Recent Developments

LIMITING DEATH: MARYLAND'S NEW DEATH PENALTY LAW

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I. INTRODUCTION

In this Article, I describe and analyze the State of Maryland's 2009 death penalty law.[1] This law adds three new death-eligibility criteria to the pre-existing law. These new evidentiary criteria supplement the pre-existing substantive death-eligibility criteria.[2] As a result, Maryland now has one of the most restrictive death penalties in the country.[3]

In Part II, I review the legislative history of the new law, including debates on the bill in the Maryland Senate and House of Delegates. The new law was developed on the Senate floor through amendments to an abolition bill. I present and quote from the debates because the bill's history is an important part of understanding the law.[4] The debates will be relevant in future litigation.[5]

In Part III, I describe how the new law and the pre-existing law fit together and how a new Maryland Rule integrates the two.[6] The new Rule divides the capital trial into three phrases: the determination of guilt or innocence, the determination of death-eligibility, and sen-

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1. MD. CODE ANN., CRIM. LAW § 2-202(a)(3), (c) (LexisNexis 2002 & Supp. 2010).

2. *See infra* Part III.

3. Elaine de Leon, *Money, Morality, and Repealing the Death Penalty*, PBS.ORG (Apr. 24, 2009), http://www.pbs.org/wnet/religionandethics/episodes/april-24-2009/money-morality-and-repealing-the-death-penalty/2757/ ("Maryland lawmakers amended the repeal bill and decided instead to make the state's death penalty statute among the most restrictive in the nation.").

4. *But see* Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 824 (2010) ("Some scholars have argued, however, that . . . consideration of legislative history is, at best, not probative, and, at worst, has a negative probative value.").

5. *See* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 308 (describing the "problem of capital punishment" as a subject for legal rules and noting that "a judge or jury's decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision").

6. *See infra* Part III.A.

tencing.[7] I discuss the effects of this trifurcation, which, in my view, are mostly good.

In Part IV, I assess the new law. With the help of a recent trial court decision, I analyze the new law's key provisions.[8] Despite using this case as a helpful supplement, my analysis remains very preliminary. Subsequent cases, with the advantage of evidentiary hearings, fact-specific challenges, and briefing on the issues, will better identify and define the most important legal issues. There are a number of provisions in the new law that trial courts and eventually the Maryland Court of Appeals will be required to interpret. I identify three potential issues: (1) what the State is required to prove to establish the death-eligibility criteria (I argue that the State must establish the fact-based criteria by the well-accepted standard of proof beyond a reasonable doubt); (2) whether the three new death-eligibility criteria are unconstitutionally vague (I offer interpretations to narrow and clarify key provisions and respond to potential vagueness challenges); and (3) whether the law is unconstitutionally arbitrary (I identify ways in which the new law logically restricts the death penalty but acknowledge the counterarguments).[9]

II. THE LEGISLATIVE HISTORY OF MARYLAND'S NEW DEATH PENALTY LAW

In January 2009, the President of the Maryland Senate Thomas V. Mike Miller Jr., acting at the request of Governor Martin O'Malley and joined by a number of other Senators,[10] introduced a bill that would have abolished the Maryland death penalty.[11] Senate Bill 279 came to the General Assembly with considerable momentum amid speculation that, for the first time since the re-enactment of the Mary-

7. *See infra* Part III.B.

8. *See infra* Part IV.

9. *See infra* Part IV.B.1–3.

10. The bill was sponsored by Senators Currie, Exum, Frosh, Gladden, Jones, Kelley, King, Lenett, Madaleno, McFadden, Muse, Peters, Pinsky, Pugh, and Raskin. S. B. 279, 426th Sess. (Md. 2009).

11. *See id.*; *see also* Richard Lacayo, *The Tide Shifts Against the Death Penalty*, TIME, Feb. 3, 2009, http://www.time.com/time/nation/article/0,8599,1876397,00.html ("After years of failed attempts by death penalty opponents to bring a repeal bill to a vote in the state legislature, Maryland Governor Martin O'Malley is personally sponsoring this year's version, promising that he will fight to have the legislature pass it during the . . . 90-day session.").

land death penalty in 1978, there was a real chance that the General Assembly would abolish capital punishment.[12]

The 2008 Maryland Commission on Capital Punishment, chaired by Benjamin Civiletti, a former U.S. Attorney General and senior partner at Venable LLP, issued a Final Report that supplied some of the momentum. The Governor, the President of the Senate, and the Speaker of the House of Delegates jointly selected Civiletti as Commission Chairman.[13] In the Report, the Commission recommended that the death penalty be abolished.[14] The Commission considered testimony presented at five public hearings by national and local experts and by Maryland citizens and evaluated this testimony and supplemental facts at five additional meetings.[15] In its Final Report, the Commission stated that "[t]he costs of capital cases far exceed the costs of cases in which the death penalty is not sought."[16] Furthermore, according to the Commission, criminal justice "resources could be better used elsewhere," such as for homicide prevention.[17] The Commission expressed concerns about both surviving family members and wrongly convicted defendants, stating that "[t]he effects of prolonged capital cases take an unnecessary toll on the family members of victims"[18] and noting that "[t]he risk of executing an innocent per-

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12. *See* Steve Lash, *Death Penalty, Police Surveillance Among Laws in Play This Session in Maryland*, DAILY RECORD (Md.), Jan. 12, 2009; John Wagner, *Move May Aid Death Penalty Repeal Bill*, WASH. POST, Jan. 29, 2009, at B1.

13. MD. COMM'N ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY 4 (2008), *available at* http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf.

14. *Id.* at 23.

15. *Id.* at 7.

16. *Id.* at 23. The Commission said:

> The cost of pursuing a capital case is estimated conservatively to be at least three times the cost of a non-death penalty homicide prosecution ($1.1 to $2.9 million). The cost studies are based on opportunity costs and not out-of-pocket expenses. Nevertheless, the direct savings calculated from 1978 to 1999 would amount to $186 million dollars, which is the value of the resources that could be used for other purposes by members of the criminal justice system.

Id. at 15 (footnote omitted).

17. *Id.* at 23; *see also* David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1578 (1998) (commenting that many prosecutors agreed that "death [penalty] cases [we]re not an efficient use of the office's resources").

18. MD. COMM'N ON CAPITAL PUNISHMENT, *supra* note 13, at 23. The Commission said: R

> Many witnesses testified about the grief, and heartbreak that the capital punishment process causes for family members of victims. The significant amount of time offenders remain on Death Row and their lengthy appeals process perpetuates the injury, grief and heartbreak to the families of victims. They are forced to relive the tragedy of the crime and re-experience its trauma. While a convicted felon who receives the sentence of life without parole goes directly to prison to serve this sentence, a convicted felon who receives a death sentence goes to Death

son is . . . a real possibility."[19] The Commission pointed out that "racial and jurisdictional bias" undermines the fairness of capital punishment in Maryland.[20] The Commission also marshaled data showing that the death penalty, in fact, has no deterrent effect and

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> Row and waits, often several decades before the sentence is carried out and the person is executed. Some family members of victims are embittered by the perceived failure of the system to carry out the sentence. As a result, many members of the families of victims oppose the death penalty as serving no useful purpose and instead causing societal harm.

Id. at 16.

19. *Id.* at 23. The Commission observed that "[o]ne of our own Commissioners, Kirk Bloodsworth, spent two years on Death Row and nearly nine total in prison for a crime he did not commit" before "[h]e was finally exonerated by DNA evidence." *Id.* Mr. Bloodsworth's wrongful sentence was, the Commission said, consistent with national data demonstrating that "130 Death Row prisoners have been exonerated." *Id.* The Commission added:

> New DNA laws do not completely eliminate the risk of other innocent people being wrongfully convicted and sent to Death Row, the way that Commissioner Bloodsworth was. . . . [I]n many cases, DNA evidence is not available and, even when it is available, it is subject to contamination or error at the scene of the offense or in the laboratory.

Id. at 23–24. The Commission quantified the high risk of error in capital cases by noting that "for every 8.7 executions [nationally], there has been one exoneration." *Id.* at 18.

20. *Id.* at 24. With respect to race, the Commission said:

> Between 1979 and 1999, there were 1,311 death-eligible cases in Maryland, resulting in five executions and five persons remaining on Death Row today—in other words, an execution rate of less than one-half of one percent (<.5%). The evidence show[ed] that . . . race play[ed] a dominant role in the administration of the death penalty in Maryland. Research presented to the Commission showed that cases in which an African-American offender killed a Caucasian victim [we]re almost two and a half times more likely to have death imposed than in cases where a Caucasian offender killed a Caucasian victim. Race play[ed] such a significant role that it overshadow[ed] several of the statutorily required factors in Maryland's system of guided discretion. The worst or most serious cases thus d[id] not necessarily receive the most severe sanction of execution.

Id. at 10 (footnotes omitted). The Commission "f[ound] that the administration of the death penalty clearly show[ed] racial bias and that no procedural or administrative changes to the processing of capital cases would eliminate these racial disparities." *Id.* at 11. Jurisdictional bias was as acute. The Commission found "that the chances of a State's Attorney seeking and imposing a death sentence differ[ed] alarmingly across jurisdictions in Maryland, even when the cases [we]re similar." *Id.* at 12. For example, "the probability of a State's Attorney seeking death [wa]s over thirteen times higher in Baltimore County than it [wa]s in Baltimore City in similar cases." *Id.* More troublesome, according to the statistics, "the probability of *receiving* a death sentence in Baltimore County [wa]s almost twenty-three times higher than the probability of receiving a death sentence for a similar crime in Baltimore City." *Id.* (emphasis added). Moreover, "jurisdictional disparities were not limited to these two counties. . . . Baltimore County cases [we]re five times more likely to have death requested than Montgomery County cases. . . . Harford County cases were eleven times more likely than Baltimore City cases to have death requested." *Id.* (footnotes and internal quotation marks omitted).

does not prevent homicides.[21] The Commission concluded that Maryland's death penalty process is "arbitrary and capricious" and "neither fair nor accurate."[22]

The Commission's Report provided an initial reason to believe that the General Assembly might abolish capital punishment. The strong, forceful advocacy of Governor O'Malley in opposition to the death penalty provided another reason to be optimistic that the General Assembly might abolish capital punishment.[23]

Upon introduction, Senate Bill 279 was referred to the Senate Judicial Proceedings Committee.[24] On February 27, 2009, the Committee gave the bill an unfavorable committee report by a vote of six to five.[25] On March 3, 2009, however, the Senate adopted a motion to substitute Senate Bill 279 for the unfavorable committee report.[26]

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21. *Id.* at 22. The Commission said that it was "convinced by the strong consensus among respected social scientists that sound research d[id] not support the proposition that capital punishment deters murders." *Id.* The Commission continued:

> The idea that capital punishment could deter homicides assumes murderers would rationally choose not to kill in order to avoid execution. The evidence presented showed that many murders [we]re crimes of passion, often impulsive, frequently committed by dysfunctional persons with serious emotional or mental disorders or acting under the influence of drugs or alcohol. Furthermore, in view of the fact that executions [we]re so rare—less than one half of one percent (<.5%) of homicides result in a sentence of death—a rational offender would deduce a 99.5% likelihood of avoiding execution for murder, a figure unlikely to deter.

Id.

22. *Id.* at 23.

23. *See, e.g.*, Julie Bykowicz, *Vote Urged on Death Penalty: O'Malley Calls on Committee to Move Repeal Bill to Floor for Full Senate Action*, BALT. SUN, Feb. 19, 2009, at 3A (noting that Governor O'Malley urged lawmakers "to consider both 'empirical evidence' and 'higher truths' when making their decision" on the repeal bill); Michael Drost, *O'Malley Marches Against Death Penalty*, WASH. TIMES, Feb. 26, 2009, at A1 (describing O'Malley's "emotional, all-out effort . . . to repeal the 30-year-old death penalty after years of defeat in the state Senate"); John Wagner, *O'Malley Goes All-Out for Death Penalty Repeal*, WASH. POST, Mar. 3, 2009, at B1 (explaining that O'Malley "flooded supporters with e-mail, phoned and met with wavering senators" in the days prior to the Senate vote). *See generally* ALAN ROSENTHAL, ENGINES OF DEMOCRACY: POLITICS & POLICYMAKING IN STATE LEGISLATURES 265–67 (2009) (describing O'Malley's influence "in setting . . . the agenda for policies and programs that may potentially become law").

24. 1 MARYLAND SENATE JOURNAL, 426th Sess. 258–59 (2009).

25. 7 MARYLAND SENATE JOURNAL 943. Senators Brochin, Haines, Jacobs, Mooney, Simonaire, and Stone voted against the bill. *Id.* Senators Frosh, Gladden, Forehand, Muse, and Raskin voted in favor of the bill. *Id.*; *see also* John Wagner, *Death Penalty Debate Likely Still on Despite Panel*, WASH. POST, Feb. 28, 2009, at B3 (noting that the committee's unfavorable report "was seen as a setback for O'Malley").

26. 2 MARYLAND SENATE JOURNAL 1101; *see also* Julie Bykowicz & Gadi Dechter, *Chaos in the Senate: Lawmakers Turn Away Repeal of Death Penalty, Debate to Resume Today*, BALT. SUN, Mar. 4, 2009, at 1A (noting that "death penalty opponents used a rare procedural move to resurrect repeal legislation" and explaining that "[t]he motion does not appear in the

Through this mechanism, the bill was presented to the Senate, on the Senate floor, in its original form.[27]

Later that day, after approval of the motion to substitute, Senators James Brochin and Robert A. Zirkin offered floor amendments to Senate Bill 279, which were each adopted by the Senate.[28] These amendments fundamentally changed the nature of Senate Bill 279 by substituting radical restrictions to the death penalty for abolition.

Senator Brochin's amendment maintained the death penalty, but his amendment provided that "[a] defendant may not be sentenced to death, but shall be sentenced to imprisonment for life without the possibility of parole . . . if the State relies solely on evidence provided by eyewitnesses."[29] According to Brochin, Maryland's statute was already "very good," but his amendment would make it "a little bit bet-

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Senate rule book"). The motion passed by a vote of twenty-five to twenty-two. 2 MARYLAND SENATE JOURNAL 1101. In 1978, proponents of the death penalty used this procedure to bring to the Senate floor a bill that reinstated the death penalty in Maryland after the 1978 Senate Committee on Judicial Proceedings had given it an unfavorable report. The Senate President said this procedure "is the way" the reinstatement bill "came to the floor thirty years ago, and this is the way that" Senate Bill 279 "is going to be on the floor today." Audio file: Proceedings on S.B. 279, Maryland State Senate at 12:55–13:01 (Mar. 3, 2009, Sess. No. 1) [hereinafter Senate Proceedings on S.B. 279, Mar. 3, Sess. No. 1] (on file with the Maryland Law Review). It is clear, however, that the Senate President was not happy with this procedure. He said: "This procedure hasn't been done in thirty years, thirty years, thirty years; it hasn't been done since February 1978 . . . and from this day on we are not going to do it again, hopefully, as long as I am up here." *Id.* at 11:58–12:14. The Senate President identified both the source of the procedure and the special reason he was allowing it:

> Since this motion is not in the rules, we look to *Mason's Manual*. *Mason's Manual* . . . advises that one source of rule for legislative procedure is custom, usage and precedence. As I have stated before, there is precedence in the history of the Senate for this motion being made. The last time it was made was in February 1978 with regard to this exact same subject matter. And, that is the reason for this unique ruling from the Chair.

Id. at 28:25–28:51; *see also id.* at 17:28–17:56 (statements of Sen. Lisa Gladden, lead sponsor of S.B. 279) (describing how the motion to substitute was used in 1978 to bring the death penalty reinstatement bill to the Senate floor over an unfavorable report from the Senate Judicial Proceedings Committee); *id.* at 19:35–19:44 ("If indeed we brought the death penalty to the State of Maryland by way of a substitute motion, why . . . can we not repeal that in the same way?").

27. The motion was made by Senator Gladden, a sponsor of the repeal bill. 2 MARYLAND SENATE JOURNAL 1101.

28. *Id.* at 1116–19; *see also* Bykowicz & Dechter, *supra* note 26 (explaining how "two Democratic Senators . . . changed the nature of the death penalty debate, quickly silencing discussion of repeal"). R

29. 2 MARYLAND SENATE JOURNAL 1117 (statement of Sen. Brochin concerning floor amendment no. 703826/2 (adopted Mar. 3, 2009)).

ter."[30] Brochin explained the motivation behind his amendment—stating that he was "troubled" by "the Kirk Bloodsworth case" in which a court convicted and sentenced to death an innocent, and now exonerated, defendant based largely on eyewitness testimony.[31] According to Brochin, his amendment would help prevent a similar miscarriage of justice.[32]

Senator Zirkin's amendment added three major evidentiary restrictions to the death penalty, making its application likely only in a small number of cases. Under this amendment, a capital defendant would not be eligible for the death penalty unless the State presented: (1) "biological evidence or DNA evidence that link[ed] the defendant to the act of murder"; (2) "a video taped, voluntary interrogation and confession of the defendant to the murder"; or (3) "a video recording that conclusively link[ed] the defendant to the murder."[33] Senator Zirkin stated that the goal of his amendment was to "create a barrier" to the death penalty in all cases in which prosecutors could not produce "more reliable evidence."[34] The amendment's first category of "more reliable evidence"—biological or DNA evidence—was, according to Zirkin, defined in the statute.[35] He was apparently referring to the Maryland DNA Act, which defines "DNA" and "[b]iological evidence."[36] According to Zirkin, his amendment would make the death penalty "much more strict and much tighter."[37]

The Zirkin amendment apparently made the Brochin amendment unnecessary. In response to a question from the floor about the interplay of the Brochin and Zirkin amendments, the Senate President said that the Brochin amendment "d[id] no harm" to the Zirkin amendment but would become "meaningless" if the Senate enacted the latter.[38] The Senate President pointed out that under the amendment there could not be a death penalty sentence based solely on

30. Audio file: Proceedings on S.B. 279, Maryland State Senate at 12:10–12:19 (Mar. 3, 2009, Sess. No. 2) [hereinafter Senate Proceedings on S.B. 279, Mar. 3, Sess. No. 2] (on file with the Maryland Law Review).

31. *Id.* at 12:18–12:30.

32. *Id.* at 12:30–12:55.

33. 2 MARYLAND SENATE JOURNAL 1119 (statement of Sen. Zirkin concerning floor amendment no. 553820/3 (adopted Mar. 3, 2009)).

34. Senate Proceedings on S.B. 279, Mar. 3, Sess. No. 2, *supra* note 30, at 19:45–20:04. R

35. *Id.* at 20:16–20:20.

36. MD. CODE ANN., CRIM. PROC. § 8-201(a)(2)–(3) (LexisNexis 2008 & Supp. 2010) (defining "[b]iological evidence" as including "any blood, hair, saliva, semen, epithelial cells, buccal cells, or other bodily substances from which genetic marker groupings may be obtained" and "DNA" as "deoxyribonucleic acid").

37. Senate Proceedings on S.B. 279, Mar. 3, Sess. No. 2, *supra* note 30, at 21:15–21:23. R

38. *Id.* at 31:35–33:00.

eyewitness testimony; the State would be required to establish one of the three forms of noneyewitness evidence listed in the amendment.[39] Senators who addressed the issue agreed with President Miller.[40] According to Senator Frosh, the Brochin amendment precluded a death sentence based solely on eyewitness testimony, while the Zirkin amendment identified the kinds of noneyewitness testimony that would be required to make defendants death-eligible.[41] Under this interpretation, the Brochin amendment could be viewed as a sort of preamble to the Zirkin amendment.

Within one hour, the Senate voted to adopt the Brochin amendment by a two vote margin (twenty-four to twenty-two),[42] voted to adopt the Zirkin amendment by a fifteen vote margin (thirty-five to ten),[43] and defeated a motion to recommit Senate Bill 279 to the Senate Judicial Proceedings Committee by a tie vote (twenty-three to twenty-three).[44] On March 5, 2009, the Senate passed the amended bill by a vote of thirty-four to thirteen.[45]

On March 21, 2009, the House Judiciary Committee gave the bill a favorable report (fourteen to seven).[46] When the bill reached the floor of the House of Delegates, ten delegates offered a total of fourteen amendments. Understanding that amending the bill was tantamount to killing it,[47] the House rejected the amendments (one was withdrawn)[48] and passed the bill by a vote of eighty-seven to fifty-two.[49] On May 7, 2009, the Governor signed the bill.[50]

The proposed, but rejected, amendments provide evidence of the House's intent in adopting Senate Bill 279.[51] The House sought to

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39. *Id.* at 31:35–34:26.

40. *See, e.g.*, *id.* at 32:26–32:30 (statements of Sen. Pres. Miller) (opining that the Zirkin amendment makes the Brochin amendment "a nullity").

41. *Id.* at 33:30–34:15.

42. 5 MARYLAND SENATE JOURNAL, 426th Sess. 242 (2009).

43. *Id.* at 243.

44. *Id.* at 244. A second motion to recommit that was made on March 5, 2009 was defeated by a vote of fifteen to thirty-two. *Id.* at 263.

45. *Id.* at 265.

46. 2 MARYLAND HOUSE JOURNAL, 426th Sess. 1744–45 (2009).

47. *See generally* William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1445 (2008) ("On the floor of the House, a proposed bill faces new challenges. The most common challenge is that opponents will propose amendments that either weaken the bill or strengthen it so much that the bill will lose its majority support ('killer amendments').").

48. 2 MARYLAND HOUSE JOURNAL 1802–06 (amendments offered on Mar. 22, 2009); 3 MARYLAND HOUSE JOURNAL 1927–31 (amendments offered on Mar. 26, 2009).

49. 3 MARYLAND HOUSE JOURNAL 1931.

50. 2009 Md. Laws 1063–88.

51. *See* Jack Schwartz & Amanda Stakem Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History,* 54 MD. L. REV. 432, 457–58 (1995) (explaining that

preserve the restrictive rules of death-eligibility contained in Senate Bill 279 as an alternative to abolition. The House therefore rejected amendments to exempt particular types of murders from the enhanced evidentiary requirements including contract murder,[52] murder of a law enforcement officer with his own gun,[53] murder to further an act of terrorism,[54] murder of a correctional officer,[55] and murder by a prisoner.[56]

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it may be appropriate to "infer a legislative objective from a committee's rejection of proposed language").

52. 2 MARYLAND HOUSE JOURNAL 1802–03 (statements of Del. Smigiel introducing floor amendment no. 323727/2). As he explained on the floor, this amendment would have incorporated the Maryland Code's contract murder provisions and exempted a defendant, who was the killer or the "contractor" in a murder for hire, from the enhanced evidentiary requirements. MD. CODE ANN., CRIM. LAW § 2-303(g)(1)(vi)–(vii) (LexisNexis 2002 & Supp. 2010) (mistakenly cited as *id.* § 2-301(g)(1)(vi)–(vii) in the amendment). On the floor, Delegate Smigiel explained that such "contractors" do not leave DNA, are not caught on video, and usually do not give videotaped confessions. Audio file: Proceedings on S.B. 279, Maryland House of Delegates at 34:20–35:00 (Mar. 25, 2009, Sess. No. 1) [hereinafter House Proceedings, Mar. 25, Sess. No. 1] (on file with the Maryland Law Review). Delegate Smigiel criticized the "game plan" of the Governor and the Senate, who, according to Smigiel, conspired to have him accept the bill "as currently written." *Id.* at 33:35–35:20.

Delegate Curt Anderson responded:

> Today's bill is not about how we amend the bill that came from the Senate or how we fine-tune it; it is about repeal or not repeal. There are many of us who are disappointed that the repeal bill did not come from the Senate. I am one of them. I am sadly disappointed that I cannot vote to repeal the death penalty in the state of Maryland.

Id. at 35:43–36:13.

Delegate Anderson continued:

> This amendment and the amendments that will follow are simply an attempt to amend the bill and send it back to the Senate. There is no saying what's going to happen once the bill goes back there. All we're saying, those of us who wanted to vote for repeal of the death penalty, is that we fought the good fight, and we're fighting now for a compromise between a death penalty that most of us do not want and a compromise . . . with the existing law.

Id. at 37:48–38:22. The House rejected the amendment by a vote of ninety to forty-four. 2 MARYLAND HOUSE JOURNAL 1803.

53. 3 MARYLAND HOUSE JOURNAL (statements of Del. Shewell introducing floor amendment no. 323321/01); Audio file: Proceedings on S.B. 279, Maryland House of Delegates at 1:21:50–1:23:45 (Mar. 26, 2009, Sess. No. 1) [hereinafter House Proceedings, Mar. 26, Sess. No. 1] (on file with the Maryland Law Review). The House of Delegates rejected the amendment by a vote of seventy-nine to fifty-eight. 3 MARYLAND HOUSE JOURNAL 1929.

54. 3 MARYLAND HOUSE JOURNAL 1931 (statements of Del. McDonough introducing floor amendment no. 343523/01). The House rejected the amendment by a vote of eighty-nine to fifty. *Id.*

55. *Id.* at 1927 (statements of Del. Serafini introducing floor amendment no. 743924/01). The Vice Chair of the Judiciary Committee, Delegate Sandy Rosenberg, stated that the Judiciary Committee had considered this amendment, but had decided that it was unable to give more value to one human life than another under a theory that "the death of some people merit the death penalty and the murder of others does not." House Proceed-

The House also rejected amendments to add evidentiary profiles that would make a defendant death-eligible—for example, when "the defendant was in the unexplained, exclusive possession of the body of the victim"[57] or when "the defendant was apprehended in the act of murder or at the end of an uninterrupted pursuit after being observed committing the act."[58] In addition, the House rejected amendments to add additional types of evidence to the enhanced evidentiary requirements that would make a defendant death-eligible if, for example, "an audio [not just video] recording of the murder or the ordering of the murder . . . conclusively link[ed] the defendant to the murder,"[59] "photographic evidence . . . conclusively

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ings, Mar. 26, Sess. No. 1, *supra* note 53, at 1:00:21–1:01:03. The House rejected the amendment by a vote of seventy-five to sixty-one. 3 MARYLAND HOUSE JOURNAL 1928. R

56. 3 MARYLAND HOUSE JOURNAL 1929 (statements of Del. Smigiel introducing floor amendment no. 783028/01). In the floor debate, the sponsor of the amendment said it would not apply if a correctional officer killed an inmate, because the defendant in that case would not have been "confined in a correctional facility." House Proceedings, Mar. 26, Sess. No. 1, *supra* note 53, at 1:35:13–1:36:00. The House rejected the amendment by a vote of eighty-seven to forty-nine. 3 MARYLAND HOUSE JOURNAL 1930. R

57. 2 MARYLAND HOUSE JOURNAL 1806 (statements of Del. McComas introducing floor amendment no. 393326/02). The House rejected the amendment by a vote of ninety-four to forty-four. *Id.*

58. 3 MARYLAND HOUSE JOURNAL 1930 (statements of Del. Boteler introducing floor amendment no. 403420/01). The House rejected the amendment by a vote of eighty-five to forty-eight. *Id.*

59. 2 MARYLAND HOUSE JOURNAL 1803 (statements of Del. Smigiel introducing floor amendment no. 103423/02). Delegate Smigiel said this amendment would cover an audio recording of a murder, and he offered, as an example, the murder of an undercover police officer recorded on the "wire" the police officer was wearing. House Proceedings, Mar. 25, Sess. No. 1, *supra* note 52, at 54:50–58:14. A delegate from Prince George's County urged the House to "resist this and all amendments." *Id.* at 1:02:38–1:03:35. She acknowledged that most legislation is not "perfect," and said: "In matters of life and death, we should err on the side of assuring that an innocent person is not put to death in our name." *Id.* She added: "Do not let the perfect be the enemy of the good." *Id.* at 1:05:04–1:05:10. The Minority Leader, Anthony J. O'Donnell, complained that the assertion that that the House should reject all amendments, based on the alleged "take-it-or-leave-it" position of the Governor and the Senate President, undermined the "bicameral process" and independence of the House. *Id.* at 1:05:12–1:08:33. The Vice Chair of the House Judiciary Committee, Delegate Sandy Rosenberg, responded that the Judiciary Committee included members "who have been working on this issue for more than two years; some for their professional careers." *Id.* at 1:08:33–1:09:45. There was no "diktat" from the Governor's office. Rather, the Judiciary Committee "reached an independent judgment" about Senate Bill 279. *Id.* Moreover, the posture of Senate Bill 279 in the House was not unique. "Over the course of the years there have been other bills that have come to us in a similar posture," in which "an amendment kills the bill," including some of the most controversial bills—for example, those concerning "a woman's right to choose," "gun control," and "stem cell research." *Id.* at 1:09:45–1:11:30. He explained that this simply is "part of the process." *Id.* The House rejected the amendment by a vote of seventy-nine to fifty-nine. 2 MARYLAND HOUSE JOURNAL 1803. R

link[ed] the defendant to the murder,"[60] or "fingerprint evidence" existed.[61]

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60. 2 MARYLAND HOUSE JOURNAL 1803–04 (statements of Del. Kipke introducing floor amendment no. 603528/01). Kipke offered a photo taken by a cell phone as an example of "photographic evidence;" he argued that if it "conclusively links the defendant to the murder," it should suffice to establish death-eligibility, as much as a videorecording." House Proceedings, Mar. 25, Sess. No. 1, *supra* note 52, at 1:17:37–1:19:08. The ensuing debate focused on whether a "single frame" photograph, like that produced by a cell phone photograph, would qualify as a videorecording, thus making the proposed amendment unnecessary. *Id.* at 1:19:08–1:22:24. During this debate, there was reference to a Letter of Advice from the Office of the Maryland Attorney General in which Counsel to the General Assembly concluded that "[a]lthough a court might construe the term 'video' [in S.B. 279] to mean a single frame, the more likely construction is that it refers to multiple frames." *Id.* at 1:19:55–1:20:09. Letter from Dan Friedman, Counsel to the Gen. Assembly, to Sen. Alex X. Mooney, Md. State Senate (Mar. 5, 2009), *available at* http://www.oag.state.md.us/Opinions/Advice2009/MOONEY_3_5.pdf. The House rejected the amendment by a vote of eighty-two to forty-nine. 2 MARYLAND HOUSE JOURNAL 1804. R

61. 2 MARYLAND HOUSE JOURNAL 1804 (statement of Del. Krebs introducing floor amendment no. 533121/01). In the floor debate, Delegate Krebs began by identifying three "schools of thought" on the death penalty in the House of Delegates: "There are people who are definitely against the death penalty no matter what, there are people who support it, and there are many people who just want to make sure it never happens to an innocent person." House Proceedings, Mar. 25, Sess. No. 1, *supra* note 52, at 1:22:44–1:24:57. She argued that "fingerprint evidence" is an established category of reliable evidence and therefore should be accepted as the basis of a death penalty sentence. *Id.* She criticized the letter of advice from the Maryland Office of the Attorney General that concluded that the term "biological evidence" in S.B. 279 does not include "fingerprint evidence." *Id.*; *see also* Letter of Advice from Dan Friedman, Counsel to the Gen. Assembly, to Sen. Alex X. Mooney, Md. State Senate (Mar. 4, 2009), *available at* http://www.oag.state.md.us/Opinions/Advice2009/MOONEY_3_4.pdf. R

A delegate from Prince George's County responded that allowing fingerprint evidence to support a death penalty sentence would be "going backwards" from the enhanced reliability provided by the bill, because fingerprint evidence "is less reliable . . . [and] more likely to be tampered with." House Proceedings, Mar. 25, Sess. No. 1, *supra* note 52, at 1:28:00–1:28:38. The House rejected the amendment by a vote of eighty-eight to forty-one. 2 MARYLAND HOUSE JOURNAL 1805. R

Delegate Krebs did not address the other two parts of her proposed amendment. The first would have defined "biological evidence" by reference to Section 8-201 of the Criminal Procedure Article (the DNA Statute) (Delegate Krebs' amendment mistakenly referred to "Section 8-201 of the Criminal Law Article"), which would include, "but . . . not [be] limited to, any blood, hair, saliva, semen, epithelial cells, buccal cells, or other bodily substances from which genetic marker groupings may be obtained." MD. CODE ANN., CRIM. PROC. § 8-201(a)(2) (LexisNexis 2008 & Supp. 2010); 2 MARYLAND HOUSE JOURNAL 1804 (statements of Del. Kreb introducing floor amendment no. 533121/01). The second would have defined "DNA evidence" by reference to the definition in Section 10-915(a) of the Courts and Judicial Proceedings Article, which provides:

> (2) 'Deoxyribonucleic acid (DNA)' means the molecules in all cellular forms that contain genetic information in a chemical structure of each individual.
>
> (3) 'DNA profile' means an analysis of genetic loci that have been validated according to standards established by: (i) The Technical Working Group on DNA Analysis Methods (TWGDAM); or (ii) The DNA Advisory Board of the Federal Bureau of Investigation.

In addition, the House rejected attempts to expand the types of recordings that would satisfy the evidentiary requirements of Senate Bill 279. For example, the House rejected an amendment that would have allowed a videorecording, instead of a videotaped interrogation and confession, to qualify for the death penalty[62] and an amendment that would have defined the types of videorecordings that could "conclusively link . . . a defendant to the murder" as including "a recording using digital media or any magnetic tape or photographic film used to record visual images for subsequent playback or broadcasting."[63] Finally, the House rejected an amendment that would have allowed a death sentence based solely on eyewitness testimony when "the defendant was previously known by at least one of the eyewitnesses."[64]

In the end, a substantial number of delegates who supported the death penalty voted for the bill without amendments. They considered the bill a fair compromise that would help prevent inappropriate capital convictions and sentences.[65]

MD. CODE ANN., CTS. & JUD. PROC. § 10-915(a) (LexisNexis 2006 & Supp. 2010); 2 MARYLAND HOUSE JOURNAL 1804 (statements of Del. Kreb introducing floor amendment no. 533121/01) (citing CTS. & JUD. PROC. § 10-915(a)).

62. 2 MARYLAND HOUSE JOURNAL 1805 (statements of Del. Krebs introducing floor amendment no. 583529/01). The amendment's term "recording" was broader in scope than the bill's language. A "recording" included "a recording using digital media or any magnetic tape or photographic film used to record visual images and associated sound for subsequent playback or broadcasting." *Id.* The House rejected the amendment by a vote of eighty-eight to forty-one. *Id.*

63. *Id.* at 1805 (statements of Del. Krebs floor amendment no. 583529/01).

64. 3 MARYLAND HOUSE JOURNAL 1929 (statements of Del. Kach introducing floor amendment no. 883624/01). The House rejected this amendment by a vote of ninety-one to forty-two.

65. One delegate ("the gentleman from Baltimore County") expressed doubts about the bill (he was "concerned" about basing the death penalty on "evidentiary . . . sufficiency" and not on "the heinousness of the crime"), but stated that with his "green vote," he hoped "we are moving . . . in the right direction; that we are making sure that we are only going to be using this . . . for people who we are certain should be the ones who we have to [use it on]." House Proceedings, Mar. 26, Sess. No. 1, *supra* note 53, at 1:48:15–1:49:10. Another delegate ("the gentleman from Montgomery" County), who described his family as victims of "an egregious crime," said: R

> I place my green vote today, because I feel as though, as a proponent and supporter of the death penalty, that we need to lay to rest the concerns and fears that we are putting people to death that are innocent. No victim's family wants to hear that an innocent person has been put to death as a result of the death penalty. . . [E]ven though this bill is not perfect . . . [it] will lay[ ] . . . to rest the concerns that are out there [about the execution of innocent people].

Id. at 1:50:03–1:51:30. Another delegate ("the gentleman from the Eastern Shore") said:

> In my area, in Dorchester County, we had a man that was sentenced to death [who was innocent], and I don't think that the State can afford to be guilty of killing someone who is innocent. So, therefore, I have a green vote. . . . If we are going to err, let's err . . . [to give] the person the opportunity to . . . live and prove that he or she is innocent.

III. IMPLEMENTATION OF THE NEW LAW

A. *Integrating the New and Pre-existing Death Penalty Laws*

The five substantive death-eligibility limitations that existed in Maryland's prior death penalty law remain effective today. These limitations preclude imposition of the death penalty unless (1) the defendant is convicted of first degree murder[66] (2) with an aggravating circumstance,[67] (3) the defendant was at least eighteen-years-old[68] and (4) not "mentally retarded" at the time of the homicide,[69] and (5) the defendant was a first degree principal, or in two special circumstances a second degree principal, in the murder.[70] These five limita-

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Id. at 1:56:07–1:56:48. Another delegate ("the gentleman from Prince George's County") said:

> I support the death penalty. I represent . . . a county that lost 132 lives last year to murder. . . . As much as I believe in capital punishment and the death penalty, I can't live with the fact of, if we even execute one person wrongly, then a tremendous [in]justice [sic] has been done. . . . I support the death penalty, and I am proud to put my vote for Senate Bill 279.

Id. at 2:07:35–2:09:25. Another delegate ("the gentleman from the Eastern Shore") said:

> I have a green vote today, for this bill, even though I think this bill is not exactly what I would like to have had. . . . This bill will keep the death penalty alive, and in my district the overwhelming support has been for the death penalty, and therefore I have cast a green vote here today.

Id. at 2:10:35–2:11:11. Another delegate ("the gentleman from Prince George's [County] closest to me") said:

> I rise to explain my green vote. . . I believe this bill as it stands before us is indeed the reflection of the political process. It is not what I wanted. I oppose the death penalty. . . . Our decision to reject all the amendments . . . is a reflection of the political process in the tradition of this body. And, we should stand up and be proud of that.

Id. at 2:19:14–2:20:18. Another delegate explained his vote for the bill by noting a number of innocent defendants who wrongfully had been convicted of serious crimes or threatened with or given the death penalty, including Bernard Webster, Anthony Gray, and Chris Conover. *Id.* at 2:21:25–2:22:20.

66. MD. CODE ANN., CRIM. LAW §§ 2-201(b)(1)(i), -202(a) (LexisNexis 2002 & Supp. 2010).

67. *Id.* § 2-303(g), (h)(2).

68. *Id.* § 2-202(b)(2)(i).

69. *Id.* § 2-202(b)(2)(ii).

70. In all first degree murders, except murders of "a law enforcement officer while the officer was performing the officer's duties," *id.* § 2-303(g)(1)(i), and murders in which "the defendant employed or engaged another to commit the murder," *id.* § 2-303(g)(1)(vii), the defendant must be a principal in the first degree to be death-eligible. *Id.* § 2-202(a)(2)(i)–(ii). In the murder of a law enforcement officer, the defendant is death-eligible if the defendant "was a principal in the second degree who: (A) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (B) was a major participant in the murder; and (C) was actually present at the time and place of the murder." *Id.* § 2-202(a)(2)(i)(2). In a contract murder, the defendant is death-eligible if "[t]he defendant engaged or employed another person to commit the

tions made the majority of convicted murderers ineligible for the death penalty prior to the enactment of Senate Bill 279.[71]

Once the decision maker determined that the defendant was death-eligible, the decision maker had to decide whether—based on the statutory aggravating circumstances and the statutory and nonstatutory mitigating circumstances—the defendant should be sentenced to death or to life imprisonment, and if the latter, with or without the possibility of parole.[72] Senate Bill 279 added three evidentiary limitations to the five pre-existing substantive limitations, only one of which is necessary to establish death-eligibility. The new evidentiary limitations did not otherwise affect the capital punishment decisional process.[73]

Now, for a court to impose the death penalty, a case must satisfy all five substantive death-eligibility criteria, and the State must satisfy one of the three new evidentiary tests—namely, that "biological evidence or DNA evidence" linked "the defendant to the act of murder," that there was a "video taped, voluntary interrogation and confession of the defendant to the murder," or that "a video recording . . . conclusively link[ed] the defendant to the murder."[74] Once a capital case passes these death-eligibility criteria, the decision maker must still decide whether, based on relevant aggravating and mitigating circumstances, the defendant should be sentenced to death or to life imprisonment, and if the latter, with or without the possibility of parole.[75] Senate Bill 279 therefore substantially limits the number of murder defendants who are death-eligible without affecting the pre-existing standards that capital decision makers, judges, or juries have applied and will continue to apply in determining whether convicted and death-eligible first degree murderers should be sentenced to death.

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murder and the murder was committed under an agreement or contract for remuneration or the promise of remuneration." *Id.* §§ 2-202(a)(2)(i), -303(g)(1)(vii).

71. MD. COMM'N ON CAPITAL PUNISHMENT, *supra* note 13, at 5 ("Only 22% of all murders met the statutory requirements that made those crimes eligible for the death penalty."). R

72. CRIM. LAW § 2-303.

73. 2009 Md. Laws 1063–88.

74. 2 MARYLAND SENATE JOURNAL, 426th Sess. 1118 (2009) (statements by Sen. Zirkin introducing floor amendment no. 553820/3 (adopted Mar. 3, 2009)).

75. CRIM. LAW § 2-303(i).

B. *Trifurcating the Capital Proceeding by Bifurcating the Sentencing Hearing*

Prior to the new law, the capital proceeding was bifurcated.[76] At trial, the decision maker decided whether the defendant was guilty of first degree murder.[77] At the sentencing hearing, the decision maker decided whether the convicted murderer was eligible for the death penalty.[78] If he was, the decision maker decided whether any other aggravating circumstances (in addition to the one necessary for death-eligibility)[79] and mitigating circumstances existed.[80] If so, the decision maker decided whether the aggravating circumstances outweighed the mitigating circumstances making death the appropriate penalty.[81] If life imprisonment was appropriate, the decision maker usually also decided whether the sentence should be with or without the possibility of parole.[82] Thus, the pre-existing sentencing hearing combined death-eligibility decisions that had the hallmarks of guilt-innocence decisions, such as whether the defendant was a first degree principal, and those of traditional sentencing decisions, such as whether the defendant should be sentenced to life imprisonment or to death.[83]

After the enactment of Senate Bill 279, the Maryland Court of Appeals, acting in its regulatory capacity, substantially changed the capital sentencing process. By revising rule 4-343, the court created a trifurcated capital proceeding for defendants found guilty of first degree murder. The process consists of (1) a guilt-innocence trial to decide whether the defendant is guilty of first degree murder,[84] (2) an *initial* death-eligibility hearing to determine whether, based on the age and principalship criteria and at least one of the three evidentiary criteria, the defendant is eligible for death,[85] and if so, (3) a *secondary* sentencing proceeding to determine whether two other death-eligibility criteria (nonretardation and at least one aggravating circumstance) exist, and if so, whether, based on the aggravating circumstances and

76. *Id.* § 2-303(b).
77. *Id.*
78. *Id.* § 2-202.
79. *Id.* § 2-303(g).
80. *Id.* § 2-303(h).
81. *Id.* § 2-303(i).
82. *Id.* § 2-303(j)(4)(5).
83. *See supra* text accompanying notes 66–70, 72, 77–82. R
84. CRIM. LAW § 2-303(b).
85. MD. R. 4-343.

mitigating circumstances (if any),[86] the penalty will be death or life imprisonment, with or without the possibility of parole.[87]

In its rulemaking capacity and based substantially on the recommendations of its Standing Committee on Rules of Practice and Procedure ("Rules Committee"),[88] the Maryland Court of Appeals decided to bifurcate the sentencing hearing, which resulted in the trifurcation of the capital proceeding.[89] The Rules Committee based its recommendation on the first two arguments that follow.[90] I also present a third argument, which the Rules Committee did not consider.

First, the Rules Committee explained that sentencing bifurcation is "more efficient."[91] When the State cannot establish that the defendant is eligible for the death penalty, bifurcation avoids much of the costs in financial and human terms of the traditional capital sentencing hearing.[92] Under the rule, at Phase I of the bifurcated capital sentencing hearing, the factual issues will be limited to death-eligibility.[93] In most cases, there will be substantial trial evidence that is relevant to these issues and is admissible in the Phase I proceeding.[94] If the State fails to establish death-eligibility in Phase I, there will be no need for the normally protracted Phase II capital sentencing proceeding.[95] Instead, Phase II will determine only whether the defendant is sentenced to life imprisonment with the possibility of parole or life imprisonment without the possibility of parole.[96] Although, in most cases the parties, especially the defendant, will introduce evidence in these "life with or without parole" Phase II proceedings, the evidentiary hearings, motions practice, and arguments will not be as pro-

86. *Id.*

87. *Id.*

88. Standing Committee on Rules of Practice and Procedure, Notice of Proposed Rules Changes, 36 Md. Reg. 1118, 1119 (proposed July 1, 2009).

89. Court of Appeals of Maryland, Rules Order, 36 Md. Reg. 1513, 1513–14 (Sept. 25, 2009).

90. Standing Committee on Rules of Practice and Procedure, Notice of Proposed Rules Changes, 36 Md. Reg. at 1119–20.

91. *Id.* at 1119.

92. *See id.*

93. MD. R. 4-343(h).

94. *Id.*

95. *See* MD. R. 4-343(i)(1)(A) (stating that a sentencing jury or judge shall only complete Phase II if certain findings are made in Phase I); Standing Committee on Rules of Practice and Procedure, Notice of Proposed Rules Changes, 36 Md. Reg. at 1119 (explaining that "[i]f the state does not prevail on Phase One issues, there would be no need for the sentencing authority to do anything more but enter a sentence of life imprisonment and determine whether it should be without parole").

96. MD. R. 4-343(i)(1)(B).

tracted as those in which death is a sentencing option.[97] Moreover, the emotional burdens on the victim's surviving family and friends should be somewhat reduced in Phase II proceedings in which the death penalty is not an issue.[98]

Second, bifurcated capital sentencing should help to prevent jury confusion and thereby produce more reliable sentencing decisions. Under the new death penalty law, capital juries will be required to make a variety of different decisions, often using different standards and burdens of proof. They will make discrete factual decisions regarding death-eligibility based on the substantive and evidentiary criteria.[99] If they determine that the defendant is death-eligible, they will find and weigh aggravating and mitigating circumstances[100] and make broader, more discretionary judgments including the ultimate judgment about whether to impose death.[101] Under the new law, juries will also apply different evidentiary standards depending on the issues, including proof that establishes a proposition "conclusively,"[102] proof that establishes a proposition beyond a reasonable doubt,[103] and proof that establishes a proposition by a preponderance of the evidence.[104] These juries must also apply different burdens of persuasion sometimes imposed on the State[105] and sometimes imposed on the defendant.[106] Combining the evidence that may be relevant to all of these legal issues in one sentencing proceeding and asking juries to apply the differing legal standards and burdens of persuasion to this body of evidence creates a great risk of jury confusion and error. Empirical studies of capital jury decisions demonstrate that this risk is

97. *See* MD. COMM'N ON CAPITAL PUNISHMENT, *supra* note 13, at 47–49 (highlighting the additional costs of sentencing proceedings where death is an option). R

98. *Id.* at 56.

99. *See* MD. CODE ANN., CRIM. LAW § 2-202(a)(3) (LexisNexis 2002 & Supp. 2010) (requiring fact-finders to determine whether the State presented evidence, such as biological or DNA evidence, a videotaped, voluntary interrogation and confession, or videorecordings linking the defendant to the murder).

100. *Id.* § 2-303(g)–(h).

101. *Id.* § 2-303(i)–(j).

102. *Id.* § 2-202(a)(3)(iii) (requiring the fact-finder to determine whether the State presented "a video recording that *conclusively* links the defendant to the murder" (emphasis added)).

103. *Id.* § 2-303(g) (requiring fact-finders to "consider whether any . . . aggravating circumstances exist beyond a reasonable doubt").

104. *Id.* § 2-303(h)(2) (requiring the fact-finder to determine whether "any of the following mitigating circumstances exists based on a preponderance of the evidence").

105. *Id.* § 2-303(g) (requiring the State to prove beyond a reasonable doubt the existence of aggravating circumstances).

106. *Id.* § 2-303(h)(2) (requiring the defendant to show, only by a preponderance of the evidence, the existence of mitigating circumstances).

very real.[107] The risk of confusion and error is decreased by bifurcating the sentencing hearing as rule 4-343 has done, thereby allocating the more discrete factual death-eligibility questions to Phase I and preserving the traditional, more discretionary sentencing issues for Phase II.[108]

Third, sentencing bifurcation helps to make the capital sentencing procedure fairer. Before the enactment of the new law, capital defendants argued that the admission of facts relevant to sentencing—for example, a defendant's substantial criminal record or alleged prior bad acts—undermined the integrity of discrete death-eligibility fact-finding decisions.[109] These latter decisions, such as whether the defendant killed the victim with his own hands, were more like guilt-innocence decisions than sentencing decisions.[110] The adoption of revised rule 4-343 "mooted" these arguments by effectively accepting them.

To appreciate this "fairness" argument, assume that *A* and *B* are standing trial for the murder of *V*, who was not a police officer.[111] The issue at trial is who killed *V*. If *A* killed *V* with his hands, he is death-eligible.[112] If *B* killed *V*, *A* is not death-eligible, even if *A* handed *B* the knife.[113] The trial jury could convict both *A* and *B* of first degree murder under the theory that they were, at least, mutual

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107. *See* CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 164–88 (2005) (discussing studies of California capital juries conducted by the author and others, all pointing to low comprehension of capital sentencing instructions); Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000) (replicating a capital case with a test jury and finding low levels of comprehension of the sentencing instructions given in the actual case).

108. *See* Standing Committee on Rules of Practice and Procedure, Notice of Proposed Rules Changes, 36 Md. Reg. 1118, 1119 (proposed July 1, 2009) (noting that "the task facing the sentencing authority, particularly a jury, [is] already complex enough" and suggesting that the amended rule would decrease such confusion).

109. *See* José Felipe Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367, 432–33 (1997) (explaining the importance of "provid[ing] adequate procedural safeguards for the most important and potentially volatile evidence that is likely to be presented in support of a convicted murder's possible execution").

110. *See* Margo A. Rocklin, *Place the Death Penalty on a Tripod, or Make It Stand on Its Own Two Feet?*, 4 RUTGERS J.L. & PUB. POL'Y 788, 796 (2007) (discussing the risk that presenting jury members with information applicable to sentencing may prejudice their death-eligibility determination).

111. Section 2-202(a)(2)(ii) of the Criminal Law Article allows for the imposition of the death penalty on a principal in the second degree if the victim was a law enforcement officer. CRIM. LAW § 2-202(a)(2)(ii).

112. *Id.* § 2-202(a)(2)(i) (establishing the death-eligibility of a defendant found guilty of first degree murder who was a first degree principal in the crime).

113. *Id.* If *A* handed *B* the knife, then *A* would no longer constitute a first degree principal in the crime.

aiders and abettors without resolving the first degree principalship issue.[114] At the sentencing hearing, the jury would have to decide whether *A* or *B* killed *V*, because only a first degree principal—one who killed with his own hand—would be death-eligible.[115]

Before resolving the principalship issue in this hypothetical case, however, the jury would hear evidence about the criminal records and perhaps unadjudicated prior bad acts of both *A* and *B*.[116] The jury might hear, for example, that *A* had been convicted of assault and had been accused of a prior killing, but that *B* had no similar history. Then, the jury would have to decide whether it believed *A* or *B* had killed *V* with his own hand. The risk that the jury would unfairly conclude that *A*, rather than *B*, had killed *V* based on *A*'s record (rather than the facts of the case) is substantial, which is why the Maryland Rules of Evidence generally prevent the admission of such information at trial.[117]

Revised rule 4-343 mandates that the capital sentencing jury decide the principalship issue and five other fact-specific death-eligibility issues[118] in Phase I before hearing all of the evidence about the defendant's criminal record and unadjudicated prior bad acts.[119] The overall goal promoted by revised rule 4-343 is to assist the jury in deciding these fact-dependent sentencing issues in a fair and impartial manner.

IV. AN ASSESSMENT OF THE NEW CAPITAL LAW: THE MEANING OF THE KEY TERMS IN MARYLAND'S NEW DEATH PENALTY LAW

A. *Interpretive Principles*

To implement the new death penalty law, the Maryland courts must first identify the applicable principles of statutory interpretation. Maryland courts will then need to interpret the new law's key terms in light of these principles. I begin with a consideration of the applicable principles of statutory interpretation.

For years, judges, scholars, and lawyers have defended and have criticized different theories of statutory interpretation.[120] Within this

114. *Id.* § 2-201.

115. *See supra* note 112 and accompanying text. R

116. CRIM. LAW § 2-303(e)(1)(iii).

117. *See* MD. R. 5-404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith.").

118. MD. R. 4-343(h)(2) (listing required findings in Phase I of the sentencing hearing).

119. *See id.*

120. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 4 (2001) ("The question of text versus purpose has always troubled the law of statutory interpretation—and it always will." (footnote omitted)). *See generally* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 1 (1999) (noting

body of scholarship, produced by classic[121] and contemporary scholars,[122] are competing claims about the validity, *vel non*, of intentionalist,[123] textualist,[124] dynamic,[125] and minimalist[126] theories of interpretation.

I do not enter into this debate here. Rather, I identify some of the interpretive principles that Maryland's appellate courts consistently have endorsed—rightly or wrongly—even though these principles sometimes are at odds with themselves.[127] I apply these

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that recent "years have seen an explosion of interest in the field of statutory interpretation").

121. *E.g.*, Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527–28 (1947) ("When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title deeds."); Karl L. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399 (1950) ("[T]he problem will recur in statutory construction as in the handling of case-law: *Which* of the technically correct answers (a) *should* be given; (b) *will* be given—and Why?"); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 863 (1930) ("[I]n a constantly increasing number of litigated cases, the point of departure is as likely as not to be a statute, the effect of which is to be estimated, the meaning discovered, and the applicability affirmed or rejected.").

122. *E.g.*, EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 1 (2008) ("You are a conscientious judge, and you have a problem. . . . [T]he primary issue before you is to determine the meaning of the statute. Unfortunately, you also know that there is no consensus about how to do that."); HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 533 (1983) ("The construction of an ambiguous document is a work of judicial creation or re-creation.").

123. *E.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–17 (1980) ("[T]he intentionalist interprets a provision by ascertaining the intentions of those who adopted it.").

124. *E.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–25 (1997) ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.").

125. *E.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31–43 (1982) (describing "the updating of laws" as a "plausible function of interpretation"); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 10 (1994) (arguing that "statutory interpretation in the United States is . . . dynamic, as a matter of practice and positive theory"); Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911, 912 (1996) (arguing that "the public-law theory of 'dynamic statutory interpretation' is worse than misguided—it is unjust").

126. *E.g.*, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 253 (1992) ("If the plain meaning of the statute's language does not cover a circumstance, then the statue is inapplicable. In a sense, this position, a minimalist one for courts, asserts that the *legislature* must complete otherwise incomplete statutes, not the courts.").

127. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 263 & n.16 (1994) ("It is not uncommon to find 'apparent tension' between different canons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites." (citing Llewellyn, *supra* note 121, at 402)). R

principles to the provisions of Maryland's new death penalty law that pose the greatest challenges. I do not organize these principles in a rigid set of interpretive rules because this would be fruitless. Maryland courts, like other state and federal courts, have not succeeded in constructing and consistently applying rules of statutory interpretation.[128] Instead, I identify and apply the interpretive principles that Maryland's appellate decisions most frequently recognize and apply.

The oft-stated "cardinal rule of statutory construction" is to identify and to follow the intent of the Maryland General Assembly.[129] Maryland courts assume that for many statutes a legislative "intent" that courts can identify and apply exists.[130]

One source of legislative intent is the language of the statute.[131] Maryland appellate decisions often note that "if the language is clear and unambiguous," then the court "need go no further."[132] While the statutory text is the place to start, the text is usually not so inherently clear as to preclude a further search for meaning.[133] If the statutory text is ambiguous, it matters whether the statute in question is criminal or civil. If statutory text in a criminal statute is ambiguous, courts often apply a strict construction rule,[134] in part, to give effect to the "rule of lenity."[135] When interpreting ambiguous terms, including

128. HART & SACKS, *supra* note 122, at 1169 ("American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."). R

129. Montgomery Cnty. v. Buckman, 333 Md. 516, 523, 636 A.2d 448, 451 (1994); *see also, e.g.*, W. Corr. Inst. v. Geiger, 371 Md. 125, 140, 807 A.2d 32, 41 (2002) ("Repeatedly, we have emphasized that 'the paramount object of statutory construction is the ascertainment and effectuation of the real intention of the Legislature.'" (quoting Whiting-Turner Contracting Co. v. Fitzpatrick, 366 Md. 295, 301, 783 A.2d 667, 670 (2001))).

130. *See, e.g.*, *In re* Taylor, 312 Md. 58, 70, 537 A.2d 1179, 1185 (1988) ("We see the legislative intent in enacting § 11-504(b)(1) emanating bright and clear from the plain language of the subsection.").

131. Bible v. State, 411 Md. 138, 153, 982 A.2d 348, 356 (2009) (explaining that the statutory language is the "primary source" of legislative intent (citing Williams v. State, 329 Md. 1, 15, 616 A.2d 1275, 1282 (1992))).

132. Farris v. State, 351 Md. 24, 28, 716 A.2d 237, 240 (1998), *superseded by statute on other grounds*, 1999 Md. Laws 422, *as recognized in* Boffen v. State, 372 Md. 724, 742–43, 816 A.2d 88, 98 (2003).

133. *Cf.* Schwartz & Conn, *supra* note 51, at 434 (stating that "an understanding of the words in the statute is necessary but not always sufficient, because the text is merely the skin of something deeper: the General Assembly's purpose, aim or policy" (internal quotation marks omitted)). R

134. *Farris*, 351 Md. at 28–29, 716 A.2d at 240 ("Criminal statutes must be strictly construed in favor of the defendant to prevent courts from extending punishment to cases not plainly within the language of the statute." (citing Tapscott v. State, 343 Md. 650, 654, 684 A.2d 439, 441 (1996); Jones v. State, 304 Md. 216, 220, 498 A.2d 622, 624 (1985))).

135. State v. Purcell, 342 Md. 214, 229, 674 A.2d 936, 944 (1996) ("'Generally, in construing penal statutes we employ the 'rule of lenity,' that is, statutes are strictly construed, in favor of the accused.'" (quoting State v. Kennedy, 320 Md. 749, 754, 580 A.2d 193, 195

those in criminal statutes, Maryland courts find meaning in "the objectives and purposes expressed by the Legislature,"[136] in the other words in the same provision, in the words in other provisions of the same statute (by "harmonizing" the provisions[137] or by accepting the negative implications of the accompanying text[138]), and in the terms of other statutes relating to the same subject matter.[139]

In identifying "the objectives and purposes expressed by the Legislature,"[140] Maryland courts also give substantial weight to legislative history. Relevant legislative history may include adopted and rejected amendments,[141] the "relationship" of the law being interpreted to "earlier and subsequent [related] legislation,"[142] "legislative reports including Bill Analysis reports, Floor reports, Fiscal Notes, reports by study or advisory committees, and other material concerning General Assembly bills found in the Department of Legislative Services' bill files, or, earlier, in the Department of Legislative Reference's bill files."[143]

(1990))). *But see* Wynn v. State, 313 Md. 533, 540, 546 A.2d 465, 469 (1988) (noting that "'[w]here public or social interest in penal legislation is especially great, the policy of giving penal laws a very strict construction may be relaxed.'" (quoting 3 SUTHERLAND, STATUTORY CONSTRUCTION § 59.05, at 33 (4th ed. 1986))).

136. *Farris*, 351 Md. at 28–29, 716 A.2d at 240.

137. United States v. Ambrose, 403 Md. 425, 440, 942 A.2d 755, 764 (2008) ("[S]tatutory text should be read so that no word, clause, sentence, or phrase is rendered superfluous but rather with an eye towards harmonizing multiple provisions within the statutory scheme." (citing Kushell v. Dep't of Natural Res., 385 Md. 563, 577, 870 A.2d 186, 193 (2005))).

138. *See, e.g.*, Breitenbach v. N.B. Handy Co., 366 Md. 467, 482, 784 A.2d 569, 578 (2001) (finding negative implication in statutory scheme); Citizens Bank of Md. v. Md. Indus. Finishing Co., 338 Md. 448, 463, 659 A.2d 313, 320 (1995) (same).

139. Pete v. State, 384 Md. 47, 65, 862 A.2d 419, 429 (2004) ("'[V]arious consistent and related enactments, although made at different times and without reference to one another, nevertheless should be harmonized as much as possible.'" (quoting State v. Bricker, 321 Md. 86, 93, 581 A.2d 9, 12 (1990))).

140. *Farris*, 351 Md. at 28–29, 716 A.2d at 240.

141. *In re* Anthony R., 362 Md. 51, 58, 763 A.2d 136, 140 (2000) (citing Kaczorowski v. Mayor of Balt., 309 Md. 505, 514–15, 525 A.2d 628, 632–33 (1987)).

142. *Id.*

143. Moore v. State, 388 Md. 623, 635–36 n.4, 882 A.2d 256, 264 n.4 (2005); *see also* Bienkowski v. Brooks, 386 Md. 516, 542–43, 873 A.2d 1122, 1137–38 (2005) (analyzing the 1978 constitutional amendments to Article IV, Section 22 by evaluating the Department of Legislative Reference's bill file); Comptroller of the Treasury v. Phillips, 384 Md. 583, 600–01, 865 A.2d 590, 599–600 (2005) (analyzing Section 7-304 of the Tax-General Article by referring to the House committee bill file); Collins v. State, 383 Md. 684, 695–96, 861 A.2d 727, 734 (2004) (analyzing Article 27, Section 291A of the Maryland Code by referring to the Senate Judicial Proceedings Committee's bill file).

B. *Key Provisions*

As has been the case with capital sentencing laws in general, the new Maryland capital law raises a number of legal issues.[144] This country is deeply divided about capital punishment.[145] This fundamental schism is embodied in our capital laws and in our constitutional law, which Justice Scalia has criticized as the equivalent of jurisprudential schizophrenia.[146] The ebb and flow of majoritarian mood and the democratic need to give voice to the deeply held views of both death penalty supporters and opponents have produced several generations of compromised laws.[147] These laws have, in turn, produced several generations of interpretive and constitutional decisions.[148]

The Maryland Court of Appeals has not yet reviewed the new capital law.[149] A recent trial court opinion, however, identifies and re-

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144. *See, e.g.*, Molly E. Grace, Note, Baze v. Rees*: Merging Eighth Amendment Precedents into a New Standard for Method of Execution Challenges*, 68 MD. L. REV. 430 (2009) (discussing the Supreme Court's evaluation of the State of Kentucky's death penalty statute, which made "death by lethal injection . . . [its] default method" of execution).

145. *See* Michael K. Brown, *The Death Penalty and the Politics of Racial Resentment in the Post Civil Rights Era*, 58 DEPAUL L. REV. 645, 645 (2009) (discussing the trends in American public opinion of the death penalty over several decades); Gregg R. Murray, *Raising Considerations: Public Opinion and the Fair Application of the Death Penalty*, 84 SOC. SCI. Q. 753, 753–54 (2003) (assessing the complex nature of individuals' opinions of the death penalty).

146. *See* Abdul-Kabir v. Quarterman, 550 U.S. 233, 284 (2007) (Scalia, J., dissenting) ("[T]his Court's vacillating pronouncements have produced grossly inequitable treatment of those on death row."); Kansas v. Marsh, 548 U.S. 163, 182 (2006) (Scalia, J., concurring) (describing the Court's death penalty jurisprudence as "incoherent"); Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in the judgment) ("To acknowledge that 'there perhaps is an inherent tension'" in the Supreme Court's death penalty jurisprudence "is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II." (quoting McCleskey v. Kemp, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting)), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

147. *See* Andrew Ditchfield, Note, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801, 801–02 (2007) (observing that "[t]he thirty-eight states that have retained the death penalty do not apply it with comparable frequency").

148. John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195 (2009) (discussing the Supreme Court's death penalty jurisprudence from *Furman v. Georgia*, 408 U.S. 238 (1972), to *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

149. This is not surprising given that the new law was enacted in 2009 and that capital trials and sentencing proceedings are protracted. *See* Recent Case, *Illinois Supreme Court Holds That a Disproportionately Long Stay on Death Row Does Not Constitute Cruel and Unusual Punishment*—People v. Simms, *No. 86200, 2000 WL 1131823 (Ill. Aug. 10, 2000)*, 114 HARV. L. REV. 648, 651 (2000) ("A lengthy appellate process is . . . an unavoidable byproduct of the just and fair application of the death penalty.").

solves a number of the law's potential issues. In *State v. Stephens*,[150] Judge Paul Hackner of the Circuit Court for Anne Arundel County rejected a number of challenges to the law.[151] In *Stephens*, the State notified the defendant that it intended to introduce biological and DNA evidence and to produce expert testimony that would link the defendant to the murder for which he was indicted.[152] The State therefore gave notice that it would seek to satisfy this DNA death-eligibility criterion.[153] The defendant responded by filing a motion that challenged the constitutionality of the new law.[154] *State v. Stephens* provides a good starting point for considering the issues raised by the new capital law.

1. The Burden of Persuasion and the Standard of Proof

The new law provides that a defendant who has been found guilty of first degree murder is death-eligible "only if" the *State presents* the court or jury with one of three forms of evidence.[155] The law puts the burden—at least the burden of production—on the State to present the evidence.

The new law, however, does not specifically allocate the burden of persuasion or identify the required standard of proof. The legislature might have assumed that those implementing the new law would fit it into the traditional criminal model that requires the State to prove certain facts beyond a reasonable doubt.[156] This is precisely what the Maryland Court of Appeals had done, by Rule, to implement the pre-existing death-eligibility principalship criteria. The Rule required, and continues to require, that the State prove first degree principalship, or one of its two second degree principalship excep-

150. No. K-08-646 (Md. Cir. Ct. Dec. 10, 2009), *available at* http://www.circuitcourt.org/images/pdfstephens/2009-12-10_memorandum_opinion_constitutionality_of_revised_statute.pdf.

151. *Id.* at 19–20.

152. *Id.* at 2.

153. *See* MD. CODE ANN., CRIM. LAW § 2-202(a)(1) (LexisNexis 2002 & Supp. 2010) (requiring the State to give the defendant thirty days written notice of its intention to seek the death penalty).

154. *Stephens*, No. K-08-646, slip op. at 2. Defendant's motion was styled: "Motion to Preclude the Death Penalty as the New Statute is Unconstitutional." *Id.*

155. CRIM. LAW § 2-202(a)(3) (emphasis added). The State must present: "(i) biological evidence or DNA evidence that links the defendant to the act of murder; (ii) a video taped, voluntary interrogation and confession of the defendant to the murder; or (iii) a video recording that conclusively links the defendant to the murder." *Id.*

156. *See* Patterson v. New York, 432 U.S. 197, 210 (1977) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.").

tions, beyond a reasonable doubt.[157] The Maryland Court of Appeals revised rule 4-343 to implement the new death penalty law and required the State to prove beyond a reasonable doubt both the new and old death-eligibility criteria.[158]

In the death-eligibility "statements," the pre-existing substantive death-eligibility criteria are stated clearly *as facts*. Examples include: "At the time of the murder, the defendant was 18 years of age or older";[159] "[t]he defendant was a principal in the first degree to the murder";[160] "[t]he defendant engaged or employed another person to commit the murder";[161] or "the defendant was a principal in the second degree" in the murder of "a law enforcement officer . . . in the performance of the officer's duties."[162] These provisions in the rule incorporate, virtually verbatim, the statutory text.[163]

In revised rule 4-343, the new death-eligibility evidentiary criteria are set forth in "statements." Thus, the State must prove beyond a reasonable doubt that (1) "[t]he State *has produced* biological evidence or DNA evidence that links the defendant to the act of murder";[164] (2) "[t]he State *has produced* a videotaped, voluntary interrogation and confession of the defendant to the murder";[165] or (3) "[t]he State *has produced* a video recording that conclusively links the defendant to the murder."[166]

This language is ambiguous in one respect. What is it that the State must prove beyond a reasonable doubt? Must the State prove that it has produced the three forms of evidence, or must the State prove that the facts satisfy the elements of the death-eligibility criteria? The answer plainly is the latter. It would be absurd to apply the beyond a reasonable doubt standard to the question of whether or not the State has *produced* or *presented* evidence relevant to an element.

157. *See* MD. R. 4-343(h)(2).

158. *Id.*

159. *Id.* (Phase I Findings, Finding 1).

160. *Id.* (Phase I Findings, Finding 6).

161. *Id.* (Phase I Findings, Finding 7). The rule also requires that "the murder [be] committed under an agreement or contract for remuneration or the promise of remuneration." *Id.*

162. *Id.* (Phase I Findings, Finding 8). In addition, the defendant: "(A) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (B) was a major participant in the murder; and (C) was actually present at the time and place of the murder." *Id.*

163. *See* MD. CODE ANN., CRIM. LAW § 2-202(a)(2) (LexisNexis 2002 & Supp. 2010) (incorporating *id.* § 2-303(g)(1)(i), (vii)).

164. MD. R. 4-343(h)(2) (Phase I Findings, Finding 2) (emphasis added).

165. *Id.* (Phase I Findings, Finding 3) (emphasis added).

166. *Id.* (Phase I Findings, Finding 4) (emphasis added).

Either it has or it has not. In every other criminal law context, the State must prove the key facts (those that prove elements) beyond a reasonable doubt—not whether the State has introduced or presented those facts.[167]

Moreover, the General Assembly's overarching goal in enacting the new law was to require that death-eligible convictions include guarantees of enhanced reliability.[168] That goal is accomplished only if it is the facts in the death-eligibility tests that the State must prove beyond a reasonable doubt—not if the State introduced some evidence of these facts. Accordingly, the State should be required to prove beyond a reasonable doubt that biological evidence or DNA evidence links the defendant to the act of murder, that the defendant confessed to the murder in a videotaped interrogation, or that a videorecording links the defendant to the murder.[169]

In *Stephens,* the circuit court agreed with this conclusion. The defendant argued that the new law's failure to "specify the method of presentation of [the death-eligibility] evidence or the burden of proof that must be met" rendered it unconstitutional.[170] The court, however, rejected this argument: "It is well established that all of the elements that support a defendant's eligibility for the death penalty must be determined by the jury and proved beyond a reasonable doubt."[171] The court interpreted the new law to impose this requirement on the axiomatic assumption that legislatures know about and adopt constitutional mandates when they enact laws, even if they are silent on the point.[172] The court also noted that revised rule 4-343 imposes the proof beyond a reasonable doubt requirement on the State.[173]

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167. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

168. *See supra* text accompanying notes 28–65 (outlining the legislative debates over Senate Bill 279). R

169. As to the third death-eligibility criterion, the State should be required to prove conclusively (a higher standard than beyond a reasonable doubt) that a videorecording links the defendant to the murder. *See supra* notes 62–63 and accompanying text. R

170. State v. Stephens, No. K-08-646, slip op. at 14 (Md. Cir. Ct. Dec. 10, 2009).

171. *Id.* at 14. The court cited *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Grandison v. State*, 390 Md. 412, 889 A.2d 366 (2005), in support of its conclusion. *Stephens*, No. K-08-646, slip op. at 14–15.

172. *Stephens*, No. K-08-646, slip op. at 15 (citing Pye v. State, 397 Md. 626, 635–36, 919 A.2d 632, 637 (2007)).

173. *Id.*

2. *Vagueness*

In *Stephens*, the defendant also alleged that the textual provisions of the three new death-eligibility criteria were unconstitutionally vague, challenging the new law facially and as applied to him.[174] He posed facial challenges to all three of the new evidentiary death-eligibility criteria.[175] The court, however, properly limited the claim to the part of the new law that applied to the defendant—the requirement that "the State presents . . . biological evidence or DNA evidence that links the defendant to the act of murder."[176] I consider all three provisions here.

a. *"The State Presents . . . Biological Evidence or DNA Evidence That Links the Defendant to the Act of Murder"*[177]

In *Stephens*, the court applied both Eighth Amendment and Fourteenth Amendment vagueness standards to the above provision.[178] The court began by noting that in assessing a statute's constitutionality, "there is a presumption that the statute is valid," and that courts will not invalidate an allegedly vague provision "if, 'by any construction, it can be sustained.'"[179] The court found that there were clear, legislatively approved definitions of "biological evidence" and "DNA evidence."[180] One Maryland statute, the court reasoned, defines DNA as "'the molecules in all cellular forms that contain genetic information in a chemical structure of each individual.'"[181] Another, the court noted, defines biological evidence "in terms of bodily substances from which genetic marker groupings may be obtained, including blood, hair, saliva, semen and other bodily cells."[182] Moreover, the court concluded, the word "links" commonly means "connects."[183]

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174. *Id.* at 3.

175. *Id.*

176. MD. CODE ANN., CRIM. LAW § 2-202(a)(3)(i) (LexisNexis 2002 & Supp. 2010); *see Stephens*, No. K-08-646, slip op. at 8–9 (noting that "whether subsections (a)(3)(ii) and (iii) are vague or not, are questions that must be left for another day in another case").

177. CRIM. LAW § 2-202(a)(3)(i).

178. *Stephens*, No. K-08-646, slip op. at 9–16.

179. *Id.* at 3 (citing Galloway v. State, 365 Md. 599, 614, 781 A.2d 851, 860 (2001)).

180. *Id.* at 16.

181. *Id.* (quoting MD. CODE ANN., CTS. & JUD. PROC. § 10-915 (LexisNexis 2006 & Supp. 2010)).

182. *Id.* (citing MD. CODE ANN., CRIM. PROC. § 8-201(a)(2) (LexisNexis 2008 & Supp. 2010)).

183. *Id.* (citing BLACK'S LAW DICTIONARY (8th ed. 2004)). The statutory text, "[t]he State has produced biological evidence or DNA evidence that links the defendant to the act of murder," MD. CODE ANN., CRIM. LAW § 2-202(a)(3)(i) (LexisNexis 2002 & Supp. 2010), is broad enough to include the defendant's DNA (or other biological evidence from the defendant), the victim's DNA (or other biological evidence from the victim), and other

Thus, the State must prove beyond a reasonable doubt that biological evidence or DNA evidence, as defined elsewhere in the Maryland Code, connects the defendant to the murder. The selection of these legislative definitions by the circuit court seems reasonable and is consistent with the legislative history.[184]

b. "The State Presents a Video taped, Voluntary Interrogation and Confession of the Defendant to the Murder"[185]

The death-eligibility scenario envisioned by the above provision is that of a capital suspect brought to the stationhouse who, after extensive questioning by a police detective, voluntarily acknowledges his guilt. This provision is a demanding test of death-eligibility that has several components in need of interpretation.

The first term that requires interpretation is "interrogation." Interrogation means "[t]he formal or systematic questioning of a person; esp[ecially], intensive questioning by the police, usu[ally], of a person arrested for or suspected of committing a crime."[186] In my opinion, systematic questions give essential context and thereby meaning to the answers the questions elicit. The requirement of an interrogation therefore seems to enhance the reliability of any resulting confession.[187]

Although this death-eligibility criterion does not require that the interrogator exercise police powers during the investigation, there are good reasons to read such a requirement into the law. First, as revealed by the definition above, the governmental nature of the interrogator is inherent in at least one common understanding of the word interrogate.[188] Second, since *Miranda v. Arizona*,[189] the word interrogation has become associated with systematic police interrogation in

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DNA (or other biological evidence)—for example, that of a pet dog that was killed with the victim and near the victim, which was found on the defendant's clothes. *But see* Washington v. Leuluaiailii, 77 P.3d 1192, 1197 (Wash. Ct. App. 2003) (holding that "canine DNA identification" does not pass the "general acceptance" test and thus is not admissible). In the vast majority of the cases, however, the DNA (or other biological evidence) will be human.

184. *See supra* Part II.

185. CRIM. LAW § 2-202(a)(3)(ii).

186. BLACK'S LAW DICTIONARY 895 (9th ed. 2009). "Interrogate" means "to question formally and systematically." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 612 (10th ed. 1996).

187. *But see* Thomas P. Sullivan, Recent Development, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128 (2005) (arguing for the adoption of a model act that requires the recording of all police interrogations because "the absence of audio or video recordings has led to widespread problems arising from disputes over what was said and done during custodial interrogations").

188. *See supra* note 186 and accompanying text. R

189. 384 U.S. 436 (1966).

the stationhouse—"custodial interrogation."[190] This is part of American legal culture, which I assume the Maryland General Assembly understood when it chose the word interrogation. Third, when the word interrogation is used elsewhere in the Maryland Code, it denotes formal questioning as part of an investigation by officials exercising police powers. For example, the Maryland Law Enforcement Officers' Bill of Rights requires a "sworn law enforcement officer" or "the Governor, the Attorney General or Attorney General's designee" to conduct interrogations of police officers accused of misconduct and strictly regulates the time, place, and manner of such interrogations.[191] Fourth, the legal limits on police interrogations serve the enhanced reliability purpose of this death-eligibility criterion. Particularly important is the right of those being interrogated by police to stop the questioning at any time or to seek the guidance of counsel in the interrogation.[192] It is hard to imagine a form of private interrogation that would have these reliability checks. For all of these reasons, the only interrogation that could satisfy this criterion is an interrogation by a police officer or other governmental official exercising police powers.

A second element of this criterion is a "confession." A confession is more than an admission. It is "[a] criminal suspect's oral or written acknowledgement of guilt, often including details about the crime."[193] The Maryland Court of Appeals "has recognized[ ] the fact that there is a real . . . difference between a confession and an admission in a criminal case."[194] According to the court:

> The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement, but based upon the substantive differences of the character of the evidence educed from each. A confession is a direct acknowledgment of guilt on the part of the accused, and, by the very force of the definition, excludes an admission, which, of itself, as applied in criminal law, is a statement by the accused, direct or implied, of facts pertinent to the issue,

190. *See id.* at 478–79 (holding that a suspect must be warned of his right to remain silent prior to a police interrogation).

191. MD. CODE ANN., PUB. SAFETY § 3-104 (LexisNexis 2003 & Supp. 2010). The statute also requires disclosure of "the name, rank, and command" of the "interrogating officer." *Id.* § 3-104(d); *see also* MD. CODE ANN., CORR. SERVS. § 11-1005 (LexisNexis Supp. 2010) (providing similar provisions governing the interrogation of correctional officers accused of misconduct).

192. *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that police must stop questioning once the accused invokes his right to counsel).

193. BLACK'S LAW DICTIONARY, *supra* note 186, at 338. R

194. Vincent v. State, 220 Md. 232, 238, 151 A.2d 898, 902 (1959).

> and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorize a conviction.[195]

The hallmark of a confession, according to the court, is that a defendant has "admitted facts which themselves (as distinguished from facts which permitted inferences to be drawn therefrom) disclosed that the [defendant] was guilty"—that is, the admitted facts satisfied all of the elements of the crime.[196] Put another way, "[a] confession of guilt is an admission of the criminal act itself, not an admission of a fact or circumstance which together with other facts warrant an inference of guilt."[197]

Trial courts should be able to readily implement the third requirement, that is, that a confession be "voluntary."[198] The pattern jury instruction that applies to the admissibility of a defendant's "statements" contains a multi-factor test of voluntariness that can be readily adapted to this death-eligibility criterion.[199] This is not to say that the distinctions between "statements," "admissions," and "confessions" are clear; they are not. It will be challenging for trial judges in capital cases to adequately explain to a capital sentencing jury why, having already considered the voluntariness of the defendant's statement at trial (in the first step of the sentencing proceeding), it must determine if that statement was a confession, and if so, whether that confession was voluntary.

Whatever the complications, the confession element of this death-eligibility criterion is important. It establishes that a death sentence—government's ultimate punishment—cannot, and should not, be available for a defendant's ambiguous answer to a question from a police officer or to a question from a jailhouse informant who will

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195. Ford v. State, 181 Md. 303, 307, 29 A.2d 833, 835 (1943) (quoting State v. Guie, 186 P. 329, 331 (Mont. 1919)) (internal quotation marks omitted).

196. *Vincent*, 220 Md. at 239, 151 A.2d at 902.

197. *Ford*, 181 Md. at 308, 29 A.2d at 835–36; *see also* 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 821, at 308 (James H. Chadbourn ed., rev. ed. 1970) ("A confession is *an acknowledgment in express words*, by the accused . . . *of the truth of the guilty fact charged* or *of some essential part of it*.").

198. In this death-eligibility criterion, "voluntary" modifies both "interrogation" and "confession." It reads: "a video taped, *voluntary interrogation and confession* of the defendant to the murder." MD. CODE ANN., CRIM. LAW § 2-202(a)(3)(ii) (LexisNexis 2002 & Supp. 2010) (emphasis added). Assumedly, the requirement that the interrogation be "voluntary" means that the suspect voluntarily agreed to be interrogated—that is, he did not assert his privilege against self-incrimination and refuse to answer questions.

199. MD. INST. FOR CONTINUING PROF'L EDUC. OF LAWYERS, MARYLAND CRIMINAL PATTERN JURY INSTRUCTION 3:18, at 65–66 (2006) (containing a nine factor test to determine whether a statement made during interrogation is voluntary).

profit from his testimony or for (in our multimedia age of readily available recordation) unrecorded questions and answers between a police officer and arrestee. The new law requires that the entire process, from initial interrogation through final confession, be videotaped.[200]

Even in the age of digital technology, there are plausible reasons to require that the interrogation and confession be videotaped. Videotapes are a reliable means of recording images and sound that is readily available to police departments.[201] Law enforcement offices are now on notice that they must videotape interrogations and confessions in potential capital cases if they wish to establish death-eligibility under this criterion. This is not a new development. In 2008, the Maryland General Assembly declared that "it is the public policy of the State" for "law enforcement unit[s]" to "make reasonable efforts to create" either "an audiovisual recording" or "an audio recording" of "custodial interrogations" in murder and certain sexual assault cases.[202] The primary form of an audiovisual recording is a videotape. Indeed, state laws, rules, and court decisions contain many references to "videotape" and assume it is a reliable means of recordation.[203]

c. *"The State Presents a Video Recording That Conclusively Links the Defendant to the Murder"*[204]

For purposes of the above provision, a "video" should be a visual image captured by television, a videotape, a video cassette, or other form of technology.[205] A "recording" is a "record" of that image.[206]

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200. CRIM. LAW § 2-202(a)(3)(ii). A "videotape" is a "recording of visual images and sound (as of a television production) made on magnetic tape." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 186, at 1317. R

201. *Cf.* Sullivan, *supra* note 187, at 1128 (arguing for the adoption of a model act that requires the recording of all police interrogations). R

202. MD. CODE ANN., CRIM. PROC. § 2-402(1)–(2) (LexisNexis 2008).

203. *See, e.g.*, MD. CODE ANN., BUS. REG. § 4.5-706 (LexisNexis 2010) (providing that a videotape is an accepted form of evidence in Home Builder Guaranty Fund proceedings); CRIM. LAW § 10-112 (providing that videotaped surveillance may be used to enforce anti-dumping law); MD. CODE ANN., CTS. & JUD. PROC. § 10-310 (LexisNexis 2006) (providing that a videotape of the license plate of a motor vehicle is admissible in a proceeding to collect a Maryland Transportation Authority toll or charge); MD. R. 2-416 (stating that civil depositions may be recorded by videotape); Dep't of Pub. Safety & Corr. Servs. v. Cole, 342 Md. 12, 17–18, 672 A.2d 1115, 1118 (1996) (finding videotape of a correctional officer's conduct admissible in an administrative disciplinary proceeding).

204. CRIM. LAW § 2-202(a)(3)(iii).

205. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 186, at 1316 (defining "video" as "involving images on a television screen or computer display"). R

206. *See id.* at 977 (defining "recording" as a synonym of "record," or "something on which . . . visual images have been recorded").

The General Assembly undoubtedly meant images of murders captured by security cameras and other reliable video devices.

While there are a number of synonyms for "conclusive," it is at least clear that conclusive requires an extremely demanding standard of proof. Conclusive is synonymous with "authoritative," "decisive," "convincing,"[207] "determinative," and "definitive."[208] "Conclusive evidence" means "evidence so strong as to overbear any other evidence to the contrary."[209] It is final in that it "put[s] an end to debate . . . by reason of irrefutability."[210] It would appear to be a higher and more demanding standard of proof than beyond a reasonable doubt, although it is difficult to identify the exact degree of difference.

3. Arbitrariness

In *Stephens*, the defendant also alleged that the new law would result in arbitrary imposition of the death penalty,[211] but the circuit court rejected this challenge.[212] The problem with the new law, according to the defendant, was not that it lacked standards, but that its standards were too narrow and its discretion too limited, making some murderers death-eligible (those who satisfy the evidentiary criteria) while failing to include others who commit as—or more—heinous murders.[213]

The new law appears to put two values in tension: (1) the need for enhanced reliability in capital guilt-innocence decisions to avoid convicting and sentencing the innocent to death, a value which the law largely satisfies, and (2) the need for proportionate punishment for equally culpable murders, a value which the law substantially, but incompletely, meets.[214] Some murders that are not death-eligible under the new law may be more culpable than those that are—for

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207. BLACK'S LAW DICTIONARY, *supra* note 186, at 329. R

208. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 186, at 303. R

209. BLACK'S LAW DICTIONARY, *supra* note 186, at 636. R

210. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 186, at 239. R

211. State v. Stephens, No. K-08-646, slip op. at 4 (Md. Cir. Ct. Dec. 10, 2009).

212. *Id.* at 7–8.

213. *Id.* at 7 (highlighting that "[s]uch a result would be no less constitutional than if one defendant was spared the death penalty because of a sympathetic jury while another equally guilty defendant was sentenced to death because that jury did not find mitigation in his case").

214. The United States Supreme Court has adopted categorical constitutional rules to enforce this proportionate culpability principle, barring executions of children age seventeen or younger, Roper v. Simmons, 543 U.S. 551, 568–72 (2005), and of the mentally retarded, Atkins v. Virginia, 536 U.S. 304, 317–21 (2002). For more on *Roper* and *Adkins*, see Grace, *supra* note 144, at 442. R

example, a mass murder that does not meet any of the three evidentiary criteria.

The governing principle underlying the new law, however, is minimally rational: The *conviction* that makes one eligible for the death penalty must have *enhanced reliability*. That is, the conviction must be supported by DNA evidence, a videotaped confession, or a videorecording of the murder. During the last twenty years, the proliferation of DNA-based exonerations in capital cases has demonstrated the fallibility of our criminal justice system and has undermined the confidence we once had in capital convictions.[215] It was not irrational for the General Assembly to respond to these miscarriages of justice by requiring enhanced reliability for capital convictions. That there may be some cases in which more culpable murderers are not subject to the death penalty does not render the new law unconstitutional. These "more culpable" offenders are not similarly situated to those murderers who are death-eligible in one sense: The capital convictions in the former cases are not supported by the measures of enhanced reliability that support the death-eligible murderers.

The constitutionality of the new law may depend on what test a court adopts to review it. One test of constitutionality that the courts have accepted is whether a capital statute is rational, not whether it is narrowly tailored to accomplish a compelling governmental interest.[216] This standard has been criticized, but it is the test that some courts have applied to uphold far-reaching capital laws.[217]

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215. *See* MD. COMM'N ON CAPITAL PUNISHMENT, *supra* note 13, at 79–81 (noting "that the numerous exonerations and reversals in capital cases in recent years have led to a decline in public support for the death penalty"). R

216. *See* Franklin v. Lynaugh, 487 U.S. 164, 181 (1988) ("[T]he States must channel the [capital] sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death." (alteration in original) (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980)) (internal quotation marks omitted)).

217. Since 1976, in approving capital laws, courts have afforded substantial deference to legislatures, and through them, to the will of the people. Applying this deferential test, sometimes explicitly and other times implicitly, the United States Supreme Court and the Maryland Court of Appeals have rejected constitutional challenges to capital laws based on the Eighth Amendment, *see, e.g.*, Baze v. Rees, 553 U.S. 35, 62–63 (2008) (rejecting an Eighth Amendment challenge to lethal injection protocol); Grandison v. State, 390 Md. 412, 447, 889 A.2d 366, 386 (2005) ("It is entirely consistent with the Eighth Amendment's narrowing requirement to include accessories before the fact . . . within the class of those eligible for the death penalty . . . ."), the Due Process Clause, *see, e.g.*, Herrera v. Collins, 506 U.S. 390, 417–19 (1993) (rejecting a habeas corpus petitioner's claim of actual innocence on due process grounds); *Grandison*, 390 Md. at 438, 889 A.2d at 381 ("The issue of whether [the Maryland death penalty statute] violates due process by permitting the jury to find, by a preponderance of the evidence, that the aggravating factors found by the jury outweigh the mitigating circumstances it finds to exist has been addressed and resolved by

In *Stephens*, the court rejected the arbitrariness challenge, stating:

> The new law heightens the standard of eligibility for the death penalty. As a result of these additional evidentiary gateways, it may well be that the number of defendants found guilty of murder in the first degree who are eligible for the death penalty will be more limited. If that were to occur, it would be the result of the salutary purpose of the amendment, which is to limit application of the death penalty to cases in which the evidence of guilt is most reliable. A numerical decrease in the number of death-eligible defendants does not create the randomness and arbitrariness prohibited by post-*Furman* jurisprudence.
>
> . . . .
>
> Just as geographic and statistical disparities in the application of Maryland's death penalty statute do not make the law arbitrary, statistical parity is not required by the Constitution. All that is required is a system by which the jury is guided in the exercise of its discretion by objective and rational standards.
>
> Contrary to Defendant's assertion, the amended statute does not change the class of murders or murderers that are subject to the death penalty. The statute merely provides that, within the class of otherwise death-eligible defendants, only those whose guilt is supported by the most reliable evidence will be subjected to the penalty.[218]

V. CONCLUSION

The Maryland Commission on Capital Punishment found that the death penalty's reinstatement in Maryland in 1978 has resulted in

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this Court on numerous occasions . . . . We have consistently determined that the weighing process based on a preponderance of the evidence does not violate due process." (citations omitted)); Ryan Dietrich, Comment, *A Unilateral Hope: Reliance on the Clemency Process as a Trigger for a Right of Access to State-Held DNA Evidence*, 62 MD L. REV. 1028, 1031–32 (2003), and the Equal Protection Clause, *see, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 291–99 (1987) (rejecting an equal protection challenge to the death penalty that was based on the statistical racial disparity in death penalty's application); Evans v. State, 396 Md. 256, 325, 914 A.2d 25, 66 (2006) ("The courts accept the reasoning in *McCleskey* concerning the failure of general statistics to establish a statewide Equal Protection or Cruel and Unusual Punishment violation and instead require a defendant to assert some specific discriminatory intent in their case."). *But see* Ronald Kahn, *Originalism, the Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining* Lawrence v. Texas, 67 MD. L. REV. 25, 27 n.15 (2007) (stating that *McCleskey*, in which the Court "fail[ed] to socially construct a relationship between government institutions, race, and the death penalty," is "ripe for modification or even for overturning").

218. State v. Stephens, No. K-08-646, slip op. at 7–8 (Md. Cir. Ct. Dec. 10, 2009) (footnote and citation omitted).

failure and futility. Specifically, there has been an extraordinarily high error rate in capital cases in Maryland. The Commission noted that:

> [T]here have been 353 death notices issued, 215 death notice cases that went to trial and 77 death sentences issued. . . [and] only . . . five executions. Moreover, of the 77 death sentences that have been issued, in addition to the five executions, there have been two commutations, three natural deaths, and there are five individuals still on Death Row, which leaves 62 death sentences that have been reversed. Sixty-two reversals out of 77 sentences is an error rate of approximately eighty percent (80%). Accordingly, the significant expenditure of time and resources that the State of Maryland has put into its capital punishment system has resulted in only five executions and an error rate of eighty percent (80%).[219]

The Commission found that if the resources dedicated to capital prosecutions and to the direct and collateral appeals of these cases in state and federal courts had been reallocated to homicide prevention programs, many lives might have been saved.[220] Programs across the country, the Commission noted, have "closely monitor[ed] a limited number of career criminals" and have "address[ed] the proliferation of guns, threats to witnesses, child abuse and domestic violence, which are the precursors to homicide."[221]

The law that the General Assembly passed in 2009 addresses the unacceptable risk that the high error rate in capital cases will result in the execution of those who are factually innocent or those whose culpability does not warrant the ultimate punishment. It is a nationally unique effort to substantially limit the reach of the death penalty, while retaining it for those cases in which the evidence of capital murder is compelling. It is a rational response to the record of failure of capital punishment in Maryland.

219. MD. COMM'N ON CAPITAL PUNISHMENT, *supra* note 13, at 50 (emphasis omitted). R

220. *See id.* at 51.

221. *Id.*