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Church v. State: Resolving One Problem but Raising Another - Addressing the Use of the Surveillance Location Privilege and the Limited Remand

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Note

CHURCH v. STATE: RESOLVING ONE PROBLEM BUT RAISING ANOTHER—ADDRESSING THE USE OF THE SURVEILLANCE LOCATION PRIVILEGE AND THE LIMITED REMAND

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In *Church v. State*,[1] the Maryland Court of Appeals considered whether a surveillance location privilege exists that allows undercover police officers to refuse to disclose the location of their observation posts at trial.[2] The court held that such a privilege exists,[3] but that before it can be applied the State must demonstrate that it has a legitimate interest in not disclosing the location that outweighs the defendant's interest in freely cross-examining his or her accusers.[4] The court's decision to place the burden of proving the privilege's applicability on the prosecution adequately protects the defendant's Sixth Amendment right to confront his or her accusers.[5] But while the court correctly concluded that defense counsel preserved the issue for appeal,[6] the court erred in issuing a limited remand that allowed the prosecution to satisfy its burden of proof after it failed to do so at trial.[7] Rather, the court should have issued a new trial because the error violated the defendant's Sixth Amendment rights under the Confrontation Clause.[8] The court's decision to order a limited remand under these circumstances demonstrates that clearer guidelines are needed to control the use of that remedy.[9]

I. THE CASE

On January 12, 2006, undercover police officer Christopher Kintop was monitoring approximately twelve individuals who had convened along Tyler Avenue in Annapolis's Robinwood community.[10] While watching the group through binoculars from a hidden location, Kintop observed a

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1. 408 Md. 650, 971 A.2d 280 (2009).
2. *Id*. at 653–54, 971 A.2d at 282.
3. *Id*. at 668, 971 A.2d at 290.
4. *Id*. at 670–73, 971 A.2d at 291–93.
5. *See infra* Part IV.A.
6. *See infra* Part IV.B.
7. *See infra* Part IV.C.
8. *See infra* Part IV.C.
9. *See infra* Part IV.D.
10. Church v. State, 408 Md. 650, 654, 971 A.2d 280, 282 (2009).

man whom he later identified as Kyeron Michael Church give a woman small white rocks in exchange for money.[11] Kintop relayed this information to other officers in his unit who then apprehended Church.[12] Once detained, the officers found $600 in cash on his person and discovered a plastic bag containing cocaine where he had been on the ground.[13] Church was charged with possession with intent to distribute a controlled dangerous substance and possession of a controlled dangerous substance.[14]

At Church's trial, the State made a motion *in limine*, asking the court to "prohibit the Defense from asking [Kintop] or having the State disclose the actual location of where th[e] surveillance was taking place."[15] In response, defense counsel suggested that Church's inability to discover Kintop's exact surveillance location would be "very prejudicial" to Church's rights.[16] When the trial judge[17] asked defense counsel what he wanted to know, he replied, "I'd like to know exactly, well first of all, I'd like to know where [Kintop] was."[18] Defense counsel further stated, "I'd like to know how far he was from my client [and] if he was using binoculars."[19] The State indicated that Kintop could testify that he had an unobstructed view of Church's actions, but also argued that a qualified privilege not to reveal an officer's concealed surveillance location permitted it to keep Kintop's exact vantage point undisclosed.[20]

The trial court ruled "that a qualified privilege not to disclose the exact location would be appropriate,"[21] but also noted that defense counsel

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11. *Id*. That evening, Church was wearing dark clothes and a black balaclava, which allowed Kintop to set him apart from the rest of the group. *Id*.

12. *Id*.

13. *Id*.

14. *Id*.

15. *Id*. at 655, 971 A.2d at 282 (alterations in original) (internal quotation marks omitted).

16. *Id*. at 659, 971 A.2d at 285 (internal quotation marks omitted).

17. Judge William C. Mulford, II, presided over Church's jury trial in the Anne Arundel County Circuit Court. *Id*. at 650, 971 A.2d at 280.

18. *Id*. at 659, 971 A.2d at 285 (internal quotation marks omitted).

19. *Id*. (internal quotation marks omitted).

20. *Id*. at 655, 971 A.2d at 282. The State cited *Johnson v. State*, 148 Md. App. 364, 811 A.2d 898 (2002), *cert. denied*, 374 Md. 83, 821 A.2d 898 (2003), in support of this contention. *Church*, 408 Md. at 655, 971 A.2d at 282 (citing *Johnson*, 148 Md. App. 364, 811 A.2d 898). When the trial judge asked the State where Kintop had been located, the State replied:

> To tell you the truth, Your Honor, I did not ask him the specific location because I don't want to know it at this point. But I can tell you that what he has told me is that he had an unobstructed view of what Mr. Church was doing and that there was nothing that was impairing his vision.

Id., 971 A.2d at 282–83.

21. *Church*, 408 Md. at 655, 971 A.2d at 283.

"should be given wide latitude to cross-examine the officer to what he saw, sight-lines, angles, lighting, time of day it might have been, whether there were any obstructions, question his memory or any potential bias."[22] In response to this ruling defense counsel said, "[v]ery well."[23]

After this, defense counsel kept his questions regarding Kintop's surveillance location in accordance with the ruling.[24] For example, he asked, "And I don't want to know where your location was, but I do want to ask you how was the lighting like in the area where you were set up to observe?"[25]

A jury convicted Church on both counts and he was sentenced to ten years in prison without parole.[26] Church appealed his conviction to the Court of Special Appeals, arguing that the trial court's ruling on the motion *in limine* prejudiced him because he could not cross-examine Kintop about his exact surveillance location.[27] The Court of Appeals granted certiorari, on its own initiative and before the Court of Special Appeals decided the appeal, to address whether the trial court erred in ruling that the State did not have to disclose the exact location from which Kintop observed the alleged drug transaction.[28]

II. LEGAL BACKGROUND

Three actively developing areas of Maryland criminal procedure are as follows: (1) the potential existence of a surveillance location privilege that would permit undercover police officers to refuse to disclose the location of their observation posts;[29] (2) the standard for when an objection to a ruling on a motion *in limine* will preserve the issue for appellate review;[30] and (3) the propriety of using the limited remand remedy to allow the prosecution to correct errors it committed during a trial.[31] If a defendant is subjected to

22. *Id*. The trial judge added this caveat to his *in limine* ruling: "So I will grant the State's motion in part and I think actually I'm going to have to just judge it as it comes up. I'll have to rely on counsel to be close as you ask your questions." *Id.* at 656, 971 A.2d at 283 (internal quotation marks omitted).

23. *Id*. at 656, 971 A.2d at 283 (internal quotation marks omitted).

24. *Id*. at 661, 971 A.2d at 286.

25. *Id*. (internal quotation marks omitted).

26. *Id*. at 656, 971 A.2d at 283.

27. *Id*.

28. *Id*.

29. *See infra* Part II.A–B.

30. *See infra* Part II.C.

31. *See infra* Part II.D.

a prejudicial error at trial, he or she is entitled to the issuance of a new trial.[32]

A. The Surveillance Location Privilege Derived from the Common-Law Informer's Privilege, and Allows the Prosecution to Withhold the Location of an Undercover Officer's Observation Post at Trial

The surveillance location privilege permits the prosecution to refuse to disclose the location of an undercover police observation post.[33] In most jurisdictions, it is a qualified privilege, only available when States can demonstrate that their interest in keeping the location secret outweighs a defendant's interest in an unobstructed cross-examination of his or her accuser.[34]

The surveillance location privilege derived from the analogous informer's privilege, which allows the prosecution to withhold from disclosing the identities of confidential police informants at trial.[35] The deeply rooted informer's privilege originated in the English common law and is designed to encourage a flow of information about criminal behavior from members of the public to law enforcement.[36] In the 1800s, application of the informer's privilege began to proliferate in American common law.[37] In 1957, the Supreme Court of the United States addressed the informer's privilege in *Roviaro v. United States*.[38] There, the Court articulated a balancing test to determine whether disclosure of an informant's identity is proper, stating that courts must weigh "the public interest in protecting the flow of information against the individual's right to prepare his defense."[39] The Maryland Court of Appeals has stated that when the informer's

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32. *See infra* Part II.E.

33. Johnson v. State, 148 Md. App. 364, 368, 811 A.2d 898, 900 (2002), *cert. denied*, 374 Md. 83, 821 A.2d 370 (2003).

34. *Id*. As a general rule, testimonial exemptions are limited to situations where a substantial individual interest that outweighs the public interest in the search for truth must be protected. United States v. Bryan, 339 U.S. 323, 331 (1950).

35. United States v. Green, 670 F.2d 1148, 1155 (D.C. Cir. 1981).

36. *Id*. *Rex v. Akers* was one of the first cases to apply the informer's privilege in the English common law. *See* (1790) 170 Eng. Rep. 850, 850 (finding that the defendant was not permitted to discover the identity of the person who notified law enforcement of a smuggling operation).

37. *See* United States v. Moses, 27 F. Cas. 5 (C.C.E.D. Pa. 1827) (No. 15,825) (finding that an officer was not bound to reveal the identity of an anonymous tipster from whom he had received information that led to an arrest); Worthington v. Scribner, 109 Mass. 487, 489 (1872) ("Courts of justice therefore will not compel or allow the discovery of [an informant's identity], either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government.").

38. 353 U.S. 53 (1957).

39. *Id.* at 62.

privilege is invoked, "trial courts must apply the *Roviaro* balancing test in each case."[40]

In the 1981 case of *United States v. Green*,[41] the United States Court of Appeals for the District of Columbia Circuit established a qualified surveillance location privilege underpinned by the same policy considerations supporting the existence of the informer's privilege.[42] The *Green* court applied the surveillance location privilege to a suppression hearing, but one year later the court expanded the application of the privilege to trial proceedings.[43]

The Court of Special Appeals of Maryland first recognized the existence of the qualified surveillance location privilege in a 2002 case, *Johnson v. State*.[44] In that case, the State filed a motion *in limine* to prevent the location of an observation post from being disclosed at trial, as police were still using the post and the private citizen who allowed police to use the property feared retaliation for his or her assistance.[45] Additionally, the defendant had not shown how determining the officer's exact location would further his defense, as the officer had already testified regarding the conditions affecting his sight line.[46] The *Johnson* court used a balancing test and held that the surveillance location privilege was applicable in that case because the State's demonstrated interest in concealing the location of the observation post trumped the defendant's interest in disclosing it.[47]

B. The Surveillance Location Privilege Is Widely Adopted, Yet Courts Use Varying Tests in Determining the Privilege's Applicability

While the surveillance location privilege is widely adopted, not all jurisdictions apply the same test when determining its propriety.[48] Courts

40. Warrick v. State, 326 Md. 696, 701, 607 A.2d 24, 26 (1992).

41. 670 F.2d 1148.

42. *Id*. at 1155 ("We believe that policy justifications analogous to those underlying the well-established informer's privilege support a qualified privilege protecting police surveillance locations from disclosure. Like confidential informants, hidden observation posts may often prove to be useful law enforcement tools, so long as they remain secret."); *see also Roviaro*, 353 U.S. at 59–60 (weighing the State's interest in receiving information from the public against the defendant's fair trial rights to determine whether disclosure of an informant's identity is proper); *Warrick*, 326 Md. at 701, 607 A.2d at 26–27 (adopting the informer's privilege balancing test set forth in *Roviaro* and the policy rationale underpinning it).

43. United States v. Harley, 682 F.2d 1018, 1020 (D.C. Cir. 1982).

44. 148 Md. App. 364, 368, 811 A.2d 898, 900 (2002), *cert. denied*, 374 Md. 83, 821 A.2d 370 (2003).

45. *Id.* at 366–67, 811 A.2d at 899–900.

46. *Id*. at 372–73, 811 A.2d at 903.

47. *Id*. at 371–73, 811 A.2d at 902–03.

48. *See* Anderson v. United States, 607 A.2d 490, 496 (D.C. Cir. 1992) (requiring the defendant to make a threshold showing that he needed the observing officer's surveillance

typically engage in a balancing test weighing the State's interest in non-disclosure against the defendant's Confrontation Clause right to cross-examine his or her accuser.[49] Although there is no consensus as to whether the burden of proving or disproving the privilege's applicability should fall on the prosecution or the defendant,[50] jurisdictions have reached a consensus to use balancing tests because the Confrontation Clause requires that a defendant's right of confrontation be protected.[51]

1. Some Jurisdictions Place the Burden of Disproving the Privilege's Applicability on the Criminal Defendant

Some jurisdictions require that a defendant disprove the privilege's applicability by demonstrating that disclosure of the surveillance location is material and/or necessary to his or her defense. In *People v. Montgomery*,[52] the California Court of Appeals stated that "[i]n a criminal case the defendant must at least show how the [surveillance location] information affects the preparation or presentation of his [or her] defense."[53] The court further stated that it should first "ask the defendant to make a prima facie showing for disclosure."[54] Other courts have gone further, finding that a defendant can only overcome the privilege by demonstrating that disclosure of the surveillance location is necessary to successfully argue his or her defense.[55]

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location to conduct a defense and that the information was not available by other means before conducting a balancing test); State v. Laws, 621 A.2d 526, 530 (N.J. Super. Ct. App. Div. 1993) (conducting a balancing test and explaining that there may be an exception where the only evidence is that of the surveillance officer); Hollins v. Commonwealth, 450 S.E.2d 397, 399–400 (Va. Ct. App. 1994) (employing the D.C. Circuit's analysis).

49. *See* United States v. Cintolo, 818 F.2d 980, 1002 (1st Cir. 1987) (holding that a qualified surveillance location privilege exists, and that courts applying it must balance the State's interest in non-disclosure against the defendant's need for the information in arguing a defense); Haider v. Dir. of Corr., 992 F. Supp. 1192, 1197 (C.D. Cal. 1998) (applying a case-by-case balancing test weighing the confidentiality of the information sought by the defendant against the interest of justice).

50. *See infra* Part II.B.1–2.

51. *See infra* Part II.B.3.

52. 252 Cal. Rptr. 779 (Cal. Ct. App. 1988).

53. *Id*. at 784.

54. *Id*. at 785; *see also* Commonwealth v. Santiago, 631 A.2d 1323, 1327 (Pa. Super. Ct. 1993) ("It is the defendant . . . who has the burden of demonstrating to the trial court that the [surveillance location] is material and that disclosure is in the interest of justice.").

55. *See* Cintolo v. United States, 818 F.2d 980, 1002 (1st Cir. 1987) (stating that "our review of this ruling of the district court comes down to a determination of whether the appellant demonstrated an authentic 'necessity,' given the circumstances, to overbear the qualified [surveillance location] privilege"); Bueno v. United States, 761 A.2d 856, 859 (D.C. 2000) ("A defendant who has requested the precise location of a police surveillance post must first show that he needs the information to conduct his defense before any balancing test is applied.").

2. Other Jurisdictions Place the Burden of Proving the Privilege's Applicability on the Prosecution

Some jurisdictions take the position that the prosecution must prove the privilege's applicability by demonstrating that disclosure of the surveillance location would compromise other prosecutions or would endanger lives or property.[56] In *State v. Garcia*,[57] the Supreme Court of New Jersey took this position, holding that once the State had met this initial burden, then the defendant could request an evidentiary hearing to attempt to show substantial need for the information.[58] The *Garcia* court upheld the defendant's conviction because he had already been afforded an evidentiary hearing to show substantial need for the observing officer's location.[59]

3. The Confrontation Clause Derived from the Common-Law Right of Confrontation, and Grants Criminal Defendants the Right to Cross-Examine Witnesses Appearing Before Them at Trial

Courts that find the surveillance location privilege inapplicable often justify their decision by emphasizing the importance of the defendant's constitutional rights under the Confrontation Clause.[60] By preventing a criminal defendant from asking where his or her accuser's undercover observation post was located, the surveillance location privilege restricts a criminal defendant's constitutional right to cross-examine witnesses.[61]

The Confrontation Clause states that a criminal defendant shall have the right "to be confronted with the witnesses against him."[62] The Clause was added to the Constitution to maintain the common-law tradition of adversarial testing, which allows a defendant to advocate for his innocence by rebutting a witness's live testimony.[63] This right is rooted in the English common-law system, under which courts would sometimes use the civil law practice of having witnesses testify prior to trial.[64] The testimony recorded

56. State v. Garcia, 618 A.2d 326, 332 (N.J. 1993).

57. 618 A.2d 326.

58. *Id*. at 333.

59. *Id.* at 334.

60. *See, e.g.*, United States v. Gazie, No. 83-1851, 1986 U.S. App. LEXIS 23026, at *29 (6th Cir. Feb. 26, 1986) (stating that "in some instances, information sought by a defendant may be so critical that his Sixth Amendment right to confrontation would outweigh the government's asserted needs for the privilege," and that the "fundamental importance of the defendant's right to a fair trial, in those cases, would have to be honored" (emphasis omitted)).

61. Anderson v. United States, 607 A.2d 490, 495 (D.C. Cir. 1992).

62. U.S. CONST. amend. VI.

63. Crawford v. Washington, 541 U.S. 36, 49 (2004).

64. *Id.* at 43.

at these pre-trial examinations—referred to as Marian examinations—was admissible as evidence in court.[65] When this sort of testimony was presented against the defendant and the defendant had not been present at the examination, the defendant's ability to challenge the witness's assertions was severely undercut.[66] In response, English law created a right to confrontation to protect a defendant's ability to receive a fair trial.[67] This safeguard was inherited by the United States legal system, and codified when the First Congress incorporated the Confrontation Clause into the Sixth Amendment.[68] In 1965, the Supreme Court held in *Pointer v. Texas*[69] that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment."[70] Maryland codified this right in Article 21 of the Maryland Declaration of Rights, which states that "in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him [and] to examine the witnesses for and against him on oath."[71]

C. An Objection to a Ruling on a Motion In Limine *Will Be Preserved for Review If the Defendant States His Objection or Preferred Alternative Outcome When the Trial Judge Issues the Ruling*

While Maryland Rule 4-323(a) governs objections made to rulings on the admissibility of evidence,[72] Maryland Rule 4-323(c) dictates whether an objection to any other ruling or order (for example, rulings on the exclusion of evidence) will preserve the issue for appellate review.[73] Rule 4-323(c) states that "[f]or purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court."[74] Applying Rule 4-323(c), the Court of Appeals of Maryland has stated that

65. *Id.* at 44. Marian examinations refer to a method of interrogation conducted under the English bail and committal statutes passed during the rule of Queen Mary. Davis v. Washington, 547 U.S. 813, 835–36 (2006). The statutes allowed for ex parte interrogations of witnesses, whose testimony could be transcribed, delivered to judges, and then submitted into evidence. *Id.*

66. *See Crawford*, 541 U.S. at 44 (detailing the great trial of Sir Walter Raleigh).

67. *Id.*

68. *Id.* at 49.

69. 380 U.S. 400 (1965).

70. *Id*. at 403.

71. MD. CONST. DECL. OF RTS. art. 21.

72. MD. R. 4-323(a).

73. MD. R. 4-323(c).

74. *Id*. Additionally, Maryland Rule 4-323(d) states that "[a] formal exception to a ruling or order of the court is not necessary." MD. R. 4-323(d).

"when a trial judge, in response to a motion *in limine*, makes a ruling to exclude evidence that is clearly intended to be the final word on the matter . . . and the proponent of the evidence makes a contemporaneous objection, his objection ordinarily is preserved."[75] If a party opposing the motion acquiesces to a court's ruling and fails to make a sufficient objection, then the issue will not be preserved for review.[76] The Court of Appeals addressed this situation in *Watkins v. State*,[77] where it held that a defense attorney's response of "[t]hank you" and "[t]hat's all I have" to the judge's denial of his motion to present evidence did not constitute an objection.[78] In *Beverly v. State*,[79] however, the Court of Appeals explained that a party's deference to a trial judge's ruling does not necessarily equate to acquiescence if the party has already objected and vigorously argued the matter.[80]

D. A Limited Remand Is Only Proper If the Issue to Be Addressed Is Subsidiary to the Criminal Trial and Further Proceedings Will Advance the Purposes of Justice

Under Maryland Rule 8-604(d), appellate courts may remand a case to lower courts if they conclude "that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings."[81] In 1972, the Court of Appeals addressed the applicability of the limited remand in *Gill v. State*,[82] holding that the remedy may be used to "correct procedures subsidiary to the criminal trial," but can never be used "to rectify prejudicial errors committed during the trial itself."[83] In *Gill*, the trial court erred in admitting the defendant's confession because the prosecution had failed to meet its burden of proving that it was voluntary.[84] Recognizing this error, the Court of Special Appeals of Maryland issued a limited remand to determine the issue of voluntariness after taking additional testimony.[85] The Court of Appeals reversed the decision of the Court of Special Appeals, explaining that a limited remand would be insufficient because regardless of

75. Prout v. State, 311 Md. 348, 357, 535 A.2d 445, 449 (1988).
76. Watkins v. State, 328 Md. 95, 100, 613 A.2d 379, 381 (1992).
77. 328 Md. 95, 613 A.2d 379.
78. *Id*. at 99–100, 613 A.2d at 381 (internal quotation marks omitted).
79. 349 Md. 106, 707 A.2d 91 (1998).
80. *Id*. at 118, 707 A.2d at 97.
81. MD. R. 8-604(d).
82. 265 Md. 350, 289 A.2d 575 (1972).
83. *Id*. at 357, 289 A.2d at 579.
84. *Id*. at 353, 289 A.2d at 577.
85. *Id*. at 354, 289 A.2d at 577.

the trial judge's admissibility finding, the determination of innocence or guilt would remain the same; thus, the proper remedy was to grant the defendant a new trial.[86] The Court of Appeals has generally followed the rule in *Gill*, only issuing a limited remand when correcting errors subsidiary to the substantive issues of a trial.[87] If the higher court recognizes an error that prejudiced the defendant's fair trial rights, then the appropriate remedy is not a limited remand, but rather a new trial.[88] The Court of Appeals recognized this principle in *Mitchell v. State*.[89] There, the court explained that a "[l]imited remand cannot be used to correct procedural defects at the trial level when the procedure involved is so intertwined with the defendant's constitutional right to counsel that a limited remand would cause unfair prejudice."[90] The Court of Appeals has also noted that a limited remand may not be used to grant parties that fail to meet their evidentiary burdens in a completed suppression proceeding a chance to reopen that hearing, as doing so would give the party "a second bite at the apple."[91]

E. Appellate Courts Must Order a New Trial If a Defendant Is Prejudiced by an Error at Trial

While criminal defendants are not entitled to receive new trials in response to harmless errors,[92] the proper remedy for prejudicial errors

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86. *Id*. at 359–60, 289 A.2d at 580.

87. *See* Patrick v. State, 329 Md. 24, 37, 617 A.2d 215, 221 (1992) (ordering a limited remand to determine whether the prosecution's failure to disclose polygraph results was prejudicial to the criminal defendant); Warrick v. State, 302 Md. 162, 173–74, 486 A.2d 189, 195 (1985) (finding that a limited remand was an appropriate remedy because the issue to be re-examined—whether the State failed to disclose discoverable information—was an inquiry "collateral to the trial").

88. Mitchell v. State, 337 Md. 509, 517, 654 A.2d 1309, 1313 (1995). In *Mitchell*, the Court of Appeals stated that in determining the propriety of a limited remand in a criminal trial, "[t]he controlling factor is . . . whether the error adversely affected the defendant's right to a fair trial." *Id*.

89. 337 Md. 509, 654 A.2d 1309.

90. *Id*. at 518, 654 A.2d at 1313–14.

91. Southern v. State, 371 Md. 93, 110, 807 A.2d 13, 23 (2002). In *Southern*, the Court of Appeals stated that the limited remand should not have been granted because the remedy allowed the State to introduce evidence on whether police had probable cause to stop and arrest the defendant after the State failed to do so at trial. *Id.* at 96, 807 A.2d at 15. The court emphasized that in issuing the limited remand, the Court of Special Appeals "departed from the practice of appellate courts to reverse the judgment in a case where the State has failed to sustain its burden of proof in a motion to suppress." *Id*. at 110–11, 807 A.2d at 23. The court also speculated that were the roles reversed and the defendant had been the party that failed to present sufficient evidence at trial, he likely would not have been afforded the same opportunity to introduce new evidence and strengthen his case. *Id.* at 110, 807 A.2d at 23.

92. Dorsey v. State, 276 Md. 638, 651, 350 A.2d 665, 674 (1976).

committed during the trial is the issuance of a new trial.[93] Errors that violate a defendant's right to a fair trial are generally deemed prejudicial.[94] The Court of Appeals has recognized that the defendant's interest in "fundamental fairness" is a relevant consideration when deciding whether a reversible error occurred.[95] Additionally, if the error may have influenced the jury's determination of guilt, then the defendant should receive a new trial.[96] The Court of Appeals emphasized this point in *Williams v. State*,[97] explaining that "[u]pon an independent review of the record, we must be able to declare, beyond a reasonable doubt, that the error in no way influenced the verdict; otherwise, reversal is required."[98]

III. THE COURT'S REASONING

In *Church v. State*,[99] the Court of Appeals of Maryland issued a limited remand without affirming or reversing the lower court's decision and held that before the prosecution can invoke the surveillance location privilege, it must demonstrate that application of the privilege will protect a legitimate State interest that outweighs the defendant's Sixth Amendment right to confrontation.[100] Judge Adkins, writing for the majority, began by discussing whether defense counsel's objection to the trial judge's ruling on the motion *in limine* was sufficient to preserve the issue for appeal.[101] The State cited *Watkins v. State*[102] in support of its contention that Church's counsel failed to preserve the issue by acquiescing to the trial judge's ruling

93. *Id.* at 659, 350 A.2d at 678.

94. *See Mitchell*, 337 Md. at 517, 654 A.2d at 1313 (finding that a new trial rather than a limited remand was necessary to determine whether defendant had waived his constitutional right to counsel by inaction); *see also* Martinez v. State, 309 Md. 124, 136, 522 A.2d 950, 956 (1987) (finding that defendant was entitled to a new trial where the record did not indicate that he had waived his constitutional right to a jury trial).

95. Austin v. State, 253 Md. 313, 319, 252 A.2d 797, 800 (1969).

96. *See* Gill v. State, 265 Md. 350, 359, 289 A.2d 575, 580 (1972) (finding that a new trial was necessary to re-determine a confession's voluntariness because the jury must have the opportunity to consider the evidence relating to a confession's voluntariness before deciding whether the defendant is guilty or innocent).

97. 364 Md. 160, 771 A.2d 1082 (2001).

98. *Id.* at 179, 771 A.2d at 1093; *see also Dorsey*, 276 Md. at 659, 350 A.2d at 678 (stating that the "reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict").

99. 408 Md. 650, 971 A.2d 280 (2009).

100. *Id.* at 672–73, 971 A.2d at 292–93.

101. *Id.* at 656–57, 971 A.2d at 283.

102. 328 Md. 95, 613 A.2d 379 (1992).

on the motion.[103] Church's counsel rebutted this argument by citing *Beverly v. State*,[104] where the Court of Appeals distinguished *Watkins* and rejected the State's argument that a defendant had failed to preserve an issue for appeal by deferring to the trial court's interpretation of the law.[105] The majority then found that the actions of Church's counsel more closely resembled those of the defense counsel in *Beverly* than those of the defense counsel in *Watkins*.[106] It recognized that Church's counsel clearly stated his objection to the application of the privilege and that his failure to ask additional questions regarding Kintop's exact location after the trial judge had issued his ruling on the motion was not acquiescence, but rather appropriate deference to the court's decision.[107] The majority closed its discussion of the preservation issue by noting that Maryland Rule 4-323(a)—under which an objection to the admission of evidence is waived unless it is made at the time the evidence is offered or as soon as grounds for an objection materialize—was not applicable in this case because the trial judge did not rule to admit evidence, but rather ruled to exclude it.[108]

Judge Adkins then addressed the application of the surveillance location privilege in light of Church's right to confront the witnesses appearing against him under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.[109] Both parties agreed that the surveillance location privilege allows for the non-disclosure of a police officer's whereabouts if the State's interest in keeping the location secret outweighs the defendant's Sixth Amendment right to confront witnesses testifying against him or her.[110] But the parties disagreed as to who carries the burden of proving the privilege's applicability.[111] The majority concluded that Maryland state courts cannot apply the privilege unless the State demonstrates that doing so would protect a legitimate State interest, and held that the State failed to make a sufficient demonstration in this case.[112] The majority further found that the application of the surveillance location privilege required the use of a

103. *Church*, 408 Md. at 656–57, 971 A.2d at 283–84 (citing *Watkins*, 328 Md. 95, 613 A.2d 379).

104. 349 Md. 106, 707 A.2d 91 (1998).

105. *Church*, 408 Md. at 657, 971 A.2d at 284 (citing *Beverly*, 349 Md. 106, 707 A.2d 91).

106. *Id.* at 660, 971 A.2d at 285–86.

107. *Id.* at 661, 971 A.2d at 286.

108. *Id.* at 662, 971 A.2d at 287.

109. *Id.* at 662–63, 971 A.2d at 287–88.

110. *Id.*, 971 A.2d at 287.

111. *Id.*

112. *Id.* at 663, 971 A.2d at 287–88.

balancing test.[113] The majority also cited *Johnson v. State*[114] and three cases from the D.C. Circuit that had used similar guidelines in applying the surveillance location privilege to support its finding.[115]

The majority then acknowledged that several other jurisdictions had ruled that the burden falls on the defendant to prove why the surveillance location privilege should not be applied.[116] The majority rejected this interpretation and placed the initial burden of proving the privilege's applicability on the State, explaining that "such burden allocation appropriately safeguards the rudimentary right of a defendant to cross-examination of witnesses against him."[117] The majority then supported its decision by noting that the State had failed to prove that it had any legitimate interest in preventing disclosure, as it had not shown that Kintop's surveillance location was still being used by police or that any harm would result from revealing it; thus, the State had provided no interests for the court to balance against defendant Church's interest in disclosure.[118]

The majority issued a limited remand without affirming or reversing and concluded that a new trial was not necessary if (1) the State could demonstrate to the trial court that police were still using Kintop's surveillance location or that the interests of someone associated with the location would be threatened by revealing it, and (2) the trial court determined that the State's interests outweighed Church's right to confrontation.[119] If the State failed to make either of these showings, then a

113. *Id*. at 664, 971 A.2d at 288 (citing Roviaro v. United States, 353 U.S. 53, 59 (1957)).

114. 148 Md. App. 364, 811 A.2d 898 (2002), *cert. denied*, 374 Md. 83, 821 A.2d 370 (2003).

115. *Church*, 408 Md. at 664–67, 971 A.2d at 288–90 (citing United States v. Green, 670 F.2d 1148, 1155–57 (D.C. Cir. 1981) (establishing a surveillance location privilege, based on the informer's privilege, that could be used in suppression hearings); United States v. Harley, 682 F.2d 1018, 1020 (D.C. Cir. 1982) (applying the surveillance location privilege to a trial proceeding and noting that it requires balancing the State's interests against the defendant's interests); United States v. Foster, 986 F.2d 541, 543–44 (D.C. Cir. 1993) (finding that the surveillance location privilege could not be applied where knowledge of the exact surveillance point would allow the defendant to challenge the undercover officer's memory and perception)).

116. *Id.* at 669–70, 971 A.2d at 291 (citing People v. Montgomery, 252 Cal. Rptr. 779, 785 (Cal. Ct. App. 1988) (finding that in determining whether to compel the prosecution to reveal an undercover police officer's surveillance location, the defendant must first make a prima facie showing for disclosure); Bueno v. United States, 761 A.2d 856, 859 (D.C. 2000) (finding that a defendant must demonstrate that knowledge of an officer's surveillance location is necessary to his or her defense before the court engages in a balancing test); Commonwealth v. Santiago, 631 A.2d 1323, 1327 (Pa. Super. Ct. 1993) (finding that the defendant carries the burden of proving that disclosure of an officer's surveillance location is both material and in the interest of justice)).

117. *Id.* at 670, 971 A.2d at 292.

118. *Id.* at 671, 971 A.2d at 292.

119. *Id.* at 672, 971 A.2d at 292–93.

new jury trial would be issued.[120] The majority concluded its opinion by noting that the rule governing the use of limited remands in *Southern v. State*[121] did not apply here because that case involved a suppression hearing.[122]

Judge Greene, joined by Chief Judge Bell, wrote a dissenting opinion arguing that Church was entitled to a new trial because the trial judge applied the surveillance location privilege absent a showing of a legitimate State interest.[123] Judge Green contended that *Southern* should apply to this case because a motion *in limine* is similar to a motion to suppress evidence in that they are both requests for a ruling on the admissibility of evidence before it is offered.[124] He noted that in *Southern*, the Court of Appeals ruled that a limited remand was improper, as it would have given the State "'a second bite at the apple in the same case,' rather than 'permit [the] court to cure some judicial error that resulted in unfairness to a party.'"[125] He then concluded that a new trial was the appropriate remedy because the jury may have been influenced by defense counsel's inability to fully cross-examine Kintop.[126]

Finally, Judge Murphy wrote a dissenting opinion expressing the view that defense counsel acquiesced to the motion *in limine* ruling and thus the issue was not preserved for review on appeal.[127] Judge Murphy emphasized that in *Simmons v. State*,[128] the Court of Appeals held that a trial judge's ruling on a motion *in limine* excluding a line of questions is only preserved for review if the record shows that the judge intended the ruling to be final.[129] Under Judge Murphy's view, defense counsel was required to ask the trial court to reconsider its *in limine* ruling during Kintop's cross-examination to preserve the issue for review.[130]

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120. *Id.*

121. 371 Md. 93, 807 A.2d 13 (2002).

122. *Church*, 408 Md. at 672–73, 971 A.2d at 293.

123. *Id.* at 673–74, 971 A.2d at 293–94 (Greene, J., dissenting).

124. *Id.* at 675–76, 971 A.2d at 295. According to Judge Greene, the majority was more concerned with giving the State an opportunity to invoke the surveillance location privilege than it was with Church's right to a fair trial. *Id.* at 674, 971 A.2d at 295.

125. *Id.* at 675, 971 A.2d at 294 (quoting *Southern*, 371 Md. at 112, 807 A.2d at 24).

126. *Id.* at 676, 971 A.2d at 295.

127. *Id.* at 676–77, 971 A.2d at 295–96 (Murphy, J., dissenting).

128. 313 Md. 33, 542 A.2d 1258 (1988).

129. *Church*, 408 Md. at 676, 971 A.2d at 295. Judge Murphy pointed out that the trial judge in this case could not have intended his *in limine* ruling to be final, since he stated, "I think actually I'm going to have to just judge it as it comes up." *Id.* at 677, 971 A.2d at 295–96 (internal quotation marks omitted).

130. *Id.* at 677, 971 A.2d at 296.

IV. ANALYSIS

In *Church v. State*, the Maryland Court of Appeals held that before the State can invoke the surveillance location privilege, it must show that its application will protect a legitimate State interest, and found that a new trial was not necessary in this case if on remand (1) the prosecution could demonstrate that non-disclosure would protect such an interest, and (2) the trial court determined that the State's interest in suppression outweighed any harm to the defendant.[131] The court's decision to place the burden of proving the privilege's applicability on the prosecution correctly protects defendants' rights under the Confrontation Clause of the Constitution.[132] The court also correctly held that defense counsel's conduct at trial was sufficiently vigorous to preserve the surveillance location privilege issue for appellate review.[133] The court erred, however, by issuing a limited remand because that remedy improperly permitted the prosecution to correct procedural errors it made at trial that violated the defendant's Sixth Amendment rights.[134] Rather than issuing a limited remand, the court should have granted Church a new trial.[135] The court's decision underscores the ambiguity of the limited remand standard and calls for a revision of the device to ensure the protection of constitutional rights.[136]

A. The Court's Decision to Place the Initial Burden of Proving the Surveillance Location Privilege's Applicability on the Prosecution Wisely Safeguards the Defendant's Sixth Amendment Right to Confront His Accusers

By placing the initial burden of proving the surveillance location privilege's applicability on the prosecution, the court set a precedent that adequately protects criminal defendants' cross-examination rights. In this case, the prosecution failed to provide any reason why Officer Kintop's surveillance location should not be disclosed, and claimed that the burden was on Church to prove why disclosure was necessary for him to argue his case.[137] Placing the burden on the defendant, which would presume the privilege's applicability, would be contrary to a defendant's fair trial

131. *Id.* at 670–73, 971 A.2d at 291–93 (majority opinion).
132. *See infra* Part IV.A.
133. *See infra* Part IV.B.
134. *See infra* Part IV.C.
135. *See infra* Part IV.C.
136. *See infra* Part IV.D.
137. Church v. State, 408 Md. 650, 670, 971 A.2d 280, 291–92 (2009).

rights.[138] As the majority noted in its opinion, public policy considerations support the use of the privilege where a legitimate State interest is at stake.[139] Considering that both the State and defendants may have valid reasons to argue for or against the privilege's applicability, a balancing test is an appropriate method for resolving the issue.[140] Here, however, where the prosecution set forth no reason supporting non-disclosure, "there is no justification for applying a balancing test."[141] Thus, the majority's decision to place the initial burden of proving the applicability of the surveillance location privilege on the prosecution sufficiently safeguards a defendant's rights to cross-examination under the Confrontation Clause.

B. The Court Correctly Held that Defense Counsel Preserved the Surveillance Location Privilege Issue for Appeal Because He Vigorously Argued in Support of His Preferred Alternative Outcome to the Trial Judge's Ruling

The majority properly resolved a second issue by holding that defense counsel's response to the trial judge's ruling on the motion *in limine* preserved the issue for appellate review. As soon as the prosecution made the motion, defense counsel noted that being prevented from asking about Officer Kintop's location would be prejudicial to Church's fair trial rights, and stated, "I'd like to know exactly, well first of all, I'd like to know where [Kintop] was."[142] After the trial judge ruled in favor of the prosecution's motion, defense counsel's compliance with the ruling did not amount to acquiescence. As the majority recognized, his deference to the trial judge's decision fell "within the appropriate bounds of professionalism . . . in a manner consistent with the court's ruling."[143] By continuing to argue for disclosure of the location after the ruling, defense

138. *See id*. (explaining that placing the burden on the prosecution appropriately protects the defendant's rights); *see also* United States v. Bryan, 339 U.S. 323, 331 (1950) (stating that "we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional").

139. *Church*, 408 Md. at 669, 971 A.2d at 291.

140. *Id.*

141. *Id.* at 671, 971 A.2d at 292.

142. *Id.* at 659, 971 A.2d at 285 (internal quotation marks omitted).

143. *Id.* at 661, 971 A.2d at 286. The majority analogized Church's counsel's conduct to that of the defense counsel in *Beverly v. State*, 349 Md. 106, 707 A.2d 91 (1998). *Church*, 408 Md. at 657–59, 971 A.2d at 284–85. In *Beverly*, the court found that defense counsel's objection to a motion made by the prosecution preserved the issue for appellate review because "once [defense counsel] realized that the court was not going to change its mind, defense counsel, having vigorously argued the matter, politely continued on with the matter of the day." *Beverly*, 349 Md. at 117–18, 707 A.2d at 96–97.

counsel would have risked agitating the trial judge, who had an interest in moving the trial forward in accordance with his interpretation of the law.

In his dissenting opinion, Judge Murphy argued that defense counsel's objection was not sufficient to preserve the issue for appellate review.[144] First, he pointed to the court's language in *Prout v. State*[145] and explained that an objection will be preserved only if the judge intended that the ruling be final.[146] Next, he argued that the trial judge's ruling on the motion *in limine* in the present case was not intended to be final and thus the issue was not preserved for review.[147] This conclusion, however, fails to recognize that while the trial judge's language that Judge Murphy pointed to in his dissenting opinion appears equivocal,[148] the trial judge also appeared to indicate that his decision to rule on the motion *in limine* was settled. The judge's statement that "[i]f it appears that [a question] is going to triangulate or locate the actual place where [Kintop] was I will be upholding the State's motion *in limine*"[149] demonstrates that even though he stated that he would judge the questions as they arose, his mind was made up about what would and what would not be appropriate. Therefore, the majority correctly held that defense counsel's objection to the trial judge's ruling on the motion *in limine* preserved that issue for appellate review.

C. The Court Erred in Issuing a Limited Remand, as Church Was Entitled to a New Trial Because the Lower Court's Misapplication of the Surveillance Location Privilege Violated His Sixth Amendment Right to Confrontation and Constituted Prejudicial Error

At trial, the prosecution failed to submit any evidence demonstrating that the State had a legitimate interest in preventing disclosure of Officer Kintop's observation post.[150] The prosecution's failure to meet its evidentiary burden meant that the need to engage in a balancing test was never triggered because there was nothing to balance against the

144. *Church*, 408 Md. at 676–77, 971 A.2d at 295–96 (Murphy, J., dissenting).

145. 311 Md. 348, 535 A.2d 445 (1988).

146. *Church*, 408 Md. at 676–77, 971 A.2d at 295–96.

147. *Id.* When issuing the ruling, the trial judge stated, "I will grant the State's motion in part and I think actually I'm going to have to just judge it as it comes up. I'll have to rely on counsel to be close as you ask your questions." *Id.* at 656, 971 A.2d at 283 (majority opinion) (internal quotation marks omitted).

148. *See id.* at 677, 971 A.2d at 295 (Murphy, J., dissenting) (focusing on the language that discussed judging the evidence "as it comes up").

149. *Id.* at 655–56, 971 A.2d at 283 (majority opinion).

150. *Id.* at 670, 971 A.2d at 291.

defendant's interest in disclosure.[151] Thus, according to the dissent, Church was prevented from cross-examining Officer Kintop as to the surveillance location in violation of his constitutional right under the Confrontation Clause.[152] Violating a criminal defendant's constitutional right to cross-examination relates to the substantive issue of the defendant's guilt because restrictions placed on that right may influence the jury's determination of guilt.[153] Under the standard set forth by the Court of Appeals in *Dorsey v. State*,[154] the reviewing court must order a new trial unless it can find "no reasonable possibility" that erroneously excluded evidence contributed to the jury's verdict.[155] It seems plausible that the court's decision to bar Church from determining where Officer Kintop was located may have led some jury members to believe that Church could not be trusted with this knowledge and thus to perceive him as potentially dangerous, vengeful, and presumptively guilty. Thus, it would have been in the interest of "fundamental fairness"[156] to order a new trial.[157]

While the majority did not even address *Dorsey*, it hastily distinguished the instant case from *Southern v. State*,[158] where the Court of Appeals held that a limited remand could not be used to reopen a suppression hearing in the same case because the prosecution failed to meet its evidentiary burden.[159] The majority argued that the *Southern* rule only applied to rulings on motions to suppress evidence, and not rulings on motions *in limine*.[160] As Judge Greene aptly noted in his dissenting opinion, a ruling on a motion to suppress evidence is analogous to a ruling on a motion *in limine* in that they both serve to determine the admissibility of evidence before it is offered at trial.[161] In *Southern*, the Court of

151. *Id.* at 671, 971 A.2d at 292.

152. *Id.* at 674, 971 A.2d at 294 (Greene, J., dissenting).

153. *Id.* at 676, 971 A.2d at 295.

154. 276 Md. 638, 350 A.2d 665 (1976).

155. *Id*. at 659, 350 A.2d at 678.

156. *See* Austin v. State, 253 Md. 313, 319, 252 A.2d 797, 800 (1969) (ordering defendant a new trial where evidence was erroneously excluded "if for no other reason than that of fundamental fairness to the accused").

157. *See Church*, 408 Md. at 676, 971 A.2d at 295 (Greene, J., dissenting) ("Fairness dictates that Church receive a new trial.").

158. 371 Md. 93, 807 A.2d 13 (2002).

159. *Church*, 408 Md. at 672–73, 971 A.2d at 293 (majority opinion) (citing *Southern*, 371 Md. at 105, 807 A.2d at 20).

160. *Id*.

161. *Id*. at 676, 971 A.2d at 295 (Greene, J., dissenting). Judge Greene explained that "[s]imilar to the situation in *Southern*, the State, here, failed to meet its burden of establishing any grounds for Officer Kintop to refuse to disclose the location of his surveillance post." *Id.* He then concluded that "[a]s in *Southern*, it would be unfair, in effect, to remand the case for the limited

Appeals remanded the case to the circuit court for a new trial.[162] Church also should have received a new trial, as we cannot know whether the trial court's prejudicial error influenced the jury's decision.[163]

At first glance, the majority's decision to issue a limited remand is understandable, as the prosecution would be able to satisfy its burden of proof by demonstrating that either the surveillance location was still in use or that a member of the public would face the risk of retaliation if the location was revealed.[164] If this happened and the lower court determined that the State's interest outweighed Church's interest, then Church's conviction would stand and the State would not have to shoulder the expense of a second trial.[165] In this sense, the limited remand may be perceived as a useful tool for facilitating judicial economy. In *Gill v. State*,[166] the prosecution supported its position that a limited remand was an appropriate remedy by making such an argument.[167] The court responded by stating that "the State made the rather dubious claim that a restricted remand is advisable because it lessens the amount of time spent in litigation . . . we do not feel that the limited remand device in any significant manner would promote this result."[168] The *Gill* court concluded that "[i]f anything, it potentially has the opposite effect—a proliferation of litigation."[169] The court further emphasized that it "can never allow expediency to overshadow the necessary and desirable procedures which have long been established and followed to protect an accused."[170] It appears that the *Church* majority unwisely let this principle go unrecognized.

D. The Court's Decision in This Case Highlights that Maryland's Standard for Issuing a Limited Remand Is Unclear and Must Be

purpose of allowing the State to reopen the motion hearing to present additional evidence." *Id*.; *see also* Jay S. Blumenkopf, *The Motion* In Limine*: An Effective Procedural Device with No Material Downside Risk*, 16 NEW ENG. L. REV. 171, 174 (1981) ("The motion *in limine* is similar to and believed to have evolved from the pretrial criminal motion to suppress illegally obtained evidence.").

162. 371 Md. at 112, 807 A.2d at 24.

163. *Church*, 408 Md. at 676, 971 A.2d at 295.

164. *See id*. at 672, 971 A.2d at 292–93 (majority opinion) (explaining how the limited remand would work).

165. *Id*. at 673, 971 A.2d 293.

166. 265 Md. 350, 289 A.2d 575 (1972).

167. *Id*. at 360, 289 A.2d at 580.

168. *Id.*

169. *Id.*

170. *Id.*

Revised to Ensure that It Is Applied Consistently and Not Used to Compromise Defendants' Fair Trial Rights

The two key sources of law governing the applicability of limited remands in criminal cases each contain ambiguities that allow courts to use the remedy without sufficient restriction.[171] First, the State rule governing remands states that a remand may be used when "the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or [when] justice will be served by permitting further proceedings."[172] This vague standard, requiring only that "justice will be served," gives courts considerable discretion when deciding to use the remedy because the standard does not set forth clear guidelines controlling its applicability.[173] The second source of ambiguity stems from the Court of Appeals's decision in *Gill v. State*, explaining that limited remands may be used in criminal cases to "correct procedures subsidiary to the criminal trial."[174] This interpretation adds some guidance to the standard given under Rule 8-604(d), but ambiguity remains, as it may not always be clear whether the error being corrected by the limited remand relates to the substantive issues of the case or to a "subsidiary" issue. The lack of a clear standard permits courts to use the limited remand to avoid the expense of a new trial even in cases where the defendant's fair trial rights were violated.[175] In this case, the error that the limited remand was ordered to correct related to the defendant's Sixth Amendment right to cross-examine the witnesses appearing against him.[176] A violation of a defendant's constitutional fair trial rights impacts the determination of the defendant's guilt.[177] Under the current standard governing the use of the limited remand, however, there is no bright line rule to indicate whether this issue is subsidiary to the substantive issues of the trial, and thus the Court of Appeals was able to avoid ordering defendant Church a new trial.[178] The legislature might improve this situation by adding a provision to Rule 8-

171. *See* MD. R. 8-604(d) (allowing the use of a remand when "justice will be served by permitting further proceedings"); *see also Gill*, 265 Md. at 357, 289 A.2d at 579 (holding that limited remands may only be used to correct errors made in "procedures subsidiary to the criminal trial," though not defining "subsidiary").

172. MD. R. 8-604(d).

173. *See id.* (failing to explain in detail when "justice will be served").

174. 265 Md. at 357, 289 A.2d at 579.

175. Church v. State, 408 Md. 650, 674, 971 A.2d 280, 294 (2009) (Greene, J., dissenting).

176. *Id.* at 672–73, 971 A.2d at 292–93 (majority opinion).

177. *See id.* at 676, 971 A.2d at 295 (Greene, J., dissenting) ("[The court] cannot say beyond a reasonable doubt that the improper restriction placed on Church's right of cross-examination in no way influenced the jury's verdict.").

178. *See id.* at 672, 971 A.2d at 292 (majority opinion) (ordering only a limited remand).

604(d) stating that the limited remand may never be used to correct an error that violated a defendant's constitutional rights.

V. CONCLUSION

In *Church v. State*, the Court of Appeals held that a surveillance location privilege exists that allows undercover police officers to refuse to disclose the location of their observation posts at trial, but that before it can be applied, the State must demonstrate that it has a legitimate interest in concealing the location that outweighs the defendant's interest in freely cross-examining his or her accusers.[179] The court additionally held that in this case, defense counsel preserved the surveillance location privilege issue for appeal because he "voiced clearly" his objection to the motion *in limine*.[180] In holding that a qualified surveillance location privilege exists, the court crafted a rule that adequately protects defendants' fair trial rights under the Confrontation Clause.[181] The court also correctly held that defense counsel's conduct was sufficiently vigorous to preserve the surveillance location privilege issue for appeal.[182] The court erred, however, in issuing a limited remand, and that error underscores the need to clarify the guidelines governing the use of that remedy.[183] The enactment of a bright line rule indicating when the use of a limited remand is permissible would help protect criminal defendants' fair trial rights.[184]

179. *Id*. at 672–73, 971 A.2d at 292–93.
180. *Id*. at 661, 971 A.2d at 286.
181. *See supra* Part IV.A.
182. *See supra* Part IV.B.
183. *See supra* Part IV.C–D.
184. *See supra* Part IV.D.