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Dean’s Message

As I come to the close of my first semester as the Dean of the University of Baltimore School of Law, I take great pleasure in sharing some reflections with you. This has been a challenging period in our region, the country and the world. The events of September 11, and the national and international responses have challenged our notions of law, liberty, security, and the rule of reason. We face a new era in which our commitment to the fundamental principles of our country are being tested as they were when the country was founded, before, during and after the Civil War, during the anti-communism activities of the 1950’s and the civil rights movement of the 1960’s. As a country we have not always passed those tests with flying colors. My prayer and hope is that support the fundamental values of America, as we have appropriately supported the victims and heroes of the September 11 attacks.

I wish to congratulate the editors of the University of Baltimore Law Forum for maintaining the tradition of this periodical as an important vehicle for the discussion of the law. I have spent most of the past six months learning about the Law School and meeting our alumni, friends, and supporters. I have frequently been asked to describe my experiences here. My constant response has been that I could not have scripted a better place in terms of its mission, goals, faculty collegiality, student commitment, and alumni accomplishments, than I have found at University of Baltimore School of Law. This is not to say that we do not have our challenges, because we do. But I believe that we have the will and the spirit to meet and overcome whatever challenges may stand in the way of UB Law School being valued and acknowledged within the State of Maryland and receiving national recognition as one of the great law schools in this region.

Many law schools around the country are attempting to create the type of legal education that has been offered at UB Law School from its inception. In 1992, the ABA Task Force on Law Schools and the Profession: Narrowing the Gap issued a report entitled “Legal Education and professional Development – An Educational Continuum.” That report is commonly known as the McCrate Report. Since the issuance of the McCrate report, law schools have been attempting to add more skills training and practical experience to their curriculum. University of Baltimore School of Law has always had skills training and practical experience as an integral part of its curriculum. UB Law School has also been known for producing graduates who are ahead of the learning curve in the transition from student to attorney. And we are continuing to promote and provide a quality legal education that has a skills orientation as well as strong theoretical and international law programs.

Already this year our Community Development Clinic has made significant contributions to advance the development of Baltimore communities, not-for profit community organizations, and small businesses. CDC is one of the few transactional clinics in the country and provides students with opportunities to participate in real estate another business transactions as part of their legal education. Our Tax Clinic has garnered dismissal of tax liabilities and refunds for its clients in Tax Court. Funded by a grant from the Internal Revenue Service, the tax Clinic is having an economic impact on people's lives while teaching students with a strong interest in tax law the enforcement side of a tax law practice. Additionally, the Civil Clinic won a Social Security overpayment case in federal court, and received an award of counsel fees in a settlement with the government on this claim. Moreover, the Center for Families Children and the Courts has issued a major report on Performance Standards and Measures for Maryland’s Family Divisions and the Center For litigation Skills held a workshop in conjunction with the American College of trial lawyers on “Ethics in Discovery.” All of these activities demonstrate how the University of Baltimore continues to provide cutting-edge legal education as had been its tradition.
Additionally, Professor Michael Higginbotham has authored a book entitled “Race Laws” published by Carolina Press. This book which is both a case book and an informational resource has been critically acclaimed. Professor Higginbotham has been participating in book-signings up and down the East Coast. The law school was proud to sponsor one of those book-signing at which Professor gave a stirring lecture to a standing room only crowd in the Moot Court Room. The book-signing was attended by students, alumni, the Chief Judge of the Maryland Court of Appeals and judges representing every state and federal court in Maryland.

The international program is similarly making great strides. I have the privilege of visiting our sister school, Shandong University Law School, in Jinan, China in the fall. One of the possible collaborations that may be coming as a result of the visit is the creation of a summer institute for Chinese law students at UB Law School. This program would allow the Chinese students and opportunity to study American law in the United States, and would allow our students who are unable to travel abroad to have an experience with international students. While there are a few logistics to work out, I am confident that we will have this program operational by Summer 2003. This fall we also added T.C. Beirne School of Law at Queensland University, Brisbane, Australia, to our family of sister schools. This relationship includes faculty and student exchange possibilities, and at least one University of Baltimore law student has indicated a desire to attend Beirne Law School for a semester.

All of these accomplishments create a greater need for resources in the law school. President Turner and I are working with the Board of Regents to have University of Baltimore receive an appropriate level of state support for the excellent program offered by the Law School. Similarly, William Lynerd, Vice-President for Advancement and I are contacting the law school’s alumni and friends to increase the level of private support. Increasing support from all of our funding sources is essential to our maintaining the quality and comprehensive legal education at the University of Baltimore School of law.

I am looking forward with excitement and anticipation to the remainder of this academic year and the years to follow. I continue to receive enthusiastic welcomes and responses from the UB community – faculty, staff, alumni/ae, central administration, and students, and as a result continue to believe that UB Law School is a dynamic and influential institution. I will be working to complete the initiatives started by my predecessors as well as in the past six months to manifest the Law School’s great potential to become valued and acknowledged as the great legal educational institution that it is.

Sincerely,

Gilbert A. Holmes
Dean and Professor of law
Learning More Than Law from Maryland Decisions

By Ian Gallacher

As lawyers and law students, we look at cases in a somewhat clinical manner. We tend to glide over the facts and concentrate on the point of law articulated by the court. If we need to use a case to support a position we are taking, or if we want to distinguish a case used by an opponent, we might look to the facts of the case to see if they affect our argument. But the facts themselves, and the story they can tell us about the people involved, are often ignored.

There is nothing surprising or wrong about this. We are lawyers, after all, not historians or sociologists, and our clients are not interested about why Mr. Tompkins was walking on the tracks of the Erie Railroad Company or whether Krause v. Rhodes tells us more about life in America in 1970 than it does about the narrow legal issues discussed by the Supreme Court. But just as our clients require us to focus on their needs and to solve their problems, we should remember that each of the cases we use as the building blocks of the common law meant something profoundly more important to the individual litigants.

Three years ago I was looking for the first reported class action in Maryland in support of an article I was writing. My search methodology was not the sophisticated plan taught in the University of Baltimore’s LARW program. Rather, I started reading on the first page of the first volume of the Maryland Reports and kept going until I found the case. The search was short — but when I read the case I realized that it offered an insight into much more than the history of representative litigation in Maryland. It, and two subsequently reported decisions tell a compelling story of life in rural Maryland in the middle of the 19th Century. They also tell of courage, the importance of freedom, and the corrosive quality of greed. And, if these other elements were not enough, they teach us lessons about 19th Century civil procedure, evidence and trial practice as well.

I. John and Jeremiah Townshend

In the middle of the 19th Century, John Townshend was a farmer in the Piscataway district of Prince George’s County, where he probably farmed tobacco on his 1,500 acre farm. John was a religious man who claimed to speak directly with God, and had long been regarded as an eccentric in the area. Despite his religious beliefs, John was a working farmer with a sizeable farm to manage. As with all businessmen, John occasionally sought to maximize his profits by minimizing his expenses; the cheapest source of farm workers in America at that time was slave labor. Accordingly, John maintained about 70 slaves on his property.

John’s conscience was troubled by his slave ownership. His divine conversations soon helped clarify a plan to free his slaves. But, as a pragmatic farmer, John could not free the slaves immediately. So on Christmas Eve 1831, and again on February 6, 1846, John executed deeds of manumission that freed the slaves at his death. Indeed, he went further than that and left his slaves all his real estate, including his farm. This must have been a crushing blow for John’s son, Jeremiah.

We know only a little about Jeremiah Townshend. He was 28 years old when his father died, and was married with at least one child. The first accurate information we have about him comes from the 1850 Federal Census which tells us that, by then, he had five children and lived on land valued at $1,260. The slave schedule attached to the 1850 census indicates two Townshends in the Piscataway district who were slave owners. The first, William Townshend, (perhaps Jeremiah’s brother or uncle) had eight slaves. The initial of the second Townshend is unreadable, but it is likely that this second Townshend was Jeremiah. At the time of the 1850 census, Jeremiah had increased the number of slaves on the farm to 99, 58 men and boys, and 41 women and girls, ranging in age from 2 to 77 years old. No further information about the slaves is recorded.

II. The Legal Maneuvering Begins

John died in May 1846, and Jeremiah acted to consolidate his position. He, along with John’s other heirs,
filed a petition in the Orphan’s Court of Prince George’s County, and later in the Circuit Court for Prince George’s County, claiming that John had been insane since 1794. This was an astounding contention: a son was claiming that his father had been insane for 50 years, despite John’s ability to farm the land and otherwise manage his affairs. Nonetheless, the petition was successful and John’s will was declared null and void. As soon as it was, Jeremiah took possession of John’s 70 slaves and presumably assumed his battle for control of his father’s property was over. But the invalidation of John’s will had no effect on his deeds of manumission, and in 1847, two slaves – known only by their first names, “Jerry” and “Anthony” – petitioned for freedom based on these deeds. Their petition was filed on behalf of themselves and the 68 other slaves whom John had sought to free.

The slaves faced a daunting prospect. They must have known little, if anything, about the legal mechanisms necessary to bring their petition, and the odds were stacked against them by the Maryland legislature. Chapter 67 of the 1796 Acts of the General Assembly of Maryland was a clear attempt to dissuade members of the Maryland bar from helping slaves obtain their freedom, stating that in all cases of petitions for freedom where the petition was dismissed:

the attorney prosecuting or appearing to the same shall pay all legal costs arising thereon, unless the courts, before whom the same may be brought, shall be of the opinion, under all circumstances, that there was probable ground to suppose that said petitioner or petitioners had a right to freedom.

Even worse, the Act decreed that all petitions for freedom should “commence and be tried only in the county where such petitioner or petitioners shall reside.” Both parties to the petition for freedom could request a jury trial and exercise peremptory challenges to up to twelve of the prospective jurors.

In other words, even if Jerry and Anthony could find a lawyer willing to incur the costs of a failed petition for freedom, their case would be heard in Prince George’s County, and Jeremiah Townshend could not only require the case to be heard by a jury, he would be able to exercise sufficient challenges to ensure that the jury was, in large part, composed of farmers and slave owners like himself. Slaves seeking freedom could hardly face a less sympathetic audience.

Despite the odds, Jerry and Anthony found a lawyer, Thomas S. Alexander, who stayed with them throughout the nine years their case moved through Maryland’s legal system. I have been unable to find more about Alexander, but in addition to being loyal to clients unable to financially compensate him for his work, and being someone willing to incur significant potential expenses as the result of his representation (not usual practice for lawyers, even in the 19th Century), he was clearly someone who knew what he was doing.

Recognizing the impossibility of winning the case in front of a Prince George’s County jury, Alexander sought to remove the case to Anne Arundel County. In support, he filed an affidavit alleging that the slaves could not obtain a fair and impartial trial in Prince George’s County, and invoked Chapter 518 of the Acts of 1849 which provided that:

in any suit or action of law now pending, or hereafter to be commenced or instituted, in any county courts of this State, or in the court of Howard District, the judges thereof, upon suggestion in writing, by either of the parties thereto or their attorneys, supported by affidavit or other proper evidence, either before or after issue joined in said cause, that a fair and impartial trial cannot be had in the county courts of the county, or in the court of Howard district [sic.] where such writ or action may be depending, shall and may order and direct the record of their proceedings in such suit or action, to be transmitted to the judges of any county court of any adjoining judicial district for trial, and the judges of such county court, to whom the said record may be transmitted, shall hear and determine the same in like manner and to the same extent as if such
suit or action had been originally instituted therein.

Alexander’s strategy worked at first: the Prince George’s County court allowed the removal. But Jeremiah petitioned in Anne Arundel County Court for a remand of the case to Prince George’s County, and his petition was granted. This decision was appealed to the Court of Appeals, and the case made the first of its three appearances before that court in 1852.

III. The First Court Of Appeals Decision

Jeremiah Townshend had also retained a lawyer, and in contrast to the little we know of Thomas Alexander, much is known about his counterpart, Thomas Fielder Bowie. “General” Bowie, as he was known, was born in 1808 in Prince George’s County, and was educated at Charlotte Hall and Union College in Schenectady. He had served as Deputy Attorney General for Prince George’s County, and had also been elected to the State Legislature. Bowie mounted an unsuccessful challenge to his cousin’s Congressional seat in 1851, and in 1854 he was successful in his Congressional bid, and sat for two terms. He died in 1869.

Bowie raised two technical questions before the Court of Appeals: first, he questioned the constitutionality of chapter 518 of the 1849 Act which Alexander had used to gain the removal of the case to Anne Arundel county; second, he questioned whether a petition for freedom was a suit at law, as required by Chapter 518. Although this second point appeared to be a relatively benign question, it was potentially devastating to Jerry and Anthony’s case. Maryland slaves could not bring actions at law. Accordingly, if a petition for freedom was not an action at law — and self-evidently it could not be, because it could only be brought by a slave — then Chapter 518 could not, under its plain terms, apply to the case. The case would therefore have to be heard in Prince George’s County.

Somewhat paradoxically, Bowie then used the common law in support of his first position. He argued that, because the common law provided that a trial should be argued in the same vicinage where a fact occurred, any legislation which permitted the removal of a case beyond the bounds of the judicial district where the relevant acts occurred was in derogation of the common law and therefore unconstitutional.

The three judges of the Court of Appeals (Chief Justice Le Grand and Justices Eccleston and Mason) who heard the case were not impressed with Bowie’s argument. Justice Mason delivered the court’s opinion, in which he observed that the 1849 Act was consistent with Maryland’s constitution, and that the ability of the legislature to “regulate at will the subject of removals” had been well established since at least the Act of 1804. Accordingly, the Court found the 1849 Act to be constitutional and held that cases meeting its requirements could be removed from one judicial district to another.

On the second, and more difficult, question, the Court of Appeals confronted the problem directly.

All laws for the removal of causes from one vicinage to another, were passed for the purpose of promoting the ends of justice, by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests and rights of one or the other of the parties to the suit. This is a common law right belonging to all our courts, and as such can be exercised by them in all cases, when not modified or controlled by our constitutional or statutory enactments . . . . The reason of the law would apply with equal force to a case like the present, as to one strictly and technically embraced within the term “action at law.” The plaintiff in the present suit, of all the classes in our community, belongs to that which is the most defenseless. Our laws give him a standing in court to prosecute his petition for freedom. An unimpeachable attorney of the court makes oath that he cannot have justice done him in his own county. Under such circumstances, would it not be a mockery of justice
to refuse him his application to have the cause removed? Would it not involve a contradiction of terms to say that he shall have the benefit of our courts of justice, but at the same time that his case shall be tried in a county where he cannot have a fair and impartial trial?

This is an interesting early example of judicial nullification. A plain reading of the 1849 Act supports Bowie’s position, yet the Court of Appeals recognized that to give the Act its plain meaning would deprive the slaves of any realistic opportunity to exercise their limited rights under Maryland law. Accordingly, the Court of Appeals held that a petition for freedom, although not technically an action at law, was “embraced within the meaning of the terms ‘suit or action at law.’” Jerry and Anthony’s case would be heard in Anne Arundel County.

IV. The Second Court Of Appeals Decision

Jeremiah Townshend was not finished. Thomas Bowie was no longer his lawyer—whether because Jeremiah was dissatisfied with his representation, because of a fee dispute or because Bowie was preparing for his successful Congressional bid is unclear—but Jeremiah had an interesting legal strategy up his sleeve. He filed a bill in equity back in the Circuit Court for Prince George’s County, arguing that his father’s insanity meant that his deeds of manumission should be considered inoperative and invalid. He also acknowledged, however, that the deeds appeared to be valid and that he would therefore be compelled to defend against them. Thus, Jeremiah argued, he would be “put to enormous and ruinous costs from the multiplicity of suits, and be unjustly and greatly harassed, and put to great charges in defending the same, which will be a direct charge upon the common property of complainants.” Hence, he sought consolidation of all the claims of freedom in one equity suit and an injunction restraining the petitions for freedom from being heard until John Townshend’s personal estate (which included the slaves) was divided among his heirs, and until the issue of John Townshend’s sanity had been litigated.

Jeremiah’s position conveniently ignored the fact that the slaves were bringing one petition for freedom that would resolve the rights of all slaves manumitted by John Townshend. His solution to the straw problem he had set up has an eerily contemporary ring to it. In essence, Jeremiah sought a cram-down class action, whereby a defendant seeks to litigate an issue one time against all potential plaintiffs.

This is a little-used but recognized class action tactic, usually invoked by a confident defendant in an attempt to gain the preclusive effect of a class victory that an individual win would not provide. Certainly that was the case with Jeremiah: although the Court of Appeals’ decision required Jerry and Anthony’s case to be heard in Anne Arundel County, Judge Crain of the Prince George’s Circuit Court granted the injunction, meaning that Jeremiah’s injunction would be heard by a Prince George’s chancellor, not an Anne Arundel judge.

However, the Court of Appeals was not amused. Although several issues were raised on appeal, the court decided that it need only rule on one of them to dismiss Jeremiah Townshend’s equity bill. Justice Mason recognized the implications of Jeremiah’s strategy, and wrote that the “alleged slave” would be unable to challenge his servile status if the injunction was heard in Prince George’s County. The court held that John Townshend’s sanity, and his capacity to execute a deed of manumission, would be determined by the same tribunal that heard the petition for freedom. The court’s irritation with Jeremiah’s ploy is evident from the tone of the opinion, and from the fact that it levied costs against him, not only for the Court of Appeals proceedings but also for the proceedings in Prince George’s County.

V. The Trial and Final Appeal

At some point in the proceedings, Anthony appears to have ceased to be a plaintiff. His name is not listed in the caption of third Court of Appeals decision, and the Court’s second opinion refers to the “alleged slave” in the singular. Most tellingly, the trial in Anne Arundel County began with Jeremiah Townshend’s contention that Jerry, and only Jerry, was over 45 years old when John Townshend executed his deed of manumission. It is unknown whether Anthony had died in the interim, he lost his willingness to continue as a plaintiff in the action, or whether the slaves had realized that he was so clearly over 45 that his continued presence in the
case would harm the other slaves’ chances of freedom. The trial court refused to grant Jeremiah’s request for a directed verdict based on Jerry’s age and the case proceeded.

As Jeremiah had admitted during his petition for an injunction, the deeds of manumission appeared to be valid on their face. Accordingly, the evidentiary burden was on him to show that his father was insane when he executed the deeds, and he applied himself to the task with gusto. He produced a witness who testified that he had known John Townshend between 1826 and 1831 and that he had conversed frequently with John during this time. From John’s conduct, manner, conversations and general appearance, this witness testified that, in his opinion, John Townshend was insane and incapable of executing a valid deed or contract. This witness also testified to other conversations he had had with John subsequent to his execution of the 1831 deed of manumission “to throw light upon the state of his mind at the time of its execution.” Despite Alexander’s objections, this testimony and the testimony of other witnesses offering substantially the same testimony was admitted.

But the most damaging testimony offered by Jeremiah came from Dr. John Fonderen, the director of Maryland’s Hospital for the Insane. Dr. Fonderen had attended the trial and listened to the testimony of the other witnesses. Jeremiah’s attorney then called him to take the stand and asked him the following question:

Upon the hypothesis that the testimony given by the witnesses in this case, of the acts and declarations of John Townshend as to his personal intercourse with God, is all true, and that at the time Townshend made these declarations, as to this intercourse and its character, he believed what he declared, what would be your opinion as to the condition of his mind at the times of such declarations?

Over objection, this question was allowed and, although the answer is unrecorded, it cannot have been favorable to Jerry and the other slaves.

The trial court ruled in favor of Jeremiah and, for the third time, the slaves found themselves before the Court of Appeals. This time, though, the Court ruled against them. Justice Mason wrote that the admissibility of evidence tending to show John Townshend’s alleged insanity prior to and at the time of the execution of the 1831 deed was not objectionable. Moreover, the testimony concerning John’s mental status after the 1831 deed was executed was similarly admissible “because it tended to show the nature and character of the insanity under which the party was supposed to labor.” In this regard, the court found the continuing nature of John Townshend’s eccentric behavior to be of particular importance.

The Court of Appeals was less certain about Dr. Forderen’s testimony, noting that the issue was “not free from difficulty upon the authorities.”

Upon an examination of the cases it will be found, that there is considerable conflict among them. It is clear that you cannot ask a witness, an expert, his opinion, as to the state of a party’s mind, upon the evidence submitted to the jury. To do so would be to transfer the functions of the jury to the witness, and would permit him to decide upon the very fact at issue, and thus to control the verdict of the jury. It is equally clear, on the other hand, that you may ask such a witness his opinion upon a state of facts, hypothetically put, based upon the evidence, and this is in fact, the proper way to submit such questions to a witness.

Although the Court was not happy with the form of the question as asked by Jeremiah’s attorney, it decided that it was sufficiently close to the usual form of such questions that the trial court did not commit reversible error in allowing it. Accordingly, the Court held that there was no reversible error and affirmed the jury’s verdict.


VI. Conclusion

Nine years after their bid for freedom had begun, Jeremiah Townshend’s slaves had no more options open to them. They would remain slaves for another eight years when, in the wake of the Civil War, the Maryland Constitution was

32.1 U. Balt. L.F. 7
amended and slavery was abolished. Nothing more is known about them.

Jeremiah died in 1892, at age 74, and is buried together with his wife and children in the McKendree Methodist Church Cemetery. Ironically, an unidentified family slave (it seems unlikely to be Jerry) also has an unmarked grave in the family plot.

There are many lessons to be drawn from this trilogy of opinions from the Court of Appeals. Apart from insights into what was deemed to be appropriate trial practice in the 1850’s, the realization that seemingly contemporary legal maneuvering has been around for a long time, and a recognition of the beneficial impact one dedicated pro bono lawyer can make, the cases teach us powerful lessons about the importance of freedom and the lengths to which those who will be economically disadvantaged by it will go to keep people enslaved.

On a less emotionally charged plane, though, perhaps the overarching general lesson that these 150 year-old decisions can offer is that cases are more than just dry recitations of the law. To the extent that this case will ever be studied for its legal significance, it stands as one of the early leading opinions on intra-state removal, as well being the earliest reported class action in Maryland. For those involved in the case, though, and hopefully for us today as well, it tells us that cases are about people, not just principles. As lawyers, and as citizens, this is an important lesson to remember.6

2 Representative Litigation in Maryland: The Past, Present, And Future Of The Class Action Rule In State Court, 58 U. Md. L. Rev. 1510 (1999). A shorter version of the story told here can be found in this article.
3 Owens v. Bowie, 2 Md. 457 (1852).
4 Townshend v. Townshend, 5 Md. 287 (1853);
Jerry v. Townshend, 9 Md. 145 (1856).
5 This was an important point. Under Maryland law, a slave over 45 could not be manumitted.
6 In addition to the Court of Appeals of Maryland’s decisions, and the various statutory enactments referred to in the text, the following materials supplied valuable information:

Hall v. Mullin, 5 HAR. & J. 190 (1821); Effie A. G. Bowie, Across The Years In Prince George’s County, (1947); Jean A Sargent, Stones and Bones: Cemetery Records Of Prince George’s County Maryland (1984).
1. Introduction:

The admissibility of a confession poses complex questions that are often overlooked by many prosecutors and defense attorneys. According to Judge Charles Moylan, “[t]here is today among many members of the bar an intellectually undisciplined tendency to treat the Fifth Amendment privilege as little more than loose shorthand for confession law generally.” This impression that confession law is relatively uncomplicated stems, in part, from the promulgation of certain bright-line exclusionary rules which were originally designed to create clear guidelines for police interrogation. This article attempts to demonstrate, however, that Maryland’s bright-line exclusionary rule regarding non-constitutional, common-law voluntariness is indeed more complicated than expected.

The United States Supreme Court in *Miranda v. Arizona*, by requiring the now-familiar set of warnings prior to any custodial interrogation, attempted to establish bright-line constitutional guidelines for custodial interrogation. According to Justice Sandra Day O’Connor, however, the unintended result has been that *Miranda* “creates as many close questions as it resolves . . . . And the supposedly ‘bright’ lines . . . have turned out to be rather dim and ill defined.”

In 2001 the Court of Appeals of Maryland in *Winder v. State* reaffirmed its own bright-line, *per se* exclusionary rule for analyzing non-constitutional, common-law voluntariness with respect to improper police promises. The Court rearticulated a “two-part test” that: 1) any implied or express police promise of “special consideration from a prosecuting authority or some other form of assistance,” and 2) which *causes* a suspect to make a statement, will render that statement involuntary. As a result, Maryland has one of the most expansive exclusionary rules on improper promises in the country. Yet, like the bright-line rules of *Miranda*, Maryland’s *per se* bright-line exclusionary rule for common-law voluntariness creates almost as many close questions as it resolves.

Among the issues that the Court of Appeals has not squarely addressed is whether the *per se* common-law rule applies with equal force to non-custodial interrogations. Also unclear is whether implied, improper threats are analyzed under the *per se* rule. Moreover, the Court has not quantified the precise measure of causation needed for an improper promise to render a statement involuntary – that is, whether the promise must only have a slight effect on the decision to confess or whether the promise must be the proximate cause of the confession. Furthermore, the Court of Appeals has not definitively addressed how the common-law standard should apply to the jury instruction on voluntariness.

The Court of Appeals has also not resolved whether certain promises are improper. Among these unresolved issues are: 1) the precise definition of an implied, improper promise; 2) promises that are qualified by a police admonition that there are “no guarantees;” 3) promises to tell the prosecutor or judge of a suspect’s cooperation, without promising leniency; 4) promises of material items, unrelated to the court system; 5) promises regarding bail; 6) promises of counseling, without promising counseling in lieu of punishment; 7) promises to help a non-relative; 8) promises to help a relative with non-legal matters; 9) playing the “false friend” scenario; and 10) false promises, which are otherwise not improper.

With so many unresolved issues in Maryland, one of the principal benefits of the *per se*, bright-line rule – clear guidelines for courts and law enforcement – has been rendered, at least at present, somewhat elusive. This should not, however, be unexpected. The dilemma of analyzing common-law voluntariness is that “despite over two centuries of judicial and legislative concern regarding promises, there is no consensus as to when if ever – even in theory – a suspect’s decision to confess in return for such promises reflects the minimally sufficient autonomous choice that confession law should seek to assure.” Similarly, the Supreme Court, which has “carefully sidestepped promise issues,” has stated that there is “no talismanic definition of ‘voluntariness,’ mechanically
applicable to the host of situations where the question has arisen... Neither linguistics nor epistemology will provide a ready definition of the meaning of “voluntariness.”

The purpose of this article is to outline the unresolved issues with respect to the common-law voluntariness test and to provide arguments on both sides of each issue for both prosecutors and defense attorneys to utilize in court.

II. Voluntariness –

A. Common Law Versus Due Process

In a nutshell, the State must prove, upon proper objection, the voluntariness of a confession in several different contexts:

A) In a motions hearing, the State has the burden to prove voluntariness, by a preponderance of the evidence, under Maryland, non-constitutional, common law – that is, that the statement was not caused by any improper promises or threats;

B) If the State prevails on the common law, the State then has the burden to prove voluntariness, by a preponderance of the evidence, under the Federal Due Process Clause – that is, that the defendant’s will was not overborne, under the totality of the circumstances, by coercive police conduct;

C) Then, at trial, the State has the burden to prove to the trier of fact, beyond a reasonable doubt, that the confession was voluntary.

With respect to the common-law analysis of improper promises, the Court of Appeals in Winder v. State explicitly reaffirmed the expansive per se exclusionary rule for improper promises in Hillard v. State, which itself was a reaffirmation of the common-law exclusionary rule stretching back to 1873 in Nicholson v. State. The Hillard Court “required [that] no confession or other significantly incriminating remark allegedly made by an accused be used as evidence against him, unless it first be shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary.” In defining “coercive barnacles,” the Winder Court summarized the non-constitutional, common-law test as follows:

Based on Hillard, we glean a two-part test to determine the voluntariness of a custodial confession in circumstances where a defendant alleges that the police induced his or her confession by making improper promises. We will deem a confession to be involuntary, and therefore inadmissible, if 1) a police officer or an agent of the police force promises or implies to a suspect that he or she will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect’s confession, and 2) the suspect makes a confession in apparent reliance on the police officer’s statement.

In applying this test, the Court of Appeals unanimously reversed three murder convictions and death penalty sentences based on several “egregious,” improper promises made by the police in Wicomico County.

With respect to the constitutional analysis, in Dickerson v. United States, the Supreme Court stated that the federal due process analysis of voluntariness:

refined the test into an inquiry that examines “whether a defendant’s will was overborne” by the circumstances surrounding the giving of a confession. The due process test takes into consideration the “totality of all of the surrounding circumstances – both the characteristics of the accused and the details of the interrogation” . . .. The determination “depend[s] on a weighing of the circumstances of pressure against the power of resistance of the person confessing.”

In other words, an improper promise is just one of many factors in the due process analysis of whether the defendant’s will was overborne. However, when a confession results from physical brutality or other tactics which “shock the
sensibilities of civilized society,”20 “there is no need to weigh or measure its effects on the will of the individual victim.”21

Although the “primary purpose” of both analyses “is to protect against government overreaching,”22 the voluntariness analysis under Maryland common law is generally more favorable to the defendant than the analysis under federal due process.23 The Maryland common-law approach generally applies a “per se exclusionary rule”24 in which confessions caused by a limited set of police tactics—improper promises and threats—are presumed to be involuntary, irrespective of actual coercion. In contrast, the federal constitutional approach focuses on whether any number of coercive police practices—including promises and threats, as well as deception and lengthy interrogations—cause the defendant, under the “totality of the circumstances,”25 to be actually coerced into confessing.26 In short, under the common-law approach, Maryland courts will not examine whether an improper promise caused the incarcerated defendant’s will to be actually overcome.

The due process test, however, is arguably more favorable to the defendant in one narrow area. If the police use certain coercive techniques to take advantage of a suspect whom they know has a substantial cognitive or psychological impairment, the Maryland common-law approach provides little protection.27

Although Maryland courts have often stated that another underlying purpose of the common-law test is “reliability,” or “the belief that an involuntary or coerced confession is quite likely to be contrary to the truth,”28 Maryland courts, at least in the past fifty years,29 have not actually analyzed the truthfulness of a particular confession or the likelihood that a particular interrogation technique would cause a false confession. While the common law in Maryland does not explicitly prohibit an analysis of whether a particular confession is false, the constitutional test does explicitly forbid any evidentiary inquiry into the reliability, or truthfulness, of the confession itself.30 Nonetheless, the reliability of a confession is an important rationale underlying the requirement that the State prove voluntariness, beyond a reasonable doubt, to the trier of fact.31

**B. Is the Common-Law per se Rule Necessary For All Improper Promises?**

The *per se* common-law rule is not without its critics. Judge Moylan recently referred to the *Hillard* decision as a “misbegotten ghost.”32 The *per se* rule is based on old Maryland cases, dating back to 1873,33 which themselves were based upon the expansive common-law *per se* exclusionary rule from eighteenth and early nineteenth century England.34 The primary focus of those old English cases was preventing unreliable confessions flowing from certain improper promises, which were believed, in those days, to have an overpowering effect on certain suspects.35 The English courts “relied on intuition rather than empirical data to identify interrogation practices likely to produce such confessions.”36

In 1884 in *Hopt v. Utah*, the Supreme Court’s first decision adopting a version of the common-law rule, the Court criticized the expansive common-law exclusionary rule as having “been carried too far.”37

This eighteenth/nineteenth century *per se* exclusionary rule which was “carried too far” is nearly identical to the holdings in *Hillard*38 and, for the most part, in *Winder*. As such, there are several concerns with this antiquated pedigree that should be carefully reviewed in order to examine whether the full force of Maryland’s common-law exclusionary rule is still necessary.

First, several sociological studies dispute the notion that certain improper promises, short of promises of significant leniency, engender false confessions.39 Second, it can be argued that the *per se* common-law rule is unnecessary in recent times when the defendant now enjoys several layers of added protections—due process voluntariness, *Miranda*, the Sixth Amendment,40 and the State’s burden to prove voluntariness, beyond a reasonable doubt, to the trier of fact.

Third, the *per se* standard was resurrected in 1979 in *Hillard* by a Court of Appeals which may have been reacting to a justifiable fear during the seventies— that a conservative Supreme majority might overturn *Miranda*.41 For example, in 1977 the Attorney General of Maryland, Francis Burch, joined twenty other State Attorneys General in an Amicus Curiae brief for the eventual decision in *Brewer v. Williams*,42 urging that the Supreme Court abandon *Miranda*.43 By 1980, however, with the Supreme Court’s decision in *Rhode Island v. Innis*,44 this fear appeared to be subsiding and, as a result of the recent decision in *Dickerson v. United States*,45 did not actually come to pass.
Fourth, a Supreme Court decision from 1991 has influenced several other states in repudiating the common-law rule. In *Arizona v. Fulminante*, the court announced that the *per se* exclusionary rule for improper promises, as enunciated in the 1897 Supreme Court decision, *Bram v. United States*, “does not state the [constitutional] standard for determining the voluntariness of a confession.” The Court in *Bram* held that the *per se* common-law test for voluntariness is subsumed within the Fifth Amendment privilege against compelled self-incrimination. The *per se* constitutional test enunciated in *Bram* is nearly identical to the holding in *Hillard.* Although the constitutional dicta in *Fulminante* is by no means binding on the Court of Appeals in interpreting its own non-constitutional, common-law standard, the Supreme Court’s repudiation of such a venerated decision reinforces the need to evaluate the contemporary utility of the *per se* standard.

Fifth, in a fifty-state survey, only a handful of states apply an exclusionary rule as expansive as that enunciated in *Hillard* and reaffirmed in *Winder* (Florida, Maine, Michigan, Mississippi, and South Carolina). While many states have a variation of the *per se* Hillard/Winder rule, most of these states have watered down the exclusionary force of the rule with selective holdings. Missouri, for example, applies a *per se* exclusionary rule only for promises of leniency, rather than for any promise of benefit. Several states have recognized exceptions for promises: 1) initiated by the defendant; 2) regarding bail; 3) to bring the suspect’s cooperation to the attention of the prosecutor or judge; 4) which are implied; and 5) which are unrelated to the crime charged. Some states have adopted, by judicial fiat or statute, a modification of the common-law rule whereby only those promises likely to cause a false confession should be forbidden. Many states simply apply the federal due process test that examines whether the suspect’s will was actually overborne.

Lastly, psychological literature indicates a greater possibility of an unreliable confession with certain implied threats than with improper promises. Yet, from 1997 to 2001, Maryland appellate courts seemed to have developed a more “police friendly,” “totality of the circumstances” standard for certain implied threats. Similarly, the literature seems to indicate that certain types of deception—lying about physical evidence such as DNA—might be so overwhelming to some suspects such that an unreliable confession could result. Yet, with respect to police deception, the Court of Appeals has consistently utilized the due process, “totality of the circumstances” approach.

Nonetheless, even though the Court of Appeals in *Reynolds v. State* noted “a pronounced trend [in other jurisdictions] away from *per se* exclusion and toward a totality of the circumstances approach,” the Court concluded that “Maryland has followed the old common-law rule, which has seemed to adopt a *per se* exclusion Rule . .. The *Winder* Court, without mentioning this majority trend in the country, simply reaffirmed the expansive common-law exclusionary rule. Thus, the *per se* test, absent legislative action, is firmly established in Maryland. Nonetheless, there are many permutations of the test which remain unresolved by the Court.

C. The Present State of the Maryland Law of Voluntariness

1. With Respect to Improper Promises, the Court of Appeals will not Examine Whether the Defendant’s Will was in fact Overborne.

The common-law approach presumes coercion, upon the showing that an improper promise is causally related to a subsequent confession. The common-law approach “relieves the defendant of the burden of showing that his will was, in fact, overborne by such an influence.”

Accordingly, the Court of Appeals in *Winder v. State* did not analyze whether the defendant’s will was “overborne,” or actually coerced, as is done in the due process approach. The *Winder* Court did utilize, once, the term “coerced” to describe the effect of improper promises on the accused. The Court stated, “[w]e look to all of the elements of the interrogation to determine whether a suspect’s confession . . . was coerced through the use of improper means.” This limited use of the concept of coercion was consistent with the one-time reference to “coercion” in *Hillard*.

In so holding, the *Winder* Court scaled back a trend in the Court of Appeals from 1986 to 1997 to assimilate the common-law analysis with the “totality of the circumstances” analysis. This trend, which applied the “totality of the circumstances” test to both the common-law and the due process analysis, began in *Lodowski v. State* in 1986, was favorably mentioned in *Reynolds v. State* in 1992, and then appeared nearly completed in *Hof v. State* in 1995.
The trend toward assimilation of the “totality of the circumstances” analysis and the common-law test seemed actually accomplished in *Burch v. State* in 1997. Judge Wilner, writing for the Court, summarized the two tests as follows:

Under State common law, a confession or other significantly incriminating remark may not be used as evidence against a defendant unless, in the metaphoric words of *Hillard v. State*, it is “shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary.” In plain English, that means that, “under the totality of all of the attendant circumstances, the statement was given freely and voluntarily.” The “totality of the circumstances” test also governs the analysis of voluntariness under the State and Federal Constitutional provisions.

Consistent with this trend, the *Winder* Court conceded that, “we generally look at the totality of the circumstances affecting the interrogation and confession . . . . To determine whether a suspect relied upon an offer of help from an interrogating authority in making a confession, we examine the particular facts and circumstances surrounding the confession.” However, the Court did not actually apply an unqualified “totality of the circumstances” test and did not examine whether the defendant’s will was overborne. Rather, the Court applied the “particular facts and circumstances” (not necessarily the “totality of the circumstances”) to the causation prong of the common-law analysis.

As such, the Court only examined a narrow set of factors among those catalogued by the Court of Appeals in *Hof v. State*, as part of the “totality of the circumstances” test. The *Winder* Court did not analyze the defendant’s age, intelligence, maturity, education, or experience with custodial interrogation. Moreover, the Court did not examine the degree to which the defendant was restrained (e.g., handcuffs), the number of interrogating officers, the size of the room, the distance of the interrogation from familiar surroundings, the tone and volume of the interrogators’ voices, whether the defendant was physically mistreated, or whether the defendant was deprived of food and water. Thus, as described in *Martin v. State*, the *Winder* Court simply engaged in a general “cause-and-effect” analysis.

### 2. Does the Common-Law Exclusionary Rule Apply Only to a “Custodial Confession?”

The *Winder* Court stated that the common-law exclusionary rule applies to a “custodial confession.” The Court, therefore, implied that there is no per se rule of exclusion with respect to improper promises made in a non-custodial setting. The Court crafted this arguable requirement of custody from dicta in *Reynolds v. State*, which had restated the Maryland common-law per se rule in the context of a “defendant in custody.” Quoting from several text writers, the Court of Appeals in *Reynolds* stated:

> [I]t is the defendant’s sensitivity to inducement while in custody and the potential impact of the promise of leniency that render the confession inadmissible. Courts abhor, or at least find distasteful, promises of leniency or immunity made by state agents to defendants subject to the vulnerability of custodial interrogation.

Whether consistent with this dictum in *Reynolds* or by historical accident, not one case from the Court of Appeals has actually applied a per se common-law analysis to a statement taken in a non-custodial setting. In 1997 in *In re Eric F.*, the Court of Special Appeals applied a “totality of the circumstances” test, rather than a per se analysis, to an allegedly improper inducement made to a seventeen-year-old suspect who was not in custody. It remains to be seen if custody is not present, whether the Court of Appeals will apply an unqualified “totality of the circumstances” test to an improper promise, as was done in *In re Eric F.*, or will retain the per se exclusionary rule.

On the other side of the issue, there does not appear to be any case from the Court of Appeals prior to *Reynolds* in 1992 which stated that custody was a prerequisite for the application of the common-law exclusionary rule. Furthermore, it could be argued that if the Court of Appeals viewed custody as a prerequisite to the operation of the per...
se common-law rule, the Court in two cases involving non-custodial statements, Reynolds and Pappaconstantinou,\(^90\) would not have mentioned the common-law analysis. Instead, the Court devoted several pages of analysis to different aspects of the common-law rule in both cases. The Court of Special Appeals in Minehan v. State recently analyzed the common-law test with respect to allegedly improper promises and threats in a non-custodial setting; however, the court did not have to apply the common-law analysis because it first ruled that the alleged inducements were not improper.\(^91\)

Furthermore, in Stokes v. State, a case in which the defendant was at least detained during a search warrant, the Court of Appeals did not imply that custody or detention was a prerequisite for the operation of the per se rule.\(^92\) The Court held as involuntary the defendant’s statements which were made in response to police threats to arrest his wife.\(^93\) One commentator has argued that promises or threats regarding third persons would be no less coercive if the defendant were not incarcerated.\(^94\)

### 3. Does The Common-Law per se Rule Apply to Implied Threats?

Maryland courts have sometimes analyzed implied threats under the due process, “totality of the circumstances” test, rather than under the common-law test. The Winder Court appeared to leave open the possibility that there may indeed be, as Judge Moylan noted in Martin v. State,\(^95\) an “aberrational little pocket dealing with the impact of promises (though not necessarily of threats) under Maryland common law.”\(^96\) The Winder Court explicitly held that the common-law per se test applied to improper promises\(^97\) and characterized the improper police statements at issue as improper promises, rather than threats: “Of course, as Appellant argues, most of the statements we have recounted can be construed as threats as well as promises. We have not considered the police statements as threats for purposes of our analysis because, as promises alone, they rise to the level of actionable impropriety.”\(^78\) In the due process context, the Supreme Court in 1991 in Arizona v. Fulminante rejected the per se test, as embodied in Bram, with respect to a “credible threat of physical violence.”\(^99\)

Some other recent cases do appear to draw, albeit implicitly, a distinction between the analysis applied to implied threats and promises. In 1997 in Burch v. State, where promises were not at issue, the Court of Appeals applied an unqualified “totality of the circumstances” approach to a continuing threat from prior physical violence inflicted upon the defendant.\(^100\) After Winder, the Court of Special Appeals in Raras v. State relied on Burch in applying the “totality of the circumstances” test to an allegedly improper threat.\(^101\) In 2001 in Jackson v. State,\(^102\) a case involving a continuing threat of physical abuse of the suspect, the Court of Special Appeals quoted from Burch in asserting that the common-law test is governed by the “totality of the circumstances” test.

By comparison, while Maryland appellate courts sometimes apply the “totality of the circumstances” test to implied threats, this test has almost never been actually applied to examine the causation from an improper promise. From 1986 and 2001, in most instances in which the Court of Appeals mentions an unqualified “totality of the circumstances” test, promises were either not at issue or the Court did not have to actually analyze the effect of an improper promise.\(^103\)

On the other side of the argument, the vast majority of Maryland cases have not mentioned any difference in the analysis between threats and promises. In Nicholson v. State,\(^104\) and a long line of subsequent cases from the Court of Appeals, the Court recited the same test for promises and threats.\(^105\) For example, the Court in 1980 in Stokes v. State applied the common-law rule and held that “a promise not to arrest a near relative of the defendant, or a threat to do so, constitutes the form of inducement which will render a resulting statement involuntary.”\(^106\) In Winder itself, the Court stated in dicta that the first part of the Hillard test is to “determine whether the police or a State agent made a threat, promise, or inducement.”\(^107\) In Hof v. State, Judge Moylan stated that a “conditional promise is, by definition, a threat in the eventuality the condition is not satisfied.”\(^108\) He went on to quote McCormick on Evidence: “Whether an interrogator’s language will be construed as promising a benefit or as threatening a detriment in such situations is a matter of very subjective choice.” Other commentators agree that, “the relative morality of purchasing a confession with [a promise] as opposed to obtaining one by use of threats lies very much in the eye of the beholder.”\(^109\)

A recent 4-3 decision from the Court of Appeals in Pringle v. State,\(^111\) placed in some doubt the existence of
any significant distinction between improper threats and promises. In *Pringle*, the police detained three passengers in a car that contained cocaine in a closed compartment in the back seat. The defendant, who was not the registered owner, was in the front passenger seat. The officer told the detained passengers after finding the drugs, “if no one admitted to ownership of the drugs he was going to arrest them all.”

No one responded, and the officer placed all three passengers under arrest. Two hours later, the defendant confessed after waiving his *Miranda* rights. After concluding that there was no probable cause for the arrest, the Court performed a Fourth Amendment attenuation analysis of the taint of the illegal arrest on the confession. As part of this taint analysis, the Court conducted an “exploration of voluntariness” of the confession and concluded that there was no attenuation of the “coercive effect” of the “inducement” (threat) that had occurred two hours earlier.

The *Pringle* Court indicated in several ways that it was, in effect, conducting a *per se* common-law analysis of the voluntariness of the threat. The Court recited the common-law test, but did not quote any due process cases, nor make mention of whether the defendant’s will was overborne.114 Most recently, the Court of Special Appeals in *Minehan v. State* analyzed alleged threats in the common law context without mentioning the “totality of the circumstances.”

It can also be argued that courts should give the defendant more protection from police threats than from improper promises. For instance, the threat to arrest a loved one, by its very nature, is more coercive than a promise not to arrest a loved one. In fact, studies indicate that people perceive threats to be more coercive upon the subject’s decision to confess than direct or implied promises. For example, the Supreme Court of Nevada held that, while it may be permissible to promise the suspect to tell the prosecutor of his cooperation, it is impermissible to tell the suspect that his failure to cooperate will be communicated to the prosecutor.118

The Court of Appeals has expressed no ambiguity, however, in holding that threats pertaining to constitutional rights will render the subsequent statement involuntary. In *Thiess v. State*, the threat to keep the suspect held incommunicado until he confessed rendered a confession involuntary. In *Lewis v. State*, the Court of Appeals indicated that it was improper for a detective to make a threat that the defendant would be labeled a murderer if he requested a lawyer.

4. What Measure of Causation is Required from the Improper Influence?

What if the defendant was only slightly influenced by an improper promise? What if the defendant was primarily influenced by genuine remorse, but also by an improper promise? Maryland appellate courts have seldom addressed the precise measure of causation required by the common-law rule.

Notably, in the first voluntariness case in Maryland, *Nicholson v. State*, the defendant argued that “[t]he law does not measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration, if any degree of influence was exerted.” The Court of Appeals, however, did not reach this issue because the Court accepted the trial court’s factual finding that the officers’ denials of any improper promise or threat were credible. In 1887 in *Biscoe v. State*, the second case in Maryland involving improper promises, the Court conceded that, “[i]t is not, of course, an easy matter to measure in all cases the force of the influence used, or to decide as to its precise effect upon the mind of the prisoner . . ..” However, the Court again did not reach the issue of how to measure the influence of the inducement.

Despite having identified the issue in these early cases, the Court of Appeals has not squarely decided the precise measure of causation needed for an improper influence to render a statement involuntary. The *Winder* Court only stated:

The second prong of the *Hillard* test triggers a causation analysis to determine whether there was a nexus between the promise or inducement and the accused’s confession. In *Reynolds*, we made clear that “[i]f a suspect did not rely on an interrogator’s comments, obviously, the statement is admissible regardless of whether the interrogator had articulated an improper inducement . . .. As to the second factor, the reliance, or nexus, between the inducement and the statement, to determine whether a suspect relied upon an offer of
help from an interrogating authority in making a confession we examine the particular facts and circumstances surrounding the confession.\textsuperscript{124}

In \textit{Winder}, the Court engaged in a \textit{general “cause-and-effect” analysis} that considered a few “attenuating” factors, such as the timing of the inducement in relation to the confession, the level of intimidation felt by the defendant, any “intervening” factors (new interrogation locations), and the flagrancy of the police conduct.\textsuperscript{125} The Court also emphasized that the timing of the confession in relation to the inducement was “critical.”\textsuperscript{126} The Court stated as well that “a singular [police] statement communicated to the suspect may be sufficient to qualify as an inappropriate offer of help.”\textsuperscript{127}

The \textit{Winder} Court considered two cases which also seemed to apply a general “cause-and-effect” analysis that considered some attenuating factors.\textsuperscript{128} One of the cases cited was \textit{Johnson v. State},\textsuperscript{129} in which the Court of Appeals held as voluntary a confession that was given three days after a statement that had been involuntarily induced by an improper promise. The voluntary confession three days later was given to another officer at another place, and neither the officer nor the defendant mentioned the improper promise.\textsuperscript{130}

Neither \textit{Winder} nor \textit{Johnson} discussed prior Maryland cases that had adopted a more stringent (“defendant-friendly”) rule of causation. For example, in 1950 in \textit{Edwards v. State},\textsuperscript{126} the Court examined the effect of an improper inducement on two subsequent statements made two hours and thirteen hours, respectively, after the first confession was improperly induced by a promise.\textsuperscript{131} The Court stated that the “improper influence which produced the first confession is presumed to still be in effect until a cessation of that influence is definitely shown, and the evidence to overcome and rebut such a presumption must be clear, strong, and satisfactory, and any doubt on this point is resolved in favor of the accused.”\textsuperscript{132} The Court suppressed the second and third confessions. Also, in \textit{Kier v. State}, the Court, citing \textit{Edwards}, suppressed a second confession made fourteen days after the first improperly induced confession.\textsuperscript{133} \textit{Edwards} and \textit{Kier}, however, might be distinguished because they involved the effect of an improper inducement and a prior confession upon a subsequent confession.

In 1996 in \textit{Martin v. State}, the Court of Special Appeals offered a more precise description of the necessary measure of causation: “If the inducement is shown to have \textit{some}, even if only slight, influence on a subsequent confession, the \textit{per se} exclusion approach creates a conclusive presumption that the influence was dispositively catalytic and relieves the defendant of the burden of showing that his will was in fact overborne by such influence.”\textsuperscript{134}

The Supreme Court of Michigan in \textit{People v. Conte}, an opinion with a nearly identical \textit{per se} test as \textit{Hillard}, held that a promise “must have more than an attenuated causal connection with the confession, but need not be the only or even principal motivating factor.”\textsuperscript{135} The Supreme Court of Mississippi, which also has an exclusionary rule as expansive as \textit{Hillard}, uses the term “proximate cause”\textsuperscript{136} to measure the influence of the improper promise upon the subsequent statement.

\textbf{5. Did \textit{Winder} Narrow The Definition of An Improper Promise?}

The \textit{Winder} Court may have narrowed the definition of an improper promise by defining it as “special consideration from a \textit{prosecuting authority} or some other form of assistance in exchange for the suspect’s confession . . . .”\textsuperscript{137} The \textit{Hillard} Court had stated a broader definition – “help or some special consideration” – without mentioning “prosecuting authority.”\textsuperscript{138}

This arguably narrowed definition in \textit{Winder} is consistent with an older, and subsequently abandoned, line of Maryland cases from 1961 to 1965. In 1961 in \textit{Presley v. State}, the Court of Appeals stated that the State must prove that a confession was not caused by a “promise, threat or inducement whereby the accused might be led to believe that there would be a \textit{partial or total abandonment of prosecution}.”\textsuperscript{139} In several subsequent cases\textsuperscript{140} the Court restated this narrowed definition until it appeared for the last time in 1965 in \textit{Smith v. State}.\textsuperscript{141}

This narrower definition of an improper promise is consistent with \textit{Hopt v. Utah}, the Supreme Court’s first case on common-law voluntariness.\textsuperscript{142} In \textit{Hopt}, the Supreme Court held that a confession is involuntary if made “in consequence of inducements . . . touching the charge preferred.”\textsuperscript{143} Even in 1897 in \textit{Bram v. United States}, Hillard’s ancestral role model, the Supreme Court reiterated this qualification that
the improper influence must relate to the “crime charged.”144 Furthermore, this narrowed definition is arguably consistent with the Court’s statement in Reynolds v. State that, “[g]enerally the type of inducements that rendered confessions inadmissible at common law were inducements extreme enough to make confessions unreliable and which directly impacted on the accused or the crime charged.”145

This narrowed definition is also consistent with recent sociological studies indicating that minor promises, which do not offer substantial help with the suspect’s sentence or likelihood of acquittal, are unlikely to produce a false confession. Professor Welsh White, who has written several articles criticizing police promises, threats, and deception, concluded that:

As Wigmore observed, the premise that confessions produced by any promises are untrustworthy was probably never correct. If the inducement to confess is relatively slight – a promise that the officer will testify that the suspect cooperated, for example – there is little reason to believe that a suspect will respond with a false confession . . . [However, regarding] a promise of significant leniency, empirical data as well as intuition suggest that even an innocent suspect will be quite likely to confess rather than risk the consequences of maintaining his innocence.146

Some language in Winder, however, suggests the contrary. The Court’s use of the phrase “or some other form of assistance” could be interpreted as a reaffirmation of an expansive definition of an improper promise. The Court did not expressly couple this phrase with the qualifier, “from a prosecuting authority.”147 With the exception of the cases discussed above from 1961 to 1965, and the dicta in Reynolds, the Court of Appeals has consistently applied a broad definition of an improper promise. For example, in Nicholson v. State,148 the Court defined an improper promise as “any promise of worldly advantage.” The Court repeated the Nicholson definition in Reynolds,149 Hof,150 and Winder.151 In 1980 the Court in Stokes v. State broadly stated that the “rule in Hilliard announces that a statement is rendered involuntary if it is induced by any official promise which redounds to the benefit or desire of the defendant.”152

One court in recent years has broadly interpreted an improper promise to include a material benefit unassociated with the pending case. The Court of Special Appeals in In re Joshua David C. quoted the Nicholson definition in holding that an officer’s promise of a tee shirt to a ten-year-old child rendered the subsequent statement involuntary.153

a. What is an Implied Promise?

The Winder Court established an “objective” test for determining whether the police actually communicated a direct or implied promise. First, a statement will not be suppressed just because the defendant sincerely believed that he would receive some benefit for his confession, without any evidence that his belief was reasonably “premised on a statement or action made by an interrogating officer.”154 Second, the Winder Court held that, “[a]lthough a defendant need not point to an express quid pro quo . . . a promise or offer within the substance of the officer’s eliciting statement” is required.155 Third, the Court may have narrowed the definition of an improper promise by not adopting language from previous cases that any “promise, however slight” would constitute an inducement.156

The Court of Appeals has most often analyzed an implied promise in the context of the police statement, “it would be better for the defendant to talk.” In Ball v. State, the Court held as voluntary the defendant’s written version of a prior oral confession, despite the detective’s statement that it would be “much better if you told the story . . . to the jury . . . so that it is your words not mine . . .”157 In Ralph v. State, the Court of Appeals suggested that when there is no improper police statement or action, other than the admonition, “it is better to tell the truth,” an improper promise will not be found.158 In Deems v. State, the police statement, “the truth would hurt no one,” was not an improper inducement.159 Similarly, the Court of Special Appeals in In re Owen F. found no implied promise when the officer told a fourteen-year-old with an IQ of 70, “I think it is better if you tell me.”160 In Dobbs v. State, the prosecutor’s statement, “Tell the truth. You have nothing to fear, if you weren’t in it,” was
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held to be an implied promise.162 In Lubinski v. State, the Court of Appeals stated that the police statement, “It will help you a lot [if you give a statement]” would be an improper inducement.163 In In re Lucas F., the Court of Special Appeals held that the exhortation to tell the truth, “so there would be no problem later,” was improper.164 Chief Judge Gilbert wrote that the exhortation sowed the “seeds of a subauditur in the [ten-year-old defendant’s] mind that if he related the events that transpired . . . he would avoid subsequent problems.”165

Studies do indeed show that implied promises of leniency may be interpreted in almost the same way as direct promises. Suspects process information “between the lines.”166 Thus, the “difference between expressions of compassionate understanding on the one hand, and implied promises of leniency on the other, is at the margins sometimes a matter of emphasis and nuance.”167

b. Qualified Promises – Implied, Improper Promises Accompanied by the Warning that Nothing Can Be Promised.

Another difficult issue arises when the police warn the suspect that the police cannot make any promises, and then proceed to make an implied promise. In 1887 in Biscoe v. State, the interrogator told the defendant he could make no promises to the defendant, but then told the defendant, “It would be better for him to tell the truth, and have no more trouble about it.”168 The Court of Appeals observed, “But what does this amount to when, in the next breath, we find him [making a promise]?”169 The Court held the subsequent confession to be involuntary. However, in 1958 in Merchant v. State, the Court of Appeals held that because the defendant was told that anything he said can be used against him, there could be no improper promise implied in the police statement, “The truth hurts no one.”170

In 1990 the Court of Special Appeals in Watters v. State held that certain implied promises were not improper because the officer repeatedly reminded the defendant that he could not promise him anything.171 The officer told the defendant, “I can’t promise that you are going to walk out of jail, okay? ... I am giving you the opportunity to tell us what you know. I can’t say whether that is going to help you, I can’t say that it is not going to help you, because I am not in that position.”172 Most recently, the Court of Special Appeals in Minehan v. State held that a suspect “could not reasonably believe the officers would ensure his case was handled with leniency” because the police warned the suspect several times that the police could “not promise [him] anything.”173

c. Short of a Promise to Advocate for Leniency, a Promise to Tell the Prosecutor or Judge of the Defendant’s Cooperation

In Hillard v. State, the Court found a statement involuntary which was made in reliance upon the officer’s promise “to go to bat” for the defendant with the prosecutor.174 However, the Court has never directly ruled on a promise simply to inform the prosecutor or judge of the defendant’s cooperation, without promising to advocate for leniency. In Winder, the Court of Appeals characterized the various improper offers of help made to the defendant by three different officers as follows: “to contact the prosecuting authorities in order to provide him leniency during his subsequent prosecution. The officers purportedly would carry out their offers by advocating on Appellant’s behalf to the state’s attorney and the judge presiding over his anticipated trial.”175

In Grammer v. State in 1953, the Court of Appeals implied that a promise to tell the judge of the defendant’s cooperation might be problematic. The officer told the suspect that “at the time of court . . . it would be testified to that he had cooperated with us in making a statement.”176 However, because the questionable promise was made after the confession, the court did not have to rule on whether there was an improper promise.177 In Hall v. State, the Court of Appeals expressly declined to rule on a similar question.178

In contrast, in Boyer v. State, the Court of Special Appeals held that it was not improper for the officer to tell the defendant that the officer would tell the prosecutor of the defendant’s cooperation.179 Similarly, Professor White, who has written extensively on the problem of false confessions, conceded that this type of promise is unlikely to lead to a false confession.180 The overwhelming majority of states has held that promises of this nature are not improper.181

d. Promises of a Material Item, Unrelated to the Case

The Court in Reynolds v. State noted that “[p]romises of purely collateral benefits do not generally reach a level that undermines the voluntariness of a confession.”182
In *In re Joshua David C.*, the Court of Special Appeals applied the common-law exclusionary rule to an involuntary confession made by a ten-year-old who was promised a tee shirt. The court cited *Nicholson v. State*, which prohibited a “promise of worldly advantage.” In 1968 in *Lyter v. State*, an implied promise to help the defendant get a job when he got out of jail was held to be improper. In *Mitchell v. State*, the defendant alleged that the police promised to return the defendant’s car to his wife. The Court of Special Appeals did not have to analyze the promise about the car because the trial court believed the officers’ testimony that they had offered no inducements.

e. Promises Regarding Bail

Although no Maryland appellate court has squarely held that promises related to bail are improper, there are ample dicta to indicate that such promises would be improper. The *Hillard* Court did not specifically hold that the improper promise “to go to bat” with the prosecutor related to bail. However, the trial judge appeared to find that the promise related to the question of bond. Similarly, the Court of Special Appeals in *Whack v. State* stated that “promises to reduce bail . . . may act to vitiate the voluntariness of a confession.” In *Ponds v. State*, the Court of Special Appeals stated the confession would have been involuntary if the trial court had believed the defendant’s allegations that the police would recommend “personal bond” in exchange for cooperation.

However, in *Pharr v. State*, although the court did not have to decide the propriety of a police promise to get the defendant out on bond, the court did not explicitly state that such a promise was improper. Furthermore, regarding a detective’s effort to convince the defendant that he was not in custody, the Court of Special Appeals in *In re Eric F.* held that it was not an improper promise for the detective to tell a suspect that whatever the suspect said, the suspect would “go home . . . that night.”

f. Promises Regarding Counseling (not in lieu of punishment)

What if the police promise psychological assistance during the suspect’s eventual jail sentence rather than in lieu of it? The Court of Appeals has not addressed this issue.

The *Winder* Court, however, did indicate that the following police statement was an improper inducement: “We think the person who committed these [acts] needs help. I think you need help. The only way we can get you that help is for you to let us know what happened. We can let the State’s Attorney’s Office know . . . .” The Court characterized the officer’s statement as a promise to help “with obtaining psychological assistance and leniency from the prosecuting authority.” In *Johnson v. State*, the Court found that a statement was “properly suppressed” because it had been induced by a promise of psychological treatment. There, the trooper stated that if the defendant confessed to the murder “he might be able to receive some sort of ‘medical treatment at Perkins’ instead of being ‘locked up for the rest of [his] life ....’”

g. Promises Regarding Privacy

In 1937 in *Markley v. State*, the Court of Appeals did not find improper a police promise to keep the defendant’s name out of the “published statements on the case.” The Court held that an assurance of secrecy, short of a promise not to prosecute, does not render a confession inadmissible. In 1943 in *Ford v. State*, the Court of Appeals did not find improper a promise to tear up the detective’s notes at the end of the interrogation. However, a promise to keep a defendant’s statement confidential, beyond the narrow holdings of *Markley* and *Ford*, will surely result in an involuntary statement.

h. Promises to Help (Not to Harm) a Non-Relative Friend in Legal Matters

In 1980 the Court of Appeals in *Stokes v. State* held as improper a “promise not to harm (physically or emotionally) a near relative with whom the defendant naturally has a close bond of affection.” The Court specifically left open the issue of what “degree of closeness” the defendant must have with a non-relative friend who is the subject of the police promise or threat. However, in 2002 the Court of Appeals in *Pringle v. State* held, in the context of a Fourth Amendment “attenuation” analysis, that a threat not to arrest a non-relative, co-defendant would constitute a “coercive”
“inducement”\textsuperscript{201} and, thus, \textit{implied} that the subsequent confession was involuntary.

The Court of Special Appeals in \textit{Bellamy v. State} extended the exclusionary rule of \textit{Stokes} regarding near relatives to a promise to help the defendant’s fiancé.\textsuperscript{202} In \textit{Fowler v. State},\textsuperscript{203} the Court of Special Appeals held that a detective’s exhortation to disclose the co-defendant’s name, so that “the weight could be shared,” was an improper inducement. However, the court found that the confession was admissible because the defendant had not relied on the inducement. In \textit{Jarrell v. State}, the Court of Special Appeals held, in the context of consent to search under the Fourth Amendment, that the police promise to release a sick friend from jail caused the consent to be involuntary.\textsuperscript{204}

The Supreme Court in \textit{Spano v. New York}, although in the due process context, held as involuntary a confession induced by the police officer’s statement that the police officer would probably lose his job if the defendant did not confess.\textsuperscript{205} The Court held that the defendant’s sympathy was “falsely aroused” because the interrogating officer was a childhood friend of the defendant.\textsuperscript{206}

\textbf{i. Promises to Help a “Near Relative” in Non-Legal Matters}

In \textit{Stokes v. State}, the Court of Appeals left open the possibility that it may be improper to promise to help a “near” relative with matters not pertaining to the pending case or to any other case.\textsuperscript{207} The Court held as improper a “promise \textit{not to harm} (physically or emotionally) a near relative with whom the defendant naturally has a close bond of affection.”\textsuperscript{208} A unanimous Supreme Court in \textit{Lynumn v. Illinois}, although a due process case, held a confession induced by the police officer’s statement that the police officer would probably lose his job if the defendant did not confess,\textsuperscript{209} her two children would be taken from her by the State, and her welfare payments would be cut off.\textsuperscript{210}

In \textit{Reynolds v. State}, the Court of Appeals found no impropriety with the police exhortation to the defendant to tell the truth in order to help the defendant’s daughter, the victim, with her self-doubt over the prospect of no one believing her allegations of sexual abuse against the defendant.\textsuperscript{210} The Court labeled this promise as “collateral” because the statement had not “directly impacted” the defendant. The Court emphasized that the benefit of the promise was not something that the “\textit{police} would or would not do if the defendant made a statement.”\textsuperscript{211}

The Court of Special Appeals in \textit{Finke v. State} also found no impropriety with a similar police exhortation that the defendant should admit the crime to spare his three-year-old grandson the necessity of having to testify against the defendant.\textsuperscript{212} In \textit{Boyd v. State}, the defendant asked to see her children before executing a written statement.\textsuperscript{213} The officer responded that she would be allowed to see her children after she completed and signed a written statement.\textsuperscript{214} In holding that this was not an improper inducement, the Court of Special Appeals stated, “[w]e know of no right on the part of a suspect in a murder case to interrupt the interview process in order that the suspect may visit with his or her children before continuing with the interrogation.”\textsuperscript{215}

\textbf{j. False Friend Scenario and Promises to Investigate Any Leads That The Defendant Provides in an Exculpatory Statement}

In a case decided several months before \textit{Hillard}, the Court of Special Appeals in \textit{Rowe v. State} examined a police statement that the victim was a “no-good-son-of-a-bitch . . . and that the only thing that [the detective] wanted to do really was to shake the hand of the man that murdered him ....”\textsuperscript{217} The court held that this was not improper because the defendant could not have reasonably interpreted the statement as a “preliminary pardon.”\textsuperscript{218} Even a noted critic of many modern police interrogation techniques, Professor Albert Alschuler, has acknowledged that the police “should be allowed to express false sympathy for the suspect, [and] blame the victim.”\textsuperscript{219}

In \textit{Finke v. State}, the Court of Special Appeals examined the police promise to investigate any leads the defendant provided. The court held that this promise was not improper because, if it has any effect at all, it would induce an exculpatory statement.\textsuperscript{220} The Court of Special Appeals came to the same conclusion on a similar set of facts in \textit{Clark v. State}.\textsuperscript{221}
k. False Statements or Unfulfilled Promises Which Are Otherwise Proper

Generally, the Court of Appeals has held that deception, except “an overbearing inducement, is a ‘valid weapon of the police arsenal.’” With respect to police deception, Maryland appellate courts apply the constitutional due process test of whether the defendant’s will was overborne under the totality of the circumstances. However, if the police lie about the law, the resulting confession will likely be deemed involuntary, especially if the lie pertains to the suspect’s constitutional rights.

In Ford v. State, the Court of Appeals held that a “breach of faith” regarding a promise to tear up the detective’s notes after the defendant confessed was not sufficient to render the confession involuntary. In Mitchell v. State, the Court of Special Appeals stated in dicta that it was not a significant factor in the voluntariness inquiry that the police did not follow through on their promise to get the defendant a reduction in bail.

However, Professor White has argued that false or unfulfilled promises, which would otherwise not be improper, should not be permissible and should render a subsequent confession involuntary. He analogized this situation with a defendant’s right to withdraw a guilty plea when the State has breached its end of the plea bargain.

l. Encouraging a Suspect to Adopt an “Accidental” Theory of the Case or to Admit to a Lesser Crime

The ploy to encourage a suspect to admit to an accidental theory of the case was unanimously upheld in 1997 by the Court of Appeals in a death penalty case. In Ball v. State, the Court upheld the technique of presenting the defendant with two opposing versions the facts. The first version presented the defendant as a diabolical criminal. The second version presented the defendant as a loving father, who had a “tough life,” and who shot the victim accidentally. The Court classified this technique as a permissible form of deception, rather than an implied promise of leniency and, thus, applied a “totality of the circumstances” test.

In Smith v. State, the Court of Special Appeals held that the police statement, “the Court might take into consideration a version by the accused of the fire being accidental,” was not an improper inducement. Nonetheless, Professors Richard Ofshe and Richard Leo claim that this technique has played a part in eliciting some false confessions because the technique “relies on communicating a promise of leniency for its efficacy.”

m. Promises Initiated by the Defendant

In Hillard, the defendant’s attorney appeared to have initiated the idea of the detective “going to bat” for the defendant. However, the Court did not mention this as a factor in finding involuntary a confession which resulted from the same promise made later by the detective. The Court ignored this factor and held that the detective’s promise rendered the resulting confession involuntary. The Court of Special Appeals in Jones v. State held a confession to be involuntary even though the defendant initiated the subject of the police getting him “help.” Similarly, in Bellamy v. State, even though the defendant initiated the subject, the Court of Special Appeals held as involuntary a confession induced by a promise of help to secure the release of the defendant’s fiancé.

However, the Court of Special Appeals in Mitchell v. State stated that an important factor in holding that there were no improper inducements was that the “defendant volunteered to give information about [another case] in return for certain things that he requested the police do for him.” Several states have relaxed the per se rule on this basis.

n. Confession Induced By Valid Plea Agreement Between an Unrepresented Defendant and the Prosecutor.

In 1986 the Court of Appeals in Wright v. State held as voluntary a statement of an unrepresented defendant which was induced by a plea bargain negotiated with a prosecutor shortly after the defendant was arrested. Because the defendant specifically agreed that any of his statements made as part of the plea bargain, pursuant to Maryland Rule 4-243, would be admissible in the event that he withdrew from the plea, the Court held that these statements were admissible, as long as the State honored its end of the bargain. The Court conceded the next year that its decision in Wright was in the minority when compared to other jurisdictions around the country.
6. Should Courts Consider the Likelihood of Certain Police Practices Causing an Unreliable or even False Confession?

The likelihood of producing a false confession was the controlling test for the admissibility of confessions at common law in England after the Restoration in 1660. The Court in Reynolds observed that “[t]he common law approach was to identify inducements that might make a confession unreliable or even false.” For a limited number of years in Maryland, between 1925 and 1943, the truthfulness of a confession was an important factor in the determination of voluntariness. In 1928 in Carey v. State, the Court of Appeals held that the “ultimate test to be applied in determining the admissibility of the statement” is: “Was the situation produced by that evidence such that there was a reasonable probability that the accused would make a false statement or confession.”

Although the Court of Appeals has often explained that one underlying rationale of the common-law rule is that a “promise of some benefit is, of course, inherently untrustworthy,” the Court, since these early cases, has not actually examined the reliability of a particular confession, or the likelihood that a particular police tactic would produce an unreliable confession. However, the Court of Appeals has not explicitly forbidden, under the common law, an analysis of the truthfulness of the confession, as the Supreme Court has done with respect to the due process analysis.

In the past six years, there has been a wave of scholarly articles concerning the phenomenon of false confessions. In one such study, Professors Ofshe and Leo analyzed sixty proven false, or probably false, confessions. Out of the thirty-three proven false confessions, only eighteen (55%) were discovered before trial, five (15%) plead guilty, nine (27%) were convicted at trial, and only one (3%) was acquitted. Sixteen out of the sixty involved cognitively disabled defendants. In the Washington D.C. area, the public awareness of the possibility of a false confession has increased as a result of a series of articles in the Washington Post on the lengthy, incommunicado interrogations sometimes employed in Prince George’s County.

Despite this heightened concern, the scholarly literature has only produced a relatively small number of documented false confessions which “can be explained . . . primarily on the ground that the interrogator’s promise provoked the suspect’s confession.” Furthermore, there is “no sound empirical proof that such instances are widespread.” Even Ofshe and Leo concede that there has been no research “to quantify the number and frequency of false confessions or the rate at which they lead to miscarriages of justice.”

Professor White has advocated that trial judges should evaluate the likelihood that a particular police tactic, in general, would produce a false confession. The Ofshe/Leo article, which examined sixty purportedly false confessions, advocated that judges actually examine the reliability of each confession, provided that a videotape regime is in place. The latter proposal has been widely criticized as being unworkable and invading the traditional role of the fact finder.

Judge Andrew Sonner recently suggested, in a dissenting opinion, the unreliability of a confession as a factor in examining an alleged threat to arrest the defendant’s companions. Professor Magid, a critic of anecdotal studies purporting to show widespread instances of false confessions, nonetheless concedes that, at least with respect to deceptive police practices, “[t]here is a growing view that reliability is the appropriate focus of the debate.”

D. The Jury Instruction on Voluntariness – Should the Jury Apply a Common-Law or Due Process Test?

A jury in Maryland must decide two issues in considering a confession: its voluntariness and its reliability. In 1976 in Dempsey v. State, the Court of Appeals, speaking through Judge Eldridge, restated these two roles: “[T]he jury has the final determination, irrespective of the court’s preliminary decision, whether or not the confession is voluntary, and whether it should be believed.”

The State’s burden to prove voluntariness to the jury is not constitutionally required. Since at least 1947, the Court of Appeals has required this “greater safeguard,” known as the “Massachusetts Rule,” in order to further Maryland’s “strong public policy” against the use of involuntary confessions. As such, the jury must decide voluntariness beyond a reasonable doubt before it even considers the reliability, or “weight,” of a confession.
The instruction for the “Statement of Defendant” in the *Maryland Criminal Pattern Jury Instructions*, 3:18, MICPEL, states:

The State must prove beyond a reasonable doubt that the statement was freely and voluntarily made. A voluntary statement is one that, under all circumstances, was given freely . . . . To be voluntary it must have not been compelled or obtained as a result of any force, promises, threats, inducements or offers of reward . . . . In deciding whether the statement was voluntary, consider all of the circumstances surrounding the statement . . . . If you find beyond a reasonable doubt that the statement was voluntary, give it such weight as you believe it deserves.

In considering voluntariness, should the jury apply the common-law or due process test, or both? The instruction leaves this and other questions unresolved.

First, the instruction does not clarify how the jury can reconcile the inherent tension between the third sentence, which generally encapsulates the common-law *per se* rule, and the second and fourth sentences, which generally refer to a modified due process, “totality of the circumstances” test.266

Second, the two most recent cases from the Court of Appeals seem to provide conflicting dicta in relation to this question. In 1995 in *Hof v. State*,267 the Court seemed to favor a modified due process, “totality of the circumstances” approach for the jury. However, in 1986 in *Brittingham v. State*, the Court seemed to endorse the *per se* approach by favorably quoting, among other cases, a 1948 case, *Smith v. State*, that had explicitly applied the *per se* common-law test to the jury’s role in determining voluntariness.268

Third, the instruction does not provide a definition for a “voluntary” statement beyond the assertion that it is a statement that is “freely” given. Fourth, the instruction omits important clarifying language from both the common-law and due process tests. With respect to the due process test, the instruction does not contain commonly quoted language, such as “coerced,” “overborne will,” or “capacity for self-determination [being] critically impaired.”269 With respect to the common-law test, the instruction does not define improper promises or threats, nor does it mention “implied” promises or threats.

Fifth, the instruction does not mention whether the voluntariness determination needs to be unanimous. For example, the instruction does not provide guidance on what might happen if the jury disagreed on which test to apply or if the jury was hung on the voluntariness issue.270

As presently written, defense attorneys can argue to jurors that they should focus on the “mandatory” nature of the third sentence — that the jury “must” find a confession involuntary if it was obtained as a result of any police promise (not necessarily one that the Court of Appeals would define as “improper”). Defense attorneys can argue that, irrespective of the lack of a “compel[ing]” or coercive influence of the promise, the jury should disregard the confession “obtained as a result” of the promise. Of course, the prosecutor would respond that the jury “must” consider the “totality of the circumstances,” pursuant to the fourth sentence of the instruction, not just the cause-and-effect of a promise. Without further clarification from the trial judge, jurors could easily consider both arguments to be reasonable interpretations of the instruction, thus creating a greater likelihood of a divided jury on the question of voluntariness.

This defense attorneys’ argument is supported by the majority of the case law in Maryland. As mentioned above, the Court in *Brittingham* seemed to endorse the jury’s use of the *per se* test.271 Also, in three cases from 1948 to 1960, the Court seemed to sanction the *per se* test for the jury’s consideration of voluntariness.272

Furthermore, because the Court has expressly sanctioned “jury reconsideration of the trial court’s determination,”273 it can be argued that the jury should reconsider the two voluntariness tests in the same order that the trial court must consider them — with the *per se* test conducted *prior to and separate from* the due process test.274 Thus, pursuant to this formulation, if the jury found the confession involuntary under the *per se* test, it would not need to consider the due process test.

Lastly, there is some empirical support for the role of the *per se* test in protecting the defendant against jurors who are skeptical that improper promises can cause an involuntary or unreliable statement.275 In *Confessions in the Courtroom*,276 the authors conducted five empirical studies of jurors’ reactions to promises and threats leading to a confession. The results consistently indicated that jurors
perceive that a confession induced by a promise of leniency is less suspect than a confession induced by a threat of severe consequences. These results were consistent with previous studies in which “people attribute more responsibility and freedom to a person for actions taken to gain a positive outcome than for similar actions aimed at avoiding punishment.”277 The authors concluded that this “positive coercion bias” can, and should, be corrected with an instruction to the jury about the coercive effect of certain promises.278

Because it appears that the jury must reconsider the trial judge’s ruling on the per se test (either by itself or in conjunction with the due process test), the trial court should give a more detailed instruction on the elements of the common-law test. For instance, the trial court should instruct on which types of promises are deemed improper, and then proceed to explain the per se nature of the causation prong.279

However, even if the per se test were explained in more detail to the jury, this would not alleviate the inherent tension in the instruction: How does the jury reconcile the per se test with the “totality” test? Should the jury be instructed that the common-law per se test should be applied prior to the “totality” test, as is mandated for a judge at the threshold stage of admissibility? Or should the jury merely be instructed that a promise can be coercive, but the jury should still consider a promise as only one critical factor in the totality of the circumstances? If Maryland were to adopt this latter approach, the jury would essentially apply a modified due process analysis.

Such a modified due process, “totality of the circumstances” test is supported by the Court’s most recent case on the jury’s evaluation of voluntariness. The Hof Court seemed to endorse the due process, “totality of the circumstances” test where it traditionally had not applied—in conjunction with the common-law rule of Hillard:

In determining whether a confession is voluntary if it is induced by force, undue influence, improper promises, including any official promise which redounds to the benefit or desire of the defendant.”280

The Court also emphasized another aspect of the voluntariness test which is not typically as important in the per se test: “The critical focus in an involuntariness inquiry is the defendant’s state of mind.”281 Thus, as a result of the above quoted language, the Court appeared to eschew a jury instruction for voluntariness that is dominated by the per se test.

Furthermore, it can be argued that the deterrence rationale, which is one of the underlying rationales of the per se test, at the threshold level of admissibility, does not seem appropriate at the jury level. As Judge Moylan observed, “[i]t is not the job of a jury ‘to police the police.’”282 The Court of Appeals in both Brittingham283 and Hof284 observed that the purpose behind the jury’s consideration of voluntariness appears to be the “reliability” of the statement, rather than “to protect against government overreaching”285 – the deterrence rationale underlying the exclusionary rule at the threshold level of admissibility. Certain studies have shown that some improper promises that are forbidden by the common-law rule (short of promises of significant leniency) are not likely to cause unreliable confessions.286 Thus, applying the common-law test, jurors will more often face the difficult task to “disregard a trustworthy, albeit involuntary, confession (the thing that Jackson v. Denno said a jury was incapable of doing).”287 The “totality of the circumstances test” makes it less likely that jurors will face this problem identified in Jackson.

Lastly, the defendant may not need the extra protections of the per se test. The defendant already enjoys several protections against unreliable statements at the threshold level of admissibility: the per se common-law voluntariness test itself, the due process voluntariness test, Miranda, and the Sixth Amendment right to counsel.288 The latter two protections did not exist from 1948 through 1960 when the Court of Appeals seemed to endorse the per se approach for the jury.289

In conclusion, a middle ground between the two approaches can be found in Reynolds v. State, in which the Court quoted the Second Circuit’s holding that the voluntariness inquiry in each case is whether such a promise overbears the suspect’s will . . . either alone or in conjunction with other
Thus, a “compromise” instruction should inform the jury that they could find the defendant’s will to be overborne as a result of merely one improper promise because certain promises of leniency, especially with incarcerated defendants, can be highly coercive. Next, the jury should be instructed that if they do not believe that the promise alone caused an overborne will, they should consider other factors in the totality of the circumstances in determining voluntariness.

III. Conclusion

The Court of Appeals made clear in Winder and Williams that it will apply a more restrictive application of the “totality of the circumstances” approach to certain improper promises. The Court of Appeals will presume coercion by essentially engaging in a cause-and-effect analysis, which has little, if anything, to do with whether the defendant’s will was actually overborne. However, many issues still remain unclear.

While the case law slowly develops so as to fill in some of the ambiguities in the common-law standard in Maryland, defense attorneys and prosecutors can be assured that there are many arguments to be made on both sides with respect to most confessions. Practitioners can be assured that there are even more creative arguments to be made under Miranda, the Sixth Amendment, and the due process right to an attorney and to silence. Confession law is indeed far more complicated than expected.

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6 Id. at 309, 765 A.2d at 115.

7 See infra notes 53-65 and accompanying text.

8 George E. Dix, Promises, Confessions, and Wayne LaFave’s Bright Line Rule Analysis, 1993 U. Ill. L. Rev. 207, 252.

9 Id. at 215.


13 362 Md. at 307-308, 765 A.2d at 114.
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14 286 Md. at 153-54, 406 A.2d at 420.

15 38 Md. 140, 153 (1873).

16 286 Md. at 150, 406 A.2d at 418 (emphasis added).

17 362 Md. at 309, 765 A.2d at 1150.

18 Id. at 320, 765 A.2d at 121. See infra notes 84, 175 and 192.


24 Pappaconstantinou, 352 Md. at 180, 721 A.2d at 247-48.

25 See Hof, 337 Md. at 596-97, 655 A.2d at 377-78, for a comprehensive list of many factors in the totality of the circumstances.


28 Hillard, 286 Md. at 157, 406 A.2d at 422. See Reynolds, 327 Md. at 503-504, 610 A.2d at 786-87. The Winder Court did not mention “reliability” or “trustworthiness” as an underlying rationale. See Winder, 362 Md. at 304-21, 765 A.2d at 113-22.


30 See Jackson v. Denno, 378 U.S. 368, 384-85 (1964) (The practice of analyzing the trustworthiness of a confession “was unequivocally put to rest in Rogers v. Richmond, 365 U.S. 534 (1961), where it was held that the reliability of a confession has nothing to do with its voluntariness.”).

31 Hof, 337 Md. at 617, 655 A.2d at 388. See infra D.


36 Id.

37 110 U.S. 574, 584 (1884).

38 The Hillard rule itself may even be more expansive than Nicholson and Hopt, given that the defendant in Hillard had a lawyer present during the interrogation who “repeatedly sought promises of help in exchange for a statement by Hillard.” 286 Md. at 148, 406 A.2d at 417. Furthermore, the defendant and his attorney signed a Miranda waiver form which stated, “you are not promised anything to make a statement …” Id.


Articles

See Ashford v. State, 147 Md. App. 1, 36, 807 A.2d 732, 753 (2002) (Moylan, J.), cert. denied, 372 Md. 430, 813 A.2d 257 (2002) (“By 1971, the political complexion of the Supreme Court had, as a result of the 1968 election, changed dramatically. It was even called by some the ‘Burger-Nixon Court.’ To the surprise of almost all observers, however, the new Court did not overrule Miranda.”). Justice Brennan in his dissent in Michigan v. Mosley warned that, “[t]oday’s distortion of Miranda’s constitutional principles can be viewed only as another step in the erosion, and, I suppose, ultimate overruling of Miranda’s enforcement of the privilege against self-incrimination.” 423 U.S. 96, 112 (1975) (Brennan, J., dissenting).


43 Amicus Brief, 219, 221.

44 446 U.S. 291, 305 (1980) (Burger, C.J., concurring) (“The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule Miranda, disparage it, nor extend it at this late date.”).

45 530 U.S. at 440 (The Supreme Court held that the Miranda decision was “constitutionally based” and could not be overruled by Congress absent an equivalent substitute.).

46 See infra note 65 and accompanying text.


49 See id.

50 “A confession can never be received in evidence where the prisoner has been influenced by any threat or promise.” Id. at 543 (citations omitted). The Court in Bram, cited and quoted from the second Maryland case dealing with the common-law rule. Id. at 560 (quoting Biscoe v. State. 67 Md. 6, 8 A. 571 (1887)). Judge Moylan observed in Hof, 97 Md. App. at 271, 629 A.2d at 1266, that “Maryland opinions have looked to Bram as a leading authority on the common-law test of voluntariness.” (citations omitted).

51 The Supreme Court did not explicitly denigrate Bram in two subsequent decisions. See Withrow, 507 U.S. at 689; Dickerson v. United States, 530 U.S. 428, 433-34 (2000).

52 In fact, no Maryland case has even commented on this specific aspect of Fulminante.

53 See Johnson v. State, 696 So.2d 326, 329-30 (Fla. 1997).

54 See State v. Coombs, 704 A.2d 387, 391 (Me. 1998) (burden of proof at suppression hearing is beyond a reasonable doubt).


56 See Abram v. State, 606 So.2d 1015, 1030-31 (Miss. 1992) (burden of proof at suppression hearing is beyond a reasonable doubt).


58 See State v. Nicklasson, 967 S.W.2d 596, 606 (Mo. 1998).


64 See KAN. STAT. ANN. § 60-460(f) (West 2000); N.Y. McKinney’s Crim. Pro. Law 60.45(1); Bisbee v. State, 17 S.W.3d 477, 480 (Ark. 2000); State v. Luton, 927 P.2d 844,


70 327 Md. at 506, 610 A.2d at 787 (citations omitted).

71 Id. at 507, 610 A.2d at 788.

72 See Ireland v. State, 310 Md. 328, 331 (1987) (“Because of the inherent dynamism of the common law, we have consistently held that it is subject to judicial modification in the light of modern circumstances or increased knowledge . . . . Equally well established is the principle that the common law should not be changed contrary to the public policy of this State set forth by the General Assembly.”) (citations omitted).


74 362 Md. at 307, 765 A.2d at 114.

75 286 Md. at 150, 406 A.2d at 417. (“[The confession must] first be shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary.”).


77 See 327 Md. at 506, 610 A.2d at 787-88 (“In harmony with the approach taken in federal constitutional analysis, Maryland has for the most part applied a ‘totality of the circumstances’ rule when appraising the voluntariness of confessions under state nonconstitutional law.” Id. at 504, 610 A.2d at 786).

78 See 337 Md. at 595-96, 655 A.2d at 377-78.

79 See 346 Md. at 266, 696 A.2d at 449-50.

80 Judge Wilner authored the opinion in Hillard v. State in the Court of Special Appeals which was reversed by the Court of Appeals. 40 Md. App. 600, 392 A.2d 1181 (1978), rev’d 286 Md. 145, 406 A.2d 415 (1979). Judge Wilner wrote in Hillard, “the test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such to overbear [the defendant’s] will to resist.” 40 Md. App. at 607, 392 A.2d at 1185 (emphasis added in part) (citations omitted). Judge Wilner’s use of the “totality of
the circumstances” in Hillard in 1978 was consistent with a long line of similar holdings in the Court of Special Appeals from 1968 through 1976, some of which were written by two venerated judges who later became part of the unanimous Court of Appeals’ decision in Hillard. See State v. Robinson, 3 Md. App. 666, 671-72, 240 A.2d 638, 641-42 (1968) (Murphy, C.J.); Dennis v. Warden, 6 Md. App. 295, 299 n.5, 251 A.2d 909, 912 (1969) (Orth, J.); Murphy v. State, 8 Md. App. 430, 435, 260 A.2d 357, 359-60 (1970) (Murphy, C.J.); Ryon v. State, 29 Md. App. 62, 66, 349 A.2d 393, 396-97 (1975) (Orth, C.J.). Most recently, Judge Wilner explained in Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003), that a “confession that is preceded or accompanied by threats or a promise of advantage will be held involuntary, notwithstanding any other factors that may suggest voluntariness, unless the State can establish that such threats or promises in no way induced the confession.” (Emphasis added).

See 113 Md. App. at 231, 686 A.2d at 1150.

See id. at 309, 765 A.2d at 115.

327 Md. at 507, 610 A.2d at 788.

Id. at 505, 610 A.2d at 787 (emphasis added) (citations omitted). Because the Court in Reynolds held that no improper inducements were made, the Court did not actually apply the common-law per se rule to the non-custodial statements. 327 Md. at 509, 511, 610 A.2d at 789, 790.


81 Burch v. State, 346 Md. at 266, 696 A.2d at 449-50 (citations omitted) (emphasis added).

82 362 Md. at 307, 312, 765 A.2d at 114, 117 (emphasis added).

83 337 Md. at 596-597, 655 A.2d at 377-78.

84 The Court might have applied so few factors, in part, because the police conduct in Winder went “far beyond that in any of our prior cases where improper inducements were recognized.” 362 Md. at 317, 765 A.2d at 120. However, the Court, in dicta in Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003), indicated no retreat from a strict cause-and-effect analysis of improper promises and threats.

85 See 113 Md. App. at 231, 686 A.2d at 1150.

86 See id. at 309, 765 A.2d at 115.

87 327 Md. at 507, 610 A.2d at 788.

88 Id. at 505, 610 A.2d at 787 (emphasis added) (citations omitted). Because the Court in Reynolds held that no improper inducements were made, the Court did not actually apply the common-law per se rule to the non-custodial statements. 327 Md. at 509, 511, 610 A.2d at 789, 790.


90 See 352 Md. at 174-180, 721 A.2d at 244-48. Because the Court held that there was no State action, the Court did not actually apply a per se common-law analysis to the non-custodial statement. However, the Court in Pappaconstantinou, 352 Md. at 174-75, 721 A.2d at 245, did emphasize the fact that the defendant was in custody when analyzing the first two Maryland cases dealing with the common-law rule, Nicholson, 38 Md. at 143, and Biscoe, 67 Md. at 8, 8 A. at 571-72. However, the Court of Appeals in Williams v. State did not repeat Winder’s language concerning a “custodial confession” when commenting on the common-law rule. Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003).


92 See 289 Md. at 158-60, 423 A.2d at 554-55.

93 See id. at 157, 423 A.2d at 553.


95 113 Md. App at 229, 686 A.2d at 1149 (emphasis added).

96 362 Md. at 320 n.21, 765 A.2d at 121 (emphasis added).

97 See id. at 309, 765 A.2d at 115.

98 Id. at 320 n.21, 765 A.2d at 121.


100 See 346 Md. at 266, 696 A.2d at 449-50.

101 See 140 Md. App. at 158, 780 A.2d at 337-38.

102 See 141 Md. App. at 186, 784 A.2d at 676-77.

in determining “whether particular police conduct is deemed improper.”

104 38 Md. at 153.


106 289 Md. at 161, 423 A.2d at 555. However, the Court in Ball v. State, 347 Md. at 175, 699 A.2d at 1178-79, classified the threat in Stokes as “a promise that the suspect’s wife would not be arrested.”

107 362 Md. at 311, 765 A.2d at 116 (emphasis added).

108 97 Md. App. at 273, 629 A.2d at 1267.

109 Id. (quoting McCormick on Evidence § 148).


112 Id. at 532, 805 A.2d at 1019.


114 See id. However, it can be argued that the Pringle Court’s “exploration of voluntariness,” pursuant to a Fourth Amendment attenuation analysis, was not an independent, common-law analysis of the voluntariness of the confession. First, the Court did not state that it was applying Winder’s two-prong, common-law test of voluntariness. Second, if the Court had been actually applying the common-law test, there would have been no reason to apply the constitutional “attenuation” analysis, because of the “well settled principle ‘that courts should not decide constitutional issues unnecessarily.’” Hillard, 286 Md. at 150 n.1 (citations omitted).

115 See 147 Md. App. at 446-77, 809 A.2d at 73-74.

116 See Kassin and McNall, supra note 66, at 242. See Conte, 365 N.W.2d at 664 (“[A] promise to a defendant guaranteeing the release of his wife is probably more likely to induce his confession than a promise of some benefit to him.”).

117 Kassin and McNall, supra note 66, at 245-46.


120 See 285 Md. 705, 721-22, 404 A.2d 1073, 1081-82 (1979). See also United States v. Harrison, 34 F.3d 886, 891-92 (9th Cir. 1994) (“There are no circumstances in which law enforcement officers may suggest that a suspect’s exercise of the right to remain silent may result in harsher treatment by a court or prosecutor.”). See infra notes 224 and 225.

121 38 Md. at 147 (citing Russell on Crimes, 826) (emphasis added). The Supreme Court in 1897 in Bram v. United States later adopted the same expansive language as the defendant argued above in Nicholson – “any degree of influence.” 168 U.S. at 565.

122 67 Md. 6, 7, 8 A. 571, 571 (1887).

123 See Bram, 168 U.S. at 565.

124 362 Md. at 312, 765 A.2d at 117. In Williams v. State, the Court stated that a “confession that is preceded or accompanied by threats or a promise of advantage will be held involuntary, … unless the State can establish that such threats or promises in no way induced the confession.” (emphasis added). Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at * 14 (Md. June 13, 2003).

125 See id. at 312-13, 318-20, 765 A.2d at 117, 120-22.

126 Id. at 319, 765 A.2d at 121.

127 Id. at 317, 765 A.2d at 119.

129 See 348 Md. at 350-51, 703 A.2d at 1275-76.

130 See id. at 347-49, 703 A.2d at 1272-74.


132 Id. at 400, 71 A.2d at 493 (emphasis added).


134 113 Md. App. at 231, 686 A.2d at 1150.

135 365 N.W.2d at 663.

136 Abram, 606 So.2d at 1030. In Reynolds v. State, the Court of Appeals favorably quoted a federal case which utilized the concept “proximate cause.” 327 Md. at 506, 610 A.2d at 787-88 (quoting Cole v. Lane, 830 F.2d 104, 109 (7th Cir. 1987)).

137 362 Md. at 309, 765 A.2d at 115 (emphasis added).


142 See 110 U.S. at 585.

143 Id. (emphasis added).

144 168 U.S. at 549.

145 327 Md. at 512, 610 A.2d at 790-91 (citing LaFave and Israel, Criminal Procedure, 6.2 at 440 (1984)) (emphasis added).

146 White, supra note 35, at 1234-36 (emphasis added). See supra notes 59-63.


148 38 Md. at 153.

149 See 327 Md. at 507, 610 A.2d at 788.

150 See 337 Md. at 595, 655 A.2d at 377.

151 362 Md. at 309, 765 A.2d at 115.

152 289 Md. at 160, 423 A.2d at 554-55.


154 Winder, 362 Md. at 311, 765 A.2d at 116. See Stokes, 289 Md. at 162, 423 A.2d at 555-56.

155 362 Md. at 311, 765 A.2d at 116.

156 See Hof, 337 Md. at 595, 655 A.2d at 377 (citations omitted).

157 347 Md. at 174-176, 699 A.2d at 1178-79.

158 226 Md. 480, 486, 174 A.2d 163, 166 (1961); see Hillard, 286 Md. at 154 n.3, 406 A.2d at 420.

159 127 Md. 624, 630, 96 A. 878, 880 (1916).


161 67 Md. at 8, 8 A. at 572.

162 148 Md. 34, 60, 129 A. 275, 285 (1925).

163 180 Md. 1, 4-5, 22 A.2d 455, 457 (1941).

165 *Id.*


168 67 Md. at 7, 8 A. at 571.

169 *Id.* at 8, 8 A. at 572.

170 217 Md. 61, 70, 141 A.2d 487, 491-92 (1958).


172 *Id.* at 242, 578 A.2d at 815-16.


174 286 Md. at 153, 406 A.2d at 420.

175 362 Md. at 315, 765 A.2d at 119.

176 *Id.*


180 White, *supra* note 35, at 1234-35.

181 See *supra* notes 61 and 65 and accompanying text.

182 327 Md. at 511, 610 A.2d at 790. The Court noted that one exception to the rule on collateral benefits is a threat or promise to arrest a relative. See *id.* at 512, 610 A.2d at 791 (quoting *Stokes*, 289 Md. at 161, 423 A.2d at 555).

183 See 116 Md. App. at 603, 698 A.2d at 1166.

184 38 Md. at 153. This same passage from *Nicholson* was favorably quoted in both *Winder*, 362 Md. at 309, 765 A.2d at 115, and *Reynolds*, 327 Md. at 507, 610 A.2d at 788.


187 See 286 Md. at 149, 406 A.2d at 417-18.


191 116 Md. App. at 518, 698 A.2d at 1125.

192 362 Md. at 314, 765 A.2d at 118.

193 *Id.*

194 348 Md. at 350, 703 A.2d at 1275-76.

195 *Id.* at 348, 703 A.2d at 1273.


197 See *id.* at 317-18, 196 A. 98-99 (citing 2 Wharton, Criminal Evidence (11th Ed.) 1036; Joy, Amissibility of Confessions, 50).

198 See 181 Md. at 309-10, 29 A.2d at 836 (citing *Markley v. State*, 173 Md. 309, 317, 196 A. 95, 99 (1938)).

199 289 Md. at 160, 423 A.2d at 554-55.

200 See *id.* at 160 n.2, 423 A.2d at 555.
See 370 Md. at 547-554, 805 A.2d at 1028-1032, cert. granted, Maryland v. Pringle, 123 S. Ct. 1571 (2003) (implicitly answering the Court of Special Appeals’ statement that it “is unsettled whether a promise to benefit a friend justifies finding the subsequent confession involuntary.” Pringle v. State, 141 Md. App. 292, 310 (2001)). However, the Court did not explicitly refer to the inducement as “improper.”


Id.

289 Md. at 160, 423 A.2d at 555.

Id. (emphasis added).

See 372 U.S. 528, 534-35 (1963). Consistent with this due process standard, the majority of cases in the country apply a “totality of the circumstances” test to promises related to relatives’ penal status. Voluntariness of Confession as Affected by Police Statements that Suspect’s Relatives will Benefit by the Confession, 51 A.L.R. 4th 495, 499 (1987).

See 327 Md. at 511-12, 610 A.2d at 790-91.

Id. at 512, 610 A.2d at 790 (emphasis added).


See id.

Id.


Id. at 645, 398 A.2d at 488. The Court favorably analyzed Rowe in Ball, 347 Md. at 179.


See 56 Md. App. at 482-84, 468 A.2d at 369-71.


See Lewis, 285 Md. at 721-22, 404 A.2d at 1081-82.

181 Md. at 309-310, 29 A.2d 836.

See 51 Md. App. at 354-55, 443 A.2d at 655. The court rested its decision primarily on other factors. See id.

See White, supra note 94, at 986-87 (quoting Santobello v. N.Y., 404 U.S. 257 (1971)).

See 347 Md. at 178-180, 699 A.2d at 1180-81.

Id. at 168-69, 699 A.2d at 1175-76.


Ofshe and Leo, The Truth about False Confessions and Advocacy Scholarship, 37 CRIM. L. BULL 293, 364-64 n. 356 (2001) [hereinafter The Truth]; See Ofshe and Leo, The

See 286 Md. at 148, 406 A.2d at 417.


See 50 Md. App. at 77-78, 435 A.2d at 827.

See 181 Md. at 309-310, 29 A.2d 836 (emphasis added).

See supra note 59 and accompanying text.

See 307 Md. 552, 515 A.2d 1157 (1986).

See id. at 584-85, 515 A.2d at 1173-74.


See 3 John Henry Wigmore 819, at 297.

See 327 Md. at 503, 610 A.2d at 786.

See 155 Md. 474, 479, 142 A. 497, 499 (1928); See State v. Dobbs, 148 Md. 34, 58-59, 69, 129 A. 275, 284-85, 288-89 (1925); Ford, 181 Md. at 310, 29 A.2d at 836. This trend in the Court of Appeals ended shortly after the Supreme Court, in Lisenba v. California, 314 U.S. 219, 236 (1941), indicated for the first time that due process voluntariness does not concern itself with the truthfulness of a confession. The Supreme Court stated, “[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.” Id.

Ball, 347 Md. at 175, 699 A.2d at 1179; Reynolds, 327 Md. at 504, 610 A.2d at 786 (citations omitted).

See Jackson, 378 U.S. at 384-85.


See supra note 153.

See Jackson, 378 U.S. at 378 n.8 ("[R]econsideration of [voluntariness] by the jury does not, of course, improperly affect the jury’s determination of the credibility or probativeness of the confession or its ultimate determination of guilt or innocence.").

As analyzed above, the Court in both Hillard and Winder did not apply an unqualified “totality of the circumstances” test to improper promises. The Court applied a general “cause and effect” analysis of whether the promises caused the defendant to confess. See supra Section C.1.

337 Md. at 595-97, 655 A.2d at 377-78.


See Gilbert and Moylan, supra note 263, at 485.

See 306 Md. at 662-66, 511 A.2d at 49-51. In Williams v. State, the Court of Appeals held that the jury must be instructed about the “very heavy weight” to be accorded a violation of Maryland’s prompt presentment rule. Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *17, (Md. June 13, 2003). Thus, if the jury must be instructed on the specifics of this Maryland non-constitutional rule, then it can be argued that the jury should also be instructed in more detail on the specifics of Maryland’s non-constitutional, common-law rule of voluntariness with respect to improper promises and threats.


Hof, 337 Md. at 617, 655 A.2d at 388 (emphasis added). The Court used the term “jury reconsideration” two additional times. Id. at 618, n.16, 655 A.2d at 389.

Hillard, 286 Md. at 150 n.1, 406 A.2d at 418 (“[T]he well settled principle [is] ‘that courts should not decide constitutional issues unnecessarily.’”) (citations omitted).


See supra note 39.

WRIGHTMAN AND KASSIN, supra note 39, at 105.

Id. at 118-123.

When applicable to a juvenile, the trial court should consider giving a supplementary instruction for the jury to give greater scrutiny to the voluntariness of a confession. See McIntyre v. State, 309 Md. 607, 617, 526 A.2d 30, 34-35 (1987). False confessions are more likely to occur among juveniles and mentally retarded suspects. See Cassell, supra note 246, at 586; see Magid, supra note 246, at 1192; Comment, Illinois Weakened Attempt to Prevent False Confessions by Juveniles, 33 LOY. U. CHI. L.J. 487 (2002).

337 Md. at 595, 655 A.2d at 377 (citations omitted) (emphasis added).

Id. at 619, 655 A.2d at 389.


See 306 Md. at 664-65, 511 A.2d at 50-51 (quoting Hillard, 286 Md. at 157).

337 Md. at 597, 617, 655 A.2d at 378, 388.

Pappaconstantinou, 352 Md. at 180, 721 A.2d at 248.

White, supra note 35, at 1234-35.

GILBERT AND MOYLAN, supra note 263, at 485 (citing Jackson v. Denno, 378 U.S. 368 (1964)).

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289 See supra note 272 and accompanying text.

290 327 Md. at 507, 610 A.2d at 788 (quoting Green v. Scully, 850 F.2d 894, 901 (2d Cir. 1988)) (emphasis added).

291 Of course, this would not resolve whether unanimity should be required on the issue.

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Ametek v. O’Connor: Employer and Insurer are Entitled to a Credit for the Number of Weeks Benefits Were Paid When a Workers’ Compensation Award is Increased on Judicial Review

By Kimberly Lensing

In a case of first impression, the Court of Appeals of Maryland held that when a workers’ compensation award of permanent partial disability benefits is increased on judicial review, the employer and its insurer are entitled to a credit for the number of weeks that benefits were paid, rather than a credit for the total amount paid. Ametek v. O’Connor, 364 Md. 143, 771 A.2d 1027 (2001).

Susan O’Connor (“O’Connor”) filed a claim for workers’ compensation benefits against her employer, Ametek, Inc. (“Ametek”), and its insurer, Home Indemnity, pursuant to the Workers’ Compensation Act (“Act”). The Workers’ Compensation Commission ordered Ametek and Home Indemnity to pay O’Connor permanent partial disability benefits of $81 for 50 weeks for 10% loss of use of her body. O’Connor filed a Petition for Judicial Review in the Circuit Court for Anne Arundel County. There, her disability was increased from 10% to 70% loss of use of her body. On remand, the Commission increased O’Connor’s benefits to $134 for 467 weeks. Moreover, the Commission credited Ametek and Home Indemnity for the 50 weeks of compensation already paid and reduced O’Connor’s award from 467 to 417 weeks.

O’Connor again sought judicial review in the circuit court and was awarded a judgment of $2,650, for 50 weeks at $53, to compensate her for the 50 weeks she received only $81 per week. The court of special appeals affirmed the ruling, holding that Ametek and Home Indemnity were entitled to a credit based upon the actual amount paid and not the number of weeks benefits were paid. The Court of Appeals of Maryland granted certiorari, reversed the court of special appeals, and remanded the case with instructions to reverse the circuit court’s judgment.

The Philip Electronics court first analyzed section 9-627(k), which authorized the claimant’s award. It noted that subsection (k)(3) provides that the Commission shall award compensation for a loss up to 500 weeks. Philip Elecs. N. Am. v. Wright, 348 Md. 209, 703 A.2d 150 (1997). The court further noted that a weekly framework is consistent with the purposes of the Act, which is to minimize hardship to the employee and his or her family. The Act “compensate[s] employees for the loss of earning capacity resulting from accidental injury, disease, or death occurring during the course of employment.” Id. at 144, 771 A.2d at 1072, 1075. In so holding, the court focused on the language of Md. Code Ann., Lab. & Empl. §§ 9-627(k), 9-628, 9-629, and 9-630 (1999 & 2000 Cum. Supp.), which clearly and unambiguously revealed a legislative commitment to the payment of permanent partial disability benefits on a weekly basis. Id. at 149-50, 771 A.2d at 1076.

The Philip Elecs. court also addressed the remedial nature of the Act, which resolves any uncertainty in the claimant’s favor. Id.
acknowledged that when the intent of the legislature is unclear or ambiguous “this Court... may not stifle the plain meaning of the Act, or exceed its purposes, so that the injured worker may prevail” and “may not create ambiguity or uncertainty in the Act’s provisions where none exists ....” Id. Although the court of special appeals acknowledged the holding in *Philip Electronics* was consistent with the purposes of the Act, it nonetheless reached the opposite result in its decision in *Ametek*. *Id.* at 154, 771 A.2d at 1079.

The court of appeals analyzed section 9-627(k)(4), which references three sections of the Act that govern the award of permanent partial disability benefits and reinforce the weekly payment schedule. *Id.* Specifically, sections 9-628, 9-629, and 9-630 govern disabilities requiring benefits for a determined number of weeks. *Id.* at 150-51, 771 A.2d at 1076. Sections 9-629 and 9-630 (a)(1)(i) provide that the employer or its insurer pay the covered employee weekly benefits. *Id.* at 151, 771 A.2d at 1077. Based on the plain language of these sections, the court of appeals in *Philip Electronics* concluded “[t]hese statutory provisions reflect the intent of the General Assembly that the payment of permanent partial disability benefits be based upon a weekly framework.” *Id.* at 151-52, 771 A.2d at 1077. Although factually distinguishable, the court of appeals held that the analysis in *Philip Electronics*, involving the subsequent reduction of a workers’ compensation award, was nonetheless applicable to *Ametek* when the award has been subsequently increased. *Id.* at 152, 771 A.2d at 1077.

The court of appeals further noted that other jurisdictions have ruled similarly. *Id.* For example, in *Humpty Dumpty v. Moorehead*, 569 P.2d 998 (Okla. 1977), a credit was given to an employer for the number of weeks that benefits were paid. In that case, the claimant was originally awarded temporary total disability benefits of $45 for 298 weeks and was later awarded 500 weeks of permanent total disability at a weekly rate of $40. *Id.* The Oklahoma Supreme Court held “the calculation of credit for temporary total disability payments made ... is to be made on the basis of the number of weeks payments were made, and not on the basis of the amount of money paid out.” *Id.*

*Ametek* did not place the purposes of the Workers’ Compensation Act at risk because there was no overpayment by the employer or insurer and no risk that O’Connor would not receive her day-to-day support. *Id.* at 156, 771 A.2d at 1080. After the credit, O’Connor was entitled to an additional 417 weeks payable at a higher rate. *Id.* However, the court addressed the equity issue of the underpayment affecting O’Connor. *Id.* The court rejected a similar equity argument in *Philip Electronics* stating that whether “the overpayment ... is unjust or equitable must be considered in light of the operation of the Act as a whole,” and that “[a] single transaction does not represent the appropriate focal point to determine the fairness or equity of the application of the Act.” *Id.* at 156-57, 771 A.2d at 1080. The court held that O’Connor’s situation, an award that resulted in an underpayment, must be considered in the context of the Act as a whole as well. *Id.*

The court of appeals’ holding in *Ametek* creates a bright-line rule governing the award of permanent disability benefits by requiring that the employer and insurer receive a credit for the number of weeks for which benefits were paid, rather than a credit for the total amount paid. This ensures that the Workers’ Compensation Act will be consistently interpreted in different claims. Although predictability makes the Act less flexible and allows for fewer exceptions, this uniform system guarantees every claimant receives equal treatment.
Recent Developments

Chesapeake Amusements v. Riddle:
A Dispensing Slot Machine with Player Enhancement Features that Signal When a Winning Ticket is Being Dispensed Does Not Violate Maryland’s Statutory Provision Prohibiting Illegal Slot Machines

By Adam Kleinfeldt

The Court of Appeals of Maryland held a dispensing slot machine with player enhancement features is not an illegal slot machine prohibited by Md. Code Ann. art. 27, § 264B(1957). Chesapeake Amusement v. Riddle, 363 Md. 16, 766 A.2d 1036 (2001). In so holding, the court interpreted section 264B to prohibit machines with player enhancement features that manipulate the element of chance rather than simply facilitating the playing of paper pull-tabs. Id. at 40-41, 766 A.2d at 1048.

The appellant, Chesapeake Amusements, Inc. (“Chesapeake”) is a for-profit Maryland corporation that provides instant bingo machines to several Maryland locations. The State’s Attorney for Calvert County (“County”) and Chesapeake disagreed as to whether the Lucky Tabb II is an illegal slot machine.

The Lucky Tabb II, an instant bingo ticket dispenser with a video screen that displays the contents of the tickets, emits a musical tone (“player enhancement features”) if the ticket is a winner. To receive an instant bingo ticket, a customer must insert money into the Lucky Tabb II and push a button located on the front of the machine. As the ticket is severed from a roll, a barcode reader in the machine reads the code on the back of the ticket. The information in the barcode is used to create a video image of what is displayed on the ticket. The parties agreed that the video image was merely a reproduction of the inside of the ticket, and customers cannot use the indications on the video screen independently to determine whether they are entitled to a prize.

Chesapeake brought an action for declaratory judgment in the Circuit Court for Calvert County to determine if the Lucky Tabb II was an illegal slot machine under Md. Code Ann. art. 27, § 264B(1957). The circuit court held that the Lucky Tabb II violated the statute. The Court of Appeals of Maryland granted certiorari sua sponte to determine if the Lucky Tabb II was an illegal slot machine pursuant to section 264B.

The court of appeals analyzed whether section 264B permits a distinction to be drawn between pull-tab dispensing machines without player enhancement features and those with the features. Id. at 28, 766 A.2d at 1042. The court further agreed that the answer to that question was in the interpretation of the “chance” element of the statute that reads:

For a machine ... to be a slot machine, which is prohibited by law, its operation must be characterized by an element of chance, as result of which the user of the machine ... may receive or become entitled to a prize by reason of the unpredictable operation of the machine.


While the court may have agreed with the county concerning the central question in the case, the court disagreed with the county’s interpretation of the above statute. The county argued that statutes involving gaming laws should be liberally construed “so as to prevent the mischiefs intended to be provided against.” Id. at 31, 766 A.2d 1044 (citing Md.Code Ann. art. 27, § 246 (1957)). The county also argued that the chance element of the statute was satisfied because it was “unpredictable” to the player as to whether the machine would dispense a winning ticket. Id. at 31, 766 A.2d 1044.

The court of appeals rejected the county’s arguments because it failed to squarely examine the relationship between the player and the operation of the machine pursuant to the chance element of section 264B. Id. at 33, 766 A.2d at 1044-45. Instead, the court found that the plain language of the statute,
Recent Developments

mainly the chance element of section 264B, is paramount and that the legislative history should not be consulted when the meaning of the statute is clear and unambiguous. *Id.*

The court stated that the language of section 264B was clear and unambiguous and that the Lucky Tabb II was not an illegal slot machine within the meaning of section 264B. The court relied on *Cabazon Band of Mission Indians v. Nat’l Indian Gaming Comm’n*, 14 F.3d 633 (D.C. Cir. 1994), in making its determination. *Id.* at 39, 766 A.2d 1048. In *Cabazon*, the court held that the machine in question was “quite” different from the Lucky Tabb II because that machine randomly selected pull-tabs and displayed them for the gambler. *Id.* In contrast, “instead of using a computer to select patterns, the Lucky Tabb II actually cuts tabs from a paper roll and dispenses them to the players... [and] without the paper rolls, the machine has no gaming function at all.” *Id.* at 40, 766 A.2d 1048 (*quoting Cabazon*, 14 F.3d 633 (D.C. Cir. 1994)).

In applying the same reasoning, the court found that the “element of chance is in the [roll of] pull-tabs themselves, and not in the operation of the machine.” *Id.* at 41, 766 A.2d at 1049. The Lucky Tabb II, like other gaming machines with similar player enhancement features, simply displays the contents of the ticket on the screen and does not change the outcome of the games. *Id.* at 40, 766 A.2d at 1049. The chance requirement of the statute is not based on the player’s perception, and the legislative history of section 264B cannot aid in the determination of the chance requirement when the language of the statute is clear and unambiguous. *Id.* at 41, 766 A.2d at 1049.

The Court of Appeals of Maryland’s decision in this case is important to Maryland law because the decision, unlike those cited by the county, resolves any ambiguity surrounding the interpretation of the chance element of section 264B and the relationship between the player and operation of an instant bingo machine. According to the decision in this case, as long as the machines with player enhancement features simply parrot what is on the ticket and do not affect the nature and chance of the game the machines are not illegal under section 264B. *Id.*

This case is a victory for companies like Chesapeake Amusements. Armed with this interpretation of section 264B, these companies can continue to design and operate machines with elaborate player enhancement features as long as the chance element involved is confined solely to the pull-tabs. Likewise, gamblers who frequent the machines because of these added features may continue to do so. As long as these companies stay within the guidelines of the instant decision, the chance element of section 264B will fail as a weapon against instant bingo machines with player enhancement features.
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Graves v. State:
A Conviction in Another State of a “Sexually Violent Offense” May Not Be Used as the Predicate to Establish that a Person is a “Sexually Violent Predator” in Maryland

By Ryan N. Hoback

The Court of Appeals of Maryland held the statutory definition of a sexually violent predator does not include persons who are convicted of committing criminal acts in another jurisdiction that would constitute a sexually violent offense in Maryland. Graves v. State, 364 Md. 329, 772 A.2d 1225 (2001). In so holding, the court resolved an apparent incompatibility between the applicable Maryland statute and case law.

Garnell Graves (“Graves”) pleaded guilty in the District of Columbia to a charge of indecent acts with a minor in 1992. He served four years of a two- to six-year prison sentence and was paroled in May of 1996. While on parole, Graves began residing with Leslie Horton and her eight-year-old sister in an apartment in Suitland, Maryland. Graves forced the younger sister to have vaginal intercourse approximately eighteen times in 1997.

A Prince George’s County Grand Jury indicted Graves, charging him with child abuse, second-degree rape, and third-degree sex offense. On June 23, 1998, the State requested the trial court determine before sentencing whether Graves was a sexually violent predator pursuant to section 792(b)(4) by virtue of his District of Columbia conviction. A sexually violent predator is a person who is convicted of a sexually violent offense or has been determined to be at risk of committing a subsequent sexually violent offense.

On October 27, 1998, Graves entered an Alford plea to the charge of third-degree sexual offense. An Alford plea states the defendant “understandingly consent[s] to the imposition of a prison sentence even if he is unwilling to admit his participation in the acts constituting the crime.”

On November 20, 1998, the Circuit Court for Prince George’s County ruled Graves was a sexually violent predator under the statute. The trial court imposed a prison sentence of ten years with three years suspended and a five-year parole period with supervision. On February 18, 1999, Graves filed a motion for modification and reduction of sentence, asserting the trial court improperly considered his out-of-state conviction and unnecessarily exceeded the sentencing guidelines for his offense. The motion was denied.

The Court of Special Appeals of Maryland affirmed the trial court’s determination that Graves was a sexually violent predator holding “out-of-state convictions may be considered in determining whether an individual is a sexually violent predator.” The court of special appeals noted the statutory section concerning sexually violent predators specifically excluded reference to out-of-state convictions, but reasoned the “legislature intended a broad and sweeping registration of sexual offenders.”

The court of appeals began its analysis by reviewing the history of the enactment of the applicable statute. Id. at 336-39, 772 A.2d at 1229-31. In 1995, the Maryland Legislature enacted Article 27, § 792 “Registration of Offenders.” Id. at 336, 772 A.2d at 1229-30. The Act “provided for sexual offenders, upon release from prison, to notify local law enforcement of [his or her] presence in the county where [he or she] intended to live.” Id. at 337, 772 A.2d at 1230.

The court went on to note that in 1997 the Maryland Legislature expanded the sexual registration offender statute, in accordance with the 1996 amendments to its federal counterpart, and “established additional classifications of offenders subject to the statutory registration requirements.” Id. at 338, 772 A.2d at 1231. The amended statute expanded the definitions for a “child sexual offender” and a “sexually violent offender” to include references to out-of-state convictions. Id. at 340-42, 772 A.2d at 1232-33. However, the court noted the
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The definition of a “sexually violent predator” omitted any reference to out-of-state convictions. Id. at 341, 772 A.2d at 1232.

Next, the court of appeals explained the two-pronged test for determining whether an individual is a sexually violent offender. Id. at 342, 772 A.2d at 1233.

First, the court must determine whether the accused committed more than one sexually violent offense. Id. If the court resolves this question in the affirmative, it must next determine whether the person is likely to commit additional sexually violent offenses. Id. In determining the likelihood of a repeat offense, section 792(b)(3) permits the court to consider “any evidence” it considers appropriate, which would include prior convictions. Id.

The court next attempted to “identify and effectuate the legislative intent underlying the statute(s) at issue”. Id. at 345, 772 A.2d at 1235 (quoting Derry v. State, 358 Md. 325, 335, 748 A.2d 478, 483 (2000)). The court first looked at the plain meaning of the words of the statute finding the “legislature specifically excluded reference to out-of-state convictions” when considering “whether someone qualifies as a sexually violent predator and the imposition of enhanced registration requirements.” Id. at 346, 772 A.2d at 1235.

The court went on to review the background and procedural process of the enactment of the statute in an effort to show the Legislature carefully considered the words that comprised the current statute. Id. at 347-50, 772 A.2d at 1236-37. The court stated although the history of the statute supported the inclusion of out-of-state convictions in the definitions of “sexually violent offense,” “sexually violent offender,” and “sexually violent predator,” the bill was rewritten before enactment only retaining reference to extraterritorial criminal acts in the definition of a “sexually violent offender.” Id. at 348-50, 772 A.2d at 1236-37.

In addition, the court explained that to read the definition of a “sexually violent predator” to include out-of-state convictions of sexually violent offenses would require an “interpretative insertion of words and phrases into the statutory language which the General Assembly consciously and deliberately removed from the definitions ‘sexually violent predator’ and ‘sexually violent offense.’” Id. at 350, 772 A.2d at 1238. Moreover, the court opined even if the legislature omitted references to out-of-state convictions by mistake, the court is incapable of “correcting ‘an omission in the language of a statute even though it appeared to be the obvious result of inadvertence’.” Id. at 351, 772 A.2d at 1238 (quoting Coleman v. State, 281 Md. 538, 547, 380 A.2d 49, 55 (1977)).

Graves v. State is critical to Maryland case law because it reestablishes the notion that courts cannot fix the perceived mistakes of the Legislature. Out-of-state convictions may not be used to determine whether a defendant is a sexually violent predator even when the perceived mistake has the potential to put at risk those who are typically afforded special protection from sexual criminals, such as women and children. Upon the legislature falls the sole responsibility of allowing Maryland courts to consider extraterritorial offenses in determining whether an accused is a sexually violent predator. They alone have the power to amend the statute thereby ensuring greater public safety.

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Holbrook v. State:
Arson and Reckless Endangerment Do Not Have to be Merged at Sentencing Because They are Considered Separate Crimes

By Toni Boettcher

In a case of first impression, the Court of Appeals of Maryland held reckless endangerment and arson are separate crimes for double jeopardy purposes and, therefore, do not have to be merged at sentencing. Holbrook v. State, 364 Md. 354, 772 A.2d 1240 (2001). The court further held Legislative intent was clear that persons convicted of arson might also be convicted of reckless endangerment.

Holbrook, the defendant, lived with his girlfriend and several of her family members at the residence that is the subject of this case. Following a physical altercation with his girlfriend, Holbrook was told to leave the home and not return. Holbrook returned to the home several times. When his girlfriend refused to talk to him, he threatened to “get all of them” or to “burn the house down.” On the day of the fire, Holbrook went to the home to talk to his girlfriend. After being told she was not home, Holbrook loitered outside the residence for about 45 minutes. Later that night, the house was set on fire. Holbrook was seen across the street from the home about ten minutes after the fire was discovered. The eight people inside the house escaped without injury.

Holbrook was tried in a bench trial in the Circuit Court for Wicomico County and was found guilty of one count of first-degree arson and eight counts of reckless endangerment. At sentencing, Holbrook received thirty years for the arson conviction, of which seven and one-half years were suspended. He was sentenced to five years for the first reckless endangerment conviction, to run consecutive with the arson sentence. Holbrook received five years for each of the seven remaining reckless endangerment convictions, to run consecutive to the first reckless endangerment sentence and to each other. The Court of Special Appeals of Maryland affirmed the trial court, and the Court of Appeals of Maryland granted certiorari and affirmed.

In reaching its decision, the court of appeals first examined legislative history to determine the Legislature’s intent when drafting the reckless endangerment statute. Id. at 362, 772 A.2d 1246. The court found the statute was constructed for the purpose of “deterring the commission of potentially harmful conduct before an injury or death occurs.” Id. at 366, 772 A.2d 1247(citing State v. Pagotto, 361 Md. 528, 762 A.2d 97 (2000)). Because the intent of the statute was to prevent the commission of potentially harmful conduct, a defendant could be found guilty even if no actual injury occurred. Id. The court determined it did not matter whether the accused intended his conduct to create a substantial risk of injury or death. Id. at 367, 772 A.2d 1247. Reckless endangerment can be found if the act would have been seen as a gross departure from the standard of conduct that a law-abiding person would observe. Id. (citing Minor v. State, 326 Md. 436, 605 A.2d 138 (1992)).

Next, the court examined the history of arson. Id. at 367, 772 A.2d 1248. The statute evolved from the common law, which defined arson as the “malicious burning of the dwelling of another.” Id. (citing Brown v. State, 285 Md. 469, 403 A.2d 788 (1968)). Today, the statute defines arson as “willfully or maliciously setting fire to or burning a dwelling or occupied structure, whether the property of the person or another.” Id. (citing Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 6(a)). “Willfully” is defined as an act that is done intentionally, knowingly, and purposefully. Id. at 369, 772 A.2d 1248. “Maliciously” is defined as an act done with the intent to harm a person or property. Id. To consider a structure a “dwelling,” it must be set up for overnight accommodations, although it is not necessary that the building actually be occupied at the time of the arson. Id.

The court then looked at the required evidence test, which determines for double jeopardy purposes whether the different offenses, growing out of the same occurrence, should be merged and treated as the same offense. Id. at 370, 772 A.2d
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1249. Under this test, if each offense contains at least one element necessary to secure a conviction that the other does not, the offenses are not considered the same and merger need not occur to prevent double jeopardy. *Id.* (citing *Williams v. State*, 323 Md. 312, 593 A.2d 671 (1991)).

In the instant case, arson and reckless endangerment each have one differing element; arson requires a defendant to act “willfully and maliciously,” while reckless endangerment requires a defendant to act “recklessly.” Therefore, the two offenses do not merge. *Id.* at 371, 772 A.2d 1249. In discussing the difference between the elements of arson and reckless endangerment, the court reasoned the Legislature was clear in its definition of “malicious” and “willful” in the arson statute and it intended arson to be a specific intent crime. *Id.* at 371, 772 A.2d 1250. On the other hand, in view of the fact that reckless endangerment requires a person to consciously disregard any risk of harm to other people, the Legislature intended reckless endangerment to be a general intent crime. *Id.* Furthermore, arson is a crime against habitation, whereas reckless endangerment is a crime against people. *Id.* at 372, 772 A.2d 1250. As Holbrook was convicted and sentenced on two separate crimes, the court determined there was no double jeopardy violation. *Id.* 373, 772 A.2d 1251.

Finally, the court considered the rule of lenity, which requires that when there is doubt or ambiguity as to the legislative intent regarding multiple punishments for the same act, the conflict will be resolved against “turning a single transaction into multiple offenses.” *Id.* (citing *Williams v. State*, 323 Md. 312, 593 A.2d 671 (1991)). The purpose of this rule is to prevent courts from increasing the statutory penalty when it is not certain how much punishment the Legislature intended. *Id.* The court determined the Legislature worded the reckless endangerment statute to remove the ambiguity. *Id.* at 374, 772 A.2d 1251.

In *Holbrook v. State*, the Court of Appeals of Maryland held reckless endangerment and arson do not have to be merged for sentencing purposes because they are separate crimes. In the past, the general intent of reckless disregard for consequences was substituted for the specific intent required to establish the *mens rea* element of arson. This is no longer the case. This ruling makes clear the importance of the protection of human life in our society. It also attempts to deter potentially harmful conduct by allowing for separate punishments for a single act, even if there are no injuries.

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Jackson v. State:
Judge’s Expansion Beyone the Outer Limits of His or Her Broad Discretionary
Rights Equates to Impermissible Error
By Julie Folkemer Zimmer

The Court of Appeals of Maryland held that a judge’s comments about a defendant’s place of origin during the sentencing process amounted to impermissible sentencing criteria. Jackson v. State, 354 Md. 192, 772 A.2d 273 (2001). In so holding, the court determined that the judge had erroneously considered the defendant’s origin in formulating the sentence. The court noted that a judge may be granted broad discretion, however the origin of a defendant is clearly an inappropriate factor and creates an inference of a lack of impartiality. Id. at 208.

On July 12, 1998, at 1:00 a.m., the Defendant, Valentino Maurice Jackson (“Jackson”), went to the home of the victim, Mitchell Woods (“Woods”), to buy cocaine, but Woods refused to sell it to him. On July 12, 1998 at 3:30 a.m. Jackson returned to Woods’ home and was observed by a patrol officer aiming a short-barreled shotgun at Woods’ chest. Jackson was then arrested and convicted in the Circuit Court for Howard County of first-degree assault, second-degree assault, reckless endangerment, and unlawful possession of a short-barreled shotgun. During sentencing, the trial judge imposed an 18 year sentence, and made the following statements:

Now, unfortunately, a number of communities in the lovely city of Columbia have attracted a large number of rotten apples. Unfortunately, most of them came from the city. And they live and act like they’re living in a ghetto somewhere. And they weren’t invited out here to behave like animals .... That is why people move out here to get away from people like Mr. Jackson. Not to associate with them and have them follow them out here and act like this was a jungle of some kind. So. It’s not. And our only chances to preserve it is to protect it.

Id. at 198.

In an unreported opinion, the Court of Special Appeals of Maryland affirmed in part, reversed in part, and vacated the sentences for reckless endangerment and second-degree assault.” Id. at 198. The Court of Appeals of Maryland granted certiorari to determine whether the judge’s comments at sentencing exceeded the outer limit of the judge’s broad discretion and was impermissible sentencing criteria. Id. at 207. Therefore, the court of appeals held the judge’s comments at sentencing exceeded the outer limit of the judge’s broad discretion and was impermissible sentencing criteria. Id. at 207.

The court of appeals began its analysis by referring to prior case law granting a judge very broad discretion in sentencing criminal defendants. Id. at 199. The court identified the applicable grounds for appellate review of a trial courts sentence. The court determined that one appealable issue is when the sentencing judge is “motivated by ill-will, prejudice, or other impermissible considerations.” Id. at 200. The Jackson court concluded that the comments made by the trial court constituted review under this theory. Id. at 200.

Next, the court compared the facts in Jackson to those in United States v. Diamond, 561 F.2d 557 (4th Cir. 1977), in which the court identified impermissible considerations made by the judge during the sentencing hearing. In Diamond, two defendants from New York were convicted in Virginia
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of theft of an interstate shipment of goods. During sentencing, the judge said, “I suppose that you have a constitutional right to commit a crime wherever you want to commit it. But the Court takes a dim view of people coming down from New York to commit their crimes in Virginia.” Id. at 200 (quoting United States v. Diamond, 561 F.2d 557, 559 (4th Cir. 1977)). In Diamond, the court concluded there was no bias during the trial, but that the comments at sentencing reflected bias. The determination made by the court that the defendants had received a fair and just trial led them to affirm the conviction, while reversing the sentence due to the evidence of bias during the sentencing hearing. In comparison, in Jackson, during sentencing the judge “gave the impression that he based his sentence, at least in part, on something beyond the facts and circumstances of the crime and the background of petitioner.” Id. at 201. Even though Jackson was not from Baltimore City, the judge may have factored in the defendant’s origin as a criteria during the sentence. The court in Diamond concluded that a defendant’s origin is irrelevant to and must not be considered in sentencing. In application of the holding in Diamond, and the statements made by the judge in Jackson, the court determined that while the judge has some degree of judicial discretion, a limitation imposed on a judge prevents the judge from using the defendants origin as a sentencing criteria.

The court also explored the idea that the judge’s comments may have been racially biased. The court believed that the comments made by the judge did not reflect actual racial prejudice, however the court cautioned that they could lead a reasonable person to draw such an inference that the sentence was racially motivated. Id. at 202. The court of appeals in Contee v. State, 223 Md. 575, 165 A.2d 889 (1960), examined the theory of improper appeals to racial prejudice. In Contee, an African American man was tried for rape of a Caucasian woman. In Contee, the prosecutor continually emphasized the distinction in race between the victim and the defendant. Id. at 203. The court of appeals reasoned that while the racial comments in Contee were blatant, the racially biased result remained similar to that in Jackson, 364 Md. at 207. The court in Jackson relied on Contee to uphold that the “matters of race and the matters of a defendant’s place of residence or origin are inappropriate sentencing considerations,” even when here is an absence of racial prejudice. Id. at 202.

The court of appeals analyzed prior case law to clarify the distinction between permissible and impermissible judicial remarks. The court applied the ruling in Poe v. State, 341 Md. 523, 671 A.2d 501 (1996), in which a judge’s comments concerning his religious and philosophical beliefs did not infer that the sentence was motivated by ill will. The judge in Poe stated, “what irritated [him] was this liberal philosophy .... I still believe in old fashion law .... Maybe one day they will say you should not sit here any more because you are too much of a dinosaur. You are too conservative in criminal law.” Id. at 206. (quoting Poe v. State, 341 Md. 523, 671 A.2d 501 (1996)). The court in Poe determined a judge could make remarks, such as those stated above, as long as the sentence and the sentencing factors were not motivated by ill will, prejudice, origin or other impermissible consideration. Id. at 206. The court distinguished the remarks in Jackson from those in Poe by illustrating that the statements in Poe concerned the judge’s personal beliefs and were not directed at any particular person. Id. at 207. Conversely, the remarks in Jackson were directed at the defendant and reflected how the judge viewed him personally. The court concluded that judicial comment should only reflect how the law views the defendant’s conduct, not how the judge views the defendants conduct.

The holding by the Court of Appeals of Maryland in Jackson v. State redefines the discretionary powers granted to trial judges. The court in Jackson, while limiting the discretionary authority, also reaffirms the fundamental right of fairness and the extension of that right to the sentencing phase. Id. at 207. The holding affirms Maryland’s distinction in limiting the discretionary powers of the trial judge, and reasserts the right to equal treatment regardless of race, origin, or religion. Jackson verifies the practitioner’s ability to appeal a sentence when a trial judge has stepped beyond the discretionary powers conferred upon the office, and factored a defendant’s race, religion or origin into the sentencing guidelines.
**Katsenelenbogen v. Katsenelenbogen:**

Under the Domestic Violence Statute the Standard for Issuing a Protective Order is Whether a Reasonable Person in the Applicant’s Position Fears Serious Bodily Harm

By Ryan N. Hoback

The Court of Appeals of Maryland held the standard for issuance of a protective order under the domestic abuse statute is an individualized objective one, which views the situation from the perspective of a reasonable person in the applicant’s position. *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122, 775 A.2d 1249 (2001).

Sergey Katsenelenbogen (“husband”) and Janet Katsenelenbogen (“wife”) were having marital problems. The husband fired the couple’s live-in nanny claiming that he needed the nanny’s room because he was unwilling to share a bedroom with his wife. During the ensuing argument between husband and wife, he allegedly shoved his wife and one of their children.

The wife filed a petition for protection from domestic violence in the Circuit Court for Montgomery County. The court entered an immediate ex parte order. At a full hearing, the court found the husband pushed the wife and granted the protective order.

The husband appealed to the Court of Special Appeals of Maryland arguing the court’s lifting of the protective order finding relief affordable under the statute. *Katsenelenbogen*, 365 Md. at 134, 775 A.2d at 1256. The statute is designed to protect and assist victims of domestic violence as a “new substantive policy consideration in protective order cases.” The court held the standard for issuance of a protective order is an “individualized objective one, which views the situation from the perspective of a reasonable person in the applicant’s position.” *Id.* at 135, 775 A.2d at 1257. The court did not believe the court of special appeals intended such a conclusion. *Id.* The court reasoned if the court of special appeals intended such a conclusion, it would have reversed the protective order without remand. *Id.*

The court of appeals admitted the “issuance of a protective order and the provision of this kind of relief . . . may have consequences in other litigation,” such as divorce, support, or child access cases. *Id.* at 137, 775 A.2d at 1258. However, the court reiterated that the concern of a court is “to do what is reasonably necessary—no more and no less—to assure the safety and well-being of those entitled to relief.” *Id.*

The court turned its attention to clarifying the proper standard for issuance of a protective order. *Id.* at 138, 775 A.2d at 1259. A protective order may only be issued under Section 4-506(c) of the Family Law Article when at least one act of abuse is proven by clear and convincing evidence. *Id.* at 130, 775 A.2d at 1254. In accordance with Section 4-501(b), abuse can be an act that causes serious bodily harm, an act that places a person eligible for relief in fear of imminent serious bodily harm, assault in any degree, an act or attempt of rape or sexual offense or false imprisonment. *Id.* at 130-31, 775 A.2d at 1254.

The court held the standard for issuance of a protective order is an “individualized objective one, one that looks at the situation in the light of the circumstances as would be perceived by a reasonable person in the petitioner’s position.” *Id.* at 138, 775 A.2d at 1257.
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A.2d at 1259. An abused person may be particularly aware of non-verbal signals that threatened them in the past but which someone else might not understand to be threatening. Id. at 139, 775 A.2d at 1259. A court must also take into account any vulnerability of the victim “by virtue of physical, mental or emotional condition or impairment.” Id. at 139, 775 A.2d at 1260. This case addressed an unresolved issue in a matter of public concern and established a rule for the future. In so holding, the court strengthened the position of domestic violence victims by providing for protection orders to be issued viewing the situation from the eyes of the individual. The court of appeals made a strong statement, evidenced by its taking a moot case, that even acts amounting to minor battery constitute domestic violence. The court’s clarification of the proper standard for issuing a protective order has reduced the burden to all that seek such an order. By affirming the notion that a court must look through the eyes of the victim without considering any future litigation between the parties, the abused now have sharper teeth in the fight to combat the growing problem of domestic violence.

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The Supreme Court of the United States held electronic database reproduction of periodicals results in copyright infringement of the author’s rights, unless otherwise agreed. New York Times v. Tasini, 121 S. Ct. 2381 (2001). In so ruling, the Court protected the individual authors’ copyright from exploitation by and for the benefit of the publishers.

Over the course of three years, six freelance authors ("Authors") wrote a total of twenty-one articles for the New York Times Co., Inc., Newsday, Inc., and Time, Inc. ("Publishers"). The Authors each registered copyrights for their individual articles. The Publishers had registered collective work copyrights for each work in which an article originally appeared. The Authors were hired as independent contractors by the Publishers. The Publishers did not obtain consent from any of the Authors to place the articles in an electronic database.

The Publishers had a license authorizing LEXIS/NEXIS to reproduce and sell the articles that appeared in the three periodicals. Times, one of the Publishers, also had an agreement with another company authorizing the creation of CD-roms using the text of the articles. In each of these electronic forms (LEXIS and CD-rom), each article appeared individually, without any connection to the other articles originally published in the same edition.

The Authors filed a civil suit against the Publishers in the United States District Court for the Southern District of New York seeking declaratory relief, an injunction, and damages.

Both the Publishers and the Authors filed motions for summary judgment. The district court granted the Publishers’ motion. The Authors appealed the judgment of the district court to the Second Circuit Court of Appeals which granted summary judgment in favor of the Authors. The United States Supreme Court granted certiorari to determine whether the copying of the articles was privileged under 17 U.S.C.S. ‘201(c). The Court affirmed the court of appeals decision in favor of the Authors.

The Court held the Publishers infringed upon the copyrights of the Authors because electronic databases do not copy and display the articles as part of a collective work. New York Times v. Tasini, 121 S. Ct. 2381, 2387. The Court first reviewed the history of 17 U.S.C.S. ‘201(c), Id. at 2387-88. Before the 1976 amendment to the Copyright Act, authors’ rights were not protected when their article was published in a collective work because the law "recognized a freelance author’s copyright in a published article only when the article was printed with a copyright notice in the author’s name." Id. at 2388. Because publishers had "superior bargaining power," authors often lost their rights to the article. Id. The theory behind this was copyright "indivisibility" meaning "when a copyright notice appeared only in the publisher’s name, the author’s work would fall into the public domain, unless the author’s copyright, in its entirety, had passed to the publisher." Id.

By amending the Copyright Act in 1976, Congress sought to further protect the rights of authors with respect to their work product. Id. The 1976 amendment replaced the doctrine of indivisibility with the notion that a copyright is "a bundle of discrete exclusive rights." Id. In ‘201(c), Congress effectively created two distinct copyrights, one for the author and one for the collective work in which the author’s article would appear. Id. The statute provides three categories in which the publisher has the privilege to copy the work: (1) the collective work privilege, (2) the revision of the collective work privilege, and (3) any later collective work in the same series privilege. Id. at 2389.

The Court noted the Publishers’
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main argument against the Authors’ charge of infringement of copyrights was “that reproduction and distribution of each Article by the Databases lie within the ‘privilege of reproducing and distributing the [Articles] ... as part of...[a] revision of that collective work.’” Id. at 2390. The Court rejected this argument because it lessened the Authors’ exclusive rights in their articles.

In its analysis, the Court concentrated on how the articles were presented to, and perceived by, the user of the Databases in order to determine whether the copying and distribution of the articles fell within the revision of the collective works privilege of ‘201(c).’ Id. The Court noted the articles were presented out of context from their original production because “each article appears as a separate item within the search result.” Id. at 2390, 2391. The Court stated the articles could be viewed as “a new compendium” or as “individual articles presented individually.” Id. at 2391. The Court concluded that the articles, as reproduced in the Databases, were neither part of nor a revision of the original edition.

The Court next evaluated the Publishers argument of media neutrality and noted that transferring work between media does not involve altering the character of the work for copyright purposes. Id. at 2392. In addressing this argument, the Court recognized the legitimacy of the concept of media neutrality but stated, “the transfer of articles to the Databases does not represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another.” Id. Why does this argument fail? In rejecting the Publishers’ argument, the Court concluded media neutrality should serve as protection of the Authors’ rights to the individual articles when presented outside of the collective work context. Id.

The Court then evaluated the Publishers asserted protection under ‘201(c).’ The Publishers asserted they were protected “because users can manipulate the Databases to generate search results consisting entirely of articles from a particular periodical edition.” Id. at 2393. The Court analogized this situation to one in which the library staff, in response to a search request, gathered all of the articles from a certain periodical. Id. The Court rejected this argument, as well, and reasoned that merely because a database can be manipulated to produce a new document “does not mean the database is not infringing.” Id.

Lastly, the Court examined the issue of public policy. The Publishers maintained a judgment in favor of the Authors would have “‘devastating’ consequences” and would “punch gaping holes in the electronic record of history.” Id. The Publishers also claimed easy access would no longer be available to periodical texts of years past. Id. at 2393. The Court also rejected this argument, noting Publishers and Authors are free to enter into a contract allowing Database reproduction of the articles. Id. The Court concluded “speculation about future harms is no basis for this Court to shrink authorial rights Congress established in ‘201(c).’” Id. at 2394.

By ruling electronic reproduction of periodical articles without the author’s consent is copyright infringement under ‘201(c),’ the Supreme Court of the United States protects the individual rights of authors from the sometimes monopolizing control of the publishing world. This ruling prevents unjust enrichment by the publishers and provides authors the opportunity to continually benefit from their work product. Another consequence of this ruling is the promotion of print sources. Electronic databases have dominated the publishing arena thereby causing economic hardship for authors. This ruling supports authors and print sources. The ruling allows those, whose livelihood is writing, to have their rights protected. It also allows authors to benefit from the fruits of their labor in the future, as opposed to having the publishers benefit continually from the authors’ works, as was the case before the 1976 amendment to the Copyright Act.