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IT'S NOT TOO LATE

EVALUATING SPINAL INJURIES USING THE A.M.A. *GUIDES:* IS THE D.R.E. MODEL CONSISTENT WITH MARYLAND'S WORKERS' COMPENSATION STATUTE?

By Bruce A. Kirkwood*

INTRODUCTION

For those of us who represent claimants in Workers' Compensation claims, permanent partial disability awards are our "bread and butter." Indeed, a permanent partial disability award generally comprises the most significant monetary aspect of a typical Workers' Compensation claim. The importance of the process involved in securing an award of permanent partial disability cannot, therefore, be underestimated. In Maryland, a significant percentage of permanent partial disability awards is made up of claims involving spinal injuries. This is not surprising, since among the general public symptoms relating to the back and spine are the most common of adults' every day complaints. However, when the symptoms follow an injury or illness, sorting out the injury or illness component from any age-related component is often difficult, if not impossible.

Thus, given the prevalence of spinal injuries and ailments resulting from work-place injuries, it is imperative that the medical evaluation process which culminates in a rating of impairment is consistent with, and in the spirit of, the Workers' Compensation statute. For this reason, it is critical for the claimant's practitioner to fully understand the medical evaluation process by which the claimant is rated for permanent impairment.

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Two models are currently utilized by doctors performing evaluations of spinal injuries: the Range of Motion (hereinafter "R.O.M.") system and the Diagnosis Related Estimate (hereinafter "D.R.E.") model. This article will review and analyze, as related to the statutory scheme, these two models of rating permanent impairment, and argue that the D.R.E. model is inconsistent with the spirit and language of Maryland's Workers' Compensation system.

IMPAIRMENT AND DISABILITY

The terms impairment and disability are often used interchangeably. However, it is not always accurate to do so. While the statutory scheme discusses "Permanent Partial Disability,"[1] the regulatory guidelines promulgated by the Workers' Compensation Commission specifically refer to "Impairment."[2] A review of the two terms is therefore appropriate.

Impairment is defined in the A.M.A.'s *Guides to the Evaluation of Permanent Impairment*, Fourth Edition, (hereinafter, *Guides*) as an alteration of an individual's health status. Impairment, according to the *Guides*, is assessed by medical means and is a medical issue. An impairment is a deviation from normal in a body part or organ system and its functioning. The *Guides* defines "permanent impairment" as one that has become static or stabilized during a period of time sufficient to allow optimal tissue repair, and one that is unlikely to change in spite of further medical or surgical therapy.[3]

The *Guides'* definition of an impairment closely parallels that of the World Health Organization (WHO), which has defined an impairment as "any loss or abnormality of

1 Md. Ann. Code, Labor & Empl. Art., Sec. 6-625, et seq.

2 COMAR 14.09.04.02.

3 AMA's *Guides to the Evaluation of Permanent Impairment*, Fourth Edition, 1.

psychological, physiological, or anatomical structure or function."[4]

In the *Guides*, "impairments" are defined as conditions that interfere with an individual's "activities of daily living."[5] Activities of daily living include, but are not limited to, self-care and personal hygiene; eating and preparing food; communication, speaking, and writing; maintaining one's posture, standing, and sitting; caring for the home and personal finances; walking, traveling, and moving about; recreational and social activities; and work activities.[6] An impairment percentage derived using the *Guides* is intended, among other purposes, to represent an informed estimate of the degree to which an individual's capacity to carry out daily activities has been diminished.

"Disability" is defined by the *Guides* as an alteration of an individual's capacity to meet personal, social, or occupational demands, or statutory or regulatory requirements, *because of* an impairment.[7] Disability refers to an activity or task the individual cannot accomplish, as opposed to strictly a medical issue. A disability arises out of the interaction between impairment and external requirements, especially those of a person's occupation. An "impaired" individual is therefore not necessarily "disabled." However, for purposes of permanent partial disability under the statutes and regulations, it is critical that an accurate and current assessment of impairment be performed in order for an accurate and appropriate award of permanent partial disability to be

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4 World Health Organization, *International Classification of Impairments, Disabilities, and Handicaps*, 1980.

5 *Guides* at 315.

6 *Guides* at 1.

7 The WHO, according to the *Guides*, defines a disability as "any restriction or lack [resulting from an impairment] of ability to perform an activity in the manner or within the range considered normal for a human being."

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HISTORICAL BACKGROUND: PERMANENT PARTIAL DISABILITY EVALUATIONS

In 1987, the Maryland Legislature drastically changed the requirements for physicians' evaluation reports in permanent partial disability claims. Prior to July 1, 1987, the effective date of the new legislative guidelines for permanent partial disability awards, there were essentially no specific requirements for the preparation of medical reports, nor were there any strict guidelines for evaluating physicians to use in the evaluation process.

The statutory changes in 1987 provided that, effective of July 1, 1987, and thereafter until the Commission "adopts guides," physicians were instructed to use the most recent edition of the *Guides to the Evaluation of Permanent Impairment*.[8] In addition, the evaluating physician, in his report, was also instructed to address additional information relative to the claimant's condition including pain, weakness, atrophy, loss of endurance, and loss of function.[9]

Effective December 15, 1988, the Workers' Compensation Commission adopted guidelines for evaluations related to permanent impairment.[10] Although the Commission's

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8 Md. Ann. Code of 1957, Article 101, Section 36C(c).

9 Id.

10 COMAR, Chapter 04, provides: "Guide for Evaluation of Permanent Impairment
14.09.04.02. General Guidelines.

A. As evidence of Permanent impairment, a party may submit a written evaluation of permanent impairment prepared by a physician.

B. When preparing as evaluation of permanent impairment, a physician shall:

(1) Generally conform the evaluation with the format set forth in 2.2 ('Reports') of the American Medical Association's "Guides to the Evaluation of Permanent Impairment";

(2) Use the numerical ratings for the impairment set forth in the American Medical Association's "Guides to the Evaluation of Permanent Impairment", provided that a physician is not required to use the inclinometer evaluation technique specified in 3.3, but may use the goniometer technique specified in the "Addendum to Chapter 3";

guidelines are similar to those set forth in the interim requirements of Article 101, Section 36C(c), under the regulation, evaluating physicians are now asked to consider six additional factors in evaluating impairment, including loss of function, endurance, range of motion, pain, weakness, and atrophy.[11] As set forth below, these additional factors are significant in analyzing whether the D.R.E. set forth in the *Guides* is, in application, consistent with Maryland's regulatory and statutory scheme for evaluations and permanent partial disability (P.P.D.) awards.

WHAT IS PERMANENT PARTIAL DISABILITY?

Permanent partial disability is defined as partial in character but permanent in quality.[12] While this definition is not particularly enlightening, courts have generally interpreted the general purpose of this benefit as providing compensation for one's loss of earning capacity resulting

(3) Include the items listed under the heading "Comparison of the results of analysis with the impairment criteria..." in 2.2 ("Reports") of the American Medical Association's "Guides to the Evaluation of Permanent Impairment"; and

(4) Include information on the items required by Article 101, 36C(a), Annotated Code of Maryland, which include:

(a) Loss of function, endurance, and range of motion, and

(b) Pain, weakness, and atrophy.

C. A physician preparing an evaluation of permanent impairment may include numerical ratings not set forth in the American Medical Association's "Guides to the Evaluation of Permanent Impairment" for the items listed in B(4) of this regulation. If the physician does so, the physician shall include in the evaluation the detailed findings that support those numerical ratings.

D. When reviewing an evaluation for permanent impairment, the Commission shall consider all the items listed in B of this regulation.

E. The Commission may not approve payment of a physician's fee for an evaluation that does not comply with this regulation.

F. This regulation shall apply to all evaluations prepared on or after July 1, 1990.

11 Id.

12 Md. Ann. Code, Labor & Empl. Art., Section 9-625.

from an accidental injury sustained in industrial employment.[13] "Disability" has been interpreted as having reference to wage earning disability or loss of wage earning capacity, and payments are made on that basis.[14]

Essentially, permanent partial disability benefits are intended to compensate an injured worker for what is commonly known as "industrial loss of use." In measuring the amount of industrial loss of use, which is essentially loss of earning capacity, the following factors, among others, are to be taken into account: the nature of the worker's physical injury; his age or experience and training; his occupation, and his wages before and after the injury.[15] Thus the examination leading to a permanent partial award is critical since the award is, in theory, intended to compensate that worker for the permanent damage done to his wage earning capacity.[16]

MAXIMUM MEDICAL IMPROVEMENT:

AN IMPLICIT PREREQUISITE TO AN AWARD

"Maximum medical improvement" is the stage where a disease or injury has stabilized, and the employee has benefited maximally from the intervening medical care.[17] Until the claimant reaches maximum medical improvement or until the disability becomes permanent,

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13 *See, e.g., Cox v. American Store Equip. Corp.*, 283 F.Supp. 390 (D.Md. 1968).

14 *See, e.g., Miller v. James McGraw Co.*, 184 Md. 529, 42 A.2d 237 (1945).

15 *Ralph v. Sears Roebuck & Co.*, 102 Md.App. 387, 649 A.2d 1179 (1994); *Hall v. Willard Sand and Gravel Co.*, 60 Md.App. 260, 482 A.2d 159 (1984).

16 It should be noted that the application of the Guides as related to the Workers' Compensation statute is only relevant with regard to permanent partial disability issues, and does not pertain, for purposes of this article, to temporary total disability benefits, which are payable only until the date when the worker reaches his maximum medical improvement, or until disability becomes permanent. *Alexander v. Montgomery County*, 87 Md.App. 275, 589 A.2d 563 (1997); *Bethlehem Steel Co., etc. v. Traynor*, 239 F.Supp. 749 (D.Md. 1965).

17 *Sears Roebuck & Co. v. Ralph*, 340 Md. 304,666 A.2d 1239 (1995).

temporary total disability benefits are payable.[18] All disability, whether total or partial, is either permanent or temporary. The period of temporary total disability is the healing period or the time during which the worker is wholly disabled and unable, by reason of his injury, to work. It is, therefore, a separate and unitary period of compensation, and as such is distinguished from a permanent partial disability.[19] An injury is considered to be a permanent disability if there is no reasonable expectation of improvement.[20]

Thus, until conclusion of the healing period, an evaluation of any permanent damage would be premature. Accordingly, a claimant must reach maximum medical improvement before being entitled to an award of permanent partial disability. It is this very point, the claimant's attaining maximum medical improvement (and the disability being permanent in nature), which necessitates a review of the two models set forth in the Guides for evaluating permanent partial disability.

QUANTIFYING IMPAIRMENT UNDER THE GUIDES

The first edition of the *Guides* was published in 1971. A second edition was published in 1984, a third in 1988, and the fourth edition in 1993. Over the years the *Guides* has become increasingly accepted as a tool to determine medical impairment.

One of the primary purposes of the *Guides* is to lead to consistency amongst different physicians when evaluating impairments.[21] The primary usage of the *Guides* in Workers'

18 See, supra note 16.

19 *See, e.g., Gorman v. Atlantic Gulf & Pac. Co.*, 178 Md. 71, 12 A.2d 525 (1940).

20 Maryland Pattern Jury Instruction 30:8.

21 *Guides*, 94.

Compensation claims has been for musculoskeletal injures. The first edition of the *Guides* established a specific methodology for determining musculoskeletal impairment. That methodology, the core of which has remained constant for more for 25 years, is the Range of Motion model. As the *Guides* became more accepted, the use of the Range of Motion model to determine musculoskeletal impairment similarly became more frequent. In Maryland, when the Workers' Compensation Commission adopted guidelines for evaluating permanent impairment, the claimant's range of motion was specifically listed as one of six factors the evaluating physician should consider when evaluating the claimant's degree of permanent impairment.

While the use of the Guides was not mandated by statute until 1987, nor by regulation until 1988, it is clear that for a number of years, the majority of evaluating physicians in musculoskeletal cases included a range of motion examination. The range of motion methodology has, for many years, provided a reasonably consistent method for determining impairment. More importantly, its use was, and is, consistent with the statutory and regulatory scheme for determining permanent partial disability in Maryland, especially as related to claims involving spinal injuries.

In the Fourth Edition of the *Guides*, a second approach or "model" was introduced. This method, which is said to apply especially to patients' traumatic injuries, is called the "Diagnosis-Related Estimates" or "Injury" model, and relies heavily on simply assigning a patient to one of eight pre-set categories of injury, on the basis of clinical findings. These categories include such as minor injury, radiculopathy, loss of spine structure integrity, or paraplegia.

The *Guides* suggest the evaluating physician assessing spinal impairment should use the

D.R.E. model if the patient's condition is one of those listed in the corresponding table.[22] However, if none of the eight categories of the D.R.E. Model is applicable, then the evaluating physician is instructed to use the Range of Motion Model. It is important to note that if disagreement exists about the category of the Injury Model in which a patient's impairment belongs, then the Range of Motion Model may be applied to resolve the uncertainty.[23]

Several conflicts seem to exist between the D.R.E. model and the Maryland workers' compensation system. For example, the *Guides* mandate that before an impairment evaluation is to be accepted as valid under the *Guides'* criteria, the impairment being evaluated should be a permanent one, that is, one that is stable, unlikely to change within the next year, and not amenable to further medical or surgical therapy.[24] This requirement brings to light a significant flaw in the D.R.E. Model which is discussed below. Also, the evaluating physician, in estimating the extent of the patient's primary impairment or impairing condition (that is, the condition that seems to be of most concern to the patient), must base his or her rating estimate on *current findings and evidence*.[25] This is perhaps another inconsistency between the use of the D.R.E. model and the standards for P.P.D. awards.

The "Range of Motion" (R.O.M.) Model[26]

Determining the range of motion of a patient's spine is a clinically useful procedure,

22 *See Guides*, 108 (Table 70).

23 *Guides*, 101.

24 *Guides*, Glossary at 315.

25 *Guides*, Section 2.2, Rules for Evaluations.

26 The Range of Motion Model, which has also been called the "Functional Model," is discussed at length in the *Guides*, Section 3.3j.

according to the *Guides*, and it is one of two methods recommended in the *Guides* for evaluating spine impairment. This approach uses a diagnosis-based component,[27] a method for determining the range of motion of the impaired spinal region[28] described using a standardized measuring device[29] and procedure, and a component based on any spinal nerve deficit.[30] Heavy emphasis is placed upon the physical exam and the clinical findings resulting therefrom, and it is recommended that impairment be evaluated only after the individual has completed all necessary medical, surgical, and rehabilitative treatment.[31]

Regional spine mobility measurements are generally quantified through the use of inclinometers, while measurements of ranges of motion of the extremities are typically obtained through the use of a hinged goniometer.[32] Use of either an inclinometer or goniometer is mandated by regulation in Maryland.[33] In measuring range of motion, the evaluator should select at least three consecutive measurements and calculate the mean or average of the three.[34] This is a test of consistency, designed to produce reliable results and ratings.

The clinical findings are then judged against the data on standards and normal

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27 *Guides*, 113 (Table 75).

28 Under the R.O.M. Model, the spine is divided into three regions: cervical (upper), thoracic (middle), and lumbar (lower). *Guides*, 112.

29 The *Guides* recommend the use of an inclinometer, a small, angle-measuring instrument that operates on the principle of gravity, measuring angles in a manner similar to the operation of a compass. The measurements allow the physician to determine the patient's range of motion. *Guides*, 114-130.

30 *Guides*, Section 3.lk.

31 *Guides*, 112.

32 Another instrument used to measure angles. See Stedman's Medical Dictionary (23rd Ed.1976), 597.

33 COMAR 14.09.04.02 B(2).

34 *Guides*, 112.

functioning, which are based both on medical studies and consensus judgments. The impairment measurements and estimates involving the three major regions of the spine should be recorded in standardized charts.[35]

The Diagnosis-Related Estimates (D.R.E.) Model[36]

The D.R.E./Injury Model relies in large part on medical data other than the physical exam and the individual's range of motion. Essentially, the physician is guided to a specific category of impairment as the result of reviewing medical history, conducting an exam, and reviewing any clinical "workups." Depending on the information obtained, the evaluating physician places the individual into a category of spine impairment. There much less relevance in the individual's spinal range of motion with the D.R.E model than with the R.O.M. model.

The D.R.E./Injury Model relies especially on indications of neurological deficits and uncommon, adverse structural changes such as fractures, dislocations, and loss of motion segment integrity, but essentially ignores the development of an injury or ailment over time, whether it be an improvement or a deterioration. Under this model, categories of impairment are differentiated according to clinical findings and diagnoses contained primarily in the medical history.

With the D.R.E. Model, surgery to treat an impairment does not modify the original impairment estimate, which remains the same in spite of any changes in signs or symptoms that may follow the surgery and irrespective of whether the patient has favorable or unfavorable response to treatment.[37] The D.R.E. Model attempts to document physiologic and structural

35 *Guides*, 132-134 (Figs. 77-80).

36 The D.R.E./Injury Model is described in Sections 3.3a through 3.3i of the *Guides*, 95 - 106.

37 *Guides*, 100.

impairments relating to conditions other than common developmental findings.

DOES THE D.R.E. MODEL COMPORT WITH MARYLAND'S WORKERS' COMPENSATION STATUTE AND REGULATIONS?

Permanent Partial Disability awards in Maryland, as governed by statute[38] and regulation[39] must be based on a structured medical methodology. Reading the statute, regulations, and pertinent case law, it is clear the following conditions must exist prior to the entry of an award:

-The claimant must be at maximum medical improvement before being evaluated for permanent partial disability;[40]

-The evaluation must be based on the claimant's condition at the time of the examination;[41]

-Any permanent partial disability be causally related only to the compensable injury which is the subject of the claim;[42]

-Aggravation or deterioration of the compensable injury or condition flowing from the injury are to be considered in the granting of any additional award for the same injury;[43]

-Spinal range of motion is a factor which must be considered at the time of examination.[44]

It seems apparent that the Range of Motion model is in compliance with the requirements of Maryland's statutory and regulatory scheme. The question is whether the D.R.E. Model complies.

The D.R.E. Model differs in several important respects from the Range of Motion model.

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38 Md. Ann. Code, Labor & Empl. Art., Sec. 9-625 et seq.; Sec. 9-721.

39 COMAR 14.09.04.02 ("Guide for Evaluation of Permanent Impairment").

40 See, supra notes 19 and 20.

41 *Guides*, Section 2.2, Rules for Evaluations, at 8.

42 Md. Ann Code, Labor & Empl. Art., Sec. 9-656 (requiring apportionment of the disability between the compensable injury and any unrelated condition).

43 Md. Code Ann., Labor & Empl. Art., Sec. 9-736.

44 COMAR 14.09.04.02.

First, even though examinations in both models are conducted only after maximum medical improvement has been attained, the impairment rating using the D.R.E. is not necessarily based on the worker's condition at the time of evaluation. The *Guides* provide that

> "[w]ith the Injury Model, surgery to treat an impairment does not modify the original impairment estimate, which remains the same in spite of any changes in signs or symptoms that may follow the surgery and *irrespective of whether the patient has a favorable or unfavorable response to treatment*."[45]

The fact that a worker's condition has improved or worsened since the time of injury is *not* to be taken into account in the impairment rating using the D.R.E. Using the R.O.M., however, the impairment rating is based on the worker's condition at the time of the examination; improvement *is* included.

Second, the D.R.E. does not take into account so-called developmental findings such as osteoarthritis or herniated disc without radiculopathy, either of which may be aggravated by the injury and in some cases caused by the injury. Impairment caused by those conditions is taken into account in examinations using R.O.M.

Third, the rating structure established for use with the D.R.E. rates a specific injury. It is not structured for, and cannot be utilized in, cases where there are sequential injuries to the same body part. For example, suppose a claimant previously suffered a low back injury in 1985, and received a permanent partial disability award at that time of 4%. The claimant then sustains a second low back injury in, for example, 1995. Unfortunately, if the claimant is rated under the D.R.E., he will be pigeonholed into a category of impairment without regard to the prior injury. *The D.R.E. was not designed for and does not take into account the prior injury*. If the

45 *Guides*, 100 (emphasis added).

evaluating doctor for the 1995 injury performed his examination using the D.R.E., he would conclude that the claimant has a 5% impairment based on the claimant's placement in a category for unverified radiculopathy. He would automatically conclude, under the D.R.E, that the claimant's total impairment was 5% notwithstanding the prior 4% award for the 1985 injury. The conclusion that claimant's impairment has only increased by 1% is probably very unrealistic, and is directly attributable to the use of the D.R.E. The R.O.M., on the other hand, permits the evaluator to consider the prior injury. If the claimant's range of motion is worse, the evaluator can see that. If neurological findings are different, the evaluator can account for that.

Finally, the D.R.E. was designed for use in traumatic injuries. That is the apparent basis for excluding "developmental findings" from consideration in reaching an impairment rating. In cases involving the spine, limited to a single traumatic event to previously uninjured parts, the D.R.E. model may be appropriate. However, many back injuries, even those with a definable traumatic element, have a component which is the result of employment-related wear and tear over time.[46] Because the impairment from such injuries is more developmental in nature, it cannot be properly evaluated by the D.R.E. The R.O.M. model has successfully rated such injuries for a number of years and captured the actual impairment at the time of evaluation.

Three conflicts seem to exist between the D.R.E. and the Maryland scheme. First, Section 9-625 of the Labor and Employment Article authorizes payment of permanent partial disability benefits to a claimant who "*is permanently partially disabled.*" COMAR Section 14.09.04.02 requires that the evaluating physician make use of either an inclinometer or goniometer, as specified in Section 3.3 of the *Guides*, wherein it is clearly stated that "the

46 *Cf. Lilly v. Commissioner*, 225 S.E.2d 214 (1976).

impairment being evaluated should be a permanent one, that is, one that is stable, unlikely to change within the next year, and not amenable to further medical or surgical therapy..."[47] Read together, these various provisions plainly require that the claimant not be evaluated until his condition has reached its maximum degree of medical improvement so that the full impact of the injury is evaluated and benefits awarded based upon the claimant's condition at his maximum degree of improvement.

Clearly, an evaluation of the claimant's condition at a time *before* he has reached his maximum degree of improvement is contrary to the statute. The statute contemplates that the claimant will have access to all the treatment that is reasonably necessary for the injury he suffered and that he be compensated for the effect of the injury on him as an individual. Any evaluation undertaken before claimant's body has had full opportunity to heal to the greatest extent possible would be inappropriate and tend to overestimate claimant's impairment. Similarly, if the claimant's condition worsens during the course of treatment, as many spinal injuries do, it would be inappropriate to rate him before his condition has stabilized as this would underestimate his impairment.

Notwithstanding those basic requirements, the D.R.E. bases the impairment rating of the claimant not upon his condition at the time he is evaluated, but rather upon the condition of the claimant at or near the time of the injury. On the surface, the D.R.E. appears to meet the conditions set forth in the statute. The *Guides* emphatically state that a claimant should not be evaluated until he has reached his maximum degree of improvement and that the evaluating physician should do a full examination. That is precisely what one would expect to occur under

47 *Guides*, 94.

the statutory frame work.

However, in reality the D.R.E. does not rate a person's impairment at the time of the evaluation. Instead, the D.R.E. requires that the claimant be rated not based on his condition at the evaluation, but rather upon the claimant's condition at the time of injury. Regardless of how absurd that may appear, that is precisely what the D.R.E. mandates.[48] As noted above, whether a claimant's condition improves or degenerates has no impact on his impairment rating.

In *The Guides Newsletter*,[49] Dr. Robert Haralson, III, one of the authors of the musculoskeletal portion of the Fourth Edition, states "[i]n the spine, because the results of the injury are rated rather than results of the treatment, a patient with radiculopathy from a compensable ruptured disc can be rated within several days of the injury." Thus, a claimant who initially has verified radiculopathy would receive a 10% impairment rating even if the radiculopathy, as a result of treatment, were *no longer present at the time of the examination* for impairment rating. Under the Maryland scheme, that result would not be appropriate since the claimant would not have been rated based on his condition at the time of the examination.[50]

The D.R.E. also seems to violate the apportionment requirements of the Code.[51] That section provides that when the worker's permanent disability or death is due in part to an accidental injury or occupational disease, and in part to a pre-existing disease or infirmity, the employer is required to pay compensation only for the portion attributable solely to the accidental

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48 *Guides*, 100.

49 American Medical Association, September/October 1996.

50 This example reflects an over-compensation situation. Other examples show under-compensation situation, such as spinal injuries that get progressively worse with treatment and time.

51 Md. Ann. Code, Labor & Empl. Art., Sec. 9-656.

injury or occupational disease. The Commission must apportion the amount of permanent disability by determining how much of the disability is due to the pre-existing condition.[52]

As noted above, the D.R.E. excludes from consideration developmental findings even though such findings may result from employment related wear and tear. The *Guides* justify that process by implying that *all* developmental findings are the result of aging. That is not accurate in many cases. The Legislature has attempted to avoid such sweeping assumptions by providing that a pre-existing impairment or condition be apportioned out if definitely ascertained.[53] The D.R.E. circumvents that process.

The D.R.E. also is contrary to the reopening provisions of the workers' compensation statute.[54] Under the law, a claim may be reopened if the claimant's condition has been aggravated or grown worse subsequent to receiving an award. Under the D.R.E., no additional award appears possible. The impairment rating would remain the same irrespective of whether there is a favorable or unfavorable response to treatment. It would necessarily follow that the impairment rating would not change thereafter in the absence of a new injury. Under the D.R.E. a request to reopen would be futile.

CONCLUSION

The D.R.E. Model, while not totally lacking in value under certain circumstances, appears to contain many inconsistencies with Maryland's statutory and regulatory scheme for granting

52 *See, e.g., Subsequent Injury Fund v. Kraus*, 301 Md. 111, 482 A.2d 468 (1984); *Bosley v. Jackson*, 250 Md. 401, 243 A.2d 513 (1968); *Subsequent Injury Fund v. Rinehart*, 12 Md. App. 649, 280 A.2d 298 (1971); *Blanding v. J.H. Andrews & Sons*, 36 Md. App. 14, 373 A.2d 19 (1977).

53 Md. Ann. Code, Labor & Empl. Art., Sec. 9-656.

54 Md. Code Ann., Labor & Empl. Art., Sec. 9-736.

permanent partial disability awards. By pigeon-holing claimants in a category of impairment, and granting a permanent partial disability award primarily on that basis, the D.R.E. model ignores the prerequisite that the claimant attain maximum medical improvement before being evaluated for such an award. Further, the D.R.E. model fails to take in to account the effect of treatment, particularly as to whether the claimant has improved or deteriorated, and, in theory, does not require a claimant's permanent partial disability rating to be based entirely upon the claimant's condition at the time of the permanent partial disability evaluation.

What does this mean to the practitioner? While it is unclear whether this issue has been raised before the Maryland Commission or courts in the context of a jury trial/appeal, it merits investigation and provides additional fodder to claimant's counsel when challenging an award which is based upon an evaluation performed pursuant to D.R.E. model.[55]

At first glance, one may ponder why claimant's counsel would ever question a permanent partial disability award based on D.R.E. Pursuant to the D.R.E. model, the rating would be based on information obtained prior to the claimant's reaching maximum medical improvement, thus potentially resulting in a higher award. However, because this issue relates only to spinal injuries, and because said injuries often turn out to be developmental in nature, it is just as likely, if not more so, that spinal injury claims will involve an aggravation or progression of the condition over time, thus resulting in a larger award of permanent partial disability when the claimant finally attains maximum medical improvement.

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55 While the author is unaware of any pending litigation in Maryland relative to this issue, he is currently challenging three permanent partial disability awards in the State of West Virginia before the Workers' Compensation Office of Judges (West Virginia's cousin to Maryland's Workers' Compensation Commissioners) based upon evaluations performed pursuant to the D.R.E. model. Additionally, at least one P.P.D. award based upon the D.R.E. model in the State of West Virginia has been reversed on appeal to the Office of Judges because it was performed pursuant to the D.R.E. model, and that model was held to be inconsistent with the West Virginia Workers' Compensation statute. *Cottrell v. Work. Comp. Div., et al.*, Claim 92-66811, Office of Judges.

In any event, if and when one is presented with an opponent's evaluation performed under the D.R.E., claimant's counsel, when scheduling the claimant for an evaluation with a physician of counsel's choice, can ensure that the Range of Motion model is utilized, and that the physician is provided the corresponding guidelines to the use of the Range of Motion model. Counsel can then compare the results of the two evaluations, one done pursuant to the Range of Motion model, and the other according to the D.R.E. model, when determining what evidence to rely upon at the Commission level, or at a jury trial. Finally, the foregoing arguments may be useful in having your opponent's D.R.E. based evaluation excluded from evidence altogether.

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"STILL SMOKIN':" CONSTRUCTIVE POSSESSION AND *TAYLOR v. STATE*, 346 Md. 452 (1997)

by James E. Malone*

Appellant and four friends rented a room at a Day's Inn in Ocean City. Police were summoned concerning a possible controlled dangerous substance violation. Officers smelled marijuana coming from the room. While the officers were standing at the door, two occupants and a female juvenile arrived. Upon opening the door, officers asked an occupant if marijuana was being smoked. Receiving an answer in the negative, the officers asked to search for "dope" and consent was given. Inside the room, the appellant was seen lying on the floor. One officer indicated he could not tell if appellant was asleep or awake. Officers testified there were clouds of smoke in the room which smelled like marijuana. Rather than suffer the indignity of a search, one occupant retrieved a bag of marijuana from his carrying bag and surrendered it to the police, then told the police there was marijuana in another carrying bag within the room. Rolling papers were found in the wallet of another occupant, whose wallet was in a carrying bag. There was no evidence anyone in the room was smoking marijuana. The ashtrays were clean and no marijuana was visible. There was testimony that others, friends of the occupants, had come by the motel room earlier and smoked marijuana in the presence of the occupants.[1]

The trial court found that appellant was in close proximity to the marijuana, that others had smoked marijuana in his presence and therefore appellant knew that marijuana was in the room; that because he was apparently asleep in the room, he had some proprietary interest

1 *Taylor v. State*, 346 Md. 452, 454-456.

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therein, and that circumstances were reasonably sufficient to infer that he was engaging in the mutual use and enjoyment of contraband with his co-defendants.[2] The Court of Special Appeals affirmed in an unreported opinion.[3]

The Court of Appeals reversed, holding the evidence insufficient to convict. In so holding, the Court pointed to the following factors: no marijuana was found on the appellant or in his personal belongings, no occupants of the room were observed smoking marijuana, and the contraband was found in hidden places not shown to be within the dominion and control[4] of the appellant.[5]

Many people believe *Taylor* to be a dramatic change in the law of constructive possession. However, an analysis of the evolution of constructive possession shows *Taylor* fits into the previously delineated picture of constructive possession of controlled dangerous substances.

LAW PRIOR TO *TAYLOR*

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2 *Id.* at 456.

3 *Id.* at 456.

4 "Dominion and control" appears to be a term of art arising from Md. Code Art. 27, Sec. 277(s), which reads as follows: "'Possession' shall mean the exercise of actual or constructive dominion or control over a thing by one or more persons." "Control" is un-helpfully defined in *Graybeal v. State*, 13 Md.App. 557, 563 (1971) as "to exercise restraining or direct influence over." No Maryland case has been found which defines "dominion." Courts tend to use this term with some looseness, sometimes referring to actual physical possession, sometimes referring to nothing more than the *Folk* factors. *See Tucker v. State*, 244 Md. 288 (1966); *Bryant v. State*, 229 Md. 531 (1962); *Hignut v. State*, 17 Md.App. 399 (1973); *Agee v. State*, 8 Md. App 148 (1969); *Speaks v. State*, 3 Md.App. 371 (1968)

5 *Taylor, supra* at 459.

Folk v. State[6] is the most frequently cited case when issues of constructive possession occur. *Folk* observes that the factors implying or negating constructive possession include the defendant's proximity[7] to the contraband, whether the proximal contraband was hidden from the defendant, the possessory interest of the defendant, if any, in the premises, and whether there is any evidence of mutual use and enjoyment between the defendant and others present.[8] Subsequent case law further fleshed out these factors in a variety of factual situations.

Proximity

Simple proximity is easily illustrated. In *Cook v. State*[9] officers legally entered a

6 11 Md.App. 508 (1971).

7Proximity, now substantive law, was once considered a mere evidentiary issue. In *Hayette v. State*, 199 Md. 140 (1952), appellant was alleged to be running an illegal lottery operation. A search warrant was executed at appellant's place of business, a store. Certain lottery paraphernalia was found in the store. In the rear of the store, in the backyard, a box was found which contained some trash and a paper bag in which lottery slips were found along with a sum of money.

The question the court addressed was whether connection between the appellant and the evidence was sufficient to justify admission. The court ruled the connection was sufficient to allow its admission as evidence. "The yard, no less than the store was part of appellant's premises." *Hayette, supra* at 144.

Similarly, in *Dodson v. State*, 213 Md. 13 (1957), the court considered the status of a glass jar and paper bag, both containing marijuana, found under the front porch of appellant's first floor apartment. Found within the apartment were cigarette papers and two smoked marijuana cigarettes. Succinctly summing, the court notes, "Reasonable probability of its connection with the crime alleged, under the circumstances, is the only test of admissibility." *Dodson, supra* at 17.

This evidentiary issue was forever co-opted into substantive law in *McCuen v. State*, 3 Md.App. 73 (1968), a case in which the Court of Special Appeals struggles unnecessarily with rather unremarkable facts. McCuen, an inmate at the Maryland Penitentiary, is discovered with secobarbitol, a prohibited drug, secreted under the edge of his wash basin. The Court of Special Appeals indicates the only issue is *sufficiency* of the evidence to support the conviction, but cites *Hayette* and its analysis of *admissibility* of evidence as authority. *McCuen, supra* at 74-75.

8 The common thread running through all of the cases affirming joint possession is 1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband. *Folk, supra* at 514.

9 84 Md.App. 122 (1990).

residence and immediately found appellant with two others. Cocaine and empty cocaine vials were found on a table in the same room as the defendant, along with some paraphernalia. The court concluded it would be impossible to be unaware of the cocaine present on the table and possession may be imputed from such a circumstance.[10]

Proximal But Hidden

The law of constructive possession concerning hidden or remote items may be divided into two sub-groups: hidden within a residence and hidden within a vehicle. Typical of the controlled dangerous substance cases in which the substance is hidden within a residence is *Haley v. State*.[11] Pursuant to a search warrant, officers enter the private residence of Weiland. Drug paraphernalia is found on Peterson, a guest. Marijuana and drug paraphernalia are found on Haley and Roberts, also guests. Drugs and paraphernalia are found in a rear bedroom dresser, under a mattress in another bedroom, in a medicine cabinet in a bathroom, and in a kitchen closet.[12] The court couches its language in terms of "dominion and control"[13] but refuses to find

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10 "Significantly, in the case *sub judice*, three of the above [*Folk*] elements are present. When the police executed the raid, they found appellants within several feet of the table laden with cocaine and packaging paraphernalia. The cocaine and accompanying paraphernalia were not secreted away, and one could not conclude by any stretch of the imagination, that appellants were unaware of its presence. The house was one from which the police had observed a man exit on several occasions to conduct drug transactions. The house was sparsely furnished and was without electricity. This evidence, in the expert opinion of Officer Trogdon, indicated that the house was being used as a base for a drug operation in which the appellants played a role. Therefore, despite the lack of proof that appellants had a proprietary or possessory interest in the house, the evidence was sufficient to permit the jury to conclude that appellants exercised joint and constructive possession of the cocaine." *Cook, supra* at 134.

It appears the elements which were present were that the controlled dangerous substance was proximal, that it was not hidden from view and that the circumstances presented a reasonable inference of mutual use and enjoyment. A somewhat similar fact pattern is found in *Broadway v. State*, 3 Md.App. 164 (1968)

11 7 Md.App. 18 (1969).

12 *Haley, supra* at 20-22.

13 "...we do not think that the evidence was sufficient to establish that any of them were 'possessed' of the drugs or paraphernalia found on the premises or that those articles were 'under the control' of any of them as those

sufficiency to convict Haley, Roberts or Peterson of possession of the remotely located substances or paraphernalia.

Even more interesting for purposes of the discussion at hand is *Barksdale v. State*,[14] a case where, like *Taylor*, the subject matter is clearly proximal, but hidden. Appellant and his girlfriend[15] are discovered, pursuant to entry by search warrant, "on the premises" of a one-bedroom apartment. No one else is present. On the kitchen table, within a lady's purse, was found 8 bags of heroin, and a cigarette case containing 20 glassine bags, apparently not containing controlled dangerous substance, but "folded in a peculiar fashion" which an officer testified was used in the dispensing of heroin.[16] Upon further examination, 46 bags of heroin were extracted from the nether regions[17] of Mr. Barksdale's beloved. Both appellant and appellant's girlfriend exhibited numerous needle marks, both new and old.[18] The court notes that

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terms are defined. We reach this conclusion in considering that none of the appellants had any proprietary interest in the premises or lived there; that it was not shown, outside of the search warrant, that any of them had been on the premises at any time in the past; that there was no evidence how long they had been on the premises prior to the arrival of the police; that the police entered the premises and made the arrests 'immediately' upon their arrival 'we knocked on the door and said 'police.' No one answered. And we forcibly entered the premises with a maul at this time.' The lapse of time between the knocking and entering was only such time 'it takes to hit the door twice with a maul, pretty rapidly * * * thirty seconds, it could have been five to ten (seconds)'; that the articles were not in the living room but in a dresser in a bedroom under clothing under a mattress in another bedroom, in a closet in the kitchen, that they were not found in close proximity to the appellants; and that there was no direct evidence properly admissible that they were engaged in violation of the narcotic laws. The appellants did not have physical possession of the articles, and we cannot say that the evidence showed directly or supported a rational inference that the appellants had constructive possession of the articles or that they exercised restraining or directing influence over them." *Haley, supra* at 33-34.

14 15 Md.App. 469 (1972).

15Miss Amanda Taylor. *Barksdale, supra* at 470.

16*Barksdale, supra* at 471.

17 "There is no question that Miss Taylor is guilty of possession of heroin in a most unusual fashion. Evidently that manner of possession was employed to hide forty-six bags of heroin, it being put by her or somebody in her vagina and subsequently discovered on examination by a policewoman at the Pine Street Station." *Id.* at 473.

18*Id.* at 472.

no hypodermic needles were found within the apartment.[19] Both apparently kept clothes there.[20] The court ruled that mere evidence appellant kept clothes there is insufficient to impute a proprietary interest in the apartment and that no rational inference of possession as to appellant could result from the fact of heroin found in a woman's purse, in a woman's cigarette case, and, well, ... in a woman.[21]

What the court is looking for is a reason to impute knowledge to one not in possession.[22] Implicit in both cases is if there were knowledge, it would *still* be necessary to prove mutual use and enjoyment. In *Haley* this imputation may arise pursuant to the use of the substances with which appellants were caught. In *Barksdale*, needle marks would supply such a nexus.

The history of constructive possession in automobiles may be stated briefly. In *Mazer v. State*[23] marijuana was found on the rear floor of an automobile in which only the driver was present. This was sufficient to sustain the conviction.[24] In *Stewart v. State*[25] a right rear seat

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19 *Id.* at 474.

20 *Id.* at 472.

21 "The only direct evidence pertaining to Barksdale was that he was present in the apartment at the time of the raid, that he was an addict with fresh needle marks on his arms, and that before he was taken out into the chilly night in police custody he put on 'more clothing' which was in a closet in the apartment. These meager facts did not show, nor was it a rational inference therefrom that Barksdale exercised actual or constructive dominion or control over the heroin and glassine bags found in a lady's purse, and a lady's cigarette case on the kitchen table and in Amanda Taylor's vagina, and that he kept or maintained the apartment." *Id.* at 475.

22 *See State v. Leach*, 296 Md. 591 (1983); *see also Wimberly v. State*, 7 Md.App. 302 (1969)

23 212 Md. 60 (1956).

24 "The appellant argues that the mere fact that marihuana was found in his case does not establish beyond a reasonable doubt that he put it there, or that it was in his possession or under his control. Reasonable probability of its connection with the crime alleged, under the circumstances, is the only test of admissibility. *[citations omitted]* The question of reasonable doubt is for the trier of facts. The question for us to decide is simply whether there was sufficient evidence from which the trier of facts could properly draw the conclusion of guilty beyond a reasonable doubt." *Id.* at 67.

25 1 Md.App. 309 (1967).

passenger was determined to be in possession of paraphernalia and controlled dangerous substance found on the rear left side floor.[26] In *Folk* appellant was one of six occupants of a vehicle filled with marijuana smoke. Upon the occupants exiting the vehicle pursuant to the request of the investigating officer, one occupant threw a black plastic container in which marijuana was discovered.[27] This was sufficient to convict.

In *Livingston v. State*[28] the court limited somewhat the range of what may and may not be possession. Trooper Eagle Eye stopped a vehicle for speeding and, with the aid of a 30,000 candlepower flashlight, managed to discern two marijuana seeds on the right front floorboard of the vehicle. Appellant was seated in the rear. Sitting in the back seat, the court ruled, did not sufficiently demonstrate any knowledge of the two marijuana seeds on the floor.[29]

Five years after *Livingston* and its talk of "knowledge of, and hence, any restraining or directing influence"[30] comes *Colin v. State*,[31] a case perhaps best viewed, like *Livingston*, as a

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26 *Stewart, supra* at 313.

27 *Folk, supra* at 511.

28 317 Md. 408 (1989).

29The actual issue framed by the court was whether the search incident to arrest was valid. The court ruled that the trooper had an absolute right to stop the speeding vehicle and to visually inspect the premises that presented itself. Having spotted what he believed to be marijuana seeds, he had probable cause to believe that a misdemeanor - possession of marijuana - was being committed, and he had the right to arrest the person or persons committing the misdemeanor. No factual basis was presented to the trooper by appellant that might show that appellant was a participant in the crime. Therefore, the arrest of appellant was illegal and the subsequent search was invalid. *Livingston, supra* at 411-414. In reading *Livingston*, one cannot help but think that the court was swayed by its peculiar facts. Would the outcome have been the same if the amount found on the front floor board was 15 grams, as in *Mazer*?

30 "Merely sitting in the backseat of the vehicle, Livingston did not demonstrate to the officer that he possessed any knowledge of, and hence, any restraining or directing influence over two marijuana seeds located on the floor in the front of the car." *Livingston, supra* at 415-416.

31 101 Md.App. 395 (1994).

product of its peculiar facts.[32] Appellant was seated in the front passenger seat when the vehicle was pulled over by a trooper. The driver gave consent to search.[33] The trooper, in performing his search, removed the interior cover plates on the rear door panels and discovered cocaine in the left rear interior door.[34]

It is difficult to imagine a controlled dangerous substance in a vehicle which is more hidden than this, and clearly appellant did not have control of the vehicle, and did not have a proprietary interest in the vehicle. Yet the Court found certain factors determinative. Being in the same vehicle is sufficient to establish close proximity; the fact that the cocaine was secreted away was said not to be determinative. Surprisingly, what the court did find determinative was that appellant originally gave a false name and appeared nervous.[35] *Colin* cannot be reconciled with any of its predecessors and can only be viewed as a bizarre aberration.

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32 *Colin* is also known for the proposition that the operator of a rental vehicle who is not listed on the rental agreement as an authorized driver has no privacy interest in the automobile. *Id.* at 405.

33 *Colin, supra* at 398.

34 The cocaine found was alleged to be worth $25,600. *Id.* at 399.

35 "Appellant Colin contends that he was not in close proximity to the drug because he was in the front passenger seat whereas the drugs were found in the left rear door interior. He further argues that he was unaware of the presence of the cocaine and therefore never exercised 'dominion or control' over the substance. As a passenger, it may be true that Colin did not exercise 'control' over the vehicle. Colin was traveling in the same vehicle as the cocaine, however, and that is sufficient to establish 'close proximity.' Although the cocaine was not in plain view, being secreted away in a door, this factor is also not determinative. Rather, the circumstantial evidence adds up to a revealing picture. Colin initially told Deputy Houck that his name was 'Tony Morris.' Testimony revealed that Colin and [co-defendant] Heath displayed a nervous response as the officers searched the door where the cocaine was found. Colin's failure to be truthful to the officer and nervousness as the search progressed closer and closer to the location of the cocaine could reasonably be interpreted as showing that he had something to hide and that he knew where it was to be found. Moreover, as Colin was a voluntary passenger, it may be reasonably inferred that he anticipated 'the mutual enjoyment of the contraband.'*[cite omitted]* Further, from his riding in the vehicle with appellant Heath, it could be reasonably inferred that they wanted to use the drug jointly." *Colin, supra* at 407.

Query: Would the Court of Special Appeals be so ready to impute possession if two marijuana seeds had been found inside the left rear interior door panel? This is a poorly reasoned case decided on the basis of the amount of controlled dangerous substance found.

Proprietary Interest

The rationale for imputing possession of contraband on the premises to one who has some possessory interest in the premises is clear. An owner, or one with possessory rights is charged with knowledge of and perhaps dominion and control over the items on his property.[36] Yet there appear to be times when the court shies away from such imputation, perhaps requiring additional factors, as in the curtilage cases, also discussed below.

Scott v. State[37] perhaps lays out a typical proprietary interest scenario. Police lawfully entered a residence with a search warrant. Officers proceeded to the third floor after being informed that the appellant might be located there. Appellant saw the officers and retreated to his bedroom, where he was arrested. Pursuant to his arrest, police searched and found drugs and paraphernalia in clothes lying on appellant's bed, in a topcoat behind the door, in clothes in a metal clothes closet within the room and in a paper bag atop the metal clothes closet.

In finding the evidence sufficient, the opinion of the court lacks specific reason or rationale. No discussion of proximity or proprietary interest occurs.[38] Clearly, this is not a close case. The point of *Scott* is it is unlikely that the clothes in his room, and even the paper bag found there, are anyone else's but Scott's, as it appears from the facts presented that Scott possessed them exclusively.

36There is some confusion in this area. In *Armwood v. State*, 229 Md. 505 (1962), the defendant, a known drug dealer, is accosted by a policeman in an alley. The defendant takes the policeman to his apartment, points to a purse containing heroin and paraphernalia, and admits that he received it from another for resale. The court found that his exclusive possession of the apartment and his pointing at the purse holding the contraband was sufficient to find 'at least constructive possession.' *Id.* at 570. Of course, the defendant admitted possession. *Id.* at 568. Perhaps less mental gymnastics on the part of the court might have made a clearer opinion.

37 7 Md.App. 505 (1969).

38The court merely intones that "the evidence... was sufficient for the trier of fact to find beyond a reasonable doubt, that the appellant had actual possession, or at least constructive possession of them [the items of contraband] and control of them." *Scott, supra* at 529.

In *Munger v. State*[39] we see the court defining some ragged outer limits to the proprietary interest factor. In *Munger*, a police officer gained consent entry to an apartment to look for a stolen television set. The officer testified when he entered the apartment he saw syringes, hypodermic needles, and burnt bottle caps on a table. During trial, it was stipulated that the apartment was rented to the appellant, that only appellant paid the rent, but there were numerous people who visited the apartment.[40] Appellant was convicted of possession of narcotic paraphernalia and given 5 years. The court here, quite summarily, notes his proprietary interest and indicates that he is at least guilty of joint possession. *Munger* stands for the proposition that the proprietary interest presumption, at least as to items found within a residence, is very strong. Non-exclusive use of the residence, while perhaps a useful trial argument, is insufficient as a legal argument against imputing possession to one who has a proprietary interest in the residence where the contraband was located.

The outer limits of this doctrine were further defined in *State v. Watson*,[41] in which, ultimately, appellant and his girlfriend were convicted of receiving stolen goods and possession of marijuana. Police received information that appellant had a stolen television set in his apartment and executed a search warrant. An officer stationed at the rear of appellant's apartment building heard a window open up and saw a brown paper bag ejected from said window. Five ounces of marijuana were found in the bag. It was determined appellant's

39 7 Md.App. 710 (1969).

40 "When trial was resumed... it was stipulated that the owner of the property would testify that the apartment, consisting of the entire floor of the building, was rented to the appellant, that the rent was collected only from the appellant and no one else but that when he went to the apartment there were always numerous people there, 'anywhere from 10 to 12 individuals.'" *Munger*, *supra* at 713. Appellant testified that he subleased the room to another and the paraphernalia was the property of the sub-lessor. Alas, this was adjudged to be lacking.

41 18 Md.App. 184 (1973).

girlfriend, Harris, ejected the bag.[42] Appellant was not present at the time of the search.

The question of constructive possession of marijuana applied only to Watson, obviously. It was determined that appellant had a proprietary interest in this apartment as he paid part of the rent, although he also kept another apartment. Appellant also kept clothes at this, his recently searched apartment. He also admitted he stayed at this apartment and photographs of he and his co-defendant Harris were found at both of appellant's apartments. Clearly, these are some of the factors that the court commonly considers, and perhaps on this basis alone, the court could find or impute constructive possession.

One senses unease, however, in the court, finding it is now requested to impute constructive possession to someone not even present, when another clearly possesses, and, indeed, may solely possess. Thus, the rise of "other crimes" evidence.[43] The court finds persuasive an associate of Watson who testified he and appellant were "in the business of selling narcotics just prior to the crime in question,"[44] and that appellant offered to give this associate narcotics if he would refrain from testifying at trial.[45]

42Harris argued that when she released the bag, she had no dominion or control and therefore could not be in possession. This was not as nutty an argument as it may seem today. *See Agee v. State*, 8 Md.App. 148 (1969).

43 "Thus, the state may present evidence of other criminal acts of the accused unless the evidence is 'substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character.'" C. McCormack, Evidence, Sec. 190 (2d. Ed. 1972); *see also Ross v. State*, 276 Md. 664 (1976).

44 *Watson, supra* at 197.

45 *Id.* at 197. One might well question as to how this testimony is relevant and not merely prejudicial, inclined to show that appellant is indeed a person of "criminal character." Associate's testimony is that they were selling "narcotics," not necessarily marijuana. In addition, his testimony is silent as to from which apartment, if either, this "business" was being run. Lacking a nexus between this testimony and the bag of marijuana thrown by Harris from the apartment, this testimony, while deeply prejudicial to the appellant, was irrelevant. Following *Watson* is *State v. Anaveck*, 63 Md.App. 239 (1985). Appellant and his wife Lena lived in a house with their three daughters, ranging in ages from 20 to 24, and the infant child of one of their daughters. A search warrant is executed at their home. Lena is present, appellant is not. Lena directed troopers to a box in a first floor closet where cocaine was found. It is clear that Lena, having both knowledge and proprietary interest, is guilty of possession. As to

For one accused of possession in his residence when he is not present, some further factor must be shown. The admission of "other crimes" evidence, strictly speaking, allows the imputation of knowledge of the contraband to the absentee-accused.

The curtilage cases require but a brief digression. In *Dodson v. State*[46] and *Puckett v. State*[47] the court considers controlled dangerous substances outside of the house and comes to somewhat similar results. In *Dodson*, the police entered appellant's first floor apartment, apparently by consent. They find cigarette papers on a box on the mantel. Outside, under the porch in a jar, police find a jar and a paper bag containing marijuana. Appellant was arrested and then consented to a second search of his apartment during which two partially burnt marijuana cigarettes were found. Appellant testified that his wife had not been home for four days at the time of his arrest. Some testimony was presented that appellant was an occasional seller of marijuana.[48] The opinion does not indicate whether Mrs. Dodson had been charged.

In *Puckett*, sixteen marijuana plants were found at the edge of a vegetable garden in appellant's yard. Mr. and Mrs. Puckett, owners of the property, were charged with possession of marijuana[49] and possession of marijuana in sufficient quantity to indicate an intent to distribute.[50]

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appellant, possession must be imputed. The court looks, once again, at "other crimes" evidence presented by a trooper who testifies that tow days prior to the execution of a search warrant he purchased cocaine directly from Lena Anaweck at their residence with appellant present, and one day prior to the execution of the search warrant, the trooper observed a confidential informant purchase cocaine from the residence, appellant taking an active part in the said sale. Here, at least, the "other crimes" testimony has a nexus to the charges for which the defendant stood accused. It places the appellant in his residence - where the contraband was ultimately found - selling the type of contraband which was ultimately found, in close time proximity.

46 213 Md. 13 (1957).

47 13 Md.App. 584 (1971).

48 *Dodson, supra* at 14-16.

49 Ann. Code of Md., Art. 27, Sec. 287.

50 Ann. Code of Md., Art 27, Sec. 286(a)(1).

The marijuana plants were discovered by Puckett's tenant, who mowed the grass on occasion. He testified that Mrs. Puckett told him not to cut the particular area which was found to contain the marijuana plants, and, further, that Mrs. Puckett had told him that it was marijuana and that Mrs. Puckett's sister-in-law smoked it. Mrs. Puckett took the stand to deny any knowledge of the marijuana and that she told the tenant not to mow another area, not the area in question, in order to avoid cutting flowers. The court found that Mr. Puckett spent most of his time in Pennsylvania pursuant to his employment in the construction industry.[51]

Clearly, Mr. Dodson and Mrs. Puckett are similarly situated, as may be Mr. Puckett and Mrs. Dodson, the absentee wife. Mr. Dodson and Mrs. Puckett are connected to the marijuana through third party testimony.[52] It is clear that Mr. Puckett and Mrs. Dodson have a proprietary interest, but this, standing alone, is insufficient.[53] The court in *Puckett* refuses to allow Mr. Puckett's conviction to stand. The court in *Dodson* is all-too-willing to infer possession of all controlled dangerous substances to Mr. Dodson.[54]

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51 *Puckett, supra* at 586-587. Mr. Puckett also, well... ratted his wife out:

> "Five days after the execution of the search warrant [which resulted in the Pucketts' arrest] Mr. Puckett and his attorney called one of the troopers who had executed the warrant and showed him seven other marijuana plants growing some thirty or forty yards away from the first patch." *Id.* at 586.

52 The testimony which connects appellant to the marijuana found under the porch is considerably shakier than the testimony given by the third party in *Puckett*. In *Dodson*, one Joseph Watson testified that he had purchased marijuana from appellant on three occasions. *Dodson, supra* at 15-16.

53 "Ownership and exclusive possession of property may in some circumstances be sufficient to create a rational inference that the owner was in possession of a prohibited substance growing thereon. However, we cannot here overlook the findings of the trial judge that Mrs. Puckett was the active party, and the total absence of evidence of Mrs. Puckett's involvement. He may well have been guilty, but the proof does not support it." *Puckett, supra* at 587-588.

54 "The fact that Dodson had occupied the apartment alone for four days was some evidence that the cigarette butts were in his possession. His apartment being on the first floor, and the entrance being through the front door, the glass jar and the paper bag found under the front porch could have been in his possession." *Dodson, supra* at 16.

Mutual Use and Enjoyment

The *Folk* factor of mutual use and enjoyment allows evidence of contraband usage to impute knowledge and dominion and control to all those within the area of the contraband. This may not be the immediate area. In *Gault v. State*[55] the appearance of "fresh needle marks" on appellant allows the supposition that he is participating in the mutual use and enjoyment of heroin found in a paper bag in a garbage can on the porch of the residence where he is but a guest.[56] Similarly, in *Hill v. State*,[57] Patrolman Bishop L. Robinson[58] received word known drug users were using drugs at a certain apartment. He, along with other officers, entered the apartment pursuant to consent and found appellant and two others. A consent search of the apartment turned up paraphernalia for the use of heroin and one bottle cap filled with heroin. Appellant's arms were then examined and "fresh needle marks" were found. It was not appellant's apartment. Appellant indicated the other women found in the apartment had used heroin in appellant's presence and that appellant had used heroin four days previously. She indicated she knew where the paraphernalia was kept.[59] With little discussion, the appellate court affirmed her conviction.[60]

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55 231 Md. 78 (1963).

56 *Gault, supra* at 80. Compare this case to *Dodson*. Perhaps one difference between the two is that an officer testified that Gault confessed the heroin in the bag in the garbage can was purchased for the mutual enjoyment of those in the apartment. At trial, Gault contested his confession, surprisingly without much success.

57 237 Md. 630 (1965).

58 Until recently, Secretary of the Department of Public Safety and Correctional Services for Maryland.

59 *Hill, supra* at 630-631.

60 The "fresh needle marks" cases are fascinating in and of themselves and include *Jason v. State*, 9 Md.App. 100 (1970); *Barksdale, supra*; *Nutt v. State*, 16 Md.App. 695 (1973); *Peachie v. State*, 203 Md. 239 (1953); *Stewart v. Warden of Md. House of Corrections*, 231 Md. 657 (1957); *Williams v. State*, 231 Md. 83 (1963); *Henson v. State*, 236 Md. 518 (1964); *Garrison v. State*, 272 Md. 123 (1974); *Broadway v. State*, 3 Md.App. 164 (1968); *Waugh v. State*, 3 Md. App 379 (1968) and *Anderson v. State*, 9 Md. App 639 (1970). In *Davis v. State*, 9

Folk, supra, is perhaps the classic mutual use and enjoyment case. In *Folk*, an officer observes a vehicle parked in a secluded area. The lights are off and the windows shut. He detects a cigarette being lit in the back seat and then passed to the front seat.[61] As the trooper approached, a window was rolled down and the trooper could detect an odor of marijuana coming from the vehicle. The occupants were ordered out and one of them threw a black plastic container into the nearby brush. It was recovered and marijuana discovered. There were six occupants of the vehicle.[62] The court finds that each passenger is proximate to every other passenger in an automobile, and therefore, if a marijuana cigarette is being smoked by any occupant, the marijuana is proximate; that, because of the glowing nature of cigarettes and the peculiar odor of marijuana knowledge could easily be inferred,[63] and that the officer's

Md.App. 48 (1970), Davis was a tenant two days out of every seven with Green. Green sold marijuana to an undercover agent from her apartment and a subsequent search warrant was executed. Hashish was found in plain view. On a metal box paraphernalia for injecting heroin was located along with a small postal scale and an envelop containing marijuana. Davis was not present at the time of the execution of the search warrant. A later examination of avis by authorities revealed he had "needle marks." The Court of Special Appeals ruled that there was insufficient evidence to convict Davis of the sale of marijuana that Green made to the confidential informant, but, as to the items found in the search:

> "The needle marks found on Davis' arm at the time of his arrest permitted an inference that he knew of the presence of, and was directly connected with, the narcotic paraphernalia found in the metal box, within which was also found an envelope of marijuana and some marijuana pipes. The fact that the hashish was lying in clear view of anyone having a right of access to the premises tended to establish that Davis exercised control of it.[Neither Davis nor Green were convicted of possession of hashish at trial] The evidence that he entered the premises shortly after police arrived tended to establish his identification with the marijuana exposed to plain view within the apartment.[Apparently, the marijuana was exposed to plain view pursuant to the execution of the search warrant, into which Davis walked] On these facts...." *Id.* at 55-56.

Not to put too fine a point on it, but Davis' "needle marks" got him a marijuana conviction.

61 *Folk, supra* at 519. Trooper Eagle Eye again?

62 Appellant Lillie Mae Folk was actually a juvenile at the time and she was therefore charged with and found to be delinquent at the trial court level. *Folk, supra* at 509-510.

63 "In the case at bar, the proximity between the appellant and the marihuana could not be closer, short of direct proof that the appellant herself was in possession of the marihuana. She was one of six occupants in a Valiant automobile and was, therefore, whatever her position on the car, literally within arm's length of every other occupant of that automobile. The marihuana cigarette being smoked was, at any point in time, within direct physical

observation of a cigarette being passed back and forth, it being inferred by the odor of marijuana smoke coming from the vehicle that the cigarette is a marijuana cigarette, shows mutual use and enjoyment are taking place.[64]

With numerous examples of what kind of evidence results in a conviction, certainly one example exists of the conduct which, even in fairly equivocal circumstances, results in insufficient evidence for conviction. In *Cain v. State*[65] appellant frequented the home of a suspected drug dealer, a bus converted to rural residential housing.[66] During the course of several weeks an undercover agent discussed the sale of various drugs with the bus owner. On at least

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possession of one of those occupants. Proximity could not be more clearly established.

Nor would there be, under the circumstances, of this case, any difficulty in drawing a reasonable inference that the marihuana was within the view, or otherwise within the knowledge, of the appellant. In a darkened car in a dark field, the glow from a lighted cigarette is clearly visible within the maximum radius of four to five feet between the glow and the viewer. Knowledge of the presence of marihuana would be imparted even more emphatically by the sense of smell, in a situation where the cloud of smoke and the peculiar pungent odor filled the interior of a tightly closed automobile. Neither would the inference be unreasonable that some conversation transpired among the six persons huddled there in the dark dealing with what the cigarettes and fumes were all about. It would, indeed, be unreasonable not to infer knowledge of the marihuana on the part of appellant." *Id.* at 518.

64 "It is common knowledge that in the marihuana smoking culture a common cigarette is passed communally from one smoker to another in the fashion of an Indian pipe of peace, rather than each smoker hoarding a personal cigarette unto himself." *Id.* at 519-520. The author of the opinion, the estimable Moylan, also mentions the following as a factor:

> "The appellant did not offer any evidence to explain her presence in the deserted field in the darkened automobile wherein marihuana was being smoked." *Id.* at 520.

Quite distressing. Perhaps her papers were not in order. Pre-arrest silence is only admissible to impeach a defendant's testimony, and only in certain circumstances, and is therefore hardly a valid consideration. *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed. 2d 86 (1980). There is no indication in the opinion that the defendant took the stand. Clearly, pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), appellant was told that she did not have to give a statement or offer explanation. Post-arrest silence is otherwise inadmissible. *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975); *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The defendant, or appellant in this case, is not required to take the stand and testify, *Stevens v. State*, 232 Md. 33 (1963) and no inference of guilt can arise from this failure to testify, *Martin v. State*, 73 Md.App. 597 (1988). Given all this, it seems fundamentally unfair to cite appellant's lack of explanation as to her presence as a factor.

65 34 Md.App. 446.

66 This case comes to us from the Circuit Court for Cecil County.

one occasion the appellant was present. Appellant was seen visiting the bus and changing clothes there, but was never seen sleeping on the bus. At the end of the investigation, a search and seizure warrant was executed and numerous drugs and drug paraphernalia were found in a non-working refrigerator and a dresser on the bus. Some marijuana and paraphernalia was found in open view. Appellant was in the "general vicinity."

The *Cain* Court cites *Folk* at the beginning of its analysis.[67] Appellant may have been proximate to the marijuana and paraphernalia found in plain view, depending on the court's definition of "general vicinity." The drugs found in the dresser were proximal to appellant but hidden.[68] As to the non-working refrigerator perhaps more facts are needed before a decision may be reached. Yet the court clearly has no patience for this aspect of the *Folk* analysis, but is keen to determine if there are enough facts from which a reasonable inference of mutual use and enjoyment can be found.

The court found that, although appellant may have been a frequent visitor to the bus,[69] there was no evidence that appellant lived with the suspected drug dealer;[70] that there was no testimony as to the defendant's participation in the sale of drugs;[71] that there was no proof of

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67*Folk* is peculiar in that it lists two formulas: the common denominators of cases confirming joint possession and the common denominators of cases negating joint possession. Accordingly, *Cain* cites, at 449,

> "The common thread running through all of these cases negating joint possession is 1) the lack of proximity between the defendant and the contraband, 2) the fact that the contraband was secreted away in hidden places not shown to be within his gaze or knowledge or in any way under his control, and 3) the lack of evidence from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of contraband." *Folk, supra* at 514.

68*See Haley*, discussed *supra*.

69*Cain, supra* at 447-448.

70 *Id.* at 451.

71 *Id.* at 450.

needle marks or other proof of drug use;[72] that, indeed, there was no evidence of any unlawful conduct by the defendant during the period of surveillance;[73] that the suspected drug dealer gave a statement completely exonerating appellant;[74] that when the undercover agent purchased from the suspected drug dealer, appellant was never present.[75]

Knowledge

Time and subsequent case law has explicitly added the requirement of knowledge, a factor mentioned in *Folk*.[76] In *Dawkins v. State*[77] the court read into the statute a scienter requirement not only that the defendant knew the controlled dangerous substance was present, but also that the defendant know its illicit nature.[78]

WHAT *TAYLOR* MAY MEAN

72 *Id.* at 451.

73 *Id.* at 450. It is difficult to understand what the court is saying here, or exactly how it expected it might discover unlawful conduct, or exactly what inference it desired to draw. As has been discussed, supra, "other crimes" evidence has been used by the court as a determining factor in some of the proximity cases. The court's unwillingness to explain what is meant by "general vicinity" does not help the understanding of this case. Further, certainly convictions are not admissible in the state's case in chief, and only certain convictions are admissible on cross examination of the defendant. *See* Malone and Rozas, *Impeachment in Maryland after State v. Giddens*, 1W.Md.L.J. 1, 2 (1998).

74 *Cain, supra* at 448.

75 *Id.* at 448.

76 "... 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant...." *Folk, supra* at 518.

77 313 Md. 638 (1988).

78 "In accord with the overwhelming majority of other jurisdictions, we hold that 'knowledge' is an element of the offenses charged in this case. The accused, in order to be found guilty, must know of both the presence and the general character or illicit nature of the illicit substance. Of course, such knowledge may be proven by circumstantial evidence and by inferences drawn therefrom." *Dawkins, supra* at 651.

Clearly, some of these factors are not at all affected by *Taylor*. Proprietary interest, as a *Folk* factor, remains unchanged, as does proximity and knowledge. What further inference in the law of constructive possession may be gleaned from *Taylor* may depend upon what aspect of it one is willing, or able, to focus.

The trial court found that others were smoking marijuana in appellant's presence-- his hotel room-- and therefore, appellant had proximity, proprietary interest, knowledge, and was participating in the mutual use and enjoyment of the contraband. The repudiation of the judgment of the trial court by the Court of Appeals may well lead one to argue that *Taylor* stands for the proposition that presence in a room where others are smoking marijuana is insufficient to sustain a conviction for possession of marijuana.[79]

A narrower reading seems easier to reconcile with the law of the recent past. Clearly, *Taylor* states that mere presence in a room where others *had been* smoking marijuana is insufficient to convict.[80] The Court merely refuses to parlay appellant's presence during the recent pot smoking session in the hotel room into the imputation that appellant had knowledge of hidden marijuana found pursuant to investigation by authorities. Further, even if the Court had imputed knowledge, there were no circumstances present from which might be drawn a reasonable inference that mutual use and enjoyment was occurring.[81]

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79 This would certainly be in line with Maryland non-CDS law. *See Wilson v. State*, 319 Md. 530 (1990); *Tasco v. State*, 223 Md. 503 (1960); *Warfield v. State*, 315 Md. 474 (1989). Mere presence at the scene of a crime, without more, is insufficient to sustain a conviction.

80 "Viewing the evidence in the light most favorable to the State, Officer Bernal's testimony established only that Taylor was present in a room where marijuana *had been* smoked recently, that he was aware that it *had been* smoked, and that Taylor was in proximity to contraband that was concealed in a container belonging to another." *Taylor, supra* at 459 (emphasis added).

81 "...[A]shtrays were clean and no marijuana was visible...", *id.* at 456, "...[N]o marijuana or paraphernalia was found on Petitioner or in his personal belongings, nor did the officers observe Petitioner or any other occupants of the hotel room smoking marijuana." *Id.* at 459.

Taylor, therefore, is a case decided within the known confines of *Folk*, merely defining further when knowledge may or may not be imputed to contraband proximal to the defendant, but hidden.

THE EFFECT OF *TAYLOR* ON A COMMON JURY INSTRUCTION

The MICPEL jury instruction, the one commonly given in Maryland, reads as follows:

> The defendant is charged with the crime of possession of (controlled dangerous substance), which is a controlled dangerous substance. In order to convict the defendant of possession of (controlled dangerous substance), the State must prove:
>
> (1) that the defendant knowingly possessed the substance;
>
> (2) that the defendant knew the general character or illicit nature of the substance; and
>
> (3) that the substance was (controlled dangerous substance).
>
> Possession means having control over a thing, whether actual or indirect [the defendant does not have to be the only person in possession of the substance. More than one person may have possession of the substance at the same time.] A person not in actual possession, who knowingly has both the power and the intention to exercise control over a thing, either personally or through another person, has indirect possession. In determining whether the defendant had indirect possession of the substance, consider all the surrounding circumstances. These circumstances include the distance between the defendant and the substance, whether the defendant had some ownership or possessory rights in the place or automobile where the substance was found, and any indications that the defendant was participating with others in the mutual use and enjoyment of the substance.

Post-*Taylor*, is it accurate?[82] What *Taylor* has done is further define "all the surrounding circumstances." Which way it is defined depends upon counsel's view of the case. If counsel is

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There is, of course, the problem with the officers' observation that "[t]here were clouds of smoke in the room that smelled like marijuana." *Id.* at 455. With little evidence otherwise, the court accepts the explanation of appellant that others had smoked in the room previously. *Id.* at 458-459.

82Pre-*Taylor*, was it accurate? Arguably not. It did not take into consideration *Haley, supra*; or *Barksdale, supra*. *Colin, supra*, also is ignored.

desirous of pressing the view that the opinion represents a repudiation of the facts and rulings of the trial court (the "radical *Taylor*" position), the following addition to the end of the MICPEL instruction is suggested:

> Mere proximity to the substance, mere presence on the property where it is located or being used, knowledge of the substance's presence and illicit nature and association with the person who controls the drug or the property on which it is found, is insufficient to support a finding of possession. Even when all of the factors are present, the State must prove that the defendant controlled the substance.

Or, in another more general formulation:

> Mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or property on which it is found, is insufficient to support a finding of possession.[83]

Should counsel agree with the narrower reading of *Taylor* (the "moderate *Taylor*"), an emendation is still in order. It is suggested that the sentence of the instruction read as follows:

> These circumstances include the distance between the defendant and the substance, *whether the substance was near the defendant but hidden from him*, whether the defendant had some ownership or possessory rights in the place or automobile where the substance was found, and any indications that the defendant was participating with others in the mutual use and enjoyment of the substance. *If the substance was near the defendant but hidden from him, the State must show that the Defendant had knowledge of the hidden substance and participated with others in the mutual use and enjoyment of that substance.*

CONCLUSION

Taylor is not a revolutionary case as to the law. It is most logically evaluated pursuant to the dictates of *Folk*, defining further the law of constructive possession of controlled dangerous substances when the contraband is proximal but hidden. It also gives some slight guidance as to what sort of "surrounding circumstances" may or may not impute possession.

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83 The author is indebted to Alan Wolf, Asst. Public Defender, Director of Training, Office of the Public Defender, for these elegant solutions.

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SANITIZATION: IS IT FOR MARYLAND?

by Ramon Rozas III*

INTRODUCTION

Impeaching a witness with his prior convictions is a powerful tool for an attorney. When the prosecutor impeaches the defendant himself in a criminal trial with a prior conviction, however, certain special problems arise.[1] One recurrent and difficult problem is the question of what procedure to follow when one or more of the defendant's admissible prior convictions is for the *same offense* that he is on trial for, e.g., a defendant charged with theft has a prior conviction of theft. Such a situation is fraught with danger for the trial court ruling on the issue since the jury may make improper use of the defendant's record, concluding he has a "propensity" to commit the offense in question.[2]

Prior to 1995, most Maryland courts and attorneys assumed allowing "same crime" impeachment was an abuse of discretion; i.e., a trial court should exclude any prior convictions similar, or identical, to the charged offense as more prejudicial than probative.[3] In 1995, the Court of Appeals overturned those assumptions, and intermediate appellate court precedent, in *Jackson v. State*.[4] The Court of Appeals held

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[1] "The sharpest and most prejudicial impact of the practice of impeachment by conviction...is upon one particular type of witness, namely, the accused..." McCormick on Evidence, sec. 43 (2 Ed.1972).

[2] "[T]he jury...[may] give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concen wth present guilt..." McCormick, sec. 43. Trying to cure the prejudice by the use of a limiting instruction requires the jury to perform "a mental gymnastic which is beyond, not only their power, but anybody else." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir.1932)(Hand, J.); *cf. Bruton v. United States*, 391 U.S. 123, 135, 20 L.Ed.2d 426 (1968)(jury can sometimes be expected to ignore instruction).

[3] *See Dyce v. State*, 85 Md.App. 193, 200, 582 A.2d 582 (1990).

[4] 340 Md. 705, 668 A.2d 8 (1995).

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that exclusion of the prior convictions in these situations was not automatic, and that such impeachment would in some situations be allowed. While recognizing the possible prejudice to the defendant, the Court of Appeals rejected a bright line rule and adopted a multi-factored balancing test.

This article will suggest that, under the discretionary powers granted them in *Jackson* and the Maryland understanding of discretion, trial courts have another option than the simple dichotomy of admission or exclusion. The approach known as "sanitization," where the fact of the conviction, but not the actual offense committed, is admitted into evidence, has been employed in many other jurisdictions. Such treatment by Maryland trial courts would be an appropriate exercise of their discretionary powers.

DYCE AND *JACKSON*: THE PER SE RULE AND ITS END

In *Dyce v. State*,[5] the Court of Special Appeals was faced with a defendant on trial for possession with intent to distribute cocaine.[6] The defendant testified, and the State impeached him with a prior conviction for distribution of cocaine.[7] The Court of Special Appeals reviewed dicta from two previous Court of Appeals cases. The Court of Appeals had previously stated, in dicta:

> "[w]here the crime for which the defendant is on trial is identical or similar to the crime for which he has been previously convicted the danger [of prejudice] is greater, as the jury my conclude that because he did it before he

[5] *Supra*.

[6] The unanimous opinion in *Dyce* was authored by Judge Karwacki. *Dyce, supra* at 194. Judge Karwacki would later join in Judge Raker's opinion in *Jackson*, effectively reversing himself. See infra at note 16.

[7] *Dyce, supra* at 195-196.

most likely has done it again."[8]

Also quoted by the *Dyce* Court was *Prout v. State*,[9] where the Court of Appeals said

> "a prior conviction which is similar to the crime for which the defendant is on trial may have a tendency to suggest to the jury that if the defendant did it before he probably did it this time."[10]

The Court of Special Appeals in *Dyce* thus concluded where the conviction in question was "virtually identical"[11] to the crime the defendant was on trial for, admission "constituted a clear abuse of discretion...and was reversible error."[12] Since *Dyce*, the simple rule in Maryland criminal cases was that "same crime" impeachment was not allowable.[13]

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[8] *Id.* at 199 (quoting *Ricketts v. State*, 291 Md. 701, 703, 436 A.2d 906 (1981))(emphasis in original).

[9] 311 Md. 348, 535 A.2d 445 (1988).

[10] *Dyce, supra* at 199 (quoting *Prout, supra* at 364).

[11] The cases, and this article, use the terms "same crime" and "similar crime" impeachment interchangeably. A prior conviction sufficiently similar to the crime charges should trigger sanitization just as an identical conviction would.

[12] *Id.* at 200.

[13] This rule was referred to twice again. In *Love v. Curry*, 104 Md.App. 684 (1995), a pedestrian plaintiff sued a driver who struck her. The defendant raised the defense of contributory negligence, showing the plaintiff was smoking PCP right before the accident. The plaintiff conceded she was smoking PCP, but was also impeached with a prior conviction for importation of PCP. The plaintiff argued on appeal that, where the crucial issue in the case was her use of PCP immediately prior to the accident, impeaching her with a prior conviction would be too prejudicial since the jury might infer from her prior conviction the same prejudicial "propensity." The Court accepted the holding of *Dyce* as the rule in criminal cases, but refused to extend the principle to civil cases. *Love, supra* at 698.

In *State v. Giddens*, 335 Md. 221 (1994), the Court of Appeals was faced with an issue, amongst others, of whether the trial court had properly balanced the prejudice from impeachment with its probative value. The trial court had noted the charge on trial was battery, while the impeaching conviction was distribution. The trial court thus saw little prejudice, although it noted that had the charge on trial been distribution, it would have excluded the conviction. *Id.* at 221. The Court of Appeals cited to *Dyce*, and stated that the trial court's reference to the *Dyce* rule "evidences its understanding of the balancing process." *Id.*

In light of *Dyce* and the dicta in *Prout*, *Ricketts* and *Giddens*, it came as a surprise[14] when the Court of Appeals rejected the *Dyce* rule of *per se* exclusion. Jackson was on trial for theft. He also had several convictions for theft dating from 1991.[15] In a 1994 jury trial, the court allowed the defendant, who testified, to be cross-examined concerning those convictions. The defendant was convicted, and filed an appeal.[16] Prior to consideration by the Court of Special Appeals, the Court of Appeals granted certiorari upon its own motion.[17]

Judge Raker's majority opinion[18] first reviewed the "trend toward increasing flexibility that has marked the historical development of Rule 5-609."[19] The Court also noted that a "per se rule barring same-crime impeachment would deny trial judges needed flexibility."[20] The Court recognized the dangers of allowing same-crime impeachment,[21] but turned to a series of factors outlined by federal cases interpreting Fed.R.Evid. 609.[22] A trial court should be free, the Court reasoned, to apply these factors in its discretion.

[14] It was a surprise to the author, at least.

[15] *Jackson, supra* at 709.

[16] *Id.* at 708.

[17] *Id.*

[18] Judge Karwacki, now on the Court of Appeals, joined in the majority, even though he had authored *Dyce*. Even more remarkable, the majority in *Jackson* does not mention *Dyce*. Judge Bell's dissent cited to *Dyce* as part of a line of decisions that "have long recognized, and been sensitive to, the risk of prejudice..." *Jackson, supra* at 723-724 (Bell, J., dissenting).

[19] *Jackson, supra* at 711.

[20] *Id.* at 714.

[21] *Id.* at 714-716 (quoting from *Ricketts, supra* at 703-704)(citing federal cases).

[22] These factors were (1) the impeachment value of the crime, (2) the age of the conviction and the defendant's subsequent history, (3) the similarity of the past and instant crimes, (4) the "importance of the defendant's testimony" and (5) the "centrality of the defendant's credibility." *Id.* at 717 (citing *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.1976)).

In *Jackson*, the Court of Appeals reviewed both the prejudice to the state from *per se* exclusion and the dangers of admission, both in prejudicing the jury and discouraging a defendant from testifying. *Jackson* rejected the use of *per se* exclusion.[23] It concluded the best person to make the decision and exercise discretion was the trial court. In reviewing the competing interests involved, however, the Court made an interesting aside. It noted that several jurisdictions allow the use of "same-crime impeachment" without allowing the jury to learn the actual name of the prior conviction.[24] This procedure is known as "sanitization." *Jackson* expressed neither disapproval nor explicit rejection of sanitization, and a review of its history and principles shows sanitization is an appropriate procedure for a Maryland trial court to use.

SANITIZATION: A SOLUTION TO THE PROBLEM

A number of ways of addressing the special prejudice of same-crime impeachment have been proposed and adopted.[25] Everything from excluding *all* evidence of a defendant's prior convictions except for perjury or false swearing,[26] to excluding all

[23] The intermediate appellate court apparently resented *Jackson*'s cavalier treatment of *Dyce*. In an unreported opinion, *Lisa Taylor and Jesse Ervin*, No. 1690 September 1996 Term (COSA, 8/12/97), the Court of Special Appeals reversed Ervin's convictions of conspiracy to distribute and possession with intent to distribute heroin. The Court ruled the trial court abused its discretion in allowing Ervin to be impeached with a prior conviction for possession with intent to distribute cocaine. Slip opinion at 15. The Court quoted extensively from *Dyce*, *id.*, but never mentioned *Jackson*. See slip opinion at 16 ("[b]ased on the holdings of *Dyce*, *Ricketts* and *Prout*, we believe that...the trial judge abused his discretion").

[24] *Jackson, supra* at 714, n.5.

[25] McCormick on Evidence, sec. 43 (2d Ed.1972)(""[t]he variety of solutions, both actual and proposed, indicates the stubborn and troublesome nature of the problem").

[26] W.Va.R.Evid. 609(a)(1) (1997).

evidence of a defendant's convictions, unless the defendant first offers explicit evidence of his credibility, [27] to the out-right exclusion of a defendant's record,[28] has been proposed or tried. One procedure used in several states is "sanitization."

When a trial court "sanitizes" a conviction, it allows in evidence of the date and the fact of the conviction, but no more. Evidence of the specific offense the witness was convicted of is not admissible.[29] The states employing sanitization do so in a variety of situations.[30] This article will examine the narrowest use: sanitizing "same-crime" impeachment of the defendant when he or she testifies.[31]

SANITIZATION: A BRIEF HISTORY AND PROCEDURE

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[27] Uniform Rule of Evidence 21.

[28] *State v. Santiago*, 492 P.2d 657, 661 (Haw.1971)("we hold that to convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused's constitutional right to testify").

[29] *State v. Brunson*, 625 A.2d 1085, 1090 (N.J.1993).

[30] *See, e.g., State v. Geyer*, 480 A.2d 489 (Conn.1984)(sanitizing all non-*crimen falsi* offenses); *Brunson, supra* (sanitizing "same-crime" offenses); *State v. Rutchik*, 341 N.W.2d 639 (1984)(the entire record of all witnesses who testify in Wisconsin sanitized).

[31] The Wisconsin model of not allowing any witness to be impeached with the name of any conviction seems extreme. Cf. 3A Wigmore on Evidence, sec. 987, p. 910 (Chadbourne Rev.1970)(considered a "queer rule"). Likewise, sanitizing a defendant's entire record ignores a legitimate state interest in attacking the defendant's credibility. *But see* James H. Gold, *Sanitizing Prior Conviction Impeachment Evidence to Reduce its Prejudicial Effects*, 27 Ariz.L.Rev. 691, 702-703 (1985)(arguing prejudicial damage to defendant from naming prior conviction occurs regardless of whether offense is "same-crime" or not and all prior convictions should be sanitized).

Perhaps the first jurisdiction to employ sanitization was Florida, in *Washington v. State*.[32] Soon after Florida, Wisconsin adopted sanitization as a rule in *Rice v. State*.[33] Rice was convicted of taking indecent liberties with a girl, and at trial was impeached with a "similar" conviction.[34] The Supreme Court of Wisconsin held it

> "error to inject such an issue into the case. As it stood, it was highly prejudicial. The jurors, understanding the evidence to be competent for their consideration, could readily come to the conclusion that the defendant was given to the practice of the kind of offense with which he was charged."[35]

Merely asking if the defendant was convicted of a crime was the acceptable practice, *Rice* held.[36] Sanitization of *all* prior convictions for *all* witnesses remains the rule in Wisconsin.[37]

Approximately ten jurisdictions have adopted sanitization in one form or another.[38] A procedural framework for the use of "same crime sanitization" can be designed employing the experience and rules of these states. As an initial matter, all prior

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[32] 98 So. 60 (1923). Sanitization remains the rule in Florida to this day. *See Britton v. State*, 604 So.2d 1288, 1290 (Fla.App. 5 Dist.1992)(prosecutor may ask only two questions: have you been convicted of a crime, and how many times).

[33] 217 N.W. 697 (Wis.1928).

[34] "The defendant was asked...if he had ever been convicted of a crime, to which he answered 'Yes'...the court interrupted to inquire: 'What were you charged with?'. The defendant answered: 'Just about the same thing.'" *Rice*, 217 N.W. at 699.

[35] *Id.* at 699-700.

[36] *Id.* at 699.

[37] *Rutchik, supra.*

[38] *See Geyer, supra*; *Waller v. State*, 395 A.2d 365 (Del.1978); *Britton v. State, supra; Richardson v. State*, 674 S.W.2d 515 (Ky.1984); *Brunson, supra*; *State v. Pitts*, 322 N.W.2d 443 (Neb.1982); *State v. McClure*, 692 P.2d 579 (Or.1984); *McAmis v Com.*, 304 S.E.2d 2 (Va.1983); *Rutchik, supra*; *State v. Gomez*, 880 P.2d 65 (Wash.App.Div.1 1994). The Fourth Circuit has not mandated sanitization, but has accepted trial court use of the technique on occasion. *See, e.g., United States v. Wilson*, 556 F.2d 1177, 1178 (4th Cir.1977); *Boyce v. United States*, 611 F.2d 530, n.1 (4th Cir.1979).

convictions which the state intends to cross-examine the defendant with should be disclosed to the trial court, preferably prior to trial. Consistent with Maryland law, the judge should initially exclude all convictions not within the "eligible universe" of impeachable offenses,[39] or which are more than fifteen years old.[40] The remaining convictions should be scrutinized to see if their admission is more prejudicial than probative.[41]

Of any remaining convictions, any offenses which are the same or similar to the charge on trial, should be sanitized if the defendant so desires.[42] If the defendant has a mixed records, i.e., some convictions which are the same or similar and some which are admissible or not, the prosecution has two options: (1) sanitize all the convictions, or (2) only employ the non-similar convictions for impeachment.[43]

On cross-examination, the state may ask if the defendant was convicted of a crime, how many times and when. Several jurisdictions split over whether the penalty

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[39] *State v. Giddens*, 335 Md. 205, 213 (1994).

[40] Maryland Rule 5-609(b).

[41] *See State v. Rivers*, 921 P.2d 495, 499 (Wash.1996)(sanitization not substitute for balancing requirement, but used after admission is determined to be more probative than prejudicial).

[42] One danger of sanitization is that the jury may speculate about the unnamed conviction and so do more prejudice to the defendant. This concern led California to reject sanitization. *See People v. Barrick*, 654 P.2d 1243, 1250 (1982). However, *Barrick* also enacted a *Dyce*-type rule so its rejection of sanitization loses force. In light of the possible dangers, however, the defendant should have the choice. *See Goodman v. State*, 336 So.2d 1264, 1267 (Fla.Dist.Ct.App.1976)(defendant has right to identify offense). Where only "similar-crime" sanitization occurs, however, a defendant will rarely wish to forgo its benefits. *Cf.* Gold, *supra*, at 704 (defendant may wish to identify offense if fairly minor to prevent speculation).

[43] "[O]nly two of the defendant's three prior convictions are similar to the offense presently charged. If... the State should choose to introduce all three prior convictions, the trial court should sanitize all three convictions to avoid the speculation that would inevitably occur if evidence were introduced to prove the theft convictions and the convictions of the unidentified crimes. Alternatively, the State may prefer to introduce only the theft conviction, in which case evidence of the nature of that offense may be admitted." *Brunson, supra* at 1093.

received is admissible.[44] Since current Maryland law admits the sentence received,[45] such a question must be allowed.

DISCRETION IN MARYLAND AND PARTIAL ADMISSIBILITY OF EVIDENCE

Trial courts in Maryland are granted discretion in the admission of prior convictions.[46] Simple logic indicates if a court has the discretion to admit a prior conviction, or exclude it as prejudicial, within that in/out spectrum lies a middle path: admit part of the information, to wit: the fact that the defendant was convicted and only that. One commentator on sanitization believes a trial court with such discretionary power is free to sanitize prior convictions as the facts of the particular case require.[47] An examination of the nature of discretion in Maryland confirms Professor Gold's belief.

In his oft-cited article[48] on judicial discretion, Professor Maurice Rosenberg identified two types of judicial discretion. The primary type of discretion means a trial court may choose amongst a variety of choices and outcomes.[49] The second type is a purely procedural matter where a trial judge's decision will not be closely reviewed by the

[44] *Compare Britton, supra* (only questions allowed are if the defendant has been convicted and how often) *and State v. Hicks*, 661 A.2d 1300 (N.J.Super.A.D.1995)(degree of offense and sentence received admissible so jury may gauge severity and credibility).

[45] *Foster v. State*, 304 Md. 439, 470 (1985).

[46] *Jackson, supra* at 719.

[47] Gold, *supra* at 707 ("a trial court could rule that, unless a particular prior conviction was sanitized, it would be inadmissible because its prejudicial effect would outweigh its probative value if it were fully identified").

[48] This author found over one hundred citations by judicial opinions or other articles to Professor Rosenberg's piece.

[49] Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L.Rev. 635, 637 (1971).

appellate panel.[50] What kind of discretion do Maryland trial courts possess in relation to evidence, specifically its partial admissibility? A review of two Court of Appeals decisions reveals that evidentiary discretion to be "primary;" that is, a trial court's discretion consists of the ability to choose amongst several options without being constrained by legal principles strictly dictating the outcome.

In *CSX Trans. v. Continental Ins.*,[51] several insurers filed suit against CSX to determine the extent of their coverage liability for certain hearing-loss claims by CSX employees. At trial, the court "heavily" redacted certain insurance policies which were then entered into evidence.[52] CSX lost the trial, and on appeal complained, amongst many other issues, that the trial court erred in redacting provisions from the policies.

The Court of Appeals disagreed. It considered well-settled that

> "when conducting a trial, a trial court has wide discretion to admit or exclude evidence. [citations omitted]. This principle is no less true when the exclusion occurs in connection with the redaction of a document...preliminary to that document being admitted into evidence..."[53]

The redaction was within the trial court's "discretion," then, because the trial court had the power not merely to admit or exclude the document as a whole, but could pick and choose amongst the parts of the document, as it saw appropriate.

In contrast, the Court of Appeals explicitly limited discretion in *Ellsworth v. Sherne Lingerie, Inc.*[54] There, the Court debated whether to adopt the Federal "public

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[50] *Id.*

[51] 343 Md. 216, 680 A.2d 1082 (1996).

[52] *Id.* at 251, 680 A.2d at 1100.

[53] *Id.* at 251-252, 680 A.2d at 1100.

[54] 303 Md. 581, 495 A.2d 348 (1985).

records" hearsay exception, codified as Fed.R.Evid. 803(8). The Court had no difficulty accepting the basic premise of the exception, allowing the admission into evidence of the "factual findings" in such public records.[55] More troublesome, however, was whether "opinions" contained in such records should be admissible. The Court reviewed three positions federal circuits had adopted: the minority position, excluding such conclusory material, the majority position admitting it in the discretion of the trial judge,[56] and the single circuit which *required* admission in certain situations.

The Court adopted the exception for Maryland, but aligned Maryland with the minority which allowed only the "facts" stated in the public record to be admissible, while excluding the "opinions" contained therein.[57] The Court allowed that a report which contained a mix of fact and opinion should be redacted by the trial judge to exclude the opinion and admit the factual findings.

In *Ellsworth*, the Court explicitly rejected a "discretionary" standard and imposed a requirement on trial judges to exclude certain material. Judge Eldridge, concurring separately, summed up:

> "[a]s I understand the majority, the Court is drawing a firm line between 'fact' and 'opinion,' and is requiring the trial judge to distinguish, in every instance in which a public record is offered for admission, between fact and opinion. *The majority is not allowing the trial judge any latitude or discretion in admitting evaluations or conclusions* if, as a matter of law, they are deemed to fall

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[55] *Id.* at 603-608, 495 A.2d at 360-361 (recognizing ubiquity of rule in other jurisdictions).

[56] *Id.* at 608, 495 A.2d at 362 ("increasing numbers of federal appellate courts are allowing trial judges broad discretion to accept opinions and judgments found in 'evaluative reports'"); *id.* at 614, 495 A.2d at 365 (the "overwhelming majority of cases are in accord" with discretionary admission of opinions) (Eldridge, J., concurring).

[57] *Id.* at 612, 495 A.2d at 363-364. This rule has since been codified as Maryland Rule 5-803(b)(8). The federal courts since *Ellsworth* have adopted a uniform standard. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 102 L.Ed.2d 445 (1988)(opinions admissible).

within the category of 'opinions.'"[58]

Judge Eldridge went on to criticize the rule, since it would create "a very difficult and time consuming task, and one in which there are no satisfactory guidelines" for the trial judge.[59] Trial judges, in his view, should have discretion to admit or exclude conclusions.[60]

Judge Eldridge's conception of the type of "discretion" he and the majority were debating was obviously primary: the area in which it was to be exercised (or restrained) lacked clear doctrinal rules, the essence of primary discretion.[61] In such situations, discretion goes not only to the reviewing court's power to "second-guess" the lower court, but the lower court's very authority to make a number of choices from not-very-clear-cut options.[62]

These two cases show when Maryland appellate courts speak of a trial court's discretion to admit or exclude evidence, they speak of *primary* discretion. A Maryland trial court may admit relevant evidence, exclude it, or make whatever redactions necessary to eliminate any prejudice and highlight the evidence's probative value.

CONCLUSION

[58] *Id.* at 615, 495 A.2d at 365 (emphasis added).

[59] *Id.*

[60] *Id.*

[61] *See* Rosenberg, *supra* at 637 (primary discretion created where "decision-constraining rules do not exist").

[62] Judge Eldridge's concurrence highlights that he and the majority were considering the discretion as primary by separately addressing a "review-constraining" problem. In his view, the majority's rule "will present a problem...to the appellate courts as well. In every [relevant] case...an appeal may be predicated on the ground that certain 'opinions' were erroneously admitted or that relevant 'facts' were excluded." *Ellsworth, supra* at 615, 495 A.2d at 365.

Sanitization is a useful and creative solution for the special prejudice which arises from "same-crime" impeachment. It strikes a balance between the state's legitimate interest in impeaching a testifying defendant, and the defendant's right not to have the jury consider irrelevant "other crimes" evidence. It has been used successfully in a number of jurisdictions which have adopted it.

Maryland trial courts should apply sanitization whenever a "same-crime" impeachment problem arises. Maryland trial courts possess discretion in determining how to admit evidence, and this discretion allows them to determine whether or not to admit the "name" of an offense when impeaching the defendant. Since *Jackson v. State* announced that *per se* exclusion is no longer the law in Maryland, trial courts must look elsewhere for the solution to this stubborn problem. Sanitization is an option that Maryland trial courts should explore.

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NOTE

Bowen v. Smith: Incarceration of Worker Not Automatic Suspension of Temporary Total Disability

by Lee A. Caplan*

Roland H. Bowen ("claimant") was incarcerated in the Maryland Department of Corrections from July 23, 1991, through December 9, 1991. His employer, A.H. Smith ("employer") terminated payment of temporary total disability benefits ("TTD")[1] to him from July 12, 1991 through January 14, 1992. The claimant filed issues with the Maryland Workers' Compensation Commission ("Commission") and requested a hearing on the termination of TTD payments. Specifically the claimant requested the Commission to determine whether he was entitled to receive TTD benefits while incarcerated.

The Commission held a hearing and, on February 22, 1993, denied claimant's demand for benefits while he was incarcerated but reinstated his TTD benefits from December 10, 1991, through January 12, 1992. Claimant appealed to the Circuit Court for Calvert County, alleging that the Commission erred in finding he was not temporarily totally disabled from July 12, 1991, through December 9, 1991. The trial court granted the employer's motion for summary judgment. In affirming the Commission's decision, the court stated:

> "Claimant's inability to secure gainful employment during the five months in question stemmed not from his injury, but from his imprisonment. In effect, Claimant's incarceration

1 There are four types of disability benefits that an eligible injured worker can receive: temporary total disability, permanent total disability, temporary partial disability, and permanent partial disability. *Jackson v. Beth.-Fair Shipyard*, 185 Md. 335, 338, 44 A.2d 811, 812 (1945). In *Bowen* the court was only concerned with temporary total disability benefits.

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constituted a superseding cause of his inability to work."[2]

Claimant appealed to the Court of Special Appeals. On its own motion the Court of Appeals granted a writ of certiorari prior to consideration by the Court of Special Appeals.

The Court of Appeals has frequently stated that the Maryland Workers' Compensation Act (the "Act") should be construed as liberally in favor of injured workers as its provisions will permit in order to effectuate its broad remedial purpose.[3] Any uncertainty in the law should be resolved in favor of the claimant.[4] The Court thus looked to the language of the statute to determine whether the legislature intended to allow employers to suspend TTD payments based on post-accident incarceration.[5]

According to the *Bowen* Court the general purpose of the Act is to provide compensation to injured workers and their families for the worker's loss of earning capacity resulting from a work-related injury.[6] The Court was only concerned with disability benefits.

Disability benefits are paid to an injured worker to compensate for the injured worker's loss of earning capacity, not to compensate merely for the worker's injury. "More than merely indemnifying workers for injuries sustained on the job, the system embodied in the Act provides compensation when earning power is lost as a result of work-related disabilities."[7] Thus, disability benefits compensate for the worker's inability to secure or retain employment resulting

2 *Bowen v. Smith*, 342 Md. 449 at 454, 677 A.2d 81 (1996).

3 *Para v. Richards Group*, 339 Md. 241, 251, 661 A.2d 737, 742 (1995).

4 *Mayor and City Council of Baltimore v. Cassidy*, 338 Md. 88, 97, 656 A.2d 757, 761-62 (1995).

5 *Bowen, supra* at 454.

6 *Victor v. Proctor & Gamble*, 318 Md. 624, 628-29, 569 A.2d 697, 700 (1990).

7 *Belcher v. T. Rowe Price*, 329 Md. 709, 737, 621 A.2d 872, 886 (1993).

from the worker's work-related injury.

The right to disability benefits is established by the Act. The *Bowen* Court reasoned that it is the province of the General Assembly to restrict the right of incarcerated individuals to receive temporary total disability benefits.[8] The Court of Appeals quoted the Nevada Supreme Court in stating that any policy change should be made by the legislature and not the court:

> "Because there is no statutory exception which eliminates benefits when a worker is jailed, the benefits are due the worker even if his needs are fulfilled from another governmental source. The state legislature can change our statute to suspend payments during periods of incarceration, much like a private insurer might place conditions on his coverage. But in the absence of legislation, we decline the State's invitation to make that policy shift ourselves."[9]

Quoting further out-of-state authority the Court stated "worker's compensation is a statutory responsibility and any change or addition to the law is a function of the legislature and not the courts."[10] According to the Court many states have responded by changing their workers' compensation statutes to restrict prisoners' rights to receive disability benefits.[11]

The statutes restricting the right of incarcerated individuals to receive disability benefits reflect policy determinations, and the states' approaches have not been uniform. For example, Florida provides that no compensation shall be paid an inmate of a public institution unless that individual

> "has dependent upon him for support a person or persons

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8 *Enterprise v. Allstate*, 341 Md. 541, 552, 671 A.2d 509, 515 (1996); *Frye v. Frye*, 305 Md. 542, 567, 505 A.2d 826, 839 (1986).

9 *In re Spera*, 713 P.2d at 1158.

10 *Matter of Johner*, 643 P.2d 932, 934 (Wyo., 1982).

11 See, e.g., Fla. Stat. Ann. § 440.15(9) (West 1996); Mich. Comp. Laws Ann. § 418.361 (West 1996); Or. Rev. Stat. § 656.160 (1995).

> defined as dependents elsewhere in this chapter, whose dependency shall be determined as if the employee were deceased and to whom compensation would be paid in case of death; and such compensation as is due such employee shall be paid such dependents during the time he remains such inmate."[12]

In Arkansas, the statute provides that the spouse, and if no spouse, the inmate's minor dependent children, may petition the Commission for receipt of the inmate's workers' compensation disability benefits for the period of the worker's incarceration. If the inmate has no surviving spouse or minor dependent children, the State Department of Corrections may petition for receipt of the benefits as reimbursement for the cost of incarcerating the inmate.[13] In Oklahoma, the statute provides that workers' compensation benefits shall be placed into an inmate account, from which the State Board of Corrections may charge up to 50% of any deposits to cover costs of incarceration.[14] In Michigan, the statute provides that an employer is not liable for compensation during the period of time that the claimant "is unable to obtain or perform work because of imprisonment or commission of a Crime."[15] In Oregon, the statute provides that an incarcerated worker is ineligible to receive disability compensation during the period the worker is incarcerated for the commission of a crime.[16]

The Maryland Legislature has not addressed the issue of an inmate's rights to the receipt of temporary total disability benefits during a period of incarceration. The Legislature has spoken, however, with regard to a prisoner's rights to other workers' compensation benefits

12 Fla. Stat. Ann. § 440.15(9) (West 1996).

13 Ark. Code Ann. § 11-9-812 (Michie 1996).

14 Okla. Stat. Ann. tit. 57, § 549(B) (West 1996).

15 Mich. Comp. Laws Ann. § 418.361 (West 1996).

16 Or. Rev. Stat. § 656.160 (1995).

during periods of incarceration. See Maryland Annotated Code, Labor and Employment Article §9-735. Under this section, prisoners who suffer injuries arising out of and in the course of qualifying prison employment are not entitled to receive temporary disability benefits and are prohibited from receiving permanent disability benefits to which they may be entitled until after their release from prison.[17]

The Act specifically provides for only one circumstance whereby TTD benefits may be suspended - that is, where the claimant unreasonably refuses to submit to or obstructs reasonable medical examination of his or her injuries. §9-720 of the Labor and Employment Article provides that any employee entitled to receive compensation under this article is required, if requested by the Commission to submit himself for medical examination at a time and from time to time at a place reasonably convenient for the employee and as may be provided by the rules of the Commission. If the employee refuses to submit to any such examination, or obstructs the same, his right to compensation shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.

Because there is no statutory exception which eliminates benefits when a worker is jailed, the Court of Appeals has determined the benefits are due the worker even if his needs are fulfilled from another governmental source. The Court invited the legislature to change the statute to suspend temporary total disability payments during periods of incarceration. In the absence of legislation, the Court declined the employer/insurer's invitation to make that policy shift itself.

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17 It is interesting to note that §9-221(b) of the Labor and Employment Article excludes from coverage of the Maryland Workers' Compensation Act prisoners in Allegany County, Maryland who receive a stipend or other money paid into an account administered by a correctional institution. They are not paid a "wage," which is required for the prisoner to achieve "covered employee" status under the Act.

POINTS AND AUTHORITIES

Terry Dewain Briggs v. State: "Unauthorized Access" To A Computer System Defined

In November of 1994, the Scarborough Group, Inc., hired Terry Dewain Briggs as a computer programmer and system administrator.[1] Briggs managed Scarborough's entire computer system. Among his duties was placing passwords on files with sensitive information.[2] However, the two parties disputed the terms of Briggs' contract, and he resigned on July 24, 1995.

Soon after, Scarborough realized some of those sensitive files were secured with passwords known only to Briggs. Scarborough later contended the secured files had been moved to a subdirectory named "ha-ha he-he" two days before Briggs resigned. Scarborough ultimately filed civil suit against Briggs and contacted the police. Briggs was charged with Theft of computers[3] and Unauthorized Access to Computers.[4]

At trial, Briggs moved to dismiss the unauthorized access count. The trial court refused to dismiss the charge, rejecting Briggs' argument that, as an employee, he had authorization to enter the computer system.[5] The jury acquitted Briggs of theft but convicted him of unauthorized access and the trial judge placed him on probation. Briggs

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[1] *Terry Dewain Briggs v. State*, No. 24, Sept. 1997 Term, Court of Special Appeals (1/22/98).

[2] *Briggs*, slip opinion at 1.

[3] Md. Ann. Code of 1957, Art. 27, sec. 342(a)(1).

[4] Art. 27, sec. 146(c)(2).

[5] *Briggs*, slip opinion at 3.

appealed, and the Court of Appeals took certiorari on its own motion before consideration by the intermediate appellate court.[6]

The Court of Appeals reversed Briggs' conviction. The Court first reviewed the language of sec. 146(c),[7] and concluded three elements existed:

> "the State must prove: (1) that Briggs intentionally and willfully accessed a computer or computer system; (2) that the access was without authorization; and (3) the access was with the intent to interrupt the operation of the computer service."[8]

The Court then applied the tools of statutory construction to the term "without authorization."[9] The Court noted that "authorized" was not defined in the statute.[10] However, dictionary definitions[11] of "authorization" supported an interpretation of authorize as "to clothe with authority or legal power." The ordinary meaning of the word supported the view that the statute "makes no reference to authorized users who exceed their scope."[12]

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[6] *Id.*

[7] "(c) Illegal access. - (1) a person may not intentionally, willfully, and without authorization access...a computer...[or] (2)...intentionally, willfully and without authorization access...a computer...to...cause the malfunction...of a computer [or] (ii) alter, damage or destroy data..."

[8] *Briggs*, slip opinion at 6-7.

[9] *See, e.g., Whack v. State*, 338 Md. 665, 672 (1995)(first look at plain meaning to determine intent); *see, e.g., Gargliano v. State*, 334 Md. 428, 435 (1994)(words have ordinary and natural meaning).

[10] *Briggs*, slip opinion at 9.

[11] The Court used both Black's Law Dictionary (6th Ed.1990) and Webster's New International Dictionary, Unabridged (2d Ed.1950). *See Briggs*, slip opinion at 10.

[12] *Id.* at 11. The Court also cited the other jurisdictions that had explicitly included authorized users going beyond the scope of their authorization. See, e.g., 18 U.S.C. sec. 1030(a)(1), (2) & (4)(criminalizing "exceeding authorized access"). The Legislature could have followed these jurisdictions if it wished to. *Briggs*, slip opinion at 11.

The legislative history supported such an interpretation, since both the testimony in support of the original 1984 bill and the Senate Committee Report spoke in terms of "deter[ing] individuals from breaking into computer systems."[13] The 1989 amendments also were aimed at the evil of "hackers" entering the system from outside.[14] As such, the Legislature seemed concerned with access from outside the system, not otherwise authorized users exceeding the scope of their authorization.

The Court of Appeals in *Briggs* concluded that employees authorized to use a computer system can not be prosecuted for unauthorized activities in the system. As such, a gap exists in the present Maryland criminal computer law which should be addressed. Of course, the Court of Appeals recognized the problem but put "the ball" in the court where it belonged: "[i]f the law is to be broadened to include Briggs' conduct, it should be modified by the Legislature, not by this Court."[15]

Kaufman v. Motley: Changes in Custody by Protective Order

Appellant Geoffrey Kaufman, the father, and Appellee Dawn Motley, the mother, have two minor children in common. In February 1997, a consent order in the Circuit Court for Frederick County, Maryland was entered giving custody to the father.[16] About a month later, the mother filed a Petition for Protection from Domestic Violence.[17] After a hearing in the circuit court, the judge found that threatening, harassing and stalking

[13] *Id.* at 12-13 (quoting Committee Report System, Summary of Committee Report, House Bill 121).

[14] *Id.* at 14.

[15] *Id.* at 15.

[16] *Kaufman v. Motley*, 119 Md.App. 623, 625, 705 A.2d 330 (1998).

[17] Pursuant to Ann. Code of Md., Family Law sec. 4-506.

behavior had occurred. The trial court ordered the father to stay away from the mother's home and place of work, and also awarded custody of the minor children to the mother.[18] The father appealed, arguing that the order did not set a limit for its expiration and was thus invalid, and that the prior order precluded the court from switching custody without (1) a change in circumstances and (2) a finding about the best interests of the children.

The Court of Special Appeals affirmed the trial court, rejecting both arguments.[19] It indicated that while the trial court did not specify how long the order would be in place, it would lose its power by statute after two hundred days.[20] For the two hundred day period, however, the order was in force. There mere fact that the order did not set a time limit did not make it invalid *ab initio*.[21]

Turning to the custody issue, the Court agreed that the usual method of changing custody was (1) by showing a change in circumstances and (2) showing where the best interests of the children lay.[22] The Court, however, held that the provisions of Family Law 4-506 alone create a second method of altering custody. A court may issue a protective order if it finds clear and convincing evidence of the alleged abuse.[23] As part

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[18] *Id.* at 625-626.

[19] The unanimous opinion was by Judge Charles Moylan.

[20] *Id.* at 629. Since the order in question was issued, the statute has been amended to allow twelve month protective orders. Ann. Code of Md., Family Law Article sec. 4-506(g)(1). After another hearing and "good cause shown," this may be extended by another six months. Family Law Article sec. 4-507(a)(2) (1997 Supp).

[21] The Court distinguished *Zerhusen v. Zerhusen*, 73 Md.App. 386 (1988). There, the ex parte portion of the order was made fifteen days long even though the statute only provided for five days of relief. The *Zerhusen* Court concluded the extended time made the whole order ineffective. The *Kaufman* Court, however, felt *Zerhusen* was concerned with ex parte orders only.

[22] *Kaufman, supra* at 629.

[23] Ann. Code of Md., Family Law Article sec. 4-506(c)(ii) (1997 Supp).

of that protective order, the court may "award temporary custody of a minor child of the respondent [and petitioner]."[24] In the Court's view, that was all that was required to change custody by this mode. The Court emphasized, however, that such a change was temporary.[25]

What the Court of Special Appeals essentially did in *Kaufman v. Motley* was read out of the protective order system any requirement for the court to consider "the best interests of the child." The Court explicitly said such considerations are not part of a change of custody under 4-506(d). The vast body of case law developed concerning the best interest standard and change of circumstances is inapplicable to protective order proceedings. As a practical matter, District Court judges, who have no regular experience in custody matters and yet hear the majority of protective order cases, have been left with little or no legal guidance as how and when to award custody. In fact, it would appear the Court of Special Appeals would allow a change of custody by protective order even when it is *not* in the best interests of the child. By reading the well-settled "best interests" case law out of the protective order statute, the Court of Special Appeals has eliminated the sole guidance a trial court could turn to on the stormy seas of custody.

Green v. State: Pattern Jury Instructions Are Not Automatically Complete

Green was arrested in Sheila Marie McDougald's house in Baltimore City. McDougald testified she had awoken on the night in question to find Green, a former

[24] Family Law Article 4-506(d)(6).

[25] *Kaufman, supra* at 630-631. Of course, whether an eighteen month change of custody is "temporary" for a minor is questionable.

boyfriend, inside of her home and yelling at her because he believed she "had some man...in [her] bed..."[26] She admitted Green had lived with her a week before, but denied he had any property located in the home or that he had permission to enter.[27] A police investigation located a damaged window lock in the basement, where Green had apparently entered.

Green admitted he had entered through the basement, but testified he had been staying at the house for several days. He stated he went out for the evening drinking with some friends against McDougald's wishes.[28] He testified McDougald would not answer the door when he knocked, so he entered the basement to recover his tools which he needed to go to work the next day.[29] He further claimed that he regularly entered the house in this manner, McDougald was aware of it and she permitted it. Green was arrested after McDougald called the police and was charged with Fourth Degree Burglary.[30]

At trial, Green's attorney attempted to present to the jury a defense of "reasonable belief" that Green was entitled to enter the residence. Defense counsel sought an instruction advising the jury that "criminal intent" was an element of the offense which the State had to prove. The Court, after an extended colloquy with counsel, refused.[31]

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[26] *Green v. State*, 119 Md.App. 547, 550, 705 A.2d 13 (1998).

[27] *Id.*

[28] *Id.* at 551-552.

[29] *Id.* at 552.

[30] Md. Ann. Code of 1957, Art. 27, sec. 32(a)(1) (1996 Repl.Vol.).

[31] *Green, supra* at 552-553. The Court's position is interesting:

"[DEFENSE COUNSEL]: See, I don't know that the pattern - I was looking at an old pattern book I believe, but I don't know that that one goes into that there has to be a criminal intent. There does have to be a criminal intent. I have case law on it, *Warfield v. State* [315 Md. 474 (1989)]. I have the case.

Furthermore, the Court refused to allow defense counsel to argue Green's "reasonable belief" to the jury.[32] Green was convicted.

The Court of Special Appeals reversed. It reviewed the fourth degree burglary precedent and concluded that to be convicted, Green had to know "his entry was unwarranted, unlicensed, or unprivileged."[33] Green's testimony generated the issue for the jury and it was their function to determine whether or not he had a reasonable belief of a license to enter the property.[34]

The Court zeroed in on the source of the problem:

> "[w]e recognize the difficulty here resulted from the court's understandable desire to rely on the pattern instructions. We appreciate the court's interest in adhering strictly to the pattern jury instructions, which serve as a useful road map for trial judges. *Indeed, appellate courts have chastised trial judges for deviating from the model burden of proof instructions.* Nevertheless, the pattern instructions are not comparable to rules of evidence. *They serve as a valuable tool but... they cannot be followed without consideration of the particular circumstances of each case.*"[35]

Green is a minor victory for all attorneys who have struggled to vanquish the idea that the Maryland Pattern Jury Instructions are official pronouncements. Obviously, they

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THE COURT: I'm giving the pattern jury instruction.

[DEFENSE COUNSEL]: Does it say anything about necessary intent?

THE COURT: I'm giving the pattern jury instruction. Either it does or it doesn't...that's the instruction that I'm giving.

[DEFENSE COUNSEL]: Okay, but can I just tell you one thing? I do have a case, *Warfield v. State*, which specifically addresses this issue...of whether there is a criminal intent necessary.

THE COURT: This is an annotation that is part of the pattern jury instruction, but I'm giving the pattern jury instruction."

[32] *Id.* at 554-556. Defense counsel complained "[Y]ou've given me no defense." The Court responded "[I] don't agree with you." *Id.* at 555-556.

[33] *Id.* at 557.

[34] *Id.* at 561.

[35] *Id.* at 561-562 (emphasis added)(citations omitted).

are not products of the legislature nor are they judicial case law, adopted after argument and extensive reasoning. They are the product of a group of lawyers and judges who meet and try to reach a consensus about what the law states.[36] They must be viewed with some skepticism when a novel or unusual circumstance exists and can never take precedence over case law.

For trial judges, however, *Green* is yet another contradictory pronouncement from the appellate courts. They have been "chastised" for straying from the pattern instructions.[37] It has been "strongly recommend[ed]" that trial courts "closely adhere" to the pattern instructions.[38] There is an "appellate policy of general adherence to the Maryland Criminal Pattern Jury Instructions."[39] This constant bombardment from the appellate level makes the trial court's response to attempts to vary from the pattern instruction understandable: "I'm giving the pattern jury instruction." What trial courts sense as a safe harbor, however, is less so after *Green*. The message of *Wills, Merzbach, Rajnic* and *Green* is that trial courts shouldn't vary from the pattern jury instructions - unless they should.

Jackson v. State: Non-plea Agreements Not Automatically Enforceable

[36] *Wills v. State*, 329 Md. 370, 384, 620 A.2d 295 (1993). Admittedly, this group is fairly august. *See id* ("learned and experienced men and women"). The Standing Committee on Pattern Jury Instructions which assembled the 1997 Supplement to the criminal instructions included Professor Jose Felipe Anderson, the Honorable Judge Charles Moylan, Fred R. Joseph, Esq. and Professor Byron L. Warnken. The Civil Subcommittee which prepared the 1997 Supplement to the Third Edition of the civil instructions included the Honorable Judge Robert E. Cahill, Sr., and Western Maryland's own Gorman E. Getty, III, Esq.

[37] *Green, supra* at 562.

[38] *Merzbacher v. State*, 346 Md. 391, 404, 697 A.2d 432 (1997).

[39] *Rajnic v. State*, 106 Md.App. 286, 291 n.1, 664 A.2d 432 (1995)(*citing to Wills v. State*, 329 Md. 370, 620 A.2d 295 (1993)).

Jackson was charged with child sexual abuse and related offenses. At the motions hearing in his case held on March 14, 1997, Jackson sought access to the victim's Department of Social Services (DSS) records, and both parties agreed the court should review them *in camera* initially. However, there was a problem due to the immediate trial date of March 24; moreover, the *Hicks* date in the matter was April 28, 1997.[40]

While the trial court did not learn of the deal until later, the defense and prosecution had come to an agreement. There was certain physical evidence in the case, i.e., a stain on bedsheets where the alleged sexual intercourse had occurred, which the State had inexplicable not yet sent for DNA analysis;[41] they desired to have that opportunity. The State agreed, off the record, that if the DNA tests excluded the defendant the State would dismiss the charges.[42] In return, the defendant would agree to a continuance and waive his *Hicks* rights.[43] Under the agreement, at the March 14 motions hearing, Jackson waived his *Hicks* rights and the trial date was ultimately continued by Judge Gelfman at the March 14 hearing.

The sheet, rather predictably, returned from the lab with a definite result: the defendant was excluded as the source of the stain.[44] The State suddenly repudiated the

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[40] *Jackson v. State*, 120 Md.App. 113, 117, 706 A.2d 156 (1998). The *Hicks* date is the end of the mandatory 180 day period a criminal information or indictment can be tried on, absent good cause. *State v. Hicks*, 285 Md. 310, 403 A.2d 356 (1979). The sanction for not trying a defendant within that period, absent good cause, is dismissal. *Id.*

[41] Defense counsel at one point complained to the court about the State's delay: "[w]e have sought in every way we could to get them to do their work. In fact, this case was [first] continued back in January... precisely so the D.N.A. could in fact...be available." *Jackson, supra* at 123.

[42] *Jackson, supra* at 121.

[43] *Id.* at 123-124.

[44] *Id.* at 121 (state's attorney admitted "the results came back that the particular...sheet had excluded Mr. Jackson caused some concern with the State").

agreement and asked that the case be reset, although it would now be outside the *Hicks* limit. The defense complained of this about-face, but Judge Gelfman heard the matter again on April 25 and concluded that there was no *Hicks* problem because good cause had existed to continue the matter.[45]

The defense filed a motion to enforce the agreement and dismiss the charges, which was heard by a second trial judge on May 5. This judge found that an agreement had been validly entered into and consideration existed. However, he concluded no prejudice resulted to the Defendant and refused to dismiss the charges.[46] Jackson filed an interlocutory appeal.

The Court of Special Appeals first held the appeal to be valid,[47] and then turned to the agreement's enforceability. The Court concluded the agreement was not a plea agreement, and was not *automatically* enforceable. Looking at the nature of plea agreements, the Court found three differences between such agreements and the "miscellaneous agreement" the state and Jackson had entered into. First, plea agreements have as one purpose judicial efficiency and economy and as such occupy a favored place in jurisprudence.[48] The court felt, however, that a bargain calling for the waiver of *Hicks* rights worked *against* judicial expediency.[49] Second, plea agreements must be presented to and accepted by a trial court. As such, the court becomes a party to the agreement.[50]

[45] *Id.* at 125.

[46] *Id.* at 126-127.

[47] *Id.* at 129. The Court concluded the "collateral orders" doctrine authorized the appeal.

[48] *Jackson, supra* at 134-135.

[49] *Id.* at 135. The court did not mention, of course, that the State's end of the bargain, to dismiss charges if certain contingencies went against them, would certainly help judicial efficiency.

[50] *Id* (citing to Maryland Rule 4-243).

Here, of course, the court only learned of the agreement after it had been breached. Finally, a plea of guilty under an agreement waives a number of important constitutional rights, including the right to trial by jury and the right against self-incrimination. Thus, a breach of such an agreement by the State is an indirect violation of the defendant's constitutional rights.[51] In contrast, the *Hicks* right the defendant gave up was the product of "mere" legislation and court rules.

While not automatically enforceable, the agreement, calling as it did for an order of court postponing the trial date, did involve the trial court in some way. As such, the court did have the power to enforce it in its discretion.[52] In light of the lack of prejudice, however, the *Jackson* Court held that the trial court had not abused its discretion in refusing to dismiss the charges. A major reason to not dismiss the charges, in the Court's view, was that ample good cause existed to continue the original trial date.

Judge Gelfman, at the April 25 hearing, had stated that she *would have* found good cause on March 14 because of the necessity for her to review the DSS records. While case law holds an "after-the-fact" good cause determination invalid,[53] the *Jackson* Court ruled that Judge Gelfman's finding, while articulated after the *Hicks* date, was made (in her mind) before the *Hicks* date and was thus allowable.[54] In light of that, the equities did not weigh in favor of enforcing the agreement.[55]

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[51] *Jackson, supra* at 135.

[52] *Id.* at 136-137.

[53] *See, e.g., Franklin v. State*, 114 Md.App. 530, 691 A.2d 257, *cert. denied*, 346 Md. 241, 695 A.2d 1229 (1997).

[54] *Jackson, supra* at 139.

[55] While the State prevailed, the Court assessed costs against Howard County because it "viewed the State's breach of the agreement as having necessitated this appeal to begin with." *Id.* at 140, n.4. One wonders if

Jackson is a blow against ancillary deals between parties in criminal cases. Without judicially enforceable remedies, defense counsel cannot be advised to give up (non-constitutional) rights in return for possible future advantages. If the agreement does not work out, either through mistake, plan or simple error, *Jackson* demonstrates the hesitation that courts show in trying to punish one side or another for breaking an agreement.

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every defense attorney at the raw end of a deal is now forced to appeal so that *some* sanction can be levied against the State.

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Comparative Analysis of Jury Trial Prayers Allegany County, Maryland In 1997

by Nat Horsch*

INTRODUCTION

Ann. Code of Md., Courts & Jud. Proc., section 4-302 addresses the right of the accused to a trial by jury. The law states that, "unless the penalty for which the defendant is charged permits imprisonment for a period in excess of 90 days, a defendant is not entitled to a jury trial in a criminal case." Thus, if the penalty permits imprisonment for a period in excess of 90 days the defendant is entitled to a jury trial.[1]

This project examines the number of jury trial prayers from the District Court of Allegany County, Maryland. In each case the judge and defense attorney (if any) is noted. The number of jury trials prayed by each defense attorney and before each judge is then compared to the total number of cases tried by that judge/attorney which are eligible for jury trial. For the purpose of this project, cases eligible for jury trial will be defined as those cases carrying a penalty of 90 days or more.

PURPOSE

The purpose of this project is to: 1) Examine the number of jury trials demanded by the public defenders and certain private defense attorneys of Allegany County, Maryland; 2) examine the number of jury trials granted by the District Court judges of Allegany County, Maryland; 3)

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1 Multiple charges which each carry less than ninety days but add up to more *in toto* do not entitle one to a jury trial. *See Duckworth v. District Court*, 119 Md.App. 73 (1998); *but see* Rozas, *Aggregation of Penalties and Jury Trial Prayers in District Court*, 1 W.Md.L.J. 21 (1998)(advocating liberal jury trial allowances).

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examine the number of other dispositions in cases eligible for jury trials for each selected attorney and each judge; 4) determine the percentage of cases eligible for jury trials in which jury trials are actually demanded by each selected attorney; and 5) determine the percentage of other dispositions in cases eligible for jury trial for each selected defense attorney and judge.

METHODOLOGY

In order to gather the necessary data the District Court case files closed in 1997 were manually examined. Cases which were not eligible for jury trial were excluded, as were violations of probation. Serious and non-serious traffic cases were excluded. Finally, cases not within the original jurisdiction of the District Court were excluded.

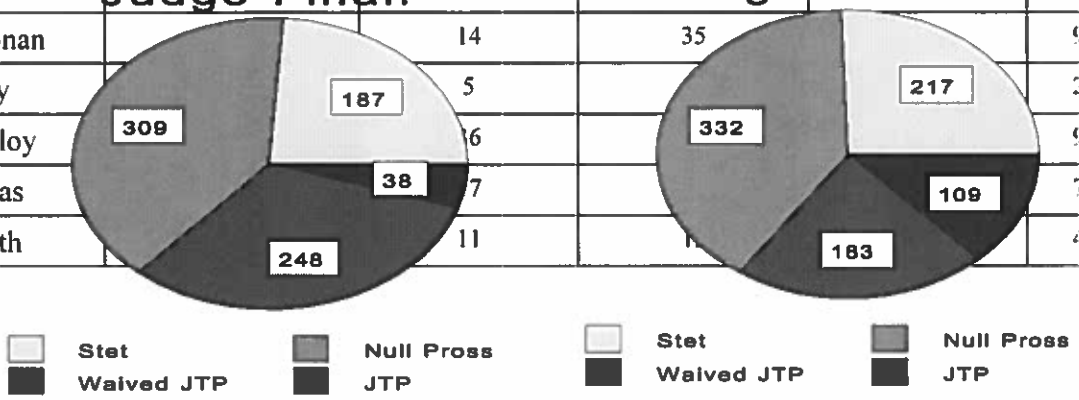
LIMITATIONS

The most obvious limitation of this study was the large amount of time required to manually search through the case files; the study was limited to cases closed in 1997. Secondly, this study was limited to the number of case files readily available. While these files must remain in the courthouse, they are often under review by probation officers and other court officials and may not have been available for this project. This project is a case study of jury trial prayers in the District Court of Allegany County, MD, for 1997 based on available case file review.

FINDINGS

Number and Type of Disposition by Defense Attorney

Attorney	Cases Placed on stet	Cases Nolle Prossed	Waived Jury Trial	Jury Trial Prayers	Total
Burkey	51	62	38	2	153
Malone	4	17	11	1	33
Stankan	10	27	19	4	60
Lane	3	5	5	6	19
Pannone	34	22	50	12	118
Friend	6	9			26
Nocnan		14	35		97
Shay		5			23
Malloy		6			94
Rozas		7			70
Smith		11			41

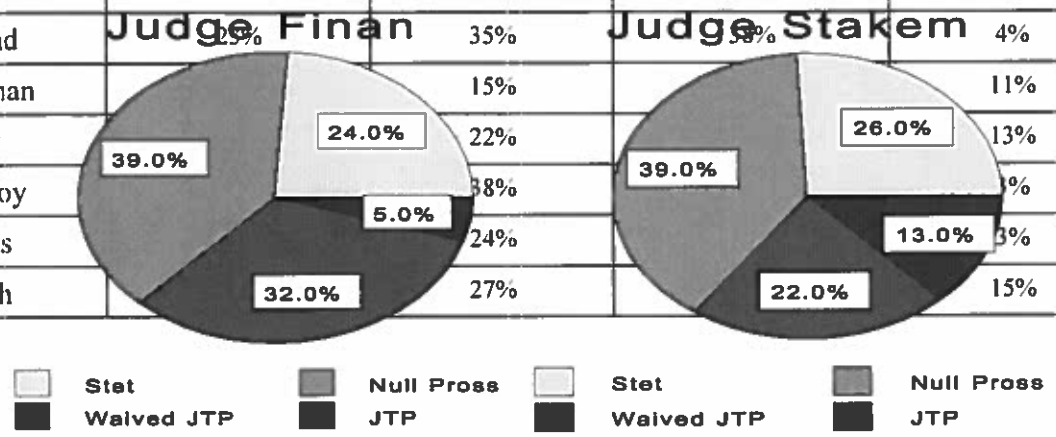


Number and Type of Disposition by Judge

Judge	Cases Placed on stet	Cases Nolle Prossed	Waived Jury Trial	Jury Trial Prayers	Total
Finan	187	309	248	38	782
Stakem	217	332	183	109	841

Percentage of Dispositions by Defense Attorney

Attorney	Cases Placed on Stet	Cases Null Prosed	Waived Jury Trial	Jury Trial Prayers
Burkey	33%	41%	25%	1%
Malone	12%	52%	33%	3%
Stankan	17%	45%	31%	7%
Lane	16%	26%	26%	32%
Pannone	29%	19%	42%	10%
Friend	25%	35%	58%	4%
Noonan		15%		11%
Shay		22%		13%
Malloy		38%		1%
Rosas		24%		3%
Smith		27%		15%



Percentage of Dispositions by Judge

Judge	Cases Placed on Stet	Cases Nolle Prossed	Waived Jury Trial	Jury Trial Prayers
Finan	24%	39%	32%	5%
Stakem	26%	39%	22%	13%

CONCLUSIONS

The data gathered shows two key areas of disparity. First is the disparity between the percentage of eligible cases where jury trials are prayed by public defenders versus private defense attorneys. Private attorneys prayed jury trials in 8.5% of eligible cases while public

defenders prayed jury trials in 5.3% of eligible cases. The disparity between eligible cases prayed to jury trial by public defenders and private attorneys is 3.2%. While there are clear advantages and disadvantages to praying jury trials in certain types of cases, it is possible that whether or not a jury trial is prayed depends on a defendant's counsel either public or private.

Second is the disparity between the percentage of eligible cases which are prayed to jury trial before the two primary judges in the District Court of Allegany County, Maryland. A jury trial was prayed before Judge Stakem in 13% of eligible cases while only 5% of eligible cases were prayed to jury trial before Judge Finan. The disparity between eligible cases prayed to jury trial before Judge Stakem and Judge Finan is 8%. While each case is individual and has unique circumstances, it is possible that whether or not a jury trial is prayed depends upon the judge presiding over the case in the District Court of Allegany County, Maryland.

It is important to remember that this project is a case study and only compiles data from those cases closed in 1997. With more time a more longitudinal study may have been conducted and subsequent results may differ from those indicated in this paper. Despite these facts, it is interesting to note the disparities mentioned above. It is clearly possible that one's legal counsel and one's judge can influence whether or not one's case is tried in the District Court or prayed to jury trial in the Circuit Court.

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THE LAW UNDER THE SWASTIKA:
Studies on Legal History in Nazi Germany
by Michael Stoolies
The University of Chicago Press, 1998

REVIEWED BY Raymond F. Weston*

INTRODUCTION

The Law Under The Swastika: Studies on Legal History in Nazi Germany has two stated purposes and an unstated one. First, it attempts to trace the development (or perhaps the disintegration) of law during the Nationalist Socialist era of approximately 1933 until the end of the European theatre of World War II conflict in 1945. Second, it attempts to examine the seeming oxymoron of "Justice within Injustice;" that is, islands of law or perhaps individuals who maintained some credible independence from, and normalcy despite, the Nazi regime. Finally, while Stolleis, the author, never directly confronts the issue or states it as his purpose, within the fabric of the text is the constant nagging question of how virtually the entire body of jurists and members of the bar, like German society in general, abandoned their moral compass and abdicated so easily to the Nazis.

EVOLUTION (OR DEVOLUTION) OF THE LAW UNDER THE NAZIS

In addition to other sociological problems immediately prior to the Nazi rise, the author points out that the German legal system in many ways was not fully developed. First, the constitutional fabric upon which it was based was not fully understood or supported by the

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German people or the bar. Since the Constitution was essentially imposed from without (as a result of the German defeat of WWI) many resented it and viewed it as a source of embarrassment, humiliation and loss of sovereign control. Second, for a culture to move from a Monarchy to a Presidential model republic with no transition or internal impetus was difficult. Third, the German legal system, unlike the common law traditions of the English speaking countries, followed a very codified and formalistic law format similar to France. Thus the bar was trained to slavishly apply the rules laid down in the codes and the judges exercised less latitude and independent decision-making than in a common law country.

The author points out that contrary to popular belief the Nazis were no great codifiers of the law. After their rise to power they, of necessity, had to adopt the Weimer Republic's law as their initial foundation. They were further handicapped by their somewhat anti-intellectual bent; the persecution and flight of many of their greatest jurists, who were either Jewish or simply retired to avoid moral and political strife, weakened the talent available. Furthermore, at least in the early years of the Regime the Nazis needed to placate and calm the bourgeois class. Towards this end the initial wave of Nazi law while horrifying was narrow in scope. For example in 1933 the Nazis passed a law entitled "Law to Restore the Professional Civil Service" and in 1935 passed a law against "Disproportionally High Numbers of Jews Attending High School." These "Affirmative Action" programs for the "Aryans" were marketed as a means of diversifying these institutions and ensuring equal representation of ethnic groups. Only later would the true intent and motive be revealed.

As the author explains, the Nazis attempted to affect changes in the law by three different methods. First, they actually passed new legislation. Many of these laws simply began to define

categories of individuals as "non-citizens" (less than human) and thus they were by definition not entitled to the protection due the rest of society. Additionally, by changing the procedural and jurisdictional underpinning of the law the Nazis could radically affect the outcome of a given case merely by granting the SS or Peoples Court jurisdiction rather than the "normal courts."

Second, by decreeing that all current laws must be interpreted and enforced in the spirit of Nazi idealism, the Nazis attempted to change all the laws in one fell swoop without actually rewriting them. This ironically allowed some of the braver and more independent jurists wide latitude in attempting to perform justice or at least blunt some Nazi injustice.

Third, the Nazis simply engaged in packing the courts with jurists who were sympathetic to or completely accepted the Nazi party line. This became a vicious cycle, however, which aggravated the problem of the flight of experienced jurists. As more and more Nazi's began sitting on the bench more and more moderates, or even those jurists secretly opposed to the Nazis, stepped down.

"JUSTICE WITHIN INJUSTICE"

In attempting to examine if and under what circumstances "justice" prevailed within the Nazi legal system the author first distinguishes two possible definitions of "justice." The first sees justice as normative or flowing from the natural rights of man. Even when a statute or code is faithfully followed and procedures observed the outcome is still unjust if the underlying law was unjust. The second definition is more formalistic and ritualistic. Did the judicial body faithfully follow and execute the law regardless of its substance?

I further believe two separate classes of individuals and two separate time periods must

be distinguished when examining whether "justice" occurred. As to classes of people, is the individual considered a "German Citizen" or has the individual been defined a "non-entity" (Jew, communist, Gypsy etc.)? Second, are we dealing with when the German State still had its internal stability or late in the war when it was crumbling?

Until near the end, most Germans still had a relatively predictable and ordinary legal system with regard to ordinary activities. Disputes still arose about property lines, individuals still got married (and sometimes divorced), and wills still had to be probated. Since most of these activities were largely apolitical and often highly technical, under normal circumstances their essential character went unchanged. However, even in these apparently benign categories if you were a "non-entity" your legal status was compromised or worse. For example, Jews and Gentiles were forbiden to inter-marry or even date lest the "Aryan" bloodline be tainted.

Even those fortunate enough to be considered German citizens found an increasingly hostile substantive legal environment. For example, in the area of social welfare as early as 1935 the German Labor Front explained: "Until now, excessive amounts of money from the funds of the social administration and general welfare work have been spent on people who were hopelessly sick and unquestionably inferior." This gave rise to infamous "euthanasia actions" and deportation to concentration camps for those who otherwise would be protected as German citizens. As time went on it became increasingly difficult for a German citizen to avoid falling into a "disfavored" class.

In the area of formalistic and procedural law the issue of justice verses injustice is perhaps a bit more difficult to resolve. As the author points out under procedural law and legal positivism it is even possible to speak of justice and injustice within a Nazi concentration camp.

For example, once the law is in place, if the identical procedure is utilized and the outcome is consistent then under a strict interpretation of positive law and procedural law that is "justice."

With regard to the state of affairs toward the end of the war, the author correctly concludes that once the government was no longer able to police or enforce its own laws one cannot properly analyze these actions from a principled legal perception. It becomes more of a sociological question.

The author further goes to some length to give examples of instances where individuals (at significant personal risk) attempted to moderate the Nazi legal tide. The author cites numerous decisions by the Prussian High Court which clearly went contrary to Nazi wishes. In one case concerning Gypsy persecution the Court decreed

> "[a]s German citizens, gypsies are not subject to any special law. While they are subject to the general obligations of the law, they are also under the protection of the laws. Of course the police are entitled to counteract the particular threats that arise from the peculiar habits of gypsies and their nomadic lifestyle. However, they cannot chase them from place to place."

Unfortunately, even a Prussian Court has no independent means to enforce its rulings. Furthermore, as the author points out, these overt efforts, while noble, were simply too infrequent and irresolute to have any lasting impact.

A final area of law to which the author dedicates an entire chapter is "Military Justice" during the Nazi reign. This seems fitting since by the war's end virtually every able bodied (and many unabled bodied) males were under military jurisdiction. To effectively evaluate the justice or injustice of military law under the Nazis one must realize that many of the professional soldiers held a certain ambivalence or even dislike towards the Nazis and resented the political interference in their judicial system. Furthermore, unlike German Constitutional law, German

military law had a long and well established history independent of the Nazis. The author's contention is that while some of the rulings of the military may seem harsh they are essentially just. He arrives at this conclusion by examining German military justice rulings in World War II with similar rulings made during World War I and even by the allies during World War II (especially the Russians). In this context the typical German soldier did not fare too badly when compared to their opponents. This is especially remarkable considering the increasing pressures the Nazi party and the turning of the military tide brought on the system.

MORAL WEAKNESS AND ABDICATION BY THE BAR

Finally, throughout the entire book the author obliquely asks the obvious but impossible question: how could the bar show so little leadership in resisting the Nazis and in many cases actually become Hitler's most effective and faithful servant? One answer, which is sociological instead of legal, is that whatever conditioning and attitudes had been instilled in the German population in general were also adopted by the bar. The mere fact that the bar may have been a little better educated would have no effect upon the societal substrate upon which individual norms and morals were based. A second, more legally oriented answer is that unlike the common law Toquevillean ideal of attorneys as moderators and buffers of the more extreme and temporary societal urges, members of the German bar were expected to be team players and follow and enforce societal trends and laws. Neither explanation is entirely probative, and neither justifies what occurred.

CONCLUSION

Quite frankly, except for members of the Bar who are specifically interested in esoteric and obscure comparative law topics this book is of little value or interest. As a legal treatise for practitioners in common law countries it suffers two major flaws, either of which would prove fatal. First, it is a temporally legal dead end. Normally when one studies past legal institutions it is because these institutions or cultures gave rise to or at least influenced the contemporary legal system. Thus when one studies Roman law it is because one can directly trace and view its tremendous effect on contemporary legal systems. Fortunately, with the Nazis' demise, their legal legacy was stillborn. Second, since Nazi law was more positive and Napoleonic in nature, its transferability to a common law tradition would have been limited in any event.

Furthermore, above and beyond its limited value as a legal treatise, this book is ultimately doomed as a analysis of the issues. The author simply attempts to address too many issues at once and as a result fails to adequately focus upon or explore any of the non-legal but socially relevant questions which any examination of the Nazi regime should ask.

REFERENCE CHART OF JUVENILE COURT PROVISIONS

1. A law enforcement officer may arrest an alleged delinquent "pursuant to the law of arrest" or if he believes the child has run away. C&J 3-814(a)(2) and (4).

2. Within 15 days of taking a child into custody, the officer must file a complaint with the intake officer of the Department of Juvenile Justice (DJJ). C&J 3-810(p)(1).

(a) to get dismissal for a violation, the child must show actual prejudice. C&J 3-810(q).

3. The officer has 120 days to file the complaint if the child is placed in a diversion program. C&J 3-810(p)(2).

4. If the intake officer seeks detention, a hearing must be held the next court day. C&J 3-815(d)(2).

5. The court may continue the detention hearing for good cause shown for no more than 8 days. Md.R. 11-112(a)(3).

6. A court may not order more than 30 days of detention *prior* to adjudication. C&J 3-815(4); Md.R. 11-112(b)(2) and 11-114(b)(2).

7. As part of an adjudicatory or waiver hearing, the court may order an additional 30 days detention. Md.R. 11-112(b)(2).

8. The Intake Officer takes a complaint and within 25 days must decide if judicial action on the complaint would be "in the best interests of the child or the public." C&J 3-810(c).

9. The intake officer may refuse to authorize a petition, pursue informal adjustment or authorize the State's Attorney to file a petition.

(a) A refusal may be appealed by various parties to the State's Attorney. C&J 3-810(h)(2).

(b) Informal adjustment must be consented to by the child, parents and victim. C&J 3-810(f)(2).

(c) If authorized, the State's Attorney must file the juvenile petition within 30 days, or seek an extension from the court. C&J 3-812(b). Dismissal is appropriate if deadline missed. *In Re James*, 286 Md. 702 (1980).

10. The adjudicatory hearing must be held within 60 days, or a good cause postponement must be sought from the county administrative judge. Md.R. 11-114(b)(1). Dismissal may or may not be the appropriate sanction. *In Re Keith W.*, 310 Md. 99 (1987).

11. If the child is in detention, the adjudicatory hearing must be held within 30 days. C&J 3-815(d)(7)(I).

12. Disposition must be within 30 days of adjudication, if the child is not in detention. Md.R. 11-115(a).

13. If the child remains in detention after adjudication, the disposition hearing must be within 14 days. C&J 3-815(d)(7)(ii).

14. DJJ must file a report every six months on every child committed to its custody. Md.R. 11-115(c)(3)(a).

15. Upon application of any party, DJJ or its own motion the court shall grant a hearing and consider a modification of commitment. Md.R. 11-115(c)(3)(a) & (b).

FIFTEEN THINGS TO REMEMBER IN
JUVENILE PETITIONS AND ADJUDICATIONS

1. A law enforcement officer may arrest an alleged delinquent "pursuant to the law of arrest" or if he believes the child has run away. C&J 3-814(a)(2) and (4).

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4. If the intake officer seeks detention, a hearing must be held the next court day. C&J 3-815(d)(2).

5. The court may continue the detention hearing for good cause shown for no more than 8 days. Md.R. 11-112(a)(3).

6. A court may not order more than 30 days detention *prior* to adjudication. C&J 8-315(4); Md.R. 11-112(b)(2) and 11-114(b)(2).

7. As part of an adjudicatory or waiver hearing, the court may order an additional 30 days detention. Md.R. 11-112(b)(2).

8. The Intake Officer takes a complaint and within 25 days must decide if judicial action on the complaint would be "in the best interests of the child or the public." C&J 3-810(c).

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