

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2013

NO. 2155

JODY LEE MILES,
Appellant

v.

STATE OF MARYLAND,
Appellee

APPEAL FROM THE CIRCUIT COURT
FOR QUEEN ANNE'S COUNTY
(Thomas G. Ross, Judge)

BRIEF AND APPENDIX OF APPELLEE

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE.	1
QUESTIONS PRESENTED.	2
STATEMENT OF FACTS.	2
SUMMARY OF ARGUMENT.	6
ARGUMENT:	
I. THIS COURT SHOULD REJECT MILES’S VARIOUS CLAIMS THAT HIS DEATH SENTENCE IS ILLEGAL.	8
A. Repeal of the death penalty statute, effective on October 1, 2013, applies prospectively only.	9
B. The Maryland “General Saving Clause” statute expressly forecloses Miles’s claim that the repeal of the death penalty in 2013 affects or modifies his year 1998 death sentence.	14
C. Miles’s death sentence is not unconstitutional on the grounds he raises, so the sentence is not illegal.	23
1. Miles’s death sentence is not arbitrary and capricious.	24
2. Miles’s death sentence does not violate the rule of lenity.	28

	<u>Page</u>
3. Miles’s sentence is not cruel and unusual punishment that runs afoul of “decency.”	29
II. GIVEN THAT THE DIVISION OF CORRECTIONS DOES NOT HAVE THE PRESENT STATUTORY AUTHORITY TO ENACT LETHAL INJECTION PROTOCOLS FOLLOWING REPEAL OF THE DEATH PENALTY STATUTE IN MARYLAND, THE PERSEVERANCE OF MILES’S DEATH SENTENCE, POST-REPEAL, VIOLATES DUE PROCESS.	32
III. THIS COURT SHOULD REMAND TO THE LOWER COURT WITH INSTRUCTIONS TO MODIFY MILES’S DEATH SENTENCE TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.	37
CONCLUSION.	44
PERTINENT PROVISIONS.	45
APPENDIX.	APX. 1-11

TABLE OF AUTHORITIES

Cases

<i>Abeokuto v. State</i> , 391 Md. 289 (2006).	38
<i>Apple v. State</i> , 190 Md. 661 (1948).	30
<i>Bartholomey v. State</i> , 260 Md. 504 (1971), <i>vacated in part and remanded</i> , 408 U.S. 938 (1972).	26
<i>Bell v. State</i> , 236 Md. 356 (1964).	9, <i>passim</i>

	<u>Page</u>
<i>Calhoun v. State</i> , 297 Md. 563 (1983), <i>cert. denied</i> , 466 U.S. 993 (1984).....	29, 30
<i>Chaney v. State</i> , 397 Md. 460 (2007).	7, 32
<i>Chow v. State</i> , 393 Md. 431 (2006).....	9, 10, 12
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977).....	30
<i>Collins v. State</i> , 383 Md. 684 (2004).....	10
<i>Coleman v. Balkcom</i> , 451 U.S. 949 (1981).	31
<i>Cunningham v. State</i> , 397 Md. 524 (2007).	32
<i>Dep't of Human Res. v. Hayward</i> , 426 Md. 638 (2012).	34
<i>Deville v. State</i> , 383 Md. 217 (2004).....	12
<i>Dobbert v. Florida</i> , 432 U.S. 282 (1977).	27
<i>Evans v. State</i> , 396 Md. 256 (2006), <i>cert. denied</i> , 552 U.S. 835 (2007).....	32
<i>Forbes v. Harleysville Mutual</i> , 322 Md. 689 (1991).....	11
<i>Frost v. State</i> , 336 Md. 125 (1994)	10, 11
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).	26, 30
<i>Gilmer v. State</i> , 389 Md. 656 (2005).....	12
<i>Graves v. State</i> , 364 Md. 329 (2001).....	16
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976).	24, <i>passim</i>

	<u>Page</u>
<i>Harris v. State</i> , 306 Md. 344 (1986)	39
<i>Harris v. State</i> , 331 Md. 137 (1993)	9, 10, 11
<i>Holbrook v. State</i> , 364 Md. 354 (2001).....	29
<i>Jackson v. Indiana</i> , 406 U.S. 715 (1972).....	35, 36
<i>Johnson v. State</i> , 362 Md. 525 (2001).....	41
<i>Jones v. State</i> , 302 Md. 153 (1985).....	21
<i>Jones v. State</i> , 336 Md. 255 (1994).....	29
<i>Jones v. United States</i> , 327 F.2d 867 (D.C. Cir. 1963).....	19
<i>Kushell v. Dep't of Natural Res.</i> , 385 Md. 563 (2005).....	9, 10
<i>Lawson v. State</i> , 187 Md. App. 101 (2009).....	40
<i>Lewis v. State</i> , 348 Md. 648 (1998).....	12
<i>Lovell v. State</i> , 347 Md. 623 (1997).....	38
<i>Maguire v. State</i> , 192 Md. 615 (1949).....	10
<i>Miles v. State</i> , 349 Md. 215 (1998).....	18
<i>Miles v. State</i> , 365 Md. 488 (2001), <i>cert. denied</i> , 534 U.S. 1163 (2002).....	6
<i>Miles v. State</i> , 397 Md. 352, <i>cert. denied</i> , 552 U.S. 883 (2007).....	6
<i>Miles v. State</i> , 421 Md. 596 (2011), <i>cert. denied</i> , 132 S. Ct. 1743 (2012).....	6

	<u>Page</u>
<i>Miles v. State</i> , 435 Md. 540 (2013).	7
<i>Montgomery Mut. Ins. Co. v. Chesson</i> , 399 Md. 314 (2007)..	38
<i>Nestell v. State</i> , 954 P.2d 143 (Okla. Crim. App. 1998).	27
<i>Oken v. State</i> , 378 Md. 179, cert. denied, 124 S.Ct. 2084 (2004).	25, 26
<i>People v. Thomas</i> , 678 N.W.2d 631 (Mich. Ct. App. 2004).	20
<i>Phipps v. State</i> , 39 Md. App. 206 (1978)..	30
<i>Pollard v. State</i> , 394 Md. 40 (2006).	32
<i>Price v. State</i> , 378 Md. 378 (2003).	9, 10, 11
<i>Richmond v. State</i> , 326 Md. 257 (1992).	10
<i>Robey v. State</i> , 397 Md. 449 (2007)..	10, 11
<i>Scott v. State</i> , 310 Md. 277 (1987)	38
<i>Scott v. State</i> , 379 Md. 170 (2004)	40
<i>Smith v. State</i> , 399 Md. 565 (2007)..	10, 11
<i>Stanley v. State</i> , 390 Md. 175 (2005)	10
<i>State v. Johnson</i> , 285 Md. 339 (1979)..	9, <i>passim</i>
<i>State v. Kennedy</i> , 320 Md. 749 (1990)..	11
<i>State v. Kennerly</i> , 204 Md. 412 (1954)	22, 23
<i>State v. Santiago</i> , 49 A.3d 566 (Conn. 2012).	36

	<u>Page</u>
<i>State v. Wilkins</i> , 393 Md. 269 (2006)	32
<i>Stoddard v. State</i> , 395 Md. 653 (2006)	12
<i>Tichnell v. State</i> , 287 Md. 695 (1980)	25
<i>United States v. Universal Corp.</i> , 344 U.S. 218 (1952)..	10
<i>Waker v. State</i> , 431 Md. 1 (2013)	18, 19
<i>Webster v. State</i> , 359 Md. 465 (2000).	20, 22, 23
<i>Wilkerson v. State</i> , 420 Md. 573 (2011)	39
<i>Witte v. Azarian</i> , 369 Md. 518 (2002).	12

Constitutional Provisions

United States Constitution

Sixth Amendment	25
Eighth Amendment.	9, <i>passim</i>
Fourteenth Amendment	29, <i>passim</i>

United States Code:

Title 1, § 109.	19
-------------------------	----

Maryland Declaration of Rights:

Article 16.	26, 29, 30
Article 25	26, 29, 30

Statutes

Annotated Code of Maryland:

Article 1, § 3 (Rules of Interpretation). 16

Article 41, § 4-516. 41

Former Article 27:

§ 412. 25, 41

§ 413. 25

§ 414. 25

Correctional Services Article:

§ 3-901 et seq. 33

§ 7-301. 41

§ 7-601. 13, 14, 43

Criminal Law Article:

§ 2-101. 41

§ 2-202. 12

§ 2-203. 12, 41

§ 2-401. 26

N.M. State. Ann., §§ 31-20A-1-6 (2009). 35

Rules

Maryland Rules of Procedure:

Rule 4-345..... 7, 40

Rule 4-351..... 40

Rule 8-604..... 37, 38

Miscellaneous

725 Ill. Comp. Stat. Ann. 5/119-1 (2011). 36

1978 Md. Laws ch. 3. 25

1987 Md. Laws ch. 237. 40

2013 Md. Laws ch. 156. 6, *passim*

Senate Bill 276 6, 13

Senate Bill 280 36

Ian Duncan, *Inmate Makes Repeal Claim*, Baltimore Sun,
May 2, 2014. 14

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CONTENTS OF APPENDIX

Findings & Sentencing Determination.. . . . APX. 1-11

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BRIEF AND APPENDIX OF APPELLEE

STATEMENT OF THE CASE

Appellee, the State of Maryland, accepts the Statement of the Case set forth in the brief of Appellant, Jody Lee Miles.

QUESTIONS PRESENTED¹

1. Should this Court reject Miles's various claims that his death sentence is illegal?
2. Given that the Division of Corrections does not have the present statutory authority to enact lethal injection protocols following repeal of the death penalty statute in Maryland, does the perseverance of Miles's death sentence, post-repeal, violate due process?
3. Should this Court remand to the lower court with instructions to modify Miles's death sentence to life without the possibility of parole?

STATEMENT OF FACTS

As recounted by the Court of Appeals of Maryland in the direct appeal opinion in Miles's case, the basic facts underlying the prosecution of Miles were as follows:

On April 2, 1997, Edward Joseph Atkinson was shopping at the Structure Store and Small's Formal Wear located at a mall in Salisbury, Maryland. While arranging to pick up tuxedos at Small's for a musical theater production he was directing, he received a page. Atkinson immediately left the mall. Later that day, at approximately 5:30 p.m., Harry Hughes, Jr., a resident of Old Bradley Road in Mardela Springs, Maryland, saw Atkinson

¹ Miles's brief presents two questions presented, but with six argument headings. The Appellee has condensed the issues raised by Miles and addresses the merits of those claims in issue (1). The State has also added issues (2) and (3), in light of the State's due process concession explained in Section II.

driving a black Toyota Camry down Old Bradley Road. Within fifteen minutes, Hughes heard a single gunshot.

On the same day, Atkinson failed to show up for dinner at his home with his parents and for his evening play rehearsal. His mother, Dorothy Atkinson, notified the Maryland State Police that her son was missing. The next day, April 3, 1997, at approximately 9:00 p.m., Maryland State Police officers located Atkinson's Toyota near Old Bradley Road and found a cowboy boot print in the area.

In the morning of April 4, 1997, Robert Wayne Atkinson, the victim's brother, and his friend who had joined the search, Sean Thomas Mooney, returned to Old Bradley Road to comb the area for additional information concerning Edward Atkinson's whereabouts. After following footprints on the ground, Robert Wayne Atkinson discovered his brother's body in a wooded area. Later that same day, Robert Wayne Atkinson and Sean Mooney also saw a gray colored car driven by the appellant heading towards the crime scene off of Old Bradley Road. The police arrived on the scene and determined that Edward Atkinson had been shot once in the back of the head and dragged to the location where his body was found. The police noticed several additional cowboy boot prints near the body matching the one found the night before by the victim's car, as well as scuff marks indicating a struggle at the side of the road. The police also discovered that Atkinson's pockets had been emptied, but a search of the wooded area surrounding the crime scene failed to produce the victim's wallet and keys.

In contacting his brother's credit card companies to report the theft, Robert Wayne Atkinson learned that the cards had been used after his brother had been reported missing. The cards had been used on April 3, 1997, at a Wal-Mart ATM in Cambridge, Maryland, at the Tru Blu gas station in Harrington, Delaware, at the Structure and J.C. Penney stores in the Dover Mall, and at Shuckers Pier 13 Restaurant in Dover, Delaware. The personnel interviewed at these locations described the credit

card holder as a white male, approximately 6'1" to 6'3" tall, having medium length dirty blonde to brown hair, and wearing white jeans or pants with a white shirt and cowboy boots. (Two of the Tru Blu gas station attendants subsequently identified appellant as the Atkinson card user.) Composite sketches of the suspect were drawn and circulated on local news stations. During the next two weeks, news reports specifically mentioned the sighting of the murder suspect at the Tru Blu gas station.

On April 15, 1997, James Towers (a resident of Caroline County) was in his home monitoring the police and fire department radio transmissions with his scanner. Towers' scanner was capable of picking up cellular phone conversations. At some point between 8:30 and 9:30 p.m., Towers overheard a conversation on his scanner where a male and female discussed the importance of staying away from the Tru Blu gas station in Harrington, Delaware. Because he thought this conversation might be related to the news story about the murder, Towers tape-recorded the conversation. Towers notified the Maryland State Police about the tape, who promptly picked up the tape from Towers' residence.

The tape of the phone conversation included a discussion of concealing evidence, as well as descriptions of the geographic area surrounding the couple's home. Deputy Ronald Russum of the Caroline County Sheriff's Department listened to the tape and identified the female voice as Jona Miles, who turned out to be appellant's wife. Detective James Fraley of the Delaware State Police identified the voices as Jody and Jona Miles, based on his previous contacts with both individuals.

By April 22, 1997, after locating Jona Miles's residence, the Maryland and Delaware State Police applied for search warrants for 292 Cole Brit Lane, Harrington, Delaware and 27880 Whiteleysburg Road, Greensboro, Maryland, properties owned by Jona Miles and her parents. The police executed the warrants on the same day. During the search of the properties, the police seized several items of clothing belonging to appellant

and his 1996 W-2 tax statement as well as other papers, a razor, telephone bills, phone numbers from a caller identification box, and other pieces of note paper.

Later that day, the police placed Jona Miles under arrest and questioned her at the Caroline County Sheriff's Department. Jona Miles gave a statement to the police and assisted them in ascertaining her husband's whereabouts. She also signed a consent to search form authorizing Corporal Fisher of the Maryland State Police Force to search her trailer located on her parents' property at 27880 Whiteleysburg Road. Pursuant to the consent to search form, the police seized one pair of black men's jeans and one pair of Structure dress pants.

Jona Miles admitted that within a week after April 2, 1997, she had thrown two Structure shirts in a dumpster near Route 404 in Centreville, Maryland, and a few days later she had accompanied her husband as he disposed of his cowboy boots in a dumpster behind a shopping center in Milford, Delaware. Ms. Miles also dumped a handgun, holster and ammunition left by her husband in the Choptank River near Denton, Maryland. With the assistance of Ms. Miles, the State Police were able to recover the gun in its holster and the ammunition, but were unable to find the clothing. As a result of information given to them by Jona Miles, the police arrested appellant where he had been working. The contents of the car, including a cellular phone and the vehicle registration card, were inventoried and seized.

During the evening of April 22, 1997, Corporal William V. Benton and Trooper Psota began interviewing appellant, after he was advised of his *Miranda* rights. Within minutes of the beginning of the questioning, appellant admitted that on April 2, 1997, he met Edward Atkinson at a rest area near Old Bradley Road. Appellant claimed that he had been sent by a loan shark to collect a package from Atkinson, which the victim did not produce. He stated that he became scared when Atkinson, who, at appellant's direction, had his back to appellant the entire time,

reached inside his jacket. Appellant, concerned that Atkinson had a gun, fired one shot striking the victim in the back of the head. Afterwards, appellant found and removed Atkinson's wallet and two briefcases from the car. Although appellant returned to the scene on April 4, 1997 with the intention of burying Atkinson's body, he fled when he saw all of the police cars in the area.

Miles v. State, 365 Md. 488, 499-503 (2001), *cert. denied*, 534 U.S. 1163 (2002) (footnote omitted).

SUMMARY OF ARGUMENT

A jury in the Circuit Court for Queen Anne's County, Maryland, convicted Miles of felony murder and related offenses and sentenced him to death at a sentencing hearing on March 18, 1998. The present appeal follows the October 18, 2013, denial of Miles's motion to correct an illegal sentence, which alleges that the Maryland legislature's repeal of the death penalty renders Miles's death sentence illegal.²

As will be demonstrated, Miles's sentence is not illegal — either when it was handed down in 1998 or now — and his claims in support of his motion to correct an illegal sentence have no merit. In fact, given Miles's inability to convince the Court of Appeals that his death sentence is illegal since 2001,² it

² See Senate Bill 276, appearing in 2013 Md. Laws Ch. 156, effective October 1, 2013, (hereinafter the "repeal legislation")

² See, e.g., *Miles v. State*, 365 Md. at 488; *Miles v. State*, 397 Md. 352, *cert. denied*, 552 U.S. 883 (2007); *Miles v. State*, 421 Md. 596 (2011), *cert.* (continued...)

would appear that his current novel claim was brought under Maryland Rule 4-345 only because that rule permits the presentation of new claims years after criminal convictions are final, by allowing an alleged illegal sentence to be corrected “at any time.” Md. Rule 4-345(a). But Miles’s invocation of Maryland Rule 4-345 rings hollow; Maryland case law on the topic has established that a viable motion to correct an illegal sentence must involve an illegality that inheres in the sentence itself. *Chaney v. State*, 397 Md. 460, 466 (2007). There is no illegality inherent in Miles’s sentence, as the Court of Appeals has reiterated, and Miles’s various contentions that center upon his claim that the repeal legislation renders his sentence illegal under Maryland Rule 4-345(a) must be rejected.

There is, however, relief available to Miles, although not under the auspices of a motion to correct an illegal sentence. In the State’s view, because the Maryland Division of Corrections (“DOC”) cannot promulgate lethal injection protocols absent an enabling statute, and because repeal legislation has eliminated the possibility that an enabling statute will be drafted in the foreseeable future, Miles’s death sentence is presently unenforceable. The uncertain enforceability of Miles’s sentence gives rise to a due process claim, which in turn mandates that his death sentence should be vacated.

²(...continued)
denied, 132 S. Ct. 1743 (2012); *Miles v. State*, 435 Md. 540 (2013)

In the third and final question presented, the State will address the consequences of its concession in issue two, and will argue that the only available alternative sentence for Miles is life imprisonment without the possibility of parole (“LWOP”). The State, therefore, will ask this Court to vacate Miles’s death sentence, and remand with instructions for the lower court to impose LWOP.

ARGUMENT

I.

THIS COURT SHOULD REJECT MILES’S VARIOUS CLAIMS THAT HIS DEATH SENTENCE IS ILLEGAL.

Miles contends that his death sentence is illegal for several reasons, none of which are correct. First, Miles contends that the repeal legislation was meant to apply retroactively, (Brief of Appellant at 5-16), even though both a legal presumption of statutory prospectivity and the plain language of the repeal statute compel an unavoidable conclusion that the legislation was meant to apply prospectively only. Miles’s argument to the contrary is without merit.

Miles also alleges that the Maryland General Saving Clause, which is a statutory rule of interpretation that protects criminal penalties should the authorizing statute be subsequently repealed, does not apply. This is flatly wrong, as Miles’s conviction and sentence became final years before the repeal legislation, and, in the repeal legislation, the legislature did not expressly disavow the Saving Clause.

Lastly, Miles claims that the repeal legislation transformed his valid sentence into one that is arbitrary and capricious, and violative of the rule of lenity, the Maryland Declaration of Rights, or the Eighth Amendment prohibition against cruel and unusual punishment. (Brief of Appellant at 25-32). As discussed herein, however, none of these stated bases support Miles's contention that his death sentence is illegal.

A. Repeal of the death penalty statute, effective on October 1, 2013, applies prospectively only.

Under Maryland law, a presumption exists that legislation applies prospectively only:

The general presumption is that all statutes, State and federal, are intended to operate prospectively and the presumption is found to have been rebutted only if there are clear expressions in the statute to the contrary. Retroactively, even where permissible, is not favored and is not found, except upon the plainest mandate in the act.

Bell v. State, 236 Md. 356, 369 (1964). *See also State v. Johnson*, 285 Md. 339, 343 (1979) (“It is a widely recognized principle that the retroactive operation of a statute is disfavored.”) (and cases cited therein).

Further, as a matter of statutory interpretation, the repeal legislation applies prospectively only. “The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature.” *Chow v. State*, 393 Md. 431, 443 (2006) (quoting *Kushell v. Dep’t of Natural Res.*, 385 Md. 563, 576 (2005)); *Price v. State*, 378 Md. 378, 387 (2003); *Harris v. State*, 331 Md. 137,

145 (1993). Ordinarily, statutory interpretation begins and ends with an examination of the plain language of the statute, “for the legislative intent of a statute primarily reveals itself through the statute’s very words[.]” *Price*, 378 Md. at 387. *Accord Smith v. State*, 399 Md. 565, 578 (2007); *Robey v. State*, 397 Md. 449, 453 (2007); *Stanley v. State*, 390 Md. 175, 184 (2005).

When interpreting the plain language of a statute, reviewing courts should approach the task from “a ‘commonsensical’ perspective.” *Frost v. State*, 336 Md. 125, 137 (1994) (quoting *Richmond v. State*, 326 Md. 257, 262 (1992), in turn quoting *United States v. Universal Corp.*, 344 U.S. 218, 221 (1952)). Constructions that are “illogical, unreasonable, or inconsistent with common sense,” should be avoided. *Frost*, 336 Md. at 137; *Harris*, 331 Md. at 145. The statutory language should be read “so that no word, clause, sentence or phrase is rendered superfluous or nugatory.” *Chow*, 393 Md. at 443 (quoting *Kushnell*, 385 Md. at 576-77, in turn quoting *Collins v. State*, 383 Md. 684, 691 (2004)).

If the language of the statute is clear and unambiguous, the reviewing court will give effect to the statute as written, and the inquiry will ordinarily end. *Smith*, 399 Md. at 578; *Price*, 378 Md. at 387. The plain statutory language is not required to be “divorced from its textual context,” however, as “adherence to the meaning of words does not require or permit” such isolation. *Price*, 378 Md. at 388 (quoting *Maguire v. State*, 192 Md. 615, 623 (1949)).

Rather, the statutory text should be construed “‘in light of the legislature’s general purpose and in the context of the statute as a whole.’” *Frost*, 336 Md. at 138 (quoting *Forbes v. Harleysville Mutual*, 322 Md. 689, 696-97 (1991)). As the Court of Appeals noted in *State v. Kennedy*, 320 Md. 749, 753 (1990), “the real and actual intent of the legislature should prevail over a mechanical reading of the statute.”

“Occasionally [this Court] see[s] fit to examine extrinsic sources of legislative intent merely as a check of [the Court’s] reading of a statute’s plain language.” *Robey*, 397 Md. at 454. In those instances, the reviewing court might “‘look at the purpose of the statute and compare the result obtained by use of its plain language with that which results when the purpose of the statute is taken into account.’” *Smith*, 399 Md. at 578 (quoting *Harris*, 331 Md. at 146). “[T]he context of a statute, the overall statutory scheme, and archival legislative history of relevant enactments,” might prove useful under those circumstances. *Smith*, 399 Md. at 578-79; *Robey*, 397 Md. at 454. Where the statute’s language is unambiguous, such examinations are done as a confirmatory process, and are not intended to undermine or contradict the plain meaning of the statute. *Smith*, 399 Md. at 578.

If ambiguity exists in the statutory language, it becomes the job of the reviewing court “to resolve that ambiguity in light of the legislative intent,” using all available resources and tools of statutory construction. *Price*, 378

Md. at 387; *accord Chow*, 393 Md. at 444; *Stoddard v. State*, 395 Md. 653, 662 (2006); *Gilmer v. State*, 389 Md. 656, 663 (2005). A statute is unclear or ambiguous when there are two or more reasonable interpretations of the plain statutory language. *Stoddard*, 395 Md. at 662; *Gilmer*, 389 Md. at 663; *Deville v. State*, 383 Md. 217, 223 (2004); *Lewis v. State*, 348 Md. 648, 653 (1998). In that instance, the legislative intent might be ascertained by consulting the legislative history – which includes “comments and explanations regarding it by authoritative sources during the legislative process.” *Stoddard*, 395 Md. at 662 (quoting *Witte v. Azarian*, 369 Md. 518, 525-26 (2002)).

In rejecting Miles’s allegation that his sentence is illegal, the lower court correctly found that, “[u]nder Sections Four and Five of the new law, the Legislature provide[d] a clear intent that the new law should be applied only to sentences in which the death sentence has not been imposed as of October 1, 2013.” (App. 8).³ Not only was there no manifestation whatsoever by the

³ Those sections of the repeal legislation provide:

SECTION 4. AND BE IT FURTHER ENACTED, That in any case in which the State has properly filed notice that it intended to seek a sentence of death under § 2-202 of the Criminal Law Article in which a sentence has not been imposed, the notice of intention to seek a sentence of death shall be considered to have been withdrawn and it shall be deemed that the State properly filed notice under § 2-203 of the Criminal

(continued...)

legislature that Miles’s year 1998 sentence should be subject to the repeal legislation, there was, rather, the clear statement that the repeal legislation applies only after the effective date, October 1, 2013.

In the repeal legislation, the Maryland legislature amended Maryland Code (1999, 2008 Repl. Vol. and 2014 Supp.), § 7-601 of the Correctional Services Article to authorize the Governor to “change a sentence of death into a sentence of life without the possibility of parole[.]” Md. Code Ann., Correct. Serv. Art., § 7-601(a)(1) (2013 Supp.).⁴ If the legislature had intended for the repeal legislation to apply to those defendants, like Miles, who were already serving a sentence of death when the repeal was enacted, retention (and amendment) of this statute would have been unnecessary. Because this amended statute is part of the repeal legislation, it necessarily follows that the legislature intended and understood that Senate Bill 276 did not affect those

³(...continued)

Law Article to seek a sentence of life imprisonment without the possibility of parole.

SECTION 5. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2013.

2013 Md. Laws Ch. 156.

⁴ Before the repeal legislation, this statute authorized the Governor to “commute or change a sentence of death into a period of confinement that the Governor considers expedient[.]” Md. Code Ann., Correct. Serv. Art., § 7-601(a)(1) (1999, 2008 Repl. Vol. and 2012 Cum. Supp.)

defendants who already were serving under a death sentence when the bill became law in Maryland. The persistence of this statute clearly demonstrates that a death sentence imposed before repeal has continued viability post-repeal: if the legislature had intended to repeal the death penalty retroactively, it would not have simultaneously explicitly preserved the Governor's authority to "change a sentence of death into a sentence of life without the possibility of parole." Md. Code Ann., Correct. Serv. Art., § 7-601(a)(1) (2013 Supp.). A more definitive declaration of legislative intent can hardly be imagined.⁵

B. The Maryland "General Saving Clause" statute expressly forecloses Miles's claim that the repeal of the death penalty in 2013 affects or modifies his year 1998 death sentence.

To the extent that there can be any lingering doubt about the legislature's intent regarding the repeal legislation's impact on defendants currently serving a death sentence, the Maryland General Saving Clause

⁵ In the argument portion of his brief, Miles devotes a subsection to Governor Martin O'Malley's comments, made when he signed the repeal legislation into law to suggest that he, too, "intended to preclude future executions by the repeal act." (Brief of Appellant at 16) (capitalization modified). But the governor cannot bestow retroactivity upon legislation through command or comment. Moreover, Governor O'Malley's office has also indicated that, with respect to the defendants currently on death row in Maryland, the governor "will consider each case individually, but the repeal act limited his powers. He is required to impose a sentence of life without parole if he makes a change." Ian Duncan, *Inmate Makes Repeal Claim*, Baltimore Sun, May 2, 2014, at A2. This contradicts Miles's position that the Governor believes that the repeal legislation retroactively applies to Miles.

(hereinafter, “Saving Clause”) conclusively resolves the issue. The Saving Clause is a statutory rule of interpretation that protects or saves criminal penalties that have been lawfully imposed by statutes that are subsequently repealed by the legislature. When the Saving Clause is activated — by virtue of the repeal of a criminal statute — it automatically protects criminal convictions unless the legislature, in repealing the statute under which the conviction abides, expressly disclaims application of the Saving Clause in the repeal legislation. In Miles’s case, his conviction and sentence became final years before the repeal legislation. In the repeal legislation, the legislature did not expressly disclaim the Saving Clause, which could not be viewed in any sense as an error of omission, given the high-profile nature of the repeal legislation. Accordingly, the Saving Clause protects Miles’s conviction and sentence.

The Maryland Saving Clause reads as follows:

The repeal, or the repeal and reenactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal, shall not have the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, section or part thereof, unless the repealing, repealing and reenacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and reenacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits,

proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability.

Md. Code Ann., Rules of Interpretation, Art. 1 § 3 (2011 Repl. Vol). By its express terms, the Saving Clause nullifies Miles's claim that the legislature's repeal of the death penalty in 2013 directly affects the lawful death sentence he received in 1998. *See generally Graves v. State*, 364 Md. 329, 346-47 (2001) ("Ordinarily, where the language of the statute is not ambiguous or obscure, this Court need not look beyond the plain language of the statute to discern legislative intent."). The Court of Appeals' application of this rule of interpretation mandates the same conclusion.

In *Bell*, 236 Md. at 358, the Court of Appeals addressed the impact of a statute's repeal on a criminal conviction from the perspective of both the Maryland common law and the Saving Clause. Regarding the former, the Court stated:

It is clear that the common law of Maryland is that the repeal of a statute creating a criminal offense, after conviction under the statute but before final judgment, including the final judgment of the highest court empowered to review the conviction, requires reversal of the judgment, because the decision must accord with the law as it is at the time of final judgment[.]

Id. at 363. For criminal cases involving convictions that are final at the time of repeal of an underlying statute — which was the situation in *Bell* and is the situation in Miles’s case — the Saving Clause applies:

We see no basis for finding an express direction by the Legislature in the public accommodations law that existing criminal liabilities or penalties were to be extinguished. The Legislature must be presumed to have known that under Sec. 3 of Art. 1 of the Code an express direction, in so many words, was required to show legislative intent to effect such an extinguishment. The demonstrated preoccupation of the Legislature with the effect of the public accommodations law on the trespass act strengthens the view that it would have been completely explicit in its directions had it wished to change the general rule established by the saving clause.

Id. at 368. Under the facts of *Bell*, the Court of Appeals determined that the Saving Clause shielded the penalty incurred under the statute in place two years before the law was changed. *Id.* at 368.

In *Johnson*, 285 Md. at 340, the Court of Appeals addressed the issue of whether “the law existing at the time the appeal is decided or the law existing at the time of the trial is controlling.” *Id.* That issue arose in *Johnson* because the Maryland legislature amended the law relating to revocation of probation proceedings by allowing trial court discretion in ordering less than the full period of imprisonment from the probationer’s suspended sentence.

Id. at 341-42. The Court of Appeals stated:

Where penalties, rights or liabilities incurred or accrued under a prior version of a statute would otherwise be extinguished by

its repeal, most legislatures have enacted general savings statutes which have the effect of continuing a repealed statute in force for the purpose of punishing offenses committed prior to repeal. Thus, a general savings statute preserves penalties imposed under prior law except where a subsequent repealing act manifests the legislative intention to the contrary.

Id. at 344. With respect to the Saving Clause, the Court of Appeals held: “[w]e interpret this provision as saving any penalty, forfeiture or liability incurred under a statute which is subsequently repealed or amended unless the repealing act expressly provides otherwise.” *Id.* at 345. Because the amended probation revocation statute and its legislative history were silent as to any restriction on operation of the Saving Clause, the Court found that this clause mandated that the amended statute did not apply to Johnson’s sentence. *Id.* See also *Miles v. State*, 349 Md. 215, 230 (1998) (holding that “under the general saving clause, when the General Assembly repeals or amends a statute, the common law rule does not apply, and a prosecution under the repealed statute may ordinarily continue despite the repeal”).

More recently, the Court of Appeals handed down *Waker v. State*, 431 Md. 1 (2013). There, the Maryland legislature enacted a reduced penalty for theft after Waker committed his crimes but before he was sentenced. *Id.* at 5. But when he was sentenced, Waker did not receive the benefit of this reduction; he received the more stringent penalty that was authorized when Waker committed the crime. *Id.* The Court of Appeals held that this sentence

was illegal, “because it was not authorized by the statute in effect at the time of his trial and sentencing.” *Id.* at 13. In its opinion, the Court of Appeals also distinguished *Johnson, supra*: “In the present case, unlike in *Johnson*, the change in the statute favorable to Waker occurred prior to Waker’s trial and sentencing. In contrast to *Johnson*, the penalties ‘incurred and imposed’ on Waker were not those in effect at the time the trial court imposed sentence.” *Id.* at 11. Miles’s case is controlled by *Johnson* and is distinguishable from *Waker*, because his sentence was imposed and became final well before the change in the law that he claims entitles him to relief.

As in *Johnson*, in the present case there is nothing in the language of the repeal statute or its legislative history that expressly disavows application of the Saving Clause. *Bell*, 236 Md. at 368; *Johnson*, 285 Md. at 345-46. The legislature’s repeal of the death penalty was hard-fought and high-profile, so it must be presumed, as it was in *Bell* and *Johnson*, that the legislature knew what it was doing when it declined to disclaim application of the Saving Clause to defendants such as Miles, who had received final judgment death sentences long before the effective date of the repeal legislation. *See also Jones v. United States*, 327 F.2d 867, 870 (D.C. Cir. 1963) (interpreting federal savings statute at 1 U.S.C. § 109 and determining that, legislative amendment that modified the murder statute to allow juries and judges to consider life imprisonment in first degree murder cases “did not apply to sentences imposed

prior to [the effective date of the amendment], for the amendatory Act contained no language applying its ameliorating provisions to previously committed offenses”); *People v. Thomas*, 678 N.W.2d 631, 637 (Mich. Ct. App. 2004) (holding that sentencing amendment that took effect over one year after the defendant was sentenced did not apply because “there is no language in either amended statute indicating that the elimination of the mandatory minimum sentence . . . was intended to apply to defendants who committed their offenses and were sentenced before [the effective date of the amendment]”).

Miles concedes that, “on its face,” the Saving Clause “speaks to maintaining a penalty following the repeal of a statute which allowed the penalty originally.” (Brief of Appellant at 18). But he asserts that “[t]here are two principal reasons the Savings Clause does not apply in this case to preserve the DOC’s ability to implement an execution protocol.” (Brief of Appellant at 19). Miles first contends that his “sentence of death has not been implemented [or “incurred”] as he has not been executed.” (*Id.* at 19-20). This argument fails. Miles’s sentence was handed down on March 18, 1998, when a jury of his peers sentenced him to death. *See Webster v. State*, 359 Md. 465, 474 (2000) (“The final judgment in a criminal case consists of the verdict and, except where there is an acquittal, the sanction imposed, which is normally a fine or sentence of imprisonment or both”) (citation omitted). This

sentence became final upon the completion of his direct appeal in 2002. Miles currently is incarcerated under a death sentence, as demonstrated by his commitment order, which is clearly a sentence he has “incurred.” *See id.* at 482 (“The meaning of ‘sentence’ in the criminal context is clear — it refers to the act of the court in pronouncing sentence, announcing the sanction *that is being imposed on the defendant*) (emphasis added). The fact that Miles has “incurred” a death sentence is the basis for his current incarceration (or his current appeal for that matter). The fallacy of Miles’s argument lies in the fact that it defines a sentence by its end-limit. By this rationale, a criminal defendant who receives a life sentence does not “incur” that sentence until the entirety of his/her life is lived, which is preposterous. The same fallacy would render a defendant serving a 30-year sentence to not have “incurred” that sentence until the passage of thirty years.

Moreover, if Miles’s interpretation prevailed, he would not be aggrieved (and technically ineligible to pursue an appeal) until he is executed. But this would place an appellate court in the untenable position of determining whether or not the Saving Clause applies only after Miles was executed. To the extent, however, that any such post-execution appeal was pursued, it would have to be dismissed. *See Jones v. State*, 302 Md. 153, 158 (1985) (holding that the death of a defendant after the conviction has been affirmed on direct appeal but during subsequent discretionary review by an

appellate court mandates dismissal of the discretionary appeal while leaving the existing judgment intact). Contrary to Miles's claim, when a jury imposed a sentence of death upon him in 1998, he incurred that sentence at that time, even though that sentence has not been carried out to completion.

The second part of Miles's claim is that "the Savings Clause precedents in Maryland sparingly apply the Clause." (Brief of Appellant at 20). As the discussion above demonstrates, however, that is simply not true. The Court of Appeals has consistently applied the Saving Clause, as in *Bell* and *Johnson*, which are indistinguishable from the present case insofar as the repeal legislation happened after the underlying convictions became final, and the repeal legislation did not exclude application of the Saving Clause. Two additional cases Miles cites — *State v. Kennerly*, 204 Md. 412 (1954), and *Webster*, 359 Md. at 465 — are inapposite. In *Kennerly*, the Court did not decide whether or not the Saving Clause applied to the facts of the case. *Kennerly*, 204 Md. at 417 ("But, if we assume, *without deciding*, that the general saving clause is inapplicable to a penalty not 'incurred' prior to June 1, 1953, it does not follow that the old requirement was repealed on that date") (emphasis added).

Likewise, in *Webster*, the Court did not expressly rule on whether or not the Saving Clause applied to a situation where the legislature amended a subsequent offender mandatory sentence provision by deleting daytime

housebreaking as a predicate offense, further propounding that the amendment was prospective only from the date of enactment. 359 Md. at 481-82. Rather, the Court of Appeals held that the amendment was ambiguous, and, under the rule of lenity, the amended statute should apply to sentences occurring after its effective date. *Id.* at 487. The holdings in *Kennerly* and *Webster* do not directly answer whether the Saving Clause protects Miles’s sentence, but *Bell* and *Johnson* do answer that question in the affirmative.

Accordingly, the cases upon which Miles relies to support his claim that the Saving Clause is “sparingly applied” do not actually support that proposition. The cases that do apply the Saving Clause — *Bell* and *Johnson* — leave no doubt that the Saving Clause applies in Miles’s case and to his sentence, which was imposed prior to repeal of the death penalty statute and where the repeal legislation did not disavow application of the Saving Clause.

C. Miles’s death sentence is not unconstitutional on the grounds he raises, so the sentence is not illegal.

Issue V of Miles’s brief employs a “scattergun” approach in which he alleges that his sentence is illegal on various statutory and constitutional grounds: that it is arbitrary and capricious; that it violates the rule of lenity; that it offends Maryland’s evolved sense of “decency”; that it is cruel and unusual punishment; and that it does not advance retribution and deterrence. (Brief of Appellant at 25-32). Miles’s effort to wedge these various meritless contentions into a claim of sentence illegality fails. What Miles is ultimately

attempting to do is combine the constitutional standards required in the death penalty sentencing scheme with the repeal legislation to promote a sentence illegality claim. But the manner in which Miles's sentence was imposed has been challenged and continuously survived constitutional scrutiny, and the repeal legislation does not create a sentence illegality where none existed before the legislation.

1. *Miles's death sentence is not arbitrary and capricious.*

The Supreme Court has expressly declared that the death penalty “does not invariably violate the Constitution.” *Gregg v. Georgia*, 428 U.S. 153, 169 (1976). The Maryland death penalty statute under which Miles was sentenced to death has continuously survived scrutiny, despite being the subject of comprehensive, continuous, and vehement attacks on numerous fronts for over thirty years.

In *Gregg*, the Supreme Court traced the history of death penalty jurisprudence in the United States and concluded that a sentence of death for the crime of murder was not a *per se* violation of the Eighth Amendment. *Id.* at 176-87. The Court stated: “We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.” *Id.* at 187. Rather, for Eighth Amendment purposes, a determination of whether to impose the

death penalty must not be arbitrary and capricious and must take into consideration the nature of the offense and the character and propensities of the offender. *Id.* at 189.

Following *Gregg*, effective July 1, 1978, the Maryland legislature approved the death penalty statute under which Miles was sentenced. 1978 Md. Laws ch. 3 (originally codified as Maryland Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.), Art. 27, §§ 412-414). In *Tichnell v. State*, 287 Md. 695, 720-29 (1980), the Court of Appeals opined that Maryland's capital punishment statute passed federal constitutional muster. Years later, in *Oken v. State*, 378 Md. 179, 194-204, 210-53, *cert. denied*, 124 S.Ct. 2084 (2004), the Court of Appeals engaged in an extensive analysis of Supreme Court jurisprudence and Maryland's capital sentencing scheme in order to address a Sixth Amendment challenge to the statute.

The Court recognized that the Supreme Court in *Gregg* "effectively approved the bifurcated system we employ in Maryland today." *Id.* at 210. Maryland's statute contained all of the characteristics found significant in reducing arbitrary and capricious imposition of the death penalty: limiting the kinds of murders for which a defendant can receive the death penalty; a bifurcated trial; presentation of aggravating and mitigating evidence focusing on the nature of the crime and the character of the defendant; the need for the sentencer to find at least one aggravating factor beyond a reasonable doubt; the

possibility of recommending mercy regardless of the number of aggravating or mitigating factors; and automatic statutory review by the Court of Appeals to consider whether “(i) the imposition of the death sentence was influenced by passion, prejudice, or any other arbitrary factor; (ii) the evidence supports the finding by the court or jury of a statutory aggravating circumstance . . . ; and (iii) the evidence supports a finding by the court or jury that the aggravating circumstances outweigh the mitigating circumstances. . . .” Md. Ann. Code, Criminal Law, § 2-401(d)(2) (2002). As the Court of Appeals stated, Maryland’s statute “was designed to conform with the post-*Furman* [*v. Georgia*, 408 U.S. 238 (1972)] requirement that the class of defendants be narrowed by the finding of an aggravating circumstance in order to ensure that the death penalty not be imposed in an ‘arbitrary’ or ‘freakish’ manner.” *Oken*, 378 Md. at 257.

The Court of Appeals has held that, because neither Article 16 nor Article 25 defines cruel or unusual punishment, it is ultimately within the province of the legislature to fix the penalty for commission of crimes and offenses. *Bartholomey v. State*, 260 Md. 504, 515-19 (1971), *vacated in part and remanded*, 408 U.S. 938 (1972). In the years following *Furman*, the legislature did so, and the Court of Appeals has approved the legislature’s implementation of the death penalty as a possible criminal punishment in Maryland.

Miles claims, however, that his sentence is illegal because he “has a right under State law, the Maryland Declaration of Rights, and federal law to not be subject to an irrational arbitrary imposition of a sentence of death, which would result if his sentence stands while all other potentially eligible defendants who did not have a death sentence in place on October 1, 2013, are exempted from the death penalty.” (Brief of Appellant at 25). But there are no “potentially eligible defendants” who will face the death penalty if no such penalty was imposed prior to October 1, 2013. In other words, the class of defendants in which Miles’s sentence must be compared are those who committed murder and were sentenced prior to October 1, 2013. *See Dobbert v. Florida*, 432 U.S. 282, 301 (1977) (holding that defendants who commit crimes on either side of a legislatively drawn line are not “similarly situated”).

Miles is not similarly situated to those individuals who commit murder after October 1, 2013, because, unlike them, Miles was convicted when the judicially approved statutory scheme for imposing a sentence of death was in effect, which correspondingly provided him notice at the time he killed the victim that the maximum possible sentence for felony murder was death. *See Nestell v. State*, 954 P.2d 143, 145 (Okla. Crim. App. 1998) (“Perpetrators of crime cannot claim the benefit of, and are not similarly situated to those subsequently sentenced under, a later enacted statute which lessens the culpability of their crime after it was committed”).

Contrary to Miles's argument, his sentence is not based on the arbitrary date that he committed murder. As required by *Gregg* and its progeny, Miles's sentence is based on the circumstances of his offense and the characteristics of the offender. The fact that others with similar characteristics who commit first degree murder under the same aggravating circumstances after October 1, 2013, will receive a different sentence from Miles does not change that fact. To imply otherwise is to suggest that the legislature cannot redefine a crime or its punishment without rendering sentences previously imposed for the same crime unconstitutional.

Reduced to essentials, the repeal legislation did not create a sentence illegality where none existed before it was enacted. Miles conflates the constitutionality of the death penalty in Maryland when he was sentenced in 1998 with the legislature's decision to repeal the death penalty in 2013. When Miles was sentenced to death in 1998, his sentence fully complied with the arbitrary and capricious and cruel and unusual constitutional standards, and Miles does not contend otherwise. His claim that his sentence has transformed into one that is arbitrary and capricious because of the repeal legislation that has nothing to do with him or his sentence must be rejected.

2. *Miles's death sentence does not violate the rule of lenity.*

Notwithstanding that the repeal legislation does not apply retroactively or that Miles's sentence is protected by the Saving Clause, *supra*, Miles's

claim that the rule of lenity mandates that his sentence be deemed illegal must be rejected. The rule of lenity is a principle of statutory construction. “The policy behind the rule of lenity is to prohibit courts from ‘interpret[ing] a . . . criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the legislature] intended.’” *Holbrook v. State*, 364 Md. 354, 373 (2001) (citations omitted). The rule of lenity, however, “serves only as an aid for resolving an ambiguity and it may not be used to create an ambiguity where none exists.” *Jones v. State*, 336 Md. 255, 261 (1994). As more fully set forth above, there is no ambiguity in the repeal legislation; it does not apply to Miles’s sentence based on the Saving Clause and the obvious prospective nature of the legislation.

3. *Miles’s sentence is not cruel and unusual punishment that runs afoul of “decency.”*

Nor is Miles’s sentence illegal insofar as it violates his own interpretation of Maryland’s sense of “decency.” (Brief of Appellant at 30, 32). In *Calhoun v. State*, 297 Md. 563 (1983), *cert. denied*, 466 U.S. 993 (1984), the Court of Appeals rejected Calhoun’s claim that the imposition of a death sentence through administration of lethal gas violates the Eighth and Fourteenth Amendments of the United States Constitution and Articles 16 and 25 of the Maryland Declaration of Rights. *Id.* at 612. The Court observed

that, “under the Eighth and Fourteenth Amendments the Supreme Court has expressly stated that the death penalty is an acceptable form of punishment.”

Id. The Court also implicitly tied together Calhoun’s claims under the Maryland Declaration of Rights with his Eighth and Fourteenth Amendment claims, which the Court of Appeals ultimately rejected in pertinent part as follows:

It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed. It is also established that imposing capital punishment, at least for murder, in accordance with the procedures provided under the Georgia statutes saves the sentence from infirmities which led the Court to invalidate the prior Georgia capital punishment statute in *Furman v. Georgia, supra*.

Id. at 614 (quoting *Coker v. Georgia*, 433 U.S. 584, 591 (1977)). *See also Phipps v. State*, 39 Md. App. 206, 213 (1978) (“As long as the punishment that is decreed conforms ‘with the basic concept of human dignity,’ . . . and is neither ‘cruelly inhumane [n]or disproportionate,’ . . . to the offense, there is no violation of the Eighth Amendment, *Gregg v. Georgia, supra*, nor of the Maryland Declaration of Rights, Articles 16 and 25.”) (citations omitted); *Apple v. State*, 190 Md. 661, 668 (1948) (“Ordinarily any punishment, authorized by a statute, and imposed by a court within the statutory limits is not cruel and unusual punishment, and is not subject to review by this Court.”).

In *Gregg*, the Supreme Court squarely rejected the argument that “standards of decency” demand the end of the death penalty, noting that “it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.” 428 U.S. at 179. *See also Coleman v. Balkcom*, 451 U.S. 949, 959 n.1 (1981) (Rehnquist, J. dissenting) (discussing *Gregg*’s rejection of the claim that “standards of decency” demand the end of the death penalty, further opining that the argument presumes that “the role of judges, as opposed to democratically elected legislatures, is to ‘divine’ what are ‘decent’ societal values.”). The legislature’s clear intent that the repeal legislation does not apply to any persons who committed first degree murder before October 1, 2013, demonstrated *supra*, contradicts Miles’s claim that the repeal legislation reflects an evolved standard of decency that condemns the death penalty on moral grounds. But even if Miles were correct on that point, it does not follow that his sentence is illegal.

II.

GIVEN THAT THE DIVISION OF CORRECTIONS DOES NOT HAVE THE PRESENT STATUTORY AUTHORITY TO ENACT LETHAL INJECTION PROTOCOLS FOLLOWING REPEAL OF THE DEATH PENALTY STATUTE IN MARYLAND, THE PERSEVERANCE OF MILES'S DEATH SENTENCE, POST-REPEAL, VIOLATES DUE PROCESS.

As demonstrated, Miles's sentence is not illegal — either when it was handed down or now — and his claims in support of his motion to correct an illegal sentence have no merit. There is no illegality that inheres in Miles's sentence itself. *See Chaney*, 397 Md. at 466 (explaining that, although a motion to correct an illegal sentence may be made at any time, the alleged illegality must inhere in the sentence itself); *accord Cunningham v. State*, 397 Md. 524, 526 (2007); *Pollard v. State*, 394 Md. 40, 47 (2006); *State v. Wilkins*, 393 Md. 269, 272-73 (2006).

What does exist is a conundrum, which emanates not from Miles's death sentence itself, but rather from the repeal legislation working in tandem with the lack of lethal injection protocols in Maryland. The latter factor exists because of the Court of Appeals' decision in *Evans v. State*, 396 Md. 256 (2006), *cert. denied*, 552 U.S. 835 (2007). There, the Court found in pertinent part that the lethal injection checklist issued by the DOC was a regulation adopted without compliance with procedural requirements of the State Administrative Procedure Act ["APA"]. *Id.* at 349-50. Because DOC did not

publish this checklist in the Maryland Register or send a copy of it to the Joint Legislative Committee on Administrative, Executive, and Legislative Review, the checklist, the Court of Appeals held, was ineffective. *Id.* at 344-45. Since *Evans*, DOC has not finalized a lethal injection checklist that complies with the APA.

In the lower court, Judge Ross described this conundrum as follows: “The legislature provided no retroactive relief to the five (5) inmates currently on death row. . . [but] the removal of the [DOC’s] authority in death penalty matters creates a troubling situation which this Court in [sic] now required to address.” (App. 4). The court noted that “[o]ne of the questions raised is whether the repeal of post-sentence death penalty procedures, both administrative and statutory, causes a sentence of death to be illegal? . . . That is, whether a person can be incarcerated indefinitely under a sentence of death with no protocol or authority to create a protocol for the remainder of his life?” (*Id.*). The court answered that question in the negative.

The court then concluded, however, that Miles’s sentence was not illegal, because the DOC “does have the present authority to reinstate the protocols that have lapsed and to undertake the procedural safeguards and requirements set out in the prior statute, i.e. §§3-901, *et seq.* of the Correctional Services Article.” (App. 5). Miles challenges that holding by asserting: “The absence of underlying statutory authority to support regulations

governing executions bars implementing a death penalty execution protocol today.” (Brief of Appellant at 7). After thorough review of the applicable law, Appellee agrees with Miles’s assertion.

DOC does not have the present authority to promulgate lethal injection protocols. An agency’s authority to enact regulations arises from, and must be consistent with, the statute the regulations are meant to implement. By removing the statutory authority to carry out the death penalty, the General Assembly extinguished DOC’s authority to promulgate the lethal injection protocols. *See generally Dep’t of Human Res. v. Hayward*, 426 Md. 638, 658 (2012) (“Administrative agencies have broad authority to promulgate regulations, to be sure, but the exercise of that authority, granted by the Legislature, must be consistent, and not in conflict, with the statute the regulations are intended to implement.”). Because the lower court’s conclusion that DOC has the authority to implement protocols is incorrect, the court’s first conclusion — that a defendant cannot be incarcerated indefinitely under a sentence of death — prevails. The consequence of this conclusion is that Miles’s death sentence should be vacated.

The State’s legal basis for its position that Miles’s death sentence should be vacated is the due process clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court has held that “due process requires that the nature and duration of commitment bear some reasonable

relation to the purpose for which the individual is committed.” *Jackson v. Indiana*, 406 U.S. 715 (1972). In *Jackson*, the Court struck down Indiana’s policy of indefinite pretrial commitment of incompetent defendants on Fourteenth Amendment due process grounds. *Jackson*, 406 U.S. at 738. By analogy, here, Miles is incarcerated for the purpose of carrying out his death sentence, but the duration of that type of commitment is indeterminate, given that there is no prospect of that a death sentence will be carried out in Maryland following the repeal of the death penalty. This offends similar due process considerations that the Supreme Court relied upon in *Jackson*. It is the uncertain enforceability of Miles’s death sentence — caused by both the repeal legislation and the absence of an enabling statute that would allow DOC to enact lethal injection protocols — that engenders this due process concern. These factors are singular to Maryland and its post-repeal death penalty process.⁶

⁶ The lack of lethal injection protocols, together with DOC’s inability to draft protocols following repeal of the death penalty, differentiates Maryland’s situation with other states where non-retroactive repeals of the death penalty occur while defendants remain on death row. In New Mexico, the legislature prospectively repealed the State’s death penalty in 2009, with two defendants remaining on death row. *See* N.M. State. Ann., §§ 31-20A-1-6 (2009). Governor Bill Richardson signed the bill abolishing the death penalty in New Mexico on March 18, 2009. On August 27, 2012, one of the two remaining death row defendants, Timothy Allen, filed a motion to dismiss his death sentence, contending that the 2009 prospective repeal of New Mexico’s death penalty renders his sentence unconstitutional. The lower court denied (continued...)

Similar to the incompetent criminal defendants in *Jackson* who were subject to indefinite pretrial commitment, the State should not indefinitely hold Miles under a sentence of death when the State no longer has the authority to implement that sentence, which the circuit court correctly recognized in this

⁶(...continued)

this motion, and Allen filed an interlocutory appeal to the Supreme Court of Mexico. The Attorney General of New Mexico, Gary K. King, has filed a brief in opposition to Allen's claims, arguing, *inter alia*, that Allen's death sentence does not amount to cruel and unusual punishment and that prospective repeal of the death penalty does not violate equal protection. This case has been briefed but no decision has been issued by the Supreme Court of New Mexico. *See Allen v. State*, No. 34, 386.

In Connecticut, the legislature prospectively repealed the death penalty in 2012, with eleven defendants on death row. 2012 Ct. SB 280. One of these defendants, Eduardo Santiago, was convicted and sentenced to death in 2012. *State v. Santiago*, 49 A.3d 566 (Conn. 2012). Santiago has challenged his death sentence, alleging that the repeal precludes a death penalty in his case. The Attorney General's office has filed a brief in opposition, arguing, *inter alia*, that the State's Savings Statute requires the Court to defer to the legislative intent that the death penalty be retained for crimes committed before the effective date of the repeal, and that the Eighth Amendment and equal protection principles do not preclude a death sentence in Santiago's case. The Supreme Court of Connecticut has not handed down a decision in this matter. *State v. Santiago*, S.C. 17413.

Illinois also repealed its death penalty in 2011, with fifteen defendants still on death row. *See* 725 Ill. Comp. Stat. Ann. 5/119-1 (2011). On March 9, 2011, the same day as signing the repeal legislation, Illinois Governor Pat Quinn commuted the death sentences of each of these defendants. *See* Steve Mills, *What Killed Illinois' Death Penalty*, Chicago Tribune, March 10, 2011, <http://articles.chicagotribune.com/2011-03-10/news/ct-met-illinois-death-penalty-history201103091death-penalty-death-row-death-sentences>.

case. A due process claim arises here where an intervening statute has made the prospects of the State being able to carry out Miles's death sentence uncertain at best. Accordingly, the parties hereby stipulate that this Court should order that Miles's death sentence be vacated on the due process grounds described in this section.⁷

III.

THIS COURT SHOULD REMAND TO THE LOWER COURT WITH INSTRUCTIONS TO MODIFY MILES'S DEATH SENTENCE TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.

If this Court accepts the State's concession and vacates Miles's death sentence on due process grounds, the final question to be resolved is the manner in which this Court should dispose of this appeal. As discussed herein, this Court should remand this case with instructions that the lower court impose LWOP without a hearing.

Maryland Rule 8-604 lists the methods by which this Court may "dispose of an appeal." Md. Rule 8-604(a) (2014). One of those options is to "remand the action to a lower court in accordance with section (d)." Md. Rule 8-604(a)(5). Section (d)(1) in turn provides:

⁷ Contemporaneously with the filing of this Brief of Appellee, the parties in this action have filed a stipulation agreeing that Miles's death sentence should be vacated on due process grounds.

(1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

Md. Rule 8-604(d)(1). *See Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314, 334-35 (2007) (holding that a limited remand generally is appropriate “if the error occurred in a proceeding collateral to the trial itself, and the limited purpose of the remand is to correct the error that occurred during the collateral proceeding.”).

Ordinarily, in cases where the Court of Appeals has vacated a death sentence, the Court has remanded for a new sentencing hearing. *See Abeokuto v. State*, 391 Md. 289, 350-51, 360 (2006) (vacating death sentence after finding that appellant’s waiver of a jury for re-sentencing was involuntary, and remanding for resentencing); *Lovell v. State*, 347 Md. 623, 648, 666-67 (1997) (vacating death sentence and remanding for resentencing because sentencing court required appellant to appear at sentencing in shackles without proper individualized evaluation); *Scott v. State*, 310 Md. 277, 286, 301 (1987) (vacating death sentence and remanding on grounds that the trial court did not

adequately instruct the sentencing jury on the State's burden of proof at sentencing); *Harris v. State*, 306 Md. 344, 359, 367-68 (1986) (vacating death sentence and ordering new sentencing hearing on grounds that appellant was not allowed to personally allocute at sentencing).

But Miles's case is different. As more fully discussed *supra*, there is no error or illegality in Miles's convictions or his sentence. The basis for vacating Miles's death sentence is something that is entirely separate from his convictions and sentence, *i.e.*, the repeal legislation working in tandem with the lack of lethal injection protocols in Maryland, making the enforcement of Miles's death sentence currently impossible. The Court of Appeals has discussed the circumstances under which a limited remand is an appropriate remedy, noting that "a limited remand is proper particularly when the purposes of justice will be advanced by permitting further proceedings." *Wilkerson v. State*, 420 Md. 573, 600 (2011).

While the interests of justice support a limited remand, those same interests would not be served by further resentencing proceedings. This is because no additional findings in the lower court would be necessary on remand. Consequently, under the unique circumstances of this case, after this

Court vacates Miles's death sentence, this Court should remand with instructions that the lower court automatically impose LWOP.⁸

The penalty of life imprisonment without the possibility of parole for first degree murder became a sentencing option in Maryland pursuant to Ch. 237 of the Acts of 1987. *See* Laws of Maryland 1987, Ch. 237. The Court of Appeals has observed:

The Report of Senate Judicial Proceedings Committee on the bill which became Ch. 237, signed by the Committee's Chairman, stated (emphasis added):

“Life imprisonment without the possibility of parole is needed as a sentencing option in first degree murder cases because there are people committing heinous crimes; for example, serial killers, who are not eligible for the death penalty. In addition, a death penalty proceeding is a long, expensive process and a tremendous drain on resources. Life without parole would be less costly and would have the effect of preventing the defendant from killing again. The intent of this bill is to add imprisonment for life without the

⁸ Alternatively, this Court could amend Miles's commitment order to modify his death sentence to LWOP without remanding. Insofar as LWOP would be the only available sentence after Miles's death sentence is vacated, and because no additional findings would be necessary in the lower court, the unique circumstances of this case would support this type of modification. *See generally Lawson v. State*, 187 Md. App. 101, 109-10 (2009) (differentiating between correcting commitment record under Maryland Rule 4-351, and modifying a sentence under Maryland Rule 4-345, and noting that the former does not require a hearing); *accord Scott v. State*, 379 Md. 170, 190-91 (2004) (same).

possibility of parole to the sentencing options available upon a finding of guilty of murder in the first degree”

Johnson v. State, 362 Md. 525, 534 (2001) (emphasis in original). Under Maryland Code (1957, 1996 Repl. Vol.) Art. 27, § 412(b), now codified at Md. Code Ann., Crim. Law Art. (“CL”), § 2-203 (2012 Repl. Vol.), the State is required to formally notify a defendant that it intends to seek a sentence of life without possibility of parole, which “means imprisonment for the natural life of an inmate under the custody of a correctional institution” Art. 27, § 412(f)(2); CL 2-101 (b) (2012 Repl. Vol.).⁹ A person who receives such a sentence “is not eligible for parole consideration and may not be granted parole at any time during the term of the sentence.” Maryland Code (1957, 1993 Repl. Vol., 1996 Cum. Supp.) Art. 41, § 4-516(d)(3)(i); Md. Code Ann., Correctional Serv. Art., § 7-301(d)(3)(i) (2008 Repl. Vol.).

As discussed in Argument I (c) of this brief, *supra*, the jury in Miles’s case decided whether the State proved the existence of aggravators in Miles’s crime beyond a reasonable doubt, whether mitigating factors existed, whether the aggravators outweighed the mitigating factors, and whether the ultimate punishment, death, should be imposed. (*See* verdict sheet, Apx. 1-11). In

⁹ In this case, the State filed a notice of intent to seek a sentence of death, as well as a notice intent to seek a sentence of imprisonment for life without the possibility of parole on July 29, 1997. (R. Docket entries at 1).

determining that Miles's crimes warranted the ultimate punishment permitted by law, the jury found that the crimes were singular in their depravity, seriousness, and harm to society. Though circumstances entirely separate from Miles's crimes and sentence have arisen that warrant vacation of his death penalty, the intent of the jury's findings should be held intact. Accordingly, LWOP should be automatically imposed.

Obviously, LWOP is a less severe penalty than death. If Miles's death sentence is vacated, LWOP should be automatically substituted without the need for a resentencing hearing. The jury already heard and decided the appropriate sentence for Miles in 1998. Life imprisonment, instead of life imprisonment without the possibility of parole, was only available to Miles if: (a) the State did not prove beyond a reasonable doubt that Miles was a principal in the first degree murder; (b) that Miles did not commit murder in the course of a robbery; (c) that aggravators did not outweigh the mitigating circumstances. (*See* Apx. 10). The jury in Miles's case, however, found that all of those conditions were proven and entered a sentence of death. Those jury determinations foreclose the possibility of Miles receiving life imprisonment. Because removal of the jury's death decision as a result of this appeal and by operation of a political development that is entirely separate from Miles's sentence, the default sentence for Miles should be LWOP. Part of the jury's deliberative process required it to move from life imprisonment,

to LWOP, to death. Their entry of death was their simultaneous rejection of life imprisonment. Accordingly, Miles should be automatically sentenced to LWOP.

This outcome is supported by the repeal legislation. This legislation is introduced as “AN ACT concerning Death Penalty Repeal — **Substitution of Life without the Possibility of Parole.**” 2013 Md. Laws Ch. 156 (emphasis added). Moreover, in passing the repeal legislation, the legislature modified Section 7-601 of the Maryland Correctional Service Article, so it now provides that the Governor may “change a sentence of death into a sentence of life without the possibility of parole[.]” Md. Code Ann., Correct. Serv. Art., § 7-601(a)(1) (2013 Supp.). This modification supports an argument that there is one and only one option at this point for modifying Miles’s sentence: that Miles’s death sentence be converted to LWOP. There is no legal authority for this Court to do something other than the sole option set forth by the legislature when it repealed the death penalty.

The repeal legislation demonstrates that the legislature was not willing to eliminate the death penalty for felony murder unless the perpetrator could be sentenced to life without the possibility of parole. The legislature decided that society’s interest in retribution and punishment for Miles’s heinous crime is fulfilled by a sentence of life without the possibility of parole, when a jury

previously determined that Miles should receive the maximum possible penalty of death.

Miles cannot legitimately disavow this clear legislative intent. This is particularly so in light of his claim that the repeal legislation is retroactive, and thus applicable to him. If he is correct, then the repeal legislation's stated intent that life without the possibility of parole is substituted for the death penalty likewise applies to him.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court vacate Miles's death sentence, and remand this matter to the lower court with instructions to impose life without the possibility of parole.

Respectfully submitted,

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PERTINENT PROVISIONS

United States Constitution, Amendment VI - Right to speedy trial, witnesses, etc.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment VIII - Bails, fines, punishments.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV.

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

[Appointment of Representatives in Congress]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the

male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

[Persons Disqualified from Holding Office]

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

[What Public Debts Are Valid]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

[Power to Enforce This Article]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Maryland Declaration of Rights, Article 16. Sanguinary laws to be avoided; cruel and unusual punishment.

That sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter.

(1981 Repl. Vol.)

Maryland Declaration of Rights, Article 25. Excessive bail, fines and punishment.

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law.

Article 1, § 3. Effect of repeal or revision of statute on penalty or liability previously incurred.

The repeal, or the repeal and reenactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal, shall not have the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, section or part thereof, unless the repealing, repealing and reenacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and reenacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability.

(2011 Repl. Vol)

United States Code, Title 1, § 109. Repeal of statutes as affecting existing liabilities.

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Article 41, § 4-516. Investigation to determine advisability of parole; prisoners serving multiple sentences; prisoners convicted of violent crimes; prisoners serving life imprisonment.

Repealed by Acts 1999, ch. 54, § 1, effective October 1, 1999.

(1999 Supp.)

Former Article 27, § 412. Punishment for murder.

(a) *Designation of degree by court or jury.* — If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) *Penalty for first degree murder.* — Except as provided under subsection (g) of this section, a person found guilty of murder in the first degree shall be sentenced to death, imprisonment for life, or imprisonment for life without the possibility of parole. The sentence shall be imprisonment for life unless: (1)(i) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (ii) a sentence of death is imposed in accordance with § 413; or (2) the State notified the person in writing at least 30 days prior to trial that it intended to seek a

sentence of imprisonment for life without the possibility of parole under § 412 or § 413 of this article.

(c) *Notice of intent to seek death penalty.* — (1) If a State’s Attorney files or withdraws a notice of intent to seek a sentence of death, the State’s Attorney shall file a copy of the notice or withdrawal with the clerk of the Court of Appeals.

(2) The validity of a notice of intent to seek a sentence of death that is served on a defendant in a timely manner shall in no way be affected by the State’s Attorney’s failure to file a copy of the death notice in a timely manner with the clerk of the Court of Appeals.

(d) *Penalty for second degree murder.* — A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

(e) *Court to determine possibility of parole.* — Except as provided by § 413 of this article, the court shall decide whether to impose a sentence of life imprisonment or life imprisonment without the possibility of parole.

(f) *Definitions.* — (1) In this section, the following terms have the meanings indicated.

(2) “Imprisonment for life without the possibility of parole” means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.

(3) “Mentally retarded” means the individual has significantly subaverage intellectual functioning as evidenced by an intelligence quotient of 70 or below on an individually administered intelligence quotient test and impairment in adaptive behavior, and the mental retardation is manifested before the individual attains the age of 22.

(g) *Penalty for defendants less than 18 years old or mentally retarded defendants.* — (1) If a person found guilty of murder in the first degree was, at the time the murder was committed, less than 18 years old or if the person establishes by a preponderance of the evidence that the person was, at the time the murder was committed, mentally retarded, the person shall be sentenced to imprisonment for life or imprisonment for life without the possibility of parole and may not be sentenced to death.

(2) The sentence shall be imprisonment for life unless the State notified the person in writing at least 30 days prior to trial that the State intended to seek a sentence of imprisonment for life without the possibility of parole under this section or § 413 of this article.

(2000 Supp.)

Former Article 27, § 413. Sentencing procedure upon finding of guilty of first degree murder.

(a) *Separate sentencing proceeding required.* — If a person is found guilty of murder in the first degree, and if the State had given the notice required under § 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death.

(b) *Before whom proceeding conducted.* — This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) *Evidence; argument; instructions.* — (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to § 412 (b) of this article;

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death, imprisonment for life without the possibility of parole, or imprisonment for life, and the burden of proof applicable to these findings in accordance with subsection (f) or subsection (h) of this section.

(d) *Consideration of aggravating circumstances.* — In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) One or more persons committed the murder of a law enforcement officer while in the performance of his duties;

(2) The defendant committed the murder at a time when he was confined in any correctional institution;

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer;

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct;

(5) The victim was a child abducted in violation of § 2 of this article;

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder;

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration;

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life;

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident; or

(10) The defendant committed the murder while committing or attempting to commit a carjacking, armed carjacking, robbery under § 486 or

§ 487 of this article, arson in the first degree, rape or sexual offense in the first degree.

(e) *Definitions.* — As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1)(i) The terms “defendant” and “person”, except as those terms appear in subsection (d)(1) and (7) of this section, include only a principal in the first degree.

(ii) In subsection (d)(1) of this section, the term “person” means:

1. A principal in the first degree; or

2. A principal in the second degree who:

A. Willfully, deliberately, and with premeditation intended the death of the law enforcement officer;

B. Was a major participant in the murder; and

C. Was actually present at the time and place of the murder.

(2) The term “correctional institution” includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3)(i) The term “law enforcement officer” has the meaning given in s 727 of this article.

(ii) The term “law enforcement officer”, as used in subsection (d) of this section, includes:

1. An officer serving in a probationary status;

2. A parole and probation officer;

3. A law enforcement officer of a jurisdiction outside of Maryland;

and

4. If the law enforcement officer is wearing the uniform worn by the law enforcement officer while acting in an official capacity or is prominently displaying his official badge or other insignia of office, a law enforcement officer privately employed as a security officer or special policeman under the provisions of Article 41, §§ 4-901 through 4-913 of the Code.

(4) “Imprisonment for life without the possibility of parole” means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.

(f) *Finding that no aggravating circumstances exist.* — If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and a sentence of death may not be imposed.

(g) *Consideration of mitigating circumstances.* — If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, “crime of violence” means abduction, arson in the first degree, escape in the first degree, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery under § 486 or § 487 of this article, carjacking or armed carjacking, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant’s conduct or consented to the act which caused the victim’s death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim’s death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) *Weighing aggravating and mitigating circumstances.* — (1) If the court or jury finds that one or more of these mitigating circumstances exist,

it shall determine whether, by a preponderance of the evidence, the aggravating circumstances outweigh the mitigating circumstances.

(2) If it finds that the aggravating circumstances outweigh the mitigating circumstances, the sentence shall be death.

(3) If it finds that the aggravating circumstances do not outweigh the mitigating circumstances, a sentence of death may not be imposed.

(i) *Determination to be written and unanimous.* — The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) *Statements required in determination.* — The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any aggravating circumstances found under subsection (d) of this section outweigh the mitigating circumstances found under subsection (g) of this section;

(4) Whether the aggravating circumstances found under subsection (d) do not outweigh mitigating circumstances under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) *Imposition of sentence.* — (1) If the jury determines that a sentence of death shall be imposed under the provisions of this section, then the court shall impose a sentence of death.

(2) If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the court may not impose a sentence of death.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall determine whether a sentence of death shall be imposed under the provisions of this section.

(4) If the court or jury determines that a sentence of death may not be imposed, and the State did not give the notice required under § 412 (b) of this article of intention to seek a sentence of life imprisonment without the possibility of parole, the court shall impose a sentence of life imprisonment.

(5) If the State gives the notice required under § 412 (b) of this article of intention to seek a sentence of imprisonment for life without the possibility of parole but does not give notice of intention to seek the death penalty, the court shall conduct a separate sentencing proceeding as soon as practicable after the trial has been completed to determine whether to impose

a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(6) If the State gives the notice required under § 412 (b) of this article of intention to seek the death penalty in addition to the notice of intention to seek a sentence of imprisonment for life without the possibility of parole, and the court or jury determines that a sentence of death may not be imposed under the provisions of this section, that court or jury shall determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(7)(i) In determining whether to impose a sentence of imprisonment for life without the possibility of parole, a jury shall agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole.

(ii) If the jury agrees unanimously to impose a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life without the possibility of parole.

(iii) If the jury, within a reasonable time, is not able to agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(8) If the State gives the notice required under § 412 of this article of the State's intention to seek a sentence of imprisonment for life without the possibility of parole, the court shall conduct a separate sentencing proceeding as soon as practicable after the trial has been completed to determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(1) *Rules of procedure.* — The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

(m) *Alternate jurors.* — (1) A judge shall appoint at least 2 alternate jurors when impaneling a jury for any proceeding:

(i) In which the defendant is being tried for a crime for which the death penalty may be imposed; or

(ii) Which is held under the provisions of this section.

(2) The alternate jurors shall be retained during the length of the proceedings under such restrictions and regulations as the judge may impose.

(3)(i) If any juror dies, becomes incapacitated, or disqualified, or is discharged for any other reason before the jury begins its deliberations on sentencing, an alternate juror becomes a juror in the order in which selected, and serves in all respects as those selected on the regular trial panel.

(ii) An alternate juror may not replace a juror who is discharged during the actual deliberations of the jury on the guilt or innocence of the defendant, or on the issue of sentencing.

(2000 Supp.)

Former Article 27, § 414. Automatic review of death sentences.

(a) *Review by Court of Appeals required.* — Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) *Transmission of papers to Court of Appeals.* — The clerk of the trial court shall transmit to the Clerk of the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or not imposition of the sentence of death is justified in the case.

(c) *Briefs and oral argument.* — Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) *Consolidation of appeals.* — Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) *Considerations by Court of Appeals.* — In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413(d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances outweigh the mitigating circumstances; and

(f) *Decision of Court of Appeals.* — In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(1) Affirm the sentence;

(2) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under § 413; or

(3) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(g) *Rules of procedure.* — The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section.

(1996 Repl. Vol.)

Correctional Services Article, § 3-901 Custody.

(a) *Duties of judge.* — Whenever an individual is sentenced to death, the judge of the court where the conviction takes place shall cause the individual to be taken into custody by the sheriff of the county in which the individual was indicted.

(b) *Duties of sheriff.* — (1) While the inmate is in the custody of the sheriff, the sheriff shall:

(i) hold the inmate under guard as the sheriff determines to be necessary; and

(ii) keep the inmate in solitary confinement in the same manner as is required when the inmate is in the custody of the Division.

(2) As soon as possible, the sheriff shall deliver the inmate to the Division to await the execution of the inmate's sentence.

(c) *Expenses.* — The expenses of the Division relating to the detention of an inmate under sentence of death, including the expenses of guarding, lodging, feeding, clothing, and caring for the inmate, may not be assessed against, billed to, or paid by the county in which the inmate was indicted.

(2001 Vol.)

Correctional Services Article, § 3-902. Warrant of execution.

(a) *Defined terms.* — (1) In this section the following words have the meanings indicated.

(2)(i) “State postconviction review process” means the initial adjudication of a postconviction petition filed under Article 27, § 645A(a)(2)(i) of the Code, including any appellate review of the postconviction proceeding.

(ii) “State postconviction review process” does not include:

1. a postconviction proceeding that has been reopened under Article 27, § 645A(a)(2)(iii) of the Code or any appellate review of the proceeding; or

2. a postconviction proceeding on a second petition filed before October 1, 1995, or any appellate review of the proceeding.

(3) “Warrant of execution” means a warrant for the execution of a sentence of death on the individual against whom the sentence was imposed.

(b) *Contents of warrant of execution.* — (1) A warrant of execution shall:

(i) state the conviction and sentence;

(ii) designate a 5-day period, beginning on a Monday, within which the sentence must be executed; and

(iii) command the Commissioner to carry out the death penalty on a day within the designated period.

(2) The period designated in a warrant of execution shall begin not less than 4 weeks and not more than 8 weeks after the warrant of execution is issued.

(c) *Initial warrant of execution.* — At the time an individual is sentenced to death, the judge presiding in the court shall issue a warrant of execution directed to the Commissioner.

(d) *Stay during review process.* — (1) A warrant of execution is stayed during the direct review process and the State postconviction review process.

(2) If the original warrant of execution has not expired at the end of the State postconviction review process, the judge who imposed the sentence of death or the judge then presiding in the court in which the sentence was imposed shall lift the stay imposed under paragraph (1) of this subsection.

(3) If the original warrant of execution has expired at the end of the State postconviction review process, the judge who imposed the sentence of

death or the judge then presiding in the court in which the sentence was imposed shall issue another warrant of execution.

(e) *Pregnant inmate.* — (1) If the Governor is satisfied that a medical examination shows that an inmate is pregnant, the Governor shall revoke a warrant of execution for the inmate.

(2) As soon as the Governor is satisfied that the inmate is no longer pregnant, the Governor promptly shall issue another warrant of execution.

(f) *Governor's stay.* — (1) The Governor may grant a stay of a warrant of execution for any cause.

(2) If the Governor grants a stay under this subsection:

(i) the Governor shall issue an order revoking the warrant of execution; and

(ii) the sentence of death may not be executed until the Governor issues another warrant of execution.

(3) The Governor promptly shall notify the Commissioner of an order that revokes a warrant of execution.

(g) *Time of execution.* — (1) The Commissioner shall set a time, within the period designated in the warrant of execution, when the sentence of death shall be executed.

(2) No previous announcement of the day or time of the execution may be made except to those who are invited or allowed to be present as provided in this subtitle.

(2001 Supp.)

Correctional Services Article, § 3-903. Custody after sentence.

(a) *“Official” defined.* — In this section, “official” means:

(1) the Commissioner; or

(2) the sheriff of the county in which an inmate was indicted.

(b) *Notice of reprieve or stay.* — (1) If the Governor grants a reprieve to an inmate under sentence of death or a court imposes a stay on the execution of a sentence of death, the Governor or court shall serve notice of the reprieve or stay on:

(i) the inmate; and

(ii) the official who has custody of the inmate.

(2) The official who has custody of the inmate shall obey the reprieve or stay.

(c) *Retention in custody.* — An inmate who is granted a reprieve or stay shall remain in the custody of the official who receives notice under subsection (b)(1)(ii) of this section.

(d) *Subsequent proceedings.* — (1) In any subsequent judicial proceeding, the court shall serve any court order regarding an inmate on:

- (i) the inmate; and
- (ii) the official who has custody of the inmate.

(2) If a court resents an inmate to death, the provisions of this subtitle shall apply to the new sentence in the same manner as the original sentence.

(3)(i) If a new trial is granted to an inmate who is in the custody of the Commissioner, the inmate shall be transported back to the place of trial under guard as the Commissioner directs.

(ii) The expenses relating to the transportation of an inmate back to the place of trial under subparagraph (i) of this paragraph shall be paid by the Division.

Correctional Services Article, § 3-904 Incompetent inmate.

(a) *Definitions.* — (1) In this section the following words have the meanings indicated.

(2) ‘Incompetent’ means the state of mind of an inmate who, as a result of a mental disorder or mental retardation, lacks awareness:

- (i) of the fact of the inmate’s impending execution; and
- (ii) that the inmate is to be executed for the crime of murder.

(3) ‘Inmate’ means an individual who has been convicted of murder and sentenced to death.

(b) *Treatment and medication.* — An inmate is not incompetent under this section merely because the inmate’s competence depends on continuing treatment, including the use of medication.

(c) *Prohibition against execution.* — The State may not execute a sentence of death against an inmate who has become incompetent.

(d) *Petition alleging incompetence.* — (1) A petition that alleges that an inmate is incompetent and that seeks to revoke a warrant of execution against the inmate may be filed by:

- (i) the inmate;
- (ii) if the inmate is represented by counsel, counsel for the inmate;

or

(iii) if the inmate is not represented by counsel, any other person on the inmate's behalf.

(2) The petition shall be filed in the circuit court of the county in which the inmate is confined.

(3) On the filing of the petition, the court may stay any warrant of execution that was previously issued and has not yet expired.

(4) The petition must be accompanied by an affidavit of at least one psychiatrist that:

(i) is based, at least in part, on personal examination;

(ii) states that in the psychiatrist's medical opinion the inmate is incompetent; and

(iii) states the pertinent facts on which the opinion is based.

(5) A copy of the petition shall be served on the Attorney General and the Office of the State's Attorney that prosecuted the inmate, in accordance with the service requirements of the Maryland Rules.

(6) Unless the inmate is already represented by counsel, the court promptly shall appoint the public defender or, if the public defender for good cause declines representation, other counsel to represent the inmate in the proceeding.

(7) Unless the State's Attorney stipulates to the inmate's incompetence, the State's Attorney shall cause the inmate to be examined and evaluated by one or more psychiatrists selected by the State's Attorney.

(8) If the inmate's request is reasonable and timely made, an inmate is entitled to be independently examined by a psychiatrist that the inmate selects.

(9) Unless, with the court's approval, the parties waive a hearing, the administrative judge of the court shall designate a time for an evidentiary hearing to determine the inmate's competence.

(e) *Hearing.* — (1) A hearing under this section shall be held without a jury:

(i) in court;

(ii) at the place where the inmate is confined; or

(iii) at another convenient place.

(2) At the hearing, the inmate:

(i) subject to reasonable restrictions related to the inmate's condition, may be present;

(ii) through counsel, may offer evidence, cross-examine witnesses against the inmate, and make argument; and

(iii) has the burden of establishing incompetence by a preponderance of the evidence.

(f) *Order.* — The court shall enter an order that:

(1) declares the inmate to be competent or incompetent; and

(2) states the findings on which the declaration is based.

(g) *Finding of competence.* — If the court finds the inmate to be competent, the court immediately:

(1) shall lift any stay of a warrant of execution that was previously issued and has not yet expired; or

(2) if all previously issued warrants of execution have expired, shall notify the court that imposed the sentence of death and request that the court issue a new warrant of execution.

(h) *Finding of incompetence.* — (1) If the court finds the inmate to be incompetent, the court shall:

(i) stay any warrant of execution that was previously issued and has not yet expired; and

(ii) remand the case to the court in which the sentence of death was imposed.

(2) The court in which the sentence of death was imposed shall strike the sentence of death and enter in its place a sentence of life imprisonment without the possibility of parole.

(3) The sentence of life imprisonment without the possibility of parole imposed under paragraph (2) of this subsection is mandatory and may not be suspended wholly or partly.

(i) *Appeal.* — (1) There is no right of appeal from an order issued by a circuit court under this section.

(2) Notwithstanding paragraph (1) of this subsection, either party may seek review in the Court of Appeals by filing an application for leave to appeal in accordance with the Maryland Rules.

(3) If an application for leave to appeal is filed, the Court of Appeals may stay any warrant of execution that was previously issued and has not yet expired.

(j) *Subsequent petition.* — (1) Not earlier than 6 months after a finding of competence, the inmate may petition the court for a redetermination of competence.

(2) The petition must be accompanied by an affidavit of at least one psychiatrist that:

(i) is based, at least in part, on personal examination;

(ii) states that in the psychiatrist's medical opinion the inmate is incompetent;

(iii) states that the incompetence arose since the previous finding of competence; and

(iv) states the pertinent facts on which each opinion is based, including the facts that show the change in the inmate's condition since the previous finding.

(3) Proceedings on a petition under this subsection shall be in accordance with subsections (d) through (i) of this section.

(k) *Forms and procedures.* — The Maryland Rules shall govern:

(1) the form of petitions and all other pleadings; and

(2) except as otherwise provided in this section, the procedures to be followed by the circuit court in determining competency or incompetency and by the Court of Appeals in reviewing applications for leave to appeal.

(l) *Effect on authority of Governor.* — This section does not affect the power of the Governor to stay execution of a sentence of death under § 3-902(f) of this subtitle or to commute a sentence of death under § 7-601 of this article.

(2004 Supp.)

Correctional Services Article, § 3-905 Method of execution.

(a) *In general.* — The manner of inflicting the punishment of death shall be the continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent until a licensed physician pronounces death according to accepted standards of medical practice.

(b) *Effect on health occupations.* — (1) The administration of the lethal substances required by this section is not the practice of medicine.

(2) Notwithstanding any other law, a pharmacist or pharmaceutical supplier may dispense drugs, without a prescription, to the Commissioner or the Commissioner's designee to carry out this section.

Correctional Services Article, § 3-906. Administration of lethal injection.

(a) *Duties of Commissioner.* — The Commissioner shall:

(1) provide a suitable and efficient place, enclosed from public view, in which an execution may be carried out;

(2) provide all of the materials that are necessary to perform the execution; and

(3) subject to subsection (c) of this section, select the individuals to perform the execution.

(b) *Supervision.* — The Commissioner or the Commissioner's designee shall supervise the execution.

(c) *Lethal injection.* — (1) An execution shall be performed by individuals who are selected by the Commissioner and trained to administer the lethal injection.

(2) An individual who administers the paralytic agent and lethal injection need not be licensed or certified as any type of health care practitioner under the Health Occupations Article.

Correctional Services Article, § 3-907. Witnesses.

(a) *Required witnesses.* — In addition to those individuals who are otherwise required to supervise, perform, or participate in an execution, the Commissioner shall select at least 6 but not more than 12 respectable citizens to observe the execution.

(b) *Optional witnesses.* — Counsel for the inmate and a member of the clergy may be present at the execution.

Correctional Services Article, § 3-908. Certificate.

The Commissioner shall:

(1) prepare and sign a certificate that states:

(i) the time and place of execution; and

(ii) that the execution was conducted in accordance with the sentence of the court and the provisions of this subtitle;

(2) request that each witness of the execution sign the certificate; and

(3) file the certificate within 10 days after the execution with the clerk of the court in the county in which the inmate was indicted.

Correctional Services Article, § 3-909. Disposition of body

(a) On application of a relative, the body of an executed inmate shall be returned to the relative at the relative's cost.

(b) If an application is not made under subsection (a) of this section, the Commissioner shall arrange for burial.

(2001 Vol.)

Correctional Services Article, § 7-301. Eligibility for parole.

(a) *In general.* – (1) Except as otherwise provided in this section, the Commission shall request that the Division of Parole and Probation make an investigation for inmates in a local correctional facility and the Division of Correction make an investigation for inmates in a State correctional facility that will enable the Commission to determine the advisability of granting parole to an inmate who:

(i) has been sentenced under the laws of the State to serve a term of 6 months or more in a correctional facility; and

(ii) has served in confinement one-fourth of the inmates aggregate sentence.

(2) Except as provided in paragraph (3) of this subsection, or as otherwise provided by law or in a predetermined parole release agreement, an inmate is not eligible for parole until the inmate has served in confinement one-fourth of the inmates aggregate sentence.

(3) An inmate may be released on parole at any time in order to undergo drug or alcohol treatment, mental health treatment, or to participate in a residential program of treatment in the best interest of an inmates expected or newborn child if the inmate:

(i) is not serving a sentence for a crime of violence, as defined in § 14-101 of the Criminal Law Article;

(ii) is not serving a sentence for a violation of Title 3, Subtitle 6, § 5-608(d), § 5-609(d), § 5-612, § 5-613, § 5-614, § 5-621, § 5-622, or § 5-628 of the Criminal Law Article; and

(iii) has been determined to be amenable to treatment.

(b) *Multiple terms.* – Except as provided in subsection (c) of this section, if an inmate has been sentenced to a term of imprisonment during which the inmate is eligible for parole and a term of imprisonment during which the inmate is not eligible for parole, the inmate is not eligible for parole

consideration under subsection (a) of this section until the inmate has served the greater of:

- (1) one-fourth of the inmates aggregate sentence; or
- (2) a period equal to the term during which the inmate is not eligible for parole.

(c) *Violent crimes.* – (1)(i) Except as provided in subparagraph (ii) of this paragraph, an inmate who has been sentenced to the Division of Correction after being convicted of a violent crime committed on or after October 1, 1994, is not eligible for parole until the inmate has served the greater of:

1. one-half of the inmates aggregate sentence for violent crimes; or
2. one-fourth of the inmates total aggregate sentence.

(ii) An inmate who has been sentenced to the Division of Correction after being convicted of a violent crime committed on or after October 1, 1994, and who has been sentenced to more than one term of imprisonment, including a term during which the inmate is eligible for parole and a term during which the inmate is not eligible for parole, is not eligible for parole until the inmate has served the greater of:

1. one-half of the inmates aggregate sentence for violent crimes;
 2. one-fourth of the inmates total aggregate sentence; or
 3. a period equal to the term during which the inmate is not eligible for parole.
- (2) An inmate who is serving a term of imprisonment for a violent crime committed on or after October 1, 1994, shall receive an administrative review of the inmates progress in the correctional facility after the inmate has served the greater of:

- (i) one-fourth of the inmates aggregate sentence; or
- (ii) if the inmate is serving a term of imprisonment that includes a mandatory term during which the inmate is not eligible for parole, a period equal to the term during which the inmate is not eligible for parole.

(d) *Life imprisonment.* – (1) Except as provided in paragraphs (2) and (3) of this subsection, an inmate who has been sentenced to life imprisonment is not eligible for parole consideration until the inmate has served 15 years or the equivalent of 15 years considering the allowances for diminution of the inmates term of confinement under § 6-218 of the Criminal Procedure Article and Title 3, Subtitle 7 of this article.

(2) An inmate who has been sentenced to life imprisonment as a result of a proceeding under § 2-303 or § 2-304 of the Criminal Law Article

is not eligible for parole consideration until the inmate has served 25 years or the equivalent of 25 years considering the allowances for diminution of the inmates term of confinement under § 6-218 of the Criminal Procedure Article and Title 3, Subtitle 7 of this article.

(3)(i) If an inmate has been sentenced to imprisonment for life without the possibility of parole under § 2-203 or § 2-304 of the Criminal Law Article, the inmate is not eligible for parole consideration and may not be granted parole at any time during the inmates sentence.

(ii) This paragraph does not restrict the authority of the Governor to pardon or remit any part of a sentence under § 7-601 of this title.

(4) If eligible for parole under this subsection, an inmate serving a term of life imprisonment may only be paroled with the approval of the Governor.

(2007 Supp.)

Correctional Services Article, § 7-601. Power of Governor.

(a) *In general.* — On giving the notice required by the Constitution, the Governor may:

(1) change a sentence of death into a sentence of life without the possibility of parole;

(2) pardon an individual convicted of a crime subject to any conditions the Governor requires; or

(3) remit any part of a sentence of imprisonment subject to any conditions the Governor requires, without the remission operating as a full pardon.

(b) *Written order.* — (1) A pardon or commutation of sentence shall be evidenced by a written executive order signed by the Governor under the great seal.

(2) An order granting a pardon or conditional pardon shall clearly indicate on its face whether it is a partial or full pardon.

(c) *Presumption of valid conviction.* — There is a presumption that the grantee of a pardon was lawfully and properly convicted of a crime against the State unless the order granting the pardon states that the grantee has been shown conclusively to have been convicted in error.

(2013 Supp.)

Criminal Law Article, § 2-202. Murder in the first degree - Sentence of death.

(a) *Requirement for imposition.* – A defendant found guilty of murder in the first degree may be sentenced to death only if:

(1) at least 30 days before trial, the State gave written notice to the defendant of:

(i) the State’s intention to seek a sentence of death; and
(ii) each aggravating circumstance on which the State intends to rely;

(2)(i) with respect to § 2-303(g) of this title, except for § 2-303(g)(1)(i) and (vii) of this title, the defendant was a principal in the first degree; or

(ii) with respect to § 2-303(g)(1)(i) of this title, a law enforcement officer, as defined in § 2-303(a) of this title, was murdered and the defendant was:

1. a principal in the first degree; or
2. a principal in the second degree who:
A. willfully, deliberately, and with premeditation intended the death of the law enforcement officer;

B. was a major participant in the murder; and

C. was actually present at the time and place of the murder;

(3) the State presents the court or jury with:

(i) biological evidence or DNA evidence that links the defendant to the act of murder;

(ii) a video taped, voluntary interrogation and confession of the defendant to the murder; or

(iii) a video recording that conclusively links the defendant to the murder; and

(4) the sentence of death is imposed in accordance with § 2-303 of this title.

(b) *Limitations.* – (1) In this subsection, a defendant is “mentally retarded” if:

(i) the defendant had significantly below average intellectual functioning, as shown by an intelligence quotient of 70 or below on an individually administered intelligence quotient test and an impairment in adaptive behavior; and

(ii) the mental retardation was manifested before the age of 22 years.

(2) A defendant may not be sentenced to death, but shall be sentenced to imprisonment for life without the possibility of parole subject to the requirements of § 2-203(1) of this subtitle or imprisonment for life, if the defendant:

- (i) was under the age of 18 years at the time of the murder; or
- (ii) proves by a preponderance of the evidence that at the time of the murder the defendant was mentally retarded.

(c) *Limitations.* – State relies solely on eyewitness evidence.- A defendant may not be sentenced to death, but shall be sentenced to imprisonment for life without the possibility of parole subject to the requirements of § 2-203(1) of this subtitle or imprisonment for life, if the State relies solely on evidence provided by eyewitnesses.

(2009 Supp.)

Criminal Law Article, § 2-203. Murder in the first degree--Sentence of imprisonment for life without the possibility of parole.

A defendant found guilty of murder in the first degree may be sentenced to imprisonment for life without the possibility of parole only if:

- (1) at least 30 days before trial, the State gave written notice to the defendant of the State's intention to seek a sentence of imprisonment for life without the possibility of parole; and
- (2) the sentence of imprisonment for life without the possibility of parole is imposed in accordance with § 2-304 of this title.

(2002 Vol.)

Rule 4-345. Sentencing -- Revisory power of court.

(a) *Illegal sentence.* The court may correct an illegal sentence at any time.

(b) *Fraud, mistake, or irregularity.* The court has revisory power over a sentence in case of fraud, mistake, or irregularity.

(c) *Correction of mistake in announcement.* The court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.

(d) *Desertion and non-support cases.* At any time before expiration of the sentence in a case involving desertion and non-support of spouse, children, or destitute parents, the court may modify, reduce, or vacate the sentence or place the defendant on probation under the terms and conditions the court imposes.

(e) *Modification upon motion.*(1) Generally. Upon a motion filed within 90 days after imposition of a sentence (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.

(2) Notice to victims. The State's Attorney shall give notice to each victim and victim's representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, § 11-104 or who has submitted a written request to the State's Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, § 11-503 that states (A) that a motion to modify or reduce a sentence has been filed; (B) that the motion has been denied without a hearing or the date, time, and location of the hearing; and (C) if a hearing is to be held, that each victim or victim's representative may attend and testify.

(3) Inquiry by court. Before considering a motion under this Rule, the court shall inquire if a victim or victim's representative is present. If one is present, the court shall allow the victim or victim's representative to be heard as allowed by law. If a victim or victim's representative is not present and the case is one in which there was a victim, the court shall inquire of the State's Attorney on the record regarding any justification for the victim or victim's representative not being present, as set forth in Code, Criminal Procedure Article, § 11-403 (e). If no justification is asserted or the court is not satisfied by an asserted justification, the court may postpone the hearing.

(f) *Open court hearing.* The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. The defendant may waive the right to be present at the hearing. No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in subsection (e)(2) of this Rule have been satisfied. If the court grants the

motion, the court ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based.

(2014)

Rule 4-351. Commitment record.

(a) *Content.* When a person is convicted of an offense and sentenced to imprisonment, the clerk shall deliver to the officer into whose custody the defendant has been placed a commitment record containing:

- (1) the name and date of birth of the defendant;
- (2) the docket reference of the action and the name of the sentencing judge;
- (3) the offense and each count for which the defendant was sentenced;
- (4) the sentence for each count, the date the sentence was imposed, the date from which the sentence runs, and any credit allowed to the defendant by law;
- (5) a statement whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of the preceding term or to any other outstanding or unserved sentence; and
- (6) the details or a copy of any order or judgment of restitution.

(b) *Effect of error.* An omission or error in the commitment record or other failure to comply with this Rule does not invalidate imprisonment after conviction.

(2010 Rules)

Rule 8-604. Disposition.

(a) *Generally.* As to each party to an appeal, the Court shall dispose of an appeal in one of the following ways:

- (1) dismiss the appeal pursuant to Rule 8-602;
- (2) affirm the judgment;
- (3) vacate or reverse the judgment;
- (4) modify the judgment;

(5) remand the action to a lower court in accordance with section (d) of this Rule; or

(6) an appropriate combination of the above.

(b) *Affirmance in part and reversal, modification, or remand in part.*

If the Court concludes that error affects a severable part of the action, the Court, as to that severable part, may reverse or modify the judgment or remand the action to a lower court for further proceedings and, as to the other parts, affirm the judgment.

(c) *Correctable error.* (1) Matters of form. A judgment will not be reversed on grounds of form if the Court concludes that there is sufficient substance to enable the Court to proceed. For that purpose, the appellate court shall permit any entry to be made by either party during the pendency of the appeal that might have been made by that party in the lower court after verdict by the jury or decision by the court.

(2) Excessive amount of judgment. A judgment will not be reversed because it is for a larger amount than claimed in the complaint if the plaintiff files in the appellate court a release of the excess.

(3) Modified judgment. For purposes of implementing subsections (1) and (2), the Court may modify the judgment.

(d) *Remand.* (1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

(2) Criminal case. In a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing.

(3) Request for impleader of the subsequent injury fund in an appeal from a workers' compensation commission decision.

(A) Generally. If a party files a request for impleader of the Subsequent Injury Fund before the record on appeal has been filed, the Court shall grant the request. If a party files a request for impleader after the record on appeal is filed, the Court shall determine whether there is good cause to grant the request..

(B) Order granting request for impleader. If the Court grants a request for impleader, the Court shall suspend further proceedings and remand the case to the Workers' Compensation Commission for further proceedings..

(C) Information to be provided to the subsequent injury fund and parties. Within 10 days after the date of an order granting a request for impleader, the impleading party shall provide to the Subsequent Injury Fund and all other parties:

(i) a copy of the original claim, any amendments, each issue previously filed, and any award or order entered by the Commission on the claim;

(ii) identification, by claim number if available, of prior awards or settlements to the claimant for permanent disability made or approved by the Commission, by a comparable commission of another state as defined in Code, Labor and Employment Article, § 1-101;

(iii) all relevant medical evidence relied on to implead the Subsequent Injury Fund; and.

(iv) a certification that a copy of the request for impleader and all required information and documents have been mailed to the Subsequent Injury Fund and all other parties.

(e) *Entry of judgment.* In 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.

(2013 Rules)

JODY LEE MILES, * IN THE
Appellant * COURT OF SPECIAL APPEALS
v. * OF MARYLAND
STATE OF MARYLAND, * September Term, 2013
Appellee * No. 2155
* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of November, 2014, three copies of the Brief and Appendix of Appellee were mailed, first-class, postage pre-paid, to Robert W. Biddle, Nathans & Biddle, L.L.P., 120 E. Baltimore Street, Suite 1800, Baltimore, Maryland 21202, with a copy to Erika A. Short, Chason, Rosner, Learly & Marshall, LLC, 401 Washington Avenue, 5th floor, Towson, Maryland 21204. The herein Brief was also hand-delivered to Brian M. Saccenti, Assistant Public Defender, Office of the Public Defender, Appellate Division, William Donald Schaefer Tower, 6 Saint Paul Centre, Suite 1302, Baltimore, Maryland 21202.

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