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The Editorial Board and Staff of the University of Baltimore Law Forum have worked tirelessly to ensure Volume 33.1 continues in the journal’s long tradition of being interesting, insightful, and informative. This is the first of two publications by this Editorial Board and Staff. This issue continues to highlight many recently decided cases in our traditional “Recent Development” (RD) format, which succinctly summarizes the facts, procedure, holding, and analysis of a case.

Our article in this issue, Federal Firearms Prosecutions: A Primer by Phillip S. Jackson, will acquaint Maryland practitioners with various issues a client may encounter if charged with a federal firearms violation. The article will orient readers with a federal firearms charge and affirmative defenses. Additionally, the article will discuss issues involving pretrial detention, search and seizure, and sentencing.

On the technology front, I encourage readers to “surf” the University of Baltimore School of Law’s updated and improved website at law.ubalt.edu/lawforum. Our website provides readers access to current issues, as well as past issues.

Finally, I would like to thank my Editorial Board for their significant contributions to this issue and the journal in general. Melissa Machen Shannahan, with the assistance of John MacClean, ensured the appropriate sampling and quality of RDs for this issue. Farrah Arnold’s many hours of solicitation and eventual editing of articles is reflected in the interesting and well-written article in this issue. Justin Flint’s organizational effectiveness kept our production schedule on time and running smoothly. Havalah Neboschick’s work as Manuscripts Editor was sincerely appreciated, especially considering she had to simultaneously wear the hat of President of the Student Bar Association. Last, but certainly not least, I would like to thank my fiancé, Rachel Zbyszinski, for her continuing support and love throughout this challenging but rewarding publication process.

Ryan N. Hoback
Editor in Chief
FEDERAL FIREARMS PROSECUTIONS: A PRIMER

By Phillip S. Jackson

Introduction

For the past several years, the U.S. Attorney’s Office, in coordination with the Bureau of Alcohol, Tobacco and Firearms and area police departments, has increasingly pursued in the U.S. District Court the prosecution of persons with previous criminal felony convictions found in possession of firearms. Until recently, in almost all such cases, there was the prospect of greater punishment for those convicted in the federal courts of such a crime than in the state courts of Maryland. The purpose of this article is to acquaint the criminal practitioner with a variety of salient issues he or she will confront when involved in a case where a client faces federal firearm charges.

The Crime

In the majority of cases pursued under this federal firearms initiative, the primary charge is an alleged violation of 18 U.S.C. § 922(g)(1)(2002), colloquially known as a “felon in possession” charge. That statute reads, “It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, to . . . possess in or affecting commerce, any firearm or ammunition.” Although prosecutions initiated under this statute usually involve the alleged illegal possession of a handgun, note that it is also unlawful for a convicted felon to possess firearm ammunition. Indeed, a significant minority of federal firearm prosecutions involved defendants in possession of ammunition without a handgun. The bail and sentencing provisions outlined below apply with equal weight to those charged with either unlawful possession of a firearm or illegal possession of ammunition.

To convict a defendant for unlawful possession of a firearm by a felon, the government must prove three basic elements: (1) that the defendant possessed a firearm or ammunition; (2) that prior to his or her possession of that weapon or ammunition, the defendant had suffered a disqualifying criminal conviction; and (3) that the firearm or ammunition affected interstate commerce. A defendant convicted of a Section 922(g) violation faces a ten-year maximum term of imprisonment, except in those cases where because of his or her prior criminal record a defendant is considered an “armed career criminal” as defined by 18 U.S.C. § 924(e). The “armed career criminal” provisions of Section 924(e) are explored in more detail below.

Although the mens rea aspect of this crime requires the government to prove defendant knowingly possessed a firearm, it is not necessary that the government prove defendant knew that his or her possession was unlawful, that he or she knew of his or her prior felony conviction, or that he or she knew the firearm was somehow involved in interstate commerce.

The lion’s share of litigation in these cases center on search and seizure issues and the possession element of the crime. Whether a particular weapon is a firearm, whether a defendant has been previously convicted of a disqualifying crime, and whether the firearm or ammunition affects interstate commerce are not typically points of contention at trial.

The definition of “firearm” is found at 18 U.S.C. § 921(a)(3), and includes:

(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
(B) the frame or receiver of any such weapon;
(C) any firearm muffler or firearm silencer; and
(D) any destructive device.

By that definition, the government need not allege or prove that the firearm is operable. Antique firearms are excluded from the definition of “firearm” and, therefore, from application of the criminal statute. “Ammunition” as defined by 18 U.S.C. §922(a)(17)(2002), includes
“cartridge cases, primers, bullets [and] propellant powder designed for use in any firearm.”

For the element concerning a defendant’s prior criminal conviction to apply, it is only necessary that the defendant’s prior criminal conviction subjected him or her to a potential penalty of incarceration of more than one year. It is immaterial that the actual sentence meted out involved no term of imprisonment or a term of imprisonment of less than a year; however, a misdemeanor conviction under state law and punishable by less than two years incarceration would not disqualify a defendant from lawful firearm possession under 18 U.S.C. § 922(g)(1).

So, for example, a defendant whose only prior conviction was for a misdemeanor theft in Maryland (a crime whose maximum sentence is eighteen months) could not be federally prosecuted under Section 922(g)(1) for unlawful possession of a firearm.

As it is seldom tactically advantageous to have the prior criminal conduct of one’s client accentuated at trial, this is an element that is typically readily stipulated to by defense counsel. When addressed as a stipulation, the district court judge should only allow evidence of the fact of the disqualifying conviction. No information about the nature or circumstances of that conviction should be imparted to the jury. When linked with an appropriate limiting instruction to the jury, the potential prejudicial effect of the client’s prior criminal record can thereby be kept to a minimum.

With an eye to that legislation, the best course of action for a practitioner representing a client charged with a Section 922(g) violation may be to request a pre-sentence report very soon after entering the case. The district court can, at its discretion, order a pre-sentence report even where a defendant has not yet been convicted of the crime with which he or she has been charged. In the normal course of investigation, the U.S. Probation Officers do a very thorough and accurate examination of defendant’s prior criminal conduct. A pre-sentence investigation may very well determine that in light of the above described legislation, your client may not be disqualified from possessing a firearm at all. At worst, the preliminary pre-sentence report will more fully inform you and your client of the potential exposure he or she faces. As outlined below, your client’s potential length of incarceration is very much a factor of his or her prior criminal record.

As to the interstate commerce element, it is sufficient that the government shows that the firearm was manufactured outside the state where the defendant possessed it. This too is an element typically handled for expediency’s sake by stipulation. Since the Supreme Court’s decision in *United States v. Lopez*, there have been some rumblings that more may be required in the way of a showing of a measurable or substantial effect on interstate commerce. However, in recent decisions the Fourth Circuit has declined to read into *Lopez*, and its progeny, any greater burden than that outlined above.

The same precepts that govern other crimes having a possessory element govern the possession element of a Section 922(g)(1) violation. The government need not prove the defendant had actual or exclusive possession of a firearm; constructive or joint possession is sufficient. The government may prove constructive possession by demonstrating that the defendant exercised, or had the power to exercise, dominion and control over the firearm. On that basis, the Fourth Circuit upheld the conviction of a defendant where the firearm was seized from a residence in which the defendant had been observed for two days prior to the execution of that warrant although he was not present at the time of the warrant’s execution and in which the defendants personal papers were found proximate to the seized firearm. Similarly, the court upheld the conviction where the gun was recovered from the defendant’s bedroom, and at the time of his arrest, ammunition of a matching caliber was found in the defendant’s pocket. On the other hand, the court found evidence insufficient to sustain a conviction where the firearm had been recovered from under the seat of the defendant who was merely a passenger in an automobile.

With respect to joint possession, the Fourth Circuit affirmed in an unpublished case the firearm conviction of the driver of a vehicle who never had actual or exclusive possession of a firearm. In that matter, a front seat passenger was observed by the police pointing a handgun out the car window, but the court was able to infer, based on the police chase that followed, that the driver had knowledge of the firearm’s presence in the car, and had apparently shared in the purpose of the passenger’s brandishing that weapon.

In my legal experience, the “possession” aspect of
the crime is the most contested element of a Section 922(g) prosecution. As a practical matter, it is more a matter of advocacy and persuasion as applied to the specific facts of the case, than knowledge of the legal parameters of “possession” that are key to the disposition of these cases. Quite often, the firearm in issue is not found in the exclusive possession of the defendant, as when a gun is found lying in a vehicle full of passengers. Equally often, the defendant is not found proximate to the firearm when it is seized, as when a gun is found in an empty residence. Normally, it will not be the issue of sufficiency of the evidence that determines your client’s fate, but rather your skill in distancing the client from the seized weapon.

Affirmative Defenses

In United States v. Perrin, the Fourth Circuit joined several other circuits in ruling that a defendant charged with a Section 922(g) violation has available to him or her the claim of self-defense. The court indicated, however, it was prepared to recognize that defense in only a very narrow range of cases. To raise the defense of justification or self-defense, a defendant must produce evidence that would allow the fact-finder to conclude: (1) the defendant was under an unlawful and present threat of death or serious bodily injury; (2) the defendant did not recklessly place himself or herself in a situation where he would be forced to engage in criminal conduct; (3) the defendant had no reasonable legal alternative to both the criminal act and the avoidance of the threatened harm; and (4) there was a direct causal relationship between the possession of the firearm and the avoidance of the threatened harm.

In its reported decisions on this issue, the Fourth Circuit emphasized the threat causing the defendant to arm himself must be imminent. In that regard, the court has held that even where a defendant’s fear of attack may have been both rational and his true motivation for carrying a firearm, a self-defense jury instruction was not warranted in a case where the defendant, in the course of his legitimate profession, was shot eight months previous to his arrest and had, therefore, purchased a firearm in response to that earlier attack. Moreover, a self-defense jury instruction was not warranted in a case where two days prior to the arrest, a shotgun-toting enemy stalked the defendant.

On the other hand, the court endorsed a self-defense jury instruction in those cases where the threat was both deadly and immediate. For example, where a defendant without provocation was threatened by a gunman, and then wrestled the gun away from his assailant, the jury should be properly instructed on self-defense.

Bail/Detention

Once arrested, the issue of pre-trial detention is naturally the prime concern of most defendants. In that regard, it is important to be familiar with 18 U.S.C § 3142 (2000). I will here endeavor to briefly highlight Section 3142’s significant provisions as they affect alleged firearm violations. Under Section 3142’s statutory scheme, the government’s ability to seek detention of an arrestee is not plenary. Rather, the government can seek detention only if the charged conduct is (1) “a crime of violence;” (2) “an offense for which the maximum sentence is life imprisonment or death;” (3) a controlled substance violation that carries a term of ten years or more imprisonment; or (4) a felony and the defendant has been previously convicted of any combination of two or more violent crimes or narcotics felonies. In addition, the government can also seek detention if the defendant is a serious flight risk or presents a serious risk that he or she will obstruct or attempt to obstruct justice.

Because a defendant who finds himself or herself charged with a federal handgun violation will typically have an extensive criminal record, it is usually on the ground that a defendant has two or more prior violent crime and/or narcotics felony convictions that the government moves for detention. As outlined above, in such cases, Section 3142 explicitly authorizes the government to move for pretrial detention. However, in cases where a defendant has only one prior conviction for a violent crime or narcotics felony the law is unsettled as to the government’s authority to move for detention. In such cases, usually the only basis for the government’s detention motion would be that the Section 922(g) violation constitutes a crime of violence. Although it is long settled that for sentencing guideline purposes a Section 922(g)(1) violation is not a “crime of violence,” it is unclear whether, for Section 3142(f) purposes, a felon in possession charge is a “crime
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of violence” that would allow the government to move for detention.

A “crime of violence” includes those felonies that, by their nature involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. In concrete terms, the issue is whether the government can ask for the detention of a defendant who, while on parole for a violent felony, is caught with a loaded firearm on the street in an open-air drug market, and then charged with a Section 922(g) violation. To date, the Fourth Circuit has not addressed this issue. Those circuits that have wrestled with this issue have come to divergent conclusions.48 Indeed, within this district there has been a split. In United States v. Aiken,49 the court held, as a matter of law, a felon in possession charge constitutes a “crime of violence” for purposes of Section 3142(f), while Judge Chasanow has more recently held to the contrary.50

In those cases where the government is statutorily authorized to move for the pre-trial detention of a defendant, it must convince the presiding magistrate by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of the community.51 In making that decision, the magistrate must consider the following factors:

1. the nature and circumstances of the offense charged;
2. the weight of the evidence against the defendant;
3. the history and characteristics of the defendant, including such things as his or her prior criminal record, employment record, ties to the community, physical and mental condition, and whether at the time of the charged violation the defendant was under some form of court supervision; and
4. the seriousness of the danger to the community that would be posed by the defendant’s release.52

The hearing in which the detention issue is fleshed out usually occurs at a time removed from a defendant’s initial appearance before the magistrate. This delay is typically occasioned by a request for continuance made by either party that must be granted. If the government makes the continuance request the detention hearing can be delayed for up to five days.53 In the interim, an agent of United States Pretrial Services will interview the defendant, conduct a background investigation, and prepare a report addressing the factors that must be weighed by the court in making its decision.

Finally, should either party choose, 18 U.S.C. § 3145 (2000) provides for review by the district court of a magistrate’s detention/release determination. Such reviews are conducted de novo.54

Search and Seizures Issues

Search and seizures issues confronted by the practitioner in such cases will vary widely. A comprehensive treatment of those issues in this article is impracticable. However, as a general matter, firearm seizures result from an on-the-street encounter or a car stop, or a search warrant.

In regard to those firearms seized as the result of the execution of a search warrant, the practitioner will want to be familiar with Arkansas v. Wilson55 (cases where a no-knock entry was made); United States v. Lalor56 (issue as to the nexus between the firearm seized and the residence for which the warrant was sought); Illinois v. Gates57 (analysis of what comprises “probable cause”); United States v. Leon58 (for the metes and bounds of the “good faith exception”); and Franks v. Delaware59 (in those cases where it is suspected the affiant misrepresented facts to the issuing magistrate).

With regard to those firearms seized as the result of an on-the-street encounter between the police and your client, the practitioner will want to be familiar with California v. Hodari D.60 (where the defendant discarded the drugs during a police chase); United States v. Mendenhall61 (an analysis of the point at which an on-the-street encounter becomes a detention for Fourth Amendment purposes); Terry v. Ohio62 (an analysis of what amount of evidence is necessary to briefly detain and frisk a suspect); and J.L. v. Florida (in those cases where the stop was prompted by an anonymous tip).

In regard to those cases arising from a gun found in a car, the practitioner will want to be acquainted with Delaware v. Prouse63 (for a discussion of the quantum of evidence needed to justify a warrantless traffic stop); Michi-
gan v. Long (for a discussion of the lawful scope of a warrantless search of an automobile made incident to a Terry-type stop); Maryland v. Wilson (for the proposition that, as part of a lawful traffic stop the police can order the occupants of a vehicle to get out of the stopped car); New York v. Belton (for a discussion of the lawful scope of a warrantless search of a car made incident to the arrest of a car’s occupant); Carroll v. United States and United States v. Ross (for discussions of the quantum of evidence needed for and the lawful scope of a warrantless search of an automobile).

Sentencing

As outlined above, a defendant who does not qualify for enhanced sentencing under 18 U.S.C. § 924(e) faces a ten-year maximum term of incarceration. In meting out a sentence in such a case, the judge’s sentencing options are circumscribed by the United States Sentencing Guidelines that, unlike Maryland’s sentencing guidelines, are not merely precatory.

A pair of numeric scores drives the federal sentencing guideline scheme. One score involves a defendant’s prior criminal conduct, and is referred to as the Criminal History Category. The crime for which a defendant is being sentenced is also accorded a numeric value, and is referred to as the Offense Level. Where those two scores intersect on the guideline matrix, a range of months is found. Within that range of months the federal judge must sentence a convicted defendant to prison.

In ascertaining the appropriate offense level for convictions of 18 U.S.C. § 922(g)(1) violations, United States Sentencing Guidelines Manual § 2K2.1 is the pertinent reference point. Generally speaking, if a defendant has previously been convicted of any combination of two “controlled substance offenses” or “crimes of violence,” his or her offense level is twenty-four. If a defendant has previously been convicted of only one narcotics or violent felony, his or her offense level is twenty. There are certain offense specific adjustments that could enhance or reduce the offense level depending on the circumstances of the crime of conviction. As an example, if the firearm at issue was stolen or had an obliterated serial number, that offense level would be increased two levels. Those adjustments are outlined in U.S.S.G. § 2K2.1(b).

For determining a defendant’s criminal history category, Section 4A.1 of the United States Sentencing Guidelines Commission manual is the relevant guideline. By that section, the number of a defendant’s previous convictions, the length of imprisonment imposed for those convictions, and the defendant’s status vis-à-vis the criminal justice system at the time of the crime are all factored in determining the defendant’s criminal history category.

As an example, a defendant who, within the past two years was convicted of narcotics distribution, received a suspended sentence, and who was still on probation at the time of the instant Section 922(g) violation, would by § 4A1.1’s computations have a criminal history category of II. Having suffered only one previous conviction for a narcotics or violent felony, this hypothetical defendant’s offense level would be twenty per Section 2K1.1(a)(4). Assuming this defendant’s conviction came as the result of a jury trial, his sentencing guideline range would be 37-46 months of incarceration. Under such circumstances, (indeed under almost all circumstances where a defendant has only one prior narcotics or violent felony conviction) a federal sentence would be less than the five-year minimum mandatory sentence that would attach to a conviction obtained under Maryland’s analogous firearms statute.

That would certainly not be the case where a defendant convicted of a Section 922(g)(1) violation suffered three previous convictions of any combination of “violent felonies” or “serious drug offenses” committed on occasions different from one another. Under such circumstances, notwithstanding the sentencing provisions outlined above, per 18 U.S.C. § 924(e)(1) (more popularly termed the Armed Career Criminal Act or “ACCA”), a defendant faces a minimum mandatory fifteen-year term of imprisonment and a maximum life term of incarceration. The term “serious drug offense” is defined at 18 U.S.C. § 924(e)(2)(A) as any federal narcotics offense for which the maximum term of imprisonment is ten years or more; or any state narcotics violation involving the manufacture, distribution or possession with intent to distribute narcotics for which the maximum term of imprisonment is ten years or more. By that definition, a conviction for simple possession of narcotics would not be a “serious drug offense,” and would, therefore, not count as a predicate conviction for ACCA purposes. Under Maryland
law, the maximum sentence for distribution of marijuana is only five years; therefore, a conviction for the distribution, manufacture, or possession with intent to distribute marijuana similarly would not be a "serious drug offense."

In pertinent part, 18 U.S.C. § 924(e)(2)(B) defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that -- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." In other words, a crime will be classified, as a "violent felony" if it is specifically so designated, e.g. a burglary has an element involving the use of force, e.g. a murder or robbery, or its commission, involves a serious risk of injury to others.

In Taylor v. United States, the Court wrestled with the issue of how a sentencing court should approach a defendant’s prior criminal record in determining what qualifies as a "violent felony" conviction, where the prior conviction is not explicitly so stamped by Section 924(e)(2)(B). Choosing from among alternative approaches, the Court adopted a "categorical approach," in which weighing a defendant’s prior record, the sentencing court is required generally "to look only to the fact of conviction and statutory definition of the prior offense." Note that although Taylor usually restricts the district court’s inquiry to ascertaining the statutory definition of the prior offense, the Court also recognized that "the categorical approach ... may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases . . . ." On that language, in United States v. Cook, the court held where a crime may be committed by both violent and nonviolent means, "the sentencing court must examine the charging papers and the jury instructions” to determine whether the crime for which the defendant was convicted was done by violent means.

On paper this process sounds simple and straightforward. In practice these determinations have spawned manifold and wide-ranging appellate decisions. Because the various states have disparate definitions for similarly titled crimes, even those crimes explicitly designated in the ACCA as "violent felonies" are often the subject of heated appeals. As just one example, before Maryland re-codified its breaking and entering statutes in 1994, "burglary" was defined as "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." In Missouri, however, a burglary conviction could result from the unlawful entering of a building for the purpose of committing a crime therein irrespective of whether the building entered was a dwelling, the entry occurred at night, or the crime intended was a felony or misdemeanor. In having to choose from a host of possible definitions, federal courts were, therefore, faced with the difficult task of determining what constitutes a burglary for Section 924(e)(2)(B).

In addressing this dilemma, the Taylor Court concluded Congress did not have intend the crime of "burglary" to have a variety of meanings varying the impact of prior convictions for like crimes depending on the state where a defendant’s prior convictions occurred. Instead, the Court reasoned "Congress meant by ‘burglary’ the generic sense in which the term is now used in the criminal codes of most States . . ., [a crime which] contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Thus, what under Maryland law had historically been deemed a "storehouse breaking" would for Section 924(e) purposes be considered a "burglary."

Even more problematic is discerning the effect of prior convictions for crimes not explicitly categorized as "violent felonies,” defined as those crimes involving a serious risk of injury to others. Although not having an element the intentional application of force, such crimes as escape and involuntary manslaughter have been construed as "violent felonies” because their commission in all cases involves a serious potential risk of physical injury. There are other crimes where the commission involves a significant risk of injury to others (e.g., resisting arrest and possession of a firearm in relation to a drug trafficking crime), which perhaps could perhaps serve as predicate crimes under the ACCA and which undoubtedly the appellate courts will be asked to construe in the future.

Where the prior conviction was for a crime that can be committed by either violent or non-violent means, the sentencing court may consider the charging document underlying that prior conviction, the instructions made to the jury at the trial of that crime and the pre-sentence reports prepared as an aid for sentencing that prior convic-
In United States v. Coleman, the issue was whether a previous common-law assault conviction should count as a “violent felony” conviction. A common law assault may encompass some conduct that does not involve the use, attempted use, or threatened use of physical force. In determining whether that prior assault conviction was a “violent felony” for Section 924(e) purposes, the district court properly referred to the probable cause statement that accompanied the statement of charges. The probable cause statement indicated, that in the course of the alleged assault Coleman pointed a gun at a police officer. On this basis, the circuit court concluded that Coleman’s prior assault conviction was properly categorized as a “violent felony.”

Often the pre-sentence report will note several previous convictions that share a common sentencing date. For instance, if the police arrest a burglar who is subsequently charged with multiple burglaries that occurred over the course of a month, the burglar may end up pleading, and being sentenced to a number of burglaries at one time. Under such circumstances, the issue becomes whether those prior offenses were “committed on occasions different from one another.” If treated as having been committed on separate occasions, each burglary charge would be separately counted as a qualifying conviction for Section 924(e) purposes. If not, the convictions would count collectively as only one prior conviction, and a significantly different sentence would be meted out. Convictions occur “on occasions different from one another” if each of the prior convictions arose out of a separate and distinct criminal episode. Courts have applied a variety of factors to determine whether multiple convictions constitute separate and distinct criminal episodes, including whether the offenses arose in different geographic locations, whether the nature of the offenses were substantially different and whether the offenses involved different victims and different criminal objectives. In the above scenario, the burglar who in a single court proceeding had been convicted and sentenced for multiple burglaries would likely be treated as an armed career criminal and would face a minimum mandatory fifteen-year term of imprisonment.

The ability of counsel to attack the viability of those prior convictions is sharply circumscribed. In a case where the defendant sought to have the sentencing court review his previous convictions on the grounds that he was ineffectively represented by counsel, the Supreme Court held with the sole exception of those prior convictions where the court failed to appoint counsel for the defendant, the defendant in a federal sentencing proceeding has no right to collaterally attack his previous convictions at his sentencing for a federal firearm violation.

Finally, once it is determined that a defendant is subject to the provisions of the ACCA, the pertinent sentencing guideline is found in Section 4B1.4 of the United States Sentencing Guideline Manual. Under Section 4B1.4, a defendant’s criminal history category will never be lower than Category IV, and a defendant’s offense level will never be lower than thirty-three. Therefore, the lowest sentencing guideline range for an ACCA-qualified defendant convicted at trial of a Section 922(g)(1) violation is from 188 to 235 months.

ABSTRACT

Philip S. Jackson is a 1984 graduate of the University of Baltimore School of Law. For the past ten years, the author has been an Assistant United States Attorney with the U.S. Attorney’s Office for Maryland assigned to the Violent Crime/Narcotics section of that Office.

1. During 2001, Article 27, Section 449(e) of the Annotated Code of Maryland was enacted, which imposed a mandatory five-year term of incarceration for violators who, having been previously convicted of certain violent crimes and narcotics felonies, were found in possession of a firearm.
3. See id.
4. Id.
5. Id.
6. Accordingly, the terms “firearm” and “ammunition” will be used interchangeably throughout this article.
9. See id.
10. See id.
14. “Destructive device” is defined at 18 U.S.C. § 921(a)(4) and includes such things as hand grenades, mines and bombs.
15. United States v. Willis, 992 F.2d 489, 491 n.2 (4th Cir. 1993).
22. See id. at 39, 42.
23. See id.
30. Id. at 134, 136-137 (4th Cir. 2001).
31. Id.
34. See United States v. Richardson, 833 F.2d 310, 1987 WL 38924 (4th Cir. 1987).
35. Id.
38. United States v. Paollello, 951 F.2d 537 (3d Cir. 1991); United States v. Panter, 688 F.2d 268 (5th Cir. 1982); United States v. Lemon, 824 F.2d 763 (9th Cir. 1987).
39. Perrin, 45 F.3d at 875.
40. Id. at 873-74.
42. Perrin, 45 F.3d at 875.
43. Paollello, 951 F.2d at 542-43.
44. “Any offense punishable by death or imprisonment for a term exceeding one year is a felony”. 18 U.S.C. § 1.
46. Id.
48. See, e.g., United States v. Dillard, 214 F.3d 88, 104 (2nd Cir. 2000) (held the risk of violent use posed by a convicted felon’s possession of firearms is significant, and therefore a Section 922(g) violation is a crime of violence within the meaning of 18 U.S.C. § 3156); and United States v. Singleton, 182 F.3d 7, 12, 16 (D.C. Cir. 1999) (concluding that a Section 922(g) charge is categorically not a crime of violence within the meaning of 18 U.S.C. § 3156, accordingly defendant cannot be detained on that basis).
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Schemes of Barratry Violate Strong Public Policy and Are Void and Unenforceable in Maryland

By: Dawn Lyon

The United States Court of Appeals for the Fourth Circuit held schemes of barratry violate strong public policy and are void and unenforceable in Maryland. Accrued Fin. Serv., Inc. v. Prime Retail, Inc. 298 F.3d 291 (2002). The court held contractual schemes used to stir up and promote litigation for the benefit of the promoter rather than the real party in interest violates Maryland’s current public policy. Id. at 300. In so holding, the court of appeals narrowly interpreted the statute, ignoring the primary purpose of its enactment. Id.

Accrued Financial Services, Inc. (“AFS”), a California corporation in the business of conducting lease audits for tenants in commercial buildings and factory outlet malls, retained a percentage of the lease discrepancy amount collected according to its audits. AFS required each tenant to assign all legal claims the tenant had against the landlord and to give AFS control over any litigation it might initiate to enforce the claims. In a typical “Letter of Agreement” between AFS and the tenant, the tenant authorized AFS to retain a fee of 40-50% of any “discrepancy” discovered and collected. If the tenant chose not to pursue the discrepancy, the tenant was required to pay AFS 40% of the discrepancy in exchange for its client services. AFS conducted audits at a Baltimore factory mall owned by Appellee, Prime Retail, Inc. (“Prime Retail”). AFS maintained Prime Retail imposed unexplainable charges and assessments to its tenants, which were considered excessive errors.

In May 1998, on behalf of seventeen tenants, AFS sent a demand letter to Prime Retail for claims discovered and acquired through assignments. Prime Retail filed an action in the Circuit Court for Queen Anne’s County seeking a declaratory judgment that AFS was not the proper plaintiffs and, therefore, lacked standing. AFS subsequently commenced an action in the Central District of California for claims discovered in Michigan and Maryland stores. The California district court transferred this action to the District of Maryland, after which AFS voluntarily dismissed the case without prejudice. AFS filed a second action in the Circuit Court for Baltimore City, which Prime Retail removed to federal court. In this action, AFS sued on behalf of seventeen tenants in fifty locations alleging nine different causes of action. Id. Prime Retail filed a motion to dismiss asserting AFS lacked standing because the alleged assignments violated public policy. The district court granted Prime Retail’s motion to dismiss, holding the assignments void as a matter of public policy. AFS appealed to the Court of Appeals for the Fourth Circuit to determine whether the contractual arrangements between AFS and the tenants were void as they violated Maryland’s public policy.

First, the Court of Appeals for the Fourth Circuit analyzed the contractual relationship between AFS and the tenants. Id. at 296-97. Under the law of assignments, a claim that is commercial in nature survives the death of the assignor. Id. at 297. However, the court explained that generally assignments are only enforceable to the extent they are consistent with public policy. Id. at 297. The court noted AFS sought to further its business of uncovering claims and earning fees from collecting on them, although AFS had no prior interest in the claims, and the claims were not based on securing any transaction or preexisting commercial relationship between the tenants and AFS. Id. at 297. The AFS assignment was not a routine assignment used to further an existing or underlying commercial transaction. Id. at 299. Instead, tenants had only two choices, either to pursue a lawsuit or pay AFS a contingency fee on the money AFS might have collected. Id. at 297-98. Regardless, AFS could pursue claims and tenants could not prevent AFS from litigating claims in court. Id. at 298-99.
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The court noted the Court of Appeals of Maryland recognized that early common law prohibited barratry, maintenance, and champerty, declaring contracts that provide for such conduct void. Id. at 298. The court referred to William Blackstone’s definition of “common barratry” as the offense of “frequently stirring up suits and quarrels;” “maintenance” as “an officious intermeddling in a suit;” and “champerty” as a “bargain with a plaintiff or defendant . . . whereupon the champertor is to carry on the party’s suit at his own expense.” Id. at 298. Maryland’s common law was codified in a criminal statute, outlawing “barratry” as follows:

Without an existing relationship or interest in an issue, a person may not for personal gain, solicit another person to sue or to retain a lawyer to represent the other person in a lawsuit. Md Code Ann. Bus. Occ. & Prof. Art., § 10-604(a)(1). Id. at 299. The court applied the statute and common-law principles and held Maryland’s public policy prohibits schemes to promote litigation for the benefit of the promoter rather than the party in interest. Id. at 299. The court ultimately held AFS was a solicitor for frivolous litigation, stirring up law suits for personal gain. Id. at 299. The court added that the arrangements violated public policy as they provide for expert testimony for a contingent fee. Id. at 300. AFS employees were to testify as experts on the landlord and tenant relationship for a contingent fee, and the court stated such testimony also violated public policy. Id. at 300.

The dissent argued although AFS and the tenants were bound by California law regarding the application and validity of assignments, the court failed to apply California law to the barratry issue. Id. at 302. If the majority applied California law, the barratry claim would fail. Id.

The Fourth Circuit holding takes an unprecedented step in its goal to stop “lawsuit mining arrangements” by redefining the broad definitions of barratry and maintenance in public policy. The court’s determination restricts tenants’ rights to contract by restricting the right to enter into an assignment contract that provides an affordable means of protection against fraudulent practices by landlords. The Fourth Circuit ruling will prove to be injurious to assignments allowed by law in Maryland, and parties that have interest may never be able to assert that right.
ALS Scan, Inc. v. Digital Service Consultants, Inc.: Technology Cannot Eviscerate Constitutional Limits on State Power to Exercise Jurisdiction Over a Defendant

By: Ronald K. Voss

In a case of first impression, the United States Court of Appeals for the Fourth Circuit held technology could not eviscerate constitutional limits on a State's power to exercise jurisdiction over a defendant living outside of the State. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (2002). In so holding, the court ruled the district court could not, consistent with due process, exercise judicial power over an out-of-state entity that caused injury in Maryland through electronically transmitting information via the Internet. *Id.*

ALS Scan, Inc. ("ALS"), a corporation located in Columbia, Maryland, created and marketed adult photographs for distribution over the Internet. Digital Service Consultants ("Digital"), a Georgia corporation, operated as an Internet Service Provider ("ISP") for Alternative Products, Inc., ("Alternative"), an Internet advertising and sales company. ALS asserted that Digital, together with Alternative, appropriated copies of hundreds of ALS’ copyrighted photographs and placed them on its websites, thereby gaining revenue from them through membership fees and advertising. ALS thus averred that Digital and Alternative had infringed its copyrights within Maryland and elsewhere by selling, publishing, and displaying its copyrighted photographs.

ALS commenced an action for copyright infringement against Digital in the United States District Court for the District of Maryland. Digital filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2), asserting the district court lacked personal jurisdiction. The court granted Digital’s motion. ALS thereafter appealed. The court accepted the appeal to determine whether a person electronically transmitting information via the Internet to Maryland, whereby causing injury in the State, is subject to the jurisdiction of a Maryland district court.

The court began its analysis by recognizing that applying traditional due process principles governing a State’s jurisdiction over persons outside the State based on Internet activity required “some adaptation of those principles, [as] the Internet is omnipresent. *ALS Scan*, 293 F.3d 707 at 712. The court concluded, “as a general principle, [if] a person’s act of placing information on the Internet subjects that person to personal jurisdiction in each state in which the information is accessed, then the fundamental concept that a state has geographically limited judicial power, would no longer exist.” *Id.*

Consequently, the court opined that, “under current Supreme Court jurisprudence, despite advances in technology, State judicial power over persons appears to remain limited” [to two types]. *Id.* at 712. These limitations encompass persons within the State’s boundaries as well as those outside of the State, but who have established minimum contacts with the State. *Id.*

The court further reasoned that until the due process concept of personal jurisdiction is reconceived and rearticulated by the Supreme Court addressing increases in technology, a new standard must be developed. *Id.* The court resolved that this new standard should set forth limited circumstances when it can be determined that an out-of-state entity, “through electronic contacts, has conceptually entered . . . and established those minimum contacts in the . . . state via the Internet for jurisdictional purposes.” *Id.*

Focusing on the requirements for establishing specific jurisdiction, which necessitate purposeful conduct directed at the State, and that the plaintiff’s claims arise from that purposeful conduct, the court adopted the model set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). *ALS Scan*, 293 F.3d at 714. In *Zippo*, the court concluded that “the likelihood that personal jurisdiction can be constitutionally exercised is
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directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” *Id.* (quoting Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

The Zippo model concentrated on differentiating between those websites that are “active” and subsequently susceptible to creating jurisdiction, and those websites that are passive, which do not generate personal jurisdiction over the out-of-state entity. *ALS Scan*, 293 F.3d at 714. With these guidelines, the court resolved that the exercise of jurisdiction is determined by examining the level of Internet activity that occurs and the nature of the commercial exchange of information on the website. *Id.* The court concluded that if a defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of files over the Internet, those acts involve an “active” website -- thereby creating personal jurisdiction. *Id.* In contrast, the court declared that a passive website that does little more than make information available to those who are interested in it, is not grounds for the exercise of personal jurisdiction. *Id.*

In adopting the Zippo model, the court set forth that a “State may, consistent with due process, exercise judicial power over a person outside the State when that person (1) directs electronic activity into the State; (2) with the manifested intent of engaging in business or other interactions within the state; and (3) that activity creates, in a person within that State, a potential cause of action cognizable in the State’s courts.” *Id.* Under these guidelines, the court ruled that a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. *Id.*

Applying the new standard, the court concluded that Digital’s activity was, at most, passive, and therefore did not trigger the exercise of judicial power of a Maryland court. *ALS Scan*, 293 F.3d at 714. The court further reasoned that Digital did not direct its electronic activity specifically at any target in Maryland; it did not manifest an intent to engage in a business or some other interaction in Maryland; and none of its conduct in creating a website necessitated a cause of action in Maryland. *Id.* at 715.

The decision of *ALS Scan*, promulgates that many courts have recognized that the standards used to determine the proper exercise of personal jurisdiction may evolve as technology progresses. However, the decision ensures that it will nonetheless remain clear that technology cannot bulldoze the constitutional walls that limit a state’s power to exercise jurisdiction over an entity.

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Atkins v. Virginia:
Imposing the Death Penalty on Mentally Retarded Offenders is Cruel and Unusual Punishment Prohibited by the Eighth Amendment

By: Supriya M. McMillan

In a six-to-three decision, the United States Supreme Court held imposing the death penalty on mentally retarded offenders was cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution. *Atkins v. Virginia*, 122 S.Ct. 2242 (2002). The Court found a national consensus indicating that the death penalty should not be imposed on less morally culpable people. Furthermore, the Court conducted an independent evaluation and found that mentally retarded persons had diminished culpability and, therefore, the reasons underpinning the death penalty did not apply and mentally retarded persons faced a special risk of execution.

In August 1996, Daryl Renard Atkins (“Atkins”) and William Jones abducted Eric Nesbitt. They robbed him and then took him to an isolated location where he was shot and killed with a semi-automatic handgun.

The jury convicted Atkins of abduction, armed robbery and capital murder. At the penalty phase of Atkins’ trial, the defense relied on testimony of a psychiatric expert who concluded that Atkins was mildly mentally retarded.

The jury sentenced Atkins to death. The Supreme Court of Virginia affirmed the decision in the resentencing hearing and relying on the Supreme Court’s *Penry* holding, rejected Atkins’ argument that he was mentally retarded and could not be sentenced to death. Because of the issue’s gravity and the dramatic shift in state laws in the past thirteen years, the Supreme Court granted certiorari to revisit the issue. The Court reversed and remanded for further proceedings.

The Court began with a summary of the standard of review used to decide whether a punishment is excessive under the Eighth Amendment. *Id.* at 2246-48. The Court noted that for there to be justice, it was mandatory that the level of punishment for crimes be equivalent to the level of the offense. *Atkins*, 122 S.Ct. at 2246 (citing *Weem v. United States*, 217 U.S. 349 (1910)). The Court stated that instead of using past history to judge whether a punishment is excessive under the Eighth Amendment. *Id.* at 2246-48. The Court noted that for there to be justice, it was mandatory that the level of punishment for crimes be equivalent to the level of the offense. *Atkins*, 122 S.Ct. at 2246 (citing *Weem v. United States*, 217 U.S. 349 (1910)). The Court stated that instead of using past history to judge whether a punishment was excessive, it was necessary to look at the “evolving standards of decency” that reflected a maturing society. *Id.* at 2247 (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)). The Court further held that objective factors should be used in conducting the proportionality review under the evolving standards of decency, the most reliable and objective being the legislation enacted by state legislatures. *Id.* In addition, in cases involving a consensus, the Court explained that it must complete an independent evaluation to determine if there is any reason to disagree with the judgment reached by the legislatures. *Id.* at 2247-48.

The Court then discussed how laws passed by state legislatures indicated strong public policy against the imposition of death on mentally retarded offenders. *Id.* at 2248-50. After *Penry*, many state legislatures passed laws preventing imposition of death on mentally retarded defendants. *Id.* at 2248. The Court stated that many states passed laws limiting imposition of the death penalty, indicating the direction of the change in the overall views in society. *Atkins*, 122 S.Ct. at 2249.

The Court explained that legislatures passed laws forbidding execution of mentally retarded offenders, even though anti-crime legislation was more popular, which indicated society viewed mentally retarded offenders as less culpable. *Id.* The Court found further evidence that the legislation was passed by an overwhelming majority of each legislature. *Id.* The Court explained that a final indicator of a national consensus against execution of mentally
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retarded offenders was that many states that allow execution of mentally retarded offenders made the practice uncommon. Id.

The Court then conducted an independent evaluation to decide whether the popular and legislative consensus was proper. Id. at 2250-52. Although deficiencies of mentally retarded offenders did not exempt them from criminal sanctions, the deficiencies did limit personal culpability. Id. at 2250-51. The Court provided two reasons why the legislative consensus was proper and mentally retarded offenders should be excluded from execution because of those deficiencies. Atkins, 122 S.Ct. at 2251.

First, justification for the death penalty would not apply to mentally retarded offenders. Id. The Court explained that justifications for the death penalty were retribution and deterrence. Id. In regard to retribution, the severity of punishment was dependent on the culpability of the offender. Id. According to the Court, an exclusion for the mentally retarded was appropriate because mentally retarded offenders were less culpable due to their diminished capacities. Id. The Court also stated the death penalty was used as a deterrent to reduce the chance that a criminal would carry out murderous conduct as a result of the increased severity of punishments. Id. The Court held that mentally retarded offenders were less likely to be deterred by the possibility of the death penalty for a crime because of their diminished capacities. Atkins, 122 S.Ct. at 2251.

Another reason given by the Court for approving the consensus was that mentally retarded offenders face a special risk of wrongful execution. Id. at 2251-52. The Court noted the possibility of false confessions due to the diminished capacity of mentally retarded offenders. Id. at 2252. In addition, the Court explained that a mentally retarded offender would not be able to make a persuasive showing of mitigation when faced with evidence of one or more aggravating factors used to impose the death penalty. Id.

The United States Supreme Court decision in Atkins v. Virginia further limits imposition of the death penalty by States because it is now unconstitutional to impose the death penalty on mentally retarded offenders. The decision will lead to appeals by many convicts on death row who will claim to be mentally retarded in order to overturn their sentence. In addition, the decision limits the power of a judge or jury to make a proper sentencing decision because mental retardation will no longer be a mitigating factor, but will be an absolute factor in prohibiting the death penalty. The decision by the United States Supreme Court gives offenders of heinous crimes one more loophole to avoid the death penalty.

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Attorney Grievance Commission v. Santos:
An Attorney May Not Be Disbarred for Failing to Return Unearned Fees, Absent Fraud, Deceit or Misrepresentation

By: John A. Carpenter

The Court of Appeals of Maryland held an attorney may not be disbarred for failing to return unearned fees, absent fraud, deceit or misrepresentation. Attorney Grievance Comm’n v. Santos, 370 Md. 77, 803 A.2d 505 (2002). To disbar an attorney, the trial judge must find a misappropriation of funds by fraud, deceit or misrepresentation, pursuant to Rule 8.4(c) of the Maryland Rules of Professional Conduct (“MRPC”). Id. at 87-88, 803 A.2d at 511. In Santos, the attorney who failed to refund unearned fees absent the intent to commit fraud, deceit or misrepresentation received a ninety-day suspension with the possibility of reinstatement. Id. at 89, 803 A.2d at 512.

The Attorney Grievance Commission (“AGC”) filed a Petition For Disciplinary Action under MRPC Rule 16-709, on behalf of former clients of Mario Santos (“Santos”), alleging several violations of the MRPC rules pertaining to attorney competence, diligence, communication with clients, safekeeping of property, terminating representation, and trust account requirements. Santos allegedly failed to properly represent several clients in bankruptcy, divorce and other matters, and failed to return most of the clients’ fees paid in connection with his representation.

The trial judge ruled that Santos had “incompetently represent[ed] each of his clients by not demonstrating the necessary skill, thoroughness and preparation in the handling of their matters.” The judge also found Santos’ procrastination had prejudiced his clients’ interests by denying them the relief to which they were entitled. Further, Santos failed to communicate with his clients, failed to give proper notice to his clients of the abandonment of his representation, and deposited client funds in his operating account. The trial judge explained that Santos’ collective violations of the rules of professional conduct “erode public confidence in the legal profession and are conduct prejudicial to the administration of justice in violation of Rule 8.4(d).” The trial judge also noted that Santos was fully cooperative with the investigation, and had sought a more structured working environment by accepting employment with the Public Defender’s Office.

Neither Santos nor the AGC objected to the trial judge’s findings of law; however, both parties filed different recommendations for sanctions. The AGC recommended disbarment, while Santos requested not more than a six-month suspension with reinstatement upon compliance with certain court-mandated conditions.

The court of appeals referred Santos’ initial hearing to the Circuit Court for Anne Arundel County under Maryland Rule 16-709(b), which allows the court of appeals to assign such cases to the trial courts for fact-finding purposes. The case was then transferred to the Circuit Court of Baltimore City. After the trial findings, both parties filed separate recommendations for sanctions to the court of appeals.

The court of appeals first addressed the AGC’s contention that by neglecting and abandoning five separate clients and failing to return unearned fees, Santos was unfit to practice law. Id. at 84-85, 803 A.2d at 509. The court explained that, in prior decisions, it had indefinitely suspended attorneys for neglecting client matters and failing to return unearned fees. Id. at 95, 803 A.2d at 509-10. As such, the court stated the AGC had misplaced its reliance on cases in which an attorney was disbarred for either repeatedly neglecting client matters or misappropriating client funds. Id. at 85, 803 A.2d at 509-10.

The court distinguished Attorney Grievance Comm’n v. Manning,
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318 Md. 697, 569 A.2d 1250 (1990) from the case at hand explaining that Manning was previously suspended for similar conduct that led to his disbarment. *Id.* at 85, 803 A.2d at 510.

The court also distinguished *Att'y Grievance Comm'n v. Milliken*, 348 Md. 486, 704 A.2d 1225 (1998), stating that Milliken repeatedly neglected client matters and failed to return client fees, wrote checks to his wife against trust accounts and shared fees with a non-lawyer. *Id.* at 85-86, 803 A.2d at 510. Milliken also failed to answer client suits for return of fees, ignored the resulting default judgments, and when investigated by the AGC, was extremely uncooperative and refused to answer Bar Counsel’s letters. *Id.*

Similarly, the court explained that in *Att’y Grievance Comm’n v. Wallace*, 368 Md. 277, 293, 793 A.2d 535, 545 (2002), “the volume and severity of the complaints against respondent” led the court “to conclude that the appropriate sanction [was] disbarment.” *Id.* at 86-87, 803 A.2d at 510.

The court next turned to the appropriate sanction for Santos, noting the purpose of a disciplinary proceeding is to protect the public. *Id.* at 87, 803 A.2d at 510-11. The court explained that it considers all facts in each case, including the attorney’s prior record and remorseful and cooperative attitude. *Id.* at 87, 803 A.2d at 511.

Stating that the general rule of sanctions in cases of “unmitigated misappropriation of client fees,” is disbarment, the court contemplated whether Santos’ conduct amounted to an unmitigated misappropriation. *Id.* The court held that because the trial judge did not rule on a violation of Rule 8.4 (c), by implication, Santos had not violated Rule 8.4 (c). *Id.* at 87-88, 803 A.2d at 511. Further, Santos’ failure to return unearned fees was neglectful but not fraudulent or deceitful; therefore the AGC’s recommendation of disbarment was not appropriate in this case. *Id.* at 88, 803 A.2d at 511.

As an additional guide, the court examined the American Bar Association Standards for Imposing Lawyer Sanctions (1986), Standard 5.11 (a) and (b), which states that disbarment is generally appropriate when “a lawyer engages in . . . intentional conduct involving . . . fraud [or] deceit.” *Id.*

Based on case precedent and the ABA Standards, the appropriate sanction for Santos was an indefinite suspension from the practice of law with application for reinstatement after ninety days. *Id.* at 89, 803 A.2d at 512. However, the court refused to delineate specific conditions of reinstatement except to return unearned fees or make appropriate arrangements to do so. *Id.* at 88-89, 803 A.2d at 511-12.

In *Att’y Grievance Comm’n v. Santos*, the court held that an attorney who failed to properly represent clients’ interests, and failed to return unearned fees, may not be disbarred unless he has misappropriated client funds by fraud, deceit or misrepresentation.

The impact to Maryland law is that in order to disbar an attorney, the AGC must prove the attorney misappropriated client funds through fraudulent or deceitful means, a much higher standard to achieve. This holding raises the possibility that future clients of incompetent attorneys may suffer similar harms as previous aggrieved clients, because the AGC was not able to prove the attorney committed misappropriation of funds by fraud, deceit or misrepresentation.
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**Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls:**
Mandatory, Suspicionless Drug Testing of Public School Students Participating in Extracurricular Activities is a Constitutionally Reasonable Intrusion that Furthers a Public School’s Legitimate Interest in Deterring Drug Use

By: Jennifer Merrill

In a five to four decision, the Supreme Court of the United States held that mandatory, suspicionless drug testing of public high school students participating in extracurricular activities is a constitutionally reasonable intrusion that furthers a public school’s legitimate interest in deterring drug use among children. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559, 2562 (2002). The Court further held that a public school need not demonstrate a pervasive drug problem among the population subject to testing to warrant the intrusion. *Id.* at 2568. In so ruling, the Court determined that the government’s compelling interest in preventing and eradicating drug use among children in the United States outweighs the limited privacy expectations held by public middle and high school students. *Id.* at 2568-69.

In the fall of 1998, the Tecumseh, Oklahoma School District (“School District”) implemented the Student Activities Drug Policy (“Policy”). The Policy required all public middle and high school students to submit to suspicionless drug testing as a prerequisite to participation in any extracurricular school activity and to adhere to random testing during participation in the activity. The Policy further obligated students to comply with testing at anytime upon “reasonable suspicion.” Testing was conducted through urinalysis screening designed only to detect the presence of illegal drugs. While the Policy applied to all extracurricular activities, in practice, it was only used to test students participating in competitive activities such as band, athletics, and the Academic Team.

Tecumseh High School students, Lindsay Earls and Daniel James, filed a 42 U.S.C. § 1983 action against the School District in the United States District Court for the Western District of Oklahoma. The students requested injunctive and declarative relief based on their assertion that the Policy violated the Fourth Amendment.

Relying on the ruling in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) wherein the Supreme Court upheld the suspicionless drug testing of public high school athletes, the trial court granted summary judgment for the School District. The Court of Appeals for the Tenth Circuit reversed and declared the Policy unconstitutional, holding that “before imposing a suspicionless drug testing program . . . ‘a school must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing.’” *Earls*, 122 S.Ct. at 2563) quoting *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1278 (10th Cir. 2001). The Supreme Court of the United States granted certiorari to determine whether the School District must first identify that a substantial drug abuse problem exists among the students to be tested to justify the mandatory testing.

The Court began its analysis by recognizing that the type of search conducted by the School District was an administrative search. *Id.* at 2564. The Court explained that a showing of probable cause is not necessary in an administrative search that is not associated with law enforcement. *Id.* Furthermore, an administrative search does not require any showing of individualized suspicion. *Id.* The Court stated that the proper standard for determining whether an administrative search is reasonable is whether the government can show that a special need exists to discover the presence of, or prevent the development of, dangerous hidden
conditions. *Id.*

Next, the Court addressed the privacy expectations held by students attending public middle and high schools. *Id.* at 2565. A public school student’s privacy interest is “‘limited in a public school environment where the State is responsible for maintaining discipline, health and safety.’” *Earls*, 122 S.Ct. at 2565 quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)). The Court concluded that because students submit themselves to additional regulations beyond general school policies when participating in an extracurricular activity, these students have an even further diminished expectation of privacy. *Id.*

The Court then assessed the nature of the intrusion imposed by the drug testing on the students in the present case and determined that it was nominal. *Id.* at 2566-67. The School District conducted minimally invasive urinalysis tests for the sole purpose of detecting illegal drugs and the results were not turned over to law enforcement authorities. *Id.* Furthermore, the School District only divulged the test results to other school personnel on a “need to know basis.” *Id.* at 2566. Moreover, a student was given two chances to cure a positive test and was required to receive substance abuse counseling before being suspended from the activity. *Id.* at 2567. Finally, the only penalty for ‘failing’ the drug test was exclusion from the extracurricular activity for the greater of the rest of the school year, or eighty-eight school days, and not dismissal from school. *Earls*, 122 S.Ct. at 2567.

Next, the Court considered the nature of the government’s concerns and the effectiveness of the Policy in addressing these concerns. *Id.* The Court noted that the School District’s interest in protecting its students from drug use was immediate and thus a special need considering the epidemic nature of drug use in the nation today. *Id.* Rejecting the decision of the court of appeals, the Supreme Court declared that “‘[a] demonstrated problem of drug abuse is not necessary to the validity of a testing regime.’” *Id.* at 2567-68 (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)). However, the Court recognized that the School District did provide specific evidence of a few occasions of drug use at the Tecumseh schools that bolstered the justification for testing. *Id.* at 2567.

Respondents asserted that the testing of extracurricular students did not serve to address any safety concerns as is generally required in a special needs analysis. *Id.* at 2568. The Court stated that the health risks associated with drug use constituted a proper safety concern to satisfy the special needs test for administrative searches. *Earls*, 122 S.Ct. at 2568. The Court also rejected the argument set forth by respondents that the drug testing should be premised on individualized suspicion by reasoning that such testing may unfairly target students of certain groups. *Id.* at 2568-69.

A lengthy dissent asserted that the majority targeted “a student population least likely to be at risk from illicit drugs and their damaging effects” and thus did not serve any compelling government interest. *Id.* at 2572, 2577 (Ginsburg, J. dissenting). The dissent further opined that the majority overstepped its bounds and expanded the *Vernonia* precedent too broadly. *Id.* The proper test, as suggested by the dissent, should consider a totality of the circumstances and a “fact-specific balancing” that weighs the privacy expectations of the group to be tested with the government’s interests in addressing immediately identifiable and present safety concerns specific to the targeted group. *Id.* at 2574.

The ruling by the Supreme Court of the United States in *Earls* increases the student population in Maryland’s public schools that may be subjected to mandatory, suspicionless drug testing. This decision also expands the scope of administrative searches by allowing the government to utilize broad concepts of special need as justification for such searches. By allowing a special need showing based on a sweeping, nationwide problem, the Court may allow other agencies to expand the scope of potential administrative special need searches without any specific showing of immediately identifiable need. As a result, agencies in Maryland may now be able to legitimize administrative special need searches based on external societal concerns, instead of seeking justification based on identifiable, present, and internal concerns.
Carpenter Realty v. Imbesi:  
Judgment Creditor is Not Entitled to Post-Judgment Interest from Date of an Original Judgment that Was Reversed on Appeal

By: Brenda N. Taylor

The Court of Appeals of Maryland held a judgment creditor is not entitled to post-judgment interest from the date of an original judgment that was reversed on appeal. Carpenter Realty Corp. v. Imbesi, 369 Md. 549, 801 A.2d 1018 (2002). The court further held that unless the court includes a specific instruction to a trial court that post-judgment interest must be awarded dating back to the entry of the original judgment, such award “should rest with the sound discretion of the trial court.” Id. at 561, 801 A.2d at 1025.

Thomas Imbesi (“Imbesi”) entered into a Stock Redemption Agreement (“SRA”) with Carpenter Realty (“Carpenter”), 7Up/Baltimore (“7Up”) and several additional 7Up entities. Imbesi later redeemed his corporate stock for $500,000 plus 5% interest and forgiveness of a $137,158.00 debt he owed to the corporations. Imbesi defaulted on the loan in July 1991. Imbesi died on March 10, 1992.

Imbesi’s personal representative filed a lawsuit in the Circuit Court for Baltimore County against Carpenter and 7Up for payment. Carpenter and 7Up filed a counterclaim against the Estate asserting that Imbesi had an outstanding note in the amount of $80,000.00 plus 6% interest due and payable to them.

A bench trial ended in a $57,447.67 judgment for the Estate, which did not include pre-judgment interest. A setoff of the $80,000 note was not allowed because the corporations had not filed a timely claim for payment against the Estate pursuant to Maryland Code (1974, 1991 Repl. Vol.) Section 8-103 of the Estates and Trusts Article. Carpenter and 7Up appealed. The court of special appeals reversed and remanded. The circuit court held, in a case of first impression, that the $80,000.00 note could be used as a defensive setoff despite the running of the statute of limitations under Maryland’s Non-claim Statute, Md. Code Ann., Est. & Trusts § 8-103. The court ordered entry of judgment in favor of Carpenter and 7Up. The Estate appealed and the court of special appeals affirmed. The court of appeals reversed and remanded.

The circuit court held, in a case of first impression, that the $80,000.00 note could be used as a defensive setoff despite the running of the statute of limitations under Maryland’s Non-claim Statute, Md. Code Ann., Est. & Trusts § 8-103. The court ordered entry of judgment in favor of Carpenter and 7Up. The Estate appealed and the court of special appeals affirmed. The court of appeals reversed and remanded.

The Estate petitioned the circuit court for entry of judgment for $57,447.67, prejudgment interest of $3,588.51 and postjudgment interest of $30,518.09. Carpenter and 7Up filed a cross-petition conceding $57,971.27 but contesting the pre- and post-judgment interest. The Estate was awarded costs, damages, and accrued prejudgment interest. The Estate appealed.

The court of special appeals held the Estate was entitled to receive 10% postjudgment interest commencing on April 4, 1995, the date when judgment was entered in favor of the Estate after the first trial. Carpenter filed a petition for writ of certiorari, which the court of appeals granted.

In its analysis, the Court of Appeals of Maryland first considered Maryland’s statutes governing postjudgment interest. Carpenter, 369 Md. at 558, 801 A.2d at 1023. Maryland Rule 2-604(b) provides that “a money judgment shall bear interest at the rate prescribed by law from the date of entry.” Id. at 558, 801 A.2d at 1024. Maryland Rule 2-601(b) provides that “the effective date of entry of a judgment is the date on which the clerk of the court prepares a written record of the judgment.” Id. at 559, 801 A.2d at 1024.

The court next determined what constituted the date of entry of a judgment when the initial judgment was reversed and remanded and subsequent judgments were entered on the
record. *Id.* at 559, 801 A.2d at 1024. Maryland Rule 8-604(e) provides “[i]n reversing or modifying a judgment in whole or in part, the court may enter an appropriate judgment directly or may order the lower court to do so.” *Id.* at 560, 801 A.2d at 1025. The court stated that “where our mandate specifically directs the entry of a judgment after remand, postjudgment interest on the award runs from the date of issuance of the mandate.” *Id.* at 560-61; 801 A.2d at 1025. When the appellate court fails to give the trial court specific instructions mandating an award of postjudgment interest dating back to the entry of the original judgment, the trial court may use its sound discretion to determine whether to make such an award. *Carpenter*, 369 Md. at 561, 801 A.2d at 1025.

The court next reviewed the history of the case from the entry of the original judgment through the subsequent mandates issued on appeal. *Id.* The April 10, 1995 circuit court order entering judgment in favor of the Estate was a final judgment for purposes of appellate review. *Id.* On August 6, 1996 the court of special appeals issued a mandate that reversed the original judgment and remanded the case; the mandate did not specifically leave the original judgment in place. *Id.* at 562, 801 A.2d at 1026. Either party could have filed a motion to alter, amend, or revise the judgment, requesting the court to leave the original judgment in place. *Id.* at 563, 801 A.2d at 1026.

Motions to alter, amend or revise judgments are governed by Maryland Rule 2-534. *Id.* This rule provides that on motion of any party filed within ten days after entry of judgment, the court may amend the judgment, or may enter a new judgment. *Carpenter*, 369 Md. at 563, 801 A.2d at 1026. Maryland Rule 2-535 provides that on motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. *Id.* Maryland Rule 8-431 governs general motions to the court of appeals or court of special appeals. *Id.* Because neither Imbesi nor Carpenter filed such a motion, the court stated that the court of special appeals’ reversal eliminated the April 10, 1995 judgment. *Id.* at 567, 801 A.2d at 1029.

The court concluded that for purposes of calculating postjudgment interest, Carpenter and 7Up were not required to pay the Estate until the circuit court entered its judgment on October 19, 2000. *Id.* at 567, 801 A.2d at 1029. Postjudgment interest was not awarded because the judgment in favor of the Estate was immediately paid from the escrow account upon entry of the judgment. *Id.* at 568, 801 A.2d at 1029.

The Court of Appeals of Maryland sent a clear message that a judgment creditor is not entitled to postjudgment interest from the date of an original judgment that was reversed on appeal unless the court’s mandate specifically dictates such an award. To preserve postjudgment interest, attorneys must file a motion requesting the court to include specific instructions for the calculation of such interest from the date of the original judgment in its mandate. Where monetary awards are delayed by appeals, attorneys who make this extra effort protect their clients’ right to interest compensation when the judgment becomes final.
Crane v. Scribner:
Statutory Cap on Non-Damages Does Not Apply When Plaintiff’s Last Asbestos Exposure was Before Statute’s Effective Date

By: Farrah L. Arnold

The Court of Appeals of Maryland held a statutory cap for non-economic damages does not apply when a plaintiff’s last asbestos exposure was before the statute’s effective date. *Crane v. Scribner*, 369 Md. 369, 800 A.2d 727 (2001). The court further held such a plaintiff has the burden of proving the cause of action date occurred before the statute went into effect, which is ultimately a question of fact to be determined by a jury. *Id.* at 369, 396-97, 800 A.2d at 727, 742-44.

While in the Navy, John Scribner ("Scribner") worked closely with Crane and Garlock gasket materials that contained asbestos. Upon discharge, Scribner worked for PEPCO until 1995 when he was diagnosed with mesothelioma. Scribner underwent major surgeries but died from the disease a few months later.

After Scribner’s death, his wife and children brought a wrongful death action against the asbestos manufacturers who were found negligent and strictly liable in a jury trial. Defendants Crane and Garlock appealed to the court of special appeals, arguing the trial court erred in refusing to apply the cap to the survival action as a matter of law. The court of appeals granted certiorari.

The court of appeals began its analysis by examining three possible approaches for determining when a cause of action arises under section 11-108(b)(1). *Crane*, 369 Md. at 390, 800 A.2d at 739. The court first considered the “manifestation approach” set forth in *Armstrong*. In *Armstrong*, the court rejected the defendant’s argument that a plaintiff’s cause of action did not arise until the disease manifested itself. *Id.* at 384, 800 A.2d at 735-36. The court noted while such an approach could be applied with simplicity and certainty, this approach was statutorily inconsistent because it disregarded the distinction between when a cause of action arises from when a cause of action accrues. *Id.* at 390, 800 A.2d at 740. However, the court did not expressly adopt an alternative method of determination, but merely ruled out the “manifestation approach.” *Id.* at 385, 800 A.2d at 736.

The court next considered the “exposure approach” which suggested the cause of action occurred when a plaintiff first inhales asbestos fibers that cause cellular changes leading to disease. *Id.* at 390, 800 A.2d at 740. The court acknowledged while it is difficult to pinpoint this exact moment, determination of the latency period of the disease can help detect when the disease was contracted. *Crane*, at 382, 800 A.2d at 734. For instance, it can be determined that the first cancer cell developed in Scribner’s body prior to July 1, 1986 by examining information such as his first and last exposures to asbestos, the total latency period of the disease, and the rate of his tumor growth. *Id.*

The court noted that with hindsight, one may reasonably determine if a plaintiff had the disease before the cap was in effect. *Id.* at 384-85, 800 A.2d at 736.

The third approach, or the “*Grimshaw approach*,” looked to when the disease itself arose in the body. *Id.* at 390-91, 800 A.2d at 739-40. *Grimshaw* specifically recognized the cause of action occurred before the diagnosis or symptoms of mesothelioma arose, but refused to conclude the action arose at the time of exposure to asbestos. *Id.* at 385, 800 A.2d at 736. The court stated this approach is difficult to apply because it evokes competing medical expert testimony to define the exact time of the action. *Crane*, 369 Md. at 391, 800 A.2d at 736. Moreover, this approach focused intently on when the first cell turned cancerous, which cannot be accurately as-certained. *Id.*

Of these three approaches for
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determining a cause of action, the court explained the “exposure approach” had the fewest significant problems and appeared most consistent with the statutory language. Id. at 390, 800 A.2d at 739. The court held if the plaintiff’s last exposure to asbestos was undisputedly before the statute’s effective date, then 11-108(b)(1) does not apply as a matter of law. Id. at 394, 800 A.2d at 742. The court further elucidated that cases where exposure occurred both before and after the statutory effective date will be left to the trier of fact. Id. at 394, 800 A.2d at 742. However, the court stated the burden is on the plaintiff to establish by sufficient evidence that his or her cause of action occurred prior to the cap’s effective date. Crane, 369 Md. at 395, 800 A.2d at 742 (citing Owens-Corning v. Walatka, 125 Md. App. 313, 322-31, 725 A.2d 579, 583-88 (1999)). The court explained the “exposure approach” hinges on the notion that there was an injury, and thus a time of cause of action. Id. at 392, 800 A.2d at 740. The court found the plaintiff’s non-injurious exposures to the defendant’s products were inconsequential to a determination of cause of action. Id. The court stated exactly when the injury came into existence cannot be reasonably ascertained through any reasonably reliable methodology, however it is certain that the greater the exposure, the greater the cellular damage. Id. at 392-93, 800 A.2d at 741. The court noted it is not yet possible to know which asbestos fiber ultimately caused the cell division impenetrable to the body’s defenses. Id.

The Baltimore City trial believed a jury should not consider the issue of whether the cap should be applied, nor should it resolve when the plaintiff’s cause of action arose. Crane, 369 Md. at 396, 800 A.2d 742-43. In Bauman, the court, after the jury returned its verdict, held a jury must resolve disputes over when the cause of action occurred. Id. at 396, 800 A.2d at 743 (citing Owens-Corning v. Bauman, 125 Md. App. 454, 726 A.2d 745 (1999)). Based upon this holding, the second jury was impaneled. Id.

Disagreement over impaneling the second jury resulted because statute 11-108(d) suggested a jury may not be informed of the statutory limitation. Id. The Bauman court explained “not to reveal the cap to the jury did not remove from it the obligation to determine the factual question of when the plaintiff’s cause of action arose . . . .” Id. Moreover, a jury has as its very function an obligation to be the trier of fact when there is a genuine dispute between parties. Crane, 369 Md. at 396-97, 800 A.2d at 743. The jury must, however, be supplied with appropriate instructions regarding what test or method must be used to arrive at a determination. Id. The court must then decide whether the statutory cap should be applied based upon the jury’s determination. Id.

The Defendants made case-specific complaints because they believed Scribner failed to produce sufficient evidence that the cause of action arose prior to July 1, 1986. Id. at 397, 800 A.2d at 743. They also argued impaneling the second jury on this issue was inappropriate because Scribner produced evidence to the first jury that was inconsistent to the second time around. Id. Because the jury found the plaintiff had mesothelioma substantially caused by exposure to Defendants’ products, the court stated these case-specific complaints were without merit. Crane, 369 Md. at 397, 800 A.2d at 743.

Crane v. Scribner elucidates section 11-108(b) regarding a personal injury cause of action sustained due to asbestos exposure. While no succinct method can steadfastly be applied to a determination of the cause of action date, the “exposure approach” appears most statutorily consistent, and has relatively minor problems. While plaintiffs’ last exposure to asbestos is frequently well before the statutory effective year of 1996, this may not always be the case as older buildings and facilities require asbestos abatement to meet upcoming renovation and rehabilitation needs.
**Gray v. State:**
A Court Has Discretion to Allow a Witness Accused by the Defendant of Committing the Crime to Invoke the Fifth Amendment In the Jury’s Presence

By: Brenda N. Taylor

In a case of first impression, the Court of Appeals of Maryland held a court has discretion to allow a witness, accused by the defendant of committing the crime, to invoke the Fifth Amendment in the jury’s presence. *Gray v. State*, 368 Md. 529, 564, 796 A.2d 697, 717 (2002). The court further stated when a court does not allow a “Gatton witness” to invoke the Fifth Amendment before a jury, the court should instruct the jury that the witness invoked his right against self-incrimination and is unavailable to the defendant. *Id.* at 564, 796 A.2d at 717-18.

James Gray (“Gray”) was charged with the murder of his wife, Bonnie Gray (“Bonnie”), whose body was found in her car trunk on December 6, 1995. *Id.* at 533, 796 A.2d at 699. During the trial, which began on March 17, 1998, Gray insisted his wife’s lover, Brian Gatton (“Gatton”), murdered her. *Id.* Witnesses testified that Bonnie and Gatton had an affair. *Id.* Additional evidence was proffered implicating Gatton in Bonnie’s murder. *Id.* at 533-34, 796 A.2d at 699.

The Circuit Court for Charles County, following a hearing on the Motion in Limine, did not permit Gray’s witness, Evelyn Johnson (“Johnson”), to testify about Gatton’s statements to her and in her presence, which implicated Gatton in Bonnie’s murder. *Gray*, 368 Md. at 536, 796 A.2d at 701. The court refused to admit Johnson’s hearsay testimony as a statement against penal interest made by Gatton under Maryland Rule 5-804(b)(3). The court reasoned Gatton made the statements while high and drunk or while threatening Johnson after he raped her. *Id.* at 537, 796 A.2d at 701. The court also refused to allow Gatton to invoke his Fifth Amendment right in the jury’s presence and denied Gray’s request to instruct the jury that Gatton invoked his Fifth Amendment privilege. *Id.* at 534, 796 A.2d at 699-700. The jury convicted Gray of first-degree murder and sentenced him to life imprisonment. *Id.* at 532, 796 A.2d at 698. Gray appealed to the Court of Special Appeals of Maryland, which affirmed the circuit court’s decision. *Id.* The Court of Appeals of Maryland granted Gray’s petition for writ of certiorari and reversed and remanded for a new trial. *Id.* at 532, 796 A.2d at 699.

The Court of Appeals of Maryland first reviewed whether Johnson’s hearsay testimony should have been admitted and held “it was prejudicial error for the trial court to refuse to admit in evidence, through Johnson’s testimony, the declaration against Gatton’s penal interest.” *Gray*, 368 Md. at 565, 796 A.2d at 718. Under Maryland Rule 5-804(b)(3), when a declarant is unavailable as a witness, a declarant’s inculpatory statement that exculpates an accused must be corroborated. *Id.* at 536, 796 A.2d at 701. Gatton’s statements made to Johnson before the rape substantially corroborated his post-rape statements. *Id.* at 546, 796 A.2d at 706. Additional evidence was proffered to corroborate Johnson’s testimony about Gatton’s statements against interest. *Id.*

Next, the court addressed whether a defendant is entitled to question an alternate suspect in the presence of a jury when the court knows the witness will invoke the Fifth Amendment. *Id.* at 532-33, 96 A.2d at 699. Prior cases dealt with a prosecution or court witness called to testify for inculpatory purposes when it was known or should have been known the witness intended to invoke the Fifth Amendment. *Id.* at 532-33, 96 A.2d at 699. The court ruled that a defendant has a constitutional right to confront an alternate suspect in the presence of a jury. *Id.* at 546, 796 A.2d at 706. Additional evidence was proffered to corroborate Johnson’s testimony about Gatton’s statements against interest. *Id.*
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evidentiary purposes. *Gray*, 368 Md. at 558, 796 A.2d at 714.

The majority concluded a court must exercise its discretion to determine if a defendant is unfairly prejudiced if the court does not allow the defendant to call a potentially exculpatory witness when the court knows that the witness will invoke the Fifth Amendment privilege before a jury. *Id.* at 561, 796 A.2d at 716. Whether a criminal defendant may request a witness to testify before a jury when it is known he will reasonably and in good faith invoke the Fifth Amendment privilege is determined by applying Maryland Rules 5-401 and 5-403. *Id.* at 560, 796 A.2d at 715. The court noted there could be probative value to a witness’s assertion of the privilege in a criminal case. *Id.* A court, in exercising its discretion, must remember a “defendant is entitled to have his defense fully presented to the jury.” *Id.* at 561, 796 A.2d at 716.

A court must, on the record, first determine if sufficient other evidence was proffered, which “if believed by any trier of fact, might link the accused witness to the commission of the crime.” *Id.* at 564, 796 A.2d at 717. If such evidence exists, the court may allow, and limit as appropriate, the defendant to question the witness about his involvement in the crime and have him invoke the Fifth Amendment privilege in the jury’s presence. *Gray*, 368 Md. at 564, 796 A.2d at 717.

In a concurring opinion, Judge Raker stated the court erred in refusing to allow Gatton to invoke the Fifth Amendment privilege before the jury. *Id.* at 565, 796 A.2d at 719. Judge Raker further stated “in ‘single culprit crimes,’ ... a defendant is not barred, as a matter of law, from calling a witness before the jury” to invoke the Fifth Amendment privilege and to attempt to convey to the jury, by inference, his claim of innocence. *Id.* at 578-79, 796 A.2d at 726. Judge Raker would require a defendant to notify the court if a witness is an alternate suspect. *Id.* at 579, 796 A.2d at 726. However, Judge Battaglia, the lone dissenter, stated that allowing adverse inference from the invocation of the Fifth Amendment privilege undermines “the integrity of the constitutional right to remain silent.” *Id.* at 601, 796 A.2d at 740.

Finally, the court addressed whether a trial court, after refusing to permit the defendant to question an alternate suspect, is obligated to explain to the jury why the defense has not questioned the alternate suspect. *Id.* at 564, 796 A.2d 717-18. If a court does not allow a “Gatton witness” to invoke the Fifth Amendment privilege in the jury’s presence, the court, if requested, should instruct the jury that the witness invoked his right against self-incrimination and is unavailable to the defendant. *Gray*, 368 Md. at 564, 796 A.2d 717-18. The court noted either party may be entitled to a jury instruction, even if the “Gatton witness” invokes his privilege in the jury’s presence. *Id.* at 564, 796 A.2d at 718.

The guidance offered by the Court of Appeals of Maryland gives Maryland courts discretion to allow a defendant, who claims he is wrongly accused, to place an alternate suspect on the witness stand. The alternate suspect may invoke the Fifth Amendment privilege so long as there is sufficient other evidence to support the defendant’s accusation. When adequate evidence exists, defense attorneys should not hesitate to call a “Gatton witness” to create reasonable doubt in the minds of the jury.
The Court of Appeals of Maryland held the risk-utility test does not apply in strict liability design defect cases unless the product in question malfunctions. Halliday v. Sturm, Ruger and Co., Inc., 368 Md. 186, 208, 792 A.2d 1145, 1158 (2002). Moreover, the court concluded common-law principles of strict liability shall not contradict the public policy set forth by the Maryland General Assembly. Id. The Legislature chose not to change the strict liability burden on handgun manufacturers. Id.

The tragic death of Jordan Garris in June 1999 gave rise to the litigation between Jordan’s mother, Melissa M. Halliday (“Halliday”) and Sturm, Ruger and Company, Inc. (“Sturm Ruger”). Jordan’s father, Clifton Garris (“Garris”) purchased a Ruger P89 semi-automatic handgun in March 1999 from On Target, Inc., a retail firearms store. The handgun came with an instruction manual, a free handgun safety course (which Garris declined), a pamphlet (published by the Federal Bureau of Alcohol, Tobacco, and Firearms entitled “Youth Handgun Safety Act Notice,”) and a lock box with a padlock to store the handgun and magazine. The instruction manual provided warnings and instructions regarding the storage and use of the handgun. On the cover of the manual, and embossed on the barrel of the handgun, was a caution to read the manual before using the handgun.

Garris disregarded the warnings and failed to safely store the handgun. Rather, the handgun was stored under his mattress and a loaded magazine was left on a bookshelf in the same room. Both the handgun and magazine were visible to Jordan and he knew how to load the handgun. While playing with the handgun, Jordan shot himself and subsequently died of injuries from the gunshot two days later. Halliday sought to hold the manufacturer of the handgun, Sturm Ruger, responsible for Jordan’s death.

Halliday filed suit in the Circuit Court for Baltimore City against Sturm Ruger and On Target for the death of her son, Jordan Garris. The suit alleged the handgun was defectively designed and contained inadequate warnings. Sturm Ruger responded to the complaint with a motion to dismiss or, in the alternative, a motion for summary judgment.

The Circuit Court for Baltimore City held, based on Maryland law, the risk-utility test applied only when the product malfunctioned and the handgun purchased by Garris did not malfunction. The circuit court concluded Garris clearly knew the handgun was dangerous and granted summary judgment in favor of Sturm Ruger.

The court of special appeals upheld the decision of the circuit court, holding the risk-utility test applies only when a product malfunctions. The alleged design defect should be considered under the risk-utility analysis. The court of special appeals concluded the consumer expectation test is no longer valid Maryland law. The majority, however, recognized the argument concerning whether the warnings were adequate was irrelevant. Halliday argued no warnings would be adequate to make the handgun safer except for the inclusion of child-resistant devices on the handgun.

Halliday raised four questions before the court of appeals. First, Halliday urged the court to abandon the consumer expectation test and adopt a risk-utility test in strict liability actions based on design defects. Id. at 200, 792 A.2d at 1153-54. Second, Halliday requested, when applying the test, the court not require a product malfunction as a prerequisite or the use of a handgun by a three-year-old be considered a malfunction.
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Third, Halliday requested the court not allow an exception to the risk-utility test for handguns. *Id.* Fourth, Halliday argued Garris’s conduct in leaving the handgun and magazine accessible to Jordon was foreseeable, it was not a misuse of the product and further urged the warning given in the instruction manual did not shield Sturm Ruger from liability. *Halliday*, 368 Md. at 200, 792 A.2d at 1153-54.

The court of appeals began its analysis by reviewing the consumer expectation test and the risk-utility test. The consumer expectation test derives from Section 402A of the Restatement (Second) of Torts. *Id.* at 194, 792 A.2d at 1150. A defectively dangerous product is defined as one that “is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product’s characteristics.” *Id.*

The risk-utility test, unlike the consumer expectation test, is applied in situations in which a safer alternative design was feasible and would alter the balance by reducing the danger of the product. *Id.* at 194, 792 A.2d at 1150. This test considers a product defective and unreasonably dangerous if the danger presented by the product outweighs its utility. *Id.* The court concluded that for a manufacturer to be liable to the consumer the product must be both in a “defective condition” and “unreasonably dangerous” at the time the product entered the market. *Id.* at 195, 792 A.2d at 1150.

Maryland cases concerning strict liability generally applied the consumer expectation test in design defect cases when there was no malfunction. *Halliday*, 368 Md. at 197, 792 A.2d at 1152. The court previously concluded, “a handgun manufacturer or marketer could not be held liable under this [risk-utility] theory.” *Id.* at 197, 792 A.2d at 1152. (quoting *Kelly v. R.G. Indus., Inc.*, 304 Md. 124, 497 A.2d 1143 (1985)). The court explained, “a handgun is not defective merely because it is capable of being used during criminal activity or to inflict harm.” *Id.* The court previously concluded, “to impose strict liability upon the manufacturers or marketers of handguns for gunshot injuries resulting from the misuse of handguns by others would be contrary to Maryland public policy as set forth by the Legislature.” *Id.* at 198, 792 A.2d at 1152.

The court of appeals applied the consumer expectation test to the case at hand. *Id.* at 208, 792 A.2d at 1158. The court concluded there was no cause of action in the case and further found the handgun did not malfunction, but unfortunately performed as designed and intended. *Id.* The cause of Jordan’s tragic death, the court concluded, was the carelessness of his own father, Garris, in leaving the handgun and magazine in Jordan’s view and failing to heed the warnings given to him at the time he purchased the handgun. *Halliday*, 368 Md. at 208, 792 A.2d at 1158.

The court of appeals refused to modify precedent and impose liability on handgun manufactures who fail to safely add devices to handguns that would make them childproof. *Id.* at 208, 792 A.2d at 1150. The court of appeals recognized common-law principles should not be changed to contradict the public policy of the State set forth by the General Assembly of Maryland. *Id.* The court stated the Maryland Legislature has chosen not to impose burdens on handgun manufacturers and chose to deal with the problem in other ways. *Id.* at 208, 792 A.2d at 1150. The court of appeals respected the decision by the Legislature and rejected the contentions made by Halliday to change the consumer expectation test standard.

The court of appeals holding in *Halliday* supports both the rights of Maryland citizens to own and safely use handguns, as well as the rights of manufacturers to sell handguns. Opponents to private handgun ownership have repeatedly attempted to impose the risk-utility standard. The court of appeals’ decision not to impose the risk-utility standard for handguns clearly articulated that anti-gun supporters will not prevail and handgun manufacturers will not be liable for the carelessness of handgun owners. The decision by the court of appeals will undoubtedly make handgun owners more responsible for their actions or inactions regarding handgun ownership.
**HUD v. Rucker:**

Title 42 U.S.C. § 1437d(l)(6)’s Plain Language of Lease Terms Affords Local Housing Authorities the Discretion to Evict Tenants for Drug-Related Activities of Household Members or Guests, Regardless of Whether the Tenant Knew of Such Activity

By: Mollie Shuman

Title 42 U.S.C. § 1437d(l)(6)’s plain language of lease terms affords local housing authorities discretion to evict tenants for drug-related activities of household members or guests, regardless of whether tenants knew of such activity. Dept. of Hous. and Urban Dev. v. Rucker, 122 S.Ct. 1230, 1236 (2002). The Supreme Court opined the Anti-Drug Act of 1988 (“the Act”) was a response to the presence of drug dealers who “increasingly impos[ed] a reign of terror on public and other federally assisted low-income housing tenants.” Id. at 1232. Consistent with Congressional intent, the Court afforded the United States Department of Housing and Urban Development (“HUD”) and the Oakland Housing Authority (“OHA”) enormous discretion to evict “innocent” tenants for any drug-related activities of inhabitants under their control. Id. at 1233.

Respondents, four tenants of the OHA, signed a lease containing a provision that required tenant, household member, guest, or person under the tenant’s control to avoid any drug-related criminal activity on or near the premises. Id. at 1232. In addition to this adhesion term, each lease contained a consent provision to emphasize that the tenant must “understand that if I or any member of my household or guests should violate this lease provision, my tenancy may be terminated and I may be evicted.” Id. None of the respondents participated in drug-related activity. Id. Instead, their relatives and caregivers were involved in drug consumption as well as possessing drug paraphernalia within the apartment complex. Rucker, 122 S.Ct. at 1232.

Although these activities violated the lease terms Respondents filed federal actions against HUD, OHA, and OHA’s director, arguing the Act did not authorize the eviction of “innocent” tenants, and if it did, the statute was unconstitutional. Id. at 1233. The United States District Court for the Northern District of California entered a preliminary injunction prohibiting the tenants’ evictions. Id. A panel of the court of appeals reversed and permitted the eviction of tenants who violated the lease provision. Id. A court of appeals en banc panel of the court of appeals affirmed the preliminary injunction, reversing the holding that authorized the eviction of “innocent” tenants. Id. The Supreme Court granted certiorari and held that section 1437d(l)(6) required lease terms that afforded HUD the ability to terminate the lease of a tenant when a household member or guest engaged in a drug-related activity, regardless of the tenant’s knowledge. Id.

The Court carefully dissected the plain language of the statute and opined section 1437d(l)(6) unambiguously held tenants accountable for not only their own drug-related criminal activity, but for another class of people as well. Rucker, 122 S.Ct. at 1233. The en banc court of appeals opined the statute failed to define the level of personal knowledge required for an eviction. Id. However, Congress’s use of the word “any” to modify “drug-related criminal activity” illustrated its intention to discard a knowledge requirement. Id. In fact, the grammatical interpretation provided by HUD convinced the Court that “under the tenant’s control” modified not only “other person,” but also “member of the tenant’s household” and “guest.” Id. at 1233-34. Therefore, the criminal acts of temporary or permanent guests endangered a tenant of losing residency.
Moreover, the court distinguished 21 U.S.C. § 881 (a)(7), which expressly exempted tenants who lacked knowledge of criminal drug-related activity from forfeiture, from the statutory history of section 1437d(l)(6) in illustrating Congress’s intention to preclude any knowledge requirement. *Id.* at 1234. Absent an innocent owner defense, Congress purposefully held tenants accountable for the criminal activity of household members or guests by stating these individuals were under the tenant’s control. *Id.*

Moreover, the Court supported Congress’ permission given to local public housing authorities to conduct no-fault evictions based on public policy reasons. *Rucker*, 122 S. Ct. at 1235. Congress posited that regardless of knowledge, a tenant is a threat to other residents and the housing complex without an ability to control the drug activities committed by a household member. *Id.* (citing 56 Fed. Reg. 51560, 51567 (1991)). Therefore, the Court stated HUD and OHA are most capable of assessing the degree to which a housing project suffers from drug-related crime and the extent to which the tenant may reasonably prevent or mitigate the offending action. *Id.* at 1235.

Furthermore, a balancing test illustrated that although “no-fault” evictions exemplified strict liability, its deterrence on crime ultimately held the greatest weight. *Id.* The absence of such strict liability led to the deterioration of the physical environment of housing developments, which ultimately resulted in substantial governmental expenditures. *Id.* By implementing a secondary communal policing system, the lease terms facilitated a safe and decent federally assisted low-income housing community, whereby all members may feel at ease to walk within its boundaries. *Id.*

The strict housing policy of HUD and OHA serves as a paradigm for federally assisted low-income housing in Baltimore City. In a drug-infested city that produces widespread violence, Baltimore will benefit greatly from the harsh, yet constitutional Supreme Court interpretation of Section 1437d(l)(6). Though unaware tenants may be punished by illegal actions of their household members or temporary guests, the strict housing policy ultimately benefits residents of housing communities who live among the presence of drug dealers and their omnipresent reign of terror.
The Court of Appeals of Maryland held the State of Maryland does not recognize a child-plaintiff's tort law cause of action for "wrongful life." *Kassama v. Magat*, 368 Md. 113, 148, 792 A.2d 1102, 1123 (2002). The court further held the trial judge did not err in submitting the issue of the mother’s contributory negligence to the jury, or in refusing her request for a “last clear chance” jury instruction. *Id.* at 127-33, 792 A.2d at 1111-14.

Millicent Kassama (“Kassama”) learned she was pregnant with Ibrion Kassama (“Ibrion”) in February, 1995. She was referred by her primary care physician to respondent, Aaron Magat (“Dr. Magat”) for obstetrical care. Dr. Magat first examined Kassama on April 19 and estimated that Ibrion was approximately seventeen weeks, and five days old. Noting she came to his office late in her pregnancy, Dr. Magat referred Kassama for standard obstetrical laboratory testing the very next day. These tests included an alpha-fetaprotein test (“AFP test”), which served as a screening device for certain fetal disorders. Kassama neglected to have the AFP test performed until May 16. Dr. Magat did not receive the results until May 25, when Kassama was twenty-two weeks and four days pregnant. The AFP test results indicated a significantly elevated risk that her child had Down’s Syndrome. Standard medical procedure required the mother to promptly undergo amniocentesis to identify whether the child had Down’s Syndrome. The test results, however, would not have been available for two weeks, at which time Kassama would have been over twenty-four weeks pregnant and unable to terminate the pregnancy in Maryland.

Ibrion was born with Down’s Syndrome, and Kassama filed a complaint in the Circuit Court for Baltimore County on behalf of herself and the child. Only Kassama’s negligence claim was submitted to the jury, which found, in a special verdict, Dr. Magat was negligent and Kassama was contributorily negligent. Kassama appealed to the Court of Special Appeals of Maryland, which affirmed the trial court. *Id.* at 131, 792 A.2d at 1113.

The court next examined Kassama’s contention that the trial judge erred in denying her requested jury instruction on the doctrine of “last clear chance.” *Kassama*, 368 Md. at 132, 792 A.2d at 1113 (2002). Kassama claimed even if the jury could have found her contributorily negligent, Magat still had the last clear chance to avert the injury “by advising her of the abnormal result, to obtain amniocentesis, and allow her to terminate the pregnancy.” *Id.* at 132, 792 A.2d at 1113. Again, the court held Kassama’s argument mistakenly depended on specific findings of
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negligence by the jury when its actual findings were only general. *Id.* at 133, 792 A.2d at 1114. The court affirmed the decision of the court of special appeals, finding “there was a smorgasbord of possibilities [here] and, as to most of them, the instruction requested by petitioner was inapplicable.” *Id.* at 133, 792 A.2d at 1114.

Finally, the court turned its attention to the claim for “wrongful life” brought on behalf of Ibrion. *Id.* at 133, 792 A.2d at 1114. The Arizona Supreme Court distinguished “wrongful life” claims from other tort law claims arising from the birth of a child. *Id.* at 136, 792 A.2d at 1116 (citing *Walker v. Pizano v. Mart*, 790 P.2d 735 (Ariz. 1990)). These claims were brought by children, not parents, for alleged injuries caused by children being born rather than aborted. *Kassama*, 368 Md. at 136, 792 A.2d at 1116 (2002). Thus, in the instant case, the injury claimed by Ibrion was not caused by Dr. Magat, but resulted from being allowed to live “the injury of life itself.” *Id.* at 136, 792 A.2d at 1116.

The court recognized twenty-eight states currently deny recovery for these actions, while only three provide for a limited recovery. *Id.* at 137-38, 792 A.2d at 1116-17. Among the first to address this issue was the New Jersey Supreme Court in *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967), holding such claims required courts to measure the difference between “life with defects against the utter void of non-existence,” and that such a determination “is impossible to make.” *Id.* at 139, 792 A.2d at 1117 (quoting *Gleitman*, 227 A.2d at 692). The vast majority of courts have been unwilling to accept that impaired life is worse than non-life, and have rejected the “wrongful life” cause of action on the ground that a child’s life cannot be a legally cognizable injury. *Id.* at 141, 227 A.2d at 1119. Even in the three states recognizing a limited recovery for such claims, recovery is limited to “the extraordinary expenses of dealing with the impairment,” and awards of general damages are denied. *Id.* at 144, 792 A.2d at 1121 (2002). Therefore, the court of appeals held “for purposes of tort law, an impaired life is not worse than non-life, and, for that reason, life is not, and cannot be, an injury.” *Kassama*, 368 Md. at 148, 792 A.2d at 1123 (2002) (emphasis in original).

In *Kassama v. Magat*, the Court of Appeals of Maryland aligned itself with the vast majority of states refusing to recognize a child-plaintiff’s cause of action for “wrongful life.” A finding that an injury has occurred in such a case requires a determination that non-life is preferable to living with an impairment, such as Down’s Syndrome. While other jurisdictions maintain such a determination is beyond the scope of the judiciary, the court of appeals went a step further by adopting an impaired life is not worse than non-life. The court’s decision is likely to have far-reaching implications on Maryland medical malpractice litigation, as it precludes a child-plaintiff from claiming a number of possible causes of action stemming from a doctor’s negligence.

Life itself cannot be a cognizable injury in the State of Maryland; thus, a cause of action for “wrongful life” does not exist.

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Recent Developments

Long v. State:
Courts Cannot Modify a Consent Order Without Giving the Parties an Opportunity to Be Heard Because to Do Otherwise Would Violate the Parties’ Right to Due Process

By: Dawn A. Anderson

The Court of Appeals of Maryland held that courts cannot modify a consent order without giving the parties notice and an opportunity to be heard because to do otherwise would violate the parties’ right to due process. Long v. State, 371 Md 72, 807 A.2d 1 (2002). In so holding, the court reinforced the effect of a consent order by requiring that court ordered modifications occur only after the parties are given a full opportunity to be heard on the matter.

Derrick Long, Sr. was ordered to pay $25 per week child support for his daughter. Long neglected to comply with the order and failed to appear for the hearing addressing his neglect to provide child support. Pursuant to Md. Rule 15-207(e), the state filed a petition for contempt in the circuit court. At the contempt hearing, evidence showed Long failed to pay any support or arrearage resulting in back owed support of $2975.00. Long claimed jail and job problems caused non-payment, however the trial court found no legitimate reason to prevent Long from working. The court also found that Long had no personal assets of any kind.

The Circuit Court for Washington County found Long in contempt from May 1999 through September 1999 and ordered Long imprisoned pending payment of $700 to purge the contempt. Long appealed to the Court of Special Appeals of Maryland. In addition, Long and the state filed a joint motion to vacate the sentence arguing that the state could not sanction him with incarceration because he had no ability to pay the purge amount required to release him from incarceration. The parties attached a consent order to the motion, stating that the sentence was to be vacated and Long was to be released. The order did not provide for remand for further consideration.

The Court of Special Appeals of Maryland vacated the contempt charge, but remanded the case to the Circuit Court for Washington County, to determine what, if any, conditions of release reasonably assured the petitioner’s appearance at further proceedings. Long and the State appealed the ruling, alleging that the court’s actions deprived the parties the benefit of their bargain, and that in holding as it did, the intermediate court deprived the parties of their right to litigate through briefing and oral arguments on merits. Finally, Long asserted that, according to Md. Rule 15-207(e), he could not be incarcerated pending a hearing because he had no ability to purge himself of the contempt.

The Court of Appeals of Maryland first examined consent orders generally, defining them as hybrids that combine contract law and judicial decrees. Id. at 82, 807 A.2d at 7. Consent orders memorialize an agreement of parties who relinquish the right to litigate the matter in exchange for a certain, carefully negotiated, outcome. Id. The court noted that consent orders have the “same force and effect as any other judgments....” Id. (citing Jones, 356 Md. 513, 740 A.2d 1004 (1999)).

The court further explained that the parties define the scope of a consent agreement. Therefore, a court must first look to the agreement to interpret it. Long, 371 Md. at 83, 807 A.2d at 7. The court noted that when interpreting a consent order the objective test of contracts applies. Id. at 84, 807 A.2d at 8. The court must consider “[t]he written language . . ., irrespective of the intent of the parties . . ., unless the written language is not susceptible of clear

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and definite understanding, or unless there is fraud, duress, or mutual mistake.” *Id.* The court further noted that public policy dictates that consent orders be accepted because “law favors compromise and amicable adjustments.” *Id.* (quoting Sisson v. Baltimore, 51 Md. 83 (1879)).

The court continued by addressing whether the intermediate court erred in modifying the consent order. *Id.* at 81, 807 A.2d at 7. The court reiterated the general rule that consent orders cannot be modified by the court; they should be accepted or denied as proposed. *Long,* 371 Md. at 87, 807 A.2d at 10. Courts may suggest modifications and allow the parties to amend the consent order on their own. In addition, the court stated that when a court modifies a consent order an appeal is allowable. *Id.*

The court noted that while it is greatly concerned over Long’s failure to pay child support, the ultimate goal is not to punish parents, but to provide support for children. *Id.* at 92, 807 A.2d at 13. The court held that the court of special appeals erred in modifying the consent order without giving the parties notice and an opportunity to be heard, and remanded the case in part. *Id.*

The Court of Appeals of Maryland has reinforced Maryland law dealing with consent orders. This reinforcement continues to support the strength and weight of consent orders. Consent orders should be given reverence by the courts when the order does not violate fairness and is reasonable. Courts can still accept or reject a proposed order; however, courts seeking to modify a consent order must give the parties notice and allow them an opportunity to be heard. *Id.*

In applying these principles, the court observed that the proposed consent order provided that Long’s sentence be vacated and had no provision for remand to the circuit court. *Long,* 371 Md. at 88, 807 A.2d at 10. The court of special appeals modified the order by remanding the case to the circuit court and subjecting Long to incarceration without an opportunity to be heard. *Id.* at 89, 807 A.2d at 11. In acknowledging the intermediate court’s attempt to ensure Long’s appearance at future hearings, the court of appeals indicated that the parties could have included provisions to secure Long’s appearance at further proceedings in their agreement. The court cannot materially modify the existing agreement and alter the bargain of the parties. *Id.*

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The Court of Appeals of Maryland has reinforced Maryland law dealing with consent orders. This reinforcement continues to support the strength and weight of consent orders. Consent orders should be given reverence by the courts when the order does not violate fairness and is reasonable. Courts can still accept or reject a proposed order; however, courts seeking to modify a consent order must give the parties notice and allow them an opportunity to be heard. *Id.*

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Schmerling v. Injured Worker’s Ins. Fund:
Monitoring and Recording Devices In Telephones are Not Considered “Telephone Equipment” for the Purposes of the Maryland Wiretap Act’s Telephone Exemption, Unless They Enhance Communication or Advance the Efficient Use of Telecommunication

By: Megan M. Bramble

The Court of Appeals of Maryland held monitoring and recording devices in telephones are not considered “telephone equipment” for the purpose of the Maryland Wiretap Act’s telephone exemption, unless they enhance communication or advance the efficient use of telecommunication. Schmerling v. Injured Worker’s Ins. Fund, 368 Md. 434, 438, 795 A.2d 715, 717 (2002). In a case of first impression, the court also examined the functional utility of the device and its ability to further the use of the telecommunication system as the proper measure of the applicability of the exemption. Id.

The Injured Worker’s Insurance Fund ("IWIF") is an independent insurance company that provides worker’s compensation to Maryland businesses. Id. at 439, 795 A.2d at 717. In 1996, the company upgraded its telecom-munications system by adding a new Meridian telephone system with monitoring capabilities that were designed by Racal ("Racal device"). Id. The monitoring system recorded the voices of IWIF employees, as well as any other party on the line, in order to evaluate and improve IWIF customer service. Id.

Jack J. Schmerling alleged IWIF’s monitoring and recording of business calls without the prior consent of other parties was a violation of the Maryland Wiretapping and Electronic Surveillance Act § 10-401, and thus filed a class action suit against IWIF. Id. The Wiretap Act prohibits the willful interception of, “any wire, oral, or electronic communications.” Schmerling, 368 Md. at 445, 795 A.2d at 721. Schmerling specifically alleged the monitoring and recording of business calls through the Racal device was unlawful. Id. at 439, 795 A.2d at 718.

The Circuit Court for Baltimore County granted summary judgment in favor of the IWIF, ruling that the monitoring system did qualify as “telephone equipment” and that it was used for valid business purposes. Id. at 441, 795 A.2d at 719. The Court of Special Appeals of Maryland affirmed the lower court’s decision. Id. Schmer-ling petitioned for writ of certiorari to the Court of Appeals of Maryland. Id. The court reversed the court of special appeals decision with regard to the Wiretap Act, holding the add-on Racal device was not “telephone equipment” within the meaning of the telephone exemption. Id. at 456, 795 A.2d at 727.

The court began its analysis by interpreting the statutory language of the Wiretap Act. “Telephone equipment” is not defined in the Wiretap Act, so in interpreting the meaning of the language the court focused on the natural and ordinary meaning of the language, the express and implied purpose of the statute, and common sense. Schmer-ling, 368 Md. at 444, 795 A.2d at 720. To qualify for exemption from these prohibitions, the Racal device needed to meet the dual-pronged criteria of being “telephone equipment (or a component thereof) used in the ordinary course of business.” Id. at 446, 795 A.2d at 722. The issue under debate was whether the Racal device counted as an “electronic, mechanical, or other device” under the Wiretap Act, which made its use for interception of communications illegal. Id. at 445, 795 A.2d at 721.

To determine legislative intent, the court compared the language of the statute with the statute’s overall purpose. Id. at 445, 795 A.2d at 721. The Wiretap Act was modeled after the federal law, Title III of the Omnibus Crime Control and Safe Streets Act ("Title III"), 18 U.S.C.S.
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§§ 2510-2522 (2000); therefore, the court reviewed federal cases to ascertain the legislative history of the section. Id. (citing Miles v. State, 365 Md. 488, 507, 781 A.2d 787, 798 (2001)).

The Federal Electronic Communications Privacy Act amendments to Title III provided insight into whether the Racal device qualified as a component of the “telephone equipment” in order to fall within the Wiretap Act’s exemption. Schmerling, 368 Md. at 445, 795 A.2d at 721. In the wake of new technology, the amendments satisfied the need to extend its protection of privacy. Id. at 449, 795 A.2d at 723. Along the same lines, the Maryland bill brought the Wiretap Act up to par with the level of privacy risks new technology created. Id.

Neither Congress nor the Maryland General Assembly intended the scope of the amendments to expand the meaning of “telephone equipment.” Id. at 450, 795 A.2d at 724. If anything, it was meant to provide a more restrictive definition. Id. The court expressed dissatisfaction with other jurisdictions’ methodology in defining the term “telephone equipment.” Id. at 453, 795 A.2d at 725. The court rejected the reliance on factors such as who designed or sold the product, and the degree of integration of the system. Schmerling, 368 Md. at 453, 795 A.2d at 725. Instead, the court chose a functional approach that required the device have some relation to the enhancement of the communication system, such as a positive impact on efficiency, cost, or some other measurable effect. Id. at 454, 795 A.2d at 726.

Since the Racal device’s use was specifically for recording purposes, the court ultimately found the use of the device could be regulated. Id. at 454, 795 A.2d at 726. This was the case because its attachment to the IWIF telephones was intended. Id. Although the Racal device may have increased effectiveness of employee training, it did not increase the effectiveness of the telecommunication equipment itself. Id. at 455, 795 A.2d at 727. Thus, the Racal device did not enhance telecommunication. The court concluded even if the system was a component of the phone, it should not be considered “telephone equipment” because it was only capable of monitoring. Id.

Although the Wiretap Act ultimately poses a hardship to those businesses that rely on recording devices for quality assurance, the ultimate legislative goal of protection of privacy is achieved through the Wiretap Act. As a result, companies may find themselves precluded from using monitoring equipment in certain circumstances, even when it would behoove both the company and the general public to use such devices. Nevertheless, the ruling in this case guarantees Maryland citizens the protection of private information.

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**Slack v. Truitt:**

Presumption of Due Execution Attaches to a Will, Despite the Absence of an Attestation Clause and May Only Be Overcome by Clear and Convincing Evidence that the Will was Not Properly Attested

By: Jennifer Merrill

In a case of first impression, the Court of Appeals of Maryland held a presumption of due execution attaches to a will, despite the absence of an attestation clause, and may only be overcome by clear and convincing evidence the will was not properly attested. *Slack v. Truitt*, 368 Md. 2, 17, 791 A.2d 129, 138 (2002). Additionally, the court emphasized when a will is signed by the testator outside the presence of witnesses, the requirement that the testator acknowledge the document as his will to the signatory witnesses may be achieved through the testator’s conduct alone. *Id.* at 12-13, 791 A.2d at 135-36. In so ruling, the court elevated the validity of wills that do not contain an attestation clause and reinforced the legitimacy of attesting witnesses that are not present to observe the actual signing of the document by the testator.

On June 5, 1999, Dale Slack (“Slack”) drafted and signed a one-page, handwritten, last will and testament that bequeathed the bulk of his estate to Michael and Teresa Truitt. Slack wrote the words “Witnessed By” at the bottom of the will with space reserved underneath for witnesses’ signatures, but did not include an attestation clause in the document. Thereafter, Slack asked his neighbor, Dorothy Morgan (“Morgan”), and Morgan’s daughter, Sandra Bradley (“Bradley”), to come to his house to sign a document, but did not verbally reveal to either woman the document was his last will and testament. Two hours after Morgan and Bradley signed Slack’s will in the space reserved for witnesses’ signatures, Slack committed suicide.

Slack’s brother, and next of kin, Clinton A. Slack (“Clinton”), filed a petition with the Orphan’s Court for Cecil County requesting priority of appointment as personal representative of Slack’s estate. Subsequently, Teresa Truitt (“Truitt”) filed a separate petition also claiming priority of appointment as personal representative of Slack’s estate as a beneficiary and creditor. The orphan’s court selected Clinton as the personal representative for the estate, but declined to admit the will to probate. Truitt filed a *de novo* appeal in the Circuit Court for Cecil County which similarly refused to admit Slack’s will to probate. Thereafter, Truitt appealed to the Court of Special Appeals of Maryland. The court of special appeals reversed the ruling of the circuit court, finding although “the witnesses’ attestations were hurried and careless, they were sufficient under [Maryland Estates and Trusts Article Section] 4-102.” *Id.* at 7, 791 A.2d at 132 (citing *Truitt v. Slack*, 137 Md. App. 360, 367, 768 A.2d 715, 719 (2001)). The Court of Appeals of Maryland granted certiorari to clarify and interpret conditions surrounding the attestation of a will that may impact due execution under Maryland law.

The court began its analysis with a review of Section 4-102 of the Maryland Estates and Trusts Article, noting in order for a will to be duly executed it must be “(1) in writing, (2) signed by the testator . . . and (3) attested and signed by two or more credible witnesses in the presence of the testator.” *Id.* at 7, 791 A.2d at 132. As the Slack will was indisputably written and signed by the testator, the court deemed the primary issue to be whether the will was properly attested pursuant to the statutory attestation requirement. *Id.*

The court noted prior Maryland case law recognized that where a will contains an attestation clause, a presumption of due execution arises that may only be overcome by clear and convincing evidence. *Id.* at 9-
The court then acknowledged that the question as to whether the same presumption arises absent an attestation clause is one of first impression in Maryland. *Slack*, 368 Md. at 10, 791 A.2d at 134. Accordingly, the court analyzed caveats from other jurisdictions where the basis for contesting the will was the absence of an attestation clause and a failure on the part of the signatory witnesses to recall the circumstances under which they signed the will. *Id.* at 10-12, 791 A.2d at 134-35. The court concurred with decisions that held that an attestation clause is not required for a presumption of validity to arise and further noted an “attestation clause is not the *sine qua non* of the presumption of due execution.” *Id.* at 12, 791 A.2d at 135.

The court of appeals next considered the appropriate burden of proof to place upon a caveator who contests a will that does not contain an attestation clause on the basis of improper execution. *Id.* The court looked to *McIntyre v. Saltyysiak*, 205 Md. 415, 421, 109 A.2d 70, 72 (1954), where a clear and convincing evidence standard of proof was placed on a caveator contesting a will containing an attestation clause for failure to meet the requisite formalities. *Id.* at 13, 791 A.2d at 135. The court noted because a presumption of due execution arises in wills, notwithstanding the presence of an attestation clause, the clear and convincing evidence standard should be applicable in either situation. *Id.*

Upon ruling a presumption of due execution arises in a will without an attestation clause absent clear and convincing evidence to the contrary, the court looked to the circumstances surrounding the attestation of the Slack will. *Slack*, 368 Md. at 13-14, 791 A.2d at 136-37. The court again examined *McIntyre* and determined proper attestation does not require witnesses to be cognizant the document is a will if the testator signs the document in the witnesses’ presence. *Id.* at 12-13, 791 A.2d at 135-36. Conversely, the *McIntyre* court observed if a testator signs a will outside the presence of witnesses, he must acknowledge the document as his will. *Id.* This acknowledgement, however, may be done non-verbally, such that the testator holds the document out as his own to the witnesses while giving them an opportunity to ascertain the pertinent information contained within the document. *Id.*

Applying *McIntyre*, the court found Slack’s conduct sufficient to meet the acknowledgment requirement because he presented his own handwritten and signed document to Morgan and Bradley, which they signed in the space provided for witnesses. *Id.* at 14-15, 791 A.2d at 136-37. Additionally, the court determined Clinton did not present clear and convincing evidence to rebut the presumption of due execution that arose when Morgan and Bradley attested the document. *Id.* at 17, 791 A.2d at 138.

A forceful dissent asserted the majority overextended the court’s *McIntyre* holding and interpreted the statutory attestation requirement so broadly as to render it as a condition for due execution moot. *Slack*, 368 Md. at 21-23, 791 A.2d at 140-42 (Battaglia, J., dissenting). The dissent opined a will that does not contain an attestation clause should not be given the same “evidentiary weight” leading to presumption of due execution as a will that does contain such a clause. *Id.* at 21, 791 A.2d at 140. The dissent further suggested the proper burden of proof for a caveator contesting a will absent an attestation clause should be a preponderance of the evidence accompanied by a consideration of the totality of the circumstances. *Id.* at 23-24, 791 A.2d at 142.

The Court of Appeals of Maryland’s *Slack* ruling is a victory for the rights of legitimate testators. By placing the hefty burden of clear and convincing evidence on a caveator to a will that does not contain an attestation clause, the court reduces potential claims by disgruntled non-beneficiaries. Neither a witness’ failure to recall the circumstances surrounding the signing of a will, nor the signing of the will by the testator outside of the presence of the witnesses, may be sufficient to overcome the burden. Through this decision, the court is emphasizing the desire of the judiciary to validate wills and vehemently protect the wishes and desires of testators by making it more difficult for a will to
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**Tyma v. Montgomery County:**

A County Ordinance is Lawful in Extending Employment Benefits to Domestic Partners of Its Employees

By: Purvi Patel

The Court of Appeals of Maryland upheld a Montgomery County ordinance, the Employee Benefits Equity Act of 1999 ("Act"), that extended employment benefits to domestic partners of its employees. *Tyma v. Montgomery County*, 369 Md. 497, 499, 82 A.2d 148, 150 (2002). Public concern was raised as to whether the ordinance abrogated the State’s definition of marriage by providing domestic partnerships equal footing with legally recognized marriages. The court disagreed, finding neither state nor federal law preempts a home rule county from enacting a local law solely affecting that municipality’s personnel policies. Moreover, the court stressed the municipality’s actions did not deprive State regulation of marriage.

On November 30, 1999, the Montgomery County Council ("Council") enacted Montgomery County Bill No. 29-99, which became effective March 3, 2000. Formerly, benefits such as health, leave, and survivorship were only available to spouses and dependents of county employees. However, the Act extended these benefits to domestic partners. The Act’s scope encompassed all active and retired county employees.

The Act amended Chapter 19A, Ethics, of the County Code to include domestic partners under the definitions of “immediate family” and “relative.” *Id.* at 503, fn. 2&3, 82 A.2d at 151. Now, a domestic partner may receive benefits “equivalent to those available to” beneficiaries under the original definitions, including benefits under federal law. *Id.* at 501-2, fn. 1, 82 A.2d at 150-51. To be a beneficiary, a domestic partner must meet all requirements outlined in Section 33-22(c)(1). *Id.* at 503, fn. 4, 82 A.2d 151.

Petitioners, employees and residents of Montgomery County, filed an action in the Circuit Court of Montgomery County seeking an order to invalidate the Act. Instead, the circuit court granted a motion for summary judgment denying their request. The petitioners filed an appeal in the Court of Special Appeals of Maryland. However, before the court of special appeals could review the appeal, the Court of Appeals of Maryland granted certiorari.

The court began its analysis with the Home Rule Amendment, Article XI-A of the State Constitution, which “transferred the General Assembly’s power to enact many types of public local laws” to counties if they chose to adopt a home rule charter. *Id.* at 504, 82 A.2d at 152. Furthermore, “counties enjoy full legislative power,” under the Home Rule Amendment, “to pass all ordinances . . . [deemed] expedient under the police power limited only by Article 25 of the State Constitution,” State laws, and a similar public general law. *Id.* at 506, 82 A.2d at 153.

The court differentiated between a public general law and a public local law. A general law is defined as “a subject . . . of significant interest . . . to more than one geographical subdivision, or the entire state.” *Tyma*, 369 Md. at 507, 82 A.2d at 154 (citing *Cole v. Sec’y of State*, 249 Md. 425, 435, 240 A.2d 272, 278 (1968)). Local laws apply to “only one subdivision.” *Id.*; see *Steimel v. Bd. of Election Supervisors of Prince George’s County*, 278 Md. 1, 5, 357 A.2d 386, 388 (1976).

Petitioners’ first contention was Maryland law does not recognize same-sex and common-law marriages. *Id.* at 508, 82 A.2d at 154. As a result, this Act is expressly prohibited from granting benefits to same-sex partners of Montgomery County employees. *Id.* Petitioners also argued the Act was “an unlawful, back-door attempt” to legitimize “illegitimate relationships under Maryland law by attempting to create . . . a legal relationship.” *Id.*
equivocality between lawful spouses and same-sex domestic partners.” _Id._ at 509, 82 A.2d at 155.

In response, the court confirmed the lower court’s conclusion that the Act was properly enacted. _Id._ at 511, 82 A.2d at 156. Because it was a purely local law, the Act did not infringe the State’s ability to regulate or define marriage statewide. _Id._ Moreover, the Act may “significantly enhance the county’s ability to recruit and retain highly qualified employees.” _Tyma_, 369 Md. at 512, 82 A.2d at 157.

Next, petitioners asserted the Act “affects the interests of the whole State as well as interests outside the State” and also “require[s] expenditure of State funds.” _Id._ at 509, 82 A.2d at 155. The court relied on _Snowden v. Anne Arundel County_, finding it reasonable for State funds to be used in reimbursing private legal expenses of certain county employees charged with a criminal offense. _Id._ at 511, 82 A.2d at 156 (citing _Snowden_, 295 Md. 429, 431, 456 A.2d 380, 381 (1983)). Similarly in this case, the court agreed with the county that the Act falls within the scope of the Home Rule Amendment (the “HR Amendment”) effectuated by Article 25, § 5 of the Maryland Constitution. _Id._ at 512, 82 A.2d at 157.

The court further disagreed with petitioners that a “legal equivalency [existed] between” a domestic partnership and a marriage under the Act based on their similar requirements. _Id._ at 514, 82 A.2d at 158. The Act simply stated whatever benefits were conferred on a spouse or a spouse’s dependent must also, in the same manner and to the same extent, be provided to a domestic partner of a county employee. _Id._ In fact, the court determined the Act “affects only the personnel policies of Montgomery County and does not implicate the State’s interest in marriage.” _Tyma_, 369 Md. at 515, 82 A.2d at 158. Furthermore, this reasoning maintained consistency with other jurisdictions. _Id._

Finally, petitioners contended that benefits provided under federal laws, such as the Family and Medical Leave Act (“FMLA”), did not include domestic partners as beneficiaries, so neither may a county ordinance. _Id._ at 517, 82 A.2d at 160. The court, after examining regulations implementing FMLA and other federal laws, concluded employers “must observe . . . plan[s] that provide greater . . . rights to employees.” _Id._ (citing 29 C.F.R. § 825.700(a)). Because “these laws represent minimum standards,” the county may lawfully provide greater employee benefits than federal laws require without fearing preemption. _Id._

In _Tyma_, the Court of Appeals of Maryland followed other jurisdictions in upholding a local law, that extended employment benefits to domestic partners of county employees. In validating the Montgomery County ordinance, the court broadened the scope of who is considered a beneficiary. This decision has been groundbreaking for all same-sex domestic partnerships in Maryland, particularly Montgomery County.
Witte v. Azarian:
The Court of Appeals of Maryland Indentified Activities to be Calculated in Determining the Percentage of a Medical Expert’s Professional Time Directly Involving Testimony

By: Bryan C. Hughes

The Court of Appeals of Maryland held professional activity of a medical expert directly involves testimony when the expert: (1) is in, or traveling to or from, deposition or trial for the purpose of testifying; (2) assists a litigation team in developing or responding to discovery; (3) reviews notes, prepares reports, or confers with a litigation team after being informed of the likelihood that the expert will be called to testify; and (4) is engaged in any similar activity that has a clear and direct relationship to the expert’s testimony. Witte v. Azarian, 369 Md. 518, 535-36, 801 A.2d 160, 171 (2002). In so holding, the court interpreted Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04(b)(4), which mandates that an expert may devote no more than 20% of his or her annual professional activities directly involving testimony in personal injury claims. The certificate attested that Honick had reviewed the medical records related to Witte’s treatment of Azarian, that Witte was negligent in his treatment, and that his negligence proximately caused permanent injury to Azarian.

Following Azarian’s waiver of arbitration, the case was transferred to the Circuit Court for Montgomery County. The trial court granted summary judgment in favor of Witte, finding that Honick devoted more than 20% of his annual professional time to activities directly involving testimony in personal injury cases. The court of special appeals reversed and remanded, rejecting the trial court’s “expansive construction of the phrase ‘directly involve testimony.’” Id. at 526, 801 A.2d at 165. The court identified its task as one of statutory construction and looked first to the language of the statute to determine legislative intent. Id. at 525, 801 A.2d at 165. Finding the wording ambiguous as to the meaning of the phrase “directly involving testimony,” the court turned to the legislative history to determine the intent of the General Assembly. Id. at 526, 801 A.2d at 165. This statute was part of a procedure devised for resolution of healthcare malpractice claims in response to a crisis in the malpractice insurance market in 1976. Id.

When the initial bill did not pass, the Governor created a task force on medical malpractice insurance to make recommendations for eliminating excessive damages and reducing the frequency of malpractice claims. Witte, 369 Md. at 529-30, 801 A.2d at 167 (2002). These recommendations included a requirement that a qualified expert filing a certificate with the HCAO derive no more than 50% of his or her income annually from testimony related to healthcare malpractice claims. Id. at 530, 801 A.2d at 167. In 1986, a Senate Bill incorporating these recommendations passed with a modification that experts be
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disqualified if “more than 20% of the expert’s professional activities (annually) directly involve testimony in personal injury claims.” Id. at 530, 801 A.2d at 168 (emphasis provided).

The legislative history did not indicate the specific activities the Legislature intended to include in calculating the 20%. Id. at 531, 801 A.2d at 168. The court found no similar statutes for comparison in other jurisdictions, referring to this as a “peculiarly Maryland provision.” Id. The court noted that a reading of the statute that would unreasonably limit the pursuit or defense of an existing cause of action should be avoided because of the constitutional dilemma this would present. Id. at 533, 801 A.2d at 169. The condition in the statute regarding expert witnesses applies to defendants as well as plaintiffs. Witte, 369 Md. at 533, 801 A.2d at 169 (2002). If the statute was construed expansively, it could limit a defendant’s ability to defend an action in violation of Articles 19 and 24 of the Maryland Declaration of Rights. Id. at 533-34, 801 A.2d at 169-70.

The court of appeals concluded that consideration of all the evidence provided two clues as to the Legislature’s intent in enacting this statute. Id. at 534, 801 A.2d at 170. First, the Legislature intended that a category of “professional witness” not be qualified as an expert competent to sign a certificate for purposes of this statute. Id. Secondly, reducing the percentage from 50% to 20% evidenced the Legislature’s concern that the statute should not shrink the pool of eligible experts so to deny a party the ability to pursue or defend a claim. Id. at 534, 801 A.2d at 170.

In consideration of these factors, the court held that the professional activity of a medical expert directly involves testimony when the expert is in, or traveling to or from deposition or trial for the purpose of testifying. Id. at 535, 801 A.2d at 171 (2001). The time an expert spends assisting a litigation team in developing or responding to discovery is also calculated. Witte, 369 Md. at 535, 801 A.2d at 171 (2002). Time spent reviewing notes, preparing reports, and conferring with members of a litigation team after being informed that it is likely that the expert will be called to testify is counted as well. Id. at 535-36, 801 A.2d at 171. Finally, any similar activity with a clear and direct relationship to testimony being given by a doctor in a malpractice case is calculated in determining the percentage. Id. at 536, 801 A.2d at 171. Application of these factors to the circumstances of the present case revealed that the court of special appeals correctly found that Honick met the under 20% requirement and qualified to sign a certificate in support of Azarian’s claim. Id.

In Witte v. Azarian, the Court of Appeals of Maryland provided a statutory construction of Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04(b)(4), determining the types of activities to be included in calculating the percentage of time an expert devotes annually to testimony directly involving personal injury claims. Maryland is currently the only state with such a unique requirement. The court’s decision sets an important standard for future Maryland personal injury litigation, resulting in a wider pool of experts, as no one expert may spend more than 20% of his or her time engaged in the indicated activities. However, it may also result in a poorer quality of expert, as those most qualified to provide testimony will be precluded from testifying in some cases.

COMING SOON!

Law Forum
Volumes

33.2, 34.1 & 34.2
**Young v. State:**

Supreme Court’s Holding In *Apprendi* Does Not Apply to Sex Offender Registry

By: Chrys P. Kefalas

In a case of first impression, the Court of Appeals of Maryland held the Supreme Court’s holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not apply to sex offender registry. *Young v. State*, 370 Md. 686, 690, 806 A.2d 233, 235 (2002). In so holding, the court determined Maryland’s Registration of Offenders statute, which requires certain convicted defendants to register as sex offenders, is not punishment, and does not violate due process rights enunciated in *Apprendi*. *Id.* at 716, 806 A.2d at 250.

In the summer of 1999, Jessica McGregor (“McGregor”), a sixteen-year-old girl, met Jessie Lee Young (“Young”), a thirty-four-year-old man who ran an escort service in New York. Young, with knowledge that McGregor was a minor, allowed her to join his escort service as a prostitute. During the first week of September 1999, Young and McGregor moved to metropolitan Washington D.C., where McGregor continued to work as a prostitute.

Young was convicted in the Circuit Court for Anne Arundel County for transporting a person for the purposes of prostitution in violation of Md. Code Art. 27, section 432 (1996 & Supp. 2000). The statutory maximum sentence was ten years. The circuit court sentenced Young to ten years, with credit for time served, and all but eight years suspended. Additionally, the court placed Young on five years probation and ordered, pursuant to Md. Code Art. 27, section 792 (1996 & Supp. 2000) that he register as a sexual offender.

Young appealed to the Court of Special Appeals of Maryland, challenging the registration requirement. The court of special appeals affirmed. Young filed a petition for a writ of certiorari, which was granted by the Court of Appeals of Maryland.

The major issue before the court of appeals was whether Md. Code Art. 27, section 792 (1996 & Supp. 2000) is a punitive statute that imposes a sanction triggering a right to a jury trial and the right to proof beyond a reasonable doubt under *Apprendi*. Young, 370 Md. at 693, 806 A.2d at 237. Accordingly, the court began its analysis by reviewing the Supreme Court’s landmark *Apprendi* decision. *Id.* at 695, 806 A.2d at 238.

In *Apprendi*, the Supreme Court held “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 696, 806 A.2d at 239. Thus, the court stressed in order for Young’s challenge to succeed, he must demonstrate the following independent elements: (1) the sex offender registry constitutes punishment; (2) factual findings in question expose Young to a greater penalty than the prescribed statutory minimum; and (3) “that such factual prerequisites involve facts ‘other than the fact of a prior conviction.’” *Id.* at 696-97, 806 A.2d at 239.

The court had not previously considered any case that addressed whether the sex offender registration statute violates due process in light of *Apprendi*. *Id.* at 697, 806 A.2d at 239. Accordingly, the court turned to both state and federal case law from other jurisdictions. *Id.* Other jurisdictions dealt with whether registration and notification provisions of sex offender registration statutes or civil and forfeiture provisions constitute punishment for *ex post facto*, double jeopardy, and cruel and unusual punishment purposes. Young, 370 Md. at 697, 806 A.2d at 239. The court concluded the “overwhelming body of judicial precedent” demonstrates that sex offender registration is not punishment. *Id.*

The common thread underlying the case precedent was the
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application of the *Usery-Hendricks* “intent-effects test.” *Id.* at 702-07, 806 A.2d 242-46. In determining whether registration under Section 792 constitutes punishment, the court applied the following two-part test: (1) whether the Legislature intended the sanction as punitive; and (2) whether there is “clearest proof” the statute is “so punitive” in effect as to prevent the court from legitimately viewing it as regulatory or civil in nature, despite the Legislature’s intent. *Id.* at 702-03, 806 A.2d at 242.

To decipher the Legislature’s intent, the court examined the legislation’s declared purpose and the statute’s text and structure. *Id.* at 711-12, 806 A.2d at 248. The court noted Section 792 contained no express statement of purpose. *Id.* at 712, 806 A.2d at 248. However, the court found the “plain language” and design of the statute “clearly indicated that it was not intended as punishment” but as a regulatory requirement intended to protect the public. *Young*, 370 Md. at 712, 806 A.2d at 248.

The court’s next step determined whether, despite the Legislature’s intent, Section 792 was “so punitive” in effect to prevent the court from legitimately viewing it as remedial in nature. *Id.* at 712-13, 806 A.2d at 249. The court applied the following *Mendoza-Martinez* factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment -- retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether it lacks an alternative purpose to which it rationally may be connected; and (7) if such alternative does exist, whether the statute appears excessive in relation to it. *Id.* at 698, 806 A.2d at 240.

Applying the *Mendoza-Martinez* factors, the court concluded the effect of Section 792 was not “so punitive” as to outweigh the Legislature’s remedial purpose. *Id.* at 714, 806 A.2d at 50. It noted the statute’s physical restraints are minimal, emphasizing the affected person’s movements are not restricted in any way and the information required to register does not impose an unreasonable burden. *Id.* at 713, 806 A.2d at 249. In addition, the court stated while the stigma associated with registration is an affirmative disability, “the burden is not so unreasonable, in light of the statute’s remedial aims, that it converts the statute to a punitive one.” *Id.* Furthermore, it found sex offender registration was not traditionally regarded as punishment and the statute contained no *scienter* requirement. *Young*, 370 Md. at 714-15, 806 A.2d at 250.

The court acknowledged that registration requirements further the aim of deterrence. *Id.* at 715, 806 A.2d at 250. Nevertheless, the court found the statute had legitimate purposes other than punishment, including protecting the public, and alerting law enforcement and surrounding community to sexual offenders who may reoffend. *Id.* The court also asserted the statute was narrowly tailored to protect the public from sex offenders. *Id.*

Finally, the court dealt squarely with whether the factual findings required under Section 792 exposed the defendant to a greater penalty than the prescribed statutory maximum. *Id.* at 716, 806 A.2d at 251. In holding that it did not, the court stated the fact McGregor was under the age of eighteen is not “a fact that increases [the sentence].” *Id.* In fact, the trial court sentenced Young to ten years, the statutory maximum, but suspended two years and ordered Young to register as a sex offender as a condition of probation. *Young*, 370 Md. at 716, 806 A.2d at 251. Thus, the court stated “Apprendi does not apply to a case in which a trial court imposes a discretionary sentence within the permissible statutory range.” *Id.*

The Court of Appeals of Maryland, as a matter of first impression, held the Supreme Court’s holding in *Apprendi v. New Jersey* does not apply to sex offender registration. In so holding, the court settled the issue of sex offender registration in light of Apprendi’s criminal due process implications in Maryland. However, Maryland practitioners should be aware, the court remained silent on new internet notification requirements and their Fourteenth Amendment due process implications.
Robert L. Bogomolny, former corporate senior vice president and general counsel of G.D. Searle & Company and former dean and professor of law at the Cleveland-Marshall College of Law at Cleveland State University, was named the seventh president of the University of Baltimore (UB) by the University System of Maryland (USM) Board of Regents. President Bogomolny succeeds H. Mebane Turner, who retired this July 2003 after serving 32 years as UB’s president. President Bogomolny (pronounced “Bow-go-mole-knee”) began his new position on August 1, 2002, with an official investiture ceremony taking place on April 25, 2003.

President Bogomolny was selected by the Board of Regents from a national field of candidates, including six semi-finalists and three finalists. A 15-member Presidential Search Committee, including representatives from UB’s faculty, staff, student, and alumni populations, selected the finalists following campus-wide surveys and discussions. The Board of Regents interviewed all three finalists.

Prior to his appointment as UB president, Bogomolny served as corporate senior vice president and general counsel for G.D. Searle & Company, an international pharmaceutical company, from 1987 to 2001. While at Searle, President Bogomolny was responsible for all legal activities of the company, including its legal, regulatory, quality control, and public affairs departments. He also led the company’s government affairs department in Washington, D.C. and served on the Searle Executive Management Committee.

Before his experience at Searle, President Bogomolny was a professor of law and dean of the Cleveland-Marshall College of Law at Cleveland State University from 1977 to 1987. Before that, he served seven years as professor of law at Southern Methodist University School of Law. Other positions he has held include assistant director of the Vera Institute of New York, a criminal justice research entity (1969-70); assistant chief counsel to the U.S. Department of Health, Education and Welfare’s Bureau of Drug Abuse Control (1967-69); special assistant to the U.S. Attorney for the District of Columbia; attorney in the criminal division of the U.S. Department of Justice (1966-67); and associate for Burke, Haber & Berrick, Cleveland, Ohio (1963-66).

A native of Cleveland, Ohio, President Bogomolny earned his bachelor’s and law degrees from Harvard University. For the former, he graduated cum laude. President Bogomolny has four grown children and a grown stepchild.

President Bogomolny is a member of several professional and philanthropic organizations. He serves as chairman of the board of Chamber Music America, a national non-profit organization for professional chamber musicians with offices in New York. He also is a board member of the Foundation for Emotionally Disturbed Children in Chicago, and a board member and past president and chair of the development committee of Orchard Village, a program for developmentally disabled adults in Skokie, Illinois. His work in the legal arena includes past membership on the steering committee of the Task Force on Violent Crime for the Bar Association of Greater Cleveland, and former trustee of the Legal Aid Society of Cleveland. He also served as chairman of the Task Force on Medical Care for the Indigent, sponsored by the Board of Cuyahoga County Commissioners in Cleveland, Ohio. President Bogomolny is a member of the bar in the District of Columbia, Illinois, Ohio, and the U.S. Supreme Court.

President Bogomolny’s combination of success in both academia and the private sector allow him to be poised for leading the University of Baltimore into the twenty-first century.