be competent to stand trial. *Id.* (citing *Thanos v. State*, 330 Md. 77, 85, 622 A.2d 727, 730 (1993)). If triggered, then the second step also creates a mandate from the Legislature to the trial judge to determine whether the defendant is incompetent to stand trial. *Id.* at 365, 761 A.2d at 895. The defense counsel filed the motion to request a mental examination, thus, calling the Petitioner's competency into question and overcoming the presumption that Petitioner was competent to stand trial. *Id.* at 369, 761 A.2d at 897.

The third step requires the determination of competency to be done "on evidence presented on the record." *Id.* at 366, 761 A.2d at 896. The court reviewed both the language of the statute and legislative history and determined that a finding of competency, made without an opportunity for evidence to be presented, was invalid. *Id.* Furthermore, the court recognized that it must find beyond a reasonable doubt that the defendant is competent to stand trial. *Id.*

The court examined Petitioner's

motion and stated there was no evidence on the record upon which a determination could be made beyond a reasonable doubt. *Id.* at 367, 761 A.2d at 896. The court held that although the statute did not require it, a special or formal hearing to present evidence was appropriate to provide an adequate record upon which a valid determination of competency could be made. *Id.* at 367-68, 761 A.2d at 896-97. Therefore, the trial court's determination of competency was neither made from evidence on the record, nor was any opportunity afforded for the presentation of such evidence, thus, constituting reversible error. *Id.* at 369, 761 A.2d at 897-98. The court ruled that a failure to meet the requirements of section 12-103 (a) nullified not only the determination itself, but also the trial and resulting conviction. *Id.* at 370, 761 A.2d at 98.

In *Roberts v. State*, the court held there must be an opportunity to present evidence upon which a valid competency determination can be made. Enabling parties to utilize all of their constitutional rights must not be a speedy process in which the courts deny protected liberties. Therefore, it is important to ascertain statutory intent and observe court procedures in order to effectuate justice throughout the adversary system.

State v. Sampson:

Search of Garbage Placed for Collection in a Public and Readily Accessible Area Does Not Violate the Fourth Amendment

By Michelle M.Owens

In a four to three decision, the Court of Appeals of Maryland defined the scope of the Fourth Amendment when a resident places her garbage within the curtilage of her property and the police subsequently take the trash directly from the property. *State v. Sampson*, 362, Md. 438, 765 A.2d 629 (2001). Furthermore, the court held that an individual relinquishes any reasonable expectation of privacy in the trash once it has been placed in, or even near, a public way for collection. *Id.* at 452, 765 A.2d at 636.

Respondent, Donna L. Sampson (“Sampson”), became the target of an investigation involving controlled dangerous substances. Upon a tip received by a business merchant, members of the Cambridge City Police Department began looking for evidence by searching through Sampson’s trash. Sampson’s home has a shallow front yard that leads to a municipal sidewalk, while the curb and public street are on the far sidewalk. The garbage bags were routinely left in front of a tree located two to three feet from the sidewalk. Upon learning that Sampson’s trash was regularly collected from her home on Monday and Thursday mornings, the police performed “trash runs” on

six successive trash collection days. Just before the trash collector was due to arrive, the investigating officer, while standing on the sidewalk, reached over the two to three feet of lawn, picked up the trash without stepping on the lawn, and took the trash to the police station, where the trash bags were opened and searched. The garbage bags were opaque and made of green or white plastic. The police obtained clear plastic baggies, with the corners cut out, that contained traces of cocaine from the garbage bags.

Sampson was convicted in the Circuit Court for Dorchester County of possession of cocaine and maintaining a common nuisance. The Court of Special Appeals of Maryland reversed Sampson’s convictions holding that the seizure of the trash bags, and their contents, violated Sampson’s Fourth Amendment rights. The Court of Appeals of Maryland granted certiorari to determine if it is permissible for the police, either directly or through prior arrangements with trash collectors, to seize and search garbage that has been set out for collection.

The court began its analysis by reviewing case law in which the United States Supreme Court established guiding principles

regarding the issue, beginning with *Calif. v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625 (1988). *Id.* at 441, 765 A.2d at 630. In *Greenwood*, the Court held that when the police, through a prior arrangement with the trash collector, obtain, open, and search through trash containers set out on the curb outside the curtilage of a home, they do not violate the Fourth Amendment. *Id.* at 441-42, 765 A.2d at 630 (citing *Calif. v. Greenwood*, 468 U.S. 35, 108 S. Ct. 1625 (1988)). In the instant case, the court of appeals opined that the curtilage concept was designed to afford the immediate area surrounding a house the same protections as the house itself. *Sampson*, at 442, 765 A.2d at 631 (citing *United States v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134 (1987)). Accordingly, the Court of Appeals of Maryland assumed, for purposes of this case, that the trash bags were left within the curtilage of Sampson’s home. *Id.*

The court further analyzed the Fourth Amendment under the pivotal case of *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967). *Id.* at 442-43, 765 A.2d at 631. In *Katz*, the Court held that the Fourth Amendment does not protect places, but instead protects people. *Id.* (citing *Katz*

v. United States, 389 U.S. 347, 351-52, 88 S. Ct. 507, 511). Therefore, what one knowingly exposes to the public does not become subject to the protections afforded by the Fourth Amendment. *Id.* As a consequence, the court of appeals concluded that although Sampson may have entertained a subjective expectation of privacy in her trash, such an expectation was not objectively reasonable.

The court distinguished between *Greenwood* and the situation present in *Sampson*, where the resident places the trash within the curtilage of her home and the police take the trash directly from the property, rather than from the trash collector. *Id.* The court of appeals, however, found no significant difference in the two situations. *Id.* The court found support in the guiding principal that generally, when one places trash in, or even near, a public way for collection purposes, the person loses any reasonable expectation of privacy in such material. *Sampson*, at 446-47, 765 A.2d at 633-34. Subsequently, the court gave great weight to the rule:

Absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection. The act of placing it for collection is an act of abandonment and what happens to it thereafter is not within the protection of the fourth amendment. *Id.* at 447, 765 A.2d at 634 (*quoting United States v.*

Cromwell, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied*, 440 U.S. 959, 99 S. Ct. 1500 (1979)).

Consequently, the Court of Appeals of Maryland found that Sampson's trash was in an area at or near a public way, and thus exposed and readily accessible to the public, and that she relinquished any reasonable expectation of privacy in the seized trash. *Sampson*, at 451-52, 756 A.2d at 636. Therefore, whether the trash at issue is technically found within the curtilage of one's home is no longer the proper focus; instead the standard the court will apply involves inquiry into whether the person placed her trash for collection in an area so that it was readily accessible to the public. *Id.*

Sampson demonstrates the on-going debate surrounding the issue of whether it is permissible for the police, either directly or through prior arrangements with trash collectors, to seize and search trash set out by persons for collection. Much of the debate focuses on whether the trash is within the boundary of the curtilage concept and who takes the trash, a police officer or the routine trash collector. The Court of Appeals of Maryland limited such an inquiry. The location of the trash is not an important focus, but the pivotal inquiry is whether the trash is readily accessible to the public. Although the court is certainly not expunging the curtilage concept, it is defining the scope within which the concept functions in interpreting Fourth Amendment inquiries. Whether

one places his trash within or outside that area intimately tied to the home itself is not important, because the person discarding the trash has no expectation of privacy in the trash. Conclusively, the court defines Fourth Amendment protections based on a reasonable expectation of privacy and such expectation must be objectively reasonable to society.

State Dep't of Assessment & Taxation v. N. Balt. Ctr.:
A Nonprofit Organization Not Receiving Significant Private Donations May be Eligible for a Charitable Property Tax Exemption

By Ed Biggin

The Court of Appeals of Maryland held that a nonprofit organization which does not receive significant private donations may be eligible for a charitable property tax exemption based on the application of a four-factor balancing test. *State Dep't of Assessment and Taxation v. N. Balt. Ctr.*, 361 Md. 612, 762 A.2d 564 (2000). In so holding, the court reinforced its reluctance to adopt a hard-and-fast, or single-factor charitable donation test for determining whether an institution qualifies for the charitable property tax deduction. *Id.* at 625, 762 A.2d at 571.

North Baltimore Center, Inc., (“NBC”) is a community mental health center operating in Baltimore City. NBC’s mission is to provide counseling and rehabilitative services to mentally ill patients who are indigent. The majority of NBC’s funding comes from the state and federal government. NBC receives less than one percent of its total revenue from private charitable donations.

NBC applied to the State Department of Assessment and Taxation (“SDAT”) for a charitable property tax exemption for its building. The SDAT denied NBC’s application for the tax exemption, relying on the test [enunciated by the

Court of Appeals of Maryland in *Supervisor of Assessments v. Group Health Ass’n*, 308 Md. 151, 517 A.2d 1076 (1986)] for determining whether an organization is charitable. SDAT’s denial was based solely on the fact that NBC had failed to secure significant private donations, a factor that the SDAT found to be dispositive in determining whether an institution or organization is charitable under the *Group Health* test. NBC appealed to the Property Tax Assessments Appeals Board for Baltimore City (“PTAAB”), which affirmed the SDAT’s decision.

The Maryland Tax Court reversed the decision of the PTAAB, holding that the significant private donations factor was not meant to be the dispositive factor in determining whether an organization is charitable for purposes of the charitable property tax deduction. In addition, the tax court held that any decision should be made only after weighing all of the *Group Health* factors.

The SDAT appealed to the Circuit Court for Baltimore City, which affirmed the tax court’s decision. The Court of Special Appeals of Maryland then heard the case and also affirmed the tax court’s decision, reading the *Group Health* test as not “necessarily

requiring significant private donations but as having identified factors to be considered in making what is always a factual determination.”

The court of appeals granted certiorari to settle the conflict among the lower courts concerning how the *Group Health* test should be used to determine whether an organization is “charitable” for purposes of the charitable property tax exemption. *Id.* at 615, 762 A.2d at 566.

The court began its analysis by recognizing that section 7-202(b)(1) of the Tax Property Article of the Annotated Code of Maryland governed this case. *Id.* at 613, 762 A.2d at 564. The statute allows for a charitable property tax exemption “if the property: i) is necessary for and actually used exclusively for a charitable or educational purpose to promote the general welfare of the people of the State, ... and ii) is owned by: 2) a non-profit charitable, fraternal, educational, or literary organization.” *Id.* at 613, 762 A.2d at 565. The issue before the court, therefore, was how to determine the meaning of “charitable” under section 7-202(b)(1). *Id.*

The court continued its analysis by revisiting an earlier

decision that addressed the issue of whether an organization is “charitable” for purposes of the property tax exemption under the predecessor of section 7-202(b)(1). *Id.* at 613-14 (citing *Supervisor of Assessments v. Group Health Ass’n*, 308 Md. 151, 517 A.2d 1076 (1986)). In *Group Health*, the court held that Group Health Association, Inc., a non-profit health maintenance organization (HMO), was not a “charitable organization” for purposes of the property tax exemption. *Id.* at 614-15, 762 A.2d at 565. In its holding, the court declined to establish a hard-and-fast rule regarding the meaning of “charitable” under the statute. Instead, the court stated that a determination of “whether an institution is ‘charitable’ must include a careful examination” of four factors. *Id.* at 616, 762 A.2d at 566. The four factors in the *Group Health* test are: “examination of 1) the stated purpose of the organization, 2) the actual work performed, 3) the extent to which the work performed benefits the community and the public welfare in general and 4) the support provided by donations.” *Id.* (quoting *Group Health*, 308 Md. at 156, 517 A.2d at 1079).

The court of appeals then reviewed its application of the four-factor test to the facts in *Group Health*. *Id.* at 617-18, 762 A.2d at 566-67. The court found that the stated purpose of Group Health was not charitable but rather “to provide health care to its members for a fee.”

Id. (quoting *Group Health*, 308 Md. at 160-61). Also, the court found that Group Health’s charitable work is only incidental to its purpose of providing health care to its members. *Id.* Further, the court found that Group Health’s benefit to the community and the public welfare in general was only secondary to the benefit given to its members. *Id.* Finally, the court found that Group Health only receives very small contributions or donations, and “is supported almost entirely by membership fees.” *Id.* at 617, 762 A.2d at 567. Based on the analysis of the four factors, the court concluded that Group Health was not “charitable” for purposes of the charitable property tax exemption under the predecessor of section 7-202(b)(1). *Id.* at 618, 762 A.2d at 567.

The court then reviewed the decision of the tax court in the case at hand based on the four-factor test described in *Group Health*. The court noted with approval the tax court’s reliance on the court of appeals’ statement in *Group Health* “that it was not attempting ‘to establish a hard-and-fast rule as to the meaning of charitable.’” *Id.* at 619, 762 A.2d at 568. The court further stated that the tax court’s reversal of the PTAAB decision was based on a consideration and balancing of the *Group Health* factors. *Id.* at 620, 762 A.2d at 568. The court of appeals then concluded its review by stressing the tax court’s finding that “substantial charitable contributions were not required to meet the *Group Health*

test.” *Id.* at 621, 762 A.2d at 569.

The court then examined the ruling of the court of special appeals, which found that the meaning of “charitable” under section 7-202(b)(1) “did not require significant private donation.” *Id.* at 621 (quoting *State Dep’t of Assessments & Taxation v. N. Balt. Ctr.*, 129 Md. App. 588, 743 A.2d 759, (2000)). The court also emphasized that the court of special appeals did not use a single-factor significant private donation test, but instead applied the four-factor *Group Health* test for determining if an organization is “charitable” for purposes of the charitable property tax exemption. *Id.* at 621-22, 762 A.2d at 569. The court of appeals held that the court of special appeals did not err as a matter of law in affirming the decision of the tax court. *Id.* at 622, 762 A.2d at 570.

The court of appeals concluded its analysis by discussing a series of Maryland cases where the four-factor *Group Health* test was applied. *Id.* at 623, 762 A.2d at 570. Noting that in applying the four-factor test courts had considered the level of charitable donations received by an organization, the court observed that none of the decisions in which the four-factor *Group Health* test was applied “turned on whether, and if so, what level of, private donations are required to qualify for the charitable exemption.” *Id.* Rejecting SDAT’s reliance on the level of charitable donations received by NBC, the court explained that reliance on any one

factor in the *Group Health* test would be inconsistent with the court's refusal to enunciate a hard-and-fast rule for charitable exemptions. *Id.* at 624, 762 A.2d at 571. Instead, because no one factor is intended to be determinative, the trier of fact should apply a balancing test which encompasses each of the *Group Health* factors. *Id.*

The court's decision in *State Dep't of Assessment and Taxation v. N. Balt. Ctr.* clarified the standard for determining whether an organization is "charitable" for purposes of the charitable property tax exemption under Md. Code (1986, 1994 Repl. Vol. 2000 Supp.) section 7-202(b)(1) of the Tax Property Article. The court reaffirmed that the standard is a four-factor balancing test and not a single-factor substantial contribution test. This decision is especially important to organizations in Maryland, such as NBC, because it relieves them of the burden of ensuring that they receive significant private donations in order to qualify for the property tax exemption.

Temporary Staffing, Inc. v. J.J. Haines & Co.:
Employer's Obligation to Pay Workers' Compensation Claims is Determined by
Contract Between Temporary Staffing Agency and Employer

By Scott H. Amey

In a case of first impression, the Court of Appeals of Maryland held contracts or agreements between a temporary staffing agency and an employee's assigned company determine obligations to pay workers' compensation claims. *Temporary Staffing v. J.J. Haines & Co.*, 362 Md. 388, 765 A.2d 602 (2001). In so holding, the court expanded the Workers' Compensation Commission's jurisdiction to determine the specific employer accountable for an employee's injuries. To perform such an obligation, the Workers' Compensation Commission must consider any agreements between the co-employers. Accordingly, all aspects of a workers' compensation claim will be decided in one proceeding.

On December 31, 1992, Mark A. Jewell ("Jewell") was injured while working at J.J. Haines & Co., Inc. ("J.J. Haines") when a tractor trailer backed into him. Temporary Staffing, Inc. ("TSI") sent Jewell to work at J.J. Haines, pursuant to an agreement signed between the two employers. According to literature provided by TSI to J.J. Haines, TSI accepted responsibility for workers' compensation insurance. In addition, TSI billed J.J. Haines \$8.75 per hour and in turn, TSI paid

Jewell \$5.60 per hour.

On January 22, 1993, Jewell filed a claim with the Maryland Workers' Compensation Commission ("Commission"). The Commission determined that J.J. Haines was the employer and its insurance company was liable for Jewell's injuries.

J.J. Haines petitioned for judicial review in the Circuit Court for Anne Arundel County. The circuit court found that J.J. Haines and TSI were co-employers, reversed the Commission's decision, and remanded the case to the Commission. On remand, the Commission, without considering the agreement between the parties, found Jewell to have a temporary total disability and permanent partial disability. Both employers were ordered to pay equal shares of Jewell's claim.

Again, J.J. Haines sought judicial review by the circuit court. The court found TSI was "primarily liable for payment of any award" to Jewell. TSI filed a notice of appeal to the court of special appeals. On its own motion, the court of appeals granted certiorari to determine whether the trial court erred in finding: 1) TSI was primarily liable for Jewell's award; 2) J.J. Haines was liable for any award in excess of TSI's coverage and 3) Jewell

was an employee of TSI, rather than of both employers.

The court first examined the intent of the Maryland Workers' Compensation Act ("Act") and the establishment of the Commission. *Id.* at 397, 765 A.2d at 606. The court further cited numerous holdings that detailed the longstanding intention to balance the needs of injured employees versus the burden on employers and the public to finance such compensation systems. *Id.* (citing *Polomski v. Mayor & City Council of Balt.*, 344 Md. 70, 684 A.2d 1338 (1996)). The court added that the purpose for the establishment of the Commission was to administer the workers' compensation program. *Id.* at 398, 765 A.2d at 607. The creation of the Commission was an effort to provide "prompt relief to injured workmen" and an appeal to a court for any Commission decision if there is a mistake of law or if the Commission "acted arbitrarily." *Id.* (quoting *Egeberg v. Md. Steel Prods. Co.*, 190 Md. 374, 58 A.2d 684 (1948)).

Next, the court found that when a question arises as to the liability of co-employers, "the Commission out of necessity, must determine the extent of each respective employer's liability. In

the performance of that duty, the Commission, in order to fulfill its obligation, must consider an agreement between employers.” *Id.* at 399, 765 A.2d at 607. In addition, the court recognized that the jurisdiction of the Commission included the, “authority to approve claims, re-open cases, make determinations on employment relations, determine liability of employers, award lump sum payments, approve settlements, award fees for legal services, funeral expenses, and medical services.” *Id.* at 400, 765 A.2d at 608. Both sides made arguments concerning the terms of the contract as it existed between the parties, however, the Commission held that making such a determination was beyond its jurisdiction. *Id.*

Because this was a matter of first impression in Maryland, the court examined the law in other states. *Id.* at 401, 765 A.2d at 609. Courts in Minnesota, Idaho, Illinois, Louisiana, Montana, North Carolina, and Oklahoma granted jurisdiction to respective agencies to interpret contracts between co-employers. *Id.* at 401-03, 765 A.2d at 609-10.

The court held that due to the Commission’s authority and the intent of the Act, the Commission has jurisdiction to interpret agreements or contracts between co-employers. *Id.* at 403-04, 765 A.2d at 610. Moreover, the court held that a separate civil proceeding contradicts the efficient and economical intentions of the Act. *Id.* at 404, 765 A.2d at 610. Thus, the

circuit court, acting as a reviewing court, cannot decide issues that were not decided by the Commission. *Id.* at 404-05, 765 A.2d at 610-11. The court found that the Commission erred in failing to render a decision on TSI and J.J. Haines’ contract. *Id.* at 405, 765 A.2d at 611. Furthermore, the circuit court was required to remand the case back to the Commission to determine the existence of the contract between the parties and the effect of liability under the contract. *Id.* at 405-06, 765 A.2d at 611.

After a detailed examination of the intent of the Workers’ Compensation Commission Act, the Court of Appeals of Maryland extended the Commission’s power to adjudicate all claims within the same proceeding. Although enabling legislation grants the Commission express authority to administer the workers’ compensation process, the court streamlined the process, thus altering the burden on the parties and Commission. Therefore, parties who do not raise contract interpretation issues before the Commission will be barred from raising that issue in circuit court, which will be required to remand the case until the Commission interprets the contract or agreement.

Werbowsky v. Collomb:

Futility Exception Remains Applicable but Only Where Irreparable Harm Caused by a Demand or Direct Conflict Precluding Good Faith is Clearly Demonstrated

By Danielle C. Grilli

In its first examination of the issue since 1968, the Court of Appeals of Maryland held that the futility exception to the requirement that a demand be made upon directors as a prerequisite to instituting a derivative action is only applicable when the majority of directors in a corporation are so directly conflicted that they cannot be expected to operate within the confines of the business judgment rule, or if a demand or delay in receiving a response could cause irreparable harm to a corporation. *Werbowsky v. Collomb*, 362 Md. 581, 766 A.2d 123 (2001). The court concluded that directors who served on the boards of both the company and its controlling corporate shareholder were not so conflicted that they would respond adversely to a demand by minority stockholders to investigate whether a business transaction was in the best interest of the company. The court considered the alternatives to the futility exception proposed by other jurisdictions and organizations, but reiterated its support of the futility exception in limited application.

Lafarge Corporation (“Lafarge”) is a corporation chartered in Maryland. Lafarge

S.A. (“LSA”) is a French corporation that is the majority stockholder of Lafarge. LSA began planning an acquisition of the UK company Redland PLC. LSA asked Lafarge in 1996 if it was interested in any of Redland’s American or Canadian assets, which Lafarge declined. Bertrand Collomb (“Collomb”) was serving as Chairman of the Board of Directors for both Lafarge and LSA and as CEO of LSA. After the start of LSA’s hostile takeover of Redland in October 1997, Collomb advised the Lafarge directors that upon successful takeover of Redland, LSA would again offer them some of Redland’s Canadian and American assets. The board concluded that to consider LSA’s offer, it would be necessary to assign a special committee of independent directors.

Lafarge assigned five of its directors to the special committee and authorized them to review the proposal by LSA. The special committee then selected the firm of Warburg Dillon Read (“Dillon Read”), as its investment banking advisor. Dillon Read recommended that Lafarge acquire several assets which LSA had acquired in the takeover of Redland, PLC. Members of the

special committee met with Collomb and agreed to a price of \$690 million. Subsequently, the committee approved the arrangement by adopting a resolution that Lafarge’s board accepted the next day. The price was not to exceed \$690 million.

This suit was filed on March 18, 1998, one day after the transaction was announced, with no prior contact or demand made upon Lafarge or its directors. The suit was initially brought by the owner of only twenty shares of Lafarge, a company which, since 1994, had filed sixty-four other shareholder lawsuits against various corporations. The suit was filed well after the transaction in question had commenced.

An amended complaint was filed asserting that Lafarge overpaid for the Redland assets by between \$165 and \$210 million. The complaint also claimed that pre-suit demands upon the directors would have been futile since 1) the majority of the supposedly independent directors “actively participated in the wrongful conduct” that was the immediate result of their gross negligence in failing to recognize the potential harms of the deal with LSA; 2) the directors had an incentive to accommodate LSA

in order to maintain their positions in light of LSA's control over Lafarge, and the directors were substantially compensated for their duties and 3) due to language in the liability insurance policies of both the directors and officers, the corporation would not be allowed to bring action against the directors. The defendants responded to the amended complaint with a motion to dismiss based, among other reasons, on plaintiff's failure to make demand on the directors for remedial action. The motion to dismiss was denied.

The Circuit Court for Montgomery County noted the lack of Maryland law on this issue and relied heavily on a test articulated by Delaware law. In applying this test to the evidence presented, the circuit court concluded that the plaintiffs had failed to establish a reasonable doubt that the directors lacked independence and granted summary judgment for the defendants.

The Court of Appeals began its analysis by stating that the nature of a derivative suit has two parts, "First, it is the equivalent of a suit by the shareholders to compel the corporation to sue. Second, it is [a] suit by the corporation, asserted by the shareholder on its behalf, against those liable to it." *Id.* at 600, 766 A.2d at 133. The court then posited that due to the intrusive nature of a derivative suit on managerial authority, the law

attaches a prerequisite to filing this type of suit. *Id.* Interpreting Maryland law in *Kamen v. Kemper*, 500 U.S. 90, 95-97 (1991), the Supreme Court enunciated that a Maryland pre-suit demand in a derivative action is a substantive requirement *Id.* at 601, 766 A.2d 134. It is established that courts will not hear a derivative action by a stockholder on behalf of a corporation until it is shown that all of his remedies are exhausted in the corporation and a demand upon the corporation to pursue the suit was denied or ignored. *Id.* at 602, 766 A.2d at 135-36 (*citing Parish v. Milk Producer's Ass'n*, 250 Md. 24, 81-82, 242 A.2d 512, 544 (1968)). The one exception to this rule is that demand is not required if it would be futile.

Although it has been codified in a minority of jurisdictions, the futility exception remains primarily a creature of the common law in most jurisdictions, including Maryland. *Id.* at 602, 766 A.2d at 135. Because the court has not considered this issue since *Parish* in 1968, it reviewed both statutory and common law developments in other states since that decision. The court believed that the trend subsequent to *Parish* "has been to enforce more strictly the requirement of pre-suit demand and at least to circumscribe, if not effectively eliminate, the futility exception." *Id.* at 607, 766 A.2d at 137. The court next considered the

Delaware test used by the lower court, but called it "an exacting requirement" and declined to follow it. *Id.* at *46-47, *61-62.

The court discussed the "flat universal demand requirement" posited by the American Bar Association and the American Law Institute and contained in section 7.42 of the Model Business Corporation Act ("Act"). *Id.* at 611, 766 A.2d at 140. The Act provides that in order to commence a derivative suit, a shareholder must make a written demand upon the corporation "to take suitable action" and a ninety-day period must expire from the date the demand was made unless the shareholder has already been told that the demand was rejected by the corporation or irreparable injury to the corporation would result by waiting ninety days. *Id.* at 611-612, 766 A.2d 140.

The court stated that although there "is much to be said for the ABA/ALI approach" that calls for the elimination of the futility exception to the demand requirement, the court declined to make it a part of its common law because it represents a "radical departure from our current common law" and is a change that should be decided by legislative hearings. *Id.* at 617-618, 766 A.2d 143. The court emphasized the importance of the demand requirement and noted that "pre-suit demand is not an onerous requirement." *Id.* at 619, 766 A.2d 144.

The court held that, for now, it would continue to utilize the futility exception, but would follow the current trend of other jurisdictions and hold that it is a limited exception. *Id.* at 620, 766 A.2d at 144. In order to apply the futility exception, allegations or evidence must clearly establish “in a very particular manner” that either: (1) a demand, or a delay in awaiting a response to a demand, would cause irreparable harm to the corporation, or (2) a majority of the directors are so personally and directly conflicted or committed to the decision in dispute that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule.” *Id.*

Plaintiffs raised two objections to the decision of the circuit court: first, that the court erred by deciding the futility issue on summary judgment after deciding that the amended complaint raised the issue adequately, and second, that the evidence, on a summary judgment standard, was sufficient to show futility. *Id.* at 620, 766 A.2d at 144-45. The court of appeals affirmed the lower court and rejected both complaints stating that although the futility issue is often raised in a motion to dismiss, it is not required to be decided only at that point. *Id.* at 620-21, 766 A.2d at 145. With regard to the futility issue, the court found that the plaintiffs had

not produced sufficient evidence to demonstrate that the directors of Lafarge were conflicted or controlled by LSA so extensively that demand upon them would have been futile.

The holding of the court of appeals is significant because it is the first time the court has rendered an opinion on this issue in over thirty years. More importantly, although the court states that it is not changing the common law, this decision is a radical departure, in spirit if not in letter, from the court’s more liberal treatment of the issue in *Parish v. Milk Producer’s Ass’n*. With this decision, the court appears to have become hostile to the futility exception, and comes very close to eliminating it altogether. Given the strict nature of the newly formulated limitation, perhaps they have.

**HOUSE BILL 114: STATE GOVERNMENT - ELECTRONIC TRANSACTIONS
PROTECTION ACT**

By Amy Mezewski

House Bill 14 creates the Electronic Transaction Act (ETPA) which will take effect on October 1, 2001. By adding to the Maryland Code Annotated, State Government Article Sections 6-201 through 6-203, the ETPA will govern electronic transactions and describe the Unit's duties.

The ETPA grants the Attorney General the authority to adopt certain regulations relating to consumer protection in electronic transactions. Specifically, the ETPA establishes an Electronic Transaction Education, Advocacy, and Mediation Unit.

The purpose of the Unit is to prevent the misappropriation of private consumer information and to protect against unlawful conduct or practices in electronic commerce. The Unit will establish certain regulations to accomplish these goals at the direction of the Attorney General.

Primarily, the Unit will receive complaints concerning the collection and use of private information and will investigate and prosecute those complaints. In addition, the Unit will receive complaints regarding any unlawful conduct, theft, and identity fraud. Finally, the Unit will develop educational programs to foster public understanding of privacy issues and will promote voluntary and mutually agreed upon non-binding arbitration and mediation of privacy-related electronic transaction disputes.

HOUSE BILL 154: ESTATES & TRUSTS – INTESTATE SUCCESSION – ABANDONMENT OR FAILURE TO SUPPORT MINOR CHILD

By Marlena J. Reed

House Bill 154 repeals and reenacts, with amendments and additions, the Estates and Trusts Article, Section 3-104 and Section 3-112 of the Annotated Code of Maryland. House Bill 154 was passed on April 7, 2001, by an overwhelming majority of the House of Delegates and the Senate. Specifically, the Bill precludes a parent from inheriting by intestate succession from a minor child of that parent, when the parent either abandons or willfully fails to contribute to a minor child's support. Specifically, Section 3-112 defines abandonment as a willful and intentional relinquishment of all parental rights and duties and a renouncement of the child entirely.

Under the current version of Section 3-104(b), a child's estate will be distributed equally between surviving parents. As a result of House Bill 154, the provisions in Section 3-104(b) are limited by the provisions added to Section 3-112. Under the current version of Section 3-112, 3-104(b) is inapplicable to a parent who abandons a child or willfully fails to pay any child support in violation of a court order for three consecutive years.

The Bill will take effect on October 1, 2001.

**SENATE BILL TWO – GENETIC INFORMATION – NON-DISCRIMINATION IN
EMPLOYMENT – INSURANCE**

By Ryan Stampfle

Senate Bill Two, entitled “Genetic Information – Nondiscrimination in Employment – Insurance”, amends Article 49B – Human Relations Commission Sections 15 & 16 of the Annotated Code of Maryland and Section 27-909 of the Insurance Article of the Annotated Code of Maryland. This Bill prohibits employers and health care insurers from discriminating on the basis of genetic information.

Section One of the Bill, which took effect on April 10, 2001, also makes illegal any discriminatory action, such as failing to hire an individual, discharging an employee, or otherwise discriminating against any person, with respect to their genetic information or because of their refusal to make available the results of genetic tests. Employers are also unable to require genetic testing or information for hiring purposes or for determining benefits.

Section Two of the Bill, which takes effect on October 1, 2001, makes it illegal for health care insurers to use genetic information, or request genetic services to reject, deny, limit, cancel, refuse to renew, increase the rates of, affect the terms or conditions of, or affect a health insurance contract. Disclosure of genetic information is only authorized to provide medical care and research.

SENATE BILL 205: ANTI-DISCRIMINATION ACT

By Youngju Au

Senate Bill 205 (cross-filed with House Bill 307), prohibits discrimination based on sexual orientation in public accommodations, labor and employment, and housing. This Bill adds sexual orientation as another protected class to Article 49B of the Maryland Code, which currently prohibits discrimination based on race, color, religion, sex, age, national origin, marital status, and physical or mental handicap.

This Bill was first introduced in 1999 to the Maryland General Assembly where the House voted in favor of the Bill. The Bill then stalled in the Senate and was not reintroduced until January 2001, where it passed in March 2001.

This Act is subject to existing remedies and procedures regarding discrimination, as well as to existing exemptions from provisions of law that prohibit discrimination. Therefore, exempted from this Bill are religious organizations, the Boy Scouts of America, and the Girl Scouts of America. In addition, renters of rooms or apartments in an owner's principal residence are exempt from provisions of the Bill relating to housing discrimination. Furthermore, the Act immunizes an employer from liability when the employer engages in reasonable acts to verify the sexual orientation of any employee or applicant in response to a charge filed against the employer on the basis of sexual orientation.

Senate Bill 205 specifies that it may not be construed as authorizing or validating same-sex marriage and that it neither requires nor prohibits an employer from offering health insurance benefits to unmarried domestic partners. Furthermore, this Bill does not mandate that educational institutions promote any form of sexuality or sexual orientation or include such matters in its curriculum. Rather, this Bill is intended to ensure specific defined rights and not to endorse legislative approval of any form of sexual behavior.

This new Bill will take effect on October 1, 2001, and amends Article 49B – Human Relations Commission of the Annotated Code of Maryland.

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