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Diggs v. State: A Not-So-Plain Error?

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Recent Decisions

THE COURT OF APPEALS OF MARYLAND

DIGGS v. STATE: A NOT-SO-PLAIN ERROR?

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In *Diggs v. State*,[1] the Maryland Court of Appeals examined the impact of judicial conduct on a defendant's right to a fair trial.[2] Specifically, the court utilized plain error review when defense counsel failed to object to the judge's behavior and held that the judge's egregious conduct precluded the defendants from having fair and impartial trials.[3] In expanding the scope of plain error review, the court should have used the doctrine's historical application to create narrow precedent,[4] but instead took a policy-driven approach that left vague guidelines for the future.[5] To restore public confidence and judicial integrity, the court could have instead used its inherent supervisory power to review the judge's conduct[6] or relied on assistance from the Maryland Commission on Judicial Disabilities.[7]

I. THE CASE

Steven Diggs and Damon Ramsey were both convicted before the same judge in the Circuit Court for Baltimore City in separate trials for different crimes.[8] Diggs was arrested and found guilty of possession of marijuana.[9] In a different incident, Damon Ramsey was

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1. 409 Md. 260, 973 A.2d 796 (2009).
2. *Id.* at 262–63, 973 A.2d at 797–98.
3. *Id.* at 293–95, 973 A.2d at 815–16.
4. *See infra* Part IV.A.1.
5. *See infra* Part IV.A.2.
6. *See infra* Part IV.B.1.
7. *See infra* Part IV.B.2.
8. *Diggs*, 409 Md. at 263–64, 271, 973 A.2d at 797–98, 802.
9. *Id.* at 263–64, 973 A.2d at 798. On February 6, 2007, a jury found Diggs guilty of driving without a license, but the judge declared a mistrial when the jury was unable to

charged and convicted of possession of cocaine, heroin, and marijuana and possession with intent to distribute cocaine and heroin.[10] Diggs and Ramsey both appealed their convictions to the Court of Special Appeals, arguing that the judge's behavior in each case prevented them from having fair and impartial trials.[11]

Specifically, Diggs argued that the judge—not the prosecutor—laid the foundation for the distribution of marijuana charge by specifically questioning the detective who pulled over Diggs's vehicle and discovered the marijuana.[12] Diggs also claimed that the judge intervened during the direct examination of another detective and attempted to rehabilitate him.[13] Further, Diggs argued that the judge pressed his first witness, Diggs's sister, during direct and cross-examination for further details about the incident.[14] During this particular alleged error, defense counsel properly objected to the judge's "inquisitory" statement and suggested that his conduct was inappropriate, but Diggs did not object at any other point.[15]

Ramsey similarly made claims of judicial bias.[16] First, Ramsey alleged that the judge acted partially when he empanelled the jury before holding a suppression hearing regarding Ramsey's motion that the drugs were illegally seized, contrary to the procedure established in the Maryland Rules of Criminal Causes.[17] The judge, he claimed,

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reach a verdict on the charges of possession of marijuana and possession with intent to distribute. *Id.* at 264 n.3, 973 A.2d at 798 n.3. On June 1, 2007, a different jury tried the drug charges involved in this appeal. *Id.* at 264, 973 A.2d at 798. The jury found Diggs guilty of possession of marijuana, but was unable to render a unanimous decision on the charge of possession of marijuana with intent to distribute. *Id.*

10. *Id.* at 271, 973 A.2d at 802.

11. *Id.* at 263 & n.1, 973 A.2d at 798 & n.1.

12. *Id.* at 264, 973 A.2d at 798. When the prosecutor failed to further question the witness regarding the contents of recovered baggies, the judge asked specifically why the drugs would be used for "street level distribution" rather than "personal use." *Id.* Diggs alleged that the judge's questioning—not the prosecutor's—established why the marijuana would be used for street distribution, laying the charge for distribution of marijuana (instead of solely possession). *See id.* at 264–65, 973 A.2d at 798–99 (showing how the judge's questioning might have laid the foundation for the charge).

13. *Id.* at 265, 973 A.2d at 799. The judge allegedly tried to rehabilitate the officer by saying, "'It was over two and a half years ago, right? I mean we're talking November and the event would have been September '04 so okay.'" *Id.*

14. *Id.* at 265–66, 973 A.2d at 799. The judge purportedly asked about issues such as how long her brother had been staying at her house, *id.* at 266–67, 973 A.2d at 799–800, whether she was "'comfortable'" about information she had provided, *id.* at 267, 973 A.2d at 800, and why she failed to inform the officers immediately that the drugs and money belonged to her boyfriend and not to her brother, *id.* at 268–69, 973 A.2d at 800–01.

15. *Id.* at 269–71, 973 A.2d at 801–02.

16. *See id.* at 271, 973 A.2d at 802.

17. *Id.* at 271–72, 973 A.2d at 802–03. The defendant alleged that empanelling the jury before ruling on the motion showed the judge's partiality from the outset of proceed-

then accused defense counsel of striking jurors based on race[18] and referred to defense counsel's hearing strategy as "'pretty silly.'"[19] Ramsey also maintained that the judge elicited important elements of the State's case by intervening during the direct examination of the State's key witness, expanded the scope of the prosecutor's inquiry, and strengthened the evidence surrounding the element of intent to distribute when the prosecutor had finished direct questioning.[20] Ramsey claimed that the judge's intervention of sua sponte questions and comments to jurors during the witness's cross-examination undermined defense counsel's attempt to impeach recollections about the incident.[21] Moreover, Ramsey argued that the judge asked another witness to retake the stand, after the prosecutor declined to engage in redirect, and proceeded to establish the drugs' chain of custody.[22] Finally, Ramsey asserted that the judge's addition to the pattern jury instructions governing credibility violated his right to a fair trial.[23]

Before any proceedings in the Court of Special Appeals, the Court of Appeals issued a writ of certiorari on its own initiative to hear both cases and to decide whether Diggs's and Ramsey's due process rights to a fair trial were violated by the judge's conduct.[24]

II. LEGAL BACKGROUND

Diggs v. State represents the intersection of two key legal issues: (1) the application of plain error review as an exception to the preservation requirement,[25] and (2) due process concerns involving the standards of judicial conduct.[26]

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ings because under Maryland Rule 4-252, the motion to suppress the seized contraband is to be determined before trial. MD. R. 4-252(a), (g)(1); *Diggs*, 409 Md. at 271–72, 973 A.2d at 802–03.

18. *Diggs*, 409 Md. at 272–74, 973 A.2d at 803–04.

19. *Id.* at 275, 973 A.2d at 804. The judge also later referred to defense counsel as "'young lady,'" which Ramsey argued demeaned her status as a lawyer. *Id.* at 280, 973 A.2d at 807.

20. *Id.* at 275–78, 973 A.2d at 804–06.

21. *Id.* at 278, 973 A.2d at 806.

22. *Id.* at 280, 973 A.2d at 807.

23. *Id.* at 281–83, 973 A.2d at 808–09.

24. *Id.* at 262–63, 973 A.2d at 797–98. Because this same judge's behavior was at issue in *Green v. State*, the court in *Green* vacated the judgment of the Court of Special Appeals and remanded for reconsideration following the *Diggs* decision. 409 Md. 302, 302, 973 A.2d 820, 820 (2009).

25. *See infra* Part II.A.

26. *See infra* Part II.B.

A. Plain Error Review Developed as an Exception to the Preservation Rule—Which Requires Counsel to Object to Preserve an Issue for Appeal—and as a Means to Protect a Defendant's Due Process Rights

Maryland courts historically require counsel to preserve issues for appeal, but sometimes exercise appellate review in limited circumstances to vindicate a defendant's due process rights.[27] When formal bills of exception were required,[28] counsel had to introduce a motion for a mistrial or a motion to strike the judge's remarks and to warn the jury to disregard those remarks in order to preserve appellate review of challenges to the judge's comments.[29] Eventually, the rule was informalized and parties were no longer required to take formal exceptions during the course of a trial, so long as the objection was made known to the court.[30] Courts recognized exceptions to the preservation rule only when the record "clearly showed that the accused had not had a fair and impartial trial, and thereby was denied due process of law"[31] under either "structural"[32] or "plain error" review.[33]

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27. Elmer v. State, 239 Md. 1, 8–9, 209 A.2d 776, 780–81 (1965). The Court of Appeals has also recently elaborated on its "inherent supervisory authority over the administration of justice in Maryland courts" in a case dealing with judicial conduct. Archer v. State, 383 Md. 329, 360, 859 A.2d 210, 229 (2004); *see also* Weinschel v. Strople, 56 Md. App. 252, 259, 466 A.2d 1301, 1304 (1983) (noting that the Court of Appeals has the ability to exercise supervisory authority). *But see* State v. Manck, 385 Md. 581, 606 n.3, 870 A.2d 196, 211 n.3 (2005) (noting that the first time the Maryland Court of Appeals ever exercised its supervisory authority was in *Archer*). *See generally* Smith v. Andrews, 959 A.2d 597, 610 (Conn. 2008) (suggesting that the exercise of supervisory authority is a very rare occurrence); Sapper v. Sapper, 951 A.2d 5, 7–8 (Conn. App. Ct. 2008) (same).

28. Originally, an attorney properly preserved issues with a formal exception to be included in a bill of exceptions, which became part of the record, upon receiving an unfavorable trial court ruling. Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947, 949 (1998). The purpose of the formal exception was to document errors when there was no court reporter or transcript to "recite the occurrences at trial." *Id.* In their discretion, trial judges preserved a record of these exceptions, compiling a bill of exceptions to list the errors subject to appeal. *Id.*

29. *Elmer*, 239 Md. at 8, 209 A.2d at 780.

30. *See id.* at 8–9, 209 A.2d at 780–81 (explaining that the change in the rule was meant to simplify procedures and to rid the court of unnecessary formalities). For a more detailed and complete analysis of the purposes behind the preservation of error requirement, see Carter, *supra* note 28, at 949–54.

31. *Elmer*, 239 Md. at 8, 209 A.2d at 780.

32. *See, e.g.*, Redman v. State, 363 Md. 298, 303, 768 A.2d 656, 659 (2001) (arguing that structural error review is proper under Maryland law to vindicate prejudicial issues). Structural error review is appropriate where "the framework within which the trial proceeds" is affected. Arizona v. Fulminante, 499 U.S. 279, 310 (1991). Automatic reversal is warranted, in this instance, because the error unfairly affected the entire trial, and thus the lower court proceedings could not have "'reliably serve[d] its function as a vehicle for determination of guilt or innocence.'" *Id.* (quoting Rose v. Clark, 478 U.S. 570, 577–78

Plain error review allows Maryland appellate courts to review issues not properly preserved during trial proceedings when a defendant's due process rights have been infringed.[34] Under Maryland Rule 8-131(a), the scope of appellate review is limited to issues "plainly appear[ing] by the record to have been raised in or decided by the trial court."[35] The Rule, however, grants the appellate court the discretion to "rarely"[36] decide issues not preserved.[37] Plain error

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(1986)). For example, in *Tumey v. Ohio*, the United States Supreme Court held that the Ohio practice of only paying a mayor for his services as a judge if he convicted those brought before him was unconstitutional. *See* 273 U.S. 510, 535 (1927) (noting that the judge had a "direct pecuniary interest in the outcome" and an "official motive to convict and to graduate the fine to help the financial needs of the village"); *id.* at 512 (observing that the judge had a "personal financial interest" and "was operating the court in order to make money for the village"). Specifically, the Court ruled that the defendant was denied his due process right under the Fourteenth Amendment to have an "impartial judge," "[n]o matter what the evidence was against him," because of the mayor's pecuniary interests in the case at hand. *Id.* at 535.

The Maryland Court of Appeals has noted that structural error is subject to automatic reversal when errors are of "constitutional magnitude," including where a judge is partial. *Redman*, 363 Md. at 303 n.5, 768 A.2d at 659 n.5. The court has recognized the *Tumey* decision and the application of structural error analysis. *Id.* The doctrine, however, has enjoyed a limited application before the Court of Appeals, arising in cases like *Harris v. State*, in which the court held that where the jury was not sworn in there was no waiver of the defendant's objection to the unsworn jury. 406 Md. 115, 122, 956 A.2d 204, 208 (2008); *see id.* at 122–27, 956 A.2d at 208–11 (reasoning that the "presumption of regularity" normally given to trial proceedings was overcome because the jury was never sworn in, and a sworn jury is a necessity, not just a mere formality); *cf.* Alston v. State, 177 Md. App. 1, 16 n.6, 934 A.2d 949, 958 n.6 (2007) (noting that the Maryland Court of Special Appeals has applied structural error analysis several times), *cert. granted*, 403 Md. 304, 941 A.2d 1104 (2008).

33. *See* Brown v. State, 203 Md. 126, 129–30, 100 A.2d 7, 9 (1953) (refusing to exercise appellate review because no objections were made and there was no showing of plain error sufficient to justify reversal). In *Robinson v. State*, handed down after *Diggs*, the court clarified more fully the circumstances in which plain error review is appropriate. 410 Md. 91, 104–06, 976 A.2d 1072, 1080–81 (2009). Exercising the court's discretion must not unfairly prejudice the parties or court and must assist in the orderly administration of justice. *Id.* at 104–05, 976 A.2d 1080. For a more detailed explanation of the necessary circumstances for exercising appellate review, see *id.* at 104–06, 976 A.2d 1080–81.

34. *See, e.g.*, Squire v. State, 280 Md. 132, 134–35, 368 A.2d 1019, 1020 (1977) (noting the use of plain error review in "compelling circumstances" such as error in jury instructions).

35. MD. R. 8-131(a); *see also* Walker v. State, 338 Md. 253, 262, 658 A.2d 239, 243 (1995) (stating that "ordinarily [the appellate court] will not review an issue that was not presented to the trial court"); State v. Bell, 334 Md. 178, 188–89, 638 A.2d 107, 113 (1994) (holding that an appellate court will not ordinarily consider an issue not previously raised and that the Court of Appeals may exercise its discretion independently of the Court of Special Appeals).

36. *Robinson*, 410 Md. at 104, 976 A.2d at 1079 ("Such prerogative to review an unpreserved claim of error, however, is to be rarely exercised and only when doing so furthers, rather than undermines, the purposes of the rule."); *see id.* at 105, 976 A.2d at 1080 (refusing to exercise plain error review because appellant did not attempt to argue that

appellate review of jury instructions is explicitly recognized in Maryland Rule of Criminal Causes 4-325(e), but no other rule expressly identifies the court's discretionary review of issues not properly preserved.[38] Plain error review was originally exercised rigidly,[39] but as the importance of due process rights increased in the context of instructional errors, the doctrine enjoyed a more liberal application.[40]

1. The Maryland Courts Originally Emphasized Procedural Concerns to Use Plain Error Review Infrequently Under a "Correctability" Approach

Maryland originally utilized a rigid "correctability" approach to plain error review, allowing appellate review only when, even if the error had been objected to, the court could not have corrected it.[41] In *Wolfe v. State*,[42] for example, the trial court attempted to assist the defendant in making a decision about whether he should testify or remain silent, warning that the State had a strong case against him if he did not testify.[43] Even though the defendant failed to object to the

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failure to object was "mere oversight" instead of the "deliberate decision of defense counsel not to object").

37. *Bell*, 334 Md. at 188, 638 A.2d at 113.

38. MD. R. 4-325(e). The Rule states the following:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

Id.

Maryland Rule of Criminal Causes 4-323(a), governing objections to evidence, does not explicitly state the same, but its predecessor was recognized as affording an exception to the preservation rule where the accused was deprived due process of law. MD. R. 4-323(a); Elmer v. State, 239 Md. 1, 9, 209 A.2d 776, 781 (1965) (noting that under then-Rule 522 formal exceptions are unnecessary so long as the party makes the objection known to the court). *But see* Conyers v. State, 354 Md. 132, 149–50, 729 A.2d 910, 919 (1999) (refusing to "relax the preservation requirement" of 4-323(a) even though a few earlier death penalty cases had suggested the appropriateness of such plain error review because "[t]he rules for preservation of issues have a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court, and these rules must be followed in all cases including capital cases").

39. *See infra* Part II.A.1.

40. *See infra* Part II.A.2.

41. *See, e.g.*, Reynolds v. State, 219 Md. 319, 324–25, 149 A.2d 774, 777 (1959) (noting that plain error review will not be exercised when "the errors complained of are such that the trial court could have—and undoubtedly would have—corrected [them] if the defendant had interposed her objections").

42. 218 Md. 449, 146 A.2d 856 (1958).

43. *Id.* at 454–55, 146 A.2d at 858–59.

alleged error, the appellate court took cognizance of and corrected the plain error by awarding the defendant a new trial because "the error . . . was such as the court could not have corrected even if it had attempted to do so."[44] It was not improper for the trial court to inform the defendant about testifying, the court decided, but the judge's comments about the evidence—without instructing the jury to disregard them—could have prejudiced the defendant.[45]

Maryland courts applied plain error review under this approach narrowly to protect procedural fairness concerns.[46] For instance, in *Reynolds v. State*,[47] the defendant was convicted of three separate offenses that concerned prostitution[48] and alleged on appeal that the court did not clearly explain the meaning of "disorderly house" in the jury instructions.[49] The court, however, declined to use the doctrine because "it [was] obvious that the errors . . . [in jury instructions we]re such that the trial court could have—and undoubtedly would have—corrected [them] if the defendant had interposed her objections."[50] Therefore, counsel could not appeal the use of or failure to explain the meaning of "disorderly house."[51] This "correctability" methodology respected the fairness concerns underlying the preservation rule, while also leaving appropriate room for correcting particularly egregious errors.[52]

2. *Maryland Courts Focused on the Defendant's Due Process Rights to Enlarge Plain Error Review of Jury Instructions*

Maryland courts replaced the aforementioned procedural policy concerns with constitutional due process considerations in plain error

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44. *Id.* at 455, 146 A.2d at 859.

45. *Id.* at 454–55, 146 A.2d at 858–59.

46. *See, e.g.*, *Reynolds*, 219 Md. at 324–25, 149 A.2d at 777 (refusing to exercise plain error review because the court could have corrected the error if counsel had objected). *But cf.* Agee v. Lofton, 287 F.2d 709, 709–10 (8th Cir. 1961) (observing that counsel might not object because he fears irritating the judge); People v. Johnson, 404 N.E.2d 531, 533 (Ill. App. Ct. 1980) (same).

47. 219 Md. 319, 149 A.2d 774.

48. *Id.* at 321, 149 A.2d at 775.

49. *Id.* at 324, 149 A.2d at 777.

50. *Id.* at 324–25, 149 A.2d at 777.

51. *Id.*

52. *See* Chaney v. State, 397 Md. 460, 468, 918 A.2d 506, 511 (2007) (suggesting that plain error review should be exercised rarely "so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge").

review of jury instructions;[53] the courts, however, continued to temper the analysis with some degree of stringency.[54] The new approach justified the use of plain error review not only where the trial court could have corrected the error, but also in "compelling" or "exceptional" circumstances, which encouraged a case-by-case analysis of instructional errors.[55] Despite the lack of stringent guidelines to the analysis, the court conducted inquiries into defense counsel's trial tactics.[56] For example, in *Squire v. State*,[57] the Court of Appeals ultimately concluded that the failure to object to instructions on the standards of self-defense resulted from counsel's belief that jury instructions were given in accordance with Maryland and federal law and that the failure was not a result of counsel's oversight or calculated trial decisions.[58] Therefore, plain error review could be used in this circumstance.[59] In *Dimery v. State*,[60] the Court of Appeals ruled that even constitutional rights could be waived and plain error review would not "alleviat[e] . . . unfortunate consequences as may result from a choice of trial tactics."[61] This concern for trial tactics tempered the relaxation of the doctrine, preventing the court from always infringing on the judge's discretion.[62]

The interest of the Court of Appeals in the defendant's due process rights, however, justified an even broader view of the error's materiality in *State v. Hutchinson*.[63] In *Hutchinson*, the court's interest in the defendant's right to a fair trial justified assessing the materiality of

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53. *See, e.g.*, State v. Hutchinson, 287 Md. 198, 202–08, 411 A.2d 1035, 1037–41 (1980) (analyzing plain error review and concluding that it may be used to ensure the defendant's right to a fair trial when erroneous jury instructions are involved).

54. *See, e.g.*, Dempsey v. State, 277 Md. 134, 141–42, 355 A.2d 455, 458–59 (1976) (noting that "[o]rdinarily, of course, a question will not be considered on appeal if it has not been presented to the trial court" and finding that no extraordinary circumstances existed to justify appellate review).

55. Squire v. State, 280 Md. 132, 134–35, 368 A.2d 1019, 1020 (1977).

56. *See, e.g.*, *id.* at 136, 368 A.2d at 1021 (awarding a new trial, despite failure to object, after concluding that the failure was not a result of trial tactics or inadvertence); Sine v. State, 40 Md. App. 628, 633–34, 394 A.2d 1206, 1210 (1978) (evaluating whether counsel's failure to object was for tactical reasons or a result of inadvertence).

57. 280 Md. 132, 368 A.2d 1019.

58. *Id.* at 136, 368 A.2d at 1021.

59. *Id.* at 135–36, 368 A.2d at 1020–21.

60. 274 Md. 661, 338 A.2d 56 (1975). The court relied on Maryland Rule 756 g, which governed instructional errors. *Id.* at 665, 338 A.2d at 57–58.

61. *Id.* at 676–77, 338 A.2d at 63–64 (quoting Giles v. State, 229 Md. 370, 387, 183 A.2d 359, 367 (1962)).

62. *Id.* at 678–79, 338 A.2d at 64–65.

63. 287 Md. 198, 411 A.2d 1035 (1980). The court, here, relied on then-Rule 757(h), which "clearly anticipates circumstances giving rise to error which may justify" review of jury instructions. *Id.* at 202, 411 A.2d at 1037–38.

the trial judge's omission in the jury instructions that the defendant could be found not guilty.[64] The court affirmatively refused to adopt the correctability interpretation of the governing rule.[65] Rather, the court concluded, it was more important that "an appellate court . . . take cognizance of unobjected to error as compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial."[66] The court held that because a "trial judge may influence the jury by the inflection of his voice, his words, his conduct and his assessment of the evidence,"[67] his "omission in the [jury] instructions was an oversight material to the rights of the defendant and incapable of being cured by the verdict sheet."[68] *Hutchinson* marked a significant development in the doctrine because the court held that an *omission* denied a defendant his due process rights and legitimated appellate review to correct that error.[69]

This relaxed approach for errors in jury instructions was extended to all alleged errors of law.[70] In *Rubin v. State*,[71] the Court of Appeals followed the *Hutchinson* analysis in analyzing an error in jury instructions,[72] noting that "errors of law generally" could be taken into consideration under this approach.[73] The court held that no

64. *See id.* at 208, 411 A.2d at 1040–41.

65. *Id.* at 203, 411 A.2d at 1038. The dissent, in fact, accused the majority of sub silentio overruling the "correctability" standard. *Id.* at 218, 411 A.2d at 1046 (Smith, J., dissenting).

66. *Id.* at 203, 411 A.2d at 1038 (majority opinion).

67. *Id.* at 206, 411 A.2d at 1040.

68. *Id.* at 208, 411 A.2d at 1041. *But see* Brown v. State, 14 Md. App. 415, 420–22, 287 A.2d 62, 64–65 (1972) (holding that a plain error would be reviewable if it were "an irremediable error of commission, but not an error of omission").

69. *See Hutchinson*, 287 Md. at 208, 411 A.2d at 1041 (holding that the judge's omission from jury instructions was material to the defendant's rights); *see also* State v. Daughton, 321 Md. 206, 210–13, 582 A.2d 521, 523–24 (1990) (considering whether the omission of a jury instruction on presumption of innocence was plain error under the *Hutchinson* analysis); Trimble v. State, 300 Md. 387, 399, 478 A.2d 1143, 1149 (1984) (holding that the omission of the defendant's mental retardation from the jury instructions as grounds for finding the defendant to be legally insane was not plain error), *post-conviction relief granted*, 321 Md. 248, 582 A.2d 794 (1990).

70. *See, e.g.*, Rubin v. State, 325 Md. 552, 587–88, 602 A.2d 677, 694 (1992) ("[A]s [former] Rule 756 g makes clear with respect to jury instructions, and as the cases hold with respect to errors of law generally, an appellate court may in its discretion in an exceptional case take cognizance of plain error even though the matter was not raised in the trial court." (second alteration in original) (internal quotation marks omitted) (quoting Dempsey v. State, 277 Md. 134, 141–42, 355 A.2d 455, 459 (1976))).

71. 325 Md. 552, 602 A.2d 677.

72. *Id.* at 587–89, 602 A.2d at 694–95.

73. *Id.* at 587–88, 602 A.2d at 694 (quoting *Dempsey*, 277 Md. at 141–42, 355 A.2d at 459). *But see* Abeokuto v. State, 391 Md. 289, 326–27, 893 A.2d 1018, 1039–40 (2006) (declining to exercise plain error review under Maryland Rule 4-323(a), which states that "[a]n objection to the admission of evidence shall be made at the time the evidence is

"fixed formula" had been determined for when discretion should be exercised, but "'expect[ed] that the appellate court would review the materiality of the error . . . giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention.'"[74] The *Rubin* court refused to exercise plain error review because it found that counsel might have failed to object to the jury instructions for tactical reasons.[75]

B. An Impartial Judge Is an Integral Part of a Fair Trial

Maryland courts require the judge to remain impartial so that the defendant receives his right to a fair trial and the public's confidence in the judiciary is subsequently maintained.[76] Substantial precedent has developed under Maryland law focusing on the amount of discretion a judge should have during trial proceedings to avoid interfering with the defendant's rights.[77] Interested in preserving judicial integrity and promoting high standards of judicial conduct, the Maryland legislature also created the Commission on Judicial Disabilities.[78]

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offered or as soon thereafter as the grounds for objection become apparent," and that "[o]therwise, the objection is waived" (internal quotation marks omitted)); Conyers v. State, 354 Md. 132, 149–50, 729 A.2d 910, 919 (1999) (refusing to "relax the preservation requirement" under Rule 4-323(a) even though a few earlier death penalty cases had suggested such plain error review would be appropriate because "[t]he rules for preservation of issues have a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court, and these rules must be followed in all cases including capital cases"); Bruce v. State, 328 Md. 594, 611, 616 A.2d 392, 400 (1992) ("[D]espite the special character of a capital case, the tried and tested rules of evidence and procedure still apply. Both sides should play by the rules."); Gaylord v. State, 2 Md. App. 571, 575, 235 A.2d 783, 786 (1967) ("[A] defendant in a criminal prosecution cannot raise for the first time on appeal an objection which was available to him at the trial and which he did not raise below.").

74. *Rubin*, 325 Md. at 588, 602 A.2d at 694 (quoting *Hutchinson*, 287 Md. at 203, 411 A.2d at 1038).

75. *Id.* at 589, 602 A.2d at 695.

76. The comment to the Code of Judicial Conduct Canon 3A states the following:

> A judge must perform judicial duties fairly and impartially. A judge who manifests bias of any kind in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial. For example, a judge must refrain from comment, gesture, or other conduct that could reasonably be perceived as sexual harassment.

MD. R. 16-813 CJC Canon 3A cmt.

77. *See infra* Part II.B.1.

78. MD. CONST. art. IV, § 4A; *see infra* Part II.B.2.

1. Maryland Courts Developed Guidelines to Review Judicial Conduct to Ensure that the Jury Is Not Influenced by the Judge

In evaluating the judge's behavior, Maryland courts afford the trial judge "wide discretion in the conduct of a trial and [hold] that the exercise of discretion will not be disturbed unless it has been clearly abused."[79] Under the totality of the circumstances, when a judge exercises her discretion, she must actually remain unbiased,[80] must appear impartial,[81] and must avoid interacting with counsel in a way that would prejudice the defendant in the jury's eyes.[82]

a. The Judge Must Actually Be Impartial to Avoid Influencing the Jury and Must Properly Exercise His Judicial Authority as a Matter of Maryland Nonconstitutional Criminal Procedure

The Court of Appeals has held that a judge must remain "impartial and courteous," and not allow his "personal feelings" to be observed by the jury.[83] A "clear showing" that the jury was adversely influenced must be made to find that the appellant was prejudiced by the judge's behavior.[84]

In *Bryant v. State*,[85] the Court of Appeals applied this "clear showing" analysis.[86] The court held that a "clear showing" had not been made because, while the judge rebuked defense counsel, "the mere fact that the trial was conducted in an impatient and brusque way" did not justify reversal.[87] The court concluded that the judge's comments to the jury about "being kept away from their homes" and his admonitions to counsel did not clearly prejudice the jury.[88]

To determine actual bias, Maryland courts have examined the circumstances at trial and the judge's words and actions.[89] The court's inquiry in *Marshall v. State*,[90] for example, centered on the judge's ad-

79. Crawford v. State, 285 Md. 431, 451, 404 A.2d 244, 254 (1979) (internal quotation marks omitted) (quoting Bartholomey v. State, 260 Md. 504, 530, 273 A.2d 164, 177–78 (1971)).

80. *See infra* Part II.B.1.a.

81. *See infra* Part II.B.1.b.

82. *See infra* Part II.B.1.c.

83. Apple v. State, 190 Md. 661, 670, 59 A.2d 509, 513 (1948).

84. *Id.*

85. 207 Md. 565, 115 A.2d 502 (1955).

86. *Id.* at 585, 115 A.2d at 511.

87. *Id.*

88. *Id.* at 583–85, 115 A.2d at 510–11.

89. *See, e.g.*, Archer v. State, 383 Md. 329, 359, 859 A.2d 210, 228 (2004) (considering the circumstances of the trial and the judge's conduct and warnings to the defendant).

90. 291 Md. 205, 434 A.2d 555 (1981).

monitions to the witness, which the court found had infringed on the defendant's rights.[91] The court held that the admonitions "unnecessarily affected" the defendant's remaining testimony and infringed on his right to present a defense.[92] The judge's admonitions to the defendant about the consequences of not testifying risked compelling him to testify in a certain way to satisfy the judge, "out of fear that if he did not, he would suffer some severe, but unexplained consequence."[93]

Similarly, in *Archer v. State*,[94] the court focused on the judge's actions, which evidenced his departure from "neutral" judge to "advocate" in advising a recalcitrant witness that he could be subject to cross-examination or refuse to testify and be subject to contempt proceedings.[95] The *Archer* court held that the judge's warnings and conduct compelled the witness's testimony and that his instructions to a colleague to try to convict the witness of contempt were prejudicial in denying the defendant his right to a fair trial.[96]

The *Archer* court also concluded that "as a matter of Maryland nonconstitutional criminal procedure, the trial judge's improper use of judicial authority compel[led]" reversal.[97] In so holding, the court exercised its "inherent supervisory authority over the administration of justice," in addition to basing its holding on the defendant's due process rights.[98] The court relied on *United States v. Hastings*,[99] in which the Supreme Court asserted that the use of supervisory authority was necessary "to implement a remedy for violations of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, [and] to deter illegal conduct."[100]

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91. *Id.* at 214, 434 A.2d at 560.

92. *See id.* (noting that "[p]erjury warnings may intimidate defense counsel as well as the defendant himself, thereby discouraging counsel from eliciting essential testimony from the witness").

93. *Id.* at 212–13, 434 A.2d at 559.

94. 383 Md. 329, 859 A.2d 210.

95. *Id.* at 347, 859 A.2d at 221.

96. *Id.* at 347, 360, 859 A.2d at 221, 228–29.

97. *Id.* at 360, 859 A.2d at 229.

98. *Id.*

99. 461 U.S. 499 (1983).

100. *Archer*, 383 Md. at 360, 859 A.2d at 229 (citing *Hastings*, 461 U.S. at 505).

b. The Judge Must Also Appear Impartial to Avoid Influencing the Jury Because the "Probability of Unfairness" Is Enough to Deprive a Defendant of His Due Process Rights

Besides inquiring into the judge's actual behavior, Maryland courts have held that "even the *probability* of unfairness"[101] must be guarded against because the accused has a paramount right to a fair trial.[102] To guard against the appearance of unfairness, the courts have used a "reasonable" person approach to review the judge's influence on the jury.[103]

For instance, in *Vandegrift v. State*,[104] the Court of Appeals held that the trial judge's questioning "was beyond the line of impartiality over which a judge must not step" when he asked questions that could lead a jury to infer that he did not believe the witness's testimony.[105] A judge can properly "sharpen" issues and "clarify" points for the jury,[106] courts have held, but proceeding further and manifesting disbelief infringes on the jury's role as ultimate trier of fact[107] and thereby deprives the defendant of his right to a fair trial.[108]

Likewise, in *Jefferson-El v. State*[109] the court focused on the need for the appearance of impartiality, under the Maryland Code of Judicial Conduct, in ruling that the judge's behavior could have influenced the jury.[110] The court reasoned that the judge's statements in the defendant's prior case—that the verdict was "'an abomination'"—could lead a reasonable person to question his partiality in this

101. Crawford v. State, 285 Md. 431, 452, 404 A.2d 244, 254 (1979) (emphasis added by the court) (internal quotation marks omitted) (quoting *In re* Murchinson, 349 U.S. 133, 136 (1955)).

102. *Id.* at 451–53, 404 A.2d at 254–55.

103. *See, e.g.*, Jefferson-El v. State, 330 Md. 99, 109, 622 A.2d 737, 742 (1993) (holding that a reasonable person could infer that the judge was not impartial).

104. 237 Md. 305, 206 A.2d 250 (1965).

105. *Id.* at 310–11, 206 A.2d at 253–54 (holding that the judge's questions to the witness "influenced the jury").

106. Pearlstein v. State, 76 Md. App. 507, 515, 547 A.2d 645, 649 (1988).

107. *Vandegrift*, 237 Md. at 310, 206 A.2d at 253; *see also* Starr v. United States, 153 U.S. 614, 626 (1894) ("It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.").

108. *See Jefferson-El*, 330 Md. at 105–07, 622 A.2d at 740–41 (noting that the judge's conduct has a "direct bearing" on the defendant's fair trial).

109. 330 Md. 99, 622 A.2d 737.

110. *Id.* at 109–10, 112, 622 A.2d at 742, 743–44.

case.[111] Reversal would then be justified because a judge's conduct, opinions, or manifestations most likely impacted the jury.[112]

Using the same reasonableness analysis, in *Jackson v. State*,[113] the Court of Appeals emphasized the judge's duty to remain impartial in sentencing.[114] Instead of focusing on whether the judge's comments during trial were motivated by ill-will or prejudice, the court focused on whether justice "appear[ed] to [have] be[en] done."[115] Because the judge's language—such as referring to people who are "'from the city'" and the "'ghetto'" as "'rotten apples'"[116]—could make a reasonable person believe the judge was biased and that race was inappropriately considered at sentencing, the court ruled that the defendant had been deprived of due process.[117]

c. The Judge Must Avoid Interacting with Counsel in a Way That Improperly Influences the Jury

Recently, Maryland courts have also spotlighted the interactions between judge and counsel.[118] Because their interactions can influence the jury, the defendant's right to a fair and impartial trial may be infringed.[119] The Court of Appeals has held that where the defendant has chosen to be tried by a jury, the jury—as ultimate trier of fact and free from the prejudicial influence of interactions between judge and counsel—should decide the accused's guilt or innocence.[120]

In *Johnson v. State*,[121] the Court of Appeals explored the relationship between judge and counsel and held that the judge abused his

111. *Id.* at 109, 622 A.2d at 742. The court relied on then-Maryland Rule 1232, Canon 3C of the Maryland Code of Judicial Conduct, that required recusal when the judge's impartiality might be questioned. *Id.* at 106, 622 A.2d at 741.

112. *Id.* at 106, 112, 622 A.2d at 741, 743–44.

113. 364 Md. 192, 772 A.2d 273 (2001).

114. *Id.* at 207, 772 A.2d at 281–82.

115. *Id.* at 205, 772 A.2d at 280 ("In the oft-quoted statement of Justice Frankfurter, 'justice must satisfy the appearance of justice.'" (quoting Offutt v. United States, 348 U.S. 11, 14 (1954))); *see also* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 (1988) (noting that justice must appear to have been served); Marshall v. Jerrico, Inc., 446 U.S. 238, 242–43 (1980) (same); *In re* Murchison, 349 U.S. 133, 136 (1955) (same).

116. *Jackson*, 364 Md. at 197, 772 A.2d at 275–76.

117. *Id.* at 208, 772 A.2d at 282.

118. *See, e.g.*, Johnson v. State, 352 Md. 374, 388, 722 A.2d 873, 879 (1999) (considering the interaction between judge and counsel and the influence it may have on the trial).

119. *See id.* at 393–94, 722 A.2d at 882 (noting that a judge's comments, interrogations, and premature rulings can influence the jury and violate a defendant's "right to a fair trial").

120. *See id.* at 385–86, 722 A.2d at 878 ("In addition, if the defendant has elected to be tried by a jury, it is the province of that jury to decide the guilt or innocence of the defendant." (quoting Jefferson-El v. State, 330 Md. 99, 106, 622 A.2d 737, 741 (1993))).

121. 352 Md. 374, 722 A.2d 873.

discretion and the defendant was precluded from having a fair trial where the judge threatened defense counsel with arrest for contempt of court before the jury.[122] The court held that regardless of defense counsel's conduct, portraying him in such a "negative light" deprived his client of a fair trial.[123] The risk of influencing the jury was one the court was not willing to take.[124]

2. *The Maryland Legislature Created the Commission on Judicial Disabilities to Maintain High Standards of Judicial Conduct*

The Commission on Judicial Disabilities was established by constitutional amendment in 1966[125] as a disciplinary body to "assist in monitoring the conduct of Maryland judges."[126] The Commission has the power to investigate complaints against judges of the Court of Appeals, intermediate courts of appeal, and circuit courts (among others), and the Commission can also conduct hearings concerning complaints, issue reprimands, and recommend further disciplinary action to the Court of Appeals.[127] Action can be taken for sanctionable conduct—including "misconduct while in office," "persistent failure" to perform judicial duties, and "conduct prejudicial to the proper ad-

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122. *Id.* at 387, 393–94, 722 A.2d at 879, 882; *see also* Spencer v. State, 76 Md. App. 71, 78–79, 543 A.2d 851, 854–55 (1988) (finding reversible error where, under the totality of the circumstances, the trial judge's remarks to counsel in front of the jury "impugned her integrity," "indicated that she was dishonest with the court and the jury," and denied appellant a fair trial).

123. *Johnson*, 352 Md. at 388, 722 A.2d at 879.

124. *Id.* at 388–89, 973 A.2d at 879–80; *see also* Jenkins v. State, 375 Md. 284, 339–40, 825 A.2d 1008, 1041 (2003) ("We *must zealously guard against any actions or situations which would raise the slightest suspicion that the jury in a criminal case had been influenced or tampered with* . . . ." (emphasis added by the court) (quoting State v. Wilson, 336 S.E.2d 76, 77 (N.C. 1985))).

125. MD. CONST. art. IV, § 4A.

126. STATE OF MD., COMM'N ON JUDICIAL DISABILITIES, ANNUAL REPORT FOR FISCAL YEAR 2009 1–2 (2009), *available at* http://www.courts.state.md.us/cjd/pdfs/annualreport09.pdf [hereinafter *Annual Report*].

127. MD. CONST. art. IV, § 4B(a)(1)–(2).

The Maryland Rules of Courts, Judges, and Attorneys give the Commission the authority to direct Investigative Counsel to initiate proceedings against the judge, who may then dismiss the complaint or make a recommendation to a Board consisting of two judges, two attorneys, and three public members. MD. R. 16-804.1(a), 16-805(a), (c), (f). The Board then makes a recommendation to the Commission. MD. R. 16-805(j)(1).

During Fiscal Year 2009, the Commission received 137 complaints (only five were initiated by the Commission's Investigative Counsel, while most were filed by the general public). *Annual Report*, *supra* note 126, at 7. The Commission issued six dismissals with a warning and only one private reprimand that involved a district court judge. *Id.*

ministration of justice"—that violates obligatory provisions[128] of the Code of Judicial Conduct.[129]

After a recent investigation, for example, the Commission unanimously rejected the issuance of a public reprimand,[130] and instead referred the matter to the Court of Appeals with a recommendation that the judge receive a thirty-working-day suspension.[131] The Commission concluded that the judge's "undignified, discourteous, and disparaging" comments violated the Code of Judicial Conduct and "str[uck] at the very heart of the integrity and impartiality of the judiciary and the public's confidence in such integrity and impartiality."[132] The judge's disrespectful remarks during the course of fourteen cases, including, "'I don't have any mercy,'"[133] violated the Code of Judicial Conduct and eroded public confidence in the judiciary.[134]

Upon the Commission's recommendation, the Court of Appeals independently reviewed the judge's behavior.[135] The court found by clear and convincing evidence[136] that this judge's inappropriate comments were "exhibited in a pattern of behavior over a period of time and in many cases" and were "prejudicial to the administration of jus-

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128. The Rules distinguish between binding and non-binding obligations. *See* MD. R. 16-813 pmbl. (distinguishing between "'shall'" and "'shall not,'" which impose "binding obligation[s]," and "'should'" and "'should not,'" which are "intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding obligation").

129. MD. R. 16-803(k)(1).

130. *In re* Lamdin, CJD 2005-108 & CJD 2006-055, at 15 (Md. Comm'n Judicial Disabilities 2007), *available at* http://www.courts.state.md.us/cjd/pdfs/cjd2006055.pdf, *aff'd*, 404 Md. 631, 948 A.2d 54 (2008). *But see In re* Boone, CJD 2007-047, Stipulation at 2 (Md. Comm'n Judicial Disabilities 2007), *available at* http://www.courts.state.md.us/cjd/pdfs/cjd2007047.pdf (making a private reprimand public after finding that the judge's "undignified and disparaging" comments were made on the record, in the courtroom, and "represent[ed] a serious lapse in judgment" in violation of Canons 1, 2A, 3A, 3B(4), and 6 of the Maryland Code of Judicial Conduct).

131. *In re Lamdin*, CJD 2005-108 & CJD 2006-055, at 17.

132. *Id.* at 14–15.

133. *Id.* at 5. The judge in another case said, "'I told some lady we confiscate cell phones and we put the cell phones in plastic bags and send them down to Annapolis. I suggested maybe we ought to do the same thing with children except poke holes in the bag.'" *Id.* at 4.

134. *Id.* at 14–15.

135. *In re* Lamdin, 404 Md. 631, 650, 948 A.2d 54, 65 (2008); *see also In re* Foster, 271 Md. 449, 470, 318 A.2d 523, 534 (1974) ("Based on our independent review of the record, we think that the Commission's finding in this regard was supported by clear and convincing evidence.").

136. *In re Lamdin*, 404 Md. at 637, 948 A.2d at 57 ("Upon our independent review, this Court must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, Canons of the Code adopted by this Court have been violated.").

tice, manifested bias . . . and lacked dignity, courtesy, and patience."[137] The court concluded that a thirty-working-day suspension without pay was the appropriate sanction.[138]

III. THE COURT'S REASONING

In *Diggs v. State*,[139] the Maryland Court of Appeals used a plain error analysis, when both defendants' attorneys failed to object to all of the alleged errors, to reverse the convictions of the two defendants because the judge's behavior in each case was so egregious as to preclude a fair and impartial trial.[140] Writing for the majority, Judge Battaglia examined the scope of a defendant's right to a fair trial when defense counsel fails to object to the judge's inappropriate conduct during trial.[141]

The court first examined whether defense counsel's failure at trial to object to most of the issues raised on appeal in both cases precluded its review of the issues.[142] The court reasoned that judicial bias that had not been objected to was sometimes appealable under structural error review.[143] Structural error review, the court maintained, allowed the appellate court to review structural "defects" that affected the framework of the trial proceedings,[144] which could include an impartial judge.[145] The court noted that it more often used plain error review to review errors "'so material to the rights of the accused'" that they might preclude a fair and impartial trial, and utilized this approach to review the judge's behavior in these cases.[146]

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137. *Id.* at 650, 948 A.2d at 65.

138. *Id.* at 655, 948 A.2d at 68.

139. 409 Md. 260, 973 A.2d 796 (2009).

140. *Id.* at 294–95, 973 A.2d at 816.

141. *Id.* at 262, 284–87, 973 A.2d at 797, 809–11. The court overturned the convictions despite defense counsels' failure to object at the time some of the alleged errors took place. *Id.* at 287, 973 A.2d at 811.

142. *See id.* at 284, 973 A.2d at 809 (addressing the preservation issue before deciding the merits of the case). The court reasoned that both objections—Diggs's counsel's objection to the judge's questioning of the first witness and Ramsey's counsel's objection to a comment the judge made to the jury, which the judge did not rule on—would be reviewable on appeal. *Id.* at 284–85, 973 A.2d at 809–10.

143. *Id.* at 285–86, 973 A.2d at 810–11. The court also noted that it had previously reviewed allegations of judicial bias without articulating a reason for requiring objections. *Id.*

144. *Id.* at 285, 973 A.2d at 810 (internal quotation marks omitted) (quoting Redman v. State, 363 Md. 298, 303 n.5, 768 A.2d 656, 659 n.5 (2001)).

145. *Id.* (citing *Redman*, 363 Md. at 303 n.5, 768 A.2d at 659 n.5).

146. *Id.* at 286, 973 A.2d at 811 (quoting Trimble v. State, 300 Md. 387, 397, 478 A.2d 1143, 1148 (1984)).

The court next examined its judicial partiality jurisprudence and concluded that a disinterested judge is fundamental to a defendant's right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution.[147] A criminal defendant is guaranteed by due process the "cold neutrality of an impartial judge" because otherwise the judge might impede on the jury's role.[148] Moreover, as a matter of Maryland nonconstitutional criminal procedure, the court reasoned, a trial judge cannot improperly use his "'judicial authority'" to deny the defendant his due process rights through admonitions and partial conduct.[149] Finally, the court noted, a judge must not only actually be fair in questioning, but must appear impartial and disinterested.[150]

Examining the need for judicial impartiality, the court concluded that judges are held to high standards of conduct because of their distinguished position and potential to impact the jury's verdict.[151] While a judge can appropriately comment or clarify answers, the court ruled that a judge must maintain neutrality, question sparingly, and allow attorneys to use cross-examination for clarification.[152] The court reasoned that a trial judge's repeated challenges to a witness's statements had—in a previous trial—suggested disbelief in testimony and improperly influenced the jury;[153] a judge's repeated questioning could problematically result in the jury relying on the judge's disbelief

147. *Id.* at 263 & n.2, 287–92, 973 A.2d at 798 & n.2, 811–14.

148. *Id.* at 288, 973 A.2d at 812 (citing North Carolina v. Rhodes, 224 S.E.2d 631, 638 (N.C. 1976)).

149. *Id.* at 287, 973 A.2d at 811. For example, the court noted that in a previous case involving judicial partiality, three warnings of contempt, a phone call to another judge in the witness's presence, the threat of life imprisonment as a contempt sanction, the threat that the other judge would impose the longest available contempt penalty, and the advice given on how the witness could testify was "'excessive and improper.'" *Id.* (quoting Archer v. State, 383 Md. 329, 352, 859 A.2d 210, 224 (2004)).

150. *Id.* at 288–89, 973 A.2d at 812. The court stated that a judge's comments at sentencing, which "could cause a reasonable person to question the impartiality of the judge," were an example of abuse of discretion. *Id.* at 289, 973 A.2d at 812 (internal quotation marks omitted) (quoting *Archer*, 383 Md. at 356–57, 859 A.2d at 227 (2004)).

151. *Id.* at 289, 973 A.2d at 812–13 (citing Jefferson-El v. State, 330 Md. 99, 106, 622 A.2d 737, 741 (1993)). Further, the court reasoned, if the defendant had "elected to be tried by a jury," the *jury*—not the judge—should determine his "guilt or innocence." *Id.* (quoting *Jefferson-El*, 330 Md. at 106, 622 A.2d at 741). For instance, where ill-will, prejudice, or the appearance of racial bias could be inferred from a judge's words at sentencing, a judge could have abused his discretion. *See id.* at 290, 973 A.2d at 813.

152. *Id.* at 292, 973 A.2d at 814. In a footnote, the court clarified and narrowed the holding, declining to extend the analysis to a judge's role in either a criminal or civil trial with self-represented litigants. *Id.* at 292 n.11, 973 A.2d at 814 n.11.

153. *Id.* at 290–92, 973 A.2d at 813–14 (quoting Vandegrift v. State, 237 Md. 305, 310, 206 A.2d 250, 253 (1965)).

to assess a witness's credibility.[154] Further, the court noted that it had previously held that even when the jury was not present in the courtroom, a trial judge's admonitions to a witness about the consequences of lying could constitute error by affecting the defendant's own honesty.[155]

The court then considered the cases sub judice and held that the judge inappropriately intervened with questions and comments, exceeding the appropriate circumstances in which a judge may clarify answers.[156] During Diggs's trial, the court found that the judge laid the foundation for the distribution charge during the lead detective's questioning and rehabilitated another confused detective.[157] The judge also strengthened the State's case, the court noted, by inappropriately questioning the defense's lead witness and implying disbelief in her testimony, creating an "aura of partiality in front of the jury."[158]

Similarly, the court found that during Ramsey's trial, the judge helped draw key elements of the State's case from a witness and elicited testimony of intent to distribute after the prosecutor had completed his examination of a witness.[159] The judge also commented to the jury in a way that bolstered the prosecutor's integrity and established the drugs' chain of custody when the prosecution failed to do so.[160]

In conclusion, the court held that the judge's behavior in these cases was so egregious as to preclude the defendants from receiving fair and impartial trials and warranted reversal, and the court remanded the cases for rehearing before a different judge.[161] The court further ruled that counsel's repeated objections to the judge's behavior could lead to unprofessional conduct from both the judge and lawyer and could violate a defendant's right to a fair trial by portray-

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154. *Id.* at 291–92, 973 A.2d at 814.

155. *Id.* at 290, 973 A.2d at 813 (warning that such behavior risks "swimming in treacherous waters" because the judge's interference could cause the witness to change his testimony (internal quotation marks omitted) (quoting Marshall v. State, 291 Md. 205, 211, 434 A.2d 555, 558 (1981))).

156. *See id.* at 292, 973 A.2d at 814 ("These cases differ from the appropriate circumstances in which a judge may ask questions to clarify an answer or comment.").

157. *Id.* at 293, 973 A.2d at 815.

158. *Id.*

159. *Id.*

160. *Id.* Relying on Maryland Rule 4-325(c), which states "[t]he court may . . . instruct the jury as to the applicable law and the extent to which the instructions are binding," the court held that the language the judge added to the pattern jury instructions governing credibility was appropriate under Rule 4-325 because it was not an inaccurate statement of the law. *Id.* at 282, 283 n.7, 973 A.2d at 808, 809 n.7 (internal quotation marks omitted) (quoting MD. R. 4-325(c)).

161. *Id.* at 294–95, 973 A.2d at 816.

ing counsel negatively to the jury.[162] Ordinarily, however, the court cautioned that failure to object would only be countenanced by the appellate court where the judge "exhibit[ed] repeated and egregious behavior of partiality, reflective of bias."[163]

In dissent, Judge Murphy opined that neither Diggs nor Ramsey was entitled to a new trial.[164] He refused to apply a "'repeated and egregious behavior'" exception to the preservation rule, which requires counsel to object to preserve the issue for appeal.[165] He further argued, particularly in Diggs's case, that it was unclear whether continuous objections would have been unprofessional.[166]

In Diggs's trial, Judge Murphy maintained that the judge asked only proper questions.[167] Further, he asserted that Diggs's counsel did not inadequately represent her client, but rather failed to object as a matter of trial tactics.[168] Judge Murphy also believed that Ramsey was treated with respect and was not precluded from having a fair trial, as evidenced by the judge's refusal to allow the State's lead witness to give nonresponsive answers to defense counsel's questions.[169]

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162. *Id.* at 294, 973 A.2d at 815–16.

163. *Id.* The court further noted that failure to object in less persuasive situations would not lead to intervention by the Court of Appeals because it is counsel's responsibility to preserve issues for appeal. *Id.*, 973 A.2d at 816.

164. *Id.* at 295, 973 A.2d at 816 (Murphy, J., dissenting).

165. *Id.* at 296, 973 A.2d at 817.

166. *Id.* at 296–97, 973 A.2d at 817.

167. *See id.* at 295–96, 973 A.2d at 816 ("I would not grant a new trial on the ground that the Circuit Court asked questions that the prosecutor was clearly entitled to ask."). Moreover, Judge Murphy maintained that the trial judge's instructions to the jury to warn them that his comments were only advisory—as opposed to binding—and that they should draw no conclusions from them was evidence that he did not abuse his discretion. *See id.* at 296, 973 A.2d at 816–17 ("In my opinion, the fact that the jury 'hung' on the 'possession with intent to distribute' charge reinforces the presumption that the jury followed those instructions."). Judge Murphy thought that the jury's inability to unanimously convict Diggs of possession with intent to distribute supported his claim that the jury took the judge's comments to heart and made a decision regardless of his commentary and questioning. *Id.*

168. *Id.* at 297–98, 973 A.2d at 817. Judge Murphy believed that the record showed that defense counsel was not afraid to request relief or engage in exchanges with the trial court during bench conferences. *Id.* at 297, 973 A.2d at 817. In addition, during closing argument defense counsel said the following:

> The judge in this particular case was unable to treat those people equally on the witness stand. . . . Every person is supposed to be treated the same by the Court with the same dignity and respect. But it's a perfect example that even though we would like to believe that human beings don't let their hatred cause them to do wrong things, it does happen . . . . [A]nd you saw it here during this trial.

Id.

169. *Id.* at 298–99, 973 A.2d at 818. Judge Murphy also asserted that empanelling the jury before the suppression hearing was done for efficiency purposes and that there was no abuse of discretion during jury selection. *Id.* at 299, 973 A.2d at 818–19. Judge Murphy

IV. ANALYSIS

In *Diggs v. State*, the Maryland Court of Appeals broadened the use of plain error review to evaluate judicial conduct.[170] The court could have respected the defendants' due process rights[171] and left a more narrow precedent under the older "correctability" approach to plain error review.[172] Instead, the court left vague guidelines for its new "repeated and egregious behavior" exception to the preservation rule[173] by applying the plain error analysis that had largely evolved under review of instructional errors.[174] Alternatively, the court could have avoided this problem, while also honoring the defendants' rights, by exercising its inherent supervisory power to decide this exceptional case.[175] The court also could have enlisted the help of the Commission on Judicial Disabilities to promote the integrity of and restore confidence in the judiciary.[176]

A. *The* Diggs *Court Greatly Expanded Plain Error Review to Examine the Judge's Conduct and Left Vague Precedent for Applying the New "Repeated and Egregious Behavior" Exception to the Preservation Rule*

Prior to *Diggs*, the Court of Appeals had not specifically addressed the extent to which a trial judge's "personal beliefs and opinion[s]" and repeated conduct could constitute plain error.[177] The court's ex-

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concluded that the comments to the jury were acceptable and the addition to the pattern jury instructions was a proper clarification of the law. *Id.* at 300–01, 973 A.2d at 819.

170. *Id.* at 262–63, 287, 294–95, 973 A.2d at 797, 811, 816 (majority opinion).

171. The court did not reach the issue of the Sixth Amendment, but instead decided that the judge's behavior deprived the defendants of their Fifth and Fourteenth Amendment rights. *Id.* at 263 & n.2, 973 A.2d at 798 & n.2. *See generally* Emily Wheeler, Note, *The Constitutional Right to a Trial Before a Neutral Judge: Federalism Tips the Balance Against State Habeas Petitioners*, 51 BROOK. L. REV. 841, 849 (1985) (noting that the Sixth Amendment guarantee to a trial by an impartial jury "has been interpreted to require nondiscrimination in juror selection and the protection of jury members from prejudicial *ex parte* influences" and has not been interpreted to mean a jury free from judicial influence (footnote call number omitted)).

172. *See infra* Part IV.A.1.

173. *Diggs*, 409 Md. at 294, 973 A.2d at 815–16.

174. *See infra* Part IV.A.2.

175. *See infra* Part IV.B.1.

176. *See infra* Part IV.B.2.

177. *See* Appellant's Reply Brief at 12–13, *Diggs*, 409 Md. 260, 973 A.2d 796 (No. 110) ("This Court has yet to address the question of whether a trial judge's intrusion of its personal beliefs and opinion into a criminal trial [constitutes] plain error."); *infra* note 208. In his reply brief, Diggs noted that the court had not addressed this issue, but that in *Rubin v. State*, 325 Md. 552, 602 A.2d 677 (1992), *habeas corpus granted sub nom.* Rubin v. Gee, 128 F. Supp. 2d 848 (D. Md. 2001), *aff'd*, 292 F.3d 396 (4th Cir. 2002), plain error review was not limited to jury instruction errors during a criminal trial. Appellant's Reply

pansion of plain error review, which created the "repeated and egregious behavior" exception to the preservation rule,[178] could have found stronger grounding under the narrow "correctability" approach to plain error review,[179] but was rooted in more recent precedent largely examining errors in jury instructions.[180]

1. *The* Diggs *Court Should Have Reviewed the Errors Under the Older "Correctability" Approach to Create a Narrow "Repeated and Egregious Behavior" Exception to the Preservation Rule*

The "correctability" approach[181] would have given the court a structural crutch to rely on in establishing guidelines for future plain error review in the context of judicial conduct, as opposed to instructional errors.[182] The more narrow approach would have beneficially confined the doctrine to particularly egregious cases, like this, and avoided future appeals presenting less convincing facts.[183] Further, because the "correctability" approach was used for all errors of law, the court would have been justified in relying on it, instead of the more recent and relaxed instructional error approach.[184]

Under this standard, the court could have reached the same result because the circuit court "could not have corrected [the error]

Brief, *supra*, at 12 (citing *Rubin*, 325 Md. at 587, 602 A.2d at 694); *see also* Dempsey v. State, 277 Md. 134, 141–42, 355 A.2d 455, 459 (1976) ("However, as [former] Rule 756 g makes clear with respect to jury instructions, and as the cases hold with respect to errors of law generally, an appellate court may . . . take cognizance of plain error even though the matter was not raised [below].").

178. *Diggs*, 409 Md. at 294, 973 A.2d at 815–16.

179. *See infra* Part IV.A.1.

180. *See infra* Part IV.A.2.

181. *See supra* Part II.A.1.

182. *Compare Diggs*, 409 Md. at 286–87, 973 A.2d at 811 (using plain error review as the doctrine had developed under review of instructional errors). *See generally* Note, *Appellate Review in Criminal Cases of Points Not Raised Below*, 54 HARV. L. REV. 1204, 1205 (1941) (suggesting that procedural rules and individual rights clash when the appellate court considers issues not raised below, but that where "[defendant] appears to be guilty, a conviction will rarely be reversed" because of the pressure to punish the "wicked").

183. The court tried to confine its approach by suggesting that ordinarily the failure to object will not be corrected, but using this "correctability" approach would have better set fortified, structural guidelines rather than appearing as a mere caution to counsel. *See Diggs*, 409 Md. at 294, 973 A.2d at 815–16 (creating the "repeated and egregious behavior" exception with the warning that the court will not ordinarily intervene when counsel has failed to object).

184. *See, e.g.*, Wolfe v. State, 218 Md. 449, 455, 146 A.2d 856, 859 (1958) (applying plain error to a judge's comments to a defendant during trial because the court could not have corrected the error).

even if it had attempted to do so."[185] Without counsels' objections, Diggs and Ramsey were prejudiced by the judge's actual behavior and appearance of partiality.[186] But even if both attorneys had objected every time, their clients would likely have been prejudiced in the eyes of the jury through constant rebukes by the partial judge,[187] whom the jury looks to for guidance.[188] Regardless of whether counsel objected, the jury would have been influenced, the defendants' rights would have been offended, and the errors could not have been corrected but for appellate review.[189] Using the "correctability" approach would have allowed the court to both correct the errors and establish a "repeated and egregious behavior" exception to the preservation rule[190] with strict guidelines for future appellate review when objections would be futile and would interfere with the jury's task.[191]

A futility requirement would legitimize the failure to object at every instance of judicial misconduct because repeated objections would not change the judge's behavior and could lead to unprofes-

185. *Id.*; *see also Diggs*, 409 Md. at 283, 973 A.2d at 809 ("Although Diggs'[s] and Ramsey's attorney only objected once to the pattern of judicial behavior, both argue, nevertheless, that it would have been futile or unprofessional to continuously object, and that we should reach their arguments in order to serve the ends of justice.").

186. *See* Wheeler, *supra* note 171, at 871 ("Precisely because of the acknowledged influence that a judge has over a jury, the opponents of judicial comment fear that anything other than judicial passivity will jeopardize the impartiality of the verdict." (footnote call number omitted)).

187. *See, e.g.*, Oade v. State, 960 P.2d 336, 338 (Nev. 1998) (holding that because early in the case Oade's counsel moved for a mistrial based on the court's "attitude," and the judge "interrupted counsel and denied the motion," "it was not unreasonable for Oade's counsel to remain quiet during the remainder of the trial rather than voice objections and risk antagonizing the judge" (internal quotation marks omitted)).

188. *See* Johnson v. State, 352 Md. 374, 385–86, 722 A.2d 873, 878 (1999) (suggesting that a judge's conduct has influence on the jury's verdict).

189. *Cf.* Jenkins v. State, 375 Md. 284, 339–40, 825 A.2d 1008, 1041 (2003) ("We *must zealously guard against any actions . . . which would raise the slightest suspicion that the jury in a criminal case had been [improperly] influenced . . . . Any lesser degree of vigilance would foster suspicion and distrust and risk erosion of . . . confidence in the integrity of our jury system.*" (emphasis added by the court) (internal quotation marks omitted) (quoting State v. Wilson, 336 S.E.2d 76, 77 (N.C. 1985))).

190. *Diggs*, 409 Md. at 294, 973 A.2d at 816.

191. Of course, counsel should still object to the judge's conduct, but under this approach, objecting once would preserve the objection to the judge's behavior throughout the trial instead of requiring an objection at every instance of misconduct. *Cf.* STEVEN P. GROSSMAN, TRYING THE CASE 141–47 (1999) (suggesting that one of counsel's most difficult decisions is when to object because such objections could be damaging to a client). Objecting once, instead of not at all, would establish the error on the record and give the defendant the chance to receive a fair trial by avoiding biasing the jury.

sionalism.[192] In Diggs's case, for instance, it was futile to repeatedly object to the judge's constant improper conduct; counsel had objected once during the judge's questioning of a lead witness,[193] but the judge's behavior, here, appears to have been typical.[194] Not only was the judge's behavior a constant problem in both of these cases, spanning the entire trial proceedings,[195] but his behavior also resulted in the Court of Appeals vacating another case he had heard in the past.[196] Moreover, his behavior across trials evidenced a pattern of judicial misconduct.[197] Objection to every error was not likely going to change his behavior in any significant way.[198] As evidence of his attitude, the judge specifically told Ramsey's attorney that "[y]ou can say anything that you want at this bench," when counsel attempted to object.[199] His statements and actions showed a disregard for his neutral role, likely eliminating the possibility of preventing this type of behavior with objections.

Not only would repeated objections have been futile, but they likely would have influenced the jury.[200] Because "[n]egative interac-

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192. *See Diggs*, 409 Md. at 293–94, 973 A.2d at 815–16 (noting that appellants argued that repeated objections would have been futile and ruling that repeated objections could lead to "unprofessional conduct" and "exacerbate tension").

193. *Id.* at 269–71, 973 A.2d at 801–02. The following occurred after counsel objected:

> [DEFENSE COUNSEL:] This is inappropriate. You are not supposed to involve yourself in a case this way.
>
> THE COURT: Do you understand my comment? You can say anything that you want at this bench.
>
> [DEFENSE COUNSEL:] No, Judge, if you're going to say in front of the jury that it was two and half years before you mentioned that, then I want them to hear, but this isn't the first time. We have been doing this case many times before.

Id. at 270, 793 A.2d at 802.

194. *See, e.g.*, *id.* at 264, 973 A.2d at 798 (noting Diggs's first allegation that the judge helped lay the foundation for the distribution of marijuana charge); *see also infra* note 299 (noting recent appeals that have arisen involving the same judge's conduct).

195. *See supra* notes 12–23 and accompanying text (detailing the judge's behavior in both Diggs's and Ramsey's trials); *see also Diggs*, 409 Md. at 271–82, 973 A.2d at 802–09 (noting that the judge intervened in multiple testimonies and made comments to jurors during Ramsey's trial).

196. Green v. State, 409 Md. 302, 302, 973 A.2d 820, 820 (2009).

197. *See infra* note 299 (exploring how the judge's conduct might not have been confined to this pair of cases, but was an overarching issue).

198. Upon counsel's exception to the judge's addition to the pattern jury instructions, the judge noted that he "d[id] it in every case," *Diggs*, 409 Md. at 281, 973 A.2d at 808 (emphasis omitted), suggesting that an objection would not result in a change in his behavior here.

199. *Id.* at 270, 973 A.2d at 802.

200. Appellant's Reply Brief, *supra* note 177, at 17 n.8 (arguing that repeated objections might leave counsel "with considerable suspicion and skepticism by the very group whom he is trying to convert to his client's view of the facts, thereby perhaps irreparably damaging his client's interest" (quoting People v. Sprinkle, 189 N.E.2d 295, 297 (Ill. 1963))).

tions" between the judge and counsel throughout the trial could "lead to unprofessional conduct" and "exacerbate tension in the courtroom,"[201] counsel was justified in not objecting to avoid prejudicing his client.[202] The judge's constant behavior would have required many objections throughout trial and interfered with the jury's independent review of the case.[203] Using this justification for extending plain error review under the older "correctability" approach, however, would have highlighted the prejudicial effect of objections in this particular case.[204] The alternative framework would have factored in the exceptional egregiousness, here, to allow a truly narrow future "repeated and egregious exception"[205] to the preservation rule.[206]

2. *The* Diggs *Court Used the Plain Error Analysis that Developed Largely Under Review of Instructional Errors to Leave Vague Precedent and Failed to Redeem Its Analysis*

By focusing on the prejudicial effect of the judge's conduct, the court largely grounded its analysis in recent precedent that expanded the scope of plain error review of jury instructions.[207] Applying the

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201. *Diggs*, 409 Md. at 294, 973 A.2d at 815.

202. Other courts have recognized why counsel might be reluctant to object to a judge's inappropriate behavior. *See, e.g.*, Agee v. Lofton, 287 F.2d 709, 710 (8th Cir. 1961) (reasoning that attorneys fear antagonizing the judge and prejudicing their client); People v. Johnson, 404 N.E.2d 531, 533 (Ill. App. Ct. 1980) (noting that counsel might fail to object to a judge's interrogation of a witness because he would want to avoid angering the judge). Some commentators stress the importance of objecting to prejudicial conduct. *See, e.g.*, JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 111 (3d ed. 1999) (advising that "[t]rial counsel's most difficult task is preserving for appellate review a claim of prejudicial error because of the conduct of the trial judge" and that counsel "must respectfully state for the record whatever prejudicial tone of voice, facial expressions and/or gestures that you observe being used by the trial judge"); *id.* § 201(A) ("When the judge's question will prejudice your client, you must object to preserve error.").

203. *See generally* 16B AM. JUR. 2D *Constitutional Law* § 968 (1998) (noting that the jury must make its decision free from the influence of others).

204. The court, instead, attempted to narrow its holding under the more relaxed approach by placing a warning to lawyers in the last two paragraphs of its lengthy opinion. *See Diggs*, 409 Md. at 294–95, 973 A.2d at 815–16.

205. *Id.* at 294, 973 A.2d at 815–16.

206. A "correctability" standard would minimize future appeals and only allow intervention in the most egregious cases like *Diggs*, instead of giving counsel room to argue in less convincing cases. *See generally* Appellant's Brief at 18, Stuckey v. State, No. 1202 (Md. Ct. Spec. App. June 29, 2009) (citing *Diggs* and using the case as precedent to argue that, despite counsel's failure to object, appellate review should be taken of the trial judge's partiality in questioning because counsel's failure to object may be explained by his hesitancy to increase courtroom tensions).

207. *See Diggs*, 409 Md. at 286–87, 973 A.2d at 811 (citing *Richmond v. State*, 330 Md. 223, 235–36, 623 A.2d 630, 636 (1993), *Rubin v. State*, 325 Md. 552, 587–88, 602 A.2d 677, 694 (1992), *State v. Daughton*, 321 Md. 206, 211–12, 582 A.2d 521, 523–24 (1990), *Trimble v. State*, 300 Md. 387, 397, 478 A.2d 1143, 1148 (1984), and *State v. Hutchinson*, 287 Md. 198,

doctrine in the context of judicial misconduct,[208] especially in this problematic pair of cases,[209] the court established a vague "repeated and egregious behavior" exception to the preservation rule, which will be difficult to apply practically in the future.[210] The court could have redeemed the analysis—and set a stricter standard—by distinguishing trial tactics, but failed to avail itself of that opportunity.[211]

a. The Diggs *Court's Concern for the Defendants' Due Process Rights Motivated a Results-Driven Analysis to Mirror Plain Error Review of Jury Instructions*

Expanding the analysis specifically to judicial bias mirrored the extension of the plain error doctrine for instructional errors in *State v. Hutchinson*.[212] The *Hutchinson* court's overriding policy concern for the defendant's rights condoned a relaxation of plain error review from a "correctability" approach to one focused on the defendant's

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202, 411 A.2d 1035, 1037–38 (1980), which all focused on alleged errors in jury instructions). *But see id.* (citing *Abeokuto v. State*, 391 Md. 289, 327, 893 A.2d 1018, 1040 (2006), which dealt with failure to object to testimony). It has been suggested that the high stakes of a criminal case justify a more liberal approach to plain error review to ensure that a defendant's due process rights are not infringed. Kevin Hessler, Note, State v. Hutchinson, 10 U. BALT. L. REV. 362, 370, 382 (1981). The broad application of plain error review—which arguably "comes close to assuring [a defendant] the right to a perfect trial rather than a fair one"—developed under review of instructional errors to ensure that "no miscarriage of justice w[ould] be allowed" (no matter how small the error, particularly when the error concerns an omission from jury instructions). *Id.* at 382 (arguing that a more liberal standard might be "too generous," but is justified to serve the purposes behind the plain error rule). The more liberal approach would then justify intervention where something was omitted—as opposed to affirmatively stated—in jury instructions.

208. There is some evidence that the court has ruled on improperly preserved issues in the judicial context. *See* Pearlstein v. State, 76 Md. App. 507, 516, 547 A.2d 645, 649–50 (1988) (addressing, under the correctability approach, a judge's making of prejudicial remarks in the presence of the jury while trying to assist an underrepresented defendant). No case, however, appears to apply plain error analysis to such egregious judicial remarks and conduct of the type that were on display here. *See, e.g.*, Wolfe v. State, 218 Md. 449, 455, 146 A.2d 856, 859 (1958) (addressing under the correctability approach a judge's making of prejudicial remarks in the presence of the jury while trying to assist an unrepresented defendant); Elmer v. State, 239 Md. 1, 9, 209 A.2d 776, 781 (1965) (noting that "the unquestionably harmful effects of the judge's remarks in the presence of the jury . . . would call for [the court's] review . . . even if no objection had been made thereto," but ruling that an objection had been made here); Ferrell v. State, 73 Md. App. 627, 638–39, 536 A.2d 99, 104–05 (1988), *rev'd on other grounds*, 318 Md. 235, 567 A.2d 937 (1990) (noting that a judge must not interject herself "into a case to any significant extent," but concluding that the remarks did not constitute reversible error). Because the alleged error was so expansive here, the court should have considered the effect that using this more relaxed approach to plain error review would have in the future.

209. *See infra* Part IV.A.2.a.

210. *See infra* Part IV.A.2.b.

211. *See infra* Part IV.A.2.c.

212. 287 Md. 198, 411 A.2d 1035.

substantive rights due to a judge's *omission* of certain language from jury instructions.[213] In *Diggs*, this particular judge's egregious conduct, which led to a deprivation of the defendants' due process rights to a fair trial,[214] motivated the court to follow *Hutchinson* and later precedent.[215] The court, however, failed to consider the effect of the relaxed due process-centered approach, as opposed to the more narrow "correctability" approach, in the area of judicial conduct. Under this policy-based inquiry, the court properly applied the recent relaxed plain error precedent[216] by examining how the judge's actual behavior and appearance to the jury infringed on the defendants'

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213. *See id.* at 203, 411 A.2d at 1038 (relaxing the doctrine by refusing to adopt an interpretation of the rule that would disallow appellate review where the error, if objected to, could have been corrected, because it is more important to vindicate a defendant's fundamental rights instead of using "such an absolute approach [that] is the antithesis of the discretion authorized by the rule"); *see supra* note 207 (discussing the *Diggs* court's reliance on cases like *Hutchinson* that dealt with plain error review of errors in jury instructions).

214. Integral to a defendant's due process right is the right to a decisionmaker who "listen[s] to arguments of both sides before basing his or her decision on the evidence and legal rules adduced at the hearing." 16B AM. JUR. 2D *Constitutional Law* § 968 (1998). In a jury trial, therefore, the ultimate trier of fact—the jury—must decide the defendant's guilt independently of the judge and without actual interference or the appearance of prejudice.

The *appearance* of impartiality, therefore, imposes a constellation of concerns involving judicial conduct. In fact, some scholars consider the "appearance" of fairness to be the "core" of due process. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 483 (1986) (writing that "[f]ew perceptions more severely threaten trust in the judicial process than the perception that a litigant never had a chance"); *see also* Peter David Blanck, *The Appearance of Justice Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 887, 889 (1996) (discussing the "appearance of justice" in judicial conduct that is necessary in order for the defendant to properly have his due process rights vindicated). Under this heightened concern for appearances, a judge's egregious conduct interferes substantially with the appearance of justice and would justify the expansion of plain error review here. *See* Diggs v. State, 409 Md. 260, 294–95, 973 A.2d 796, 815–16 (2009) (concluding that the jury could have been influenced by the judge's behavior). Without this concern for the *appearance* of justice, but instead emphasizing actual conduct and focusing on a transcript devoid of nonverbal cues and emotions, the court might not have come to the same conclusion or would have set an easier precedent to follow. Ultimately, however, the court's concern for appearances outweighed the failure to object under the procedural preservation requirement. *See id.* at 263 & n.2, 973 A.2d at 798 & n.2 (noting that the court decided under the Fifth and Fourteenth Amendments, rather than under the Sixth Amendment, that the defendants' rights to a fair trial had been violated). Perhaps the concern with appearances ought not drive the analysis because the appellate court cannot accurately evaluate a judge's effect on the jury and might overemphasize or underemphasize his influence.

215. *See Diggs*, 409 Md. at 294–95, 973 A.2d at 816 (noting that the defendants' due process rights to a fair trial had been violated).

216. *See id.* at 287, 973 A.2d at 811 (applying plain error analysis to review the errors).

rights, but the court failed to recognize that this context was different.[217]

First, the court held that the judge's words or actions actually adversely influenced the trial.[218] In *Diggs*, for instance, the court found that during questioning of the prosecution's lead witness the judge laid the foundation for the distribution charge,[219] rehabilitated another State witness,[220] and inappropriately questioned the defense's lead witness.[221] Similarly, in *Ramsey*, the court held that the judge elicited key elements of the State's case from a witness,[222] established aspects of a witness's testimony regarding the drugs,[223] elicited testimony regarding the elements of intent to distribute,[224] made comments to the jurors to bolster the prosecutor's integrity,[225] and established the drugs' chain of custody when the prosecutor failed to do so.[226] The court concluded that the judge abused his discretion and ability to "clarify"[227] and acted like a "co-prosecutor."[228]

The judge, however, also would have appeared partial to a reasonable person and therefore likely negatively influenced the jury.[229] He continually questioned Diggs's lead witness, "bolster[ing] the State's case while implying a disbelief in the defense" and created an "aura of partiality in front of the jury."[230] Under the relaxed instruc-

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217. The court cited Maryland Rule 8-131(a) for its ability to utilize plain error review, *id.* at 283–84 & 284 n.8, 973 A.2d at 809 & n.8, but then relied heavily on jury instruction cases, like *Hutchinson*, to construct the plain error standard in the new context, *id.* at 286–87, 973 A.2d at 811; *see supra* note 207.

218. *See supra* Part II.B.1.a.

219. *Diggs*, 409 Md. at 264, 293, 973 A.2d at 798, 815; *see supra* note 12 and accompanying text (exploring Diggs's allegation that the judge laid the foundation for the charge).

220. *Diggs*, 409 Md. at 265, 293, 973 A.2d at 799, 815; *see supra* note 13 and accompanying text (discussing the judge's attempt to rehabilitate the witness).

221. *Diggs*, 409 Md. at 265, 293, 973 A.2d at 799, 815; *see supra* note 14 and accompanying text (explaining how the judge inappropriately badgered the defense's lead witness, Diggs's sister).

222. *Diggs*, 409 Md. at 275, 293, 973 A.2d at 805, 815.

223. *Id.* at 276, 293, 973 A.2d at 805, 815.

224. *Id.* at 277, 293, 973 A.2d at 806, 815.

225. *Id.* at 281, 293, 973 A.2d at 808, 815.

226. *Id.* at 280, 293, 973 A.2d at 807, 815.

227. *Id.* at 292, 973 A.2d at 814; *see also* Marshall v. State, 291 Md. 205, 213, 434 A.2d 555, 560 (1981) (holding that the judge must maintain his neutrality, manage his questioning, and allow attorneys to fulfill clarification concerns through cross-examination).

228. *Diggs*, 409 Md. at 293, 973 A.2d at 815; *see also* MD. R. 16-813 CJC Canon 3A (stating that a judge must be impartial).

229. *Diggs*, 409 Md. at 293, 973 A.2d at 815 (holding that the judge's questioning showed his disbelief in the witness and created an "aura of partiality" and "an atmosphere [that was] . . . fundamentally flawed"); *see also supra* Part II.B.1.b (discussing the development of the importance of appearing impartial under Maryland case law).

230. *Diggs*, 409 Md. at 293, 973 A.2d at 815.

tional error approach, apprehension about the appearance of impartiality, which deprives a defendant of his constitutional right to a fair trial because of the jury's perception of a judge's opinion, was a proper concern for the court.[231] Repeated and badgering questioning would suggest to the jury that the judge did not believe the witness's testimony;[232] the judge's disbelief, then, would dangerously impinge on the jury's role and render a fair trial a nullity.[233] Because of this concern, the court properly held that the judge abused his discretion when his questioning and comments interfered with the "appearance of justice" under the recent relaxed plain error review of jury instructions.[234]

b. The Policy Concerns Motivating the Decision to Use the Relaxed Doctrine Will Have Problematic Effects in the Future

Judicial conduct, as opposed to jury instructions, is more discretion-based.[235] As such, the effect of *Diggs* and the newly-minted "repeated and egregious behavior" exception[236] to the preservation rule

231. *See* Jackson v. State, 364 Md. 192, 205, 772 A.2d 273, 280 (2001) ("[J]ustice must satisfy the *appearance* of justice." (emphasis added) (internal quotation marks omitted) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954))); *see also supra* note 208 and accompanying text (discussing how due process concerns justify a more liberal approach to review of unobjected to instructional errors).

232. *See Diggs*, 409 Md. at 289–92, 973 A.2d at 813–14 (analyzing how a judge's repeated challenges to a witness's statement could suggest his disbelief in the witness's testimony and deprive a defendant of his right to a fair trial); *see also* Vandegrift v. State, 237 Md. 305, 311, 206 A.2d 250, 254 (1965) (discussing the limits of a judge's discretion in questioning).

233. *Diggs*, 409 Md. at 291–92, 973 A.2d at 814.

234. *Id.* at 293, 973 A.2d at 815; *see also Jackson*, 364 Md. at 206–07, 772 A.2d at 281–82 (evaluating how the court must prevent the "*probability* of unfairness" in keeping up the public perception of the criminal justice system's ability to render justice (internal quotation marks omitted) (quoting Crawford v. State, 285 Md. 431, 451–52, 404 A.2d 244, 254 (1979))); *cf.* Redish & Marshall, *supra* note 214, at 475–81 (arguing that the "appearance of justice," represented by an "independent adjudicator," is at the "core" of due process). Ramsey also asserted that the judge demeaned his counsel's status as a lawyer by stating, "Just a minute. I did not finish, *young lady.* You are going to be out of here in a minute. Don't interrupt me." *Diggs*, 409 Md. at 280, 973 A.2d at 807 (emphasis added). The court, however, did not explicitly rule on the effect of this comment. *See id.*

235. *Compare Diggs*, 409 Md. at 283 n.7, 973 A.2d at 809 n.7 (noting that under Maryland Rule 4-325, a judge can "'instruct the jury as to the applicable law and the extent to which the instructions are binding,'" and generally the court is only concerned with whether "additional language is a correct statement of the law" (citation omitted)), *with* Bryant v. State, 207 Md. 565, 584–85, 115 A.2d 502, 510–11 (1955) (noting that the judge should be impartial, but that judgment will not be reversed unless there is a clear showing that the judge influenced the jury against the defendant).

236. *Diggs*, 409 Md. at 294, 973 A.2d at 815–16.

will implicate a constellation of practical and policy concerns.[237] Under the Maryland Code of Judicial Conduct, judges must observe "high standards of conduct,"[238] but absent a clear showing[239] that he "departed from a neutral judicial role," his discretion cannot be questioned.[240] Making this "clear showing," however, invites a tedious, problematic case-by-case inquiry into the record—more so than review of more objective jury instructions.[241]

Appellate review of a judge's conduct will require, for instance, the reviewing court to distinguish between the minutiae—from proper clarification to improper influencing[242]—to determine where the judge appropriately clarified as opposed to where he influenced the jury.[243] Not only is it hard, if not impossible, to quantify the judge's effect from a "bare transcript" void of emotions, voice inflections, and "non-verbal cues,"[244] but the reviewing court has the benefit of hindsight in the analysis and cannot appreciate courtroom tensions.[245] Setting this precedent based on two egregious cases undermines the fairness and requirements of procedural rules[246] and

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237. *Cf.* Hessler, *supra* note 207, at 377 (suggesting that appellate courts will have to use their own "subjective evaluation" to determine on a case-by-case basis what constitutes plain error).

238. MD. R. 16-813 CJC Canon 1.

239. *See supra* Part II.B.1.a (investigating the "clear showing" standard in Maryland case law); *see also* Apple v. State, 190 Md. 661, 670, 59 A.2d 509, 513 (1948) (explaining that a "judge should at all times be impartial and courteous and should not permit his personal feelings . . . to be exhibited before a jury, but unless there is some clear showing . . . that his words or his actions influenced the jury adversely to the appellant" reversal is not justified).

240. Archer v. State, 383 Md. 329, 347, 859 A.2d 210, 221 (2004).

241. *See* Brief of Appellee at 8–9, *Ramsey*, 409 Md. 260, 973 A.2d 796 (No. 147) ("Without a specific and detailed record of objections to the judge's questions, it is difficult, if not impossible, to measure the effect that the questions may have had on the jury from the bare transcript . . . .").

242. *See id.* at 8–10 (noting that "it is difficult, if not impossible, to measure the effect that the questions may have had on the jury from the bare transcript").

243. *Compare Apple*, 190 Md. at 670, 59 A.2d at 513 (holding that although the trial was brusquely conducted by the judge, his actions did not clearly influence the jury adversely to the defendant), *with* Marshall v. State, 291 Md. 205, 213–14, 434 A.2d 555, 560 (1981) (holding that while the judge can interrogate witnesses to clarify for the jury, it is better to leave this task to counsel, and finding that admonitions to the witness infringed on the defendant's right to a fair trial).

244. Brief of Appellee, *supra* note 241, at 8–9.

245. *See* Dimery v. State, 274 Md. 661, 678–79, 338 A.2d 56, 64–65 (1975) (suggesting that it is easier for an appellate court "to think and to pick out errors").

246. *See* Conyers v. State, 354 Md. 132, 150, 729 A.2d 910, 919 (1999) ("The rules for preservation of issues have a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court, and these rules must be followed in all cases . . . .").

will open appellate review to cases where the result is not so clear.[247] Exercising plain error review over a judge's discretionary conduct will have the further effects of eroding public confidence in the judge's role and of promoting distrust of lower court decisions.[248] It may also have a chilling effect that will temper a judge's ability to clarify matters appropriately for the jury and prevent him from fully exercising his authority.[249]

c. The Court Could Have Redeemed Its Analysis but Failed to Consider Trial Tactics in Its Results-Driven, Policy-Based Decision

The court failed to redeem its analysis when it departed from precedent[250] and declined to distinguish the failure to object from trial tactics.[251] Even though this was an exceptional case, guiding the analysis would have better avoided a future influx of appeals based on

247. *See* Green v. State, 409 Md. 302, 302, 973 A.2d 820, 820 (2009) (vacating and remanding for reconsideration in light of *Diggs*); *see also supra* note 24 and accompanying text. Because the same trial judge decided *Green*, however, which will likely affect the outcome of that case on remand, Maryland will have to wait for another judge's conduct to come up for appeal in order to see how the appellate courts will treat *Diggs*. *See generally* Steve Lash, *Double-Murder Conviction At Risk*, DAILY REC., June 15, 2009 (noting that Green, a convicted double-murderer, will have a chance to have his convictions overturned).

248. A relaxed application of plain error review of judicial conduct risks undermining the trial court's legitimacy and decisionmaking. *See* Marla N. Greenstein, *Maintaining Public Confidence in the Integrity and Impartiality of the Courts*, JUDGES' JOURNAL, Spring 2009, at 40, 40 (discussing the argument that the "'appearance of impropriety'" may lead to the public's decreased acceptance of court rulings). Reviewing judicial conduct repeatedly on appeal might weaken a judge's authority to oversee a fair trial and decrease confidence in the judicial role. *See* Joseph v. State, No. 1477, 2010 Md. App. LEXIS 16, at *17–21 (Md. Ct. Spec. App. Feb. 1, 2010) (holding that "[i]n the event of a retrial in this case, those principles [regarding judicial conduct post-*Diggs*] should be applied to assure appellant a fair trial, presided over by a judge who is, and who appears to be, impartial"); *see also* MD. R. 16-813 CJC Canon 1 cmt. (elaborating that deference to the rulings of courts "depends upon public confidence in the integrity and independence of judges" who must act "without fear or favor").

249. *See* Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 536 (2008) (arguing that strict enforcement of judicial conduct interferes with the judge's ability to administer proceedings as it eliminates his or her ability to draw on natural instincts and emotions).

250. *See, e.g.*, Rubin v. State, 325 Md. 552, 588, 602 A.2d 677, 694 (1992) (holding that part of the plain error analysis includes "'giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention'" (quoting State v. Hutchinson, 287 Md. 198, 202–03, 411 A.2d 1035, 1038 (1980))).

251. Ironically, the court included the trial tactics exception when crafting the new plain error exception, Diggs v. State, 409 Md. 260, 286–87, 973 A.2d 796, 811 (2009), but failed to delve into any substantive analysis as the dissent did, *id.* at 297–98, 973 A.2d at 817 (Murphy, J., dissenting).

judicial conduct.[252] The court had the opportunity to explain why this was not a matter of tactical maneuvers, provoked by Judge Murphy's dissent, but failed to accept the opportunity.[253] The court only summarily noted that "prosecutors are responsible for developing their cases, and . . . defense counsel must object in order to seek correction by the judge and preserve the issue for appeal."[254] Addressing this important piece of precedent, even if the court implicitly ruled trial tactics out of the analysis, would have given the court some sort of guideline for the future and strengthened the analysis.[255]

Moreover, warning counsel that trial tactics will not be countenanced would have encouraged lawyers to act appropriately.[256] The supplementary cautioning would have encouraged counsel to uphold professional standards[257] and avoided abuse of the plain error exception.[258] It also would have prevented counsel from believing that he might be able to double-benefit by playing to the jury's emotions and not objecting, knowing that the failure to do so will not be fatal.[259]

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252. *See, e.g.*, Appellant's Brief at 18, Stuckey v. State, No. 1202 (Md. Ct. Spec. App. June 29, 2009) (arguing, under *Diggs*, that "reversal is required" because counsel's failure to repeatedly object "can be explained as an understandable reluctance" to increase courtroom tensions).

253. *See Diggs*, 409 Md. at 297–98, 973 A.2d at 817 (arguing that Diggs's counsel failed to object as a matter of trial tactics).

254. *Id.* at 294, 973 A.2d at 816 (majority opinion).

255. *See* Dimery v. State, 274 Md. 661, 677–79, 338 A.2d 56, 64–65 (1975) (holding that there was no plain error where counsel did not request jury instructions as to the jury's right to limit the period of incarceration because "[i]t might well have been a matter of trial tactics").

256. *Compare* MURPHY, *supra* note 202, § 111 (writing that counsel must object to the judge's conduct), *with* Johnson v. State, 352 Md. 374, 388–89, 722 A.2d 873, 880 (1999) (noting that judges get angry and irritated, but possess the power to punish, and thus have a duty to control themselves despite counsel's behavior).

257. *See generally* Hessler, *supra* note 207, at 382 (suggesting that the court's holding in *Hutchinson*, which similarly relaxed the plain error doctrine, would "foster less competent practice in the legal profession").

258. *See id.* at 381 (suggesting that expansion of the rule might lead to exceptions "swallow[ing] the rule" and "beginning . . . a trend toward plain error review of progressively less harmful mistakes than those deemed reviewable in the past").

259. *See* State v. Hutchinson, 287 Md. 198, 218, 411 A.2d 1035, 1046 (1980) (Smith, J., dissenting) ("[A]n attorney might very well sit quietly by when an obvious error of this kind arises saying to himself that if the jury in its wisdom does not acquit his client, then he has in the record a ground for appellate reversal."); *see also Dimery*, 274 Md. at 679, 338 A.2d at 65 (holding that plain error does not include counsel's mistakes). Some think that the substantial rights portion of the plain error analysis has led to an ad hoc, case-by-case inquiry. *See generally* Jeffrey L. Lowry, Note, *Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1083 (1994) (discussing the ad hoc application of the federal plain error counterpart). Others argue, however, that the court's discretionary use of plain error review may prove to be its best defense against counsel's use of "trial tactics" because he will think twice, uncertain about whether the appellate court will review the unpreserved error. *See* Hessler, *supra*

B. Alternatives Existed to Reach Judicial Integrity with Less Problematic Consequences

The Court of Appeals likely avoided separating *Diggs* and *Ramsey* because the same judge decided both cases and exhibited a pattern of egregious conduct.[260] This decision, however, required the court to expand plain error review to justify overturning the convictions in both cases. Perhaps the court could have reversed the judgment in *Diggs*, based on the properly preserved exchange between the judge and Diggs's lead witness,[261] and found partiality without considering the judge's interchange with the other witnesses that were not properly preserved.[262] With regard to *Ramsey*, the court could have reversed solely on the properly preserved issue of the judge's remarks to the jury[263] without expanding the analysis to a host of other issues under plain error review.[264] Even if the court did not find that the alleged error of judicial remarks in *Ramsey* was as convincing as the continuous questioning beyond clarification in *Diggs*, the court could have separated the cases instead of consolidating them and expanding the use of plain error review.[265] In the interest of keeping the cases consolidated, addressing the entirety of the judge's repeated and egregious behavior, and sending a disciplinary message, the court had to use a broader analysis of the entire record and subsequently left imprecise guidelines in the process. Instead of the course it took, the court could have better addressed the same concerns under its supervisory authority, without the use of plain error review to reverse both

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note 207, at 383 (suggesting that the use of plain error as a defense strategy should not be overemphasized precisely because the uncertainty of its application makes it unreliable).

260. The court consolidated the cases instead of separating and making distinctions between them. *See* Diggs v. State, 409 Md. 260, 294–95, 973 A.2d 796, 816 (2009) (deciding both cases together).

261. *See supra* note 14 and accompanying text.

262. The court could have done this simply by deciding the two cases separately instead of together. *See generally Diggs*, 409 Md. at 293, 973 A.2d at 815 (finding that the judge's conduct precluded Diggs from having a fair trial and *then* separately examining the judge's conduct in Ramsey's case).

263. *See id.* at 285, 973 A.2d at 810 (noting that "the defense objected after the judge remarked to the jury that 'most lawyers, good lawyers, talk to their witnesses,'" and while the judge did not rule on the objection he instead commented to the jury about the appropriateness of the prosecutor's conduct).

264. *See supra* notes 12–23 and accompanying text (exploring the judge's conduct in both *Diggs* and *Ramsey*).

265. *See generally* Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be—Part I Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 723 (1995) (discussing the drawbacks of consolidation, including "lessen[ing the] courts' ability to modify litigants' decisions defining the boundaries of lawsuits, to create the most efficient litigation units, and to manage litigation most productively and fairly").

convictions,[266] or ruled on the properly preserved issues, separately in *Diggs* and *Ramsey*, and sought assistance from the Commission on Judicial Disabilities to discipline the judge.[267]

1. *The Court Could Have Relied on Its Supervisory Authority to Avoid Creating a "Repeated and Egregious Behavior" Exception to Plain Error Review*

The court could have exercised its "inherent supervisory authority over the administration of justice"[268] to examine and rule on the judge's impartiality, guided by the Code of Judicial Conduct.[269] Even though technically counsel's failure to object might not prove fatal in this scenario either, the court's concern for the *particular* circumstances of these cases—both decided by the same judge—would have justified exercising this exceptional review over both cases.[270] Doing so would have sent a stronger message that *ordinarily* an appellate court will not exercise its supervisory authority to review an erroneous judge where errors have not been preserved and will only exercise such authority in truly exceptional cases.[271]

Precedent existed under *Archer v. State*,[272] in which the court held that "as a matter of Maryland nonconstitutional criminal procedure, the trial judge's improper use of judicial authority" compelled reversal and remand for a new trial.[273] The *Diggs* court relied on this holding,[274] but ultimately decided the case based on the defendants' due process rights.[275] If the court would have taken this alternative approach and exercised its "inherent supervisory authority,"[276] the ex-

266. *See infra* Part IV.B.1.

267. *See infra* Part IV.B.2.

268. Archer v. State, 383 Md. 329, 360, 859 A.2d 210, 229 (2004).

269. *See, e.g.*, MD. R. 16-813 CJC Canons 2–3 (describing the standards of judicial conduct for avoiding impropriety and the appearance of impropriety and for performance of judicial duties).

270. *See generally Archer*, 383 Md. at 360, 859 A.2d at 229 (asserting the court's "inherent supervisory authority over the administration of justice in Maryland courts"); Weinschel v. Strople, 56 Md. App. 252, 259, 466 A.2d 1301, 1304 (1983) (noting that the Court of Appeals has the ability to exercise supervisory authority).

271. This type of review is so rare, in fact, that the Court of Appeals claimed that it exercised its supervisory authority for the first time in *Archer*, decided in 2004. State v. Manck, 385 Md. 581, 606 n.3, 870 A.2d 196, 211 n.3 (2005).

272. 383 Md. 329, 859 A.2d 210.

273. *Id.* at 360, 859 A.2d at 229.

274. Diggs v. State, 409 Md. 260, 287, 973 A.2d 796, 811 (2009).

275. *See id.* at 263 & n.2, 973 A.2d at 798 & n.2 (noting that Ramsey's second question for appeal—whether his Sixth Amendment right was violated—did not need to be decided "because of the . . . disposition of his first question," which was the violation of his rights under the Fifth and Fourteenth Amendments).

276. *Archer*, 383 Md. at 360, 859 A.2d at 229.

pansion of plain error analysis arguably could have been avoided.[277] The court could have reversed solely because the judge's conduct was inappropriate without examining counsel's failure to object.[278] The slight alteration of the framework spearheading the analysis would have allowed the court to avoid specifically addressing the failure to object and instead to focus on the key issue of judicial conduct.

The shifted framework would have avoided two problematic issues. First, conceptualizing the problem as one of supervisory authority over the "administration of justice" would have placed the emphasis on the appropriate scope of judicial discretion under the Code of Judicial Conduct to restore judicial integrity.[279] Under the plain error analysis, however, the court had to first explore counsel's failure to object[280] and then examine whether the judge's behavior was so egregious as to justify review under this plain error standard.[281] The alternate approach would have avoided justifying counsel's failure to object, and instead highlighted the appellate court's ability to ensure "justice" in every case.[282] Being forthright about the extreme and continual behavior in these cases under an inherent, truly exceptional type of appellate review, would have more strongly reminded judges of their duty to maintain impartiality and high standards of conduct. The candid focus would have been appropriately centered on the *judge*, rather than on both the judge and counsel, to justify counsel's failure to object and invoke plain error review.[283] If the court acknowledged that it did not want to separate the cases because

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277. *See* Appellant's Reply Brief, *supra* note 177, at 18 (arguing that the court could have instead utilized its supervisory authority in reviewing the judge's conduct). The rarity of the invocation of its supervisory authority would have supported the conclusion that the court will seldom overturn a case for reasons of judicial conduct. Other states, particularly Connecticut, note that an appellate court's supervisory authority is to be exercised rarely. *See* Smith v. Andrews, 959 A.2d 597, 610 (Conn. 2008) (noting that the court's supervisory authority is only very rarely invoked); Sapper v. Sapper, 951 A.2d 5, 7–8 (Conn. App. Ct. 2008) (invoking appellate review under the court's "inherent supervisory authority" to review claims of prejudicial judicial conduct where plain error review was not properly requested).

278. *See Diggs*, 409 Md. at 293–95, 973 A.2d at 815–16 (addressing counsels' failures to object to the judge's conduct).

279. *See generally* MD. R. 16-813 pmbl. (noting that judges must "honor and respect the judicial office as a public trust and strive to enhance and maintain public confidence in our legal system").

280. *Diggs*, 409 Md. at 284–85, 973 A.2d at 809–10.

281. *Id.* at 287, 973 A.2d at 811.

282. *See* Archer v. State, 383 Md. 329, 360, 859 A.2d 210, 229 (2004) (noting the court's ability to reverse the trial court's judgment as a matter of Maryland nonconstitutional criminal procedure).

283. *See* Jefferson-El v. State, 330 Md. 99, 106–07, 622 A.2d 737, 741 (1993) (relying on the Code of Judicial Conduct to find that the judge appeared to be partial). Here, the

the same judge heard both, it could have used this alternate approach to reach the same conclusion and better protect judicial integrity.[284] Moreover, practitioners would no longer have precedent to justify their failures to object while seeking appellate review in every case, only rare, exceptional cases.[285]

Second, invoking the court's supervisory power under *Archer* would have avoided utilizing the relaxed plain error doctrine in contexts other than judicial conduct, such as review of evidentiary issues.[286] Approving of the exception in the discretionary arena of judicial conduct—and perhaps other areas in the future—could undermine a system of procedure meant to protect fairness to all parties and could infringe on the authority of lower courts.[287] The court should have better defended the preservation rule and highlighted its important function in the administration of justice.[288] Using its supervisory power would have allowed the court to address the judge's conduct and the defendants' due process rights, while avoiding the expansion of plain error review and fortifying easily administrable, procedural fairness rules.[289]

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court could have similarly ruled under the Code of Judicial Conduct to tie its inquiry to rules and reinforce the importance of the judge's conduct.

284. Because exercising its supervisory authority is a rarity, this course would have highlighted the egregiousness of the judge's continual behavior in these particular cases and signaled to counsel, in a more substantial way, that future cases will not be granted certiorari when counsel fails to object. *See* State v. Manck, 385 Md. 581, 606 n.3, 870 A.2d 196, 211 n.3 (2005) (noting that *Archer* was the first time the court had exercised an inherent supervisory power).

285. *See Diggs*, 409 Md. at 294, 973 A.2d at 816 (attempting to narrow the plain error analysis by stating that "[f]ailure to object in less persuasive situations may not have the same result, nor will we necessarily intervene").

286. *See* Conyers v. State, 354 Md. 132, 150–51, 729 A.2d 910, 919–20 (1999) (discussing the court's treatment of alleged unpreserved evidence errors under Maryland Rule 4-323(a), which does not include a "plain error" exception as Maryland Rule 4-325(e) provides for jury instructions); *see also supra* notes 38, 73 (giving fuller explanations and case citations that expand upon this distinction).

287. *See* Matthew G. Jeweler, Note, Butler v. State*: Upholding the Right to a Fair Trial at All Costs*, 66 MD. L. REV. 1098, 1119–20 (2007) (suggesting that granting the trial judge deference improves judicial efficiency and restores confidence "that [the trial judge's] decisions will not always be second-guessed").

288. *See* Carter, *supra* note 28, at 950 (suggesting that the preservation rule gives the trial court primacy over a case, affords an appellate court a full record, encourages the proper behavior of attorneys, and recognizes the unfairness to the winning party at trial).

289. *Cf.* John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 NEB. L. REV. 159, 161 (2001) (arguing that requiring counsel to object "as soon as an impending violation of the rule is reasonably to be anticipated" is a procedural avenue through which the adversarial system places the burden on the parties to depict the facts accurately and promotes a fair process); Richard E. Langlois, Preservation of Error 1 (Apr. 29–May 1, 2009) (unpublished paper, prepared for Conference for Criminal Appeals sponsored by University of Texas School of Law), *available at*

2. *The Court Could Have Increased Judicial Integrity by Leaving the Matter of Judicial Discipline up to the Commission on Judicial Disabilities Instead of Creating Vague Precedent*

Instead of creating questionable precedent by combining the cases to discipline the judge, the court could have utilized the Commission on Judicial Disabilities to restore public confidence.[290] The court could have ruled separately on the properly preserved errors in *Diggs* and *Ramsey*, and then left the Commission with the task of disciplining the judge.[291] The Commission then could have issued a private reprimand[292] or entered into a deferred discipline agreement with the judge without proceedings,[293] filed charges,[294] disciplined him by consent before rendering a decision,[295] or issued a public reprimand or referred the matter to the Court of Appeals upon clear and convincing evidence that the judge had committed sanctionable conduct.[296]

The judge's egregious conduct here seemingly violated provisions of the Code of Judicial Conduct when the court found that his conduct showed his partiality and "created [an] aura of partiality in front of the jury."[297] His badgering of defense witnesses beyond mere clarification in *Diggs* and his establishing key aspects of the State's case in *Ramsey*, among other alleged errors, manifested bias appropriate for

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http://www.utcle.org/eLibrary/preview.php?asset_file_id=20627 (suggesting that the preservation requirement ensures that attorneys are knowledgeable about trial rules).

290. See Note, *Discipline of Judges in Maryland*, 34 MD. L. REV. 612, 615–19 (1974), for a helpful background discussion on the Commission on Judicial Disabilities.

291. *See* MD. R. 16-805 (defining the Commission's ability to investigate complaints).

292. MD. R. 16-807(b).

293. MD. R. 16-807(c). If the Commission concludes that the "conduct was not so serious, offensive, or repeated as to warrant formal proceedings," but that the judge should "undergo specific treatment, participate in one or more specified educational programs, issue an apology . . . or take other specific corrective or remedial action" and the judge agrees while also meeting a few other specifications, he may enter a deferred discipline agreement. *Id.*

294. MD. R. 16-808(a).

295. MD. R. 16-808(*l*). After charges are filed, but before the Commission's decision, the following may occur:

> [T]he judge and Investigative Counsel may enter into an agreement in which the judge (1) admits to all or part of the charges; (2) as to the charges admitted, admits the truth of all facts constituting sanctionable conduct as set forth in the agreement; (3) agrees to take any corrective or remedial action provided for in the agreement; (4) consents to the stated sanction; (5) states that the consent is freely and voluntarily given; and (6) waives the right to further proceedings before the Commission and subsequent proceedings before the Court of Appeals.

Id.

296. MD. R. 16-808(j).

297. Diggs v. State, 409 Md. 260, 293, 973 A.2d 796, 815 (2009).

review by the Commission as well as disciplinary action.[298] Although the judge in *Diggs* did not use vulgar profanity like sanctioned judges in the past, he appears to have violated obligatory provisions of the Code of Judicial Conduct,[299] making his actions sanctionable by the Commission or the Court of Appeals.[300] The court, thereby, would have avoided expanding plain error analysis as a vehicle through which it could discipline a seemingly errant judge,[301] while properly

298. *See supra* text accompanying notes 156–60 (discussing the judge's behavior in *Diggs* and *Ramsey*); *see also In re* Lamdin, 404 Md. 631, 652, 948 A.2d 54, 66 (2008) (noting that that judge's improper behavior "undermined the judicial system repeatedly"); *In re* Foster, 271 Md. 449, 478, 318 A.2d 523, 538 (1974) (accepting the Commission on Judicial Disabilities's recommendation that Judge Foster be censured for violating judicial conduct rules). *See generally* MD. R. 16-813 CJC Canon 3A cmt. (providing that "[f]acial expression and body language, in addition to oral communication, can give an appearance of judicial bias").

299. While the Court of Appeals did not evaluate the judge's conduct in light of the Code of Judicial Conduct, his behavior appears to have violated the obligatory provisions. *See Diggs*, 409 Md. at 293, 973 A.2d at 815 (noting the judge's conduct "crossed the line of propriety" and "created [an] aura of partiality in front of the jury"). Not only was the judge's behavior at issue in these two cases, but the behavior was repeated on many occasions. *See, e.g.*, Green v. State, 409 Md. 302, 302, 973 A.2d 820, 820 (2009) (vacating and remanding another case of the judge in *Diggs*). Recent appeals have been raised over the same judge's conduct in other cases. *See* Appellant's Brief at 7–18, Joseph v. State, No. 1477 (Md. Ct. Spec. App. Sept. 30, 2009) (claiming that defendant was not given a fair trial because the judge interjected and assisted the prosecution through interjecting inappropriate questions and comments); Appellant's Brief at 24–31, Sims v. State, No. 1509 (Md. Ct. Spec. App. Sept. 30, 2009) (claiming that the defendant is entitled to a new trial because the judge acted as a co-prosecutor); Brief of Appellant at 16–28, Haggerty v. State, No. 1009 (Md. Ct. Spec. App. July 1, 2009) (alleging that the judge acted as an inquisitor and second prosecutor).

300. *Compare Diggs*, 409 Md. at 293, 973 A.2d at 815 (noting that in *Diggs*, the judge's behavior and comments "bolstered the State's case while implying a disbelief in the defense and created the aura of partiality in front of the jury," and in *Ramsey*, the judge "bolster[ed] the integrity of the prosecutor," "elicited key elements of the State's case," and "established key aspects of [the State's witness's] testimony"), *with In re Lamdin*, 404 Md. at 652, 948 A.2d at 66 (sanctioning the judge for violating the Code of Judicial Conduct because his comments "undermined the judicial system repeatedly").

301. Of course, the problem with judicial commissions may be a lack of transparency. *See* Green & Roiphe, *supra* note 249, at 550 n.263 (noting that judicial commissions are usually not public, which may undermine their ability to dispense justice). While the Commission's investigation might prevent future prejudicial or inappropriate behavior, its drawback is that, despite posting opinions on an Internet website, the public receives no actual notice of the proceedings, which places doubt on the assumption that public confidence in the judiciary is actually reinforced. *See id.* (suggesting that the lack of transparency in the process undermines the hope that commissions will instill a sense of confidence in the judiciary). In this sense, the disconnect between the actions of judicial commissions and public awareness of their procedures might undermine the "appearance of justice," *see supra* note 214 (probing scholars' work that suggests the appearance of justice might be the core of due process), but reach *actual* justice by sanctioning a judge for his prejudicial behavior.

addressing the defendants' due process rights and upholding the procedural rules.[302]

V. CONCLUSION

In *Diggs v. State*, the Maryland Court of Appeals, using a plain error analysis when counsel failed to object to much of the judge's behavior, reversed two drug convictions because the error complained of was so material to the rights of the accused as to preclude a fair trial.[303] Instead of creating a "repeated and egregious behavior" exception to the preservation rule,[304] the court could have set more narrow precedent under the older "correctability" standard,[305] which would not have expanded the use of plain error review to a new context and left vague guidelines for the future.[306] The court could have used better alternatives to address the underlying integrity concerns, rather than creating problematic precedent.[307]

Some state judicial commissions have rules that require records and proceedings to be kept confidential, at least for a certain period of time. Jeffrey M. Sharman, Senior Fellow American Judicature Society, Judicial Ethics: Independence, Impartiality, and Integrity 11 (May 19–22, 1996) (unpublished paper, prepared for Inter-American Development Bank Judicial Reform Roundtable II). This procedure protects unwarranted complaints against judges, but the confidentiality thwarts transparency efforts. *Id.*; *see also* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 119 (2009) ("[T]he key factor [for success] is effective calibration between judicial independence and external accountability."). States that limit confidentiality protections and allow public access to records and proceedings once an initial investigation has been undertaken strike the best balance. Sharman, *supra*, at 11; *cf.* Kathy Mack & Sharyn Roach Anleu, *The Security of Tenure of Australian Magistrates*, 30 MELB. U. L. REV. 370, 396–97 (2006) (arguing, specifically in the context of Australian judicial commissions, that the "transparency and procedural fairness" of the Judicial Commission in Australia "provides significant protection for the constitutional values of public confidence and institutional integrity").

302. *Cf.* Hon. Glenn T. Harrell, Jr., *The Maryland Commission on Judicial Disabilities: Whither Thou Goest?*, U. BALT. L.F., Spring 1996, at 3, 10 (noting that one of the Commission's main purposes "is to maintain the public's confidence in the judiciary" (citing Frank Greenberg, *The Task of Judging the Judges*, 59 JUDICATURE 458, 462 (1976))). The Circuit Administrative Judge or Chief Judge of the Court of Appeals could also have exercised supervisory authority. MD. R. 16-101. *See generally* 7 M.L.E. *Courts* § 3 (2000) (providing that the Chief Judge of the Court of Appeals has administrative responsibility over all of the courts of the State and can appoint a Circuit Administrative Judge to supervise fellow judges and implement policies of the Court of Appeals).

303. *Diggs*, 409 Md. at 293–95, 973 A.2d at 815–16.

304. *Id.*

305. *See supra* Part IV.A.1.

306. *See supra* Part IV.A.2.

307. *See supra* Part IV.B.1–2.