SUPREME COURT OF MARYLAND
CASES & DECISIONS UPDATE

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About This Update

The Department of Legislative Services, Office of Policy Analysis, reviews the opinions issued by the Supreme Court of Maryland and reports on those decisions of potential interest to the General Assembly. The project is led by Amy A. Devadas. Shane C. Breighner, Amanda L. Douglas, Joshua S. Prada, Joanne E. Tetlow, Holly N. Vandegrift, and Jennifer L. Young assisted in the preparation of this edition.

In this edition, the following cases are summarized:

- *John Doe v. Catholic Relief Services*, 484 Md. 640 (2023): The prohibition against sex discrimination in the Maryland Fair Employment Practices Act (MFEPA) and the Maryland Equal Pay for Equal Work Act (MEPEWA) does not include protection against discrimination based on sexual orientation. Additionally, MFEPA's religious entity exception bars claim of workplace discrimination based on religion, sexual orientation, and gender identity by employees whose duties "directly further the core mission(s) – religious or secular, or both – of the religious entity."

- *Jennifer Rowe v. Maryland Commission on Civil Rights,* 483 Md. 329 (2023): There is no express statutory grant of review in the Appellate Court of Maryland of circuit court rulings on judicial review of no-probable-cause findings by the Maryland Commission on Civil Rights (MCCR). The plain language of the statute demonstrates that the General Assembly intended to confine judicial review of MCCR's no probable cause determinations to the circuit court.

- *Maryland Department of the Environment v. Assateague Coastal Trust*, 484 Md. 399 (2023): The Maryland Department of the Environment (MDE) acted reasonably and in compliance with the water quality standards of the federal Clean Water Act and Title 9, Subtitle 3 of the Environment Article when it reissued in 2019 a general discharge permit for animal feeding operations (AFO) that included new provisions regarding outdoor air quality (as it relates to water pollution) for poultry operations. Specifically, the framework MDE used to make its final determination to reissue the general discharge permit is consistent with federal and State laws, and the manner in which it chose to address

ammonia emissions as water pollution complied with the laws and fell within the discretion provided to MDE by the General Assembly.

- *Comptroller of Maryland v. Comcast of California, Maryland, Pennsylvania, Virginia, West Virginia, LLC, et al*., 484 Md. 222 (2023): The special statutory administrative remedies for challenging tax disputes under the Tax-General Article, which the General Assembly intended to be exhausted prior to pursuit of relief in the circuit court, are exclusive with respect to a challenge by affected companies of the constitutionality and legality of Maryland's Digital Advertising Gross Revenues Tax Act under federal law. Because the companies did not exhaust those administrative remedies prior to seeking a declaratory judgment in the Circuit Court for Anne Arundel County and the constitutional exception to exhaustion of the administrative remedies did not apply, the circuit court lacked jurisdiction in the declaratory judgment action.

- *Steven G. Carver v. State of Maryland*, 482 Md. 469 (2022): When evaluating a petition for writ of actual innocence under § 8-301 of the Criminal Procedure Article, courts must consider the cumulative effect of the newly discovered evidence within the context of the entire adversarial proceeding, including its impact on (1) any evidence admitted at trial; (2) any evidence available at the time of trial, including both evidence offered but excluded and evidence not offered but available; and (3) the defendant's or defense counsel's trial strategy. This hindsight assessment requires courts to determine whether the cumulative effect of the new evidence and the available evidence at trial undermined the verdict. The Supreme Court of Maryland further held that its prior holding in *Hunt v. State*, 474 Md. 89 (2021), was limited, and an expert opinion acquired after trial did not constitute new evidence simply because due diligence did not require trial counsel to uncover an expert witness's fraud.

- *State of Maryland v. Keith Krikstan*, 483 Md. 43 (2023): Evidence of a substitute teacher's in-class discussion with a minor student about the teacher's anger or jealousy over the minor's affection for another adult amidst the teacher's ongoing, out-of-class sexual exploitation of the same minor via electronic and telephone communications was sufficient to support a conviction for sexual abuse of a minor. The Supreme Court of Maryland held that a rational juror could conclude that the teacher's in-school conduct involved the sexual exploitation of a minor.

- *Woodlin v. State*, 482 Md. 31 (2022): The Maryland Repeat Sexual Predator Prevention Act of 2018, codified under § 10-923 of the Courts and Judicial Proceedings Article, does not require a circuit court to consider any particular factor when it determines whether the probative value of the evidence the State seeks to admit outweighs the danger of unfair prejudice under § 10-923(e)(4). Rather, circuit courts can consider an array of factors, and the Supreme Court of Maryland provided a nonexhaustive list of appropriate factors to guide the circuit courts in future cases.

Maryland Fair Employment Practices Act and Maryland Equal Pay for Equal Work Act – Sexual Orientation

Case: *John Doe. v. Catholic Relief Services*, 484 Md. 640 (2023).

Decision: The prohibition against sex discrimination in the Maryland Fair Employment Practices Act (MFEPA) and the Maryland Equal Pay for Equal Work Act (MEPEWA) does not include protection against discrimination based on sexual orientation. Additionally, MFEPA's religious entity exception bars claims of workplace discrimination based on religion, sexual orientation, and gender identity by employees whose duties "directly further the core mission(s) – religious or secular, or both – of the religious entity."

Background and Summary: John Doe, a gay, cisgender man married to another man, was hired to work as a Program Data Analyst at Catholic Relief Services (CRS) in June 2016. Over the course of his employment, Doe held numerous positions with duties relating to data and information technology. Prior to hiring, Doe was informed by a CRS recruiter that CRS would provide spousal benefits to his spouse. On his hiring, Doe enrolled his spouse through CRS's benefits enrollment system, and CRS accepted the enrollment. Approximately five months later, Doe was notified by the CRS's human resources department that the enrollment of his spouse in CRS's benefits program was mistakenly approved, and that Doe's spouse was not eligible for spousal benefits because CRS considers the provision of spousal benefits to same-sex spouses to be contrary to the organization's Catholic values.

Doe filed suit in the U.S. District Court for the District of Maryland, claiming violations of Title VII of the federal Civil Rights Act of 1964, the federal Equal Pay Act (EPA), MFEPA, and MEPEWA. The district court held that CRS had violated the prohibition against sex-based discrimination in Title VII, as interpreted by the Supreme Court of the United States in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), as well as the EPA. As to State law claims, the U.S. District Court certified three questions of law to the Supreme Court of Maryland, which the Supreme Court reordered and rephrased as follows:

1. Whether the prohibition against sex discrimination in MFEPA (§ 20-606 of the State Government Article) prohibits discrimination on the basis of sexual orientation.

2. Whether the prohibition against sex discrimination in MEPEWA (§ 3-304 of the Labor and Employment Article) prohibits discrimination on the basis of sexual orientation.

3. What is the meaning of the phrase "to perform work connected with the activities of the religious entity," as used in MFEPA's religious entity exemption (§ 20-604(2) of the State Government Article)?

Certified question 1: Whether the prohibition against sex discrimination in MFEPA (§ 20-606 of the State Government Article) prohibits discrimination on the basis of sexual orientation.

Under § 20-606(a)(1)(i) of the State Government Article, an employer is prohibited from failing to hire, firing, or otherwise discriminating against an individual relating to the individual's "compensation, terms, conditions, or privileges of employment" based on the individual's "race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment, …."

MFEPA was originally passed in 1965 in the wake of the federal Civil Rights Act of 1964. The Supreme Court of Maryland has recognized that MFEPA is modeled on Title VII of the Civil Rights Act of 1964 (Title VII) and historically had used federal court interpretations of Title VII as a guide in its interpretation of MFEPA. Eventually, the provisions of MFEPA deviated from those of Title VII. Doe argued that MFEPA should be interpreted in the same way that Title VII was interpreted by the Supreme Court of the United States in *Bostock*. The *Bostock* court held that Title VII includes a prohibition against sex discrimination based on sexual orientation because discrimination based on sexual orientation inherently implicates prohibited sex-based discrimination and therefore is also prohibited. Doe argued that the prohibition against sex-based discrimination in MFEPA should be similarly interpreted.

In answering certified question 1, the Supreme Court of Maryland stated that, when MFEPA was amended in 2001 to include sexual orientation as a protected category, the General Assembly did not believe sexual orientation discrimination to be included as part of the prohibition against sex discrimination. As a result, the court declined to extend the *Bostock* interpretation of Title VII to its interpretation of MFEPA in the instant case. The court reasoned that if the General Assembly had seen sex discrimination as including sexual orientation discrimination, there would be no reason for the separate category. The court also noted in dicta that it understood it to be the practice of the General Assembly "to specifically identify the categories it intends to protect in antidiscrimination statutes." The court also noted that because sexual orientation discrimination, but not sex discrimination, is included in the religious entity exemption, "…reading the prohibition against sex discrimination to include a prohibition against sexual orientation discrimination would render MFEPA's religious entity exemption…nugatory."

In a dissenting opinion, Justice Watts observed that the majority failed to take into account the legal landscape in which the General Assembly passed the legislation in 2001 that added sexual orientation as a protected category. Justice Watts noted that, at the time, lower federal courts had consistently held that the Title VII prohibition against discrimination based on sex did not extend to sexual orientation and, lacking any indication that this interpretation would change, the General Assembly may have taken a "belt and suspenders approach" to ensure that State law was clear on the matter. Both Justice Watts and, in a separate dissenting opinion, Justice Hotten, would have interpreted MFEPA in accordance with the holding in *Bostock* given the historical relationship between Title VII and MFEPA, as well as the overall remedial purpose of MFEPA.

Certified question 2: Whether the prohibition against sex discrimination in MEPEWA (§ 3-304 of the Labor and Employment Article) prohibits discrimination on the basis of sexual orientation.

Section 3-304 of the Labor and Employment Article prohibits employers from providing unequal compensation to employees based on sex or gender identity. The prohibition against discrimination in compensation based on gender identity was added to MEPEWA by Chapters 556 and 557 of 2016. The majority of the court found that the failure of the General Assembly to add sexual orientation to § 3-304 at that time indicated the intent of the General Assembly to exclude sexual orientation from MEPEWA's protections. The court stated that it seemed implausible that the General Assembly would add sexual orientation and then gender identity to MFEPA but then unintentionally neglect to include both when amending MEPEWA. The court also noted that adding sexual orientation discrimination as a protected category in MEPEWA requires a policy determination and action by the General Assembly, not the court.

As with certified question 1, Justices Watts and Hotten, in their respective dissenting opinions, would have interpreted the prohibition against discrimination based on sex and gender identity in MEPEWA to include sexual orientation.

Certified question 3: What is the meaning of the phrase "to perform work connected with the activities of the religious entity," as provided in MFEPA's religious entity exemption under § 20-604(2) of the State Government Article?

As noted above in the discussion for certified question 1, § 20-606(a)(1)(i) of the State Government Article prohibits discrimination in employment based on, among other things, sex, sexual orientation, and gender identity. However, under § 20-604, MFEPA does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion, sexual orientation, or gender identity to perform work connected with the activities of the religious entity."

CRS argued that § 20-604 excludes religious entities entirely from the requirements of MFEPA relating to religion, sexual orientation, and gender identity. Conversely, Doe argued that the court should apply to MFEPA the "ministerial exception" employed by the Supreme Court of the United States. The ministerial exception precludes the application of anti-discrimination laws like Title VII to employment claims implicating the relationship between a religious institution and its ministers. The Supreme Court of Maryland declined to employ either interpretation. Instead, the court held that the exemption from MFEPA applies to employees whose duties "directly further the core mission(s) – religious or secular, or both – of the religious entity."

The majority offered nonexclusive factors to aid State courts in applying this new standard. First, a court should employ a fact-intensive examination of the duties of the employee and the core mission(s) of the entity. Second, the court explained that duties directly furthering the core mission of a religious entity means those "duties that are not one or more steps removed from taking the actions that effect the goals of the entity, …." Third, a court may consider the size of the religious entity as relevant. Fourth, a religious entity may have both religious and secular core missions. This factor implicates employees whose duties extend beyond those that are purely ministerial and

might include roles like those performed by Doe in information technology. Additionally, the description of the entity's mission provided to the public and/or regulators, the services provided, the people the entity seeks to benefit, and how funds are allocated may be relevant factors.

According to Justice Watts's dissent, the exemption applies to the hiring and firing decisions of a religious entity where the individual's work affects the essential activities of the religious entity. Justice Hotten's dissent argued that the exemption does not apply to employment activities that are not religious in nature.

It is of note that in the majority opinion and both dissenting opinions, the justices found the language of the religious entity exemption to be ambiguous. The majority acknowledged that its interpretation of the exemption creates a situation where some employees of a religious entity can sue for all actionable MFEPA discrimination claims while others can sue for claims other than discrimination based on religion, sexual orientation, or gender identity. However, they noted that it is up to the General Assembly "…to decide whether to retain or eliminate the difference in MFEPA's coverage among employees of the same religious entities." Justice Watts, in her dissenting opinion, went so far as to "respectfully recommend that the General Assembly revisit the language [of the religious entity exemption]."

Maryland Commission on Civil Rights – Judicial Review of No Probable Cause Finding

Case: *Jennifer Rowe v. Maryland Commission on Civil Rights*, 483 Md. 329 (2023).

Decision: There is no express statutory grant of review in the Appellate Court of Maryland of circuit court rulings on judicial review of no-probable-cause findings by the Maryland Commission on Civil Rights (MCCR). The plain language of the statute demonstrates that the General Assembly intended to confine judicial review of MCCR's no probable cause determinations to the circuit court.

Background and Summary: For two years, Jennifer Rowe was a member of Krav Maga MD, LLC (KMMD), a mixed-martial arts training gym. KMMD operates a private Facebook group for its members. An individual posted in the group asking why some people have negative attitudes despite having full use of their extremities. Rowe, who suffers from anxiety, depression, and post-traumatic stress disorder, responded "[B]ecause some of us have mental/emotional disabilities." KMMD decided Rowe's comment violated the group's posting policies and deleted her comment. Rowe was contacted by KMMD's general manager via private Facebook message and email explaining the reason for the deletion of her comment. Rowe contacted KMMD staff multiple times over the course of five months regarding the deletion of her comment. KMMD's general manager informed Rowe their decision to delete her comment was final and asked her to cease communication regarding it. Rowe subsequently sent two more emails to the general manager and Chief Executive Officer (CEO) of KMMD and called the gym twice. In her second email, she offered an ultimatum – either have a meeting in person or she would contact Krav Maga Worldwide and, if that failed, she would initiate an inquiry with MCCR. In an email

response, the CEO terminated her membership and banned her from the premises, citing violations of her membership agreement by engaging in disruptive, slanderous, and harassing behavior.

Rowe filed a complaint with MCCR alleging KMMD engaged in disability discrimination by deleting her Facebook comment and terminating her gym membership. MCCR investigated the complaint and accepted evidence from Rowe and KMMD. Ultimately, MCCR found that KMMD had a legitimate, nondiscriminatory business reason to terminate Rowe's membership because she failed to conform to the usual and regular requirements, standards, and regulations of their establishment.

Rowe filed a request for reconsideration of the finding, which MCCR denied. Rowe filed a petition for judicial review in the Circuit Court of Baltimore City of MCCR's denial of her request for reconsideration. The circuit court issued an order affirming MCCR's decision.

Rowe then appealed the circuit court's decision. The Appellate Court of Maryland (then known as the Court of Special Appeals) raised *sua sponte* the issue of jurisdiction. The right to take an appeal from an administrative agency decision is limited except where it is expressly granted by some statute. Section § 20-1005(d)(2) of the State Government Article (which is part of the Human Relations statute) authorizes judicial review of MCCR findings in circuit court, but the statute is silent on a right to appeal to the Appellate Court. The Appellate Court eventually dismissed the appeal for lack of jurisdiction in the matter.

Rowe filed a petition for a writ of *certiorari*, asking the Supreme Court of Maryland to determine whether § 20-1005(d)(2) grants the right to judicial review through express incorporation of the circuit court judicial review provision contained in the Administrative Procedure Act (APA) under § 10-222 of the State Government Article. Section 20-1005(d)(2) specifies that "a denial of a request for reconsideration of a finding of no probable cause by [MCCR] is a final order appealable to the circuit court as provided in § 10-122 of [the State Government Article]." The next section of the APA, § 10-223, provides that "a party who is aggrieved by a final judgment of a circuit court under this subtitle may appeal to the Appellate Court of Maryland in the manner the law provides for the appeal of civil cases." In such situations, a petitioner who is aggrieved by a final judgment of a circuit court under the APA's contested cases subtitle is entitled to the same right to review in the Appellate Court.

The Supreme Court of Maryland held that the plain language of § 20-1005(d)(2) of the State Government Article is unambiguous, explicitly providing for judicial review in "the circuit court" (in accordance with § 10-222 of the State Government Article) but not in the Appellate Court. The statute expressly references § 10-222 and nothing else. The reference to § 10-222 (which is part of the APA) in § 20-1005(d)(2) refers to the procedures to be followed in a circuit court review of an MCCR probable cause determination (which arise under the Human Relations statute). However, it does not convert the case into a contested case under the APA. A discrimination complaint prior to a probable cause finding is not a contested case under the APA. A contested case under the APA receives a quasi-judicial hearing; MCCR's work before a probable cause determination is more investigative than quasi-judicial.

Based on a review of the legislative history and language used in other relevant statutes in which the General Assembly expressly granted review by the Appellate Court, the court determined that consistent with its reading of the statute, the General Assembly did not intend to provide judicial review of an MCCR probable cause finding beyond a circuit court.

The dissent agreed that judicial review of a decision by an administrative agency must be "expressly granted by law." However, where the majority focused on the plain language of § 20-1005(d)(2) granting appeals to the circuit court only, the dissent found express incorporation of further judicial review in three steps: (1) § 20-1005(d)(2) of the State Government Article establishes judicial review and identifies § 10-222 as the statutory provision governing that right; (2) § 10-222 establishes an entitlement to judicial review under Maryland's APA; and (3) § 10-223 provides, minus two exceptions, a party aggrieved by a final judgment of a circuit court to appeal in the manner that law provides for appeal of civil cases.

The dissent argued that § 10-223 authorizes appellate review of a circuit court's judgment on judicial review of a no probable finding cause as provided in § 10-222 because (1) § 10-223 applies broadly to *any* final judgment of a circuit court under the subtitle; (2) the phrase "expressly granted by law" under § 12-302 of the Courts and Judicial Proceedings Article (exceptions to the right of appeal from final judgments) does not limit where the express grant of authority for judicial review must appear; (3) the structure of § 10-223 is broadly inclusive of all final judgments issued under the subtitle; and (4) § 10-223 is not limited in scope to contested cases. Straightforward application of §§ 20-1005(d)(2), 10-222, and 10-223 of the State Government Article demonstrates the General Assembly expressly granting a right of appeal. The dissent also discussed a 1985 decision by the then Court of Special Appeals in an appeal of a no probable cause finding by MCCR. The dissent argued that the General Assembly's legislative inaction following the case supports the conclusion that the General Assembly had acquiesced to the exercise of appellate jurisdiction in that case. The majority rejected this conclusion, found no relevant reported opinions during the time since the case, and characterized that case as an erroneous exercise of jurisdiction by the Appellate Court.

Environmental Law – Administrative Law – Federal Clean Water Act and Maryland Water Pollution Control Laws

Case: *Maryland Department of the Environment v. Assateague Coastal Trust*, 484 Md. 399 (2023).

Decision: The Maryland Department of the Environment (MDE) acted reasonably and in compliance with the water quality standards of the federal Clean Water Act and Title 9, Subtitle 3 of the Environment Article when it reissued in 2019 a general discharge permit for animal feeding operations (AFO) that included new provisions regarding outdoor air quality (as it relates to water pollution) for poultry operations. Specifically, the framework MDE used to make its final determination to reissue the general discharge permit is consistent with federal and State laws, and the manner in which it chose to address ammonia emissions as water pollution complied with the laws and fell within the discretion provided to MDE by the General Assembly.

Background and Summary: Under the federal Clean Water Act and Title 9, Subtitle 3 of the Environment Article of the Maryland Code, MDE has the authority to issue general discharge permits on a determination that the discharge meets all State and federal water quality standards. A general discharge permit is a type of water pollution discharge permit under federal and State schemes that places limits on the type and quantity of pollutants that can be released into the waters of the United States, and it is issued for a particular industry or category of discharges when they are susceptible to regulation under common terms and conditions.

Before issuing or reissuing a general discharge permit, a public participation process is made available under Title 1, Subtitle 6 of the Environment Article, which, among other things, allows a draft permit to be published and made available for public comment and requires MDE to hold a public hearing, if requested. Additionally, judicial review or a contested case hearing is available, depending on the circumstance. Specifically, permits issued for the discharge of pollutants into State waters are subject to judicial review of MDE's administrative record; the issues reviewed are generally limited to those raised during the public comment period. The administrative record can include, in relevant part, a final determination by MDE to approve and issue a permit.

MDE has adopted regulations and permitting schemes in several major pollution source sectors associated with water pollution, one of which is agricultural – and a category of agricultural pollutant source is AFOs. A general discharge permit for AFOs imposes a "zero discharge" limitation, which prohibits all discharges of pollutants to surface and ground waters from AFO production areas. In accordance with statutory requirements, MDE reviews or reissues water pollution control permits every five years. Accordingly, MDE issued the first AFO general discharge permit in 2009 when AFO regulations were initially adopted, and then a second permit in 2014. The third permit issued in 2019 (the 2019 General Permit) was the subject of controversy in this case. Each subsequent permit is prohibited from being less stringent than the predecessor permit; here, the conditions of the AFO general discharge permits have been enhanced each time the permits have been issued.

Any given AFO wanting to be covered under the general discharge permit is required to submit to MDE (1) a notice of intent and (2) a nutrient management plan (Required Plan) that addresses site-specific conditions aimed at preventing the discharge of pollutants into State waters by that particular AFO ("technology based effluent limitations"). Required Plans are approved by MDE, and its terms are incorporated into the general discharge permit as conditions enforceable by MDE. Required Plan proposals are subject to the public participation process outlined above, and any person aggrieved by their final approval may request a contested case hearing.

MDE submitted the 2019 General Permit to the Environmental Protection Agency (EPA) as required and then incorporated the EPA's suggested modifications. With no objection from the EPA, MDE subsequently issued a notice of tentative determination to reissue the general discharge permit. While the 2019 General Permit followed the same regulatory framework as the 2009 and 2014 permits, it also contained new provisions that were challenged in this case by the plaintiff, Assateague Coastal Trust (Assateague). One new provision provided that Required Plans prepared for any particular facility must address any "resource concerns" – a term of art describing an expected degradation of soil, water, air, plant, or animal resources – about the AFO's air quality

for poultry facilities. In particular, the new provision said, "for poultry: if outdoor air quality is determined to be a resource concern, use appropriate [federal] standards." Assateague and members of the poultry industry submitted competing comments on this particular provision, with Assateague arguing that this new language was insufficient to ensure water quality standards were being upheld, particularly as those standards relate to air pollution from ammonia emissions that are released in the air and then deposited on surface water. Ultimately, MDE responded to this commentary in writing but did not actually alter the new provisions of the permit in a manner suggested by any parties. Subsequently, MDE issued its Notice of Final Determination, and the 2019 General Permit was finalized and issued effective July 8, 2020.

On July 23, 2020, Assateague filed a petition for judicial review in the Circuit Court for Montgomery County, challenging MDE's final determination for the 2019 General Permit because the permit allegedly failed to comply with federal and State law regarding specific water quality standards. On March 11, 2021, the circuit court reversed the final determination and remanded it "to mandate effluent limitations for ammonia and other water quality based effluent limits." MDE filed an appeal to the Appellate Court of Maryland (formerly the Court of Special Appeals), but the Supreme Court of Maryland granted MDE's separate petition for *writ of certiorari* before the Appellate Court weighed in on the matter.

On appeal, the Supreme Court resolved the following two questions: (1) whether MDE's final determination to issue the 2019 General Permit was reasonable and complied with the water quality standards established under the federal Clean Water Act and the State's water pollution control law; and (2) whether MDE's permit conditions in the 2019 General Permit that address AFO ammonia emissions were reasonable and complied with the water quality standards established under the State's water pollution control law. In a 6-1 decision, the court ultimately answered in the affirmative for both and reversed the judgment of the circuit court.

The court directly reviewed the permit in light of the issues raised by Assateague during the public comment period and MDE's response; it did not review the merits of the circuit court's decision. The court noted that the relevant State statute (1) was amended in 2009 to authorize only for review of the administrative record, rather than a contested case hearing and (2) did not expressly provide any standard of review, which meant substantial evidence and arbitrary and capricious standards would be applied in the court's analysis. The court explained that an agency is afforded a great deal of deference in these cases – and it also detailed Assateague's prior legal challenges to the 2009 and 2014 General Permits, both of which failed.

Agreeing with the general principles applied by the reviewing courts in 2009 and 2014, the court reiterated that the federal and State laws and regulations that establish the general framework for the particular type of pollution source challenged in the case has not changed since those cases were decided. First, MDE's regulations governing AFOs incorporate by reference the same standards in place by the EPA for concentrated animal feeding operations (CAFOs), which are AFOs that exceed certain size thresholds or discharge significant pollutants into the waters of the United States. In contrast, AFOs are only regulated at the State level and are smaller than CAFOs. Second, the court stated that MDE's AFO general discharge permit model is consistent with State law. According to the court, the General Assembly provides to MDE "considerable discretion" to

"… (1) determine whether the discharge will meet all [S]tate and federal water quality standards, and appropriate effluent limitations; and (2) establish the conditions necessary to prevent a violation of federal and [S]tate laws." MDE also has extensive regulatory and rulemaking authority as part of this discretion. Further, the General Assembly has not mandated the adoption of a particular type or types of discharge permits for different pollutant sources; rather, it has given MDE authority to develop its permit schemes. The court, citing § 9-313(c) of the Environment Article (authorizing the imposition of different requirements for different pollutant sources and different geographical areas), further said, "the Legislature recognizes there is no 'one-size-fits all' approach to regulating water pollution." The court reviewed MDE's general discharge permit framework and its procedures for reviewing Required Plans for AFOs, and concluded that with respect to the first question, MDE's approach is reasonable and complies with federal and State law. The same permitting model applied to the 2019 General Permit has been in place for over a decade and was utilized in two prior permit iterations; therefore, this is consistent with discretionary authority provided under the law and not arbitrary and capricious.

Regarding the regulation of ammonia emissions raised in the second question, Assateague contended that the regulation and limitations (or lack thereof) on ammonia emissions were insufficient. The court concluded that there was substantial evidence in the administrative record to support MDE's position that it complied with the laws and that it did intend to regulate ammonia emissions through specific limitations and practices established via an AFO's Required Plan, which, once approved, become enforceable conditions of the general discharge permit. In support of this, the court pointed to the new provision of the 2019 General Permit directed at poultry operations where outdoor air quality is determined to be a "resource concern." Additionally, MDE prepared a written response based on Assateague's initial public comments. This response, the court says, was expressly mentioned by the General Assembly in § 1-606(c) of the Environment Article as part of the record to be examined on judicial review. Therefore, after examining the sufficiency of this response and the other relevant factors such as the public participation process for Required Plans, MDE's actions with respect to the way it addressed ammonia emissions/air quality in the 2019 General Permit were reasonable and fell within the scope of discretion afforded to it by the legislature.

The dissent argued that MDE is required to regulate ammonia emissions as water pollution through the permit, and the administrative record did not reflect that it did this. Thus, the case should be remanded to the circuit court to determine whether substantial evidence supports a finding that specific provisions of the 2019 General Permit regulate ammonia emissions as water pollution on a site-specific basis and whether those provisions comply with federal and State laws.

Digital Advertising Gross Revenues Tax – Exhaustion of Administrative Remedies

Case: *Comptroller of Maryland v. Comcast of California, Maryland, Pennsylvania, Virginia, West Virginia, LLC, et al*., 484 Md. 222 (2023).

Decision: The special statutory administrative remedies for challenging tax disputes under the Tax-General Article, which the General Assembly intended to be exhausted prior to pursuit of relief in the circuit court, are exclusive with respect to a challenge by subsidiaries of Comcast Corporation and Verizon Communications, Inc. (the companies) of the constitutionality and legality of Maryland's Digital Advertising Gross Revenues Tax Act under federal law. Because the companies did not exhaust those administrative remedies prior to seeking a declaratory judgment in the Circuit Court for Anne Arundel County and the constitutional exception to exhaustion of the administrative remedies did not apply, the circuit court lacked jurisdiction in the declaratory judgment action. The Supreme Court of Maryland vacated the circuit court's declaratory judgment against the Comptroller and remanded the case to the circuit court with directions to dismiss the action.

Background and Summary: The Maryland Digital Advertising Gross Revenues Tax Act (first effective in tax year 2022) imposes a tax on annual gross revenues of at least $1 million derived from digital advertising services in the State by businesses with at least $100 million in global annual gross revenues. Various digital advertising services are subject to the tax, but advertisement services on digital interfaces owned or operated by or operated on behalf of a broadcast or news media entity are not considered digital advertising services under the Act.

The companies brought an action for a declaratory judgment in the Circuit Court of Anne Arundel County challenging the constitutionality and legality of the Act under federal law. The circuit court issued a final order declaring the Act unconstitutional and illegal under federal law. The Comptroller appealed, and the Supreme Court of Maryland granted *certiorari* before decision in the Appellate Court of Maryland. The Supreme Court of Maryland issued a *per curiam* order vacating the orders of the circuit court and remanded the case to the circuit court to dismiss the action. The court stated that the circuit court lacked jurisdiction over the action since the companies failed to exhaust their mandatory administrative remedies under Title 13 of the Tax-General Article.

When generally considering a special statutory administrative scheme enacted by the General Assembly, the Supreme Court of Maryland has established three categories describing the relationship between the administrative and possible alternative judicial remedy: (1) the administrative remedy may be *exclusive*, thus precluding a claimant from pursuing judicial review until after a final administrative decision has been made; (2) the administrative remedy may be *primary*, but not exclusive, in which case, a claimant may file an alternative judicial action, but the administrative remedy must be exhausted before the court can adjudicate the merits of the judicial action; and (3) the administrative remedy and alternative judicial remedy may be fully *concurrent*, with neither remedy being primary, in which case the claimant need not exhaust administrative remedies before pursuing an available judicial remedy. If the statute does not expressly state whether the administrative remedy is exclusive, primary, or concurrent, the court must determine legislative intent based on statutory interpretation, including the comprehensiveness of the administrative remedy scheme.

The court summarized the administrative remedies available under Title 13 of the Tax-General Article, including remedies through the Maryland Tax Court, which is an administrative agency in

the Executive Branch of State government. The appellate courts have described the administrative remedies for tax disputes as "comprehensive," and thus either exclusive or primary, rather than concurrent. To reach its conclusion that the General Assembly intended the statutory administrative remedy scheme in Title 13 of the Tax-General Article to be exclusive rather than primary, the court relied upon two statutory provisions: § 13-505 of the Tax-General Article; and § 3-409(b) of the Courts and Judicial Proceedings Article. Section 13-505 of the Tax-General Article states that, "A court may not issue an injunction, writ of mandamus, or other process against the State or any officer or employee of the State to enjoin or prevent the assessment or collection of a tax under this article." The Comptroller argued that this provision is an unambiguous expression of legislative intent to preclude judicial intervention in tax cases until a final administrative determination is issued, while the companies argued that it precludes only the use of coercive remedies in tax matters, such as an injunction, but not a declaratory judgment.

The court agreed with the Comptroller that the provision is unambiguously designed to prevent a court action that will enjoin or prevent tax assessment or collection before exhaustion of administrative remedies. Although the companies asserted that the declaratory judgment was to provide a defense if the Comptroller initiated litigation, the court determined that the purpose of the declaratory judgment could only have been to prevent the Comptroller from assessing the digital advertising tax or collecting that tax through eventual legal action. And, since a declaratory judgment may be granted only if "it will serve to terminate the uncertainty or controversy giving rise to the proceeding," the effect would be preventing the collection of the digital advertising gross revenues tax. Accordingly, the court held that allowing a declaratory judgment action as an exception to § 13-505 of the Tax-General Article runs afoul of the legislative intent to resolve tax disputes through the special statutory administrative remedies in Title 13 of the Tax-General Article. Also, the companies' interpretation that the statutory provision authorizes a declaratory judgment action that is filed before the tax is due (and before claims for an administrative remedy may be claimed) would provide an incentive for early court challenges to new or altered taxes and defeat the purpose of the administrative remedial scheme.

Section 3-409(b) of the Courts and Judicial Proceedings Article, which is part of the Maryland Uniform Declaratory Judgments Act, states that, "If a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed in lieu of a proceeding under this subtitle." The court cited multiple cases where it previously held that where the General Assembly prescribes a special statutory remedy and intends for that remedy to be exclusive or primary, § 3-409(b) prohibits any action to be brought under the Declaratory Judgments Act until exhaustion of the administrative remedies. Thus, the companies could not bypass the special statutory administrative remedies under Title 13 of the Tax-General Article by bringing an action for a declaratory judgment in the circuit court.

The court reasoned that together § 13-505 of the Tax-General Article and § 3-409(b) of the Courts and Judicial Proceedings Article made clear the legislative intent that the special administrative remedies in Title 13 of the Tax-General Article are exclusive. Consequently, the companies were required to exhaust the administrative remedies before pursuing judicial action.

The companies also argued that the "constitutional exception," which permits a judicial determination without administrative exhaustion, applies. The court agreed with the Comptroller's assertion that the constitutional exception applies only in the limited situation when there is a direct attack upon the power and authority of the General Assembly to enact the legislation at issue. Furthermore, the "extremely narrow" constitutional exception is also subject to several specific limitations, including its inapplicability when an administrative remedy is exclusive, as opposed to primary. Since the court determined that the special statutory administrative remedy in the Tax-General Article is exclusive, the constitutional exception did not apply.

Criminal Procedure – Petition for Writ of Actual Innocence

Case: *Steven G. Carver v. State of Maryland*, 482 Md. 469 (2022).

Decision: When evaluating a petition for writ of actual innocence under § 8-301 of the Criminal Procedure Article, courts must consider the cumulative effect of the newly discovered evidence within the context of the entire adversarial proceeding, including its impact on (1) any evidence admitted at trial; (2) any evidence available at the time of trial, including both evidence offered but excluded and evidence not offered but available; and (3) the defendant's or defense counsel's trial strategy. This hindsight assessment requires courts to determine whether the cumulative effect of the new evidence and the available evidence at trial undermined the verdict. The Supreme Court of Maryland further held that its prior holding in *Hunt v. State*, 474 Md. 89 (2021), was limited, and an expert opinion acquired after trial did not constitute new evidence simply because due diligence did not require trial counsel to uncover an expert witness's fraud.

Background and Summary: In 1989, Steven G. Carver and Joe Hodge were jointly tried in the Circuit Court for Baltimore City and convicted of the first-degree murder of John Green and related handgun charges. Carver was sentenced to life without the possibility of parole plus a consecutive 20 years for the handgun offenses.

In 2012, Carver filed a petition for writ of actual innocence under § 8-301 of the Criminal Procedure Article. Section 8-301 allows a person convicted of a crime to file a petition for writ of actual innocence if there is newly discovered evidence that (1) creates a substantial possibility of a different result and (2) the evidence could not have been discovered in time to move for a new trial under Maryland Rule 4-331 (allowing a defendant to file a motion for a new trial within 10 days of a verdict). Carver asserted that the following categories of newly discovered evidence entitled him to relief: (1) a series of police reports related to threats by Bryant McArthur against the victim, John Green, and an alleged assault on Denise Brewer, who was unsuccessfully solicited on behalf of Bryant McArthur to assist in the execution of John Green; (2) false credentials of the State's ballistics expert witness, Joseph Kopera; (3) the opinion of another firearms expert, William Conrad; and (4) open warrants against Hodges Epps, an eyewitness who testified at trial (which Carver argued showed motivation for Epps to lie in exchange for leniency from the State).

The circuit court denied the petition determining that the evidence was not newly discovered, nor would it have substantially impacted Carver's trial. Carver appealed to the Appellate Court of Maryland, which affirmed and held the circuit court's decision. Carver then appealed to the Supreme Court of Maryland; the court granted *certiorari* in July 2022.

The Supreme Court of Maryland held that when evaluating the materiality of new evidence under § 8-301 of the Criminal Procedure Article, courts must consider the cumulative effect of the new evidence within the context of the entire adversarial proceeding and evaluate how the new evidence would impact (1) any evidence admitted at trial; (2) any evidence available at the time of trial, including both evidence offered but excluded and evidence not offered but available; and (3) the defendant's or defense counsel's trial strategy. *Faulkner v. State*, 468 Md. 418 (2020). The court reasoned that this hindsight assessment requires courts to determine whether such newly discovered evidence combined with the evidence the jury did hear creates a "substantial or significant possibility" that a reasonable jury would have acquitted the defendant; that is, whether the cumulative effect of the new evidence and the available evidence at trial undermined the verdict. The court found that Carver failed to meet the burden under § 8-301 of the Criminal Procedure Article because the evidence was speculative and did not cumulatively undermine his conviction.

According to the court, under § 8-301 of the Criminal Procedure Article, newly discovered evidence "speaks to" a petitioner's actual innocence when it "would potentially exonerate the convicted defendant." *Smallwood v. State*, 451 Md. 290 (2017). The court determined that the evidence of McArthur's plot to murder Green did not "speak to" Carver's innocence because it did not erode the factual basis of the conviction and the eyewitness testimony at trial. The court cited *Smallwood*, discussing the nonexhaustive examples of evidence that "speaks to" an individual's actual innocence, which includes (1) a confession by another individual to having committed the crime; (2) acknowledgement by an eyewitness or other evidence indicating the witness was mistaken; (3) acknowledgment by an eyewitness or other evidence indicating that the witness intentionally lied; or (4) evidence casting serious doubt on the reliability of scientific evidence used against the defendant. In reaching this conclusion, the *Smallwood* court cited materials from the 2009 legislative committee files for the statute.

The court also held that its prior holding in *Hunt v. State*, 474 Md. 89 (2021), was limited, finding that expert opinions acquired after trial do not constitute new evidence, simply because due diligence did not require trial counsel in *Hunt* to uncover Kopera's deception prior to 2007. Although the court found that Kopera's fraudulent credentials were newly discovered evidence, the court determined that expert opinions acquired after trial, such as Conrad's opinion, do not qualify as new evidence. In this case, the defense counsel could have "discovered" the expert testimony either at trial (by retaining their own expert) or in time to move for a new trial under Maryland Rule 4-331. The court further reasoned, assuming Conrad's expert opinion did qualify as new evidence, it did not create a substantial likelihood that Carver's trial would have achieved a different result because Conrad agreed with Kopera's reported conclusion that he could not say with certainty how many firearms were used in the murder of Green.

Finally, the court held that Epps's criminal history did not constitute newly discovered evidence because Carver's defense counsel could have discovered it through a background check in time to file for a new trial under Md. Rule 4-331. The court reasoned that even if Epps's criminal history did constitute new evidence, it was immaterial because it would, at best, be used for impeachment. Furthermore, because Epps was likely unaware of the warrants because they were never served, it is unlikely that Epps had any motivation to lie in his testimony for leniency from the State. Finally, Epps's testimony was consistent with the testimony of the other eyewitnesses, which does not create a substantial likelihood that this impeachment evidence would have resulted in a different outcome at trial.

The court affirmed the lower courts' decisions and concluded that it was not persuaded by Carver's newly discovered evidence because it was speculative, did not undermine confidence in the verdict, and, when viewed with the evidence presented at trial, did not create a substantial likelihood of a different outcome at trial.

The dissent agreed with the standard used by the majority but disagreed with the way it was applied. The dissent also contended that the majority opinion mistakenly applied the law in a manner that unintentionally raises the standard petitioners must meet. According to the dissent, the majority opinion assumed that all other elements of the trial would have remained constant and failed to consider the "ripple effect" of the additional evidence presented by Carver on "…the trial court's evidentiary rulings, the State's case, the testifying detectives' credibility, and defense counsel's ability to put on a defense." Given this effect, the dissent argued that the "additional evidence would have changed the complexion of the trial," and the Supreme Court should have reversed the lower court's judgment and granted Carver a new trial.

Criminal Law – Sexual Abuse of a Minor – Evidence Involving Sexual Exploitation of a Minor

Case: *State of Maryland v. Keith Krikstan*, 483 Md. 43 (2023).

Decision: Evidence of a substitute teacher's in-class discussion with a minor student about the teacher's anger or jealousy over the minor's affection for another adult amidst the teacher's ongoing, out-of-class sexual exploitation of the same minor via electronic and telephone communications was sufficient to support a conviction for sexual abuse of a minor. The Supreme Court of Maryland held that a rational juror could conclude that the teacher's in-school conduct involved the sexual exploitation of a minor.

Background and Summary: Section 3-602(b)(1) of the Criminal Law Article provides that a "parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." The statute defines sexual abuse as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not."

Keith Krikstan, a 30-year-old substitute teacher, was charged with a violation of § 3-602 relating to his relationship with A.G., a 12-year-old student. Krikstan first met A.G. when he taught A.G.'s class as a substitute, and began texting and video chatting with A.G. outside of school hours. Krikstan expressed his desire to have sex with A.G., and the two exchanged explicit photos and videos. After several weeks of such communication, A.G. told Krikstan that she was interested in a 21-year-old man named Joey. Krikstan sent A.G. a message expressing disappointment and stating "I'm done." After this exchange, Krikstan substituted in A.G.'s math class. After the class ended, Krikstan gave A.G. a pass so she could be late to her next class and the two had a conversation about Joey. Although A.G. could not recall the specifics of what was said, she testified that her impression was that Krikstan was "mad" about Joey. After this conversation, Krikstan resumed communicating with A.G. outside of school hours, including having conversations in which they discussed having sex with each other. In some of these communications, Krikstan continued to express disappointment over A.G.'s relationship with Joey. While he was substitute teaching in January 2018, another student reported Krikstan's relationship with A.G. to school officials. Krikstan was arrested and later convicted of sexual abuse of a minor. He appealed his conviction to the Appellate Court of Maryland (formerly the Court of Special Appeals).

The Appellate Court reversed Krikstan's conviction, finding that the evidence was not sufficient to support the conviction. Specifically, the court found that Krikstan did not engage in sexual abuse at any time when he had responsibility for the supervision of A.G. The parties agreed that Krikstan had responsibility for supervision of A.G. while working as a substitute teacher and that this responsibility terminated when the school day ended. Because all of Krikstan's overtly sexual communications with A.G. occurred outside of school hours, the court focused its analysis on whether the exchange regarding Joey immediately after A.G.'s math class constituted an act involving sexual exploitation of A.G. The court found that, while such an act need not be physical, it must at least have a "sexual undertone." Rejecting the argument that Krikstan discussing A.G.'s feelings toward another man would, on its own, qualify as having a sexual undertone, the court found that, because the State had presented no specific evidence that Krikstan said or implied anything sexual, the evidence was not sufficient to conclude that he had committed an act involving sexual exploitation. In a concurring opinion reviewing the legislative history of § 3-602, Judge Kehoe concluded that the lack of criminal liability for Krikstan's actions was a "historical accident." According to Kehoe, the enactment of § 3-602 and its predecessors, which were intended to provide enhanced penalties for individuals who abuse children they have a special duty to protect, have unintentionally had the effect of shielding those individuals in circumstances like this. Judge Kehoe urged the General Assembly to amend § 3-602 to address this issue. The Supreme Court of Maryland granted a writ of *certiorari*.

The Supreme Court of Maryland first addressed the question of when Krikstan had responsibility for the supervision of A.G. While the court noted that the case law on this point provides that a teacher's responsibility may continue beyond school hours in certain circumstances, that continuation generally requires that there be no temporal break in the teacher-student relationship, and that such a break consistently occurred here between Krikstan's substitute teaching and his out-of-school communications with A.G. The court, therefore, concluded that Krikstan's responsibility over A.G. ended when the school day ended and A.G. left school grounds. The

court's further analysis therefore focused on Krikstan's conversation with A.G. after math class concerning Joey.

The court next turned to the meaning of the word "involves" as used in the phrase "involves sexual molestation or exploitation." In the court's view, the ordinary meaning of the word, the court's prior case law, and the legislative history of § 3-602 and similar provisions all support a broad reading of the term. According to the court, an act that involves sexual exploitation of a minor should be read to mean "an act that is related to, affects, or is part of the sexual exploitation of a minor." In so doing, the court rejected the conclusion of the Appellate Court that an act must necessarily have a "sexual undertone" to qualify. In reviewing the legislative history of § 3-602 and similar statutes, the court noted that the first enacted statutes regarding child abuse were intended to improve protections for children that were "inadequate at common law." In examining subsequent enactments, the court highlighted a consistent trend of the General Assembly broadening protections for children, supporting the conclusion that the relevant statutory language should be read expansively.

Finally, the court applied its understanding of the statutory language to conclude that the evidence regarding Krikstan's conversation with A.G. after math class was sufficient to find that he engaged in an act involving sexual exploitation. In doing so, the court distinguished the present case from its previous decision in *Wicomico Cnty. Dep't of Soc. Servs. v. B.A.*, 449 Md. 122 (2016), which the Appellate Court had relied upon its decision. In *B.A.*, the court affirmed the decision of an administrative law judge that a martial arts instructor had not engaged in sexual abuse of a minor.[1] In *B.A.*, the instructor engaged in in-class behaviors toward a minor student that all parties agreed were not, in isolation, sexual abuse. Outside of class, however, it was undisputed that the instructor engaged in communications with the minor that were sexual in nature. The Department of Social Services argued that the instructor's in-class behavior constituted sexual abuse because it was intended to build trust with the minor in order to facilitate sexual abuse outside of class.[2] While the court did not categorically reject the possibility that an act intended to facilitate future sexual exploitation could constitute an act involving sexual exploitation, it did hold that mere fact that an act was intended to build trust with a minor in order to facilitate future sexual exploitation does not, on its own, support a conclusion that the act involved sexual exploitation. Rather, there would need to be evidence that a person took a specific action with the specific intent of facilitating sexual exploitation. Turning to the present case, the court found that such specific evidence did exist. The conversation between Krikstan and A.G. after math class was not in any way related to Krikstan's academic duties. In addition, the conversation, placed in the context of their relationship, was an "indication of romantic feelings."[3] Whereas in *B.A.,* an administrative law judge found that the in-class conduct of the instructor was not inappropriate and the local department of social services conceded that while the instructor's in-class behavior did not itself involve sexual exploitation it

[1] *B.A.* was not a criminal case. Rather, it involved an allegation that the instructor had violated a provision of the Family Law Article. At the time the case was decided, the definition of sexual abuse in that provision was nearly identical to the current definition in § 3-602.

[2] As the Supreme Court of Maryland noted, this is a type of behavior commonly referred to as "grooming." In light of its holding that Krikstan's in-class conduct could be considered sexual abuse, however, the court declined to further discuss the application of § 3-602 to grooming.

[3] In *B.A.*, the court specifically identified this as one of several things that would have rendered the instructor's in-class behavior sexually exploitative.

did involve "grooming," the State argued that Krikstan's in-class conduct was inappropriate for a classroom environment and constituted sexual exploitation. The court thus found that a reasonable juror could have concluded, given the evidence, that Krikstan's in-class conversation was inappropriate and an act related to or involving his out of class sexual exploitation of A.G. Although it disagreed with the Appellate Court's disposition, the court's majority opinion did endorse Judge Kehoe's view that § 3-602 unintentionally creates a gap in the protections afforded to children that the General Assembly should close.

Justice Hotten wrote a dissent, which Justices Eaves and Battaglia joined. In arguing that there was an insufficient nexus between Krikstan's in-class conduct and his out-of-class sexual abuse of A.G., Justice Hotten stressed that, in her testimony, A.G. could not recall the specifics of their conversation. In Justice Hotten's view, the available evidence about the conversation therefore fell short of what is required to demonstrate the kind of specific intent necessary to distinguish the conduct from innocuous behavior and show that the conduct involved sexual exploitation. To conclude otherwise, Justice Hotten argued, would be to improperly import Krikstan's out-of-class conduct into the analysis of his in-class behavior, as the court refused to do in *B.A.* Justice Hotten also agreed with Judge Kehoe that the General Assembly should close the gap that, in her view, shields Krikstan's conduct from criminal liability.

Criminal Law – Maryland Repeat Sexual Predator Prevention Act of 2018 – Admission of Evidence

Case: *Woodlin v. State*, 482 Md. 31 (2022).

Decision: The Maryland Repeat Sexual Predator Prevention Act of 2018, codified under § 10-923 of the Courts and Judicial Proceedings Article, does not require a circuit court to consider any particular factor when it determines whether the probative value of the evidence the State seeks to admit outweighs the danger of unfair prejudice under § 10-923(e)(4). Rather, circuit courts can consider an array of factors, and the Supreme Court of Maryland provided a nonexhaustive list of appropriate factors to guide the circuit courts in future cases.

Background and Summary: In 2019, John Woodlin was permitted to stay the night at his daughter's (Mother) home where she lived with her husband and three children. Woodlin and his daughter agreed to him sleeping on the downstairs couch. That evening, Woodlin went upstairs to his 10-year-old grandson's (A.H.) room and sexually assaulted A.H. while holding him down and covering his mouth. The abuse included groping and performing fellatio on A.H. Immediately after, Woodlin left the house and was later discovered by his other daughter (Aunt), who took him in for the duration of the night. In the morning, Woodlin called Mother crying and alleging the reverse, that A.H. perpetrated sexual assault against him. Mother's and Aunt's subsequent inquiries of A.H. led to A.H. disclosing that Woodlin committed sexual assault against him. Aunt and Mother called the police and brought A.H. to the hospital where officials performed a rape kit (no forensic evidence of rape was found). Woodlin was arrested and charged with child sexual abuse and other related offenses against A.H.

Pursuant to the Maryland Repeat Sexual Predator Prevention Act of 2018, codified under § 10-923 of the Courts and Judicial Proceedings Article, the State moved to include at trial evidence of Woodlin's 2010 conviction of sexual assault against a different individual. In the former matter, Woodlin entered a guilty plea, admitting to inserting and photographing the insertion of foreign objects into an unconscious adult male's rectum.

Section 10-923 allows the State to introduce in a criminal trial a defendant's other "sexually assaultive behavior" involving different victims to help establish credibility in qualifying sexual assault cases. "Sexually assaultive behavior" means an act that would constitute specified sexual crimes or specified sexual abuse offenses. In order for evidence of such other sexually assaultive behavior to be admissible, the State must prove the following four criteria (listed under § 10-923(e)) at a mandatory hearing: (1) the evidence is offered either to prove a lack of consent or rebut an express or implied allegation that a minor victim fabricated a sexual offense; (2) the defendant had the opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior; (3) the sexually assaultive behavior was proven by clear and convincing evidence at the required hearing; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. At the mandatory hearing to establish the four criteria, the circuit court granted the motion. The State introduced the prior sexually assaultive behavior at trial before a jury, and Woodlin was convicted.

Woodlin appealed the circuit court's decision to allow the propensity evidence, arguing the court abused its discretion when admitting the evidence of his former conviction. The Appellate Court (formerly the Court of Special Appeals) bifurcated and rephrased Woodlin's question to ask whether (1) his 2010 conviction was sufficiently similar to the charged offense so as to allow its admission and (2) the evidence used to prove the 2010 conviction was too salacious to be admitted.

The Appellate Court held that the motions judge did not abuse his discretion in weighing the similarity and dissimilarity and admitting the evidence because the judge focused on lack of consent, which was similarly present in both cases. Because lack of consent was a key element in the prosecution of both cases, dissimilarities of the ages of the victims, use of objects, and completing penetration did not outweigh the probative value in including the former conviction. Regarding the "salacious" element of Woodlin's appeal, the court held that Woodlin waived this argument because he was provided the entire plea transcript to be used at trial, containing the details of the sexual abuse, on at least three separate occasions and never argued to the motions judge or trial judge his concern with the unredacted transcript. The court affirmed the circuit court's decision and Woodlin's conviction. Woodlin sought review in the Supreme Court of Maryland and was granted *certiorari*.

The Supreme Court of Maryland assessed the history, plain meaning, and the legislative history of the Maryland Repeat Sexual Predator Prevention Act. The court noted that the General Assembly first proposed a list of factors for circuit courts to consider when weighing the probative value of former sexually assaultive behavior against unfair prejudice. By the time the Act was passed, the list of factors was removed from the language of the bill. Woodlin argued that courts should be required to consider the factors listed in *United States v. LeMay*, 260 F.3d 1018 (9th Cir. 2001), while the State argued against adoption of a mandatory list of factors. Instead, the State argued

that the task of weighing probative value against unfair prejudice would "…be better served by the identification of illustrative factors, than by mandating a rigid test akin to the one that the [General Assembly] consciously rejected."

The court agreed with the State. In its analysis, the court noted the General Assembly's intent to provide circuit courts wide discretion and discussed several federal cases that preceded *Le May* or questioned the reasoning in *Le May*. The court then provided the following nonexhaustive list of factors for circuit courts to consider when weighing the probative value of evidence of a defendant's other sexually assaultive behavior against the danger of unfair prejudice: (1) similarity or dissimilarity of the acts; (2) temporal proximity and intervening circumstances; (3) frequency of other sexually assaultive behavior; (4) whether the evidence of the other sexually assaultive behavior overshadows the crime charged; and (5) the jury's knowledge that the defendant previously was punished for the other sexually assaultive behavior. If a circuit court determines that the State has satisfied the four criteria under § 10-923(e), only then may the circuit court exercise discretion to admit or exclude the evidence in question. While contemplating this exercise of discretion, a circuit court may consider the State's need for the disputed evidence and the manner in which the State intends to prove the other sexually assaultive behavior. Ultimately, the Supreme Court of Maryland determined that the circuit court did not abuse its discretion in determining the probative value of Woodlin's 2010 conviction.