

**CRIMINAL DECISIONS AT A GLANCE:
COURT OF APPEALS/COURT OF SPECIAL APPEALS
January 1, 2006 - December 31, 2006**

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I. Pre-Trial Issues

A. Suppression Generally

1. *Matoumba v. State*, 390 Md. 544 (2006). Police officer was not required to be qualified as an expert witness under the Maryland Rules to testify at a suppression hearing concerning facts regarding reasonable articulable suspicion to justify a stop and frisk. *Ragland v. State*, 385 Md. 706, 870 A.2d 609 (2005) applies to trial proceedings, not suppression hearings. A trial court has broad discretion to decline to apply the rules of evidence in determinations of questions of fact preliminary to admissibility of evidence, except those relating to privilege and competency of experts.

B. Fourth Amendment

Stops/Frisks

1. *Blasi v. State*, 167 Md. App. 483 (2006). Required performance of a field sobriety test constitutes a search under the Fourth Amendment, but a police officer only needs “reasonable suspicion” of intoxication to administer the test, rather than probable cause.
2. *Byndloss v. State*, 391 Md. 462 (2006). Length of detention during lawful traffic stop was reasonable where police “diligently pursued” completion of license and warrant check. Fact that K-9 unit appeared and alerted to drugs 27 minutes after stop initiated was not unreasonable where license and warrant status

were still not confirmed due to computer malfunction, but officer continued to pursue the record information.

3. ***Swift v. State*, 393 Md. 139 (2006).** A subject was “seized” for Fourth Amendment purposes when an officer pulled his patrol car in front of the person walking down the street at 3:00 a.m., emerged from his patrol car, and asked for the subject’s ID. The officer then conducted a warrant check. The Court found that a warrant check by itself is not a seizure. It held, however, that a reasonable person in Swift’s position would not have felt free to leave and therefore the encounter was not “consensual.”
4. ***Daniels v. State*, 172 Md. App. 75 (2006).** West Virginia police had probable cause to stop the defendant’s van based upon information shared with the Frederick County police. Probable cause was based upon an informant known to police, working collectively.

Warrantless entries, searches & arrests

1. ***Cruz v. State*, 168 Md. App. 149 (2006).** A canine scan did not violate the Fourth Amendment when, during the course of an exterior scan of the vehicle, the dog instinctively jumped up on the vehicle without police command, stuck his head in an open window, and alerted to drugs. The canine scan did not constitute a search of the interior of the vehicle.
2. ***Gorman v. State*, 168 Md. App. 412 (2006).** Warrantless entry and search of premise was justified where police were on the premise for legitimate and uncontrived reasons, detected the odor of marijuana emanating from inside, and the occupants were aware that the police detected the contraband. There was sufficient exigency to justify the warrantless entry and search, since it was reasonable for the police to believe that the detected contraband would be destroyed in the time required to obtain a search warrant.
3. ***Volkomer v. State*, 168 Md. App. 470 (2006).** Warrantless

intrusion of defendant's home by Delaware probation officers was a lawful, routine "home visit," and the discovery and seizure of contraband observed by a Delaware State Trooper who was accompanying the probation officers was supported by probable cause under the plain view doctrine.

4. ***State v. Ofori*, 170 Md. App. 211 (2006).** The presence of heavy window tinting, a lot of air fresheners, and a license that did not match the driver provided sufficient "reasonable articulable suspicion" to the officer to justify delaying a traffic stop 17 extra minutes until a drug-sniffing dog could be called. Thus the search was proper even if the traffic stop was delayed to allow the dog to arrive.
5. ***Brown v. State*, 171 Md. App. 489 (2006).** There was probable cause to stop a vehicle that had run into the back of another vehicle even if the officer never charged the driver of the vehicle with anything related to the traffic accident.
6. ***Purnell v. State*, 171 Md. App. 582 (2006).** When the police arrest the driver of a vehicle, they have probable cause to search the pockets of a coat found in the vehicle which they know belongs to a passenger, not the driver.
7. ***Christian v. State*, 172 Md. App. 212 (2007).** There is no reasonable expectation of privacy in the space between the storm door and the solid door of a home. Accordingly, the police were not required to obtain a warrant before opening the screen door to seize a bag containing suspected drugs.

Search and arrest warrants

1. ***Brown v. State*, 168 Md. App. 400 (2006), *aff'd*, ___ Md. ___ (Feb. 7, 2007).** When police are in the process of executing a search warrant at a residence, they may detain a person who knocks on the door during the search. For safety reasons while executing a warrant, the police may immobilize people on the scene to assess the security risk. Although the individual may not be

automatically subject to a frisk or search simply for being at the scene, the person may be subject to a Terry frisk based on reasonable suspicion.

2. ***Greenstreet v. State*, 392 Md. 652 (2006).** The State may not present evidence of a typographical error to controvert the date in the affidavit. Although evidence existed that the year listed in the warrant affidavit was inaccurate, the reviewing court may not look beyond the four corners of the warrant document to infer that the date was a typographical error.
3. ***State v. Savage*, 170 Md. App. 149 (2006).** The “knock and announce” requirement only requires giving adequate notice to the person in control of the premises; an actual “knock” is not required. Moreover, the failure to provide adequate notice before executing the warrant does not render the evidence inadmissible; the exclusionary rule does not apply. (This case also has a long examination of the concept of “standing.”)
4. ***Myers v. State*, 395 Md. 261 (2006).** An outstanding arrest warrant discovered subsequent to an illegal traffic stop removes the taint of the improper seizure, and therefore evidence recovered pursuant to warrants sought after the suspect’s arrest on the outstanding warrant are admissible. (Case has detailed analysis of *Brown v. Illinois* three-part test for attenuation of taint.)
5. ***Johnson v. State*, 172 Md. App. 126 (2006).** A defendant does not have a right to inspect an earlier warrant for a different individual even if information obtained upon the execution of that warrant formed part of the basis for the warrant for the defendant. It was proper for the court to review the earlier warrant in camera and rule that there was nothing in it that would negate probable cause for the latter warrant, and moreover on the facts of this case, there was probable cause for the second warrant even without the information gathered in the first warrant. Discussion of cases holding that the *Brady* requirement to disclose potentially exculpatory evidence, applicable at trial, does not

apply in the context of an application for a search warrant.

6. *Daniels v. State*, 172 Md. App. 75 (2006). A West Virginia search warrant for a van suspected to be involved in a Frederick County murder was validly executed even when the Frederick County police conducted the physical search; the West Virginia police supervised the execution of the warrant and hence the Frederick County police were operating as agents of, or assistants to, the West Virginia police.

C. Fifth Amendment - Miranda/Voluntariness

1. *Perez v. State*, 168 Md. App. 248, 896 A.2d 380 (2006). Initial written statements provided by a murder suspect were admissible since made during a delay in presentment that was not solely for the purpose of interrogation. However, subsequent statements made during the lengthy detention were found to be involuntary and inadmissible due to two invalid waivers of the defendant's right to prompt presentment because the defendant was not adequately informed of his right.
2. *Griner v. State*, 168 Md. App. 714 (2006). No Miranda violation where defendant suspected of child abuse was not in custody when she spoke to police at the hospital, in her residence, and at the police station. Police statement to the defendant that he would talk to Child Protective Services about the information provided by the defendant was not an improper inducement and the defendant's statements were not involuntary.
3. *Ware v. State*, 170 Md. App. 1 (2006). Post-*Miranda*-warning silence to a non-question (a police officer commenting that he could be compassionate and understanding) is not an invocation of one's right to remain silent and was admissible; post-*Miranda*-warning silence to a question about the location of a murder weapon was an invocation of the right to remain silent to that question and was not admissible (but here was harmless error).
4. *Owens v. State*, 170 Md. App. 35 (2006). Two short interviews

conducted at the hospital where the defendant had gone with the child he was suspected of abusing were not “custodial interrogations,” and therefore no *Miranda* warning was required.

5. *Brown v. State*, 171 Md. App. 489 (2006). A suspect is not in custody when asked to perform field sobriety tests, and thus no *Miranda* warning is required.
6. *Rollins v. State*, 172 Md. App. 56 (2006). When a witness voluntarily gave a statement to the police at the scene of a crime, and again at the police station, only to change his story and inculcate himself when the police officer pointed out inconsistencies, there was no *Miranda* requirement up until the witness changed his story.

D. Fifth Amendment - Double Jeopardy

1. *Giddins v. State*, 393 Md. 1 (2006). Trial court’s granting of a motion for mistrial and subsequent admonition to the prosecutor that the prosecutor committed misconduct and could not retry the defendant, did not amount to an acquittal barring retrial because the court did not rule on the evidence before it.
2. *Hubbard & Earl v. State*, 395 Md. 73 (2006). Earl and Hubbard were tried jointly. An eyewitness against one of them (Earl) had been barred from testifying against the other (Hubbard) due to a faulty photo array. After the first witness was sworn, but before testimony was taken, the court declared a mistrial because it determined that the only fair way to proceed was to sever the trials. The Court ruled that, because there was a viable alternative to a mistrial (excluding the testimony of the eyewitness altogether), there was no “manifest necessity” for a mistrial and retrial of the two was barred by double jeopardy. (The Court acknowledged the harm done to the State by excluding the witness entirely, but noted that it was also the State’s decision to proceed with a joint prosecution knowing that the eyewitness’s testimony was probably inadmissible against one of the two).

E. Sixth Amendment

Right to Counsel

1. *Walker v. State*, 391 Md. 233 (2006). Defense counsel's unilateral strategy of non-participation in trial conducted in absentia was not presumed prejudicial to the defendant under *U.S. v. Cronin*, 466 U.S. 648 (1984), where defense counsel was present throughout the trial and undertook a defense of jury nullification.
2. *Catala v. State*, 168 Md. App. 438, *cert. denied*, 396 Md. 14 (2006). No actual conflict of interest that affected counsel's performance was found where defense counsel had accepted future employment with the prosecution and had earlier notified the defendant of that fact.
3. *Smith v. State*, 394 Md. 184 (2006). It is ineffective assistance of counsel to advise the court that one's client does not have grounds to assert his 5th Amendment right.
4. *Testerman v. State*, 170 Md. App. 324 (2006), *cert. granted*, ___ Md. ___ (March 15, 2007). It is ineffective assistance of counsel, reviewable upon direct appeal, to fail to articulate "with particularity" the grounds for a motion for judgment of acquittal when the facts alleged by the state do not constitute the crime charged.
5. *Blake v. State*, 395 Md. 213 (2006). There is no right to counsel for a petition for DNA testing under Md. Crim. Proc. Code Ann., §8-201.
6. *State v. Adams*, 171 Md. App. 668 (2006). In 1979 Adams was found guilty of rape, kidnapping, and armed robbery, among other things. He was sentenced to 22 concurrent life sentences for the rape and various sexual offenses, plus, for the robbery and kidnapping, a total of fifty years consecutive to the life sentences. His convictions were upheld on appeal. However, in

2005 he had some of the convictions set aside on post-conviction. The State appealed from that ruling. The Court of Special Appeals affirmed the granting of a new trial, holding that (a) the jury was improperly instructed that the court's instructions were merely advisory; (b) it was ineffective assistance of counsel to fail to object to an incorrect instruction confusing venue with jurisdiction; (c) it was ineffective assistance of counsel to fail to file a timely Motion to Modify Sentence; and (d) that Adams had not waived his right to challenge the jury instruction by not raising the claim on appeal in 1980, as the "new rule" barring advisory-only instructions did not exist until *Jenkins v. Hutchinson*, 221 F3d. 679 (2000)

7. *Evans v. State*, 396 Md. 256 (2006). *Strickland* is still the standard for judging ineffective assistance of counsel; neither *Wiggins v. Smith*, *Rompilla v. Beard*, nor *Miller-El v. Dretke* created a new rule.
8. *State v. Borchardt*, 396 Md. 586 (2006). Ineffective assistance of counsel can stem from inadequate investigation and preparation, but if that background work is done, a reasonable tactical decision not to present certain evidence, or to limit its use at trial, is granted great deference.

Right to Confrontation

1. *Rollins v. State*, 172 Md. 1 (2006). Admission of autopsy report that contained only routine and objectively ascertainable findings of fact regarding post-mortem examination of victim did not present a confrontation problem where testimonial material such as opinions, speculation, and conclusions were redacted from report. Redacted report was properly admitted under the business records or public records exceptions to the hearsay rule. Opinion testimony of an expert medical examiner, who did not prepare the report, as to manner of death based on reliance upon medical examiner's files, was not improper.
2. *Griner v. State*, 168 Md. App.714 (2006). Out-of-court statements

by child abuse victim to a treating nurse were not testimonial because they were made, not to develop testimony for trial, but for the purpose of medical diagnosis and treatment.

3. *Head v. State*, 171 Md. App. 642 (2006). A statement that was both a dying declaration and an excited utterance, made to a police officer responding to the scene of a shooting, was not “testimonial” under *Crawford v. Washington*, 124 S.Ct. 1354 (2004) and *Davis v. Washington*, 126 S.Ct. 2266 (2006) and therefore was admissible hearsay.

F. Identification

1. *Jones v. State*, 395 Md. 97 (2006). When challenging a photo array, defendant can call the detective who put it together to question whether the array was impermissibly suggestive.

G. Jurisdiction

H. Venue

I. Speedy Trial/Hicks/Detainer

1. *Jules v. State*, 171 Md. App. 458 (2006). Jules waived *Hicks* and postponed the trial to accommodate defense counsels’ vacation. After *Hicks* had run, the State nol prossed a flawed indictment and recharged with a corrected indictment two weeks later. The reindictment was held not to violate *Hicks* because the dismissal occurred after *Hicks* had run and therefore could not have been done to circumvent *Hicks*. Trial on the corrected indictment was 16 months after Jules was initially charged. However, there was no speedy trial violation because while the delay was largely weighted against the State, the defendant was not strident in his speedy trial demands and demonstrated no actual prejudice as a result of the delay.

J. Voir Dire/Jury Selection

1. ***Curtin v. State*, 393 Md. 593 (2006).** Prospective jurors in an armed robbery case need not be asked if they have any strong feelings concerning the use of handguns. Distinguished ***Baker v. State*, 157 Md. App. 600 (2004)**, because here there was no issue concerning the propriety of handgun use as such, and thus jurors would have no reason to think about handgun use.
2. ***Williams v. State*, 394 Md. 98 (2006).** If a juror does not divulge information requested on voir dire and the court cannot or does not conduct additional voir dire to determine if the nondisclosure was inadvertent (and prejudicial), a new trial should be ordered.
3. ***State v. Logan*, 394 Md. 378 (2006).** There is no mandatory voir dire concerning possible defenses; here, specifically, there was no requirement that the panel be asked about feelings toward the defense of not criminally responsible. It is not an abuse of discretion for the court to refuse to rewrite vague and improper voir dire questions, nor is not an abuse of discretion to refuse to ask questions about the content of media reports prospective jurors have seen concerning the case.
4. ***Singfield v. State*, 172 Md. App. 168 (2006).** It is error to fail to ask a voir dire question concerning handgun use when the court's initial description of the crime to the jury did not mention a handgun, and when the defense argued imperfect self-defense in addition to actual innocence.

K. Charging Documents

1. ***Stoddard v. State*, 395 Md. 653 (2006).** A single indictment charging multiple crimes on multiple dates does not render the various crimes a "single unit" for purposes of the expungement statute.

L. Discovery/Constitutional Duty to Disclose

1. ***State v. Williams*, 392 Md. 194 (2006).** Maryland Rule 4-263(g), which implements the ***Brady v. Maryland*, 373 U.S. 83 (1963)**, requirement for the State to provide exculpatory evidence to the defense, extends beyond any information held by individuals working in or with the State's Attorney's office on a particular criminal case, to also include any exculpatory information known

to any Assistant State's Attorney in that jurisdiction. The State had an obligation to disclose fact that a homicide witness was previously a narcotics informant for the State, despite the fact that the homicide detectives and prosecutors were not aware of the witness's history.

2. *Thomas v. State*, 168 Md. App. 682, *cert. granted*, 394 Md. 479 (2006). No discovery violation where the prosecutor informed defense counsel about the defendant's statement to an FBI agent on the same day he learned about it, which was a week before trial. The State did not intend to use the statement before its discovery and the time requirements for discovery only apply to evidence from individuals who, unlike the FBI agent, have already reported to the State's Attorney.
3. *Johnson v. State*, 172 Md. App. 126 (2006). A defendant does not have a right to inspect an earlier warrant for a different individual even if information obtained upon the execution of that warrant formed part of the basis for the warrant for the defendant. It was proper for the court to review the earlier warrant in camera and rule that there was nothing in it that would negate probable cause for the latter warrant, and moreover on the facts of this case, there was probable cause for the second warrant even without the information gathered in the first warrant. Discussion of cases holding that the *Brady* requirement to disclose potentially exculpatory evidence, applicable at trial, does not apply in the context of an application for a search warrant.

M. Recusal

N. Plea-Bargaining

1. *State v. Pitt*, 390 Md. 697 (2006). Defendant's statements obtained pursuant to plea agreement that provides for the admissibility of the statements if the defendant breaches agreement are inadmissible if the State repudiates the plea agreement.

O. Severance & Joinder

P. Other Pretrial Challenges

1. *Daniels v. State*, 172 Md. App. 75 (2006). The Maryland rule on prompt presentment does not apply when arraignment is held outside the State of Maryland, unless there is evidence that the Maryland authorities colluded with the foreign jurisdiction to delay presentment.

II. Trial Issues

A. Course & Conduct of Trial

1. *McIntyre v. State*, 168 Md. App. 504 (2006). No error in denying motion for mistrial in child pornography case based on police officer's reference to the defendant having "previously gotten . . . into trouble for downloading child pornography," after the court gave a timely and accurate curative instruction and after the jury was already aware that the defendant had admitted to electronically receiving and sending several images of child pornography.
2. *Kelly v. State*, 392 Md. 511 (2006). Trial court erred in requiring the defense to proffer the questions the defense was going to ask its witnesses and prohibiting the defense from calling those witnesses because the court found that, based on the proffer, their testimony would not be relevant. The trial court departed from its role as an impartial arbiter and should have let the State object to testimony offered by defense witnesses.
3. *Kang v. State*, 393 Md. 97 (2006). There is no "bright line rule" requiring that an interpreter give a word-for-word translation in all cases; here the Defendant indicated that his command of English was good enough that he understood most of what was going on without translation.
4. *Smith v. State*, 394 Md. 184 (2006). A direct contempt proceeding

is not “summary” under Md. Rule 15-203 if sanctions are imposed after a separately docketed proceeding wherein the alleged contemnor was questioned by the judge and his attorney allowed to present argument in mitigation. Therefore, the proceeding must be conducted pursuant to Md. Rule 15-204.

5. *Hurst v. State*, 171 Md. App. 223 (2006). Not error to deny a defendant’s request for postponement on the grounds that he was dissatisfied with his attorney, when his attorney stated he was prepared for trial and when defendant did not undertake any steps to hire alternate counsel.

B. Representation by Counsel/ Waiver

1. *Catala v. State*, 168 Md. App. 438, *cert. denied*, 396 Md. 14 (2006). Trial court erred in not permitting the defendant an adequate opportunity to explain the reasons for his appearance at sentencing without an attorney, after indicating to the court following the verdict that he intended to obtain new representation for sentencing.
2. *Broadwater v. State*, 171 Md. App. 297 (2006) (*cert. granted*, 396 Md. 524 (2006)). A defendant is properly advised of her right to counsel pursuant to Md. Rule 4-215 if the required notifications are given collectively over several proceedings; they need not all be given at the same proceeding.

C. Jury Issues

1. *Abeokuto v. State*, 391 Md. 289 (2006). Plurality opinion found that waiver of jury sentencing was not knowing and voluntary because the trial court failed to inquire about potential effects of Abeokuto’s anti-psychotic medication and its impact on his sentencing waiver. Although similar inquiry was not required for trial jury waiver that occurred immediately following the competency hearing, inquiry was required for sentencing given the lapse of time between trial and sentencing.

2. ***Kang v. State*, 393 Md. 97 (2006).** Waiver of jury trial is valid even if court makes no specific inquiry into voluntariness of waiver, if there is nothing in the record to indicate that the waiver might not have been voluntary.
3. ***Owens v. State*, 170 Md. App. 35 (2006), cert. granted, 396 Md. 12 (2006).** The requirement that jurors be U.S. citizens is statutory, not constitutional, and any objection regarding a non-citizen juror was waived when there was no voir dire question about citizenship status. Moreover, the presence of a non-citizen on the jury does not automatically entitle defendant to a new trial; at least where the error was inadvertent, the defendant would have to show actual bias.
4. ***Powell/Zylanz v. State*, 394 Md. 632 (2006).** There is no requirement that a judge explicitly state on the record that he/she finds a knowing and voluntary waiver of the jury trial right; such a finding may be implied by the record. There is no requirement that the judge specifically ask the defendant if his decision was coerced unless there is some factual trigger in the record which might call his voluntariness into doubt.
5. ***Baby v. State*, 171 Md. App. 329 (2006).** It was not an abuse of discretion to retain an alternate juror who read potentially prejudicial news coverage of the trial, when that juror assured the court he did not disclose the contents of the article to anyone and was not among the jurors who deliberated on the verdict.
6. ***Christian v. State*, 172 Md. App. 212 (2007).** There is no specific litany that must be followed for a valid jury trial waiver.

D. Witnesses/Impeachment/Privilege

1. ***Simmons v. State*, 392 Md. 279 (2006).** Trial court did not err in refusing defense attempt to establish that the defendant's wife had, prior to trial, asserted her Fifth Amendment rights because the defendant did not call his wife as a witness to assert the privilege in front of the jury.

2. ***Bryant v. State*, 393 Md. 196 (2006).** Expert testimony that the defendant had an “impulse control disorder” was properly excluded when there was no factual foundation establishing that the defendant was acting on impulse during this particular event. Also, statement given to a detention center nurse during an intake health screening is not protected by psychologist-patient privilege. A screening is not for the purpose of diagnosis or treatment. Moreover, the person doing the screening does not qualify as a treating psychiatrist or psychologist, or as someone who is acting in concert with a treatment provider.

3. ***Smith v. State*, 394 Md. 1884 (2006).** An attorney asked by the court to advise a witness on his Fifth Amendment right not to testify may not disclose to the court whether the witness has a valid right to invoke the Fifth Amendment, nor may the lawyer disclose to the court what his advice was to the witness. The trial judge must conduct an independent inquiry, out of the presence of the jury, as to each and every question for which the witness asserts a Fifth Amendment privilege and make a determination if the privilege applies.

4. ***Baby v. State*, 171 Md. App. 329 (2006).** The trial court may allow expert testimony on “rape trauma syndrome” to help explain seemingly inconsistent behavior on the part of the victim.
5. ***Rollins v. State*, 172 Md. App. 56 (2006).** State was entitled to cross-examine defendant about testimony he gave at the unrelated trial of a different defendant, when that testimony was inconsistent with the testimony he gave in his own case and where the defendant was warned by the court in the earlier case that his testimony could be used against him in his own case.

E. Evidence

1. ***Thompson v. State*, 167 Md. App. 513 (2006).** Trial court erred in granting State’s motion to exclude DNA evidence when the motion was not made until almost the close of the State’s case. State’s untimely motion to exclude DNA evidence prevented defendant from requesting a continuance that the trial court would be able to grant.
2. ***Fields v. State*, 168 Md. App. 22, *aff’d on other grounds*, 395 Md. 758 (2006).** Evidence of defendant’s name on a monitor screen in a bowling alley was admissible as “non-assertive circumstantial crime scene evidence.” Evidence was “not an implied assertion of the factual proposition that the [defendant] was present at the bowling alley,” but was “circumstantial evidence that could be probative of that fact.”
3. ***Fullbright v. State*, 168 Md. App. 168 (2006).** Police officer’s testimony that it is difficult to recover good latent fingerprints from a bloody knife was not opinion evidence, pursuant to ***Ragland v. State*, 385 Md. 706, 870 A.2d 609 (2005)**, but instead was an explanation for the police officer’s conduct (not submitting the knife for fingerprinting). Unlike ***Ragland***, the officer’s opinion was not introduced to prove an essential element of the underlying offense, but was introduced simply to counter a defense argument that there had been an adequate police investigation.

4. ***Simmons v. State*, 392 Md. 279 (2006)**. Trial court properly exercised its discretion in preventing the defendant from questioning a medical expert about whether his wife's asserted Fifth Amendment right not to testify would alter his opinion as to the cause and timing of their child's injuries.

5. ***Clemons v. State*, 392 Md. 339 (2006).** Conclusory aspects of comparative bullet lead analysis (“CBLA”) are not generally accepted by the scientific community, and therefore are inadmissible under the standard established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and adopted in Maryland in *Reed v. State*, 283 Md. 374 (1978). Under *Frye-Reed*, evidence emanating from a novel scientific process is inadmissible absent a finding that the process is generally accepted by the relevant scientific community.
6. ***Thomas v. State*, 168 Md. App. 682, cert. granted, 394 Md. 479 (2006).** Trial court properly admitted evidence that the defendant resisted providing a blood sample required by a warrant. Evidence was sufficient to support an inference of “consciousness of guilt” and that the defendant was attempting to conceal evidence gathered as part of a murder investigation.
7. ***Griner v. State*, 168 Md. App. 714 (2006).** Out-of-court statements by child abuse victim to a treating nurse were properly admissible as a hearsay exception for the purpose of a medical diagnosis or treatment under Maryland Rule 5-803(b)(4).
8. ***Ware v. State*, 170 Md. App. 1 (2006).** Post-*Miranda*-warning silence to a non-question (a police officer commenting that he could be compassionate and understanding) is not an invocation of one’s right to remain silent and was admissible; post-*Miranda*-warning silence to a question about the location of a murder weapon was an invocation of the right to remain silent to that question and was not admissible (but here was harmless error).
9. *Wisneski v. State*, 169 Md. App. 527 (2006). Court did not err in allowing State to reopen case, after close of all evidence, to introduce a stipulation to prior convictions.
10. *Rivers v. State*, 393 Md. 569 (2006). The State can establish that a substance is a non-CDS under Md. Code Ann., Crim. Law §5-617 by “process of elimination.” An expert testified that, based upon the substance’s appearance, the only CDS it could be was crack cocaine, and the substance tested negative for cocaine upon chemical analysis. This was sufficient to establish that the

substance was a non-CDS. A visual inspection is a valid part of the process of elimination, even if it is insufficient, by itself, to serve as the sole means of identification.

11. *Hurst v. State*, 171 Md. App. 223 (2006). The State may present rebuttal evidence that the defendant had committed a similar crime in a similar manner 21 years earlier; the specific facts need not be so unique as to constitute a “signature” crime.
12. *Brown v. State*, 171 Md. App. 489 (2006). The statute allowing chemical analysis as “prima facie evidence” in DWI/DUI cases does not create mandatory presumptions and hence does not violate the Due Process clause.
13. *Rollins v. State*, 172 Md. App. 56 (2006). If defendant opens the door to prior bad acts evidence with his direct testimony, the State may elicit that evidence on cross-examination.

F. Demonstrations

G. Instructions

1. ***Janey v. State*, 166 Md. App. 645 (2006). No abuse of discretion in denying a requested instruction on the possible vagaries of cross-racial identification where: (1) the witness making the identification was not critical to the case; (2) other evidence corroborated the witness’s identification; and (3) the witness testified to personal difficulty with cross-race identification and thus placed the issue before the jury.**
2. ***Butler v. State*, 392 Md. 169 (2006). Trial court inappropriately commented on jury note. During deliberations, the jury sent a note to the court stating: “We have one juror who does not trust the police no matter the circumstance.” The trial court responded by telling the jury that “Anybody who had felt that way should have said so in voir dire so a challenge could have occurred, and if anybody deliberates with that spirit now, I suggest they might be violating their oath.” The trial court instead should have conducted an inquiry into the jury’s allegation or instructed the jury that the verdict must be unanimous.**
3. ***Thompson v. State*, 393 Md. 291 (2006). A flight instruction is still**

proper in Maryland, but the court must find that “four inferences reasonably may be drawn” from the evidence: (1) that the behavior of the defendant suggests flight, (2) that the flight suggests a consciousness of guilt, (3) that the guilt is related to the crime charged or a closely related crime; and (4) that the consciousness of guilt suggests actual guilt. In the instant case, the jury was not informed of facts which gave rise to a strong inference that Thompson’s “consciousness of guilt” arose from the 86 vials of crack cocaine he was carrying, and not the robbery with which he was charged. Thompson was forced to chose between presenting highly prejudicial and irrelevant information to the jury or being unable to present an alternative inference that the jury could draw regarding his motivation for fleeing the police. Therefore the third prong of the test was not met, and the flight instruction was improperly given

4. ***State v. Brady*, 393 Md. 502 (2006).** It is plain error to instruct a jury that the doctrine of transferred intent applies to the charge of attempted murder.
5. ***Garrett v. State*, 394 Md. 217 (2006).** It is an abuse of discretion to refuse to exercise plain error review when an instruction on transferred intent is given to a charge of attempted murder.
6. ***Ruffin v. State*, 394 Md. 355 (2006).** Trial courts shall use the pattern instruction on presumption of innocence and reasonable doubt in every criminal case. “Deviations in substance will not be tolerated.”
7. ***State v. Adams*, 171 Md. App. 668 (2006).** Defendant is entitled to post-conviction relief where court gave “advisory only” instructions to jury.

H. Opening/Closing Arguments

1. ***Juliano v. State*, 166 Md. App. 531, 890 A.2d 847 (2006).** Prosecutor’s reference to the defendant as a “thief” was not reversible error where the comment did not mislead jurors and

was made in response to defense counsel's closing argument that if employees of business victimized by theft were "stupid" about the way they conducted business, they "get what [they] deserve."

2. *Rollins v. State*, 172 Md. App. 56 (2006). No reversal required when State's rebuttal argument mischaracterized Defendant's argument, when jurors are properly advised that argument is not evidence.

I. Verdict

- 1.

III. Post-Trial Procedures

A. Sentencing/Enhanced Penalties/Merger

1. *Juliano v. State*, 166 Md. App. 531, 890 A.2d 847 (2006). Although the statutory presumption that a victim has a right to restitution under § 807(a)(2) of the Criminal Procedure Article does not violate due process, a victim's entitlement to restitution and the amount of the restitution award are facts that must be proven by the preponderance of the evidence. A prosecutor's representation of the amount of a loss is not competent evidence of the loss, particularly if the amount differs from the amount of loss proven in the theft trial.
2. *Harris v. State*, 169 Md. App. 98, *cert. denied*, 394 Md. 481 (2006). Mandatory 25-year sentence as a third-time offender was illegally imposed on defendant because his prior drug conspiracy conviction and sentence did not qualify him for the enhanced penalty. Although his drug conspiracy sentence was in excess of 180 days, the qualifying drug offenses for the enhanced penalties under Section 5-608(c)(1)(i) of the Criminal Law Article do not extend to conspiracy.
3. *State v. Wilkins*, 393 Md. 269 (2006). A sentencing judge's failure

to acknowledge that he or she had the right to suspend some part of a life sentence does not render the life sentence illegal if it was within the statutory maximum.

4. ***Wyatt v. State***, 169 Md. App. 394 (2006). A “qualifying crime” for a conviction for possessing a firearm after having been convicted of a misdemeanor carrying a penalty of more than two years includes any misdemeanor where the maximum penalty is more than two years, even if the court can sentence the defendant to less.
5. ***Cathcart v. State***, 169 Md. App. 379 (2006), *rev’d on other grounds*, ___ Md. ___ (Feb. 12, 2007). When reviewing a sentence for “proportionality” under an Eighth Amendment challenge, court looks at time to be served, not at the time suspended.
6. ***Pollard v. State***, 394 Md. 40 (2006). If a sentence is allowed by statute, it is not an “illegal” sentence, even if the judge did not acknowledge that he had the right to suspend some portion of the sentence.
7. ***Blickenstaff v. State***, 393 Md. 680 (2006). Consecutive sentences for unrelated convictions totaling more than 18 months can be served at local detention facilities.
8. ***Ware v. State***, 170 Md. App. 1 (2006). When sentencing in a case where death or LWOP is requested, there is no requirement that a PSI be updated when a case is remanded for resentencing.
9. ***Testerman v. State***, 170 Md. App. 324 (2006), *cert. granted*, ___ Md. ___ (March 15, 2007). In a sentencing proceeding, the State may introduce the Subsequent Offender Notices to prove a defendant’s prior qualifying offenses, at least when the Defendant does not challenge their accuracy.
10. ***Reiger v. State***, 170 Md. App. 693 (2006). A claim that the trial court relied upon “improper considerations” is waived if no objection is made at the time of sentencing. Moreover, when

imposing a legal sentence, the court may take parole eligibility dates into consideration.

11. ***Haskins v. State*, 171 Md. App. 182 (2006).** Haskins committed a new crime while on parole. His parole was revoked and the remainder of his paroled sentence was reimposed. Then he was sentenced to consecutive time on the new crime. Due to a successful collateral action, his first sentence was later vacated. He filed a motion to correct an illegal sentence seeking, and eventually winning before the CSA, credit for the time served after his parole was revoked, to be applied against the sentence for the new charge. He then filed a new motion to correct illegal sentence, claimed that on the second set of charges he should be given credit for time served on the original sentence before he was released on parole.

(a) Since the second sentence was not an illegal sentence, his claim was not properly before the trial court as a “Motion to Correct Illegal Sentence.”

(b) Time spent out on parole constitutes a release from physical custody, such that the inmate is not entitled to credit for the time served prior to parole under Md. Code Ann., Crim. Pro. §6-218(d).

B. Probation & Parole

1. ***Haskins v. State*, 171 Md. App. 182 (2006).** Parole constitutes a break in custody for purposes of calculating time served under Md. Code Ann., Crim. Pro. §6-218(d).

C. Motion for a New Trial/ Review/Modification of Sentence

1. ***Mack v. State*, 166 Md. App. 670, 891 A.2d 369 (2006).** Pre-existing mental condition known to defendant years before offense and trial is not newly discovered evidence when the defendant fails to exercise due diligence by not reporting command hallucinations to defense counsel until sentencing.

D. Post Conviction

1. ***Obomighie v. State*, 170 Md. App. 708 (2006).** The circuit court does not have jurisdiction to hear post-conviction challenges under the Uniform Postconviction Act after the petitioner’s probation period ends.
2. ***Haskins v. State*, 171 Md. App. 182 (2006).** The law of the case doctrine can bar claims that a sentence was illegal when the claim was or could have been raised on an earlier appeal.
3. ***Evans v. State*, 396 Md. 256 (2006).** The right to reopen a postconviction proceeding is at the court’s discretion and is not tantamount to the right to file a second postconviction action.

E. Coram Nobis & Common Law Remedies

F. DNA “Actual Innocence” Post-Conviction

1. *Blake v. State*, 395 Md. 213 (2006). When a defendant seeks testing of DNA evidence under Md. Crim. Pro. Code Ann., §8-201, the defendant has certain due process rights. “At minimum” the defendant is entitled to a chance to respond to the State’s averment that the evidence no longer exists, the burden is on the State to prove that the evidence no longer exists, and the motions court must make some findings of fact and “set forth the underlying reasons when it dismisses a petition for testing.” However, there is no right to counsel when seeking DNA testing.
2. *Thompson v. State*, 395 Md. 240 (2006). On a request for DNA testing under Md. Crim. Proc. Code Ann., §8-201, the trial court cannot require that the State retain a portion of the samples for future testing unless it is “scientifically feasible” to do so. Similarly, the court could not bar the defendant from using the test results in future proceedings if sufficient samples for future testing are not preserved.

IV. Substantive Criminal Law

A. Offenses

1. ***Schlamp v. State*, 390 Md. 724 (2006).** Evidence of repeated instigation of fights throughout a single evening was insufficient to support conviction for common law riot (“three or more persons unlawfully assembled to carry out a common purpose in such a violent or turbulent manner as to terrify others”). “Unlawful assembly” element missing where fights were not group-initiated and were repeatedly diffused.
2. ***Maxwell v. State*, 168 Md. App. 1 (2006).** (1) Court rejected defendant’s argument that a person may not be convicted of attempt of a strict liability offense (in this case, age-based second degree rape where mistake of age is not a defense). The intent required for attempt was to commit the substantive offense, and the defendant was charged, not with common law attempt, but with a violation of statutory attempted second degree rape. (2) Substantial step toward completing rape was taken when the defendant picked up victim, drove to parking lot, defendant and victim exposed their genitals, and defendant pulled out a condom.
3. ***McIntyre v. State*, 168 Md. App. 504 (2006).** Evidence was sufficient to support defendant’s conviction for knowingly possessing child pornography that was discovered on two computer discs seized from the kitchen of a trailer the defendant shared with his family. Factors the jury could use to establish that the defendant was the one possessing the child pornography included his admission that he had previously sent child pornography over the internet and the presence of the defendant’s personal belongings in the kitchen area. Argument that the evidence was insufficient to establish that the images depicted actual children as opposed to virtual images, was not raised at trial and was unpreserved for appellate review.
4. ***Toth v. State*, 393 Md. 318 (2006).** Suspect was charged with speeding (§21-801) and DWI (§21-902(b)). Jury trial was prayed and Toth won a motion to

suppress in the circuit court. DWI charge was nolle prossed. Toth attempted to pay the \$75 fine for his speeding ticket but the judge hearing his case ordered the clerk not to accept payment. After a merits proceeding two months later, the judge found Toth guilty of speeding and levied a \$500 fine plus \$166 court costs. The Court of Appeals found that, under Md. Code Ann., Trans. Art. §26-204, Defendant was entitled to pay a fine in lieu of going to trial, even after he had requested a trial and a date had been set.

5. *Brown v. State*, 169 Md. App. 442 (2006). Attempted voluntary manslaughter is a lesser included offense of attempted murder.
6. *Wisneski v. State*, 169 Md. App. 527, *cert. granted*, 395 Md. 420 (2006). What constitutes a “public place” under common-law indecent exposure depends on the circumstances of the case; here, intentionally exposing oneself to other guests while in the living room of someone else’s mobile home constituted indecent exposure.
7. *Chow v. State*, 393 Md. 431 (2006). The “temporary gratuitous exchange or loan” of a handgun between two people authorized to own handguns is not an illegal transfer of a firearm under Md. Code Ann., Public Safety Art. §5-124 (2003). Moreover, to be punishable, the participant must know that the transfer is illegal.
8. *State v. Brady*, 393 Md. 502 (2006). The doctrine of transferred intent does not apply to attempt crimes.
9. *Kilmon v. State/Cruz v. State*, 394 Md. 168 (2006). The reckless endangerment statute does not apply to the conduct of a pregnant woman toward her fetus.
10. *Testerman v. State*, **170 Md. App. 324 (2006)**, *cert. granted*, ___ Md. ___ (**March 15, 2007**). Switching seats with a passenger does not constitute “fleeing and eluding by other means.”
11. *In re Antoine M.*, 394 Md. 491 (2006). The finder of fact must determine that an alleged trespasser did not have an honest, reasonable belief that he was allowed to be on the property, in order to sustain a charge of trespassing.
12. *Jones v. State*, 395 Md. 97 (2006). When Defendant is found in the halls of a religious school during regular hours and money is later found to be missing from the office of one of the nuns who worked there, there is insufficient evidence to prove the “breaking” element of a second degree burglary

conviction.

13. *Baby v. State*, 171 Md. App. 329 (2006). If consent is given to penetration, but then withdrawn after penetration, there is no rape.
14. *Brown v. State*, 171 Md. App. 489 (2006). In a DWI/DUI case, the presumption of impairment under Md. Code, Cts. & Jud. Proc. Art. Ann. §10-307 does not violate due process, the offense of DUI *per se* is not unconstitutional, and the statute requiring that a breath test be administered within two hours of apprehension is not unconstitutionally vague.
15. *Twine v. State*, 395 Md. 539 (2006). Homeless sex offenders cannot be convicted of failing to register their addresses with the state because they have no address.
16. *Jeandell v. State*, 395 Md. 556 (2006). A residence is more than just a place where one is staying, and therefore a homeless sex offender who moved from shelter to shelter is still homeless under *Twine* and cannot be convicted of failing to register his address with the state.
17. *Allen v. State*, 171 Md. App. 544 (2006). Unauthorized use statute, as recodified, now requires proof that person both possessed the property AND that the accused entered or was present, without permission of the owner, upon the premises of another, from which premises the property was taken or use deprived.

B. Defenses

1. *Brown v. State*, 169 Md. App. 442 (2006). Imperfect self-defense reduces a charge of attempted murder to attempted voluntary manslaughter, not assault.

C. Principals & Accessories

V. Juvenile Causes

1. *In re Antoine M.*, 394 Md. 491 (2006). Md. Rule 4-324(a) does not apply in juvenile cases; there is no requirement that a motion for judgment be made at the close of the case to preserve a sufficiency argument for appeal.

VI. Capital Proceedings

1. ***Abeokuto v. State*, 391 Md. 289 (2006).** Plurality opinion found that waiver of jury sentencing was not knowing and voluntary because the trial court failed to inquire about potential effects of Abeokuto's anti-psychotic medication and its impact on his sentencing waiver. Although similar inquiry was not required for trial jury waiver that occurred immediately following the competency hearing, inquiry was required for sentencing given the lapse of time between trial and sentencing. Because four judges believed there was error in sentencing, although there was no majority opinion regarding error, the death sentence was vacated for a new sentencing proceeding.
2. ***Evans v. State*, 396 Md. 256 (2006).** The Paternoster study does not provide a basis for setting aside a capital sentence; the defendant must show specific discrimination in his/her case that led to the imposition of his/her death penalty. *Strickland* is still the standard for judging ineffective assistance of counsel; neither *Wiggins v. Smith*, *Rompilla v. Beard*, nor *Miller-El v. Dretke* created a new rule. The current DOC regulations and procedures for implementing the death penalty were improperly adopted because they were not developed in compliance with the Maryland Administrative Procedures Act. No executions can be implemented unless and until the DOC adopts APA-compliant regulations governing executions.

VII. Appeal Issues

1. ***In re: Kaleb K.*, 390 Md. 502 (2006).** Challenge to timeliness of delinquency petition was not preserved when the only basis for a motion to dismiss raised in the juvenile court was on a different statutory provision than on appeal. Raising a new argument based on a different statute on appeal would amount to "sandbagging" the State and juvenile court and is, therefore, unpreserved.
2. ***Walker v. State*, 392 Md. 1 (2006).** District Court order, denying motion to dismiss sexual offense charges when the defendant

alleged he would never be competent to stand trial, was an interlocutory order that was not appealable under the collateral order doctrine where other more appropriate statutory remedies for release were available. Although the question of ongoing detention of charged defendants who are found incompetent to stand trial due to a mental disorder and who are not likely to reach or regain competency was important, the issue was not properly before the Court.

3. *Surland v. State*, 392 Md. 17 (2006). Court reverses precedent that, when a defendant dies pending direct appeal, the appeal is dismissed and the indictment dismissed *ab initio*. The new rule is, upon notice of the death and pursuant to Maryland Rule 1-203(d), the applicable time requirements to pursue the appeal are automatically extended to allow the defendant's estate to appoint a substituted party. If no substituted party is appointed by the estate to continue the appeal, the appeal will be dismissed, but the judgment will remain intact.
4. *Chmurny v. State*, 392 Md. 159 (2006). Where a defendant died after the jury returned a guilty verdict, but before sentencing, the Court of Appeals dismissed the appeal, finding that: (1) the defendant's counsel had no authority to file an appeal because, under agency law, the death of the principal revokes the power of the agent to act; and (2) the appeal was untimely filed. The Court of Appeals commented that the circuit court has the authority to abate the proceedings *ab initio*, thereby vacating the verdict, as part of its revisory power under Maryland Rule 4-331(b).
5. *Fuller v. State*, 169 Md. App. 303, *aff'd*, ___ Md. ___ (March 13, 2007). There is no right to direct appeal from a circuit court's refusal to grant an inmate's petition for drug treatment under Md. Health Gen. §8-507. (In dicta the Court also noted that an inmate serving multiple sentences could be committed for treatment only if *all* of his or her sentencing judges agreed to it).
6. *Garrett v. State*, 394 Md. 217 (2006). It is reversible error to

instruct a jury in the doctrine of transferred intent in connection with an inchoate crime (here attempted first degree murder) and it is an abuse of discretion for the CSA to refuse to recognize plain error when such an instruction is not objected to.

7. *Testerman v. State*, 170 Md. App. 324 (2006), *cert. granted*, ___ Md. ___ (March 15, 2007). Failure to argue “with particularity” in support of a Motion for Judgment of Acquittal may constitute ineffective assistance of counsel reviewable upon direct appeal.
8. *Reiger v. State*, 170 Md. App. 693 (2006). Challenge to sentence allegedly based upon “improper considerations” is waived if not objected to at the time of trial.
9. *Cottman v. State*, 395 Md. 729 (2006). If a new trial is granted by the trial court while an appeal is pending, the appeal is dismissed and the issues become moot. The appellate court still has discretion to publish an opinion on the mooted issues, however.
10. *State v. Logan*, 394 Md. 378 (2006). It is not harmless error to admit an improperly obtained confession even if the defendant then uses that confession to bolster his NCR defense.

VIII. Miscellaneous

1. *Stoddard v. State*, 395 Md. 653 (2006). Charges in a single charging document may still be expunged if they are not a “single unit” with other charges in the same charging document; charges are only a “single unit” if they arise from the same incident or set of facts.